COLUMBIA UNDERGRADUATE LAW REVIEW

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ARTICLES

COLUMBIA UNDERGRADUATE LAW REVIEW

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LETTER FROM THE EXECUTIVE EDITORS

Dear Reader,

On behalf of the Editorial Board, we are excited to present the Spring 2024 issue of the *Columbia Undergraduate Law Review*. This year, we received a record number of submissions from undergraduate institutions around the world. The selected pieces reflect the rich diversity of original scholarship written on a variety of pressing legal issues. With that in mind, we are thrilled to present the following articles.

In "How SFFA v Harvard Perpetuates Discriminatory Gatekeeping: Black Women and Legal Education," Faith Wilson of Rutgers University surveys the development of affirmative action policy and ongoing implications for under-represented minorities and, more specifically, Black women in higher education and the legal field following its recent reversal.

In "How Contemporary Courts Have Rendered the Americans with Disabilities Act Powerless," Dante Rodriguez of Columbia University argues against the exclusion of individuals with disabilities from protections offered via legal classification and interrogates the Supreme Court's subsequent lack of action in cases regarding disability discrimination.

In "The Implications of Neuroscience and its Development in Supreme Court Cases Regarding Juvenile Sentencing," Zander Pitrus of Duke University examines the application of neuroscientific research to the reevaluation of juvenile sentencing practices based on previous standards of cognitive "culpability."

In "Good Faith Gone Bad: The Distortion of the Common Law Origin of Qualified Immunity to Expand Police Power at the Cost of Civil Rights," Gabrielle Linder of Columbia University challenges the legal evolution of qualified immunity and growing lack of accountability and abuses of force among law enforcement officers citing a "clearly established right" in committing unconstitutional acts of violence.

In "United States v Rahimi: Originalism at the Cost of Women's Lives?," Liz Thomason of the University of Florida investigates originalist interpretations of Second Amendment applications in the context of domestic violence and critiques the inadequate means of support and safety provided to survivors by judicial systems.

In "The Search for "Truth": Analyzing Florida's Stop WOKE Act and the Tensions in the Current Framework of American Academic Freedom," Karun Parek of Columbia University examines legal attitudes towards academic freedom on public university campuses and the growing tension between First Amendment protections and states' attempts to intervene in which topics remain open for debate.

In "Rethinking the Exclusionary Rule: Rights vs. Deterrence Rationale," Anika Jain of the University of North Carolina, Chapel Hill analyzes the "exclusionary rule" regarding evidence obtention and the Supreme Court's shift in rationale from a protection of fundamental rights to the deterrence of police officer misconduct when applying its rulings.

We hope you enjoy these incredible articles and the hours of work that our editors invested into preparing these works for publication. Thank you for your continuous readership of the *Columbia Undergraduate Law Review.*

Sincerely,
Jinoo Kim and Kira Ratan
Executive Editors, Print Division

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

Please send inquiries to culreboard@columbia.edu and visit our website at www.culawreview.org.

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How SFFA v Harvard Perpetuates Discriminatory Gatekeeping: Black Women and Legal Education

Faith Wilson | Rutgers University

Edited by Laiba Syeda, Benjamin Waltman, John Brunner, Nicole Wong, Arya Kaul Anusha Kumar, Emily Huang

Introduction

Secondary education has historically acted as a mechanism for societal stratification, differentiating between the privileged and the underprivileged by granting educational access to some while denying it to others. This differentiation has been significantly influenced by biological essentialism, the notion that certain traits and behaviors are intrinsically associated with specific biological categories, such as race and gender. This perspective has traditionally marginalized Black women, limiting their access to education based on the erroneous belief that neither women nor Black individuals are suited for educational institutions. In the early history of the United States, education was primarily reserved for privileged white males. Enslaved Black women in the United States were expressly forbidden from accessing education. This paper aims to show how selective interpretations of history and legal precedent hinder efforts to confront the challenges that Black women face in pursuing post-secondary education at top-tier legal institutions.

In *SFFA v Harvard*, the U.S. Supreme Court's consideration of the constitutionality of affirmative action fails to adequately account for the historical context that necessitates such laws. The Supreme Court's belief that ignoring race leads to equal assessment of applications overlooks the reality that true equal consideration is still an unattained ideal in America. Eliminating racial considerations from admissions could trigger a national decline in Black women's representation in top-tier legal institutions. The LSAT, a primary determinant in law school admissions, has been shown to disadvantage Black women due to socio-economic and educational disparities. Without affirmative action, which formerly considered race as a component to foster diversity, the number of Black women in top-tier law schools might significantly decrease. This is because the admissions process may become more reliant on LSAT scores, a test where Black women statistically underperform due to systemic barriers. This paper explores the history of Black women’s education in America, the evolution of affirmative action, and contemplates the prospective landscape without a diversity framework in law school admissions.

Black Women in America: Historical Background

A. Black Women and Higher Education

American Black women have a strained relationship with higher education that traces back to the forced migration from western Africa to North America. For over two hundred years, Black women who understood education to be an inalienable right toiled for equal access to education. When Black women were enslaved and sold in the transatlantic slave trade (1619-1808), the intellectual zeitgeist of the nineteenth century was saturated with scientific racism. Scientific racism was used by proponents of enslavement to counter abolitionist thought, they ultimately argued that it was the Black person's predestined role to be of servitude to the white population. John Bouvier, a nineteenth-century attorney, contributed to America's legal cannon by creating the first legal dictionary. This dictionary functioned to be a cornerstone of America's own legal system instead of relying on the precedent of English law. In 1851, Bouvier distinguished between enslaved people, whose rights were denied, and white people, whose rights were acknowledged. Bouvier asserted that the word "person" was not a universally applicable term for humans, but rather one with an implication attached to it:

> "[A]ny human being is a man, whether he be a member of society or not, whatever may be the rank he holds, or whatever may be his age, sex…[A] person is a man considered according to the rank he holds in society, with all the rights to which the place he holds entitles him, and the duties which it imposes."[1]

This legal distinction, based on the status of Black people in America's social hierarchy, resulted in more anti-literacy laws that prohibited their education. White enslavers' recognition of Black people's humanity led to the development of legal infrastructure specifically designed to limit Black people's access to education. This limitation strictly applied to academic education, as Black people were only provided oral religious education. Enslavers enforced that enslaved people—Black women and men—did not learn to read or write because these abilities threatened the institution of chattel slavery. A North Carolina statute prescribed that educating enslaved people "tend[ed] to excite dissatisfaction in their minds" and "produce insurrection and rebellion.."[2] In Mississippi, state law required white people to serve up to a year in prison as "penalty for teaching a slave to read."[3] In nineteenth-century Virginia, an anti-literacy law specified: "[E]very assemblage of negroes for the purpose of instruction in reading or writing, or in the night time for any purpose, shall be an unlawful assembly. Any justice may issue his warrant to any office or other person, requiring him to enter any place where such assemblage may be, and seize any negro therein; and he, or any other justice, may order such negro to be punished with stripes."[4]

After Bouvoir's distinction between men and people, abolitionists appealed to and advocated for the personhood of Black people. Jeannine Marie DeLombard's scholarship indicates that this appeal was a touchstone of the anti-slavery movement:

> One of the most effective, influential, and underappreciated rhetorical tactics of the transatlantic anti-slavery movement was to transform enslavers' conscious economic exploitation of the human capacities of those targeted for enslavement into an unchristian *denial* of black humanity.[5]

These developments in the abolitionist movement were conducive to Black women accessing education, but not without legal resistance. Prior to the Emancipation Proclamation, Black women could only access undergraduate education in select regions of the American North. In this period, legal education was strictly prohibited for Black people. Ohio institutions like Oberlin Collegiate Institute was one of the few schools to grant higher education degrees and certificates to Black women in the nineteenth century, besides Historically Black Colleges and Universities (HBCU). Admission into Oberlin proceeded after a large group of abolitionist students, a trustee, and a faculty member decided to attend Oberlin on one condition: "That the education of the people of color is a matter of great interest and should be encouraged and sustained at the institution."[6] The board of trustees voted on this stipulation, with only one additional vote guaranteeing its effectuation. From 1835 onward, Oberlin admitted Black students to their undergraduate programs.

Ten years after Mary Jane Patterson became the first Black woman to earn a bachelor's degree from Oberlin, Charlotte E. Ray achieved another milestone by becoming the first Black woman to obtain a law degree. Ray received her law degree from Howard Law School, an HBCU, in 1872. She submitted her application to the law department under the name "C.E. Ray" because of the department's reluctance to admit women. Ray applied to law school around the time when white women were also being denied licenses to practice law, which would explain her reservations about applying with her full name. In *Bradwell v Illinois* (1873), a white woman named Myra Bradwell appealed a sexist decision made by the Illinois Supreme Court. In 1869, Bradwell had passed the bar examination and applied for admission to the state bar through the Illinois Supreme Court; however, she was denied her license to practice because she was a woman in an 8-1 vote by the Justices. The opinion of the Illinois Supreme Court case read: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth."[7] Adding fuel to the fire of biologically essentialist rhetoric, three Justices echoed that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother"[8] in a concurring opinion. The case of *Bradwell v*

Illinois exemplifies the societal and political environment within which Charlotte Ray endeavored to pursue her legal education. Black women contended not only with racial discrimination, but also with gender bias, compounding the challenges they faced on their path to acquiring legal education.

B. Black Women and Legal Education

In the twentieth-century, the rate of Black women's law school admissions displayed an upward trend. Against the backdrop of ongoing civil advocacy to be legally recognized as capable people with a right to advanced education, Black women persisted against challenges and pursued their legal education ambitions. In 1956, Lila Fenwick became the first Black woman to earn a law degree from Harvard Law School. Fenwick's achievement came 85 years after the first Black man graduated from the same institution. This temporal difference is important because the overall success of Black women in law contradicts the historical fact that Black men had earlier access to legal education. *The Journal of Blacks in Higher Education* published that "[i]n the 1998-99 academic year, black women made up 61.7 percent of all [Black]-American applicants to law school, 63.7 percent of all blacks accepted at law school, and 64.7 percent of all black first-year students at the nation's law schools."[9] In 2001, Black women made up 59.6 percent of the Black American enrollments in the top-50 law schools in America.[10] The landmark Supreme Court decision that demanded the integration of U.S. schools surged enrollment rates for Black women. The cohort of Black women who applied to law school in the 2000s experienced their formative years in the aftermath of the *Brown v Board of Education*[11] ruling; thus, they benefited from expanded access to educational opportunities with fewer restrictions. In 1954, the U.S. Supreme Court decided that the "separate but equal" educational facilities are inherently unequal. The *Plessy v Ferguson* (1896)[12] case ruled that all facilities could be racially segregated but equal with respect to quality. The Court recognized how the legal doctrine violated the provisions of the Equal Protection Clause in the Fourteenth
Amendment and was, therefore, unconstitutional. After educational facilities were integrated,

Black women could attend all-white schools. In the opinion delivered by then-Chief Justice Earl Warren, the Court rationalized how the segregation of schools stunted Black children's learning experience:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children… A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental

> development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[13]

The *Brown* decision did not eradicate racial segregation within schools, and some Black students "still attended schools with substandard facilities, out-of-date textbooks and often no basic school supplies."[14] The conceptual foundation, however, of equal education being a right reserved by Black people proliferated throughout the community. Across economic classes, Black students began attending schools with better opportunities for success, like magnet high schools. The empowerment derived from an improved educational environment instilled confidence in these students to apply to college and, even further, for graduate-level degrees. Thus, increased ambition among Black women is one plausible reason for their increased enrollment in law schools.

Another prime reason for the surge in Black women's enrollment rates could be the effectuation of affirmative action. The legal backing of the country, which urged institutions to consider race and gender as a part of an applicant's evaluation, invoked a sense of headway for Black women. Prior to affirmative action, reputable institutions denied many qualified Black women applicants. The advent of affirmative action increased Black women's chances for admission to law schools through the legal enforcement of diversity. This likely instilled a sense of optimism in prospective Black women law applicants, considering the assurance that their race or gender would not serve as factors for disqualification during the admissions process. All in all, the combination of landmark Supreme Court decisions and the implementation of affirmative action likely led to a surge in Black women applying to law school.

Purpose of Affirmative Action

In 1961, President John F. Kennedy made a historic move to sign an executive order. Executive Order 10925 mandated: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[15] Affirmative action, in effect, is the nation recognizing that the necessary agent for change is a conscious agenda to expand the applicant pool beyond just the culturally dominant groups. Retrospectively, this period in the United States was emblematic of a reckoning that special treatment could not be tolerated. While writing boldly of individual freedoms in the Declaration of Independence, the nation acknowledged—at a federal level— the existence of special-negative and special-positive treatment. By way of E.O. 10925, the country took another step toward rectifying the obstacle-ridden terrain for minorities.

Affirmative Action and Women

From the 1960s to 1970s, the inclusion of women in past legislation was introduced as an amendment, suggesting that governing bodies considered this incorporation secondary. For example, in 1965, President Lyndon B.

Johnson issued Executive Order 11246, requiring government contractors and subcontractors to expand job opportunities for minorities.[16] In 1967, President Johnson amended E.O. 11246 to include women. In 1970, the US Department of Labor issued Order No. 4, which permitted federal contractors to "correct 'underutilization' of minorities." Only in a revision a year later did the order include women. The omission of women from original legislations signifies that they were not initially contemplated as beneficiaries or holders of these rights.

In the United States, writing legislation for singular demographics, like race or gender, denotes that they are mutually exclusive. In turn, minority women often fall between the cracks with respect to their legal rights. For example, when the Nineteenth Amendment was enacted in 1920, white women gained the right to vote as a result of the decades long suffrage movement. A legislative milestone which prescribed how women's voting rights could "not be denied" on account of their sex somehow failed to encompass all women. Herein lies the concept of *intersectionality*, coined by legal scholar and professor Kimberley Crenshaw. Black women being both 'woman' and 'Black' made them susceptible to infringement on account of their race, gender, or both. In the 1991 *Stanford Law Review*[17], Crenshaw wrote:

> [M]any of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.

Black women have often found themselves in an awkward and irrational limbo regarding their rights. Historically, when a door is opened for the Black race, womanhood infringes on their ability to claim those legal rights. When a door is opened for women, their Blackness then infringes on their right to claim those legal rights. At a women's convention in Akron, Ohio,

Sojourner Truth succinctly shed light on the paradoxical experience of Black

> women in America: That man over there says that women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman?[18]

Black women are robbed of the benevolent sexism that white women received and robbed of the male privilege that Black men were accorded. In both of these identities, their rights came second. Their personhood that Bouvoir defined in the *Law Dictionary*[19] was not fully realized by the law and their peers. Women's rights and civil rights activist Frances Barrier Williams described this unfortunate experience of Black women in her speech, "The Intellectual Progress of the Colored Women of the United States Since the Emancipation Proclamation."

> [Black women] are the only women in the country for whom real ability, virtue, and special talents count for nothing when they become applicants for respectable employment. Taught everywhere in ethics and social economy that merit always wins, [Black] women carefully prepare themselves for all kinds of occupation only to meet with stern refusal, rebuff, and disappointment.[20]

For this reason, affirmative action legislation affects the Black women demographic differently. It provides a platform where they can be evaluated on a level with their white and women counterparts alike. In order to not find America in a regressive position, as Williams described, the role of affirmative action is imperative for the continued progress of Black women.

The Legal Battle for Affirmative Action Policy

On June 4th, 1965, President Lyndon B. Johnson delivered a commencement address at Howard University. The address laid out the conceptual justification of affirmative action: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."[21] The effects of centuries-long disenfranchisement do not evaporate with the rapidity of signing a legal document like E.O. 11246. Disgruntled citizens rebelled against these legislative attempts in order to establish equality in multiple ways, commonly as lawsuits against institutions around the country.

A. *Regents of the University of California v Bakke* (1978)

In 1978, the U.S. Supreme Court heard the *Bakke*[22] case. Allan Bakke applied to the University of California Medical School at Davis two years in a row (1973 and 1974). Even with qualifiers like high test scores and a high college GPA, Bakke was denied both times. After receiving the second rejection, Bakke filed with California's state court to compel his admission.

At this time, the University of California had a special admissions program that complied with President Johnson's affirmative action policy. The school had a racial quota for each admitted class of students, reserving spots for minorities. Bakke's case traveled from the California courts up to the Supreme Court, where he posited that he was rejected because he was white. Bakke argued that the quota policy violated the Equal Protection Clause of the Fourteenth Amendment and § 601 of Title VI of the Civil Rights Act of 1964: "no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance."[23] The results at the trial court were as follows: they invalidated the special admissions program implemented by the University of California because it violated federal and state constitutions as well as Title VI but ruled against compelling Bakke's admission because of insufficient proof that he would be admitted in the absence of the special admission program.

When the case reached the U.S. Supreme Court, they affirmed two aspects of the state court's judgment to 1) order Bakke's admission, and 2) invalidate the University of California's special admissions programs. However, the Supreme Court reversed the lower court's judgment to prohibit the University of California from considering race as a factor in future admission decisions. While Justice Powell concluded that the medical school's special admissions program is unnecessary to the achievement of a diverse student body, Justices Brennan, White, Marshall, and Blackmun concluded that the "remedial use of race"[24] is justified for facilitating more minority representation in the medical profession. Ultimately, the Supreme Court deemed race consideration acceptable in certain situations of university admissions.

B. *Hopwood v Texas* (1996)

To address the disproportional enrollment of minorities, The University of Texas Law School (UT Law), implemented a special admissions program that showed preference for Black and Mexican Americans. In 1994, *Hopwood v Texas*[25] was first heard by the U.S. District Court for the Western District of Texas. The plaintiffs included four white people, one a woman and three being men: Cheryl Hopwood, Douglass Carvell, Kenneth Elliott, and David Rogers. The four individuals contended that their rejection was solely derived from UT Law's special admissions program, arguing that it violated provisions of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, among other laws. On August 19th, 1994, the District Court ruled that UT Law's 1992 admissions procedure was in violation of the Fourteenth Amendment.

The U.S. Court of Appeals for the Fifth Circuit reheard this case on March 18th, 1996. The question examined was: Does the Fourteenth Amendment allow the school to discriminate this way? Jerry E. Smith, the Circuit Judge, delivered that he and the other judges maintain that the purview of the Fourteenth Amendment does not extend to UT Law's special admissions program. Contrary to the ruling in *Bakke*, the Fifth Circuit did not validate UT Law's affirmative action program on the basis that the institution was ameliorating the issue of minority underrepresentation. The *Hopwood* decision was consequential in the state of Texas; the state Attorney General, Dan Morales, broadly interpreted the dicta through a statewide ban of affirmative action. Through an issued opinion (L097-001), race consideration in among all frontiers of college operations, was strictly prohibited. The *Hopwood* standards were applied to admissions as well as "financial aid, scholarships, and student and faculty recruitment and retention."[26] Morales also extended the purview of the *Hopwood* dicta to not only state universities, but private institutions that accepted federal funding. This was followed by a decline in minority student enrollment.

C. *Johnson v Board of Regents of the University of Georgia* (2001)

Another case against affirmative action policy involved three white women alleging unfair discrimination through the University of Georgia's (UGA) affirmative action policy. Under this policy, UGA allotted a fixed number of non-white and male applicants to its newly admitted class. However, female applicants and white applicants were not awarded the same favorable consideration. The plaintiffs contended that UGA's explicit consideration of race violated the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964. They further contended that UGA's explicit apportionment for male applicants violated both Equal Protection and Title IX.

The district court opted to overlook Justice Powell's opinion in *Bakke* on the ground that diversity, as a compelling interest, is not a binding precedent. This court even posited that the effort of diversity was "so inherently formless and malleable that *no* plan can be narrowly tailored to fit it."[27] When the case was heard by the Eleventh Circuit, the judges affirmed the entirety of the district court's ruling. The circuit judges expressed this opinion on UGA's 1999 freshman admissions policy: "A policy that mechanically awards an arbitrary 'diversity' bonus to each and every non-white applicant at a decisive stage in the admissions process, and severely limits the range of other factors relevant to diversity that may be considered at that stage, fails strict scrutiny and violates the Equal Protection Clause of the Fourteenth Amendment."[28]

D. *Grutter v Bollinger* (2003)

In compliance with *Bakke*, the University of Michigan Law School implemented an admissions policy that considered race to achieve enrollment diversity. The admissions boards holistically reviewed an applicant with a combination of hard variables- like grades and test scores- and soft variables- like the admission essay, recommendation letters, and undergraduate course difficulty.[29] With a 3.8 GPA and a 161 LSAT score, Barbara Grutter, a white woman from Michigan, applied to the University of Michigan Law School in 1997. When Grutter was rejected from the Law School, she filed a suit alleging she had been discriminated against because of her race and that these policies violated both the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The district court heard the case in 2001 and concluded that the school's effort to increase the diversity of enrolled students was not compelling, deeming the use of race as an admissions factor as unlawful. In 2002, the United States Court of Appeals for the Sixth Circuit reversed the decision, referencing Justice Powell's concession that race-based consideration was a compelling state interest and functioned as legal precedent. They ruled that "[t]he Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student

body is not prohibited by the Equal Protection Clause, Title VI, or § 1981."[30] The University of Michigan provided evidence to substantiate their claim that racial diversity in student enrollment is a compelling interest through citing studies on how diversity improves students' aptitude for the "work force, society, and the legal profession."[31] In this historic Sixth Court decision, the purpose of race-conscious admissions was recognized.

Statewide Affirmative Action Reversal Effects

Following the circuit court decisions in *Hopwood* and *Johnson*, colleges in Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas discontinued their use of affirmative action as originally prescribed. A 2013 study at the University of Washington of these states revealed that the percentage of students of color enrolled in graduate programs dropped from approximately 9.9 percent to 8.7 percent after the affirmative action bans, which for "individual students, this decline represents an average of about 60 fewer students of color enrolled across graduate programs."[32] One potential explanation for the decline in enrollment could be that college admissions boards were accepting more applicants from different racial categories. Additionally, the disillusionment stemming from the perception that admissions boards were no longer evaluating applications beyond biased numerical metrics may have dissuaded minority students in these states.

The reversal of affirmative action reintroduces the possible return of the considerable underrepresentation of Black women in law school. This historical trend is partially because of the disparity between black test takers and white test takers. Even with comparable academic achievement and accolades, a 2001 study[33] reported, Black people tend to perform less on the LSAT by an approximate nine points. In 1997, Linda F. Wightman published work that substantiates the trend of test score disparities:

> "[T]he means of both LSAT score and UGPA are significantly lower for applicants of color than for white applicants for every group except Asian American applicants... These data suggest that if these quantitative measures of prior academic attainment are used as the only input to admission model, students of color as a group are likely to be systematically excluded from law school admission opportunities."[34]

The 1992 Women's Law Journal of Berkeley, "The Legal Implications of Gender Bias in Standardized Testing," the authors voiced that "the empirical literature which does exist makes it clear that minority females suffer a very real double jeopardy [with standardized testing] based on both their sex and their race."[35] In the case of *SFFA v Harvard*, the issues surrounding unfair preference for specific student groups remain unresolved. The term "standardized", in the context of standardized testing, perpetuates a fallacy of uniformity in educational experiences. It obscures the reality that Black women, due to racial and gender-

based disparities in education, often face unique cognitive challenges that may contribute to lower performance on standardized tests, such as the LSAT. Since the Court affirmed that affirmative action policies are unconstitutional, law school admission metrics are calibrated to favor non-minority applicants who typically score higher on these standardized tests.

The Shortcomings of *SFFA v Harvard*

The *SFFA v Harvard* decision criticized Harvard and University of North Carolina for their nebulous metrics for achieving a diverse student body. The two institutions could not provide sufficient information to substantiate "whether a particular mix of minority students produces 'engaged and productive citizens' or effectively 'train[s] future leaders.'"[36] With no anticipated termination for affirmative action policies, the Justices opined that they could not ensure when, and if, the universities' diversity goals were reached. It is paradoxical for Justices to criticize these admissions policies for lacking a projected end date when the United States government is far from making race a non-issue at social, political, and economic levels. The Supreme Court appears intent on cultivating a future where racial considerations are unnecessary. However, this perspective overlooks the critical fact that longstanding racial disparities, which are far from being resolved within the United States, continue to necessitate these considerations.

The Court's decision in *SFFA v Harvard* suggests a surface-level understanding of the American social landscape, implying that affirmative action policies are simply gratuitous favors to racial minorities. It underestimates the fact that race carries significant socioeconomic implications that necessitate such policies in college admissions. The Justices jointly stated, "Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin."[37] In a sociological context, intersectionality is "rooted in the premise that human experience is jointly shaped by multiple social positions (e.g. race, gender), and cannot be adequately understood by considering social positions independently."[38] So contrary to the justices' opinion, race invariably impacts the challenges bested, the skills built, and the lessons learned by prospective applicants. The Court falsely presumes that removing affirmative action brings about the landscape that was made "unmistakably clear" in the *Brown* decision: "the right to a public education 'must be made available to all on equal terms.'"[39] Black women applying to law school have not had the same educational experience as their white or male counterparts. Their academic journeys, in turn, are informed by the intersection of race and gender. America's history of race and gender relations cannot be naively presumed to disappear through race-blind admissions. The adage that reverberates throughout the Black community, "We have to work twice as hard for half of what they have," attests to the essential fact that the United States is not a level playing field. White

Americans do not carry the ancestral experience of overcoming centuries-long disadvantages in the educational system. The Supreme Court has demonstrated great ineptitude for combatting the blemish of racial discrimination in this country by concluding that race-blind breeds inequity. In the opinion for *SFFA v Harvard*, the Court deemed the approach in *Plessy* to be "folly" because the 1896 Supreme Court "[tried] to derive equality from inequality."[40] Uncannily, the Supreme Court made the same lapse in judgment 127 years later. In a country that continues to reckon with the consequences of its racial hierarchy, the Court has mistakenly ruled that eliminating race-conscious admissions will engender equality.

