

# CAPSTONE JOURNAL

## OF LAW AND PUBLIC POLICY

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VOLUME III

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NUMBER 2

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Correctional Education & Mass Incarceration

*Mackenzi Barrett*

Minnesota Voter ID Law Alternatives

*Paige Anderson*

'The Left Behind': An Incomplete Story of British Euroscepticism

*Noah Avery Greene*

Norway's Influence & Bottom-Up Europeanization in  
Several Key Policy Areas

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R.G & G.R Harris Funeral Homes Inc. v. Equal Employment  
Opportunity Commission and Aimee Stephens

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Sanctuary Cities: A Constitutional Limitation  
on Federal Power

*Leah Humble*

Dark Provenance: Restitution for Nazi Looted Art

*Tanner D'Ortenzio*



The Legal Research Club is proud to present the

# **CAPSTONE JOURNAL OF LAW AND PUBLIC POLICY**

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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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## ACKNOWLEDGEMENTS

What an incredible year it has been for the Legal Research Club. Together, we achieved a growth in membership and operations, received the Capstone Innovation Award, and now, the successful publication of another edition of the Capstone Journal of Law and Public Policy. These achievements were only made possible as a result of the efforts of the students, faculty, and professional community that have invested their time in our mission. To all of you, we owe our thanks.

The LRC thrives in a dynamic pre-law environment. We thank Hannah Berman, Director of Pre-Law at The University of Alabama, for your continued commitment to this community. And to the other faculty members that gave their time to speak on our panels and at events, thank you.

To the pre-law advisors throughout the Southeast that have encouraged their students to submit their work, we owe our thanks. It is through this collaboration that the CJLPP has emerged as the premier undergraduate law review in the region. We are humbled to receive such incredible submissions from your students, and excitedly welcome this continued collaboration.

We owe our sincerest gratitude to Dr. Lawrence Cappello, LRC advisor. The energy and tenacity you have imbued into this organization will leave a lasting legacy. With your support, there is no limit to the success of this organization and its members.

This publication comes as the result of the steadfast dedication and brilliance of the contributors and editorial staff. Words cannot express how inspiring your commitment to the LRC's mission has been. That your efforts continued, unabridged, despite the trying circumstances that the pandemic caused, is remarkable. This work is a testament to the character and determination of the students that comport this organization. For that, we thank you.

I feel incredibly honored to have worked with such a capable and talented executive team. There is no doubt in my mind that the Legal Research Club will continue to flourish with each group of students that both shape, and are shaped by this organization. We hope you enjoy this publication.

Best Wishes,

Claire Faivre  
President, Legal Research Club  
2019-20

## LETTER FROM THE EDITOR

Dear Reader,

It is with much pep and vigor that I present to you the second issue of the third volume of the Capstone Journal of Law and Public Policy.

When I look back to where we started with this Journal, six semesters ago, I could not be prouder of our continued progress towards legal excellence and rigorous scholarship. We have transformed from a small and dedicated group of budding legal scholars, into a rapidly growing amalgamation of students across campus. No longer are we restricted to the traditional legal disciplines. As students across our campus and the southeast are beginning to recognize the intersection of their respective disciplines and passions with the law, we have seen an even broader range of topics and disciplines represented in our submission pool and editorial staff alike.

I believe that this increased interest in policy and law is due in part to the various seminars and panels put on by the executive board of our Legal Research Club. For that I thank you all, and in particular the singular Claire Faivre, without whom this Journal would not exist. Kudos, Madam President.

While on the topic of thanks, the warmest regards go out to my right hand, Katie Kroft. I cannot wait to see how much further you take this publication in your tenure as Editor in Chief next semester. And to the rest of my editing staff—you showed up for my last-minute Zoom meetings, fresh-faced and ready to work remotely. Your dedication did not go unnoticed or unappreciated, and I thank you for working through these difficult times.

And last but not least, to the Reader. As you metaphorically crack the spine of this online edition, I hope you find yourself mentally challenged, intellectually questioned, and forced to confront assumptions you had about this little planet we call home. After all, what good is reading if you do not at least learn something. May you all always remember the power of words, and true words at that. For in this time of uncertainty and political unrest, I believe the meticulously researched written word will help us set a course for more peaceful times. May you too be a part of that journey.

Cheers to you all,

Henry Pitts  
Editor in Chief, Capstone Journal  
Spring 2020

## **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.

Follow us on Instagram and Twitter @**LRCatUA** and send an email to **LRCatUA@gmail.com** to subscribe to The Note, our weekly newsletter, to stay up to date.



# CORRECTIONAL EDUCATION & MASS INCARCERATION

*Mackenzi Barrett*

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## INTRODUCTION

In 1968, the population of the United States was approximately 200 million; fifty years later, the population grew to approximately 327 million, a growth of nearly 64%.<sup>1</sup> The United States' prison population, however, experienced the same amount of growth — nearly 64% — in just ten years, from 1970 to 1980.<sup>2</sup> Over fifty years, the

<sup>1</sup> Population in the U.S. from the U.S. Census Bureau, GOOGLE, [https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude\\_&ctype=l&strail=false&bcs=d&nselm=h&met\\_y=population&scale\\_y=lin&ind\\_y=false&rdim=country&idim=country:US&ifdim=country&hl=en&dl=en&ind=false](https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&ctype=l&strail=false&bcs=d&nselm=h&met_y=population&scale_y=lin&ind_y=false&rdim=country&idim=country:US&ifdim=country&hl=en&dl=en&ind=false) (last visited Jan. 8, 2020).

<sup>2</sup> Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-1986 (1988), <https://www.ncjrs.gov/pdffiles1/digitization/111098ncjrs.pdf>.

prison population increased by 800%, far more than can be accounted for by mere population growth alone.<sup>3</sup> The United States has the highest incarceration rate<sup>4</sup> in the world at around 700.<sup>5</sup> Furthermore, despite housing less than 5% of the world's population, the United States holds nearly 25% of the world's prison population.<sup>6</sup>

The term mass incarceration most aptly describes this phenomenon, but a simple explanation cannot capture the cause of this phenomenon. Instead, mass incarceration is the consequence of the intersection of a variety of different factors that resulted from a shift to a more punitive focus of criminal justice across the country, characterized by policy changes such as mandatory sentence lengths.<sup>7</sup> The effects of mass incarceration served to further exacerbate pre-existing societal issues, such as income inequality, racism,

<sup>3</sup> JACOB KANG-BROWN, ET AL., *People in Prison in 2018* (2019), <https://www.vera.org/downloads/publications/people-in-prison-in-2018-updated.pdf>.

<sup>4</sup> The number of persons under the jurisdiction of local jails and state and federal correctional authorities per 100,000 residents." Key Statistics: Incarceration Rate, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=493> (last visited Jan. 8, 2020).

<sup>5</sup> PETER WAGNER & WENDY SAWYER, *States of Incarceration: The Global Context 2018*, PRISONPOLICY.ORG, <https://www.prisonpolicy.org/global/2018.html> (last visited Jan. 8, 2020).

<sup>6</sup> MICHELLE YE HEE LEE, *Does the United States really have 5 percent of the world's population and one quarter of the world's prisoners?*, WASHINGTON POST, (April 30, 2015) <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the>

<sup>7</sup> THE GROWTH OF INCARCERATION IN THE UNITED STATES 2-4 (Jeremy Travis, et al. eds., 2014), <https://www.nap.edu/read/18613/chapter/2#3>.

addiction, poor mental health, etc.<sup>8</sup> Thus, mass incarceration creates a vicious cycle, wherein mass incarceration feeds itself by causes becoming consequences that perpetuate and worsen the phenomenon.

As complex as an issue as mass incarceration is, with widespread and diverse causes, there is no singular, simple solution. However, this Article aims to argue that a return to a rehabilitative philosophy of punishment in the United States' criminal justice system will begin the process of ending mass incarceration, with providing education to the currently imprisoned as key to a system focused on rehabilitation. Part I will provide background on correctional education in the United States. Part II will detail the state of corrections and education, both individually and the intersection of the two. Lastly, Part III will argue for an increase in and emphasis on correctional education programming in both state and federal prisons.

## I. CORRECTIONAL EDUCATION

### A. *What is Correctional Education?*

The Correctional Education Association defines correctional education as “education and/or training in any field which provides skills to assist in the rehabilitation of offenders, ex-offenders and at-risk individuals.”<sup>9</sup> Correctional education is a broad term and encompasses adult basic education, adult secondary education, vocational training, college coursework, special education,

<sup>8</sup> *Id.* at 4-7.

<sup>9</sup> CONST. art 1 (ceanational.org), <https://ceanational.org/constitution> (last visited Jan. 8, 2020).

etc.<sup>10</sup> The Office of Correctional Education within the U.S. Department of Education recognizes correctional education as “an opportunity for the incarcerated to prepare for success upon release.”<sup>11</sup> Furthermore, the Office acknowledges that a wide variety of organizations provide educational programming to the various types of correctional institutions in the United States, i.e., more than just governmental entities provide educational opportunities to the incarcerated.<sup>12</sup>

### *B. History/Timeline*

Even in the infancy of the United States, education for prisoners was not unheard of although it was usually religious in nature and provided by those associated with a religious organization, such as a church.<sup>13</sup> Thus, correctional education is not a new, unfamiliar, or obscure concept in the United States and is well-trenched — if not sometimes forgotten — in America’s history. In 1870, the American Prison Association — now, the American Correctional Association — issued a Declaration of Principles.<sup>14</sup> Of the thirty-seven principles, four of them make a connection between prisons and education, one of

<sup>10</sup> CORRECTIONAL EDUCATION, CSGJUSTICECENTER.ORG, <https://csgjusticecenter.org/corrections> (last visited Jan. 8, 2020).

<sup>11</sup> CORRECTIONAL EDUCATION: ADULT EDUCATION AND LITERACY, U.S. DEP’T OF EDUCATION, <https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/correctional-education.html> (last visited Jan. 8, 2020).

<sup>12</sup> *Id.*

<sup>13</sup> HISTORY, CEANATIONAL.ORG, <https://ceanational.org/history> (last visited Jan. 8, 2020).

<sup>14</sup> DECLARATION OF PRINCIPLES, ACA.ORG, [http://www.aca.org/ACA\\_Prod\\_IMIS/ACA\\_Member/About\\_Us/Declaration\\_of\\_Principles/ACA\\_Member/AboutUs/Dec.aspx?hkey=a975cbd5-9788-4705-9b39-fcb6ddc048e0](http://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/Declaration_of_Principles/ACA_Member/AboutUs/Dec.aspx?hkey=a975cbd5-9788-4705-9b39-fcb6ddc048e0) (last visited Jan. 8, 2020).

which states that “Education is, therefore, a matter of primary importance in prisons.”<sup>15</sup>

Although the then American Prison Association’s sole dedication was not to education, it was out of the APA that the Correctional Education Association emerged through the establishment of a standing committee on education at the APA Congress in Louisville in 1930.<sup>16</sup> One year later, Austin MacCormick, the Assistant Director of the Bureau of US Prisons and member of APA, published *The Education of Adult Prisoners* based on his research from 1928; this book marked the beginning of the modern era of correctional education.<sup>17</sup> Fifteen years later in 1946, MacCormick and a few other members of the APA officially established the Correctional Education Association.<sup>18</sup>

In 1990, Congress passed a law that included the establishment of the Office of Correctional Education within the Department of Education.<sup>19</sup> Congress found and declared that “education is important to, and makes a significant contribution to, the readjustment of incarcerated individuals to society.”<sup>20</sup> Congress’s stated purpose in establishing the Office was to “encourage and support

<sup>15</sup> DECLARATION OF PRINCIPLES ADOPTED AND PROMULGATED BY THE 1870 CONGRESS OF THE NATIONAL PRISON ASSOCIATION, [http://www.aca.org/aca\\_prod\\_imis/docs/Exec/1870Declaration\\_of\\_Principles.pdf](http://www.aca.org/aca_prod_imis/docs/Exec/1870Declaration_of_Principles.pdf) (last visited Jan. 8, 2020).

<sup>16</sup> CEA TIMELINE, CEANATIONAL.ORG, <https://ceanational.org/timeline> (last visited Jan. 8, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990, Pub. L. No. 101-392 (1990)

<sup>20</sup> 20 U.S.C. § 3423a (1990).

educational programs for criminal offenders in correctional institutions.”<sup>21</sup> Furthermore, Congress recognized that there was a growing need amongst state and other local education programs for the federal government to provide assistance for criminal offenders in correctional institutions, which includes prisons, jails, detention centers, etc.<sup>22</sup> With the creation of the Office of Correctional Education, the federal government recognized the benefits of providing educational opportunities to the currently incarcerated.

However, four years later, Congress reversed its position and passed the Violent Crime Control and Law Enforcement Act of 1994. Passed in the “tough on crime” era, the 1994 Crime Bill was the largest crime bill in the history of the country and had provisions including expansion of the death penalty, the three strikes policy, immigration initiatives, community schools, drug courts, battered women’s shelters, etc.<sup>23</sup> Most damning to correctional education, specifically to programs providing postsecondary opportunities to the incarcerated, was an amendment to the Higher Education Act of 1965. The amendment prohibited Pell Grant funding for those incarcerated: “No basic grant shall be awarded under this subpart to any individual who is incarcerated in any Federal

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, U.S. DEPT OF JUSTICE, <https://www.ncjrs.gov/txtfiles/billfs.txt> (last visited Jan. 8, 2020) and CRIMINAL JUSTICE FACTS, SENTENCINGPROJECT.ORG, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Jan. 8, 2020).

or State penal institution.”<sup>24</sup> Pell Grants are sources of need-based funding provided by the federal government for low-income postsecondary students.<sup>25</sup> Incarcerated persons are among the poorest populations in the United States with their annual incomes prior to incarceration being 41% less than non-incarcerated people of similar ages, thus undoubtedly qualifying many incarcerated persons as “low-income.”<sup>26</sup> The 1994 Crime Bill has been described by some as “the public law that effectively killed prison higher education in the United States and left millions of incarcerated men and women with drastically reduced educational opportunities.”<sup>27</sup> In the years after its passage, the hundreds of programs offering college courses to the incarcerated were reduced to mere dozens.<sup>28</sup>

Senator Pell, at the beginning of 1994, foreshadowed what was to come on the Senate floor: “education is our primary hope for rehabilitating prisoners...we must maintain our commitment to corrections education...[and] be concerned with their rehabilitation so that prison does

<sup>24</sup> H.R. 3355 - VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, <https://www.congress.gov/103/bills/hr3355/BILLS-103hr3355enr.pdf> (last visited Jan. 8, 2020).

<sup>25</sup> FEDERAL PELL GRANT PROGRAM, U.S. DEP’T OF EDUCATION, <https://www2.ed.gov/programs/fpg/index.html> (last visited Jan. 8, 2020)

<sup>26</sup> BERNADETTE RABUY & DANIEL KOPF, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the incarcerated*, PRISONPOLICY.ORG, <https://www.prisonpolicy.org/reports/income.html> (last visited Jan. 8, 2020).

<sup>27</sup> Mary Rachel Gould & Spearitt, *Twenty Years after the Education Apocalypse: The Ongoing Fall Out from the 1994 Omnibus Crime Bill*, 33 ST. LOUIS U. PUB. L. REV. 283 (2014).

<sup>28</sup> *Id.* at 284.

not remain a revolving door.”<sup>29</sup> Over a decade later, Congress recognized the consequences of the sharp reduction in prisoner participation in educational programs with the passage of the Second Chance Act of 2007, a bill aimed at recidivism prevention.<sup>30</sup> Accordingly, one of its stated purposes was to “provide offenders in prisons, jails or juvenile facilities with educational, literacy, vocational, and job placement services to facilitate re-entry into the community.”<sup>31</sup> The Act created a grant program focused on evaluating and improving educational methods at prisons, jails, and juvenile facilities.<sup>32</sup> Under the program, the Attorney General was allowed to make grants to various public and private entities including for the purpose of improving academic and vocational education programming available to offenders in prisons, jails, and juvenile facilities.<sup>33</sup>

In the summer of 2016, the Department of Education announced a new pilot program called the Second Chance Pell Program, which allows eligible incarcerated Americans to receive Pell Grants and pursue postsecondary education — from 67 selected colleges and universities —

<sup>29</sup> Mary Rachel Gould & Spearitt, *Twenty Years after the Education Apocalypse: The Ongoing Fall Out from the 1994 Omnibus Crime Bill*, 33 ST. LOUIS U. PUB. L. REV. 283 (2014).

<sup>30</sup> H.R. 1593, 110th Cong. - SECOND CHANCE ACT OF 2007 <https://www.congress.gov/bill/110th-congress/house-bill/1593/text> (last visited Jan. 8, 2020).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

while still incarcerated.<sup>34</sup> With the Higher Education Act of 1965 still amended to prohibit the provision of Pell Grants to the incarcerated, the program serves as an experiment to test whether or not federal aid for incarcerated persons should be permanently reinstated.<sup>35</sup> The experiment was described as an example of the Obama administration's commitment to "create a fairer and more effective criminal justice system, reduce recidivism, and combat the impact of mass incarceration on families and communities through educational opportunity."<sup>36</sup> As of 2019, the experiment is ongoing, and the Department of Education has not published results.<sup>37</sup> Despite the experiment, incarcerated persons are still officially ineligible to receive Pell Grant funding until the Higher Education Act has been amended. The Higher Education Act was last reauthorized in 2008 and was due for reauthorization in 2013, but although bills to reauthorize the HEA have been introduced, none have passed yet.<sup>38</sup> Congress does not have to reauthorize the HEA to reinstate Pell Grant funding for the incarcerated; it

<sup>34</sup> 12,000 INCARCERATED STUDENTS TO ENROLL IN POSTSECONDARY EDUCATIONAL AND TRAINING PROGRAMS THROUGH EDUCATION DEPARTMENT'S NEW SECOND CHANCE PELL PILOT PROGRAM, U.S. DEP'T OF EDUCATION, <https://www.ed.gov/news/press-releases/12000-incarcerated-students-enroll-postsecondary-educational-and-training-programs-through-education-departments-new-second-chance-pell-pilot-program> (last visited Jan. 8, 2020).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> ANSWERING YOUR FREQUENTLY ASKED QUESTIONS ABOUT SECOND CHANCE PELL, U.S. DEP'T OF EDUCATION, <https://blog.ed.gov/2019/04/answering-frequently-asked-questions-second-chance-pell/> (last visited Jan. 8, 2020).

<sup>38</sup> REAUTHORIZATION OF THE HIGHER EDUCATION ACT OF 1965, FINAID.ORG, <https://www.finaid.org/educators/reauthorization.phtml> (last visited Jan. 8, 2020).

could do so by passing any bill that amends section 401(b) of the HEA, such as the Restoring Education and Learning Act of 2019.<sup>39</sup> But while the REAL Act has been introduced in both the House and Senate, neither chamber has passed the bill, and thus Pell Grants remain inaccessible to the incarcerated.

