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Clayton Pierce

Volume 8
Number 2
Spring 2021



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Penn Undergraduate Law Journal

Vol. 8

Spring 2021

No. 2

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A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal's principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate

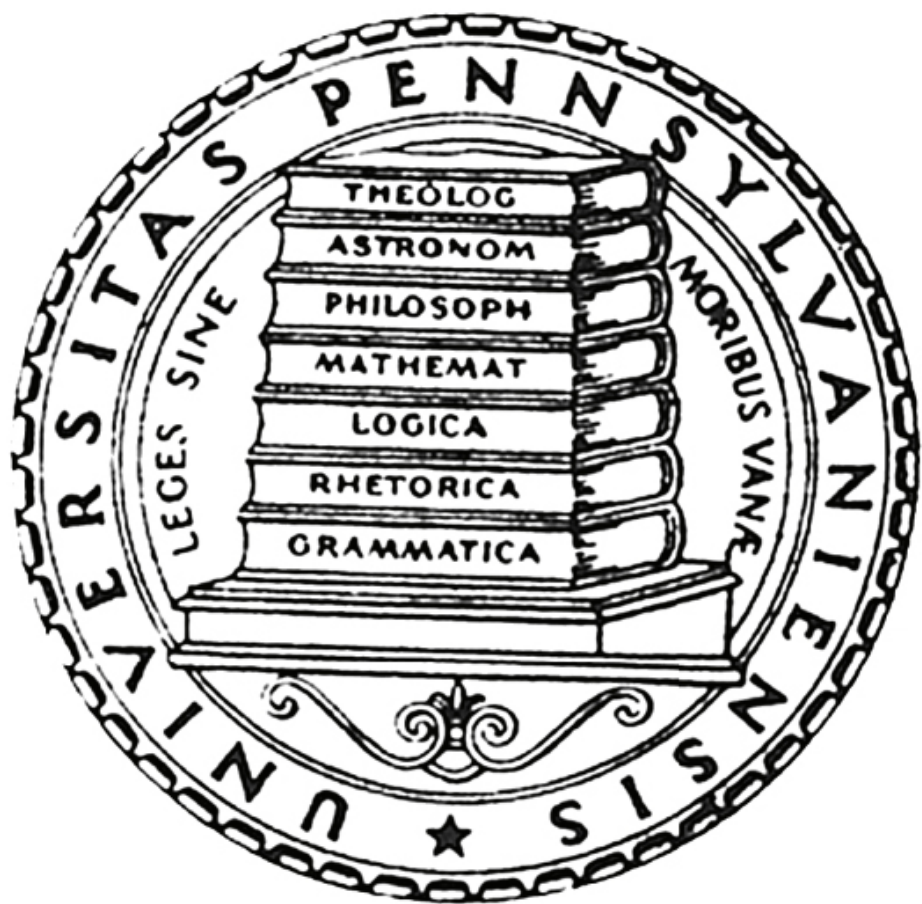
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Volume no. 8, Issue no. 2, 2021.

www.pulj.org



LETTER FROM THE EDITOR-IN-CHIEF

Sara Rex, University of Pennsylvania

Dear Reader,

We are thrilled to present to you the sixteenth issue of the Penn Undergraduate Law Journal. Selected and edited during the coronavirus pandemic, these articles offer original perspectives on relevant legal issues, ranging from asylum claims in Ireland to capital punishment in the United States. One piece, the product of collaboration between undergraduate law journals, comments on the ways institutions of higher learning have dealt with the impacts of the pandemic. The articles from this semester offer insight into some of the most relevant law-related issues of this time period.

Our first article, “The Standard of Truth: A Critique of the Irish Standard of Proof in Accessing Credibility in Asylum Determinations,” comes to us from Blánaid Ní Chearnaigh from Trinity College Dublin. She begins by defining the criteria for asylum status both in Ireland and abroad, detailing the single-most significant part of applications: credibility. She then discusses the standard of proof for asylum determinations in Ireland, using comparative examples and the evolution of the definition of an asylee in Ireland. Ms. Chearnaigh concludes her analysis of Irish standards of proof by stressing the importance of internal and external consistency in the stories of asylum seekers.

In our second article, “Vaccine Mandates in Institutions of Higher Learning: The Tightrope Act Between Public Health and the Freedom of Choice,” authors from both our Penn Undergraduate Law Journal and the Columbia Undergraduate Law Review discuss the tradeoff between individual rights and public health in light of COVID-19 vaccine mandates in institutions of higher learning. They identify a duty of care and a conflicting need for compromise that make it necessary to carefully navigate ethical intricacies during this time. Analyzing legal precedent and the sphere of reasonable accommodations, Emma Davies, Chloe Lowell, Joshua Rose, and Megha Thomas reflect on some of the most pressing developments of this time.

Our third piece, “Fathers’ Rights in Light of Rulings of the European Court of Human Rights,” was submitted by Małgorzata Witalis from the University of Warsaw. The article features a thorough contemplation by Ms. Witalis of the extent of rights afforded to fathers after rulings by the European Court of Human Rights. She grounds her work in principles such as the child’s best interest and prior court rulings, allowing her to construct a framework around the establishment of paternity, denial of paternity, and the father-child relationship. She prompts readers to evaluate the current allowances and limitations on the rights of fathers in

Europe, underscoring the child's best interest as a concept with central dominance to clarifying the lens through which readers can view this significant legal matter.

In our fourth article, "Chinese American Birthright Citizenship During the Exclusion Era," author Cindy Kuang from Stanford University examines claims of citizenship in the Supreme Court. Primarily contrasting the favorable outcome of *United States v. Wong Kim Ark* (1898) with the unfavorable outcome of *Elk v. Wilkins* (1884), Ms. Kuang seeks to elucidate the motivations underpinning the different rulings. This piece comments on a larger narrative of citizenship as a political issue, describing historical rhetoric that targeted population minorities and led to exclusionary policies.

Our fifth article, "Plea Bargaining in the Cook County Criminal Justice System: Sacrificing Justice for Expediency?" comes from Keelly Michael Jones at the University of Chicago. He examines whether plea bargaining undermines justice to promote expediency in the criminal justice system. Analyzing both reasons in favor of and opposing plea bargaining, he includes interviews with respondents who entered into plea agreements. Ultimately, Mr. Jones concludes that although those who use plea agreements tend to value expediency, this is often outweighed by fears that more pressing facets of their case outcomes will negatively impact them.

In our sixth article, "Legal Theory and the Eighth Amendment: The Law and Morality of Capital Punishment in the United States," Clayton Pierce from Colorado College examines the text of the Eighth Amendment with a focus on theories of legal interpretation, such as inclusive legal positivism, natural law theory, integrity theory, and exclusive legal positivism. He seeks to highlight constitutional interpretations that can help design a framework through which readers can investigate whether the death penalty might be considered cruel and unusual punishment.

Thank you to all who contributed to this publication: our authors, readers, writers, sponsors, and members of our Journal all played critical roles in compiling these outstanding pieces. I would like to thank Editor-in-Chief Emeritus Lorenza Colagrossi, who led the team during this editing process and introduced me to the Journal. I am honored to publish this edition and present these works to you, our readers.

Sincerely,

Sara Rex

A handwritten signature in cursive script that reads "Sara Rex". The signature is written in black ink and is positioned below the typed name.

FOREWORD

THE DETERMINATION OF ASYLUM CLAIMS: TRUTH AND RISK

Dr. Oran Doyle, Trinity College Dublin

In this excellent article, Blanaid Ní Chearnaigh identifies significant problems with the way in which asylum determinations are made in Ireland. The Convention Relating to the Status of Refugees 1951 appears to establish a clear threshold for the grant of asylum status: ‘well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.’ But how is a decision-maker to determine whether this is the case. Several difficulties present themselves.

First, countries typically allow migrants to enter only for certain and limited types of reasons. Those limitations may be more or less restrictive, but there are always some restrictions. If we accept that this is legitimate, then it is permissible for countries to treat refugees more favourably than other migrating people. States have obligations under the Convention to admit refugees but they do not generally speaking have obligations to admit other non-nationals. But people may have many good reasons to choose to migrate, other than fleeing persecution. The desire to make a better life for oneself and one’s family has driven migration patterns for centuries if not millennia. Whilst economic migration is feasible within the global north, those who have the greatest economic need to migrate are precisely those most likely to be excluded from pre-approved migration mechanisms: visa-free entry, work permits, etc. Those who migrate for economic reasons may feel compelled to present themselves as refugees in order to gain entry. But if we accept that states may control their borders, then states are entitled to establish processes to distinguish refugees from those migrating for economic reasons. This is a rather obvious point, but it becomes relevant when we come to consider how refugee determinations may be made.

Second, as cogently outlined in Ms. Chearnaigh’s article, there are formidable difficulties, across several dimensions, in establishing whether someone is a refugee. To the extent that the fear of future persecution depends on past events, we have very few ways of verifying an asylum seeker’s account of what they have experienced. In other legal processes, one might examine witnesses, forensic evidence, contemporaneous documentary material, etc. But none of this is likely to be available to someone who has fled persecution.

The closest analogue in domestic legal proceedings is probably sexual offences where the accused person admits the fact of the sexual intercourse but

maintains that they believed the intercourse was consensual. The resolution of that issue depends on an assessment of the credibility of the accused person and the complainant. But even this most difficult type of case has some advantages over asylum claims in terms of establishing what occurred. For, in Ireland at least, the credibility issue in a sex offences trial will be decided by a jury drawn from members of the same community. There is at least some hope that such a jury will understand the thinking of the complainant and the accused, the behaviour that community-members should understand indicates a lack of consent.

This process is far from perfect and I do not wish to extol it nor in any way minimise the trauma of complainants in such trials. My point is rather to emphasise how the decision-maker in an asylum application is even more disadvantaged than the jury in such a criminal trial. For here – and this is one of the strongest insights in Ms. Chearnaigh’s article – the decision-maker lacks the cultural software to assess the credibility and plausibility of the applicant’s account. A jury in a criminal trial can bring different perspectives to bear in assessing credibility and can generally draw on a shared background of assumptions and beliefs to make sense of human behaviour. In the asylum context, the decision-maker will most likely be from a radically different background, sharing little common experience with the applicant and be ill-equipped to assess whether the applicant is credible.

Our awareness of these evidential difficulties means that we cannot hold asylum seekers to the same onus and standard of proof as applies in civil litigation. To some extent, the Irish procedures are cognisant of this. As related by Ms. Chearnaigh, the Irish courts have decided that the decision involves two steps. In relation to past events, the correct standard to apply is the balance of probabilities coupled with, where appropriate, the application of the benefit of the doubt. In relation to the assessment of future risk, the standard is a ‘reasonable degree of likelihood’. This removes from the applicant an impossible burden that cannot be met. Nevertheless, the ‘balance of probabilities’ threshold for past events and the danger of credibility assessments may result in asylum status being denied to refugees.

It is at this point that I encounter my sole area of significant disagreement with Ms. Chearnaigh. At times, she seems to suggest that the difficulty in asylum applications is the notion of truth itself. She writes, ‘With regard to most material facts in an asylum case, there is no such thing as the “truth”....’ This is incorrect. The problem is an epistemological one of gaining access to the truth (discovering what truly happened) rather than the radically relativist position that there is no truth, or that there are different and competing ‘truths’. For if there were no truth to these material facts, there would be no point in worrying about them at all. Pushed further, there would be little point in concerning ourselves with asylum cases at all. If it can be neither true nor untrue that an asylum seeker, say, suffered torture in the past or that there is a reasonable likelihood of persecution if returned to their country, then we have no reason to be concerned about what might happen to them. It is precisely because persecution truly

occurs that we have reason to be concerned for asylum seekers and should want to design a decision-making process that correctly identifies refugees.

I suspect that this is more an infelicity of expression on Ms. Chernaigh's part than a considered commitment to a thoroughgoing relativism about the existence of objective reality. Because most of Ms. Chernaigh's article evinces sincere concern for the plight of refugees, presupposes that things truly happened to them and that they truly face risks in the future, and accordingly seeks to grapple with the epistemological difficulties of ascertaining what that truth is. Put another way, Ms. Chernaigh's critique of the Irish processes rests on the important, but unashamedly objectivist belief, that the Irish procedures are flawed because they may lead to wrong decisions.

What are the potential options for reform? As mentioned above, civil litigation in Ireland places the onus of proof on the party who alleges a fact to prove that fact on the balance of probabilities. This standard is partly adopted in the context of asylum seekers, such that the applicant must persuade the decision-maker of past material facts on the balance of probabilities. This is softened by the fact that the benefit of the doubt can be applied. Moreover, the assessment of future risk is a reasonable likelihood of persecution.

Even this limited deployment of the balance of probabilities standard is questionable, however. The balance of probabilities standard is particularly appropriate to adversarial litigation between two or more parties. Each party alleges facts that are advantageous to it and disadvantageous to the other party. The court has no reason to prefer party A to party B, so the standard ensures that it is just slightly easier for B to disprove the fact than it is for A to prove the fact. The asylum assessment, however, as Ms. Chernaigh explains, is an inquisitorial one. A and B are not in an adversarial relationship with one seeking to disprove what the other is seeking to prove. More fundamentally, there is no party B who suffers from party A being successful.

This is not quite the same, however, as saying that the only risk in an asylum context is wrongfully refusing asylum to a genuine refugee. If that were the only risk, then asylum should be granted to all who seek it, without any need for an individualised assessment. But, as noted above, it is legitimate for states to control their borders. It follows from this that there is some sort of wrong done to states if an asylum seeker is wrongly deemed to be a refugee. That said, the wrong done to a state by an incorrect decision is not of the same order as the wrong done to a genuine refugee refused asylum status. A state can much more easily accommodate a non-genuine refugee than a genuine refugee can face the risk of persecution on return to their own country.

The context of a criminal trial provides a useful analogy here. In Ireland, as in other common law countries, the prosecution in a criminal trial must prove all facts beyond a reasonable doubt. This reflects the fact that while the state – or the community – have a legitimate and important interest in seeing criminals convicted,

this is less compelling – in any given case – than the interest of an innocent person in not being convicted. Whereas a ‘balance of probabilities’ standard should produce roughly equal risks of wrongful conviction and wrongful acquittal, the ‘beyond a reasonable doubt’ standard, increases the risk of wrongful acquittals – including decisions not to prosecute guilty people in the first place – and reduces the risk of wrongful convictions. It does not eliminate the risks of wrongful conviction; nor does it disregard the state’s generalised interest in successfully prosecuting criminals. But in the context of any particular case, it tilts the scales in favour of the accused person.

This bears some similarities to the asylum context: the state has a generalised interest in controlling its borders but this is not, in any individual case, greater than the interest a genuine refugee has in bringing granted asylum status. To some extent, the other aspects of the Irish procedures – benefit of doubt on some issues and the reasonable likelihood of persecution test – recognise this. Nevertheless, it remains questionable whether balance of probabilities is ever an appropriate standard for the establishment of past material facts in this inquisitorial context. The damage of a wrongful refusal of asylum status suggests that the procedures for establishing refugee status should be weighted more in favour of the asylum seeker.

Ms. Chearnaigh has done significant work in drawing these issues to our attention. As a future research project, it would be interesting to see more detail on possible alternative approaches, political and/or litigation strategies for persuading the legislature and/or the courts to adopt a new approach.

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**THE STANDARD OF TRUTH:
A CRITIQUE OF THE IRISH STANDARD OF
PROOF IN ASSESSING CREDIBILITY IN ASYLUM
DETERMINATIONS**

Blánaid Ní Chearnaigh, Trinity College Dublin

I. Introduction

To be declared a refugee in Ireland, the threshold of proof requires that, “on the balance of probabilities,”¹ an applicant establishes a well-founded fear of persecution pursuant to the Convention Relating to the Status of Refugees.² In international law, the legal isthmus of asylum protection is characterized by humanitarian principles enshrined in international law and state sovereignty. Although the Convention details the governance of this isthmus, its silence on the procedural requirements concerning asylum determinations has resulted in gross inconsistencies. Indeed, an individual could potentially qualify for asylum in one jurisdiction but be refused on identical facts in another based on the persuasiveness of the narrative they present and the procedural environment. This is an increasingly frequent situation in asylum determinations where the range of verifiable evidence is arguably less tangible than in other legal procedures where decision makers have more resources at their disposal.³ On top of a frequent dearth of corroborating or documentary evidence to support the application’s claim, as well as the common absence of testimonial evidence beyond the applicant’s narrative,⁴ the process itself is also an “essay in hypothesis”⁵ where predictions are made on what could conceivably happen to an applicant at some future point in time and the legitimacy of their fears.⁶

1 O.N. v. Refugee Appeals Tribunal, 13 IEHC 2.

2 UN High Commissioner for Refugees (UNHCR) *1951 Convention Relating to the Status of Refugees*, in CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES (2013). Hereinafter referred to as “the Convention.”

3 UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* 31 (2013).

4 Martin Jones & Francis Houle, *Building a Better Refugee Status Determination System* 25 REFUGE 3, 6 (2008).

5 GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 54, 3rd ed. (2007).

6 The Convention, *supra* note 2, at Art. 1(A)(2). The full definition reads as follows: “As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear,

As a result, determinations are mutually dependent on the assessment of their credibility, understood to involve three criteria: internal consistency, external consistency, and plausibility.⁷ And yet, with no international standard, many applications for asylum in Ireland are rejected specifically because there are doubts surrounding their “credibility.”⁸ While described as the single most important step in asylum determinations,⁹ the term “credibility” is used in different ways in Ireland and elsewhere, with a range of descriptive intentions and legal consequences. Not only is it “conceptually elusive and adjudicatively influential,”¹⁰ but “it is an unenviable task, and one that is fraught with potential danger.”¹¹ While decision makers are concerned with “the search for truth,” the divergent thresholds of proof on how to assess the credibility of an account serves to undermine the truth.

In order to realign the legal significance of credibility assessments and their relationships with the standard of proof, this paper seeks to unpack the pitfalls of the current standards governing international protection in Ireland. As such, Section II of this paper will outline the current asylum protection framework at both international and domestic levels. Section III will set out the standard of proof for asylum determinations applied in Ireland and draw on comparative examples. Section IV will explore the mutually dependent relationship between the evidentiary threshold per the standard of proof and credibility assessments. Specifically, it will examine the adjudicative reliance on internal consistency, external consistency, and plausibility as means to test credibility. Finally, Section V will offer analysis of the following discussion, and Section VI will conclude accordingly.

6 (cont.) is unwilling to return to it.”

7 Amanda Weston, *A Witness of Truth: Credibility Findings in Asylum Appeals*, 12 IMMIGR. & NAT'LITY L. & PRAC. 87, 89 (1998).

8 Recent statistics indicate a rejection rate at the first instance of approximately 70.3%. See further, Republic of Ireland Statistics, EUROPEAN COUNCIL FOR REFUGEES AND EXILES (ECRE) & ASYLUM INFORMATION DATABASE (Dec. 31, 2019), <http://www.asylumineurope.org/reports/country/republic-ireland> (last visited May 8, 2020).

9 Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J., 367.

10 Guy Coffey, *The Credibility of Credibility Evidence at the Refugee Review Tribunal*, 15 INTERNATIONAL JOURNAL OF REFUGEE LAW 377, 377 (2003).

11 R.K.S. v. Refugee Appeals Tribunal 436 IEHC, Unreported, per Peart J (2004).

II. Conceptualising The Asylum Protection Framework

A. The International Regime

The international protection regime is largely governed by the Convention and its 1967 Protocol,¹² which acts as the cornerstone for the protection of refugees.¹³ Drafted in the wake of the Second World War, the Convention was a response to mass displacement triggered by events preceding 1 January 1951.¹⁴ By way of formulating a definition, the Convention labels a refugee any individual who is outside their country of nationality and is “unable or unwilling to avail himself of protection of that country” owing to a “fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹⁵ As of 2015, there are 145 state parties to the Convention. Of crucial significance is that all ratifying countries are applying the same Convention in their jurisdictions in the assessment of asylum applications. However, they are interpreting and applying it in different ways. In recognizing the risk of persecution, the Convention contains a commitment in Article 33 not to return a refugee to the borders of a country where they face said persecution, also known as the principle of *non-refoulement*.¹⁶

However, it is widely recognized that neither the Convention nor its Protocol contain procedural rules for determining who is a refugee. Nor is any adequate model for setting common standards clearly specified in the Qualification Directive.¹⁷ In fact, no codified definition of persecution is provided either.¹⁸

12 In 1967, temporal and geographical restrictions were abolished following the introduction of the Protocol relating to the Status of Refugees, 606 United Nations Treaties Series (U.N.T.S.) 267 (opened for signature January 31 1967, entered into force October 4 1967). Hereinafter referred to as “the Protocol.”

13 Council Directive 2004/83/EC of April 29, 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Recital 3.

14 Traditionally, the Convention only applied to those in fear of persecution arising out of “events occurring in Europe before 1 January 1951.” However, introduction of the Protocol removed the geographical limitation from the Convention, rendering it universally applicable as a result.

15 The Convention, *supra* note 2, at Art. 1(A)(2).

16 In full, Art. 33 states that “no Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

17 Directive 2011/95/EU of the European Parliament and of the Council of December 13, 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Hereinafter referred to as “QD.”

18 While beyond the ambit of this discussion, this author seeks to highlight that the term “persecution” is not defined in the 1951 Convention. Irrespective of this omission, scholars have taken the view that persecution connotes injurious or oppressive action. See generally, Stephen B. Young, *Who is a Refugee? A Theory of Persecution*, 5 IN DEFENSE OF THE ALIEN 38-52 (1982). However, the problem with such a narrow interpretation of its meaning is that the

Instead, it is assumed that the refugee population is readily identifiable and “accords them a status, a defined package of rights”,¹⁹ and the declaratory rather than constitutive nature of refugee status²⁰ is a “technical requirement” that gives the impression of being governed only marginally by international refugee law *stricto sensu*.²¹ Emphasis on state discretion in this regard, therefore, is hardly surprising as the obligation of States to take domestic measures to determine who is a refugee is owed directly to other state parties rather than to the individual refugee.

B. The Irish Regime

The development of asylum law in Ireland has been a staggered process. Falling behind many Western states in introducing and implementing asylum legislation, the Irish regime for determining asylum applications has been constructed in a series of ad hoc responses to the dynamism of migration in the country, as well as in the European context.²² In 1956, Ireland became a signatory to the Convention, transposing the definition of a refugee into Irish law through the Refugee Act 1996²³ supplemented by several statutory instruments,²⁴ as well as the transposition of the relevant CEAS instruments to which Ireland opts-in.²⁵ From a progressive standpoint, Brazil and

institution of asylum is already faced with constraints which threaten the humanitarian spirit of the international regime. Consequently, formidable challenges to broaden the conception of persecution must be considered in order to continue to provide sanctuary to refugees. One such challenge is the linkage between human rights and the refugee regime. See further, David James Cantor, *Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence* 34 REFUGEE SURVEY QUARTERLY 76-106 (2015). However, Grahl-Madsen has submitted that “well-founded” connoted a fear based on reasonable grounds of persecution. In his view, this suggests that this claim should be measured with a more objective yardstick rather than the frame of mind of the person concerned which is decisive for their refugee status claim. See further, ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1966).

19 Cathryn Costello & Emily Hancox, *The Recast Asylum Procedures Directive 2013/32/EU: Caught Between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee*, in *REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: THE NEW EUROPEAN REFUGEE LAW 2* (Vincent Chetail et al. ed., 2015).

20 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 28, HCR/1P/4/ENG/REV 9 (Dec. 2011). Hereinafter referred to as “the Handbook.”

21 UNHCR *Note on Determination of Refugee Status under International Instruments*, ¶ 14, U.N. Doc. EC/SCP/5 (August 24, 1977).

22 Rosemary Byrne, *Expediency in Refugee Determination Procedures*, 35 *IRISH JURIST* 149, 149 (2000).

23 Refugee Act, s. 2 (1996). Hereinafter referred to as “the 1996 Act.”

24 In particular, S.I. 518 of 2006 (as amended); SI 2011/51 and SI 2011/52.

25 Council Regulation No. 343/2003 of Feb. 18, 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national; Directive 2004/83/EC, supra note 13; Council Directive 2005/85/EC of Dec. 1, 2005 on minimum standards on procedures in Member States

Arnold regard the 1996 Act as “prescient for its specific inclusion of sexual orientation and gender as grounds falling within the ‘particular social group.’”

²⁶The developing awareness about refugee protection in Ireland also led to the International Protection Act 2015 which not only reformed existing protections by giving further effect to various protection-related EU Directives,²⁷ but also repealed the 1996 Act.²⁸

Specifically, it constituted a turning point in Irish law through the introduction of a single protection procedure. This involves a composite process whereby an application is considered from the perspective of asylum and thereafter in respect of subsidiary protection. This is done by way of the two independent bodies previously established by the 1996 Act: the International Protection Office (IPO, formerly ORAC) and the International Protection Appeals Tribunal (IPAT, formerly RAT).²⁹As a result, it seeks to both streamline and ensure a greater efficiency in relation to such applications, given that the evidence relied upon in support of an asylum application is demonstrably highly material and of central importance in reaching a determination.³⁰ In accordance

for granting and withdrawing refugee status; Regulation (EU) No. 603/2013 of the European Parliament and of the Council of June 26, 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013; Regulation (EU) No. 604/2013 of the European Parliament and of the Council of June 26, 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast).

²⁶ Patricia Brazil & Samantha Arnold, *LGBTI Asylum Applications in Ireland: Status Determination and Barriers to Protection*, in *LGBTI ASYLUM SEEKERS AND REFUGEES FROM A LEGAL AND POLITICAL PERSPECTIVE PERSECUTION, ASYLUM AND INTEGRATION* (Arzu Güler et al. ed. 2018).

²⁷ Specifically, Directive 2004/83/EC, *supra* note 13; Council Directive 2005/85/EC, *supra* note 25.

²⁸ The 2015 Act also amended related immigration legislation such as the Illegal Immigrants (Trafficking) Act (2000) and the Immigration Acts (1999, 2003, and 2004).

²⁹ Brazil & Arnold at 145, *supra* note 26.

³⁰ See *H.I. & Anor v. The Minister for Justice and Equality & Ors, A.I. & Ors v. The Minister for Justice and Equality & Ors*, IECA 20 (2020) per Whelan J. at 59 in the context of subsidiary protection. See further, QD, *supra* note 16. Art. 2(f) of the QD states that a person eligible for subsidiary protection is a third-country national (or a stateless person): “who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to

with M.M.,³¹ adjudication in this context is a two-step process. First, the establishment of past facts that may constitute evidence that supports the application involves gathering and evaluating information and the credibility assessment. The second limb requires the legal appraisal of that evidence to decide whether the substantive conditions for granting international protection are met.³²

III. The Standard Of Proof

Unlike criminal and civil cases, the primary objective of both evidence and credibility assessment in the qualification of international protection depends on determining the extent of future risk.³³ Indeed, while the general rule of “no proof means no case” applies both in criminal and civil spheres, decision makers in asylum determinations base their conclusions on often scant or incomplete evidence to determine whether the individual before them faces a real risk of serious harm if returned home. If wrongfully decided, this risk brings with it the “irreversible nature of the damage which may result in the risk of torture.”³⁴ The potential for asylum protection to be undermined, as explored by Craig and Zwann, hinges on whether states place too heavy a burden on applicants to establish a well-founded fear.³⁵ In light of an applicant’s responsibility to provide evidentiary support and prove the facts of their claim, “the term ‘standard of proof’ means the threshold to be met by the claimant in persuading the decision maker of the truth of his or her factual assertions.”³⁶

30 (cont.) his or her country of former habitual residence, would face a real risk of suffering serious harm...and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.”

