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BROCCOLI AND APPLESAUCE:
A TRIBUTE TO JUSTICE ANTONIN SCALIA

Justice Scalia was not one to water down his position or understatement his argument. In the oral arguments concerning Obamacare, he asked Donald Verrilli legendary question: “Could you define the market — everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli.” Later, in his dissent in *King v. Burwell*, Justice Antonin Scalia called the majority’s reasoning “pure applesauce.” Apart from his penchant for food metaphors in his position on Obamacare, Justice Scalia was a formidable thinker and sharp writer who, regardless of whether he was writing the majority opinion or a scathing dissent, made outstanding contributions to U.S. jurisprudence.

Antonin Gregory Scalia was born to an Italian immigrant couple in Trenton, New Jersey on March 11, 1936. The family moved to New York City when he was five years old. Demonstrate the great academic abilities from a young age, Scalia graduated first in his class at St. Francis Xavier, a military prep school. He then attended Georgetown University where he graduated summa cum laude and as valedictorian in 1957. Scalia went on to Harvard Law School where he served as editor of the *Harvard Law Review* and graduated magna cum laude in 1960. He served as the head of various government offices, agencies, and conferences during the Nixon and Ford administrations. From 1977 to 1982 Scalia left government and joined the faculty of the University of Chicago Law School. He was also a visiting professor at Georgetown and Stanford Universities. President Ronald Reagan appointed him to the U.S. Court of Appeals for the District of Columbia Circuit in 1982. Reagan appointed him to the Supreme Court four years later, where he was approved by a Senate vote of 98-0.

During his years on the bench, Justice Scalia was a fervent and vigorous advocate of two schools of legal thought: originalism and textualism. Originalism holds that judges should interpret the Constitution according to the meaning of its language at the time it was written. Textualism considers the words of legal statutes and frowns on turning to outside sources like statements from members of Congress about the meaning and purpose of laws.

His intellectual integrity and constant adherence to both principles meant that he left an indelible mark. Fiercely conservative in many of his opinions, Scalia frequently crossed swords with Living Constitution proponents, whom he often criticized for imposing their own legal and social views on the Constitution. And yet, in an age where the judiciary is getting increasingly partisan, Scalia was admired for consistently ruling out of principle. He always placed originalism above the fray of politics. Prizing philosophical rigor and intellectual integrity, Scalia inspired vigorous debate within the Supreme Court’s conservative bloc and inspired a whole new generation of young lawyers by showing that it is possible to be an intellectually and philosophically fulfilled conservative in the legal profession.

Regardless of whether one agrees with Justice Scalia’s positions, one must admit that the debate surrounding those issues is better for his arguments. He has made an lasting impression on U.S. jurisprudence and for that, he deserves to be remembered as a great Supreme Court justice.
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ABOUT WCULR

The Wheaton College Undergraduate Law Review is an organization at Wheaton College (IL) dedicated to publishing an undergraduate law review that glorifies God and exalts Christ through faithful scholarship, commitment to excellence, and a balanced engagement in the multifaceted nature of legal issues.

VISION STATEMENT

This review seeks to promote the research of important legal issues by Wheaton College students and to create a forum for discussion and thoughtful analysis of such issues. Additionally, the Review intends to assist students in acclimating to the environment of a law review in preparation for law school and to offer students leadership opportunities in the arenas of law, writing, research, and management.

COMMUNITY RESPONSIBILITY

Being a part of the greater campus community and of the body of believers worldwide, this club seeks to further the kingdom of God in the sphere of legal scholarship through faithful scholarship, following Christ, commitment to excellence, and constantly striving to improve this publication to be a leading name among undergraduate law reviews. This club affirms the Wheaton College Community Covenant and Statement of Faith as guiding documents for life and doctrine at Wheaton College and, by extension, all groups and clubs that exist at Wheaton College.

SUBMISSIONS

If you would at all be interested in submitting an article for consideration for publication in the Wheaton College Undergraduate Law Review, please do so! Articles must follow the following guidelines:

a. All submissions must be your original work. Articles should pertain to an issue in international or domestic law. Possible topics include but are not limited to: landmark Supreme Court cases, federal regulations, state-level policies, and much more.
b. Length, or lack thereof, is not an issue. Please feel free to submit pieces of any length.
c. Please include a title and bio that includes your name, year, major, and school.
d. Send all submissions to wculr@my.wheaton.edu.
e. Please include proper citation information, including source, author, and page numbers where appropriate.

We look forward to receiving your submissions! Happy writing!

DISCLAIMER

The views expressed by the contributors are not necessarily those of Wheaton College or of the Editorial Board, Staff Advisor, or Faculty Advisor of the Wheaton College Undergraduate Law Review. While every effort has been made to ensure the accuracy and completeness of information contained in this journal, the editors cannot accept responsibility for any errors, inaccuracies, omissions, or inconsistencies contained herein.

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CHRISTO ET REGNU EJUS.
For Christ and His Kingdom.

“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”
~ JOHN MILTON
Dear Reader,

When I was first approached about helping to start a student law review at Wheaton nearly two years ago, I was immediately excited, as the appearance of this journal could signal the next stage in the development of a budding legal community on campus. There is, without question, widespread interest in both legal matters and the study of law on Wheaton’s campus, yet for quite some time there has been no formal extracurricular outlet for students interested in legal research, writing, and discussion. Now is a most appropriate time for such an outlet.

In our present era of shifting legal discourse, influenced by both fluctuating political contours and a globalized world, encouraging undergraduate engagement in the legal sphere is a necessity. If college students either feel that they cannot contribute to legal discourse or simply choose not to, how are they to know if they have any chance of making a difference in the public or private spheres through careers as lawyers, judges, attorney generals, or whatever other path they could follow given the proper motivations? And even if some do enter law school or related careers beyond, how can they know they’re doing it for the right reasons?

This journal has both a spiritual and a practical purpose. As is the case with everything we do as followers of Christ, we publish this journal for the glory of our Maker and Savior, from whom comes our barest foundations of morality. However, we do not say this lightly or with an intent to encourage a spirit of partisanship, a tendency towards theological snobbery, or a departure from careful inquiry using the minds God has given us. This journal can further the efforts of Christian and non-Christian legal scholars devoted to using such reasoning to be agents of justice, mercy, and grace.

Pragmatically, this journal also provides students with an unusual opportunity to air their legal opinions in a formal publication that can reach the community of Wheaton students, faculty, alumni, and beyond. Undergoing the careful processes of detailed legal research, crafting tight and persuasive arguments, and collaborating with an extraordinary team of editors and designers to produce a final article will be a satisfying process for those with a long-term interest in some aspect of law. For their audiences, the opportunity to read such polished work can also be satisfying, and hopefully educational as well.

In conclusion, as we begin this new chapter in the story of Wheaton’s legal community, it is our great desire to further the spiritual and intellectual flourishing of our writers, editors, and readers by encouraging their participation in the important legal debates of our day, perhaps helping them to know whether a future in law truly grabs their interest. Provoking rigorous inquiry into a range of issues will further an atmosphere of reasonable, civil dialogue that can illuminate diverse perspectives on court cases or laws currently in the public eye. We think that in the end, embarking on such a quest can only be for the betterment of our community.

With the Highest Hopes,

Nathan Heath
Editor-in-Chief Emeritus

“Justice is itself the great standing policy of civil society; and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all.”
-Edmund Burke
Dear Reader,

It is with pride and excitement that I, on behalf of the Wheaton College Undergraduate Law Review Editorial Board, present to you the inaugural edition of the Wheaton College Undergraduate Law Review, Volume 1, Number 1, Spring 2016. This is a historic moment not only for the WCULR but also for the pre-law community at Wheaton and even more so for the Wheaton community at large. Never before has an undergraduate law review been published at Wheaton College, so this edition holds special significance for all those involved and also for those who, we hope, will be benefited by this work.

Needless to say, such groundbreaking work could not be done by one person alone, or even two or three. This inaugural edition of the Wheaton College Undergraduate Law Review is the product of countless hours contributed by an array of partners. First, we would like to thank those students that submitted their pieces for consideration for publication. Without them, this review would not be possible. Phil Kline and Chris Prescher deserve special mention as two writers who took on the task of writing completely new essays for the purpose of publication in this Review.

Secondly, this Review would not have happened without the unflagging dedication of the students whom I have the privilege to call my colleagues. Thanks to Richard Green, the review includes a piece expositing the U.S. jury system, and on top of that, Drew Bjorklund, Carolyn Weldy, and Joshua Tjahjadi spent numerous hours on painstakingly formatting citations to accord with the Bluebook citation style used by Harvard Law School. Mary Preston Austin, Chris Prescher, Richard Green, and every other editor played a crucial role in reviewing the submissions, editing them, deciding whether to publish them, and honing their arguments for precision and cogency. Many more hours were also spent by Nicole Miller and the editors that helped her to design the layout and turn the submissions from text into a publishable document. This inaugural edition is the result of committed, synergistic teamwork, and I hope that such collaboration will continue to characterize the review as it Lord-willing continues into the future.

With that in mind, what does the WCULR include in this edition? This publication begins with an incisive commentary on the SCOTUS decision Korematsu v. United States (1944) by Phil Kline. Following that, yours truly addresses the issue of state-level public accommodation anti-discrimination laws and explores how their noble intent can be balanced with constitutional rights. Subsequently, two pieces by Richard Green and Gabriella Nicole Siefert explain and advocate for reform of the jury system, respectively. Nathan Kanter then examines the case out of California Sedlock v. Baird with SCOTUS rulings on the Establishment clause in mind. As previously mentioned, our very own Chris Prescher then examines the topic of police brutality and the right to resist, and finally, Emily Fromke concludes this edition by putting forward a case for a hybrid approach to voter identification laws.

In I Corinthians 10, we are instructed, “Whether, then, you eat or drink or whatever you do, do all to the glory of God.” At first glance, this may seem puzzling. How are such mundane, ordinary tasks such as eating or drinking supposed to be done to God’s glory? Yes, healing a lame man, giving sight to the blind, walking on water, surely these are things done to the glory of God, but eating and drinking? The answer is contained in one of the previous verses, verse 26, “For the earth is the Lord’s, and all it contains.” When God finished with His first creation He called it “very good” (Gen. 1:31), and though creation is fallen, it is still good for us to undertake those tasks that God designed us as humans to go about doing. Included within that, I believe, is the call to legal scholarship and to consider the nature of just government. We hope that this Review, undertaken as something that God designed us to do, enlightens the minds of those who read it and brings glory to our Maker and Savior.

For Christ and His Kingdom,

Joshua Romero
Editor-in-Chief
Destined to Pass Away: Japanese Internment and the Eroding Rights that Carved the Path to Korematsu v. United States (1944)

Philip Kline†

ABSTRACT

The landmark SCOTUS ruling Korematsu v. United States (1944) is often regarded as a grave blight on the record of the Supreme Court of the United States. One might think that such unenlightened thinking is an artifact of the past, but in this piece Kline notes that it is a real and present danger even today. To counter this risk, the United States must remember the road that led to Korematsu so that it does not repeat those same mistakes again. With this goal of remembrance in mind, Kline gives a history of the governmental policies and actions that led up to the decision in Korematsu and the legal reasoning that allowed for that decision. In concluding, Kline urges the reader to consider how the decision to reject the principles behind Korematsu might guide the United State’s future actions in the struggle against radical Islam.

“…[M]en have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.” ~ Justice Robert Jackson

In Ernest Hemingway’s novel “The Sun Also Rises,” someone famously asks the character Mike Campbell how he went bankrupt. “Two ways,” Mike says, “[g]radually, then suddenly.” Liberties, like resources, can pass away gradually before disappearing suddenly. A tour through history shows one the “suddenly” times of government overreach. Devoid of context, one might think that there is no way something like that could ever happen again. Yet, eventually, one looks back and sees that something like that did happen again. How? Context reveals a gradual chain of events that made the sudden event possible. These choices and circumstances, taken on their own merits, often seem far less egregious than their end result.

Perhaps few examples in legal history illustrate this truth as well as Korematsu v. United States (1944) and President Franklin D. Roosevelt’s Japanese internment program. While most people readily identify Korematsu as one of the biggest blights on the Supreme Court’s reputation, few seem to think it could ever happen again today. That assumption brushes over the wartime fears, systematic prejudices, and political challenges of the early 1940s, overlooking the patterns that paved the way for Korematsu. Such an approach to legal history, while reassuring, is a false comfort. Personal rights were being eroded long before Korematsu came before the Court, and they were eroded in response to timeless questions that are not easily answered.

It is imperative, then, that every participant in a free society possess a long memory. Anyone who truly wants to avoid the mistakes of the past must understand the gradual progressions that enabled them, lest the sudden outcomes be misinterpreted and distract us from those progressions. This is especially true for legal minds. The

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1 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Justice Robert Jackson concurring).
2 Ernest Hemingway, The Sun Also Rises 136 (1954).
Destined To Pass Away

The course of history suggests that the hallmarks of a free society, like the components of the physical world, eventually atrophy and crumble unless they are attended to and repaired. The institutions that safeguard the law must “be the last, not the first”\(^3\) to give way.

I do not intend to argue here that \textit{Korematsu} was wrongly decided. I already assume that to be the case. The annals of history, the dictates of conscience, and Congress itself have condemned Roosevelt’s internment program and the Court’s justification thereof as a “grave injustice” resulting from “race prejudice.”\(^4\)

Nevertheless, the late Justice Antonin Scalia told a group of law students in 2014 that “you are kidding yourself if you think the same thing will not happen again.”\(^5\) By tracing the history and legal considerations that enabled \textit{Korematsu} to happen in the first place, this paper outlines a snowball effect of cultural attitudes, government actions, and judicial opinions that built on each other to create \textit{Korematsu}. The paper then discusses the complex questions that these circumstances raised and the varying ways legal thinkers have answered them, especially during the \textit{Korematsu} era. In this way, I hope to illuminate sources of tension that continue today and, if left unchecked, could surely lead to similar injustices in the future.

A Cultural Snowball Effect

Even before the events of Pearl Harbor, discrimination against Japanese immigrants in America took many forms. Each prejudicial act seemed to embolden the actors and instigate further partiality. Having settled in the West Coast and taken jobs, the Japanese “displayed a capacity for hard work” that a 1942 government report admitted “seriously threatened to drive down American standards through sheer competition.”\(^6\) This economic envy began to manifest itself in escalating forms of discrimination. In 1906, San Francisco advocated for and passed measures to segregate schools for Japanese children.\(^7\) Similar sentiments existed in other West Coast cities. By publicizing long-simmering tensions, these attitudes likely contributed to increasing numbers of Japanese parents sending their children to supplemental Japanese-language schooling at night or even to Japan for their education.\(^8\)

Meanwhile, diplomatic backlash from Japan resulted in the 1907 “Gentleman’s Agreement” in which President Theodore Roosevelt agreed to protect the rights of Japanese emigrants already in America if Japan helped prevent further emigration. Never officially ratified by Congress, the “Gentleman’s Agreement”\(^9\) was formally replaced by the Johnson-Reed Act of 1924 which explicitly banned Asian immigration, including Japanese immigration.\(^10\)

Even before the Johnson-Reed Act, Americans tried to form legal conditions that would create similar results. The Alien Land Law of 1913 prohibited aliens that were not eligible for citizenship from owning property in California.\(^11\) Because only white persons and some persons of African descent were eligible for naturalization at the time, Japanese were the primary demographic targeted and affected.\(^12\) Similar laws sprung up throughout the

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\(^3\) Youngstown, 343 U.S. at 655 (Justice Robert Jackson concurring).
\(^9\) See \textit{On This Day}, supra note 7.
\(^12\) \textit{Id.}
western half of America over the next decade, predicated on the idea that a people group which cannot be made citizens ought not to add to competition for property and economic gains. In 1923, the state of Washington amended its Alien Land Law to bar Japanese children born in America from owning land in trust for their parents. Japanese education and social circles were becoming increasingly isolated in the U.S. at the same time that America’s Japanese population was effectively cut off from growth via immigration.

All of this social, economic, and legal discrimination eventually affected not only non-citizen Japanese immigrants (referred to as “Issei”) but also the second-generation children of the Issei (known as the “Nisei”). According to the common law principle of birthright citizenship cemented in the 14th amendment, which states that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,” Nisei children were American citizens by virtue of having been born in the U.S.. As citizens, the law ought to have afforded them more protections and benefits than their parents. In practice, they were treated and viewed the same as their parents. All of these events perpetuated a cycle wherein restrictions to the rights of Japanese migrants “prevented their assimilation” and “intensified their insularity.” As Issei and Nisei alike were more effectively pushed to the fringes of society, their “otherness” became entrenched and thereby justified further actions that pushed them increasingly outside.

Meanwhile, other laws lurked on the books that, despite mostly going unused, were still codified. Among them was the only remaining element of the infamous Alien and Sedition Acts. Passed under President John Adams’ administration, these acts responded to threats of war with the French by cracking down on domestic dissent and freedom of speech while also allowing for easier deportation of immigrants who lacked citizenship. This latter allowance outlived its counterparts in the form of the Alien Enemies Act, making “subjects of [a] hostile nation or government…liable to be apprehended, restrained, secured, and removed” provided they are not already naturalized.

The tragic events of Pearl Harbor on Dec. 7, 1941 demanded an immediate response from the US. Within hours of the attack, President Roosevelt issued Proclamations 2525, 2526, and 2527 identifying Japanese, German, and Italian migrants as alien enemies subject to the provisions of the Alien Enemies Act. These proclamations allowed for alien enemies to be evacuated and banned from certain zones of the country as well as taken into custody if deemed dangerous.

Meanwhile, panic was setting in throughout the nation. A cartoonist in a New York newspaper “drew a cartoon showing multitudes of bucktoothed, squint-eyed Japanese lined up across the entire West Coast to be given packs of dynamite” with the caption “waiting for the signal from home.” The cartoonist was a man named Theodore Seuss Geisel, better known as Dr. Seuss, who would eventually make his career writing and illustrating books for children. Tensions heightened after Japan shelled a Santa Barbara oil refinery in February 1942. There were no

15 U.S. Const. amend XIV, § 1.
16 William H. Rehnquist, All the Laws but One: Civil Liberties in Wartime 207 (1998).
casualties, but the close-to-home violence may have contributed to an incident popularly known as “The Battle of Los Angeles.” Shortly after the Santa Barbara episode, the city of Los Angeles went into a blackout while the air force shot over one thousand rounds of anti-aircraft fire aimed at imagined Japanese bombers. Nothing was shot down, no bombs were dropped, and the whole affair was attributed to a severe case of nervous jitters.20

Governors, senators, and newspapers on the West Coast appealed for federal relocation measures.21 One governor, Chase Clark of Idaho, brazenly asserted that “Japs live like rats, breathe like rats, and act like rats.”22 Separate commissions led by the Secretary of the Navy and Supreme Court Justice Owen Roberts concluded that Japanese in Hawaii had contributed to Pearl Harbor and that similar espionage should be expected on the West Coast.23 Even one such act, like the destruction of a dam, could have devastating effects on citizens and the war effort.

No such act was forthcoming, but General John DeWitt, head of the Western Defense Command, worried “the very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.”24 He argued that there was no way to test the loyalty of Japanese aliens, whom he deemed “a dangerous element,” and strongly advocated for relocation measures.25

He soon got his wish, tasked with executing Executive Order 9066. Signed by President Roosevelt within mere hours of receiving the proposal from advisers, the order charged DeWitt and the newly-created War Relocation Authority with overseeing removal of Japanese aliens from military zones designated throughout the West Coast.26 Pepperdine School of Law professor Robert Pushaw makes the important point that despite well-documented evidence that Roosevelt’s advisers (among others) deliberately exaggerated the threat posed by Japanese migrants, Roosevelt himself did not “have much time to ponder the constitutional implications of this action because he was preoccupied with making critical strategic decisions in a truly global war.”27 Over the next few months, DeWitt mandated curfews, ordered evacuations, and required evacuees to report to internment camps further inland. These orders applied to Issei and Nisei without distinction. “A Jap’s a Jap!” DeWitt would say, “[i]t makes no difference whether he’s an American or not.”28

Indeed, it did not appear to make a difference. Over 60% of interned Japanese were American citizens being held without charges or trial.29 It was estimated at the time that 25% of Japanese in America were under 15 years old.30 By the end of the war, no Japanese American had been found guilty of or even indicted for espionage.31

**Eroding Rights**

Not everyone agreed to comply with the government’s mandates. University of Washington student Gordon Kiyoshi Hirabayashi disobeyed the curfew and relocation orders. In *Hirabayashi v. United States* (1943), the Supreme Court avoided addressing the relocation issue on a technicality but unanimously ruled that the racially-based curfew was a reasonable government action.32 In his majority opinion, Chief Justice Harlan Stone wrote:

> We decide only that the curfew order as applied, and at the time it was applied, was within the boundaries

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23 Pushaw, *supra* note 21, at 190.
25 Rostow, *supra* note 8, at 531.
26 Pushaw, *supra* note 21, at 191.
27 Id.
30 Background, *supra* note 6.
of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.\textsuperscript{33}

This broad relinquishment of oversight opened the door to racial categorizations in times of war. Stone argued that government’s choice to single out a particular group in society for reasons of public safety “is not to be condemned merely because, in other and in most circumstances, racial distinctions are irrelevant.”\textsuperscript{34}

By only concerning themselves with the curfew—something not uncommon to certain times and places in American history—the Court may have hoped to skirt the deeper issues of evacuation and internment. Yet Justice Robert Jackson, despite siding with the government in \textit{Hirabayashi}, saw the danger inherent in the Court’s response. In an unpublished concurrence, Jackson referred to the war power as “the Achilles Heel of our constitutional system” and said the government’s use of it made a person’s ancestry a crime: “An act otherwise innocent becomes in [Japanese Americans] a crime only because their ancestors were Japanese.”\textsuperscript{35}

That Achilles heel was soon brought to bear when Japanese American Fred Korematsu, a native of California, intentionally refused to comply with relocation orders and was arrested. \textit{Korematsu v. United States} (1944), among the most infamous judicial decisions in American history, ruled that the government was within its power to use race-based classifications to exclude citizens from part of the country when “conditions of modern warfare [threaten] our shores,” for “the power to protect must be commensurate with the threatened danger.”\textsuperscript{36}

The court did not, however, discuss the constitutionality of internment proceedings even though the context of the executive orders meant that Korematsu’s exclusion from California necessarily entailed confinement in an internment camp. The court accepted the government’s argument that because this detention “did not become actual” for Korematsu, who was preemptively detained for violating the exclusion order, it was not deemed “an issue in the case.”\textsuperscript{37}

Still, the effect was the same. Jackson knew that one leads to the other, and “validat[ing] the principle of racial discrimination in criminal procedure” was akin to loading a “weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”\textsuperscript{38} If people could be compelled to leave their homes because of their ancestry, they could be contained in special camps as well. Jackson knew this because he watched the same principle play out with \textit{Hirabayashi} and \textit{Korematsu}.