## II. CORRECTIONS AND EDUCATION

### A. *Corrections*

In 2011, the United States Supreme Court issued its 5-4 decision on *Brown v. Plata*, affirming a special panel of judges' ruling that ordered California to release enough prisoners to reach 137.5% of its prisons' total design capacity due to the current population constituting an eighth amendment violation.<sup>40</sup> The majority opinion asserted that California had been in violation for years, especially concerning its adequacy in medical and mental health care for prisoners, and that all of its attempted remedies had failed due to "severe overcrowding in California's prison system."<sup>41</sup> Indeed, any "[short] term gains in the provision of care have been eroded by the long-term effects of severe and pervasive overcrowding."<sup>42</sup> The majority opinion recognized that while prisoners have been

<sup>39</sup> S.1074, 116th Cong. - RESTORING EDUCATION AND LEARNING ACT OF 2019, <https://www.congress.gov/bill/116th-congress/senate-bill/1074/text?q=%7B%22search%22%3A%5B%22restoring+education+and+learning+act%22%5D%7D&r=1&s=6> (last visited Jan. 8, 2020).

<sup>40</sup> *Brown v. Plata*, OYEZ, <https://www.oyez.org/cases/2010/09-1233> (last visited Jan 4, 2020).

<sup>41</sup> *Brown v. Plata*, 563 U.S. 493 (2011).

<https://www.law.cornell.edu/supct/html/09-1233.ZO.html>

<sup>42</sup> *Id.*

deprived of their right to liberty, they still maintain certain other rights as a result of the “essence of human dignity inherent in all persons,” and that such dignity serves as the motivation for the eighth amendment.<sup>43</sup> Furthermore, the Court asserted that a prison has an obligation to provide food, clothing, and necessary medical care to its prisoners because as a result of incarceration, “society takes from prisoners the means to provide for their own needs.”<sup>44</sup>

This obligation of prisons, and thus by states, can be understood as the state’s “carceral burden,” which results from the “potentially dangerous conditions” that prisoners find themselves in combined with an inability to provide for their own care and protection.<sup>45</sup> Prison authorities exercise power in determining the conditions under which prisoners live, and these conditions affect not only the quality of a prisoner’s life but also their likelihood of survival.<sup>46</sup> Dangerous conditions run rampant in America’s prison system, with prisoners experiencing assault, sexual violence, drug violence, corruption, lack of treatment for mental disorders, etc.<sup>47</sup> In October of 2016, the Department of Justice began an investigation into the Alabama Department of Corrections concerning these very issues.<sup>48</sup> In a letter to Governor Kay Ivey, the DOJ asserted that

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Sharon Dolovich\*, *ARTICLE: CRUELTY, PRISON CONDITIONS, AND THE EIGHTH AMENDMENT*, 84 N.Y.U.L. Rev. 881, (October, 2009).

<sup>46</sup> Dirk van Zyl Smit, *ARTICLE: Regulation of Prison Conditions*, 39 Crime & Just. 503, (2010).

<sup>47</sup> PRISON CONDITIONS, EJI.ORG, <https://eji.org/issues/prison-conditions/> (last visited Jan. 8, 2020).

<sup>48</sup> INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN, U.S. DEP’T OF JUSTICE 3, <https://www.justice.gov/crt/case-document/file/1149971/download> (last visited Jan. 8, 2020).

Alabama routinely violates the constitutional rights of its prisoners and that serious lack of supervision and staffing and severe overcrowding further worsen these violations.<sup>49</sup> The DOJ further describes the ADOC as “deliberately indifferent” to prison conditions that are dangerous, violent, objectively unsafe, and deplorable.<sup>50</sup>

The states experiencing overcrowded prisons are not limited to California and Alabama; as of 2013, at least 22 states are operating in excess of their prisons’ design capacities.<sup>51</sup> Overcrowding is recognized as one of the key determinants of unsafe and unsanitary prison conditions.<sup>52</sup> As such, at least 22 states have a factor that works against the possibility of a safe prison environment. With the vast number of people incarcerated, leading to overcrowding, the question is whether or not prison serves its purpose of deterrence.<sup>53</sup> If at least 95% of all state prisoners will be released from prison at some point, the efficacy of the prison systems rests on those released individuals staying

<sup>49</sup> Re: Notice Regarding Investigation of Alabama’s State Prisons for Men, U.S. DEPT OF JUSTICE, <https://www.justice.gov/opa/press-release/file/1150276/download> (last visited Jan. 8, 2020).

<sup>50</sup> *Supra* note 48 at 6

<sup>51</sup> STATE PRISON CAPACITY, OVERCROWDED PRISONS DATA, GOVERNING.COM, <https://www.governing.com/gov-data/safety-justice/state-prison-capacity-overcrowding-data.html> (last visited Jan. 8, 2020).

<sup>52</sup> Morag Macdonald, *Overcrowding and its impact on prison conditions and health*, 14 International Journal of Prisoner Health 65 (2018).

<sup>53</sup> David S. Lee & Justin Mccrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence* (2016), [https://eml.berkeley.edu/~jmccrary/lee\\_and\\_mccrary2016.pdf](https://eml.berkeley.edu/~jmccrary/lee_and_mccrary2016.pdf) (last visited Jan. 8, 2020).

out of prison.<sup>54</sup> The Bureau of Justice Statistics found that 83% of released state prisoners were arrested at least once within nine years of their release.<sup>55</sup> This statistic suggests that prisons are not successfully deterring criminal behavior. With released prisoners returning to prison (i.e., high recidivism rates) and new prisoners entering prison, mass incarceration and overcrowding should not be surprises. Furthermore, overcrowding, especially that caused by high rates of recidivism, potentially exacerbates itself by reducing the ability of prisons to provide educational and rehabilitative programs, and *Newman v. State of Alabama* recognized that “if he gets no training or education at all, it is absolutely certain that he and another 98 percent of the prison population like him will commit other crimes when they get out.”<sup>56</sup>

### B. Corrections + Education

In 1954, the Supreme Court declared, “Today, education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship...it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of

<sup>54</sup> Timothy Hughes & Doris James Wilson, *Reentry Trends in the U.S.*, <https://www.bjs.gov/content/reentry/reentry.cfm> (last visited Jan. 8, 2020).

<sup>55</sup> Mariel Alper & Matthew R. Durose, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> (last visited Jan. 8, 2020).

<sup>56</sup> *Supra* note 52 at 66 and *Newman v. State of Ala.*, 466 F. Supp. 628 (M.D. Ala. 1979). <https://law.justia.com/cases/federal/district-courts/FSupp/466/628/2361346/>

an education.”<sup>57</sup> In American prisons, approximately 75% of state prison inmates did not complete high school.<sup>58</sup> This is compared to less than 20% of the general population that did not receive a high school diploma.<sup>59</sup> Although nearly half of those inmates eventually received a GED, in a society full of college degrees and vocational certificates, a GED fails to offer as few opportunities as even a high school diploma.<sup>60</sup> Thus, without the benefit of a quality education, good citizenship seems unlikely.

Over the course of three decades, corrections and education spending increased across the states; however, the increase in corrections spending outpaced the increase in education spending by over 300%.<sup>61</sup> This holds true for the majority of states even when adjusted for population change.<sup>62</sup> One of the biggest causes of the dramatic increase in corrections spending has been the mass incarceration epidemic.<sup>63</sup> Research has shown that there are links between education and incarceration; for example, researchers “have estimated that a 10 percent increase in high school graduation rates may result in a 9 percent

<sup>57</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>58</sup> Caroline Wolf Harlow, *Education and Correctional Populations* 3, <https://www.bjs.gov/content/pub/pdf/ecp.pdf> (last visited Jan. 8, 2020).

<sup>59</sup> *Id.* at 1.

<sup>60</sup> *Id.* at 3 and IN TODAY’S ECONOMY, HOW FAR CAN A GED TAKE YOU, NPR.ORG, <https://www.npr.org/2012/02/18/147015513/in-todays-economy-how-far-can-a-ged-take-you> (last visited Jan. 8, 2020).

<sup>61</sup> STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION, U.S. DEP’T OF EDUCATION 1, <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf> (last visited Jan. 8, 2020).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

decline in criminal arrest rates.”<sup>64</sup> If more of a state’s funds are being dedicated to corrections and less to education, then a state is potentially introducing more crime by creating an overall less educated populace. As crime increases, a state will then devote even more funds to correction, and thus, the tradeoff between corrections and education becomes a vicious cycle.

While improving educational access and quality outside of prison may help prevent new crime, there still remains the issue of those without an education already in prison that will most likely be released in the future. Educating a prisoner “[provides] inmates with knowledge and challenges that give them important skills as well as expand their sense of purpose and life goals.”<sup>65</sup> In other words, education may enable an incarcerated individual to consider alternatives to criminal behavior and furthermore, may provide him with skills and qualifications necessary to continue his education or attain employment once released. Research has shown that participating in correctional education reduces an inmate’s likelihood of recidivating by 28% when compared to inmates who did not participate in correctional education.<sup>66</sup> Education, then, makes it less likely that an individual once released from prison will return to prison. One formerly incarcerated individual who participated in correctional education stated, “Imagine education being the one aspect of his new life that will keep

<sup>64</sup> *Id.*

<sup>65</sup> Robert Bozick, et al., *Does providing inmates with education improve post-release outcomes? A meta-analysis of correctional education programs in the United States*, 14 *Journal of Experimental Criminology* 392 (2018).

<sup>66</sup> *Id.* at 403.

him free.”<sup>67</sup>

Despite the recognized benefits of correctional education by researchers, educators, prisoners, and policymakers alike, there still remains resistance to correctional education from many. Many correctional education programs try to stay away from public recognition, largely due to fear of public or policy backlash.<sup>68</sup> The argument against providing an education to inmates is usually that it is not fair, especially when the education is postsecondary. After all, law-abiding citizens that are not incarcerated must pay for their education past secondary school. To those against correctional education, it does not seem right that their taxpayer dollars should go toward educating someone who committed a crime.<sup>69</sup> However, it cannot be ignored that many of those incarcerated lacked opportunity in the first place; a disproportionate number of those incarcerated come from poor communities or communities of color.<sup>70</sup> Providing an inmate with the opportunity to receive an education may mean providing him with an opportunity that he never had before. Additionally, if prison by itself fails to fulfill its purpose of deterrence and produces high recidivism rates, correctional education can improve the outcome of prison by both reducing recidivism rates and more importantly, treating prisoners as human beings capable of rationality and change.

<sup>67</sup> Erin L. Castro, et al., *Higher Education in an Era of Mass Incarceration*, 1 JCSHESA Inaugural Issue 19 (2015).

<sup>68</sup> *Supra* note 27 at 289

<sup>69</sup> Kara Henson, *Prison inmates shouldn't receive free college education*, MHSROUNDTABLE.COM (2009), <https://www.mhsroundtable.com/archives/prison-inmates-receiving-free-college-education-invoke-controversy/> (last visited Jan. 8, 2020).

<sup>70</sup> *Supra* note 61 at 2

### III. INCREASING THE NUMBER OF INCARCERATED STUDENTS

#### A. *Punishment Philosophies*

As mentioned in the introduction, the latter part of the 20th century produced a shift in the public's mindset of punishment from rehabilitative to punitive. Prior to the 1970s and 1980s, moral thinkers likened retributive theories of punishment with feelings of vengeance and vindictiveness; these theories were considered primitive, akin to *lex talionis*, i.e., "eye for an eye."<sup>71</sup> However, a shift occurred when scholars began to think of a rehabilitative focus as particularly manipulative and exploitative, as the purpose of rehabilitation was to in some way force a change or transformation on the one being rehabilitated.<sup>72</sup> Furthermore, and perhaps more important from a policy perspective, a general consensus developed that "nothing works" in rehabilitating inmates.<sup>73</sup> Additionally, a series of historic events, such as the Vietnam War and the Watergate Scandal, led to a lack of conviction in the possibility of reformation of anyone, especially criminals.<sup>74</sup> Since education is usually seen as a form of rehabilitation, the education of the incarcerated fell in favor as the United States began to embrace a punitive approach.

However, it is clear from the United States' current mass incarceration epidemic that the central position currently given to punitive approaches in its criminal justice system has failed and persisted for too long. Beyond those currently incarcerated, there are also those that have a

<sup>71</sup> Trudy Govier, *Forgiveness and Revenge* 16 (2002)

<sup>72</sup> *Id.*

<sup>73</sup> Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap between Rhetoric and Reality in U.S. Prison Programs*, 45 *Law Soc. Rev.* 33 (2011).

<sup>74</sup> *Id.* at 36.

criminal record, as many as 100 million, nearly 1 in 3 Americans, that impacts their everyday lives and the families and communities that are impacted by incarceration.<sup>75</sup> Currently, there is a focus on the crime itself, as evidenced by the policy of mandatory sentencing, rather than the individual who committed the crime. Returning to a rehabilitative theory of punishment would entail placing the individual as the focus; rehabilitation means considering an individual within their specific context and tailoring a punishment to their needs.<sup>76</sup> Intuitively, such an approach makes sense; people are different — are individuals that have varied responses to the same stimuli, no one punishment has the same effect on everyone. A rehabilitative approach recognizes the differences that exist amongst individuals and allows for adjustments for those inherent differences.

### *B. Education as Rehabilitation*

Education has long been recognized for its rehabilitative effects; the 1870 Declaration of Principles recognized education as “a vital force in the reformation of fallen men and women,” with a “[tendency to] quicken the intellect, inspire self-respect, excite to higher aims, and afford a healthful substitute for low and vicious amusements.”<sup>77</sup> Research, furthermore, acknowledges

<sup>75</sup> AMERICANS WITH CRIMINAL RECORDS, SENTENCINGPROJECT.ORG, <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> (last visited Jan. 8, 2020).

<sup>76</sup> Ennifer Marson, *The History of Punishment: What Works for State Crime?*, 7 *The Hilltop Review* 22 (2015). <https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1127&context=hilltopreview>

<sup>77</sup> *Supra* note 15

education as a “change-agent.”<sup>78</sup> Education provides incarcerated individuals the opportunity to improve their situation in life; more education means that a person not only has more opportunities in the workforce but also that they have improved critical thinking and cognitive skills. Improved critical thinking skills means improved ability to seek alternatives.

It is important to remember that education is a criminogenic need, a need that influences a person’s likelihood to engage in criminal behavior.<sup>79</sup> Low educational attainment constitutes a “risk factor,” and improving an individual’s educational attainment corresponds to a reduction in risk.<sup>80</sup> Education is one of the “moderate four” criminogenic needs, with the “big four” concerning various antisocial attributes, such as antisocial behavior.<sup>81</sup> Education involves interaction with peers and teachers as well as higher thinking and learning, thus encouraging students to engage in more social behavior, i.e., reduction in education as a risk factor may involve reductions in others as well.

Correctional education allows individuals the opportunity to form relationships with peers, gain skills and qualifications, and engage with potentially thought-provoking and challenging material while incarcerated instead of experiencing idleness, atrophy, and stagnation. Often, those in prison find themselves in a self-imposed isolation and withdrawal as a defense mechanism, making re-entry that much more difficult once

<sup>78</sup> Marian O’Neil, *Correctional Higher Education: Reduced Recidivism?*, 41 *Journal of Correctional Education* 31 (1990).

<sup>79</sup> *Supra* note 65 at 391

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

released.<sup>82</sup>Indeed, the prison environment may serve to aggravate the criminogenic risk factors as stated above. Education, on the other hand, acts as a counterbalance to these psychologically damaging effects of prison, improving a released individual's ability to reintegrate into the outside community, a society with vastly different norms and expectations than prison. More importantly, prisons by nature promote uniformity and conformity through the use of numeric identification, prison uniforms, etc. while education encourages innovation and creativity, allowing incarcerated individuals to transcend society's dehumanizing labels of prisoner, inmate, convict, criminal, and embrace their humanity.

#### IV. CONCLUSION

The shift from a rehabilitative to punitive theory of punishment in the late 20th century ushered the United States into an era of mass incarceration. The “tough on crime” approach instead of improving public safety and reducing crime only served to rapidly increase the prison population, exacerbating poverty and inequality, and thus mostly harming already underprivileged communities. Low levels of educational attainment contribute to the likelihood of an individual engaging in criminal behavior, and as the correctional population grew, more funds were diverted to corrections, minimizing the importance of education, and creating a vicious cycle. A majority of those incarcerated

<sup>82</sup> Craig Heney, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities* (2001), <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment> (last visited Jan. 8, 2020)

never finished high school, and thus for many, correctional education is a second chance, and for some, a first chance. Receiving an education while imprisoned could for many incarcerated individuals mean the difference between returning to prison after release and not.

American society recognizes the benefits of education, else it would not employ compulsory education, and education is a key component to rehabilitation. The punitive criminal justice system has failed, but a rehabilitative criminal justice system, with education as its center, acknowledges the potential inherent within each human being, incarcerated or not.

# Minnesota Voter ID Law Alternatives

Paige Anderson

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## EXECUTIVE SUMMARY

Four years after Senator Al Franken won the 2008 Minnesota Senate race by a mere 312 votes 243 people were either convicted or awaiting trial for engaging in voter fraud during this election.<sup>1</sup> Due to this finding, many have questioned whether Minnesota should draft and implement voter ID laws to preserve the integrity of its elections. This has proven difficult due to a strong lack of public support

<sup>1</sup> Bill Frezza, *Sen. Al Franken Voter Fraud Revelations Call For Ways To Reduce It*, FORBES (Aug. 8, 2012, 4:09 PM), <https://www.forbes.com/sites/billfrezza/2012/08/08/sen-al-franken-voter-fraud-revelations-call-for-ways-to-reduce-it/#7252a0034998> (last visited 2019).

for voter ID laws; a 2012 ballot initiative proposing a constitutional amendment mandating that voters show photo ID at the polls was rejected, and a similar piece of legislation has not been proposed since. <sup>2</sup> This report compares the status quo to four alternative policies— strict photo ID laws, non-strict photo ID laws, strict non-photo ID laws, and non-strict non-photo ID laws — to ascertain which policy best safeguards the legitimacy of Minnesota elections without disenfranchising minorities and seniors. Research suggests that although the adoption of voter ID laws may reduce occurrences of voter fraud, the harm they cause to minorities and seniors, as well as widespread political distaste for such legislation, do not currently make them a feasible option for Minnesota.

The United States prides itself on being a representative democracy, and as such a citizen's right to vote is one of his or her most valuable civil liberties. The objective of this report is to identify if implementing voter ID laws in Minnesota will reduce the likelihood of voter fraud without infringing upon minorities' and seniors' ability to vote, while also earning the respect and support of the Minnesota government and residents as a whole.

