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A Punishment Worse Than Death: Evaluating the Effects of Solitary Confinement in Light of its Goals to Deter, Incapacitate, and Rehabilitate

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Abstract

This paper aims to provide compelling reasons for a reduction in the use of solitary confinement by analyzing the current system in light of the sociological and penological goals it intends to accomplish. Although an increasing number of Americans have begun to support sentencing and corrections reforms, the same cannot necessarily be said for reforms specifically targeting those held in solitary confinement. To many Americans, incarcerated individuals in solitary confinement are society's "worst of the worst," violent criminals that will never change. Despite objections from the general American public, many reformers in states from Maine to Mississippi have pushed for a reduction in the use of solitary confinement. Historically, solitary confinement has been justified for its role in the rehabilitation of offenders, the deterrence of violent crime, and incapacitation. The discussion below demonstrates how solitary confinement is a cruel and damaging practice that fails on each of those counts. In light of solitary confinement's inability to rehabilitate, deter, and incapacitate, this paper ends with policy recommendations based on reforms that have already begun in various states.

I. INTRODUCTION

Since the 1980s, the use of solitary confinement in American super-maximum security prison units and facilities[1] has become increasingly common. Between 1995 and 2008, the number of inmates in solitary confinement increased from 57,591 to 81,622, and the numbers continue to rise.[2] Prisoners in solitary confinement spend anywhere from 22 to 23.5 hours per day in their cells, with virtually no human contact and especially punitive restrictions on visitation, reading materials, and group programming.[3] Many individuals who have lived in solitary confinement describe it is a punishment far worse than any death sentence.[4] Even though a growing number of Americans support sentencing and corrections reforms, the general population would not necessarily agree that such reforms should extend to inmates in solitary confinement. In fact, a poll by the nonpartisan Pew Research Center reported that 85 percent of Americans favor sending fewer low-risk, nonviolent offenders to prison to keep violent criminals in prison for their full sentences.[5] Since the public tends to associate prisoners in solitary confinement with violent crime, the public likely supports punitive restrictions on those sent to solitary confinement.

Despite the public's negative view of violent offenders in segregation, various activists support measures seeking a reduction in solitary confinement. Over the last ten years, the movement to reform solitary confinement has grown substantially. In the mid-2000s, Ohio reduced its supermax population by 89 percent, and Mississippi reduced its segregated population by 85 percent.[6] Between 2011 and 2012, Maine radically transformed its solitary confinement policies, sending fewer people to solitary and ensuring that those sent

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1 For the purposes of this paper, I will often use the terms "supermax prison" and "solitary confinement" interchangeably, because supermax prisons are housing units that exclusively use solitary confinement as punishment. For example, "solitary confinement reform" and "supermax prison reform" will mean the same thing in this essay, since both aim to reduce the use of solitary confinement. Solitary confinement is also known as "segregation" and "isolation," so in this paper, all three terms will be used to denote the punishment of "solitary confinement."

2 Nicholas Turner, "Written Testimony," U.S. Committee on the Judiciary, *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences* (Washington, DC: 2014), 2.

3 Zachary Heiden, "Change is Possible: A Case Study of Solitary Confinement Reform in Maine," *American Civil Liberties Union of Maine,* (2013): 3.

4 William Blake, "Voices from Solitary: A Sentence Worse than Death," Solitary Watch, lsat modified March 11, 2013, http://solitarywatch.com/2013/03/11/voices-from-solitary-a-sentence-worse-than-death/.

5 "Public Opinion on Sentencing and Correction Policy in America," *Pew Center on the States,* (2012): 4.

6 Turner, Written Testimony, 3.

spent less time there, lived in higher quality conditions, and could more easily earn their way out with good behavior.[7] In April 2014, New York City Mayor Bill de Blasio brought in Joseph Ponte, the corrections commissioner that spearheaded Maine's segregation reforms, to look for ways to reduce the use of solitary confinement in New York City jails.[8] In the year 2014 alone, fifteen articles discussing reforms to solitary confinement have appeared in the *New York Times*. Thus, in the context of our current social and political environment, solitary confinement poses an important question for policymakers: Should its use be reduced, and if so, how can we justify that reduction to a public that still favors a punitive position against the most violent offenders? In this paper, I argue that the current solitary confinement system needs major reforms in line with those that have already taken place in different states around the country. While solitary confinement in supermax prison facilities strives to achieve the utilitarian penological goals of deterrence, incapacitation, and rehabilitation, it has failed on all three counts, proving to be a psychologically damaging, ineffective, and wasteful tool.

This essay works to provide compelling reasons for solitary confinement reduction by analyzing the current system in light of the goals it intends to accomplish. To this end, Section II provides the necessary framework and context for my argument. Within this section, I first introduce the utilitarian theory of punishment, a sociological theory that focuses on incapacitation, deterrence, and rehabilitation, concepts that often justify the use of supermax prisons. From there, I provide an overview of solitary confinement, examining its history, justifications for its use, and the conditions inmates in solitary experience. Section III evaluates whether or not these facilities actually reach the goals they intend to reach. Here, I explain how solitary confinement fails to deter, incapacitate, and rehabilitate. I discuss the negative psychological effects of solitary confinement on prisoners, the often nonexistent effect solitary has on improving institutional safety, and the harmful societal impacts when segregated individuals are released. Lastly, Section IV considers policy approaches that local governments can take based on the current political environment and proven best practices. Here, I more closely examine the effects of reforms that have already occurred in certain states. Based on their projects, I

7 Heiden, "Solitary Confinement Reform in Maine," 12.

8 Michael Winerip, "De Blasio Setting up a Test: Prison Reformer vs. Rikers Island," *The New York Times,* April 4, 2014, http://nytimes.com/.

suggest some general policy recommendations to reduce the use of solitary confinement. Section V concludes.

II. FRAMING THE ISSUE OF SOLITARY CONFINEMENT

A. *A Sociological Approach to Punishment*

In the broadest sense, the sociology of punishment aims to figure out why and how our society punishes individuals. Punishment results from the social structure and cultural values we have in place, so who and how we punish depends on the role that punishment plays in society.[9] In order to approach punishment sociologically, we must first understand the different justifications for a punishment and then evaluate the social institutions we have with respect to those justifications.

The philosophies justifying punishment can be broken down into two general categories: retributivism and utilitarianism.[10] Proponents of a retributive system argue that punishment exists to place moral blame on the offender for his or her crimes, so the future behavior of the individual should not be considered when enacting punishment. In this sense, retribution is a backward looking philosophy, focusing only on the nature of the crime. A utilitarian defense of punishment, on the other hand, strives to maximize the greatest good for the greatest number. In terms of punishment, utilitarian theories focus on the good and bad consequences that result from it. Within utilitarianism, the theories of deterrence, incapacitation, and rehabilitation emerged. The deterrence rationalization asserts that punishment should exist, because it discourages people from committing crimes. Incapacitation often supports the use of custody, because taking the offender out of society prevents him or her from re-offending. Rehabilitation theory suggests that punishment should help reform the offender so that he or she will not break the law again in the future.

If the intended results and effects of a punishment are not aligned with the purposes behind it, then it should be reformed or eliminated. This method of assessing punishments can be applied to solitary confinement. The use of solitary confinement often rests upon utilitarian arguments, with many emphasizing its deterring, incapacitating, and rehabilitating effects. In the next section, I will explore solitary confinement in more detail, focusing on its history, methods, and stated purposes. This will help us understand society's reasons for solitary confinement before we begin evaluating the pros and cons of the institution as it exists today.

9 Cyndi Banks, *Criminal Justice Ethics: Theory and Practice* (New York: Sage Publications, 2013): 120.

10 Ibid., 105.

B. *The History of Solitary Confinement: A History of Changing Discourses and Justifications*

The debate over solitary confinement has emerged as a contentious contemporary issue, but the practice itself has existed for many centuries, even predating the rise of the modern prison. Like many practices, solitary confinement has gone through periods of heavy use as well as periods of abeyance. In the early nineteenth century, segregating entire prison populations was the main form of punishment. By the end of the century, prisons used solitary confinement increasingly sporadically until the punishment disappeared almost entirely. In the 1970s, prisons once again began using solitary confinement more systematically, in line with the philosophical return to more rehabilitative prison techniques. By the late 20th century, the control system we have today developed, with a renewed emphasis on isolating large populations of prisoners in special units or separate facilities for security purposes.[11] In addition to changes in use, the discourse surrounding the role of solitary confinement in punishment has changed greatly since its inception. Examining solitary confinement historically, we can see that our justifications for solitary confinement have always hinged on at least one of three punishment philosophies: rehabilitation, deterrence, and incapacitation.

The earliest advocates of solitary confinement had very reformist intentions, emphasizing the transformative effects of isolated segregation. In contrast to the filthy and physically abusive *gaols* that housed criminals before the 1800s, prisons were imagined to be institutions in which criminals could be "cured" of their negative qualities.[12] Reformers believed that isolation created a stable environment that would give prisoners time to reflect and repent.[13] Prison builders in the mid 19th century also saw solitary confinement as an effective way to deter future crime. By limiting prisoners' contact with each other, public safety would increase, since criminals would not be able to develop escape plans or plot future crimes.[14] In the late 19th century, however, prison administrators realized that the supposedly positive goals of solitary confinement were not being achieved in practice. Acclaimed British author Charles Dickens aptly described it as follows:

In intentions [of solitary confinement], I am well convinced that it is kind, humane, and meant for

11 Sharon Shalev, *Supermax: Controlling risk through solitary confinement* (Portland: Willan Publishing, 2009): 12-13.

12 Shalev, *Supermax,* 14.

13 Heiden, "Solitary Confinement Reform in Maine," 5.

14 Shalev, *Supermax,* 15.

> reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry out its execution, do now know what is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers…[15]

As the practice continued, more and more people realized that segregated prisons did not successfully rehabilitate prisoners, had high operation costs, and had devastating health effects on prisoners. Thus, by the end of the century, the systematic use of isolation ended.

Despite the lessons of the 1800s, solitary confinement returned to the United States in the 1970s as a way to modify the behavior of inmates. During that time period, the United States punishment system, in general, emphasized rehabilitation. Once again, prison administrators hoped to find ways to "fix" criminals, and this mentality influenced views on solitary confinement. MIT professor Edgar Schein, for example, encouraged prison wardens to "think of brainwashing, not in terms of politics, ethics or morals, but in terms of the deliberate changing of human behavior and attitudes by a group of men who have relatively complete control over the environment in which the captive populace lives."[16] Solitary confinement would make prisoners easier to manage and more susceptible to rehabilitation programs in general population prisons, turning prisoners into *tabula rasas*, on which more socially acceptable behaviors could be written.[17] Eventually, this justification for solitary confinement came under heavy criticism. Critics disliked the emphasis on rehabilitation, because it gave certain elite individuals the power to impose their views and values on others.[18] In addition to being inherently paternalistic, these programs, like those implemented in the 1800s, were better in theory than in practice. For instance, determining when a prisoner had been successfully "rehabilitated" was very arbitrary, so prison officials could abuse their power and discriminate against different prisoners based on race, class, etc. Often, correctional officers would also physically abuse those in isolation. As in the 19th century, a rehabilitative justification for isolation failed to live up to its intended goals.

15 Charles Dickens, *American Notes for General Circulation* (London: Penguin Books, 1842): 146-147, quoted in Shalev, *Supermax,* 12.

16 Shalev, *Supermax,* 18.

17 Ibid., 19.

18 Ibid., 20.

Although the rehabilitative approach towards prison policy fell out of favor by the mid 1970s, this did not mark the end of solitary confinement. Instead, solitary confinement continued under different justifications. In the latter half of the 20th century, the issue of crime dominated the American social and political landscape. From the mid-1980s through 1994, Americans believed that crime was the most urgent issue the government should address, and politicians responded with an unwavering commitment to be "tough on crime."[19] As politicians fought to clean up the streets, the number of incarcerated individuals rose sharply. In conjunction with this rise in the general prison population, unrest within prisons also rose, with attempted escapes, group disturbances, assaults by inmates on other inmates, and assaults by inmates on staff increasing throughout the country.[20] As violence and disorder mounted, prison administrators looked for ways to regain control over inmates. Prison security became the number one priority, and the old emphasis on rehabilitation all but disappeared. In order to achieve that stability, wardens turned to solitary confinement. They believed that isolating chronically disruptive prisoners from the general population for long periods of time would help improve institutional security.

During the push for rehabilitation in the 1970s, prisoners stayed in solitary confinement for relatively short periods of time, just long enough to create a *tabula rasa* before immediately being returned to the general prison population for rehabilitative programming.[21] In the 1980s, however, prisoners remained in isolation for longer and longer periods of time. In order to house these prisoners, administrators built special units and facilities. These spaces became known as supermax (super-maximum security) prisons, highly restrictive housing units that isolate inmates from the general prisoner population through the extensive use of solitary confinement.[22] Solitary confinement once again gained a newly defined role, and the modern supermax prison was born. These prisons exercise extreme forms of control well beyond those exercised on the general prison

19 Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (New York: New York University Press, 2006): 36.

20 Shalev, *Supermax,* 20.

21 Ibid., 19.

22 Ibid., 3.
Since this definition for supermax prison includes both units within prisons and separate facilities, I will use the term "supermax prisons" to broadly encompass both types.

population. They house the "worst of the worst," the "mad" and the "bad."[23] According to Vanderbilt University Professor Lisa Guenther, "[Solitary confinement's] implicit, and often explicit, aim is to control, contain, and incapacitate prisoners. Gone is the rhetoric of rehabilitation or spiritual redemption."[24] Essentially, a rehabilitative approach to punishment transformed into a punishment built for deterrence and incapacitation, and this approach continues to this day.

C. *The Modern Supermax Prison: A New Philosophy Put in Practice*

Modern supermax prisons not only have different goals associated with solitary confinement, but they also utilize different methods and create different environments to help achieve those goals. In order to critique society's current justifications for solitary confinement, we need to understand the conditions that inmates face within these facilities, because these conditions have long-lasting effects on the inmates themselves. Before examining these negative effects in more detail, I will first explain the daily routine for inmates in supermax prisons and describe the physical architecture that surrounds these inmates.

The ritual for prisoners in solitary confinement stays constant day in and day out. Prisoners remain isolated in their cells for 22 to 23.5 hours a day, and they spend the remaining time in "dog pens," outdoor exercise yards with concrete walls and almost no view of the sky. General practice restricts inmates' face-to-face contact with other individuals, and prisoners often use intercoms to communicate, even with guards. Some prisoners can earn the right to books and television shows with good behavior, but the prison still severely limits access to these materials. Besides having their wrists chained and unchained through the cuff-ports in their cells and routine strip searches by officers, prisoners experience no physical contact while in solitary confinement.[25] In a system determined to isolate "dangerous" individuals for longer and longer periods of time, this mundane routine can continue for years on end.

Supermax prisoners also live in very ascetic physical conditions. Professor Guenther provides a comprehensive description of the typical supermax cell in her book:

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23 Lora A. Rhodes, *Total Confinement: Madness and Reason in the Maximum Security Prison* (Berkeley: University of California Press, 2004): 4.

24 Lisa Guenther, *Solitary Confinement: Social Death and its Alternatives,* (Minneapolis: University of Minnesota Press, 2013): 161.

25 Ibid., 164-165.

> "A typical cell ranges in size from six feet by eight feet to eight feet by twelve feet… Cells are usually painted white or pale grey to reduce visual stimulus. Furnishings consist of a bed, a table and seat, a toilet, and a sink – all bolted in place. The door … obstructs the prisoner's view to the outside while allowing natural light to filter through along with the sounds and smells of adjourning cells… There is a slot in the door, called a cuffport… through which food trays are exchanged and the prisoners' hands cuffed or uncuffed for removal from the cell. There are either no windows at all or just a small, high window that lets in light but does not afford any view of the outside. Fluorescent lights are kept on twenty-four hours a day and surveillance cameras are continuously running."[26]

The conditions that they experience clearly reflect the supermax prison's emphasis on complete control over an inmate. In the next section, I will introduce and analyze different empirical studies of prisoners in supermax prisons, studies that will illustrate how solitary confinement fails to deter and incapacitate, in large part due to the methods used and the environments built for those who live there.

III. FALLING SHORT OF THE MARK: EVALUATING SOLITARY CONFINEMENT TODAY

As illustrated above, solitary confinement today strives to both deter and incapacitate those we consider to be the most violent and most dangerous offenders. We place them in uncomfortable cells with minimal contact with the outside world. This procedure is meant to deter other prisoners and the general population from misbehaving, while also incapacitating particularly unstable individuals from committing harmful acts while incarcerated. Architects designed these institutions, and prison administrators designed these practices in order to successfully control the "worst of the worst." While the intentions appear practical, various academic studies have shown that supermax prisons do not actually accomplish their goals. In fact, solitary confinement results in behaviors that harm all those involved. It harms inmates psychologically, it does little to encourage positive behavior in supermax prisons or general prisoner population prisons, and it has negative impacts on society, as a whole.