Conclusion

Black women attorneys continue to be one of the most underrepresented groups in the legal professional network, especially in the private sector. According to a 2023 report on diversity conducted by the National Association for Law Placement, Black women comprised only 3.68 percent of a total of 46,924 associates at the included law firms. When fewer Black women are admitted to top law schools due to discriminatory metrics, their dearth in law firms is exacerbated. It is incumbent upon the Supreme Court to revisit Justice Powell's methodology for what constitutes a compelling state interest for a diverse student body. Justice Powell's scrutiny, while seemingly rigorous, was superficial in its disregard for the lived experiences of racial minority applicants, an oversight that deviates from the practical pursuit of equality. In *Bakke*, he even insinuated that the goal of "remedying… the effects of 'societal discrimination' was also insufficient because it was an amorphous concept of injury that may be ageless in its reach to the past."[41] To this, I echo the opinion of Jonathan Feingold in his faculty scholarship essay for Boston University School of Law: "Framed in this way, the Court views policies designed to remedy social discrimination or racial underrepresentation as nothing more than unconstitutional racial balancing."[42]

The cases preceding *SFFA v Harvard* have been narrowly fixated on the perceived preferential treatment received by minority applicants through affirmative action. This focus erroneously suggests these policies, which aim to uplift minority students, are discriminatory and harmful. Widening the scope will show that "the 'harmed innocents' are actually the qualified vulnerable Black and Latino/a students who are denied a mechanism to show the true measure of their talent."[43] The lack of an in-depth analysis used in *SFFA v Harvard* regrettably resurrects an admissions landscape detrimental to minority applicants.

The decision to reverse affirmative action hinges on the assumption that race, as a special-positive factor in decision-making, will persist indefinitely without a clear endpoint. While the Court ruled that the consideration of race erodes the constitutional fabric of America, other facets of an applicant's

identity, such as their socio-economic status, quality of primary and secondary education, and access to standardized test preparation services, remain unchecked. These elements, although capable of conferring advantages and disadvantages, have been deemed acceptable in the broader discourse on equitable admissions practices. The Court's decision to draw the line at racial consideration disregards the real-world implications tied to racial identity.

Black women pursuing admission into top-tier law schools are among a highly competitive applicant pool. The recent shift away from considering race in the admissions process could pose significant challenges, particularly considering the demographic realities that often render Black women less likely to have had access to affluent resources or an education devoid of socioeconomic disparities. In this post-*SFFA v Harvard* landscape, where applicant evaluations pivot heavily on hard metrics like LSAT scores and undergraduate GPA, we may witness a widening chasm in admission rates along racial lines. The case of *SFFA v Harvard* marks a premature attempt to usher in a post-racial America while neglecting the complex interplay of race, classism, and sexism as continuing factors of inequality. Racial consideration should remain a valid factor in admissions decisions until the United States makes a concerted effort to achieve equality across all fronts. Only at this juncture can the concept of deracializing student applications become a practical and equitable undertaking.

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How Contemporary Courts Have Rendered the Americans with Disabilities Act Powerless

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Abstract

The support for the disability rights movement in the United States surged at the end of the 20th century, driven by social movements, landmark court cases, and the enactment of the Americans with Disabilities Act (ADA) of 1990.[1] Yet ample evidence suggests that the legal status of Americans with disabilities has not significantly improved since the 1985 Supreme Court decision in *City of Cleburne v. Cleburne Living Center*.[2] This decision had an unintentionally harmful impact on the disability rights movement, as the majority opinion established the precedent that denied the disabled the heightened scrutiny and suspect class protections afforded to many other recognized minorities, despite the Court's ruling in favor of the disabled residents of Cleburne Living Center. In this paper, I argue that improper application of the *Cleburne* precedent occurred for three major reasons: the rigid hierarchical suspect classification system in contemporary jurisprudence, the courts' motivated reasoning, or tendency to cherry-pick case citations, discretionarily determining the weight of certain precedents over others, and the Rehnquist Court's imposition of stricter criteria for filing disability discrimination claims. I contend that many of these procedures were commonplace for the Supreme Court to avoid overstepping their reach into matters where Congress is more expert. This deferral of authority on the status of Americans with disabilities was clarified by Congress shortly after by passing the ADA, an act that was largely ignored by the courts in deciding cases of disability discrimination.

Introduction

The disability rights movement in the United States has gained momentum in recent decades, culminating in the successful passage of the Americans with Disabilities Act (ADA) in 1990. The years leading up to the ADA's enactment were marked by contentious debate and numerous protests by disabled Americans and disability rights advocates, seeking more equitable protection of Americans with disabilities.[3] These protests dominated news reports and television screens, reflecting a complex situation regarding the rights of the disabled that had been unfolding in the Supreme Court for some time. At the heart of this debate was the prospective status granted to disabled plaintiffs suing for discrimination in violation of their equal protection rights due to their disability.

The phrase "equal protection" has become a hotly contested issue, filling up the Supreme Court's docket for centuries after the ratification of the "Equal Protections Clause" in the 14th Amendment passed in 1868. This Amendment was passed shortly after the 13th Amendment, which formally abolished slavery, with the apparent intent of ensuring that newly emancipated Black Americans would not be subjected to oppressive conditions under the law. The text of the 14th Amendment explicitly guarantees that no state can "deny to any person within its jurisdiction the equal protection of the laws," thus forming the basis for the widely cited Equal Protection Clause.[4] This Clause is integral to the innumerable claims of discrimination that have reached the Supreme Court, and the Court has subsequently developed a relatively objective metric for dealing with claims of Equal Protection violation. Depending on the type of discrimination, such as gender or racial discrimination, the Supreme Court imposes varying burdens on the State to prove that its law is not discriminatory. The Court generally recognizes three different classifications, each granted varying levels of judicial scrutiny, which correlates to the burden placed on the State. The highest classification is called "suspect classification" and is reserved for groups discriminated against based on race, national origin, religion, and alienage.[5] When someone makes a claim of discrimination based on their race, national origin, religion, or alienage, the Court is required to employ the most exacting judicial scrutiny, or strict scrutiny, when evaluating the contested law for discrimination. Under strict scrutiny, the legislature must prove that their legislation was passed to further a "compelling governmental interest."[6] Historically, most all laws examined by the Supreme Court under strict scrutiny have failed to pass and are stricken down. The second classification is quasi-suspect classification, which is reserved for groups discriminated against by gender and birth legitimacy; when someone from these groups makes a claim of discrimination, the Court is to employ intermediate scrutiny which requires the legislature to prove the law furthers an "important government interest," notably lower than the "compelling," standard under strict scrutiny.[7] The final

classification, non-suspect classification, is for every other group, and the Court applies rational basis review to these claims where legislation must be related to a legitimate state interest, and there must be some connection in the means and end of the ordinance.[8]

The discriminated group is a suspect class if the group is a "discrete and insular minority." The "discrete and insular minority" metric standardizes the suspect classification criteria.[9] Any discrete and insular minority group is granted strict or intermediate scrutiny. That said, not all groups granted strict or intermediate scrutiny are discrete and insular minority groups. Women, for example, are granted intermediate scrutiny even though they are not a minority in the United States. This is because discriminated groups can be a suspect class if they meet other criteria, including, but not limited to, historical discrimination and political powerlessness. If the group is not a discrete and insular minority group, then the Court gives local, state, and federal legislative bodies more latitude to make distinctions in legislation where they see fit. This is because the Courts are less skeptical of Congressional intentions in passing legislation that might distinguish between groups not historically vulnerable to institutionalized oppression. The Courts recognize a hierarchy of vulnerability to discrimination based on several factors including, but not limited to historical discrimination, insulation, and political powerlessness. The Supreme Court has recognized race as a categorization that is extremely vulnerable to legislative discrimination, and as such, places more judicial protections against legislation regarding race than it would for another categorization like age, gender, class, etc. The Court determines which level of classification and scrutiny applies to a group based on whether the group is a suspect class.

The three-tiered scrutiny classification system has been beneficial as a quantifiable metric for the Court to allocate equitable protections to discriminated groups, but it is not exhaustive. Americans with disabilities are one group that is not protected under this framework. Until the late twentieth century, the Supreme Court had not ruled on the status of the disabled in the United States, and as such, the lower courts largely decided for themselves how to categorize claims of disability discrimination. Then, in 1985 the Supreme Court presided over *The City of Cleburne, Texas v. Cleburne Living Center* and formally established that ability, or rather disability, is a non-suspect classification meaning that it is only subjected to rational basis review. I argue that this decision was not made in bad faith for those with disabilities, but rather out of confusion and inexperience in the realm of disability classification. The majority opinion in *Cleburne* was a placeholder decision, airing on the side of caution to not prevent Congress from providing for those with disabilities. In effect, the Court punted the question of disability discrimination to Congress, and Congress answered in 1990 with its passing of the ADA. I demonstrate how the ADA, as a response to the Court's punt, was largely ignored, and that

Cleburne's cautious decision-making has effectively rendered the ADA powerless, an outcome certainly not intended by the majority opinion in *Cleburne*.

In Part I, I introduce *City of Cleburne, Texas v. Cleburne Living Center*, the Supreme Court case that ignited debate among lower courts on how to correctly address the equal protection of the disabled. In Part II, I introduce the text of the Americans with Disabilities Act, and establish that Congress passed this legislation to address the failures of the *Cleburne* decision. In Part III, I outline two major flaws in the three tiered system of judicial scrutiny: (A) the existence of a more nuanced spectrum of discretionary scrutiny, and (B) the unrecognized implementation of types of judicial review outside the scope of the three conventional forms. In Part IV, I argue that judicial fact-finding contributes to inconsistent use of disability jurisprudence, resulting in many unfavorable decisions for disabled parties. In Part V, I highlight that the Supreme Court under Chief Justice Rehnquist weakened the effects of the Americans with Disabilities Act. In (A) I explain that implementing new standards of review weakened the ADA's effects, and in (B) I employ *Heller v. Doe* to exemplify this point. Finally, I call for a less stringent interpretation of judicial review that affords the disabled more protections under the law.

A Placeholder Classification Gone Wrong: an Introduction to *Cleburne*

The 1985 Supreme Court Case *City of Cleburne, Texas v. Cleburne Living Center* ruled that disabled Americans are not a suspect or quasi-suspect class, igniting debate on the equal protection of the disabled. The respondent in the case is Cleburne Living Center (CLC), a group home for individuals with intellectual disabilities that would provide housing and care to residents by a full-time staff.[10] As per a Texas zoning ordinance, the construction of "[h]ospitals for the insane or feeble-minded, or alcoholic [*sic*] or drug addicts, or penal or correctional institutions"[11] required the city of Cleburne approve a special use permit. The City of Cleburne denied the Cleburne Living Center's special use permit application. In response, CLC filed a lawsuit against the City of Cleburne alleging that the city ordinance was invalid on its face and as applied because it discriminated against the disabled in violation of the Equal Protections Clause of the 14th Amendment. CLC claimed that if the prospective residents of the group home had not been disabled, their special use permit would have been approved.[12] The District Court ruled in favor of the City of Cleburne, determining that there was no violation of the fundamental rights of CLC or its prospective residents. Importantly, the Court also ruled that the disabled do not constitute a suspect or quasi-suspect class, and as such are only subject to rational basis review.[13]

On appeal, however, the Fifth Circuit reversed the District Court's decision. The Fifth Circuit Court determined that disability is a quasi-suspect classification, and after reviewing the case with intermediate scrutiny, it struck

down the Cleburne city ordinance as facially invalid.[14] The court determined that the disabled are a quasi-suspect class because the group satisfies three major criteria: they are a discrete and insular minority, are politically powerless, and have historically faced discrimination. With regard to disabled people being a discrete and insular minority group, the Fifth Circuit Court found it particularly disheartening that Cleburne's city ordinance denied prospective residents the benefits of living with others with disabilities, as the Court notes that the construction of the Cleburne Living Center is the only plausible way that residents with disabilities would be able to live in Cleburne City.[15] If it is true that prospective residents of Cleburne Living Center would only be able to live in Cleburne City if they could live in the assisted living facility center, then these individuals certainly ought to be considered insular individuals.

The city appealed the decision of the Fifth Circuit Court to the Supreme Court. At the Supreme Court, Justice White authored the majority opinion, and ultimately ruled in favor of the respondents, upholding the ruling of the Fifth Circuit Appeals Court but with one large caveat: the disabled do not constitute a quasi-suspect class.[16] In his decision, Justice White addresses each tier of the classification system to justify which classification is appropriate for the disabled. In dismissal of suspect class identification, the Court agrees with the holding of the Court of Appeals that differentiating legislation for people based on ability is relevant to legitimate governmental concern for the care of both parties. Like in the Fifth Circuit decision, the Supreme Court argues that strict scrutiny would only harm the disabled, as crafting legislation that allots different provisions to them would be struck down under strict scrutiny. In contention with the Fifth Circuit Court however, the majority refutes quasi-suspect classification and splits up their argument against intermediate scrutiny into three separate points, corresponding to three of the common criteria cited as constituting a quasi-suspect classification: that a group is a discrete and insular minority, that they have experienced a history of discrimination, and that they are politically powerless.[17] Firstly, to the "discrete and insular minority" criterion, the majority argues that the great diversity within the disabled community refutes their discrete status.[18] Secondly, they argue against the Fifth Circuit's assertion that those with disabilities have been historically discriminated against, referencing recent legislation passed in their favor, namely §504 of the Rehabilitation Act of 1973.[19] In effect, the enactment of the Rehabilitation Act is used by the Court to argue against heightened protection of the disabled, claiming that this act alone negates centuries of prior discrimination. The Court once again uses the Rehabilitation Act of 1973 as evidence against the third criterion of political powerlessness, claiming that if the disabled were indeed politically powerless, they would not have succeeded in passing this act.[20] White further argues that if he were to bend the rules for suspect classification to afford the disabled quasi-suspect classification, this

would create a slippery slope forcing the Court's hand in granting quasi-suspect classification for the mentally ill, the infirm, and the aging.[21] After clarifying these criteria, the majority preclude the disabled from quasi-suspect classification, thus rendering them a non-suspect class who is only afforded rational basis review.

Citing recent legislation that contrasts a broad history of social and politically-motivated legal discrimination should not override the suspect classification of the disabled. On a more technical note, the related criterion calling for heightened scrutiny is that the group has "historically been subjected to discrimination"[22] and says nothing about a history of discrimination without improvement, or a history of ongoing discrimination, not allowing for progress to be made for discriminated groups without later "punishment" of this progress by relegating this group's protection of discrimination to a lower level of scrutiny. Additionally, suspect classification is not adjusted in response to changing public sentiment or legislation for pre-established suspect classes.[23] If it were, in fact, the case that a history of discrimination, and thus suspect class eligibility, ended once favorable legislation to this group has passed, then race would have been made ineligible for strict scrutiny after the passing of the Civil Rights Act in 1964 and reduced to a quasi-suspect or non-suspect class, calling for lower scrutiny. This did not happen, however, as the purpose of recognizing a history of discrimination is that such history often has persistent effects despite progressive reform, and the stratifying effects of discrimination are often long-lasting, pervasive, and covert.[24]

In establishing the disabled as a non-suspect class, the court intended to enhance the protection of the increasingly positive legislation broadening the rights of the disabled from being struck down by unnecessarily exacting judicial scrutiny.[25] The majority opinion expressly states that the rational basis review afforded to non-suspect classification allows the government "the latitude necessary… to pursue policies designed to assist the retarded in realizing their full potential."[26] Whether we accept this as logically sound or representative of all the concurring justices' opinions on the matter, this statement demonstrates an explicit intention to broaden the decision-making power of the legislature in drafting laws and programs aimed at achieving equitable protections and provisions necessary for disabled Americans. Beyond this, the majority has difficulty classifying the disabled as a coherent group because of the myriad kinds of disabilities or conditions experienced by people who would all be considered part of this category. As such, the court believes that classification of the disabled ought to be "a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."[27] Justifying the use of mere rational basis review in this case, the Court tries to not impede on the upward trajectory of disability rights legislation, and punts the responsibility of establishing the proper standard of review for the disabled to Congress and

other informed professionals.[28] As written, *Cleburne's* majority opinion seems to champion disability rights, in spite of their lower classification of the disabled as a group, to expressly step out of Congress's way in the progress they had made in the recent past with legislation beneficial for people with disabilities. This "punting," however, has come back to paint the *Cleburne* decision with the shadow of all the subsequent disability rights cases that cite *Cleburne's* classification standard in order to further discriminatory behavior against the disabled.[29] The majority in *Cleburne* thought they ought to be safer than sorry in striking down the ordinance as-applied, granting relief to the disabled respondents, without imposing tight control on Congress's latitude in disability legislation, but taken out of this context, the opinion has been misconstrued as overtly dismissive of the respondent's claim to heightened scrutiny.[30]

I. An Introduction to the Americans with Disabilities Act

The gap that the Court acknowledged in *Cleburne* regarding legislative protections of the disabled needed to be addressed by Congress to ensure that the Court's cautious approach to the *Cleburne* was not made in vain. That is, if Congress did not rule upon this gap in disability protections, it would be up to the discretion of State and local governments and judiciaries. Recognizing their responsibility in this domain, Congress passed the Americans with Disabilities Act in 1990, formally outlawing many forms of discrimination toward people with disabilities, including employment, transportation, public accommodations, communications, and access to state and local government programs and services.[31] The ADA opens with a recognition of the discriminated status of the disabled in the United States and a statement of intent to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,"[32] using their Congressional "power to enforce the Fourteenth Amendment and to regulate commerce."[33]

This gives Congress the responsibility to make legislation regulating these matters, not only because they are the most representative branch of the federal government, but also because their close contact with expert federal regulatory agencies and committees makes their judgment much more informed than that of the Supreme Court.[34] Additionally, it is commonly recognized by legal scholars, politicians, and judges that the law exists in a hierarchy starting with the Constitution as supreme law of the land, followed by Congress and their legislation, followed by federal regulations, then followed by the Supreme Court, all state governments, and state judiciaries. Thus, five years after *Cleburne v. Cleburne*, Congress reversed the Court's established precedent that the disabled do not constitute a quasi-suspect class on account of not being deemed a historically discriminated-against group[35] by directly addressing this in the language of the Americans with Disabilities Act in their Findings and Purpose Section:

> "[The Congress finds that] historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem" (42 U.S. Code § 12101 (a) (2)).[36]

Congress also states that people discriminated against on the basis of their disability have lacked access to the same legal recourse granted to those discriminated against on the basis of their race, sex, or national origin.[37] This comparison strategically acknowledges the similarity between the disabled and other suspect and quasi-suspect groups, satisfying the second criterion for heightened scrutiny of political powerlessness. The third suspect characteristic that the majority opinion in *Cleburne* indirectly contests is that the disabled constitute a discrete and insular minority. The majority express their concern over the "great diversity" of the disabled community that makes legislation addressing these varying needs unlikely to withstand heightened scrutiny.[38] The disabled are not considered discrete as the spectrum of needs, lifestyles, and types of disabilities of these individuals make it hard to distinguish them from those that are not disabled, and to group all individuals with disabilities together. Though not necessarily discrete, Americans with disabilities are surely an insular minority, that is, a minority isolated from members of the majority socially and politically, as by the nature of many people's disabilities they must be accommodated for in separate ways from their non-disabled counterparts.[39] In other words, the concept of disability is that someone's condition disables them from participating in certain parts of society without accommodations being made: laws, education, technology, and architectures have been revolutionized around the world for the past centuries largely without consideration of how individuals with any mental, chromosomal, or physical conditions might be disabled to reap the full benefits of these progresses as those lacking such conditions. As mentioned in the Fifth Circuit opinion, disabled people would be precluded—thus insulated—from living in Cleburne City unless they had access to live in a specialized living facility like the prospective CLC.

Another critical feature of the ADA is the accommodations it demands for those with disabilities. The scope of what accommodations were deemed reasonable and what burden is undue has fueled disability employment debate for decades since its passing. One of the principal objectives of the Americans with Disabilities Act was to eliminate all forms of disability discrimination in the workplace, as the lack of jobs among disabled Americans was seen to perpetuate their political powerlessness and lack of autonomy, ultimately "cost[ing] the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[40] Bypassing these negative outcomes is arguably worth the increased individual responsibility placed on employers in

providing "reasonable accommodations"[41] for their employees with disabilities, so long as it does not place "undue burden"[42] on the employer.

II. The Flawed Three-Tiered Scrutiny System

A. Scrutiny as a Spectrum

Much of the jurisprudence on suspect classification has been gathered at large and was not explicitly outlined until the Supreme Court decided *United States v. Carolene Products Co.* in 1938. In a widely-cited footnote, Justice Harlan Stone qualified the *Carolene Products* outcome based on the Court's usage of a low scrutiny "rational basis" review of the law in question.[43] By formally coining this low level of scrutiny in contrast to the strict scrutiny mentioned in earlier cases, Footnote 4 unintentionally outlined an inflexible standard determining that strict scrutiny should be limited to discrimination against "a discrete and insular minority."[44] Almost a century later, judges, attorneys, and legal scholars alike are still constrained to utilizing the same discrete and insular characteristic necessary for minority groups to be awarded anything greater than mere rational basis review, and when granted, such suspect classes are largely protected under judicial scrutiny of federal laws or programs that discriminate against them. But Justice Marshall's concurring opinion in *Cleburne* demonstrates that the lines between different categories of scrutiny are more blurred than the courts make them out to be.

While agreeing with the Court's ultimate ruling in favor of the Cleburne Living Center, Justice Marshall starkly opposes the viewpoints of the majority opinion regarding the rational basis review standard used for the respondents. After presenting his case for heightened scrutiny, referencing how different groups in similar circumstances were granted higher scrutiny, he identifies a greater concern that he has in the majority's decision to strike down the Cleburne city ordinance as applied, and not as facially invalid. Justice Marshall notes that in no other instance has the Court ruled on an equal protection challenge on an as-applied basis.[45] He foreshadows the complex questions that not ruling the ordinance invalid at its face will cause.[46] Now lower courts are still left dealing with the same legislative issue in the *Cleburne* case without definitive interpretation. Because of this inefficient case-by-case interim solution, Marshall calls to the legislature to provide standards and certainty in the proper adjudication of disability rights cases. Marshall believes that the Court's insistence on strict labels is harmful to groups that deserve higher protection, and that this must be addressed by Congress making a ruling on the matter.[47] Such statutory clarification on the status of the disabled in the law would tackle the issue of inconsistent application of scrutiny standards. Marshall believes that the Court's rigid approach without Congressional framework distracts from the responsibility of the Court in this case, which is to identify and prevent "impermissible assumptions or false stereotypes regarding individual ability and need."[48] That is, the distinctions of rational basis,

intermediate, and strict scrutiny are not there to prevent discriminated individuals from access to recourse, but rather to ensure that the Courts prevent legislatures from discriminating against groups in need. The criteria of "discrete and insular minority," "historically discriminated," and "politically powerless," should not be referenced as the end-all-be-all criteria in determining whether someone's equal rights deserve protection, but rather a spectrum of needs that take all forms of marginalization into account. Marshall argues that the majority seems to have taken the negative perspective on heightened scrutiny, that they are looking for reasons *not* to apply it, rather than reasons a group needs higher scrutiny to ensure their protection.[49] Justice Stevens, authoring his own concurring opinion, cites his logic from an earlier case saying that he is "inclined to believe that what has become known as the [tiered] analysis of equal protection claims" is not entirely logical and does not provide for easily understood precedents, but rather explains "decisions that actually apply a single standard in a reasonably consistent fashion."[50]

B. Second-Order Rational Basis Review

In addition to many insightful arguments that Marshall makes in his concurring opinion, Marshall also points out one major inconsistency: the majority opinion used a different standard of judicial scrutiny than they claimed. Despite working extensively to justify merely granting people with disabilities rational basis review, the majority actually applied what can be seen as a higher "second-order" rational basis-review. This second-order review, as previously coined by Justice Stevens in his 1976 *Craig v. Boren* concurring opinion, is one where the Court places the burden of proof on the legislature to provide a legitimate governmental concern for the distinctions they made regarding individuals with versus without disabilities.[51] It is this type of second-order rational review that Justice Marshall notes when he argues that the Court has contradicted precedent set in other cases where rational basis review was correctly used.[52] The effect of this flawed decision-making process in *Cleburne* was not limited to the Cleburne city ordinance, but in fact has come to confuse lower courts in how to understand the Court's findings in *Cleburne*. That is, by failing to re-categorize the standard of scrutiny they used as second-order, the outcome of a court's rational basis review became dependent on the foundation of cases it used to define terms like rational basis review. For example, if a lower court were to cite *City of Cleburne v. Cleburne Living Center* regarding the standards used under rational basis, they would be holding the State to a higher standard than they would have had they cited *United States v. Carolene Products*.