31 M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General, Case C-277/11, November 22, 2012, ECLI:EU:C:2012:744.

32 *Id.* at ¶ 64.

33 See International Association of Refugee Law Judges European Chapter, Qualification for International Protection (Directive 2011/95/EU)—A Judicial Analysis (EASO, December 2016), <https://www.easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf> (last visited May 10, 2020).

34 Specifically, the ECHR attached significant importance to Article 3 ECHR concerning the prohibition of 34 inhuman or degrading treatment or punishment and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises. See further, M.S.S. v. Belgium and Greece (Application No. 30696/09, Grand Chamber Judgment of 21st January 2011) at ¶ 293.

35 Sarah Craig & Karin Zwaan, *Legal Overview*, in *ASYLUM DETERMINATION IN EUROPE: ETHNOGRAPHIC PERSPECTIVES* (Nick Gill & Anthony Good ed., 2019) 38.

36 Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 366 *INTERNATIONAL JOURNAL OF REFUGEE LAW* (2003).

The calibration of a standard of proof in Ireland was only litigated for the first time in 2017 in *O.N. v. Refugee Appeals Tribunal & Ors.*³⁷ In this case, O'Regan J affirmed that the correct standard in respect to past events in international protection applications was, and remains, the balance of probabilities coupled with, where appropriate, application of the benefit of the doubt as contemplated by Article 3 of the Council Directive 2004/83/EC. It provides improved standards, specifically that, “[M]ember States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.”³⁸

The joined cases concerned African nationals who, for fear of persecution on political grounds, sought refugee status in Ireland with both hinging on whether or not the standard of proof applied was correct.³⁹ Specifically, the applicants argued that the standard of proof as to the acceptance of past events was synonymous with the standard required for the assessment of future real risk, which was estimated as around 30% of a “reasonable degree of likelihood.”⁴⁰ While accepting this estimate, the respondents contended that different standards were applied in different jurisdictions and thus, a uniform standard could not be applied to assess the relevant applications.⁴¹ Having reviewed the approaches taken in the UK and international case law and finding them to be unpersuasive, O'Regan J stated, “the balance of probabilities, coupled with, where appropriate, the benefit of the doubt” is the appropriate standard in international protection cases.⁴²

The High Court refused a subsequent challenge⁴³ and a request for a certificate to appeal⁴⁴ on this point, and several attempts to relitigate O'Regan J's determination have resurfaced.⁴⁵ The Court firmly upheld the decision in *O.N.* in its judgment in *M.E.O. (Nigeria) v. International Protection Appeals Tribunal*,⁴⁶ submitting that, “insofar as there is any suggestion that the IPAT is out of line

37 *O.N. v. Refugee Appeals Tribunal*, *supra* note 1.

38 Directive 2004/83/EC, *supra* note 12.

39 *O.N. v. Refugee Appeals Tribunal*, 13 IEHC, *supra* note 1, at ¶ 1.

40 *Id.* at ¶ 3. In substantiating this submission by way of case law, the applicants relied on the cases of *I.N.S. v. Cardoza-Fonseca* 407 US 407 (1987); *R (Sivakumaran) v. Secretary of State for the Home Department* AC 958 (1988); *The Minister for Immigration and Multicultural Affairs v. Rajalingam* F.C.A. 719 (1999); *Karanakaran v. Secretary of State for the Home Department* 3 All ER 449 (2000); *F.A. v. Minister for Justice* 5 ICCLMD 108 (2002); *B.P. v. Minister for Justice & Ors.* 4 IR 200 (2003); *Da Silveira v. Refugee Appeals Tribunal* IEHC 436 (2004); and finally, the applicant suggested that the judgment of Herbert J. should be considered as an outlier in *D.H. v. Refugee Applications Commissioner* IEHC 95 (2004).

41 *O.N. v. Refugee Appeals Tribunal*, 13 IEHC, *supra* note 1, at ¶ 3.

42 *Id.* at ¶ 63.

43 *N.N. v. The Minister for Justice and Equality*, 99 IEHC (2017).

44 *P.D. v. The Minister for Justice and Equality*, 330 IEHC (2017).

45 See *R.J. v. The Minister for Justice and Equality & Ors.*, 448 IEHC (2019); *W.H. v. the International Protection Tribunal & Anor*, 297 IEHC (2019)

46 782 IEHC (2018).

with international standards, it is clear from the affidavit of Ms. Hilka Becker, Chairperson of the Tribunal, that the approach it adopts as to past facts, balance of probabilities plus benefit of the doubt, is in line with UNHCR guidance.”⁴⁷ While this is correct, the UNHCR have stated that “the more generous ‘standard of proof’ as developed by some common law countries is the correct approach.”⁴⁸ On this basis, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of “reasonable likelihood.”⁴⁹ In substantiating their reasoning, the UNHCR reminded us that the ultimate objective of asylum determinations is humanitarian.⁵⁰ To otherwise place too high an evidentiary threshold and standard of proof would be inconsistent with the spirit of justice and understanding grounded in the international refugee regime. Therefore, the requirement of proof should “not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.”⁵¹

The relatively relaxed nature of this standard suggests that proving an asylum claim should be relatively unequivocal. However, in light of the extensive discretion given to states in relation to asylum procedures rules concerning the burden and standard of proof, divergent thresholds exist.⁵² Contrary to the dual approach taken in Ireland, jurisprudence and policy guidance in the UK confirm that a unitary approach should be taken by decision makers in regard to all applications. Specifically, when considering whether an applicant has shown a well-founded fear of persecution, the House of Lords held that it was enough to establish a reasonable degree of likelihood which could be described as “a serious possibility,” “substantial grounds for thinking,” or a “reasonable chance” of persecution. This standard is patently lower than the civil standard of the balance of probability.⁵³

47 *Id.* per Humphreys J at ¶ 14. The Court noted, however, that “as far as past or present facts are concerned, it is clear from the tribunal’s methodology that not all facts have to be accepted on the balance of probabilities test, and facts which have a ‘reasonable chance of being true’...can be accepted if the benefit of the doubt is extended to them” at ¶ 6.

48 UNHCR, *An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR*, 1(3) European Series 88 (1995).

49 *Id.* at 87.

50 Note on Burden and Standard of Proof in Refugee Claims, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES GENEVA (Dec. 16, 1998), <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/UN%20High%20Commissioner%20for%20Refugees%2C%20Note%20on%20Burden%20and%20Standard%20of%20Proof%20in%20Refugee%20Claims%2C%2016%20December%201998.pdf> (last visited April 22, 2020).

51 The Handbook, *supra* note 20, at ¶ 195-197.

52 See *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs*; *Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs*; *Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs*, High Court Of Australia, 87 A.L.R 412, 12th ed. (1989) (stated that there should be a “real chance” of persecution if the applicant will be returned to the country of origin, and that the “real chance” standard can be a less than fifty percent probability); *ex parte Sivakumaran*, *supra* note 40; *INS v. Cardoza-Fonseca*, *supra* note 40; *Immigration and Naturalization Service v. Stevic* 467 US 407 (1984). The Court stated that a noncitizen who establishes a “clear probability” of persecution cannot be removed.

53 *Fernandez v. Government of Singapore and Others* UKHL 6 (1971). The Court suggested that

It strikes this author as odd that, given the proximity of both jurisdictions, the approaches taken to assess the standard of proof are so distinct. A reading of the thresholds lends itself to fair speculation that an individual seeking asylum would have a greater chance of success in the UK. That said, this author acknowledges the submission made by the responding counsel in *M.E.O. (No.2)*⁵⁴ that “merely because other jurisdictions may or may not apply their own differing standards of proof in international protection cases when the state of the law in Ireland as to the standard of proof in civil cases is certain, and when there is no mandated international standard short of which it is alleged Ireland, falls short.”⁵⁵ Indeed, no standards on this matter are contained within the Convention or elsewhere—merely facilitative guidance.

One could surmise that this was preemptively excluded, pursuant to the principle of state sovereignty, to allow states to construct their procedures in response to the needs of their own jurisdiction. And yet, the bifurcated approach in Ireland seems less convincing than the emphasis of assessing future risk akin to the cornerstone of *non-refoulement*. Comparatively speaking, Ireland appears to employ a higher threshold. Where problems arise from this, however, is when the standard of proof in asylum determinations intrinsically relies on credibility assessments. Before determining the material facts and assessing the credibility of the applicant’s statements, pursuant to the Irish approach, the decision maker must first determine which of two thresholds of credibility, or standards of proof, will be applicable. Kagan argues that since credibility is an element of an alleviating evidentiary rule, it is anathema to ask an asylum seeker to prove credibility.⁵⁶ Indeed, proving credibility is not the same as proving the truth, a reality that the Irish standard in *O.N.* fails to appreciate.

more favorable standards should be applied in relation to claims of the fugitive, e.g. “a reasonable chance,” “serious possibility,” or “substantial grounds for thinking”; Ex parte Sivakumaran, *supra* note 40. The House indicated that a lesser degree of probability than the normal civil standard was sufficient. See also *M.A. (Somalia) v. Secretary of State for the Home Department* UKSC 49 (2010). The court, without deciding on the point, proceeded on the basis that “real possibility” was the correct test to apply to past and present facts both in Convention and Article 3 ECHR cases. The Court indicated that it would be desirable for it to decide authoritatively on the point on another occasion at ¶ 20.

54 *M.E.O. (Nigeria) v. The International Protection Appeals Tribunal & Ors; U.O. (Nigeria) v. The International 54 Protection Appeals Tribunal & Ors* No.2 146 IEHC (2019).

55 *Id.* per Humphreys J at ¶ 6(iii).

56 Kagan, *supra* note 9, at 367.

IV. On The Balance Of Credibility: The Relationship Between The Evidentiary Threshold And Credibility

As the fulcrum to international protection claims,⁵⁷ credibility often exclusively relies upon the applicant's narrative as the sole means of evidence.⁵⁸ The term itself has been widely understood to detail whether someone or something is reliable or capable of being believed.⁵⁹ "Credible" is defined as "able to be believed or convincing."⁶⁰ Consequently, the applicant's narrative must be examined in order to establish whether there is a genuine, well-founded fear of persecution.⁶¹ In the same vein, however, a well-founded fear does not necessarily equate to having already faced actual persecution, an approach supported by *travaux préparatoires* to the 1951 Convention,⁶² who have stated that it does not necessarily require a causal relationship between persecution and flight,⁶³ but the assessment of asylum determination must be based on all the evidence.⁶⁴ Nonetheless, problems of proof are well known in the asylum context and the assessment of credibility is never an exact science.⁶⁵ Yet, Norman suggests that assessing credibility is not an exercise in establishing the truth but about "making findings of fact that are reasonable and open on the evidence."⁶⁶

Distinctions do exist between the criminal justice system and the asylum process, and yet the asylum tribunal is ostensibly an inquisitorial forum.⁶⁷ A

57 Patricia Brazil, *Applications for Asylum by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons*, 6(11) THE RESEARCHER 10 (2011).

58 Jenny Millbank, *The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, INT'L J. REFUGEE L. 2 (2009).

59 *Credible*, *The Concise Oxford Dictionary*, (9th ed. 1995).

60 *Ibid.*

61 Samantha K. Arnold, *The Culture of Credibility in the United Kingdom and Ireland and the Sexual Minority Refugee*, 30 IRISH LAW TIMES 55 (2012).

62 See generally UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (last visited Apr. 30, 2020), <https://www.unhcr.org/4ca34be29.pdf>.

63 UNHCR at 87, *supra* note 48. Additionally, S.A. (Algeria) v. Minister for Justice, Equality and Law Reform & Anor, 78 IEHC (2012). In this case, Hogan J emphasized the forward looking nature of the test.

64 See I.R. v. Minister for Justice Equality & Law Reform & Anor, 353 IEHC (2009) at ¶ 11: "The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed." This requirement is emphasized by the broad language of Art. 4(1) QD, which requires an applicant to submit all the elements needed to substantiate the application.

65 Helen Baillot et al., *Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK*, 10(1) INTERNATIONAL JOURNAL OF LAW IN CONTEXT 105, 102 (2014).

66 Steve Norman, *Assessing the Credibility of Refugee Applicants: A Judicial Perspective*, 19 INT'L J. REFUGEE L. 273-92, 291 (2007).

67 *Difficult to Believe: The Assessment of Asylum Claims in Ireland*, IRISH REFUGEE COUNCIL (2012), <https://www.irishrefugeecouncil.ie/difficult-to-believe-the-assessment-of>

cursory analysis of the mechanisms employed would lead one to believe it to be an adversarial and confrontational arena.⁶⁸ Indeed, it is tempting for decision makers to confuse a finding on the credibility of statements made in support of an application with the credibility of the people themselves, given the threshold of proof that inevitably allows for their bleeding together. Many of the challenges faced by asylum seekers bubble beneath the surface and day-to-day assessments of credibility function as the primary gatekeeper in asylum adjudication. Of course, it is possible to find that some statements of a person claiming asylum are untrue or to have doubt over their veracity whilst still concluding that the central elements of the claim are true and capable of giving rise to a fear of persecution.⁶⁹ The following discussion will explore more directly some of the key factors decision makers often take into account when assessing the credibility of an asylum claim. Specifically, it will focus on internal consistency, external consistency, and plausibility to reflect on the assumptions that inform this process as well as the ways in which such assumptions have the potential to unjustly reduce applicants' prospects for being believed.

A. Internal Consistency

In asylum determinations, consistency is commonly interpreted as the cornerstone of a true account, operating on the principle that those who lie will eventually “slip up.”⁷⁰ In our own jurisdiction, the High Court accepted the use of internal inconsistency as a credibility indicator in *S.B. v. Minister for Justice and Equality*.⁷¹ It confirmed that where there is contradiction between accounts offered by an applicant, it is a matter for the Tribunal to assess as in *S.A. (Ghana and South Africa) v. International Protection Appeals Tribunal*.⁷² However, Cohen noted that witnesses in the UK were given their statements to read before going into court.⁷³ This worrying finding tells us something even more worrisome about the system those most vulnerable are trying to navigate; it is impossible for a witness to maintain absolute consistency in their testimony, particularly in

68 *Ibid.* For a more recent empirical study flagging similar issues, see Katie Coyle, *Overtured on Appeal: Why Well-Founded Asylum Applications Fail in First Instance*, UNIV. COLLEGE CORK (Legal Research Series, Working Paper 11, May 2020) 17, <https://www.ucc.ie/en/media/academic/law/CCJHRWPSNo11KatieCoyleOverturedonAppealMay2020.pdf> (last visited May 15, 2020).

69 *Ibid.*

70 Jane Herlihy et al., *What Assumptions about Human Behaviour Underlie Asylum Judgments*, 22(3) INT'L J.L. REFUGEE 351, 362 (2010).

71 235 IEHC (2018).

72 97 IEHC (2018).

73 Juliet Cohen, *Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony*, 69(1) MEDICO-LEGAL JOURNAL 25-34 (2001).

circumstances where significant time has elapsed since the events occurred and when their applications are eventually heard, particularly in Ireland.⁷⁴ Not only that, but the system within which a narrative must survive in Ireland is a rigorous process.

Indeed, throughout the quest for protection in Ireland, the statements made by the asylum seekers are myriad. There is an official written application followed by a questionnaire more than sixty pages long to be completed without legal assistance, a substantive interview assessing said questionnaire, and a hearing testimony which may be influenced by outside actors like interpreters. In light of this, and as observed by Barsky, the opportunities for the applicant's narrative to be distorted are vast.⁷⁵ What is more, scholarship into the foibles of memory and recall suggests that no two autobiographical accounts can be the same and details will inevitably be added or omitted in subsequent recalls,⁷⁶ even where the account is of a highly significant or emotive nature.⁷⁷ In fact, Cohen argues against the reproducibility of narrative as a criteria for credibility on account of not just the vagaries of memory, but also the short term effects of trauma.⁷⁸ As Rousseau and Foxen point out, "trauma can alter the account of experience in a number of ways,"⁷⁹ particularly for women who are more likely to experience sexual violence, honor crimes, domestic violence, forced sterilization, and genital mutilation as well as trafficking.⁸⁰ And yet, the system demands that all narratives be consistent?

What troubles this author most, however, is that within this discursive paradigm that emphasizes consistency to satisfy the threshold of proof, decision

74 Ireland has frequently been criticized for the length of time during which proceedings take place. See further, Sorcha Pollak, *How do other countries compare to Ireland on asylum applications?*, THE IRISH TIMES (Nov. 12, 2019), <https://www.irishtimes.com/news/social-affairs/how-do-other-countries-compare-to-ireland-on-asylumapplications-1.4091228> (last visited April 30, 2020). See also, Byrne, *supra* note 21.

75 ROBERT BARSKY, CONSTRUCTING A PRODUCTIVE OTHER: DISCOURSE THEORY AND THE CONVENTION REFUGEE HEARING 131 (1994).

76 Herlihy et al., *supra* note 70. See also, Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13(3) INT'L L.J. REFUGEE 293-309 (2001).

77 See generally, Hilary Evans Cameron, *Refugee Status Determinations and the Limits of Memory* 22 INT'L L.J. REFUGEE 469 (2010).

78 Cohen, *supra* note 73, at 308.

79 CÉCILE ROUSSEAU AND PATRICIA FOXEN, CONSTRUCTING AND DECONSTRUCTING THE MYTH OF THE LYING REFUGEE: PARADOXES OF POWER AND JUSTICE IN AN ADMINISTRATIVE IMMIGRATION TRIBUNAL 48 (2005).

80 See generally, Bethany Collier, *Country of Origin Information and Women: Researching Gender and Persecution in the Context of Asylum and Human Rights Claims*, ASYLUM AID (2007), <https://www.refworld.org/docid/49997afd1a.html> (last visited April 30, 2020). See also, VICTORIA CANNING, GENDERED HARM AND STRUCTURAL VIOLENCE IN THE BRITISH ASYLUM SYSTEM (2017).

makers do not acknowledge the structural obstacles raised by their own system—one which attaches a significant amount of probative weight to this form of evidence. In a case examined by the Irish Refugee Council, a decision maker was reported as having dismissed an applicant’s account of rape as a “fabrication intended to enhance the asylum claim.”⁸¹ In dismissing the claim, the decision maker stated that the account of rape had not been included in the applicant’s questionnaire, rendering her testimony inconsistent, uncredible, and untruthful.⁸² Nevertheless, the Report revealed that upon review of the questionnaire and screening interview, the applicant had accounted for this fact. Not only that, but it had been accurately summarised in the IPO decision.⁸³ Indeed, it is “difficult to believe” that an oversight of this magnitude could ever take place in the Irish system and that an applicant’s testimony of such a severe traumatic experience could be so summarily dismissed, particularly in light of the ramifications for this vulnerable woman.

Against exhortations of caution and according to the Irish judiciary, the IPAT is in a better position to make judgments relating to credibility, in particular about the specificity of detail of a claim, contradictory evidence, inconsistencies, and evasiveness⁸⁴ as in *M.S. (Albania) v. The Refugee Appeals Tribunal*.⁸⁵ Nonetheless, this author submits that the use of internal consistency as a definitive tool in the arsenal of the decision maker for deducing truth has the potential to lead to erroneous conclusions.⁸⁶

This is particularly apt where the dilatory and unwieldy assessment process can *inter alia* affect memory, synonymous with the scholarship surrounding the effects of traumatic experiences suffered by the applicant.⁸⁷ Not only that, but this onerous requirement contained within the discursive paradigm not only fails to conform to the contours of forced exile but is skewed in favour of the demands of legal discourse.⁸⁸

81 The Report, *supra* note 67, at 28.

82 *Ibid.*

83 *Ibid.*

84 See also, *M.A.C. (Pakistan) v. The Refugee Appeals Tribunal*, 298 IEHC (2018).

85 *M.S. (Albania) v. The Refugee Appeals Tribunal*, 395 IEHC (2018).

86 While beyond the constraints of this discussion, in *A.A. (Pakistan) v. International Protection Appeals Tribunal*, 769 IEHC 5 (2018), Humphreys J. stated that, “[M]erely because an applicant is consistent about something does not make that something the tribunal has to accept. Otherwise one would be handing out international protection merely for keeping one’s story straight, whether fabricated or otherwise” at ¶ 11. Consequently, the use of consistency is fickle; seemingly, applicants are damned if they are consistent and damned if they are not consistent, which is, it is submitted, an invidious position to be in.

87 Jane Herlihy et al., *Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interview Studies*, 324 BRITISH MED. J. 324 (2002).

88 Pia Zambelli, *Hearing Differently: Knowledge-Based Approaches to Assessment of Refugee Narrative*, 29 INT’L J. REFUGEE L. 10, 23 (2017).

B. External Consistency

As noted by Cooke J, “in most forms of adversarial dispute the case of oral testimony is one of the most difficult challenges...this difficulty is particularly acute in asylum cases...obtaining any administrative evidence of their status and even identity may be impractical if not impossible.”⁸⁹ As articulated, the difficulty faced by applicants to obtain documentary evidence to support and corroborate their testimony is greatly influenced by how frequently war-torn or otherwise unstable their countries of origin are and whether they arrive alone. If they fear persecution by the government, gaining access to documents may come at the risk of surveillance and implications for their families. By way of recognizing these difficulties and, correspondingly, to mitigate the burden on applicants, UNHCR guidelines state the following:

While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.⁹⁰

Consequently, the decision maker shares the duty of adducing and evaluating relevant evidence, and this burden is discharged where the decision maker is well versed in up-to-date information on the objective situation in the country of origin and verifies the narrative presented.⁹¹ Therefore, “a knowledge of conditions in the applicant’s country of origin is an important element in assessing the applicant’s credibility.”⁹² In *B.C. (Malawi) v. International Protection Appeals Tribunal*,⁹³ the applicant claimed that he had a twin sister who was murdered in Malawi because she had albinism. The IPAT accepted that the applicant had a sister with albinism but said that “no country of origin information (COI) was found to support the proposition that the relatives of those suffering from albinism are at risk”⁹⁴ despite several pieces of country information before the IPAT that did lead to such a conclusion.⁹⁵ It is therefore

89 I.R. v. The Minister of Justice Equality and Law Reform, *supra* note 64 at 353.

90 The Handbook, *supra* note 20, at 42.

91 The Report, *supra* note 67, at 4.

92 The Handbook, *supra* note 20, at 19. The importance of considering the consistency of the applicant’s statements with such evidence is explicit from the inclusion in Article 4(5)(c) QD (recast) of a requirement that “the applicant’s statements...do not run counter to available specific and general information.”

93 *B.C. (Malawi) v. The International Protection Tribunal*, 705 IEHC 6 (2018).

94 *Id.* at ¶ 4.

95 *Id.* at ¶ 5. See also, *Z.K. v. Refugee Appeals Tribunal & Anor*, 543 IEHC (2014).

paramount that the information comes from publicly available sources that are contemporary, reliable and unbiased.⁹⁶

And yet, even the available independent information concerning COI is often insufficiently particularized to confirm whether claimed events occurred or not.⁹⁷ In the most recent empirical study, Coyle highlighted that COI information was being applied selectively by the IPO.⁹⁸ The CREDO Manual noted, “country of origin information is not a lie detector.”⁹⁹ Indeed, the varied reliability of governmental sources has been noted by the Irish Refugee Council, outlining that although IPO and the IPAT occasionally make use of international NGOs’ reports, both overwhelmingly rely on governmental sources. While these sources are not necessarily unreliable, it has been cautioned that “it may be necessary to consider whether there is any governmental bias.”¹⁰⁰ While the increasing availability of contemporary COI may help reduce the margin of error in decision-making and, in some cases, help assist to corroborate the narrative presented by the applicant, it cannot substitute the wider range of factual evidence usually available in other types of cases. Nor can it take precedence over the live testimony provided in this author’s opinion.

C. Plausibility

When concluding on the information presented before them, decision makers may be tempted to infer that the narrative is implausible based on their

96 See *Country of Origin-Country Guidance Working Party, Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist*, 21 INT’L. J. REFUGEE L. 10 (2006). Hereinafter referred to as “the Working Party.” The Working Party stated the following: “In Ireland, it is seen as a helpful rule of thumb for judicial decision makers to corroborate information by taking examples from at least three strata in a ‘hierarchy’ starting with (1) intergovernmental sources, then government sources and international NGOs, (2) then international news reports, national NGOs, national news, then local governmental sources, local news, then (3) ordinary witnesses” at ¶ 30.

97 Jo Pettitt et al., *The Use of COI in the Refugee Status Determination Process in the UK: Looking Back, Reaching Forward*, 25(2) REFUGEE 182, 190 (2008).

98 Coyle, *supra* note 68, at 19. Her empirical study of first instance decisions found in one case that the IPO had determined that an alleged forced marriage would be incredible on the grounds that “although there was COI dealing with nieces marrying Uncles whose wives were dead there was no COI dealing with nieces marrying Uncles who had a wife that was alive.”

99 Gábor Gyulai et al., *Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual*, HUNGARIAN HELSINKI COMMITTEE (2013), <https://helsinki.hu/wp-content/uploads/Credibility-Assessment-in-Asylum-Procedures-CREDO-manual.pdf> (last visited May 1, 2020).

100 The Working Party at ¶ 52, *supra* note 96. See also, Rebecca Dowd et al., *Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal*, 30 INT’L L.J. REFUGEE 71, 88. Albeit in the Australian context, this research found that an applicant’s father asserted that the fee for registering the applicant, who was born in violation of China’s birth control policy, would be higher than evidence from the Health and Family Planning Commission suggested, owing to governmental corruption.

own knowledge or understanding. Indeed, a claim may often hinge on a failure to satisfy decision makers' speculative reasoning as to how an individual facing persecution *ought* to behave or act or how certain events should have unfolded, which consequently violates the principle of objectivity unless it is based on independent, reliable, and objective sources.¹⁰¹ And yet, plausibility is a culturally and personally determined concept. As per Kalin, "too often officials assume that the way they think is also . . . Some have even suggested that, given their life experiences, there comes a point where "we can feel that the truth can, if it exists, be smelt."¹⁰³ the way the asylum-seeker thinks."¹⁰²

In the US experience, "conjecture" as to what guerillas would or would not do in certain situations was "not a substitute for substantial evidence."¹⁰⁴ Critically, findings based on plausibility run the risk of amounting to the subjective opinion of the decision maker, consequently reflecting "the [decision maker's] own personal theories of 'truth' and 'risk' but little else."¹⁰⁵ This was firmly entrenched in Irish law in the case of *R.K.S.*¹⁰⁶ when a woman was not believed in relation to a claim of rape by the Appeals Tribunal based on sheer "gut instinct," resulting in the rejection of her appeal. In granting leave to seek judicial review, the High Court held that basing determinations on "gut feelings" or mere instinct is an insufficient tool for use by administrative bodies,¹⁰⁷ and even more so when in the context of asylum determinations given the stakes.

Macklin, as long ago as 1998, went as far as to state that the faith decision makers put into the fallacy of "gut feelings" does not amount to a legally defensible basis for a decision.¹⁰⁸ Specifically, she refers to the misunderstood

101 See also, *M.E. v. Refugee Appeals Tribunal & Ors*, 145 IEHC (2014). The Court held that to reject credibility based upon speculation creates an unlawful credibility finding unfairly against the applicant. See further, *M.A. (Eritrea) v. Secretary of State for the Home Department* 1608 EWCA Civ (2014) at ¶ 17: "It would have been difficult for [the judge] to draw any further inferences from the evidence that was available without being accused of speculation given the lack of material once M.A.'s account was disbelieved." See also, UNHCR at 77, *supra* note 3.