## INTRODUCTION

As of 2019, 35 states in the United States have identified some form of voter ID laws. 17 of these states require a form of photo ID while the other 18 mandate

<sup>2</sup> Amanda Melillo, *How Minnesota's Voter ID Amendment Was Defeated*, BRENNAN CTR. FOR JUST. (Nov. 9, 2012), <https://www.brennancenter.org/blog/how-minnesota's-voter-id-amendment-was-defeated>.

some form of non-photo ID.<sup>3</sup>

As was the case with Al Franken in 2008, many are concerned that voter fraud in the form of ineligible voting, false registrations, duplicate voting, or the fraudulent use of absentee ballots skew election results, prompting voter fraud tracking by external interest groups. <sup>4</sup> Although 243 fraudulent votes may not seem like a lot, Franken's win had massive impacts upon the progression of the nation as a whole; it gave Senate Democrats the 60th vote they needed in order to overcome a Republican filibuster and vote in favor of Obamacare in 2010. <sup>5</sup>

Additionally, while those belonging to Minnesota's Democratic-Farmer-Labor Party (also known as the DFL) generally oppose the implementation of voter ID laws, members of the Republican Party are typically in favor of them, making voter ID laws a politically-charged issue.

Perhaps the largest concern surrounding voter ID laws is the idea that they disenfranchise minorities and seniors from voting based upon the economic and physical barriers they impose. This claim will be explored in greater detail throughout this report and serves as the basis as to whether voter ID laws are an appropriate means in which to combat

<sup>3</sup> Wendy Underhill, *Voter ID Requirements : Voter ID Laws*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 24, 2020), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>4</sup> The Heritage Foundation, *Election Fraud Cases*, (2019), [https://www.heritage.org/voterfraud/search?combine=&state=MN&year=2009&case\\_type=All&fraud\\_type=All](https://www.heritage.org/voterfraud/search?combine=&state=MN&year=2009&case_type=All&fraud_type=All) (last visited 2019).

<sup>5</sup> Bryon York, *When 1,099 Felons Vote in Race Won by 312 Ballots*, WASH. EXAMINER (Aug. 06, 2012, 12:00 AM), <https://www.washingtonexaminer.com/york-when-1-099-felons-vote-in-race-won-by-312-ballots> (last visited 2019).

voter fraud given Minnesota's current social, political, and economic environment.

## I. BACKGROUND

As previously mentioned, the issue of voter fraud truly began to manifest its appearance in Minnesota's political dialogue in the time around Al Franken's 2008 Senate win. It was not until 2012, however, that a provisional ballot concerning voter ID laws was issued to the public by the Republican-led Minnesota House and Senate. The proposed legislation was an amendment to the Constitution of the State of Minnesota that would have required that "[all] voters voting in person must present valid government-issued photographic ID before receiving a ballot."<sup>6</sup> As Figure 1.2 indicates, a survey conducted by Public Policy Polling in June of 2012 initially found that around 58% of Minnesotans supported the amendment while 38% opposed it. By October, approximately 43% of the public was in opposition, indicating that although opinions seemed to be changing, the proposed amendment would most likely pass. However, election day proved otherwise; 46% of voters supported the amendment while 51% voted against it, defeating its passage.<sup>7</sup> This shift can be partially attributed to an educational campaign launched by several voting rights groups claiming that voter ID laws would disenfranchise seniors and minorities, garnering public distaste for the amendment.<sup>8</sup>

After almost six years, voter ID laws once again

<sup>6</sup> Act of Apr. 10, 2012, ch. 167, 2012 Minn. Laws HF 2738. (April 10, 2012), <https://www.revisor.mn.gov/laws/2012/0/Session+Law/Chapter/167>

<sup>7</sup> *Supra* note 2.

<sup>8</sup> *Ibid.*

became a component of political discussion during Minnesota's 2018 gubernatorial election. During this election, every GOP candidate claimed they would support the drafting and implementation of voter ID laws during their time in office.<sup>9</sup> Tim Walz, a member of the Democratic-Farmer-Labor Party, won the gubernatorial election, and because of this, the question of whether or not Minnesota should adopt voter ID laws was put to rest for another year.

On April 5th, 2019, the Democratic-Farmer-Labor Party-controlled Minnesota House of Representatives voted in favor of HF1500. The bill allows documented and undocumented immigrants to obtain a driver's license, which is an acceptable form of voter photo ID. <sup>10</sup>Although it has been explicitly stated that driver's licenses cannot be used as valid ID for voting, HF1500 has once again stirred discussion as to whether or not photo ID, or ID of any kind, should be mandated at the polls.<sup>11</sup>

Although no concrete voter ID laws have been proposed since 2012, the fact that 70% of states in the nation possess some form of voter ID laws leads one to conclude that voter ID laws will likely make it onto the Minnesota legislature's agenda in the coming years.

<sup>9</sup> Tim Pugmire, *Minnesota GOP Governor Hopefuls All Back Voter ID*, MPR NEWS (Oct. 09, 2017, 4:00 AM), <https://www.mprnews.org/story/2017/10/09/voter-id-law-minnesota-gop-governor-candidates-back> (last visited 2019).

<sup>10</sup> H.F. 1500 91st Leg (Minn. 2019).

<sup>11</sup> Torey Van Oot & Jessie Van Berkel, *Minnesota House Votes to Allow Driver's Licenses for Immigrants in the Country Illegally*, STAR TRIB. (Apr. 06, 2019, 2:54 PM), <http://www.startribune.com/minnesota-house-expected-to-pass-bill-to-allow-driver-s-licenses-for-immigrants-in-the-country-illegally/508170682/> (last visited 2019).

## II. ALTERNATIVES AND EVALUATION

This report will explore types of voter ID laws that have already been implemented in various states throughout the nation: status quo; non-strict, non-photo ID; strict, non-photo ID; non-strict, photo ID; strict, photo ID. It is important to note that the differences between some alternatives, such as strict versus non-strict photo ID laws and strict versus non-strict non-photo ID laws may appear minute, but the policy decisions each one demands are vastly different in nature. Additionally, each alternative - except for the status quo - presented will also possess an example of a state that utilizes that particular type of voter ID law.

Instead of merely choosing a popular alternative, it is important to assess a variety of different criteria before making a decision on what types of voter ID laws would be the most effective in a given area; here, the five types of voter ID laws will be assessed based on the following criteria: equity, political acceptability, effectiveness, and economic possibility. The goal of this report is to identify an effective alternative that addresses concerns of infringement, while also earning the respect and support of Minnesota residents as a whole. As such, equity is the most important criterion, closely followed by political acceptability and effectiveness. Equity will be weighted most heavily at 30% since the major concern surrounding both political and public opinion regarding voter ID laws is whether or not they will disenfranchise minorities and seniors. Political acceptability will assess the probability that the current Minnesota administration — DFL-controlled House and Governor with a Republican-

controlled Senate<sup>12</sup> — is to pass the legislation necessary to implement each alternative and will be weighted at 25%. Effectiveness will be weighted at 25% based on the policy's likelihood to actually decrease instances of voter fraud. Lastly, economic possibility will be weighted at 20% and will address the costs associated with distributing free ID cards. This system of assessment utilizes a 1-5 scale with a 1 indicating higher level of desirability in a given criterion and a 5 indicating a lower level desirability. The findings of the assessment are outlined more thoroughly in Figure 1.4 and will be referenced throughout this paper.

<sup>12</sup> *Legislative Party Control: A Chart, 1901 to the Present*, MINNESOTA LEG., [https://www.leg.state.mn.us/lrl/history/caucus\\_table](https://www.leg.state.mn.us/lrl/history/caucus_table) (last visited 2019).

**Figure 1.4: Alternatives Matrix**<sup>13</sup>

<b>ID Type</b>	<b>Equity</b> <i>Avoiding Disfranchisement</i> (30%)	<b>Political Acceptability</b> <sup>14</sup> <i>Current Administration</i> (25%)	<b>Effectiveness</b> <i>Reduction of Voter Fraud</i> (25%)	<b>Economic Possibility</b> <i>Cost of Free ID Cards</i> (20%)	<b>Total</b>
<b>Status Quo</b>	1 (0.3)	1 (0.25)	5 (1.25)	1 (0.2)	2
<b>Non-Strict, Non-Photo ID</b>	2 (0.6)	2 (0.5)	4 (1)	1 (0.2)	2.3
<b>Strict, Non-Photo ID</b>	3 (0.9)	3 (0.75)	3 (0.75)	1 (0.2)	2.6
<b>Non-Strict, Photo ID</b>	3 (0.9)	3 (0.75)	2 (0.5)	2 (0.4)	2.55
<b>Strict, Photo ID</b>	5 (1.5)	5 (1.25)	1 (0.25)	3 (0.6)	3.6

<sup>13</sup> Each alternative was ranked on a scale from 1-5, with 1 being the best and 5 being the worst. These rankings were then multiplied by each criteria's weight in order to generate a score for each alternative. The alternative with the lowest score is considered the best. Figure 1.4 is an original table.

<sup>14</sup> Because public opinion polls regarding voter ID laws in Minnesota have not been produced since the 2012 ballot initiative was proposed, this category is largely based on deductive reasoning involving the composition of the Minnesota legislature and Minnesota's overall political climate.

### A. *Status Quo*

If voter ID laws are not implemented in Minnesota, citizens can vote at the polls without showing a form of photo or non-photo ID. Eligible voters can either pre-register to vote online, by mail 21 days before the election, or they can register at the polls on election day if they miss the 21 day deadline. If they choose to register online or by mail, citizens must fill out an application and provide their email address, home address, as well as ID in the form of either a Minnesota driver's license, Minnesota ID card, or the last four digits of one's Social Security Number.<sup>15</sup> In order to register to vote on election day, eligible voters must provide proof of residency in the form of a Minnesota driver's license, learner's permit, Minnesota ID card, tribal ID, voter voucher, employee voucher, late notice of registration, records of previous registration in the same precinct, or a Minnesota post-secondary student photo ID.<sup>16</sup>

It is also important to note that the average cost to obtain some form of ID in Minnesota is \$19.25 for people ages 18-65, \$16.50 for those 65 and over, and \$0.50 for those who are disabled or mentally ill.<sup>17</sup>

<sup>15</sup> *Voter Registration*, MINNEAPOLIS YOUR CITY. YOUR VOTE., <http://vote.minneapolismn.gov/voters/REGISTER> (last visited 2019).

<sup>16</sup> *Election Day registration*, MINNEAPOLIS YOUR CITY. YOUR VOTE., <http://vote.minneapolismn.gov/voters/ELECTION-DAY-REGISTER> (last visited 2019).

<sup>17</sup> Michaëlle Bond, *Other states give IDs to residents for free. Could it happen here?*, PHILA. INQUIRER Sep. 25, 2018, <https://www.inquirer.com/philly/news/pennsylvania/id-fee-ID-homeless-philadelphia-20180925.html>.

### B. *Status Quo Evaluation*

The status quo ranked first amongst the list of alternatives with a score of 2 on the original matrix. The status quo ranked first for equity because it does not impose any economic barriers upon minorities and seniors. This means that people do not go out of their way to pay for and secure a form of photo or non-photo ID. Additionally, strict forms of voter ID laws add an extra barrier to voters — in this case, seniors — as those without acceptable forms of ID on election day must transport themselves to the board of elections to have their ballot counted. It is also important to note that, while some may not possess a means of transportation to bring them to the board of elections, others — typically minorities — may not be able to afford time off of work or childcare services to make the trip. It should also be noted that, as of 2016, around 11% of Americans did not possess a government-issued form of photo ID<sup>18</sup>, meaning that approximately 36 million Americans would need to secure ID. These various economic factors may then serve to disenfranchise certain demographics who do not have the required resources to have their vote verified. To reiterate, because the status quo does not impose any of these economic hurdles, it ranked first for equity.

Additionally, status quo ranked first for political acceptability. Given the fact that the current administration,

<sup>18</sup> Sari Horwitz, *Getting a photo ID so you can vote is easy. Unless you're poor, black, Latino or elderly.*, THE WASH. POST (2016), [https://www.washingtonpost.com/politics/courts\\_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972\\_story.html](https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html) (last visited 2019).

controlled by the DFL, opposes the implementation of voter ID laws, it can be assumed that the public shares similar values. The 2012 ballot initiative failure also demonstrates that Minnesota hosts many proactive groups who are willing to advocate against voter ID laws should they be offered to the public as ballot initiatives once more.

When it comes to effectiveness, the status quo ranked last. Because voters are not required to provide any form of ID there are virtually no hurdles in place to stop fraudulent voters. Although seemingly counterintuitive, fraudulent voters are relatively inconsequential to the outcomes of most elections: there are around 3.7 million eligible voters in Minnesota and only 243 possible fraudulent votes were cast in the 2008 election.<sup>19</sup>

Lastly, the status quo ranked first in terms of economic possibility because the distribution of free ID cards for voting is not required given there are currently no voter ID laws in Minnesota.

### *C. Non-Strict, Non-Photo ID*

While non-photo ID means that voters are able to show a form of ID that does not include a photograph, non-strict means that voters “have an option to cast a ballot that will be counted without further action on the part of the voter.”<sup>20</sup> To vote on election day, citizens must show a form of ID that includes their name and address, name and signature, or name and photograph; acceptable examples include social security cards, licenses, or utility bills. If

<sup>19</sup> *American Community Survey 1-year estimates.*, U.S. CENSUS BUREAU (2017), <https://censusreporter.org/profiles/04000US27-minnesota/> (last visited 2019)..

<sup>20</sup> *Supra* note 3.

voters do not have a valid form of ID with them, they can sign an affidavit known as Form ED-681 where they attest that the person signing said form is the same person whose name appears on the official voter checklist.<sup>21</sup>

#### D. Non-Strict, Non-Photo ID Evaluation

Non-strict, non-photo ID placed second on the alternative matrix. This alternative ranked second in terms of equity because although an ID is required, it can be a non-photo ID, which is typically less expensive than a photo ID, reducing the financial burden placed upon minorities and seniors.<sup>22</sup> Additionally, the “non-strict” component of this alternative means that voters “have an option to cast a ballot that will be counted without further action on the part of the voter,”<sup>23</sup> so transportation, time off work, and childcare are not additional costs that must be considered. In terms of political acceptability, this alternative tied with non-strict, photo IDs and ranked second. Although the DFL is typically against voter ID laws, this non-strict, non-photo ID is the alternative advocating for the minimum level of additional security, making it more desirable when placed next to “strict” and “photo- ID” alternatives. When it comes to effectiveness, this alternative ranked fourth, as it provides the bare minimum in terms of additional security measures. Finally, this alternative tied for first with status quo and strict, non-photo ID in terms of economic possibility because the distribution of free ID cards is not necessary.

<sup>21</sup> *FAQ - Voter ID*, CT.GOV, <https://portal.ct.gov/SOTS/Election-Services/FAQ/FAQ---Voter-ID> (last visited 2019).

<sup>22</sup> *Supra* note 33.

<sup>23</sup> *Supra* note 3.

### *E. Strict, Non-Photo ID*

In contrast to more lenient voter ID laws, strict voter ID laws state that voters “must vote on a provisional ballot and also take additional steps after Election Day for it to be counted.”<sup>24</sup> Upon arriving at the polls on election day, voters must show ID in the form of either a driver’s license, military ID, a utility bill, bank statement, government check, paycheck, or a government-issued document other than a notice of voter registration.<sup>25</sup> If one does not possess either of the aforementioned forms of ID, they can vote in one of two ways by means of a provisional ballot. Option one involves providing one’s driver’s license, state ID number, or the last four digits of one’s Social Security Number, voting on a provisional ballot, and having the board of elections verify the information so that the ballot may be counted. Option two entails voting on a provisional ballot and then returning to the board of elections within a week following the election with a valid form of ID so that the ballot may be counted.<sup>26</sup>

### *F. Strict, Non-Photo ID Evaluation*

In terms of overall ranking, strict, non-photo IDs placed fourth. This alternative ranked third for equity because although a photo ID is not required, the “strict” component of such a law requires that voters “must vote on a provisional ballot and also take additional steps after

<sup>24</sup> *Supra* note 3.

<sup>25</sup> *ID Requirements*, FRANK LAROSE OHIO SECRETARY OF STATE, <https://www.sos.state.oh.us/elections/voters/id-requirements/> (last visited 2020).

<sup>26</sup> *ID Requirements*, OHIO SEC’Y OF ST., <https://www.sos.state.oh.us/elections/voters/id-requirements/>.

election day for it to be counted.”<sup>27</sup> Because of this, additional costs such as transportation, time off work, and childcare, and their impact on minorities and seniors, must be considered. This alternative ranked fourth in terms of political acceptability because activists would likely argue that the “strict” component of the legislation would greatly disenfranchise minorities and seniors, garnering public opposition. Additionally, this alternative ranked third for effectiveness, for the “strict” nature of the law requires additional follow-up and a form of ID, although not as strict as photo ID. Lastly, this alternative tied with status quo and non-strict, non-photo IDs ranked first for economic possibility because the distribution of free ID cards is not required.

### *G. Non-Strict, Photo ID*

Non-strict photo IDs resemble non-strict non-photo IDs but differ as a form of photo ID must be presented at one’s polling place. States such as Michigan have adopted this type of voter ID law. In Michigan, voters are strongly encouraged to bring a photo ID with them to the polls, but if they do not possess a photo ID or simply forgot to bring it to the polls, all they must do is sign an affidavit attesting to their identity. <sup>28</sup>

Studies conducted by faculty at the University of Pennsylvania estimate that only 0.3-0.6 percent of voters did not possess a valid form of photo ID during the 2016 election, but that “minority voters were 2.5 to 6 times more

<sup>27</sup> *Supra* note 3.

<sup>28</sup> *A Guide to Voter ID/Affidavit at the Polls*, MICHIGAN.GOV, [https://www.michigan.gov/sos/0,4670,7-127-1633\\_8716-178123--00.html](https://www.michigan.gov/sos/0,4670,7-127-1633_8716-178123--00.html) (last visited 2019).

likely than non-Hispanic, white voters to lack a photo ID.”<sup>29</sup> In light of these findings, Michigan has tried to make photo IDs more affordable and available. Those without acceptable photo ID can apply for a state ID card through the Secretary of State branch office for \$10.00. This \$10.00 fee is waived for individuals over the age of 65 or those who may not be able to afford one due to economic limitations or disability.<sup>30</sup>

#### *H. Non-Strict, Photo ID Evaluation*

Overall, this alternative placed third. When it came to equity, this alternative tied with strict, non-photo IDs for third place. These two alternatives are tied because the inconvenience associated with the cost of obtaining a photo ID or following up with election officials after election day in order to have provisional ballots verified are ultimately synonymous barriers. Additionally, this alternative tied with strict, non-photo ID and ranked third in terms of political acceptability for the same reasons described for the preceding criteria. When it came to effectiveness, this alternative ranked second; photo ID is more difficult to obtain than non-photo ID and adds a strong layer of protection against voter fraud. Finally, this alternative ranked second in terms of economic possibility. While Michigan charges \$10.00 for ID, they also offer the ability to waive this fee.<sup>31</sup> Since the government is paying for these free IDs, this imposes an additional cost on taxpayers.