Solitary confinement clearly hurts the individuals that experience it. The negative psychological effects of solitary confinement on prisoners have been well documented for centuries. In 1847, Dickens held "this slow and daily tampering with the mysteries of the brain, to be measurably worse than any torture of

26 Ibid., 164.

the body."[27] Confined in solitary for over 26 years, currently-incarcerated inmate William Blake echoes this sentiment, writing, "I've experienced times so difficult and felt boredom and loneliness to such a degree that it seemed to be a physical thing inside so thick it felt like it was choking me, trying to squeeze the sanity from my mind, the spirit from my soul, and the life from my body."[28] Scientific studies support the claims presented in these anecdotes. According to psychiatrist Terry Kupers, "Every prisoner placed in an environment as stressful as a Supermax unit, whether especially prone to mental breakdown or seemingly very sane, eventually begins to lose touch with reality and exhibit some signs and symptoms of psychiatric decomposition."[29] In Dr. Craig Haney's study of prisoners at the Pelican Bay supermax facility in California, over half of the tested inmates suffered nightmares, more than 70 percent worried about mental breakdowns, and over 77 percent were diagnosed with chronic depression.[30] In a more recent study published by Dr. Stuart Grassian, Grassian reports that inmates in solitary confinement live in conditions "toxic to mental functioning." For mentally weak inmates, this can lead to "a confusional psychosis with intense agitation, fearfulness, and disorganization." Moreover, he discovers that even the most mentally stable individuals suffer from psychological damage after years in solitary confinement.[31] Empirical research thus demonstrates that solitary confinement significantly harms the mental functioning of incarcerated individuals.

Some might argue that these negative psychological effects would be worthwhile if solitary confinement successfully deterred future crime and incapacitated dangerous inmates. One prison administrator justifies solitary confinement as follows. "These are those people in prison who would prey on people because of their violence, and you have to have some place where you can put them that at least offers a modicum of safety to the other guys you leave out there [in general population prisons], and largely that is going to be a [supermax] environment."[32] However, evidence also indicates that solitary confinement fails to

27 Dickens, *American Notes,* 147, quoted in Shalev, *Supermax,* 188.

28 Blake, "Voices from Solitary."

29 Terry A. Kupers, "Declaration in the case of *Coleman v. Wilson,*" (1993): 56, quoted in Shalev, *Supermax,* 189.

30 Craig Haney, "Mental Health Issues in Long-Term Solitary and "Supermax Confinement," *Crime and Delinquency* 49, no. 1 (2003), quoted in Shalev, *Supermax,* 189.

31 Stuart Grassian, "Psychiatric Effects of Solitary Confinement," *Washington University Journal of Law & Policy* 22, (2006): 354.

32 Shalev, *Supermax,* 47.

make prisons safer. Often, supermax prisons have high levels of violence, and solitary confinement has not decreased institutional violence in non-supermax prisons.

Supermax prisons themselves have always been more susceptible to violence. Supporters of supermax units assert that the violent atmosphere stems from a more heavily concentrated population of dangerous inmates. However, unequal treatment and violence from guards have been big drivers of violence as well. Within supermax facilities, there are many examples of violence by staff members against inmates. Guards have been known to rape, beat, and brutally punish inmates held in solitary confinement.[33] The increased violence can be attributed to what Shalev calls the "ecology of cruelty" in supermax prisons.[34] The punitive environment that surrounds the correctional officers affects not only the inmates, but also the guards. Supermax rules and regulations support an institution where violent punishment and repression become standard operating procedures.[35] Moreover, although supermax facilities are often perceived as housing the most violent criminals, the majority of prisoners end up in solitary confinement simply because they have mental illnesses that keep them from understanding prison rules.[36] Many others are classified as "nuisance prisoners," individuals that break minor rules, file grievances against the prison, or annoy prison staff.[37] In Arizona, for example, 35 percent of inmates in maximum-security units were not even convicted of violent offenses.[38] Despite this, the "ecology of cruelty" has a damaging influence on otherwise nonviolent prisoners. A study cited in a Vera Institute of Justice report found that "57 percent of serious assaults on staff occurred in a control unit that housed less than 10 percent of the facility's prisoners."[39] Taken together, both types of violence illustrate the markedly violent nature of solitary confinement facilities.

Supermax prisons also aim to improve institutional security in non-supermax prisons. Separating the

33 Ibid., 171.

34 Ibid., 175.

35 Ibid., 175.

36 "The Dangerous Overuse of Solitary Confinement in the United States." *American Civil Liberties Union,* (2014), 8.

37 Ibid.

38 Shira E. Gordon, "Solitary Confinement, Public Safety, and Recidivism," *University of Michigan Journal of Law Reform*, 47, no. 2 (2014): 514.

39 Turner, "Written Testimony," 6.

"worst" criminals from the general prison population supposedly deters "better" inmates from misbehaving, because they will want to avoid suffering under supermax conditions. If this deterrence effect existed, one would expect to see decreasing incidents of violence in general population prisons as supermax facilities emerged. However, studies have not illustrated this trend. Professor Chad S. Briggs examined the effects that opening a supermax facility had on institutional prison violence in Arizona, Illinois, Minnesota, and Utah. In three of the states, he discovered that opening a supermax facility had no effect on institutional violence, and in one of the states, opening a supermax prison actually increased assaults against prison staff.[40] He concludes that strong preliminary evidence suggests that supermax prisons cannot be justified in terms of increasing institutional security.[41] Studies conducted in California also support these results, with research showing that overall prison violence has been steadily increasing since the opening of the supermax prison facility, Pelican Bay.[42] Based on these empirical studies, using solitary confinement does not prevent violence in supermax facilities or in the overall prison system.

Advocates of solitary confinement also contend that supermax prisons deter future crime from occurring. This assertion holds true as long as the offender remains in prison, but more than 93 percent of prisoners are eventually released.[43] Oftentimes, supermax prisons release inmates from solitary confinement directly back into the community. The immense control that supermax prisons impose leaves lasting effects on inmates, effects that have negative repercussions for both the inmate and for society. Professor Shalev writes "[Prisoners in solitary confinement] become accustomed to solitude, are completely dependent on the structures and routines of the institutions, and are ill equipped to function outside that environment."[44] The psychological impacts detailed above give prisoners who have experienced solitary confinement emotional baggage that they carry with them long after their release. Some prisoners even want to return to prison, because

40 Chad S. Briggs et al, "The Effects of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence, *Criminology* (Nov. 2003): 1367.

41 Ibid., 1370.

42 Shalev, *Supermax,* 209.

43 Terry A. Kupers, "What to do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement," *Criminal Justice and Behavior* (Aug. 2008): 1005.

44 Shalev, *Supermax,* 219.

reintegrating into society poses such a difficult problem.[45] The effects of long-term solitary confinement thus manifest themselves in negative behaviors outside of prison. Supermax prisons have been labeled "breeding grounds of violent recidivism," because many leave the prisons and succumb to bouts of overwhelming rage and violence.[46] Recidivism rates among prisoners released from solitary confinement are markedly higher than rates among those released from the general prisoner population, which contradicts the claim that solitary confinement deters future crime.[47] For instance, a study conducted in Connecticut found that 92 percent of prisoners held in solitary confinement were rearrested within three years. In contrast, among prisoners who had not been held in solitary confinement, only 66 percent were rearrested.[48] David Lovell et al. utilized a retrospective matched control design to match supermax prisoners with non-supermax prisoners along mental health and eight recidivism predictors in Washington State. Lovell et al. found that prisoners released from supermax facilities directly into the community recidivated at significantly higher rates than their non-supermax matches.[49] While some might argue that higher rates of recidivism naturally follow since isolated individuals are the "worst of the worst," the matched design result suggests that the higher recidivism rates stems from time in solitary confinement, not from differences in prisoner characteristics. Moreover, segregation reduction projects have actually been able to decrease recidivism among this population.[50] Therefore, higher recidivism rates can mainly be attributed to the detrimental impacts of solitary confinement.

The analysis above illustrates how solitary confinement fails to meet the outlined utilitarian goals of punishment. Instead of improving safety and security, solitary confinement hurts inmates, prison security, and society. While solitary does not meet these institutional utilitarian goals, these goals are ideals that our punishment system should continue to strive for. So, do alternatives to solitary confinement exist that can better rehabilitate, deter, and incapacitate? In the final section, I will explore various successful reforms around the

45 Ibid., 200.

46 Ibid., 219.

47 Ibid., 220 and Turner, "Written Testimony," 2.

48 Legislative Program Review and Investigations Committee, "Recidivism in Connecticut," 2001.

49 David Lovell, L. Clark Johnson, and Kevin C. Cain, "Recidivism of Supermax Prisoners in Washington State," *Crime & Delinquency* 53, no. 4 (Oct. 2007): 644-645.

50 See Section IV of this article.

United States and outline a path forward.

IV. THE SEARCH FOR AN EFFECTIVE PUNISHMENT: ALTERNATIVES TO SOLITARY CONFINEMENT

Solitary confinement as it exists today may be an ineffective way to deter, incapacitate, or rehabilitate violent offenders, but I would also like to note that historical failures in segregation policy do not necessarily mean that the entire segregation system should be abandoned all at once. Some individuals still benefit from time in solitary confinement. For some, segregation provides protective custody. For others, it prevents them from fighting with other inmates. However, prisons need to make sure they send the right individuals to solitary, and they need to alter the more inhumane and damaging aspects of the practice. Many policymakers and organizations have already taken steps to do just that, implementing projects to reduce the use of solitary confinement while still guaranteeing institutional and societal safety. Below, I will introduce the positive effects that reforms in several states have had, and I will synthesize the approaches taken into a more general policy approach towards segregation reduction. I will end with a discussion about the feasibility of implementing such reforms amidst the circumstances of today.

Segregation reduction projects have begun to spring up across the country, from Mississippi to Washington State. Most of these projects are ongoing, but I have included some of the major findings from state reforms that have already generated significant results.

A. *Mississippi*

In 2007, Mississippi created new, more stringent criteria for sending inmates to solitary confinement. Inmates would only be moved to solitary confinement if they committed serious infractions or tried to escape from prison. The state also created a step-down program to help mentally ill inmates in solitary confinement earn their way out of segregation and receive mental health treatment.[51] By more selectively using solitary confinement, the segregated prisoner population decreased from 1,000 to 150. More importantly, prisoner-on-prisoner and prisoner-on-staff violence decreased by 70 percent, and the use of force by correc-

51 Angela Browne, Alissa Cambier, and Suzanne Agha, "Prisons Within Prisons; The Use of Segregation in the United States," *Federal Sentencing Reporter* 24, no. 1 (2011): 48.

tional officers dropped significantly.[52]

B. *Maine*

Maine instituted many reforms between 2011 and 2012 under Corrections Commissioner Joseph Ponte. The Maine Department of Corrections improved conditions within supermax prisons, began providing prisoners with more mental health care and services, and improved programming for inmates in solitary.[53] Inmates received access to radios, televisions, and reading materials, and had the opportunity to interact with other prisoners through group recreation sessions.[54] Maine prisons also found alternative forms of punishment that helped reduce the number of prisoners sent to solitary confinement. Instead of using solitary confinement as punishment for minor infractions, prison wardens revoked privileges or confined unruly inmates to a cell in the general population area.[55] After these changes, the number of violent incidents has remained about the same, and by some metrics, has even decreased.[56] This illustrates that prisons can achieve the same levels of institutional safety without the negative psychological and societal effects caused by solitary confinement.

C. *Washington State*

Based on recommendations from the Vera Institute of Justice, Washington implemented reforms in 2011 to provide special resources to vulnerable populations in solitary confinement. It also offered more group programming for segregated prisoners.[57] Washington has reduced segregation by 30 percent statewide and has seen a decline in "use of force" incidents by correctional officers.[58]

D. *Recommendations for Other States*

Since reform efforts in many states up to this point have had positive results, similar reforms should be implemented in states throughout the country to steer the criminal justice system towards its penological

52 Turner, "Written Testimony," 3.

53 Heiden, "Solitary Confinement in Maine," 12.

54 Ibid., 13.

55 Ibid., 13.

56 Ibid., 30.

57 Turner, "Written Testimony," 11.

58 Ibid., 11.

goals. As illustrated above, reforms have achieved levels of safety that the old system of solitary confinement could not, and without the negative psychological effects. The aforementioned states all shared common policy approaches. They devised new criteria for sending prisoners to solitary confinement that has decreased the size of the segregated prisoner population. They worked to improve conditions for those in solitary confinement by providing mental health services, group programming opportunities, or more access to audio-visual materials, and they developed programs to help offenders earn their way out of solitary confinement. Therefore, while each state has different needs that may result in slightly different reforms, the general approach to solitary confinement reform can be very similar across states. Going forward, I recommend what Dr. Angela Browne of the Vera Institute calls, "unpacking segregation."[59] To "unpack segregation," we need to closely analyze the current composition of inmates in solitary confinement as well as the existing policies. Some prisoners in solitary confinement have mental health issues. Others live in segregated units as a form of protection. Some committed minor infractions, while some have committed heinous felonies. Each group lives in solitary confinement, but each group has different needs. Unpacking segregation means states must first identify what types of individuals make up the segregated population. After classifying them, states can create policies to assist the different groups.

Based on the changes that have already taken place, I would suggest the following general reforms:

1. Work to change the culture within prisons. Train the staff to be more aware of the types of people living in solitary confinement. By tailoring treatment to each group in segregation, violence should decrease.
2. Devise alternative punishments for less serious violations by prisoners in the general population. Revoke privileges or temporarily isolate them rather than sentence them to long-term solitary confinement. This will reduce the segregated population and ensure that only people who need solitary confinement will be sent.
3. Create special facilities for vulnerable populations. Many individuals in prison suffer from mental health problems or are more vulnerable to social victimization and bodily harm. Instead of sending them to solitary confinement, send them to special facilities with tailored services.

59 Angela Browne in discussion with the author, May 12, 2014.

4. Provide more programming for prisoners in segregation. Most inmates in solitary confinement return to society. Better programming, such as GED education and job training, will provide prisoners with the social and practical skills they need after they leave solitary confinement. This will hopefully also reduce recidivism rates.
5. Create clear ways for prisoners in solitary confinement to transition back to the general prison population. Having a defined path gives prisoners hope and purpose while in segregation. It also gives them the opportunity to earn their way out of solitary confinement through good behavior, behavior that will be necessary after release.
6. Improve conditions in the solitary confinement units. Conditions in solitary confinement have been shown to have very negative effects on prisoner psychology and on prison safety. More natural light, bigger cells, and access to books and radios help keep inmates sane, which helps keep prisons safe.

Of course, instituting wide-ranging change may not be easy. Solitary confinement has been common practice for decades now, and many corrections commissioners do not like deviating from the status quo. Solitary confinement reforms can be justified, however, because solitary confinement simply does not meet the goals it intends to meet. Prisoners are not cured, prisons are not safer, and society is not made better off. For these reforms to catch on, individuals and advocacy groups need to push for change. In most reformist states, change came only after intense advocacy by non-profit groups or leadership changes in the department of corrections. For example, in Mississippi, the ACLU played a crucial part in reform, bringing lawsuits and exposing the harms of solitary confinement. In Maine, a progressive leader like Joseph Ponte saw the ills in the system and dedicated himself to fighting the norm. Social pressure greatly influenced the movement towards segregation reduction, and this pressure will need to continue in order encourage more reforms. Luckily, the movement against solitary confinement has been gaining momentum. Solitary confinement is becoming an increasingly pressing topic for academics, non-profits, and the media. As these groups take hold of the issue, more and more Americans will be exposed to the problems with solitary confinement, and they will hopefully begin to support reforms as well.

V. CONCLUSION

Solitary confinement has been a prominent feature of the American penal system for many centuries now. Over time, the discourse justifying its use has often changed, shifting from rehabilitation to deterrence, incapacitation, and control. Regardless of the philosophies behind solitary confinement, it has always proven to be an ineffective practice, unable to meet the goals it intends to achieve. Solitary confinement harms prisoners psychologically, does not improve prison security, and creates inmates that hurt society after their release. When the results of a punishment conflict with the purposes of the punishment, reforms should be pursued.

Many states today recognize this and have begun looking for ways to reduce their use of solitary confinement. The reforms that have already taken place show that reducing segregation populations and improving conditions in segregation units can help prisons better achieve the aims of punishment. As projects proceed and positive results continue to surface, even Americans that want nothing to do with the supposed "worst of the worst" will begin to see the failures and inefficiencies of the old system of solitary confinement. The movement against solitary confinement will only continue to grow, and a punishment that for centuries has been worse than death will finally give way to more effective alternatives.

