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Articles

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Analyzing the Privacy Standards of the Roberts Court in *United States v. Jones*

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Abstract:
At the time the Constitution was adopted, technology did little to affect our understanding of basic Fourth Amendment jurisprudence. However, as innovation has swept the modern era, the courts have wrestled with the application of the Fourth Amendment to uses of surveillance technology. The U.S. Supreme Court's ruling in United States v. Jones provides clarity on the scope of Fourth Amendment protection; particularly, it addresses the extent to which law enforcement may use a GPS tracking device to monitor citizens. The decision in Jones proves to be a curtailment in the powers of law enforcement, and represents a potentially shifting paradigm for the privacy standards of the Roberts Court.

As the world has developed with considerable innovation, the use of technology has become a ubiquitous part of contemporary life. The advances of modern society, however, often harbor issues for existing case law. The Supreme Court's interpretation of the Fourth Amendment has often been contingent on innovative technology. Specifically, law enforcement's use of surveillance tools has warranted interpretation by the Court. Police are arguably more effective at preserving an individual's safety as these innovations enter the public arena. For example, it furthers law enforcement's ability to collect vital evidence, potentially allows them to protect the public from threats of terrorism and the like, and even enables police to electronically frisk a criminal without fear of harming the officer.[1]

This use of technology, however helpful to the public welfare it may be, often collides with the privacy interests embodied in the Fourth Amendment. The Amendment reflects the need for certain enclaves to be free from arbitrary rule.[2] The framers of the Constitution recognized the need to protect the people against the prying eyes of the government. Over time, the Court has reinforced "the overriding respect for the sanctity of the home that has been embedded in our transitions since the origins of the Republic."[3] [4] Thus, it has frequently paid deference to the growing use of technology in society.[5] However, the Court has also recognized that "[i]t is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence."[6] In *United States v. Jones*, the Court reexamined its historical and contemporary understanding of Fourth Amendment jurisprudence, in response to law enforcement's use of a 21st-century surveillance technique—the global positioning system (hereafter "GPS") device.

The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

> issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."[7]

Like other areas of the Constitution, the language of the Fourth Amendment comes under constant review. The courts have become—as their existence intends—a battleground for those who dispute claims against unreasonable searches. In most cases, these claims have resulted from warrantless searches conducted by government officials. Former Chief Justice Rehnquist, in his narrow interpretation of the Fourth Amendment, noted, "it is often forgotten that nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants."[8] The language employed by the framers prohibits *unreasonable* searches and seizures, not necessarily those that are *warrantless*. Thus, the courts must undertake a balancing test when determining the reasonableness of a search.[9] In *United States v. Place*, the Court regarded this test as the necessary balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interests alleged to justify the intrusion."[10] The issuance of a warrant backed by probable cause is the most common means of accomplishing this,[11] despite the view taken by Rehnquist.

The focus of the cases discussed herein is therefore a result of this particular understanding of Fourth Amendment jurisprudence. The analysis of these cases will consider whether certain government action, in the absence of a warrant, constituted a "search"—for we commonly recognize a *warrantless* search as *unreasonable*.

I. PROTECTION FOR PLACES OR PEOPLE?

The development of Fourth Amendment jurisprudence has seen a variation of issues, stretching from wiretaps on telephones,[12] to simple visual surveillance,[13] and even to thermal-imaging devices.[14] In *Jones*, the Supreme Court addressed a new issue, namely the Fourth Amendment's reach to GPS tracking devices.

A. THE FACTS OF JONES

The case reached the Court after the United States Court of Appeals for the District of Columbia Circuit reversed respondent Jones' conviction.[15] Jones, the owner and operator of a nightclub in the District of Columbia, became the target of an FBI investigation after he was suspected of trafficking narcotics.[16] Agents employed a number of surveillance techniques, including, but not limited to, the use of a GPS tracking device, which was affixed to the vehicle registered to Jones' wife.[17] After tracking the vehicle's movements, the Government secured an indictment—based in part on the information gathered from use of the GPS tracking device—charging Jones with certain criminal activity, of which he was later convicted.[18] The Supreme Court granted certiorari to determine whether the attachment of the GPS tracking device, and the subsequent use of that device to monitor the vehicle's movements on public streets, constituted a search within the meaning of the Fourth Amendment.

B. THE PROPERTY-BASED INTERPRETATION

Early decisions regarding unauthorized government intrusions were tied to common-law trespass until the latter half of the twentieth century.[19] The Court's interpretation relied exclusively on whether a physical intrusion had occurred. The holding in *Olmstead v. United States*, for example, employed this property-based approach after police attached wiretaps to telephone wires on public streets.[20] In particular, the Court examined whether the government's use of the wiretaps to gather evidence, absent a physical intrusion, constituted a Fourth Amendment search.[21] The opinion explained that a search had not occurred because "[t]here was no entry of the houses or offices of the defendants."[22]

This doctrine, premised on physical trespass, remained the standard for nearly four decades. In *Silverman v. United States*, the

Court struck down law enforcement's warrantless use of a "spike mike[23]".[24] In *Silverman*, a man's residence came under suspicion of serving as the headquarters for an illegal gambling operation.[25] Officers then, in an adjoining house, pierced the wall of suspects' premises with the "spike mike."[26] In a similar case, *Goldman v. United States*, the Court upheld the unauthorized eavesdropping on a conversation, after police had placed a detectaphone[27] against an office wall.[28] The ruling in these cases differed by one technical distinction: The government's use of a "spike mike" amounted to a physical intrusion, whereas use of the detectaphone did not because it failed to pierce the wall against which it was placed. It is thus clear why the sole application of the trespassory standard is problematic. In both cases, law enforcement essentially employed the same methods of eavesdropping, but the constitutionality differed in the physical sense of the intrusion.

C. ESTABLISHING THE CONTEMPORY STANDARD

The exclusive property-based approach was explicitly overturned with the decision in *Katz v. United States*.[29] The case reached the Court after FBI agents attached an electronic listening device to the outside of a public telephone booth in an effort to monitor a suspect's conversations.[30] The Government contended—relying heavily on the Court's holding in *Olmstead* and *Goldman*—that the agent's conduct need not be tested by Fourth Amendment standards, because no physical penetration of the telephone booth had occurred. The Court rejected this argument, and articulated the need to depart from the "trespass" doctrine quite clearly. The Court explained that the extension of Fourth Amendment protection cannot turn upon a physical intrusion, for the Amendment "protects people, not places."[31] Thus, the Court regarded the fact that the listening device failed to penetrate the phone booth as having "no constitutional significance."

In concurrence, Justice Harlan established the *Katz's* reasonable-expectation-of-privacy test. The rule is twofold and provides: (i) that a person must exhibit an actual (substantive)

expectation of privacy, and (ii) that the expectation is one that society is prepared to recognize as reasonable.[32] Harlan further explained that "objects, activities, or statements that one exposes to the plain view of outsiders," however, "are not protected because no intention to keep them to himself has been exhibited."[33] The courts have applied the *Katz* formulation to nearly all subsequent cases addressing the constitutionality of Fourth Amendment searches.

II. *JONES*: CLARIFICATION ON PAST PRECEDENT

It is clear that the Supreme Court has deviated from its property-based understanding of the Fourth Amendment. The application of the *Katz* standard has resulted in a curtailment of protection in some cases, and an expansion of protection in others. The Court thus ruled on things such as the use of beepers[34],[35] the physical manipulation of a bag,[36] and an officer's reach into a vehicle,[37] in consideration of whether it violated an individual's expectation of privacy. The decision in *Jones* provides clarity on the *Katz* framework—specifically, in relation to property rights.

A. THE APPLICATION OF TWO STANDARDS

In *Jones*, the Court examined whether the attachment of the GPS tracking device, and subsequent use of that device to monitor the vehicle's movements on public streets, constituted a search within the meaning of the Fourth Amendment.[38] It concluded that it does. Recall that the Fourth Amendment in relevant part provides "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated."[39] Using this language, the Court began its analysis by establishing that a vehicle is indisputably an "effect" as the term is used in the Amendment[40]—a point further discussed *infra* Section III.C. The defendant's vehicle is thus a constitutionally protected area.

The Court then noted that the Government "physically occupied private property for the purpose of obtaining

information."[41] It regarded such conduct as a physical intrusion, which would have amounted to a search at the time the Fourth Amendment was enacted.[42] The Government contended that the *Katz* standard applies, arguing that Jones was absent any reasonable expectation of privacy since the vehicle's movements were in plain view and visible to the public.[43] However, the Court found that the rule delineated in *Katz* was not necessarily applicable. It refused to address the Government's contention, reasoning that the rights secured to Jones by the Fourth Amendment "do not rise or fall with the Katz formulation."[44]

The Court's holding underscores the Fourth Amendment's close connection to property rights. The Court pointed out that if the Amendment was insignificant to property, it would have simply referred to "the rights of the people to be secured against unreasonable searches and seizures," and that the phrase "'in their persons, houses, papers, and effects' would have been superfluous."[45] As previously established, early interpretation of the Amendment reflected the need for citizens to be free from government trespass upon constitutionally protected areas. The Court reasoned that the decision in *Katz* did not dismiss this understanding, and noted that the Harlan standard did not withdraw the protection that the Fourth Amendment provides to the home.[46] The Court further declared that the "reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test."[47]

In concurrence, Justice Alito broke from the majority's rationale. He dismissed its interpretation of historical property rights, and found no constitutional relevance to the Government's intrusion upon Jones' vehicle. Alito reasoned that the *Katz* test should exclusively apply.[48] He took issue with the majority's approach by arguing that it will present "vexing" problems for cases involving contact though electronic signals, as opposed to physical contact.[49] However, the majority failed to understand his point. It noted that its reasoning does not exclusively rely on the

trespassory test; that cases which lack a physical trespass remain bound to the standards proscribed in the Katz formulation.[50]

III. THE COURT ADDRESSES THE GOVERNMENT'S CONTENTIONS

A. *KNOTTS V. UNITED STATES*

The Government pointed to the Court's holdings in a number of post-*Katz* cases, on which several of their claims relied. Two of such cases—*United States v. Knotts* and *United States v. Karo*—contain close similarities to the facts of *Jones*.

In the first case, *United States v. Knotts*, law enforcement agents placed a beeper[51] in a can of chloroform, which later came into the possession of defendant Knotts, with his consent.[52] The agents used the beeper, as well as visual surveillance, to track the defendant's movements in his vehicle on public streets.[53] The Court granted certiorari to determine whether the Government's surveillance of the vehicle constituted a search. The majority ruled that by traveling on public streets, Knotts voluntarily conveyed his movements to anyone who wished to observe him and could therefore claim no legitimate expectation of privacy.[54] The majority noted that the government's use of the beeper simply enhanced observation of what was already public: "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[55] The Government's conduct was thus consistent with the rule expounded in *Katz*, as it obtained information that presented no intention to remain shielded from public observation.[56]

In essence, law enforcement's use of the GPS tracking device in *Jones* represents the same surveillance technique upheld in *Knotts*. Government agents used the device to obtain information that was merely public. The Government argued that the Court's finding in *Knotts* dismisses the conclusion that their conduct constituted a search.[57] However, the Court found no

relevance from its previous ruling. The holding in *Knotts* analyzed governmental surveillance by means of the beeper, but failed to address the instillation itself. *Knotts* would be relevant if the present case was not examining the installation of the GPS tracking device; but as it has been established, the common-law trespassory test defines the installation as a search. According to the Court, its ruling in *Knotts* is thus inapplicable to *Jones*. Such dismissal of the reasoning in *Knotts* underscores the expansion in protection the Court appears to now be offering. Law enforcement must not only be mindful of whether their conduct violates a legitimate expectation of privacy, but whether it is physically intrusive as well.

B. *UNITED STATES V. KARO*

In *United States v. Karo*, the second "beeper" case, the Court addressed the question left open in *Knotts*: Whether the installation of a beeper in a container constitutes a Fourth Amendment search.[58] In *Karo*, Drug Enforcement Administration (DEA) agents installed a beeper in a can of ether which was later delivered to the defendants.[59] Like in *Knotts*, defendant Karo consented to the transfer of the can from the seller into his possession.[60] At the time of the transfer, the beeper conveyed no information because law enforcement was not yet monitoring its signals.[61] The Court concluded that the government's conduct did not constitute a search within the meaning of the Fourth Amendment.

The lower court did not find that the actual installment of the beeper amounted to a Fourth Amendment violation, but that an infringement had occurred when the can was transferred to defendants.[62] The lower court explained that "individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them..."[63] The Court declined to accept this reasoning. Instead, it held that since the beeper conveyed no information at the time it

was transferred into the defendants' possession, its presence did not encroach on any reasonable expectation of privacy.[64]

In *Jones*, the Court distinguished from what occurred in *Karo* to that of the present case. Karo accepted the can at the time of the transfer, and thus forfeited the right to object to the enclosed beeper.[65] In *Jones*, however, there is an absence of consent. The vehicle belonged to Jones at the time the government attached the GPS tracking device.[66] Therefore, Jones, by no stretch of the imagination, consented to the presence of the beeper on his vehicle.

However, what the Court in *Jones* did not examine is the constitutionality of the installation in respect to the type of information produced by the device. The Court in *Karo* held that the presence of the unmonitored beeper—a result of government installation—was not a Fourth Amendment search because "it conveyed no information that Karo wished to keep private, for it conveyed no information at all."[67] When the government attached the GPS tracking device to the vehicle in *Jones*, it did produce information, but only information that was public— that is, Jones' location. Does the presence of the GPS thus violate any privacy interest? In *Karo*, the Court noted that "[i]t is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence."[68] One could therefore argue that the government's use of technology that produces private information is such an exploitation, but its use that produces public information is not. Perhaps, then, a Fourth Amendment violation would occur if the government were using a GPS tracking device to monitor Jones' movements within the confines of his home, but using the device to obtain information that is purely public is arguably not.

C. *NEW YORK V. CLASS*

The government further relied on the holding in *New York v. Class*, which addressed the extent to which the Fourth Amendment protects an automobile traveling on public thoroughfares. In *Class*, a police officer reached into the

defendant's vehicle to move papers that were obscuring the Vehicle Identification Number (hereafter "VIN").[69] The Court granted certiorari to determine whether the officer's reach into the vehicle was in conflict with the Fourth Amendment.

Like in *Jones*, the Court in *Class* noted that automobiles are "effects" as the term is used in the Amendment. The Court understood this term to encompass more than merely property. James Madison's initial proposal of the Fourth Amendment provided for "[the] rights of the people to be secured in their persons, their houses, their papers, and their other property, from unreasonable searches and seizures..."[70] Congress of course revised the proposal to include "effects" rather than "property."[71] This broadened its scope to the extent to which the Court now understands the Amendment to encompass things such as automobiles.

However, the Court also recognized the diminished expectation of privacy that an automobile has on public streets.[72] In *Cardwell v. Lewis*, Justice Blackmun noted that "one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects... [i]t travels public thoroughfares where both its occupants and its contents are in plain view."[73] Other factors can also reduce the expectation of privacy in an automobile.[74] For example, vehicles are often subject to state regulation through inspections, and at times seized by law enforcement in an effort to preserve the public welfare.[75] In *Class*, the Court concluded that the papers placed in front of the VIN were insufficient to create a privacy interest, noting that "[t]he exterior of a car...is thrust into the public eye, and thus to examine it does not constitute a 'search.'"[76]

However, the Court in *Jones* rejected the Government's reliance on their previous ruling. As the Government recognizes, their actions extended beyond a mere visual inspection of the automobile.[77] By attaching the GPS to the vehicle, absent the owner's consent, the officers "encroached on a [constitutionally]

protected area." The Court's decision is clearly contingent on their application of the common law trespassory test, for their ruling would plainly differ in the absence of a physical intrusion. If the agent's conduct had failed to constitute a physical invasion, it is clear, from the Court's opinion in *Class* and *Cardwell*, that no Fourth Amendment search occurred.