\textit{Hirabayashi} was a narrowly-worded ruling that decided “only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power.”\textsuperscript{39} The opinion clarified this more than once, saying “it is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.”\textsuperscript{40} And yet the majority decided \textit{Korematsu} “in the light of the principles [they] announced in the Hirabayashi case.”\textsuperscript{41}

In his dissent, Justice Jackson objected that \textit{Hirabayashi} 

[D]id validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is \textit{Hirabayashi}. The Court is now saying that in \textit{Hirabayashi} we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody

\textsuperscript{33} Hirabayashi v. United States, 320 U.S. 81, 102 (1943).

\textsuperscript{34} Hirabayashi, 320 U.S. at 101.


\textsuperscript{36} Korematsu v. United States, 323 U.S. 214, 220 (1944).

\textsuperscript{37} Hutchinson, supra note 35, at 478.

\textsuperscript{38} Korematsu, 323 U.S. at 246.

\textsuperscript{39} Hirabayashi, 320 U.S. at 102.

\textsuperscript{40} Id. at 105.

\textsuperscript{41} Korematsu, 323 U.S. at 217.
for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know. Jackson’s famous “loaded gun” analogy was born from experience. The very case he helped to decide in Hirabayashi returned in Korematsu to fire a bullet at the rights of Japanese Americans.

In the short term, Jackson’s prediction seemed overstated. If Korematsu was a loaded weapon, the Supreme Court seemingly disarmed it almost immediately when it handed down its decision in Ex Parte Endo (1944), ruling that the government could not confine Japanese Americans whose loyalty was not in question. This decision, along with that of Korematsu, was strategically timed to be announced the same day that the government announced the end of its relocation program.

However, the Court based its decision in Endo on the statutory language of the laws and did not comment on whether the Constitution would permit a similar law. Just as it did in the prior two cases, the Court tailored its ruling as narrowly as possible in order to avoid commenting on the constitutionality of the Roosevelt administration’s actions. Having been for a short time the last government institution standing between Japanese Americans and violations of their liberties as citizens and persons, the Court seemingly gave in just as the executive branch ended its assault. The result of Endo notwithstanding, the Court had validated racial discrimination piece by piece in a climate where American attitudes had steadily regressed to make such a ruling possible. And no subsequent decision of the Court has ever overturned it.

**Difficult Questions and Diverging Answers**

How did this crisis of rights happen? With the benefits of hindsight and a modern-day context, we tend to look back at these cases with horror, seeing only discrimination and recklessness. Yet, as Pushaw asks, “If Korematsu strikes us as clearly wrong, why did the Court fail to grasp this obvious point?” Pushaw rightly points out that “the answer cannot be” that the justices “did not care about individual rights and liberties,” because these same justices—seven of whom were Roosevelt appointees—historically “sought to expand constitutional rights and vigorously protect them.”

It is easy to look back at mistakes and only see what made the mistakes so egregious—something the primary actors did not have the foresight or wisdom to see. On the other hand, we rarely recall the factors that were foremost on the actors’ minds at the time. This is a dangerous way to do history and risks deepening ignorance at the cost of losing the capacity to prevent similar mistakes.

That is especially true of legal history. Precedents, especially of iconic cases, shape the contours of judicial understandings for decades to come. Therefore, how a precedent is remembered and understood is as important as the precedent itself. Indeed, interpretation is the very source of precedent’s power. Temple University professor of law Craig Green suggests that “Korematsu’s significance is a matter of doctrinal and historical exegesis, and any interpretation’s success must be measured by its influence on the current generation of scholars and commentators, who will in turn guide the next cohort of lawyers and judges.” If we only remember Korematsu as a racist anomaly that must never happen again, we invite the return of the conditions that allowed it to happen in the first place. Understanding the considerations weighing on the justices’ minds will illuminate legal dilemmas that are both less offensive and more potent than the Court’s ruling in Korematsu.

Three questions in particular impacted the Supreme Court during World War II. First: is it the place of the judicial branch to pass judgment on military decisions in a time of war, especially when the results of inhibiting the war effort could be catastrophic? Second, would it be more prudent to temporarily sacrifice a right when unani-

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42 Id. at 247.
43 See Ex parte Endo, 323 U.S. 283 (1944).
44 Hutchinson, supra note 35, at 488.
45 Ex parte Endo, 323 U.S. at 297.
46 Pushaw, supra note 21, at 174.
47 Id.
48 Craig Green, Ending the Korematsu Era: an Early View from the War on Terror Cases, 105 Nw. U. L. Rev. 983, 1038 (2011).
mous public sentiment or a strong chief executive threaten to undermine the court’s legitimacy and ability to fulfill its constitutional role? And third, should times of war shift legal frameworks from categories of personal rights to categories of the roles of separate government branches and institutions? These quandaries counterbalanced concerns about personal freedoms in wartime decisions like Korematsu.

Circumstances of war have always presented challenges to republics. Rome appointed dictators to oversee military efforts during national emergencies so that laws would not stand in the way of the protection of the republic. “In times of war, the laws fall silent,”—a quotation often attributed to Cicero—points to a need for pragmatism above principles. This was certainly the conclusion of Justice Hugo Black in his Korematsu majority opinion: “To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue.” Justice William O. Douglas similarly stated in his concurrence in Hirabayashi that “peacetime procedures do not necessarily fit wartime needs.” Douglas deemed that “the wisdom or expediency” of military actions “is not for [the Court] to review.”

Moreover, the risks of interfering with actions in war are great. Douglas argued that the military should not “be required to wait until espionage or sabotage becomes effective” to take action. Even Jackson, in his Korematsu dissent, somewhat espoused this view, saying that “the armed services must protect a society, not merely its Constitution” and that he would have preferred for the military to be permitted to proceed without any judicial review instead of allowing for the blessing of the Constitution on questionable military decisions.

Some legal thinkers have gone a step further, integrating the rule of law under the Constitution and under times of war by pointing to what constitutional scholar and professor at Yale Law School Bruce Ackerman calls “The Emergency Constitution.” This understanding of the Constitution holds that we don’t throw away the Constitution during war but instead interpret it according to the circumstances of war. In the words of Harvard Law School professor Mark Tushnet, “It is not, then, that law is silent in wartime. Rather, it is that sometimes it speaks in tones that advocates of particular positions do not like.” Justice Stone similarly concurred in a 1934 case that “emergency does not create power” but “may furnish the occasion for the exercise of power.”

For Tushnet, this understanding is actually beneficial to our jurisprudence because it results in a cycle of social learning. Each occasion of wartime government overreach contributes to victory in the war. Those occasions are then evaluated during times of peace and recognized as the result of “exaggerated threats.” The more this happens, the more skeptical a society becomes of the claims of a government so that “the scope of proposed government responses to threats” must decrease.

This sunny spin on the exigencies of war, however, may be more a matter of interpretation than of objective reality. Justice William J. Brennan looked at the same pattern of U.S. history and concluded that “after each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”

Ex Parte Milligan (1866), as much a standard of the high court’s wartime canon as Korematsu, argues that “no doctrine, involving more perversity consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or

49 Korematsu, 323 U.S. at 223.
50 Hirabayashi, 320 U.S. at 106 (Douglas concurring).
51 Id.
52 Id. at 107 (Douglas concurring).
53 Korematsu, 323 U.S. at 244 (Jackson dissenting).
54 Id.
56 Tushnet, supra note 24, at 283.
58 Tushnet, supra note 24, at 284.
59 Id.
60 Id. at 273-4.
Destined To Pass Away

Even Jackson, despite his emphasis on military necessity, agrees in his loaded gun analogy by fearing what a cynical or panicked people might justify with the precedent of *Korematsu*. At first glance, Jackson’s multifaceted opinions seem confused or even contradictory. How could the same man call an action unconstitutional while also deeming it necessary for the wellbeing of the country?

Yet Jackson was not the only justice harangued by a divided mind. Justice Frank Murphy equated racial distinctions with “an admission that the great American experiment has failed” because they are at odds with the very principles which America went to war to defend, and he said all of this in the very concurrence in which he upheld racially-defined curfews. The most noble-minded champion of natural rights may be convinced to buckle when confronted with dire circumstances. How else could John Adams, defense attorney for the British soldiers in the Boston Massacre and ardent proponent of the Declaration of Independence, sign the Alien and Sedition Acts into law? Lest one forget, these maligned laws included the Alien Enemies Act that paved the way for Roosevelt’s Japanese exclusion policies, and the Alien Enemies Act is still in effect today.

Even a judge who cares more about protecting rights than she does about prolonging the nation those rights spawned, however, would have reason to consider acquiescing to government infringement in certain circumstances. In the long run, the ability to protect certain rights might benefit from concessions against other rights, at least temporarily. A forceful public opinion or strong chief executive could each threaten the legitimacy of the court as an institution.

Ackerman worries that a fearful populace could demand certain restrictions on personal liberty. Even worse, unsuccessful policies could result in louder calls for even more damaging attacks on civil liberties. It would be better to grant the initial demands and prevent whatever worse violations might come next than to take one’s chances and treat freedom as an “all-or-nothing” kind of game.

The federal government, despite their protestations that Japanese evacuation was necessary for the war effort, seems to have partially acted based on similar assumptions about the destructiveness of public opinion. In a report for the War Relocation Authority explaining the evacuation program, written circa 1942 and restricted from publication, the government authors wrote that “the American Japanese people--quite apart from their individual intentions--were complicating the problems of western defense in numberless ways simply by living in vital areas. As long as they continued to reside in these areas, the military authorities could never be wholly free to concentrate on the primary job of defending our western frontier.” Intermment was a matter of “public morale,” unfortunate but necessary to assuage other West Coast residents.

Clearly, populist clamor can initiate overreactions even when the more effective responses to a threat would likely be bland changes that, in the words of Harvard law professor Laurence Tribe and Vice Dean of University of Miami School of Law Patrick O. Gudridge, are “not nearly dramatic enough to reassure any but the least emotional among us.” The something-is-better-than-nothing fallacy becomes conventional wisdom in any crisis. As Eugene Rostow, who went on to become Dean of Yale Law School and Undersecretary for Political Affairs in the Johnson administration, observed in 1945, German and Italian aliens, as well as Japanese Americans in Hawaii, were too numerous to be confined and were left alone despite, by the government’s logic in *Korematsu*, posing a larger threat than the 100,000 Japanese on the West Coast who “became the chief available target for the release of frustration and aggression.”

The founding fathers famously feared too much democracy. Some people, when perceiving a threat to their own liberty, respond by snatching liberty away from others as if it were a scarce resource instead of a state of being.

61 Ex parte Milligan, 71 U.S. 2, 121 (1866).
62 *Hirabayashi*, 320 U.S. at 111 (Murphy concurring).
63 Ackerman, supra note 55, at 1029.
64 *Background*, supra note 6.
65 *Id.*
67 Rostow, supra note 8, at 497.
And when enough of these people join together, their power becomes a threat to even the institutions that exist to protect their liberties. “We don’t have standing armies to enforce opinions,” Justice Sandra Day O’Connor once remarked, “[w]e rely on the confidence of the public in the correctness of those decisions.”

Of course, one would prefer to believe that the esteemed men and women who serve as our nation’s highest authority on rights and responsibilities would not be too heavily swayed by public opinion. Still, the judicial branch’s legitimacy is contingent on not only public support but also executive support. Our entire system of government operates on the assumption that the three branches of government will respect the way power is allocated to each branch. Granted, the checks and balances inherent in the Constitution help ensure that no one branch severely oversteps its bounds. An over-zealous president, for example, could be reigned in by an uncooperative congress and overruling judiciary, while a stubborn senate could trigger executive orders, presidential vetoes, or even a refusal from the executive branch to carry out a law.

The judicial system, however, has fewer built-in protections. Just as the courts lack armies to enforce opinions among the people, they also lack tangible methods with which to impel presidential compliance. Most presidents will adhere to judicial decisions because the upheaval of ignoring the courts could threaten the very fabric of democracy. Yet when that democracy is already threatened by aggressor nations, a president may see less risk and more necessity in disobeying the Court.

A president in this scenario would, of course, also need to be well-supported by the citizenry. By his third term in the White House, Franklin D. Roosevelt was exceedingly popular, was conducting perhaps the most consequential war of the 20th century, and had already once threatened via backchannels to ignore the Court in Ex Parte Quirin (1942) if they did not side with him (the Court sided with him less than two weeks later). According to Pushaw, a cycle of political calculations occurs during wartime decisions wherein justices silently evaluate the urgency of the crisis, the “egregiousness and magnitude” of possible rights violations, and the likelihood that the president will follow through with the Court’s decisions.

Senior Lecturer in Law at the University of Chicago Dennis J. Hutchinson, who published in the Supreme Court Review about Justice Jackson’s approach to the 1940s Japanese cases, believes that Jackson (who was ever-aware of the many risks involved in making these decisions and should be commended for still choosing to dissent in Korematsu) made these same calculations. Recalling the government’s refusal to release detainees as ordered in Ex Parte Merryman (1861), Jackson gambled with his affirmation of the Court’s decision in Hirabayashi that “a minor deprivation of civil liberties was the price of preserving the Court’s power in peacetime.” The gamble could only work, however, if the balance between the judicial and executive branches “would be restored” after the war, “almost as if nothing had happened.” The bitter irony was that Jackson’s gamble enabled Korematsu, a decision that de-legitimized the Court and signaled to the government that it could get away with more than it was accustomed to.

Finally, the government’s positions in cases like Hirabayashi and Korematsu are a reminder that the Constitution consists of more than just the Bill of Rights. While modern eyes look back and only see the aspects of those cases that concern personal liberty, the judges’ decisions were in fact immersed in important questions about institutions. One recent comprehensive study found that war does tend to elicit more conservative Supreme Court decisions in cases that have nothing to do with the war. In cases connected with the conflict, however, war seems to have no impact.

That 2005 study in the New York University Law Review posits that these counterintuitive results indicate that war causes the Court to retreat “from its usual rights versus security focus of decisionmaking to a focus on

70 Pushaw, supra note 21, at 185.
71 Hutchinson, supra note 35, at 476.
72 Id.
In times of peace, justices will usually seek to properly balance individual freedoms with a need to maintain order. In times of war, this ceases to be their main concern. Instead, they view cases with an eye towards considering the roles and powers of different branches of government. As such, war-related cases remain relatively consistent while garden-variety civil liberty cases side more often with the government because the justices are still using the institutional lens. They do not return to a primary focus on liberties until the war is over, at which point there are no more war-related cases to decide.

These findings are consistent with Green’s charge that Korematsu’s offensive morals were “secondary to the Court’s judgments about war powers and executive deference.” This is why phrases like “Congress, and the military authorities acting with its authorization, have constitutional power” populate Hirabayashi and Korematsu. Modern-day Justice Stephen Breyer explains the Korematsu decision as an inability to protect individual rights while simultaneously preserving the president’s war powers. In his unpublished concurrence in Hirabayashi, Jackson expressed concerns from the other end of the spectrum. Worried about protecting the Court’s institutional integrity, Jackson notes that military decisions, which are often based on secret information, cannot then be secretly explained to the Court because the Court “would lose character as an independent branch of government.” At the end of the day, justices do not evaluate cases solely on their implications for certain rights. They bring the full weight of the Constitution to bear on the many issues raised by a particular case.

**Yesterday’s Memory; Today’s Reality**

Not all of these predicaments are easily solved, and some must necessarily be answered on a case-by-case basis. But answers must not include unjust qualifications or discriminations that impinge the rights of citizens or the dignity of human beings. Even if we cannot solve the dilemmas posed above with absolution, we must think carefully about them now while we are free of the urgency of a crisis. Americans are defined not by their race or religion but because they believe in the ideals of liberty and justice for all and have committed to strive towards those ideas. And if there are ways we are alienating any of our fellow Americans, we must rectify them.

In the 1942 report to the War Relocation Authority, the government authors offered a stunning rationale for Japanese internment. Fearful of the possibility of invasion, the government speculated that some Japanese Americans would “respond to years of Caucasian discrimination suffered in this country and aid the attacking forces.” Realizing the consequences of the error of discrimination, they doubled down and discriminated more aggressively!

New ages bring new enemies. We are now friends with Japan but battle the scourge of radical Islamic terrorism. This threat cannot be attributed to a specific region, ethnicity, or religious understanding, and yet it is easy to associate it with all three. Syrians, immigrants of Arabian descent, Americans who worship at a mosque—these categories of people and others face increasing scrutiny from our political discourse and private attitudes in the face of terrorism’s external threat.

How we react now determines how we will act later. It is not clear how well traditional equal protection interpretations, which have generally been connected to categories of race and gender, would safeguard the ambiguous demographics associated with Islamic terrorism. Will we apply the strict scrutiny standards of race-based classifications, exemplified in landmark cases like Brown v. Board of Education (1954)? Or will we resort to the excuses of Korematsu and claim exception due to unique circumstances? Both are vocal precedents, and not only because they have never been overturned by the Court. Tribe and Gudridge warn that “the memory of how we once rational-

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74 Green, *supra* note 48, at 988.
75 Hirabayashi, 320 U.S. at 101-2.
77 Hutchinson, *supra* note 35, at 472.
78 *Background*, supra note 6.
ized what we later take to be a wrong, sometimes a great and terrible wrong, contributes to constitutional law no less than does the memory of how we have in the past kept our affirmative commitments to do right. Perhaps Justice Jackson is right and the institutions of a free people are bound to pass away. Even so, may we who have the benefits of history and hindsight not be the first to give them up.

80 Tribe & Gudridge, supra note 66, at 1805.
Religious freedom, freedom of expression, and property rights are all fundamental institutions in the political and legal landscape of the United States. It is not without reason that free exercise of religion and freedom of speech are protected in the very first amendment to the U.S. Constitution. Yet, these institutions are being threatened by state-level public accommodation anti-discrimination law. Though such laws have good intentions and noble roots in the Civil Rights Act of 1964, they have been used to violate U.S. citizens’ rights. With this in consideration, this paper analyzes state-level public accommodation anti-discrimination laws and suggest a way forward that would preserve their fundamental intent while protecting U.S. citizens’ freedom of speech and respecting their private property. Romero advocates for the creation of a new category of protection for “services in support of expressive activity” and also gives other suggestions that might help protect the fundamental rights the U.S. is committed to upholding.

Imagine a Muslim who makes his living as an architect, creating blueprints for and overseeing the construction of commercial buildings, office spaces, mid-size buildings, and some houses on the side. Now imagine that one day a Seventh-Day Adventist comes to him requesting that he design and oversee the building of a new church for the Seventh-Day Adventist congregation—one that will be so grand it will put every other church in the town to shame. Our Muslim protagonist is flattered at the offer but explains that it is against his religious beliefs to support the Seventh-Day Adventists’ worship by building them a new sanctuary. A reasonable person might consider the Muslim’s position perfectly permissible, but according to current legislation in Colorado and many other states, it is not. In fact, according to such legislation, the state could mandate that he complete the building or suffer punishment. This example demonstrates just one flaw in state-level public accommodation anti-discrimination law in the United States. To remedy this flaw and others like it, serious legislative change is required. First Amendment rights, the institution of private property and freedom of association, and a correct interpretation of unjust discrimination as contrasted with a refusal to endorse a certain message demand that public accommodation anti-discrimination law should be curtailed in its extension, its scope of protected characteristics, and its definition of discrimination.

One might think that the example of the Muslim and Seventh-Day Adventist is just a hypothetical illustration, but situations eerily similar to this are cropping up across the United States. In Oregon, Aaron and Melissa Klein could face a bill of up to $150,000 in damages due to the couple refusing to make a cake celebrating a same-sex
In the state of Washington, Baronelle Stutzman faces two lawsuits filed against her by the Washington Attorney General and ACLU respectively for declining-- because of her religious convictions-- to provide flowers to help celebrate a same-sex ceremony. In New Mexico, the New Mexico Supreme Court upheld a ruling against Elane Photography and ordered it to pay attorney fees amounting to $6,637.94 because the owners refused to photograph a couple’s same-sex commitment ceremony. Finally, in Colorado, an administrative judge ruled against Jack Phillips, owner of Masterpiece Cakeshop, and imposed fines on him for refusing to “use his artistic abilities to promote and endorse [another’s] same-sex ceremony.” This slew of cases clearly demonstrates that incidents endangering freedom are not mere hypotheticals or rare occasions but in fact constitute a pressing public policy issue.