<sup>29</sup> Denise-Marie Ordway, *New insights on US voters who don't have photo ID*, JOURNALIST'S RESOURCE. (2018), <https://journalistsresource.org/studies/politics/elections/voter-photo-id-law-research/> (last visited 2019).

<sup>30</sup> *Supra* note 23.

<sup>31</sup> *Supra* note 23.

### I. *Strict, Photo ID*

Strict photo IDs resemble strict non-photo IDs but differ as a form of photo ID must be presented at the polling place. Wisconsin has implemented this type of voter ID laws. Upon arriving at polling locations, voters must show a form of photo ID that contains their photograph, address, and an expiration date that falls after the date of the most recent general election.<sup>32</sup>

If voters do not bring a valid form of photo ID with them to the polls, they can complete a provisional ballot. In order to have this ballot counted, voters must visit the municipal clerk by 8:00 pm on Election Day or by 4:00 pm the following Friday and present a valid form of photo ID.<sup>33</sup>

Should voters not be able to afford or present the necessary documentation to secure a regular Wisconsin photo ID, they can apply for one free of charge through the Department of Transportation.<sup>34</sup> Currently, 13 states including Wisconsin provide free voter ID cards for those who cannot afford them.<sup>35</sup>

<sup>32</sup> *Photo ID Required*, MYVOTE WIS., <https://myvote.wi.gov/en-us/PhotoIDRequired> (last visited 2019).

<sup>33</sup> *Provisional Voting*, WIS. ELECTIONS COMM'N, <https://elections.wi.gov/clerks/provisional-ballots> (last visited 2019).

<sup>34</sup> *Wisconsin ID Card for Voting Purposes - Petition Process*, WISCONSIN.GOV, <https://wisconsindot.gov/Pages/dmv/license-drivers/how-to-apply/petition-process.aspx> (last visited 2019).

<sup>35</sup> Zack Sigel, *A state-by-state guide to voter IDs: Am I prepared for Election Day?*, POLICYGENIUS MAG. (2018), <https://www.policygenius.com/blog/a-state-by-state-guide-to-voter-ids/> (last visited 2019).

### *J. Strict, Photo ID Evaluation*

When compared to the other alternatives, strict photo ID laws placed last. This alternative ranked fifth for equity; not only must voters consider costs associated with obtaining photo ID, but they must also consider expenses concerning transportation, time off work, and childcare to have their provisional ballots verified. When it comes to political acceptability, this alternative ranks fifth as the DFL, activists, and public would oppose the legislation, as it imposes the greatest security restrictions and economic burdens upon citizens. Speaking of effectiveness, this alternative ranks first, as it presents multiple hurdles for fraudulent voters. Finally, this alternative ranked last for economic possibility, as ID cards would have to be provided free of charge by the state, imposing additional costs to taxpayers. Given that it costs approximately \$16.50-\$19.25<sup>36</sup> to obtain a form of ID in Minnesota and there are approximately 3.7 million eligible voters in the state<sup>37</sup>, should even 10% of these voters obtain free IDs it would cost around \$6,105,000-\$7,122,500.<sup>38</sup>

### CONCLUSION

Among the five voter ID options available to Minnesota policy makers, retaining the current law is the most strategic choice. The flexibility Minnesotans currently possess allows them to register and participate in elections in the most cost-effective and equitable manner. Requiring

<sup>36</sup> *Supra* note 17.

<sup>37</sup> *Supra* note 34.

<sup>38</sup> These numbers were calculated by multiplying 10% of Minnesota's population (370,000) by \$16.50 to get a value of \$6,105,000 and then again by \$19.25 to get a value of \$7,122,500.

proof of address and a form of ID for registration by mail and on election day is sufficient for political acceptability. Additionally, it is clearly the most just form of democratic participation available in the United States. The status quo in Minnesota does not force economic burdens upon its citizens. The status quo also does not explicitly disenfranchise minorities, seniors, and those without reliable methods of transportation. Neither the taxpayer nor the voter will have to support the cost of ID cards or an expansion of the bureaucratic process. Continuing this policy will allow Minnesota to continue facilitating democratic elections, prevent voter fraud, and offer opportunities for continued improvement regarding voter turnout.

## **THE ‘LEFT BEHIND’ AN INCOMPLETE STORY OF BRITISH EUROSCEPTICISM**

*Noah Avery Greene*

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### INTRODUCTION

Shortly after the vote to leave the European Union, media pundits and political analysts began searching for a narrative that could help explain the referendum outcome. From this analysis came a class of academic literature and news media that identified the final vote count as a direct result of the displaced white-working-class, often referred to as the ‘left behind.’ A recent headline in *The Guardian* proscribed that, “Liberals still ignore the grievances of the ‘left behind.’”<sup>1</sup> Researchers like Sara Hobolt explain the leave vote as a lashing out by the less educated in light of a changing globalized world.<sup>2</sup> The label ‘left behind’ is intended to characterize the white-working-class, who have not been able to take advantage of the direct benefits of globalization. In turn, Hobolt’s thesis acts as an articulation

<sup>1</sup> Nick Cohen, *Liberals still ignore the grievances of the ‘left behind’*, *THE GUARDIAN* (May 12, 2018, 1:30 PM), <https://www.theguardian.com/commentisfree/2018/may/12/liberals-still-ignore-the-grievances-of-the-left-behind>.

<sup>2</sup> Sara B. Hobolt, *The Brexit vote: a divided nation, a divided continent*, 23 (9) *J. EUR. PUB. POL’Y.* 1259, 1259-77 (2016).

of the argument that Brexit is a result of neoliberals lashing out. This is in contrast to other researchers who have focused on the British exceptionalism argument. Simon Tilford argues that British exceptionalism was the core cause of Brexit, citing a continual overconfidence by the British political elite who view themselves as better than their French and German counterparts. They also claim that the United Kingdom is stronger when it is the leader of the Commonwealth.<sup>3</sup>

Neither Hobolt nor Tilford are wholly correct. Hobolt's explanation of Brexit fails to holistically understand the circumstances that led to the referendum. Instead, she places too much emphasis on globalized 'winners and losers.' Additionally, statistical research from scholars like Danny Dorling suggests that middle-class-English pensioners, not the working-class of the North, voted to leave, drastically affecting the final count of the referendum.<sup>4</sup> On the other hand, Tilford does not give enough credence to the argument that Brexit is about far more than British exceptionalism. Like Hobolt, his argument is too narrow, and it fails to navigate the argument between the political elite and everyday citizens regarding British exceptionalism. This essay is an attempt to find the median between the two arguments which best explains Brexit. I will argue that Brexit was inevitable and that while important, British exceptionalism was only one

<sup>3</sup> Simon Tilford, *The British and Their Exceptionalism*, CTR. FOR EUR. REFORM (May 3, 2017), <https://www.cer.eu/insights/british-and-their-exceptionalism>.

<sup>4</sup> BBC NEWSNIGHT, *Middle classes (not working class) voted for Brexit, argues Danny Dorling - BBC Newsnight*, YOUTUBE (Sept. 29, 2016), <https://www.youtube.com/watch?v=eOMiUONDLno>.

factor in the referendum outcome. Political and economic transitions such as the development of the New Labour party, social exclusion of the working class, and austerity measures—a result of the 2008 financial crisis—more fully explain why Brexit occurred. Furthermore, I will be assessing the merits of the British exceptionalism argument by analyzing former Prime Minister David Cameron’s handling of Eurosceptic members of the Conservative and Unionist Party, colloquially called Tories.

### I. BRITISH EXCEPTIONALISM, WHERE DID IT BEGIN?

It is difficult to conceptualize the intersection of British exceptionalism and Euroscepticism without looking at its long history. Andre Glencross highlights that the mainstay of British exceptionalism sentiment in relation to Europe arose during the 1970s as the United Kingdom (UK) was debating remaining in the European Economic Community (EEC).<sup>5</sup> British Euroscepticism has never existed solely on the left or right. In 1975, Labour Members of Parliament such as Barbara Castle advocated for withdrawal from the EEC,<sup>6</sup> while Conservatives such as Margaret Thatcher supported efforts to remain. Gurminder Bhabra, a professor of postcolonial studies, argues that the 1970s are too recent to accurately trace the British exceptionalism mantra. She also asserts that these sentiments are the residual affinity that the British people

<sup>5</sup> Andre Glencross, *British Euroscepticism as British Exceptionalism: the forty-year “Neverendum” on the relationship with Europe*, 67 (4) *STUDIA DIPLOMATICA* 7, 7-20 (2014).

<sup>6</sup> Anne Perkins, *Barbara Castle: Obituary*, *THE GUARDIAN* (May 3, 2002, 1:30 PM), <https://www.theguardian.com/politics/2002/may/03/obituaries.anneperkins>.

still maintain for the privileges they once had as an empire<sup>7</sup>. In effect, the loss of their empire has created a social vacuum in which British citizens are attempting to maintain a sense of uniqueness. The best timeline outlining the origins of British exceptionalism likely falls somewhere between where Glencross and Bhambra have argued. It would be naïve to say that British exceptionalism was not publicly displayed until the question of leaving the EEC was first put to voters. England maintained an empire for a prolonged period of time, creating a sense of exceptionalism hundreds of years prior.

However, I would place the first significant point in the story of British exceptionalism at Winston Churchill's doorstep. In his essay *Wit and Wisdom*, Churchill posits that Britain is "with Europe, but not of it." He continues by writing, "We are interested and associated, but not absorbed. And should European statesmen address us in the words which were used of old, 'Wouldest thou be spoken for to the king, or the captain of the host,' we should reply, with the Shunammite woman, 'I dwell among mine own people.'"<sup>8</sup> Churchill's rhetoric deliberately creates a strong sense of separation between the UK and Europe. As Margaret Thatcher would come to understand, this strain cannot be easily reconciled, namely because Churchill's opposition to a fully integrated Europe was met with a

<sup>7</sup> Gurminder K. Bhambra, *Brexit, Trump, and 'methodological whiteness': on the misrecognition of race and class*, 68 BRIT. J. SOCIOLOGY (SPECIAL ISSUE) S214, S214-32 (2017).

<sup>8</sup> International Churchill Society, *Wit and Wisdom*, 104 FINEST HOUR 11 (1999)  
<https://winstonchurchill.org/publications/finest-hour/finest-hour-104/wit-and-wisdom-12/>.

reciprocal push from European leaders, such as French President Charles De Gaulle.<sup>9</sup>

## II. BRITISH EXCEPTIONALISM AND BREXIT

The Brexit referendum resulted from a British exceptionalism uprising instigated by the Conservative Party, rather than public outcry. David Cameron's premiership was characterized by battles with the Eurosceptic wing of his party. As former party Leaders Tony Blair and Neil Kinnick were to Labour, Cameron was the modernizer for the Conservatives.<sup>10</sup> This title of "modernizer" naturally comes with some level of resistance.

In 2007, after becoming party leader, Cameron began reforming the Tory image of conservatism away from the abrasive regalia of Thatcherism by attempting to make the party a more multicultural organization. First, he required half of potential parliamentary candidates placed on A-Lists be women.<sup>11</sup> Second, Cameron placed an increased emphasis on annexing people of color into the party.<sup>12</sup> Although these initiatives had little impact on the true form of the party, they led to increased clamor from party members to maintain the status quo.<sup>13</sup> The modernization effort, while necessary, marked the beginning of Brexit and

<sup>9</sup> Nesta Roberts, *Emphatic 'No' by de Gaulle*, THE GUARDIAN (Nov. 28, 1967), <https://www.theguardian.com/world/1967/nov/28/eu.france>.

<sup>10</sup> Peter Dorey, *A New Direction or Another False Dawn? David Cameron and the Crisis of British Conservatism*, 2(2) BRIT. POL.137, 137-166 (2007).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

the end of Cameron's political career. Cameron proved incapable of balancing his policy initiatives of government transparency and deregulation with fighting the established Eurosceptic sentiments which he sometimes shared.

As leader, Cameron maintained that the UK would need to reform the laws and the structure of the EU, renegotiate the country's status in the EU, or hold a referendum to decide whether to stay or leave.<sup>14</sup> Unfortunately for Cameron, he chose the most poorly designed of the three options, deciding to take a short-term call for action instead of a long-term solution. Furthermore, Cameron was forced to approach the referendum with haste so as not to appear prevaricating.<sup>15</sup> Cameron's premiership and the eventual calling of the referendum provide a clear example of how British exceptionalism among political elites steers the direction of the country. Tory backbenchers have long seen Britain as a better economic partner than the rest of Europe since Margaret Thatcher's infamous choice to negotiate an economic rebate for the UK at the 1984 Fontainebleau European Council meeting.

Several Tory members of Parliament made the argument that the referendum was not about the British exceptionalism strain within the Conservative Party, but was something the public had requested. However, there is evidence to the contrary. In 2015, the top concerns of UK voters were the economy, healthcare, and immigration; their relationship with Europe was seventh on the list,

<sup>14</sup> Julie Smith, *Gambling on Europe: David Cameron and the 2016 referendum*, 13 (1) BRIT. POL. 1, 1-16 (2018).

<sup>15</sup> *Ibid.*

preceded by education.<sup>16</sup> This further evidences the priority that British exceptionalism has among the political elite, unlike blatant Euroscepticism, which is spread across political interests. The EU was not a salient political issue until after the referendum.

### III. PAINTING A FULLER PICTURE

The modernization of the Labour Party is apparent in this debate because it further divided British political interests, creating an opening for the United Kingdom Independence Party (UKIP) and other groups to exist. This division created the initial sentiment of a working class that felt underrepresented in a globalized marketplace. The Labour Party under Tony Blair, or New Labour as it is often referred, established itself as a member of the third-way political ideology. Third-way politics, as theorized by Anthony Giddens, is intended to be both socially responsible and open to neoliberal economic policies.<sup>17</sup> Though the adoption of the third-way philosophy took place under Blair, the modernization process started years earlier with Neil Kinnick. It was during this period that we began to see the uneasiness of the Northern working class regarding the project of globalization. Harry Bromley-Davenport and his colleagues came to a similar conclusion after conducting focus groups with white-working-class

<sup>16</sup> William Jordan, *At the same time, the Conservatives expand their lead on the one issue that beats both – the economy*, YOUgov (Apr. 15, 2015, 3:49 AM), <https://yougov.co.uk/topics/politics/articles-reports/2015/04/15/health-tops-immigration-second-most-important-issu>.

<sup>17</sup> ANTHONY GIDDENS, *THE THIRD WAY* (John Wiley & Sons eds., 2013).

male residences in Sunderland.<sup>18</sup> Several participants identified the modernization project under Blair, and Gordon Brown after him, as the reason for their increased support of counter parties like UKIP.<sup>19</sup> This level of social exclusion is more responsible for the initial 21st century phase of Euroscepticism that helped drive Brexit than British exceptionalism. The salience of New Labour as the progenitor for changing voting patterns is more evident than Brexit voters' attitudes toward immigrants or their perceptions of Britain as an exceptional state. UKIP's membership swelled in the early days of Blair's premiership.<sup>20</sup> Voters who did not want to gravitate toward the Conservatives or remain with New Labour shifted to UKIP as the more Eurosceptic alternative. The specific grievance of these voters is that New Labour extinguished Clause IV from the party constitution, no longer making provisions to support full employment.<sup>21</sup> They equated Labour under Blair to a continuation of a Thatcher-Major premiership. However, the perceived failings of the New Labour Party do not offer a comprehensive explanation for Brexit. While Blair was significantly less liberal than his predecessors, he did advocate for increased funding for

<sup>18</sup> Harry Bromley-Davenport et al., *Brexit in Sunderland*, 37 (5) ENV. AND PLAN. C: POL. AND SPACE 795, 795-812 (2018).

<sup>19</sup> *Ibid.*

<sup>20</sup> Patrick Dunleavy & Sean Kippin, *How Democratic are the UK's Political Parties and Party System?* DEMOCRATIC AUDIT UK (Aug. 2, 2016), <http://www.democraticaudit.com/2016/02/08/how-democratic-uks-political-parties-party-system/>

<sup>21</sup> Patrick Seyd, *New Parties/New Politics? A Case Study of the British Labour Party*, 5 (3) PARTY POL. 275, 383-405 (1999).

education<sup>22</sup> and took a more moderate stance on criminal justice than the Conservatives.<sup>23</sup>

The term “austerity” continues to explain Brexit, despite the consistent use of the word for the past several decades. The British political system is prone to periods of crisis that force structural change in the government.<sup>24</sup> Brexit is no different. In this case, the catalyst was the 2008 financial crisis and the governmental restructuring that resulted in decreased collaborative capacity traditionally associated with the EU. Many citizens believed the crisis resulted from an economy littered with fraud and scams by big bankers. Even ten years after the crisis, UK citizens still have a complicated view of global financial institutions. YouGov focus group research found that many participants associated supranational financial organizations, like the World Bank, with self-interested elites immune to the fluctuations in the global economy.<sup>25</sup> It is reasonable that a global financial crisis, which had no immediate end in sight, could affect how British people viewed their place within Europe. Popular culture has a way of painting this picture rather beautifully. In the movie *Brexit: The Uncivil War*, Remain campaigners conduct focus group interviews

<sup>22</sup> Sean Coughlan, *Education, Education, Education*, BBC News UK (May 14, 2007), <http://news.bbc.co.uk/1/hi/education/6564933.stm>

<sup>23</sup> New Statesman, *From the Archive: Tony Blair is Tough on Crime, Tough on the Causes of Crime*, NEW STATESMAN (Dec. 28, 2015), <https://www.newstatesman.com/2015/12/archive-tony-blair-tough-crime-tough-causes-crime>

<sup>24</sup> Colin Hay, *Narrating Crisis: The Discursive Construction of the Winter of Discontent*, 30 Soc. 253, 253-77 (1996).

