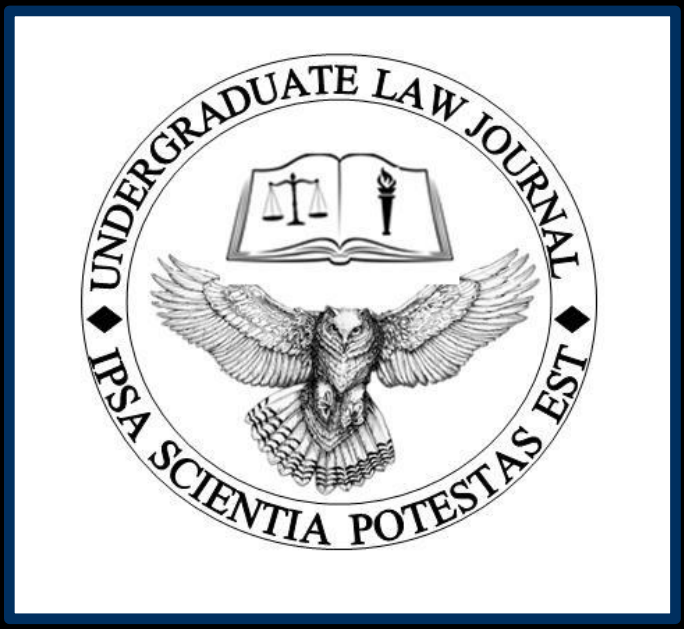
UNDERGRADUATE LAW JOURNAL



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Spring 2019

The ULJ would like to thank Holly Pereira, Chris Kuczynski, and Katherine Murphy for their invaluable assistance and Professors Sarah Nielsen, Emre Yersel ,Anthony Horky, Paul Koku, Dalel Bader and Cheryl Arflin for assisting with the mentoring, editing and proofing.

The Florida Atlantic University Undergraduate Law Journal is published online by FAU Digital Library and is available at http://journals.fcla.edu/FAU_UndergraduateLawJournal.

The Undergraduate Law Journal is also a contributor to an Intercollegiate Undergraduate Law Journal which may be viewed at http://intercollegiatelawjournal.com/.

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Letter from the Editor-in-Chief

The Undergraduate Law Journal is wrapping up another great year, thanks to the tireless work of our Advisor Cheryl Arflin, our dedicated E-board, and all the student and faculty members who were essential during the editing process. The most exceptional articles from undergraduate authors are published in the annual journal. In publishing the journal, we hope to stimulate and sustain undergraduate law discussion and education at FAU. We thank the Pre -Law Services Committee for expanding our reach by increasing visibility and access to educational resources for pre law students.

By providing students with assistance during the research process, fostering thought provoking discussions, and connecting motivated students with industry leaders and legal professionals, the ULJ provides tangible and longstanding benefits to its members. Our readers will enjoy a wide subject variety of legal analyses, from dealing with constitutional challenges to the complexities of eminent domain.

This year's publication would not have been possible without the undying commitment of adviser Dr. Cheryl Arflin, to whom I express gratitude for ensuring the longevity of the journal, and our faculty advisors who dedicated hours of their valuable time to assist students with crafting their research, and our student editors found time to perfect the quality work that our authors provide.

Our member- scholars continue to produce quality legal analyses year after year, consistently contributing to the development of legal research. Please explore our annual electronic publications through the FAU online library (www.journals.fcla.edu/FAU_UndergraduateLawJournal). If you have any questions, please email ckimbrel@fau.edu.

Cheers, Nora Douglas
Editor-in-Chief, Undergraduate Law Journal, 2018/2019

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lose it' for the job scenario. Though biometrics might be making the workplace increasingly more efficient and innovative with this also comes new risks. Employers are especially at risk with potential liability encompassed within privacy law and how this data is obtained and stored. The employers require their employees to submit to the use of biometrics, yet there are minimal to zero required obligations to the employee by the employer. There are currently no federal regulations put in place for the protection of employee privacy rights relative to biometrics.

Affirmative Action has been a topic in American politics since the civil rights era of the 1950-1960s. Although this policy was created within the federal government to promote racial diversity during the civil rights era, universities took notice and implemented their own interpretations. Several lawsuits have challenged these interpretations and have become more controversial in practice over time. Race neutral affirmative action has become the new alternative for states that have banned racial affirmative action. The benefits behind socio-economic policies, such as the 10% plan, allows under-privilege students to have the opportunity to pursue a higher education with fewer roadblocks. By removing racial preferences from applications, this will prohibit institutions from discriminating against any student of color while avoiding the legal issues behind racial affirmative action.

Who has the power to declare war? Many would say that the U. S. Constitution is clear and Article 1, Section 8, Clause 11 states that the U. S. Congress has the power to declare war. That clause has only one interpretation. However, the Presidency of the U. S. has found a loop hole to undermine this constitutional mandate, and that is by using the Commander-in-Chief clause. This clause, located in Article 2, Section 2, Clause 1 of the Constitution, states that the President shall be the Commander in Chief of the army and navy, and of the militia of the several states. The President is

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Advocates of freedom of the press argue that it would be ridiculous to put a prior restraint on the media simply to protect people's "secret affairs." One argument is that if an individual is having an affair they should not do so in public knowing that anyone could record them and send it to their spouse. But regardless of the action being performed by an individual in public, he or she should have a right to autonomy without being exposed by the media. Should one's private affairs receive the same protection as his/her cell phone?

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theory as described in the Federalist papers prompts an entirely different perspective. John Jay wrote, “Nay, that absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.” He particularly rejected the image of a king as President.

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Intersectionality is a theory originating from Kimberlé Crenshaw in 1989. The theory focuses on, “the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups.” This theory is used by feminist theorists to shed light on the plight of African-American women and women of other minority groups. The protection against such discrimination has been a recent development within only a few decades. This development has been fought in the office of lawmakers and in all the levels of the U.S. Courts of law. This article will analyze how the courts have dealt with such discriminatory cases, how the law has transformed, and how opinions have been adjusted to uphold the spirit of the U.S. Constitution.

Apple's App Store: Exploring the Future of Antitrust Laws

by Alyssa Alvarez

Introduction

Apple, the well renowned technology company is acknowledged for an incredibly unique and successful business model, targeting consumers with its exclusivity. The company's distinctiveness is not limited to the physical design, it is also distinctive because of its iOS software, Apple Music, and App Store. The App Store was introduced to Apple users in 2008, growing from only 500 apps to billions of apps.[1] Developers are required to enter an App enrollment program and pass a series of guidelines to develop his or her app through Apple.[2] This means that no third party developer can function properly on Apple devices or be added onto Apple products without illegally changing the software of the Apple interface, also known as "jailbreaking."[3] Jailbreaking and other forms of unauthorized modification of iOS products "is a violation of the iOS end-user software license agreement" and "may deny service for an iPhone, iPad, or iPod touch that has installed any unauthorized software."[4] Apple's right to void a user's warranty and Apple Care support incentivizes Apple users to strictly use the App Store. The particularly exclusive ecosystem of the App Store may be threatened by

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[1] *The App Store Turns 10*, Apple Newsroom, December 08, 2018, https://www.apple.com/newsroom/2018/07/app-store-turns-10/, (last visited January 27, 2019.)

[2] *Apple App Review*, Apple, https://developer.apple.com/discover/, (last visited January 27, 2019.)

[3] *Unauthorized Modification of IOS*, Apple Support. June 15, 2018, https://support.apple.com/en-us/HT201954, (last visited January 27, 2019.)

[4] Id.

an antitrust lawsuit before the Supreme Court, which will either strengthen the protections afforded by the Sherman Antitrust Act[5] or weaken the overall legality of antitrust laws for the future.

Apple Inc. v. Robert Pepper: In Regards to the Apple iPhone Antitrust Litigation

An ongoing case, *Apple Inc. v. Robert Pepper*[6], goes over the material facts of Apple's recognized App Store. It emphasizes the fact that Apple makes it increasingly difficult and nearly impossible for its consumers to purchase applications other than through its monopolistic store. The App Store takes a 30% commission[7] from every application purchase from the developers, which ultimately forces many developers to increase the overall price of the applications. Therefore, Apple consumers pay Apple much more for the apps than they would typically pay in a competitive market, because the commission costs are inevitably trickled down to the consumer with no other alternative. The Plaintiff's argument in the *Apple v. Pepper* case states that if multiple individual firms or third party developers sold applications outside of Apple's closed system (creating an alternative competitive market), subsequently Apple users would pay a significantly lower price. *Pepper*

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[5] Sherman Antitrust Act, 15 U.S.C. §§ 1-38, Cornell Law School, https://www.law.cornell.edu/wex/sherman_antitrust_act, (last visited March 19, 2019.)

[6] *Apple Inc. v. Pepper*, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Leagle, https://www.leagle.com/decision/insco20180618c39, (last visited March 19, 2019.)

[7] *Brief for the United States as Amicus Curiae*. WestLaw. May 18, 2018. https://1-next-westlaw-com.ezproxy.fau.edu/Document/I6aa55b35541811e8a2e69b122173a65f/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=21&docFamilyGuid=I6aa55b36541811e8a2e69b122173a65f&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.Search%29, (last visited January 27, 2019.)

is seeking damages for consumers who purchased apps from the App Store. He is seeking a monetary reward for the overcharge of app purchases as well as a petition to allow third-party applications across all Apple products.[8] Consumers similarly situated may argue that Apple's App Store establishes a monopoly.

Apple v. Robert Pepper: The Aftermath

Ultimately, the U. S. District Court for the Northern District of California dismissed the case due to a lack of stated antitrust injury, [9] based upon the requirements of the *Clayton Act*[10], the *Sherman Antitrust Act*,[11] and the *Illinois Brick Doctrine*.[12] Robert Pepper later appealed the dismissal to the U. S. Court of Appeals for the Ninth Circuit in California.[13] Apple appealed the case,[14] allowing the lower courts to send their records of the case up to the Supreme Court in hopes that it would review the verdict. The Supreme Court granted Apple's petition in 2018.[15]

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[8] *Apple Inc. v. Pepper*, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Leagle, https://www.leagle.com/decision/insco20180618c39, (last visited March 19, 2019.)
[9] Basem Besada, and Isaac Idicula, *Apple Inc. v. Pepper*, Cornell Law School, November 20, 2018, https://www.law.cornell.edu/supct/cert/17-204, (last visited January 27, 2019.)
[10] *Clayton Act*, 15 U.S. Code § 12, Cornell Law School, https://www.law.cornell.edu/uscode/text/15/12, (last visited March 19, 2019.)
[11] *Sherman Antitrust Act*, 15 U.S.C. §§ 1-38, Cornell Law School, https://www.law.cornell.edu/wex/sherman_antitrust_act, (last visited March 19, 2019.)
[12] *Illinois Brick Doctrine Law and Legal Definition*, USLegal, https://definitions.uslegal.com/i/illinois-brick-doctrine/,(last visited March 19, 2019.)
[13] Id.
[14] Id.
[15] *Apple Inc. v. Pepper*, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Leagle, https://www.leagle.com/decision/insco20180618c39, (last visited March 19, 2019.)

Defense of the *Illinois Brick Doctrine*

The Supreme Court case will question whether developers and consumers have the right to sue Apple through antitrust laws. Antitrust laws were developed to eliminate any hindrances with free competition and "protect trade and commerce against unlawful restraints and monopolies."[16] Apple has remained protected from these lawsuits due to its defense using the theory behind the court's decision in *Illinois Brick Co. v. Illinois*.[17] This case concluded that consumers could not sue the alleged non-competitive company if consumer/business transactions were actually with intermediaries and not the named company in the law suit. Apple considers themselves to be a middleman between the consumer and the developer of the Apps. Therefore, only individual developers could potentially file a lawsuit against the company, not the consumers. Essentially, the developers are paying Apple to distribute applications to its iOS users. Therefore, the developers are the only direct purchasers of Apple's services that could sue Apple, meaning that the plaintiff, Pepper, lacks standing to sue because there is not a direct link between them and Apple.[18] Apple argues that in addition to the protection under the *Illinois Brick Doctrine*, Apple also technically does not "possess key price-setting power,"[19] The developers are ultimately controlling the price of applications, not Apple.

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[16] *15 U.S.C.A. § 12 Title 15*, WestLaw. November 02, 2002. https://1-next-westlaw-com.ezproxy.fau.edu/Document/NBEB622A0AFF711D8803AE0632FEDDFBF/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default), (last visited January 27, 2019.)

[17] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), Justia, https://supreme.justia.com/cases/federal/us/431/720/, (last visited March 19, 2019.)

[18] Id.

[19] Basem Besada, and Isaac Idicula, *Apple Inc. v. Pepper*, Cornell Law School, November 20, 2018, https://www.law.cornell.edu/supct/cert/17-204, (last visited January 27, 2019.)

When analyzing Apple's argument from the consumer's position, it is reasonable to assume that the consumer believes it is engaging in a single transaction with Apple, given that Apple receives the consumer's payment and billing information and it appears that the product, the app, is being delivered by Apple. The *Illinois Brick Co.* case should be reevaluated, especially since many states have already questioned the ruling in this case. Twenty-nine states as of November 2018 filed an *Amici Curiae brief*, asking for the court decision to be overturned. These states claim that the Brick Doctrine is "grounded in predictions and policy concerns that have been undermined by subsequent experience and events."[20]

According to the court, some of the public policy purposes for litigating the Illinois case was not to force Congress to enact additional antitrust statutes, but to protect businesses from lawsuits from both the consumer and developer for the same damages.[21] This is why some may agree with Apple's defense. But, in regards to this upcoming Apple case, consumers and developers would be seeking damages for different injuries. Consumers would be suing for overpriced applications in a monopoly and developers would be suing for a loss of profit due to the commission as well as the overall higher price of its applications.

Conclusion

The Supreme Court decision is still pending.[22] After successful yet

[20] *Class Action Issues*, American Antitrust Institute, November 5, 2018, https://www.antitrustinstitute.org/work-product/class-action-issues-update-november-2018/, (last visited Jan. 27, 2019.)

[21] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), Justia, https://supreme.justia.com/cases/federal/us/431/720/, (last visited March 19, 2019.)

[22] Apple Inc. v. Pepper, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018), Oyez, https://www.oyez.org/cases/2018/17-204, (last visited March 19, 2019.)

controversial mergers such as the AT&T Time Warner merger,[23] it is reasonable to assume that Apple's defense may be proven credible at the Supreme Court level. If Apple wins this case, it will establish a trend whereby other companies behave in a more monopolized and closed off fashion. On the other hand, if Apple is found actively engaging in antitrust activities, other companies will be pressured to act more morally, especially if it means these companies can be sued by consumers and developers for the same actions taken by the company. Until then, the Supreme Court will debate potential verdicts of the case and whatever the outcome, it will profoundly impact the future of company business models as we currently know them.

[23] Herbert Hovenkamp, *Is the AT&T-Time Warner Decision a Blow Against Antitrust?,* Knowledge at Wharton, June 19, 2018, http://knowledge.wharton.upenn.edu/article/impact-att-time-warner-decision/ (last visited Jan. 27, 2019.)

Guilt. Punishment. Justice, but is it really?

By Stefania Cardenas

"…Punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law."[1] *Cesare Beccaria*

Guilt. Punishment. Justice. Three simple words that define the basis for our actions for breaking a law in our legal system. Since the beginning of history, justice has been sought by the public to be the result of punishing a wrongdoer. "An eye for an eye, "is possibly the earliest theory concerning punishment for a wrong that is committed and most commonly representative of punishment, and hence, justice that humanity remembers.

After the jury voices their opinions and the judge enters judgment, the sentencing is the part that must be decided. While many court cases lead to predictable and expected outcomes, the sentencing system and the different possibilities behind it, are found troublesome by many. Famous cases such as Brock Turner's or Ethan Couch's include sentencing that has been found to be unduly lenient.[2] On the other hand, we find an extraordinary amount of cases in which sentencing for

[1] Cesare Beccaria (Italian Judge, 1738-1794), Brainy Quote, https://www.brainyquote.com/quotes/cesare_beccaria_729749, (last visited March 19, 2019.)

[2] Sean Lester, *While North Texas 'affluenza' teen went free, similar East Texas case led to 20 years in prison*, The Dallas Morning News, https://www.dallasnews.com/news/crime/2016/02/15/while-north-texas-affluenza-teen-went-free-similar-east-texas-case-led-to-20-years-in-prison, (last visited March 19, 2019.)

shoplifting has been awarded with life sentences.[3] The violation of the Eighth Amendment seems to be present in many of these Supreme Court cases, but they have not been corrected to adjust a punishment that fits the crime as it was intended. The basic guidelines for sentencing must be analyzed along with cases that are set as examples of many of the disparities that are emerging.

The basic determination of punishment falls under current guidelines and statutes. Once the guilty verdict has been determined, a judge will follow guidelines based upon the current laws instituted to determine the final sentence. Guidelines found within our current justice system have been found to be too easily affected by bias, which may lead to possible Eighth Amendment violations and thus, ironically, injustice. Bias is emerging as a problem, along with laws instated that allow for harsh punishment for small crimes. Three strikes laws started in Washington State in 1993,[4] later to be enacted by other states, and is a prime example of this injustice. Furthermore, the vagueness found within the guidelines that judges follow, allow for the implementations of things such as racial disparity and affluence to disturb the proper balancing of the sentencing of the recipient. The question presented are whether the current guidelines encourage, enable, and allow injustice within our justice system?

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[3] Fiona Keating, *Scores of prison sentences declared 'unduly lenient' after victims complain,* Independent Minds, July 30, 2017, http://www.independent.co.uk/news/uk/home-news/prison-sentences-attorney-general-unduly-lenient-sentence-scheme-rapist-murderer-terror-offences-a7867351.html, (last visited March 19, 2019.)

[4] Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime,* ABA, June 30, 2017, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_vitiello/, (last visited March 19, 2019.)

The Eight Amendment

The Eighth Amendment of the Constitution states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[5] Bail is ''excessive'' in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[6] When dealing with excessive fines, the court determined that ''the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.''[7] However, in *Austin v. U.S.*, the court held that the excessive fines clause can be applied in civil forfeiture cases.[8] The concept of excessive punishment continued to evolve with the *Trop v. Dulles* case, where based upon its interpretation of cruel and unusual punishment, the court stated, ''[we] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.''[9] As stated previously, cruel and unusual punishment is determined by society and the standards that we are upholding in terms of decency. Public executions, guillotines and electric chairs may be a thing of the past and no longer tolerated by the public, but what are our current standards of decency and what are those things that we are willing to accept evolving as well?

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[5] *Further Guarantees in Criminal Cases, Eighth Amendment*, Government Publishing Office, https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-9.pdf, (last visited March 19, 2019.)
[6] *Stack v. Boyle*, 342 U.S. 1, (1951), Justia, https://supreme.justia.com/cases/federal/us/342/1/, (last visited March 19, 2019.)
[7] *BFI, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), Justia, https://supreme.justia.com/cases/federal/us/492/257/, (last visited March 19, 2019.)
[8] *Austin v. United States*, 509 U.S. 602 (1993), Justia, https://supreme.justia.com/cases/federal/us/509/602/, (last visited March 19, 2019.)
[9] *Trop v. Dulles*, 356 U.S.86, (1958), Justia, https://supreme.justia.com/cases/federal/us/356/86/, (last visited March 19, 2019.)

All "excessive" matters, in terms of bail, fines or punishment, are after all, determined by the court. The courts and judges who represent them, are the last point in which decisions are made to determine bail, fines or punishments that follow the guidelines set by the Constitution. The judges are all representative and influenced by the public in what the proper punishment is for the specific case. Although judges in 2019 may not be sentencing people to be beheaded in the guillotine, unjust and immoral punishments are being created that might fall outside the realm of what we consider our standards of decency. Realistically, excessive punishment might not involve public execution in our current times, but it might include excessive fines for petty crimes or life term sentences for drug possession.

History of the Federal Guidelines

Our most modern Federal Guidelines for sentencing began in 1984, with the creation of the Sentencing Reform Act of 1984 (SRA) and the Sentencing Commission. Prior to the SRA, federal sentencing orders were essentially unappealable if they fell within the prescribed sentencing range.[10] Sentences for similar crimes were given sentences that were vastly different, since there were no mandated guidelines, Studies confirmed the devastating injustice. To cite one example, judges from the Second Circuit were asked to recommend sentences based on the identical presentation reports. The sentences that were administered in one extortion case varied from eight years with no fine to twenty years and a $65,000 fine. This became a concern which was addressed

[10] *Dorszynski v. United States*, 418 U.S. 424, (1974), Justia, https://supreme.justia.com/cases/federal/us/418/424/ (last visited March 19, 2019.)

by the Sentencing Reform Act.[11] The passage of mandatory guidelines with the implementation of the SRA of 1984, resulted in a monumental retraction of judicial discretion in sentencing.[12]
As stated by Senator Edward M. Kennedy, "This Act established the Sentencing Commission for the purpose of formulating guidelines to be used by judges in the sentencing process and abolishes parole in the Federal system. Under the system established by the 1984 Act, people convicted of similar crimes will serve similar sentences, and the sentences imposed will reflect the actual time that must be served."[13] Federal mandatory minimum sentencing statutes demand that execution or incarceration follow criminal conviction, a category that covers drug dealing, murdering federal officials and using a gun to commit a federal crime.[14] There are three categories that these statutes fall under, the first category includes a "safety valve" that allows some leniency for first time, small time offenders to serve penalties less than mandatory or

[11] .*Sentencing Commission Guidelines*. Hearing before the Committee on the Judiciary, United States Senate, One Hundredth Congress, First Session, on Guidelines Drafted by the U.S. Sentencing Commission, October 22, 1987, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=cat06361a&AN=fau.027440489&site=eds-live&scope=site, (last visited March 19, 2019.)
[12] Henry Stegner, *An End to Arbitrary and Capricious Federal Sentencing Guidelines*, Idaho Law Review, Vol. 53, No..3, Sept.2017, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=lft&AN=124478813&site=eds-live&scope=site, (last visited March 19, 2019.)
[13] *Sentencing Commission Guidelines*. Hearing before the Committee on the Judiciary, United States Senate, One Hundredth Congress, First Session, on Guidelines Drafted by the U.S. Sentencing Commission, October 22, 1987. ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=cat06361a&AN=fau.027440489&site=eds-live&scope=site, (last visited March 19, 2019.)
[14] Id.

at least less severe prison sentence or fines than are considered mandatory.[15] The second category involves flat or single sentence statutes that incur life imprisonment. The third category is described as the "piggyback" category, which are not mandatory minimums, but sentence defines the offenders by reference to underlying statutes including those that impose mandatory minimums.[16]

Under a 2005 case, *Booker v US*, the courts eliminated the binding effect of the sentencing guidelines. Post-verdict it was determined that guidelines cannot be characterized as a source of mandatory minimum sentence, although they continue to tilt heavily towards incarceration.[17] Prior to the *Booker* case, all judges were forced to follow the sentencing guidelines for every case tried. However, they did have the option to not strictly follow the mandated guidelines as long as they explicitly stated the reasoning why the case was not appropriate to fall under the mandatory standards. After the *Booker* case, the rules changed and gave more freedom and less regulation to judges, only referencing the guidelines as a guide rather than a law that must be followed.

The Sentencing Guidelines stated, "The *Booker* decision addressed the question left unresolved by the Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004): whether the Sixth Amendment right to jury trial applies to the federal sentencing guidelines. In its substantive *Booker* opinion, the Court held that the Sixth Amendment applies to the sentencing guidelines. In its remedial *Booker* opinion, the Court severed and excised two statutory provisions, 18 U.S.C. § 3553(b)(1), which made the federal guidelines mandatory, and 18

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[15] *An Overview of the Federal Sentencing Guidelines,* 2019, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf, (last visited March 19, 2019.)

[16] Id.

[17] *United States v. Booker*, 543 U.S. 220 (2005), Justia, https://supreme.justia.com/cases/federal/us/543/220/, (last visited March 19, 2019.)

U.S.C. § 3742(e), an appeals provision."[18]

However, there is a strong feeling that mandatory minimum sentencing laws have been misused by the Department of Justice because they are frequently directed against low-level offenders, contrary to the original intent of Congress. Combined with sentencing guidelines, most of the sentences that have been imposed by federal judges in the past 30 years have been unjustly long for the conduct and culpability of the defendant. The justice system has been distorted by removing from judges the power to decide the proper sentence in their cases and allowing prosecutors to have influence over the determination of the final sentencing.[19]

Federal Sentencing Guidelines

The Federal Sentencing Guidelines created by the Sentencing Commission determines the length of the prison sentence or probation based upon the seriousness of the offense and the criminal history of the individual. Each type of crime is assigned a base offense level, which is the starting point for determining the seriousness of an offense. The seriousness of the offense can be categorized anywhere from one to forty-three. The more serious the crime, the higher the level. Adjustments are made based on characteristics and factors that applied during the crime such as if there was a plea, obstruction of justice or if there was a weapon involved or if it was used. Adjustments and factors vary from offense to offense. Multiple counts in a case and acceptance

[18] *An Overview of the Federal Sentencing Guidelines,* 2019, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf, (last visited March 19, 2019.)

[19] *Mandatory Minimums and Sentencing Reform,* Criminal Justice Policy Foundation, 2019, https://www.cjpf.org/mandatory-minimums,(last visited March 19, 2019.)

of responsibility are factors that may increase or decrease levels of the offense.[20]

The second determinant of the level of punishment being administered is based upon the criminal history of the individual. The categories are broken down from category one to six. The point at which the final offense level and the criminal history category intersect on the Commission's sentencing table determines the defendant's sentencing guideline range.[21]

After the final guideline range is determined, if it is found that a mitigating or aggravating circumstance exists, the judge is allowed to deviate from the guideline range. When departing from the sentencing guidelines, the judge must state in writing the reason why they chose to depart from the guidelines.

Below is a chart that breaks down and demonstrates the categories and the length of imprisonment based on the intersecting characteristics. For example, according to the chart if we determine an individual has committed a crime of level 35 and falls under a level four due to their criminal history, they are bound to receive a minimum of 235 months and a maximum of 293 months of imprisonment for the crime committed.

[20] *An Overview of the Federal Sentencing Guidelines,* 2019, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf, (last visited March 19, 2019.)
[21] Id.

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
Zone A	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

November 1, 2016

Revisions to various areas of the minimum sentencing guidelines have been made and continue to be tweaked. The most recent revision occurred on November 1st, 2018. However, the most recent revision for the chart was made on November 1st, 2016.

Similar criteria exists for fines for individuals found to be guilty of the crime for which they were charged. The sections are broken down into two categories and the intersecting point becomes the guideline. Fines are required to be imposed for every case, except, if the offender has stated that they are unable to pay the fine or if there is a law or subsection in the statute that overrides their need to pay the fine. The following represents the chart for fines.

Offense Level	A Minimum	B Maximum
3 and below	$200	$9,500
4 to 5	$500	$9,500
6 to 7	$1,000	$9,500
8 to 9	$2,000	$20,000
10 to 11	$4,000	$40,000
12 to 13	$5,500	$55,000
14 to15	$7,500	$75,000
16 to17	$10,000	$95,000
18 to19	$10,000	$100,000
20 to 22	$15,000	$150,000
23 to 25	$20,000	$200,000
26 to 28	$25,000	$250,000
29 to 31	$30,000	$300,000
32 to 34	$35,000	$350,000
35 to 37	$40,000	$400,000
38 and above	$50,000	$500,000.00

[23]

As with any other law, there exists exceptions that permit the minimum sentencing to be entirely disregarded and for the individual to be

[23] Id.

sentenced according to the judge's discretion. As stated in the statute **§5C1.2**. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases: Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);
(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
(3) the offense did not result in death or serious bodily injury to any person;
(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a

> determination by the court that the defendant has complied with this requirement.[24]

From a broad overview of the range found within the categories, it is obvious that there exist vast differences between the minimum and maximum terms and values within the imprisonment length as well as the fine amount. For example, when observing a level twenty-three offense, it is clear that, based on the category that the individual falls into based on their criminal history, the minimum term of imprisonment faced ranges anywhere from 46 months to 115 months, with fines ranging from a minimum of $20,000 to $200,000. Such large ranges demonstrate how a judge might make vastly different choices, and those choices might be based upon possible bias.

Judge power over sentencing is complete, and usually allows suggestions made by the prosecution and the defendant. Factors are listed that need to be taken into consideration, specific to every case tried, that might vary the outcome of the final sentence administered. Although efforts have been made to ensure justice and equality throughout cases, violations of the Eight Amendment have been present throughout history. Cases have been presented in front of appellate courts accusing the court of violating the Eighth Amendment rules.

Eighth Amendment Cases

Perhaps one of the most popular Eighth Amendment cases is *Miller v. Alabama*,[25] in which the Supreme Court held unconstitutional roughly 2,000 life-without-parole sentences, which had been administered to

[24] Id.

[25] *Miller v. Alabama*, 132 S.Ct. 2455(2012), https://www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf, (last visited March 14, 2019.)

juveniles in twenty-eight states and the federal government.[26] The constitutionality of the life-without-parole sentence was in question due to the realization that the sentence meant that the prisoner was meant to die in prison. Juveniles that received such sentences were being defended by stating that due to their age, decisions they made as youths should not be upheld to the same standards as adults.[27] Factors that affect youth differently than adults include their tendency for recklessness and ability to resist peer pressure. Furthermore, when the resulting sentence was compared internationally, it was found that no other nation was administering such sentences in which the convicted criminal was meant to die in prison. Therefore, why was the American justice system the only one upholding such severe sentences?

Another example of an Eighth Amendment violation was presented in the *United States v. Bajakajian* case.[28] During this case, the offender had brought through customs $357,144 in cash, but had only claimed $15,000 during his report to the customs inspector, after being notified that any amount in excess of $10,000 needed to be reported per federal law.[29] The result was that the full total of the cash was forced to be forfeited, which led to the accusation of the violation of the Excessive Fines Clause of the Eight Amendment. There are four factors that

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[26] Craig Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, George Mason Law Review, Vol. 20, No. 1, Fall 2012, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=lft&AN=83823007&site=eds-live&scope=site, (last visited March 19, 2019.)

[27] Id.

[28] *United States v. Bajakajian*, 524 U.S. 321 (1998), Justia, https://supreme.justia.com/cases/federal/us/524/321/, (last visited March 19, 2019.)

[29] *Reports on Exporting and Importing Monetary Instruments*, 31 U.S.C. § 5316(a)(l)(A) (2012), https://www.law.cornell.edu/uscode/text/31/5316, (last visited March 19, 2019.)

constitute excessive fines according to the Supreme Court: (1) nature of the crime and its connections to other criminal activity, (2) whether the defendant fits into the class of persons at whom the statute was aimed,(3) the maximum sentencing or fine under the applicable statute and the sentencing guidelines, (4) and the harm caused by the offense.[30]

Supreme Court cases have not been the only factor in witnessing Eighth Amendment violations. Statutes have been passed as well, that due to their inflexible finalities might lead to a conclusion of extreme consequences for undeserved crimes. The three strikes law originated in 1993 in Washington State,[31] "three strikes and you're out" was the fad at the time, in terms of statutes created for repeat offenders. This law would be the main example of the major flaw that would demonstrate how even laws that have been passed individually by states are subject to bias and a possible violation of the Eighth Amendment. The three strikes law states that criminals that have convicted with multiple previous felonies will automatically be sentenced to life imprisonment upon their third conviction. The requirement for the crimes to be tried under this statute are vague.[32] Any crime that fall under a serious or violent category would possible fall under the purview of this statute. Although the state that began the trend was Washington, California's

[30] Slavinskiy, Yan, *Protecting the Family Home by Reunderstanding United States v. Bajakajian*, Cardozo Law Review, Vol. 35, No. 4, Apr. 2014, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=lft&AN=96035799&site=eds-live&scope=site, (last visited March 19, 2019.)

[31] Washington State RCWs, Title 9, Chapter 9.94A.570, *Persistent Offenders*, https://app.leg.wa.gov/rcw/default.aspx?cite=9.94A.570, (last visited March 15, 2019.)

[32] Id.

legislature upheld the strictest and harshest version of this law.[33] In California, for the crime committed to fall under the statute, the first and second offense were required to be serious or violent. However, the third crime did not require such standards. As a result, California began sentencing people to life sentences for crimes like petty theft and drug possession.[34] The result of the harsh statute was a strained budget due to the oversized nature of the prison population due to the law. At the time, before the statute reform was passed, second and third strikers made up roughly a quarter of California's large prison population.[35] After the reform act was passed, defendants may only be sentenced 25 years to life if their crime was violent or serious, or they have disqualifying crimes among their priors such as sex crimes or violent offenses. The difference in numbers was tremendous when comparing cases between other states and California. According to a National Institute of Justice report, in the State of Washington, which began the three strikes, they only had 115 offenders admitted to the Washington State prison system between the years of 1993 to 1998. Georgia reported less than 10 cases per year, meanwhile California had sentenced nearly 40,000 offenders

[33] *Three Strikes Law, Repeat Felony Offenders, Penalties*, University of California, Hastings School of Law, Scholarship Repository, 2012, http://repository.uchastings.edu/ca_ballot_props/1315, (last visited March 15, 2019.)

[34] Lorelei Laird, *After Third Strike, Many Now Walk: California Begins to Release Prisoners after Reforming Its Three-Strikes Law*, ABA Journal, Vol. 99, No. 12, 2013, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=edsjsr&AN=edsjsr.24596007&site=eds-live&scope=site, (last visited March 19, 2019.)

[35] Id.

to prison under this law. [36] Multiple variations of this law existed. Some variations even included the "out" to be counted in the second strike rather than the third. Although the extremist cases originated in California, various states subjected themselves to this notion and it resulted in reforms that needed to be created due to the realization that punishments being delivered were sometimes not equivalent to the crime committed by the offenders. [37]

Racial Disparity and Affluenza

Another factor often found to be affecting the effectiveness of sentencing is racial disparity. Through the years, the justice system has recognized and made an effort to correct inequalities in justice by increasing uniformity, certainty, equality, severity and transparency in sentencing, with a special emphasis on the growing concern over racial and ethnic inequality in punishment. The discrimination against non-whites, was clear in the early years of research, which allowed for a push from the public for better standards. [38]

In the 1980's, reforms emerged in the form of minimums and guidelines after the report concluded that young black men received the harshest sentences and that racial effects were not eliminated by guidelines.[39]

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[36] James Austin, John Clark, Patricia Hardyman, and Alan Henry *Three Strikes and You're out : The Implementation and Impact of Strike Laws*, National Institute of Justice, 2000, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=edsgpr&AN=edsgpr.ocn862120408&site=eds-live&scope=site, (last visited March 19, 2019.)

[37] Id.

[38] Id.

[39] Brian Johnson and Jacqueline G. Lee, *Racial Disparity Under Sentencing Guidelines: A Survey of Recent Research and Emerging Perspectives*, Sociology

Ultimately, the most recent research on the subject offer increasing evidence that racial and ethnic disparities continue to characterize punishment under sentencing guidelines, though the instances are subtle and indirect. Judges are no longer bound by the guidelines but it has been observed that sentencing allows for greater discretion from the judge, and is more likely to allow for the influence of societal stereotypes to affect sentencing. [40]

It is a theory that these disparities exist, based on our own psychological motives, in which it is assumed that we are creating a link between race and ethnicity with assessments of culpability and dangerousness.[41] Although the problem has been recognized, we seldom truly realizing the kind of change that needs to be brought in order to completely transform this prediliction. Sentencing guidelines were created with positive motives in terms of increasing equality. However, it seems that negative attitudes go much further, for equality is not being followed under the influence of sentencing guidelines, as subconscious as it may be.