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Constitutionality of DACA: A Survey of Crane v. Napolitano

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Abstract

Immigration has been one of the most divisive issues in the United States and President Obama's immigration reform plans face continued challenges. Some argue that the prosecutorial discretions currently conducted by our government's Executive branch to implement socially just policies for immigration are an overreach of power and unconstitutional. The case of Crane v. Napolitano is used in this paper to consider this question of constitutionality in more detail. Filed in Summer 2012, Crane v. Napolitano is a case that has far-reaching consequences. Legally, it raises important questions and restrictions of prosecutorial discretion. The presidential directives had been challenged for (i) contradicting the plain language of the INA ('shall' be inspected, detained or directed), and (ii) constituting impermissible legislation. Neither charge is well-founded. Moreover, I believe the Court has a responsibility to view the act in question within its historical context. This case brings attention to a problem in our broken immigration system, in which the influx of immigrants – both documented and undocumented – is overwhelming us and our conceptions of the minority. We are in dire need of relief, not just for our struggling undocumented residents, but for our budget and overworked police resources. This, in turn, questions us about the sustainability of the democratic system that we, proud Americans, so revere and abide by. I believe President Obama's most recent Executive Action points properly follow its constitutional duty to "take care that the Laws be faithfully executed" not in accordance to the immobilized politics of our Congress today but to the American democratic ideals of our past and future.

Immigration has been one of the most divisive issues in the United States and President Obama's immigration reform plans face continued challenges. Some argue that the current use of prosecutorial discretion by our government's Executive branch to implement policies that accommodate a growing population of undocumented residents are an overreach of power and unconstitutional. States have sued the Obama administration, and several of these suits have come before the court. In all of the cases brought to the federal courts regarding the constitutionality of Deferred Action for Childhood Arrivals (DACA) and similar executive actions, judges around the nation have tiptoed their way around the question of constitutionality, instead, opting to rule on other relevant procedural or jurisdictional technicalities. Most recently, Judge Andrew Hanen of the US District Court for the Southern District of Texas enjoined executive actions on immigration, ruling on procedurural rather than the constitutional merits of the case. In this article, I use another federal court case, *Crane v. Napolitano,* to consider the constitutionality of DACA in more detail, ultimately arguing that despite several pages of discussion on the discretionary implications from the language of the Immigration and Nationality Act, the Supreme Court fails to provide a convincing argument against the use of these directives. Moreover, I argue that it fails to consider the historical and social context in which these directives play a crucial role in the immediate protection of human rights.

Filed in Summer 2012 in a federal court in Dallas, *Crane v. Napolitano* was brought before Judge Reed Charles O'Connor of the US District Court for the Northern District of Texas by several United States Immigration and Customs Enforcement (ICE) agents led by Christopher Crane, the President of the worker's union, against Janet Napolitano, then Secretary of Homeland Security, for handing down an executive order, commonly referred to as DACA, that the plaintiffs claim is unconstitutional. While the case was dismissed based on technical jurisdictional reasons, Judge O'Conner wrote in his order: "the Court finds that Plaintiffs are likely to succeed on the merits of the claim challenging the Directive and Morton Memorandum as contrary to the provisions of the Immigration and Nationality Act."

The relevant sections of the INA provide that immigrants who fulfill certain conditions 'shall' be inspected, detained or deported. Through a series of administrative directives, the President directed that immigrants falling within certain categories—including, most prominently, immigrants who came to the United States as children and have not been involved in any violations of law—should not be inspected, detained or

deported. The presidential directives have been challenged for (i) contradicting the plain language of the INA ('shall' be inspected, detained or deported), and (ii) constituting impermissible legislation. Neither charge is well-founded. Precedence, in the form of previous police discretionary policies-related cases, has allowed the word 'shall' to permit the exercise of well-recognized prosecutorial discretion, and the presidential directives are nothing more than instances of such discretion. Accordingly, the challenges to the directives are unconvincing. I ultimately argue that these executive actions do not violate the articles of the United States Constitution and, more importantly, are necessary policy measures, given the current reality of our immigrant population and the centuries-long history of bias and discrimination towards immigrants perpetuated in this country.

CASE BACKGROUND

In this section, I give a brief overview of the people and departments involved as well as the events leading up to the Complaint submitted.

Defendants. Created in 2002, the United States Department of Homeland Security (DHS) coordinates and unifies National Homeland Security efforts and is charged with, among other things, overseeing citizenship and immigration, preventing human trafficking and terrorism, and safeguarding civil rights and civil liberties. **Janet Napolitano**, principal defendant of this case, was the Secretary of DHS through the end of 2013, until **Jeh Johnson** took her place a couple days before Christmas of 2013.[1] Co-defenders include: **Alejandro Mayorkas**, Director of United States Citizenship and Immigration Services (USCIS) and **John Morton**, Director of ICE.

Plaintiffs. The plaintiffs are ICE law enforcement officers. The lead plaintiff, **Christopher Crane**, is the President of the ICE Agents and Officers Union. As ICE officers, the plaintiffs are authorized by law to arrest aliens for administrative immigration violations or for any criminal offense against the United States, and to execute administrative and criminal arrest warrants.

Issue of Contention. Plaintiffs contend that various executive actions taken by DHS, USCIS, and ICE

1
Department of Homeland Security 2012

have forced officers in a position where they are being asked to take actions that they believe violate federal law and their oaths to uphold and support federal law. These executive actions, by order of date, are known as the "Morton Memorandum," the "Directive," the "Supplemental Guidance," and "DACA."

On June 17, 2011, Defendant Morton issued a **Memorandum** entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (Morton Memorandum). The Morton Memorandum provides ICE personnel "guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities," which includes "the promotion of national security, border security, public safety, and the integrity of the immigration system (Morton 2011)." The Morton Memorandum sets out several factors that ICE officers, agents, and attorneys should consider when determining whether an exercise of prosecutorial discretion may be warranted for a particular alien.

On June 15, 2012, Defendant Napolitano issued a **Directive** entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Directive). The Directive sets forth to what extent DHS should enforce immigration laws "against certain young people who were brought to this country as children and know only this country as home."[2] The Directive instructs ICE officers to refrain from placing certain aliens who are unlawfully present in the United States into removal proceedings. It also directs ICE officers to facilitate granting deferred action to aliens who are unlawfully present in the United States and are already in removal proceedings but not yet subject to a final order of removal. The Directive also instructs USCIS to accept applications to determine whether the individuals who receive deferred action are qualified for work authorization during the period of deferred action. To qualify for deferred action under the Directive, the alien must satisfy the following criteria:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for at least five years preceding the date of [the Directive] and is present in the United States on the date of [the Directive];
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United

2 Napolitano 2012

States;

- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety;
- is not above the age of thirty.

In July 2012, DHS issued the "ERO **Supplemental Guidance**: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," which directs DHS personnel to implement the terms of the Directive. In early August 2012, DHS issued a document entitled "National Standard Operating Procedures (SOP): **Deferred Action for Childhood Arrivals (DACA)** (Form I-821D and Form I-765)," which explains how DHS will process applications for deferred action under the Directive.

The federal law in question is one of the primary statutes for immigration, the INA. The INA was passed by the US Congress in 1952 and has been amended many times since. As of January 4, 2012, there are various sections of the Act that specifically mandate actions of the Officers and Executive office.[3] To name a few:

- "***All*** aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States ***shall*** be inspected by immigration officers;[4]
- "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien ***shall*** be detained for a proceeding"[5];
- "[Secretary of Homeland Security] ***shall have control, direction, and supervision of all employees*** and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; ***issue such instructions;*** and ***perform other acts he deems necessary for carrying out his authority*** under the provisions of this chapter[6] (***emphasis*** added).

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3 8 USC § 1103 2012; 8 USC § 1225 2012

4 8 USC § 1225(a)(3)

5 8 USC § 1225(2)(A)

6 8 USC § 1103(a)(1)(2); 8 USC § 1103(a)(1)(3)

ANALYSIS OF COURT'S STATEMENTS

Plaintiffs assert that the Directive violates Federal law on six accounts: (1) federal statutes requiring the initiation of removals; (2) federal law by conferring a non-statutory form of benefit—deferred action—to more than 1.7 million aliens, rather than a form of relief or benefit that federal law permits on such a large scale; (3) federal law by conferring the legal benefit of employment authorization without any statutory basis and under the false pretense of "prosecutorial discretion"; (4) the constitutional allocation of legislative power to Congress; (5) the Article II, Section 3, constitutional obligation of the executive to take care that the laws are faithfully executed; and (6) the Administrative Procedure Act through conferral of a benefit without regulatory implementation. Among them, the two I will focus on are: (1) the violation of federal statutes requiring the initiation of removals and (5) the violation of the Article II, Section 3, constitutional obligation of the executive to take care that the laws are faithfully executed.[7] In this section, I explore the various nuances of the power of prosecutorial discretion as well as the validity of the argument that the Directive and documents of its kind are violations of federal law, by asking two main questions: (1) Does the content of the Directive violate federal law? and (2) Does prosecutorial discretion have the legal power to implement the content of the Directive?

Does the content of the Directive violate federal law? The Plaintiffs assert that the Memorandum violates federal law because their understanding of the INA requires immigration officers to initiate removal proceedings when they encounter immigrants who do not have definitive proof of their legal status at hand. However, the defendants argue that the wording of the Act does not mandate immigration officers to initiate removal proceedings for all aliens. The Court studied this matter by examining clause 8 USC § 1225(2)(A) –"if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien ***shall*** be detained for a proceeding" – to determine that the INA, indeed, does require officers to detain all undocumented immigrants under any circumstances without discretion.

The key word here is "shall." How restrictive is that verb in this Act? Does it leave the decision to initiate removal proceedings subject to an immigration officer's prosecutorial discretion or not? The Court

7 Crane v Napolitano, 2013

argued in favor of the Plaintiffs on this issue of mandatory action in two ways. The court first claimed that if Congress had not meant it to be mandatory, they would have used the word "may," instead of "shall."[8] The Executive office rejected this reasoning by pointing to two previous cases in which the word "shall" was interpreted in favor of the discretionary definition: (1) *City of Chicago v. Morales* and (2) *Town of Castle Rock, Colorado v. Gonzales*. The Court, then, made their second argument in response by deciding that the INA does indeed require officers to initiate removal proceedings, without flexibility in officer discretion.

(1) *Chicago v. Morales* was a case that evaluated the "shall" verb's mandatory effectiveness in the following Chicago's ordinance: "When a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he ***shall*** order all such persons to disperse and remove themselves from the area."[9] In this case, the Court decided that this was not a mandatory action because the legislative body that drafted the ordinance conceded that "police officers must use some discretion in deciding when and where to enforce city ordinances"

(2) *Colorado v Gonzales* was a case centered around state laws on police responsibility in enforcing restraining orders.[10]Again, the Court did not find this statue to create a mandatory duty for police officers.

Despite the word "shall" in both of these two statutes, the Court found that both were not mandatory by reasoning that interpretation of these acts should rest primarily on the long historical tradition of discretion in policing rather than the exact wordings of the law. In fact, the Court specifically argued that the legislative body would have to be very explicit and specific in their laws to express the rejection of discretion in policing policies and activities. In other words, the intent of the legislation must be "explicit." But the court failed to

8 Lopez v. Davis 2001

9 527 US at 47 n2

10 The relevant section is:
(a) . . . A peace officer shall use every reasonable means to enforce a restraining order.
(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
(I) The restrained person has violated or attempted to violate any provision of a restraining order; and
(II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.
(c) . . . A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry.

provide consistent criteria to judge the level of explicitness. In both of these cases, the Court simply found that neither of the laws had been explicit enough.

Given this understanding of precedence, it would seem necessary to interpret the word "shall" as equally discretionary for the INA statutes in question. First, there has been a history of discretion used in immigration law. To quote the Supreme Court majority in *Arizona v. United States* (2012)*:*

> A principal feature of the removal system is the broad discretion exercised by immigration offi cials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. Discretion in the enforcement of immigration law embraces immediate human concerns… Some discretionary decisions [also] involve policy choices that bear on this Nation's international relations… The dynamic nature of relations with other countries requires the Executive branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.[11]

Based on this precedent, it should be clear that not only is there a good history and tradition of discretionary work in immigration law by officials, but there is also a good need for this flexibility on the Executive branch's part – for humanitarian and international relations reasons. Second, because there are no clear criteria for assessing the "explicit" nature of "shall" statues, I do not find there to be convincing evidence that Congress created these laws with any specific intention of mandatory officer initiation that does not exist in immigration. So, given the history of discretion in immigration law, until the Court can provide a reason for interpreting "shall" differently in this specific case of *Crane v. Napolitano,* it has a responsibility to follow precedence and apply the flexible reading of "shall" towards ICE officers, as well.

Another way to look at this is by arguing that the purpose of the Memorandum, Directive, and their sibling orders are for the prioritization of deportation efforts. The DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 of them each year. Under these circumstances, through the Directive, the Executive office is prioritizing the removal of immigrants who present threats to the United States, instead of spending valuable resources on deporting those who are otherwise law-abiding and beneficial to our economy and society. The

11 (Arizona v US, 132 S Ct. at 2499)

branch is neither establishing citizenship benefits for these aliens, nor is it providing them with the means to vote. The branch is conducting a system of triage in which those that pose the greatest risk of harming United States society get attention and deportation trials first. And this is a responsibility and right of the immigration agency, granted by the various immigration statutes.[12] The Court agreed: "immigration law is an area of law where ***DHS and ICE have traditionally had discretion*** to prioritize their enforcement efforts ***to promote the efficient use of their limited financial resources*** and further their goal of ensuring public safety in the United States."[13] So, to this first question, I find the Court's interpretation of the law inconsistent and assert that the answer is "no; the content of the Directive does NOT violate federal law."

Does prosecutorial discretion have the legal and constitutional power to implement the content of the Directive? So, now the question turns from the constitutionality of the content of the material to the constitutionality of the actor and methods by which this content is realized. The plaintiffs argue that the Directive violates federal law under the false pretense of "Prosecutorial Discretion." According to the plaintiffs, prosecutorial discretion is the exercise of discretion not to remove, not the conferral of a non-statutory benefit, deferred action, to more than 11.7 million aliens, which they argue is too large a scale for such a benefit.[14] However, I argue that these are misled accusations and that creating and enforcing policies like the DACA program are actually part of the job description of the Executive branch, especially with our current huge influx of undocumented immigrants. In other words, DACA is not only legal and appropriate but also, in my understanding, is necessary.

In 2001, a pair of senators (one Republican, one Democrat) introduced to the floor the DREAM Act, which has struggled to pass through both the House and Congress, even with the most recent attempt in Spring 2014. The bill seeks to provide conditional permanent residency to certain immigrants who arrived in the U.S. as minors, have lived in the country continuously for at least five years, are of good moral character, and graduated from U.S. high schools. Immigrants who complete two years in the military or two years at a four-year institution of higher learning would be granted conditional permanent residency, or "temporary

12 (Thompson 2014)

13 (Crane v Napolitano, 2013)

14 (Christopher L. Crane et al., v Janet Napolitano, in her official capacity as Secretary of Homeland Security, et al., 2013)

residency,"for a six-year period. Within the six-year period, they may qualify for permanent residency if they have "acquired a degree from an institution of higher education in the United States or [have] completed at least 2 years, in good standing, in a program for a bachelor's degree or higher degree in the United States" or have "served in the armed services for at least 2 years and, if discharged, [have] received an honorable discharge."[15] In other words, the DREAM Act bill would provide immigrants with a path to legal residence in the United States.

Given Article I, Section 3 of the Constitution, "all legislative Powers herein shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," the defendants have taken to arguing that the DACA Directive is an Executive attempt to pass the DREAM Act by means of executive prosecutorial discretion, bypassing the rejections from the House and Congress. The court agreed:

> Congress unquestionably has the ability to legislate in the area of immigration law with regard to the removal of aliens… [Thus,] congress has the ability to eliminate DHS' discretion with respect to when to initiate removal proceedings against an alien, and DHS cannot implement measures that are incompatible with Congressional intent.[16]

The Court argues that DHS' prosecutorial discretion power exists only post-initiation of deportation hearings and that this decision does not limit their discretion at later stages of the removal process.

However, as we touched on before, the Administration – namely, the Attorney General – has utilized prosecutorial discretion throughout history in criminal law and immigration law. The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws. They have this latitude because statute designates them the President's delegates to help discharge his constitutional responsibility to "take Care that the Laws be faithfully executed."[17] In *Heckler v Chaney* (1985), a case on administrative law, the Court recognized that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive branch not to indict – a decision which has long been regarded as the special province of the Executive branch, inasmuch as it is the Executive who is

15 (National Immigration Law Center 2014)

16 (Christopher L. Crane et al., v Janet Napolitano, in her official capacity as Secretary of Homeland Security, et al., 2013)

17 (United States v Armstrong 1996)

charged by the Constitution to "take Care that the Laws be faithfully executed. "[18] The Court fails to consider the unique position we are in right now with an overwhelming number of other legal and social considerations that ultimately force the Executive's hand to use their discretion to actively protect human rights in our country.

