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BYU’s Pre-Professional Advisement Office
Kris Tina Carlston

We would also like to thank those who have made the printing and distribution of the journal possible:

Rawlinson Family Foundation
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The 2021 Brigham Young University Prelaw Review (Journal) continues to demonstrate Brigham Young University’s commitment to excellence in scholarship and student development. Throughout this past year, it has been a privilege to work with ambitious students who want to produce the best possible undergraduate legal journal.

Continuing the vision of the Journal, this year’s staff has worked arduously to present professional and current legal scholarship. As undergraduates, the depth and breadth of the addressed topics required that these students do much more than just edit. The authors and editors researched to find court cases and law review articles to support their arguments. During the year, as new information became available, authors and editors continually updated and refocused their arguments to provide timely discussions of the current issues. Consequently, each of these articles reflects the latest decisions from the courts and scholarship from the legal community.

The goal is always to produce a reputable legal journal. However, this experience also provides the opportunity for the staff to prepare themselves as members for future professional scholarship and work in the legal field. Each student has become proficient in the Bluebook system of legal citations and all have spent countless hours editing and source checking each other’s legal articles. The students have also learned to analyze pressing issues, incorporate legal citations, and present cogent legal arguments, all while receiving training in journal publishing. These students leave the 2021 edition of this Journal possessing the ability to excel in law and other professional pursuits.

We continue to be grateful for the endowment from the Rawlins Family Foundation that funds the Journal and the support of Brigham Young University’s resources to create and print this publication. As you read the topics addressed in this Journal, I’m sure that you will agree that this is an impressive work produced by these
BYU undergraduate authors and editors. It continues to be a pleasure to work with such fine individuals and students on a daily basis.

Kris Tina Carlston, JD, MBA
Director—Pre-Professional Advisement Center
Prelaw Advisor
EDITOR IN CHIEF & MANAGING EDITOR’S NOTE

During this unprecedented year, we have been honored to continue a tradition of scholarship with the publication of the 2021 edition of the Brigham Young University Prelaw Review. This year’s topics are grounded in issues on the cutting edge of legal thought, ranging from the legal liability of corporate supply chains to the thorny conundrum of internet censorship, and from the intersection of property law and religious liberty to the question of statehood admission.

This publication is a testament to the hard work and dedication of this year’s staff. Authors and editors were selected in July 2020, and since that time, they have honed their ideas and claims through devoted study and healthy debate. After selecting their topics, authors and editors worked together to research and craft their papers. They effectively navigated the hurdles of new case law and counter opinions, adapting their arguments to present the soundest claims possible. Ultimately, these articles represent the academic resilience and undeterred scholarship of the authors who wrote them and the editors who polished them. We are confident that each piece will bring new awareness and deeper understanding of pertinent legal issues of our day.

We would like to extend our gratitude to all who contributed to this year’s volume of the Prelaw Review. Some staff members sought out the assistance of professors and legal scholars to glean expert insight into specific legal disciplines. Without the assistance of these professors and scholars, this final product would not have been possible, and we are grateful for the generous donation of their time. We also extend a special thanks to the members of the editorial board—Alixa Brobbey, Jared Lockhart, and Kaity Marquis—for their patience, dedication, and honest feedback that contributed to each author’s paper and the success of the review as a whole. Additionally, we express immense gratitude to Kris Tina Carlston for her unceasing efforts to uphold the rigor and prestige of this review,
despite the curveballs of this tumultuous year. She has been the most
tremendous asset to our team. We would also like to thank the fac-
ulty and staff of Brigham Young University’s J. Reuben Clark Law
School for the many resources they provided us. Lastly, we express
appreciation to Laura Bean who formatted all the papers for final
production.

It is with great pleasure that we present the 2021 edition of
the Brigham Young University Prelaw Review. We wish all those
involved the best of luck in all endeavors they will pursue.

Denise Han
Editor in Chief

Alexis Watson
Managing Editor
The subject of immigration is one that is becoming an increasingly controversial point of debate and deliberation. Many people acknowledge the difficulty of attaining legal citizenship in this country and the subsequent influx of undocumented immigrants as a result. Despite the “unalienable rights...of life, liberty, and the pursuit of happiness” guaranteed by the Declaration of Independence, many living in America are deprived these freedoms because of their status as an immigrant.³

Many of these rights are granted through the possibility of education. Accessible education for children provides the opportunity to contribute to one’s community. As it stands, states cannot deny children a public K-12 education based on immigration status. However, similar protections are not guaranteed for higher education. Currently, Deferred Action for Childhood Arrivals (DACA), a United States immigration policy, allows some eligible individuals with unlawful presence in the United States the opportunity to work and receive an education. This policy does not, however, guarantee access to in-state tuition rates of public universities. This paper

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1 Christian Bowcutt is studying English at Brigham Young University with a minor in Spanish. He plans to attend law school after graduation. He would like to thank his co-author Eliza Allen, as well as the editorial staff of the BYU Pre-Law Review.

2 Eliza Allen is a junior at Brigham Young University majoring in Sociology and minoring in Editing. She will be attending graduate school in Fall 2022. She would like to thank her co-author Christian Bowcutt as well as Alixa Brobbey of the BYU Pre-Law Review Editorial Staff.

3 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
analyzes the reasons why DACA recipients should be guaranteed in-state tuition as a part of their legal right to higher education.

I. BACKGROUND

America has a rich history of immigration. Immigration has continually been the subject of much debate and scrutiny. The children of undocumented immigrants suffer from a lack of stability in immigration law. These children are left underprivileged in a country that prioritizes “liberty and justice for all.” The inequality is apparent in the educational disparities DACA recipients face in the United States, namely denial of admissions, lack of financial aid, and the inability to pay in-state resident tuition. This paper will focus on in-state resident tuition.

Tuition costs are at record highs. College tuition on average has risen 78% from 1978 to 2010. This number continues to rise. Thus, receiving financial aid is increasingly mandatory. As costs continue to rise, DACA recipients, who are excluded from the benefits of in-state tuition, will be at a perpetual disadvantage. This issue has been at least partially resolved in the context of a K-12 education. In the court case Plyler v. Doe, the Supreme Court ruled that all children, regardless of immigration status, shall have the same right to access K-12 Education. Thus, states were federally prohibited from denying students access to free education and from charging tuition based on citizenship status. Justice Brennan’s ruling used the Equal Protection Clause in the Fourteenth Amendment to state that


5 Citizens who have lived in a single state for many years are defined as residents. Students who move from one state to another solely for the purpose of attending college are considered nonresidents. Typically, states will allow a nonresident to become reclassified as a resident after a certain period of time, usually nine to twelve months; see Michael A. Olivas, 30 J. Coll. Univ. L. 435, 438 (2004).


denying an education would create a “lifetime of hardship” and a “permanent underclass” since “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education.” While this was a victory for K-12 students, states have proceeded to restrict access to affordable higher education for DACA recipients by denying in-state tuition rates.

In recent decades, legislation has permitted states to withhold in-state tuition rates from DACA recipients. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which changed the federal social welfare and health benefits for undocumented immigrants, denied certain higher education benefits to undocumented students. This required states to pass their own legislation if they wanted to permit DACA recipients to pay in-state tuition rates.

The Development, Relief, and Education for Alien Minors (DREAM) Act was introduced in 2001 which would repeal the section of the IIRIRA that allows states to discriminate against undocumented students on the definition of residency for the purpose of in-state tuition. Since its initial introduction, several forms for the DREAM Act have been proposed, but none have passed.

The majority of states are still yet to guarantee the right to in-state tuition rates to many undocumented students who are eligible for DACA and residing in their state. Unless federal legislation guarantees the right to affordable higher education to all DACA recipients, there will continue to be a “permanent underclass” that is inhibited only by delayed action by government.

The Deferred Action for Childhood Arrivals (DACA) program was introduced in 2012 by a Department of Homeland Security (DHS) memorandum to provide the possibility to work and temporarily remove the risk of deportation for eligible undocumented

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8 Id. at 223.
immigrants who had entered the United States as minors. DACA recipients are children of immigrant families who are allowed to reside in the United States for renewable two-year periods. Young people who meet the DACA requirements are granted a temporary deferment of deportation and are eligible for work authorization, Social Security numbers, driver’s licenses, and the opportunity to pursue higher education. Recipients are not, however, eligible for federal and most state financial aid, nor are they offered a path to citizenship. Likewise, DACA recipients are not guaranteed the discounted rates at public colleges offered to legal citizens residing in a state.

In September 2017, the DACA program was rescinded through a memorandum from the Department of Homeland Security despite approximately 800,000 active participants. The rescission has led to several federal court cases which have permitted existing recipients to continue in the DACA program without accepting new applications. On June 18, 2020, a 5-4 decision was issued by the U.S. Supreme Court which determined that the Trump administration had terminated the DACA program in violation of the Administrative Procedure Act. Meanwhile, the 652,880 active DACA recipients as of September 2019 were quite limited in the opportunities granted


them.\textsuperscript{16} Over one-third of DACA recipients were enrolled in college, and approximately one-fourth were simultaneously employed and enrolled in college. Because they were ineligible for federal aid and in-state tuition fees, these students had to finance their education otherwise.\textsuperscript{17}

As a result, thousands of students are struggling to attend college because states are not required to offer in-state tuition rates to immigrants residing in that state. Undocumented immigrants are guaranteed equal access to public education through high school, but despite the increasing necessity of a college education to obtaining decent employment and maintaining a good quality of life today, equally affordable education is not granted to DACA recipients in college. Therefore, Congress must pass federal legislation to guarantee undocumented students in-state tuition rates in order to ensure the rights guaranteed in the Equal Protection Clause of the Fourteenth Amendment which states that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{18}

\section{II. Proof of Claim}

\subsection{A. Current Legislation}

In 1975, a class action was filed against the revised education laws in Texas which denied enrollment and withheld state funds for the education of children not “legally admitted” to the country. When certain school-age children from Mexico were denied education, the case was filed to guarantee free public education to all. The district court ruled that these revised education laws were not meant to nor effective in keeping illegal aliens out of the State of Texas. The court

\begin{tabular}{l}
16 Daniel Alulema, \textit{DACA and the Supreme Court: How We Got to This Point, a Statistical Profile of Who Is Affected, and What the Future Hold for DACA Beneficiaries}, 7, J. on MIGRATION \& HUM. SEC., 123-130 (2019). \\
18 U.S. Const. amend. XIV, § 1. 
\end{tabular}
therefore ruled that denying education to undocumented children was not beneficial to the schools and that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{19} As Justice Brennan stated in this case, \textit{Plyler v. Doe}, inhibiting undocumented students from receiving an education creates a “permanent underclass” that is perpetually disadvantaged.

A similar ruling created precedence for this case when Justice Warren explained in \textit{Brown v. Board of Education} that education is perhaps the most important function of government and the foundation of good citizenship.\textsuperscript{20} Likewise in \textit{Plyler}, the Court explained that “education has a fundamental role in maintaining the fabric of our society”\textsuperscript{21} and “provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”\textsuperscript{22} The Court addressed the counterargument that certain rights can be denied to those who participate in unlawful conduct by stating that “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”\textsuperscript{23} A state could not discriminate “merely by defining a disfavored group as nonresident.”\textsuperscript{24} The court stated frankly, undocumented students are people “in any ordinary sense of the term” and are thus protected under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{25} The Supreme Court’s ultimate decision and reasoning behind it illustrates the basic tenants upon which the argument behind in-state tuition for undocumented students lies: undocumented students are people and are thus entitled to equal protection under the law to pay in-state tuition rates as do all other people within a state’s jurisdiction.

\textsuperscript{21} \textit{Plyer}, 457 U.S. at 203.
\textsuperscript{22} \textit{Id.} at 221.
\textsuperscript{23} \textit{Id.} at 220.
\textsuperscript{24} \textit{Id.} at 227.
\textsuperscript{25} \textit{Id.} at 210.
Phyler set the precedence for cases that would continue to grant access equal access to public education. In 1994, California voters passed Proposition 187 to deny undocumented students access to the state’s public schools and other social services. The proposed law would require that schools verify the immigration status of enrolled students, report suspected undocumented immigrants, and deny services. Legislation to authorize states to deny education to undocumented students failed in the Senate. Nevertheless, Arizona, Alabama, and Texas passed legislation which required schools to report undocumented students in order to estimate the financial burden. Meanwhile, Supreme Court cases like Regents of the University of California v. Bakke and Gratz v. Bollinger afforded equal opportunity to marginalized groups in education, furthering the progress toward available education for all.

The current protocol for dealing with undocumented students is a policy known as Deferred Action for Childhood Arrivals (DACA). DACA arose from an executive order signed by President Obama in 2012. Under this system, eligible children of illegal aliens can pay a fee every two years to defer deportation. Eligibility for DACA is extremely limited. Candidates must meet the following requirements, as well as others: Were under the age of 31 as of June 15, 2012; Came to the United States before reaching your 16th birthday; Have continuously resided in the United States since June 15, 2007, up to the present time; Were physically present in the United States on June 15, 2012; Had no lawful status on June 15, 2012; Are currently in school, have graduated or obtained a certificate of completion from high school; and, have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors. See CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), U.S. Citizenship and Immigration Services.

27 Id.
31 Eligibility for DACA is extremely limited. Candidates must meet the following requirements, as well as others: Were under the age of 31 as of June 15, 2012; Came to the United States before reaching your 16th birthday; Have continuously resided in the United States since June 15, 2007, up to the present time; Were physically present in the United States on June 15, 2012; Had no lawful status on June 15, 2012; Are currently in school, have graduated or obtained a certificate of completion from high school; and, have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors. See CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), U.S. Citizenship and Immigration Services.
Social Security card, and a driver’s license. However, there is no path to citizenship under this plan. Recipients are in a state of limbo, constantly hovering between legality and illegality. DACA recipients cannot fully participate in the economy. This creates overall deadweight loss in the economy and a perpetual lose-lose situation. DACA was suspended by the Trump administration, but after federal lawsuits challenged its rescission, the Supreme Court ruled in 2020 that this was in violation of the Administrative Procedure Act (APA), because it was done in an arbitrary and capricious manner.\(^\text{32}\) On January 20, 2021, President Joe Biden issued an executive order to reinstate DACA.\(^\text{33}\)

Even with the re-implementation of DACA which once again grants the right to work and receive a higher education to eligible minor immigrants, recipients are still limited access because of the financial burdens that they face. Undocumented students must rely upon policies adopted state-by-state or institution-by-institution to determine whether they can pay affordable tuition rates. Meanwhile, they receive fewer resources and networks.

Although most students in the United States attend a college institution with the support of federal and state loans, grants, and scholarships, most financial aid is not available to DACA recipients due to the Higher Education Act of 1965 (HEA) which states that only citizens and eligible non-citizens are eligible for federal financial aid.\(^\text{34}\) DACA recipients are not eligible. They must find alternative sources of financial support. The cost of tuition as a non-resident for DACA recipients makes financing higher education even more difficult.


\(^{34}\) Gabriel R. Serna et al., State and Institutional Policies on In-State Resident Tuition and Financial Aid for Undocumented Students: Examining Constraints and Opportunities, 25, EDUC. POL’Y ANALYSIS ARCHIVES, 1, 10 (2017).
In order to properly ensure the equal right to higher education that DACA recipients have been granted, in-state tuition must also be a guarantee for them in the state they reside. In the Plyler ruling, Justice Brennan explained that it should be up to Congress to address the social costs that occur when certain groups are denied their privileges. In doing so, he called upon the legislature to take action in implementing policy that would prevent the unequal access to higher education against the children of undocumented immigrants. Policy must be passed at the federal level in order to ensure that the Equal Protection Clause of the Fourteenth Amendment is, in fact, being executed for education throughout the United States.

B. Adversarial Concerns

One common argument opposing federal legislation granting all undocumented students in-state tuition is the notion that undocumented students and their families benefit from the state without contributing to it. However, undocumented persons pay property tax through normal rent and mortgages just like any other citizen, sales tax through normal spending, and even income tax through their employers.\(^{35}\) In fact, undocumented Americans paid $12 billion in 2007 to the Social Security Fund.\(^{36}\) DACA recipients are paying taxes and contributing to the economy through employment, yet they are denied certain federal benefits such as financial aid and the right to in-state tuition rates.

With merely 5-10% of undocumented students attending college, it is evident that the inaccessibility of higher education does not deter undocumented youth from staying in the country.\(^{37}\) Thus, it is in the best interest of the undocumented and the United States to


pass federal legislation granting in-state tuition to DACA recipients. DACA recipients will be able to obtain higher-paying jobs, consume more goods and services, and stimulate the economy. Far from being a burden, the undocumented student will be able to contribute more fully to the economy despite being the victim of archaic and cumbersome immigration policies.\(^{38}\) Undocumented college students are 20 to 30 percent less likely than lawful permanent residents to find local work after graduation. Meanwhile, the states with the most undocumented students gain the highest wages and highest state taxes. This goes to show that granting work and college opportunities to undocumented students financially benefits the state.\(^{39}\) In addition, access to in-state tuition rates is shown to reduce the number of undocumented immigrants living in poverty.\(^{40}\)

In *Plyler*, Justice Brennan acknowledged the financial implications of supporting undocumented students by saying “Modern education, like medical care, is enormously expensive, and there can be no doubt that very large added costs will fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools.”\(^{41}\) It should be noted that the Federal Government has previously excluded illegal aliens from several social welfare programs, such as the food stamp program, the Medi-

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38 The long-term fiscal impact of an immigrant depends upon the level of education achieved. Immigrants with more education have greater financial contributions towards their community. Undocumented immigrants that are depicted as net consumers (rather than contributors) of public services is a result of their low incomes and educational levels rather than merely their immigration status. See Jennifer L. Frum, *Post-Secondary Educational Access for Undocumented Students: Opportunities and Constraints*, 3, AM. ACAD., 81, 81-108.


41 *Plyer*, 457 U.S. at 253.
care hospital insurance benefits program, and other supplemental security income programs. Although referring to lower education, Justice Brennan explained that education is an essential human right and cannot be denied despite the possible cost implications. In fact, Justice Brennan declared that there was no evidence suggesting that immigrants entered the United States illegally for the purpose of a free education. In addition, Brennan explained that there was no evidence that excluding undocumented children from the rights of public education would improve the quality of education for others.

Notwithstanding, some states have still attempted to limit in-state tuition access to DACA recipients based on budgetary concerns. However, these claims have been largely refuted due to the fact that undocumented immigrants are net economic benefit to the country. Allowing DACA recipients access to in-state tuition increases their opportunity to succeed, and the United States can benefit economically from these contributions.

C. Federal Action

The precedents set by the case in *Plyler v. Doe*, which states that undocumented students are guaranteed the right to education, and the DACA program, which provides the opportunity to attend higher education to eligible children of illegal aliens, make clear the need for federal legislation to be passed to require all DACA recipients be eligible for in-state tuition rates, rather than paying what a non-resident would pay simply due to their status as an undocumented student. Texas, which was the first state to offer undocumented students financial aid, was one state which passed policy to provide in-state resident tuition to undocumented students who graduate high school in Texas, reside in the state for three years before graduation, and sign an affidavit declaring intent to apply for legal residency status. In doing so, Texas set a clear example of the policy that ought

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43 Serna et al., *supra* note 33, at 11.
to be implemented at a federal level as a part of the rights of DACA recipients.

One form of legislation proposed to support undocumented students was the Development, Relief, and Education for Alien Minors (DREAM) Act. This proposed act would create a path towards real citizenship for those children brought to the United States. It would do so by granting temporary citizenship for those who pursue military service or higher education. During that time, a person would be able to qualify for permanent citizenship by completing their higher education or military program. This act has yet to be passed. However, if all states offered in-state tuition to undocumented students then valid completion of higher education would be possible and therefore more youth would be able to achieve legal citizenship.

The DREAM act’s original intent was to defend undocumented immigrants against the effects of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) by repealing the section that allows states to discriminate against undocumented students on the definition of residency for the purposes of in-state resident tuition. In 1996, the IIRIRA was passed to deny higher education benefits to undocumented students. This act essentially re-segregated education benefits for undocumented students. As a result, states now have to pass legislation to allow in-state tuition for undocumented students. To date, twenty-one states have passed legislation granting this right.44 Thus, there is still much work to be done to guarantee equal protection under the law for undocumented persons. Passage of the DREAM Act would grant undocumented immigrants fair access to higher education so they can legally contribute to the nation’s economy.

Today, 65% of jobs in the United States require a form of higher education beyond merely a high school diploma.45 The enrollment of only 5-10% of undocumented students, then, is evidence of a


perpetuating, permanent underclass. This puts the vast majority of undocumented students at a disadvantage compared to their peers. Most undocumented students come from low-income families that do not have the resources available to pay full tuition for their children. Undocumented students who reside in a state ought to be guaranteed the same rights as any other resident. After all, the ruling of Plyler explained that an “illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State.”

Granting in-state tuition to undocumented students may not immediately contribute to the passing of laws such as the DREAM act, but it will help these students excel when this type of legislation does pass. Those who oppose granting in-state tuition often argue that doing so will deprive citizens of scarce education dollars. While funding for education is a major concern, the reality is that granting in-state tuition for undocumented students will have a minimal effect on each state’s financial situation. In fact, even in states with higher number of undocumented immigrants, undocumented students make up less than two percent of the overall student population.

The modification of the DACA program to guarantee the right to in-state tuition would prevent states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” Far from being a “permanent underclass,” these DACA recipients would be able to afford a higher education and secure the kind of job that would allow them to prosper in their community and the entire country. This was certainly the intent of creating a program like DACA. Similar to the federal protections endowed by Plyler v. Doe, federal legislation should be passed granting the right to in-state tuition to all persons in a state’s jurisdiction, including DACA recipients.

46 Gonzales, supra note 36, at 21.
48 Plyler at 227.
Although this would not resolve all financial aid issues for immigrants, it would significantly lower cost barriers for higher education.\textsuperscript{50} DACA was initially introduced in order to provide a way in which qualified undocumented immigrants could legally work and study in the states. This freedom is limited without a guarantee of affordable tuition. Without a federal guarantee toward higher education, it has been up to the state to take action to allow undocumented students to pay in-state tuition. Many states have resisted enacting measures to allow in-state tuition to all residents due to budgetary concerns. Not only is access to higher education a national economic benefit, but it is a right that all residents of the United States must be granted.\textsuperscript{51}

\section*{III. Conclusion}

The implementation of the DACA program allowed eligible children of illegal aliens who have resided in the United States the right to work and access to higher education, executing the rights set forth in the Equal Protection Clause of the Fourteenth Amendment. Yet, DACA recipients are not eligible for financial aid or in-state tuition fees, so the availability of higher education remains unequal. The case \textit{Plyler v. Doe} shows that education is necessary for social mobility. Free public education through high school is guaranteed even to undocumented students. Yet the same rights have not been extended through higher education, and accessibility for undocumented students is incredibly difficult without equal federal benefits.

Herein lies a concrete opportunity to help undocumented children, which is both economically beneficial and legally necessary. By guaranteeing in-state tuition to all eligible college students, the United States will raise a more educated and contributing generation which it owes to all under its jurisdiction. This education will pay dividends in these students’ future and in the future of the United States.

\begin{footnotesize}
\begin{enumerate}
\item \textit{E.g.} Johnson, \textit{supra} note 42, at 173.
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States. With higher education comes better employment and a higher income which in turn leads to more tax revenue through higher spending on goods and services and property taxes shifting from low rent payments to higher mortgage payments. Offering in-state tuition to DACA recipients is a necessary step to prevent discrimination of education on arbitrary terms.
In 1994, as a 19-year-old Black American pregnant woman, Kemba Smith was charged with intent to distribute 255 kilos of crack-cocaine. At the start of her college experience, Smith had become romantically involved with a man named Peter Hall who was a major drug dealer. She and many other witnesses described at trial that although Hall was initially charming and attractive, he was an incredibly abusive boyfriend. Both Smith and a friend Candace R. Jeter who knew Hall, testified that Hall had slapped, beaten, and choked Smith on multiple occasions as well as had yelled at her and threatened her. Hall was known to be so enraged by the littlest of things like seeing Smith simply talk to another man that he would beat Smith so severely that it resulted in visits to the emergency room. Smith experienced major abuse, but she still simultaneously felt initial loyalty and love towards Hall like many victims of domestic violence. Additionally, she was afraid to leave for fear of physical harm. This led to Smith becoming marginally involved in Hall’s drug conspiracies and performing small tasks for him like renting

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different apartments. Besides performing minor jobs, she did not actually transport drugs, receive direct profits from the drug conspiracies, or act as a leader in the conspiracy. When Hall was murdered, Smith was charged as a co-conspirator in the crime and was convicted for the full quantity of drugs involved in the conspiracy.

After Smith’s trial, the judge needed to determine if Smith qualified for downward departure on her sentence. Of the two main ways that a defendant can qualify for downward departure, the first option is usually difficult for low-level drug offenders to access. Termed “substantial assistance,” this option enables a reduced sentence if the defendant provides substantial and valuable information to the government. As Smith had little information to give, this option was not applicable. The second option, termed the safety valve, allows defendants downward departure if they can demonstrate that they meet five criteria including: they had little to no criminal history (4 or fewer criminal history points), did not use violence or a weapon in connection with the offense, were not an organizer or leader of the drug enterprise, provided the government with all the information they had, and the offense did not result in serious injury or death. Though Smith met most of these criteria, she was unable to qualify for the safety valve because she did not meet two of the conditions: she had possessed a firearm and had not initially cooperated with the government to the full extent.

Even though the abuse Smith experienced played a major role in her involvement in the drug crime, this abuse did not mitigate her inability to meet all the safety valve criteria because the safety valve did not consider or account for the effects of abuse. She was then sentenced to 24.5 years in prison—the strict mandatory minimum.

In addition to demonstrating problems that can occur because the safety valve does not fully consider abuse as a mitigating circumstance, Smith’s case also highlights the frequently problematic approach taken in sentencing court towards evidence of abuse. In Smith’s case, not only did the court largely dismiss extensive evidence

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of abuse that pointed to Smith’s duress, coercion, and damaged cognitive function, but the judge actually took the evidence of abuse that was presented as further evidence of Smith’s incrimination: “The court could not accept such a defense when Smith had dated Hall for such a long time and had witnessed Hall’s violent nature. In the court’s view, Smith understood and appreciated the criminality of Hall’s actions. The court did not believe that Smith committed the offenses solely out of fear.” Instead of considering the abuse Smith experienced as evidence of deep psychological fear, the court understood this abuse as evidence of her sustained experience with and knowledge of Hall’s character and violence. Smith’s abuse at the hands of Hall was used against her. In this instance, the judge’s assessment of the effects of abuse on Smith represents a misunderstanding of the real and powerful psychological effects of abuse on a defendant’s cognitive function and decision-making. Without input from psychologists and other mental health experts to speak to the extent to which this abuse would have influenced Smith, judges were not able to accurately consider how this abuse—evidence relevant to her culpability—affected Smith; subsequently, the court misinterpreted its effects in a way severely detrimental to her. Unfortunately, many other defendants, often women, find themselves in situations today similar to Smith’s because of the safety valve’s failure to adequately consider how abuse affects one’s culpability and because judges sometimes misunderstand the real psychological effects of abuse on a defendant’s decision-making.

Even though there is a gap in the way that abuse is considered during sentencing determination for drug offenses, efforts to alter the way these sentences are determined have often failed. Multiple attempts have been made to shift the role of determining safety valve qualification from judge to jury under Alleyne v. United States which held “that any fact that increases the mandatory minimum

7 Id. at 896.

is an ‘element’ [of the offense] that must be submitted to the jury.” 9

Repeatedly, lower appellate courts have held that Alleyne applies only to factors that increase a defendant’s minimum sentence and not to factors like the safety valve which reduce a defendant’s mandatory minimum; as such, courts have held that safety valve qualification is entirely a matter of judicial discretion. Functioning within this set precedent of judicial discretion, this paper proposes an added qualification to the safety valve that requires judges to proactively consult with psychologists and other mental health professionals when there is evidence of abuse presented. After consulting with psychologists and other mental health professionals, the judge will then be empowered to determine if the abuse played a significant role in the defendant’s inability to meet one of the five safety valve criteria. This paper proposes that the judge be allowed to override a single criterion that a defendant would not have met otherwise due to abuse suffered, enabling the defendant to qualify for the safety valve and subsequent downward departure.

By way of organization, this paper begins by first discussing the need for sentencing reforms that specifically looks at and considers abuse. This first section discusses how abuse tends to disproportionately affect women in incarceration, how the science suggests that abuse plays a major role in cognitive function, and how the majority of sentencing reforms have not been able to sufficiently address this gap. Second, this paper explores more thoroughly the process of determining a defendant’s qualification for the safety valve in order to better understand how the safety valve’s parameters do not fully encompass the effects of abuse on a defendant. Third, this paper summarizes the cases that have foundationally confirmed safety valve determination as a matter of judicial and not jury discretion in order to understand the tight confines of precedent within which reforms must be made. Fourth, this paper presents in further detail its two-part qualification to the safety valve that functions within the set precedent and 1) requires judges to consult with mental health professionals in situations where evidence of abuse is present and 2) enables judges to allow a defendant to meet the safety valve even

if they would not initially have met one of the criteria due to abuse. Fifth, this paper considers two cases where different levels of abuse played a role in the defendant’s actions in order to demonstrate the viability of this prescription across a broad range of scenarios. Sixth, this paper presents final reasons why this prescription would prove beneficial and would be particularly effective.

I. Why Focus on Abuse?

The safety valve’s failure to consider the role of abuse in a defendant’s criminal offense disproportionately punishes women who are statistically more likely to be involved in criminal drug activity due to intimate partner violence. In 2017, the Center for Disease Control published their findings from a National Intimate Partner and Sexual Violence Survey that 1 in 4 women and 1 in 9 men in the U.S. experience sexual violence, physical violence, and/or stalking by an intimate partner in their lifetime. Although both sexes are affected, women are over twice as likely to be victims of this type of abuse. Additionally, according to a Federal Bureau of Prisons study “as many as 90 percent of women in prison have experienced trauma and that the most common type of traumatic experience for female inmates is repeated sexual violence, followed by intimate partner violence. Male inmates are less likely to have been a direct victim of violence....” This astronomically high statistic indicates that the vast majority of women sentenced to prison have been victims of sexual violence at one point or another in their lives. The briefing report from the U. S. Commission on Civil Rights adds that another important difference between reported male and female abuse is that while “the risk of abuse for men declines after childhood, the risk of


abuse for women endures throughout their juvenile and adult lives.”

Women experience greater amounts of sexual violence as juveniles and adults than men do before they are convicted of a crime. The impact of sexual violence on women must be taken into account when considering sentencing practices. Although sexual violence and domestic abuse is not exclusively a women’s issue, the numbers above show that it statistically affects women at higher rates than men. Gender blind approaches in policy, law, and sentencing can often lead to inadvertently ignoring major injustices that disproportionately affect women.

The U.S. Commission on Civil Rights reported that female offenders are also more likely to be convicted of nonviolent drug crimes than male offenders and that 56% of women in prison were serving time for non-violent drug crimes on a federal level in 2016. With so many women in prison for low-level drug offenses, it is critically important to look at the intersection between the sexual violence that these women experience and non-violent drug crimes. The Sentencing Project highlights in particular how mandatory sentencing policies for drug crimes create “the girlfriend problem,” imposing a severe burden on female offenders who are in some kind of relationship with a male drug dealer. This “girlfriend problem” is particularly troubling because if intimate partner violence is not taken into account in drug sentencing, the likelihood of mis-sentencing or over-sentencing increases. Mary E. Gilfus at the National Resource Center for Violence Against Women writes that “[s]ome women are introduced to drugs by abusive partners and may be forced to sell or carry drugs for them, while other impoverished women may resort

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13 Id. at 18.
14 Id. at 18.
to selling drugs to finance a planned escape from an abuser or to find a place to sleep.”16 Women’s involvement with drugs in a large number of cases is intimately connected to their situations of previous or current sexual partner violence.

Additionally, abuse takes a toll on the victim’s cognitive capacity and mental health and has major psychological repercussions for victims. The CDC notes that sexual violence, stalking, and intimate partner violence have been linked with acute trauma, a wide range of psychological conditions, PTSD, and maladaptive coping behaviors, including increased substance abuse and use.17 Further, intimate partner violence can result in traumatic brain injury which can lead to severe physical and psychological damage. Murray B. Stein et al. found that victims of intimate partner violence with and without PTSD had “poorer performance on tasks of speeded, sustained auditory attention and working memory... and response inhibition,”18 and Janet Yuen-Ha Wong et al. concurred that “psychological stress may be further developed into autonomic, hormonal, immunological, neurological, and neuropsychological alterations relating to thoughts and feelings. These alterations may lead to poor decision-making about leaving or staying in abusive relationships, as well as memorization and concentration problems.”19 The research is clear about the effects of abuse and the serious cognitive and psychological conditions that occur in intimate partner violence. If these facts regarding the effects of abuse on cognitive function are better understood in general and on a case-by-case basis in the courtroom, judges are more


18 Murray B. Stein et al., Neuropsychological Function in Female Victims of Intimate Partner Violence with and without Posttraumatic Stress Disorder, 52 BIOLOGICAL PSYCHIATRY 1079, 1079 (2002).

likely to approach sentencing determination differently. For example, instead of regarding the limited information a defendant gives to the government as inherent evidence of the defendant’s refusal to cooperate, judges may instead recognize that a defendant’s experience of abuse may have affected their memory and concentration resulting in less detailed information. Further, instead of regarding a defendant’s participation in a drug crime as an inherent reflection of the defendant’s criminal inclinations, judges may alternatively recognize that the effects of abuse may have played a greater role in the defendant’s actions than the defendant’s personal criminality.

Despite the relevance of abuse in a large number of defendants’ (often females’) situations, the majority of sentencing reforms, though important steps, have not overtly focused on addressing this gap. In the early 2000s and into more recent years, individual state legislations made significant efforts to de-intensify drug laws. In 2010, Congress passed the Fair Sentencing Act which reduced the sentencing disparity of crack and powder cocaine offenses from 100:1 to 18:1. And in December of 2018, Congress passed the First Step Act which made headway in lowering mandatory minimums and in expanding the safety valve. But even though these reforms made meaningful strides toward allowing more low-level drug participants to access downward departure, the reforms often did not have as profound an effect on predominantly female defendants as they did on male defendants. For example, though the First Step Act seemed to enable more defendants to qualify for the safety valve through allowing defendants with a more extensive criminal history


to qualify, in practice, this modification did not affect female defendants nearly as much as male defendants because female defendants statistically tend to have a much more limited criminal history than their male counterparts.

Recognizing both the pervasiveness and the relevance of abuse in a defendant’s criminal actions requires that abuse be given more specific attention in sentencing. A judicial system that fails to consider both these scientifically relevant and often gender-specific factors that affect a defendant’s culpability and likelihood to recidivate as well as the different gendered experiences of a sentence’s application fails to equally apply the laws. Judge Nancy Gertner writes: “A sentencing system that fails to consider real differences between male and female offenders, differences that may correlate with the sources of their crimes and provide a basis for their rehabilitation, is an unequal one.” In essence, when lawmakers attempt to create gender-neutral laws without taking into account the laws’ effects on individual groups, those laws can disproportionately punish certain groups like women, thus becoming unfair in their application. Failure to consider the role of abuse in relation to a defendant’s offense can preclude women and others from fair sentencing. Sex differences in abuse simply cannot be ignored without many female and other casualties in the criminal justice system.

II. Determining a Defendant’s Safety Valve Qualification

Understanding the full process whereby a defendant’s qualification for the safety valve is determined demonstrates the lack of attention currently given to abuse in this process. After being convicted by a jury as guilty of possession and intent to distribute drugs, the judge must then determine a defendant’s initial sentencing level of offense by considering the drug type, the quantity of accountable

26 Id. at 1403.
drugs, and a defendant’s number of past criminal points.\textsuperscript{27} With that information, the judge then finds the corresponding baseline sentence on a designated matrix in the sentencing guidelines.\textsuperscript{28} Following determination of a defendant’s initial mandatory minimum, the judge decides whether or not a defendant qualifies for the safety-valve which then allows defendants the possibility of a significantly reduced sentence.

The safety valve provision 18 U.S.C. § 3553(f) allows judges the option to abandon mandatory minimums and impose less severe sentences for defendants who meet certain criteria. The provision is applicable when 1) the defendant has a minimal or nonexistent criminal record,\textsuperscript{29} 2) the defendant did not use violence in the course of the crime,\textsuperscript{30} 3) the offense did not result in death or serious injury to any person,\textsuperscript{31} 4) the defendant played a limited role in the crime,\textsuperscript{32} and 5) the defendant has cooperated with the government to the full extent possible.\textsuperscript{33} Then, once a defendant has convinced the “sentencing court by a preponderance of the evidence that he [or she] satisfies each of the safety valve’s five requirements,”\textsuperscript{34} judges are permitted to set aside the mandatory minimums that would have applied, and determine a lower sentence.

The safety valve’s factors do not proactively consider the effects of abuse on a defendant’s criminality and instead focus on other factors like the defendant’s criminal history, lack of violence, role in the crime, and cooperation with the government. While all of these factors point towards a lower-level role in the crime, failing to consider

\textsuperscript{27} See U.S.S.G. §4A1.1.
\textsuperscript{28} Id.
\textsuperscript{29} 18 U.S.C. § 3553(f)(1).
\textsuperscript{30} Id. at (2).
\textsuperscript{31} Id. at (3).
\textsuperscript{32} Id. at (4).
\textsuperscript{33} Id. at (5).
how abuse affected a defendant’s actions can preclude many defendants who clearly played a diminished role in the crime from qualifying for downward departure if that abuse prevented them from meeting all five of these criteria. For example, defendants who fear retribution on themselves or loved ones for divulging information related to the drug crime often initially withhold information. Even when they eventually cooperate with the government, the damage is often already done, and it is often difficult to demonstrate qualification for this fifth criteria especially when abuse is not admitted as a mitigating factor. Without reform, the process of determining safety valve qualification is likely to continue to disproportionately punish defendants who fall victim to abuse.

III. Judge not Jury Determines Safety Valve Qualification

Qualifying for the safety valve places an incredibly heavy burden of proof on the defendant who must prove to the “sentencing court by a preponderance of the evidence that he [or she] satisfies each of the safety valve’s five requirements.”35 Many defendants, victims of abuse and not, have found that proving their qualification by a preponderance of the evidence can be particularly difficult when put before a singular judge and not before a jury, especially because the safety valve excludes consideration of certain facts relevant to a defendant’s culpability. As a result, many defendants have appealed decisions of safety valve disqualification. However, despite multiple attempts, courts have consistently ruled that qualification for the safety valve is a matter completely restricted to the realm of judicial discretion.

In 1996, US v. Shrestha clarified that the burden of proof falls heavily on the defendant to demonstrate their qualification for the safety valve rather than on the opposing party to prove their disqualification.36 Then in 2005, U.S. v. Labrada-Bustamante (9th Cir.

35 Id. at 2.
36 United States v. Shrestha, 86 F.2d 935, 940 (9th Cir. 1996).
affirmed determination by judge not jury when the court held that the decision of safety valve application did not violate the Constitution because it did not involve fact finding. The court put forward that “mandatory minimum sentences under section 841(b) presuppose a jury’s determination of the underlying facts.”\textsuperscript{38} In 2014 with \textit{US v. King}\textsuperscript{39} and then in 2016 with \textit{US v. Leanos},\textsuperscript{40} defendants both appealed safety valve disqualification based on \textit{US v. Alleyne}\textsuperscript{41} which held that “any fact that increases the mandatory minimum is an ‘element’ [of the offense] that must be submitted to the jury.”\textsuperscript{42} In both cases, the courts found that \textit{Alleyne} was confined to factors that could increase a defendant’s sentence while the safety valve was concerned with factors that could reduce a defendant’s sentence. Both courts upheld safety valve determination by judge not jury.\textsuperscript{43}

Understanding the courts’ consistent adherence to judicial discretion over a span of nearly 20 years points towards a necessary shift in proposed legal reforms. Rather than continue to push for safety valve factors to be tried before a jury, enacting sentencing reforms situated within this clearly established realm of judicial discretion seems more plausible and effective.