All of these cases are rooted in state-level public accommodation anti-discrimination laws. These laws vary state by state in how many businesses they encompass and what characteristics they protect, but generally speaking, these laws prohibit any business from discriminating against someone in any way based on certain categories called protected characteristics. Take Colorado’s public accommodation anti-discrimination law as an example. According to the Colorado Anti-Discrimination Act and the Sexual Orientation Employment Discrimination Act as enshrined in the Colorado Revised Statutes, Title 24, Article 34, Part 6, Section 601, a “place of public accommodation’ means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public.” Concerning such establishments, the Colorado General Assembly has legislated:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

Public accommodation anti-discrimination law such as this is not limited to Colorado. It also exists in states including but not limited to: New Mexico, New Jersey, the District of Columbia, Washington State, New York, and Kentucky.

Public accommodation law is more than a century old and its common law predecessor is even older. According to Alfred Avins in the Marquette Law Review, the concept of a public accommodation extends back to the common law concerning common carriers, defined as firms that offered transportation services for people or goods. According to English common law, “it was the duty of a common carrier to serve all persons without imposing unreasonable conditions.” This law crossed the Atlantic from England to America, though common carriers still “had power to make reasonable regulations and discriminations.” Similar rules also applied to inns and similar establishments of housing for transient guests in Britain, though such rules did not apply in English common law

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3 Kim, supra note 1.
8 NM Stat. § 28-1-7 (2013); Public, supra note 1; Gottry, supra note 1, at 967; Murphy, supra note 1; Bailey, supra note 1; KRS 344.120-140 (2015).
9 Alfred Avins, What is a Place of ‘Public’ Accommodation?, 52 Marq. L. Rev. 1, 2 (1968).
to places of entertainment, such as theaters, “on the ground that theaters were not a necessity of life.”

“Public accommodation” was first used as a legal term in a public accommodation anti-discrimination law passed in Massachusetts. This preceded the term’s first use in federal U.S. legislation in the Civil Rights Act of 1875, which forbade discrimination in enjoying the accommodations of public transportation, places of lodging, and entertainment establishments. However, the Supreme Court subsequently struck down that legislation as unconstitutional in the Civil Rights Cases of 1883. The first time the phrase was used continuous up to the time of the writing of this piece was Title II of the Civil Rights Act of 1964, which mandated that “all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation… without discrimination on the ground of race, color, religion, or national origin.” Note that in this original legislation, the protected characteristics were narrowly constrained to four different categories, three of which were tailored to deconstruct segregationist structures.

The act was also much narrower than modern laws in its definition of public accommodation. First, such an establishment had to “affect commerce” or practice “discrimination or segregation… supported by State action.” Secondly, it had to fall into one of four categories: an “establishment which provides lodging to transient guests,” a “facility principally engaged in selling food for consumption on the premises,” a “place of exhibition or entertainment,” or any establishment which contained within its premises or was located on the premises of any of the previous three types of establishment and held “itself out as serving patrons off any such covered establishment.” These were the four main categories of businesses that fell under the regulatory dragnet of the Civil Rights Act.

Title II also contained two notable exceptions to the definition of public accommodations. First, it legislated that “an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence” did not count as a public accommodation. This exception was called the “Mrs. Murphy” exception. Concerning this exception, Senator Hubert Humphrey of Minnesota observed:

The so-called Mrs. Murphy provision results from a recognition of the fact that a number of people open their homes to transient guests, often not as a regular business, but as a supplement to their income. The relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.

By including a Mrs. Murphy exemption, Congress recognized that at some point a person’s right to freedom of association and discretion to dispose of their property as they saw fit imposed a limit on the government’s power to eliminate discrimination.

Second, Title II also stated that “the provisions of this title shall not apply to a private club or other establishment not in fact open to the public,” unless such an establishment purported to serve “customers or patrons” of any establishment previously deemed a public accommodation by Title II subsection (b). Again, by installing this exemption, the legislators conceded that it was not the role of the law to wipe out all discrimination as such. Instead, they limited their legislation to the four different categories already discussed. Taken holistically, Title II of the Civil Rights Act defined public accommodations in a narrow manner specifically tailored to achieve its goals.

Compare this to the example of Colorado’s public accommodation law, and one can see that the scope of such law has vastly expanded. Colorado’s law has neither a Mrs. Murphy nor a private club exemption and so applies to all businesses, and includes nine protected characteristics, as opposed to the four-- race, color, religion, or national origin-- in the Civil Rights Act. This lack of restraint in public accommodation legislation has created numerous

10 Id. at 5-6.
11 Gottry, supra note 1, at 965.
13 Id. § 2000a(b).
problems already highlighted by the previously mentioned case studies.

Opponents of this argument might object that there is nothing wrong with the described situations. Should not businesses be barred, one might ask, from discriminating against someone based on their sexual orientation, or on any other characteristic for that matter? While these questions are valid, they neglect three vital principles which current state-level public accommodation anti-discrimination laws often violate: First Amendment rights, the institution of private property and freedom of association, and the true meaning of unjust discrimination as contrasted with a refusal to endorse a certain message.

First, overly broad public accommodation laws endanger First Amendment rights, specifically the right to freedom of speech and free exercise of religion. These rights are enshrined in the Bill of Rights, which states, “Congress shall make no law prohibiting the free exercise thereof [i.e. of religion]; or abridging the freedom of speech.” \(^{17}\) Now of course, this does not mean that free speech is an unlimited constitutional right; \(^{18}\) Supreme Court Justice Oliver Wendell Holmes has noted that the right to freedom of speech does not give someone the right to falsely yell, “Fire!” in a theater. \(^{19}\) Unfortunately, as will be demonstrated, state-level public accommodation anti-discrimination law frequently encroaches on these rights to an improper extent. This is best explained by looking at particular examples, but first, some principles of constitutional law must be established. As James Gottry notes, in addition to safeguarding personal freedom of speech, the First Amendment also guards the freedom of corporate speakers. In both Pacific Gas and Electric Co. v. Public Utilities Commission of California and Citizens United v. Federal Election Commission, the Supreme Court held respectively that “speech does not lose its protection because of the corporate identity of the speaker,” and that “First Amendment protection extends to corporations.” \(^{20}\) Gottry goes on to note that according to Kaplan v. California, the Supreme Court has held that this protection is not limited just to words but also includes expressive activities such as “picture, films, paintings, drawings, and engravings.” \(^{21}\) The Supreme Court has also held that freedom of speech as protected by the First Amendment also includes the right to not speak. \(^{22}\) From this, it is easy to conclude the First Amendment protection, including the right to not speak, would extend to a photography business.

However, in Elane Photography v. Willock 2013-NMSC-040 (2013), the New Mexico Supreme Court (NMSC) held that as a public accommodation Elane Photography had to either use its expressive service of photography to help celebrate a same-sex commitment ceremony in violation of the owners’ religious principles or suffer a penalty for refusing to do so. \(^{23}\) In issuing such a ruling, the New Mexico Supreme Court held that “the NMHRA [New Mexico Human Rights Act] does not violate free speech guarantees because the NMHRA does not compel Elane Photography to either speak a government mandated message or to publish the speech of another.” \(^{24}\) This statement relies on a clearly incorrect interpretation of landmark free speech cases—West Virginia State Board of Education v. Barnette (1943) and Wooley v. Maynard (1977)—, but even according to the NMSC’s interpretation of these cases, the NMHRA would still violate Elane Photography’s freedom of speech.

First, even if the NMSC’s interpretation were correct, Elane Photography’s freedom of speech would be violated by the mandates of the NMHRA. Compliance with the NMHRA would have forced Elane Photography to use its expressive services to celebrate a same-sex commitment ceremony. Since photography has been designated as an expressive activity (i.e. it amounts to speech), and since the NMHRA, according to the NMSC’s interpretation, mandated that Elane Photography photograph the ceremony, this axiomatically equates to government-mandated speech. It also would have constituted coerced publication of another’s speech. According to the criteria in Spence v. Washington (1974), an action is considered expressive when, “An intent to convey a particularized message

\(^{17}\) U.S. Const. am. I.


\(^{19}\) Schenck v. United States, 249 U.S. 47, 52 (1919).

\(^{20}\) Gottry, supra note 1, at 968-9.

\(^{21}\) Gottry, supra, note 1, at 970.


\(^{23}\) NM Supreme Court, supra note 4.

was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."$^{25}$ A same-sex commitment ceremony qualifies as expressive action under these criteria, since the message “present” and “understood by those who viewed it” would be one of commitment to each other. Since the NMHRA would have forced Elane Photography to photograph this speech and publish it in a celebratory manner, the NMHRA violates free speech principles even according to the New Mexico Supreme Court’s own narrow interpretation of *Barnette* and *Wooley*.

Even if that were not true, examination of the true holdings in *Barnette* and *Wooley* make it plainly evident that the NMHRA violates the principle of freedom of speech. In *Barnette*, the Supreme Court held, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”$^{26}$ Clearly this would protect a photography business from confessing with their photography that they celebrate same-sex commitment ceremonies. Furthermore, the Court in *Wooley* expands on the meaning of free speech, so as to leave no room for doubt; referencing *Barnette*, the Court states, “[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”$^{27}$ The First Amendment does not prohibit only some compelled speech, as the NMSC would have one believe; rather, it prohibits any forcing of speech by the government. Since the NMHRA would force Elane Photography to use expressive action to help commemorate a same-sex commitment ceremony, it is clear that the public accommodation anti-discrimination law in the New Mexico Human Rights Act violates the fundamental, constitutional right to freedom of speech.

In another example, consider that the Colorado Revised Statutes, Title 24, Article 34, Section 601, state that it is unlawful to discriminate on the basis of “creed.”$^{28}$ Interpreted widely by courts, this could mean that one could be faulted for not supporting political speech. For example, if a graphic designer who happened to be a Democrat refused to create an advertisement for a Republican candidate’s campaign, one could easily interpret that as discrimination based on “creed,” which would violate the Colorado Revised Statutes. Clearly, overly broad public accommodation law poses a real threat to freedom of speech.

A second pitfall of current state-level public accommodation law is that it fails to pay due respect to freedom of association and the institution of private property. One must remember that businesses are in fact private entities, so the state must have a legitimate rationale for including them in its category of public accommodations. Some might say that the business is open to the public and therefore, that the public has an interest in it, but who decides whether a business is open to the public? Is it not the owner? Just because the public uses a facility with the owner’s permission does not mean that the public owns it.$^{29}$

To be clear, this does not mean the right to property is absolute, cannot be limited, or can never be outweighed by other considerations. Though it is legal to own a gun, it is quite reasonably illegal to use that gun to harm

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26 *Barnette*, 319 U.S. at 642. To this quote it might be objected that, as seen in the civil rights laws, government should have a right to limit speech or decide what is orthodox if what someone else holds hurts another person. However, a distinction should be drawn between sanctioned behavior and sanctioned speech. Whereas the civil rights laws coerce some people to accept integration, they do not, or at least should not, force people to speak a certain message. However, state-level public accommodation anti-discrimination laws, I argue, are being interpreted to do just that.
27 *Wooley*, 430 U.S. at 714; see *Barnette*, 319 U.S. at 633-634; see also *Id.* at 645 (Murphy, J., concurring).
28 C.R.S. 24-34-601(2)(a) and KRS 344.140 (2015).
29 Opponents of this argument might object that a business should not be allowed to discriminate against potential clients if it holds itself out as serving the public. However, many public accommodation anti-discrimination laws mandate not just that businesses serve someone if they advertise their services as public. They often mandate that a business hold itself out as serving the public. In other words, they do not give the business a choice as to whether it shall hold itself as serving the public at large or not. For example, the NMHRA forbids public accommodations “to make a distinction, directly or indirectly, in offering or refusing to offer its services,” NM STAT § 28-1-7 (2013); see also C.R.S. 24-34-601(2)(a) and KRS 344.140 (2015).
others. As professor of law Samuel Bagenstos writes, “Regulation is not incompatible with private ownership.” Nevertheless, proper deference must be accorded to the institution of private property and freedom of association, which means that the state must have a compelling interest for imposing additional regulation and must respect the most intimate spheres of one’s life. What does this mean in concrete terms? A good example of this is Title II of the Civil Rights Act, which had two exceptions—the Mrs. Murphy and private club exception—recognizing that these situations were exceptionally intimate in such a way that the government did not have a right to regulate them.

Expansive public accommodation law, however, contradicts this principle. This is most aptly illustrated in the case that comes out of New York. Cynthia and Robert Gifford own Liberty Ridge Farm, which they allow others to rent as a venue for birthday parties and close to twelve weddings each year. When the couple refused on religious grounds to host a lesbian ceremony at their residence, even though they have employed and hosted events for gay people in the past, the state fined the couple $13,000. The weddings are typically held on the first floor of the Gifford’s home or in a nearby field, but Administrative Law Judge Migdalia Pares still ruled that the Gifford’s farm was a public accommodation, because they regularly receive remuneration for their hosting services. According to Pares, “The fact that the Giffords also reside at Gifford Barn… does not render it private.” If residing at a place does not make it private, then what does? It is not wrong to label some establishments as public accommodations, but in doing so, the state should avoid legislating for a person in the more intimate spheres of his or her life. Current public accommodations law as interpreted by judges does not respect the institution of private property and freedom of association.

Interpretive rulings by judges on the topic of public accommodation anti-discrimination laws have distorted the true meaning of unjust discrimination. In Elane Photography LLC v. Willock, Elane Photography made clear that it did not object so much as to who it was photographing, Y, (members of a same-sex couple) as it objected to what they were doing, X. To refuse to do a normal photo shoot for Willock because she claimed to be a lesbian would certainly be unjust discrimination, but to refuse to use photography to support a same-sex commitment ceremony is not the same and does not constitute unjust discrimination. Instead, it is a proper exercise of the discretion that each person deserves to determine what he or she will and will not support. The same reasoning applies to the Gifford’s situation. Their refusal was predicated not on the status of the person they were serving—they had employed and hosted events for gay people in the past—but on a refusal to support an activity that they believe is immoral. This is less a question of unjust discrimination and more a question of constitutional principles.

So what is the solution to this quagmire? As a remedy, public accommodation anti-discrimination laws should be rewritten to respect the institution of private property and freedom of association, limit protected characteristics, and uphold First Amendment rights by clarifying what counts as unjust discrimination. First, a proper public accommodation law would give deference to the institution of private property; when in doubt, the state should leave the disposal of a person’s property up to his or her own discretion. Categories such as “creed” could easily be interpreted as contradicting the First Amendment, as in the hypothetical with the Democratic graphic designer, so at the least, such a protected characteristic should be clarified in a way that accords due

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31 Bailey, supra note 1.
32 Id.
33 Id.
34 Id.
deference to First Amendment rights. Other categories, such as “personal appearance,” should also be omitted because they rob the owner of a business of his or her power to control the brand and style of the business. It is important to note that this paper does not advocate the wholesale abolition of protected characteristics; often, a protected characteristic is a very useful concept that reinforces the norms of justice. However, as this paper has argued, excessive scope can lead to objectionable results that ought to be avoided.

Third, public accommodation anti-discrimination law should protect freedom of speech and religion. This solution has two parts: clarifying what it means to discriminate “based on” a certain protected characteristic and subsequently demarcating a new category of protected acts as services in support of an expressive action. As an example of the first prong, the “Cake Wars” in Colorado exemplifies the distinction quite well. In December 2013, the state of Colorado ruled in favor of a gay couple who had filed a discrimination complaint against Jack Phillips of Masterpiece Cakeshop for refusing to create a cake for their ceremony. Then, in the summer of 2014, activist Bill Jack went to three different bakeries and asked them to create “cakes shaped like the Bible with anti-gay religious messages, including ‘homosexuality is a detestable sin.’” When Azucar Bakery, Le Bakery Sensual, and Gateaux, all decided to not fulfill his request, he filed a complaint with Colorado’s Civil Rights Division, stating that their refusal constituted unlawful discrimination. However, the state of Colorado denied his complaint, saying “he wasn’t denied because of his faith, but because the Denver businesses considered his messages as hateful and offensive.” The state of Colorado should have recognized that same distinction in the case with Masterpiece Cakeshop. Jack Phillips did not turn away the gay couple because they were gay, but because he did not want to support or condone an expressive activity, their commitment ceremony. With these two cases, the state of Colorado issued inconsistent rulings that showed a definite bias in the application of free speech principles. The state was correct in its ruling on the latter case, and that distinction between discrimination based on status and discrimination based on refusal to condone a message or activity should be enshrined in law to protect the important First Amendment rights.

How should it be codified? This leads to the second component of the change, which would require recognition of a new category of actions that are protected under the First Amendment because they support an activity that counts as speech under the First Amendment. These shall be referred to as services that support expression, and these services should be protected just like regular speech would be protected under the First Amendment. According to this doctrine, it would be wrong to force a bakery or florist shop to celebrate a same-sex commitment ceremony by providing their services to it because those services would necessarily be in support of an expressive activity. However, it also holds under this doctrine that an inn would not be allowed to discriminate against someone by refusing to provide them lodging because of their sexual orientation, since lodging in this regard would not support any expressive activity.

Contrasting with the “services in support of expression” solution, scholars on public accommodation law have proposed alternative solutions that do not do enough to protect the constitutional principles at stake. The first solution is that advanced by Richard Epstein in his article, “Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right.” In this essay, Epstein argues that public accommodation anti-discrimination laws should be limited to monopoly providers. While this may seem reasonable at first, it would not fully protect free speech and free exercise rights when there was only one provider of an expressive service in a town. Epstein’s approach would still allow compelled speech when an expressive service was only provided by one company in the area. For this reason it ought to be rejected as insufficient. A second remedy that would be more effective than the previous but still would not solve every situation would be to create a free speech exemption in public accommodation laws. While this would protect freedom of speech, it would not suffice to protect freedom of religion. Consider, for example, the Muslim architect who quite reasonably

36  Moreno, supra note 5.
37  Id.
did not want to build a sanctuary for Seventh Day Adventists. While the free speech exemption would protect a photography business, it would not protect him. That is why protection is necessary for services in support of expressive activities. While a free speech exemption would do some good, it would not do enough.

Some might object to the proposed protection for services in support of expression, arguing that anything can be construed as expressive, which would turn this theory into a limitless license to discriminate. Indeed Samuel Bagenstos makes this very objection in his article, “The Unrelenting Libertarian Challenge to Public Accommodations Law,” in which he writes, “Any business’s provision of a good or service to someone on an equal basis with others can always be characterized as expressive . . . . [It] expresses the message, at least, that the customer is entitled to be treated like any other customer.”

Bagenstos worries that an overly broad construal of the First Amendment might allow a restaurant to refuse service to a black man, saying that to serve him as it serves its white customers would constitute compelled speech that he is equal to its other customers.

Professor Bagenstos’ concerns are well placed but not unanswerable. First, the services in support of expression would not grant limitless license to discriminate, because the Supreme Court has only recognized a select number of activities as expressive and has set very clear criteria for identifying what counts as expressive activity. Since not all activities are expressive, not all services would be protected; only ones that support an expressive activity, such as baking a cake for a wedding, would be protected.

Second, Professor Bagenstos’ objection utilizes a flawed value paradigm. He tries to take the concept of protected speech to a reductio ad absurdum, but in doing so, he discounts the value of the First Amendment. What if there really was a legitimate First Amendment free speech claim to refusal of service? In such a case should not it be given some weight? Any principle can be misconstrued in an absurd way, so the fact that the First Amendment can be misinterpreted does not mean it should be discounted altogether. In sharp contrast to the all-or-nothing dilemma presented by Professor Bagenstos (i.e. either free speech extends to every service that has some expressive character or to no service at all), the “services in support of expression” doctrine upholds the First Amendment right to freedom of speech without allowing for wholesale discrimination on the part of businesses.

Other might next object that the “services in support of expressive activity” policy would allow a bakery to refuse to bake a cake for a biracial couple if the owners of the bakery objected to the marriage. This is a sobering argument that must be considered carefully. The answer is indeed that this would allow a bakery to refuse to support the expressive activity of a biracial couple in expressing commitment to each other through a wedding. However, that is the logical extension of the principle of freedom of speech enshrined in our Constitution and free speech jurisprudence. It is an unpalatable concession to say the least, but it is also the cost of upholding the freedom of speech of each individual.

Perhaps the best way to illustrate the need for this policy change is to take a scene from A Man For All Seasons, the biographical film about Sir Thomas More adapted from Robert Bolt’s play by the same name. Young William Roper, speaking about a character with evil proclivity, tells Sir Thomas More, the Chancellor, to have him arrested. Sir Thomas More refuses to do so, saying that he has not broken the law, and states that he would not arrest a man who had not broken the law even if he were “the Devil himself.”

“So, now you give the Devil the benefit of law!” William Roper questions, to which Sir Thomas more replies, “Yes! What would you do? Cut a great road through the law to get after the Devil?”

“Yes, I’d cut down every law in England to do that!”

“Oh? And when the last law was down, and the Devil turned ‘round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man’s laws, not God’s! And if you cut them down, and you’re just the man to do it, do you really think you could stand upright in the winds that would blow them? Yes, I’d give the Devil benefit of law, for my own safety’s sake!”

