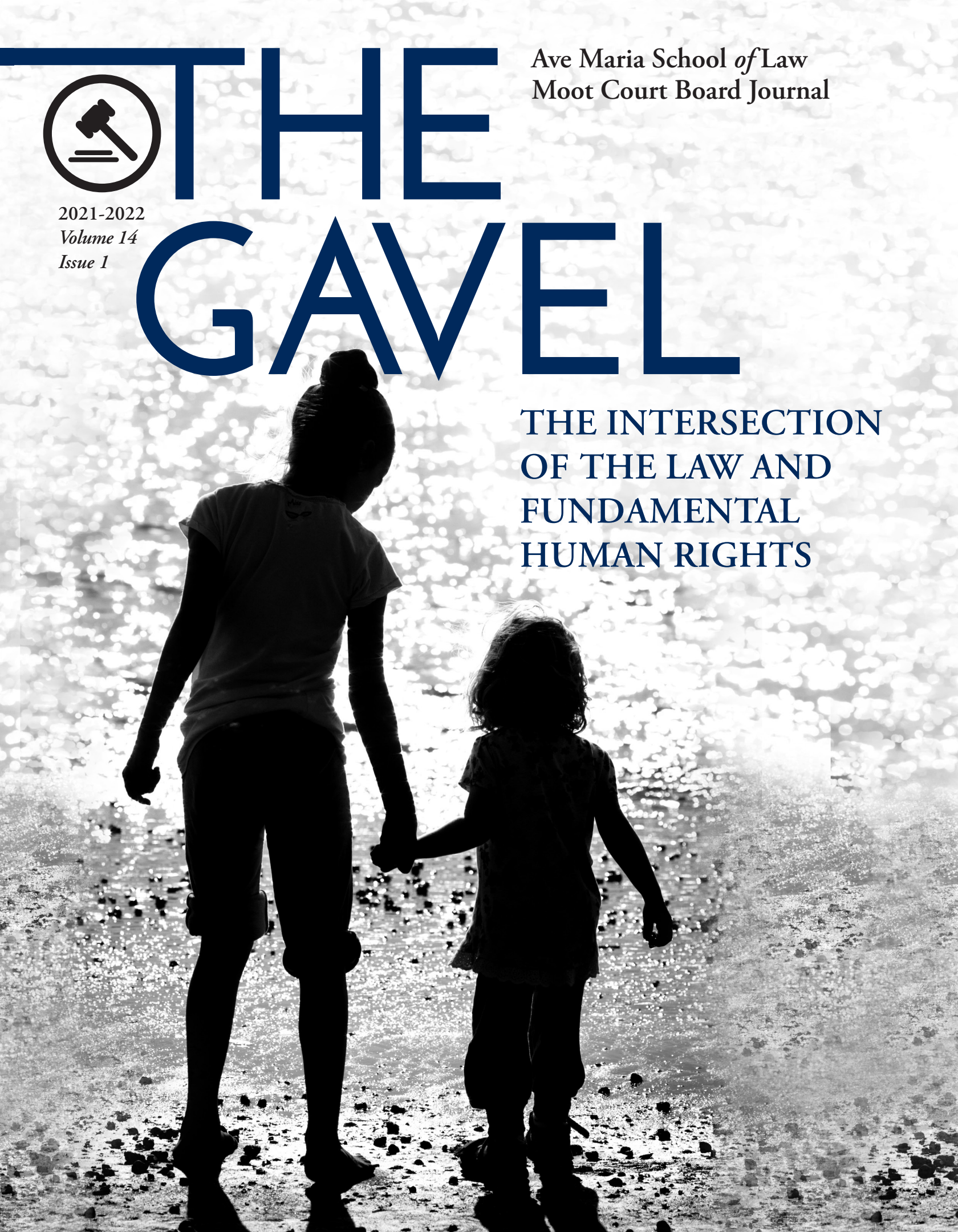
Ave Maria School *of* Law
Moot Court Board Journal

THE GAVEL

2021-2022
Volume 14
Issue 1

THE INTERSECTION OF THE LAW AND FUNDAMENTAL HUMAN RIGHTS



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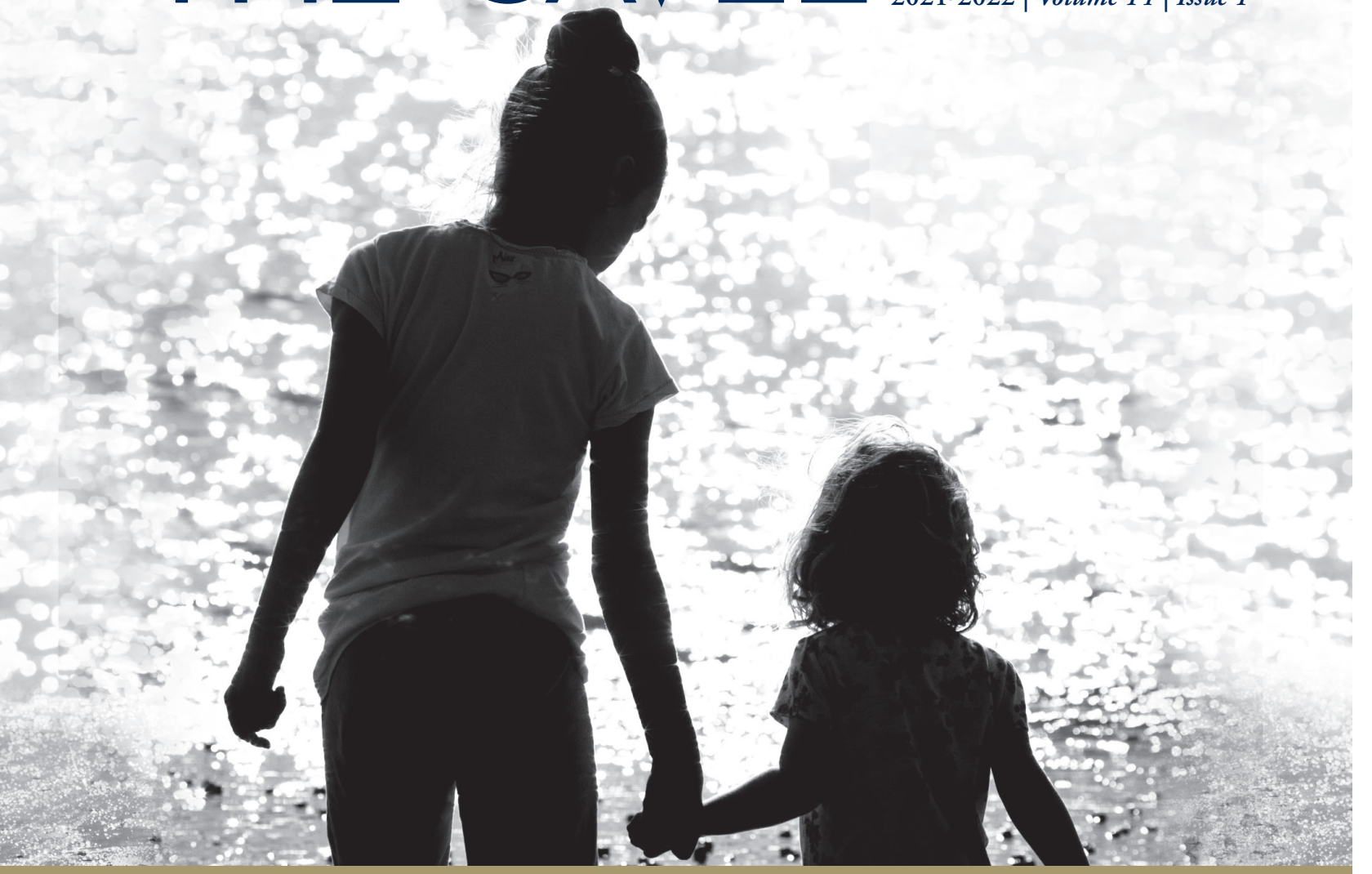

AVE MARIA SCHOOL OF LAW ▪ MOOT COURT BOARD JOURNAL
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INSIDE THIS ISSUE

LETTER FROM THE
President

Dear Reader:

I am pleased to present the efforts of the 2021-2022 Moot Court Board and hope you enjoy this year's edition of *The Gavel*. As a student, there exists no better opportunity to develop one's skills as an advocate than being a member of the Moot Court Board, and it has been a privilege to watch our board members be rewarded for their efforts. They showed up to compete against some of the most prestigious law schools in the country and should be proud of their success.

The board continued the time-honored tradition of hosting the Robert H. Bork Appellate Competition at our school in the Fall semester. Thank you to all the professors, alumni, and local attorneys who participated as judges this year, and to all the students who took on the challenge of competing. We are particularly grateful to attorney Kyle Dudek, Dean John M. Czarnetzky, and the Honorable Nicholas P. Mizell, Magistrate Judge, who served as the panel of judges in the final round of the competition.

Additionally, we sent teams to compete in six external competitions this year. To this year's faculty coaches, Dean Emeritus Eugene Milhizer, Professors Richard Myers, Scott Devito, Kevin Govern, Mollie Murphy, Bruce Connolly, John Raudabaugh, Adjunct Professor Sally Ashkar, and our faculty advisor, Professor Mark Bonner: we cannot stress enough how thankful we are for your continued support. Our students continue to grow and develop into skilled advocates as a result of your collective care and effort. While most of our teams' results are unknown as of yet, I have seen firsthand their hard work and dedication, and I look forward to celebrating their success in the near future at our year-end banquet!

To my fellow executive board members, Amanda Newkirk, Helen Mena, Sarah Baulac, Kyle Jordan, Hannah Chisler, and Edner Geffrard: thank you for your hard work this year. Your support and dedication to the board made this a fantastic season, and I'm forever grateful to each of you for contributing to our success. Being elected to serve as President of the Ave Maria Moot Court Board has been the greatest honor of my academic career, and I hope that I have served you all well.

Finally, I wish the incoming Board nothing but success. Stay the course. Work hard. And have fun.

Respectfully,

Christopher J. Gero Prado
President,
Ave Maria Law Moot Court Board

LETTER FROM THE
Editor

Dear Reader:

The theme of the 2021-2022 edition of *The Gavel* is The Intersection of the Law and Fundamental Human Rights. The U.N. describes human rights as "inherent to all human beings . . . ."[1] Importantly, "*[e]veryone* is entitled to these rights, without discrimination."[2]

We tasked each Moot Court Board member to write about a matter that ignited them. To bring light to a human rights issue that moves them—one that grabs a hold of them so deeply they are compelled to act.

This edition of *The Gavel* encompasses what makes Ave Maria School of Law special. The student authors, future attorneys, are grounded in faith and reason. Once they are licensed in the practice of law, they will undoubtedly use their talents for good and to defend the very human rights that they write of in this journal. We are fortunate enough to have two fantastic examples of putting this into practice by our guest contributors, Dean John M. Czarnetzky and Professor Bonner.

Eleanor Roosevelt famously said:

> Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[3]

It is my hope that you find these articles interesting. But more than that, I hope that you're inspired to look close to home and to take action to uphold these rights that are inherent to every person.

With that, I'm proud to present the 2021-2022 edition of *The Gavel*. Thank you for your support and happy reading.

Sincerely,

Sarah Baulac
Editor-in-Chief
The Gavel

References:

1 *Human Rights*, UNITED NATIONS, https://www.un.org/en/global-issues/human-rights (last visited Mar. 7, 2021).
2 *Id.* (emphasis added).
3 Eleanor Roosevelt, Remarks Delivered at the United Nations: The Great Question (Mar. 27, 1958).

DUTY. HONOR. COUNTRY.

By Dean John M. Czarnetzky

The gallantry of the service members at Pearl Harbor 80 years ago hardly requires recounting. At 7:48 am on a Sunday morning, 353 Japanese aircraft attacked the United States at Pearl Harbor, Hawaii. In addition to devastating damage to ships, aircraft, and military installations, the United States suffered 2,403 Americans killed and 1,178 wounded. Against terrifying odds, American service members manned the guns, took off in planes, and did their best to defend our country at great cost in blood. The sacrifice of those service members on that day galvanized our nation, and acted as a catalyst for an eventual world-wide recognition of human rights.

I assert that each of us has a space inside of us that must be filled by the pursuit of something greater than ourselves, and each of us has the natural right to do so. Put more directly, to be human means to crave the transcendental. We WILL, one way or another, fill that space inside of us. If we ignore the desire to serve something beyond ourselves, we will seek worldly solutions — alcohol, drugs, money, power, etc. — none of which will ever fill the void.

Some among us do not just crave transcendence; they seek it and live it. As a law professor and now as a Dean, I have for decades exhorted young people to do just that. I ask them, "you only have one life; why would you devote it to anything less than something greater than yourself?" They inevitably ask, "What is that? How do I find it?"

Fortunately, medieval philosophers, whose wisdom is undiminished by all the intellectual hubris of us moderns, identified three "transcendentals" — the three things that, for us, human beings, are goods in themselves, and thus transcend time, place, culture, and individual human beings. They are "Truth, Beauty and the Good."

These transcendentals — truth, beauty, and good — ARE worth devoting our lives to. They CAN fill that craving within each of us. To the extent we substitute anything else as our focus, we will never be happy because to do so is to deny our human nature. As an aside, for believers, God Himself is THE Truth, THE Beautiful, and THE Good.

I do not hesitate to assert that our great country embodies the good in the modern world — not perfectly; only God is perfect. However, when I reflect on the nations of my forebears, I drop to my knees and thank a merciful God for this nation. Why did they come here, our ancestors, if not to participate in the Good, which this great country is uniquely designed to achieve for its people?

I believe that history teaches that such persons or nations often gain temporary dominance, but eventually, the unalterable nature of human beings impels other human beings to rise up to defeat them. The Red Brigades are forgotten in the dustbin of history, despite the terror they wreaked in Europe. The Japanese and German empires were defeated in five years by the Allies, led by the United States of America. The world that emerged from those victories of the transcendent over the temporal was better in every way than it otherwise would have been.

So, for me, this is what connects us with those servicemembers on Pearl Harbor. When called upon, they fought for the fundamental rights of the citizens of their country. In doing so, they lived the True, the Beautiful, and the Good. They fulfilled their destiny as humans fully and indisputably, which left an international impact that those pursuing transcendence should seek to maintain.

It is also why I believe that regardless of the state of the world at any given time . . . we will always have people willing to defend this nation. Human nature requires that we live for Truth, Beauty, and the Good.

May God bless all of you, and may God bless the United States of America.

FROM OUR FACULTY ADVISOR:

Professor Mark H. Bonner

The Ave Maria Moot Court Board is about more than oral advocacy and witness-examination proficiency. It's about more than the good fellowship that litigators develop among themselves. It's about mastery of substantive and procedural law in litigation and the development of the writing skills necessary for success in the legal field.