III. How Fact-Finding is a Tool to Affirm Judgments, not Inform Judgments

Fact-finding is a hugely important responsibility for both Congress and the Court to make informed decisions on complex cases and enact factually-based

laws, respectively. However, the fact-finding of Congress and the Court do not carry the same weight. Congress, as the branch most directly representative in votes to the people it governs, and with close ties to federal agencies staffed by experts in a variety of subject-matter, is seen as the most informed and equipped to deal with large and complex issues that require substantial analysis of data.[53] While the Justices are tasked with the judicial review of legislative acts, they are not directly elected, nor do they face term limits or reelection, so they are relatively isolated from the demands and attitudes of the American public, resulting that their decisions might not reflect progressive sentiment of the time.[54] Thus, as the proclaimed authority of fact-finding and establishing consistent procedures, Congress's findings serve as the standards that the Court must look to. However, this is not how the Court often bases its findings, as in the *Cleburne* majority opinion. Particularly, Justice Marshall calls out the majority's selective fact-finding which downplayed the severity of historical discrimination against the disabled,[55] referencing minor advancements in the trajectory of disability rights and completely glossing over the lengthy "history of purposeful unequal treatment" experienced by people with disabilities.[56] That is, it seems that the Court has the tendency to cite their own precedents over Congressional statutes, disregarding the primary function that the Congress has in establishing what is the law. While I do not accuse the court of intentionally absconding relevant facts that would have tipped the scales in favor of the disabled, I do believe that we are left unsatisfied with the Court's accepted risk of factual oversight when Justices look for evidence to frame their arguments.

A. The Rehnquist Court

We turn from the Burger Court to the Rehnquist Court to examine how concerns for discretionary decision-making were compounded by even stricter scrutiny criteria and a non-progressive reading of the *Cleburne* decision and the ADA. During the Rehnquist Court, we see a level of judicial scrutiny less demanding than mere rational basis review, with the ability for employers to defend their discriminatory behavior, now prohibited by the ADA, by citing economic rationale. Regarding the undue hardship caveat to the reasonable accommodations accessible to employees with disabilities, this Court began interpreting this clause to mean almost any expense to the employer. Take *Chevron U.S.A., Inc. v Echazabal*, where Mario Echazabal sued his employer, Chevron, for disability discrimination after he was reassigned to work in another area of the factory upon discovery of his disability through a physical examination.[57] In deciding this case, the Supreme Court shut down his request for accommodation after considering the economic arguments of the petitioner in this case, such as reduced time lost to sickness, excessive turnover from medical retirement or death, and litigation costs.[58] This rationale is even more lenient toward discriminatory parties, so long as they can explain why their discriminatory behavior was economically beneficial to them, and why they

believe that increasing their accessibility to the disabled would cost them more than they would gain back in worker productivity.

B. *Heller v. Doe*

Heller v. Doe is an even more glaring example of the Rehnquist Court refusing to afford the disabled heightened scrutiny, citing seemingly everything but the Americans with Disabilities Act as the factual foundation of their decision, and it demonstrates how the level of scrutiny used in a case translates to a different case outcome for the disabled. This 1993 case addresses two different Kentucky statutory procedures for the involuntary commitment of the mentally disabled versus the mentally ill. Those being involuntarily committed on the basis of *mental disability* need only be proven by "clear and convincing evidence" in their commitment hearings in which their guardians and family members are allowed to participate as a party in these proceedings. Meanwhile, for those being committed on the basis of their *mental illness*, their case against them for involuntary commitment must be proven by the State "beyond a reasonable doubt," and their family members are not entitled to be a party in the proceedings.[59]

Disabled respondents claimed violation of Equal Protection and Due Process and also provided that the Court ought to use heightened scrutiny in assessing the differing Kentucky procedures, but the majority opinion shut this down, since *Doe* had originally claimed to the District Court that rational basis review should be utilized to strike down the statues.[60] The court expresses, "[e]ven if respondents were correct that heightened scrutiny applies, it would be inappropriate for us to apply that standard here."[61] They allege that it would be unjust to inject a higher level of scrutiny so late in the judicial process that could change the outcome of the case. Ironically, this "higher level of scrutiny" is the correct level of scrutiny afforded to the disabled as explicitly delineated by Congress's Americans with Disabilities Act, a response to fragmented and unsatisfactory rulings on the disabled as a group in *Cleburne*. In quoting *FCC v Beach Communications* for precedent on the factual findings of Congress, the majority notes that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and that "[a] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," but the same deference does not seem to be implemented by the Court in regard to the ADA whose factual findings alone would decide this case in favor of the respondents.[62] They apply this standard to Kentucky's statewide statutory procedures, while completely disregarding how this exact citation would contradict their judicial scrutiny decision if applied to the Americans with Disabilities Act. Here it seems that the majority opinion shirks their responsibility to enforce a higher level of scrutiny that should have been applied at the District Court level, and instead carefully find facts that avoid this messy task. This sentiment is echoed

in upholding the Kentucky statutes demanding a higher burden of proof for the mentally ill than for the mentally disabled, and Justice Souter dissents that, "It is no coincidence that difficult issues in civil cases are not subject to proof beyond a reasonable doubt," completely missing the theory behind assignment of burdens of proof, which is the importance of avoiding error in a judgment given the respective interests of the parties and not for the mere difficulty of avoiding error.[63] That is, American Courts have consistently demonstrated their difficulties in defining the disabled as a discrete category, that is classifying an individual as having a disability, and so we see the Kentucky statute make it easier to involuntarily commit those with mental disabilities with a lower burden of proof to those committing individuals with "disabilities."

Souter also argues that even under rational basis review, the decision of the majority fails to establish a rational relationship between the disparate treatment of individuals on the basis of ability or mental illness and some legitimate governmental purpose, and further outlines that the majority failed to take a strong position regarding *Cleburne*, as it does not try to overrule nor to apply its precedent fully.[64] Part of this seems to stem from the fact finding pattern of the majority that strategically avoids making hard stances on issues that have caused contention before, but another part of the majority opinion finds itself lost in citing the contradictory decision of *Cleburne*, whose rational basis review was much stricter than that which they claimed they used. Both of these facts subvert the purpose of *Cleburne* to protect the status of those with disabilities with legislation that favors their progress. Not only that, but the majority in *Heller* also contradicts their own support for Kentucky's varying degrees of burden of proof afforded different classes of people, as Souter points out the Court's concern with the varying difficulties of proving involuntary institutionalization of the mentally ill versus the mentally disabled, and their reasoning for setting different burdens of proof. In the case of involuntary commitment, it is individuals with alleged mental disabilities or mental illnesses who are being, as it were, put on trial, and are entitled to the protection of the burden of proof necessary for the State to meet. That is, if the burden of proof for commitment is "by preponderance of the evidence," or "by clear and convincing evidence," this individual faces a much higher probability that the State's burden will be met than if the burden were "beyond a reasonable doubt." Thus, if we are to imagine that individuals "on trial," for involuntary commitment are opposed to their being committed, then we see that those on trial for having a mental disability are in a more difficult position than those on trial for having a mental illness because of the benefit of doubt, or burden of proof, awarded to them. Souter ponders the reasoning behind such a difference in burden of proof. To this effect, Souter shuts down the possibility that these differing burdens reflect differing interests of the public, as this preference toward the protection of the mentally ill over the disabled would surely not be

tolerated by the majority.[65] Even the perspective of the difficulty in meeting the burden of proof for the "vastly different" cases of the mentally ill and the disabled would strengthen the case for higher burdens of proof for the disabled and lowered burdens for the mentally ill, the opposite of the ruling of the Court.[66] Either way, the argument of the majority is flawed to the extent that whichever point of view is used to justify upholding the Kentucky procedures only presents a greater contradiction in the Court's logic. If lowering the burden of proof for cases of commitment of the disabled is justified under the state's *parens patriae* powers, in caring for citizens unable to care for themselves—as argued by Justice Kennedy for the majority—the Court now finds themselves accepting a reality in which the disabled are seen as powerless and unable to care for themselves.[67] This allegedly powerlessness, then, should be the exact criterion that makes the disabled eligible for heightened judicial scrutiny, as in *Cleburne*, the political powerlessness of the disabled as a group was rejected, and were thus seen as a politically powerful group. It is logically flawed to accept the lower burden of proof to involuntarily commit disabled individuals and to reject the disabled heightened scrutiny because this implies an oxymoronic categorization in which the disabled are seen as unable to care for themselves on the one hand but politically powerful on the other.

III. Conclusions

The underlying logic of granting varying levels of judicial scrutiny to different groups rests on the societal desire to protect groups that have experienced legal and political oppression in ways that have always been justified in law (for example Jim Crow, Japanese Internment, and eugenics). Thus, the judiciary has employed stricter scrutiny for these cases where the State consistently seems to make arguments for the necessity to discriminate against individuals on the basis of one characteristic or another. Varying scrutiny, then, is to protect these individuals relative to the level to which they are being and have been subjected to discriminatory laws on account of their identity, especially for minorities. As noted by Justice Powell, the importance of democracy in the United States, which facilitates rule of the majority, necessitates the Court to ensure that minorities "can engage equally in the political process."[68] The Court should never underestimate the importance of providing a group acknowledged to have experienced great discrimination more exacting judicial scrutiny for the sole reasoning that it is unlike other minority groups that have experienced discrimination. This principle belies the entire theory of protection of the minority: that they are unlike other more politically recognized groups, and that in spite of these differences, their self-sufficiency and participation in society are to be respected and protected by the government. To reject heightened scrutiny for the disabled on account of their differences from other recognized minorities ironically demonstrates their need for heightened scrutiny: they are a minority within a minority. Their isolation from

others in society and in the law makes their status even more discrete and insular than that of many minority groups who might have formed community ties with other members with their shared identity. Unfortunately for many Americans with disabilities, as was the case for the respondents in *Cleburne*, comradery and shared community with those who have shared life experiences on account of having similar disabilities is a luxury not guaranteed to most of those who identify as disabled. This acknowledged insular trait of the disabled in American society was what lent so much credence to Cleburne Living Center's claim, and strengthened the Court's opinion in favor of CLC.

Admittedly, I believe that strict scrutiny should not apply to people with disabilities because this scrutiny does not allow Congress to make any legal distinctions upon this classification, while disability is in fact a relevant category in making many legislative decisions.[69] Namely, this would effectually outlaw even favorable legislation such as Social Security Disability Insurance and Supplemental Security Income.[70] The best possible course of action, then, is to not only reject strict scrutiny, but to reject scrutiny as a strict system. Justices are hailed as extremely knowledgeable contributors to American Democracy, and to prescribe reductive suspect criteria is to underestimate the capacity of each justice to adapt interpretation to unique case circumstances. Making decisions in a vacuum ignores the heterogeneity within every group, regardless of any identity in common. To negate this, and instead propose homogeneity of all within any group of similar race, gender, or national origin, the Court subjects these groups to the same discrete and insular category that effectively discriminates against them. Instead, the Court should realize its broad latitude in considering the unique facts of each case and party in its fact finding, refer to expert Congressional facts, and when necessary refer to the decisions of previous court decisions with the context of these unique circumstances in mind. The Court must accept the findings of Congress in the ADA as the most reputable on the subject of the disabled and should defer to the act's text over any judicial precedent that predates this act to determine how to rule on contemporary cases. The three-tiered scrutiny system has gone too far in limiting protections it awards to individuals in need. Justices should not feel so compelled to prove formulaic determinations of groups of people that only further subject them to legal otherization. Additionally, successes in social activism should not be used against a minority group as evidence against their struggle. The irony in this should be evident that the only way progress is made for oppressed groups is through their collective action to be heard, and their successes in passing legislation does not negate their historical powerlessness. Riddled with contradictions, *Cleburne* has confused the Court on how to rule in matters regarding disability discrimination to the detriment of the disabled. The pejorative legacy of *Cleburne* contradicts the cautious intent of *Cleburne* to defer authority to Congress, in acknowledgment that the Court is not qualified to

speak on the necessary protections for the large category of disabled Americans. The *Cleburne* decision was an admitted placeholder decision which has unfortunately been taken at its face value by contemporary Courts, selectively citing passages where the Court refuses to grant protected status, and neglecting to consider their deferral of authority on the matter to Congress and their intent to find the most effective solution to protect the disabled without giving rise to a debate of semantics. Their decision requires that judges step back when necessary and take it upon themselves to adapt their decision-making and application of precedent to the very unique circumstances of each case of disability discrimination, but instead Americans with disabilities find themselves confined to poorly interpreted precedent predating the most significant advancement in the disability rights movement, effectively relegating them to the same level of legal vulnerability as they would have experienced over 50 years ago before the misunderstanding of *Cleburne v. Cleburne*.

[1] Americans with Disabilities ("ADA"), Act 42 USC (1990).
[2] *City of Cleburne, Texas v. Cleburne Living Center* 473 US, 432 (1984).
[3] I have decided to use the words 'disabled' and 'intellectually disabled' instead of the outdated term 'retarded' in line with contemporary courtesy towards individuals with disabilities and the disability rights movement. I also believe that referring to the respondents in *Cleburne* as individuals with disabilities clarifies the case's direct relevance to the passage of the Americans with Disabilities Act.
[4] US Const Amend. XIV.
[5] "Suspect Classification," Legal Information Institute.
[6] "Strict Scrutiny," Legal Information Institute.
[7] "Intermediate Scrutiny," Legal Information Institute.
[8] "Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model," Open Yale Law School.
[9] "Suspect Classification."
[10] *City of Cleburne, Texas v. Cleburne Living Center,* 435 (White, J., majority).
[11] "Section 8 of the Cleburne zoning ordinance" as cited in *City of Cleburne, Texas v. Cleburne Living Center,* 436 (White, J., majority).
[12] *City of Cleburne, Texas v. Cleburne Living Center,* 437 (White, J., majority).
[13] Ibid.
[14] Ibid, 437-38.
[15] Ibid, 438.
[16] Ibid, 442.
[17] Ibid, 442-43.
[18] Ibid.
[19] Ibid, 443; Rehabilitation Act of 1973 29 USC § 701(1973).
[20] Ibid.
[21] Ibid, 445-46.
[22] J. B. Miller, "The Disabled, the ADA, and Strict Scrutiny," 6 *St. Thomas Law Review* 2 (1994), 396; *Lyng v. Castillo,* 477 US 635, 638 (1986); *Massachusetts Board of Retirement v. Murgia,* 427 US 313, 14 (1976).
[23] *Lyng v. Castillo,* 477 U.S. 635, 638 (1986).
[24] *City of Cleburne, Texas v. Cleburne Living Center*, 467 (Marshall J., concurring).
[25] Ibid.
[26] *City of Cleburne, Texas v. Cleburne Living Center*, 446.
[27] Ibid, 432 and 446.
[28] Ibid, 442-43.
[29] J. B. Miller, "The Disabled, the ADA, and Strict Scrutiny," 6 issue 2 *St. Thomas Law Review* 393, 408 (1994).

[30] Jayne Ponder, "The Irrational Rationality of Rational Basis Review for People with Disabilities: Call for Intermediate Scrutiny," 53 issue 2 *Harvard Civil Rights-Civil Liberties Law Review* 709, 709-10 (2018).
[31] *Americans with Disabilities Act*, Disability Resources (US Department of Labor), Accessed April 5, 2024, online at https://www.dol.gov/general/topic/disability/ada.
[32] 42 USC § 12101(b)(2) (1990) (Amended 2008).
[33] US Const Amend. XIV.
[34] J. B. Miller, "The Disabled, the ADA, and Strict Scrutiny," 401 (1994).
[35] 473 US 432, 443.
[36] 42 USC § 12101(a) (1990).
[37] Ibid.
[38] 473 US 432, 443.
[39] 42 USC § 12101(a) (1990).
[40] Ibid, 12101(a)(7-8).
[41] Ibid, 12111(9).
[42] Ibid, 12111(10).
[43] *United States v. Carolene Products Co.,* 304 US 144, 152 (1938).
[44] Ibid.
[45] *City of Cleburne, Texas v. Cleburne Living Center,* (Marshall J., concurring).
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid, 467.
[50] *City of Cleburne, Texas v. Cleburne Living Center*, 452 (Stevens J., concurring).
[51] *Craig v. Boren,* 429 U.S. 190, 212 (1976) (Stevens J., concurring).
[52] *Craig v. Boren,* 459 (Marshall J., concurring).
[53] Charles Tiefer, "The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue," 29 no.2 *Harvard Journal on Legislation* 357, 387 (1992).
[54] David S. Hamburger, "30 Years After *Cleburne*: A Look Back at a Landmark Decision for Intellectual Disability Jurisprudence", *Penn Undergraduate Law Journal* 2, no. (2) (2015): 123-137.
[55] *City of Cleburne, Texas v. Cleburne Living Center,* (Marshall J., concurring).
[56] Ibid.
[57] *Chevron USA., Inc. v Echazabal* 536 US, 73 (2002).
[58] Ibid, 84.
[59] *Heller, Secretary, Kentucky Cabinet for Human Resources v Doe* 509 US, 312 (1993).
[60] Ibid, 318-19
[61] Ibid, 319

[62] *FCC v Beach Communications* 508 US, 307, 313-315 (1993)
[63] *Heller v Doe,* 319 (Souter J., dissenting)
[64] Ibid, 337.
[65] Ibid, 340,
[66] Ibid.
[67] Ibid, 332 (Kennedy J., majority).
[68] Lewis F. Powell, Jr., "'Carolene Products' Revisited," 82 *Columbia Law Review* 1087, 1088-89 (1982).
[69] *City of Cleburne, Texas v Cleburne Living Center*, 438 (White J., majority).
[70] Jayne Ponder, "The Irrational Rationality of Rational Basis Review for People with Disabilities: Call for Intermediate Scrutiny," 713.

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The Implications of Neuroscience and its Development in Supreme Court Cases Regarding Juvenile Sentencing

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Introduction

Despite the long-standing belief that children possess the same culpability as adults, the development of neuroscience has effectively disproved that theory, leading the Supreme Court to reconsider juvenile sentencing. The Supreme Court, analogous to courts at all levels, has been progressively attentive to neuroscience and the fundamental differences between juveniles and adults. The primitive use and understanding of neuroscience—evidencing the reduced culpability of juveniles—began with the 1988 Supreme Court case *Thompson v Oklahoma* prohibiting the death penalty for juveniles under the age of sixteen. This unprecedented ruling recognized that the culpability of juveniles is separate from that of adults, ultimately creating an avenue for the Supreme Court to later expand on these distinctions.[1] Although *Thompson* ruled that capital punishment is unconstitutional for individuals under sixteen, the Court increased the age to eighteen in the 2005 ruling *Roper v Simmons*.[2] The Court's reevaluation of juvenile sentencing in *Roper* is representative of the evolutions in neuroscience in which the American Medical Association and American Psychological Association submitted their first amicus curiae briefs concerning juveniles. From 2005 to 2012, the Supreme Court accepted, heard, and ruled on three more cases after *Thompson* regarding the culpability of juvenile offenders: *Roper v Simmons* in 2005, *Graham v Florida* in 2010, and *Miller v Alabama* in 2012. Throughout the progression of these cases, the Supreme Court referenced neuroscience research more frequently in the opinions.

The United States legal system historically failed to recognize the distinction between juveniles and adults due to the lack of neuroscience research. As discussed by Venturelli in the University of Pennsylvania Journal of Constitutional Law, prior to the nineteenth century, "once a child turned seven years old, it was possible for him or her to be arrested, tried, and punished like an adult, and it was certain once a child turned fourteen years old."[3] Children under the age of seven were reckoned to have no criminal capacity.[4] Juvenile sentences became exceedingly barbaric, permitting the execution of children as young as fourteen prior to *Thompson*. Research suggests that "adolescents are more emotionally reactive, have difficulty suppressing action

and attention toward emotional stimuli, and have underdeveloped cognitive control systems."[5] In their first amicus curiae briefs submitted to the Court regarding juvenile sentencing, the American Psychological Association and American Medical Association delineated the scientific differences between juveniles and adults that reduce the former's culpability when committing crimes.[6;7] With this emerging research, the Court began to increasingly analyze the constitutionality of juvenile sentencing through the scope of neuroscience.

The Supreme Court and its Progression in Deciding Juvenile Sentencing Cases

During the late 1980s and 1990s, the Supreme Court's attention was drawn to juvenile sentencing. This period was marked by a dramatic rise in violent crime, which provoked panic, causing society to view ruthless punishments as the solution.[8] With the hope of immediately decreasing violent crime, state legislators enacted stringent sentencing schemes that lengthened sentences while reducing the age of adult jurisdiction. This approach allowed younger children to be tried as adults, a process further intensified by judges using their broad discretion to punish juvenile offenders more harshly. Accordingly, this period permitted forty-five states to try juveniles as adults with sentences such as "life without parole" and the death penalty.[9] There was a strong emphasis on deterrence and incapacitation, resulting in more juvenile executions and heightened imprisonment of youth in adult prisons and jails. Deterrence and incapacitation generally refer to two of the strictest philosophies of punishment; they entail deterring crime by punishing with the utmost rigor and removing individuals from society through means such as execution and extensive sentences. Both philosophies can be constitutional if they are proportionate to the offender and the crime committed. Mills, et al. interestingly note that "...[f]rom 1990 to 1999, there was a 10-fold increase in the number of juvenile life without parole sentences."[10] Thus, the Supreme Court was disposed to re-examine the constitutionality of severe juvenile sentences under the Cruel and Unusual Punishments Clause of the Eighth Amendment. As the Court analyzed the sentences, it heavily predicated its decisions on the evolving standards of decency and neuroscience research. This is evident in the Court's multiple reassessments of juvenile age and sentence classifications and its increasing reliance on amicus curiae briefs from scientific organizations. Further analysis suggests that juveniles had to be given special treatment under the Eighth Amendment. With *In re Gault*, the first Supreme Court case that considered juvenile rights, the Court applied the Due Process Clause of the Fourth Amendment, justifying that "children are people."[11] In *Miller*, one of the latest juvenile sentencing cases decided in 2012, the Court acknowledged that "children are different."[12] The transformation and progression of juvenile considerations by the Supreme Court are directly parallel to the development of neuroscience.[13]

The Implications of *Thompson v Oklahoma*: The Proscription of Death Penalty Sentences for Persons Under Sixteen

In the 1988 Supreme Court case *Thompson v Oklahoma,* the fifteen-year-old petitioner was convicted of first-degree murder. The prosecutor petitioned to have him tried as an adult, which the trial court granted. Consequently, the teen was convicted and sentenced to the death penalty, which the Court of Criminal Appeals of Oklahoma affirmed.[14] However, the Supreme Court issued its decision prohibiting the death penalty for persons under the age of sixteen, effectively nullifying the sentence issued in *Thompson*.

In prohibiting the death penalty for those under sixteen, the Supreme Court notably stated that juveniles have diminished culpability and that the application of the death penalty to this class of juvenile offenders does not measurably contribute to the underlying penological purposes.[15] The Court examined the improper use of penological justifications, which was scrutinized more extensively with neuroscience discovery in the 2010 case *Graham v Florida*. In the *Thompson* opinion, the Court found that the penological justifications of retribution and deterrence were unacceptable and inapplicable to the execution of a fifteen-year-old offender.[16] Due to the diminished culpability of juveniles, teenagers' capacity for growth, and juveniles' lack of cost-benefit analysis, there was no justifiable penological theory to support this punishment.[17] The *Thompson v Oklahoma* ruling continues to remark the following:

> This Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult, since inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time, he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.[18]

When the Supreme Court decided *Thompson* in 1988*,* neuroscience was relatively nascent and lacked definitive research that outlined the stark differences between juveniles and adults. In the absence of such information, the Court instead focused on the behaviors of children and their susceptibility to negative influences, suggesting that their brains were not fully developed to engage in strong decision-making and reasoning processes.[19] Steinberg, Chung, et al. find that, among youth offenders, there is some combination of poor school performance, mental health problems (including substance abuse), undependable family relationships, negative peer influences, and being in crime-intensive communities that influence their offending.[20] In *Thompson,* seven amicus briefs were filed on behalf of the petitioner, explaining that the fifteen-year-old was surrounded by and involved in these negative influences, which exacerbated his immature behavior.[21] Because his environment impacted his impulsive behavior,

the amicus briefs contended that he was less culpable than an adult.[22] The amicus briefs were submitted by groups such as the American Bar Association, the National Legal Aid and Defender Association, the American Society for Adolescent Psychiatry, and the Child Welfare League of America.

Legal and scientific communities uniformly agree that the impetuous nature of juveniles is a result of their incomplete brain development, which evidently contrasts the full development of adult brains. The unanimity between the legal and scientific communities is continually reinforced parallel to the progression of neuroscience. Although *Thompson v Oklahoma* does not explicitly reference neuroscience, it maintained that supporting a death penalty sentence for a fifteen-year-old would "offend civilized standards of decency."[23] With the advancement of scientific research, the Court reassessed the benchmark for cruel and unusual punishment and determined that the execution of a fifteen-year-old contravened the current standards of decency.[24] Therefore, as "the Court must be guided by the 'evolving standards of decency that mark the progress of a maturing society,'" the development of neuroscience would impact future Supreme Court cases and warrant a reevaluation of the evolving standards of decency over time.[25] The evolution of neuroscience continues to directly impact society's maturation, as it informs scholars, legislators, judges, and the general public. Notably, *Thompson* established the necessary foundation for the Supreme Court to later consider neuroscience developments. In fact, in *Roper v Simmons,* the Court explicitly mentions and uses it to corroborate its holding.[26]

The Implications of *Roper v Simmons*: The First Application of Neuroscience Research to Declare Juvenile Death Penalty Sentences Unconstitutional

In the 2005 Supreme Court case *Roper v Simmons*, the respondent planned and committed a capital murder at the age of seventeen and was sentenced to death after turning eighteen. As an extension of the reasoning in *Thompson*, the Court ruled that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on an offender under the age of eighteen.[27]

The respondent's argument was based on the Court's holding in *Atkins v Virginia*, which held that the execution of mentally impaired persons was unconstitutional.[28] The Court pronounced that, because their brains are not fully developed, mentally impaired individuals have diminished culpability because of their reduced conscience and abilities to reason.[29] Comparably, children's brains are not mature until their mid-to-late twenties, so the logic in *Atkins* can also be applied to juveniles. Due to juveniles' brain development being incomplete, they are inherently different from, and have less culpability than, adults. It follows that they should not receive the harshest sentences applicable to the most serious adult offenders.