D. *OLIVER V. UNITED STATES*

The final case that the government pointed to is *Oliver v. United States*. The question the Court considered in *Oliver* was premised on the open fields doctrine.[78] After passing no-trespassing signs, police had entered the defendant's property to investigate suspected marijuana growth.[79] The Court granted certiorari in determination of whether such conduct amounted to a search within the meaning of the Fourth Amendment.[80]

The decision in *Oliver* would presumably strengthen the Government's position; because although police actions constituted a trespass at common law, the Court found that it was not a Fourth Amendment search. The majority held that the officer's actions were inconsistent with the standards proscribed in *Katz*, stating that an "expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"[81] The language employed in this statement underscores the ambiguity of the *Katz* formulation. In essence, the rule is conditional; it does not recognize *all* expectations of privacy, but only those which *society is prepared to recognize as reasonable*. But how does society determine which expectations are reasonable, especially with the constant advances in surveillance technology? Activities that were once thought to be private may now be considered insufficient to exhibit a legitimate expectation of privacy. For example, at the time the Fourth Amendment was enacted, a conversation carried out within the confines of a home would reasonably be considered a private activity. Modern technology, however, presents us with nuanced circumstances in privacy disputes. Moreover, in *Smith v. Maryland*, the Court rejected Petitioner's claim that he

demonstrated an expectation of privacy when speaking with someone on the telephone within his home "to the exclusion of all others."[82] The majority reasoned that by using his phone, petitioner voluntarily conveyed information to the telephone company, and thus the asserted expectation was not "one that society is prepared to recognize as *reasonable*".[83]

Furthermore, recall that when establishing the *Katz* test, Justice Harlan wrote that an intention to conceal one's activities from the plain view is necessary to evoke Fourth Amendment protection.[84] Such an intention clearly exists in *Oliver*, for the Defendants surrounded the property with no-trespassing signs. Yet, under the *Katz* standard, the Court reasoned that Defendants could claim no legitimate expectation of privacy. Many have condemned the test for failing to provide a sufficient framework. Writing for the majority in *Kyllo v. United States*, Justice Scalia noted that "[t]he *Katz* test...has often been criticized as circular, and hence subjective and unpredictable."[85] One legal researcher also noted that "[a]fter Katz, courts were left with the arduous task of deciphering the contours of this new approach."[86]

Nonetheless, the Court in *Oliver* applied the *Katz* standard in favor of the Government, reasoning that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[87] However, in *Jones*, the Court ruled that the opinion in *Oliver* provided little support for the Government's position.[88] It held that although officers may constitutionally intrude upon open fields that lack the curtilage[89] of a home, an automobile—understood as an "effect" within the meaning of the Fourth Amendment—is not one of those unprotected areas.[90]

IV. REHNQUIST TO ROBERTS: BREAKING AWAY FROM PAST TRENDS?

As tradition shows, each Chief Justice has left the Supreme Court with a specific legacy or targeted a particular area of law. Determining the Court's jurisprudential agenda, however, may

prove difficult in its early years. In September 2005, John G. Roberts was sworn in as Chief Justice, and three Associate Justices—Alito, Kagan, and Sotomayor—have since joined the Court. With the change in Court personnel, we will now see which path the Roberts Court will follow.

When Roberts was confirmed as Chief Justice, a conservative trend was expected to emerge; his record of pro-government rulings led many to expect him to pursue the agenda set by his predecessor, William Rehnquist. While serving as a judge on the Court of Appeals for the District of Columbia, Roberts ruled in favor of law enforcement in several cases centered on Fourth Amendment issues, such as in *United States v. Holmes*.[91] The defendant in *Holmes* contended that police violated the Fourth Amendment when officers seized a small scale he had concealed in his pocket.[92] The court's decision—authored by Roberts—turned upon whether it felt the circumstances surrounding the seizure justified the taking of the scale.[93] In assessing those circumstances, the court found that the officers' seizure of the scale was not unconstitutional.[94] Roberts concluded the court's opinion by writing that "[w]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[95]

Many predicted that Roberts would lead the Court in a fashion similar to that of Rehnquist. At his confirmation hearings, members of the Senate Judiciary Committee questioned Roberts on the right to privacy.[96] Senator Specter seemed to believe that Roberts harbored conservative views on the subject, and pointed to one of Roberts' earlier memos in which he wrote that the right to privacy was not found in the Constitution.[97] Nonetheless, Roberts assured that he does believe the right to privacy exists within the Constitution, stating in part that "[i]t's protected by the Fourth Amendment which provides that the right of people to be secure in their persons, houses, effects and papers is protected."[98] However, we can now watch as the privacy standards of the Roberts Court unfold. Referencing the Roberts Court in its fifth term, legal commentator Jonathan Adler, argued that "[a]t present, we can

characterize the Roberts Court as a moderately conservative minimalist Court..."[99]

A. TRENDS FROM THE REHNQUIST ERA

Chief Justice Rehnquist certainly developed a particular approach to interpreting the Constitution in respect to privacy rights, and many expect to see a resurrection of that approach in the Roberts Court. As a result of his pro-government voting patterns, Rehnquist was largely an enemy to privacy rights. Not only is this notion clear from his time on the Court, but it has been reinforced by justices from the Rehnquist Court itself. In his last opinion delivered on the Court, dissenting in *Payne v. Tennessee*, Justice Marshall wrote that the Rehnquist Court was sending "a clear signal that essentially all decisions implementing personal liberties protected by the Bill of Rights...are open to reconsideration."[100] Although some of his rulings exhibit support for *informational* privacy,[101] Rehnquist showed little concern for Fourth Amendment privacy interests during his tenure as a justice. He repeatedly sided with the government in a number of cases and helped narrow the definition of a search, such as in *Oliver v. United States*, *California v. Greenwood*, and *Florida v Riley*—to name a few. The decision in *Oliver* made searches of open fields constitutionally permissible[102]—discussed *supra* section III.D—and the ruling in *Greenwood* established that trash left at the curb was subject to government searches as well.[103] Furthermore, in *Riley*, the Court found that police surveillance from the air does not violate an individual's expectation of privacy.[104]

However, in *Bond v. United States*, Rehnquist helped to expand the scope of Fourth Amendment protection, and authored the majority opinion himself. In *Bond*, a border patrol agent entered a bus passing through a permanent checkpoint near the Southern U.S. border.[105] The agent boarded the bus to check the immigration status of its passengers.[106] While walking off the bus, he squeezed the soft carry-on luggage that passengers had placed in the overhead compartments.[107] In the process, the agent noticed

that a green bag contained a "brick-like" object. The officer then opened the bag, revealing that it contained methamphetamines.[108]

The Court found that the agent's physical manipulation of the luggage constituted a Fourth Amendment search, noting that the luggage was an "effect" within the meaning of the Amendment.[109] Deviating from past decisions, the Court reasoned that prior cases "involved only visual, as opposed to tactical, observation," and thus the asserted expectation of privacy was one that society was prepared to recognize as reasonable.[110] His support for Fourth Amendment privacy interests clearly contradicts Rehnquist's pro-government legacy. Furthermore, Roberts also broke a similar voting pattern in *Jones*. The Court articulated a similar rationale in both cases. Although no direct reference to common law trespass exists within the *Bond* decision, the Court found that law enforcement's conduct, in both cases, extended beyond a visual inspection and was physically intrusive. These similarities show a parallel in the privacy standards of both the Rehnquist and Roberts Court.

In *Kyllo v. United States*, Rehnquist rejoined the conservatives in the dissent when he voted to limit the definition of a search.[111] In *Kyllo*, the United States Department of the Interior had raised suspicions that marijuana was being grown within the confines of a home.[112] The Department was able to secure a warrant after an officer used a thermal imaging device to determine whether the amount of heat emanating from the home was consistent with use of the high-intensity lamps typically required for growing marijuana indoors.[113]

In consideration of whether the use of the thermal imaging was a violation of the Fourth Amendment, the Court ruled against the government. The majority found that obtaining information regarding the interior of the home, that could not have been obtained without an intrusion into that home, was a Fourth Amendment search, at least where such technology is not in general public use.[114] Disagreeing with the majority, Rehnquist

joined the dissent. It argued that the agents' actions were reasonable because such conduct amounted to "off-the-wall"

surveillance, rather than "through-the-wall" surveillance.[115] The dissent further declared that the Court "should not erect a constitutional impediment to the use of sense-enhancing technology unless such technology provides the user with the functional equivalent of actual presence in the area being searched."[116]

B. THE STATUS OF THE ROBERTS COURT

Early assessments of the Roberts Court do reveal conservative trends which are similar to those of the previous Rehnquist Court. Although the shift is modest, it is clear that the Court has adopted right-wing positions on the majority of cases during Roberts' tenure as Chief Justice. For example, the Court has tended to support business interests in the antitrust cases it has heard thus far.[117] One legal scholar characterized the Roberts Court as "the most pro-business Supreme Court there has been since the mid-1930s."[118] The Court's rightward shift has also extended to issues surrounding abortion. In April 2007, the Court voted to uphold the Congressional ban on what has been termed "partial-birth abortions."[119] It is therefore no surprise that scholars have forecasted a conservative landscape for future Fourth Amendment jurisprudence; that the Court's stance on privacy would resemble the trends of the previous Court. Yet this prediction seems less likely with the decision in *Jones*.

Though Elena Kagan's succession of Justice Stevens has prevented a complete takeover of the court by conservatives, right-wing justices still dominate the Court. In *Jones*, Roberts left the side of conservatives, however, and joined the liberals in protecting the right to privacy. His support for civil liberties, in this case, has the potential to steer the Court away from the low privacy standards that Rehnquist helped to establish. The majority opinion

in *Oliver*—joined by Rehnquist—explained that even though the government's intrusion upon an open field was a trespass at common law, it was not a search within the meaning of the Fourth Amendment. The Court reasoned that the type of activities the Amendment intended to shield from the government did not exist within open fields,[120] and that the asserted privacy interest was not one that "society recognizes as reasonable."[121] However, the Court's analysis differed under Roberts; in *Jones*, the Court applied both the *Katz* and common law trespassory tests. Unlike the majority in *Oliver*, the Court here emphatically articulated the expansion in Fourth Amendment protection that both standards provide. The Roberts Court's more recent terms show a relatively liberal pattern. For example, in its seventh term, the Court handed down two decisions, both providing that the right to effective assistance of counsel is applicable to the plea-bargaining stage in criminal cases.[122] The general trend evident in its recent terms has left many questioning whether the Court's turn will have a lasting effect.

The Court's reinforcement of the standards expounded in *Jones* may provide an answer to this question—at least for its understanding its interpretation of privacy rights. Nearly a year after the Court authored the decision in *Jones*, it heard another case addressing the definition of a Fourth Amendment search in *Florida v. Jardines*. To investigate suspected marijuana growth, Miami police officers approached the home of Defendant Jardines accompanied by a canine trained to detect narcotics.[123] Police were able to secure a warrant after the dog detected the scent of marijuana at the base of the front door.[124] When the case reached the Court, it held that the officers' conduct was a search.[125]

The Court's holding rested in large part on the privacy standards delineated in *Jones*. It rejected one of the State's primary contentions, which provided that the Court's past decisions proved that no search occurred, as there was no violation of any reasonable expectation of privacy.[126] The claim raised by the State, which applies only the one standard, clearly resembles the flawed

argument (according to the Court) fashioned by the Government in *Jones*. In response, the Court directly cited the expansion of protection it expounded in *Jones*: "The *Katz* reasonable-expectation test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment..."[127] The Court therefore reasoned that it need not consider the *Katz* test because it found the officer's conduct physically intruded on Jardines property and was thus unconstitutional under the trespass standard.[128]

Unlike in *Jones*, Roberts sided with the government in *Jardines* when he joined Justice Alito's dissent. His voting pattern in the two cases may provide implications for his stance on Fourth Amendment privacy. The *Jardines* dissent faulted the majority's conclusion that a physical intrusion had occurred. Alito noted that trespass law allows members of the public— mail carriers, girl scouts, individuals delivering flyers, ect.—to approach a residence and remain there for a short period of time.[129] The majority of course agreed, but found that the presence of the narcotics dog was intrusive on Jardines' property.[130] However, the dissent argued that no case exists to support such a rule, declaring that "trespass law provides no support for the Court's holding..."[131]

Although Roberts favored the State by joining this dissent, his support for the common law standard is clear. He did not part with the expansion of protection expounded in *Jones*; rather, the dissent contended that it is the property rights advocated in *Jones* that dismiss the majority's conclusion, for "trespass law provides no support for [it]..."[132] Therefore, Roberts' commitment to both standards may be an early indication of his support for Fourth Amendment privacy rights. Of course, there is also the likelihood that he is mirroring the voting patterns of Rehnquist. The decision in *Jones* may merely represents a slight deviation from a larger pro-government trend. In *Kyllo*, Rehnquist returned to his normal Fourth Amendment view after taking the opposite position in *Bond*. Roberts' vote in *Jardines* therefore may indicate a similar

return to the conservative pattern that so many predicted would unfold.

V. CONCLUSION

Proper interpretation of the Fourth Amendment is vital to preserving the privacy interests embodied in the Constitution. The Court has both consistently narrowed and expanded the definition of a "search" in the face of evolving surveillance technology. The standards enunciated by Justice Harlan in *Katz* have broken the Court's exclusive tie to common law trespass; however, as many have struggled in their efforts to demystify the *Katz* approach, it has also been one of the most misunderstood aspects of Fourth Amendment jurisprudence. With the decision in *Jones*, the Court has provided clarity on the application of the two tests. In essence, the Court offers double protection for those who seek to invoke their Fourth Amendment liberties.

The Roberts Court has set a new precedent for contemporary privacy analysis, and the decision in *Jardines* exemplifies its commitment to that approach. The ruling in *Jones* may suggest that the Court is treading on a path different from that of the Rehnquist Era, as evidenced by the Court's emphatic exposition of common-law property rights. However, two things may indicate that Roberts is satisfying the predictions forecasted by scholars for the new Court. First, an in-depth look at the Court's reasoning in *Bond* and *Jones* indicates a possible parallel for both Chief Justices' privacy standards in respect to property rights. Second, a broader analysis of the voting patterns of Roberts and Rehnquist reveals a similar view of Fourth Amendment privacy. Furthermore, the Court's holding in *Jones* could have significant implications for the powers of law enforcement—or curtailment thereof. An activity that does not violate a reasonable expectation of privacy may still be considered physically intrusive under the common law standard, and thus unconstitutional. However, the Court's decision could easily turn upon a question of reasonable suspicion or probable cause. The Court expressly forfeited any

consideration of this issue in *Jones*, because the Government failed to raise an argument addressing it in the D.C. Circuit. As the nuances of Fourth Amendment disputes continue to bring new situations before the Court, a similar case introducing the question of probable cause could certainly alter the Court's findings. Nonetheless, the decision in *Jones* proves to be comforting to those who feel the realm of guaranteed privacy has shrunk due to the advances in surveillance technology. John Whitehead, President of the Virginia-based Rutherford Institute, has argued that "[w]e have entered a new and frightening age when advancing technology is erasing the Fourth Amendment."[133] In relief from the ruling in *Jones*, he further stated "[t]hankfully, the US Supreme Court has sent a resounding message to government officials – especially law enforcement officials – that there are limits to their powers."[134] The Court's exposition of privacy rights in *Jones* provides clarity on interpreting the Fourth Amendment, and represents a potentially shifting paradigm for the privacy standards of the Roberts Court.