\section*{IV. Prescriptive Qualification on the Safety Valve}

Undoubtedly, defendants are relatively confined by their options for attaining downward departure. And when defendants cannot provide a substantial amount of useful information to the government (usually because they were low-level members of the drug conspiracy), they rely even more heavily on qualifying for the safety valve.

\begin{itemize}
\item[37] United States v. Labrada-Bustamante, 428 F.3d 1252, 1257 (9th Cir. 2005).
\item[38] \textit{Id.} at 1263.
\item[39] United States v. King, No. 18-11468 (5th Cir. Oct. 17, 2019).
\item[40] United States v. Leanos, 827 F.3d 1167 (8th Cir. 2016).
\item[42] \textit{Id.} at 107.
\end{itemize}
Due to the firmly established precedent that sentence determination is fully a matter of a judge’s discretion and not a jury’s discretion, qualification for the safety valve becomes even more difficult. When extenuating circumstances like abuse are not taken into account when considering a defendant’s criminal actions, it becomes even more difficult for defendants to receive sentences that accurately reflect their criminality and punish them fairly.

Because the precedent has clearly been set denying defendants the option of presenting their argument for safety valve qualification before a jury, and because factors like abuse are not often given full consideration during sentencing determination, this paper proposes adding a qualification to the safety valve that stipulates that during the sentencing determination, if there is evidence of abuse affecting the defendant’s actions, the judge must independently solicit the opinion of a relevant psychologist, psychiatrist, or mental health professional to better understand the role the abuse played in the defendant’s situation. With this additional expert perspective, judges will be better informed as they determine a defendant’s sentence. Then, if after a judge has solicited the opinion of a mental health professional and determined that abuse played a significant enough role in the defendant’s inability to meet at most one criteria of the safety valve, this paper proposes that the judge have the option to pardon a defendant’s failure to meet no more than one criterion.

Further development and research are required in order to define a clear process for actually instigating this prescription. First, it would be necessary to specifically define a method for choosing the psychiatrists and psychologists to which judges would turn. It would also be important to better define what level and extent of psychiatric examination would be required in order for judges to have adequately consulted with a mental health expert to understand the defendant’s mental state.


With this prescription in mind, this paper considers two cases in an effort to demonstrate the adaptability and broad applicability of
this qualification to a variety of different situations involving abuse. With the first case, understanding how the judge approached Santa Negron’s sentence in *US v. Castro* demonstrates how consulting with a psychiatrist about the defendant’s mental state can provide incredibly important information to a judge, dramatically affect a defendant’s sentence, and help avoid disproportionately punishing a drug offender. The second case, *US v. Paz-Barona*, presents a situation where the defendant suffered short-term, albeit acutely traumatic, abuse that may or may not have affected her cognitive function and subsequent ability to meet the safety valve criteria. When considering how the prescription would have applied in this particular case, it becomes clear that consulting with a psychiatrist would have only provided advantageous information to the judges in the process of determining Paz-Barona’s sentence.

### A. *US v. Castro, No. 1:96-CR-10139*

In her article highlighting different drug sentencing disparities that female defendants often face, Judge Nancy Gertner describes her own process of assigning a sentence to the defendant Negron in 1996 in the district court of Massachusetts. Negron was charged with distributing between 150 and 500 grams of (crack) cocaine base—an offense that would trigger a 10-year mandatory minimum. Gertner describes how Negron had suffered intense abuse over the course of her life and in connection with the drug offense. When she was a young child, she was abused by her stepmother. She was married at age 14 to escape her home life. When her husband became abusive, she escaped illegally into Puerto Rico and tried to find work to support herself and her children. She married another man in the

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US; when he became abusive, she left him as well. After leaving her second husband, she began to look for work. A man that she had been introduced to by her recent ex-husband offered to help her; she thought he meant that he would help her find a job but instead he pressured her into drug trafficking.

As Judge Gertner sentenced Negron, she “refused to sentence her without evaluating her mental state.” She independently consulted with a psychiatrist who examined Negron for signs of duress and coercion. The psychiatrist found that Negron’s behavior was a “learned response from previous relationships of abuse and her focused goal to provide for her children.” Based off the psychiatrist’s findings that the abuse Negron had suffered substantially affected her cognitive functions and Negron’s satisfaction of the safety valve criteria, Gertner subsequently departed substantially from the mandatory minimum. Instead of assigning her a sentence of 10 years, Gertner assigned her a sentence of 2 years and 3 months.

In this situation, Judge Gertner was clearly aware of and sensitive to situations where abuse plays a role in a defendant’s actions. However, had she stopped at simply being cognizant of abuse’s potential to affect a defendant’s criminality, it is possible that she would only have departed downwards a couple months or a couple years—a practice that is incredibly common with sentencing even though it is highly probable “that women’s sentences are in fact higher than they should be given women’s lower recidivism rates and relative culpability for their roles in their offenses.” Rather, it was only after Gertner had consulted with a psychiatrist who could authoritatively speak to the abuse’s effect on Negron that Gertner was able to determine Negron’s sentence and drastically depart downwards.

47 Id. at 1406.
48 Id. at 1406.
49 Id. at 1407.
50 Id. at 1407.
51 Id. at 1407.
52 Margareth Etienne, Sentencing Women: Reassessing the Claims of Disparity, 14 J. GENDER RACE & JUST. 73, 82 (2010).
As a result of considering this psychiatrist’s assessment of the scientific effects of abuse on Negron’s mental functioning, Judge Nancy Gertner reduced Negron’s sentence roughly 8 whole years below the original mandatory minimum. This individual factor of abuse, one that is not currently considered by the safety valve at all, played a large enough role in Negron’s situation to justify departing this far downward. Clearly, consulting with this psychiatrist was invaluable in Gertner’s decision-making process, incredibly consequential for Negron’s sentence, and instrumental in ensuring Negron received a punishment that reflected her actual culpability.

B. US v. Paz-Barona

While arriving from Colombia in the Miami International Airport, Paz-Barona was found to have “foreign objects in her lower intestine.” She was taken to a hospital where she expelled nine pellets of heroin accounting to 271.5 grams. After her arrest, Paz-Barona cooperated with the government and at her plea hearing, “the government and Paz-Barona’s counsel both stated that they believed the safety valve provision was likely to apply.” However, despite indication of a lessened sentence, it was determined that she had not met the safety valve provision. Paz-Barona then released further information regarding the crime including information about the individual who had intimidated her into transporting the heroin pellets. Specifically, she said that after leaving the airlines office to change their flight date due to hurricanes in Florida, she was approached in the airport by an individual who shoved a “hard object” in her back. He then threatened that he knew where her children lived and would kill them or her if she did not comply with his demand to transport the pellets to New York. Even with this new information, both the district and the circuit court held that

54 Id. at 279.
55 Id. at 279-280.
56 Id. at 279.
Paz-Barona had not sufficiently cooperated with the government and that the discrepancy between Paz-Barona’s original testimony and her later testimony made her testimonies unreliable, disqualifying her from the safety valve’s fifth qualification.

In this particular case, the nature of the abuse is clearly different than the abuse suffered by Santa Negron. Whereas Negron suffered extensive and prolonged abuse, Paz-Barona’s abuse seemed to occur within the limited period of time when she was at the airport when the individual accosted her. But even though the nature of Paz-Barona’s abuse differed from what Negron suffered, it is still very possible that it had a major traumatic effect on her. However, in the process of determining her safety valve qualification, the judges did not actively consult with a psychiatrist or psychologist in order to assess her cognitive state. Rather, the judges explained that the inconsistency in the testimonies as well as the lack of concrete details regarding the individual who accosted her represented a failure to provide full and complete information to the government and seemed to represent a last-resort effort for qualification rather than a good-faith effort to meet the safety valve criteria. While this could have been the case, it is also possible that Paz-Barona’s testimony actually did represent a good-faith effort to cooperate completely with the government and that her inability to provide coherent, detailed, and consistent testimony could have been due to the effects of the abuse and fear she suffered in the airport. Multiple aspects of her situation point to mental duress playing a major role in her actions. It is likely that being accosted with a “hard object” shoved in her back as well as the fear of losing her life or her children’s lives caused her significant trauma. In fact, the threat seemed poignant enough for Paz-Barona to take the incredible risk of ingesting nine pellets of heroin. This would not only be incredibly dangerous to Paz-Barona because she would be risking relatively likely discovery

57 Id. at 281.
due to the large number of pellets in her intestine, but ingesting these pellets could also prove fatal if even one of them ruptured.

In order to understand with greater certainty if the effects of the trauma and abuse that Paz-Barona experienced had actually significantly inhibited her ability to cooperate with the government, a psychologist or psychiatrist would need to assess Paz-Barona’s mental state. Without fully understanding Paz-Barona’s actions in the context of her abuse, the judges approached only the surface facts of the case—namely that her testimonies did not match and that her testimonies did not provide enough detailed information—and consequentially concluded that she did not meet the fifth criterion of the safety valve. Had the judges been required to consult with a psychologist or psychiatrist, they would have had additional critical information regarding Paz-Barona’s cognitive state that would have allowed them to make a more definitive decision. Either the assessment would have supported the conclusion that Paz-Barona had not fully cooperated with the government because the abuse had not affected her enough to significantly impair her cognitive functioning or, the assessment would have supported the conclusion that Paz-Barona had in fact cooperated to her full capacity with the government because the abuse had actually significantly impaired her cognitive functioning in the aftermath of her trauma and fear. Either way, a psychiatrist’s professional opinion would have augmented the judges’ decision-making process. And if the judges had determined after consulting with a psychiatrist that Paz-Barona had not met the fifth safety valve criterion because of the effects of abuse and if they had then resulting departed downwards, they would have avoided assigning a highly disproportionate mandatory minimum sentence to a defendant who did not merit harsh punishment.

58 Id. at 279.

C. Side-by-Side Comparison

Looking at these cases side-by-side reveals the workability of this prescription. In a case like Negron’s where the abuse is extreme and prolonged, a consultation with a psychologist or psychiatrist gives the judge important additional information to understand the sheer extent to which that abuse played a role in the defendant’s actions. In situations like Negron’s where the abuse was extreme, having a prescription that allows judges to pardon a defendant’s initial inability to meet a certain criterion because of abuse suffered ensures that defendant-survivors of violence get proportionate sentences. On the other hand, in situations like Paz-Barona’s where the question of the abuse’s effect on the defendant’s ability to qualify for the safety valve is less clear, consulting with a psychiatrist provides the judge with additional data to more accurately answer that question. Regardless of if the psychological examination had revealed that Paz-Barona’s abuse had significantly or minimally affected her cognitive functioning, that information would have strengthened the accompanying conclusion, contributing to a more just and scientifically substantiated sentencing determination.

VI. Benefits of This Proposal

A. Encourages Sentencing that Reflects Actual Criminality

Encouraging judges to consider additional mitigating circumstances, like abuse, on a defendant’s ability to qualify for the safety valve allows judges to decide sentences that more accurately reflect a defendant’s criminality, likelihood to recidivate, and culpability for the crime. Introducing a proposal that requires judges to consider this information that is incredibly relevant to a defendant’s case and ability to qualify for the safety valve allows for the judge to account for more than the limited factors already included in the safety valve that intend to add up to a defendant meriting a reduced sentence.
B. Prevents Extreme Variations in Individual Safety Valve Determinations

Judges who do and who do not consider the effects of abuse on a defendant give those defendants sentences that vary drastically. A failure to create a standardized method for considering abuse in safety valve determination intrinsically creates a system that enacts vastly different applications of the same law. While instances of mis-sentencing due to implicit bias or misunderstanding of case facts happen in all areas of law, these variations in how the safety valve is applied in situations with abuse are more than just isolated instances.

Defendants whose judges do not consciously consider the effects of abuse on defendants’ criminal actions and ability to qualify for the safety valve face a sentence substantially lengthier than their counterparts whose judges do consider the effects of abuse. Even with two relatively parallel defendants, a defendant whose judge actively considers the effects of abuse may receive a sentence reduced far below the mandatory minimum while a defendant whose judge does not choose to proactively consider the effects of abuse may be assigned the mandatory minimum sentence. Enacting this prescription and requiring judges to consider the role of abuse would at least make headway towards standardizing this process. Though there will always be judges who perhaps minimize the effects of abuse, enacting this prescription assumes that most judges’ sentencing determinations will better reflect defendants’ culpability when the judges are able to consider additional relevant data and evidence like the effects of abuse on defendants’ actions.

C. Expands Judicial Discretion

Not only does this proposal operate within the precedent law that consistently places determination of safety valve qualification within the realm of judicial discretion and not jury discretion, but this proposal goes on to expand that judicial discretion. This qualification enables judges to have more valuable information with which to determine a defendant’s sentence. It then gives judges more leniency by allowing them to pardon a defendant’s initial failure to meet a singular safety
valve criterion when due to the effects of abuse. Additionally, requiring a judge to independently consult with a psychologist when there is evidence of abuse simply ensures that the judge has additionally relevant evidence and information. At the same time, requiring that judges consult with psychiatrists to assess a defendant’s cognitive functioning does not restrict the judge’s ability to assign a sentence that she or he deems appropriate because it does not mandate how the judge should approach that information. Then, giving the judge the ability to pardon a defendant’s failure to meet a single safety criterion gives the judge even further discretion.

D. Encourages Intersectional Cooperation

Finally, implementing this proposal will contribute to more data and science-informed judicial decisions. Encouraging judges to rely more on experts in other fields when making determinations that involve intersecting problems encourages more accuracy. As Margareth Etienne suggests, legal authorities need to “team with social scientists […] to distinguish warranted disparity from unwarranted disparity” in sentencing outcomes. Just as more cooperation is needed between legal authorities and social scientists to understand the greater factors that affect distinctive populations of individuals in the criminal justice system, so also must legal authorities, including judges, better work with scientific, psychological, and psychiatric specialists in order to properly gauge a defendant’s culpability and determine an appropriate sentence. Instead of asking judges to play the role of psychologist or psychiatrist as well as judge, implementing this proposal would encourage intersectional cooperation with those individuals who actually do have the authority to make judgement calls about a defendant’s mental state. This would encourage the integration of even more scientifically corroborated information into the sentencing process.

CONCLUSION

The safety valve represents one of only two main options for downward departure for defendants charged with drug trafficking. As of now, the safety valve does not fully consider the role of abuse on a defendant’s criminal actions and additionally on his or her ability to qualify for the safety valve. Adding a provision to the safety valve that requires judges to consult with psychologists or psychiatrists in incidents where abuse has been a factor will eliminate sentences that misunderstand and misdiagnose the role of abuse in a defendant’s actions and subsequent criminality; instead, it will enable judges with additional relevant information and flexibility to determine a sentence that more accurately reflects a defendant’s culpability while refusing to limit or delegate their judicial discretion. Finally, allowing judges the option to pardon a defendant’s initial failure to meet a singular safety valve criterion when due to the effects of abuse will ensure that defendants like Smith, Negron, and even Paz-Barona are able to receive downward departure when merited.
LEFT AT THE BORDERS: ADDRESSING THE ISSUE OF INCLUSIVITY FOR FEMALE IMMIGRANTS

Elizabeth S. Castillo and Brooklyn Bird

The respondent married at the age of seventeen, and her now-ex-husband began beating her weekly soon after the first of their three children was born. He threw paint thinner on the respondent, burning the flesh of her breast; broke her nose; raped her repeatedly; and threatened her with death if she called the police—who, when they finally did come, did not arrest him, even with evidence of recent physical abuse. When she fled to her father, this now-ex-husband followed her and threatened to kill her unless she returned. The abuse continued once she had returned home after running away—twice.²

The respondent and her three children, of Guatemala, were denied asylum in the United States because the immigration judge determined that she did not “demonstrate that she had suffered past persecution or ha[d] a well-founded fear of future persecution on account of a particular social group.”

Immigration to the United States is a topic fraught with a complicated history and charged with intense political discourse. Notwithstanding the fact that the US would have neither formed nor grown without it, immigration has evolved into a hotly disputed concept. Anyone who has watched a presidential primary debate

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can recognize that the issue is not easily resolved. Presidents of the United States have addressed the nuance and necessity of immigration in various ways. Since President Donald Trump’s election, his administration adopted a particularly aggressive stance,\(^3\) citing the protection of American labor as grounds for limiting immigration to unprecedentedly low rates. Asylum seekers’ success rests on their ability to pass a certain set of screenings—a process the Trump administration has made adjustments to, impacting the lives of those attempting to immigrate.

The existing immigration laws dictate certain nonnegotiable regulations in order to protect both immigrants and the United States. These laws are primarily derived from the United Nations 1951 Convention Relating to the Status of Refugees as well as legislation created during the immigration spikes of the nineteenth and twentieth centuries. Different administrations, however, have implemented ideology-based changes to immigration as a result of campaign promises, global circumstances, and the like. Most recently, in 2018, President Trump’s then-attorney general, Jeff Sessions, overturned a particularly poignant immigration case—that of the abused Guatemalan woman who we described previously. After her case was denied twice in immigration court, the Department of Homeland Security (DHS) referred her case to the original immigration judge for further proceedings. However, Sessions halted this third investigation and overturned the undecided ruling, declaring that domestic abuse is not considered valid in the credible-fear screening of asylum seekers. Our article seeks not only to unveil how disregarding domestic abuse disproportionately affects migrant women but also to discuss how women’s existing disadvantage renders the law unfair in a system responsible for achieving justice for both aspiring and current Americans.

Accordingly, this article pertains particularly to the female immigration process. Throughout the paper, we argue the need for fundamental change in the existing policies and laws in order to

properly establish the treatment of women seeking asylum within the United States. In presenting the unique problems that women face and outlining the gender-biased language in American immigration policy, we lay the foundation necessary to understanding the existent strain on females. By illustrating the great burden of proof women must demonstrate while attempting to attain asylum, we are able to enumerate and demonstrate the consequences of Attorney General Sessions’ decision—consequences that further attenuate the ability of women to seek asylum. The subsequent complications, as exhibited in research citation and case law, are those that we seek to remedy in our prescriptive suggestions to current law.

I. BACKGROUND

While the challenges and needs of all asylum seekers are unique and diverse, women and girls encounter especially trying circumstances in their migration to the United States. In recent years, a significant increase in gender-related crimes, especially among gang populations in Central America, has rendered women and girls incapable of safely remaining within their home countries. Women are motivated to flee their countries of origin in order to avoid rampant female homicides, abuse, domestic violence, and forced sexual relationships with gang members. These circumstances should reasonably afford any afflicted woman consideration for asylum within the United States. Yet many women are refused refugee status under the current legislation and procedures.

In order to provide clarification for the terms used most frequently in our argument, we rely on definitions provided by the international legal documents referenced throughout our argument. A refugee, as described in the Immigration and Nationality Act (INA), is “any person who is outside any country of such person’s nationality” or “is outside any country in which such person last habitually resided;” a person “who is unable or unwilling” to return to that country; and a person who is “unable or unwilling to avail himself or herself to the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”
According to the INA, an *immigrant* is “every alien[,] except an alien who is within one of the following classes of nonimmigrant aliens.” These classes include diplomatic officers (including foreign government employees, their family members, and their employees) and aliens “having a residence in a foreign country which he has no intention of abandoning,” such as officers of international organizations. A *migrant* is a term similar in meaning to *immigrant* but with a more transient nature and with no entailment of necessary intent to stay within a new country.

Before moving forward, defining significant terms used in the discussion of the relationship between women, domestic violence, and immigration is important. According to the Department of Justice, a *domestic violence misdemeanor* is “any crime committed by an intimate partner, parent, or guardian of the victim that required the use of attempted use of physical force or threatened use of a deadly weapon.”

*Gang violence* is defined as “criminal and non-political [sic] acts of violence committed by a group of people who regularly engage in criminal activity against innocent people.” The term *gang* refers to three or more individuals who collectively identify themselves by creating an atmosphere of fear or intimidation and whose purpose is, at least in part, to engage in criminal activity. Defining *domestic violence* and *gang violence* is critical as these forms of violence are often the motivating factors for women seeking refuge within the United States. Gang violence is especially coercive of “forced migration” as gangs can impose threats not only within the home, as in cases of domestic violence alone, but throughout

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entire countries and regions as a whole. This understanding counters the argument that women might more aptly seek refuge within their home and neighboring countries than within the United States. Certain regions of the world experience a higher volume of gang involvement and criminality, including but not limited to developing countries.

The basis of United States law regarding asylum seeking can be found primarily in the United Nations 1967 Convention Relating to the Status of Refugees, the Immigration and Nationality Act of 1952, and the Refugee Act of 1980. Refugees who fit this definition are eligible for the protections of asylum, which include the United States’ legal obligation to protect those already in the country or arriving at the borders.

The asylum-seeking process follows one of two paths: affirmative or defensive. Both of these procedures require physical presence within the United States or at a port of entry. Upon arrival (with or without counsel), an asylum-seeker must provide the requisite evidence to meet the burden of proof that is required for refugee status. Individuals complete their claims of credible fear with Customs and Border Protection (CBP) officials. If the CBP officer determines that a migrant’s claims are legitimate, the migrant is granted the ability to apply for the defensive asylum process within an immigration court. If the office determines a migrant’s credible fear is not evident, the court orders the removal of the migrant. Declined migrants may appeal this decision before an immigration judge, who then determines whether migrants are indeed removed or else returned to the asylum-seeking process.

Asylum seekers must declare asylum within a year of arrival to the United States, but the process of obtaining citizenship can take years to complete. This timeframe results in increased instability, prolonged separation, and possible danger for asylum seekers awaiting conclusion. US law has historically allowed asylum seekers

the right to remain within the United States while their claims are pending. However, asylum seekers are often held in detention centers during this time, which decreases the likelihood that they will be granted asylum\(^9\). Asylum, if attained, is finally granted when a Customs and Immigration Service officer affirmatively adjudicates a claim.

This already complicated asylum-seeking process has only become further convoluted in recent years. In June of 2018, Attorney General Jeff Sessions overruled Matter of A-R-C-G-, 26 I&N Dec. 338 (BIA 2014). His decision resulted in the discontinuation of the Obama administration’s policy\(^10\) that made it possible for more women to claim credible fear due to domestic abuse. In Sessions’ words, “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by nongovernmental actors will not qualify for asylum.” Many women and girls seeking asylum to the United States are fleeing domestic abuse, rape, and torture, which is often a direct result of gang violence or otherwise incited by gang members\(^11\). Often such violence is a direct result of governmental negligence, corruption, or even gang involvement, which further incentivizes immigrants’ attempts at American citizenship.

As it currently operates, the American legal system of asylum-seeking, immigration, and naturalization is ostensibly gender neutral. However, given the variant socioeconomic statuses, wartime instabilities, and cultural pressures faced by female migrants, the immigration juridical process in America is inherently unequal. Because the current administration’s stance disregards domestic violence, a primary reason for which women seek asylum and by which they are able to prove well-founded fear, the administration has disarmed women of their ability to find refuge in the United States.


States when, in reality, they are entitled to such by both American and international law.

In consideration of these injustices, the 1967 Convention Relating to the Status of Refugees and Immigrant and Nationality Act should be altered to include gender-specific provisions in its statutory fiat: it should be amended with proper intent to include groups threatened as a result of their gender. The current law is insufficient to protect women whose situations deem them worthy of asylum declaration through a combination of the enumerated precepts of the law. We specifically call for the following amendments: (1) the removal of gender-biased language from immigration law (including but not limited to United States immigration law and all United Nations legislation that implicates the United States) in order to avoid marginalization of either gender, (2) a provision identifying gender as a qualifying group to which a refugee may belong and claim fear of danger within, and (3) the reform of current asylum-seeking procedures (e.g., interviews, hearings) in order to properly address the crises faced by women seeking refuge within the United States.

II. Description of Discrepancies and Prescriptive Revisions

A. The Disadvantages of Asylum-Seeking Women under The Convention Relating to the Status of Refugees, 1967–Present

Both the United States law and the asylum process as it currently functions work against women seeking asylum. Migrant women have faced unjust obstacles in their pursuit of American asylum since 1951. Despite the fact that the risk of physical and psychological danger due to domestic violence is extremely high in many of the countries from which women flee to America, the 1967 Convention Relating to the Status of Refugees (the Convention) failed to recognize, and the United States’ legal system still fails to recognize, such crises of domestic violence as a basis for “well-founded fear.” This omission occurs largely because this group of migrant women’s fears of domestic violence are related to gender discrimination. As the United States law currently interprets the Convention, persecution on account of gender is not accepted as a cause for “well-founded
fear.” Qualifying fears must be born of “reasons of race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{12} Thus, many violence-fleeing migrant women are denied refugee status.

Records from the federal courts and Board of Immigration Appeals (BIA) indicate that although some claims of gender-based violence are processed and received in recognition of gender-based violence, there is still ample inconsistency. Immigration attorney Rodel Rodis argues, “The difference in the immigration judges’ contrasting decision[s]... show[s] that applying for political asylum is like playing Russian roulette—land the right judge and you win, land the wrong judge and you lose.”\textsuperscript{13} Some judges provide women extended protections for their claims of gender-based violence, while other judges deny women with similar cases and circumstances. A study in 2007 found that “there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one Court of Appeals to the next, and from one year to the next, even during periods where there has been no intervening change in the law... A Chinese [asylum seeker] unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her claim, as compared to 47% nationwide.”

It is thus necessary that the United States amends its application of the Convention. A provision must be added asserting that gender-based abuse claims qualify as “well-founded fear,” especially due to the fact that, owing to such fear, many women are unable and/or unwilling to avail themselves of the protection of their countries of origin.


While the United States may claim that its current judicial system employs gender-neutral policy, a close reading of the standing laws reveals that this cannot be true. As provided by the Convention, the very definition of a refugee includes gender-biased pronouns; the Convention defines a refugee as anyone who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events” (emphasis added). For example, Article 17 of the Convention states, “A refugee may not invoke the benefits of this provision if he has abandoned his spouse.” Gender-specific diction (e.g., he and his), such as these terms of male responsibility, is not gender neutral. Therefore, the law containing such language cannot claim to be gender neutral. Such gendered language is evidence that the Convention, as it now stands in the United States, consequently lacks language that properly construes gender responsibility. In other words, if there is a specification regarding a man’s exclusion from asylum-seeker benefits due to spousal abandonment, legislators must also address what legal specifications are provided for all persons whose spouses have abandoned them. The United States must reflect this in its law.

C. The Heavy Burden of Proof for Immigrant Women

Females are faced with unique circumstances that are deserving of unique recognition in their claims of credible fear. One prominent challenge that women face and are prompted to flee from is the “ruined property” phenomenon. This is when women or girls have been sexually mistreated, had a child out of wedlock, participated in an extra-marital affair, or otherwise breached cultural

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codes of conduct. As a result, women are regarded with a permanently degraded status. Furthermore, they are subject to physical, emotional, and sexual abuse for a lifetime. This issue is particularly salient when immigration officers determine whether women have adequate opportunity for “recourse to state protection,” or, in other words, whether they are able to find safety in another part of their home countries. Applicants for asylum must show that their “feared persecution” will either be carried out by the government or by a party that the government is “unwilling or unable to control.” This burden of proof can be extremely difficult to substantiate for women affected by the “ruined property” phenomenon. In contrast, men very rarely face similar plights. It is the combination of this issue with other untoward circumstances of need-based asylum seeking that renders the current gender-neutral language incomplete.

If and when females are finally able to move forward in the asylum-seeking process, their chances of actually obtaining asylum are slim due to an overloaded immigration court system as well as several procedures that place a heavy burden of proof upon migrant women. The standards for acceptable evidence of necessity of asylum are extraordinarily high for female migrants. Per the guidelines of the Immigration and Nationality Act (INA), asylum applicants must demonstrate that they have no possible recourse to state protection. In other words, asylum seekers must provide evidence that they are unable to relocate to another part of their country of origin in order to escape threats of danger, nor are they able to receive adequate protection from their own government. Given that many girls are raised in cultures in which women are dependent on fathers, brothers, and husbands, this requirement of the INA is inherently unfair.\textsuperscript{15} They are not equipped with the cultural nor fiscal mobility necessary to represent themselves before immigration officials. Additionally, in the Matter of D-V-, the applicant moved around her home country several times before fleeing to the US for safety—evidence that for hers and others’ cases, relocation can be an insufficient remedy

for the danger women face. It must be understood that women are not treated as equals to men outside the United States. Once women are within the United States, they will enjoy equal protection under the law. However, the lack of specificity in the INA denies them of attaining such protection because they are not “playing” on a proverbial even field.

As a world leader, the United States has the opportunity and obligation to exemplify the concept that women’s rights are human rights, both within and without the immigration process.

**D. Further Discrimination under the Trump Administration, 2016–Present**

In recent years, the conditions for women seeking asylum within the United States have only degenerated. “The [Trump] administration has undertaken more than 400 executive actions on immigration” since January of 2017.¹⁶ Given these changes implemented by the Trump administration under Attorney General Jeff Sessions, female asylum-seekers are faced with true inequality: a condition that is contrary to both international statutes and American law and must be righted through prompt amendment.

One effect of these recent amendments to immigration policy is that women and other migrants are often forced to wait for extensive periods of time before receiving legal assistance or a hearing in front of an immigration judge. This waiting has historically occurred within United States detainment centers. In recent years, increased Migrant Protection Protocols (MPP) have forced roughly 60,000 asylum seekers to wait just south of the United States border in Mexico.¹⁷ For almost all migrants, the environments of migrant

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camps in Mexico are both “filthy and dangerous.” Young women face threats of rape, hunger, exposure, and neglect. Such conditions draw attention to the need for expedited claim processing. Lengthy waiting periods at the border render the United States culpable for the reinforcement of fear—even the very credible fear from which female asylum seekers are most commonly fleeing.  

E. General Difficulties Faced by Young Women Fleeing to the United States, Present

Young migrant women are uniquely impaired in their efforts to seek asylum in America due to several causes. Among these unique difficulties is the extreme risk of violence that women face as they migrate to the United States. “The United Nations High Commissioner for Refugees (UNHCR), United Nations Population Fund (UNFPA), and the Women’s Refugee Commission recently assessed protection risks for women and girls on their journey to [asylum]. They established that women and girls, especially those traveling alone, face particularly high risks of certain forms of violence, including sexual violence by smugglers, criminal groups, and individuals in coun-


19 Since the writing of this article, President Joe Biden has been inaugurated into office as the President of the United States. We recognize that his administration has already made timely and significant plans for reform to the United States immigration system. However, these plans still lack the necessary acknowledgment of gender as a persecuted social group to which qualified refugees might belong. See FACT SHEET: President Biden Outlines Steps to Reform Our Immigration System by Keeping Families Together, Addressing the Root Causes of Irregular Migration, and Streamlining the Legal Immigration System, The White House (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/.
Domestic abuse is so prevalent in both the developing and developed world that the World Health Organization (WHO) declared such offenses to be a “wide-spread phenomenon.”

An additional point of importance in the evaluation of female asylum-seeking, the attorney general’s overruling, and the credible-fear screening is that, because of the threat of life-altering and life-threatening ostracization (not to mention punishment by death), many rape and abuse survivors are unlikely to report their assault to anyone in their home country. In other words, the woman’s word is the only “evidence” she has to present to the asylum officer. It must thus be taken into account, when properly recognizing women’s credible-fear claims, that women can easily lack external corroboration of their stories. Moreover, it is possible that when women do indeed report their abuse (e.g., unwanted approaches from a potential suitor, incest) they will face dangerous retribution. While initially it might seem that reporting such harassment to government officials could easily constitute a woman as eligible for an interview with a United States asylum officer, in many countries revealing the abuse ultimately poses a serious threat to a woman’s imminent well-being. Thus, women are often unable to rely on the support of the government of their countries of origin in the validation of their claims of credible fear.

Even without the risk of punishment and ostracization for acknowledging harassment, women are still hindered in their ability to express themselves before immigration officers due to their social customs. “In some cultures, men normally do not share the details of their political, military, or even social activities with spouses, sisters, daughters, or mothers . . . . Some women may not be able to explain which male relatives were politically active or, if they are aware of the relatives’ political activity, may be unable to provide any details about it.” Women of this particular circumstance are rendered further incapable of indicating that the abuse they suffer is a direct result of political affiliation. In other words, if they were privy to the knowledge of their abuser’s political associations, they

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20 Muižnieks, supra note 15.
21 Martin, supra note 11.
would be likely to qualify for asylum because they could be classified as facing persecution on account of membership in a particular social group. However, because of their gender-specific, culturally driven characterization, they are unaware and therefore further disabled from the protection they deserve but know not how to obtain (Martin, 459).22

Communicative challenges, like the previously described inability to identify abuse as affiliated with a political party, are important to note because they affect the most key moments of a woman’s transition from migrant to potential status as refugee: the interview with an immigration official and the hearing before an immigration court judge. “Women taught not to make eye contact with men”—and taught to never speak about matters of sexuality to anyone, let alone men or authority figures—“will have difficulty appearing credible before a male judge. Women suffering from post-traumatic stress disorder [(PTSD)] will have difficulty recounting their ordeal confidently, coherently, and consistently. Ironically, the precise manifestations of PTSD, such as selective memory and difficulty recounting certain details, are the same indicators that judges use to assess an applicant’s credibility.”

Another difficulty in communication that female migrants face is the trend of appearing before immigration authorities with relatives who may very well be the perpetrators of abuse. “For a variety of reasons, the presence of relatives, particularly a husband or father, may impede an asylum applicant’s willingness to discuss gender-related persecutory acts or fears. For example,

I. The applicant’s relatives may not be aware of the harm experienced by the applicant. She may wish that a relative remain unaware of her experience, or she may be ashamed to say what she fears or has experienced in front of a relative.

II. The applicant’s claim may be based, in part, on fear of a male relative who is present.

III. In some cases, a woman may be accustomed to having a male relative speak for her, meaning she could be consequently unprepared for an immigration officer’s screening and could

22 Id. at 459.
inadvertently fail to provide necessary details. This is especially true for younger women when they are coming from circumstances and cultures in which they are conditioned to be subservient to men.

IV. However, sometimes a woman is more comfortable when her male relatives are present—the decision must be up to her.

“These all exhibit the fact that immigration procedures must not remain insensitive to gender, given that this is a problem that experts find women face and men do not.”

We present one final—but certainly not summative—gender-specific issue faced by women. This prejudice surrounds women’s physical nature in a very literal way: women’s bodies are often classified as physical territory of the country during military and political struggles. This is not experienced by men in these same places or circumstances of unrest. In certain countries, rape is recognized as an instrument of war rather than just a “byproduct of the lawlessness that accompanies armed conflict.” We argue that this could classify women with “membership in a particular social group” of sorts but feel that gender-specific provisions would be more efficient and honorable in providing the protection that they need.

F. Necessary Provisions to Current United States Immigration Law

In response to the reprehensible circumstances faced by women seeking asylum within the United States, the attorney general’s stance precludes the dual consideration of women fleeing abuse in countries experiencing political and military disruption. Domestic abuse is not a monolith and cannot be treated as such in US immigration law. We reemphasize the fact that women do not self-select into the category of female, and due to the inconsistency of immigration court rulings, their status as female deserves separate recognition and protection. This necessitates amendment to current American immigration law.

23 Muižnieks, supra note 15.
24 Martin, supra note 11.
Such amendment begins with the inclusion of gender-specific provisions in the United States’ application of statutes like The 1967 Convention Relating to the Status of Refugees and other documents that fail to properly recognize women and their unique gender-based circumstances within the immigration process. “The main problem facing women as [asylum seekers] is the failure of decision makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated groups and their failure to recognize the political nature of seemingly private acts of harm to women” (emphasis added) (Rodger Haines, 380). In essence, so long as the Convention (and therefore US law) is absent of discrimination in its interpretation and application, these policies should provide all the protection necessary to asylum applicants regardless of their gender. We raise concern, as Haines does, that the problem is not necessarily limited to the fact that the language is not gender specific, but rather that “[the present system of immigration] has often been approached from a partial perspective and interpreted through a framework of male experiences.”

Certain conditions that are currently considered grounds for credible fear, like female genital mutilation, run parallel to the domestic violence that migrant women face, demonstrating that such violence should earn women similar due process under the law. “The regulations and Matter of Chen, Itl . . . state that severe and atrocious past persecution is enough for asylum, absent future persecution. If immigration judges and asylum officers appropriately applied these standards, as opposed to marginalizing or overlooking women, women facing gender-based abuses might more readily find the justice that they deserve. For example, it is hard to dispute that a woman’s tortuous experience of forcible genital mutilation as a child constitutes severe and atrocious persecution. As such, genital mutilation’s effects may continue to haunt her throughout her life in very concrete ways, such as an irreversible lack of sexual sensation,
scarring, miscarriages, and chronic abdominal pain.”26 Female genital mutilation cases are often accepted as a valid case of credible fear. Because such cases deserve and often do receive recognition as past persecution and grounds for credible fear, other similarly traumatic circumstances under which females are seeking asylum should similarly be considered as grounds for credible fear. Granted that these issues directly correlate with the fear women face from domestic abuse (by parents, spouses, would-be spouses, former spouses, and siblings), we again illustrate the unfairness of, and demand reform to, the attorney general’s statement. In doing so, women would be better served by their asylum officers and immigration judges according to the gender-specific issues they face: “credibility” in a fear-based analysis needs to be understood in terms of cultural context.

Furthermore, it is necessary to regard such reforms as categorical qualifications that women fulfill and men do not. More simply put, women are subject to female genital mutilation and other sorts of abuses that men are not. We readily recognize that there are specific forms of abuse that men face and experience. That fact is not a matter of dispute but rather further evidence of the need for gender-specific provisions so all parties might be best respected and properly treated.

United States immigration law must also be amended to account for the disadvantage that many women inherit from the gender-biased cultures from which they are fleeing. In many world cultures, women have little to no rights without the support and authority of a male spouse to whom they are married. “Refugee women who [are] the heads of their households and without an adult male relative [are] particularly at risk and [have] little or no protection or access to justice.”27 We therefore suggest that women who are fleeing abusive husbands, are forced to seek asylum without their spouse, or have been separated from their spouse during the process be treated with


27 Muižnieks, supra note 15.
added consideration to the fact that these circumstances drastically affect their well-being, process, and claims of credible fear. Men face similar issues too. It is for this reason that immigration laws and would-be immigrants deserve gender-specific provisions. What we propose is to alleviate undue inequality and to relieve, where applicable and appropriate under the law, unnecessarily heavy burdens of proof.

Interestingly, there are more men granted asylum than women. In the last three years, men surpassed women in numbers of accepted applications by more than 500, sometimes close to 800. When this data is compared to DHS’s statistics on refugee arrivals, we can conclude that men are granted asylum more often than women. As we are aware that cases are decided on an individual basis, we do not purport to find blatant sex discrimination here. However, as a result of the attorney general’s 2018 overruling paired with the disadvantages that women already face while seeking US asylum, this has turned from an understandable and non–statistically significant difference to a true gender disparity. This gap may be remedied through appropriate amendments to asylee qualifications (e.g., a provision stating that migrants may gain refugee status due their fear of persecution on account of their gender)—the result being the admission of women whose claims of credible fear previously went unacknowledged.