To be clear, this does not mean that racism itself is ever morally right; it simply means that the government

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39 Bagenstos, supra note 30, at 1235.
40 Washington 418 U.S. at 411-412; Gottry, supra note 1, at 970.
should not take every step to completely eradicate discrimination in every place whatsoever. Most would agree that lying is wrong, but the government has never, and ought not to seek to eliminate every sort of lying. That is beyond the purview of sound government, which must recognize its limits as much as it recognizes its strengths. This concession is neither favored nor wanted, but it is in this case necessary to give the Devil protection of free speech for the sake of one’s own protection.

Some might reject this solution, pointing to the harm that people might suffer when they are discriminated against. While it is certainly valid to allege emotional pain and other harms, this only considers one side of the equation. What about the harm caused by punishing someone for their religious beliefs? To discount the soft harm imposed on the business is to assume a biased, circular, self-confirming view that one harm is worse than the other because one is in the right and one is not. To consider only the first harm is to place it upon a pedestal as morally justified and to discredit the other harm as morally unjustified. However, this gives the state the right to arbitrate and compel others to subscribe to a particular vision of the good society. To do so is the antithesis of American government.

Sadly, state-level public accommodation anti-discrimination law has overgrown its historical roots and thereby encroached on First Amendment rights, property, and freedom of association, and has furthermore twisted the meaning of unjust discrimination to accord with an inaccurate interpretation. In his article on public accommodation anti-discrimination law Richard Epstein observes, “It is indeed a sorry state of affairs that a great norm intended to blunt private power has now become a tool to allow all-too-powerful institutions to stamp out those groups that oppose their vision of the good society.”

42 This use of public accommodation laws clearly infringes on First Amendment rights; as the Supreme Court observed in West Virginia State Board of Education v. Barnette (1943), “freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”

43 In order to revive the freedom to disagree, even in things that impact the fundamental principles of a liberal society, public accommodation anti-discrimination laws must be curtailed. Only when the meddling is finished will the matter be truly settled.

42 Epstein, supra note 38, at 1290.
43 Barnette, 319 U.S. at 642.
MEDDLING AND SETTLING
On Juries: An Introduction to the American Jury System

Richard Green†

ABSTRACT

The right to a trial by jury is a revered constitutional right, but what does that right actually entail in practice? How many members must a jury include, and how is a jury formed? These questions and more are answered in this piece explaining different aspects of the jury system in the United States. Through this piece, Green expounds on the details of the jury system established in United States case law. This includes questions such as how many jurors are required, how jurors are selected and stricken from jury service, what standards jurors are instructed to follow in reaching a verdict, and how many jurors is required to reach a valid judgment. In all, this piece is an illuminating explanation of a fundamental right in the United States— the right to a jury trial.

Given the Constitutional right to a trial by jury in criminal proceedings and the jury’s power to enforce, or ignore, the standards of the law, it comes as no surprise that significant case law regarding juries and how they operate has developed. Specifically, there have been many court opinions, mostly from the 1970s, regarding the size of juries, the ways that they are created, and the standards to which they are held in coming to their verdicts. This case law has been successful in ensuring that the right to a trial by a fair and impartial jury of one’s peers is not infringed upon while still allowing states to have a say in having their juries operate in ways that other states or the Federal government do not have their juries operate.

The right to a trial by jury is assured by the 3rd Article and later reinforced by the 6th Amendment to the United States Constitution. The founders of this country, in response to the abuses of the British government by infringing upon their rights, provided in this country’s first documents basic blanket protections for every citizen and his or her rights. These protections include that, for federal cases, “The Trial of all Crimes…and shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed;”¹ these juries were further defined as having to be “impartial” and “of the State and district wherein the crime shall have been committed.”² With the Court’s ruling in Duncan v. Louisiana, this right to a trial by jury was extended to violations of state law.³ The jury is also the trier of fact in trials including a jury, meaning they have the ultimate responsibility of coming to a verdict in the case. For this reason, the makeup of the jury and the means by which it can come to verdicts are issues that are important to look at and define in order to protect the life and liberty of the accused. An unconstitutionally small jury, one that in its makeup fails to properly fulfill its constitutional duties, or one that renders a decision in violation of one’s rights pose problems that could undermine the integrity of the United States’ entire judicial system.

Before potential jurors can even be brought into the court and chosen to fill the cases before the court, it is necessary for the number of jurors needed for a trial to be established. Common law tradition in England has held since the middle of the 14th century that a jury consists of exactly twelve members,⁴ but that number appears

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1 U.S. Const. art. III, § 2.
2 U.S. Const. amend. VI.

On Juries

nowhere in the Constitution. Instead, the number of jurors constitutionally required has been a matter of jurisprudence. Originally, the Supreme Court found a constitutional requirement of twelve jurors, but in the 1970s, a series of Court cases provided more leeway for state courts to depart from that number. The Supreme Court granted certiorari to another question of jury size in Williams v. Florida. Williams was appealing because he lost a pre-trial motion for the jury to be expanded from the state mandated six to twelve jurors, and was later convicted. The Supreme Court found no implicit requirement in the Constitution that a jury consist of twelve members rather than six, since “there is no discernible difference between the results reached by the two different-sized juries” in several experiments that had been done. Eight years later, the Court found a jury of five members to be unconstitutional, giving a very different type of opinion than in Williams v. Florida. In Williams, the Court’s opinion was based on historical fact: that there is no reason to believe twelve jurors is required, so six was valid. Now in Ballew v. Georgia, the Court had to confront the logical outcome of Williams that smaller juries would be convened and brought up on appeal until a hard limit was reached. In deciding that six was the minimum with five being unconstitutional, the Court relied on mathematical models for support of that number, rather than just an arbitrary line in the sand. Specifically, the Court relied on statistical analysis of six and five member juries in regards to the percentage of expected hung juries and expected representation of minority communities. So the minimum number of jurors constitutionally allowed, and thus the minimum needed to be filled in jury selection, is six members.

The creation of a jury is considered by some to be “the most important part of any criminal trial.” This is because jury selection provides the first opportunity for both the prosecution and defense counsel to portray their version of the alleged crime before the men and women who will be charged with coming to a verdict. Counsels will also naturally seek to find and retain jurors who they believe will tend to agree with their own position while maintaining the appearance of being fair and impartial as is constitutionally required. This has led to the creation of statutes and case law providing for the reasons and means by which a juror can legally be excused or excluded from the panel. Ultimately, the goal of this is for the juries to be able to hear cases with unfair bias for or against the defendant, respecting both the presumption of innocence and the need for just punishment of crime.

The first level of juror screening is strikes for cause. These strikes, unlimited in number, are done because the jurors are themselves demonstratively biased in one direction or the other. For example, if a juror has a shared experience with the defendant or the victim, their hearing of the case could be biased. In order for an attorney to find out who these biased potential jurors are, a voir dire is conducted, in which the judge, prosecutor, and/or defense attorney ask the jury panel questions regarding themselves, their affiliations, their employment, their experience with juries, etc. It is important that these questions actually be asked, and done so fairly explicitly, as jurors are only obligated to answer questions that are actually put before them. Whether or not to grant the strike for cause is up to the judge, who must determine based on the juror’s answers whether the juror could be fair and impartial. At least in the New York judicial system it has been ruled that it is better for the judge to err on the side of caution and excuse jurors who may be biased. While not binding law outside of New York, making reference to Culhane may assist the challenger in winning the motion to strike.

If the attorney does not want a juror in the box, but either cannot or fails to have the juror stricken for cause, the next recourse is a peremptory strike. Here, the attorney does not need to give any basis for the request to strike the juror. Because these challenges provide more opportunity to exclude certain jurors without being able to show a reason, courts and statutes have limited these strikes far more than strikes for cause. These strikes are first limited in their number; in federal court they are limited as follows: three for each side in civil and misdemeanor cases,

References:
5 See Thompson v. Utah, 170 U.S. 343 (1898).
sixteen in felony cases distributed as six to the government and ten to the defense, and twenty for each side in capital crime cases. Most states have instituted fairly similar numbers. These challenges have further been limited by Supreme Court decisions in order to prevent unconstitutional discrimination in jury selection. The first in this string of cases is *Batson v. Kentucky*, which held that excluding jurors solely on the basis of race is an unconstitutional use of peremptory strikes. It is necessary for a race-neutral reason for the strike to be given. The Court did not hold that this ruling prevents any and all peremptory challenges, but that a strike that does not rise to the level of “cause” must have a reason besides the juror’s race. This *Batson* ruling has since been further expanded to include gender and, at a Circuit Court level, sexual orientation.

Due to the jury having the responsibility to render a verdict on the case, with their failure resulting in a mistrial, it is necessary for specific lines to be drawn for what are appropriate ways to reach those verdicts. The first standard to be established is the level of proof needed, the burden that the state has. This level of proof has been long established as “beyond a reasonable doubt.” This standard does not however carry with it a clear definition and application, absent further instructions. This is problematic, as the *Winship* case did not take a stance as to whether or not there is a requirement for juries to be given instructions defining reasonable doubt, or if it is even constitutional to do so. There is still no federal requirement for such instructions to be given to juries, but five Circuit Courts and the highest courts for thirteen states have made jury instructions defining reasonable doubt a required procedure to some extent. Three Circuit Courts and the highest courts for six other states have gone the other way, holding that these jury instructions are not required, and giving any definition to “reasonable doubt” may even constitute reversible error. With these contradictory views, it would be expected that the Supreme Court would make a final decision, but none has occurred yet.

Since at least some jurisdictions currently require a definition of “reasonable doubt” to be established to give to juries and there is no indication that this position is in danger of being overturned, work has been done to determine what exactly constitutes a “reasonable doubt.” In *Holland v. United States*, the definition given by the trial judge of “the kind of doubt... which you folks, in the more serious and important affairs of your own lives, might be willing to act upon” was upheld, though the Court expressed a preference for a rendering more similar to *Bishop v. United States*, which gave the definition as “a doubt as would cause reasonable men to hesitate to act” (emphasis added) rather than to act. As can be seen by these contradictory yet both affirmed statements, there is no clear linguistic definition of “reasonable doubt,” so some have attempted to find a numerical definition. In a 1971 study consisting of 24 judges, 69 jurors, and 88 sociology students, the participants were tasked with defining the probability of guilt they thought necessary for finding the defendant guilty. The study found that around two-thirds of the judges and jurors in the study saw “beyond a reasonable doubt” as a likelihood that the defendant is guilty of 9.5 out of 10 or less with over eighty percent of students seeing guilt at that likelihood.

After the standard of “reasonable doubt” has been determined, the question to be raised is the standard of proof beyond a reasonable doubt, but the Court took the opportunity to cite ten opinions from 1881 to 1958 that support the basic requirement. This shows the constancy of the requirement.

15 See *In re Winship*, 397 U.S. 358 (1970). (The case was ultimately based on whether juvenile proceedings also require proof beyond a reasonable doubt, but the Court took the opportunity to cite ten opinions from 1881 to 1958 that support the basic requirement. This shows the constancy of the requirement.)
17 Id. at 1718-1719.
18 Id. at 1719-1720.
22 Id. at 324.
agreement among the jury that is necessary. James Madison initially proposed that the 6th Amendment include that the jury must be unanimous in verdict, but that clause was not approved in the Senate. While forty-eight states and the federal court system do require juries to be unanimous, Oregon and Louisiana do not, instead allowing for convictions by a vote of ten to two, Louisiana having changed from a nine to three conviction vote. The Supreme Court upheld both Oregon’s ten to two and Louisiana’s former nine to three voting requirements when they were challenged. However, the Court has ruled that a jury of six must be unanimous. This is a reasonable distinction. Since a jury of five members is not allowed, it would follow that a jury of five agreeing members would not be legal either. However, since a nine or ten person jury would be legal if they were the entirety, it makes sense that their agreement can carry the conviction. The next step to be taken in this jurisprudence would be to appeal a conviction by a vote of six to three. This would allow a blanket decision to be made that a jury verdict must consist of three things: a jury of at least six members, a decision reached by a two-thirds majority, and the number of voters in that majority must themselves total at least six. This seems to be the most logical synthesis of the holdings of Williams, Ballew, Apodaca, Johnson, and Burch.

As citizens of the United States, we have been given the right to a trial by a jury of our peers, with a presumption of innocence that can only be overridden by evidence beyond a reasonable doubt. With the power that juries thus have, it is necessary for the process by which juries come to their verdicts to be clear and understandable both to the defendant and to the population at large. When jurisprudence began departing from twelve-member, unanimous jury decisions being necessary, this clarity was put at risk. With further cases both then and now, however, this clarity is being and will continue to be restored and improved upon. The process by which jurors are selected has not undergone this same loss of clarity that must be restored, but rather has needed, and will continue to need, further case law in order to ensure that the process is done fairly and without prejudice.

23 Apodaca v. Oregon, 406 U.S. 404 (1972). (This fact is also cited in Williams v. Florida, possibly because Justice Byron White wrote both Court opinions.)
Guilty as Charged: Why the American Jury System Needs Reform

Gabriella Nicole Siefert†

ABSTRACT

Trial by jury is a fundamental right that many Americans take for granted, and one that is firmly ensconced within the U.S. Constitution. While these may be widely accepted as true, the reliability, fairness and consistency of the jury system is something that has often been debated. In this piece, Siefert starts by illustrating the historical origins of the trial by jury, using them to explain why it remains a vital institution for preserving American democracy. Siefert goes on to explain how the present jury system is so plagued by flaws and inconsistencies that it threatens to corrupt the U.S. justice system. Proceeding on to analyze three of these flaws — widespread ignorance among jurors, disinterest in the verdict outcome, and widespread jury bias, Siefert makes the case that the jury system presents a new form of tyranny: that of the incapable and unjust juror. She concludes that the system remains within the realm of repair and lists several important reforms that can be implemented.

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1 Phoebe A. Haddon, Rethinking the Jury, 3 WM. & MARY BILL RTS. J. 29, 43 (1994).
2 Id. at 43.
3 U.S. Const. amend. VI.
5 Id. at 1167.
right to a fair trial.

Today’s average juror, often without a college diploma or any specialized legal training, has no business bearing the heavy burden of determining the potential culpability of the accused. Juries are typically selected through a process called voir dire in which attorneys question prospective jury members in front of a judge. During this time, attorneys use the person’s responses to questioning, in conjunction with any previously known background information they might have in order to determine which side of the case he or she might have a bias towards. For example, in a criminal case involving the murder of a six year old child, attorneys might question the prospective juror whether or not they have children or grandchildren. A young mother with three children under the age of ten might be more sympathetic to the prosecution. In such cases defense attorneys would do everything in their power to prevent someone with that background from serving on the jury. Throughout this process, attorneys are well aware that their careful selection of six or twelve people could make or break the outcome of the trial. The decisions made by a juror, whether in a county, state or federal courthouse, are by no means insignificant. Many cases seen by juries involve stakes in excess of $100,000, a sum far above what many jury members will make in an entire year. In addition, jurors are often required to deliver verdicts that could lead to the accused spending two or three years in prison, and for each year of prison the government will spend an enormous $25,000. One must also take into account the immeasurable psychological hardship and loss of income for individuals serving their jail sentence.

Keep in mind that the requirements to serve on a jury are anything but strict; anyone whose name graces a “voter registration” list or a “list of persons over the age of eighteen and holding valid driver’s license” is eligible to serve on a jury. Jurors who are selected more likely than not have “little or no previous experience with trial procedure and legal standards.” This begs the question: do jurors possess the civic and legal knowledge necessary in order to carry out their critical task? The answer, after examining the evidence, is most certainly “no.” Though there are far more degree-holding Americans today in comparison to five decades ago, basic general knowledge and socio-political awareness has failed to increase correspondingly. A 2006 poll found that “58% of Americans cannot name the three branches of the federal government” and “only 28% can identify two or more of the five rights protected by the First Amendment; figures are shocking enough to make poor Washington and Jefferson roll in their graves.” Some might insist that jurors’ ignorance of the civic systems they are governed by has no bearing on their ability to deliver just verdicts. However, it is not jurors’ ignorance that is most problematic; rather it is what such ignorance suggests about citizens that is most concerning. If Americans demonstrate little to no concern for the justice system, the judicial branch, or even their constitutional rights, there is little to no chance that they will care about the administration of justice itself. It is these Americans, lacking the most basic knowledge about the American system of government, and caring little for the outcome of the verdicts they deliver, that are charged with judging some of the nation’s deadliest serial killers, rapists and thieves.

This problem of “juror ignorance,” is much akin to the political ignorance one sees among American citizens and casts serious doubt on a jury’s ability to fully comprehend evidence presented to them during trial. Due to the complex jargon used in court, many jurors do struggle following legal instructions given to them by judges during or after the trial. As for interpreting witness’ testimonies, even jurors who find themselves able to “un-
derstand the words and get the thought intended by a witness” may lack the power to “read his [the witness’] hidden motive” simply because of their lack of specialized knowledge.\textsuperscript{17} All too many errors committed by juries are also due to a simple lack of comprehension or inability to properly understand legal terms or burdens of proof.\textsuperscript{18} Whether or not juries fail to pay attention during trial or simply are unable to understand the evidence they are presented with, jurors’ lack of understanding has assuredly led to numerous inaccurate verdicts over the years. In fact, in a study done by Northwestern University covering 271 cases, jurors delivered inaccurate verdicts in approximately one out of every eight of the cases.\textsuperscript{19} A justice system that regularly forces innocent citizens to serve time in prison is, without a doubt, a system in desperate need of reform. It has become abundantly clear that juries, due to their lack of training and subsequent nescience, simply do not possess the qualifications necessary to determine the culpability of the accused.

While juries were first praised for their impartiality, it is important to acknowledge that all jurors enter the courtroom with their own personal biases against peoples of various ethnicities and socio-economic statuses which all too often prevent them from giving the accused a fair trial. It has been said that bias, in more ways than one, “brings misery to the human race.”\textsuperscript{20} All people, regardless of familial background, gender, or creed look at the world and those around them through a lens unique to their own personal life experiences. Jurors are not an exception to this reality of human nature. All jurors are “potentially subject to a wide range of biases” that in turn might prevent them from “evaluating information rationally.”\textsuperscript{21} Looking back at the atrocious rulings from cases involving race, such as those involving Emmett Till and the even more recent Rodney King, it is not too far fetched to conclude that “the jury remains an instrument of racial oppression.”\textsuperscript{22} Juries had the responsibility to assign blame for the brutal treatment of both Till, who was kidnapped and murdered, and King, who was beaten by several white police officers; yet, as shown by the verdicts, they did not.\textsuperscript{23} Fortunately, several overt types of racial prejudice have declined since the Jim Crow days of the Southern United States. However, that does not mean that bias occurring as a result of unconscious racial profiling or prejudice has disappeared completely. To combat racial bias, precedent such as the “fair cross section” requirement was established.\textsuperscript{24} This requirement insists that a jury panel’s diversity be an accurate reflection of the diversity in the area where the defendant committed the crime and did promise less biased juries for a time. However, since jury panels are merely the group of individuals “from which the petit jury is selected,” not all petit juries end up being as fair to minority defendants as they should.\textsuperscript{25} Juries selected to rule on racially charged cases often do not represent a fair cross section of their community; in the case of Trayvon Martin, who was shot and killed by a white police officer, five caucasians and one latino constituted the jury of six.\textsuperscript{26} For reasons such as these, racial bias remains a serious problem in many courtrooms today.

In addition to racial bias, jurors are often influenced by their own personal ideological and political convictions. The recent studies of economist Scott Wentland find that “jurors may be influenced by ideological bias, with juries in relatively Democratic areas awarding far higher punitive damages... [than] those in Republicans ones.”\textsuperscript{27} This means that the political affiliation of citizens in a crime’s location could potentially cripple a defendant’s case before the attorneys even give their opening statements. Our founding fathers would probably have agreed that neither someone’s age, gender, economic prosperity, personal health nor any of those factors should “move the

\textsuperscript{17} Henry S. Wilcox, Frailities of the Jury 39 (1907).
\textsuperscript{18} Somin, supra note 4, at 1183.
\textsuperscript{20} Wilcox, supra note 17, at 61.
\textsuperscript{21} Somin, supra note 4, at 1175.
\textsuperscript{22} Albert W. Alschuler, Our Faltering Jury, Public Interest, Jan. 1, 1996, at 28.
\textsuperscript{23} Flint Taylor, Racism, the U. S. Justice System, and the Trayvon Martin Verdict, IN THESE TIMES (July 16, 2013) http://inthesetimes.com/article/15303/racism_the_us_justice_system_and_the_trayvon_martin_verdict.
\textsuperscript{24} Lockhart v. McCree, 476 U.S. 162, 168 (1986).
\textsuperscript{25} Weaver et al., supra note 11, at 404.
\textsuperscript{26} Flint, supra note 23.
\textsuperscript{27} Somin, supra note 4, at 1184-5.
scale a fraction of a hair when justice weighs the facts before the law.”

Yet, the abuses continue as jurors continue to carry out justice with bias and have proven their continued struggle to separate the guilty from the innocent.

In addition to their inherent bias and lack of legal training or basic civic knowledge, jurors have no vested interest in the outcome of the trial, which, in many cases contributes to their dispassionate examination of evidence and frivolous verdict determination. In examining the effectiveness of trials by jury, one must ask whether jurors would be willing to listen to hours, possibly even weeks, of evidence presentation, testimony and cross examinations all for the sake of the preservation of justice. In examining one of the most controversial criminal cases in U.S. history, the O.J. Simpson case, it is difficult not to call the diligence of the jury into question. The case itself was eight long months long with an overwhelming twenty-three days spent in trial. Copious amounts of incriminating testimony was presented to the jury in addition to physical evidence such as the “bloody glove” found in Simpson’s estate which was “only one of nearly three dozen blood exhibits connecting Simpson to the murders.”