<sup>25</sup> Olivia Joyner, *One Decade on, People Still have a Complicated View of the Financial Crisis*, YOUNGOV (Sept. 14, 2018), <https://yougov.co.uk/topics/finance/articles-reports/2018/09/14/one-decade-people-still-have-complicated-view-fi>

with a range of voters to understand what arguments best resonate with people on both sides. After chaos erupts during the interviews, an older gentleman remarks that he has lost everything, pointing to the EU as the cause and the financial crisis as a symptom of that cause.<sup>26</sup> For him, leaving the EU is about something more than immigration, it is about control over his own financial fate. This sentiment perfectly explains the intermediate success of Brexiteers like Nigel Farage, leader of the Brexit Party since 2019. He managed to convince ordinary citizens that Brexit was about reclaiming the nation state,<sup>27</sup> implying that Brexit has less to do with British exceptionalism than a return to the golden age of the British Empire.

Thiemo Fetzer outlines the impact that austerity measures had on Brexit, stipulating that the welfare reforms that took place under the aegis of austerity led to a swell in UKIP support and subsequently increased the Leave campaign support.<sup>28</sup> Stuart Gietel-Basten takes this argument a step further by asserting that public services, such as the National Health Service, almost approach a religious status in the UK.<sup>29</sup> Thus, a government determined to carry out austerity measures appeared out of touch and apathetic.<sup>30</sup> This sense of apathy and the ensuing feeling of betrayal links all of these contentions in the

<sup>26</sup> BREXIT: THE UNCIVIL WAR (House Productions 2019).

<sup>27</sup> Storia, *Nigel Farage on Globalization, Free Speech, Hillary Clinton and More Part II of III*, YOUTUBE (Nov. 26, 2017), <https://www.youtube.com/watch?v=kc4vQQihMtk>.

<sup>28</sup> Thiemo Fetzer, *Did Austerity Cause Brexit?* 109 (11) AM. ECON. REV. 3849, 3849-86 (2019).

<sup>29</sup> Stuart Gietel-Basten, *Why Brexit? The Toxic Mix of Immigration and Austerity*, 42 (4) POP. AND DEV. REV. 673, 673-80 (2016).

<sup>30</sup> *Ibid.*

public's mind. Conservatives have orchestrated a game of factional politics, done in the name of British exceptionalism. Labour has left behind its working-class constituency. Austerity has won the day, even when the people do not want it. All of these contentions create a tale of political games and ideological manipulations played outside of the villages of the average British person.

### CONCLUSION

In this essay, I established that British exceptionalism was a significant factor in the final referendum outcome. Opinions that can be perceived as British exceptionalism have been historically significant in the political discourse since Winston Churchill. I then identified the most notable example of British exceptionalism that led to the referendum — Tory Eurosceptics pressuring Cameron to call for a national vote. However, overall British exceptionalism has a much more tacit impact on the referendum outcome. The essay also outlines the salient ideological factors found in New Labour and the financial fatigue from austerity, as both of these elements made voters feel confident in casting their vote to leave the EU.

We will likely never fully understand the range of factors that went into the referendum outcome. However, political scientists cannot assess any factor in isolation and claim it to be a comprehensive explanation of Brexit. It is dangerous to view British exceptionalism alone as the leading causal factor, devoid of greater historical context and in relation to the other Brexit factors. If we do this, we fail to truly understand why and how we got to where we are.

**AN OUTSIDER ON THE INSIDE: NORWAY'S  
INFLUENCE & BOTTOM-UP  
EUROPEANIZATION IN SEVERAL KEY  
POLICY AREAS**

*Castro Gabriel*

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INTRODUCTION

Norway has a unique relationship with the European Union (EU), as their constituents have rejected EU membership twice, in 1972 and 1994, despite leaders promising economic and security benefits. <sup>1</sup>As a compromise, Norway joined the European Economic Area (EEA) in 1994 – which granted it access to the EU's single market and free movement of goods, capital, services, and people (Schengen Area) between the EU and Norway; therefore, Norway has to entirely adopt the *acquis communautaire* relating to the these four freedoms.<sup>2</sup> Numerically, this means that Norway is subject to about 20% of EU laws as there are about 23,000 EU

<sup>1</sup> Nohlen, D & Stöver, P. "Elections in Europe: A data handbook", p 5.

<sup>2</sup> *Norway - Trade - European Commission*. EUROPEAN COMMISSION, <https://ec.europa.eu/trade/policy/countries-and-regions/countries/norway/>. (Last visited June 3, 2016).

laws<sup>3</sup> and about 5,000 EEA laws in force.<sup>4</sup> Despite having to sacrifice democratic and participatory rights in Brussels, Norway participates in EU programs and actions and financially supports European social and economic integration.<sup>5</sup> Thus, the question remains: how much influence is Norway able to wield in EU policy through their participation in select EU programs, actions, committees, conferences, lobbying efforts, and agreements? Herein, this paper will analyze specific economic policy areas where Norway can exercise authority within the EU structure – energy and environmental policy, and Arctic Ocean policy – and their effectiveness in doing so. These policy areas carry a considerable amount of importance to the Norwegian people and the EU economically through a mutually beneficial alliance that allows equal negotiations from both sides.

Europeanization refers to the extent to which a member state or third country influences the policies of the EU or vice versa. Throughout recent decades, the EU has been criticized as exercising a solely top-down Europeanization approach where member states have no say in the policies they adopt or ‘download.’ Europeanization involves the member states or third countries’ adopting and influencing EU policy, or ‘downloading’ and ‘uploading’ respectively.

<sup>3</sup> *Directory of European Union legislation - EUR-Lex*, EUR-LEX.EUROPA.EU (May 19, 2016), [https://eur-lex.europa.eu/browse/directories/legislation.html?root\\_default=CC\\_1\\_CODED%3D11,CC\\_2\\_CODED%3D1150&displayProfile=allConsDocProfile&classification=in-force](https://eur-lex.europa.eu/browse/directories/legislation.html?root_default=CC_1_CODED%3D11,CC_2_CODED%3D1150&displayProfile=allConsDocProfile&classification=in-force) (Last visited June 3, 2016).

<sup>4</sup> *EEA-Lex | European Free Trade Association*. EFTA, <https://www.efta.int/eea-lex> (Last visited June 3, 2016).

<sup>5</sup> Andreas Østhagen & Andreas Raspotnik, *Partners or Rivals?: Norway and the European Union in the High North*, in *THE EUROPEAN UNION AND THE ARCTIC* 97, 101 (Nengye Liu et al., 2017).

However, scholarly contributions on Europeanization from third countries almost entirely focus on top-down, member state downloading of the EU's *acquis*.<sup>6</sup> This paper advocates for a return to the bottom-up perspective by arguing that Norway, as a third country without voting rights in EU institutions or representation in the European Council or Parliament, has not inherited a position of complete downloading of policy. Though it may appear that Norway is unable to exercise authority regarding EU policy, this is only because the avenues of influence are mostly informal, like Norwegian stakeholders lobbying in Brussels.

#### I. THE EUROPEANIZATION PROCEDURE – THE PROCESSES OF INFLUENCING EU POLICY AS A THIRD PARTY COUNTRY

To determine the extent that Norway can and has exercised any influence within the EU, the mechanisms available for third-party involvement must be evaluated. To understand the specificities of Norwegian bottom-up Europeanization, one must examine relevant Europeanization terminology and typology detailing when third countries exercise influence within the legislative process, and the avenues utilized in the input of influence. Parties exercise influence before (*ex-ante*) or after (*ex-post*) the completion of EU legislation. The *ex-ante* stage includes the effort to shape the agenda or formulate policy before the implementation of legislation.<sup>7</sup> The *ex-post*

<sup>6</sup> Tanja A. Börzel & Thomas Risse, When Europe hits home: Europeanization and domestic change, 4 EUROPEAN INTEGRATION ONLINE PAPERS 1 (2002).

<sup>7</sup> Bas Arts & Piet Verschuren, *Assessing Political Influence in*

stage includes negotiations with the EU regarding legislation where countries can customize the implementation process to fit their domestic interests.<sup>8</sup> As discussed in later sections, Norway exercises limited *ex-ante* influence because of their lack of representation in Brussels but considerable *ex-post* influence because of their reconceptualization and customization of EEA-applicable EU legislation.

The determinants, or variables, instrumental in the success of third country efforts to influence the EU legislative process are having key “access to relevant venues and structural power resources.”<sup>9</sup> To effectively exercise their weight and authority, third countries must possess strength in one or both of these variables. Regarding access to relevant venues, the arrangement may be formal or informal. A formal arrangement includes access or representation in any of the EU legislative institutions.<sup>10</sup> Informal access, on the other hand, constitutes participation or involvement with policy makers outside EU legislative institutions such as liberal political forums and conferences.<sup>11</sup> Due to its lack of voting rights in Brussels, Norway has limited access to formal venues. However, Norway does have significant access to informal venues

*complex decision-making: An instrument based on triangulation*, 20(4) INTERNATIONAL POLITICAL SCIENCE REVIEW 411, 413 (1999).

<sup>8</sup> Eva Thomann, *Customizing Europe: Transposition as bottom-up implementation*. *Journal of European Public Policy*, 22 JOURNAL OF EUROPEAN PUBLIC POLICY 1368, (2015).

<sup>9</sup> Benjamin Hofmann, et al., *Following, Challenging, or Shaping: Can Third Countries Influence EU Energy Policy?*, 7(1) POLITICS AND GOVERNANCE 152, 152 (2019).

<sup>10</sup> *Id.* at 154.

<sup>11</sup> *Ibid.*

due to its frequent invitation to political forums, especially regarding Arctic and energy policy. Norway's structural power resources include political leverage against energy-deficient EU receiver countries, yielding significant influence on EU energy policy.<sup>12</sup> This also applies to Norway's seafood contributions to the European Union.

The specific typology of third countries in EU governance is also necessary to understand the specific position of Norway in their relation to the EU legislative process and can be used as a point of comparison to other third countries. Hoffmann and Jevnaker's typology of third countries in EU energy governance can be used to detail Norway's access to relevant avenues and structural power resources in relation to its position in the influence of EU policy.<sup>13</sup> According to Hoffman and Jevnaker, third country access can either be "absent" or "present," and third country structural power resources can either be "high" or "low." Depending on the extent of the third country's ownership of structural power resources and their access to relevant venues, there are challengers, shapers, outsiders, and followers.

Those countries with absent access and high structural power resources are challengers, such as Russia and Turkey. Belarus is considered an outsider by the authors due to its low structural power resources and absent third country access. Followers are countries with present third country access and low structural power resources, such as Iceland. Hoffman and Jevnaker argue that Norway is a

<sup>12</sup> Andrej Pustovitovskij & Jan-Frederik Kremer, *Structural Power and International Relations Analysis: "Fill Your Basket, Get Your Preferences"* 10 (Institute for Development Research and Development Policy, Paper No. 191, 2011).

<sup>13</sup> Hoffman, *supra* note 9 at 152, 155.

*shaper* of EU policy because it has both high structural power resources that facilitate their access to relevant avenues of influence.<sup>14</sup> A shaper is a third country that only *partially* downloads EU policy and often uploads some of their own preferences as well.<sup>15</sup> As argued in subsequent selections, although Norway must partially download policy through its involvement in the EEA, Norway also takes advantage of its energy and Arctic dominance to upload its preferences in policy areas that benefit them.

## II. ENERGY AND ENVIRONMENTAL POLICY: RENEWABLE ENERGY AND NATURAL GAS

Energy policy is a specific policy area in which top-down Europeanization possesses dominance in its ability to reconfigure domestic energy policy.<sup>16</sup> This is due to the fact that the energy *acquis* is applied even beyond the EU and into EEA territories. What is often overlooked, however, is how Norway has been able to influence the energy *acquis*. Regarding energy specifically, their sheer structural power resources derived from their net energy contributions to the EU has resulted in the acquisition of informal avenues. These avenues include Norwegian multinational corporations lobbying in Brussels and political conferences frequently hosted by the European Commission.

Often overlooked in the scholarship of EU-Norway relations is the EU energy dependency that allows Norway to possess political leverage and give it structural power resources. Norway is the seventh largest exporter of crude oil; the oil and gas sector is 18% of the Norwegian GDP

<sup>14</sup> *Id* at page 139.

<sup>15</sup> *Id* at 155-56.

<sup>16</sup> Börzel, *supra* note 6.

and 62% of all Norwegian exports in 2018.<sup>17</sup> In addition, Western Europe depends on Norwegian energy as they have limited natural gas reserves themselves.<sup>18</sup> Lastly, Norwegian gas makes up 31% of all EU gas imports.<sup>19</sup> These statistics are indicative of a dynamic where the EU, and especially Western Europe, rely on Norwegian supplies to satisfy their natural gas needs. As the closest and therefore most convenient source of energy to Western Europe, Norway can easily contest the rules and regulations that would apply to them and often the EU's only option is to accommodate their wishes.

Another important element of Norway's structural power resources is their capability to support the EU's energy transition efforts. The EU's ambitions for their transition to renewable energy are aggressive with a goal of "at least 32% in renewable energy by 2030."<sup>20</sup> Such ambitious goals require the large-scale implementation of technologies to support the propagation of renewable energy plants, an initiative that Norway has pioneered years before the EU had any desire to transition to clean energy.<sup>21</sup> For example, over 99% of electricity production in Norway

<sup>17</sup> Norway - Trade - European Commission, EUROPEAN COMMISSION, <https://ec.europa.eu/trade/policy/countries-and-regions/countries/norway/> (Last visited June 3, 2016).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Clean Energy for All Europeans Package Completed: Good for Consumers, Good for Growth and Jobs, and Good for the Planet*, EUROPEAN COMMISSION (May 22, 2019), [https://ec.europa.eu/info/news/clean-energy-all-europeans-package-completed-good-consumers-good-growth-and-jobs-and-good-planet-2019-may-22\\_en](https://ec.europa.eu/info/news/clean-energy-all-europeans-package-completed-good-consumers-good-growth-and-jobs-and-good-planet-2019-may-22_en).

<sup>21</sup> Ruud Egging & Asgeir Tomsgard, *Norway's Role in the European Energy Transition*, 20 ENERGY STRATEGY REVIEWS, 99-101 (April 2018).

is from renewable sources. Their large hydropower base and optimal conditions for wind energy support an electrical grid fully employing renewable energy.<sup>22</sup> Not only are these sources plentiful, they are also flexible and controllable, with export pipelines that can act as storage supplies “to balance supply and demand” and reconcile any possible solar or wind shortages in the countries of natural-gas-deprived Western Europe.<sup>23</sup> A seemingly perfect technological energy system has only reinforced the Norwegian bargaining power and has substantiated their position as the EU’s main source of renewable energy.

This dynamic has political consequences especially regarding Europe’s transition to clean energy. The EU’s energy dependency on Norway is apparent in the European Commission’s continuing dedication to holding EU-Norway Energy Conferences. The most recent, the 4th EU-Norway Energy Conference, was titled “Working Together for a Successful Energy Transition”<sup>24</sup> in which Norway advocated for EU funding for Carbon Capture and Storage (CCS) technologies. These technologies will act as another source for renewable energy production. With assistance from energy giants lobbying in Brussels, Norway was able to successfully receive the funding they advocated for as the European Investment Bank (EIB) identified CCS as a

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *4th EU-Norway Energy Conference*, EUROPEAN COMMISSION (Feb. 5, 2019).

priority and claimed that “it will be a big part of our business.”<sup>25</sup>

Although their utilization of energy-related conferences is instrumental in receiving financial support for their objectives, especially in regard to energy policy, Norway depends on lobbying efforts in Brussels to also be successful. These lobbying efforts are integral to gaining increased access to relevant actors in European institutions. According to the transparency register, Norway spends €15 million on lobbying – the third largest third country lobbying spender.<sup>26</sup> Furthermore, the organization that spends the most on EU lobbying is Equinor ASA, a Norwegian energy company that has participated in over forty-six meetings with the European Commission on topics from CCS to hydropower concerns.<sup>27</sup> Regarding other venues, experts from Norwegian energy ministries and the Directorate-General of Energy meet frequently, and Norway has been invited to informal Council sessions since 2003 to discuss upcoming EU legislation.<sup>28</sup> These venues of access to the Commission allow Norway to seek *ex-ante* influence, which is rare for a third country. Concerning *ex-post* influence, Norway has customized the implementation of EEA-applicable legislation in areas such as public

<sup>25</sup> Sam Morgan, *Norway's Carbon Storage Project Boosted by European Industry*, EURACTIV (Sep. 6, 2019), <https://www.euractiv.com/section/energy-environment/news/norways-carbon-storage-project-boosted-by-european-industry/>.

<sup>26</sup> “Equinor ASA - Transparency Register.” *Ec.europa.eu*, 2019.

<sup>27</sup> *Ibid.*

<sup>28</sup> Hoffman, *supra* note 9 at 152, 159.

ownership in licensing contracts on energy.<sup>29</sup> The combination of both *ex-post* and *ex-ante* influence, as well as the structural power resources and the access to relevant avenues that are granted to Norway because of its energy assets, reinforce its shaper status by granting it political leverage from the EU's dependence on energy.

### III. ARCTIC POLICY: FISHERIES AND BLUE ECONOMY

Norway's efforts to keep Arctic issues prominent in Brussels dominates its domestic policy, serving as an attempt to maintain the reigns on the EU-Arctic debate and use this policy area as a vehicle for overall EU influence. Geographically, the EU has no access to the Arctic because member states Sweden and Finland do not border it. Thus, the EU has had no other options but to negotiate with Norway to protect their interests. As a result, the European Commission claimed Arctic policy would remain an important factor in EU-Norway relations.<sup>30</sup> The EU's desire to be heavily involved with the Arctic stems from their two key interests in the region: the sustainability of their economic interests, like the Blue Economy and the fisheries, as well as the sensitivity of the region to climate change.

Arctic environmental degradation in an EEA member state would result in international criticism of the EU and would engender external interference in climate change

<sup>29</sup> Austvik, O. G., & Claes, D. H. "EØS-avtalen og norsk energipolitikk [The EEA Agreement and Norwegian energy policy]" (No. 8). Oslo: Europautredningen, 2011.

<sup>30</sup> *An Integrated European Union Policy for the Arctic*, EUROPEAN COMMISSION (Dec. 8, 2016) [https://ec.europa.eu/environment/efe/news/integrated-eu-policy-arctic-2016-12-08\\_en](https://ec.europa.eu/environment/efe/news/integrated-eu-policy-arctic-2016-12-08_en).

policies. Furthermore, it would damage the EU's reputation as a global pioneer in climate change reconciliation efforts. Rising sea levels would also negatively affect Europe as a whole, especially in low-lying areas and islands. Thus, the EU has an interest in preventing such catastrophes from delegitimizing their reputation. Norway also has something to gain in the EU's concern for the Arctic beyond climate change mitigation: "research funds and innovation mechanisms" that will foster business development in a significantly poorer and less developed High North.<sup>31</sup> In conferences and lobbying efforts alike, Norway has argued for EU funding for Arctic infrastructure and development. These efforts have been successful, with the EU recently pledging over €70 million for Arctic research and innovation between 2018-2020.<sup>32</sup>

The EU is also dedicated to continuing support of their 'Blue Economy' policy which includes the Arctic Ocean, represents 5.4 million jobs, and generates over €500 billion a year.<sup>33</sup> The key sector identified for high potential in development is aquaculture, one of the Arctic's most prized resources. In their report, *An Integrated European Union Policy for the Arctic*, the European Commission asserts that fisheries management is important for maintaining sustainable growth in the Blue Economy.<sup>34</sup>

<sup>31</sup> Andreas Østhagen, *Geopolitics and Security in the Arctic: What Role for the EU?*, 16 EUROPEAN VIEW 239, 244 (Nov. 27, 2017).