[1] Melissa Arbus, "A Legal U-Turn: The Rehnquist Court Changes Direction and Steers Back to the Privacy Norms of the Warren Era," 89 Va. L. Rev. 1730, (2003) ("[modern surveillance tools] have the potential to serve as formidable partners in the war on drugs and may play a predominant role in the war against terrorism...[t]hey allow police to obtain valuable evidence that a suspect has been in close proximity to illicit drugs...[t]hey further permit an officer to electronically frisk a dangerous suspect...").
[2] *Oliver v. United States*, 466 U.S. 170, 177 (1984) (explaining that the Fourth Amendment recognizes that government should not interfere in particular areas of life).
[3] The Court applies principles that have long respected the privacy of the home. For example, in *Wilson v. Layne*, the Court – in order to emphasize the roots of Fourth Amendment privacy interests – notes a section of William Blackstone's "Commentaries on the Laws of England": "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of antient Rome. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private."
[4] *Payton v. New York*, 445 U.S. 573, 601 (1980).
[5] See David H. Gotez, "Locating Location Privacy," 26 Berk. Tech. L. Jour. 823, 828 (2011) ("the majority in *Katz* paid deference to the role of advancing technology...and how our expectations of privacy may shift in response...").
[6] *United States v. Karo*, 468 U.S. 705, 712 (1984).
[7] U.S. CONST. amend. IV.
[8] Craig M. Bradley, *THE REHNQUIST LEGACY*, 85 (Cambridge University Press 2006).
[9] See *New York v. Class*, 475 U.S. 106, 115 (1986) (explaining that one must balance "the need to search [or seize] against the invasion which the search [or seizure] entails.").
[10] 462 U.S. 696, 703 (1983).

[11] id
[12] *Olmstead v. United States*, 277 U.S. 438 (1928).
[13] *Knotts v. United States*, 460 U.S. 276 (1983).
[14] *Kyllo v. United States*, 533 U.S. 27 (2001).
[15] *United States v. Jones*, 132 S. Ct. 945, 945 (2012).
[16] id
[17] id
[18] id at 948
[19] id at 948-949
[20] See *Olmstead v. United States*, 277 U.S. 438, 464 (1928) (holding that "[n]either the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage'...").
[21] id at 438
[22] *United States v. Jones*, 132 S. Ct. 945 (2012) (quoting *Olmstead v. United States*, 277 U.S. 438 (1928)).
[23] In *Silverman*, the Court defines a "spike mike" as a listening device consisting of a microphone attached to a foot-long spike, with an amplifier, a power pack, and earphones.
[24] 365 U.S. 505 (1960).
[25] id
[26] id at 505-506
[27] A "detectaphone" is a listening apparatus – similar to a spike mike – that represents another form of electronic eavesdropping.
[28] 316 U.S. 129 (1942).
[29] See 389 U.S. 347, 352 (1967) ("We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the trespass doctrine there enunciated can no longer be regarded as controlling.") (internal quotation marks omitted).
[30] id at 347
[31] id at 360 (Harlan concurring)

[32] id
[33] id (internal quotation marks omitted).
[34] Electronic listening devices
[35] *United States v. Karo*, 468 U.S. 705 (1984).
[36] *Bond v. United States*, 529 U.S. 334 (2000).
[37] *New York v. Class*, 475 U.S. 106 (1986).
[38] *United States v. Jones*, 132 S. Ct. 945, 948 (2012).
[39] U.S. CONST. amend IV.
[40] *United States v. Jones*, 132 S. Ct. 945, 948 (2012).
[41] id
[42] id
[43] id at 949
[44] id
[45] id at 948
[46] Id at 949 (quoting *Alderman v. United States*, 394 U.S. 165, 179 (1969))
[47] id
[48] id
[49] id
[50] id
[51] A beeper is a tracking device that represents another form of electronic monitoring.
[52] id at 276-278
[53] id
[54] id at 280
[55] id at 282
[56] *Katz v. United States*, 389 U.S. 347, 360 (1967) (explaining that "objects, activities, or statements that one exposes to the 'plain view' of outsiders," however, "are not 'protected' because no intention to keep them to [him or herself] has been exhibited").
[57] *United States v. Jones*, 132 S. Ct. 945, 951 (2012).
[58] *United States v. Karo*, 468 U.S. 705 (1984).
[59] id at 707
[60] id

[61] id at 712
[62] id at 710
[63] id. (quoting 710 F.2d 1433, 1437 (1983))
[64] id at 712
[65] *United States v. Jones*, 132 S. Ct. 945, 952 (2012).
[66] id
[67] *United States v. Karo*, 468 U.S 705, 712 (1984).
[68] id
[69] 475 U.S. 106 (1986).
[70] *Oliver v. United States*, 466 U.S. 170, 175 (1984).
[71] id
[72] See *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) ("A car has little capacity for escaping public scrutiny.").
[73] id
[74] See *United States v. Chadwick*, 433 U.S. 1, 12 (1977) ("All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.") (quoting *Cady v. Dombrowski* 413 U.S. 433, 441(1973)).
[75] id
[76] 475 U.S. 106, 113 (1986) (citing *Cardwell v. Lewis*, 417 U.S. 583, 588-589 (1986)).
[77] *Jones v. United States*, 132 S. Ct. 945, 952 (2012).
[78] The open fields doctrine was established by Justice Holmes in *Hester v. United States*, and provides that law enforcement may enter and search an open field without a warrant.
[79] id at 173
[80] id
[81] id at 177
[82] 442 U.S. 735, 743 (1979).
[83] id (internal quotation marks omitted) (emphasis added).
[84] 389 U.S. 347, 360 (1967) (Harlan concurring).
[85] 533 U.S. 27, 33 (2001).
[86] Melissa Arbus, "A Legal U-Turn: The Rehnquist Court Changes

Direction and Steers Back to the Privacy Norms of the Warren Era," 89 Va. L. Rev. 1729, 1730 (2003).

[87] *Oliver v. United States*, 466 U.S. 170, 177 (1984).

[88] 132 S. Ct. 945, 952 (2012).

[89] Curtilage is the area immediately surrounding the home, which extends the intimate activities associated with the home and privacies of life.

[90] id

[91] See, e.g., *United States v. Lawson*, 410 F.3d 735 (2005) (holding that agents seizing a car based on probably cause was constitutional); *Stewart v. Evans*, 351 F.3d 1239 (2003) (dismissed the asserted expectation of privacy by an employee of the United States Department of Commerce); *United States v. Jackson*, 415 F.3d 88 (2005) (rejected the majority's conclusion that law enforcement lacked probable cause to search the trunk of an automobile) (Roberts, J, dissenting); *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (2004) (finding that probable cause precluded inquiry into the reasonableness of defendant's arrest under the Fourth Amendment).

[92] 385 F.3d 786, 788 (2004).

[93] id at 789 ("[t]he propriety of a search under the Fourth Amendment depends on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time...") (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)) (internal quotation marks omitted)

[94] id (The only relevant question is whether a reasonable officer, knowing what Phillip knew at the moment of seizure, would have been justified in removing the scale...we hold that he would have been... Officer Phillip was fully justified in being 'awfully nervous' as he began the frisk.)

[95] id at 792 (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)

[96] Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate, 109th Cong. 1 (2005).

[97] id (statement of Sen. Arlen Specter, Chairman, S. Comm. On Judiciary)
[98] id (statement of John Roberts, Cir. Judge for D.C.)
[99] Jefferson H. Powell, "REASONS ABOUT THE IRRATIONAL: THE ROBERTS COURT AND THE FUTURE OF CONSTITUTIONAL LAW," 86 Wash. Law Rev. 217, 219 (2011).
[100] David M. O'Brien, *The Supreme Court in American Politics* (W.W. Norton & Company, Inc. 8th ed. 2008).
[101] See Susan M. Gilles, "FROM REHNQUIST TO ROBERTS: HAS INFORMATIONAL PRIVACY LOST A FRIEND AND GAINED A FOE?," 91 Marq. L. Rev. 453, 455 (2007) ("focusing on his opposition to a general right of privacy has led scholars to overlook his support of an increasingly important form of privacy - informational privacy. This Article sets the record straight: Rehnquist was a strong proponent of a right to informational privacy.").
[102] 466 U.S. 170 (1984).
[103] 486 U.S. 35 (1988).
[104] 488 U.S. 445 (1989).
[105] 529 U.S. 334 (2000).
[106] id
[107] id
[108] id
[109] id at 336
[110] Id at 338
[111] 533 U.S. 27 (2001)
[112] id
[113] id
[114] id
[115] id at 40 (Stevens dissenting)
[116] id
[117] See *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006) (holding that oil companies' joint venture pricing policy was not price fixing in the antitrust sense).
[118] Erwin Chemerinsky, "The Supreme Court: Sharp turn to the

right," online at http://archive.calbar.ca.gov/Archive.aspx?articleId=87364&categoryId=87025&month=8&year=2007 (accessed Aug. 2012).
[119] *Gonzales v. Carhart*, 550 U.S. 124 (2007).
[120] *Oliver v. United States*, 466 U.S. 170, 177 (1984) ("open fields do not provide the setting for those intimate activities
[121] id
[122] *E.g.*, *Missouri v. Frye*, 132 S.Ct. 1399 (2012) (holding that the Sixth Amendment right to effective assistance applies to entry of a guilty plea); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) (finding that the deficient legal advice an inmate received from counsel during a plea bargain deprived the inmate of the right to effective assistance of counsel).
[123] *Florida v. Jardines*, 133 S. Ct. 1409 (2013).
[124] id
[125] id at 1413
[126] See id at 1416 ("The State cites for authority our decisions in *United States v. Place*, *United States v. Jacobsen*, and *Illinois v. Caballes*, which held, respectively, that canine inspection of luggage in an airport, chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the 'reasonable expectation of privacy' described in *Katz*") (internal citation omitted).
[127] id at 1417 (internal quotation marks omitted).
[128] id
[129] id at 1419 (Alito dissenting)
[130] id (According to the Court, however, the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent's house by his dog, Franky) (Alito dissenting)
[131] id (Alito dissenting)
[132] id (Alito dissenting)

[133] Warren Richey, *Unanimous Supreme Court: Get a warrant before installing GPS tracking device* 2, Christian Science Monitor, Jan 23, 2012.
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Felony Disenfranchisement: Consequences for American Democracy

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Abstract:
This paper critiques the practice of felony disenfranchisement in the United States, challenges the overall functionality of the prison system, and proposes practices more in line with modern political values. A general background provides a brief explanation for the rapid expansion of America's prison landscape in conjunction with the draconian measures taken during the era of the "War on Drugs," which mainly targeted minority and indigent populations who are now vastly overrepresented in the prison apparatus and whose communities lack a significant segment of their populations' voice in the political sphere. The paper also discusses the history of felony disenfranchisement that began as an ancient Greek and Roman practice known as civil death, and was transferred to the Americas by colonists and persists to this day in various forms across the country. The article then examines the precedent-setting case Richardson v. Ramirez and challenges the Court's decision using two distinct strategies proposed by two legal scholars after the fact. The first utilizes Abigail Hinchcliff's textualist approach that follows a syntactical pattern present in the structure of several phrases in the constitution, thereby narrowing the scope of the Court's decision and expanding the opportunity to challenge its unconstitutionality. The second approach, described by Gabriel Chin, examines the original intent present in personal accounts of those who crafted Section Two of the Fourteenth Amendment. Ultimately, it is determined that Section Two has been rendered void through the inclusion of the Fifteenth Amendment and that felony disenfranchisement thus can no longer be justified. In conclusion, the author argues that while it would be a great

improvement to restore voting rights to felons immediately following the completion of their sentence, it would be more beneficial to preserve that right throughout the incarceration period.

"Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath the axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box… the disinherited must sit idly while others elect his civil leaders and while others choose the fiscal and governmental policies which govern him and his family." *Murphy v. City of Canton*[1]

The 2000 presidential election, which determined the victory of George W. Bush over Al Gore by a mere 537 votes, was perhaps the most controversial election in our nation's history. Critics continue to argue over issues that include lack of uniformity in the process of recounting votes, faulty voting machines that led to the hanging Chad debacle, personal politics of the Supreme Court justices, that Gore won the popular vote while Bush won the electoral votes, and so on. But what is often left out of the picture is that during the 2000 presidential election, over 700,000 ex-felons[2] were unable to cast their ballots in Florida *alone*.

Had they been able to vote, would the election have turned out differently? Some demographic statistical data suggests that racial and socioeconomic factors would have aligned many of the 700,000 ex-felons with the Democratic Party.[3] The practice of felony disenfranchisement must be either justified or modified, as it has radical consequences on our nation's democratic process with more than a half million people in the state of Florida and more than 4 million people[4] nationwide forbidden from entering the ballot box.[5]

Originally governed by restrictive democratic practices, the United States has since adjusted its democratic process to be more inclusive. At the outset, "the Founders both underestimated the American people's desire for democracy and overestimated the dangers of democracy."[6] These suspicions and concerns are demonstrated through the heavy reliance on institutions such as the Electoral College in selecting the president and state legislatures in

selecting senators, as well as the historical disenfranchisement of demographics such as African-Americans and women. The United States has been following a trend of gradual expansion of its democratic tradition and strengthening of the agency of its people.

The continuing discriminatory practice of felony disenfranchisement contradicts America's evolving democratic process. Given the increasingly high rate of imprisonment combined with the punishment of exclusion from the voting population for felony offenses, the admired holistic quality of American democracy is unraveling. We can never hope to enjoy the fruits of a just society when a significant segment of the population is removed from the treasured democratic process. Before discussing relevant case material and possibly remedying this problem, it is necessary to shed some light on the subjects that intersect with and are crucial to understanding how and why felony disenfranchisement persists.

Why Are More Than Two Million People Imprisoned in the United States?

With only 5 percent of the world's population but 25 percent of the world's prison population,[7] the United States has more incarcerated persons per capita than any other country in the world.[8] During the 1980s, a "war on drugs" was formally declared, although it had begun years before. Rather than viewing the rise in drug use as a public health crisis "requiring generous public funding of treatment centers, education programs, mental health facilities, and clean-and-sober living arrangements," drug use was identified as a threat to public safety leading to "the arrest and incarceration of both users and suppliers of criminalized drugs."[9] As a result, the rate of incarceration has increased at an alarming rate due to the advent of harsher, more punitive drug laws, mandatory minimum sentences, life sentences for repeat offenders, and other blitzkrieg measures. Even though crime and incarceration rates in the United States have moved independently

from each other for over a decade, many of these measures remain in place.[10]

In addition to adopting "tough on crime" practices to combat seemingly high crime rates, prison expansion has ominously spread across our nation's landscape in order to manage the rising number of inmates[11] and attempt to create a "geographical solution to socio-economic problems."[12] California, for example, constructed nine prisons between 1852-1955, but between the 1950's-1980's, the number had doubled and, by 2000, twelve additional prisons had opened.[13] As of 2007, the State of California had spent more than $44 billion on incarceration and related expenses, a 127percent jump from 1987, while during the same period, spending on higher education rose just 21percent.[14] Ruth Wilson Gilmore explains that these new prisons popped up on "devalued rural land," which the State had purchased from big landowners that had "assured the small, depressed towns now shadowed by prisons that the new, recession-proof, non-polluting industry would jump-start local redevelopment,"[15] however, neither jobs nor general economic revitalization materialized.[16]

This disturbing rationale for the public's acceptance of such draconian measures and the construction of hundreds of prisons is what continues to perpetuate the issue of felony disenfranchisement. It generates a mentality that not only accepts, but finds comfort in the notion that those inside the penitentiary are intrinsically different from those on the outside. Those who are different, or rather, deviant, are therefore deserving of the degrading treatment they are subjected to in prison and must accordingly be branded "a permanent second-class status" upon release, so they can be separated from the rest, or "locked out of society."[17] Depending on the state, ex-felons can be stripped of basic civil and human rights: the right to vote, the right to serve on juries and the right to be free of legal discrimination for employment, housing, access to education, and public benefits. Dehumanizing public perception will only further entrench the

struggle to protect the rights that the convicted have left and to restore the rights that they have lost.

