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LETTER FROM THE EDITOR-IN-CHIEF

Every third Issue of the *Howard Law Journal* is dedicated to a symposium honoring the legacy of former Howard University School of Law dean and civil rights leader, Wiley A. Branton. Each year, students, scholars, faculty, and staff, as well as family members and close friends of Wiley A. Branton come together to engage in productive discourse about a topic that is plaguing our society today, and what we can do about it as present and future legal practitioners and social engineers.

The 2016 Symposium was entitled, "President Obama's Legacy in the Courts: Executive Power and the Federal Judiciary." Without question, former President Barack Obama's legacy is cemented in history. President Obama initially made history by becoming the first African American President of the United States, but he continued to make history while in office through his judicial appointments. President Obama nominated two women to the Supreme Court: Justice Elena Kagan and Justice Sonia Sotomayor, the latter of whom became the first Latina American on the Supreme Court. Through these appointments and many more, President Obama sought to impact the judicial branch by bringing about a diversity of minds, ideas, and perspectives. To highlight President Obama's diverse appointments, the Symposium touched upon a range of topics, including voting rights, education, civil rights, and affirmative action, among others. A number of our esteemed panelists have written Articles about President Obama's impact on the judiciary, and so they have been included here in our Thirteenth Annual Branton Symposium Issue.

Issue 3 opens up with remarks delivered by Vanita Gupta, the former Principal Deputy Assistant Attorney General and acting Head of the Civil Rights Division at the United States Department of Justice. Ms. Gupta gave an impassioned speech about the current administration of justice in this country, highlighting public distrust in police, the Department of Justice's work to protect voting rights, and past and present pivotal cases that demonstrate the work that remains to be done.

Next, is an Article written by Chief Judge of the District of Columbia Court of Appeals, the Honorable Anna Blackburne-Rigsby. Her Article, entitled "The Importance of a Diverse Judiciary to Closing the Historic 'Health' Gap Between Blacks and Whites, and President Obama's Legacy" discusses the importance of a diverse judiciary, and how it can assist in bridging the gap between blacks and whites, not only within the criminal justice system, but in health and quality of life as well.

In his Article, "Evaluating President Obama's Appointments of Judges from a Conservative Perspective: What Did the Election of Donald Trump Mean for Popular Sovereignty?," Professor Stephen B. Presser discusses the effects that liberal and conservative judicial appointments have on the judi-

ciary and the administration of law. Most notably, Professor Presser concludes his Article by stating that the "noble aims" of the American people "are best achieved, not by an activist judiciary, whose accomplishments can be swept away by a subsequent bench, but by the branches closest to the[m], in whom sovereignty in this country must always rest."

In her Essay, "Laying the Foundation: How President Obama's Judicial Nominations Have Paved the Way for a More Diverse Supreme Court," Professor April G. Dawson acknowledges the two diverse appointments that former President Obama made to the Supreme Court: Justices Sotomayor and Kagan. However, she notes that Supreme Court Justices are mainly nominated from federal courts of appeals. Thus, Professor Dawson looks to President Obama's appointments to the district courts and courts of appeals to assess whether he has consistently made diverse appointments across the federal judiciary.

We next have an Essay written by Professor Peggy Cooper Davis, entitled, "The Obama Presidency and the Confederate Narrative." In it, Professor Davis discusses the "Confederate Narrative," an ideal that was essentially brought about to perpetuate race and class separation for hundreds of years, and how this ideal was not only brought to the forefront during Barack Obama's presidency, but challenged.

Following our panelists' Articles and Essays are the *Journal's* student Note and Comments. Keeping in line with the theme of the judiciary, these student works discuss the trials and tribulations of individuals before incarceration and afterward. Student author Johnathan M. Nixon highlights the "before" in his Comment, "Eye Spy Injustice: Delving into the Implications Police Body Cameras Will Have on Police Officers and Citizens." In it, Mr. Nixon discusses a number of police shootings that have occurred in recent years, highlighting the need for body cameras. He then provides recommendations for how police body cameras can be instituted efficiently and cost effectively.

The following student works highlight the "after," noting struggles that inmates face while incarcerated. In "Break Every Chain: The Ongoing Shackling of Pregnant Inmates Violates the Eighth Amendment," student author Leonie Stoute discusses the terrifying practice of shackling pregnant inmates, even during labor. Ms. Stoute argues that such a practice constitutes a violation of the Eighth Amendment's ban on cruel and unusual punishment because it leads to suffering for the women and birth defects in the children.

Student author R. Bisi Adeyemo discusses the difficult process of organ transplantation for inmates in her Comment, "Don't Break My Heart, My Achy Breaky Heart: A Call for Legislation to Expressly Grant Inmates the Right to Donate Their Non-Vital Organs." Ms. Adeyemo discusses the fact that many inmates attempt to participate in organ donation, but often-

times prison officials deny their requests. Thus, Ms. Adeyemo argues that inmates have a right to donate non-vital organs.

The last student Comment, entitled, "I'm On Fire: A Call to Eradicate Excessive Solitary Confinement Sentences for Nonviolent Offenses," was written by myself. In it, I discuss the excessively long sentence lengths for inmates placed in solitary confinement, as well as the multitude of psychological evidence, which demonstrates just how debilitating solitary confinement truly is. I ultimately argue that solitary confinement should be limited in its use, especially for inmates who are placed in isolation for nonviolent offenses.

Writing my final Letter from the Editor-in-Chief is very bittersweet. Over this past year, I have learned so much in my capacity by just reading the Articles that have been published, as well as attending the Branton Symposium and engaging in discourse with scholars and students about the issues that plague us today. What helps me to look back on this time with pride is the fact that the *Howard Law Journal* will continue to publish great works, we will continue to host thought provoking discussions at the Branton Symposium, and another sixty years from now, another Editor-in-Chief will talk about new and innovative ways that we have continued to influence law and policy in this country. On behalf of the entire *Journal*, I sincerely thank you all for your readership over this past year, and in the years to come.

Monique Peterkin
Editor-in-Chief
Volume 60

About the Wiley A. Branton/ *Howard Law Journal* Symposium:

Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program that focuses on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal*'s spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue, President Obama's Legacy in the Courts: Executive Power and the Federal Judiciary, in recognition of the great Wiley A. Branton. Past Symposium issues include:

Unfinished Work of the Civil Rights Act of 1964: Shaping An Agenda for the Next 40 Years

The Value of the Vote: The 1965 Voting Rights Act and Beyond

What Is Black?: Perspectives on Coalition Building in the Modern Civil Rights Movement

Katrina and the Rule of Law in the Time of Crisis

Thurgood Marshall: His Life, His Work, His Legacy

From Reconstruction to the White House: The Past and Future of Black Lawyers in America

Collateral Consequences: Who Really Pays the Price for Criminal Justice?

Health Care Reform and Vulnerable Communities: Can We Afford It? Can We Afford to Live Without It?

Protest & Polarization: Law and Debate in America 2012

Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges

Rights vs. Control: America's Perennial Debate on Guns

Reforming the Criminal inJustice System

REMARKS

Delivered at the Thirteenth Annual Wiley A. Branton/*Howard Law Journal* Symposium on October 14, 2016

VANITA GUPTA*

Thank you, Valecia [Battle], for that kind introduction. Thank you to Dean [Danielle] Holley-Walker, for welcoming us all here to Howard Law School. And thank you to the students at the *Howard Law Journal* for organizing this inspiring symposium in honor of Wiley A. Branton. From the streets of Pine Bluff, Arkansas, to the halls of Washington, D.C., Wiley Branton made equal justice not just the focus of his career but the cause of his life. He fought fearlessly to end segregation. He worked tirelessly to safeguard the franchise. And he inspired countless students and scholars to engage in public service. It is a pleasure to join so many distinguished judges, faculty and students as we come together to celebrate his legacy. And it is an honor to do so, here, at this outstanding and historic institution.

We are living, right now, through times of great challenge across America. Many people are asking—some with real doubt—can we heal the wounds and bridge the divides of racial tension that plague our communities? Do our public institutions still answer to the people they serve? Does our country truly value the voices, dignity and lives of all people?

In my two years as head of the Civil Rights Division at the Department of Justice, I have heard these questions time and again, most frequently in conversations about policing—a defining civil rights is-

* Head of the Civil Rights Division at the Department of Justice.

sue of our time. In the streets, on college campuses, on social media—people are struggling for answers, for an end to violence, for justice. Yet the tragedies we have confronted are not new. And the outcry is not the result of any single incident. These challenges have been with us for years, but suddenly they are at the center of our public dialogue. That's in part because of new technology, like cell phone videos.[1] Today, America is seeing heart-breaking events and police-community tensions unfold in real time and on stark display.

There is little question and broad agreement across all corners of America that our criminal justice system needs reform. And although we have made great legal and social progress towards a more inclusive nation, if we truly reflect on the causes of unrest, we must acknowledge the role of discrimination and its bitter fruit: inadequate schools; segregated housing; unequal economic opportunity; and interference with our most sacred rights—from religious freedom to voting. For far too many people, the color of their skin, their national origin and their gender or faith constrain their options and undermine their opportunities. In order for our nation to reach its full promise and potential, we must ensure equal opportunity and equal justice for all. That's why in the Civil Rights Division, we are firmly committed to ending discrimination—root and branch—in all aspects of life. The current climate in our country—with widespread public engagement on these issues—gives us a unique opportunity to do so. And I am hopeful that if we address these challenges with candor, we can achieve real progress.

We start with that most basic human need, the need for safety. Whether civilians or officers, we all want to live and work in safe communities and get home to our loved ones at night. And we all have a role to play in making that a reality. We can't think of public safety as the job of the police alone; the community is central to preventing, reporting and solving crime. And so if residents—including victims and witnesses—don't trust the police enough to share information, we all suffer. Simply put, public safety requires a foundation of trust between police and the communities they serve.

1. Elliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/.

One critical problem in American policing today is the visible *absence* of public trust in police.[2] And so it's worth asking, what fueled this distrust between law enforcement and the communities they serve, particularly communities of color? As many law enforcement leaders have acknowledged, it's in part the product of the historical role that police, and the law itself, have played in sanctioning and perpetuating—what Dr. King once called—America's "long night of racial injustice,"[3] from slavery, to the Black Codes, to lynchings, to Jim Crow segregation. Or as FBI Director James Comey noted last year: "At many points in American history, law enforcement enforced the status quo, a status quo that was often brutally unfair to disfavored groups."[4] Distrust is also the product of lived experience and negative interactions that people have had with law enforcement. Experiences like being mistreated during a traffic stop, followed in a retail store, or worse. And distrust is the product of criminal justice policies – often set by legislators and other public officials, not line officers – that have disproportionately harmed communities of color and people living in poverty.[5] Stop and frisk, over reliance on incarceration and barriers to reentry have caused many communities – young black men in particular – to lose faith in the legitimacy of our justice system.[6]

I said earlier that you can't have public safety without public trust. It's also true that you can't build public trust without demonstrating meaningful accountability when police officers violate the law. In the aftermath of officer-involved shootings, the public often demands criminal accountability—prosecution of the involved officer. When officers intentionally use excessive force, the Civil Rights Division brings these cases, but I'll be honest with you, the federal statute

2. Cheryl K. Chumley, *Public Trust in Police Low Criticism of Militarization Rises: Poll*, WASH.TIMES (Aug. 26, 2014), http://www.washingtontimes.com/news/2014/aug/26/public-trust-police-low-poll-finds/. *See generally* Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 THOERETICAL CRIMINOLOGY 443 (2005), http://www.slcdocs.com/ODHR/Website/Right%20to%20Safety/Literature/PoliceReformAndTheProblemOfTrust.pdf (providing an analysis of the mistrust of the police in communities).

3. *Martin Luther King Jr. - Acceptance Speech*, NOBEL PRIZE, https://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-acceptance_en.html (last visited Jan. 1, 2017).

4. James B. Comey, *Hard Truths: Law Enforcement and Race*, FED. BUREAU INVESTIGATIONS (Feb. 12, 2015), https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race.

5. JUST. POLICY INST., RETHINKING THE BLUES: HOW WE POLICE IN THE U.S. AND AT WHAT COST 2 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/rethinkingtheblues_final.pdf.

6. Mark Konkol, *When People Don't Trust the Criminal Justice System, What's a City to Do?*, DNAINFO (Nov. 20, 2015, 11:35 AM), https://www.dnainfo.com/chicago/20151120/auburn-gresham/when-people-dont-trust-criminal-justice-system-whats-city-do.

that applies is narrow.[7] In use-of-force cases, federal law requires us to prove both that the officer used "objectively unreasonable" force and that she or he acted willfully—"for the specific purpose of violating the law"—the highest standard of criminal intent in the federal code.[8] Mistake, misperception, negligence, and poor judgment are not prosecutable at the federal level.[9] That said, during the last eight years, we have charged 465 law enforcement officials for committing willful violations of civil rights and related crimes.[10]

Criminal accountability in appropriate cases is critical. Yet criminal prosecution is only one tool, and there are limits to its ability to bring about systemic change. The Civil Rights Division also has civil enforcement authority to hold state and local governments accountable when a police department engages in a pattern or practice of unconstitutional conduct.[11] This includes unlawful stops, searches and arrests; excessive force; racial profiling and other forms of biased policing and violation of First Amendment rights. Many of our investigations resonate so widely because they make visible the sometimes subtle, but dangerous ways that the justice system can corrode a community's faith in its government.

We found this kind of breakdown in our investigation of the Baltimore City Police Department. In Baltimore, we saw how a "zero tolerance" street enforcement strategy became a quest to produce numbers—pedestrian stops in particular—regardless of their limited impact on solving crime and their damage to community relationships.[12] The city's African-American residents bore the brunt of this activity. The Baltimore Police Department made roughly 44[%] of its stops in two small, predominantly African-American districts that

7. 18 U.S.C. § 242 (1996).

8. RICHARD M. THOMPSON II, CONG. RESEARCH SERV., POLICE USE OF FORCE: RULES, REMEDIES, AND REFORMS 2, 6 (2015), https://fas.org/sgp/crs/misc/R44256.pdf.

9. Andrew Conte & Brian Bowling, *Proposed Laws Would Make It Easier to Prosecute Officers*, TRIBLIVE (Mar. 17, 2016, 11:00 PM), http://triblive.com/news/editorspicks/10143083-74/police-law-prosecutors.

10. Simore Weichselbaum, *Policing the Police*, MARSHALL PROJECT (May 26, 2015, 6; 12 PM), https://www.themarshallproject.org/2015/04/23/policing-the-police#.6FUKdO7AM.

11. Radley Balko, *The Justice Department's Stunning Report on the Baltimore Police Department*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/08/10/the-justice-departments-stunning-report-on-the-baltimore-police-department/?utm_term=.529a1649acdd.

12. *How Zero Tolerance Policing Destroyed Black Communities in Baltimore*, THE REAL NEWS (Aug.30, 2016), http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=17125 (providing an interview with Stephen Janis and Luke Broadwater).

contain only 11[%] of the city's population.[13] Officers routinely arrested people for loitering or trespassing if they could not provide a "valid reason" for being on the sidewalk or standing near a public housing development.[14] The police department condoned and encouraged this behavior. In one instance, a shift commander emailed a template for describing such trespassing arrests; the template provided blank fields to be filled in with details, except that it had the words "black male" pre-filled for the suspect description.[15] In Baltimore, blanket assumptions and stereotypes about certain neighborhoods and certain communities led residents to see the justice system as illegitimate and authorities as corrupt. These perceptions drove resentment. And resentment prevented the type of effective policing needed to keep communities *and* officers safe.

We identified a similar set of problems in Ferguson, Missouri, last year, where the city's mistreatment of its own residents—especially African Americans and those living in poverty— ultimately led people to take to the streets.[16] Although African Americans made up 67 percent of the population, from 2012 to 2014, they constituted 85[%] of those subjected to a vehicle stop, 90[%]of those who received a citation and 93[%] of those arrested.[17] During our investigation, we spoke with city officials and residents who explicitly distinguished Ferguson's African [ ] American residents from the city's "normal" re-

13. U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 6 (2016) [hereinafter BALTIMORE REPORT], https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department; *see also* DEL Quentin Wilber & Kevin Rector, *Justice Department Report: Baltimore Police Routinely Violated Civil Rights*, BALT. SUN (Aug. 9, 2016, 08:59 PM), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-doj-report-20160809-story.html.

14. BALTIMORE REPORT, *supra* note 13, at 29, 37; Lynh Bui & Tom Jackman, *Strip Searches, 'Lock Up All the Black Hoodies': Excerpts From Justice Dept. Report on Baltimore PD*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/08/10/excerpts-from-the-justice-departments-report-on-practices-of-the-baltimore-police-department/?utm_term=.0bfa0751eae1.

15. BALTIMORE REPORT, *supra* note 13, at 37; Brew Editors, *"Officer Doe Observed a Black Male"*, BALT. Brew (Aug. 11, 2016, 09:07 PM), https://www.baltimorebrew.com/2016/08/11/officer-doe-observed-a-black-male/.

16. Michelle Ye Hee Lee, *'Hands Up, Don't Shoot' Did Not Happen in Ferguson*, WASH. POST (MAR. 19, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/?utm_term=.80a3dc2c5b9b.

17. U.S DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; Sarah Bufkin, *9 Startling Details From the Ferguson Report by the Department Of Justice*, BUSTLE (Mar. 4, 2015), https://www.bustle.com/articles/67943-9-startling-details-from-the-ferguson-report-by-the-department-of-justice.

sidents or "regular" people.[18] In addition to racial bias, we also found another troubling dynamic at play: the city's undue focus on policing as a means to generate revenue.[19] The city routinely issued multiple citations with excessive fines and fees for minor violations. Fines like $302 for jaywalking, $427 for disturbing the peace and $531 for allowing high grass and weeds to grow on your lawn.[20] When people living in poverty could not pay these fines and fees, they were subjected to multiple arrests, jail time and payments that far exceeded the cost of the original ticket.[21] These policies broke the law. They criminalized poverty. And they destroyed trust.

In police departments around the country, we're working with communities to implement sustainable reform through court-enforceable, independently monitored consent decrees. We're focusing on policies, training and guidance so that officers can prevent racial bias, de-escalate tense encounters and avoid using excessive force. We're working with police departments to invest in officer wellness so that men and women who wear the badge receive the care and support they need. We're promoting community-oriented policing so that all stakeholders get a voice in the process of ensuring public safety. And we're improving accountability mechanisms, supervision structures and data collection measures to ensure adequate oversight. During this process, our goal is not minor change but lasting, comprehensive reform that transforms relations between police and communities. And—not overnight, but over time—to change culture. As others have said, "culture eats policy for lunch."[22] Of course, changing culture takes sustained effort from all stakeholders. That's why the success of our police reform work depends on the commitment of police leaders, line officers, city officials and average residents. Ultimately, any progress will be brought about by the local community itself.

The reforms in our consent decrees are working and saving lives. In Seattle, a federal monitor found that, over three months, officers used force in only 2 percent of roughly 2,500 encounters with individu-

18. FERGUSON REPORT, *supra* note 17, at 76.

19. *Id.* at 9.

20. *Id.* at 20.

21. *Id.* at 59. *See generally* Complaint at 7–8, United States v. City of Ferguson, No. 4:16-cv000180 (E.D. Mo. Feb. 10, 2016), https://www.justice.gov/crt/file/832451/download.

22. *See* STEVE ANDERSON, POLICE LEADERSHIP, Organizational Culture Eats Policy for Lunch 2 (2015), http://bjaexecutivesessiononpoliceleadership.org/pdfs/019CultureEatsPolicy.pdf.

als in crisis.[23] In Detroit, after about a decade with the police department under a consent decree, we found improved training and revised use-of-force policies helped lead to a nearly 60 percent decline in the average number of officer-involved shootings per year.[24] And in Ferguson, as of mid-August, the city had dismissed more than 32,000 court cases and cancelled more than $1.5 million in fines.[25]

We also know that we cannot achieve police reform in a vacuum. Day-in and day-out, police officers—the vast majority of whom perform their demanding, at times dangerous jobs with honor and integrity—confront social, health and economic challenges that they didn't create. Challenges like mental illness, addiction and poverty. For too long, we—as a society—have thrown the criminal justice system at all these issues. And we've given law enforcement just one set of tools to respond: arrest and incarceration. So now we—as a society—share an obligation to reverse this trend.

In response to these challenges, today there is a widespread, bipartisan movement for comprehensive criminal justice reform. And I'm proud to say that the entire Department of Justice is playing a lead role. We're building partnerships and creating resources for law enforcement and mental health professionals to help people with mental illness access treatment from community-based services.[26] We're combating the school-to-prison pipeline, where discriminatory discipline practices too often result in children of color and children with disabilities getting sentences rather than diplomas.[27] We're addressing unlawful and harmful fine, fee and bail practices that result in the jailing of tens of thousands of people simply because they are

23. Jennifer Sullivan, *Report: Force Rare as Seattle Police Deal With About 10,000 Mentally Ill People a Year*, SEATTLE TIMES (Sept. 7, 2015, 11:36 AM), http://www.seattletimes.com/seattle-news/crime/spd-report-minimal-force-used-in-contacts-with-mentally-ill/.

24. *Head of the Civil Rights Division Vanita Gupta Delivers Remarks at the NYU School of Law Center on the Administration of Criminal Law's Eight Annual Conference*, U.S. DEP'T OF JUST. (Apr. 8, 2016), https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-nyu-school-law-center; *Justice Department Announces Successful Resolution of Consent Judgment Involving Detroit Police Department*, U.S. DEP'T OF JUST. (Aug. 25, 2014), https://www.justice.gov/opa/pr/justice-department-announces-successful-resolution-consent-judgment-involving-detroit-police.

25. *Head of Civil Rights Division Vanita Gupta Delivers Remarks at Southern Center for Human Rights Symposium on the Criminalization of Race and Poverty*, U.S. DEP'T OF JUST. (Sept. 20, 2016), https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-southern-center-human-rights.

26. *See generally* INT'L ASSOC. OF THE CHIEFS OF POLICE, BUILDING SAFER COMMUNITIES: IMPROVING POLICE RESPONSES TO PERSONS WITH MENTAL ILLNESS (2010), http://www.theiacp.org/portals/0/pdfs/improvingpoliceresponsetopersonswithmentalillnesssummit.pdf.

27. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

poor.[28] We're advocating for bipartisan and much-needed sentencing reform legislation. We're shifting the paradigm for prisons by insisting that solitary confinement be used rarely—not by default—and banning its use on juveniles.[29] We're phasing out our use of private prisons – due in part to growing concerns about safety, services and cost savings.[30] And we're working hard to ensure that people who served their time and paid their debt to society get the support they need to restart their lives.[31]

As I mentioned earlier, the entrenched inequalities in our justice system cannot be separated from the systemic discrimination—and erosion of public trust it perpetuates—elsewhere in our society. Our country does not guarantee, nor do people expect, equal outcomes. But we do promise equal opportunity. Sadly, even 62 years after *Brown v. Board of Education*—the landmark ruling that Wiley Branton worked to implement in Little Rock, Arkansas—far too many children still attend racially-segregated schools and live in racially-isolated neighborhoods.[32] Earlier this year, following a five-decade-long desegregation battle in Cleveland, Mississippi—a city divided literally by railroad tracks that separate east from west and black from white—a federal court ordered the school district to consolidate its secondary schools.[33] As the court wrote, "the delay in de-

28. *See Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices*, U.S. DEP'T OF JUST. (Mar. 14, 2016), https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices; Letter from Vanita Gupta, Principal Deputy Assistant Attorney General, U.S. Dep't of Just. and Lisa Foster, Director, Office for Access to Justice (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download.

29. Laura Wagner, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons* (Jan. 25, 2016, 9:24 PM), http://www.npr.org/sections/thetwo-way/2016/01/25/463891388/obama-announces-reforms-to-solitary-confinement-in-federal-prisons.

30. *See* Memorandum From the Acting Director Federal Bureau of Prisons (Aug. 18, 2016), https://www.justice.gov/archives/opa/file/886311/download.

31. *See* FED. BUREAU OF PRISONS, REENTERING YOUR COMMUNITY: A HANDBOOK (2016), https://www.bop.gov/resources/pdfs/reentry_handbook.pdf; *Roadmap to Reentry: Reducing Recidivism Through Reentry Reforms at the Federal Bureau of Prisons*, U.S. DEP'T OF JUST., (Apr. 19, 2017) https://www.justice.gov/reentry/roadmap-reentry.

32. *See* GOV'T ACCOUNTABILITY OFFICE, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 26 (2016), http://www.gao.gov/assets/680/676745.pdf; *see also* Janie Boschma, *Separate and Still Unequal*, THE ATLANTIC (Mar. 1, 2016), https://www.theatlantic.com/education/archive/2016/03/separate-still-unequal/471720/.

33. *See* Aria Bendix, *A Mississippi School District Is Finally Getting Desegregated*, THE ATLANTIC (Mar. 14, 2017), https://www.theatlantic.com/education/archive/2017/03/a-mississippi-school-district-is-finally-getting-desegregated/519573/; Christine Hauser, *Mississippi District Ordered to Desegregate Its Schools*, N.Y. IMES (May 17, 2016), https://www.nytimes.com/2016/05/18/us/cleveland-mississippi-school-district-desegregate.html.

segregation has deprived generations of students of the constitutionally-guaranteed right of an integrated education."[34]

Systemic discrimination undermines opportunity in our economy, too—from housing segregation to lending discrimination. Diminished economic opportunity derails hope—hope that through the tenacity of work and the resiliency of spirit, people in this country can lift themselves up, invest in their dreams and seize the promise of a brighter future. Housing can affect where you get a job, the kind of school you go to, how you get to work and whether you live in a safe community. The Civil Rights Division has sued housing authorities and jurisdictions around the country—from Georgia, to Louisiana, to New York—that continue to segregate residents by race well into the 21st century.[35]

Similarly, in the American economy, we know that access to credit is a critical component of building a better life. Credit enables working families to borrow money so they can buy a home, lease a car, stockpile savings, start a business or finance an education. In mortgage lending, when communities of color lack access to credit because of discriminatory barriers, they don't get the same opportunities that white residents do to own property, to build equity and to increase wealth. In the aftermath of the subprime mortgage crisis—which disproportionately harmed communities of color—my office created a fair lending unit.[36] And since 2010, in partnership with our U.S. Attorney colleagues, the Civil Rights Division has obtained more than $1.5 billion in relief for individual victims and impacted commu-

34. Federal Court Orders Justice Department Desegregation Plan for Cleveland, Mississippi, Schools, U.S. DEP'T OF JUST. (May 16, 2016), https://www.justice.gov/opa/pr/federal-court-orders-justice-department-desegregation-plan-cleveland-mississippi-schools.

35. *See* Allie Bidwell, *Justice Department Attempts to Block Louisiana School Voucher Program*, U.S. NEWS (Aug. 26, 2013, 10:57 AM), http://www.usnews.com/news/articles/2013/08/26/justice-department-attempts-to-block-louisiana-school-voucher-program; *Justice Department Sues Georgia for Unnecessarily Segregating Students With Disabilities*, US. DEP'T OF JUST. (Aug. 23, 2016), https://www.justice.gov/opa/pr/justice-department-sues-georgia-unnecessarily-segregating-students-disabilities; *Justice Department Sues Palm Beach, Florida, County School Board for Discriminating Against Pregnant Employee*, U.S. DEP'T OF JUST. (May 25, 2016), https://www.justice.gov/opa/pr/justice-department-sues-palm-beach-florida-county-school-board-discriminating-against; *Manhattan U.S. Attorney Sues New York City Department of Education for Discrimination an Retaliation at Pan American International High School*, U.S. DEP'T OF JUST. (June 9, 2016), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-sues-new-york-city-department-education-discrimination-and.

36. Jenny Markon, *Justice Department's Civil Rights Division Steps Up Enforcement*, WASH. POST (June 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060304938.html.

nities.[37] By combating discrimination in the marketplace, we're defending the timeless American ideal that says if you work hard, if you play by the rules and if you follow the law, you deserve a fair shot and an equal chance to succeed.

Equal opportunity requires protecting all people—no matter who they are, what they look like, whom they love or where they worship—from harm. Violence against people based on their identity not only violates the law. It also denies entire communities the promises of equal protection and true freedom. The Civil Rights Division vigorously prosecutes hate violence, including crimes that target people because of their religion, sexual orientation or race.[38]

Systemic discrimination, however, also extends well beyond acts of violence. We've fought to ensure that all people can marry the person they love. As the Supreme Court ruled last year in *Obergefell v. Hodges*, our Constitution promises all people "equal dignity in eyes of the law."[39] We're also working to protect the rights of transgender women and men by preventing sex-based discrimination in schools, businesses, jails, prisons and elsewhere. And – following recent heinous acts of terrorism and divisive rhetoric – we're combating a backlash of religious discrimination targeting Muslim communities and others perceived to be Muslim.[40] This discriminatory backlash includes hate crimes, but also bullying in schools and unlawful barriers to building houses of worship. Discrimination in these areas may not be the most easily noticeable or explicit, but it still threatens the vibrancy of our democracy and the spirit of America.

Now, no matter what policy issue we care about most, we get closer to these goals through the ballot box. Voting is the right that protects all other rights. The Department of Justice works to ensure that every eligible voter can cast a valid ballot. It makes no difference to us what candidate a voter selects or what party she supports. But

37. *Federal Government and State Attorneys General Reach $25 Billion Agreement With Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses*, U.S. DEP'T OF JUST. (Fen. 9, 2012), https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest.

38. *About the Division*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/about-division (last visited Apr. 23, 2017).

39. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples under the Fourteenth Amendment).

40. U.S. DEP'T OF JUST., CONFRONTING DISCRIMINATION IN THE POST-9/11 ERA: CHALLENGES AND OPPORTUNITIES TEN YEARS LATER 13–16 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/04/16/post911summit_report_2012-04.pdf; *see also* Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html.

we fight day-in and day-out, in elections big and small, to protect her right to have a say. Even with the severe setback of the Supreme Court's 2013 decision in *Shelby County v. Holder*,[41] we continue to use every tool at our disposal, including the Voting Rights Act, to protect voters from discrimination and provide the opportunities federal law guarantees.[42] And we're winning. This year, courts around the country have protected the franchise, including in landmark cases we've brought in North Carolina and Texas.[43] And this November, trained Justice Department personnel will travel to roughly half of the nation's states to monitor elections in the field. Of course, no matter how vigorously and effectively we protect this most fundamental right, eligible voters need to go out and exercise it. Democracy requires active participation. Self-government doesn't happen by chance.

Even with significant success stories around the country, I fully recognize the unfinished and urgent work ahead. This work is about who we—as a nation—are, and who we aspire to be. It's about our complex, imperfect, but unyielding story of progress. In America, Justice Thurgood Marshall, the great-grandson of a slave, graduated from Howard Law School and used the law to strike down the same systemic discrimination that the Supreme Court sanctioned just decades earlier. In America, people like Wiley Branton worked courageously to desegregate public schools and protect the ballot. Our story continues. As President Obama said from the Edmund Pettus Bridge in Selma last year, "[o]h, what a glorious task we are given, to continually try to improve this great nation of ours."[44] In the days ahead, let all of us write the next chapter of America's progress by advancing

41. *See* Shelby County v. Holder, 133 S. Ct. 2612 (2013) (holding the coverage formula of the Voting Rights Act of 1965, which determines which jurisdictions are subjected to preclearance based on their history of discrimination in voting as unconstitutional).

42. *See Voting Section*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/voting-section (last visited Apr. 23, 2017); *see also Statutes Enforced by the Voting Section*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/statutes-enforced-voting-section (last visited Apr. 23, 2017).

43. *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (finding the North Carolina law was enacted with racially discriminatory intent in violation of the Fourteenth Amendment and section 2 of the Voting Rights Act); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (holding the Texas voter ID law violated § 2 of the Voting Rights Act through its discriminatory effects in part because there was a stark racial disparity between those with required ID and those without and the voter ID provisions failed to correspond in meaningful way to claimed interest).

44. *Remarks by the President at the 50th Anniversary of the Selma to Montgomery Marches*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Mar. 07, 2015, 02:17 PM), https://obamawhitehouse.archives.gov/the-press-office/2015/03/07/remarks-president-50th-anniversary-selma-montgomery-marches.

equal opportunity, by embracing each other's humanity and by fighting for justice to form a more perfect union. Thank you.

The Importance of a Diverse Judiciary to Closing the Historic "Health" Gap Between Blacks and Whites, and President Obama's Legacy

THE HONORABLE ANNA BLACKBURNE-RIGSBY*

* The Honorable Anna Blackburne-Rigsby was sworn in on March 17, 2017, as Chief Judge of the District of Columbia Court of Appeals. She was nominated to the Court of Appeals by President George W. Bush in August 2006. Prior to her appointment to the District of Columbia Court of Appeals, Chief Judge Blackburne-Rigsby served for six years as an Associate Judge on the Superior Court of the District of Columbia, having been nominated in 2000 by President William J. Clinton. Chief Judge Blackburne-Rigsby also served as a Magistrate Judge on the Superior Court from 1995–2000. Chief Judge Blackburne-Rigsby chairs the District of Columbia Courts' Joint Committee on Judicial Administration and also chaired the Standing Committee on Fairness and Access, and served as a Commissioner on the District of Columbia's Access to Justice Commission. In addition, Chief Judge Blackburne-Rigsby served as the Moderator and Chair of the National Consortium on Racial and Ethnic Fairness in the Courts and is a past President of the National Association of Women Judges (NAWJ) for the 2013–2014 term. Chief Judge Blackburne-Rigsby is an alumna of Howard University School of Law, where she graduated in the top five percent of her class and served as Lead Articles Editor of the Howard Law Journal and Co-Captain of the Charles Hamilton Houston Moot Court Team. Chief Judge Blackburne-Rigsby teaches professional responsibility at the University of the District of Columbia David A. Clarke School of Law. She is married to Judge Robert R. Rigsby, who is an Associate Judge on the Superior Court of the District of Columbia, the former Corporation Counsel for the District of Columbia, and a retired Colonel and Military Judge of the United States Army Reserves. They are the proud parents of a son who is currently attending college. Chief Judge Blackburne-Rigsby is the daughter of Justice Laura D. Blackburne, retired, New York State Supreme Court. She acknowledges with gratitude the assistance of her Special Counsel, David Guo, Esq., and her judicial fellow, Ryan Cowdin, Esq., a graduate of The George Washington University Law School.

INTRODUCTION

President Barack Obama's judicial appointments broadly reflect the demographic characteristics of the current United States and law student populations.[1] I believe a diverse judiciary is critical to ensuring access to justice for all. In this Article, I want to focus particularly on how a diverse judiciary and increased civil legal aid can help bridge the gap between Blacks and Whites in terms of life expectancy and

1. President Obama has appointed more people of color and women onto the federal judiciary than any U.S. President in history, thus "dramatically improv[ing] the demographic diversity of the federal judiciary." *See* ALL. FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 4 (2016) [hereinafter BROADENING THE BENCH], http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf; NAT'L WOMEN'S L. CTR., WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO 1 (2016), https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud7.14.16.pdf (stating that, as of the report, President Obama had appointed 138 female judges, more than any other President to date); Sara Atske, *More Minority Federal Judges Have Been Appointed Under Democratic Than Republican Presidents*, PEW RES. CTR. (July 19, 2016), http://www.pewresearch.org/fact-tank/2016/07/19/minority-federal-judges-have-been-appointed-under-democratic-than-republican-presidents (noting that, as of the time of the report, President Obama had appointed fifty-five Black judges, thirty-three Hispanic judges, seventeen Asian judges, four judges from other minority groups, and 198 White judges, which, on a percentage basis, was higher than the next leading President, President Bill Clinton). In fact, President Obama has "nominated more than twice as many non-[W]hite judges" and "more than twice as many women . . . than did [his immediate predecessor] President George W. Bush." BROADENING THE BENCH, *supra*, at 4. According to the Federal Judicial Center, of President Obama's 332 judicial appointments, 42% have been women (140), 36% have been people of color (120), and 18% (61) have been African American. These calculations and numbers come from the *Federal Judicial Center's History of the Federal Judiciary* webpage and were determined based on a search of judges by nominating Presidents, gender, and race or ethnicity. *History of the Federal Judiciary Article*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Apr. 2, 2017). The United States Census Bureau estimated that, as of July 1, 2015, approximately 61.6% of the population was White, not Hispanic or Latino, 13.3% was African American, 17.6% was Hispanic or Latino, 5.6% was Asian, and about 1% was Native American. *Quick Facts*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/00 (last visited Feb. 16, 2017). According the American Bar Association's (ABA) most recent matriculation data, women comprise 51% of students entering law school and minorities comprise 32%. *See 2016 JD Matriculants by Gender & Race/Ethnicity, Statistics*, AM. BAR ASSOC., http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited Mar. 8, 2017).

access to health care. I will first discuss the theoretical arguments in favor of a diverse judicial branch. I will then explain why a diverse judiciary—both historically and presently—is an access to justice issue, using the "health gap" between Blacks and Whites as a case study. Finally, I will provide some recommendations on how we can close the "health gap" with a more diverse judiciary.

I. WHY IS DIVERSITY IN THE COURTS IMPORTANT?

There are three principal reasons that a more diverse judiciary is important.[2] First, a diverse judiciary is needed to promote democracy and to foster public trust and confidence in the judicial branch of government—especially among historically disadvantaged groups. The judiciary, like other branches of government, should be reflective of the people that it serves.[3] The Supreme Court appears to have endorsed this view of judicial representation when the Court interpreted the Voting Rights Act of 1965 in *Chisom v. Roemer*.[4]

In *Chisom v. Roemer*, a class of approximately 135,000 Black voters from Orleans Parish, Louisiana, challenged the selection method for Louisiana's Supreme Court justices from the New Orleans area.[5] Specifically, they claimed that the method of selecting the two New Orleans area justices "impermissibly dilute[d] minority voting strength" in violation of the Voting Rights Act.[6] The Fifth Circuit had previously held that judicial elections were not covered under the Act, reasoning that judges were not "representatives" for purposes of the Act since they need not be elected at all, depending on the system of judicial appointment used by each state.[7] A majority of the Supreme

2. *See* Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 Nw. U. L. Rev. 587, 590 (2011).

3. *Id.* (explaining that diversity helps remedy past systematic discrimination in the judicial selection process); Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 Ind. L.J. 1423, 1426 (2008) (noting that, according to Alexander Hamilton, "the judiciary is structured according to democratic principles but at the same time it must be structurally insulated from political pressures"). It also explains that a diverse judiciary signals "both explicitly and implicitly . . . that the judiciary is willing to hear all claims by all of its citizens in a fair and unbiased manner. When there is descriptive diversity, there is a public perception of fairness, and this makes the court system more legitimate." Vargas, *supra*, at 1429.

4. Vargas, *supra* note 3, at 1427 (explaining that the Supreme Court decision in *Chisom v. Roemer*, 501 U.S. 380 (1991), "can be read to support the view that for a judiciary to be fundamentally representative it must also be racially and ethnically diverse").

5. Chisom v. Roemer, 501 U.S. 380, 384 (1991).

6. *Id.* at 385.

7. *Id.* at 388 (referring to the Fifth Circuit decision in *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990)).

Court disagreed, concluding that the Voting Rights Act was enacted to remedy historic racial discrimination in voting and that "[i]t is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections [i.e., judicial elections] from that protection."[8]

Second and relatedly, diversity on the bench "serves as a symbol for the members of groups that have been historically underrepresented on the bench[.]"[9] Although this "role model" argument has been criticized for positioning minority judges as "cosmetic symbols, rather than as democratic representatives,"[10] Minority role models in the judiciary are symbolically important to encourage other individuals with diverse backgrounds to join the bench.

Last, and most importantly for purposes of this Article, a diverse bench allows for more diverse viewpoints to be part of the judicial decision-making process, which will result in better and fairer decisions.[11] "Implicit biases are [ ] biases based on implicit [or unconscious] attitudes or [ ] stereotypes."[12] Such biases can be based on race, gender, religion, or socio-economic status.[13] Judges, like all law-

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8. *Id.* at 403–04.

9. Scherer, *supra* note 2, at 590.

10. As now-President and Director Counsel of the NAACP Legal Defense Fund, Sherrilyn Ifill explains:

> By obscuring the potential for minority judges to transform judicial decision-making, the role model argument positions black judges as cosmetic symbols, rather than as democratic representatives. This emphasis draws attention to the racial "face" of the judge, rather than to the substance of a judge's decision-making or contribution to broadening the scope of judicial decision-making. A black "role model" judge is credited solely for being black and inspiring others, rather than assessed for his competence, performance or effectiveness as a representative.

Ms. Ifill also criticizes the public confidence argument:

> Likewise, the "public confidence" rationale fails as a sufficiently persuasive basis for mandating racial diversity on the bench. The public confidence rationale is, in fact, a distinctly disempowering justification for racial inclusion on the bench. It bases the value of diversity on the questionable aim of strengthening the appearance of justice, rather than on the goal of increasing actual fairness in the administration of justice. Given the wealth of evidence demonstrating that racial discrimination pervades the justice system in most states, prescribing "the appearance of justice" as a palliative to the African American community without the promise of actual fairness, invites rather than ameliorates a deepening crisis of confidence in our judicial system. It suggests that the appearance of justice is the best we can achieve.

Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 480–81 (2000).

11. Scherer, *supra* note 2, at 591.

12. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

13. *See id.* at 956 (identifying various potential bases for implicit bias, including race, gender, sexual orientation, etc.).

yers, carry the same 'cultural baggage' as other members of society."[14] Accordingly, just like other members of society, judges are prone to suffering from implicit, subconscious bias, which may affect their judicial-decision making.[15] For example, according to one recent implicit bias test conducted on judges, a vast majority of White judges and even a large percentage (44.2%) of Black judges demonstrated a preference for White litigants.[16] These implicit biases affect how different groups of people view the fairness of the justice system. "For example, [one study demonstrated that] 45% of [W]hite lawyers believe that less racial bias exists in the justice system than in the rest of society, while more than 90% of [B]lack lawyers feel that racism in the justice system is either the same as or greater than in other segments of society."[17] In another study, "83% of [W]hite judges surveyed believe[d] that [B]lack litigants are treated fairly in the justice system, while only 18% of [B]lack judges share[d] that belief."[18] Additionally, "[a]cross constitutional doctrines, poor people suffer diminished protection, with their claims for liberty and equality formally receiving the least judicial consideration. . . ."[19]

Accordingly, the appointment of diverse judges is important not only to buttress against implicit biases of other judges, but also to improve the deliberative processes by "assist[ing] colleagues to appreciate and resolve complicated questions involving issues such as economic inequality" and discrimination, thereby reducing implicit bias within the judiciary as a whole.[20] President Obama's diverse judicial appointments stem from his belief that judges should be attuned to the lives, concerns, and history of the litigants that come before

14. Ifill, *supra* note 10, at 434.

15. Gregory S. Parks, *Judicial Recusal: Cognitive Bias and Racial Stereotyping*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 681, 683 (2015) (explaining that "[r]esearch suggests that [cognitive biases] may influence judicial decision-making. For example, these types of shortcuts may lead to racial stereotypes such as associating race and crime. In turn, such automatic associations may lead to sentencing disparities").

16. *Id.* at 687 (citing study conducted in Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1205–06 (2009)).

17. Ifill, *supra* note 10, at 435.

18. *Id.* at 436.

19. Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008).

20. Carl Tobias, *Judge Thompson and the Appellate Court Confirmation Process*, 91 B.U. L. REV. 727, 740 (2011); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 346 (2012) (explaining that studies show that "White judges are far more likely to dispose of any employment discrimination case at the summary judgment phase than are minority judges").

them, and not elevate form over function in their decision-making.[21] A diverse judiciary, reflective of the community it serves, brings a broader perspective of views to the deliberative process, which allows judges to better understand the legal issues confronting litigants appearing before the court. "[J]udges who hail from different social or cultural backgrounds may provide a more nuanced understanding of facts, evidence, and credibility determinations than judges who lack such experience."[22]

However, there is a school of thought that believes that judicial diversity is not particularly important because judges should not bring their life-experiences into judicial decision-making, and that judges should simply apply the applicable legal rule or principle to the facts of the case.[23] While judges will arrive at the same conclusion given a particular set of facts because the applicable law yields a clear answer, there are some cases where judges, when interpreting the law and arriving at a decision, will reach a different decision or arrive at the same decision by a different analytical route, based on differing or nuanced views of a case, resulting from their diverse life experiences.[24]

More importantly, as Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, explains:

> [T]he effects of racial diversity on judicial decision-making should not be measured solely by looking at case outcomes in discrimination cases . . .; the value of diversity should be measured *by its effect*

21. Professor Thomas B. Colby explained in his article that, in his search for a replacement for Justice Souter, President Obama declared:

> I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book; it is also about how our laws affect the daily realities of people's lives—whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation. I view that quality of empathy of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes.

Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1962 (2012).

22. Weinberg & Nielsen, *supra* note 20, at 324.

23. *Id.* at 327.

24. *See, e.g.*, John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama's "Empathy Standard"*, 120 YALE L.J. ONLINE 89, 96–97 (2010) (observing that President Obama acknowledged that "[t]here were 'truly difficult' cases where 'the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision"). As Professor Gregory Parks notes, Justice Oliver Wendell Holmes, Jr., Justice Benjamin Cardozo, and Judge Jerome Frank of the Second Circuit subscribe to this philosophy. *See* Parks, *supra* note 15, at 68–82. More recently, Justices Sandra Day O'Connor, Thurgood Marshall, and Elena Kagan subscribe to the belief that life experience helps shape legal decisions. Rollert, *supra*, at 101.

> *on the deliberative process*. Even if [B]lack and [W]hite judges reach the same outcomes, we should value racial diversity if it brings alternative perspectives and analysis to the process and enriches the legal decision-making.[25]

Regardless of the rationale, I believe all of the above arguments share the important premise that a diverse judiciary will create greater public trust and confidence in the judiciary, particularly for minority communities. The Black population has a uniquely and historically strained relationship with the justice system.[26] Although there are many complex reasons for this, the law has at times played a role in perpetuating "social, cultural, and political" segregation between Blacks and Whites.[27] For example, there are stark racial disparities in criminal sentencing between Blacks and Whites.[28] In addition, Blacks still are affected by de facto "racial discrimination in housing opportunities, mortgage lending, access to employment . . . and educational opportunities."[29] One study of employment civil rights disputes filed in federal district courts showed that White judges were about four times more likely than Black judges to dismiss a case at the summary judgment level involving a *pro se* plaintiff—a type of litigant who is much more likely to be from a minority population.[30]

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25. The Hon. Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 How. L.J. 645, 650 (2010) (emphasis added); *see also* Ifill, *supra* note 10, at 451 ("Minority judges' ability to bring to the bench particular perspectives to help understand racial bias and discrimination should be conceived of as a valuable asset to judicial decision-making. The concept of discrimination is a difficult one, one which has been constantly shaped and re-interpreted over the past thirty years. In the absence of racial diversity on the bench, White judges are left to interpret and to analyze discrimination in the absence of input and analysis by legal decision-makers who can conceptualize legal discrimination from the perspective of the victims of discrimination.").

26. Ifill, *supra* note 10, at 408.

27. *Id.* at 430.

28. According to the ACLU:

> There are significant racial disparities in sentencing decisions in the United States. Sentences imposed on Black males in the federal system are nearly 20[%] longer than those imposed on [W]hite males convicted of similar crimes. Black and Latino offenders sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated [W]hite offenders and receive longer sentences than their [W]hite counterparts in some jurisdictions. Black male federal defendants receive longer sentences than Whites arrested for the same offenses and with comparable criminal histories. Research has also shown that race plays a significant role in the determination of which homicide cases result in death sentences.

ACLU, Racial Disparities in Sentencing 1 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

29. Ifill, *supra* note 10, at 429–30.

30. Weinberg & Nielson, *supra* note 20, at 344–45; Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Pub. Pol'y. 705, 714 (noting that the African Americans tend to file pro se 20.79% of the times versus 8.37% for Whites).

This strained relationship between the Black population and the justice system has resulted in many consequences. As I discuss in the following sections, one consequence is the "health gap:" the large disparity between the life expectancy and the quality of health care enjoyed by Whites as opposed to Blacks. This "health gap"[31] was created, at least in part, by a legal system lacking in diversity. I will first explain the historic legal roots of the health gap, and then I will discuss how a diverse judiciary is important to guard against legal decision-making that disproportionately affects minorities and other disadvantaged communities.

II. THE HEALTH GAP BETWEEN BLACKS AND WHITES

A. Introduction

Imagine that in Washington, D.C., at some point today, an African American baby boy is born, probably at Howard University Hospital, a historically African American hospital in Northwest Washington.[32] Just a little over two-and-a-half miles away, at George Washington University Hospital, a White baby boy is born at roughly the same time. Both children will grow up in Washington, breathing the same air and drinking the same water. At some point they may even pass each other on the street in this moderately-sized city of over 600,000 residents. Yet, if current statistics bear out, that African American boy will likely die a shocking fifteen years before the White boy.[33] An African American male born today in our nation's capital can expect to live to sixty-six, similar to men born in developing countries such as the Philippines[34] or India.[35] His White counterpart

31. The "health gap" in this context refers to the disparity in quality of health care and life expectancy between Black and White Americans. "Race not only affects socioeconomic status, biology, and physical environment; it also affects the way health care institutions function to provide services . . . Independent of economics, race affects the type and quality of health care treatment received." Vernelia R. Randall, *Racist Health Care: Reforming an Unjust Health Care System to Meet the Needs of African-Americans*, 3 HEALTH MATRIX 127, 131 (1993).

32. *See About Howard University Hospital*, HOW. UNIV. HOSP., http://huhealthcare.com/healthcare/hospital/about-huh (last visited Apr. 2, 2017) (explaining that Howard University Hospital was initially called "Freedmen's Hospital and provided a refuge where ex-slaves received" medical care that they were denied elsewhere).

33. Ted Eytan, *A Life-Expectancy Gap That Hasn't Changed in Fifteen Years*, COMMUNITY COMMONS (Sept. 23, 2014), http://www.communitycommons.org/2014/09/eytan-life-expectancy/ (based on data compiled from 2009).

34. *Philippines*, THE WORLD FACTBOOK (Mar. 2, 2016), https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html (ranking 160th in the world).

35. *India*, THE WORLD FACTBOOK (Mar. 16, 2016), https://www.cia.gov/library/publications/the-world-factbook/geos/in.html (ranking 163rd in the world).

should expect to live to eighty-one,[36] akin to world leading countries like Japan[37] and Iceland.[38] The difference between African American women and White women is only slightly better.[39] Nationally, the life expectancy gap between Blacks and Whites is about six years, and this gap has not statistically decreased over the last century.[40] Of course, there are various causes for this discrepancy in lifespan,[41] but it is undeniable that a large reason is the pervasive and systematic gap in the health care and economic opportunities provided to Blacks, as opposed to Whites, both in Washington, D.C., and across America.[42] In fact, statistics show that Blacks have lower health and quality of life across the board, including lower birth weights, higher infant mortality rates, higher obesity rates, and higher rates of diseases such as heart disease, cancer, and diabetes.[43] The causes of this racial disparity in health are multi-faceted and complex. My focus here, however, is specifically on the role that the law has historically played in perpetuating racial inequity in health care for African Americans.

36. Eytan, *supra* note 33 (identifying the life expectancy of African American men in Washington at 66 and that of White men at 80.8 years).

37. *Japan*, THE WORLD FACTBOOK (Mar. 16, 2016), https://www.cia.gov/library/publications/resources/the-world-factbook/geos/ja.html (ranking 2nd in the world).

38. *Iceland*, THE WORLD FACTBOOK (Feb. 25, 2016), https://www.cia.gov/library/publications/the-world-factbook/geos/ic.html (ranking 6th among the world).

39. Eytan, *supra* note 33 (identifying the life expectancy of African American women in Washington at 75.5 and that of White women at 86.1).

40. KAREN SCOTT COLLINS ET AL., COMMONWEALTH FUND, QUALITY OF HEALTH CARE FOR AFRICAN AMERICANS: FINDINGS FROM THE COMMONWEALTH FUND 2001 HEALTH CARE QUALITY SURVEY (Mar. 2002), http://www.commonwealthfund.org/~/media/files/publications/other/2002/mar/quality-of-health-care-for-african-americans—a-fact-sheet/collins_factsheetafam-pdf.pdf; Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DEPAUL J. HEALTH CARE L. 735, 742–43 (2005) (observing that the gap in life expectancy at birth has not "narrowed appreciably over the last century).

41. Lindsey Cook, *Why Black Americans Die Younger*, U.S. NEWS & WORLD REPORT (Jan. 5, 2015, 12:01 AM), http://www.usnews.com/news/blogs/data-mine/2015/01/05/black-americans-have-fewer-years-to-live-heres-why (ranking homicide as the third leading cause for the discrepancy between African American and White American males nationally).

42. *Id.*; *see also* Office of the Press Secretary, *Remarks by the President at the NAACP Conference*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (July 14, 2015, 4:54PM), https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference ("By just about every measure, the life chances for black and Hispanic youth still lag far behind those of their white peers. Our kids, America's children, so often are isolated, without hope, less likely to graduate from high school, less likely to earn a college degree, less likely to be employed, *less likely to have health insurance*, less likely to own a home.") (emphasis added).

43. *See* Cook, *supra* note 41.

B. Slavery, the Constitution, and the Beginnings of the "Health Gap"

Any frank discussion on how the legal system has historically impacted the health of African Americans must necessarily begin with a discussion of slavery in America. African Americans' first experience with the health system in this country was through the prism of slavery, and some disparities in health are vestiges of this history of racial segregation and slavery.[44]

The owning and selling of African slaves in America has its roots in traditional notions of contract and property law, not unlike the sale of goods or real property today.[45] Even back in the 17th century, however, the idea of people owning other people was suspect enough to trigger[46] affirmative laws preserving the institution of slavery.[47] For example, in 1664, Maryland enacted the first statute protecting slavery, which provided that "all [B]lacks then living in the colony or later imported into the colony, regardless of their present conditions of servitude, were to be slaves for life and that the condition of slavery was hereditary for all [B]lacks as well."[48]

Subsequently, upon the founding of the United States of America, the Constitution, in effect preserved the institution of slavery. "[S]lavery [has] played a significant role in American constitutional law."[49] Because slavery was a critical component of the agrarian economy in most of the thirteen colonies, it was important to preserve the system.[50] Yet, many individuals and even many lawyers and law students today do not know the extent of this "dark side" of

44. Outterson, *supra* note 40, at 747–48.

45. *See* Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courthouse*, 28 CONN. L. REV. 1, 14–15 (1995) ("[E]nslavement of [B]lacks from Africa was partially justified by the reality that the typical African could not speak, read, or write English, and had not been a party to the original contract by which he came to be transported to the American colonies and transferred to the employment/ownership of a colonist.").

46. *Id.* (noting that because the "social contract philosophies of Locke, Hobbes, and others [started] to gain[ ] ground, the danger increased that slaves would eventually question the right of their masters to own them without the consent of the slaves themselves," and that colonists turned to legislation to protect slavery).

47. *Id.*

48. *Id.*

49. Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 268 (2000) [hereinafter Finkleman, *Teaching Slavery*] (explaining that slavery is often not talked about in Constitutional Law classes due to an aversion to the topic).

50. Paul Finkelman, *How the Proslavery Constitution Led to the Civil War*, 43 RUTGERS L.J. 405, 408 (2013) [hereinafter Finkleman, *Proslavery Constitution*] (explaining that in 1787 slavery "was a powerful economic institution" and that, "[i]n 1787 the value of all the slaves in the United States exceeded that of any other form of property except real estate").

the Constitution. Specifically, there are three explicit clauses that protected or endorsed the system of slavery.[51] These clauses include the infamous "Three-Fifths Clause," U.S. CONST., art. I, § 2, cl. 3, which counted slaves as three-fifths of a person for purposes of state representation in Congress[52]; the "Fugitive Slave Clause," U.S. CONST., art. IV, § 2, cl. 3, which required all states—including states without slavery—to return runaway slaves "'on demand' of their masters[ ]"[53]; and the "Importation Clause," U.S. CONST., art. VI cl. 2, which protected the African slave trade until at least 1808.[54]

The Constitution is the "supreme Law of the Land,"[55] and the judiciary is bound to uphold the Constitution. Accordingly, racism and prejudice, both explicit and implicit, towards African Americans that a large segment of society maintained during the slave-owning era were bolstered by many judicial opinions of the time.[56] This can be seen most notoriously in the 1857 Supreme Court case, *Dred Scott v. Sandford*,[57] which, upon present-day reflection, is considered one of the worst and most racist decisions in the Court's history.[58]

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51. Finkleman, *Teaching Slavery*, *supra* note 49, at 262 (arguing that slavery is rarely mentioned in most law school Constitutional Law courses).

52. U.S. CONST., art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which *shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.*") (emphasis added).

53. U.S. CONST., art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

54. U.S. CONST., art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall *not be prohibited* by the Congress *prior to the Year one thousand eight hundred and eight*, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.") (emphasis added); Finkleman, *Teaching Slavery*, *supra* note 49, at 262 (explaining that in addition to the three overt clauses protecting slavery, many other clauses in the Constitution also "were fully or partially included in the document to accommodate or protect slavery[,]" such as "the ban on expert taxes," the "Insurrections Clause," the "Domestic Violence Clause," and "the provisions for the election of the president by the electoral college").

55. U.S. CONST., art. VI cl. 2.

56. *See, e.g.*, Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" for the Defendant*, 12 LEWIS & CLARK L. REV. 1219, 1220 (2008) [hereinafter Finkleman, *Dred Scott*] (observing that the Supreme Court decision in *Dred Scott* is universally panned as a result of racism of the time).

57. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

58. *See* Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271–72 (1997) ("Commentators across the political spectrum describe Dred Scott as 'the worst constitutional decision of the nineteenth century,' 'the worst atrocity in the Supreme Court's history,' 'the most disastrous opinion the Supreme Court has ever issued,' 'the most odious action ever taken by a branch of the federal govern-

The facts of this case are well-known: Mr. Dred Scott was born a slave and lived in St. Louis, Missouri, a slave state, where he was owned by Dr. John Emerson. Mr. Scott traveled with Dr. Emerson to Illinois, a "free state," and Minnesota, a then-free territory, before returning to Missouri in 1842.[59] In 1846, Mr. Scott tried to purchase his freedom from Dr. Emerson's widow and, when she refused, he sued for his and his family's freedom.[60] Mr. Scott argued that his time spent on "free soil" made him a free person.[61] Chief Justice Robert B. Taney, writing for the Court, held that Mr. Scott had no right to sue for his freedom because neither free nor enslaved African Americans could be considered citizens of the United States.[62] Chief Justice Taney wrote, "a negro, whose ancestors were imported into this country, and sold as a slave could not become an American citizen."[63] The Court further held that Congress could not ban slavery in the American territories.[64]

The *Dred Scott* decision was plagued with racist language. Framing the issue as one of constitutional interpretation, Chief Justice Taney wrote that African Americans were never intended to be included under the word "citizens" as described in the Constitution because "they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their [i.e., White] authority[.]"[65] Chief Justice Taney's judicial decision did not merely apply the law to the applicable facts, but rather was an expression of his and the Court's bias against African Americans.

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ment,' a 'ghastly error,' a 'tragic failure to follow the terms of the Constitution,' 'a gross abuse of trust,' 'a lie before God,' and 'judicial review at its worst.'") (footnotes omitted).

59. *Id.* at 275.

60. Finkleman, *Dred Scott*, *supra* note 56, at 1226.

61. *See* Graber, *supra* note 58, at 275.

62. *Id.* at 275–76.

63. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

64. Finkleman, *Dred Scott*, *supra* note 56, at 1231 (noting that alternatively, slaves were a "specially protected form of property" and thus protected from government appropriation under the Constitution).

65. *Scott*, 60 U.S. (19 How.) at 404–05 (noting the Court went on to state that it was not making a judgment call on whether that constitutional intent is correct policy or not, stating only that "[i]t is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted").

As the law of the land,[66] slavery ensured that any medical attention that was actually given to African Americans was substandard. In fact, "health care" for slaves was more akin to "veterinarian" health care given to livestock, i.e., for the benefit of the "property" owner and when necessary for mitigating economic losses.[67] For example, according to one study of "antebellum Virginia," White slave owners provided "[s]anitary and public health measures" for their slaves because White slave owners lived in close physical proximity to them.[68] This system was "paternalistic and primarily served the interests of the master."[69] Moreover, slavery justified morally abhorrent human experimentation. In one study in 1800, "hundreds of slaves were [purposefully] infected with small pox."[70] This type of treatment fostered "Black suspicion of white medicine," which to some extent continues to this day.[71]

C. The "Separate but (Not) Equal" Doctrine

The legal emancipation of slaves pursuant to President Abraham Lincoln's Emancipation Proclamation[72] following the Civil War did not necessarily entail better or improved health care for the newly-freed African American population, given the stark differences in social and economic conditions between them and White Americans.[73] In fact, post-Emancipation, Blacks were no longer entitled to even rudimentary health care provided by their slave owners, and were forced to fend for themselves "to purchase or contract for whatever health care they could afford from whoever would be allowed to serve

66. Finkleman, *Proslavery Constitution*, *supra* note 50, at 422 ("The protections for slavery . . . set the stage for a proslavery national government and a proslavery jurisprudence in the nineteenth century.").

67. *See* Outterson, *supra* note 40, at 748–49 (comparing the health given to Black slaves as akin to taking "care" of "livestock" and "chattel property").

68. *Id.* at 749 (providing that this concept was called "germs have no color line"); *see also* Randall, *supra* note 31, at 146–47.

69. Randall, *supra* note 31, at 146–47.

70. Dania Palanker, *Enslaved by Pain: How the U.S. Public Health System Adds to Disparities in Pain Treatment for African Americans*, 15 GEO. J. POVERTY L. & POL'Y 847, 855–56 (2008) (noting other experiments such as "pouring boiling water on the spinal column and performing experimental surgery without anesthesia").