<sup>32</sup> *Arctic - Research and Innovation*, EUROPEAN UNION EXTERNAL ACTION (Sep. 11, 2018) [https://eeas.europa.eu/headquarters/headquarters-homepage\\_et/53525/Arctic%20-%20Research%20and%20Innovation](https://eeas.europa.eu/headquarters/headquarters-homepage_et/53525/Arctic%20-%20Research%20and%20Innovation).

<sup>33</sup> *Blue Growth*, EUROPEAN COMMISSION (Sep. 28, 2016), [https://ec.europa.eu/maritimeaffairs/policy/blue\\_growth\\_en](https://ec.europa.eu/maritimeaffairs/policy/blue_growth_en).

<sup>34</sup> *Supra* note 30.

Norway, as the second largest exporter of seafood in the world and 60% of its exports go to the EU, also places priority in the region and its fisheries.<sup>35</sup> Due to the EU's dependence on Norwegian fisheries, together they establish mutually beneficial policies that drive sustainable growth, instead of the top-down forced downloading of policy that many claim occurs in third countries. One of these policies was EMODnet, a map that layered the water column of the Arctic over the entire seabed at a multi-resolution scale.<sup>36</sup> Efforts like EMODnet illustrate the coequal dynamic between Norway, a small Scandinavian state, and the EU, an extremely powerful supranational body, that results from a state having important structural power resources.

The specificities of how and when Norway exercises their influence over Arctic policy needs to be outlined. Norway takes advantage of these two uncompromising EU interests to establish their own governance throughout the area while still benefiting from involvement in the EU's Single Market. Through the Commission's 1st European Union Stakeholders Conference, "Knowing, Developing, and Connecting the Arctic," representatives from the EIB, multinational corporations, ministerial offices of EU member states, and members of the European Commission discussed the future development of the Arctic.<sup>37</sup>

<sup>35</sup> *Fisheries and Trade in Seafood*, REGJERINGEN.NO, (Oct. 7, 2018), <https://www.regjeringen.no/en/topics/food-fisheries-and-agriculture/fishing-and-aquaculture/1/fiskeri/internasjonalt-fiskerisamarbeid/internasjonalt/fish/id685828/>.

<sup>36</sup> *Supra* note 30.

<sup>37</sup> *Knowing, Developing, and Connecting the Arctic*, EUROPEAN COMMISSION (2016), [https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/2018-09-17-1st-arctic-stakeholder-conference-report\\_en.pdf](https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/2018-09-17-1st-arctic-stakeholder-conference-report_en.pdf).

Interestingly, Northern Norway's regional interests were placed at the forefront of the conference with the unanimous support of the Arctic Council, an intergovernmental forum headquartered in Norway. These interests included "promoting regional stability and cooperation" in the region as well as locating opportunities to develop the EU's Blue Growth.<sup>38</sup> Norway's independence from the EU in the development of the Arctic highlights the country's successful efforts in utilizing informal access to relevant venues of influence to promote their interests.

#### CONCLUSION

The dynamic between the EU and third countries needs to be reconceptualized to reject the notion that exercising any influence at the top of such a powerful and seemingly impenetrable polity is a futile effort. A country with a population of merely five million has been able to wield a considerable amount of power in the highly bureaucratized policy making structures of the EU. Norway's structural power resources in energy and the Arctic have reversed and rewritten the common top-down Europeanization approach that plagues the EU in favor of a system where third countries can exercise considerable influence and authority.

Norway has demonstrated that a state's assets and resources can translate into routes of influence if a certain import dependency exists. This reality has significant implications for non-EU states who want to benefit from the EU's Single Market and still possess some power over

<sup>38</sup> *Ibid.*

the implementation of policies that affect them without sacrificing sovereignty. However, it is imperative that these states consider and evaluate how the weight of their assets and resources can be leveraged to influence existing policy making structures. Future research into Switzerland as an EEA, but not EU, member state could assist in these efforts due to their lack of important assets and resources and their consequential efforts to lobby the European Union.

**R.G & G.R HARRIS FUNERAL HOMES INC.  
V. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION AND AIMEE STEPHENS**

*Rachel Sharma*

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INTRODUCTION

In the case of *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission and Aimee Stephens*, the United States Supreme Court should assert that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of transgendered status and gender identity. Specifically, discrimination against such persons is based on impermissible gender stereotypes that the Court has repeatedly stated cannot justify sex-based discrimination.

Title VII states that employers may not “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, sex, or national origin.”<sup>1</sup> The Court has repeatedly interpreted Title VII to prohibit employers from predicated sex-based

<sup>1</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964).

discrimination upon gender stereotypes, namely assumptions regarding the roles of men and women in society.

Discrimination against transgender and gender-nonconforming persons is based on the stereotypes regarding gender roles that the Court – and common sense – have demonstrated are inimical to basic principles of equality and fairness. For this reason, the Court in *R.G. & G.R. Harris Funeral Homes Inc.* should hold that Title VII’s prohibition against sex-based discrimination prohibits employers from discriminating against transgender and gender-nonconforming individuals.

## I. FACTS

In 2007, Anthony Stephens was hired as a Funeral Director Apprentice at Harris Funeral Homes. For six years he performed well in this position, but in early 2013, Stephens began having “attitude issues.”<sup>2</sup> These issues were resolved, and Stephens continued working at the funeral home. Six months later, Stephens handed his boss and owner of Harris Funeral Homes, Tom Rost, a letter stating that he wished to start presenting and dressing like a female, while still working at the funeral home. This refers to wearing female clothing and complying with the female dress code of the workplace. Tom Rost took two weeks to consider this and later offered Stephens a severance package. The petitioner, Harris Funeral Homes, believes that this was not sex-based discrimination, let alone transgender discrimination, under Title VII.<sup>3</sup>

<sup>2</sup> Brief for Petitioner at 1, *R.G. & G.R. Funeral Homes Inc. v. EEOC and Aimee Stephens*, 18-107 (U.S. Ct., 2019).

<sup>3</sup> *Id.*

The Equal Employment Opportunity Commission (EEOC), a respondent in this case, has its own middle-ground opinion<sup>4</sup> separate from the main respondent, Aimee Stephens. The EEOC claims that Title VII's definition of "sex" does not apply to transgender people, as sex stereotyping alone does not violate Title VII. Discrimination based on transgender status does not constitute sex stereotyping prohibited by Title VII, but sex stereotyping may be used as evidence to prove sex discrimination.<sup>5</sup> This differing argument from the EEOC warrants a separation of petition from Aimee Stephens, giving it no bearing on this argument between Harris Funeral Homes Inc. and Aimee Stephens.

Aimee Stephens, the main respondent, claims that this case merits sex discrimination and sex stereotyping, and that Title VII should include gender discrimination.<sup>6</sup> Although this case has not been decided as of publication, it is on the docket for oral arguments on October 8th, 2019.<sup>7</sup> Based on the arguments of the petitioner and respondents, I will assert throughout this article that the Supreme Court should side with Respondent Aimee Stephens, as her argument is stronger than those made by the EEOC and Harris Funeral Homes. The legal question to

<sup>4</sup> Brief for Respondent EEOC at 1, R.G. & G.R. Funeral Homes Inc. v. EEOC and Aimee Stephens, 18-107 (U.S. Ct., 2019).

<sup>5</sup> Brief for Respondent EEOC at 32, R.G. & G.R. Funeral Homes Inc. v. EEOC and Aimee Stephens, 18-107 (U.S. Ct., 2019).

<sup>6</sup> Brief for Respondent Stephens at 32, R.G. & G.R. Funeral Homes Inc. v. EEOC and Aimee Stephens, 18-107 (U.S. Ct., 2019).

<sup>7</sup> Supreme Court Calendar, Argument Calendar Session beginning October 7, 2019. [https://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentCalOctober2019.pdf](https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2019.pdf).

be answered by the Supreme Court is should “Title VII prohibit(s) discrimination against transgender people based on their status as transgender or sex stereotyping under *Price Waterhouse v. Hopkins*.”<sup>8</sup> The answer to this question should be yes.

## II. BACKGROUND

Although Title VII only prohibits discrimination on the basis of sex, the Court has interpreted this statute expansively to effectuate Title VII’s underlying intent and purpose. In *Price Waterhouse v. Hopkins*, the Court held that sex-based discrimination occurs when employers predicate their discrimination on impermissible stereotypes. In this case, Hopkins filed a Title VII claim against her employer when its partners based a decision regarding her promotion on sex-based stereotypes. All of the partners were male, and they believed that she was not dressing and acting “as a woman should.” Hopkins won, and the Court established the test for sex-based discrimination based on sex stereotypes. If the decision by the employer would have remained unchanged if the discriminatory factor, in this case sex, was different, then the situation is not classified as sex stereotyping.<sup>9</sup> Specifically, the Court re-emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they *matched the stereotype associated with their group*.”<sup>10</sup>

## III. ARGUMENT OF PETITIONER

<sup>8</sup> Brief for Petitioner at 31, *R.G & G.R. Funeral Homes Inc. v. EEOC and Aimee Stephens*, 18-107 (U.S. Ct., 2019).

<sup>9</sup> *Price Waterhouse v. Hopkins*, Oyez, <https://www.oyez.org/cases/1988/87-1167> (last visited Nov 10, 2019).

<sup>10</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *R.G. & G.R. Funeral Homes Inc.*, the Petitioner’s argument goes against the Court’s precedent and would lead to a result that undermines the principles of fairness and equality. In response to the question presented, the Petitioner argues that Title VII does not prohibit transgender discrimination based on their status or sex stereotyping. Their reasons include citing that the original meaning of Title VII describes sex, that Stephens does not allege that Harris Funeral Homes treated one sex better than another, and that this case does not fit the *Price Waterhouse* precedent. Additionally, the Petitioners claim that Stephen’s arguments do not establish sex discrimination, that the previous holdings of the Supreme Court on similar cases do not support judicially creating a new Title VII protected class, that Stephens’s theories of statutory construction are backwards, and that redefining sex discrimination will cause problems.<sup>11</sup>

The facts of the case suggest that the Petitioner’s actions were predicated upon the type of gender stereotyping that the Court’s previous rulings prohibit. According to the Petitioner, Stephens was fired because she did not comply with the gender specific dress code, and the same action would have been taken against a cisgender female who did not comply with the proper dress code. Furthermore, the Petitioner argues that Stephens’s comparison of “his” situation to that of a cisgender woman who failed to comply with the dress code is invalid. To be

comparable, the situation would have to involve a

<sup>11</sup> Brief for Petitioner at 42-45, *R.G. & G.R. Funeral Homes Inc. v. EEOC and Aimee Stephens*, 18-107 (U.S. Ct., 2019).

transgender man who does not comply with the dress code.<sup>12</sup> Therefore, Harris Funeral Homes would treat this man the same as they would Stephens, a transgender female. As such, Harris is erroneously claiming that they are not discriminating on the basis of sex.

This sex-specific dress code is based on Harris Inc.'s perceptions of proper behavior for both men and women. Since Stephens did not conform to these beliefs, the justifications upon which the dress code relies are precisely the reasons why the actions of the funeral home should be deemed sex-based discrimination. They are based on outdated stereotypes regarding how women – and men – should behave. If the Court ruled in favor of the Petitioner, we would return to an era where discrimination could be justified because women or men do not behave in the manner that others think they should. In a society dedicated to liberty, equality, and dignity, such a result cannot be endorsed.

Additionally, the Petitioner asserts that previous holdings in similar cases do not support the creation of a new protected class under Title VII. The two previous holdings cited are those of *Newport News Shipbuilding and Dry Dock CO. v. EEOC* and *Oncale Sundowner Offshore Services Inc.* In the *Oncale* case, the Supreme Court held that same-sex sexual harassment was prohibited under Title VII because it is a form of discrimination. According to the Petitioner, this discrimination never occurred, and Title VII does not apply. The *Newport News* case involved a company that provided fewer medical benefits for pregnant

women who were spouses of male employees than for

<sup>12</sup> *Id.* at 46.

pregnant female employees. This case also involves discrimination, albeit discrimination of male employees over female employees. Both cases rely on the specific wording of Title VII when it was enacted. They also recognize new situations in which the wording may be used, but never seek to change the wording of Title VII.<sup>13</sup> *R.G. & G.R. Funeral Homes Inc.* does support an alteration of the wording of Title VII, so the Court's precedent is therefore inapplicable.

Additionally, the Petitioner makes the argument that Harris Funeral Homes is not asking the Court to exclude transgender people from protection under Title VII, but instead asks the Court to not establish transgender people as a protected class.<sup>14</sup> In *Espinoza v. Farah Manufacturing Co.*, a case dealing with alienage and discrimination, the Court ruled against adding alienage as a protected class in Title VII. The opinion of that case stated, "Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage."<sup>15</sup> In *Espinoza*, the Court deferred to Congress in adding a new protected class to Title VII,<sup>16</sup> and the Petitioner argues that this should be done in this case as well. It is the job of Congress to legislate, and it is the job of the Courts to adjudicate.

The Petitioner also argues that redefining sex discrimination in this manner will cause problems for employers. However, such arguments fail to classify the

type of discrimination that occurred in this case. For

<sup>13</sup> *Id.* at 46-47.

<sup>14</sup> *Id.* at 42.

<sup>15</sup> *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 95 (1973).

<sup>16</sup> *Id.* at 15.

example, sex specific showers for privacy from the opposite sex would be prohibited under a new, redefined Title VII. This would subject employers to an increased number of liability proceedings, as both transgender and cisgender employees could file sex discrimination lawsuits. This also would endanger the privacy of employees' gender identities.

#### IV. ARGUMENT OF AIMEE STEPHENS

The Respondent answers these claims by asserting that Title VII does prohibit transgender discrimination based on their status or sex stereotyping. When sex is the basis of an adverse employment decision, it violates Title VII. Ms. Stephens would not have been fired if she had been a cisgender female who did not wish to conform to the dress code; therefore, the discharge was because of sex. This situation clearly constitutes discrimination because she acted in a manner that did not conform with the Petitioner's subjective beliefs about how women should look and behave. Although not conforming to the dress code is a workplace violation, firing Ms. Stephens because of that nonconformity based on gender stereotypes is legally problematic. Failing to address transgender discrimination undermines Title VII protections for all parties. Title VII's language does not exclude transgender people, and the meaning of certain words is determined by text, even if all the applications were not expressed when written. Also, neither Congress nor presidential administrations have attempted to change Title VII's language.

This "motivating factor" standard requires that the alleged Title VII violation be a contributing factor for an employee's dismissal. In this case, if Aimee Stephens had

been a cisgender female wanting to dress and conform to society's view of a woman, then she likely would not have been fired.<sup>17</sup> Therefore, the “motivating factor” standard is met here because had Ms. Stephens been a cisgender woman and conformed to the dress code of that sex, then she likely would not have been fired. Therefore, Harris Inc.’s response constitutes discrimination under Title VII. The Petitioner’s argument relies heavily on the use of “sex” not gender in Civil Rights Act of 1964. However, this argument is irrelevant because even if the wording applies to “sex,” any discrimination that involves transgendered people inherently involves sex. The definition of sex typically involves the reproductive organs and the cisgender sex. However, gender involves cultural and internal views of oneself. By the nature of being transgender, where one’s perceived gender does not match the cisgender sex, discrimination would be based on sex because the two are closely linked. Aimee Stephens was fired because she did not wish to present as her cisgender sex.<sup>18</sup> That is sex-based discrimination; therefore, the meaning of the “sex” in 1964 still applies to transgender discrimination.

Notably, Ms. Stephens’ boss stated that her appearance would be “too masculine for a woman” and that “a man should look like a...man.”<sup>19</sup> This makes it clear that the Petitioner is guilty of sex-stereotyping Mrs. Stephens and that her firing was discrimination based on such prejudices. The Respondent argues that Title VII protects

individuals in their specific situations, and not groups of

<sup>17</sup> *Supra* note 6, at 15, 16.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Id.* at 11, 30.

people, while Harris Funeral Homes attempts to argue that because neither men nor women faced discrimination as a group, there was not discrimination under Title VII. This argument by the Petitioner is unfounded and the one by the Respondent is more in line with the actual wording of Title VII. The law clearly states “individual” in its wording; this makes it clear that the law is about one particular individual in one particular set of circumstances. Furthermore, if Harris Funeral Homes tried to escape liability by stating that they would have discriminated the same way against a male transgender employee for failing to act sufficiently feminine, this would not have allowed them to do so based on the ruling of *Price Waterhouse*.<sup>20</sup> The Petitioner cannot escape liability by using this faulty reasoning against the Respondent.

#### CONCLUSION

The Petitioner makes it very clear that they believe that Congress intended for Title VII’s definition of “sex” to apply to cisgender sex. Gender identity as a concept was not widely acknowledged and would not have been included in the definition of “sex.” However, the Respondent counters this by proving that while the meaning of a statute is determined by text, applications that were not expressly contemplated when enacted become a part of the statute through the text. In *Oncale*, the Court made it clear that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>21</sup> In that case, same-sex harassment was not envisioned by Congress to be protected

under Title VII and yet it is. Therefore, whether or not the

<sup>20</sup> *Id.* at 16.

<sup>21</sup> *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

Court decides what “sex” means in Title VII, this case still applies to sex and is still classified as discrimination under Title VII.

On a broader note, if the Court sides with the Petitioner, then Title VII protections for all people will be weakened. This case involves discrimination due to sex-stereotyping and generalizations. If the Court sides with Harris Funeral Homes Inc., then other transgender employees could potentially be fired due to these generalizations. For example, if a woman dresses in a more traditionally masculine manner, or vice versa, they can be fired if this portrayal of gender does not fit within their employer’s ideals. The courts would later have to solve this problem by defining acceptable levels of gender conformity and unacceptable levels of gender nonconformity.<sup>22</sup> This, in turn, would hurt all those in the workplace who rely on Title VII protections. In *R.G. & G.R. Funeral Homes Inc v. EEOC and Aimee Stephens*, the Court should reaffirm the already-established principle that discriminating against any person on outdated gender stereotypes constitutes sex-based discrimination and rule in favor of Aimee Stephens.\*

**\*Addendum:** When this article was written in the Fall of 2019, a decision and opinion in the case of *R.G. & G. R. Funeral Homes v. Equal Employment Opportunity Commission and Aimee Stephens* had not been released. On June 15, 2020, the Supreme Court ruled, 6-3, that Title IV does apply to gender identity and sexual orientation because these are based on sex. Thus, those who are discriminated against in these ways now have recourse under Title IV.