A factor that exemplifies the irregularities of sentencing is found behind the story of the 'affluenza' defense. Affluenza is a term referring to the particular circumstance in the upbringing of a wealthy individual, which might psychologically affect the decision making of the affected party so that they are unable to tell right from wrong. In other words, the defense for an individual was that they were too rich to tell right from wrong. The case that made this defense famous was that of Ethan

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Compass, Vol. 7, No. 7, July 2013, https://onlinelibrary.wiley.com/doi/full/10.1111/soc4.12046, (last visited March 19, 2019.)

[40] Id.

[41] Id.

Couch, a teen that killed four people, as he rammed his truck into a crowd of people while drunk driving. [42]

The offender originally was sentenced to 10 years of probation, defying prosecutors who sought a 20- year prison sentence. During his time on probation, he committed a parole violation that ultimately resulted in a sentence of 720 days incarceration for his crime. Families were outraged and criticized that he got special treatment because of his wealth.[43]

Another story that brought light to this potential offense, was the comparison between this case and one of an immigrant teen who committed a similar crime, with similar circumstances, yet, he faced charges much harsher from the beginning to end. The case mentioned above refers to Jamie Arellano,[44] a drunken teen, who ran a red light and crashed into a pregnant woman's car, killing her and her unborn child. Arellano was charged with intoxication manslaughter and intoxication assault, the same counts that were filed against Couch. However, the main difference between the cases resulted from the choice to move Arellano's case to adult court, in which he took a plea deal that landed him 20 years in jail.[45] Was the reason for this significant difference racial disparity or wealth disparity?

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[42] Id.

[43] Daniel Victor, *Ethan Couch, 'Affluenza Teen' Who Killed 4 While Driving Drunk, Is Freed,* NY Times, April 2, 2018,
2018, https://www.nytimes.com/2018/04/02/us/ethan-couch-affluenza-jail.html, (last visited March 19, 2019.)

[44] Id.

[45] *Affluenza Teen Ethan Couch got probation for killing 4 while poor immigrant Texas teen got 20 years prison for fatal drunken crash,* The Associated Press, Feb. 16, 2016, https://www.nydailynews.com/news/national/affluenza-case-highlights-disparity-sentencing-article-1.2533960, (last visited March 19, 2019.)

Cases with controversial sentences for crimes committed are still a recurring spectacle we encounter today. One of the most recent cases, made well-known by the media, is the one of college student Brock Turner.[46] Turner was charged with sexual assault with intent to commit rape when he sexually assaulted a 22-year old woman after she had blacked out from drinking at a campus party. He was sentenced to a total of six months in jail, with three years probation. He only served three months of jail for his crime. The short sentence drew much attention because of the leniency of the sentencing as well as the topic of sexual assault on college campuses.[47] Reports after the sentencing recorded the judge as saying that the Judge believed Turner's side of the story, that the woman gave consent.[48]

Conclusion

Ultimately, guidelines have been created to help ensure justice and equality in the sentencing of individuals. However, not enough attention has been paid to ensure the results. Multiple factors come into play when the overall effectiveness of the fairness within the guidelines for sentencing are analyzed thoroughly.

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[46] *People v. Turner*, Case #B1577162, Superior Court for the State of California in Santa Clara, https://www.paloaltoonline.com/media/reports/1465602925.pdf, (last visited March 15, 2019.)

[47] Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. Times, Aug. 9, 2018, https://www.nytimes.com/2018/08/09/us/brock-turner-appeal.html, (last visited March 19, 2019.)

[48] Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, The Atlantic, June 17, 2016, https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/, (last visited March 15, 2019.)

An examination, study and further discussion among lawmakers is certainly necessary to begin any kind reform. Revision is essential in order for anyone to believe that the guidelines are close to ensuring justice for all. Furthermore, a stricter, and perhaps clearer set of rules are necessary regarding the use of these guidelines. Judges need to know when guidelines must be followed strictly, what kind of exceptions could be made and what the necessary steps are to be followed if revision or exceptions are to be created for certain sentencings. Guidelines must be written and tested meticulously, and the goal of equality for all must be constantly at the forefront of discussions, debate, and efforts to reform. Vast differences in sentencing for similar crimes and situations should not be available, nor should they be accepted in the justice system of the United States.

The presence of guilt is not the item in question, but the degree of punishment assigned to that illegal activity must be the focus in order to ensure justice is served. Although in the United States we have the Eight Amendment as our guarantee to avoid injustice in punishment, there have been so many cases in history and modern times that may be violating this Constitutional provision. Yet, no grand, wildly public reform has been demanded. As Italian criminologist Cesare Beccaria said, "Men's most superficial feelings lead them to prefer cruel laws. Nevertheless, when they are subjected to them themselves, it is in each man's interest that they be moderate, because the fear of being injured is greater than the desire to injure."[49] Reform for cruel laws are a necessity, for they do not only violate some of our basic human rights, but no person ever knows the unfortunate day that the consequences of a mistake might determine the fate of a loved one or our own fa

[49] Cesare Beccaria (Italian Judge, 1738-1794), Brainy Quote, https://www.brainyquote.com/quotes/cesare_beccaria_729749, (last visited March 19, 2019.)

Ageism v. Capitalism, A Motive for Discrimination

By: Michael Dewing

Introduction

The story of age discrimination as interpreted by civil justice is told by analyzing the current structure of laws highlighting specific Supreme Court cases along with our U.S. Congress chiming in and attempting to further address the fairness in the rule of law governing the specifics of the EEOC procedural steps and how appellate courts may consider factors relating to the analogous terminology. Further study is warranted and justified by statistical data points and analysis in the way ageism is defining our labor force and our economic system with a focus on age discrimination, giving particular attention to time, age, and experience.

2019 Millennials v. Boomers 1960's

An excerpt from *Richard Fry's Millennials projected to overtake Baby Boomers as America's largest generation*, reads,

- Millennials are on the cusp of surpassing Baby Boomers as the nation's largest living adult generation, according to population projections from the U.S. Census Bureau. As of July 1, 2016 (the latest date for which population estimates are available), Millennials, whom we define as ages 20 to 35 in 2016, numbered 71 million, and Boomers (ages 52 to 70) numbered 74 million. Millennials are expected to overtake Boomers in population in 2019 as their numbers swell to 73 million and Boomers are expected to decline to 72 million. Generation X (ages 36 to 51 in 2016) is projected to pass the Boomers in population by 2028. **Boomers** – whose generation was defined

by the boom in U.S. births following World War II – are aging and their numbers shrinking in size as the number of deaths among them exceeds the number of older immigrants arriving in the country. Because generations are analytical constructs, it takes time for popular and expert consensus to develop as to the precise boundaries that demarcate one generation from another. **Millennials-** With immigration adding more numbers to this group than any other, the Millennial population is projected to peak in 2036 at 76.2 million. Thereafter, the oldest Millennial will be at least 56 years of age and mortality is projected to outweigh net immigration. By 2050 there will be a projected 74.3 million Millennials. **Generation X-** For a few more years, Gen Xers are projected to remain the "middle child" of generations – caught between two larger generations, the Millennials and the Boomers. Gen Xers were born during a period when Americans were having fewer children than in later decades. When Gen Xers were born, births averaged around 3.4 million per year, compared with the 3.9 million annual rate from 1981 to 1996 when the Millennials were born. Though the oldest Gen Xer was 51 in 2016, the Gen X population is projected to grow for a couple more years. Gen Xers are projected to outnumber Boomers in 2028, when there will be 64.6 million Gen Xers and 63.7 million Boomers. The Census Bureau projects that the Gen X population will peak at 65.8 million in 2018. **Baby Boomers-** Baby Boomers have always had an outsize presence compared with other generations. They peaked at 78.8 million in 1999 and have remained the largest living adult generation. There were an estimated 74.1 million Boomers in 2016. By midcentury, the Boomer population is

projected to dwindle to 16.6 million.[1]

Consensus Building

Today's corporate climate and best business practice mirrors that of our legislature and judiciary. Where one moves, others will follow to build upon the consensus of how best to balance the economic system. Those include areas of law addressing the issues of our civility and civil rights built into the framer's constitutional promise, followed by the amendments and statutes determined to benefit our aging society and the ageless democracy on which the precedents have been supported. Good governance begins at home, here in our working democracy in every house in America. The country is a working model originally built on the premise and promise of fair and ethical treatment of citizens, along with the kind of representation that embodies those principles. Today we look at market performance and sensationalized information as a benchmark of our values. This speaks to how an entire country has been depreciating its human capital through a devaluation of rights and applying different standards to people based upon class distinctions. There are questions emerging concerning whether or not we are becoming a separatist society.

Patriotism is a feel-good slogan and a marketing campaign for those that feed on our intellectual curiosity and our empathy for the weak. Belief systems have been with man since the dawn of our time. We are all getting older. And according to Cary Franklin, this is the age of

[1] Fry, Richard*, Millennials projected to overtake Baby Boomers as America's largest generation*, March 1, 2018, "http://www.pewresearch.org/fact-tank/2018/03/01/millennials-overtake-baby-boomers/", (last visited on 10/14/2018.)

crippling discriminatory animus with extreme prejudice![2] We are the feeders and consumers, and we'll stop at nothing to feast upon the apathy with which we protect our values, unless we are required to reevaluate our own concept of freedom. Law and order can ease that burden and teach how to support values as each of us reach for a future of prosperity. The description exemplifies what lessons may be learned from the order of law and rules designed to make our governmental system more stable and consistent. We all would like to function better and communicate our desires with greater impact for contribution and reward. Perhaps we should have legal studies as part of our curriculum in public education for every citizen, student, hiring manager, and corporate team in order to enhance consistency that enables our society to work with greater consistency, justice, and fairness.

Ageism Ratios

This is not just a story of people in their 60s or 70s. Workers as young as 50 are shocked to find themselves suddenly tossed onto the employment rubbish heap, just when they felt on top of their game. They're feeling stressed, angry and betrayed by a society that has benefited greatly from their contributions. Bigotry That Knows No Boundaries: age discrimination may become a reality whether you are black or white, poor or well off, male or female, gay or straight. It is a reality that all will likely face if they live long enough. In the job market, a person's ability to survive and have a sense of self-worth

[2] Cary Franklin, *Discriminatory Animus*, University of Michigan Law School, 2014, https://www.google.com/search?ei=glFsXLnZM4qAtQWS8qXQAQ&q=is+this+an+age+of+crippling+discriminatory+animus+with+extreme+prejudice%3F&oq=is+this+an+age+of+crippling+discriminatory+animus+with+extreme+prejudice%3F&gs_l=psy-ab.3...91553.141598..142178...0.0..0.195.8340.7j66.....0....1..gws-wiz.....0i71j0i131j0j0i67j0i22i10i30j0i22i30j33i160j33i299j33i22i29i30j33i10.zLxdmGIo9tU, (last visited Feb. 19, 2019.)

becomes questionable as they age. New research shows that age discrimination may be even more common than we thought and more prevalent than other forms of bias, like ethnic discrimination. According to a study published in the Journal of Age and Ageing, one third of British people in their 50s and above reported age discrimination, a figure that surprised researchers. From poorer service in restaurants to ill treatment in hospitals to outright harassment, people found themselves increasingly disrespected as they aged.[3]

Lead researcher Isla Rippon of University College London told Reuters that such day-to-day experiences impact physical and mental health, "Frequent perceived discrimination may be a chronic source of stress and build up over time, leading to social withdrawal and reluctance to go to the doctor."[4] When it comes to financial stress, older Americans say that job insecurity is their number-one concern, according to a recent survey.[5] Many people over 50 find themselves hanging on to their jobs for dear life, aware that they are perceived as obsolete and not as valuable as younger workers, despite their vast experience and institutional knowledge. According to a 2013 AARP survey report, "more than one-third of older workers are not confident that they would find another job right away without having to take a pay cut or move

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[3] Parramore, Lynn Stuart, *Economic Discrimination: An American Corporate Phenomenon*, "50 Is the New 65: Older Americans Are Getting Booted from Their Jobs and Denied New Opportunities", and "Age discrimination could be headed your way, sooner than you think.", Dec. 22, 2013, https://www.alternet.org/economy/age-discrimination-workplace ", (last visited on 10/14/2018.)

[4] L. Rippon, *The Ageing Experience: Perceived age discrimination and self-perceptions of ageing in the English Longitudinal Study of Ageing*, ULC Discovery, 2016, http://discovery.ucl.ac.uk/1508174/, (last visited Feb. 19, 2019).

[5] Maureen Connolly and Margot Slade, *The United States of Stress 2018*, Everyday Health, https://www.everydayhealth.com/wellness/united-states-of-stress/, (last visited Feb. 19, 2019.)

(37%). Of those, about one in five (19%) say the reason they are not confident is due to age discrimination and 21 percent identify age limitations, such as feeling they are 'too old' or limited in some way because of their age."[6]

Ashton Applewhite blogs about aging and ageism at ThisChairRocks.com.[7] In this blog, she discusses some of the myths concerning older workers that permeate our culture: that people over 50 are rigid, trapped in their jobs, take too many sick days, or can't cope with technology. The most common myth is that older workers are all the same. Applewhite's research shows that nothing could be further from the truth. The hallmark of later life is heterogeneity. Think about it. We become less alike with every day that passes. A group of 20-year-olds is much more alike than a group of 60-year-olds. People age at different rates. The stereotypes don't fit. Older workers go more slowly, but they're more accurate. Age confers patience and coping skills, the ability to handle stress. The perception that older workers can't handle physically demanding tasks is often outdated. Chronological age is generally not an indicator of capacity, even for pilots or firefighters. Older, experienced workers actually hurt themselves less on the job. The idea that after a certain age you can't do demanding tasks is just a myth. Even during slavery, the market price for slaves remained high well into their 70s, because slave owners knew they could do valuable work. The stereotype that older workers can't adjust to technology is similarly overstated, she says, noting that

[6] Staying Ahead of the Curve 2013: The AARP Work and Career Study, Older Workers is an Uneasy Job Market, published in 2014, https://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2014/Staying-Ahead-of-the-Curve-2013-The-Work-and-Career-Study-AARP-res-gen.pdf,, (last visited Feb. 19, 2019).

[7] Ashton Applewhite, *This Chair Rocks*, Feb. 14, 2019, https://thischairrocks.com/blog/, (last visited Feb. 17, 2019).

they are usually more than capable of learning new technical skills, particularly if those skills have relevance to their work experience. Applewhite's research shows that the most productive and effective teams in the workplace are mixed-age groups. "Experience plus freshness just makes sense," she says. "A team with different generational perspectives has new energy, new possibilities for collaboration."[8]

We live in an era of planned obsolescence, in which designers deliberately make a thing limited in its useful life. Now this planned obsolescence includes human beings. Is it really an efficient use of our human capital to turn experienced workers into Walmart greeters? Clearly, we need workplace policies and programs that expand the opportunities for older Americans to extend their labor force participation and continue to contribute their valuable skills and experience. Phased retirement plans in which older workers are kept on as part-time workers or consultants, for example, can benefit both employers and employees. Such plans mitigate the potential loss of knowledge as older workers retire. The biggest-picture problem in the economy that needs to be addressed has to do with what economists call aggregate demand, the overall demand for goods and services. When people don't have enough money in their pockets, which happens when economic shocks occur, and the government pursues austerity policies, businesses stop hiring and people can't find jobs or keep the ones they have. This results in involuntary unemployment. Unless the government invests in the economy through jobs programs, education, infrastructure-building, and so on, aggregate demand remains low and unemployment persists. Telling people to accept lower paying jobs may make sense for individuals, but in the economy as a whole, as Keynesian economists constantly remind us, wage cuts just add to the

[8] Id.

shortfall in demand.[9] In the end, we want an economy that allows everyone to work who is able to do so and provides a robust social safety net for those who can't. According to Parramore, "Our current system is unsustainable, and age discrimination, which strikes even those who are still in their prime, is quickly becoming an economic, social and public health disaster for the 21st century."[10]

Discrimination Trends

Consider the story of IBM as told by Peter Gosselin and Ariana Tobin in ProPublica.[11] Apparently IBM enabled a planning presentation that former IBM executives said was drafted by heads of a business unit carved out of IBM's once-giant software group and charged with pursuing the "C," or cloud, portion of the company's CAMS strategy. The presentation laid out plans for substantially altering the unit's workforce. It was shown to company leaders including Diane Gherson, the senior vice president for human resources, and James Kavanaugh, recently elevated to chief financial officer. Its language was couched in the argot of "resources," IBM's term for employees, and "EP's," its shorthand for early professionals or recent college graduates. Among the goals: "Shift headcount mix towards greater % of Early Professional

[9] Will Kenton, *Keynesian Economics,* Investopedia, http://www.investopedia.com/terms/k/keynesianeconomicsasp, (last visited Feb. 17, 2019).

[10] Lynn Parramore, *50 is the New 65: Older Americans are Getting Booted from Their Jobs and Denied New Opportunities,* AlterNet, Dec. 24, 2013, https://www.alternet.org/2013/12/age-discrimination-workplace/, (last visited Feb. 19, 2019).

[11] Peter Gosselin and ArianaTobin, , *Cutting 'Old Heads' at IBM*, March 22, 2018, https://features.propublica.org/ibm/ibm-age-discrimination-american-workers/ , (last visited on 10/14/2018.)

hires." Among the means: "[D]rive a more aggressive performance management approach to enable us to hire and replace where needed and fund an influx of EPs to correct seniority mix." Among the expected results: "[A] significant reduction in our workforce of 2,500 resources." A slide from a similar presentation prepared last spring for the same leaders called for "re-profiling current talent" to "create room for new talent." Presentations for 2015 and 2016 for the 50,000-employee software group also included plans for "aggressive performance management" and emphasized the need to "maintain steady attrition to offset hiring."[12]

Leading by Example

The example above sets the tone for an environment prevalent with discrimination, justified only as a means to support new competitive growth in corporate economic models. Nothing to substantiate our constitutional rights, Supreme Court decisions, or a legislative process to protect and promote the health and welfare of our all working-class citizens tasked with responsibilities that secured our freedom, grew our companies and enhanced out GDP for 50+ years and more. Furthermore, to manipulate laws and leverage legal strategy to benefit entities that would support a continuation of growth to destroy competition, is not only irresponsible economically, but at the very least, the highest form of immoral perpetuity and corruption of a system originally geared for balance and fairness by founders and intended to employ equal opportunity in the nation. Taking a closer look at the letter of the laws that govern these issues, we see a disconnect in the interpretation by companies such as IBM and other major conglomerates that enables them to violate the public policy purpose behind the law. It's time for comprehensive reform throughout the

[12] Id.

courts in the business law areas regarding age discrimination!

The Problem: Discrimination

We have a problem America; Discrimination! This bias against older employees has infiltrated every aspect of our societal boundaries from judicial benchmarks to corporate oversight, regulatory policy and the rule(s) of Capitalism. The insight into why there may be a pre-conceived bias against older employees may come from the rapidly developing technology sector. One of the phrases used to indicate intentional bias is the "Right Fit." It is a polite term used today to say, "we discriminate here, thank you for your service and understanding, best of luck". Additionally, the target market of potentially “right fit” employees sought for any job, brand development or luxury promotion in a 2019 business model, may also be considered a comparison problem to the impending wave of millennial consumers entering the labor market. Thus, a condition of "subliminal discrimination" occurs in corporate structures when they seek to match the labor pool their profiles. To quantify the finding, one only has to look at the hiring strategies of human resource departments harvesting new graduates from the higher education platform across the country to match the "early professionals" seeking business and leisure services positions. As aging Veterans in our population struggle to hold positions or gain entry into the labor pool, they are finding the task cumbersome and demeaning.

Corporate Education

Discrimination has become an institutional lifestyle. Engrained in corporate governance, supported in the institution of education, and practiced in the economic debate of how and why we promote ourselves

in America as the "New Fresh Face" of consumer markets on the global scale, we set the stage and expectations for engaging in age discrimination. We keep telling ourselves we want everything new, and we reinforce the principle in how to approach our own consumerism, and that of a potential world market share. It is corporate design by default, and it has infiltrated every aspect of our approach to building a future of equality and fairness. Thinking about mission statements and the core competencies in the sustainable development messaging utilized to promote brands, companies, organizations, institutions, policies, charities and more, we begin to understand the power of subliminal messaging. Business will leverage any asset, or resource to corner, and dominate market share, consumer populations, votes, tax incentives, social utility, labor pools, hiring strategies, educational planning, career development, internship opportunities, workforce alliance programs, strategic economic development, corporate infrastructures, and the list goes on quite a bit further, like down the cartesian line into discrimination infinity. Some are well practiced at harvesting "top tier human capital" opportunity. It's the American way. It is supported by the institutionalists, the non-pragmatists, and every political body we can conceive. While corporate giants lobby and leverage market suppliers, the "academics" operating our politics, offer a persuasive educational theory that makes the case for age discrimination as the foundational theory for maximizing assets. They help structure the interpretation of market demand and the interpretation of the laws and rules regulating human behavior. The rule of law is defined as, "the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced; the principle of government by law."[13] The concept of the rule of law is central to our system of governance. Our system is supposed to be about fairness, and

[13] Dictionary.com, https://www.dictionary.com/browse/rule-of-law, (last visited Feb. 19, 2019).

building dreams in this country, and guidelines that provide corrective measures we all seek on our journey. Course correction is a necessary component of matching pace with the evolving social mores. We rely upon ethics, constitutional principles, and social values to form the framework of our important systems.

Statutory Guidelines: The Supreme Order

From the Code of Federal Regulations, 29 CFR 1614.101,[14] we have the following information concerning the general policy concerning the task of the Equal Employment Opportunity Commission, § 1614.101 and its work to prevent discrimination:

> (a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or genetic information and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.[15]
>
> (b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000eet seq.), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621et seq.), the Equal Pay Act (29 U.S.C. 206(d)), the Rehabilitation Act (29 U.S.C. 791et seq.), or the Genetic Information Nondiscrimination Act

[14] Code of Federal Regulation, Chapter XIV, Equal Employment Opportunity Commission, https://www.law.cornell.edu/cfr/text/29/1614.101, (last visited Feb. 19, 2019).
[15] Id.

(GINA) (42 U.S.C. 2000ffet seq.) or for participating in any stage of administrative or judicial proceedings under those statutes. 74 FR 63984, Dec. 7, 2009.[16]

Congressional concerns and the statement of the purpose behind the anti-discrimination laws are reflected in 29 U.S. Code § 621:

- (a)The Congress hereby finds and declares that— (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce. (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. (Pub. L. 90–202, § 2, Dec. 15, 1967, 81 Stat. 602.)[17]

[16] Id.
[17] 29 U.S. Code § 621 , Chapter 14, Age Discrimination in Employment, https://www.law.cornell.edu/uscode/text/29/621, (last visited Feb. 19, 2019).

Civility is an Attitude

Corporate America's insistence that profit is the only value to be sought is destroying the very foundation of our economic systems. Are we civilized? That's a fair question? The story is not yet written because oppression persists from the ever more pervasive ruling class. Their manipulation of our legal and business systems so that they have a society of obedient slaves working and building a lifestyle for the ruling class is reprehensible. We strive for greatness, they settle for capital gains! The vast majority of Americans grovel at the steps of capital enterprise, begging for entrance. Corporate America gorges themselves on profits as they violate statues and regulations in order to gain the advantage. The rule of law is no match for our present greed and only a flicker of light in the endless darkness in man. We need a better message, one that communicates values concerning families, community, organization, regions, states and our country on an ever emerging and evolving global sustainability platform. We need a change in mindset related to how one acquires wealth through a function of contribution. A mechanism that allocates resources related to contributions in relation to the contribution of others should be used to propel the innovations for growth solutions. The general welfare of people living, working and playing well together, comes through the accumulation of resources and the knowledge that we share in partnerships concerning labor and service.

Summation: An Impetus for Change

Research tells us we have much to learn, about ourselves and perspectives in the world. Values have shifted, and priorities have changed us all. We are moving into unknown territory. At issue is the question of our own validity and an aggressive impulse to contribute.

We also seem to be very compelled to conform to the majority's expectations. So, contribution seems to be something everyone needs. It's a compulsion about expression of values and influences and a quest for acceptance as a contributor. Enabling acceptance is another important skill for Americans to acquire and is significantly affected by age discrimination. Concepts like ethics and civility, order and rules about fairness and equality for consideration and contribution, all have a place at the table where we negotiate our sense of value and self-worth. That kind of negotiation and collaboration is not as possible when the guiding principles are reflected by theories related to survival of the fittest, eat or be eaten, work or die. The answer probably lies in education with an emphasis on an understanding of fairness and justice and the required components for our system to find bala

Adhesion Contracts Discourage An Equitable Playingfield, creating a "Take it or Leave it Epidemic"

By Leanet Gutierrez

Introduction

A consumer saves up for months intending to purchase a computer to complete homework and save himself the burden of going to the library each night. One fateful day he goes to the store and purchases a computer costing six hundred dollars. Excitedly the consumer gets home, begins to unravel the packaging, and sets up his new computer. After the personalized selection feature the screen acclaims, "You're almost there." But there is one last thing he must do to finally own his new computer, he must select "yes" on the terms and agreements. The license agreement consumers must sign expects consumers to select yes, otherwise the product is not functional. These agreements are not only found in computers sales, but are present in conjunction with services and products that consumers frequently use in modern society. These types of contracts are contracts of adhesion, "take it or leave it contracts," sometimes referred to as boilerplate contracts. The contracts are defined as "standardized contracts offered to consumers on a 'take it or leave it' basis without giving the consumer an opportunity to bargain for terms that are more favorable.[1] Consumers must agree to the boiler plate terms such as price and the overall logistics that do not go in depth into the effect and overall result of the policies customers sign. Under the common law, these contracts are treated as binding contracts.[2] In

[1] Legal Dictionary, https://legaldictionary.net/adhesion-contract/, (last visited March 14, 2019.)

[2] *Common Law and Uniform Commercial Code Contracts,* Lumen, https://courses.lumenlearning.com/workwithinthelaw/chapter/formation-and-types-of-contracts/, (last visited March 14, 2019.)

order to express agreement, a consumer must put their signature at the end of the document and usually select that they "agree to the terms and policies set forth by *X* company/corporation". This signature and agreement to the policies commit the consumer to being required to legally follow the policies (whether or not they read the terms).[3]

History

The concept of contracts was adopted under the British common law back in the 14th Century.[4] Under 14th century common law, contracts were defined as agreements between two capable parties in order to create a level playing field. When formulating a contract, a party must agree to all terms, there must be evidence of assent (willful acceptance), the contract must be for a legal purpose, and the contract must be signed by an individual who has capacity to understand the terms of the contract.[5] Under common law, contracts submitted to a court of law were analyzed and broken down in order to find an even playing field for both parties. It was not until 1919 when Edwin W. Patterson wrote an article on the processes of French Civil Law that was published in the Harvard Law Review that courts throughout the United States began to adopt the legal theory of adhesion contracts.[6]

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[3] Id.

[4] A.W. Brian Simpson, *A History of the Common Law of Contract: The rise of the Action of Assumpsit,* 1987, Oxford Scholarship Online, March 2012, http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198255734.001.0001/acprof-9780198255734 , (last visited March 18, 2019.)

[5] *Adhesion Contracts,* Wex, Cornell Law School, https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29, (last visited March 14, 2019.)

[6] Edwin Patterson, *Historical and Evolutionary Theories of Law,* Columbia Law Review Vol51, No.6, 1951, JSTOR,

One of the biggest disputes that arose around this concept in the United States was the *Steven v. Fidelity & Casualty Co. of New York et al,*[7] where deceased George A. Steven purchased life insurance. The insurance Mr. Steven purchased ensured reparations upon his death while on an aircraft provided the policy holder had an issued Certificates of Public Convenience and Necessity or any other authorizations for air passengers.[8] Upon the death of Mr. Steven in a connecting flight that crashed, Mrs. Steven claimed the policy benefit the insurance had promised upon purchase. However, she soon discovered that because Mr. Steven was not issued Certificates of Public Convenience and Necessity or any other authorizations for air passengers in Illinois or Indiana, Casualty Co. of New York would not issue the policy benefit. Defendant Casualty Co. of New York stated that it did pay policy benefits if the air carrier issued proof of authorization before the passenger became deceased. The terms of this contract were interpreted by the Court in such a way that they found the "accident in question did not come within the coverage and insurance provided for in the policy." [9]

While this case might look rather straightforward, it served as a pioneer for adhesion contracts as the Judges in this case analyzed the case based upon the policies of the contract Mr. Steven signed and submitted to Fidelity & Casualty Co. of New York. But the Judges failed to adhere to a legal practice called *contra proferentem,* which is a term that establishes the interpretations of contracts against the drafter and

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https://www.jstor.org/stable/1119252?seq=1#page_scan_tab_contents , (last visited March 19, 2019.)

[7] *Steven v. Fidelity & Casualty Co. of New York et al* , 58 Cal.2d 862 (1962), https://scocal.stanford.edu/opinion/steven-v-fidelity-casualty-co-27180, (last visited March 14, 2019.)

[8] Id.

[9] Id.

eliminates the factor of ambiguity.[10] Based upon the *Steven v. Fidelity & Casualty Co. of New York* case, the concept was established as a precedent that courts throughout the United States began to adopt when engaging in contract analysis. Adhesion contracts began to be more and more popular tools of corporations. While analyzing the case of *Steven v. Fidelity & Casualty Co. of New York*, one is able to see that the simplicity of the case was the result of the fact that the plaintiff, Mrs. Steven, was not given enough opportunity to voice her interpretation of the contract and her knowledge of the facts that substantially affected the case resulting from the court's failure to adher to *contra proferentem*.

Analysis

Even though the plaintiff, Mrs. Steven, raised a final issue where she expressed that "the insuring clauses covered only a 'scheduled air carrier,' a phrase that had been agreed upon by all insurance carriers writing this type of insurance, was in restraint of trade and therefore, illegal,"[11] the court ruled against the plaintiff thereby disregarding this statement and surpassing *contra proferentem*, basing the Court's analysis upon stated provisions in the insurance policy as provided in the vending machine. The insurance was purchased when Mr. Steven held a ticket on a 'scheduled air carrier.' Through no fault of his own, the flight was cancelled and the only option for him and 5 other men was to take the Turner flight home. But because the Turner flight was not a scheduled air carrier, the court interpreted the provision that

[10] *Contra Proferentem Doctrine Law and Legal Definition,* USLegal.com, https://definitions.uslegal.com/c/contra-proferentem-doctrine/, (last visited March 14, 2019.)

[11] *Steven v. Fidelity & Casualty Co. of New York et al,* 58 Cal.2d 862 (1962), https://scocal.stanford.edu/opinion/steven-v-fidelity-casualty-co-27180, (last visited March 14, 2019.)

referenced the 'scheduled air carrier' as compelling. Did Mr. Steven get a chance to negotiate the terms or to even indicate his assent? The policy was purchased in a vending machine.[12] But the court chose to limit the insurer's exposure to risk by excusing their promise to pay based upon a technicality that it was highly unlikely Mr. Steven saw or understood. The question is why did the court make this ruling?

According to Judge Christopher M. Kaiser of the U.S. Patent and Trademark Office, adhesion contracts reduce transaction costs and help lubricate the gears of the market.[13] In other words, adhesion contracts are favorable to the economy as there is no room to negotiate the details of the contracts and thus there is much to gain for the companies who call the shots and format the contracts so that their exposure to liability is minimal. Companies do not need to offer reparations for incidents that mildly contradict their policies and the cases become much simpler for the court. These contracts are highly unconscionable and express the powerless nature that consumers face while going against some of the most one-sided clauses that dictate each and every transaction that consumers undertake preventing them from an equitable playing field. Judges and court of laws are able to see the unconscionability of the contract and yet the contracts are still favored because companies put forth a substantial argument for the benefits of efficiency.

[12] Id.

[13] Christopher Kaiser, *Take It or Leave It: Monsanto v. McFarling, Bowers v. Baystate Technologies, and the Federal Circuit's Formalistic Approach to Contracts of Adhesion*, Chicago-Kent Law Review, Vol. 80, Dec. 2004, https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3488&context=cklawreview, (last visited March 14, 2019.)

Current Status

Today, many companies use adhesion contracts. From day to day transactions to transactions that will change the consumer's life drastically. The take it or leave it epidemic has taken over the United States. The take it or leave it epidemic refers to the idea that through every minor and major transaction, companies have adopted the tendency to employ adhesion contracts that bind consumers who either can't understand the verbage or are often assured that they don't need to read it. Because negotiations are rarely available, consumers are also left with the feeling that if this is a product or service that they need, they're just going to have to do whatever the company says. Consumers rarely have the incentive or the option to read, discuss, or refute boiler plate contracts.

These company mass-produced contracts are meant to be onerous for the consumer and intimidating. The number of pages many times challenges the consumer to read it all when they may have a limited amount of time for substantial review. For example, when in a wholesale club often cashiers will ask customers to renew memberships by simply agreeing to the terms popping on the small screen used for consumers to pay. Sometimes customers are asked to sign agreements that they cannot even preview or review prior to execution. In the midst of all the craziness and hurried pace that supermarkets or in this case wholesale clubs run, how can one expect the consumers to sit and look through all the terms and agreements which are binding, particularly when all they have to do is select 'yes'?

These adhesion contracts that consumers are subjected to are very much preferred by the companies because these types of contracts help facilitate transactions favorable for companies, not the consumers.

These contracts are meant to be signed on a, "do not read, just sign," basis under the guise of representing boiler plate standard provisions that express basic terms while expecting consumers not to object. Adhesion contracts tend to set forth their policies after the consumer spends the money on the device and then present non-negotiable policies that the consumer cannot meaningfully dispute. However, if one puts forth a hypothetical situation where all companies establish non-adhesion contracts for their products then one would see that the market would be somewhat stuck in a slower pace that would enable contract and policy review. Companies would take weeks or months to conclude a transaction and thus transactions in consumer goods and services would significantly slow down. Within this hypothetical situation one can further expect a lot of negotiation from the consumer to the companies. This would cause some disorganization within companies' policies and thus unfairness in the treatment of consumers because each consumer and contract would be treated differently.

Recommendation

After analyzing the reality of current day adhesion contracts, it seems that a solution might be to submit a two-part contract. In these two-part contracts, consumers would sign an agreement that is consistent with boilerplate terms and legally acceptable standards, perhaps based upon ethics. After the agreement consisting of the boiler plate terms are submitted, an email or text with a link would then be sent to the consumer further explaining wide-ranging concepts and requiring a final signature. What this solution boils down to is the elimination of the terms that consumers review for the first time *after* they are already fully bound by the contract. Instead, the consumer would be able to agree to the terms he or she is given on the sales floor and not have to risk the surprise clauses.

Adhesion contracts over five thousand dollars should be required to be treated with the doctrine of reasonable expectations. When applied, the doctrine of reasonable expectations states "where there is ambiguity . . . it is resolved in favor of the insured's reasonable expectations."[14] According to a Cornell Law School review applying this principle would, ". . .invalidate parts of the adhesion contract . . . the weaker party will not be held to adhere to contract terms that are beyond what the weaker party would have reasonably expected from the contract." [15] Requiring this principle for transactions over five thousand dollars would not be interfering with the free market, instead it would serve as an equitable playing field for consumers. This option would allow consumers to choose a different item if they disagree with the contract promptly after their purchase. Instead of having to open a computer, set it up and read the terms and agreements, or having the terms and agreements mailed two to three weeks after the purchase, the consumer would receive these terms instantly. This solution would help both the consumer and the merchant. Applying this principle of law would show the consumers that businesses are willing to provide better services and care for those they serve. One should not need a Juris Doctorate degree in order to accurately and consistently understand the numerous contracts they are bound to transact on a daily basis.