An Overview of Felony Disenfranchisement

Felony disenfranchisement is one of many surviving relics from ancient Greek and Roman traditions. In ancient Greece and the Roman Empire, criminals were subjected to penalties known as "civil death," which prohibited them from appearing in court, making speeches, attending assemblies, serving in the army, and voting. After the fall of Rome, European countries adopted many of the traditions and practices of the Romans such as the aforementioned penalties. Such forms of punishment involving the loss of civil rights were successful at creating a stigma "in the small communities of those times." It also increased "the humiliation and isolation suffered by the offender and his family, and served as a warning to the rest of the community."[18] In the context of feudal societies, the adoption of such measures is important given the centrality of the lord or king and his supremacy over the individuals in his community or kingdom. The excess in punishment that fostered alienation served as a reminder of the sovereign's unequivocal supremacy over the condemned man and law-abiding subjects alike:

> The crime attacks the sovereign: it attacks him personally, since the law represents the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince. The right to punish, therefore, is an aspect of the sovereign's right to make war on his enemies […] The punishment is carried out in such a way as to give a spectacle not of measure, but of imbalance and excess; there must be an emphatic affirmation of power and of its intrinsic superiority. If severe penalties are required, it is because their example must be deeply inscribed in the hearts of men."[19]

When the English colonials settled in America, they brought their common law traditions with them, including civil death for criminals. While many archaic elements of civil death, such as the ineligibility to inherit property or to enter into contracts, were gradually abandoned, felony disenfranchisement persists to this day.

Considering that civil death emanates from a medieval political system, practices such as felony disenfranchisement serve no purpose in a democracy. Even in America's more restrictive democratic era, such a practice established the supremacy of a principal authority, an authority that the Founders worked tirelessly to decentralize. The extreme, excessive measures of retribution that the state exacts, such as disenfranchisement, cripples the individual will to participate in civil society. The act of exclusion labels the individual as deviant from the rest, renders their membership in society as disingenuous, and generates a feeling of political impotence. The cultivation of such attitudes undermines the very fiber of our political system and contests foundational ideals such as freedom and equality that many Americans cherish dearly. While our Constitution exhibited several flaws upon its first draft, such as the Three-Fifths Clause or disenfranchisement of women and African-Americans, these have been rectified over time, albeit slowly. Why continue to hold on to this convention when it is so clearly outmoded? It simply does not make sense that a practice so severe continues given the principles and history that have contributed to the establishment of the United States as it is known today.

Presently, felony disenfranchisement laws are non-uniform, with each state formulating its own methodical set of criteria that removes the right of suffrage from individuals with felony convictions.[20] In four states, all people with felony convictions are permanently disenfranchised; in seven states, only people with select convictions are permanently disenfranchised; in nineteen states, voting rights are restored upon completion of the sentence,

which includes prison, parole, and probation; in five states, voting rights are restored automatically after release from prison and discharge from parole; in fourteen states, including the District of Columbia, voting rights are restored automatically after release from prison; and in only two states, Maine and Vermont, there is no disenfranchisement for convicted felons.[21]

The lack of uniformity in voting laws across the country causes confusion for those who wish to retain their forfeited right, which is amplified by the cumbersome and complicated restoration process. In a study of 14 states, researchers found that about 1.5 million people who have completed their sentences and are eligible to register to vote remain disenfranchised due to lack of knowledge on their state's particular laws and/or their inability to navigate complex procedures to restore their rights. Many states require lengthy waiting periods, which can vary depending on the offense; and some state procedures are arbitrarily more or less difficult than other states at different times depending on the current leadership. Finally, some states employ various character tests for applicants seeking to restore their rights, [22] even though individual attributes or character flaws have no bearing on qualifications for voting. [23]

Those Most Affected by Disenfranchisement

People of color are vastly over-represented in the American criminal justice system and have been the most affected by the rising incarceration rates as well as felon disenfranchisement. Despite the 1965 Voting Rights Act mandated to end overtly discriminatory practices of the Jim Crow era, black males have nearly a 30percent chance over their lifetimes of being convicted of a felony[24] causing "one in six black males nationwide [to be] excluded from the ballot box,"[25] despite the fact that black people make up only 6.7percent of the general population.[26] The same is true for women: half of those imprisoned are women of color. Most shocking of all: today there are more black men under correction control than were enslaved in 1850, a decade prior to the

Civil War.[27] These appalling statistics demonstrate the inherent backwardness that many of our laws are based upon, which continue to categorize the same historically relegated communities as the lowest ranking members of society. Racism and social inequity are not relics of our past, but rather, are defining forces that continue to thrive in our criminal justice system.

The toll that disenfranchisement takes on communities is devastating as it, "cultivates a sense of inferiority, powerlessness, and exclusion in individuals," who are trying to reenter society.[28] Felony disenfranchisement fundamentally undermines rehabilitation as it perpetuates feelings of alienation and disillusionment in the political process. Many political theorists have stressed the significance of franchise as a "certificate of social standing and as the basis for dignity and self-confidence" while some criminologists have suggested that the "indiscriminate use of such sanctions may pose a barrier to offender reintegration, contributing to higher rates of recidivism."[29] For minority communities, these feelings of inadequacy may exist even without going to prison but are further aggravated upon losing the right to vote. The fact that minorities are removed from the voting process in significantly disproportionate numbers will continue to determine the factors that perpetuate a society based on norms that are not suitable for all. If such high numbers of these populations are disenfranchised, fewer and fewer members of these communities with unique histories of oppression and distinct needs will be able to take part in determining the laws by which we all live. Without the voices of all members, those that do not fit the normative standard will continue to be politically, economically, and socially marginalized by laws and practices that do not represent or protect them.

Like communities of color, "there is a severity towards the poor,"[30] causing them to suffer unduly from the rising incarceration rates and disenfranchisement. What some have referred to as the "modern incarnation of the poll tax" is the policy that prevents low-income individuals from regaining their voting

rights after serving their sentences. For many, the explicit or implicit requisite reimbursement of "all the fines, fees, court costs, restitution, and other legal financial obligations associated with a conviction" that must be paid before the right to vote can be restored results in "de facto permanent disenfranchisement" for countless individuals who simply cannot pay.[31] Combined with high sanctions that cripple formerly incarcerated people, "interest accrues on top of any unpaid legal financial obligation debt."[32] Under these structures, many individuals will never be able to fully pay off their debts and will be denied the right to vote indefinitely. It is simply callous to demand individuals—who did not have much of an income prior to their conviction,[33] and have been without one while they served their sentence—to shell out the payment of all the fees associated with their conviction.

Richardson v. Ramirez: Setting the Stage for Disenfranchisement Litigation

Richardson v. Ramirez stands as the leading precedent courts turn to in affirming the constitutionality of disenfranchisement practices. In this case, the Supreme Court found that the Equal Protection clause "does not require states to advance a 'compelling state interest' before denying the vote to citizens convicted of crimes." Three plaintiffs from three different counties in California brought the case on their own behalf as well as on behalf of "all other ex-felons similarly situated."[34] They had each been separately convicted and had completed their sentences as well as paroles, but were denied the right to vote due to the state's constitutional provision that permanently disenfranchised anyone convicted of an "infamous crime."[35] In voting rights cases, states must show that the voting restriction is necessary to a "compelling state interest" and that the state's objective is achieved through the least restrictive means. The plaintiffs argued that the state had no compelling interest to justify denying them the right to vote and the California Supreme Court held that the law

disenfranchising convicted felons who have completed their sentences and paroles was in violation of the Equal Protection Clause of the Fourteenth Amendment.

On appeal, the Supreme Court ruled that the state does not have to prove that its felony disenfranchisement laws serve a compelling state interest. Pursuant to Section Two of the Fourteenth Amendment,[36] the Court demonstrated that felony disenfranchisement laws were exempt from heightened scrutiny. The Court held that Section Two distinguishes felony disenfranchisement from other forms of voting restrictions, which must be narrowly tailored to serve compelling state interests in order to be constitutional.[37] Though, several scholars, activists, and organizations argue that such a provision "obviously intended to punish any of the former Confederate States which tried to prevent former slaves from voting by reducing their representation in the national legislature."[38] In agreement with petitioner's own claims as well as the numerous briefs filed by amici curiae, the Court noted "it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed serving his term," but that such arguments should be "addressed to the legislative forum, which may properly weigh and balance them against those in support of California's present constitutional provisions." The Court asserted,

> It is not for us to choose one set of values over the other. If respondents are correct, and the view, which they advocate, is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence at least, of the fact that there are two sides to the argument.[39]

Rather ironically, the majority concluded that it is either up to the legislators or the citizens of California to decide whether such a law should persist through the democratic process, a process in

which the respondents would have no say and a process in which the respondents wish to be a part of. The Court reversed and remanded the case so that the State of California could "reach [the] respondents' alternative contention that there was a total lack of uniformity in county election officials' enforcement of the challenged state law," but before the California Supreme Court could decide this issue, California changed its law.[40]

In his dissenting opinion, Justice Marshall found the court's ruling in *Ramirez* to be troubling. Marshall declared that the acceptance of measures that "[stripped] ex-felons who [had] fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment," to be "based on an unsound historical analysis."[41] After a lengthy explanation in four sections of the case's non-justiciability with regard to standing, seeking an advisory opinion, the absence of controversy, etc., Marshall discussed the merits of the constitutionality of the case. He disagreed with the majority's findings with regard to Section Two and found that the section had emerged as a result of the Republicans' concern regarding the "congressional representation of the Southern States" after the abolition of slavery. Section Two "put the Southern States to a choice: enfranchise Negro voters or lose congressional representation."[42] Marshall contended that while the majority viewed Section Two of the Fourteenth Amendment as making a distinction of the rights delineated in Section One, "there is no basis for concluding that Congress intended by Section Two to freeze the meaning of other clauses of the Fourteenth Amendment" [43] To advance his point, Marshall cited *Harper v. Virginia Board of Elections*:

> The Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was

> at a given time deemed to be the limits of fundamental rights.[44]

Reasserting that voting is a "fundamental"[45] right and is "of the essence of a democratic society,"[46] Marshall determined that the state could not demonstrate a rational or compelling state interest to deny former felons the right to vote and that there was "no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decision of the government."[47] Although there are claims that the voting pattern of former felons may be "subversive to the interests of society," Marshall firmly discounted them by declaring "differences in opinion cannot justify excluding any group from the franchise." Further, Marshall emphasized that our democratic process is subject to change, and that our laws "are not frozen," but rather, "in the process of revision [according] to the needs of a changing society."[48] In this respect, Marshall could not have been more correct. Looking at where the United States began in its early history, that is, with the extension of franchise to solely white males and a generally diminished capacity of direct involvement in the leadership selection process, America has consistently undergone changes that have grown to encompass more perspectives in its political culture and democratic process. The only segment that remains excluded consists of convicted felons.

Challenging *Richardson v. Ramirez*

Although there have been a variety of challenges to the Supreme Court's 1974 ruling in *Richardson v. Ramirez*, almost none, particularly those regarding equal protection approaches, have been successful. Except for cases where the Supreme Court can determine that "there was a discriminatory impact as well as discriminatory intent"[49] and/or "selective enforcement of the law"[50] of state disenfranchisement laws, the Court has generally

ruled against the unconstitutionality of felon disenfranchisement laws on the grounds of the Fourteenth Amendment

William Liles urges challengers of felony disenfranchisement to abandon equal protection claims and instead take the route of the "less settled realm of the Voting Rights Act" because "to date, no felony disenfranchisement law has been found unconstitutional for violating the Voting Rights Act." However, it is worth noting that the Supreme Court has refused on several occasions to rule on such questions regarding the Voting Rights Act in conjunction with felony disenfranchisement. Although Liles claims that "the chances of success are still much higher" in the Voting Rights Act due to its limited history regarding such constitutional question,[51]there other compelling Fourteenth Amendment challenges that should not be tested first.

Given that *Ramirez* has continued to define precedent for over three and a half decades and that the Supreme Court has demonstrated no interest in revisiting, challengers are faced with the incredibly difficult task of recapturing the Court's attention. Abigail Hinchcliff's approach in arguing against felony disenfranchisement is perhaps the most compelling because "works within *Ramirez's* central holding" utilizing a textualist approach. In examining Section Two—or as she refers to it, the "Penalty Clause"—of the Fourteenth Amendment in the context of the entire document, Hinchcliff argues that the phrase "other crime" clearly "follows a syntactical pattern found in three other constitutional clauses: the Extradition, Grand Jury, and Impeachment Clauses," which all employ the phrase in their construction. [52] The meaning of the word "crime" in each clause is "defined by the paradigm term," and in utilizing the doctrine of *ejusdem generis* (the general must follow the specific),[53] she argues that "rebellion," in the case of the Penalty Clause, "may justifiably extend only to crimes that relate in a meaningful way to the crime of rebellion" therefore narrowing the scope of the Court's decision and expanding franchise.[54]

In the *Ramirez* decision, based on the scarce "legislative history" of the Penalty Clause, the Court reasoned that the exception indicated that such "language was intended by Congress to mean what it says."[55] Hinchcliff is quick to point out that after the Court "nod[ded] in the direction of plain meaning" it did not "engage in any sustained or detailed exercise in textual interpretation," and she contends that the "construction of 'other crime' is not compelled by the textualist reading of *Ramirez*" nor is it by the "plain" meaning of the Constitution. Indeed, "other crime" in the context of the Penalty Clause "does not 'plainly' mean anything."[56] When looking at the phrase throughout the Constitution, particularly the varied meaning of the term "crime," Hinchcliff denotes a pattern. Beginning with the Interstate Extradition Clause, Hinchcliff focuses on the phrase, "a Person charged in any State with Treason, Felony, *or other Crime*."[57] She explains "the words 'Treason, Felony' provide an interpretive frame for construing [the phrase] 'or other Crime'" because they name two of the three known classes of common law offenses, allowing for "other Crime" to include "even the most minor misdemeanors: since that is logically "the third category of common law offenses."[58] Following her synthesis, she advances to Grand Jury Clause of the Fifth Amendment:

> No person shall be held to answer for a capital, or *otherwise infamous crime*, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.[59]

Hinchcliff argues that the Courts interpret "otherwise infamous crime" as a crime punishable by a term of one year or more and have excluded most misdemeanors from this category.[60] Such a conclusion follows the same pattern of interpretation utilized in the Extradition Clause because the Grand Jury Clause names "capital" offenses and "since 'capital' is a punishment-based classification,

the Court reasoned that infamy of an offense […] must be measured by the punishment it carries." In interpreting the significance of "infamous crime" the Court noted that in *Mackin v. United States* that "the leading word, 'capital,' describe[es] the crime by its punishment only;" therefore, the phrase "otherwise infamous crime, […] must be held to include any crime subject to an infamous punishment."[61]

Lastly, Hinchcliff examines the Impeachment Clause, which reads that the President, Vice President, and other official leaders "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, *or other high Crimes and Misdemeanors*.[62]

She remarks that while no authoritative judicial interpretation exists, when "members of Congress and legal scholars interpret the Clause, they turn to the paradigm cases to determine the limits of impeachable offenses."[63] Most who have examined the meaning of the phrase "other high Crimes and Misdemeanors" have concluded, the class of impeachable crimes "refers to some form of political […] crimes." Referencing treason and bribery in conjunction "with the word other, seems to indicate that high crimes and misdemeanors should be understood to be of the same general kind and magnitude as treason and bribery."[64] In other words, the phrase "other high Crimes and Misdemeanors," which follows the terms "Treason" and "Bribery," imitates and denotes the syntactical pattern established in the earlier clauses, which equates the offences of treason and misdemeanors as one and the same.[65]

Thus, Hinchcliff identifies "three general principles" that will aid in the "meaning or scope" of the Penalty Clause. First, the term "crime" is malleable depending on the clause; second, the "scope of the 'other crime'" is "framed" by the terms that precede it; third, "other crime" clarifies the relationship between its category and the preceding terms.[66] In uncovering what kind of offense "rebellion" represents, she determines that it "does not exemplify an ordinary felony." At the time the clause was adopted,

rebellion would have constituted treason, not a felony; "it would therefore be odd to specify rebellion (and only rebellion) as the paradigmatic case of a disenfranchisable offense if any run-of-the-mill felony would suffice to justify the loss of the right to vote." Such a discovery allows Hinchcliff to conclude that the Penalty Clause does not stand as an "affirmative sanction for *all* felon disenfranchisement," but rather, offenses related to acts of rebellion. Further,

> [d]isenfranchisement statutes that mandate the denial of voting rights to individuals convicted of such felonies that bear no relation to the seriousness of rebellion must be held up to constitutional scrutiny […] The Framers of the Fourteenth Amendment had a precise term with which to refer to all felonies, and the fact that they did not deploy that term in the Penalty Clause suggests that they meant for "other crime" to refer to some other category (or sub-category) of offenses. [67]

Based on these findings, *Ramirez* becomes narrowed and allows the Courts as well as the States to reconsider the decision that upheld felon disenfranchisement by analyzing the language of the Fourteenth Amendment within the holistic context of the entire Constitution. The Penalty Clause no longer confirms the constitutionality of suspending voting rights from convicted felons.