103 *R.K.S. v. Refugee Appeals Tribunal*, *supra* note 11. However, as this author will go on to discuss shortly, it is important to note that Peart J later qualified this statement in his judgment by stating that gut feeling that the truth is not being told is an insufficient tool to use by administrative officials.

102 Walter Kalin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing*, 20 INT'L. MIGRATION REV. 230, 234 (1986).

104 *Lopez-Reyes v. Immigration and Naturalisation Service*, 79 F.3d 908 (9th Cir. 1996) at ¶ 5.

105 Allan Mackey & John Barnes, *Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards*, INT'L. ASS'N. REFUGEE L. JUDGES, (March 2013) https://www.iamj.org/iarlj-documents/general/Credo_Paper_March2013-rev1.pdf (last visited May 10, 2020).

106 *R.K.S. v. Refugee Appeals Tribunal & Ors*, *supra* note 11.

107 *Ibid.*

108 Audrey Macklin, *Truth or Consequences: Credibility Determinations in the Refugee Context*, INT'L. ASS'N. REFUGEE L. JUDGES CONF. 134 (1998).

assumption that the gut of judges is a “uniquely trustworthy arbiter of truth.”¹⁰⁹ She recognized that often, the slippery process of theorizing credibility determinations engages with what she terms as “the search for truth” and “what really happened.”¹¹⁰ Evidently, despite the strides of social sciences since then, these issues remain pervasive. In an examination carried out by Brazil and Arnold concerning status determinations for LGBTI applicants in Ireland, they found that a number of recent decisions of the High Court have cautioned refugee decision makers to exercise care in making findings based on demeanour and cross-cultural expectations, as well as the need to avoid making findings based on stereotypical expectations of behavior. For example, in *O.P.E. v. Refugee Appeals Tribunal*,¹¹¹ Stewart J noted the following:

The applicant’s evidence was that she would be persecuted because she had engaged in homosexual acts. The applicant labelled this as sexual orientation. However, the knowledge and understanding of sexual orientation that a teenager might have in Ireland is likely to be very different to a teenager growing up in a country where such practices are taboo or even criminalised.¹¹²

Yet, more recent case law in Ireland indicates the accepted use of plausibility as a credibility indicator,¹¹³ despite a number of recent decisions that appear to have reverted to the more regressive approaches of the past in the LGBTI applications.¹¹⁴ But how far can such bald conclusions be justified? The dangers of assuming knowledge or plausible scenarios were well described by Lord Bingham:

An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react... but he may, and I think should, feel very much more uncertain about the

¹⁰⁹ *Id.* at 139.

¹¹⁰ *Id.* at 137.

¹¹¹ *O.P.E. (Nigeria) v. Refugee Appeals Tribunal*, 748 IEHC (2015).

¹¹² *Id.* at 9.

¹¹³ *C.M. (Zimbabwe) v. The International Protection Appeals Tribunal*, 35 IEHC (2018).

¹¹⁴ In *A.F. (Nigeria) v. Refugee Appeals Tribunal*, 430 IEHC (2016), Stewart J. declined to interfere with a finding that it was “[i]ncredible that [the applicant] would ever hold hands or show affection to his partner in public” at 29. Similarly, in *P.D. v. Refugee Appeals Tribunal*, *supra* note 43, the Court rejected a challenge to a refusal of refugee status to a Zimbabwean gay man partly on the basis that he had watched heterosexual pornography. Both of these cases highlight the need to ensure that decision makers are sufficiently trained on the perils of relying on stereotyped reasoning in LGBT asylum cases. Brazil & Arnold have provided a much more in-depth analysis on these cases and challenges faced by LGBTI applicants. See further, Brazil & Arnold, *supra* note 26, at 157.

reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker...No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even—which may be quite different—in accordance with his concept of what a reasonable man would have done.¹¹⁵

Kalin notes that the very nature of the reasonable man and truth is culturally relative.¹¹⁶ This is often the case for women, as Zambelli observes, where some cultures would categorize a woman who lives alone as a prostitute and therefore at risk of sexual assault.¹¹⁷ Dowd concluded that assumptions of human behaviour are the most pervasive element of credibility assessments.¹¹⁸ A reformed process, Zambelli suggests, must “adapt to interculturality by privileging open-mindedness, ontological diversity and bridge-building”¹¹⁹ as a means to connect the cultural gulf between the applicant and the decision maker.¹²⁰ It is submitted, therefore, that plausibility should not be considered an independent concept *per se*. Rather, the assessment should be conducted with reference to the entirety of the evidence as opposed to the expectation of decision makers who are potentially far removed from the lived experiences of asylum seekers.^{121 122}

This author vehemently submits that the “reasonable man” has no place in these determinations and, given the inevitability of subjective analysis,¹²³ the

115 Thomas Bingham, *The Judge as Juror: the Judicial Determination of Factual Issues* 38 CURRENT LEGAL PROBLEMS 1, 14 (1985).

116 Kalin, *supra* note 102, at 232.

117 Zambelli, *supra* note 88, at 13.

118 Dowd, *supra* note 100, at 74.

119 *Ibid.*

120 While beyond the ambit of this discussion, demeanor has also played a role in this cultural context. As Ruppel notes, “The manner in which individuals respond to questions may...be influenced by culture” at 13. Indeed, what may be perceived as evasive or unduly taciturn in Western culture may be justified by cultural norms of the applicant. See further, Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applications* 23 COLUMBIA HUM. RTS. L. REV. 1-42 (1991). However, demeanor has been omitted as it is this author’s submission that, and in line with UNHCR Guidance, it should not be relied on by decision makers given its inherent fallibility for a whole host of reasons discussed in this paper. See further, UNHCR *supra* note 3, at 187. What is more, it can often distort the process by decision makers reading into human behavior, and, occasionally, may lead to bias. For example, in *AAMO (Sudan) v. Refugee Appeals Tribunal & anor*, 49 IEHC (2014), allegations of bias were affirmed by Harding Clark J who stated, “Personal dislike is not a valid reason for any legal decision and certainly not a reason for ignoring numerous documents relevant to a claim which appear to emanate from reliable sources” at ¶ 24.

121 Douglas McDonald-Norman, *Credibility Assessment in Refugee Status Determination* 26 NAT’L L. SCH. INDIA REV. 115, 126 (2014).

8 Sean Rehaag, “I Simply Do Not Believe”: A Case Study of Credibility Determinations in Canadian Refugee Adjudication’ 38 WINDSOW REV. L. & SOC. ISSUES 38, 38 (2017).

123 See generally, Regina Graycar, *The Gender of Judgements: An Introduction*, in PUBLIC AND

current threshold of proof stacked against applicants does not reflect the reality of the decision maker's assessment.

V. Pragmatism And Analysis

It is clear to this author that disjunction between credibility and validity is ubiquitous, signalling that a "culture of disbelief" continues to jar asylum determinations in Ireland.¹²⁴ An accepted theme is that credibility in decision-making is poorly understood by decision makers themselves, as they seldom have the ability to accurately detect a falsehood from the truth, which gravely concerns this author. Pervading the judicial interpretation of credibility is the misconception that the search for credibility is the "search for the truth." Yet, the literature would suggest that it is generally considered an element of persuasiveness rather than truthfulness.¹²⁵ Decision makers must be cognizant of the literature related to normal memory processing concomitant with the effects of trauma on memory. It does not necessarily reflect the requirement for veracity of recalled events to determine credibility. The same goes for the reliance on COI where there is scope beyond the controls of a decision maker for spurious news to take root where a biased government exists or for decision makers to fill the gap of logic of what seems plausible against cultural relativism. Every claim for protection under the Convention must be assessed in light of its own circumstances rather than by reference to the instincts and expectations of decision makers whose circumstances are far removed from the lived experiences of a refugee; tempered skepticism and forensic critique coupled with an appreciation of the immense consequences of an erroneous refusal is imperative.¹²⁶

These evidentiary issues, read in line with the Irish standard of proof, cumbersome and unduly subjective as it is, cast doubts on the primacy of credibility determinations as a mechanism for asylum determinations. This is even more striking when the evidentiary threshold intrinsically relies on credibility assessments in the asylum context. In the UK, even where none of an applicant's claimed experiences, beyond their nexus with the Convention, are credible, they may nonetheless be eligible for protection on the basis of harm feared within the reasonably foreseeable future by reason of their protected traits under the Convention.¹²⁷ Indeed, Kagan avers, "a person does not need to be

PRIVATE: FEMINIST LEGAL DEBATES (Margaret Thornton ed., 1991).

124 The Report *supra* note 67, at 45. See also, Carol Coulter, Asylum Appeal Reform Would Cut Costs, Says Ex-Judge, THE IRISH TIMES (Sept. 2011), www.irishtimes.com/news/asylum-appeal-reform-would-cut-costs-says-ex-judge-1.598491 (last visited May 2, 2020).

125 James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees* 30 BOSTON UNIV. INT'L. L.J. 1, 28 (2011).

126 Douglas McDonald-Norman, *Simply Impossible: Plausibility Assessment in Refugee Status Determination* 39 ALT. L.J. 451, 455 (2015).

127 This is not to say that the UK approach is without its flaws. See further, James A. Sweeney, *Credibility, Proof and Refugee Law* 21 INT'L. J. REFUGEE L. 700 (2009). See also, Lessons Not

credible to be a refugee.”¹²⁸ Consequently, an undue emphasis upon whether asylum seekers present a truthful and credible narrative may hence, as explored, obscure the true nature of asylum determinations: to determine whether an individual applicant is entitled to protection under the Convention.

VI. Conclusion

The current asylum determination system in Ireland fails to limit the most pernicious aspects of subjectivity in its process. The search for and standard of truth is, and remains, an unenviable task, quixotic at best, not least in asylum determinations, and so “the lasso of truth remains elusive.”¹²⁹ However, asylum determinations are not a search for truth and decision makers in the asylum context are not fact finders. Rather, given the threshold of proof, they are probability estimators of a balance which requires an account to be 51% probable. Yet, is 51% the value that should equate to a genuine account? Notwithstanding other factors which have been recognized by academic scholarship affecting asylum determinations,¹³⁰ most statements will relate to experiences as lived and recalled by the person who is talking about them and a high number of factors influence and distort how we recall and interpret past experiences. With regard to most material facts in an asylum case, there is no such thing as “the truth” and credibility assessments should not focus on such an expectation. When considering the broader context, the stakes involved in refugee determinations are high. The consequences of an error in a refugee status determination are unimaginable; a wrongful decision may threaten the liberty, security, and even the life of an applicant seeking refuge. Therefore, it must comply with the principles of procedural, constitutional, and natural justice.

Moreover, these evidentiary issues present a broader issue that permeates asylum claims and blurs credibility. What internal consistency, external consistency, and plausibility fail to do is provide clear guidance about how decision makers can reliably discern the truth. The *raison d’être* is palpable: it is impossible. The import of this discussion is not that any particular policy should be adopted. There already exists a wealth of guidelines provided by the UNHCR and other bodies,¹³¹

128 Kagan, *supra* note 9, at 367.

129 Lynn Smith, *The Ring of Truth, The Clang of Lies: Assessing Credibility in the Courtroom* 63 UNIV. NEW BRUNSWICK L.J. 10-37, 29 (2012).

130 Given the constraints of this paper, issues surrounding hunger affect decision-making in asylum claims amid research into the cognitive bias of decision makers that extends to concerns relating to the appearance of applicants and their representatives have been omitted. These issues, however, further serve to reinforce the arbitrary nature of credibility as an assessment of truth. See further, Daniel L. Chen et al., *Decision Making Under the Gambler’s Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires* 131 THE QUARTERLY J. ECON. 1181 (2016). Catriona Jarvis, *The Judge as Juror Re-visited* 7 IMMIGR. L. DIGEST 16-32 (2003).

131 UNHCR, *supra* note 3. See further, Int’l Ass’n Refugee L. Judges, *International Judicial Guidance for the Assessment of Credibility* (IARLJ 2015/16), in A STRUCTURED APPROACH

and suggestions have been made to offer further training to decision makers, particularly at first instance.¹³² While welcomed, this author submits rather, if one begins with the assumption that, on the balance of probabilities, a non-credible testimony rests on inconsistent testimony, both internal and external, and does not engage a plausible narrative, then the standard for which the evidence is evaluated must be recalibrated to minimize the most serious impact of the luck of the draw in high stakes refugee adjudication. If 51% consistency and plausibility is the benchmark for a credible claim, what does this tell us about Ireland's commitment to protect humanitarian principles and reflect policies that are done in the spirit of justice and understanding? The current standard of proof is ill-equipped to limit the most pernicious aspects of subjectivity that plague a system that demands a standard of truth from those most vulnerable seeking our help.

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VACCINE MANDATES IN INSTITUTIONS OF HIGHER LEARNING: THE TIGHTROPE ACT BETWEEN PUBLIC HEALTH AND THE FREEDOM OF CHOICE

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Abstract

The United States is built on legal principles which support individual liberties and rights protecting one’s expression, religion, and privacy, among many others. Yet, in times of public emergency, a state simultaneously has the duty to protect the common good and wellbeing of the population, allowing it to institute regulations in the interest of public safety. This paper seeks to examine the balancing act between public health and individual rights in the context of COVID-19 vaccine mandates, specifically if and how higher education institutions can navigate the implementation of such mandates. There exists strong legal precedent for vaccine mandates in the interest of public well-being, yet this foundation is weakened in light of the emergency use authorization (EUA) of the current COVID-19 vaccines and reasonable accommodations that must be addressed to respect individual freedoms or circumstances. While colleges and universities have a “duty of care” to prevent foreseeable harm to students, they must make compromises in their vaccine plans to acknowledge this “tightrope act” between individual and communal rights.

Introduction

Built into the American legal system is the balance between a variety of different rights and privileges. All institutions, businesses, and organizations in the U.S. that operate in the public sphere are generally required by law to uphold these various protections, and American colleges and universities are no exception to this rule.¹ It is no surprise to anyone, however, that oftentimes the rights protected by the Constitution conflict with each other. For instance, an individual’s right to privacy might conflict with a reporter’s right to access information, or an activist’s right to freedom of speech or expression might conflict with the government’s imperative to

¹ There are many examples from American legal history to support this point, but one landmark case is *Heart of Atlanta Motel, Inc. v. United States*, 379 US 241 (1964), which itself supports Title II of the Civil Rights Act of 1964 in saying that places of public accommodation cannot discriminate on the basis of race.

maintain order.² In both of these cases and many more, it is the job of the legal system, and often the Supreme Court, to decide in which circumstances certain rights or privileges have a higher valuation than others. This balancing act can be especially difficult when considering the conflict between two or more different “natural rights,” rights included in the First Amendment, or any other highly valued rights.

The issue of vaccine mandates on college and university campuses is also one of balancing different rights and responsibilities. Most people would agree that an institution of higher learning has the responsibility to protect its student body from disease, among other dangers to both the body and mind. Yet, schools are also the foundation of the American marketplace of ideas. They therefore also have the responsibility to respect a wide range of viewpoints among their students.

Should this responsibility to protect differing viewpoints apply to vaccinations and supersede the mandate that colleges and universities have to protect public health? In the American political discourse, we have long been aware of non-medical exemptions to vaccines, such as those based on religious grounds; 45 out of 50 U.S. states currently have religious exemptions to immunizations.³ Historically, non-medical exemptions to vaccinations have been relatively low. Yet in response to the COVID-19 pandemic, and the subsequent vaccines that have been produced to combat the virus, there is a substantial amount of vaccine skepticism for a variety of reasons. According to recent survey data, one in five Americans would not take the vaccine unless forced to do so by their job or their school or refuse to take the shot entirely.⁴ Regardless of the reasons behind this reluctance to take the vaccine, whether it be on religious or personal liberty grounds, the question of the relative weight between the right for everyone to be healthy and the right for everyone to hold their own views on a university or college campus has surged to the forefront of the legal discourse in the U.S. This article will explore the historical legal background of vaccine mandates and the duty of colleges and universities to protect students’ health, as well as potential caveats to requiring entire student bodies to receive a vaccine.

Legal Precedent

The intersection in the law between vaccines and institutions of higher learning is not a particularly robust subject in regards to cases that have reached the Supreme Court. One major case in this area was *Jacobson v. Massachusetts* in

2 *Schenk v. United States*, 249 US 47 (1919).

3 Erik Skinner, Alise Garcia, States With Religious and Philosophical Exemptions From School Immunization Requirements, National Conference on State Legislators, (2021) <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

4 Stephanie Saul, *Covid-19: U.S. Vaccine Confidence Rises Though Skeptics Remain, Survey Says*. *The New York Times*, (2021), <https://www.nytimes.com/live/2021/03/30/world/covid-vaccine-coronavirus-cases?auth=login-google>.

1905, where the Supreme Court ruled that compulsory vaccination laws are not a violation of personal liberty.⁵ This case took place during a smallpox epidemic in the Boston area, and at the time the state of Massachusetts had a mandatory vaccination law. The municipality of Cambridge, MA extended this regulation, requiring that the smallpox vaccine be distributed to all its inhabitants.⁶ If anyone refused the vaccination, then they would be fined \$5, which translates to about \$150 today. Henning Jacobson, a pastor from Cambridge who was originally from Sweden, argued that the compulsory vaccinations were a violation of his personal liberty and his rights under the Fourteenth Amendment.⁷ This case is not directly related to the situation being analyzed in this article, as the compulsory vaccinations were not the result of a university's rule but rather a municipal law; however, this decision is one of the most important rulings in the public health sector of the law. The landmark ruling extended the use of the state's "police powers" to vaccinations and public health policy more generally.⁸ What is particularly striking about this case is the fact that the court formalized the notion that personal liberty is superseded by the state's police powers, but only with specific considerations. The opinion penned by Justice John Marshall Harlan established four requirements that need to be met in order for laws such as compulsory vaccinations to be constitutional which are as follows: "necessity, reasonable means, proportionality, and harm avoidance".⁹ Justice Harlan argued that the compulsory vaccination law that was being examined met all four of these criteria. At the time, smallpox was ravaging the community of Cambridge and thus the vaccine was necessary to prevent further spread of the virus, which once contracted is incurable by any known medicine. The vaccines were implemented by city physicians visiting the most affected areas of the city and giving vaccinations to all those who were healthy enough and willing to get the vaccine. No force was used to coerce people into getting the vaccine, although you were fined or subject to a short prison sentence as Jacobson was if you refused to get the vaccine.¹⁰ This delivery system of the vaccine, according to the court, seemed to be reasonable and proportionate given the circumstances. Moreover, the fact that the vaccines were first delivered to the most affected areas reasonably indicates that the law was attempting to minimize the amount of harm that was caused by the spread of smallpox. All of these

5 *Jacobson v. Massachusetts*, 197 US 11 (1905).

6 Ibid

7 Michael Willrich, *Pox: An American History* (Penguin, 2011).

8 In this context, police powers refer to the right that the government has to create and enforce all laws necessary to protect the public's safety and well-being. In the U.S., these powers are derived from the 10th Amendment to the Constitution.

9 Lawrence O. Gostin, *Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95(4) *Am J Public Health* 576 (Apr. 2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449223/?_escaped_fragment_=&po=52.7778.

10 Michael R. Albert, M.D., Kristen G. Ostheimer, M.A., and Joel G. Breman, M.D., D.T.P.H., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1901–1903*, 344 *N Engl J Med* 375 (2001), <https://www.nejm.org/doi/full/10.1056/nejm200102013440511>.

factors contributed to a 7-2 majority in favor of the compulsory vaccination law.

Having established the necessary constitutional basis for a compulsory vaccination law, we can now examine another Supreme Court case that specifically deals with schools and vaccinations. In 1922, the court ruled for mandatory school district vaccination in *Zucht v. King*.¹¹ Rosalyn Zucht, the plaintiff in the case, was excluded from attending both public and private schools in the San Antonio area because she refused to get vaccinated with the smallpox vaccine; the school district required proof of vaccinations in order to enroll in any school. Zucht sued with the argument that because smallpox was not an epidemic at the time, the mandatory vaccinations did satisfy the requirements laid out in the *Jacobson* case, specifically the “necessity” clause. The court, however, ruled unanimously against Zucht and in favor of the San Antonio vaccination law. Associate Justice Louis Brandeis, who authored the majority opinion for the case, stated that the law fell within the police powers that *Jacobson* had formalized for the state when responding to public health risks.¹² Justice Brandeis further wrote that because public health officials deal with unknown risks when trying to combat disease, they require a broad discretion to implement various laws and ordinances. As a result, even though smallpox was not ravaging San Antonio as it had in Cambridge twenty years earlier, the court believed that the mandatory vaccinations passed the four requirements outlined in *Jacobson*.

Neither of these two Supreme Court cases are directly related to COVID-19 or even institutions of higher learning, in relation to vaccination requirements. Yet, both decisions came down comfortably on the side of public health over personal liberty. This is important to note, as current colleges and universities are using the precedent set up in *Jacobson* and *Zucht* to require COVID-19 vaccinations for students to return to campus. One example of these requirements comes from Cornell University, which recently released a statement saying “Accordingly, Cornell intends to require vaccination for students returning to Ithaca, Geneva, and Cornell Tech campuses for the fall semester. Medical and religious exemptions will be accommodated...”.¹³ Neither personal liberty nor moral objections to compulsory vaccinations are valid non-medical exemptions under this university requirement and many similar ones. The reasoning behind this can be directly traced back to *Zucht* and *Jacobson*. But does the current state of vaccine skepticism in the U.S. change the calculus of balancing personal liberty considerations with public health concerns? Or does the fact that these compulsory vaccines are taking place on college campuses rather than through a city ordinance make a legal difference? These legal questions are worth examining more closely.

11 *Zucht v. King*, 260 US 174 (1922).

12 *Ibid*

13 Martha E. Pollack and Michael I. Kotlikoff, *COVID-19 Vaccination and Fall Instruction*, UNIVERSITY STATEMENTS (Apr. 2, 2021), <https://statements.cornell.edu/2021/20210402-vaccination-fall-instruction.cfm>.

Emergency Use

In times of public emergency, the strong legal precedent supporting the power to implement restrictions and regulations surrounding vaccines serves the interest of protecting “public health, public safety, and the common good.”¹⁴ This legal foundation has given states the opportunity to mandate vaccines for their residents—a right which can be extended to higher education institutions, becoming an attractive possibility for universities hoping to transition to in-person learning following the COVID-19 pandemic. Historically, vaccine mandates have been most present in sectors such as education and healthcare, allowed for by employment law. In the higher education sphere, universities have many immunization requirements for students before enrolling and arriving on campus, including but not limited to vaccines for meningitis, measles, rubella, chickenpox, and hepatitis. The typical policy regarding vaccination does prevent a vaccine-exempted student from participating in campus activities or housing if an outbreak of the disease occurs. This is particularly relevant to the COVID-19 pandemic, in which some individuals will undoubtedly refuse to get vaccinated; yet, are higher education institutions even allowed to require vaccination at this stage?

The three vaccines being administered across the United States for COVID-19 include the mRNA vaccines from Pfizer-BioNTech and Moderna and the virus-based vaccine from Johnson & Johnson. All three vaccines have been authorized by the FDA for emergency use. Emergency use authorization (EUA) entails that there is a public health emergency endangering the security, health, and well-being of the population; the FDA is then able to accelerate the emergency administration of unapproved vaccinations. This is distinct from an FDA approval, or licensure, which is the typical route a vaccine must take before being administered to the public.¹⁵

The Equal Employment Opportunity Commission (EEOC) issued guidelines in December of 2020 that allow colleges and employers the right to bar employees if they do not receive the vaccine; however, this right does not apply as long as the vaccine is issued for emergency use—a guideline that can be extended to students as well. As long as the vaccines are not licensed by the FDA, no student or faculty member that refuses the vaccine can be barred from campus activity, making a vaccine mandate impossible to implement. On the other hand, under EUA, the statute reads that individuals must be informed of all possible benefits and harms associated with taking the vaccine, along with offering an

14 Johns Hopkins Bloomberg School of Public Health, *Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides?*, Covid 19: School of Public Health Expert Insights (Nov. 17, 2020),

<https://www.jhsph.edu/covid-19/articles/can-covid-19-vaccines-be-mandatory-in-the-u-s-and-who-decides.html>.

15 *FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine*, U.S. FDA (Feb. 27, 2001), <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine>.

option to accept or reject the receipt of said vaccine. The individual is required to also be informed of “the consequences, if any, of refusing administration of the [vaccine], and of the alternatives to the [vaccine] that are available and of their benefits and risks.”¹⁶ These consequences in higher education may include a restriction of partaking in on-campus activities or being required to quarantine. While a vaccine mandate may be permissible under the EUA statute, there are myriad complications that arise without FDA licensure and under EEOC guidelines.

Many colleges and universities have not decided whether or not to mandate the COVID-19 vaccine in light of its emergency use authorization. California State University and other University of California schools are leaning against mandating the vaccine to avoid legal issues associated with the EUA. Rutgers University and Cornell University, contrarily, have already made the vaccine mandatory for all students returning to campus in the fall, citing the health of the students and wider community.¹⁷ Higher education institutions have the legal precedent to require vaccination, but a vaccine mandate also poses potential legal obstacles so long as a vaccine remains in the EUA stage.

Reasonable Accommodations

The issue of vaccine mandates on college campuses parallels a conversation about vaccine mandates in the workplace, a topic that has received greater focus. Under federal law, employers have the right and the obligation to establish a safe workplace that is compliant with applicable laws and protocols.¹⁸ However, the protocol that employers intend to follow to protect the health and safety of their employees and the people they serve can counter the priorities and desires of employees. Employees or applicants may personally reject employer requirements for a variety of personal reasons. Discourse about when it is permissible to make exceptions for vaccine mandates have focused on two types of reasons for which employees can request exemptions from workplace practices and policies, and specifically exemptions from employer mandated vaccines. The two types of reasons of major focus are religious exceptions and exemptions due to disability. Accommodations on the basis of religious beliefs and practices are protected under Title VII of the Civil Rights Act and the EEOC provides guidelines for understanding the extent to which employers must accommodate religious beliefs and practices.

16 A. Kevin Troutman & Richard Meneghello, *First Lawsuit Challenging Mandatory COVID-19 Vaccine May Shed Light On Employer Parameter*, JD Supra, (Mar. 8, 2021) <https://www.jdsupra.com/legalnews/first-lawsuit-challenging-mandatory-7190156/>.

17 Akshay Syal, *Colleges Consider Requiring Covid Vaccinations for Students as Young Adults Drive Rise in Cases*, NBC, (Mar. 26, 2021), <https://www.nbcnews.com/health/health-news/colleges-consider-requiring-covid-vaccinations-students-young-adults-drive-rise-n1262094>.

18 Glenn S. Grindlinger, *Employment Issues and the COVID-19 Vaccine*, FOX ROTHSCHILD LLP. (Feb. 8, 2021), <https://www.foxrothschild.com/publications/employment-issues-and-the-covid-19-vaccine/>.

Guidelines on when and to what extent employers must make accommodations for those with disabilities are protected under the Americans with Disabilities Act and governed by the Equal Employment Opportunity Commission (EEOC).