71. Outterson, *supra* note 40, at 749–51.

72. *Emancipation Proclamation*, HIST. CHANNEL, http://www.history.com/topics/american-civil-war/emancipation-proclamation (last visited Mar. 9, 2017) (explaining that President Lincoln proclaimed on September 22, 1862, that all slaves in the South "shall be then, thenceforward, and forever free").

73. Outterson, *supra* note 40, at 751.

them."[74] Some modern scholars believe that African Americans actually became *worse* off after the Civil War as "they lost the paternalistic slave health care system and very little was available to replace it."[75] What was available—usually charities, government health programs, and private health care providers—fell woefully short of need.[76]

With the rise of modern medicine and hospitals, many African Americans found themselves excluded from modern health care as a result of deeply imbedded racial animus and legal segregation.[77] African Americans who could afford health care usually had to resort to a "segregated medical system" of largely "segregated Black medical" professionals, who were themselves excluded from the mainstream medical profession.[78] White hospitals that actually would treat African Americans did so in lower-quality segregated wards "often used for training white physicians, residents[,] and interns."[79] In addition, the judiciary continued to endorse the disparate treatment of African Americans in its decisions, notwithstanding the adoption of the Fourteenth Amendment in 1868, which provides 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*."[80]

The judicially created doctrine of "separate but equal"—the idea that legally mandated segregation between races is consistent with the Equal Protection Clause of the Fourteenth Amendment—is most fa-

74. *Id.* ("Free blacks suffered appalling health with a mortality rate approximately double the white rate.").

75. *Id.* at 751–52 ("A slave owner suffered financially if a slave died or missed work due to illness or injury. Antebellum landlords with Black contract laborers did not have similar financial incentives.").

76. *Id.* at 752 (highlighting that the federal government and Northern philanthropists provided some limited health care relief to the newly freed African American population); Randall, *supra* note 31, at 147 (observing that the Bureau of Refugees, Freedmen and Abandoned Lands was instituted to furnish medical services to the African American population, but that its effectiveness ended after the Compromise of 1877 which ended Reconstruction and the country's first nascent attempt at affirmative action).

77. Outterson, *supra* note 40, at 757 (concluding that health care was a "relatively free market, mostly unencumbered by regulation" following the Civil War).

78. *Id.* at 760 (chronicling that African American doctors were excluded from the all-White American medical Association and "denied admitting privileges to hospitals, even to segregated wards").

79. *Id.* at 758.

80. U.S. CONST. amend. XIV, § 1 (stating in full, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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").

mously embodied by the 1896 Supreme Court decision in *Plessy v. Ferguson*.[81] In *Plessy*, Mr. Homer Plessy, who was seven-eighths Caucasian and one-eighth African American, challenged a Louisiana law passed in 1890 providing for separate railway carriages for Caucasian and "colored" persons.[82] He claimed it violated the Equal Protection Clause of the Fourteenth Amendment.[83] The Supreme Court disagreed, and Justice Henry Billings Brown held that while,

> [t]he object of the amendment was undoubtedly to *enforce the absolute equality* of the two races before the law . . . *it could not have been intended to abolish distinctions based upon color*, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[84]

Justice Brown's rationale and decision was divorced from the reality of how African Americans and Caucasians actually lived under such a regime. But such explicit support from the highest court in the land for the "separate but equal" doctrine only helped to entrench a system, particularly in the South, where African Americans, although now "free persons," were treated unequally under the law.[85] Disparate treatment of African Americans manifested itself in all aspects of life, including education, transportation, bathrooms, and other public accomodations. In the context of health care, separate but equal laws continued to allow many hospitals to segregate African Americans or even exclude African Americans entirely.[86] Consequently, "[w]ith few exceptions," African Americans were relegated to "black-only hospitals," which had inferior equipment, segregated wards in the

81. S*ee* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1956).

82. *Id.* at 538, 541 (noting that Mr. Plessy was, specifically, arrested for violating the Louisiana statute when he took a seat in a passenger car reserved for Whites only passengers, and he thereafter filed suit against the judge of the criminal district court, Judge John H. Ferguson, who convicted him of violating said law).

83. *Id.* at 542.

84. *Id.* at 544.

85. Ronald Turner, *Plessy 2.0*, 13 Lewis & Clark L. Rev. 861, 878–81 (2009).

86. Outterson, *supra* note 40, at 757 (noting that a quarter of all hospitals in 1922 excluded African Americans); Palanker, *supra* note 70, at 857 (stating that African Americans were excluded from many medical facilities "during the first 65 years of the twentieth century").

"back room," or nothing at all.[87] African American physicians were also denied admitting privileges at many hospitals.[88] It is unsurprising that by 1928, "each [W]hite citizen of the United States ha[d] fourteen times as good a chance at proper hospital care as ha[d] [an African American]."[89] And even by 1941, only 45.2% of Black childbirths were in hospitals compared to 87.1% of Caucasian childbirths.[90] Such disparities in the medical profession contributed to African Americans' continued mistrust of the medical profession.[91]

D. *Simkins v. Moses H. Cone Memorial Hospital* and the Civil Rights Act of 1964

As a result of African Americans' and other minorities' persistent fight for equality and civil rights during the first half of the twentieth century, legal segregation began to weaken and break down. The "separate but equal" doctrine was rejected by a unanimous Supreme Court in *Brown v. Board of Education*, in the context of public schools.[92] The Court found that, "[s]eperate educational facilities are inherently unequal" and "by reason of segregation . . . deprive[ ] [Black students] of the equal protection of the laws guaranteed by the Fourteenth Amendment."[93]

However, while the pivotal *Brown* decision is widely taught in schools and etched into our collective conscious, much less known is the Fourth Circuit's vital 1963 decision in *Simkins v. Moses H. Cone Memorial Hospital*.[94] *Simkins* prohibited private hospitals from discriminating against African American patients and doctors and was decided just one year prior to the enactment of the Civil Rights Act. *Simkins* dealt with the question of whether a hospital operating pursu-

87. Palanker, *supra* note 70, at 857.

88. *Id.* (stating that there was a lack of African American doctors as "most medical schools" refused to admit them).

89. Outterson, *supra* note 40, at 757 (quoting H.M. Green, *Hospitals and Public Health Facilities for Negros*, 55 PROC. THE NAT'L CONF. OF SOC. WORK 179, 179–80 (1928)).

90. Palanker, *supra* note 70, at 857.

91. Between 1932 and 1972, the federal government sponsored a study whereby four hundred African American men with syphilis were studied for its effect over the course of forty years, even after a cure was discovered in 1947, called the "Tuskegee Experiment." The study only ended after the New York Times published an exposé in 1972. *Id.* at 855.

92. Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954); *see also* Ifill, *supra* note 10, at 488 (explaining that while White judges "will not share the common historical and experiential bonds of racial subordination as blacks[,]" [w]hite Judges can understand and represent "outsider voices in judicial decision-making").

93. *Brown*, 347 U.S. at 495.

94. Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc), *cert. denied* 376 U.S. 938 (1964).

ant to the Hill-Burton program, a federal and state government program designed to help finance the construction of hospitals, could segregate or exclude African Americans from its care under the Constitution.[95] The Hill-Burton Act was sponsored by Senator Lister Hill, an Alabama Democrat and segregationist, and Senator Harold Burton, a Republican from Ohio.[96] The Hill-Burton Act specifically contemplated that federal grant money would be used to build segregated hospitals by delegating to the states the responsibility of determining the "health facility needs of their populations."[97] While there is language within the original Act that the state-drafted health facility plan "would assure adequate hospital facilities without discrimination on account of race, creed, or color," an exception existed within the Act that essentially swallowed the rule.[98] The Act allowed for the state to provide "separate hospital facilities" for "separate population groups, if the plan made an equitable provision on the basis of need for facilities and services of like quality for each group."[99]

In a three-to-two en banc decision by the Fourth Circuit, the court ruled that the two defendant hospitals Moses H. Cone Memorial Hospital and the Wesley Long Community Hospital were considered "instrumentalities of government" as a result of their participation in the Hill-Burton program.[100] Consequently, the Fifth and Fourteenth Amendments of the Constitution prohibited these hospitals from discriminating against individuals on the basis of race.[101] Moreover, the Fourth Circuit also held that the provision of the Hill-Burton Act allowing for separate but equal facilities was unconstitutional.[102]

95. *Id.* at 960–61 ("The threshold question in this appeal is whether the activities of the two defendants . . . which participated in the Hill-Burton program, are sufficiently imbued with 'state action' to bring them within the Fifth and Fourteenth Amendment prohibitions against racial discrimination. Beyond this initial inquiry lies the question of the constitutionality of a portion of the Hill-Burton Act (Hospital Survey and Construction Act), 60 Stat. 1041 (1946), as amended, 42 U.S.C.A. § 291e (f) . . .").

96. Outterson, *supra* note 40, at 767 ("Segregation and the Hill-Burton program were fellow travelers from the beginning.").

97. *Id.* at 768.

98. David Barton Smith, *Healthcare's Hidden Civil Rights Legacy*, 48 ST. LOUIS U. L.J. 37, 46, 46 n.40 (2003) (referring to section 622 (f) of the original legislation that was subsequently repealed in 1964).

99. *Id.* (asserting that the Hill-Burton Act exception was the "only" federal legislation of the twentieth century that explicitly permitted federal money to be used on a racially exclusionary manner).

100. Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 970 (4th Cir. 1963) (en banc), *cert. denied* 376 U.S. 938 (1964).

101. *Simkins*, 323 F.2d at 967–68.

102. *Id.* at 969.

The Fourth Circuit's decision must be viewed in context; it was decided during the height of the Civil Rights Movement, shortly before the passage of the Civil Rights Act of 1964.[103] Title VI of the Act prohibited hospitals that received federal funds from discriminating on the basis of race.[104] Consequently, "[h]ospitals were forced to desegregate, virtually overnight, to ensure they could receive Medicare funds."[105] The Civil Rights Act of 1964[106] was critical in prohibiting racial discrimination in, among other spheres of life, "public accommodations" and "in federally assisted programs."[107]

E. Aftermath and Implicit Bias in the Health Care System Today

Legalized racism in the health care system or segregation in hospitals has mostly become a thing of the past. Thanks to the *Simkins* decision and the Civil Rights Act, "[i]n heavily segregated communities, desegregation of the hospitals translated into *immediate health gains for Blacks*."[108] Yet, as with emancipation, desegregation of hospitals and medical care led to some unintended consequences. Historically African American hospitals, created as a result of the "separate but equal" regime, fell onto hard times as many of them either closed down or merged with previously exclusively-White hospitals.[109] Other previously White hospitals, in response to "forced desegregation," abandoned African American neighborhoods, leading to a shortage of health facilities.[110] Changes in the law could not change many of the prejudices and norms that had been built up in society through slavery, segregation, and Jim Crow over the past two-hundred-plus years.

Against this historical backdrop, it is unsurprising that there are still significant racial disparities in health care, leading to lower quality care and shorter life expectancies for African Americans.[111] These disparities are both "structural" and "institutional;" *structural*, in the

103. Smith, *supra* note 98, at 48–49 (noting that the Civil Rights Act was also critical to ensuring that hospitals were desegregated).

104. Palanker, *supra* note 70, at 857–58 ("The passage of Title VI and subsequent creation of Medicare had the greatest impact on hospital desegregation.").

105. *Id.*

106. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

107. *Id.*

108. Outterson, *supra* note 40, at 775 (noting for example, a study on African American infant mortality in Mississippi found a "large reduction" between 1965 and 1971) (emphasis added).

109. Smith, *supra* note 98, at 56 ("The institutions that cared for blacks and the poor before Medicare was enacted were the major casualties . . . ").

110. Palanker, *supra* note 70, at 858.

111. Outterson, *supra* note 40, at 738.

sense that Whites had greater access to quality health care, and *institutional*, in the sense that there is a lack of health facilities in areas where African Americans live.[112] There are also potential physician implicit biases toward African Americans, which may mirror the implicit biases that minorities face in the justice system.[113] This is a problem that is difficult to remedy. In medicine, physician diagnosis and judgment is critical to ensuring good health care and trust in the medical system.[114] However, physicians "may be less likely to provide [B]lack patients than [W]hite patients with aggressive therapies for life-threatening conditions, effective preventive care[,] and effective pain relief."[115] Finally, according to some legal scholars, African Americans, as a result of their collective experiences, are also "biased" against the health care system—"[y]ears of discrimination by institutions and actors in the public health system have created mistrust among the African American community."[116]

III. A DIVERSE JUDICIARY AND THE HEALTH GAP

A diverse judiciary not only promotes public trust and confidence in the judicial system,[117] but also helps to ensure that judicial decision-making considers a wide variety of viewpoints.[118]

Although progress has been made to make the judiciary more diverse, as a whole, the judiciary is still predominantly White and male.[119] In state courts, where judges are selected through a variety of methods, including gubernatorial appointments, direct elections, and

112. Ruqaiijah Yearby, *Sick and Tired of Being Sick and Tired: Putting an End to Separate and Unequal Health Care in the United States 50 Years After the Civil Rights Act of 1964*, 25 HEALTH MATRIX 1, 11–12 (2015) (stating that structural biases also relegate African Americans to lower-quality schools, unemployment and underemployment, and jobs without health insurance); *see also* Randall, *supra* note 31, at 144–60 (providing an excellent summary of analysis of exactly how institutional racism in the health care system deny African Americans equal care).

113. Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 218 (2003) (noting that physicians may be unconsciously employing race-based assumptions or stereotypes when prescribing treatment).

114. *Id.* at 196 ("A patient's trust in his physician in act in the patient's best interest is an essential ingredient in the therapeutic relationship.").

115. *Id.* at 218 (explaining that differences in treatment "cannot be explained away by clinical or nonclinical factors independent of the patient's race").

116. Palanker, *supra* note 70, at 854 (concluding African American mistrust of the health care system is greater than that of other racial and ethnic groups and deeply engrained).

117. *See* Blackburne-Rigsby, *supra* note 26, at 649 (citing a 2003 American Bar Association report that diversity on the bench promotes public confidence in the courts).

118. Tobias, *supra* note 20, at 740.

119. CIARA TORRES-SPELLISCY ET AL., IMPROVING JUDICIAL DIVERSITY 1 (2010) (explaining that every demographic group other than White males are underrepresented when compared to their share of the country's population).

retention elections,[120] White men still comprise 57% and 58% of trial and appellate courts, respectively, despite the fact that White men only make up 30% of the United States' population.[121] In contrast, people of color, both men and women, only make up 17% of the judges on the state trial courts and 20% of the judges on the state appellate courts, whereas they make up nearly 40% of the United States' population.[122]

In addition to a need for a more diverse bench, the legal community understands that there is a need for greater civil legal aid to improve access to justice. Improved civil legal aid is also important to improving the health of African Americans suffering from the "health gap."[123] "The fundamental causes of health [care issues] are found in people's social resources. Such resources for [good] health [care] include income, wealth, education, employment, financial assistance, food security, housing, transportation, social inclusion, and access to care."[124] Many of these "social resources" can be secured or improved through the assistance of legal counsel to help in civil legal proceedings. An attorney can help improve a litigant's chance to secure unemployment benefits, for example. Securing such legal benefits can help improve financial stability and health in the long run.[125] In fact, "[m]uch of the work of civil legal aid attorneys and other poverty lawyers centers on obtaining access to basic needs including income, housing, utilities, food, and medical care," which all contribute to better health.[126]

There is a link between greater access to legal assistance and improved health care.[127] However, more studies are needed to quantify and qualify exactly what types of assistance best contribute to narrow-

120. *Methods of Judicial Selection*, AMERICAN JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Jan. 30, 2017).

121. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 7 (2016), http://gavelgap.org/pdf/gavel-gap-report.pdf.

122. *Id.* (finding specifically, women of color make up 8% on both the trial and appellate benches while men of color make up 9% and 12% on the trial bench and appellate bench, respectively).

123. James Teufel et al., *Legal Aid Inequities Predict Health Disparities*, 38 HAMLINE L. REV. 329, 331 (asserting there is a "smaller but growing body of research on the impact of civil legal aid services on health outcomes").

124. *Id.* at 339.

125. *Id.* at 355 ("A growing body of evidence supports that legal representation results in improved health outcomes.").

126. *Id.* at 354.

127. *Id.* at 353 (stating that the "link between civil legal aid inequality and health was as strong, if not stronger, than the link between income inequality and health").

ing the "health gap."[128] Relatedly, additional studies are needed to assess how increased civil legal aid can improve health care for minority communities.

IV. RECOMMENDATIONS

First, it is incumbent upon all lawyers to do their part to undertake in pro bono services for lower-income and indigent clients. Not only is it the right thing to do, it is also a part of an attorney's professional obligations in virtually all jurisdictions. The American Bar Association's Model Rules of Professional Conduct Rule 6.1 recommend that a lawyer aspire to render *at least fifty-hours of pro bono legal services per year* going to "persons of limited means" or organizations designed to address the legal needs of persons of limited means.[129] However, a recent American Bar Association Study on this issue found that only 36% of those surveyed provided the recommended fifty or more hours of pro bono services.[130] 20% of attorneys provided no pro bono services.[131]

Second, we need to develop innovative and explicit measures that maximize our finite civil legal aid resources in an effort to reduce the "health gap." One such inventive measure is "Medical-Legal Partnerships" which "integrate poverty lawyers as part of the health care team to better address the underlying social, legal[,] and economic challenges" facing patients who are low-income.[132] In a pilot study on the effectiveness of "Medical-Legal Partnerships" or "MLPs," a study of twenty cancer patients who received legal assistance revealed that "75% of patients interviewed said legal assistance reduced stress, 50% reported that receipt of legal assistance had a positive effect on their family or loved ones, 45% said legal assistance positively affected their financial situation, and 30% reported that legal assistance helped them maintain their treatment regimen."[133] Moreover, the pilot study found that adding an attorney to the medical team increased a pa-

128. *Id.* at 357.

129. MODEL CODE OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N, Discussion Draft 1983).

130. A.B.A. STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS, at vii (2013).

131. *Id.* at vi.

132. Teufel et al., *supra* note 123, at 354 ("The MLP model provides a mechanism for health care professionals and attorneys to work together to deliver care in a more holistic manner.").

133. Dana Weintraub et al., *Pilot Study of Medical-Legal Partnership to Address Social and Legal Needs of Patients*, 21 J. HEALTH CARE FOR THE POOR AND UNDERSERVED 157, 159 (2010) (stating that another study found that MLPs were financially sustainable).

tient's awareness of free legal services, increased access to food and income support, and decreased other barriers to health care.[134]

Lastly, diverse judicial leadership is important for ensuring greater fairness and access to justice in the court system. Judicial leadership is important within the court system, and within the legal community and the greater community as a whole, for addressing racial, ethnic, and gender discrimination in the courts and for reducing barriers that prevent access to justice by low and moderate income citizens.

CONCLUSION

The "health gap" between Blacks and Whites in this country is the result of a set of complex social, historical, and *legal* causes. A diverse judiciary will promote greater public trust and confidence in the courts. Further, diverse judicial leadership is needed to increase civil legal aid for lower-income and minority citizens struggling with unemployment, workers compensation, and family, law issues among others. Addressing these problems through increased civil legal aid can potentially improve the long-term health prospects, reduce barriers to health care, and start to diminish the systemic "health gap" for minorities.

134. *Id.* at 165.

Evaluating President Obama's Appointments of Judges from a Conservative Perspective: What Did the Election of Donald Trump Mean for Popular Sovereignty?

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INTRODUCTION: PRESIDENT OBAMA'S JUDICIAL APPOINTMENTS: THE NUMBERS

A first question that might be asked about President Obama is: what sort of numerical impact did he have on the federal judiciary? By the conventional measures, he did his share to place judges with his judicial perspective on the bench. I will address below, in more detail, just what that judicial perspective was, and the problems I have with it; but to begin, it should be observed that as far as the numbers are concerned, President Obama's appointments were similar in quantity to those of recent Presidents. He succeeded in placing two liberal justices on the United States Supreme Court: Sonia Sotomayor and Elena Kagan, both women, and those two appointments resulted in more women on the Court than at any time in our history.[1] The total number of Obama Article III judgeship nominees to be confirmed by the United States Senate is 329, including two justices to the Supreme Court of the United States, fifty-five judges to the United States Courts of Appeals, 268 judges to the United States district courts, and four judges to the United States Court of International Trade.[2] Looking just at recent two-term Presidents, George W. Bush, Bill Clinton, and George H.W. Bush also had two Supreme Court appointments confirmed, while Ronald Reagan had three.[3] Comparing Courts of Appeals appointments, Mr. Obama's figure of fifty-five is greater than George H.W. Bush's of forty-two, but less than that of Ronald Reagan (eighty-three), Bill Clinton (sixty-six), or George W. Bush (sixty-three).[4] President Obama's District Court appointments (270) are fewer than those made by Bill Clinton (306) or Ronald Reagan (292),

1. This was a total of three women, since one, Ruth Bader Ginsberg, a Clinton appointee, was already on the Court.

2. *Members of the United States Supreme Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 27, 2017); *see also Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges/search/advanced-search (last visited Apr. 14, 2017).

3. U.S. CTS., JUDGESHIP APPOINTMENTS BY PRESIDENT, www.uscourts.gov/sites/default/files/apptsbypres_0.pdf.

4. *Id.*

but more than those made by George H.W. Bush (149), or George W. Bush (263).[5]

My assignment for my panel at the Symposium was, from the perspective of a conservative, to evaluate the performance of President Obama in appointing judges. What, then, is such a perspective, and how can it inform what one might say about President Obama and judges? It has been suggested that the very notion of the rule of law *is* a conservative doctrine,[6] which might lead one to think that even a man of the left, such as President Obama, if he appointed judges sworn to uphold the law (which all of them are), might inevitably appoint conservative judges. It turns out however, that at this time, in the early twenty-first century, the old view, that the rule of law was conservative, no longer dominates.

I. PRESIDENT OBAMA'S VIEW OF THE JUDICIARY: A CURRENT PARTY DIVISION OVER BLACKSTONE AND BENTHAM

In particular, we are now at a peculiar moment in our jurisprudence where we have our two major political parties starkly divided over many things, but over none as much as over what ought to be the role of judges in our polity. It should be admitted that from the very beginnings of Western philosophy, there was disagreement about the nature of law itself. It is usually suggested that all Western philosophy is but "footnotes" to Plato,[7] and that Plato recognized a core ambiguity over what we now call "justice," the aim of a system of laws. In his great dialogue, widely recognized as his most important work on the nature of government, "The Republic,"[8] Plato explores the nature of

5. *Id.*

6. "The esteemed American legal historian Morton Horwitz takes issue with [E.P.] Thompson's claim that the Rule of Law is an 'unqualified human good' because, he argues, it is a 'conservative doctrine' that actually impedes 'the pursuit of substantive justice.'" Daniel H. Cole, *'An Unqualified Human Good': E.P. Thompson and the Rule of Law*, 28 J.L. & SOC'Y 177, 190 (2001) (quoting Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977)).

7. "The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato." ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 39 (1978). On this idea, see e.g., *Western Philosophy As "Footnotes To Plato"*, AGE-OF-THE-SAGE.ORG, http://www.age-of-the-sage.org/philosophy/footnotes_plato.html (last visited Mar. 27, 2017).

8. As a seminal text, there are countless translations of The Republic. One relatively ubiquitous contemporary edition is PLATO, THE REPUBLIC OF PLATO (Allan Bloom, trans., 2d ed. 1991). There is a new third edition, published in 2016, with an introductory essay by Adam Kirsch.

law and justice and asks whether it ought to be understood as something expressing timeless truths; or whether it simply ought to be viewed as the "advantage of the stronger," as Plato's character, Thrasymachus maintained;[9] or, to use the contemporary aphorism, whether we ought to recognize that "might makes right." Throughout Anglo-American history there have been reflections of this fundamental jurisprudential question. Sir William Blackstone, the greatest expositor of the English Common Law (the body of doctrine governing how courts decided public and private law cases) firmly believed that the common law was timeless and reflected nothing less than the plan of God for man.[10] His great contemporary critic, Jeremy Bentham,[11] however, argued that Blackstone was simply rationalizing arbitrary rule by those with wealth and power in England.

A similar debate breaks out from time to time in American history, and ours is one of those times. Until relatively recently, however, there was something of a consensus in American legal circles that Blackstone got it right, and, similarly, there was a broad consensus in American society that we were devoted to the rule of law, that the law and the Constitution reflected timeless truths and principles of justice, and that we were essentially all agreed that the role of judges was to follow the pre-existing law. For example, in our most fundamental exposition of constitutional law, *The Federalist*, such a Blackstonian sentiment was clear. Following Montesquieu, a contemporary of Blackstone, *Federalist 78*—the most famous of *The Federalist* dealing with the judiciary—argued that when judges strayed from the rules formerly laid down, when they assumed a legislative role, they were, in effect, moving us toward tyranny and away from liberty.[12]

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9. The language "advantage of the stronger," appears in Bloom's 2nd edition. *Id.*, at 15, Book I, line 338 c. PLATO, THE REPUBLIC OF PLATO 15 (Allan Bloom, trans., 2d ed. 1991) [hereinafter Bloom, THE REPUBLIC]. In Desmond Lee's translation, the line is rendered as "justice or right is simply what is in the interest of the stronger party." PLATO, THE REPUBLIC 19 (Desmond Lee, trans., 2d ed. 1974).

10. For Blackstone and his great four volume treatise on the Common Law (1765-69), see generally STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW (2017) [hereinafter PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW], at Chapter 1, and sources there cited.

11. For Bentham's famous attack on Blackstone, see JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT: BEING AN EXAMINATION OF WHIT IS DELIVERED, ON THE SUBJECT OF GOVERNMENT IN GENERAL IN THE INTRODUCTION OF SIR WILLIAM BLACKSTONE'S COMMENTARIES (1776).

12. *The Federalist*, a series of essays written by Alexander Hamilton, James Madison, and John Jay, urging the New York Constitutional Ratifying Convention to approve the 1787 document, has become the acknowledged best source for the original understanding of that document. The famous remarks of Alexander Hamilton, quoting Montesquieu on the appropriate

It must be recognized, however, that since at least the time of the New Deal, and occasionally before, there has been an emerging feeling in the bar, in the American legal academy, and to an accelerating extent in the courts, that it is the job of judges to keep the law abreast of the times. Stated slightly differently, as now frequently maintained, it is especially the province of Justices on the Supreme Court to implement a "Living Constitution,"[13] especially, to alter the content of the Bill of Rights and the notions of due process and equal protection in the interests of equality, fairness, and democracy. This view of law and the Constitution, associated with "The Modern Mind,"[14] was clearly reflected in then-candidate Obama's famous statements that he wanted to appoint Justices and judges who would know what it was like to be a member of a minority community or to be a single mother; that he wanted to appoint to the judiciary judges with "empathy" who could sympathize with the downtrodden, and, presumably, render decisions which would lighten their burden.[15]

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role of judges occur in Federalist 78: "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" THE FEDERALIST PAPERS: NO. 78 (Alexander Hamilton), http://avalon.law.yale.edu/18th_century/fed78.asp (last visited Mar. 27, 2017). Hamilton is quoting CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 173 (1748). The most widely available, accessible, and affordable edition of the Federalist is probably ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS (Clinton Rossiter et al., eds., 1999).

13. One good definition of this "Living Constitution" idea is given in Adam Winkler, *A Revolution Too Soon: Woman Suffragists and The "Living Constitution*," 76 N.Y.U. L. REV. 1456, 1463 (2001) ("Based on the idea that society changes and evolves, living constitutionalism requires that constitutional controversies, in the words of Justice Oliver Wendell Holmes Jr., 'must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'" (internal citation omitted)). For seminal works on the Living Constitution approach, see, e.g., Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963), and STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

14. For the great legal realist argument by Jerome Frank, setting forth the claim that the law is always inherently uncertain, and that it is a mistake to think that the law is anything other than the expressed will of the judges, see JEROME FRANK, LAW AND THE MODERN MIND (1930), recently reissued, JEROME FRANK, LAW AND THE MODERN MIND (2009) (including an introduction by Brian Bix).

15. Candidate Obama made this point in a speech before Planned Parenthood Action Fund, July 17, 2007, where he stated that "Justice Roberts said he saw himself just as an umpire but the issues that come before the Court are not sport, they're life and death. And we need somebody who's got the heart—the empathy—to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor or African[-]American or gay or disabled or old—and that's the criteria by which I'll be selecting my judges. Alright?" *Barack Obama Before Planned Parenthood Action Fund*, https://sites.google.com/site/lauraetch/barack obamabeforeplannedparenthoodaction (last visited Mar. 27, 2017).

The President's view of the task of the judiciary was certainly in keeping with the current view of his fellow Democrats and of most law professors,[16] but remarkably that was not generally the view of Republicans in 2016, or perhaps, of many Americans. Most Americans may have understood that a judge with empathy, a judge for whom redistribution of some kind may have had greater sway than following the rules laid down, a judge whose view of justice might have inclined him or her to favor the powerless over those in power, was a judge who might upset expectations and make it harder to carry out existing obligations or to facilitate economic planning. In other words, as will be explored a bit further in what follows, for me, the 2016 election was a contest between those who still believed in the older Blackstonian conception of law and those who adhered to views that might have been closer to those of Jeremy Bentham.

II. DONALD TRUMP AND THE CONSERVATIVES ON THE JUDICIARY

Surely, it is significant that when Donald Trump ran against Hillary Clinton, he made it plain that he differed from the Democrats' vision of the judiciary and stated clearly that his favored brand of judge was exemplified by the late Antonin Scalia,[17] the leading proponent not of a "living Constitution," but rather of a "dead Constitution." By this, Scalia meant a Constitution that was interpreted according to the manner it was understood at the time it was passed, one that had a meaning fixed in the past. This notion of a "fixed" meaning, according to the original understanding, was what led Scalia to say he preferred a "dead" Constitution to a "living" one, because a living one could be plastic in the hands of a Justice, leading possibly to uncertainty and inequity. One could easily see the 2016 Presidential election and, indeed, several elections in American history, as refer-

16. Candidate Obama laid out this view with commendable simplicity and clarity in his Planned Parenthood Action fund speech where he stated:

> I think the Constitution can be interpreted in so many ways. And one way is a cramped and narrow way in which the Constitution and the courts essentially become the rubber stamps of the powerful in society. And then there's another vision of the court [sic] that says that the courts are the refuge of the powerless. Because oftentimes they can lose in the democratic back and forth. They may be locked out and prevented from fully participating in the democratic process.

Id. Candidate Obama emphatically suggested that his view was that the Court should be in the business of protecting the powerless, and not to be "rubber stamps." *Id.*

17. *See, e.g.*, Steven Ertelt, *Donald Trump: "I Will Pick Great Supreme Court Justices" Like Antonin Scalia*, LIFENEWS.COM (Aug. 2, 2016, 10:04 AM), http://www.lifenews.com/2016/08/02/donald-trump-i-will-pick-great-supreme-court-justices-like-antonin-scalia/.

enda on the appropriate judicial perspective. Scalia was a polarizing figure in the legal academy, and relatively few American law professors at this point in our history embrace his point of view, and most would have subscribed to that of President Obama or, presumably Hillary Clinton. But is there anything that can be said for Scalia's view in our day and time?

My recent book on law professors[18] makes the argument that such a conservative view is, when all is said and done, the only appropriate one, and in this piece I am making multiple references to that work, but I am not the only conservative observing that we are in the process of witnessing a powerful reaction to the dominant legal Academic school of "living constitutionalism." For example, my colleague John McGinnis, one of the country's leading conservative originalist constitutional theorists,[19] recently excoriated the views of President Obama in an issue of the City Journal, a publication of the conservative think tank, the Manhattan Institute. McGinnis was responding to a summation of President Obama's constitutional philosophy, which the President offered in his "farewell address" given in Chicago, on January 10, 2017. The President said:

> Our Constitution is a remarkable, beautiful gift. But it's really just a piece of parchment. It has no power on its own. We, the people, give it power. We the people give it meaning—with our participation, and the choices we make. Whether or not we stand up for our freedoms. Whether or not we respect and enforce the rule of law.[20]

For McGinnis this was a summation of everything that is wrong with the "living constitution" view of the document. Said he, analyzing the preceding paragraph:

> With just a few sentences, Obama demonstrated the incoherence at the heart of the philosophy of the "living Constitution." According to this view, shared by Obama, the Constitution's meaning wasn't fixed at the time it was enacted, but is determined by the whims and preferences of twenty-first-century Americans. If that is the case, how can we possibly have the rule of law? If that is the case, our freedoms are not protected from ordinary politics but determined

18. *See generally* PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10.

19. For McGinnis' co-authored book making the case for originalism, as the doctrine most faithful to popular sovereignty, see generally JOHN O. MCGINNIS & MICHAEL P. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

20. A transcript of the President's remarks is available, *inter alia*, at the Real Clear Politics website, Tim Hains, *President Obama's Full Farewell Address: Constitution Is Just Piece Of Parchment, People Give It Power*, REAL CLEAR POL. (Jan. 10, 2017), http://www.realclearpolitics.com/video/2017/01/10/watch_live_president_obamas_farewell_address.html.

> by them—a recipe for endless social division, as different parties try to substitute their preferred vision of rights for those in the Constitution. Only if the meaning of the Constitution transcends those divisions can it serve as the nation's anchor.[21]

McGinnis went on to criticize the President, not just for his view of constitutional law, but also for his administration's actions, which to McGinnis were blatant departures from the rule of law. These included the President's use of Executive Orders to override existing law to enable millions of undocumented immigrants to avoid deportation or to obtain work permits, or to override particular provisions of the Affordable Care Act that would have been, at the time, politically unpalatable.[22] These instances (and other critics have pointed to many others)[23] for McGinnis were reminiscent of the claim of the Stuart Monarchs, such as James I and James II, to be above the law. McGinnis reminded his readers that "The Take Care Clause of our Constitution was designed to prevent such abuses."[24]

It is, of course, unlikely that those who voted in the 2016 election did so on the basis of their reading of the judicial opinions of President Obama's appointments to the Article III judiciary, but it does not seem much of a stretch to suggest that Donald Trump garnered many votes because of a feeling that the country was spinning out of control, and that lawless behavior was rampant on the part of the government. Behavior, perhaps of a kind that McGinnis and Mr. Obama's critics lament. I cannot point to precise evidence on this point, but the "Right Direction" and "Wrong Track" numbers are suggestive. Rasmussen Reports, a reasonably accurate polling site, found

21. John O. McGinnis, *Farewell to Lawlessness*, CITY J. (Jan. 11, 2017), https://www.city-journal.org/html/farewell-lawlessness-14936.html.

22. *Id.*

23. For a book-length argument to this effect, see generally DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW (2015) (arguing that Constitutional overreach was involved in the passage of the Patient Protection and Affordable Care Act ("ACA" or "Obamacare"), in unauthorized wars in the Middle East, in the erosion of property, speech and religious rights, and many other instances). For a more recent listing, see generally Ilya Shapiro, *Top 10 Ways Obama Violated the Constitution During His Presidency*, THE FEDERALIST (Jan. 19, 2017), http://thefederalist.com/2017/01/19/10-ways-obama-violated-constitution-presidency/. Professor Shapiro argues that "the Obama administration has been the most lawless in U.S. history[,]" and points to what he argues are abuses involved in (1) The Chrysler Bailout, (2) Obamacare Implementation, (3) Political Profiling by the IRS, (4) Recess Appointments, (5) DACA and DAPA, (6) The Assault on Free Speech and Due Process on College Campuses, (7) The Clean Power Plan, (8) The WOTUS ("Waters of the United States") Clean Water Rule implemented by the EPA, (9) The Net Neutrality Rule, and (10) The EPA's Cap-And-Trade carbon emissions regulation. *Id.*

24. McGinnis, *supra* note 21.

that for the four-day period from November 6th-10th 2016, which included the date of the Presidential election, thirty-two percent of the likely voters polled felt that the country was headed in the "Right Direction," but sixty percent felt that the United States was on the "Wrong Track."[25] Still, there is no clear content of what "Right Direction" and "Wrong Track" actually means. Even so, one might infer that, at some level, those who voted in the 2016 Presidential election understood that our core creed of popular sovereignty, our notion that here the people rule was being undermined by a judiciary and an administration that, in their view, increasingly failed to adhere to the rule of law, and whose misconduct may have been influenced by a legal academy increasingly out of touch with popular perceptions.

III. THE VIEW OF THE CONSERVATIVES WITH REGARD TO THE PRESERVATION OF POPULAR SOVEREIGNTY

I have tried to make this case in the popular press,[26] and of course, it was also the theme of my study of American law professors,[27] and perhaps it would be helpful to sketch some of the contours of that argument here. For me, there are two powerful foundations to the argument that recently our government, the courts, and the academy have moved away from the appropriate understanding of the rule of law. The first has to do with the nature of law and government themselves, and, at the risk of seeming hopelessly unmodern or perhaps insufficiently postmodern,[28] I still find considerable wisdom in

25. *Right Direction or Wrong Track*, RASMUSSEN REP. (Mar. 27, 2017), http://www.rasmussenreports.com/public_content/politics/top_stories/right_direction_wrong_track_mar27.

26. *See generally* Stephen B. Presser, *What American Law Professors Forgot and What Trump Knew*, CHI. TRIB. (Nov. 17, 2016, 7:42 PM) [hereinafter Presser, *What American Law Professors Forgot*], http://www.chicagotribune.com/news/opinion/commentary/ct-law-professors-trump-scalia-supreme-court-conservative-perspec-1118-md-20161117-story.html.

27. PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10.

28. See the remarkable recent rumination by David Ernst, on the Federalist website, where he explains the rise of Donald Trump as an antidote to the ascendance in recent culture of political correctness and "postmodernism," which Ernst describes as "the nihilism in the common presumption that all truth is relative, morality is subjective, and therefore all of our individually preferred 'narratives' that give our lives meaning are equally true and worthy of validation." David Ernst, *Donald Trump Is the First President to Turn Postmodernism Against Itself*, THE FEDERALIST (Jan. 23, 2017), http://thefederalist.com/2017/01/23/donald-trump-first-president-turn-postmodernism/. My point here is that there is still wisdom in understanding that value-relativism is not much of a guide to living life, and that it is wise to search for an objective basis for morality, quite possibly one reflected in religion. For some healthy skepticism on the subjectivity of morals demonstrated by a great liberal constitutional theorist, see generally Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

the assertion made by the earliest federal judges that there could be no order without law, no law without morality, and no morality without religion.[29] Pursuant to this view, American law needs to have a firm moral and religious basis.[30] Thus, it is not surprising that for many Americans, when the United States Supreme Court issues opinions that seem to reject religion in the public square, permit abortion on demand, or dictate how marriage must be understood—all in a manner that runs against traditional religious and moral doctrine—there is popular resistance.

However, there is a second foundational point to be made. If the law (especially one grounded in morality and religion) is to be changed, it should be done by a popular branch of government—either the legislature (in the case of laws) or the people themselves (if it is a constitutional amendment). For too long and for many Americans, the law seems to change by executive order (as McGinnis observed) or by judicial decision. I blame the American legal academy for much of this and, in particular, for encouraging the view that the law is no different from politics.[31] Of course, such a view encourages

29. This precise language can be found, for example, in the jury charges of the early Federalist judge, Samuel Chase. *See, e.g.,* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 141–49 (1991) [hereinafter PRESSER, THE ORIGINAL MISUNDERSTANDING]; STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 84–97 (1994) [hereinafter PRESSER, RECAPTURING THE CONSTITUTION]. The notion that there must be a religious foundation to law can equally be discovered in the early state Constitutions. For example, a provision of the Pennsylvania Constitution of 1776 provides that members of the legislature must take an oath or affirm that "[they] do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And [they] do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration." *Constitution of Pennsylvania - September 28, 1776*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/pa08.asp (last visited Mar. 31, 2017).

30. *See* PRESSER, THE ORIGINAL MISUNDERSTANDING, *supra* note 29, at 141–49; PRESSER, RECAPTURING THE CONSTITUTION, *supra* note 29, at 84–97. *See generally* STEPHEN B. PRESSER, GOD AND THE CONSTITUTION: TOWARD A LEGAL THEOLOGY (1997); Stephen B. Presser, *Some Realism About Atheism: Responses to The Godless Constitution*, 1 TEX. REV. L. & POL. 87 (1997) (reviewing ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS (1996)).

31. The notion that the law is no different from politics sums up the position of one of the most exciting academic movements in the twentieth century, Critical Legal Studies, which is the subject of Chapter 14 in Law Professors. PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10. For many Americans, considering the result in *Bush v. Gore*, 531 U.S. 98 (2000), where a majority of Republican Justices on the United States Supreme Court held for George Bush, and thus reversed a majority of Florida Democratic judges on the Florida Supreme Court who had held for Al Gore, this notion was difficult to ignore. Accordingly, one Yale Law professor declared that the big winners in Bush v. Gore were Critical Legal Studies and American Legal Realism. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1441 (2001) ("Jurisprudentially speaking, the big winners of the 2000 election were American Legal Realism and Critical Legal Studies.").

politicians to take the law into their own hands, as McGinnis and others suggest has been done. Worse, law professors have encouraged judges to legislate removing the power of changing the law from the popularly elected legislatures. Finally, the legal change that has been encouraged by the academy has resulted in a substantial redistribution of resources and an increasing precariousness in property and contract rights, thus, perhaps, suggesting to many Americans that the primary purpose of law—to secure rights and economic expectations—has been undermined.[32]

IV. THE ACADEMY'S DISDAIN FOR THE CONSERVATIVE VIEW

I do blame my fellow legal academics for at least part of this undermining of the law and the expectations it is supposed to create. Our recent election has underscored the stark contempt that much of the academy has for conservatives and Republicans in general, and in particular for the candidate of the Republicans in the last election, Donald Trump. Presidenet Trump is a controversial figure and, for most of his career, was more of a showman than a politician; but, after all, he was the choice for President of enough Americans to give him a substantial victory in the electoral college. There was a suggestion that foreign powers, particularly Russia, may have sought to influence the American electorate to reject Mrs. Clinton,[33] but no evidence has been offered that their efforts actually had any influence. In particular, there is no evidence that Trump's victories in key states that had formerly been part of a "blue wall" for the Democrats, such as Wisconsin, Pennsylvania, and Ohio owed anything to foreign intervention. Yet, immediately before the election, there was almost no support for Mr. Trump in the legal academy,[34] and some law professors, most notably Sanford Levinson at Texas, were aghast at the prospects of a Trump victory.

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32. For the powerful statement of the view that Constitutional Law ought to be all about protecting rights, including property rights, see, e.g., PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at 435–37 (discussing the Sharon Statement). For the suggestion that the Obama administration was cavalier about the protection of property and contract rights, see, e.g., Todd Zywicki, *The Auto Bailout and the Rule of Law*, 7 NAT'L AFF. 66 (2011), http://www.nationalaffairs.com/doclib/20110317_Zywicki.pdf.

33. *See, e.g.*, Adam Entous et al., *Secret CIA Assessment Says Russia Was Trying to Help Trump Win White House*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/world/national-security/obama-orders-review-of-russian-hacking-during-presidential-campaign/2016/12/09/31d6b300-be2a-11e6-94ac-3d324840106c_story.html?utm_term=.Bacaf8a8c6ce.

34. *See* Presser, *What American Law Professors Forgot supra* note 26.

When interviewed by the Wall Street Journal, Professor Levinson, described by the Journal's reporter as "[a]mong the nation's most prominent constitutional scholars," suggested that a military coup "was not impossible" during a possible Trump tenure, as, in Professor Levinson's view, Mr. Trump might engage in "dangerous militaristic adventurism." Further, Levinson explained, it was even more plausible that a state such as California might secede during a Trump administration because it might choose not to remain a member of the union "when the president is a raving narcissist that some describe as a sociopath."[35] Similar remarks were made by Mark Tushnet, a professor at Harvard Law School and one of the founders of Critical Legal Studies, in a blog post claiming that the legal left had won the "culture wars," and that it was time for liberal academics to abandon what he called "Defensive Crouch Liberal Constitutionalism," and instead should call for much more aggressive liberal judicial activism. Tushnet confessed, however, that "[o]f course all bets are off if Donald Trump becomes President. But if he does, constitutional doctrine is going to be the least of our worries."[36] More than 1,400 law professors eventually signed a statement suggesting that Mr. Trump's nominee for attorney general, Jeff Sessions, a traditional jurisprudential conservative, was unfit for the job, based on unproven allegations[37] that did not stand in the way of Mr. Sessions' eventual approval by the Senate. At least some of us were convinced that this opposition to Mr. Sessions did not flow from his particular qualifications, which were actually quite impressive, but rather from an ideology that had permeated the legal academy, which led law professors to make disparaging assumptions about Mr. Sessions.[38]

35. Jacob Gershman, *Law Professors Grapple With Trump*, WALL ST. J. (Nov. 2, 2016, 2:25 PM), http://blogs.wsj.com/law/2016/11/02/law-professors-grapple-with-trump/.

36. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKANIZATION (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html.

37. For the statement signed by 1,424 American law professors, see *Statement From Law School Faculty Opposing Nomination of Jeff Sessions for the Position of Attorney General* (Jan. 9, 2017), https://docs.google.com/document/d/167Ci3pVqwzOUe7_e7itlpew1qGcTo0ZD5dNICIbLQWA/pub

38. For commentary developing this point, see Scott Douglas Gerber, *The Law Professors Versus Sen. Jeff Sessions*, CLEVELAND.COM (Jan. 8, 2017, 10:06 AM), http://www.cleveland.com/opinion/index.ssf/2017/01/the_law_professors_versus_sen.html#incart_river_index; Michael I. Krauss, *The Law Professors' Scandalous Statement Against Jeff Sessions*, FORBES, http://www.forbes.com/sites/michaelkrauss/2017/01/05/the-law-professors-scandalous-statement-against-jeff-sessions/#1ed2dbf03475 (last updated Jan. 5, 2017, 11:46 AM); Jesse Merriam, *Law Professors Not "Above the Fray" In Their Opposition to Sessions*, AM. GREATNESS (Jan. 18, 2017), http://amgreatness.com/2017/01/18/law-professors-not-above-the-fray-in-their-opposition-to-sessions/;

V. THE SOURCES OF CURRENT ACADEMIC JUDICIAL IDEOLOGY: THE POLITICAL DEFENDERS OF THE LIVING CONSTITUTION

How did this legal academic ideology take hold? And how did it cause the legal academy to veer in a direction that caused it to lose touch with the aspirations of much of the American electorate? Answering this question was a major task of my book,[39] but we can at least sketch the outlines of the process here. The beginning might well be traced to Oliver Wendell Holmes, Jr.'s argument in his 1881 Common Law and also his famous 1897 Path of the Law Speech, where he maintained that "the life of the law was not logic but experience," and that "the law pretty nearly corresponded . . . to what was then regarded as convenient," and also suggested that one ought to view the law the way a "bad man" would, one who was only interested in "what the courts would do in fact," and not in what the legal rules actually mandated.[40] This attitude led, shortly thereafter, to the "legal sociology" of Roscoe Pound,[41] who also maintained that law professors should be studying what the courts and other legal actors were actually doing rather than the "law in the books," and then, in the nineteen thirties, to the "legal realists," such as Jerome Frank and Karl Llewellyn, who, to a greater (Frank) or lesser (Llewellyn) extent sought to show that courts were engaged in after-the-fact rationalizations rather than neutral application of legal rules.[42] In other words, Frank and Llewellyn were making the same point as did Holmes—that judges were actually legislators, and they might as well self-consciously engage in that activity, for the betterment of all.

Perhaps what the emerging legal realist consensus meant was the eventual triumph of the notion that the law ought to be as much about justice as about following the rules laid down. Surely this is what was understood by the Warren Court, and, in particular by its Chief Justice, Earl Warren, who habitually disarmed advocates by asking: "Yes,

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Stephen B. Presser, *Sen. Sessions And The Smug Self-Satisfaction of The Law Professoriate*, CHI. TRIB. (Jan. 6, 2017, 6:19 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-jeff-sessions-smug-law-professors-perspec-0109-md-20170106-story.html.

39. PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10.

40. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897). For Holmes in general and these matters in particular, see generally PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at Chapter 5.

41. For Pound, see generally PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at Chapter 7.

42. On these two legal realists, see generally PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at Chapter 10.

but is it fair?"[43] The Warren Court, to the delight of academics and some judges,[44] dramatically engaged in judicial legislation to alter the rules regarding racial segregation, criminal procedure, bible reading and prayer in public schools, and representation in state legislatures.[45] This volcanic period of Court-ordered alterations in our constitutional law, this massive shifting of power away from the state legislatures and to the federal courts and the federal government generally became the principal topic for the next two generations of constitutional scholars who divided among those who created new constitutional theories in support of what the Warren Court had done, and those who retreated to older theories to criticize that Court.

Justice Scalia, while he rarely explicitly criticized the Warren Court, shared the Warren Court's critics' concerns in the rejection of a "living Constitution."[46] One Warren Court critic, Robert Bork, was denied a seat on the Supreme Court because it was feared that he would undermine its achievements, and the similar revolutionary work of the Burger Court in its *Roe v. Wade* decision, which, for the first time, found in the Fourteenth Amendment's Due Process Clause a right for a woman to terminate a pregnancy before fetal viability.[47] Bork, because of his conservative perspective, was subjected to a virtual torrent of abuse, most notably by the late Senator Edward Kennedy, in his famous "Robert Bork's America" speech on the floor of the Senate during Bork's confirmation hearings:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the

43. *See, e.g.*, *Earl Warren's Way: "Is it Fair?"*, TIME, July 22, 1974, at 74 (Obituary of Earl Warren) ("Warren's trademark on the bench was to interrupt a counsel's learned argument citing precedent and book with the simple, almost naive question: 'Yes, but is it fair?' He believed that social justice was more important than legalisms: 'You sit up there and you see the whole gamut of human nature. Even if the case being argued involves only a little fellow and $50, it involves justice. That's what is important.'").

44. For an example of judicial approval of the Warren Court's project, see J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

45. For a summary of the Warren Court's accomplishments, see, e.g. PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at 229–31, and cases there cited.

46. For Scalia's rejection of the "Living Constitution" view, see, e.g., PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at Chapter 20, and Scalia's two books, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann et al., eds., 1998), and ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

47. Roe v. Wade, 410 U.S. 113, 153, 163–65 (1973).

> doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy.[48]

Kennedy seemed to suggest that at the time of his Senate hearings, Bork had begun to temporize, perhaps to disguise his allegedly pernicious views, "[u]nder the twin pressures of academic rejection and the prospect of Senate rejection, Mr. Bork subsequently retracted the most Neanderthal of these views on civil rights and the first amendment. But his mind-set is no less ominous today."[49]

This piece of fairly extreme demagoguery on Senator Kennedy's part, which also included the suggestions that Bork's jurisprudence was "an extremist view of the Constitution and the role of the Supreme Court that would have placed him outside the mainstream of American constitutional jurisprudence in the 1960s, let alone the 1980s,"[50] eventually contributed a new verb to our lexicon, "Bork," meaning to calumniate through extreme exaggeration in order to unjustly tarnish the reputation of an individual.[51] Calling Mr. Bork's views: "out of the mainstream" or "Neanderthal" was more than a little stretch, as Bork's views were simply the traditional interpretations of the Constitution leaving most powers to the state and federal governments, albeit the interpretations were stunningly rejected by the Warren Court. In spite of the deference until then usually extended to Presidents making Supreme Court appointments, Bork, a distinguished scholar and Yale Law School professor and, at the time of his nomination, a sitting member of the United States Court of Appeals for the District of Columbia Circuit, found himself defeated as a nominee to the United States Supreme Court, by a vote of 42-58.[52] From that moment on, champions of a progressive jurisprudence, the "living Constitution," if you will, could tar conservatives as reactionaries, and suggest their enmity to minorities and the powerless.

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48. 133 CONG. REC. S18518–19, 18519 (daily ed. July 1, 1987) (statement of Sen. Kennedy), https://www.loc.gov/law/find/nominations/bork/statements.pdf.

49. *Id.* at 18518–19.

50. *Id.* at 18518.

51. *See, e.g., Bork*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/Bork (last visited Jan. 21, 2017), which gives, as the first definition of the transitive verb, Bork, "to attack or defeat (a nominee or candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification." *Id.*

52. Linda Greenhouse, *Bork's Nomination Is Rejected; Reagan 'Saddened'*, N.Y. TIMES (Oct. 24, 1987), http://www.nytimes.com/1987/10/24/politics/24REAG.html?pagewanted=all.

VI. THE CRITICS OF THE WARREN COURT AND OF THE "LIVING CONSTITUTION" AND THEIR CRITICS

There were some academics, most notably United States Court of Appeals Judge for the Second Circuit, Learned Hand, and Columbia's Professor Herbert Wechsler, who, a generation before the Bork nomination, had argued that the Justices of the Warren Court (and the same argument would later apply to *Roe v. Wade*), by clearly making decisions not on the basis of neutral Constitutional theory but rather on the basis of substantive outcomes favored by the Justices, were undermining democratic government. By overturning the result of legislation in the states and localities, these critics argued, the Court was engaging in the very activity Hamilton had warned against in Federalist 78,[53] and was, in effect, substituting rule by nine unelected ephors, rather than maintaining the sovereignty of the American people themselves. As Hand put it:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[54]

What Hand was suggesting, of course, was that if federal judges legislated for us instead of deferring law making to the popularly-elected branches, the American people would, simply stated, be losing self-government.

Hand, Wechsler, and a few other Warren Court critics[55] were, however, in the decided minority in the American Legal Academy, where most professors were engaged in a vigorous defense of what the Warren Court had done, and engaged in increasingly complex efforts to demonstrate that the Warren Court's virtually rewriting of the Constitution was actually consistent with American ideals, if not, precisely

53. *See* THE FEDERALIST NO. 78, *supra* note 12.

54. LEARNED HAND, THE BILL OF RIGHTS 73–74 (1959). "Ephors" were the aristocratic autocratic rulers of Sparta, after whom Plato modeled his "Guardians" in his famous Republic. *See* Bloom, THE REPUBLIC, *supra* note 9.

55. Perhaps the other most prominent critic was Alexander Bickel. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978).

with the American legal tradition of following the rules laid down.[56] The boldest such efforts, efforts which limned theories of the "living Constitution," may have come from Yale Law professors Bruce Ackerman and Akhil Reed Amar, the former of whom argued that the Constitution was and could permissibly be amended by the American people outside of Article V, and the latter of whom argued that an "unwritten Constitution," permitted the Justices considerable leeway to adapt it to changing times.[57] While Justice Scalia could still maintain that "the only good Constitution is a 'dead' Constitution,"[58] it was clear that most law professors did not agree, and most prominently, the law professor who became the 44th President of the United States, Barack Obama, made plain his view that advocates of a "living Constitution," such as Supreme Court Justice Stephen Breyer,[59] had his concurrence.[60]

Indeed, I argued in my Law Professors' book that it is likely that President Obama's Constitutional views—those that suggested to him that Justices with "empathy" ought to be appointed to the Court—may have been shaped by the fact that he attended Harvard Law School when the most progressive of the recent jurisprudential theories, Critical Legal Studies (CLS), was in its ascendance.[61] For CLS, and its adherents, law was really politics, judges had considerable if not total discretion, and indeed, one of their proponents, Mark Tushnet (already mentioned), once maintained that if he were a judge, he would do whatever was necessary to advance socialism in his decisions, but would justify what he was doing by trotting out whatever currently fashionable constitutional theory was then in vogue.[62] It is

56. For a sampling, see generally ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976), JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), and LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

57. On Ackerman and Amar, see, e.g., PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW *supra* note 10, at Chapter 16.

58. For this belief of Scalia's, see, e.g., Bruce Allen Murphy, *Justice Antonin Scalia and the 'Dead' Constitution*, N.Y. TIMES (Feb. 14, 2016), https://www.nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constitution.html?smtyp=cur&_r=0. For Murphy's book-length study of Scalia's jurisprudence, see BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE (2014). For my reservations about Murphy's conclusions regarding Scalia, see Stephen B. Presser, *The Rock Star of One First Street,* U. BOOKMAN (Aug. 25, 2014), http://www.kirkcenter.org/index.php/bookman/article/the-rock-star-of-one-first-street.

59. *See generally* BREYER, *supra* note 13.

60. On President Obama's Constitutional Views see PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at Chapter 23.

61. *See id.* at 442–43.

62. Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

hardly surprising, then, that critics of Mr. Obama's presidency have accused him of ignoring the rule of law.

VII. SENATOR SCHUMER AND JUDICIAL IDEOLOGY

These days, however, those who defend an aggressive judicial role in favor of previously-discriminated-against groups in particular do not usually do so based on the philosophical arguments of Critical Legal Studies, Legal Realism, or Holmesian pragmatism. Through an extraordinary political move during the Bush administration, several progressive lawyers, advising Senate Democrat Chuck Schumer, formulated a new notion of "judicial ideologies," to argue against conservative nominees and to claim that it was necessary to maintain a "balance" of ideologies on the benches of the lower federal Courts, and most likely the Supreme Court itself.[63] Their fear, of course, was that Bush would succeed in placing on the lower federal courts, and eventually on the Supreme Court, judges with a conservative perspective, judges who understood the judicial role not as one giving the power to implement social change in pursuit of progressive goals, but rather as one with the responsibility to defer to the popular branches of government and to maintain the Constitutional scheme of federalism and separation of powers. That traditional judicial role, in the opinion of many conservatives (and I was one who testified to this effect before the Senate hearings on "judicial ideology" called by Senator Schumer), was not, in our view, an "ideology," but was, rather, the task of judges called for in the *Federalist,* and, indeed, in the Constitution itself. Far from being a "radical" set of beliefs, "out of the mainstream" as Sunstein and the other progressive advisors of Senator Schumer maintained, it was, in our view, the only legitimate behavior for judges, as Hamilton made clear in *Federalist 78*. For us, then, to call, as Senator Schumer did, for "ideological balance" on the

63. Three lawyers, two law professors, and one legal activist at a Democratic Party retreat formulated this argument for Senator Schumer. They were Laurence Tribe of Harvard, Cass Sunstein, then of Chicago and now at Harvard, and Marcia Greenberger, of the National Women's Law Center (an advocacy group for equality and opportunity for women and families). For the contribution of these three to Schumer's political attack on the appointments of George W. Bush to the lower courts, see PRESSER, THREE CENTURIES OF SHAPING AMERICAN LAW, *supra* note 10, at 428. For Sunstein's somewhat over-the-top argument that the conservative perspective exemplified by Supreme Court Justices such as Antonin Scalia is the work of "Radicals in Robes," see generally CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005). For my argument that Sunstein was wrong, see generally Stephen B. Presser, *Was Ann Coulter Right? Some Realism About Minimalism*, 5 AVE MARIA L. REV. 23 (2007).

bench, and to call for appointments of judges with different "ideologies" until the conservatives were balanced by progressives, was like calling for a balance between "right" and "wrong," and demanding appointments of judges with the wrong perspective to balance the right ones. This, to us, made no sense.[64]

CONCLUSION: THE MEANING OF TRUMP'S VICTORY FOR THE FUTURE OF THE JUDICIARY: SOME REALISM ABOUT ATAVISM

Supporters of President Obama and Hillary Clinton were astonished at the electoral college victory by Donald Trump in the past election, but perhaps that victory came about because of a widespread perception that a failure to adhere to the rule of law on the Supreme Court bench and those of the lower courts, a failure to follow the law in the executive branch, and a failure to understand the requirements of the rule of law in the Congress required correction. Not a balance of "ideologies," but a return to American ideals may have powered Trump's victory.[65] Many Americans may have concluded that the problems that we now face in our country may not best be solved by shifting the judiciary in a direction favored by progressives in general and President Obama in particular.

If, as I have argued here, the perspective (or, if you like, the "judicial ideology") favored by progressives is the wrong one, it is because it undermines American self-government. That "ideology" undercuts the principle of popular sovereignty, and it cedes power to the "administrative state," that is, to administrative agencies, and in particular, to those agencies of the government most removed from the people: the federal government.[66] This problem, the nature of the dilemma we face, and the possible solutions were crisply limned in a recent piece published by Ken Masugi, on the Trump-inspired website, American Greatness. He wrote:

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64. For my thoughts on "judicial ideology," see generally, Stephen B. Presser, *Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?* 6 TEX. REV. L. & POL. 245 (2001), Stephen B. Presser, Statement, *Hearing Before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts on Should Ideology Matter?,* 50 DRAKE L. REV. 453 (2002), and Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War over the Judiciary*, 39 LOY. U. CHI. L.J. 427 (2008).

65. On this point, see also Presser, *What American Law Professors Forgot, supra* note 26.

66. On the illegitimacy of the "Administrative State," see generally DANIEL R. ERNST, TOQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014), and PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

> Often misleadingly described as the "fourth, unelected branch" of government or the bureaucracy, the administrative state is instead a regime change that grips all three branches, especially the elected ones, and the people as well. It reduces the Congress to its financier and makes the executive branch its protector and enforcer. The judiciary is as often its collaborator as its corrector.
>
> Moreover, the administrative state's reach goes beyond the government. It embraces and enhances the media, political consultants, the professions (especially the legal establishment), academia, and identity groups. These all legitimate each other while strengthening the administrative state.
>
> The administrative state thereby forms a majority faction—to use James Madison's term for a majority opposed to the common good—that has ruled America since the Reagan years. Whatever the disagreements within it, this majority faction has sanctioned reckless wars abroad, open borders at home, and a globalist economy that has favored some parts of the country over others.[67]

Masugi's point was that the Trump administration was committed to returning law-making power to the American people themselves, and taking it away from an overweening set of federal government agencies and bureaucrats, a judiciary committed to formulating and carrying out policy, and an executive ruling by executive order rather than faithfully executing the laws. Not all Americans, and, in particular, not all readers of this *Journal* would agree with this description of the past three decades in America, but few could disagree that the problems of reckless foreign engagement, unregulated immigration, and crony capitalism are real and need to be addressed. Those who applauded the Obama appointments to the judiciary are, of course, hardly Trump supporters. Still, if the 45th President is able better to implement federalism, in order to return power to the governments closest to the people, he will have enhanced democratic government. If he succeeds in his stated goal of reviving the separation of powers, he will have gone some distance in bringing the judiciary back to its Hamiltonian role as the "least dangerous branch." We will then be closer to having judges, who, as Hamilton argued in *Federalist 78*, would be the implementers of the expressed will of the American people themselves, and we will be closer to achieving the goals that all of

67. Ken Masugi, *Trump Defends the Constitution*, AM. GREATNESS (Jan. 22, 2017), http://amgreatness.com/2017/01/22/trump-defends-constitution/.

us ultimately cherish as Americans, the rule of law and the true securing of popular sovereignty.