III. CONCLUSION

This research, with its subsequent prescriptive changes, is independent of any political party or affiliation. In outlining the difficulties faced by women who seek asylum in the United States, we intend to engender general awareness and clarify that this issue should not be reduced to mere campaign promises or fluctuations in administrations’ policy. Rather, the rights of asylum-seeking women must be treated for what they are: indelible, unchanging human rights,

unaffected by elections or authority figures. The mistreatment that women face should be understood with the esteem endowed in the United Nations Charter and the US Constitution.

Attorney General Sessions’ decision does not reflect the gender sensitivity deserved by applicants of all sexes, from all countries. Although the American legal system of asylum seeking, immigration, and naturalization is purportedly gender neutral, the policy adjustments we suggest are necessary to give proper recognition to gender and to provide the subsequent protection of credible claims that gender-marginalized women deserve. From the burden of proof to the immensity of gender-based abuse and discrimination, we find it important to fully clarify and address the plight that female asylum seekers face with an adaptation of immigration policy. These adaptations should include, but are not limited to, the removal of gender-biased language, the recognition that claims of gender-related abuse are grounds for credible fear, and the adjustment of asylum-seeking procedures to account for the unique difficulties faced by asylum-seeking women.
In 2011, Susan Krieger filed to discharge $30,450 in bankruptcy, most of which was student debt. In spite of regularly applying for jobs, residing with her 76-year-old mother, and relying on state welfare to meet her basic needs, Krieger was unable to meet any of her monthly loan payments. While Krieger’s debt was initially discharged, her collection agency, the Education Credit Management Corporation (ECMC), later appealed the decision to the Bankruptcy Court for the Central District of Illinois. Following an adversary proceeding, the court reversed the discharge and restored Krieger’s obligation to pay her outstanding debt. The court stated that they found no evidence that Krieger’s circumstances should necessarily persist for the foreseeable future, despite the fact that Krieger had failed to find employment at any of the 180 jobs to which she had applied. Because only a handful of these applications were outside her preferred occupation as a paralegal, the court also claimed that Krieger had made insufficient effort to seek employment outside her chosen field.

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3 Krieger v. Educational Credit Management Corp., 713 F.3d 882 (7th Cir. 2013).
4 See id. at 882-885.
5 See id. at 885.
While Kreiger went on to successfully challenge the decision before the United States Court of Appeals for the Seventh circuit in *Krieger v. Educ. Credit Mgmt. Corp* and restore her discharge, her extreme difficulty in doing so demonstrates that this case is the exception that proves the rule of student exceptionalism. Student exceptionalism refers to the long-standing doctrine that in bankruptcy, student debt should only be dischargeable in extraordinary circumstances. This doctrine is so universal that even the most desperate students rarely attempt to escape their debt through bankruptcy.  

A 2015 study by the Federal Reserve estimated that out of 884,956 annual bankruptcy cases, only 674 sought to discharge student debt, most of which failed. Even when student debtors are facing life circumstances as bleak as Krieger’s—circumstances which would certainly warrant the discharge of ordinary debt—they are generally not entitled to debt relief. And despite the ubiquity of student exceptionalism, there is still some variation in how different courts interpret the criteria under which debtors qualify for the rare, exceptional discharge. While federal laws and precedent create universal standards that guide courts’ rulings, there remains a great deal of ambiguity within these standards, which leads to an inconsistent application of bankruptcy law. More importantly, this ambiguity often leads to courts enforcing standards that are much stricter than the letter of bankruptcy law, resulting in a harsh brand of student exceptionalism that many judges and scholars refer to as “a certainty of hopelessness.”

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6 Brook E. Gotberg et al., *A No-Contest Discharge for Uncollectible Student Loans*, 91 *University of Colo. L. Rev.* 183, 200 (2020).  
8 *Bankruptcy and Student Loans*, CONGRESSIONAL RESEARCH SERVICE, 12-15 (2019).  
In this paper, we explore the history of bankruptcy law and the trends which have made it so difficult for debtors to discharge student loans in bankruptcy. We will introduce the concept of undue hardship and the Brunner test, a standard created in 1987 which gives courts three criteria for determining whether repaying a student loan constitutes undue hardship.\textsuperscript{10} To demonstrate the application and ambiguity of these criteria, we examine several prominent court rulings that reveal an excessively strict standard for allowing discharge. We will then propose specific metrics to add to the Brunner test to give courts a clear idea of what qualifies as undue hardship and, under such qualifications, allows a person to discharge student debt.

I. Background


The current hurdles faced by Americans attempting to discharge their student debt begin with 11 U.S.C. § 523(a)(8). Before § 523(a)(8)’s creation in 1978, discharging student loans in bankruptcy was an almost identical process to discharging any other debt. During this time, however, many lawmakers and policy experts began to worry about the longevity of the federal student loan program, for two reasons: 1) Unlike most loans, lenders cannot take out collateral on student loans. Debt collecting agencies can seize a person’s property if they fail to pay a mortgage, but failure to pay student debt cannot result in one’s education or degree being taken away. 2) The federal government does not risk rate debtors, meaning that anyone is eligible for a loan regardless of credit history or financial trustworthiness.\textsuperscript{11} These two factors make it possible for a critical mass

\textsuperscript{10} Brunner v. New York State Higher Educ. Services Corp., 831 F.2d 395 (2\textsuperscript{nd} Cir. 1987).

\textsuperscript{11} Note, Ending Student Loan Exceptionalism: The Case For Risk-Based Pricing and Dischargeability 126 Harv. L. Rev. 587, 590-593 (2012).
of people to take out loans that they do not have the ability to repay, jeopardizing the entire program.\textsuperscript{12}

\textsection{1} U.S.C. § 523(a)(8) was a response to these concerns. In its infancy, § 523(a)(8) excepted students from discharge during the first five years of repayment, implying that a longer time period from graduation was necessary to prove that the debtor had attempted to repay the loan without resorting to bankruptcy.\textsuperscript{13} In the decades following, the bankruptcy code for student loan discharge has grown increasingly stringent. In 1990, the minimum waiting period for discharge was increased from 5 to 7 years,\textsuperscript{14} and in 1998, lawmakers removed the option to discharge after a waiting period altogether, opting instead to rely solely on its “undue hardship” requirement.\textsuperscript{15}

\textbf{B. Undue Hardship}

Undue hardship describes the circumstances under which a person is exempted from the obligation to repay student debt, due to the extreme and undeserved strain that the obligation would place on the debtor. This standard is inarguably vague. Amendments to § 523(a) (8) and later legislation do not provide a precise or implementable definition of undue hardship, and congressional records of the discussion surrounding these pieces of legislation do not resolve this issue.\textsuperscript{16}

The task of interpreting undue hardship therefore fell to the courts. It was not until 1987 that a somewhat universal standard of undue hardship came in the form of the \textit{Brunner} test, a three-pronged approach to determining the impact of student debt on debtors. The \textit{Brunner} test arose from the 1987 student loan bankruptcy case \textit{Marie Brunner v. New York State Higher Education Services Corp},

\textsuperscript{12} Susan Dynarski, \textit{An Economist’s Perspective of Student Loans in the United States}, \textit{Brookings}, September 2014, at 9-11.

\textsuperscript{13} \textsection{1} U.S.C. § 523 (2) (1988),

\textsuperscript{14} Crime Control Act of 1990 § 3621(2), 104 Stat. at 4965.

\textsuperscript{15} Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837.

in which the court determined that a more explicit test was necessary to prove undue hardship. The Brunner test describes three requirements under which a debtor qualifies for discharge: 1) The debtor is not able to maintain a basic standard of living while repaying the loans; 2) Circumstances exist that strongly indicate that this state of affairs will continue for the majority of the repayment period; 3) The debtor has made good faith attempts to repay the loan.\textsuperscript{17}

\textbf{C. Application of Brunner}

Despite these three requirements, the Brunner test’s ability to ensure that good-faith debtors receive relief from financial hardship is questionable. Historically, bankruptcy courts have interpreted the Brunner test and ruled on student loan cases in a way that goes beyond its original language, as demonstrated in Krieger. Exceptions to this excessively strict application of Brunner rarely survive appeals to higher courts. For example, in 1993, a bankruptcy court departed from standard procedure and granted Francisco Espinosa discharge of the accrued interest on a student loan, requiring him to only pay the principal debt of $13,250 without making a finding of undue hardship or holding an adversary proceeding with the loan servicer. Espinosa paid off the principal on the debt in 1997, but in 2000, Espinosa’s loan servicer, United Student Aid Funds, Inc., came to collect interest on the loan.\textsuperscript{18} A district court ruled that United was denied due process in the original case because no adversary proceeding was held, reversing the lower court’s decision. Espinosa then appealed his case to the Supreme Court, which opened his case in 2009.

The Supreme Court ruled that the original bankruptcy court’s discharge of the debt had been erroneous, maintaining that for discharge, an adversary proceeding must have been held and the debtor must have provided proof of undue hardship. The Court also ruled that since United waited seven years to challenge the bankruptcy

\textsuperscript{17} See Brunner, at 396.

\textsuperscript{18} Espinosa v. United Student Aid Funds, Inc., 553, 59 F.3d 1193 (9th Cir. 2008).
court’s ruling, they could not expect Espinosa to pay the remainder of the debt. While the debt remained discharged, the Supreme Court’s ruling against the lower court’s original decision further cemented the ubiquity of student exceptionalism and high standards for discharge eligibility.

Since that time, other court rulings have indicated that this stringent interpretation is subject to change, most clearly demonstrated by a 2020 ruling in Rosenberg v. New York State Higher Education Services. In 2018, Kevin Rosenberg filed for bankruptcy, attempting to discharge over $220,000 of student debt that he accumulated while attending law school. Having chosen to practice law only briefly upon graduation, he had no means to repay such a large sum. In this case, the court still used the Brunner test to evaluate Rosenberg’s debt, but with more leniency than is typical, and his debt was discharged in full. In a court opinion, Judge Cecelia Morris explained that the court did not require Rosenberg to provide evidence that his inability to repay the debt would “persist forever,” as has often been required of debtors. Additionally, the court did not determine whether Rosenberg’s state of affairs was a consequence of choice. Typically, in a case such as this, Rosenberg would have had to account for the fact that he only practiced law very briefly after graduation, as a typical legal salary would have been sufficient to save him from his dire financial straits. The good faith prong of the Brunner test would be satisfied only if Rosenberg’s departure from practicing law was reasonably outside his control. Judge Morris pointed out that this requirement, while a common application of Brunner, is found nowhere in the wording of the Brunner test or in § 523(a)(8). In her concluding remarks, Judge Morris states that “The harsh results that often are associated with Brunner are actually the result of cases interpreting Brunner. Over the past 32 years, many cases have pinned on Brunner punitive standards that are not contained therein... They have become a quasi-standard of mythic

19 See id. at 558.


21 See id. at 461.
proportions so much so that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans.”22 These statements, along with this court’s lenient application of Brunner, demonstrate how courts have created a harsh precedent that goes against the original language and principles of bankruptcy law. The subjective nature of Brunner allows for a concerningly large variety of interpretation; thus, the addition of an objective or quantitative metric to the Brunner test could have beneficial effects on courts that use it to determine the existence of undue hardship.

II. ADJUSTING BRUNNER AND 11 U.S.C. § 523(a)(8)

Current application of § 523(a)(8) and the Brunner test reveal that there are three basic issues with how the federal court system handles student debt. The first issue is that the standard for what constitutes undue hardship is too high, barring many debtors from a deserved discharge. The second issue is that courts inconsistently apply the Brunner test across federal jurisdictions and between higher and lower courts. The third issue is that the burden of proof placed on the debtor in establishing that they meet the three prongs of Brunner is unreasonably high. Introducing new metrics to evaluate a debtor’s situation based on these issues will better ensure that courts treat debtors fairly and that consistent standards are applied to all cases.

A. Living Wage

To address the first two issues, we propose amending § 523(a)(8) to resolve the ambiguity of Brunner’s first prong, that the debtor cannot maintain a basic standard of living. These adjustments would include a more concrete method of evaluation in determining undue hardship. We propose that the standard of living criterion be determined by a simple threshold of a living wage. If giving up 10% of monthly income to pay off student loans would place debtors under the living wage threshold, their circumstances should satisfy the hardship prong of Brunner and qualify them for discharge of student loans.

22 See id. at 459.
provided the other prongs are also satisfied. Using a universally applicable metric such as living wage removes ambiguity, which historically has resulted in an unreasonably high standard applied to debtors, as seen in cases such as in Espinosa.

Currently, courts evaluate debtors’ finances to determine if they are responsibly living within their means and if they can maintain a satisfactory standard of living. Under this practice, there is some variation between different courts on the strictness with which they evaluate debtors’ finances.23 Our proposed standard would create an equal and more lenient standard for everyone, better ensuring that debtors receive necessary relief. It should also be noted that the requirement to subtract 10% of monthly income to fall under the threshold comes from current options available to debtors to refinance their loans. Several federal relief programs exist for student loans in which debtors can have a portion of their wages (usually 10%) allocated to paying off student debt for a certain period (usually 25 years). After this time, the remainder of the debt is forgiven.24 The living wage threshold we propose targets those whose financial hardship is dire enough that they cannot afford to give up even 10% of income for a prolonged period.

Finding where to draw the living wage threshold is difficult. We maintain that the guiding principle of any solution should be balancing fairness between debtor and creditor. Thus, any threshold worth implementing must provide relief to more debtors than is possible under the current system, while also ensuring that the federal student loan program does not come under risk of bankruptcy, per the original rationale behind § 523(a)(8). We submit that the best existing candidate for a specific threshold comes from a method of calculating area-specific living expenses developed by economists at the Massachusetts Institute of Technology. These researchers compiled data from every county and metropolitan area in the United States


and determined living expenses based on local prices of necessities. Their calculation also includes other variable factors such as household size and the income of one’s spouse or partner. The researchers’ criteria for what constitutes a “livable” income is that which is required to be financially independent, or to have basic needs met without additional government or community assistance. A livable income includes the ability to pay expenses for housing, transportation, food, childcare, basic healthcare, and taxes. It does not include expenses such as entertainment, eating out, or savings. As economists designed this standard to be the minimum income required to live without assistance and, as such, cuts out all nonessential expenses, this living wage threshold is analogous to the lowest bar of what can reasonably be considered a threshold for hardship. In other words, if a debtor cannot maintain a living wage while paying off the loan, undue hardship is certainly implied. We therefore assert that any system that explicitly or implicitly creates a harsher standard to meet the undue hardship requirement of § 523(a)(8) violates even the most textual interpretation of this law.

We recognize that extenuating circumstances may exist in which a person may not fall below the living wage threshold but still be living in undue hardship. In the proposed § 523(a)(8) alterations, falling below the living wage line would be a sufficient, not a necessary, condition for discharge. Most exceptions would likely arise from medical conditions for which the normal calculation of healthcare costs is insufficient. In this case, adding the additional healthcare costs to the standard living wage line would be sufficient. In other extenuating circumstances, a debtor could contest their hardship before a bankruptcy court. As these cases are exceptional by nature, we make no proposals for how courts should handle them.

The MIT living wage metric was designed by experts to draw the line at the threshold of what is livable, and, according to many economists, it is the single best system to determine who lives in hardship. This metric fits neatly within the current legal framework,

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staying true to the original rationale of student exceptionalism while also fulfilling the classical doctrine of U.S. bankruptcy law, which holds that “the ‘honest but unfortunate debtor’ has a right to bankruptcy’s ‘fresh start.’”

We do not claim that a living wage threshold is the only necessary measure to fix the student debt crisis. While major reforms to the federal bankruptcy programs may be in order, our primary focus is ensuring that the current body of legislation and precedent accomplishes its stated intentions: in this case, by providing relief to those living in undue hardship.

B. Persistence and Good Faith

The living wage threshold is a necessary tool in determining hardship, but this is only one part of the equation. The other two prongs of Brunner provide a framework for determining if the debtor’s hardship is undue and persistent, requiring the debtor to demonstrate that his or her state of affairs will continue for the foreseeable future and that he or she has made good faith efforts to repay the loan. As we have discussed previously, the court opinion issued by Judge Morris in Rosenberg shows the contrast between the text of the law itself and the extra criteria courts have applied to these tests. For Brunner’s “persistence of circumstances” prong, Judge Morris points out that most courts place such a high burden of proof on the debtor that he or she effectively has to demonstrate that his or her financial straits will “endure forever.” The actual text of this prong of the Brunner test, from the official court opinion issued in Marie Brunner v. New York State Higher Education Services Corp., states that it must be the case that “additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.”

What constitutes “likely to persist” is open to interpretation, but there is little doubt that the standard, as applied in the cases we have explained above and in countless other unmentioned lesser-known cases, typically goes beyond reasonable


27 See Brunner, at 396.
likelihood. Our recommendation is to include a clause in § 523(a)(8) that satisfies this criterion if a debtor has been living below the living wage for a majority of a three-year period, which is the upper limit for how long a debtor can put federal student loans in forbearance and pause repayments. As with the living wage requirement itself, there are many scenarios in which a sudden change in circumstances could cause a person’s financial situation to be new yet permanent, in which case he or she would be able to contest that courts waive this three-year requirement.

Brunner’s third prong is that the debtor has made a good faith effort to repay their student debt. We have no official proposal for amendments based on this prong; however, we reiterate that as is the case with prongs one and two, courts have long been, in the words of Judge Morris, adding “punitive standards that are not contained [in § 523(a)(8) or Brunner].” The most notable departure that Rosenberg took from these extra standards, as we have described in the previous section, is that the court did not require Rosenberg to demonstrate that his financial situation was not the foreseeable consequence of his actions. Rosenberg, as well as Krieger, both could potentially have prevented some of their hardship had they pursued different occupations. This is one aspect in which Judge Morris’ ruling may have gone too far; while not explicitly stated in statutory bankruptcy law, occupation of choice is naturally a logical consideration for assessing effort made in good faith. Were chosen occupation not grounds for courts denying a discharge, it would be possible and perhaps inevitable for students to accumulate massive debt that they had no intention of repaying, safe in the knowledge that their financial status and frequency of repayments would be sufficient to qualify them as a good-faith debtor in undue hardship. Going forward, courts should continue to consider chosen occupations, but in the context of other factors in the debtor’s situation. In other words, choosing a lower paying profession should not automatically be grounds for disqualifying for discharge. Overall, due to the highly circumstantial nature of assessing “good faith,” we recommend that this prong remain subject to the court’s interpretation, but with a

28 See Rosenberg, at 459.
primary focus on the debtor’s frequency and total value of repay-
ments relative to his or her financial status.

C. Implementation and Caveats

It is important to note that while the proposed living wage provides a precisely calculated, location-specific metric for the minimum amount necessary to meet basic needs, it is not yet codified into the US legal system. The federal minimum wage, which is legally defined, has been insufficient for maintaining living expenses since the 1960’s. Likewise, the legally recognized poverty line is far lower than any reasonable interpretation of hardship, as noted by the economists that developed the living wage metric. We therefore recognize that our proposal to incorporate the living wage into bankruptcy courts’ decisions regarding the proof of undue hardship faces substantial legal hurdles: while proponents of a legally codified living wage have lobbied the federal government for decades, the minimum wage and poverty line currently remain the only legally recognized minimum standards of living.

The adoption of the living wage as a consideration during bank-
ruptcy proceedings remains a viable option for courts, which are allowed more discretion and flexibility as they examine circum-
stances on a case-by-case basis. We do not suggest that the addition of a living wage requirement into the Brunner test should dimin-
ish courts’ ability to freely interpret individual situations: rather, we believe that such an added metric will allow the Brunner test to be interpreted as originally intended, since those who fall below the living wage are, in most cases, undoubtedly living in hardship. Additionally, our proposal for a three-year time period clause gives courts yet another specific metric to understand if the debtor’s situ-
ation is a long-term one and thereby judge their situation fairly and accurately. Given such aids, we believe that the courts will be able to perform the Brunner test and assess undue hardship accurately and as originally intended, assuaging the important concerns addressed

in Rosenberg and allowing for more consistency in court rulings regarding student loan bankruptcy.

III. Conclusion

Once again, we are not arguing for sweeping reforms to the federal student loan program, nor are we necessarily arguing against it. However, given the current difficulty of discharging student debt in bankruptcy, and within the context of current bankruptcy law and doctrine, we maintain that steps must be taken to ensure that the application of law more closely matches the law’s intention. These proposals seek to balance principles of fairness between debtor and creditor. One the one hand, it is a tenet of U.S. bankruptcy doctrine that the “honest but unfortunate debtor” has a right to a fresh start through bankruptcy, and courts should seek to achieve this goal for student debtors as much as possible. On the other hand, the economic demands on the federal student loan program and the nature of student loans make realizing this goal unrealistic. Student loans, as we discussed, have no collateral. Universities and creditors cannot demand that debtors return an academic degree or years of education if financial obligations aren’t met: thus, there is no way to enforce payment. High default rates—and there is every incentive to default on a loan with no collateral, even among those that began with honest intentions—would place any federal student loan program under constant threat of bankruptcy.

Student exceptionalism in bankruptcy was therefore a necessary step in saving the federal student loan program. But the heavy-handed application of law has swung the pendulum too far in the other direction. Forty-five million American students and graduates collectively hold $1.7 trillion of student debt, a figure that amounts to almost 8% of U.S. GDP. Current bankruptcy law may have saved the student loan program from bankruptcy, but it has also contributed to soaring tuition prices, created a growing debt bubble, and

placed inescapable hardship on the backs of millions. Economists disagree on the long-term impact of these policies, but even the most optimistic concede that this is a problem with which citizens and lawmakers will grapple for at least a generation. The proposals we have set forth address a small but crucial part of the student debt crisis. Millions of student debtors qualify for bankruptcy even under the standards of § 523(a)(8) and the Brunner test. Most of those that have filed for bankruptcy have nonetheless failed, because, to paraphrase Judge Morris of the Southern District of New York, most courts have applied standards that are not contained in law. It is time for a course correction.

The most important part of these adjustments is giving the law a more precise and equal tool for determining who lives in hardship, a need that we answer through the calculation of living wage. There is then the secondary but still vital issue of determining if a hardship is undue and persistent. We suggest that courts should, in most situations, make this decision based on a simple evaluation of past income and frequency of repayments. There will be exceptions to the rules we have laid out, some of which we have accounted for, but the rest we place in the hands of courts. We regard these proposals as being a tune-up, a refinement of an existing process, rather than a new system altogether. There may be a need for grander policies to address the debt crisis in the future, but we offer these suggestions as a possible first step. Even if amendments to § 523(a)(8) and a reinterpretation of Brunner do not go very far in solving a national crisis, it is our hope that these adjustments may save a few from the crushing weight of debt and give a fresh start to those that most deserve it.

ELIMINATING FORCED LABOR IN AMERICAN CORPORATIONS AND THEIR SUPPLY CHAIN: EXISTING SOLUTIONS AND FAILURES

Breann Hunt

I. INTRODUCTION

If you’ve ever purchased some of Nestle’s chocolate milk, Nesquik, you may have been purchasing a product sourced by slave labor. As the world’s largest food manufacturer, Nestle has maintained its competitive advantage by cutting ethical corners in its sourcing practices. From Thailand to Africa, the global food manufacturer’s supply chain is replete with severe human rights violations that have caused public outrage on multiple occasions.

Twenty-one million individuals across the globe are victims of forced labor at any given moment. Included in this statistic are millions of children subjected to “restriction of movement, physical and sexual violence, intimidation and threats, retention of identity

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1 Breann Hunt is a junior at Brigham Young University majoring in Strategic Management. Breann would like to thank her editor, Miranda Olson, for her amazing work reviewing this paper and her excellent contributions to its content.


documents, withholding of wages, [and] debt bondage." Annual profits of forced labor come to a total of $150 billion USD for American companies per year, spread over a multitude of industries and global conglomerates. Increased consumer production has created fierce price competition among national corporations, driving subcontractors to resort to illegal and immoral methods to gain labor contracts. Low prices for consumer goods are often paid by the most vulnerable populations.

The financial benefit of forced labor creates little incentive for perpetrators to abandon the practice on moral grounds. The competitive advantage organizations gain from unethical supply chain practices is a lucrative incentive to continue illegal behavior. Human rights organizations often present emotional pleas to governments, corporations, and the general public to demand systematic change, but these organizations lack the power to attack the global and widely entrenched issue of forced labor. These third-party efforts, while laudable in their activism, seek redress in the abstract, as current legal systems are unprepared to litigate on the global stage.

With yearly revenues of $90 billion, Nestle’s profits rival the GDP of entire nations and possess global influence. In 2005, six plaintiffs alleged that they were enslaved on [Nestle’s] plantations and sued Nestle and its parent companies in Doe v. Nestle for aiding and abetting their enslavement. Despite public awareness and pending legal action, Nestle made no change to their supply chain practices, and in 2015—a full decade after the initial attempt at legal action—the company admitted to human rights violations in its Asian


supply chain. It should be noted that the 2005 claims were from victims in Africa, thus highlighting the widespread, global scope of the company’s behaviors. The lack of legal action likely enabled Nestle to continue illegally sourcing food products. Nestle has never faced legal consequences for its role in human rights violations; instead, the firm released reports as a result of public outcry. However, reports and research can only go so far in moderating the ethics of billion-dollar companies, particularly when voluntary reporting is done by the company itself.

The fact remains that illegal and inhumane labor conditions have persisted despite increasing public awareness of the existence of forced labor conditions. Watchdogs and whistleblowers have appealed to public sentiment in an attempt to enforce good behavior from billion-dollar organizations. However, consumers have been unable to create meaningful change in an economic market with an oligopoly or monopoly that restricts buying power. Indeed, the case of *Doe v. Nestle* has not caused any meaningful legislation to be passed and has only recently been appealed to the Supreme Court for further consideration on behalf of the plaintiff’s claims. The lack of effective legislation and cries for change in this matter prove that this issue has gone ignored, preventing a clear legal consensus from emerging. Supreme Court justices remain divided on the issue, including the role of the judiciary in the interpretation of existing laws. In *Doe v. Nestle*, Justice Brett Kavanaugh claims, “[T]his case really is a case, I think, about the proper role of the judiciary as compared to the proper role of Congress here in fleshing out the Alien Tort Statute.”

It is past time for the American legal system to recognize corporate culpability in the regular, egregious violations rife in global supply chains. The author of this Article will examine existing legal solutions and their failures, while expanding on Justice Kavanaugh’s question concerning the expansion of legislation.


II. BACKGROUND

Many arguments surrounding the issue of illicit supply chain management often focus on the ethical obligation of the courts to rule against corporations that fail to protect and manage risk. Ethical arguments, while often compelling in the eyes of the public, fail to create a sound legal basis for litigation as seen in court precedent where most rulings have sided in favor of the corporations. Indeed, multiple courts have ruled against arguments featuring U.S. law that try to explicitly outlaw slave labor, citing instead the context of the original law as being economically motivated as opposed to morally sanctioned. According to the court in the precedential *McKinney v. U.S. Dept. Treasury* case, “the plain language of § 307 (referring to Section 307 of the Tariff Act of 1930) will not support an interpretation that it was enacted to afford consumers a legal right or interest in preventing, for economic, moral, or ethical reasons, the importation of foreign goods produced by forced labor.”

In recent years, the number of suits brought against American corporations by international plaintiffs has increased, including several high-profile cases\(^9\) such as *Doe v. Nestle* mentioned above, where supply chain violations are the cause of the cited damages. U.S. Code § 1589 explicitly outlaws slave labor in the United States while U.S. Code § 1307 prohibits the import of products produced by such labor, and allows for international plaintiffs to sue American companies. This circumstance appears ripe for litigating supply chain violations, yet slave labor rates are only increasing, and American companies continually face accusations of illicit supply chain management. Thus, the author will examine the effectiveness of various non-governmental and legal statutes and their impact on eliminating forced labor from American corporations’ supply chains to prescribe possible redress.

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III. PROOF OF CLAIM

A. Limited Grounds for Plaintiffs

As American companies globalize their supply chains, the likelihood of violating international human rights statutes increases. Global sourcing also creates issues in determining the legitimacy of plaintiffs’ claims to sue on American soil. Justice Elena Kagan questioned the distinction between corporations and individuals in slave labor liability upon hearing arguments from Doe v. Nestle. She asks, “if you could bring a suit against 10 slaveholders, when those 10 slaveholders form a corporation, why can’t you bring a suit against the corporation?”11 Her words highlight the extent to which corporations are shielded, not only from financial risk, but from moral (and illegal) violations.

Following a ruling in Jesner v. Arab Bank that limited the grounds for plaintiffs to sue for forced labor violations, legal scholars Verider and Stephen argue that “private human rights litigation in federal courts will survive only when plaintiffs either fit within an existing statute, such as the Torture Victims Protection Act (which excludes corporate defendants) or the Anti-Terrorism Act (which only covers injury to U.S. nationals), or can both satisfy the requirements of diversity jurisdiction and find a basis in state or foreign law for their claims.”12 Essentially, current trends in court rulings move towards an extremely narrow definition of human rights violations that leaves plaintiffs struggling to not only seek individual damages, but also to change a system that continues to perpetuate offences against the defenseless. Victims of forced labor may lack resources or access to legal redress, as many live outside of the United States and have linguistic and financial barriers to initiating legal action. The increased restriction on the grounds for redress for victims effectively protects billion-dollar industries from facing accountability for

11 Bravin, supra note 6.

human rights violations perpetrated in pursuit of profit while making it nearly impossible to prevent the creation of future victims through widespread legal action.

B. Protection for Corporations

United States law outlaws corporations and citizens from benefiting from forced labor.\textsuperscript{13} Further litigation from the Tariffs Act of 1930 claims that goods produced by convict or forced labor shall not enter any U.S. port.\textsuperscript{14} Human rights activists have attempted to argue for a moral and ethical application of the Tariffs Act to bar consumer goods produced by slave labor from entering the U.S. market. Several cases\textsuperscript{15} citing this distinct language argue that the Act justifies a ruling in favor of forced labor victims. However, the \textit{McKinney v. U.S. Dept Treasury} ruling appeals to the context of the Tariffs Act, which states that “section 307 was enacted by Congress to \textit{protect} domestic producers, production, and workers from the unfair competition which would result from the importation of foreign products produced by forced labor.”\textsuperscript{16} The California District Court’s interpretation of the Tariff Act of 1930 reinforced the lack of ethical business obligation in supply chain cases. In other cases, such as the \textit{International Rights Fund vs. U.S.},\textsuperscript{17} plaintiffs cited Section 307 of the Tariffs Act of 1930 as justification for declaratory and injunctive relief from multiple United States Government entities for failure to investigate allegations of forced child labor in cocoa imports from Côte d’Ivoire. The court in 2005 upheld the decision of \textit{McKinney v. U.S. Dept. Treasury} “because of the undisputed facts regarding the lack of any significant domestic production of cocoa,

\begin{footnotesize}
\begin{enumerate}
\item Forced Labor, 18 U.S.C §1589 (2008).
\item McKinney v. U.S. Dept. Treasury, 799 F.2d at 1544.
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\end{enumerate}
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307 essentially renders itself moot under these facts."\(^{18}\) The court therefore created a precedent that precludes use of Section 307 in litigating violations of forced labor when a U.S industry is not at risk from foreign competition. Essentially, this interpretation protects the interests of those American corporations that are often the perpetrators of human rights violations on international soil. No such protection for the vulnerable population of forced laborers exists.

However, well-known brands and companies that produce popular products for consumers in the United States like Nike, Microsoft, and even Walmart have been linked to forced labor upon which they rely for market success. The nature of subcontracting production and other labor allows U.S. companies to manage the logistics of selling goods through overseas supply chains, far distant from the consumers that will actually purchase the products. Thus, “corporations and manufacturers are not held legally responsible when an outside firm that is sub-contracted to produce their product uses forced labor.”\(^{19}\) Not only are corporations legally cleared from implications of forced labor by avoiding responsibility for subcontract labor, but consumers are often unaware of the reality of supply chain morality due to the distance between production and purchasing. Therefore, corporations can effectively avoid both legal and societal implications that would arise from aiding and abetting systems of forced labor. While violating the laws prohibiting the use of forced labor, such U.S. companies grow larger and more influential, creating economic monopolies on U.S. markets and barring fair economic competition. Other firms competing in the U.S. market who are not inclined to cut ethical corners find themselves at a disadvantage compared to firms that leverage the lack of information and liability to advance in market share. Indeed, the power, size, and available markets for these products allow the overbearing firms to dictate the price and

\(^{18}\) *Int’l Labor Rights Fund*, 391 F.Supp.2d at 1370.

speed of manufacturing.\textsuperscript{20} In turn, financial inequality and market bias abound, harming victims, customers and the free market alike, though disproportionally.

\textit{C. Competition Inequality}

Presently, there is no \textit{adequate} legislation addressing the financial inequality created in the U.S. market when firms who benefit from forced labor compete with other firms who uphold lawful labor practices. While legislation such as code 1307 addresses the concept of forced labor violations, there is no comprehensive legislation that addresses forced labor victims, customers implicated in the purchase of goods produced by such victims, and the protection of the free market from the influence of unethical cost reduction from various corporations. In the ruling of \textit{McKinney v. U.S. Dept of Treasury}, the court addressed the argument of competitive injury in economic markets based on sourcing from forced labor. Such competitive injury can be described as price discrimination that distorts economic fairness. The ruling states that, “Article III [of the Constitution] requires more specific allegations of competitive injury to satisfy the case or controversy requirement.”\textsuperscript{21} From the conclusion of this case, it is clear that the court acknowledged the presence of competitive injury abstractly but required appellants to quantify injury further to gain a favorable ruling. The author will address and establish the definition of competitive injury under existing statutes and prescribe additional measures for promoting free market trade by penalizing companies engaging in forced labor.


\textsuperscript{21} \textit{McKinney v. U.S. Dept. Treasury}, 799 F.2d at 1544.
D. Forced Labor and Its Effect on the Free Market and Antitrust Violations

The federal government of the United States has developed legislation to promote rigorous business competition in the marketplace. Examples include antitrust laws and SEC requirements which ensure fair competition and freedom of information in the market by breaking up market monopolies and issuing property rights. In relation to supply chain management, antitrust laws enforced by the FTC examine firms’ supply chains. The FTC claims that, “A vertical [supply chain] arrangement may violate the antitrust laws [...] if it reduces competition among firms at the same level (say among retailers or among wholesalers) or prevents new firms from entering the market.”22 Supreme Court precedent dictates that antitrust issues be examined through a reasonable framework that includes a consideration of the effect of a firm’s actions on competition within the market. The FTC claims that, “[price advantage through supply chain] must be weighed against any reduction in competition from the restrictions.”23 While price advantage is not illegal, gaining market high ground through forced labor creates an unfair vertical supply chain that tilts economic competition in favor of the company with human rights violations.

According to the FTC, “a vertical arrangement may violate the antitrust laws, however, if it reduces competition among firms at the same level (say among retailers or among wholesalers) or prevents new firms from entering the market.”24 Sourcing goods through illegal labor reduces competition by unfairly lowering the cost of goods sold for firms, thus enabling them to undercut competitor pricing. This does have the effect of reducing the advantages of free market competition and prevents new firms from entering the market. For


23 Id.

example, a study done on the price increase upon Fair Trade certification of coffee brands (an industry often associated with forced labor in its supply chains), researchers found that price increases did not reflect the consumer’s willingness to pay. A Fair Trade certification is a third party supply chain certification that audits participating businesses to ensure their subcontracted labor is well paid and free from slave labor. The study further claims that, “Fair Trade Certification has an impact of raising the price of coffee 22% compared to non-Fair Trade coffees,” while “Fair Trade Certification increases the premium consumers are willing to pay for coffee by 1.1%.” Thus, while brands that secure their supply chains from human rights violations must necessarily increase their prices, there is not a corresponding willingness to pay the additional price from consumers. The study cited deals with a common consumer good, coffee, where firms compete with similar prices and four brands represent more than 55% of total market share. Other common consumer goods have similar industry structures, such as Nestle, where large competitors compete on price for market share. When industries compete on price, the likelihood of ethical supply chain efforts creating an effective competitive advantage with the majority of consumers decreases.

While there is certainly evidence of forced labor within coffee supply chains, ethically sourced coffee brands have not made a significant entrance into the mainstream market. This represents how

27 Carlson, supra note 25.
dominant, global firms with no legal repercussions for their human rights violations suppress the expansion of ethically sourced U.S. competitors. In the Supreme Court filings for *Doe v. Nestle*, competitors claim that Nestle violated their right to the free market. According to several firms who had taken measures to ethically source their product, “As slave-free cocoa and chocolate companies, [we] are at a competitive disadvantage to companies that source cheap cocoa produced with forced child labor. The higher production costs associated with compliance with international human rights norms require [us] to sell chocolate at higher prices.”30 If other firms are operating with legally sourced labor, they will be less likely to sustain profits and compete in markets where some firms are illegally benefiting from cheaper labor. Economic scholars Kynak et al. argue that, “The competitive environment, heating up with the emergence of new and powerful competitors in the markets with regard to all sectors, tempts entities to perform unethical maneuvers in their commercial relations with the aim of gaining a competitive advantage.”31 Unethical maneuvers to gain competitive advantage in the market are often hard to detect and costly to investigate. Indeed, “transaction and auditing costs of the entities increase due to the fact that such operations based on the derivation of unfair advantage are difficult to detect.”32

As mentioned above, becoming a Fair Trade certified brand requires rigorous standards and will increase the cost to the firm for goods sold. This includes associated overhead costs. Other certifications for sustainability such as the B Lab, which includes similar standards for labor within the supply chain, represent high costs

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32 Id.
to firms who decide to engage in such third-party labels.\footnote{Certification, B Lab, \url{https://bcorporation.net/certification}.} While these certifications are not necessary for firms to engage in ethical practices, they represent the overall cost disadvantage for firms that refuse to compromise ethical sourcing standards for price cuts. Thus, for this reason, national antitrust legislation can define the federal government’s obligation to address forced labor in supply chains, and provide additional context in courts for understanding the quantifiable damage done to free markets by illicit supply chain management.

E. Current Legislative Efforts in Forced Labor Reduction and Policing

The United States federal government has a legal obligation to remedy illicit practices in the supply chains of American companies. However, some may argue that the federal government should not interfere in free market operations due to volunteer efforts by human rights organizations and public advocacy groups that have come to prominence in recent years. Current legal arguments suggest leaving the ethics of human rights violations to the court of public opinion. Logically, if the public can successfully keep businesses from engaging in forced labor in their supply chain through social pressure, there is little need for government intervention. To this end, it is necessary to examine existing legislation and its effectiveness in deterring forced labor as well as voluntary public efforts to reduce human rights violations committed by American companies. Legislation has been limited in this regard, but recently, attempts to police the ethicality of supply chains have been instated. The State of California has attempted to end the practice of forced labor by enacting the California Transparency in Supply Chain Act of 2010. A decade after its inception, the California Transparency in Supply Chain Act has been critiqued by scholars and investors alike. The declared purpose of the CTSCA is to “help California consumers
make better and more informed purchasing choices.”  

The CTSCA requires businesses worth over $100 million in California to “disclose on their websites their efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale.” However, the Act “only requires that covered businesses make the required disclosures, even if they do little or nothing at all to alter their supply chains.” Human rights organizations classify the CTSCA as “more symbolic than substantive in nature.”

Despite the lack of enforcement and means of policing, the act does provide a basis for creating reporting that can be compared across firms. One common critique of corporate social responsibility (CSR) reporting is that voluntary reporting is extremely arbitrary and varies by firm. Legislation such as the CTSCA can standardize the reporting initiatives, though admittedly, the CTSCA does little to create meaningful change in companies’ supply chains without the power to enforce more than reporting statistics. The CTSCA is one of the most widespread examples of modern supply chain legislation. To date, no other states have made similar moves to adopt such legislation. Internationally, the United Kingdom has passed the Modern Slavery Act of 2015, which includes a supply chain disclosure clause similar to CTSCA. As of 2021, the United States government has not passed similar legislation combatting modern slavery.