Under Title I of the Americans with Disabilities Act (ADA), employers are required to provide reasonable accommodations to employees or employment applicants with disabilities, except when such an accommodation would cause “undue hardship.” The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the ADA. The most recent Enforcement Guidance, published in 2002, clarifies the rights and responsibilities of employers and individuals with disabilities. This includes clarification of the definition and extent of “reasonable accommodation” and “undue hardship,” the legal obligations regarding reasonable accommodations in the hiring process, and the conditions in which reasonable accommodations can be denied. Accommodations refer to “any change in the work environment or in the way that things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”¹⁹ Per this guidance, employers must meet legal obligations of reasonable accommodation for applicants and employees with disabilities, so that these applicants and employees are able to perform the necessary functions of their jobs. Reasonable accommodations may include changes in schedule to accommodate medical treatments, changes in the physical lay-out of office space to accommodate wheelchair users, or by hiring a sign language interpreter to accommodate hard of hearing or deaf employees. Requests for accommodations are an informal and interactive process between the individual and the employer, by which the employee expresses the types of changes that they would like to see due to their medical condition and by which the employers assess whether the individual’s medical conditions meet the DA definition of “disability.” There is no “one size fits all” solution, both employee and employer can negotiate the remedy that should be utilized on the basis of its effectiveness and burdensomeness of the remedy. So long as the reasonable accommodation is effective, employers may use their discretion on which to provide on the basis of ease to implement, cost, or other considerations.

Per the guidance of the EEOC, “The preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.” However, if an accommodation is required that would cause “undue hardship” to the employer, the employer is not under obligation to provide it. Undue hardship refers to significant difficulty or expense. It depends on the resources and circumstances of the workplace. What is considered an undue hardship depends on whether the accommodations proves to create a financial

19 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA* U.S. EEOC (Oct. 17, 2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_36_.

difficulty for the employer or interferes extensively, or substantially with the nature or operation of the business. For this reason, undue hardship is determined by a case-by-case basis and is not dependent on the title, or pay grade of the employee. For example, early on during the coronavirus pandemic prior to local and state interventions, an IT office may have allowed some or all of their employees with pre-existing conditions to work from home because it did not affect the business' ability to function, while other employers, like grocery stores, could not reasonably accommodate remote work because it would have interfered extensively with the operations of the business. Whether remote work was a reasonable accommodation depended on the nature of the business; the pay grade of the employee is irrelevant.

As businesses and employers return to work and vaccines become available to the general public in the United States, a central question is: can employers require their employees to be vaccinated? Can employers provide exceptions to a vaccine policy for individuals who cannot obtain a vaccine due to disability? To answer the first question, the EEOC allows employers to institute a policy that requires employees to be vaccinated. Under the ADA, employers can have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace."²⁰ To the second, if a safety-based qualification standard tends to screen out an individual with a disability, the employer must show that the screened-out employer would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Requiring vaccines may tend to screen out individuals with disabilities, so to address this employers must assess whether unvaccinated individuals with disabilities pose a direct threat by evaluating the duration of the risk, the severity of the potential harm, the likeliness of the harm, and the imminence of the harm. If it is in fact found that there is a direct threat posed by an unvaccinated individual, then the employee cannot be excluded from the workplace, unless there is no way to provide a reasonable accommodation absent undue hardship. However, this does not permit the employer to automatically terminate the worker, but rather may be entitled to accommodate remote work. Again, like other reasonable accommodations, it is best understood as a case-by-case situation which requires negotiation between employer and employee that is sensitive to the needs of the employee and the nature of business operations. For workplaces in which employees are in direct contact with customers and where social distance measures and protocols cannot be practiced, say, such as a dentist office, a dental technician who is unvaccinated may pose a direct threat that cannot be reasonably accommodated absent hardship. However, within that very office space, an unvaccinated appointment coordinator may not be seen as a direct threat because social distancing and personal protective equipment (PPE) may be sufficient to minimize risk or because the employee is able to work

remotely. Again, the main considerations are whether the individual poses a direct threat and whether this threat can be accommodated absent undue hardship for the employer.

Another consideration to keep in mind is the permissibility and nature of religious based exemptions for vaccines. Like accommodations on the basis of disability, the employee is tasked with informing the employer about a need for an exemption. For religious-based exemptions, employees must sincerely hold a religious belief, practice, or observance which prevents the employee from receiving the vaccination. Once an employee makes a request for an exception on this grounds, then the employer is tasked with providing a reasonable accommodation for the religious belief, practice, or observance, unless it would pose an undue hardship under the standard defined by Title VII of the Civil Rights Act.

“Religion” under Title VII refers to all aspects of religious observance and practice, including not only organized religious, such as Christianity, Judaism, Islam, Hinduism and Buddhism, but also religious beliefs that are uncommon and informal, and which to some may seem “illogical or unreasonable.”²¹

Religious beliefs do not need to include beliefs on God, but are generally conceived as concerning “ultimate ideas” about “life, purpose, and death.” For this reason, mere personal preferences, or social, political, and economic philosophies, do not count as religious beliefs. Whether a practice or observance is deemed religious depends on the motivation of the person engaged in the practice. For this reason, the same practice can be deemed secular for someone if a person engages in it for secular purposes, and deemed religious for another if a person engages in it for religious reasons. For example, dietary restrictions based on health-related purposes may prevent someone from eating pork. Another person may not engage in eating pork because they are a practicing Muslim, who refrains from this activity on the religious belief that eating pork is haraam or “forbidden.”²² Only the latter would be considered a religious practice, even if the person who refrained from eating pork for health-related purposes happened to practice a religion. For the case of refraining from vaccination, in order to be considered a religious practice, the action or omission from action must be motivated by religious reasons. That is, it is not merely that the person practices a religion that would permit them from refraining from vaccination, but the refraining from vaccination must be on the basis of the beliefs, practices, and observances of that religion. Since religion is broad and the employer may be unfamiliar with certain beliefs, practices, and observances, it should be assumed that an employee’s request is sincere. Only when the employer has an objective basis for questioning the religious nature of a practice that prevents

21 *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EEOC (July 22, 2008), <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>.

22 Haram Definition, *The Oxford Dictionary of Islam*, available at *Oxford Islamic Studies Online*.

vaccination or for questioning the sincerity of the person's belief, then the employee may be permitted to ask for additional information to support the employee's request.

Once the employee has made the request, and if necessary, shown supporting information, then the employee must actively pursue providing a reasonable accommodation. Again, if it is shown that there is no accommodation that can be made without "undue hardship," then it would be legally permissible for the employer to exclude the employee from the workplace. "Undue hardships" as defined by Title VII is "having more than a de minimis cost or burden on the employer." Per the definition of undue hardship under Title VII, employers have a lower standard to show that an accommodation would pose a burden on the employer than for the case of showing undue hardship under the ACA. To keep in mind, exclusion from the workplace does not equate to automatic termination. Whether exclusion from the workplace entails termination is dependent on whether remote work is an option and whether there are other rights that apply under EEO laws or other federal, state, and local provisions.²³

University Duty: History & Current Applications

Beyond simply having the legal right to mandate compliance with vaccine protocols, "duty of care" law may practically necessitate that a university require vaccinations and employ the federally approved, free tools at their disposal. Modern legal precedent has established that a foreseeable, dangerous, and preventable harm can be held against a negligent institution.

In 1913, *Gott v. Berea College* ruled that universities were custodians of student safety or physical wellbeing, establishing the legal doctrine of *in loco parentis*. After a restaurant owner sued Berea College for prohibiting its students from entering public eating houses, the Kentucky Court of Appeals ruled that these restrictions were within the power of a university. The court wrote that institutions of higher education "stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils."²⁴ Up until the 1960s, state colleges and universities widely held this legal standing, meaning they assumed the role and responsibilities of a parental figure. The doctrine of *in loco parentis* also applies to teachers, primary and secondary schools, and childcare organizations, allowing these figures and institutions to assume legal liabilities in the case of negligence despite foreseeable harm.

Over several decades, courts would slowly erode the previous understanding established in *Gott v. Berea College*. This new era of the late 1970s and 1980s would view universities not as custodians of student wellbeing, but

²³ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EEOC (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#>.

²⁴ *Gott v. Berea College*, 156 Ky. 376 (1913).

rather emphasize the responsibility of individual students as adults. In 1979, the third circuit of the U.S. Court of Appeals first rejected the custodial duties of universities in *Bradshaw v. Rawlings*. The case involved an eighteen-year-old student severely harmed in an automobile accident after the driver, another underage student, had allegedly become inebriated at a school-sanctioned event. *Rabel v. Illinois Wesleyan University* would further this legal view of universities in 1987 when the Illinois appellate court ruled “it would be unrealistic to impose upon a university the additional role of custodian over its adult students.”²⁵ In the same decades that courts rolled back the *in loco parentis* doctrine and sided with universities, other cases began assigning specific duties to higher education institutions. The Massachusetts Supreme Court introduced the concept of university duty in protection from foreseeable harm in *Mullins v. Pine Manor College*. Though these cases certainly hold universities to a higher standard than *Bradshaw v. Rawlings* and *Rabel v. Illinois Wesleyan University*, it still marks a shift from *in loco parentis* doctrine. Rather than viewing college students as detached from their own wellbeing and safety, students maintain more independence and responsibility. Legal scholars classify this as a relationship of *parity* rather than parenting.

Most of the cases discussed above outline liability for bodily injury or harm rather than infectious disease. Yet, the history of higher education case law still offers convincing precedent for a legal duty to vaccinate. Several factors that create a duty—foreseeability, the severity of the harm, and the cost and access to insurance—are certainly applicable to the potential harm from COVID-19.

Foreseeability tends to be the most crucial factor in determining what qualifies as a university’s duty. This may suggest that care of duty is applicable to our present scenario—COVID-19 not only spreads rapidly in densely populated spaces such as college dorms and apartments, but can quickly infect large groups of students who gather while asymptomatic.²⁶ The 2020-2021 school year effectively proved the immediate danger that unvaccinated young adults pose. In a matter of weeks, college towns became the nation’s hotspots as students returned to campuses in the fall.²⁷

While the courts have established that universities are at least partly responsible for their students, this same responsibility does not extend to the surrounding community at large, nor does it apply to graduates of an institution. Higher education case law has consistently ruled that any responsibility lies solely for a school’s own student population. Still, this precedent offers a convincing argument that universities ought to protect their own student bodies from the COVID-19 virus given the accessible and safe means provided.

25 *Rabel v. Illinois Wesleyan University*, 161 Ill. App. Ct. 348 (1987).

26 *Considerations for Institutions of Higher Education*, CDC (Dec. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html#print>.

27 Sarah Watson, Shawn Hubler, Danielle Ivory, and Robert Gebeloff, *A New Front in America’s Pandemic: College Towns*, N.Y. Times, (Sept. 6, 2020), <https://www.nytimes.com/2020/09/06/us/colleges-coronavirus-students.html>.

Conclusion

Already, universities are solidifying mandatory COVID-19 vaccinations in their plans for students returning in the fall of 2021. Rutgers University recently wrote to over 71,000 students announcing mandatory vaccinations, citing the health of both those on campus and the surrounding community.²⁸ Cornell University, Nova Southeastern University, Fort Lewis College in Colorado, and St. Edward's University in Texas have all followed suit. Each university has pledged to allow for exemptions in the case of religious practices or severely immunocompromised individuals.

Ultimately, institutions of higher education will have to allow for some compromises of individual rights as they write vaccination guidelines for students. This balancing act, an already complex legal challenge, is made more daunting by emergency use authorization and a long list of potential exemptions.

Bibliography

Albert, Michael R. M.D., Kristen G. Ostheimer, M.A., and Joel G. Breman, M.D., D.T.P.H., "The Last Smallpox Epidemic in Boston and the Vaccination Controversy." 1901–1903, 344 N Engl J Med 375 (2001), <https://www.nejm.org/doi/full/10.1056/nejm200102013440511>.

"Considerations for Institutions of Higher Education." CDC. Dec. 31, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html#print>.

Devlin, Dory. "Rutgers to Require COVID-19 Vaccine for Students." Rutgers Today. Mar. 25, 2021), <https://www.rutgers.edu/news/rutgers-require-covid-19-vaccine-students>.

"Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA." U.S. EEOC. Oct. 17, 2002. https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_36_.

"FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine." U.S. FDA. Feb. 27, 2001. <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine>.

Gostin, Lawrence O. "Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension." 95(4) Am J Public Health 576, Apr. 2005, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449223/?_escaped_fragment_=po=52.7778.

Grindlinger, Glenn S. "Employment Issues and the COVID-19 Vaccine." FOX ROTHSCHILD LLP. Feb. 8, 2021. <https://www.foxrothschild.com/>

²⁸ Dory Devlin, *Rutgers to Require COVID-19 Vaccine for Students*, Rutgers Today, (Mar. 25, 2021), <https://www.rutgers.edu/news/rutgers-require-covid-19-vaccine-students>.

publications/employment-issues-and-the-covid-19-vaccine/.

Haram Definition, *The Oxford Dictionary of Islam*, available at *Oxford Islamic Studies Online*.

Johns Hopkins Bloomberg School of Public Health, “Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides?” Covid 19: School of Public Health Expert Insights. Nov. 17, 2020.

<https://www.jhsph.edu/covid-19/articles/can-covid-19-vaccines-be-mandatory-in-the-u-s-and-who-decides.html>.

Pollack, Martha E. and Kotlikoff, Michael I. “COVID-19 Vaccination and Fall Instruction, UNIVERSITY STATEMENTS.” Apr. 2, 2021. <https://statements.cornell.edu/2021/20210402-vaccination-fall-instruction.cfm>.

Pox, Michael Willrich, *An American History* (2011).

“Questions and Answers: Religious Discrimination in the Workplace.” U.S. EEOC. July 22, 2008. <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>.

Saul, Stephanie. “Covid-19: U.S. Vaccine Confidence Rises Though Skeptics Remain, Survey Says.” *The New York Times*. Sep. 4, 2021. <https://www.nytimes.com/live/2021/03/30/world/covid-vaccine-coronavirus-cases?auth=login-google>.

Skinner, Erik and Garcia, Alise. “States With Religious and Philosophical Exemptions From School Immunization Requirements.” National Conference on State Legislators. (2021) <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

Syal, Akshay. “Colleges Consider Requiring Covid Vaccinations for Students as Young Adults Drive Rise in Cases.” NBC. Mar. 26, 2021. <https://www.nbcnews.com/health/health-news/colleges-consider-requiring-covid-vaccinations-students-young-adults-drive-rise-n1262094>.

Troutman A. Kevin, and Meneghello, Richard. “First Lawsuit Challenging Mandatory COVID-19 Vaccine May Shed Light On Employer Parameter.” JD Supra. Mar. 8, 2021. <https://www.jdsupra.com/legalnews/first-lawsuit-challenging-mandatory-7190156/>.

Watson, Sarah, Shawn Hubler, Danielle Ivory, and Robert Gebeloff, “A New Front in America’s Pandemic: College Towns.” *The New York Times*. Sept. 6, 2020. <https://www.nytimes.com/2020/09/06/us/colleges-coronavirus-students.html>.

“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.” U.S. EEOC. Dec. 16, 2020. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#>.

Cases Cited

Gott v. Berea College, 156 Ky. 376 (1913).

Jacobson v. Massachusetts, 197 US 11 (1905).

Rabel v. Illinois Wesleyan University, 161 Ill. App. Ct. 348 (1987).

Schenck v. United States, 249 US 47 (1919).

Zucht v. King, 260 US 174 (1922).

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FATHERS' RIGHTS IN LIGHT OF RULINGS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The goal of this paper is to provide an overview of fathers' rights in light of rulings of the European Court of Human Rights (ECHR). Given the depth of the subject, particular emphasis is put on three main areas: establishment of paternity, denial of paternity, and a father-child relationship. The last dimension is placed in the context of both family background and the meaning of the parents' mutual relationship in relation to a child's situation. The paper is divided into five parts. Part one provides an introduction to the topic: legal subjects whose rights are considered by the ECHR are described, the *child's best interest* principle is defined, and fathers' rights are analyzed in a sociopolitical context. Furthermore, I evaluate which rights are protected by the European Convention on Human Rights. In the second part, I present cases pertaining to establishment of paternity. Part three discusses matters associated with denial of paternity. The fourth part focuses on rulings related to a father-child relationship. The final part covers conclusions supported by the ECHR rulings on the aforementioned matters and elucidates cases in which the ECHR leaves the margin of appreciation to states involved. The paper concludes with a reflection on the extent to which fathers' rights are protected and restraints that might be imposed on fathers in order to protect other legal subjects.

I. Introduction

a. Legal subjects in cases pertaining to fathers' rights

In cases associated with fathers' rights considered by the ECHR, the rights of three legal subjects are examined. The first, which will not be discussed in detail in the paper, is a child's mother. In the context of matters related to fathers' rights, she is a legal subject that can constitute an obstacle in acknowledgment of paternity. For instance, a mother's protection from being deprived of agency in cases involving their children is ensured by Polish law. According to Article 73 § 1 of the Family and Guardianship Code, a mother's consent is necessary in paternity recognition.¹

¹ *Ustawa z dnia 25 lutego 1964 r. - Kodeks rodzinny i opiekuńczy*, Dz.U. nr 9

The existence of such a mechanism enables a mother to participate in creating a new legal situation of her child and to meaningfully influence the situation of her own. It is worth noting, however, that the acknowledgment of a child is a one-sided act on the acknowledging side, and is not a mandatory act.² At the same time, one of the goals of contemporary family law is to ensure an even contact to both mother and father regardless of their mutual relationship.³ The then Polish Ombudsman for Children emphasized the importance of the matter in a 2013 report, pointing to the “need to resign from rules of family law that cause conflict. Introducing new solutions guaranteeing a child’s right to be raised by both parents is imperative.”⁴

The second legal subject present in the aforementioned ECHR cases is the father himself. A biological father’s rights need to be balanced with a child’s rights; thus, the issue turns into a question of socio-psychological reality, becoming a wider dilemma that exists outside of a strictly legal framework as well. As such, the father’s position is more complex than that of the mother’s. Fathers’ rights pertain to a change of delegating responsibility; in case of paternity establishment, a father assumes an obligation related to child maintenance alimony, but in the case of paternity denial, he is absolved from this obligation. Given the intricacy behind this kind of responsibility, one may arrive at a conclusion that it is not a matter that could be dealt with in a one-size-fits-all fashion because legal reality can be different from actual reality.

The last of the main legal subjects of cases pertaining to fathers’ rights considered by the ECHR is a child. In disputes brought to national courts and, subsequently, to the ECHR, the emphasis should be on the child’s subjectivity, distinguishing it from the other values at play, such as *the good of family*. In comparison with the parents’ interest described above, the question of a *child’s best interest* is much more delicate, as a child, being in the process of receiving education, requires a particular protection. It does not, however, translate into a consistent line of judicial rulings made by the ECHR because of two particular children’s rights: a right to preserve their identity⁵ as well as a right to private and family life.⁶

poz. 59 (2017) [Polish Journal of Laws, No. 9 position 59 (2017)].

2 Magdalena Gołowkin-Hudała, *Zgoda matki na uznanie dziecka w świetle ustawodawstwa polskiego i wybranych państw europejskich*, in *Pochodzenie dziecka. Polskie regulacje prawne na tle ustawodawstw wybranych państw europejskich* 40 (ed. S. L. Stadniczeńko, M. Gołowkin-Hudała 2005).

3 Ewa Skrzydło-Tefelska, *Uznanie dziecka w prawie międzynarodowym* 30 (Wrocław, Zakład Narodowy imienia Ossolińskich Wydawnictwo, 1990).

4 Dariusz Szenkowski, *Zagubiony wymiar dobra dziecka*, in *Współczesne ojcostwo. Konteksty kulturowe, pedagogiczne i prawne*, 86 (ed. E. Ogrodzka- Mazur, G. Błahut, T. B. Chmiel 2016).

5 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>

6 *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

b. The child's best interest principle

The *child's best interest* principle constitutes a basis of family law that is also highlighted in the Convention on the Rights of the Child. The value of a child's physical, psychological, and spiritual development, which should prepare him or her to function in a community and to create his or her own family life, is respected.⁷ Despite the lack of a succinct definition of the *child's best interest*, protection of this value is considered to be of utmost importance.⁸

In terms of characterizing fathers' rights according to the European human rights system, Article 9 section 3 of the aforementioned convention specifies that *to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*⁹ is a child's right, not the parents'. Given the principle of primacy pertaining to the child's best interest, a child should not be an injured party in case of conflict of interest between parents. Hence, the situation in which an arbitrary decision by a mother or state authorities deprives a child of contact with his or her father without any meaningful rationale is unacceptable. Such a situation occurs due to various reasons: a mother's conviction that a father will not be able to appropriately take care of their child, a mother's desire to take revenge on her ex-husband, or either parent's desire to restrict the child's contact with the other parent.¹⁰ For these reasons, it is crucial to underscore that a divorce cannot serve as a rationale for constraining child-parent relationships or a restriction of parental authority.¹¹

Another element of the *child's best interest* principle is also a right to know one's identity stemming from closer and extended families; every human enjoys this birthright which should not only be created by law but also protected by it.¹²

c. Parental authority and care-giving

The question of parental authority considers the legal implications related to parenthood, usually enumerated as being inheritance, a right to take on a surname, and alimony. There is no precise definition of parental authority; rather, it is understood as *the collection of parents' rights and duties towards their underage child which aims at ensuring him or her a due care and guarding his or her interests*.¹³

⁷ Szenkowski, *supra* note 4, at 85.

⁸ Wanda Stojanowska, *Władza rodzicielska pozamająłńskiego i rozwiedzionego ojca. Studium socjologiczno- prawne*, 32 (1985).

⁹ *Id.* at 138.

¹⁰ Szenkowski, *supra* note 7, at 89.

¹¹ Ya'lr Ronen, *Redefining the child's right to identity*, 18 International Journal of Law, Policy and the Family, no. 2, 2004, at 157.

¹² Iwona Długoszevska, *Przesłanki oraz skutki ograniczenia władzy rodzicielskiej*, 37 (2012).

¹³ J. Ignaczewski (ed.), *Komentarz do przepisów KRO regulujących władzę rodzicielską*, in *Władza rodzicielska i kontakty z dzieckiem. Komentarz. Wyd. 4*,

Such a definition of parental authority relates to the *child's best interest* principle as it defines parents as their children's guardians not "owners." Thus, their duties as parents are of bigger importance than their entitlements stemming from being a parent.¹⁴ It is worth noting that "parental authority" is not a phrase used in the Polish legal system to denote a parent's unrestricted power. Stressing the importance of parental authority in the context of the ECHR cases pertaining to the establishing paternity and denial of paternity is vital because such instances bring consequences, not only for a complainant but also for a person indirectly involved in a case (e.g. a man who takes on or is deprived of a father's responsibilities, or a child whose information regarding his or her identity undergoes a change). Simultaneously, restricting parental authority cannot be a result of the parents' divorce as, according to matters pertaining to the child's best interest described above, national family law should strive to ensure a child has equal contact with both parents.

d. Changing forms of contemporary fatherhood

The question of fathers' rights becomes more and more important given a transforming model of family and, consequently, the changing role a father plays in a family. The difference is apparent already on the stage of starting a family, which does not have to constitute a marriage or other forms of legally registering the parents' relationship. The ECHR's task is to detect this change, especially considering the Court relies on the European Convention on Human Rights, an *alive legal instrument* that ought to adjust to contemporary changing reality.

Even the growth of families has undergone changes. In 23 European countries, adoption by homosexual couples or by couples that are not joined by marriage whose relationship is legalized in another way is allowed.¹⁵ Furthermore, new forms of family have emerged: reconstituted families—the marriage of two people who already have kids from a previous marriage—and diasporic families—a family structure that fulfils basic family function despite the parents' divorce—are more and more popular phenomena.¹⁶ The fathers' role is being noticed in terms of changing approaches to social benefits that used to be associated only with motherhood, such as states encouraging parents to divide their paternal leave between themselves. Moreover, organizations connecting fathers who oppose courts' presumption that a mother is better suited to bring up children are being created, which can be labeled as a manifestation of *new fatherhood*.

This plethora of changes occurred in European society during the second

Warszawa (2019).

14 Długoszewska, *supra* note 12, at 39.

15 Stanisław Kawula, *Mozaikowość rodziny. Szkic do portretu współczesnych form rodzinno-mażeńskich*, 17 (2003).

16 *Id.*

half of the twentieth century, e.g. gender equality, moving away from traditional gender roles, and new ways of portraying men in the media straying from the cult of strong masculinity. Among fathers who report before the ECHR that their freedoms are being curtailed, a greater awareness of their rights is evident.¹⁷

Men's interest in fathers' rights can be understood in two ways: a result of bigger personal awareness and will to provide the best environment for a child's development or a consequence of strong opposition to feminist movements supporting single motherhood. Organizations in support of these feminist movements critique entities fighting for fathers' rights, arguing that they deprive women of reproductive rights under the disguise of advocating for gender equality.¹⁸ This aspect is worth emphasizing when pondering about cases pertaining to fathers' rights because it illustrates how the discussed matters leave the legal level and enter an ideological level of the debate.

e. Article 8 of the European Convention on Human Rights

In cases associated with fathers' rights, Article 8 of the European Convention on Human Rights frequently turns out to be a cause for a legal dispute:

“Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”¹⁹

As Article 8 denotes, the right to private life is not an absolute value; it might be repealed through other regulations with respect to maintaining norms and rules that are in force in democratic countries based on the rule of law. In order to refer to Article 8, a complainant has to demonstrate that at least one of the following values protected by the convention was violated: private life, family life, home, or

¹⁷ Nora Cebotarev, *Familia, socialización y nueva paternidad*, Revista Latinoamericana de Ciencias Sociales Niñez y Juventud, no. 2, 63 (2003).

¹⁸ Serene J. Khader, *When Equality Justifies Women's subjection: Luce Irigaray's Critique of Equality and the Fathers' Rights Movement*, 23 Hypatia A Journal of Feminist Philosophy, no. 4, 48 (2008).

¹⁹ Guide on Article 8 of the European Convention on Human Rights (31 August 2020), https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

correspondence.²⁰ The main area of interest of this paper is related to situations in which a violation of private or family life occurred and cases when such a violation was not detected because of the ECHR agreeing with a national court ruling.

II. Establishment And Acknowledgment Of Paternity

Acknowledging a child is a procedure in which one has to submit a unilateral statement to an appropriate state institution. The goal of this action is to establish the identity of a child who was born out of wedlock.²¹ Acknowledgment of paternity depends on whether or not a child was born within or outside marriage. According to Article 62 § 1 of the aforementioned Family and Guardianship Code, in the first case, there is a presumption that a child is an offspring of the mother's husband up to 300 days after marriage annulment or divorce.²² Another factor that can be taken into account is the moment of conception, as in the case of French law.²³ When the situation is more complex and presumption of fatherhood cannot be applied, acknowledgment of paternity may be done by both parents and a court.²⁴ In acknowledging a child born out of wedlock, the roman system historically prevailed, which stated that fatherhood should be acknowledged by a father, turning a court's acknowledgment described above into an assistant procedure.²⁵ In the 1970s (in Italy on May 19th 1975, in France on January 3rd 1972), however, this rule was softened in favor of children born outside marriage.²⁶

Conducting DNA tests is inseparably associated with paternity cases as they are nearly indisputable evidence. Their compulsory character, however, could be in violation of Article 8 of the European Convention on Human Rights on the grounds that the test constitutes arbitrary state action. The example of conflict of interest in conducting DNA tests is shown in *Mifsud v. Malta*. The case involves an adult child who wanted to know their identity and the father who stated before the Court that Maltanian law had made genetic tests obligatory in spite of the lack of a father's consent.²⁷ The ECHR did not consider this claim as a legitimate reason to refer to Article 8 of the European Convention on Human Rights. The justification for this ruling was based on the notion of the proportionality principle weighing individuals' interests, where a child's interest was deemed superior to the complainant's interest, as well as an emphasis on the minimal severity of conducting DNA tests.²⁸

In *Mikulić v. Croatia*, a child was the one to seek establishment of paternity,

20 Skrzydło-Tefelska, *supra* note 3, at 27.

21 *Ustawa z 25.02.1964 r.*, *supra* note 1.