Each year, our members typically write appellate briefs for internal or external moot court competitions, which are graded by competition judges. However, our students have the opportunity to do more by writing an article for publication in *The Gavel*, which gives them a chance to display their writing ability on a topic that interests them in a published format accessible to prospective employers. *The Gavel* is also available online on our website, making a ready citation and direct link in a resume.

The Gavel started in Fall 2008 in Ann Arbor with Volume 1, Issue 1. It was presented as the *Ave Maria School of Law Newsletter*. Professor Patrick Quirk was the faculty advisor for Moot Court Board, and I then succeeded him in the Fall 2009 semester upon our relocation here to Naples, FL. Over the years, the quality and reach of the journal steadily improved, and in Fall 2014, with Volume 6, Issue 1, it was renamed the *Ave Maria School of Law Moot Court Board Journal* and was published in the attractive format it now enjoys. We usually include an article from a member of the faculty, with this year's contribution from our esteemed Dean John M. Czarnetzky.

As you can see, we've covered a lot of topical ground throughout our history. The essays therein were written by moot court board members and edited by the our Vice President for Publications, who serves as the Editor-in-Chief of *The Gavel*, and chairs the publications committee tasked with producing each edition. These editions, including the present one, display the earnest effort, analysis, and ability of our authors, and demonstrate the writing skills that have brought so many of them well-deserved success as practicing lawyers.

Robert H. Bork
INTERNAL APPELLATE COMPETITION

Thank you to all of our judges and volunteers.

Pictured from Left to Right: Edner Geffrard, Adam Cretella, Dean Czarnetzky (Ave Maria School of Law), The Honorable Nicholas Mizell Magistrate Judge (United States District Court Middle District of Florida), Kyle Dudek (Henderson, Franklin, Starnes & Holt, P.A.), Shanna Mais, Kelsey Grant

OVERALL TEAM WINNER

Shanna Mais and Kelsey Grant

Best Oralist

Kelsey Grant

Best Brief

Edner Geffrard and Adam Cretella

EXTERNAL COMPETITION HIGHLIGHTS

AAJ REGIONAL STUDENT ADVOCACY TRIAL COMPETITION

Each year, AAJ hosts the Student Trial Advocacy Competition and showcases top future trial lawyers. This tournament is one of the premier trial advocacy competitions in the country.

Kyle Jordan (3L), **Piero Sotomayor** (2L), **Amanda Newkirk** (3L), **Helen Mena** (3L)

SEIGENTHALER-SUTHERLAND CUP NATIONAL FIRST AMENDMENT MOOT COURT COMPETITION

The Seigenthaler-Sutherland Cup Competition, founded in 1949, is one of the oldest and most prestigious national moot court competitions in the United States and welcomes competitors across the country.

Deborah Gedeon (2L), **Hannah Theis** (2L), **Stephen Dwyer** (2L)

(Not pictured: Jessica Patton)

NEW YORK CITY BAR ASSOCIATION AND THE AMERICAN COLLEGE OF TRIAL LAWYERS NATIONAL MOOT COURT COMPETITION

The National Moot Court Competition is an annual inter-law school event designed to promote the art of appellate advocacy. It is one of the longest-running and most honored competition of its kind.

Team 1: Chris Gero Prado (3L), **Sarah Baulac** (3L), **Anthony Altomari** (2L)

Team 2: Jessica Patton (2L), **Matthew Keeton** (2L), **Hannah Chisler** (2L)

UCLA CYBERSECURITY MOOT COURT COMPETITION

UCLA School of Law Cybersecurity Moot Court Competition is an annual external moot court competition open to all law schools, exploring cutting-edge issues in the field of cyber law.

Team 1: Zachary Lecius (2L), **Hannah Reynolds** (2L)

Team 2: Joshua Mireles (2L), **Liz Thomas** (3L)

(Not pictured: Jack Garwood)

ROBERT F. WAGNER NATIONAL LABOR AND EMPLOYMENT LAW MOOT COURT COMPETITION

The Wagner Competition is the nation's largest student-run moot court competition and the premier national competition dedicated exclusively to the areas of labor and employment law.

Hunter Roser (2L), **Anthony Tommarello** (3L), **Jack Garwood** (3L)

TYLA NATIONAL TRIAL COMPETITION

The National Trial Competition (NTC) was established in 1975 to encourage and strengthen students' advocacy skills through quality competition and valuable interaction with members of the bench and bar.

Alexis Goodwin (3L), **Priscilla Pacheco** (3L), **Kelsey Grant** (2L)

Universal Declaration of Human Rights

Drafted by a multinational group of representatives with varying cultural and legal background and translated into more than 500 languages, the Universal Declaration of Human Rights (UDHR) is the cornerstone document for the common understanding of fundamental human rights across the world.[1] The UDHR was developed by the United Nations Commission on Human Rights, chaired by Eleanor Roosevelt;[2] and after minor changes,[3] it was approved unanimously on Dec. 10, 1948 by forty-eight nations.[4] While the UDHR is not a legally binding document, its nonbinding status allows it to transcend positive international law as a moral authority on human rights,[5] and it is recognized for having paved the way for more than seventy human rights treaties.[6] Over seventy years later, the UDHR remains a pledge across member nations to promote understanding and common observance of human rights and fundamental freedoms,[8] including:

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3: Everyone has the right to life, liberty and security of person.

Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6: Everyone has the right to recognition everywhere as a person before the law.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13: Everyone has the right to freedom of movement and residence within the borders of each state.
Everyone has the right to leave any country, including his own, and to return to his country.

Article 14: Everyone has the right to seek and to enjoy in other countries asylum from persecution.
This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15: Everyone has the right to a nationality.
No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16: Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
Marriage shall be entered into only with the free and full consent of the intending spouses.
The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17: Everyone has the right to own property alone as well as in association with others.
No one shall be arbitrarily deprived of his property.

Article 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Universal Declaration of Human Rights *cont.*

Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20: Everyone has the right to freedom of peaceful assembly and association.
No one may be compelled to belong to an association.

Article 21: Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
Everyone has the right of equal access to public service in his country.
The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23: Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
Everyone, without any discrimination, has the right to equal pay for equal work.
Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24: Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26: Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27: Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29: Everyone has duties to the community in which alone the free and full development of his personality is possible.
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

References:

[1] *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Mar. 27, 2022).
[2] *Universal Declaration of Human Rights*, BRITANNICA, https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights (last visited Mar. 23, 2022).
[4] UNITED NATIONS, *supra* note 1.
[5] International Bill of Human Rights Resolution, UNITED NATIONS, [https://web.archive.org/web/20190121232151/http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=14O243550E15G.60956&profile=voting&uri=full=3100023~!909326~!676&ri=1&aspect=power&menu=search&source=~!horizon] (last visited Mar. 28, 2022).
[6] BRITANNICA, *supra* note 2.
[7] UNITED NATIONS, *supra* note 1.
[8] *Id.*

Article 4

MODERN SLAVERY: Pornography, Human Trafficking, and the Thirteenth Amendment

By: Hannah Thies

The Thirteenth Amendment to the United States Constitution simply states: "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."[1] Slavery, though frequently thought of as a heinous crime of a bygone era, is still very much a present reality in the 21st century; in fact, there are more victims of slavery now than at any other time in human history.[2] It is estimated that during the slave trade of 1886, there were approximately 12 million people in bondage, that number today is around 40 million.[3] Of this estimated 40 million, 19% are trafficked for sex, sexual exploitation and pornography, making up 66% of the total global profits of human trafficking.[4] Pornography and human trafficking are symbiotic, "porn directly influences the supply and demand for sex trafficking."[5] Thus it would seem that pornography, though frequently upheld as a First Amendment Freedom of Speech or Fourteenth Amendment Right to Privacy issue, violates the Thirteenth Amendment's prohibition against slavery.

The case law of the Supreme Court of the United States concerning pornography and the First and Fourteenth Amendments has been a balancing act between individual and state interests for decades. Under *Roth v. United States*, obscenity does not fall within a category of constitutionally protected speech.[6] Further, beginning with *Stanley v. Georgia* in 1969, the Court has relied upon the private nature of the home to protect an individual's right to own and consume obscene material.[7] While the right to own and view pornography has been traditionally upheld as a constitutionally protected right, the right to advertise, sell, and market pornography has not been regulated within the bounds of the First and Fourteenth Amendments, and the Court has found that the state has an interest in regulating the commercialization of obscene material.[8] One of the biggest obstacles to regulation has been the advent of the Internet. This is, in part, because the Court has determined that pornography outside the home can be regulated, but pornography inside the home cannot be, and with the rise of technology, virtually all pornography is now easily accessible within the home.[9] In the balancing act that takes place between state interest and individual rights, an important factor has been absent, which if considered, could take the case law concerning pornography in a different direction.

The Thirteenth Amendment was not only intended to abolish the slavery of the South following the Civil War, but also vested in Congress the "power to pass all laws necessary and proper for abolishing *all badges and incidents* of slavery in the United States."[10] Sex trafficking is defined as: "a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age."[11] Former President Barack Obama, in a 2012 address, referred to this as: "human trafficking, which must be called by its true name – modern slavery."[12] The pornography industry is reliant upon human trafficking and closely connected, so as to be inseparable from it; "when someone looks at pornography, they are visually consuming another person's purchased body. Perhaps the viewer didn't pay for the porn, but someone is making money on it, and the people in those photos and videos are now displayed as products to be consumed."[13] Further, "the person captured in the images has no control over what happens to those images. The pornography becomes the consumer's domain, they . . . become slaves to the consumer."[14]

As final food for thought concerning slavery, the question must be posited: are not the consumers enslaved as well? The porn industry is a $97 billion dollar giant.[15] In 2019, porn websites accounted for 10% of the top fifty most visited websites in the United States,[16] and thirteen is the average age that individuals in the United States begin consuming pornography.[17] The slavery in this instance is not one-sided; the entire network, of consumers and victims, is enslaved to industry.

In light of the inextricable link between this modern slavery, and pornography, it seems inappropriate that regulation is sparse because of personal or private interests under the guise of Freedom of Speech and Privacy. Undoubtedly, the slaveholders of the South believed that they had a personal and private interest in continuing to use others for their benefit; this is the very basis of the Thirteenth Amendment that human dignity must rise above individual interest. There is a legislative and judicial obligation to regulate pornography as a human rights issue deeply concerned with the dignity of the human person.[18] The Thirteenth Amendment cannot be disregarded in this issue, it is not only the "liberties" of consumers that must be given deference and importance, but the lives of millions who are indeed living under the mark, "badge[] and incident[]" of modern slavery.

In sum, attorneys seeking to contribute to change in this area should file civil rights actions for victims of human trafficking under the Thirteenth amendment. ○

References:

1 U.S. CONST. amend XIII, § 1.

2 TRAFFICKWATCH, https://traffickwatch.org/learn-facts (last visited Sept. 27, 2021); *see also* U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, 2020 Trafficking in Persons Report 43 (2020).

3 *Id.*

4 *Exploiting Humans is Big Business, By the Numbers: Is the Porn Industry Connected to Sex Trafficking?*, FIGHT THE NEW DRUG, https://fightthenewdrug.org/by-the-numbers-porn-sex-trafficking-connected/ (last visited Sept. 27, 2021).

5 *9 Surprising Facts About Human Trafficking in the U.S.*, FIGHT THE NEW DRUG, https://fightthenewdrug.org/surprising-facts-about-human-trafficking-in-the-u-s/ (last visited Sept. 27, 2021).

6 Roth v. United States, 354 U.S. 476, 485 (1957).

7 Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("We think that mere categorization of these films as 'obscene' is insufficient justification for such a

drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments.").

[8] United States v. Reidel, 402 U.S. 351, 354 (1971) ("As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his home."); *see also* Miller v. California, 413 U.S. 15, 18 (1973).

[9] Hope Watson, Note, *Pornography-Based Sex Trafficking: A Palermo Protocol Fit for the Internet Age*, 54 VAND. J. TRANSNAT'L L. 495, 505 (2021) ("Free of traditional pornography's oversight . . . the fiscal bottom line becomes the only directive, insisting that filmmakers hire inexperienced, inexpensive models. As a result [they] . . . are more likely to enlist trafficking victims . . . ."); *see also* Brain Heart World, *A Documentary Series: Discover the Harmful Effects of Pornography, BRAIN, HEART, WORLD* (2018), https://brainheartworld.org/.

[10] United States v. Stanley, 109 U.S. 3, 20 (1883) (emphasis added).

[11] *Human Trafficking Defined: Human Trafficking by the Numbers*, HUMAN RIGHTS FIRST (Jan. 7, 2017), humanrightsfirst.org/resource/human-trafficking-numbers.

[12] *Id.*

[13] Rachel Olexa, *Are You a Modern-Day Slave Owner?: Is Modern Slavery Connected to the Porn Industry?*, FIGHT THE NEW DRUG (May 24, 2018), https://fightthenewdrug.org/rachel-olexa-war-intl-modern-day-slavery-and-porn/.

[14] *Id.*

[15] *Exploiting Humans is Big Business, By the Numbers: Is the Porn Industry Connected to Sex Trafficking?, supra* note 4.

[16] Watson, *supra* note 9 ("141 million people voted for their favorite pornographic videos on PornHub, surpassing voter turnout for the 2016 US [sic] presidential election by the multi-millions.").

[17] *Exploiting Humans is Big Business, By the Numbers: Is the Porn Industry Connected to Sex Trafficking?, supra* note 4.

[18] See Mary Graw Leary, *Mulleris Dignitatem: Pornography and the Dignity of the Soul – An Exploration of Dignity in a Protected Speech Paradigm*, 8 AVE MARIA L. REV. 247 (2010).

[19] *Stanley*, 109 U.S. at 20.

WHERE ARE THE VICTIMS OF HUMAN TRAFFICKING?