Another challenge stemming from the Fourteenth Amendment in conjunction with constitutional history, charges that Section Two was made void with the adoption of the Fifteenth amendment. In his article, Gabriel Chin argues that Section Two was originally meant to enfranchise African-Americans during Reconstruction, but it failed to do so when the former Confederate states unanimously refused to extend the vote to African-Americans despite Section Two's threat of reducing congressional representation. As a result, Congress repealed the clause with the Fifteenth Amendment, six months after the Constitution was

amended by the Fourteenth. Chin comments, "Although intended to promote the right to vote, Section Two has played an ironic role in limiting the franchise of African-Americans,"[68] which Chin contends "remains as the major basis for the disproportionate disenfranchisement of African-Americans adults"[69] and "may have altered the outcome of as many as seven recent U.S. Senate elections as well as one presidential election."[70]

Chin further describes Section Two as being "part of a brief political experiment quickly recognized as a mistake and then abandoned."[71] He explains that the intent behind Section Two was designed to encourage former Confederate states to enfranchise African-Americans by punishing them with a loss of representation. Consequently, the wording of Section Two ultimately left the decision to include African-Americans in the democratic process up to the states.[72] Instead of granting African-Americans voting rights, even though Section One determined that they were citizens, "Section Two set a price for disenfranchising them:" that is, disenfranchisement of "any" male citizen inhabitant over the age of twenty-one "except for participation in rebellion, or other crime," would suffer a reduction on the basis of their representation in the House of Representatives. Because African-Americans constituted a large segment of the population of the former Confederate states, Section Two's ultimatum would have been significant. If the southern states "called Section Two's bluff, Section Two's penalty offered African-Americans and Republicans something less than full compensation."[73]

Because the former Confederate states could have bypassed Section Two's requirement to enfranchise African-Americans, Congress decided to propose the Fifteenth Amendment in 1869, which made "African-American suffrage permanent and national"[74] by explicitly prohibiting the prevention or denial of the right to vote based on "race, color, or previous condition of servitude."[75] At this point, the Constitution appeared to have two provisions regarding the same subject: Section Two, which reduced representation for refusing to enfranchise African-

Americans and the Fifteenth Amendment, which prohibited racial disenfranchisement; however, in view of many of the historical accounts, Chin concludes that the Fifteenth Amendment was "repealed or otherwise undermined Section Two of the Fourteenth Amendment."[76] Included in the accounts is Representative George Boutwell, a principal drafter of the Fifteenth Amendment, who wrote:

> By virtue of the Fifteenth Amendment the last sentence of section two of the Fourteenth Amendment is inoperative wholly, for the Supreme Court of the United States could not do otherwise than declare a State statute void which should disenfranchise any of the citizens described, even if accompanied with the assent of the State to a proportionate loss of representative power in Congress.[77]

Based on findings of other historical and contemporary figures, Chin reasons that Section Two is no longer operative. Even on its own, Section Two cannot provide a remedy because it was in itself, remedied by the Fifteenth Amendment, which provides greater relief than Section Two.[78] Essentially, the Fifteenth Amendment annulled Section Two of the Fourteenth Amendment and disenfranchisement can no longer be reasonably justified using that provision. The usage of Section Two to permit state disenfranchisement laws would be the equivalent of challenging the transportation, sale, or consumption of alcohol, under the Eighteenth Amendment's conditions even though the Twenty-First Amendment repealed it. According to Chin's strategy, if the issue should find itself before the Supreme Court once again, a further examination on the history and adaptation of the Constitution would invalidate its original, faulty findings in *Ramirez* thereby rendering Section Two of the Fourteenth Amendment void as well as the precedent that governs the retention of felony disenfranchisement as a means of punishment.

Ending Disenfranchisement for All Felons

As the scholarship discussed in this article demonstrates, there are reasons to question the practice of punishing individuals who were once incarcerated on felony offenses with the loss of franchise. Scholarly figures find the felony disenfranchisement practice excessive and severe in that the State continues to seek retribution on those "who have fully paid their debt to society."[79] They find that such a practice is at odds with our political system and many advocate for the reinstitution of the franchise for formerly incarcerated individuals. While such a resolution is certainly better than none and will result in the restoration of franchise to many, it continues to establish or embed the inevitability of prison and its role in our daily lives. As a consequence of this notion, our incarceration rates are out of control and have wrought our criminal justice system with fallacious myths and stereotypes resulting in the further relegation of racial minorities and the indigent, which is compounded by a loss of rights, particularly franchise.

We think about imprisonment as a fate reserved for others,[80] criminals or deviants, who, no matter their circumstances or the unjust nature of their conviction, are sent to prison where this "otherness" is somehow used to justify the forfeiture of not only their right to franchise, but to health and well being, dignity, and humanity.[81] Those who are imprisoned are silenced, ignored, and invisible. For us,

> Prison functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.[82]

Inside as well as outside prison, they suffer abuses none of us can dare to imagine. It seems only logical, then, that those who are behind bars, perhaps more than anybody, should have a right to

voice their criticisms regarding the system that continuously marginalizes them. There is no reason to discount what they have to say about our prejudiced societal norms, which have ignored their needs and have failed them.

Our expectations of prison must be fundamentally altered. Prison cannot function as an institution designed to punish individuals for their crimes against society by stripping them of their basic rights while simultaneously conditioning them to conform to the proper social protocol, which is determined by the same rights they are not privileged to exercise. Clearly, we are at hypocritical impasse regarding the utility of prison.

Besides advocating the renewal of voting rights for *ex*-felons, why not take it a step further and promote the retention of voting rights for *all* felons, incarcerated and formerly incarcerated alike? Why should reforming inmates into productive members of society start the day their sentence ends, when it could begin upon entering prison? During their prison sentences, inmates should be encouraged "to become engaged in pro-social activities," more informed or socially aware, and they should be treated as part of a larger community for which they will affirm a commitment to.[83] Retention of the right to vote during this period can help advance those goals since, as discussed previously, the right of franchise is an invaluable custom that defines membership in American society. As Mandeep Dhami explains,

> Denying prisoners the right to vote is likely to undermine respect for the rule of law since citizens who cannot participate in the making of laws will probably not recognize their authority. Allowing prisoners to vote, by contrast, may strengthen their social ties and commitment to the common good, thus promoting legally responsible participation in civil society.[84]

The denial of franchise to felony offenders undermines the ideal that voting is a fundamental right and instead promotes the notion

that voting is a luxury or privilege that can be forcibly removed at any time.

Conclusion

Whether felony disenfranchisement is challenged using Hinchcliff's textual approach, Chin's reliance on the historical context of the Constitution or even another method, it is absolutely vital that this constitutional question be reexamined because "voting is the most precious right of every citizen."[85] Besides its integrality to our American political identity, the "the right of suffrage is a fundamental matter in a democratic society […and] is preservative of other basic civil and political rights."[86] The success of our democratic institutions rely on the input of all our members no matter their race, sex, class, or criminal background. In a society that appears to grow more and more divided, we cannot afford exclude any portion of our general population from exercising such a vital right. Indeed, we have the most to learn from and improve upon based on those voices that are currently silenced.

[1] 947 F. Supp. At 971 (S.D. Miss. 1995).
[2] For the purposes of this paper, the term "ex-felon" will specifically refer to those who have completed their sentences, including probation. The terms "convicted felon" or "felon" refer to those with felony convictions on their records whether they are incarcerated, serving probation, or have completed their sentences altogether.
[3] Christopher Uggen & Jeff Manza, "Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States," 67 *American Sociological Association* 777, 794 (2002).
[4] Some important statistics must also be noted regarding the composition of the prison population: over half (55percent) are serving for a fist time drug offense while 13percent are serving for violent offenses; nearly three quarters (72.1percent) of the population are non-violent offenders with no history of violence; and one-third are first-time, non-violent offenders. The Sentencing Project, *The Federal Prison Population: A Statistical Analysis* (Department of Corrections), online at http://www.sentencingproject.org/doc/publications/inc_federalprisonpop.pdf .
[5] Elizabeth Simson & John Kenneth Galbraith Fellow, *Justice Denied: How Felony Disenfranchisement Laws Undermine American Democracy* (2002), online at http://www.adaction.org/media/lizfullpaper.pdf
[6] Ezra Klein, "Notes on Whether American Democracy Is Working," 2013 *Was*hington Post, (2013).
[7] American Civil Liberties Union, *Combatting Mass Incarceration—The Facts,* www. aclu.org, June 2011.
[8] Robin Levi & Ayelet Waldman, *Inside this Place, Not of It*, 17 (McSweeny's 2011).
[9] Rickie Solinger, et al., *Interrupted Life: Experiences of Incarcerated Women in the United States*, 14(University of California Press 2010).

[10] *Id*., 12.
[11] Between 1970-2005, the U.S. prison population rose by 700percent. ACLU, *Combatting Mass Incarceration—The Facts,* www. aclu.org, June 2011.
[12] Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, 26 (University of California Press, 2007).
[13] Angela Davis, *Are Prisons Obsolete?*, 13 (Publisher's Group Canada 2003).
[14] ACLU, *Combatting Mass Incarceration*.
[15] Further, the presence of prisons has increased the population of rural districts where inmates are often transferred from neighboring cities or even from faraway states, allowing those districts to earn more political representation due to the census's inclusion of inmates as part of the total population of the district in which they are housed (not the communities from which they are genuine members). Such a system grants more say and therefore more power to rural districts in the state to decide policy because of their inflated statistics. In Lassen County in California, a quarter of the total population is behind bars, but is still counted in the census as county "residents." A rural district with a gargantuan prison population (that is, in proportion to its genuine, "free" population) can therefore wield the extra weight of its non-voting members to earn more representation and/or funding for its prison enterprises or other ventures, even though a significant segment of its population has been artificially transplanted from other districts and has no say in the policy objectives. Eric Lotke & Peter Wagner, "Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From," 12 Pace Law Review 587, 588, 599 (2004).
[16] Gilmore, 158.
[17] Levi & Waldman, 13.

[18] William Walton Liles, "Challenges to Felony Disenfranchisement Laws: Past, Present, and Future," 58 Alabama Law Review 615, 616 (2007).
[19] Foucault, *Discipline and Punish* 47-48 (Vintage Books 1995).
[20] Liles, 616.
[21] Brennan Center for Justice, "Criminal Disenfranchisement Laws Across the United States." PDF file.
[22] Mauer & Kansal, 5-6.
[23] "If they are residents, they, as all other qualified residents, have a right to an equal opportunity for political representation […] 'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington v. Rash,* 380 U.S., 89 (1965).
[24] Simson & Fellow, 28.
[25] Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity*, 198 (Duke University Press 2009).
[26] Levy & Waldman, 18.
[27] *Id.,* 12.
[28] Mauer & Kansal, 29.
[29] Jeff Manza & Christopher Uggen, "Punishment & Democracy: Disenfranchisement of Nonincarcerated Felons in the United States," *Perspectives on Politics* 491, 493 (2004).
[30] Foucault, 77.
[31] Ericka L. Wood & Neema Trivedi, "Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls," *Clearing House Review* 30, 31 (2007).
[32] Wood & Trivedi, 40.
[33] The U.S. Department of Justice reported 68percent of people in prison had not completed high school, 53percent earned less than $1000 a month prior to their incarceration, and nearly one half were either unemployed or working part-time prior to their arrest. Mark Mauer, *Race to Incarcerate*, 178 (New Press 2006).

[34] *Richardson v. Ramirez,* 418 U.S. 24 (1974).
[35] Brennan Center for Justice, "Right to Vote: Key Decisions in Felony Disenfranchisement Litigation," 5. PDF file.
[36] "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. amend. XIV, § 2.
[37] *Id*.
[38] ACLU, *Will the Court Revisit Felon Disenfranchisement Laws this Term?*, www.aclu.org, (Sept. 2004).
[39] *Supra* 418 U.S.
[40] *Id*.
[41] *Id*. (Marshall J., dissenting).
[42] In other words, "The historical purpose of the Penalty Clause was to maintain Republican dominance in Congress" and such a "political motivation 'should not be construed to be a limitation on the other sections of the Fourteenth Amendment." Abigail M. Hinchcliff, "The 'Other' Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement," 121Yale Law Journal 194, 208 (2011).
[43] *Supra.* 418 U.S. (Marshall J., dissenting).
[44] 383 U.S. 663.
[45] *Dunn v. Blumstein,* 405 U.S. 330 (1972).

[46] *Reynolds v. Simms,* 377 U.S. 533 (1964).
[47] *Supra* 418 U.S. 24 (1974) (Marshall J., dissenting).
[48] *Id*.
[49] Liles, *supra* at 621.
[50] *Id.,* at 624.
[51] *Id.,* at 628.
[52] Hinchcliff, *supra* at 197.
[53] *Id.,* at 199.
[54] *Id*., at 198.
[55] 418 U.S. at 12.
[56] Hinchcliff, *supra* at 215.
[57] U.S. Const. art. IV, § 2 (emphasis added).
[58] Hinchcliff, *supra* at 219.
[59] U.S. Const. amend. V (emphasis added).
[60] Hinchcliff, *supra* at 220.
[61] *Id.,* at 221.
[62] U.S. Const. art. II § 4 (emphasis added).
[63] Hinchcliff, *supra* at 221.
[64] *Id.* at 222.
[65] *Id.* at 226.
[66] *Id.* at 227.
[67] *Id.* at 230.
[68] Gabriel J. Chin, "Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?," 92 Georgia Law Journal 1, 1, 3 (2004).
[69] *Id.* at 4.
[70] Uggen & Manza, *supra* at 794.
[71] Chin, *supra* at 6.
[72] *Id.* at 5.
[73] *Id.* at 7.
[74] *Id.* at 15.
[75] U.S. Const. amend. XV, § 1.