This does not mean, of course, that we should abandon our efforts to improve the lives of the least fortunate among us, nor does it mean that we should cease striving to ensure that all Americans enjoy the equal protection of the laws, due process, or the many cherished freedoms and rights the Constitution seeks to secure. What it does mean, however, is that these noble aims are best achieved, not by an activist judiciary, whose accomplishments can be swept away by a subsequent bench, but by the branches closest to the American people, in whom sovereignty in this country must always rest.

ESSAY

Laying the Foundation: How President Obama's Judicial Nominations Have Paved the Way for a More Diverse Supreme Court

April G. Dawson*

INTRODUCTION

The United States Supreme Court has seen significant changes in its makeup in the past 50 years. While the Court historically has been a white male, protestant institution, it is currently made up of five men, three women, five Catholics, three Jews, one African American, and one Latina. President Obama can take credit for a significant portion of the current diversity of the Court, having appointed two of the three female Justices currently on the bench, and having appointed the first Latina Justice. In addition to having made a direct impact on the diversity of the current Court, President Obama may have also made an impact on the diversity of the Supreme Court in the future.

Increasingly, Supreme Court Justices are being selected from the ranks of federal appellate judges. Thus, if the federal appellate bench is diverse, it increases the likelihood that future presidents will select diverse Supreme Court nominees. This Essay will review President Obama's judicial appointments to the federal appellate and district courts to determine if he increased the diversity of the federal courts

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in a meaningful way and thereby laid the foundation for a more diverse Supreme Court.

Part I of this essay briefly discusses the relatively new trend of presidents selecting federal appellate judges for Supreme Court nominees. Before examining President Obama's federal court of appeals judicial appointments, Part II addresses the obstructionist response by Congress to President Obama's presidency, and provides context for the discussion of President Obama's judicial nominations. Part III examines President Obama's federal appellate judicial appointees by comparing the diversity of his selections with the diversity of the appellate judge selections of President Obama's five most recent predecessors. Part IV examines President Obama's federal district judge appointees, and likewise, compares the diversity of President Obama's federal trial court judicial appointments with the diversity of the selections made by the five previous presidents. The Conclusion reflects on the likelihood that a future president will select one or more of President Obama's lower court diverse appointees to serve on the U.S. Supreme Court.

I. Supreme Court Justice Nominee Pool

The first step in determining whether President Obama took steps during his tenure in office to improve the diversity of the future Supreme Court is to consider the most likely pool from which Supreme Court nominees will be selected. Historically, presidents have selected individuals to be nominated for the High Court from a variety of legal and political professions.[1] Past presidents have nominated politicians, academics, government attorneys, private attorneys, and judges.[2] While one would assume that most Supreme Court nominees have been judges, historically, that has not been the case.[3] From 1901 through 1966, only 28% of the new nominees were former or current federal appellate judges.[4] However in recent years, Supreme Court

1. *See generally* Benjamin H. Barton, *An Empircal Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137 (2012) (discussing pre-appointment jobs of Supreme Court Justices).

2. *See generally id.*

3. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 645 (1987).

4. During this time period there were 39 *new* individuals who were nominated to serve on the Supreme Court. Of that number, 11, or 28%, were current or previous federal appellate judges when nominated. Sixteen of the 39, or 41%, had prior judicial experience at either the federal appellate, federal district or state court level. (Edward Douglass White, Charles Evan Hughes, and Harlan Fiske Stone were all nominated to the position of Chief Justice during this

nominees have increasingly been current federal court of appeals judges. From 1967 to the present, 77% of the nominees were former or current federal appellate judges.[5] Since 1986, fourteen individuals have been nominated to serve on the Supreme Court.[6] Of that number, only two were not federal judges, and of those two, only one of them was confirmed.[7] Underscoring this trend was President Obama's nomination of Merrick Garland, chief judge of the D.C. Circuit, to fill the vacancy on the Supreme Court left following Justice Scalia's death,[8] and President Trump's nomination of Neil Gorsuch, a judge on the Tenth Circuit, to fill the same vacancy.[9]

So, while historically the path to a Supreme Court nomination was varied and nominees were selected from a variety of legal professions, today the road is narrow and the pool is small.[10] As a result, presidents are playing an increasingly important role in the composition of the Supreme Court to be formed even after they leave office through their lower federal court appointments. Thus, a president's Supreme Court legacy can go beyond direct appointments to the High Court.[11]

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time period. However, they are not included in the percentage calculation because, at the time of their nomination, they were or had served as an Associate Justice. The relevant percentage relates to new individuals nominated to serve on the High Court.) *See* Appendix.

5. *See* April G. Dawson, *Missing in Action: The Absence of Potential African American Female Supreme Court Justice Nominees – Why This Is, and What Can Be Done About It*, 60 How. L.J. 177, 190 (2016) (noting that between 1967 and 2017 there were 22 new nominees to the Supreme Court and that, of that number, only 5 were not current or previous federal judges when nominated).

6. The following 14 individuals were nominated to serve on the Court since 1986: Antonin Scalia, Robert Bork, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Harriet Miers, Samuel Alito, Sonia Sotomayor, Elena Kagan, Merrick Garland, and Neil Gorsuch.

7. *See* Dawson, *supra* note 5, at 191 (noting that the two non-judge Supreme Court nominees nominated between 1967 and 2017 were Harriet Miers and Elena Kagan, and that, of the two, only Kagan was confirmed).

8. *Another View: Senate Should Act on Obama's Supreme Court Nominee*, Daily Chron. (Aug. 14, 2016, 11:54 PM), http://www.daily-chronicle.com/2016/08/11/another-view-senate-should-act-on-obamas-supreme-court-nominee/aea39xr/?page=1.

9. Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. Times (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?_r=1.

10. *See also* Timothy P. O'Neill, *The Pre-Appointment Experience of Supreme Court Justices: Response to Professor Barton*, 64 Fla. L. Rev. F. 28, 29 (2012). *See generally* Barton, *supra* note 1.

11. For example, although Jimmy Carter did not make any appointments to the Supreme Court, in 1980 he appointed Ruth Bader Ginsburg to the D.C. Circuit Court of Appeals and Stephen Breyer to the First Circuit Court of Appeals. Had Ginsburg and Breyer not been federal appellate judges, it is unlikely they would have been nominated by Bill Clinton for appointment to the Supreme Court in 1993 and 1994, respectively. *See* Richard L. Berke, *The Supreme Court: The Overview; Clinton Names Ruth Ginsburg, Advocate for Women, to Court*, N.Y. Times

Before engaging in a review of President Obama's lower federal judge appointments to determine the impact he has made on the Supreme Court of the future, Part II below addresses the climate of Congressional obstructionism President Obama encountered generally, and specifically when attempting to appoint federal judges.

II. OBSTRUCTIONISM IN THE APPOINTMENT OF FEDERAL JUDGES

Article II, Section 2 of the U.S. Constitution provides that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court."[12] This provision has been interpreted as the procedure by which a president also nominates and appoints all federal appellate and federal district judges.[13] Thus, the "Appointments Clause" gives the president the primary power in shaping the makeup of the federal judiciary. However, that power is checked with the inclusion of the "Advice and Consent Clause," which gives the Senate final approval of a president's judicial nominee.[14] The Senate exercises its authority by convening the Senate Judiciary Committee, which investigates the judicial nominees, holds hearings on the nominees, takes a committee vote on the nominee, and makes a recommendation regarding confirmation to the full Senate.[15] Following the Senate Judiciary Committee's consideration of the nominee, the full Senate will vote.[16] Because the Senate must act before a judicial nominee can be duly appointed and receive their commission, the Senate has the power to thwart a president's efforts in appointing judges.

There is no clearer example of the Senate's ability to obstruct a president's affirmative mandate to appoint federal judges than the un-

(June 15, 1993), http://www.nytimes.com/1993/06/15/us/supreme-court-overview-clinton-names-ruth-ginsburg-advocate-for-women-court.html?pagewanted=all; Gwen Ifill, *The Supreme Court; President Chooses Breyer, an Appeals Judge in Boston, for Blackmun's Court Seat*, N.Y. TIMES (May 14, 1994), http://www.nytimes.com/1994/05/14/us/supreme-court-president-chooses-breyer-appeals-judge-boston-for-blackmun-s-court.html?pagewanted=all; O'Neill, *supra* note 10, at 30.

12. U.S. CONST. art. II, § 2, cl. 2.

13. *See generally* Burke Shartel, *Federal Judges: Appointment, Supervision, and Removal: Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 510 (1930) (discussing appointment of district and circuit judges).

14. *Id.* at 486.

15. *See* 3 U.S. CONGRESS, SENATE, COMMITTEE OF THE JUDICIARY, HISTORY OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 1816-1981, at iv (1982).

16. *See* Rachel Brand, *A Practical Look at Federal Judicial Selection*, ADVOCATE 83–84 (2010), http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Rachel%20Brand.pdf (discussing the federal judicial selection process).

precedented decision of the Senate to refuse to hold hearings and take a vote on President Obama's nominee to fill the vacant Supreme Court seat that resulted from the death of Justice Antonin Scalia. Following Justice Scalia's death on February 13, 2016, the Republican leadership, less than twenty-four hours after Scalia's death, stated that the Senate would not consider any nominee until after the November election.[17] President Obama, in accordance with the Constitutional obligation that he "shall" nominate and appoint Supreme Court justices, nominated Merrick Garland on March 16, 2016, to fill Justice Scalia's seat on the Court.[18] However, Garland's nomination languished for 293 days before the nomination lapsed on January 3, 2017.[19]

While the Senate's decision to not hold a hearing and a vote on a president's Supreme Court justice nomination was wholly unprecedented,[20] the Senate's decision to simply ignore President Obama's nomination was a culmination of obstructionist tactics employed by Congress that dogged President Obama's entire presidency.[21] To be sure, congressional obstructionism is not uncommon when one party controls the executive branch and another controls the legislative branch.[22] The party in control of Congress in such situations often

17. Sen. Mitch McConnell, *Justice Antonin Scalia* (Feb. 13, 2016), http://www.mcconnell.senate.gov/public/?p=PressReleases&ContentRecord_id=8E6839F9-181B-42F5-B8F0-F4244B9D7927&ContentType_id=C19BC7A5-2BB9-4A73-B2AB-3C1B5191A72B&Group_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f; *see* 162 CONG. REC. S925, S925–26 (daily ed. Feb. 23, 2016) (statement of Sen. McConnell). The Constitution does not provide the number of justices on the Court. Rather, the Constitution gives Congress the authority to determine the structure of the federal judiciary as a whole. As a result, Congress sets the number of Supreme Court Justices. Congress originally set the number at six, with a Chief Justice and five Associate Justices, in the Judiciary Act of 1789. The number of justices was increased to seven in 1807, increased to nine in 1837, and increased to ten in 1863. The number of justices was reduced to seven in 1866. In 1869, the number was fixed at nine, where it remains today. *See* Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789-2016*, 26 BERKELEY LA RAZA L.J. 92, 97 (2016).

18. The White House Office of the Press Secretary, *Nomination Sent to the Senate* (Mar. 16, 2016), https://www.whitehouse.gov/the-press-office/2016/03/16/nomination-sent-senate.

19. Cristian Farias, *Merrick Garland's Supreme Court Nomination Just Died With the Old Congress*, HUFFINGTON POST (Jan. 3, 2017, 8:42 PM), http://www.huffingtonpost.com/entry/merrick-garland-supreme-court-nomination-dead_us_586be633e4b0de3a08f9a8f2.

20. Richard Blumenthal & Monte Frank, *Senate's Refusal to Consider Garland Undermines Rule of Law,* THE HILL (Mar. 24, 2016, 6:00 AM), http://thehill.com/blogs/pundits-blog/the-judiciary/274154-senates-refusal-to-consider-garland-undermines-rule-of-law.

21. *See generally* William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive Branch Action*, 2014 UTAH L. REV. 773 (2014) (finding that President Obama was faced with one of the most obstructionist Congresses in American history).

22. *See* Alex Altman & Zeke Miller, *The Challenge for the New Republican Majority*, TIME (Nov. 4, 2014, 1:13 AM), http://time.com/3557627/2014-midterm-elections-republican-senate-ma

responds to presidential action in an obstructionist manner so as to prevent presidential successes that would hinder the losing party's chances of making headway in the next midterm and general election.[23] However, the level of obstructionism that President Obama faced was unprecedented.[24]

Much like the duality discussed in the context of the Garland nomination–that the obstructionism with Garland's nomination was both unprecedented as Supreme Court nominations go and at the same time par the course for treatment of President Obama–the obstruction President Obama faced generally was also both unique and familiar. The level of congressional obstructionism President Obama faced was unique in that it far exceeded obstruction faced by any other president in modern history.[25] While unique on the one hand, that same obstructionism was also familiar in that roadblocks have always been placed in the path of African Americans seeking to gain or exercise governmental power.[26]

One of the clearest examples of congressional obstructionism towards African Americans appointed to positions of power in the government has been in the context of federal judicial appointments. The first African American to receive a life-tenure Article III judicial appointment was William Henry Hastie, who was nominated by President Harry Truman in 1949 to fill a position on the Third Circuit Court of Appeals.[27] Hastie was nominated by Truman on October 15,

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jority-mitch-mcconnell/ ("The triumph was . . . the culmination of [McConnell's] six-year plan to reclaim power in the Senate by thwarting Barack Obama's legislative agenda.").

23. Marshall, *supra* note 21, at 784.

24. *See* ROBERT DRAPER, DO NOT ASK WHAT GOOD WE DO: INSIDE THE U.S. HOUSE OF REPRESENTATIVES, at xviii–xix (2012) (quoting Republican Representative Kevin McCarthy as saying, "We've gotta challenge [Democrats] on every single bill," and noting that top House Republicans met the night of President Obama's inauguration to devise a plan to "mortally wound" President Obama through "united and unyielding opposition"); Jonathan Bernstein, *Empty Bench Syndrome*, N.Y. TIMES, Feb. 9, 2011, at A27 ("Senator McConnell made clear his party would filibuster every item on President Obama's agenda, including judicial nominations.").

25. Marshall, *supra* note 21, at 773.

26. *See* MARY L. RUCKER, OBAMA'S POLITICAL SAGA: FROM BATTLING HISTORY, RACIALIZED RHETORIC, AND GOP OBSTRUCTIONISM TO RE-ELECTION 1–2 (2013).

27. FED. JUD. CTR., http://www.fjc.gov (last visited Mar. 30, 2017). To access the database, click on "History of the Federal Judiciary," then click on "Judges of the United States Courts," then click on "Select Research Categories"; next select "Court Type" and "Nominating President" and click "CONTINUE"; then select "All Courts of General Jurisdiction" and "George Washington" and click "Search." Prior to his appointment to the Third Circuit, Hastie had been appointed by President Franklin Roosevelt, and in 1937, served as the first federal district judge for the District Court of the U.S. Virgin Islands. GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 85–86 (1984). This court is not an Article III court, but an Article IV U.S. territorial court. Judges of territorial courts do not have life tenure. Although this was the first

1949, and after no Senate action or any indication that the Senate would act,[28] Hastie received a recess appointment[29] from Truman on October 21, 1949.[30] Hastie was re-nominated to the same position by Truman on January 5, 1950, but was not finally confirmed by the Senate until July 19, 1950.[31] The delay of more than six months for Senate action on a federal appellate judge nomination was unprecedented at the time.[32] The primary reason for the delay was the effort to block Hastie's appointment by the then-chair of the Senate Judiciary Committee, James Eastland, a devout segregationist from Mississippi.[33]

Eastland continued his obstructionism towards African American federal appellate court nominees with his attempt to prevent the appointment of Thurgood Marshall as the second African American nominated to the federal appellate bench.[34] In fact, the delay in Marshall's confirmation was even longer than Hastie's six-month delay, which had occurred approximately ten years earlier.[35] Marshall was nominated by President John F. Kennedy to the United States Court of Appeals for the Second Circuit on September 23, 1961.[36] With the Senate having taken no action and with the anticipation of a confirma-

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time an African American was appointed to a federal district judge position, this appointment was not controversial. This was so most likely because the position was not located in the continental United States and the position was a non-life tenure appointment. While the first African American was not appointed to an Article III court until Hastie's appointment in 1949, the first woman, who was white, was appointed to an Article III federal court fifteen years earlier in 1934. President Franklin D. Roosevelt nominated Florence Allen to serve on the United States Court of Appeals for the Sixth Circuit in March 1934, and Allen was confirmed in less than four weeks. Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 493 (2004) [hereinafter Clark, *One Man's Token*].

28. Jonathan J. Rusch, *William H. Hastie and the Vindication of Civil Rights*, 21 HOW. L.J. 749, 803 (1978).

29. *See* U.S. CONST. art. II, § 2, cl. 3. Article II, Section 2, Clause 3 of the U.S. Constitution gives the president the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.*

30. FED. JUD. CTR., *supra* note 27.

31. *Neglected Nomination*, WASH. POST, July 8, 1950, at 4 (referring to "covert opposition to Judge Hastie's confirmation which finds refuge in vague allegations that he has belonged to 'subversive' organizations"); *Negro Judge Confirmed*, N.Y. TIMES, July 20, 1950, at 32; *Senate Confirms Hastie to Seat on Appeals Court*, WASH. POST, July 20, 1950, at 6.

32. *See* Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237, 254 (1993) (discussing the opposition facing black circuit court judges in the Senate confirmation process).

33. WARE, *supra* note 27, at 236.

34. *See* Revesz, *supra* note 32, at 254 (discussing the opposition facing black circuit court judges in the senate confirmation process).

35. *See generally id.* at 249 (describing the tortured course of Marshall's nomination and recess appointment and the subsequent delay, repeated hearings, threatened filibuster, and eventual, 11th-hour confirmation by the Senate).

36. *Id.* at 237.

tion battle, Kennedy made a recess appointment on October 5, and Marshall was sworn in on October 23, 1961.[37] Kennedy resubmitted Marshall's nomination to the Senate on January 15, 1962, but he was not confirmed until September 11, 1962, almost a year after his initial nomination.[38] Meanwhile, Kennedy's twenty other federal appellate nominees, all of whom were white men, were confirmed within three months of their nominations, with most being confirmed within one month of their nomination.[39] Moreover, their confirmation hearings were all completed in a single day, while Marshall's hearing was conducted over multiple days during a four-month period.[40] The cause of the delay was again Senator Eastland's obstructionism.[41] Eastland also attempted to stall the appointment of Marshall to the U.S. Supreme Court following Lyndon B. Johnson's June 13, 1967, nomination of Marshall to the Supreme Court seat vacated by Justice Tom Clark.[42]

Two other early African American federal judicial appointees were also blocked by Eastland: A. Leon Higginbotham and Spottswood Robinson.[43] Both Higginbotham and Robinson were nominated to the federal district court bench by President Kennedy in 1963.[44] Higginbotham was nominated to the District Court for the Eastern District of Pennsylvania on September 25, 1963,[45] and Robinson was nominated to the U.S. District Court for the District of Columbia, October 1, 1963.[46] Although the other individuals nominated by Kennedy during that same time were confirmed,[47] Eastland

37. *Id.*

38. *Id.* at 238, 253.

39. FED. JUD. CTR., *supra* note 27.

40. *See* Revesz, *supra* note 32, at 252 ("The confirmation hearings of all nineteen of Kennedy's other nominees were completed in a single day; in Marshall's case, they took place over six separate days spread out over almost four months.").

41. *See generally id.* at 247.

42. *See* WIL HAYGOOD, SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA 18–19 (Alfred A. Knopf 2015).

43. *See* Victor Williams, NLRB v. Noel Canning *Exposes Judicial Incapacity: Junior Varsity Politicians' Foul the President's Textual Appointment Discretion*, 43 RUTGERS U. L. REC. 60, 75, 82 (2016) hereinafter Williams, *Exposes Judicial Incapacity*.

44. *Id.* at 75; *see also* OFFICIAL CONGRESSIONAL DIRECTORY FOR THE USE OF THE UNITED STATES CONGRESS: 91ST CONGRESS, 1ST SESSION 291 (U.S. GOV'T PRINTING OFFICE 1969); *Unsuccessful Nominations and Recess Appointments*, FED. JUD. CTR. [hereinafter CONGRESSIONAL DIRECTORY], https://www.fjc.gov/history/judges/unsuccessful-nominations-and-recess-appointments (last visited Apr. 17, 2017).

45. 109 CONG. REC. 24332 (1963).

46. CONGRESSIONAL DIRECTORY, *supra* note 44, at 670.

47. George Clifton Edwards, Jr. was nominated by John F. Kennedy on September 9, 1963, to the United States Court of Appeals for the Sixth Circuit. Edwards was confirmed by the Senate on December 16, 1963, even though Kennedy had died on November 22, 1963. Bernard

blocked the nominations of Higginbotham and Robinson,[48] resulting in the lapse of both nominations after President Kennedy's death on November 22, 1963.[49] President Lyndon Johnson appointed both men as recess appointments on January 6, 1964.[50] Johnson re-nominated both men on February 3, 1964.[51] Higginbotham was confirmed by the Senate on March 14, 1964, and received his commission on March 17, 1964.[52] Robinson was confirmed by the Senate on July 1, 1964, and received his commission on July 2, 1964.[53]

Constance Baker Motley was the eighth African American, the fourth woman, and the first African American woman appointed to the federal bench.[54] She too suffered undue delay during her confirmation process due to racial politics and the obstructionist tactics of Eastland.[55] Motley was nominated by President Johnson on January 26, 1966, to the U.S. District Court for the Southern District of New York. However, Motley was not confirmed by the Senate until August 30, 1966.[56] At the time of Motley's nomination, only three other women had been appointed to the federal bench.[57] While the nomina-

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Thomas Moynahan, Jr. was nominated by John F. Kennedy on September 16, 1963, to the United States District Court for the Eastern District of Kentucky. Moynahan was confirmed by the Senate on November 8, 1963. FED. JUD. CTR., *supra* note 27.

48. *See* Victor Williams, NLRB v. Noel Canning *Tests the Limits of Judicial Memory: Leon Higginbotham, Spottswood Robinson, and David Rabinovitz "Rendered Illegitimate"*, 6 HLRE 107, 122 (2015) (citing Drew Pearson, *Long Wait Is Suggested for Judge's Confirmation*, Spokane Daily Chron., July 7, 1965, at 4, https://news.google.com/newspapers?nid=1338&dat=19]650707&id=61ZYAAAAIBAJ&sjid=ofcDAAAAIBAJ&pg=3332,1147545&hl=EN) [hereinafter Williams, *Limits of Judicial Memory*].

49. *See* Williams, *Exposes Judicial Incapacity, supra* note 43 at 75–76.

50. FED. JUD. CTR., *supra* note 27.

51. *Id.*

52. *Id.* Higginbotham was elevated to the Third Circuit Court of Appeals by President Jimmy Carter on September 19, 1977. He was confirmed on October 7, 1977, and received his commission on October 11, 1977. *Id.*

53. *Id.* Robinson was elevated to the D.C. Circuit Court of Appeals by President Johnson on October 6, 1966. He was confirmed by the Senate on October 20, 1966, and received commission on November 3, 1966. *Id.*

54. *See* Florence Wagman Roisman, *An Extraordinary Woman: The Honorable Constance Baker Motley (September 9, 1921- September 28, 2005*), 49 IND. L. REV. 677, 677 (2016).

55. CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY 215 (1998); *see also* Clark, *One Man's Token*, *supra* note 27, at 516.

56. FED. JUD. CTR., *supra* note 27.

57. Roisman, *supra* note 54. The first female federal judge was Florence Allen who was nominated by President Franklin D. Roosevelt in early March 1934 to serve on the United States Court of Appeals for the Sixth Circuit. Allen was confirmed in less than four weeks. At the time of Motley's nomination in January 1966, Allen, the first and only female federal appellate judge, was on senior status, which she had assumed in 1959 at the age of 75. Allen died in September 1966 at the age of 82. The next two women appointed to federal judgeships were appointed to federal district courts. Burnita Shelton Matthews received a recess appointment from President Harry Truman on October 21, 1949, to fill a newly created seat on the United States District Court for the District of Columbia. She was nominated to the same position by

tions of her three white counterparts took three months or less for Senate confirmation, Motley's confirmation fight took more than seven months.[58]

Consistent with this history of obstructionism, President Obama was blocked at every opportunity, particularly when it came to his executive and judicial appointments.[59] And while the obstruction Obama faced may not have been masterminded by professed bigots of the likes of Eastland, race certainly played a role in efforts to thwart Obama's success.[60]

III. Federal Appellate Judicial Appointees

Notwithstanding the obstructionist tactics employed to frustrate President Obama's appointments, President Obama was able to make 55 federal appellate judge appointments.[61] As discussed above, the current trend is for presidents to select Supreme Court nominees from the pool primarily comprised of federal appellate judges. Thus, it follows that if the federal appellate judiciary is diverse, there is a greater likelihood that future Supreme Court appointees will be diverse.[62]

Truman on January 5, 1950, and confirmed by the Senate on April 4, 1950. Sarah Tilghman Hughes received a recess appointment from John F. Kennedy on October 5, 1961, to fill a newly created seat on the United States District Court for the Northern District of Texas. She was nominated to the same position by Kennedy on January 15, 1962, and confirmed by the Senate on March 16, 1962. Motley was the fourth woman nominated to be a federal judge. FED. JUD. CTR., *supra* note 27.

58. *Id.*

59. *See* Sheldon Goldman et al*., Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism,* 97 JUDICATURE 7, 7 (2013) (documenting and analyzing President Obama's judicial selections and the Senate response, including in-depth discussion of the role of diversity in Obama's appointments); John C. Roberts, *The Struggle Over Executive Appointments*, 2014 UTAH L. REV. 725, 736 (2014).

60. *See* Charles M. Blow, *The Obama Opposition*, N.Y. TIMES (Nov. 9. 2014), http://www.nytimes.com/2014/11/10/opinion/charles-blow-the-obama-opposition.html?_r=0; Lauren Fox, *Sanders Suggests Obama's Race Is a Factor in GOP 'Obstructionism'*, TPM LIVEWIRE (Feb. 23, 2016, 8:54 PM), http://talkingpointsmemo.com/livewire/sanders-race-obama-deligitimization-scotus (quoting Sen. Bernie Sanders as saying "[w]hat you are seeing today in this Supreme Court situation is nothing more than the continuous and unprecedented obstructionism that President Obama has gone through . . . [T]he racist effort to try to delegitimize the president of the United States"); Alan Greenblatt, *Race Alone Doesn't Explain Hatred of Obama, But It's Part of the Mix*, NPR (May 13, 2014, 07:03 AM), http://www.npr.org/sections/codeswitch/2014/05/13/311908835/race-alone-doesntexplain-hatred-of-obama-but-its-part-of-the-mix; Williams, *Exposes Judicial Incapacity*, *supra* note 43, at 75 n.51 ("The present GOP/Tea Party appointment obstruction roots lie in ugly Southern Democrat race and religion hatred. Most recently the obstruction was directed at the entire governance effort of the first black President with a primary focus directed against his appointments.").

61. FED. JUD. CTR., *supra* note 27.

62. For example, although President Carter was not able to directly impact the diversity on the Supreme Court because he was one of the few presidents who did not have an opportunity to appoint a Supreme Court Justice, Carter was able to indirectly affect the makeup of the High

Like the Supreme Court, the federal appellate bench has historically been comprised of white men. The first woman was not appointed to the federal appellate bench until 1934,[63] and the first person of color was not appointed to the federal appellate bench until 1949.[64] The makeup of the federal judiciary began to change during the Carter administration. When President Jimmy Carter took office in 1977, the federal appellate bench was approximately 95% white male.[65] During his four years as president, Carter made a total of fifty-six appellate court appointments.[66] Ten were white women,[67] one was an African American woman (the first to be appointed a federal appellate judge),[68] eight were African American men,[69] two were Hispanic men,[70] and one was an Asian American man (the first federal appellate judge of Chinese descent).[71]

Although Carter made a dedicated effort to increase the diversity of the federal appellate bench,[72] his immediate two successors felt no such obligation. Over the course of two terms, President Ronald Reagan made a total of eighty-six appellate judge appointments.[73] Of that number, only six of those appointments were women and all were white. Of the seventy-seven male appointees, one was African American, and one was Hispanic.[74] President George H.W. Bush appointed

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Court with his appointment of Ruth Bader Ginsburg to the D.C. Circuit. Had Ginsburg not been a judge on the D.C. Circuit, it is doubtful that President Clinton, thirteen years later, would have nominated her to the Supreme Court. And as Ginsburg was the only woman on Clinton's short list, it is doubtful that a woman would have been appointed at all during Clinton's presidency. Thus, Carter's efforts to diversify the federal appellate courts made it possible for the second woman to be appointed to the Supreme Court. *See generally* Dawson, *supra* note 5.

63. *See* FED. JUD. CTR., *supra* note 27; note 57 and accompanying text.

64. *See* FED. JUD. CTR., *supra* note 27 and accompanying text.

65. *See* Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131, 1133 n.6 (2003) [hereinafter Clark, *Carter's Groundbreaking*].

66. *See* FED. JUD. CTR., *supra* note 27.

67. *Id.*

68. Amalya Lyle Kearse was appointed to the U.S. Court of Appeals for the Second Circuit in 1979, making her the first African American women appointed to the federal appellate bench. *Student Profile: The Honorable Amalya L. Kearse*, UNIV. MICH. L. SCHOOL, https://www.law.umich.edu/historyandtraditions/students/Pages/ProfilePage.aspx?SID=17683&Year=1962 (last visited Apr. 6, 2017).

69. *See* FED. JUD. CTR., *supra* note 27.

70. *Id.*

71. Appointed in 1977, Thomas Tang was the first Asian American of Chinese descent, but Herbert Young Cho Choy, who was of Korean descent and was appointed by President Richard Nixon in 1971, was the first Asian appointed to the federal bench. TSUNG CHI, EAST ASIAN AMERICANS AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK (2005).

72. *See* Clark, *Carter's Groundbreaking*, *supra* note 65, at 1132–33.

73. FED. JUD. CTR., *supra* note 27.

74. *Id.*

forty-two federal appellate judges during his one term in office. Of that number, seven were white women, thirty-one were white men, two were African American men, and two were Hispanic men.[75] Worse than the appointment of only thirteen women during the twelve-year span of the Regan and Bush I presidencies was the failure of a single women of color to be appointed to the federal appellate bench during those twelve years.[76]

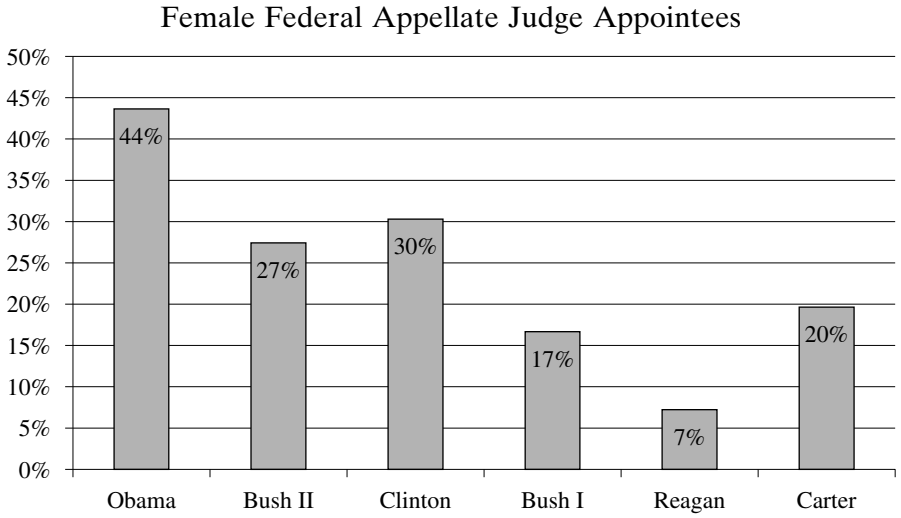
During Bill Clinton's two terms as president, he appointed sixty-six federal appellate judges—sixteen white women, three African American women, two Hispanic women, thirty-five white men, six African American men, five Hispanic men, and one Asian American man.[77] George W. Bush appointed sixty-three federal appellate judges during eight years in office.[78] Of that number, fourteen were white women, two were African American women, one was a Hispanic woman, forty were white men, four were African American men, and two were Hispanic men.[79]

Before reviewing the diversity of President Obama's fifty-seven federal appellate appointees,[80] it should be noted that even though he served two terms, Obama has the third fewest confirmations of federal appellate judges of the last six presidents.[81] Even Jimmy Carter, who only served one term, had one more federal appellate confirmation than Obama. Of the six previous presidents, Bush I was the only president with fewer appointments than Obama. Bush only served one term, and although Obama served two, he only had fourteen more federal appellate appointments than Bush.

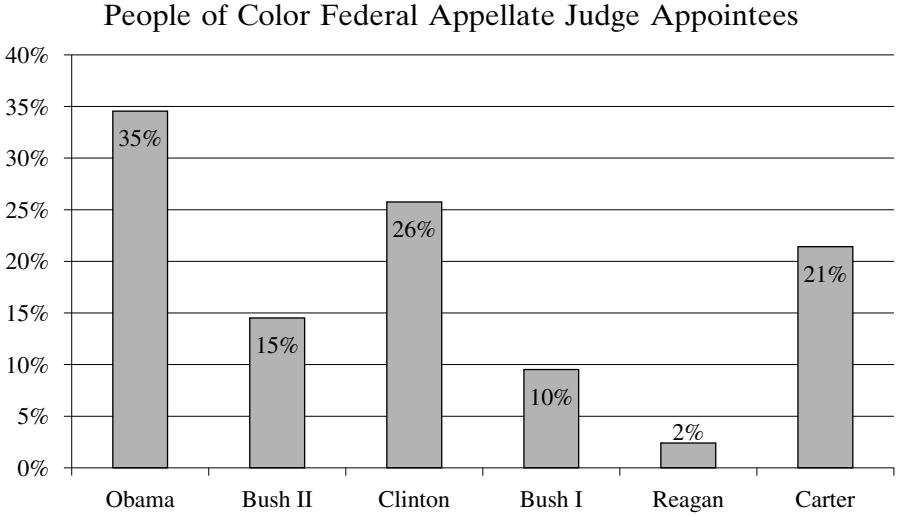
Of the fifty-seven federal appellate judges appointed by Obama, twenty were white women, two were African American women, three were Hispanic women, one was an Asian American woman (the first),[82] seventeen were white men, seven were African American men, four were Hispanic men, and three were Asian American men.[83]

75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. George W. Bush had sixty-three, Clinton had sixty-eight, George H. W. Bush had forty-two, Reagan had eighty-six, Carter had fifty-six. *Id.*
82. *Id.* President Obama appointed and elevated then-U.S. District Judge Jacqueline Hong-Ngoc Nguyen to the United States Court of Appeals for the Ninth Circuit on May 14, 2012. Nguyen is the first Asian American woman appointed to the federal appellate bench, and the first Vietnamese American federal judge. *Id.*
83. *Id.*

The following table shows the percentage of female federal appellate judge appointments for the last six presidents:



This table shows the percentage of federal appellate judge appointments that were people of color:



President Obama has made great strides in increasing the diversity of the federal appellate bench both in terms of gender and race.

And in doing so, he has increased the likelihood that the Supreme Court of the future will be more diverse.

IV. FEDERAL DISTRICT JUDICIAL APPOINTEES

While in modern history a federal district judge has not been directly elevated to the Supreme Court, district judges are often nominated to federal appellate judgeships,[84] which will then increase their chances of being considered for a Supreme Court appointment. For example, Justice Sonia Sotomayor would not have been nominated to serve on the Supreme Court had she not been a federal appellate judge. However, Sotomayor may not have even been considered for a seat on the Second Circuit Court of Appeals (her position when appointed to the Supreme Court) if she was not at the time a federal district court judge.[85] Because the trend of nominating federal appellate judges to serve on the Supreme Court will likely continue,[86] and because it is not uncommon for district judges to be elevated to the position of a federal appellate judge, a president's district judge appointments can have an impact on the Supreme Court of the future as well.[87]

Similar to his court of appeals judicial appointments, President Carter was progressive in his district judge appointments. Carter appointed 203 individuals to the federal district courts.[88] Of that number, twenty-nine were women (comprised of twenty-two white women, six African American women, one Hispanic), and 174 were men (comprised of 136 white men, twenty-two African American men, one American Indian male, two Asian American men, thirteen Hispanic men, one Pacific Islander).[89] President Reagan appointed 290 individuals to the federal district court.[90] Of that number, twenty-four were women (twenty-two white women, one African American

84. Roughly 36% of appellate judges appointed in the last forty years (Carter through Obama) were sitting federal district judges at the time of their nomination, and overall district judges comprise the single largest group, with private practice coming in second at 32%. Research on file with author.

85. At the time of then-judge Sotomayor's appointment to the Second Circuit Court of Appeals in 1998 by President Clinton, she was a judge on the Southern District of New York District Court, having been appointed to that position by President Bush I in 1992. Dawson, *supra* note 5, at 189 n.51.

86. President Trump successfully nominated Neil Gorsuch, a federal appellate judge, to fill the vacancy on the Supreme Court.

87. *See* Dawson, *supra* note 5, at 189, 201–02.

88. FED. JUD. CTR., *supra* note 27.

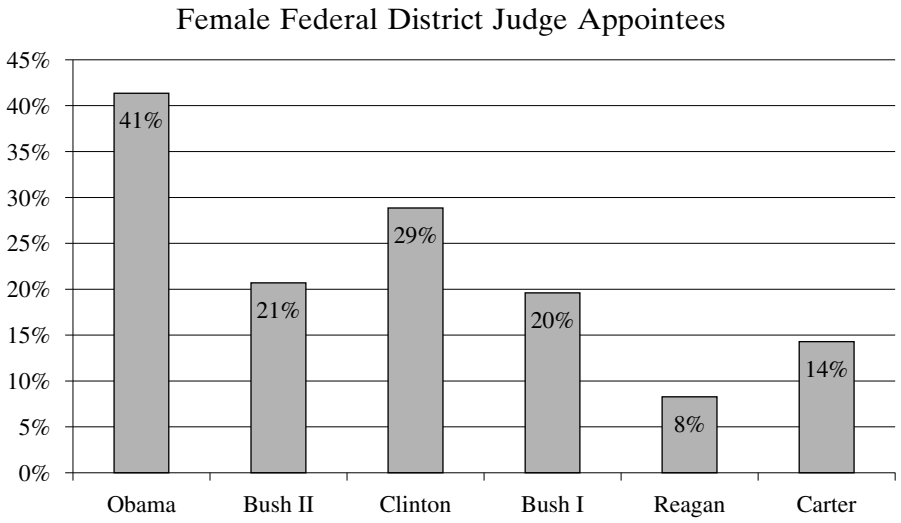
89. *Id.*

90. *Id.*

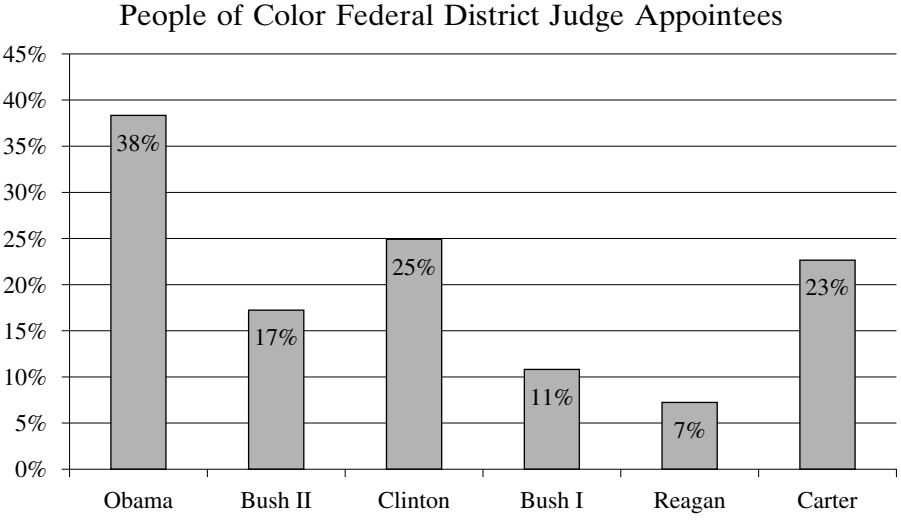
woman, one Hispanic), 266 were men (247 white men, five African American men, two Asian American men, twelve Hispanic men).[91] The first President Bush appointed 148 individuals to the federal district courts.[92] Of that number, twenty-nine were women (twenty-four white women, two African American women, three Hispanic women), 119 were men (108 white men, eight African American men, three Hispanic men).[93] President Clinton appointed 305 individuals to the federal district courts.[94] Of that number, eighty-eight were women (seventy white women, thirteen African American women, one Asian American, four Hispanic women), 217 were men (159 white men, forty African American men, one American Indian, three Asian American men, fourteen Hispanic men).[95] President Bush II appointed 261 individuals to the federal district courts.[96] Of that number, fifty-four were women (thirty-six white women, six African American women, one Asian American, eleven Hispanic women), 207 were men (176 white men, twelve African American men, three Asian American men, sixteen Hispanic men).[97] Finally, President Obama appointed 268 individuals to the federal district courts.[98] Of that number, 110 were women (seventy white women, twenty-four African American women, one American Indian, nine Asian American, ten Hispanic women), 156 were men (104 white men, twenty-nine African American men, eight Asian American men, twenty Hispanic men, one Pacific Islander).[99]

The following table shows the percentage of female federal district judge appointments for the last six presidents:

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*



This table shows the percentage of federal district judge appointments that were people of color:



Like his federal appellate appointments, President Obama exceed his predecessors both in terms of race and gender in his selection of federal trial court judges. Not only does the increased diversity of the federal bench improve the federal judiciary as a whole because it is more representative, the increase in the diversity of the lower fed-

eral courts increases the chances that the Supreme Court of the future will likewise be diverse.

Conclusion

With the election of Donald Trump as president of the United States, it is safe to assume that none of President Obama's lower court appointments will be elevated to the Supreme Court for at least the next four years. President Trump has already appointed Neil Gorsuch to fill Justice Scalia's seat on the Bench. It is not yet clear if President Trump will have an opportunity to appoint another Justice to the Court, but the possibility does exist. The average age of retirement of Supreme Court justices from 1971 to 2006 was 78.7,[100] and the current Court includes three Justices who are over the age of 77. Ruth Bader Ginsburg is 84, Anthony Kennedy is 80, and Stephen Breyer is 78.[101] However, despite their ages, it is not a certainty that any of these justices will leave the bench during the next four years. The oldest justice was Oliver Wendell Holmes, Jr., who retired in 1932 at the age of 90, two months shy of his 91st birthday, and the second oldest justice was John Paul Stevens, who retired in 2010 at 90 years and two months.[102]

Notwithstanding the vitality of the oldest members of the Court, it is hard to imagine that another Supreme Court vacancy will not occur during the term of the individual who is elected president in 2020. And if a democrat is elected, approximately thirteen of President Obama's diverse federal appellate appointees will be under the age of 60[103] and will still be in a position of being age-viable Supreme Court candidates.[104] If democrats do not win the White House until 2024,

100. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 782 (2006). Antonin Scalia died at the age of 79.

101. *Famous Supreme Court Justices*, BIOGRAPHY.COM, http://www.biography.com/people/groups/legal-professionals-supreme-court-justices (last visited Apr. 5, 2017) (noting the ages of the other Justices in order of oldest to youngest are Clarence Thomas, 68; Samuel Alito, 68; Sonia Sotomayor, 62; John Roberts, 62; and Elena Kagan, 56). *See generally* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012 (Clare Cushman ed., 3d ed. 2013) (indicating the ages, date of confirmation, and years of service of all the Supreme Court justices).

102. *See* THE SUPREME COURT JUSTICES, *supra* note 101, at 262; *John Paul Stevens Biography*, BIOGRAPHY.COM, http://www.biography.com/people/john-paul-stevens-9494379 (last visited Mar. 30, 2017).

103. Of President Obama's female court of appeals appointees, eight are currently under the age of 55. One of the eight is Asian, and one is Hispanic. Of President Obama's diverse male court of appeals appointees, five are under the age of 55. Three are African American, and two are Asian. *See* FED. JUD. CTR., *supra* note 27.

104. Presidents have become keenly aware of the importance of age in selecting nominees for Supreme Court appointment. *See* Dawson, *supra* note 5, at 192. Although the average ap-

the list of age-viable diverse candidates shrinks by half if a candidate under the age of 60 is desired.

With respect to President Obama's district court appointees, it is possible for some of his diverse appointees to have a path the appointment to the Supreme Court. As noted above, Justice Sotomayor began her judicial career as a district court judge. Sotomayor was 38 when she was appointed to the district court bench. Five years later at the age of 43, Sotomayor was appointed to the federal court of appeals. Eleven years later, she was appointed to the Supreme Court at the age of 55.

If a democrat is elected president in 2020, approximately seventy-six of President Obama's diverse federal district court appointees will be young enough to be appointed to and to serve two years on the court of appeals[105] and remain age-viable for Supreme Court appointments. If democrats do not win the White House until 2024, that number drops to forty-one.

Whether President Obama will have an impact on the diversity of the Supreme Court in the future, will depend in large part on the results of the 2020 election. And while it is difficult to predict whether one or more of President Obama's diverse federal court appointees will assume a seat on the Supreme Court, President Obama made a significant and lasting mark on the federal judiciary as a whole, and has set a high bar for presidents of the future.

pointment age of the current Justices is 52-1/2, presidents have on occasion appointed individuals who were in their 60s to the bench. Justice Ginsburg was 60 when she was appointed in 1993 by President Clinton. Three of President Richard Nixon's four nominees were over the age of 60. Warren Burger was 62 when appointed Chief Justice in 1969, Harry Blackmun was 62 when appointed in 1970, and Lewis Powell was 64 when appointed in 1971. Nixon's fourth nominee was William Rehnquist, who was 47 at the time of his appointment to the Bench. *Id.* at 193; *Famous Supreme Court Justices, supra* note 101.

105. John Roberts served two years on the D.C. Circuit Court of Appeals at the time of his appointment to serve as Chief Justice of the Supreme Court. Clarence Thomas served approximately 1-1/2 years on D.C. Circuit Court of Appeals at the time of his appointment to the Supreme Court. *See* Dawson, *supra* note 5, at 189.

APPENDIX
Supreme Court Nominees from 1901-1966

Nominating President	Nominee	Year Nominated	Senate Action	Previous Judicial Position
T. Roosevelt	Oliver Wendell Holmes, Jr.	1902	confirmed	Chief Justice of the Massachusetts Supreme Judicial Court
	William R. Day	1903	confirmed	Judge of the United States Court of Appeals for the Sixth Circuit
	William Henry Moody	1906	confirmed	— —
Taft	Horace Harmon Lurton	1909	confirmed	Judge of the United States Court of Appeals for the Sixth Circuit
	Charles Evans Hughes	1910	confirmed	— —
	Edward Douglass White*	1910	confirmed	Elevated from Associate Justice to Chief Justice of the United States
	Willis Van Devanter	1910	confirmed	Judge of the United States Court of Appeals for the Eighth Circuit
	Joseph Rucker Lamar	1910	confirmed	— —
	Mahlon Pitney	1912	confirmed	— —
Wilson	James Clark McReynolds	1914	confirmed	— —
	Louis Brandeis	1916	confirmed	— —
	John Hessin Clarke	1916	confirmed	Judge of the United States District Court for the Northern District of Ohio
Harding	William Howard Taft	1921	confirmed	Judge of the United States Court of Appeals for the Sixth Circuit
	George Sutherland	1922	confirmed	— —
	Pierce Butler	1922	confirmed	— —

Nominating President	Nominee	Year Nominated	Senate Action	Previous Judicial Position
	Edward Terry Sanford	1923	confirmed	Judge of the United States District Court for the Eastern District of Tennessee and the Middle District of Tennessee
Coolidge	Harlan Fiske Stone	1925	confirmed	— —
Hoover	Charles Evans Hughes*	1930	confirmed	Previously Associate Justice of the Supreme Court of the United States
	John J. Parker	1930	rejected	Judge on the United States Court of Appeals for the Fourth Circuit
	Owen Josephus Roberts	1930	confirmed	— —
	Benjamin N. Cardozo	1932	confirmed	Chief Judge of the New York Court of Appeals
F. Roosevelt	Hugo Black	1937	confirmed	— —
	Stanley Forman Reed	1938	confirmed	— —
	Felix Frankfurter	1939	confirmed	— —
	William O. Douglas	1939	confirmed	— —
	Frank Murphy	1940	confirmed	— —
	Harlan Fiske Stone*	1941	confirmed	Elevated from Associate Justice to Chief Justice of the United States
	James F. Byrnes	1941	confirmed	— —
	Robert H. Jackson	1941	confirmed	— —
	Wiley Blount Rutledge	1943	confirmed	Judge of the United States Court of Appeals for the District of Columbia Circuit
Truman	Harold Hitz Burton	1945	confirmed	— —

Nominating President	Nominee	Year Nominated	Senate Action	Previous Judicial Position
	Fred M. Vinson	1946	confirmed	Judge of the United States Court of Appeals for the District of Columbia Circuit
	Tom C. Clark	1949	confirmed	— —
	Sherman Minton	1949	confirmed	Judge of the United States Court of Appeals for the Seventh Circuit
Eisenhower	Earl Warren	1954	confirmed	— —
	John Marshall Harlan II	1955	confirmed	Judge of the United States Court of Appeals for the Second Circuit
	William J. Brennan	1957	confirmed	Associate Justice of the Supreme Court of New Jersey
	Charles Evans Whittaker	1957	confirmed	Judge of the United States Court of Appeals for the Eighth Circuit
	Potter Stewart	1959	confirmed	Judge of the United States Court of Appeals for the Sixth Circuit
Kennedy	Byron White	1962	confirmed	— —
	Arthur Goldberg	1962	confirmed	— —
L. Johnson	Abe Fortas	1965	confirmed	— —

* Edward Douglass White, Charles Evan Hughes, and Harlan Fiske Stone were all nominated to the position of Chief Justice during this time period. However, they are not included in percentage calculation because, at the time of their nomination, they were or had served as an Associate Justice. The relevant percentage relates to new individuals nominated to serve on the High Court.

ESSAY

The Obama Presidency and the Confederate Narrative

PEGGY COOPER DAVIS AND VALERIA VEGH WEIS*

Since this nation's founding, a Confederate Narrative has covered and protected racial subordination. This Confederate Narrative has been prominent at times and muted at times. My thesis is that, by its very success, the Obama presidency brought this narrative to the fore, paving the way for a reactionary attachment to local control. I will describe the Confederate Narrative in Part I. In Part II, I will explain how the Confederate Narrative was challenged by and after the civil war, but then revived to blunt the effects of Reconstruction. In Part III, I will argue that resistance to the Obama presidency enlivened the Confederate Narrative. Finally, in Part IV, I will comment on the likely effects of Donald Trump's presidency on national receptivity to the Confederate Narrative on the one hand, and on federal protection of civil and human rights on the other.

I. THE CONFEDERATE NARRATIVE AT THE FIRST AND SECOND FOUNDINGS

There is a long tradition in the United States of resistance to remote and centralized power. It goes back to King George. That is, it goes back to the American colonies' resistance to British rule. Britain was, of course, a colonial power, and it ruled the transplanted white settlers with what the settlers saw as arrogant disdain. Exploitation of the kind represented by unilateral taxes or the Coercive [aka Intolera-

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ble] Acts that followed the Boston Tea Party bred not only rebellion but also hatred of distant authority.[1]

When independence from England was won, a dislike of distant rule morphed, in a sense, from an anti-colonial sentiment to an anti-federal sentiment. No top-down authority would be accepted easily after the harsh struggle against Britain. Beyond that, it was difficult in the Eighteenth Century to think of the States as a unified whole. Interstate communication and travel were so slow and arduous that the nation seemed unworkably large. The national and global sensibilities that have come with jet travel and with the (still astonishing) Internet were unimaginable. Dependence on a far-away centralized authority seemed impractical. Moreover, the former colonies, although newly minted as states, had various, and not always harmonious, identities.

The chief cause of disharmony was, of course, slavery. When the colonies broke away from British rule, slaveholding and antislavery factions were at a stalemate. The price of uniting slaveholding and non-slaveholding states was a dark compromise. The Constitution of the new nation protected slaveholders' rights to their human property by providing that:

> No Person held to Service or labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or labour, but shall be delivered up on Claim of the Party to whom such Service or labour may be due.[2]

This, the Fugitive Slave Clause, is notorious for its flat contradiction of the principle announced in the United States' Declaration of Independence that all men [and, we will insist if our forebears would not have, that this means all *people*] are created equal and endowed with rights to life, liberty and the pursuit of happiness. But for purposes of our argument it is most important for having assured that neither the federation nor any of the free states could interfere with the slaveholding customs, laws, and practices of Southern states. Protecting slavery was important enough to undermine the Declaration of Independence only a few years after its announcement.

In the original constitutional debates, the Founders tended to be inexplicit about the desire to safeguard rights in human chattel—worth, by one estimate, more than ten trillion in today's dollars at the

1. ALAN ROGERS, EMPIRE AND LIBERTY: AMERICAN RESISTANCE TO BRITISH AUTHORITY, 1755-1763 (1974).

2. U.S. CONST. art. IV, § 2, cl. 3.

time of the Civil War.[3] They talked more openly about a certain understanding of the need for local control. One could say that the desire to protect an economic investment in human property was papered over with broad talk about freedom to maintain local or regional ways of life. **This covering talk of freedom from external and distant control is what we call the Confederate Narrative.**

The cover was thin, however, and in time it became transparent. With southern secession and the outbreak of the Civil War, the desire to preserve rights in human chattel was explicitly expressed as the central goal of the Confederate states. These words from various declarations of succession reveal their purposes:

Georgia:

> The people of Georgia having dissolved their political connection with the Government of the United States of America, present to their confederates and the world the causes which have led to the separation. For the last ten years we have had numerous and serious causes of complaint against our non-slave-holding confederate States with reference to the subject of African slavery.[4]

Mississippi:

> Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth . . . .
>
> We must either submit to degradation, and to the loss of property worth four billions of money, or we must secede from the Union framed by our fathers, to secure this as well as every other species of property. For far less cause than this, our fathers separated from the Crown of England.[5]

South Carolina:

> [A]n increasing hostility on the part of the non-slaveholding States to the institution of slavery, has led to a disregard of their obligations, and the laws of the General Government have ceased to affect the objects of the Constitution.[6]

Texas:

3. Samuel H. Williamson & Louis P. Cain, *Measuring Slavery in 2011 Dollars*, MEASURING WORTH, https://www.measuringworth.com/slavery.php (estimating value of U.S. slaves as a proportion of G.D.P.) (last visited Apr. 8, 2017).

4. *See generally The Declaration of Causes of Seceding States*, CIV. WAR TRUSTS http://www.civilwar.org/education/history/primarysources/declarationofcauses.html (transcribing Georgia's declaration dated January 19, 1861) (last visited Apr. 8, 2017).

5. *Id.* (transcribing Mississippi's declaration dated January 9, 1861).

6. *Id.* (transcribing South Carolina's declaration dated December 20, 1860).

> In all the non-slave-holding States, in violation of that good faith and comity which should exist between entirely distinct nations, the people have formed themselves into a great sectional party, now strong enough in numbers to control the affairs of each of those States, based upon an unnatural feeling of hostility to these Southern States and their beneficent and patriarchal system of African slavery, proclaiming the debasing doctrine of equality of all men, irrespective of race or color—a doctrine at war with nature, in opposition to the experience of mankind, and in violation of the plainest revelations of Divine Law.[7]

II. THE CONFEDERATE NARRATIVE CHALLENGED AND REVIVED

With Union victory in the Civil War, a new order was ushered in. Slavery was prohibited, but that was only a beginning. The nation was now obliged to accept that basic human rights should not be held at the sufferance of local factions. A broken nation was reconstructed as a guardian of human freedom. The Thirteenth, Fourteenth and Fifteenth Amendments, and a series of five Reconstruction-Era Civil Rights Acts, gave citizenship and all of its attendant rights to all who were or would be born on the United States' soil. Newly enfranchised Black-American citizens assumed political power and began to rebuild the South in ways that were egalitarian and progressive. And the federal government, functioning through a bi-racial Congress, asserted its power in efforts to protect the freedom and equal dignity that citizenship required.

Of course, this was not the end of racial injustice. As bi-racial local governments proliferated in the South and as federal authority was asserted for the protection of human rights, the Confederate Narrative was resurrected in a slightly altered form. The Post-Civil War Confederate Narrative is a story in which the Confederate Army was a band of freedom fighters,[8] struggling to maintain a genteel way of life, which was simultaneously benevolent and controlling with respect to Black-American people.[9] According to this story, the Civil War

7. *Id.* (transcribing Texas's declaration dated February 1, 1861).

8. To offer an example given by Drew Gilpin Faust, "the women of St. Lucah, Georgia, proclaimed that . . . their husbands were off fighting for the merchants' freedom." Drew Gilpin Faust, THE CREATOR OF CONFEDERATE NATIONALISM 54 (1988). Moreover, the confederate loyalists also portrayed slaves as appreciative of their good lives and rejecting of Freedom. *Id.* at 63.

9. As Walker Percy said: "When a politician mentions states' rights, it's a better than even bet that in the next sentence it will become clear what kind of states' rights he is talking about. It

was a brutal assault on these well-intentioned freedom fighters. State sovereignty was central to this distortive story. According to the Post-Civil War Confederate Narrative, the Thirteenth, Fourteenth and Fifteenth Amendments and the accompanying Civil Rights Acts were forcible impositions upon the sovereign power of independent states. These new legal instruments unseated a tutelary racial caste system and permitted the election of Black and White state, local and federal officials who were both incompetent and corrupt.[10] According to the Post-Civil War Confederate Narrative, a benign social ordering was sacrificed on the name of a misguided fantasy of racial equality. Overall, the Post-Civil War Confederate Narrative undermined Reconstruction, weakened the Civil War Amendments, and justified Jim Crow subordination. It continued to mutate and, in recent years, it has eviscerated the Voting Rights Act[11] and the Violence Against Women Act,[12] threatened and distorted Obamacare,[13] and provided a framework for resisting all manner of Congressional and Presidential social justice initiatives.

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usually comes down to the right to keep the Negro in his place." Randall B. Smith, *Walker Percy and the Atticus Finch Question*, CATHOLIC WORLD REPORT (Oct. 4, 2015), http://www.catholicworldreport.com/Item/4229/walker_percy_and_the_atticus_finch_question.aspx

10. For much of this century, Reconstruction historiography was dominated by a 'traditional' interpretation that portrayed the years following the Civil War as ones of unrelieved sordidness in political and social life. In this view, vindictive Radical Republicans fastened black supremacy upon the defeated South, unleashing an orgy of corruption presided over by unscrupulous carpetbagger [northerners who ventured south to reap the spoils of office], traitorous scalawags [W]hite southerners who cooperated with the Republican Party for personal gain], and ignorant freedmen.

Eric Foner, *Reconstruction Revisited*, 10 REVS. IN AM. HIST. 82, 82 (1982).

11. *See* Shelby County v. Holder, 133 S. Ct. 2612 (2013) (holding Section 4(b) of the Voting Rights Act of 1965, which determined jurisdiction subject to a preclearance based on their histories of voting discrimination, unconstitutional).

12. *See* United States v. Morrison, 529 U.S. 598 (2000) (holding the Violence Against Women Act of 1994 unconstitutional because it exceeded congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment to the Constitution).

13. Trump's recent executive order directed federal agencies to "waive, defer, grant exemptions from, or delay the implementation of any provision or requirement" of Obamacare that imposes a "fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications." Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, Exec. Order No. 13,765, 82 Fed. Reg. 8351 § 2 (Jan. 20, 2017), https://www.gpo.gov/fdsys/pkg/FR-2017-01-24/pdf/2017-01799.pdf. In addition, the order directs federal officials to "afford the states more flexibility and control to create a more free and open health care market." Julie Hirschfeld Davis & Robert Pear, *Trump Issues Executive Order Scaling Back Parts of Obamacare*, N.Y. TIMES (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/us/politics/trump-executive-order-obamacare.html; *see also What Executive Actions Has Trump Taken?* BBC NEWS (Apr. 12, 2017), http://www.bbc.com/news/world-us-canada-38695593.

III. BARACK OBAMA AS A SYMBOL OF FEDERAL POWER

The election of a Black-American president was met in some quarters in much the same way as the election of Black-American officials was met during Reconstruction. Obama's 2009 speech to a joint session of Congress elicited the shout "You lie!" from a Republican congressman.[14] Party leaders insisted in the face of all evidence to the contrary that the President was foreign born. Seventy-two percent (72%) of registered Republican voters still doubt President Obama's citizenship, and this percentage includes people high in political knowledge.[15]

Major factions of the now transformed Republican Party vowed to obstruct Obama and his party's initiatives whenever possible. Major social welfare legislation that Obama's party managed to enact was challenged in the courts. By 2014, Republicans had majorities in both the House and Senate, and the President's agenda was almost entirely thwarted.[16]

I ask you to recall the Confederate Narrative and the myth of Black-Americans' incompetence during Reconstruction. Just as the racially integrated legislatures of Southern states were lambasted as primitive savages with carpetbagger accomplices and violently overthrown, the Obama administration was vilified and opposed at every step. But President Obama summoned the power of his office to persevere.