F. Third-Party Efforts in Forced Labor Reduction and Policing

Voluntary efforts to monitor and improve supply chain human rights violations by third party organizations currently include researching existing work conditions and possible solutions, but these efforts


35 Id.

36 Id.


38 Modern Slavery Act, 2015, c. 30.
do little in the implementation of systematic change. The theory of change behind third party organizations relies on the assumption that the public will put pressure on firms if given compelling narratives of workplace conditions. Organizations striving to end forced labor in supply chains include, but are not limited to, the Fair Labor Association, Know the Chain, and Corporate Human Rights Benchmark (CHRB). These organizations have contributed to a greater understanding of research techniques to identify how supply chains exploit workers globally. CHRB reports specifically on the largest global companies by name and industry. Know the Chain similarly generates reports for companies and investors to voluntarily elect to adopt better supply chain practices. In each case, these supply chain watch dogs are connected to a vast network of other international rights organizations that promote the UN Sustainable Development Goals and other priorities geared towards bettering conditions for all humankind. However, like the results of the California Transparency in Supply Chain Act, these NGOs struggle to make a concrete and sustainable impact. Though they are clearly able to find information concerning human rights infringements in global supply chains, the information only yields value when condemned by courts. In many ways, these efforts are isolated from legislative efforts, which reduces their effectiveness.

In sum, the CTSCA and third-party voluntary efforts focus primarily on reporting yet fall short in implementing real change. Existing precedent for proving corporate injury has so far been limited. These ineffective efforts to penalize global supply chains who engage in forced labor de-incentivize investors from progressing, accepting, and promoting ethical supply chains. However, further development on the issue of ethical supply chain management may come to fruition in the future. As recently as July 21, 2020, the Slave-Free Business Certification Act was introduced to the United States Congress. The bill would require reporting of supply chain violations through external audits and certification of slave-free labor. Ultimately, the bill proposes that “the Secretary may assess punitive damages in an amount of not more than $500,000,000 against a

39 Birkey, supra note 37.
covered business entity. The proposed Slave-Free Business Certification Act draws on the precedent of the CTSCA by requiring public disclosure of supply chains. It remains to be seen whether this approach to legislating supply chains in the United States will have a similar effect as that of the California Supply Chain Act.

IV. CONCLUSION

The author proposes that a more direct approach to supply chain violation be adopted in conjunction with the Slave-Free Business Certification Act or in coordination with SEC or FTC regulations. It is clear that third party organizations have research and analysis capabilities and methodologies that can be utilized to assess corporate injury. In order for claims of corporate injury to be sustained in antitrust regulation cases or SEC information injunctions, the Supreme Court requires clear proof of injury. In accordance with existing capabilities in supply chain analysis, this article demands that trusted supply chain organizations include specific metrics relating to competitor injury. Upon proof of competitor injury, the author argues that antitrust laws should be applied to cases of forced labor within supply chains, as previously outlined. The author concedes that clear competitor injury must be proven through existing Antitrust definitions of injury, but argues that in the presence of a multiplicity of NGOs and ineffective legislation, resources can be reallocated by both governments and third parties to determine the extent of economic damage when firms engage in illegal supply chain practices compared to legally sourced firms. In this way, human rights violations can be litigated through existing law, and the diversity of research available to the public will serve to create a clear path of action for consumers as well as legal entities charged with upholding existing law.

The author’s findings indicate that issues of illicit supply chain management are relevant to today’s legal discourse, and that an effective method of incentivizing compliance with national and international human rights standards has not yet been implemented in the

United States. Upon examination of the California Transparency in Supply Chain Act, this paper concludes that the lack of enforcement renders this legislation ineffective in changing company practices. Appeals to public virtue have failed to inspire systematic change in the global supply chain, as the Act falls short in prescribing penalties for non-compliant firms. Non-governmental organizations excel in creating research reports and providing statistics on forced labor conditions; however, the quantity of reports has oversaturated the market without effecting change. This paper instead proposes that research organizations focus on proving corporate injury and instances where free market trade has been dampened by unfair advantages gained by illegally sourced labor. The author concludes that the U.S. government has a duty to upholding the free market and protecting its citizens, and this duty must be carried out in eliminating forced labor from U.S. consumer goods.
BEYOND #MeToo: ADDRESSING WORKPLACE SEXUAL MISCONDUCT CASES AND THE TARGETED USE OF NON-DISCLOSURE AGREEMENTS

Taylor Percival

I. INTRODUCTION

Following the news of several sexual assault allegations filed against Hollywood gatekeeper Harvey Weinstein in late 2017, the #MeToo movement officially became a global phenomenon. Women across the United States and the world began sharing their experiences of sexual abuse and became committed to breaking the silence surrounding workplace harassment. The millions of tweets and posts containing the “MeToo” hashtag represent only a fraction of the number of individuals affected by sexual misconduct. In 2018, several celebrities founded the Time’s Up legal defense fund with over 700 volunteer lawyers committed to providing legal defense for sexual violence victims. As is so often the case, victims of workplace sexual harassment suffer in silence for fear of retaliation from their employer.

Various tactics have been used to silence victims in the past. When the allegations against Harvey Weinstein came to light in 2017, Taylor Percival is a junior at Brigham Young University majoring in Psychology and minoring in Spanish. She will be attending law school in fall 2022. Taylor would like to thank her editor, Lane Gibbons, a senior at Brigham Young University majoring in Sociology and minoring in Global Women’s Studies. Lane will be attending BYU Law in the fall of 2021.

it was revealed that non-disclosure agreements, threats, and coercion had been used to prevent victims from going to law enforcement and seeking legal action against perpetrators of sexual misconduct in the workplace. The power imbalance and culture of victim-silencing in workplace settings became clear as more allegations came out against other powerful figures like Roger Ailes, Kevin Spacey, and Matt Lauer. The questions raised by these revelations attempt to uncover why it is that victims stayed silent for so long as their abusers continued to commit acts of sexual misconduct.

The widespread media attention on these victim-silencing tactics has sparked a national skepticism regarding their legality and ethicality. To what extent can non-disclosure agreements be enforced in cases of sexual misconduct before they encroach on unconscionability? This paper will elucidate the legal and historical precedents regarding non-disclosure agreements (NDAs) in an attempt to answer this question and bring clarity to a complex issue. Ultimately, federal legislation should reflect existing state measures in order to prevent workplace sexual harassment. This may take the form of comprehensive training, limiting the requirements of non-disclosure agreements in employment contracts, or imposing greater penalties for employers who seek to prevent the disclosure of sexual harassment or misconduct.

We will address cases pertaining to sexual misconduct and non-disclosure agreements and explore the history of NDAs and current legislation. We will then explain how current state legislation and previous cases support our claim that NDAs are unconscionable and unlawful in sexual misconduct cases. Lastly, we will discuss proposed legislation that should be passed in order to federally limit the use of NDAs in sexual misconduct cases.

II. Background

The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as a form of sex discrimination that violates The...
Civil Rights Act of 1964. The EEOC outlines two main types of sexual harassment: first, “quid pro quo” or harassment that involves the exchange of sexual favors for employment benefits, and second, harassment that creates a hostile or offensive work environment. To be classified as harassment, the behavior must affect the individual’s employment (either implicitly or explicitly), interfere with the employee’s performance, or create an unacceptable work environment. Employers are responsible for creating an environment where sexual harassment is not tolerated.6

A. Key Concepts

Sexual assault is defined as any kind of sexual contact, as prescribed by law, that occurs without the direct consent of the victim.7 Consent can be withheld when the victim is conscious or unconscious, or physically unable to consent. Sexual assault can include, but is not limited to, rape and attempted rape, fondling or unwanted sexual touching, or forcing sex acts such as oral sex or penetration.8 Consent is a freely given agreement to participate in a sex act or behavior. Any lack of verbal or physical agreement is considered to be the absence of consent.9 Lack of resistance, submission due to force or threat of harm, a previous relationship, or the dress of the victim does not constitute consent. A person who is unconscious or physically incapable to agree to participation (due to substance use or other kind of impairment) cannot give consent.

6 Id.
8 Id.
9 May 5, 1950, ch. 169, § 1 (Art. 120), 64 Stat. 140.
B. The Civil Rights Act of 1964

Title VII of The Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, sex, religion, and nationality.\textsuperscript{10} In the case of Title VII, “on the basis of sex” is defined as conditions such as childbirth and pregnancy, or related medical conditions. Under this section, discrimination includes the following: failing or refusing to hire an individual; unequal treatment of individuals in terms of compensation, work conditions, or work privileges; segregating individuals in a way which would adversely influence their employment status; and unfairly terminating employment of an individual on the basis of the aforementioned attributes.\textsuperscript{11} Accordingly, the Supreme Court has interpreted that sexual harassment is considered discrimination on the basis of sex and is therefore prohibited.

C. Meritor Savings Bank v. Vinson

In September of 1978, Mechelle Vinson sued her former employer, Sidney Taylor, for sexual harassment.\textsuperscript{12} Vinson argued that such harassment created a “hostile working environment” which constitutes discrimination under Title VII of the Civil Rights Act of 1964.\textsuperscript{13} The case reached the U.S. Supreme Court in 1986 and the question was raised, “Did the Civil Rights Act prohibit the creation of a “hostile environment” or was it limited to tangible economic discrimination in the workplace?”\textsuperscript{14} In a unanimous decision, the Court decided in favor of Vinson and concluded that sexual harassment is a form of sex discrimination prohibited by Title VII.

In \textit{Meritor Savings Bank v. Vinson}, the Supreme Court ruled that harassment was any workplace conduct that severely and negatively

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\textsuperscript{11} \textit{Id.}


\textsuperscript{14} \textit{Meritor Savings Bank}, 477 U.S. at 62.
\end{flushleft}
impacted the victim’s employment. The Supreme Court further clarified this ruling in *Harris v. Forklift* and *Oncale v. Sundowner*. In these cases, it was determined that harassment is subjectively and objectively offensive and is motivated by the victim’s membership in a protected category (such as a gender or racial group).

**D. Silencing Tactics and Non-disclosure Agreements**

In the past, many tactics have been used to silence victims of sexual misconduct in the workplace. One of the most commonly used has been non-disclosure agreements (NDAs). Because employee’s speech is protected under Title VII, employers have historically used NDAs to prevent public disclosure of sexual misconduct in the workplace. NDAs are intended to be mutually agreed upon, but issues may arise when there is a power imbalance between the two signing parties, therefore increasing the risk of coercion, whether intended or not. NDAs can be composed of different provisions; the most common provisions are non-disclosure provisions, non-disparagement provisions, non-cooperation provisions, and affirmative statements.

A non-disclosure provision prevents one or both parties from disclosing certain information established in the NDA. This may include, but is not limited to, the settlement proceedings and settlement claims. Non-disparagement provisions can either be narrow or broad. A narrow non-disparagement provision restricts parties from participating in libel, slander, or defamation only. In the case of narrow provisions, truth is a viable defense for breach of the agreement. On the other hand, broad non-disparagement provisions prevent one


party from making comments about the other party that could damage their reputation. This means even negative statements that are true but could harm the other’s reputation are prohibited. Non-cooperation provisions state that the signing party will not assist anyone else in pursuing legal action against the accused party. These provisions are the most controversial because they are considered by some to be obstructions of justice.20 Lastly, affirmative statements are provisions that require one or both parties to participate in affirmative speech. This may range from providing references or letters of recommendation to requiring that one party says positive things about the other party publicly, as was the case in one of Weinstein’s NDAs.21

**E. BE HEARD Act**

The BE HEARD in the Workplace Act (H.R.2148) was introduced to the U.S. House of Representatives in March of 2019, sponsored by Massachusetts Representative, Katherin M. Clark. The acronym BE HEARD stands for: Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination.22 If passed, the act would (1) make it unlawful for employers to discriminate against any individual based on sexual orientation, gender identity, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. It also (2) prohibits employers from entering into contracts with employees which contain certain, restrictive non-disparagement or non-disclosure clauses. It would (3) ban the use of mandatory or forced arbitration agreements. Additionally, the act would (4) establish grant programs dedicated to preventing workplace discrimination and offering legal resources to victims of workplace harassment.23

Based on Title VII of the Civil Rights Act of 1964, *Meritor Savings Bank v. Vinson* concluded that sexual harassment is defined

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20 *Id.*

21 *Id.*


23 *Id.*
as a form of discrimination. Consequently, disclosure of workplace sexual misconduct is protected and individuals who wish to pursue legal action against an employer have the right to do so. Any form of retaliation or coercive non-disclosure agreement on the part of the employer to prevent employees from reporting or seeking legal action is unlawful. In order to uphold this protection, legislation should be passed which offers increased legal support for victims of workplace sexual harassment, such as the BE HEARD in the Workplace Act.

III. Proof of Claim

A. State Legislation

Although the BE HEARD Act has yet to be passed by the House of Representatives, many states have taken the initiative to crack down on workplace sexual harassment. The year 2018 witnessed a surge in legislation moving to restrict non-disclosure and non-disparagement agreements, likely in the wake of the #MeToo movement. In this section, we will discuss the extent of these legislative efforts, and highlight notable examples.

According to the National Conference of State Legislatures, over 20 states introduced legislation addressing workplace sexual harassment in 2018, and 16 states introduced legislation specifically limiting the use of non-disclosure agreements in relation to sexual harassment. Furthermore, four states, California, Connecticut, Illinois, and New York, proposed legislation which would implement or increase training on sexual harassment policies. Additionally, there are currently eleven states making efforts to enact legislation

24 Meritor Savings Bank, 477 U.S. at 57.
26 Id.
aimed at prohibiting the use of non-disclosure agreements relating to workplace sexual misconduct altogether.

In March of 2018, the state of Washington enacted a total of four bills relating to sexual misconduct in the workplace. \(^{27}\) First, Senate Bill 5996 determines that it is unfair for an employer to “discharge or otherwise retaliate against an employee for disclosing or discussing sexual harassment or sexual assault occurring in the workplace.” \(^{28}\) Additionally, it determines that any non-disclosure agreements imposed with the intent to prevent an employee from disclosing sexual harassment is “void and unenforceable.” \(^{29}\) Second, Senate Bill 6068 determines that the use of non-disclosure agreements in any “civil judicial or administrative action relating to sexual harassment or sexual assault” in unenforceable. \(^{30}\) Third, Senate Bill 6313 preserves an employee’s right to publicly file a complaint for discrimination in employment contracts and agreements. \(^{31}\) Finally, House Bill 2759 establishes the Washington state women’s commission which aims to “address issues relevant to the problems and needs of women,” including sexual discrimination and sexual harassment. \(^{32}\)

In early 2020, Massachusetts State Senator Diana DiZogli proposed an amendment to an economic bill that would institute a ban on taxpayer-funded non-disclosure agreements throughout the state government. \(^{33}\) This piece of legislation would help prevent forced NDAs, while still allowing their use in the private industry at the request of the employee. The amendment was approved by an overwhelming majority of 38-1 in July of 2020. Additionally, the

\(^{27}\) Id.

\(^{28}\) S.B. 5996, 65th Leg. § 1 (2018) at 2.

\(^{29}\) Id. at 2.

\(^{30}\) S.B. 6068, 65th Leg. § 1 (2018) at 1.

\(^{31}\) S.B. 6313, 65th Leg. § 1 (2018).


amendment bars all state government branches from making non-
disparagement or non-disclosure agreements a condition of settle-
ment. Sen. DiZogli has also introduced a bill which would prevent
employers from any form of retaliation against an individual who
does not consent to a non-disclosure agreement related to sexual
harassment. This bill has not yet been voted on. These two efforts
from Senator DiZogli were prompted by the #MeToo movement, as
well as her own experience with workplace sexual misconduct.34

Significant efforts to defend and protect victims of workplace
sexual harassment have already been undertaken by multiple states.
These pieces of legislation vary in method and severity, but most aim
to do the following: Prevent workplace sexual harassment through
comprehensive training, protect the rights of victims by limit-
ing the requirements of non-disclosure agreements in employment
contracts, and impose greater penalties for employers who seek to
prevent the disclosure of sexual harassment or misconduct. Thus,
federal legislation should reflect these efforts.

B. Non-disclosure Agreements

One way that employers have historically failed to protect their
employees and their rights is the use of non-disclosure agreements
to settle cases of workplace sexual misconduct. Historically, sexual
misconduct cases have been settled outside of court using non-dis-
closure agreements, Harvey Weinstein being one of the most nota-
ble examples. These agreements often allow powerful individuals
to coerce their victims into silence through payouts. Because these
payouts are usually large, those in positions of leadership are espe-
cially apt to use their money to hide from the legal consequences
of their actions. The Gender Policy Report asserts that “US federal
law prohibits retaliation for reporting discrimination, yet NDAs
offer legal routes to discourage victims from reporting harassment

34 Id.
and sharing information with others.”

Because employees have the right to speak publicly about workplace sexual misconduct, employers use secrecy provisions in NDAs to prevent them from exercising that right.

Non-disclosure agreements may be signed preemptively or after the incident has occurred. This means that someone may sign an NDA before an incident has even occurred, meaning that there is no way that they can make a conscious choice about whether or not they will take legal action. Some may argue that those who accept NDAs and their payouts are not victims. But, the reality is that many victims agree to NDAs for fear of losing their jobs or of not being believed—not for the money. Almost any time an NDA is signed in a workplace setting, there is an inherent power unbalance. This dynamic risks the possibility of coercion because one party will always have more power when signing the agreement than the other.

As mentioned before, the #MeToo movement has been instrumental in this transition from secrecy to public disclosure. By giving victims a platform and a voice to share their experiences, it is systematically fighting against the culture of silence and shame. The publicity that has come from the media basis of #MeToo has raised public awareness of sexual misconduct—especially in the professional world. This new narrative fostered by the #MeToo movement is what has led to the unprecedented media coverage and public interest around sexual misconduct trials of prominent individuals and to calls for changes in legal legislation and in the workplace. It has also been the catalyst for proposed federal legislation that will ensure greater protections for all employees.

C. Unconscionability

As they pertain to workplace sexual misconduct, non-disclosure and non-disparagement agreements might be considered unconscionable, as per standard contract law defenses. The inequitable power

dynamic of an employer-employee relationship requires a nuanced approach, especially in the case of sexual harassment. If a court finds a contract to be unconscionable, the contract may be considered legally invalid and void.\textsuperscript{36} In order for a contract to be void using an unconscionability challenge, there must be sufficient proof of both substantive and procedural unconscionability.\textsuperscript{37} First you must ask whether or not the substantive contractual terms are so unfair or oppressive as to “shock the conscience.”\textsuperscript{38} Then consider whether the parties involved demonstrate unequal bargaining power, resulting in no real negotiation and therefore little evidence of a real choice. A pertinent example of this would be a provision in a non-disclosure agreement which silences the victim of workplace sexual harassment and prevents them from speaking out against their employer, while simultaneously allowing the employer to speak freely about the victim, even in a negative or accusatory way.\textsuperscript{39} Such a provision would be both substantively and procedurally unconscionable.

In the case of \textit{Equal Employment Opportunity Commission v. Astra USA, Inc.}, a district court in Massachusetts ultimately decided to restrain and enjoin Astra USA Inc., a pharmaceutical company, from entering into or enforcing “provisions of any Settlement Agreement which prohibit current or former employees from filing charges with the EEOC and/or assisting the Commission in its investigation of any charges.”\textsuperscript{40} This decision was reached following an investigation by the EEOC about three sexual harassment charges claimed against Astra. It was later discovered that Astra had entered into at least eleven settlement agreements with employees who had been a victim or a witness of sexual harassment. Each settlement contained


\textsuperscript{38} \textit{Id.} at 70.

\textsuperscript{39} Weston, \textit{supra} note 36.

\textsuperscript{40} \textit{Equal Employment Opportunity Comm’n v. Astra USA, Inc.}, 94 F.3d 738 (1st Cir. 1996).
agreements including: the settling employee would not file a charge with the EEOC, she would not help others file a charge with the EEOC, and she would “assent to a confidentiality regime.” These three stipulations represent non-disclosure, non-assistance, and confidentiality. Astra ultimately declined requests from the EEOC to rescind conditions which prevented employees from filing a charge with the EEOC. Consequently, the case was brought before a First District Court where it was determined NDAs that prohibit employees from disclosing information regarding sexual harassment claims may be unlawful, particularly if the EEOC is investigating the claims. Additionally, it was decided that provisions with non-assistance agreements which prevent communication with the EEOC are a matter of public policy, and therefore unlawful. The court emphasized that the EEOC is responsible for enforcing and defending the intentions and conditions in Title VII (namely, investigating charges of discrimination) and therefore any attempt to hinder the EEOC’s fulfilment of that responsibility is unlawful.

Thus, the decision made in *Equal Employment Opportunity Commission v. Astra USA, Inc.* and the implications of it are a salient support for our argument. The use of non-disclosure agreements to prohibit workplace sexual harassment victims from pursuing action against their employer or harasser is unlawful in that it impedes the efforts of the EEOC to investigate workplace discrimination charges. Additionally, non-disclosure agreements that are created on the basis of oppressive terms and unequal bargaining power should be void.

*D. Meritor Savings Bank v. Vinson*

As mentioned previously, the landmark Supreme Court case *Meritor Savings Bank v. Vinson* established that sexual harassment is a form of sex discrimination and is therefore prohibited under Title VII of the Civil Rights Act of 1964. In this section, we will expand upon the facts of the case, as well as its implications with regards to our claim.

41 Id.
42 *Meritor Savings Bank*, 477 U.S. at 57.
In September of 1974, Mechelle Vinson started work as a teller-trainer at a branch of Capitol City Federal Savings and Loan Association in Washington D.C. (later acquired by Meritor Savings Bank). Throughout her entire time working at the bank, Vinson’s direct supervisor was a man named Sidney L. Taylor. In 1977, after four years of work, Vinson took an indefinite sick leave from her job and was subsequently fired. Shortly after being fired, Vinson filed suit against the bank and Taylor. Vinson claimed that Taylor sexually harassed and abused her for a period of three years. She testified that her supervisor “fondled her in front of other employees, followed her into the women’s restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions.”

Vinson defended the fact that she never reported these incidents to the bank because she feared retaliation. The case was brought before a U.S. federal district court in 1980 and the judge ruled against Vinson. Taylor maintained his innocence and the bank denied liability. It was determined that, because Vinson never notified the bank of the misconduct, the bank was not liable. Furthermore, the court held that Vinson was not a victim of sexual harassment because any evidence of a sexual relationship demonstrated that it was voluntary.

However, that decision was later reversed by the Court of Appeals for the District of Columbia Circuit. The court countered the conclusion that the sexual relationship was voluntary, positing instead that if the evidence determined that “Taylor made Vinson’s toleration of sexual harassment a condition of her employment,” her voluntariness was irrelevant. Additionally, the court reaffirmed that there are two forms of sexual harassment which are actionable under Title VII of the Civil Rights Act of 1964: “harassment that involves the conditioning of concrete employment benefits on sexual favors (quid pro quo), and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment.” In other words, a work environment which prevents employees from doing their job effectively or feeling safe is a form of harassment. This
definition is further substantiated by the United States Equal Employment Opportunity Commission (EEOC). Therefore, Taylor’s sexual harassment of Vinson is a form of discrimination which is actionable under Title VII. What’s more, the court ruled that the bank was indeed liable for the hostile work environment created by Taylor, despite Vinson not officially notifying the bank of the incidents.

Meritor Savings Bank then appealed the case to the U.S. Supreme Court, and it was brought before the Court on March 25 of 1986. In a unanimous decision, the Court held that a claim of “hostile environment” sexual harassment is a form of sex discrimination that is actionable under Title VII of the Civil Rights Act of 1964. The Court further clarified that the conditions specified in Title VII are “not limited to ‘economic’ or ‘tangible’ discrimination,” and therefore Vinson’s claim is justifiable and actionable. Additionally, the Court dismissed the inquiry over Vinson’s voluntariness by asserting that the issue is not over whether an individual’s participation was voluntary, but rather whether it was unwelcome.

The case of *Meritor Savings Bank v. Vinson* is significant in both its precedent and its implications. This case was the first in which the Supreme Court identified sexual harassment as actionable under law, and it did so by substantiating sexual harassment as a form of discrimination on the basis of sex. Thus, employers who commit sexual harassment are in violation of Title VII of the Civil Rights Act of 1964, and subject to retribution accordingly. Victims of workplace sexual harassment are entitled to the same protections given to victims of discrimination on the basis of race, religion, and nationality, according to Title VII. Therefore, it is unlawful to “fail or refuse to hire or to discharge” an individual, or to discriminate against an individual “with respect to [his or her] compensation, terms, conditions, or privileges of employment” in cases of workplace sexual misconduct. Consequently, a victim of workplace sexual harassment cannot be terminated or withheld opportunities if they come forward about their mistreatment. Insofar as these implications apply to our claim, any employer who attempts to prevent the disclosure of

46 *Meritor Savings Bank*, 477 U.S. at 64.
incidents of workplace sexual harassments is attempting to obstruct an incident of discrimination, which is unlawful. Therefore, the use of non-disclosure or non-disparagement agreements with the intent to silence victims of sexual harassment is unlawful.

E. Faragher v. City of Boca Raton

In 1998, former lifeguard Beth Ann Faragher brought an action against the City of Boca Raton and her former supervisors Bill Terry and David Silverman. She claimed that her supervisors had created a sexually hostile work environment, citing their actions as a form of discrimination under the precedent of *Meritor v. Vinson* because of the Civil Right Act of 1964. Faragher alleged that her supervisors had created the negative atmosphere through touching, remarking, and commenting of a sexual nature, mainly against female employees.48

The District Court ruled that the supervisors’ behavior was discriminatory harassment that substantially impacted the workplace environment. It was determined that the City was liable because the harassment was pervasive enough that it could not reasonably be determined that the City did not have knowledge of the supervisors’ behavior.49 The supervisors were considered agents of the company, meaning the company was liable for their actions. The Eleventh Circuit reversed this, concluding that there was not enough evidence that the City had adequate knowledge to be liable for the employees’ actions.50

The Supreme Court decided in a 7-2 decision that an employer is in fact vicariously liable under Title VII of the Civil Rights Act of 1964 for discrimination caused by a supervisor. This liability is subject to the employer’s ability to prove that they took appropriate action.51 The defense proposed by the employers must include proof that the employers took reasonable action to prevent and address sexual harassment and the plaintiff failed to use available resources

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49 *Id.* at 1534.
50 *Id.* at 1536.
51 *Id.* at 1538.
to address the harassment and discrimination. Ultimately, the Court reversed the Seventh Circuit’s reversal of the initial ruling and sided with the plaintiff, ruling that the City of Boca Raton was liable for the damages that came against Faragher.\textsuperscript{52}

\textit{F. Burlington Industries v. Ellerth}

Similarly, the Supreme Court ruling on \textit{Burlington Industries v. Ellerth} has significant implications for employer responsibility and liability with relation to workplace sexual misconduct.\textsuperscript{53} Kimberly B. Ellerth left her job at Burlington Industries after 15 months because of alleged harassment by her supervisor, Ted Slowik. Ellerth rejected all of Slowik’s advances and did not receive any negative retaliation as a result. She did not alert the company of the alleged harassment despite their anti-sexual harassment policies. Ellerth challenged the claim that she did not receive any negative retaliation by arguing that the Burlington Industries forced her constructive discharge.\textsuperscript{54} The question raised by the lawsuit was whether the employer was liable for the harassment experienced by Ellerth and if the liability was vicarious of the result of negligence.

In a 7-2 opinion, the Court ruled in favor of Ellerth.\textsuperscript{55} The official court opinion, citing \textit{Meritor}, states that “An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”\textsuperscript{56} Essentially, it was ruled that even though there was not tangible evidence that the harassment impacted Ellerth’s employment, the company was required to show that they took action quickly to prevent or correct the behavior in order to defend themselves for the liability. Whether there are job-related consequences for the victim or not, the company

\begin{thebibliography}{99}
\bibitem{52} \textit{Id.} at 1539.
\bibitem{54} \textit{Id.} at 748.
\bibitem{55} \textit{Id.} at 746.
\bibitem{56} \textit{Id.} at 765.
\end{thebibliography}
is responsible for the harassment or misconduct experienced by the employee while in the workplace. In order to prove that they have fulfilled their responsibility to protect the employee, the employer must demonstrate that “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”57 In the case of Burlington Industries v. Ellerth, the evidence that Burlington Industries had adequately protected Ellerth from discrimination or harassment in the workplace was insufficient.

As was decided in Meritor Savings Bank v. Vinson, harassment is a form of discrimination, and any discrimination on the basis of sex is in violation of Title VII.58 As demonstrated by Faragher v. City of Boca Raton, employers are responsible for the environment in which their employees work, including the prevention and addressing of harassment in any form.59 This means that employers are vicariously responsible for any harassment or discrimination that occurs between employees at work.

These cases (Burlington Industries v. Ellerth; Faragher v. City of Boca Raton) are important because they establish that employees are entitled to protection in the workplace under Title VII. They also establish that employers are responsible for protecting their employee’s rights when they are at work. This means having anti-harassment and discrimination measures in place and taking timely and reasonable action when misconduct does occur. Employers are also responsible for informing their employees about their rights and protections while at work. The only burden that falls on the employee is to use the resources provided to them.

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57 Id.
58 Meritor Savings Bank, 477 U.S. at 57.
59 Faragher, 864 F. Supp.
G. BE HEARD Act

The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, or BE HEARD Act, is a current piece of legislation that has been proposed in the U.S. House of Representatives. In 2019, it was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, but remains unvoted on. The main tenets of the BE HEARD Act, as outlined previously, are that it (1) makes it illegal to discriminate against an individual in the workplace based on sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, or sex stereotypes, (2) prevents employers from entering into contracts with workers with certain non-disparagement or non-disclosure clauses, (3) bars pre-dispute arbitration agreements and post-dispute agreements with some exceptions, and (4) sets up grant programs for preventing and responding to workplace discrimination and harassment so that all employees will have equal opportunities to pursue legal action regardless of socioeconomic status through legal assistance and advocacy.

According to the American Civil Liberties Union (ACLU), the BE HEARD Act has value because of its potential to expand anti-discrimination laws created under Title VII of the Civil Rights Act, remove economic and other barriers to justice, assist employers in forming safe, harassment free workplaces, and hold perpetrators of workplace sexual misconduct accountable. Historically, workplace harassment laws have only applied to companies with 15 or more employees, leaving many workers who are self-employed or work for small businesses unprotected under Title VII. It also protects

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61 Id.
independent contractors, volunteers, interns, fellows, and trainees who may not always fall under the definition of “employee.”

The BE HEARD Act supports our claim that employees should not be prevented from taking legal action in response to workplace sexual misconduct. It should be placed under vote in the House of Representatives as soon as possible. Federal legislation such as the BE HEARD Act is necessary in order to ensure that sexual harassment and misconduct in the workplace are illegal on a national level. This legislation will also ensure that victims of workplace sexual harassment and misconduct will not be blocked from pursuing legal action should they choose to do so. The BE HEARD Act also breaks down barriers to justice by extending the time limit for challenging harassment, modernizing the definitions of harassment and discrimination, clarifying that motivation is not adequate to establish discrimination, and increasing access to legal services for employees in low-wage jobs.

BE HEARD and similar legislation is needed in order to protect the rights of employees in the workplace. Employees should be able to go to work knowing that if discrimination occurs, their employers will protect them. And, should their employers fail to protect them, they are protected under the law and have the right to speak out about any abuse or misconduct that they experience while at work.

IV. Conclusion

Title VII of the Civil Rights Act of 1964 establishes discrimination on the basis of sex as unlawful. The landmark case Meritor Savings Bank v. Vinson set the precedent that sexual harassment, including the perpetuation of a hostile work environment, is a form of sex discrimination and is actionable under Title VII. Furthermore, in the case of sexual harassment perpetrated by an employer against an employee, non-disclosure agreements may be deemed unconscionable and voided based on unequal bargaining power. Based on these foundations, the rights of victims of workplace sexual harassment

63 Id.

64 Meritor Savings Bank, 477 U.S. at 57.
are protected by law and any attempt by an individual or employer to prevent the disclosure of such an incident is unlawful.

With these arguments in mind, we recognize that there are circumstances in which a non-disclosure agreement in the case of workplace sexual misconduct may be beneficial to all parties involved. In fact, it may be the case that the victim is the one to pursue a non-disclosure agreement, for any number of reasons. However, the true intentions and wishes of a victim can be difficult to interpret when there is an imbalance of power at play. Efforts to distinguish between coercion and free will are complicated by unequal bargaining power. Herein lies the complexity of this issue. Suffice it to say, any attempts made by an individual or an employer to conceal an incident of workplace sexual harassment is justifiably unlawful, and the wellbeing of the victim must always take priority. Although state governments have made notable efforts to mitigate the unlawful use of non-disclosure agreements, such legislation should be adopted by the federal government. The BE HEARD Act is an exemplary piece of legislation which should be prioritized by lawmakers and passed immediately; the urgency of the issue demands it.
Religious liberty and property extend into the original strands of American founding and history. In 1701, William Penn, the founder of Pennsylvania, published the Charter of Privileges, ensuring the protection of freedom of religion and delineating the intersection between religion and property. Article I states, “no Person or Persons, inhabiting in this Province or Territories, ...shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, not be compelled to frequent or maintain any religious Worship, Place or Ministry contrary to his or their Mind, or to do or super any Act or Thing, contrary to their religious Persuasion.”

Penn recognized the nature of persecution intrinsically involves property both in the nature of worship and through the nature of ownership. In time, property rights in connection to freedom of religion or belief secured their place in the United States legal framework primarily through the Constitution, including in the First, Fifth, and Fourteenth Amendments.

Religious liberty and property are distinctly protected rights. And yet, analysis of both rights in a shared framework provides nuances for strengthening religious liberty.

Careful analysis of the First, Fifth, and Fourteenth Amendment reveal several foundational clauses which apply to both property and

1 Rachel is a senior in the Economics program at Brigham Young University. She intends to pursue a graduate degree in economics before attending law school. She wishes to give a special thanks to her editor Carolina Costa.

2 Charter of Privileges of 1701, art. I, para. 1.

3 U.S. Const. amend. I, V, XIV.
religious liberty. The Establishment Clause and Free Exercise Clause of the First Amendment of the Bill of Rights illustrate how interconnected religious liberty is to the manifestation of freedom; religious liberty is a set of beliefs and practices, public and private. Without the freedom to assemble and gather in public spaces (property), religious liberty loses its *forum externum*. Both religious liberty and property rights were deemed essential in the ultimate framework of natural and civil rights as originally crafted by John Locke, Thomas Jefferson, and James Madison. Their timeless analysis of “life, liberty, and property,” ultimately incorporated in the Declaration of Independence and into the Fifth and Fourteenth Amendments of the Bill of Rights, illustrates the intersection between religion or “life” and property. Property is defined through physical possessions and through ownership of ideas and services. Considering both of these definitions at the intersection of religious liberty is foundational to the analysis offered in this paper.

Religious liberty, like property, is protected in the Constitution through the Free Exercise Clause and Establishment Clause of the First Amendment. The Supreme Court has adopted various evolving frameworks to protect religious liberty including the Lemon Test (prevents excessive “government entanglement” in religious matters), the Sherbert test (requires strict scrutiny in determining “compelling government interest” when free exercise is burdened), and the Smith test (overturned Sherbert and allows government to burden religious freedom in the presence of a “valid and neutral law with general applicability.”) Likewise, Congress in response to the overturning of the Sherbert test, passed the Religious Freedom

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5 *Id.*


Restoration Act\(^9\) to ensure that strict scrutiny would remain. Religious liberty has a complex history and is less secure as the legal frameworks instituted by the Supreme Court are beginning to fray. COVID-19, sexual orientation laws, religious scandals, and an overall intolerance for religious practice threaten the robust frameworks that once ensured religious liberty. On the other hand, property rights remain intact, vigorous, and secure. The legal framework that protects property can offer important insights for the ongoing protection of religious liberty.

\section*{I. Background}

The right to own property and religious liberty are fundamental human rights. Each right is protected through a different and yet amazingly similar legal framework; property is protected through tangible boundaries and societal contract whereas freedom of religion or belief is protected through separation of church and state. Compartmentalizing human rights can be harmful because human rights are inherently connected; when one human right is threatened, elements of other human rights are threatened as well. Therefore, property rights and religious liberty can be strengthened by adapting a legal framework that protects both rights enabling comparable expectations of security.

Property rights in the United States stem primarily from the Fifth and Fourteenth Amendments\(^{10}\) to the Constitution. The Fifth Amendment states persons shall not “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”\(^{11}\) This phrase highlights two primary clauses that establish property rights in United States law.

\begin{itemize}
\item \(^{10}\) U.S. \textit{Const.} amend. V, XIV.
\item \(^{11}\) U.S. \textit{Const.} amend. X, § 1.
\end{itemize}
A. The Due Process Clause

The first is the Due Process Clause which states that no one shall “be deprived of life, liberty or property, without due process of law.”\textsuperscript{12} Originalist interpretation of the Constitution commonly argues the physical or tangible definition of property as outlined in the due process clause. However, in \textit{Flemming v. Nestor}\textsuperscript{13}, the definition of a “vested property interest” was expanded to include intangible property possessions such as employment or welfare. Although this decision expanded the definition of property, courts continue to dictate what can be claimed as a property right. This provision does not allow arbitrary assignment of the definition of property. In order to have expanded property rights protected, \textit{Board of Regents v. Roth}\textsuperscript{14} established that the owner of property must be able to prove “legitimate” claim to employment or other possession. Therefore, in order to protect freedom of religion or belief, a legitimate claim of sincere religious practice must be present. We see this question arise in cases where the legal question stems from delineating the “legitimate claim” to religious liberty or the sincerely held beliefs of those with religious beliefs.\textsuperscript{15} Just as property frameworks do not explicitly define property in a narrow sense, religion is not defined in a narrow sense but protected narrowly as a belief and not always as an action or practice.

Another application of property rights for religious liberty occurs where both legal frameworks are further protected through the intersection of other Constitutional rights. In \textit{Perry v. Sindermann},\textsuperscript{16} the “Unconstitutional Conditions” doctrine was established which states that an individual cannot be denied property on the basis of constitutionally protected interests, such as freedom of religion or belief. The

\textsuperscript{12} Id.
\textsuperscript{14} Bd. of Regents of State Coll.s v. Roth, 408 U.S. 564, 579 (1972).
\textsuperscript{16} Perry v. Sindermann, 408 U.S. 593 (1972).
Due Process Clause protects property as both ownership and “interest.” Religious liberty can be defined in similar terms as “expression” and “interest.” Therefore, the interpretation of the Due Process Clause is essential when examining the precedence of religious rites in the United States because freedom of religion or belief can be protected as a property interest.

B. The Matthews Test

Due process serves as the foundational mechanism for protecting property rights and interests. However, the Matthews test further structures the implications of due process in terms of how specific property rights must be analyzed in order to be upheld. In *Mathews v. Eldridge* 17 a three-prong due process test was established to protect property rights. Consideration must be adequately given to the following criteria, “first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.” 18 This test requires due diligence and substantive burden of proof in determining the ultimate impact of depriving an individual of property rights. In the context of freedom of religion or belief, a mechanism to ensure that property rights are not arbitrarily removed is critical to both individual and public expression. The Matthews Test mirrors the Lemon Test for protecting religious liberty. In *Lemon v. Kurtzman* the Court established a three-prong test to uphold the Establishment Clause and requires, “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster ‘an excessive

18 Id.
government entanglement with religion.””¹⁹ In both property law and religious liberty law, account for government “interest” or “entanglement” illustrating that limited government involvement in both cases creates a more potent framework.