Since *Thompson* and *Atkins* both thoroughly considered the standards of decency, the respondent in *Roper* asked the Court to reevaluate the standards that have significantly developed since *Stanford v Kentucky*.[30] Although *Stanford* ruled that capital punishment is constitutional for an offender at least sixteen years of age,[31] the respondent in *Roper v Simmons* asserted that a national consensus had since developed against it.[32] The Court in *Roper* accentuated the importance of "referring to the 'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be 'cruel and unusual.'"[33] The Court noted that the standards of decency for juveniles in the epoch of *Thompson v Oklahoma* have since shifted.[34] The progression of neuroscience directly impacted the evolving standards of decency and engendered a national consensus that opposed the execution of offenders under the age of eighteen.

Although neuroscience emerged to be more advanced by the ruling of *Roper,* attested by it being the first Supreme Court juvenile sentencing case for which the American Psychological Association and American Medical Association each submitted an amicus curiae brief, *Roper* still references *Thompson.* For instance, *Roper* cites *Thompson* to explain that "[j]uveniles' susceptibility to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[35] Though neuroscience research was relatively unsophisticated at the time of the ruling in *Thompson*, the Court provided exhaustive scrutiny of the contrasting characteristics between juveniles and adults, laying the foundation for *Roper* to further elaborate on these differences with developed scientific findings.

The *Roper* opinion contends that the distinctions between juveniles and adults, which warrant juveniles' diminished culpability, demonstrate that they cannot be reliably classified among the worst offenders. The opinion continues to explicitly reference scientific studies and states that "[f]irst, as any parent knows and as the scientific and sociological studies… tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults'" and that "'these qualities often result in impetuous and ill-considered actions and decisions.'"[36] The differences outlined between juveniles and adults in *Roper* are informed by the amicus briefs submitted by the American Psychological Association and American Medical Association in favor of the respondent.[37;38] The American Psychological Association and American Medical Association used behavioral studies to substantiate that even late adolescence is characterized by a reduced ability to inhibit impulses and a diminished likelihood to consider productive alternatives to criminal behavior.[39;40] The American Medical Association relied on studies and structural brain imaging to justify that juveniles do not perform cost-benefit analyses, lack personal responsibility, and have not fully matured in cognitive, emotional, and social functions.[41] Additionally, the American Psychological Association

corroborates that adolescents are immature while in development, are statistically overrepresented in every category concerning reckless behavior, and have a transitory nature, suggesting that, for most juveniles, their volatile behaviors are merely short-lived.[42] The American Psychological Association and American Medical Association amicus briefs set a precedent, as the Court, for the first time, explicitly applied neuroscience research to distinguish juveniles from adults.

Aronson, in the American Psychological Association's Psychology, Public Policy, and Law Journal, finds the use of scientific evidence in *Roper* fascinating because the respondent's legal team did not use brain images to relate visible lesions or gross pathologies of the brain's regions to decision-making, a particular mental state, or a diagnosable mental condition.[43] Instead, the respondent's legal team submitted that, even if juveniles are deemed culpable in relation to a crime, they should be relieved of full culpability because juveniles' brain structure and function are not mature to the extent that adults' brains are.[44] Therefore, the respondent's legal team sought an age-based categorical exemption of full culpability for all juveniles due to their delayed brain development. Aronson expounds that neuroscience has expeditiously advanced despite its relative infancy, leading to improved techniques and technology, including magnetic resonance imaging (MRI).[45] MRI is, moreover, providing scientists and judges with a more extensive understanding of how brain development is immature in adolescence. As neuroscience continues to develop, society could mature in its perception of juveniles, which can shift the standards of decency.[46] In that same regard, the development of neuroscience provides a more thorough understanding of juvenile characteristics, which is further expanded upon in *Graham v Florida.*

The Implications of *Graham v Florida*: The Advancement of Neuroscience and the Prohibition on Juvenile Life Without Parole Sentences for Non-Homicide Crimes

In the 2010 case *Graham v Florida*, the sixteen-year-old petitioner committed armed burglary and another non-homicide crime, which resulted in a life without parole sentence. The Court, however, ruled that juveniles under eighteen could not be sentenced to life in prison without parole for a non-homicide crime because it violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.[47]

The Court references the American Psychological Association and American Medical Association amicus curiae briefs submitted in *Graham* to point out "developments in psychology and brain science."[48] Regarding the development, the Court includes that juveniles are less likely to be evidence of "irretrievably depraved character" than adults, as the parts of the brain affecting behavior continue to mature through late adolescence.[49] The Court explains that because neuroscience research consistently proves that juveniles' unformed

brains cause reckless and transient dispositions, there was no reason to challenge the Court's observations in *Roper*.[50]

The American Psychological Association amicus curiae brief submitted in *Graham* illustrates that "recent neuroscience research shows that adolescent brains are not yet fully developed in regions related to higher-order executive functions, such as impulse control, planning ahead, and risk evaluation."[51] This is concordant with the claims that juveniles lack maturity, have the capacity for change, and are more susceptible to negative influences. The amicus brief submitted by the American Medical Association in this case also confirms, through brain-imaging technology, that brain regions correlated to behavior, regulation of emotional response, and impulsivity are structurally immature during adolescence.[52] These findings are also consistent with age-related differences in brain function and behavior.

In *Roper*, the Court held that, because of juveniles' undeveloped brains and characteristics, the death penalty is disproportionate to their age, and youth offenders are less deserving of the most severe punishments.[53] Some developmental characteristics of juveniles include impulsivity, risk-taking, vulnerability to coercion, and rudimentary decision-making. Extending the reasoning in *Thompson* and *Roper,* the Court in *Graham* decided that a juvenile, compared to an adult, has a "twice diminished" moral culpability if they did not kill or intend to kill anyone.[54] As previously discussed, the Supreme Court in *Thompson* determined that juveniles have diminished culpability because their brains are not fully formed, causing erratic but transient behavior and characteristics.[55] Due to the inherently capricious behavior associated with juveniles, *Graham* advanced the diminished culpability deduction in *Thompson* to rule, after *Roper*, that juveniles have twice diminished culpability for not killing or intending to kill.[56] This is a cogent indication of the Court's enhanced reliance on neuroscience research to understand juveniles' neurological differences. Moreover, *Graham* includes that a juvenile's transgression is not as morally reprehensible as an adult's.[57] Graham received the second most severe sentence after the death penalty, but the Supreme Court decided that life without parole is unwarranted for a juvenile because their transgressions likely do not suggest an entrenched pattern of criminal conduct.[58]

The Court in *Graham* further examines penological justifications. The penal sanctions of retribution, deterrence, incapacitation, and rehabilitation do not provide legitimate justifications when sentencing non-homicide juvenile offenders to life without parole. Retribution is commonly understood to involve punishing an offender with the most stringent sentence proportional to the crime, deterrence refers to punishing with the utmost rigor to deter future crime from that individual and society as a whole, incapacitation concerns removing offenders from society through means such as execution and extensive

sentences, and rehabilitation includes treating offenders rather than punishing them.

The Court is informed by *Tison v Arizona* in concluding that the retribution rationale can only be applied when the criminal sentence is directly commensurate with the personal culpability of the offender.[59] However, juveniles have diminished moral culpability, if not twice diminished, which makes the penological theory of retribution inapplicable. With regard to deterrence, the Court relies on *Roper v Simmons* to assert that the same developmental characteristics that cause juveniles to have a decreased culpability also cause them to be less susceptible to deterrence as they are unlikely to consider the ramifications of a punishment.[60] Furthermore, to justify incapacitation for a juvenile life without parole sentence, incorrigibility, or the lack of capacity for an individual to change demonstrated by repeated offenses, must be determined to presume that they will be a permanent danger to society.[61] *Graham v Florida* cited the opinion in *Roper v Simmons* to justify that a juvenile offender cannot definitively be characterized as a danger to society because "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[62] Additionally, *Graham* references *Workman v Commonwealth*'s opinion, stating that "incorrigibility is inconsistent with youth."[63] Finally, the penological sanction of rehabilitation cannot justify a juvenile sentence of life without parole. Juveniles must be given a chance to demonstrate maturity and change, and denying their right to reenter society makes an absolute judgment about their lack of value and purpose. This prompted a greater focus on juvenile treatment programs. As the American Psychological Association and American Medical Association amicus briefs, neuroscience research, and the Court all suggest, juveniles are most capable of change and more than likely to reform.

The *Graham* Court depended on the most recent neuroscience findings to augment the developmental characteristics of juveniles noted in *Thompson* and the scientific research referenced in *Roper*. The recent findings in *Graham* associate brain regions with behavior, decreased regulation of emotional response, impulsivity, and poor decision-making.[64] The researchers consistently found that brain function and behavior are noticeably distinct with age-based differences.[65] The Court in *Graham* emphatically—and with greater resolve—described that juveniles have diminished culpability due to their developmental characteristics.[66] The Court went even further to construct a new legal concept of twice diminished culpability, reducing the culpability of juveniles to a greater degree if they did not kill or intend to kill someone.[67] Consequently, the Court debunked each penological justification of rehabilitation, deterrence, incapacitation, and rehabilitation for a juvenile life without parole sentence for a non-homicide offense.

The Implications of *Miller v Alabama*: The Furtherance of Neuroscience to Bar Mandatory Juvenile Life Without Parole Sentences for Homicide Offenders

Miller v Alabama was decided in 2012, where the fourteen-year-old petitioner was convicted of murder and sentenced to a statutorily mandated punishment of life without parole. The Court ruled that the Eighth Amendment prohibits a juvenile homicide offender from being sentenced to a mandatory life without parole sentence.[68]

In the *Miller* ruling, the Court referenced *Thompson, Roper,* and *Graham* regarding the fundamental differences between juveniles and adults.[69] Although all these cases except *Thompson* were expressly informed by neuroscience research presented by the American Psychological Association and American Medical Association, the constantly advancing field warranted both organizations to submit new amicus curiae briefs. Additionally, all of these rulings, as well as *Miller*'s, included vigorous deference to the evolving standards of decency, which is unequivocally impacted by the advancement of neuroscience.

The American Medical Association's amicus brief submitted in *Miller* outlines that "only recently have studies provided an understanding of the neurobiological underpinnings for why adolescents act the way they do. For example, brain-imaging studies reveal that adolescents generally exhibit greater neural reactivity than adults or children in areas of the brain that promote risky and reward-based behavior."[70] The American Psychological Association's amicus brief in *Miller* presents novel research, consolidating that juveniles are psychosocially immature.[71] This immaturity is attributed to a negative relationship between a juvenile's social factors and their actions and behaviors, increasing the likelihood of criminal activity.[72] The brief outlines notable features of adolescent brain development concerning the connections between the prefrontal cortex and other brain structures that are pivotal to executive functions, such as decision-making, judgment, and the calculation of risks.[73] Four central findings of the new research prove that the brain systems dictating social and emotional maturity develop throughout adolescence. First, early adolescence is marked by "the 'incentive processing system' in the brain involving neurotransmitters like dopamine," which increases "risk-taking, reward-seeking, and peer-influenced behaviors" that will be likely be transcended as the brain continues to develop.[74] Second, there is an advancement in executive functions during childhood and adolescence when the brain endures substantial synaptic "'pruning'—the paring away of unused synapses—leading to more efficient neural connections."[75] Third, executive functions mature when the adolescent brain undertakes profound myelination, where neural pathways are insulated with myelin that increases electrical impulses.[76] This allows for more swift and effective communication throughout the brain and refines

higher-order capacities, such as reasoning, planning, and considering risks and rewards. Fourth, in late adolescence, there are increased connections in cortical and subcortical areas of the brain that enhance the processing of emotional and social information and heighten stronger judgment.[77]

The decision in *Miller* further reinforced the rulings in *Thompson*, *Roper*, and *Graham*.[78] These cases were used to supplement the decision in *Miller* because they stipulated noteworthy differences between juveniles and adults. As evidenced by the amicus briefs of the American Psychological Association and the American Medical Association, neuroscience is constantly developing, influencing the evolving standards of decency. Relative to the development of neuroscience research, the Court in *Miller* bolstered the reasoning in *Graham*, providing that the evidence does not demonstrate that juveniles are incorrigible and unlikely to reform.[79] Therefore, they must be allowed to exhibit maturity as their brain develops. Although *Miller* involved a homicide crime as opposed to the non-homicide offender in *Graham*, the Court assessed the evolved neuroscience research to conclude that, even with the most severe offenses, juveniles' brains are substantially underdeveloped, neurologically preventing them from engaging in formed executive functions.[80] By effectively categorizing juveniles as mentally deficient, the Court ruled that designating a life without parole sentence to a juvenile offender is disproportional and a violation of the Eighth Amendment because of juveniles' high probability for radical change.[81]

Conclusion and Discussion

The Supreme Court understood the cognitive and behavioral differences between juveniles and adults more comprehensively with the development of neuroscience between 2005 and 2012. As a result, the Supreme Court's prohibition on the death penalty for those under the age of sixteen increased to eighteen, juveniles were classified to hold diminished or twice diminished culpability, and the Court emphasized the developmental characteristics of juveniles to determine the proportionality of their sentences.

In the 1988 case of *Thompson v Oklahoma,* the Court provides that of the 1,393 persons sentenced to death between 1982 and 1986, five were younger than sixteen years old.[82] The Court recognized that executing children was abhorrent; it was discordant with American tradition and the history of law. The Court in *Thompson*, without direct references to neuroscience, recognized the differences between juveniles and adults, restricting a state's ability to unconstitutionally sentence a juvenile younger than sixteen to the death penalty.[83] In the 2005 ruling of *Roper v Simmons*, the age was then increased to eighteen.[84]

While *Roper v Simmons* was litigated, over seventy juveniles were sentenced to the death penalty in thirteen states.[85] *Roper,* by extending the reasoning of *Thompson* contemporaneous with the progression of neuroscience,

is indicative of one of the first pivotal advancements in the neuroscience field. Although *Roper* was the initial juvenile sentencing case in which the American Psychological Association and American Medical Association each submitted its first amicus curiae brief, the profound research compelled the Court to increase the prohibition of the death penalty to those younger than eighteen.[86] Additionally, because *Thompson* barred the death penalty for those younger than sixteen, the over seventy juveniles sentenced to death in *Roper* were between the ages of sixteen and seventeen.[87] One can reasonably assume that death penalty sentences for juveniles would be profusely higher if *Thompson*'s conclusion were different. This is corroborated by the inclination of legislators and judges to accent deterrence and incapacitation, at all measures, to decrease crime during this period. Juveniles were significant contributors to the increasing crime because of their recklessness and judges were not reluctant to sentence them to execution. However, these Supreme Court rulings eradicated such unconstitutional sentences.

In *Graham v Florida*, the Court explains that juvenile life without parole sentences for non-homicide offenses are devoid of a national consensus.[88] The opinion includes that although thirty-seven states, the District of Columbia, and the federal government allow juvenile life without parole sentences for non-homicide offenses in some circumstances, only eleven states impose it.[89] At the time of *Graham*'s ruling, 123 juvenile non-homicide offenders were serving juvenile life without parole sentences, with seventy-seven serving in Florida and the rest imprisoned in only ten other states.[90] The Court ruled that juvenile life without parole sentences for non-homicide juvenile offenders under the age of eighteen was unconstitutional. As the development of neuroscience vigorously influenced the evolving standards of decency, juveniles are now defined as those younger than 18 and continue to have diminished culpability.

Finally, *Montgomery v Louisiana* retroactively applied *Miller v Alabama*, and the cases each involved a juvenile homicide offender who was sentenced to life without parole.[91] The Court determined that over two thousand juveniles were unconstitutionally serving life without parole sentences that were mandated by state legislatures.[92] Only some states applied *Miller* and reconsidered juvenile life without parole sentences; however, *Montgomery* required that all states apply *Miller*'s decision to juveniles who also held this sentence prior to the ruling.[93] Therefore, these thousands of juveniles were eligible to have their sentences commuted.

When the Supreme Court issues its decisions, state courts are obviously bound by the rulings. Since these Supreme Court decisions were informed by the development of neuroscience research delineating fundamental differences between juveniles and adults, state courts are also influenced by this research because they must implement the reasoning and findings in these cases to future issues with similar characteristics. This prompts all courts to consider the

evolution of neuroscience when making determinations. In state cases involving juvenile sentencing, courts inevitably rely on some of the Supreme Court decisions analyzed in this paper to determine constitutionality. The neuroscience research included in these Supreme Court cases is critical as state courts are constitutionally mandated to apply the highest Court's rulings; indeed as these cases continue to be cited throughout the nation, neuroscience will hold an indelible influence.

Neuroscience research substantially developed throughout each case and continues to tremendously impact society. It informs the decisions of the Court as they determine the treatment of juveniles who are vulnerable, impulsive, and whose actions are transient. Notably, the research also impacts the decisions of voters and legislators. From *Thompson* in 1988 to the present, states have been progressively abandoning juvenile life without parole sentences and the death penalty. To date, twenty-eight states and the District of Columbia have banned life without parole sentences for juveniles.[94] In nine additional states, there are no juveniles serving life without parole sentences.[95] The other states still permit its application as long as it is not a mandatory sentence. Furthermore, twenty-seven states—the majority—retain the death penalty, maintaining an established tradition and standard in society.[96] Throughout each of these cases, the development of neuroscience research had substantial implications, directly impacting the standards of decency. States increasingly abandoned juvenile life without parole sentences and the death penalty because of the Supreme Court and neuroscience research promoting the penological sanction of rehabilitation over deterrence, incapacitation, and retribution. Because neuroscience is still relatively new and constantly evolving, its continued advancement may reasonably transform the standards of decency relevant to juvenile sentencing. It is foreseeable that more states will emphasize rehabilitation, abolish the death penalty, and ban life without parole sentences for juveniles. Indeed as such standards of decency evolve, the Supreme Court will likely hear cases concerning the constitutionality of the death penalty and non-mandatory life without parole sentences.

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Good Faith Gone Bad: The Distortion of the Common Law Origin of Qualified Immunity to Expand Police Power at the Cost of Civil Rights

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Introduction

The modern-day doctrine of qualified immunity bears little resemblance to the common law standard that it originated from. The doctrine's deviations from common law originate from *Pierson v Ray*, and are only exacerbated in *Harlow v Fitzgerald*, *Saucier v Katz*, and subsequent decisions. Specifically as it has been applied to police, the doctrine of qualified immunity has endangered constitutional rights by leaving government officials with almost guaranteed immunity from liability for the abuse of civil rights. Given that the doctrine has no real basis in the common law it claims to originate from, the constitutional issues raised by qualified immunity outweigh the precedential value of keeping it in place.

Historical Underpinnings of Qualified Immunity

Qualified immunity is immunity extended to government officials that protects them from suits alleging they violated someone's rights while in an official capacity, and it is far from a recent development in law. While the modern standard for qualified immunity was defined in the 1982 Supreme Court case *Harlow v Fitzgerald*[1] it is argued to have its origins in the common law "good faith" defense.[2] The "good faith" defense was an English and American legal precedent to extend immunity from civil liability to some government officials—namely legislators, judges, and high-ranking executive officials—based on a good faith defense.[3] "Good faith" is broadly used to encompass honest dealing, and can mean, depending on the context, "an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent."[4] The "faithful performance of duties" and "honest belief" are the phrases most commonly considered in qualified immunity cases. This "good faith" defense was first extended to the police in defense of Section 1983 claims in *Pierson v Ray* (1967).[5]

Section 1983 claims are a type of civil rights liability suit brought under the Civil Rights Act of 1871, or 42 U.S.C. § 1983. The act was key in providing a legal pathway of redress for citizens whose constitutional rights—specifically those outlined in the Fourteenth Amendment—were violated by state actors.[6] It was passed in the wake of the Civil War in order to provide federal level enforcement measures against state officers, as police were failing to provide Black people equal protection under the law from violent groups like the Ku Klux Klan. In the original text written by the 42nd Congress, § 1983 specified:

> "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."[7]

However, this clause (known by Reinert and henceforth as the "Notwithstanding Clause") was excluded from the first edition of the *Revised Statutes of the United States*.[8] The statutes were published in 1874, despite being completed in 1873, as the committee responsible for the work had changed the statutes "so much" that Congress refused to accept the revisions, and enlisted

Thomas Jefferson Durant to reverse the committee's major changes to the statutes.[9] Durant's work,which was authorized by Congress in 1874 and published the next year, nevertheless contained the glaring omission of the Notwithstanding Clause, for reasons still unknown.[10] Soon after publication, complaints were raised about errors in the *Revised Statutes*, including by the *American Law Review*, leading to another edition of the *Revised Statutes* being commissioned in 1877.[11] Despite the complaints raised and errors contained within the first edition of the *Revised Statutes*, it was considered "legal evidence of the laws and treaties therein contained." Subsequent versions only constituted prima facie evidence, which can be refuted by the originally enacted legislation unless the codification has been adopted as law. Since this does not apply to the first edition of the *Revised Statutes*, the Notwithstanding Clause is not "formally positive law" and was also removed from the Civil Rights Act of 1871 due to administrative discretion, rather than positive lawmaking.[12]

The Intervention of *Pierson v Ray*

The importance of the Notwithstanding Clause, despite its absence from the United States Code, lies within *Pierson v Ray* and its progeny, specifically in the use of the derogation canon—the strict interpretation of statutes departing from the common law—to extend the "good faith" defense to police.[13] The Notwithstanding Clause explicitly challenges the Supreme Court's reasoning to extend the common law defense in *Pierson*, which claimed there was "no clear indication that Congress meant to abolish wholesale all common law immunities."[14] The term "custom or usage," which appears in the clause, was commonly used to refer to common law when § 1983 was passed in 1871.[15] The clause thus clearly indicates that Congress intended for officials to be liable under § 1983 suits, regardless of "any" common law defenses "to the contrary."[16] Even if the written content of the clause were to be disregarded due to its omission from U.S. Code, the clause has important implications for Congress's intent, as it demonstrates that Congress intended for no state law—statutory or common—to act as a barrier to § 1983 liability.[17] The Court found in *Astoria Fed. Sav & Loan Association v Solimino*[18] (1991) that congressional intent is sufficient to supersede common law "rules of preclusion" (e.g. the "good faith" defense). The Court has also found in *United States v Texas* (1993)[19] that the derogation canon is "most concerned" with common law rights (as well as some cases of remedial scope and claim construction of statutory rights) rather than with common law defenses, as applied in *Pierson*, and thus, 42 U.S.C. § 1983 would no longer demand strict interpretation.[20] A broad interpretation would align with the Court's previous § 1983 precedent, which was based on the Court's approach in other cases involving Reconstruction statutes to "accord [them] a sweep as broad as [their] language."[21] Though Congress may not have intended to "abolish wholesale all common law immunities," the language used shows a clear intent for § 1983 to apply "notwithstanding" *any* law which may shield someone from liability. Thus, by

extending common law defenses to police in a § 1983 suit in *Pierson*, the Court clearly contradicted the intent of the 42nd Congress in crafting the Civil Rights Act of 1871.

The Warren Court, which issued some of the most progressive rulings on civil rights, initially laid the groundwork for the modern-day qualified immunity doctrine, and its invocation by the police as a defense of their racist actions.[22] Justice Warren wrote in the *Pierson* decision that while officers are not entitled to "absolute and unqualified immunity," they should not be held liable "if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid."[23] This "good faith" defense was extended to officials in *Pierson* based on the common law immunities the Court falsely claimed Congress had not wanted to exclude. Except, even if one were to accept the argument to include common law immunities, Keller clarifies that when 42 U.S.C. § 1983 was passed, "ministerial officers lacked immunity if they merely exceeded their authority—even when acting in good faith."[24] In addition to ministerial duties, officers were not granted immunity even when exercising discretionary duties if officers "clearly lacked jurisdiction or delegated authority."[25] The Court, therefore, evidently did not base its decision on the common law of the time, let alone on the substance and intent of 42 U.S.C. § 1983, but rather on a Mississippi state common law defense from the 1950s which granted police officers immunity in false arrest and imprisonment actions.[26]

The Court in *Pierson* also cites judicial precedent to extend immunity from § 1983 liability to police officers. The *Pierson* decision drew upon *Monroe v Pape*[27] (1961), which stated that municipalities—in this case, Chicago—were not liable under the statute. However, the majority in *Monroe* also held that the police officers, having committed an illegal search and seizure, had committed an act constituting a "deprivation under color of state authority."[28] Since the officers deprived the petitioners of their rights through a guise of governmental jurisdiction, the case satisfied the requirements for a suit under the Civil Rights Act, as the Court held suits under § 1983 of the Civil Rights Act of 1871 "do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws."[29] In *Pierson*, the Court invoked *Monroe* to assert that a "defense of good faith and probable cause which is available to police officers in a common law action for false arrest and imprisonment" had been made recognized in § 1983 suits.[30] The Court cited *Monroe* in this manner even though the *Monroe* decision refused to extend immunity to the police, and instead insisted § 1983 cases be read "against the background of tort liability that makes a man responsible for the natural consequences of his actions."[31] *Pierson*'s extension of qualified immunity to police officers in § 1983 suits did not have a proper basis in its own cited court precedent, let alone its common law claims of origin.