ANALYSIS OF OTHER LEGAL AND SOCIAL CONSIDERATIONS

One aspect of many social justice related cases that has not been brought up in this case is the requirement for strict scrutiny under an Equal Protections claim. This is probably due to the fact that undocumented immigrants are not covered by our Bill of Rights because they are not legal citizens or permanent residents of the United States. However, it is important to emphasize that these undocumented immigrants are a crucial part of our economy and society, many of them unwitting children, and for all intents and purposes, are law-abiding residents of our country. While they may not be protected under the Fourteenth Amendment, the court should consider whether a similar approach to considering this case might be appropriate. In *Schuette v. BAMN* (2012), the dissent authored by Justice Sotomayor, joined by Justice Ginsburg, emphasizes the importance of history in understanding the full picture of the case at hand, to understand both the intent of the legislation considered and its the impact. The intent of the INA is hard to parse out, given the many decades of revisions that have gone into it. But it is undeniable that the issues faced by undocumented immigrants expose the ills of an outdated immigration system that carries the remnants of institutionalized discrimination against immigrants evident throughout our nation's history. Both Democrats and Republicans have taken aims at reforming the immigration policies in place, realizing that it has failed to keep up with the demands of globalized markets and war. Particularly relevant to *Crane v. Napolitano,* Sotomayor wrote, "We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups". She continues, "Yet to know the history of Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process."[19] These statements

18 (Heckler v Chaney 1985)

19 (Schuette, Attorney General of Michigan v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN) et al. 2012)

are even more prominent and crucial when considering that of the over 41 million immigrants that live in the United States, nearly a third of them are noncitizens who are not protected or represented in our legislative government.

Following Sotomayor and Ginsburg's lead, then, the Court should consider our nation's immigration history and its influence on why many of our undocumented immigrants and undocumented and powerless today. In 1882, the federal government created its first explicit discriminatory law that prohibited entry of a specific ethnic working group on the premise that it endangered "the good order of certain localities." The Chinese Exclusion Act targeted Chinese "skilled and unskilled laborers" from entering the country for ten years under penalty of imprisonment and deportation. The Act also affected Asians who had already settled in the United States; any Chinese immigrant who left the United States had to obtain certifications for reentry, while being excluded from the path to citizenship, permanently alienating them from this country even as life-long residents.[20] When the ten-year period was over, nativist culture hadn't died down (and arguably, still lives on in the 21st century) and the Act was renewed in 1892. It was not until 1943 that the Act was reconsidered and somewhat rejected. By then, the Immigration Act of 1924 sought to establish a distinct American identity by favoring native-born Americans over Jews, Southern Europeans, and Eastern Europeans in order to "maintain the racial preponderance of the basic strain on our people and thereby to stabilize the ethnic composition of the population."[21]

This history of racially discriminatory immigration policies is the context within which we should be learning and understanding the plight of undocumented immigrants. Their experiences speak of social injustices in the form of poverty and exploitation in the workplace without a form of relief, family separation impacting both U.S. and non-U.S. citizen children, and the inestimable toll that stigma and fear of deportation have on their mental well-being. By not caring about these issues and consequences, we abandon our nation's core humanitarian ideals and democratic values.

The undocumented population's experience with poverty in America takes the innate problems in our nation's social support system that plague our own citizens and worsens it with complex legal issues that

20 (Chinese Exclusion Act 1882)

21 (Grant 1933)

enhance the limitations and prohibits undocumented workers from finding any form of relief. According to the Career Equity Resources Center[22], the average income of undocumented families is 40% lower than that of either native-born families or of legal immigrant families and nearly 40% of undocumented children live below the federal poverty level, compared with 17% of native born children.[23] This can be attributed to the low-paying jobs they hold and to their susceptibility to being paid below minimum wage. In 2008, undocumented immigrants made up 25% of farmworkers,17% of construction workers, and are likely to hold low-skilled jobs[24] such as cleaning services.[25]

These numbers compounded by nativist biases spur myths about undocumented immigrants draining resources meant for citizens and taking advantage of free social services. However, studies reveal that this simply isn't true. The status of being undocumented brings unrelenting fear of deportation and detention into these families, which causes them to stay in the shadows and avoid many public resources.[26] In an open letter to President Obama, a student related that his mother did not report the burglary of their home to the police out of fear of deportation.[27] Undocumented immigrants, while ineligible for almost all federal benefits, are eligible for emergency Medicaid which covers treatment for a medical emergency.[28] However, undocumented immigrants do not utilize emergency medical treatment because they are plagued by the fear of being questioned on their immigration status.[29]

Meanwhile, they are boosting the economy with much-needed contributions to the labor force, state and local taxes, and Social Security and Medicare funds. They work in low-paying occupations unappealing to U.S. citizens. In 2007, they contributed $11.2 billion to Social Security Trust Fund and $2.6 billion to Medi-

22 (Career Equity Resources Center 2010)

23 (Gonzales 2009)

24 Cohn and Passel 2009

25 Oakford 2013

26 (Bohrman and Murakawa 2005)

27 (Hong 2013)

28 (Personal Responsibility and Work Opportunity Act of 1996)

29 (Dozier 1992)

care.[30] Households headed by undocumented immigrants paid $11.2 billion in state and local taxes,[31] and their contributions are projected to increase if granted legal status. Legalization of undocumented immigrants will result in an increase in net personal income of around $33 billion dollars, which will generate almost $5.4 billion in additional net tax revenue – all in just the first three years following legalization.[32] Thus, a path to an immigration status for undocumented workers will have greater long-term fiscal impact on society, as a whole. Moreover, the human capital theory and the investment concept of education maintain that investing in education generally increases the individual's' lifetime of earnings and makes them more productive members of the labor force, which itself translates into higher levels of output, income, and economic return at the local, state, and national levels.[33] Given the increasing debt and financial situation of the United States, the impact of the INA is not ideal and the impact of the Directive, as discussed earlier, can reduce the costs of evicting these workers while pulling from the resources they provide us.

Society attempts to give undocumented students some reprieve from the issues they face because they are usually not part of the decision-making process involved in coming to the United States. On the other hand, society has shown less understanding for parents of undocumented children. The statement "You don't punish children for what their parents did"[34] is a familiar argument in support of undocumented students but not of their parents. This split in support results in policies that separate families affecting both undocumented and U.S. citizen children. An estimated 200,000 parents of U.S. citizen children were deported between 2011 and 2012, and at least 5,100 of these children were put into foster care in 2011.[35] What is perhaps more tragic is the fact that the Immigration and Customs Enforcement (ICE) does not collect data on what becomes of the children in these cases. When these children fall off the grid, they presumably stay within our borders – what

30 (Lantigua 2011) The estimate came from wages reported by employers that do not match up with real names and numbers in the Social Security Administration system (Lantigua, 2011).

31 (Center for American Progress 2013)

32 (Hinojosa-Ojeda 2013)

33 (Paulsen 2001)

34 (Condon, 2010; Starr, 2013)

35 (Center for American Progress 2013)

happens to them, whether we like it or not, will come to affect us in the future as they grow up. Whether they find a family, gain an education, and ultimately contribute to our society is not only a human rights concern but one with political, educational, health, and economic impact.

So, who is representing the undocumented in a nation that fights for,arguably, only some of the documented? There is a need for a solution to this question, whether it is temporary or long-lasting. For long-lasting solutions, perhaps this raging globalization and immigration situation may force us to consider the definitions of citizenship and residency, and the value of keeping those definitions relevant to our modern global society today. Or perhaps the idea of creating political representatives on behalf of the missing voices in our government should be actively pursued and executed so that laws made do acknowledge a hefty portion of our population that has no interest in leaving. But until some action takes place within Congress to acknowledge their discriminatory past and present and its irresponsibility to over 11 million of its residents, someone else needs to do that job, at least, temporarily. That responsibility must lie with the Executive, and the Court must acknowledge its necessity and core values as those in line with the history and purpose of the Constitution.

In the creation of our United States government, Alexander Hamilton reflected on the tripartite system, enlisting the Court with the responsibility of "judgment," the Legislative with the "purse," and the Executive with the "sword of the community."[36] Tasked with implementing the laws passed by Congress, the Executive branch would do well to realize that it does not just consist of the "sword of the community" – it also consists of the hand, the arm, the heart, and the soul of the entity holding that sword. The EExecutive branch's role is not to strike down every man, woman, and child who dares to disobey legislative laws.

To be clear, this is not to dismantle the three-way balance scheme hatched at the birth of American democracy – the Executive branch should faithfully execute the laws of the land and of the people. I simply believe that discretion comes with that faithful responsibility. The President's faithful execution of the immigration laws is not just limited to bringing enforcement actions against individuals and ultimately deporting them, but also to prioritizing the deportable population in a cost-effective and conscientious manner and providing benefits to deportable non-citizens when they qualify for them. "The immigration agency is charged

36 (Hamilton 1788)

with utilizing the funds appropriated by Congress to enforce the immigration laws against individuals who represent a *high priority* for removal, and DACA can be justified as an effort to enforce congressionally mandated priorities."[37] Obama and his office are not waiving deportation for people left and right without criteria or because of personal affiliation for these immigrants. In fact, the Obama Administration has detained and deported noncitizens at record levels.[38] We are no longer dealing with a normal traditional situation of mass migration – we have reached new heights that need immediate and humane reactions.

In fact, President Obama seems to have accepted this position and responsibility, especially in light of the inaction of Congress on this crucial and impatient issue. From his first campaigns in 2008, President Obama has championed fixing the United States' immigration system by working with Congress to pass "comprehensive, common sense immigration reform." The Senate passed a bipartisan, comprehensive immigration bill to fix our system almost a year ago, but House Republicans have refused to bring it to a vote. "In the absence of legislative action, on November 20, 2014, President Obama issued his Immigration Accountability Executive Actions to fix as much of our broken immigration system as possible within the scope of his existing legal authority."[39]Immigrant communities, including both documented and undocumented, stand to benefit from the President's actions, which increase accountability, focus our immigration enforcement, and streamline legal immigration to boost our economy and promote naturalization.

CONCLUDING REMARKS

Crane v. Napolitano is a case that has far-reaching consequences. Legally, it raises important questions and restrictions of prosecutorial discretion. Socially, it brings attention to a problem in our broken immigration system, in which the influx of immigrants – both documented and undocumented – is overwhelming us and our conceptions of the minority. This, in turn, forces us to question the sustainability of the democratic system that we, proud Americans, so revere and abide by.

37 (Wadhia 2013)

38 (Wadhia 2013)

39 (Office of the Press Secretary 2014)

In this paper, I discuss the reasons I disagree with the Court's resolve that the Directive overstepped Executive branch boundaries. The court was right to question the language of the INA to appropriately discern the level of discretionary action appropriate for immigrant removal proceedings. However, the court rejects precedence without providing a satisfactory reasoning. Thus, the content of the Directive stands consistent with the Federal law and with the precedence of discretionary action on the part of our police forces. Moreover, courts might consider applying procedures commonly used for Equal Protections cases to this case, due to the intense history of discrimination and the inherent powerless position these immigrants have. We are in dire need of relief, not just for our struggling undocumented residents, but for our budget and overworked police resources. The Executive branch should faithfully execute the laws of the land and of the people, and according to precedence as well as common sense, discretion comes with that faithful responsibility. President Obama's most recent executive action points are heartening, and I believe the Executive branch is properly fulfilling its constitutional duty to "take care that the Laws be faithfully executed," not in accordance to the failures of our broken immigration policies today but to the American democratic ideals of our past and future.

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Developed or Diluted: Examining the Definition, Interpretation, and Application of Crimes Against Humanity

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Abstract

The Rome Statute of the International Criminal Court offers a clear definition for "crimes against humanity," but it is evident that the substantive meaning of the term and its distinction from war crimes and other gross violations of human rights is dependent upon one's ideological starting point—cultural, religious, or otherwise. This paper explores the interpretive evolution of the term "crimes against humanity" by examining rulings of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. By demonstrating a clear pattern of definitional expansion, this paper calls into question the sustainability of such a trajectory and suggests that, at some point, expansion dilutes efficacy.

I. Introduction

The focus of this paper is threefold: first, to give a historical account of the evolution of the term "crimes against humanity" and its definition in relation to war crimes and gross violations of human rights; second, to present a philosophical consideration of crimes against humanity by identifying possible differences in interpretation based on culture, religion, and ideology; and third, to discuss how the term "crimes against humanity" has been applied in the rulings of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. Ultimately, this paper concludes by arguing that while the expansion of the term "crimes against humanity" was an appropriate part of its development to a point, continued expansion of the term is dangerous and could lead to a marked dilution of efficacy by which the term loses the weight of exceptionality and becomes devalued in its truest sense.

II. Defining Crimes Against Humanity

Acts now referred to as crimes against humanity are, arguably, as ancient as humanity itself. It was not until the twentieth century, however, that the term "crimes against humanity" came into widespread use and was assigned specific, legal meaning (Cryer 2014: 188). Often considered the bloodiest in human history, the twentieth century gave rise to unspeakable acts on a shocking scale that necessitated for new ways of describing, categorizing, and punishing such grave atrocities (Maogoto 2004: 1). While there is a general consensus that "crimes against humanity" is a term used for "unimaginable atrocities that deeply shock the conscience of humanity," the specific definitional parameters have evolved throughout the years (Rome Statute 1998: 7). The concept of crimes against humanity has developed through international customary law and was first used as a term by the Allied Powers following World War I, in reference to the Ottoman government's massacre of Armenians in Turkey (Schabas 2000: 16-17). Since then, the concept has evolved significantly, and there have been three especially noteworthy efforts to define crimes against humanity: the Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia, and the Rome Statute of the International Criminal Court.

The Nuremberg Tribunal was held following World War II in an effort to punish the perpetrators of the

war's most heinous atrocities, specifically the Nazi leaders involved in the Holocaust. A number of leaders were charged guilty of "crimes against humanity," and thus the term was defined by the international community for the first time. The Nuremberg Charter declared crimes against humanity to be: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, during or before the war." (International Military Tribunal 1945: 2). Philosopher Larry May brings special attention to the "during or before the war" portion of the definition, stating that according to the Nuremberg Tribunal, crimes against humanity were "effectively a sub-set of war crimes." (May 2005: 119). While the term "crimes against humanity" entered into international legal thought only in the twentieth century, the concept of war crimes is as old as war itself and is simply understood as breaches of the accepted laws of war, which include not attacking non-combatants and not torturing war prisoners. It follows logically then that the first iteration of a definition for crimes against humanity stemmed directly from the rules governing interstate war.

The distinction between war crimes and crimes against humanity is broadened through the language of the 1993 Statute for the International Criminal Tribunal of the Former Yugoslavia (ICTY). The changes to the definition of crimes against humanity that took place have endured, but they were initially made in order to accommodate the specific circumstances the tribunal was created to address. In addition to specifically enumerating the crimes of torture and rape, the ICTY Statute goes beyond the Nuremberg Charter to specify that crimes against humanity include crimes committed in armed conflict, "whether international or internal in character." (ICTY Statute 1993: 6). This is significant in that while crimes against humanity must still be directly linked to armed conflict, the armed conflict did not need to be considered a war between distinct sovereign states, but could be a civil war or intrastate conflict (May 2005: 119).

It was during tragedies like the Cambodian genocide at the hands of the Khmer Rouge in the 1970s that the need to expand the definition of crimes against humanity to include crimes committed against one's own people was felt acutely. While history indisputably revealed the need for international protection of people from their own governments, the concept of crimes against humanity remained tethered to armed conflict and thus linked to war crimes. This was the case until 1995, when the ICTY Appeals Chamber decided that, "it is now settled customary international law that crimes against humanity do not require a connection to

international armed conflict [or] any conflict at all." (Dusko Tadic v. Prosecutor 1997: 224). By severing the link with war and armed conflict, the ICTY opened the door for individuals to be charged with crimes against humanity for isolated acts of a particularly egregious nature, rather than this designation remaining reserved for atrocities committed by states (May 2005: 120).