Conclusion

Adhesion contracts appear to be above the law. According to the Cornell Law School review, "Courts carefully scrutinize adhesion

[14] *Adhesion Contracts,* Wex, Cornell Law School, https://www.law.cornell.edu/wex/adhesion_contract_%28contract_of_adhesion%29, (last visited March 14, 2019.)
[15] Id.

contracts and sometimes void certain provisions because of the possibility of unequal bargaining power, unfairness, and unconscionability. Factoring into such decisions include the nature of the agreement, the possibility of unfair surprise, lack of notice, unequal bargaining power, and substantive unfairness."[16] The rule of law is a guideline and should be treated as such. If contracts require informed assent on the part of both parties, adhesion contracts should not be enforceable. And loopholes in the interpretation of facts where parties want to make a distinction between procedural issues v. substantive ones, should not be allowed.

[16] Id.

Putting a Finger on Biometrics Law

by: Amanda Heine

Americans nationwide are walking into their place of employment Monday through Friday and either placing their finger on a scanner, having their face analyzed by a beam or even the iris of their eye digitally scanned. The process of clocking in for work with your fingerprint has become extremely jejune. This process is more often than not required by employers before an employee can start their work day. Whether biometrics is used for logging in hours, authentication, or security purposes, it is typically a 'use it' or 'lose the job' scenario. Though biometrics might be making the workplace increasingly more efficient and innovative, it also comes with new risks. Employers are especially at risk with potential liability encompassed within privacy law and how this data is obtained and stored. The employers require their employees to submit to the use of biometrics, yet there are minimal to zero required obligations owed to the employee by the employer. There are currently no federal regulations put in place for the protection of employee privacy rights relative to biometrics.

Introduction

In an assortment of public and private institutions, biometric technology is becoming a prevalent means to identify individuals. This is due to biometric technology's alleged superior control and efficiency of access to many aspects of identification protocols used by these institutions. The idea of biometrics has been around since the dawn of Star Trek in the 1960's with the concept of voice ID, retina scan and facial recognition. Remember when Captain Kirk of Starship Enterprise would just speak to the ship and the ship would just know who he was? Well, that is biometric technology. Captain Kirk also used biometric

technology to access Project Genesis with the use of a Retina Scan.[1] Just to think about the idea of biometric technology from a 1960s fictional series that has become reality today is phenomenal. Unfortunately the crucial part the movies left out is that these devices need to be programmed. The devices don't "just know" an individual, they have to be queried with a physical attribute that is distinct to a specific individual. What the movies did get right was some of the shortcomings of biometric technology. They portrayed how easy it was to procure a fingerprint from a glass or door handle by the use of wax or tape. That finger print then could be replicated and applied using molds. The intent of this research is to provide main ideas and drivers in the area of biometric technology and privacy to raise awareness to the innovative possibilities and of the foreseeable issues that emerge. The basic usages of biometric modalities has become a conventional method for use in identifying individuals and an efficient technology to support elevated security measures. It is important to note that there are risks associated with the use of biometric identifiers and consideration must be given to the possibility of failed system integrity. Finally, concerns related to constitutional protections along with current and pending legislation must also be considered.

The Basics of Biometrics

There is no ubiquitous definition for biometrics but it is generally referred to as measurable human biological and behavioral characteristics that can be used for identification and/or and automated method(s) of recognizing or analyzing an individual based on human

[1] Project Genesis, StarTrek.com, http://www.startrek.com/database_article/project-genesis, (last visited March 5, 2019.)

biological and behavioral characteristics.[2] Biometrics have been gradually subjugating the usage of passwords and the usage of physical keys. Due to the emergence of these technologies there is an increased necessity to find balance between the safeguard of individual privacy rights and the implementation of advanced technologies.

When we think of Biometrics, we think of the future. But biometrics are not the future anymore, they are the present. This technology has become a favored human identifier due to its perceived reliability and its uniqueness of a "one-to-one" match.[3] Collecting biometric identifiers is now gathered through the use of scans that then analyzes the significant data turning it into an algorithm that can be used to uniquely identify an individual. One of the oldest identifiers used is the fingerprint. The use of ink and paper for biometric identification to reduce forgery has been around since the 1800s. Fingerprints were found on pre-historic clay tablets as seals and a type of signature for business transactions.[4] It was in the 1880's when fingerprints were notably recognized to be a means of distinct personal identification. In 1892, the first fingerprint identification was used to identify a murderer, thereby establishing the significance of fingerprints.[5]

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[2] Barbara Harris and Susan Sholinsky, *Biometrics in the Workplace,* (June2018), https://www.ebglaw.com/content/uploads/2018/02/Sholinsky-Steinmeyer-Reuters-Expert-QA-Biometrics-February-2018.pdf, (last visited Feb. 28, 2019.)

[3] Lauren D. Adkins, *Biometrics: Weighing Convenience and National Security Against Your Privacy*, 13 Mich. Telecomm & Tech. L. Rev. 541, 2007, http://repository.law.umich.edu/mttir/vol13/iss2/10, (last visited March 5, 2019.)

[4] *The History of Finger Prints*, 2012, https://www.acschools.org/cms/lib/PA01916405/Centricity/Domain/362/The History of FingerprintsUpdated 21 August 2012.pdf., (last visited March 5, 2019.)

[5] Cyril John Polson, *Finger Prints and Finger Printing: An Historical Study*, American Journal of Police Science, 41 J. Crim. L. & Criminology 495 (1950-1951), https://heinonline.org/HOL/LandingPage?handle=hein.journals/jclc41&div=86&id=&page=, (last visited March 5, 2019.)

The use of fingerprints for identification has transformed over the years. We now use scanners rather than clay and ink. Another identifier less commonly used as a biometric modality is hand geometry. Hand geometry uses characteristics such as the length, width, and surface area of the hand to create a map which is then used as the identifier.[6] This means of identification is used less frequently considering its limited accuracy. The use of hand geometry is generally incorporated with other biometric modalities similar to the two-step verification process that is utilized with passwords. Both hand and finger imprinting are more likely to be accepted by the general public as they are less invasive.[7] Facial recognition is becoming more widely used because it is less invasive. Facial recognition has been used for years but in the form of composite sketches for forensic use.[8] Facial recognition has now developed into a process in which technology captures and maps facial features which include the nose, eyes, and mouth. Capture can be accessed by either static photos or video images. One challenge to this modality is that facial appearances tend to change overtime which threatens the authenticity and reliability of the process.[9]

[6]Lauren Adkins, *Biometrics:weighing Convenience and National Security Against Your Privacy*, 13 Mich. Telecom. Tech. L. Rev. 541, 2007, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1096&context=mttlr, (last visited March 5, 2019.)

[7] Id.

[8] Jonghyun Choi et al., *Data Insufficiency in Sketch Versus Photo Face Recognition*, Institute for Advanced Computer Studies, University of Maryland, http://users.umiacs.umd.edu/~jhchoi/paper/cvprw2012_sketch.pdf, (last visited March 5, 2019.)

[9] Id.

Ocular biometrics are another unique way to recognize individuals. These modalities use iris, periocular, retina, and eye movement scans.[10] Retina scan technologies require close contact to map the fine network of capillaries using a low intensity light that is sent through the eye. Challenges with retina scans are created by degenerative disorders of the retina.[11] Voice recognition is developed when a distinct intonation, pitch, and pronunciation of a voice is measured and then compared to a previously stored voice sample.[12] To capture a voice imprint an individual will traditionally recite a verbal or numerical phrase.[13] Voice recognitions can utilize a fixed set of phrases or recognized voice patterns. These systems are not as accurate as fingerprinting or iris scans as an individual's voice can change with health and emotional states.[14]

Some other emerging behavioral characteristics utilized for biometric identification are written signatures, keystroke dynamics and gaits.[15]

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[10] Ishan Nigam, Mayank Vatsa & Richa Singh, *Ocular biometrics: A survey of modalities and fusion approaches*, 26 Information Fusion, 2015, https://www.semanticscholar.org/paper/Ocular-biometrics%3A-A-survey-of-modalities-and-Nigam-Vatsa/45f4b0087fdcc17f122cc4f7a9aa19dd51b40669, (last visited March 5, 2019.)

[11] *Biometric Eye Scans*, The Columbia Encyclopedia, 6th ed., 2019, https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/biometric-eye-scans, (last visited March 5, 2019.)

[12] Langenderfer, J. and Linnhoff, S., *The Emergence of Biometrics and Its Effect on Consumers*, Journal of Consumer Affairs, 2005, Wiley Library Online, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-6606.2005.00017.x, (last visited March 5, 2019.)

[13] Id.

[14] *Voice Verification*, Global Security, https://www.globalsecurity.org/security/systems/biometrics-voice.htm (last visited March 5, 2019).

[15] Id.

Gait is the manner in which an individual walks. This modality is captured through gait recognition systems. Gait is less accurate than most other biometric identifiers due to environmental factors like walking surfaces and shoe choice. This can cause flawed measurability.[16] Other more intricate interactions that are used in biometrics are hand-eye coordination as well as hand tremors. All of these means of analyzing data create variables that lead to the heightened possibility of error.[17] Biometrics have been gradually subjugating the usage of passwords and the usage of physical keys. Due to the emergence of these technologies, there is a increased necessity to find balance between the safeguard of individual privacy rights and the implementation of advanced technologies.

Efficiency and Risks

The username and password era is becoming a thing of the past in our society. Especially since now you need a twelve character password with one upper case letter, two numbers, and a special character. Then you need multi-factor identification before you can login which will be sent to an email address which requires another twelve character password, with an upper-case letter, two numbers and a special character. That password to your email also needs multi-factor authorization which will send a text of a six digit number to your cell phone. Then you will have to input the digits within 10 seconds to access the email but before you can get those digits you need to use a

[16] Id.

[17] Avi Turgeman, *Behavioral Biometrics Are Not New, So Why Are They So Hot Right Now?* Forbes, 2017, https://www.forbes.com/sites/forbestechcouncil/2017/06/20/behavioral-biometrics-are-not-new-so-why-are-they-so-hot-right-now/#7050997a33d7, (last visited March 5, 2019.)

biometric fingerprint to unlock that phone. After spending about 10 minutes or more trying to login to protected data you ask, "why didn't I just lead with that biometric identifier?" Biometrics fill the need of being able to accurately identify people in a timely manner in order to allow the access and exchange of sensitive data which may include health and financial data. A serious concern is the need to remember all of the different lengthy passwords.

The Department of Homeland security has been using biometric technology to detect and prevent illegal entry into the U.S., grant and administer proper immigration benefits, vetting and credentialing, facilitating legitimate travel and trade, enforcing federal laws, and enabling verification for visa applications to the U.S.[18] In 2013, the Department of Homeland Security replaced the U.S. Visitor and Immigration Status Indicator Technology Program(US- VISIT) with the Office of Biometric Identity Management (OBIM). The OBIM system is assumed to enable national security and public safety decision making.[19] Homeland security released a Privacy Impact Assessment which outlines a few of the privacy risks of the biometric data system.[20] The assessment implies that there is a risk to the quality and integrity of the biometric data collection and management which may cause misidentification. It also suggests that data which is collected by a mobile device is susceptible to monitoring, interception, and tampering by unauthorized individuals. The most harrowing of risks is that the biometric information collected does not correctly map to one

[18] *Biometrics*, Office of Biometric Identity Management, Homeland Security, https://www.dhs.gov/biometrics, (last visited Feb. 28, 2019.)
[19] Office of Biometric Identity Management, Homeland Security, https://www.dhs.gov/obim, (last visited Feb. 28, 2019.)
[20] *Privacy Information.* Office of Biometric Identity Management, Homeland Security, https://www.dhs.gov/obim-privacy-information, (last visited Feb. 28, 2019.)

individual or even worse, it involves collecting data from individuals who are not offenders and the inappropriately collected data is retained inappropriately and indefinitely.[21]

Biometric technology isn't just a password that can be easily changed. It is technology that identifies you by something that is part of you which is immutable. If these identifiers are copied and hacked there is almost no way to change your password unless you change your fingerprint.

The risk for consumer skeptics like Snowden and Matrix fans is that they do not want the government tracking their every move. There is also the risk that there may be technology errors that are not easily corrected or that put people in terrible positions with law enforcement. There is also the concern that the data can be manipulated to indicate that a person was physically present when they weren't. Because this type of data is considered so reliable, there is also the concern that it will not be adequately evaluated and dealt with.

Consumer Considerations

It is recognized that consumers are skeptical of new things especially in a century flooded with telemarketers and spammers.[22] The consumer skeptics who arise with biometric technology are those who are avid

[21] Cantor, J., *Privacy Impact Assessment for the Automated Biometric Identification System,* U.S. Department of Homeland Security, 2012, https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-december2012.pdf, (last visited Feb. 28, 2019.)

[22] Kaj P.N. Morel and Ad Th.H. Pruyn, *Consumer Skepticism Toward New Products*, European Advances in Consumer Research, 2003, https://research.utwente.nl/en/publications/consumer-skepticism-toward-new-products, (last visited March 5, 2019.)

Snowden and Matrix believers. They don't want the government tracking their every move, like the program the Department of Homeland Security uses for tracking immigrants. It is programs like this that create dubiousness about biometric modality use. The view of biometric use differs drastically between social groups considering the variation in cultural values and beliefs.[23] One social group may endorse the iris scans when checking into a hospital while the same social group may object to the use of facial recognition when walking into a department store. The intangible interactions between a biometric system and an individual are commonly overlooked. The willingness of an individual to participate and accept biometric use usually relies on the perceived safety and the presumed benefit.[24] Then we must also acknowledge that individual participation is driven by the potential consequences to those who don't participate.[25] If an individual chooses not to use biometrics, then they may not get a job or may be subject to isolation for certain social interactions. Systems must be diverse. And consideration must be given to ADA requirements.[26]

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[23] Consensus Study Report, *Biometric Recognition: Challenges and Opportunities*, National Research Council (US), Whither Biometrics Committee, 2010, https://www.ncbi.nlm.nih.gov/books/NBK219893/, (last visited March 5, 2019.)

[24] Concensus Study Report, *Who Goes There? Authentication Through the Lens of Privacy*, The National Academies Press 2003, https://www.nap.edu/catalog/10656/who-goes-there-authentication-through-the-lens-of-privacy, (last visited March 5, 2019.)

[25] Lancelot Miltgen, C., Popovič, A. and Oliveira, T., *Determinants of end-user acceptance of biometrics: Integrating the "Big 3" of technology acceptance with privacy context*, Decision Support Systems, 2013, https://www.researchgate.net/publication/258821079_Determinants_of_end-user_acceptance_of_biometrics_Integrating_the_Big_3_of_technology_acceptance_with_privacy_context, (last visited March 5, 2019.)

[26] Title III, ADA Requirements, 2011, https://www.ada.gov/reg3a.html, (last visited March 5, 2019.)

Certain individuals may not feel they can enroll in these systems as a result of physical inhibitions.[27] It is also important to consider the complications that these systems establish for an individual and their First Amendment rights. Having a mandatory requirement of biometric use begets de facto discrimination.[28] Consumers may also be skeptical about the standards used with biometrics. For instance, with facial recognition software, solitude may no longer be possible.[29] One day the notion of walking outside will no longer be a simple liberty. Things like 3D cameras with automated facial recognition that have been rapidly advancing in technology create foreseeable privacy implications.[30] In this scenario we must acknowledge that there is no real opt-out in a digital age with cameras everywhere. To function in society one must walk outside in public to participate.

When public and private sectors converge their facial recognition databases, do we not expose our faces in public? Many of us have experienced a moment when using Facebook or other means of social media where you receive a prompt to tag someone by name. This feature of tagging someone you may know was developed by the use of software which uses mass collection of facial geometric mapping through photos on various sites. The case of *Licata v. Facebook*, INC.,

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[27] Id.
[28] Id.
[29] Katherine Strandburg and Daniela Stan Raicu, eds,. *Privacy and Technologies of Identity: A Cross-Disciplinary Conversation,* 2006, *https://www.springer.com/us/book/9780387260501*, (last visited March 5, 2019.).
[30] Jennifer Tucker, *How Facial Recognition Technology Came To Be*, 2014, Globe Correspondent, https://www.bostonglobe.com/ideas/2014/11/23/facial-recognition-technology-goes-way-back/CkWaxzozvFcveQ7kvdLHGI/story.html, (last visited March 5, 2019.)

questions the gathering and storing of individuals facial geometry.[31] The principal concerns with the existing laws requiring consent is that the individual usually has no other option than to consent. Though there is a perceived notion that individuals have the right to choose how their biometrics are used, stored, and shared, do they really have a choice?

Integrity and Trustworthiness

Biometric technology isn't just a password that can be easily changed. It is technology that identifies you by something that is part of you which is immutable. If these identifiers are copied and hacked there is almost no way to change your password unless you change your fingerprint. Issues arise with the integrity of biometric data. Biometric data once gathered must be imputed and assigned by an individual accurately. This constitutes a potential for information data to be incorrectly assigned.[32] Which creates a demand for a invincible and accurately designed data collection process. Unlike unintended disclosure of a password, unintended disclosure of biometrics creates grievous consequences that are very difficult to remediate the exposure.[33] A breach of biometric data cannot be readily corrected by simply implementing a new password. Lack of discussion and concerns of the consequences associated with errors within biometrics

[31] *Licata v. Facebook, Inc.,* 3:2015cv03748, N.D. CAL, Aug. 17, 2015, https://dockets.justia.com/docket/california/candce/3:2015cv03748/290384, (last visited March 5, 2019.).

[32] Yanick Fratantonio, et al., *Cloak and Dagger: From Two Permissions to Complete Control of the UI Feedback Loop*, 2017 IEEE Symposium on Security and Privacy, 2017, Georgia Tech, http://iisp.gatech.edu/sites/default/files/documents/ieee_sp17_cloak_and_dagger_final.pdf, (last visited March 7, 2019.)

[33] Consensus Study Report, *Biometric Recognition: Challenges and Opportunities*, National Research Council (US), Whither Biometrics Committee, 2010, https://www.ncbi.nlm.nih.gov/books/NBK219893/, (last visited March 5, 2019.)

as well as the unintended disclosure of the data arouses much controversy. Technology errors tend to create a cloak and dagger effect. Biometric identification technology is likely to experience errors whether it be a false acceptance or false rejection. And technological parameters are set for these occurrences, but those parameters are usually set by the person who designs the technology.[34]

Health Risks

There has been an amplified desire to use biometric technology considering its intrinsic security features. One of the most coveted modalities of biometrics is the utilization of the human eye. At present there are two biometric modalities exploited for identification which are iris and retina scans. Both modalities use mathematical codes to record the data. The variance between the two is that Iris scans use subtle infrared illumination camera technology and retina scans use a low-energy infrared light beam emitted into an individual's eye.[35] Retina scans are accurate but the accuracy may be forfeited over time due to the nature of the retina tissue being affected by disease that causes degradation.[36] The preferred method is with the Iris because it is more

[34] Id.
[35] Allen Earman, *Eye Safety for Proximity Sensing Using Infrared Light-emitting Diodes*, Renesas, 2016, https://www.renesas.com/us/en/doc/application-note/an1737.pdf, (last visited March 7, 2019.)
[36] John Trader, *Iris vs. retina biometrics yes, they really are different,* SecureIDNews. 2014, https://www.secureidnews.com/news-item/iris-vs-retina-biometrics-yes-they-really-are-different/, (last visited March 7, 2019.)

reliable due to internal data components which creates stability.[37] The current ocular biometric methods use radiation which creating ionization because of the heat that is generated, which may adversely affect the accuracy and consistency. Studies show that adverse effects may occur to an eye subjected to thermal exposure. Concerns arise with the repeated exposure to infrared radiation that could cause damage to the multiple components of the eye as regenerative capabilities are very limited in most situations. One scientific model displayed a potential of laser-induced eye lesions caused by continued exposure to beams.[38] Biometric technology is frequently misunderstood, conceivably as a result of the industries lack of education and their being a deficit of regulations. This carries motive for legislation to be enacted rather than the limited guidelines that exist today. Without directed regulations and standards, public safety can and will be ignored subjecting the uninformed public to health risks.

Constitutional Protections

There is no real baseline for legal protection of biometric data because it is primarily a matter of state regulation and differs among jurisdictions. The use of biometric identifiers generates much debate

[37] M.Sujatha, K.V.S.Sravanthi, B.Jahanavi Raja, L.Dhanunjay, J.Naveen Kumar M.Sujatha, *Recognition of Human Iris Patterns for Biometric Identification*, IOSR Journal of Electronics and Communication Engineering, vol.10, pp.21-24, 2015, https://pdfs.semanticscholar.org/83d6/e6d3b8ba758abbd8f50c70540b88b9950eca.pdf, (last visited March 7, 2019.)

[38] Nikolas Kourkoumelis and Margaret Tzaphlidou, Eye Safety Relatred to Near Infrared Radiation Exposure to Biometric Devices, The ScientificWorldJournal, vol. 11, pp.520-528, 2011, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5720004/pdf/TSWJ-2011-11-902610.pdf, (last visited March 7, 2019.)

involving the challenges they create when discussing compliance with the Fourth Amendment, which includes the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[39] Here we must recognize that biometrics is implicit in the Fourth Amendment definition of persons. The courts have yet to articulate specific biometric modalities and their potential for violating the Fourth Amendment. In *United States v. Dionisio,* a case is made that heightens concerns around the expectation of privacy regarding voice prints.[40] The court's rationale was that the subpoena does not violate the Fourth Amendment thus there was no need to show probable cause. They stated that "no person can have a reasonable expectation that others will not know the sound of his/her voice."[41] Another issue with Fourth Amendment rights is that the court suggests that fingerprinting is also not intrusive therefore probable cause is not always necessary. With the expectation of privacy diminished in cases like *United States v. Dionisio,* careful attention to the consequences must be addressed, particularly as it relates to situations where automated facial recognition is litigated.

Passwords are constantly being interchanged with biometrics data which may adversely affect Fifth Amendment rights.[42] The Fifth

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[39] Lee Epstien and Thomas Walker. *Constitutional Law for a Changing America Rights, Liberties, and Justice.* Sage Press. pp. 728-732, 2016.
[40] *United States v. Kirschner,* 823 F. Supp. 2d 665, 669, E.D. Mich., 2010, https://casetext.com/case/us-v-kirschner-2, (last visited Mrch 7, 2019.)
[41] Katz v. United States, 389 U.S. 347 , U.S. S. Ct.., 1967, https://supreme.justia.com/cases/federal/us/389/347/, (last visited March 7, 2019.)
[42] Lauren D. Adkins, Biometrics: *Weighing Convenience and National Security Against Your Privacy*, 13 Mich. Telecomm & Tech. L. Rev. 541 (2007) http://repository.law.umich.edu/mttir/vol13/iss2/10, (last visited March 7, 2019.)

Amendment protects citizens from self-incriminating testimonials and includes passwords in its definition. But in *Commonwealth v. Baust*, the Fifth Amendment did not protect against biometric passwords.[43] The court's rationale was based on the distinction between testimonial acts using mental process versus physical characteristics. The court ruled that a biometric fingerprint is not protected under the Fifth Amendment because the fingerprint is a physical characteristic.[44] There appears to be an impasse as much of legal precedent predates contemporary technology. Most devices today require both a password and a biometric identifier, therefore biometric modalities should be protected under the Fifth Amendment based upon its intended use.[45] Iphones lack the dual security of having to enter both a password and a biometric identifier, though when your biometric identifier fails, device then requires your numeric password.[46] In this scenario, we cannot confirm whether you would be protected by the constitution or not.[47]

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[43] *Commonwealth v. Baust,* 89 Va. Cir. 267 (2014).

[44] Kyle J. O'Brien *Rethinking Fingerprints under the Fifth Amendment, American Bar Association, Aug. 9, 2017,* https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/cybersecurity/rethinking-fingerprints-under-fifth-amendment/, (last visited March 7, 2019.)

[45] Jack Linshi, *Why the Constitution Can Protect Passwords But Not Fingerprint Scans,* Time, 2014 http://time.com/3558936/fingerprint-password-fifth-amendment/, (last visited March 7, 2019.)

[46] Reed Albergotti, *Judge Rules Suspect Can Be Required to Unlock Phone With Fingerprint,* The Wall Street Journal, Oct. 31, 2014, https://blogs.wsj.com/digits/2014/10/31/judge-rules-suspect-can-be-required-to-unlock-phone-with-fingerprint/, (last visited March 7, 2019.)

[47] Jack Linshi, Why *the Constitution Can Protect Passwords But Not Fingerprint Scans*, Time, 2014, http://time.com/3558936/fingerprint-password-fifth-amendment/, (last visited March 7, 2019.)

The 229 year old law provides superior constitutional protections to a numeric password rather than your own fingerprint. We must question why there are no disclaimers provided when purchasing devices with biometric capabilities stating that when using the biometric password we relinquish our Fifth Amendment rights. We have arbitration disclaimers in most contracts that waive our right to trial by jury, therefore shouldn't there be a disclaimer for other rights that we unknowingly waive?

Legislation

With the emergence of possibilities within biometric technology industries, multiple legal issues concerning privacy eventualities must also be considered. Biometric technology is not just utilized in the public sector, it is becoming customary in the private sector. This means that biometric information data is currently being collected and stored. Concerns arise encompassing privacy and use of this data. Due to these concerns, the demand for regulation becomes imperative. Some of these issues and concerns regarding privacy rights and data protection within the realm of biometrics have been addressed and acknowledged in a many jurisdictions.[48] Illinois was the first state legislature to enact the Biometric Privacy Act, 740 ILCS 14/1 et seq. (BIPA) in 2008. It was initially introduced as Senate Bill 2400 by State Senator Terry Link and is considered the most stringent law that regulates biometrics. BIPA does not prohibit the collection of biometric data but it provides standards that private entities should follow when obtaining and storing biometrics. BIPA requires written consent along with prior disclosure of the purpose for in which the

[48] James Fullmer, Cybersecurity 2018 – The Year in Preview: Biometrics Security Privacy and the Law (2017), https://www.securityprivacyandthelaw.com/2017/12/cybersecurity-2018-the-year-in-preview-biometrics/ (last visited Jan 26, 2019).

collection of biometrics data is required. It also requires prior notification of the length of time in which this distinct biometric data will remain stored.

BIPA is now over a decade old and still remains the only biometric statute that bestows a right of private action. Texas and Washington are the only other states that have passed legislation specifically addressing biometric data.[49] What BIPA has that the other two states do not is that it permits a private right of action for violations, which means individuals may sue for violations of the statute's provisions.[50] This means that the Act provides "[a]ny person aggrieved by a violation of th[e] Act to bring suit to recover liquidated or actual damages, attorneys' fees, litigation expenses and other relief, including injunctive relief."[51]

The case *Santana v. Take-Two,* involved 3D mapping with the use of cameras to create avatars of gamers. This is one case in which the courts dismissed BIPA claims due to their lack of Article III standing.[52] The court did not accept as valid the Plaintiffs' allegations of a material risk, in part because they were unable to articulate a real injury. The

[49] 740 Ill. Comp. Stat. 14/10 (2008); 11 Tex. Bus. & Com. Code Ann. § 503.001 (West 2009); H.B. 1493, 65th Leg. Reg. Sess. (Wash. 2017)

[50] See Lara Tumeh, Washington's New Biometric Privacy Statute and How It Compares to Illinois and Texas Law, BLOOMBERG BNA (Oct. 16, 2017), https://www.jdsupra.com/legalnews/washington-s-new-biometric-privacy70894/

[51] Laney Gifford, Zachary Madonia & J. Thomas Richie, Illinois Supreme Court Adopts Expansive Interpretation of Standing under Illinois BIPA, Potentially Opening the Flood Gates for Class ActionsDeclassified(2019), https://www.classactiondeclassified.com/2019/02/illinois-supreme-court-adopts-expansive-interpretation-standing-illinois-bipa-potentially-opening-flood-gates-class-actions/ (last visited Feb 6, 2019).

[52] Id.

matter that has been questioned in recent years is the scope of BIPA and its Article III parameters.[53] In a recent court opinion filed on January 25, 2019 in *Rosenbach v. Six Flags Entertainment Corporation*, the Illinois Supreme Court adopted a broad interpretation of the word "aggrieved" which has expanded the right to sue under BIPA as it relates to injury.[54] Based upon this decision, it is likely other states will adopt biometric laws.

Many states realize the pressing necessity to regulate the adverse effects of biometric technology on privacy but only Illinois, Washington and Texas have enacted biometric specific privacy laws. [55] States like California, Michigan, New Hampshire, Montana, Idaho, Massachusetts, Delaware and others across the country have comparable pending laws before their legislature.[56] Many of the proposed laws aim to impose notice/consent requirements and the disclosure of how it will be stored and the eventual destruction. Other states that have strong privacy measures are attempting to include biometric modalities.[57] Biometric

[53] See also *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114(2017); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) on Article III standing.
[54] *Rosenbach v. Six Flags Entertainment Corp*., No. 123186 (Ill. 2018)
[55] Karla Grossenbacher & Christopher W. Kelleher, *Hazards Ahead: Uptick in Biometric Privacy Laws Can Put Employers in Hot Seat*, EMP. L. LOOKOUT (Oct. 3, 2017), https://www.laborandemploymentlawcounsel.com/2017/10/hazardsahead-uptick-in-biometric-privacy-laws-can-put-employers-in-hot-seat/
[56] See Michigan, 2017 Bill MI H.B. 5019; New Hampshire, 2017 Bill NH H.B 523;Alaska, 2017 Bill AK H.B. 72;Montana, 2017 Bill MT H.B. 518; Massachusetts, 2017 Bill MA H.B, 1985; Massachusetts, 2017 Bill MA S. 95; Delaware, Bill DE; California, Bill CA S. 327; Idaho, 2017 Bill ID S, 1033.
[57] James Fullmer, *Cybersecurity 2018 – The Year in Preview: Biometrics*, Security Privacy and the Law, 2017, https://www.securityprivacyandthelaw.com/2017/12/cybersecurity-2018-the-year-in-preview-biometrics/ (last visited Jan 26, 2019).

modalities shouldn't just be considered as an algorithm, they are part of the human individual.

Before there is full-scale use of biometric technology in society there needs to be established rules and regulations. Guidelines and standards are not enough to hold entities accountable for the safety of individual's identifying data. Most biometric data is digitally stored, therefore it allows for it to be circulated rapidly. Due to our advancements in technology it has become seemingly rudimentary to exchange data. Regulating the storage, retrieval, and use that data requires a uniform approach.[58] At this time, biometric protections generate more problems than they do solutions because of jurisdictional debates. There are currently bills in both houses of Congress. One of those is the Consumer Privacy Protection Act of 2017 which is Senate Bill (S.) 2124 and House of Representatives Bill (H.R.) 4081. Senate Bill 2124 was referred to the Senate Judiciary Committee in November of 2017 and H.R. 4081 was introduced in October of 2017. In Section 3(11)(D) of Senate Bill 2124, is a definition of "[u]nique biometric data, such as face print, fingerprint, voiceprint, a retina or iris image, or any other unique physical representation," that is to be included under sensitive personally identifiable information in an "electronic or digital form that identifies or could be used to identify a particular person."[59] The bills before Congress delineates how "misuse of sensitive personally identifiable information has the potential to cause serious or irreparable harm to an individual's livelihood."[60] Congress also found that it is

[58] Sharon Roberg-Perez, *The Future Is Now: Biometric Information and Data Privacy*, 31 Antitrust 3, 2017, https://www.robinskaplan.com/~/media/pdfs/the future is now biometric information and data privacy.pdf?la=e, (last visited March 7, 2019.).
[59] *Consumer Privacy Protection Act 2017*, https://www.congress.gov/bill/115th-congress/senate-bill/2124, (last visited March 7, 2019.)
[60] Id.

important for "business entities that own, use, store, or license sensitive personally identifiable information to adopt reasonable policies and procedures to help ensure the security and privacy of sensitive personally identifiable information".[61] Though before the houses of Congress for more than a year, the evidence of the need for regulation and the increased use of biometrics demands legislative attention, both federally and within the states.[62]

Important Trends in Biometric Data Security

According to recent reports, the biometric market was valued at USD $13.89 billion in 2017 and is forecasted to reach $41.80 billion in 2023.[63] Technology such as fingerprint, face, and iris scans have become the norm and an integral part of our society. It appears that biometric technology is in a Thomas Kuhn revolution cycle.[64] Biometics is in a model crisis on the brink of a revolution and a paradigm shift. Traditional passwords and punch cards are disappearing and new technologies are emerging. These technologies include gestural, heart rhythm, gait analysis and chemical biometrics that are derived from DNA, body odor, and even perspiration. There are already hybrid technologies being developed such as the Nokia's vibrating

[61] Id.
[62] J.C. Pierce, *Shifting Data Breach Liability: A Congressional Approach*, 57 Wm. & Mary L. Rev. 975, 985, 2016, https://scholarship.law.wm.edu/wmlr/vol57/iss3/6/, (last visited March 7, 2019.)
[63] *Biometric System Market*, Market Research Firm, https://www.marketsandmarkets.com/Market-Reports/next-generation-biometric-technologies-market-697.html, (last visited March 7, 2019.)
[64] *The Kuhn Cycle*, thwink.org, http://www.thwink.org/sustain/glossary/KuhnCycle.htm, (last visited Feb. 28, 2019.)

magnetic ink tattoos (US Patent 8,766,784)[65] and a password pill from Proteus Digital Health which are in our near future.[66] Then we have the password pill from Motorola and Proteus Digital Health.[67] Regina Dugan, the current VP of Motorola, says that they are making the authentication process "more human."[68] She describes the process of taking the pill as turning you into a cyborg making your "arms like wire, hands like alligator clips" and when a device is touched you're automatically authenticated.[69] There is even technology using Spatial Phase Imaging (SPI) Sensors which extract three-dimensional (3D) information without being scanned or using structured lighting.[70] That means your biometric data can be collected anywhere anytime without your knowledge just by walking down the street in public.

As biometrics are entering mainstream use by consumers, corporations will also be increasing the integration of these systems. Airports will be increasing their use of biometric passports and biometric check-ins will

[65] *Coupling an electronic skin tattoo to a mobile communication device*, Google Patents, https://patents.google.com/patent/US20130297301A1/en, (last visited March 1, 2019.)
[66] J.R. Ehrenfeld, *Industrial Ecology: Paradigm Shift or Normal Science?,* American Behavioral Scientist, Oct. 1, 2000, https://journals.sagepub.com/doi/10.1177/0002764200044002006, (last visited March 1, 2019.)
[67] Kim Lachance Shandrow, *Swallow This 'Password' Pill to Unlock Your Digital Device*s, Entrepreneur, Feb. 3, 2014, https://www.entrepreneur.com/article/231182, (last visited March 7, 2019.)
[68] Id.
[69] Id.
[70] Photon-X – SPI Technology, Photon-X, http://www.photon-x.co/#technology, (last visited March 7, 2019.).

become customary.[71] As of January 2019, Miami passengers who are flying Lufthansa Flight 461 can now board simply by having their face scanned rather than using their boarding pass or passport.[72] According to a recent report by Société Internationale de Télécommunications Aéronautiques (SITA), 77% of airports and 71% of airlines are planning on implementing biometric technologies or investing in biometric research and development within the next few years.[73] By 2020 all smart devices, which includes phones, tablets, and wearables, will have biometric security enablement.[74] With the consumer shopping trend turning away from department stores and toward online purchases, individuals can easily pay for their items with their biometric identifiers straight from their phone. There is also a high demand for certainty in patient identifications in the healthcare industry. It is predicted that the demand for biometric identifications in healthcare

[71] Marisa Garcia, *Biometric Technology Is Taking Off As 77% Of Airports and 71% Of Airlines Review Digital ID Options*, Forbes(2018), https://www.forbes.com/sites/marisagarcia/2018/09/29/biometric-technology-is-taking-off-as-77-of-airports-and-71-of-airlines-review-digital-id-options/#4f4c8eb6704d, (last visited March 7, 2019.)