<sup>22</sup> *Supra* note 2, at 35.

# SANCTUARY CITIES: A CONSTITUTIONAL LIMITATION ON FEDERAL POWER

*Leah Humble*

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## INTRODUCTION

After President Trump’s inauguration in 2016, the federal courts have had to contend with difficult questions regarding sanctuary cities and their parameters. Advocates for sanctuary cities usually cite arguments regarding the 10th Amendment or humanitarian issues, while opponents value preemption and public safety concerns. As immigration policy becomes increasingly prevalent in national politics, this issue will likely be met with more state and federal regulation, as well as new case law to determine the validity of this legislation. The term “sanctuary city” lacks an accepted definition to be used by legislatures and the judiciary, partially due to the phrase’s evolution since it first emerged in the United States. A change in the practices of sanctuary cities has also accompanied this development, resulting in yet another alteration of their regulation on the national, state, and local levels. Though it is important for the national news media

to recognize these immigration issues, this coverage necessarily leads to substantive, divisive stances based on political ideology. In reality, the issue of sanctuary cities does not fundamentally align with typical party affiliations, as conservatives tend to favor the federal government's position, while liberals tend to favor state sovereignty; these two associations are usually reversed.

There are a few main issues currently circulating the federal court system regarding sanctuary city policy. First is whether or not states or cities have, within their 10th Amendment power, the authority to create sanctuary cities in which local or state law enforcement officers are either prohibited from aiding in the enforcement of federal law or otherwise not required to do so. The second major concern is whether the federal government can constitutionally combat these cities' or states' statutes monetarily. The fundamental constitutional issue at hand is the interpretation of federalism within the doctrine of separation of powers. The Supreme Court has been interpreting this issue since Chief Justice Marshall explicated the supremacy of federal law in *Marbury v. Madison* (1803). Since this decision, the courts have continued to detail the underpinnings of this delicate structure, and its newest issue involves the constitutionality of sanctuary cities and the federal government's power over them. Among the many considerations for and against sanctuary cities, the most common include public safety, federal supremacy, state sovereignty, preemption, and federalism. When two or more of these interests collide, the burden falls to the judiciary to decide the correct balance when viewing these issues with a constitutional lens. Case law both in federal court decisions as well as in

Supreme Court decisions overwhelmingly supports the ideals of dual sovereignty in favor of states' autonomy over their own policies. Neither preemption nor the supremacy clause, in light of the powers reserved to the states by the Tenth Amendment, justifies the coercion currently being attempted by the federal government. Thus, sanctuary cities are protected by the Tenth Amendment, and actions by the federal government to withhold enforcement funding to states who wish not to aid in enforcement of federal regulations are therefore unconstitutional.

### I. HISTORY OF SANCTUARY CITIES

The sanctuary city movement began in the early 1980s and originated from religious institutions opening their doors to harbor refugees. Since that time, sanctuary city policies have evolved into local police policy intended to foster a feeling of community safety. The introduction of federal, state, and local legislation has accompanied the shift in the nature of sanctuary cities from religious to governmental, so a brief historical overview is necessary for proper analysis. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) which, in Section 1373, states that a, "... Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship of immigration status, lawful or unlawful, of any individual."<sup>1</sup> The constitutionality of this statute has

<sup>1</sup> Communication between government agencies and the Immigration and Naturalization Service, 8 USCS § 1373 (2020).

been challenged and upheld in federal court.<sup>2</sup> In 2017, President Trump issued an executive order<sup>3</sup> which deemed jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 are ineligible to receive federal funds. Unlike 8 U.S.C. 1373 itself, the courts struck down this executive order as it violated principles of federalism, as the executive branch was wielding legislative power. The House also passed H.R. 3003 in 2017, the “No Sanctuary for Criminals Act,” prohibiting local and state noncompliance with federal immigration enforcement while also threatening the loss of federal grant money and assistance for not enforcing federal law. While 8 U.S.C. 1373 essentially ‘prohibits prohibition’ (prohibits state governments from prohibiting local governments and officials from enforcing federal immigration law), H.R. 3003 is broader in scope, directly prohibiting noncompliance with a monetary threat. This latest piece of legislation has not been considered by the Senate, but it raises general concerns regarding how far the courts will allow federal interference in state police policy. With this statutory and common law background, the bedrock has been laid for judicial review.

## II. ARGUMENTS IN FAVOR OF SANCTUARY CITIES

### A. *Public Safety*

One interesting aspect of sanctuary city policy is the use of a public safety argument by advocates on both sides of the debate. Though anti-sanctuary city proponents argue

<sup>2</sup> *City of New York v. United States*, 179 F.3d 29, (2nd Cir. 1999).

<sup>3</sup> Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 § 9a (2017).

that sanctuary cities harbor an over-saturated population of criminals making the overall city less safe, defenders argue that sanctuary cities are safer because they foster healthy relationships between undocumented immigrants and local law enforcement. If people are concerned about deportation as a result of their immigrant status, they are statistically less likely both to report crimes committed against them or to voluntarily give information and assistance to law enforcement to solve crime. Immigrants as a population are more likely to live in urban cities with higher crime rates than rural areas. Thus, without sanctuary policies, police might not be able to effectively conduct investigations and prosecute perpetrators.

In December 2002, a brutal rape occurred in Queens, New York (a sanctuary city) of and by undocumented immigrants. In light of this incident, the House Subcommittee on Immigration, Border Security, and Claims held hearings with the intent to crack down on sanctuary policies, which they deemed at least partly to blame for the incident.<sup>4</sup> Though the sanctuary policy was accused of enabling the assailants who otherwise might have been dealt with on the account of their illegal status, it is even more likely that law enforcement would have never been made aware of the incident in the first place if not for the sanctuary policy. Recent studies have shown that nearly 70% of undocumented immigrants are less likely to report a

<sup>4</sup> New York City's "Sanctuary" Policy and the Effect of such Policies on Public Safety, Law Enforcement, and Immigration, 108th Cong. (2003) (statement of John Feinblatt, Criminal Justice Coordinator, City of New York).

crime for fear of being questioned about their status.<sup>5</sup>

Additionally, many sanctuary policies are non-comprehensive. For example, the New York City policy in question after the incident in Queens included a provision explicitly allowing officers to transmit information about undocumented persons to federal authorities if suspected of criminal activity engagement.<sup>6</sup> Similar provisions are present in almost all other sanctuary policies, providing further evidence that, because local authorities can report information regarding immigrants' criminal activities, these cities are no less safe because of their sanctuary status. Therefore, national public safety is not a concern the federal government should use in regulating sanctuary policies.

### *B. Federal Compliance Through Legislation Unconstitutional*

Since the enumeration of the Constitution, federal law has been viewed and accepted as the supreme law of the land. However, this federal supremacy is also met with considerable limitation and constraint. Congress has broad power to regulate interstate interactions and issues with foreign policy as states are prohibited from legislating in these areas, and immigration necessarily falls in the scope of this plenary power. Nonetheless, though a certain subject is within the power of Congress, the courts have ruled that

<sup>5</sup> Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. Irvine L. Rev. 247 (2012).

<sup>6</sup> N.Y. Exec. Order No. 124 (Aug. 7, 1989), [http://www.nyc.gov/html/records/pdf/executive\\_orders/1989EO124.PDF](http://www.nyc.gov/html/records/pdf/executive_orders/1989EO124.PDF).

Congress cannot pass acts which force state and local compliance with federal statutes. In 1993, Congress passed the Brady Handgun Violence Prevention Act which authorized the creation of a national database for instant background checks on those attempting to purchase handguns. One provision of this act required Chief Local Law Enforcement Officers (CLEOs) to conduct background checks themselves in the interim between the passage of the act and the creation of the database. When *Printz v. United States* was brought before the Court by several CLEOs, a 5-4 majority ruled that this violated the principle of concurrent authority shared by the state and federal governments and was therefore unconstitutional. The court agreed that the subject of handguns did fall into Congress' commerce power, but disagreed that this power allowed them to force local compliance. Similarly, while immigration falls under a Congressional power, Congress may not abuse this power to comprise the police power of local jurisdictions.

As stated in *Printz*, Congress may not compel compliance with federal law; additionally, the Supreme Court has ruled that when Congress exercises its power of the purse in such a way that forces state compliance *indirectly*, this is also unconstitutional—it may use tax and spending powers to *incentivize* participation, but not to *command* it. Ultimately, Congress may not use its monetary power in such a way that leaves states with two options: either to comply with the law or be left unable to perform its functions. The Supreme Court outlined this in *New York v. United States*, a case about the disposal of radioactive waste. In the case, Congress passed the Low-level Radioactive Waste Policy Act which compelled states to

create their own radioactive waste disposal sites. It did this not through explicit legislation, which would be expressly unconstitutional according to *Printz*, but by creating taxes that burdened the states to a point in which they had no choice but to comply. In the majority opinion, Justice O'Connor wrote, "Either type of federal action [express legislation or monetary incentives] would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." Translated to the context of sanctuary cities, the federal government is attempting to use the same principle; though they are not expressly prohibiting states and localities from enacting sanctuary policies, by withholding federal funding from those cities who choose sanctuary policies, they are effectively commandeering the regulatory process just as the conservative majority deemed unconstitutional in *New York v. United States*. Through two landmark Supreme Court cases, the Court has articulated a noteworthy constraint on federal power: *Printz* maintains that Congress cannot force local organizations to enforce federal law, and *New York* further explains that the withholding of funds effectively forces that compliance.

### C. Doctrine of Preemption

The conception of a sphere of state sovereignty into which the federal government cannot intrude brings about some of the conflicting interests in the notion of preemption and the rights afforded to states via the 10th Amendment. Anti-sanctuary city supporters argue that sanctuary cities fall under the umbrella of immigration, so when Congress passes legislation on it, these federal acts

preempt the state or local statutes. The doctrine of preemption, simply stated, is that local or state laws may be diverted or thwarted when conflicting federal legislation is passed because of the supremacy of federal law. However, this must also be weighed against the 10th Amendment, which states, “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”.<sup>7</sup> For Congress to effectively preempt a field, the state or local legislation it is preempting must be conflicting and of direct relation.<sup>8</sup> Local sanctuary policies do not directly conflict with the “... efforts of federal immigration authorities. [...] they cannot obstruct the regulation of the admission, removal, and deportation of immigrants—a federal interest that is separate and distinct from local policing.”<sup>9</sup> The valid governmental interest acted upon by Congress is not obstructed by sanctuary policies and therefore cannot be preempted by them. Rather, the 10th Amendment guarantees states sovereignty over their own police powers when Congress has not effectuated a conflicting law in compliance with its constitutionally enumerated powers.

Limits on federal preemption can also be seen in the Supreme Court’s treatment of the Affordable Care Act (ACA) as it ruled the dichotomous choice it left for states—to expand coverage or lose all federal funds for Medicaid—unconstitutional. In their review of

<sup>7</sup> U.S. Const. amend. X

<sup>8</sup> HANNAH MICHALOVE, *Expanding Printz in the Sanctuary City Debate*, 40 *Campbell L. Rev.* 237 (2018).

<sup>9</sup> *Id.*

“Preemption Plus” strategies and their harmful effects on public health, attorneys Hodge et. al. conclude that denying federal funds from sanctuary cities may be unconstitutional in a fashion similar to the ACA. They also present a substantial concern about preemption beyond than its superficial incompatibility with sanctuary cities: “preemption plus” tactics used by the federal government can have significant harmful effects on public health innovations, particularly regarding the ways in which they limit state and local governments’ abilities to legislate and regulate on public health issues in their own jurisdiction.<sup>10</sup> When state or local governments enact sanctuary policies, they are acting based on their own public safety needs. Acting on which federal preemption would be fatal.

The Supreme Court has ruled on preemption in a recent case about sports gambling, *Murphy v. National Collegiate Athletic Association*.<sup>11</sup> The court held that Congress lacks the authority to compel states to directly require or prohibit enforcing federal programs. Additionally, it prevents the federal government from prohibiting state or local jurisdictions from enacting new policies. Although this case regarded legislation on sports gambling schemes, the underlying principles of federalism engrained in the opinion also apply to sanctuary city policies. The Supreme Court here ruled that preemption policies may not simply point to the Supremacy Clause as the source of the constitutionally prescribed power which is attempting to preempt the state law. In the words of Justice Samuel Alito, for a statutory provision “to preempt state law, it must [...]

<sup>10</sup> JAMES G. HODGE, JR., *et.al*, Public Health “Preemption Plus”, 45 *Journal of Law, Medicine, and Ethics* 156 (2017).

<sup>11</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, (2018).

represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do”.<sup>12</sup> Justice Alito also affirms that the preemption must be based on a regulation of the conduct of *private citizens*, not states themselves. Federal regulation of sanctuary policies aims toward the state and local entities themselves, rather than the citizens who reside in them. Therefore, according to the explanations of preemption and dual sovereignty in *Murphy*, current attempted federal regulation of sanctuary cities is unconstitutional.

### III. FEDERAL GOVERNMENT ATTEMPTS TO LIMIT SANCTUARY CITIES

In *City of New York v. United States*<sup>13</sup>, the Second Circuit Court of Appeals upheld the constitutionality of 8 U.S.C. 1373 against New York’s conflicting executive order E.O. No. 124, which prohibited its employees from providing information about immigration status to federal authorities. 8 U.S.C. 1373 prohibits state governments from limiting the voluntary actions of their employees. In upholding the federal statute, the Court took a more limited view of the Tenth Amendment; “States do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs.”<sup>14</sup> Nonetheless, sanctuary policies and 8 U.S.C. 1373 have coexisted since *City of New York* because the sanctuary policies do not expressly prohibit federal enforcement of immigration policy and 8

<sup>12</sup> *Ibid.*

<sup>13</sup> \*Not to be confused with *New York v. United States*

<sup>14</sup> *City of New York v. United States*, 179 F.3d 29, (2nd Cir. 1999).

U.S.C. 1373 limitedly bars states from prohibiting their officials' personal, voluntary action. However, the introduction of H.R. 3003 which threatens loss of federal funding for noncompliance, should not be met with the same constitutional welcome. Rather than protecting the freedom of state officials, as is the purpose of 8 U.S.C. 1373, H.R. 3003 commands compliance with federal immigration law with the threat of the loss of federal funding. By commandeering the regulatory process of the states, H.R. 3003 should be ruled unconstitutional if signed into law.

Another avenue by which the federal government has attempted to regulate sanctuary city policies is through the President's power to issue Executive Orders, specifically President Trump's Executive Order No. 13768. Effectively, the President attempted to refuse federal funding from states incompliant with 8 U.S.C. 1373 similar to H.R. 3003. As such, E.O. No. 13768 was struck down by the U.S. District Court for Northern California. Furthermore, the executive branch has no authority to wield the legislature's power over the purse. The court used this stark violation of federalism in its decision to overturn the executive order in *County of Santa Clara v. Trump* in 2017. If Congress does not have the constitutional grant of power to legislate on the regulation of sanctuary cities, the President cannot attempt to gain control over and use a power not granted to him while attempting to accomplish the same goals.

#### IV. CONCLUSION

In light of the powers reserved to the states by the Tenth Amendment, neither preemption nor the supremacy clause justifies the coercion currently being attempted by the federal government. Sanctuary cities are protected by the Tenth Amendment, and actions by the federal government to withhold enforcement funding to states who wish not to aid in enforcement of federal regulations are unconstitutional.

In this period of dual sovereignty as the prevailing interpretation of federalism, sanctuary cities must be within the sphere of state sovereignty protected by the Tenth Amendment from federal commandeering. In its ideal form, the judicial branch of government should be a non-biased arbiter on issues of law. It is for this reason that the Framers of the Constitution chose not to have Supreme Court Justices elected by popular vote and to allow them to serve life-long terms. In the face of social change and stark ideological affiliations, the Court should remain the stable branch of government. However, this ideal becomes problematic in real-life applications, and the issue of sanctuary policy highlights one of the most prominent flaws. The justices who voted to limit federal power on issues such as handguns and sports gambling in *Printz* and *Murphy* are the same justices who advocate for a strong national regulation of immigration. This inconsistency reveals a problem, as the current political climate influences the judicial branch of government, turning it from the ideal, unaffected branch into another political party scheme. In reality, 8 U.S.C. 1373 can coexist with current sanctuary policy; there is no need for further federal

intervention into these policies. In fact, further entanglement should be deemed unconstitutional by the Court based on its own established precedents.

**DARK PROVENANCE: RESTITUTION FOR NAZI-LOOTED ART**

*Tanner D’Ortenzio*

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INTRODUCTION

What if Adolf Hitler’s art had gained him admission to an art school? This question, pondered by historians and inquisitive minds alike, has garnered a multitude of books, articles, and discussions. As tantalizing as this possibility may seem, the fact of the matter is that the monstrous ruler of the Third Reich used this failure as fuel to systematically seize or demolish all forms of art and culture deemed corruptive to the German people. At the time, these seizures posed few legal ramifications due to two major factors. To begin with, the owners of this confiscated art were in no position to fight these unjust acts, and to deepen their struggles, Nazi officials acquired these possessions “legally” through means of coercion and intimidation. Current investigations performed by archivists, as valuable as they may be, will never reflect the enormous amount of art and valuables that were lost during the second great war. Estimates for the value of art lost or stolen by the Nazi

regime in Poland alone falls at around \$20 billion dollars.<sup>1</sup> Work towards the restitution of art by lawyers, art historians, and archivists alike will continue for decades to come. The goal of this article is to focus on two court cases involving works created by the famed expressionist, Egon Schiele. Utilizing the precedent established by these rulings, this article argues for the absolute restitution of the fine art stolen by the Nazi Regime, as well as the application of the 2016 Holocaust Expropriated Art Recovery Act (H.E.A.R. Act) to all future cases.

Fritz Grunbaum, a Jewish cabaret performer and adamant opponent of the Nazi regime, amassed quite the collection of modern art during his time. Grunbaum owned over 400 pieces of art, 81 of those being created by Schiele, placing the Jewish art collector within the greedy gaze of the Nazi Regime.<sup>2</sup> Consequently, the horrors of the Holocaust left the Grunbaum family with “nothing left [and] no estate proceeding for inheritance.”<sup>3</sup> In turn, the expressionist’s works of art were placed in the wrong hands, leading to a lengthy legal battle over the ownership of Schiele’s “Woman in a Black Pinafore” (1911) and “Woman Hiding her Face” (1912). Another case of the same tragic origins occurred in Vienna in 1938 to an Austrian art gallery owner, also of Jewish descent. The following sixty-three-year legal battle over the ownership of famed artist Egon Schiele’s Portrait of Wally has made

<sup>1</sup> *Rosjanie oddają skradzione dzieła sztuki* [Russians Give Back Stolen Works of Art], wyborcza.pl, (Oct. 8, 2007), <https://wyborcza.pl/1,75399,4554829.html>.