22 *Id.*

23 Skrzydło-Tefelska, *supra* note 3, at 3.

24 *Id.* at 20.

25 *Id.* at 21.

26 *Mifsud v. Malta*, no. 62257/15, § ..., 29 January 2019

27 *Id.*

28 *Id.*

which prompted the ECHR to conclude that national law should provide a mechanism forcing a presumed father to undergo DNA tests directed by the court.²⁹ The lack of such an instrument renders establishment of paternity ineffective and overlooks the *child's best interest* principle. Such legal circumstances led to the situation in which the complainant (a presumed child) remains in ignorance of their own identity.

The arbitrariness of the courts' actions is found in *Canonne v. France*, in which the applicant claimed that the national courts had violated his right to respect for private and family life ensured by Article 8 of European Convention on Human Rights.³⁰ In this situation, according to the applicant, the national court inferred his paternity because of his denial to carry out the DNA tests.³¹ However, the ECHR ruled that the measures used by countries to execute the right to respect for private and family life lay in their margin of appreciation. Recognition of paternity was not justified only by the lack of cooperation from the father, excluding the possibility of arbitrariness of the courts.³²

The rights in question in *Jäggi v. Switzerland* not only included the right to private and family life but also the right to physical integrity and the right to freedom of thought, conscience, and religion. As in the previous cases, the applicant sought a DNA test to establish his identity, but the subject of the case, the applicant's father, was not alive.³³ As such, the aforementioned rights could have been violated by conducting the DNA tests after the father's death.³⁴ The late father's family did not demonstrate any objections regarding their personal beliefs or religion, which is why conducting DNA tests would not violate the family's rights.³⁵ The ECHR detected a violation of Article 8 of the European Convention on Human Rights, as the Swiss authorities wrongly accepted the primacy of protecting the deceased person and their family rather than the vital interest of the applicant. Additionally, "the Court noted that the protection of legal certainty alone could not suffice as grounds to deprive the applicant of the right to discover his parentage."³⁶ Hence, legal certainty does not bring value *per se*.

Nevertheless, the cases considered by the ECHR are not associated only with genetic tests. Taking into consideration the *child's best interest* principle, there are some mechanisms providing them with legal security, such as the mother's consent to establish paternity. However, the purposefulness of this mechanism must be kept in mind so as not to create a rule that does not protect any value. Such a problem was apparent in *Róžański v. Poland*, in which the applicant claimed that his right to the family life was

29 *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I, 7 February 2002.

30 *Canonne v. France*, no. 22037/13, 25 June 2015.

31 *Id.*

32 *Id.*

33 *Jäggi v. Switzerland*, no. 58757/00, § ..., ECHR 2006-X.

34 Tadeusz Jasudowicz, *Prawa ojców w orzecznictwie strasburskim*, 46 (2008).

35 *Jäggi v. Switzerland*, no. 58757/00, § ..., ECHR 2006-X.

36 *Id.*

violated. The actual state did not raise doubts that the applicant was the child's father; however, in light of Polish law, he did not have an effective means by which he could apply for recognition of paternity without the mother's consent.³⁷ When ruling in this case, the Court did not give priority to the biological father's interests over what was best for the child and the family that raised them. The only thing observed by the Court was the negligence of Polish courts in balancing the interests of the parties and in examining whether the child's well-being was threatened.³⁸

What is worth noting, however, is the dissent that indicated the necessity of the child's legal protection. Citing the *Nylund* and *Yousef* cases, the Court pointed out that the child cannot be disadvantaged because of the conflict between the mother and the father.³⁹ In the aforementioned cases, the ECHR acknowledged that national legal systems might include limitations aimed at the protection of child's interest. The judge noticed the fact that the loophole is not to be blamed for the situation that had occurred, but the father himself because of his indecisiveness demonstrated in not having taken up actions before. The *Róžański v. Poland* case shows both sides of the arguments regarding fathers' rights and cases that should be resolved by the national authorities and the ECHR. On one hand, law should be a warrant of the actual reality, protecting it and enabling its execution on formal grounds. On the other hand, the law can shape this reality in a way that protects the weakest legal subjects, creating such legal reality in which they could experience the widest range of freedom which would be limited only by other subjects' freedoms.

An example of reasoning according to which the biological reality does not have to be the prioritized one is illustrated by the *R. L. and others v. Denmark* case. The applicants (a woman and an alleged father) intended to deny paternity, but even after running genetic tests, the national courts did not agree to change the birth certificates of the children.⁴⁰ The ECHR cited the *child's best interest* premise, recognizing that legal certainty is a superior value and that the biological father did not demonstrate willingness to take responsibility.⁴¹ Although the right to recognize one's identity associated with the *child's best interest* concept might be questioned, the ECHR pointed out that family integrity is a value which should be protected with greater intensity in this case. The court took a similar approach while ruling on *Fröhlich v. Germany*.⁴²

The Court acknowledges, however, that it did not adopt a similar position

37 *Róžański v. Poland*, no. 55339/00, § ..., 18 May 2006

38 Jasudowicz, *supra* note 28, at 42.

39 *Id.*

40 *R.L. and Others v. Denmark*, no. 52629/11, § ..., 7 March 2017

41 *Id.*

42 Evelyn Merckx, *Frolich v. Germany: (ab)using the child's best interest to safeguard those of others*, Strasburg Observers, November 20, 2018, available at: <https://strasbourgobservers.com/2018/11/20/frohlich-v-germany-abusing-the-childs-best-interests-to-safeguard-those-of-others/>.

in *Mandet v. France*.⁴³ In this case, apart from balancing the interests of the child, the biological father, and the social father, the Court resolved questions about the right to recognize one's identity. Paradoxically, in the similar case of *Odièvre v. France*, the Court did not find that lack of identity recognition was a violation of Article 8 of the European Convention on Human Rights.⁴⁴ As both cases occurred in the same country, this cannot be explained by the wide margin of appreciation that the Court grants. The differences in the ECHR rulings may be explained only by the *child's best interest* principle, as the protection of this value differs depending on particular circumstances and concretisation rather than on a universal paradigm. The Court refers to the child's right to recognize their identity, so as not to allow the child to be treated in an arbitrary way. This conduct underlines the fact that the *child's best interest* is a value that needs to be protected.

Different rulings in similar cases portray that the ECHR does not want to take a stand and prefers to leave countries with a wide margin of appreciation. The child's right to family life guarantees a deceptive stability (it is only effective at the time of giving judgement), coming from the fact that a little child is not stressed over matters of parentage. On the other hand, informing the child about their identity before they fully develop might turn out to be a better idea, as in that case the child will not be forced to redefine themselves over the course of life.

III. Denial Of Paternity

The process of denying paternity is based on balancing the same rights—the right to respect for private and family life and the right of the child to recognize their identity. Analogically, the subjects exercising their rights are the man that has been falsely considered the father and the child who wishes the law supported the paternal reality.

Mizzi v. Malta demonstrates the negative consequences that can derive from the legal presumption that the mother's husband is the child's father. By definition, this presumption is voidable and can be overturned in the process of establishing paternity.⁴⁵ Consequently, establishing paternity is not necessary in every situation when a child is born. In this case, the applicant did not have any means in national legislation to successfully deny paternity.⁴⁶ The Maltese court justified its decision by claiming that property rights can be put at risk in case of the daughter's right to inherit, but that this does not pose a threat to family life.⁴⁷ The court also relied on the *child's best interest* rule, as the child

43 *Mandet v. France*, no. 30955/12, § ..., 14 January 2016.

44 *Odièvre v. France [GC]*, no. 42326/98, § ..., ECHR 2003-III

45 *Stojanowska*, *supra* note 8, at 16.

46 *John Anthony Mizzi v. Malta*, no. 17320/10, § ..., 22 November 2011.

47 *Id.*

excluded from the family would be unaware of a crucial fact-forming part of their identity. The constitutional applicant was the only legal measure guaranteed by Maltese law at that time. Nevertheless, the ECHR found this situation unacceptable, as the legal presumption of paternity prevailed over the actual reality that the man was not the father of the child. Simultaneously, the Court did not rule whether Article 8 of the European Convention on Human Rights guarantees the right not to be forced to form relationships with other people.⁴⁸ The violation of the right to respect one's private and family life was demonstrated only in the lack of legal measure to deny paternity effectively; this situation could be compared to the one presented in *Róžański v. Poland* case, as it demonstrates the duty of the national authorities to provide effective mechanisms enabling individuals to protect their rights.

A similar approach of ECHR can be observed in the *Paulik v. Slovakia*⁴⁹ case, in which the national law did not allow denial of paternity even after demonstrating the results of the genetic tests. The ECHR similarly concluded that when the applicant's child is an adult, the *child's best interest* premise is a wish to recognize one's identity rather than stabilize family life.

Apart from the lack of possibility to deny paternity because of inappropriate measures in the legal system, denying paternity could be prevented because of the statutory limitation. Due dates of statutory limitations can differ depending on who makes such a request.⁵⁰ The troublesomeness of the time limitation is evident in the *Shofman v. Russia*⁵¹ where the applicant demonstrated the efficiency of determining the period in which one could deny paternity from the moment of child's birth. Having known the truth about the child's origin later that is permitted in the bill, the alleged father was deprived of the legal measure guaranteeing him the possibility to deny paternity. Nonetheless, among the countries bound by the Convention, there is no standard in which the time to initiate proceedings would be possible. Usually, it is six months or a year, although it can reach up to two years or not be determined at all.⁵² In *Rasmussen v. Denmark*,⁵³ the Court introduced a time limit that could restrict the time in which it is possible to deny paternity. Such a measure lies in the child's interest and serves legal certainty. However, the latter cannot prevail in biological and social realities. The Court stated that the lack of recognition of situations in which the father cannot deny paternity due to the time limitation after having recognized the biological fact constitutes a violation of the private life.⁵⁴ The ECHR demonstrated a similar

48 Stojanowska, *supra* note 8, at 32

49 *Paulik v. Slovakia*, no. 10699/05, § ..., ECHR 2006-XI (extracts)

50 Jasudowicz, *supra* note 28, at 27.

51 *Shofman v. Russia*, no. 74826/01, § ..., 24 November 2005

52 Jasudowicz, *supra* note 28, at 29.

53 *Sørensen and Rasmussen v. Denmark*, no. 52620/99, § ..., 28 November 1984, Series A no. 87.

54 *Id.*

approach in the *Phinikaridou v. Cyprus*⁵⁵ case, stating that even though the sole existence of a time limitation does not violate Article 8 of the European Convention on Human Rights, the lack of effective mechanism to execute one's rights does so as it does not enable the child to recognize their own identity.

The *Chavdarov v. Bulgaria*⁵⁶ case shows a wide margin of appreciation provided by the ECHR. The applicant who was the biological father of the children was not recognized as such because the children's mother was in a relationship with another man. When the women parted from the applicant to begin a new relationship, the biological father consulted a lawyer who informed him that according to the Bulgarian law, it is impossible to deny the alleged paternity of the applicant. As the national law provided no legal measures, the applicant reached directly to the ECHR. The Court ruled that Bulgaria's duty is to protect family life. In the described case, however, the applicant was not deprived of family life and the bond between him and his children was not threatened in any way.⁵⁷ This ECHR position indicates that the Court itself shall not decide about the formal question of national legislation. Instead, the Court examines the true effectiveness of legal rules and their inference in human rights.

IV. Father-Child Relationship

Law does not interfere in a relationship that is being developed between the father and the child when the first of the legal subjects is married to the child's mother unless the nature of the said relationship is abusive. Nonetheless, in a situation in which the father-child bond is not protected by law, it is crucial to demonstrate its existence. The contrast between the father's concern regarding the child can be demonstrated by two cases where the ECHR paid attention to the fathers' interest in the well-being of his child before and after its birth—*Róžański v. Poland* and *Yousef v. The Netherlands*.⁵⁸ However, this kind of attention cannot be limited only to the moment when the father is an applicant before the ECHR.

The same conclusion can be drawn from the case of *Nylund v. Finland*,⁵⁹ where one could note that in order to invoke Article 8 of the European Convention on Human Rights, the father has to demonstrate the interest in the child's well-being before as well as after they are born. It does not change the fact that based on this ECHR ruling, this Article of the Convention can be treated as a facilitator of the development of the bond between the father and the child—even if the child was not born in a relationship recognized by law. Because of the existence of such

55 *Phinikaridou v. Cyprus*, no. 23890/02, § ..., 20 December 2007

56 *Chavdarov v. Bulgaria*, no. 3465/03, § ..., 21 December 2010

57 *Id.*

58 *Yousef v. the Netherlands*, no. 33711/96, § ..., ECHR 2002-VIII

59 *Nylund v. Finland* (dec.), no. 27110/95, § ..., ECHR 1999-VI

an assumption, it is the actual reality that forms the legal one and not *vice versa*.

The same assumption can be seen in the cases pertaining to other aspects of the development of the bond between father and his child as it underlines the respect towards family life. *Kroon and Others v. The Netherlands*⁶⁰ is a very important case which demonstrates respect towards family life requires that the biological and social reality should outweigh the legal presumption. The Court also recognizes the existence of the relationship between the minor and their parents even if these parents are not married.⁶¹ Furthermore, parents do not need to live together in order to secure the existence of a family tie between them and their child. In this ruling, ECHR underlines the importance of the state's positive obligations to guarantee that the legal reality mirrors social reality in the best way possible.⁶²

The ECHR held a similar position in the case of *Keegan v. Ireland*,⁶³ pointing out that the child is an offspring of two people, regardless of their mutual relationship and the legal status of their relationship. The Court emphasized that a bond between parents and the child is independent from the relationship between both parents and it exists even if the relationship between parents has ended or they do not live together (*Berrehab v. The Netherlands*⁶⁴).

The cases described above express the ECHR position that Article 8 of the European Convention on Human Rights also protects family structures that differ from the conventional configuration: parents and a child. The Convention is treated as a *living instrument*, a tool designed to match a dynamically changing social reality rather than a means of imposing rigid frames that would limit this development. Therefore, ECHR's position observed in the cases regarding the formal definition of the word "family" indicates the Court prioritizes the actual reality over the legal presumption. This stand benefits the *child's best interest* as it guarantees children the right to know their identity and the legal certainty regarding one's origin.

The ruling in *Yousef v. The Netherlands* illustrates that the Court does not place the biological reality above other values. Despite the fact that the applicant was the daughter's father, the ECHR did not overlook the violation of Article 8 of the European Convention on Human Rights. The father filed the complaint only after the girl's mother died, referring to the fact that the national law prohibited him from recognizing the child and, consequently, the right to decide about her future. The ECHR ruled that law can protect the development of family life provided that it existed before. The father's lack of interest towards the child during earlier stages of development proves that the applicant was not deprived of the right to private and

60 *Kroon and Others v. The Netherlands*, 27 October 1994, § ..., Series A no. 297-C.

61 Charlotte Mol, *Non-traditional Family Forms & the International Dimension of Family Life: A Report on the ERA Seminar*, 'Recent Case Law of the European Court of Human Rights in Family Law Matters', Family & Law, June 2016, available at: <http://www.familyandlaw.eu/tijdschrift/fenr/2016/06/FENR-D-16-00006/fullscreen>.

62 Emerton et al., *International Women's Rights Cases*, 325, (2005).

63 *Keegan v. Ireland*, 26 May 1994, § ..., Series A no. 290,

64 *Berrehab v. the Netherlands*, 21 June 1988, § ..., Series A no. 138

domestic life because it had not existed before. The ECHR explained its decision by claiming that in situations where both the parent's and the child's best interest are in question, "the child's rights must be the paramount consideration."⁶⁵ The willingness to protect the father's rights does not justify the child's detachment from their family.

Apart from denying paternity, *Chavdarov v. Bulgaria* was concerned with the way in which the bond between the father and the child might be protected in light of the European Convention on Human Rights. Unless this relationship is threatened, the ECHR is not obliged to state that the applicant should become a legal father, based only on the notion that the law should reflect the biological reality. The Court did not observe a violation of article 8 of the European Convention on Human Rights when giving priority to the social reality over the biological reality. The Court also indicated that the sole formal issue cannot be the violation of private and domestic life if the social reality is not being threatened in any way.

A separate question concerns the relationship between the presumed-biological father and their child after it is demonstrated that they are not the biological father after all. In the *Nazarenko v. Russia*⁶⁶ case, the Court ruled that it is the State's duty to protect a bond between the child and the man who raised them. The lack of the ability to do so violates Article 8 of the ECHR

V. Conclusion

Analyzing the case-law demonstrated above, one cannot arrive at the conclusion that the ECHR does not advantage *a priori* any of the legal subjects. At the same time, it is crucial to underline the importance of the *child's best interest* principle, as the offspring is a weaker legal subject and instrumental treatment by the state authorities could affect them in the most permanent way. When ruling, the ECHR has to weigh not only the concern for all of the legal subjects involved but also to determine the values being balanced. The Court must consider, in cases of conflict between different child's rights, the right to preserve one's own identity and the right to non-interference in one's private, familiar or domestic life ensured by Articles 8⁶⁷ and 16⁶⁸, respectively, of the United Nations Convention on the Rights of the Child.

The role of the ECHR is not to protect the institution of marriage. A child born in wedlock benefits from the presumption of the paternity of the mother's husband; it is not an irrebuttable presumption and neither is the legal certainty that is being protected by such a presumption. In cases concerning recognition of one's

65 Jasudowicz, *supra* note 28, at 27.

66 *Nazarenko v. Russia*, no. 39438/13, § ..., ECHR 2015 (extracts)

67 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>

68 *Id.*

identity, the ECHR inclines towards the position of the child who invokes the right to learn it. At the same time, the country bound by the Convention must ensure that a man can undergo genetic testing in a way that is not too harmful for him when compared to the benefits that a child might obtain. According to the Court, domestic law should also provide effective means for use by a biological father in the recognition of the child. Hence, one can conclude that the ECHR is more keen on preserving already-existing structures inside the countries rather than dealing with particular cases in which it would take the role of an arbiter.

The role of the ECHR is not to replace the national courts nor to be the highest instance. What it does, though, is consider whether given values have been weighed in a manner consistent with the European Convention on Human Rights. Despite the fact that the ECHR examines national legislation, it looks at it from a different angle than national lawmakers who create law that has to foresee countless future cases. The ECHR starts by considering a specific situation and checks whether the national law is able to efficiently provide an individual with their inalienable rights.

If the recognition of the child violates an existing *status quo*, the ECHR examines the character of a particular case, leaving countries a wide margin of appreciation in weighing which value is the prevailing one; it takes into consideration factors such as child's age, father's involvement in his offspring's life, stability of family life, or outcomes of recognition of the child's identity both present and future. Importantly, depending on the child's age, the *child's best interest* is understood differently. A younger child would benefit more from the stability of their family, whereas for an older child, knowing their identity might be of a greater importance. However, this is not an official rule of the ECHR's decisions as it processes each request individually.

The ECHR demands the effectiveness of legal means provided by national legal systems also in cases that involve denial of paternity. It is on individual countries to create a well-functioning mechanism that allows an alleged father to rebut a presumption of paternity. To ensure that a child's right to family life is being executed and there is stability in the father/child relationship, there is a time limit that cannot be exceeded in the national legislation in terms of denying paternity. Simultaneously, the Court claims that the sole existence of a time limitation is not a law *per se* but instead a meta-law; it is being used in order to protect a certain value and not for the purpose of existence of such a restriction. That is why the Court views it as a violation of Article 8 of the European Convention on Human Rights when applicants do not possess the factual ability to enjoy the rights which the time limitation was meant to protect, specifically the right to deny paternity by a man who is not the biological father of the child. On the other hand, assuming that the role of this restriction is to safeguard the man's rights even when the alleged father would not have the possibility to rebut the presumption, the Court does not rule in advance in his favor if it is to be harmful to the child.

In the ECHR verdicts that regulate the relationship between the father and

the child, the Court's diligence towards the *child's best interest* is noted. At the same time, the ECHR does not create a new definition of family that must be approved by the countries bound by the Convention, leaving them a wide margin of appreciation. As an authority engaged in human rights issues, it protects the well-being of individuals and seeks to ensure their protection by national legislation by making sure there are some mechanisms that enable effective protection of human rights. The child's right to establish a relationship with their father is treated by the ECHR as superior in comparison to the legal and social reality. At the same time, it is important to observe the irreversibility of this rule; the biological father does not possess an absolute priority to contact his child if, in situations that stray from a definition of a standard domestic life (one family house, married parents, children), he does not demonstrate a due care for and interest in his child. He cannot refer to the *child's best interest* as it would be synonymous with treating them instrumentally.

To summarize, the ECHR provides fathers with the protection of their powers guaranteed in Article 8 of the European Convention on Human Rights in terms of establishing paternity as well as denying the unjust presumption of paternity. It is worth stressing that fathers' rights do not function in a void and the ECHR understands them as individuals' rights supplemented by certain duties of fatherhood. Due to this approach, the child becomes the subject of a legal dispute instead of being an object that is later passed to one of the disputing parties. Consequently, the ECHR does not oppose fathers' and mothers' rights, although in some cases they might be competing with each other. On the contrary, it seeks solutions in which both of them can be harmonized.

Table of Legislation

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950,

Europ.T.S. No. 5; 213 U.N.T.S. 221.

Guide on Article 8 of the European Convention on Human Rights (31 August 2020),

https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United

Nations, Treaty Series, vol. 1577, p. 3, available at <https://www.refworld.org/docid/3ae6b38f0.html>

Table of Cases

- Berrehab v. the Netherlands*, 21 June 1988, § ..., Series A no. 138
Canonne v. France, no. 22037/13, 25 June 2015.
Chavdarov v. Bulgaria, no. 3465/03, § ..., 21 December 2010.
Jäggi v. Switzerland, no. 58757/00, § ..., ECHR 2006-X.
John Anthony Mizzi v. Malta, no. 17320/10, § ..., 22 November 2011.
Keegan v. Ireland, 26 May 1994, § ..., Series A no. 290.
Kroon and Others v. The Netherlands, 27 October 1994, § ..., Series A no. 297-C.
Mandet v. France, no. 30955/12, § ..., 14 January 2016.
Mifsud v. Malta, no. 62257/15, § ..., 29 January 2019
Mikulić v. Croatia, no. 53176/99, ECHR 2002-I, 7 February 2002.
Nazarenko v. Russia, no. 39438/13, § ..., ECHR 2015 (extracts)
Nylund v. Finland (dec.), no. 27110/95, § ..., ECHR 1999-VI
Odièvre v. France [GC], no. 42326/98, § ..., ECHR 2003-III
Paulík v. Slovakia, no. 10699/05, § ..., ECHR 2006-XI (extracts)
Phinikaridou v. Cyprus, no. 23890/02, § ..., 20 December 2007
R.L. and Others v. Denmark, no. 52629/11, § ..., 7 March 2017
Różański v. Poland, no. 55339/00, § ..., 18 May 2006
Sørensen and Rasmussen v. Denmark, no. 52620/99, § ..., 28 November 1984,
 Series A no.
 87.
Shofman v. Russia, no. 74826/01, § ..., 24 November 2005
Yousef v. the Netherlands, no. 33711/96, § ..., ECHR 2002-VIII

Bibliography of Secondary Sources

- Cebotarev, Nora, *Familia, socialización y nueva paternidad*, Revista Latinoamericana de \ Ciencias Sociales Niñez y Juventud, no. 2, 63 (2003).
 Długoszewska, Iwona, *Przesłanki oraz skutki ograniczenia władzy rodzicielskiej*, 37 (2012).
 Emerton et al., *International Women's Rights Cases*, 325, (2005).
 Gołowkin-Hudała, Magdalena, *Zgoda matki na uznanie dziecka w świetle ustawodawstwa polskiego i wybranych państw europejskich*, in *Pochodzenie dziecka. Polskie regulacje prawne na tle ustawodawstw wybranych państw europejskich* 40 (ed.. S. L. Stadniczeńko, M. Gołowkin- Hudała 2005).
 Ignaczewski, J. (ed.), *Komentarz do przepisów KRO regulujących władzę rodzicielską*, in *Władza rodzicielska i kontakty z dzieckiem. Komentarz. Wyd. 4*, Warszawa (2019).

- Kawula, Stanisław, *Mozaikowość rodziny. Szkic do portretu współczesnych form rodzinno-mażeńskich*, 17 (2003).
- Khader, Serene J., *When Equality Justifies Women's subjection: Luce Irigaray's Critique of Equality and the Fathers' Rights Movement*, 23 *Hypatia A Journal of Feminist Philosophy*, no. 4, 48 (2008).
- Merckx, Evelyn *Frolich v. Germany: (ab)using the child's best interest to safeguard those of others*, Strasburg Observers, November 20, 2018, available at: <https://strasbourgothers.com/2018/11/20/frohlich-v-germany-abusing-the-childs-best-interests-to-safeguard-those-of-others/>.
- Mol, Charlotte, *Non-traditional Family Forms & the International Dimension of Family Life: A Report on the ERA Seminar, 'Recent Case Law of the European Court of Human Rights in Family Law Matters'*, *Family & Law*, June 2016, available at: <http://www.familyandlaw.eu/tijdschrift/fenr/2016/06/FENR-D-16-00006/fullscreen>.
- Ronen, Ya'ir, *Redefining the child's right to identity*, 18 *International Journal of Law, Policy and the Family*, no. 2, 2004, at 157.
- Skrzydło-Tefelska, Ewa, *Uznanie dziecka w prawie międzynarodowym* 30 (Wrocław, Zakład Narodowy imienia Ossolińskich Wydawnictwo, 1990).
- Stojanowska, Wanda, *Władza rodzicielska pozamałżeńskiego i rozwiedzionego ojca. Studium socjologiczno- prawne*, 32 (1985).
- Szenkowski, Dariusz, *Zagubiony wymiar dobra dziecka*, in *Współczesne ojcostwo. Konteksty kulturowe, pedagogiczne i prawne*, 86 (ed. E. Ogrodzka- Mazur, G. Błahut, T. B. Chmiel 2016).
- Ustawa z dnia 25 lutego 1964 r. - Kodeks rodzinny i opiekuńczy*, Dz.U. nr 9 poz. 59 (2017)
- [Polish Journal of Laws, No. 9 position 59 (2017)].

CHINESE AMERICAN BIRTHRIGHT CITIZENSHIP DURING THE EXCLUSION ERA

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I. Introduction

In 1898, the Court made a landmark decision in the case *United States v. Wong Kim Ark*, in which an American-born Chinese man successfully claimed American citizenship in court.¹ Born in San Francisco to working-class Chinese immigrant parents, Wong Kim Ark was stopped from entering the United States in 1895 on his way back from a visit to China. The collector of customs examining Wong's identification papers claimed he was ineligible to enter the country, as he could not be an American citizen due to his parents' status as Chinese aliens, as Chinese exclusion laws prohibited Chinese laborer immigration. Wong was detained on the steamship on which he had arrived, where he awaited deportation to China. To secure his release, Wong's attorney filed a writ of *habeas corpus* in federal district court. When the court ruled in Wong's favor, the Justice Department—under pressure from Chinese exclusionists—appealed the ruling directly to the Supreme Court, intending to use Wong's citizenship claim as a test case to end the practice of granting citizenship to children born to alien immigrants in the United States.