Many experts and onlookers see “abundant other evidence” offered throughout the trial that clearly “pointed to his [Simpson’s] guilt.” Following the near month long number of days in court, the jury deliberated for an underwhelming three hours and forty minutes before finding Simpson not guilty; many around the nation were “stunned by his acquittal.”

Other than the acquittal of a guilty man, according to many, the most unfortunate part of this verdict was that it occurred due to the negligence of jury members. Despite the urgings of one of the prosecuting attorneys to take notes in order to better recall all the information presented to them, only two jurors ended up doing so. To make matters worse, one juror seemed to “doze off repeatedly” during the trial. If jury members are truly dedicated to delivering a fair and just verdict, they must pay close attention and “desire to hear the evidence” as it is presented to them. In many cases, taking notes or being willing to stay awake during trial are not meaningless suggestions, but rather, what any responsible juror would agree to do. While some mistakes made by jurors may be innocent and purely due their lack of legal expertise, a great too many errors are a result of negligence that stems from jurors lack of “self-interested stake” in the outcome their decisions may bring. This dangerous apathy and indifference towards the administration of justice and conviction of criminals renders today’s juries incapable of doing rightly by the accused.

The jury system, as it currently operates, has demonstrated itself over the years to be incapable of ruling consistently, fairly and without bias. However, that does not mean that juries themselves are a lost cause. Most Americans, largely still believe in the viability of the jury system and see it as a “positive and necessary force in the quest for justice.” In trying to repair this broken system, legislators and legal experts alike must first start in the jury box to discover what part of the process jurors themselves are having difficulty with. Many jurors, when questioned, explain that their uncertainty regarding the trial process itself actually causes much anxiety. That is why some states today find it useful to, upon their selection, provide prospective jurors with an orientation video that aids them in understanding “their role in the legal system.” This would undoubtedly alleviate many of the concerns regarding jurors’ ignorance and lack of basic legal knowledge. Jurors who understand the critical part they play in the administration of justice as well as the basics of the system itself will be more confident, and objective in delivering verdicts. Another issue that arises for jurors is their ability to remember and process the copious amounts

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28 Wilcox, supra note 17, at 62.
29 Alschuler, supra note 22, at 33.
30 Id. at 30.
31 Id.
32 Id.
33 Id. at 33.
34 Id.
35 Wilcox, supra note 17, at 27.
36 Somin, supra note 4, at 1174.
38 Id.
39 Id. at 863.
of information presented to them during trial; the Simpson case lasted for almost a month. Many suggest that requiring judges to provide jurors with paper and writing utensils to take notes during trial can also be beneficial in keeping record of important evidence.\textsuperscript{40} Jurors will then be able to refer back to their notes while deliberating thus allowing them to make more educated, evidence based, verdicts.

Another issue with the current system is jurors’ dispassionate view towards their civic duty. Many avoid jury service like the plague and take every opportunity they can to be exempted from service. This directly affects their desire to pay attention during trial, carefully consider the evidence and ultimately deliver objective verdicts. In examining this issue, it is important to find ways to help jurors care deeply for the cases they hear and the decisions they make. In other words, how can jurors view attending trial, not as a duty, but as a service to one’s own country? Many suggest that the reason citizens across the country dread jury duty is due to the fact that going to court on a weekday almost always means missing time at work. Because there is often a professional exemption available for “high-income”, white collar workers, that means many who serve on juries are lower wage workers for whom such luxuries are not an option.\textsuperscript{41} To fix this, it is imperative that employment exemptions be removed so that all citizens more “equally share the obligation or jury duty regardless of their occupation and income level.”\textsuperscript{42} This will also help to ensure that a more diverse jury is created, with members represented across all income levels and racial groups. This will also help to combat some of the racial and ideological biases pervading the current system.\textsuperscript{43}

Jury trials have been part of the American justice system since the very beginning because, by and large, they are integral to a democratic government. A nation such as the United States, made by and for the people, must acknowledge the importance of citizen participation in the justice system. While the system in its current form allows jurors’ ignorance, bias, and lack of a vested interest in the trial’s outcome to get in the way of just verdicts, there is still hope for the concept of trial by jury. In educating jurors, allowing and encouraging them to take notes during trial, in addition to doing away with employment based professional exemptions, the jury system can be made more objective, consistent and fair. Whether the defendant is guilty or innocent, jurors, judges, and attorneys alike will be able to look at the American people and confidently say that they are serving justice once again.

\textsuperscript{40} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.

Nathan Kanter†

Abstract

In this article, Kanter explores the idea of religious freedom as expressed in the First Amendment of the Constitution, as well as its present day applications, through analyzing five cases: Engel v. Vitale, Lemon v. Kurtzman, Board of Education v. Allen, Wallace v. Jaffree, and Lee v. Weisman. Using a 2015 ruling by the California Appellate Court in Sedlock v. Baird as a starting point, Kanter gives a vigorous defense of the right to religious freedom in an age where it is in erosion, illustrates the ways in which erosion may happen, and makes the case for non-intervention by the Court in matters of religious ideology.

I. Introduction

The First Amendment of the Constitution concisely expresses each citizen’s freedom to choose their own religion: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Like many aspects of society, the view of religion has changed with each successive generation. This year, the California Appellate Court ruled on Sedlock v. Baird determining whether the Encitas Union School District’s (EUSD) yoga program violates the Establishment Clause of the First Amendment. Although yoga has manifested in the private sector as a health practice, the California Appellate Court fails to properly parse the program to its fundamental level, and misapplies a cultural phenomenon.

II. Historical Background

The notion of religious choice permeated debates during the drafting of the United States Constitution. In 1785, James Madison presented “A Memorial and Remonstrance,” to the General Assembly of Virginia in order to prevent a three cent tax on citizens for the Protestant Episcopal Church. Madison articulates, in the final section of this paper, that citizens have “the equal right…to the exercise of his Religion according to the dictates of conscience,” to contend against persecution at the hands of an established church. Madison defined religion as “the duty we owe our Creator, and the Manner of discharging it.” This most easily fits the theistic understanding of religion. The next year, Thomas Jefferson addressed the House of Delegates with “An Act for Establishing Religious Freedom.” With protection of religious freedom in mind, Jefferson advocated that, “no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced,

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restrained, molested, or [burdened] in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.”3 This statement demands equality for all religious opinions, but does not offer guidelines to determine religiosity. These notions intersect in the First Amendment, which protects each citizen’s personal choice of religious belief without fear of subjection or persecution.

III. Supreme Court Precedents

The Supreme Court has decided several cases based on the Establishment Clause. Although no clear legal definition of religion exists, the Court created several tests to evaluate the constitutionality of public programs. Many of these cases deal with religious promotion in schools.

First, Engel v. Vitale (1962) proposed the question whether public schools, empowered by the New York State Constitution, could write a nondenominational prayer for their district to begin each day. However, Justice Black noted in his decision “The religious nature of prayer was recognized by Jefferson, and has been concurred in by theological writers.”4 Due to the promotion of a specific religious observance, the Supreme Court decided this program constituted a breach in the Establishment Clause.

The decision of Lemon v. Kurtzman (1971) created an applicable test for courts to evaluate Establishment clause issues. In this case, the Court determined whether teachers from church-related schools could receive additional bonuses from the state legislatures in Pennsylvania and Rhode Island. They publically funded the additional salary incentives for “secular educational services”5 the teachers provided. Drawing from precedent, Justice Burger notes, “in the absence of precisely stated constitutional prohibitions, we must draw lines…[where] the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’ Walz v. Tax Commission.”6 In response the Court put forth a three pronged test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen (1968); finally, the statute must not foster ‘an excessive government entanglement with religion’ Walz, supra, at 397 U. S. 674.”7 The Court ruled the statute in question unconstitutional due to excessive entanglement of religion with the state for:

It matters not that the teacher receiving taxpayers’ money…that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training.8

Since the religious and secular aims of church-related schools are not separate, the provisions created an environment of excess entanglement. Subsequent cases utilize the Lemon test to define religious activity.

The Supreme Court tackled another Establishment Clause issue to settle an Alabama case, Wallace v. Jaffree (1985). Justice Stevens asserted judgment upon three statutes:

(1) 16-1-20, enacted in 1978, which authorized a 1-minute period of silence in all public schools ‘for meditation’; (2) 16-1-20.1, enacted in 1981, which authorized a period of silence “for meditation or voluntary prayer”; and (3) 16-1-20.2, enacted in 1982, which authorized teachers to lead “willing students” in a prescribed prayer to “Almighty God…the Creator and Supreme Judge of the world.”9

He deemed the first admissible, but the latter two inadmissible because of Alabama’s intention to promote “re-

6 Id. at 612.
7 Id. at 612-3.
8 Id. at 641.
religious activity.” The state could not present or lead students in religious activity. The Court held that students must select their own form of religious observance when the state implements meditation into their curriculum.

Lastly, in Lee v. Weisman (1992) the Court notes a need to expand the principles governing the establishment of religion. Justice Kennedy asserts that the Establishment Clause, “guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so.” This expansion of the Lemon test helped deem a nonsectarian prayer at a middle school graduation constitutionally unacceptable. He goes on to reiterate a point from Lynch v. Donnelly: “The directions…given in a good-faith attempt to make the prayers acceptable to most persons does not resolve the dilemma caused by the school’s involvement, since the government may not establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds.” Thus, the Supreme Court rounded out their guidelines for public schools regardless of the traditional, nontraditional, or state-formed nature of the promoted beliefs.

These cases present several lines of reasoning distancing education from religious influence. Once created, the Lemon test served as the test to determine the religious intentions behind establishment issues. The Coercion test reinforces the Court’s goal to avoid the promotion of a state sponsored religion. Also, lower courts have attempted to clarify the gray areas of the Establishment Clause.

IV. Transcendental Meditation

When deciding Malnak v. Yogi (1977), The District Court of New Jersey expanded the definition of religion. The defendants argued the high school elective was “secular in nature,” and led to “reduced stress, and better educability and sociability.” Both the District and Appellate Courts deemed the propagation of Transcendental Meditation and the Science of Creative Intelligence a violation of the Establishment Clause. The opinions of the courts aimed to use a unitary definition of religion by emphasizing “religious beliefs…provide a basic framework for perceiving, interpreting, and evaluating the world of the believer.” District Court Judge Meanor derived this outcome from the Lemon test, while Judge Adams, of the Appellate Court, applied the Nyquist test (from Committee for Public Education v. Nyquist) to evaluate the program’s religious intention.

Malnak v. Yogi demonstrates universal applicability of the Lemon test on nontraditional religious sources in the District Court of New Jersey. The plaintiffs consisted of the Coalition for Religious Integrity, Americans United for Separation of Church and State, and the Spiritual Counterfeit Project. They objected to the fact that five Boards of Education in New Jersey, by supplying $40,000 to hire the World Plan Executive Council to teach a high school elective, authorized “the dissemination of the Science of Creative Intelligence and the propagation of the technique of Transcendental Meditation.” The World Plan claimed that people should practice Transcendental Meditation “(1) To develop the full potential of the individual; (2) To improve governmental achievements; (3) To realize the highest ideal of education; (4) To eliminate…crime and behavior that brings unhappiness,” among others things. The course begins with a ceremonial Puja, where instructors give each student their own secular mantra. In the program, the teacher began with ten to fifteen minutes of instruction on the Science of Creative Intelligence, then the students meditated for the remainder of the session. During this time, the meditator contemplates a meaningless sound to reap personal benefits. Also, the class included a

10 Id. at 41.
12 Id. at 578.
13 Chananie, supra note 2, at 154.
15 Chananie, supra note 2, at 163.
16 Malnak, 440 F.Supp. at 1287.
17 Id. at 1288.
18 Chananie, supra note 2, at 148, 153.
textbook that “states that a person attains the qualities of creative intelligence, e. g., truthfulness, efficiency, freedom, through regular contact with the field of pure creative intelligence during the practice of Transcendental Meditation.” The spiritual nature of the content lead the Court to decide on its acceptability.

Judge Meanor applies the Lemon test for his opinion. He found the state had employed inappropriate means to achieve their cited secular purpose. “Clearly, [the program] has a primary effect of advancing religion and religious concepts.” Finally, Judge Meanor reasoned, because federal and state aid contributed to the program’s dissemination, the government participated in excessive entanglement with religion. In his opinion, the program fails under the scrutiny of the Lemon test.

Upon appeal, Judge Adams employed the Nyquist test to further demonstrate the program’s unconstitutionality. This test aims to define religious intention behind programs by determining whether a belief system 1) deals with ultimate concerns, 2) is comprehensive in nature, and 3) contains formal religious “signs”, such as rituals, ceremony, or clergy, of which a court can take notice. Although the language is ambiguous, Judge Adams aims to create a single unitary definition of religion for the First Amendment: “Only if the government favors a comprehensive belief system and advances its teaching does it establish a religion. It does not do so by endorsing isolated moral precepts.” This builds upon the notion that the state should not offer a system, which “provides a basic framework for perceiving, interpreting, and evaluating the world of the believer.” The third part of the Nyquist test holds considerable importance, because “rituals, ceremonies, or other externals signs…might act as indicators of the comprehensive and fundamental nature of a belief system.” This final part holds considerable importance, for it requires comparison of the program to accepted religions.

Malnak v. Yoga serves as an example of the State Court system addressing an expansion of the traditional, theist definition of religion. It accurately captures the Establishment Clause’s aim to avoid a civic religion. Also, it promises to relegate “belief firmly into that realm of the inviolability of the individual conscience.” Due to broader categorization of belief, it serves to protect the right of religious freedom entailed in the First Amendment.

V. Sedlock v. Baird

The State of California found a similar opportunity to rule on a controversial Establishment Clause case, Sedlock v. Baird. In this dispute, the Encitas Union School District attempted to revise their physical education curriculum. The Superior Court and Appellate Court concurred: this program is constitutionally acceptable. However, their reasoning fails to envision the full picture.

Sedlock v. Baird assessed the constitutionality of EUSD’s yoga program. This program would become part of the mandatory curriculum in nine schools under their jurisdiction. The Jois Foundation donated $533,000 to EUSD to create a program under specific conditions: Jois must certify all instructors involved, the District “will develop an integrated wellness program that includes components of physical fitness, wellness, and life skills,” and the program must be “scalable and transferable to other settings.” The District then developed the curriculum and selected the teachers. The curriculum renamed yoga positions to cater to the young students and included a period of quiet meditation guided by quotes from secular figures. These quotes meant to cultivate...

19 Malnak, 440 F.Supp. at 1291.
20 Id. at 1324.
21 Id.
22 Chananie, supra note 2, at 159.
23 Id. at 165.
24 Id. at 163.
25 Id. at 166.
26 Id. at 163.
“life skills built around key themes of yoga instruction such as self-discipline, balance, and responsibility.”

For example, they provide this quote by Dr. Martin Luther King Jr.: “The time is always right to do what is right,” to inspire moral action.

Although students had the option to abstain from participation, the program is mandated as part of the physical education curriculum. The Jois Foundation played a fundamental role in the inception of the program.

The Jois Foundation harbored major interest in the success of the EUSD yoga program in which they had heavily invested. The initial ruling of this case stated the mission of the Jois Foundation is “to establish and teach Ashtanga yoga in the community, at minimum, the physical postures, breathing, and relaxation.” With their goal of a scalable yoga program evident, the Jois Foundation funded a joint study between the University of San Diego and the University of Virginia to study the physical and behavioral effects of EUSD yoga. This study tried to determine if practicing yoga affected physical fitness, behavior, attendance, emotional wellness, academic achievement, and extracurricular practice of yoga. Their findings state yoga likely generates extracurricular practice and improves emotional wellness and academic performance; and that yoga may affect student fitness and behavior, but probably does not influence attendance. The survey required students, parents, teachers, administration, and the yoga instructors to respond. The first three maintained low response numbers peaking at 55.9%, 7.9%, and 56.3% respectively. While the latter two experienced full participation. Because the study required participants and faculty to volunteer information stating behavioral changes, it is likely the data experienced response bias based on respondents’ interest in the program. Those disinterested in the outcome are less likely to participate in its generation. This study serves as the premise for the benefits associated with EUSD’s yoga program.

In the Appellate decision, Judge Meyer listened to the circumstances of the EUSD yoga program, and in turn, applied the Lemon test. In concurrence with the original decision Judge Meyer stated “the practice of yoga may be religious in some contexts, yoga classes as taught in the District are, as the trial court determined, ‘devoid of any religious, mystical, or spiritual trappings,’” to a reasonable observer, the student attending the class. Though teachers periodically discouraged students chanting “ohm” in their sessions, he asserts, in America, yoga is a cultural, nonreligious phenomenon. The Court believes, renaming the positions of yoga and using American, cultural references for guided meditation made the program secular enough to circumvent the fact, for some “the practice of yoga is a religious ritual, undertaken for spiritual purposes.” Thus, the Court of Appeal in California deemed the yoga program within the bounds of the Lemon test.

However this decision does not follow prior precedents of the Establishment clause. Because the Jois foundation trained the teachers used in EUSD’s yoga program, it is a derivative of Ashtanga yoga, a religious form. Rebranding the practice does not dismiss its source; it only serves to make the program’s ideals more ambiguous. This ambiguity poses an issue to the reasonable observer view, because primary school children are more impressionable and less equipped to deem the program religious. The religious connotations are evident because students engage in spiritual chants while participating. Also, the study suggests a strong likelihood of extracurricular yoga practice, which obviously results in the advancement of its ideals. Much like the nonsectarian prayer of *Lee v. Weisman*, this program, palatable to most, represents a trend toward a civic religion. *Matnak v. Yogi* demonstrated a secular purpose could not justify the inappropriate means of its realization. The Court stating America has secularized yoga in the private sector does not change the beliefs of those practicing yoga in a reli-

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29 *Id.*
30 *Id.* at 750.
31 *Id.* at 744.
33 See *Id.*
34 *Id.* at 10.
36 *Id.* at 742.
religious manner, nor should the court attempt to influence them.

When applying the Nyquist test, the components of Sedlock v. Baird become increasingly problematic. The program aims to increase students’ flexibility, but also mandates a coping ritual for emotional wellness. In addition, the teachers read secular American quotes to their students during guided meditation; each quote promotes a specific moral precept. Combining these lessons creates a comprehensive system of morality to govern personal interactions. The ultimate concern of the program seeks national implementation of EUSD’s ideals of morality through their yoga ritual. Finally, since EUSD yoga directly descends from religious Ashtanga yoga it exhibits a “formal, external, or surface [sign] that may be analogized to accepted religion.” How is meditation secular when paired with yoga, but religious standing alone in Malnak v. Yogi? Mandating bodily observance of yoga and leading meditation coerces students to participate in the program, for if they abstain, they may suffer the social repercussions of nonconformity.

Sedlock v. Baird calls for a decision on the scope of the Establishment Clause. Both courts fail to recognize EUSD’s implementation of inappropriate means to achieve a secular purpose, which ultimately results in the propagation of religious beliefs. Fundamentally, the courts do not properly emphasize EUSD yoga’s religious origin. Steven Chananie asserts the First Amendment seeks to prevent the “government from fostering one unified worldview over another.”

EUSD created its yoga program with the intention of spreading a system of morality and ritual under the guise of revamped physical education.

VI. Conclusion

Citizens of the United States of America have the Constitutional freedom to choose their own religion. This program inhibits the students’ choice by promoting its own version of ritualistic practice. By changing the meaning of a spiritual practice in case law, the government further participates in an excessive entanglement with religion. Madison describes, in “Memorial and Remonstrance,” the change in American religious ideology caused by establishing a state church from the prospective of a foreigner: “The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and [philanthropy] in their due extent, may offer a more certain repose from his Troubles.” Many immigrants flocked to the United States based solely on the freedom to practice their religion of choice.

Anyone can go to a yoga studio and pay to participate; the right to free exercise allows citizens to self-select their religious observance. By claiming yoga is secular in America, all Americans practicing it religiously experience a degradation of their beliefs based on the power of law. Jefferson sheds light on the legislative side of the issue: “[When] the civil magistrate [chooses] to intrude his powers into the field of opinion...[It] is a dangerous fallacy which at once destroys all religious liberty because...his opinions [become] the rule of judgment [to] approve or condemn the sentiments of others.” When dealing with religious ideologies, the court cannot redefine the values of some to placate the desires of others. To stand idly by will endanger all religious practices indefinitely.

Addendum: The Jois Foundation has rebranded itself as the Sonima Foundation.

37 Chananie, supra note 2, at 160.
38 Id. at 167.
39 Madison, supra note 1, at § 9.
40 Jefferson, supra note 3.
Freedom Versus Order: Police Brutality and the Right to Resist

Chris Prescher†

ABSTRACT

Police brutality, manifested through unlawful arrest, excessive force, and racial discrimination, plagues the United States in the 21st century. In order to solve this issue, action must be taken on three levels: (1) the power amassed through police militarization must be reduced, (2) the rights specifically established by the Constitution must be preserved by the courts, and (3) those rights must be expanded to include the ability to reasonably resist unlawful arrest and excessive force. Law enforcement power has flourished in a time where societal order is the priority. Thus, when addressing the issue of police brutality, one must realize that order cannot and should not exist without personal liberty.