In January of 2014, Barack Obama, speaking to the press before a Cabinet meeting, said: "[w]e are not just going to be waiting for legislation. I've got a pen and I've got a phone, and I can use that pen to sign executive orders and take executive actions and administrative actions."[17] He subsequently used executive power to commit the U.S.

14. South Carolina Republican House member Joe Wilson shouted, "You lie" during President Obama's health care speech to Congress, and members of both parties condemned the heckling. *Rep. Wilson Shouts, 'You Lie' to Obama During Speech*, CNN (Sept. 10, 2009, 08:27 AM), http://www.cnn.com/2009/POLITICS/09/09/joe.wilson/#cnnSTCText.

15. Josh Clinton & Carries Roush, *Poll: Persistent Partisan Divide Over 'Birther' Question,* NBC NEWS (Aug. 10, 2016 02:19 PM), http://www.nbcnews.com/politics/2016-election/poll-persistent-partisan-divide-over-birther-question-n627446 (exposing the results of a recent NBC News SurveyMonkey poll conducted in late June and early July of more than 1,700 registered voters).

16. Alex Altman & Zeke J. Miller, *The Challenge for the New Republican Majority*, TIME (Nov. 4, 2014, 01:13 AM), http://time.com/3557627/2014-midterm-elections-republican-senate-majority-mitch-mcconnell/.

17. Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBSNEWS (Jan. 14, 2014, 12:44 PM), http://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-

to the Paris Agreement on climate change,[18] to institute the Clean Power Plan to reduce emissions,[19] to restrict new energy exploration in the Arctic Ocean and new coal leases on government land,[20] to cap many student-loan payments,[21] and to tighten rules on gun sales.[22] He has made it harder for corporations to use so-called inversions to lower their taxes,[23] required retirement-investment advisers to eliminate conflicts of interest,[24] and made more than four million workers eligible for overtime pay.[25]

Obama's exercises of federal power—whether executive power or legislative power—yielded vociferous resistance. Confederate rhetoric appeared once again in lawsuits challenging those exercises of power. In a majority opinion upholding some provisions of the Affordable Care Act and invalidating another (*NFIB v. Sebelius*), Chief Justice Roberts included a wholly unnecessary preamble.[26] This preamble, not joined by any other member of the Court, was ostensibly

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to-take-on-congress/; *see also* James Surowiecki, *The Perils of Executive Action*, NEW YORKER (Aug. 08, 2016), http://www.newyorker.com/magazine/2016/08/08/the-perils-of-executive-action.

18. Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITE HOUSE: PRESIDENT BARAK OBAMA (Sept. 3, 2016, 10:41 AM), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement.

19. Climate-Resilient International Development, Exec. Order No. 13,677, 79 Fed. Reg. 58,231 (Sept. 23, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-09-26/pdf/2014-23228.pdf.

20. *See* EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (2013), https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf; Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, https://www.gpo.gov/fdsys/pkg/FR-2016-12-14/pdf/2016-30277.pdf.

21. *Presidential Memorandum—Federal Student Loan Repayments*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (June 9, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments.

22. *Memorandum—Promoting Smart Gun* Technology, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 4, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/05/memorandum-promoting-smart-gun-technology; *see also Fact Sheet: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer,* THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 4, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.

23. Chad Bray, *Fertilizer Deal Called Off Over New Tax Inversion Rules*, N. Y. TIMES (May 23, 2016), https://www.nytimes.com/2016/05/24/business/dealbook/us-netherlands-cf-oci-nitrogen-inversion.html.

24. Former President Barack Obama directed the Department of Labor to move ahead with a proposal that would raise investment-advice standards for brokers handling retirement accounts. Mark Schoeff Jr., *Obama Directs Labor Department to Move Ahead on Fiduciary Rule*, INVESTMENT NEWS (Feb. 23, 2015, 08:45 AM), http://www.investmentnews.com/article/20150223/FREE/150229979/obama-directs-labor-department-to-move-ahead-on-fiduciary-rule.

25. 29 CFR § 541 (2011); Defining and Delimiting the Exemptions for Executive Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516 (July 6, 2015), http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=28355; *see also* Fair Pay and Safe Workplaces, Exec. Order No. 13,673 79 Fed. Reg. 45,309 (July 31, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-08-05/pdf/2014-18561.pdf.

26. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).

offered as a statement of principles governing Congressional power to enact a national medical care system that sustains itself by making demands on States and on the People. In fact, it was an ode to the importance of limiting federal power. Roberts said:

> 'State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'[27] Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy.[28] The independent power of the States also serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'[29]

There isn't space here to document the revival of the Confederate Narrative that Roberts' words embody, but here are some examples from recent litigation:

In an early lower court challenge to Obamacare, the plaintiff's motion for a preliminary injunction warned that under Obamacare:

> [T]he federal government will have the absolute and unfettered power to create complex regulatory schemes to fix every perceived problem imaginable and to do so by ordering private citizens to engage in affirmative acts, under penalty of law, such as taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy, among others. The term 'Nanny State' does not even begin to describe what we will have wrought if in fact the Health Care Reform Act falls within any imaginable governmental authority. To be sure, George Orwell's 1984 will be just the primer for our new civics.[30]

In its challenge to an interim appointment made by President Obama, the Senate Republican Leader Mitch McConnell and 44 other members of the United States Senate argued that:

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27. *Id.* (citing New York v. United States, 505 U.S. 144, 181 (1992)).
28. *Id.* (citing The Federalist No. 45, at 293 (J. Madison)).
29. *Id.* (citing Bond v. United States, 564 U.S. 211, 222 (2011) (emphasis added)).
30. Plaintiff's Motion for a Preliminary Injunction & Brief in Support at 36–37, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (No. 2:10-cv-11156), 2010 U.S. Dist. Ct. Motions LEXIS 35868.

> The Court should not countenance . . . encroachment on the 'great security' against 'concentration of . . . powers' so 'essential to the preservation of liberty.' The Federalist No. 51, at 318. It should repudiate the Executive's overreaching and reaffirm the continuing vitality of the constitutional structure.[31]

(We note that Ronald Reagan made 232 appointments during Congressional recess, George W. Bush made 171, Bill Clinton made 139, George H. W. Bush made 78 (serving only one term) while Barack Obama had made 32 as of February 1, 2015.)[32]

In a challenge of Obama's Deferred Action for Childhood Arrivals policy giving immigrants who arrived in the United States as children temporary protection against deportation, we find this excited rhetoric:

> Here, the questions at hand are whether the President and the executive branch must remain within the lines drawn for them by our founders or whether they shall be lawless tyrants who know no limits other than their own imagination . . . The petition for a writ of certiorari should be granted and this Court should . . . fulfill its sworn duty to protect and defend the Constitution against lawless disregard by the executive branch in this case.[33]

IV. THE RETURN OF THE CONFEDERATE NARRATIVE

As we saw, the Obama presidency was a lightening rod for excited sentiment against exercises of federal power. That sentiment was marshaled in the campaign to elect Donald Trump. Trump ran for the office of president on a platform that emphasized deregulation, small government, loosening of environmental controls, dismantlement of public welfare programs, and rollbacks of federally protected individual rights and liberties (excepting, of course, the right to bear arms).[34]

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31. Brief of Senate Republican Leader Mitch McConnell and 44 Other Members of the United States Senate as Amici Curiae at 34, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281), 2013 WL 6228469.

32. HENRY B. HOGUE, CONGRESSIONAL RESERVE ARCHIVE, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2015), https://www.senate.gov/CRSpubs/3d313cc2-9515-4533-b1f0-3f762cd09007.pdf; Bruce Drake, *Obama Lags His Predecessors in Recess Appointments*, PEW RESEARCH CTR. (Jan. 13, 2014), http://www.pewresearch.org/fact-tank/2014/01/13/obama-lags-his-predecessors-in-recess-appointments/.

33. Reply Brief of Petitioner in Support of Petition for Writ of Certiorari, Arpaio v. Obama, No. 15-643, (Dec. 30, 2015), 2015 U.S. S. Ct. Briefs LEXIS 4961, *21.

34. Jane C. Timm, *Every New Policy Stance Trump Has Taken Since Election*, NBCNEWS (Nov. 19, 2016, 09:32 PM), http://www.nbcnews.com/politics/politics-news/decision-2016-look-back-trail-campaign-season-n686011.

Now that Donald Trump holds the reins of federal power, we might wonder what domestic policies we can expect. Will he pursue his own agenda of federal initiatives to enhance the public good? Or will he simply dismantle federal domestic programs? While now-President Trump appears to have a strong appetite for power, he seems, consistently with the Confederate Narrative, determined to exercise federal power to shrink rather than strengthen central authority to protect the People's rights and secure the People's welfare. We cite here just one of many examples: we compare the positions and policies of the Obama Justice Department with respect to protecting citizens against police violence and abuse; with those of President Trump's Attorney General William Sessions, a former Senator who, tellingly, fought against removal of the Confederate flag from public buildings in the South;[35] opposed the Violence Against Women Act as an interference with state sovereignty;[36] and regarded the 1965 Voting Rights Act as a "piece of intrusive legislation."[37]

Under Obama appointee Eric Holder, the Department of Justice began twenty-three investigations of state and local law enforcement agencies and entered eleven consent decrees mandating reforms in urban policing. Then-Senator Sessions condemned these interventions as abuses of federal authority and, early in his term as Attorney General, he indicated that the federal government would back away from them. Sessions directed the Deputy Attorney General and the Associate Attorney General to review outstanding consent decrees and investigations and admonished that "local control and local accountability are necessary for effective local policing. It is not the responsibility of the federal government to manage non-federal law enforcement agencies."[38] Doug Peterson, the Republican Attorney General in Nebraska, applauded this change saying, "I appreciate the

35. *See* Ben Mathis-Lilley, *The Despair of the Jeff Sessions Hearing*, SLATE (Jan. 11, 2017, 02:20 PM), http://www.slate.com/blogs/the_slatest/2017/01/11/jeff_sessions_hearing_the_confederacy_segregation_and_racism_that_lasts.html.

36. Alice Speri, *Career Racist Jeff Sessions Is Donald Trump's Pick for Attorney General*, THE INTERCEPT (Nov. 18 2016, 2:50 PM), https://theintercept.com/2016/11/18/career-racist-jeff-sessions-is-donald-trumps-pick-for-attorney-general/.

37. Sarah Wildman, *Closed Sessions*, NEW REPUBLIC (Dec. 30, 2002), https://newrepublic.com/article/61363/closed-sessions.

38. *Is Jeff Sessions' Justice Department Trying to Kill Police Reform in Baltimore*, ACLU OF MD. (Apr. 5, 2017), http://www.aclu-md.org/blog/2017/04/05/is_jeff_sessions%E2%80%99_justice_department_trying_to_kill_police_reform_in_baltimore (discussing Session's memorandum directed to the DOJ's Deputy Attorney General and the Associate Attorney General).

attitude he [Sessions] is taken . . . It's really a separation of powers issue."[39]

Overall, it does seem that with the election of Donald Trump the Confederate Narrative has gained new potency. Federal enforcement of civil rights was the centerpiece of the Reconstruction Amendments, and, thus far, it seems that President Trump is as eager as were the States of the former Confederacy to leave civil rights at the mercy of local preferences.

39. Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html.

COMMENT

Eye Spy Injustice: Delving Into the Implications Police Body Cameras Will Have on Police Officers and Citizens

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INTRODUCTION

In recent years, documented incidents of police brutality and the mistreatment of civilians have steadily increased throughout the United States.[1] In 2009, police officers shot an unarmed Oscar Grant in the back as he was handcuffed and lying face down on the ground in an Oakland, California, transit station.[2] In 2015, a Charleston, South Carolina, police officer shot Walter Scott in the back eight times and subsequently tried to cover up the killing.[3] Based on occurrences similar to the aforementioned, many individuals now consider police officers as catalysts of chaos rather than enforcers of justice.[4] These

1. *See Increasing Police Brutality: Americans Killed by Cops Now Outnumber Americans Killed in Iraq War*, GLOBAL RES. (Dec. 14, 2013) [hereinafter *Increasing Police Brutality*], http://www.globalresearch.ca/increasing-police-brutality-americans-killed-by-cops-now-outnumber-americans-killed-in-iraq-war/5361554.

2. *See* Tom Head, *The Shooting Death of Oscar Grant: What You Need to Know*, ABOUT NEWS (Feb. 27, 2016), http://civilliberty.about.com/od/lawenforcementterrorism/p/oscar_grant.htm.

3. *See* Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter* Scott, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

4. *See generally* Bill Schneider, *Do Americans Trust Their Cops to Be Fair and Just? New Poll Contains Surprises*, REUTERS (Jan. 15, 2015), http://blogs.reuters.com/great-debate/2015/01/

incidents have put stress on the relations between police officers and the individuals that they have sworn to protect.[5] Citizens' mistrust and suspicion could partially be attributed to the fact that, like the Walter Scott killing, police officers have attempted to cover up incidents of brutality and may have gotten away with it had it not been for quick-thinking bystanders.[6]

American citizens have watched in horror—in what seems to be a daily occurrence—as instances of police brutality have been displayed across various media outlets.[7] In response to these incidents, many have pushed authoritative figures to inquire into what can be done to ensure that these occurrences do not continue to happen.[8] In response to such questions, legislation has been introduced that would require police officers to wear cameras on their person that would record their on-duty activities.[9] It was proclaimed that the purpose of these body cameras would be to not only serve the public by providing citizens with 'unbiased' documentation of police interactions, but to also protect police officers by providing them with evidence that will support a law abiding officer's actions when dealing with accusations of police abuse.[10]

While the introduction of body cameras has produced regulations regarding the use of these cameras,[11] not all states have implemented

15/one-third-of-americans-believe-police-lie-routinely/ (displaying graphs of surveys taken from Americans of different demographics on their beliefs in law enforcement).

5. LAW ENFORCEMENT OATH OF HONOR, INT'L ASS'N OF CHIEFS OF POLICE [hereinafter OATH], http://www.theiacp.org/portals/0/pdfs/oath_honor_adobe.pdf (last visited Apr. 6, 2017).

6. Charles Montaldo, *The Death of Zachary Hammond*, THOUGHTCO. (Mar. 31, 2016), https://www.thoughtco.com/death-of-zachary-hammond-971116.

7. *See* Crimesider Staff, *Tulsa Police Officer Betty Shelby Turns Herself in to Face Charges in Shooting Death*, CRIMESIDER (Sept. 23, 2016, 4:47 PM), http://www.cbsnews.com/news/terence-crutcher-tulsa-shooting-betty-shelby-officer-charged-with-manslaughter-in-police-shooting/; *see also* Brian Flood, *Fresno Police Release Body Camera Footage of Cops Killing Unarmed Man*, THEWRAP (July 14, 2016, 8:18 AM), http://www.thewrap.com/fresno-police-release-body-camera-footage-of-cops-killing-unarmed-man/.

8. *See* Ravishly, *What You Can Do Right Now About Police Brutality*, HUFFINGTON POST (Apr. 17, 2015, 6:37 PM), http://www.huffingtonpost.com/ravishly/what-you-can-do-right-now_1_b_7050424.html.

9. *See Features: Police Body-Worn Cameras: Where Your State Stands*, URB. INST. (Jan. 1, 2016), http://apps.urban.org/features/body-camera/.

10. *See* Josh Siegel, *Why Police Say Body Cameras Can Help Heal Divide With Public*, DAILY SIGNAL (July 18, 2016), http://dailysignal.com/2016/07/18/why-police-say-body-cameras-can-help-heal-divide-with-public/.

11. *See* Laura Leslie, *Police Body Cam Legislation Not Only New NC Law*, NC CAPITOL (Sept. 30, 2016), http://www.wral.com/police-body-cam-legislation-not-only-new-nc-law/16065452/.

body cameras or body camera regulations to govern their use.[12] This could become troublesome because the nature of a police officer's job may require him or her to participate in a wide variety of activities that could potentially lead to privacy concerns.[13] For example, if an officer conducting an on-foot chase while wearing a body camera happens to run through a hospital where individuals are being treated for their most intimate and personal issues, there are jurisdictions with no body camera regulations in place to protect these individuals' right of privacy.[14]

To help reconcile this lack of legislation, this Comment recommends that body cameras be implemented in all 50 states. Additionally, this Comment proposes that body camera regulations be subject to state law—which will provide lawmakers the autonomy to ensure that the implementation, storage, and dissemination of body cameras and their footage will be equitable, not only for police officers, but for the citizens of that state. Local police agencies are generally governed by their respective state, county, or town legislation, so this Comment advises that, where there is already body camera governance in place that is not at the state level, the implementation of a state-wide body camera policy will supersede that governance in order to prevent confusion and misinterpretation of body camera laws by all parties in that jurisdiction.[15] In order to illustrate the need for body cameras and to determine the proper regulations needed to govern them, this Comment will segment off into six parts.

Part I delves into the historical issues that have been associated with policing and briefly touches upon how body cameras could potentially alleviate said problems. Part II illustrates how recent incidents of police brutality and misconduct have affected citizen/police relations and how the implementation of body cameras could be a step in the right direction towards mending this relationship. Part III segues into the implications that the implementation of body cameras will have upon law enforcement. Part IV explores the negative and

12. *See Nearly All States Considered Police Body Cameras in 2015, Few Enacted Laws*, FISCAL NOTE (Aug. 6, 2015), https://www.fiscalnote.com/2015/08/06/nearly-all-states-considered-police-body-cameras-in-2015-few-enacted-laws/.

13. Siegel, *supra* note 10.

14. *See* Niraj Chokshi, *These Are the States That Want to Regulate Police Body Camera Videos*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/25/these-are-the-states-that-want-to-regulate-police-body-camera-videos/?utm_term=.4ed5606f2b1f.

15. *See State and Local Government*, WHITE HOUSE, https://www.whitehouse.gov/1600/state-and-local-government (last visited Mar. 12, 2017).

positive repercussions that body cameras may have on police officers as well as citizens. Part V summarizes and compares body camera guideline recommendations made by the American Civil Liberties Union (ACLU), the state of South Carolina, and the state of Texas. Part VI recommends that all states should implement body cameras for police officers, that body camera regulations should be subject to state law, and demonstrates what that potential law may entail. I conclude this Comment by reiterating the need for body cameras and emphasizing the positive effects they will have on society.

I. HISTORICAL ISSUES OF POLICING

A. Implicit Biases

It is likely that all individuals carry some type of implicit bias towards people who differ from them. Whether it be based on race, gender, or socioeconomic class, these biases affect the way individuals think about and treat others.[16] Typically, these biases are not an issue because individuals are able to either mask their feelings or act on these biases without any significant harm towards themselves or others. However, this is not the case when it comes to police officers and the citizens they oversee.

In careers such as law enforcement, where split second decisions must be made that have life or death implications associated with them, implicit biases are dangerous because they may have the disproportional effect of singling out a particular group of people and treating them in an unequal manner. For instance, during the 1970's "war on drugs," a disproportionate number of African Americans and Latinos were stopped, searched, and arrested due to the stereotype that people of color were more prone to drug use and crime.[17] In turn, African Americans and Latinos had higher arrest and incarceration rates than other groups—not because the aforementioned groups used drugs more frequently than others, but because law enforcement officers were prejudiced towards people of color and focused on these communities when policing.[18] Thus, the negative connotation that people of color are more criminal became fulfilled indirectly by the internal biases of police officers. Since that time, strides have been

16. *See Understanding Implicit Bias*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (last visited Mar. 30, 2017).

17. *See Race and the Drug War*, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/race-and-drug-war (last visited Mar. 15, 2017).

18. *Id.*

made to ensure that all citizens are treated fairly by police and the implementation of body cameras is a step in that direction. Body cameras and their footage can be used as training tools for officers to identify, as well as correct, implicit biases before they are forced to make a life altering decision while on duty.

B. Accountability

One of the primary functions of police officers is to apprehend suspected criminals to provide the judicial system an opportunity, if need be, to hold those individual accountable for their actions.[19] However, in the United States there has been a longstanding issue with police being held accountable for their actions when they fail to abide by the law while on duty.[20] An example of this is the 2014 shooting of Tamir Rice. Rice was a twelve-year-old boy who, while playing with a toy gun at a local park, was shot at close range by a police officer.[21] Although the 911 caller who initially notified dispatchers of Rice's presence at the park stated that she believed the gun was fake and that the individual brandishing it was probably a juvenile, that information was never passed on to police.[22] The officers who responded to the dispatcher's call drove to where Rice was located, and two seconds after an officer exited his vehicle, Rice was shot and killed.[23] Although video evidence of the incident proved that the officer who shot Rice did not tell the truth when he stated that he had instructed Rice to show him his hands on multiple occasions, a grand jury decided not to indict the officers because there was a possibility that the gun was real.[24] If body cameras were utilized during this incident, the camera footage would have given the grand jury a firsthand account of how the incident transpired; thus allowing them to make a more informed decision when determining whether the actions of the officer were reasonable, and if they were not, hold that officer accountable for his actions.

19. *See* Stephanie Reid, *The Duties of a State Police Officer*, CHRON, http://work.chron.com/duties-state-police-officer-15152.html (last visited Mar. 12, 2017).

20. *See* Dana Liebelson & Daniel Marans, *14 Times Cops Walked in 2015 After Shooting People to Death*, HUFFINGTON POST (Dec. 29, 2015, 2:34 PM), http://www.huffingtonpost.com/entry/police-killings-no-indictment_us_5682b893e4b0b958f65a7702.

21. *See* James Downie, *Lessons of Tamir Rice's Death*, CHI. TRIB., (Jan. 4, 2016, 8:50 AM), http://www.chicagotribune.com/news/opinion/commentary/ct-tamir-rice-police-shootings-20160104-story.html.

22. *Id.*

23. *Id.*

24. *Id.*

C. False Testimony

Historically, there has been an issue of determining whether the testimony of police should be taken at face value, and if so, how much weight that testimony should be given.[25] Generally, police officers are given deference in a court of law regarding their actions and statements while on duty.[26] This may give pause to some citizens who wish to assert that a police officer has lied about what he or she has said or done while performing their duties because if a court will typically give an officer deference and the suit becomes a case of he-said-she-said, it seems unlikely that a judge would choose the testimony of a citizen over that of an officer of the law.

An example of a police officer giving false testimony is the 2015 killing of Walter Scott in Charleston, South Carolina. In this instance, a police officer pulled Scott over during a traffic stop.[27] While pulled over, Scott exited his vehicle and ran away in the opposite direction of the officer.[28] As Scott fled, the officer shot him five times in the back.[29] In the police report filed by the officer, it was stated that Scott approached the officer and tried to take his stun gun.[30] The report was ultimately found to be false when a video taken by a bystander, which showed the officer firing his weapon upon a fleeing Scott, surfaced on the web.[31] Subsequently this video provided the grand jury with the evidence that it needed to indict the officer.[32] Implementing body cameras could help to alleviate issues like the aforementioned because it would provide constant documentation of events that could readily be recalled for review, thus serving as a "witness" in a situation that may not have otherwise had one.

25. *See* Steve Mills & Toddy Lighty, *Cops Rarely Punished When Judges Find Testimony False, Questionable*, CHI. TRIB. (May 6, 2016, 10:24 AM), http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-testimony-met-20160506-story.html.

26. *Id.*

27. *See* Elliott C. McLaughlin, *Ex-North Charleston Officer Indicted on Federal Charges in Walter Scott Death*, CNN (May 11, 2016, 4:56 PM), http://www.cnn.com/2016/05/11/us/north-charleston-police-michael-slager-indicted-walter-scott-shooting/.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

D. Modern Day Policing

Currently, more than 1,000,0000 law enforcement personnel are employed in the United States.[33] Generally, each one of these individuals have taken the law enforcement oath of honor which states "[o]n my honor, I will never betray my badge, my integrity, my character, or the public trust. I will always have the courage to hold myself and others accountable for our actions. I will always uphold the Constitution, the community, and the agency I serve."[34] This oath reinforces police officers' standards of integrity, bravery, and honor not only to the law, but also to the community in which they serve.[35] However, these characteristics are ones that some individuals in America may not feel embody the true essence of law enforcement officers nowadays.[36] As of recent, acts of police misconduct and violence have been magnified in the media, especially those incidents in which African Americans have found themselves being the victims of police brutality.[37]

II. REACTIONS TOWARDS INCIDENTS OF POLICE BRUTALITY

A. Public Reactions

Police brutality is likely an issue that has existed before the beginning of ordered policing, but in today's America, the issue of police brutality and the relations between police officers and citizens is believed to be worsening.[38] This can be evidenced by looking at the

33. *See* Daniel Bier, *By the Numbers: How Many Cops Are There in the USA?*, SKEPTICAL LIBERTARIAN (Aug. 26, 2014), http://blog.skepticallibertarian.com/2014/08/26/by-the-numbers-how-many-cops-are-there-in-the-usa/; *see also* BRIAN A. REAVES, U.S. DEP'T OF JUST., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf.

34. OATH, *supra* note 5.

35. *See* Maggie Lourdes, *Do Cops Take an Oath?*, CHRON, http://work.chron.com/cops-oath-22507.html (last visited Mar. 12, 2017).

36. *See* D.K., *What the Cops Say*, ECONOMIST (Apr. 27, 2015), http://www.economist.com/blogs/democracyinamerica/2015/04/policing-america.

37. *See* Elliott C. McLaughlin, *There Aren't More Police Shootings, Just More Coverage*, CNN (Apr. 21, 2015, 7:26 AM), http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/.

38. *See* Shaun King, *Police Brutality Is Getting Worse and Shows No Signs of Slowing Down*, DAILY KOS (Sept. 22, 2015), http://www.dailykos.com/story/2015/9/22/1423847/-Police-brutality-is-getting-worse-and-shows-no-signs-of-slowing-down. Physical use of force makes up more than 50% of the reported misconduct reports filed against police. *See generally* Lesley Hauler, *5 Facts About Police Brutality in the United States That Will Shock You*, AOL NEWS (Oct. 22, 2015), http://www.aol.com/article/2015/10/22/5-facts-about-police-brutality-in-the-united-states-that-will-sh/21252144/.

number of individuals that police officers are credited with killing in the past 3 years. In 2015, police officers were credited with killing more than 1,100 individuals.[39] This number is staggering compared to two years ago in which police were "only" credited with the death of more than 748 people.[40] As controversy surrounding the amount of deaths rises, so does the amount of attention and exposure that these killings are given through means such as cell phone videos and social media.

One of the more notorious police killings occurred on April 12, 2015 in Baltimore, Maryland, where police officers arrested an African American man named Freddie Gray.[41] According to police reports and video footage shot by bystanders, Gray did not fight back or resist when police officers attempted to detain him, but was somehow seriously injured between the time of his arrest and the time he arrived at the local police station.[42] Although none of the officers involved in the arrest or transport of Freddie Gray described using force, Gray was found to be in critical condition upon his arrival at the police station.[43] Due to his injuries, Gray was subsequently transported to a local hospital where he was treated for three fractured vertebrae and a crushed voice box.[44] The doctors that treated Gray described his injuries as consistent with a victim of a serious car accident.[45] It later became public knowledge that the vehicle transporting Gray made two undocumented stops before reaching the police station to which there is no footage or documentation to explain what occurred during these stops.[46] Gray eventually died of his injuries on April 19, 2015, a week after he was detained.[47] If the officers in this instance were wearing body cameras when arresting and transporting Gray, the two previously unknown stops would have been recorded

39. *See The Counted People Killed by Police in the US*, GUARDIAN, http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited Mar. 7, 2017).

40. *See* Scott Shackford, *More Than 1000 People Have Been Killed by Police in 2014*, REASON.COM (Dec. 9, 2014, 10:55 AM), http://reason.com/blog/2014/12/09/more-than-1000-people-have-been-killed-b (citing *Killed By Police*, FACEBOOK, https://www.facebook.com/KilledByPolice/?fref=NF).

41. *See* David A, Graham, *The Mysterious Death of Freddie Gray*, ATLANTIC (Apr. 22, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119/.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

and documented and the circumstances surrounding Gray's death would become clearer.

The 'mysterious' death of Gray led to protests in front of the Baltimore Police Station, where protesters demonstrated their anger over the lack of information surrounding Gray's arrest and death.[48] As tensions began to grow between protestors and police officers, so did the intensity and violence of the protests.[49] What began as peaceful marches to bring attention to the killing of Gray turned into residents throwing rocks and bottles at police officers, which transitioned into buildings and cars being set ablaze and over a half dozen businesses being looted or damaged.[50] These riots resulted in an estimated nine-million dollars' worth of damage to businesses and surrounding homes.[51]

Alternatively, some individuals who have witnessed these heart-breaking incidents have taken up the civil rights mantle and created organizations in opposition to police brutality such as the "#BlackLivesMatter" movement.[52] "Black Lives Matter was created in 2012 after Trayvon Martin's murderer, George Zimmerman was acquitted for his crime, and 17-year old Trayvon was posthumously placed on trial for his own murder."[53] Black Lives Matter is said to be

> [r]ooted in the experiences of Black people in this country who actively resist . . . de-humanization[.] #BlackLivesMatter is a call to action and a response to a virulent anti-Black racism that permeates our society. Black Lives Matter is a unique contribution that goes beyond extrajudicial killings of Black people by police and vigilantes.[54]

This organization brings awareness to the variety of ways that African Americans are deprived of basic human rights and dignities

48. *See* Holly Yan, Ashley Fantz & Kimberly Hutcherson, *Freddie Gray Death: Protestors, Police Scuffle in Baltimore*, CNN (Apr. 23, 2015, 10:01 PM), http://www.cnn.com/2015/04/23/us/baltimore-freddie-gray-death/index.html.

49. Holly Yan & Dana Ford, *Baltimore Riots: Looting, Fires Engulf City After Freddie Gray's Funeral*, CNN (Apr. 28, 2015, 10:30 AM), http://www.cnn.com/2015/04/27/us/baltimore-unrest/.

50. *Id.*

51. *See The Baltimore Riots Cause $9 Million Worth of Damage*, REUTERS (May 13, 2015, 4:29 PM), http://www.businessinsider.com/r-baltimore-rioting-damage-estimate-at-9-million-us-government-2015-5.

52. *We Affirm That All Black Lives Matter*, BLACKLIVESMATTER, http://blacklivesmatter.com/guiding-principles/.

53. *About the Black Lives Matter Network,* BLACKLIVESMATTER, http://blacklivesmatter.com/about/.

54. *Id.*

every day in the United States of America, through various mediums such as rallies, marches, and films.[55]

B. Governmental Reactions

In the wake of tragic incidents such as the Ferguson, Missouri, shooting in 2014, where an unarmed teenager named Michael Brown was gunned down by a police officer, legislators as well as civil leaders have searched for ways to ensure that incidents of police brutality were deviations from normal police interactions with civilians rather than the norm.[56] From these conversations, one policy suggestion emerged as the forerunner of remedying this issue of police misconduct, and that was to require police officers to wear body cameras while on duty.[57] The thought process behind this suggestion was that if police officers were equipped with body cameras which recorded their actions at the time that incidents similar to the ones previously mentioned occurred, it would be much easier to determine whether police officers made the right call while on duty, were justified in their actions, or acted outside the scope of their authority.[58] This is because video footage provided by these cameras would give a first-hand account of the progression of events; thus increasing the "transparency" of police interactions with citizens.[59] By increasing the transparency of these interactions it is likely that, over time, incidents of police brutality and harassment would decline while citizens' views and overall trust of the police would be bolstered.[60]

III. THE IMPLEMENTATION OF BODY CAMERAS ON LAW ENFORCEMENT

Prior to the death of Michael Brown in 2014, few police departments had instructed their officers to wear body cameras.[61] Even

55. *Id.*

56. *See* Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 831–33 (2015).

57. *Id.* at 832–33.

58. *Id.* at 833.

59. *Id.*

60. *See* MICHAEL D. WHITE, OFFICE OF JUSTICE PROGRAM, POLICE OFFICER BODY-WORN CAMERAS 19 (2014), https://www.ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf.

61. *See* Peter Hermann & Rachel Weiner, *Issues Over Police Shooting in Ferguson Lead Push for Officers and Body Cameras*, WASH. POST (Dec. 2, 2014), https://www.washingtonpost.com/local/crime/issues-over-police-shooting-in-ferguson-lead-push-for-officers-and-body-cameras/2014/12/02/dedcb2d8-7a58-11e4-84d4-7c896b90abdc_story.html.

though some departments had tested body cameras using "pilot programs," where departments would instruct their officers to wear body cameras for a short period of time to determine whether these cameras should be implemented as part of an officer's standard equipment, these cameras were not popular.[62] This all changed following the death of Michael Brown.[63] After the details surrounding Brown's death came to light it became public opinion that police officers should wear body cameras while on duty.[64] Even President Barack Obama shared these sentiments and proposed a seventy-five million dollar grant to fund the purchasing of 50,000 body cameras to be used by law enforcement officers.[65] This grant would be used by the federal government to assist state and local police departments with purchasing and storing body cameras and related equipment.[66] Additionally, these funds would be utilized to train police officers in performing their jobs more efficiently and would also assist with the development of evaluation tools to study the best practices for body camera usage.[67]

As of May 1, 2015, TASER International Incorporated, one of the leading manufacturers of body cameras in the United States, stated that police departments in "a total of 16 major U.S. cities, including Miami, Los Angeles and San Diego, have purchased . . . wearable cameras for their officers."[68]

IV. POTENTIAL CONCERNS AND BENEFITS OF BODY CAMERAS

A. Concerns

1. Costly

There are more than 1,000,000 law enforcement personnel in the United States today, and to equip each one of these individuals—or even a majority of them—with a body camera could become ex-

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*; *see also* David Jackson, *Obama Team Will Fund Police Body Camera Project*, USA TODAY (May 1, 2015, 3:54 PM), http://www.usatoday.com/story/news/nation/2015/05/01/obama-police-body-cameras-josh-earnest-baltimore/26696517/.
66. *See* Hermann & Weiner, *supra* note 61; *see also* Jackson, *supra* note 65.
67. Jackson, *supra* note 65.
68. *See* Patrick Gillespie, *Taser: 16 Major U.S. Cities Now Have Police Cameras*, CNN (May 1, 2015, 10:06 AM), http://money.cnn.com/2015/04/30/investing/taser-earnings-police-cameras-baltimore/.

tremely expensive especially considering the cost of purchasing the equipment and training officers to effectively use said cameras.[69] Many police departments that wished to implement body cameras ran into issues with the cost of the equipment.[70] In an attempt to lower costs, police departments had purchased body cameras in bulk from manufacturers such as Taser International.[71] On Taser International's website, its "on-officer" camera unit retails for $399.[72] Notwithstanding any potential discounts that the government or police departments could receive from contracting with body camera manufacturers, purchasing body cameras wholesale, or any departmental decisions regarding camera sharing between officers, police departments across the United States could potentially spend hundreds of millions of dollars on the purchasing of body cameras alone.[73] Furthermore, this figure does not take into account how much it would cost to store the actual body cameras themselves and the body camera footage taken by police officers while on duty.

For every police officer that utilizes a body camera while on duty, there are potentially several videos from his or her shift that must be uploaded.[74] For example, in Duluth, Minnesota, 110 officer-worn cameras produced 8,000 to 10,000 videos per month.[75] With police protocol requiring most videos to be stored for at least 30 days from the time of an incident, the amount of information that needs to be saved can become astonishing.[76] In San Diego, California, a police department contracted with TASER to purchase 1,000 body cameras for $267,000.[77] Although this price is discounted from the retail value of body cameras, the actual cost to implement these cameras comes into focus when storage contracts are taken into consideration. For storage, software licenses, maintenance, warranties and other related

69. *See* Kevin Rector, *Baltimore Police Officers Get Training in Body Cameras*, BALT. SUN (May 27, 2016, 7:36 PM), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-body-camera-training-20160527-story.html; *see also* REAVES, *supra* note 33.

70. *See* Bryan Bakst & Ryan J. Foley, *For Police Body Cameras, Big Costs Loom in Storage*, ASSOCIATED PRESS (Feb. 6, 2015), https://www.policeone.com/police-products/body-cameras/articles/8243271-For-police-body-cameras-big-costs-loom-in-storage/.

71. *Id.*

72. *See* Doug Wyllie, *New TASER AXON Body On-Officer Camera Hits the Streets*, POLICEONE (Aug. 1, 2013), https://www.policeone.com/police-products/body-cameras/articles/6354361-New-TASER-AXON-Body-on-officer-camera-hits-the-streets/.

73. Bakst & Foley, *supra* note 70.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

equipment the city of San Diego spent another $3,600,000.[78] That is a total of $3,827,000 for the implementation of body cameras for one city, and being that there are thousands of state and local law enforcement agencies in the United States, one must pause and consider: where would the money to fund this venture come from?

2. Body Cameras Are Stationary

Body cameras, as their name infers, are worn on the body of a police officer. As a result, a legitimate concern has been raised about whether these cameras display an accurate record of an encounter. Since these cameras do not offer a 360-degree view, some elements of an encounter may be taken out of context or not properly captured at all.[79] Additionally, by only providing an account from the perspective of the officer, body cameras may turn from a tool of accountability to a "multiuse surveillance" device.[80]

3. Privacy Rights

a. Rights of Citizens

A primary concern that civilians have about the implementation of body cameras is that these cameras will affect their privacy, with specific emphasis on their Fourth Amendment rights.[81] The Fourth Amendment states that individuals have "[t]he right . . . to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ."[82] Police officers have a unique job in that their occupation may sometimes require that they intrude into the lives and upon the personal property of others.[83] On any given day, officers may find themselves entering into an individual's place of residence to serve a search warrant, or find themselves participating in the chase of a suspect that leads them through a private place of busi-

78. *Id.* (noting the provisions of the contract between Taser International and Duluth, Minnesota, stated that Duluth was to receive 84 cameras and charging bays for less than $5,000, while its three-year contract and licensing agreement for data storage cost roughly $78,000).

79. *See* Mike Ludwig, *Body Cameras Are Not Pointed at the Police; They're Pointed at You*, TRUTHOUT (May 24, 2015), http://www.truth-out.org/news/item/30940-body cameras-are-not-pointed-at-the-police-they-re-pointed-at-you.

80. *Id.*

81. *See* Devallis Rutledge, *Legal Issues With Body Cams*, POLICE MAG. (Jan. 26, 2015), http://www.policemag.com/channel/technology/articles/2015/01/legal-issues-with-body-cams.aspx.

82. U.S. CONST. amend. IV.

83. *See* Timothy Roufa, *A Day in the Life of a Police Officer*, BALANCE (Oct. 12, 2016), https://www.thebalance.com/a-day-in-the-life-of-a-police-officer-974861.

ness.[84] Regardless of the situation, if body cameras were implemented to provide a first-person account of police officer's on-duty activities, it is not only recording the actions of the officer, but also any individuals that the officer may come into contact with as well as any person that may fall within scope of the camera's lens at that time.[85] The accidental and incidental filming of individuals could raise concerns that, although body cameras provide an account of an officer's actions, it vicariously surveys those individuals who happen to fall within the range of the camera's view.[86] This opens the proverbial "Pandora's Box" to determine whether body cameras are being strictly used to give an account of a police officer's on-duty activities, or to gather information and intelligence on unsuspecting citizens, even if incidental.[87]

b. Rights of Officers

Civilians are not the only ones who should have apprehensions regarding body camera implications upon their privacy rights; police officers may be concerned that these cameras do not allow for full autonomy during the workday.[88] If body cameras were implemented under a regulation that required them to be turned on during all hours of a workday, police officers would have no privacy when discussing serious matters with their colleagues such as familial troubles, career choices, or the stresses of their occupation.[89] Every word and action that occurred during that officer's work day could potentially become part of a recorded document for others to review.[90] Recording police officers' conversations with their colleagues could become especially problematic if those officers began to feel that they were somehow being discriminated against for a statement or action that was made

84. *See* Rob Polansky et al., *Police Issue Search Warrant for Vermont Home of Man Found at Sea*, EYEWITNESS NEWS 3 (Sept 27, 2016, 7:13 AM), http://www.wfsb.com/story/33256980/police-issue-search-warrant-for-vermont-home-of-man-found-at-sea; *see also* Kyle Hicks, *Nineveh Man Leads Police on Chase Through Multiple Counties*, FOX 59 (May 8, 2016, 6:55 PM), http://fox59.com/2016/05/08/nineveh-man-leads-police-on-chase-through-multiple-counties/.

85. *See* Nick Wing, *Here's How Police Could End Up Making Body Cameras Mostly Useless*, HUFFINGTON POST (Oct. 10, 2015, 9:03 AM), http://www.huffingtonpost.com/entry/police-body-camera-policy_us_5605a721e4b0dd8503079683.

86. *Id.*

87. *Id.*

88. *See Illinois Officers Claim Body Cameras an Invasion of Privacy in Lawsuit*, FOX NEWS (June 25, 2016), http://www.foxnews.com/us/2016/06/25/illinois-officers-claim-body-cameras-invasion-privacy-in-lawsuit.html.

89. *Id.*

90. *Id.*

under the purview of their body camera that would have otherwise been private. This could implicate issues concerning police officers' First Amendment right to Freedom of Association as well as Freedom of Speech.[91] For example, two officers who wish to have a conversation about a superior officer while on duty may feel that their speech is restricted because they know that anything done on duty may be memorialized by their body cameras and could potentially be reviewed at a later time. If so, these officers' First Amendment right to Free Speech has been 'chilled,'[92] and body cameras have now presented a new issue that must be dealt with.

4. Modification of Body Camera Footage

In step with the concern that body cameras may violate individuals' privacy rights is the concern of that police department or authoritative figures who may have something to lose, will use their influence or access to body cameras to edit, or simply not record, body camera footage for their own personal agenda.[93]

A method in which legislators could potentially minimize the ability of individuals to edit or modify body camera footage is to require that body cameras be turned on during a police officer's entire shift.[94] If police officers were given discretion on when to activate their body cameras while on duty, potentially issues could arise regarding whether that officer recorded an entire encounter from beginning to end or manipulated the recording to only capture parts of an incident that would paint him in a positive light. Furthermore, when an officer who has acted less than admirably has discretion on when to activate their body camera, that officer may decide to not record, delete, or modify, body camera footage, which can be a problem with very real implications as demonstrated in the case of Walter Scott.[95]

91. Freedom of Association is the right of individuals to join or leave groups of that person's own choosing. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984 (2010). Freedom of Speech is the right to express any opinion without fear of government censorship or societal sanction. U.S. CONST. amend. I.

92. Chilled speech is the inhibition or discouragement of the legitimate exercise of a constitutional right, especially one protected by the First Amendment of the United States, by potential or threatened prosecution under, or application of, a law or sanction. *Chilling effect*, Webster's New World Law Dictionary (2010).

93. *See* Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All*, ACLU (Mar. 2015), https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all.

94. *Id.*

95. *See* Judd Legum, *Everything the Police Said About Walter Scott's Death Before a Video Showed What Really Happened*, THINKPROGRESS (Apr. 7, 2015), https://thinkprogress.org/every

Another way in which the modification of body camera footage could be minimized is to implement an automatic download process of all body camera footage into a third party database until it can be later reviewed.[96] Having an automatic download process would not only prevent on-duty police officers from tampering with their body camera or its footage, but would also indemnify police officers for any mishap that could accompany the storage of footage while on their shift as it will be understood that officers do not have any involvement with this process.[97] This will allow officers to focus not on the body camera attached to their persons, but what is truly important—policing the community and ensuring citizen safety.

5. Dissemination of Information

Whenever a police officer utilizes a body camera, the footage taken by that body camera must be stored.[98] Body cameras are implemented to record the everyday activities of law enforcement officers and the footage taken from these cameras should be stored in such a way that they can be retrieved at a moment's notice to bear witness to occurrences happening within our society.[99] Although footage retrieval and dissemination is a primary function of the implementation of body cameras, there is no set application pertaining to the dissemination of body camera footage.[100] This can become extremely problematic because, as we have seen by the slaying of Walter Scott, not all law enforcement officers or police departments are forthright with their reports or camera footage.[101]

Legislators must address whether the footage taken from body cameras will be subject to the Freedom of Information Act ("FOIA") because this Act provides the public with the right to request access to

thing-the-police-said-about-walter-scotts-death-before-a-video-showed-what-really-happened-f623b4205390#.kyhadnfiv.

96. Stanley, *supra* note 93.

97. *Id.*

98. *See* Josh Sanburn, *Storing Body Cam Data Is the Next Big Challenge for Police*, TIME (Jan. 25, 2016), http://time.com/4180889/police-body-cameras-vievu-taser/.

99. *See* Chris W. Roberts, *Court System Would Benefit From More Widespread Use of Police Body Cameras*, UT NEWS (June 9, 2016), http://news.utexas.edu/2016/06/09/court-system-would-benefit-from-more-police-body-cameras.

100. *See* Lee Hermiston, *ACLU Recommends New Rules for Police Body Cameras*, EMERGENCY MGMT. (May 22, 2015), http://www.emergencymgmt.com/safety/ACLU-Recommends-New-Rules-Police-Body-Cameras.html.

101. Legum, *supra* note 95.

records from any federal agency.[102] What particularly needs to be addressed is whether footage taken from body cameras will fall under one of FOIA's categories of information that are exempt from being released. Congress has established that "certain categories of information . . . are not required to be released in response to a FOIA request because release would be harmful to" a governmental interest.[103] Exemption seven is the relevant provision for determining whether footage taken from police body cameras can be accessed under FOIA. This provision states that:

> Information compiled for law enforcement purposes that: (A) Could reasonably be expected to interfere with enforcement proceedings. (B) Would deprive a person of a right to a fair trial or an impartial adjudication. (C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy. (D) Could reasonably be expected to disclose the identity of a confidential source. (E) Would disclose techniques and procedures for law enforcement investigations or prosecutions. (F) Could reasonably be expected to endanger the life or physical safety of any individual.[104]

It is highly likely that the analysis used to determine whether a body camera video will fall under this exemption will be evaluated on a case by case basis. However, it is also likely that much of the footage captured by body cameras will not fall within this exemption because it is more probable that a crime will not occur during a police officer's shift than it will. Ultimately, legislators and police agencies must consider this exemption when implementing body cameras and their regulations to determine which individuals will have access to body camera footage, and if so, what can be done to protect the identity of those individuals who are not instrumental to the purpose of the video.

B. Benefits

1. Body Cameras Could Bolster Relations Between Law Enforcement and Citizens

Recently, relations between law enforcement and citizens have not been positive. This can be evidenced by the slayings of individuals such as Walter Scott, Oscar Grant, and Michael Brown, as well as the

102. *See generally* Freedom of Information Act, 5 U.S.C.A. § 552(b) (2016) (providing requirements for agency publication of information).
103. *Id.*
104. *Id.*

protests and rioting against police brutality seen in Baltimore, Maryland.[105] One of the perceived benefits of implementing body cameras is to relieve some of the tensions between these two groups, and to hopefully improve law enforcements' transparency.[106] It is theorized that implementing body cameras will have a "civilizing" effect on citizens and law enforcement officers alike because both parties will have a mutual understanding that everything they say and do while encountering one another will be recorded and viewed at a later date.[107] This will encourage both parties to hold themselves responsible for their conduct and to effectively 'police' themselves when dealing with each other.[108]

Body cameras could protect police officers from individuals who would "bear false witness" to their conduct because a citizen who would otherwise file a false complaint now understands that their actions as well as the actions of the police officer is being documented for others to see; thus making it much more difficult to fabricate what transpired during a police interaction. Additionally, these body cameras could provide context for the situations between police officers and civilians, which could become especially helpful in court when an individual who had acted in one particular manner during an interaction with police acts in an opposite manner before the court. Furthermore, body cameras could potentially have the effect of reducing acts of police brutality because body camera footage would provide an unbiased account of interactions between police officers and civilians, effectively serving as a preemptive warning for officers who may seek to conduct themselves in a less than ethical manner.[109] If body cameras were implemented in such tragedies as Michael Brown and Eric Garner, there would have been less of an opportunity for officers to cover up their actions with falsified police reports and edited security footage. Moreover, the videos taken from police body cameras could be utilized to provide clarity and calm citizens who may have concerns or suspicions in situations where the details of an incident are highly controversial or extremely vague.

105. *See Increasing Police Brutality*, *supra* note 1; Head, *supra* note 2; Hermann & Weiner, *supra* note 61; Yan & Ford, *supra* note 49.
106. WHITE, *supra* note 60, at 18.
107. *Id.* at 6.
108. *Id.*
109. *Id.* at 6–7.

2. Save Time and Money

The implementation of body cameras can have a civilizing effect on those recording and being recorded—and while this is the main objective of implementing these cameras—this behavior could also spell savings for police departments. When individuals do not file unfounded complaints on police, police officers do not have to spend resources and manpower to prove why these complaints are groundless.[110] For complaints that were found to have merit, police departments may have to conduct lengthy and costly investigations to determine whether the officer was within the scope of his employment or whether a punishment should be handed down.[111] Potentially, this could all be avoided by the implementation of body cameras. When allegations arise after an encounter, police officers can quickly refer to the recorded footage of a body camera to give a first-person account of what transpired. Ron Miller, Chief of Police for the City of Topeka, Kansas, had this to say about the effects of body camera footage on police complaints: "[w]e've actually had citizens come into the department to file a complaint, but after we show them the video, they literally turn and walk back out."[112] As can be seen, it is beneficial to utilize body cameras as a safeguard against false accusations of police brutality.

3. Preserving Information

Having video records of police encounters could significantly bolster the preservation of information, which could subsequently be used to review police conduct within a department or used as evidence at trial. "Unlike in-car cameras, body worn cameras capture everything that happens as officers travel around the scene and interview multiple people."[113] These videos indiscriminately record everything

110. *See generally Handling Complaints—A Guide for Police Officers and Staff*, IPCC, https://www.ipcc.gov.uk/sites/default/files/Documents/publications/Handling_complaints_for_police_officers_and_staff_interactive_PDF.PDF (stating guidelines for police staff responding to complaints).

111. *See generally* Gregor Aisch & Haeyoun Park, *For Chicago Police, Many Complaints but Few Consequences*, N.Y. TIMES (Dec. 17, 2015), http://www.nytimes.com/interactive/2015/12/15/us/chicago-police-officers-rarely-punished-for-civilian-complaints.html?_r=0 (exposing statistics of the few consequences of complaints against Chicago police).

112. *See* Sue Udry, *Odd Bedfellows & Debate Over Cop Cameras*, BILL OF RIGHTS DEFENSE COMMITTEE (Oct 31, 2014), http://bordc.org/news/odd-bedfellows-debate-over-cop-cameras/.

113. PoliceOne Staff, *More Than Accountability: 5 Unique Uses for Body Cameras*, POLICEONE.COM (Feb. 26, 2015), https://www.policeone.com/police-products/body-cameras/articles/8349555-More-than-accountability-5-unique-uses-for-body-cameras/.

in its sight and may document something that could potentially be the difference between a police officer being indicted for the killing of an innocent individual or that officer going on administrative leave.

4. Footage Can Be Used for Training Purposes

Police officers can use footage captured by body cameras to educate and train young and newly-admitted officers. These videos can be used as scenario-based training tools, determining areas where officers perform strongly and areas where they may need more work before being placed in the field. Using body camera footage in this way could reinforce the training police officers traditionally receive by judging their decision-making processes and how they may communicate and act in certain scenarios.[114]

V. PROPOSED RECOMMENDATIONS

Since there is little law pertaining to the use of body cameras, some states and organizations have enacted laws or proposed guidelines regarding the use and application of body cameras. The proposed recommendations that this Comment will examine were given by the American Civil Liberties Union (ACLU), the State of South Carolina, and the State of Texas.

A. The Implementation and Application of Body Cameras

When assessing when and how police officers should utilize their body cameras, the ACLU stated that there needs to be a "balance . . . to ensure that officers can't manipulate the video record, while also placing reasonable limits on recording in order to protect privacy."[115] This organization recommends that police officers should be required to activate their body cameras "when responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public," which would include stops, frisks, searches, arrests, and consensual interviews.[116] To ensure that these officers follow this regulation, the ACLU suggests that three courses of action should result from a failure to record: (1) "direct disciplinary action against the individual officer;" (2) "the adoption of rebuttable evidentiary presumption in

114. *See supra* Part II. B.
115. Stanley, *supra* note 93.
116. *Id.*

favor of criminal defendants who claim exculpatory evidence was not captured or was destroyed;" and (3) "the adoption of rebuttable evidentiary presumption on behalf of civil plaintiffs suing the government, police department and/or officers for damages based on police misconduct."[117]

South Carolina's Law Enforcement Training Council established guidelines for its state law enforcement to follow. These guidelines indicate that "uniformed officers whose primary function is to answer calls for service and interact with the public, or officers who have a reasonable expectation that they will," should wear body cameras.[118] While wearing body cameras, these officers have the duty to activate them "when a uniformed officer arrives at a call for service or initiates any other law enforcement or investigative encounter between an officer and a member of the public."[119] This includes instances involving violent crimes, public drunkenness, and suspicious persons.[120] However, police have discretion on when to use body cameras when dealing with victims of rape or sexual assault, and are encouraged to avoid recording individuals who are nude, or "when sensitive human areas are exposed."[121]

The Texas Commission on Law enforcement published a guideline that teaches members of law enforcement agencies the foundational rules of body cameras before these body cameras can be implemented within those agencies' ranks.[122] In these guidelines, police officers are not required to advise citizens that they are being recorded, but are required to begin recording and continue recording an event until it is either concluded or, according to the guidelines, deactivation of the body camera is authorized.[123] Events in which police officers are to activate their body cameras include: (1) all calls for service; (2) officer initiated contacts like arrests and traffic stops; and (3) prisoner or witness transports.[124] Officers may also activate their body camera if they reasonably believe that recording may provide

117. *Id.*
118. *See* John Blackmon, *Body Camera Guidelines Published*, SCFOP3 (Dec. 8, 2015), https://scfop3.org/body-camera-guidelines-published/.
119. *Id.*
120. *Id.*
121. *Id.*
122. *See* TEX. OCC. CODE § 1701.655 (2015); *accord Sample Model Policy on Body-Worn Cameras,* TCOLE [hereinafter *Sample Policy 1*], https://www.tcole.texas.gov/content/body-worn-camera-policies (last visited Mar. 31, 2017).
123. *Sample Policy 1*, *supra* note 122.
124. *Id.*

evidence in a criminal investigation.[125] Deactivation of a body camera is authorized when "all arrests have been made," when "all witnesses and victims have been interviewed," and when continued recording will no longer "serve to obtain additional evidence."[126] Texas' guidelines go on to state that if a body camera is deactivated without proper authorization, the police officer must give a brief verbal statement explaining why the body camera was deactivated before turning it off, and subsequently document it in a report.[127]

B. Retention, Storage, and Use of Body Camera Footage

It is the view of the ACLU that body camera "[d]ata should be retained no longer than necessary for the purpose for which it was collected because, for the vast majority of police encounters with the public, there is no reason to preserve video evidence and those recordings therefore should be deleted relatively quickly."[128] The ACLU's guidelines further state that unless a video from a body camera has been flagged, police should retain these video for a period of weeks, not months, before they should be deleted.[129] A video would only be flagged if it involved a use of force, led to a detention or an arrest, or where a formal or informal complaint had been registered.[130] When it comes to the use of body camera footage, the ACLU is of the opinion that these recordings should only be utilized when conducting an internal or external investigation regarding the misconduct of an officer, otherwise, there is no reason for these videos to be viewed before their retention period expires and it is deleted.[131]

Under South Carolina's guidelines, videos from body cameras that are "non-investigative, non-arrest, and are not part of an investigation" will be deleted after a period of fourteen days.[132] Texas' proposed guidelines are much more comprehensive. Under the guidelines set out by the Texas Commission on Law Enforcement, videos are categorized by the crime depicted.[133] For example, videos containing DWI's are withheld for a period of 3,650 days, while inci-

125. *Id.*
126. *Id.*
127. *Id.*
128. Stanley, *supra* note 93.
129. *Id.*
130. *Id.*
131. *Id.*
132. Tim Smith, *Police Body-Cam Rules Detail Who Should Wear Them and When*, THE STATE (Dec. 6. 2015, 9:24 AM), http://www.thestate.com/news/local/crime/article48369100.html.
133. *Sample Policy 1*, *supra* note 122.

dents of car crashes are only held for 180 days.[134] However, no matter what the video entails, there is a mandatory retention period of 90 days for all videos, and those videos that become part of an internal investigation will be held for indefinite retention until they are no longer needed.[135]

C. Public Disclosure of Body Camera Footage

The ACLU weighs two factors when determining whether the public should have access to body camera videos: the need for government oversight and openness, and privacy.[136] In balancing these two values, the ACLU suggests that videos should be subject to public disclosure as long as the consent of individuals subject to the video is obtained.[137] Additionally, when possible, blurring and blacking out portions of an individual's face or using video and/or audio distorting methods should be utilized to protect the identity of individuals who have been recorded.[138] When videos are un-redacted and un-flagged, they should not be disclosed to the public without the consent of those individuals subject to the video recording because those recordings are likely to be of "low public oversight," since there is little indication that police have conducted themselves in an unprofessional manner.[139] Furthermore, videos that are flagged for possibly having footage of police misconduct should be redacted and disclosed to the public, but if redaction is not possible, these videos should still be disclosed to the public because the "need for oversight generally outweighs the privacy interests at stake."[140]

South Carolina's guidelines state that, "data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act."[141] However, a person who is subject to the recording, a criminal defendant whose pending criminal action is relevant to the recording, a civil litigant whose pending civil action is relevant to the recording, and a person whose property has been seized or damaged in relation to a crime that the recording is related

134. *Id.*
135. *Id.*
136. *See* Stanley, *supra* note 93.
137. *Id.* (noting that an example of consent would be if a police officer enters the home of a citizen, notifies the citizen that he or she is being recorded, and the citizen subsequently agrees to the police officer's recording).
138. *Id.*
139. *Id.*
140. *Id.*
141. S.C. CODE ANN. § 23-1-240 (2015).

to may request and receive body camera footage pursuant to South Carolina's Rules of Criminal Procedure.[142] Moreover, the State Law Enforcement Division, the Attorney General, and a circuit solicitor may request and receive data produced by a body camera for any legitimate criminal justice purpose, and they alone have the discretion to release that data to the public if they so choose to.[143]

Texas guidelines defer to the Texas Public Information Act (TPIA) when determining whether body camera footage can be disseminated to the public.[144] Under TPIA, a law enforcement agency must receive authorization from the person who is the subject of a recording before releasing the video.[145] When body camera footage shows police officers using deadly force or is related to a criminal investigation of an officer, that footage is deemed confidential and is not subject to public disclosure unless a law enforcement agency decides to disclose it under the belief that it furthers the agency's interests.[146] When an individual seeks to obtain body camera video under a public information request, that individual must specify the location where the recording occurred, the approximate date and time that the incident recorded in the video transpired, and the name of one or more persons known to be a subject to the recording.[147]

VI. AUTHOR'S RECOMMENDATIONS

As illustrated above, body camera laws differ greatly depending on the jurisdiction. Because the purpose of implementing body cameras is to bolster safety and transparency between law enforcement and citizens, this Comment recommends that body cameras be implemented in all fifty states and that body camera regulations be subject to state law to ensure that the implementation, storage, and dissemination of body cameras and their footage are equitable for citizens as well as police officers. Furthermore, this Comment provides suggestions on what should be included in a state-wide policy for body cameras.

142. *Id.*
143. *Id.*
144. *Sample Policy 1*, *supra* note 122.
145. KEN PAXTON, PUBLIC INFORMATION HANDBOOK 2016, at 110 (2016).
146. *Id.*
147. *Id.*

A. Implementation and Use of Body Cameras

This Comment recommends that a police officer's body camera be linked to the officer's cruiser, and when an officer turns on his or her police siren in response to a call, the body camera automatically activates. For those officers who do not utilize police cruisers but use bikes or walk when patrolling, their body cameras should be automatically activated once they decide to respond to a call and should not be turned off until that matter is concluded unless exigent circumstances permits them to turn off the camera.[148] Similar to the recommendations enumerated by the Texas Commission on Law Enforcement, once an officer's body camera has been activated, he or she is not permitted to deactivate it until either (1) all arrests have been made; (2) all witnesses and victims have been interviewed; or (3) when the continued recording will no longer serve to obtain additional evidence.[149] However, police officers should be required to inform citizens that they are being recorded if the circumstances permit, and if the citizen states that he or she does not wish to be recorded, the police officers should verbally document this exchange on the body camera before disengaging it. Furthermore, when police officers are confronted with sensitive situations, such as child-birth, victims of rape, or nudity, they should have discretion to deactivate their body cameras once they verbally document the reason they have chosen to do so.

By requiring police officers to follow these guidelines when implementing body cameras, citizens will better understand that these cameras are not in place to survey their activities, but to protect their safety. Citizens could merely inform officers that they do not wish to be recorded when interacting with them if they wish to protect their identity. Implementing this mandate also puts all parties on notice that, unless otherwise requested and documented, all interactions between police officers and citizens are presumed to be recorded. Theoretically, this will give a "civilizing effect" to both police officers and citizens when dealing with each other, potentially leading to less documented incidents of police brutality, less false claims of police harassment, and hopefully a more transparent and trusting relationship between police officers and the communities in which they serve.

148. Circumstances such as bathroom breaks, meetings with superiors, and collegial conversations with colleagues. *Sample Policy 1*, *supra* note 122.

149. *Id.*

B. Storage and Retention of Body Camera Footage

To prevent police tampering and modification of body camera footage, this Comment recommends that all footage be automatically uploaded and stored on the "cloud" of a third party server, where it will be handled by a disinterested and unaffiliated third party agency once an officer's shift is over. When a complaint is filed, or access to the body camera footage is needed, police departments can simply contact the third party server to download the video recording or receive a hard copy of the footage from the disinterested agency. From there, police departments can review the contents of the video to either substantiate or disprove the asserted claims.