[72] *Now boarding from MIA: facial recognition departures*, Miami International Airport, Feb. 1, 2019, https://news.miami-airport.com/now-boarding-from-mia-facial-recognition-departures/, (last visited March 7, 2019.).

[73] *Air Transport Cybersecurity Insights 2018,* SITA, https://www.sita.aero/resources/type/surveys-reports/air-transport-cybersecurity-insights-2018, (last visited March 7, 2019.)

[74] Rachel German & K. Suzanne Barber, *Current Biometric Adoption and Trends*, May 2018, The University of Texas at Austin Center for Identity, https://identity.utexas.edu/assets/uploads/publications/Current-Biometric-Adoption-and-Trends.pdf, (last visited March 7, 2019.)

will increase by 22.9% in 2025.[75] Biometrics will continue to innovate and be a driver in technology transformation of information security.

Conclusion

Though it may appear that biometric identifiers are annexing the security industry, passwords aren't going away. We see throughout the research that biometric technologies have their challenges and work best when supplemented with passwords. For companies that utilize biometric identifiers, whether their jurisdiction has legislation in place or not, it is apparent and essential to have written policies in place. In any transaction being proactive is superior to that of being reactive. Shaving a few dollars off of office payroll with the use of biometric systems will be ineffective if the right policies are not in place and up to industry standards. Outlining the process of collecting, storing and deleting of data assists in preventing foreseeable litigation particularly if policies are not put in place. The first biometric legislation has been around over a decade, it is really time for Congress to act upon the bills that are before them. Building consumer trust with biometric data technologies is crucial to economic development and innovation. Data privacy policies must create transparency and uniformity. We must acknowledge that biometric technologies are not perfect or absolute and therefore, we must have policies in place that accommodate these

[75] Credence Research, Healthcare Biometrics Market By Technology (Fingerprint Recognition, Iris Recognition, Palm Geometry Recognition, Vein/Vascular Recognition, Other), By Applications (Record Management And Data Security, Healthcare Staff Authentication And Workforce Management, Patient Identification And Tracking, Other), By Usage Area (Hospitals And Clinics, Pharmaceutical And Medical Device Manufacturing, Research And Academia, Other) - Growth, Future Prospects, And Competitive Analysis, 2017 – 2025, Nov. 2017, Market Research Reports, https://www.credenceresearch.com/report/healthcare-biometrics-market, (last visited March 7, 2019.)

weaknesses. There is no escaping the advancement of technology, the best we can do is prepare and anticipate the challenges.

Affirmative Action: The Unequal Protection Clause

By Sayd Hussain

Introduction

With the current climate around race continuing to be challenged by Federal courts, including the U.S. Supreme Court, the U.S. braces for a new era of Affirmative Action policies in the academic setting of universities, ones not based on race but on race-neutral policy. Race-neutral affirmative action is relativity new and it is mainly implemented in states where race-based Affirmative Action is banned. The real question behind this new era of Affirmative Action is, does this policy violate the equal protection clause of the 14th Amendment of the U.S. Constitution or can race-neutral Affirmative Action be enough to satisfy universities' desire for a diverse student body? Before we can answer these questions, we must look at the history of Affirmative Action.

History of Affirmative Action

"Affirmative Action" was coined in executive order (EO) 10925 signed by President John F. Kennedy on March 6th, 1961. This order required government contractors to have an Affirmative Action policy within their employment that treats employees fairly.[1] Furthermore, it created the President's Committee on Equal Employment Opportunity (EEOC) and the Office of Federal Contract Compliance Programs. On September 24th, 1965, President Johnson signed EO 11246, expanding the prohibiting of U.S. government contractors from discriminating

[1] *Executive Order 10925, Establishing the President's Committee on Equal Employment Opportunity,* EEOC, https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html, (last visited March 18, 2019.)

against people of color.[2] Also, the EO must have established a non-discriminatory hiring/employment policy. These policy changes were largely ignored by the public according to Mark Naison, an Affirmative Action professor at Fordham University.[3]

After African-Americans rioted in American cities during the 1960s, elite universities decided to embrace President Kennedy's Affirmative Action policies to include "goals, quotas and racial preferences for black students in college admissions."[4] Universities felt that by promoting Affirmative Action to recruit underrepresented groups of Americans, it can help undo the years of not admitting these excluded groups of color. Natasha Warikoo, an associate professor of education at the Harvard Graduate School of Education, argued that universities such as Harvard systematically excluded African Americans and by adopting Affirmative Action policies, universities can move towards social and racial justice in America.[5]

In *Brown v. Board of Education*, the U.S. Supreme Court decided a case that changed America, and determined that "separate but equal" was very unequal after all.[6] This opened a new era of the American

[2] *Executive Order No. 11246, NonDiscrimination in Government Employment,* EEOC, https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-11246.html, (last visited March 18, 2019.)
[3] *What To Know About Affirmative Action As The Harvard Trial Begins,* NPR, https://www.npr.org/2018/10/16/657499646/what-to-know-about-affirmative-action-as-the-harvard-trial-begins, (last visited March 9, 2019.)
[4] Id.
[5] *The Era of Affirmative Action May Not Last Much Longer,* The Atlantic, https://www.theatlantic.com/education/archive/2018/07/the-era-of-affirmative-action-may-not-last-much-longer/564416/, (last visited March 9, 2019.)
[6] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), https://www.law.cornell.edu/supremecourt/text/347/483, (last visited March 18, 2019.)

education system where all schools in seventeen states have to desegregate to accommodate for people of color.[7] Affirmative Action was created to address historically excluded students, but it was not a smooth process. Each school had different ways to address Affirmative Action. Racial quotas and preferences initially opened doors to historically excluded students, but legal challenges quickly followed.[8]

The University of California Medical School decided to create racial quotas as its Affirmative Action policy. The Medical School created two separate admissions programs, general and special admissions. The general program handled most applicants while the special program admitted minority and economically disadvantaged applicants.[9] Although white applicants could have applied through the special program, no white applicant has ever been accepted throughout the history of the special program. For every 100 seats opened for its medical school, 16 spots were reserved for minority or historically unrepresented students in the special program.[10]

Twice denied admission to California's medical school program, Allan Bakke believed quotas created an unfair application system and was the

[7] *History of Affirmative Action in Education, Infographic*, Pearson (2016), https://www.pearsoned.com/history-of-affirmative-action-in-education/ (last visited Mar 10, 2019.)
[8] Lindsay H. Hoffman, *Affirmative Action in College Admissions: Yes or No?* The Huffington Post (2017), https://www.huffingtonpost.com/lindsay-hoffman/affirmative-action-in-col_b_8972502.html, (last visited Mar 10, 2019.)
[9] *Let's ace law school, Case Briefs, Outlines, Lessons, and Exam Prep for Law School Student*,Quimbee, https://www.quimbee.com/cases/regents-of-university-of-california-v-bakke, (last visited Mar 10, 2019.)
[10]Adam Harris, *The Era of Affirmative Action May Not Last Much Longer*, The Atlantic (2018), https://www.theatlantic.com/education/archive/2018/07/the-era-of-affirmative-action-may-not-last-much-longer/564416/, (last visited Mar 10, 2019.)

reason that he was denied admissions to the University of California Medical School. Bakke had significantly higher scores than the admitted minorities who took up the 16 seats, which led him to bring a lawsuit against the university on the grounds that its policy violated the Equal Protection Clause of the 14th Amendment. The case of *Regents of the University of California v. Bakke*[11] in 1978 became the first U.S. Supreme Court case to address Affirmative Action policies. The Equal Protection Clause of the 14th Amendment requires that no state "… deny to any person within its jurisdiction the equal protection of the laws."[12] Furthermore, Bakke argued that the university violated Title VI of the Civil Rights Act of 1964.[13] The U.S. Supreme Court ruled that racial quotas during the admission process violated the equal protection clause of the 14th Amendment. A victory for Bakke, but the Supreme Court also ruled that Affirmative Action was constitutional in some circumstances.[14]

As *Bakke* became the first Supreme Court case to deliberate Affirmative Action practices, the opinions of the justices became the precedent for the future. Justice Lewis F. Powell, Jr wrote the controlling *Bakke* majority opinion where he stated that a quota system based on race is a

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[11] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justia, https://supreme.justia.com/cases/federal/us/438/265/, (last visited March 18, 2019.

[12] LII Staff, *14th Amendment*, LII / Legal Information Institute (2018), https://www.law.cornell.edu/constitution/amendmentxiv, (last visited Mar 10, 2019.)

[13] *Title VI of the Civil Rights Act of 1964*, 42 U.S.C. Section 2000D et seq., U.S. Department of Justice, https://www.justice.gov/crt/fcs/TitleVI-Overview, (last visited March 18, 2019.)

[14] Alex McBride, *The Supreme Court, Expanding Civil Rights, Landmark Cases*, *Regents of University of California v. Bakke* (1978), Thirteen, https://www.thirteen.org/wnet/supremecourt/rights/landmark_regents.html, (last visited Mar 10, 2019.)

violation of the U.S. Constitution.[15] However, he also stated that giving preference to qualified minorities was "vital to an integrated society."[16] Justice Thurgood Marshall, the first African-American Justice on the U.S. Supreme Court, argued that the Equal Protection Clause can be used to remedy past discrimination practices.[17] The Equal Protection Clause, from the 14th Amendment, is the "idea that a governmental body may not deny people equal protection of its governing laws."[18] Since the U.S. Constitution did not prevent past discrimination for the past 200 years, how can the Constitution now be interpreted as a barrier to institutions trying to remedy the legacy of past discrimination?[19] Justice Marshall believed that Affirmative Action policies were necessary because ending racial segregation did not "automatically end segregation, nor did they move Negroes from a position of legal inferiority to equality."[20]

Nonetheless, Justice Powell's majority opinion would be the lasting judicial precedent whereby the Court viewed the 14th Amendment based on individuals' rights, regardless of race. The court determined that Affirmative Action can be used if an institution has a compelling

[15] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justia, https://supreme.justia.com/cases/federal/us/438/265/, (last visited March 18, 2019.)
[16] Id.
[17] Lincoln Caplan, *Thurgood Marshall and the Need for Affirmative Action*, The New Yorker (2017), https://www.newyorker.com/news/news-desk/thurgood-marshall-and-the-need-for-affirmative-action (last visited Mar 10, 2019).
[18] LII Staff, *Equal Protection,* Cornell Law School, (2018), https://www.law.cornell.edu/wex/equal_protection, (last visited Mar 11, 2019.)
[19] Joseph Berger, *Education; The Bakke Case 10 Years Later: Mixed Results*, The New York Times (1988), https://www.nytimes.com/1988/07/13/us/education-the-bakke-case-10-years-later-mixed-results.html, (last visited Mar 10, 2019.)
[20] Id.

interest to promote diversity.[21] However, the 1996 case of *Hopewood v. Texas,*[22] which was an appeal from the Fifth Circuit Court of Appeals, was the first successful legal challenge to Affirmative Action, banning the use of race as a factor of admissions in order to achieve diversity. The Supreme Court denied accepting the case for review thereby allowing the appellate decision to become precedent.[23] But seven years later, the decision in *Hopewood v. State of Texas* was overturned by *Grutter v. Bollinger*.[24]

The 2003 U.S. Supreme Court decision of *Grutter* upheld Affirmative Action policies of the University of Michigan Law School.[25] Although race was a factor in admissions, it was not enough to be considered a racial quota, but an overall part of the student's evaluation. Justice O'Connor, who authored the majority opinion, wrote, "by enrolling a "critical mass" of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession."[26] The majority opinion followed the precedent of *Bakke*, allowing the use of race to be an additional factor to promote racial diversity. However, Justice Scalia along with Justice Thomas dissented, stating that, "[The] nonminority individuals who are deprived

[21] Adam Harris, *The Supreme Court Justice Who Forever Changed Affirmative Action*, The Atlantic (2018), https://www.theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938/ (last visited Mar 10, 2019).
[22] *Hopewood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), Justia, https://law.justia.com/cases/federal/appellate-courts/F3/78/932/504514/, (last visited March 18, 2019.)
[23] Id.
[24] *Grutter v. Bollinger*, 539 US 306 (2003), https://www.oyez.org/cases/2002/02-241, (last visited March 18, 2019.)
[25] LII Staff, *Grutter V. Bollinger*, LII / Legal Information Institute (2003), https://www.law.cornell.edu/supct/html/02-241.ZS.html (last visited Mar 10, 2019).
[26] Id.

of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand".[27] Justice Scalia and Justice Thomas viewed Affirmative Action as a form of reversed racism against non-minority students, creating an unequal system based on race.

Due to the legal challenges of Affirmative Action, an alternative was introduced called race neutral Affirmative Action. Race neutral policies were explored in states such as Florida, Michigan, and California. These states have banned the use of raced based Affirmative Action either by voter referendum or executive order. For example, voters, through a referendum, banned racial preferences in California, Arizona, Washington, Oklahoma, Nebraska, and Nebraska. Florida is the only state that banned racial preferences by executive order while New Hampshire is the only state that banned it through state legislative action.[28]

Voter referendums were legally challenged in the U.S. Supreme Court in *Schuette v. Coalition to Defend Affirmative Action* in 2014.[29] The U.S. Supreme Court ruled in an unprecedented 6-2 majority, that voters have the right to ban race based Affirmative Action policies. Justice Kennedy wrote the majority opinion, stating that he believed states can perform lab-style tests of different policies to create solutions. These solutions can include implementing race neutral Affirmative Action

[27] Id.
[28] Halley Potter, *What Can We Learn from States That Ban Affirmative Action?,* The Century Foundation (2016), https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/ (last visited Mar 10, 2019).
[29] *Schuette v. Coalition to Defend Affirmative Action*, 568 U.S. 1249 (U.S. 2013), Oyez, https://www.oyez.org/cases/2013/12-682, (last visited March 18, 2019.)

policies to indirectly increase diversity.[30]

The 2016 Supreme Court case on Affirmative, *Fisher v. University of Texas*, warned institutions that not all Affirmative Action policies will pass constitutional analysis. Justice Kennedy wrote the majority opinion and said that in order for a university to use race to promote a diverse student body; it must satisfy the condition that a race-neutral option would not produce a diverse student body.[31] "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity,"[32] he said. Justice Alito warned in his 51-page dissent that the U.S. Supreme Court decision will help African-Americans but harm Asian-Americans.[33] This warning became a reality when the Students for Fair Admissions (SFFA) filed a lawsuit against Harvard University. This is the first type of Affirmative Action case that involves higher achieving non-white students against other racial groups, unofficially creating a racial quota system.[34]

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[30]Richard D. Kahlenberg et al., *Did the Supreme Court Just Kill Affirmative Action?* Politico (2014), https://www.politico.com/magazine/story/2014/04/did-the-supreme-court-just-kill-affirmative-action-105934#.U59C7_ldWSo, (last visited Mar 10, 2019.)

[31] *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). https://scholar.google.com/scholar_case?case=6883717302676149601&q=Fisher+v.+University+of+Texas+at+Austin,+133+S.+Ct.+2411+(2013)&hl=en&as_sdt=40006&as_vis=1, (last visited March 18, 2019.)

[32] Id.

[33] Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, The New York Times (2016), https://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html, (last visited Mar 10, 2019.)

[34] Anemona Hartocollis, *Asian-Americans Suing Harvard Say Admissions Files Show Discrimination*, The New York Times (2018), https://www.nytimes.com/2018/04/04/us/harvard-asian-admission.html, (last visited Mar 10, 2019.)

Analysis of Race Based Affirmative Action

Affirmative Action has become a top discussion among universities, Justices and voters alike. It begs the question of whether Affirmative Action policies are needed in 2019, some 65 years after Brown.[35] The current state of Affirmative Action is that it is a necessary tool for institutions to promote a unique and diverse student body.

Justice O'Connor mentioned in her majority opinion in *Grutter*[36] that, "[T]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[37] Although Justice O'Connor voted to keep Affirmative Action alive, at the same time, she gave it a hopeful timeline of 25 years of existence. Furthermore, Justice O'Connor stated that race-neutral Affirmative Action is the future of institutional policy, "The Court takes the [Michigan Law School] at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable."[38]

Fast forward to 2014 and the U.S. Supreme Court upheld the Michigan voter referendum to ban race based Affirmative Action as part of the *Schuette case.*[39] This put the Michigan law school at odds with its established race-based Affirmative Action policy. Justice Sonia Sotomayor sharply disagreed with the majority opinion in *Schuette*. In

[35] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), https://www.law.cornell.edu/supremecourt/text/347/483, (last visited March 18, 2019.)
[36] LII Staff, *Grutter V. Bollinger*, Cornell Law School (2003), https://www.law.cornell.edu/supct/html/02-241.ZS.html, (last visited Mar 10, 2019.)
[37] Id.
[38] Id.
[39] *Schuette v. Coalition to Defend Affirmative Action*, 568 U.S. 1249 (U.S. 2013), Oyez, https://www.oyez.org/cases/2013/12-682, (last visited March 18, 2019.)

her dissent, she wrote, "For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government."[40] Justice Kennedy, who voted in favor the Michigan Law's Affirmative Action policy in 2003, was with the majority during *Schuette* because, "Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues."[41] Therefore, the University of Michigan must end its race based Affirmative Action policy and find new techniques to achieve racial diversity.

In 2016, two years after the ban on Affirmative Action in Michigan, the University of Michigan shockingly outlined their experiment with race-neutral Affirmative Action in their amicus curiae brief filed in *Fisher.*[42] Michigan argued that race neutral affirmative action failed to bring in the racial and ethnic diversity compared to racial policies. The brief highlighted "[E]xtensive efforts to consider socioeconomic status in admission and recruiting," which some consider to be the strongest component of a race neutral policy.[43] The university wrote that it, "reinforced stereotypes," to believe that admissions based on economic backgrounds will bring in minority students, considering there are six

[40] Bill Mears, *Michigan's ban on affirmative action upheld by Supreme Court*, CNN (2014), https://www.cnn.com/2014/04/22/justice/scotus-michigan-affirmative-action/index.html, (last visited Mar 11, 2019.)
[41] Id.
[42] *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). https://scholar.google.com/scholar_case?case=6883717302676149601&q=Fisher+v.+University+of+Texas+at+Austin,+133+S.+Ct.+2411+(2013)&hl=en&as_sdt=40006&as_vis=1, (last visited March 18, 2019.)
[43] Id.

times as many white students who come from low socio-economic status than African-American students.[44]

This is evident by the data released in their brief, showing an approximate 12% decrease in undergraduate minority enrolled students and a 14.5% decrease in the graduate programs since 2006.[45] Undergraduate enrollment of African-Americans has been down 33% since 2006 while there was an increase of African-American applicants, from 16% in 2006 to 19% in 2015.[46] Due to the decline of minority enrollment, the absence of diversity meant that students will have a significantly reduced opportunity to make meaningful connections across racial boundaries. Michigan believe it is "[E]ducationally valuable in dispelling stereotypes and exposing students to new viewpoints."[47] The amicus curiae brief ended by stating, "The University's nearly decade-long experiment in race neutral admissions thus are a cautionary tale that underscores the compelling need for selective universities to be able to consider race as one of many background factors about applicants."[48]

Analysis of Race Neutral Affirmative Action

Chief Justice Roberts questioned during the court session of *Fisher v. University of Texas at Austin*, "What unique perspective does a minority student bring to a physics class?" Justice Ruth Bader Ginsburg questioned the top 10% admissions rule, saying, "[I]t's totally dependent upon having racially segregated neighborhoods, racially

[44] Id.
[45] Id.
[46] Id.
[47] Id.
[48] Id.

segregated schools, and it operates as a disincentive for a minority student to step out of that segregated community and attempt to get an integrated education."[49]

The Century Foundation, a public policy firm, found that 7 out of the 11 flagship universities that have race neutral Affirmative Action policies achieved racial diversity in the classroom except for the University of Michigan and the University of California Berkeley and Los Angeles. The study found five strategies that the successful universities used to achieve ethnic diversity without having a race-based admission process, which are, creating percent plans, adding economic factors in admissions, new financial aid programs, improved recruitment and drop legacy preferences.[50]

One of the several strategies, percent plans, allowed students from the top 10% of their high school graduating class to receive a preference or automatic acceptance into the State University system. States such as Texas, Florida, and California guarantee automatic acceptance for top performers in high school which helps meets universities' diversity based on geography rather than race. The report shows that in 2004, the University of Texas freshman class was 4.5 percent African American and 16.9 percent Hispanic.[51] In other words, the combined African-American and Hispanic percentage actually rose from 18.6 percent under the old race-based policy to 21.4 percent under the race-neutral

[49] Adam Liptak, *Supreme Court Justices' Comments Don't Bode Well for Affirmative Action*, The New York Times (2015), https://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html?module=inline, (last visited Mar 11, 2019.)
[50] Halley Potter, *What Can We Learn from States That Ban Affirmative Action?* The Century Foundation (2016), https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/, (last visited Mar 10, 2019.)
[51] Id.

programs.[52] The California system saw an increase of diversity using a percent plan after voters voted to banned Affirmative Action in 1996. Initially, California saw a decreased enrollment of minority students but by 2008, it had an increased from 18% to 24% of Latino and African-American students.[53] The University of Florida, which saw a decrease in Latino and African-American enrollment after Governor Bush signed an executive order, banning race based affirmative action in 1999. In the long-term however, race neutral Affirmative Action has exceeded racial Affirmative Action policies. For example, Hispanic enrollment dropped initially from 12% to 11.2% but now, it has increased to 16.6%. [54]

To explain the successes of race neutral policies in Florida, Texas, and California, it is important to recognize that these states have a larger population of Hispanic and other non-White applicants. Universities will have an easier time reaching its critical mass of diversity without racial Affirmative Action in states with a diverse population. Elite universities, such as UC Berkeley, UCLA and Michigan, have been the most affected by banning race based Affirmative Action.

The Century Foundation found that elite schools that do not have race based Affirmative Action have difficulty enrolling competitive, diverse students. The reason is that elite schools are highly selective regardless of the racial background of the applicant. Furthermore, competitive, diverse students may receive better, more competitive offers from elite schools with an existing race based Affirmative Action program. In other words, if a student gets accepted to elite school such as the University of Michigan without racial preference, the student is more

[52] Richard D. Kahlenberg, *A Better Affirmative Action,* The Century Foundation (2016) https://tcf.org/assets/downloads/tcf-abaa.pdf, (last visited Mar 11, 2019.)
[53] Id.
[54] Id.

likely to get into other competitive elite schools that do implement a racial preference.[55] Therefore, the majority of race neutral Affirmative Action policies works in the long term for most cases to bring economic and ethnically diverse students to universities.

A study from the Educational Testing Service (ETS) in 2015 simulated a college admissions system where socioeconomic Affirmative Action was used to determine if it is a replacement for racial Affirmative Action. The simulation tested different Affirmative Action policies and the effect each caused on enrolled students in a randomly generated freshman class. Universities without any Affirmative Action policies had an enrollment of 86% white, 8.6% Asians, 3.9% Hispanic and 1.9% African-American.[56] Universities that implemented a strong race based Affirmative Action policies saw student demographics of 68% white, 6% Asian, 15% Hispanic, and 11% African-American. During this period, race based Affirmative Action saw an increase of Hispanic and African-American enrollment while there was a decrease in white and Asian enrollment.[57] Universities that implemented a strong socioeconomic Affirmative Action policy however, had a demographic of 82% white, 7.4% Asian, 6.8% Hispanic, and 3.4% African American.[58]

From the ETS simulated college admissions test, it is evident that race neutral Affirmative Action did not reach similar racial diversity compared to race based Affirmative Action. At the same time, the

[55] Id.
[56] Sean F. Reardon, *Can Socioeconomic Status Substitute for Race?* Educational Testing Service (2015) https://www.ets.org/Media/Research/pdf/reardon_white_paper.pdf, (last visited Mar 11, 2019.)
[57] Id.
[58] Id.

percent plans did in fact help bring economic diversity within the enrolled freshman class. Therefore, a combination of both racial and economic Affirmative Action is recommended to bring both racial and economic diversity to a university student body.[59] The simulation concludes that, "[E]ven relatively aggressive [race-neutral] Affirmative Action policies do not mimic the effects of race-based policies on racial diversity; likewise race-based Affirmative Action policies do not mimic the effects of [race-neutral] policies on diversity; (b) there is little evidence of any systemic mismatch induced by [race-based] Affirmative Action policies; students who benefit from Affirmative Action are not, on average, admitted to colleges for which they are underqualified; and (c) the use of Affirmative Action policies by some colleges affects enrollment patterns in other colleges as well."[60]

It is understandable to see that race neutral Affirmative Action policies are designed solely to bring in economic diversity while race based Affirmative Action solely brings in racial diversity. Justice Ginsburg commented during *Fisher* about race neutral affirmative action, "It's totally dependent upon having racially segregated neighborhoods, racially segregated schools, and it operates as a disincentive for a minority student to step out of that segregated community and attempt to get an integrated education".[61] In other words, it is not accurate to expect racial diversity by socioeconomic Affirmative Action policies

[59] Id.
[60] Id.
[61] Adam Liptak, Supreme Court Justices' Comments Don't Bode Well for Affirmative Action The New York Times (2015), https://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html?module=inline (last visited Mar 11, 2019).

alone.[62]

The ETS study also strengthens the idea that race based Affirmative Action does not place minority students in classrooms they cannot excel in, even with poorer statistics.[63] They found no evidence that this is based on race based Affirmative Action and found little evidence to show that these policies impact academic preparation for minority students compared to white students.[64] "Until racial disparities in educational preparation are eliminated, then, other strategies are needed.[65] The study concluded that race-based Affirmative Action is still needed in the present day.[66] This is because race neutral Affirmative Action does not do enough to bring ethnic diversity into the classroom, thus, failing to reach the critical mass universities desire to have. However, having a system with both race and socioeconomic based Affirmative Action can further complicate the academic admissions process. "The under-representation of poor and working class at elite universities is far greater than the under-representation of students of color."[67] It allows those who were affected by previous discrimination, who didn't gain generational wealth and live in rougher neighborhoods, to get a chance to live a better life regardless of their skin color.[68]

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[62] Adam Liptak, Supreme Court Justices' Comments Don't Bode Well for Affirmative Action The New York Times (2015), https://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html?module=inline (last visited Mar 11, 2019).
[63] Sean F. Reardon, *Can Socioeconomic Status Substitute for Race?* Educational Testing Service (2015), https://www.ets.org/Media/Research/pdf/reardon_white_paper.pdf, (last visited Mar 11, 2019.)
[64] Id.
[65] Id.
[66] Id.
[67] Id.
[68] Id.

Therefore, the safest legal method to counter past discrimination is smart, socioeconomic Affirmative Action policies. It is the fairest system available and it allows universities to avoid the costly race based Affirmative Action. Justice Scalia and Justice Thomas, critics of Affirmative Action, state their preference for socioeconomic Affirmative Action.[69] The Century Foundation's report further shows that, "[A]t the top twenty law schools, 89 percent of African Americans, and 63 percent of Latinos come from the top socioeconomic half of the population."[70] Therefore, it is unfair to have a system based on race because not every person of color is poor and not every white person is rich. By having a system based on the socio-economics of the student while factoring in the hardships of students' academic and professional life, it can create a fair system for all students to succeed.

Analysis of *Students for Fair Admissions v. Harvard Cooperation* Pending Lawsuit

Students for Fair Admissions (SFFA) is an organization whose mission is "[T]o defend human and civil rights secured by law, including the right of individuals to equal protection under the law, through litigation and any other lawful means."[71] The organization, comprised of 21,000 volunteer members, launched a lawsuit in federal court against Harvard University claiming that the university discriminated against Asian applicants. SFFA argued that Harvard holds Asians to higher standards

[69] Id.
[70] Id.
[71] *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, https://www.scribd.com/document/391361594/Trial-Evidence2, (last visited March 18, 2019.)

than any other racial applicants, including whites.[72] Furthermore, SFFA alleges evidence that proves Harvard sets racial quotas on Asian applicants which were previously ruled by the U.S. Supreme Court as unconditional in *Regents of the Univ. of Cal. v. Bakke.*[73]

The President of Harvard University, Lawrence S. Bacow, wrote a letter to the community on October 10, 2018. He said, "The College's admissions process does not discriminate against anybody. I am confident the evidence presented at trial will establish that fact. The Supreme Court has twice ruled on this issue and has held up our admissions process as exemplar of how, in seeking to achieve a diverse student body, race may enter the process as one factor among many in consideration."[74] To support President Bacow's claims, in 2012, Harvard filed an amicus brief in *Fisher,* asserting that Harvard, "considers all aspects of an applicant background and experience, including in some circumstances the applicant's racial or ethnic background."[75]

Nonetheless, the SFFA cited that because Harvard accepts federal funds, it is required to follow Title VI of the Civil Rights Act and the Equal

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[72]*The Harvard Plan That Failed Asian Americans*, Harvard Law Review, https://harvardlawreview.org/2017/12/the-harvard-plan-that-failed-asian-americans/, (last visited Mar 11, 2019.)

[73] Anemona Hartocollis, *What's at Stake in the Harvard Lawsuit? Decades of Debate Over Race in Admissions*, The New York Times (2018), https://www.nytimes.com/2018/10/13/us/harvard-affirmative-action-asian-students.html (last visited Mar 11, 2019.)

[74] Lawrence S Bacow, *Harvard Admissions Lawsuit*, Harvard University (2018), https://admissionscase.harvard.edu/news/letter-community-harvard-president-lawrence-s-bacow, (last visited Mar 11, 2019.)

[75] *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, https://www.scribd.com/document/391361594/Trial-Evidence2, (last visited March 18, 2019.)

Protection Clause of the 14th Amendment. Therefore, if the university is found liable for discriminating against Asian-Americans, Harvard would be faced with legal scrutiny of their actions.[76] SFFA continues to maintain a strong stance in Federal Court, publishing all their court filings on their website.[77] According to student records that were released to the public, Asian-Americans scored the lowest in "positive personality, likability, courage, kindness and being widely respected."[78] Also, these court documents show that Harvard audited its own admissions process and found it did have a bias against Asian-American applicants.[79] This audit might be further evidence that the university discovered a biased against Asian-American applicants and never made an attempt to correct the mistake, making Harvard negligent. The SFFA claims that, based on the court documents, Harvard "killed the investigation and buried the reports."[80] Harvard has attempted to introduce race neutral Affirmative Action policies. However, the university did not believe in this policy, preferring race based Affirmative Action policy.[81]

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[76] *The Harvard Plan That Failed Asian Americans*, Harvard Law Review, https://harvardlawreview.org/2017/12/the-harvard-plan-that-failed-asian-americans/, (last visited Mar 11, 2019.)

[77] *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, https://www.scribd.com/document/391361594/Trial-Evidence2, (last visited March 18, 2019.)

[78] Anemona Hartocollis, *What's at Stake in the Harvard Lawsuit? Decades of Debate Over Race in Admissions*, The New York Times (2018), https://www.nytimes.com/2018/10/13/us/harvard-affirmative-action-asian-students.html (last visited Mar 11, 2019.)

[79] Id.

[80] *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, https://www.scribd.com/document/391361594/Trial-Evidence2, (last visited March 18, 2019.)

[81] Id.

As the court battle between Harvard and the Students for Fair Admissions continues, it is important to take a step back and remember that every applicant that applies to a university has dreams for a better future and every student deserves equal opportunity. A student cannot choose the color of their skin. Therefore, universities should not choose the color of their applicants. Although universities justify the use of race to promote a perfect society, the United States continues to diversity naturally, therefore, the use of race based Affirmative Action will be no longer necessary in the near future.

Conclusion

While the U.S. Congress has never created a law on Affirmative Action, states have taken it into their own hands, either with an executive order, legislative action or voter referendum to decide the future of Affirmative Action. The benefits of race-neutral Affirmative Action, such as the 10% plan, allows underprivileged students to have the opportunity to pursue higher education without as many roadblocks. Although this policy has worked in states with large diverse populations, states such as Michigan, which is less diverse, suffer from these policies to reach diversity.

Nonetheless, universities should not force diversity by using people of color to fill in the critical mass of diversity. All students should earn their spots to make the admissions process a fair and equal one. Thus, students will feel that their admissions decision will be based upon the holistic review of a student's entire application, not just a racial one. Yale Law School alumni, Justice Thomas, said it best, "I'd graduated from one of America's top law schools, but racial preference had

robbed my achievement of its true value."[82]

[82] Luke Johnson, *Thomas Compares Affirmative Action to Slavery*, The Huffington Post (2013), https://www.huffingtonpost.com/2013/06/24/clarence-thomas-affirmative-action_n_3491433.html, (last visited Mar 11, 2019.)

Constitutional Law: War Powers

by Robert Marriaga & Sayd Hussain

In the 20th and 21st century, an issue has emerged in American Politics. That issue is who declares war. Many would say that the United States Constitution is clear and states who has the power to declare war. Article 1, Section 8, Clause 11 of the U.S. Constitution states, that the United States Congress has the power to declare war[1]. That clause has only one interpretation, The United States Congress has the full authority to start war if needed and Congress is the only one that can declare it. However, The Presidency of the United States has found a loop hole to undermine this constitutional clause. The main argument used by the President of the United States is that the constitution gives him/her the authority to go to war without asking the United States Congress for permission due to the Commander-in-Chief clause. This clause is located in Article 2, Section 2, Clause 1. The clause states that, The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[2]. The President is given authority by the Constitution to command and serve as leader of the armed forces who are sent to fight in combat.

The question is, does the President of the United States have the authority to declare war or go into war without asking Congress permission even if the United States Constitution gives the office the leadership of the armed forces? The wording of the Constitution doesn't seem to be a problem; Article 1 seems to be clear. But is not giving the President the authority to declare war, disrespecting the role they have as Commander-in-Chief? Many scholars have looked into this argument

[1] *U.S. Constitution, Art. I, § 8.*
[2] *U.S. Constitution, Art. II, § 2.*

of who has the power to declare war and many cases have been in court to resolve this dispute. This research will give a solid answer on who has the power to declare war.

When looking up the in the United States Congress library, the official number states that the United States Congress has declared war 11 times[3]. Those wars include Declaration of War against Great Britain in 1812, Germany in 1917, Austria-Hungary in 1917, Japan in 1941 and Germany again in 1941. The major wars the United States was involved in, were approved by Congress. Declaring war did not seem to be an issue up to that point, but after the World War II victory, this started to become a problem within American Politics. The problems happening in Asia in the early 1950s and 1960s changed the role the President had in the U.S. Armed Forces. Wars in Vietnam and in Korea are technically wars but not officially. The President of the United States did not get any authorization from the Legislative Branch in order to get involved in any of those two wars in the Pacific. In 1973, the United States Congress through legislation tried to stop Presidential Actions from entering into conflicts/war without U.S Congress authorization after President Richard Nixon commanded the U.S. Armed Forces to bomb Cambodia while fighting in Vietnam without notifying Congress. This immediately made Congress pass the War Powers Resolution of 1973.