Understanding the problem

“I can’t breathe.” These three words painfully escape the mouth of Eric Garner, 43, as he is placed into a chokehold by a New York Police Department officer, and slammed onto the ground. “I can’t breathe.” He gasps these words 10 more times as he is held down by five officers, one shoving his face into the pavement.¹

One hour later, Garner passed away. The medical examiner found that he died from “compression of [the] neck (choke hold), compression of [the] chest, and prone positioning during physical restraint by police.”² More than 20 years ago, the NYPD banned the use of chokeholds, defined as a police maneuver that puts “any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.”³

Eric Garner’s death at the hands of law enforcement is unfortunately not an isolated incident. In November of 2014, Tamir Rice, 12, was shot and killed by an officer in a park in Cleveland, Ohio.⁴ In August of 2014,

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³  Id.

Michael Brown was shot several times and left dead on the street in Ferguson, Missouri. On April 12 of 2015, Freddie Gray, 25, sustained a fatal spinal cord injury while in police custody in Baltimore, Maryland. During a routine traffic stop in North Charleston, South Carolina, Walter Scott, 50, was gunned down from behind and killed by Officer Michael Slager.

Only the last instance, the death of Walter Scott, ended in the indictment of the officer whose actions caused the death of the individual, which would most likely not have occurred if not for a first-hand video of the shooting brought to the public by a civilian bystander. Walter Scott Sr., the father of the victim, said “It would have never come to light. They would have swept it under the rug, like they did with many others.” Days later, outside the North Charleston City Hall, this sentiment was echoed by a protester speaking over a megaphone, saying “This has been a reality that has been in the North Charleston Police Department for many, many years; it just so happens we got a video.” In contrast, the circumstances surrounding Freddie Gray’s death reveal an issue with the manner in which police misconduct is investigated:

The Baltimore Sun found that police missed the opportunity to examine some evidence that could have shed light on events. For example, by the time police canvassed one neighborhood looking for video from security cameras, a convenience store camera pointed at a key intersection had already taped over its recordings of that morning.

Too often, investigations of law enforcement’s use of excessive force are carried out by the same departments whose members are under investigation. The officers whose actions are in question are given the benefit of the doubt when using lethal force. While it is important to not shift the burden of proof to the defendants when seeking to charge officers of the law with criminal activity, these cases reveal a tendency to trust the reports of the officers whose actions are in question—even when they contradict evidence and eyewitness testimony. According to Everett Wade, a 54 year old Baltimore citizen, “Police have a ‘Stop Snitching’ policy. The good boys in blue cover for each other.”

On October 20, 2014, police officer Jason Van Dyke shot and killed Laquan McDonald in Chicago, Illinois. Video footage from the dashboard camera of one of the police cruisers revealed that McDonald was “strolling away from officers when Van Dyke [jumped] out of his vehicle and [pulled] his gun. Van Dyke began firing six seconds after arriving on scene and took 15 seconds to fire 16 shots. In those moments, shortly before he is shot, McDonald never faces Van Dyke.” The video, released over a year after McDonald’s death, “[contradicted] nearly everything police said happened” and “[showed] how elaborately police appear to have fabricated their version of that moment and how officers stood by each other in verifying the details.”

The existence of this “Stop Snitching” policy was validated by a report conducted by the National Institute of Justice, a branch of the United States Department of Justice, which surveyed members of law enforcement on police attitudes toward abuse of authority. In the study, 52% agreed that “it is not unusual for a police officer to turn a blind eye to improper conduct by other officers,” and 67% agreed that “an officer who reports another

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8 Id.
9 Id.
10 Rector, supra note 6.
11 Id.
13 Id.
14 Id.
officer’s misconduct is likely to be given the cold shoulder by his or her fellow officers.”  

15 This unwillingness to internally report police misconduct is increasingly alarming when coupled with the fact that 84% of those surveyed admitted that they had witnessed “police officers in their department [using] more force than is necessary to make an arrest.”

16 Police brutality in the United States is not confined to individual media outlets’ anecdotes, as several Department of Justice inquiries yielded evidence that law enforcement departments engaged in the use of excessive force, as well as racial targeting of minorities.  

17 A DOJ investigation into the Albuquerque Police Department concluded that “officers too often use deadly force in an unconstitutional manner in their use of firearms… often in circumstances where there is no imminent threat of death or serious bodily harm to officers or others.”

18 The abuse of power in the APD extended to “less than lethal force,” which, despite its name, could often lead to serious injury or death.  

19 Officers would use electronic control devices (“Tasers”) “on people who [were] passively resisting, observably nontreating but unable to comply with orders due to their mental state, or posed only a minimal threat to the officers.”

20 These uses of excessive force by APD officers were not isolated or sporadic, but represented a systematic pattern of activity throughout the department.

21 An inquiry by the DOJ into the Cleveland Division of Police just five months prior yielded eerily similar results.

22 The investigation concluded that there is reasonable cause to believe that Cleveland police officers engage in a pattern or practice of unreasonable and in some cases unnecessary force in violation of the Fourth Amendment of the Constitution. That pattern or practice includes: the unnecessary and excessive use of deadly force, including shootings and head strikes with impact weapons; the unnecessary, excessive or retaliatory use of less lethal force including Tasers, chemical spray and fists; excessive force against persons who are mentally ill or in crisis, including in cases where the officers were called exclusively for a welfare check; and the employment of poor and dangerous tactics that place officers in situations where avoidable force becomes inevitable.

23 A DOJ report on the Ferguson, Missouri Police Department, the location of Michael Brown’s death, revealed that the FPD possessed “a pattern of unconstitutional policies… leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community.”

24 The report also found that “Ferguson’s police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes,” with the city’s own data establishing “clear racial disparities that adversely impact African American.”


16 Weisburd et al., supra note 15, at 3.


18 Id.

19 Id.

20 Id.

21 Id.


24 Id. at 2.
What is more telling than these reports showing police misconduct is the incredible lack of data and statistics for police departments across the country. The Cato Institute’s National Police Misconduct Reporting Project states:

There are over 17,000 law enforcement agencies in the United States. Most states have laws on the books that either prevent those departments from releasing disciplinary and internal investigation records or permit those agencies to keep those records secret.\textsuperscript{25}

With regard to the DOJ tracking statistics, Cato points out that “the last time the Department of Justice generated a statistical report on police misconduct in the United States was over 8 years ago in a report based on 2001 statistics that were voluntarily given to it by 5% of the police departments.”\textsuperscript{26} In a speech at Georgetown University in February of 2015\textsuperscript{27}, the Director of the Federal Bureau of Investigation James B. Comey told of his attempts following the riots in Ferguson\textsuperscript{28} to obtain data on the amount of African Americans shot by police:

I wanted to see trends. I wanted to see information. They couldn’t give it to me, and it wasn’t their fault.

Demographic data regarding officer-involved shootings is not consistently reported to us through our Uniform Crime Reporting Program. Because reporting is voluntary, our data is incomplete and therefore, in the aggregate, unreliable.\textsuperscript{29}

Comey went on to recount a conversation he had with an unnamed police chief who “[expressed] his frustration with that lack of reliable data. He said he didn’t know whether the Ferguson police shot one person a week, one a year, or one a century…”\textsuperscript{30}

The issue of U.S. police departments using excessive force was first brought to mass public attention more than two decades ago during the 1992 Los Angeles riots.\textsuperscript{31} These riots were in response to the beating of a black man, Rodney King, at the hands of several white LAPD officers.\textsuperscript{32} The increasing numbers of police brutality cases did not arise as a result of law enforcement utilizing the same tactics that had been employed for the last century. Instead, the rise in public awareness of police misconduct correlates with the movements to militarize local police departments. In June of 2014, the American Civil Liberties Union published a 91 page report on the excessive militarization of American policing, titled “War Comes Home.”\textsuperscript{33} The report focuses on the creation, management, and actions of Special Weapons and Tactics, or SWAT, teams. According to the report, the creation of these wartime tools and tactics was inspired by the “War on Drugs,” and the result was police departments resembling the armies of small nations, disproportionately engaging African American communities. The report outlines numerous wrongs of the police militarization movement, including racial biases, escalations in violence and excessive force, a complete lack of oversight, transparency, or accountability, and an intense fear of police in

\textsuperscript{25} Reporting Project- FAQs, NATIONAL POLICE MISCONDUCT REPORTING PROJECT, CATO INSTITUTE (Mar. 29, 2016), www.policemisconduct.net; Reporting, supra note 15.

\textsuperscript{26} Id.


\textsuperscript{30} Id.

\textsuperscript{31} Id.


black neighborhoods. All of these statistics and conclusions pale in comparison to the weight of the individual stories of police brutality resulting from the militarization of police forces:

Eurie Stamps was in his pajamas, watching a baseball game, when SWAT officers forced a battering ram through his front door and threw a flashbang grenade inside. Stamps, a 68-year-old grandfather of twelve, followed the officers’ shouted orders to lie face down on the floor with his arms above his head. He died in this position, when one of the officers’ guns discharged. Stamps wasn’t the suspect; the officers were looking for his girlfriend’s son on suspicion of selling drugs. The suspect was arrested outside the home minutes before the raid. Even though the actual suspect didn’t live in Stamps’ home and was already in custody, the SWAT team still decided to carry out the raid. Framingham has since disbanded its SWAT team.

In May of 2015, responding to law enforcement officials’ use of armored vehicles and camouflage to confront protesters in Ferguson, President Barack Obama spoke during a visit to Camden, New Jersey, saying “We’ve seen how militarized gear can sometimes give people the feeling like there’s an occupying force, as opposed to a force that’s part of the community that’s protecting them and serving them. [This gear] can alienate and intimidate residents and make them feel scared.”

It seems clear that police brutality and misconduct are present in the United States, even if the exact magnitude of the issue is still unknown. The question then becomes: why does this matter? Is the restriction of freedoms for a few Americans justified if those restrictions contribute to the preservation of societal order? Is it not important for members of law enforcement to have few limits placed on their actions, so that they are prepared to “protect and serve,” even if those actions may infringe on the rights of individuals? Approaching these questions must be done with the utmost care, as the answers given will shape the very nature of the United States of America. A response favoring the preservation of societal order over the freedoms of individual citizens would diverge greatly from the U.S.’s Constitutional foundations. This reality casts a somber light on the issue of police brutality.

**Separation of Powers**

There is an underlying issue with the militarization of law enforcement, even before one arrives at the constitutional violations present in police use of excessive force and unlawful arrest. In turning local peacekeeping forces into standing armies, power has been consolidated into police forces. This accumulation of power has been coupled with a lack of transparency, oversight, and accountability. One of the key foundations of the U.S. Constitution is dividing the powers allotted to government, an aspect which is vital to protecting the rights of individual citizens. If one branch or one department of government is given multiple powers and the capacity to govern multiple steps of authoritative process, such as the ability to both enforce laws and decide on the legal nature of that enforcement, then the individual is left with little recourse against the possible onslaught of unjust governance. In the Federalist, No. 47, James Madison comments on this very danger of consolidated power within a regime, referencing French political philosopher Montesquieu:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. ‘When the legislative and executive powers are united in the same person or body’ says he, ‘there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.’ Again ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.’ Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the

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34 See Id.
35 Id. at 9.
36 Ferguson, supra note 28.
38 War Comes Home, supra note 33.
meaning which we have put on this celebrated maxim of this celebrated author.\textsuperscript{39}

The role of the Constitution of the United States is to establish this separation of powers as a means to protect the citizen from a tyrannical regime that would infringe upon his or her liberty. To ensure this security, the Constitution established a republic which divided governmental authorities amongst multiple branches, creating a system of checks and balances. Accountability is inherent in this system of mixed government, which established that no one individual or body of government may amass totalitarian power over the people—were that to happen, then the death of liberty would be inevitable. While the states are not held specifically to the federal model outlined in the Constitution, Article IV § 4 “[guarantees] to every state in this union a republican form of government.”\textsuperscript{40}

On June 11th 1787, at the Constitutional Convention, Edmund Randolph, in discussing the guarantee clause of § 4, said that “a republican government must be the basis of our national union; and no state in it ought to have in their power to change its government into a monarchy.”\textsuperscript{41}

This issue of governmental division of power and authority is a crucial aspect to the issue of police brutality and militarization. A law enforcement entity, whether at the federal, state, or local level, violates the intended republican nature of the Union outlined by the framers of the Constitution when it exists free of accountability and oversight. When discussing the Department of Defense’s program known as 1033, which “hands out unused military gear to state and local law enforcement agencies around the country,” this separation of powers issue was crucial to Kentucky lawmakers.\textsuperscript{42} During a meeting in September of 2014, chair of justice studies at the Eastern Kentucky University graduate school Pete Kraska argued that

the larger sentiment of that report,\textsuperscript{43} chronicling… the erosion of the 1878 Posse Comitatus Act, which delineated stark separation of powers between the U.S. military and civilian police forces. Beginning in the Reagan Administration, the War on Drugs catalyzed… “an increasingly blurry distinction” between the two powers.\textsuperscript{44}

The Posse Comitatus Act, drafted less than a century after the U.S. Constitution, showed early American lawmakers’ desire to extend the separation of powers maxim to law enforcement agencies. The Act, 18 U.S.C. § 1385, stated that “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”\textsuperscript{45} This act reflected an “American tradition that bridles at military involvement in civilian affairs.”\textsuperscript{46} One of the grievances expressed in the Declaration of Independence was that the King had “kept among [the Colonists], in times of peace, Standing Armies without the consent of [their] legislatures.”\textsuperscript{47} With regard to the Constitution exception clause of § 1385, “it has been observed that the Constitution contains no provision expressly authorizing the use of the military to execute the law.”\textsuperscript{48} As a result, the excessive militarization of posse comitatus, or law enforcement agencies, has relied upon acts of Congress—or a lack thereof in cases where local policing is free of accountabil-


\textsuperscript{40} U.S. Const. art. IV.


\textsuperscript{43} WAR COMES HOME, \textit{supra} note 33.

\textsuperscript{44} Meador, \textit{supra} note 42.


\textsuperscript{47} Id.

\textsuperscript{48} Id.
ity and oversight.

The infringements upon the constitutional rights of citizens by police brutality have been extensive and severe; however, to simply address the individual violations is ultimately futile if one does not also confront the system which has allowed the violations in the first place. Without a reconstruction of modern American law enforcement, the means by which so many have been deprived of life and liberty will continue to exist, and eventually become commonplace. The power possessed by law enforcement agencies in communities across the nation defies the democratic tenets instituted by the founders and replicates the very governmental crimes that provoked the colonies’ rebellion against Great Britain. Especially in marginalized neighborhoods of lower socioeconomic classes, police departments are perceived as tyrannical regimes with unlimited power. The pronouncement on the exterior of police cruisers to “protect and serve” conflicts with the internalized message, to instill fear and control.49 It is this deeply ingrained fear that contributes to conflicts between citizens and law enforcement, and it is this desire to control that leads to the wide range of civil rights violations. Thus it is imperative that law enforcement power be brought into check and subjected to accountability and oversight. The expansion of police militarization must be stopped and departments must be scaled back, returning them to their intended function as peace keeping forces rather than standing armies waging war on the populace. In addition, the actions of law enforcement agencies must be transparent; those employed by the state to protect and serve the people must answer to the people. Police officers are not exempt from the law, and ensuring that they uphold the law they are charged with enforcing is vital to preserving democracy. The role of police to preserve order and enforce rules and regulations is a vital one, but in enforcing the law, officers must not be permitted to exist as judge, jury, and executioner.

Those who would dissent from this opinion often reference the need to protect and defend good police officers. This rejoinder is fair, as the majority of men and women in uniform stand for peace and justice, and attempt to truly protect and serve their communities. However, a vital aspect of equipping these police officers to do their jobs is holding accountable those who break the law whilst wearing the badge. One of the greatest disservices one can do to the upstanding officer is to pass a blind eye to their colleagues’ faults, to sweep under the rug the unlawful actions of the those in their ranks who give the badge a bad name. The ramifications of this blanket of immunity, this assumption that a status in law enforcement proves innocence—these issues are the foundation for the communities with a deep-set distrust of law enforcement, the communities where the sight of a patrol car instills fear and distrust. When those who infringe upon the rights of the citizens they are called to protect are given a free pass and not held accountable, the communities can no longer trust that those in uniform are actually there to protect and serve. When the actions of law enforcement seem to be free of consequence, the citizen can no longer determine which cop is good and which is bad. Refusing to properly and thoroughly investigate possible police wrongdoing, indict and, when necessary, charge those who break the law that they are entrusted to uphold, is one of the greatest wrongs that one can commit against the faithful men and women in uniform. In order to lift up and support law enforcement, one must hold them accountable. Members of law enforcement must be held to the same standards as other citizens, if not a higher standard as they are entrusted with upholding the law. To hold them to lesser standards by turning a blind eye to unlawful activity is to disrespect the position itself.

There is a fear that to extend legislative and regulatory accountability over police officers is to place them in metaphorical handcuffs. There exists the sentiment that “the shackles should be removed and freedom for the police departments to do their jobs should be enhanced,”50 especially when considering officers who die in the line of duty.51 This argument is of course an important one, and appropriate accountability in law enforcement

51 See Sam R Hall, Therese Apel, Sarah Fowler, Tim Doherty & Jason Munz, 2 Hattiesburg Officers Killed; 4 Suspects in Custody, CLARION LEDGER (May 11, 2015), http://www.clarionledger.com/story/news/2015/05/09/two-hattiesburg-po-
is not in conflict with the desire to properly prepare officers for the line of duty. As a matter of fact, ensuring that officers uphold the law is beneficial to not only the citizens, but to the police themselves. “It is generally accepted that public perception of the legitimacy of law enforcement turns on how the police treat people when exercising their regulatory authority, and people are more likely to obey the law when they perceive law enforcement authorities as legitimate.”

Furthermore, while the need to properly equip officers is important, there exist issues with the underlying framework behind this type of argument. First of all, “freedom to do their jobs” does not equal total freedom. Police officers do not require full autonomy to serve and protect their communities—to enforce the law. If anything, granting officers full autonomy to use whatever force they deem necessary detracts from their ability to do their jobs. Secondly, this call for law enforcement freedom often stems from the false dichotomy of us versus them. Often times, opposing sides of the issue work from one of two rhetorical extremes; in this case, either all police officers are wrong and infringing upon the rights of innocent citizens, or all police officers are good and responding to a disobedient and criminal populace. “To be effective in lowering crime and creating secure communities, the police must be able to elicit cooperation from community residents. Security cannot be produced by either the police or community residents acting alone—it requires cooperation.”

Neither extreme is correct; there are police officers who uphold the law, there are bad criminals who threaten the members of the community and law enforcement, and there are police officers who unjustly infringe upon the constitutional rights of private citizens. In order for the first group to properly engage the second, the third group must be recognized and dealt with. Otherwise, order may be preserved, but to what end? In weighing personal freedom and public order, it is critical that one remembers the purpose for preserving public order. The benefit of societal order is that it provides a maximum potential for protecting the rights of the individual. If, in the pursuit of public order, one discards the rights and freedoms of the individual, then the resulting order is useless, and frankly un-American. The nucleus of American democracy is the preservation of individual rights—so much so that one necessarily trades bureaucratic efficiency for a sustaining of the citizen.

Democracy is messy and frustrating, but it “still represents the best hope for freedom and prosperity for any society.” One may be able to achieve full peace and order through a totalitarian police state, but anyone who believes in the American experiment would reject this false tranquility. Granting police officers the “freedom to do their jobs” requires giving them not only the capacity to maintain order, but also the constraint to defend liberty, for these are the two equal halves of law enforcement’s occupation. Therefore, allowing police to do their jobs necessitates legislative and regulatory oversight, in addition to a democratically established system of accountability.

Preserving Constitutional Rights

This restructuring of American law enforcement to preserve individual liberty through accountability is only one step in solving the issues surrounding police brutality—one step that will neither be accomplished overnight.
nor completely eliminate breaches of freedom. Even when policing forces exist within a system of checks and balances, there will still be cases where they violate the Constitution. Thus, engaging the issue of police brutality must include an assessment of a citizen’s constitutional rights and derive a set of standards to assess police behavior. Upholding the Constitution is a prerequisite for law enforcement agencies to have legitimacy in their jurisdictions, as “legitimacy judgments, in turn, are shaped by public views about... the fairness of the processes the police use when dealing with members of the public.”

Legal issues surrounding a person’s interactions with the criminal justice system make up 4 out of the 10 amendments in the Bill of Rights. The Fourth, Fifth, Sixth, and Eighth amendments give a constitutionally based response for those affected by a governmental body executing arbitrary authority. These amendments protect the individual from unlawful exercises of authority within the justice system, with the Fourth and Fifth being the most pertinent to one’s interactions with members of law enforcement.

The inclusion of every step in the criminal process is, unfortunately, a fairly recent development. Despite the umbrella of freedoms outlined in the first 10 amendments added in 1791, it was not until 2015 that constitutional protection was explicitly extended to a citizens interactions with law enforcement after arrest, but before the trial itself. The Eighth Amendment states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The issue is that the majority of this protection “applies only to convicted prisoners.” The only constitutional provision for citizens not yet convicted pertains to their ability to obtain bail, but not to their treatment while in custody. The Fourth Amendment states that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” This “seems to apply only to free people outside of prison,” those “who have been arrested but not convicted and cannot make bail fall into a hazy constitutional gray zone.”