This definitional evolution throughout the course of the ICTY set the stage for the 1998 Rome Statute of the International Criminal Court, which provides the definition of crimes against humanity most widely accepted and referenced in mainstream international law. The statute defines crimes against humanity in Article 7 as acts, "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." (ICTY Statute 1993: 6). The statute's enumeration include all those cited in the Nuremberg Charter and ICTY Statute, as well as the additions of, "enforced disappearance of persons" and, "the crime of apartheid." (Rome Statute 1998: 4). In addition to affirming that crimes against humanity have been separated from the nexus of war, the Rome Statute introduces a special cognitive requirement that the perpetrator have "knowledge of the attack" (Rome Statute 1998: 3). This requirement is presumably meant to justify the prosecution of individuals by establishing their complicity in the aforementioned widespread and systematic attacks. While not explicitly included in the language of the statute, an even stricter standard of discriminatory intent has been used by courts such as the ICTY Trial Chamber to prove that an individual's acts of killing be treated as part of a broader discriminatory attack and hence a crime against humanity, rather than simply murder. According to May, in order for an individual to be prosecuted for a group-based crime like crimes against humanity, there must be a group-based element such as discriminatory intent (May 2005: 128).

While in the past there was considerable overlap between the terms, the Rome Statute makes it clear that crimes against humanity are no longer a mere subset of war crimes and that there exists both clear and significant distinctions between the two terms. Simply put, war crimes must take place during armed conflict, while crimes against humanity can take place during times of peace. Additionally, crimes against humanity constitute an arguably more serious crime in that they must be systematic, widespread, and involve a civilian population, while war crimes by strict definition do not. Lastly, crimes against humanity must involve knowl-

edge of the systematic, widespread, and civilian nature of the attacks, but this knowledge requirement does not extend to war crimes.

Both war crimes and crimes against humanity fall under the broader umbrella of gross violations of human rights, due to the magnitude and severity of the crimes. The United Nations Universal Declaration of Human Rights articulates in thirty distinct articles rights every human being is entitled to upon birth, from the right to life to the right to leisure (UDHR 1948: 3, 24). Violations of these rights are acts that in some way deprive an individual of exercising or enjoying one or more of these intrinsic rights, and it is not difficult to see how both war crimes and crimes against humanity are considered gross violations in regards to both magnitude and severity. Title 22 of the United States Code, for instance, defines gross violations of human rights as, "flagrant denial of the right to life, liberty, and security of person" (U.S. Code 1998: 22). Thus, while the current definitions of war crimes and crimes against humanity differ in obvious ways, they both remain under the broad umbrella category of gross human rights violations.

III. Interpreting Crimes Against Humanity

While the basic textual distinctions between war crimes and crimes against humanity as established in the Rome Statute seem relatively clear and indisputable, cultural and ideological differences in interpreting these distinctions can be stark. This is seen especially in regards to the understanding of key terms like "civilian." From the perspective of the Islamic State in Iraq and Syria (ISIS), the intense persecution of Christians in Iraq is not considered a crime against humanity because Christians are not considered to be civilians, but rather enemies of the rightful Islamic state (Saltman 2014: 16). UN Secretary-General Ban Ki-Moon has expressed his deepest concern over the conversion-or-death ultimatum given to Christians in Mosul, and the mass displacement of 200 thousand Yezidi from Sinjar and Tal Afar. But despite his official warning that "any systematic attack on the civilian population…because of their ethnic background, religious beliefs or faith may constitute a crime against humanity," the extremist members of ISIS see their actions not as crimes against humanity, but rather as saving humanity by instituting rightful Islamic rule (Ki-Moon 2014: 3).

According to John Kelsay, chair of the religion department at Florida State University, the religious

justification for such apparent atrocities is derived from relying on a distinctly Islamic understanding of the morality of war through "Shari'a reasoning," or "appealing to text and precedent in Islamic history in order to determine how best to resolve contemporary problems" (Kelsay 2007: 166). Looking back on Osama bin Laden, Al-Qaeda, and the events of 9/11, philosopher Christopher Eberle explains that bin Laden not only relied on Shari'a reasoning to legitimize his actions, but that he had claimed that the "mantle" of Shari'a law fell on his shoulders and it was in fact his duty to defend and further the Islamic state (Eberle 2012: 196). To bin Laden, the victims of 9/11 were not civilians, but active aggressors against the Islamic state by simply being American citizens. Bin Laden interpreted American acts as a "great series of fierce and ugly Crusader wars against Islam," and thus likened attacks against America and the Western world to, "when the victim starts to avenge the innocent children" (Laden 2005: 137-138). Even if Islamic extremists were to hypothetically affirm the Rome Statute's definition, their interpretation of the word "civilians" alone would cause their interpretation of crimes against humanity to differ drastically from that of the broader international community. Though intended to be objective, definitions are inherently relative and are subject to a certain level of subjectivity in interpretation.

While it is clear how religious disposition can lead to differing interpretations of crimes against humanity, cultural and political factors also play formative roles in shaping how the term is interpreted. In 2010, for instance, then President of France Nicolas Sarkozy ordered the mass deportation of the Roma gypsies out of France and back to Eastern Europe. This semi-nomadic people group is often considered the dregs or excrement of Europe due to their transient lifestyle and historical involvement with crime. The Roma have been objects of intense persecution and stigmatization since they migrated to Europe from India in the twelfth century (Featherstone 2013: 3). In a public speech, Sarkozy boasted of his plans to deport the Roma and clear their makeshift camps in the name of security and public order, vowing to, "put an end to the wild squatting and camping of the Roma" (Parker 2012: 477). Within two short weeks of Sarkozy's "war on delinquency," forty Roma camps had been cleared and their inhabitants deported (Parker 2012: 478). While Sarkozy claimed he was acting on behalf of the public good, many in the international community were shocked that European Union (EU) citizens were being deported solely on the basis of ethnicity.

Among the critics of Sarkozy's ongoing deportation campaign is Viviane Reding, European Commissioner of Justice for the EU, who stated that she is, "appalled by a situation which gave the impression that people are being removed from a Member State of the European Union just because they belong to a certain ethnic minority." Reding also declared that legal action would be taken against France (Traynor 2010: 10). Seeing that the Rome Statute lists "deportation or forcible transfer of a population" as a crime against humanity when it takes place "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," it is clear that a compelling case can be made for considering France's continued actions as a crime against humanity (Rome Statute 1998: 3). Sarkozy and his administration obviously do not see their mission as such, and instead see the presence of the Roma as "a crime issue calling for urgent measures" (Nacu 2012: 1324). By treating the Roma as criminals instead of civilians, Sarkozy not only provides justification for his actions, but also reveals his political basis for such an interpretation. For any political leader, preserving the security of one's people is paramount, and this is especially true for Sarkozy, since "appealing to anti-immigration sentiment has been a key strategic point for the French right-wing party and especially for Sarkozy in political competition." (Nacu 2012: 1325). Thus, whether out of electoral necessity or genuine ideology, the recent French deportation of the Roma exemplifies yet another source of interpretive difference. While Sarkozy's not being held accountable for this problematic interpretation may speak more to enforcement issues in the realm of international law as a whole than problems with the definition of crimes against humanity, it serves to underscore the power of interpretation and just how much depends on it.

Stepping further back, interpretations of the distinction between war crimes and crimes against humanity may differ in that the definition presented in the Rome Statute could be rejected altogether and the focus could shift to the essence of what an individual's perception of what constitutes as a crime against the human race. Take, for instance, a strictly naturalistic worldview that holds the sole purpose of human life to be the survival and propagation of the human race. A crime against humanity from that ideological basis would thus be anything that hinders the evolutionary progress of humanity. This rationale is what provided the ideological justification for the twentieth century eugenics movement and even the Holocaust, which sought to eliminate, through initiatives like the Nazi Action T4 Program, those "lives not worth living":

Jews, gypsies, homosexuals, disabled, and the like (Cohen 2010: 692). While the horrors of the Nazi regime were the first to be labeled crimes against humanity, the Nazi regime did not think itself committing a crime against humanity, but rather doing humanity a favor by genetically purifying it (Cohen 2010: 692). While this reasoning is appalling, it is remarkably consistent with the ideological framework from which it was derived. Even in the nineteenth century, social Darwinists like Herbert Spencer were making claims like, "all imperfect must disappear," and "the whole effort of nature is to get rid of [imperfect persons], and make room for the better…if they are not sufficiently complete to live, they die, and it is best that they should die" (Black 2003:12). To the Nazis, the gravest crime against humanity was medical intervention that preserved the lives of the inferior by using resources that rightfully belonged to the superior Aryan race (Cohen 2010: 692). While extreme, this example demonstrates that the term "crimes against humanity" is itself largely neutral and that the ideological basis from which it is interpreted is immeasurably critical when it comes to infusing the term with meaning.

IV. Applying Crimes Against Humanity

The term "crimes against humanity" has been expanded and refined throughout the years and assigned particular meaning through rulings in significant cases. As stated previously, this article will examine in detail three such cases decided in international criminal tribunals, paying special attention to not only the contribution each makes to the term's definition, but also the reasons why the charge of crimes against humanity has been invoked and how such rulings have been enforced.

Established by the UN Security Council in 1993, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first international criminal tribunal to be instituted since the tribunals following World War II in Nuremberg and Tokyo. While criminals were charged with a variety of offences from war crimes to genocide, 670 of the counts brought to the tribunal were for crimes against humanity, and this accounted for over 40 percent of all charges (Sadat 2013: 344). Of the charges levied, crimes against humanity also boasted the highest successful conviction rate, at 39 percent (Sadat 2013: 344). Therefore, the prominence of crimes against humanity in the ICTY is undeniable, but one must also remember that the ICTY

significantly augmented the definition to include crimes like imprisonment, torture, and rape which, while always considered gross violations of human rights, did not fall under the crimes against humanity definition established at Nuremberg.

The Kunarac, Kovac, and Vukovic case decided by the ICTY in 2001 was especially significant in establishing atrocities such as rape and torture as crimes against humanity. The case involved three ethnic Serbs—Kunarac, Kovac, and Vukovic—who were former soldiers involved in a campaign to rid the Foca municipality of Muslims. The method employed, as stated by the tribunal, was "expulsion through terror," which entailed atrocities from razing mosques to slaughtering men and raping women and children. The egregious dehumanization of women and children through rape, sexual slavery, and torture was a central focus of the opinion, and illustrates the establishment of such crimes as crimes against humanity. Judge Florence Mumba describes in gruesome detail the evidence justifying the conviction of these three men on numerous counts of war crimes and crimes against humanity. For example, in finding Kovac guilty of rape under Count 23 as a crime against humanity, Mumba describes Kovac's abuse of a twelve year-old Muslim girl whom he raped repeatedly before selling, "like an object, in the knowledge that this would almost certainly mean further sexual assaults by other men" (Mumba 2001: 7). Torture is another atrocity addressed, and the Trial Chamber of the tribunal found Kunarac guilty under Count 1 of torture as a crime against humanity for facilitating and encouraging the gang-rape of a Muslim woman (Mumba 2001: 3). In addition to firmly establishing torture and rape as within the definitional scope of crimes against humanity, Mumba's judgment summary touches upon the temporal universality of crimes against humanity despite the fact that Article 5 of the ICTY Statute affirms crimes against humanity as being linked to the nexus of armed conflict (ICTY Statute 1993: 6). Mumba concludes her opening remarks by observing that, "indeed, it is opportune to state that, in time of peace as much as in time of war, men of substance do not abuse women" (Mumba 2001: 3). While not part of the official definition set forth by the ICTY, this acknowledgement of the fact that in certain circumstances there should be no distinction between behavioral expectations in times of peace and in time of armed conflict set the stage for the next iteration of the crimes against humanity definition.

As with the ICTY, the concept of crimes against humanity played a central role in the International

Criminal Tribunal for Rwanda (ICTR), established by the UN Security Council in 1994. Seeing that crimes against humanity constituted both the predominant charge and the predominant reason for conviction, it is understandable to consider the ICTR "both qualitatively and quantitatively a 'crimes against humanity court,' particularly if one regards genocide as an acute form of crimes against humanity" (Sadat 2013: 347). In keeping with the trend of expanding the definition of crimes against humanity to encompass more crimes, Article 3 of the ICTR Statute does away with the requirement that crimes against humanity be linked to the nexus of armed conflict. Instead, it presents the condition that crimes against humanity simply be "part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (ICTR Statute 1994: 4).

A case that illustrates this and that itself pushes the bounds of what constitutes a crime against humanity is the Nahimana, Bayaragwiza, and Ngeze case, also known as the Media Case. Nahimana, Bayaragwiza, and Ngeze were charged with genocide, incitement to genocide, conspiracy to commit genocide, and crimes against humanity for extermination and persecution by using various media outlets to incite anti-Tutsi sentiment and action, leading ultimately to the massacre of nearly a million Tutsis in 1994. For Nahimana and Bayaragwiza, these charges were a result of their involvement with the RTLM radio station, and for Ngeze it was due to his role with the Kangura newspaper. While the Trial Court found all three guilty for the crime against humanity of extermination, the Appeal Court reversed this decision for Nahimana and Bayaragwiza as it concluded that although the RTLM broadcasts instigated ethnic hatred, they did not substantially contribute to the extermination of civilian Tutsis (Meron 2007: 17). While these men ended up being convicted and imprisoned on different charges related to genocide, this ruling proved significant in that it established that a certain kind of action could in theory constitute a crime against humanity even though the actions of the specific defendants in question do not.

Another example of stretching the theoretical bounds of crimes against humanity without actually reaching a conviction is the Bikindi case. In this case, a Rwandan pop singer, Simon Bikindi, was charged with incitement to genocide and persecution as a crime against humanity for songs that were wildly popular both before and during the genocide. The prosecutor claimed that the songs were about the extermination of

the Tutsi and had an "amplifying effect on the genocide," citing as evidence the fact that the Hutus would sing Bikindi's songs while hacking their victims to death (Benesche 2013: 448). Seeing, however, that the lyrics were shrouded in metaphor and that there was no specific reference to violence, the court was unable to procure sufficient evidence to justify convicting Bikindi of such a grave offense as a crime against humanity. While the ICTR did not actually convict Bikindi of crimes against humanity for his songs, it established the grounds for such a conviction, and paved the way for the ICTR to issue several convictions of hate speech as crimes against humanity. Susan Benesch, faculty associate at Harvard and Director of the Dangerous Speech Project, remarked that ICTR decisions in regards to the issue not only constitute one of the Tribunal's primary contributions to international law, but also "form nearly all of the word's jurisprudence on indictment to genocide and on speech as a crime against humanity" (Benesch 2013: 451). The fact that the Bikindi case goes beyond mere hate speech to call music into question is significant, considering that music is traditionally considered entertainment and granted certain artistic liberties. Irrespective of the outcomes, both the Media case and the Bikindi case prove significant in that they broaden the potential reach of the term "crimes against humanity" to areas never before touched.

While conducted on a smaller scale, the Special Court for Sierra Leone (SCSL), established in 2002, continues the trend of expanding the definition of crimes against humanity both in regards to requirements and specific crimes identified. Additions of specific crimes include sexual slavery, forced prostitution, forced pregnancy, forced marriage, and "any other form of sexual violence;" meanwhile, the discriminatory intent and armed conflict requirements are eliminated altogether (SCSL 2002: 1). Interestingly, the SCSL deviates from the ICC's Rome Statute established four years earlier by omitting the state or organizational policy requirement to account for the fact that many violations took place in the context of guerilla attacks from rebel groups in the bush that, while systematic and widespread, were not directly linked to a defined organization (Sadat 2013: 349).

The broadening of the term, especially with regard to acts of sexual violence, can be explained by examining the nature of the atrocities that took place during the Sierra Leonean Civil War, from 1991 to 2002. Radhika Coomaraswamy, UN Special Rapporteur on the Elimination of Violence Against Women, estimates that, during the war, 72 percent of women in Sierra Leone experienced human rights abuses, and over 50 per-

cent were subjected to sexual violence, from gang rape to being raped with weapons and objects (Nowjoree 2005: 86). A June 2000 Human Rights Watch report describes the gang rape of a ten-year-old girl in the village of Makeni who was, "all bloody when they raped her, and she was crying…she was so small that she was crawling along the ground from the pain, she could not even walk" (HRW 2000: 7). In addition to rape, women and young girls were often captured by the soldiers living in the bush and forced to enlist as soldiers themselves. These girl soldiers were then forced to become wives to the older male soldiers and entered into a state of domestic and sexual slavery.

These circumstances are what led the Trial Chamber of the SCSL to decide that "forced marriage" was a crime that could be prosecuted as a crime against humanity (Park 2006: 314). While it is undeniable that the horrors imposed upon girl soldiers are almost unspeakable and that such gross violations of human rights must be addressed and punished, the fact that the Chamber decided to prosecute forced marriage as a crime against humanity is both significant and telling. This expansion of the term confirms that crimes against humanity has evolved into a means of protecting not only universal human rights, but also rights that do not extend to all of humanity. In regards to the atrocities committed against girls in Sierra Leone, sociologist Augustine Park observes that "girls are uniquely positioned as not only a marginalized gender, but also a marginalized age group," and that the SCSL "is at the forefront of recognizing the human rights of women and girls" (Park 2006: 314). The judges presiding over the SCSL clearly understood this as well, and wrote that they hoped their decision would highlight the need for international jurisprudence to address the "high profile nature of the emerging domain of gender offences" (SCSL 2002: 11). Many have praised the SCSL for including forced marriage as a sub-category of crimes against humanity, reasoning that even though forced marriage encompasses a variety of acts like rape and forced domestic labor already recognized as crimes against humanity, none individually or collectively capture the unique gravity of such an act. Micaela Frulli, International Law Associate Professor at the University of Florence, succinctly states that, "forced marriage is more than the sum of its components" (Frulli 2008: 1036).