By: Priscilla Pacheco

We have all heard of the term human trafficking. The first thing that likely pops into your head are the sad eyes of a young, disheveled girl that has been taken from her home and forced into a life of servitude. That is the typical reaction. Every state and the federal government has enacted some sort of law prohibiting human trafficking since 2000.[1] Generally, the Department of Homeland Security defines human trafficking as, "[the] use of force, fraud, or coercion to obtain some type of labor or commercial sex act."[2] However, the United Nation Protocol to Prevent, Suppress and Punish Trafficking in Persons (UN Protocol, 2000) defines human trafficking as:

> The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or been to achieve the consent of a person having control over another person, for the purpose of exploitation.[3]

Both definitions convey similar things. They are very broad and many of the terms are vague. It is clear, however, that human trafficking is more than sex trafficking and that there are other means of human trafficking encompassed in those definitions. These other forms of trafficking include labor trafficking, slavery/servitude, and organ trafficking.[4] With these laws, and the support of the government, why are we failing to identify the victims of human trafficking, making it hard to build a case with successful prosecution?[5]

Earlier laws had more specific language, narrowing the issue to exploitation during prostitution, leading law enforcement to only focus on that sector of human trafficking.[6] Police often focus on what they believe the general public would be the most supportive of, and because public perception of human trafficking is focused on sex trafficking, specifically of minors, then that is what law enforcement focuses their resources on.[7] Although both citizens and immigrants face the same issue, the public is more open to fighting child sex trafficking, and less likely to support resources going to combatting trafficking involving immigrants due to the contentions in the United States about illegal immigration.[8] In addition, law enforcement typically receives more tips regarding sex-trafficking, rather than labor-trafficking and therefore are reluctant to use resources to follow those leads.[9]

Beyond the issue that most agencies focus their main resources on sex-trafficking, therefore letting other forms of trafficking fall by the wayside, there are many other reasons that victims fall through the cracks. Many patrol officers and first responders are not thoroughly trained in the identification and investigation of this type of crime, and often victims don't realize they're a victim of this crime.[10] This can occur because "the responsibility for the identification and investigation of trafficking is delegated to investigators in vice or child exploitation" who have routine ways to investigate and build cases in their specialties.[11] Human trafficking is a fairly new crime, that has little investigatory history, and therefore there are sparse routine tactics for investigation.[12] The organizations that are in charge of investigating leads in human trafficking are attempting to do so using tactics for different crimes, therefore missing essential information and putting many of these cases at jeopardy.[13] Many of these agencies, upon discovering what they believe could be labor trafficking or something similar will then refer the case to federal agencies, and rob themselves of developing new investigatory tactics.[14] In addition, there is a lot of confusion on how to define specific elements of the crime as there is little caselaw to help narrow the rules and differentiate between exploitive labor practice and human trafficking.[15] With the standard being set so low from the forefront, due to a difficulty in identifying the crime, many detectives believed there was very little they could do to proactively find human trafficking cases and therefore waited for victims to come forward, or be referred to a case by outside sources.[16]

Victims of this crime are often well hidden from the public, and rarely would be someone with the incentive to report such a crime and identify what was occurring.[17] The main elements of this crime happen "behind closed doors," and the people who know about it have every reason to keep it hidden.[18] Victims are unlikely to self-reporteither due to safety concerns, a false belief of their dependance on their traffickers, or even the knowledge they are a victim of a crime, as opposed to just a bad situation.[19] This is specifically seen in immigrant victims, who immigrated under false pretenses unaware

of the trafficking situation waiting for them.[20] In many cases, victims have a criminal record or a compelling reason not to report their situation for fear of being ostracized, incarcerated, or otherwise retaliated against.[21] In order to try and intervene on the cycle of trafficking, it is important to implement a structured partnership in the community to connect with and recognize victims in human trafficking.[22] Appropriate places to implement a partnership could be malls, medical centers, shelters, homeless groups, or similar places that a victim would likely have some access to and visit at least once.[23] This collaboration would prevent the need for police to detain and question victims, which might scare them and prevent their willingness to help, and keep them involved long enough to build a successful case.[24] Taking this more proactive approach, reaching into the areas that victims might be found, would yield better results in identification and eventually prosecution of human trafficking cases.[25]

There are many factors that lead a victim of human trafficking to first identify their situation, and then find the courage and support necessary to report their situation to the proper authorities.[26] It starts with the proper education, social awareness, and resources. In order to cultivate that education, however, it is up to the legislature and criminal justice system to properly define and lay the groundwork for identifying and prosecuting this crime.[27] It is a team effort from entire communities to build and support the most vulnerable among us.[28]

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HUMAN SEX TRAFFICKING VS. PROSTITUTION: The Fine Line Between the Two According to the Law

By: Amanda Newkirk

Prostitution and human sex trafficking are both ubiquitous topics in today's world and have recently become even more prevalent. A vast majority would agree that human sex trafficking is reprehensible. Similarly, some would argue that prostitution is just another form of work, but others recognize its moral reprehensibility. As time progressed, the laws regarding prostitution grew harsher, and currently almost mimic human sex trafficking laws. Are the two one and the same? This article seeks to explain the distinctions between prostitution and human sex trafficking.

As an initial matter, the United States Supreme Court has not yet addressed the issues of prostitution or human sex trafficking. The most relevant Supreme Court case merely recognizes that an adult has a right to engage in private, consensual sex.[1] However, this decision fails to provide any insight as to the Supreme Court's views regarding prostitution and human sex trafficking, leaving lower federal courts and the states to identify and codify such a distinction.

For example, the Ninth Circuit ruled in *Erotic Service Provider Legal Education and Research Project v. Gascon* that the Fourteenth Amendment does not create a constitutional right to engage in prostitution, and that it is not commercial speech that would be protected under the Constitution like speech, religion, or assembly.[2]

Furthermore, each state is free to create their own laws regarding prostitution and human sex trafficking. For example, Florida Statute § 796.07 addresses the matter of prostitution, indicating that:

> Prostitution means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.
>
> It is unlawful: . . . (b) To offer, or to offer or agree to secure, another for the purpose of prostitution or for any other lewd or indecent act.[3]

Moreover, Florida Statute § 787.06 addresses the matter of human trafficking, providing that:

> The Legislature finds that . . . victims of human trafficking are forced to work in prostitution or the sexual entertainment industry . . . . Human trafficking means transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, purchasing, patronizing, procuring, or obtaining another person for the purpose of exploitation of that person.[4]

The definition of human sex trafficking uses the word prostitution, indicating a strong connection between the two topics.

With that said, the biggest connections between prostitution

and human sex trafficking are consent and coercion.[5] The idea or argument is that in prostitution, there is consent because the person is selling themselves for work. The act is still criminalized, at least here in Florida, but there is a façade of consent.[6] "Prostitution criminalizes the exchange of sexual acts for money with consenting individuals."[7] Human sex trafficking is thought to be a step more because there is not consent as those being sold are usually coerced or forced to act. "Human trafficking is considered by the Florida Legislature to be modern-day slavery involving an element of coercion that isn't present in prostitution."[8] In speaking to a Collier County Sheriff's Office Sex Crimes Detective, he relayed that human sex trafficking is really treated as a harsher form of prostitution – but it is still prostitution.

To really be able to dive into this further, we'll begin with the definitions of consent and coercion. Consent is defined as "the voluntary agreement or acquiescence by a person of age or with requisite mental capacity who is not under duress or coercion and usually who has knowledge or understanding."[9] Coercion means "where the relation of the parties is such that one is under subjection to the other and is thereby constrained to do what his free will would refuse."[10]

Furthermore, there is an argument regarding consent that for prostitution consent cannot be truly voluntary. While the person may be "okay with the act," usually prostitution, even sex work, is a form of economic coercion because usually those selling are from lower-income classes, they are homeless, unable to get a job, or addicted to drugs.[11] "In thousands of interviews, we have heard prostituted women, men, and transwomen describe prostitution as paid rape, voluntary slavery, signing a contract to be raped (in legal prostitution), the choice that is not a choice, and as domestic violence taken to the extreme."[12] When those are the motivating factors for prostitution, then the question is—is it really voluntarily? Do those who enter the into this act do so because they feel as though they have no other means? If so, the consent is not truly voluntary.

With respect to coercion, one normally thinks of coercion as a gun loaded to another's head or being held down and forced to act. However, we live in a capitalist society where everything we do, see, and experience is related to money. It is harder to see that cash or money itself is a coercive force, but the argument is that it is.[13] Money is coercive because it starts with human intention.[14] Generally men, but sometimes women, are well aware that the sexual encounter is unwanted, and must be enticed by money before the woman will engage in it.[14] The physical process of handing over the money is to show that without the money, this act would not be happening.[16] Therefore, there is not true consent because of the exchange of money, a coercive factor.[17]

In conclusion, when looking at the statutes, we see that coercion and consent play a drastic part in distinguishing between human trafficking and prostitution. This is especially apparent as the Florida Legislature used the word "prostitution" in their definition of sex trafficking. Accordingly, there is a fine line to walk with the law regarding prostitution and human sex trafficking.

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Article 5

HUMAN TRAFFICKING AND THE LEGALIZATION OF PROSTITUTION

By: Hannah Chisler

"Criminalization has a Body Count" is a slogan that adorned protestor signage carried by "sex workers" and supporters of the movement to decriminalize prostitution during a rally in Washington D.C. in June 2018.[1] This slogan is far from new, as the push to decriminalize prostitution began in the 1970s,[2] when the term "sex work" was coined by activist Carol Leigh.[3] The sex work movement has yet to gain much traction, as Nevada remains the only state to allow legal prostitution,[4] and the Supreme Court carefully acknowledged an adult's right to engage in private sexual activity without applying the principle to prostitution in *Lawrence v. Texas* in 2003.[5] However, with the shift in the social climate towards decriminalizing this type of work, and the laxed attitude toward sex, some states and politicians, like Kamala Harris, are considering decriminalization of prostitution in some degree.[6] While supporters of decriminalization, like Harris, have noted that

the "ecosystem" of sex work includes people that exploit others in the "industry," the victims of decriminalizing sex work may in fact include sex trafficking victims as well as those willing participants in prostitution.[7]

Florida, like many other states, recognizes human trafficking as one of the most serious human rights issues today, and Florida has a statute that allows victims to bring a cause of action against their traffickers.[8] Florida Statute § 787.06 was enacted in 1968, amidst the movement for "sex positivity" and legalization of prostitution.[9] The Statute provides in subsection (11): "[a] victim's lack of chastity or the willingness or consent of a victim is not a defense to prosecution under this section if the victim was under 18 years of age at the time of the offense."[10] The statute also states that "human trafficking is a form of modern-day slavery," and that "victims are subjected to force, fraud, or coercion for the purpose of sexual exploitation or forced labor."[11]

So, why are so many people out on the streets in L.A., D.C., and other major cities holding signs that vehemently urge the government to take steps to allow the type of behavior protected by these statutes? Part of the argument is that decriminalizing prostitution would lead to a decrease in the demand for sex trafficking and therefore protect sex-trafficked victims.[12] However, a counterargument to this lies in the case *Robles v. State*, in which the Fourtennth Circuit Court of Appeals in Texas held that Texas Penal Code Ann. § 43.02, which criminalizes soliciting a prostitute, was rationally related to the State's interest in deterring other crimes, specifically, human trafficking and violence against women.[13] Therefore, it did not violate the due process clause of the Fourteenth Amendment.[14]

This same reasoning also applied in the Ninth Circuit Court of Appeals in California in *Erotic Service Provider Legal Education & Research Project v. Gascon.*[15] There, the court upheld Cal. Penal Code § 647(b)(2015) because the criminalization of the commercial exchange of consensual, adult sexual activity was rationally related to important governmental interests, and accordingly it did not violate the Due Process Clause.[16]

So, as it stands, the push to decriminalize prostitution may get more airtime, but the constitutional argument does not seem to prevent the protection of sex trafficking victims or limit human rights. Further, even if prostitution was decriminalized and then eventually legalized, testimonials from former prostitutes are eerily similar to the testimonials of human trafficked victims. Both describe being violently assaulted both sexually and physically,[17] and both victims recount the incredible emotional and physical toll that their experiences took on them.[18] So, even with the element of consent in prostitution, any type of exploitation of another human being needs to be eradicated. Those involved should be prosecuted, rather than lauded, for the sake of protecting individual freedoms. ○

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INHUMANE CONDITIONS IN AMERICAN PRISONS: A Solitary Issue

By: Stephen Dwyer

Universal recognition of human rights is essential because it acknowledges that equality should be shared among individuals regardless of the circumstance. This applies to all people, including prisoners. The conditions of many American prisons exhibit inhumane qualities, which are part of a generally problematic prison system.[1] The Eighth Amendment and the Universal Declaration of Human Rights both protect against cruel and unusual punishment by stating that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[2] and "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3] The question becomes what can be defined as cruel and unusual punishment? Is overcrowding of prisons cruel and unusual? Is solitary confinement cruel and unusual? In a society that is increasingly cognizant of human rights, these questions should be met with solutions.

Solitary confinement is a form of punishment that is practiced in prisons[4] and is arguably cruel and unusual. Studies show that solitary confinement takes a heavy toll on those who are subject to its cruelty.[5] "When the U.S. military studied naval aviators captured and imprisoned during the Vietnam War, they found that the practices of solitary confinement by enemy forces produced suffering just as severe as that brought on by physical torture."[6] Solitary confinement has a direct impact on many functions that are essential to mental

wellbeing. For example, "[a] healthy person who has been locked alone in a cell for months or years may begin to exhibit depression, anxiety, and cognitive impairment. And many inmates in solitary show evidence of agitation, paranoia, memory lapses, hallucinations, irrational anger, and obsessive revengeful thoughts."[7]

Do these results comport with the recognition of human rights and laws in the United States? This question is crucial in determining what amounts to "cruel and unusual" punishment in the United States. In making this determination, the U.S. Supreme Court held, "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[8] Years later, the Supreme Court developed a two-prong test to determine when prison officials violate the Eighth Amendment:[9] "[f]irst, the deprivation alleged must be, objectively, 'sufficiently serious,'. . . ; a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities."[10] For a claim based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.[11] The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment."[12] This is the current standard used to evaluate cruel and unusual punishment.

How does the Supreme Court view solitary confinement in light of this standard? Justice Breyer recently stated in his dissent in *Ruiz v. Texas*:

> Others have more recently pointed out that a terrible 'human toll' is 'wrought by extended terms of isolation' and that '[y]ears on end of near-total isolation exact a terrible' psychiatric 'price'. . . . As a result, it has been suggested that, '[i]n a case that present[s] the issue,' this Court should determine whether extended solitary confinement survives Eighth Amendment scrutiny. This I believe is an appropriate case to conduct that constitutional scrutiny.[13]

The U.S. prison system fails to recognize that the right of all people to freedom from cruel and unusual punishment does not end at its gates.[14] The modern understanding of the effects of solitary confinement reveals it to be cruel and unusual, and the time has come for our prisons to reflect that and change accordingly. ○

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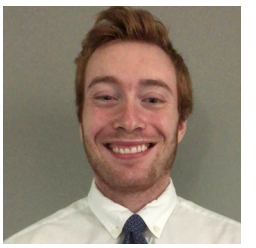
Article 7

TO STAND ON HIS OWN LEGS: Racial Discrimination in College Admissions



By: Anthony Altomari

Discrimination has long been an issue in the United States. Despite the ratification of the Fourteenth Amendment, which ensures that "No state shall . . . deny to any person within its jurisdiction the equal protection of the law,"[1] discrimination continues to erode our society, finding particular comfort in higher education institutions that use race as a factor in their admissions process.[2] The goal of such policies has been to achieve a "critical mass" of underrepresented students and "[t]o ensure that these minority students do not feel isolated[;]… to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes."[3] Courts have further opined that such polices "promote[] cross-racial understanding… and enable[] students to better understand persons of different races."[4] However, such objectives are façades, and when stripped away, the true goal of the policies is revealed: racial balancing.[5]

Universities have stated—and the Supreme Court agrees—that racially discriminatory policies may be used in admissions processes as long as they are narrowly tailored to further a compelling governmental interest.[6] A peculiar axiom, given that the Supreme Court has also stated that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice,"[7] and that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education."[8] Moreover, as currently constructed, such policies are unequally enforced among minority communities. For instance, the law school in *Grutter* was not admitting students from all minority groups equally, giving preference to African American applicants over their Native American and Hispanic counterparts.[9] Furthermore, the university in *Fisher* admitted that their policies were not tailored to Asian American students because they felt that these students were "'overrepresented' based on state demographics."[10] Such policies do not advocate for the admission of all underrepresented minorities, but rather appear to verge on the formation of "racial quotas," which have been struck down as unconstitutional by the Supreme Court.[11] Evidently, these schools do not believe it necessary to narrowly tailor their policies to achieve a "critical mass" of students on their campuses, instead selecting students from minority communities until they believe the communities are sufficiently represented. However, race should not be used as a factor to the material advantage or disadvantage of students if schools lack the ability to treat all racial minorities equally. Such policies show that our nation still has a steep journey to conquer racial inequity in our society.