This constitutional gray area, described by Supreme Court Justice Sonia Sotomayor as a chance for law enforcement “to get a free kick in” when dealing with pretrial detainees, existed until 2015.60 On June 22, 2015, the Supreme Court ruled on a case filed by petitioner Michael Kingsley against Stan Hendrickson and other officers of the Monroe County Jail in Sparta, Wisconsin.61 Kingsley brought a claim against the officers under Rev. Stat. §1979, 42 U. S. C. §1983, which states that every person “shall be liable” if they “subject any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”62 Under §1983, Kingsley claimed that the officers used excessive force against him in violation of the due process clause of the Fourteenth Amendment.63 The claim was based on an interaction that occurred in April of 2010, when several officers subdued Kingsley in his cell: one shoving a knee into his back, another shoving his head into cement while he lay there handcuffed, and yet another shocking Kingsley with a Taser for 5 seconds, leaving him lying on his stomach for 15 minutes.64

The appeal brought before the Supreme Court was not to determine whether or not the officers used excessive force against the Kingsley, but rather to decide what test applies to the assessment of an officer’s use of force. During Kingsley’s lawsuit against the Monroe County officers, the jury members in his case were told that

56  U.S. CONST. amend. VIII.
58  U.S. CONST. amend. IV.
59  Stern, supra note 57.
60  Id.
63  Stern, supra note 57; see Kingsley, No. 14-6368, 2015 U.S. LEXIS 4073, at *6-7; U.S. CONST. amend. XIV.
64  Stern, supra note 57; see Kingsley, No. 14-6368, 2015 U.S. LEXIS 4073, at *6.
in order to rule in favor of Kingsley, they had to find that “Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff.”\(^{65}\) While the burden must always rest on the plaintiff, to prove the intent and mindset of the officers involved is unreasonable and unattainable. “Under that high standard, Kingsley lost. It’s incredibly difficult to prove law enforcement intentionally deprived suspects of their constitutional rights.”\(^{66}\) Thus, the question brought before the Court was “whether, to prove an excessive force claim, a pretrial detainee must show that the officers were subjectively aware that their use of force was unreasonable, or only that the officer’s use of that force was objectively unreasonable.”\(^{67}\)

The majority opinion, delivered by Justice Breyer, ruled that, to prove excessive force, the plaintiff need not establish the intent of the officer, but simply that the force used would be deemed excessive by a reasonable person.\(^{68}\) In addition to this, the court reaffirmed that “pretrial detainees (unlike convicted prisoners) cannot be punished at all.”\(^{69}\) This case cemented the guaranteed rights that citizens have when interacting with law enforcement—rights to not be deprived of life, liberty, or property without due process of law—and explicitly expands those rights to include citizens who have already been arrested. Someone being arrested and charged with a crime does not lose constitutional protections. The due process clause of the Fifth Amendment, applied to the states by the Fourteenth Amendment, exists to ensure that citizens are not deprived of their rights, even when charged with a crime.\(^{70}\) Without the correct application of these amendments, officers would be free to exercise arbitrary judgement on arrested individuals before those individuals are actually convicted of a crime, or to behave in a negligent manner that violated those persons’ freedoms. The ramifications of this ruling extend to situations like that of the death of Freddie Gray, whose spinal injury and death occurred after he was arrested by law enforcement.\(^{71}\) Under Kingsley, the Gray family need not prove that officers intentionally engaged in a use of force that caused the injuries, but merely that the actions of the officers involved were objectively unreasonable.\(^{72}\) With this shift in the standard, it is much more likely that the officers who arrested Freddie Gray will be found liable in his death. In his arrest, an officer’s knee was driven into Gray’s neck; he was dragged on the ground to the police van, and left handcuffed in the back of a van without a seatbelt.\(^{73}\) Even if it cannot be proven that the officers intentionally deprived Gray of his life and liberty without due process, it can certainly be shown that their use of force and their negligence which together led to Gray’s death, was objectively unreasonable.

In the death of Freddie Gray, the officers’ violations of his Fourteenth Amendment right to due process through excessive force and negligence was not the only constitutional issue. Before the unconstitutional treatment Gray experienced in custody, there was the questionable nature of his arrest.

The reason Gray was chased by police remains unclear. Police have said it came in part because he ran, raising officers’ suspicions in an area known for drug dealing. A police report on the arrest states that Gray “fled unprovoked” and that an illegal switchblade knife was later found on him but provides no other reason for the pursuit.\(^{74}\) The Fourth Amendment protects the person from unlawful searches and seizures, and requires that the officer has probable cause before searching an individual.\(^{75}\) This right “applies as much to the citizen on the streets as well as at home or elsewhere,” because “whenever a police officer accosts an individual and restrains his freedom

\(^{66}\) Stern, supra note 57.
\(^{68}\) Id.
\(^{69}\) Id.
\(^{70}\) U.S. Const. amend. V.
\(^{71}\) Rector, supra note 6.
\(^{72}\) Stern, supra note 57.
\(^{73}\) Rector, supra note 6.
\(^{74}\) Id.
\(^{75}\) U.S. Const. amend. IV.
to walk away, he has ‘seized’ that person within the meaning of the Fourth Amendment.”

The facts of Terry v. Ohio led the Warren Court to rule the stop and frisk performed by the detective to be constitutional, stating that if a “reasonably prudent officer is warranted in the circumstances of a given case in believing that his safety or that of others is endangered,” then he/she “may make a reasonable search for weapons of the person believed by him to be armed and dangerous.” Several distinct aspects of the particular situation in Terry v. Ohio justified the particular officer’s actions:

The actions of petitioner and his companions were consistent with the officer’s hypothesis that they were contemplating a daylight robbery and were armed. . . . The officer’s search was confined to what was minimally necessary to determine whether the men were armed, and the intrusion, which was made for the sole purpose of protecting himself and others nearby, was confined to ascertaining the presence of weapons.

In this case, the search was not an arbitrary decision, but rather was based on reasonable suspicion and made in the desire to ensure safety.

The arrest and search of Freddie Gray does not come close to meeting the standards outlined in Terry. “The knife was not discovered until after police stopped Gray and was not a factor in the decision to pursue him.” Officers apprehending Gray were not doing so because of a reasonable suspicion that he was armed and dangerous, and because they lacked this “reasonable apprehension of danger,” they could not retroactively use the discovery of the knife to justify the arrest.

To justify the arrest, “the officer sought to spin Gray’s flight from police into a justification for a chase that ultimately ended tragically—in essence justifying the stop and search of Gray by virtue of who Gray was (a young black man) and where they were (a poor neighborhood).”

There are several constitutional violations with this sort of justification, but what is most frightening is the fact that the search and seizure of Freddie Gray has the support of Supreme Court jurisprudence in the form of Illinois v. Wardlow. With its ruling in Wardlow, the court legitimized police stops like Gray’s by finding that they could be warranted based on circumstances surrounding the flight.

In Chicago in 1995, “[Sam] Wardlow fled upon seeing police officers patrolling an area known for heavy narcotics trafficking. Two of the officers caught up with him, stopped him and conducted a protective pat-down search for weapons. Discovering a .38-caliber handgun, the officers arrested Wardlow.” In reaching his opinion, Chief Justice Rehnquist ruled that since “Wardlow fled upon seeing police officers patrolling an area known for heavy narcotics trafficking,” the officers were thus justified in arresting and searching him.

The constitutional ramifications of this decision, which “occurred at the height of the war on drugs, during the Clinton era of mandatory sentencing and zero-tolerance policing” are appalling.

First is the apparent disregard of the Equal Protection Clause of the Fourteenth Amendment, which says that “[No state shall] deny to any person within its jurisdiction the equal protection of the laws.” To justify the arrest of Freddie Gray and Sam Wardlow is to justify representatives of the state treating citizens differently based on their socio-economic status. One’s existence within a low-income area known for crime is deemed legitimate support for arresting the individual. This kind of precedent sends the message that not all are equal under the Fourth Amendment, and factors such as one’s race, income, and location mean that the individual is not guar-

76 Terry v. Ohio 392 U.S. 1, 3 (1968) (a summary of the Court’s decision as written in the syllabus).
77 Id.
78 Id.
80 See Terry 392 U.S. at 3.
81 Oppenheim, supra note 79.
82 Id.
84 Id.
85 Oppenheim, supra note 79.
86 U.S. Const. amend. XIV.
anteed the same constitutional protections afforded to another person who exists in a higher socio-economic position. “In any area characterized by police as ‘high-crime,’ officers have carte blanche to chase down anyone who feels threatened enough by the sight of police to run.”

Not only are officers given a license to discriminate based on the socio-economic status of the community, but they also are the ones deciding which of these areas qualify, as “judges inevitably find the places where flights occur to be “high-crime areas” based solely on police testimony.” Wardlow gives law enforcement the unrestricted right to infringe upon the constitutional rights of minority communities, and to justify these infringements based not in legitimate probable cause—or reasonable suspicion, as outlined in Terry—but instead on the stereotypes of those who live in that area.

In addition to being an utter derision of the Equal Protection Clause, Illinois v. Wardlow tramples on the Fourth Amendment by stating that a person’s flight from law enforcement is justification for search and seizure. In expressing the opinion, Rehnquist admits that “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.” However, he goes on to arbitrarily decide that “unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not ‘going about one’s business;’ in fact, it is just the opposite.” With no basis whatsoever, Rehnquist separates a passive refusal to consent from the active refusal to consent via removing one’s self from the situation. The right to refuse consent for an unwarranted search and seizure is not simply a right to “go about one’s business,” contrary to his unsubstantiated assertion. The right to refuse consent is, quite simply, the right to refuse consent. Flight is a manner in which one refuses consent, for to flee is to send the message that one does not desire to interact with law enforcement, and a “refusal to consent to a search or seizure may not be admitted as evidence of guilt, may not be considered as supporting a determination of probable cause, and may not be considered as supporting a determination of reasonable suspicion for a Terry stop.” To state that this active refusal via flight infers anything more than refusal, is to read into the situation a preconceived bias that the person fleeing is breaking the law. This type of assumption is not probable cause, nor is it a basis for reasonable suspicion.

Neither in the Fourth Amendment, nor in any search and seizure jurisprudence, can the assertion that refusal to consent by fleeing differs from a “standard refusal” be found. Furthermore, this opinion ignores the valid reasons for people to want to avoid a police encounter.” In the dissenting opinion, Justice Stevens cites a case from 1896:

“It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that “the wicked flee when no man pursueth, but the righteous are as bold as a lion.” Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

In arguing that flight from law enforcement equates to illegal activity, the Court disregards the host of reasons that communities fear law enforcement.

In his opinion, Rehnquist is forced to admit that “an individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is com-

87 Oppenheim, supra note 79.
88 Id.
89 See Wardlow, 528 U.S. at 125.
90 Id.
92 Oppenheim, supra note 79.
93 See Wardlow, 528 U.S. at 131 (Stevens dissenting); Alberty v United States, 162 U.S. 499, 511 (1896).
94 ‘I Can’t Breathe’, supra note 1; Goldstein & Santora, supra note 2; Dewan & Oppel Jr., supra note 4; Rector, supra note 6; Blinder et al., supra note 7; Drash, supra note 12; Samuels & Martinez, supra note 17; War Comes Home, supra note 33; Devereaux, supra note 49.
mitting a crime.” Yet, when these two unconstitutional justifications for arrest are put together, they magically combine to form a legitimate basis for unlawful search and seizure, according to Wardlow. The case establishes a precedent that two wrongs make a right—if an arrest is based on a violation of the Equal Protection Clause through profiling, and an unconstitutional basis for arrest, founded on one invoking their right to refuse consent, then the arrest is justified.

In addition to the issues associated with a consolidation of power in law enforcement on the macro scale, with police militarization and lack of oversight, granting police officers extensive latitude when determining constitutional rights violations creates an immense threat to the rights of the individual. In one case, law enforcement alleges that fleeing and refusing arrest symbolizes guilt, and in another case, United States v. Di RE, the opposite is argued: “that the defendant’s failure to protest could be used to create probable cause, on the theory that an innocent man would have objected to, or resisted, his arrest.” Granting such arbitrary exercises of authority to law enforcement organizations undermines the Constitutional rights guaranteed to individual citizens.

The issues with Fourth Amendment jurisprudence do not end here. “A right to be free from unreasonable searches and seizures is declared by the Fourth Amendment, but how one is to translate the guarantee into concrete terms is not specified. Several possible methods of enforcement have been suggested over time; however, the Supreme Court has settled, not without dissent, on only one as an effective means to make real the right.” This effective means is the Exclusionary Rule, which is the “exclusion of evidence as a remedy for Fourth Amendment violations.” This rule, as an interpretations of the Fourth Amendment, and the substantive right to due process born out of the Warren Court, resulted in the sentiment that “the guilty too often seemed to spring free without good reason” and yet left little recourse for the innocent whose rights were infringed upon.

The Constitution seeks to protect the innocent. The guilty, in general, receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent because of their innocence. Law breaking, as such, is entitled to no legitimate expectation of privacy, and so if a search can detect only law breaking as such, it poses little threat to Fourth Amendment values. By the same token, the exclusionary rule is wrong, as a constitutional rule, precisely because it creates huge windfalls for guilty defendants but gives no direct remedy to the innocent woman wrongly searched. The guiltier you are, the more evidence the police find, the bigger the exclusionary rule windfall; but if the police know you are innocent, and just want to hassle you (because of your race, or politics, or whatever) the exclusionary rule offers exactly zero compensation or deterrence.

The lack of legal recourse for innocent people who are subject to unlawful searches and arrests is a significant problem; however, the call to remove the Exclusionary Rule ignores the vital role it plays in holding law enforcement accountable. While it does not give direct solutions to the innocent who are deprived of their rights to liberty and privacy, the Exclusionary Rule works to discourage those violations in the first place. With the knowledge that any evidence recovered using unlawful means is inadmissible at trial, law enforcement must respect the rights of the accused when carry out their policing duties. If the Exclusionary Rule is eliminated from Fourth Amendment jurisprudence, then a key constitutional provision that prevents law enforcement from arbitrary exercises of authority is gone. The purpose of the Exclusionary Rule is not to ensure that evidence cannot be brought against the guilty, but instead to require police officers respect the rights of all citizens. Otherwise, there is the real possibility that police departments would resort to using any means necessary when performing inves-

95 See Wardlow 528 U.S. at 124.
96 Id.
98 CRS, supra note 41.
99 Id.
101 Id. at 1133-4.
tigations and arrests.\textsuperscript{102}

In the United States, unlawful arrests and the use of excessive force by police officers are a widespread problem. It is clear that solutions to these issues must occur on multiple levels. There must be a systematic reconstruction of law enforcement, ensuring that police departments and other organizations have accountability and transparency. In addition, there must be a move to reinforce constitutional provisions protecting the rights of citizens. Even when the powers of law enforcement agencies are kept in check, individual cases of excessive force and unlawful arrest will occur. The Constitution has guaranteed citizens specific rights when engaging with law enforcement, but these rights are only as strong as the ability to enforce them. When an individual’s rights are infringed upon, they must have legal recourse. In addition to having a systematic accountability, police officers must also be accountable to the people with whom they interact.

\textbf{The Right to Resist}

The question then becomes: is this enough? Within these solutions, the correct arena for a person to handle a deprivation of his or her rights is the court of law or the political process. If a member of law enforcement makes an unlawful arrest or uses excessive force, the citizen may seek legal action, whether by calling for criminal charges against the officer or by seeking civil damages. Issues of specific cases may also be addressed through new legislation. Both of these avenues, however, often take years to reach fruition. The incident in \textit{Kingsley v. Hendrickson} occurred in 2010, yet the Supreme Court came to their decision in 2015—and this decision was not a final one, but will instead result in further litigation based on the standard put forth by the court.\textsuperscript{103} This also ignores the “evidence that some of the alternative remedies to an unlawful arrest were not effective, and that neither civil nor criminal sanctions had proven effective in preventing police abuses.”\textsuperscript{104} Furthermore, for many deprived of life and liberty, the possibility of legal recourse through the courts is greatly lacking. A lawsuit or new legislation cannot bring back the lives of Eric Garner, Tamir Rice, Freddie Gray, Walter Scott, or Laquan McDonald.

Although bail is more readily available now, it still doesn’t spare the arrestee the expense of paying it himself or paying a bondsman. It does not erase the stigma of the arrest either, even if he is eventually vindicated. Administrative remedies that have been initiated by local police departments are difficult to kick into motion and often the arrestee’s “story” is deemed uncorroborated and unsubstantiated by the police hierarchy. Civil injunctions are practically impossible to obtain unless a clear pattern of abuse is established by the complainant. Civil damage suits against the offending officer are sometimes uncollectible after the arduous path to judgment is overcome, and criminal proceedings against the same are usually not sanctioned because false arrest is usually not considered a crime.\textsuperscript{105} If the answer to the question “is this enough?” is no, then the focus must shift to further remedies to handle issues of police brutality—specifically, the individual’s ability to retain and defend their constitutional rights before those rights are violated. At this point, one must readdress the legality and necessity of a concept much older than the Constitution itself: the common law right to resist unlawful arrest.

This right first appeared in the Magna Carta in 1215, with the first judicial decision coming in the Hopkin Huggett’s Case. This particular instance “involved several men who came to the aid of a man being unlawfully arrested by a constable; in the resulting fight the constable was slain… The court determined that a person who came to the aid of someone being unlawfully arrested, and killed the constable, was guilty not of murder but of manslaughter.”\textsuperscript{106} The United States Supreme Court has only ruled on the right to resist unlawful arrest once, in

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\item \textsuperscript{102} \textit{War Comes Home, supra} note 33.
\item \textsuperscript{103} See \textit{Kingsley}, No. 14-6368, 2015 U.S. LEXIS 4073, at *4.
\item \textsuperscript{104} Hemmens & Levin, \textit{supra} note 97, at 31.
\item \textsuperscript{105} James B Lindsey, \textit{The Right to Resist an Unlawful Arrest: Judicial and Legislative Overreaction?}, 10 \textit{Akron L. Rev.} 171, 181-2 (1976).
\item \textsuperscript{106} Hemmens & Levin, \textit{supra} note 97, at 9-10.
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the 1900 case Bad Elk v. United States. In this case,

three policemen in South Dakota attempted, under verbal orders, to arrest another policeman for an alleged violation of law when no charge had been formally made against him and no warrant had issued for his arrest. Those attempting to make the arrest carried arms, and when he refused to go, they tried to oblige him to do so by force. He fired and killed one of them. He was arrested, tried for murder, and convicted.

The Supreme Court ruled that since the “party resisted arrest by an officer without warrant, and who had no right to arrest him… the offence of the party resisting arrest would be reduced from what would have been murder, if the officer had had the right to arrest, to manslaughter.” In formulating the majority opinion, Justice Peckham stressed the fact that “no reason for making the arrest was given, nor any charge made against him.”

Despite establishing the right to resist, this case does not grant someone resisting arrest the freedom to use whatever force necessary. In weighing individual freedom and public order, it is important that precedent not give citizens the perceived liberty to use unlimited force, even when law enforcement violates constitutional rights. The majority opinion states that

“He [John Bad Elk], of course, had no right to unnecessarily injure, much less to kill, his assailant; but where the officer is killed in the course of the disorder which naturally accompanies an attempted arrest that is resisted, the law looks with very different eyes upon the transaction when the officer had the right to make the arrest from what it does if the officer had no such right. What might be murder in the first case might be nothing more than manslaughter in the other, or the facts might show that no offense had been committed.

The plaintiff in error was undoubtedly prejudiced by this error in the charge, and the judgment of the court below must therefore be reversed, and the case remanded with instructions to grant a new trial.

If the common law right to resist arrest is unrestricted, with no conditions, then the issues present remain but the parties simply switch places. There exists the danger that society would enter into anarchy, and those good police officers mentioned earlier, would have no protection. Furthermore, criticism of the right to resist arrest stem from the worry that this level of freedom will exacerbate problems, as “force begets force and escalation into bloodshed is a frequent probability.” The common law right to resist arrest must carry restrictions. If the issues of excessive force and brutality present in police departments are answered by granting civilians the ability to respond with excessive force and brutality, then the problem remains with a different victim. As such, the decision in Bad Elk does not clear the man who resisted arrest of all culpability, but simply rules that the lawfulness of the arrest be taken into account when assessing the charge. John Bad Elk was cleared of murder when resisting an illegal arrest; however his actions of killing a police officer were still deemed as manslaughter under the court’s ruling, following the common law precedent.

Since the decision passed down by the Supreme Court over 115 years ago, the common law right to resist unlawful arrest has been systematically removed throughout the United States. By 1983, 19 states had eliminated the right through statute, and 12 states had abrogated it through case law. In Warner’s article, “Uniform Arrest Act,” it was argued that “If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.” In addressing the issue of freedom versus order, the pendulum has swung to the opposite side of the common law origins. Instead of granting citizen’s total freedom in resisting arrest, the right has been almost completely taken away. This reversal is alarming considering the fact that the removal of the citizen’s rights does not occur in a vacuum, but rather is coupled with an increase in the capabilities of law

107 Id. at 15.
108 Bad Elk v. United States, 177 U.S. 529, 529 (1900).
109 Id.
110 Id. at 530.
111 Id. at 537.
112 Hemmens & Levin, supra note 97, at 30; see also State v. Koonce, 214 A.2d 428 (App Div. 1965).
113 Hemmens & Levin, supra note 97, at 28.
114 Id. at 21; see also Sam B. Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 345 (1942).
enforcement. In a 1983 decision, the Indiana Supreme Court stated that “if the officer is resisted before he has used needless force and violence, he may then press forward and overcome such resistance, even to the taking of the life of the person arrested, if absolutely necessary.”\textsuperscript{115} The opinion did not grant the citizen the right to resist unless they were “without fault… [and] violently assaulted.”\textsuperscript{116} If any other liberty other than their life and bodily health was infringed upon, they could not resist. If they did, the arresting officer could use any force necessary, even when the original arrest was unlawful.