C. The Fourteenth Amendment

The Fourteenth Amendment further underscores the importance of due process with a clause that mirrors the Fifth Amendment. The Fourteenth Amendment certifies that no “State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²⁰ The Fourteenth Amendment plays a critical role in establishing the fundamental freedoms of the Bill of Rights in connection with “life, liberty, or property”²¹ building on the importance of property interests such as employment or welfare. As stated in the annotated Constitution, “in Gitlow v. New York, the Court in dictum said: For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”²² Due process ensures protection of religious liberty as well; the government cannot arbitrarily burden religious liberty, target minorities, or overturn the legal framework that protects individual rights. In this context, the Fourteenth Amendment is critical to uphold all fundamental rights including the Bill of Rights, and therefore freedom or religion or belief. Justice Harlan in Adamson v. California²³ stated, “that the language of the first section of the Fourteenth Amendment,

¹⁹ Lemon v. Kurtzman, 403 U. S. 602, 613 (1971) (internal quotation marks omitted).
²⁰ U.S. CONST. amend. XIV, § 1.
²¹ Id.
taken as a whole...sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.” The Due Process clause as outlined in the Fifth and Fourteenth Amendment, cannot be overstated as the most critical mechanism for protection of individual human rights outlined in the Bill of Rights. Furthermore, the Due Process clause ensures that property interests such as “life, liberty, and property”\(^{24}\) can be protected in a shared context with other essential human rights such as freedom of religion or belief. The Fourteenth Amendment ensuring due process, bring protection of property and religious liberty full circle. In each case, property and religious liberty are defined and outlined in separate Amendments but coalesce in the Fourteenth Amendment through the promise of protection at a federal and state level.

**D. The Takings/Just Compensation Clause**

The second property clause in the Fifth Amendment is the Takings/Just Compensation Clause which states “nor shall private property be taken for public use, without just compensation.”\(^{25}\) The Takings Clause establishes the requirement that in order for the government, either state or federal, to claim eminent domain or ownership of property from a private holder, “public use” must be sufficiently defended and justified. There are obvious connections to religious liberty as religious property has been directly affected by the Takings Clause.\(^{26}\) If property is thus taken for public use, whether religious or secular, it cannot be taken without proper and appropriate compensation. The implications of the Takings/Just Compensation Clause become interesting when considered in the context of religious liberty. The Clause suggests first the potential that rights can be taken away for public use which directly points to the “separation of church and state.” However, it also suggests that if rights are

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25 Id.
taken away for public use, compensation is required. Compensation or reparation in light of potentially threatened religious rights is critical when considering the full scope and consequence of freedom of religion or belief. Ultimately, the Due Process Clause and the Takings/Just Compensation Clause are critical in analyzing how property rights intersect with religious rites and provide interesting case studies for where courts have upheld religious liberty in some circumstances, completely trampling religious liberty in others.

II. PROOF OF CLAIM

Various religious bodies have expressed the intersection between property and freedom of religion or belief. The Catholic church believes that “property, correctly understood and properly regulated, is a preserver of peace, a method for harmonious human activity, and a means toward human flourishing. It is also a guarantor of religious freedom—a role that becomes ever clearer as respect for Christianity erodes in Europe and the Americas. The links between property rights, economic liberty, and religious liberty are clear in the social teaching and they are clear in history.” The intersectionality between these two human rights is best illustrated in the broader context of democracy.

Property protection rests on several fundamental assumptions including: “(1) that every person is entitled to become an owner, (2) that opportunities to acquire property are freely available, (3) that ownership is widely dispersed, (4) that owners are presumptively free to use their property as they wish and to determine the course of their own lives, and (5) that people are entitled to quiet enjoyment of their property.” The application of these assumptions for religious liberty illustrate that property law and freedom of religion can share a similar approach in policy implication. Freedom of religion or belief


assumes (1) that every person is entitled to ownership of conscience or a belief system, (2) that opportunities to acquire a belief system are freely available, (3) that ownership is widely dispersed, (4) that owners are presumptively free to use their conscience and belief system as they wish and to determine the course of their own lives, and (5) that people are entitled to the private and public practice of their beliefs. Property rights and freedom of religion are “bundled rights” and mutually “reinforcing bonds.” Both are fundamental human rights that stress the nature of ownership, which is critical in the interchange between individuals and society as a whole; Protecting the connection between property rights and freedom of religion strengthens legal leverage to protect religious liberty using a property framework and vice versa.

Frequently, as illustrated with the Takings Clause, religious liberty and property rights are not just related, they are inextricably connected. Consider the following examples from individual states: “In Arizona, a Protestant pastor was arrested for holding Bible studies in his home, authorities alleging that he thereby violated zoning laws that prohibit regular assemblies in residences. In Pennsylvania, Washington, DC, and many other places, Catholic dioceses with financial problems have been unable to manage their own properties responsibly due to opponents who use historic preservation codes to prevent the alteration, sale, or demolition of church structures. In Massachusetts, Illinois, and other jurisdictions, Catholic agencies have been forced to abandon their adoption services in the face of mandates to place children with same sex couples. These mandates have force because the state controls the licensure of adoption agencies.” These instances elucidate the critical relationship between property rights and freedom of religion and prove the necessity for legal framework connecting freedom of religion or belief to property in nuance and in application. The following two cases studies reveal how the legal framework protecting religious liberty and

29 Id.

property are mutually reinforcing and can strengthen the protection of religious minorities in extreme cases involving property.

A. Calvary Chapel Dayton Valley v. Steve Sisolak

In July of this year, freedom of religion or belief was threatened on the basis of property law because of COVID-19. In Nevada, Governor Sisolak implemented a phase two reopening plan that allowed casinos, businesses, restaurants to again hold in-person gatherings; however, the Governor severely limited religious freedom by putting a cap of 50 people on religious gatherings. The Calvary Chapel of Dayton Valley sued, citing the restriction on religious gatherings was discrimination and therefore unconstitutional under the first Amendment. They further asserted that the ban on only religious gatherings causes irreparable harm to the members of the congregation and therefore injunctive relief was necessary. The case went from the District Court of Nevada to the Court of Appeals at which point, Calvary Chapel requested an emergency judgement from the Supreme Court. The Court denied certiorari to Calvary in a 5-4 decision stating that Nevada could restrict religious gatherings as they served a different purpose than social gatherings. Justice Kavanaugh, Alito, Gorsuch, and Thomas wrote dissenting opinions. In the opening summary of their joint dissension Justice Alito states, “The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance.” Dismissing the Constitutional provisions protecting religion and property is extremely harmful to the framework of our democracy as it undermines the essence of inalienable rights.

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A greater framework that incorporates property rights and religious freedom could have better protected the religious liberty claims brought forward in this case. If the court applied property law to the case and asserted the Matthews Test, which requires a heavy burden of proof for deprivation, the religious liberty may have been defended on stronger ground. The Matthews test requires, as previously stated, due consideration for “first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”

The private interest of hundreds of people who gather to worship at Calvary Chapel remains an essential qualifier for the implications of the Matthews Test in this case. Additionally, the erroneous deprivation of worship in light of the thousands allowed to gather in casinos further violates the test. Substitute procedural requirements would not add fiscal or administrative burden to Government interest, as the Church expressed willingness to comply with state COVID-19 mandates and in fact, practiced an abundance of caution prior to the court ruling.

The Matthews Test can protect houses of worship when there is a lack of evidence to argue “free-exercise violations.”

B. Tanzin v. Tavir\textsuperscript{37}

A second case study illustrates the breadth of property protection rights and due process. The Tanzin v. Tavir case is a prime example of the intersection between freedom of religion and property rights. The Fourteenth Amendment protects property in the context of life, liberty and due process.\textsuperscript{38} Tanzin is a Muslim who was asked by the FBI to be an informant of suspicious Muslim behavior. When he denied on religious grounds, the FBI retaliated and put him on a no flight restriction list, ultimately violating his property rights and due process. Tanzin sued for money damages citing the 1993 Religious Freedom Restoration Act which states, “A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.”\textsuperscript{39} The Takings Clause from the Fifth Amendment further emphasizes the need for ‘appropriate relief’ when it states, “nor shall private property be taken for public use, without just compensation.”\textsuperscript{40} The Supreme Court ruled 8-0 on the case, affirming that those persecuted on the basis of religion can seek money damages.\textsuperscript{41} The outcome is bellwether in correlating the relationship between property and freedom of religion violations because current property law include the Takings clause allows monetary compensation for property rights violations. The decision to allow monetary relief for religious liberty further allows compensation from government, defying immunity doctrine and securing the sympatico nature between property rights and religious liberty. In the Opinion for the Court, Justice Thomas

\textsuperscript{37} Tanzin v. Tanvir, No. 19-71, 592 U.S. _ (2020).
\textsuperscript{38} U.S. CONST. amend. XIV, § 1.
\textsuperscript{40} U.S. Const. amend. V, § 4.
\textsuperscript{41} Tanzin v. Tanvir, No. 19-71, 592 U.S. _ (2020).
connected religious liberty to property law when he cited *Philadelphia Co. v. Stimson*\(^\text{42}\) which states, “The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded.” This citation connects Tanzin’s persecution to “wrongful evasion of property” allowing him to seek monetary damages. The *Tanzin* case fortifies religious liberty in the context of property law, further strengthening both human rights with tangible outcomes and critical precedence.

The *Calvary Chapel* and *Tanzin* cases illustrate the importance of property laws in protecting freedom of religion or belief. Because property and religion are both human rights centered on individual “ownership,” it is critical that current efforts to protect religious liberty be viewed in the powerful precedence of property law. Strengthening the intersection of these two frameworks as mutually reinforcing creates greater protection for all human rights.

**III. Conclusion**

Freedom of religion or belief is fragile, nuanced, and increasingly complicated. Property law is robust and provides critical insights for religious liberty. Intellect, employment, and the pursuit of happiness have all come to be characterized as bundled rights under the Fourteenth Amendment property clause and extend to include freedom of religion or belief. Both the *Calvary Chapel* and *Tanzin* cases illustrate that isolating freedom of religion or belief in a human rights vacuum does not ultimately achieve greater protection nor can it prove “the least restrictive means of furthering that compelling governmental interest”\(^\text{43}\) as established by the Sherbert test and reinforced with the Religious Freedom Restoration Act of 1993.\(^\text{44}\)

Analysis of the property law framework in the Fifth, and Fourteenth

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Amendment reveal that the fundamental view of “ownership” that is protected by due process applies to freedom of religion or belief.\textsuperscript{45} In order to fully practice one’s religion or belief, ownership is critical. Freedom of religion or belief is a truly intersectional human right that relies on freedom of speech, assembly, and property. In the United States efforts to uphold the establishment clause, freedom of religion or belief has inadvertently become a singular human right instead of a pluralistic one. Defending freedom of religion or belief in the legal property framework enhances the protection and promotion of religious liberty in pluralism. Ensuring the protection of freedom of religion or belief and property rights strengthens and reinforces other related and paramount human rights.

\textsuperscript{45} Adamson v. Cal., 332 U.S. 46, 75 (1947).
In April 2020, YouTube CEO Susan Wojcicki announced that YouTube would remove any “problematic” content that contradicted the World Health Organization’s (WHO) COVID-19 recommendations. Less than a month later, a 25-minute clip from a well-known anti-vaccine conspiracy theorist was removed from YouTube and Facebook. Representatives from Facebook stated the video violated their policies by promoting the theory that wearing a mask can cause illness. At around the same time, YouTube also removed a video by two California doctors who called for an end to COVID-19 lockdowns.

During the era of the novel coronavirus SARS-CoV-2, social media sites have justified removing inflammatory opinions pertaining to COVID-19 in attempts to protect and promote public health and safety by automatically categorizing such opinions as misinformation. While the intention of such censorship is noble, it raises the question of whether social media sites and internet service providers in general

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have too much power when it comes to controlling information. In this situation, the grounds for censorship is the threat of COVID-19; in the future, however, there are no guarantees that social media sites will wait for another large-scale social problem before exercising such power to silence the public again.

In order to address concerns about the power of social media companies in the online marketplace of ideas, Section 230 of the Communications Decency Act (CDA)⁴ should be amended to mandate removal of third-party content that violates individuals’ basic rights, while holding internet service providers liable for any removal of other third-party content and protecting users from misinformation by requiring companies to tag suspicious content.

According to the Pew Research Center, 55% of adults in the United States relied on social media for their news in 2019.⁵ When it comes to elections, natural disasters, and other important current events, sites like Facebook and YouTube prove essential for keeping the public informed. Their services supply users with information both biased and unbiased, and make possible an individual’s exposure to a variety of viewpoints. Thus, these websites could be considered virtual town squares, in the interest of updating the American public and allowing a public discourse of unfiltered opinions necessary to a functioning democracy. Accordingly, they may then be made subject to the provisions of the First Amendment⁶ that protect against the abridgment of free speech. In interest of both social media companies and users, as well as in order to align social media companies with current laws, changes should be made to ensure social media companies act more like public utilities than as “publishers.” Rather than immediately removing controversial opinions from the Internet based on keywords and algorithms, social media sites such as YouTube and Facebook should be required by law to flag suspicious

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⁶ U.S. Const. amend. I.
content in order to alert viewers of its lack of substantiation but still allow perceived misinformation to remain online unless said content directly threatens users’ basic rights.

Facebook and YouTube’s aggressive approach to policing misinformation about COVID-19, although well-intentioned, could have disastrous effects if allowed to spread beyond this global pandemic. In an age where social media has become intrinsic to the dissemination and formation of opinion, the free exchange of ideas on the Internet is of prime importance, and any threat to that process could mean a disruption of the free speech so necessary for democracy.

This paper intends to propose a solution that could resolve the problem described above. The remainder of this paper is organized as follows: Section I contains background information about the issue, including definitions for misinformation, disinformation, publisher and public utility, an introduction of Stratton Oakmont v. Prodigy,7 and a brief summary of the Communication Decency Act (CDA).8 Section II introduces the flaws in the CDA that give internet service providers, and especially social media companies, power but no accountability and how these powers could be exploited to impede freedom of expression. Section III presents a detailed description of the proposed solutions to amend Section 230 of the CDA. Section IV concludes this paper with a brief discussion on social media and the public good.

I. BACKGROUND

A. Misinformation vs. Disinformation

*Misinformation* generally refers to “false information that is spread, regardless of intent to mislead.” *Disinformation* means “false information, as about a country’s military strength or plans, disseminated by a government or intelligence agency in a hostile act of tactical political subversion.” *Disinformation* is also used more generally to

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8 47 U.S.C. § 230
mean “deliberately misleading or biased information; manipulated narrative or facts; propaganda.” In other words, disinformation refers to knowingly spreading misinformation.

B. Public Utility vs. Publisher

The term public utility describes a business that provides a necessary service, such as water, gas, electricity, etc., to the public. A public utility generally has a monopoly on the service provided. These businesses can be publicly regulated (although such regulation has declined since the 1970s) but are not held liable for user content, if applicable. For example, a phone company is considered a utility and cannot be held liable for any defamatory or slanderous messages communicated through its phone service. The company enables the communication and spread of information but does not have control over the messages communicated.

The term publisher, or publication, on the other hand, describes a company that has control over content, like a newspaper. Publishers produce and/or curate the content that is distributed. The practice of censoring content indicates that a company is a publisher rather than a public utility, and companies considered to be publishers are thus held liable for user content.

C. Stratton Oakmont v. Prodigy

In a 1995 decision, Prodigy, an online service including social media forums, was held liable for screening third-party content for defamation. The plaintiff, investment bank Stratton Oakmont, sued Prodigy and anonymous defendants in New York for defamation after an anonymous user posted to a message board statements

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claiming that the bank and its president, Daniel Porush, had committed criminal and fraudulent acts. Oakmont and Porush argued that Prodigy should be considered a publisher and be held responsible for the user’s statements. The court agreed that because Prodigy had a reputation for removing content that violated the service’s family-friendly guidelines, the company could be classified a publisher, thus making Prodigy liable for removing slanderous and/or defamatory content. This case set a nation-wide precedent that indicated that moderating user content increases a service’s potential legal liability for harmful content the said company does not catch. Service providers now have to monitor user content perfectly or avoid accepting liability by choosing to not moderate at all.

D. The Communication Decency Act

The Communication Decency Act (CDA) of 1996 was enacted as Title V of the Telecommunications Act of 1996 by Congress as an attempt to protect minors from accessing pornographic material on the Internet. Senators James Exon (D-NE) and Slade Gorton (R-WA) introduced the act to the Senate Committee of Commerce, Science, and Transportation in 1995. The act was eventually passed by Congress and has had two significant effects on the Internet, the second being the focus of this paper. First, the CDA prohibits individuals from knowingly transmitting “obscene or indecent” content to minors. Second, Section 230 states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content


13 47 U.S.C. § 230

This means that internet service providers are not liable for content posted by third-parties who use their services.

Section 230 of the CDA has arguably been one of the most important instruments in protecting freedom of expression and innovation on the Internet. However, the Department of Justice has recently proposed a recommendation to revise Section 230 of the CDA, questioning whether it nurtures innovation or fosters unaccountability. The department recognized that large tech platforms are no longer fragile and suggested changes to preserve competition, protect free speech on the Internet, and distinguish between hosting defamatory content and enabling criminal activity.

The Senate Commerce Committee has also held hearings to discuss these revisions and has invited Big Tech CEOs, including Facebook’s Mark Zuckerberg, Alphabet’s Sundar Pichai, and Twitter’s Jack Dorsey, for questioning. Nevertheless, Congress is divided on the issue, with both parties interested in revising Section 230 but in conflicting ways. Critics have suggested that Congress is not actually interested in revising the law, but that it instead has different motives in inviting Big Tech CEOs to testify during the hearings while excluding smaller businesses on which a change in the

15 47 U.S.C. § 230
16 Id.
17 Dep’t of Justice, Section 230 — Nurturing Innovation or Fostering Unaccountability?, Benton Inst. for Broadband & Soc'y (Feb. 19, 2020, 3:00 PM), https://www.benton.org/event/section-230-%E2%80%93-nurturing-innovation-or-fostering-unaccountability.
18 Eric Goldman, supra note 12.
20 47 U.S.C. § 230
law would have a larger effect. Big Tech firms are often already equipped to censor information when needed, but smaller firms might have a hard time amassing the manpower to actually adhere to being regulated as a publisher.

A solution that would benefit both big and small businesses would be a law that mandates the removal of third-party content violating individuals’ basic rights, while holding internet service providers liable for the removal of any other third-party content and protecting users from misinformation by requiring companies to tag suspicious content. This way, internet service providers are given incentive to refrain from removing content unless it violates individuals’ basic rights, due to the risk of being held liable for third-party content on their sites.

II. PROOF OF CLAIM

A. Communication Decency Act

Social media sites like Facebook, Instagram, and Twitter have historically been protected by Section 230 of the Communication Decency Act (CDA) of 1996 which, as mentioned in the previous section, states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” (47 U.S.C. § 230). This means that internet service providers are not liable for content posted by third parties who use their services; in this way, social media sites act like utilities, since telephone providers are also not liable for what people say while using their services. However, after a survey of how social media sites actually act—including the most recent case of removing millions of posts that were labeled as


22 47 U.S.C. § 230
COVID-19 misinformation—it can be stated that social media services are increasingly acting like publishers.

It makes logical sense to hold internet service providers liable for any removal of other third-party content when they are acting like publishers, as supported by the court decision of Oakmont v. Prodigy.\textsuperscript{23} If internet service providers are not to be seen or regulated as publishers, then the law is giving internet service providers, including social media sites, an excessive amount of power to censor information. The Department of Justice has in fact recently recommended revisions to Section 230 of the CDA,\textsuperscript{24} as was stated in the previous section, questioning whether the act nurtures innovation or fosters unaccountability.\textsuperscript{25}

\textit{B. Social Media Sites as Publishers}

While there is not a huge barrier to entry for internet service providers, because of the low cost required to enter the social media market, one can still argue that based on the number of people who frequently use these social media services, social media sites can almost be seen as public marketplaces, and therefore utilities; however, when surveying current social media trends, it is obvious that companies are acting more like publishers, bringing them into conflict with past legal discourse about censorship on social media.

When social media companies choose to remove content, whether that be due to violations of a code of conduct or for any other reason, they are acting more like publishers, exposing themselves to risk of liability in accordance with Oakmont v. Prodigy\textsuperscript{26} and testing


\textsuperscript{24} 47 U.S.C. § 230

\textsuperscript{25} Dep’t of Justice, \textit{Section 230 — Nurturing Innovation or Fostering Unaccountability?}, \textsc{Dep’t of Just.} (2020), https://www.justice.gov/file/1286331/download.

the limits of the CDA. In the case of the removal of COVID-19 misinformation, Facebook and YouTube are clearly acting as publishers by censoring user opinion. Deleting videos about COVID conspiracy theories, taking down rants from anti-maskers, and removing posts from doctors who disagree with WHO recommendations, for example, are all actions indicating that the social media company in question is able to edit their site’s content just like a newspaper can. If social media companies take a publisher approach to user content, they are justified in removing whatever content they want, as First Amendment protections of freedom of speech and expression do not extend to publishers as they do to utilities. These companies cannot, however, be protected by Section 230 of the Communications Decency Act, meaning they can be sued for slanderous content found on their websites, as was the case in Oakmont v. Prodigy.

The case of Oakmont v. Prodigy introduced a dilemma to the world of big tech companies: either companies must eliminate all slanderous and otherwise potentially dangerous content from their sites, or they must refrain from interfering at all, at risk of facing legal consequences. In the case of Facebook and YouTube, these companies walk a fine line of choosing to manage user content. Yes, they have the right to censor incorrect opinions and remove content which violates their code of conduct; however, in doing so, they open themselves to the possibility of lawsuits if their algorithms miss an instance of hate speech or a derogatory post about a public figure. Scrubbing all 2.8 billion active Facebook users content (350 million

27 47 U.S.C. § 230
28 U.S. Const. amend. I.
new posts per day)\textsuperscript{31} borders both on unrealistic and unsustainable—thus necessitating change.

Social media companies acting as publishers while avoiding liability for censoring content conflict with both the precedent of Oakmont v. Prodigy\textsuperscript{32} and the law as outlined in Section 230 of the CDA.\textsuperscript{33} In order to avoid this contradiction and promote the freedom of expression, a solution must be implemented to keep these companies from acting as publishers while still protecting the basic rights of users. These companies must move away from acting like publishers in favor of acting more like utilities.

C. A Need for Accountability

On October 28th, 2020, the Senate Commerce Committee held a hearing to examine whether Section 230 of the CDA\textsuperscript{34} “enabled Big Tech bad behavior.”\textsuperscript{35} The committee questioned Facebook CEO Mark Zuckerberg, Alphabet CEO Sundar Pichai, and Twitter CEO Jack Dorsey. Both Dorsey and Pichai provided a measured defense of Section 230 of the CDA; however, Facebook chose a different tactic.

“The debate about Section 230 shows that people of all political persuasions are unhappy with the status quo. People want to know that companies are taking responsibility for combatting harmful content—especially illegal activity—on their platforms. They want to know that when platforms remove content, they are doing so fairly and transparently. And they want to make sure that platforms are held accountable,” Zuckerberg said in his opening testimony.
“Changing it is a significant decision. However, I believe Congress should update the law to make sure it’s working as intended.”

As Zuckerberg pointed out, there are many problems with the way internet service providers are currently regulated under the CDA. There should be more fairness and transparency in the way companies are removing content, more responsibility to protect individuals’ basic rights, and more encouragement for innovative ways to promote freedom of speech rather than increased censorship.

This paper will discuss proposed solutions to the concerns above. They are by no means comprehensive but are important steps in the journey to find the best course of action to deal with these problems that have developed in response to the technological advances of our time.

III. PROPOSED SOLUTIONS

To avoid the legal implications associated with censorship, social media companies must find a way to either avoid removing user content, or else identify all problematic content to ensure all dangerous information is taken down—all while avoiding mis-classifying user opinion as misinformation. We believe that the best solution, in order to avoid this complicated dichotomy, would be for social media companies to act as little like publishers as possible.

In order to achieve this, we propose revisions to Section 230 of the CDA that would include mandating the removal of certain, dangerous content through mechanisms such as a keyword-specific algorithm, flagging posts that seem suspicious, and providing avenues for users to petition review of those tags.

36 Id.
37 47 U.S.C. § 230
38 Id.
A. Censorship Appropriate Fields

Before Section 230 of the CDA\(^{39}\) can be revised, it is necessary to define what content internet service providers are supposed to censor. Just as we have the right to free speech but are still not allowed to shout fire in a crowded theatre, the same argument can be applied to not allowing people to shout fire on social media sites, which could be likened to a virtual crowded theatre.

There must be a baseline as to what content cannot be allowed online; for example, violent rhetoric such as pointed threats targeting individuals or groups violates the safety of others and should be censored. The CDA\(^{40}\) was originally drafted in part to prevent minors from being able to access pornographic material, so it can also be argued that pornography of any kind would need to be removed from social media sites due to the potential presence of users who are under 18 years of age.

It would be acceptable to employ an algorithm based on a set of keywords in order to take care of scanning the social media site for triggers and subsequently removing unsafe and/or illegal content. To prevent errors and wanton censorship even within these strict boundaries, users could be provided the means to petition administrators for review of their content should they believe a post was unwarrantedly taken down.

B. Public Audit

With the solution for how to protect the basic human rights of individuals also comes accountability: a public audit of how social media sites censor the content on their sites. This solution would give companies a social responsibility to the public, keeping them accountable for the content on their sites. Even though many people will not fully understand the way in which social media sites censor content, this solution will provide the transparency and accountability that is currently lacking. A public audit would make apparent whether or

\(^{39}\) Id.

\(^{40}\) Id.
not companies are making the mandated effort to censor the content which could violate users’ basic rights.

C. Tagging Posts

Under our proposed solution, it is recommended that social media companies implement the practice of aggressively tagging users’ posts. Either by using an algorithm or by manually inspecting content, social media companies would flag suspicious posts with warning labels stating, “CAUTION: Possible Misinformation,” or a similar message, along with a link to company resources about critical thinking and fact-checking. Tagging posts rather than removing them would preserve the integrity of the free exchange of ideas while keeping users safe from harmful misinformation.

This practice is already in place, to a degree, on many social media platforms. For example, during the 2020 presidential election, Twitter flagged tweets which promoted disinformation about the election results.41 On Instagram, posts containing possibly sensitive or explicit content are accompanied by a warning. We propose making this a more widespread and rigorous practice in order to prevent immediate censorship of content while still protecting and warning users about potentially misleading or shocking information.

Users should be given avenues for redress, as well. After their posts are tagged for possible misinformation, users could link credible source material to prove their claims and show that their opinions do not warrant censorship. Companies could also give users the ability to attach sources to their posts rather than only allowing source uploads to resolve flags. This would place the responsibility for proving the validity of their content on users rather than company algorithms. Furthermore, allowing users to include their sources would promote critical thinking and the spread of credible information online.

D. Small- to Mid-Sized Internet Service Providers

The reason why internet service providers were given so much protection under the law was because the government wanted to encourage innovation. When the government regulates internet service providers, it creates a barrier for entry as it becomes more difficult to run a service if internet service providers must follow a long list of regulations. While the proposed solution of tagging posts might still be difficult for small-to-midsize internet service providers to implement, it is a much easier solution compared to a more robust censorship requirement stipulating monitoring all content on their platforms. Tagging encourages companies to act more like utilities instead of publishers in order to not be held liable for third-party content under the CDA.

There are many other potential solutions, but the tagging solution is one of the simplest. For example, another solution would be to have a third-party fact-checker regulate the content on the internet. However, this solution generates a lot of questions. First, who would be the third-party fact-checker? Or should there be many third-party fact-checkers? Whoever gets to fact-check the internet would have an immense amount of power over what content is allowed and what people actually see. Many people would trust the government to be unbiased, but private companies could be bought out. Any amount of corruption in this third-party fact-checking company could result in disinformation being spread as fact.

IV. Conclusion

If social media companies are brought back into line with current law concerning social media censorship, as well as held accountable for infractions, revisions to Section 230 of the CDA must include some mechanism to move companies away from current

43 47 U.S.C. § 230
44 Id.
trends of publishing and instead nearer the example of public utilities. Mandating the removal of certain types of dangerous content and then allowing the rest to remain online in order to foster the free exchange of ideas would bring both past legal decisions and current social media companies’ practices closer towards harmony with each other, all while preserving the basic intent of the Internet.

If nothing is done to address these instances of content removal, censorship could quickly become the order of the day. While taking down one video contradicting the WHO may seem like nothing, content removal could quickly escalate. If social media companies decide what “truth” means, what is stopping these companies or even the government from using social media platforms to impose and enforce their own ideas of “truth” on the public? When a private company decides what qualifies as misinformation without working under regulations, what is keeping their power in check?

In their own interest, social media companies may err on the side of caution and utilize algorithms to automatically remove all potentially problematic information; however, doing so (as Facebook and YouTube are doing now in removing all content contrary to WHO’s COVID-19 guidelines 45) leads to a slippery slope of unwarranted censorship. When social media companies prioritize profit above the benefit afforded to users in providing an open and unfiltered forum for discussion and expression, that forum is stunted. In a world so guided by the information transmitted through social media platforms, should the government incentivize the promotion of the social good by regulating social media companies’ censorship of their users’ content? Perhaps social media should be deemed a necessary public utility and thus protect users from censorship by subjecting these companies to the restraints of the First Amendment. 46

There’s really no easy answer or solution to this complex problem created by the unprecedented technological advances of this era. However, it is known from past experiences that tragedies happen when basic human rights are not met and protected. The proposed solution of amending Section 230 of the Communication Decency

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45 Abby Ohlheiser, supra note 3.

46 U.S. Const. amend. I.
Act\textsuperscript{47} to provide for basic, benevolent censorship while limiting internet service providers’ power to censor other content is not perfect, yet it attempts to protect the free exchange of unfiltered opinions so that innovations flourish and the quality of human lives increases while also emphasizing the importance of social responsibility by allowing basic censorship to protect the public. It is a workable solution that could prove to be flexible enough to withstand the test of time and technological advances.

\textsuperscript{47} 47 U.S.C. § 230
DOMESTIC VIOLENCE VICTIMS, A NUISANCE TO SOCIETY?: MOVING TOWARD A MORE EQUITABLE SYSTEM IN PROTECTING VULNERABLE WOMEN

Elizabeth Haderlie1 and Layla Shaaban2

Consider the following scenario. You are a member of the city council. Citizens’ complaints about the city’s deterioration have increased ever since low-income housing was built in your community. Each member of the council is interested in the welfare of the citizens in their jurisdiction and comes ready to a council meeting with proposed thoughts and ideas to help create a safe and welcoming community. It is proposed that nuisance ordinances be instituted to help with this issue. The ‘nuisance’ ordinance is passed, despite warnings that the policy would increase the vulnerability of domestic violence victims.

Two months later, Elizabeth Simmons’ daughter calls her crying. She claims her ex-boyfriend has threatened to hit her in the head with a hammer. After calling the police and having him removed from the house, she gets a restraining order the next day. She rescinds the order a month later, telling the judge that she couldn’t possibly imagine her ex-boyfriend hurting her again. And then, on January 13, Elizabeth places another call to the police asking for assistance at her home. When the police arrive, Elizabeth’s ex-boyfriend has her answer the door calmly. In April, he attempts to enter the house, thinking that she and her daughter are asleep. Elizabeth calls the

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police, but when they arrive the boyfriend has left. With the newly passed “nuisance” ordinance, landlords have no option but to evict Elizabeth and her daughter, which results in homelessness and more abuse by the ex-boyfriend.

Violence experienced by women, especially women of color, is a real and terrifying truth. In many areas of the country calling the police a definite number of times might cause more harm than good. In fact, in thousands of cities across the United States, calling the police can result in your eviction and lead to homelessness. Nuisance laws have historically been put into place to help keep the peace in neighborhoods and protect those living in these neighborhoods. They are a way of putting some sort of policing in the hands of the people for an enhanced level of safety within their communities. But what if these nuisance laws, while attempting to protect citizens, are putting some citizens at greater risk of abuse, and in some cases even murder?

Nuisance ordinances disproportionately affect minority victims of domestic violence. In fact, black, brown and indigenous women of color. Not only do they subject victims to homelessness and a cycle of abuse but, by preventing them from seeking assistance from law enforcement in fear of repercussion, also violate these victims’ constitutionally protected rights to first redress the government for grievances (First Amendment). These ordinances also threaten victims’ housing stability by marking them as nuisances for seeking police help. Victims become unprotected by the law, a violation of their essential Fourteenth Amendment right to equal protection when they are incapable of seeking help without facing a backlash. Historically, nuisance ordinances encourage police to strictly enforce a law protecting property and safety of everyone else other than victims of domestic violence. These pressures for law enforcement officers to protect the property of others have caused them to neglect the safety and life of the individuals directly affected by acts of violence perpetrated by someone close to them.

Our solution to this disparity that exists among female domestic violence victims, specifically African American women, is for the federal government to amend the Violence Against Women Act, designed specifically to protect women, to further protect female
victims of domestic violence, specifically women of color, by including a clause that addresses nuisance ordinances and the limitations local governments must keep in mind as they create local nuisance ordinances. We begin by exploring the history of nuisance ordinances, followed by a discussion on the First and Fourteenth, concluding with a section on possible solutions.

I. BACKGROUND

A. Nuisance Ordinances

In order to protect the livelihood of cities and towns across the nation, cities and local municipalities have begun to rely heavily on nuisance ordinances to control crime. Nuisance ordinances are mechanisms used to be able to control the behavior of tenants within city bounds. Nuisance ordinances tend to have three main features. First, they limit the number of calls made to emergency services [ie. law enforcement]. The reason that this criterion exists is partly due to the fact that police presence tends to lower property value and decrease the quality of life in the area. Repeated calls to law enforcement can also exhaust the city’s resources and make it difficult for emergency services to respond to dire situations. The second feature is a list of activities that fall under the nuisance “classification.” These activities differ from city to city, but they usually address issues like drug and gang activity or noise. The vagueness in defining these activities is willful. Cities can decide what constitutes a nuisance on a case-by-case basis, which can be detrimental to groups that are more likely to be targeted than others. The third and final feature of nuisance ordinances is the demand that they place on landlords in particular. Nuisance ordinances force landlords to evict the “nuisance” or face fines or, in some situations, incarceration. This creates an environment in which tenants are fearful of their landlords, and landlords are forced into compliance to the city or municipality.3

It is uncertain what brought on the rise of nuisance ordinances in rental agreements. Historians believe that nuisance ordinances rose

to popularity in 1980, as a response to drug related crime.\textsuperscript{4} According to the Policy Surveillance Program, 37 out 40 major cities in the United States have implemented some form of nuisance ordinance. Twenty-two of these cities require eviction as a response to nuisance, and five out of 40 classify calls for emergency services such as law enforcement a nuisance.\textsuperscript{5} The heavy policing of tenants’ activities and requests for emergency service have detrimental effects, especially on victims of domestic violence.

Victims of domestic violence are unable to access potentially life-saving emergency services due to nuisance ordinances threatening their rental agreements. This discourages victims from seeking the help they need to escape violent situations. In the case that they do report violence to law enforcement, they face a new set of obstacles that come due to nuisance ordinances. They can face eviction, which can then taint their records, making it incredibly difficult for them to find a new place to rent. Housing instability could then result in dependency on the abuser by the victim, furthering the cycle of abuse. Evictions and housing instability can create deep psychological issues, affecting the mental health of the victim.\textsuperscript{6} Overall, nuisance ordinances create a violent and traumatizing environment for domestic violence victims. They are targeted not only by their abuser and batterer, but also by the system meant to protect.

\textit{B. Domestic Violence}

Domestic violence, also known as intimate partner violence, is defined as the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, threats, and

\begin{itemize}
\item \textsuperscript{4} \textit{Id.} at 849.
\item \textsuperscript{5} Gretchen W. Arnold, \textit{From Victim to Offender: How Nuisance Property Laws Affect Battered Women}, 34 \textit{J. INTERPERSONAL VIOLENCE} 34 (2016).
\item \textsuperscript{6} \textit{Id.} at 34.
\end{itemize}
emotional abuse.\textsuperscript{7} Intimate partner violence is a current public health crisis that is affecting 1 in 4 women in the United states.\textsuperscript{8} Almost 10 million people experience domestic violence every year.\textsuperscript{9} When we look deeper into the public health crisis, we find that domestic victimization is correlated with a higher rate of depression and suicidal behavior. Intimate partner violence accounts for 15\% of all violent crime, and 72\% of all murder-suicides involve an intimate partner; 94\% of the victims of these murder-suicides are female.\textsuperscript{10} Nearly 20 people per minute are physically abused by an intimate partner.

It’s estimated that on a typical day, there are more than 20,000 phone calls placed to domestic violence hotlines nationwide.\textsuperscript{11} And these are just the victims who call in. Although the domestic violence hotline provides a support for these victims, it does not provide a solution to the violence they are facing. These victims need local and legal support when they find themselves in an intimate partner violence situation. Yet many of these victims might choose not to call the police out of a fear they will be marked as a nuisance to the communities in which they reside.

The statistics we have viewed up this point account for both women of color and white women. But historically research has shown us that black women are disproportionately affected by intimate partner violence. It is estimated that 45.1\% of Black women have experienced intimate partner physical violence, intimate partner

\begin{itemize}
\item \textsuperscript{7} National Coalition Against Domestic Violence, https://ncadv.org/learn-more (last visited Jan. 13, 2021).
\item \textsuperscript{8} Arnold, \textit{supra} note 5.
\end{itemize}
sexual violence and/or intimate partner stalking in their lifetimes.12 And an estimated 51.3% of black adult female homicides are related to intimate partner violence.13 More than 40 percent of Black women will experience domestic violence in their lifetime according to the Institute of Women’s Policy Research’s Status of Black Women in the United States. In comparison, 31.5% of all women will experience domestic violence.14

For Black women, domestic violence risks are extremely high. In fact, they are 30–50 percent more likely to experience domestic violence than white women. And, worse yet, they are almost three times as likely to die as a result of domestic violence than white women. Yet their first response is often not to report what they are experiencing. Or, if they do report, they later recant their stories. They also are less likely to visit shelters or receive services. Instead, many Black women suffer in silence. According to the Women’s Community, Inc., Black women are often reluctant to call the police because of the past injustices they have witnessed or experienced. This reason also keeps them from pressing charges against their abusers. They also are concerned with being labeled a “snitch” in their communities and they are worried that their community will be labeled or viewed as “bad” if they report the abuse. As a result, they remain silent.

Being a victim of abuse is already a difficult burden to carry, and nuisance laws do not relieve any of the stress these victims carry day in and day out. Not only do these women have to worry about when the next time might be that the abuser will attack, but they also must keep in the back of their minds what this will look, and sound like to the neighbors. Will their next call to law enforcement officials become the next step towards being evicted? Taking it a step


13 Id.

further, the distrust that black women already might have in a system that is often systemically and institutionally racist affects their likelihood of reaching out to the police for help. Many poor communities are disproportionately made up of people of color, especially Black people of color. Violence is not something new to those who come from low socioeconomic statuses. Victims of domestic abuse in these communities might be overlooked as just another act of violence, or city officials might just see Black people in general as a nuisance to their city because of the amount of crime we see in these communities. Crime and violence are a direct effect of poverty, and domestic violence falls under this category.

II. CONSTITUTIONAL QUESTIONS

A. First Amendment Petition Clause

The First Amendment of the United States Constitution guarantees the right to petition the government for redress of grievances. The Court has consistently held that this right to petition involves seeking the assistance of law enforcement. By discouraging victims from seeking law enforcement, nuisance ordinances trample on the fundamental First Amendment rights of victims.