However, rather unexpectedly, *Wong Kim Ark* instead became an important protection of birthright citizenship when the Court ruled in a 6-2 decision in favor of the defendant.² Even more interestingly, the case is also something of an anomaly in the Supreme Court's own otherwise conservative record. In an earlier case, *Elk v. Wilkins* (1884), the Court had rejected the citizenship claim of John Elk, a Winnebago man born on a reservation in Iowa to Wisconsin-born parents. Citing previous treaties between Indian American tribes and the United States government, the Court ruled that Elk was a subject of an Indian nation "alien and dependent" to the United States and, therefore, the protections of the Citizenship Clause did not apply to him.³ Given the Supreme Court's willingness to exclude particular groups from citizenship based on a narrow interpretation of the Fourteenth Amendment, its decision to recognize Wong's claim to citizenship becomes all the more striking. Just as *Elk v. Wilkins* originated from controversy

1 *United States v. Wong Kim Ark* 169 U.S. 649 (S. Ct. 1898)

2 Lucy E. Saylor, *Wong Kim Ark: The Contest over Birthright Citizenship in Immigration Stories*, 34. (2005)

3 *Elk v. Wilkins*, 112 U.S. 94,99 (S. Ct. 1884)

over the recognized national status of American Indians, *Wong Kim Ark* arose during a time when intense anti-Chinese sentiment dominated American politics. The same year the Supreme Court heard this case, a legislator stated in a speech on the House floor that, “The United States is committed to the policy of the exclusion of Chinese laborers. There is no difference of opinion on that subject.”⁴ Furthermore, under the Chinese Exclusion Act of 1882, Chinese immigration had been virtually banned for a decade and a half, and any Chinese person living in the country at the time was ineligible for citizenship by naturalization.⁵

Thus, at first glance, the *Wong Kim Ark* decision seems to contradict the prevailing ideology behind U.S. immigration policy by allowing any Chinese person born in the United States to claim citizenship at birth. This essay seeks to understand the political forces in play that influenced the case’s outcome as well as its eventual impact. We argue that, though the Supreme Court’s decision to uphold Wong’s citizenship was hailed as a victory for Chinese people seeking protection in the American legal system in spite of existing exclusion laws, the ruling was made with an ultimately conservative agenda in mind. In our exploration of how the Supreme Court came to its decision, we will first examine *Wong Kim Ark*’s origins, tracing its roots in Chinese exclusion. From there, we will assess the ways in which anti-Chinese rhetoric informed legal debate over the constitutionality of birthright citizenship, before examining how the Supreme Court weighs in on this issue in *Wong Kim Ark*’s majority opinion. Finally, we will analyze the policy changes that occurred within a decade of the decision in order to assess *Wong Kim Ark*’s immediate impact on the enforcement of American immigration policy. The history of *Wong Kim Ark* illuminates a larger narrative of citizenship as a political issue, which, though complicated, was guided by a distinct ideology of using race as a filter for American citizenship. In our attempt to contextualize the case within this narrative, we will frame the *Wong Kim Ark* decision within a discussion of how the movement for Chinese exclusion grew and developed at a time when the country found itself grappling with the question of who deserved American citizenship.

II. Birthright Citizenship & Chinese Exclusion

Wong’s case evoked a deep cultural anxiety over Chinese immigration to the United States that became a prominent theme in American politics during the previous half century. To understand the significance of the Supreme Court’s unconventional decision in *Wong Kim Ark*, it is important to understand that America has a history of active hostility toward its Chinese population. Between 1850 and 1870, the number of Chinese immigrants in the United States increased anywhere between 15 and 80 times over.⁶ Their arrival was soon met

4 Senator Platt, *Congressional Record* 35, 57th Congress, 1st sess. (1902)

5 *Ibid.*

6 Population data from 1850 and 1870 on Chinese immigration is incomplete. Estimates of

with intense—often violent—protest, particularly from labor unions fearful of increased job and wage competition. These protests gave rise to the rhetoric of Chinese exclusion, depicting Chinese immigrants as inherently unassimilable into American culture. Legislative campaigns to prohibit Chinese immigration and naturalization began as early as 1862 in California, the state with the highest concentration of Chinese laborers in the country. When the first attempts to place Their arrival was soon met with intense—often violent—protest, particularly from labor unions fearful of increased job and wage competition. These protests gave rise to the rhetoric of Chinese exclusion, depicting Chinese immigrants as inherently unassimilable into American culture.⁷ Legislative campaigns to prohibit Chinese immigration and naturalization began as early as 1862 in California, the state with the highest concentration of Chinese laborers in the country.⁸ When the first attempts to place restrictions on Chinese immigration were struck down in court, California lawmakers sought to pressure Chinese immigrants to leave the state by enacting discriminatory economic policies instead. During the 1870's, San Francisco passed some of the harshest ordinances in the country, designed to harass Chinese residents and businesses. These laws ranged from zoning rules preventing Chinese-owned businesses from operating in white neighborhoods to construction regulations prohibiting laundry businesses—which were predominantly run by Chinese proprietors—from operating in wood buildings.⁹

California's record for legislating against Chinese immigrants sent a clear message to federal legislators seeking to run for office: prioritizing Chinese exclusion was key to courting the California vote. The call for Chinese exclusion entered national politics during the 1876 presidential election, when both the Democratic and Republican parties made opposition to Chinese immigration a prominent plank in their platforms.¹⁰ Shortly thereafter, the first version of the Chinese Exclusion Act was introduced to the House of Representatives. Once the bill was signed into law on May 6, 1882, it became the first significant restriction on immigration for an entire ethnic group, banning Chinese labor immigration to the country for ten years.¹¹ Most notably, the Exclusion Act also declared Chinese immigrants already

Chinese in the U.S. in 1850 range from around 700 to 4,000. According to the 1870 U.S. Census, there were around 63,000 Chinese residing in the country. U.S Census, *Chinese Population*. (1850-1870).

7 American Federation of Labor, Samuel Gompers, and Herman Gutstadt, *Meat vs. Rice: American Manhood Against Asiatic Coolieism, Which Shall Survive?* (1902)

8 Franklin Odo, *The Columbia Documentary History of the Asian American Experience* (New York: Columbia Univ. Press, 2002), 26.

9 Lon Kurashige, *Two Faces of Exclusion: The Untold History of Anti-Asian Racism in the United States*, 19 (2016)

100 Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act*, 12 (2002)

11 The first restrictive federal immigration law was the Page Act, which was passed in 1875.

The act prohibited the immigration of women from “China, Japan or any other Oriental country” for “immoral purposes”. *An Act Supplementary to the Acts in Relation to Immigration*, 43-141, U.S.S.L § 477-478, 18 (1875), 477-478.

living in the United States to be ineligible for citizenship via naturalization.¹²

A. Citizenship Appeal Precedents

The effect of the Exclusion Act was seen immediately in the courts. From the year that the law was passed until 1905, thousands of Chinese petitioners would appeal their citizenship statuses in federal court.¹³ The Supreme Court heard a handful of these cases and, each time, ruled against the petitioner with very little exception. In *Chae Chan Ping v. United States* (1889), a Chinese citizen barred from reentering the United States argued that the provisions of Chinese exclusion laws illegitimately breached the terms of the 1868 Burlingame Treaty.¹⁴ Ping had resided in San Francisco for two years until he departed for his homeland in 1887. Prior to his departure, Ping had obtained a certificate that would allow him to reenter the United States from the collector of customs. However, while Ping was outside of the United States, Congress passed the Scott Act in 1888, nullifying his reentry certificate, so Ping was detained on the steamship upon his return to the United States. His counsel filed a writ of *habeas corpus*, alleging that Ping's detainment violated the terms of the 1868 Burlingame Treaty, which stipulated that a Chinese citizen residing in the United States would enjoy the status of subjects to a "most favored nation." The Supreme Court heard this case on appeal from an order of the circuit court of the United States for the Northern district of California.

In the end, the Supreme Court denied Ping reentry, recognizing the plenary power of Congress to enforce immigration policies, even when they ran contrary to international treaties. Justice Field wrote the majority opinion. Though Justice Field himself had pushed back against exclusionist legislation during his tenure on the California Supreme Court, the position he takes in this case appears much more conservative. Describing the Chinese exclusion laws as "protective legislation" against the "great danger that at no distant day that portion of our country would be overrun by [Chinese]." Justice Field goes on to state that treaties with other countries are "of no greater legal obligation than" a legislative act passed by Congress. Therefore, the Court ruled, since Congress passed the exclusion laws *after* ratifying the Burlingame Treaty, that the stance that these acts took against Chinese immigration would be the final word on the issue. Four years later, the Court doubled down on its position in *Fong Yue Ting v. United States* (1893).¹⁵ Ting and two other Chinese citizens were arrested in New York City after they were found without certificates proving their legal residency in the U.S. In this case, the petitioner argued that the exclusion laws sanctioned the detainment of Chinese

12 Diplomats and their children as well as students studying in the United States were excepted from Chinese exclusion policies. *Chinese Exclusion Act*.

13 Salyer, L., 1995. *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Studies in legal history). University of North Carolina Press.

14 *Chae Chan Ping v. United States*, 130 U.S. 581, 581 (1889).

15 *Fong Yue Ting v. United States*, 149 U.S. 698, 698 (1893).

residents without due process of law, thereby rendering the policy unconstitutional and void. However, the Court ruled again in a 6-3 majority in favor of the U.S. government while citing *Chae Chan Ping* as a precedent for this decision.¹⁶

While each of these petitioners was a Chinese citizen residing in the United States rather than being American-born like Wong Kim Ark, the outcomes of these early cases are telling of how existing attitudes toward the Chinese affected the way in which the Supreme Court evaluated these cases, making them important precedents to consider before examining the proceedings of *Wong Kim Ark*. As long as the precedent set by these cases held, a Chinese resident appealing his citizenship status would not find protection in earlier laws or treaties—nor would the Supreme Court declare the exclusion laws themselves unconstitutional. The majority opinions of both cases plainly affirm the legality of Chinese exclusion. In both cases, the Supreme Court declared the right to “exclude aliens from its territory” to fall within a government’s jurisdiction. Though the Court never explicitly commented on the legitimacy of exclusion on the basis of race, its silence on the matter and its record of ruling against Chinese appellants prior to *Wong Kim Ark* made it clear that race would remain a defining condition when evaluating fitness for citizenship. For the time being, Chinese residents would continue to be aliens ineligible for naturalization.

B. The Question Of Birthright Citizenship

The Supreme Court’s continuation of Chinese exclusion soon emboldened Chinese exclusionists to seek a Court decision on birthright citizenship. Though highly restrictive on naturalization by design, Chinese exclusion laws notably did not specify the citizenship status of American-born Chinese. Instead, Chinese children born in the United States presumably obtained American citizenship under the Citizenship Clause of the Fourteenth Amendment, even though their parents would never be eligible for citizenship. Nevertheless, these second-generation Chinese Americans continued to be subject to the exclusion law provisions holding Chinese residents to a higher standard of proof when asked to demonstrate their lawful residence status. Despite his American citizenship, Wong Kim Ark was required to carry on his person at all times a special certificate issued by the Internal Revenue Service.¹⁷ If he was found without this certificate, he would be deported unless a “credible white witness” testified on his behalf in court.¹⁸ Nevertheless, since birthright citizenship allowed Chinese children born in the United States to stay in the country as American citizens, between 1880 and 1890, the population of Chinese residents in the U.S. increased slightly, even as immigration from China slowed to a trickle.¹⁹

¹⁶ *Geary Act* (1892)

¹⁷⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Population of Chinese in the U.S. was 107,488 in 1890—up 1.9 percent from 1880. After 1882,

Anxious to close this alleged legal loophole, exclusionists sought to further restrict Chinese American citizenship by bringing a test case on birthright citizenship to court. Just two years after the Chinese Exclusion Act was enacted, the federal district court of California heard the case *In re Look Tin Sing* (1884). Look Tin Sing was a 14-year-old American-born Chinese, who was detained on his way back from studying abroad in China, on the grounds that he did not have a certificate of lawful residence.²⁰ Hearing the case was Justice Field—of the *Chae Chan Ping* case—and two other federal judges. The prosecution argued that, though a child of foreign parents was eligible for citizenship, Look had not yet reached the age of majority and so could not yet claim his American citizen status. As such, he was “more nearly a Chinese than an American” and, therefore, open to deportation under the exclusion laws. However, unlike in the *Chae Chan Ping* decision, where the citizenship status of the Chinese petitioner depended only upon the legality of a particular provision of Chinese exclusion law, *Look Tin Sing* framed the argument more generally as a question of how the Fourteenth Amendment would apply to all American-born children of immigrants. This important distinction is clearly seen in the examples that Justice Field draws upon in his opinion. Ultimately, citing his concerns that deciding against birthright citizenship would be met with public outcry from European immigrants, thereby paradoxically making it impossible to enforce a Chinese immigration ban, Justice Field ruled in favor of the petitioner.²¹ In doing so, he set an important, if controversial, precedent for validating an American-born Chinese’ claim to citizenship.

The prosecution in *Look Tin Sing* had built its case around interpreting the phrase “subject to the jurisdiction of” in the Citizenship Clause as excluding the children of Chinese aliens, a group explicitly discriminated against by federal immigration policy. Since their Chinese parents could not legally become American citizens, the prosecution argued, these children must not be strictly considered as subjects under the jurisdiction of the United States either. Though this argument had failed to convince the court in *Look Tin Sing*, the principle of *jus sanguinis* was eagerly embraced as the obviously preferable citizenship law within legal academic circles. An 1886 article in the *American Law Register* articulates the reasoning: “Alien parents, acting under the authority of their own sovereign and in hostility to the nation in whose territory they may be at the birth of their children, are not subject to the jurisdiction of the invaded country. And [their] children ... are born subject to the jurisdiction of the country to which their parents belong.”²² In the same year Wong Kim Ark was detained, the *American*

the number of Chinese immigrants entering the U.S. per year remained below 100 for six years in a row. U.S. Census Bureau. *History and Growth of the United States Census*. Washington D.C.: Government Printing Office, 1900. www.census.gov/history/pdf/wright-hunt.pdf.

20 *In re Look Tin Sing*, 21 F. 905, 910 (C.C.D. Cal. 1884).

21 Daily Alta California, 1884. *Look Tin Sing: An Important Case Argued in the Circuit Court Yesterday*.

22 Stoney, T., 1886. *Citizenship. The American Law Register (1852-1891)*, 34(1), p.1.

Law Review published an article written by San Francisco attorney George D. Collins, entitled “Are Persons Born within the United States *Ipsa Facto* Citizens Thereof?” Citing the *Look Tin Sing* decision by name, Collins argued emphatically against the continuance of birthright citizenship and advocated for American citizenship to follow the international law precedent—the citizenship status of a child should be determined by that of his parents, since “by the law of nature alone children follow the condition of their fathers and enter into all their rights.”²³

However, Collins’ opposition to birthright citizenship stemmed from more than legal principle alone. In his criticism of what he saw as a “manifestly impolitic” policy, Collins explicitly names “the Chinese ... a people foreign to us in every respect”²⁴ as unwarranted beneficiaries of such a policy. As he writes, “Now it is evident that such persons are utterly unfit, wholly incompetent, to exercise the important privileges of an American citizen... and yet under the common-law rule they would be citizens.”²⁵ Therefore, since *Look Tin Sing* was never appealed after being decided in federal district court, it would take a Supreme Court decision to finally settle the matter of birthright citizenship. Interestingly enough, Collins played an important role in bringing the *Wong Kim Ark* case before the Court in the first place. In the years after his article was published, Collins began writing letters to the Attorney General in an earnest campaign to overturn the precedent set by *Look Tin Sing* for birthright citizenship, even offering his services as legal counsel on such a case. His persistent appeals ultimately prompted the Justice Department to search for another test case for birthright citizenship.

III. Supreme Court Decision

The details of Wong Kim Ark’s case were strikingly similar to those of *Look Tin Sing*. Both began as *habeas corpus* cases filed in California; Wong’s attorney even cited the *Look Tin Sing* ruling as a precedent in his petition. The proceedings of Wong’s case also followed Look’s closely. The prosecution once again argued the Fourteenth Amendment did not guarantee Wong’s citizenship even though he had been born in the United States, noting his parents’ status as “Chinese persons, and subjects of the emperor of China” as evidence of his status as a Chinese alien.²⁶ Therefore, because Wong was “by reason of his race, language, color, and dress, a Chinese person,” he could be legally denied entry to the United States under Chinese exclusion laws.

Nevertheless, if exclusionists hoped the Supreme Court would deliver a

²³ Emer de Vattel, and Charles G. Fenwick, *The Law of Nations* (Washington D.C.: Carnegie Institution of Washington, 1916), quoted in George D. Collins, “Are Persons Born within the United States *Ipsa Facto* Citizens Thereof?” *American Law Review* 18 (1884), 833

²²⁴ Collins, *Are Persons Born Within the United States Ipsa Facto Citizens Thereof*, 834 (1884)

²⁵ *Id.*, 834.

²⁶ *United States v. Wong Kim Ark* 169 U.S 649 (S. Ct. 1898)

different outcome on *Wong Kim Ark*, they were disappointed. Writing in the majority opinion, Justice Gray began by noting that if the petitioner was determined to be an American citizen, then the restrictions on Chinese immigration imposed by the exclusion laws could not be applied to him, demonstrating the Supreme Court's clear awareness of *Wong Kim Ark*'s significance as a test case for birthright citizenship, and, correspondingly, for the limitations of Chinese exclusion. Yet, following his initial statement of the issue in question, Justice Gray's analysis of the petition focused on the legal precedent for birthright citizenship, without consideration of the petitioner's race. Tracing the doctrine of birthright citizenship from English common law through the early nineteenth century, he finds there to be ample evidence that all children born within the United States to foreign parents who do not hold a diplomatic office were recognized as American citizens without question more than 50 years after the adoption of the Constitution. Furthermore, though the United States also recognized citizenship of children of American citizens born outside of U.S. territorial limits in 1855, Justice Gray noted that there was no evidence to indicate that the doctrine of *jus sanguinis* had superseded that of birthright citizenship.

The question, then, was whether a child of alien parents who are ineligible for naturalized citizenship represented a subject under the jurisdiction of the United States. To this end, Justice Gray noted that, though the manifest intent of the Citizenship Clause had been to establish the citizenship of freed black slaves, the intent of the Fourteenth Amendment itself "was not intended to impose any new restrictions upon citizenship ... [but rather] declaratory in form, and enabling and extending in effect."²⁷ In *Elk v. Wilkins*, the only other case in which the Supreme Court made an adjudication on the meaning of the clause, the American-born Chinese was simultaneously a citizen and thereby language used in the Civil Rights Act of 1866. However, as Justice Gray states, this decision did not extend to cases beyond those concerning members of Indian tribes in the United States. Instead, the wording of the Fourteenth Amendment was designed to exclude from citizenship two classes of individuals—namely, "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state."²⁸ All cases falling outside of these two exceptions must be considered as protected by the Citizenship Clause—regardless of race or color. Consequently, denying American-born Chinese citizenship under the Fourteenth Amendment would also "deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage who have always been considered and treated as citizens of the United States."²⁹

Finally, although the Supreme Court had upheld in previous decisions Congress' authority to determine policies of naturalization and immigration, "statutes enacted by Congress, as well as treaties made by the President and

²⁷⁷ *Id.*, 654.

²⁸ *Id.*, 670.

²⁹⁹ *Id.*, 694.

Senate, must yield to the paramount and supreme law of the Constitution.”³⁰ Since the Constitution had given Congress “a power to confer citizenship, not a power to take it away,”³¹ Chinese exclusion policies could not be extended to bar American-born Chinese from their rightful status. With respect to this decision, Justice Fuller dissented, joined by Justice Harlan. As he wrote, the phrasing of the Citizenship Clause was not intended to permit the Chinese, a group which exclusion laws sought to keep out of the United States, to become “citizens by the accident of birth.”³² Fuller instead declared that children of aliens “must necessarily remain themselves subject to the same sovereignty as their parents,” particularly when their parents have not renounced their foreign citizenship and are “forbidden by its system of government, as well as by its positive laws” to be naturalized.³³ Though Justice Fuller was ostensibly referring here to unnaturalized immigrants in general, his language leaves little doubt that the aliens in question are the Chinese. “Nationality is essentially a political idea,” he argues, and it would be imprudent to ignore Congress’ intent to control the flow of immigration into the United States through the exclusion and expulsion of certain aliens, by ruling that Wong Kim Ark—or any other American-born Chinese—was a citizen.³⁴ Indeed, Fuller’s dissent presciently raised an issue that would complicate the development of American immigration policy for years to come. The American-born Chinese was simultaneously a citizen and thereby entitled to all the constitutional rights given to their status—and also a member of a group categorically barred from American citizenship.

IV. Impact On Immigration Policy

If *Wong Kim Ark* represented a landmark decision, the public reaction certainly did not reflect this fact. News of the decision was met with little fanfare. Headlines about heightening tensions in Cuba and the imminent war with Spain dominated the front page of the *New York Times* the day after the decision was handed down. Buried on page 7, a brief statement declared, “Chinese Born Here are Citizens.”³⁵ Nevertheless, the precedent established by the *Wong Kim Ark* decision would have far-reaching impacts on citizenship law at a critical junction in American history. The conclusion of the Spanish American War within the year would suddenly turn the United States into an imperialist power with territories all over the world, while immigration to the country swelled at the turn of the twentieth century. The Supreme Court had affirmed the rights of American-born Chinese to birthright citizenship, but it had simultaneously

300 Id., 701.

31 Id., 703.

32 Id., 732.

33 Id., 725.

34 Id., 707.

35 “Chinese Born Here are Citizens.” *New York Times* (New York), March 29, 1898, 7.

reinforced the power of Congress to shape immigration policy in the United States as it saw fit. Through both statutory and judicial law at the turn of the twentieth century, American government would seek to curb the growth and naturalization of the Chinese as an undesirable immigrant population, in spite of the guaranteed path to birthright citizenship by the *Wong Kim Ark* decision.

A. Stricter Chinese Exclusion Laws

Quite unsurprisingly, the outcome of *Wong Kim Ark* did not reverse anti-Chinese sentiment in the United States overnight. The cause of Chinese exclusion persistently drew widespread support at the national level of the legislature, a fact amply demonstrated when Congress revisited the restrictions of the Chinese exclusion acts in 1902. Under the original Chinese Exclusion Act, the ban on Chinese immigration and naturalization required renewal every ten years.³⁶ The anticipated renewal of the Chinese exclusion acts in 1902 raised an additional question which had not been a factor in previous reviews of the laws. In 1898, the United States had come to possess several new territories mere months after *Wong Kim Ark* was decided through its annexation of the Hawaiian Islands and American Samoa as well as acquisition of Spain's imperial holdings after the Spanish American War. Amongst these new insular territories, Hawaii and the Philippines in particular stood apart as regions which retained a sizable Chinese population. After the United States annexed Hawaii in 1898, Congress had moved swiftly to pass the Organic Act of 1900, extending all U.S. legislation to the islands, including policies which prohibited Chinese immigration both into Hawaii and from Hawaii to the United States mainland.³⁷ When the 57th Congress subsequently convened in 1902, the question of how Chinese exclusion would be applied to the Philippines would become an important topic of debate.

The initial version of the new bill prohibiting the immigration of Chinese laborers "from any foreign country to the United States, its Territories, or any territory under its jurisdiction, insular or otherwise" drew concern from legislators.³⁸ As Senator George Wellington (Md.) said, "If Congress in this act can exclude the Chinaman from the Philippine Islands by force of its power in this country, how can it exclude the inhabitants of these islands from the right and privilege they should have under the Constitution of coming from the Philippine Islands into other parts of the United States?"³⁹ Some legislators worried that attempting to ban Chinese immigration from the Philippines to the U.S. mainland would paradoxically make it more difficult to enforce exclusion, believing that the immigration ban would immediately be tested in court

³⁶ *Chinese Exclusion Act*, 22 U.S.C. ch. 126 § 61 (1882) (repealed 1943)

³⁷ *Hawaiian Organic Act*, 31 U.S.C. ch. 339 § 141 (1900)

³⁸ *Congressional Record* 35, 57th Congress, 1st sess. (1902)

³⁹ Senator Wellington, *Congressional Record* 35, 57th Congress, 1st sess. (1902)

after such a bill was passed, and “the decision of the Supreme Court will be that [Chinese residents in the Philippines] are citizens of the United States.”⁴⁰

Given the Supreme Court’s otherwise conservative record with respect to decisions concerning Chinese exclusion, it seems probable that such concerns arose from the surprising outcome of *Wong Kim Ark* and the protections the decision extended to American-born Chinese in spite of existing exclusion laws. However, while the citizenship status of residents in U.S. insular territories would indeed be contested in court, the prediction that the Supreme Court would extend Fourteenth Amendment rights to the Philippines was quite mistaken. Instead, in the infamous Insular Cases, the Supreme Court designated various U.S. territorial holdings—including the Philippines—“unincorporated territories.”⁴¹ Consequently, the rights outlined in the Constitution did not extend *ex proprio vigore* to residents of the insular territories. In this way, the Court enabled Congress not only to enforce a Chinese immigration ban upon the Philippines, but also to diminish the impact of *Wong Kim Ark* itself. In spite of the Supreme Court’s decision to uphold Wong’s citizenship, children of Chinese parents born in the insular territories continued to be excluded from birthright citizenship under the technicality that the Citizenship Clause did not extend beyond the U.S. mainland. Though the legislature could not reverse the citizenship of Chinese residents born in the mainland United States, the line of reasoning behind the Insular Cases confined Wong Kim Ark’s protections for Chinese claiming citizenship to the most narrow scope possible. Chinese individuals—and, in fact, any other individual—acquiring American citizenship by birth was now the anomaly rather than the rule, allowing Congress for the most part to continue shaping citizenship law for the purpose of Chinese exclusion.