V. Conclusion

It is clear that the notion of crimes against humanity has been used extensively and effectively to ad-

dress and punish truly horrific atrocities that have indeed shocked the conscience of humanity. Many perpetrators of such crimes are currently behind bars, and in that respect, enforcement of crimes against humanity convictions has proven successful. Also, given the customary nature of international law, it is understandable that the first tribunals to utilize the notion of crimes against humanity have been precedent setting and formative in expanding and refining its definition. That said, this expansionary trajectory does not seem suitable with every use of the term augmenting it in some way. It seemed that the establishment of the International Criminal Court and the Rome Statute of 1998 would halt this trend, yet the SCSL illustrates that this is not a safe assumption and that "crimes against humanity" is quickly becoming a catch-all term for any and all grievances the circumstances at hand dictate must be addressed. Jonathan Yovel, Professor of Law at the University of Haifa, echoes this sentiment, and while he acknowledges the usefulness of crimes against humanity as a means of redress for victims seeking some sort of restitution from perpetrators, he ultimately expresses concern over the broadening of the term. Yovel states that, in regards to the crimes enumerated in the Rome Statute, there barely seems to be a "unifying concept," and he goes on to express his concern "that the rhetorically ominous and useful category [of crimes against humanity] would become both abused and trivialized" (Yovel 2006: 53). While it is healthy and reasonable for a legal concept to be expanded and refined while it is still being developed, Yovel's concern is valid in that there is undoubtedly a point at which a term becomes over-inclusive and, in an effort not to exclude, is stripped of the efficacy derived from precision.

While carving out sub-categories for specific minorities is testing potentially compromising waters, it would be difficult to argue that the notion of crimes against humanity has been ineffectual or void of utility. To the contrary, even though one's ideology is central to interpreting the very meaning of crimes against humanity, the International Criminal Tribunals for the Former Yugoslavia and Rwanda as well as the Special Court for Sierra Leone illustrate the fact that the concept of crimes against humanity is widely enforceable and capable of bringing about appropriate punitive consequences. Looking to the future, however, it is easy to foresee a continued trajectory of expansion bringing about a sense of dilution from over-inclusiveness where crimes that could be charged as other human rights violations are charged as crimes against humanity. Ultimately, this may cause international actors to feel distanced from the "particular parameters that made

civilization so invested in the concept of crime against humanity in the first place" (Yovel 2006: 53). "Crimes against humanity" was initially a term of exceptionality, which inspired significant investment in the issue from society. It was a term used to describe atrocities that were exceptionally shocking to the human conscience and that could not adequately be grouped alongside other kinds of human rights violations. Thus, by expanding the definition of crimes against humanity to include more crimes, the term becomes less and less exceptional. Continuing to expand the term "crimes against humanity" constitutes dilution in that the term becomes devalued, not in that such crimes are made light of but in that such crimes are no longer set apart. Losing this weight of distinction is deeply significant, and that is why Yovel holds that allowing the continued expansion of crimes against humanity will result in gross abuse at worst and severe trivialization at best (Yovel 2006: 53). Alternatively, deferring to the Rome Statute definition of crimes against humanity as the international standard that should only be altered or augmented out of absolute necessity provides a sense of accountability that promises to preserve the efficacy of the term for years to come. While the notion of crimes against humanity has been developed largely in response to egregious atrocities, there is hope, however idealistic, that the notion can one day serve a preventative function and save humanity from conscience-shocking atrocities in the future.

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Conceptual and Practical Issues of a Mosaic Theory of the Fourth Amendment

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Abstract

Police tracking of a vehicle on public thoroughfares has not traditionally been considered a search subject to Fourth Amendment protections. However, the possibility that tracking could be considered a search when a GPS device is utilized has been the subject of increasing scholarly debate since the Supreme Court's decision in United States v. Jones. Five Justices in Jones joined concurring opinions which appear to support the idea that a sufficient aggregation of non-search activities may be considered a Fourth Amendment search, a concept which has come to be known as mosaic theory in the literature. There is substantial disagreement as to whether or not mosaic theory should be adopted, and numerous questions have been raised with respect both to its philosophical underpinnings and to possible problems of implementation. This paper surveys the scholarship on mosaic theory and analyzes the issues it presents.

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.[1]

Justice Brandeis' prophetic dissent in Olmstead v. United States[2] seems to summarize the conundrum in which modern legal scholars find themselves. Government agents are now capable of obtaining personal records and reproducing them in court without committing a physical intrusion, and in many cases courts are reluctant to take a stance on whether the Fourth Amendment applies to these revolutionary abilities. This is perhaps best observed in United States v. Jones,[3] in which police tracked a suspect for twenty-eight days using a GPS device implanted on the bottom of his vehicle. The Fourth Amendment protects the population from "unreasonable searches and seizures,"[4] but the question of what constitutes a search becomes muddled when technology is at issue. The majority opinion held that a search took place not because the suspect was monitored constantly for twenty-eight days, but because the police invaded the suspect's personal effects when they initially installed the tracker. If a situation ever arose where police did not need to physically intrude before conducting similar surveillance, the Jones ruling would not be controlling.

Concurring opinions in Jones authored by Justices Alito and Sotomayor attempted to frame the Fourth Amendment issue in terms of the totality of the surveillance that took place during the tracking,[5] an approach Orin Kerr, a law professor at The George Washington University Law School, first called a "mosaic theory" of the Fourth Amendment.[6] The traditional method for analyzing police activity asks whether an individual act is a search, but a mosaic theory of the Fourth Amendment would ask whether a collective sequence of non-search techniques amount to a search when considered as an aggregated whole[7]. A mosaic search is committed when surveillance, considered in context and as a collective whole, reveals a pattern that exposes aspects of a target's personal life (including those aspects that are unrelated to the investigation) which would not be available at any single point of observation or even at every point of observation when considered independently. Many developing and not yet developed technologies may allow for law enforcement to amass information about a person in unprecedented ways, and the implementation of a mosaic theory may serve to counteract the broad diminution of privacy that would probably accompany these

advances. This means that a mosaic theory would likely apply to any technology that has the ability to generate patterns, and would give rise to any number of questions in any number of cases. There exists a strong possibility that various surveillance techniques would at least sometimes be considered searches even when past courts have held them never to be searches. If applied to the surveillance in Jones, mosaic theory would ask whether GPS monitoring over twenty-eight days is a search even though public location surveillance is generally not considered a search.

Although Orin Kerr coined the term "mosaic theory," he is far from the only scholar to discuss the issue. The idea of an aggregation-based approach to defining Fourth Amendment searches has been the subject of scholarly debate since at least 2002. Daniel Solove, law professor at The George Washington University Law School, refers to an "aggregation problem" while discussing the government's ability to obtain information from recordkeeping third parties such as telephone companies; "[t]his problem is caused by the accumulation of details. A fact here or there may seem innocuous but when combined, they become more telling about that person."[8] Unlike Kerr, Solove argues that measures be taken to directly counteract this phenomenon. Smith et al., in a more contemporary article, share Solove's sentiment by saying that "the use of GPS surveillance for prolonged periods of time without a warrant cannot pass muster under the Fourth Amendment."[9] Attorney Benjamin Ostrander, meanwhile, sees mosaic theory's vagueness as problematic because law enforcement officers would essentially be left "to speculate as to how much is too much,"[10] but also recommends legislative action to prevent unrestricted GPS surveillance. Finally, Stephen Henderson, a law professor at The University of Oklahoma College of Law, attempts a practical approach to address the uncertainties surrounding mosaic theory by drafting an administrable set of regulations that he recommends be enacted legislatively.

Mosaic theory would in fact pose a variety of conceptual and practical issues that would need to be answered before legislative implementation. This paper addresses the broadest uncertainties of the theory and advocates possible solutions. Perhaps the most important question to answer with regard to mosaic theory is not related to any philosophical uncertainty, but whether adhering to its principles would be possible and practical.

CASE HISTORY

United States v. Jones was the eventual result of a joint investigation by the Federal Bureau of Investigation and the Metropolitan Police Department intended to monitor an individual suspected of narcotics violations.[11] A tracking device was implanted on nightclub owner Antoine Jones' vehicle without a valid warrant, and his movements were tracked for 28 days.[12] The respondent was indicted on drug conspiracy charges, but moved to suppress the evidence gathered by GPS monitoring.[13] The District Court suppressed the data collected while the vehicle was parked at the respondent's residence but not the data collected from the vehicle's movements in public,[14] using the Supreme Court's ruling in United States v. Knotts[15] as justification. In United States v. Maynard,[16] the case that would become Jones once it reached the Supreme Court, the D.C. Circuit reversed, stating that a reasonable expectation of privacy did in fact exist in the vehicle's public locations in this case.[17] Specifically, in his opinion, Judge Ginsburg focused on the fact that the average passerby would only observe individual moments in Jones' travel, but not the entirety of his movements, which was obtained and recorded by the GPS monitoring.[18] Constant monitoring, he concluded, provides context to the discrete moments of observation, allowing the government to reliably observe a pattern and thus identify "all the places, people, amusements, and chores that make up that person's hitherto private routine."[19] Although the activity took place in public, the personal information invariably revealed by long-term monitoring was not otherwise visible to the casual observer and thus private in nature.

When this case was appealed to the Supreme Court, Justice Scalia, writing for the majority, concluded that the search took place at the moment officers physically trespassed into Jones' personal effects in order to implant the tracking device,[20] essentially stalling a more dramatic and significant ruling on the role of advanced technology in societal expectations of privacy. In her concurring opinion, Justice Sotomayor recognized the short lifespan of the majority opinion's relevance; "[w]ith increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled Smartphones."[21] She holds GPS monitoring to be so invasive that even short-term monitoring implicates privacy expectations; "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[22] Of particular importance is the fact that records can be stored indefinitely and that GPS monitoring "evades the ordinary checks that constrain abusive law enforce-

ment practices"[23] because it is cheap and proceeds surreptitiously. In contrast to Ginsburg in Maynard, she broadens her scope, questioning the rule established in Smith v. Maryland[24] that an individual lacks any reasonable expectation of privacy in information voluntarily disclosed to third parties; "[t]his approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[25]

Justice Alito, like Sotomayor, recognizes that the majority opinion fails to account for cases where no physical trespass occurs, and he instead focuses on the long-term nature of the monitoring. Given that traditional surveillance for an extended period of time was difficult and costly, Alito states that only "an investigation of unusual importance"[26] would have justified physical surveillance comparable in scale to the GPS surveillance in the current case. He concludes that the utilization of long-term GPS monitoring to investigate relatively common and minor offenses impinges on a reasonable expectation of privacy; "[f]or such offenses, society's expectation has been that law enforcement agents would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period."[27] Alito's analysis turns almost entirely on the factor of time, which is only secondary to the amount of information revealed in Ginsburg's and Sotomayor's analyses. In determining whether GPS monitoring in a given case constitutes a search, Alito would probably ask how long surveillance lasted, while Ginsburg and Sotomayor would ask how much personal information was exposed.

BROAD TRIGGERS FOR FOURTH AMENDMENT PROTECTION

The courts have established various measures that determine the point at which mere surveillance crosses the threshold into a search subject to legal protection. In determining whether the use of advanced surveillance capabilities results in a search, one can focus either on law enforcement conduct or on the information revealed by that conduct in determining whether the Fourth Amendment is implicated.

In the former category, Solove,[28] Smith et al.[29] and Justice Sotomayor in Jones all place emphasis on the potential for law enforcement abuse of a given tactic. Ostrander[30] briefly describes his policy recommendations as effectively combating abuse, and Smith et al.[31] see the abuse factor as being particularly influential in Fourth Amendment case history. While the concept of "abuse" may be similarly as abstract and uncertain as the idea of "reasonableness," the language implemented by these authors indicates a degree of

particularity. Smith et al.[32] and Henderson[33] both speak of police abuse as carrying the potential to "chill" fundamental freedoms such as speech, thoughts, and behaviors. Smith et al. elaborate by stating that intrusions "inflict upon us a different identity; they force a schism between true identity and expressed identity."[34] In this way, abuse can be identified as practices that, if known, would interfere with an individual's behavior.

In the latter category, searches can be defined in terms of the information revealed by police activity. Henderson details four broad factors identified by the American Bar Association's Criminal Justice Standards on Law Enforcement Access to Third Party Records (LEATPR) that influence whether information is considered private.[35] The underpinning theme is that Fourth Amendment protection is activated not by something a law enforcement agent does but by the nature of the information itself. However, attempting to distinguish between "private" and "non-private" information is something that Solove sees as futile due to the complex nature of privacy, which is "a dimension of social practices, activities, customs, and norms that are shaped by history and cultures."[36] Despite these difficulties, Henderson does not address them, nor does he adequately acknowledge the potential for law enforcement abuse. As previously described, he mentions an abuse trigger only briefly and resigns himself to uncertainty when formulating his policy recommendation, claiming that there will be no issue in most cases where the police exercise good faith.[37]

CONCEPTUAL ISSUES OF MOSAIC THEORY

Mosaic theory in the abstract[38] presents a variety of conceptual and constitutional issues, questions, and beliefs that have been repeatedly asserted in the literature. Most discussion of mosaic theory relates to prolonged GPS surveillance. Traditional surveillance of vehicles on public property has never been considered a Fourth Amendment search, but under mosaic theory, GPS monitoring of a vehicle's location could be a search under some circumstances. This raises questions such as (1) how modern GPS surveillance significantly differs from traditional surveillance, and (2) what the legal system should do differently with respect to GPS surveillance.

How is Modern Surveillance Different and what should be the Standard?

The first question to be answered is how technologically assisted surveillance differs from traditional surveillance of vehicle movements, if it does at all. In Knotts, the planting of a primitive tracking device in

a container sold to a suspect was held not to be a search, leading to the acceptance of a general rule that there exists no reasonable expectation of privacy in public thoroughfares. Judge Ginsburg in Maynard, however, points to the fact that the Court in Knotts acknowledged that "dragnet-type" surveillance practices might trigger different constitutional protections.[39] Although there is little specification as to what constitutes a "dragnet-type" practice, the language seems to imply that such a method would be indiscriminate in its gathering of data and would carry great potential to capture information irrelevant to an investigation. Ginsburg reasons that GPS surveillance is in fact a "dragnet-type" practice, and therefore Knotts is not controlling.[40]

If Knotts does not apply, Fourth Amendment analysis of GPS surveillance of a vehicle's public movements must be approached differently. Instead of framing the issue in terms of whether an activity is open to public view, as is traditional, it may be more appropriate to apply third party doctrine, i.e. the ability of third parties to view a vehicle in public. Sotomayor and Smith et al. advocate for reexamining the traditional third party doctrine as it pertains to the modern era. Interestingly, they both utilize a nearly identical vocabulary in asserting that "secrecy" as a prerequisite for privacy is "ill-suited to the digital age"[41]. Traditionally, third parties have been defined as institutions such as phone companies or banks that collect and maintain personal records. However, individuals in public can arguably be considered third parties as well. In doing anything on a public street, a person voluntarily releases his or her location and behavior at a given moment to every person who bears witness. Traditional third party doctrine holds that when a person knowingly reveals personal information to an outside entity, no reasonable expectation of privacy exists. While it may be tempting to use this line of thinking to disqualify public-location surveillance from Fourth Amendment protection, it actually exposes an important distinction between members of the public as third parties and organizations that keep personal records as third parties.

Members of the public are not one unified third party but many different individual third parties, meaning that there is no aggregation of observations. In essence, one person may view a car in one place and another may view a car in another place, but no one person will have tracked the car's movements over its entire commute, hence Judge Ginsburg's determination that the fact that an activity takes place in public does not necessarily mean it is "visible" to the public. Even when a person knowingly reveals his or her lo-

cation to every other person in sight while going from one place to another, the commute as a whole remains unknown to them, let alone subsequent commutes over a period of days or weeks. GPS surveillance by the police takes what many different third parties see in isolation and merges it to create something new and more revealing. This could be as focused as the granting of context during a single commute or as broad as repeated observations over a period of days. For example, an adulterous husband is revealed when observed leaving his wife at home in the morning, buying flowers, and then taking them to another woman. A person's daily routine is revealed when his or her attendance at a fitness center or a church is observed at a set time every day over a period of multiple days. In these cases, GPS surveillance reveals information about an individual's personal life that is both generally unseen by the public and unrelated to any investigation that may be at hand[42]. This type of monitoring therefore reveals information that is, as a whole, not revealed to any individual third party and therefore cannot be disqualified from Fourth Amendment protections on the basis of traditional third party doctrine.