This seemed to be a move by the U.S. Congress to define issue of who declared war. This resolution gave a clear interpretation of what declaring war meant. It re-introduces that Congress is the only one to declare war, that the President has consulted with Congress of all the decisions made while in combat and time periods in which the President

[3] *Official Declarations of War by Congress,* United States Senate, https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm, (last visited March 19, 2019.)

has to notify Congress of the activities abroad and results.
After this resolution was introduced as a public law, the effect and impact it has caused on the executive power are minimal. The United States has gotten into many other conflicts/wars without congressional approval. El Salvador and Grenada in the 80s, Persian Gulf Conflict and many other conflicts/war the U.S. has been involved in. Presidential power over congressional approval has raised serious legal questioning. This has caused legislators to force lawsuits against the Commander-in-Chief. The *Sanchez-Espinoza v. Reagan* case was one of the many times that House Representatives have taken this issue to court. House Members, 12 to be exact, brought this case to the U.S. District Court, District of Columbia. What the House Members claimed was that President Ronald Reagan broke the law by violating the War Powers Resolution by engaging in war activities by providing weapons and military equipment to one of the sides to forcibly remove the Nicaraguan Government from power and asked the judiciary to solve this issue and prevent the President from exercising this unconstitutional action. President Reagan's legal team believed they did not violate the War Powers resolution or any other federal statute that was accused of, and asked for the court to dismiss the case. The decision made by the judiciary was to dismiss that case and stated that this was a non-justiciable question but more of a political question and that on those grounds, it was impossible for them to make decision.[4] This court case was then brought to the U.S. Court of Appeals in the District of Columbia.[5] The Circuit judges confirmed the District Court's decision and also dismissed the case.

A more recent case was the *Campbell v. Clinton* case in 1999. This case was a result of the NATO air strikes against Yugoslavia in Kosovo. The

[4] *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983).
[5] *Sanchez-Espinoza v. Reagan*, 770 F. 2d 202 (D.C. Cir. 1985).

House Representatives introduced a lawsuit claiming that U.S. involvement with NATO led by President Clinton violated the article 1, section 8 clause 11 of the United States Constitution which states that Congress declares war and that it also violated the War Powers Resolution. House members wanted United States to withdraw any participation in these actions and no longer participate in actions against Yugoslavia. Attorney Andrea Gail Cohen, who was President Clinton's attorney filed a motion to dismiss the case on the grounds that it was not a legal question, it was a political question. The United States District Court of D.C. dismissed the case and stated that the House members lacked standing.[6] The court believed it was a political question. In 2000, the United States Court of Appeals in D.C. affirmed the decision made by the District Court of D.C. and also dismissed the case giving the same opinion.

When analyzing and looking into the different schools of thought, strong arguments and very well-structured points of view seem to come out. Even if Article 1, Section 8, Clause 11 seems to be clear, scholars and legal masterminds have another view on it. The Commander-in-Chief clause has given a whole new dimension to who declares even if the War Powers Resolution confirms Article 1. The Presidents have changed the term of war and have claimed that many of the conflicts they have entered are more like police actions. Markus Dubber and Mariana Valverde state that United States serves as the police in the world and in the region. They give the example of President Theodore Roosevelt and how he made changes to the Monroe Doctrine, "Roosevelt Corollary" which gave the U.S. power to intervene in conflicts in Latin America. Under this doctrine, the United States can act if they see a threat to democracy or peace in the region.

[6] *Campbell v. Clinton,* 52 F. Supp. 2d 34 (D.D.C. 1999).

The President has broad power over foreign affairs, and they guide America Foreign Policy negotiating treaties and having the ability to appoint public officials such as ambassadors and high-rank officials in the State Department. Police Actions are a justification of scholars that side with the President when it comes to having the ability to start conflict. The President is Commander-in-Chief and also deals with the countries' foreign affairs; this gives the President ability to get involved in conflict and label it as Police Action not war. In 2011, President Barack Obama approved of United States participation in a military intervention in Libya against Muammar al Qadhafi in coalition with NATO. This action caused President Obama a lawsuit by congress members. The case was *Kucinich v. Obama,* President Obama was accused of violating the War Powers Resolution and violating the constitution by not having permission to go into war by Congress. District Judge of the District of Columbia, Reggie Walton dismissed the case on the lack of subject-matter. What is interesting is President Obama's defense and the statements given by him and his administration to court and congress. President Obama believed that his actions were not war actions but more of a police action. White House Press Secretary Jay Carney stated that, the operations were, "time-limited military action."[7] Then President Obama sent a letter to Congress stating that, "The War Powers Resolution did not apply to this case because of the limited nature of the involvement."[8] He added that he had the authority to conduct these operations, "constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive."

The Presidency uses not only the Commander-in-Chief clause but also, powers over foreign policy. This gives them two claims in their

[7] *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).
[8] Id.

argument of declaring war. The third claim President Obama used was the Political Question. The Political Question has been an ally to the Presidency because this blocks the judiciary from making a decision because the judiciary defines declaring war a non-justiciable question but a Political Question. Political Questions is an automatic dismissal by the court and is sent back to Congress and Presidency to dispute. The judiciary only answers legal questions, political questions make it difficult for courts to give a resolution. John Yoo from Berkeley Law believes that war powers are something that the judiciary can't solve.

"The judiciary's powers are limited in the area of war powers."[9] The judiciary could solve issues in foreign policy but not war powers. This is favorable for the Executive because courts can't get involved and congress has a hard time enforcing war powers.

On the other side of the argument is congress and their claim of declaring war. Many scholars argue that the United States Presidency has exceeded its constitutional limits and have turned in imperial presidency. This claim was made by Arthur Schlesinger when he wrote the book The Imperial Presidency. The main argument of Schlesinger is that the President has obtained too much power over war/conflicts and foreign affairs.[10] He sides with constitutionalists that believe the President is not meant to have too much power in his/her hands.

Schlesinger treats war powers just as identified in Article 1, Section 8, Clause 11. Jonathan Turley from George Washington University Law

[9] John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, California Law Review 84, No. 2 (1996), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1653&context=californialawreview, (last visited March 19, 2019.).

[10] Arthur Schlesinger, *The Imperial Presidency*, New York, Popular Library, 1974.

School seems to agree with this idea that declaring war resides in the hands of congress. Turley was the Attorney of the House Members who were the Plaintiffs during the *Kucinich v. Obama* case. During the court, Turley undermined President Obama's statement of the length of the intervention and that was not a war, by stating that, "Military operations constitute of war."[11] Legal scholars that believe in congressional power to declare war define military/police actions as an act of war. They try to close the loop whole in which many presidents have held themselves closely too. Scholars believe this argument is a loop hole that helps the executive exceed its' power and its' not consistent with the design of the constitution. Stephen Carter published a research paper in the Virginia Law Review and stated that important decisions like this should not rely on one person and that is why the constitution gave the power to declare war to congress. Carter believes the War Powers Resolution was passed to back Article 1, Section 8, Clause 11, "The genius of the Resolution, with all of its faults, is this: It guarantees that unless the Congress of the United States gives its approval, all of that awesome power will not be concentrated in the hands of a single individual."[12] Louis Fisher in Presidential War Power, states that war declaration has to be a decision made only by congress. Scholars that defend congress believe that Presidents going into conflict is a clear violation of the constitution, the war powers resolution and abuse of presidential power.

Conclusion

The power to declare war seems to be a problem in which both sides

[11] *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).
[12] Stephen Carter, *The Constitutionality of the War Powers Resolution*, Yale Law School, 1984, https://digitalcommons.law.yale.edu/fss_papers/2225/, (last visited March 19, 2019.)

claim rights to it and have strong academic leverage to back their positions. The legislative branch has power in paper and executive has found loop wholes to form a strong case. Where is the solution? The solution is in the United States Constitution. The solution can be found while researching where the founding fathers got their idea of Article 1, Section 8, Clause 11, the solution can be found in the obligations of congress in relations with armed forces and the solution is in future judiciary resolution.

The founding fathers had a vision that is not questionable or taken out of context. The United States Government was designed to not have a king. Many powers were put in congressional hands because the founding fathers did not want a president to have full authority over many important issues. War is one of them. In the Federalist Papers, Alexander Hamilton stated in Federalist Paper Number 69, that the President was not a king.[13] The power a king has over war in countries where they have monarchies, is absurd. The king has full autonomy to decide the destiny of armed forces. The reason why Hamilton wrote this was to remind Americans that we had to rely on Congress for many approvals because Congress is the representation of the American people and its will. Article 1, Section 8, Clause 11 cannot be taken out of context because our federalist papers are there to show why our founding fathers wrote what they wrote on the Constitution. The President is the commander-in-chief, but this doesn't mean they can decide whether to go to war/police actions or not. After Congress approves war or police actions, then they can make all the decisions of

[13] Alexander Hamilton, James Madison, and John Jay. *Federalist No. 69, The Real Character of the Executive* , The Federalist Papers, https://www.gutenberg.org/files/1404/1404-h/1404-h.htm, last visited March 19, 2019.)
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military strategy and operations. After approval, the commander-in-chief can responsibly command our troops but not before approval. Congress is the only one that can declare war and has the power to fund the armed forces.

Congress has the obligation to support our armed forces on Article 1, Section 8, Clause 11 & 12. Clause 11 gives them the authority to raise and support Armies and clause 12 gives them authority to provide and maintain a Navy. The United States Congress has to support troops but can end any participation or operations by defunding war. Congress can bargain with the President and prevent them from sending troops abroad, by passing resolutions in which they will not fund war/conflicts if the President doesn't fulfill their constitutional duty. War is a serious matter and congress has the constitutional obligation to have a say in whether to go to war or not because its peoples' taxes that are being spent on the war.

The role of the judiciary is crucial to topic like war. The judiciary has been accurate by making the decision of dismissing the cases but in the future, it is key that they set a precedent. Michael Garcia from Congressional Research Service stated that the judiciary has not ruled out a possible resolution.[14] This is a sign that maybe one day, a district court, court of appeals or even supreme court might have a say may set a precedent. It is important and crucial to preserve the separation of powers and rule of law. But if this issue becomes a constitutional problem or by some reason it has an impact that can change society completely, the judiciary, as wise academic intellectuals, have to make a

[14] Michael J. Garcia, *War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution,* Congressional Research Service, February 17, 2012, 1-20.

decision for the best of us. Only the judiciary can help the United States Congress enforce the declaration of war clause and war powers resolution.

Private Use of Eminent Domain,
A look at current eminent domain issues and a revisit of *Kelo v. City of New London*

by Eric Kemper

Introduction

With heated debate taking place on Capitol Hill regarding the building of a border wall between the United States and Mexico, the debate centered on the funding of the wall with most of the logistics being left out. Much of the land needed for the wall is privately owned, so the government plans to use eminent domain to acquire the land for erecting the wall. This requires the current landowner to be given just compensation for the land.[1] The landowner has no choice but to cede this land to the government or seek higher compensation through the court system. While this may seem straight-forward and relatively fair if the wall is for the national security interests of the country, it is often not this clear-cut. The power of government to exercise eminent domain is restricted by the Takings Clause in the Fifth Amendment of the U.S. Constitution. The Takings Clause states, "… nor shall private property be taken for public use, without just compensation." Although the border wall would fit under the definition of public use, there are cases where the government seeks to take land by eminent domain and sell it to a private developer. Does such a taking violate the "public use" restriction of the Takings Clause?

The issue was directly challenged in the case of *Kelo v City of New London,*[2] when in 2000, the city of New London approved a development plan by a private not-for-profit entity, the New London

[1] *U.S. Const., Amend. V*
[2] *Kelo v. City of New London,* 545 U.S. 469 (2005).

Development Corporation ("NLDC"), that required using the city's eminent domain powers to take private land. The city designated NLDC in charge of the development plan implementation and authorized it to "purchase property or to acquire property by exercising eminent domain in the city's name."[3] When NLDC could not successfully negotiate purchases with all of the private property owners, it instituted condemnation proceedings leading to a lawsuit by the landowners against the city. The owners, including Susette Kelo, argued that the taking of their properties violated the "public use" restriction in the Fifth Amendment.

Although the owners were successful at the trial court level, they were not so on appeal. The U.S. Supreme Court granted certiorari to "determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment."[4] The Court ruled in favor of the city holding that the private project was a revitalization of an economically depressed area, therefore fitting the definition of "public use" because the citizens of the city would benefit from it.[5]

This case, and several prior decisions discussed in the Court's opinion[6] represent a massive expansion of the Fifth Amendment and has paved the way for other private companies to use the government's powers of eminent domain to acquire land from private owners who refuse to sell. Other examples include the Keystone XL pipeline and a Foxconn factory. In the Keystone XL matter, TransCanada sought to use eminent

[3] *Id.* at 474.
[4] *Id.* at 477.
[5] *Id.* at 490.
[6] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

domain to acquire the land needed to complete the pipeline. The pipeline project is currently in limbo as it was blocked by a federal judge for not fully researching the effect the pipeline would have on climate change, leaving landowners unsure about what will happen with their land. The Trump administration is expected to appeal this decision. The microchip company Foxconn sought government assistance through eminent domain to acquire land for the construction of a new factory. Foxconn does plan to open a new manufacturing facility in Wisconsin, but the value of project is now lower than the initial $10 billion projection. However, all of the land needed for the $10 billion valuation is currently in Foxconn's possession, obtained through eminent domain.

Analysis

The plaintiffs were not alone during the *Kelo v City of New London* case, when the Supreme Court ruled that cities could take non-blighted properties for the pursuit of economic development by private developers. Kelo and the other plaintiffs were backed by several institutions such as the Institute for Justice, a non-profit whose goal is limiting the size and scope of the government through litigation. The Institute for Justice claimed that this policy of eminent domain use, "… undermines the rights of every American."[7] Unfortunately, their support through *amicus curie* briefs did not help win the day. The dissenting opinions of Justices Sandra Day O'Connor and Clarence Thomas also supported the claims made by Kelo and the other plaintiffs. In her dissent of the Court's 5-4 decision, Justice O'Connor wrote:

> To reason, as the Court does, that the incidental public benefits resulting from the subsequent

[7] John Kramer, *Homeowners Lose Eminent Domain Case*, Institute for Justice, https://ij.org/press-release/new-london-connecticut-release-6-23-2005/, (last visited Mar 19, 2019).

> ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

Indicating her belief that the Court was wrongfully interpreting the Takings Clause and expanding the powers of government. This follows that the Fifth Amendment prohibits a government's taking of private property for private development, and is in fact, what the Takings Clause is meant to prevent.

With municipalities being able to take private land for large scale developments, property owners in traditionally underrepresented areas could have their lives upended to make way for large revenue generating projects. In some cases, property taken by a government's use of eminent domain sits vacant and not developed. While in the opinion of the Court, Justice Stevens said, "The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community,"[8] nearly twenty years after the Supreme Court's decision, the property lost by Kelo sits vacant with no improvements or development. All of the plaintiffs from that case whose homes were taken have had no development on their condemned properties,[9] showing that the government forced these people out of their homes, disrupting their lives only to do nothing with the land.

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[8] *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

[9] Susette Kelo, *I still feel the pain of losing my 'Little Pink House'*, USA Today, https://www.usatoday.com/story/opinion/2018/04/16/private-land-seizure-pfizer-new-london-little-pink-house-column/507608002/, (last visited Mar 19, 2019)

However, the *Kelo* majority recognized that state legislatures have the ability to impose their own restrictions on the use of eminent domain. In his opinion for the Court, Justice Stevens concluded by noting:

> In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. Internal citations omitted.

Florida, for example, has one of the toughest eminent domain policies in the country requiring that land taken through eminent domain must remain in public hands for 10 years before it can be sold to private developers.[10] This law coincides with the dissenting opinion of Justice Clarence Thomas in *Kelo* and the Taking's Clause mandate that private property must be taken for public use. In *Kelo*, Justice Thomas wrote, "If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power–for public or private uses–then it would be surplusage."[11]

[10] Fla. Stat. s. 73.013 (2019).
[11] *Kelo v. City of New London, Conn.,* 545 U.S. 469, 508 (2005).

While Florida has followed Justice Thomas' recommendation to prevent eminent domain abuses, many states do not have such strong protections. However, even in states with strong protections from eminent domain abuses the government can still force people to sell the land to private investors, and often for much less than the original market value of the land. This is done through the issuance of a property or "condemnation blight" which is a declaration the property is too far dilapidated to be recovered and the value of the land is drastically reduced.[12] Declaring the land a condemnation or property blight clears the way for developers to obtain the land at far less than market value because the land is deemed unsafe and abandoned. In some instances, merely the discussion of a property blight declaration can reduce property values. Worse, if the municipality ultimately decides against issuing the blight, the property's value may never recover and the owner has no rights to seek damages from the municipality for devaluing their property.[13]

A common argument against restricting the government's exercise of eminent domain is that it would hamper economic development because stubborn land owners could block large projects from succeeding. These claims are too broad, however, because this would simply give land owners the right to participate in the market. Their land will be worth much more to developers who want to use it to build. Instead of adversely affecting property values, announcements of these projects

[12] Robert Alfert, *Condemnation Blight Under Florida Law: A Rule of Appropriation or the Scope of the Project Rule in D*, The Florida Bar Journal (July/August 1998), https://www.floridabar.org/news/tfb-journal/?durl=%2Fdivcom%2Fjn%2Fjnjournal01.nsf%2FAuthor%2F287B3B9F4487411A85256ADB005D61F6, (last visited Jun 19, 2018).
[13] Id.at 14.

will increase the value of the land, incentivizing owners to sell at market or a higher price to the developer. A bill similar to this idea has been introduced recently in Texas to address their booming economy and swift building of new energy pipelines. Texas Senate Bill "421 features several statutory changes, including: mandating a public meeting to ensure property owners understand the process and can have their question answered, stipulating minimum protections that must be present in the contract, as well as holding condemners accountable if they offer property owners less compensation than they are owed."[14] Texas allows private developers to use eminent domain for pipelines as they are deemed a public use, sometimes these companies do not have public meetings and unilaterally take the land from private owners.

This type of legislation should be universal, since it protects private property owners from having their land taken by other private entities. It also lessens the burden on the courts since land deals are more likely to be done privately so the deal can be completed quickly and quietly. The bill allows land owners to do more than simply accept the offer given to them or go to court to dispute the offer. Instead it allows property owners to have public meetings and ensures they are well compensated for ceding their land. Many groups in Texas and across the country support the bill and tighter controls on a government's exercise of eminent domain. By holding municipalities and their developer counterparts accountable for the use of property blights, property owners can feel comfortable knowing that a private developer will not take their house from them using eminent domain.

Conclusion

[14] Scott Willey*, Lois Kolkhorst files eminent domain reform bill* Fort Bend Herald, (2019), http://www.fbherald.com/free/kolkhorst-files-eminent-domain-reform-ill/article_d709df39-bf34-5b0c-a7ee-c66f34397036.html , (last visited Jan 28, 2019).

The general involvement of government aiding private developers in real estate transactions calls into question the protections granted by the Fifth Amendment to the U.S. Constitution. *Kelo v City of New London,* should be overturned to prevent more eminent domain abuses and allow property owners to have complete ownership of their land without fear that the government will seize it for a large private development project. The use of condemnation or property blights to lower property values so that the market value of the property is cheaper for developers must also be revised. Laws should be passed to provide monetary remedies for property owners when their property is publicly scheduled to be blighted, causing values to plummet, despite the blight not being declared. This would hold the government financially accountable for their misuse of blights. In many cases, the property subjected to taking is not developed and sits vacant as in the case of *Kelo v City of New London*. In other words, the City of New London forced these people out of their homes and disrupted their lives only to do nothing with the land.

Restricting eminent domain by holding state and local governments accountable and creating financial remedies for property owners will have a positive impact in this country. It can save taxpayers money by forcing governments (and their officials) to be more calculating in their exercise of eminent domain and condemnation blighting, which may also have the effect of allowing more people to stay in their homes, keeping their lives and property intact. Private developers should be required to negotiate fairly with private landowners and not resort to government intervention or the courts to take action in getting the deal finished. Sadly, as Justice O'Connor noted, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a

shopping mall, or any farm with a factory." Before government can exercise the power of eminent domain solely for economic development, the government and private developers should be required to negotiate at arms-length just as buyers and sellers do in ordinary real estate transactions. It is within the purview of state legislators to restrict the exercise of eminent domain, and it is their obligation to protect private landowners from unlawful takings by revenue seeking bureaucrats and greedy developers.

The Case Against Unwanted Publicity: A claim of privacy

by Sandy Larose

Advocates of the freedom of the press argue that it would be ridiculous to put a prior restraint on the media simply to protect people's "secret affairs." One argument is that if an individual is having an affair they should not do so in public knowing that anyone could record them and send it to their spouse. But regardless of the action being performed by an individual in public, he or she should have a right to autonomy without being exposed by the media. Should one's private affairs receive the same protection as his/her cell phone? If the police need a warrant to search a suspect's cell phone, why shouldn't the media be required to obtain a warrant before exposing one's private affairs and potentially ruin their reputation? As Justice Sotomayor stated in *United States v. Jones,*[1] "Viewing the contents of people's text messages exposes a "wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." By allowing the media to infringe upon the privacy of a person we risk exposing a wealth of detail about that person's life. While not making a case for putting a restrain on the media, there is a case to be made for requiring anyone, including the media, who wishes to expose sensitive information about a person to be required to obtain a warrant.

Suppose there are two men walking along the beach holding hands and kissing on a beautiful summer day. Suddenly, a TV crew perceives them as an object of interest and begins to record what appears to be a romantic scene. One of the men notices the TV crew and outrageously demands that they stop recording because he is married to a woman and does not

[1] *U.S. v. Jones*, 615 F. 3d 544 (2012), https://www.law.cornell.edu/supremecourt/text/10-1259, (last visited March 17, 2019.)

want her to find out about his affair, especially on TV. The man adds that this would not only ruin his marriage, but also his character in the eyes of his peers who do not know that he is bisexual. The TV crew acknowledges the man's legitimate concerns and stops recording. However, a few months later, the man's wife recognizes him on a five second TV news broadcast titled *Summer of Love*. Furious, she confronts him and consequently files for divorce. The man then files a lawsuit against the TV channel claiming that they invaded his privacy and intentionally inflicted emotional distress on him which ruined his marriage. But the court disagrees. They find that the public's interest in romance outweighs the man's privacy interest. The court concludes that there is no cause of action and therefore no legal basis to infringe upon the freedom of the press. The court further concludes that since no liability exists, this case has no merit.

Joseph Siprut, Adjunct Professor at Northwestern University School of Law, disagrees with the court. Siprut argues that, "Whether a picture should be deemed to be newsworthy should be determined, not by mere reference to whether the accompanying article or book is newsworthy, and whether there is a "reasonable connection" between the article and the photo, but rather by reference to whether the picture itself is newsworthy."[2] He adds that "If the picture is not newsworthy on its face, and the subject of the photo was chosen merely to illustrate the article, then (whether there is a reasonable connection between the article and the photograph's subject or not) the right should belong to the individual."[3] Though privacy should be valued, Siprut's economic

[2] Joseph Siprut, *Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places,* Pepperdine Law Review, Vol. 33, No. 2, 2006, http://www.siprut.com/assets/attorney_biographies/Privacy_Through_Anonymity_Siprut%20.pdf, ((last visited March 17, 2019.)
[3] Id.

approach may not be the most appropriate. For instance, an insurance company may have an interest in estimating the extent to which its customers value their privacy because this might help determine which security programs may be more beneficial and competitive to protect the privacy of those customers. However, this does not prove that the insurance company's interest is to protect the privacy of its customers. Instead, it seems that the main interest is to make a profit. Similarly, in any case involving the rights of the media versus the privacy rights of an individual, not only should we focus on determining the "newsworthiness" of the information being reported but we also need to make sure that the media isn't the one to make this determination.

Mark Tunick, Associate Professor of Political Science at Florida Atlantic University, discusses many reasons why people value privacy such as reputation: "Having information about oneself exposed to others can obviously affect one's reputation, and when one's reputation is damaged and one's standing is reduced in the eyes of one's friends, family, coworkers, or community, one can suffer a number of setbacks, including monetary loss and emotional or physical distress."[4]

Current social mores seem to indicate that people feel the need to keep others out of their private business, and even to withhold important information from those who may deserve to know the truth, like the case of the bisexual man's wife. In his economic argument, Siprut recommends that the right to privacy be given to the person who values

[4] Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media*, Routledge, 2014.

it the most economically.[5] For example, in the case of the bisexual man, it is clear that the plaintiff economically values the right to his image as indicated by his attempt to sue the TV Channel. Siprut argues that if the TV Channel bargains with the plaintiff and offers an amount which the plaintiff refuses, the plaintiff obviously values his image more than the TV Channel and therefore should own the right to his image. But what if the plaintiff does not want to put a price on his/her image? What if they simply do not want to be put under a false light or have their private facts published? One example is the case of *Carl De Gregorio v. CBS Inc.*,[6] in which two co-workers were filmed walking hand-in-hand on Madison Avenue by a CBS-TV camera crew. De Gregorio demanded that the film be destroyed because he was married and feared that this would not look good. However, CBS-TV went ahead and broadcasted the film, after which De Gregorio sued. Unfortunately, he lost because the court did not find any cause of action. The New York County court quoted, "[T]he privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events, but extends far beyond to include all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general."[7] This decision raises the question of what is considered newsworthy.

The dictionary defines the word 'news' as "a report of a recent event;

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[5] Joseph Siprut, *Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places*, Pepperdine Law Review, Vol. 33, No. 2, 2006, http://www.siprut.com/assets/attorney_biographies/Privacy_Through_Anonymity_Siprut%20.pdf, (last visited March 17, 2019.)

[6] *De Gregorio v. CBS Inc*, 123 Misc. 2d 491 (1984), Leagle, https://www.leagle.com/decision/1984614123misc2d4911528, (last visited March 17, 2019.)

[7] Id., quoting *Paulsen v Personality Posters*, 59 Misc.2d 444, 448.

previously unknown information."[8] If we choose to define the news reported by the media as such, then it is simply a report of an event that has recently happened and is somewhat relevant. In the case of the bisexual man, the information being reported is that of a couple kissing in a park. Since this is probably not the first or the last time that a gay couple is kissing in a park, it seems that this information should not be considered "news". Some might argue that since this specific couple has never been seen before in this specific act, then it is considered "something new" and therefore it is "news". Which brings up the question of whether or not it is "newsworthy"? The De Gregorio court seems to think that it is. But for an information to be "worthy" of being revealed to the public shouldn't there be some sort of social utility or value to it? How can seeing a gay couple kissing in a park add any value to our society? The De Gregorio court argued that romance is "entertainment," which is of public interest.[9] Should a private individual be forced to give up his right to privacy to "entertain" others? Could we not find an alternative that would not require such an infringement upon the privacy of those men? If the goal of the media was simply to show a gay couple kissing in a park, couldn't they have asked another gay couple for permission? They could have also hired models to illustrate the exact same scene. There are quite a few options available that do not require violating the privacy of people in public places as illustrated by both cases mentioned above, particularly in which the privacy interest outweighs the interest of the public.

[8] *News*, Merriam-Webster, https://www.merriam-webster.com/dictionary/news, (last visited March 17, 2019.)
[9] *De Gregorio v. CBS Inc*, 123 Misc. 2d 491 (1984), Leagle, https://www.leagle.com/decision/1984614123misc2d4911528, (last visited March 17, 2019.)

In the case of *Penwell v Taft Broadcast,* [10] for instance, Billy Gene Penwell was videotaped being arrested at a bar by undercover police officers during a drug raid. He sued to get an injunction because even after the news reporters were made aware that his arrest was a mistake because he was innocent, they continued to broadcast the video claiming that it was of public interest. In fact, the court concluded that, "Persons who are so unfortunate as to be present at the scene of a crime are regarded as properly subject to the public interest and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims."[11] This is a clear example of a legitimate public interest conflicting with a compelling privacy interest. Going back to the notion of newsworthiness, there is no apparent reason why broadcasting the same event over and over again would have any social utility other than probably annoying the public or the subject of interest, who in this case is Penwell.

In *Briscoe v. Reader's Digest Association, Inc.*,[12] Marvin Briscoe hijacked a truck in 1956. But he was then rehabilitated and never committed another crime again. He chose not to tell anyone including his daughter about the hijacking in order to leave behind his past criminal life. In 1967, Reader's Digest published an article regarding hijacking which included *Briscoe*'s crime. This disclosure also included *Briscoe*'s name while excluding the information that this crime was committed in 1956. As a result, *Briscoe*'s relationship with his daughter was ruined. *Briscoe* filed a lawsuit against Reader's Digest for invasion

[10] *Penwell v Taft Broadcast,* 13 Ohio App. 3d 382 (Ohio Ct. of App. 1984), https://casetext.com/case/penwell-v-taft-broadcasting-co, (last visited March 17, 2019.)
[11] Id.
[12] *Briscoe v. Reader's Digest Association, Inc*., 4 Cal. 3d, 529 (1971), https://scocal.stanford.edu/opinion/briscoe-v-readers-digest-association-inc-27624, (last visited March 17, 2019.)

of privacy.[13] The Supreme Court of California remanded the case back to the trial court to determine, ". . . (1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed."[14] So, should the press be required to obtain a warrant in order to publish information about a criminal and his crime for which he had already been punished? Eugene Volokh quotes the *Briscoe* Court ruling, "But revealing Briscoe's identity eleven years after his crime, the court said, served no "public purpose" and was not "of legitimate public interest"; there was no "reason whatsoever" for it."[15]

Eugene Volokh argues, however, that "[O]thers definitions of me should primarily be molded by their own judgments, rather than by my using legal coercion to keep them in the dark."[16] Tunick would argue that once a person has received legal punishment, they should not have to face societal punishment. Advocates of rehabilitation, especially the Briscoe court, would agree with him. However, critics would agree with Volokh in that others should be free to create their own judgments of an individual without the interference of the law. Perhaps Briscoe's daughter abandoned him not for knowing of his past crime, but for knowing that he's not trustworthy. Just like Briscoe may have kept this information from his daughter not because he is a "rehabilitated man"

[13] Id.
[14] Id.
[15] Eugene Volokh, *Free to Tell the Truth About People's Past Crimes,* The Volokh Conspiracy, 2014, http://volokh.com/2004/12/20/free-to-tell-the-truth-about-peoples-past-crimes/,(last visited March 17, 2019.)
[16] Id.

but because he did not want to disappoint her. Whatever the reason may be, the media should not have the power to share one's personal affairs, including past crimes, unless the information is clearly newsworthy.

It is important to note that the *Briscoe* court decision was overturned with the California Court of Appeals decision in *Gates v. Discovery Communication, Inc.*[17] In this case, Gates was convicted of being an accessory after the fact to a murder-for-hire crime. His role in the murder was reported by Discovery. He sued for invasion of privacy and his suit was dismissed by the court, "We are led to the conclusion that insofar as Briscoe held that criminal or civil penalties could result from the publication of the public record of a judicial proceeding, it was overruled by Cox. Gates's invasion of privacy action is based on Discovery's disclosure that he was convicted of being an accessory after the fact to a murder for hire. The disclosure was a truthful report of information in the public record of a judicial proceeding and was privileged under the First Amendment."[18]

Some people argue that sometimes the information is not one's to keep. For instance, in the case of cheaters: when one cheats on their partner, as much as they have the right to privacy in their infidelity, their partner has a right to know the truth. This raises the question of whether it would be wrong for the media to publish the picture of a man cheating on his wife. Should it not be the individual's choice to reveal the information that he, the husband, is cheating, to the wife. Some people would argue that not every information about us is our choice to reveal. They would further argue that the cheater's wife has a right to make the

[17] *Gates v. Discovery Communications, Inc.,* No. Do39399, Ct. of App. 4th District, Division 1, California, https://caselaw.findlaw.com/ca-court-of-appeal/1324402.html, (last visited March 17, 2019.)
[18] Id.

choice not to be with a cheater, indicating why she needs to know the truth. Similarly, Briscoe's daughter had a right to know about her father's past crime. Since humans are not always honest and trustworthy, does this indicate that the media also serves another valid purpose? Do we depend on the media to keep us honest? But, at which point do we draw the line? If you continue to allow the media to share our most personal affairs will we still have a right to privacy?

Some people go as far as claiming that there is no right to privacy. But, the Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[19] By simply reading this clause, without looking at any case law, one interpretation could be that we have a right to privacy in our private affairs. Others interpret their "effects" as being their cell phones, which means that if the police were to open their text messages without a warrant, it would constitute an illegal search and seizure. This interpretation is inconclusive due to the absence of actual federal legislation on the subject of cell phones. Looking at prior court decisions, generally warrantless cell phone searches are deemed unconstitutional. But there are also many cases in which these unreasonable searches have been upheld.

Suppose that during the arrest of John Doe, the driver of a stolen vehicle, the police locate a cell phone in the backseat. They then go through the text messages and find evidence of a drug deal between a

[19] *Fourth Amendment*, U.S. Constitution, Cornell Law School, https://www.law.cornell.edu/constitution/fourth_amendment, (last visited March 17, 2019.)

John Doe and a dealer. Would this constitute an illegal search? More often than not, in order to justify searches that are incidental to an arrest, the police must prove that they had probable cause to make the arrest, which allows them to search only the area within the arrestee's immediate control. This obviously suggests that it would not be justifiable for the police to conduct a warrantless search of a person's car if that person was arrested at the mall and their car was parked in their garage. The inherent mobility of a vehicles makes it difficult to assign the same level of privacy to that vehicle that is assigned to their home. It is for this reason that when the police have probable cause to arrest, a warrantless search of a vehicle is more often than not considered reasonable.

However, let's assume that in the case of John Doe, the police did have the stolen report of the vehicle as probable cause. This means that they can simply turn over the stolen vehicle to the department and begin their legal investigation, rather than begin an invasive search of not just the vehicle, but also a cell phone that could belong to someone different than the owner of the vehicle or the arrestee. Some people would argue that this person could be the one who has stolen the vehicle and that only by searching their cell phone could the police confirm this information. But what if this person was someone who received a ride from the actual thief that pretended to be a taxi driver, thus by searching the phone the police could be violating the privacy of an innocent person. Because criminals also have the right to privacy, and because there was no exigency for the police to conduct this search without a warrant, they could have gone through the process of obtaining a warrant, particularly since they acquired control over the vehicle.

It is also important to remember that the scope of the warrantless search is no more and no less than what a warrant would authorize. In other

words, having a warrant would not necessarily mean that the police could search every part of the vehicle, or even the cell phone. In a similar case, *State v. Hinton*,[20] a police officer used the iPhone of Lee, who had just been arrested for possession of heroin, to send text messages to Shawn Hinton. The police officer essentially posed as Lee to arrange a drug transaction with Hinton. Eventually the transaction went through and Hinton was convicted for attempted possession of heroin. Hinton appealed arguing that his Fourth Amendment rights were violated. The state cited *California v. Greenwood*, *U.S. v. Miller* and *Smith v. Maryland*[21] to argue that, "Once you send a text to a third party it is like leaving your garbage on the curbside or turning info over to the phone company and you can no longer expect privacy in it."[22] *Smith v. Maryland* involved the crime of robbery, the victim was receiving threatening phone calls from the robber, whose identity was known. The robber's phone company, a private entity, at the request of the police, installed a pen register at their office to record numbers dialed from the robber's house. The court held, "There is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system and hence no search within the Fourth Amendment is implicated by the use of a pen register installed at the central offices of the telephone company."[23] Because there was no "search, the court

[20] *State v. Hinton*, 280 P.3d 476 (Wash. Ct. App. 2012), Casetext, https://casetext.com/case/state-v-hinton-111, (last visited March 17, 2019.)
[21] *California v. Greenwood*, 486 U.S. 35 (1988), S*mith v. Maryland*, 442 U.S. 735, 743–44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *United States v. Miller*, 425 U.S. 435 at 440 (1976),
[22] *State v. Hinton*, 280 P.3d 476 (Wash. Ct. App. 2012), Casetext, https://casetext.com/case/state-v-hinton-111, (last visited March 17, 2019.)
[23] S*mith v. Maryland*, 442 U.S. 735, 743–44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), https://www.courtlistener.com/opinion/110118/smith-v-maryland/, (last visited March 17, 2019.)

concluded no warrant was needed."[24]

The *Hinton* case and the *Smith* case can be distinguished. In *Hinton*'s case, there is an actual search of a state actor. The government cannot claim that *Hinton* voluntarily conveyed information to a third party because *Hinton*, though he believed that he was texting Lee, was involuntarily conveying the information to the police. Thus, unlike *Smith*, *Hinton* could not have assumed the risk of disclosure since he was not disclosing information to the intended party. In the *Miller* case, the court found that, "On their face, the documents subpoenaed here are not respondent's "private papers." [25] The court continues, "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[26] As stated above, in *Hinton*'s case, the information obtained was not revealed to a third party and conveyed by the third party to the police. Instead, the police used deception and posed as Lee to persuade Hinton to commit a crime. The third-party doctrine would not apply in this instance.