The Implications of *Pierson v Ray*: *Harlow v Fitzgerald & the "Clearly Established" Test*

The *Pierson* standard for "good faith" immunity was superseded by the *Harlow v Fitzgerald*decision, which continues to underpin the modern doctrine by distinguishing between absolute and qualified immunity. *Pierson*'s previous "good faith" defense was changed to a broad, but simple standard in *Harlow*: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known."[32] *Harlow* assumes a broad, general immunity for officials, only allowing for liability when a right that was "clearly established" has been violated. A "clearly established" right could be interpreted by the courts liberally, as is done in other Reconstruction-era law cases.[33] In practice since *Harlow*, however, "clearly established" has amounted to an almost impossible standard for plaintiffs to meet.[34] Harlow's "clearly established" test was created by removing previous aspects of the doctrine that the justices found too "subjective," such as the requirement that an officer "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."[35] The Court moved away from these "subjective" facets of the doctrine as they often found these standards "proved incompatible with the principle that insubstantial claims should not proceed to trial."[36] However, the "subjective motive" was the "singular element" of qualified immunity's "good faith" defense origin in common law.[37] *Harlow*, by removing the subjective nature of the standard that prioritized independent judiciary review, created an immunity that, in its attempts at an objective standard, lost almost all variation in outcome.

This "clearly established" law test which *Harlow* set out did not have its origins in the historic common law "good faith" defense, but rather in *Wood v Strickland*. The case was brought by a student who claimed their expulsion by a school official violated their constitutional rights to due process.[38] The Court agreed to hear the case and found the disagreement between the Court of Appeals and the District Court to be based on a dispute over whether an "objective" or "subjective" test should be applied for qualified immunity defenses in § 1983 suits.[39] The "appropriate standard," according to the Court, required both but cited no common law origin for this "appropriate standard."[40] The standard created by the Court in *Wood* was that a school official's actions must have such disregard for "clearly established constitutional rights that their action cannot reasonably be characterized as being in good faith."[41] *Harlow* abandoned the subjective "good faith" aspect of *Wood*'s test and only kept *Wood*'s addition to the doctrine, the test of a "clearly established" right.[42] By removing the distinctive feature of common law—the subjective "good faith" standard—and replacing it with the "clearly-established law" test from *Wood*, the Court in *Harlow* transformed "qualified" immunity into what Keller calls "something closer to absolute immunity."[43]

This may be because *Harlow* was considering the question of absolute immunity being extended to high-ranking executive officials, specifically White House aides to President Nixon.[44] Keller contends that the 1896 Supreme Court case *Spalding v Vilas* and insights from Justice Thomas M. Cooley's work from 1879, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract*, support the idea that at the time the Civil Rights Act of 1871 was enacted, high-level executive officials "at least equivalent to department heads" were entitled to absolute immunity in common law; in contrast, "all other executive official's discretionary duties" were granted qualified immunity.[45] *Harlow*, however, marked a departure by extending qualified immunity, rather than absolute immunity, to high-ranking executive officials in § 1983 suits. *Harlow* also amended the doctrine, which applied to all government actors, to operate closer to the absolute immunity previously only granted to a small group of officials. The framework established in *Harlow* shielded officers from liability even when violating an individual's rights, so long as they were not "clearly established" in statutory or common law. Despite Keller's suggestion in his paper that a qualified immunity of some sort did exist in the common law of 1871, his same paper confirmed this so-called "immunity" did not extend to when an officer exceeded their authority or violated the law.[46]

In fact, the doctrines that Keller identifies operate less like the modern doctrine of qualified immunity and would instead be best characterized as a body of law on "administrative discretion."[47] Supporting the theory that these common law doctrines were more applicable to administrative issues, Pfander observed the doctrines chosen by Keller "operate much the way Chief Justice Marshall's account of judicial review of executive actions operated in *Marbury v Madison*," which stated when an official acts outside of the law, the common law was "available," or even "obliged" to provide remedy.[48] In fact, in *Marbury v Madison*,[49] the Court ruled that even executives, such as those in *Spalding* or *Harlow*, are not absolutely immune, stating:

> "If one of the heads of departments commits any illegal act under colour of his office by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law."

Keller ignores this clear lack of immunity for officials who violated the law in order to sustain his argument that there was a "good faith" based qualified immunity in the common law of 1871. However, this immunity did not extend to an officer's illegal actions, as it was used in *Pierson* to defend a violation of constitutional rights. In fact, because the Constitution operates (in part) to limit "official discretion," there is "no room" for good faith defenses against claims of constitutional violations, as the violation of constitutional rights clearly

constitutes a transgression of an official's legal discretion, and thus common law immunity would not apply.[50] In allowing these defenses to be raised and accepted in § 1983 suits, which specifically deal with the deprivation of constitutional rights by state officials, the Court not only willfully reimagines the common law but flagrantly violates the spirit of the Constitution and its limitations to official discretion.

The Court, unnecessarily and without proper precedent, reformulated qualified immunity into a doctrine that more closely resembles absolute immunity. By extending this nearly absolute immunity to all levels of government officials, the Court has created a constitutional crisis. Since *Harlow v Fitzgerald*[51] "involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983," the Court could have merely adjusted the standard for qualified immunity for high-ranking executive officials or even kept the "good faith" standard. Instead, the Court cited *Butz*, a case which denied that *all* federal officials hold absolute immunity but granted it to some (including the petitioners). The Court said it had previously found that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."[52] The decision thereby extended the *Harlow* standard of qualified immunity to state officials under § 1983, while coinciding with precedent, extending a level of immunity to state officials that was neither afforded by the common law nor intended by the 42nd Congress to apply against § 1983 suits.[53]

***Saucier v Katz* & Developments of Sequential Analysis**

The Supreme Court case that marked the next major development in qualified immunity was *Saucier v Katz* (2001), which made a sequential analysis of qualified immunity claims mandatory. *Saucier*'s test for what would merit qualified immunity was two-pronged: (1) "whether a constitutional right would have been violated on the facts alleged, for if no right would have been violated, there is no need for further inquiry into immunity," and (2) "whether the right was clearly established."[54] The sequential element of the analysis in *Saucier* was transformative to the doctrine, as it made sure a ruling was made "early in the proceedings" to avoid trial "when the defense is dispositive."[55] This is because, in *Saucier*, the Court asserted that "[s]uch immunity is an entitlement not to stand trial, not a defense from liability."[56] This definition of qualified immunity, specifically as "an entitlement not to stand trial" bears little to no resemblance to the common law of 1871, and completely disregards the fact that the Congressional intent in passing 42 U.S.C. § 1983 was to provide a pathway for litigation regardless of such immunities.

Saucier had broad-reaching effects on the judiciary's subsequent decisions, further institutionalizing an exceptionalism of rights for police, and making it even more difficult to bring a successful civil rights suit against officers. In *Saucier*'s second prong, on whether the right was "clearly

established," the Court set out yet another requirement: that the "inquiry must be undertaken in light of the case's specific context, not as a broad general proposition."[57] This statement is key to understanding the Court's current interpretation of qualified immunity. Currently, the standard in qualified immunity cases is that the plaintiff must not only present evidence that their constitutional rights were violated, but they must also prove that those rights were violated in a manner and setting with nearly identical facts to a previous adjudicated and favorably decided case.[58] This places citizens in a cycle of civil rights violations with practically no room for respite and an ever-narrowing path for victory in the courts.

Even though the mandate of a sequential analysis put forth in *Saucier* was abandoned just eight years later through the *Pearson v Callahan* decision (2009), the adjustments made by the Court only expanded police power against § 1983 suits. In *Pearson*, the Court held that while *Saucier*'s sequence of analysis is "often appropriate, it should no longer be regarded as mandatory in all cases."[59] The petitioners in *Pearson* appealed the decision from the Tenth Circuit, which had found they were not entitled to qualified immunity, as the Tenth Circuit was particularly concerned with expanding the consent-once-removed doctrine to people who were not undercover officers, such as the petitioners, who were only informants.[60] Nevertheless, the Court, while also ending the *Saucier* sequential analysis, expanded the scope of qualified immunity beyond government officials to include informants, who, despite sometimes being paid for their services, are not considered government agents.[61] The Court also cited the inability of officers to appeal the ruling on whether they violated someone's constitutional rights as one of the key reasons for striking down *Saucier* as a strict requirement.[62]

Proponents of a sequential analysis have argued that if Courts are repeatedly able to rule that officers did not violate a "clearly established" right without defining the constitutional issue presented by a case, a pattern can be created, where officers are repeatedly able to violate a constitutional right without facing liability, as no rights are defined, and thus never clearly established.[63] Support for the sequential approach largely hinges upon two arguments: 1) police are made clear of any constitutional violations to avoid in the future, and 2) plaintiffs are able to recover damages in future suits if the same constitutional rights are violated once again.[64] By abandoning the mandate of sequential approach in *Pearson*, the Supreme Court has at once required lower courts grant qualified immunity (unless there is a clearly established precedent not to do so), while also no longer requiring lower courts give a ruling on whether a constitutional issue was violated, thus reducing the frequency lower courts clearly establish such law, and reducing plaintiffs chance at being awarded damages.[65]

Even as the Supreme Court removed the requirement of sequential analysis to qualified immunity claims, some courts have not only maintained

this sequential analysis, but added additional aspects to it, in an attempt to mediate the results, which historically skew heavily in favor of officers. The Ninth Circuit added a third question to consider, which was employed by some courts post-*Saucier*: "whether a reasonable person in the officer's position would have known that his actions violated the right alleged by the plaintiff."[66] Some courts have seen this as a third prong of sequential analysis, while others see it as naturally following from *Saucier's* "clearly established" second prong.[67] The Supreme Court, despite being asked directly to comment on this "third prong" in *Tolan v Cotton*, has yet to do so; instead, they base their ruling in that case on a separate issue involving the summary judgment standard.[68] However, the Court's opinion in *Anderson*, which discussed the degree of specificity in which a right must be defined in order to be considered "clearly established," stated that "the contours of the right must be sufficiently clear enough that a reasonable official would understand that what he is doing violates that right."[69] The "objective reasonableness of an official's conduct," according to the Court in *Anderson*, citing *Harlow*, is "measured by reference to clearly established law."[70] Though the Court's definition of a "clearly established right" and the "objective reasonableness of an official's conduct" is circular, it nonetheless establishes a need for the analysis of reasonableness, which is central to the third prong, in the Court's consideration of qualified immunity cases.

Courts even disagree on the true effect of the third prong on case outcomes. The First Circuit described the third prong as "often the most difficult one for the plaintiff to prevail upon."[71] Others have said that, regardless of the formulation of the test ,"a defendant will only be held liable if his or her actions were objectively unreasonable in view of clearly established law."[72] Justice Sotomayor, while a circuit judge for the Second Circuit, was decidedly against a third prong in qualified immunity cases. She found that by "splitting the 'relevant, dispositive inquiry' in two, we erect an additional hurdle to civil rights claims against public officials that has no basis in Supreme Court precedent."[73] She claims that while her distinction may be a "fine one," there are "real consequences" to allowing defendants a third chance at immunity if the other two, quite stringent steps, have been met.[74] Though the scale of the impact may still be debated by the courts, the third prong nonetheless clearly adds yet another barrier to already stringent standards for overcoming qualified immunity.

Nevertheless, the Court remains steadfast in upholding qualified immunity, claiming there are real consequences and costs to the government and its officials without an immunity in place against civil liability. The Court has repeatedly emphasized, as one of the main reasons for implementing qualified immunity, the government's stake in reducing the time and money spent on §1983 cases against government officials.[75] But rather than demand a decrease in civil rights violations, the Court created an "entitlement" for officials to avoid trial for their unconstitutional acts.[76] In *Harlow*, the Court repeatedly

emphasizes the reduction of subjectivity in cases and, more generally, the need to reduce the extent of § 1983 cases against officials. While *Pierson* laid forth qualified immunity—in part to shield officers from financial liability when acting in good faith—*Harlow* expanded the scope of reasoning behind qualified immunity. The Court expanded its reasoning in *Harlow* to justify its removal of the doctrine's subjective aspects, creating more consistent decisions in § 1983 suits in favor of officers. *Harlow* lists numerous government interests in expanding qualified immunity, such as "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[77] From this line of reasoning, the Court claims in *Harlow* that these cases come at "a cost not only to the defendant officials, but to society as a whole."[78]

But, do the costs the Court cites really occur, and when they do, who truly bears the brunt of them? Not the police, as "officers virtually never personally satisfy settlements and judgments entered against them."[79] This reality directly contradicts one of the Court's key rationale behind qualified immunity: that personal liability would deter law enforcement from carrying out discretionary duties.[80] There is virtually no individual liability for police officers, and their departments have been largely unconcerned with the number of § 1983 suits their officers are involved in. Therefore, courts should not assume officer's are over-deterred from their duties because of liability, thus invalidating the Court's stated governmental interest in maintaining qualified immunity.[81] Beyond arguments on deterrence, some scholars have even suggested that qualified immunity may increase the length and cost of litigation in § 1983 suits.[82]

In fact, since the "resurrection" of qualified immunity in *Monroe v Pape* and its extension to individual officers in *Pierson*, the country saw a "dramatic increase" in § 1983 cases.[83] Since *Pierson*, the Court has reformulated qualified immunity in *Harlow* to not only protect officials from "the costs of trial," but also the "the burdens of broad-reaching discovery."[84] Further, in 2009, the Court stated that resolving "insubstantial claims" prior to discovery was the "driving force" behind the creation of qualified immunity.[85] Yet, a study from 2017 found that qualified immunity is used to dismiss only 0.6% cases at the motion to dismiss stage, leaving the majority of officials subject to discovery.[86] This finding once again shows how little promise the doctrine has, even in its ability to carry out the Court's stated purpose of the doctrine.

Qualified Immunity in the Present Day

Despite the doctrine's failure to accomplish its intended goals, or perhaps because of it, the Court has continued to narrow their definition of a "clearly established law" in recent years. Plaintiffs are now required to show that their constitutional and statutory rights are not only clearly established but "beyond debate."[87] By mandating the actions of officials to be "beyond debate," the Court has effectively sealed off the legal pathway for almost all plaintiffs

except those with "exceedingly similar" facts.[88] In fact, an officer can no longer be denied qualified immunity unless "every" reasonable officer would understand his actions to be in violation of the law.[89] In *White v Pauly*,[90] the Court even reversed a lower court's denial of qualified immunity, stating that they had "misunderstood the 'clearly established' analysis" by failing to "identify a case where an officer acting under similar circumstances" was found to have violated someone's Fourteenth Amendment rights.

As the definition of the doctrine has changed, so have attitudes towards it—inside and outside the Court. Multiple Supreme Court justices have expressed disagreement with qualified immunity, particularly in its present interpretations. Justice Sotomayor wrote a scathing dissent in *Mullenix v Luna,*[91] stating that the doctrine as applied "renders the protections of the Fourth Amendment hollow." Even Justice Clarence Thomas, regarded widely as one of the most conservative justices on the Court, has called for a revision of the qualified immunity doctrine on the basis of its misrepresentation of the common law "good faith" defense.[92] He argued that the "good faith" defense was not a blanket defense for government actors, who were previously held to a standard of strict liability, and were only afforded the defense only when it was an applicable element of a particular tort.[93] Despite this, Sotomayor and Thomas have repeatedly sided with the Court in recent decisions upholding, and even expanding, qualified immunity, reversing lower court denials of qualified immunity without even hearing oral arguments.[94]

Lower court justices have also shared their displeasure with the doctrine and its seeming impunity for civil rights violations by police. In one such case, a Mississippi judge while simultaneously ruling in favor of the police, urged that qualified immunity be thrown in "the dustbin of history."[95] The judge ruled that the officer had flagrantly violated the rights of the plaintiff, who had been subjected to 110 minutes of an excessive roadside search that left his newly purchased Mercedes ripped apart. Despite this ruling, the judge still found that the officer was entitled to qualified immunity because the actions were not "beyond debate."[96] The judge lamented his decision, as well as the fact that the doctrine of "qualified" immunity now "operates like absolute immunity."[97]

The Supreme Court has recently issued decisions ignoring the deeply flawed foundations of the doctrine. In 2023, the Court heard arguments on qualified immunity's lack of basis in common law, as well as its misconstruing of Congressional intent, and denied the plaintiff's petition for certiorari.[98] Based on the Supreme Court's repeated refusal to limit qualified immunity even in the face of evidence combating it, some scholars have suggested that the lower courts should redefine the doctrine for themselves. One way in which the lower courts could redefine the doctrine is by using a narrowed interpretation of Supreme Court qualified immunity decisions, which are often "rife with ambiguity."[99] Justice Thomas's concurrence in *Ziglar* could even be interpreted as an invitation for the lower courts to do exactly that.[100]

The blanket defense afforded to government officials via qualified immunity shields them from financial liability for their illegal actions and gives them license to break the law with virtually complete civil impunity. When this impunity is compounded with the lack of internal accountability from police departments and district attorneys, public trust in law enforcement disintegrates and has tangible consequences for the victims of their crimes.[101] A report made public by the National Criminal Justice Reference Service stated that police crime is especially difficult to study as there is "virtually no official nationwide data collected, maintained, disseminated, and/or available for research analyses."[102] Another issue that the report articulates is that, even once evidence on arrests and convictions is gathered, police are "largely exempt from law enforcement" because of a lack of internal accountability and enforcement.[103] The report was able to analyze, however, data on police crime which did lead to arrests. The report found that 72.3% of arrests of officers involving the "most common most serious offenses" (defined as simple assault, driving under the influence, aggravated assault, forcible fondling, and forcible rape) led to a conviction, and only 54% of arrests of these "most common most serious offenses" ended in the arrested officer losing their job.[104]

The Future of Qualified Immunity

Regardless of which court reformulates qualified immunity, it is clear an intervention is needed. At present, the doctrine is a blatant infringement on citizens' constitutional protections and a fictitious protection of unconstitutional acts by government officials, particularly police. The Court did not accept, or even address, recent arguments against the doctrine's common law origins or the Court's interpretation of the 42nd Congress's original intent, instead simply denying the petition of certiorari.[105][106] Yet, concerns—based in both constitutional and common law—have continued to grow amongst legal scholars and lower court justices. Both constitutional and common law concerns have only grown as the doctrine has expanded, and plaintiffs are left with an ever-narrowing ability to successfully file suit. Plaintiffs are placed in a vicious cycle, which allows justices to avoid clearly establishing law in granting a qualified immunity defense, and then, as justices are able to avoid clearly establishing the law in § 1983 suits, plaintiffs rarely, if ever, have sufficient clearly established law to overcome such a defense. This almost absolute immunity which plaintiffs must overcome to be awarded damages originated in *Harlow* and its use of the "clearly established" law test, but also back to *Monroe* and *Pierson* in omitting a key portion of Section 1983. Given that these cases form the basis for the judicial doctrine and have no real basis themselves, the courts must reconsider qualified immunity before the faulty foundations on which it was built create a monster even the Constitution fails to protect us from.

[1] *Harlow v Fitzgerald*, 457 U.S. 800 (1982).

[2] *Pierson v Ray*, 386 U.S. 547 (1967).

[3] *See generally* Scott A Keller, "Qualified and Absolute Immunity at Common Law," 73 *Stanford Law Review* (2021).

[4] "Good Faith," *Legal Information Institute*, https://www.law.cornell.edu/wex/good_faith (visited December 6, 2023).

[5] *Pierson v Ray*, 386 U.S. 547 (1967).

[6] U.S. Library of Congress, Congressional Research Service, *Policing the Police: Qualified Immunity and Considerations for Congress*, by Whitney K. Novak, LSB10492 (2020), 2.

[7] Civil Rights Act of 1871, 42 U.S.C. § 1983 (1871).

[8] Alexander A. Reinert, "Qualified Immunity's Flawed Foundation," 111 *California Law Review* (2023).

[9] Margaret Wood, "The Revised Statutes of the United States: Predecessor to the U.S. Code," *Library of Congress Blogs*, (2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s- code/.

[10] Ibid; Alexander A. Reinert, "Qualified Immunity's Flawed Foundation," 111 *California Law Review* (2023)

[11] Margaret Wood, The Revised Statutes of the United States: Predecessor to the U.S. Code, July 2, 2015,

[12] Alexander A. Reinert, "Qualified Immunity's Flawed Foundation," *California Law Review* (2023).

[13] Ibid.

[14] *Pierson v Ray*, 386 U.S. 547 (1967).

[15] Reinert, "Qualified Immunity's Flawed Foundation," (finding that "this clause meant to encompass state common law principles," and noted that the understanding that "custom or usage" was synonymous with common law was why the Court overruled *Swift* v *Tyson*, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842), in *Erie R.R. Co. v Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and also citing *W. Union Tel Co. v Call Pub. Co.*, 181 U.S. 92, 102, 21 S.Ct. 561, 45 L.Ed. 765 (1901), which cites BLACK'S LAW DICTIONARY on how common law derives from "usages and customs").

[16] Margaret Wood, "The Revised Statutes of the United States: Predecessor to the U.S. Code."

[17] Reinert, "Qualified Immunity's Flawed Foundation."

[18] *Astoria Fed. Sav & Loan Association v Solimino*, 501 U.S. 104 (1991).

[19] *United States v Texas*, 507 U.S. 529 (1993)

[20] Reinert, "Qualified Immunity's Flawed Foundation."

[21] *Griffin v Breckenridge*, 403 U.S. 88 (1971).

[22] Andrea Januta et al., "Rooted in Racism: The Origins of Qualified Immunity," *Reuters*, (2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-history/.

[23] *Pierson v Ray*, 386 U.S. 547 (1967).

[24] Scott A Keller, "Qualified and Absolute Immunity at Common Law," 73 *Stanford Law Review* 1137, 1350 (2021).

[25] Ibid.

[26] *Pierson v Ray*, 386 U.S. 547 (1967).

[27] *Monroe v Pape*, 365 U.S. 167 (1961).

[28] Ibid.

[29] Ibid.

[30] *Pierson v Ray*, 386 U.S. 547 (1967).

[31] *Monroe v Pape*, 365 U.S. 167 (1961).

[32] Ibid.

[33] See *Griffin v Breckenridge*, 403 U.S. 88 (1971) and *United States v Price*, 383 U.S. 787 (1966)

[34] Lucia Leoni, "There Is Nothing 'Qualified' about the Doctrine of Qualified Immunity," 108 *Stetson Journal of Advocacy and the Law*, (2023).

[35] *Harlow v Fitzgerald*, 457 U.S. 800 (1982); *Wood v Strickland*, 420 U.S. 308 (1975).

[36] *Harlow v Fitzgerald*, 457 U.S. 800 (1982).

[37] Keller, "Qualified and Absolute Immunity at Common Law," 1390.

[38] *Wood v Strickland*, 420 U.S. 308 (1975).

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] *Harlow v Fitzgerald*, 457 U.S. 800 (1982).

[43] Keller, "Qualified and Absolute Immunity at Common Law," 1393.

[44] *Harlow v Fitzgerald*, 457 U.S. 800 (1982).

[45] Keller, "Qualified and Absolute Immunity at Common Law," 1364.

[46] Ibid, 1350.

[47] James E. Pfander, "Zones of Discretion at Common Law," 116 Northwestern University Law Review 148, 150.

[48] Ibid, 150.

[49] Marbury v Madison, 5 U.S. 137 (1803).

[50] Pfander, "Zones of Discretion at Common Law," 150.
[51] *Harlow v v Fitzgerald*, 457 U.S. 800 (1982).
[52] *Butz v Economou*, 438 U. S. 504 (1978).
[53] Keller, "Qualified and Absolute Immunity at Common Law," 1394.
[54] *Saucier v Katz*, 533 U.S. 194 (2001).
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Lucia Leoni, "There Is Nothing 'Qualified' about the Doctrine of Qualified Immunity," 108 *Stetson Journal of Advocacy and the Law*, (2023).
[59] *Pearson v Callahan,* 555 U.S. 223 (2009).
[60] Ibid.
[61] *Pearson v Callahan*, 555 U.S. 223 (2009).
[62] Ibid.
[63] Nancy Leong, "The Saucier Qualified Immunity Experiment: An Empirical Analysis," 33 Pepperdine Law Review 667, 668.
[64] Ibid.
[65] Joanna C Schwartz, "The Case Against Qualified Immunity," 93 *Notre Dame Law Review* 1797, 1815-1826.
[66] *Gould v Davis,* 165 F.3d 265, 272 (4th Cir. 1998)
[67] E. Lee Whitwell, "How Qualified is Qualified Immunity: Adding a Third Prong to the Qualified Immunity Analysis," 43 *Campbell Law Review* 403, 414.
[68] Ibid, 416.
[69] *Anderson v Creighton*, 483 U.S. 635 (1987).
[70] Ibid.
[71] *Wilson v City of Boston*, 421 F.3d 45 (1st Cir. 2005).
[72] *Robertson v Lucas*, 753 F.3d 606, 615 n.4 (6th Cir. 2014).
[73] *Walczyk v Rio*, 496 F.3d 139, 166–67 (2d Cir. 2007) (Sotomayor, J., concurring).
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[76] *Saucier v Katz*, 533 U.S. 194 (2001).
[77] *Harlow v Fitzgerald*, 457 U.S. 800 (1982).
[78] Ibid.
[79] Joanna C Schwartz, "The Case Against Qualified Immunity," 1821.