[76] Chin, *supra* at. 15, 16.
[77] George S. Boutwell qtd. Chin, *supra* at 16.
[78] *Id.* at 21.
[79] 418 U.S. at 29 (Marshall J., dissenting).
[80] Davis, *supra* at 15.
[81] "Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person." Sauvé v. Canada, [2002] 3 S.C.R. 519 at para. 44 (Can.); Sauvé v. Canada, [1993] 2 S.C.R. 438 (Can.).
[82] Davis, *supra* at 15.
[83] Mark Mauer, "Voting Behind Bars: An Argument for Voting by Prisoners," 54 Howard Law Journal, 549, 562
[84] Mandeep Dhami, "Prisoner Disenfranchisement Policy: A Threat to Democracy?" *Analyses of Social Issues and Public Policy,* 5 (December 2005).
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Regulating Equality: In Defense of the Arbitration and Mediation Services (Equality) Bill

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Abstract:
This article addresses the new British law, the Arbitration and Mediation Services (Equality) Bill and the assertions that the bill is Islamophobic. The article examines British and shari'a divorce regulations and examines the impact that legislation will have on the ability of British Muslims to gain Islamically sound divorces. Ultimately, after examining the law and the parliamentary debate, the article concludes that the law, far from damaging the rights of British Muslims, offers British-Muslim women enhanced legal protection.

A New Law in England

In contemporary debates surrounding the position of Islam and Muslims in society, shari'a[1] and the treatment of women have become flashpoints. In one perspective, the feminist concern about the treatment of women in the Muslim world and Islamic law is central to such discussions. Others suggest that the treatment of women is a distraction employed by bigots to mask Islamophobia or to justify other policy objectives. England finds itself at the center of such a debate due to a new bill before the House of Lords.

While some have accused the Arbitration and Mediation Services (Equality) Bill and its proponents of using purposes of this discussion the treatment of women as a guise or tool for legalizing Islamophobia, that perspective fails to account for the non-religious nature of the legislation and the gender equity principles that are the focus of the bill. Through an examination of the bill, the original legal system, and the parliamentary debates concerning the legislation, this article will show that the Arbitration and Mediation Services (Equality) Bill is so narrowly drawn that it does not infringe on the rights of willing participants to practice their religion, it merely prevents some practitioners from exploiting culture to victimize others. Though the bill weakens arbitration tribunals, including Islamic law councils, the bill and its supporters' objective is are not the destruction of Islam or obliteration of Islamic law in England, rather the protection of women by limiting the power of non-governmental arbitrators to engage in non-consensual discrimination, in accordance with the equality and civil principles espoused in English law.

Divorce Regulation

Two kinds of divorce law are central to this discussion of the Arbitration and Mediation Services (Equality) Bill. Though the regulation impacts any ruling supplied by an arbitration tribunal, the most contentious rulings, both in terms of jurisdictional issues and of gender-based discrimination, are the divorce settlements.[2] Thus, these laws are the basis for much of the debate. Before

considering the impact of the legislation on arbitration panels' employment of gender-based discrimination, it is necessary to consider the role of gender is Islamic law, especially law pertaining to the contested area of divorce. This system will also be juxtaposed with the English divorce system to which the legislation would allow English Muslims greater recourse, particularly in cases of gender-based discrimination by an arbitration of mediation service.

Divorce is a contentious and complicated subject in Islamic law. Divorce has been permissible in Islamic law since its inception and is common among Muslims, though divorce is discouraged in Islamic religious tradition: "The Prophet (peace_be_upon_him) said: Of all the lawful acts the most detestable to Allah is divorce."[3] Bearing this hadithic prescription forward, Islamic councils and law favor the perpetuation of marriages. Nonetheless, several kinds of divorce exist in shari'a, as well as regulations of divorce settlements.

There are six methods of divorce is Islamic law. The simplest and most controversial method of divorce is *ṭalaq*.[4] In this case, a husband divorces his wife with an oral formula[5] that dissolves the marriage.[6] Under Islamic law, he does not need to cite cause and may exercise this prerogative at any time. The second form of divorce is related to *ṭalaq*. *Ṭalaq al-tafwīḍ*, delegated divorce, occurs when the husband has granted the wife the permission to dissolve the marriage unilaterally, usually in the marriage contract but also during the marriage by presenting the choice, through an oral formula.[7] *Mubara'* and *khul'* are divorce by consent. In *mubara'*, both parties consent to the divorce. In *khul'*, the divorce is at the wife's petition, possibly to a court or religious official. Both of these options can include the wife's foregoing some or all of her *mahr,*[8] especially in a *khul'* divorce.[9] *Faskh*, the next type of Islamic divorce, means annulment or rescission; it is issued by a court (passive voice) when one of the parties swears before a judge that certain conditions have been met or when the husband refuses a divorce but the court deems the wife to have

sufficient cause for divorce.[10] Under Hanafi law,[11] courts may intervene if the marriage is irregular,[12] a person with the option to dissolve the marriage exercises it, the parties were prohibited legally from marrying in the first place, the marriage was between non-Muslims who converted, a husband is unable to consummate the marriage, or the husband is missing.[13] Other schools of legal theory are less strict. Maliki law allows courts to issue divorces for cruelty, inability to maintain the wife, desertion, or disease that makes remaining together dangerous.[14] The sixth method of divorce is apostasy. If one spouse converts to another religion, the marriage, if parties were Muslim when it was contracted, is voided.[15] In this situation, though, the converts are urged to return to the faith – as are all Muslim apostates – at which point the marriage, in some perceptions, is reinstated, though in others it is not.[16] In any of these cases, the divorce is both legally and religiously complete.[17] While this is interesting I do not know how well the defined terms relate to the rest of the article. This section is boring, and flat. It makes the reader to lose interest.

Marriage and divorce regulations in shari'a favor the husband. In the words of Dr. Ziba Mir-Hosseini, a Muslim academic and legal anthropologist, "Muslim law on marriage is 'fundamentally patriarchal.' It suits the interests of men rather than women."[18] This pattern continues in the protocols for divorce settlements.

Islamic law does not observe alimony or marital property. As spouses maintain independent ownership of the property they possessed before or acquired during the marriage, no right to alimony or division of assets exists.[19] After the divorce, the husband is required to continue providing maintenance for a period of three menstrual cycles[20] known as the 'idda,[21] providing for her in the standard of living in which he lives and they shared during the marriage.[22] After the 'idda, the husband may accept his wife again as a spouse on equal terms or he may not, which finalizes the divorce.[23] Additionally, the husband must pay the remainder of the *mahr* at the time of the divorce.[24] Those payments–the *mahr* and

the *'idda* maintenance–are the only monies owed the wife at the termination of the marriage. Divorce settlements in Islamic law thus also favor the husband, a point invoked by participants, activists, and legislators in considering the role of Islamic divorce law in England.

Islamic law also regulates child custody during divorce. In the patriarchal culture of Islam, the paternal figure is the default guardian for children. However, exceptions exist in the short term to provide the maternal nurturing for young children. Under Hanafi law, a mother has the right to child custody for before puberty, which is to say the age of seven for a male child and the age of nine for a female child.[25] After that age, children are placed in the custody of the father or his extended family should he die or become unable to care for them.[26] The paternal bond relationship, though, supersedes the age regulation and maternal relationship. If a woman remarries, she loses custody of her children and the right to visitation without paternal approval.[27] Child custody and visitation can be used as a bargaining chip during the divorce to convince a woman to forgo some or all of her *mahr*.[28] Thus, child custody is both a function and a tool of patriarchy in Islamic law.

England, on the other hand, has built a tradition of protecting women in divorce procedure. In English law, divorces are functions of civil law and are registered by a secular court, though other parties may conduct the arbitration used to reach the settlement, and are designed to uphold England's legal equality principles. Under the Matrimonial Causes Act 1973, courts may grant a divorce at the request of one partner in cases of an "irretrievable breakdown of the marriage," signified by a five-year separation, unreasonable behavior such that "the petitioner cannot reasonably be expected to live with the respondent," adultery, two years desertion – in which case divorce would be without consent of the respondent, or two years separation with the consent to divorce of the respondent.[29] The court does not make distinctions based on gender in assessing these claims, referring instead to "petitioner" and "respondent." Additionally, under the Matrimonial

Causes Act 1973, English law does not recognize extra-judicial divorces[30] until they have been sanctified by a court.[31] However, if the divorce took place abroad, the law of the land in which the divorce took place would come into effect. Such divorces would be recognized in England under the Foreign Divorces and Legal Separations Act 1971.[32]

English law includes the both the notions of marital property and of alimony, providing women economic protection in England's family law.[33] The legal custom is that an equitable, fifty-fifty split will provide the basis for the division of assets in a divorce in an English court.[34] Recently, though, this area of law has become more convoluted. In 2010, the Supreme Court of the United Kingdom found that prenuptial agreements may legally alter the division from the fifty-fifty model,[35] with the important restriction that "if there was evidence that one party had been pressurized into signing an agreement that disadvantaged them, or if the courts just thought the agreement was unfair, that a 'pre-nup' would not be valid, and the settlement would revert to an equal division."[36] When legislators recognized that inhabitants of the United Kingdom, especially immigrants and Muslims, were using foreign divorces (particularly in India and Pakistan) to avoid division of marital assets or alimony in accordance with English law Part II of the Matrimonial and Family Proceedings Act 1984 was introduced allowing England's courts to grant ancillary relief to spouses whose marriages were terminated in foreign courts.[37] Thus, one can see, through the developments in asset distribution, that English law seeks to protect women in cases of divorce, along with its accommodation for other religious and national differences.

Additionally, England's child custody procedure does not expressly account for gender of the custodian or the age of the child, which protects the parental rights of both parents, regardless of gender. Custodianship of children is determined by the child's welfare,[38] not, as in Islamic law, based on the child's age. However, the framing of the argument by the House of Lords

suggests that preference is given to keeping the child with closer relations and respect is given to the notion of maternal care,[39] which defers from the Islamic law practice of preferring the paternal family, irrespective of the position of the mother. Thus, in child custody cases the English tendency for gender equity in civil court procedure is demonstrated.

Overall, the divorce laws of England and Islam reflect different principles and values that may bring them into conflict. The divorce regulations of shari'a focus on religious requirement and patriarchy. The divorce laws of England are based on secular principles and equity. The use of arbitration services in the English legal system, particularly mediation services that draw on the elements of religious laws that contradict English laws, facilitates the application of those systems is, thus, a matter of state concern and supervision.

Mediation and Arbitration Tribunals

To supplement divorce laws, English law permits the use of mediation and arbitration tribunals to facilitate the process. Though these groups are themselves legal, they can pose problems with other aspects of English law, particular law related to gender equity.

Mediation and adjudication tribunal fall under the category of Alternative Dispute Resolution forums, which are forums in which consenting adults may seek sub-governmental solutions to their conflicts.[40] Arbitration and mediation are subtly different services:

> Arbitration is where two or more parties agree on an independent person who will decide on their dispute. The terms of reference have to be mutually agreed beforehand and there has to be acceptance of the final outcome. […] Mediation involves a neutral person trying to help the parties to a dispute identity common ground and reach a mutually satisfactory agreement. It is the parties who settle, not the mediator.[41]

Arbitration panel rulings are legally binding under the Arbitration Act 1996, with the proviso that both parties accept the tribunal as having the power to rule on the case.[42] Such rulings are enforced by civil courts.[43] These groups are empowered to rule or advise on civil cases,[44] not criminal cases that are supposed to be resolved in state criminal courts. These tribunals, though, have, over the years, moved beyond that initial jurisdiction to begin handling cases ranging from divorce, to financial matters, to domestic violence.[45] The previous failure of the government to regulate that expansion has been is taken as a tacit acceptance.

Critics of arbitration and mediation services, particularly those provided by religious groups, have different perspectives on the role those services play in state legal structure. Those opposed to the arbitration tribunals are concerned about the role they take away from the state. They believe that panels challenge the state's position as the sole authority over citizens' rights and legalities.[46] Proponents of arbitration tribunals, on the other hand, favor them because they provide "privatized diversity." They feel that through these groups, the state implicitly provides for freedom of religion and culture without explicitly drawing them into the public sphere.[47] The conflict of principles arises when the non-interventionist approach results in "placing civil and family disputes with a religious or cultural aspect fully *outside* the official realm of equal citizenship"[48] to the extent that other state principles–such as gender equity – are sacrificed to the first principle–in this case, religious and cultural expression.

Shari'a Councils in England

Muslim shari'a councils are a type of mediation and arbitration services that have existed beside the English legal system since 1982.[49] Only recently have they become official, though, with the formation of the Muslim Arbitration Tribunal (MAT) in 2007.[50] Shari'a councils are not the only religious arbitration groups,[51] but they have roused the greatest conflict.

Shari'a councils provide their clients with resolutions based

on Islamic law.[52] The English shari'a councils are informal and have no legal power to impose penalties or enforce their rulings.[53] Instead, Muslims choose voluntarily to accept them. The councils are meant to deal exclusively with civil cases.[54] Usually they are sought for family, financial, or commercial concerns, including everything from marriage and divorce, to inheritance, to nuisance neighbor suits.[55] According to literature by the Shari'a Council, 95% of queries were "matrimonial problems," the majority of which were women seeking divorce, including cases sent by solicitors whose clients wanted Islamic as well as civil divorces.[56] British legal authorities have approved the use of shari'a law in such situations. In July of 2008, Lord Chief Justice Lord Phillips approved of the use of shari'a principles in "family disputes" saying, "There is no reason why principles of Shari'a Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution."[57] Thus, shari'a councils arguably have a reasonable and legal position in the English court system.

Shari'a councils and their role in British-Muslim life are increasing rapidly. According to a 2009 study by the think tank Civias, there are approximately eight-five shari'a councils in Britain[58] with branches in London, Birmingham, Bradford, Manchester, and Nuneaton.[59] Many of the councils have reported an increase in demand in the last five years, increasing from one hundred to two or three hundred cases a month.[60] Leaders of the tribunals attribute the increase to faith, not community pressure. Sheikh al-Haddad says, "Muslims are becoming more aligned with their faith and more aware of what we are offering them."[61] The shari'a councils are, thus, presented to be bourgeoning manifestations of community will.

The Muslim Arbitration Tribunal courts are also supported by the organized religious community. Inayat Bunglawala, assistant secretary-general of the Muslim Council of Britain, has expressed the organizations support for shari'a councils. She also noted that Jewish courts have been allowed to develop in England

and suggested that Muslim courts should be permitted to as well.[62] Between the developing public use and the official religious endorsement, shari'a councils appear constructive and useful supplements to the English legal system.

Concerns Regarding Shari'a Council

Nevertheless, debate surrounding Shari'a councils has arisen. Points of concern include their role in the legal system, their treatment of women, and their impact on religious and social legislation.

It has been suggested that shari'a councils are working outside of their mandate and are misrepresenting themselves. Arguing against the councils, Lord Kalms stated, "the Muslim Arbitration Tribunal says by its own admission that most of its work falls outside the remit of the Arbitration Act,"[63] a factor which could reasonably drive the government to action. In the eyes of the government, shari'a councils have "no jurisdictional powers and should only be operating in an advisory capacity; however, increasingly, they are straying into areas of family and criminal law."[64] In 2007, MAT settled six cases of domestic violence in 2007, in tandem with police investigations.[65] While it might seem that these cases demonstrate the ability of shari'a councils to complement the existing English legal structure, the results suggest that such is not the case. After the shari'a council ruled, sentencing the men to anger management courses and mentoring by community elders, the women withdrew the complaints they had lodged with the police,[66] effectively freeing their husbands from criminal prosecution.[67] That outcome is not a problem in the eyes of the MAT, whose chairman suggested that it was advantageous because, as Islamic law supports, the marriages were preserved.[68] Furthermore, the councils appear unlikely to forgo opportunities to become involved in such cases in the future, despite the civil case mandate. Sheikh Fais-ul-Atab Siddiqi, chairman of the governing council of the Muslim Arbitration Tribunal, said he felt the courts could handle "smaller" criminal cases, dubbing them simply community matters: "All we are doing is regulating community

affairs in these cases."[69] Even when shari'a councils remain within the civil mandate, jurisdictional issues arise. For instance, the councils may refuse to recognize a divorce issued by the government prior to or apart from a shari'a-style divorce unless the husband was the petitioner, because Islamic law permits the husband almost unlimited right to divorce.[70] Furthermore, the courts keep scant records, and decisions cannot be appealed.[71] These technical issues have raised concerns about the position and viability of shari'a councils in England.