This regulation will potentially save money for the police departments because they will not have to concern themselves with storing multiple videos from each shift in which an officer uses a body camera, but will only have to store those videos from which claims arise. By contracting with third party servers or handlers, police departments can pay a flat rate to store all information taken from these body cameras, and in turn, these third-party servers will store, disseminate, and delete these videos according to guidelines that the affiliated police department provides. This regulation will also save police departments time. Police departments will not have to manually review, store, and flag every video that they receive since all body camera footage will be automatically uploaded at the conclusion of an officer's shift. Additionally, these videos will not be touched until either it is time for that video to be deleted or it is flagged by a complaint of a citizen or an internal investigation by the department. Most importantly, this regulation will indemnify police officers of improper conduct with regards to storing and reviewing body camera footage because officers would have no involvement with the handling of their body camera, besides turning it in to the department once their shift ends. Psychologically, this will allow officers to perform their duties in a more efficient manner because they no longer have to worry about accidentally mishandling or deleting footage while on-duty; therefore, officers can focus on protecting the community and rebuilding relations with citizens.

C. Disclosure of Body Camera Footage to Citizens

Like the opinion expressed by the ACLU and in total opposition to South Carolina's guidelines, this Comment recommends that when

disclosing body camera videos to the public, multiple safeguards should be in place to ensure that government and public interests are met. For the purpose of uniformity, all body camera videos should be subject to Freedom of Information Act, but the government should amend these statutes to clarify how law enforcement agencies and citizens should conduct themselves when a FOIA request has been filed. Like Texas' guidelines, when an individual seeks to obtain body camera footage, he or she must specify in detail the location where the recording occurred, the time and date of the incident, and the name of one or more persons subject to the body camera video. Requiring this specificity will serve as a check to protect the Government's interests in protecting the safety and privacy of its citizens, but also enables those individuals who have a true claim to these videos to obtain them.

Unless consent is obtained, body camera footage that is disbursed to the public should be redacted in such a way that protects the safety and identity of individuals not subject to a requestor's appeal. Additionally, in high profile cases, law enforcement should make it a habit to disclose redacted videos of body camera footage to the public to help rebuild relations between citizens and law enforcement. Furthermore, videos that fall under an enumerated FOIA exemption will not be released.[150]

CONCLUSION

In light of the current state of America's law enforcement agencies and its citizens, body cameras seem to be an essential tool that could positively affect the way police officers and citizens interact. As seen in the unfortunate situations involving Michael Brown, Oscar Grant, and Walter Scott, the unbiased documentation of police interactions is desperately needed. Having realized this, some legislators quickly enacted laws that would require their state's law enforcement departments to couple their officers with body cameras that would record and document their on-duty activities, but unfortunately did not thoroughly identify regulations regarding these cameras.

This Comment recommends that body cameras be implemented in all fifty states to improve relations and provide transparent communication between law enforcement and citizens. Additionally, this

150. *Frequently Asked Questions*, FOIA.Gov, https://www.foia.gov/faq.html (last visited Mar. 3, 2017).

Comment suggests that state law regulate the implementation, storage, and dissemination of body camera footage to ensure that police officers and citizens understand the implications and regulations regarding body cameras and their use during police interactions. The body camera is a tool that could prove to be essential in progressing police and citizen relations, but without the proper regulations to govern these tools, body cameras may prove to cause more harm than good. Having a state-wide policy will provide lawmakers the autonomy to determine the best way to regulate the use of body cameras to ensure that relations between law enforcement and their citizens improve. Furthermore, a state-wide policy will provide citizens with regulations that will not only protect them, but provide them with an understanding of how body cameras affect their interactions with police, and most importantly how these cameras affect their privacy. Rebuilding relations between law enforcement and citizens is a road that will take time, but the first step in that road is to establish well-defined and transparent standards that promote accountability and openness.

COMMENT

Break Every Chain: Bringing an End to the Unconstitutional Shackling of Pregnant Inmates

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INTRODUCTION

Shawanna Nelson went into labor on September 20, 2003.[1] The day that a woman gives birth to a child is usually one of the most memorable days of her life, and it was no different for Ms. Nelson. However, for Ms. Nelson, that day was memorable for all the wrong reasons. Ms. Nelson's experience caused extreme mental anguish, pain, torn stomach muscles, damage to her sciatic nerve, an umbilical hernia, and permanent disfigurement to her hips.[2] Surely these injuries do not happen to the average woman who gives birth, but for the thousands of incarcerated women who are subjected to the inhumane practice of being shackled during labor, they are all too common.[3]

1. Nelson v. Corr. Med. Servs., 583 F.3d 522, 525 (8th Cir. 2009).
2. *Nelson*, 583 F.3d at 526.
3. ACLU Reprod. Freedom Project, ACLU, ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers (2012), https://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf [hereinafter ACLU Briefing Paper].

By the time Ms. Nelson arrived at the prison infirmary her contractions were five to six minutes apart and the nurses determined that she should be transported to the hospital immediately.[4] Officer Patricia Turensky was assigned to be the transporting officer and despite the sense of urgency the nurses conveyed and an instruction from her superior to rush Nelson to the hospital and forgo the cuffs, Officer Turensky still placed Nelson in handcuffs before transporting her to the hospital.[5]

Officer Turensky would later testify that when they arrived at the hospital, Nelson was not threatening nor did she do or say anything to suggest that she was an escape risk, yet Turensky still decided to shackle her legs to a wheelchair on their way to the maternity ward.[6] At this point, Nelson was well into the final stages of her labor but after she changed into her hospital gown, both of her ankles were shackled to opposite sides of the hospital bed.[7] One of the nurses attending to Ms. Nelson indicated that she wished that Nelson was not shackled.[8] Anytime Ms. Nelson needed to be examined by a nurse, Officer Turensky removed the shackles.[9] Yet, as soon as the nurse was finished, the shackles were placed back on.[10] A couple of hours later, Nelson was finally taken to the delivery room and at the request of the doctor the shackles were removed just moments before she gave birth to her son.[11]

Nelson filed suit in federal court against Correctional Medical Services (CMS) alleging that they were "deliberately indifferent" to her medical needs, and in a landmark decision, the Eighth Circuit held that the law "clearly established" that shackling a female inmate during labor and delivery without security justifications violates the Eighth Amendment by imposing cruel and unusual punishment.[12] The decision was monumental because it was the first time a federal appellate court had held that shackling female pregnant inmates was

4. *Nelson*, 583 F.3d at 525.

5. *Id.*

6. *Id.*

7. *Id.* at 525–26.

8. *Id.* at 526.

9. *Id.*; *see also* Elizabeth Alexander, *Unshackling Shawanna: The Battle Over Chaining Women Prisoners During Labor and Delivery*, 32 U. ARK. LITTLE ROCK L. REV. 435, 442 (2010).

10. Alexander, *supra* note 9, at 442.

11. *See Nelson*, 583 F.3d at 526.

12. U.S. CONST. amend. VIII; *see Nelson*, 583 F.3d at 527; *see also* Alexander, *supra* note 9, at 435–44.

unconstitutional and it helped bring much needed attention to a common, inhumane practice.[13]

Aside from the practice being inhumane and humiliating to the mother, it has been condemned due to the dangers it poses for both mother and child. Shackling restricts a woman's ability to move throughout her labor and does not take into account unexpected emergencies that often require women to remain free of restraints.[14] Efforts to bring attention to the issue were made by various organizations including Amnesty International, which released two reports on the widespread practice, one in 1999 and another in 2001.[15] These reports made a strong case as to the illegality of the practice.[16] National correctional and medical associations including the American Medical Association (AMA) and the American Public Health Association (APHA) have also provided their opinion on the practice, adopted resolutions, and recommended against the practice.[17] Wardens and jailers had the authority to place perinatal restraints on an inmate at their discretion prior to 2000 despite the undeniable dangers clearly illustrated by these groups because there were no federal or state statutes prohibiting the practice.[18]

13. Brett Dignam & Eli Y. Adashi, *Health Rights in the Balance: The Case Against Perinatal Shackling of Women Behind Bars*, 16 HEALTH & HUM. RTS. J. 13, 16 (2014); *see also* Susan Buttenweiser, *Shackled and in Labor*, WOMEN'S MEDIA CTR. (Mar. 10, 2015), http://www.womensmediacenter.com/feature/entry/shackled-and-in-labor.

14. Many women rely on expert testimony and in a number of shackling cases experts agree that shackling poses a threat to the mother and the baby. *See Nelson*, 583 F.3d at 529; Villegas v. Metro. Gov't of Davidson County, 709 F.3d 563, 574–75 (6th Cir. 2013); Brawley v. Washington, 712 F. Supp. 2d 1208, 1219 (W.D. Wash. 2010); *see also* Alexander, *supra* note 9, at 436–44.

15. *See generally "Not Part of My Sentence:" Violations of the Human Rights of Women in Custody*, AMNESTY INT'L (Feb. 28, 1999) [hereinafter *Not Part of My Sentence*], http://www.amnestyusa.org/node/57783?page=show (focusing on human rights violations of women in custody in United States prisons). *See also* AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001) [hereinafter ABUSE OF WOMEN IN CUSTODY] (presenting a follow up report to "Not Part of My Sentence" that focuses on the misconduct of guards and the mistreatment of pregnant women in custody in U.S. prisons).

16. *See generally Not Part of My Sentence*, *supra* note 15 (stating that the Supreme Court and lower courts have interpreted the Eighth Amendment provisions as a constitutional guarantee for incarcerated men and women to have rights such as medical care and physical safety); *see also* ABUSE OF WOMEN IN CUSTODY, *supra* note 15 ("Amnesty International considers the routine use of restraints on pregnant women, particularly on women in labor, a cruel and unusual practice that rarely can be justified in terms of security concerns."); *see also* Dignam & Adashi, *supra* note 13.

17. *See generally* Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 AM. MED. ASS'N J. OF ETHICS 779 (2013) [hereinafter *Shackling and Separation*], http://journalofethics.ama-assn.org/2013/09/pfor2-1309.html (discussing the practice of shackling pregnant women and women in labor and labels it "medically hazardous" and "emotionally traumatizing."). *See also* ACLU BRIEFING PAPER, *supra* note 3.

18. Dignam & Adashi, *supra* note 13.

In January 2000, Illinois became the first state to prohibit shackling during hospital transport and delivery.[19] To date, Illinois, New York, Nevada, and several other states have passed laws prohibiting or restricting the shackling of pregnant inmates, although from the perspective of many female inmates, it is still very much an uphill battle to labor without being restrained.[20] The practice remains legal in twenty-eight states but even in states where shackling is illegal, lawsuits claiming that the barbaric practice still continues are common.[21] Illinois, which was a trailblazer in passing legislation to ban the shackling of pregnant inmates, failed to protect 17-year-old Cora Fletcher who was shackled despite the law, which stated that "under no circumstances may leg irons or shackles or waist shackles be used on any pregnant prisoner who is in labor."[22]

Illinois is not the only state whose legislation has failed to protect pregnant inmates. Although a New York statute prohibits the shackling of a woman before, during, or immediately after labor and delivery, a survey revealed that twenty-three out of twenty-seven female inmates who gave birth five years after the statute passed were illegally shackled.[23] Although the Nevada statute states, "No restraints of any kind may be used on an offender who is in labor," Valerie Nabors was still shackled throughout the majority of her labor.[24] Ultimately, data shows that pregnant inmates are still subjected to shackling during their pregnancies—which is a violation of their Eighth Amend-

19. 730 ILL. COMP. STAT. 5/3-6-7 (2000); Dignam & Adashi, *supra* note 13.

20. 2015 N.Y. Laws 983—A; NEV. REV. STAT. § 209.376 (2011); CAL. PENAL CODE § 5007.7 (West 2008); TEX. GOV'T CODE ANN. § 501.066 (West 2009); TEX. HUM. RES. CODE ANN. § 244.0075 (West 2009); TEX. LOC. GOV'T CODE ANN. § 361.082 (West 2009); N.Y. CORRECT. LAW § 611 (McKinney 2016); COLO. REV. STAT. ANN. § 17-1-113.7 (West 2010); 61 PA. CONS. STAT. § 1104 (2010); WASH. REV. CODE ANN. § 72.09.651 (West 2010); W. VA. CODE ANN. § 25-1-16 (West 2010); *see also* ACLU BRIEFING PAPER, *supra* note 3 ("Eighteen states . . . have laws prohibiting or restricting shackling pregnant prisoners.").

21. The Editorial Board, *Handcuffed While Pregnant,* N.Y. TIMES (Sept. 23, 2015), http://mobile.nytimes.com/2015/09/23/opinion/handcuffed-while-pregnant.html?referrer=&_r=1.

22. 730 ILL. COMP. STAT. 5/3-6-7 (2000); Andrea Hsu, *Difficult Births: Laboring and Delivering In Shackles*, NPR (July 16, 2010, 3:35 PM), http://www.npr.org/templates/story/story.php?storyId=128563037; Lilya Dishchyan, Note & Comment, *Shackled During Labor: The Cruel and Unusual Truth*, 14 WHITTIER J. CHILD & FAM. ADVOC. 140, 149–50 (2015).

23. Melissa Jeltsen, *Disturbing Report Finds New York's Female Prisoners Illegally Shackled During Labor*, HUFFINGTON POST (Mar. 10, 2015), http://www.huffingtonpost.com/2015/02/12/shackling-new-york_n_6665600.html; The Editorial Board, *supra* note 21; WOMEN IN PRISON PROJECT, CORR. ASS'N OF N.Y., 2015 ANTI-SHACKLING BILL TALKING POINTS (2015) [hereinafter ANTI-SHACKLING BILL TALKING POINTS], http://www.correctionalassociation.org/wp-content/uploads/2015/09/Anti-Shackling-Bill-2015-Talking-Points-9-15-FINAL.pdf.

24. Audrey Quinn, *In Labor, in Chains. The Outrageous Shackling of Pregnant Inmates*, N.Y. TIMES (July 26, 2014), http://www.nytimes.com/2014/07/27/opinion/sunday/the-outrageous-shackling-of-pregnant-inmates.html.

ment rights—largely because current laws and regulations are not being enforced.[25]

This Comment examines the reasons why anti-shackling legislation has been inadequate at protecting pregnant women due to weak, under inclusive, or unclear language in the law, which contributes to the ongoing violation of pregnant inmates' constitutional rights. Part I explores the history and purpose of state anti-shackling laws, the effect that shackling has on women and their infants, and the justification given for shackling. Part II provides an overview of the Eighth Amendment, describes what constitutes a violation of the amendment. Part II also discusses Hope v. Pelzer, a Supreme Court case that is relevant to the shackling of pregnant inmates. Finally, Part III proposes a solution, which includes enacting federal legislation similar to the Prison Rape Elimination Act that would preempt existing state law and create protections for women who reside in states that do not have anti-shackling laws.

I. THE HISTORY OF STATE AND FEDERAL ANTI-SHACKLING LAWS

The number of women in prison and the number of women giving birth while incarcerated has greatly increased since 1977 but gender-specific policies are slow to catch up.[26] The details regarding how the shackling of pregnant women began are largely unknown but historians speculate that the practice began in the seventies "when criminal justice facilities began adopting gender-neutral policies."[27] Several jurisdictions did not modify their restraint policies to accommodate pregnant inmates.[28] Certain shackling policies failed to consider the differences between men and women and therefore failed to recognize that the shackling of female inmates is less necessary mainly because women are less likely to be serving time for a violent crime.[29] Malika

25. *See generally* Dishchyan, *supra* note 22 (discussing the fallbacks of United States legislation that was designed to protect incarcerated expectant mothers).

26. ACLU Briefing Paper, *supra* note 3.

27. Claire Louise Griggs, Comment, *Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners*, 20 Am. U. J. Gender Soc. Pol'y & L. 247, 250 (2011).

28. *Id.* at 251; *see also* Tori DeAngelis, *The Restraint of Pregnant Inmates*, 47 Am. Psychol. Ass'n (Jun. 2016), http://www.apa.org/monitor/2016/06/restraint-inmates.aspx ("Restraining pregnant inmates is a result of prisons and jails failing to update existing policies to accommodate women . . .").

29. Griggs, *supra* note 27, at 251; *see also* Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, *in* Gendered Justice: Addressing Female Offenders (2003) ("Although there is agreement among criminal justice

Saada Saar of the Rebecca Project for Human Rights claims that the department of corrections has not put enough thought into how treatment for women should be different from treatment for men.[30] She explains,

> If a man behind bars has a broken arm or needs to have his appendix taken out, that individual is put into restraints, into shackles during medical transport . . . So essentially what is done for those men has been extended to women . . . And part of what's different is that we have babies.[31]

Furthermore, incarcerated women often experience high-risk pregnancies due to a lack of adequate prenatal nutrition and care in prisons—shackling often exacerbates these risks.[32] In order to understand why the practice of shackling pregnant women is dangerous, gruesome, and inhumane it is important to describe the effects shackling has had on women and their babies.

A. The Effects of Shackling on Women and Their Babies

Shackling or the use of restraints is defined as the use of any physical restraint or mechanical device to control the movement of a prisoner's body or limbs including handcuffs, leg shackles, and belly chains.[33] The use of physical restraints interferes with normal labor and delivery.[34] Women need to be able to move or be moved in prepa-

professionals that few women pose a risk to public safety, current sentencing models assume that everyone charged with or convicted of a crime poses such a risk.").

30. Hsu, *supra* note 22.

31. *Id.*

32. ACLU National Prison Project et al., The Shackling of Incarcerated Pregnant Women: A Human Rights Violation Committed Regularly in the United States 4 (2013) [hereinafter ACLU National Prison Project]; The Am. Coll. of Obstetricians & Gynecologists, Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females 1 (2011) [hereinafter ACOG], http://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co511.pdf?dmc=1&ts=20141019T1821017590 ("Pregnancies among incarcerated women are often unplanned and high-risk and are compromised by a lack of prenatal care, poor nutrition, domestic violence, mental illness, and drug and alcohol abuse.").

33. This definition of shackling has been codified in several of the anti-shackling laws across the country and it is also used by the American Congress of Obstetricians and Gynecologists. *See* 55 Ill. Comp. Stat. 5/3-15003 (2017); Me. Rev. Stat. tit. 34-A, § 3101–02 (2015); ACLU National Prison Project, *supra* note 32, at 3; ACOG, *supra* note 32, at 2.

34. *See* Nelson v. Corr. Med. Servs., 583 F.3d 522, 533–34 (8th Cir. 2009) (finding that placing restraints could have caused harm or interfered with medical care); *see also* ACOG, *supra* note 32, at 4 (noting physical restraints interfere with the ability of health care providers to safely practice medicine by reducing their ability to assess and evaluate the mother and the fetus and making labor and delivery more difficult); Bureau of Justice Assistance, U.S. Dep't of Justice, Best Practices in the Use of Restraints with Pregnant Women and Girls Under Correctional Custody 5 (2012) [hereinafter Best Practices in the Use of Restraints], https://www.nasmhpd.org/sites/default/files/Best_Practices_Use_of_Restraints_Pregnant(2).pdf

ration for emergencies including shoulder dystocia[35], hemorrhage, or abnormalities of the fetal heart rate requiring swift intervention and sometimes, cesarean delivery.[36] Not only is shackling demeaning and unnecessary, but it prevents the woman and her baby from receiving the proper level of care.[37]

Sometimes women may experience abdominal pain during pregnancy and tests are necessary to determine conditions such as appendicitis, preterm labor, or kidney infection.[38] These special tests may not be safely performed while a woman is shackled.[39] Hypertensive disease occurs in 12-22% of pregnancies and is directly responsible for 17.6% of maternal deaths in the United States.[40] Additionally, preeclampsia[41] can result in seizures, which may not be adequately treated if a woman is shackled.[42] The use of restraints interferes with normal labor and delivery because it restricts a woman's ability to walk during labor, and this lack of mobility prohibits sufficient pain management, successful cervical dilation, and an overall successful vaginal delivery.[43]

Women in labor need to be mobile in order to assume various birthing positions and the lack of mobility interferes with a doctor's ability to treat a woman in labor and could cause serious complications.[44] In an interview with Amnesty International, Maria Jones de-

("The use of restraints can interfere with maternal and fetal health care during pregnancy, labor, delivery, and maternal and newborn health care during the post-partum period.").

35. MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/dystocia (defining dystocia as a "slow or difficult labor or delivery.").

36. ACOG, *supra* note 32, at 3.

37. *Id.* ("Physical restraints interfere with the ability of health care providers to safely practice medicine by reducing their ability to assess and evaluate the mother and the fetus and making labor and delivery more difficult.").

38. *Id.*

39. *Id.*

40. *Id.*

41. MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/preeclampsia (defining preeclampsia as "a serious condition developing in late pregnancy that is characterized by a sudden rise in blood pressure, excessive weight gain, generalized edema, proteinuria, severe headache, and visual disturbances and that may result in eclampsia if untreated.").

42. ACOG, *supra* note 32, at 3.

43. *Id.*

44. Dishchyan, *supra* note 22, at 147; *see also* Michele Ondeck, *Healthy Birth Practice #2: Walk, Move Around, and Change Positions Throughout Labor*, 23 J. PERINATAL EDUC. 188 (2014) ("Women who use upright positions and are mobile during labor have shorter labors, receive less intervention, report less severe pain, and describe more satisfaction with their childbirth experience than women in recumbent positions.").

scribed her experience of being shackled to her hospital bed, unable to spread open her legs in order to properly deliver her baby:[45]

> Because I was shackled to the bed, they couldn't remove the lower part of the bed for the delivery, and they couldn't put my feet in the stirrups. My feet were still shackled together and I couldn't get my legs apart. The doctor called for the officer, but the officer had gone down the hall. No one else could unlock the shackles, and my baby was coming but I couldn't open my legs.[46]

Clearly, placing physical restraints on a pregnant inmate makes it more difficult for healthcare providers to treat the mother by reducing their ability to evaluate the mother and the fetus properly.[47] The use of physical restraints prevents a doctor from assessing a patient's medical concerns when timely treatment or intervention is crucial.[48] Even a delay of five minutes can result in permanent brain damage to an infant.[49] Seventeen-year-old Cora Fletcher was shackled by her hands and feet to both sides of the bed prior to going into labor.[50] Three days later Ms. Fletcher delivered a stillborn baby.[51] Although it was not confirmed, it is probable that the use of restraints contributed to the outcome.[52]

Shackling also increases the risk of falls and prevents a woman from being able to break her fall and protect herself and her fetus if she does fall. Pregnant women in their third trimester already have balance issues and shackling their wrists and legs only exacerbates these issues.[53] Restraints that interfere with leg movement should never be used.[54] Tina Tinen, a pregnant prisoner at a correctional facility in New York—a state that had adopted anti-shackling legislation—slipped on icy pavement while wearing handcuffs and ankle

45. Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL'Y & L. 223, 225 (2007).

46. *Id.*

47. ACOG, *supra* note 32, at 3.

48. Dishchyan, *supra* note 22, at 148; ACLU BRIEFING PAPER, *supra* note 3.

49. Dishchyan, *supra* note 22, at 148; ACLU BRIEFING PAPER, *supra* note 3.

50. Dishchyan, *supra* note 22, at 150.

51. *Id.*

52. *See id.*

53. Yelena Moroz Alpert, *5 Ways Pregnancy Affects Your Balance*, FITPREGNANCY, http://www.fitpregnancy.com/pregnancy/pregnancy-health/5-ways-pregnancy-affects-your-balance (last visited Mar. 29, 2017) ("[The] ovaries release relaxin, a hormone that softens the ligaments in your pelvis to create space for the growing fetus . . . relaxin circulates through your entire body . . . so ligaments in your hips, knees, and ankles can get a little [loose]"); Sichel, *supra* note 45, at 227.

54. ACOG, *supra* note 32, at 3.

irons despite enacted legislation that was supposed to protect her.[55] Ms. Tinens' slip could have harmed her baby if it was severe enough and the potential injury could have been prevented if she was able to use her hands to stop her fall.[56]

Additionally, shackling during post-partum recovery can hinder a woman's ability to fully recover and handle her newborn infant properly.[57] Jaqueline McDougall was shackled on the way back to the prison facility after undergoing a cesarean section.[58] Her handcuffs were linked to a chain around her waist and clamped together over her freshly sutured incision.[59] She stated: "It felt like they were ripping open my C-Section."[60] Shackling also hinders mother-child bonding because it prevents a mother from being able to handle the infant with the appropriate level of care.[61] Women are also at an increased risk of venous thrombosis[62] during pregnancy and the postpartum period, and the lack of mobility due to physical restraints may increase this risk.[63] For these reasons, it is clear why groups like The American College of Obstetricians and Gynecologists (ACOG), Amnesty International, American Civil Liberties Union (ACLU), and others have all made recommendations urging a ban or severe limitation on the use of physical restraints on pregnant women.

B. A Brief History on the Emergence of Anti-Shackling Laws

The number of incarcerated women increased by an exorbitant amount between 1980 and 2010, rising from around 13,000 to upwards

55. Quinn, *supra* note 24.

56. *See id.*

57. ACOG, *supra* note 32, at 3.

58. Quinn, *supra* note 24.

59. *Id.*

60. *Id.*

61. ACOG, *supra* note 32, at 3 ("After delivery, a healthy baby should remain with the mother to facilitate mother-child bonding. Shackles may prevent or inhibit this bonding and interfere with the mother's sage handling of her infant.").

62. MERRIAM-WEBSTER, https://www.merriam-webster.com/medical/deep%20vein%20thrombosis (defining deep vein thrombosis as "a condition marked by the formation of a thrombus within a deep vein (as of the leg or pelvis) that may be asymptomatic or be accompanied by symptoms (as swelling and pain) and that is potentially life threatening if dislodgment of the thrombus results in pulmonary embolism").

63. ACOG, *supra* note 32, at 3; Morteza Izadi et al., *Do Pregnant Women Have a Higher Risk for Venous Thromboembolism Following Air Travel?*, 4 ADVANCED BIOMEDICAL RES. (Feb. 23, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4361953/ ("Pregnancy is associated with a 5 to 10 –fold increased risk of [vein thrombosis] compared with nonpregnant women; however, during the postpartum period, this risk would increase to 20-80 fold.")

of 100,000.[64] Currently, the United States has the highest incarceration rate of women in the world with more than 200,000 women in U.S. prisons or jails each year.[65] The Women in Prison Project highlighted that, "the U.S. currently incarcerates more women per capita than any other country in the world: we have less than 5% of the world's women yet nearly 33% of the worlds incarcerated women."[66] It is highly likely that the number of pregnant inmates has also increased with the rise in the female inmate population.[67] The Bureau of Justice Statistics estimates that pregnant women account for about 6% of the female prison population, so there are roughly 12,000 pregnant incarcerated women who pass through the system annually.[68] Due to the disturbing increase of incarcerated pregnant inmates, it became impossible to ignore the fact that incarceration policies needed to be changed to accommodate the needs of female inmates.[69]

The U.S. District Court for the District of Columbia was among the first courts to address the issue of shackling pregnant inmates over two decades ago in *Women Prisoners v. District of Columbia*.[70] A group of female prisoners sued the District of Columbia alleging that being shackled during labor violated their Eighth Amendment right to be free from cruel and unusual punishment.[71] The court held "while a woman is in labor and shortly thereafter . . . shackling is inhumane."[72] The D.C. Circuit affirmed the district court's decision in 1996.[73] A short time later, in 1999, Illinois became the first state in the United States to ban the practice of shackling pregnant women prisoners and

64. JENNIFER G. CLARKE, PRENATAL CARE FOR INCARCERATED WOMEN 6 (2013), http://www.uptodate.com/ contents/prenatal-care-for-incarcerated-women

65. Dishchyan, *supra* note 22 at 142; ACLU BRIEFING PAPER, *supra* note 3.

66. Ema O'Connor, *New York Prisons Are Illegally Shackling Pregnant Women During Labor*, BUZZFEED, http://www.buzzfeed.com/emaoconnor/new-york-prisons-are-illegally-shackling-pregnant-women-duri#.iaO8ZN7o1 (last updated Feb. 18, 2015, 1:09 PM).

67. CLARKE, *supra* note 64; Dishchyan, *supra* note 22, at 143–44 (2015).

68. *See* LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUST., WOMEN OFFENDERS 8 (1999); ACLU BRIEFING PAPER, *supra* note 3; Dishchyan, *supra* note 22, at 143–44.

69. Dishchyan, *supra* note 22, at 142.

70. *See generally* Women Prisoners of D.C. Dep't of Correc. v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994) (noting a class action brought on behalf of female prisoners against the District of Columbia Department of Corrections); Griggs, *supra* note 27, at 251 ("A group of female prisoners sued the District of Columbia prisons in *Women Prisoners v. District of Columbia*, alleging widespread Eighth Amendment violations regarding the conditions of confinement for female inmates.").

71. *Women Prisoners*, 877 F.Supp. at 668; Griggs, *supra* note 27, at 251–52.

72. *Women Prisoners*, 877 F.Supp. at 668; Griggs, *supra* note 27 at 251–52.

73. *See generally Women Prisoners*, 899 F.Supp. 659 (D.D.C 1996); Griggs, *supra* note 27, at 251–52.

detainees during childbirth.[74] The law stated: ". . . [no] handcuffs, shackles, or restraints of any kind may be used during [a pregnant inmates] transport to a medical facility for the purpose of delivering her baby . . ."[75] It also stated that there were no circumstances where leg irons, shackles, or waist shackles were permitted for use on a pregnant female inmate who was in labor.[76]

Later, that same year, the practice became more broadly recognized when Amnesty International released the report "Not Part of My Sentence: Violations of the Human Rights of Women in Custody."[77] Soon after, in 2001, Amnesty International released a second report entitled, "Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women."[78] Both reports described in detail the cruel, inhumane, and degrading use of restraints on incarcerated pregnant women and the dangers they posed to both mother and child.[79] The reports include advanced recommendations that severely limit the use of restraints on pregnant inmates for health and safety risks posed to the mother and child.[80] The reports urged other states to consider adopting legislation, policies, and procedures to prevent the use of shackles on pregnant women.[81] The Amnesty International reports, consensus on the part of American College of Obstetricians and Gy-

74. 730 ILL. COMP. STAT. 5/3-6-7 (2000); Amy Fettig, *$4.1 Million Settlement Puts Jails on Notice: Shackling Pregnant Women is Unlawful*, ACLU (May 24, 2012, 5:52 PM), https://www.aclu.org/blog/41-million-settlement-puts-jails-notice-shackling-pregnant-women-unlawful ("In 1999, Illinois became the first state in the nation to pass a law banning the practice of shackling pregnant women prisoners and detainees during childbirth.").

75. 730 ILL. COMP. STAT. 5/3-6-7.

76. *Id.*

77. *See Not Part of My Sentence*, *supra* note 15.

78. ABUSE OF WOMEN IN CUSTODY, supra note 15.

79. *See Not Part of My Sentence*, *supra* note 15 ("While inducing her labor she was put into handcuffs. They took the handcuffs off when the baby was about to be born. After the baby was born she was shackled in the recovery room. She was shackled while she held the baby. Had to walk with shackles when she went to the baby. She asked the officer to hold the baby while she went to pick something up. The officer said it was against the rules. She had to maneuver with the shackles and the baby to pick up the item. In the room she had a civilian roommate and the roommate had visitors and she had to cover the shackles, she said she felt so ashamed . . . She said she was traumatized and humiliated by the shackles. She was shackled when she saw her baby in the hospital nursery (a long distance from the room). Passing visitors were staring and making remarks. She was shackled when she took a shower; only one time when she was not."); *see also* ABUSE OF WOMEN IN CUSTODY, supra note 15.

80. *Not Part of My Sentence*, *supra* note 15 ("[J]ails and prisons should use restraints only when restraints are required as a precaution against escape or to prevent an inmate from injuring herself or other people or damaging property. In every case, due regard must be given to an inmate's individual history. Policies on the use of restraints should prohibit their use on pregnant women when they are being transported and when they are in the hospital awaiting delivery; on women who have just given birth."); Fettig, *supra* note 74.

81. *Not Part of My Sentence*, *supra* note 15; Fettig, *supra* note 74.

necologists (ACOG), the American Medical Association (AMA), as well as other experts led to an expanding trend in state law.[82]

Change also came at the federal level.[83] In 2007, the US Marshals Service established policies and procedures stating that restraints should not be used when a woman is in labor, delivery, or post-partum recovery.[84] Similarly, in 2008, the Federal Bureau of Prisons ended the practice of shackling pregnant inmates in all federal correctional facilities.[85] In the same year the American Correctional Association (ACA) approved standards opposing use of shackles during labor and delivery.[86] These standards served as guidelines, but since they were not mandatory, state and local prisons and jails were not required to abide by them.[87] This further solidified the need for uniform anti-shackling federal legislation that states and their respective Departments of Corrections could abide by.

C. Substantiated "Justifications" for Shackling Have Not Been Made

Despite substantial efforts made by medical experts to discourage the practice of shackling, there are theories about why the practice still exists.[88] Proponents of shackling, like Steve Patterson of the Cook County Sheriff's Office in Illinois, argue that the practice is necessary to ensure that incarcerated women do not escape during la-

82. Fettig, *supra* note 74.

83. *Id.*

84. U.S. MARSHALS SERVICE, RESTRAINING DEVICES § 9.1(D)(3)(E) (2010); *see also* ACOG, *supra* note 32, at 2 ("In 2007, the U.S. Marshals Service established policies and procedures for the use of authorized restraining devices, indicating that restraints should not be used when a pregnant prisoner is in labor, delivery, or in an immediate post-delivery recuperation.").

85. U.S DEP'T OF JUST., ESCORTED TRIPS § 570.40 (2008) [hereinafter ESCORTED TRIPS]; *see also* ACOG, *supra* note 32, at 2 ("[T]he American Correctional Association approved standards opposing the use of restraints on female inmates during active labor and the delivery of a child. The standards also state that before active labor and delivery, restraints use on a pregnant inmate should not put the woman or fetus at risk.").

86. ESCORTED TRIPS § 570.45, *supra* note 85; *see also* ACOG, *supra* note 32, at 2 ("[T]he American Correctional Association approved standards opposing the use of restraints on female inmates during active labor and the delivery of a child. The standards also state that before active labor and delivery, restraints use on a pregnant inmate should not put the woman or fetus at risk.").

87. ACOG, *supra* note 32, at 3.

88. Dishchyan, *supra* note 22, at 144; *see also* Collier Meyerson, *The Shocking Practice Pregnant Women Endure in American Prisons*, FUSION (Oct. 12, 2015), http://fusion.net/story/212720/the-shocking-practice-pregnant-women-endure-in-american-prisons/ ("A lack of attention to the needs of women in prison is much to blame . . .").

bor.[89] Patterson said, "we don't want [inmates] to escape—that's the bottom line."[90] He further stated that the only escape attempt he is aware of occurred in 1998 when a pregnant inmate escaped and was caught just off the hospital grounds.[91] However, a study conducted by the American College of Obstetricians and Gynecologists found that there is no data to support this rationale—and therefore Patterson's allegation—since no escape attempts have actually been reported among pregnant prisoners who were not shackled during childbirth.[92] One woman recounted her experience to the Correctional Association of New York stating, "I'm having my baby and . . . officers are standing right there like I'm going to try and escape during contractions. It was ridiculous . . . very painful and frustrating."[93] Furthermore, even if a woman in active labor did try to escape, it is unlikely that she would get very far.[94]

Proponents of shackling also argue that the practice is necessary to prevent incarcerated women from harming themselves or those around them.[95] Proponents like Patterson, who claim that shackling still exists because, "[we] have to bring inmates to the same area that the general public comes to."[96] He further stated, "if you're laying[sic] in hospital bed, and in the next hospital bed is a woman who's in on a double murder charge, because she's pregnant she shouldn't be handcuffed to the side of the bed–I think if you're the person laying[sic] in bed next to her you might disagree."[97] Aside from being exaggerated, Patterson's justification may be unsubstantiated because according to a number of different reports, the majority of incarcerated women are nonviolent offenders, *i.e.* not serving time for a

89. Heather Schultz, *An Anti-Shackling Wake Up Call*, CTR. FOR AM. PROGRESS (May 22, 2014, 3:49 PM), https://www.americanprogress.org/issues/women/news/2014/05/22/90306/an-anti-shackling-wake-up-call/.

90. ACLU NATIONAL PRISON PROJECT, *supra* note 32, at 6.

91. Hsu, *supra* note 22.

92. ACOG, *supra* note 32, at 3.

93. ANTI-SHACKLING BILL TALKING POINTS, *supra* note 23, at 3.

94. Sichel, *supra* note 45, at 235 ("Women in active labor, experiencing severe labor pains and often highly medicated, will likely be unable to truly disrupt security in the hospital."). *Contra* Betsy Woodruff, *It's Time to Stop the Horror of Shackled Births*, DAILY BEAST (July 30, 2015, 1:00 AM), http://www.thedailybeast.com/articles/2015/07/30/it-s-time-to-stop-the-horror-of-shackled-births.html ("'I read that a woman ran a marathon and then gave birth almost immediately afterwards . . . To me that's proof that all women should be shackled if they're pregnant, if they could run a marathon.'").

95. Schultz, *supra* note 89; ACOG, *supra* note 32, at 3.

96. ACLU NATIONAL PRISON PROJECT, *supra* note 32, at 6.

97. *Id.* (internal citations omitted).

double murder charge.[98] The small percentage of women who are convicted of violent crimes are typically convicted of minor offenses, such as simple assault and other minor violent crimes.[99] The assumption that women will pose a threat to society or themselves during childbirth is an assumption that subjects women to being unjustifiably and unconstitutionally shackled.[100] The likelihood of ending up in a hospital bed next to a pregnant inmate who is in on a double murder charge is slim to none, and the failure to enforce anti-shackling laws should not be justified by such unsupported generalizations.

D. Shackling Persists Despite Enacted Legislation

1. The Failure to Enforce Anti-Shackling Laws Leads to the Ongoing Shackling of Pregnant Inmates

Twenty-four states have enacted anti-shackling legislation or policies, but many of these laws and policies have proven to be inefficient.[101] Interviews with former inmates, prison officials, health care providers, and records, requested through the Freedom of Information Act (FOIA) all reveal negligence on the part of facilities to properly implement these laws in states across the country that have passed legislation.[102] Medical professionals, corrections officers and prison officials are not informed about anti-shackling laws or they are not trained on how to obey the laws.[103] Inevitably, the laws are not enforced and the continuation of shackling is prevalent.[104]

In addition to inadequate implementation, vague in language some of the laws contributes to their weakness as well.[105] Many

98. *Id.* at 7; THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BRIEFING SHEETS 2 (2007) http://www.sentencingproject.org/wp-content/uploads/2016/01/Women-in-the-Criminal-Justice-System-Briefing-Sheets.pdf; ("Women incarcerated in state prisons were less likely than men to have been convicted of a violent offense (35% vs. 53%)."); *Facts About the Over-Incarceration of Women in the United States*, ACLU, https://www.aclu.org/other/facts-about-over-incarceration-women-united-states (last visited Mar. 14, 2017) ("18% of women in prison have been convicted because of violent conduct.").

99. GREENFELD & SNELL, *supra* note 68, at 1 ("Three out of four violent female offenders committed simple assault."); *see also* Dishchyan, *supra* note 22, at 145–46.

100. Dishchyan, *supra* note 22, at 145.

101. ACLU NATIONAL PRISON PROJECT, *supra* note 32, at 10 ("24 states limit the use of restraints on pregnant inmates only by policies; and 8 states have no laws or policies or any other form of regulation addressing the restraints on pregnant inmates . . . [N]ot all of the current laws and policies restricting the use of restraints provide comprehensive protection against shackling."); *see also* Quinn, *supra* note 24.

102. Quinn, *supra* note 24.

103. *Id.*

104. *See id.*

105. *Id.*

shackling bans carve out exceptions for situations where corrections staff believe that shackling is necessary for the health and safety of the incarcerated women.[106] The language of some of the laws gives a lot of discretion to corrections officers, empowering them to use restraints if they identify undefined "security risks."[107] Danyell Williams, a former doula[108] at a Philadelphia correctional facility, gave a first-hand account of the lack of enforcement of anti-shackling laws.[109] "These laws were passed and everybody patted themselves on the back for doing what was right and human and then went on about their business," Williams told the New York Times.[110] "But there's no policing entity that's really going to hold these institutions responsible."[111] There have also been several lawsuits filed in a number of states like Illinois and Washington, despite enacted anti-shackling legislation.[112]

Cultural problems within correctional facilities is another reason that staff are likely unwilling to change.[113] Megan Amundson, the executive director of NARAL Pro-Choice Massachusetts, attributes the

106. "As contractions surged through [the inmate's] body, she could not move or change position to relieve the pain. A Cook County correctional officer repeatedly refused to remove the restraints, she said, even when a doctor objected saying that he was unable to administer an epidural." *See* Colleen Mastony, *Childbirth in Chains*, CHIC. TRIB. (July 18, 2010), http://articles.chicagotribune.com/2010-07-18/news/ct-met-shackled-mothers-20100718_1_shackles-handcuffs-labor) (describing a scenario where a corrections officer abused his discretion and refused to remove the shackles from a pregnant inmate when it was arguably clear that the inmate posed no health or safety risks.); Woodruff, *supra* note 94.

107. Griggs, *supra* note 27, at 270 ("It is not uncommon for changes in department of corrections' directives or policies to go uncommunicated to prison guards, or for such policies to be applied with such discretion as to essentially permit the practice in nearly all circumstances."); Quinn, *supra* note 24.

108. "A Doula is "a trained professional who provides continuous physical, emotional and informational support to a mother before, during, and shortly after childbirth." *What is a Doula?*, DONA INT'L, https://www.dona.org/what-is-a-doula/ (last visited Mar. 15, 2017).

109. Natasha Bertrand, *New York's Jails Are Allegedly Breaking a Key Law Meant to Protect Pregnant Women,* BUS. INSIDER (Feb. 17, 2015), http://www.businessinsider.com/report-new-york-prisons-are-illegally-shackling-pregnant-inmates-during-labor-2015-2.

110. *Id.*

111. *Id.*

112. *See supra* Part I.D.3; Hsu, *supra* note 22; Emily Olson, Mothers in Chains: How National and State Legislation Have Been Enacted to Stop the Practice of Shackling Incarcerated Pregnant Women 12–13 (Spring 2010) (unpublished undergraduate research paper), http://digitalcommons.tacoma.uw.edu/cgi/viewcontent.cgi?article=1002&context=ppe_prize ("Shackling gained notoriety in Washington State due to a recent court case. In June 2009, the Washington State Department of Corrections was sued by a Kitsap County woman who has been shackled during labor . . . Brawley was transported to St. Joseph's Hospital in Tacoma with a metal chain shackled around her stomach. She was then fastened by leg restraints to her hospital bed, where the doctor tried to induce labor by breaking the amniotic sac, which had drained completely. She had an immediate emergency Cesarean section, with the restrains removed only after the request of the doctor so her emergency procedure could be performed.").

113. Woodruff, *supra* note 94.

lack of implementation to the way prisoners are perceived and treated.[114] "They're not seen as pregnant women," she said; "[t]hey're just seen as prisoners."[115] Matt Simpson, senior policy strategist at the ACLU of Texas, says that, "There is a culture to some degree of just assuming anybody in a jail is lying about their medical condition . . . It's very rare that a woman is taken seriously."[116] Changing the culture has proven to be very difficult.[117] It was not uncommon activists in Massachusetts to still hear stories about pregnant women being held in restraints despite a ban on the use of restraints on women in their second or third trimester.[118] Although people are working hard to pass anti-shackling legislation, prison officials, and staff often ignore them in practice citing the unsubstantiated safety reasons described above.[119]

The issue received some much needed attention on Capitol Hill, where a bipartisan pair of senators teamed up to introduce federal legislation that would bar the shackling of incarcerated juvenile pregnant women – the bill was never enacted.[120] As state-level efforts have shown, these kinds of policies are much easier to pass than to implement.[121] Gavi Wolfe, legislative counsel for the ACLU, noted that, "[absent] robust reporting requirements . . .it is difficult to ascertain how well a policy is being [executed] and whether it is actually protecting women."[122] Wolfe states that despite legislation being passed, there is still an accountability factor that is missing: "'There needs to be reporting requirements so that there is accountability after the spotlight has turned elsewhere, because that inevitably happens,' said Wolfe."[123] Wolfe believes that one of the pitfalls of

114. *Id*.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *See supra* Part I.C.
120. The Human Rights for Girls bill was introduced in the senate on July 23, 2015, but it was not enacted. The Bill sought to "eliminate the use of restraints of known pregnant juveniles . . . during labor, delivery, and post-partum recovery . . ." and to "eliminate the use of abdominal restraints, leg, and ankle restraints, wrist restraints behind her back, and four point restraints on known pregnant juveniles . . ." *See* S. 1851, 114th Cong. §§ 1(C)(I), (II) (2015); *see also* 162 CONG. REC. S833, S850–53 (daily ed. Feb. 11, 2016); Woodruff, *supra* note 94 ("Texas Republican Senator John Cornyn and New York Democratic Senator Chuck Schumer [lead] the federal efforts to end the practice. The two pushed for an amendment to the Juvenile Justice and Delinquency Prevention Reauthorization Act that bars the shackling of pregnant incarcerated juvenile women from the beginning of the third trimester through delivery.").
121. Woodruff, *supra* note 94.
122. *Id.*
123. *Id.*

existing litigation is that lawmakers concede the inhumanity of shackling but they do not follow through to see how the laws are actually implemented.[124] A brief look into New York, Illinois, and California—states that have already passed anti-shackling legislation—proves to be disheartening and demonstrates that the activists are right, and the practice is still widespread in states even after they have passed anti-shackling laws.

a. New York

The practice of shackling pregnant inmates still occurred at alarming rates in New York despite former Governor David Paterson signing a law prohibiting the shackling of woman before, during, or immediately after labor and delivery.[125] Twenty-three out of twenty-seven women surveyed by the Correctional Association of New York stated that they were shackled just before, during, or after their delivery.[126] The organization interviewed 950 incarcerated women in six different prisons.[127] It found that sixty-four of the participants were pregnant while incarcerated.[128] Additionally, the Correctional Association found that the violations are not just occurring at the state level, but at the county level as well.[129] A survey of local correctional policies revealed that out of fifty-two counties (that responded) only fifteen had written policies that fully complied with the 2009 law.[130] Sixteen counties either had no policies on shackling women during childbirth at all or failed to provide documentation regarding the policies.[131] Senator Velmanette Montgomery, who sponsored the 2009 bill, implied that prisoners continue to be shackled because they do not know their rights.[132] Miyhosi Benton, an inmate at a New York

124. *Id*.

125. 2009 N.Y. Sess. Laws 1290; The Editorial Board, *supra* note 21.

126. ANTI-SHACKLING BILL TALKING POINTS, *supra* note 23 (noting that an update to a New York Anti-Shackling Bill was overdue because twenty-seven women who gave birth while in state corrections custody in the five years after the 2009 law was enacted and found that 23 out of those 27 women were shackled in violation of the law); Quinn, *supra* note 24.

127. TAMAR KRAFT-STOLAR, CORR. ASS'N OF N.Y., REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTH CARE FOR WOMEN IN NEW YORK STATE PRISONS 31 (2015); O'Connor, *supra* note 66.

128. KRAFT-STOLAR, *supra* note 127; O'Connor, *supra* note 66.

129. ANTI-SHACKLING BILL TALKING POINTS, *supra* note 23.

130. *Id.*

131. *Id.*

132. *See* Rosalind Adams, *Despite Anti-Shackling Law, Pregnant Prisoners Say Practice Persists*, ALJAZEERA AMERICA (Mar. 3, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/3/3/pregnant-prisoners-shackling-persists.html; *see also* Velmanette Montgomery, *Legislators and Human Rights Activists Hail End of Shackling Incarcerated Pregnant Women*, NYSENATE.GOV

county jail, was shackled around her ankles, waist, and wrists.[133] "I was shackled too tight and my stomach was in a lot of pain," Benton said, "I didn't know I could say '[t]ake these off because it hurts.'"[134] Senator Montgomery has suggested that facilities fail to adequately inform inmates of their rights by measures as simple as posting signs around the correctional facilities.[135]

b. Illinois

The practice of using restraints on pregnant prisoners was banned in the state of Illinois in 2000, but sadly it has not been adequately enforced.[136] Improperly trained guards continued to shackle women after legislation banning the practice passed in 1999.[137] The ineffectiveness may have been related to the language of the statute. When the legislation was originally passed in 2000, it failed to define "labor."[138] Correction officials falsely believed that labor referred only to the actual delivery but not the hours or days leading up to labor and delivery.[139] Prisoners in Cook County brought a class-action lawsuit, and in 2012, the state passed new legislation strengthening protections for women in the county.[140] Chicago attorneys Tom Morrissey and Ken Flaxman believed that there were roughly 150 women included in the class action suit with cases that dated back to late 2006—well after the initial ban on restraints was enacted.[141] The suit

(May 20, 2009), https://www.nysenate.gov/newsroom/press-releases/velmanette-montgomery/legislators-and-human-rights-activists-hail-end (discussing the Senator Montgomery's role in prohibiting state and local correctional authorities from using restraints on pregnant female inmates by her sponsorship of the 2009 Anti-Shackling Bill).

133. Adams, *supra* note 132.

134. *Id.*

135. *Id.* ("Montgomery said she planned to pressure the commissioner of the Department of Corrections and Community Supervision (DOCCS) on the issue and push for ways to better inform inmates of their rights, including posting signs around correctional facilities.").

136. Maude Carroll, *Unshackling Pregnant Prisoners*, ACLU (Dec. 6, 2011, 11:48 AM), http://www.aclu-il.org/unshackling-pregnant-prisoners/.

137. *See id.*

138. The statute bans the use of leg irons or shackles or waist shackles on any pregnant inmate who is in labor but does not account for the different stages of labor. *See* 730 ILL. COMP. STAT. 5/3-6-7 (2000); Carroll, *supra* note 136.

139. Carroll, *supra* note 136.

140. *See generally* Second Amended Complaint, Zaborowski v. Sheriff of Cook County, No. 08-CV-6946, 2010 WL 9935504, (N.D. Ill. Sept. 21, 2010) ("Plaintiffs filed a Second Amended Complaint alleging that Defendants Thomas J. Dart, the Sheriff of Cook County, Illinois and Cook County, Illinois violated their constitutional rights based on Defendants' policy of shackling female pre-trial detainees at the Cook County Department of Corrections ("CCDOC") before, during, and immediately after they give birth."); Quinn, *supra* note 24.

141. For a list of several women included in the class action lawsuit and their stories, see Second Amended Complaint, *supra* note 140; see also Hsu, *supra* note 22.

eventually settled for $4.1 million, nonetheless, Chicago Legal Advocacy for Incarcerated Mothers cited 20 institutions that still did not have written policies that comply with the Illinois law.[142]

c. California

California passed anti-shackling legislation in 2005 and passed an updated version in 2012.[143] However, Legal Services for Prisoners with Children (LSPC) noted in a report that the majority of California county correctional facilities have yet to implement proper written policies that fully comply with the law.[144] According to the same report, "in some of those counties, pregnant women may be shackled in leg irons, waist chains, and handcuffs behind the body."[145] As of February 7, 2014, based on their most recently provided written policies, LSPC found that out of fifty-five counties, thirty-two counties were in partial compliance and two were entirely out of compliance.[146] Sacramento County has the fifth largest jail population in the state of California with over 400 women, yet it did not submit its policies for review to determine if they complied.[147] Ten counties still referred to the legislation originally passed in 2005.[148] The most recent legislation made significant improvements by removing the requirement that "a prisoner must be declared by the attending physician to be in active labor."[149]

142. *See generally* Class Settlement Agreement, Zaborowski v. Sheriff of Cook County, No. 08-CV-6946, 2012 WL 10180786, (N.D. Ill. May 17, 2012); Quinn, *supra* note 24.

143. CAL. PENAL CODE § 3407 (West 2012).

144. JESSE STOUT, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, NO MORE SHACKLES 8 (2014), http://www.prisonerswithchildren.org/wp-content/uploads/2014/02/NO-MORE-SHACKLES-report-LSPC-2.18.14-1.pdf ("After corresponding with each county for almost a year, more than two-thirds of the counties in California, 34 of 58, still have written policies that do not comply with the law."); Avital Norman Nathman, *Why Are So Many Pregnant Prisoners Still Being Shackled?*, COSMOPOLITAN (May 21, 2014), http://www.cosmopolitan.com/politics/news/a6890/anti-shackling-laws-pregnant-prisoners/ (finding that only a year after California passed a shackling ban, Legal Services for Prisoners with Children revealed that the majority of counties still had policies that did not comply with the law); Quinn, *supra* note 24 (noting that California has struggled to effectively implement their anti-shackling legislation).

145. STOUT, *supra* note 144; *see also* Nathman, *supra* note 144. The California Penal Code specifically bans leg irons, waist chains, and handcuffs behind the body. CAL. PENAL CODE § 3407(a).

146. STOUT, *supra* note 144, at 3–4 (stating amongst other things, the counties that were in partial compliance did not grant medical professional authority to have restraints removed or state that restraints will only be used in the event of a safety issue).

147. *Id.* at 4.

148. *Id.* at 5.

149. *Id.* (internal citation omitted).

d. State-by-state analysis

Although a state-by-state analysis would show that there are several instances where shackling occurs despite legislation, it is important to note that female inmates' constitutional rights are being violated whether states are failing to comply with the legislation they have enacted or states simply have no legislation banning the practice at all.

II.

A. Eighth Amendment Violations, the Cruel and Unusual Reality

1. *Furman* and the Four Factor Considerations to Determine Whether Something Is Cruel and Unusual

In *Furman v. Georgia*, the Supreme Court stated that, "the high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."[150] The Court also noted that, "the Cruel and Unusual Punishment Clause prohibits the infliction of uncivilized and inhuman punishments."[151] "The [s]tate, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."[152] "A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."[153]

Justice Brennan in his concurring opinion outlined four factors to consider when determining whether something is cruel and unusual.[154] The primary principle is that a punishment must not be so severe that it is degrading to human dignity.[155] The routine use of restraints on

150. Furman v. Georgia, 408 U.S. 238, 256 (1972). Incarcerated women likely classify as an unpopular group, especially in correctional facilities where the practice of shackling is remnant of protocols designated for male institutions. *See Shackling and Separation, supra* note 17, at 779 (noting that correctional facilities are historically male-focused institutions that fail to address the needs of women).

151. *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

152. *Id.*

153. *Id.* Shackling pregnant women before, during, or immediately after labor for no justifiable reason is degrading to human dignity. *See* Buttenweiser, *supra* note 13 (finding that the standard of care in prison systems is evidence that women are being denied a basic level of humanity and dignity).

154. *Furman*, 408 U.S. at 281 (Brennan, J., concurring).

155. Justice Brennan notes:

> More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings.

inmates during pregnancy and childbirth is an assault on human dignity.[156] In *Nelson*, the Eighth Circuit found that Shawanna Nelson was treated in a way "antithetical to human dignity" when she was shackled during her pregnancy; so it follows that when the practice is done to other women in similar situations, they are also being treated in a way that is antithetical to their human dignity.[157]

The secondary principle is that if the punishment is obviously inflicted in a wholly arbitrary fashion, then it may violate the cruel and unusual punishment clause.[158] Correctional institutions historically constructed by men for men, often deny or fail to provide adequate reproductive health care services for women.[159] An organization called SPARK Reproductive Justice Now, which often partners with the ACLU and Amnesty International, noted that "[o]ne of the most harmful manifestations of the invisibility and [ ] marginality of the . . . needs of female inmates is the oftentimes arbitrary shackling by the waists, ankles[,] and wrists of pregnant women during labor, delivery[,] and recovery and transport to and from medical facilities."[160] SPARK also interviewed several nurses and physicians who expressed dissatisfaction with correctional officers because the restraint practices were oftentimes arbitrary and inconsistent.[161] Officer discretion also results in shackling being inflicted in a wholly arbitrary fashion be-

> The barbaric punishments condemned by history, 'punishment which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like,' are of course, 'attended with acute pain and suffering.' When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significant of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

Id. at 272.

156. *State Standards for Pregnancy-Related Health Care and Abortion For Women in Prison*, ACLU, https://www.aclu.org/map/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map (last visited Mar. 7, 2017) ("[T]oo may correctional facilities routinely restrain inmates during pregnancy and childbirth, notwithstanding the medical dangers of doing so, and the assault on human dignity.").

157. Nelson v. Corr. Med. Services, 583 F.3d 522, 534 (8th Cir. 2009).

158. *Furman*, 408 U.S. at 281 (1972) (Brennan, J., concurring).

159. *See generally* Jennifer G. Clarke, et al., *Reproductive Health Care and Family Planning Needs Among Incarcerated Women*, 96 AM. J. OF PUB. HEALTH 834 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470599/?tool=pubmed ("Women in correctional institutions have substantial reproductive health problems, yet they are underserved in receipt of reproductive health care.").

160. TONYA M. WILLIAMS, SPARK REPRODUCTIVE JUSTICE NOW, GIVING BIRTH BEHIND BARS: A GUIDE TO ACHIEVING REPRODUCTIVE JUSTICE FOR INCARCERATED WOMEN 11 (2011), http://www.sparkrj.org/website/wp-content/uploads/2016/07/Giving-Birth-Behind-Bars-Guide.pdf.

161. *Id.*

cause there is inadequate or no oversight of whether shackling was necessary; therefore pregnant incarcerated women are left at the mercy of their guards.[162]

The third factor Justice Brennan outlined in *Furman* is punishment that is clearly and totally rejected throughout society such that no legislature would even be able to authorize the infliction of such punishment.[163] Widespread criticism from medical practitioners supports the idea that shackling is rejected throughout society.[164] "In every state where the practice of shackling incarcerated women has been prohibited[,] nurses, doctors, and nurse-midwives were on the front lines demanding women be permitted to give birth safely and with dignity, free from physical restraints."[165] The Executive Vice President of ACOG also backs the anti-shackling initiative declaring that, "[p]reventing the practice of shackling these women is an important step toward assuring humanitarian care and social justice."[166] As noted above, groups such as Amnesty International and the American Medical Association have spoken against the inhumane practice.[167] Notably, the United States Court of Appeals for the Eighth Circuit directly spoke against the issue in *Nelson*, and held that the law "clearly established" that shackling a female inmate during labor and delivery without security justifications, violates the Eighth Amendment by imposing cruel and unusual punishment.[168] The condemnation of shackling by medical organizations, human rights activists, and the judiciary indicates that the practice is rejected throughout society and as such, legislatures should take this into account when enacting legislation that prohibits the practice.

The last factor for determining if punishment is cruel and unusual is if the punishment is patently unnecessary.[169] National and medical associations have openly opposed the shackling of pregnant women because it is "unnecessary and dangerous."[170] Shackling is patently

162. Negar Mortazavi, *An Illegal and Inhuman Practice: We Must Stop Shackling of Pregnant Incarcerated Women*, HUFFINGTON POST (May 14, 2014, 12:14 PM), http://www.huffingtonpost.com/negar-mortazavi/an-illegal-and-inhuman-pr_b_4957996.html.

163. *Furman*, 408 U.S. at 281 (1972) (Brennan, J., concurring).

164. *See supra* Part I.B.

165. WILLIAMS, *supra* note 160, at 32.

166. *Id*. at 37.

167. *See supra* Part I.C.1.

168. Nelson v. Corr. Med. Services, 583 F.3d 522, 534 (8th Cir. 2009) ("The constitutional rights asserted by Nelson were clearly established.").

169. *Furman*, 408 U.S. at 281 (1972) (Brennan, J., concurring).

170. ACLU BRIEFING PAPER, *supra* note 3.

unnecessary because the vast majority of incarcerated women are non-violent offenders who pose a low security risk—especially during labor and postpartum recovery.[171] Further, there are no "documented instances of women in labor escaping or causing harm to themselves, the public, security guards, or medical staff."[172] Although public safety is cited as a reason for shackling, "in most instances armed guards accompany shackled women into or around the delivery room," so correctional officers can more than adequately ensure the safety of the public without the use of shackling restraints.[173]

2. *Turner*: The Constitutional Guarantee and *Estelle*: A Constitutional Standard of Care

In *Turner v. Safley*, Justice O'Connor stated, "prison walls do not form a barrier separating prison inmates from the protections of the Constitution . . . [W]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect [prisoners'] constitutional rights."[174] Supreme Court case law dictates that inmates in correctional facilities are entitled to specific standards of care.[175]

In *Estelle v. Gamble*, the United States Supreme Court held that, "the government [has an] obligation to provide medical care for those whom it is punishing by incarceration.[176] An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met . . . denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose."[177] The Supreme Court held that the deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.[178] Essentially, *Estelle* can be interpreted to mean that expectant prisoners are entitled to medical care related throughout

171. *Id*. ("The vast majority of incarcerated women are non-violent offenders who pose a low security risk – particularly during labor and postpartum recovery.").

172. *Id.*

173. *Id.*

174. Turner v. Safley, 482 U.S. 78, 84 (1987) (quoting Procunier v. Martinez, 416 U.S. 396, 405–06 (1974)); Dishchyan, *supra* note 22, at 140.

175. Griggs, *supra* note 27, at 254.

176. Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

177. *Id.* at 103; Sichel, *supra* note 45, at 232.