[80] Joanna C Schwartz, "Police Indemnification," 89 *New York University Law Review* 885, 894.
[81] Schwartz, "The Case Against Qualified Immunity," 1821-1822.
[82] Joanna C Schwartz, "How Qualified Immunity Fails," 127 *The Yale Law Journal* 2, 11 (2017).
[83] Kathryn Dix Sowle, "Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion," 55 *Tulane Law Review* (2021).
[84] *Harlow v Fitzgerald*, 457 U.S. 800 (1982).
[85] *Pierson v Ray*, 386 U.S. 547 (1967).
[86] Schwartz, "How Qualified Immunity Fails," 10.
[87] *Ashcroft v al-Kidd*, 563 U.S. 731 (2011).
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[94] *See City of Tahlequah v Bond*, 595 U.S. ___ (2021), *Rivas-Villegas* v *Cortesluna*, 595 U.S. ___ (2021).
[95] *Jamison v McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020).
[96] Ibid.
[97] Ibid.
[98] *Kevion Rogers v Jeffrey Jarrett*, et al., Docket for 23-93, October 2, 2020.
[99] Joanna C Schwartz, "The Case Against Qualified Immunity," 1835.
[100] *Ziglar v Abbasi*, 137 S. Ct. 1843 (2017) (Thomas, concurring in part and concurring in the judgment).
[101] Philip Matthew Stinson et al., "Police Integrity Lost: A Study of Law Enforcement Officers Arrested," 22 (2016).
[102] Ibid, 14.
[103] Ibid, 33.
[104] Ibid, 403-404.

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United States v Rahimi: Originalism at the Cost of Women's Lives?

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Abstract

In this paper, I sought to analyze the background, issues, and potential impacts of *United States v Rahimi*, a case currently under consideration by the US Supreme Court. The central question posed in *Rahimi* is whether individual Second Amendment rights preclude civil protective orders from suspending impacted parties' ability to retain firearms, a provision which is often invoked to protect survivors of domestic violence from their abusers. Arguments in *Rahimi* are largely based on the *Bruen* test, a standard steeped in originalism that requires that legislation restricting Second Amendment rights be supported by analogous examples in United States history and tradition. Civil protective orders are essentially useless for many survivors of domestic violence if their abuser cannot be prevented from possessing firearms, which leads many survivors to reject legal recourse altogether. The other major avenue through which many survivors seek recourse—the criminal justice system—remains generally ineffective when addressing cases of domestic violence because of abusers' refusal to take accountability, the necessity of participating in a drawn-out and uncertain trial, and the insufficient time or space for survivors to process their experiences. By incorporating aspects of my own experience as a certified Domestic Violence Advocate in the state of Florida and reflections from interviews with experts in law and survivors' experiences, I argue that *United States v Rahimi* and related Second Amendment cases seek an originalist result that comes at the cost of women's lives and sense of personal safety.

In the eyes of Professor Teresa Drake, a member of the faculty at the Levin College of Law and Director of its Gender Justice Clinic, *United States v Rahimi* is "one of many cases that make me wonder if we aren't just living in the twilight zone."[1] The appellee to the Court, Zackey Rahimi, has a lengthy record of committing armed violence[2] and many consider him a subpar poster figure for the expansion of individual Second Amendment rights, even going so far as to describe his actions as the antithesis of responsible gun ownership.[3] Nevertheless, his case is now under consideration by the US Supreme Court due to their desire to rule on the question of whether civil domestic violence (DV) protection orders that suspend individuals' rights to firearms violate the Second Amendment. This case adds another stone to the path created by the Court's consideration of gun-related cases in recent years, specifically *DC v Heller*[4] and *New York State Rifle & Pistol Association, Inc. v Bruen*.[5] Both holdings took a relatively originalist stance to expand the rights of citizens to possess firearms and strike down overly restrictive government regulations that the Court viewed as infringing upon the Second Amendment.

Despite the lofty focus of Second Amendment originalists on frontier ideals, namely the idealization of firearms as a means of self-protection, the threat posed by *United States v Rahimi* to women cannot be ignored. Beyond the observation that the United States can be distinguished from other industrial nations by "an astoundingly high level of personal violence,"[6] approximately 4.5 million American women alive today have had intimate partners threaten or harm them with a gun.[7] Furthermore, the United States is plagued by mass shootings that have become commonplace to the point that the public has been largely desensitized to their devastating and preventable impacts, especially considering that violence against women is often "a reliable bellwether for mass shootings."[8] If women—and American citizens more broadly—cannot disarm individuals who pose a clear risk of abusing or continuing to harm an intimate partner, then victims will be even less likely to seek help. They may resort to risky alternatives such as fighting back or acting as a shield to protect children that often lead abusers to escalate their behavior. While training to be certified as a Domestic Violence Advocate in the state of Florida, I was taught that the most notable factors to consider when collaborating with a survivor on their exit plan were the presence of children and guns.[9] The utter inability to remove the latter from the equation will only increase the mortal risks faced by those experiencing domestic violence.

Background and Facts of *United States v Rahimi*

In 2019, Zackey Rahimi physically assaulted his girlfriend with whom he shares a child[10] in a parking lot during a verbal dispute, leading her to hit her head and sustain multiple injuries.[11] Afterward, Rahimi shot at a witness[12] and threatened to shoot his girlfriend if she confided in anyone or attempted to seek help. She later sought a protective injunction against him, which forbade Rahimi

from possessing firearms[13] and from "harassing, stalking, or threatening"[14] her and their child. Violating the firearm provision would constitute a breach of 18 USC § 922(g)(8), a federal statute that precludes individuals who are subject to intimate partner protective orders issued after evidentiary hearings from knowingly possessing guns under penalty of federal felony prosecution.[15] However, Rahimi blatantly flouted the order multiple times in the span of only two months, leading to his identification as a suspect in several public shootings.[16] On one occasion, he used a gun to threaten a different woman and fired in public five times, including once after "a fast-food restaurant declined a friend's credit card."[17] Consequently, law enforcement obtained a warrant to search his residence, where they discovered multiple guns and his copy of the protective order, which Rahimi was then charged with violating.[18]

Domestic Violence Protective Orders and the Survivors' Experience

Though numerous states, including Florida, have passed laws allowing for the disarmament of unstable or dangerous individuals, reaching that standard is challenging and presents many questions.[19] The line between threats and actions has become blurred, as injunctions are permitted exclusively in situations where violence has either already occurred or is imminent. Proving imminence usually necessitates evidence of escalation through a pattern of actions that have become more severe or aggressive over time, which parallels the common tactics of abusers.[20] Power and control are essential to abusers because they must be able to prevent the survivor from reaching out for help to close off all potential methods of escape. Escaping or even attempting to do so signifies that "the batterer is losing control, and they'll escalate and do whatever they need to do to maintain control."[21]

When victims do reach out to law enforcement, it often comes out of sheer desperation and their goals are usually for the violence to cease and to be left alone.[22] Sending an abuser to jail, ruining their life, or potentially depriving their children of a parent are often undesired consequences, a considerable reason why many survivors opt only to seek a permanent injunction for protection rather than criminal prosecution.[23] Furthermore, the mental and emotional burden of facing one's abuser and being re-traumatized by their refusal to take accountability is often compounded by the defense asking why a survivor did not involve the police earlier or leave immediately after the abuse began. This line of questioning places the blame on the survivor without considering the potential logistical, cultural, and emotional barriers that often prevent victims from reaching out, and the uncertainty of criminal trials only adds to the stress.[24] Testifying and the lack of time and space to process such traumatic experiences also contribute to the criminal justice system's lack of compassion or genuine respect for survivors.[25] As a result, many survivors refrain from pressing charges against their abusers; instead, they rely on civil

protective orders such as the one issued to Rahimi's former partner to regain a sense of safety and peace of mind.

Imminent risk is the standard by which judges determine whether an individual warrants the acquisition of a protective order, which can be bolstered by a history of behavior or evidence of potential escalation.[26] This bright-line rule or legal standard can be somewhat ambiguous, but Professor Drake defined it by commenting that "you know when you see it,"[27] and observing that, "if a judge isn't going to be able to put their head on the pillow that night if they do not sign that temporary injunction, that's imminent risk."[28] Therefore, the decision to impose a protective order often rests more upon a judge's discretion than the particular facts of a case, with similar issues extending to the enforcement of such orders. Because protective orders are products of civil court, law enforcement does not have the legal capacity to enforce them by searching property without a warrant, which is usually only issued on suspicion of criminal activity.[29] This de facto lack of enforcement is already a considerable weakness of such protective orders, and the potential impact of the *Rahimi* decision would only worsen the situation by removing judges' ability to disarm individuals in the first place.[30]

***U.S. v Rahimi* and the Fifth Circuit Court of Appeals**

Rahimi's conviction was upheld by a federal district court, but he later appealed with a Second Amendment challenge that was initially rejected by the Fifth Circuit. However, after the Supreme Court held in *Bruen* (2022) that restrictions on gun ownership must fulfill a 'history and tradition' test based on originalist judicial philosophy, the three-judge panel of the Fifth Circuit reversed their decision and instead ruled in Rahimi's favor.[31] Though the Circuit Court's decisions do not apply nationwide, their shift illustrates the impacts of the *Bruen* test and how it can lead to marked changes in jurisprudence that have monumental impacts on society.[32]

One member of the panel, Judge Wilson, a Trump appointee, was concerned about the potential misuse of civil protection orders due to the low burden of imminence needed to strip an individual of their Second Amendment rights and the lack of limits on their application.[33] The federal government used Justice Scalia's "law-abiding and responsible" standard established in *Heller*[34] to argue that broad historical precedent does exist to justify the disarmament of individuals who do not fit the description, and Judge Wilson worried that such an expansive definition could be weaponized against political nonconformists or those who the government seeks to punish.[35]

According to Brittani Melvin, the lead Injunction for Protection Attorney at the Peaceful Paths Domestic Abuse Network, this tactic is already being used to target those who are disproportionately preyed upon by the justice system,[36] including Black and Latino men. Civil protective orders are especially vulnerable to abuse because they are issued in family court, a branch of civil

court in which judges possess "an incredible amount of discretion."[37] As a result, civil protection orders can easily be misused in situations including divorce proceedings, as well as in a manner dependent on individual judges' biases, negating Judge Wilson's point because his prediction has long been true without much institutional action being taken to remedy such disparities. The appellate system is intended to counteract the impact of judicial prejudice, but it remains relatively inaccessible for many,[38] meaning that we must either accept the existing system with all of its imperfections or search for sustainable and effective methods of inducing progress and positive change.

Judge James C. Ho, another member of the ruling panel for the Fifth Circuit, penned a concurrence arguing that "'Those who commit violence, including domestic violence, shouldn't just be disarmed—they should be detained prosecuted, convicted, and incarcerated.'"[39] By invoking the appropriateness of criminal prosecution in cases involving domestic violence, Judge Ho implies that civil protective orders are inferior and asserts that criminal prosecution allows abusers to be kept from "'engaging in further crimes.'"[40] His indication that the civil justice system is somehow inferior or holds less authority than the criminal system[41] is comparable to a misconception identified by Attorney Melvin that civil court is not "real court"[42] because charges are not prosecuted by the government and civil cases usually do not involve the possibility of a prison sentence. His deference to criminal prosecution as the manner in which abusers should be disarmed neglects the benefits of civil protective orders for survivors and refuses to acknowledge the various weaknesses of the criminal justice system in reckoning with domestic violence.

Attorney Melvin elaborated that when seeking an injunction, the defense almost always asks about whether an analogous criminal case is in progress,[43] an avenue that many judges use to discredit the desire for a protective order without criminal prosecution. However, the temporary no-contact order associated with criminal cases usually expires at the end of the proceeding unless extended as a result of a conviction, meaning that if the abuser is acquitted or given no prison time, the survivor will often have little to no protection.[44] Such tensions create a Catch-22, as judges are often hesitant to issue orders without proof that a criminal prosecution has merit, and without such evidence, the survivor is left with almost no recourse.[45] Supporters of gun rights made similar claims, with the senior vice president of Gun Owners of America going so far as to comment that "this law disarms nonviolent people who have never been convicted of a crime,"[46] although Rahimi certainly does not fit this description of relative innocence.

Samuel Stafford, an Assistant Professor at the University of Florida and Judicial Hearing Officer for the Eighth Circuit of Florida, described Judge Cho's concurrence as patently impractical because it refrains from acknowledging the

reality: the criminal justice system is overloaded and woefully inefficient, meaning that survivors are forced to be re-traumatized indefinitely without any assurance that their abuser will face tangible consequences.[47] Survivors often abandon their cases due to the lack of relief despite months of effort, while the defense is constantly attempting to prolong the proceedings in order to buy time for their client.[48] Additionally, funneling people into criminal court places heavy financial burdens on the Public Defender's Office and on survivors who choose to retain private counsel,[49] considering the significant role that financial manipulation and abuse play in domestic violence. In summary, the criminal justice system is, according to Professor Drake, "a horrific way to handle intimate partner violence"[50] for a multitude of reasons, namely the financial and emotional burden it places upon survivors. The Fifth Circuit's decision in *Rahimi*[51] to emphasize the merits of an overburdened criminal system at the expense of survivors' autonomy constitutes "a source of pain, anger, and uncertainty"[52] for those who rely on "civil remedies for protecting individuals for whom criminal remedies have not seemed sufficiently expedient or effective."[53]

The *Bruen* test, which played a major role in the Fifth Circuit's ruling, also disempowers women and marginalized groups by looking back to a colonial era rampant with misogyny, race-based chattel slavery, demonstrates the inability of originalism to address issues that have only been adequately addressed socially and legally relatively recently.

The *Bruen* Test and the Rise of Second Amendment Originalism

The Second Amendment has long been a significant focus of the American political community, especially considering the attention paid by the Roberts Court to securing and expanding gun rights. However, even Justice Scalia noted in *DC v. Heller* that "the right secured by the Second Amendment is not unlimited."[54] The Constitution allows for reasonable regulation to be considered "presumptively lawful"[55] when it is narrowly tailored to fulfill legitimate government interests, including the prohibition of firearm possession by dangerous individuals, which served as the justification for 18 US Code §922(g)(8). This presumption of lawfulness in particular circumstances is not limited to the federal level, as the incorporation of the Second Amendment in *McDonald v. City of Chicago*[56] in 2010 formally applied the same standard to state and local governments.

Despite the reasonable assumption that such support would allow for new regulations based on rising issues such as automatic weapons and the increase in mass shootings, the Court instead held in *Bruen* that legislators and executives must provide historical twins or analogs to justify firearm regulations.[57] Therefore, those seeking to limit access to guns or institute any type of restrictive or regulatory legislation must fulfill this "history and tradition" test by proving that comparable measures existed either circa 1791

when the Bill of Rights was passed, or approximately 155 years ago when the Fourteenth Amendment was ratified.[58] This test is rooted in originalist philosophy, a theory of constitutional interpretation that prioritizes how constitutional provisions were understood at the time of their passage.

The application of the *Bruen* test to *Rahimi* is what caused the Fifth Circuit to reverse its initial decision due to the lack of sufficiently analogous historical precedent for gun regulations related to the prevention of domestic violence. This result is not surprising when one considers that marital abuse was not outlawed in every state until 1920[59] and that violence against women, in general, has only begun to be taken seriously in the past few decades.[60] Prosecution for intimate partner violence has historically been based on charges of assault, battery, or other more generalized crimes,[61] and only relatively recently has domestic violence been a separate category that highlights the continued issue that femicide and domestic abuse pose to the American people. Therefore, in many ways, the *Bruen* test leaves us scrambling to reckon with Justice Kagan's argument that in the context of domestic violence, "'the past is a foreign country; they do things differently there.'"[62]

Referring to *Bruen*, Professor Drake asserted that "it's some of the worst precedent"[63] she had seen, and many appellate judges agree. Less than two years after the case was decided, numerous judges "appointed by Presidents Reagan, Clinton, George W. Bush, Obama, Trump, and Biden,"[64] have roundly criticized the *Bruen* test as unworkable and overly vague. Justice Brunner, a Democrat on the Ohio Supreme Court, observed that "no appellate court should be the fact-finder in determining the tradition of gun regulations."[65] Brunner's comment echoes common criticism of originalism as a system that requires judges to act as historians, leading to inaccuracies and unjust conclusions. Federal judges have asserted that the *Bruen* test is unclear and does not establish which kinds of historical support are relevant or sufficient, causing discord and marked differences in interpretation among the courts.[66] Consequently, the same law could be struck down by one court and upheld by the other simply due to differing perspectives, or a law that has historical support could be rejected because the government's legal staff did not have the time or resources to research it.[67] The focus on historical analysis over necessity and current public sentiment "effectively eliminates any modern regulation"[68] and "seems to lead, generally, to more guns in the hands of more people"[69] in an era in which guns have become exponentially more advanced and lethal than ever before.

Originalism has myriad definitions, but it is generally considered to be a form of jurisprudence or legal theory purporting that "a law's constitutionality today is dependent on the Constitution's… 'original public meaning' when the relevant constitutional text was enacted."[70] Justice Thomas is an outspoken proponent of originalism, and he is often joined by other members of the Court's current conservative supermajority, including Chief Justice Roberts and Justices

Alito and Gorsuch. Despite the support for originalism as a means of limiting judicial discretion and creating a framework that makes decisions more predictable, it has instead dehumanized and disempowered minorities and historically subjugated groups, including women, Native Americans, and Black Americans.[71] By focusing on public opinion from an era in which slavery was normalized, women were considered property, and essentially only white, relatively wealthy men held political power, originalism inherently dehumanizes and deprives those who do not fit into this dominant category of society of a voice.[72] When the Second Amendment was ratified, public opinion supported the nationwide disarmament of Black and Native Americans because they were seen as potential threats,[73] meaning that the *Bruen* test implicitly endorses such prejudices despite the contradictions they create with later legislation and constitutional amendments, such as women's suffrage in the Nineteenth Amendment and the emphasis on de facto racial equality enshrined in the Voting Rights of 1965. The rise of originalism has seemingly coincided with what Professor Drake referred to as "a dramatic pushback" against minority rights that is pushing us towards the primitive notion of "white men keep their guns,"[74] one with which the *Bruen* test clearly aligns.

With respect to the Second Amendment, sweeping notions of originalism tend to evoke images of the frontier and a society in which guns were seen as necessary for individuals to feed and protect themselves. As a result of this "frontier heritage," many believe that "the nation's love affair with the gun is impervious to change,"[75] a notion that has contributed to the popularization of historically focused frameworks such as originalism. Even Professor Drake referred to the Framers and their slaves as "using guns to shoot animals so they could eat," demonstrating the pervasiveness of beliefs that private individuals were often using firearms primarily to hunt for food.[76] However, prior to 1850, less than a tenth of the population (including women and Black Americans) owned guns,[77] and most meat was harvested from domesticated livestock,[78] meaning that hunting was "from the start…an inessential luxury."[79] Most hunting on the frontier was done by Native Americans and individual professionals rather than families. Furthermore, these hunters often created traps to ensnare prey because they were more efficient and cost-effective than guns.[80]

The misconception of the frontier ideal, though, continues to falsely inform our understanding of the original intent and meaning of the Second Amendment, especially after the Court ruled in *DC v Heller*[81] that the Second Amendment protected individual gun ownership. The Court's emphasis on a tie between originalism and the Second Amendment also fails to consider that guns were not considered the primary murder weapon in colonial times,[82] whereas they are now viewed more as threats to personal safety than assets that aid in survival and hunting for sustenance. The romanticization of guns and the strong

association between them and the masculine ideal were not recorded until at least the mid-nineteenth century.[83] Only after the Civil War was the association with patriotism and the defense of liberty truly established across the country when Union soldiers were permitted to keep their firearms, following a prolonged correlation between armament and the patriotic defense of one's country.[84] These links between masculinity and violence have persisted through the centuries and continue to inform American ideas and values through frameworks such as originalism, which has been credited with much of the recent expansion of individual Second Amendment rights. Not only is originalism related to the Second Amendment predicated on misrepresentations of history, but the framework largely "glorifies an era of blatant oppression…transforming that era's lowest shortcomings into our highest standards"[85] for judicial decision-making.

***United States v Rahimi* and the U.S. Supreme Court**

Following the divisive decision by the Fifth Circuit, the Justice Department sought a review of the case by the U.S. Supreme Court, which heard arguments in November.[86] Among those that I interviewed for this analysis, Attorney Melvin[87] and Professor Drake[88] were both resigned to their expectation that the Court would uphold the Fifth Circuit's decision, though the latter was somewhat unsure because of the Court's lack of predictability and loss of public faith in recent years. On the other hand, Professor Stafford was surprised by the Court's decision to even hear the case, as he felt that the Court likely granted review specifically because it disagreed with the Circuit Court's ruling.[89] Though the Court will likely not decide *Rahimi* until the end of its current term in June, the oral arguments demonstrated many of the justices' hesitance with the Fifth Circuit's ruling.[90] Additionally, the Court expressed its disapproval of *Rahimi* as a test case for the issue at hand, with Chief Justice Roberts commenting to Rahimi's counsel, "'You don't have any doubt that your client's a dangerous person, do you?'"[91]

In spite of the substantial possibility that the Court will overturn the Fifth Circuit's ruling, *Rahimi* pokes at the very core of the Court's reputation and the tensions between individual rights and the public good. Since the Warren Court, the institution has been caught in what Professor Stafford referred to as a positive and negative evolution based on the priorities of its members.[92] The positive side is based on the recognition of societal changes through which protections for minorities and vulnerable groups, especially women and children, have been expanded in conjunction with the progression of societal attitudes.[93] The negative parallel is defined by devotion to a chauvinistic enhancement of Second Amendment rights, often to the detriment of public safety, in addition to the focus on the religious and free speech rights of advantaged speakers, especially Christians.[94] Generally, the Roberts Court has been quite hostile towards criminals and offenders. However, in *Rahimi*,

conservative courts including it and the Fifth Circuit are at least somewhat willing to overlook that aspect of this case in favor of expanding individual Second Amendment rights.[95]

Current and Potential Impacts of *U.S. v. Rahimi*

Beyond the immediate impacts of *Rahimi* on survivors of domestic violence, Justice Kavanaugh noted during oral arguments that the federal background check database includes data on individuals subject to civil protective orders, meaning that pre-purchase background checks would no longer register such orders if the statute is struck down.[96] Even the background check system itself would likely be threatened by the continued employment of the *Bruen* test in its current state, as there is very little historical support for such restrictions on a federal level.

Attorney Melvin informed me that she and her colleagues have already begun mentioning the potential effects of *Rahimi* to clients who are worried about their abuser having access to firearms, especially because many of them rely exclusively on civil orders.[97] Furthermore, she mentioned that some survivors already feel discouraged from seeking civil protective orders, in addition to the potentially devastating chilling effect that a ruling in favor of preserving abusers' right to firearms would have on the willingness of survivors to file in the first place.[98] Injunctions are already often a last resort for survivors due to the possibility of angering an abuser and leading to an escalation of violence, so the possibility that such orders cannot compel them to relinquish guns is one that essentially nullifies them as a viable option for many.[99] On the other side, some abusers have filed motions to reobtain their firearm rights due to the progression of *Rahimi*, retraumatizing survivors who simply want to be left alone.[100]

Reporting abuse and attempting to flee or seek help from community resources is already incredibly challenging for victims of domestic violence due to the stigma of remaining in such situations, especially because "you're in the most danger when you leave"[101] due to the potential to alert the abuser to your desire to escape. Furthermore, communities that experience domestic abuse at higher rates, including immigrants and non-white women, tend to hold more reservations about contacting law enforcement due to anxieties concerning citizenship status or fear of being discriminated against or harmed by police.[102] These considerations and factors, including race and religion, compound one another to worsen the impacts of abuse on marginalized demographics.[103] As a result, such individuals often rely exclusively on civil injunctions to protect themselves from further harm; defanging them would deprive survivors of practical legal avenues.[104]

Professor Drake described the crux of this issue by identifying the improvements in the social and political statuses of women, reasoning that people now wonder why women don't leave such situations considering their

relative autonomy in comparison with past perceptions of them as powerless to men.[105] However, abusers target their victims' individuality and manipulate them such that they often distrust all others, in addition to controlling their finances and surveilling them. Therefore, once one considers the multitude of barriers to leaving such situations, it becomes much clearer why many survivors choose an option that ensures their safety without requiring re-traumatization or drawn-out criminal proceedings: civil protective orders. The continued judgment of survivors and the expectation that they must explain every decision they make concerning their personal experience demonstrate that society has not yet evolved to truly understand and empathize with them.[106]

In addition to the subjective experiences of individual survivors, the statistics tell us that the potential for *Rahimi* to keep guns in the hands of abusers will kill women. Possession of a gun in a domestic abuse situation reportedly increases the risk of femicide by over 1,000 percent,[107] demonstrating that guns are one of—if not the most important—factors to consider when planning a potential escape with a survivor. The risk of filing an injunction also comes into play here, as there is an up-to-ten-day window between the issuance of a temporary injunction and the final hearing.[108] If abusers can retain firearms during that period – which is already quite lethal, with 70 percent of women killed by abusers murdered in the process of leaving[109] – there is next to nothing stopping them from killing their victim to exhibit the ultimate and final form of control over their life and that of their victim.[110] Therefore, despite the lofty espousal of originalism to support individual rights, "originalism is going to get women killed."[111]

Conclusion

Originalism is defined by deference to the drafters of the Constitution, who "articulated important, inclusive democratic ideals but did not yet know how to live up to them."[112] The United States was founded in a time and context completely different from today, and refusing to acknowledge the benefits of progress over time and in the face of emerging issues is illogical. Because originalism extols colonial values that excluded many from the political community, it is "fundamentally incompatible"[113] with a society and government that seek to include all in their decision-making. However, the Court's recent streak of originalist decisions and cases that have upended public confidence, including *Dobbs* and *Bruen*, have caused even Professor Drake to wonder whether the Court will "do the right thing"[114] by reversing the Fifth Circuit in *Rahimi*. In the past six years, her "faith has been terrorized,"[115] and she no longer trusts in any sort of predictability with respect to the Court's decisions—a widespread feeling that has led to uncertainty and violence against the Court and the government as a whole. Even if the Court does overturn the Fifth Circuit and retreat slightly from the *Bruen* test in its original form to protect survivors and maintain some semblance of the status quo, there is no

guarantee that originalism is going away any time soon, nor that the originalists on the Court will refrain from continuing to erode minority rights to the detriment of American society as a whole.[116]

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The Search for "Truth": Analyzing Florida Stop WOKE Act and the Tensions in the Current Framework of American Academic Freedom

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Abstract

This paper looks at the state of academic freedom at the collegiate level and the evolving attitudes of the judiciary towards government intervention in academia. In the aftermath of Florida's Stop WOKE Act and the legislative deluge by various states to intercede in classroom conversations, the legal gray area that academic free speech exists in has become incredibly prominent and open to attacks. Looking through historic attitudes towards academic freedom, this paper looks at a revised understanding of how the First Amendment can be interpreted to protect collegiate classrooms. In particular, this paper will build off an existing set of precedents at the appellate level that provide an opportunity to serve as a foundation for rectifying the various inconsistencies in how the judiciary currently views academics and the role of public colleges and universities as forums for open discussions and debate.