Thus, while *Wong Kim Ark* should have opened a path to citizenship for Chinese residents—or at least those born in the United States—any illusions that this decision would be readily accepted into a political milieu which had previously held Chinese as a fundamentally unassimilable group were quickly dispelled in the years immediately following the case. The legislative record of Congress at the turn of the twentieth century demonstrated a concerted effort to circumvent the citizenship protections for Chinese immigrants affirmed by the *Wong Kim Ark* decision. Existing provisions of Chinese exclusion laws either remained unchanged or were enhanced to broaden their reach. For its part, the Supreme Court acquiesced to these statutory changes, allowing Congress to extend constitutional rights to newly acquired territories exclusively on an at-will basis. At the center of these efforts was a resistance to *Wong Kim Ark*’s affirmation of a citizenship criteria that would be agnostic to race, particularly as the United States expanded its territories to encompass new regions with substantial Chinese populations. In extending the

40 Ibid.

411 White writes of “territory which has been incorporated into and forms a part of the United States” in his opinion, presumably in contrast to insular territories such as the Philippines. *Downes v. Bidwell*, 182 U.S. 244, 246 (1901).

timeframe and scope of exclusion policies, Congress successfully marginalized Chinese residents as an undesirable immigrant group by accumulating significant political power while retaining the protections that *Wong Kim Ark* afforded for other demographics, which the legislature did not seek to exclude. Moreover, the continuance of Chinese exclusion was only a portent of what was to come less than two years later: Congress would authorize the permanent extension of Chinese exclusion laws, imposing a strict restriction on Chinese immigration that would remain in place until the repeal of the exclusion acts in 1943.⁴²

B. The End To Citizenship Appeal In Court

Despite increasingly harsh laws restricting their paths for immigration and citizenship at the turn of the century, Chinese communities had retained a powerful tool for activism in the ability to file suit in the courts until this point. This would change in 1904, when the Chinese government—angered by the harsh treatment of Chinese subjects under American immigration policy—refused to renew its trade treaty with the United States. In response, Congress moved to extend the provisions of the Chinese exclusion acts indefinitely, while seeking to add new restrictions to the existing policy.⁴³ The new bill also sought to give immigration officials the power to judge the citizenship claims of alleged American-born Chinese people in an effort to close off the “*habeas corpus* route,” which Chinese people took to petition their citizenship status in court.⁴⁴ This provision was ostensibly designed to further erode the protections of the *Wong Kim Ark* decision.

In the years after *Wong Kim Ark*, the number of Chinese claiming birthright citizenship in the courts increased dramatically. In the same year the decision was handed down, there were 261 petitions.⁴⁵ Attorneys for alleged Chinese American citizens would take their cases directly to the federal courts on the grounds that collectors of customs had no authority over the rights of a native-born citizen. Concerned about the weakening enforcement of exclusion laws, exclusionist powers in Congress pushed to limit the access of Chinese petitioning their citizenship to the courts in order to preclude the possibility of *Wong’s* outcome repeating itself. However, the proposed amendment ultimately failed to be included in the final version of the law.

Nevertheless, when these legislative efforts to quash the possibility of Chinese citizenship appeals were unsuccessful, exclusionists turned instead to the judiciary to settle the question. In 1905, the Justice Department set up a test case in *United States v. Ju Toy*, by appealing a *habeas corpus* suit to the Supreme

42 *An Act to Repeal the Chinese Exclusion Acts, to Establish Quotas, and for Other Purposes*, 42 U.S.C. ch. 57 § 78-199 (1943).

43 *Congressional Record* 38, 58th Congress, 2nd sess. (1904)

44 Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law*, 111. (1995).

45 *Ibid*, 99.

Court on the grounds that, should all applicants be allowed to challenge the decisions of immigration officers in court, “orderly administration of the Chinese exclusion law, where citizenship is claimed, remains impossible.”⁴⁶ The circumstances of Ju Toy’s case were remarkably similar to Wong’s. Ju Toy was a cook returning to the United States from a trip to China. He was a Chinese man born in Oakland, California, making him an American citizen by birth—and technically exempt from the exclusion laws.⁴⁷ However, upon his arrival at the port of San Francisco, Ju Toy was denied permission to land and detained by immigration officials who believed he was a Chinese alien. After Ju Toy’s counsel successfully sued for his release in federal district court, the government appealed his case to the Supreme Court.

Even though *Ju Toy* began under precisely the same circumstances as *Wong Kim Ark* had years earlier, this time the government did not base its argument on challenging Ju Toy’s citizenship status. Instead, it argued that the determinations of immigration officials concerning allegations of citizenship should be treated as conclusive, without the option to involve the courts unless “mistake, fraud, injustice, or manifest wrong” was discovered.⁴⁸ Allowing petitions for citizenship allegations in court, the prosecution claimed, would severely hinder the government’s ability to administer not only Chinese exclusion laws but also general American immigration policy. Consequently, the decision delivered by the Supreme Court this time would also be quite different. The court found the case to be in favor of the government in a 6-3 majority. Justice Holmes wrote a conspicuously brief opinion on the decision. As he argued, though “to deny entrance to a citizen is to deprive him of liberty ... with regard to [an alleged citizen] due process of law does not require judicial trial.”⁴⁹ Instead, the court authorized the Bureau of Immigration, which had handled all matters relating to Chinese immigration since 1903, to process Chinese applicants claiming citizenship without judicial review.⁵⁰

According to historian Lucy Salyer, though the opinion declared there was no fundamental distinction between *Ju Toy* and preceding cases dealing with citizenship, the *Ju Toy* decision “carved out a decidedly new proposition” in constitutional law.⁵¹ While the opinion did not mention the *Wong Kim Ark* decision, the *Ju Toy* ruling significantly weakened the protections that the earlier case afforded to American-born Chinese from exclusion laws. By making the assessment of immigration officers final in deciding the citizenship allegations of any individual seeking to enter the United States, the Supreme Court in effect made all Chinese residents vulnerable to the exclusion laws, regardless of their actual citizenship status.

According to historian Lucy Salyer, though the opinion declared there

46 Ibid, 101.

47 *United States v. Ju Toy*, 253 (1905).

48 Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law*, 112. (1995)

49 *United States v. Ju Toy*, 198 U.S. 253 (1905)

50 Erika Lee, *At America’s Gates: Chinese Immigration During the Exclusion Era*, 68. (2003)

51 *United States v. Ju Toy*, 198 U.S. 253 (1905)

was no fundamental distinction between *Ju Toy* and preceding cases dealing with citizenship, the *Ju Toy* decision “carved out a decidedly new proposition” in constitutional law.⁵² While its precedents had specified that certain constitutional rights could not be invoked by aliens to protect them from deportation, *Ju Toy* blurred the distinction between citizen and alien by subjecting both to the jurisdiction of the Bureau of Immigration. Where *Wong Kim Ark* had established protections for native-born Chinese citizens despite broadly existing exclusion laws by distinguishing them from Chinese aliens, the *Ju Toy* decision now broke them down. Perhaps even more importantly, the restrictions that *Ju Toy* placed on the procedural rights of an individual claiming American citizenship would almost completely eliminate the possibility of future challenges to Chinese exclusion in court.

The effects of *Ju Toy* were seen immediately. The number of *habeas corpus* suits filed by Chinese in Northern California dropped precipitously, from 153 cases filed in 1904, to 32 in 1905, and finally to as low as 9 in 1906.⁵³ With no procedural rights beyond the processes of the Bureau of Immigration, Chinese people seeking to enter the country found themselves entirely subject to the inclinations of immigrant inspectors. While there is no way to know exactly how many—if any—Chinese American citizens were wrongly detained and deported as a result of *Ju Toy*, it is more than likely that such incidents did occur, given how conspicuously vague the Supreme Court remained on *how* inspectors should go about evaluating claims of citizenship status. The criteria for verifying the citizenship of Chinese applicants developed by immigration officers can only be characterized as imprecise at best. As historian Erika Lee writes, these measures clearly reflected “racialized assumptions of Chinese Americans as fraudulent or inferior citizens,”⁵⁴ arising from the long-standing perception of Chinese as “perpetual foreigners.”⁵⁵

In addition to providing extensive documentation, from birth certificates to testimonials, Chinese claiming citizenship underwent the same lengthy interrogations that Chinese aliens were subjected to in order to prove their nativity and the right to reenter the United States. While certain applicants were successful, the chances of an individual of Chinese descent being granted entry to the United States rested heavily upon his or her conformity to a highly specific definition of “Americanness” in the eyes of the immigration officer—a mark that many an applicant failed to meet. When San Francisco resident Lee Toy Mock was arrested on suspicion of falsely claiming citizenship, his failure to answer the immigrant inspector’s questions in English led the officer to recommend his deportation, concluding that Lee was an “alien [without] the slightest knowledge of the

522 Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law*, 114. (1995)

53 Ibid, 170.

54 Erika Lee, *At America’s Gates: Chinese Immigration During the Exclusion Era*, 100. (2003)

55 Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* (Durham: Duke University Press, 1996), 4.

English language.”⁵⁶ Though the *Ju Toy* decision did not mark the beginning of such practices, its guarantee that the decision of an immigrant inspector would be final certainly allowed these criteria to be more broadly applied. Thus, not even a decade after *Wong Kim Ark* was decided, access to citizenship for Chinese people had more or less reverted to its original state. Though native-born individuals of Chinese descent were citizens *de jure*, the ways in which immigration policy was enforced—as sanctioned by the Supreme Court—continued to deny Chinese citizens entry to the United States if they did not meet criteria drawn along racial lines. Both the legislative and judicial record at the turn of the century demonstrate that, when the purposes of Chinese exclusion came to be at odds with *Wong Kim Ark*’s protection of birthright citizenship, the aims of exclusionists consistently won out. When considering its immediate impact, the *Wong Kim Ark* decision’s impact upon American citizenship law is altogether ambiguous.

IV. Conclusion

Ironically, the immediate impact of *Wong Kim Ark* was decidedly negative for would-be Chinese immigrants to the United States. The years following the decision saw Congress move to enact stricter exclusion policies than ever before. Some of these policies bolstered Chinese exclusion laws, while other changes broadened restrictions on citizenship, affecting Chinese residents in U.S. territories beyond the mainland. The Supreme Court would also overlook the maneuvers of the government to blunt the effects of *Wong Kim Ark*. The *Wong Kim Ark* case came, perhaps, at an inopportune time, when racialized attitudes toward Chinese in the country sustained staunch support for the exclusion of this group from immigration and citizenship. Indeed, the Supreme Court demonstrated through decisions both preceding and following *Wong Kim Ark* that it had no interest in curbing the enactment of Chinese exclusion policies. Nevertheless, the *Wong Kim Ark* decision’s protection of citizenship for native-born Chinese, in spite of existing exclusion laws, encountered stubborn resistance from the legislature. Chinese American citizens would not see their status fully recognized until Chinese exclusion as a policy was repealed in 1943.

Of course, *Wong Kim Ark* is hailed today by progressives as a foundational case in the development of modern American citizenship law. Its more immediate efficacy in opening a path to American citizenship for Chinese residents is decidedly less successful. However, the decision did have one more noteworthy, if somewhat unorthodox, effect. On April 18, 1906, an earthquake struck San Francisco, causing several fires around the city, most of which burned for three days. All of the city’s birth records were destroyed when the fire burned down the courthouse.⁵⁷ Many Chinese

56 Erika Lee, *At America’s Gates: Chinese Immigration During the Exclusion Era*, 102. (2003)

57 Wayne Hung Wong, *American Paper Son: A Chinese Immigrant in the Midwest*, 28. (2006)

residents took the opportunity to claim American citizenship, saying that they had been born in San Francisco and that their birth certificates had been lost in the fire. Thus, in this rather peculiar way, *Wong Kim Ark* enabled not just these individuals, but also other Chinese immigrants who claimed to be the relatives of these “paper” citizens, to avoid the restrictions of Chinese exclusion. Somewhat ironically, this case that had legitimized Chinese American citizenship by birthright was ultimately most effectively leveraged to enable the illegal immigration of Chinese into the country. By itself, *Wong Kim Ark* did not mark the beginning of significant improvement in the treatment of Chinese in the United States, but perhaps this is unimportant. When considered in the broader context of the movement against Chinese immigration, the history of this case exists as a record of resilience and enterprise that Chinese residing in the United States displayed during the exclusion era, as they sought to enter and stay in the country—struggling against politics, racism, and occasionally even the law itself to assert their status as citizens.

Bibliography

- An Act Supplementary to the Acts in Relation to Immigration*, Public Law 43-141, U.S. Statutes at Large 18 (1875): 477-478.
- An Act to Execute Certain Treaty Stipulations Relating to Chinese*, Public Law 47-126, U.S. Statutes at Large 22 (1882): 58-61.
- An Act to Prohibit the Coming of Chinese Persons into the United States*, Public Law 52-60, U.S. Statutes at Large 27 (1892): 25-26.
- An Act to Repeal the Chinese Exclusion Acts, to Establish Quotas, and for Other Purposes*, Public Law 78-199, U.S. Statutes at Large 57 (1943), 600.
- Chae Chan Ping v. United States*. 130 U.S. 581 (1889).
- “Chinese Born Here are Citizens.” *New York Times* (New York), March 29, 1898.
- Collins, George D. “Are Persons Born within the United States Ipso Facto Citizens Thereof?” *American Law Review* 18 (1884).
- De Vattel, Emer, and Charles G. Fenwick. *The Law of Nations*. Washington D.C.: Carnegie Institution of Washington, 1916.
- Elk v. Wilkins*. 112 U.S. 94 (1884).
- Fong Yue Ting v. United States*. 149 U.S. 698 (1893).
- Gyory, Andrew. *Closing the Gate: Race, Politics, and the Chinese Exclusion Act*. Chapel Hill: Univ. of North Carolina Press, 2002.
- Hawaiian Organic Act*, Public Law 56-339, U.S. Statutes at Large 31 (1900), 141.
- History and Growth of the United States Census. Washington D.C.: Government Printing Office, 1900. www.census.gov/history/pdf/wright-hunt.pdf.
- Hyde, Carrie. *Civic Longing: The Speculative Origins of U.S. Citizenship*.

- Cambridge: Harvard Univ. Press, 2018.
- In re Look Tin Sing*. 21 F. 905, 910 (C.C.D. Cal. 1884).
- Kurashige, Lon. *Two Faces of Exclusion: The Untold History of Anti-Asian Racism in the United States*. Chapel Hill: Univ. of North Carolina Press, 2016.
- Lee, Erika. *At America's Gates: Chinese Immigration During the Exclusion Era, 1882-1943*. Chapel Hill: Univ. of North Carolina Press, 2003.
- "Look Tin Sing: An Important Case Argued in the Circuit Court Yesterday." *Daily Alta California* (San Francisco), September 28, 1884.
- Lowe, Lisa. *Immigrant Acts: On Asian American Cultural Politics*. Durham: Duke University Press, 1996.
- Salyer, Lucy E. *Laws as Harsh as Tigers*. Chapel Hill: Univ. of North Carolina Press, 1995.
- Salyer, Lucy E. "Wong Kim Ark: The Contest Over Birthright Citizenship," in *Immigration Stories*, ed. David A. Martin, and Peter H. Schuck. New York: Foundation Press, 2005.
- Stoney, Thomas P., "Citizenship." *The American Law Register* (1852-1891) 34, no. 1 (1886): 1-14. doi:10.2307/3304972.
- U.S. Congress. Congressional Record. 57th Cong., 1st sess., 1902. Vol. 35, pt 5.
- U.S. Congress. Congressional Record. 58th Cong., 2nd sess., 1904. Vol. 38, pt 6.
- U.S. Constitution, amend. 14, sec. 1.
- United States v. Ju Toy*. 198 U.S. 253 (1905).
- United States v. Wong Kim Ark*. 169 U.S. 649 (1898).
- Wong, Wayne Hung. *American Paper Son: A Chinese Immigrant in the Midwest. Urbana*: University of Illinois Press, 2006.

ARTICLE**PLEA BARGAINING IN THE COOK COUNTY
CRIMINAL JUSTICE SYSTEM: SACRIFICING JUSTICE
FOR EXPEDIENCY?**

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Abstract

Does plea bargaining sacrifice justice for the sake of expediency in the criminal justice system? If so, is this a good thing? Much of the earliest research conducted on plea bargaining has sought to convince academics and the general public that expediency is the most desirable quality when resolving criminal cases, even if done at the expense of ensuring that just outcomes are achieved. From the point of view of trial judges, prosecutors, and defense attorneys, this quality of expediency appears to take special priority. The reasons brought to bear in support of this feature have regularly included the ability of plea bargains to: 1) minimize overwhelming caseloads; 2) maximize the allocation of resources used in managing overwhelming caseloads; and 3) minimize the uncertainties of conviction and sentencing outcomes confronted when taking cases to trial. Notable rebuttals to this campaign of expediency have included beliefs acknowledging that the plea-bargaining system: 1) empowers prosecutors to wield unchecked discretion in determining charge and sentence severity; 2) disenfranchises judges from using discretion to establish more situationally-aware sentences; 3) incentivizes innocent people to plead guilty to crimes they did not commit; and 4) reprimands defendants who choose to see their cases through to trial. In this study, I interview a group of ten individuals who have previous experiences with entering into plea agreements in Cook County, Illinois to determine whether they, too, believe that expediency should take priority in the criminal justice system. This study finds that while returning citizens do hold expediency in high regard, this regard is often overshadowed by concerns they have for other less satisfying features of the plea-bargaining system. These features include: 1) internal and external pressures to plead guilty; 2) a lack of cooperation from court-appointed counselors; and 3) the use of penal detention (in lieu of rehabilitative services) for nonviolent and drug-related offenses.

Biography

Keelly Jones is a recent graduate of the University of Chicago, having received his B.A. in Political Science and B.A. in Public Policy Studies in June of 2019. His academic background widely consists of courses in political theory, analysis, and implementation, emphasizing the capacity to evaluate the foundations of political movements, organizational structures, and legislative processes in both historical and modern contexts.

Keelly currently works as a Project Assistant for the law firm Applegate & Thorne-Thomsen, P.C., in Chicago, Illinois, and has plans to matriculate to law school and specialize in criminal justice within the next two to three years. In his spare time, Keelly enjoys exercising, writing fiction, producing television shows and films, and composing music.

Acknowledgments

I would like to express my appreciation for all of the guidance I received from Professors Gerald Rosenberg, James Leitzel, and Randolph Stone (retired) while completing this study. Other significant contributions include advice and support I received from Dr. Nichole Fazio; Bevis Pardee; Kali Frampton; Amalia Mendoza; Dr. Waldo E. Johnson, Jr.; Dr. Regina Dixon-Reeves; Dr. Melissa Gilliam; Tiana Pyer-Pereira; Molly Cunningham; Annie Heffernan; Shaz Rasul; and Paula Carney. Finally, I would like to acknowledge the tremendous assistance I received from my organizational research consultants in recruiting participants for my study.

*As a special note, this paper was honored as one of ten Finalists for the University of Chicago Department of Public Policy Studies' Richard P. Taub Thesis Prize in May of 2019.

Introduction

I. An Inquiry into the Validity of Plea Bargaining

Imagine, if you will, the following scenario: John Doe is charged with committing X crime, which carries a possible sentence of Y. The prosecutor assigned to John Doe's case offers a plea bargain to reduce the charge from X to W and recommends that John receive a shorter sentence if he pleads guilty to committing crime W. John believes that he is being charged under false pretenses and would prefer to take his case to trial. However, both John's defense attorney and the prosecutor have encouraged him to accept the plea bargain, insisting that ending his case quickly is far more important (to himself and everyone else) than

ensuring that he is proven guilty beyond a reasonable doubt. These parameters leave John with a choice to make. He could reject the offer and demand a jury trial; whose outcome is uncertain but would allow him to retain his position of innocence, until proven guilty beyond a reasonable doubt by the prosecutor. Or he could accept the plea bargain offer, with its more certain outcome, and forfeit his position of innocence (thereby relieving the prosecutor from the task of proving his guilt).

Would you say that aforementioned above proposition is a *fair* one? To *whom* would you say it is *fair*? Alternatively, would you say that the above proposition is a *just* one? To *whom* would you say it is *just*? This paper explores the perspectives of those who have chosen to accept various plea bargains offered throughout the criminal justice system of Cook County, Illinois. Before doing so, this paper provides context for: 1) understanding how the use of plea-bargaining system has expanded throughout the United States; 2) analyzing how scholars have previously considered the strengths and weaknesses of the plea-bargaining system; and 3) deconstructing the method of analysis chosen for exploring these perspectives. For the sake of this paper, I have chosen to define “fairness” as the extent to which procedural decisions made during a criminal case are unbiased and impartial in both their introduction and implementation.¹

Similarly, I have chosen to define “justice” as the courses of action and deliberation through which a criminal offense is punished via the enforcement of a charge and sentence proportional to the severity of the offense committed. A key component to this definition is that, to justly establish a defendant’s guilt for a criminal offense, they must be proven beyond a reasonable doubt to have committed the offense. This feature extends to the understanding that convicting those whom all evidential standards suggest are innocent should be avoided at all costs. Any procedural shortcuts that undermine the thoroughness of these determinations do so in violation of justly establishing an individual’s guilt.

Justice may be pursued for a variety of reasons (i.e. satisfying a need for retribution, fulfilling a desire for restoration, determining the truth among events, maintaining social order and societal welfare), and can be expressed in a multitude of forms (i.e. punitive punishments, rehabilitative treatment, and conditional probation). Regardless, this paper argues that the plea-bargaining system is neither fair nor just on its own, as it is a system which sacrifices securing justice for the pursuit of expediency. From the perspective of many trial judges, prosecutors, and defense attorneys, this focus on expediency is a good thing. What is lesser known, is whether criminal defendants tend to feel the same way about this focus.

¹ MERRIAM WEBSTER, www.merriam-webster.com/dictionary/fairness (accessed November 3rd, 2018).

In their simplest form, plea bargains are defined as a type of legal negotiation in which “an agreement is set up between the plaintiff and the defendant” in a criminal case to resolve said case without the use of a trial.²³ These agreements outline stipulations to be upheld by both the prosecutor and the defendant (in league with their defense attorney) in order for a settlement regarding both the defendant’s charge and sentence to be reached.⁴ Plea bargaining has existed as a mechanism of criminal case disposal in American criminal justice proceedings since as early as the late eighteenth century, establishing appellate and Supreme Court precedent after the end of the Civil War.⁵

Throughout the various developments made to plea bargains over the 155 years since that time, the consensus regarding the use of plea bargains most commonly concerns those who grant plea bargains, rather than those to whom they are granted. The missing link within these discussions of consensus for and against plea bargaining, as I will soon lay out, is the perspectives of criminal defendants (to be referred to as “returning citizens” throughout this thesis for reasons explained below) who have entered into them.

II. The Purpose and Intentions of the Research

The purpose of my research is twofold. First, I seek to accumulate substantial, first-hand returning citizen accounts concerning plea agreement establishment and use throughout the City of Chicago and Cook County, Illinois. Second, I then seek to use the accounts I accumulate to better inform the ways in which legal, political, and academic actors discuss the use of plea-bargaining and its reliability as a means of resolving criminal cases.

My reason for performing this action is simple: focusing on the experiences of returning citizens is new. Very little research has been conducted on defendant experiences within criminal justice systems of any kind throughout the United

2 THE LAW DICTIONARY, <https://www.thelawdictionary.org/plea-bargaining/> (accessed May 15, 2018).

3 Throughout this paper, there will be several instances where I will discuss a situation or circumstance in which a single defendant is being referenced, but a plural pronoun is used when describing them. I have chosen to use gender neutral pronouns in order to avoid making assumptions about the genders of the defendants being discussed.

4 Over time, the tool has taken on a series of different names, including *plea bargains*, *plea bargain agreements*, *plea agreements*, and *plea deals*. I will be using these terms interchangeably throughout this paper, though my preferred choices are either *plea bargains* or *plea agreements*.

5 Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 6, 1–48 (2013).

States, and the few studies and interviews that have been conducted are often isolated and ungeneralizable. From a public policy perspective, this makes any recommendations for how the plea-bargaining system may be improved internally (in ways that address the concerns of those most impacted by it) difficult to quantify and scale. From a public interest perspective, individuals who support criminal justice reform efforts are at a disadvantage. In order to fix a potential criminal justice issue, all relevant information concerning that issue must be made available for scrutiny when possible. Otherwise, it becomes virtually impossible to determine where the error is being made. To that end, this thesis is motivated by the following questions:

1. *If asked to reflect on their experiences with the tool, how would most returning citizens describe the behaviors and relationships of the other key actors, and what might they believe motivates the actors to engage in those behaviors?*
2. *How would most returning citizens define “justice” in the context of the criminal justice system, and what might they have to say about the ability of plea bargains to achieve justice?*

Due to geographical and time restrictions, the scope of this research was limited to plea-bargaining experiences of returning citizens residing within Cook County, Illinois and the city of Chicago. The research conducted consists of personal interview discussions and the completion of a small topical survey of ten returning citizens. The hope for this study is that it will inspire new conversations around the impact the plea-bargaining system has on all the actors involved and draw more attention to how the experiences of defendants may better inform future criminal justice reform efforts.

III. Outline of the Paper

This paper is outlined as follows: Section 1 provides general background on plea bargaining: how it is defined, and how it grew to prominence throughout the United States. Section 2 provides an overview of relevant academic literature concerning how the plea-bargaining system has been historically defended and opposed by various legal scholars and academics. Section 3 describes the methods utilized to investigate the perceptions of returning citizens of the plea-bargaining system (given their direct exposures to the system at different periods of time in their lives). Section 4 provides the results of the analysis (based primarily in the

individual interviews). Section 5 summarizes the conclusions reached, stressing that the plea-bargaining system sacrifices justice and fairness for the sake of expediency. Finally, Section 6 offers recommendations for various ways in which the plea-bargaining system can be made more just and fair over time.

Section 1. Background, Context, and History

Understanding how returning citizens interact with plea agreements and the plea-bargaining system begins with understanding what the central components of a plea agreement are. This section provides a general overview of how plea bargains are intended to function. This overview includes reviewing the system's: 1) relevant actors (i.e. *whose* actions constitute the creation of a plea agreement); 2) relevant activities (i.e. *what* actions constitute the creation of a plea agreement); 3) and relevant types (i.e. *what kinds of plea agreements* can be created). This section concludes with a brief consideration of the plea-bargaining system's constitutional history within the United States Supreme Court.

I. Plea Bargaining Basics

Relevant Actors

Throughout the development of the plea-bargaining practice, four central actors have been identified as relevant to its successful establishment and execution. The first of these actors is the trial judge who, being expected to serve as an impartial arbiter over the terms of the agreement, determines whether or not agreements are in accordance with legal procedures and statutory requirements.⁶ Following the trial judge is the prosecuting attorney (or "prosecutor") who brings the initial charges against the defendant, and seeks to implement a plea bargain agreement in exchange for the defendant's compliance throughout the proceedings.⁷

Next is the defense attorney (or "defense counsel") who serves to represent the interests of the defendant during their trial proceedings and advises them on the options available to them for pursuit in resolving their case, which include the possibilities and consequences associated with accepting a plea bargain agreement.⁸ Finally, there is the defendant who (above all the others) is the individual most affected by the plea agreement, as one cannot be entered into

6 Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059–1154 (1976).

7 Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 52, 50–112 (1968).

8 Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1191, 1179–1314 (1975).

without the defendant's knowing and voluntary consent.

Relevant Activities

During the course of any plea bargain agreement, the prosecuting attorney requires the defendant to plead guilty to whatever charge the prosecutor settles on convicting the defendant with, and to refrain from seeking to have their case appealed at a later time (though this part of an agreement can become void should a court of appeal later determine a violation on the part of the prosecutor to have occurred in other terms of the agreement). In turn, defendants expect prosecutors to make concessions consisting of conditions favorable to a more lenient charge or punishment.⁹

Defense attorneys, acting in the interests of their clients, enter into negotiations with the prosecuting attorney to attempt to secure these conditions, and consult with their clients about the conditions once they have been put forward for consideration. Once the conditions of the plea agreement have been deemed acceptable by the defendant, the defense attorney, and the prosecutor, a formal plea agreement can be brought to the attention of the trial judge. At this point, the trial judge can (at their discretion) choose to either accept or reject the plea agreement.¹⁰

9 These concessions can include: 1) dropping a series of additional charges in exchange for pleading guilty to one or a fewer number of them; 2) lowering a more serious charge to a less serious charge; and 3) lowering a more serious sentence possibility to a less serious sentence possibility.