178. U.S. CONST. amend. VIII; *Estelle*, 429 U.S. at 103–04.

their pregnancies.[179] The right to adequate medical treatment has been established, but restricting the use of physical restraints on women during labor has not yet been established.[180] However, by shackling pregnant prisoners, causing them pain, and in many instances causing serious physical and mental injury, prison officials are not affording them the standard of care guaranteed by the Supreme Court in *Estelle v. Gamble*.[181]

3. *Hope v. Pelzer*: Gratuitous Infliction of Wanton and Unnecessary Pain and its Analogies to the Shackling of Pregnant Inmates

Larry Hope, a former inmate at an Alabama Prison was handcuffed to a hitching post on two occasions.[182] On the first occasion, he was handcuffed to the post for two hours—only let down to use the bathroom—subject to discomfort whenever he tried to move his arms to improve circulation because the handcuffs cut into his wrists causing him pain and discomfort.[183] On the second occasion, Hope was shackled to the post shirtless for seven hours and suffered from sunburned skin.[184] In *Hope*, the Supreme Court found that the Eighth Amendment violation was obvious and Hope was knowingly subjected to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a seven hour period, and other factors that created a risk of particular discomfort and humiliation.[185]

Pregnant inmates who are shackled face similar discomfort to Larry Hope when they try to move and improve their circulation because the handcuffs often cut into their skin causing them pain and discomfort.[186] The United States Department of Justice, Bureau of

179. "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . this is true [when] the indifference is manifested . . . by the prison guards . . . intentionally interfering with the treatment." *See Estelle*, 429 U.S. at 104–05 (supporting the notion that because pregnant inmates have widely accepted serious medical needs, a deliberate indifference to those needs would constitute an Eighth Amendment violation.); Sichel, *supra* note 45, at 232.

180. Sichel, *supra* note 45, at 232.

181. *Estelle*, 429 U.S. at 103–04; Sichel, *supra* note 45, at 227.

182. Hope v. Pelzer, 536 U.S. 728, 733 (2002).

183. *Id.* at 734.

184. *Id.* at 735.

185. *Id.* at 738.

186. "When she arrived at the doctor's office, she asked the correction officers to remove her handcuffs and leg shackles (which were cutting off circulation in her swollen ankles) so she'd be less likely to trip and fall as she lowered herself out of the van." *See* Mira Ptacin, *What Happens When You're Pregnant in Prison*, ELLE (Nov. 17, 2015), http://www.elle.com/culture/career-polit-

Justice, Assistance Division released a statement regarding best practices in the use of restraints with pregnant women and girls under correctional custody where it explicitly stated that the use of restraints can pose health risks for pregnant women and their fetuses by limiting their movement and circulation.[187] A first hand account from Courtney Fortin, an inmate at York County Jail in Maine, demonstrates similar discomfort to what Larry Hope faced.[188] Fortin says the leg shackles that were placed on her during a ride to a doctor's appointment were cutting off the circulation to her swollen ankles.[189]

Similar to Larry Hope, some female inmates have experienced being shackled for hours on end. Restraints have been used on pregnant inmates during transport to weekly medical appointments and Governor Cuomo of New York said this process can take more than ten hours[190] —that is three hours longer than when Larry Hope was cruelly and unusually shackled to a hitching post.[191] The Correctional Association interviewed several women who said that they were shackled for long periods of time with one woman stating in particular that she was kept in handcuffs and ankle shackles for over five hours after giving birth.[192] Maria Caraballo, an inmate in a New York State facility, was handcuffed to the metal part—which draws similarities to a hitching post—of the hospital bed restricting her movement and cutting her wrists and was ultimately shackled for a total of eight hours.[193]

The ACLU recounted Shawanna Nelson's story where the use of restraints caused her cramps and intense pain since she could not adjust her position during contractions.[194] Unlike Larry Hope, Shawanna Nelson was not able to use the bathroom while she was shackled.[195] After childbirth, the use of shackles caused her to soil the

ics/news/a31940/pregnant-in-prison/ (noting one of the many painful accounts from a pregnant inmate who was subjected to loss of circulation in her ankles because of her leg shackles).

187. BEST PRACTICES IN THE USE OF RESTRAINTS, *supra* note 34, at 5.

188. Ptacin, *supra* note 186 (describing Ms. Fortin's experience being shackled to and from her doctor's visits.)

189. *Id.*

190. Kenneth Lovett, *Pregnant Inmates at New York Prisons Will No Longer Be Shackled Under New Law*, N.Y. DAILY NEWS (Dec. 22, 2015, 2:19 PM), http://www.nydailynews.com/new-york/new-york-pregnant-inmates-no-longer-shackled-article-1.2474021.

191. *Id.*

192. Victoria Law, *Giving Birth While Shackled May Be Illegal, But Mothers Still Have To Endure It*, THE GUARDIAN (Feb. 13, 2015, 3:25 PM), https://www.theguardian.com/us-news/2015/feb/13/mothers-prison-illegal-shackled-while-giving-birth.

193. Buttenwieser, *supra* note 13.

194. Woodruff, *supra* note 94.

195. *Id.*

sheets because she was not unshackled quickly enough to use the bathroom.[196]

The Eighth Amendment violation should also be obvious in circumstances where pregnant inmates are shackled since pregnant women are knowingly being subjected to a substantial risk of physical harm, unnecessary pain, restricted position of confinement for hours, and other factors that create a risk of particular discomfort and humiliation.

III. PROPOSED SOLUTION

A. Congress Should Enact Federal Legislation Banning the Practice of Shackling Pregnant Inmates

1. Congressional Action Is Needed to Ensure the Constitutional Rights of Pregnant Inmates Are Met

In 2008, the U.S. government adopted an anti-shackling policy but the policy applies only to prisons and detention centers operated by the federal government.[197] The policy does not reach state and local facilities—where violations occur the most frequently.[198] Additionally, the Executive branch, not the U.S. Congress, enacted the policy.[199] In the past, the United States has been urged to enact federal legislation banning the shackling of detained and incarcerated women during pregnancy.[200] The Federal government responded by issuing a periodic report in 2013.[201] Its emphasis has been on the role of policies, rather than legislation, in regulating the shackling of pregnant inmates.[202] However, legislation is preferable to policies because it is democratically enacted and publicly available.

196. *Id.*

197. *See* ESCORTED TRIPS, *supra* note 85; ACLU NAT'L PRISON PROJECT, *supra* note 32 at 10.

198. *See* ESCORTED TRIPS, *supra* note 85; ACLU NAT'L PRISON PROJECT, *supra* note 32.

199. ACLU NAT'L PRISON PROJECT, *supra* note 32.

200. *Id.* at 1 ("We recommend that the UN Human Rights Committee (the "Committee") that monitors compliance with the [International Covenant on Civil and Political Rights] ask and encourage the United States to 1) enact a federal law banning the practice of shackling prisoners during pregnant, covering, at a minimum, the third trimester, transport to medical facilities, labor, delivery and postpartum recovery.").

201. U.S. DEP'T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE 67–68 (2013), https://www.state.gov/documents/organization/213267.pdf ("Both the federal and some state governments have announced policy changes that improve the standards for treatment of women during labor and delivery.").

202. *Id.*

Additionally, anti-shackling legislation would likely stand the test of time more than mere policy would.[203] Legislation must be repealed or amended as opposed to policies that can be changed pursuant to internal department rule-making procedures without any public scrutiny.[204] As described above, policies are not sufficient as evidenced by the recurring violations of each state's respective policies. This ineffectiveness perpetuates a seemingly endless cycle of constitutional violations of the rights of women and their fetuses – action by Congress is overdue.[205] Not only should Congress enact federal legislation to protect the constitutional rights of pregnant inmates, but it should also model it similar to the Prison Rape Elimination Act—an act that addressed and remedied an Eighth Amendment violation of a different kind.

2. The Prison Rape Elimination Act of 2003—A Vital Time When Congress Recognized Prisoners' Rights

The Prison Rape Elimination Act (PREA) was passed by Congress in 2003 with bipartisan support.[206] Congress realized that prison rape was ripe for legislation as it was an increasingly visible issue for corrections officials and lawmakers and it "was taken up by the courts as a form of cruel and unusual punishment."[207]

Similarly, federal anti-shackling legislation is now ripe for federal action. More than one federal court has concluded that the practice violates the Eighth Amendment.[208] Corrections officials and lawmakers have clearly dropped the ball in protecting the rights of pregnant women who are incarcerated. Additionally, state efforts have been unable to effectively stop the practice.

PREA cites many purposes, but four stand out in regards to potentially adopting similar legislation to protect pregnant inmates.[209] One of the purposes of the Act includes establishing "a zero-tolerance standard for the incidence of prison rape in prisons in the United

203. *See id.* at 3–4 (2013); ACOG, supra note 32, at 4.
204. ACLU NAT'L PRISON PROJECT, supra note 32, at 13; ACOG, supra note 32, at 4.
205. *See supra* Part III.
206. 42 U.S.C.S. § 15601 (2003); *see also Prison Rape Elimination Act*, NAT'L PREA RESOURCE CTR. [hereinafter *Prison Rape Elimination Act*], https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea (last visited Mar. 6, 2017).
207. VALERIE JENNESS, THE PASSAGE OF THE PRISON RAPE ELIMINATION ACT: AN ANALYSIS OF THE RECONFIGURATION OF SEXUAL CITIZENSHIP FOR PRISONERS 2 (2006).
208. *See* Villegas v. Metro. Gov't of Davidson County, 709 F.3d 563, 574–75 (6th Cir. 2013); Nelson v. Corr. Med. Services, 583 F.3d 522, 529 (8th Cir. 2009).
209. *See* 42 U.S.C.S. § 15602 (2003).

States."[210] The evidence is clear—pregnant women are still being shackled even in states where the practice is outlawed. A zero tolerance policy would set a standard that would help ensure that inmates were not shackled at any stage of their pregnancy or immediately after instead of relying on policies that contain exceptions or policies that are continuously ignored. However, zero tolerance would not leave any room for confusion or subjective adaptation – it would be universally understood that the shackling of pregnant women be unacceptable unless there were extenuating circumstances.

Another purpose of PREA is to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape."[211] Federal legislation that created national standards would preempt existing state law and create standards for states that have failed to enact any laws or policies banning shackling.[212] There are over twenty states that do not have laws against shackling pregnant women who are incarcerated.[213] The work that organizations have done to detect and reduce the shackling of pregnant inmates is more than admirable but the federal government is more than capable of taking over this responsibility as evidenced by their incorporation of this purpose into PREA. Federal legislation could incorporate creating a commission similar to the National Prison Rape Elimination Commission that could develop draft standards for the elimination of anti-shackling laws that do not pass constitutional muster.

PREA cites, "accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape."[214] Some states have mechanisms like reporting requirements in place to hold officers accountable

210. *Id.* at § 15602(1).

211. *Id.* at § 15602(3).

212. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); Hughes v. Talen Energy, 136 S. Ct. 1288, 1297 ("The Supremacy Clause makes the laws of the United States the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.") ("Put simply, federal law preempts contrary state law.") ("A state law is preempted where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law . . .").

213. *See* ACLU NAT'L PRISON PROJECT, *supra* note 32.

214. 42 U.S.C.S. § 15601.

for shackling pregnant inmates but some do not.[215] State agencies have internal policies that restrict the use of restraints on pregnant women but often times they are not available to the public rendering accountability and transparency nearly impossible.[216] Accountability mechanisms would serve as a deterrent for prison officials who ignore the laws set in place and still violate the constitutional rights of female prisoners; officials like Officer Turensky would no longer be able to simply ignore the law and shackle inmates like Shawanna Nelson.

Lastly, a very important purpose of PREA is "to protect the Eighth Amendment rights of Federal, State, and local prisoners."[217] Additionally, federal courts that have considered the issue have all agreed that shackling pregnant inmates is a violation of their constitutional right to be free from cruel and unusual punishment yet the practice is still not so unusual.[218] Policies have failed at affording women the constitutional guarantee established in *Turner* and *Estelle*, however federal legislation enacted with the purpose of protecting these rights and guarantees may prove to be more effective. The Act addressed incidences of prison rape in federal, state, and local institutions and how the government could adequately protect individuals suffering from such abuse.[219] These are the protections that should be afforded to pregnant inmates who are still being unconstitutionally shackled.

CONCLUSION

There is a stigma surrounding prisoners that presumes they are less deserving of basic levels of care and dignity and that stigma is

215. ACOG, *supra* note 32, at 3; ACLU NAT'L PRISON PROJECT, *supra* note 32, at 13 ("Pennsylvania, Arizona, and Illinois promote accountability by including a reporting provision in their laws . . . [i]n contrast, California's law has no reporting requirement.").

216. ACLU NAT'L PRISON PROJECT, *supra* note 32, at 13.

217. 42 U.S.C.S. § 15601.

218. U.S. CONST. amend. VIII; *see* Estelle v. Gamble, 429 U.S. 97, 104 (1976); Nelson v. Corr. Med. Services, 583 F.3d 522, 534 (8th Cir. 2009) ("Officer Turensky violated [the pregnant inmates] clearly established Eighth Amendment rights by shackling [them] during labor . . ."); Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 668 (D.D.C. 1994) (finding that the use of restraints on pregnant inmates violates their Eighth Amendment right to be free from cruel and unusual punishment); *Villegas* 789 F. Supp. 2d at 919 (M.D. Tenn. 2011) ("[S]hackling of a pregnant detainee in the final stages of labor shortly before birth and during post-partum recovery . . . violates the Eighth Amendment's standard of contemporary decency.").

219. 42 U.S.CS. § 15602 (2003); *see also Prison Rape Elimination Act*, *supra* note 190 ("The purpose of the act was to 'provide for the analysis of the incidence and effects prison rape in Federal, State, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape.'").

evidenced by the failure to enact or properly implement anti-shackling laws. Outside the prison walls, the government enacts a substantial amount of laws and regulations regarding women and children annually because of the importance of protecting both groups of people. Protecting women and children diligently and vigilantly should not stop merely because a woman is incarcerated. The dangers and risks to the unborn child and the mother have been documented and both the judiciary and prominent medical organizations have spoken against the issue. At this point, allowing a woman to be shackled during her pregnancy is cruel and unusual and before the damage goes any further, the federal government should intervene and either pass legislation to stop the barbaric practice or enact stricter laws to protect the rights of these individuals.

COMMENT

Don't Break My Heart, My Achy Breaky Heart: A Call for Legislation to Expressly Grant Inmates the Right to Donate Their Non-Vital Organs

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* J.D. Candidate, Howard University School of Law, Class of 2017; Executive Publications Editor, *Howard Law Journal*, Vol. 60; B.A., Spanish and Psychology, Emory University, 2014. I must first give thanks to God for His continued grace and the strength to go through this journey at law school and my life. To Professor Jasbir Bawa, Professor Sha-Shana Crichton, and my Senior Notes & Comment Editor, Rukiya Mohamed, thank you for helping me during the writing and editing process of this Comment; your thoughtful feedback pushed me to explore the depths of organ donations and inmates' rights. I want to give a special thanks to my family for their unwavering support and for always encouraging me to reach for the stars.

"After how much we have taken from society . . . it's unacceptable that society is denied the opportunity to receive something so valuable from us in return."
– Shannon Ross, inmate at the Stanley Correctional Institution[1]

INTRODUCTION

In an interview with America Magazine, Joseph Green Brown stated that if he hadn't been on death row, his brother would probably be alive today; but it's as if Brown's brother took his death sentence in place of Brown.[2] Brown was convicted of first-degree murder and sentenced to death in Florida.[3] While Brown was an inmate on Florida's death row, his youngest brother was in need of a kidney transplant.[4] Brown tried to become a living donor in order to donate one

1. Sally Satel, *A Kidney for a Kidney*, SLATE (Apr. 15, 2013, 1:29 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2013/04/let_prisoners_donate_organs_it_could_be_fair_ethical_and_just.html.

2. *Fourteen Years on Death Row: An Interview With Joseph Green Brown*, AMERICA, Mar. 29, 1997, at 19, http://www.deathpenaltyinfo.org/14years.pdf.

3. *Id.* at 17; *see also* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 290 (1992).

4. Laura-Hill M. Patton, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387, 430 n.204 (1996); Rorie Sherman, *'Dr. Death' Visits the Condemned*, NAT'L L.J., Nov. 8, 1993, at 11.

of his kidneys to his brother.[5] A doctor came to the prison to examine Brown to determine if he was a match for the kidney transplant; however, the prison authorities denied Brown permission to be tested and taken to the hospital in Georgia, where Brown's brother lived.[6] Later, Brown requested to be taken to the hospital where sick inmates were taken for treatment, which was approximately fifty miles from the Florida State Prison and where his brother was located—the prison authorities denied Brown's second request to donate his kidney for the second time.[7] Nine days after the denial of the second request, Brown's brother died at the age of forty-two.[8] Brown was later released from death row when the court found that the prosecution's main witness had lied about Brown's role in the robbery.[9]

Unfortunately, stories such as Brown's brother are prevalent throughout the United States. Currently, there are 118,376 people waiting for a lifesaving transplant.[10] More than twenty-five organs can be donated from the human body.[11] Kidneys and segments of the liver and lung[12] are among some of the organs that can be donated by a living donor.[13] In 2016, nearly 6,000 transplants were procured from living donors.[14] There are three different types of donation systems available to living donors: directed donation; altruistic, non-directed

5. Patton, *supra* note 4; Sherman, *supra* note 4.

6. *Fourteen Years on Death Row*, *supra* note 2.

7. Lance Benzel, *Freed From Death Row, Speaker Decries Capital Punishment*, GAZETTE (Apr. 16, 2011), http://gazette.com/freed-from-death-row-speaker-decries-capital-punishment/article/116380; *Fourteen Years on Death Row*, *supra* note 2.

8. *Fourteen Years on Death Row*, *supra* note 2

9. *See* RADELET, *supra* note 3; *Fourteen Years on Death Row*, *supra* note 2, at 17.

10. UNITED NETWORK FOR ORGAN SHARING, https://www.unos.org/ (last visited Mar. 16, 2017).

11. Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 3 (1989) ("At least twenty-five different body parts and fluids have now been transplanted in human beings, including parts of the inner ear, a variety of glands (pancreas, pituitary, thyroid, parthyroid, and adrenal), blood vessels, tendons, cartilage, muscles (including the heart), testicles, ovaries, fallopian tubes, nerves, skin, fat, bone marrow, blood, livers, kidneys, and corneas."); Donny J. Perales, *Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to Those on Organ Donor Waiting Lists*, 34 ST. MARY'S L.J. 687, 688 (2003).

12. These organs are also known as non-vital organs because they are not essential for survival and thus can easily be donated to another without any impact on the individual's daily living after recovery.

13. *Living Donation*, UNITED NETWORK FOR ORGAN SHARING, https://www.unos.org/donation/living-donation/ (last visited Mar. 31, 2017).

14. *Id.*; *Donors Recovered in the U.S. by the Donor Type*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, https://optn.transplant.hrsa.gov/data/view-data-reports/national-data/# (last visited Mar. 31, 2017) (noting that the total number of donors in 2016 was 15,945, of which 5,974 were living donors).

donation; and paired donation.[15] In a directed donation, the most common type of living donation, "the donor names the specific person to receive the transplant."[16] In an altruistic, non-directed donation, the donor does not name the specific person to get the transplant and the match is arranged based on medical compatibility with a patient in need.[17] Lastly, a paired donation system involves two pairs of living donors and transplant recipients; the candidates both have a willing donor, but cannot donate because of incompatible blood types.[18] The candidates switch donors so both can receive a compatible organ.[19] All three systems revolve around notions that the donor is making such a gift without any compensation, whether monetary or any other gift from the recipient.

Because of the nature of the altruistic system, organ donations in the United States are at a significant low. Many proposals have been made in an effort to address the organ shortage in the United States. For example, some have proposed that the system should move from the notion of altruism to more of a market system where the donation of organs is monetized.[20] Others have proposed an "opt-out" system where consent is presumed unless an individual explicitly states that he or she does not want to be an organ donor,[21] compensating donors

15. *Living Donation*, *supra* note 13; *About Donation*, ORGAN PROCUREMENT & TRANSPLANTATION NETWORK, https://optn.transplant.hrsa.gov/learn/about-donation/ (last visited Mar. 16, 2017).

16. *Living Donation*, *supra* note 13.

17. *Id.* Non-directed donations accounted for less than five percent of living kidney donations. *Organ Donations Increase, Still a Need for More Living Donors*, AETNA (Aug. 2016), https://news.aetna.com/2016/08/organ-donations-increase-still-a-need-for-more-living-donors/. It's important to note that non-directed donations were not widely accepted in the United States; only fifteen percent of transplant centers considered non-directed kidney donations from living donors in 1994. Ginger A. Gruters, Living Donors: Process, Outcomes, and Ethical Questions (unpublished staff discussion paper Sept. 2006), https://bioethicsarchive.georgetown.edu/pcbe/background/ginger_gruters.html#edn68.

18. *Living Donation*, *supra* note 13.

19. *Id.*

20. *See* Phyllis Coleman, *"Brother, Can You Spare a Liver?" Five Ways to Increase Organ Donation*, 31 VAL. U. L. REV. 1, 14–18 (1996); Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 76 (1994) ("A properly designed organ futures market would restore [financial] incentives, dramatically expand[ ] organ supplies, and [save] many lives.").

21. *See* Coleman, *supra* note 20, at 18 ("Presumed consent . . . creates a rebuttable presumption that everyone wants to be an organ donor. Organs would be removed unless an individual 'opts out' prior to death. Several, primarily European, countries have adopted presumed consent."). Under a presumed consent system, the chance that the deceased's family member would reject permission is lowered. Mark F. Anderson, *The Prisoner as Organ Donor*, 50 SYRACUSE L. REV. 951, 954 (2000) [hereinafter Anderson, *Prisoner*].

with non-monetary benefits,[22] requiring donation requests in hospitals,[23] and making more people eligible to donate posthumously by changing the definition of death.[24] With a growing number of the population incarcerated,[25] many believe that those who are incarcerated can address this shortage.[26] Although many inmates in prison systems have attempted to participate in the current altruistic system of organ donation, prison officials often deny their requests.[27] Donations to strangers by inmates are almost always denied.[28] Surprisingly,

22. Jason Altman, *Organ Transplantations: The Need for an International Open Organ Market*, 5 TOURO INT'L L. REV. 161, 180 (1994) ("Other 'payment in kind' incentives consist of premium discounts on medical insurance, funeral expenses . . . supplier credit toward college tuition."); Coleman, *supra* note 20, at 17 ("[D]onors and their families could be given priority if they subsequently need transplants.").

23. Coleman, *supra* note 20, at 17–18 ("Hospitals would be responsible for designating a trained person to ask family members about organ donation at the time of death. . . . [Currently], many physicians and other health care professionals ignore [this] law.").

24. Anderson, *Prisoner*, *supra* note 21, at 954. For example, under the Pittsburgh Protocol, a patient is declared dead once he has experienced two minutes of cardiac arrest. Under this alternative definition, the pronouncement of death would occur earlier than the medical definition of death. *See* Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, to Whom Will Their Organs Go?*, 5 HEALTH MATRIX 249, 272–73 (1995); *see also Death*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/death https://www.merriam-webster.com/dictionary/death (last visited Mar. 31, 2017) ("The irreversible cessation of all vital functions especially as indicated by permanent stoppage of the heart, respiration, and brain activity.").

25. Approximately 6.8 million adults were incarcerated in 2014. *See* Danielle Kaeble et al., *Correctional Populations in the United States, 2014*, BUREAU OF JUST. STAT. (Dec. 29, 2015), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5519.

26. *See* Anderson, *Prisoner*, *supra* note 21; Coleman, *supra* note 20, at 27–34; Perales, *supra* note 11. *But see Whitney Hinkle*, Note, *Giving Until It Hurts: Prisoners Are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593 (2002) (arguing that prisoners, condemned or general population, should not serve as organ donors).

27. *See generally* Christian Longo, *Giving Life After Death Row*, N.Y. TIMES (Mar. 5, 2011), http://www.nytimes.com/2011/03/06/opinion/06longo.html?_r=0. Christian Longo, a death row inmate hoping to atone for his crimes, is perhaps one of the strongest advocates for inmate organ donations. In March 2014, Longo founded an organization called Gifts of Anatomical Value from Everyone ("GAVE") and offered to give a kidney to an Oregon resident on dialysis. Mark Hanrahan, *Christian Longo, Death Row Inmate, Fights For Right to Donate His Organs After Execution*, HUFFINGTON POST (June 21, 2011), http://www.huffingtonpost.com/2011/04/21/christian-longo-death-row-organ-donation_n_852090.html ("I am seeking nothing but the right to determine what happens to my body once the state has carried out its sentence."). Alternatively, some inmates desire to donate their organs for religious reasons, rather than coerced reasons. *See generally* Jessica Miller, Note, *A Life For an Afterlife: Assessing the Potential Redemption of Capital Inmates' Requests to Posthumously Donate Organs Under the Religious Land Use and Institutionalized Persons Act*, 13 RUTGERS J. L . & RELIGION 87 (2011) (discussing the Religious Land Use and Institutionalized Persons Act's application to condemned inmates' efforts to donate their organs after execution).

28. *See* John Pope & Mark Schleifstein, *Prison Blocks Inmate From Donating Organ; Meanwhile Would-Be Recipient Sits, Waits*, TIMES, Jan. 2, 2005 (discussing the denial of Seven Sage's, a Louisiana inmate, offer to donate a kidney in response to an advertisement in a local newspaper); *see also* Satel, *supra* note 1 ("I have not been able to find any states that permit inmates to give a kidney to a stranger.").

many inmates such as Joseph Green Brown are also denied the opportunity to become a living donor and donate an organ to a needy family member.[29]

This Comment focuses on an inmate's right to donate non-vital organs and addresses the heavy opposition against inmates participating in the altruistic system of organ donation.[30] Part I of this Comment provides the statutory and judicial history of organ donations in the United States. Part II examines the ethical and practical issues surrounding inmate organ donations. Part II also looks at international practices in regards to organ donation and how such practices influence the United States organ donation system. Part III explores the rights that prisoners retain while incarcerated, including the right of bodily integrity in the context of *McFall v. Shimp* and *Planned Parenthood v. Casey*. Part IV delves into a review of a number of states with policies that permit inmates to donate their organs and the various ways that the states address the ethical and practical issues surrounding organ donations from inmates. Finally, Part V concludes with a proposal to change federal legislation to expressly grant inmates the right to register as an organ donor of non-vital organs and ways to address the issues surrounding organ donation.

29. *See, e.g.*, Mark Gladstone, *Inmate's Try to Save Mom Thwarted; State Wouldn't Pay for Guard to Allow Pre-Transplanted Tests*, SAN JOSE MERCURY NEWS, Aug. 12, 2005 (discussing the denial of California inmate Tyrone Allen's request to donate a kidney to his mother); Devi Nampiaparampil, *How a Death Row Inmate's Request to Give His Organs Kept Him Alive*, NEWSWEEK (Apr. 29, 2015), http://www.newsweek.com/how-death-rows-request-give-his-organs-kept-him-alive-326552 (discussing the denial of Ohio inmate, Ronald Ray Phillips to donate a kidney to his mother); David Orentlicher & Eric M. Meslin, *Death-Row Donation Request Raises Ethic Concerns*, S. BEND TRIB., May 24, 2005 (discussing the denial of Michigan inmate Gregory Scott Johnson's request to donate his liver to his sister). But see the few instances when inmates are given the right to donate his or her organs in Amanda Seals Bersinger & Lisa Milot, *Posthumous Organ Donation as Prisoner Agency and Rehabilitation*, 65 DEPAUL L. REV.1193, 1190–1200 (2016); Tom Coyne, *Organ Donation Request Raises Ethics Concerns*, LINCOLN J. STAR (May 19, 2005), http://journalstar.com/news/national/organ-donation-request-raises-ethics-concerns/article_aac22573-7b2e-59d2-bc2b-76aa51952b39.html; Mary Engels, *Inmate Is Donating Kidney to His Cousin*, N.Y. DAILY NEWS (Jan. 16, 2001, 12:00 AM), http://www.nydailynews.com/archives/boroughs/inmate-donating-kidney-cousin-article-1.908327; Eric M. Meslin, *Death Row Organ Donation*, INDIANA U., http://bioethics.medicine.iu.edu/reference-center/topic-guides/deathrow/ (last visited Mar. 9, 2017).

30. It is beyond the scope of this Comment to address the ethical debate surrounding condemned inmates. This Comment will not distinguish between condemned inmates and general population inmates because it will only look at living organ donors. Thus, the prison term length of the individual is not important.

I. BACKGROUND ON ORGAN DONATION IN THE UNITED STATES

Organ donation in the United States has undergone many transformations through the use of various statutes such as the Uniform Anatomical Gift Act and the National Organ Transplant Act. Although both statues were enacted to address the organ transplant shortage and shape the donation system, the statutes were also enacted to ensure that prisoners could not donate organs in exchange for a sentencing reduction.

A. Statutory History of Organ Donation in the United States

In order to qualify as an organ recipient or an organ donor, several conditions must be satisfied in the United States.[31] An individual easily qualifies as an organ recipient if the person is suffering from organ failure, free of cancer or disease, and able to tolerate surgery.[32] The criteria for an organ donor are more exact: a person must be younger than fifty-five years of age and have an organ free from disease or cancer.[33]

In an attempt to address the shortage of organs available for transplants, the Uniform Anatomical Gift Act ("UAGA") was approved in 1968.[34] The UAGA provided that anyone who was at least eighteen years of age and mentally competent had the right to designate the donation of his or her organs for transplantation after death.[35] However, the UAGA failed to address many issues in re-

31. David E. Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 IND. J. GLOBAL LEGAL STUD. 621, 626 (1998).

32. Clive O. Callender, *Legal and Ethical Issues Surrounding Transplantation: The Transplant Team Perspective*, *in* HUMAN ORGAN TRANSPLANTATION: SOCIETAL, MEDICAL—LEGAL, REGULATORY, AND REIMBURSEMENT ISSUES 42, 42 (Dale H. Cowan et al. eds, 1987); Jefferies, *supra* note 31, at 626. Due to the organ shortage, physicians are often tasked with the difficult choice of having one organ but multiple candidates to determine which patient will receive an organ first. Physicians often weigh the patients' "social worth" before telling UNOS which patient has been selected to be the recipient. When looking at a patient's social worth, physicians consider a number of factors such as number of dependents, marital status, employment background, and educational background. *Id.* (citing NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, TRANSPLANTATION IN NEW YORK STATE: THE PROCUREMENT AND DISTRIBUTION OF ORGANS AND TISSUES (1988)).

33. *Living Donation*, *supra* note 13. Although not a criterion, cadavers that are brain dead, but still have a beating heart are preferable in order to increase the chances of a successful transplant. Jefferies, *supra* note 31, at 626.

34. *Prefatory Note* to UNIF. ANATOMICAL GIFT ACT (UNIF. LAW COMM'N 1968); Jefferies, *supra* note 31, at 627–28.

35. *See* Unif. Anatomical Gift Act § 2 (Unif. Law Comm'n 1968); Jefferies, *supra* note 31, at 628.

gards to the country's organ shortage. Approximately twenty years later, revisions to the UAGA brought about two important changes. First, the revisions expressly prohibited the sale of human organs for the sole purpose of transplantation.[36] Second, the UAGA revisions included a provision for routine inquiry, which required a physician to notify the hospital of a potential organ donor.[37] The 1968 UAGA and its 1987 revisions were adopted in all fifty states and the District of Columbia.[38]

In 1984, Congress enacted the National Organ Transplant Act ("NOTA") to address the interstate commerce of transplantation.[39] Under NOTA, Congress expressly recognized the United States system for organ procurement as a system of voluntary donations.[40] Prior to the enactment of NOTA, then-Senator Al Gore stated "[i]t is against our system of values to buy and sell parts of human beings. It is wrong."[41] Under NOTA, the sale of human organs was made a federal offense: "[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."[42]

In 2001, the United States government considered compensation in the form of a tax incentive for organ donations.[43] Two bills pro-

36. UNIF. ANATOMICAL GIFT ACT §10 ("A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy."); Jefferies, *supra* note 31, at 630.

37. UNIF. ANATOMICAL GIFT ACT §5; *see also* Jefferies, *supra* note 31, at 630.

38. Jefferies, *supra* note 31, at 631. The UAGA was also revised in 2006 and attempted to simplify the donation process. The 2006 revisions accommodate the forms found on the back of driver's licenses in the United States and permits an individual to bar others from making a gift after the individual's death. The revisions also better enabled procurement organizations to quickly determine whether an individual is a donor. *See generally* UNIF. ANATOMICAL GIFT ACT (UNIF. LAW COMM'N 2006).

39. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (codified as amended at 42 U.S.C. § 273–274 (1984)) (noting it is unlawful to transfer human organs for valuable consideration if the transfer affects interstate commerce); Jefferies, *supra* note 31, at 631.

40. National Organ Transplant Act, 42 U.S.C. § 274e. NOTA also established the Organ Procurement and Transplantation Network in order to maintain a national registry for matching eligible organ donors and candidates. 42 U.S.C. § 274(b); *see also* E. Bernadette McKinney et al., *Offender Organ Transplants: Law, Ethics, Economics, and Health Policy*, 9 HOUS. J. HEALTH L. & POL'Y 39, 57 (2008).

41. Stuart J. Bagatell et al., *Organ Donation by a Prisoner: Legal and Ethical Considerations*, 162 J. LA. ST. MED. SOC'Y 44, 45 (2010).

42. National Organ Transplant Act, 42 U.S.C. § 274e(a) (1984). International policy also prohibits the sale of organs. *See* WORLD HEALTH ORG. *Guiding Principles on Human Cell, Tissue and Organ Transplantation* (2010), WORLD HEALTH ORG., http://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf ("[O]rgans should only be donated freely, without any monetary payment or other reward of monetary value.").

43. Bagatell et al., *supra* note 41.

posed within the House of Representatives, the Gift of Life Tax Credit Act and the Help Organ Procurement Expand Act, proposed a refundable credit to individuals who agreed to be living donors or to donate their organs upon death.[44] Under the bills, qualified individuals would receive a refund amount between $2,500 and $10,000.[45] In addition to tax incentives, the 107th Congress made numerous attempts to incentivize organ donation in the United States. This included the "Gift of Life Congressional Medal Act"[46] and the "Organ Donation Improvement Act."[47] However, all regulations failed to come to fruition, reinforcing the belief that organ donation should revolve around altruism.[48]

B. Overview of Organ Donation in Prison Systems in the United States

Many states enacted laws to reduce blood shortages by allowing inmates to reduce their sentences by a number of days for each pint of blood they donated.[49] Many of these programs such as the inmate blood donor program no longer exist because of the standardization of sentencing—requiring inmates to serve a substantial portion of their sentence.[50] Despite such standardization, many state legislatures have attempted to pass statutes in favor of organ donations from inmates.

The State of Missouri proposed a "Life for a Life" bill in 1998 that allowed a death row inmate to donate a kidney in exchange for a reduced sentence.[51] Representative Chuck Graham believed that the

44. GIFT OF LIFE TAX CREDIT OF 2001, H.R. 1872, 107th Cong. (2001); HELP ORGAN PROCUREMENT EXPAND ACT, H.R. 2090, 107th Cong. (2001); *see also* Alexander S. Curtis, *Congress Considers Incentives for Organ Procurement*, 13 KENNEDY INST. ETHICS J. 51, 51 (2003).

45. Curtis, *supra* note 44, at 51; *see also* Bagatell et al., *supra* note 42, at 45.

46. Introduced by Senator Bill Frist of Tennessee, the Act proposed to award the donor's family with a Congressional Medal honoring the donor. GIFT OF LIFE CONGRESSIONAL MEDAL ACT OF 2001, S.B. 325, 107th Cong., 147 Cong. Rec. 1933 (2001).

47. The Act, introduced by Representative Michael Bilirakis of Florida, awarded grants to transplant centers to offset the expenses of the donors. ORGAN DONATION IMPROVEMENT ACT OF 2001, H.R. 624, 107th Cong., 147 Cong. Rec. 3042 (2001).

48. P. Clark, *Financial Incentives for Cadaveric Organ Donation: An Ethical Analysis*, 4 INTERNET J. L., HEALTHCARE & ETHICS 1, 3 (2005).

49. *See, e.g.*, ALA. CODE § 14-9-3 (2011) (detailing that a prisoner who donates at least one unit of blood to the American Red Cross shall be entitled to a thirty-day reduction of her sentence); Perales, *supra* note 11, at 693 (providing examples of the states such as Massachusetts who offered shortened inmates' sentences by five days for each pint of blood donated).

50. Perales, *supra* note 11, at 693–94.

51. H.R. 1670, 89th Gen. Assemb., 2d Reg. Sess. (Mo. 1998); *see also* Perales, *supra* note 11, at 694.

"Life for a Life" program would alleviate the organ shortage problem.[52] However, the bill did not pass due to organ donation organizations asserting that the exchange of organs for a reduced sentence violated federal law prohibiting the sale of organs for valuable consideration.[53] Furthermore, critics argued that organ donation should be based on altruism.[54] In 2000, Florida State Representative William F. Andrews, introduced a bill, which would allow condemned inmates to donate their organs upon execution.[55] Representative Andrews believed that condemned inmates who donated their organs would be doing a service by helping others live.[56] However, the introduction of the bill was met with strong ethical, legal, and scientific opposition.[57]

A program, Operation Blue, ULTRA: DION, was proposed as an amendment to the UAGA and NOTA.[58] The purpose of the program was to give inmates suspended time for organ donations.[59] One of the provisions proposed that an inmate could choose to be a local living banker (LLB)—a potential living donor of part of the pancreas, part of the liver, part of the lung, or one kidney.[60] If an inmate were to pledge three organs upon death, the inmate could receive a maximum total of 180 days of suspended time.[61] Additionally, an inmate could receive up to seven years of reduced time for registering to be an LLB.[62]

The Federal Bureau of Prisons has permitted inmates to donate organs under stringent conditions—an inmate incarcerated in the Bureau may serve as a living donor only if the recipient is a member of the inmate's immediate family.[63] Moreover, the Bureau requires the inmate to sign a statement consenting to the following: the dangers of

52. Perales, *supra* note 11, at 694.

53. *Id.* at 695. Similar bills have been proposed in Kentucky, Massachusetts, and South Carolina. *See* H.B. 444, 2008 Reg. Sess. (Ky. 2008); H.B. 1624, 189th Gen. Ct. (Mass. 2015); S.B. 417, 117th Gen. Assemb., Reg. Sess. (S.C. 2007).

54. Perales, *supra* note 11, at 695.

55. H.B. 999, 102nd Leg., Reg. Sess. (Fla. 2000).

56. Perales, *supra* note 11, at 694–95.

57. Hinkle, *supra* note 26, at 599.

58. Clifford Earle Bartz, *Operation Blue, ULTRA: DION—The Donation Inmate Organ Network*, 13 Kennedy Institute of Ethics J. 37, 38 (2003).

59. *Id.* Although there appears to be a coercive element to inmate organ donations, Bartz believes the issue could be addressed if the agreement to participate in the organ program is explained to the inmate so that he fully understands the terms of the contract before making the choice to participate. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. U.S. Dep't of Just., Patient Care 44–45 (June 3, 2014), https://www.bop.gov/policy/progstat/6031_004.pdf [hereinafter Patient Care].

the operation, the recognition that such an agreement was of his own free will, and the Government is not responsible for any financial responsibilities or complications.[64] Although a United States Federal Bureau of Prisons report addresses federal inmates, states often heavily regulate the extent of an inmate's right to donate organs.[65]

Unfortunately, the judicial history of organ donation is not as robust as the statutory history. In *Campbell v. Wainwright*, Campbell, a death-row prisoner, filed a complaint under the Civil Rights Act requesting that Wainwright, the director of the Division of Corrections, be ordered to permit him to undergo medical tests to determine whether Campbell qualified as a potential kidney donor to a Florida child.[66] Campbell wanted to be taken to a Denver, Colorado, hospital for the test and, if he qualified, for the surgical removal of his kidney for the donation.[67] Campbell also requested premium post-operative medical care once he returned to Florida's prison system.[68] Campbell maintained that the Florida prison system "has no vested constitutional right or authority to deprive [him] of personal liberty to donate a kidney. The Fifth Circuit affirmed the District Court's decision, finding that the dismissal of Campbell's complaint was proper because the operation would result in a huge financial burden for the state.[69] The Fifth Circuit held that as a result of his incarceration, Campbell has no right to the relief he requested—to be taken to a Denver hospital in order to undergo medical tests.[70]

In *Lonchar v. Thomas*, Lonchar filed a habeas petition in an attempt to delay his execution long enough for the Georgia legislature to change its execution method from electrocution to lethal injection, which would permit him to donate his organ.[71] On June 26, 1995, the state court dismissed the habeas petition, finding that it was brought

64. *Id.*

65. *See* Bersinger & Milot, *supra* note 29, at 1200–02 (noting Mississippi Governor Barbour released the Scott sisters and Ohio Governor Kasich postponed the execution of Ronald Phillips so he could donate a kidney to his mother).

66. Campbell v. Wainwright, 416 F.2d 949, 950 (5th Cir. 1969).

67. *Id.*

68. *Id.*

69. *Id.* ("Transportation of the appellant from Florida to Colorado and back would require special security personnel and would involve substantial additional expenditures of money by the State of Florida.")

70. *Id.*

71. Angela Carson, Lonchar v. Thomas: *Protecting the Great Writ*, 13 GA. ST. U. L. REV. 809, 813 (1997).

for manipulative purposes.[72] After numerous petitions to stay the execution,[73] the Supreme Court granted writ of certiorari on the day of his execution. Although the U.S. Supreme Court stayed Lonchar's execution in order for the federal court to determine the merits of his habeas corpus petition,[74] the Georgia court ultimately denied his petition and electrocuted Lonchar in November 1996.[75]

In *Lee v. Quarterman*, Lee, an inmate in Texas, testified during a July 2008 hearing that his father was ill and was in need of a kidney transplant.[76] Lee desired to donate his kidney and wanted to be tested to determine if he was a suitable donor.[77] The court found that the Texas Department of Criminal Justice ("TDCJ") procedures would be applicable to Lee's current claim.[78] The TDCJ issued a policy to address organ donations, which was promulgated to ensure uniformity of eligibility of inmates for access to organ donation.[79] The organ donation policy establishes that "the consent for organ or tissue donation, as well as the charges incurred in the preliminary testing and the actual donation process, are the sole responsibility of the donor, donor recipient, and organization financially responsible for the donation."[80] The policy later discusses that the physician in charge of the organ recipient transplantation team must request for the inmate to participate in the donation.[81] Under the policy, Texas emphasizes that "[a]ll donations are free and voluntary," and the inmate will not receive compensation of any kind for the donation.[82] The District Court found that inmates such as Lee do not have a constitutional right to donate organs.[83] Furthermore, the court found that Lee did not present any arguments or evidence that he would face undue

72. Lonchar v. Thomas, Nos. 95-V-332, 335 (Super. Ct. Butts County June 26, 1995). The Supreme Court of Georgia denied Lonchar's appeal of the dismissal. Lonchar v. Thomas, Nos. S95r1545, S95M1512 (Ga. June 27, 1995).

73. On June 27, 1995, Lonchar filed a petition in the district court, which granted the stay of execution. Lonchar v. Thomas, 58 F.3d 590, 591 (11th Cir. 1995). The 11th Circuit ultimately vacated the stay. *Id.* at 593.

74. Lonchar v. Thomas, 517 U.S. 314, 331–32 (1996).

75. *See* Bersinger & Milot, *supra* note 29, at 1203.

76. Lee v. Quarterman, No. C-07-476, 2008 WL 3926118, at *2 (S.D. Tex. Aug. 21, 2008).

77. *Id.*

78. *Id.* at *1.

79. Correctional Managed Health Care Policy Manual § E-31.2 (2016) [hereinafter TDCJ Policy], http://tdcj.state.tx.us/divisions/cmhc/docs/cmhc_policy_manual/E-31.02.pdf.

80. *Id.* at § E-31.2(I).

81. *Id.* at § E-31.2(III).

82. *Id.* at § E-31.2(IV).

83. *Lee*, 2008 WL 3926118, at *3 (citing *Campbell v. Wainwright*, 416 F.2d 949, 950 (5th Cir. 1969) (per curiam)).

hardship if he complied with the TDCJ policy.[84] Although the court denied Lee's motion, it did not preclude him from donating an organ in compliance with the policies set forth by TDCJ.[85]

The consensus in the United States is a strong objection towards allowing any condemned inmate to donate his or her organs. Many critics argue that programs such as Missouri's "Life for a Life" would encourage judges and juries to choose the death penalty for a suspect,[86] resting on the assumption that the sentence might lead to an organ donation that will save someone on the waiting list.[87] Furthermore, critics contend that such programs would create unfair treatment between inmates—healthy inmates who were able to donate in exchange for a commuted sentence from those inmates who were interested in donating but were prohibited due to a medical condition.[88] However, the legal, ethical, and practical concerns are amongst the strongest contentions.

II. LEGAL, ETHICAL, AND PRACTICAL REASONS AGAINST ORGAN DONATIONS FROM INMATES

The strongest opposition to inmates serving as organ donors is due to many of the legal, ethical and practical issues surrounding organ donations in the United States. Many argue that prisons are inherently coercive and executive officers have the potential to abuse the prison system.[89] Others have also argued that vulnerable populations such as children and inmates are unable to give informed consent under any condition.[90] However, among the strongest opposition opposed to inmates donating organs are the practices of foreign coun-

84. *Id.* at *1.

85. *Id.*

86. Many critics of programs such as Missouri's "Life for a Life" Bill fear that the implementation of the program would result in an increase in death penalty sentencing in hopes that the incarcerated prisoner would donate his or her organs. Such results would look eerily similar to China's prisoner-organ donation system. See discussion *infra* Part II, for further discussion of China's organ donation system.

87. Anderson, *Prisoner*, *supra* note 21, at 955.

88. U.S. Dep't of Health & Hum. Servs., *The Ethics of Organ Donation from Condemned Prisoners*, OPTN, https://optn.transplant.hrsa.gov/resources/ethics/the-ethics-of-organ-donation-from-condemned-prisoners/ (last visited Mar. 18, 2017) [hereinafter *Ethics of Organ Donation*].

89. L.D. de Castro, *Human Organ from Prisoners: Kidneys for Life*, 29 J. MED. ETHICS 171, 173 (2003).

90. Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J. L. & MED. 45, 57, 88, 104 (1995); Castro, *supra* note 89, at 172; *id.* at 172.

tries—a fear that the United States will become a country that harvests organs rather than obtaining them through donations.[91]

A. Legal, Ethical, and Practical Considerations

The idea of organ donations from inmates is a very controversial topic in the United States. Many maintain that inmates are in a vulnerable position and cannot consent freely given the "inherently coercive" environment in which they live.[92] Because of this environment, inmates require protection from coercion and exploitation.[93] When it comes to live organ donation, the consensus is that "a person who gives consent to be a live organ donor should be competent, willing to donate, free from coercion, medically and psychosocially suitable, fully informed of the risks and benefits as a donor, and fully informed of the risks, benefits and alternative treatment available to the recipient."[94] When a person registers to become a living donor, a donor advocate is appointed, the donee is advised that the donor may change his or her mind any time prior to the donation, and a psychological assessment is undertaken.[95]

In order for human organ donation to take place in most countries, including the United States, there must be voluntary and informed consent from the donor.[96] Consent is defined as informed consent obtained without duress.[97] The informed consent requirement stems from the common law principle of self-determination, which recognizes that every individual has the right to refuse unwanted medical treatment.[98] Under the doctrine of informed consent, the physician is required to discuss with the donor all of the risks asso-

91. Anna Stolley Persky, *Life From Death Row: Inmates Want to Donate Organs, But State Disagrees*, ABA J. (Apr. 01, 2012, 09:00 AM), http://www.abajournal.com/magazine/article/life_from_death_row_inmates_want_to_donate_organs_but_state_disagrees ("[T]his country does not want to become like China, where two-thirds of donated organs are harvested from prisoners."); Shannon Ross, *With Organ Donations, Let Prisoners Give Life to Others*, N.Y. TIMES (Apr. 25, 2013), http://www.nytimes.com/roomfordebate/2013/04/25/should-prisoners-be-allowed-to-donate-their-organs/with-organ-donations-let-prisoners-give-life-to-others ("We're not China. That nation's shameful harvesting of organs from inmates should not prevent healthy, consenting Americans from the liberty to give others a renewed chance at life.").

92. Barbara E. McDermott, *Coercion in Research: Are Prisoners the Only Vulnerable Population?*, 41 J. AM. ACAD. PSYCHIATRY L. 8, 8 (2013); *Ethics of Organ Donation*, *supra* note 88.

93. Castro, *supra* note 89, at 171.

94. Bagatell et al., *supra* note 41, at 45.

95. Arthur Caplan, *The Use of Prisoners as Sources of Organs – An Ethically Dubious Practice*, 11 AM. J. BIOETHICS 1, 4 (2011).

96. Banks, *supra* note 90, at 57.

97. Bagatell et al., *supra* note 41, at 44.

98. *See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 277 (1990).

ciated with organ transplantation and the autonomy to make the decision free from any coercion.[99] Moreover, some opponents of organ donations from inmates maintain that the organ recipient should be informed that the source of the donation was from an inmate.[100]

Others have argued that it is unethical to use inmates for the benefit of non-prisoners.[101] The primary focus of this argument has been the use of inmates for medical experiments such as the MK-ULTRA project. Under this project in the 1950's and 1960's, the CIA conducted a human experiment program, which gave mind-altering drugs to hundreds of Americans in an effort to explore the possibilities of mind control in humans.[102] Many of the "guinea pigs" of the experiment included mental patients and inmates.[103] In 1975, twenty-one states explicitly permitted inmates to participate in biomedical research.[104] In 1978, federal regulations instituted a ban on the use of inmates as subjects in all biomedical research conducted by the federal government unless the research has the potential to benefit the inmates themselves and proposes no more than the minimal risk to the subjects.[105]

Organ donations from inmates, both living and condemned, present an even larger legal issue.[106] The National Organ Transplant Act stipulates that organ donations cannot be made for "valuable considerations," including any monetary or material benefit.[107] Critics cite major legal concerns with using living inmates as donors because of the various incentives such as a reduction in sentence or the extension of privileges, which can be regarded as "valuable considerations.[108] In January 2001, Mississippi Governor, Haley Barbour, released two sisters, Gladys and Jamie Scott, from life sentences for armed robberies on the condition that Gladys agreed to be a donor for Jamie, who required dialysis.[109] Opponents argue that giving an inmate, such as

99. Banks, *supra* note 90, at 57; Shu S. Lin et al., *Prisoner on Death Row Should Be Accepted as Organ Donors*, 93 ANNALS THORACIC SURGERY 1773, 1776 (2012).

100. *Ethics of Organ Donation*, *supra* note 88.

101. Anderson, *Prisoner*, *supra* note 21, at 967.

102. Tim Weiner, *Sidney Gottlieb, 80, Dies; Took LSD to C.I.A.*, N.Y. TIMES (Mar. 10, 1999), http://www.nytimes.com/1999/03/10/us/sidney-gottlieb-80-dies-took-lsd-to-cia.html.

103. *Id*.

104. Anderson, *Prisoner*, *supra* note 21, at 967.

105. 45 C.F.R. § 46.306 (1978); Anderson, *Prisoner*, *supra* note 21, at 967.

106. Lin et al., *supra* note 99.

107. *Id*. at 1774.

108. Caplan, *supra* note 95, at 4.

109. *Id*. at 1; Jamila Jefferson-Jones, *The Exchange of Inmate Organs for Liberty: Diminishing the "Yuck Factor" in the Bioethics Repugnance Debate*, 15 J. GENDER, RACE & JUST. 105, 105

Gladys, parole on the condition of giving a kidney to her sister was a form of a valuable consideration and in violation of NOTA.[110]

In addition to informed consent from both living and condemned inmates, many maintain that organ donation by condemned inmates are less successful because of the execution methods. The World Health Organization and the World Medical Association state that vital organs should only be removed after patients have been pronounced dead—living patients should never be killed in order to procure organs.[111] The primary issue for organ donation from executed inmates is that the transplantation must take place before the execution in order to obtain viable organs. The most common type of execution in the United States is the lethal injection of a drug, which causes damage to all organs.[112] Many have proposed alternate execution methods such as death by organ removal in order to ensure organ viability.[113] Under this method, inmates would be anesthetized and have their organs removed before they are dead. However, to kill an inmate by organ procurement would place the surgeon in the role of executioner, which violates the fundamental physician dead-donor rule.[114]

Moreover, opponents of organ donation from inmates claim that inmates should not be allowed to engage in the donation system because the number of willing, potential donors is small,[115] the quality of usable organs are low due to age, health, obesity, or communicable diseases,[116] and that prosecutors, judges, or juries may be more likely

(2013). Governor Barbour claimed that a key reason for his decision to release the sisters was because Jamie's kidney dialysis and treatment was an extreme financial burden on the state of Mississippi. *See* Caplan, *supra* note 95, at 1.

110. Jennifer L. Visconti, *Exchanging a Kidney for Freedom: The Illegality of Conditioning Prison Releases on Organ Donation*, 38 NEW ENGLAND J. CRIM. & CIVIL CONFINEMENT 199, 215 (2012) (noting the NOTA "prohibits the transaction that occurred between Gladys Scott and the State of Mississippi. Organ donation is considered a gift in the United States . . ."). Opponents cited other issues to the donation including coerced consent. Jefferson-Jones, *supra* note 109, at 108.

111. Lin et al., *supra* note 99.

112. *Id.* at 1777.

113. Perales, *supra* note 11, at 714 (proposing an anesthesia-induced brain death and subsequent organ removal in order to avoid the dead donor rule).

114. Lin et al., *supra* note 99.

115. Caplan, *supra* note 95, at 2; *see also Ethics of Organ Donation*, *supra* note 88.

116. Caplan, *supra* note 95, at 2; *see also* Danielle Silva & Tracy Connor, *Death-Row Organ Donations Pose Practical, Ethical Hurdles*, NBC NEWS (Nov. 14, 2014, 2:14 PM), http://www.nbcnews.com/news/other/death-row-organ-donations-pose-practical-ethical-hurdles-f2D11595275.

to insist on the death penalty, knowing that lives might be saved.[117] However, the strongest reason in opposition of organ donation from inmates is fear that the United States would change its organ donation program to align with countries that do not obtain any consent from the donors prior to organ procurement.

B. Reluctance Due to International Organ Donation Practices

There is a strong history of organ procurement from inmates in a number of countries across the world. In the 1950's, organs were taken from guillotined inmates in France, and inmates were once permitted to donate organs in the United States.[118] Currently, most countries have rejected the practice of organ procurement from inmates. However, a few countries such as the Philippines and China continue these practices, sometimes without the consent of the inmate.

1. Kidneys for Life: Philippines' Inmate Organ "Donation" Program

Inmates were first used as organ donors in the Philippines in the 1970s when local doctors came back from other countries where they received specialized training in organ transplantation.[119] Some of these surgeons went to local prisons to recruit organ donors in order to practice their techniques.[120] Some inmates were promised that they or their family members would be given material rewards, while other inmates were promised sentencing commutation.[121] The prison officials attempted to justify sentencing commutation through the act of donation.[122] By assuming the risks associated with organ donation, an inmate exhibited "good behaviour," which was evidence of a reformed character.[123] Evidence of good behavior and a reformed character made an inmate eligible for sentencing commutation.[124]

117. Caplan, *supra* note 95, at 2; Nampiaparampil, *supra* note 29 ("The idea of saving "innocent" lives could also incentivize prosecutors and judges to favor the death penalty.").

118. Katrina Hui, *Rethinking the Ethics of Prisoner Organ Donation*, VOICES IN BIOETHICS (Oct. 15, 2013), https://voicesinbioethics.org/2013/10/15/prisoner-organ-donation/.

119. Castro, *supra* note 89, at 171.

120. *Id.*

121. *Id.*; *see also* Maud Beelman, Body Parts Needed for Transplants, L.A. TIMES, July 16, 1989, at 6 ("[M]ost donor inmates avoided execution and some were freed after spending a few more years in prison.").

122. Castro, *supra* note 89, at 171.

123. *Id.*

124. *Id.*; *see also* Altman, *supra* note 22, at 171.

However, the surgeons took advantage of the inmates and many of the inmates who donated organs did not receive the rewards they were promised.[125]

The Philippines' current organ donor program began in 1999; the Kidney Patients' Association of the Philippines proclaimed that there were numerous patients who needed organs, many healthy human organs were being wasted by not allowing inmates to donate their organs.[126] One of the many critics of the program reported that such commutation prevents the government from review sentencing, but more importantly, it is taking advantage of a desperate individual.[127] The Bureau of Corrections allowed inmates to donate their organs in exchange for the reward of sentence commutation amidst strong objections.[128]

2. China and the Black Market of Organs

Beginning in 1983, China began a "Crackdown on Crime" campaign, which has doubled the prison population.[129] An estimated 10,000 people were executed at the start of the campaign.[130] Now, more people are being condemned to death and judicially executed each year in China than any time since the 1950's.[131] For those condemned inmates, Chinese legislation provides three ways in which organs may be removed from inmates: (1) if an inmate's body is unclaimed by their family, (2) the inmate has volunteered his organs to be removed after his death, or (3) the inmate's family consents to the organ donation.[132] However, the Chinese government rarely

125. Castro, *supra* note 89, at 171; Beelman, *supra* note 121 ("One prisoner who donated a kidney even complained . . . that he received only $95, without the cassette recorder he was promised")

126. Castro, *supra* note 89, at 171; *see also* Nancy Scheper-Hughes, *Consuming Differences: Post-Human Ethics, Global (In)justice, and the Transplant Trade in Organs*, *in* A DEATH RETOLD: JESICA SANTILLAN, THE BUGLED TRANSPLANT AND PARADOXES OF MEDICAL CITIZENSHIP 205, 228 (Keith Wailoo et al., eds. 2006).

127. Castro, *supra* note 89, at 171–72.

128. *Id.* at 172.

129. Allison K. Owens, *Death Row Inmates or Organ Donors: China's Source of Body Organs for Medical Transplantation*, 5 IND. INT'L & COMP. L. REV. 495, 498 (1995). Crimes punishable by death include murder, rape, smuggling, fraud, production of false goods, and tax fraud. *Id.* at 499.

130. *Id.* at 499.

131. *Id.* at 498; *see also* James Griffiths, *China Still Harvesting Organs From Prisoners at a Massive Scale*, CNN (June 24, 2016, 11:45 PM), http://www.cnn.com/2016/06/23/asia/china-organ-harvesting/ (noting China carries out more executions annually than the rest of the word put together).

132. *Hinkle*, *supra* note 26, at 597; Owens, *supra* note 129, at 499–500.

seeks voluntary consent from inmates or their family members prior to organ procurement.[133] Even in the minority cases where consent is obtained, it is likely that it was not voluntary and genuine.[134] After the execution of an inmate, if the family does not claim the body, the government may then use the inmate's organs for transplantation.[135]

In addition to the lack of consent, executions are often purposely mishandled to ensure that inmates are not dead when their organs are removed to ensure the most viability.[136] Procured organs are either sold to patients waiting for transplant surgery from other countries or they are given to the government.[137] China's supply of transplantable organs grew and the Chinese's government has been able to get away with such practices due to the perception that inmates lack all rights while incarcerated.[138]

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When looking at the ethical and practical issues surrounding organ donations from inmates in the United States, legislators should ensure that the organ donation system does not mimic the systems in other countries such as China, but rather is compliant with Uniform Anatomical Gift Act and National Organ Transplant Act.[139] In order to ensure that the organ donation system in the United States remains altruistic, it is important to recognize the rights that inmates retain despite being incarcerated.

III. RIGHTS RETAINED BY INMATES IN THE UNITED STATES

It is undeniable that once lawfully incarcerated, an inmate only retains a degree of liberty—a fraction of those that are generally asso-

133. Owens, *supra* note 129, at 502; Patton, *supra* note 4, at 425.

134. Kirk C. Allison et al., *Historical Development and Current Status of Organ Procurement From Death-Row Prisoners in China*, 16 BMC MED. ETHICS 1, 2 (2015) ("[A]fter January 2015 . . . written consents are obtained and these organs are now classified as voluntary donations from citizens, accepted notwithstanding the fundamentally coercive context."); Owens, *supra* note 129, at 500.

135. Owens, *supra* note 129, at 500.

136. Allison et al., *supra* note 134; Gavin Kelleher, *China's Illegal Organ Harvesting Trade Is Still Booming*, VICE (Dec. 4, 2014, 4:43 PM), https://www.vice.com/en_ca/article/china-are-still-harvesting-prisoners-organs-329 (noting that in 2014 China was still removing organs from inmates without consent and at times while the inmate was still alive).

137. Owens, *supra* note 129, at 495 (noting an estimated 2,000 to 3,000 organs, mostly kidneys or corneas, are procured from inmates each year and used in transplants).

138. *Id.* at 498.

139. See discussion *infra* Part V for further discussion on how to address ethical concerns surrounding organ donations from prisoners.

ciated with non-incarcerated persons. However, a person's status as an inmate does not equate to a loss of all rights—the prison system does not own the body and mind of the inmate. The Supreme Court has recognized a number of rights that inmates retain while incarcerated.

A. General Overview of Inmates' Rights

Convicted inmates were once considered slaves of the state and could claim no rights.[140] Like slaves in the United States, inmates could even be refused the right to litigate their own slave status.[141] The Supreme Court has said that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[142] However, at the height of the civil rights movement, the Supreme Court began addressing unconstitutional prison conditions and expanding the substantive rights of inmates.[143]

Under the Eighth Amendment's right to be free from cruel and unusual punishment, prison systems are obligated to provide inmates with adequate medical treatment.[144] In *Estelle v. Gamble*, the Court stated a prison's deliberate indifference to an inmate's medical issues constituted cruel and unusual punishment.[145] In *Rosado v. Alameida*,[146] a state inmate sued prison officials for allegedly failing to place his name on a transplant list for a liver.[147] The court issued a preliminary injunction that within thirty days of the court order, prison officials must contact medical centers to determine whether Rosado was a transplant candidate.[148] Under the Eighth Amendment, it is the state's responsibility to provide inmates with medical care for inmates.