Third party organizations maintaining a system of records, meanwhile, aggregate data themselves. When a third party organizational record holder aggregates information for the police before handing it over, whatever the police see is also what they see. This is a very different set of circumstances than cases of GPS surveillance, where members of the public do not have the same information as the police. A core component of mosaic theory is that information is accumulated to reveal a pattern not regularly visible, but when third parties release vast sets of records, the data is already accumulated (and thus the pattern is visible) before it reaches law enforcement. Since the collecting organization has the ability to see all of the information, as opposed to when different parties see only parts of the information, police action reveals nothing new, and therefore mosaic theory may not apply.

Even understanding this difference between modern and traditional surveillance, there is considerable disagreement with regard to the standards and dimensions by which to determine that a search under mosaic theory has taken place. Solove[43] and Judge Ginsburg writing in Maynard agree that facts when combined are more revealing about a person than when considered in isolation, but Solove applies this principle to third party records systems while Ginsburg applies it to GPS surveillance. The duration of surveillance is a significant factor in Ginsburg's opinion, as he argues that over time more information is revealed as sur-

veillance activities combine to form a more complete and reliable picture of a person's life.[44] This scenario is analogous to the idea of obtaining a reliable sample size in the study of statistics, where a sample becomes more reliable as it grows larger and represents a greater portion of the population of interest. Sotomayor, in her concurring opinion in Jones, asserts that even short-term GPS surveillance may potentially reveal intimate details of a person's life and constitute a Fourth Amendment search. Technologically assisted surveillance allows police to store records indefinitely, and there is an enhanced potential for police abuse since the monitoring activities, regardless of the duration of surveillance, are less expensive and less easily detectable than physical surveillance.[45] The aspects that distinguish GPS surveillance are thus maintained independent of time.

Smith et al. also place emphasis on the potential for abuse of GPS surveillance. They agree with Sotomayor with respect to the ability to store data indefinitely. As for resource management, they focus more on the fact that GPS eliminates a need for human involvement than on the dramatically reduced costliness and likelihood of detection. Like Ginsburg and unlike Sotomayor, Smith et al. seem to limit their criteria to long-term surveillance, or at the very least do not consider short-term surveillance. While Alito in Jones clearly establishes time as the determining factor in whether a search has taken place, he uses much of the same reasoning as Smith et al. with respect to available resources; "[t]he surveillance at issue in this case—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance."[46] Rather than focusing on the advent of GPS technology as having an inherent danger of abuse, he says that the public would not reasonably expect such effort to be expended in the course of a normal investigation using traditional techniques, and that the same public expectations apply to the use of GPS surveillance. This is a unique opinion because rather than attempt to differentiate GPS technology from traditional surveillance methods, Alito equates them by pondering the traditional methods that would yield the same outcome and questioning whether the public would expect such a practice to occur with regularity.

There is a thin, barely visible thread underlying and connecting these various views that assists in the development of a standard for mosaic theory. Aside from the pattern-revealing aspect of mosaic theory, a major concern is whether surveillance is prone to abuse. An indication that an abusive activity is taking

place is, as previously discussed, the "chilling" of fundamental freedoms among the observed parties. Such "chilling" may occur when technology removes the barriers that previously limited surveillance capabilities, allowing constant, cheap, and surreptitious monitoring to take place with minimal human involvement, the records of which can be stored for consideration at any point in the future. Whether because such techniques are beyond the expected capabilities of any law enforcement entity or because they are prone to abuse and pose a significant threat to freedom, many scholars and some judges and Supreme Court justices argue that that GPS surveillance is at least sometimes a search.

What should be Done Differently in Terms of GPS Searches?

Fourth Amendment analysis utilizing mosaic theory would not necessarily conclude that GPS monitoring is a search, but rather that it sometimes can be a search. If GPS surveillance is accepted as being fundamentally unique in its capabilities to reveal a reliable pattern of a person's lifestyle and its potential for abuse, the question remains as to whether these factors render it a search under all circumstances. This is a novel issue for courts, which have traditionally utilized what Kerr calls a "sequential approach" where a given action is either always a search or never a search.[47] If GPS has the potential to implicate the Fourth Amendment for the reasons previously described, it is unlikely that it is never a search, but that does not mean it is always a search. Certainly, if GPS surveillance always reveals a telling pattern about a person's life and is always susceptible to abuse no matter the application, there would be little issue in concluding that it is always a search. The variable of time, however, comes into play in Ginsburg's opinion in Maynard, Alito's concurrence in Jones, and the scholarly writings of Kerr, Smith et al., and Henderson. Time is not a rigid and inflexible factor; rather, it is fluid and exists on a gradient, with each accumulation of a moment subtly altering the overall nature of surveillance. This complicates attempts to strictly define GPS surveillance as a search because different durations will theoretically result in different levels of invasiveness. The resulting concept from this is mosaic theory, which postulates that non-search tactics, in this case individual moments of surveillance in public space, amount to a search when considered in sum. Kerr recommends that courts reject mosaic theory in favor of a binary choice option where GPS surveillance is either always a search or never a search,[48] while Henderson says the binary approach is "completely unacceptable."[49]

A binary approach ignores the nuances that arise when the duration of surveillance changes and

subsequently becomes more or less invasive. In addressing this phenomenon, something akin to Fourth Amendment calculus must be performed to determine the exact point at which the constant stream of data into the collective whole causes simple surveillance to become a search. An analogy would be to consider a lemonade stand where the proprietor charges twenty-five cents for one cup. If a patron approaches and inquires as to the cost of one drop of lemonade, the proprietor would likely say that it costs nothing. That patron may then request an entire cup to be filled with these drops of lemonade, but it is unlikely that this cup would be given away free of charge even though it consists of countless drops that themselves cost nothing. The same is true for mosaic theory; one single instance of surveillance may be of little consequence, but once many are considered together they take on a new meaning. A binary approach to GPS surveillance is problematic because it would essentially require the proprietor to decide either to charge nothing for a full cup of lemonade or twenty-five cents for a drop. Although this may be simpler and raise fewer questions than an approach where the proprietor attempts to adjust the price to the exact amount of lemonade given away, it flies in the face of common sense. A mosaic approach allows for the duration of time of surveillance to be accounted for, which is an entirely relevant and important variable. The most obvious issue raised here is the duration of GPS monitoring that is required before it is considered a search. This raises numerous other questions, as will be addressed later, but the complicated and murky nature of mosaic theory does not disqualify it from being worth consideration, especially when the binary alternative might constitute an oversimplification.

PRACTICAL ISSUES OF MOSAIC THEORY

If courts adopt mosaic theory, the consequences would be vast and far-reaching. It is something of a novel approach to Fourth Amendment analysis, and would be accompanied by a substantial amount of uncertainty and questions needing answers. Kerr believes that courts should reject it because of its murkiness and that it "would compel courts to start afresh with a new building block of Fourth Amendment analysis."[50] Ostrander also complains that the theory's lack of clarity and uncertain scope "will provide defendants with an arsenal to attack every police investigation."[51] However, as was previously determined, GPS surveillance poses the novel problem of amassing information over time and allowing law enforcement to have a more comprehensive and reliable pattern of a person's life the longer the duration of surveillance. This means that

GPS surveillance both differs from traditional surveillance and requires an approach that accounts for time. Mosaic theory is not, as Kerr says, an "awkward halfway measure,"[52] but a theory that necessarily accounts for the nuances associated with different periods of surveillance. The difficult questions posed are therefore well worth pondering. Those to be discussed include (1) the point at which surveillance becomes a search, (2) whether or not analysis of the information obtained is required for the surveillance to be considered a search, (3) how to account for distinct intervals of tracking in the broader mosaic, (4) how surveillance from past investigations applies, (5) which techniques are implicated, (6) the constitutional reasonableness of mosaic searches, (7) the issue of retroactive unconstitutionality, and (8) how mosaic theory ideally would be implemented.

At what Point Does GPS Surveillance Become a Search?

This may be the central question of mosaic theory, but the only concrete answer thus far comes from Henderson who says surveillance becomes a search once it goes beyond twenty-four hours.[53] This seems to be a much shorter duration than Alito and Ginsburg have in mind when they say that long term GPS surveillance is a Fourth Amendment search; very few people would likely consider one full day of uninterrupted surveillance "long term" even if they disagree with its legality in the first place. Sotomayor, however, as already discussed, believes that even short-term GPS monitoring may be considered a search and does not place a particular emphasis on duration. While she may agree with Henderson that twenty-four hours of GPS monitoring is a search, she may say that an even shorter period of monitoring implicates the Fourth Amendment. Henderson places emphasis on the amount of time of surveillance, while Sotomayor focuses on the inherent advantages to law enforcement and invasiveness of GPS monitoring. Unfortunately, while Henderson is the most specific in identifying the duration of GPS surveillance necessary to consider it a search, he is vague in his rationale, failing to describe why twenty-four hours is the point at which location information should be subject to constitutional protections. The designation seems arbitrary and more like a placeholder than anything else; Henderson, asserting that his framework "strikes me as a reasonable one,"[54] does not seem to have convinced even himself of his solution's rightness.

Twenty-four hours may nevertheless be a reasonable threshold, at least in some cases. Returning to the language of statistics, we may identify the duration of surveillance as a "sample" and the sum of a

person's movements as a "population," with a search being committed at the moment the sample size becomes representative of the population as a whole. However, a reliable sample size is determined by what we consider an acceptable margin of error. There is no set point at which surveillance suddenly reveals a reliable and telling pattern; as the sample size increases, the margin of error decreases. The true question to ask in order to determine when GPS surveillance becomes a search is therefore what the margin of error is that we are willing to accept. Generally, a large sample corresponds to a very small margin of error, but applying this to GPS surveillance would indicate an extreme level of invasiveness, as surely a search has been committed before the police can predict an individual's movements with a high degree of accuracy.

While scholars may indicate a variety of moments at which they consider a search to have taken place, the point at which any level of predictability emerges represents the beginning of a pattern's formation. Using predictive power as an indicator of accumulation of information, mosaic theory may therefore be implicated when law enforcement is able to predict an individual's movements with a level of accuracy greater than complete randomness, which would be the case with a typical bystander. In other words, once surveillance activities start to reveal a pattern of that person's life, the police would more reliably be able to predict that person's movements than bystanders. No matter how slight, predictive power emerges once there is more than a single observation.

However, this is not to say that any two observations constitute the formation of a mosaic. Comparing observations within a single day does not provide information about an individual's general lifestyle but rather context to their activities within that day. The granting of such context could be considered micro-level aggregation, while context revealed over the course of several weeks is macro-level aggregation. The former can be seen in the aforementioned example of an adulterous husband being revealed through his actions of buying flowers and taking them to a woman other than the one he kissed goodbye that morning. Since context revealed during micro-level aggregation is limited in scope and therefore does not allow observers to predict an individual's future behavior, an aggregation-based approach to defining Fourth Amendment searches may not need to consider information gathered over a single day.

In defining the proper unit of measurement, therefore, each moment in a given day should be considered independently and not as part of an overarching mosaic. Every moment of observation in a given day

represents the beginning of its own mosaic. The following day, every observation made at the same time as one on the previous day completes the corresponding mosaic because each sample has become increasingly reliable. Therefore, the point at which GPS surveillance begins to reveal a minimally reliable pattern about a person's life seems to be when an observation is made at the same or approximately the same time on two separate days. This is the point at which a mosaic search can be said to have taken place. In constant surveillance, this would interestingly agree with Henderson's twenty-four hour suggestion.

Is Analysis of the Aggregated Information Required for it to be a Search?

Kerr argues that mosaic theory, unlike traditional Fourth Amendment activation, requires some action beyond simply collecting the information.[55] He questions whether a search occurs when the government collects information but has not yet analyzed or considered it as a whole[56]. The language of mosaic theory heavily emphasizes the fact that information is combined and reveals something not ordinarily visible, so a search would seem not to have taken place until the pattern is actually revealed, even if the minimum time threshold has been passed. Thus, if surveillance takes place but the information is not considered as a whole, the situation is essentially the same as when individual members of the public observe a vehicle's movements in public. There is no context, and as a result no telling pattern is formed. If there is no pattern, mosaic theory is not activated since law enforcement does not see anything a bystander cannot also see. Under mosaic theory, it is therefore possible for law enforcement to conduct a significant amount of GPS surveillance without it being considered a search until the data collected is actually viewed. Aggregation is key, so Kerr's assertion that mosaic theory requires subsequent analysis of information after it has already been acquired would seem to be correct.

An opposite situation occurs when law enforcement obtains information kept by institutional third parties, which assists in answering Kerr's question[57] of whether mosaic theory applies differently when an agency other than the government is responsible for aggregation. As was already discussed, an organization releasing personal information to law enforcement has already assembled it, and thus has analyzed it. Therefore, in GPS monitoring, law enforcement sometimes collects information without analyzing it; in obtaining third party records, law enforcement always analyzes information without collecting it. A direct involvement in both of these actions is thus key in any iteration of a mosaic theory. In other words, for mosaic theory to

be activated, law enforcement must go beyond collection by amassing and analyzing the information, and this cannot be done by any other agency.

The possible disconnect between the act of surveillance and a search being committed requires the potential for premature viewing to be accounted, as well as the limits of preemptive surveillance. Where premature viewing of GPS surveillance data is concerned, a computerized system of checks and balances may be ideal. For example, in situations where law enforcement has collected a significant amount of data but lacks legal justification to view it (and to thereby commit a search), the implementation of a password or encryption code, controlled by a magistrate or judge, may prevent premature viewing. This does not, however, account for cases in which law enforcement agents may abuse this rule by conducting GPS monitoring (without attempting to analyze data) on individuals whom they merely suspect will someday commit an illegal act. In these situations, a desirable test may be to consider whether officers held a good faith belief while carrying out surveillance that GPS tracking would expose criminal activity.

How should we Account for Intermittent Tracking?

Kerr sees the ability for GPS tracking to occur at different intervals as being very problematic.[58] When tracking occurs intermittently or at different intervals, there exists the possibility of different interpretations of the actual length of surveillance. His example is that if a GPS device tracks a person's location for an hour every day for twenty-eight days, the duration of surveillance could be identified either as twenty-eight hours (if we add the time of active surveillance) or twenty-eight days (if we measure the duration from start to finish).[59] Henderson advocates for the former interpretation, "since time is typically the best measure of invasiveness with regard to location information."[60] However, a modified version of the latter interpretation may be best. As previously discussed, one surveillance "day" has occurred only once monitoring takes place at the same time one day that it did on another. In constant surveillance, this will happen as soon as twenty-four hours have passed. In intermittent surveillance, there are many possibilities. One surveillance day could occur in one month if the tracker is turned on once a month at the same time each time. If it is turned on at a somewhat random interval, a surveillance day will occur once the location is monitored at the same time on two separate dates. While this pattern of monitoring at the same time on different days could build up to one surveillance day, monitoring at different times on different days would not. Consider,

say, one period of surveillance from monitoring that lasted from 3:00 pm to 4:00 pm on one day and another period of surveillance that occurred from 11:00 am to 12:00 pm on a different day. A search would only have taken place once, at a later date, surveillance is conducted over a period of time that was already observed on a previous day. Each moment in a day would thus contribute to its own aggregated whole.

On the surface, this seems to carry the potential for abuse; law enforcement could track a person's movements for one moment at a slightly different time every day and not have to consider a day of surveillance to have passed even after a month of observation, even though the subject was observed at approximately the same time every day for one month. However, such a practice would be of very limited usefulness to the police and is indeed seldom used; a much more likely method would be for the tracker to be turned on for a relatively extended period such as an hour. Six hours of surveillance on a given day from 12:00 pm to 6:00 pm means that law enforcement cannot, for the duration of the investigation, repeat surveillance in that time period on any subsequent day without adding a surveillance day. Thus, as surveillance carries on and more information is amassed about an individual, the likelihood of Fourth Amendment activation increases.

How should Surveillance from Previous Investigations Apply?

Kerr also wonders whether surveillance under mosaic theory has a "half-life,"[61] essentially asking how much time must pass before previous GPS surveillance stops counting towards the mosaic. Henderson would not require police to consider past surveillance, even in cases where his maximum twenty-four hour segments occur very closely together.[62] While the idea of not requiring surveillance of previous crimes to add to a current mosaic may seem rational in the abstract, Henderson's idea is incomplete. He fails to account for the potential of abuse, since an officer who desires to constantly monitor a suspect for three days without implicating the Fourth Amendment under his twenty-four hour rule would need only to make three separate requests for twenty-four hours of surveillance independently, and the only solution offered is that sanctions should be triggered if courts determine abuse has taken place.[63] This allows for the possibility that three straight days of surveillance would not be considered a search under the law while two days made under a single request would be considered a search even if the monitoring took place over as long as a month. The fact that this inconsistency arises only out of the number of requests made for surveillance is unacceptable. Thus, there cannot be a blanket determination that all past surveillance activities are irrelevant.