It was in 1876 that the Court first established that the right to petition is “the very idea of a government, republican in form.” They emphasized once again the importance of the right to petition in *Mine Workers v. Illinois Bar Assn.*, calling it “the most precious of the liberties safeguarded by the Bill of Rights.” In recognizing the importance of this right, the Courts have expanded its application to almost every department of the Government. In the following

years, the First Amendment right to petition the government has been applied to the Courts\(^{19}\), public officials, and the legislature.

The application of the First Amendment’s right to petition has extended to the right to petition the police. In *Morris v. Dapolito*, the Second District Court of New York determined that “submission of complaints and criticisms to non-legislative and nonjudicial public agencies like a police department constitutes petitioning activity protected by the petition clause”\(^{20}\). This notion was pushed even further by *Lott v. Andrews Ctr.*, where the Eastern District Court of Texas noted that “there is no doubt that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right”\(^{21}\). Other decisions by Courts across the nation support the idea that seeking law enforcement help is a proper exercise of the First Amendment right to petition. The Court in *United States v. Hylton* noted that “filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right”.\(^{22}\) The Court in *Curry v. State* found “that complaints, even though numerous, made to law enforcement agencies are protected First Amendment activity regardless of “unsavory motivation” of petitioner”.\(^{23}\)

Case law has indicated over and over again the importance of seeking the help of law enforcement. Nuisance laws discourage victims from seeking assistance by creating point systems that keep track of how often they invoke the help of law enforcement, violating their fundamental First Amendment rights. Not only do these nuisance laws strip victims of domestic violence of their right to police aid, they also empower abusers to continue their cycle of abuse.\(^{24}\)


This cycle might continue to a point where it becomes unpreventable. It might result in severe physical or sexual assault or even murder. These laws prevent police officers and departments from fulfilling their duty to protect the public.

**B. Fourteenth Amendment**

The Fourteenth Amendment prohibits states from depriving “any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” 25 The Fourteenth Amendment was in part implemented to protect the individual’s rights from the states. In *Barron v. Baltimore*, the Supreme Court decided that the intent of the Bill of Rights was to keep a check on federal government, not state governments.26 After the Civil War, the United States Congress adopted many measures in an attempt to protect individuals’ rights. Over the years the Court has defined and redefined the interpretation of due process. The court has determined that individual rights mentioned in the Fourteenth amendment can be understood in three different categories: (1) “procedural due process”; (2) the individual rights listed in the Bill of Rights, “incorporated” against the states; (3) “substantive due process.”

Procedural due process historically determined that an individual was warranted a trial by jury, but in recent years it has been modified and simplified to require at minimum: (1) notice; (2) an opportunity to be heard; and (3) an impartial tribunal. We argue that nuisance ordinances supporting evictions of domestic violence victims violate the Due Process Clause of the Fourteenth Amendment by neglecting to further explore the causes of nuisance reports, violating the victims’ right to be heard, and denying them an impartial tribunal. As mentioned earlier, nuisance ordinances not only discourage victims of abuse from calling 9-1-1, but they fail to address the abuse that instigated the call. Nuisance ordinances—we would argue—are not effectively helping all citizens whom they were drawn up for,

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25 U.S. Const. amend. XIV, § 2.
but instead perpetuate ideas that domestic violence is a “nuisance” unworthy of police attention.

Substantive due process includes all “basic human rights possessed by persons in an ordered society.” Substantive rights have been more difficult to be determined and historically the court has upheld that discerning such rights “has not been reduced to any formula,” but must be left to case-by-case adjudication. Substantive due process has been historically interpreted to include things such as the right to work in an ordinary kind of job, marry, and raise one’s children as a parent. We argue that victims of domestic violence and their families can suffer as a result of nuisance ordinances on many substantive levels. Housing law in the United States has not always been so black and white. Throughout history, policy makers and scholars have debated as to whether housing should be conceptualized as a commodity, such as a car, or a fundamental human right. In the Universal Declaration of Human Rights drafted after WWII in 1948 to which the United States signed its name it was stated that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (Section 1, Article 25)

As stated above, housing is a fundamental human right, and therefore victims evicted as a result of nuisance ordinance enforcements fall under the protections of the Fourteenth amendment.

African American females experience intimate partner violence at a rate 35% higher than that of white females, and about 2.5 times the rate of women of other races. However, they are less likely than white women to use social services, battered women’s programs, or

28 Universal Declaration of Human Rights (Section 1, Article 25).
go to the hospital because of domestic violence.\textsuperscript{29} Because victims of domestic violence are more often black women than any other race or sex, we argue that nuisance ordinances do not provide “equal protection of the law” as stated in the Fourteenth amendment of the U.S. Constitution. Nuisance ordinances are often more aggressively enforced to target residents, particularly renters, who are people of color, women, Housing Choice Voucher Program participants (who are overwhelmingly people of color and women), single parent or guardian households, and people with disabilities.\textsuperscript{30}

C. Nuisance Case Law\textsuperscript{31}

Rosetta Watson, a former resident of Maplewood, Missouri, was a victim of repeated domestic violence. After seeking police aid, she was evicted and banned from the city of Maplewood for six months, in which experienced increased abuse and homelessness. The Eastern District Court of Missouri overturned the law and provided Ms. Watson with a large compensation, we believe that some of the analysis that the judges make is necessary to advance our argument.

First the Court establishes that under the First Amendment, “communications to law enforcement -- including (1) reporting physical assault, (2) reporting criminal activity, and (3) filing a complaint with law enforcement -- are constitutionally protected activities.” \textsuperscript{32}

Second, the Court specifically addresses the language of the Nuisance section of the rental agreement in Missouri. While it specifically applies to the facts of the case, its standard can be widely applied. The Court notes that the language violates the First Amendment prima facie by “imposing penalties, including banishment,


\textsuperscript{31} \textit{Somai v. City of Bedford}, 1:19CV373 (N.D. Ohio 2020).

on the basis of calls to the police or crime occurring at a property, regardless of whether the tenant was the victim or perpetrator, thereby outright burdening tenants’ ability to report crime and seek police assistance.” 33 Ms. Watson’s inability to seek police aid directly violated her right to petition the government to redress grievances.

Further, the Court noted that Maplewood’s enacting of the nuisance ordinance intentionally discriminated against women by singling out the calls made by domestic violence victims. Because of that, Ms. Watson and other women who were victims of domestic violence are punished for seeking out police assistance.34

The same concepts and arguments are furthered in Board of Trustees of the Village of Groton v. Pirro.35 However, Pirro goes further by emphasizing the overreach created by nuisance ordinances. The Board of Village of Groton argues that the nuisance ordinances are an extension of the state’s police powers, and are therefore constitutional.36 The judges disagree. Instead, they note that “the plain language of the law” is discriminatory and overbearing. They believe that the state interest is not enough to constitute a law that “facially prohibits a real and substantial amount of expression guarded by the First Amendment”.37

No state interest is compelling enough to put victims of domestic violence at risk for more abuse. No state interest is compelling enough to violate a victims’ constitutional First and Fourteenth Amendment rights.38 However, states have found loopholes when it comes to nuisance ordinances. Most cases that have been brought against states for enforcing nuisance ordinances simply resulted in these states altering the laws to fit the decision of the Court. In

33 Id. at 437.
34 Id. at 438.
36 Id. at 11.
37 Id. at 12.
Briggs v. Norristown, the Court awarded Ms. Briggs with $495,000 in damages, but after a few months, the nuisance ordinance in question was allowed to be enforced again. The same situation occurred in Watson.

It is clear that many courts around the country have established the overburdening and chilling effect that nuisance ordinances have on victims of domestic violence. Despite these consistent findings, states have found ways to keep nuisance ordinances alive and enforced, putting more and more victims of domestic violence at grave danger. We believe that what the Courts have done so far is not effective in preventing the detrimental effects of nuisance ordinances. We present a few solutions for this issue in the section below.

D. Solution

From 2008-2009, in Milwaukee 16% of all nuisance ordinance activity was categorized under “domestic violence.” For women of color, high rates of poverty, poor education, limited job resources, language barriers, and fear of deportation increase their difficulty finding help and support services.³⁹ The federal Fair Housing Act (FHA) forbids local governments from enacting or enforcing intentionally or unintentionally discriminatory housing policies. Ordinances that have a disparate impact on one or more protected groups can violate fair housing law, unless they are justified as necessary to achieve an important municipal objective. Local governments should scrutinize all housing-related ordinances to determine whether any have the effect of creating housing barriers for protected groups and, if so, whether options are available that would reduce the harm for those groups. It is often stated that racial bias influences police enforcement decisions. And in a research study it was found that tenants living in a black neighborhood in Milwaukee were three times more likely to receive a nuisance citation compared to a tenant in a white neighborhood who had also violated the ordinance.

While proponents of nuisance ordinances argue they are necessary to deter crime, in practice they undermine public safety and punish innocent people—especially vulnerable people who have fewer resources. Domestic violence victims often feel they must endure violence and threats without police intervention when calling the police could lead to homelessness. As mentioned previously, nuisance ordinances have been found to disproportionately impact and be disparately enforced against communities of color. Because these ordinances typically do not require that residents be told about a warning or citation, impacted people often have no opportunity to show that they were actually victims of the “nuisance conduct” and may not even know that a nuisance ordinance is at the root of their housing situation.\footnote{Matthew Desmond & Nicol Valdez, Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women, 78 Am. Soc. Rev. 128, 117-141.}

We propose that the Violence Against Women Act, or VAWA, be amended to include a clause specifically for the protection of victims of domestic or intimate partner violence victims. This clause should require law enforcement officials to report any suspicion of domestic violence when called upon to report to a property. When these reports are made the city should send out a social worker to speak with the believed victim and offer support and care for the victim.

We further implore lawmakers to add a clause to the VAWA that requires all law enforcement officers to undergo training on enforcing nuisance ordinances when it comes to victims of domestic violence, whether that be further education on how to recognize signs, what questions to ask, or how to better protect these victims instead of having them punished under the law. This clause should include a section that requires landlords to seek training as well when it comes to recognizing the signs of domestic violence, and ways in which they can help these victims in their housing situations. These required courses should also include sections that teach about racial bias and offer a safe environment for police officers to explore their own racial biases and teach them what racial bias historically looks like, and how to combat it.
In his TED Talk “Why Good Leaders Make You Feel Safe,” author Simon Sinek argues that when leaders build an environment of safety and protection for people, their team members respond with trust and cooperation. Sinek says, “When we feel safe inside the organization, we will naturally combine our talents and strengths and work tirelessly to face the dangers outside and seize the opportunities.”

It’s up to the leaders in any organization to create an atmosphere of security, support and loyalty. We would argue that the position in which police officers are placed requires them to learn to be a great leader in the communities in which they serve.

Furthermore, many victims of domestic violence have mixed feelings when it comes to police and the ever-looming fear of eviction. As this clause is released and implemented by local governments, we will include ways in which law enforcement officials can become more of a friendly face in the communities where they have historically been feared.

We feel that more conversations and education surrounding this topic will provide those who are often the first responders to victims of domestic violence situations (whether they know it or not) to not only provide support but instill confidence in this population that allows them to trust the officials who have sworn to protect them. We further remind those who create nuisance ordinances that the “three calls and you’re out” rule often is a double-edged sword that does not promote victims of abuse to seek help in fear of being evicted and left homeless. The clause we offer as a solution to be added to the VAWA should include that the “x strikes and you’re out” rule be taken out of nuisance ordinances as to not deter vulnerable populations from seeking assistance from law enforcement.

III. CONCLUSION

Rental agreements play a necessary role in facilitating interactions between tenants and landlords as well as creating a contract for tenants to refer to and abide by. However, rental agreements that contain

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*Sinek, Why Good Leaders Make You Feel Safe, TED Ed (May 19, 2014).*
nuisance ordinances can be detrimental to the health and safety of many who have fallen victim to domestic violence. Nuisance ordinances typically have three main features to them. One of these very common features -- a limit on the number of calls made to emergency services such as law enforcement -- can be specifically harmful for domestic violence victims. The inability for victims to contact and receive police assistance is a violation of their fundamental Right to Petition the Government under the First Amendment as well as the Equal Protection of the Law under the Fourteenth Amendment.

While nuisance ordinances are beneficial in preventing gang activity and other heinous crimes around private and public property, the effect that they serve is not strong enough to excuse the tremendous harm they cause victims of domestic violence. There needs to exist a middle ground in which crimes like gang and drug activity are regulated, but potential activities of abuse and violence are prevented. This could potentially be achieved by creating amendments to specific acts that have previously promised to protect women against domestic violence, such as the Violence Against Women Act.
BOSTOCK’S PARADOX: INTERSECTIONS IN LGBTQ EMPLOYMENT RIGHTS AND PRIVATE, RELIGIOUS BUSINESSES

Christopher P. Smith

INTRODUCTION

Since the early 1970’s, the burgeoning LGBTQ civil rights movement has resulted in the progression of the freedoms and privileges that LGBTQ individuals can now enjoy. Same-sex marriage was legalized in 2015, and as of 2020, workplace protections have been extended to those who are LGBTQ. However, certain exemptions exist for both religious institutions and businesses owned by religions. These exemptions exist because the First Amendment of the United States Constitution protects the right to the free exercise of religion. This includes protecting how religions hire ministers and secular, non-religious workers such as accountants or building custodians.

Inevitably, the difference between both the protections afforded to religious institutions and LGBTQ employment leads to a paradox regarding LGBTQ employees since they are currently supposed to be offered the same workplace protections as those who are discriminated against on the basis of race, gender, religion, age, and disability. At the same time, they are not offered similar protections when working for an employer who, by legal standards, is considered a private religious business. However, with the introduction of a new legal precedent set forth by Bostock v. Clayton County, although religious institutions themselves can continue to discriminate against

1 Christopher is a senior studying Communications at Brigham Young University. He would like to recognize Kaylin Hill for her diligence, skill, and insight as an editor.
LGBTQ employees, private, religious businesses must follow the same jurisdiction as secular, non-religious businesses, meaning they can no longer discriminate against LGBTQ employees.

I. BACKGROUND

To understand the legal problems that surround by the Supreme Court’s ruling in *Bostock v. Clayton County*, one must first understand: (A) the nature of religious freedom according to current legal jurisprudence in the United States of America, (B) the history and current understanding of private business practice in the United States today, and (C) the history of civil rights for LGBTQ persons in the United States.


As it pertains to freedom of religion, the First Amendment to the Constitution established that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The free exercise of religious belief is a pivotal part American rights, in conjunction with the right to redress, and the right to free assembly. Therefore, knowing how the government can interact with religions and religious employers is crucial to understanding the First Amendment’s relationship to *Bostock v. Clayton County*.

*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* established a definition to determine who is a minister: a preaching member of a faith whose position allows them the opportunity to educate either a member of the public or someone within the faith about the faith’s beliefs and ideals. This ruling was established to protect ministers from Title VII of the 1964 Civil Rights Act, which protects a certain status of employee. This idea is essential because Title VII allows religious institutions to bar certain types of employees from participating as ministers, meaning that a religious institution could discriminate against potential employees if they were to be serving a ministerial function within the institution.

2 U.S. Const. amend. I
While a ministerial exemption was established when Title VII was passed into law, *Tabor* was the first time that the ministerial exemption was examined within a court of law.

**B. Rights of Private, Religious Businesses**

In 1994, the United States Congress passed the Restoration of Freedom of Religion Act\(^3\) that reduced the scope of *Employment Division v. Smith*, a landmark ruling that reduced a private religion’s power to discriminate in hiring employees. The act also included a definition separating religions from “[p]rivate, closely-held businesses of and guided by religious principles.”\(^4\) A private business is any business owned by a single-person, or a select group of people and is not owned by stockholders in a stock-exchange. A closely-held business is any business that is kept within a very small group of people, such as a family unit. A recent example of a conflict over such a business is the 2014 case of *Burwell vs Hobby Lobby Stores Inc.*\(^5\), wherein the Supreme Court reaffirmed the rights of businesses like Hobby Lobby (that are guided by Christian religious principles) to deny birth control and abortion coverage to its employees because of the company’s closely held religious values.

**C. LGBTQ Civil Rights in the Workplace**

Finally, to begin to unravel the paradox brought on by *Bostock v. Clayton County*, one must understand the history of LGBTQ Civil Rights. In 1967, the United States legislature passed the 1967 Civil Rights Act.\(^6\) Incorporated into this law was Title VII, which served to protect the working rights of minority groups. Specifically, Title VII states:


\(^{4}\) *Id.*


It shall be an unlawful employment practice for an employer—

(1) to 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, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.\(^7\)

While same-sex marriage has been legal since 2015, and an equal right initiative for LGBTQ persons has been ongoing since 1970, it was not until 2020 that equal workplace protections for LGBTQ employees were codified by the United States Supreme Court through *Bostock v. Clayton County*. In a 6-3 decision, Justice Gorsuch wrote that “These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff’s sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group.”\(^8\)

Because of this ruling, LGBTQ employees now benefit from the same protections as other classes protected by Title VII. In addition to workplace protections for sex, race, and political preference, individuals cannot be discriminated against for their sexual orientation.

To protect LGBTQ employees as required by *Bostock vs. Clayton County*, private religious businesses should be required to follow the ruling of *Bostock* and not deny working rights to LGBTQ employees, regardless of their status as private, religious businesses.

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II. UNRAVELING THE BOSTOCK PARADOX

The claim of freedom to work must come from Title VII, as it is the vehicle by which all protected persons receive the right to work. As stated previously, Title VII declared in subsection 703 that it is unlawful for an employer to discriminate against employees on the basis of certain protected statuses. Such discrimination would be a violation of the Civil Rights Act of 1964 as amended in 1971. However, there is nothing stated within the text of Title VII that explicitly protects LGBTQ employees from discrimination. As of June of 2020, there have been numerous changes allowing for protections of employment and workplace behavior thanks to Bostock. Bostock makes no distinction between sex and LGBTQ rights; to Bostock, they are one and the same. A man being discriminated against for his love for another man is experiencing discrimination because of his gender since a woman would not be treated the same way if she were in love with a man. Thus, Bostock makes firm the notion that LGBTQ employees have rights like any other person. However, this ruling makes no explicit distinction between which organizations are exempt and which are not; therefore, we cannot yet rule that private religious businesses can feasibly be required to obey this law since they are currently allowed a couple of notable exemptions that would hinder the protection of LGBTQ employees.

The primary and most important exemption is the right of any religious employer to require an employee to follow their religious standards. Under Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,9 four employees were fired because of their non-compliance in upholding the religious temple standards of the Church of Jesus Christ of Latter-day Saints. The men argued that the Church of Jesus Christ’s use of section 702, which allowed for the church to hire and fire according to religious belief, was not only spurious, but that it violated the Constitution entirely since the men were performing non-religious, secular work. The Supreme Court’s unanimous decision declared that section 702 did not violate

the Constitution and determined that any religious institution has the right to require a person to follow its religious tenets. This case had a broad impact on case law regarding the ministerial exemption that had been previously ruled-under in *Hosanna-Tabor*[^10].

Second, according to *Hosanna-Tabor*, religious institutions also have a right to select their own ministers[^11]. While *Tabor* employed a specific four-fold measure to help decide who or who was not a minister, *Our Lady of Guadalupe School v. Morrissey-Berru*, a 2020 case, stated that it was not the place of a court nor any government entity to set a specific, hard rule about the ministers of a religion since doing so would violate the First Amendment[^12]. Mrs. Morrissey-Berru had filed a complaint against the private catholic school where she had taught. The school had in 2012 required teachers to become certified in catechist teaching, something Mrs. Morrissey-Berru could not do as she was not a practicing catholic. The Supreme Court decided to undo the precedent set by *Hosanna-Tabor* by removing the ministerial test and instead following a more simplistic model[^13]. As a result, courts could rule on a case-by-case basis, but in general would assume that a person was a minister rather than not. Because of this, protecting LGBTQ employees outright in a religious institution regardless of the work that they were performing at the time would be almost impossible because all employees working for a religious institution would be at the discretion of the religion.

Another problem that arises when examining current law surrounding religious rights and employment can be found in the Religious Freedom Restoration Act of 1994 (RFRA). The key text of this act reads: “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; governments should not substantially burden religious exercise

[^10]: *Id.*


[^13]: *Id.* at *6 (2020).
without compelling justification.” This reasoning was contrary to the at-the-time recent reasoning of Employment Division v. Smith, which stated that no religion nor religious person could refuse to obey a law that was neutral to anyone. This reasoning came from two men who had used illegal substances as part of their religious faith. While the use of these substances was considered fair use for their beliefs, the Supreme Court determined that religious belief could not outweigh the needs of the law.

While the constitutionality of the RFRA has been challenged in later court cases, subsequent laws passed have allowed the essential core of the RFRA that has been cited previously to remain. One such important piece of context is the restoration of the Sherbert test in determining the burden that government might place upon religious individuals. This test calls for a strict scrutiny of any and all applicable laws and rulings, requiring the law to be as narrowly tailored to provide for as much religious freedom as possible. Finally, the government may not burden any individual (and in legal context, a business constitutes an individual just as a person does) on their free exercise of religion. Therefore, it may seem that a private religious business is exempt from following Bostock because Bostock places a burden upon the privately held belief of a business. This seems to be the case in Burwell v. Hobby Lobby, where the Supreme Court ruled in favor of Hobby Lobby.

However, as we will discuss further in this paper, this does not apply to non-religious, but privately religious businesses like Hobby Lobby. Because there is an inherent distinction between private, religious-oriented businesses and a religious institution, the result is that the law cannot be applied in the same way. To explore this, we will examine Hobby Lobby as it is related to Deseret Book.

17 Id.
18 Burwell, 573 U.S. at *1-*95.
To relate back to our previous case in *Amos*, let us examine the differences found between a business owned by a religion and that of a private, religious business. There are important distinctions to note about *Hobby Lobby* versus *Amos* in dealing with religion. Let us examine first a business that might seem like *Hobby Lobby*: Deseret Book is a private bookstore and publishing company owned by the Deseret Management Corporation, which in turn is owned by the Church of Jesus Christ of Latter-day Saints. It is operated separately from the rest of the Church, maintaining its own CEO and retaining a unique style and brand. *Hobby Lobby* is privately owned by a family that maintains a core set of religious values that governs how the store operates. While it might initially appear similar to *Hobby Lobby*, as both organizations are founded upon religious principles, because of their business structure, they function differently according to the law. Because Deseret Book is religion-owned, it is legally governed through religion law, and therefore precedents like *Amos* are applicable to Deseret Book. Unlike Deseret Book, *Hobby Lobby* is a private business and therefore the laws that govern it will diverge from Deseret Book. While Deseret Book can appeal to its subsidiary position underneath the Church of Jesus Christ as a shield from laws like *Bostock*, *Hobby Lobby* cannot as it is a private business.

Second, *Lobby* is restricted to just the Health and Human Services Department. Quoting Justice Alito: “We do not hold...that for-profit corporations and other commercial enterprises can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”

According to Alito, private, religious businesses are not allowed to opt out of any law they choose and must obey any laws that do not directly conflict with their rights to religious freedom, such as in the case with *Hobby Lobby*.

Third, we can compare a concurrent case with *Bostock*. *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.* is a similar case to that of our *Hobby Lobby* example. *R.G.* is a privately-held, closely-held religious business that

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19  *Id.* at *9* (2014).

runs its operations similar to Hobby Lobby. It had previously fired an employee because of their transgender status. While the Supreme Court had withheld from determining if these rules also applied to religions themselves, they did affirm that transgender employees were protected under Title VII.\textsuperscript{21}

Requiring religious, private businesses to not discriminate against LGBTQ employees according to \textit{Bostock} would not impose a significant burden upon these businesses. Unlike \textit{Lobby}, where the court had concluded that the financial burden of paying for birth control was a significant burden, no such burden exists when dealing with LGBTQ employees. However, financial burdens are not the only burdens that can be laid upon a business; thus, it is possible to argue that requiring a private religious business to hire LGBTQ employees would be a burden upon the free exercise of a business to spread their religious message. Even so, in reviewing \textit{R.G. & G.R.}, a key aspect of their business model stands out. The United States 5 Circuit Court of Appeals had argued that requiring a transgender employee to remain in R.G.’s employ was injurious to the beliefs and practice of \textit{R.G}. Contrary to this, the United States Supreme Court reversed the 5th Court’s mandate.\textsuperscript{22} While the Supreme Court acknowledged the religious question raised by \textit{R.G}, they ruled in favor of the employee, recognizing the lack of burden that the employee had placed upon R.G citing it as not “substantial enough” to fail the Sherbert test. Therefore, we can reasonably conclude that this same measure can apply to any other religious, private business. While protecting LGBTQ employees from willful termination by their religious employers might place a burden, it is not significant enough to raise any questions regarding the RFRA.

As civil rights have pushed toward progress on behalf of LGBTQ people, the need for protections for LGBTQ employees has become an important issue. However, legal freedoms carry little weight if they are not supported by protections from discrimination. Therefore, the compelling nature of this issue makes it important to solve. Due to the lack of reasoning behind refusing to hire LGBTQ

\begin{flushleft}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at *37.
\end{flushleft}
employees, the fact that the Sherbert test is not an issue, and that our test case of R.G. and G.R. passes the Sherbert test, we can conclude that there is no reason that private, religious businesses can deny employment to LGBTQ employees.

III. IMPACT AND ISSUES

The impact of Bostock, as I have described, is significant namely for how the divide between religious freedom and LGBTQ rights are working in contrast to expose the more difficult and nuanced questions regarding the limits of freedom of religion and the need to preserve the rights of all Americans. A significant movement of conservative-leaning legal thinkers would concur that ruling as I have argued above would narrow the current scope of the “free exercise” clause. It is true that what has been given above would result in a more nuanced interpretation of the RFRA and redefine the meaning of the question between the free exercise of a religious business as it relates to non-discriminatory practice. For some, this may pose a problem because of how they interpret the First Amendment.

Regardless, it would be incorrect to treat a private, religious business the same as a religious institution itself. Although their motives may be aligned, they are inherently different at their core. While such a ruling, as has been argued, would have ramifications for religious businesses and raise further questions that have been previously discussed by the Supreme Court (in cases like Lobby), these questions would hopefully lead to further nuanced discussions about such rights.

IV. CONCLUSION

It is significant to recognize the value that Bostock has given to current LGBTQ employees today. Thanks to Bostock, LGBTQ employees now are free to work without fear of discrimination. The dreams of life, liberty, and the pursuit of happiness are more open to such employees. With thanks to the First Amendment as interpreted in Amos and most recently in Beru, religion remains a difficult subject when discussing protecting LGBTQ rights. Further laws and rulings
like the RFRA and Sherbert, with subsequent cases like *Lobby*, might pose a difficult challenge to protecting such rights. It can be determined that even with cases like *Lobby* and the RFRA, LGBTQ employees should retain their right to work free of discrimination inside a private religious-oriented business.
18-year-old George Alvarez faced an impossible choice. He had spent the last 6 months in jail awaiting trial for burglary. While in jail, a guard accused Alvarez of attacking him. If Alvarez was found guilty of assaulting the police officer, he would receive a minimum of ten years in prison. Alvarez knew the guard was lying; the guard had jumped him. However, spending ten years in prison was too high a risk to take. Alvarez pled guilty to assaulting the officer in exchange for a lesser sentence. He spent four years in prison before security camera footage exonerated Alvarez. This footage had been there all along; the prosecutor had the video proof of his innocence before Alvarez pled guilty to the crime. Furthermore, when Alvarez later sued for compensation for his time incarcerated, a United States Court of Appeals judge dismissed the lawsuit on the basis that Alvarez had pled guilty, so the state could not be held liable for withholding the video.²

The situation is not much better for people with limited resources who choose to assert their innocence. Kalief Browder was 16 years old when he was arrested for stealing a backpack. Browder knew he was innocent and refused to plead guilty. Despite his innocence, he

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1 Emily is a senior at Brigham Young University studying Political Science and Legal Studies. She plans to attend law school in Fall 2022. She would like to express his gratitude for her editor Pavel Bermudez for all his incredible work on this paper.

spent three years behind bars awaiting a trial (which is much longer than the sentence he probably would have received for stealing a backpack). Browder spent almost two years in solitary confinement and attempted suicide several times. After three years of enduring the grueling incarceration, Browder was released from his pretrial detention. After his release from jail, video footage surfaced of officers and large groups of inmates assaulting him. Browder also told stories of being starved by guards. Outside of jail, he finished his GED and began community college; however, his time in jail — especially his time in solitary confinement — was a wound too deep to heal. Kalief Browder committed suicide shortly after being released. Kalief often asserted that his time in jail, which eventually led to his death, was a punishment for his assertion of innocence rather than pleading guilty to a crime that he did not commit.  

Courts do not have the capacity to give every defendant a trial by jury, so courts rely heavily on plea bargaining because it is a quick way to get through the extreme volume of cases. Although the criminal justice system is a hotly debated topic, the overbooked nature of the criminal justice system is backed by evidence and is relatively uncontested. Only five percent of the world’s population lives in the United States, but twenty-five percent of the world’s prison population lives in United States prisons. Furthermore, United States residents have a higher chance of being incarcerated than residents of any other country with one in every 136 United States residents

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4 E.g., Lindsey Devers, Plea and Charge Bargaining Research Summary, (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf, (Scholars estimate that about 90-95 percent of cases are disposed of through plea bargaining).

being incarcerated.\textsuperscript{6} Due to the sheer number of Americans going to prison, the United States criminal justice system does not have the resources to grant every defendant a trial by jury. As a result, the system relies heavily on plea deals to process cases efficiently.\textsuperscript{7} In 2018, only 2 percent of defendants in federal criminal cases went to trial and an overwhelming 90 percent of defendants pled guilty before trial.\textsuperscript{8} Moreover, 97 percent of current United States prisoners have taken plea bargains.\textsuperscript{9} Due to its widespread impact, plea bargaining is at the very center of the American criminal justice system. As Supreme Court Justice Anthony Kennedy said, “plea bargaining . . . is not some adjunct to the criminal justice system; it is the criminal justice system.”\textsuperscript{10}

Unlike trials, where constitutional law and case law strictly outline the process, the plea bargaining process is much more flexible. The structure of plea bargaining gives prosecutors wide discretion over the outcome of a case. One of the most effective techniques prosecutors use is pretrial detention. More than half a million people incarcerated in the United States, like Kalief Browder, have never been convicted of a crime.\textsuperscript{11} About 65 percent of people in jail and 24 percent of people incarcerated at the state and local levels are in

\begin{itemize}
\item \textsuperscript{6} See BBC News, \textit{World Prison Populations}, (last visited Feb. 1, 2021), http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm, (stating that 737 people out of every 100,000 are incarcerated).
\item \textsuperscript{8} John Gramlich, \textit{Only 2\% of federal criminal defendants go to trial, and most who do are found guilty}, (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.
\item \textsuperscript{10} \textit{Missouri v. Frye}, 566 U.S. 134, 144 (2012).
\end{itemize}
Many of these people are in pretrial detention simply because they cannot afford bail. When defendants are in pretrial detention, they cannot go to work, go home, or see their family. Therefore, people in pretrial detention get more pressure to plead guilty, so that they can get out of jail.

Another tactic that prosecutors can use to convince defendants to accept plea deals is using the trial penalty to their advantage. The trial penalty is the idea that those who accept plea bargains get less severe sentences than those who go to trial. As in the case of George Alvarez, defendants may plead guilty in fear of getting a more severe sentence at trial.

America’s criminal justice system cannot exist without plea deals, but the plea-bargaining process protects the prosecutors’ discretion rather than individuals’ rights. Because of this, courts convict defendants because they are too poor to assert their constitutional right to go to trial. Although the direct costs of a trial can be covered by the state, many indirect costs keep people from going to trial and instead force them to take plea deals. These indirect costs include pretrial detention, the trial penalty, and the costs of a trial. Additionally, people who live in poverty are disadvantaged in the plea-bargaining process because of poor representation and psychological factors.

Supreme Court precedence requires that under the Fourteenth Amendment, the poor must have equal access to the criminal justice system. If poverty restricts a person from a part of the justice system, states must remedy that flaw. Although the historical court rulings have left states to decide how to remedy such unequal access, I suggest several remedies. Under these proposals, state reforms will


13 See e.g., Griffin v. Illinois, 351 U.S. 12, 19 (1986) (stating “Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has”).
create a more equal justice system and will restore equal protection under the constitution.

Part I explains the lack of regulation in the plea-bargaining process and how, because of the unregulated structure of the plea-bargaining process, prosecutors and defendants are not on a level playing field. This section also lays out the relevant constitutional principles. Part II sets out legal precedents and establishes general rules to guide discussions of plea-bargaining’s relationship with the constitution. Part III explains how both prosecutorial tactics and flaws in the criminal justice system restrict the poor from full access to the criminal justice system, specifically access to a trial. Part IV reiterates the obligation that states have under the constitution to resolve these issues. Part V suggests actions states can take to resolve the constitutional issues.

I. BACKGROUND

A. Waiving Rights

Plea bargaining is a contract between the state and the defendant where the state agrees to lower the penalties and the defendant agrees to waive their right to trial by jury, saving the court time and resources and expediting the sentencing process.14

Despite the less extreme sentences that plea bargains usually offer, plea bargains are not always the best option for defendants. When defendants waive their right to a trial by jury, they also waive other rights guaranteed to the accused, such as their privilege against self-incrimination, the right to confront one’s accusers, the right to plead “not guilty,” the right to require the prosecution to prove guilt beyond a reasonable doubt, the right to compel favorable witnesses,

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and the right to present any available defenses at trial.\textsuperscript{15} Defendants also lose the right to appeal any case because they were not given these rights.\textsuperscript{16} In some cases, defendants waive their right to challenge issues related to pretrial rights, such as there being no probable cause for arrest, improperly seized evidence, an illegally obtained confession, and more.\textsuperscript{17} The court upheld these waivers of rights as constitutional in \textit{Brady v. United States}.\textsuperscript{18} Although plea bargains help defendants get lesser punishments, the lesser punishments often come at a high cost. These costs are especially high for defendants who are innocent of the crime they were indicted for, as in the cases of George Alvarez and Kalief Browder.

\textbf{B. Prosecutorial Discretion}

Additionally, when defendants enter the plea bargaining process, they are subject to the prosecutor’s discretion. Plea bargains are handled at the prosecutor’s discretion in four ways. First, prosecutors alone draft the bargains which judges can only approve or deny.\textsuperscript{19} In fact, in most cases, judges are prohibited from participating in or commenting on the plea negotiations, leaving the sentencing power almost entirely to the prosecutors.\textsuperscript{20} Second, unlike in other areas of

\begin{itemize}
\item[]\textsuperscript{16} See Plea Agreements And Sentencing Appeal Waivers -- Discussion Of The Law, \textit{supra} note 15.
\item[]\textsuperscript{17} See Alexandra W. Reimelt, \textit{Plea Bargains and Waiver of the Right to Appeal}, 51 B.C. L. Rev. 871, 873 (2010).
\item[]\textsuperscript{19} 21 Am. Jur. 2d \textit{Judicial Participation in Plea Bargaining Process} \S\ 619.
\item[]\textsuperscript{20} 21 Am. Jur. 2d \textit{supra} note 19.
\end{itemize}
law, the plea bargaining process is rather unrestricted. Depending on the state, prosecutors can present plea bargains before the trial, during the trial, or even after the trial in cases where the jury cannot decide.21 This gives prosecutors discretion to strategically propose plea bargains when they are most likely to be accepted. Third, during the plea bargaining process, prosecutors can withhold evidence favorable to the defendant. This evidence would otherwise come out at trial.22 Fourth, legislation has increasingly given prosecutors several tools to push plea deals onto defendants. For example, defendants can be forced into pretrial detention, which can pressure defendants into taking unfavorable deals.23 Additionally, increased mandatory minimum sentencing (a legal requirement for the minimum penalty

21 Berman, supra note 14.

22 See, e.g., Brady v. Maryland, 373 U.S. 83, 87 (1963) (stating “We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”); See also United States v. Ruiz, 536 U.S. 622, 633 (2002) (stating “lead us to conclude that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant”).

23 See, e.g., Bureau of Just. Assistance U.S. Dep’t. of Just., Plea and Charge Bargaining: Research Summary (2011) (referring to Kellough and Wortley’s findings when saying, “Pretrial detention has a strong effect on the decision to offer and accept pleas. Those who are taken into custody are more likely to accept a plea and are less likely to have their charges dropped”); See also Gail Kellough and Scot Wortley, Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions, 42 THE BRIT. J. OF CRIMINOLOGY 186, 186 (2002) (“rather than ‘managing risk,’ the findings showed that the detention of accused persons was an important resource that the prosecution used to encourage or coerce guilty pleas from accused persons.” “What is structured into this linkage between bail and plea bargaining is not a reduction of the accused’s opportunities for offending so much as a decrease in the ability of vulnerable groups to resist the system’s power to punish”); See generally Pretrial Policy: State Laws, https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-policy-state-laws.aspx (last visited Feb. 9, 2021) (describing pretrial detention laws by state).
at trial) gives defendants even more reason to avoid trial.\textsuperscript{24} All four forms of prosecutorial discretion put prosecutors at an advantage in the plea bargaining process.

\section*{C. Plea Bargaining Precedent}

The Sixth Amendment of the Constitution grants a right to a trial by jury, but this right can be waived in the plea bargaining process.\textsuperscript{25} The Supreme Court has on numerous occasions upheld plea bargains.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{24} See U. S. Sent’g. Commission, Quick Facts on Mandatory Minimum Penalties (2015). (stating “In 2015 at sentencing, 13.5 percent of all offenders in cases reported to the United States sentencing commission remained subject to a mandatory minimum penalty”) (“The average sentence length of offenders who remained subject to a mandatory minimum penalty at sentencing was 138 months, over twice the average sentence of offenders receiving relief from such a penalty (66 months). The average sentence for offenders not convicted of any offense carrying a mandatory minimum penalty was 28 months”); \textit{See generally Philip Oliss, Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines}, 63 U. Cin. L. Rev. 1851, 1851-52 (1994-1995) (describing the history of mandatory minimum sentencing including related laws passed in the late 1900s).
\item \textsuperscript{25} See \textit{Boykin v. Alabama}, 395 U.S. 238, 243 (1969) (stating “Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U. S. 1. Second is the right to trial by jury”).
\item \textsuperscript{26} See, \textit{e.g.}, \textit{Parker v. North Carolina}, 397 U.S. 790, 790 (1970) (stating “An otherwise valid plea is not involuntary because induced by a defendant’s desire to limit the possible maximum penalty to less than that authorized if there is a jury trial”); \textit{See also North Carolina v. Alford}, 400 U.S. 25, 25 (1970) (stating “A guilty plea that represents a voluntary and intelligent choice among the alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because it was entered to avoid the possibility of the death penalty.”); \textit{See also Brady}, 397 U.S. at 742 (stating “A plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty, and here, petitioner’s plea of guilty met the standard of voluntariness, as it was made “by one fully aware of the direct consequences” of that plea”).
\end{itemize}
However, courts have created guidelines for when defendants can legally waive their right to trial. For example, in multiple cases, the Supreme Court has held that confessions cannot be coerced or compelled.\textsuperscript{27} In \textit{Brady}, the Court expected plea bargains to only be used when there is overwhelming evidence that the defendant is guilty and, therefore, a trial would waste time and resources.\textsuperscript{28} The Court further suggested that plea negotiations should not be used when evidence is uncertain.\textsuperscript{29}

\section*{II. Rule}

The Equal Protection Clause of the Fourteenth Amendment states that a state cannot “deny to any person within its jurisdiction the equal protection of the law.” The following section analyzes Supreme Court decisions where the defendant lived in poverty and the decisions were based on the Fourteenth Amendment. The following analysis shows that when poverty impedes full access to the justice system, the state is required to correct that imbalance.