While institutions may seek to promote racial equity or combat the many challenges that minority communities face, the problems are rooted much deeper in their respective communities. For example, 70% of African American children and 69% of Hispanic children are born out of wedlock, compared to only 28.2% of White children,[12] 13% of cohabiting parents are African American, compared to 55% who are White,[13] and 48% of murders in 2019 were committed by African Americans.[14] These statistics evince that there are more serious cultural problems that may be contributing to fewer minorities completing their degrees,[15] and that the focus should be on correcting the issues from within, not bandaging them years after their damage has been done.

More practical solutions exist which would promote an increase in minority students completing their higher education studies rather than using racial discrimination in admission, such as allowing for school choice vouchers so that these students may receive a more well-rounded education, implementing more robust after-school programs to keep kids off the streets, and providing more aid to single mothers, such as childcare services, so they may attend school within the confines of their schedule. No solution will fix all the problems that face minority communities, but society can start by working within these communities to give them a better opportunity at success not just in the educational setting, but at life itself. It is not assistance without guidance that will induce the change necessary in this country, but rather giving every person "a chance to stand on [thier] own legs" that will make the most measurable difference.[16]

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MASKING THE CONFRONTATION CLAUSE

By: Jessica Patton

Undoubtedly, every person has been impacted by the ferocious spread of COVID-19. With the spread came mass panic, toilet paper shortages, and face mask mandates. However, in the wake of the virus grossly ravaging through the planet, one issue of legal procedure garnered significantly less attention: witness credibility as established through demeanor.

The capability of observing a witness's demeanor during testimony is deeply rooted and foundational to due process under the Confrontation Clause of the Sixth Amendment. The right to due process and a criminal defendant's Sixth Amendment rights under the Confrontation Clause are cornerstones to American jurisprudence serving a common objective: assessing the credibility of witness testimony. The Sixth Amendment addresses the defendant's constitutional right to view and assess the credibility of his accusers, while due process addresses the defendant's constitutional right to have a jury properly assess a witness's credibility.[1]

The Supreme Court in *Maryland v. Craig* recognized four elements essential to a defendant's confrontation rights: physical presence of the witness; testimony under oath; cross-examination; and observation of demeanor by the trier of fact.[2] However, the court simultaneously established an exception where the "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assures."[3]

Undeniably, the important public policy central to this issue is the public health and suppressing the spread of COVID-19. While face masks are an effective tool in this regard, their use by testifying witnesses comes at a great cost to defendants, because they impede the jury's ability to adequately observe the witness's demeanor, leading to the inability to establish credibility. Ultimately, the issues which arise are (1) whether allowing a witness to wear a mask is necessary to further an important public policy, and (2) whether the reliability of the testimony is otherwise assured.

Case law on this issue is still in its infancy but inevitably forthcoming. However, various courts have already given insight on where the trend may lead. On one end of the spectrum, a witness wearing dark sunglasses was allowed because the jury was able to "observe [the witness's] facial expressions and body language to a degree that no constitutional violation occurred."[4] While on the other end, a witness equipped with a disguise wig and fake mustache was allowed because the jury was still able "to view the witnesses' full facial expressions."[5] Furthermore, religious head scarfs were allowed because, although the scarf was tight against the witness's face, it clearly revealed "the outline of her face [and lips] when she talk[ed]."[6]

Are we to simply ignore the common denominator here? Some Florida district courts aren't letting face masks diminish the defendant's or the jury's ability to observe a witness's demeanor.

Contrary to Florida Supreme Court Administrative Order AOSC21-17 (prohibiting courts from requiring the use of face masks), the Twentieth Judicial Circuit requires every person to wear a face mask in the courthouse.[7] Most notably, the Eighteenth Judicial Circuit specifically requires all testifying witnesses to wear clear face masks while inside courtrooms.[8] Thus, it can reasonably be inferred that the purpose of such a specific mandate is to preserve the fourth pillar in *Maryland v. Craig*: observation of demeanor by the trier of fact.[9]

How are we to reconcile one court's assertion that merely "a tiny piece of cloth" is inconsequential to gauging a witness's credibility through their demeanor, with local courts acknowledging a cause for concern and mandating clear facial masks?[10] As new cases work their way through the courts, courts are left balancing public health and a defendant's constitutional rights.

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PRIDE AND PREJUDICE: Law Enforcement, Social Media, and the Death of the Impartial Jury

By: Matthew Keeton

"Shiva has three eyes, the third eye bestowing inward vision but capable of burning destruction when focused outward." [1]

The Hindu trimurti depicts three gods, combined into a single form with three faces, each tasked with an aspect of creation:[2] Brahma, the creator, Vishnu, the preserver, and Shiva, whose role "is to destroy the universe in order to re-create it."[3] There could be no more apt metaphor for the construct of American government. Article I of the United States Constitution prescribes legislative power and vests it in Congress, the creator.[4] Article II prescribes the power of the Executive, the protector, tasked with the role of oversight and endowed with, among other things, the powers of veto, treaty, pardon, and judicial nomination.[5]

Finally, Article III establishes the judiciary – the destroyer – tasked with resolution of conflict and controversy,[6] its "powers of destruction and recreation . . . used even now to destroy the illusions and imperfections of this world, paving the way for beneficial change."[7] Among these powers is criminal justice, a system comprised of three primary components: law enforcement, courts, and corrections,[8] and it is through law enforcement that courts are, in theory, endowed with the ability to identify and punish the wicked. This third eye of Shiva, turned inward toward the courts, provides the requisite tools for the dispensation of justice. But turned outward toward the public, this knowledge has the potential to destroy the foundation of integrity upon which the judiciary stands.

If it bleeds, it leads.

The Sixth Amendment guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[9] However, the right to an impartial jury is frequently undermined by pre-trial publicity, traditionally created by news media, which gives potential jurors "extremely negative attitudes toward the accused."[10]

The judiciary is not blind to the issue of media-fueled bias, but there are limits to which the United States Supreme Court has been willing to mitigate it. While "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process,":[11]

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication . . . scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.[12]

Since the advent of national news, an impartial jury is often as easily obtainable as a unicorn, and what ends up sitting in the jury box is a horse with a horn tied to its head. But what of it when the source of such preconceived notions is the criminal justice system itself?

"They were the police, jury, and executioner all in one. They were the Judges."[13]

The substantive foundation upon which a news report regarding criminal charges is built, such as police reports, court documents, and arrest records, is generally public information which is either required to be released or is obtainable upon request,[14] and is therefore fair game for media outlets. However, with the advent of social media, law enforcement agencies have made a habit of posting information about arrests to the public directly via their social media pages, frequently accompanied by mugshots and a veritable feeding ground for the court of public opinion in the accompanying comments sections.

Thus, law enforcement agencies have begun to essentially serve as media outlets unto themselves, and while this information is nothing novel from what might be found in a press release, news article, or publication on agency websites, the effect that it has on the public has the potential to be vastly more prejudicial. As such, "the law that keeps citizens in the know about their government"[15] becomes a tool to taint the waters of the potential jury pool. And because, like a national news story, the potential reach of a social media post extends far beyond the community in which it is created, even low-profile cases which are typically overlooked by large news outlets can

be subject to widespread scrutiny when followed by enough likes, shares, and comments.

In considering the prejudicial effect of a publication, public trust of the source is certainly relevant, and in regard to media sources compared to law enforcement, the disparity is great. While only thirty-six percent of U.S. adults have at least a fair amount of trust in media reporting,[16] "[s]ixty-nine percent of Americans trust local police and law enforcement to promote justice and equal treatment for people of all races . . . ."[17] When the same information is posted by both sources, there is little doubt that the public gives greater weight to the one which is taxpayer-funded and in the business of public protection rather than profit.

Furthermore, the Supreme Court has held that suppression from jury consideration of eyewitness identification of a suspect may be appropriate where the "identification procedure [] is both suggestive and unnecessary."[18] What of it when the court is of one of public opinion, both the eyewitness and party supplying the identification procedure is the justice system itself, and the jury is the public at large, including those individuals who may eventually be called upon to serve on an actual jury in an actual courtroom? Applying a similar standard, the process is certainly suggestive and, considering that it serves no substantial function aside from self-promotion, gratuitous at best.

Finally, determining what information must mandatorily be released to the public and in what manner cannot reasonably be characterized as anything other than an administrative procedure of governmental agencies. Consequently, so too is the determination of what information and in what manner an agency voluntarily releases information to the public. And if the content of such information and the manner in which it is released has the potential to negatively impact access of the criminally accused to impartial juries, the operative question, as held by the Supreme Court in *Mathews v. Eldridge*, is whether the deprivation of procedural due process resulting from this administrative function is constitutionally permissible.[19]

"More precisely . . . the specific dictates of due process generally require consideration of three distinct factors . . . ."[20] First is the private interest the action affects,[21] in this instance a constitutional right intended to protect against unjust imprisonment. Second is the risk of erroneous deprivation of that interest,[22] which here arguably rivals what the Supreme Court has recognized as a substantial threat to the integrity of that constitutional right. Finally, there is the public interest,[23] and, perhaps to the chagrin of law enforcement agencies across the nation, the Supreme Court was not referring to the public's interest in treating social media comments sections like an audience roast at the end of an episode of Jerry Springer. Rather, it is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[24] Here, that substitute procedural requirement would in reality alleviate the administrative burden on law enforcement agencies, as taxpayer dollars currently being used to pay government employees to play social media influencer could instead be rerouted back to the legitimate functions of law enforcement for which they are intended.

Alas, such behavior is stamped with the seal of approval of a public inflicted with ever-shortening attention spans and addicted to the fleeting rush of passing judgment on others at the expense of the criminally accused, while the proverbial "long arm of the law" continues to break as the criminal justice system uses it to pat itself on the back. ○

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IS THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT A PRETENSE?

By: Edner Geffrard

In all criminal prosecutions, the accused shall have the assistance of counsel for his defense.[1] A pretense of counsel should not be sufficient to evade liability for failure to provide adequate representation to an accused. In *Brewer v. Williams*, the Supreme Court held that a defendant gains the right to an attorney "at or after the time that judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment."[2] While it may not all be attributable to the work ethic of public defenders, they nonetheless have no incentive to provide adequate counseling to criminal defendants. In *Moran v. Burbine*, the Supreme Court ruled that the Sixth Amendment "becomes applicable only when the government's role shifts from investigation to accusation."[3]

Courts have been reluctant to hold public defenders responsible for subpar representation. However, the right to effective counsel typically entails that an attorney must engage in zealous advocacy for the defendant. In *Strickland v. Washington*, the Supreme Court established a two-prong test for whether a court-appointed attorney has given the proper amount of care to a court-appointed client: first, whether counsel's performance was inadequate; and second, whether the inadequate performance was prejudicial to the defendant.[4]

Nonetheless, many defendants have been unable to hold public defenders accountable for inadequate representation. Factors such as the workload of a public defender, funding to the department and resources at their disposal, mix and complexity of cases, counsel's experience, and the prosecutorial and judicial resources available have the potential to affect the outcome of a particular case and may help in determining whether a defendant received adequate counsel. In *Wilbur v. City of Mount Vernon*, the Washington Supreme Court took such factors into consideration when it imposed a hard cap on the number of cases a public defender can handle over the course of a year.[5] Given that a defendant has a constitutionally protected right to receive counsel, it is not enough for courts to simply leave it up to the legislature to address the current system.

Such factors raise questions about the ability of public defenders to adequately represent each defendant in their best interest. In *Gideon v. Wainwright*, in which the Supreme Court held that the Sixth Amendment right to counsel "is made obligatory upon the States by the Fourteenth Amendment,"[6] Justice Black cited in part the decision of Justice Sutherland in *Powell v. Alabama* that "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.'"[7] It is reasonable to think and hope that affirmative actions will follow to protect individual rights.

There has been an expansion on this issue over the years. The Supreme Court held in *McMann v. Richardson* that the right to counsel is the right to the effective assistance of counsel.[8] In *Caraway v. Beto*, the Fifth Circuit defined counsel in this context to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."[9] However, while courts have refined the definition of "effective assistance of counsel," issues affecting defendants such as access to effective counsel and recourse where such counsel is lacking need to be further addressed.

Would a defendant receive better representation if public defenders were subject to civil liability where they "clearly" fail their duty to offer zealous representation to a defendant? Would it better protect a defendant's Sixth Amendment right if we instead focused on decreasing public defenders' workloads?

Maintaining the integrity of our justice system is the utmost importance. Therefore, further reform in this area is not an attempt to expand the scope of the constitutional protection provided under the Sixth Amendment, but rather to answer in the affirmative the question of whether a public defender can and must give each case the time and effort necessary to ensure constitutionally adequate representation. ○

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THE RIGHT TO LIVE IN YOUR OWN HOME

By: Hannah Reynolds

It is the day of your high school graduation. During the ceremony, you hear about all of the exciting plans your classmates have in store after graduation. Your reality looks different. You were born with a developmental disability, and your survival is dependent on daily medical treatment. You look at your mom in the audience, and she seems sad. She knows that this is the last week you will be home because the state will not provide the funding for the nurses to come to your home. Mom must work, and she feels guilty that her work is getting in the way of your ability to stay at home. Last week as she was crying, she told you, "You will love the institution" and "There will be plenty of people just like you there." You just want to live at home with your mom as it has always been.