The central problem here is that the line between intermittent surveillance and historical or past surveillance is uncertain. At some point, intermittent surveillance becomes so infrequent that past intervals are no longer relevant and do not trigger the Fourth Amendment. The determining factor should be whether or not different periods of surveillance take place within the same investigation. Consider two similar, yet different situations: In situation one, four days of surveillance take place in January and another four days take place in March, both of which are carried out as part of the same investigation by the same law enforcement agents who have previous monitoring efforts in mind. In the second situation, the same periods of surveillance occur over the exact same days, but here the subject is investigated for two separate crimes at each interval, and the January surveillance is not considered or compared to the surveillance in March. The former case is an example of intermittent monitoring while the latter is an example of historical monitoring. Historical monitoring should not be treated as if it adds to the mosaic when it in fact does not. However, this could still pose a problem if the information revealed by historical surveillance remains available to present investigations, which would make the distinction between past and intermittent surveillance unsubstantial in practice. One possible solution would be for data collected during past surveillance to be destroyed or made inaccessible to law enforcement, which would make the divide between historical surveillance and intermittent surveillance real as well as symbolic.[64]

What Techniques are Implicated?

If mosaic theory is implemented, there exists a possibility that it will not be limited to only GPS searches, since patterns can be revealed under a variety of circumstances and through more techniques than just GPS. Kerr captures the uncertain scope of the mosaic by asking which surveillance methods trigger the mosaic and how different methods will be considered.[65] Even though GPS monitoring is currently the only method in which the courts have discussed some form of mosaic theory, mosaic theory may apply to many different techniques, and it may apply to different techniques considered together. Courts would need to grasp how widely mosaic theory applies before implementing it. Consider a situation in which police collect information on a person by obtaining credit card statements, phone records, and location information through GPS.[66] Through mosaic theory, the determination would need to be made of (1) which of these tactics, if any, should be analyzed and (2) whether they should all be analyzed together as having the ability to reveal

a pattern. When each individual tactic is considered, the same logic applied to GPS surveillance may apply to other surveillance techniques as well; mosaic theory's relevance depends on whether law enforcement or a third party aggregates the data. Usually, third parties are responsible for aggregating data in credit card and phone records, so whatever they release to the police is visible to them as well, and mosaic theory probably would not apply.

The next question to consider is whether multiple tactics can come together to reveal a pattern that should be constitutionally protected. When information gathered from different techniques in a single investigation reveals a pattern, a "mosaic" may appear to have formed. For this reason, Ostrander finds it likely that whole investigations will be called into question; "if a pattern is detected through the use of multiple investigatory techniques, and the theory is applied consistently, the investigation in its entirety will be rendered a search."[67] Applying mosaic theory to entire investigations, however, is incredibly problematic. Different surveillance techniques by default take place in different mediums and have different levels of invasiveness, meaning that they cannot be easily compared. Furthermore, the possibility that police officers may come to have some familiarity with an individual's lifestyle simply because they observed it through different investigatory tactics has been true of all investigations throughout history (the same can be said for the previously discussed micro-level aggregations).[68] Mosaic theory should not be thought of as delegitimizing the formation of patterns in all cases, as that would be a fundamental misunderstanding of its reason for existing, which is to restore a measure of privacy that modern technologies threaten. Expanding the scope of mosaic theory to encompass multiple techniques under a single investigation may be considered an overcorrection and inconsistent with traditional practices. Therefore, mosaic theory may be thought to include each technique that blends together data, but independently and not as forming a broader "mosaic" under the investigation as a whole.

The Constitutional Reasonableness of Mosaic Searches

Even accepting that a mosaic theory creates new circumstances under which Fourth Amendment searches are committed, the reasonableness of such searches remains in question. In other words, mosaic searches may require search warrants to be valid, or they may require a lesser degree of legal justification. As Kerr says, "Searches of homes ordinarily require a warrant. Searches of cars ordinarily require probable

cause but no warrant. Limited frisks of persons for weapons require only reasonable suspicion that a suspect is armed and dangerous."[69] Mosaic searches are unique because they take place in public spaces, and courts have never considered the reasonableness of searches taking place in public because they have not previously been considered searches.[70]

Smith et al. argue for warrants to be required in all mosaic searches, arguing, "the use of GPS surveillance for prolonged monitoring without a warrant cannot pass muster under the Fourth Amendment."[71] However, due to the accumulation-based nature of mosaic searches, a sliding scale of constitutional protections may be advisable. Henderson recommends the following:

> I conclude that absent consent or an emergency, the following would be reasonable: law enforcement would need a warrant to access over twenty-four hours of location information, could access a lesser period of location information using a lesser court order, and could access a record indicating location at a single point in time for any legitimate law enforcement purpose.[72]

While this may not necessarily be in disagreement with Smith et al. where long-term surveillance is concerned, it notably departs from traditional doctrine on searches of vehicles in public spaces, which requires probable cause but no warrant. Also interesting is Henderson's recommendation for the use of a lesser court order for surveillance that takes place for less than twenty-four hours, which is similar to how Solove addresses information requests of third parties. He recommends statutorily heightening the requirements for the government to obtain subpoenas due to the added protections they have that are not available with search warrants; "Unlike warrants, they can be challenged prior to the seizure of documents. The subpoenaed party can refuse to comply or make a motion to quash before a judge."[73]

Henderson's recommendation may work well with the possible guidelines to a mosaic theory here established. When a mosaic search is committed, or when an individual is monitored at the same time on two different dates, a search warrant would be necessary in order for law enforcement to legally access the data. When more than one single point of location data is accessed, but the conditions for a search are not met, a lesser court order may be appropriate. Finally, when the government seeks only the location of an individual at a single point in time, such data may be accessed as long as it is for a legitimate law enforcement purpose.

The Issue of Retroactive Unconstitutionality

The establishment of new rules begets the necessity for potential violations of such rules to be addressed. For this reason, perhaps one of the single most significant issues associated with mosaic theory is that of retroactive unconstitutionality. By definition, mosaic theory takes non-search techniques together and redefines them as searches. GPS monitoring would not be considered a search until the threshold is crossed, and after this happens the entire duration of surveillance is a search subject to Fourth Amendment protection. This means that law enforcement activity that was conducted in good faith and in accordance with the law at the time it was carried out could retroactively be called a search once the duration of surveillance was long enough to reveal a pattern. Ostrander sees this as being unavoidable with mosaic theory, and argues that it would make law enforcement "even more hesitant in exercising the full extent of their investigatory power."[74] Kerr also discusses the possibility of retroactive unconstitutionality, but questions whether the entire assembled mosaic would be considered a search or just the surveillance that took place after monitoring became a search.[75]

One solution to this may be, as Kerr says, to consider only surveillance that took place after the activity became a search subject to the Fourth Amendment. Although the entire duration of surveillance is considered a search, the monitoring that took place after it became a search is what activated the Fourth Amendment. Any monitoring that took place before the entirety of surveillance became a search may be subject to a good faith exception, since the police were acting in accordance with the law up until the point in which the mosaic was formed. Even though the surveillance preceding the activity becoming a search is instrumental in providing the pattern, it did not perform this function until the activity became a search. Confusion arises because here the act constituting a search takes place over time, while traditionally searches take place at one moment in time. However, similar approaches to exclusion in both cases may still be advisable.

How would Mosaic Theory Best be Implemented?

Opponents of mosaic theory do not necessarily disagree with its aim, but see it as impractical. The difficulties associated with implementation of mosaic theory may extend beyond the capabilities of any court. After detailing the problems associated with administration, Kerr states that legislatures are better equipped than courts to address something so complicated; "Congress has significant institutional advantages over the courts in trying to regulate privacy in new technologies. Congress can act quickly, hold hearings,

and consider expert opinion."[76] Ostrander recommends that Congress "enact legislative standards regulating both developing and existing unregulated pattern-detecting technologies."[77] Kerr and Ostrander both oppose mosaic theory, but seem willing to see a version of it implemented as long as it goes through a medium that can handle its complexity. Those who advocate for mosaic theory seem to prefer a legislative approach as well. Solove recommends statutorily heightening the standards required to obtain subpoenas to acquire information from third party record holders.[78] Justice Alito, writing his concurring opinion in Jones, remarks that privacy concerns about developing technologies may lead to the enactment of legislation to protect against intrusions.[79] Finally, Henderson, the only author to attempt to draft an actual policy, recommends that it be enacted legislatively.[80]

CONCLUSION

A mosaic theory of the Fourth Amendment, or one that is based on the aggregation of information to reveal a pattern not regularly visible to casual observers, presents numerous conceptual and practical issues, only a select few of which are discussed above. Mosaic theory, if implemented, would likely present law enforcement officials, lawyers, and judges with many uncertainties that are yet to be discovered, in addition to those already discussed and those beyond the scope of this paper. However, modern GPS surveillance certainly differs from traditional surveillance, and novel problems require novel solutions. A binary approach to this, which would define GPS monitoring as a search under all circumstances, would fail to account for the fact that a more reliable pattern is revealed as the duration of surveillance increases.

Perhaps the most important question relating to mosaic theory is not one that relates to its administrable difficulties or theoretical underpinnings, but whether implementing such a complex policy would be worth the trouble. We must determine whether the fact that GPS surveillance reveals a more reliable and telling pattern of an individual's life as the duration of surveillance increases means that we are willing to shoulder the load of searching for answers to all the difficulties associated with accounting for it. The alternative may oversimplify matters, but simply designating GPS monitoring as a search would eliminate the need for an entirely new approach to the Fourth Amendment that applies only to surveillance techniques that amalgamate personal information.

However, the forward march of technology may prove the utility of having such a policy drafted to

deal with advanced surveillance methods. If more techniques come into practice that allow law enforcement agents to collect and compile vast amounts of data about an individual, mosaic theory may be expanded to include them. In holding that a search had taken place because police had physically intruded on a suspect's personal space to install a GPS tracker, the Supreme Court in United States v. Jones limited the decision to a very specific set of circumstances and delayed a more decisive ruling on privacy expectations as they are affected by modern technology. Someday, the Court may be forced to rule on GPS monitoring in a case where no physical intrusion was necessary. However, by that point in time there may be numerous tactics available to the police aside from GPS technology that allow them to collect patterns. Any ruling specific to GPS at this point would be of limited usefulness. If advanced surveillance capabilities that create patterns about an individual's life implicate the Fourth Amendment, ruling on each new technology as it develops would be ineffective. The Court should consider advanced tactics in addition to GPS monitoring and whether they significantly diverge from traditional surveillance, or any future ruling may be just as shortsighted as Jones.

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(Endnotes)

1 Olmstead v. United States, 277 U.S. 438 (1928), Brandeis Dissenting.

2 Id.

3 132 S. Ct. 945 (2012).

4 U.S. Const. amend. IV.

5 See id at 956, Sotomayor Concurring ("I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on") and at 964 ("[f]or such [minor] offenses, society's expectation has been that law enforcement agents would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period").

6 See Kerr, Orin. 2010. "D.C. Circuit Court Introduces 'Mosaic Theory' of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search." The Volokh Conspiracy, August 6. http://www.volokh.com/2010/08/06/d-c-circuit-introduces-mosaic-theory-of-fourth-amendment-holds-gps-monitoring-a-fourth-amendment-search/.

7 Kerr, Orin. 2012. "The Mosaic Theory of the Fourth Amendment." Michigan Law Review 111, no. 3:311-54. http://ssrn.com/abstract=2032821.

8 Solove, Daniel J. 2002. "Digital Dossiers and the Dissipation of Fourth Amendment Privacy." Southern California Law Review 75, no. 5:1083-1167. http://dx.doi.org/10.2139/ssrn.313301, at 1154.

9 Smith, Priscilla J., Nabiha Syed, David Thaw, and Albert Wong. 2011. "When Machines Are Watching: How Warrantless Use of GPS Surveillance Technology Violates the Fourth Amendment Right against Unreasonable Searches." The Yale Law Journal Online 121:177-202. http://yalelawjournal.org/2011/10/11/smith.html, at 180.

10 Ostrander, Benjamin M. 2011. "The 'Mosaic Theory' and Fourth Amendment Law." Notre Dame Law Review 86, no. 4:1733-66. http://scholarship.law.nd.edu/ndlr/vol86/iss4/7/, at1748

11 See Jones, 132 S. Ct. 945, at 948.

12 Id at 948.

13 Id at 948.

14 Id at 948.

15 See United States v. Knotts, 460 U.S. 276 (1983) at 281-82 ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another").

16 615 F.3d 544 (D.C. Cir. 2010).

17 See Maynard, 615 F. 3d 544, at 549.

18 Id at 559.

19 Id at 560.

20 See Jones, 132 S. Ct. 945, at 949.

21 Id at 955, Sotomayor Concurring.

22 Id at 955, Sotomayor Concurring.

23 Id at 956, Sotomayor Concurring.

24 442 U.S. 735 (1979).

25 Jones, 132 S. Ct. 945, at 957, Sotomayor Concurring.

26 Jones, 132 S. Ct. 945, at 963-964, Alito Concurring.

27 Id at 964, Alito Concurring.

28 See Solove (2002) at 1085 ("Individuals, especially in times of crisis, are vulnerable to abuse from government misuse of personal information. Once government entities have collected personal information, there are few regulations of how it can be used and how long it can be kept").

29 See Smith et al. (2011) at 180 ("when 'machines are watching'—that is, when tracking is automated and extended for prolonged periods of time—the potential for abuse grows larger").

30 See Ostrander (2011) at 1763.

31 See Smith et al. (2011) at 187 ("the underlying rationale in Kyllo—as with the other surveillance cases—is the need to protect against police abuse").

32 Id at 200.

33 See Henderson, Sephen E. 2013. "Real-time and Historic Location Surveillance after United States v. Jones: an Administrable, Mildly Mosaic Approach." Journal of Criminal Law & Criminology 103, no. 3:803-38. http://dx.doi.org/10.2139/ssrn.2195289, at 812.

34 Smith et al. (2011) at 200.

35 See Henderson (2013) at 815-17. The factors are (1) the extent to which transfer of information to a third party is necessary to participate in society, (2) the extent to which the information is personal and likely to cause embarrassment or stigma if disclosed, (3) the extent to which information is accessible to ordinary citizens, and (4) the extent to which the law restricts access to the information.

36 Solove (2002) at 1153.

37 See Henderson (2013) at 825.

38 This framing is based on GPS surveillance, currently the only practice that has resulted in some iteration of mosaic theory working its way through the legal system. The possibility that other techniques, including those previously held not to implicate the Fourth Amendment, fit under the broad umbrella of mosaic theory will be discussed later in the section on practical questions associated with the theory.

39 See Maynard, 615 F. 3d 544, at 556-58.

40 See id at 556-58.

41 See Smith et al. (2011) at 198 and Jones at 957, Sotomayor Concurring. Smith et al use the phrase "digital information age" over "digital age," though the phrases remain very similar and represent the same concept.

42 The Knotts tracker is different: it revealed only data available to anyone who observed the vehicle.

43 See Solove (2002) at 1154.

44 See Maynard, 615 F. 3d 544, at 560

45 See Jones, 132 S. Ct. 945, at 956, Sotomayor Concurring.

46 Jones 132 S. Ct. 945, at 963, Alito Concurring.

47 See Kerr (2012) at 315.

48 See id 352.

49 Henderson (2013) at 808

50 Kerr (2012) at 314.

51 Ostrander (2011) at 1749.

52 Kerr (2012) at 344.

53 See Henderson (2013) at 810.

54 Henderson (2013) at 819

55 See Kerr (2012) at 322.

56 See id.

57 See id.

58 See Kerr (2012) at 333.

59 See id.

60 Henderson (2013) at 825.

61 Kerr (2012) at 334.

62 See Henderson (2013) at 825.

63 See id.

64 Solove (2002) at 1167 recommends a similar procedure for information obtained from third parties.

65 See Kerr (2012) at 334.

66 See id at 335.

67 Ostrander (2011) at 1749.

68 See Kerr (2012) at 328 ("In the past, however, this was considered good police work rather than cause for alarm").

69 Kerr (2012) at 336-337.

70 See id at 337.

71 Smith et al. (2011) at 180.

72 Henderson (2013) at 810.

73 Solove (2002) at 1163.

74 Ostrander (2011) at 1749.

75 See Kerr (2012) at 343.

76 Id at 350.

77 Ostrander (2012) at 1761.

78 See Solove (2002) at 1164.

79 See Jones, 132 S. Ct. 945, at 962.

80 See Henderson (2013) at 803.