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140. Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1229 (1998).

141. *Id.* at 1238.

142. Price v. Johnston, 334 U.S. 266, 285 (1948).

143. For a general overview of inmate rights, see generally Herman, *supra* note 140.

144. *Id.* at 1244.

145. Estelle v. Gamble, 429 U.S. 97, 103, 104 (1976); *see also* Brown v. Plata, 563 U.S. 493, 510–11 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. . . . A prison that deprives prisoners basic sustenance, including adequate medical care, is incompatible with the concept of human dignity. . . ."). The prison system cited limited resources due to overcrowding as the reason for its violation of the Eight Amendment. *Id.* at 502.

146. Rosado v. Alameida, 349 F. Supp. 2d 1340 (S.D. Cal. 2004).

147. *Id.* at 1342.

148. *Id.* at 1349.

The Court enacted a new standard of review under *Turner v. Safley*[149] for constitutional challenges to prison regulations and articulated a doctrine of deference that places the burden on inmates to prove that a specific prison regulation is unconstitutional.[150] The Supreme Court declared a state law unconstitutional that prevented inmates from getting married unless the superintendent gave permission.[151] According to the state law, the superintendent could only grant permission if there were compelling reasons: for allowing the marriage—generally only the birth of a child was considered compelling.[152] The Court found that inmates retained the right to marry as a result of a number of factors such as marriage being an exercise of religious faith and the importance of expressing emotional support and public commitment.[153] The Court concluded, "the almost complete ban on a decision to marry is not reasonably related to legitimate penological objectives."[154] The prison could regulate the "time and circumstances under which the marriage ceremony itself takes place," and could prevent the married couple from cohabitating, but the state could not forbid all marriages.[155]

Writing for the split court decision in *Turner v. Safley*, Justice O'Connor stated the general reasonableness standard: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if prison administrators . . . are to make the difficult judgments concerning institutional operations."[156] The Court declared several factors which are relevant in determining the reasonableness of the prison regulation: (1) whether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest; (2) whether there are other avenues in which the inmate can exercise the right; (3) the impact that the accommodation of the right in question would have on the guards, other inmates, and on the allocation of prison resources; and (4) the absence of ready alternatives is evidence of the reasonableness of the

149. Turner v. Safley, 482 U.S. 78 (1987).
150. Daniel R.H. Mendelsohn, Comment, *The Right to Refuse: Should Prison Inmates Be Allowed to Discontinue Treatment for Incurable, Noncommunicable Medical Conditions?*, 71 MD. L. REV. 295, 296 (2011).
151. *Safley*, 482 U.S. at 99.
152. *Id.* at 82.
153. *Id.* at 96.
154. *Id.* at 99.
155. *Id.*
156. *Id.* at 89.

prison regulation.[157] *Turner v. Safley* established an extremely deferential approach toward prison administrative decisions.[158] The Court refused to apply a strict scrutiny review in the prison context, asserting that such a standard would "seriously hamper [prison administrators'] ability to anticipate security problems and to adopt innovative solution[s] to the intractable problems of prison administrators."[159]

The Supreme Court applied the *Turner* standard in *Washington v. Harper*.[160] The Court upheld a prison regulation compelling inmates to take antipsychotic drugs against their will.[161] The Court concluded that the regulation was reasonable under the *Turner* standard because the inmate did not indicate any other comparable prison action that would yield the same results and the regulation stated that the prison official could only medicate when it was related to a valid treatment.[162]

Although inmates lose certain civil rights and liberties while they are incarcerated, the government does not own an inmate's body and soul. Denying an inmate the opportunity to donate his organ is not related to the legitimate penological interest of the prison. Inmates still possess the autonomy to make certain decisions such as bodily integrity and what they can do to their body.[163]

B. Inmates' Right to Bodily Integrity

The right to bodily integrity received acclaimed attention in the Supreme Court's landmark case *Planned Parenthood v. Casey*, and lower courts have addressed the right to bodily integrity as it pertains to organ donation.[164] Courts have also found that inmates, despite their incarcerated status, do not lose the right to bodily integrity in a number of circumstances if the inmate is found to be reasonable and

157. *Id.* 89–90.

158. *Id.* at 89.

159. *Id.* Four Justices disagreed with the *Turner* standard because it easily enabled most regulations to pass the Court's reasonableness standard and because of the extreme difficulty for inmates to assert their substantive due process claims. *Id.* at 100–01.

160. Washington v. Harper, 494 U.S. 210, 225–26 (1990).

161. *Id.* at 236.

162. *Id.* at 226–27. Justice Stevens, writing for the dissenters, concluded that responding to general security concerns with forced medical treatment went outside of the *Turner* standard and should be considered an "exaggerated response" by prison administrators. *Id.* at 246–47 (Stevens, J. concurring in part and dissenting in part).

163. Bagatell et al., *supra* note 41, at 46.

164. *See generally* Campbell v. Wainwright, 416 F.2d 949 (5th Cir. 1969) (finding plaintiff had no constitutional right to donate his kidney). However, *Campbell* was decided before the articulation of the right to bodily integrity.

sane.[165] This Section argues that the recognition of bodily integrity in a number of circumstances, including the right to choose whether to donate one's own organs and the right to determine what happens to one's body, should also extend to inmates' retention of bodily integrity when it comes to the decision of donating one's organs while incarcerated.

1. A General Right of Bodily Integrity Recognized By the Courts

One of the strongest arguments that a person retains the right to bodily integrity when it comes to organ donation arises from *McFall v. Shimp*.[166] McFall suffered from a rare bone marrow disease, and after certain tests, it was determined that Shimp, McFall's cousin, was the only suitable donor.[167] However, Shimp refused to go through with the transplant and McFall sued him in court.[168] McFall requested a preliminary injunction, which sought to compel Shimp to further testing and eventually compel him to donate his bone marrow.[169] The court refused to force Shimp to donate his bone marrow recognizing his constitutional right to maintain bodily integrity including refusal of medical treatment.[170] The court reasoned:

> For our law to *compel* [Shimp] to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.[171]

McFall has continuously signified that the government does not have the authority to make the determination of whether a person can donate his or her organs. The holding for *McFall* was used as support in the Supreme Court's landmark case on the recognition of bodily integrity, *Planned Parenthood v. Casey*. A brief was filed in support of

165. Zant v. Prevatte, 286 S.E. 2d 715, 716–17 (Ga. 1982).
166. McFall v. Shimp, 10 Pa. D. & C.3d 90, 90 (C.P. 1978).
167. *Id.*
168. Cable Neuhaus, *A Cousin's Stunning Refusal to Donate Bone Marrow Leaves Robert McFall Facing Death*, 10 PEOPLE 7 (Aug. 14. 1978), http://www.people.com/people/archive/article/0,,20071484,00.html.
169. *McFall*, 10 Pa. D. & C.3d at 90.
170. *Id.* at 91.
171. *Id.*; *see also* Curran v. Bosze, 141 Ill. 2d 473 (1990) (holding that a noncustodial parent could not force his twins to submit to testing in order to donate bone marrow to their half brother). The right to bodily integrity in the organ donation context has also been discussed in pop culture, specifically the novel My Sister's Keeper where Anna, who was born a Savior sister, was granted medical emancipation from her parents and the ability to choose whether to donate her organs to her dying sister, Jodi Picoult. MY SISTER'S KEEPER (2004).

the petitioners, Planned Parenthood, which used *McFall* to validate its argument that women have the right to obtain abortions.[172] The brief maintained:

> The holding in *McFall* is consistent with the respect for individual autonomy that is a traditional element of American common law. The familiar proposition that "every human being of adult years and sound mind has a right to determine what shall be done with his own body is fundamental in American jurisprudence . . . ." And as *McFall* and other cases illustrate, this is a "strong right," one that is strictly enforced rather than balanced against competing interests.[173]

In *Casey*, the Supreme Court, by a five-to-four vote, upheld the findings in *Roe v. Wade*, finding that women retain the right to an abortion, but the state can limit such an exercise if it satisfied the strict scrutiny standard.[174] Under the *Casey* standard, the government needs to show that when imposing the limitation, it was acting to support one of its legitimate interests and that the regulation was not an "undue burden" on the exercise of the right to an abortion.[175] The Court found support for the right to abortion by acknowledging the right of "personal autonomy and bodily integrity."[176] However, the plurality opinion in *Casey* has come to mean more than just abortion rights, the landmark case also serves as the case that articulated the right to bodily integrity.[177] Although only a small number of courts have addressed the right to bodily integrity as it pertains to inmates

172. Brief of the American College of Obstetricians and Gynecologists, et al. as Amici Curiae Supporting Petitioners at 20, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Nos. 910744, 91-902), 1992 U.S. S. Ct. Briefs LEXIS 275 (citing McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (C.P. 1978)).

173. *Id.* at 21.

174. *See* Planned Parenthood v. Casey, 505 U.S. 833, 843, 845 (1992) ("[I]t must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm has three parts. First is the recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."); *see also* Roe v. Wade, 410 U.S. 113 (1973).

175. *Casey*, 505 U.S. at 874–80.

176. *Casey*, 505 U.S. at 857; *see also* McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (C.P. 1978).

177. Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803, 830 (1995) ("The plurality in *Casey* reached beyond the procreational privacy that was staked out in *Roe* to rest on a rule (whether mistaken or not) of personal autonomy and bodily integrity") (internal quotation omitted); *see also* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 287, 289 (1990) (O'Connor, J., concurring) ("[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self determination . . . the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment").

while incarcerated, such cases demonstrate that inmates retain such a right.

2. Judicial Opinions on Whether Inmates Retain the Right to Bodily Integrity

Although the Supreme Court has not explicitly addressed whether prisoners have a right to bodily integrity while they are incarcerated, many lower courts have addressed this topic and found in favor of such a right. One of the more notorious cases involving an inmate's right to donate his organs while incarcerated is *Campbell v. Wainwright*.[178] In this case, the Fifth Circuit found that Campbell, the incarcerated inmate, did not have a constitutional right to donate his kidney.[179] The Court cited the high financial burden associated with the donation of Campbell's kidney as one of the main reasons in denying his request.[180] However, this explicit denial of bodily integrity to inmates has to be reevaluated due to the number of cases decided after *Campbell*, including *Planned Parenthood v. Casey*, which explicitly recognized the right to bodily integrity. In *Zant v. Prevatte*, the Supreme Court of Georgia held that the state had no compelling interest on behalf of the state sufficient to outweigh an inmate's right to refuse unwanted medical treatment when the inmate is found to be sane.[181]

A similar situation arose in *Singletary v. Costello*, when Costello, an inmate in Florida, went on a hunger strike.[182] The court noted that the general public has the constitutional right to refuse medical treatment; however, inmates are not entitled to all the rights that are guaranteed to the general public.[183] The court found that inmates retain all rights that a citizen has except those that are expressly taken away—right to refuse medical treatment is not one of those rights that have been stripped from inmates.[184] After balancing the state's interest with the Costello's, the court held that both the federal and Florida constitution recognized that the inmate had the right to bodily integ-

178. Campbell v. Wainwright, 416 F.2d 949 (5th Cir. 1969).
179. *Id.* at 950.
180. *Id.*
181. Zant v. Prevatte, 286 S.E. 2d 715, 716–17 (Ga. 1982). *But see* Washington v. Harper, 494 U.S. 210, 227 (1990) (holding that the requirements of the prison environment an inmate is not allowed to refused medication if it is decided that they may pose a danger to themselves or to others).
182. Singletary v. Costello, 665 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1996).
183. *Id.* at 1104.
184. *Id.* at 1104–05.

rity when it comes to refusing medical treatment.[185] An inmate's right to bodily integrity has also been recognized outside of the context of the right to refuse medical treatment. In *Hovater v. Robinson*, the inmate alleged to be sexually assaulted by a prison official on numerous occasions.[186] The Tenth Circuit found that "an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards."[187]

Although no court has explicitly found that inmates retain the right to bodily integrity as it relates to organ donation, the right has not been expressly taken away from inmates. The Fifth Circuit's reasoning in *Campbell* for denying the inmate the opportunity to donate his kidney rested significantly on the financial burden it would cost the state rather than on the constitutional right under the Fourteenth Amendment.[188] Moreover, *Campbell* was decided prior to the articulation of the right to bodily integrity found in *Planned Parenthood v. Casey*. Since *Planned Parenthood*, Zant, Singletary, and Hovater have articulated an inmate's right to bodily integrity.

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The ban on organ donations from inmates is not reasonably related to legitimate penological objectives. Traveling to a hospital to donate an organ does not present any more security concerns than traveling to a hospital to receive an organ, which was held constitutional under *Rosada*.[189] Although finances associated with the post-operative care can become burdensome to a state if inmates donated frequently, the state would not be obligated to bear such costs.[190] Because the right to bodily integrity has not been expressly taken away and the government does not own the inmate's body, inmates retain the right to donate non-vital organs under the Fourteenth Amendment. As articulated in *Shimp*, the compulsion to donate one's organ "would defeat the sanctity of the individual," nonetheless the refusal to permit one to donate his organs also defeats "the sanctity of the individual."[191] If the right to determine what shall be done with his own body is fundamental in American jurisprudence and one has a

185. *Id.* at 1102.
186. Hovater v. Robinson, 1 F.3d 1063, 1064–65 (10th Cir. 1993).
187. *Id.* at 1068.
188. Campbell v. Wainwright, 416 F.2d 949, 950 (5th Cir. 1969).
189. Rosado v. Almaeida, 349 F. Supp. 2d 1340, 1345–1350 (S.D. Cal. 2004)
190. *See infra* Part V for further discussion.
191. McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (C.P. 1978).

recognized right to bodily integrity in the prison system, it follows that an inmate has the right to determine whether he or she can donate his or her non-vital organs while incarcerated.

IV. MODEL STATES WITH INMATE ORGAN DONATION POLICIES

A number of states have recognized that inmates retain the right to donate their organs. These states have allowed inmates to donate organs while incarcerated and also if they die of natural causes while incarcerated. Such state examples demonstrate that the right to donate one's organs, and thus the right to bodily integrity, is retained by inmates while incarcerated.

A. Arizona

Often deemed the first program of its kind, the Maricopa County, Arizona Sheriff's Office, one of the largest jail systems in the country, began a program called the "I Do Program" in 2007 that permitted inmates to register to be an organ donor.[192] According to Sheriff Joe Arpaio, nearly 100 inmates signed up to donate their organs during the month of April 2015, bringing the total of inmate-donors to 16,500 since the inception of the program.[193] Although the program is only for posthumous giving if an inmate dies in the custody of the prison, many have argued that the popularity of the program demonstrates that there is a strong desire to donate from inmates.[194]

B. Texas

The Texas Department of Criminal Justice ("TDCJ") has a policy in place for organ donation from inmates after death.[195] During the

192. Jaclyn M. Palmerson, *Inmate Organ Donation: Utah's Unique Approach to Increasing the Pool of Organ Donors and Allowing Prisoners to Give Back*, 68 RUTGERS U. L. REV. 479, 486, 486 n.46 (2015); Kate Bennion, *Kidneys From Felons? Prisoner Organ Donation Spurs Debate*, DESERET NEWS (Apr. 24, 2013, 11:05 AM), http://www.deseretnews.com/article/865578852/Kidneys-from-felons-Prisoner-organ-donation-spurs-debate.html?pg=all.

193. Joe Arpaio, *Apraio's "I DO" Program (Inmates Willing to Donate Their Organs) Has Them Joining National Drive*, MARICOPA COUNTY SHERIFF'S OFFICE (Apr. 29, 2015), http://www.mcso.org/MultiMedia/PressRelease/Organ%20Donor.pdf; Bersinger & Milot, *supra* note 29, at 1195.

194. Ross, *supra* note 91 ("Studies indicate that 80[%] of those sentenced to death would, if allowed to, donate upon execution").

195. TDCJ POLICY, *supra* note 79, at § E-31.2; *see also* Diane Jennings, *Pros and Cons of Inmate Organ Donation Weighed*, DALLAS NEWS (Apr. 2013), http://www.dallasnews.com/news/crime/2013/04/26/pros-and-cons-of-inmate-organ-donation-weighed.

intake process, each inmate is offered the opportunity to sign a "Gift of Life" Tissue and Organ Donor Form, which allows the tissue and organ donations to take place in the event that the inmate dies while in custody.[196] If the inmate chooses not to sign the form during the intake process, the policy allows for the inmate to make the decision at a later time through a request for medical records.[197] Moreover, an inmate can also make the decision to retract his or her organ donor status through a formal writing.[198] The TDCJ policy emphasizes that the inmate will not receive any "award or compensation of any kind for his donation, including but not limited to preferred treatment by the TDCJ or improved opportunity for parole."[199]

Once an inmate officially receives his or her Tissue and Organ Donor Status, the transplantation team is responsible for ensuring informed consent in writing and ensuring that the donations are free and voluntary.[200] The policy requires formal documentation from the inmate stating his or her intent to donate and there must be a request by a physician to take the inmate's organs.[201] Organs procured from prisoners must also comply with Texas law requiring donated organs to undergo medical testing for acceptability.[202] Even after such tests, the policy reaffirms that an inmate may refuse to donate at any time.[203] However, if an inmate goes through with the donation, the TDCJ will only incur the costs associated with the transportation of the inmate-donor to and from the hospital and the normal costs of security at the hospital.[204] The inmate-donor or the organization responsible for the transplant is responsible for any additional costs associated with the transplant, including the post-operative care of the inmate-donor.[205]

196. TDCJ POLICY, *supra* note 79, at § E-31.2(II). The policy ensures uniformity in voluntary access to organ and tissue donation and has been applied to living organ donors. *See generally* Lee v. Quarterman, No. C-07-476, 2008 WL 3926118 (S.D. Tex. Aug. 21, 2008).
197. TDCJ POLICY, *supra* note 79, at § E-31.2(II)(A).
198. *Id.* at § E-31.2(II)(B); Perales, *supra* note 11, at 705.
199. TDCJ POLICY, *supra* note 79, at § E-31.2(IV).
200. *Id.*
201. *Id.*
202. *See* Perales, *supra* note 11, at 705.
203. TDCJ POLICY, *supra* note 79, at § E-31.2(IV).
204. Jennings, *supra* note 195.
205. TDCJ POLICY, *supra* note 79, at § E-31.2(VII).

C. Utah

Utah became the first state to pass legislation that explicitly allows an inmate to donate his or her organs if he or she dies while incarcerated.[206] Although the legislation was not signed into law until 2013, the Utah Department of Corrections ("UDC") had already begun distributing organ donor forms to inmates with their paperwork upon arrival to the prison during the medical and dental screenings.[207] In order to ensure the informal inmate organ donation policy was not subject to a change in administration, Representative Steve Eliason proposed the bill.[208]

Under the law, the UDC is required to make available to each inmate the organ gift donation form, which allows the "inmate to indicate the inmate's desire to make an anatomical gift if the inmate dies in the custody of the department."[209] The law emphasizes that the inmate's donation must comply with the Uniform Anatomical Gift Act.[210] Once an inmate chooses to donate his or her organs through formal documentation, the UDC maintains a record of the documentation with the intent to donate provided by the inmate.[211] After this process and a request from the inmate, the Department may release the names and addresses of all inmates who completed and signed the document indicating their intent to make an organ donation gift.[212] As of April 2013, 247 inmates had signed up to donate their organs.[213]

206. Inmate Medical Donation Act, 2013 Utah Laws 1 (codified at Utah Code Ann. § 64-13-44 (LexisNexis 2013)); *see also* Palmerson, *supra* note 192, at 489.

207. Palmerson, *supra* note 192, at 489.

208. *Id.* at 488–89. The proposed bill was inspired by the death of Ronnie Gardner, a convicted murderer who wanted to donate his organ but was prevented from doing so. *Utah First to Explicitly Allow Organ Donation by Prisoners*, Prison Legal News (Jan. 13, 2015), https://www.prisonlegalnews.org/news/2015/jan/13/utah-first-explicitly-allow-organ-donation-prisoners/.

209. Utah Code Ann. § 64-13-44(2)(a) (LexisNexis 2013); *see also* Brooke Adams, *Utah Could Join States Allowing Prisoners to Donate Organs*, Salt Lake Trib. (Oct. 18, 2012, 09:12 AM), http://archive.sltrib.com/story.php?ref=/sltrib/home3/55085039-200/inmates-death-organ-organs.html.csp ("It is just akin to what we're doing with people's driver's license.").

210. Utah Code Ann. § 64-13-44(2)(b). The organs would go through the same screening process that organs from non-inmates go through. Adams, *supra* note 212 ("Donations are barred from any one who is HIV positive, has active cancer or has systemic infection, according to the U.S. Department of Health and Human Services.").

211. Utah Code Ann. § 64-13-44(2)(c).

212. *Id.*

213. *New Utah Law Allows Organ Donations From Prisoners; Nearly 250 Sign Up*, NBC News (Apr. 13, 2013, 3:42 PM), http://vitals.nbcnews.com/_news/2013/04/13/17674231-new-utah-law-allows-organ-donations-from-prisoners-nearly-250-sign-up [hereinafter *New Utah Law*].

D. South Carolina

The South Carolina Department of Corrections established an organ and tissue donor program to educate inmates about the organ donations.[214] In order to properly educate the inmates, outside organizations such as the Medical University of South Carolina and the University of South Carolina, School of Medicine, work alongside the Department of Corrections to give inmates access to educational brochures about donations.[215] In order to donate, inmates must meet the same requirements as non-inmates.[216] Additionally, the donor recipient and charitable organizations would pay any additional costs surrounding the donation.[217]

V. PROPOSED AMENDED LEGISLATION TO THE NATIONAL ORGAN TRANSPLANT ACT

Inmates across the United States like Shannon Ross and Joseph Green Brown want to donate their organs, not for the opportunity to receive commuted sentences or any other benefit, but for the exact reason that UNOS desires—an altruistic motivation to help others in need.[218] There are hundreds of examples of selfless inmates wanting to do some good in society, for example Marco Guizar was a registered organ donor before his arrest and wanted to donate organs to a 10-year-old boy.[219] In order to address such inmates' pleas to donate organs, federal legislation should be passed to amend the 1984 National Organ Transplant Act giving incarcerated inmates in the gen-

214. S.C. CODE ANN. § 24-1-285(A) (Supp. 2014). The sentence reduction incentive was not included in the final version of the bill, which was signed on June 4, 2007. *As New Regulations Limit Organ Transplants From Executed Chinese Prisoners; South Carolina Allows Organ Donations by Prisoners*, PRISON LEGAL NEWS (Jan. 15, 2008), https://www.prisonlegalnews.org/news/2008/jan/15/as-new-regulations-limit-organ-transplants-from-executed-chinese-prisoners-south-carolina-allows-organ-donations-by-prisoners/.

215. S.C. CODE ANN. § 24-1-285(A).

216. S.C. CODE ANN. § 24-1-285 (B); *see also* S.C. CODE ANN. § 44-43-315 (Supp. 2014); S.C. CODE ANN. § 44-43-320 (Supp. 2014).

217. Bersinger & Milot, *supra* note 29, at 1199 (2016); David Morgan, *Wanna Cut Your Jail Time? Donate a Kidney!*, CBS NEWS (Mar. 8, 2007, 2:59 PM), http://www.cbsnews.com/news/wanna-cut-your-jail-time-donate-a-kidney/.

218. *See* Longo, *supra* note 27 ("There is no way to atone for my crimes, but I believe that a profound benefit to society can come from my circumstances. I have asked to end my remaining appeals, and then donate my organs after my execution to those who need them. But my request has been rejected by the prison authorities."); *New Utah Law*, *supra* note 213 (noting that Joanne Ford, who was a designated organ donor for years prior to her sentencing, was among the Utah prisoners who signed up).

219. *See* Bennion, *supra* note 192 ("I am a registered donor and believe I have every right to donate my organs to whomever I choose, and I can't think of any worthier cause or individual.").

eral prison population, either in federal or state level prisons,[220] the explicit right to donate non-vital organs while incarcerated. The federal legislation should be modeled after the inmate organ donation policies from Arizona, Texas, Utah, and South Carolina, in order to ensure that inmates have voluntary informed consent and to avoid any additional ethical issues.

All four states mentioned in Part IV have received their share of criticism regarding the practice of allowing inmates to become organ donors. Many of the objections to organ donations from inmates are unsupported. Critics argue that if inmates were allowed to donate their organs, such a practice would only yield a small amount of organs; however, this is unfounded.[221] Even if the statement were true, permitting inmates to donate non-vital organs is not meant to solve the organ shortage problem, but to address the inmates' desire to help people in need of transplantable organs—the altruistic objective of organ donation.[222] Others oppose inmate organ donations because of the prevalence of communicable diseases, which can lead to low organ quality.[223] However, all organs received from inmates would go through the same screening process as all other donor organs; thus, any organs from inmates with a dangerous disease would be barred from donation, just as any potential donor from outside the prison would be.[224] The only valid concern opposing living organ donation

220. Such legislation would also apply to government and privatized prisons. Approximately six percent of state inmates and sixteen percent of federal prisoners are under the administration of privatized prisons. *Private Prisons*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/mass-incarceration/privatization-criminal-justice/private-prisons (last visited Mar. 16, 2017). Prison administration falls under the non-delegable duty doctrine—states can be held liable for the actions of its contractors such as privatized prisons. *See generally* Hutto v. Finney, 437 U.S. 678 (1978) (affirming a decision imposing a number of orders on correction officials after the lower court found that prison conditions constituted cruel and unusual punishment). The United State Department of Justice has also stated that the state government is responsible for the actions of privatized prisons. *See* James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons*, DEP'T OF JUSTICE 18 (2001), https://www.ncjrs.gov/pdffiles1/bja/181249.pdf ("[B]ased on a number of recent infractions committed in private facilities, the court will hold government responsible for actions taken by a private provider that violate an inmate's constitutional rights.").

221. *See* Caplan, *supra* note 95, at 2; *see also Ethics of Organ Donation*, *supra* note 88. It is worth noting that one estimate suggests that roughly one-half of the inmate population would be eligible donors. Lin et al., *supra* note 99, at 1777.

222. Lin et al., *supra* note 99, at 1777 ("[T]he number of patients directly helped is not relevant, given the hugely significant impact on the recipients and their families.").

223. *See* Caplan, *supra* note 95, at 2.

224. Palmerson, *supra* note 192, at 496–97; *see also* Bartz, *supra* note 58, at 40–41 ("In order to protect against possible diseases transmission from obtaining any new tattoos, before any contract agreement is signed, each inmate will be inspected and any tattoos counted. If the num-

from inmates is one of informed consent and coercion.[225] However, when it comes to living organ donation from inmates, such concerns can be eliminated by passing legislation that encompasses the Federal Bureau Prison and all four states' organ donation policies while including some modifications.

First, in order to ensure proper informed consent is given to each inmate, inmates should be given notice of the opportunity to donate one's non-vital organs during the intake process, as is the procedure in Texas and Utah. This notice can be given either orally or through brochures; however, the notice should emphasize that donations must comply with the Uniform Anatomical Gift Act and the National Organ Transplant Act—donations must be entirely voluntary and the inmate will not receive any compensation for such a donation, including but not limited to preferred treatment by the prison or an improved opportunity for parole.[226] Additionally, the notice should outline the procedure to become a living organ donor, the non-vital organs that an inmate can donate, and the risk associated with organ donations. Lastly, the notice should reassure the inmate that the decision to donate organs could be retracted at any time. The process of adequately informing the potential inmate donor of the risk associated with altruistic organ donation should take place over a period of at least one month.[227]

After the inmate receives formal notice of the opportunity to become a living organ donor to donate his non-vital organs, the inmate

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ber of tattoos subsequently increases while the inmate is incarcerated, the contract agreement can be terminated.").

225. *See Ethics of Organ Donation*, *supra* note 88 ("Issues of informed consent of potential donors as well as recipients need to be addressed. Obviously a person condemned to death cannot consider organ or bone marrow donation as a coercion-free option."). Some propose that not giving one the autonomy to decide to be an organ donor is a type of coercion. Palmerson, *supra* note 192, at 494–95; *see also* Lin et al., *supra* note 99 ("It is hypocritical to argue that organ donation by . . . inmates is morally wrong because the prisoners' autonomy is undermined by a subtle form of coercion, because denying the prisoners' requests to donate is an even greater compromise of their autonomy.").

226. But see Kevin B. O'Reilly, *Prisoner Organ Donation Proposal Worrisome*, AM. MED. NEWS (Apr. 9, 2007), http://www.amednews.com/article/20070409/profession/304099964/6/, for a discussion on the 2007 South Carolina proposal to shorten inmates' sentences in exchange for bone marrow or kidney donations ("One would release prisoners 60 days early for donating bone marrow; the other would give good-behavior credit of up to 190 days to any inmate who performs a particularly meritorious or humanitarian act . . . which could include living kidney donations.").

227. Jefferson-Jones, *supra* note 109, at 135–36 (2013) ("The purpose of lengthening the time between acceptance and donation is to lessen any pressure that an inmate may feel to donate immediately . . . . A longer education timeline will also give ample opportunity for potential donors to opt out of the program.").

should receive the "Gift of Life" Tissue and Organ Donor Form. If an inmate decides to make a non-vital organ donation, he should formalize his intention by filling out the Tissue and Organ Donor Form.[228] This form should also indicate that the inmate made his decision of his own free will, without the influence or coercion from any other person.[229] Once an inmate completes the form and returns it to the prison administration, the prison should release all formal forms to the organ procurement organization.[230] If the inmate is a potential match for an organ donation, the organ procurement organization should contact the prison and determine if the inmate is still interested in being a living organ donor. If the inmate confirms such interest, the staff should begin psychosocial and medical evaluations of the inmate as well as screening.[231] If the inmate passes the psychosocial and medical evaluations, informed consent in writing should be obtained from the inmate stating that she acknowledges that she has passed the prerequisite evaluations and intends to donate a non-vital organ. In order to ensure that inmates are not coerced into donating their organs by prison administration, a health-care professional on the transplantation team should be responsible for the informed consent and ensuring that the donations are voluntary.[232] Additional safeguards to eliminate any coercion include requiring an inmate's status as an or-

228. This form should include a health questionnaire that will ask questions such as the potential donor's medical history. *See generally Becoming a Living Donor*, AM. TRANSPLANT F., http://www.americantransplantfoundation.org/about-transplant/living-donation/becoming-a-living-donor/ (noting the typical process to become a living organ donor). Qualified health care professionals or health-trained officers administer medical screenings during an inmate's intake process. The screenings inquire about an inmate's health history and therefore there may be some overlap with the Organ Donor Form and the medical screening. *See Receiving Screening*, *Receiving Screening*, NAT'L COMM'N ON CORR. HEALTH CARE, http://www.ncchc.org/spotlight-on-the-standards-25-1.

229. PATIENT CARE, *supra* note 63. The Form should also follow the Federal Bureau of Prisons and include that the Government is not responsible for any financial responsibilities or complications and the dangers of the operation. *Id.*

230. The possibility of an actual organ donation takes place many years after signing up to be a donor. *See Organ Donation: The Process*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://organdonor.gov/about/organdonationprocess.html. Moreover, the years between the agreement to donate and the actual donation reduces the coercive nature often found in prison settings. *See* Jefferson-Jones, *supra* note 109, at 136.

231. *See generally Living Donation*, *supra* note 13. Examples of some of the tests for a potential donor include a blood test, a urine test, and a cancer screening. *Id.*; *see also* Jefferson-Jones, *supra* note 109, at 135 ("Medical screening would aim to discover those communicable diseases, medical conditions contraindictating donation, or those whose organs are otherwise unsuitable for transplant.").

232. Bagatell et al., *supra* note 41, at 45 (noting that before any transplant, a psychologist performs a thorough evaluation of the donor to determine his vulnerability to coercion).

gan donor to remain anonymous,[233] appointing a prison-appointed panel to determine consent,[234] and ensuring that the officials who administer discipline are not the same administrators who sign inmates up as donors.[235]

When dealing with the costs associated with the organ donation, a transplant recipient's health insurance policy generally absorbs such costs.[236] The prison should only incur the costs associated with the transportation of the inmate-donor to and from the hospital and the normal costs of security at the hospital.[237] This is the same principle that is applied to the general population outside of the prison system.[238] In the event that costs exceed the prisons allowance, charitable organ donation organizations can be utilized to minimize the cost.[239]

CONCLUSION

Joseph Green Brown, is like many other inmates have attempted to participate in the altruistic system of organ donation, but are often refused the permission due to the subjectivity of prison administrators. Although a few officials allow inmates to donate their non-vital

233. Palmerson, *supra* note 192, at 493 ("[R]equiring anonymity of organ donors, such that inmates are prohibited from disclosing their election to be an organ donor, and such that officials . . . who administer discipline are not informed," and if an inmate intentionally discloses his status, the decision to donate is void).

234. *Id.* at 494 (noting that the panel would ensure that the inmate understands his decision and confirming that the decision is motivated by altruism, however, such an option would be expensive); *see also* Caplan, *supra* note 95, at 4 ("In most programs for living donors a donor advocate is appointed, a psychological assessment is undertaken, and the donee is made aware that he or she may change his or her mind about donation at any time prior to the actual act. These steps would have to be in place for a vulnerable population such as prisoners, and those carrying them out ought not have a connection to the corrections system, to minimize any possibility of coercion or manipulation").

235. Palmerson, *supra* note 192, at 515.

236. *Financial and Insurance Issues*, NAT'L KIDNEY FOUND., https://www.kidney.org/transplantation/livingdonors/financial-insurance-issues (last visited Mar. 31, 2017).

237. TDCJ POLICY, *supra* note 79, at § E-31.2(VII).

238. *See* Office of Women's Health, *Organ Donation and Transplantation Fact Sheet*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (July 16, 2012), http://womenshealth.gov/publications/our-publications/fact-sheet/organ-donation.html#e ("The transplant recipient's health insurance policy, Medicare, or Medicaid usually covers the cost of a transplant. The donor's family neither pays for, nor receives payment for, organ and tissue donation."); Jefferson-Jones, *supra* note 109, at 135 ("The State and the recipients' insurer would be responsible for medical costs.").

239. The Health Resources and Services Administration of the U.S. Department of Health and Human Services established a program with the University of Michigan to provide reimbursement to living organ donors for some of the costs associated with the organ transplantation, such as post-operative care. *Organ and Tissue Donation from Living Donors*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.organdonor.gov/about/livedonation.html (last visited Mar. 31, 2017).

organs, most decline inmates the opportunity. However, inmates' right to donate non-vital organs has never been expressly taken away by a court under the Substantive Due Process Clause of the Fourteenth Amendment and are thereby intact while inmates are incarcerated. Moreover, an inmate's right to bodily integrity has been recognized by a number of courts.

The biggest ethical concern in opposition to organ donation from inmates is the issue of informed consent and coercion. However, removing the inmates' ability to make a decision about organ donation severely limits his free will and agency—more so than giving the inmate the opportunity to donate. By amending the National Organ Transplant Act, concerns about coercion and informed consent can be properly addressed and such an amendment would ensure that the United States does not end up on the same path as countries such as China and the Philippines. The amendment should incorporate the policies and laws already established by states and the Federal Bureau of Prisons. The amendment would not only reaffirm that all donation are purely voluntary but also ensure practices are in place to prevent coercion from prison administrators.

If the purpose of incarceration is for inmates to be rehabilitated at the end of their terms, a completely selfless act to save one's life falls within the objectives of prison. An explicit legislation that permits inmates to become living organ donors would not only save lives; but more importantly, the legislation would align with the inmate's constitutional right and allow inmates to make amends for their previous crimes by helping others and engaging within their communities.

COMMENT

"I'm On Fire": A Call to Eradicate Excessive Solitary Confinement Sentences for Nonviolent Offenses

MONIQUE PETERKIN*

* J.D. Candidate, Howard University School of Law, Class of 2017; Editor-in-Chief, *Howard Law Journal*, Vol. 60. There are so many people that I should thank for the successful completion of this Comment, but I would first like to start off by thanking God. I have learned so much in this past year serving as Editor-in-Chief, and on those nights when I doubted myself and my abilities, He showed me that I am capable of everything and more. I would next like to thank the smartest person I know, my faculty advisor, Professor Harold McDougall. You challenged me so much on so many points that I felt strongly about while writing this Comment, and that only made my writing that much better. I would also like to thank the beautiful people who supported and encouraged me throughout this writing process. Those close to me know that this Comment was the most difficult thing I have ever written. I have been through so many trials and tribulations during this writing process, but seeing it come to fruition is simply surreal. Thank you to my family for always pushing me, especially my mother. Thank you to my brother for always serving as my role model. Thank you to my father for simply being you. Last but not least, thank you to my Godmother for always being my guiding light, my beacon of hope, and my realm of positivity.

INTRODUCTION

On March 17, 2014, a music video was posted to the popular website, WorldStarHipHop.com.[1] Within twenty-four hours, the video—commonly referred to as "I'm on Fire"—had been viewed nearly half a million times.[2] What made this music video so popular was that inmates recorded it in a South Carolina prison using a cell phone.[3] Although cell phones are prohibited in prisons and jails among inmates, they are a very popular contraband item.[4] Shortly after the

1. Paul Bowers, *S.C. Inmates Allegedly Film Hip-Hop Music Video in Prison*, CHARLESTON CITY PAPER (Mar. 18, 2014, 3:53 PM), http://www.charlestoncitypaper.com/FeedbackFile/archives/2014/03/18/sc-inmates-allegedly-film-hip-hop-music-video-in-prison.

2. *Id.* Today, the music video has been viewed approximately two million times. It has been viewed 900,000 times on YouTube, and 1.2 million times on its original domain, WorldStarHipHop. *See* LightworkerTV, *South Carolina Inmates Film 1st Ever Music Video*, YOUTUBE (Mar. 15, 2014), https://www.youtube.com/watch?v=8wbqiSVLUq8; *see also South Carolina Inmates Film 1st Ever Music Video In Prison!*, WORLDSTARHIPHOP (Mar. 17, 2014), http://www.worldstarhiphop.com/videos/video.php?v=wshh9d14sLHAcSMVlotr.

3. Bowers, *supra* note 1.

4. *Id.*; *see* Carol McKinley, *Smartphones in Prison: New Contraband Allows Inmates to Make Money*, DAILY BEAST (Oct. 16, 2011), http://www.thedailybeast.com/articles/2011/10/16/smartphones-in-prison-new-contraband-allows-inmates-to-make-money (finding that "[s]martphones are the new files in cakes. Today's inmates covet them more than drugs, and

incident, a spokesperson from the South Carolina Department of Corrections ("SCDC") issued a statement, stating that once the investigation concluded, the inmates involved would be "appropriately charged."[5]

As time passed and excitement about the video subsided, many began to question: what happened to these inmates? Were they found? Were they punished? This music video was said to be the first of its kind,[6] and as such, many wondered what the "appropriate" punishment would be. Alas, Dave Maass, a researcher for the Electronic Frontier Foundation ("EFF"), published the prisoners' punishments[7] and the results were shocking. The seven inmates who participated in creating the music video received almost twenty years in solitary confinement combined:[8] "five of the prisoners were punished with 180 days of 'disciplinary detention,'"[9] while the others were given 270 and 360 days—all for recording a song on a cell phone.[10] The facility justified these sentences by stating that the inmates posed a "security threat" through their alleged "gang-related"[11] words and contraband

America's prison system is struggling to crack down on the growing smartphone black market"); *see also* Seth Ferranti, *Cell Phones in Prison*, GORILLA CONVICT (Apr. 24, 2012), http://www.gorillaconvict.com/2012/04/cell-phones-in-prison/ (noting that cell phones are common contraband items, and have even "become a big and profitable business for guards and correctional officers who are quick to take advantage and make a dollar"). The Department of Justice also conducted an official report on popular contraband items, and listed cell phones as "the most common hard contraband item[ ] recovered in . . . [Bureau of Prisons] BOP institutions from FY 2012 through FY 2014 . . ." OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' CONTRABAND INTERDICTION EFFORTS, JUNE 2016 (noting that the number of cell phones recovered was "8,728 according to the BOP's 'Cell Phones Recovered' report, 5,734 according to the BOP's TRUINTEL database").

5. Bowers, *supra* note 1.

6. LightworkerTV, *supra* note 2.

7. CJ Ciaramella, *These Inmates Got Years in Solitary Confinement for Making a Music Video*, BUZZFEED NEWS (Oct. 21, 2015, 3:52 PM), http://www.buzzfeed.com/cjciaramella/these-inmates-got-months-in-solitary-confinement-for-making#.ktzeWz9LP.

8. Monique John, *'Empire' Comes to Life: Inmates Slammed With Solitary Confinement After Shooting Music Video*, HELLO BEAUTIFUL (Oct. 22, 2015), https://hellobeautiful.com/2015/10/22/prisoners-shoot-music-video-in-jail/.

9. *Id.* Solitary confinement goes by several names: "isolation, SHU (special housing units), administrative segregation, supermax prisons, the hole, MCU (management control units), CMU (communications management units), STGMU (security threat group management units), voluntary or involuntary protective custody, special needs units, or permanent lockdown." *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM., https://www.afsc.org/resource/solitary-confinement-facts (last visited Mar. 27, 2017).

10. John, *supra* note 8.

11. The "I'm On Fire" song lyrics have been transcribed and placed at the end of this Comment in the Appendix to prove that the lyrics do not promote "gang-related" activity. Rap artists oftentimes use metaphors to explain how explosive and almost "mind-blowing" their lyrics are. For example, the lyrics "AR, AK, spit something, go straight to brains" means that the lyrics go straight to a listener's brain in the same fashion as a bullet would from a gun. In a sense, it suggests that the lyrics are striking. This same sentiment is used when the first lyricist

phone; however, the SCDC's characterization of the inmates' lyrics as gang-related is far from the truth and simply tone-deaf, highlighting their ignorance of hip-hop culture.[12]

The "I'm on Fire" instance is just one example in a sea of many that exemplifies the excessive use of solitary confinement for individuals who commit nonviolent offenses. Though the main argument against cell phone use in prisons and jails is that inmates can use phones to plan an escape or a violent crime,[13] inmates are placed in solitary more frequently for nonviolent crimes—such as accessing social media—rather than conspiring to commit a criminal act.[14] In South Carolina, for example, using social media while incarcerated "is on the same level of offense as attacking a guard, rioting[,] and taking a hostage."[15] In 2012, "the [SCDC] made 'Creating and/or Assisting With A Social Networking Site' a Level 1 offense"—a category typically assigned to excessively "violent violations of prison conduct policies."[16] As EFF states, "[s]ome inmates ask their families to access their online accounts for them, while many access the Internet themselves through a contraband cell phone (possession of which is . . . [a] Level 1 offense)."[17] In sixteen cases, "inmates were sentenced to

discusses the "twelve inch shotty." He explains that his lyrics run through your body in the same fashion as a shotgun. Those are the only two metaphors that reference weapons. Two other inmates rap as well, and each inmate discusses marijuana in some aspect. However, neither person discusses the act of selling marijuana, as gangs have the perception of doing. Additionally, with marijuana's current legalization in several states, the argument that marijuana use is only associated with gang members is outdated. Thus, it becomes apparent that, instead of focusing on the lyrics, the SCDC officials heard what they wanted to hear and sentenced men to months and even a year in solitary confinement for cleverly expressing themselves through metaphor. *See South Carolina Inmates Film 1st Ever Music Video in Prison!*, *supra* note 2.

12. John, *supra* note 8.

13. One fact that the SCDC has attempted to highlight to support its contention that the "I'm On Fire" inmates' sentences were appropriate is the alarming surge in cell phone use in prisons and jails. *See* Tod W. Burke & Stephen S. Owen, *Cell Phones as Prison Contraband*, FBI (July 2010), https://leb.fbi.gov/2010/july/cell-phones-as-prison-contraband. One prison official has stated, "[c]ell phones are perhaps the worst type of contraband because, in most cases, they provide an easy, continuing connection back to the inmate's life on the street." *Id.* Inmates, on the other hand, argue that they prefer wireless phones to avoid prison monitoring. *Id.* Cell phones are private and are much less expensive than prison payphones. *Id.*

14. Additionally, some argue that correctional facilities prefer the use of payphones because they derive substantial revenue from their use: "a 1995 study found that such income totaled $96.4 million for thirty-one state correctional agencies." *Id.*

15. Alfred Ng, *South Carolina Inmates Collectively Get Almost 20 Years of Solitary Confinement for Rap Video*, N.Y. DAILY NEWS (Oct. 21, 2015, 11:44 PM), http://www.nydailynews.com/news/crime/rapper-inmates-solitary-confinement-20-years-article-1.2406526.

16. Dave Maass, *Hundreds of South Carolina Inmates Sent to Solitary Confinement Over Facebook*, ELEC. FRONTIER FOUND. (Feb. 12, 2015), https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook.

17. *Id.*

more than a decade in . . . disciplinary detention, with at least one inmate receiving more than [thirty-seven] years in isolation."[18] To extend the length of each sentence, the SCDC "issues a separate Level 1 violation for *each day* that an inmate accesses a social network."[19]

It seems that the SCDC is aware of the criticism regarding its excessive sentences, because, in February of 2015, it ruled that sixty days would be the new maximum sentence per offense.[20] Still, sixty days in solitary is much too steep a sentence for a nonviolent offense, especially when the rule remains that infractions can be coupled with one another to add up to six months, a year, or more. Even more disappointing, the SCDC's spokesperson still stands by its decision to excessively punish the "I'm On Fire" music video's participants, arguing that the inmates' lyrics were inappropriate.[21]

Since the early 1970s, prisons and jails have increasingly relied on solitary confinement to control individuals within their confines, including children.[22] The drastic surge in the use of this punishment is without question. About half a dozen solitary confinement units existed in 1985.[23] Currently, "more than [forty] states have super-maximum security [("supermax")] . . . facilities primarily designed to hold inmates in long-term isolation."[24] Today, there are between 80,000 to 100,000 individuals held in solitary confinement.[25]

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18. *Id.* This extensive sentence length is not uncommon. In fact, Maass' report details a number of other excessive sentences given to inmates for using social networks:

- In October 2013, Tyheem Henry received **13,680 days (37.5 years) in disciplinary detention** and lost 27,360 day (74 years) worth of telephone, visitation, and canteen privileges, and 69 days of good time—***all for 38 posts on Facebook***.
- In June 2014, Walter Brown received **12,600 days (34.5 years) in disciplinary detention** and lost 25,200 days (69 years) in telephone, visitation, and canteen privileges, and 875 days (2.4 years) of good time—***all for 35 posts on Facebook***.
- In May 2014, Jonathan McClain received **9,000 days (24.6 years) in disciplinary detention** and lost 18,000 days (49 years) in telephone, visitation, and canteen privileges, and 30 days of good time—***all for 25 posts on Facebook***.

Id.

19. *Id.* (emphasis added). This policy is quite arbitrary. According to Maass, "[a]n inmate who posts five status updates over five days, would receive five separate Level 1 violations, while an inmate who posted 100 updates in one day would receive only one." *Id.*

20. Radio Staff, *South Carolina Inmates Get Combined Total of 20 Years in Solitary Confinement for Posting Music Video Online*, RADIO NOW 92.1 (Oct. 23, 2015), https://radionowhouston.com/23024/south-carolina-inmates-get-combined-total-of-20-years-in-solitary-confinement-for-posting-music-video-online/; *see also* John, *supra* note 8.

21. John, *supra* note 8.

22. *Solitary Confinement Facts*, *supra* note 9.

23. *Id.*

24. *Id.*

25. *FAQ*, SOLITARY WATCH (2015) [hereinafter *FAQ*, SOLITARY WATCH], http://solitarywatch.com/facts/faq/ (last visited Apr. 4, 2017). The above stated estimate is an "extrapolation of data obtained from thirty-four states, housing seventy-three percent of all prisoners, which found over 66,000 people in restrictive housing. This figure does not include local jails,

The problem is that solitary confinement has become a "control strategy of first resort" rather than a "last resort measure reserved for the 'worst of the worst.'"[26] Men and women are currently in solitary confinement for extended periods of time because they "have untreated mental illnesses, are children in need of 'protection,' are gay or transgender, are Muslim, have unsavory political beliefs, [possess cell phones, use social media in prison,][27] or report rape or abuse by prison officials."[28] Fortunately, the publication of the "I'm on Fire" music video was enough, not only to blow the whistle on South Carolina's practices, but also to spark widespread conversation about the excessive use of solitary confinement for nonviolent offenses in general.

Some have argued that solitary confinement constitutes cruel and unusual punishment under the Eighth Amendment because (1) the conditions are typically horrid and (2) sentence lengths can be excessively and arbitrarily long.[29] In this Comment, however, I additionally argue that solitary confinement is a blatant violation of one's freedom of association right because long-term isolation inevitably leads to irreparable psychological harm. Oftentimes, when the argument of cruel and unusual punishment is used, courts tend to focus on the conditions of *that* person in *that* prison or *that* cell rather than the excessive use of solitary confinement in general.[30] Thus, I posit that arguing freedom of association, in addition to cruel and unusual punishment, is a direct challenge to the excessive use of solitary confinement, especially in the context of nonviolent offenses because isolation is much too steep a punishment for individuals who have not proven themselves to be dangerous and thus, worthy of being separated from others. A person's right to freely associate with others has

juvenile, military and immigration facilities." *Id.* In October 2015, the Bureau of Justice Statistics released a report entitled "Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12." ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS & JAILS 2011–12 (2015), http://www.bjs.gov/index.cfm?ty=PBdetail&iid=5433. According to the report, nearly twenty percent of prisoners and eighteen percent of inmates in jail have spent time in isolation. *Id.*

26. *FAQ*, SOLITARY WATCH, *supra* note 25.

27. *See, e.g.* Burke & Owen, *supra* note 13.

28. *Id.*; *see also* Jean Casella & James Ridgeway, *Rastafarians Spend a Decade in Solitary for Refusing Haircuts*, SOLITARY WATCH (Feb. 11, 2010), http://solitarywatch.com/2010/02/11/rastafarians-spend-a-decade-in-solitary-for-refusing-haircuts/ (noting that in Virginia, a group of Rastafarian men were placed in solitary—some for more than a decade—because they refused to cut their hair on religious grounds).

29. *See infra* Part III.

30. *See infra* Part II.A.2.

been recognized as a fundamental right under the United States Constitution.[31] This being so, I argue that such a right may not be excessively limited for prisoners who do not commit violent offenses, because such a punishment is so severe that it inevitably alters a prisoner's psyche.[32] Accordingly, because excessive solitary confinement sentences are detrimental and counterproductive, this punishment should be limited in its use for nonviolent offenses.

To dissect this issue, I have sectioned this paper into five parts. Part I discusses the widespread issue of solitary confinement and the practice's origins. Part II discusses the psychological implications of solitary confinement to show how cruel and unusual the deprivation of one's freedom of association truly is. Part III discusses how the cruel and unusual punishment argument has been used, highlighting its successes, but also critiquing these purported victories. Part IV is critical because it demonstrates how my freedom of association argument against excessive solitary confinement sentences for nonviolent offenses parallels the argument that was made in one of the most important Supreme Court cases of all time: *Brown v. The Board of Education*.[33] In that case, the NAACP's Legal Defense Fund ("LDF") argued that the separation of black and white children in schools should be abolished, not only because the conditions were unequal, but also because segregation was psychologically harmful to black children. Namely, many black children tended to view themselves as lesser than white children, and this negative thinking impaired their learning and growth process. I argue that solitary confinement is akin to this scenario because prisoners become so severely psychologically depleted after an excessively long stay in solitary confinement that most never learn to assimilate back into society, and as a result either become violent, repeat offenders, or "unproductive" members of society. Part V seeks to provide a solution to the issues discussed in this Comment by discussing President Obama's Executive Order, which directly addresses the issue of solitary confinement, in addition to other remedies that can be instituted to create a more reasonable term for a prisoner in solitary confinement.

31. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (stating that "freedom of association receives protection as a fundamental element of personal liberty").

32. *See* John, *supra* note 8.

33. *See generally* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (finding that separate educational facilities are inherently unequal based on precedent laid in the lower courts as well as psychological data derived from "The Doll Tests").

I. THROUGH THE LOOKING GLASS: PAST VS. PRESENT

A. From Where Did it Come?

Laura Sullivan, a writer for NPR, has researched the history of solitary confinement, and the timeline is quite troubling. In 1829, "the first experiment in solitary confinement in the United States beg[an] at the Eastern State Penitentiary in Philadelphia."[34] It was "based on a Quaker belief that prisoners isolated in stone cells with only a Bible would use the time to repent, pray[,] and find introspection."[35] Unfortunately, many prisoners lost their minds, committed suicide, or were "no longer able to function in society," and, as a result, the use of solitary confinement was discontinued for decades.[36]

In *In re Medley*, Supreme Court Justice Samuel Freeman Miller wrote about the effects of solitary confinement on inmates housed in Philadelphia in 1890, finding that "a considerable number of the prisoners . . . became violently insane[, and] others . . . committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community."[37]

Although it seemed that the United States was moving away from the trend of housing inmates in solitary confinement for the reasons stated above, in 1934, "[t]he federal government open[ed] Alcatraz in San Francisco Bay to house the nation's worst criminals."[38] Each prisoner had his own cell.[39] While a majority of the prisoners spent many hours in the yard or completing work assignments, "a few dozen [were] kept in 'D Block,' the prison's solitary-confinement hallway."[40] One cell in particular was referred to as "The Hole."[41] There was "no light, inmates [were] kept naked, and bread and water [was] shoved

34. Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006, 7:52 PM), http://www.npr.org/templates/story/story.php?storyId=5579901.

35. *Id.*

36. *Id.*

37. *In re* Medley, 134 U.S. 160, 168 (1890); *see also* Sullivan, *supra* note 34.

38. Sullivan, *supra* note 34. Alcatraz Island had been used for years before it was converted to a prison to house the nation's most dangerous criminals. *Alcatraz*, HISTORY (2017), http://www.history.com/topics/alcatraz. Beginning in the 1850s, Alcatraz was reserved for military use. *Id.* By 1933, "the Army relinquished Alcatraz to the U.S. Justice Department, which wanted a federal prison that could house a criminal population too difficult or dangerous to be handled by other U.S. penitentiaries." *Id.* Alcatraz, as it is known to many today, opened on July 1, 1934. *Id.*

39. *Alcatraz*, *supra* note 38.

40. Sullivan, *supra* note 34.

41. *Id.*

through a small hole in the door."[42] D Block prisoners could not speak to other prisoners and were seldom allowed to leave their cells.[43] Alcatraz was shut down in 1963 and is now a popular tourist attraction rather than a maximum security prison.[44]

In the 1970s, many criminologists began to rethink the idea of mass incarceration altogether because it was ineffective in deterring crime.[45] Experts issued a statement, noting that "'no new institutions for adults should be built and existing institutions for juveniles should be closed.' [This] recommendation was based on their findings that 'the prison . . . and the jail have achieved . . . a shocking record of failure. There is overwhelming evidence that these institutions create crime rather than prevent it.'"[46]

Despite these findings, in the 1980s, more facilities were built, and these prisons, nicknamed "supermax facilities," were built specifically to house *all* their prisoners in solitary indefinitely: "the use of solitary grew . . . after white supremacists murdered two prison guards in a federal penitentiary in Marion, Ill[inois]."[47] Prison administrators placed the facility on "lockdown," and this one-time remedy was institutionalized: supermax facilities soon became the new norm.[48]

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42. *Id.*

43. *Id.*

44. *Alcatraz*, *supra* note 38 (stating that "[t]he federal penitentiary at Alcatraz was shut down in 1963 because its operating expenses were much higher than those of other federal facilities at the time." Because Alactraz was located on an island, it was more difficult and expensive for necessities to be shipped to the prison).

45. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (2012) (citing DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II (2008); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 425 (1988); JOHN HOPE FRANKLIN & ALFRED A. MOSS, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 82 (Knopf, 8th ed. 2000)) (noting that this conclusion was made based on a survey conducted by the National Advisory Commission on Criminal Justice Standards and Goals).

46. *Id.*

47. The Editors, *Solitary Confinement Is Cruel and Ineffective*, SCI. AM. (Aug. 1, 2013), https://www.scientificamerican.com/article/solitary-confinement-cruel-ineffective-unusual/.

48. *Id.*; *see also* ALEXANDER, *supra* note 45, at 46, stating,

> During the presidential election that year, both the Republican candidate, Richard Nixon, and the independent segregationist candidate, George Wallace, made 'law and order' a central theme of their campaigns, and together they collected 57[%] of the vote. Nixon dedicated seventeen speeches solely to the topic of law and order, and one of his television ads explicitly [stated, among other things,] 'It is time for an honest look at the problem of order in the United States.'

Even worse, this ad was referring to civil rights activists at the time. According to Alexander, "[v]iewing his own campaign ad, Nixon reportedly remarked with glee that the ad 'hits it right on the nose. It's all about those damn Negro-Puerto Rican groups out there.'" *Id.* at 47 (citing DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS (2007)).

By 1989, California had built Pelican Bay State Prison ("Pelican Bay"), arguably the United States' most well-known supermax facility today.[49] There was no "yard, cafeteria, classrooms or shops . . . ."[50] Instead of engaging in much physical or thought-provoking activity, "[i]nmates spent [twenty-two-and-a-half] hours a day inside an [eight-by-ten-foot] cell. The other [one-and-a-half] hours were spent alone in a small concrete exercise pen."[51] Though a federal judge found that Pelican Bay's conditions "'may well hover on the edge of what is humanly tolerable' . . . he rule[d] that there is no constitutional basis for the courts to shut down the unit or to alter it substantially,"[52] and ultimately left that determination to the states.[53] Interestingly enough, "[t]here was no legislative discussion of the novel punitive design of Pelican Bay nor that it would be the site of indefinite [Security Housing Unit ("SHU")] commitments. The original planners [also] did not contemplate that some prisoners would spend decades there."[54]

In this next section, I will discuss how solitary confinement has evolved today. Part B demonstrates that the number of men and women housed in isolation has ballooned over the past fifteen to twenty years. Historically, we have seen that solitary confinement has been proven inefficient; yet, statistical trends do not note this revelation. Instead, they show that the number of individuals in isolation has continued to skyrocket and the length of the sentences continue to increase as well.

B. Numbers Don't Lie: The Widespread Issue of Solitary Confinement

Widespread solitary confinement statistics show a shocking trend. The Bureau of Justice Statistics conducted a census of state and fed-

49. Sullivan, *supra* note 34.

50. *Id.*

51. *Id.*; *see also* Madrid v. Gomez, 889 F. Supp. 1146, 1229 (N.D. Cal. 1995).

52. Sullivan, *supra* note 34; *see Madrid*, 889 F. Supp. at 1146. While deciding this case, Judge Henderson toured Pelican Bay's SHU "to inspect the conditions of isolation which inmates had challenged for cruel and unusual punishment violations." Joseph B. Allen, *Extending Hope Into "The Hole": Applying* Graham v. Florida *to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217, 223 (2011). Henderson noted that "some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo." *Id.* at 1229.

53. Sullivan, *supra* note 34.

54. Keramet Reiter, *A Brief History of Pelican Bay*, PRISONER HUNGER STRIKE SOLIDARITY, https://prisonerhungerstrikesolidarity.wordpress.com/education/resources/resources/pelican-bay/305-2/ (last visited on Mar. 28, 2017).

eral prisoners between 2000 and 2005, finding that approximately 81,000 men and women are held in some form of solitary confinement.[55] The census figures "do not include prisoners in solitary confinement in juvenile facilities, immigrant detention centers, or local jails; if they did, the numbers would certainly be higher."[56] Today, the total number of individuals held in solitary may linger between 80,000 and 100,000, according to a Yale Law School and the Association of State Correctional Administrators survey.[57]

Though prison officials justify their excessive use of solitary confinement by arguing that it reduces prison violence, placing prisoners in solitary has been found to do quite the opposite.[58] After Mississippi "reduced the number of prisoners in solitary confinement at its Parchman facility and developed new units for prisoners with mental illness, the number of violent attacks plummeted from a high of [forty-five] in March 2006 to five in January 2008."[59] Additionally, "[a] . . . study of Washington['s] prison population found that [sixty-nine percent] of those who were released directly to the community from solitary . . . landed . . . back in jail within three years, compared with [forty-six percent] of those who had been allowed to readjust to the general prison population before release."[60]

David Fathi, head of the ACLU's National Prison Project, found that solitary confinement is "profoundly damaging . . . to physical and mental health," and also noted that "a United Nations expert on torture has called for solitary confinement over [fifteen] days to be completely abolished."[61] Research has shown that one's brain changes

55. *FAQ*, SOLITARY WATCH, *supra* note 25; *see also* ANGELA BROWNE, ALISSA CAMBIER & SUZANNE AGHA, VERA INST. JUSTICE, PRISONS WITHIN PRISONS: THE USE OF SEGREGATION IN THE UNITED STATES 46 (Oct. 2011), http://www.jstor.org/stable/pdf/10.1525/fsr.2011.24.1.46.pdf (citing FED. SENTENCING REPORTER, VOL. 24 NO. 1, 46-49 SENTENCING WITHIN SENTENCING (2011)).

56. *FAQ*, SOLITARY WATCH, *supra* note 25; *see also* Casella & Ridgeway, *supra* note 28 (stating that Rikers Island alone has 990 isolation cells).

57. Terrence McCoy, *When Solitary Confinement Becomes Cruel and Unusual*, PORTLAND PRESS HERALD (Jan. 30, 2016), http://www.pressherald.com/2016/01/30/when-solitary-confinement-becomes-cruel-and-unusual-punishment/ (noting that this survey was released in September 2015).

58. The Editors, *supra* note 47.

59. Additionally, Mississippi "saved more than five million dollars." *Id.*

60. *Id.* This study was conducted in 2007.

61. Ciaramella, *supra* note 7.

considerably after only seven days of isolation.[62] More than double this amount is thus more than enough punishment.