The situation described above is, to some extent, the reality for roughly two million disabled individuals living in the United States.[1] This statistic has increased drastically with the emergence of COVID-19.[2]

According to the United Nations,

> Human rights are inherent to all human beings regardless of … status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education. Everyone is entitled to these rights *without discrimination*.[3]

Every day a disabled person's fundamental human rights are overlooked, and in the U.S., that is a significant portion of the population: nearly 42 million Americans live with some form of disability, translating to 12.7% of the U.S. population.[4] These statistics are not new to the U.S., with Congress recognizing that "[d]isability is a natural part of the human existence" and crafting the Americans with Disability Act ("ADA") to protect disabled citizens.[5] The ADA is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places open to the general public.[6]

Relying on the ADA, in *Olmstead v. L.C.*, the Supreme Court held that unjustified segregation of persons with disabilities constitutes discrimination in violation of Title II of the ADA.[7] The Court noted that it was preferable to allow disabled persons the "benefits of community living."[8] Such confinement itself "perpetuate[d] unwarranted assumptions" that the disabled person is incapable of living in their community.[9] In contrast, the community-based treatment method enables disabled individuals and their healthcare providers to develop creative alternatives for individuals who wish to live at home but would otherwise require care in a nursing facility or hospital.[10]

After *Olmstead*, any disabled person has a right to receive their specific treatment plan in "the most integrated setting appropriate."[11] Further, a public entity must make reasonable modifications to their policies, practices, or procedures when necessary to avoid discrimination based on disability, unless these modifications would "fundamentally alter" the service or program.[12]

Olmstead did not resolve the issue of forced institutionalization, instead granting state departments significant flexibility to assert the "fundamental alteration" defense.[13] State doctors regularly fail to assess and place eligible disabled individuals into community-based programs when plausible.[14] Further, states seem reluctant to prioritize community-based programs and instead rely on institutionalization.[15] Some states have even restricted access to community-based programs.[16] As a result, categories of disabled persons are forced into institutions and excluded from community-based programs.[17]

It is the legal and moral responsibility of the state and federal governments to collaborate and find the means to provide disabled citizens the option to live at home, regardless of the extent of that citizen's disability. Until then, a vulnerable subset of America's population will continue to face violations of the most fundamental human right: the human right to live in a community as an equal member.

It is the day of your high school graduation. You live in a state that is happy to accommodate your needs for medical treatment in the comfort of your home because your state knows that, although you are proud of your disability, you know your disability brings challenges to your life. They call your name. You look up at your mom in the crowd and see her crying tears of joy. You cannot wait to see her face when she hears that you were accepted into a program at the community college down the road from your childhood home. ○

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GUNS AND DRUGS: What *MORE* Can Floridians Ask For?

By: Christopher Gero Prado

Article 25 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including . . . medical care . . . ."[1] In 2016, Floridians amended the Florida Constitution to legalize the use of medical marijuana.[2] Despite the growing majority of states that have implicitly recognized the efficacy of marijuana for medicinal use by legalizing the practice via constitutional amendments or legislative acts,[3] "marijuana remains classified as a Schedule I substance under the Controlled Substances Act, where [such] substances are considered to have . . . no accepted medical use . . . ."[4] And, by virtue

of the Supremacy Clause,[5] the Federal Government's prohibition on marijuana is the controlling law of the land.

Although the United States Constitution[6] and the Florida Constitution[7] recognize and protect the right of the people to keep and bear arms, "under 18 U.S.C. §922(g)(3) no person 'who is an unlawful user of or addicted to any controlled substance' may 'possess . . . or . . . receive any firearms or ammunition.'"[8] The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) promulgated regulations that define a person who is an unlawful user as "[a] person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician."[9] On September 21, 2011, the ATF indicated in an open letter to all federal firearms licensees that "any person who uses or is addicted to marijuana, regardless of whether his or her state has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition. As a consequence, [federal firearms licensees] may not transfer firearms or ammunition to them."[10]

Shortly after the ATF issued this letter, a federal firearms licensee refused to sell a firearm to a Nevada citizen who held a marijuana registry card which allowed her to use medical marijuana in the State of Nevada.[11] The would-be-purchaser sued the Government, alleging violations of the First Amendment, Second Amendment, the substantive and procedural Due Process clauses of the Fifth Amendment, and the Equal Protection Clause of the Fifth Amendment, and additionally "sought declarations that 18 U.S.C. § 922(g)(3) and (d)(3), as well as all derivative regulations, such as 27 C.F.R. § 478.11 and the Open Letter, were unconstitutional."[12] The Government filed a motion to dismiss, and, after finding that all the plaintiff's claims failed, the district court dismissed all the plaintiff's claims with prejudice;[13] this decision was affirmed on appeal.[14]

What do the decisions rendered in *Wilson v. Holder* and *Wilson v. Lynch* mean for the more than half a million medical marijuana patients in Florida?[15] While not controlling precedent in the Eleventh Circuit, it likely means that even if a Florida citizen met with a qualified physician and was subsequently issued a physician certification to possess and use medical marijuana in Florida, a federal court of law would likely find that he or she is an unlawful user of a controlled substance who, accordingly, is constitutionally prohibited from possessing or purchasing firearms or ammunition. Thus, the gun-owning, medical marijuana-using Floridian is seemingly left with a sticky decision to make: either retain the ability to lawfully exercise your Constitutionally-protected right to keep and bear arms, or acquiesce to the federal infringement upon your exercise of the human right to healthcare, namely, consuming plant-based medicine in the form of medical marijuana. However, to all pro-gun medical marijuana patients in Florida: your dreams (and constitutional rights) need not go up in smoke.

The Marijuana Opportunity Reinvestment and Expungement Act (The MORE Act) was reintroduced in the House of Representatives in May of 2021.[16] Among other things, The MORE Act, in its proposed form, seeks to remove marijuana from the list of scheduled substances under the Controlled Substances Act. Were this to take place, the presumable effect in Florida (and other states that have legalized medical marijuana) would be that medical marijuana patients would no longer be prohibited by federal law from possessing or purchasing firearms and ammunition by virtue of being an "unlawful user" of a controlled substance. To be sure, the passage of The MORE Act will necessarily prompt the drafting of further legislation dealing with the complexities of defining when the possession and/or use of firearms or ammunition by medical marijuana patients is lawful or not, i.e., "don't mix guns and drugs." Though legislative bodies throughout the country will be faced with an onerous task in that regard, that's no reason to kick-the-can and avoid putting an end to this reefer madness; someone's life could depend on it. ○

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VICTIMS AND CONGRESS V. THE ACCUSED AND THE CONSTITUTION

By: Helen Mena

It is no well-kept secret that sexual misconduct is rampant in the United States Military.[1] Accordingly, all branches of our armed forces have implemented training and response programs supporting prevention, reporting, and protection from sexual misconduct.[2] Further, the military is able to conduct internal investigations upon any allegation.[3] Recommendations derived from these investigations are then

implemented to address any shortcomings identified.[4] Despite extensive training efforts, sexual misconduct reports continue to increase.[5] Replying to low conviction rates[6] and overturned convictions,[7] Congress amended the Uniform Code of Military Justice (UCMJ) and removed an important procedural safeguard.[8] In so doing, Congress stripped the accused of their human right to due process.[9]

This human right was redeemed in *United States v. Barry* and *United States v. Boyce*.[10] In both cases, the accused alleged Unlawful Command Influence (UCI) to reverse their convictions.[11] UCI is a procedural defense against impermissible control over a court-martial proceeding by any commanding officer.[12] This tool proves beneficial to the accused while facing a tribunal system that famously "lack[s] sufficient constitutional due process safeguards."[13] Accordingly, the accused in both cases proffered "apparent" and "unintentional" UCI defenses.[14] Specifically, the cases held that the respective circumstances gave rise to an appearance of UCI,[15] which could cause "an objective disinterested observer . . . [to] harbor a significant doubt about the fairness of the court-marital proceedings."[16] These observations by the court show its growing concern for the due process violations.[17]

With unabashed disregard for this right under due process, Congress passed an amendment to the National Defense Authorization Act of 2020, eliminating a remedy for apparent and unintentional UCI.[18] Notably, Congress added language that restricted a finding of UCI to an actual "attempt to influence,"[19] effectively eviscerating the court's interpretation of UCI under the ruse of securing more sexual misconduct convictions.[20] Instead, this addition violates due process, for in doing so, the court can now only find UCI where there is actual unlawful influence.[21] The court has defined actual unlawful influence as "improper manipulation of the criminal justice process which negatively affects the fair . . . disposition of a case."[22] A finding of UCI can thus only be supported by actual prejudice to the accused.[23] But actual prejudice can certainly occur when there is unintentional UCI, as there is no intent requirement for due process.[24] Therefore, the Constitution unequivocally requires a remedy for unintentional UCI.[25]

Through its efforts to address the appearance of unpunished sexual misconduct in the military, Congress has instead applied pressure that enables unlawful convictions and in turn violates several rights of the accused.[26] Some intend to restructure the military justice system[27] in a manner that creates additional obstacles keeping sexual assault cases out of courts-martial.[28] Yet Congress fails to recognize that conviction rates stay low despite rising allegations because the military prosecutes cases that civilian prosecutors normally drop.[29] The result of congressional pressure and the military's vigorous crackdown on sexual misconduct is the prosecution of close and often unprovable cases.[30]

In a system that already lacks adequate due process protections for persons subject to the UCMJ,[31] this retaliatory congressional action fails to understand the military justice system just as it seeks to deny servicemembers their constitutional and human rights.[32] As a society, we should absolutely endeavor to extirpate sexual misconduct in all forms, but never "at the expense of our . . . rights, which apply to all accused of a crime . . . even military members, and, yes, even in #MeToo cases."[33] ○

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THE UNCONSTITUTIONAL EXPANSION OF EXPEDITED REMOVAL

By: Piero Sotomayor

It is imperative for a nation to secure its borders for the safety of its citizens. Equally important are the measures taken by the nation to accomplish border security. The Expedited Removal process, created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), allows the Department of Homeland Security (DHS) to summarily remove aliens at U.S. ports of entry without a hearing or review[1] if they are inadmissible either by (1) entry through misrepresentation,[2] or (2) entry without valid documentation.[3] If an individual's inadmissibility fits either category, immigration authorities start the process for expedited removal when:

1. Arriving aliens seeking entry into the United States at a designated port of entry;[4]
2. Aliens who arrived in the United States by sea, who have not been admitted or paroled, and who have been in this country for less than two years;[5] or
3. Aliens who are encountered within 100 miles of the borders, who have not been admitted or paroled, and who have been in the United States for less than 14 days.[6]

There are the three circumstances in which an individual may appeal their expedited removal process. First, if an alien fears being persecuted in their country, they may apply for asylum, where they will be interviewed by an asylum officer to determine whether the alien's fear is credible.[7] Second, an alien who claims to be either a U.S. citizen or lawful permanent resident (LPR), admitted refugee, or asylee will be subject to verification of such claim from an immigration officer.[8] Third, unaccompanied alien children are not subject to expedited removal.[9]

The cost and time of deportation proceedings were factors behind the United States' implementation of the expedited removal process in which the non-citizen would be stripped of their due process rights in the circumstances outlined above.[10] Now, you might ask, how is this unconstitutional?

In 2019, DHS exercised its discretion under the Immigration and Nationality Act to authorize and employ expedited removal to the full degree of § 1225(b)(1) to include all non-citizens instead of the current three categories in which a person may be expedited.[11] With this expansion, the DHS will have had the ability to apply expedited removal in the interior of the United States. As defined by the Constitution, this is a violation of the rights bestowed to every person as they are being deprived of their life, liberty, or property without due process of law.[12] Courts have recognized that the constitutional rights apply to aliens as well, stating that "even alien[s] who are in the United States illegally may bring constitutional challenges."[13] In 1904, the Supreme Court concluded that an alien who entered the country, and became subject in all respects to its jurisdiction, and a part of its population could not be deported without due process.[14] In 2001, the Supreme Court further echoed this, stating "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[15] These remarks make it evident that the Constitution aims to protect the rights of due process for "all persons," and the expansion of expedited removal in the interior of the Unites States is a clear violation of the Constitution.

The expedited removal process has streamlined deportation and facilitated border control, but at what cost? The United States is blatantly ignoring the constitutional rights of immigrants who should be protected and given due process. We must be wary of the unchecked power vested in the DHS by Congress in their efforts to expand a policy that violates the due process rights afforded to all "people" under the Constitution of the United States. O

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REFORMING IMMIGRANT DETAINMENT AMIDST COVID-19

By: Deborah Gedeon

Every year the United States receives thousands of applications from refugees seeking asylum.[1] Most of these applications are filed by asylees that have fled the gang violence, political corruption, and persecution that has overwhelmed Central and South American countries.[2] Although these asylees have fled their native countries to obtain a better life in the United States, current immigration policies have subjected many of them to ill-treatment.

Many applications to the U.S. for asylum have been filed in response to removal proceedings. The requirements of expedited removal and the asylum process are dictated by the Immigration and Nationality Act (INA).[3] Under INA, an immigration officer conducts an inspection of apprehended noncitizens to determine whether they are admissible into the U.S.[4] If the officer determines a noncitizen is not qualified for admission, the noncitizen is denied entry into the U.S., and the officer may order expedited removal.[5] However, this order may be tolled if the noncitizen is found to be a refugee and applies for asylum.[6] A noncitizen may be considered a refugee if he is unwilling to return to his native country due to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[7]

Despite not having valid documents, asylum grants a noncitizen permanent residence in the U.S. if an immigration officer verifies that a refugee's fear of persecution is credible.[8] An officer's finding is subject to review, and a refugee may request such review if an immigration officer denies the refugee's admission into the U.S.[9] An immigration judge makes the final determination of an asylee's application during a removal proceeding.[10] Since refugees are required to be present at such proceedings, refugees are detained in detention centers pending the final decisions on their claims for asylum.[11]

While monitoring the activity of the noncitizens and deciding these cases is an important government interest, it comes at a very high and unnecessary cost.[12] To begin, the U.S. has experienced a significant backlog of asylum applications.[13] In addition, in 2017 and 2019, the Department for Homeland Security (DHS) expanded the scope of expedited removal.[14] Previously, this rule applied to apprehensions within 100 miles from any border or port of entry.[15] After the DHS's notice, expedited removal has been applied to noncitizens encountered by immigration officers anywhere in the U.S. that are unable to produce valid documentation that they have been in the U.S continuously for two years prior to the encounter with an immigration officer.[16] This expansion of expedited removal means an increase in the millions of dollars that DHS already spends to detain immigrants.[17]

The inhumane treatment that the U.S.'s immigration policies have subjected asylees to has been exacerbated since the onset of the COVID-19 pandemic. In March 2020, the U.S. passed a health law that suspended the country's acceptance of asylum applications.[18] This law also granted officers authority to deny noncitizens the opportunity to seek asylum and remove them to either Mexico or their native country.[19] By denying noncitizens the right to seek asylum, these policies have denied immigrants the right to seek a better life and be free from the violence, poverty, and persecution they may face in their native countries.