\textsuperscript{27} \textit{Brady}, 397 U.S. at 742.

\textsuperscript{28} \textit{Id.} at 752 (stating “we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or trial. We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary, and is based on our expectation that courts will satisfy themselves that pleas of guilt are voluntarily and intelligently made by competent defendants with adequate advice of counsel, and that there is nothing to question the accuracy and reliability of the defendants’ admissions that they committed the crimes with which they are charged”).

\textsuperscript{29} \textit{Id.} at 752 (stating “with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof”); \textit{See also id.} at 742 (stating “That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized”).
In *Griffin v. Illinois*,\(^30\) two defendants, Griffin and Crenshaw, were convicted of armed robbery. Immediately, the two wanted to appeal their case but needed a transcript to do so. They filed a motion asserting that they could not afford to pay the transcript fees. The Supreme Court held that transcript fees violated the 14\(^{th}\) Amendment.\(^31\) In the majority opinion, the Supreme Court affirmed that the state could not discriminate on account of poverty and that to deny the poor the right to appeal was no different than denying them a trial.\(^32\) Griffin is the beginning of a series of rulings that all have the same conclusion: poverty cannot impede access to the criminal justice system under the Fourteenth Amendment. The state must compensate and provide the poor with equal footing so there is equal protection under the law.

*Eskridge v. Washington*\(^33\) was similar to *Griffin*. Eskridge was in prison and wanted to appeal his conviction. A transcript was required to do so, but Eskridge could not afford it. Under Washington law, the state would only provide the appeal if a judge thought it


\(^{31}\) See *Griffin*, 351 U.S. at 19 (stating “Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has”).

\(^{32}\) See *Griffin*, 351 U.S. at 17 (stating “Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard and the right to counsel would, under such circumstances, be meaningless promises to the poor. In criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly, the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence, and could not be used as an excuse to deprive a defendant of a fair trial... There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance”).

would promote the interests of justice. In this case, the court denied Eskridge the requested transcript. With Griffin as precedence, the Supreme Court reaffirmed that the denial of a transcript based on poverty was a violation of the Fourteenth Amendment and that destitute defendants must be given equally adequate appellate reviews as those who can afford transcripts.

Likewise, in Smith v. Bennet the Supreme Court ruled that the state of Iowa violated the Fourteenth Amendment by denying an indigent prisoner a writ of habeas corpus because he could not afford to pay the associated fees. The Court stated that to impose any financial consideration between a prisoner and their right to sue is to deny equal protection of the law. They also reaffirmed Griffin's decision that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” This case extended the Griffin doctrine beyond appellate proceedings into post-conviction proceedings.

In Lane v. Brown, a respondent was convicted and sentenced to death. He tried appealing with the help of the public defender but lost. Lane wanted to appeal his case again, but the public defender thought they would be unsuccessful and stopped representing him. Undeterred, Lane tried to continue appealing his case, but first, he needed a transcript—which he could not afford. He appealed to receive the transcript for free and for counsel to be appointed. The Supreme Court of Indiana denied both requests. Under the law, the only way for an indigent to receive the transcript was with the help of a public defender. The Supreme Court ruled that denying Lane’s


35 Smith, 365 U.S. at 709 (stating “We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws”).

36 Smith, 365 U.S. at 710.

appellate review because of his poverty was a violation of the Fourteenth Amendment.\textsuperscript{38}

That same year, the Supreme Court issued the \textit{Gideon v. Wainwright} ruling.\textsuperscript{39} Gideon was charged with felony breaking and entering. At his trial, he requested a lawyer to represent him. Under Florida law, attorneys were only appointed for capital cases, so Gideon had to represent himself. The Supreme Court ruled unanimously that the denial of representation violated the Fourteenth Amendment and the Sixth Amendment.\textsuperscript{40}

These cases show that when poverty becomes an impediment to full access to the justice system, the impediment violates the Fourteenth Amendment. The Supreme Court recognizes the equal right of all, rich or poor, in all stages of the legal process, from trial to post-conviction. When poverty creates an imbalance, the state has the responsibility to correct that imbalance and to ensure equal protection for all. The Court has left states to decide how best to correct that imbalance.\textsuperscript{41} In the past, this has included paying for an attorney or paying for a transcript; however, today, the unique combination of the burden of indirect trial costs and the restraints of a broken

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} at 478 (stating “We agree that the Indiana procedure at issue in this case falls short of the requirements of the Fourteenth Amendment”).
\item \textsuperscript{39} \textit{Gideon v. Wainwright}, 372 U.S. 335, 335 (1963).
\item \textsuperscript{40} \textit{See id.} at 335 (stating “The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner’s trial and conviction without the assistance of counsel violated the Fourteenth Amendment”). \textit{See also id.} at 348 (stating “That the Sixth Amendment requires appointment of counsel in ‘all criminal prosecutions’ is clear, both from the language of the Amendment and from this Court’s interpretation”).
\item \textsuperscript{41} \textit{See Griffin}, 351 U.S. at 20 (stating “The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident that the State will provide corrective rules to meet the problem which this case lays bare”). \textit{See also Lane}, 372 U.S. at 483. \textit{See also Eskridge}, 357 U.S. at 216 (stating “We do not hold that a State must furnish a transcript in every case involving an indigent defendant. But here, as in the \textit{Griffin} case, we do hold that “[d]espite defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts”).
\end{itemize}
criminal system forces the poor to plead guilty before trial. Poor people do not have equal access to a trial—an essential part of the criminal justice system—and states must correct this issue.

III. POOR PEOPLE DO NOT HAVE EQUAL ACCESS TO TRIAL

A. Indirect Costs

The Sixth Amendment of the Constitution grants the right to a trial by jury. However, poor defendants cannot afford the indirect costs of trial and therefore must waive that right and plead guilty. The indirect costs of trials include pretrial detention, the trial penalty, and the cost of court appearances. If poor defendants have no choice but to waive their constitutional right to a trial by jury, this begs the question of whether they truly had this right to begin with.

i. Pretrial Detention

In 2017, 65 percent of the United States prison population, totaling approximately 480,000 individuals, was held in detention awaiting trial or court action.\(^{42}\) Pretrial detention forces defendants to miss work, causing defendants to lose days, weeks, or even months of income. In fact, in 2010, about 64 percent of defendants were detained for the entirety of their case.\(^{43}\) This can lead to debt, lost housing, family stress, and unemployment.\(^{44}\) Although pretrial detention can be stressful for anyone, it is especially stressful for poor defendants for two reasons: (1) they cannot afford bail and, therefore are more likely to be held in pretrial detention, and (2) they have fewer savings for family members to rely on while the defendant is away from work.

\(^{42}\) Liu & Nunn, *supra* note 12.


Data from the 2017 Survey of Household Economics and Decision Making shows that four in ten households would need to borrow money, sell some of their assets, or would be unable to pay if faced with a $400 emergency expense.\(^{45}\) However, bail is usually much higher than $400. Researchers have found that 70 percent of felony defendants have been assigned bail amounts greater than $5000, with the average bail for felony defendants at $55,400.\(^{46}\) Currently, over 90 percent of people in pretrial detention are eligible for bail but have not posted it.\(^{47}\) Because people stay in pretrial detention when they cannot afford to get out, the poor are more likely to be held in pretrial detention.

Not only are poor defendants less likely to pay bail, but they are also more likely to experience adverse financial consequences of pretrial detention. Prosecutors know that defendants who do not have savings and need to get out of jail to work and provide for their families are more likely to plead guilty. As one prosecutor said, “When you hold somebody’s freedom, you limit their ability to hold a job [and] pay their bills [so] they will take the deal pretty much no matter what.”\(^{48}\) In fact, pretrial detention is linked to a greater

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likelihood of receiving harsher sentences.49 On the other hand, those who have the financial stability to provide for their families while not working do not have the same pressure to get out of detention quickly through a guilty plea.

Evidence supports this claim. In a study of criminal cases in Philadelphia, researchers found that defendants who were held in pretrial detention were less likely to get their charges reduced in their plea deals.50 Other researchers found that pretrial detention increases the likelihood of conviction, whether at trial or through a plea, by 13 percent. On the other hand, defendants who were released from pretrial detention were 14 percent less likely to be found guilty than those who were not released.51 This disparity disproportionately affects those who cannot afford bail and therefore have no choice but to spend days, weeks, months, or years in pretrial detention. Although pretrial detention pushes all detained defendants to plead guilty, the poor are disproportionately affected, because they are overrepresented in pretrial detention and have stronger incentives to get out of detention.

ii. Trial Penalty

Research shows that people who go to trial often get more extreme sentences than those who take plea deals.52 This concept is known as the trial penalty. Prosecutors use the trial penalty to convince defendants to plead guilty rather than go to trial.

The trial penalty is especially intimidating for the poor. Consider the following hypothetical situation. A woman is arrested for a crime she did not commit. Both the woman and her husband make minimum wage, so after providing for their children they have no savings. A prosecutor tells the woman that she can plead guilty to the crime and spend three months in jail, or she can assert her innocence

50 Liu & Nunn, supra note 12.
51 Leslie & Pope, supra note 49.
52 Devers, supra note 4.
at trial and risk spending three years in jail. If this woman goes to jail for three years, her family goes three years without her income and her husband will have to balance being the sole financial provider for the family and the sole caretaker for their children. Logically, the less financially stable her family is the more likely it is that the defendant will plead guilty to the crime and go to jail for three months rather than put her family in such an unpredictable situation for three years.

On the other hand, a defendant who has savings will surely not want to be separated from their family while in prison, nonetheless, they will have the assurance that their savings will provide for their family while they are incarcerated. Therefore, the wealthy defendant will feel less pressure to plead guilty and accept the less severe sentence. The trial penalty threatens the poor more than the non-poor and pushes the poor into accepting plea bargains rather than going to trial.

iii. Court Appearances

Third, if a person perseveres through the costs of pretrial detention and discussion of the trial penalty, they must next face the indirect costs of court appearances. The costs of court appearances are like those of pretrial detention and the trial penalty. Trials can take several days, which means that not only do people need to find childcare for those days, but they also must miss work. If people miss work for that many days, they may lose their job. This situation is especially threatening for poor people who do not have savings to act as a safety net while they are without work.

The costs of pretrial detention, the trial penalty, and court appearances all have similar effects on defendants. When poor defendants are kept from providing for their families, they will make sacrifices to return to work and to continue to earn money, even if this means they take a bad deal or plead guilty to a crime they did not commit. These indirect costs of trial disadvantage the poor by encouraging defendants to plead guilty and discouraging defendants from going to trial. This gives defendants unequal access to trial.
B. Broken System

Beyond the indirect costs of trial, the poor also have unequal access to trial because of flaws in the justice system. There are two flaws in the justice system that keep poor defendants from going to trial: ineffective public defenders and the existence of extreme psychological distress.

i. Public Defenders

In *McCann v. Richardson*, the Supreme Court reasoned that defense counsel will keep defendants from being coerced into taking a plea deal. However, this is not the case. Nationwide, public defenders are so overbooked that they cannot dedicate the time necessary to adequately represent their clients. In some states, the average workload for a public defender is over 365 cases a year. In Kentucky, it is over 448 cases. In Kentucky, the average public defender, assuming they do not take a single day off work, is assigned 1.2 cases a day. In Maryland, 380 public defenders have a workload of 530. Additionally, an American Bar Association study of the Missouri State Public Defender System caseloads concluded that the number of public defenders needed to be increased by 75 percent to provide basic services. Even Colorado, which has the best-funded public defense system in the nation, operates at a 10 percent staff deficit in their public defense offices. Nationwide, public defenders are overbooked.

Not only are public defenders overbooked, but they are often underfunded. Recently, Louisiana cut public trial defense funding

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53 *McMann v. Richardson*, 397 U.S. 759, 759 (1970) (stating “A defendant’s plea of guilty based on reasonably competent advice is an intelligent plea not open to attack as being involuntary”).

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*
by 62 percent. In certain places in Louisiana, funding was so low that judges had to appoint tax, family, real estate, and other attorneys to criminal cases where defendants could not afford an attorney. In Wisconsin, private attorneys who take on public defense cases are paid only $40 an hour, much lower than they can make elsewhere. As a result, fewer lawyers accept public defense cases. Additionally, in Florida, the average entry-level salary of a public defender is $41,570. If a public defender supported four kids and was arrested, that public defender would qualify to be represented by a public defender.

Although funding for public defense is sparse nationwide, poor communities receive even less funding than wealthy communities. In 13 states, counties must use their own money, rather than state funding, to provide counsel for poor defendants. This means that in lower-income counties, public defenders have even fewer resources. In fact, in counties that fund their public defenders, 73 percent were operating above the recommended caseload per attorney.

Public defenders are overworked, underpaid, and even sometimes absent at crucial points in a case. When public defenders are overworked, underpaid, and have minutes - rather than hours - to spend on cases, they have an incentive to get through cases quickly. Defense attorneys often accept plea deals because it’s the easiest

58 Id. at 65.
59 Id.
62 Id.
63 Kelly, supra note 48, at 66.
64 Id.
65 See id. at 68.
and quickest way to deal with their case, not because they are acting in the best interest of their client.\textsuperscript{66} Alternatively, private attorneys have fewer incentives to advise their clients to accept a plea bargain. Compared to public defenders, private attorneys usually defend fewer clients at a time and have a bigger incentive to build clientele (because unlike public defenders, they are not assigned cases). To build clientele, private attorneys may want to spend more time on each case to get their client better outcomes and, therefore, to build a reputation as a reliable attorney.

Private and public defense are anything but equal. When public defenders do not have the time, resources, or (in some cases) the incentives to advocate for their clients, those who cannot afford private representation are pushed out of trials and into plea negotiations. The underfunded state of the public defense system is more than a simple inconvenience for the poor, it is a complete impairment to their chances of success.

ii. People in Poverty are Less Likely to Take Risks

In \textit{Bordenkircher v. Hayes}, the Supreme Court held that aggressive techniques used by prosecutors in the plea bargaining process are not coercive.\textsuperscript{67} Although extreme prosecutorial techniques, such as pretrial detention and threatening the trial penalty, are not coercive to the general population, the unique environment that poor people live in makes it so these techniques are, in fact, coercive for the poor.

Psychological research shows that poverty affects people’s decision-making in high-stress environments. When people are stressed, they get an increase in a hormone named cortisol.\textsuperscript{68} Sustained high

\textsuperscript{66} See id.

\textsuperscript{67} \textit{Bordenkircher v. Hayes}, 434 U.S. 357 (1978) (stating “The Due Process Clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged”).

\textsuperscript{68} See Stephanie P. Bair, \textit{Impoverished IP}, 81 \textit{Ohio St. L.J.} 523, 541 (2020).
levels of cortisol are closely linked to people who live in poverty.\textsuperscript{69} Cortisol is also linked with people who “stick to what they know” rather than exploring new options.\textsuperscript{70} In fact, consistently high levels of cortisol, as found in people who live in poverty, have been shown to negatively affect decision-making strategies both in the moment and over time.\textsuperscript{71}

Researchers tested whether financial concerns affect creative decision-making. They found that poor people, when asked to make decisions after being asked about finances, were significantly less likely to take risks and think creatively than their non-poor counterparts.\textsuperscript{72} Additionally, sleep deprivation, which has been proven to be more common among poor people, has also been linked to poor decision-making. People who regularly do not get enough sleep are also more likely to “stick to what they know” rather than exploring alternatives.\textsuperscript{73}

With the combination of stress, sleep deprivation, and other factors, various studies have shown that people who live in poverty are more likely to rely on habit-based decisions rather than goal-directed

\textsuperscript{69} See id. at 526.
\textsuperscript{70} See id.
\textsuperscript{71} See id.
decisions. Goal-directed decisions focus on the desired outcome and choose the most likely way to achieve that outcome. On the other hand, habit-based decision-makers do not consider options outside of what they are comfortable with. This emphasizes that people who live in poverty are less likely to take risks, even if the risks are small and the most rational option available.

In the plea bargaining context, defendants are faced with many decisions with consequences that could follow them for the rest of their lives. Not only are these decisions important, but they are made under extreme stress. As discussed before, due to pretrial detention, the trial penalty, higher costs of trial, and inadequate representation, poor people are under more stress than the average defendant. But not only are poor people under more stress in the plea bargaining process, but they are also less able to deal with that stress because they are less likely to take risks, even if the risks are small and rational. For example, if a prosecutor explains the trial penalty and the defendant is poor, they will be more likely than their non-poor counterparts to waive their right to trial.

Some might object, arguing that all of this, while unfortunate, does not constitute a violation of the 14th Amendment. They might say that some people are poor, and we are not expected to fix inherent inequalities in everyone. It might be conceded that any one of these reasons alone would probably not be strong enough to count as a violation of equal protection. However, when we take all of them into account and see that they all single out a protected class, the poor, we realize that there is an inequality in access to the criminal justice system. The poor get an overburdened public defender; they get bails they cannot pay; they are held in jail to await their trial (causing them to miss work which only exacerbates the problem), and then, with the memories of jail fresh and worries about providing

74 Bair, supra note 68, at 540 (stating “More recent empirical work in psychology and neuroscience also supports the hypothesis that those living in poverty may find it particularly difficult, psychologically speaking, to engage in creative pursuits. Specifically, the poor may be pressed by their circumstances to employ so-called exploitative and habit-based decision-making strategies that make creativity harder to come by”).

75 See id. at 543.
for their families at the top of their minds, they face a prosecutor bent on getting a conviction. There is undeniable inequality in the criminal justice system that the 14th Amendment was designed to prevent. These issues are more than simply unfortunate problems for the poor. They are an impediment to their promised equal treatment under the law. These obstacles embody the very inequalities that the Fourteenth Amendment was designed to prevent.

IV. Application

The costs inherent in pretrial detention, trial penalties, and court appearances in combination with flaws in the system – such as overburdened public defenders and the creation of inherent psychological distress for defendants – keep poor defendants from going to trial. This unequal access to trial violates the Fourteenth Amendment. The Supreme Court has not only recognized a constitutional right to a trial by jury but has also recognized on numerous occasions the poor’s disadvantage in the criminal justice system. Historical precedence shows that when the poor have unequal access to the criminal justice system, the Fourteenth Amendment is violated. Certainly, the current state of the criminal justice system unjustly forces poor defendants to accept plea bargains, keeping them from exercising their right to trial by jury.

Some may contend that historical precedence has only been applied to direct costs of a trial (such as transcript and attorney fees) and does not apply to indirect costs (such as those mentioned in this paper). This is simply not true. Although the Supreme Court has never held that a specific indirect cost in the criminal justice system violated the Fourteenth Amendment, the scope of Court decisions applies to any costs (direct or indirect) that deny access to a trial.

For example, in *Smith v. Bennet*, the Supreme Court reasoned that “to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.”76 “Consideration” is broader than simply fines or costs. “Financial

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76 *Smith*, 365 U.S. at 709.
considerations” should include stress, burdens, and obligations. Although financial considerations are an inherent and necessary part of the criminal justice system, according to the Supreme Court, financial considerations that are harsher on poor defendants than non-poor defendants violate the Fourteenth Amendment. Therefore, the indirect costs of trial are within the scope of court precedence and therefore are restricted by the Fourteenth Amendment.

V. Prescriptive Claim

The poor have a severe disadvantage in the court system. This disadvantage creates an impediment to full and equal access to the court systems. As discussed in Section II, historical court rulings such as those in *Griffin v. Illinois*, *Eskridge v. Washington*, *Smith v. Bennet*, *Lane v. Brown*, and *Gideon v. Wainwright* hold that when a group of people does not have equal access to the criminal justice system, the court must resolve the inequality. The courts have let states decide how to resolve the inequality. This section recommends solutions to the unequal access to trials.

A. Reimbursement

Research suggests that the high indirect costs of trials, such as missing work, encourage defendants to plead guilty even if they are innocent. Therefore, if a person lives below the poverty line and is found innocent at trial, states should reimburse that person for their time away from work. To equalize the time taken away from work, states should pay the defendant at least minimum wage in that state for every hour, up to forty hours a week, that the defendant spent in pretrial detention, the plea bargain negotiations, or court. States can determine where these funds will come from. If innocent defendants get reimbursed for their time in the justice system, it will subset the costs of trial and encourage more innocent defendants to go to trial even if they live below the poverty line.

An obvious critique of this method will be its perceived financial burden on states. However, it may be the cheapest option for three reasons. First, under this suggestion, the court will only need to pay
the defendant minimum wage. This is much cheaper than the alternative of paying the higher salary of a mediator or judge to mediate the pre-trial process.

Second, the court will only have to reimburse defendants in a select few cases. As mentioned above, an estimated 90 percent of defendants plead guilty before trial, and in only a small fraction of cases, defendants are found innocent at trial. Although the reimbursement method will ideally make it easier for people who live in poverty to go to trial and be found innocent, the number of people found innocent at trial will still be a small fraction of the total number of criminal cases. Additionally, the state only needs to reimburse defendants who live in poverty, narrowing the cost for states even more.

Third, a reimbursement policy will strongly discourage prosecutors from wasting time and resources by pursuing weak cases. In the current system, even if a case against the defendant is weak, the defendant may plead guilty anyway. For example, in George Alvarez’s case, the prosecutor knew that there was hidden evidence that could exonerate Alvarez, but Alvarez still pled guilty. The government wasted tax-payer dollars for four years by locking up an innocent man. Similarly, the government wasted money for three years by keeping Kalief Browder in pre-trial detention before releasing him without a trial. If the government is forced to compensate for keeping innocent Americans away from their work, family, and homes, the state will minimize their losses by only pursuing cases where there is a good chance of winning. When states only pursue strong cases, the justice system will be less overburdened, and judges, prosecutors, and public defenders will have more time.

B. Accessible Loans

Another option is to provide easily accessible and low-interest loans to people who live in poverty and are in pretrial detention, in the plea bargaining system, or going through a trial. Because of fines, attorney fees, and time away from work and home, many people who enter the criminal justice system need money quickly. Currently, people who cannot access quick money may feel like they have no
choice but to plead guilty to get out of the system and return to work. These loans are not meant to be used to post bail but are instead meant to help defendants keep their life in order by paying bills, buying groceries, getting childcare, and more. However, these loans should not be predatory, meaning that they should not put people living in poverty in a worse situation. States should make these loans either low-interest or government-subsidized. Accessible loans will help defendants assert their innocence by minimizing the external concerns that trial places on the poor.

C. Other Options

When there is unequal access to the criminal justice system, the Fourteenth Amendment requires states to remove that inequality. However, America’s federalist system allows state officials to choose which solutions would work best for their state. Reimbursement and accessible loans are examples of solutions that use limited resources and are targeted to fix inequality. However, every state has different budgets, laws, cultures, and justice systems. State officials should closely analyze the problems in the criminal justice system in their state to create a custom-made solution to their unique situation. To be clear, while no particular solution is necessary, the states must do something. Exactly what they do is up to their discretion, but until they do something, the poor will continue to have unequal access to trials.

CONCLUSION

Because most cases are resolved through plea deals, flaws in the plea bargaining process threaten many American citizens. These flaws in the plea bargaining system stem from its unregulated nature, which gives prosecutors unprecedented power to propose sentences and coerce defendants to accept those sentences.

Because of plea bargaining, prosecuting attorneys have replaced judges, juries are irrelevant, and sentences are agreed upon behind closed doors. Not only have prosecutors replaced the constitutional framework of a jury trial, but their work is virtually unregulated. Unlike in trial, prosecutors are not required to present evidence in
favor of the defendant, even if the evidence proves that the defendant is innocent. Additionally, in many states, defendants must waive certain constitutional rights before accepting a plea deal, such as the right to later claim that they had inadequate representation. Although the character of the plea bargaining system can be coercive for anyone, trial costs and the flawed structure of the bargaining system make it so that poor defendants have no choice but to plead guilty. Under this system, poor defendants cannot assert their constitutional right to trial and are instead forced into a process where they can be put in prison without sufficient proof of guilt.

Prosecutors have at least two tactics that are especially coercive for poor people: sending defendants to pretrial detention and using the trial penalty to instill fear in defendants. Both tactics play off the fact that poor defendants do not have savings, cannot provide for their family if they miss working for too long, and cannot afford childcare for extended periods. Due to these situations, poor defendants cannot afford to go to pretrial detention or get a longer sentence and, therefore, they plead guilty. The flaws in the bargaining system also keep defendants from going to trial. These flaws include the costs of trial, poor representation, and the psychological effects of the system. These factors disproportionately affect people living in poverty.

The combination of prosecutors’ coercive tactics and flaws in the bargaining system deprive the poor of their constitutional right to trial, violating the Fourteenth Amendment. Historical precedent has shown that if people do not have equal access to the criminal justice system, the state must remedy the inequality. Courts have left the states to choose the remedy. States can protect defendants’ constitutional right to a trial, rich or poor, by reimbursing innocent defendants for the costs of asserting their innocence, giving defendants easy access to loans, and more.
STATEHOOD ADMISSIONS CODIFICATION AS A PROTECTION OF VOTING RIGHTS

James Caleb Uhl1

In 1900, American Samoa ceded itself to the United States and officially became a United States territory.2 A few short years later, the United States Supreme Court decided in the “Insular Cases” that the residents of American Samoa would be considered “nationals” instead of citizens, based on the pretext that American Samoans were not considered American or Anglo-Saxon enough to fully understand the United States federal election process and be granted voting rights.3 Because these so-called nationals did not have the right to vote, the Supreme Court theorized that they could not be full citizens.4

In 2019, John Fitisemanu, Pale Tuli, and Rosavita Tuli sued the United States in Utah’s Federal District Court regarding their status as United States nationals. The plaintiffs sued for acknowledgment of their birthright citizenship under the Fourteenth Amendment.5 The United States federal government responded by filing a Motion to Dismiss on procedural grounds. The District Court did not uphold

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4 Downes, 182 U.S. at 282-283.

the Motion to Dismiss, heard the case, and decided in favor of Fitisemanu, Tuli, and Tuli. Almost immediately upon being granted citizenship by the Court, Fitisemanu registered to vote in the 2020 federal election in Utah.

Since 2019, this case has been appealed to the United States Court of Appeals for the Tenth Circuit, and Fitisemanu’s voting registration has been put on hold, pending a decision by the Tenth Circuit. In September of 2020, the Tenth Circuit heard oral arguments on the case. Regardless of the outcome, the case is expected to be appealed to the United States Supreme Court for a final decision. This seemingly menial case is pivotal in the larger context of United States jurisprudence. An acknowledgement by the federal government of birthright citizenship for residents of U.S. territories would raise further questions about the rights of United States citizens who live in territories.

**BACKGROUND**

Under current United States law, residents of territories do not vote in federal elections.\(^6\) This has been justified by language in the Constitution barring citizens and residents of non-states from voting (the Constitution stipulates that members of Congress be elected by the several States). This means that territories like Puerto Rico have not been granted a voice in federal elections for over one hundred years, as it was granted territory status in 1917. More troubling than this is the fact that Congress has the authority to be arbitrary in their decisions to grant territories statehood. Oftentimes, as in the case of Puerto Rico, they decide to simply bar territories from becoming states. This plenary power has created some highly unethical wrinkles in the course of American history.

In the nineteenth century, the conflict over whether the territory Kansas would be admitted as a free state or slave state caused a minor civil war in the territory that lasted for several years. Due to Congress’ popular sovereignty policy, pro-slavery and Free State militias poured into the territory to influence voters, oftentimes

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\(^6\) *U.S. Const.* art. IV, § 3, cl. 2.
through violent means. In 1855, the situation was so volatile that the governor was forced to call in the Kansas militia to quell the infighting. The militia only served to exacerbate the situation further. Kansas was finally admitted as a free state only three months before the commencement of the Civil War and after southern states had begun to secede from the Union, forfeiting their voting power in Congress.

California was admitted to the United States as a result of the Mexican American War and through the Treaty of Guadalupe Hidalgo. The territory was granted statehood in record time due to the 1849 California Gold Rush. Congress swiftly recognized the economic benefits and value California would provide as a state and allowed the territory to circumvent the typical admission process, admitting California to the Union in record time.

Utah, on the other hand, was not allowed into the United States for decades over a single disagreement with the rest of the country: polygamy. In 1862, the United States federal government banned polygamy. This was upheld by Reynolds v. United States in 1879: the Court ruled that religion could not be cited as a reason to avoid criminal charges. Utah was not considered for statehood admission until the Church of Jesus Christ of Latter-day Saints officially abandoned polygamy in 1890. Utah was granted statehood shortly after, in 1896, further illustrating the underlying reason for its previous non-admission.

Similar in its arbitrariness, Hawaii was denied statehood for over fifty years for racist and economic reasons. After white settlers overthrew the legitimate government of Hawaii in the 1890s, Hawaii was annexed as a territory in 1900, but not admitted as a state until 1959. During that long period of political jockeying, Hawaii frequently petitioned for statehood. During World War Two, the United States touted ethnically Japanese Hawaiian residents as a “model minority” due to their involvement in the war effort, but government suspicions against and about the loyalty of Japanese residents of Hawaii in the post-war period stalled statehood talks.

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8 Id. at 218.
In 1959, they were finally admitted, and then only because Democrats wanted Alaska to become a state (at the time, Hawaii leaned Republican). Ultimately, Hawaii was not admitted as a state until after Alaska’s admission.

Finally, Puerto Rico has five times voted to join the United States as a state and has five times been rejected, effectively denying residents of their fundamental right to participate in elections. In *Igartua-de la Rosa v. United States*, the Supreme Court upheld that territories do not have the right to vote, including Puerto Rico. The Court contended that they were barred from voting due to the fact that “[t]he only jurisdiction, not a state, which participates in the presidential election is the District of Columbia, which obtained the right through the twenty-third amendment to the Constitution.”

Given these various examples of statehood admission debacles, there is clearly a negative history associated with allowing states into the Union along arbitrary and unclear guidelines. Effective, fair law must be non-ambiguous and defined. The current statehood process is ambiguous and undefined. As situated, the statehood process is then ineffective and poor law. This poor law has allowed the inherent voting rights of the residents of the aforementioned areas to be violated.

This paper proposes that Congress must take legislative action in order to protect the rights of its citizens—rights which are being systematically violated by failure to define the statehood entry process. Appropriate legislative action includes creating a minimum threshold of pre-requirements, including a desire to become a state, a written constitution, population minimums, and a sufficiently stable and beneficial economy. These requirements, when met, would default a state into full-faith Union membership during a non-election year.

In Section One, this paper will defend the essential nature of voting rights for democracy. As far back as the thirteenth century, voting rights were internationally recognized as one of the most important guarantees of human rights. In Section Two, this paper will outline the United States’ current statehood admission process.

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*Igartua de la Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994) (regarding a question of whether an inability to vote in the United States presidential election violates their constitutional rights.)
and demonstrate why it is insufficient. Through the specific example of Puerto Rico, Section Two illustrates the real-world impact of this legal flaw. In Section Three, this paper proposes a solution to the failings of the current statehood admissions process: a Congressional act defining five specific criteria that result in automatic admission into the United States. This paper concludes with a summary of the significance of voting rights and the expected improvements resulting from the proposed legislation.

I. Voting Rights

Voting rights are an integral part of democracy. Historically, democratic governments and their courts have upheld the importance of extending voting rights to all eligible citizens. Because residents of United States incorporated territories are citizens, this is their right as well. This section will focus on English Common Law’s defense of voting rights and the Supreme Court’s insistence on extending voting rights to eligible parties. In 1993, the Supreme Court defended the concept that inherent rights granted under common law principles, such as the right to vote, can only be superseded by direct statute. Many of the rights and protections guaranteed through English Common Law were first enshrined in the Magna Carta in 1215. These primarily referred to due process and the rule of law, which inherently includes the right to vote. Naturally, the Magna Carta was historically used as a legal defense for the expansion of


11 United States v. Texas, 507 U.S. 529 (1993) (“Just as longstanding is the principle that ‘[s]tatutes which invade the common law… are meant to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.’”).

voting rights in the United Kingdom. In 1915, Helena Normanton cited the seven-hundred-year-old document, arguing that the United Kingdom denying voting rights to women was “expressly contrary to the Magna Carta.” As such, the right to vote by citizens is a concept that is protected in English Common Law.

The Magna Carta is not the final example of a guarantee of voting rights in England—in 1536, the first of the Laws in Wales Acts granted a path for Wales to gain full representation in Parliament. Although it was repealed by Parliament in 1993 for other reasons, it was a direct enshrinement of voting representation in English Common Law for a newly incorporated area.

Scotland was similarly incorporated under the umbrella government of the United Kingdom through the Acts of Union, which were ratifications of the Treaty of Union by the English and Scottish parliaments. Under these, the Scottish and English Parliaments were merged and sat as one Parliament from 1707 to 1999. By allowing Scottish citizens of the United Kingdom representation in a united Parliament, the right of the citizens of Scotland to vote was recognized and codified. As illustrated, English Common Law contains a clear and longstanding emphasis on the importance of the codification of the right of vote.

The United States has codified this same concept. In United States v. Wong Kim Ark, the United States Supreme Court ruled in favor of birthright citizenship for the plaintiff, Wong Kim Ark.


16 Articles of Union I (1707).

17 *Id.*

Ark, a man born to Chinese immigrants in San Francisco, regularly visited China. Upon returning from one of these trips, he was denied re-entry into the United States by the state of California. The immigration officials assumed that because he was ethnically Chinese, he could not be a United States citizen. He sued and the Supreme Court decided in a 6-2 decision that the Fourteenth Amendment provides citizenship to any person born in the United States.

The Supreme Court further upheld voting rights as rights in *Baker v. Carr*. In this case, the Court held that unfair redistricting is a violation of the right to vote as protected under the Equal Protection Clause.\(^\text{19}\) The decision in this case spawned a series of precedential decisions surrounding the strengthening of voting rights. Arguably, the most well-known concept that came out of *Baker* was the idea of “one person, one vote.” This concept was codified into United States law in 1964 in the Supreme Court’s ruling in *Reynolds v. Sims*.\(^\text{20}\) Several cases followed shortly thereafter that further sustained the Court’s original ruling in *Baker*, cementing the protection of voting rights under the Fourteenth Amendment’s Equal Protection Clause.

The Twenty-sixth Amendment to the United States Constitution takes this idea one step further, suggesting that any citizen who is at least eighteen years of age will not have his or her right as a United States citizen to vote in federal elections abridged based on account of age.\(^\text{21}\) If this right must not be abridged on account of age, and if this is a right of all citizens as written, then anyone born in the United States must be able to vote in federal elections.

As it stands, citizens in United States territories are unable to vote in any federal elections, and they do not have Representatives or Senators directly representing them in Congress. They also do not vote in United States presidential elections, as the Electoral College (as presently constructed) could not include their vote unless they were to receive representation in Congress.

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21 U.S. Const. amend. XVI, § 1.
II. INSUFFICIENT ADMISSIONS PROCESS

There is a clear historical precedent caused by the methodological ambiguity of statehood admissions. This ambiguity proves pre-\-\-edent systematic violation of rights that should be protected by United States law. Without protecting the right to vote, as upheld in the Constitution, the United States allows a legal violation of essential human rights. This section will examine the implications of this overt infringement.

Residents of territories are United States citizens. Citizens have the right to vote, as previously discussed. Barring a Constitutional amendment providing for residents of United States territories to vote in federal elections, residents of territories are disallowed from voting in federal elections. As a minimum standard, The United States ought to allow participation in federal elections by residents of territories as soon as possible. The most appropriate legal practice to provide for this is then to clarify and codify the statehood admissions process.

In 2019, Puerto Rico was devastated by Hurricane Maria. In February 2020, H.R. 5687, a disaster relief bill for Puerto Rico, was introduced on the floor of the House of Representatives.\textsuperscript{22} It passed and was sent to the Senate, where it died in committee. The citation for non-consideration of the bill was that states—Nebraska, in particular—needed the money more. This decision was justified by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, which states that the federal government may provide federal disaster relief to states but not territories.\textsuperscript{23} As a result, Puerto Rico regularly does not receive the federal aid it both deserves and needs.

If Puerto Rico were a state, it would likely have been granted additional disaster relief. The territory already pays a large portion of the taxes state residents do—social security taxes, business taxes, and payroll taxes are a few such examples—yet their support remains unreciprocated. The withholding of necessary aid provides

\textsuperscript{22} H.R. 5687, 116th Cong. (2020).

yet another example of the potential abuse by the federal government of citizens who are not residents of states.

Since its incorporation as a territory under the Jones-Shafroth Act in 1917, the residents of Puerto Rico have been granted statutory United States citizenship.\(^\text{24}\) Since 1917, Puerto Rico has five times voted on the question of becoming a state.\(^\text{25}\) In 1998 and 2012, Puerto Rico voted to become a state. In their most recent referendum in 2017, over 97% of voters affirmed their desire to become a state.\(^\text{26}\) The United States Congress typically funds for referendums, but Congress persistently refuses to vote on Puerto Rico’s statehood. In 2019, H.R. 4901 was proposed to the United States Congress. This bill proposes another referendum, this time exclusively over the question of Puerto Rican Statehood.\(^\text{27}\) This bill has not yet reached the floor of the House of Representatives. Therefore, Puerto Rico’s exclusion from statehood is a testament to the failure of the current statehood admissions process, illustrating the necessity of incorporating this protection into United States jurisprudence.

### III. Proposed Congressional Act

The territories of the United States would be well served if Congress enacted legislation containing criteria that, when met, will default a territory into Union membership. Such legislation would necessarily contain five distinct criteria for a territory to become a state: first, a majoritarian desire to enter the union; second, possessing a written and adopted constitution; third, having a sufficiently numerous population; fourth, meeting predetermined criteria for economic stability; and fifth, the admission of new states only during non-election years. By determining these criteria in advance and by passing


them through Congressional legislation, enough flexibility will be retained to react to unforeseen circumstances while still achieving the plethora of benefits gleaned by codifying the admission process. This paper will explain the merits and legal basis of these five criteria in the following paragraphs.

The first and primary criteria that must be met for entry into statehood is for a territory to display a majoritarian desire to enter the Union. During the Civil War, Abraham Lincoln laid out The Proclamation of Amnesty and Reconstruction, his blueprint for allowing seceded southern states to re-enter the Union. In this Proclamation, Lincoln required that ten percent of the population of the seceded states be required to swear an oath of allegiance in order for the said state to rejoin the Union. He hoped that by having such a low threshold, he could entice the South into rejoining the Union, effectively blunting their rebellious sentiments. He also pardoned the citizens of any state that would rejoin of any political wrongdoing.

By modifying the model set forth in The Proclamation of Amnesty and Reconstruction, removing the requirement to swear a binding oath of allegiance to the United States, and increasing the requisite percentage of residents who consent to statehood to fifty percent, a similar outcome to The Proclamation of Amnesty and Reconstruction would likely be accomplished. Because the means and desired outcomes are similar, it can be assumed that the outcomes would ultimately be similarly derived from the modified proposition. These outcomes could be implemented while also acknowledging the importance of a majoritarian desire to become a state by the residents of a given territory.

After having the citizens of the former states swear allegiance to the United States, Lincoln required that a Constitution be written by the oath-taking citizens. Under current United States law, in order for a territory to be organized, it must have a written constitution. Historically, written constitutions have typically been codified through Organic Acts, as in the most recent cases of

29 Id.
30 Selden Bacon, Territory and the Constitution, 10 Yale L.J. 99, 100 (1901).
Alaska, 31 Hawaii, 32 and Oklahoma. 33 All United States territories are currently unorganized, although many of them have written governing documents or, in some cases, constitutions that have not been ratified in the standard constitutional process, as in the case of Puerto Rico 34 and the Northern Mariana Islands. 35 Under the proposed legislation, territories would be required to have written constitutions, which would encompass and supersede the purpose and use of Organic Acts.