For the past few years, American political discourse has been increasingly dominated by discussions around school curricula and widespread fears of indoctrination of the American youth. Conservative legislators across the country have pushed for a raft of new legislation to push the state into classrooms and take a more active role in the implementation of curricula that is not perceived to be anchored in "woke" thought or critical race theory.[1] Florida, especially, has been at the forefront of this movement. Florida Governor Ron Desantis, in partnership with the slate legislature, passed the Individual Freedom Act, better known as Stop WOKE Act—a wide-ranging proposal that not only expanded state intervention into public classrooms at the elementary and secondary level but also imposed new restrictions at the collegiate level. The bill was extremely controversial upon its passage, with opponents citing the bill as unconstitutional and restrictive of academic freedom, which is protected under the First Amendment.

The law was immediately challenged by various plaintiffs across the state to prevent the enforcement of the legislation. The case *Pernell v Florida Board of Governors* served as a vehicle for challenging the application of the bill to the public university system. The plaintiffs saw early success with Judge Mark Walker ruling in their favor, issuing an injunction on its application to public colleges, and lambasting the legislation as out of the world of George Orwell's *1984*.[2] As the case makes its way up through the appellate system, it is clear that Florida's argument defending the bill rests on exploiting various tensions across decades of legal rulings that have created an inconsistent standard of "academic freedom" and the protections enjoined to instructors at public universities under the First Amendment. With a rising tide of new laws being proposed in state legislatures across the country following the blueprint of Florida's Stop WOKE Act, the constitutional tension around academic freedom is nearing a breaking pointThis paper hopes to understand first the historical and legal discussions that have gone about creating the idea of "academic freedom" and the protections ensured by the First Amendment. The second section will then focus on Florida's argument justifying the Stop WOKE bill's provisions by first analyzing its usage of legal precedent in restricting speech at the secondary and primary school level. It will navigate both the failures in the argument and address the need for creating a definite standard of differentiating between free speech at the collegiate level compared to other levels of education. The following section will then analyze Florida's utilization of unclear precedent regarding the government's ability to restrict the speech of public employees first established in *Garcetti v Cabellos*.[3] It will review the appellate systems' attempts to navigate this gray area and how some landed upon alternative appropriate standards for regulating government intervention in professorial speech that *Garcetti* left unclear. Collectively, by understanding and navigating these arguments that Florida used to regulate professorial speech and curricular

decisions, this paper hopes to ideate how *Pernell v Florida Board of Governors* could serve as an opportunity to resolve the holes in academic freedom and maintain the sanctity of the marketplace of ideas in increasingly tumultuous times.

History of Academic Freedom

The concept of academic freedom has long existed in the ethereal realm of rhetoric and idealism. Though lacking a clear definition, the first prominent mention of academic freedom in American higher education dates back to 1915 and the first *Declaration of Principles on Academic Freedom and Academic Tenure* issued by the American Association of University Professors (AAPU).[4] It offered an early idea of academic freedom being composed of three elements "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action." The declaration also emphasized the role of the university as an "intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world."[5] This idealistic understanding of the university touches upon the longstanding discussion around the search for "truth." John Stuart Mill in his book *On Liberty* insisted that the search for truth required free speech to facilitate debate and avoid the radicalization of suppressed ideas.[6] As such universities serve as a forum for interacting and experimenting with novel ideas under the ideals outlined in the 1915 Declaration.

The contention that "truth" required debate and discussion would later be spun out into a revised model, referred to as the "marketplace of ideas." First touched upon by Justice Holmes in his dissent in *Abrams v United States*[7] where he pushed for the "free trade in ideas," and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[8] The "marketplace of ideas" would over time develop into a key framing of the First Amendment's protections and the need for speech for societal development. The marketplace, however, was not absolute, and there was a noted need for placing some limitations on ideas being spread, such as ones that could lead to "imminent lawless action."[9] The market was fundamentally responsible to the society at large serving as a vehicle for building truths and developing ideas with the hope of serving the community. American professors in the 1915 Declaration envisioned themselves as key functionaries of the marketplace and that required them to harbor ideas that might be repugnant to larger community values and thus placing themselves in a special place in society.[10]

In 1940, the AAUP would issue a follow-up statement. The 1940 *Statement of Principles on Academic Freedom and Tenure* reinforced the idea that they have been afforded a special place in society and thus bore a

responsibility to the broader community and its students. The statement continued to push for a definition of academic freedom that accommodated the ability for professors to express their own opinions in class with the caveat that "they should be careful not to introduce into their teaching controversial matters which have no relation to their subject."[11] These two AAPU statements outlined a basic framework of academic freedom and the liberties and limitations that are extended to professors, in which they were forums for debate and thus a key functionary of the marketplace of ideas. Universities would create appropriate fora for various debates and discussions of ideas facilitated through professors, and eventually, those ideas could be placed into the broader community.

Academic freedom at the collegiate level would soon be discussed by the Supreme Court in *Sweezy v New Hampshire,*[12] which addressed a New Hampshire law that afforded the New Hampshire Attorney General to investigate potential cases of subversion. The plaintiff, Paul Sweezy, was prosecuted under the state because he refused to comply with a subpoena and discuss notes regarding a lecture he had given as potentially subversive. The Court ruled in Sweezy's favor and in doing so addressed the special role of colleges, as Chief Justice Warren noted that to "impose any straitjacket upon the intellectual leader in our colleges and universities would imperil the future of our Nation."[13] While the ruling was a plurality, and non-binding, it indicated that the judiciary was receptive to the ideals expressed by American academics and their essential role to the welfare of the state.

The Supreme Court would soon go even further in its preference towards affording academic freedom as protected by the First Amendment in their ruling in *Keyishian v Board of Regents.*[14] The landmark decision by the court overturned a New York law requiring state employees, including professors, to sign a loyalty pledge that attested that they were not members of the Communist Party. Though the foundation of the ruling is based on the overly broad nature of the law that could have entrapped many employees, the case provided an
important rhetorical opportunity for the justices to opine on the topic of academic freedom. Justice Brennan in his majority opinion expressed that:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v Tucker*, supra at 364 U. S. 487. The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues,

> [rather] than through any kind of authoritative selection." *United States v Associated Press*, 52 F. Supp. 362, 372.[15]

Brennan's placement of the classroom as a direct part of the marketplace of ideas pointed to the judiciary's adoption of an idea of academic freedom consistent with the early messages of the AAPU. The government and voices of the government such as university administrators were largely held to a standard of allowing professorial speech to flourish in the hopes of further developing the marketplace of ideas. Academia had established itself as a critical pillar in society, and the "pall of orthodoxy" was an anathema to the foundation of the country and the First Amendment's mission of encouraging new and unique speech.[16]

This idealistic streak by the Supreme Court in encouraging and protecting speech under the First Amendment in classrooms was not confined to cases regarding colleges and professors, as rulings like *Tinker v Des Moines Independent Community School District* pushed for academic freedom for students in primary and secondary education.[17] The court indicated a desire for the First Amendment's protections to permeate across the education system going as far as to say that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[18] Continued challenges would emerge over the years, as governments attempted to limit teachers' speech. One of the most prominent of these cases was *Pickering v Board of Education,* where a teacher was dismissed for writing criticism of the local school system in a newspaper.[19] The Supreme Court overturned that decision and instituted an increased level of protection for teachers by protecting their right to speak on important issues, as long as they did not recklessly make false statements.[20]

Pickering would later be paired with another case, *Connick v Myers,* to create a two-part test for regulating the speech of public employees, including academics.[21] This Pickering-Connick test sought to navigate the line between the free speech of citizens and the government's vested interest as an employer to regulate its employees' speech. *Pickering* established the first test for determining if the government overstepped in regulating speech by determining whether the speech in question was regarding a matter of public concern. If so, the case would then move to the *Connick* decision where it would be determined whether such speech was disruptive to the working environment.[22] If such speech was determined to be disruptive then it could be suppressed by the government in its role as an employer. This test, in conjunction with the other principles outlined regarding academic freedom and its necessity in society constituted an early orthodoxy of limited government intervention in academia, barring the most disruptive and irrelevant speech and public commentary by teachers that would go uninhibited by the government.

Stop WOKE and Hazelwood's Blurring of Academic Units

The judicial orthodoxy regarding academic speech would not last long, however, as new cases began to emerge in the 1980s that began to undercut and revise many of the ideals that were pushed by judges in the 1960s. A new generation of judges had entered the fray and their rulings drifted further and farther away from the liberal idealism regarding academic speech that was professed by the likes of Justices Brennan and Douglas. They saw through more specific cases for instituting limitations on academic speech that had muddled the relatively clear view that was initially built out. This blurred vision of academic freedom in conjunction with what Judge Mark Walker cites as "cherry-picking language" forms the basis for much of Florida's argumentation in *Pernell v Florida Board of Governors*.[23] By utilizing various inconsistencies in academic freedom, the state attempted to bulldoze the marketplace with its own perceived universal truth to be discussed in classroom settings.

This section will focus on analyzing Florida's claimed capacity under the Stop WOKE Act's authority to intervene in classroom curricula and prevent the teaching of certain topics. Florida utilizes *Hazelwood School District v Kuhlmeier* as a core tenet for formulating its justification for limiting classroom speech. *Hazelwood School District v Kuhlmeier* along with *Bethel School District v Fraser* narrowed the relatively broad freedoms that were granted to students within *Tinker*.[24] These two rulings provided opportunities for high schools to circumvent the First Amendment in varying circumstances. *Bethel* constrained *Tinker* by establishing that schools could prevent student speech that could be considered indecent to prevent disruptions to the learning environment, an opinion reminiscent of the *Connick* ruling. *Hazelwood* went one step further in authorizing institutional suppression of student speech by allowing school-sponsored student newspapers to be afforded lesser protections under the First Amendment. The ruling gave schools the ability to exercise prior restraint of student publications, as long as it was "reasonably related to legitimate pedagogical concerns."[25]

It is important to note that these rulings were discussed and created in cases referring to students in public high schools, the majority of whom would be minors. It has long been established that the government has had a vested interest in protecting children, with many cases such as *FCC v Pacifica Foundation* giving the government the authority to limit broadcast content based on protecting children.[26] Florida even passed the Stop WOKE Act under the pretense of protecting the state's children from potential indoctrination and preventing them from learning hate.[27] However, the *Hazelwood* ruling, despite focusing specifically on the case of high school students, has tended towards being applied at the collegiate level by circuit court judges.[28] This application to the collegiate system raises an important disconnect that has been exploited by Florida in its argument.

Do public colleges and universities operate on different standings? Or are they the same as high schools when determining the limits of insured free speech and academic freedom under the terms of the First Amendment? Florida, in its argument, depended heavily on the case of *Bishop v Aronov* to justify its intervention into collegiate curricula, with Judge Walker citing *Hazelwood* as the "polestar" in the *Bishop* decision.[29] The Eleventh Circuit and its ruling in *Bishop v Aronov* backed the University of Alabama's decision to reprimand a professor for deviating from his approved curriculum for a course of physiology by integrating a unit on intelligent design.[30] The ruling focused on an Establishment Clause claim that determined whether the professor could teach this unapproved unit. The circuit court's ruling pointed to *Hazelwood* and its allowance of institutional prior restraint as a determinant factor in considering whether a forum was open for free discussion.[31] The court contends that the forum was not an open one and thus could not serve as an appropriate defense on the part of Aronov to justify his actions, based on the *Hazelwood* ruling, which opened the door for the university to step in to maintain its "basic educational mission."[32]

Florida pulls from this line of reasoning a direct authority as an institutional force to redefine the educational mission of its colleges and censor ideas. With that authority, it can prevent the teaching of certain classes and curricula that it deems repugnant. This can be seen as a vast overreach of the context that drove *Bishop* as it regarded a university's decision to reprimand a professor for deviating from an approved curriculum. The argument also ignores the very real Establishment Clause concerns raised by *Bishop* regarding the integration of religious advocacy into the curriculum of a public university course. The *Bishop* ruling was clearly anchored on the religious nature of the discussion, a distinction that does not exist with the ongoing *Pernell* case.

However, by basing *Bishop*'s reasoning on *Hazelwood,* it perpetuates the failure to create a distinction between collegiate education and the freedoms it is afforded under the First Amendment as compared to lower levels of education. *Hazelwood* is vested in a school's capacity to minimize "legitimate pedagogical concerns" in a high school environment, but a collegiate environment is fundamentally different in regards to speech and choice, as college students have a much freer reign to pick their own coursework and protest on campuses.[33] When Justices Brennan and Warren first discussed academic freedom and issued rulings on the topic, their discussion was based on professors working at colleges and universities. But protecting "legitimate pedagogical concerns" operates on an entirely different system between levels of education. The facts of *Hazelwood* were based on the removal of an article regarding teen pregnancy in a high school newspaper. The merits of whether that topic was actually disruptive in a high school environment can be litigated at a different time, but the *Hazelwood* court noted that it would "not now decide

whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."[34] This ambiguity points to the view of some judges of the maturity of ideas that are inherent to college and the role of universities to expose students to a wide range of experiences and thus stands in contrast to the state's utilization of precedent like *Hazelwood*.[35]

Most states require students to attend a K-12 institution while they are children, after which many actively choose to enroll in colleges when they are adults.[36] There is a fundamental level of choice that exists for students when they approach college starting from the institution that they attend, the course of study that they pursue, and to some extent the courses that they elect to take. None of this holds to the same degree for high schoolers, who are generally required to complete the same curriculum as all of their peers. This choice comes with the recognition from students that they are willingly entering a new forum that should ideally be operating in a less restrictive manner compared to high schools, where they will be exposed to a variety of ideas from the marketplace. The extension of *Hazelwood* to the collegiate arena thus undercuts the ideals established by Justices Brennan and Warren regarding academic freedom by analogizing college students with high school and primary school students, and in turn, makes professors analogous to teachers at those respective institutions.

Despite *Bishop* being considered the right decision, it is anchored fundamentally on a university's capacity to close off its classrooms from being "open forums". Beyond Florida's argumentation utilizing flawed logic and overextending the circumstances that has played out in state universities, there must be recognition that *Hazelwood*'s application is a fundamentally flawed standard. Universities should function as open fora for the marketplace of ideas, though it is not unfair for them to dictate an "appropriate fora" for certain debates such as discussion of religion in a class about religion rather than physiology. Universities should not have a total ability to regulate speech within the confines of the classroom as implied by the reading of *Hazelwood* in the *Bishop* decision. Rather, they should still be held accountable for other legitimate constitutional restrictions such as preaching to students and thus violating the Establishment Clause.

By reframing this standard potential through the lens of an "appropriate fora " model rather than an open or closed fora model, the court system could realign academic freedom and focus on its essentiality in collegiate spaces. Professors would not be limited in their classroom discussion as long as it is still relevant to the topic of the class overall, an idea in line with what the AAPU proposed in their 1940 statement.[37] Florida nor any other state government should be using its authority to reduce classroom expression by professors on the grounds of avoiding indoctrination because it further infantilizes the college

student, who is deemed to need protection from potentially distasteful ideas. Academic freedom within the confines of the First Amendment should thus ensure that adults in college can access the discussions and forums for ideas that professors can provide based on their expertise. They should not have that decision undercut by professors seeking to inject alternative ideas deemed irrelevant to the class at hand, nor by an overzealous state trying to preach its own truth regarding the state of the nation or any other topics of public importance.

Rectifying *Garcetti v Cabellos*

The other major pillar that Florida uses to justify its restrictions on academic freedom through the Stop WOKE Act is based on the partial overturning of the Pickering-Conning test that came with the Supreme Court's opinion in *Garcetti v Cabellos*. The *Garcetti* precedent blunted the protections initially offered by *Pickering* and issued a set of new limitations on public employees. The prior *Pickering* standard offered public employees generous leeway to comment on current events as private citizens without the threat of retribution by a government employee as insured by the First Amendment. The *Garcetti* ruling shifted the goalposts significantly by establishing a new standard for regulating employee speech and opening the door for the government to retaliate against an employee by dictating that certain statements that fell under the umbrella of work-related duties did not receive First Amendment protections.[38] This ruling came from a split court, issued on a 5-4 vote, with the dissent calling out the potential dangers this new standard imparted on academia.[39] These concerns are quickly glossed over by the majority who dictate that this ruling, though broad in its application, did not explicitly apply to academia.[40]

Florida utilized the *Garcetti* precedent in conjunction with a select few lines from *Rosenberger v Rector & Visitors of University of Virginia* to reframe college professors as mere voices of the state, and anything they say in class could be construed as speech from the university.[41] This overly broad framing was called out by Judge Walker in his *Pernell* ruling as a stretch of the facts of the case and the precedents involved. He also pointed to the lack of clarity on the subject of *Garcetti* and its application to academia which Florida attempted to countervail by pointing to a range of circuit court cases that applied the *Garcetti* ruling in limited capacities

to the academic realm.[42] However exploitative this argument was, it does put into the spotlight again the immense gray area that was created by *Garcetti* concerning academic freedom and professorial speech. *Pickering* had established a relatively liberal understanding of what a government could do regarding limiting the speech of public employees, which was in effect undone by the new *Garcetti* standard.

Since then the lack of clarity has allowed for a variety of different cases that have reached varying conclusions as to the application of the *Garcetti* standard in academia, many of which the state of Florida references in its defense.[43] These varying decisions opened the door for small disputes regarding classroom speech to spin out into a broader debate instigated by Florida and its intervention in collegiate education. By using *Garcetti* as an underlying precedent, circuit courts have inadvertently expanded the supposedly limited scope of the ruling especially in regards to the college classroom. For example, in its defense Florida cited the application of the *Garcetti* standard in academia in the case of *Evans-Marshall v Board of Education* which focused solely on *Garcetti*'s application at the high school level and not with collegiate education.[44] That particular ruling looked at a teacher's right to select books for a high school curriculum unperturbed by public officials and attempted to make no broader discussion regarding universities. This increasingly tense situation requires resolution by the Supreme Court, which has a variety of options to pick from the circuit courts.

One of the most prominent cases to pull from for considering the application of *Garcetti* in collegiate spaces is *Demers v Austin*. The case is characterized by the fact that it outright rejects *Garcetti*'s application in higher education as a method for restricting professorial speech and rather depends on the more traditional Pickering-Conning test that had been used for twenty years, unfettered. The judge in the case concluded "that Garcetti does not — indeed, consistent with the First Amendment, cannot — apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor."[45] In effect, they carved out an academic freedom exemption that Justice Kennedy implied was possible under the terms of *Garcetti*, and in doing so the decision leaned heavily on the ideals set out in *Keyishian* regarding academic freedom and its importance to American society. This decision looked back at the consistent tendency of the court system to reaffirm academic freedom as a key tenant of the First Amendment with the court re-affirming its importance as recently as 2003 in *Grutter v Bollinger*.[46]

Looking back at *Pernell*, the lawsuit involves restrictions by the government on topics it deems of concern, namely, critical race theory, which has become a strawman for political opposition to analyze the role of race in inequality in America. It is a controversial topic concerning an exceptionally sensitive issue, and any discussion on critical race theory and its analysis of systemic racism in America is bound to ruffle feathers. However, the objective of a university has been—and continues to be—a place for such controversial ideas to be discussed, debated, and criticized. The government's actions in Florida pose a direct contrast to these ideals by stifling such discussion

altogether and threatening the careers of professors adept at teaching this legal theory.

Garcetti arguably fixed something that was not broken by adjusting the First Amendment protections afforded to most public employees; It is essential that its application in academia is clarified to not apply at the collegiate level. The marketplace of ideas requires a constant influx of new ideas to be debated whether they be controversial or not. By affording governments the ability to retaliate against speech that goes against their preferred version of the truth, *Garcetti* derails the ideals of academic freedom that were established in *Keyishian*. States should not set uncontestable definitions for concepts such as "individual freedoms," when in fact, the market should be shouldering that responsibility.[47] The primary role of the state should be in facilitating more speech rather than actively working against the provisions of the First Amendment.

Going one step further, there exists a valid line of reasoning to overturn *Garcetti v Ceballos* altogether. The majority ruling in *Garcetti* allowed employers to take action against the "inflammatory or misguided" speech of an employee.[48] As Justice Stevens pointed out, this reasoning is not far from pursuing a bar on any "unwelcome" speech and opens the door for undue government intervention into academia. This warning appears to have become a reality in Florida as the Stop WOKE Act has forced professors to end teaching certain classes and placed a shroud over academic discussions in college lecture halls.[49] The opening of such a door is repugnant to the ideals of the First Amendment and the concepts that have been consistently outlined by the court. A citizen's employment by the government does not transfigure them into an extension of the government itself, and *Garcetti*'s implication of such poses a significant danger of overriding the voices of valid criticism and whistleblowers.

Other Failings of Stop WOKE and Pernell

The argumentation and analysis provided on Stop WOKE and the subsequent *Pernell* ruling are by no means comprehensive of the failings of the case itself. Judge Mark Walker's scathing ruling pointed to a litany of additional issues and overextensions made by Florida in its bid to retain the law. From the misapplication of anti-racism legislation to a consistent use of "doublespeak" by the state in justifying academic freedom as the purpose of the bill, it becomes difficult to not see the bad faith argumentation of Florida.[50] The legislation is reminiscent of the loyalty tests that were challenged in *Keyishian* and has similarly created excessively broad standards for challenging a curriculum.

The legislation's prohibition of eighth broad concepts from being discussed in a classroom setting opens a wide trap for teachers to face reprimand for even the most innocent of discussions.[51] These broad conceptual prohibitions

raise the specter of extinguishing important historical discussions around the failings of the American state, in exchange for the teaching of Florida's preferred truth and challenge the very notion of free and open debate that are core to the vision of America. The courts have long expressed apprehension about laws that create such traps for citizens and the creation of a "chilling effect" extending into higher education treads into the dangerous territory of corralling the ideas market. Even if the state's interest was in good faith on the part of protecting children and less dependent on fear-mongering about the indoctrination of students, it is a poor foundation to extend this legislation beyond the confines of the K-12 education space.

Pernell not only pushes against the judiciary's distaste for state-sanctioned truth but brings to mind *Edwards v Aguillard*. Though *Edwards* was a discussion surrounding the Establishment Clause and the suppression of academic freedom through enforcing certain curricular paths at the high school level in Louisiana, it provides a runway for another way to break down the importance of academic freedom.[52] The court found that the implied purpose of the state was to push its truth in regard to religion, which is highly reminiscent of the current circumstances regarding Florida. But it is of huge importance to note that many scientists and educational professionals backed the overturning of Louisiana not just on religious dogma being presented to students, but that it undercut the importance of evolution as a topic itself being taught about their overall education, which this gets to another core reality of academic freedom in higher education.[53] Florida's Stop WOKE bill does not just challenge academic freedom but hinders a core requirement of universities: preparing a skill set for further education and careers. For example, prospective law students would gain potentially important knowledge from undergraduate coursework regarding critical race theory, but by setting these curricular roadblocks Florida's legislation works against the rights of students who have chosen to take courses that they deem relevant to their future needs and skillset. The consequence of this would be depriving the marketplace of ideas from gaining from the ideas of students and professors alike, further damaging academic freedoms across the country.