So it is clear. A United Nations expert on torture has admitted that solitary confinement has known psychological side effects.[63] The question then becomes what exactly are these damaging side effects? Part II of this Comment discusses, in great detail, the psychological effects of solitary confinement by examining numerous studies to prove that solitary confinement is damaging to one's mental health.

II. ISOLATION: WHAT WE KNOW ABOUT THE EFFECTS OF SOLITARY CONFINEMENT

A. Social Experiments, Studies, and Reports

Scientists have conducted studies on the effects of solitary confinement for years. Perhaps the most damning evidence that has been used to combat the use of solitary confinement is a PBS "Frontline" report that exposed solitary confinement, how it functions, and the mental ramifications of its use.[64] The study found that, for a majority of the twentieth century, the average stay in solitary lasted "just a few days, or several weeks in more extreme cases."[65] This pales in comparison to the years that many inmates spend in solitary today. Though supporters say the practice keeps correctional facilities safe, these studies prove that solitary confinement is mentally damaging and counterproductive.

1. The Rhesus Monkey and McGill Experiments

In one well-known 1950s study, Harry Harlow, a University of Wisconsin psychologist, "placed rhesus monkeys inside a custom-designed solitary chamber nicknamed 'the pit of despair.'"[66] After

62. Desire Thompson, *South Carolina Inmates Get Combined Total Of 20 Years in Solitary Confinement For Posting Music Video Online*, NEWSONE, https://newsone.com/3221072/inmates-get-20-years-solitary-confinement-for-rap-video/ (last visited May 8, 2017).

63. Ciaramella, *supra* note 7.

64. *See generally* Jason M. Breslow, *What Does Solitary Confinement Do to Your Mind?*, FRONTLINE (Apr. 22, 2014), http://www.pbs.org/wgbh/pages/frontline/criminal-justice/locked-up-in-america/what-does-solitary-confinement-do-to-your-mind/ (discussing the psychological effects of solitary confinement).

65. *Id.*

66. *Id.* The study came about because, in the 1950s, many psychologists encouraged the notion that paying less attention to infants led to increased independence. Atul Gawande, *HellHole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?*, NEW YORKER (Mar. 30, 2009), http://www.newyorker.com/magazine/2009/03/30/hellhole. This was Harlow's first time raising monkeys on his own, and so he decided to

about a day or two, most of the monkeys hunched themselves into a small corner of the chamber.[67] Doctors assumed that this behavior demonstrated their sense of hopelessness.[68] In addition to observing the monkeys fall into depression, Harlow noticed the monkeys engaging in odd, and sometimes, self-destructive behavior. "Harlow . . . found that monkeys kept in isolation wound up profoundly disturbed, given to staring blankly and rocking in place for long periods, circling their cages repetitively, and mutilating themselves."[69] Though the monkeys held in short-term isolation eventually readjusted, "twelve months of isolation almost obliterated the animals socially."[70]

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replicate the childcare methods used in nurseries. *Id.* The monkeys were fed, given play toys, and were even kept warm with blankets. *Id.*

67. Breslow, *supra* note 64. Where Harlow went wrong is that he isolated the animals to protect them from disease and infection. Gawande, *supra* note 66. Though the monkeys grew up healthy and strong, their cognitive abilities failed because they lacked social interaction with other animals. *Id.*

68. Breslow, *supra* note 64; *see also* Gawande, *supra* note 66.

69. *Id.* In another experiment, Harlow "created" a mother for the monkeys to identify with in an attempt to see if this would quell the monkeys' social anxiety:

> [O]ne artificial mother was a doll made of terry cloth; the other was made of wire. He placed a warming device inside the dolls to make them seem more comforting. The babies, Harlow discovered, largely ignored the wire mother. But they became deeply attached to the cloth mother. They caressed it. They slept curled up on it. They ran to it when frightened. They refused replacements: they wanted only "their" mother. If sharp spikes were made to randomly thrust out of the mother's body when the rhesus babies held it, they waited patiently for the spikes to recede and returned to clutching it. *No matter how tightly they clung to the surrogate mothers, however, the monkeys remained psychologically abnormal.*

Gawande, *supra* note 66.

70. Breslow, *supra* note 64; *see also* Michael Mechanic, *What Extreme Isolation Does to Your Mind*, MOTHER JONES (Oct. 18, 2012, 4:09 AM), http://www.motherjones.com/politics/2012/10/donald-o-hebb-effects-extreme-isolation (noting that, after a few days in isolation, the students were played tapes about the supernatural and began to believe that they were true. Additionally, "[t]hey performed poorly on grade-school tasks involving simple arithmetic, word associations, and pattern recognition. They also experienced extreme restlessness, childish emotional responses, and vivid hallucinations."); *1951: CIA's Psychological Torture Is Rooted in Experiments at Dachau, Project ARTICHOKE & MK-ULTRA*, ALLIANCE FOR HUMAN RESEARCH PROTECTION (2017) [hereinafter *CIA's Psychological Torture*], http://ahrp.org/1951-cias-psychological-torture-is-rooted-in-experiments-at-dachau-project-artichoke-mk-ultra/ (quoting four students saying, "being in the apparatus was a form of torture."); *Explore Sensory Stimulation, Leonard Cohen, and More!*, PINTEREST, https://www.pinterest.com/pin/486670303465119842/ (containing a picture of a male student bound during the McGill Experiments. The student's eyes, ears, and hands were covered to effectively deprive him of his senses); *MK-ULTRAViolence: Or, How McGill Pioneered Psychological Torture*, MCGILL DAILY (Sept. 6, 2012) [hereinafter *MK-ULTRAViolence*], http://www.mcgilldaily.com/2012/09/mk-ultraviolence/ (asking readers to "[i]magine being trapped in a small room. Your hands covered in gloves, your sight blocked by translucent glasses, and your head covered by a pillow . . . . You are totally deprived of your senses. This is the imagery of torture in foreign wars . . . [but] [i]t occur[red] right here at McGill."); Carol Schaeffer, *"Isolation Devastates the Brain": The Neuroscience of Solitary Confinement*, SOLITARY WATCH (May 11, 2016), http://solitarywatch.com/2016/05/11/isolation-devastates-the-brain-the-neuroscience-of-solitary-confinement/ (stating that students dropped out of the sensory deprivation experiment after not being able to think clearly and after suffering hallucinations); Valtin, *Heart of Darkness: Sensory Deprivation & U.S. Torture—Where From Here?*,

McGill University conducted a similar experiment in 1951 with human subjects. Similar to the monkeys, male graduate students voluntarily stayed in small chambers, containing only a bed.[71] To completely deprive the students of their senses, "'[t]hey wore goggles and earphones and [there was] some sort of noise, just white noise, from a loudspeaker[.]'"[72] While in their rooms, "the volunteers also wore gloves and cardboard tubes over their arms to limit their sense of touch. A U-shaped pillow covered their ears and the hum of an air conditioner further obscured outside noise."[73] According to Frontline, "*[t]he plan was to observe students for six weeks, but not one lasted more than seven days.* Nearly every student lost the ability 'to think clearly about anything for any length of time,' while several others began to suffer from hallucinations."[74]

Recall what David Fathi noted above: considerable changes occur in the brain within seven days in solitary confinement.[75] Therefore, the fact that these students could last no more than seven days is not surprising. It demonstrates that the human brain is not built to withstand such stark isolation. The male graduate students voluntarily participated in this experiment. Because they had the opportunity to leave, they did. Prisoners, however, do not. They are forced to remain in isolation, and as the studies mentioned below will prove, they suffer mental distress as a result.

2. Prison Studies: The Effects of Solitary Confinement on Inmates

Prisoners fare far worse when it comes to isolation, most notably because they are subjected to it for longer amounts of time than were attempted in the above-referenced experiments. Psychiatrists and psychologists have described the "'SHU syndrome,' . . . [affecting] prisoners who spend months in isolation."[76] The symptoms of this disorder "resemble those of Post-Traumatic Stress Disorder and might

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DAILY KOS (May 10, 2007), http://www.dailykos.com/story/2007/5/9/333027/ (noting that the person behind the McGill University experiments, Daniel O. Hebb, concluded "that . . . such [sensory deprivation] conditions would have a disorganizing effect on thought'").

71. *Supra* note 70.

72. Mechanic, *supra* note 70; *see also MK-ULTRAViolence*, *supra* note 70.

73. Mechanic, *supra* note 70; *see also MK-ULTRAViolence*, *supra* note 70.

74. Breslow, *supra* note 64 (emphasis added).

75. Thompson, *supra* note 62. This was also supported by the McGill experiments, wherein psychologists found that the students' cognitive abilities had been severely impaired after seven days temporarily, but within that time students had forgotten everyday tasks like simple arithmetic. Mechanic, *supra* note 70.

76. Reiter, *supra* note 54.

include hallucinations, depression, anxiety, anger[,] and suicide."[77] Psychiatrist and former faculty member of Harvard Medical School, Stuart Grassian, echoed these same sentiments.[78] Grassian interviewed hundreds of inmates in solitary confinement, and in one study, found that "roughly a third of solitary inmates were 'actively psychotic and/or acutely suicidal.'"[79] He ultimately "concluded that solitary can cause a specific psychiatric syndrome, characterized by hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with thinking, concentration and memory."[80] Some inmates were even found to develop crippling obsessions: "one inmate . . . developed some obsession with his inability to feel like his bladder was fully empty . . . Literally, that man spent hours, . . . 24 hours a day . . . standing in front of the toilet trying to pee . . . He couldn't do anything else except focus on that feeling."[81]

Again, recall the rhesus monkeys mentioned earlier. After a considerable amount of time in the "chamber of despair," some resorted to self-mutilation.[82] Inmates placed in solitary for an excessive amount of time have also been found to engage in this same, self-destructive behavior. In fact, there are studies which demonstrate that solitary confinement can make inmates more dangerous or, at the very least, a greater danger to themselves. Inmates placed in solitary have been found to self-mutilate "at rates that are higher than the general prison population."[83] The self-destruction does not stop

77. *Id.*
78. Breslow, *supra* note 64.
79. *Id.*
80. *Id.*
81. *Id.*
82. Gawande, *supra* note 66.
83. *Id.* Additionally, a group of medical professionals observed inmates placed in solitary confinement in New York City jails and recorded their findings:

> *Methods.* We analyzed data from medical records on 244699 incarcerations in the New York City jail system from January 1, 2010, through January 31, 2013.
> *Results*. In 1303 (0.05%) of these incarcerations, 2182 acts of self-harm were committed, (103 potentially fatal and 7 fatal). Although only 7.3% of admissions included any solitary confinement, 53.3% of acts of self-harm and 45.0% of acts of potentially fatal self-harm occurred within this group. After we controlled for gender, age, race/ethnicity, serious mental illness, and length of stay, we found self-harm to be associated significantly with being in solitary confinement at least once, serious mental illness, being aged 18 years or younger, and being Latino or White, regardless of gender.
> *Conclusions*. These self-harm predictors are consistent with our clinical impressions as jail health service managers. Because of this concern, the New York City jail system has modified its practices to direct inmates with mental illness who violate jail rules to more clinical settings and eliminate solitary confinement for those with serious mental illness.

Fatos Kaba, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, NAT'L CTR. FOR BIOTECHNOLOGY INFORMATION, U.S. NATIONAL LIBRARY OF MEDICINE (Mar. 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953781. The medical professionals concluded that in-

there. Inmates placed in solitary have been found to account for a large number of suicides in prisons and jails: "[i]n one study of California's prison system, researchers found that 'from 1999 to 2004 prisoners in solitary . . . accounted for nearly half of all suicides. A 1995 study of the federal prison system found that [sixty-three percent] of suicides occurred among inmates locked in . . . solitary or in psychiatric seclusion cells.'"[84] One inmate who participated in the study explained, "[t]he Hole and Segregation cells are depressing enough to drive many men to take their lives . . . . After years of living in the cramped confines of a segregation cell with no hope of getting out, it is easy to see why a man would prefer death."[85]

Finally, psychologist Craig Haney conducted a study of prisoners at Pelican Bay, and found that inmates began "to lose the ability to initiate behavior of any kind—to organize their own lives around activity and purpose."[86] The result is "chronic apathy, lethargy, depres-

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mates with preexisting mental conditions should be directed to a clinical setting rather than solitary confinement because isolation can exacerbate an inmate's preexisting condition and cause him to harm himself or others. Still, because the excessive use of solitary confinement leads to mental illness, should these alternatives not be used for all inmates, or at the very least, those who commit nonviolent offenses within the facility?

84. Breslow, *supra* note 64; *see also* Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J. L. REFORM 495, 506 (2014) (stating that "[p]risoners in solitary confinement who exhibit signs of mental illness such as refusing an order, self-mutilation or cutting, or expressing anger at officers likewise receive disciplinary sanctions rather than treatment. Even suicidal behavior is sometimes treated as a behavioral rather than psychological problem").

85. Breslow, *supra* note 64.

86. *Id.*; *see also* Dan Winters, *Buried Alive: Stories From Inside Solitary Confinement*, GQ (Mar. 2, 2017), http://www.gq.com/story/buried-alive-solitary-confinement (noting that "literature . . . going back decades documents the psychic anguish of isolation—severe depression, rage, panic attacks, PTSD, paranoia, hallucinations, self-mutilation. The suicide rate in solitary is five to ten times higher than . . . the general prison population. . . . Justice Anthony Kennedy told Congress in March . . . 2015, 'Solitary confinement literally drives men mad.'" In Winters' article, he provides firsthand accounts from prisoners who were in solitary, and many documented their hallucinations, the psychiatric medication they were forced to take after spending months and even years in solitary, and the little to no help that they received from prison administrators and medical staff:

> NELSON: Within the first week, I started talking to myself. I would think I was seeing stuff out of the corner of my eye. I would turn my head real fast, like I saw something in my cell. The hallucinations—it's not something a lot of us talk about, but all of us had them real bad. You see somebody else in your cell. You hear voices on the stairs or coming through the vent.
>
> TURNER: My obsessive thoughts are primarily about cleanliness and poison. I know that the staff are watching me and listening to me. I know they have prisoner informants and listening devices directed toward me. I can take measures towards these things. But they will try to poison me by some means or another. I doubt that it will be by food. It'll most likely be from something being put in or onto my sheets, pillowcase, toilet seat, door, etc. So I try to take reasonable cleaning measures to minimize these liabilities or weak spots.
>
> LUTALO: First, the prisoner starts neglecting their personal hygiene. He'll withdraw. You'll start seeing a distant look in their eyes: They're going through the changes. You

sion and despair, [and] in extreme cases, prisoners may literally stop behaving."[87] Prisoners told Haney "that the first time they[ ] [were] given an opportunity to interact with other people, they [couldn't] do it."[88] By that point, they had already developed social atrophy and anxiety.[89]

The case studies and psychological diagnoses shown above demonstrate that excessive solitary confinement sentences lead to severe mental and psychological issues. Citing the disparaging statistics of inmates placed in solitary who can no longer assimilate into society helps to prove a point: taking away a person's ability to live—to exist amongst others (or at the very least excessively limiting this ability), amounts to cruel and unusual punishment and is undoubtedly a denial of one's freedom of association right. Even more problematic are the arbitrary ways in which solitary confinement is instituted. Courts do not sentence inmates to solitary; instead, administrators in correctional facilities give prisoners their solitary confinement sentences.[90] As a result, these administrators have wide discretion over the sentences that they are allowed to give to others.[91]

Though some have argued that these excessive punishments constitute cruel and unusual punishment, this argument has been mainly used on a case-by-case basis. Many argue that the conditions at their specific jail or prison is cruel and unusual, and though attacking injustice on a case-by-case basis may be helpful, it is slow to lead to widespread reform. Still, it is important to note how this argument has been used in the courts to demonstrate that there are judges who disagree with excessive solitary confinement sentences, especially in light of the empirical data that some judges cite to argue against its use. Therefore, although this approach may not bring about reform on its

> try to talk to the prisoner, encourage him to come outside. Stop talking to a psychologist, because they're trying to get you on psychotropic drugs. And once they got you on the drugs, you do the smack-mouth [*makes rapid lip-smacking noise*]. Your hands lock up. You do the shuffle. You develop a potbelly. And you're gone.

Id. It is clear that prisoners Nelson and Lutalo were able to look back on their experiences in isolation and recall their state of mind at the time, while Turner developed paranoia and believed that prison officials were plotting on him. *See id.*

87. Breslow, *supra* note 64; *see also* Winters, *supra* note 86.

88. Breslow, *supra* note 64; *see also* Voices From Solitary, *Voices from Solitary: Survivors Speak*, SOLITARY WATCH (Oct. 21. 2014), http://solitarywatch.com/2014/10/21/voices-from-solitary-survivors-speak/ (noting that one prisoner recalled his time after solitary, stating that "[e]ven now, six months out of the hole I still remain affected. I withdraw from social interaction/setting[s]. I feel frustrated for no apparent reason").

89. *Id.*

90. Reiter, *supra* note 54.

91. *Id.*

own—or at the very least not instantly—it is a tool among many others that, when used together, possibly can.

III. CRUEL AND UNUSUAL PUNISHMENT: THE PREVAILING ARGUMENT[92]

And just, suffering in that cell, I mean mentally . . . it's impossible to put into words, that's why I put in that one part about my anger and a sense of continuously silently screaming . . . .

If you could put every emotion of the human spirit of hopelessness, pain, agony, hatred . . . frustration. Why you're locked in this cage, treated like some animal? You think that's making that person better? You think that's making everybody safer? This is still a human being. . . .

Our system of incarceration was created to punish a prisoner and correct him or make him a better person than when he went in there.

-Todd Ashker, 52,
22 Years in Solitary Confinement[93]

A. Background: The Past and Procedure of a Cruel and Unusual Punishment Claim

The rhetoric around cruel and unusual punishment stems from the Eighth Amendment of the United States Constitution.[94] The text itself states, "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[95] The ban essentially bars excessive penalties.[96]

92. Cruel and unusual punishment litigation is not a main focal point of this Comment. My main argument is that the freedom of association argument has been constantly overlooked. I thus spend a brief amount of time discussing the cruel and unusual punishment standard as well as its purported victories to demonstrate that cruel and unusual punishment litigation has largely led to victories on a case by case basis rather than as a whole.

93. Colin Archdeacon & Center for Constitutional Rights, *Effects of Solitary Confinement*, N.Y. TIMES (Aug. 3, 2015, 4:41 PM), https://www.nytimes.com/video/science/100000003831139/effects-of-solitary-confinement.html.

94. U.S. CONST. amend. VIII.

95. *Id.* (emphasis added).

96. *See, e.g.,* Coker v. Georgia, 433 U.S. 584, 591–92 (1977) (stating that the clause bars barbaric and excessive punishments); Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 49 (2008) (proposing that the "Punishments Clause" prohibits excessive punishments); Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. ON LEGIS. 1, 6 (2015) (citing Hutto v. Finney, 437 U.S. 678, 687 (1978)); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 569 (2010) (citing Solem v. Helm, 463 U.S. 277, 284 (1983) (stating that the clause prohibits punishments disproportionate to the crime); Micah Schwartzbach, *The*

For years, many have speculated that solitary confinement is a violation of the Eighth Amendment's ban on cruel and unusual punishment.[97] After all, isolating a person in a cramped cell for a prolonged period of time does seem cruel and unusual on its face. However, making this claim in a court of law is much more burdensome. To prove such a claim, two requirements must be satisfied: (1) "the deprivation alleged must be, 'objectively, sufficiently serious,' . . . resulting in the denial of 'the minimal civilized measure of life's necessities'; [and (2)] the prison official imposing the deprivation . . . must subjectively act with 'deliberate indifference to inmate health or safety.'"[98] In *Farmer v. Brennan*, the Court rejected the petitioner's request to use recklessness as a bright line standard for deliberate indifference, stating that recklessness is not self-defining.[99] It instead held that "official[s] must both be aware of facts" that pose a substantial risk to the health or safety of inmates and actually draw the inference that there is a substantial risk of serious harm.[100] Likewise, in *Estelle v. Gamble*, the Supreme Court held that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain."[101]

Born out of cruel and unusual punishment litigation were specific nuances that courts found cruel and unusual, rather than the practice of prolonged solitary confinement itself. In 1991, the Supreme Court determined that conditions of confinement could constitute an Eighth

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Meaning of "Cruel and Unusual Punishment", NOLO (2017), http://www.nolo.com/legal-encyclopedia/the-meaning-cruel-unusual-punishment.html (stating that the cruel and unusual punishment clause "prevents the government from imposing a penalty that is either barbaric or far too severe for the crime committed, and it has been applied to prison conditions").

97. *See* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 INDIANA L.J. 741, 741 (2015) (stating that "solitary confinement, as commonly practiced in the United States, is cruel and unusual punishment—whether analyzed under current Supreme Court standards or an improved framework"). *See also Cruel Isolation*, N.Y. TIMES (Aug. 1, 2011), http://www.nytimes.com/2011/08/02/opinion/cruel-isolation-of-prisoners.html (noting that "[i]n May, the Supreme Court found conditions at the overcrowded prisons so egregious that they violated the Eighth Amendment's ban on cruel and unusual punishment and ordered the state to cut its prison population by more than 30,000 inmates. The case did not address the issue of long-term solitary confinement"). *But see* Brown v. Plata, 563 U.S. 493 (2011) (finding that prison overcrowding of over 30,000 inmates amounted to cruel and unusual punishment, but the Court did not find the same for the prison's solitary confinement conditions).

98. Anthony Giannetti, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L.J. 31, 38 (2012); *see also* Farmer v. Brennan, 511 U.S. 825, 832–35 (1994); Davenport v. De Robertis, 844 F.2d 1310, 1314–15 (7th Cir. 1988).

99. *Farmer*, 511 U.S. at 826; *see also* Richmond, *supra* note 96, at 7.

100. *Farmer*, 511 U.S. at 837; *see also* Richmond, *supra* note 96, at 7–8.

101. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

Amendment violation if the totality of circumstances deprives the prisoner of "a single, identifiable human need such as food, warmth, or exercise."[102] One can easily see how a prisoner can have access to all three of these things and still lose his sanity, because he is alone in a cell for months or even years at a time.

In *Madrid v. Gomez*, the Northern District of California determined that isolating mentally ill prisoners constituted an Eighth Amendment violation.[103] The court described isolating the mentally ill as "the mental equivalent of putting an asthmatic in a place with little air to breathe."[104] Ironically enough, the court did not focus on how the practice of prolonged isolation can cause a prisoner to become mentally ill; the court instead focused on how isolation can exacerbate a preexisting condition.[105]

Still, there is one recent Supreme Court concurrence, which shows that, at the very least, the conversation surrounding the excessive use of solitary confinement is not being ignored. In *Davis v. Ayala*, Justice Kennedy provided commentary on his view of solitary confinement.[106] Though the case was about jury selection in the respondent's murder trial, Justice Kennedy was moved to discuss the excessive use of solitary confinement because of Ayala's time spent there.[107] Justice Kennedy ultimately concluded that, "[i]n a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."[108] He ultimately alludes to the idea that, if the right case presented itself, the Supreme Court could finally decide on the issue of excessive solitary confinement sentences.[109]

102. Wilson v. Seiter, 501 U.S. 294, 304 (1991).

103. Madrid v. Gomez, 889 F. Supp. 1146, 1279–80 (N.D. Cal. 1995).

104. *Id.* at 1265.

105. *Id.*

106. Davis v. Ayala, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) ("One hundred and twenty-five years ago, this Court recognized that, even for prisoners sentenced to death, solitary confinement bears 'a further terror and peculiar mark of infamy.'" (citing *In re* Medley, 134 U.S. 160, 170 (1890)).

107. *Id.* at 2208 ("[S]ince being sentenced to death in 1989, Ayala has served the . . . majority of his more than 25 years . . . in . . . solitary confinement . . . [I]t is likely respondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a . . . parking spot . . .").

108. *Id.* at 2210.

109. *Id*.

B. *Ashker v. Governor of California*: What California's Resilience Tells Us About the Fight Against Solitary Confinement

Although there has not been a case that has led to the widespread reform of solitary confinement to the degree that I desire in this Comment, there are some battles which demonstrate what true reform looks like. Recently, the argument that solitary confinement amounts to cruel and unusual punishment led to a victory in the state of California. In *Ashker v. Governor of California*, plaintiffs argued that prisoners held in the SHU at Pelican Bay who "spent a decade or more in solitary" had their Eighth Amendment rights violated, and that "the absence of meaningful review for SHU placement violate[d] the prisoners' rights to due process."[110]

Besides the legal action, what was most notable about *Ashker* was the citizen action and grassroots movements that led to the case's victory. According to the Prisoner Hunger Strike Solidarity Coalition ("PHSS"), in July 2011 "[t]he prisoners in the [SHU][111] at Pelican Bay . . . began what became a[ ] historic hunger strike to protest the cruel,

110. *See* Ashker v. Governor of California, No. C 09-5796 CW, 2014 WL 2465191 *1 (N.D. Cal. Jun. 2, 2014); *see also* Matt Ford, *The Beginning of the End for Solitary Confinement?: California's Settlement With Prisoners Will Massively Reduce the State's Use of Isolation—and Is the Latest Win for the Movement Against the Practice.*, THE ATLANTIC (Sept. 2, 2015), https://www.theatlantic.com/politics/archive/2015/09/scaling-back-solitary/403441/ (stating that "Juan Mendez, the United Nations special rapporteur on torture, urged the United States to abolish long-term solitary during the strike; he had previously compared the practice to torture"); Paige St. John, *California Agrees to Move Thousands of Inmates Out of Solitary Confinement*, L.A TIMES (Sept. 1, 2015), http://www.latimes.com/local/lanow/la-me-ln-california-will-move-thousands-of-inmates-out-of-solitary-20150901-story.html (stating that "California has been among a shrinking number of states that keep inmates isolated on the grounds of gang membership rather than behavior, at a time of increasing national criticism over the use of solitary confinement"). Many prisoners tend to join prison gangs for protection rather than true interest. J.D., *Why Prisoners Join Gangs*, ECONOMIST (Nov. 14, 2014), http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-7 (explaining that as the population of dangerous prisoners increased, so did prison gang membership so individuals could benefit from their protection); *Ashker v. Governor of California*, CTR. FOR CONST. RIGHTS (Feb. 3, 2016) [hereinafter CTR. FOR CONST. RIGHTS], https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown#; CCR JUSTICE, SUMMARY OF ASHKER V. GOVERNOR OF CALIFORNIA: SETTLEMENT TERMS (2015) [hereinafter CCR JUSTICE], https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf (detailing the settlement that the prisoners and the state reached in reforming California's use of solitary confinement); *Ashker v. Governor of California*, VERA INST. JUST., [hereinafter VERA INST. JUST.], http://www.safealternativestosegregation.org/resources/view/ashker-v-california (last visited May 7, 2017) (briefly describing the *Ashker* lawsuit and also providing links to trial documents and the ultimate settlement agreement). *But see* BORDC/DDF, *California Organizes, Educates, to End Solitary Confinement*, DEFENDING RIGHTS & DISSENT (July 23, 2015), http://bordc.org/news/california-organizes-educates-to-end-solitary-confinement/ (stating that, since the settlement and hunger strikes, many prisoners are still placed in solitary for excessive lengths of time. It is clear that more remains to be done).

111. As stated earlier, the "SHU" is yet another euphemism used in place of solitary confinement.

inhumane[,] and tortuous conditions of their imprisonment."[112] 30,000 California prisoners participated in this hunger strike, and after sixty days and the death of a prisoner, "California legislators held public hearings."[113] At the same time, the Center for Constitutional Rights ("CCR") brought a case against the state of California, and this case was none other than *Ashker v. Governor of California*.[114] Feeling the pressure, the state agreed to, among other things:

"Transform California's use of solitary confinement from a status-based to a behavior-based system";

"Create a new Restricted Custody General Population Unit (RCGP) as a secure alternative to solitary confinement"; and

"Provide[ ] significantly more out-of-cell time" for those in solitary confinement for a prolonged period of time.[115]

Prisoner representatives were even afforded the opportunity to "work with plaintiffs' counsel and the magistrate judge to monitor implementation of the settlement."[116]

The *Ashker* settlement favored inmates tremendously. These inmates risked their lives, and in the process garnered legislative and judicial support to attack California's widespread use of the SHU. It is important to note that, though the *Ashker* case is a win for California inmates, there are still tens of thousands of inmates at federal, state, and local correctional facilities who are subjected to dehumanizing conditions every day. Even worse, they are most often subjected to these conditions for petty infractions, like talking back to a guard or asking a family member to post a supportive status on Facebook telling their family and friends that they are doing just fine.[117]

Thus, although the cruel and unusual punishment argument has its utility, it has mainly been used to fight battles rather than the general war. Inmates who have argued Eighth Amendment violations in

112. BORDC/DDF, *supra* note 110.
113. *Id.*; *see also* CTR. FOR CONST. RIGHTS, *supra* note 110.
114. *See Ashker*, No. C 09-5796 CW, 2014 WL 2465191, at *1.
115. CCR JUSTICE, *supra* note 110.
116. *Id.*
117. *See supra* Part I; *see also* Michael Martin, *'Time: The Kalief Browder Story' Depicts Issues With Solitary Confinement*, NPR (Mar. 4, 2017, 6:54 PM), http://www.npr.org/2017/03/04/518527689/time-the-kalief-browder-story-depicts-issues-with-solitary-confinement ("In one . . . video[ ], Kalief is shown being slammed down on the ground for . . . appearing to do nothing more than talking back to a corrections officer. He's shackled behind his back, and, . . . its scenes like this that really bring to light the type of chaos that happens on Rikers Island."); *Solitary Confinement Facts*, *supra* note 9 ("Prisoners can be placed in isolation for many reasons, from serious infractions, such as fighting with another inmate, to minor ones, like talking back to a guard or getting caught with a pack of cigarettes.").

the past have prevailed because of how shocking the circumstances were: the California inmates who settled with the state in *Ashker* were partially afforded this victory because they starved themselves to combat solitary confinement.[118] Additionally, the named prisoners in the lawsuit spent ten or more years in the SHU. What about those prisoners who spent nine years in solitary? Five years? Even one? It is my belief that, to change the system as a whole, the cruel and unusual punishment argument must be used on a larger scale. We must move away from arguments that focus on the conditions of the prison and the cell, and focus on the practice in its totality. To do so, the cruel and unusual punishment argument can be used in combination with another constitutional argument. For example, the freedom of association constitutional argument against solitary confinement has been consistently overlooked. Recognized as a fundamental right,[119] freedom of association can be used alongside cruel and unusual punishment as well as the multitude of psychological and social experiments to show that associating with others is a fundamental right, and if such right shall be limited, it cannot be done arbitrarily and excessively.

IV. THE FREEDOM OF ASSOCIATION

A. What Is the Freedom of Association?

There are two aspects of the freedom of association: (1) the right to associate with others, and (2) the right to expressive association.[120] Under the first aspect, the freedom of association is viewed as a "fundamental element of personal liberty."[121] The right to expressive as-

118. BORDC/DDF, *supra* note 110.

119. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (finding that the freedom of association is a "fundamental element of personal liberty").

120. STEVEN D. JAMAR, CONSTITUTIONAL LAW: POWER, LIBERTY, EQUALITY 1 (2017).

121. *Roberts*, 468 U.S. at 618; *see also Freedom of Association: Essential Principles*, DEMOCRACY WEB, http://democracyweb.org/freedom-of-association-principles (last visited May 7, 2017) (finding that an instrumental right of freedom of association is the right to organize); *The Freedom (Not) to Associate*, EXPLORING CONST. CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/association.htm (last visited May 7, 2017) (stating that the "[f]reedom of association cases . . . bring into conflict two competing views of the world: rights-oriented liberalism that holds that a person's identity comes from individual choices . . . and communitarianism, that holds that a person's identity comes from the communities of which an individual is a part . . ."). *But see* Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 3–4 (1964) (finding that there are four aspects of freedom of association which go beyond the scope of this Comment):

> The first is where a question is presented of the general power of the government to restrict or otherwise regulate the affairs of an organization or its membership. This was the problem involved in *NAACP v. Alabama ex rel. Patterson*. . . . A second type of problem arises when governmental power is used to compel an individual to belong to an organization, pay dues, or otherwise participate in its activities. . . . In a third con-

sociation is viewed as "the right to associate for the purpose of engaging in constitutionally protected activities including the First Amendment freedom of speech, right to assembly, right to petition for the redress of grievances, and the free exercise of religion."[122] Although the freedom of association is not expressly enumerated in the Constitution, it is considered necessary to effectuate other constitutional rights.[123]

1. In the Beginning: Before *Brown*

As Professor Steven Jamar, a Constitutional Law Professor at Howard University School of Law, puts it, "[t]he start of the modern expansion and articulation of the right arises during the rights revolution of the mid-20th century and is one of the many examples of the Supreme Court deciding basic rights cases arising in the context of the Civil Rights Movement, especially after *Brown* . . ."[124] Though a number of these cases were brought under the Fourteenth Amendment's Equal Protection Clause, they were also decided under freedom of association principles, though not stated explicitly.[125]

Brown was not the first case of its kind. Indeed, Thurgood Marshall and Charles Hamilton Houston, a former Howard University School of Law student and Dean respectively, initially tried cases in the lower courts to lay the precedent for *Brown*.[126] These cases argued that black and white students' education was limited because of racially discriminatory laws that limited, or in some cases, essentially

text, problems of freedom of association arise in connection with the rights of individual members or minority groups vis-a-vis the organization to which they belong. An example is the Labor-Management Reporting and Disclosure Act, which guarantees certain rights of franchise, free expression and due process to members of a labor organization. The fourth area is where the associational rights at stake are not organizational but personal in nature. Professor Herbert Wechsler believes that this was a primary, though overlooked, issue in the *School Segregation Cases.* A more clear-cut illustration is furnished by a state law which punishes association with criminals, or prohibits persons of different races from eating together in restaurants.

122. JAMAR, *supra* note 120.

123. *Id.*

124. *Id.*

125. *See, e.g.*, Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STANFORD L. REV. 1241, 1255 (2014) (stating that Title II of the Civil Rights Act was created on freedom of association principles). Epstein went on to state "the imposition of anti-miscegenation laws is a violent affront to the ordinary principles of freedom of association, which apply as much (if not more) to marriage as to any other relationship." *Id.* at 1256.

126. *See generally* Mo. ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (ruling that a law student was entitled to equal protection of the laws in being admitted to a law school at a state university because of the absence of other proper provision for his legal training).

eliminated their association with one another.[127] One example is *McLaurin v. Oklahoma State Regents*, wherein "the state admitted a black student to its graduate school, but designated a special row for him to sit in the classroom, a special carrel for him to study in the library, and a special table for him to eat at in the cafeteria, all apart from white students."[128] The court was convinced that "admitting the black student to the school but preventing social and intellectual interaction with white students would not possibly be equal because interaction with other students was one of the benefits of education."[129]

2. *Brown*: The Psychological Effects of Denied Association

In December 1953, *Brown v. Board of Education* was argued before the Supreme Court.[130] The issue in *Brown* was whether segregating "children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[d] the minority children of equal educational opportunities[.]"[131] The Court reached its conclusion by not only exemplifying the inherent inequality in separate educational facilities, but also by looking at the "effect of segregation itself on public education."[132] As the Court put it, "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[133] The Court went on to state that "[s]egregation with the sanction of law . . . has a tendency to (retard) the educational and mental development of [black] children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system."[134] The Court thereafter stated that its conclusion was reached largely because of the

127. *See generally* JAMAR, *supra* note 120, at ch. 19 (highlighting the sociological and psychological ramifications of denied association).

128. JAMAR, *supra* note 120, at 39 (citing McLaurin v. Oklahoma State Regents, 339 U.S. 637, 640 (1950) (stating that the black student "was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library,[;] and to sit at a designated table and to eat at a different time from other students in the school cafeteria")).

129. *Id.*; *see also McLaurin*, 339 U.S. at 641 (finding that separating the black student from whites in all social aspects of his education will handicap him "in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession").

130. JAMAR, *supra* note 120, at 37.

131. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

132. *Id.* at 492.

133. *Id.* at 494.

134. *Id.* at 494.

psychological knowledge they possessed at that time that they did not have when deciding *Plessy v. Ferguson*.[135] The Court thus concluded what we all know to be true today: in the field of public education, the doctrine of "separate but equal" has no place because separate educational facilities are inherently unequal.[136]

What is important to note here is that, although the concept of freedom of association was not clearly articulated in *Brown*, it's implications were understood. *Brown v. Board of Education* was brought under the guise of the Equal Protection Clause of the Fourteenth Amendment because the LDF was directly combatting discrimination against members of a protected class: African Americans. Still, the Court decided to look beyond the blatant racism and discrimination to analyze what the effects of the denied association between blacks and whites did to black and white children. The empirical data that the Court relied on in reaching its conclusion was known as "The Doll Test."[137]

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135. *Id.*

136. *Id.* at 495.

137. *Brown at 60: The Doll Test*, LDF, http://www.naacpldf.org/brown-at-60-the-doll-test (last visited Apr. 17, 2017); *The Clark Doll Experiment*, ABAGOND (May 29, 2009), https://abagond.wordpress.com/2009/05/29/the-clark-doll-experiment/ (detailing the experiment, including questions asked and the children's reactions). The test proved to be more difficult after the black children seemed to realize how they viewed themselves:

> In the experiment Clark showed black children between the ages of six and nine two dolls, one white and one black, and then asked these questions in this order:
>
> "Show me the doll that you like best or that you'd like to play with,"
> "Show me the doll that is the 'nice' doll,"
> "Show me the doll that looks 'bad',"
> "Give me the doll that looks like a white child,"
> "Give me the doll that looks like a coloured child,"
> "Give me the doll that looks like a Negro child,"
> "Give me the doll that looks like you."
> "Negro" and "coloured" were both common words for blacks before the 1960s.
>
> The last question was the worst since by that point most black children had picked the black doll as the bad one. In 1950 44% said the white doll looked like them! In past tests, however, many children would refuse to pick either doll or just start crying and run away.

Id.; *Stereotypes and the Clark Doll Test*, EXPLORABLE, https://explorable.com/stereotypes (last visited May 8, 2017) (stating that "[t]he results of Clark's study were used to prove that school segregation was distorting the minds of young black kids, causing them to internalize stereotypes and racism, to the point of making them hate themselves." The writers also found that "the experiment helped to persuade the American Supreme Court that "separate but equal" schools for blacks and whites were anything but equal in practice and is therefore illegal . . ."). *But see* The Root Staff, *The Doll Test for Racial Self-Hate: Did It Ever Make Sense?*, THE ROOT (May 17, 2014), http://www.theroot.com/the-doll-test-for-racial-self-hate-did-it-ever-make-se-1790875716 (stating that, aside from overruling the "separate but equal" doctrine, *Brown's* other legacy was "[t]he tradition of questioning small children about black and white dolls in order to measure their sentiments about race"). The article goes on to play down the role that the doll test played in the *Brown* litigation by noting that the LDF's Equal Protection argument was enough to win the case, but the Court mentioned the doll test findings in a footnote); Dixon

3. The Doll Test: Segregation vs. Isolation

In the 1940s, "psychologists Kenneth and Mamie Clark designed and conducted a series of experiments known . . . as 'the doll tests' to study the psychological effects of segregation on African American children."[138] All four dolls were identical, but differed with regard to their purported race.[139] "Test subjects" ranged from ages three and seven, and were asked to identify which color doll they preferred.[140] Most of the children preferred the white doll, attributing positive characteristics to it that they did not identify in the black doll.[141] Dr. Clark recalled an episode in which he asked a black child "which doll was most like him", to which "[t]he child responded by smiling and pointing to the brown doll: 'That's a nigger. I'm a nigger.'"[142] The Clarks ultimately found that "prejudice, discrimination, and segregation created a feeling of inferiority among African American children and damaged their self-esteem."[143]

Because of the Doll Test findings, the Supreme Court in *Brown* was persuaded that separate educational facilities are inherently unequal because separating the races led to serious psychological side effects. Segregation and isolation are of course two completely different ideas. Segregation during the Jim Crow era entailed separating two groups of people—blacks and whites—to violate the blacks' access to social resources.[144] It created a psychological reaction because it was part of a subjective narrative of the power of the white identity group.[145] Isolation, on the other hand, violates a physical, genetically-based need for human contact[146] that when taken away, has proven to lead to visceral results. Thus, I argue that isolation is on par with segregation, if not worse, because it directly interferes with a basic genetic necessity that, when impaired, innately leads to psychological

Fuller 2011, *Doll Test*, YOUTUBE (Feb. 7, 2012), https://www.youtube.com/watch?v=TkpUyB2xgTM (demonstrating one of many doll tests that had been conducted following the Clarks' test).

138. *Brown at 60: The Doll Test*, *supra* note 137; *The Clark Doll Experiment*, *supra* note 137; *Stereotypes and the Clark Doll Test*, *supra* note 137.

139. *Brown at 60: The Doll Test*, *supra* note 137.

140. *Id.*

141. *Id.*; *see also The Clark Doll Experiment*, *supra* note 137; *Stereotypes and the Clark Doll Test*, *supra* note 137; The Root Staff, *supra* note 137.

142. *Brown at 60: The Doll Test*, *supra* note 137.

143. *Id.*

144. Email from Harold McDougall, Professor of Law, Howard University School of Law to Author (Nov. 27, 2016) (on file with author).

145. *Id.*

146. *Id.*

deficiencies far worse than the Supreme Court sought to avoid in *Brown*. Therefore, if isolation bears some resemblance to segregation, the next logical question is what data suggests that solitary confinement is psychologically debilitating? In other words, what is our "doll test"?

Our modern day doll test comes in the form of the numerous studies, experiments and reports published about solitary confinement. They come in the form of the rhesus monkeys who went insane after being stuck in a box for twelve months.[147] They come in the form of the young men who could not stay in a room for more than seven days without losing their minds.[148] They come in the form of the thousands of inmates in the federal, state, and local correctional facilities who left the department of corrections [UN]corrected because they were placed in solitary confinement for weeks, months, and years at a time. Because of the enforcement of solitary confinement, prisoners suffer from diminished brain capacity, become socially unconscious, and even become destructive to themselves and others. They avoid social interaction and are almost incapable of working or even "being" among others.

With this ammunition in hand, our litigation will consist of all past approaches: we will argue that solitary confinement violates the Eighth Amendment's prohibition on cruel and unusual punishment and we will argue that it violates prisoners' freedom of association right.[149] What will strengthen these arguments is the mounting evidence accumulated from social experiments and studies which demonstrate that no human being (or animal for that matter) can withstand the current administration of solitary confinement. At the same time, there must be citizen action. A prisoner in California gave his life to combat the injustices that existed in California prisons. There is no doubt that countless people of color gave their lives before *Brown* was decided. I am not suggesting that there must be lives lost, but there must be strong support and dedication for prisoners contesting the use of solitary. We must attend the town hall meetings, make our voices heard, stage strikes, and do what is necessary to bring awareness to this practice.

147. Breslow, *supra* note 64; Gawande, *supra* note 66.

148. Breslow, *supra* note 64; *CIA's Psychological Torture*, *supra* note 70; Mechanic, *supra* note 70; Schaeffer, *supra* note 70; Valtin, *supra* note 70; *Explore Sensory Stimulation, Leonard Cohen, and More!*, *supra* note 70;

149. Recall that the freedom of association "is considered necessary to effectuate other constitutional rights." *See supra* Part IV.A.

B. Prisoner's Rights: Do Prisoners Have a Right to Sanity?

Undoubtedly, the largest difference between the children in *Brown* and the prisoners discussed in this Comment is that children are innocent. They come into this world with a clean slate and should not be punished for something over which they have no control: the color of their skin. Prisoners, on the other hand, are presumed to have placed themselves in their situation. As the old saying goes, "you do the crime, you do the time." It is also widely known that prisoners are not afforded the same rights as unincarcerated Americans. Thus, I have decided to briefly discuss the rights that prisoners do have.

Prisoners are not entitled to all constitutional rights; they are however, protected by the Constitution's prohibition on cruel and unusual punishment—which "requires that prisoners be afforded a minimum standard of living"—the Equal Protection Clause of the 14th Amendment,[150] the right to due process,[151] the "right to administrative appeals[,][152] and a right of access to the parole process."[153] There also exists "the Model Sentencing and Corrections Act[, which] provides that a confined person has a protected interest in freedom from discrimination on the basis of race, religion, national origin, or sex."[154] Finally, "[p]risoners also have limited rights to speech and religion."[155]

150. Ken LaMance, *Rights of Prisoners Lawyers*, LEGAL MATCH, http://www.legalmatch.com/law-library/article/rights-of-prisoners.html (last visited May 8, 2017) (stating that "prisoners are protected against unequal treatment on the basis of race and sex, and have some limited rights pertaining to religion and speech"); *see also The Rights of Individuals in Prison*, LAWFIRMS, http://www.lawfirms.com/resources/criminal-defense/defendants-rights/prisoners-rights.htm (last visited May 8, 2017) (stating that prisoners have the right to equal protection, but that this right differs when one is in prison).

151. LaMance, *supra* note 150 (noting that "prisoners must be afforded the chance to participate in the appeals process as well as the parole process. Basically, that means that a prisoner has to be given a chance to apply for another day in court").

152. *Id.*

153. Cornell University Law School, *Prisoners' Rights*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/prisoners_rights (last visited Apr. 19, 2017).

154. *Id.*; *see also* LaMance, *supra* note 150 (stating that the Act was created to ensure that "convicted criminals received fairly uniform sentences that were based on the crime and not on other aspects of the individual such as race or sex").

155. *Id.*; *see also* Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007) (stating that religious beliefs are protected by the Free Exercise Clause if they are "sincerely held"); *see also Your First Amendment Right to Freedom of Speech and Association*, JAILHOUSE LAWYER'S HANDBOOK (2010), http://jailhouselaw.org/your-first-amendment-right-to-freedom-of-speech-and-association/ (referring to the four prong test delineated in the pivotal case, Turner v. Safley, 482 U.S. 78 (1987): (1) "Is the regulation reasonably related to a legitimate, neutral government interest?" *Id.* (2) "Does the regulation leave open another way for you to exercise your constitutional rights?" *Id.* (3) "How does the issue impact other prisoners, prison guards or officials and prison

Courts defer to "prison officials regarding prisoners' rights," finding that, "[s]o long as the conditions or degree of a prisoner's confinement are within the sentence and do not otherwise violate the Constitution, the due process clause does not require judicial oversight."[156] The rational relationship test is used to examine "whether there is a rational relation to a legitimate state interest."[157]

In applying the rational relationship test, the question remains: should one's freedom of association be limited to such a severe extent that he literally loses his mind? Does such action bear a rational relationship to talking back or having unsavory political beliefs in jails and prisons? Although the rational relationship test is the lowest level of judicial scrutiny, and is thus almost always satisfied, I still believe that the answer is likely no. One may argue that there is a rational relationship between bad behavior and the punishments that result from them, no matter how severe. Still, at the crux of the rational relationship test is rationality, and it cannot possibly be rational to excessively affect someone else's psyche, thereby making them ironically irrational in the process.

Often times, prisoners' rights are restricted and officials are given discretion over the punishments enforced to maintain order within the prison.[158] However, what happens when maintaining order within the prison interferes with one's behavior once he is released? If the role of the Department of Corrections is to "correct" those who are imprisoned, as we are led to believe, excessive solitary confinement surely is not doing the job. As stated above,[159] excessive solitary con-

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resources?" *Id.* (4) "Are there obvious, easy alternatives to the regulation that would not restrict your right to free expression?").

156. *Id. But see* Davis v. Ayala, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring):

> [D]espite scholarly discussion and some commentary from other sources, the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. To be sure, cases on prison procedures and conditions do reach the courts. See, e.g., Brown v. Plata, 563 U.S. ––––, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011); Hutto v. Finney, 437 U.S. 678, 685, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment"); Weems v. United States, 217 U.S. 349, 365–367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: "In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference.

157. *Id.*

158. *See* Richmond, *supra* note 96, at 1.

159. *See supra* Part II.

finement sentences affect prisoners so much psychologically that they often times cannot assimilate back into society. Even worse, they come out more violent.[160] The irony of someone being sentenced to solitary confinement for a nonviolent offense, and then coming out of solitary confinement violent is jarring. These violent tendencies have a dangerous impact on everyday citizens once inmates formerly held in solitary confinement are released back into society. So it comes full circle. What price are we willing to pay for those who "deserve it?" Are we truly willing to ruin someone's life for the rest of his life because he accessed Facebook two to three times every two days? Are we willing to risk civilian safety for the same reason? Of course, bad behavior in correctional facilities is rationally related to the punishment that the inmates must receive, and some administrators argue that solitary confinement is the most effective way to punish inmates. I do not dispute this. In fact, in this Comment, I do not even call for the eradication of solitary confinement in its entirety. What I ask for is its limitation. Spending months at a time in solitary confinement does not bear a rational relationship to having a phone, especially when there is no evidence of an escape plan or a violent plot. Such a punishment is excessive and a blatant abuse of power.

Because of a toxic culture of punishment, mixed with race and class-based malevolence,[161] the United States relies on incarceration, and undoubtedly solitary confinement, more heavily than any other country in the world.[162] The excessive use of this practice must be stopped before we can see any true prison reform. In Part V, I will discuss President Obama's Executive Order and other widespread efforts of reform. This shows promise that our criminal justice system is moving away from the trend of excessive solitary confinement sentences for nonviolent offenses.

160. Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.A6f7e58f81b9.

161. *See generally* ALEXANDER, *supra* note 45; TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015). Alexander and Coates both highlight how race and socio-economic status factor into how one fairs, not only in society, but within the criminal justice system.

162. ALEXANDER, *supra* note 45, at 8–10.

V. LOOKING FORWARD: HOPE, CHANGE

A. The Executive Order

In 2010, 16-year-old Kalief Browder was "accused of stealing a backpack."[163] He was sent to the infamous Rikers Island, "where he reportedly endured unspeakable violence at the hands of inmates and guards—and spent nearly two years in solitary confinement."[164] During his time at Rikers, Kalief was never found guilty of the crime.[165] Instead, he was awaiting trial the entire time.[166] Then finally, in 2013, the charges were dropped and Kalief was released.[167] Though Kalief enrolled in classes at Bronx Community College, "his life was a constant struggle to recover from the trauma of being locked up alone for 23 hours a day. One Saturday, he committed suicide at home. He was just 22 years old."[168]

In 2016, former President Barack Obama "announced a ban on solitary confinement for juvenile offenders in the federal prison system," stating "the practice is overused and has the potential for devastating psychological consequences."[169] In an op-ed, he also "outlines a series of executive actions that . . . prohibit federal corrections officials from punishing prisoners who commit 'low-level infractions' with solitary confinement."[170] Under President Obama's plan, "the longest a prisoner can be punished with solitary confinement for a first offense is [sixty] days, rather than the current maximum of 365 days."[171] As President Obama noted, "solitary confinement gained popularity in the United States in the early 1800s, and the rationale for its use has

163. Obama, *supra* note 160 (wherein former President Obama wrote about his stance on the excessive use of solitary confinement in the Washington Post's "Opinion" section); *see also* Juliet Eliperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html (discussing President Obama's article and the executive order).

164. Obama, *supra* note 160.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Presidential Memorandum—Limiting the Use of Restrictive Housing by the Federal Government*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Mar. 1, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/03/01/presidential-memorandum-limiting-use-restrictive-housing-federal; *FACT SHEET: Department of Justice Review of Solitary Confinement*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement; Eliperin, *supra* note 163; *see also* Obama, *supra* note 160.

170. Eliperin, *supra* note 163.

171. *Id.*

varied over time [but] [t]oday, it[ ] [is] increasingly overused on people such as Kalief [Browder], with heartbreaking results . . . ."[172]

As a result, President Obama "directed [former] Attorney General Loretta E. Lynch and the Justice Department to review the overuse of solitary confinement across U.S. prisons."[173] The recommendations of the Justice Department included "banning solitary confinement for juveniles and as a response to low-level infractions, expanding treatment for the mentally ill and increasing the amount of time inmates in solitary can spend outside of their cells."[174]

States that have led the way are already seeing positive results:

> Colorado cut the number of people in solitary confinement, and assaults against staff are the lowest they've been since 2006. New Mexico implemented reforms and has seen a drop in solitary confinement, with more prisoners engaging in promising rehabilitation programs. And since 2012, federal prisons have cut the use of solitary confinement by [twenty-five] percent and significantly reduced assaults on staff.[175]

The progress does not stop there:

> Illinois and Oregon, in response to lawsuits, have announced they will exclude seriously mentally ill inmates from solitary confinement, and last month New York state reached a five-year, sixty-two million dollar settlement with the New York Civil Liberties Union in which it pledged to significantly cut the number of prisoners in solitary as well as the maximum time they could stay there. California reached a settlement in September, pledging to overhaul the way it treats almost 3,000 inmates who are frequently kept alone for more than twenty-two hours a day in their cells.[176]

President Obama's Executive Order is a clear step in the right direction. When President Obama published his report on solitary confinement in January of 2016, talk of solitary confinement became more widespread politically. Indeed, as previously noted, many states have amended their solitary confinement policies to limit the amount of time that inmates are punished.[177] Unsurprisingly, these states have seen a drop in behavioral issues.[178]

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172. Obama, *supra* note 160.
173. *Id.*
174. *Id.*
175. *Id.*
176. Eliperin, *supra* note 163.
177. Obama, *supra* note 160; Eliperin, *supra* note 163.
178. Obama, *supra* note 160. Mississippi, mentioned *infra* Part I.B, is just one example.

B. Proposed Legislation

In May 2014, Representative Cedric Richmond introduced the Solitary Confinement Study and Reform Act.[179] This "bill aim[ed] to study and promote reforms to how solitary confinement is done in America and to bring the practice more in line with the U.S. Constitution."[180]

The Act had several provisions that addressed the concerns identified in this Comment. First, the Act set out to establish a commission, which would "implement a comprehensive legal and factual study of the numerous impacts, including mental, physical, and economic, of solitary confinement in the United States."[181] The Commission would hold public hearings, "take . . . testimony, and receive such evidence as it considers advisable to carry out its duties."[182] The bill also included a compliance mechanism: "[E]ach fiscal year, any money that a state would otherwise receive for prison purposes for that fiscal year under a grant program shall be reduced by fifteen percent for non-compliance."[183]

Unfortunately, this bill died in a previous Congress.[184] Additionally, with the Republican Party being a majority of the current Congress and Senate, it is unlikely that this bill will pass now. One thing that the Solitary Confinement Study and Reform Act does show is that there are legislators who would like to see an end to the excessive use of solitary confinement as well. In this Comment I have noted a Supreme Court Justice, a former President, and a Congressman who have all spoken out against the excessive use of solitary confinement. Figures of this magnitude lending their voices to this movement demonstrate a glimmer of hope, even change.

CONCLUSION

Before he was twenty-one years old, my brother, Travis Peterkin, had already been arrested three times. The first time, for dropping a candy wrapper on the floor. Littering in New York is punishable by

179. Solitary Confinement Study and Reform Act of 2014, H.R. 4618, 113th Cong. (2014); *see also* Richmond, *supra* note 98, at 13.

180. Richmond, *supra* note 96, at 13.

181. *Id.* at 15.

182. *Id.* at 16.

183. *Id.*

184. Solitary Confinement Study and Reform Act, H.R. 4618, 113th Cong. (2014).

fine,[185] but the police officer who had witnessed my brother's littering took him in overnight. Ironically, when the officer had discovered the wrapper on the floor, my brother was attempting to pick it up. This happened on my sixteenth birthday.

The second time my brother was taken to jail was for walking through a park at night. There was a sign posted, warning against walking through the park at dusk. Still, because this particular park was a shortcut to the closest store—to which my brother was going to grab some groceries for my mother—he figured a two-minute walk through the park wouldn't hurt. Besides, he had never seen anyone get in trouble for this. He was wrong. He was again taken and held overnight.

The last time, my brother walked his bike on the sidewalk. In New York, you can only ride your bike in the street, so my brother walked his bike to the street so he could ride it. Still, police officers took him in.

I discuss these interactions because I would be remiss if I ended this Comment without touching on the ways that the criminal justice system has disproportionately affected black men and women in this country. I have cited Michelle Alexander and Ta-Nehisi Coates to demonstrate that many scholars have already researched and published works explaining how the criminal justice system disproportionately affects black men and women because of the over-policing of black bodies. I am no stranger to this.

My family is from the Brownsville section of Brooklyn, New York. Each time that my brother was arrested, if my family did not have the means or the knowledge of our rights to get my brother out of lock-up, he would have been taken to Riker's Island. The main thing that I keep thinking is what if my brother ended up like Kalief Browder? What if Travis had been sent to Riker's and had been caught talking back or using someone else's contraband cell phone? After watching the "I'm On Fire" fiasco unfold and reading about Kalief Browder, I could not help but think about the countless men and women close to me who were but so close to going to solitary themselves, and how they could have come out forever changed because of a split-second decision that was nonviolent. It is my hope

185. New York Code § 16-118 (2006) (stating that littering is prohibited, and that any violation of this crime is punishable by a fine of between $50-$250).

that this Comment can convince more people that the current administration of solitary confinement is excessive and unconstitutional.

Though President Obama spoke out against the excessive use of solitary confinement, the political climate of our country has suddenly shifted. Crime and punishment, as has been expressed by Michelle Alexander, is a Republican ideal.[186] Indeed, it is undoubtedly what won Ronald Reagan and George H.W. Bush their elections.[187] With this being known, it is our job, now more than ever, to shed light on the injustice of the excessive use of solitary confinement for nonviolent offenses.

Solitary confinement was based on the belief that prisoners, when isolated with a Bible, would use the time to repent and pray.[188] Today, tens of thousands of people suffer mental anguish because of this "belief." There was no actual scientific evidence supporting the argument that isolation truly reforms inmates, but there is real scientific evidence to support the contention that it does not. Thus, we must use this proof to ensure that the practice is, at the very least, not abused. The current use of solitary confinement should be limited, especially for nonviolent offenses.

186. ALEXANDER, *supra* note 43, at 44–47.
187. *Id.* at 47–48.
188. Sullivan, *supra* note 34.

APPENDIX

"I'm On Fire" Lyrics
[*Chorus*]
I'm on! I'm on fire! I'm on fire! (8 times)
[*Verse 1*]
I'm a fight dude when I fight through
Been through hell but I made it through
Never been in love but I'll marry the mic
I'm a volcano erupting, true
Imma make that fire long B, imma smoke out this room
Smoking on that blue
Rise out, my swagger cool
Immaculate, extravagant
Use the words then say my name
Gasoline, strike a match, miss some more, I am the flame
Hear me out, I sound bright, satellite, fear the rage
AR, AK, spit something, go straight to brains
(Inaudible), I go hard, bye leather, bring the pain
Lay loose, I must say, it's a hard desert I'm hotter than
Tea kettle, I'm going out, Now I'm on can't turn me out, light switch I'm flipped up
Finna make a stand like I'm gettin' up
Imma rise up, elevate, go straight to the top, escalate.
Finna blow up, no day late.
And I aint playing like Terminator
My mind made up and stand up
Hotels like [inaudible]
Green light [inaudible]
[*Chorus*]
I'm on! I'm on fire! I'm on fire! (8 times)
[Verse 2]
I flame with the brain because I'm the torch
Stand too close you might get scorched
Give them the [inaudible] like you did before
My tongue a two-edged sword
Hercules, Conan, I'm a Warrior, He-Man.
Tag-team, I was in the west, now you can call me trash can
Pick it up, take it out, burn it up, that's what I'm about
Concrete, I'm silent, that's real talk, common stock
Put it on, I fire it up, imma blaze call the fire truck
Never mind don't waste time, I don't fight men in my hometown
[inaudible] I'm Bruce Lee, call me Jet Lee, cause I'm unleashed
Cause I'm the one, no two, three

It'll take a crane just to move me
Excuse me, pardon me, let me through, I'm here now
[inaudible]
Illuminated, illuminati, like Pac said, Killuminati
Illuminati run through your body, [inaudible] like a twelve inch shotty
Real lit, real lit
Homie, I'm in the zone now.
Best believe it's on now, it's on now.
[*Chorus*]
I'm on! I'm on fire! I'm on fire! (8 times)
Mix, mix, mix, mix, mix, mix (Repeatedly)
We bout to mix the game up mix, mix (7 times)
[*Verse 3*]
I step out my new car, chain gave me whip-lash
Fire up that new reef, hit twice then tap a**
I ball like I'm bowling.
[inaudible]
Drug get so large you think I'm riding with King-Kong.
Every day is new money, my cash flow like tray, tray
I get money, you spend money
My weed green, your sh** black.
Who this? I ball hard.
Take cars in my backyard
Those whips and chains I bought it all with my black card
Switch the game up
N***a switch ya name up
Call the green dot cause that's exactly how I came up
In the south cack em do a show for my people
Scoop Drizzle stop in that '96 regal
All I do is ball, swaggin' every day though
Homie I get money, talkin' bout the pay though
Hit the studio and drop a track and got my fatal
I'm real off in this thing and you know imma mix the game up
Mix, mix, we bout to mix the game up mix, mix (7 times)
[*Verse 4*]
I'm [inaudible] like Kay Slay
Smash Kim like Ray J
Played around like hill say
Now they all on my pay day
I [inaudible] fast give you whip lash
Step in you smell cash
I sh***ed on the track now you smell it, my black a**
I ball hard [inaudible]

Pass the blunt and I burn haze
Hide in the booth
When I produce I mix up the turntable
Mixes like I'm a chef
Mixes [inaudible]
Bruce Lee on the song now I need me a karate belt
[inaudible], hot pursuit, you know what [inaudible]
Now you saying I'm out the scoop
Yea [inaudible] I'm proud too
For the drizzle, drizzle, rain, rain
Drizzle all in my rain, rain
Rain on that range, range
Mixing up the game, game
Mix, mix, we bout to mix the game up, mix, mix (5 times)[189]

189. LightworkerTV, *supra* note 2. Note: All lyrics marked "inaudible" are a result of the low-quality video and the prisoners either yelling or speaking over each other when someone is rapping.