The third criterion for territorial admission to the Union as a state would require a territory to contain a requisitely large population. The Northwest Ordinance, a common basis for enabling acts throughout United States history, recommended that a territory have a population of at least 60,000 people before becoming a state. 36 As presently constituted, each Congressional District represents approximately 700,000 voters. Under the proposed legislation, in order to become a state, a territory would be required to have this number of permanent resident citizens. After each Congressional reapportionment, the new number average number of people represented by each Congressional district would become the new minimum population for territorial admission. This would allow for precedential consistency as presented in the Northwest Ordinance while also acknowledging the changing nature and volume of American representative government.

The fourth criterion for territorial admission relates to economic stability. Because of the expressed concerns of Congress with the economic stability of territories—as in the case of Puerto Rico—the proposed legislation would generate an index that would account for

32 An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 56-339, 31 Stat. 141 (1900).
34 P.R. Const. art. IX, §10
35 N. MAR. I. Const. schedule on transitional matters, §1
standard economic indicators such as Gross Domestic Product, poverty levels, and debt. If a territory met a certain score on this index for enough consecutive months, they would qualify for statehood admission. This index, determined by Congress upon consideration of the legislation, would then be codified by Congress.

The final criterion in the proposed legislation would require that new states only be admitted during non-election years. This requirement would best protect new states under the equal footing doctrine by allowing enough time for apportionment of electors and congresspersons. By disallowing states from new entry during non-election years, they are provided with additional time to create and manage election infrastructure and voting processes, as well as grant internal, local governments sufficient time to prepare for federal elections.

IV. Conclusion

For people like John Fitisemanu, the fight for acknowledgement of their voting rights is still being fought. Disenfranchised for decades, Americans around the globe who live in territories do not have the opportunity to vote, despite their monumental efforts. These people continue to fight racism embedded in legal precedents, bipartisan bickering, and nebulous traditionalism in order to simply have their rights acknowledged.

To best protect the voting rights of these disenfranchised persons, the statehood admission process must be clarified through Congressional legislation that codifies specific minimum threshold requirements that lead to consistent default into Union membership. United States citizens’ rights, no matter where they live or who they are, must be equally protected under the law.

This protection must be implemented based on the longstanding precedent in English Common Law establishing the importance of the right to vote in an equitable society. Recognition of the historical shortcomings of the United States federal government in fairly and expeditiously establishing voting rights through statehood admis-

37 U.S. Const. art. I, § 3, cl. 1
sions must be recognized, and Congress must urgently act to rectify the historical ignorance embedded in American institutions. The protection of voting rights must be implemented through congressional legislation establishing specific criteria that will default a territory to become a state.

This solution will enable Congress to retain its plenary power over the process of statehood admission by allowing Congress to decide on the admission criteria for new states while simultaneously superseding the oftentimes ill-motivated and ever-present dearth that currently accompanies the process. Finally, these changes will provide equal opportunity for residents of United States territories to gain a known and established path to full enfranchisement.
LENGTHY MINIMUM PAROLE REQUIREMENTS:
A DENIAL OF HOPE

Heather Walker¹

I. INTRODUCTION

In 2012, the Supreme Court held in Miller v. Alabama² that mandatory life sentences without the possibility of parole were unconstitutional for juveniles. In response to this decision, Iowa Governor Terry Branstand decided to commute thirty-eight juveniles’ sentences within his state.³ While the decision was originally seen as a potentially positive move for juvenile rehabilitation, it quickly became clear that the decision was anything but positive. Branstand commuted the thirty-eight life sentences without potential parole to merely life sentences with the possibility of parole at sixty years.⁴ This would mean that a fifteen-year-old who had their sentence commuted in this way would not receive an opportunity for parole until they were seventy-five. How could this decision honor the Court’s recognition that denying juveniles an opportunity for parole

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⁴ Id.
violates their constitutional rights? Is there any meaningful difference between life with the possibility of parole at seventy-five or life without parole when the average lifespan in the United States is seventy-eight years? This is a relevant concern, especially given that people in prison have shorter lifespans than the national average. In fact, in one study of New York parolees, researchers found that for every additional year a person was in prison, there was an average two year decrease in life expectancy.\(^5\) Eventually, the Iowa State Court found that this commutation did not honor the precedent set by the Supreme Court, and when the Supreme Court held that its 2012 decision was retroactive in *Montgomery v. Louisiana*, the people who had been sentenced as juveniles were able to appeal for an opportunity for release.\(^6\)

The Supreme Court’s past precedent on juvenile justice has left important gaps in the types of sentences that are permissible for juveniles. In *Graham v Florida*,\(^7\) the Court expressly banned life sentences without the possibility of parole for non-homicide juvenile offenders. In *Miller*,\(^8\) the Court also banned mandatory life sentences without the possibility of parole for any juvenile offender regardless of whether the offense was a non-homicide or homicide offense. These two cases do not answer every question though. In fact, even Branstand’s order was not explicitly against Supreme Court precedent. Additionally, legal scholars, attorneys, and lower courts have all considered whether bans on life sentences without parole also


\(^8\) *Miller*, 587 U.S.
include term of years sentences. For example, if someone is sentenced to 100 years in prison without the possibility of parole, is that excluded under the Supreme Court’s precedent even though it is not specifically life without parole? Legal scholars have also looked at parole systems throughout the United States to see if they align with the discretionary requirement articulated in *Miller* for juvenile sentencing. Though legal scholarship on juvenile justice abounds, relatively little work has been done on how the minimum amount of time before a juvenile has a chance for parole affects the constitutionality of a sentence. People collectively raised concerns with Branstand’s decision to only allow for parole at sixty years, but States like Texas and Colorado still allow courts to sentence non-homicide juvenile offenders to lengthy terms in prison with their first opportunity for parole being at forty years.

The Supreme Court should extend its reasoning in *Graham* and *Miller* to hold that lengthy minimum parole requirements are unconstitutional for juvenile non-homicide offenders. To honor this decision, the Court should adopt a categorical rule that non-homicide juvenile offenders should be given the possibility of parole before thirty years. I begin by presenting the Supreme Court’s past decisions regarding juvenile justice and the sentencing scheme at issue. Then, I articulate the reasoning in *Graham* and *Miller* and apply it to lengthy minimum parole requirements for juvenile non-homicide offenders, illustrating how and why lengthy minimum parole requirements are unconstitutional for non-homicide juvenile offenders. Lastly, I address why the Court should adopt a categorical rule


stating that minimum parole requirements that are thirty years or greater are unconstitutional for non-homicidal juvenile offenders.

II. BACKGROUND

Juvenile sentencing under the Eighth Amendment has been shaped by three landmark cases. Together, these cases represent the meaningful precedent for understanding the constitutionality of any juvenile sentencing scheme. In *Roper v Simmons*, the Court ruled that the death penalty was unconstitutional for juvenile offenders. In *Graham*, the Court ruled that life in prison without the possibility of parole was unconstitutional. In *Miller*, the Court held that mandatory life in prison without the possibility of parole was to be unconstitutional. To understand the legal argument around lengthy minimum parole requirements, a history of these cases is necessary.

A. Roper v Simmons

In 2005, the Court ruled that the death penalty for juvenile offenders under eighteen years old was unconstitutional. The Court acknowledged juveniles as constitutionally different than adults and ordered that this must be reflected in sentencing. This distinction rested on three main points. First, juveniles “lack maturity and have an undeveloped sense of responsibility.” Because of this lack of maturity as compared to adults, juveniles are much more likely to engage in rash, reckless, and ill-advised behavior. In fact, the Court cited social science research showing that those under eighteen were statistically overrepresented in almost every category of reckless behavior. Second, juveniles are “more vulnerable or susceptible to negative

12 *Graham*, 560 U.S.
13 *Miller*, 587 U.S.
14 *Roper*, 543 U.S.
15 *Id.* at 15.
16 *Id.*
influences and outside pressures, including peer pressures.” This Court specifically pointed out the importance of this fact given that juveniles have less control over their environment. Lastly, juveniles’ character and personality traits are not fully formed. Because of the unique nature of childhood, “the personality traits of juveniles are more transitory, less fixed.” When looking at these facts together, these differences “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders,” and thus should be exempt from punishments reserved for the worst offenders.

B. Graham v Florida

In 2009, the Court extended their rationale regarding the differences in juvenile offenders to rule that sentencing non-homicidal juvenile offenders to life without the possibility for parole (LWOP) is unconstitutional. The Court affirmed that an “offender’s age is relevant to the Eighth Amendment, and that criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” They held that because juveniles are less culpable, non-homicidal crimes are less severe, and the “sentence lack[ed] any legitimate penological justification” sentencing juveniles to LWOP for non-homicide offenses is unconstitutional. Additionally, this sentencing scheme did not offer juveniles who had changed later in life a meaningful opportunity for release. This case also introduced an important distinction in juvenile law between homicidal and non-homicidal offenses. The court defined non-homicidal crimes as those where a defendant “[does] not kill, intend to kill, or foresee that

17 Id. at 15.
18 Id.
19 Id. at 16.
20 Id. and 15.
21 Graham, 560 U.S.
22 Id. at 25.
23 Id. at 20.
life will be taken.”24 People who commit non-homicidal crimes “are categorically less deserving of the most serious forms of punishment than are murderers.”25

C. Miller v Alabama

The Court heard a challenge to the constitutionality of mandatory LWOP sentences for juveniles in 2012. Using the legal precedent in Roper and Graham, and extending concerns about mandatory sentencing schemes, the Court held that mandatory LWOP for juveniles is unconstitutional.26 This does not mean that juveniles cannot be sentenced to LWOP, but instead that the “state’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”27 This means that courts must take into account the mitigating nature of age when sentencing juveniles. Subsequently, LWOP should be very rare and only for the most incorrigible of offenders.28 The Court again articulated the idea that juveniles should be offered a meaningful opportunity for release as first discussed in Graham.

D. Current State of Juvenile Law and Types of Challenges

Together, these cases suggest three important things in understanding whether a sentencing scheme for juveniles is constitutional. First, juveniles are constitutionally different than adults. These differences make them less culpable and subsequently less deserving of harsh punishment. Sentencing schemes that do not honor the unique status of juveniles are unconstitutional. Second, the severity of the offense also matters in whether a sentence is justified. The types of crimes that justify capital punishment are different than crimes that warrant less severe responses. Namely, more severe crimes, such as homicidal

24 Id. at 18.
25 Id. at 18.
26 Miller, 587 U.S.
27 Id. at 12.
28 Id. at 10.
crimes, warrant more severe punishment. Lastly, sentences that lack a legitimate penological purpose are unconstitutional.

These cases also bring up an important distinction in the legal argument against lengthy mandatory minimum parole requirements. The Court has identified two different types of legal challenges for sentencing under the Eighth Amendment. The first is length of term challenges. These challenges are not concerned with the actual sentencing law, but simply that the court applied in a disproportionate way to the offender in question.\textsuperscript{29} For example, in \textit{Solem v. Helm},\textsuperscript{30} the Court held that LWOP was a disproportionate sentence for the defendant’s seventh nonviolent felony of passing a worthless check. They did not challenge LWOP sentences but simply that it was a disproportionate sentence for the crime. The second type of challenges are categorical challenges. Categorical claims are concerns with the sentencing law itself. These challengers seek categorical remedies against the sentencing scheme. All three cases above represent examples of categorical claims. Another example is \textit{Atkins v. Virginia}\textsuperscript{31} where the Court held that sentencing schemes that allowed for people with intellectual disabilities to be sentenced to death were unconstitutional. Here they are arguing against the law or scheme, not the application.

Categorical claims hinge on two dimensions. First, the nature of the offense, and second, the nature of the offender. If the nature of the offense is less severe, then it requires a less severe punishment. The Court ruling that capital punishment for non-homicide crimes is unconstitutional is an example of this because the nature of the offense was not severe enough to warrant such a severe punishment.\textsuperscript{32} Regarding the nature of the offender, the Court held that the diminished culpability of various defendants warrants less severe punishment. In \textit{Atkins}, the Court held that the death penalty was

\begin{itemize}
  \item \textsuperscript{29} \textit{Graham}, 560 U.S.
  \item \textsuperscript{30} \textit{Solem v. Helm}, 463 U.S. 277 (1983)
  \item \textsuperscript{31} \textit{Atkins v. Virginia}, 536 U.S. 14 (2002)
  \item \textsuperscript{32} \textit{Edmund v. Florida}, 458 U.S. 782 (1982)
\end{itemize}
unconstitutional for mentally disabled offenders. As the challenge to lengthy minimum parole requirements is a categorical claim, the legal analysis rests broadly with the nature of the offense and the nature of the offender.

E. Lengthy Parole Requirements

To understand the legal argument against lengthy minimum parole requirements, there must be a clear definition. Parole, like sentencing, is determined on a state-by-state basis. This means that there is variety in sentencing and parole schemes. Some states, like Michigan, require juvenile consideration of parole ten years after sentencing. Other states, like Colorado, have schemes that allow for parole only after forty years of the juvenile’s sentence has already been served. This sentencing scheme means that a juvenile could have their earliest opportunity for release when they are in their late fifties. At this age, they are well past the typical time to build a career, have children, and get married. In effect, these requirements deny juvenile offenders their life regardless of whether they are released later. Graham and Miller require that there be a “meaningful opportunity for release,” and while the Court does not explicitly define this term, lengthy minimum parole requirements deny juveniles that option. Though there is some ambiguity in the exact definition of what constitutes a lengthy minimum parole requirement, for this argument, we will define lengthy minimum parole requirements as anything over thirty years. As stated above, not allowing parole before thirty years means most juveniles sentenced under these schemes will not have a chance for release until they are over fifty years old.

33 Atkins, 536 U.S.
34 Russell, supra note 10, at 408.
35 Id. at 408.
36 Graham, 560 U.S.
37 Miller, 587 U.S.
III. CRITERIA FOR DETERMINING CONSTITUTIONALITY AS UNDERSTOOD IN GRAHAM AND APPLIED IN MILLER

As mentioned above, the Court views categorical claims on two dimensions: the nature of the offense and the nature of the offender. Within these two dimensions, the Court applied a two-step approach when determining the constitutionality of LWOP for non-homicide offenses in *Graham*. The Court used this same approach in *Miller*. As this is another categorical juvenile sentencing case case under the Eighth Amendment, which outlaws cruel and unusual punishment, this analysis will take the same approach as the Court in both previous cases.

In both *Graham* and *Miller*, the Court first looked to “objective indicia of society’s standards, as expressed in legislative enactments and state practice”\(^{38}\) to determine that national consensus on the statute in question. Next, “guided by the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning and purpose”\(^{39}\) the Court exercised its own independent judgment about whether the statute violates the Constitution. The second part of this approach is the Court’s recognition of the fact that the “task of interpreting the 8th amendment remains [their] responsibility.”\(^{40}\) The Court’s analysis on the second point centers on culpability of the offender, the severity of the crime, and the practical penological purposes.

A. “Objective indicia of society’s standards”

The Court’s first step in *Graham* and *Miller* was looking at society’s view of the sentencing scheme. Eighth Amendment case law is unique in that instead of viewing cruel and unusual through a historical prism, the Court is concerned with “the evolving standards

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38 *Roper*, 543 U.S.
39 *Graham*, 560 U.S.
40 *Graham*, 560 U.S.
of decency that mark the progress of a maturing society.”$^{41}$ This is because what was cruel and unusual in the past is different from what is cruel and unusual now. Scalia gave the example of public lashing and branding. Both were forms of colonial punishment, and at the time of ratification, neither punishment would have been considered cruel or unusual. Nonetheless, today those punishments would be both.$^{42}$ Given this standard, the question then becomes how to determine “evolving standards of decency.”$^{43}$ In *Atkins*, the Court held that “the clearest and most reliable objective evidence of contemporary values is in the legislation enacted by the country’s legislatures.”$^{44}$ By looking at the legislative status across the country, the Court can determine if there is a national consensus against its use.

The first step is to look at the base acceptability under statute. Namely, how many states allow for the type of sentencing in question. This was the standard used in *Roper*. Only a small set of states allowed juveniles to be sentenced to death, and there was a clear trend in rejecting the death penalty for juveniles. The Court used this information to rule that there was national consensus against its use. Legislative permissibility is not enough on its own, though. In *Graham*, “thirty-seven states as well as the District of Columbia allowed for life without parole for a juvenile non-homicide offender in some way.”$^{45}$ Even as such, the Court held that the argument that this showed no national consensus against the practice was “incomplete and unavailing.”$^{46}$ The Court made a similar judgment in *Miller*.$^{47}$ It determined that having twenty-nine jurisdictions that allowed mandatory life sentences for juveniles was not by itself sufficient to

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43 Estelle, 429 U.S.
44 Atkins, 536 U.S.
45 Graham, 560 U.S.
46 Id. at 11.
47 Miller, 587 U.S.
prove that there was not a national consensus against the sentencing.\footnote{Id. at 15.} In both cases, the Court looked past simply counting the number of states that allowed that sentencing to see whether that sentencing was endorsed by looking at the actual application of the sentencing scheme.

This same reasoning applies to lengthy minimum parole requirements for non-homicide juvenile offenders. While it is a little unclear how many states allow for lengthy minimum parole options, as shown in \textit{Graham} and \textit{Miller}, this is not the only concern. The number could potentially be as high as the thirty-seven states in \textit{Graham}\footnote{\textit{Graham}, 560 U.S.} and alone it would still not be convincing. What is convincing here is the actual sentencing practices. Only three states have express provisions that allow for or require that a minimum parole requirement be thirty years or longer for non-homicide offenses, so only three states have expressly endorsed this sentencing for juveniles. Like in the previous cases, with only three states having express provisions, this cannot equate to the actual endorsement needed to signify a national consensus for its use.

Furthermore, in both \textit{Graham} and \textit{Miller}, the Court recognized that the possibility of the sentencing in question was not necessarily an affirmative judgment on that type of sentencing. This is especially true in juvenile justice cases. For example, the sentencing schemes in \textit{Graham} and \textit{Miller} were allowed only because juveniles could be tried as adults and adults could be sentenced in that way. While the rules made these sentences “possible for some non-juvenile offenders” the Court held that they “did not justify a judgment that many States intended to subject such offenders to” these sentences because they were intended for adults.\footnote{Id. at 16.} The Court recognized this again in \textit{Miller}, concluding again that “it was impossible to say whether a legislature has endorsed a given penalty”\footnote{\textit{Miller}, 587 U.S.} just because that sentencing was possible.
Again, this is relevant when considering lengthy minimum parole requirements for juvenile non-homicide offenders. The states, excluding the three with express provisions allowing this type of sentencing, that allow for the earliest opportunity for parole to be thirty years or later are a product of juveniles being transferred to adult court and courts being allowed to sentence adults in this way. As acknowledged in Graham and reaffirmed in Miller, this does not equate to affirmative judgment on lengthy minimum parole requirements.

Considering the low level of express affirmation for this sentencing scheme both in application and in practice, there is no clear national consensus in favor of lengthy minimum parole requirements. Furthermore, ten states have express requirements that the maximum time before an opportunity for parole must be less than twenty-five years for non-homicide juvenile offenders. When comparing the three states with express support for lengthy minimum parole requirements to the ten states having expressed disapproval of the sentencing scheme, there is a national consensus against it. Altogether, using the reasoning of evolving standards first articulated in Trop v. Dulles and reaffirmed specifically for juveniles in Graham and Miller, there is a national consensus against lengthy minimum parole requirements for juvenile non-homicide offenses.

B. “Task of interpreting the 8th Amendment remains our responsibility”

National consensus is not the only factor the Court uses to determine the constitutionality of sentencing schemes under the Eighth Amendment. The Court has also acknowledged their own role in interpreting and applying the Constitution. Justice Kennedy addressed this in Graham when he wrote, “in accordance with the constitutional design, ‘the task of interpreting the Eighth Amendment remains our responsibility.” In interpreting the Eighth Amendment, the Court has considered three main factors: the culpability of the offender, the

53 Graham, 560 U.S.
severity of the crime, and whether the punishment serves a practical penological purpose. For lengthy minimum parole requirements, all three factors weigh in favor of finding the practice unconstitutional. Thus, the Court should hold that lengthy minimum parole requirements are unconstitutional.

C. Culpability

Culpability is how responsible someone is for their crime. It changes how one is punished and the justification of the punishment. In considering the constitutionality of a sentencing scheme under the Eighth Amendment, the Court is very interested in the culpability of the offender. In fact, in Atkins it was the diminished culpability of mentally disabled people that made sentencing them to death cruel and unusual. In Graham, Kennedy set out two considerations when looking at culpability under the Eighth Amendment for juveniles: “The age of the offender and the nature of the crime.” In other words, when looking at the constitutionality of juvenile sentencing, the Court must consider the age and the type of crime they committed.

When looking at the age of the offender, Roper lays out the relevant points. These have since been affirmed in both Graham and Miller. In Roper, the Court solidified that there is a constitutional difference between adults and children in their level of culpability. This difference hinges on three considerations. First, “lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.” Second, juveniles are “more vulnerable or susceptible to negative influences and outside pressures.” Lastly, “the character of a juvenile is not as well formed as that of an adult” and “the personality traits of juveniles are more transitory and less fixed.”

54 Atkins, 536 U.S.
55 Graham, 560 U.S.
56 Roper, 543 U.S.
57 Id. at 15.
58 Id. at 16.
Court acknowledged that all these factors meant that juveniles are less culpable for their actions. “Once the diminished culpability of juveniles is recognized” sentencing must reflect that diminished culpability.\(^{59}\) *Graham* echoed this stating that a juvenile is not absolved of responsibility for his actions, but his transgression “is not as morally reprehensible as that of an adult.”\(^{60}\) As the Justices pointed out in *Miller*, the distinctive characteristics of juveniles are not sentencing specific.\(^{61}\) All three points hold regardless of the sentencing scheme in practice. This means that this analysis holds when considering lengthy minimum parole requirements for juvenile non-homicide offenders.

The second thing the Court considers when looking at culpability is the severity of the crime. In *Graham*, the Court reiterated that they have “recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.”\(^{62}\) This reflects a line between non-homicidal and homicidal crimes. This is due in part to the permanence of homicidal crimes. There is something irreversible and irrevocable about taking a life. Non-homicidal crimes differ in both the severity and permanence from homicidal crimes and thus “those crimes differ from homicide crimes in a moral sense.”\(^{63}\) Together with juveniles’ differences due to age, the Court held that “...when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”\(^{64}\) This analysis is the same when considering lengthy minimum parole requirements because this paper is only concerned with this issue for non-homicide offenses. Where the analysis regarding the characteristics of juveniles and the crime is the same as in *Graham* and *Miller*, it follows that the results should

\(^{59}\) *Id.* at 17.

\(^{60}\) *Graham*, 560 U.S.

\(^{61}\) *Miller*, 587 U.S.

\(^{62}\) *Graham*, 560 U.S.

\(^{63}\) *Id.* at 18.

\(^{64}\) *Id.* at 18.
be the same as well. Namely, that juveniles convicted of non-homicide offenses have “twice diminished moral culpability” and that must be reflected in sentencing.

D. Severity of Punishment

The next thing the Court considers is the severity of the punishment. In *Roper*, the Court acknowledged that the death penalty was an especially severe punishment. The death penalty could not be revoked. If the state made the wrong choice, they could not redress that mistake. In *Graham*, the Court established that, while still different from death sentences, “life without parole sentences share some characteristics with death sentences.”\(^{65}\) Without parole, there is no opportunity for release barring executive clemency. This means that “the sentence alters the offender’s life by a forfeiture that is irrevocable.”\(^{66}\) No amount of good behavior or character change or rehabilitation will matter because they will spend the rest of their days in prison. As the Court said, it “means a denial of hope.”\(^{67}\) The Court held that this was especially severe for juveniles as “under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”\(^{68}\)

This is the place where the argument against lengthy parole minimums requirements begins to differ from previous precedent. Lengthy parole minimums are neither LWOP nor death sentences. They are less severe sentences, but like both of those sentencing schemes, there is a denial of hope. Consider the juvenile who at 16 is sentenced in Texas. Under Texas’ current sentencing scheme, where the first opportunity for parole is after forty years, the juvenile’s first chance of release would be at 56 years old. They would have missed the time to have a family, the time to have a job, and the time to get an education. This is assuming they are even released. This sentence

\[\text{id. at 18.}\]
\[\text{id. at 19.}\]
\[\text{id. at 19.}\]
\[\text{id. at 19.}\]
denies the ability to change “without giving hope of restoration.” It takes the most fruitful years of a person’s life, and in doing so commits a harm with an irrevocability similar to that in *Graham* and *Roper*. Again, the sentence is especially severe for juveniles. The 16-year-old in Texas would never have a chance to finish high school or get their first job. Juveniles like this are sentenced as children with very little skills and only released as older citizens with little opportunity for hope. While it is true that these arguments apply equally well to a someone who is eighteen and as such falls out of the technical definition of juveniles, the Court has engaged in this distinction throughout the precedent regarding juvenile. The break was eighteen for the death penalty even though there is little one can do to say how an eighteen-year-old is distinctly different. This justification depends on consistency. The courts have used this age to determine juvenile status throughout the United States. While it may present problems, courts must draw the line somewhere.

**E. Practical Penological Purposes**

The Court also recognized that “the penological justifications for the sentencing practice are also relevant” in determining whether a punishment is cruel and unusual. The Court acknowledged that it is the legislature’s job to determine which justification for punishment is most salient and how to implement that punishment. While this is true, it does not mean that “the purposes and effects of penal sanctions are irrelevant to the determination” of constitutionality under the Eighth Amendment. The goal of the Court is not to determine the best justification for punishment or how to apply that justification. Instead, the question is whether there is any legitimate penological purpose because “a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” The

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69 *Id.* at 19.

70 *Id.* at 20.

71 *Id.* at 20.

72 *Id.* at 20.
four justifications that the Court has considered in past cases are retribution, deterrence, incapacitation, and rehabilitation.73

Retributivists justify punishment under the idea that people should be held accountable for their crimes simply because they committed them.74 The Court described retributivism as the ability to “express condemnation of the crime and seek restoration of the moral imbalance caused by the offense.”75 Central to retributivism is the idea of culpability. As already acknowledged, culpability is categorically smaller for juveniles because of their distinct characteristics. Given that children are less culpable the “...case for retribution is not as strong with a minor as with an adult.”76 The culpability of the juvenile in question with regards to lengthy minimum parole requirements for juveniles are even smaller because we are only interested in non-homicide offenses. Culpability is central to retributivism and because culpability is diminished for juveniles especially those who committed non-homicidal offense, there is not a legitimate retributivist justification.

Deterrence is the second justification the Court considers. Here the idea is that harsher punishments deter people from committing the crime because of the fear of punishment. The Court correctly pointed out that the “same characteristics that render juveniles less culpable... suggest that they will be less susceptible to deterrence.”77 Namely, juveniles are more likely to make rash decisions and often do not consider the full effect of their actions. Given that this is true, juveniles are not considering the potential punishment they could receive when they decide whether to commit a crime. If the punishment is not considered when choosing to commit the crime, then deterrence is not at play. Here the penological justification is weaker in part because it is less effective. This remains the case for

73 See e.g. Roper, 543 U.S. and Graham, 560 U.S. and Miller, 587 U.S.
75 Graham, 560 U.S. at 20.
76 Roper, 543 U.S. at 170.
77 Id. at 18.
lengthy minimum parole requirements. The same features that lead us to believe that juveniles are different force the conclusions that deterrence is not an adequate penological justification for juveniles. Moreover, most juveniles likely do not even know the rules regarding parole. This means that it acts as even less of a deterrent. Some may say that even with a weaker effect, the punishment still might have acted as a deterrent for some juveniles. The Court responded to this concern in *Graham* by saying that “even if punishment has some connection to a penological goal it must be shown that punishment is not grossly disproportionate in light of the justification offered.”78 This point is especially clear when looking at a separate hypothetical example. Perhaps a state decided to sentence everyone who ignored speeding laws to ten years in prison. This may cause some people to stop speeding, but that does not automatically mean it is justified under deterrence as it is still “grossly disproportionate”79 for the crime of speeding.

The third penological justification the Court considers is incapacitation. Incapacitation is largely concerned with mitigating the effect of recidivism—the likelihood that people will commit crimes again if they are released back into society. While the Court recognized recidivism as a serious risk and incapacitation as a legitimate goal, it was still inadequate justification for juveniles who did not commit homicide. Under incapacitation courts must justify the punishment “on the assumption that the juvenile offender will forever be a danger to society.”80 For the same reasons that juveniles are different from adults, this judgment is especially fraught for juveniles. Juveniles have an increased propensity for change and are more influenced by their surroundings than adults. Both factors make it incredibly difficult to actually judge when a juvenile is incorrigible. In a similar way to life without parole, lengthy minimum parole requirements, make an extreme judgment about the juvenile. Furthermore, juveniles who did not commit homicide show less of an inclination towards the depravity needed to judge a juvenile as incorrigible. For

78 *Graham*, 560 U.S. at 21.
79 Id. at 21.
80 Id. at 22.
this reason, “even if the States judgment...were later corroborated...the sentence [is] still disproportionate because the judgment was made at the outset.”

Lastly the Court considers rehabilitative justifications. In both *Graham* and *Miller*, the analysis on this point is easy. There is no opportunity for the juvenile to be released if they are sentenced to LWOP, so this “penalty forswears altogether the rehabilitative ideal.” This question deserves more consideration when the parole option is available but only after a lengthy amount of time. The punishment does not appear to so bluntly forswear the rehabilitative ideal at first glance, but upon closer inspection the same tenets emerge. Rehabilitation engenders a respect for those that are incarcerated, and that respect and hope enables change. If a juvenile cannot expect even an opportunity for release until they are in their late-fifties or later, how can that motivate change? They will not be motivated to pick up meaningful skills as they will be passed the age to start a career. They will not be encouraged to change for the potential of a family because they are past the standard age for marriage and kids. They will not be encouraged to change because they are given so little of their lives to demonstrate that change. More than that, they never had a chance for that life to begin with. Unlike adult offenders who already had a chance for an education and a career and a family, juvenile offenders often go to prison without even having a chance to complete a high school education. At fifteen or sixteen or seventeen they are put into prison until they are almost sixty, and what are their chances then? The Court recognized the impact of these types of sentences on rehabilitation in *Graham* when they wrote: “A young person who knows that he or she has no chance to leave prison before life’s end has little incentive to become a responsible individual.” Sentences with high minimum parole requirements for juveniles cannot be justified by rehabilitative arguments.

Lengthy parole requirements are not justified under retributivism, deterrence, incapacitation, or rehabilitation. This means that

81 Id. at 22.
82 Id. at 23.
83 Id. at 28.
these sentencing schemes serve no practical penological purpose. Given that the Court held in *Graham* that “a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense”, it becomes clear that lengthy parole requirements are cruel and unusual.\textsuperscript{84}

**F. Meaningful Opportunity for Release**

The Court also articulated one other concern regarding sentencing for juveniles. Due to a juvenile’s unique status, a juvenile must be allowed a meaningful opportunity for release. To be clear, this does not mean that a state is required to “guarantee eventual freedom to a juvenile offender.”\textsuperscript{85} Instead, the Court ruled that states are required to “give defendants like *Graham* a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”\textsuperscript{86} If a juvenile’s first chance of release is in their late fifties, how can that be considered a meaningful opportunity for release? These juveniles lack skills that would be acquired outside prison. They also will have a very hard time entering the workforce upon release. They will have a criminal record, few marketable skills, and less time to devote to the workforce. They will have missed the traditional time to build a family. Even if they had a kid before going to prison, that child would be forty by the time they were released and they would have missed all chances to see their child grow up. They also would have no conception of the outside world. Consider all the technological and social changes that have occurred in the last forty years. Jimmy Carter was the President of the United States forty years ago. Those who truly should not be released because they are incorrigible, are not guaranteed release. They have to meet parole standards much like any other offender. All this rule would do is “forbid states from making the judgment at the outset that those offenders never will be fit to reenter society.”\textsuperscript{87} It gives them a chance to change and to have

\textsuperscript{84} *Id.* at 17.

\textsuperscript{85} *Id.* at 24.

\textsuperscript{86} *Id.* at 24.

\textsuperscript{87} *Id.* at 24.
that change translate into a meaningful opportunity for a life beyond the mistakes they made when they were a child.

IV. A CATEGORICAL SOLUTION

Given that lengthy parole requirements for juvenile non-homicide offenders are unconstitutional, the Court could implement a variety of solutions. The Court should adopt a categorical rule against sentencing schemes that allow juveniles first chance of parole to be after thirty years of time served for non-homicide offenses. As stated in *Graham*, where the Court also adopted a categorical rule against LWOP for juveniles, “This clear line is necessary to prevent the possibility that… sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment.”\(^\text{88}\) That is not to say that a categorical rule has no problems. In *Graham*, the Court also recognized that “Categorical rules tend to be imperfect” nonetheless, they held that “one [was] necessary.”\(^\text{89}\) The fact that categorical rules are imperfect does not justify their exclusion as a solution. Instead, following the pattern of the Court, we have to look at the categorical rule in relation to other solutions.

One solution is to allow the Court to consider age as a mitigating factor in determining sentencing. Florida argued in *Graham* that this type of consideration met the standards of treating juveniles as different that was set out in *Roper*\(^\text{90}\). The Court held that while statutes that see age as a mitigating factor are praise-worthy, they are “nonetheless, by themselves insufficient to address the constitutional concerns at issue” because nothing in the “laws prevent[ed] the courts from sentencing a juvenile non-homicide offender to life without parole based on a subjective judgment” that the juvenile had “an irretrievably depraved character.”\(^\text{91}\) In lengthy minimum parole

\(^{88}\) *Id.* at 24.

\(^{89}\) *Id.* at 25.

\(^{90}\) *Id.* at 25

\(^{91}\) *Id.* at 17.
requirements for juvenile non-homicide offenders, the sentencing
court must make a similar judgement. They must say that these
people are so depraved that the earliest they should be released is
at almost sixty years old. Also, this judgment is subjective because
of juveniles’ unique characteristics. It is very difficult to determine
who is incorrigible. As stated in Graham, these discretionary rules
are insufficient because they do not “prevent the possibility that the
offender will receive a life without parole sentence for which he or
she lacks the moral culpability.”92 Namely, these rules do not do
enough to protect juveniles from these unconstitutional sentences
when they are not justified.

There is also the case-by-case approach in which the Court
would give states strong guidance against the practice, but still allow
it to be used based on a set of standards. In Graham, the Court also
considered this approach, but ultimately concluded that even a case-
by-case basis “must be confined by some boundaries.”93 Even if we
assumed that there were cases where juveniles had sufficient maturity
and sufficient depravity to warrant these severe sentences, it is not
clear that courts could “with sufficient accuracy distinguish the few
incorrigible juvenile offenders from the many that have the capacity
for change.”94 Here again the analysis remains the same regarding
lengthy minimum parole requirements for non-homicide offenses.
There are likely the few that would deserve such an extreme sentence
with no serious hope of rehabilitation, but as the Court noted there
is no trustworthy way for courts to determine this at sentencing.
Moreover, barring lengthy minimum parole requirements does not
guarantee release of the more incorrigible offenders. It just provides
juveniles who do demonstrate change and rehabilitation a meaning-
ful chance for release. The Court acknowledged this in Graham
when writing that “a categorical rule gives all juvenile non-homicide
offenders a chance to demonstrate maturity and reform.”95

92 Id. at 26.
93 Id. at 27.
94 Id. at 27.
95 Id. at 28.
The last concern is unique to an inquiry into lengthy minimum parole requirements. Namely, why should the Court choose thirty as the cut off for the categorical rule? This test would be what is known as a bright-line standard where there is a clearly applicable standard that can be applied to all cases. The Court has ruled that when considering bright-line standards, the Court must weigh the costs and benefits of such an approach. With lengthy minimum parole requirements for non-homicide juvenile offenders, the line must be set somewhere. For the Court to simply suggest a prohibition for lengthy minimum parole requirements with no clearly applicable standard, the issue would likely end up before the Court again later as lower courts differed on how to interpret the issue without a clear standard. Furthermore, as states crafted laws, they would have little to no guidance in how to avoid litigation on their statutes. By setting the line at thirty, both states and lower courts would have clear guidelines to follow.

The solution is not perfect. What if a state decided to set the minimum parole requirement at twenty-nine years, thus satisfying the bright-line rule? This does not seem to substantially differ from a law with a thirty-year requirement, but one would be perfectly legal and the other would be unconstitutional. This is a legitimate problem, and one would hope that states acting in good faith would not adopt these types of statutes. That being said, by choosing thirty as the line, the Court could mitigate some concerns. Thirty is at the lower end of a minimum parole requirement. A juvenile sentenced at seventeen would have their first chance for release at forty-seven. While this reflects the concerns raised above, it is not as serious as some of the forty or higher minimums allowed where release is offered when the same juvenile would be offered release at almost sixty. By picking the lower end of the scale, the Court could minimize the concerns with lengthy minimum parole requirements.

96 See e.g. Montego v. Louisiana, 566 U.S. 57, (2009) (the Court weighing the costs and benefits of the bright line rule in Michigan v Jackson which they determine to overrule).
V. Conclusion

The Court has now articulated in at least three different cases that juvenile offenders are constitutionally different and that this must be reflected in how courts sentence them. Lengthy minimum parole requirements for non-homicide juvenile offenders fail to adequately reflect juveniles’ unique status. This sentencing scheme is also not nationally supported. In fact, only three states explicitly promote this type of sentencing for juveniles. Additionally, because of juvenile’s unique status, the Supreme Court recognized that non-homicide juvenile offenders are categorically less culpable. Furthermore, this type of sentencing is also very severe. Under this sentencing scheme, a juvenile’s earliest possibility for parole could be into their late fifties. This is well past the traditional time to have a family, get a career, or find their way in the world. This sentencing denies juveniles the hope that motivates change. Also, severe punishment, under the *Graham* and *Miller* reasoning, serves no practical penological purpose. Considering all of these facts together, it is clear that this type of sentencing denies juveniles the ability to change ‘without giving hope of restoration.’ Subsequently, the Court should hold that lengthy minimum parole requirements for non-homicide juvenile offenders are unconstitutional.

If lengthy minimum parole requirements for non-homicide juvenile offenders are unconstitutional, what guidance should the Court give lower courts in honoring this principle? The Court should adopt a categorical rule because it prevents the possibility that this unconstitutional sentence will be imposed on juveniles. A categorical rule works where a case-by-case approach would not because juveniles are uniquely hard to classify as the type of incorrigible offenders that warrant this type of extreme sentencing. A categorical rule prevents this faulty judgement from denying juveniles their constitutional rights. Furthermore, a categorical rule does not mean that incorrigible offenders are guaranteed release. If the parole board decides that they did not demonstrate meaningful change, they would still not be released. Thus, the categorical rule protects juveniles’ rights

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97 *Graham*, 560 U.S. at 19.
while still allowing for incorrigible juveniles to be held accountable. Setting the line at thirty gives a specific sentencing structure for lower Courts. Though not perfect, picking the lower end of the scale for lengthy minimum parole requirements still mitigates the constitutional concerns raised in sentencing.

The United States is unique in its juvenile sentencing. It is one of the few countries that has not ratified the Convention on the Rights of the Child set forth by the U.N. in 1989, and even with the Court’s limitations, the United States is the only country that still allows for offenders under the age of 18 to be sentenced to life in prison without parole.98 How a society treats children says important things about who they are. By holding that lengthy minimum parole requirements for juvenile non-homicide offenders are unconstitutional, the Court would honor children in a way that is constitutionally relevant.