Shari'a councilmembers are also charged with misrepresenting position of shari'a councils and Islamic and English law. Because of their association with religion, these councils have great power to determine their own role in the Muslim community irrespective of the English law. The shari'a councils situate themselves as the sole arbiters of appropriate behavior for pious Muslims and discourage the recourse to secular legal systems,[72] though those systems might better represent the petitioner's legal rights in that country. As Baroness Cox noted, "the power of Sharia councils lies in how they are perceived by their communities, allowing the creation of de facto legal structures and standards which contradict fundamental British legal principles."[73] This situation is particularly harmful to women who do not know that they have other rights in English law, who do not know that the informal tribunals are not necessarily binding as court decisions, or who face community and familial pressure to obey an Islamic option, and thus submit to a legal system than is more restrictive without legally consenting.[74] For example, reports have been made saying that women were intentionally manipulated by "spokesmen for male Muslim interests" who circulated the erroneous information in Muslim communities that women were not entitled to divorce without the consent of their husband and that divorces were not religiously complete without the husband's *talaq*,[75] though English law and Islamic law could, in certain circumstances, dissolve a marriage without a husband's approval. Parliament members have also, in the past, expressed concern that

husband would refuse their wives a religious divorce in an attempt to gain advantage in the divorce settlement or to control their civilly divorced wives by precluding subsequent religious marriages.[76] By permitting false information about Islamic law and erroneously presenting their decisions as distinct from English civil law, these courts have both acted outside their role as advisors and arbiters and perpetrated harm on Muslim women.

Even if the councils functioned within their mandate, there are objections to the variety of Islamic law that might be enforced. Islamic law can be practiced and interpreted in a wide spectrum of ways. Several aspects of Islamic family law, such as those that were briefly discussed above, are not in accordance with English law and custom. British lawmakers expressed concern about several practices, including unequal access to divorce, tolerance for domestic violence,[77] polygamy, inequality in child custody,[78] requirements of sexual submission,[79] and inequality in inheritance based on gender.[80] Furthermore, "the adoption of stricter and more rigid interpretations of shared religious norms and practices" by the shari'a councils is a fear of some opposition.[81] Considering the self-selecting group that might seek religious legal guidance, it might not be unreasonable for the courts to become more conservative. However, in the eyes of those already concerned about the application of religious law in their country, the application of a stricter law merely appears an even greater threat to secularism and freedom.

Shari'a councils are also opposed on the grounds of gender-based discrimination. Many scholars and activists see women's rights as a casualty of the clash between secular norms and religious practices,[82] a clash that is playing in the juxtaposition of English civil courts and shari'a councils. Islamic law councils have come to "represent a polarized oppositional dichotomy that allows *either* protecting women's rights *or* protecting religious extremism."[83] Bearing in mind the gender biases in the aforementioned divorce law and their difference from the English system, it is unsurprising that women's rights activists are

concerned with the dualist system. Prominent activist groups in England have spoken out against shari'a councils for their treatment of women. Said Diana Nammi of the Iranian and Kurdish Women's Rights Organization (IKWRO), "We have spoken to many women and all of them tell us the same story; sharia law is not providing them with the justice they seek. The councils are dominated by men, who are making judgments in favour of men."[84] It is seen that as women become more aware that the rights available in the English legal system are not those available in shari'a council, but the regulations of Islamic law, which are gender-biased in marriage and divorce law, many women's groups have come to oppose shari'a councils.

[Supporters of shari'a arbitration and mediation services purport that no such discrimination exists or that any ostensible discrimination is willfully undergone as an unavoidable aspect of Islamic law. In this theory, women attending a shari'a council are submitting to the judgments against them with the awareness that gender influences Islamic law, and Islamic law panels should not be punished for practices to which the women willingly submit. Alternatively, the Muslim Arbitration Tribunal simply insists that there is no discrimination,[85] a claim that it justifies with the hiring of female jurists "as often as possible." The Tribunal does not explain how it will treat the gender-based laws of shari'a without instituting gender-based discrimination. Despite the assertions of the shari'a council members, the claims of gender-based discrimination noted by scholars and women's rights activists have caught the attention of political leaders who are interested in the shari'a councils and their position in the English legal system.

Others object to the existence of religious law arbitration as an alternative to the British legal system. Having a second legal code may divide the country and promote the formation of subcultures, particularly those that disagree with central tenants of English law or culture. Additionally, it could threaten the supremacy of the primary system. While serving as shadow home secretary,[86] Dominic Grieve asserted, "If it is true that these

tribunals are passing binding decisions in the areas of family and criminal law, I would like to know which courts are enforcing them because I would consider such action unlawful. British law is absolute and must remain so."[87] The weakening of the central authority and the contradictions possible in a two-code system have similarly become developing concerns for England's lawmakers as the shari'a councils have flourished.

One of the gravest concerns raised about shari'a councils is the lack of consent to governance by both parties to the cases being adjudicated. Consent, which is to say informed willing participation, is required to make a contract legally binding.[88] The ability to consent is admittedly a legally gray area, frequently influenced by factors such as age and mental capacity. The capacity to consent is further complicated in cases of marginalized and subordinated persons who have habitually been subjected to "social processes of coercion that eventually restrict the agent's free will."[89] In such a case, arguably the person is not able to consent to the modification to the English system that an arbitration service embodies.

One peer Baroness Donaghy, vividly summarized the concerns of many when she enumerated the barriers to consent and equated female participation in the shari'a council system with sexual assault: "[T]he definition of mutuality is sometimes being stretched to such limits that a woman is said to consent to a process when in practice, because of a language barrier, huge cultural or family pressure ignorance of the law, a misplaced faith in the system or a threat of complete isolation, that mutuality is as consensual as rape."[90] Lord Williamson of Horton noted that thirteen cases of intimidation into participation in shari'a tribunals were listed in the parliamentary briefing associated with the bill as representing a mere fraction of the potential.[91] As consent, a necessary component of a legal contract, may not be present or possible in the culture of shari'a councils, these councils may be creating rulings to which Muslim women and men are submitting themselves, possibly unwillingly, without their being legally valid,

let alone binding. This should be prominently featured in this section. Eschew other parts.

Proponents of the shari'a councils and the MAT argue that public choice immunizes them from such objections. Even if discriminatory practices occur, supporters of the councils argue, adult Muslims may willingly submit themselves to such regulations and adjudicative bodies. As Sheikh Haitham al-Haddad said, "We are not forcing people to walk though our doors."[92] The belief is that in a liberal democratic regime, citizens are permitted to make choices in pursuit of the religion, culture, or utility?? that might infringe on their other rights. It is the individual's decision to do so, and it is not the responsibility of the council or the state to prevent them from doing so. The state's interest in promoting civil liberties, including free practice of religion, is important to the councils and legislators and thus an important part of the debate relating to the regulation of arbitration services, which in turn regulates religious arbitrators.

In the face of these manifold arguments surrounding shari'a councils, the involvement of English lawmakers was inevitable. Responding to arguments both for and against the perpetuation of these parallel legal systems, England has attempted to modify the regulation of the tribunals to address concerns without impeding access to mediation services, particularly for those seeking assistance in religious observance. A recent effort to redefine the role of arbitration bodies and address the aforementioned concerns, the Arbitration and Mediation Services (Equality) Bill, is the focus of a new debate. Keep this as well

Arbitration and Mediation Services (Equality) Bill

The Arbitration and Mediation Services (Equality) Bill was introduced by Baroness Caroline Cox (Crossbench)[93] on May 10, 2012.[94] It passed its first reading, upon introduction, and its second, on October 19, 2012.[95] The bill is supported by an alliance of Christians,[96] secularists, and women's rights groups,[97] including endorsements from Iranian and Kurdish Women's Rights Organization, the Henna Foundation, Karma Nirvana, British

Muslims for Secular Democracy, and the National Secular Society.[98] The Arbitration and Mediation Services (Equality) Bill targets the suffering induced by "religious sanctioned gender discrimination" and the development of an "alternative quasi-legal system which undermines the fundamental principle of one law for all."[99] It also addresses the "jurisdiction creep" I don't like the way she introduces ideas in this paragraph. If citing the ideas in the intro paragraph, why have supplementary paragraphs? Maybe some more clearly marked "flagging" would be appropriate here. [Not sure what he means here.] in arbitration and mediation councils discussed above.[100] In terms of Islamic law and shari'a councils, the bill empowers Muslim women to contest decisions made by sharia courts that violate equality principles and regulations in English law.[101] good

Arbitration and Mediation Services (Equality) Bill has several provisions that amend previous legislation to achieve the aforementioned objectives. Without specifically targeting one group or set of adjudication criteria. The central modification is that the bill would render it expressly illegal for arbitration councils to discriminate based on gender: "A person must not, in providing a service in relation to arbitration, do anything that constitutes discrimination, harassment or victimization on grounds of sex." This regulation precludes assuming unequal rights to inheritance or division of assets based solely on gender and valuing evidence differently based on the gender of the testifier.[102] To this end, both the Equality Act 2010[103] and the Arbitration Act 1996,[104] from which the shari'a councils derive their mandate and permission to function, would be amended. Any terms in previous legislation construed as creating an opportunity for gender-based discrimination would be void in that respect.[105] Furthermore, the bill amends the Family Law Act 1996 such that a civil court would be empowered to vacate any ruling based on a mediated settlement or negotiation if a party's consent was deemed not to have been genuine.[106] Consent could be challenged, by the party him- or herself or by a third party, if all parties were not "informed of their

legal rights, including alternatives to mediation or any other negotiation process"[107] or if "any party was manipulated or put under duress, including through psychological coercion."[108] The bill seeks particularly to defend against abuses associated with religion through amending the Equality Act 2010 to enhance the requirements for public authorities to explain to those married only by religious authority–not state civil authority–or engaging in polygamous relationships that "they may be without legal protection" and advise that obtaining a state-recognized marriage would offer greater legal rights and protections.[109] The bill also combats "jurisdiction creep" by previously mentioned. expressly stating that "[a]ny matter which is within the jurisdiction of the [British] criminal or family[110] courts cannot be the subject of arbitration proceedings"[111] and criminalizing, under amendment of the Courts and Legal Services Act 1990, false assertions of jurisdiction or the capacity to make legally binding decisions.[112] In these several modifications to existing law, the Arbitration and Mediation Services (Equality) Bill is creating only minor adjustments to already existing legislation for the sake of affirming the gender equity principles espoused in British law and resolving concerns expressed about arbitration and mediation services without focusing on a single legal issue/subject (i.e. divorce).

Debate Surrounding the Bill

Despite the Bill's innocuous focus on equality and absence of inflammatory consideration of a single doctrine or body of arbitration, the Arbitration and Mediation Services (Equality) Bill has become a matter of contention. Several points of argument, such as alleged Islamophobia and treatment of religion, legal redundancy, and nationalism, obscure the bill's focus on gender equity and the treatment of women in British law and the arbitration system that complements it. This is how an intro should be written.

This seems like the biggest point of the article. The greatest objection to the legislation is that it unfairly targets Islam and is a manifestation of Islamophobia. Islamophobia presents an

understandable concern for British Muslims. One government study of found that only one in four Britons "feel[s] positively about Islam,"[113] whereas 47% of British people consider Muslims a threat,[114] with concerns ranging from extremism and terrorism to a threat to national identity and social cohesion.[115] The bill's creator, though, denies Islamophobic originals or intent. Her intent, as stated, was to "open up responsible, sensitive discussion about sharia law [because i]f no one does anything in Parliament, then people will go to extremes."[116] The legislation, for her, is about protecting women: "I am not anti-Muslim. Indeed, I am deeply concerned that Muslim women enjoy their full legal and civil rights under the law of this land. If women from other faiths experience comparable problems of systematic discrimination, the provisions of this bill would also be available for them as it does not name any religion."[117] Other proponents of the legislation have similarly insist that that it is not motivated by religion or preventing religious observance.[118]

Despite the drafter's intent not to target one religion, Islam and shari'a were invoked frequently in debates, arguably suggesting that they are the focus of the bill. Some peers and activist groups have objected to Islam-specific practices such as polygamy, child custody, and *talaq* as justifications for such legislation.[119] Lord Bishop of Manchester went so far as to suggest there is an "implied emphasis on Muslims and Sharia."[120] Legislators have addressed the concern about the focus on Islam with the fact that all arbitration councils will face the same restriction, including the Jewish Beth Din courts.[121] Despite the focus on Islam in the debate, the bill does not mention or focus on tenants or practices of Islam.

Proponents of the bill invoke British principles of toleration in response to such accusations of bias or inhibit free practice of religion. They argue that it is the tradition of the United Kingdom to tolerate different cultures and religions; it is merely the concern of the government to "guard against" members of those cultures who would abuse that respect to institute "practices hostile to basic

concepts of British justice."[122] Instead of preventing the free exercise of religion, the bill, they say, seeks to prevent the conflation of cultural misogyny with religious doctrine that might occur in arbitration councils.[123]

Furthermore, the Bill's proponents assure that the law would not prohibit recourse to alternative systems of arbitration, even religious legal systems. Some wary of the legislation have expressed concern that those Britons who are aware of their legal rights would be prevented from determining their religious obligations on civil matters because of this legislation.[124] Baroness Cox, though, dispelled that concern. This legislation, she emphasized, is designed not to eradicate arbitration councils, and especially not specific arbitration panels; its purpose is to protect those, especially women, who would wish to access another legal scheme in assertion of their legal rights in the face of gender-based discrimination. In fact, she specifically affirmed the continual permissibility of shari'a arbitration bodies:

> If women are happy with the sharia principles and if there is a case made which discriminates against them and they are satisfied with it then that's that, they have the freedom to do that. But if retrospectively they say, hey, I suddenly realised there's a legal system out there which doesn't discriminate against me and I would like the ruling to be reconsidered then – if it was based on sharia principles that discriminate against women – it could be reconsidered and overruled in a civil court.[125]

Baroness Cox does not assume that shari'a courts necessarily discriminate, that women do not seek their rulings for themselves, or that these councils should or would be banned. The scope she presents for her legislation is much more limited. This bill, instead of being Islamophobic, is designed to protect women.

Another topic central to the discussion is the role of gender in the legislation. For the religiously and culturally observant who oppose the recourse this legislation would give women out of religious or cultural arbitration panels, this legislation challenges notions of women and gender that are considered central to their religious or cultural practice. Women often have a special role in religion as "emblems of culture and 'bearers' of tradition."[126] From this fact, two more principles are discernible. The first is the women will therefore "often serve a crucial symbolic role in constructing group solidarity vis-à-vis society at large"[127] and that women will face more "pressure to prioritize their communal loyalty over and above shared citizenship."[128] The second is that their interest in controlling women is justified in terms of perpetuating their beliefs and practices. In that way, gender is a subset of the religious motivation for some of the opposition to the proposed legislation. This concern, though religiously and culturally valid, does not negate the concerns expressed about forced participation in religious and cultural practices[129] and regulations that violate the will or interest of parties, particularly women, and that contradict tenants of English law, such as gender equality.