Turning to *Greenwood*, we see that the court established that the Fourth Amendment does not protect against the warrantless search of garbage left for collection.[27] If the Hinton court is referring to this case to say that Hinton's phone is essentially "garbage" that seems to be mistaken

[24] Id.
[25] *United States v. Miller*, 425 U.S. 435, (1976), Justia, https://supreme.justia.com/cases/federal/us/425/435/, (last visited March 17, 2019.)
[26] Id.
[27] *California v. Greenwood*, 486 U.S. 35 (1988), Justia, https://supreme.justia.com/cases/federal/us/486/35/, (last visited March 17, 2019.)

correlation. There is a clear distinction between someone's cell phone and their garbage, which they have voluntarily abandoned.

In *State v. Hinton*, the Supreme Court held, "Considering the wealth of personal and private information that is potentially stored on a cell phone, we should continue to recognize a rule that does not incentivize warrantless searches of cell phones."[28] Additionally, with regards to the recipient of the message, the court held, "[T]he sender of a text message assumes a limited risk that the recipient may voluntarily expose that message to a third party, but under our cases, the sender does not assume the risk that the police will search the phone in a manner that violates the phone owner's rights."[29] Even though one could argue that once someone sends a text message to another person they no longer have an expectation of privacy in that text message, it is crucial to first determine whether the message is delivered to the intended person.

Clearly there needs to be a remedy which will serve as a uniform rule, whether the concern is our cell phone or our private affairs. In *Katz v. United States*,[30] the court established a rule in order to determine whether a person has a reasonable expectation of privacy, "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited a subjective expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.'[31] A reasonable

[28] *State v. Hinton*, 280 P.3d 476 (Wash. Ct. App. 2012), Casetext, https://casetext.com/case/state-v-hinton-111, (last visited March 17, 2019.)
[29] Id.
[30] *Katz v. United States*, 389 U.S. 347 at 361 (1967), Justia, https://supreme.justia.com/cases/federal/us/389/347/, (last visited March 17, 2019.)
[31] Id.

person might agree that in Hinton's case, both Lee and Hinton had an expectation of privacy, and it is one that society is prepared to recognize as reasonable. Some people might argue that Lee left his phone in a stolen car without a password and therefore could not expect privacy. But if the car was locked, or if Lee didn't know the car was stolen, might you reach a different conclusion? Reasonable people probably do not expect anyone to open their car and search their phone, especially not the police. In the same way, reasonable people do not expect the media to open their car and search their phone or take a picture of them and their fiancé kissing and report it as a "beautiful love affair" without my permission or that of a court. Some people might argue that if we didn't expect such invasion of privacy we would not lock our cars. But taking security measures is not equivalent with protecting our right to privacy.

In regards to the previously mentioned scenario in which the two men are walking along the beach, the plaintiff clearly has an interest in keeping his relationship a secret. Whether or not he should be honest with his wife and his peers certainly isn't for the courts to decide. The fact here is that the plaintiff does have a compelling interest in privacy. The next question is whether there is a legitimate public interest in the information to be shared? Making that determination is one that will usually have conflicting answers and represents the next big question for our legal system to resolve.

Unitary Executive Theory: Is it Constitutional?

by Sayd Hussain & Robert Marriaga

Introduction

In the movie *VICE*, Dick Cheney was quoted several times throughout the movie as falling in love with the Unitary Executive Theory (UET). This theory is part of constitutional law, Article II, Section I of the U.S. Constitution says, "The executive power shall be vested in a President of the United States of America."[1] The Constitution also says, ". . . he shall take care that the laws be faithfully executed and shall commission all the officers of the United States."[2] Interpreting these two powerful clauses within the Constitution can justify that the President of the United States has the unified powers within the executive branch of Government as a Unitary Executive. Former White House Counsel during the Nixon Administration, John Dean, expressed in his book Broken Government,[3] "In its most extreme form, unitary executive theory can mean that neither Congress nor the federal courts can tell the President what to do or how to do it, particularly regarding national security matters." [4] Using this interpretation, the President has the sole power under the Constitution to be the executive to run the nation's affairs and it would be unconstitutional to limit the President's powers

[1] U.S. Constitution, Article II, Section 1, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/constitution/articleii, (last visited March 2, 2019.)
[2] Id.
[3] John W Dean, *Broken Government: How Republican Rule Destroyed the Legislative, Executive and Judicial Branches*, Penquin (2007), https://books.google.com/books?id=dj56j5TsNUAC&pg=PA102&dq=%22unitary+executive%22&hl=en#v=onepage&q=In%20its%20most%20extreme%20form&f=false, (last visited March 1, 2019.)
[4] Id.

to perform his sworn duties. The question is whether the unitary executive theory is constitutional or not?

One example of limited Presidential powers by Congress is the Tenure of Office Act 1876, which prevented the President from firing any of his cabinet members without the Senate's approval.[5] Although it was repealed in 1887, the 1926 Supreme Court case, *Myers v. United States,* confirmed the supposition that the President of the United States has the executive power to remove executive people from executive positions without any other approval.[6] Chief Justice William Howard Taft wrote in his opinion, **"**It gave to the Executive all the executive powers of the Congress under the Confederation, which would seem therefore to have intended to include the power of removal which had been exercised by that body as incident to the power of appointment."[7]
During the Constitutional Convention, Alexander Hamilton supported the concept of the single executive.[8] However, Edmund Randolph, who presented the Virginia Plan, expressed dissent towards supporting a single executive because it would be modeled too closely upon the British monarchy.[9] But the Constitutional Convention voted for Hamilton's idea by a vote of 7-3. The Anti-Federalist were largely

[5] *Tenure of Office Act*, History, https://www.history.com/topics/reconstruction/tenure-of-office-act, (last visited March 9, 2019.)
[6] *Myers v, U.S.*, 272 U.S. 52, 1926, https://www.law.cornell.edu/supremecourt/text/272/52#writing-USSC_CR_0272_0052_ZO, (last visited March 9, 2019.)
[7] Id.
[8] Lauren Poe, Executive Power: Hamilton and Jefferson on the Role of the Federal Executive, http://thomasjeffersonpersonalitycharacterandpubliclife.org/Lauren_Poe_Executive_Power_Past_and_Present_2.pdf, (last visited March 9, 2019.)
[9] *The Constitutional Convention debates and the Anti-Federalist Papers*, American History, http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/, (last visited March 9, 2019.)

against the unitary executive because they believed that the President should have an official council to advise the President on certain decision making functions.[10] One famous anti-federalist was George Mason, who objected to the final version of the U.S. Constitution.[11] Mason objected to the constitutional structure of 1787 because he believed there needed to be a presidential council to advise the President and that it should be made up of six-member, two members from the east, middle and the southern states. However, this proposal never went through to the final draft of the constitution. Mason stated, **"**The President of the United States has no constitutional council (a thing unknown in any safe & regular government) he will therefore be unsupported by proper Information & Advice; and will generally be directed by Minions & Favourite…"[12] Mason also stated that the lack of a presidential council would give too much power to the Senate to approve executive appointments, a concept that was supported by the Anti-Federalist papers of 1787, which was against the Constitution as drafted by the Constitution Committee.[13]

The Anti-federalist Paper 74 argued that the President would have too much power as a unitary executive by becoming the Commander-In-Chief, in charge of all the armed forces.[14] The Anti-federalist feared this would create a military president or "The President General" because

[10] *Opposition to a Unitary Executive*, American History, http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/opposition-to-a-unitary-executive-(june-4).php, (last visited March 9, 2019.)
[11] Id.
[12] http://edu.lva.virginia.gov/docs/MasonsObjections.pdf
[13] *Opposition to a Unitary Executive*, American History, http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/opposition-to-a-unitary-executive-(june-4).php, (last visited March 9, 2019.)
[14] *Antifederalist Paper 74, The President as Mlitary King*, https://thefederalistpapers.org/antifederalist-paper-74, (last visited March 7, 2019.)

the President of the United States would have more military control than any monarch during that time. Furthermore, the papers also suggested that with this type of unrestricted power, future Presidents might act as tyrants, ". . .that he can at any time he thinks proper, order him out in the militia to exercise, and to march when and where he pleases**."**[15] The article within the Anti-federalist Papers ends by saying, "And to complete his uncontrolled sway, he is neither restrained nor assisted by a privy council, which is a novelty in government. I challenge the politicians of the whole continent to find in any period of history a monarch more absolute**."**[16]

There was a clear fear among the anti-federalist that Hamilton's idea of a unitary executive would create a tyrant within the newly formed United States of America, who fought Great Britain to be free of monarchy. Furthermore, they believed that the branches of government would be continually intertwined, not allowing them to be truly independent from each other. It is that concern that prompted them to continue to ask for an executive council to advise the President as the executive is heavily intertwined with the Senate, when confirming executive appointments, treaties and the judiciary.[17] Hamilton countered these arguments by stating that a strong unitary executive would be more efficient at making important decisions for the country that cannot wait while Congress slowly progresses through their own procedural requirements.[18] The President would be in charge of the military as the Commander-In-Chief, while the House of Representatives would

[15] Id.
[16] Id.
[17] Id.
[18] *The Federalist Papers, No. 70,* Congress.Gov, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-70 (last visited March 9, 2019.)

control how much funding could be allocated towards defense spending and how it could be spent. Furthermore, Hamilton maintained that having an executive council would not be effective since councils can be divided in their opinions making it difficult to arrive at a resolution.[19] If the President needs to act swiftly and efficiently, Hamilton opined, the President could not wait for a council to determine the appropriate action since the President was elected by the people and given respective powers to act on the interest of the country.

Correspondingly, by having a unitary executive in charge, the unitary executive takes on the responsibility and liability within the executive branch. Too many heads in charge, Hamilton argued, would **"**conceal faults and destroy responsibility.**"**[20] By having a unitary executive, the President would create policy that would be popular among his supporters thus being beneficial for re-election purposes. Hamilton was so confident about having a unitary executive that he ended the Federalist Papers 70 by saying, **"**I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that the unity of the executive of this State was one of the best of the distinguishing features of our constitution**."**[21]

The unitary executive theory is strongly based on the foundations of Hamilton's Federalist Paper 70, and it was used several times by Presidents to justify their use of executive power. After President Washington declared the United States neutrality between Great Britain and France, it sparked a vast debate on executive powers. Hamilton wrote the Pacificus to support Washington, mentioning that Congress

[19] Id.
[20] Id.
[21] Id.

has the power to declare war while the President has the power to maintain peace till war is declared. **"**If the Legislature have a right to make war on the one hand--it is on the other the duty of the Executive to preserve Peace till war is declared**."**[22]

James Madison, on the other hand, claimed Hamilton and others supported the President as monarchs because it was up to Congress to establish foreign policy unless construed otherwise by the constitution, "It will not fail to be remarked on this commentary, that whatever doubts may be started as to the correctness of its reasoning against the legislative nature of the power to make treaties: it is clear, consistent and confident, in deciding that the power is plainly and evidently not an executive power**."**[23]

Another example of the controversial uses of executive powers was President Lincoln's power to suspend Habeas Corpus without congressional approval. President Lincoln told Congress that it's their right to suspend Habeas Corpus, but that in the case of a rebellion Congress might be prevented from meeting, thus justifying the President's power to also suspend Habeas Corpus during uncertain times.[24] When Lincoln issued the proclamation to suspend Habeas Corpus in 1861, Congress did not object until March 1863. Lincoln

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[22] Alexander Hamilton, *Pacificus, No. 1*, June 1793, http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html, (last visited March 9, 2019.)

[23] *Helvidius Number 1*, National Archives, Founders Online, August 1793, https://founders.archives.gov/documents/Madison/01-15-02-0056, (last visited March 9, 2019.)

[24] James Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, Journal of the Abraham Lincoln Association, 2008, https://quod.lib.umich.edu/j/jala/2629860.0029.205/--lincoln-s-suspension-of-the-writ-of-habeas-corpus?rgn=main;view=fulltext, (last visited March 9, 2019.)

interpreted the Constitution similarly to the federalist such as Hamilton. Lincoln defied Congress by enacting martial law, suspending Habeas Corpus while ignoring the restrictions of the Habeas Corpus Suspension Act of 1863.[25] President Lincoln was able to find loopholes to justify every single executive power he could find, in order to save and preserve the union,[26] "In sum, in an area generally thought at the time to be within the congressional domain, he manipulated Congress, challenged its powers, ignored its laws, and imposed his authority and will without ruffling congressional feathers or provoking congressional response."[27]

Although Hamilton believed the President must have complete control over its executive powers as the Commander-in-Chief, President Nixon was the President that pushed it too far for Congress and the country to handle. Nixon had expanded the office of the Presidency by ordering strong military action in Vietnam, Cambodia and Laos without congressional consent.[28] The irony is that the Soviet Primer had to ask the Politburo, the communist party, before taking military action in Czechoslovakia. Furthermore, Nixon used the office of the Presidency to expand not just foreign policy but domestic policy as well because he believed his powers as a strong President is a "tribute of the people."[29] President Nixon countered his critics in Congress by addressing the people in a radio address in 1968, **"**The days of a passive Presidency belong to a simpler past. Let me be very clear about this: The next President must take an activist view of his office. He must articulate the

[25] Id.
[26] Id.
[27] Id.
[28] John Herbers, *Nixon's Presidency:Expansion of Power*, N.Y. Times, 1973, https://www.nytimes.com/1973/03/04/archives/nixon-s-presidency-expansion-of-power-scholars-see-a-major-impact.html, (last visited March 9, 2019.)
[29] Id.

nation's values, define its goals and marshal its will. Under a Nixon Administration, the Presidency will be deeply involved in the entire sweep of American public concern. The first responsibility of leadership is to gain mastery over events and to shape the future in the image of our hopes.**"**[30]

By gaining public support, he would be acting as a President by the people, for the people. This would also allow him to exercise a stronger executive power within all of America's policies which were traditionally, congressional powers.[31] This became a smart tactic because President Nixon won his re-election bid for Presidency by a sweeping 520 electoral college votes, becoming the third largest electoral college victory in U.S. history. The American people fundamentally voted to support President Nixon's vision for a stronger, powerful Presidency and by winning such a large margin, Nixon was able to prove that he had the people behind him, which apparently gave the President too much confidence.[32] Nonetheless, Congress disagreed with his theory and enacted the War Powers Act,[33] overriding the Presidential veto, now requiring the President to consult with Congress before performing his duties as the Commander-in-Chief when engaging the U.S. military in foreign combat.

President Nixon believed that a strong and powerful Presidency is necessary for the future of America. In an interview after his presidency, Nixon agreed that the Constitution does not say that the President is above the law. However, during times of war, the President has

[30] Id.
[31] Id.
[32] Id.
[33] *War Powers Act,* History, 1973, https://www.history.com/topics/vietnam-war/war-powers-act, (last visited March 9, 2019.)

significant powers to act in the best interest of the country, even if these decisions are illegal within the law. "That it has been, however, argued that as far as a president is concerned, that in war time, a president does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution, which is essential for the rights we're all talking about**.**"[34] Nixon quoted President Lincoln, "Actions which otherwise would be unconstitutional, could become lawful if undertaken for the purpose of preserving the Constitution and the Nation,"[35] because it would help justify that his theories on Presidential executive powers is not something new but within the tradition of the presidency during times of war.[36] However, President Nixon's use of executive power was overly extreme in Presidential history, considering the "Saturday Night Massacre." It angered many Americans and Congress alike, ruining his argument that the use of power he executed was truly in the betterment of the people during a time of war.[37]

Throughout the history of the United States, there has been a tug of water between executive powers and Congress who can restrict

[34] *Nixon's Views on Presidential Power: Excerpts from a 1977 Interview with David Fros*t, Landmark Cases of the U.S. Supreme Court, http://landmarkcases.org/en/Page/722/Nixons_Views_on_Presidential_Power_Excerpts_from_a_1977_Interview_with_David_Frost, (last visited March 9, 2019.)
[35] Id.
[36] Id.
[37] Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, Washington Post, Oct. 21, 1973, https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm, (last visited March 9, 2019.)

presidential powers, particularly after the Nixon presidency.[38] For example, *the Ethics in Government Act of 1978*[39] created the U.S. Special Counsel's Office that is charged with investigating officials in higher office such as the President, as well as creating mandatory, public disclosure of financial and employment history of public officials and their immediate families. This means that the President wasn't able to fire the Special Prosecutor, unlike President Nixon, who fired Special Prosecutor Archibald Cox.[40] However, this Act expired in 1999, giving the responsibilities of the special prosecutor back to the Office of the Attorney General. Furthermore, the *National Emergencies Act of 1976* gives the President the authority to declare a national emergency. However, Congress can undo the emergency declaration if they have a veto-proof majority.[41]

Another effort to expand presidential powers was the Line-Item Veto Act of 1996 but was stopped in 1996 with the Supreme Court decision in Clinton v. City of New York.[42] The Line-Item Veto Act of 1996 gave power to the President to amend or repeal parts of Acts that were passed

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[38] Tom Head, *Imperial Presidency 1010: Unitary Executive Theory and the Imperial Presidency*, ThoughCo., March 5, 2019, https://www.thoughtco.com/unitary-executive-theory-the-imperial-presidency-721716, (last visited March 9, 2019.)
[39] *Ethics in Government Act of 1978*, U.S. Code, Cornell University Law School, https://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3.html, (last visited March 9, 2019.)
[40] Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, Washington Post, Oct. 21, 1973, https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm, (last visited March 9, 2019.)
[41] *National Emergencies Act*, Pub. Law 94-412, Congress.gov, https://www.congress.gov/bill/94th-congress/house-bill/3884, (last visited March 19, 2019.)
[42] *Clinton v. City of New York*, 524 U.S. 417,(1998), Justia, https://supreme.justia.com/cases/federal/us/524/417/, (last visited March 9, 2019.)

by Congress.[43] The Supreme Court, in the Clinton v. City of New York case, declared the Act to be unconstitutional because it gave the President the power to undo decisions made by Congress.[44]
Executive powers have been debated since the founding of the United States Constitution, but the first admiration that used the Unitary Executive Theory was the Reagan administration with the statement on signing the Federal Debt Limit and Deficit Reduction Bill, **"**If this provision were interpreted otherwise, so as to require the President to follow the orders of a subordinate, it would plainly constitute an unconstitutional infringement of the President's authority as head of a unitary executive branch." [45] President Reagan believed that the only way to limit big government was having a stronger Presidency, modeling the Presidency as a CEO of a large cooperation.[46] This created a movement within conservative institutions such as the Heritage Foundation to provide a legal groundwork for this constitutional theory to become a reality. This conservative foundation released publications advocating for the unitary executive theory because it exemplified the intentions of the founding founders. They argued that the President has more powers than previously examined and that the President can remove subordinates in the executive branch, direct subordinates to take

[43] Tom Head, *Imperial Presidency 1010: Unitary Executive Theory and the Imperial Presidency*, ThoughCo.,March 5, 2019, https://www.thoughtco.com/unitary-executive-theory-the-imperial-presidency-721716, (last visited March 9, 2019.)
[44] *Clinton v. City of New York*, 524 U.S. 417,(1998), Justia, https://supreme.justia.com/cases/federal/us/524/417/, (last visited March 9, 2019.)
[45] *Statement on Signing the Federal Debt Limit and Deficit Reduction Bill,* Ronald Reagan Presidential Library & Museum, 1987, https://www.reaganlibrary.gov/research/speeches/092987d, (last visited March 5, 2019.)
[46] Dana Nelson, *The Unitary Executive Question*, Los Angeles Times, Oct. 11, 2008, https://www.latimes.com/opinion/la-oe-nelson11-2008oct11-story.html, (last visited March 9, 2019.)

certain actions such as firing the special prosecutor, and may also direct government employees to not enforce Congressional laws. **"**According to the unitary executive argument, the framers gave presidents far more command authority than past presidents realized. With respect to administration, the unitary executive holds that presidents may remove all subordinates in the executive branch; they may also direct those subordinates to take a particular action; and finally, they can veto any objectionable actions, including those mandated by Congress."[47] Furthermore, conservative Justices, such as Justice Scalia and Justice Alito, have expressed the belief that this theory is evident in the constitution.[48]

Although President Reagan believed in a stronger Presidency, President Bush and Vice President Dick Cheney broadened the unitary theory during their time in the White House according to James Pfiffner in his article, *Federalist Papers 70: Is the President Too Powerful?*[49]

Alexander Hamilton's interpretation of this theory was used periodically during the Bush II administration.[50] After 9/11, the President was given extraordinary powers by Congress to defend the

[47] Yen Makabenta, *Unitary executive theory: the President's power of control over the executive branch*, The Manila Times, Sept. 15, 2018, https://www.manilatimes.net/unitary-executive-theory-the-presidents-power-of-control-over-the-executive-branch/441634/, (last visited March 9, 2019.)
[48] Id.
[49] James Pfiffner, *Federalist No. 70: Is the President too Powerful?,* George Mason University, 2011, http://pfiffner.gmu.edu/wp-content/uploads/2011/10/Pfiffner_Federalist_70_PAR_2011.pdf, (last visited March 9, 2019.)
[50] Id.

nation against terrorism with the passage of the Patriot Act[51] and the Authorization for Use of Military Force Act (AUMF).[52] These bills expanded Presidential powers by allowing the executive branch to have surveillance programs among American citizens in the name of national security. Furthermore, AUMF allowed the President to, **"**. . .use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[53] President Bush's lawyer, John Yoo, argued that he never needed Congress to approve military actions, that there were **"**no limits on the Executive's judgment."[54] Mr. Yoo said that by Congress making a law expanding the President's power, it indicated that there were no limits on executive judgements during national emergencies.[55] The unitary theory was interpreted by President Bush to give him the power to wage warrantless-surveillance programs by executive authority.[56]

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[51] *The Patriot Act of 2001*, H.R. 3162, Congress.Gov, https://www.congress.gov/bill/107th-congress/house-bill/3162, (last visited March 9, 2019.)

[52] *Authorization for Use of Military Force Act of 2001*, 115 Stat. 224, Congress.Gov, https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf, (last visited March 9, 2019.)

[53] Garrett Epps, *Constitutional Myth #3: The Unitary Executive is a Dictator in War and Peace*, The Atlantic, June 9, 2011, https://www.theatlantic.com/national/archive/2011/06/constitutional-myth-3-the-unitary-executive-is-a-dictator-in-war-and-peace/239627/, (last visited March 9, 2019.)

[54] Id.

[55] Id.

[56] Id.

President Bush used these executive powers to wage war in both Iraq and Afghanistan, fighting terror in the Middle-East. However, Congress attempted to roll back these additional executive powers, but were met with another obstacle, the power of the President to use a "Presidential Signing Statement."[57] Congress then passed by a bi-partisan majority, the Detainee Treatment Act, which limited the use of torture by the U.S. Government.[58] President Bush signed the bill but included a Presidential Signing Statement, "the constitutional authority of the president to supervise the unitary executive branch as commander in chief."[59] This statement indicates that though the act was passed and signed by the President, thereby becoming the law of the land, the President reserves his right to limit the provisions that will be enforced. According to the statement, the President as a unitary executive, can limit the enforcement of a bill if it directly limits the Presidential powers.

President Obama continued the use of the signature statement although he disapproved of this method during the Bush Administration.[60] Without congressional approval, President Obama intervened in

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[57] Yen Makabenta, *Unitary executive theory: the President's power of control over the executive branch*, The Manila Times, Sept. 15, 2018, https://www.manilatimes.net/unitary-executive-theory-the-presidents-power-of-control-over-the-executive-branch/441634/, (last visited March 9, 2019.)

[58] *Detainee Treatment Act of 2005*, 119 Stat. 2739(1), https://www.dni.gov/index.php/ic-legal-reference-book/detainee-treatment-act-of-2005, (last visited March 9, 2019.)

[59] *The President's Statement on Signing of H.R. 2863*, Office of the Press Secretary, White House President George W. Bush, Dec. 30, 2005, https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051230-8.html, (last visited March 9, 2019.)

[60] Tom Head, *Imperial Presidency 1010: Unitary Executive Theory and the Imperial Presidency*, ThoughCo., March 5, 2019, https://www.thoughtco.com/unitary-executive-theory-the-imperial-presidency-721716, (last visited March 9, 2019.)

international conflicts by sending the U.S. Armed Forces into Libya in 2011. The Obama administration sent a report to Congress that the intervention fell short of full-blown warfare.[61] Speaker of the House, John A. Boehner, asked the President to provide a legal justification for passing the 60 to 90-day deadline of the War Powers Act[62] **"**The administration's theory implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution's time limits," said Mr. Goldsmith, Justice Department Office of Legal Counsel during the Bush administration.[63]

Furthermore, executive policies such as the creation of *Deferred Action for Childhood Arrivals* (DACA) acquired legal standing within the courts even though this policy was never enacted by Congress.[64] Finally, President Trump's use of emergency powers to build a border wall within the Department of Defense remains debatable. However, the use may be permitted by the *Construction authority in the event of a declaration of war or national emergency Act***,** U.S. Code 2808.[65]

Nonetheless, if the President does declare a national emergency, it will

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[61] Charlie Savage and Mark Landler, *White House Defends Continuing Role in Libya Operation*, N.Y. Times, June 15, 2011, https://www.nytimes.com/2011/06/16/us/politics/16powers.html, (last visited March 9, 2019.)

[62] Id.

[63] Id.

[64] Andrew Wyrich, *Is DACA really unconstitutional as the Trump administration claims?*, The Daily Dot, Sept. 5, 2017, https://www.dailydot.com/layer8/is-daca-unconstitutional/, (last visited March 9, 2019.)

[65] U.S. Code Section 2808, *Construction Authority in the Event of a Declaration of War or National Emergency*, Cornell Law School, https://www.law.cornell.edu/uscode/text/10/2808, (last visited March 9, 2019.)

be taken to court to determine the constitutionality of Presidential Powers to declare emergencies within the *National Emergencies Act*.[66] Future trends may try to restrict Presidential powers. Currently, Congress is rallying support to restrict the President's power to enact tariffs known as the *Bicameral Congressional Trade Authority Act,* which will require the President to request congressional approval before enacting foreign trade policies.[67] Also, Congress is working on a resolution to use the War Powers Act to limit the executive powers of the President to deploy the military. **"**If the bill passes, it would mark the first time Congress has ever used the War Power Act of 1973 to curtail a president's ability to deploy U.S. military assets abroad."[68] The President of the United States has the ability to expand or limit its presidential powers. From Washington to Trump, each president creates their interpretation of presidential powers. The unitary executive theory was a powerful tool for President Nixon to expand Presidential powers. But Congress ultimately reduced those powers after Nixon to weaken the Presidency. The same intent remains today with a trend to weaken the Presidency of Trump.

Analysis

The constitutionality of the unitary executive theory is debatable.

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[66] Charlie Savage, *National Emergency Powers and Trump's Border Wall Explained*, N.Y.Times, Jan. 7, 2019, https://www.nytimes.com/2019/01/07/us/politics/trump-national-emergency.html, (last visited March 9, 2019.)

[67] Chris Prentice, *U.S. Lawmakers move to Curtail President's Power to Levy Tariffs*, https://www.reuters.com/article/us-usa-trade-tariffs-idUSKCN1PO2ZC, https://www.reuters.com/article/us-usa-trade-tariffs-idUSKCN1PO2ZC, (last visited March 9, 2019.)

[68] Matt Laslo, *Congress to Introduce a Bill Limiting Trump's Use of Military Power*, Jan. 30, 2019, https://news.vice.com/en_us/article/yw8vz7/congress-is-about-to-introduce-a-bill-to-limit-trumps-use-of-military-power, (last visited March 9, 2019.)

American historians and law professors have written many law journals and scholarly articles on this issue. The opinions are divided and it continues to be controversial. Unitary executive theorists claim that the Founding Fathers meant what they wrote in Article II, Section 1 of the Constitution, "The executive power shall be vested in a President of the United States."[69] Unitary executive theorists believe that this section does not have another interpretation other than what is stated. The power of the executive belongs to the President. The President is the elected figure in the branch with the Vice-President, so he has full control of the branch because the people gave him that power through elections and the Constitution. Everyone else working in the executive branch is under the control of the Chief Executive, "All federal officers exercising executive power must be subject to the direct control of the President."[70]

Law Professors Steven G. Calabresi and Kevin Rhodes wrote that the President serves as the chief of the branch and has the final say over policy and the way its enforced.[71] This means the decisions made by the secretaries of the different departments, like the Secretary of State, Treasury, Interior and all, can be overruled by the President, due to Article II, Section 1 of the Constitution. Lawrence Lessig from Columbia Law Review connects Article II, Section 1 with Article II Section 3, which reads, ". . .he shall take Care that the Laws be faithfully executed."[72] This is known as the "Take Care Clause." Lessig, a law professor at Harvard, believes that the "Take Care Clause" re-

[69] *U.S. Constitution*.
[70] Steven Calabresi and Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, Harvard Law Review, Vol. 105, Apr. 1992, https://www.jstor.org/stable/1341727?seq=1#page_scan_tab_contents, (last visited March 9, 2019.)
[71] Id.
[72] *U.S. Constitution*.

enforces the unitary executive theory,[73] showing that it's the President's duty to take care of the laws and to execute them properly. The Constitution gives the President full authority over enforcement of the law. This means that whoever tries to interfere with the President's way of executing the law is violating the separation of powers between the branches of government. One of the first court cases that set a precedent was *Myers v. United States.*[74] The case concerned the removal of Frank S. Myers from his office as First-Class Postmaster by President Woodrow Wilson in 1920. Frank S. Myers believed that President Wilson did not have the power to remove him from office and asked Congress to weight in since it was the Senate who confirmed him. The Supreme Court, by a 6-3 vote, ruled that the President had the authority to remove any officer within the executive branch. The opinion of the court included the statement that the framers gave full executive powers to the President under Article II, Section 1 and, "that Congress could not limit his control, through removal, over members of those departments."[75]

The other way unitary executive theory is implemented is when Presidents justify their actions when doing military operations without congressional authorization by using the Commander in Chief clause. Many law scholars and attorneys justify the Presidential actions as something given by the Constitution in the Commander in Chief Clause, even if Article I, Section 8 gives Congress the powers to declare war. In research done by Attorney Michael John Garcia, he shows that

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[73] Lawrence Lessig, *What an Originalist Would Understand 'Corruption' to Mean: The 2013 Jorde Lecture*, Ca. Law review, April 29, 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257948, (last visited March 9, 2019.)

[74] *Myers v. United States*, 272 US 52 (1926), https://supreme.justia.com/cases/federal/us/272/52/, (last visited March 9, 2019.)

[75] Id.

most of the justifications given by those that defend the President's power to declare war uses the Commander in Chief clause and claim it's a political question.[76]

The scholars that are against the unitary executive theory argue that the unitary executive theory violates law and is unconstitutional. In an article concerning the unitary executive theory, Professor Julian G. Ku, he acknowledges that when any branch claims exclusive powers, it can be a problem.[77] "But all claims of exclusive power, as Justice Jackson observed, pose serious dangers to the equilibrium of the Constitution's system of separation of powers."[78] Exclusive powers can be given in some cases but not in most he argues. "Anytime a branch seeks to claim a Constitutional trump card, they are undermining inter-branch cooperation and setting up almost inevitable inter-branch conflict."[79] He says that powers should be shared by the legislative and executive in order to not have problems or constitutional crisis. Professor Ku and many scholars explain that unitary executive theory can create imperial presidencies and can increase the power of one branch and weaken the others. The rule of law can be undermined and can be lost because one branch, in this case the executive branch, would be above the law. Louis Fisher, a constitutional law expert, has stated that the unitary executive theory is used to justify constitutional violations and this

[76] Michael Garcia, *War Powers Litigation Initiated by Members of Congress since the Enactment of the War Powers Resolution*, Congressional Research Service, Feb. 17, 2012, https://fas.org/sgp/crs/natsec/RL30352.pdf, (last visited March 9, 2019.)
[77] Julian Ku, *Unitary Executive Theory and Exclusive Presidential Powers*, 12 U. Penn. J. Const. L. 615 (2010), https://scholarship.law.upenn.edu/jcl/vol12/iss2/14/, (last visited March 9, 2019.)
[78] Id.
[79] Id.

makes the theory automatically unconstitutional.[80] Fisher references the case of the Bush/Cheney Administration from 2001-2009, "The unitary executive model became a convenient framework to justify constitutional and legal violations by the Bush II administration."[81] He refers to the different military operations done abroad and laws passed after September 11, 2001. Fisher states, "It requires Presidents to understand that they are under the law like every other person."[82] This seems to be a common theme by law scholars that are against the unitary executive theory, that the president has supreme authority under this theory and is a problem to the rule of law. These scholars claim that the President has to be just like every other citizen. The unitary executive theory violates the Constitution and law because power is not made for one man only but for the institutions and the balance of powers to lead the actions of government. Otherwise, unitary executive decisions may cause conflicts between branches. Members of Congress have expressed their concern with the chief executive in relations to the Presidential use of the executive order. They claim this is reminiscent of an imperial presidency. In 2014, Speaker John Boehner accused President Obama of being an emperor due to his use of power in relation to immigration when President Obama used executive powers to create immigration policy. Similar words were said by former Attorney General Jeff Sessions. Many scholars claim that executive orders give Presidents the ability to create law on their own.

But the most important concern expressed by the scholars that are against the unitary executive theory is that they see this theory as a

[80] Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 Journal of Constitutional Law 2, (2010), http://www.loufisher.org/docs/pip/unitaryexecutive2010.pdf, (last visited March 9, 2019.)

[81] Id.

[82] Id.

loophole that Presidents use to get away with decisions made that are unconstitutional because it allows them to avoid getting Congressional approval. Presidents claim they have exclusive powers and justify it through Article II, Section 1 of the Constitution, and this gives them a blank check to violate the law and exercise unauthorized Presidential power.

Conclusion

The unitary executive theory is a controversial topic. The unitary executive theory can be found in the United States Constitution and in the Federalist Papers. The type of Presidency that the founding fathers were trying to avoid was described in Federalist Paper Number 4.[83] John Jay wrote, "Nay, that absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans."[84] He particularly rejected the image of the figure of a king as President. A monarch fights for his own glory and tries to achieve what is planned in his agenda without any checks and balances. John Jay expressed fear that a monarch would act in its own interest. In that statement, he showed the way unitary figures act when given power. In Federalist Paper Number 69, John Hamilton described how a chief magistrate should have less power than a monarch and should be held accountable and even prosecuted if needed.

[83] John Jay, *The Federalists Papers: No. 4*, The Avalon Project, Yale Law School, http://avalon.law.yale.edu/18th_century/fed04.asp, (last visited March 9, 2019.)
[84] Id.