Not only is the common law right to resist unlawful arrest being removed, the mere act of resisting unlawful arrest has been criminalized. If someone is being arrested, and they resist that arrest, they will be charged with the crime even when the original arrest was deemed unlawful:

An argument developed between the officers and one of the neighborhood’s black residents (the defendant). The defendant allegedly used obscene language which caused the police to place her under arrest for disorderly conduct. This precipitated defendant’s resistance to the arrest which consisted of swinging her arms, yelling, kicking the officers and then breaking away from them. She was then further charged with using violence against a police officer. The Ohio Supreme Court reversed the defendant’s conviction that was based on the disorderly conduct charge, and then turned to a consideration of the conviction which rested on the use of violence against a police officer. The defendant argued that if the court deemed her disorderly conduct arrest to be invalid (which the court eventually did), then her resistance to such arrest was to be found privileged under the common law rule which Ohio had adhered to up to this point in time. The Ohio Supreme Court… no longer gives the person whose personal liberty is about to be seized by the state unlawfully, the right to physically and forcibly resist the seizure unless the arresters use excessive or unnecessary force.\textsuperscript{117}

Even if they are law abiding, a person can be charged with a crime for resisting the unlawful actions of law enforcement. This type of precedent creates an opportunity for police officers to intimidate and harass citizens, and to then arrest and charge those citizens if they resist that treatment. This creates a very real danger where criminal charges are manufactured where there was otherwise no illegal activity. If one is regularly bullied and terrorized by a person wearing a badge, a criminal violation should not be fabricated to stop that person from adequately standing up to that misconduct.

The rationale for removing the right is that resisting arrest is not necessary to uphold one’s rights. In 2014, New York Police Commissioner Bill Bratton said “what we’ve seen in the past few months is a number of individuals failing to understand that you must submit to arrest, you cannot resist. The place to argue your case is in the court, not in the street.”\textsuperscript{118} It is true that whenever possible, rights violations should be handled within the court systems. In no way should citizens have a blanket right to resist arrest by any means necessary. The critique that this allowance would lead to unnecessary violence is a legitimate one. Furthermore, there must be common sense restrictions on how much force can be used by the citizen, in the same way that law enforcement must have restrictions on their use of force. Per contra, to do away completely with the common law right is to ignore circumstances where resistance is the only recourse to police brutality.

Even in jurisprudence abrogating the common law right, there has consistently been a reinforcement of the need to resist in some capacity: “Thus, we hold that in the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances.”\textsuperscript{119} When law enforcement uses excessive or unnecessary force, the citizen retains the right to resist that arrest in order to protect their life and physical well-being. When the old precedent in the State of

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\item \textsuperscript{115} Plummer v. State, 136 Ind. 306 NE 928 (1983).
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Lindsey, supra note 105; City of Columbus v. Fraley, 41 Ohio St. 2d 173, 174, 324 N.E.2d 735, 736 (1975).
\item \textsuperscript{118} Bratton: There is No Constitutional Right to Resist Arrest, POLICE MAG (Dec 10, 2014), http://www.policemag.com/channel/patrol/news/2014/12/10/bratton-there-is-no-constitutional-right-to-resist-arrest.aspx.
\item \textsuperscript{119} See City of Columbus 41 Ohio St. 2d 173, 174, 324 N.E.2d 735, 736.
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Washington\textsuperscript{120} that upheld the right to resist was overruled, it was not totally removed. As in \textit{Columbus v. Fraley}, the 1997 case overruling \textit{State v. Rousseau} still maintained the right to resist unlawful arrest when the officer was engaging in excessive or unnecessary force.\textsuperscript{121} Even when actively dissolving the right, jurisdictions have been unable to look past the need for individuals to have the capacity to actively protect themselves from unlawful police force.

The question then becomes: why can the citizen defend their life, but not their liberty and property? The courts seem to admit that the right to life cannot be saved for the courts, and when threatened by unlawful police activity, one must be able to defend oneself on the streets. However, the same courts have created a hierarchy between life, liberty, and property. If law enforcement officers violate the rights of an individual, but only insofar as they deprive the person of liberty and property and not life and physical wellbeing through excessive force, then the individual must wait for legal recourse in the courts.

The injury threatening [the person in the unlawful arrest situation] is the temporary deprivation of his personal liberty by an officer of the law. The law cannot restore an arm, an eye, or a life; it can and does restore freedom. Life and liberty, though equally precious, cannot be viewed on the same plane where self-help is concerned. Liberty can be secured by a resort to law, life cannot!\textsuperscript{122}

The argument presents the resistance to unlawful arrest not as a right, but instead as a necessity in some situations. If life could be fully restored through the courts, then resistance to arrest would never be permissible. If there is another way to restore liberty and property at a later date, then the infringement of those rights in the moment is allowed.

This establishes a clear set of priorities—order within society trumps the rights of individual people. It has already been stated in this article, but it can never be said too many times: private freedom must not be exchanged for public order. If order exists merely for itself and not as a means to further establish personal freedom, then that order is futile. The common law right to resist unlawful arrest should not be an inherent unregulated right in all situations; however, it is clear that the right should not be completely abrogated. The ability of one to stand up for one’s individual freedoms in the midst of an ordered society is necessary for the further existence of democracy. The Constitution establishes a society that balances personal liberty with a democratically elected societal order. Both extremes lead to the destruction of an individual’s rights, whether through an anarchist chaos of natural selection, or through a tyrannical dictatorship of totalitarian authority. Police use of unlawful arrest and excessive force, while not at the extreme point of totalitarian authority, nevertheless crosses the line when it removes personal liberty for the mere existence of order for its own sake. If a member of law enforcement engages in unlawful behavior, the individual resisting this behavior must not be restricted merely because that struggle for freedom would lead to disorder. It is essential that order only be pursued when it reinforces the maximum potential for freedom.

The solution must be to establish a standard, where the level of resistance is compared to the level of unlawful actions of the arresting officer(s). If an individual is met with unlawful and unprovoked lethal force from a police officer, then they are justified in responding in whatever means necessary to preserve their life. If they are deprived of property through an unlawful search and seizure, then they may respond to that rights violation with the minimum resistance that would be employed by a reasonable person. The individual who is unlawfully apprehended through a discriminatory stop and frisk policy can resist by fleeing those authorities attempting to unjustly arrest them. The right to resist cannot become a license to engage law enforcement in total war, in the same way that law enforcement cannot be given the capacity to engage in total war with the people. At the same time, the decision cannot be presented as all or nothing. The citizen must have the right to match with a level of resistance comparable to the level of unlawful action. If a police action is found to be unlawful, violating an individual’s right to life, liberty, or property, and if the level of resistance is comparable to the level of unlawful

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  \item \textsuperscript{120} State v. Rousseau, 241 P.2d 447 (Wash. 1952).
  \item \textsuperscript{121} State v. Valentine, 935 P.2d 1294 (Wash. 1997).
  \item \textsuperscript{122} Ralph D Smith, \textit{The Right to Resist an Unlawful Arrest}, 7 NAT. RESOURCES J. 119, 120 (Jan. 1967); see also Lindsey, supra note 105 at 179.
\end{itemize}
action, then that person should be acquitted of all charges of resisting arrest. The reasonable person should have the capacity to protect their rights in a manner appropriate to the violation. Freedom and order cannot exist in a vacuum, but must be incorporated together in a democratic society.

When engaging in the issue of resisting arrest, the primary problem is the lack of a constitutional foundation. The fact that the right can only be traced to the common law has been the main reason that courts and legislatures have deemed it inappropriate to maintain. The ability to resist arrest is already controversial since it can threaten peace. If the founding fathers did not intend such a right to exist, then its days seem to be numbered. In searching for the constitutional bases for the right, proponents have landed on three main aspects: the First, Fourth, and Fifth Amendments. These candidates all appear to be insufficient, and for good reason. The constitutional foundation cannot be fully derived from one article or amendment. The spirit of government resistance is written into the very fabric of the document, granting the individual citizen the ability to stand up and fight the tyrannical forces of unrestrained government. The citizen can speak freely against the government and its agents; challenge its actions to arrest, search, and seize; demand the state prove its charges in a court of law before enacting punishment. It seems that physically resisting tyrannical action when necessary is a logical extension of the right to stand up to tyranny through other displays of personal freedom.

This argument from the “spirit of the Constitution” is not the most compelling point for re-establishing the right. As such, one must look deeper for a true constitutional foundation, and the answer may appear in the most unlikely of places. The Second Amendment is regularly the center of controversy with regards to its literal provisions related to firearms. However, the underlying motivation for such an amendment is rarely discussed. This creates an irony, for the real purpose surrounding the Second Amendment has nothing to do with the guns that are so often debated. The amendment, which states that “a well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed,” is not, nor has it ever been, about firearms. If the Constitution was written one thousand years ago, then the debate would be the right to own longbows; two thousand years ago, and it would be about the right to own swords and spears. This goes beyond a simple right to bear arms, but instead points to a deep rooted right to defend one’s self against a corrupt regime, or individual agents of government corruption. An amendment that merely grants the citizen the right to a gun is a hollow one. There exists under this a much deeper fundamental right—the right to, when oppressed, rise up and fight the oppression of a corrupt government or corrupt officials. At its heart, the Second Amendment is granting the people the means to combat tyranny. Alexander Hamilton, in the Federalist No. 28, said “if the representatives of the people betray their constituents, there is then no recourse left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers may be exerted with infinitely better prospect of success than against those of the rulers of an individual State.” This is the heart of the Bill of Rights as a whole. Government, even a democratically elected government, is inherently imperfect. As such, there must be a failsafe. Dire circumstances require a military means to combat tyranny, while some require vocal protest, some legislative action, and others legal recourse through the courts.

The answers put forth to solve issues of resisting unlawful arrest and excessive force must not narrow the list of remedies available, but instead must provide standards to assess which remedy is appropriate. There exists moments where the protected sanctity of a courtroom or legislature is infinitely separate from the oppressed, and the victim needs both an ability, and a right, to protect themselves from unjust treatment. Furthermore, there exist minority groups in this country who have been deprived, through decades of injustice, of the power granted by such a voting booth or courtroom. In these cases, the right to self-defense must be preserved, not only for one’s life, but for one’s liberty.

123 See Lindsey, supra note 105, at 182-3.
124 U.S. Const. amend. II.
125 Alexander Hamilton, The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered, Federalist No. 28 (Dec 26th, 1787), http://avalon.law.yale.edu/18th_century/fed28.asp.
Through unlawful arrest, excessive force, and racial discrimination, law enforcement agencies across the
country have violated the constitutional rights of those they have sworn to protect. This problem of police
brutality will not be solved overnight, and admitting that there is a problem is the first step. It is also necessary to
realize that achieving order through policing is worthless if that order is devoid of freedom. The person whose
liberty is violated must be equipped to respond not only in the courtroom and the legislature, but also in the
streets.
Voter Identification Laws and Hybrid Solutions to Voter Fraud Problems

Emily Fromke†

ABSTRACT

The right to vote is one of the most basic and fundamental privileges of Americans, but it has been damaged by questions surrounding the legitimacy of elections, and the country is now in danger of falling to elections that do not reflect the will of the American people. Although an argument can be made that voter identification laws create obstacles to the exercise of this right, something must be done to prevent further fraud and disillusionment with the political process; a hybrid solution that addresses the concerns of both sides must be implemented. Drawing upon and responding to arguments by Wisconsin State Senator Mary Lazich, as well as various legal reviews, a framework is suggested for a solution that will best protect the American people and democratic process.

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effectively impose a poll tax on voters, by requiring them to purchase a form of identification before voting. Such an effect is not only bad for the electorate but it is also directly unconstitutional.

Others argue that it is better to impose laws that prevent voter fraud, which protects against direct disenfranchisement, than to not have those laws and allow indirect disenfranchisement. The central view of this argument is that no truly perfect options exist, but that it is better to protect against voter fraud than not. Ultimately both sides fail to suggest a plan of action that tackles voter fraud and prevents voter disenfranchisement. The policies I will suggest attempt to resolve this dichotomy and reach a legitimate solution for both sides of the issue.

It is important to note that, although voter identification laws create obstacles to voting, these laws should not be thrown out altogether. The burdening aspects of these laws can be mitigated through policies that ensure access to the necessary identification for the poor and elderly, as well as improved poll access. Identification laws, in conjunction with voter aid, are necessary to increase election accuracy, faith in government, and voter turnout. Some states, such as Kansas, have faced many challenges in the implementation of their voter identification laws. States in this positions can look, for example, at North Carolina, where a hybrid model is successfully being implemented. This kind of hybrid policy is in the process of being accomplished successfully in North Carolina.

In recent years, the response to the Carter-Baker commission and the Baker-Ford commission, a second exploration of ways to increase confidence in US elections, has been mostly negative due to claims that voter identification requirements effectively create a poll tax. This potential deterrence is obviously not the intent of the Commission, but rather an unintended side effect. The Carter-Baker Commission, in return, describes the need for voter identification, stating,

In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed. It is true that one of the biggest problems with the voting system recently has actually been identifying voters, so it only makes sense that voter identification laws would be implemented. However, making everyone obtain valid identification presents a cost of both time and money that some citizens, primarily the poor, young, and elderly, simply cannot afford. This apparent constraint on voting rights has been deemed unconstitutional by certain lines of jurisprudence due to the fact that these eligible voters affected make up a large portion of the electorate. One such case came to the Supreme Court in 2014. In Ruthelle Frank et al. v. Scott Walker et al., the court ruled that Wisconsin could not require its citizens to have photo identification at the next election because there was not enough time for those without it to acquire it. Wisconsin’s voter identification law was deemed unconstitutional on the grounds that it would prevent a large group of eligible voters from voting. The problem was not with the law, but the implementation of the law. If citizens had been fully informed and provided with enough time to meet the new requirements the law would have been fine. Further, experts like Sean Milford, who have been following these cases closely, contend that this policy creates a strategic poll tax, primarily negatively affecting Democratic voter turnout. However, the margin between affected Democrats and Republicans is only five percent, so claims that these laws create a disadvantage to one party over another do not carry much weight. Naturally, disenfranchising eligible voters was not the original intent of these laws, but it is a side effect that must be fixed in order to maintain liberty and freedom in this country.

It is necessary to take a step back at this point and define the different types of identification laws that can

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3 Mary Lazich, Photo ID’s Are Constitutional—What Are We Waiting For?, State Senator Mary Lazich, http://legis.wisconsin.gov/senate/lazich/Pages/pa-show.aspx?id=Photo+ID%E2%80%99s+Are+Constitutional—What+Are+We+Waiting+For%3F (1 May 2008).
be found in the US that attempt to solve voter fraud problems. According to the National Conference of State Legislatures, there are currently four different kinds of laws that can be divided into two categories. One category defines how strict the law is—meaning whether or not voters can confirm their identity if they do not have a form of identification—and the other defines whether a photo identification is required. Laws may be non-strict non-photo, strict non-photo, non-strict photo, or strict photo. Most states originally had non-strict, non-photo identification laws. In these states a citizen does not need to provide an ID with a picture, but states his or her address or provides a document such as a bank statement that contains an address and name to prove their name is synonymous with that of the voter. If someone shows up without identification, in most cases, they may cast a provisional ballot and sign an affidavit confirming their identity that an official will check later. Other states have strict, non-photo identification, which is similar to the first case, except the citizen must give proof that they are who they say they are within a certain time frame of casting their ballot. If they do not prove their identity with a bank statement or identification of some sort the vote will not be counted. In the past ten years, states have tended to implement non-strict photo identification laws, which require some sort of photo identification (a driver’s license, passport etc.) at the polls, and if a citizen shows up without their ID, then they may sign an affidavit confirming their identity and an election official will check to make sure their vote is valid; however, the vote is not counted immediately. The most controversial form of voter identification law is strict photo identification law. These more stringent regulations require citizens to have photo identification; those who do not have one on the day of the election may cast a provisional vote, but it will not be counted until they have brought in the proper identification to prove their citizenship. These definitions will provide a framework for the way that different experts talk about voter identification laws.

Of late, it has been popular to denounce voter identification laws, especially ones that require a photograph. Arguments that support such an abolition hold that there is no way to know the complete magnitude of voter fraud, so it is not necessary to prevent fraud that might not even exist. This is a flawed argument. If legislators know fraud exists on any level and can prevent it through voter identification provisions, which would benefit the electorate by increasing belief in the electoral system and in the legitimacy of elections, then the magnitude of voter fraud is slightly irrelevant to the situation.

One skeptic, Spencer Overton, argues in the Michigan Law Review that, if it is impossible to assess the real magnitude of voter fraud (i.e. miscounted ballots, repeat voters, and any other mishaps)—and he argues that it is—then photo identification laws could do more damage than good. He writes, “Depending on the magnitude of fraud, a photo-identification requirement could erroneously skew election outcomes to a greater extent than would a lack of such a requirement.” If there is only minimal fraud, then instituting voter identification laws could disenfranchise more voters those is prevented from voting fraudulently would ultimately be bad for America’s system of democracy. As such, it may be deemed necessary to determine the exact extent of voter fraud, which could make the cost of institution of photo identification laws greater than any potential benefits.

The Harvard Law Review is also unimpressed by the magnitude of the voter fraud problem, stating, “The actual extent of voter fraud will always be in dispute. Not only can investigative findings be misleading as to the extent of fraud, but they can also dramatically overstate the actual impact on elections.” However, even though the Harvard Law Review is critical of exactly how much voter fraud exists, it suggests that a “nationwide photographic identification requirement, properly implemented, could both provide an effective solution to voter fraud concerns, real or imagined, and help eliminate confusion among voters and election officials alike.” If even the critics of voter fraud recognize the need for voter identification laws, clearly there is a demand for the security that such laws provide.

9  Id. at 1154.
Other experts suggest in the *Louisiana Law Review* that these laws are not too much of a burden on the poor and the elderly, and the actual number of people negatively affected is fewer than the amount of people helped, which is presumably the majority of the electorate. These experts recognize that either photo voter identification laws or a lack thereof both result in disenfranchisement of voters, either directly or indirectly. This line of thinking suggests that,

The issue of disenfranchisement is a double-sided coin because both sides of the debate can make a case for disenfranchisement. On one side of the coin, turning a voter away from the polls for lack of identification directly disenfranchises that voter of his or her right to vote. But on the other side of the coin, “[e]very vote that is stolen through fraud disenfranchises a voter who has cast a legitimate ballot.”

The article shows how the voter identification laws of different states directly affect other states, and that it might be “Better Safe than Sorry” when it comes to preventing election fraud. Both sides of the argument make valid observations; it might be impossible to determine the magnitude of voter fraud and the magnitude of the burden voter identification laws could place on them, but voter identification laws may actually end up helping more people gain trust in the system and better opportunity to vote.

So what do “properly implemented” policies look like? Before answering this question, it is helpful to look at a case where these laws have not been properly implemented. In 2015, Kansas attempted to implement photo identification laws in their state. Many citizens were caught off guard and had no idea that they would be required to show identification in order to register to vote. Over 36,000 people in Kansas never finished their registration because of the new law. This is a prime example of one of the many ways in which voter identification policies, if not implemented properly, can fail: publicity. The state needs to inform its citizens thoroughly and ahead of time so that they can take the proper measures to be able to vote when the time comes. Along with informing citizens well in advance of when exactly these laws will be implemented, states must take other measures to ensure that the only cause of disenfranchisement is voluntary refusal to conform to the new provisions. In the state of North Carolina, not only has the state government publicized their new policy widely two years in advance, but at every election leading up to its implementation, citizens are reminded individually as they vote that eventually they will need to bring their IDs, and they are encouraged to practice bringing them or to obtain one before the poll officials begin checking for them. Small tweaks in policy can make a significant difference.

The most compelling argument for solving voter fraud problems comes from the *Louisiana Law Review*, which says that even if voter identification laws cause unintended side-effects, it is still worthwhile to implement them, because the alternative is worse. Their views on voter identification are rather moderate, but may be the most practical. They state, “legislatures must find a solution lying somewhere between an honor system and an absolute photo identification requirement to protect both interests.”

Looking back at the example of Kansas, we can see that the people who were affected by the law most disproportionately were young people. The state of Kansas could remedy this problem by funding mobile units and sponsoring online registration in order to reach 18 to 20 year-olds, as well as the elderly and the poor. The combination of a longer timeframe to register, easier access to registration, and a provisional ballot option eliminates the effects of disenfranchisement about which so many scholars worry when it comes to photo identification laws. Although some states would like to implement strict photo identification laws, without the provisional ballot option, non-strict photo identification laws are in the best interest of the voter, because they then have an alternative way to make their vote count. This strategy, along with publicity and voter aid, creates a policy from which both the state and the citizen can benefit.
The best solution to the problem of voter fraud is one that decreases fraud, increases voter turnout, and boosts Americans’ confidence in the validity of elections, all without marginalizing potential voters. Non-strict photo identification requirements are able to do all of the things previously mentioned, as long as state governments institute the proper policies that allow provisional ballots, advertise the policy over a long period of time, prepare for the law to be implemented, and create easier access to registration. When states are considering what sort of identification laws to implement, they should look at the examples of Kansas and North Carolina in order to get a sense of what policies will not work and what policies may work best in their own state. However, even with these policies in place it is the responsibility of citizens to exercise their right to participate in the democratic process by going out and voting.