Further, as mentioned, large numbers of refugees are held in detention centers pending removal proceedings.[20] The detainees compose a diverse group of people of different ages and physical conditions, and some are vulnerable to contracting COVID-19 in the detention centers.[21] Overcrowding in these centers prevents detainees from social distancing and safeguarding their health.[22] Also, the lack of adequate staff and sanitation equipment means that the cells where the detainees are held are not kept sufficiently clean to prevent the spread of COVID-19.[23] Not only does this treatment violate refugees' human rights, but it may amount to a violation of the Fifth Amendment. In *Thakker v. Doll*, refugees succeeded in a Fifth Amendment action because the Court found their detainment was not reasonably related to government objectives, and thus, equitable to punishment.[24] Essentially, holding refugees in the inhumane detention centers violated the Fifth Amendment and subjected refugees to punishment without Due Process for seeking a better life in the U.S.[25]

U.S. policies regarding expedited removal and detainment must be reformed in a way that encourages legal entry into the U.S. while upholding respect for the lives of refugees that often come to the U.S. out of desperation. Ideally, the government should promote the use of community-based or case management programs that would assist and monitor asylees pending final decisions on their applications.[26] Also, the government could use tactics such as parole, electronic monitoring, and bond rather than resorting to detainment.[27] While there is potential for the abuse of the conditions set on parole or electronic monitoring, such abuse may be avoided if determinations for parole and bond are made by an immigration judge rather than an immigration officer.[28]

Ultimately, the U.S.'s current asylum policies prioritize law enforcement over the human rights of the people that seek refuge in this country. However, by reducing the emphasis on detainment, the U.S. may reach a more humane approach to controlling the influx of refugees and protecting its borders. ○

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PRISONERS FOR SALE

By: Victoria Martinez

The United States incarcerates individuals at a higher rate per capita than any other nation.[1] Despite a 14% drop in prison population in the first half of 2020 from 2.1 million people to 1.8 million due to the COVID pandemic, efforts to decrease the incarceration rates remain stagnant, leaving 1.7 million people currently in jails and prisons.[2] The federal and state governments began the practice of delegating prison control and functions by contracting with private for-profit entities in order to manage prison costs and overcrowding.[3] One of the leading corporations, CoreCivic, formerly the Corrections Corporation of America, stated in its annual report that:

> The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction, and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.[4]

For companies like CoreCivic, which were created for the sole purpose of managing prisons, and currently operate around 47 facilities — an estimated 39% of the country's private prison beds — money is the motive, rather than prioritizing both prison and crime reform.[5] CoreCivic received just under $2 billion in 2019 revenues while another major private prison company, GEO Group, Inc., received around $2.5 billion in 2019 revenue.[6] The business of privatized prisons has made prison labor, along with housing, operating, and staffing prisons, both financially profitable and ideologically detrimental to prison rehabilitation.[7] In January of 2021, President Biden signed an executive order reforming the incarceration system by eliminating profit-based incentives to incarcerate individuals and ordering the Department of Justice to not renew contracts with privately operated criminal detention facilities.[8] The Executive Order bars the Department of Justice from renewing contracts, but it is silent as to contracts with the Department of Homeland Security where Immigration and Customs Enforcement (ICE) regularly uses private facilities as detention centers with companies such as CoreCivic and the GEO Group.[9]

The most harmful aspect of private prison contracts is that such contracts have repeatedly been held as exempt from the Freedom of Information Act (FOIA)[10] which "governs public access to information held by the federal government."[11] Congress has attempted and failed repeatedly to pass the Private Prison Information Act (PPIA) to require non-federal prisons and detention facilities holding federal prisoners under a contract to make available to the public the same information that federal prisons and detention facilities are required to make available.[12] Private prison corporations such as CoreCivic have spent millions of dollars vigorously lobbying against the passage of acts such as the PPIA, while members of Congress have been found to own stock in these companies and receive political contributions from them.[13] The lack of transparency prevents oversight on critical issues such as inefficient contract performance by private prisons, reporting requirements, and operation requirements that all affect humane conditions of these facilities.[14]

Significant oversight of private prisons "is essential for two reasons: the drive to generate profit gives private prison operators incentives to 'cut corners on staffing, medical care, and other essential services'; and private prisons receive billions of taxpayer dollars from government contracts, reaping hundreds of millions of dollars annually in profits from these contracts."[15] The public has the right to an accounting of how and why private corporations earn such enormous profits by performing an inherently government function which, in the public context, does not produce a profit.[16] For example, such private companies have stated that staffing information should be granted a trade secret exemption from disclosure under public records statutes, but, since staffing is the most expensive component of a prison budget, private prisons are often understaffed or inappropriately staffed.[17] Further, "[t]he manner in which frontline staff use their authority has a profound impact on the prisoner experience, including levels of order, safety, distress, and suicide."[18] The American Correctional Association (ACA) is "responsible for administering accreditation and ensuring private prisons are up to contract standards."[19] ACA accreditation provides approval by prescribing what type of procedures the facility must have, but gives private facilities discretion to determine the content of such procedures.[20]

Prisons perform the highly important function of ensuring the humane treatment of prisoners and attempting to rehabilitate prisoners to reintegrate into society. Delegating such functions to corporations and entities whose main purpose is to make a profit invites abuse in the name of "cost-saving," that should not remain hidden under a private actor theory. By leaving the entire operation of prison management to the discretion of private actors, while simultaneously not allowing for review of their contracts and procedures, the government leaves individual prisoners especially vulnerable to human rights abuses at the hands of unaccountable private actors. ○

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COMMON CRIMINAL OR MENTALLY ILL? The Narrowing of the Defense of Insanity and the Criminalization of the Mentally Ill

By: Elizabeth Thomas

Imagine a clinically diagnosed mentally ill individual commits a crime and is denied the defense of insanity at trial, though all signs indicate a lack of ability to form the requisite intent to comprehend the nature of his or her actions. When phrased like this, psychiatric treatment may seem preferable to incarceration. However, the judicial system has narrowed its acceptance of the defense of insanity by mentally disordered offenders (MDOs) over the past sixty-five years, thus leaving these individuals untreated and further perpetuating social stigma surrounding mental illness.[1] Moreover, federal courts have washed their hands of this issue, declaring state autonomy to choose their own interpretations of the insanity defense to be more important than rehabilitation of MDOs.[2] This has caused rippling effects throughout society, from overpopulated prisons and repeat offenders to an increased fear of being labeled as mentally ill.[3] Where does the issue of the insanity defense stand within the justice system today, and how can we correct an issue which has plagued society for more than six decades?

From the 1950s until the 2000s (known as the "Pre-Clark Era"), the federal and state courts began their scrutinization of mentally disordered offenders.[4] In *Greenwood v. United States*, decided in 1956, the Supreme Court upheld a district court order to commit an individual to a mental hospital after he was deemed incompetent to stand trial, because he was unable to choose between right and wrong.[5] Furthermore, the order stated that the individual would be held until his mental condition improved enough that he was no longer a danger to society and adequate care was in place for him upon his release.[6] This appears to be an attempt by the Supreme Court to establish precedent, but state courts have not followed suit. In 1997, the Arizona Supreme Court took a drastically different approach in *State v. Mott*, in which it denied admission of expert testimony which suggested she suffered from battered woman syndrome, precluding her from forming the intent to commit the crime.[7] The court concluded that the Arizona judicial system had "previously rejected the theory of diminished responsibility which allows evidence of mental disease or defect . . . to be admitted for the purpose of negating criminal intent."[8] Essentially, if a person does not fall into the narrow spectrum of which circumstances constitute "insanity," Arizona courts will not allow any such evidence to come in.[9]

The last and most impactful case in this era is *Clark v. Arizona*, for which the era is coined. In 2006 a man was convicted of shooting and killing a police officer, though he claimed insanity due to paranoid schizophrenia which did not allow him to form specific intent.[10] The defendant challenged an amendment to Arizona's insanity rule which stated mental disorder evidence that did not meet the burden of proving insanity but raised a reasonable doubt about the mens rea of the crime had no effect at trial.[11] However, the Supreme Court ruled there was insufficient evidence to suggest the court should overstep state autonomy to define specific crimes and defenses,[12] allowing states to enact rules to prohibit criminal defendants from "offering mental disorder evidence for the purpose of raising reasonable doubt regarding the mens rea element of a charged offense."[13]

The "Post Clark Era" left the insanity defense to the mercy of individual states.[14] This shift began in 2010, with *Wilson v. Gaetz*.[15] Wilson was convicted of murder while mentally ill and exhausted all state remedies to no avail.[16] He sought federal habeas corpus and argued ineffective counsel at trial, stating that his family's testimony would have made his insanity more unmistakable to the jury.[17] The Seventh Circuit Court of Appeals concluded that the question of whether Wilson's attorney provided ineffective counsel, thus "robbing him of a reasonable chance of acquittal on the grounds of insanity,"[18] was valid and deserved to stand up to the heightened standard of proof.[19] In 2014, the same issue was discussed in the Ninth Circuit Court of Appeals in *Clark v. Arnold*.[20] However, the court stated that Clark did not receive ineffective counsel because although counsel failed to preserve the issues for appeal, there was no reasonable probability that the proceedings would have been different.[21]

Today, the Supreme Court of the United States, in *Kahler v. Kansas*, "declined to require that Kansas adopt an insanity test turning on a

defendant's ability to recognize that his crime is morally wrong."[22] The court permitted Kansas to adopt an insanity rule as they see fit, as there wasn't a federal rule that overrode state autonomy.[23] This is where the defense of insanity is left today, firmly in the hands of the states without concern for the effect it has on MDOs. Without a comprehensive understanding on mental illness and its effects on MDOs, the issue of overpopulated prisons and repeat offenders will only intensify. The only hope MDOs have is a federal standard that allows MDOs who suffer from mental illness the chance of psychiatric rehabilitation rather than a prison sentence.

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Article 12

VAX NOT WHAT YOU CAN DO FOR YOUR COUNTRY: Why *Jacobson* is Not an Appropriate Basis for COVID-19 Vaccine Mandates

By: Kelsey Grant

Jacobson v. Massachusetts solidified, in 1905, a state's ability to compel adults to be vaccinated against smallpox.[1] At the outset, *Jacobson* was the greatest obstacle to those fighting COVID-19 vaccine mandates.[2] The logic of *Jacobson* was that the state's power to compel vaccines arose from police power granted by the Constitution and was justified by the state's interest in protecting public health.[3] But is *Jacobson* really applicable to COVID-19 vaccine mandates? The Supreme Court intended the decision to be interpreted narrowly.[4]

COVID-19 is a relatively novel experience. Bodily integrity cases have developed significantly in the century since *Jacobson*;[5] and the vaccines are still experimental drugs,[6] which are generally withheld by the FDA, even from terminal patients.[7] All these analyses should indicate the proper way to manage this tension between the rights of an individual and the rights of all to be healthy and safe from this horrible virus. All of these analyses indicate why state and local government vaccine mandates have not been issued and will not be issued. Additionally, the recent Supreme Court decision blocking the federal vehicle for mandates, OSHA, seems to bolster this conclusion.[8]

Henning Jacobson was a Swedish immigrant and Lutheran minister who badly reacted to vaccinations as a child in Sweden.[9] About 561,000 people lived in the Boston area in 1901.[10] In Boston, 1,596 people contracted smallpox, and 270 of them died.[11] Because of the smallpox outbreak, the local Cambridge government enacted a law to compel adults over the age of 21 to be vaccinated against the disease if they had not been vaccinated in the last five years.[12] Jacobson refused vaccination for himself and his son based on their prior adverse reactions.[13]

Jacobson argued, as many do today, that compulsory vaccination violates one's "liberty."[14] But the Court replied that Constitutional liberty "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."[15] Justice Gorsuch noted in his concurrence in *Roman Catholic Diocese v. Cuomo* that *Jacobson* was wrongly being utilized to support restrictions of a different nature—business and church closings—and that:

> Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not 'contravene the Constitution of the United States' or 'infringe any right granted or secured by that instrument.'[16]

While Jacobson's bodily integrity argument was perhaps "modest" (Justice Gorsuch's word) in 1905,[17] the Supreme Court has developed this area of law significantly over the past century and recognized a right to refuse medical treatment derived from the Due Process Clause of the Constitution.[18] And even before COVID-19 emerged, some thought along the same lines as Gorsuch and noted that *Jacobson* needed rethinking.[19] The Court's protection of bodily integrity in other contexts is inconsistent with COVID-19 vaccine mandates, especially considering "the obvious integrity and privacy implications underlying the process of vaccination."[20]

Even if the government's interest in protecting public health is sufficiently compelling, other factors should give us pause, such as the contextual differences between *Jacobson*-era smallpox and

COVID-19, the uncertainty surrounding adverse and long-term effects, the grave misapplication of *Jacobson* to (non-vaccine) COVID-19 restrictions, and the past use of *Jacobson* for decisions that eventually became universally abhorred, namely *Buck v. Bell*.[21] The Court held no error in refusal to hear evidence from Jacobson on safety and efficiency of the smallpox vaccine.[22] That may have been appropriate since the smallpox vaccine had been in use for a century, but it is not appropriate for courts today to bypass.

In the Boston area, smallpox killed about one sixth of those who contracted it.[23] As of November 2021, COVID-19 has killed approximately one fifty-eighth of those who have contracted it in Suffolk County.[24] The smallpox vaccine was invented in 1798, 107 years before *Jacobson* was decided.[25] The smallpox vaccine mandate rested upon a century of trials, and the mandate addressed those who had not been vaccinated within the last five years.[26] In contrast, COVID-19 vaccines became available in December 2020,[27] and they "are the first messenger RNA vaccines to be produced and tested in large-scale phase III human trials."[28]

A court ought to consider the experimental nature of COVID-19 vaccines. It was fortunate that this vaccine technology was waiting in the wings when the pandemic began, but not enough time has passed to have completed phase III trials or to have obtained long-term data.[29] Courts generally do not grant requests to access to experimental drugs, even in dire circumstances.[30] Some terminal patients gain access to drug programs before full FDA approval, but there is no due process right to obtain experimental drugs even as a terminally ill, mentally competent patient with no other options.[31] It does not follow that courts should idly permit states and employers to constructively force experimental drugs upon Americans.

The Court in *Jacobson* suggested its decision ought to be applied narrowly and warned against local governments conceivably using it to "go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."[32] The state police powers to protect public health validated by *Jacobson* have not changed, but the disease has. As another year with coronavirus begins, and some Americans are still being barred from school and work based on refusal to vaccinate, courts ought to quash misapplication of the *Jacobson* decision and prevent federal authorities from overstepping boundaries. Perhaps a good question for all of us to ask, regarding both state and federal authorities, is this: Why do so many Americans feel that their governments are not worthy of trust? ○

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A HIGHWIRE ACT: Why Suspended Government Action on User Tracking Programs Leaves Individual Privacy Interests Hanging in the Balance

By: Hunter Roser

We often contemplate and express to one another our dreams and desires, because it is human nature to hope or plan for things we want for ourselves. We don't always act on them, but to entertain a thought or conversation costs nothing where there is no immediate intent to act on it, and it is part of the way we impart to ourselves and to others a hopefulness for the future. Consider a man who has always wished to go on a trip to Hawaii; he speaks about it frequently and may even research flights and lodgings, regardless of whether or not he actually intends on planning it. Then suddenly, the ads appearing across his Facebook and other various social media and frequently visited websites begin to include with increasing frequency roundtrip tickets, restaurants, and everything one needs to complete the perfect trip to Hawaii. Such a person may at first glance be struck by the seemingly impossible coincidence, but it is in fact rather simple, and it's no coincidence.