The founding fathers rejected the unitary executive theory.[85]

The first article in the United States Constitution addresses the function of the legislative branch, which is composed of law-makers elected by the people. This article states that the law is made by the people and they order the President to enforce it as its written. If not, law-makers are there to hold the executive accountable. Yes, the President enforces the law, but Congress has oversight and they are entitled to hold the President accountable.
When it comes to appointing executive officials, the President nominates his/her choice, and Congress approves or disapproves them. When going to war, the President through intelligence information and evidence has to prove to Congress that the country needs to go to war, and then Congress approves or disapproves the President's recommendation. When doing treaties or conducting foreign affairs, the President leads negotiations and proposes to Congress the recommended policies that congress will eventually approve or disapprove. One of the most important appointments for a President is to appoint a Justice for the Supreme Court, but Congress can say yes or no. This suggests that the most important decisions are made in partnership with Congress.

Perhaps the best option would be to have a semi-unitary executive approach. The semi-unitary executive theory consists of shared powers but with consent of Congress to let the President govern. Congress on many occasions goes into gridlock and seem like nothing can get passed. This frustrates the executive and makes them act on their own. Then conflicts get sent to the judiciary to get solved and government

[85] Alexander Hamilton, *The Federalists Papers: No. 69*, The Avalon Project, Yale Law School, 1788, http://avalon.law.yale.edu/18th_century/fed69.asp, (last visited March9, 2019.)

becomes more inefficient. A semi-unitary executive theory would require reforms on the Presidential powers such as following established protocols that allow the President to act but only with the consent of Congress. Similarly, The President should be able to remove executive officials, but only with the consent of Congress. British law allows the Prime Minister to hire and fire ministers.[86] This allows the Prime Minister to fire without causing any controversy. Approval would still be required by Congress, but the President would have the right too fire an executive member also.

Some issues could be resolved with resolutions, but issues like foreign affairs or military use, war, or oversight of government decisions should be consistent with our Constitution and regulated by the three branches of government. Each branch of government should respect the powers given by the people to the President through their vote.

[86] *About Parliament*, https://www.parliament.uk/about/, (last visited March 9, 2019.)

One Call Away: 911 Abuse as a Weapon Against Minorities

by Jameesha Rock

The phenomenon of white people calling the cops on minorities in non-emergency situations has become viral on popular social media and new sources around the nation. In each of these incidents, mostly African-Americans, are going about their day: barbecuing at a park,[1] moving into a new apartment,[2] or even playing golf.[3] While these individuals try to partake in these activities, a white caller dials 911 and reports 'suspicious activity.' Law enforcement then arrives at the scene and use their police power to relegate minorities to a status of inferiority.

Citizens have shared their outrage that law enforcement is called on people as a basis of racial discrimination. Many white citizens who have made false reports on minorities have yet to be sanctioned for their clear misuse of emergency response personnel. Instead, cops who respond to the false claim often act as mediators between the disputing parties, or they try to assure the white individual that the black party is

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[1]Christina Zhao, *'BBQ Becky,' White Woman Who Called Cops on Black BBQ, 911 Audio Releases: 'I'm Really Scared! Come Quick!'*, https://www.newsweek.com/bbq-becky-white-woman-who-called-cops-black-bbq-911-audio-released-im-really-1103057, (last visited March 12, 2019.)

[2]Eli Rosenberg, *A Black Former White House Staffer was Moving into a New Apartment. Someone reported a Burglary, The Washington Post, May 1, 2018,* https://www.washingtonpost.com/news/post-nation/wp/2018/05/01/a-black-former-white-house-staffer-was-moving-into-a-new-apartment-someone-reported-a-burglary/, (last visited March 12, 2019.)

[3]*Man who called police on black golfers: No weapons involved "other than her mouth,"* CBS News, June 1, 2018, https://www.cbsnews.com/news/grandview-golf-club-man-who-called-police-on-black-women-golfers-denies-racism/, (last visited March 12, 2019.)

not a threat. This act of calling 911 to make a false report of danger or threat intrudes on the black party's privacy and could lead to a potentially dangerous situation. On August 5, 2014, John Crawford III, a black man, died when responding officers shot him for carrying a BB gun that he took from one of the shelves in an Ohio Walmart.[4] Crawford was casually carrying the BB gun in the store and was peacefully browsing in the pet section, when someone called 911 to report a false emergency. The white patron claimed that Crawford was holding a gun and aiming at fellow shoppers. At one point, he stated Crawford was pointing the gun at two children. Police officers immediately responded to the call and fatally shot Crawford in the pet section. The false report resulted in this young man's premature death. Falsely reporting a non-emergency situation to the cops can lead to detrimental effects. This leads us to the question on how we can resolve the issue of police officers being called to the scene where no crime has taken place, except one of the parties simply has the wrong skin color.

Our legal system must find a solution for victims of false reports made by individual actors in order to prohibit an invasion of privacy. Every state currently has statutes on 911 misuse to reduce false requests of police enforcement and emergency assistance. Florida's Statute on 911 Misuse reads:

> *Misuse Of 911 Or E911 System*[5]*; Penalty* -911 and E911 service must be used solely for emergency communications by the

[4]Dan Good, *Walmart Shopper Who Called 911 could be Charged After Deadly Ohio Police Shooting*, Daily News, April 7, 2016, https://www.nydailynews.com/news/national/ohio-walmart-shopper-called-911-charged-article-1.2592305, (last visited March 12, 2019.)

[5]*Florida Statute 365.172*(13), http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0300-0399/0365/Sections/0365.172.html, (last visited March 12, 2019.)

> public. Any person who accesses the number 911 for the purpose of making a false alarm or complaint or reporting false information that could result in the emergency response of any public safety agency; any person who knowingly uses or attempts to use such service for a purpose other than obtaining public safety assistance; or any person who knowingly uses or attempts to use such service in an effort to avoid any charge for service, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. After being convicted of unauthorized use of such service four times, a person who continues to engage in such unauthorized use commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. In addition, if the value of the service or the service charge obtained in a manner prohibited by this subsection exceeds $100, the person committing the offense commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Nevertheless, many citizens are unaware that they should only dial 911 in a case of an emergency situation due to the fact that there is no clear standard to determine which situation constitutes a real emergency. Consequently, there is no clear standard for punishing those who misuse calling 911. For this reason, there are few arrests and minimal cases on 911 misuse. Often, many first-time offenders are given a simple warning for their misconduct. Repeated offenders punished for the crime of 911 abuse are only arrested if they have a history of making calls with an intent to abuse the system. In rare instances, an offender may be punished at the responding officer's discretion.

In the case of *Ohio v. Johnigan,* Lizzie Johnigan was charged with "[T]elecommunications harassment, in violation of R.C. 2917.21(A)(1);

making false alarms, in violation of R.C. 2917.32(A)(2); and making false alarms, in violation of R.C.G.O. 137.12(A), all misdemeanors of the first degree, stemming from a 911 disconnect call to the Dayton Police Department."[6] On September 24, 2002, the Dayton Police Department dispatch officer received a phone call from someone who had failed to state their name or the reason for the call before hanging up. When a caller fails to identify themselves or their state of emergency, the call automatically becomes a top priority and the police must do their due diligence in order to find the location from which the call was made. The police found that the call was made from a landline phone registered to a Daroyl Goodman located at 3201 Palmerston Avenue in Dayton, Ohio.[7] After the responding officer was dispatched to the scene, he spoke to Johnigan who stated that she had been renting the residence for almost six years from Goodman. Johnigan denied calling 911 and further stated that she was unaware of any emergency situation. She then claimed that she was having phone troubles. Records showed that there had been an extensive amount of non-emergency phone calls to 911 from the property before. Regardless of this fact, Johnigan was acquitted for her false alarm charges during her trial. The court of appeals then dismissed her case of telecommunication harassment. The court stated that they could not "conclude that the state met its burden of establishing beyond a reasonable doubt that Johnigan had placed the harassing call to the Dayton Police Department."[8]

Johnigan's case clearly showcases how hard it is to convict someone for 911 misconduct. The state must provide proof beyond a reasonable

[6]*State of Ohio v. Johnigan*, Case No. 19734, 02 CRB 12490, Jan. 23, 2004, https://cases.justia.com/ohio/second-district-court-of-appeals/2004-ohio-260.pdf?ts=1396139429, (last visited March 12, 2019.)
[7]Id.
[8] Id.

doubt that the person intended to place a phone call with the intent to harass the police department. As a result, charges for 911 misuse are often dropped and the abusers rarely ever face any punishments. In the case of *Ohio v. Link,* Wayne Link knowingly misused 911 emergency systems. On August 31, 2002, Link dialed 9-1-1 with the intent to report a false emergency in violation of Section 4931.49(D) of the Revised Code of Ohio.[9] Link called Knox County Police Department at around 3:12 a.m., stating "We need a new sheriff," and then abruptly hung up the phone.[10] The Knox County Police then arrested Link on the charges of 911 abuse and took him to court. The Mount Vernon Municipal Court issued a judgment that dismissed the case and let Link go free of the charge. After reviewing case law on the subject of 911 Misuse, the court drew the following conclusion,[11]

> "Revised Code Section 4931.40(E) defines 'Emergency Service' as emergency police, firefighting, ambulance, rescue and medical service. In the instant case, the Court finds that the Defendant called to make a complaint, not to request 'emergency service.' Even if the State could convince a jury beyond a reasonable doubt that the report was false, the Court finds that the Defendant would not be guilty of the offense charged. If the State wishes to criminalize the use of the 9-1-1 for making any non-emergency calls, the legislature must revise the statute."

Criminalizing 911 abuse offenses is quite a difficult task for the state. To punish 911 abuse, the state's legislators must revise their statutes on

[9] *State of Ohio v. Link*, 155 Ohio App. 3d 585, 2003, https://cases.justia.com/ohio/fifth-district-court-of-appeals/2003-ohio-6798.pdf, (last visited March 12, 2019.)
[10] Id.
[11] Id.

911 Misuse. However, it is not a top priority for legislators to revise statutes to prevent non-emergency calls to dispatchers. Calls that are considered misuse can be divided in several categories; for instance, unintentional calls when a patron misdials 911 and hangs up immediately once they realize their mistake. Some callers can exaggerate a situation that is not an emergency in order to use police resources. Other forms of misuse can be children participating in prank calls or mentally ill citizens that do not realize their call is misconduct under their state's statute. How can the state punish 911 misconduct across the board when many individuals are not aware that they are abusing the system? To solve this issue the state must prove beyond a reasonable doubt that the person knowingly and intentionally dialed 911 to report a false emergency. Furthermore, the state must decide misconduct on a case-by-case basis to ensure the individual intentionally engaged in conduct to misuse of 911 services.

There have been cases of 911 misuse, in which a white individual calls the police on a black individual to report miscellaneous activities such as checking out of an Airbnb[12] or taking a nap in their university's dormitory common area.[13] In such cases, can police officers prove beyond a reasonable doubt the caller knowingly misused 911 with malicious intent? How can police decipher that there is no real emergency or criminal activity in those situations? Most importantly,

[12]Marwa Eltagouri, *A Woman Called 911 about Burglars at her Neighbor's House, they were Black Airbnb Guests*, The Washington Post, May 8, 2018, https://www.washingtonpost.com/news/business/wp/2018/05/08/a-woman-called-911-about-burglars-at-her-neighhors-house-they-were-black-airbnb-guests/?utm_term=.96461707b8c7, (last visited March 12, 2019.)
[13]Brandon Griggs*, A black Yale graduate student took a nap in her dorm's common room, so a white student called police*, CNN, May 12, 2018, https://www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html, (last visited March 12, 2019.)

are states willing to severely punish the discriminating actions of calling 911 personnel on black people?

The act of calling law enforcement on minorities when no real threat or emergency has occurred is not a recent practice. The policing of black bodies and weaponizing police officers against minorities is part of American history. During the era of slavery, whites had reduced blacks to tools for slavery and set policing systems to dominate them. Biases then emerged from the concept of perceiving slaves as nonhumans and using dark skin as a moniker of inferiority. When slavery ended, white supremacists feared that emancipated blacks would revolt violently against their former masters. The irrational fear that blacks could no longer be controlled by white authority alarmed many white citizens. After slavery ceased, "white southerners felt a greater need for policing emancipated blacks, since in their minds slavery itself had been the most effective means of controlling and civilizing a 'barbarous people.'[14]

The emergence of using police forces as a tool to remove emancipated blacks became a common tactic for white citizens. "Freed blacks that made their way from southern plantations to southern and northern cities", discovered that their presence alone triggered a subliminal urge for whites to police, monitor, and try to keep blacks under control.[15] A system of policing blacks was enacted to keep them in an inferior status. Legal safeguards like the Black Codes and Jim Crow laws governed the behavior of blacks and excluded them from "white spaces." The large scale policing rights reinforced the pathology of

[14]Homer Hawkins and Richard Thomas. *White Policing of Black Populations: A History of Race and Social Control in America*, 2013, Routledge Revivals: Policing Black People.
[15] Id.

white racism and endowed whites with the power to exercise or abuse their superiority as they deemed fit.[16] The policing of black bodies created a tremendous influence on whites to criminalize blackness. The evolving perceptions of blacks has linked criminal behavior as an inherent trait of blackness.

Looking back at America's racial history, we must consider that the majority of these 911 abuse calls could be motivated by racial bias towards minorities. White citizens weaponized their racial intolerance and try to force non-whites out of public spaces. In the case of *Nelson v. Bahama Breeze Holdings, LLC,* twenty-five African-American women filed a lawsuit against Bahama Breeze Holdings, Inc. for racial discrimination and making a false police report under Ohio state law.[17] Plaintiff Diana Nelson, an African-American author wanted to host a celebration for her recent book deal and upcoming move to another state with her fellow post-graduate sorority members. Nelson decided to host her private party at Bahama Breeze in Cleveland, Ohio on June 19, 2018.

The staff of Bahama Breeze greeted and served the party with marked hostility. Nelson and her party were not served in a timely fashion nor provided with a sufficient amount of staff to accommodate all of their needs. The managers on duty, Frances Skupnik and Devin Jenkins, treated Nelson and her guests with dismissive attitudes and did not apologize for any inconveniences. From the moment Ms. Nelson's party was seated in their private area, Jenkins told the guests, "You and

[16] Id.

[17] Ed Carroll, *Lawsuit filed over Bahama Breeze incit,* Cleveland Jewish News, Sept. 13, 2018, https://www.clevelandjewishnews.com/news/local_news/lawsuit-filed-over-bahama-breeze-incident/article_1975d462-b757-11e8-ab39-9bbb6e8e9715.html, (last visited March 12, 2019.)

your people cannot leave out of this room for anything."[18] Later during the evening, Skupnik called Orange Village Police Department and falsely reported that the group of women were being unruly and were threatening to walk away from the restaurant without paying for their meals.[19] After police arrived at the scene, Nelson and her party were forced to stay in their private patio area and show proof of purchase for their meal. Nelson and her party guests were treated like criminals and beyond humiliated during their time at Bahama Breeze.

Rashon Nelson and Donte Robinson faced a similar experience when a Starbucks manager called the cops on the two men while they waited for a business meeting in Philadelphia, Pennsylvania. The two men occupied a table without purchasing anything, a common practice at many franchise locations.[20] The manager falsely reported to Philadelphia Police Department that the two men refused to leave and were trespassing the premises. This resulted in the two men being arrested and escorted out of the restaurant. Fortunately, the men were not charged for any crimes and reached a financial settlement with the Starbucks Corporation.

What can individuals do when a white individual, not affiliated with a corporation, makes a false report to police officers? When using privately owned places for public accommodation, discrimination is

[18]Id.
[19] Id.
[20]Yon Pomrenze and Darran Simon, *Black men arrested at Philadelphia Starbucks reach agreements*, CNN, May 2, 2018, https://www.cnn.com/2018/05/02/us/starbucks-arrest-agreements/index.html, (last visited March 12, 2019.)

prohibited under Title II of the Federal Civil Rights Act of 1964,[21]

> 42 U.S.C. §2000a (a) - All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.

This provision of Title II does not apply to private clubs or individual actors who racially discriminate against minorities. For example, it is not a crime or a violation of any civil statute for an individual to be racist or make racist comments. Laws cannot regulate an individual's personal bias against a certain group or change their perceptions. The law, however, can regulate the actions individuals take against certain groups of people because of their bias. Can it, therefore, be possible to criminalize white people calling the police to falsely report minorities' actions as threatening or criminal? White individuals are taking the action of falsely reporting crimes because of their personal bias against a certain group. White callers know that their false report will cause some effect on the individuals they report. The false report is used as a weapon against minorities, whether it may lead to a warning, arrest, or removing minorities from the premises. Thus, it can be a criminalized action to falsely report minorities and call the cops in a non-emergency situation. White callers may know that some form of action will be taken against the minority group by law enforcement.

New York Senator Jessie Hamilton proposed a solution to end racially

[21] *Title II of the Civil Rights Act*, U.S. Department of Justice, https://www.justice.gov/crt/title-ii-civil-rights-act-public-accommodations, (last visited March 12, 2019.)

charged false reports on August 15, 2018. Senator Hamilton announced his proposal of the "911 Anti-Discrimination/Anti-Harassment Legislation" which would differentiate racially motivated false reports and increase the penalties for such reports made with clear intent to falsely report.[22] Senator Hamilton's proposed bill would add racially motivated false reporting to the list of hate crimes to hopefully deter the amount of calls to law enforcement. Citizens who make a false report to 911 solely based on "an individual's race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual orientation" can be held accountable under this act.[23]

Senator Hamilton's solution may raise some issues with freedom of speech. People should be able to call the police if they do have a concern. Individuals may fear that now their freedom of speech and right to call the police is infringed upon if the bill is passed in New York. Critics of this bill state that Senator Hamilton cannot punish individuals for their racial bias or make it a crime to call 911. Senator Hamilton has responded that he is simply criminalizing false reports that are racially motivated out of malice and hate.[24] In addition, officers must assess if the false report was made with malicious intent and show that the caller knew that there was no real emergency. As stated above, 911 abuse cases do not undergo many arrests and often the burden falls

[22]Jesse Hamilton, *Sen. Jesse Hamilton Announces 911 Anti-Discrimination, Anti-Harassment Legislation in Wake of Living While Black Incidents in Brooklyn and Across the Country*, N.Y. Senate, Aug. 15, 2018, https://www.nysenate.gov/newsroom/press-releases/jesse-hamilton/senator-jesse-hamilton-announces-911-anti-discrimination-anti, (last visited March 12, 2019.)

[23] Id.

[24] Colin Mixson, *Pol wants harsher penalties for filers of racially biased, false police reports*, Brooklyn News, Aug. 16, 2018, https://www.brooklynpaper.com/stories/41/33/all-hamilton-911-anti-discrimination-law-2018-08-17-bk.html, (last visited March 12, 2019.)

on the state to prove beyond a reasonable doubt that the caller intended to misuse 911 services.

Hamilton's 911 Anti-Discrimination bill may face challenges. However, there should be a remedy to solve the problem of individuals calling the cops on minorities who are guilty of nothing more than simply participating in everyday life. These calls disrupt one's day and can be traumatizing for victims of false reports. Other calls can result in dangerous situations if the police are misinformed by the 911 call. Possible remedies can include: training dispatchers to determine if a real emergency or crime is being committed, training dispatchers to assess racial discrimination from the caller and training officers to carefully assess every situation. While these solutions may not fully solve the problem, they will help decrease the amount of false reports leading to the wrongful arrests of blacks. These trainings could also lead to a significant reduction police shooting of unarmed blacks which in turn will provide minorities with peace of mind during their encounters with a police officer.

Identity and discrimination in the Work Place: An Intersectional, Legal History

by Cameron Ryan

Introduction

Intersectionality is a theory originating from Kimberlé Crenshaw in 1989. The theory focuses on, "the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups."[1] This theory is used by feminist theorists to shed light on the plight of African-American women and women of other minority groups. This type of discrimination of these marginalized individuals and minority groups flows throughout American history.

The protection against such discrimination has been a recent development within only a few decades. This development has been fought in the office of lawmakers and in all the levels of the U.S. Courts of law. This article will analyze how the courts have dealt with such discriminatory cases, how the law has transformed, and how opinions have been adjusted to uphold the spirit of the U.S. Constitution.

Equal Protection of the Law

The Fourteenth Amendment was adopted during the Reconstruction period in U.S. history after the Civil War in 1868. U.S. lawmakers made this critical addition to the U.S. Constitution in order to protect the rights and citizenship privileges of former slaves. The first section of the Fourteenth Amendment details that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

[1] Merriam-Webster, *Intersectionality*, https://www.merriam-webster.com/dictionary/intersectionality (last visited Jan. 21, 2019).

> 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."[2]

The legal standard requires that all law be applied equally, that no human being, politician, company, group, etc. may deprive a U.S. citizen of their rights, or the protections entitled to them by any law passed and upheld in the United States of America. Yet, from the Reconstruction period to the modern day, many injustices have been perpetrated against minorities and marginalized human beings.

The Fourteenth Amendment is the basis for laws providing remedies for discriminatory actions and it is the basis for the legal challenges in cases that have been brought since its inception to fight injustices through the due process of law. The laws of our country changed once again with the Civil Rights Movement, which furthered the rights and legal protections of minorities and other marginalized citizens.

Title VII and the EEOC

In 1964, Title VII of the Civil Rights Act [3]was put into action. The purpose of Title VII was to offer legal and definitive protection against any public discrimination and any such practices in situations like educational systems and business. Title VII protects "any person" which has been defined as, "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal

[2] Constitute Project, *United States of America 1789 (rev. 1992),* https://www.constituteproject.org/constitution/United_States_of_America_1992 (last visited Jan. 21, 2019).

[3] *Title VII of the Civil Rights Act of 1964,* U.S. Equal Employment Opportunity Commission**,** ***https://www.eeoc.gov/laws/statutes/titlevii.cfm*****,** (last visited Feb. 27, 2019.)

representatives, mutual companies, joint--stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 [originally, bankruptcy], or receivers."[4] This definition includes any person or group regardless of age, race, gender, etc. Title VII provides protection against practices that may target or discriminate against any individual for situations like not hiring you because of your age, race, or both. As a result of Title VII, there have been many intersectional cases that have been brought forth since its inception. Title VII is the stage upon which these discriminatory practices get tried.

The Equal Employment Opportunity Commission (EEOC) was charged with the enforcement of Title VII in 1965 as the governing body designated to handle cases that fall under Title VII. Some of the EEOC's powers include:

> "The Commission is empowered… to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704]. (b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause."[5]

This allows for the combination of discrimination claims based upon a number of different types of allegations and hence the concept of intersectional discrimination. This combination effect also allows for efforts to be

[4] Id.
[5] Id.

initiated to prevent and protect against discrimination.

Since 1965 the case history for intersectional cases has grown so much that it has its own section on the EEOC's webpage.[6] There are only two cases concerned with just black women and these are labeled as "black female."[7] The recognition of cases where there are two attributes like race and gender combined really only began in December 2004.[8] Which is amazing given the fact that the EEOC started developing case files in 1965.

The Case of Emma DeGraffenreid and Other Late 20th century Intersectional Cases

Emma DeGraffenreid, et al. v. General Motors Assembly Division,[9] St. Louis, was a law suit based on the employment practices of General Motors. The case, filed in 1977, focused on the firing of Emma DeGraffenreid and the appellants in 1974. The General Motors practices challenged by this law suit were the defendant's seniority system and last hired-first fired layoff scheme and were the only issues addressed by the parties on appeal.[10] The appellants, all black women, were fired in 1974. It was alleged that Emma DeGraffenreid was only hired due to a business recession in 1973.[11] The Court decided that, "In response to cross-motions for summary judgment the court dismissed on the merits the sex discrimination claims, and dismissed without

[6] *E-Race*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm, (last visited Feb. 28, 2019.)
[7] Id.
[8] Id.
[9] *Emma Degraffenreid, et al., Appellants, V. General Motors Assembly Division, St. Louis, Et Al., Appellees.* 558 F.2d 480 (8th Cir. 1977), https://openjurist.org/558/f2d/480/emma-degraffenreid-et-al-v-general-motors-assembly-division-st-louis, (last visited Feb. 28, 2019.)
[10] Id.
[11] Id.

prejudice the claim charging racial discrimination." The effect of this ruling was that a complaint such as this one, under Title VII, might state a "cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both." [12] To summarize, the appellants and Emma DeGraffenreid could not sue on the basis of being a black female. They had to choose between one or the other, not their entire identity.

Eventually, this case made it to the Supreme Court who decided,

> "Thus, when appellants failed to file charges with the EEOC within one hundred eighty days following their entry into service, GM was entitled to consider its earlier failure to hire appellants as lawful, a mere "unfortunate event in history which has no present legal consequences… we must affirm the dismissal of appellants' Title VII claims. However, appellants' race discrimination claims based on 42 U.S.C. § 19812 remain."[13]

The Supreme Court agreed with the district court's dismissal of Title VII claims, but not based on choosing a singular part of their complex, intersectional identity, but on a limit of when you can file under Title VII. The Supreme Court said that the race discrimination claim based on a different law, remained. Though in the case of Emma DeGraffenreid, the end result was that calling attention to the discrimination of black women in the work place based upon the Supreme Court's interpretation of the law would serve to restrict the women's access to protection rather than actually protect them.

In 1982, plaintiff Ruby Clark took American Broadcasting Companies (ABC)

[12] Id.
[13] Id.

to court for a broadcast about street prostitution.[14] Ruby, a black woman, was walking down the street when she was made a part of the broadcast without her knowledge by way of photographs. Within the facts section of the Supreme Courts summary, the following was said about the plaintiff, "Plaintiff's face was clearly visible. The plaintiff appeared to be in her early to mid-twenties. She was attractive, slim, and stylishly dressed…Apparently, plaintiff was unaware that she was being photographed. As plaintiff appeared, the narrator made the following remarks, 'But for black women whose homes were there, the cruising white customers were an especially humiliating experience.' Sheri Madison, a black female resident of the neighborhood plagued by prostitution appeared on the screen seconds after plaintiff. She stated, "Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute."[15] ABC, who filmed the broadcast, did not even question the plaintiff. With the added commentary, the bias created a terrible view of black women on that street and conveyed it to the public.

In the district court, Ruby's case was dismissed at summary judgement due to the court having, "concluded that the broadcast was not libelous."[16] The plaintiff filed an appeal. Not looking into the factual question of whether the broadcast was defamatory, the Supreme Court ruled that, "We conclude that the broadcast was capable of a defamatory meaning. Because the Broadcast was susceptible to two interpretations, one defamatory and the other non-defamatory, summary judgment for ABC was improvidently granted. Accordingly, we reverse and remand the case to the district court for proceedings consistent with this opinion."[17] This decision allowed Ruby

[14] *Ruby Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208 (6th Cir. 1982), https://law.justia.com/cases/federal/appellate-courts/F2/684/1208/40768/, (last visited Feb. 28, 2019.)

[15] Id.
[16] Id.
[17] Id.

Clark to have her day in court.

Intersectional Discrimination

The modern era is no stranger to discrimination, it is still prevalent in public places. Society has learned to become a watchdog against such issues. In March 2016, the EEOC filed a class action lawsuit on behalf of African-American workers, *Equal Employment Opportunity Commission v. Stone Pony Pizza, Inc*.[18] The EEOC began their investigation after Chendra Johnson-Hampton filed a charge of discrimination with the EEOC on March 17, 2011, alleging that she was denied a position as a server at Stone Pony in September of 2010 because she is black, and that white females were hired for open server positions instead."[19] The EEOC investigated and subsequently filed a class action suit after finding, "additional [evidence] of class-wide discrimination against African Americans as a class."[20]

The EEOC informed Stone Pony of its determination by letter dated June 29, 2012, and invited Stone Pony to engage in conciliation discussions. Stone Pony responded with a wholesale denial of the EEOC's findings…the EEOC issued a new determination letter with the additional finding of class-wide discrimination against African Americans as a class. In October of 2012, the EEOC invited Stone Pony to engage in a face-to-face conciliation conference and issued a proposed conciliation agreement that provided specific relief for individuals as well as class-wide… Stone Pony rejected the proposed

[18] *Equal Employment Opportunity Commission v. Stone Pony Pizza*, 172 F.Supp.3d 941 (Mississippi 2016,) https://law.justia.com/cases/federal/district-courts/mississippi/msndce/4:2013cv00092/34580/259/, last visited Feb. 28, 2019.)

[19] Id.

[20] *Stone Pony Pizza Sued for Race Discrimination*, U.S.E.E.O.C., (May 20, 2013), https://www.eeoc.gov/eeoc/newsroom/release/5-20-13.cfm, (last visited Feb. 28, 2019.)

conciliation agreement.[21]

Another of the contested issues put forth by the defendant was that the EEOC did not have the power to submit such an action on behalf of individuals and therefore moved for summary judgement. The court denied the defendant's motion for summary judgement and affirmed the EEOC's power to bring a class action law suit when the finding of fact so warrants. The Court ruled that the summary judgements of both sides were granted in part, and dismissed in part. Of particular note, the court found that a defendant's constitutional rights to due process under the 7th Amendment were not violated by having the EEOC bring this class action law suit.[22] So, the EEOC's right to intervene was found to be appropriate.

The theory of Intersectionality looks at the individual indices of discrimination but also for the collective effect of discrimination on individuals and minorities based upon the various components of our complex identities. The fact that a black woman and other black applicants were denied while white women were hired for these server positions is part of the intersectional experience.

Conclusion

These intersectional cases reflect the complexity of the reality of Crenshaw's theory of Intersectionality that describes the reality of discrimination in the work place and in our lives. By reviewing recent cases, evidence shows that intersectional discrimination existed from employers, media companies, and judges. The research also led to a look and analysis of laws protecting against discrimination in such public places with the Equal Employment Opportunity Commission (EEOC) being the agency on the front

[21] *Equal Employment Opportunity v. Stone Pony Pizza*, 172 F. Supp. 3d 941(2016,) https://www.leagle.com/decision/infdco20160329a96, (last visited Feb. 28, 2019.)
[22] Id.

lines. The recent case, *EEOC v. Stony Pony Pizza, Inc.,* showed how procedural issues can impede the opportunity of the court to deal with the substantive issues. In any case, it is up to society to speak out and demand parity and fairness from our administrative agencies, the courts, and employers. It is also important to note that, "we the people" need to be aware of the legal requirements and interpretations of our laws that can so substantially affect our rights.

Do We Draw a Line Between Freedom of Speech and Hate Speech in American Law?

by: Raneem Shehadeh

Introduction

Though embedded in the Constitution of the United States, the rights of an American citizen are a crucial aspect of American values. The list of rights and privileges given to us as Americans by the Constitution are to be protected by state and federal governments. One of the many important sets of rights we possess and the first one listed in the amendments is freedom of speech and freedom of expression. As stated in the Constitution, the First Amendment states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] Americans are promised the right to freely express their opinions and are protected from statutes that aim to restrict this freedom of expression.

Though freedom of speech is valuable to American culture, it is still very difficult to define within a social and legal context. Both Americans and American law struggle to find the balance between what is acceptable to be freely expressed and what is hate speech that would oppress certain groups of people targeted by that hate speech. According to William Warner and Julia Hirschberg's article, hate speech is "defined as abusive speech targeting specific group characteristics, such as ethnic origin, religion, gender, or sexual

[1] *U.S. Constitution*, https://www.law.cornell.edu/constitution/first_amendment, (last visited March 11, 2019.)

orientation," in a

social context.[2] While this article specifically defines hate speech within a social context, it creates a much complicated and sensitive issue when incorporating this notion of hate speech in the American legal system. How do we incorporate laws relating to hate speech without imposing on our First Amendment rights? Where do we draw the line between the two concepts without causing any violations of the rights granted to us by our constitution?

The legal issue analyzed in this paper questions whether we have the constitutional right to engage in any form of speech, regardless of who the targeted group is and how offensively it may be interpreted, or if some sort of regulation must be established to limit hate speech targeting a certain group of people. This is done by examining the history of cases involving hate speech which has been relevant since the mid-1900s until today as well as studying certain arguments made for and against putting limitations on hate speech. This blurred line between hate speech and freedom of speech has prompted both social and legal issues. Therefore, it is important to draw a distinction between the two concepts in order to promote acceptance and tolerance, while protecting our First Amendment rights.

Regulations

There is an ongoing debate about whether hate speech should be considered a hate crime. In Carl Collison's article, he describes the

[2] William Warner and Julia Hirschberg., *Detecting hate speech on the world wide web*, In Proceedings of the Second Workshop on Language in Social Media (LSM '12). Montreal, Canada, 2012, https://dl.acm.org/citation.cfm?id=2390377, (last visited March 12, 2019.).

inclusion of hate speech in the *Hate Crime Bills* as raising a concern that restrictions may act as a threat to one's freedom of speech.[3]

Outlawing hate speech can be regarded as a threat to one of the most important American values and may be a violation of one's constitutional rights of freedom of speech. To many Americans, freedom of speech is considered the essence of democracy and what America is truly about.[4] Unlike other Western societies that have limitations and hold sanctions on hate speech, America provides protection under the Constitution for freedom of speech and therefore opens the opportunity for hate speech.[5] Any form of speech that is typically considered merely advocacy or a form of expression is protected under constitutional law and a state cannot form regulations restricting these rights, regardless of these regulations being against hateful or offensive speech. The only unprotected forms of speech that could have restrictions are: "threats, fighting words, obscenity, child pornography and speech that imminently incites illegal activity."[6] While hate crimes are illegal in the United States, hate speech is not included under the umbrella of hate crime and is protected under the

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[3] Carl Collison, *Hate speech is not a hate crime,* Mail and Guardian, Nov. 2016, https://mg.co.za/article/2016-11-02-00-hate-speech-is-not-a-hate-crime, (last visited March 12, 2019.)

[4] Samuel Walker, *Hate Speech: The History of an American Controversy,* University of Nebraska Press, 2003, https://academic.oup.com/ahr/article-abstract/100/3/965/20735?redirectedFrom=fulltext, (last visited March 12, 2019.)

[5] Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,* Cardozo School of Law, 2002, https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1147&context=faculty-articles, (last visited March 12, 2019.)

[6] Heidi Kitrosser, *Containing Unprotected Speech,* 57 Fla. L. Rev. 843, 2005, http://www.floridalawreview.com/2010/heidi-kitrosser-containing-unprotected-speech/, (last visited March 12, 2019.)

Constitution. Under 18 U.S.C.A. § 249, a hate crime is considered any physical threat or injury inflicted on a person motivated by race, color, religion, gender identity, sexual orientation, or disability.[7] While hate speech promotes discrimination against a certain group of people, which some people believe could also promote violence against this particular group, it does not inflict any physical harm or threat. Therefore, it is not considered to be part of a hate crime and is not, in and of itself, against the law. This is what ignites the controversy of hate speech versus freedom of speech.

Protecting All Forms of Speech

Many people believe that any laws against hate speech could put restrictions on freedom of speech, which would then violate our first amendment rights. However, others believe that the absence of these laws promotes the acceptance of discriminating against specific groups of people which could eventually lead to a serious hate crime. To examine one side of the argument, it is important to understand the significance of freedom of speech to most Americans, which is one of the main values igniting this controversy. Throughout history we see that the Supreme Court, through its ruling on cases involving hate speech, has almost always leaned towards protecting the first amendment rights of American citizens.