<sup>2</sup> *Reif v. Nagy*, JUSTIA: US LAW, (July 9, 2019), <https://law.justia.com/cases/new-york/appellate-division-first-department/2019/161799-15-8172.html>.

<sup>3</sup> *Id.*

significant waves in the field of art law. Both of these cases provide us with guidance on how to treat the ownership of looted art in the future, as well as how to apply the Holocaust Expropriated Art Recovery Act of 2016 to future cases that are sure to arise.

## I. ORIGINS OF THE ABHORRENCE

In Hitler's autobiographical manifesto *Mein Kampf*, he speaks on his love of art and the application process for the Academy of Fine Arts - Vienna, even going so far as to brag about how confident he was on passing the entrance exam.<sup>4</sup> Unbeknownst to young Adolf, his work was described as "utterly devoid of rhythm, color, feeling, or spiritual imagination... painful and precise draftsmanship; nothing more."<sup>5</sup> Many of the popular forms of art at the time, such as Dada, Surrealism, and Expressionism, stood in stark contrast to the unimaginative nature of Hitler's artistry. These same forms of art led to his rejection from art school, sealing his fate and instigating his abhorrence of modern art. Additionally, this contrast would cement a lasting impression in the future dictator's mind, playing an important role in the Nazi Party's future seizure of art.

The legal precedent established by the Third Reich stood in firm defense of Adolf Hitler's artistic preferences. His disdain for modern art bled into all genres, not just Jewish-owned pieces. This hatred evolved into law, leading to the mass confiscation of Jewish-owned works of art which is still being remedied today. These seizures were fueled by the idea of "Aryanization" and the erasure of "degenerate art," driven by Hitler's desire for "new cultural and artistic

<sup>4</sup> ADOLF HITLER, *Mein Kampf* 24 (1925).

<sup>5</sup> JOHN GUNTHER, *Inside Europe* 1 (1936).

creativity to arise in Germany.”<sup>6</sup> Thus, the "folk-related" and "race-conscious" art characteristic of Nazi culture was to replace what he called the "Jewish decadence of the Weimar Republic.”<sup>7</sup> Adolf Hitler was infatuated with Roman and Greek art, seeing it as an embodiment of the racial identity that he wanted to recreate in his society.<sup>8</sup> The ruler of the Third Reich went so far as to make this artistic preference into law, believing that “modern art was an act of aesthetic violence by the Jews against the German spirit.”<sup>9</sup> Jewish artists such as Max Liebermann and Ludwig Meidner received the bulk of this aesthetic attack, but Hitler “took upon himself the responsibility of deciding who, in matters of culture, thought and acted like a Jew.”<sup>10</sup>

## II. MASS CONFISCATIONS AND DEGENERACY IN THE EYES OF THE THIRD REICH

The confiscation and Aryanization of art and culture began as early as 1933,<sup>11</sup> with the Nazi party declaring German museums to be clean of degeneracy by 1938, the same year as the infamous pogrom known as the “Night of

<sup>6</sup> Anne Rothfeld, *Nazi Looted Art: The Holocaust Records Preservation Project*, PROLOGUE MAGAZINE, 2002, <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html>.

<sup>7</sup> *Id.*

<sup>8</sup> Alastair Sooke, *The Discobolus: Greeks, Nazis and the body beautiful*, BBC: CULTURE (Mar. 24, 2015), <http://www.bbc.com/culture/story/20150324-hitlers-idea-of-the-perfect-body>.

<sup>9</sup> HENRY GROSSHANS, *Hitler and the Artists* 86 (1983).

<sup>10</sup> *Id.*

<sup>11</sup> Rothfeld, *supra* note 6.

Broken Glass.”<sup>12</sup> By that point, the idea of degeneracy was firmly rooted in Nazi ideals, with forms of modern art such as surrealism, cubism, and impressionism having no place in Hitler’s Third Reich. The Nazi regime went so far as to deem any atonal or jazz-influenced music as forms of decadence, further cementing their propagandist control of German culture.<sup>13</sup> In an attempt to further develop a societal detestation for degenerate art, the regime commissioned an exhibit in Munich “in order to ‘educate’ the public on the ‘art of decay.’”<sup>14</sup> The regime’s intentions went beyond racial prejudice and attempts at societal transformation, additionally using the seized art as a form of revenue to fund the Nazi war-machine.<sup>15</sup>

To streamline the mass confiscations required to carry out this objective, the German government issued the Decree for the Reporting of Jewish-Owned Property, calling for all Jews born in either Germany or Austria to report all property worth more than U.S. \$2,000 at the time.<sup>16</sup> This decree by the Nazi regime was an attempt to

<sup>12</sup> *Nazi Germany 1933-1939: Early Stages of Persecution*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/1933-1939-early-stages-of-persecution/>.

<sup>13</sup> Jackie Metzger, *The Third Reich: Classical Music and the Nazi Leadership, 1933-1945*, THE WORLD HOLOCAUST REMEMBRANCE CENTER, <https://www.yadvashem.org/articles/general/reich-music.html>.

<sup>14</sup> *Degenerate Art*, THE MUSEUM OF MODERN ART, <https://www.moma.org/calendar/exhibitions/3868>.

<sup>15</sup> *Id.*

<sup>16</sup> Lorraine Boissoneault, *A 1938 Nazi Law Forced Jews to Register Their Wealth—Making It Easier to Steal*, SMITHSONIAN MAGAZINE (Apr. 26, 2018), <https://www.smithsonianmag.com/history/1938-nazi-law-forced-jews-register-their-wealthmaking-it-easier-steal-180968894/>.

legitimize and legalize the transfer of Jewish property into Nazi hands. This law was inhumane, forcing Jewish citizens to condense the substance of their lives into mere numbers for Nazi officials to abuse and exploit. The detrimental repercussions of this act will continue to impact the modern artistic community until all looted pieces are returned to their rightful heirs.

The Decree for the Reporting of Jewish-Owned Property provided Nazi officials with a complete list of valuables to peruse for their personal collections. This bank of information gave them the ability not only to confiscate any work of art they pleased, but to legally “purchase” these pieces through threats of violence, imprisonment, or outright coercion. This decree put forth by the Nazi regime poses ongoing problems for scholars, lawyers, and rightful heirs alike. The “legal” transactions that came from this unjust act place works of art such as Egon Schiele’s “Portrait of Wally,” “Woman in a Black Pinafore,” and “Woman Hiding her Face” within an intricate web of legal battles. The 2016 H.E.A.R. Act aims to settle these conflicting claims of ownership and establish a precedent of returning works of art to the right individuals.

### III. “Portrait of Wally”

One specific instance of this occurred in Vienna to a Jewish art gallery owner named Lea Bondi. After Bondi sold her gallery to Nazi official Friedrich Welz, possibly due to coercion or intimidation,<sup>17</sup> Welz followed in the footsteps

<sup>17</sup> Raphael Contel et. al, *Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum*, ART-LAW CENTRE: UNIVERSITY OF GENEVA, [https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-](https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea)

of the Führer and attempted to further Aryanize Bondi's former gallery. In addition to Bondi's gallery, Welz purchased more of Egon Schiele's artwork from Dr. Heinrich Rieger, another Austrian-born Jew who worked as an art collector.

After the U.S. occupation of Austria in 1945, Friedrich Welz was arrested as a Nazi collaborator, and all of his property, including Schiele's "Portrait Of Wally," was confiscated by the United States Armed Forces.<sup>18</sup> On par with U.S. policy at the time, the Reparations, Deliveries, and Restitution Division of the United States returned the stolen paintings to the Bundesdenkmal, or the Austrian Federal Office for the Preservation of Historical Monuments.<sup>19</sup> This was a common act at the time; "...rather than return work to each heir, the allies decided give the paintings back to the rightful governments (which often were still anti-Semitic) for ultimate restitution."<sup>20</sup> In turn, the Bundesdenkmal returned all of the Schiele works in their possession to the heirs of Dr. Rieger. This mistake concerning the rightful owner of the piece caused Schiele's "Portrait of Wally" to fall into the wrong hands once more when the Rieger heirs sold the paintings to the Österreichische Galerie Belvedere, a famous Austrian Art Museum in Vienna.

bondi-and-leopold-museum.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Isaac Kaplan, *3 Cases That Explain Why Restituting Nazi-Looted Art Is So Difficult*, ARTSY (Jul. 5, 2017), <https://www.artsy.net/article/artsy-editorial-3-cases-explain-restituting-nazi-looted-art-difficult>.

Meanwhile, Mrs. Bondi still lived in London and sought out the advice of a Schiele expert by the name of Dr. Rudolf Leopold in hopes that he could locate her beloved “Portrait of Wally.” In an act of pure deceit, “Dr. Leopold told her it was in the Galerie Belvedere [and] that it would be impossible to retrieve. However, Leopold [then] turned around and acquired the ‘Portrait of Wally’ from the gallery in exchange for other works.”<sup>21</sup> Many years passed, and Mrs. Bondi died in 1969 after having never attempted to retrieve her painting again.

This story was brought back to life when Schiele and another famous artist’s paintings from Leopold’s private collection arrived at the New York Museum of Modern Art in 1997 for an exhibition. Three days after the exhibition, the New York County District Attorney issued a subpoena claiming that the painting was stolen from the Bondis in 1938. Unfortunately, this subpoena was in direct violation of section 12.03 of New York’s Arts and Cultural Affairs Law, which seeks to protect the free flow of art around the world by prohibiting the seizure of any form of fine art while on exhibition. Based on this New York law, the subpoena was shut down by the state courts.<sup>22</sup>

A few short days later, United States Magistrate Judge James C. Francis filed for a seizure of the “Portrait of Wally” instigating twelve years of legal conflict. A trial was set to take place in July of 2010, but shortly before the proceedings began, Dr. Leopold passed away. As unfortunate as his death was, it allowed for smoother negotiations between the Bondi heirs and the Leopold Foundation, eventually leading to a settlement of \$19

<sup>21</sup> *Id.*

<sup>22</sup> N.Y. ARTS & CULT. AFF. § 12.03 (1991).

million dollars as their restitution for the loss of this painting. In addition to this settlement, the Schiele painting would stay in Austria.<sup>23</sup> This case is a colossal milestone in the effort for absolute restitution of looted art, establishing a legal precedent that mandates the return of art to its rightful heirs. In this specific case, the Bondi heirs settled on \$19 million as their restitution, but future cases will look to this series of events as an example of how to treat stolen art.

#### IV. “WOMAN IN A BLACK PINAFORE”

AND

#### “WOMAN HIDING HER FACE”

During the annexation of Austria, both Fritz Grunbaum and his wife Elizabeth Grunbaum fell victim to the horrors committed by the Nazi regime. Mr. Grunbaum was arrested and sent to the Dachau Concentration Camp in 1938, while Mrs. Grunbaum was evicted from their apartment and sent to live in the “collective Jewish residences, a euphemism for “ghetto.””<sup>24</sup> As part of the Decree Regarding the Reporting of Jewish Property, Nazi officials forced Mr. Grunbaum to grant the power of attorney to his wife during his time in the concentration camp. After the war broke out in 1939, Mrs. Grunbaum was required by law to update the family's property declaration before her forced imprisonment at the Maly Trostinec death camp. As well as this property declaration, Mrs. Grunbaum was forced to permit her family's art

<sup>23</sup> *United States v. Wally* 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

<sup>24</sup> *Reif v. Nagy*, JUSTIA: US LAW, (July 9, 2019),

<https://law.justia.com/cases/new-york/appellate-division-first-department/2019/161799-15-8172.html>.

collection to be inventoried by a Nazi official.<sup>25</sup> After her belongings were reviewed, “Grunbaum's entire art collection was deposited with Schenker & Co., A.G., a Nazi-controlled shipping company, and marked for export.”<sup>26</sup> Elizabeth Grunbaum was then murdered at Maly Trostinec, followed by Fritz Grunbaum’s murder at the hands of the Nazi regime at Dachau in 1941. The

Grunbaums were succeeded by Elizabeth’s two siblings: Elise Zozuli, the only heir to the family to survive the horrors of the Holocaust, and Mathilde Lukacses, who fled to Belgium before the war with her husband Sigmund.<sup>27</sup> Forced into compliance just as the Grunbaums were, Mathilde and Sigmund Lukacses had their properties inventoried, with no official claim to the Grunbaums’ property in their inventory.<sup>28</sup>

After the war ended, Mathilde Lukacses applied to an Austrian court to declare her sister’s death and to certify herself as her heir. However, she decided to withdraw her application only a month later.<sup>29</sup> Sixty-five works by Schiele then resurfaced at the Gutekunst & Klipstein art gallery in Switzerland, “put on sale...almost immediately after the window for claims made in Austria for Nazi looted art closed, on July 31, 1956.”<sup>30</sup> In 1959, Mathilde made a claim for restitution on behalf of her sister but was denied when the German government requested proof of

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

inheritance.<sup>31</sup> Decades later in 1999, Milos Vavra, descendant of Elise Zozuli and direct descendant of the Grunbaums, along with Leon Fischer, second cousin to Elizabeth Grunbaum, filed a claim of restitution for their family's collection in an Austrian court. Timothy Reif and David Fraenkel, the present-day heirs of the Grunbaums, became co-executors of the estates of Fischer and Vavra upon their deaths.<sup>32</sup>

Time passed, and the two Schiele paintings in subject resurfaced in 2005 when the defendant, Richard Nagy, purchased 50% of the share in the Schiele work "Woman in a Black Pinafore" from the Thomas Gibson Fine Art gallery. After learning about the ambiguity surrounding the work and its dark provenance, Nagy decided to void his interests in the painting. Following this decision, Richard Nagy received news of a case concerning a similar Schiele work.

In *Bakalar v. Vavra*, a New York circuit court applied Swiss law to decide that David Bakalar purchased the Schiele work "Seated Woman with Bent Left Leg" in good faith with no suspicious circumstances, allowing him to maintain ownership of the piece.<sup>33</sup> The precedent established in this case walked a fine line between restitution for the work's rightful heirs and the recent purchaser's right to own the painting. The legal standards of Swiss law found that if an individual purchased a piece of stolen art in good faith and under no suspicious circumstances, they are the rightful owner of said piece.<sup>34</sup>

<sup>31</sup> *Id.*

<sup>32</sup> Reif v. Nagy, N.Y. Slip Op. 31781 (N.Y. 2018)

<sup>33</sup> Bakalar v. Vavra, 819 F. Supp. 2d 293 (S.D.N.Y. 2011)

<sup>34</sup> *Id.*

Good faith can be defined as an act in which an individual purchases a work of art with no intention to harbor it from its rightful owner, due to limited of knowledge surrounding its provenance. Additionally, a lack of suspicious circumstances can be defined as the absence of any evidence of the theft or mistreatment of the work of art. Thus, the decision in *Bakalar v. Vavra* kept the work in the plaintiff's possession.<sup>35</sup> This led Nagy to reacquire his share in the "Woman in a Black Pinafore" painting. Nagy bought the second painting in subject, "Woman Hiding her Face," in 2013 on the basis that his purchase would be declared invalid if the Grunbaum heirs' declaration of theft was proven. The Grunbaum heirs learned of the paintings' existence in 2015 when Nagy placed both works in a New York exhibit, beginning the battle for the possession of these famed works of art.<sup>36</sup>

The New York appellate court issued a unanimous ruling in favor of the defendants, Timothy Reif and David Fraenkel, returning the two Schiele paintings to their rightful owners.<sup>37</sup> Ruling against Richard Nagy, the court cited the Holocaust Expropriated Art Recovery Act of 2016 as part of the decision. The two main purposes of the H.E.A.R Act are as follows:

<sup>35</sup> *Id.*

<sup>36</sup> *New York judge awards Egon Schiele art to Holocaust heirs*, BBC NEWS (Apr. 6, 2018), <https://www.bbc.com/news/world-us-canada-43665737>.

<sup>37</sup> *Reif v. Nagy*, N.Y. Slip Op. 31781 (N.Y. 2018).

- (1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration, and
- (2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis [during the Holocaust] are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.<sup>38</sup>

The recovery of “Woman in a Black Pinafore” and “Woman Hiding her Face” is valued at around \$5 million dollars, a massive return for Timothy Reif and David Fraenkel.<sup>39</sup> Justice Charles E. Ramos, who presided over the case, determined that “a signature at gunpoint cannot lead to a valid conveyance.”<sup>40</sup> The decision made in the *Reif v. Nagy* case serves as a testament to the New York appellate court’s rightful use of the H.E.A.R. act. Due to the circumstances surrounding the initial loss of these beautiful works of art, the court resolved this case exactly how the law and legal precedent dictates: in a just and fair manner.

<sup>38</sup> Holocaust Expropriated Art Recovery Act of 2016, 114 P.L. 308, 130 Stat. 1524 (2006).

<sup>39</sup> Anna Brady, *London dealer ordered to return Egon Schiele works worth \$5m to heirs of Holocaust victims*, THE ART NEWSPAPER (Apr. 6, 2018),

<sup>40</sup> *Id.*

## CONCLUSION

The legality surrounding Nazi-looted art is as complex as it is intriguing. Almost eighty years of loans, sales, and seizures of various pieces of fine art has created an intricate web of questions. Raymond Dowd, lawyer for the Grunbaum heirs, argued in favor of this ruling, stating that the court was taking additional steps to correct “the largest mass theft in history.”<sup>41</sup> These cases are pivotal in setting the precedent for future art restitution cases. With the implementation and further amendment of the H.E.A.R. Act, more and more works of art may be returned to their rightful owners. One sentiment can be universally agreed upon: the acts committed by Hitler and the Nazi Party are inexcusable. Art collectors in the United States have a legal and moral obligation both to uphold the tenets of the H.E.A.R. Act and to ensure that the restitution of Nazi-looted art is conducted in a just and fair manner. Forming an “an essential ingredient to empowering the hearts of [the] people,”<sup>42</sup> art has the ability to change the very course of history, the ability to change our world.

<sup>41</sup> Holocaust Expropriated Art Recovery Act of 2016, 114 P.L. 308, 130 Stat. 1524 (2006).

<sup>42</sup> Afzal Ibrahim, *What Is Art? Why is Art Important?*, THE ARTIST BLOG, <https://www.theartist.me/art/what-is-art/>.



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