As technology continues to become more prevalent, it has the potential to become more intrusive. United States citizens are granted a privacy right under the Fourth Amendment which states: "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."[1] Federal privacy law expanded greatly in 1986 with the passing of the Electronic Communications Privacy Act (Wire Tap Act) of 1986.[2] The Wire Tap Act protects wire, oral, and electronic communications while those communications are being made, are in transit, and when they are stored on computers.[3] The Act applies to email, telephone conversations, and data stored electronically. [4]

Since the Wire Tap Act was passed, technology has advanced well beyond what was available or contemplated at the time, and it has become connected to everything we do in our daily lives[5] The advancement of technology comes with many risks. One of those risks is privacy among social media users.

One of the most common ways that privacy rights have been seen to be breached by these social media platforms is through their user tracking programs.[6] These user tracking programs are operated through "cookies,"[7] which are small text files placed on a user's computer to store information about the user and her preferences.[8] Websites use cookies both to offer personalized experiences to users and to track online behavior and usage patterns to tailor online ads to groups of users based on demographics or likely purchasing behavior.[9] Cookies are often placed without users' express knowledge or consent.[10] These programs raise additional privacy concerns to the extent that they capture and transmit data about individual users.[11] This area of law has been scraped on the surface but has not been so clear when it comes to the correlation between privacy concerns and user tracking.

The legal system has dealt with many cases concerning First Amendment rights and social media but has only handled a few when it comes to privacy concerns amongst its users. One of the first instances in which courts began to encounter user tracking programs was in 2001 in the Southern District of New York in *In re Doubleclick Privacy Litigation,*[12] the names, email addresses, home, business addresses, telephone numbers, and Internet searches of millions of users.[13] The court held that DoubleClick did not violate any privacy rights of any user because DoubleClick gave its users an option to opt-out of being tracked, and it did not make use of any user information that wasn't described in the terms of agreement, and so the users were never harmed.[14] While the Court's decision was not in favor of individual privacy interests, it held to expose the intrusive programs social media platforms use today.

Privacy concerns and social media tracking drew even greater attention in *In re Facebook Privacy Litigation*,[15] in which a group of individuals filed a breach of contract claim against Facebook under the Wire Tap Act.[16] The plaintiffs alleged that Facebook knowingly transmitted personal information about them to third-party advertisers without their consent.[17] Facebook transmitted user information (including names, gender, and pictures) to third parties each time a user clicked on one of its advertisements.[18] The plaintiffs sought monetary relief, but the court held for Facebook in the Northern District of California as well as on appeal.[19] This case illustrated the power of social media platforms like Facebook and the urgent need for the law to catch up to technological advancements, while companies such as Facebook continue to exploit the personal information of their users.

On the other hand, such user tracking programs are in some ways seen to have a beneficial effect, which may be why courts have not ruled out their usage. These tracking programs have shown to be helpful to improve the interface of the internet.[20] They also may users themselves by customizing their websites, programs, and platforms to their liking rather than being overly broad.[21] Lastly, these tracking programs also help the economy flourish by allowing businesses to see what their consumer pool may likely be interested in.[22]

Overall, social media has exacerbated a privacy issue that has existed since the growth of the Internet,[23] but no law has been passed to prohibit or sufficiently limit these invasive measures, leaving this significant vulnerability to individual privacy interests largely unchecked. Therefore, as the technological world continues to turn, it remains to be seen whether appreciation and understanding of the issue by lawmakers and judges will finally begin to turn with it.

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Article 13

THE RIGHT TO TRAVEL IN THE MIDDLE OF A PANDEMIC

By: Adam Cretella

In the middle of a COVID-19 pandemic that has taken the world by storm, there are a growing number of legal issues that have been and will likely continue to be disputed in the near future. For example, vaccination mandates have been challenged[1], and certain mask mandates have been struck down as violative of the free exercise clause.[2] This article will explore the potential legal outcome should there be any state or federal law that imposes restrictions on travel. As the United States has already begun to impose restrictions on international travelers, it is possible that a vaccine passport system may be adopted for domestic travelers as well.[3]

Though the word "travel" is not found anywhere in the Constitution, the "constitutional right to travel from one State to another is firmly embedded in our jurisprudence."[4] In *Saenz v. Roe*, the Supreme Court explained that the right to travel consists of three components: (1) the right of citizens to enter and leave another state; (2) the "right to be treated as a welcome visitor" in another state; and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[5] The third was at issue in *Saenz*.[6] The Court explained that the third component of the right to travel is protected under the Fourteenth Amendment's Privileges and Immunities Clause.[7] As a result, it held that a law limiting welfare benefits for California residents who had not lived in the state for longer than one year was unconstitutional.[8]

Similarly, in *Shapiro v. Thompson*, the Supreme Court addressed the constitutionality of welfare assistance eligibility requirements in Connecticut, Pennsylvania, and Washington, D.C.[9] The Court explained that the Constitution ensures that "all citizens be free to travel throughout the length and breadth of our land uninhibited by [any law that] unreasonably burden[s] or restrict[s] this movement."[10] Further, the Court clarified that any law which serves to penalize the right to travel is unconstitutional unless it is shown to be necessary to promote a compelling state interest.[11]

It is unclear as to whether a vaccine passport law would be challenged based on equal protection or as a violation of the Privileges and Immunities Clause. However, based on the Supreme Court's characterization of the right to travel in each of these cases, it seems likely that a vaccine passport would be subject to strict scrutiny. The question then becomes whether reducing the spread of COVID-19 is a compelling state interest, and whether vaccine passport laws would be necessary to achieve that interest.

A potential outcome is that the courts would rely on modern science to determine if there is a compelling state interest. As of late, the governing authority for writing pandemic related policy has been the Center for Disease Control and Prevention ("CDC"). While many are critical of the CDC's authoritative position in our political process, courts may conclude that the CDC's opinion on the efficacy of travel restrictions is a sufficient basis for implementing travel restrictions. ○

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FREE SPEECH ACROSS THE POND

By: Jack Garwood

Prince Harry, ex-member of the British Royal Family, recently stated (in the context of a discussion on freedom of speech): "I've got so much I want to say about the First Amendment as I sort of understand it, but it is bonkers."[1] Implicit in his statement is that legislatures should be able to "make [] law[s] . . . abridging the freedom of speech, [and] of the press."[2] Luckily, the U.S. Supreme Court has consistently reaffirmed that "[t]he Government has [no] interest in preventing speech expressing ideas that offend."[3] But in the U.K., the government thinks differently.[4] And the populace, particularly young people, agree: less than half of students support free speech, with many expressing a preference for banning speech they dislike.[5]

There have been several examples of the state (ab)using its power to suppress speech it finds disagreeable. Harry Miller received a visit from the police after posting "gender critical" tweets which were reported to law enforcement.[6] One of the tweets stated: "I was assigned mammal at birth, but my orientation is fish. Don't mis-species me."[7] Another said, "the worst thing about cancer" is "[i]t's transphobic."[8] Miller also received a follow-up phone-call from the officer who "left him with the impression that he could face criminal prosecution if he continued to tweet."[9] Similarly, Darren Grimes, a prominent right-of-center journalist, and Dr. David Starkey, a conservative historian, were investigated by police because of an interview Grimes conducted with Starkey.[10] In the interview, Starkey told Grimes that "slavery 'was not genocide' because 'otherwise there wouldn't be so many damn blacks in Africa or Britain would there? An awful lot of them survived.'"[11] Problematic comments, most would agree. But worthy of police investigation? Not if one values freedom.

Perhaps the most high-profile example of a speech-related prosecution was that of Paul Chambers, who was convicted—and fined £1,000—for a tweet "jokingly threaten[ing] to blow up a local airport" out of "frustration that it was closed because of bad weather."[12] Al Murray, a comedian defending Chambers' right to free speech, noted the irony of the prosecution.[13] "The funniest thing is hearing [the tweet] read out in court by a [prosecutor] in his wig," Murray said; despite the seriousness of the proceeding, when the tweet was "said deadpan by a [prosecutor] it's funny, it's obviously a joke."[14]

More recently, Mark Meechan was prosecuted for making a crude Nazi joke.[15] Because his girlfriend thought his pug dog was "very cute," he endeavored to teach it to be the "least cute thing in the world": a Nazi.[16] The punchline? On command (in this case, the command being "gas the Jews" in the tone one would say "Here, boy!"), the dog would perform a canine Nazi salute.[17] While the humor of this particular act is debatable, its criminality should not be.

In the United States, Meechan's conduct would almost certainly have been protected by the First Amendment. Laws that "target speech based on its communicative content . . . because of . . . the idea[s] or message[s] expressed" are "presumptively unconstitutional."[18] So, laws that give the government broad latitude to prosecute "offensive" speech are unlikely to survive constitutional scrutiny, because "giving offense is a viewpoint."[19] Indeed, "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[20] Some may argue that is a bad thing. However, to people this side of the Atlantic who yearn for severe restrictions on offensive speech, ask yourself: just "*who* is competent to decide what offends?"[21]

Prince Harry calls the First Amendment "bonkers."[22] Ironically, he is able to make such a statement *because* of the First Amendment. And, luckily, the views of royals seeking to suppress speech they find disagreeable have not prevailed this side of the Atlantic since 1776. ○

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THE HARM OF "HUMAN RIGHTS" NOT ROOTED IN THE NATURAL LAW

By: Joshua Mireles

In the 1963 Encyclical, *Pacem in Terris*, Pope John XXIII declares that human rights stem not from an arbitrary legal fiction, but from the dignity of the human person: "[e]ach individual man is truly a person. His is a nature, that is, endowed with intelligence and free will. As such he has rights and duties, which together flow as a direct consequence from his nature. These rights and duties are universal and inviolable, and therefore altogether inalienable."[1] Rights, according to the Pope, are rooted firmly in an ontological truth: man is made in God's image.[2]

America's founding fathers shared a similar vision of human rights as grounded in natural law. The Declaration of Independence posits as much when it claims that "[m]en are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."[3] Importantly, the "Pursuit of Happiness," as viewed by the framers of the Constitution, does not describe the chase of mere pleasure or convenience, but the pursuit of *eudamonia*, the Aristotelian understanding of happiness as a life of virtue.[4] Similar to the Church, the founding fathers saw the purpose of government as virtue. In the words of John Adams: "[i]f there is a form of government then, whose principles and foundation is virtue, will not every sober man acknowledge it better calculated to promote general happiness than any other form?"[5] Recognizing these rights as inalienable and God-given, the founders saw the government as a means to protect the rights of every citizen, so that they might become virtuous.

This vision of human rights is incomplete without recognizing two essential notions: (1) that rights are inextricable from duties and (2) that rights are inextricable from justice. To put the first simply, every human right imposes a duty on others to respect that right and not infringe upon it. Hence, it is the duty of every man in a society to respect the rights of his neighbor, and he has the right to expect the same in return.[6]

To address the second, a right is inseparable from justice, because the end of any right is to free one to be virtuous. According to Tocqueville: "[t]he idea of rights is nothing other than the idea of virtue introduced into the political world."[7] One has a right to food because food is necessary for life, which is in turn necessary for a life of virtue. Similarly, one has a right to worship God because worshipping God is necessary for man to achieve salvation. Any true human right is in furtherance of the natural law. The corollary to this point is that any alleged "right" that is not aligned with justice is no right at all.

Contrast this view of human rights with the disturbing trend of modern jurisprudence to create rights founded not upon natural law but upon personal autonomy and convenience. "Certain currents of modern thought have gone so far as to exalt freedom to such an extent that it becomes an absolute, which would then be the source of values."[8] A pointed example of this trend is found in the oft-cited, controversial right to abortion voiced in the opinion of *Roe v. Wade:* "[t]he Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[9] According to the court, there exists a right to privacy that extends to a woman's ability to choose an abortion free from state infringement. This "right" for the court is not ordered toward the perfection of humans as rational creatures. Rather, it is ordered toward preventing pain and hardship of the mother. The court lists the factors giving rise to this right as follows:

> When choosing to abort a child,] specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

The decision in *Roe v. Wade* is a poignant example of the harm that comes from philosophically separating rights from their end. The purpose of the right created in *Roe v. Wade* is not virtue or human fulfillment, but convenience and the avoidance of difficulty. The result? Countless deaths of innocent human beings. Not only is abortion unnecessary for a life of virtue, but it is contradictory to it. Certainly, the court had the wellbeing of women in mind, but their opinion created an artificial right that contradicts the natural law and advances vice.[10]

Unfortunately, *Roe v. Wade* is not an isolated example of the court or legislature creating rights out of thin air. There is a dire need in modern jurisprudence to return to a conception of rights and recognize that a good society is one ordered toward, not against, virtue. As Catholic and Christian lawyers, it is important to recognize the historical and philosophical roots of the ideas that run contrary to our faith, and how they fall short.

> It is vitally necessary for [those in power] to endeavor, in the light of Christian faith, and with love as their guide, to ensure that every institution, whether economic, social, cultural or political, be such as not to obstruct but rather to facilitate man's self-betterment, both in the natural and in the supernatural

order . . . .We are encouraged to hope that many more men, Christians especially, will join [this] cause, spurred on by love and the realization of their duty. O

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WHETHER PRESIDENT BIDEN'S FEDERAL EMPLOYEE VACCINE MANDATE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

By: Alexis Goodwin

The Fifth Amendment to the United States Constitution provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law."[1] Article I grants the Legislative Branch powers to Congress,[2] whereas Article II of the Constitution grants the Executive Branch powers to the President.[3] Nothing in the Constitution grants power in the President to promulgate an executive order; however, "such orders are accepted as an inherent aspect of presidential power."[4] The Due Process Clause includes both procedural due process and substantive due process and requires, at a minimum, notice and hearing on the issue.[5] This article analyzes the constitutionality of Executive Order 14,043 as it relates to the Due Process Clause of the Fifth Amendment.

The United States Supreme Court has long held that states can compel vaccinations when faced with an epidemic or public health emergency.[6] What *Jacobson v. Massachusetts* did not determine, however, is whether the federal government, and specifically the President, has such a power. Executive Order 14,043 does not comply with the Due Process Clause of the Fifth Amendment because President Biden acted without Congressional authorization or the presidential power granted unto him by Article II of the Constitution,[7] when the Occupational Safety and Health Administration, as an executive agency, issued the emergency temporary standard[8].

Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* set forth three situations in which a president can act, which can aid courts in determining whether a president acted within his constitutional authority regarding an executive order, or other presidential decree.[9] The first situation is when the President acts pursuant to express or implied authorization from Congress and because the President is acting under congressional authority, great deference is given to the actions of the President and places a heavy burden on the challenger to find such a law unconstitutional.[10] The second situation occurs when Congress has not granted nor denied the President authority to act, and such inaction arguably invites the President to act, and the validity of the presidential power depends on the particular circumstances and events at issue.[11] Finally, the third situation is where the President acts in a way that is incompatible or contrary to the expressed or implied will or authority of Congress, and therefore the presidential power is at its lowest and the President must rely solely on the constitutional executive powers.[12]

Arguably, President Biden acted under scenario two or three as described by Justice Jackson. In fact, shortly after the vaccine mandate was promulgated, the United States Senate disapproved of the OSHA regulation.[13] As previously stated, when the President acts contrary to Congress' authority, the President must act on his Constitutional Executive Powers. Here, President Biden attempted to act under Congressional authority pursuant to Sections 3301, 3302, and 7301 of Title 5 of the United States Code and the guidance provided by the Occupational Safety and Health Agency was purportedly authorized under the Occupational Safety and Health Act.[14] However, this argument stretches the intent of Congress when enacting these statutes, and instead the Biden Administration is using these statutory authorities as a "work-around" to unilaterally enact legislation.[15] Thus, under the Executive Powers, President Biden acted outside of his authority and the vaccine mandates are unlawful on that ground.

Assuming *arguendo* that President Biden acted pursuant to his Executive Powers, the Executive Order still violates the Due Process Clause of the Fifth Amendment. As Justice Harlan explained in his dissenting opinion in *Poe v. Ullman*, "due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness," which cannot be "reduced to any formula" because "[n]o formula could serve as a substitute . . . for judgment and restraint."[16] Justice Harlan went on to explain that liberty "includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."[17]

At its most basic level, the Due Process Clause requires that there be notice and an opportunity to be heard.[18] However, OSHA attempted to circumvent these traditional Due Process requirements under the Emergency Temporary Standard ("ETS") exception. On November 5, 2021, OSHA promulgated its vaccine mandate as an Emergency Temporary Standard and was not required to develop this ETS "using a rigorous process that includes notice, comment, and an opportunity for a public hearing."[19] Rather, OSHA was merely required to show that (1) "employees are exposed to grave danger from exposure to substances or agents determined to be

toxic or physically harmful or from new hazards, and (2) that the emergency standard is necessary to protect employees from such danger."[20] However, the COVID-19 pandemic is not toxic nor can it be construed as new since it was discovered over two years ago and vaccines have been readily available for over one year. The only possibility remaining is that COVID-19 can be considered physically harmful. The second ETS element requires the vaccine mandate to be necessary to protect employees from the physically harmful danger that COVID-19 presents in the workplace.[21] However, this vaccine mandate "is no everyday exercise of federal power . . . It is instead a significant encroachment into the lives – and health – of a vast number of employees.[22] As has been argued throughout this article:

> Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread . . . everywhere else that people gather. That kind of universal risk is no different from day-to-day dangers that all face . . . Permitting OSHA to regulate the hazards of daily life – simply because most Americans have jobs and face those same risks while on the clock – would significantly expand OSHA's regulatory authority without clear congressional authorization.[23]

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THE EXPANSION OF THE FIRST AMENDMENT IN THE AGE OF SOCIAL MEDIA

By: Zachary Lecius

The First Amendment, initiated by the Founding Fathers, gave American citizens the right to free speech & expression, the right to establish a religion, and the right to a free press.[1] While the Supreme Court has developed different tests to determine whether the United States government has impeded upon a citizen's right to free speech, they have yet to expand said tests to disallow private social media platforms from restricting the user's right to free speech.[2] Since these social media platforms are private companies, they may censor any content that they would like.[3] The Supreme Court has not decided yet whether to expand First Amendment protections to social media platforms because in doing so, it could open-the-door to an unprecedented number of problems for any private U.S. company.[4] Since social media has become a revolutionary tool to spread information, ideas, and beliefs, this article begs the question whether it is time to expand First Amendment protections from not just the government or state action, but to now protect individuals and their freedom of expression from private, social media platforms since the freedom of expression is a basic human right.

A fundamental case in determining whether there can be a restriction of free speech on social media platforms is *Packingham v. North Carolina*.[5] In *Packingham*, the Supreme Court decided that a North Carolina statute prohibiting registered sex offenders from using social media platforms was unconstitutional.[6] Justice Kennedy delivered the opinion of the Court and stated that social media mirrored that of a "modern public square."[7] A public forum in terms of free speech is "property that the State has opened for expressive activity by part or all of the public."[8] Justice Kennedy further stated that "[t]hese websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'"[9] This public forum doctrine if expanded to digital platforms, would not allow social media websites to censor users.

Justice Thomas further discussed a mechanism for allowing the expansion of the First Amendment protections to encompass social media websites in his concurring opinion in *Biden v. Knight First Amendment Institute at Columbia University*[10] Justice Thomas first discussed the public forum doctrine as stated above, but he also analogized digital platforms to common carriers.[11] A common carrier is an entity that holds itself out to the public as being subject to control by the Legislature.[12] Common carriers are subject to First Amendment regulations because, although they are private entities, they serve the greater public.[13] Examples include railroad and telegraph companies. Justice Thomas explained that "[a] traditional

telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way."[14] He continued that these social media websites can narrow and control information of more than three billion users, making them similar to a common carrier such as the telegraph company.[15]

Furthermore, Justice Thomas discussed 47 U.S.C. § 230(c)(2)(A), which states that a computer service provider shall not be held liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . ."[16] Justice Thomas explained that under this statute, "federal law dictates that companies cannot 'be treated as the publisher or speaker' of information that they merely distribute."[17] So, companies such as Facebook, Twitter, and Instagram that hold themselves out to the public, even though they are private entities, may not be construed as a publisher censoring speech.

However, 47 U.S.C. § 230(c)(2)(A) also does not define "good faith."[18] It may be that the "good faith" restriction was not meant to "stifle viewpoints with which they disagree" nor "allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike."[19] This begs the question how the United States government can effectively enforce the statute? It seems that in the past few years these "titans" have continuously censored information that is not attuned to their agenda without recourse from the government.

In conclusion, while there may be a need for First Amendment protections from private entities that hold themselves out to be the "modern public forums," there will likely be much debate as to the repercussions that will occur due to the expansion of free speech over private entities. As for now, legal arguments will continuously develop in ways that allow for the expansion of the First Amendment to protect American citizens.

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Article 21

FLORIDA'S POLL TAX- WHY FLORIDA'S FELONS CAN FORGET VOTING

By: Sarah Baulac

Hanging Chad—merely two words are needed to paint a picture of Florida's marred voting history.[1] While a lot has changed in the twenty years since the 2000 presidential election, one thing remains the same—the state's substandard procedures are likely to keep some votes from counting. Specifically, Florida is one of six states that "requir[es] felony-related financial obligations to be met before regaining access to the ballot box."[2] These onerous financial obligations and lack of centralized payment processes act as a modern-day poll tax keeping those who have otherwise served their sentence from casting their vote.

In 2018, Florida amended its State Constitution to allow felons to vote if they complete the terms of their sentence, including parole or probation.[3] However, almost immediately thereafter, lawmakers passed a statute requiring that felons pay all outstanding court fines, fees, and restitution before their voting rights were fully restored.[4] The Division of Elections provides some guidance to those seeking to pay their outstanding fees,[5] but ultimately a unified payment system does not exist.[6]

Florida's inability (or reluctance) to set up a payment recordkeeping or payment system coupled with the disparate distribution of fees leaves felons disenfranchised in violation of Article 21 of the Universal Declaration of Human Rights. Article 21 promulgates, in part, that: "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and *equal suffrage* . . . ."[7]

While the Supreme Court "has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens," it has also recognized that the right "is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways."[8] Yet, Florida has fully taken advantage of this power in a way that does not comport with Article 21. The Sentencing Project estimates that despite the 2018 ballot referendum that promised to restore their voting rights, "over 1.1 million people [are] currently banned from voting – often because they cannot afford to pay court-ordered monetary sanctions or because the state is not obligated to tell them the amount of their sanction."[9] Furthermore, it is estimated that, in Florida, "more than one in seven African Americans is disenfranchised, twice the national average for African Americans."[10]

In 2018, seventeen individuals and three organizations brought suit in the Northern District of Florida and sought declaratory and injunctive relief.[11] Plaintiffs alleged that the state's legislative scheme and implementation of the system for restoring the right to vote violated the First, Fourteenth, and Twenty-Fourth Amendments.[12] Ultimately, the District Court granted the injunction—estopping the Secretary of State from taking any action that prevented an individual plaintiff from applying or registering to vote based only on a failure to pay a financial obligation that the plaintiff asserted he is genuinely unable to pay.[13] The Court also recognized that the Plaintiffs' averments carried considerable force—namely, that:

> even if a state can properly condition restoration of a felon's right to vote on payment of financial obligations included in a sentence . . . Florida's records of the financial obligations are decentralized, often accessible only with great difficulty, sometimes inconsistent, and sometimes missing altogether . . . create[ing] administrative difficulties that are sometimes unavoidable.[14]

Plaintiffs further argued, and the Court recognized, that "a felon who claims a right to vote and turns out to be wrong may face criminal prosecution . . . [and] if Florida does not clean up its records, some genuinely eligible voters may choose to forgo voting rather than risk prosecution."[15]

Eventually, the Eleventh Circuit Court of Appeals reversed the judgment of the District Court and vacated the challenged portions of its injunction.[16] In July 2020, the Supreme Court declined to vacate the stay of the cross appeal.[17] The only written opinion in the case originated with Justice Sotomayor.[18] She opined that the case "implicate[d] the 'fundamental political right' to vote."[19] Furthermore, she noted that the District Court had at one point, "concluded that Florida's pay-to-vote system create[d] an unconstitutional wealth barrier to voting . . . [and] that 'the overwhelming majority of felons who have not paid their [legal financial obligations] in full, but who are otherwise eligible to vote, [were] genuinely unable to pay the required amount.'"[20]

Importantly, the Supreme Court has previously held that: "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process . . . . In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause."[21] Here too, Florida's voting rules foster this "invidious discrimination" and keep ex-felons "trapped in a system that seems designed to thwart [them]."[22] This is simply not the equal suffrage that Article 21 requires.

While in September 2020 the Florida Rights Restoration Coalition announced that they had raised $20 million dollars to pay the fines and fees of thousands of Florida citizens,[23] the issue remains pervasive as Florida approaches its 2022 gubernatorial election. Although private donors and non-profits are attempting to fill the void,[24] Florida's modern-day poll tax likely remains violative of Article 21 as former felons are unduly left with big debt without a clear way to pay—inequitably blocking their avenue to the polls.

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Article 23

COLLEGE ATHLETES HAVE A HUMAN RIGHT TO REAP THE REWARDS OF THEIR IMAGES

By: Kyle Jordan

COLLEGE ATHLETES HAVE A HUMAN RIGHT TO REAP THE REWARDS OF THEIR IMAGE AND LIKENESS

For years, college athletes have had to "sit on the sidelines" when it comes to benefiting from their own image and likeness. College athletic programs have made billions of dollars off of their athletes, while the athletes themselves have seen little to nothing of the "massive money-raising enterprise [built] on the backs of student athletes . . . ."[1] That is, of course, until the ruling in *National Collegiate Athletic Association v. Alston*, which allows college athletes a pathway to benefitting off

their own image and likeness, forever changing college athletics.[2]

In 1948, the United Nations created the Universal Declaration of Human Rights (UDHR).[3] Among the rights outlined by the UDHR is the right to work, and that "[e]veryone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."[4] This is where the real argument begins. What is "just and favorable remuneration" for college athletes?

First, how much do college athletics programs bring in annually? The top twenty most profitable college football programs in the United States alone brought in $925 million in just one year.[5] The University of Texas led the way with a whopping $92 million.[6] During that time, college athletes were not allowed to make any money off their image and likeness. When the NCAA was founded in the early 1900's, their version of amateurism prohibited financial remuneration to student-athletes.[7] The NCAA leads the way in profits from college athletics and some have even accused the NCAA of acting like a cartel.[8] In 2017 alone, the NCAA reported $1.1 billion in revenue from college athletics.[9] While the NCAA is a nonprofit organization under federal tax code, it appears its main priority is making money.[10] The NCAA's executives make six-figure salaries, and the organization sells television rights for hundreds of millions of dollars every year.[11] In 2011, the NCAA ended the year with over $40 million in surplus.[12] Of course, college athletes can get scholarships that make college free, or stipends to help them pay for food and rent, but how does this compare to the billion dollar revenue stream that college's themselves and the NCAA are making? How are the college athletes getting "just and favorable remuneration" from scholarships and stipends when the work they do is generating billions in revenue?

The NCAA has long controlled college athletics and has received a majority of the profits for the privilege. How can this be the case? One of the major reasons the NCAA is so profitable is because of the 1984 Supreme Court case *NCAA v. Board Regents of the University of Oklahoma*.[13] While the Supreme Court struck down the NCAA's television plan for violating antitrust law, they also ruled that college athletes are held to a lower standard in regard to federal antitrust laws.[15] This ruling allowed the NCAA to take advantage of college athletes image and likeness and restrain athletes from profiting from them.[16] This opened the door to a variety of issues, such as former college athletes being included in sports video games – receiving no royalties – while the NCAA made millions from their image and likeness.[17] From this decision ensued over three decades of fighting by college athletes for their fair share of these billion dollar profits, culminating with the *Alston* decision, in which the Supreme Court finally decided to step in for college athletes.

In *Alston*, several Division 1 athletes filed suit against the NCAA for their restriction on non-cash education-related benefits in violation of the Sherman Act.[17] The Supreme Court ruled that the status of college athletes as amateurs does not, by that merit, allow for a lower standard under the Sherman Act.[18] Therefore, their restriction on non-cash education-related benefits violated the Sherman Act.[19]

The Supreme Court in *Alston* not only allows athletes across the country to finally receive the benefits from their own imagine and likeness, but also allows states and colleges to change rules to allow athletes to earn benefits from their image and likeness.[20] From here arises the issue of whether or not each state and school will allow for athletes to benefit from their image and likeness. Where the Supreme Court makes its sentiments on an issue so clear, but leaves so much room for uncertainty, it would seem reasonable for Congress to pass a bill that gives a set form of rules on how each college can pay their athletes. While the fight for college athletes gaining their fair compensation is not over, the scale is beginning to tip in favor of hardworking college athletes, rather than the institution which has for so long profited from their sweat equity.

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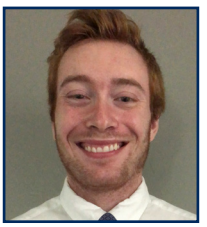
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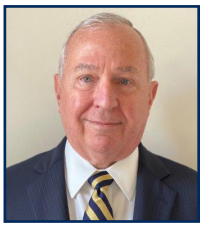
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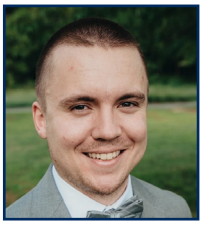
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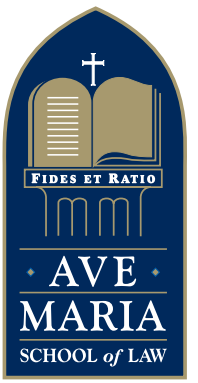

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