One case illustrates the importance of freedom of speech to the American people by overlooking the actions of extreme hatred towards a specific group of people because sanctioning them would violate their first amendment rights. In 1992, teenagers burned a cross on a black family's lawn as a sign of hatred towards black people and were

[7] *Hate Crime Acts*, 18 U.S.C.A. § 249, Cornell Law School, https://www.law.cornell.edu/uscode/text/18/249, (last visited March 12, 2019.)

charged with "a local bias-motivated criminal ordinance which prohibits the display of a symbol which arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." This case, *R.A.V v. City of St. Paul*,[8] exemplifies the controversy because first it was dismissed by a trial court which claimed that the ordinance was too broad, then it was reversed by the Minnesota Supreme Court and eventually reached the U.S. Supreme Court which had to determine whether the ordinance in question was constitutional or not.[9] The main argument that this case addresses is whether the ordinance used to arrest these teenagers was too broad and whether this interpretation violated citizens' first amendments rights by restricting their freedom of expression. The Justices unanimously opposed the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990) which specifically states:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."[10]

The justices reasoned that this ordinance was too broad, giving the state too much discretion to interpret citizens' actions which is a threat to

[8] *R.A.V. v. City of St. Paul*. Oyez, 30 Dec. 2018, www.oyez.org/cases/1991/90-7675, (last visited March 12, 2019.)
[9] *R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 1992, *Justia Law*, supreme.justia.com/cases/federal/us/505/377/#tab-opinion-1959077, (last visited March 12, 2019.)
[10] Id.

their freedom of expression. If the state has this much discretion, then it is seen to ultimately have too much power over citizens by deciding what can be considered offensive enough to violate this ordinance. The Justices concluded that this broadness in the ordinance violated the First Amendment giving the state government the ability to pick what could be said. In his opinion, Supreme Court Justice Antony Scalia, mentions how the ordinance limits one's freedom of speech "solely on the basis of the subjects the speech addresses," and that the ordinance is a "content-based regulation."[11] According to Justice Scalia, this violates citizens' rights of speech. He also included an observation that a state's disapproval of certain content should not be sufficient to suppress one's speech. Therefore, although the teenagers who burnt the cross in front of the family's lawn intended to show their contempt for people of the black race, the fact that they inflicted no physical harm or threat to the family protects them from the law. This brings us back to how the roots of American values protect citizens' right to express themselves regardless of the hate this expression may spread.

In an article by Eugene Volokh, he addresses the Justices' stance on the role hate speech plays in the First Amendment by examining the *Matal v. Tam* case.[12] In *Matal v. Tam*, Tam, a member band called the Slants, planned to register his band's name with the U.S Patent & Trademark Office. However, the U.S.P.T.O. denied them the trademark and "certain protections that trademarks get against unauthorized use by third

[11] Id.

[12] *Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366, 582 US __ - Supreme Court, 2017, https://scholar.google.com/scholar?q=Matal+v.+Tam&hl=en&as_sdt=6&as_vis=1&oi=scholart, (last visited March 12, 2019.)

parties,"[13] because the band name was seen as offensive to those who are of Asian descent. Tam challenged the constitutionality of the U.S Trademark's Disparagement Clause of the Lanham Act of 1946[14] which prohibits, "[I]mmoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[15] The opinion of the *Matal v. Tam* court delivered by Justice Alito found the anti-disparagement clause to be unconstitutional because, "It offends a bedrock First Amendment principle: speeches may not be banned on the ground that it offends."[16] This statement from the Supreme Court demonstrates the core principle embedded within the First Amendment. The mere idea of a law restricting a citizen's viewpoint, regardless of it being racially offensive, is viewed as repressive and a threat to freedom. Justice Kennedy also delivered an opinion where he explained how the First Amendment protects citizens from laws that suppress speech based solely on its subject matter and views this as "content-based discrimination."[17] The unanimous disapproval of this Act by the Justices illustrates why some critics would regard certain hate speech regulations to be restrictive on citizens' First Amendment rights.

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[13] Eugene Volokh, *Supreme Court Unanimously Reaffirms: There Is No 'Hate Speech' Exception to the First Amendment*, The Washington Post, 19 June 2017, www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/supreme-court-unanimously-reaffirms-there-is-no-hate-speech-exception-to-the-first-amendment/?noredirect=on&utm_term=.8d9c7fe6a947, (last visited March 12, 2019.)

[14] 15 U. S. C. §1052(a).

[15] Id.

[16] *Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366, 582 US __ - Supreme Court, 2017, https://scholar.google.com/scholar?q=Matal+v.+Tam&hl=en&as_sdt=6&as_vis=1&oi=scholart, (last visited March 12, 2019.)

[17] Id.

Where Protecting Hate Speech Could Lead Us

While many Americans would side with the Supreme Court's interpretation of the First Amendment which supports the utmost protection of our freedom to express, there are also many who, with the legal system increasingly favoring the freedom of any form of advocacy speech, grow fearful of what this could mean for our society. Many see this leeway provided by interpreters of the Constitution as an opportunity to promote intolerance and discrimination against those of different races, ethnicities, genders, etc. Because this interpretation makes people feel they are protected by the law, this could increase some citizens' confidence to voice any viewpoint they have regardless of how much hatred it spread towards a certain group of people. Many argue that this could eventually lead to the promotion of discrimination. While it is true that forms of speech like in the cases of *R.A.V v City of St. Paul* and *Matal v. Tam* have inflicted no direct physical harm or threat to the groups targeted, many believe that as people become more confident to voice offensive and hateful opinions about certain groups that enforce certain negative stereotypes or hatred towards them, this can encourage people to engage in real threats towards a group of people. The argument is that while it starts off as mere speech that expresses one's discriminatory view about a certain group,that then paves a way for more serious threats and harm against that group as it seems that the law accepts the expression of these discriminatory views. Therefore, this encourages perpetrators to build the courage to physically harm this group.

One particular case that sparked fear and worry within a whole community was the *National Socialist Party of America v Village of*

Skokie.[18] This case involves a group of neo-Nazis protesting in a suburb full of mostly Jewish settlers, many whom survived Nazi concentration camps. When it was taken to the Supreme Court, the majority of the Justices agreed that these protestors had the First Amendment right to protest whatever they wanted.[19] An article by Brooke Ross mentions how this case, ". . . helped clarify that all people have the right to rally publicly, no matter how offensive their views are."[20] This shows the extent to which U.S laws will go to protect freedom of speech. However, the article also poses a question asked by Lee Bollinger, a free speech expert, "Should free speech to be extended to speakers whose purpose and message is to deny free speech, people who want to overthrow the government by violence and-if successful- bring about the end of free speech?"[21] Forms of hate speech as offensive as the one mentioned in the case of *National Socialist Party of America v Village of Skokie*, promotes the idea of denying equal citizen rights, like freedom of speech, to certain groups. This is contradictory to what the First Amendment rights aim to achieve, the freedom of speech for all.

While the case of the *Village of Skokie* was offensive to Jewish people, it did not result in violent or physical harm to anyone. However, what

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[18] *National Socialist Party of America v. Village Of Skokie*, 432 U.S. 43, 1977, Https://Supreme.Justia.Com/Cases/Federal/Us/432/43/, (last visited March 12, 2019.)

[19] Id..

[20] Brooke Ross, *Should the First Amendment Protect Hate Speech? Forty Years after the Courts Upheld Neo-Nazis' First Amendment Rights, Is It Time to Reconsider Which Kinds of Speech Deserve Constitutional Protection?*, New York Times Upfront, 2018, http://www.addisonlibrary.org/sites/default/files/Should%20the%20First%20Amendment%20Protect%20Hate%20Speech.pdf, (last visited March 12, 2019.)

[21] Id.

happens when an assembly based on these sensitive and offensive issues turns violent? This is what many people who believe hate speech should be outlawed fear. On August 12th, 2017, a group of white nationalists and neo-Nazis planned to protest the government's plan to remove a statue of Confederate General Robert E. Lee, as many people find it to be a reminder of "a dark time of racism in U.S history and should be taken down."[22] As a result, a group of new protestors against white nationalists, some among the Black Lives Matter movement, also assembled that day to counter-protest. However, this resulted in rising anger among the white nationalist protestors to the point where, "one rammed his car into a crowd of counter-protestors", killing one person and injuring 19 others, according to ABC news.[23] The violence that emerges from hate speech is one of the biggest concerns of citizens who support putting limitations on speech that is hateful towards specific groups.

One of the biggest misconceptions most people have about the motives of people who support legislation on hate speech is that they aim to restrict the expression of one's viewpoint. According to Jeremy Waldron's book, *The Harm in Hate Speech*, people supporting legislation on hate speech, ". . . are concerned about the predicament of vulnerable people who are subject to hatred directed at their race, ethnicity, or religion; apart from that predicament" and probably have "little or no interest in the topic of hatred."[24] He explains how the

[22] Meghan Keneally, *What to know about the violent Charlottesville protests and anniversary rallies*, ABC News, 2018, https://abcnews.go.com/beta-story-container/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500 (last visited Jan 25, 2019).
[23] Id.
[24] Jeremy Waldron, *The Harm in Hate Speech*. Cambridge: Harvard University Press, 2012, https://www.degruyter.com/view/books/harvard.9780674065086/harvard.9780674065

environment we create for minority groups subjected to hatred is hostile when required to absorb such verbal attacks. The point is not to restrict any form of thinking or forming opinions, but instead, restrict the messages spread through hate speech that promotes the idea that certain people do not deserve equal rights.[25]

Conclusion

There is difficulty in distinguishing the extent to which one can openly express hateful or even discriminatory opinions about specific groups. While many Americans are rightfully concerned about being restricted from exercising their freedom of speech which is a violation of the First Amendment, many are also worried about the negative effects on society if it continuously accepts hate speech targeted towards minorities and the impact it has on their lives. Therefore, it is important to find a balance between freedom of expression and protection for the rights and safety of individuals targeted by hate speech.

Along with protecting freedom of speech, it is important to create an accepting environment for people of all races, religions, sexual orientations, ethnicities, etc., and one that discourages discrimination. While creating law that puts restrictions on people's freedom to form their own opinions and express them could be a violation of one's basic freedom, the law should limit how far one can go in expressing hatred towards a group of people that could promote the idea of depriving them of equal citizenship rights.

086.c4/harvard.9780674065086.c4.xml, (last visited Jan. 27, 2019.)

[25] Id.

The WTO Security Exception and Limits of the Rules-Based System

by Stephan G. Schneider

It was once said that "[i]nsofar as international law is observed, it provides us with stability and order and with a means of predicting the behavior of those with whom we have reciprocal legal obligations."[1] History shows that international politics is as complex as it can be contentious. Indeed, that is why our globalized world has resorted to the power of law to define the manner in which nation-states interact with each other. However, what does the system do when it is pushed to its boundaries? What happens when the means of predicting behavior is compromised?

An examination of the security exception within the WTO provides scholars an opportunity to discover what happens. Such an opportunity is presented by way of President Trump's invocation of what some experts call "the nuclear option" of international trade law.[2] This manuscript serves to provide an overview of the WTO and its security exception, a description and analysis of President Trump's invocation of the exception, and a look into the perceived Catch-22 such invocation now presents to the WTO.

What is the WTO?

[1] *Senator Fulbright's Quotes*, Fulbright Academy of Law, Peace and Public Health, https://fulbrightacademylaw.org/quotes-of-senator-j-william-fulbright/, (last visited Mar 21, 2019.)

[2] Daniel J. Ikenson, *The Danger of Invoking National Security to Rationalize Protectionism*, Cato Institute (2017), https://www.cato.org/publications/commentary/danger-invoking-national-security-rationalize-protectionism, (last visited Mar 21, 2019.)

The international system is built on years of negotiations. Following two devastating world wars, the international community realized that Westphalian politics was not a viable option for peaceful stability and sought to construct a rules-based system of cooperation. Realizing that trade was an avenue to cultivate cooperation and peace, the United States rallied other nations to create an international entity dedicated to fostering open trade.[3] Today, the WTO serves as the recognized forum to negotiate new trading rules and arbitrate trade disputes.[4] "At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits."[5]

The Security Exception

The General Agreement on Tariffs and Trade (GATT) includes an Article on Security Exceptions.[6] Some call the security exception necessary while others call it a loophole, some could even say it is a necessary loophole. The problem with characterizing Article XXI of the GATT is that the few scholars who have actually analyzed the security exception are as sharply divided as to the appropriate interpretation as

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[3] Orin Kirshner, *American Trade Politics and the Triumph of Globalism*, (Rutledge, 2014).
[4] *What is the WTO? - Who we are*, WTO, https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm, (last visited March 22, 2019.)
[5] Id.
[6] *Security Exceptions,Article XX*! Of the General Agreement on Tariffs and Trade (GATT), (United Nations Charter for the maintenance of international peace and security), https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf, (last visited March 22, 2019.)

they are limited in numbers.[7] Legal scholar Roger Alford provided a comprehensive description in his 2011 law review article:

> The security exception is an anomaly, a unique provision in international trade law that grants the Member States freedom to avoid trade rules to protect national security. In the long history of GATT and the short history of the WTO, that freedom has never been challenged seriously. Member States understand the exception to be self-judging and presume that it will be exercised with wisdom and in good faith. Thus far, the record has been impressive. While no doubt there have been departures, the self-judging security exception has worked reasonably well. It has certainly not undermined the effective functioning of the WTO.[8]

As for the actual text of Article XXI, it is fairly straightforward. It states as follows:[9]

> Nothing in this Agreement shall be construed
>
> a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

[7] Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship, (last visited March 22, 2019.)

[8] Id.

[9] *Article XXI – Security Exceptions & Analytical Index of the GATT*, 599-610, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf, (last visited March 22, 2019.)

b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
    i. relating to fissionable materials or the materials from which they are derived;
    ii. relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
    iii. taken in time of war or other emergency in international relations; or
c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Adding to the desire to convey its exact meaning is the fact that the WTO includes an analytical index to provide interpretation and application of Article XXI. This index essentially provides commentary on a line-by-line basis so that the original intent and scope of the text is fully understood.[10]

[10] Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship, (last visited March 22, 2019.).

Understanding the Security Exception

The best way to understand the security exception is to view it as the international equivalent of a political question where a nation can exercise its political powers at its own discretion.[11] At the core of the exception is the doctrine of self-judging. Under this doctrine, the question of which factual circumstances satisfy the requirements of the exception is left to the discretion of the invoking Member State.[12] The requirement embraces five broad categories: national security information, nuclear material, military goods and services, war and international emergencies, and UN Charter obligations.[13]

Finding the balance between nation state interests and preservation of peace within the security exception has been noted since its inception at the Geneva session of the Preparatory Committee.[14] One of the drafters noted the contrasting equilibrium between respecting the sovereign security concerns of the member states and ensuring that the exception is not abused.[15] Thereafter, discussions have continued as documented in the WTO's analytical index.[16] Which contributes sixty years of analysis and the establishment of precedent and customary law points to develop an understanding of the security exception. As noted by Professor Alfred,

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[11] Id.
[12] Id.
[13] Id.
[14] Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship, (last visited March 22, 2019.).
[15] Id.
[16] Id.

> All states agree that the security exception can only be invoked in good faith and a strong majority of States maintain that the security exception is self-judging. States interpreting the exception as self-judging are concerned with the need to effectively protect their security interests and to subordinate trade commitments to those interests. They are also concerned about institutional competency and politicizing the WTO. The minority of States that oppose a self-judging interpretation express concerns about abuse of the security exception by economically powerful States.[17]

Indeed, historical precedent suggests that the stability of international law is resolute. A comparison between legal contestations of Article XX[18] and Article XXI shows that Article XX has been the subject of WTO litigation at least twenty-two times (one out of every six cases) while Article XXI has yet to be contested.[19] To the general observer, such a fact invites intrigue. How is it that there is such a stark contrast between the two? An examination between the two would provide that there have been twenty-two instances of a member state allegedly

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[17] Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship, (last visited March 22, 2019.)

[18] *GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules*, https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm, (last visited March 22, 2019.)

[19] Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship, (last visited March 22, 2019.)

invoking Article XX in bad faith but not a single instance for Article XXI. This is quite an amazing feat considering the broad scope of the security exception.

Professor Alfred again provides insight to this issue by noting that there are three competing theories that would elucidate why nation states would obey international law – coercion theory, normative theory, and the rational choice theory.[20] Furthermore, these theories may clarify why Member States typically do not invoke the security exception in bad faith.[21]

Under coercion theory, one makes the assumption that states comply with an international obligation because they are compelled to do so by way of threats and force.[22] Observers of this theory would regard sanctions as the coercive force. However, this would not explain why more powerful states such as Great Britain and the United States have voluntarily submitted to the spirit of Article XXI. It also fails to consider the fact that the GATT and WTO do not contain any explicit coercive force.[23] While the victor of a WTO dispute resolution is given permission for retaliatory tariffs and the imposition of a fine on the losing party, some may question the coercive force of the WTO. Thus, it seems that there is more to the security exception than brute force.

The normative theory would fill in any gaps left by the coercion theory. Under this theory, the belief is that states see the rules as authoritative and binding, thus, they feel impelled to comply with an international

[20] Id. at 752
[21] Id. at 752
[22] Id.
[23] Id.

obligation.[24] If coercion theory looks at sanctions for their brute force in compelling compliance, then normative theory sees sanctions as a way to identify established norms as legally binding and the manifestation of internalized respect for the legal rules.[25] Such a theory is connected to the principle of customary law. A basic understanding of international law provides that the patterned behavior of nation-states can create precedent and serve as law. Such a concept has been memorialized in case law.[26] [27] However, even normative theory does not provide a full explanation. What would compel a nation-state to comply even if they did not respect customary law?

This is where the rational choice theory is useful. Under this theory, "States are rational, self-interested actors that do not concern themselves with the welfare of other States or the legitimacy of a rule of law, unless it fits into the States' overall interest-maximization calculus."[28] Under this theory, reciprocity, reputation, and the costs are what motivate one's behavior to comply with international law.[29]

So the security exception embodies the balance between individual sovereignty and a collective rules-based system. Such a system relies on

[24] Id. at 753
[25] Id. At 753
[26] *Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade, and for the Giving Up of Criminals Fugitive from Justice, in Certain Cases* [hereinafter the Webster- Ashburton Treaty], U.S. Department of State, Office of the Historian, U.K.-U.S., Aug. 9, 1842, The Avalon Project, https://history.state.gov/milestones/1830-1860/webster-treaty, (last visited March 22, 2019.)
[27] The Scotia, 21 F. Cas. 783 (C.C.S.D.N.Y. 1870).
[28] Id. at 755
[29] Id.

trust between nations and the expectation that all members of the international community will act in good faith. Interestingly enough, such a system has worked for over sixty years.

President Trump's Steel and Aluminum Tariffs

The Economist article that identified the current administration's efforts to undermine the international order stated, "The rules-based order ushered in after the second world war provided both the greatest-ever increase in human wealth and global trade and a whole human lifetime without worldwide armed conflict."[30] However, many experts believe that United States President, Donald J. Trump, represents a meaningful threat to the international system.[31] If the international system relies on stability and predictability, President Trump has a reputation for usurping the status quo; it is as if he embraces chaos.[32]

Such chaos extended to the realm of international law and trade policy when President Trump formally ordered a steep tariff on steel (25%) and aluminum (10%) imports from almost every country, including close U.S. allies.[33] This was of course a manifestation of President

[30] *Donald Trump Is Undermining the Rules-Based International Order*, The Economist, Jun. 7, 2018, https://www.economist.com/briefing/2018/06/07/donald-trump-is-undermining-the-rules-based-international-order, (last visited March 22, 2019.)
[31] Jake Sullivan, *The World After Trump: How the System Can Endure*, Foreign Affairs, March/April 2018, https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump, (last visited March 22, 2019.)
[32] Russ Buettner and Maggie Haberman, *In Business and Governing, Trump Seeks Victory in Chaos*, The New York Times, Jan. 20, 2019, https://www.nytimes.com/2019/01/20/us/donald-trump-leadership-style.html, (last visited March 22, 2019.)
[33] Ana Swanson, *White House to Impose Metal Tariffs on E.U., Canada and Mexico*, The New York Times, May 31, 2018,

Trump's "America First" doctrine wherein he argued that the world was a mess and American foreign policy an abject failure. His 'America First' view [is] that it was no longer America's job to clean up that mess, but to pursue its own interests. [That] [i]t was time for America's enemies to fear it, for its allies to pay their fair share and for the country to be more selfish in pursuing what it wanted."[34] Whereas there is much to be said about the political aspects of such a case, this article will focus on the legal mechanism used to justify the action.

The Legality of the Trump Tariffs

The Trump administration invokes two codifications of law to justify its tariffs under the notion of national security. At the domestic level, President Trump cites 19 U.S. Code § 1862,[35] at the international level, Article XXI. The controversy with invoking national security as an excuse is centered on the fact that such a move is seen as a tabooed behavior rather than an illegal one. As the previous section noted, there has not been a single ruling on the usage of Article XXI. That is not to say that it has not been considered. There are several manuscripts that document a country's consideration of challenging Aarticle XXI: the Falkland War trade embargo, the Reagan trade embargo on Nicaragua in 1984, sanctions on Yugoslavia in 1992, a secondary US boycott against Cuba in 1996, and the inclusion of Saudi Arabia into the WTO.[36] In all

https://www.nytimes.com/2018/05/31/us/politics/trump-aluminum-steel-tariffs.html, , (last visited March 22, 2019.).

[34] Jake Sullivan, *The World After Trump: How the System Can Endure*, Foreign Affairs, March/April 2018, https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump, (last visited March 22, 2019.)

[35] *Safeguarding National Security*, 19 U.S.C. § 1862 (1962), https://www.law.cornell.edu/uscode/text/19/1862, (last visited March 22, 2019.)

[36] [36] Roger P. Alford, *The Self-Judging WTO Security Exception*, 697 Notre Dame L.J. 697, 705 (2011),

instances, the parties saw the security exception as a tool meant for use on a good-faith basis and refrained from pressing the so called "nuclear button." It would seem that in over 60 years, everyone but President Trump has recognized the danger of opening Pandora's Box.[37] Indeed, U.S. House Democrats highlighted the danger in a 2006 letter to the U.S. Trade Representative that stated, "If the U.S. … for any reason that it deems 'necessary to its essential security interests' can invoke a self-defining 'essential security' exception, what is to prevent other countries from using this exception to block U.S. exports or to affect other U.S. rights such as enforcement of intellectual property rights without ample justification?"[38]

To advocates of the rules-based system that see trade as a way to promote unity and peace, President Trump's actions seem abhorrent and reckless. Perhaps they are if we are to accept the conclusions of the RAND Corporation who stated that, "[T]he system has boosted the effectiveness of American diplomacy and military strength and helped to advance American interests: A strong international order is strongly beneficial for the United States."[39] However, one must consider President Trump's perspective where he sees politics as a zero-sum game. If indeed trade is a game of winners and losers, Trump would

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https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship, (last visited March 22, 2019.)

[37] Id.

[38] Krzysztof J. Pelc, *The U.S. broke a huge global trade taboo. Here's why Trump's trade move might be legal*, The Washington Post, Jun. 7, 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/07/the-u-s-broke-a-huge-global-trade-taboo-heres-why-trumps-move-might-be-legal/?utm_term=.cb4f59b1307c, (last visited March 22, 2019.)

[39] Jake Sullivan, *The World After Trump: How the System Can Endure*, Foreign Affairs, March/April 2018, https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump, (last visited March 22, 2019.)

place focus on perceived short-term wins as that would translate to election victory in 2020. Granted, there is much debate as to whether there is any actual validity to this protectionist/isolationist ideology but it is important to at least contemplate it while the current U.S. president manifests such beliefs in the policy.

An Overview of the Dispute Settlement Timeline

Regardless, the international community has rallied in defense of the rules-based system. It is worth noting that some believe that the system is as robust as ever and will survive even after the Trump administration.[40] The Trump tariffs are facing resistance, such a scenario is pushing the boundaries of the system as the community moves into uncharted waters, so to speak. In response to the tariffs, the WTO received an unprecedented seven requests for WTO adjudication.[41] In addition, many countries have enacted retaliatory tariffs against the United States, targeting several politically sensitive items.[42]

Moving forward, the WTO would have to address both the invocation of Article XXI by the United States as well as the retaliatory tariffs. "At its meeting on 21 November, the WTO's Dispute Settlement Body

[40] Russ Buettner and Maggie Haberman, *In Business and Governing, Trump Seeks Victory in Chaos*, The New York Times, Jan. 20, 2019, https://www.nytimes.com/2019/01/20/us/donald-trump-leadership-style.html, (last visited March 22, 2019.)
[41] Tom Miles, *U.S. Steel tariff fight stirs up a swarm of WTO litigation*, Reuters, Oct. 29, 2018, https://www.reuters.com/article/us-usa-trade-wto/u-s-steel-tariff-fight-stirs-up-a-swarm-of-wto-litigation-idUSKCN1N31NN, (last visited March 22, 2019.)
[42] Jake Sullivan, *The World After Trump: How the System Can Endure*, Foreign Affairs, March/April 2018, https://www.foreignaffairs.com/articles/2018-03-05/world-after-trump, (last visited March 22, 2019.)

(DSB) agreed to requests from seven members for the establishment of panels to examine tariffs imposed by the United States on steel and [aluminum] imports. The DSB also agreed to four US requests for panels to examine countermeasures imposed by China, Canada, the European Union and Mexico on US imports in response to the steel and [aluminum] tariffs."[43] At the core of the argument against the United States is the argument that "US measures, allegedly taken for national security reasons, were, in their content and substance, safeguard measures taken to protect the US steel and [aluminum] industries from the economic effects of imports."[44] Furthermore, they denounced the U.S. argument stating that the WTO panels could not examine the issue because Article XXI was invoked.[45] Finally, they argue that resorting to Article XXI by the US would compromise the WTO dispute settlement and could render all WTO obligations effectively unenforceable.[46] Contrasting this, the United States argues that

> [e]very sovereign has the right to take action it considers necessary for the protection of its essential security as enshrined in Article XXI, the US said; what is inconsistent with WTO rules is the unilateral retaliation against the US by various WTO members. These members base their actions on the pretense that the US actions are safeguards; this is the height of hypocrisy, the US said. The US has not invoked WTO safeguard provisions for its actions, and because the US has not

[43] *Panels established to review US steel and aluminum tariffs, countermeasures on US imports,* WTO, https://www.wto.org/english/news_e/news18_e/dsb_19nov18_e.htm, (last visited March 22, 2019.)
[44] Id.
[45] Id.
[46] Id.

> done so, other members cannot simply act as if these provisions should have been invoked to apply safeguard rules that are simply inapplicable.[47]

A Catch-22

Opponents of President Trump's tariffs find themselves in a tough position. *The Economist* described their folly when it expounded,

> "The power of Article XXI puts countries which might challenge Mr. Trump's tariffs in a jam. If they do not make a case at the WTO but retaliate anyway, they have given up the high ground and things will probably escalate. If they neither challenge nor retaliate, they keep the moral high ground—but Mr. Trump will claim victory, which will be galling, and will quite possibly be emboldened to go further. This will also be the case if they challenge and the court sides with America—which, given the broad exception for national security that Article XXI provides, is quite likely. And if they challenge and win they will have brought about the unedifying spectacle of a panel of judges in Geneva telling a sovereign nation that they know where its security interests lie better than its president does. That would not go down well.[48]

As indicated above, countries have retaliated and only time will tell

[47] Id.

[48] *The looming global trade war*, The Economist, Mar 8, 2018, https://www.economist.com/briefing/2018/03/08/the-looming-global-trade-war, (last visited March 22, 2019.)

how the Trump administration will move forward. What is sure is that the WTO is, as some would say, on the hot seat so long as this issue continues. Some would say that this issue is the straw that broke the camel's back since the WTO is no longer updated in the way that it used to do with periodic rounds of trade negotiations.[49]

Indeed, it has been 20 years since the last major trade round.[50] If one seeks to empathize with Trump's "America First" then one would note that the U.S. has an argument to advocate disappointment with the WTO's perceived inability to create new rules, include digital trade in the system, and stop China's manipulation of the system.[51] Indeed, "[w]ithout new rules, [WTO] judges have found themselves interpreting the ambiguities in old ones in a way that looks to some like overreach."[52] Still, some would question whether it is fair to connect the WTO's shortcomings with the Trump tariffs.[53] Regardless, as described by *The Economist*, the WTO's choices are akin to being stuck between a rock and a hard place. On one hand, the WTO and the seven countries could let the Trump tariffs proceed without resistance. To do so would be to arguably compromise the very notion of the WTO and the liberal order. With the WTO and other liberal order institutions existing to promote open relations, free trade, and cooperative politics, allowing these arguable politicized tariffs to proceed unquestioned would be seen as a sign that such institutions are not needed. It would also set a dangerous precedent for countries like Russia and China.[54] And yet, the WTO and the system faces the same problem by contesting the

[49] Id.
[50] Id.
[51] Id.
[52] Id.
[53] Id.
[54] Id.

invocation of national security.

As evidenced by the analysis of the security exception, the liberal order is built on a fine balance between respecting the individual sovereignty of nation-states and putting the needs of the collective over individual ones for the general gain of all the community. Indeed, balancing the competing needs between valuing individual sovereignty or devaluing it for the collective is shown nicely when examining the *Bogota 8*. Led by Colombia in 1976, eight equatorial countries lying along the geosynchronous orbit declared their claim over the parts of the orbit directly above their territory.[55] However, such an argument was essentially laughed at by representatives of the Soviet Union and United States. They argued that claims of sovereignty over the GSO or any other part of outer space are incompatible with the spirit of the *Outer Space Treaty* and should be dismissed (they also threatened to invade the Bogota 8's newly claimed territory since none of the eight even had space-capable aircraft).[56]

Still, Article XXI is quite different. The fact that the international community went over sixty years without truly invoking it, let alone in bad-faith, shows that it truly is a "nuclear option." While the new precedent is of concern, contesting any national security claim would be to have the WTO panels essentially tell the leader of a sovereign nation that they know better than he/she as to what constitutes a national security threat. Such a scenario could lead to turmoil as disciples of the

[55] Stephan Schneider and Garett Faulkender, *The Final Frontier: Evolution of Space Law in a Global Society*, The Undergraduate Law Journal of Florida Atlantic University, 15-70, 48-49, Spring 2018, http://journals.fcla.edu/FAU_UndergraduateLawJournal/article/view/106311/101858, (last visited March 22, 2019.)
[56] Id.

notion of individual sovereignty would criticize such a conclusion. While it is true that a nation can simply ignore the WTO, it would still have to save face in the international community as it faces a loss in soft power. Regardless, if the WTO wishes to maintain stability, any questions as to the underpinnings of the international order run contrary to that desire.

Conclusion

This article started with a quote underlying the importance of stability in international politics. Such stability has resulted in overall peace, growth in trade, and prosperity. However, after sixty years without a questionably bad-faith invocation of Article XXI, such stability may see its greatest test, if not its end. Within United States domestic politics, many decry President Trump for seemingly turning democratic institutions on their head for his own gain.[57] Indeed, some could argue that Trump's invocation of Article XXI is more of the same and some would even point to a similar invocation of national security for his border wall. Lending credence to such an argument is the documented record of President Trump telling the media that the national emergency declaration he used to secure funding for the Southern border wall was not necessary.[58] Regardless, an argument can be made that the system was designed to operate for such a scenario and events are unfolding to show that everything is working as desired. Indeed, discussions during the creation of Article XXI pointed to such an event happening and its

[57] David Frum, *America's Slide Toward Autocracy*, The Atlantic, Oct 2018, https://www.theatlantic.com/magazine/archive/2018/10/building-an-autocracy/568282/, (last visited March 22, 2019.)
[58] Eric Lach, "*I Didn't Need to Do This": Donald Trump Declares a National Emergency*, The New Yorker, Feb 15, 2019, https://www.newyorker.com/news/current/i-didnt-need-to-do-this-donald-trump-declares-a-national-emergency, (last visited March 22, 2019.)

inclusion and specific wording acknowledge that a member state has every prerogative to invoke Article XXI. The question is – does the right to do something mean that one should do it?

Author Biographies

Alyssa Alvarez is a senior at FAU majoring in economics and minoring in business law. During her years at FAU, she has served pre-law students as the Co-President of Phi Alpha Delta Pre-Law, International. She will be graduating in the summer of 2019 and plans to pursue a degree in law.

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Michael Dewing is an "experienced" hospitality professional and degree seeking entrepreneur in business and financial training, looking for continuing educational opportunities in small business creation while researching matters of law, politics and international relations with companies and ownerships in addition to creating intellectual property along the way.

Leanet Gutierrez began reading contracts at the age of ten when she had to translate them for her non-English speaking immediate family. Since then, her interest in the law has increased. Currently, Leanet is majoring in Political Science and minoring in Business Law with hopes to pursue a career in Business Law and a concentration in contracts.

Amanda Heine is working towards a BA in Political Science with a minor in Philosophy and Business Law. She intends to obtain a JD/MBA at a Florida Law School. Amanda also serves as a Consumer advocate at the Law Firm of Gordon & Partners P.A., working with Class Action Litigation.

Sayd Hussain is a junior at Florida Atlantic University studying environmental engineering and minoring in political science. He is a 2017 Ecological Society of America Intern, 2018 White House Council on

Environmental Quality Intern, 2018 Embassy of Guyana Intern and was recently appointed to the Green Living Advisory Board by the Boca Raton City Council. He aspires to become an attorney to work for the U.S. Patent and Trademark Office with the possibility of entering Florida politics in the near future.

Eric Kemper majored in finance with a minor in business law and plans to attend law school in fall of 2019, in Florida. His ultimate career goal would be to practice Securities Law in Florida.

Sandy Larose is an earthquake survivor whose passion for the law has turned into a hunger for knowledge since she moved to Florida in pursuit of the American Dream. Since she enjoys writing as well as reading, she decided that the best way to reach self-fulfillment while making an impact in the world was to become a lawyer. She will graduate from the Harriet L. Wilkes Honors College this spring, majoring in political science with a minor in Spanish. Her goal is to go to law school and eventually become an Immigration and Corporate Litigation Attorney.

Robert Marriaga is a Political Scientist and is working on a Masters in Political Science. Law and politics are his true passion. His next step is to go into a Ph.D program in political science and do research on American Government, Constitutional Law and Latin American Politics. He is a constitutionalist and an admirer of the Founding Fathers of the United States of America.

Jameesha Rock will graduate from Harriet L. Wilkes Honors College in May 2019 with a major concentration in Law and Society and a minor concentration in Women's Studies. Thanks to her exposure to the law from the influence of Professors Dr. Mark Tunick and Dr. Wairimũ Njambi, she was inspired to write her ULJ article.

Cameron Ryan is an undergraduate English major studying at Florida Atlantic University with a minor in theatre. Along with being on the editing board of the Undergraduate Law Journal, he is also a loyal brother of Phi Mu Alpha Sinfonia. Cameron hopes after graduating from FAU to enter law school and to eventually become an attorney.

Raneem Shehadeh is an undergraduate student at Florida Atlantic University majoring in Political Science. After graduation, she plans to attend law school to pursue her goal of becoming an attorney.

Stephan Schneider is a Bachelor of Arts Candidate in Political Science, *Florida Atlantic University* and Senior Criminal Defense Paralegal at Figueroa-Contreras Law Group. Stephan plans to attend law school. A fervent polymath, Stephan enjoys exploring a variety of subjects including U.S. and international politics, law, technology, and music.

Our Authors

(from left to right)

Top row: Michael Dewing, Stephan Schneider, Jameesha Rock, and Sandy Larose
Middle row: Eric Kemper, Alyssa Alvarez, Sayd Hussain, Stefania Cardenas and Leanet Gutieriez
Bottom row: Raneem Shehadeh, Robert Marriaga, Cameron Ryan, and Amanda Heine