For supporters of the legislation, gender is the motivation and the justification for modifying the powers of arbitration councils. Baroness Cox, the originator of the legislation, grounds it in the need to defend women from gender discrimination, particularly women who are erroneously led to believe that they have no legal recourse distinct from these councils.[130] In addition to addressing legal voids relating to those two points, this legislation has the benefit of affirming the government's concern about gender-based discrimination and abuse: "We cannot sit here complacently in our red and green benches while women are suffering a system which is utterly incompatible with the legal principles upon which this country is founded. If we don't do something, we are condoning it."[131] The focus on gender equity is also evident in the text of the Arbitration and Mediation Services

(Equality) Bill, in which it is explicitly stated. Bearing in mind Baroness Cox's stated objectives for introducing the legislation and the aforementioned concerns regarding the treatment of women and gender-based discrimination in the panels that the law addresses, it seems evident that the Arbitration and Mediation Services (Equality) Bill was designed to protect women and promote gender equity, in accordance with accepted tenants of British law.

An important contention of opponents of the bill is that it will not solve the problems they aim to fight. Those interested in enforcing an alternate legal system are capable of doing so without an official means. Government regulated panels and British councils are not the only sources of legal advice, especially shari'a advice, available to British Muslims. As one member of the Islamic shari'a council noted, "If you ban us, then British Muslims will find somewhere else to go."[132] It is true that British Muslims are capable of applying shari'a with or without a council to guide them. However, this argument relies on the erroneous assumption that the proposed legislation would ban the use of shari'a by arbitration panels. As shari'a councils would still exist, Muslims would still have access to religious regulation if they sought it. However, now it would be with the caveat that Muslims employing those principles must do so willingly and in accordance with English law. Thus, the legislation is arguably not weakening the capacity of Muslims to enforce shari'a law on themselves or the councils to adjudicate it on the willing; it is merely preventing the councils or Muslims from applying it to the averse and the abused.

Another concern is that the law is redundant and thus unnecessary. This argument is largely asserted by those interested in skirting the issues, especially gender discrimination, asserted by proponents of the legislation. As Baroness Donaghy responded, though, related laws that have not been effective at resolving discrimination are inadequate.[133] If the present situation is such that the amendments appear necessary to ensure the state possesses explicit regulating capacity, then granting that capacity cannot be

redundant. Additionally, it is arguably better to have several laws stating that discrimination is in violation of the national principles than to have less effective regulation in that vein, leaving women open to abuse or discrimination. This argument, then, does not negate the value of the bill.

One argument–the stigmatization or isolation of users of arbitration panels, particularly religious councils–has been used by both sides of the debate. The argument is invoked by those who misunderstand the legislation to suggest that it will isolate oppressed Muslim women by leaving them no legal system.[134] The impression here is that women who do not know about their rights in the English legal system, upon the banning of shari'a based councils, will be defenseless. However, since this legislation does not ban such groups, but rather merely provides further recourse to individuals who use them, this argument is not sound. Conversely, it has been argued that the perpetuation and recognition of religious and cultural arbitration tribunals by the government, which this law would allow to continue, reinforces retrograde and repressive notions in minority communities.[135] Furthermore, if the government approved a discriminatory arbitration or mediation body, it could appear that the government approves of that body's discriminatory practices. This legislation would counter that perception by empowering civil courts to undo any discrimination to which parties object or did not consent. The argument that the Bill will isolate subsets of the British Muslim community, though invoked by both sides of the debate, thus more firmly supports those opposed to the isolation of oppressed women: supporters of the legislation.

Other proponents of the legislation are similarly concerned with community, but they are concerned with the English community at large, not just the sub-communities that utilize arbitration services. They argue that a unified legal system is central to national cohesion and the perpetuation of the state. Thus, even at the expense of women's autonomy—even dealing only with women who consensually approach arbitration panels that

recognize non-English laws—the use of non-English laws ought to be limited.[136] They argue that, for the sake of the nation, nobody should be permitted under British law to treat or render any individual a second-class citizen. By limiting the capacity of arbitration tribunals to discriminate, the proposed legislation speaks to this perspective, even if it does not fully enact its views.

It has been suggested that legislation is not the most effective means of promoting gender equality; however, this point does not disprove or argue sufficiently against the legislation. The Lord Bishop of Manchester introduced this perspective into the debate, citing the research of Dr. Aisha Gill of Roehampton University into the Forced Marriage (Civil Protection) Act, which research argued that it would be better to devote all resources into education and prevention than into related legislation.[137] While the efficacy with which this measure will remove gender-based discrimination experienced by the users of arbitration and mediation services is an important consideration, this argument, in this cases, omits an important detail. Without this legislation, it would be difficult for the women, even if they were educated about their rights under British law, to benefit to the degree they can with the legislation. Without the legislation, education could only assist those who had not yet had their affairs adjudicated and who were able to withstand community pressure to participate in an arbitration process to which they might not actually consent. With this new legislation, all Britons would have increased access to civil services that could rectify cases of discrimination, as well as the preventative capacities of the newly-explicit illegalization of discrimination in arbitration tribunals. Thus, this legislation is still important to promoting equity in the British legal system.

Conclusions

With the Arbitration and Mediation Services (Equality) Bill, the House of Lords was entering a debate about the position that arbitration and mediation councils occupy in the British legal system's adjudication of marriage and divorce procedures. Concern was growing over jurisdiction issues, balance with the

state's authority to administer legal rights, and the treatment of women. The Arbitration and Mediation Services (Equality) Bill is a parliamentary answer to those concerns.

Despite the erroneous perception that the legislation is designed to eradicate shari'a courts specifically or alone, the Arbitration and Mediation Services (Equality) Bill offers greater protections to persons discriminated against by those panels, in accordance with the principles of the British legal system. Despite the media attention and the assertions of some shari'a council members, the Arbitration and Mediation Services (Equality) Bill is not about Islam or Islamic law, rather it is about protecting the rights of women and ensuring that Islamic law is the judiciary only of the willing, not the ensnared.

[1] For the purposes of this discussion, shari'a will be taken to mean the system of laws derived from the Qur'an, which is the holy book of Islam, the Hadith, which are the accounts of the life and actions of the Prophet Muhammad, and *fiqh*, which is Islamic jurisprudence developed from history and the aforementioned sources.
[2] These controversies and others related to arbitration panels will be discussed subsequently.
[3] Abu Dawud 12:2173 (University).
[4] Often translated as repudiation, *talaq* means to release.
[5] A statement is made equivalent to "I divorce you" or "You are divorced."
[6] Esposito, 29.
[7] Esposito, 32.
[8] *Mahr* is the brideprice. Prior to an Islamic marriage, the husband and wife sign an marriage agreement that includes a *mahr* to be paid to the wife by the husband as a marital gift. A portion is given to the wife at the time in the marriage, with the rest to be given later. Often the remainder is forgone if the marriage continues, though it remains the property of the wife. However, it is an assurance of maintenance after the marriage in case of the divorce, when the remainder must be paid immediately.
Some scholars suggest that the forgoing of *mahr* to attain a divorce constitutes paying for a woman's freedom (Carroll, 109) while others consider it a bribe.
[9] Esposito, 32.
[10] Esposito, 33.
[11] The most common school of Islamic law – or *madhhab* – to be invoked in England is Hanafi, as most Muslims in England are of South Asian extraction, where Hanafi law predominates.
[12] Irregular or *fāsid* marriage occurs when there are impediments to the marriage that can be removed, such as a man's already having four wives – the maximum number allowed by Islamic law –

before contracting the marriage in question, or by having an informally or improperly conducted marriage, such as lacking sufficient witnesses to the union. A judge may affirm or deny the validity of the marriage in conjunction with both parties (Esposito, 18).

[13] Traditional law requires that a spouse be missing until such a time as he would have been 90 years old. Other schools, though, and time have introduced lower requirements (Esposito, 34).

[14] Esposito, 34.

[15] Esposito, 34.

[16] Carroll, 102.

[17] Carroll, 101.

[18] Palmer.

[19] Palmer.

[20] 61:1,4[Citations in the Qur'an are rendered as sura:aya.] Pickthall

[21] Esposito, 35.

[22] 65:6

The objective is to ensure that the woman is not pregnant and that, if she is, the husband is providing for his child. If the wife is pregnant and the husband declines to perpetuate the marriage despite the child, the husband must maintain her during the pregnancy, as he would if the marriage were to continue, and recompense her for the weaning of the child (65:6)

[23] 65:2.

[24] Esposito, 35

[25] Esposito, 35

[26] Esposito, 36

It is assumed that there are enough women in the father's family to provide nurturing, care, and feminine influence for the children without the mother. The association with the paternal family is of greater importance from the Islamic legal perspective.

[27] Esposito, 36.

[28] Carroll, 109.
[29] Matrimonial Causes Act 1973 in Carroll, 104.
[30] Such as *talaq*
[31] Carroll, 97-98.
[32] Carroll, 99.
[33] Matrimonial Proceedings and Property Act 1970, Matrimonial Causes Act 1973
[34] The Matrimonial Causes Act 1973 25(2) notes that the division of assets in a divorce must account for a myriad of factors including:
"(a)the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
(b)the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
(c)the standard of living enjoyed by the family before the breakdown of the marriage;
(d)the age of each party to the marriage and the duration of the marriage;
(e)any physical or mental disability of either of the parties to the marriage;
(f)the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
(g)the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
(h)in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit . . .

which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring."
However, in 2000, the House of Lords ruled that the fifty-fifty split should provide the basis for the division of assets, as marriage altered people's engagements with family, the economy, and the workforce (White v White (2000)).
[35] *Radmacher* (formerly Granatino) *v Granatino* [2010] UKSC 42
This case is also interesting in that the partner seeking ancillary relief through the court was the husband.
[36] Palmer.
Some have suggested that this portion of English law is discriminatory against Muslims because it has been used to render moot pre-nuptial agreements made in accordance with Islamic law, as was the case in Al-Saffar v Al-Saffar [2012] EWCA Civ 1103.
[37] Carroll, 100.
[38] "House"
[39] "House"
[40] Shachar, 576.
[41] "House"
Definitions were provided by Baroness Donaghy of the House of Lords, former chair of the Advisory, Conciliation and Arbitration Service of the British government
[42] Taher
[43] "Baroness"
[44] Taher
[45] Taher
[46] Shachar, 583.
[47] Shachar, 577.
[48] Shachar, 577.
[49] Talwar; Carroll, 107.
[50] "House"; Taher

[51] Beth Din has existed in England for more than one hundred years and is allowed to settle disputes between Orthodox Jews, including divorce and business cases (Palmer, Taher).
[52] Shachar, 576.
[53] Talwar; Taher
[54] Talwar
Whether or not the shari'a councils do or should live within this restriction is a matter of contemporary debate and will be discussed subsequently.
[55] Taher
[56] Carroll, 107.
[57] Phillips
[58] Talwar, "Baroness"
[59] Taher
[60] Talwar
[61] Talwar
[62] Taher
[63] "House"
[64] "Baroness"
An investigation into the trying of criminal cases in shari'a councils was conducted by Edna Fernandes and reported in the *Daily Mail* ("House").
[65] Taher
[66] Taher
[67] The issue has also been raised that it is legally untenable and possibly illegal to have non-Muslims receive criminal sentences and records for crimes for which Muslims do not receive them owing to this skirting of the English legal system.
[68] Taher
[69] Taher
[70] Carroll, 107, 109.
[71] "House"
[72] Shachar, 587.

[73] "Arbitration … Lords"
[74] "House"
[75] Carroll, 100.
[76] Carroll, 100. Carroll does suggest that this fear was overblown. Shachar, 576. Shachar also considers the negative impact of a husband's refusal of a religious divorce.
[77] Baroness Turner of Camden expressed particular concern about domestic violence incidences that have been unreported and perpetuated based on the practices of sharia councils, citing examples ("House").
[78] Lord Carlile of Berriew objected to the preference based on gender for the father's extended family in place of the mother in child custody cases in which the father is unable to raise the child. Baroness O'Loan objected to the child custody provisions of Islamic law being based on age being used in place of British laws that account for wellbeing ("House").
[79] Lord Carlile of Berriew noted requiring a woman to have sex with her husband even when she did not consent violated the Sexual Offences Act 2003 ("House").
[80] "House"
[81] Shachar, 591.
[82] id at 584
[83] id at 585
[84] Talwar
[85] "There will be no race or sex discrimination in this organisation!" (Muslim Tribunal Association).
[86] In the United Kingdom, the Opposition, which is the party next in size to the Government party or coalition, also creates an advisory cabinet, referred to as the shadow cabinet. Its members are referred to as shadow ministers.
[87] Taher
[88] Shachar. 588.
[89] id at 588

[90] "House"
[91] id
[92] Talwar
[93] Crossbench means she does not vote regularly with the Government or the Opposition.
Baroness Cox was previously a member of the Conservative Party but was removed for publicly opposing parts of the party platform.
[94] "Arbitration … 2012-13"
[95] id. It is unclear how the bill will fair in the House of Commons. Prime Minster Cameron promised to criminalize forced marriage but has yet to do so, suggesting that such issues are not high in the Government's priorities ("Baroness").
[96] It has also been supported by a Sikh legislator (Lord Singh of Wimbledon). No Muslim peers, though there are Muslim peers, participated in the House of Lords debate. "House"
[97] "Baroness"
[98] "Arbitration … Lords"; "House"
[99] "Arbitration … Lords"; "House"
[100] "Baroness"
[101] id
[102] As shari'a values the evidence of a female witness at half the value of that of a male witness, Islamic law councils are prefigured to contravene this regulation. (SOURCE?) (The Qu'ran verse is listed three lines below. That is the sources of this tenant in Islamic law.)
The qur'anic regulation originally refers to witnessing an economic contract but has become the accepted standard for witnesses in shari'a: "And call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses" (2:282).
[103] Equality Act 2010
See Arbitration and Mediation Services (Equality) Bill [HL] s.1(1)(11)

[104] Arbitration Act 1996
See Arbitration and Mediation Services (Equality) Bill [HL] s.2(3)(2)
[105] Arbitration and Mediation Services (Equality) Bill [HL] s.1(3)(6)
[106] s.3(2)
[107] s.3(5)(2)
[108] s.3(5)(2)
[109] s1(4)
[110] Based on objections raised during the second reading, it is likely that the family court restriction will be amended out or modified ("House").
[111] s.2(3)(2)(d)
[112] s.5(7)(2)
[113] Doughty
[114] Moosavi
[115] Doughty, quoting Professor David Voas of Essex University The quotes are drawn from Voas's chapter "Religion in Britain and the United States" in British Social Attitudes: the 26th Report. [Fact not stated in the Doughty source. I found the book independently searching the quotes. Should I include a citation for the book?]
[116] "Baroness"
[117] "Arbitration … Lords," "House"."" Presumably the Baroness is referring to Beth Din.
[118] "[T]his is not an attack on one particular religion or, indeed, on any right to worship" – Baroness Donaghy ("Arbitration…Lords," "House").
[119] "House"
[120] id
[121] Legislators are certainly aware of the application to Beth Din, which was brought up in the debate. Lord Bishop of Manchester, chairman of the Council of Christians and Jews, noted during the debate that this legislation would apply to Beth Din, though he was

unclear as to whether the drafters were aware of this. Lord Kalms asserted that Beth Din has always functioned differently than the shari'a councils and need not fear the legislation. Beth Din is a centralized and regulated body that has historically recognized itself as complementary and subservient to British law, not a replacement, so this legislation can be folded into that understanding ("House").

[122] Lord Eden of Winton (id)

[123] Suggested by Lord Singh of Wimbledon (id)

[124] The Lord Bishop of Manchester was expressing particular concern for patrons of Beth Din ("House").

[125] "Baroness"

[126] Shachar, 586.

[127] id at 591

[128] id at 586

[129] See above discussion of the law's stipulations.

[130] "Baroness"

[131] id

[132] Talwar

[133] "House"

[134] Shachar, 605.

[135] Lord Bishop of Manchester cited the Archbishop of Canterbery's argument ("House").

[136] This argument was particularly represented by Lord Kalms (id).

[137] id

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