Conclusion

Academic freedom has been a mainstay of the American tradition of utilizing the marketplace of ideas as a method for finding the truth. The long history of the judicial protection of academic freedom under the freedom of speech provisions of the First Amendment has been essential in the development of American discourse and a flourishing civic society. But it's erosion in recent years through a variety of cases and precedents that have failed to distinguish between primary and collegiate level education as well as failing to recognize the important role academics play in civic discourse has opened the door for state-sanctioned truths and the wilting of the marketplace ideas to occur. Though

Florida's legislation was egregious and an overstep that was rightfully overturned by the district court, it raises the need for clarification and reconciliation of the various standards that ensure the protection of professorial speech in college classrooms and the development of new ideas. Whether that be through the usage of *Pernell* by the courts as a vehicle to establish new precedent or the overturning of other prior precedents, the growing tension surrounding the government's attempts must be resolved before more legislation like the Stop WOKE Act passes in other states and deprives universities of the ability to serve cultivate new ideas.

[1] Governor Ron DeSantis, "Governor DeSantis Announces Legislative Proposal to Stop WOKE Activism and Critical Race Theory in Schools and Corporations," Office of Governor Ron DeSantis, December 15, 2021, https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-wo-k-e-activism-and-critical-race-theory-in-schools-and-corporations/.
[2] *Pernell et al v Florida Board of Governors et al,* No. 4:2022cv00304, Justia at *1-3 (N.D. Fla.
Nov. 17, 2022)
[3] *Ibid* at *19, *20-25.
[4] American Association of University Professors (AAUP). "General Declaration of Principles on Academic Freedom and Academic Tenure, 1915." Hathi Trust.
[5] Ibid, 6.
[6] John Stuart Mill, *On Liberty*, Project Gutenberg, 13
[7] 250 US 616 (1919)
[8] *Abrams v United States,* 250 U.S. 616, 630 (1919) (Holmes, J, dissenting).
[9] *Brandenburg v Ohio,* 395 U.S. 444, 447 (1969)
[10] AAPU. "General Declaration of Principles on Academic Freedom and Academic Tenure", 6.
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[12] 354 U.S. 234 (1957) 13. [12] Ibid, 250.
[13] *Keyishian v Board of Regents*
385 U.S. 589 (1967)
[14] Ibid, 603.
[15] Ibid
[16] *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969)
[17] Ibid, 506.
[18] *Pickering v Board of Education of Township High School District 205, Will County,* , 391 U.S. 563 (1968)
[19] Ibid, 573.
[20] *Connick v Myers*, 461 U.S. 138 (1983)
[21] "The Sixth Circuit Joins the Split: Higher Education Freedom of Speech and the Breadth of
[22] Academic Freedom Remain in Limbo," *Wafe Forest Law Review Online* 12, no. 111 (Nov. 22, 2022):117-118, http://www.wakeforestlawreview.com/2022/11/the-sixth-circuit-joins-the-split-higher-educationfreedom-of-speech-and-the-breadth-of-academic-freedom-remain-in-limbo/.

[23] *Pernell et al v Florida Board of Governors et al,* No. 4:2022cv00304, Justia at *19.
[24] *Bethel School District v Fraser*, 478 U.S. 675 (1986); *see also Hazelwood School District et al. v Kuhlmeier et al*., 484 U.S. 260 (1988)
[25] *Hazelwood School District et al. v Kuhlmeier et al*., 484 U.S. 260, 273 (1988)
[26] *Federal Communications Commission v Pacifica Foundation*, 438 U.S. 726, 749-751 (1978)
[27] Governor Ron DeSantis, "Governor DeSantis Announces Legislative Proposal to Stop WOKE Activism and Critical Race Theory in Schools and Corporations," Office of Governor Ron DeSantis.
[28] *Alabama Student Party v Student Government Assn.* 867 F.2d 1344 (11th Cir. 1989); see also
Hosty v Carter, 412 F.3d 731 (7th Cir. 2005)
[30] *Pernell et al v Florida Board of Governors et al,* No. 4:2022cv00304, Justia at *21.
[31] *Bishop v Aronov*, 926 F.2d 1066 (11th Cir. 1991) 31. Ibid.
[32] Ibid.
[33] *Hazelwood School District et al. v Kuhlmeier et al*., 484 U.S.
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Rethinking the Exclusionary Rule: Rights vs. Deterrence Rationale

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Abstract

The exclusionary rule states that evidence obtained as a result of illegal search or seizure in violation of the Fourth Amendment cannot be used in a criminal trial. When the Supreme Court adopted the exclusionary rule in *Weeks v United States*, they did so under the rationale that the rule would protect the fundamental rights of an individual to not have illegally obtained evidence used against them in court. However, the Supreme Court has gradually shifted its justification for the exclusionary rule to the deterrence of police officer misconduct. This paper distinguishes between these two rationales and argues that the Supreme Court's new deterrence rationale for the exclusionary rule harms judicial integrity; the use of the deterrence rationale requires judges to answer the question of whether not admitting illegally obtained evidence would deter police misconduct, and if this deterrence outweighs the social costs of excluding compelling evidence. Relying on this subjective question has resulted in inconsistent court rulings. Thus, I argue for a new solution that maintains the original right-protection rationale for the exclusionary rule, protecting judicial integrity and consistency, while implementing existing tort remedies to deter police officer misconduct.

Introduction

In *Weeks v United States*, the Supreme Court adopted the exclusionary rule. The rule states that evidence obtained as a result of illegal search or seizure in violation of the Fourth Amendment cannot be used in a criminal trial.[1]

When it was created, the rule's purpose was to protect the fundamental rights of an individual and protect judicial integrity.[2] The justification of the rule was not to prevent police officer misconduct; rather, the intent was to protect Fourth Amendment rights for defendants through judicial review. However, over time, the justification for the exclusionary rule has evolved, as highlighted in four Supreme Court cases: *Weeks v United States, Mapp v Ohio, United States v Leon,* and *Hudson v Michigan.* Today, the original justification for the exclusionary rule (ER) has been replaced with a new justification: to deter police officer misconduct. However, reliance on the exclusionary rule has been criticized due to its ineffectiveness in reaching this goal.[3]

While multiple tort remedies have been proposed as effective alternatives to deterring police officer misconduct, such as torts, injunctions, and criminal sanctions, this paper argues for the imposition of both the tort remedy and the exclusionary rule for different reasons. The ER (under a rights-protection rationale, rather than a deterrence rationale) should be imposed to protect defendants' Fourth Amendment rights, and the tort remedy (with a relaxing of the qualified immunity doctrine and respondeat superior liability for police departments) should be imposed both for victim-compensation reasons and for deterrence-of-police-misconduct reasons.

This paper will start by critiquing the exclusionary rule by demonstrating how it is not intended nor suited for the task of deterring police misconduct. I will then move into the successes and failures of the tort remedy, as it was before *Mapp*. Finally, I will describe whether and how these failures can be overcome.

Rights-Protection Rationale vs Deterrence Rationale:

Since adopting the exclusionary rule in *Weeks,* the Supreme Court has justified its use through the rights rationale and the deterrence rationale. Originally, the Supreme Court utilized the individual rights rationale: the goal of the exclusionary rule was to protect fundamental rights through judicial review. In *Mapp*, the court emphasizes that the exclusion doctrine is an essential ingredient in the right to be free from illegal search and seizure. Thus, the court recognizes that the use of unconstitutionally obtained evidence would in itself be a violation of Fourth Amendment rights. As such, unconstitutionally obtained evidence must be excluded because all defendants' fundamental rights ought to be protected.[4]

In *Leon* and future court cases, the court justifies the use of the exclusionary rule through the deterrence rationale. This rationale is that the exclusion of evidence protects the fundamental right to not be illegally searched. Through the exclusion of evidence, the court hopes to disincentivize police

misconduct by removing the incentive to disregard Fourth Amendment rights. In accordance with the deterrence rationale, and contrary to the individual rights rationale, the court states in *Leon* that excluding illegally obtained evidence is not a constitutional right. Therefore, in instances where the social cost of the exclusionary rule is greater than the deterrence effect, the rule need not be applied.

Often these rationales work together. By deterring the violation of illegal search and seizure, the court protects the fundamental rights protected by the Fourth Amendment. Additionally, in cases where evidence is excluded, the court effectively protects an individual's Fourth Amendment rights to not have evidence obtained unconstitutionally used against them in court.

Although these rationales can act together, these theories are distinct. The adoption of one theory over another can result in different case rulings, particularly those in which evidence is admitted because there is no misconduct to be deterred. When courts use the individual rights rationale when admitting evidence, their analysis of whether or not to apply the exclusion doctrine relies on the question of whether the evidence was obtained as a result of a Fourth Amendment violation.

However, as demonstrated in *Leon*, the use of the deterrence rationale requires courts to answer a different question — will the deterrence effect of the exclusion outweigh the social cost of the exclusionary rule? This requires courts to do a cost-benefit analysis when making their decision regarding evidence exclusion. This rationale fails to recognize the fundamental right of not having illegal evidence used against one in court and instead focuses on protecting violations of illegal searches and seizures.[5]

Further sections will analyze the costs of using the exclusionary rule under the deterrence rationale as opposed to the rights protection rationale. This new justification for the exclusionary rule requires that the Courts use a cost-benefit analysis to determine instances of application. I will then discuss how this cost-benefit analysis produces inconsistent case rulings and jeopardizes judicial integrity. Then this paper will look at current tort remedies and how they can effectively be used in place of the exclusionary rule in the deterrence of police officer misconduct.

Why ER is ineffective under deterrence rationale

The change in justification from protecting fundamental rights to deterring police officer misconduct applies the exclusionary rule incorrectly and ineffectively.

One of the main criticisms of the exclusionary rule is the creation of false negatives. Under the exclusionary rule, probative evidence crucial to convicting a defendant may be excluded as inadmissible in court. Thus, defendants who are in fact guilty go free. Using the original justification for the exclusionary rule, the costs of violating defendants' rights seems to outweigh the costs of these false negatives. By admitting illegally obtained evidence to avoid false negatives, the

courts dismiss the defendants' fundamental right to not have illegally obtained evidence used against them.

In *United States v Leon*, the Supreme Court accepted this claim in its justification for creating the good faith exception. They stated that the implementation of the exclusionary rule is based on whether the social costs of a false negative outweigh the deterrence. Thus, the purpose of the rule becomes deterring police officer misconduct. According to this new deterrence rationale justification, to create some number of false negatives does not outweigh the benefits of deterrence as police officers are unlikely to be deterred, regardless of whether or not the evidence is included. By using this new justification, the Supreme Court is allowing the guilty to walk free with no benefit.

In *United States v Leon*, the Supreme Court acknowledged that the exclusionary rule is unlikely to have a deterrent effect on judges and magistrates due to their neutrality and lack of stake in criminal prosecution outcomes. This reasoning is also applicable to police officers as the exclusion of evidence inflicts no personal cost on the officer.

The deterrent effect on police officers assumes that police officers have a personal interest in seeing someone they believe to be guilty be convicted. This suggests that police officers have some innate sense of justice that would be offended if a guilty person were to go free. However, the deterrent effect is meant to act on bad-faith officers, who are less likely to have the same sense of justice as good-faith officers. Potential motives of bad-faith officers include a desire to exert control over others, prejudice towards certain groups and a sense of impunity. Thus, to deter these acts, measures that directly penalize these officers and their misconduct are required. Officers with malicious intent are unlikely to be deterred even if the defendant goes free.

Furthermore, courts have shown to be biased towards accepting questionable police testimony to prevent false negatives. Therefore, it is likely that the deterrent effect will encourage them to hide their illegal actions through perjury. Furthermore, in many criminal justice systems, police officers are not made aware of the evidence that will ultimately be included. Thus, officers cannot be deterred if they are unaware of the effects of their actions.[6]

To minimize false negatives, courts will accept unreliable testimony to avoid dealing with the question of refusing evidence. Because the exclusionary rule is only applied if there is a violation of Fourth Amendment rights, the court can accept the evidence by showing that the collection of evidence did not violate the amendment. If it seems that evidence is reliable and relevant to convict a suspect, the possibility of setting a guilty defendant free may be undesirable to courts. It interferes with the sense of justice and responsibility courts feel toward victims and the public.[7] When police officers perform illegal acts and create incriminating evidence, courts are likely to view the police officer's actions more favorably than the illegal actions of the guilty defendant because the police officer

appears to have committed these acts in the interest of promoting justice.[8] As such, courts are incentivized to accept questionable policy testimony, claiming that misconduct never occurred to admit the evidence.

If the original justification is used, then courts would not have to determine whether the social costs of deterrence or false negatives are greater. By eliminating this analysis, judges will not have the option to accept questionable testimony to admit evidence. Yet, the question of a Fourth Amendment violation remains. Courts may still have the incentive to accept questionable testimony about whether there was a Fourth Amendment violation. However, it is harder to prove that a violation did not occur than to prove that it did but not due to misconduct. Thus, judicial integrity is preserved to a greater extent when the deterrence rationale is not used to justify the exclusionary rule.

In the more recent decisions of *United States v Leon* and *Hudson v Michigan*, the Supreme Court weighed the social cost of the exclusionary rule with its deterrence effect to determine the application of the rule. However, this method leads to an inconsistent court ruling justification due to difficulties in quantifying the effect of police misconduct; if the exclusionary rule does deter police officers, it will produce an unobservable non-event. Therefore, using cost-benefit analysis for unquantifiable elements, is akin to the courts guessing whether the deterrent effect will be more or less likely based on the case. This leads to inconsistent justifications in case decisions. For example, in *United States v Leon* and *United States v Calandra*, the court stated that the rule's inability to deter police misconduct is justification for including evidence. In *Hudson v Michigan*, the court stated that deterrence is so great that it will result in the over-deterrence of police officer misconduct.[9] This creates a precarious situation where the court can use the deterrence effect to its advantage whenever the Court wants to admit evidence. Because deterrence cannot be measured, judges must make their decision solely based on their perceived social cost of using the exclusionary rule. If the original justification was employed, this incomplete cost-benefit analysis would not need to be used. Rather, the court would have to interpret whether there had been an improper exercise of power by another branch of government, reducing the inconsistency of decisions and strengthening the court's legitimacy.

Furthermore, the task of judges should be deciding the case before them without the responsibility of influencing or being influenced by other branches of government. It should not be to attempt to deter police officer misconduct—an attempt that will most likely be futile. In *Mapp*, the Court emphasizes the value of judicial integrity in protecting the rights of the parties experiencing litigation. Judges could apply the remedy depending on the context of cases being litigated without being dependent on the actions of other government branches. With the deterrence rationale, judges are burdened with the additional task of determining how the inclusion of evidence will affect the actions of police officers–a third party not involved in the case. Without any convincing data that suggests the

deterrence effect of the rule, it is not possible for judges to do anything more than guess the likelihood of deterrence. As such, the decisions they make are likely to be uninformed. Using the original justification, judges will be able to use their judicial discretion to analyze the facts of the case and interpretation of the Fourth Amendment to make an informed decision about the case rather than doing guesswork. This will preserve judicial integrity by using a judge's judicial expertise to decide a case.

Supreme Court on Alternative Remedies:

The Supreme Court mentioned the efficacy of alternative remedies in comparison to the exclusionary rule in *Hudson v Michigan*.[10] The court had forgone the use of the exclusionary rule, stating that the deterrence of officer misconduct provided by civil rights violations and internal police discipline had strong deterrent effects, perhaps even stronger than the exclusionary rule. Thus, they reasoned that the use of the exclusionary rule would cause overdeterrence.

The dissent pushed back on this, arguing that the exclusionary rule remained the more effective deterrent. They claimed that the alternative remedies for police deterrence present at the time of *Mapp* were "worthless and futile."[11] According to the dissent, *Mapp*'s implementation of the federal exclusionary rule solved the problem of inadequate state remedies in achieving this goal. Thus, consistent with the reasoning during *Mapp*, the dissent argues that the alternative remedies for police misconduct in states during the time of *Hudson v Michigan* are also inadequate, requiring the use of the exclusionary rule as a deterrent.[12] However, this paper argues that alternatives to the exclusionary rule, specifically tort remedies, are more effective in deterring police misconduct than the exclusionary rule. These remedies lift the burden of deterring police officers off of the exclusionary rule.

It is only reasonable to assume that police officers will be deterred from committing an action when they are first, aware that this action will result in a certain consequence and second,when the consequence directly affects the police officer and outweighs the benefit of committing a constitutional violation. Of course, no proposed remedy can completely deter office misconduct and or eliminate all constitutional violations. A law enforcement officer, acting in good faith, can violate rights while believing he was acting constitutionally. However, the minimization of these violations done in bad faith will result in increased social utility and is likely to improve public relations between the public and police officers. This section will begin with a discussion of the critiques of the tort remedy and then explain if and how these challenges can be overcome.

Defects in the Present Remedy

Currently, victims of illegal search and seizure have two main civil remedies: Bivens suits against federal officers and 1983 suits against state officers. However, these remedies are hardly effective. In most jurisdictions, officers who serve warrants, even if illegal, have a complete defense. Under these

remedies, there is no recovery. In cases where a warrant is not administered, officers can rely on a defense of good faith and probable cause. Thus, it is unlikely that officers are held responsible for illegal searches and seizures.[13]

Additionally, even if the officers are found liable, it is unlikely that the plaintiff will receive damages. Compensatory damages usually require that the plaintiff suffer an injury to property, feelings, or reputation. Punitive damages usually require that the officer was acting with malicious intent. Because most illegal acts done by officers are not with malicious intent and proving hurt feelings and reputation is difficult, victims of unconstitutional actions are deterred from filing suits unless significant property damages have happened. As a result, these remedies have little deterrent effect on police officers.

A major criticism of the tort remedy is the inability of victims of violations to bring court cases against suitable defendants. The qualified immunity doctrine prohibits police officers or other government officials from being held personally liable for constitutional violations unless they violate a clearly established law. Under this doctrine, civil rights plaintiffs have to show that the defendant not only violated a clear legal rule but that there is a prior case with functionally identical facts. This greatly reduces the number of civil rights cases taken to trial. Although the doctrine was established to balance the need to hold public officials who exercise power irresponsibility accountable and the need to shield officials from harassment, distraction, and liability when performing duties reasonably, it has instead become a way for police officers to dodge accountability. However, if it were abolished, it is likely that police officers would be harassed with frivolous lawsuits, creating a dilemma. Either the deterrence of violations does not occur or there is deterrence of people entering the law enforcement profession.

Even if qualified immunity was eliminated, there remains a question of whether courts should require the officer to pay monetary damages. The threat of large monetary judgments is likely to deter qualified people from becoming police officers and unjustly punish officers and their families for errors in judgment.

Additionally, civil prosecutions of police officers are particularly difficult. Police tend to have higher repute, which makes the jury biased in their favor. Furthermore, plaintiffs in cases where the illegal search did yield incriminating evidence are unlikely to garner juror sympathy. Since jurors are resistant to believing allegations of misconduct from police officers, prosecutors are hesitant to bring cases against them. Prosecutors may also choose not to bring cases against police officers because they typically work together to prosecute other alleged criminals, resulting in a close relationship. In some jurisdictions, district attorneys are elected and rely on support from police unions and their supporters.[14]

For a deterrent effect to occur, the remedy must encourage those whose rights have been violated to seek remedy. However, plaintiffs are discouraged

from suing law enforcement officers due to the difficulty in finding an attorney who is willing to bring a case against a police officer, in addition to the unlikeliness of receiving any material monetary remedy. Additionally, many plaintiffs are unlikely to have the resources to take legal action from behind bars. For the suits brought to court, the officers experience no deterrent effect. Statistics about internal department actions show that officers who are sued are more than twice as likely to be promoted than to be punished.[15] It seems reasonable to assume that police officers reward aggressive police actions and are unlikely to punish fellow officers who discover incriminating evidence against a suspect. As such, refinements must be made to make the tort remedy a more effective deterrent.

Remedy

Before *Mapp v Ohio*, eighteenth-century common law allowed suits against officers, however the true party of interest was the government itself.[16] The government would be forced to indemnify officials carrying out government policy to prevent deterrence from government positions. A similar remedy today would recognize the direct liability of the government entity using the doctrine of respondeat superior. In his dissent in *Bivens v Six Unknown Fed. Narcotics Agents,* Justice Burger explains that:

> "The venerable doctrine of respondeat superior in our tort law provides an entirely appropriate conceptual basis for this remedy. If, for example, a security guard privately employed by a department store commits an assault or other tort on a customer, such as improper search, the victim has a simple and obvious remedy—an action for money damages against the guard's employer, the department store."[17]

The police department is likely to seek indemnification, dock pay, require training, or otherwise discipline officers who trigger the government's liability, thus creating a deterrent effect. Additionally, seeking redress against the police department is more effective than seeking redress from an individual officer. Individual officers most likely do not have the means to offer more than a minimal collectible amount. This is important because if the compensation is inadequate, plaintiffs are discouraged from going through a lengthy lawsuit.

Justice Burgers' proposal has five parts that can function as an effective deterrent for police misconduct[18]:

1) A waiver for sovereign immunity for the illegal acts of law enforcement officials committed in the performance of assigned duties.
2) The creation of a cause of action for those individuals whose constitutional rights were violated by government agents.

3) The creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute.
4) A provision directing that a civil damage remedy is completely in lieu of the exclusion of evidence obtained in violation of the Fourth Amendment.
5) A provision commanding the courts not to exclude evidence that would otherwise be admissible but for a Fourth Amendment violation.[19]

Burger intends for this proposal to replace the exclusionary rule on the basis that the exclusionary rule is ineffective in deterring police misconduct. However, the exclusionary rule is still incredibly important in maintaining individuals' fundamental right not to have illegally obtained evidence used against them in court. For this reason, the 4th and 5th elements of the proposal should not be implemented.

However, elements 1, 2, and 3 adequately address the shortcomings of the present tort remedy. The waiver of qualified immunity in cases of illegal acts would guarantee liable defendants against whom cases could be brought. Simultaneously, it would curb the over-deterrence of the profession. The tribunal board, according to Justice Burger, "is likely to eliminate the problem of jury bias." As stated by Burger, "I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for officers or by the prejudice against 'criminals' that has sometimes moved lay jurors to deny claims."[20] This would incentivize plaintiffs to seek remedy following a violation of rights, serving as a deterrence of officer misconduct because they will fear prosecution for unconstitutional acts.

A potential point of concern for this remedy regards the compensation of victims in cases where incriminating evidence is discovered. It would be odd to charge a defendant with a crime and then offer a tort remedy to compensate them for the violation of their rights. This raises questions of how the compensation would be determined and for what exactly the defendant is being compensated.

However, if this tort remedy is used in conjunction with the individual rights rationale of the exclusionary rule, then the number of cases where a guilty defendant must be compensated will decrease. The implementation of the exclusionary rule utilizing the individual rights rationale would result in more acquittals: without good faith exceptions, many court cases where evidence is not suppressed under the deterrence rationale would be suppressed under the individual rights rationale. Thus, the defendants who suffered these violations would not have been charged with the crime. The evidence that is suppressed would not be recognized by the court. Utilizing the same justification that the use of illegally obtained evidence violates a fundamental right, remedies sought after the violation must be unrelated to whether or not the evidence would have resulted

in a conviction if obtained constitutionally. Thus, damages would be awarded, assuming the victim was innocent.

A major criticism is that this approach would result in defendants being wrongfully acquitted and also claiming damages. The admission of evidence should not hinge on the court's speculation about whether it will achieve a deterrent effect. Additionally, it should not be the case that police officers can commit illegal acts and avoid compensation to their victims merely because admitting evidence might have led to a likely guilty verdict for the defendant. This negative must be accepted in order to maintain consistent justifications in court rulings.

If a defendant is found guilty due to other evidence unrelated to a constitutional violation, then this remedy could be sought for any property damages. This is necessary to deter police officers from committing illegal acts. However, damages for injury to feelings or reputation could not be awarded because this type of damage would have occurred due to the collection of legal evidence.

Ideally, preventing these violations from occurring would be better than utilizing civil remedies to compensate victims afterward. However, the exclusionary rule does not achieve this deterrence because bad-faith police officers are not directly affected. Thus, the remedy allows for a stronger deterrent effect as officers are held directly accountable. This produces a stronger deterrent effect, leading to fewer instances of police officer misconduct.

Additionally, under this remedy, violations in good faith would be compensated by police departments. This negative must be accepted because any method of compensation that differentiates between good- and bad-faith cops will promote perjury, as police officers who acted in bad faith will attempt to portray themselves as having acted in good faith. For negatives that result in minor injuries, civil remedies should be expected to compensate victims regardless of whether they caused a serious or minor injury, because law enforcement should abide by the laws, and not doing so insults the integrity of law enforcement.[21]

Conclusion

The Supreme Court decisions in *Weeks*, *Mapp*, *Leon*, and *Hudson* demonstrate how the justification of the exclusionary rule has changed from protecting individuals' rights to deterring police officer misconduct. While the deterrence rationale for the exclusionary rule does not sufficiently justify the social costs of the rule, the original justification for the exclusionary rule does. This paper advocates for the justification of the exclusionary rule to be shifted back to the protection of fundamental rights as outlined under the Fourth Amendment, given that this justification would strengthen judicial integrity and the court's legitimacy. To meet the Supreme Court's goal of deterring the police alternative, tort remedies are more effective than the exclusionary rule. While there are some valid critiques regarding the implementation of these remedies, these critiques can be remedied through Justice Burger's proposal. Thus, the best

approach is to reinstate the original justification for the exclusionary rule and implement a tort remedy for the purposes of police officer misconduct deterrence.

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[21] Alicia M Hilton, "Alternatives to the Exclusionary Rule after Hudson v Michigan: Preventing and Remedying Police Misconduct," *Villanova Law Review*, 53 (2008): 37.

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