10 While plea bargaining is often spoken about in terms of its *actors* and *functions*, a feature discussed less frequently are the various *types* of plea bargaining that exist and how each type has evolved to fit specific procedural needs within the criminal justice system. Plea bargaining can be broken down into five occurrence types: *charge bargaining*, *sentence bargaining*, *fact bargaining* ("Plea Bargains: In Depth," Findlaw.com), *nolo contendere pleas* ("Nolo Contendere," Cornell Law School 2015), and *Alford pleas* ("Alford Plea," Cornell Law School 2014). Of the five mentioned here, the two most used types of plea bargaining are *charge bargaining* and *sentence bargaining*. My inquiry is only concerned with these two types. *Charge bargaining* is categorized as an arrangement in which a defendant agrees to plead guilty (by means of a plea agreement) to a lesser charge in exchange for any additional or greater charges being dismissed (Welling 1987, 312). *Sentence bargaining* is categorized as an arrangement in which a defendant agrees to plead guilty (again, by means of a plea agreement) to the original charge levied against them in exchange for receiving a lesser sentence following their conviction (Welling 1987, 312-313).

The Supreme Court's Role in Shaping Plea Bargaining

The plea-bargaining practice itself gained constitutional prominence within the United States in response to a series of three Supreme Court cases centered on defining the procedural options available to defendants under the threat of conviction in the late 1960s and early 1970s. These cases consisted of the following: 1) *United States v. Jackson* (1968); 2) *Brady v. United States* (1970); and 3) *Santobello v. New York* (1971). As is often the occasion, the decision established in each later case invokes rulings established in the decisions of the ones that came before it. Together, these cases culminate into a judicial precedent that allows for the use of plea bargaining in criminal courts (while simultaneously maintaining that there is no constitutional right to do so).

First, in *United States v. Jackson*, the Supreme Court's majority opinion determined that the "death penalty provision" of the 1932 Federal Kidnapping Act was unconstitutional, as it imposed an "impermissible burden upon the exercise of a constitutional right," being the right to trial.¹¹ Though this case did not deliberately discuss the use of plea bargaining, it did highlight a manner in which case disposal systems and statutes could unknowingly pressure defendants into pleading guilty against their will, and corrected a statutory provision in the Federal Kidnapping Act found to have done so.

Second, in *Brady v. United States*, the Supreme Court would encounter a defense that invoked the rulings made in *United States v. Jackson*, though these rulings were ultimately deemed irrelevant. The majority opinion of *Brady* held that the circumstances of *Jackson* do not support the claim that all guilty pleas entered into as a response to the fear of receiving the death penalty from trial are involuntary by default. The *Brady* opinion also solidified the legitimacy of plea bargaining by recognizing the "knowing and voluntary" provisions of entering into a plea agreement.¹² In this way, the Supreme Court acknowledged its promotion of plea agreements as mutually beneficial arrangements for defendants willing to cooperate with other judicial actors by pleading guilty in lieu of a trial.

Finally, in *Santobello v. New York*, the majority opinion of the Supreme Court determined that the state (i.e. the actors within the criminal justice system) maintains an interest in upholding any conditions or requirements set forth in a plea agreement.¹³ Similarly to what was observed in *Brady v. United States*, the Supreme Court once again accentuated the necessity of fulfilling plea agreement conditions as a means of maintaining their mutually beneficial qualities (regardless of their non-constitutional status).

11 United States v. Jackson, 390 U.S. 570-586 (1968).

12 Brady v. United States, 397 U.S. 742-752 (1970).

13 Santobello v. New York. 404 U.S. 257 (1971).

Since these rulings, the popularity of plea agreements in criminal justice systems across the United States has skyrocketed, with their use now constituting 97 percent of all dispositions established.¹⁴ Additional cases on the growing use of plea bargaining have been argued as well, each one continuing to offer credibility to the tool's legal suitability by expanding its procedural restraints and expectations.

Section 2. Literature Review

The literature on how the plea-bargaining system has affected the course of American criminal justice practices is vast. This section simplifies how the strengths and weaknesses of plea agreements have been considered in previous literature by condensing some of the most popular claims into the following categories: 1) theoretical perspectives in *favor* of plea bargaining; and 2) theoretical perspectives in *opposition* to plea bargaining. These features will help us understand how the plea-bargaining system has entertained various degrees of approval and disapproval, depending on whether the costs of its use are attorney-centered or defendant-centered. In turn, we are also provided with a means of comprehending the reasons why returning citizens may or may not find such a tool attractive or unattractive when used to resolve their cases.

I. What Makes Plea Bargaining Seem So Attractive?

Minimizes Overwhelming Caseloads

One reason discussed in the literature for why the plea-bargaining system is beneficial is the belief that it limits the ever-growing number of cases trial judges, prosecutors, and defense attorneys must process for extended periods of time.¹⁵

While the number of state criminal court cases has continued to grow, very little
 14 Federal Sentencing Statistics, United States Sentencing Commission, (2017), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2017/7c17.pdf>.

15 Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 272, 271-326 (2016). Renada Williams-Fisher, *Plea Bargaining Negotiations*, 33 S.U. L. REV. 237, 237-248 (2015). Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761,761-780 (1996). Roger J. Miner, *The Consequences of Federalizing Criminal Law: Overloaded Courts and a Dissatisfied Public*, 4 CRIMINAL JUSTICE, 18, 16-40 (1989). James Kura, *Prove You Need the Money: Public Defenders Should Use Caseload Data to Raise Funds and Influence People*, 4 CRIMINAL JUSTICE, 21, 21-41 (1989). Sam W. Callan, *An Experience in Justice without Plea Negotiation*, 13 LAW & SOC'Y REV. 327, 330, 327-348 (1979). Martin A. Levin, *Delay in Five Criminal Courts*, 4 THE UNIVERSITY OF CHICAGO PRESS FOR THE UNIVERSITY OF CHICAGO LAW SCHOOL, 83, 83-131 (1975).

headway has been made in ensuring that there are enough “competent personnel” to review this increased number of cases thoroughly.¹⁶ This shortcoming makes plea bargaining appear to be a practical solution in comparison.

Some scholars who defend the use of plea bargaining on this premise have gone so far as to suggest that trials for lesser crimes have now become “needless,” as they steal valuable time and resources away from reviewing more serious crimes.¹⁷ Such caseload expansion, in league with the argument that all three key judicial actors are being “underpaid” for their work, sets the stage for plea bargaining’s arousing appeal.¹⁸ Plea bargaining, in relation to this first complication, provides trial judges, prosecutors, and defense attorneys with an outlet for resolving criminal cases faster. This then allows for greater case turnover and grants these actors the ability to focus their time on more complex cases.

Maximizes Resource Use and Efficiency

An additional reason given for supporting the use of plea bargaining is the belief that such a system allows judicial actors to engage in more efficient resource allocations.¹⁹ Much of this rests in the understanding that, once again, more serious and complex crimes demand greater resources than less serious and complex crimes do.²⁰ Some of the more obvious forms of judicial resources include (but are not

16 Welsh S. White, *Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 440, 447, 439-465 (1971). James T. Brennan, *Judicial Fiscal Independence*, 23 U. FLA. L. REV. 279, 277-288 (1971).

17 Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 212, 199-267 (2006). David Brereton and Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC’Y REV. 45, 47, 45-70 (1981). Charles H. Clarke, *Plea Bargaining and Trial Penalties: When May the State Legitimately Require Criminal Defendants to Surrender Their Trial Rights*, 55 IND. L. J. 86, 71-90 (1979-1980). John J. Cleary, *Preparing a Client to Plead Guilty*, 24 PRAC. LAW. 45, 43-56 (1978).

18 Allison D. Redlich and Alicia A. Summers, *Voluntary, knowing, and intelligent pleas: Understanding the plea inquiry*, 18 PSYCHOLOGY, PUBLIC POLICY, AND LAW, 627, 626-643 (2012). Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewed or Exploited in Plea Bargaining Negotiations*, 91 MARQ. L. REV. 161, 145-162 (2007). Michael Asimow, *When Lawyers Were Heroes*, 30 U.S.F. L. REV. 1133, 1131-1138 (1996). Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC’Y REV. 255, 247-260 (1979).

19 KEN CHASSE, NO VOTES IN JUSTICE MEANS MORE WRONGFUL CONVICTIONS, 22, 1-28 (2016). Carrie Menkel-Meadow and Robert G. Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POLICY 239-240, 237-250 (1983). Thomas W. Church Jr., *In Defense of Bargain Justice*, 13 LAW & SOC’Y REV. 522, 509-526 (1979).

20 Welsh S. White, *Proposal for Reform of the Plea Bargaining Process*. 119 U. PA. L. REV. 439, 447 (1971).

limited to): time, money, manual labor, and sources for gathering evidence, with the most valuable among these often being time and money. This understanding offers credibility to the appearance of economic practicality that plea bargaining entertains. In terms of striving to maximize caseload efficiency, trial court judges, prosecutors, and defense attorneys possess an incentive to minimize the number of procedural steps they complete with each defendant they are assigned to.²¹

While it is within reason to assert that the employment of trial court judges, prosecutors, and defense attorneys rely on the occurrence of criminal offenses, the *quantity* of cases being reviewed at any one time influences the *quality* of the outcomes established to resolve them. For example, the most recent data available on the activities of prosecutors within state courts shows that the total operating budget for the 2,330 prosecutors' offices in operation in 2007 was \$5.8 billion.²² From a total of 2,906,795 felony cases resolved, each full-time prosecutors' office was responsible for closing an average of 1,248 cases, with each prosecutor handling 94 cases.²³ These budgetary figures have seen small increases since then, but none proportional enough to match the growing number of cases prosecutors have been tasked with resolving.²⁴

This budgetary stagnation provides a clear motivation for both prosecutor's and public defender's offices use of restraining resource allocations as a metric for

21 For example, an indigent defendant who chooses to resolve their case through a plea agreement avoids accruing additional court expenses encountered otherwise, such as those found in: 1) screening, selecting, and compensating a qualified jury; 2) holding a defendant in pre-trial detention for an extended period of time; and 3) monopolizing more of a trial judge's, prosecutor's, and public defender's limited time, resources, and attention.

22 Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 - Statistical Tables*, THE UNITED STATES DEPARTMENT OF JUSTICE – BUREAU OF JUSTICE STATISTICS 1, 1 (Dec. 28, 2011), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1749>; The most recent data available on the activities of public defenders within state courts shows that the total operating budget for the 957 public defenders' offices (compared to the 2,330 prosecutors' offices) said to be operational in 2007 was a figure of \$2.3 billion (compared to the figure of \$5.8 billion for prosecutors' offices). For more information, please visit the Bureau of Justice Statistics website and review the article provided at this address: <https://www.bjs.gov/content/pub/pdf/pdo07st.pdf>.

23 Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 - Statistical Tables*, THE UNITED STATES DEPARTMENT OF JUSTICE – BUREAU OF JUSTICE STATISTICS 1, 1 (Dec. 28, 2011), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1749>.

24 Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263 (2011); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010).

ensuring expedient case disposal. Any case that can be disposed of quickly is one that saves both money and time for the judicial actors assigned to resolve it. As a result, this relationship blurs the line between pursuits of efficiency and pursuits of expediency in resolving criminal cases: given their limited resources and growing caseloads, to dispose of a case *efficiently* is to dispose of a case *expediently*. In other words, expediency becomes efficiency. Plea bargaining, in relation to this second complication, provides trial judges, prosecutors, and defense attorneys with a means with which to better allocate how they divide their resources among cases of various severity and conviction probabilities, in order to dispose of them quickly.

Minimizes Outcome Uncertainty

While the first two reasons discussed in this section concern the perceived advantages of using plea bargaining by the well-acknowledged judicial actors intended to benefit *themselves*, the final two reasons focus on the advantages these three sets of actors believe exist for *defendants*. The first of these two defendant-oriented reasons for supporting the plea-bargaining system is the belief that it minimizes the degree of outcome uncertainty (for both criminal charges and sentences) associated with common trials.²⁵ This understanding serves as yet another means of offering credibility to the appearance of economic practicality plea bargaining offers.

By setting the conviction and/or sentence expectations to values lower than what would be seen following a formal conviction through trial, trial judges, prosecutors, and defense attorneys (in league with the defendant) facilitate a space in which an enticing “discount effect” can shine through.²⁶ This discount effect, in turn, grants defendants the ability to take a more active role in determining their case’s outcome. Plea bargaining, in relation to this third complication, serves as

25 Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 928 (2016).; Patricia D. Breen, *The Trial Penalty and Jury Sentencing: A Study of Air Force Courts-Martial*, 8 J. EMPIRICAL LEGAL STUD. 206, 213 (2011).; Jeffery T. Ulmer & John H. Kramer, *The Use and Transformation of Formal Decision Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies*, 45 SOCIAL PROBLEMS 248, 259 (1998).; Belinda R. McCarthy & Charles A. Lindquist, *Certainty of Punishment and Sentence Mitigation in Plea Behavior*, 2 JUST. Q. R. 363, 369 (1985).

26 Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 896 (2004); The “discount effect” is a phenomenon through which criminal defendants are led to believe that their cooperation with the other judicial actors is what has led to their receiving a more lenient charge or sentence outcome for their respective cases. This effect (as will be discussed in an upcoming section on prosecutorial overcharging) may not take prosecutorial sentencing discretion into consideration when suggesting this relational outcome.

a catalyst to not only provide defendants with the opportunity to influence the outcome of their case, but to also do so in a way that benefits them when compared to the uncertainty linked to trials.

Maximizes Outcome Expediency

The last of the two defendant-oriented reasons for continuing to support the system of plea-bargaining is the belief that they ensure a swifter and more affordable form of case resolution.²⁷ This form of expediency refers to the speed in which defendants are able to resolve their business with the criminal justice system and (in the best case scenario) return to their normal lives. Involvement with the criminal justice system in most capacities (even those unrelated to a personal act of crime) can often be confusing, intimidating, and stressful: features which become more severe when an individual is made the subject of prosecution.²⁸ These emotional costs are undesirable enough on their own, without the inclusion of the court expenses and fees that accompany them: most of which are often unaffordable to the average individual being held for prosecution.²⁹

The most recent data available on the distribution of felony and misdemeanor cases being tried demonstrates that, in 1996, 82 percent of all state-prosecuted felony defendants were represented by “public defenders” or some other form of “assigned counsel” throughout their case.³⁰ In 1998, 66 percent of all federally-

27 John B. Arango, *Defense Services for the Poor*, 4 CRIM. JUST. 24, 25 (1989); Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 623 (1987); Sam W. Callan, *An Experience in Justice without Plea Negotiation*, 13 LAW & SOC’Y REV. 327, 330 (1979); Francis J. Carney & Ann L. Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U. L. REV. 292, 293 (1969).

28 Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L. REV. 1265, 1293 (2018); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L. J. 1393, 1393 (2018).

29 Salma S. Safiedine & K. Jeannie Chung, *The Price for Justice: The Economic Barriers That Contribute to an Unfair and Unjust Criminal Justice System*, 4 CRIM. JUST. 40, 41-42 (2018); JAIN, *supra* note x, at 1404-1405.; David E. Clark & Kevin J. Murtagh, *Flood of New Court Fees Drown Indigent Defendants*, 22 N. C. ST. B. J. 8, 9 (2017); Monica Llorente, *Criminalizing Poverty through Fines, Fees, and Costs*, 19 CHILD. RTS. LITIG. 18, 19 (2016); Michael Pinard, *Poor, Black and Wanted: Criminal Justice in Ferguson and Baltimore*, 58 HOW. L. J. 857, 870 (2015); Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

30 Caroline W. Harlow, *Defense Counsel in Criminal Cases*, THE UNITED STATES DEPARTMENT OF JUSTICE – BUREAU OF JUSTICE STATISTICS 1, 1 (Nov. 2000); A thorough investigation into whether more recent information was available on the percentage of defendants who use some form of assigned counsel confirmed the existence of a gap. More recent publications on this issue (see, for example, the Justice Policy Institute’s 2011 publication, “System Overload: The Cost of Under-Resourcing Public Defense”)

prosecuted felony defendants were represented by a court-appointed attorney.³¹ Additional unforeseen costs associated with these interactions may include child care costs, elderly care costs, missed work time costs, and transportation costs. Plea bargaining, in relation to this complication of affordability, provides defendants with an option to move through the criminal justice system as quickly and inexpensively as possible without any substantial delays due to features associated with trial preparation.

II. What Makes Plea Bargaining Seem So Unattractive?

The Presence of Unchecked Prosecutorial Overcharging Discretion

One of the main arguments made against the plea-bargaining system is that it empowers prosecutors to overcharge defendants as a means of pressuring them into entering plea agreements.³² While this phenomenon already occurs during trials, it becomes more severe during the process of plea bargaining, as very few procedural mechanisms exist (both at the state and federal levels) to restrict the degree of discretion prosecutors wield when delivering charges.³³ This overcharging phenomenon (also referred to as “overreaching”) can occur within a handful of interconnected activities.³⁴ The lack of regulatory oversight on the charging practices of prosecutors grants them the discretion to either: 1) inflate the number of charges a defendant receives by piling on multiple, overlapping charges for a single crime.³⁵; or 2) inflate the charge substances a crime is associated with,

continue to use the figures established from the data analyzed in 1996 and 1998.

31 *Id.*

32 Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLOM. L. REV. 1304, 1366 (2018).; Kyle Graham, *Overcharging*, 11 OHIO ST. J. OF CRIM. L. 701, 704 (2014).; H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 72 (2011).; Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. R. 37, 75 (1983).; James Vorenberg, *Decent Restraint of Prosecutorial Power*, HARV. L. REV. 1521, 1525 (1981).

33 Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT'L. CRIM. JUST. REV. 22, 23 (2002).; Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. L. LEGAL ETHICS 259, 266 (2001).; Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 775 (1996).; Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 672 (1992).; Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. L. STUD. 43, 43 (1998).

34 CRESPO, *supra* note x, at 1313-1314.; Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 (2008).

35 This process may also be referred to as “charge-stacking.”; CRESPO, *supra* note x, at 1313.; Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CAL. L. REV. 1573, 1595 (2012).; Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a*

even if doing so might reach beyond the credibility of the law or evidence available for said crime at the time.³⁶

Once one of these activities has taken place, the prosecutor can then lower the severity of their own (referring to the prosecutor) expressed charge and sentence preferences (creating what is known as “sentence differentials”) as a means of feigning leniency in exchange for cooperation as part of any plea agreement established.³⁷ The discrepancy of this process, however, is found within the realization that these new charge preferences are what the prosecutor *originally* desired to charge the defendant with when first becoming familiar with their case.³⁸ The “concessions” made in these situations are a means through which the prosecutors can obtain their actual charge preferences, while appearing to reward the defendant’s decision to plead guilty with a more lenient sentence.³⁹ This interpretation contradicts arguments favoring plea bargaining by pushing back against it on the basis of interpersonal morality. The concept of overcharging implies there is a reasonable charge range that is being ignored for something more severe, which violates my earlier definition of “justice” (which requires proportionality in charging and sentencing in response to criminal offenses). In this way, plea bargaining can be seen as a conduit for procedural abuse on the part of prosecutors who seek to ensure that their charge preferences are obtained (even if doing so requires that they deceive defendants on the severity and magnitude of their actions).

The Absence of Flexible Judicial Sentencing Discretion

A second disadvantage highlighted as a consequence of the plea-bargaining system stems from the belief that plea agreements infringe upon the capacity of trial

Doctrinal Response, 6 OHIO S. J. CRIM. L. 453, 463 (2009); Paul M. Secunda, *Cleaning up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1275 (1997).

36 CRESPO, *supra* note x, at 1313.; GRAHAM, *supra* note x, at 1578.; CRESPO, *supra* note x, at 1314.; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1979, 1992, (1992); David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC’Y REV. 45, 47 (1981); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 656 (1981); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978).

37 CRESPO, *supra* note x, at 1314.

38 Ronald F. Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003).

39 *Id.*

judges to fulfill their responsibilities as impartial arbiters of sentence determination.⁴⁰ Much of this infringement stems from a variety of different procedural developments intended to bolster the strength and allure of plea bargaining and plea agreements over time.⁴¹ One such development was the creation of the Federal Sentencing Reform Act of 1984.⁴² This Act abolished the United States Parole Commission and created the United States Sentencing Commission to take its place. This new Commission was chartered with the responsibility to “establish sentencing policies and practices for the federal courts, including guidelines” for determining “the appropriate...punishment for offenders” throughout the United States.⁴³

Whereas the sentencing practices of the criminal justice system prior to this shift were more inclined to resolve cases on an individual level, sentencing practices after this shift (such as the introduction of “mandatory minimum sentences”) were expected to focus on sentence uniformity among cases with comparable circumstances.⁴⁴ Though this shift intended to nullify sentence

40 Julie Stewart, *The Effects of Mandatory Minimums on Families and Society*, 16 T.M. COOLEY L. REV. 37, 38 (1999).; MISNER, *supra* note x, at 756.; Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1854 (1995).; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencer*, 101 YALE L. J. 1681, 1686 (1992).; Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CIN. L. REV. 901, 926 (1991).; Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission’s ‘Mandatory Guidelines’*, 4 FED. SENTENCING REP. 129, 129 (1991).

41 Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722-1723 (2005).

42 Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 188 (1993).; Stephen J. Schulhofer, *Rethinking Mandatory Minimum*, 28 WAKE FOREST L. REV. 199, 215 (1993).; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guideline*, 28 WAKE FOREST L. REV. 223, 223 (1993).; Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 292 (1993).; ALSCHULER, *supra* note x, at 908.; Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 887 (1990).

43 This information was taken from the United States Sentencing Commission Website, “About” Section, under “First Principal Purpose.” For more information, please visit the website at the following address: <https://www.ussc.gov/about-page>.

44 Mark Osler, *The Promise of Trailing-Edge Sentencing Guidelines to Resolve the Conflict between Uniformity and Judicial Discretion*, 14 N. C. J. L. & TECH. 203, 217 (2012).; Amy L. Anderson & Cassia Spohn, *Lawlessness in the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentence Outcomes*, 27 JUST. Q. REV. 362, 363 (2010).; Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, U. CHI. L. REV. 749, 749 (2006).; William W. Wilkins, Jr. & John R. Steer, *The Role*

disparities perceived to exist on the basis of race, sex, age, national origin, family ties, and so on, it had the added effect of dissolving the ability of judges to consider any of these factors when attempting to be more lenient during sentencing.⁴⁵ In this way, plea bargaining obstructs judges from being able to consider defendant and case characteristics likely to result in sentences that are more lenient and individualized than the conditions of a typical plea agreement might allow.

The “Conviction of the Innocent” Problem

Yet another prominent disadvantage attributed to the plea-bargaining system is the belief that the system’s overwhelming presence has cultivated an environment in which individuals who are innocent of the crimes they stand accused of are being pressured into entering plea agreements.⁴⁶ Much of what motivates these endeavors stems from the limitations defendants face in protecting themselves from several previously addressed oversights that exist within criminal procedure today (such as the range of discretion prosecutors wield in determining what to charge defendants with). In many instances, this sentiment represents the logical conclusion to a line of reasoning that views the plea-bargaining system as a “welfare-maximization” problem, meant to be aggregated over a large collection of criminal cases.⁴⁷

When pursued under this premise, maximizing welfare through the use of plea agreements excuses the conviction of innocent individuals as an

of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity, 50 WASH. & LEE L. REV. 63, 71 (1993).

45 STEWART, *supra* note x, at 37.; Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GEND. & L. 169, 170 (1996).; Susan E. Ilingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant’s Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 961 (1992).; Charles J. Ogletree, Jr., *The Death of Discretion Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1951 (1988).

46 David Bjerk, *Guilt Shall Not Escape or Innocence Suffer? The Limits of Plea Bargaining When Defendant Guilt is Uncertain*, 9 AM. L. & ECON. REV. 305, 311 (2007).; Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 629-630 (2005).; Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial*, 17 J. L. ECON. & ORG. 149, 150 (2001).; Bruce H. Kobayashi & John R. Lott Jr., *In defense of criminal defense expenditures and plea bargaining*, 16 INT’L REV. L. & ECON. 397, 397-398 (1996).; SCHULHOFER, *supra* note x, at 1981-1982.; ALSCHULER, *supra* note x, at 707.

47 Nuno Garoupa & Frank H. Stephen, *Law and Economics of Plea-Bargaining*, SSRN 1, 7 (July 21, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=917922.; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1916 (1992).; Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 749 (1983).

acceptable risk to take for the possibility of increasing the number of guilty individuals who accept plea agreements in lieu of trial.⁴⁸ This, in turn, ignores the reality that criminal cases are unique to the circumstances and motivations of the individual parties involved, and fails to reconcile various “social costs” associated with convicting innocent people of crimes they did not commit.⁴⁹ For example, confidence in the legitimacy of the criminal justice system is contingent on public belief that the system considers all who are brought before it to be innocent until proven guilty in a court of law.⁵⁰ Without such a feature, confidence can be eroded and may lead to even greater discrepancies in executing judicial responsibilities in the future. In this way, plea-bargaining is sacrificing justice for those who (by all legal accounts) are innocent of the crimes they are being accused of for the sake of increasing the aggregate number of guilty convictions being processed and resolved.

The “Trial Penalty” Problem

A final disadvantage of the plea-bargaining system rests in the belief that the popularity of plea agreements has resulted in defendants being punished for choosing to take their case to trial rather than plead guilty.⁵¹ What this suggests is that, rather than simply failing to reap the supposed benefits of the plea agreement, defendants are receiving more severe sentences in response to not settling on a plea agreement when comparable crimes are considered.⁵² Many who oppose plea bargaining on this premise argue that such a tactic implies the existence of a procedural bias against defendants seeking to exercise their constitutional right to

48 Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 160 (2011).; Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing under the Federal Guidelines*, 83 CAL. L. REV. 419, 443 (1995).; SCOTT & STUNTZ, *supra* note x, at 1915.

49 Richard P. Adelstein & Thomas J. Miceli, *Toward a Comparative Economics of Plea Bargaining*, 11 EUR. J. L. & ECON. 47, 55 (2001).; SCHULHOFFER, *supra* note x, at 1996.; GROSSMAN & KATZ, *supra* note x.

50 Sarah C. Benesh, *Understanding Public Confidence in American Courts*, 69 J. POL. 696, 703 (2006).; Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT'L CRIM. J. REF. SERV. 1, 14 (2002), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-1.pdf?q=ideas->.; CALLAN, *supra* note x.

51 Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L. Q. 67, 87 (2005).; Malcolm M. Feeley, *Perspectives on Plea Bargaining*, 13 L. & SOC. R. 199, 208 (1979).; LANGBEIN *supra* note x.

52 Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 184 (2007).; Chester L. Britt, *Social Context and Racial Disparities in Punishment Decisions*, 17 JUST. Q. REV. 707, 720 (2000).; GIFFORD, *supra* note x, at 65.; Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOCIAL PROBLEMS 247, 255 (1991).

a trial.⁵³ While it is reasonable to assume that defendant cooperation should result in the defendant receiving a lighter sentence than if they were convicted in trial, the trial penalty problem looks beyond this to consider the extent to which rejecting a plea agreement and favoring a trial should be considered “uncooperative” by nature of constitutional law.

There are a variety of perceivable benefits associated with resolving a case with a plea agreement, some of which have already been proposed in earlier parts of this section. While many of these benefits are subjective in nature (i.e. the belief that plea agreements help minimize overwhelming caseloads), others carry more weight in objectivity (i.e. the belief that plea agreements help minimize outcome uncertainty). It is important to remember that these arguments do not possess the substantive weight afforded to that of a constitutional right.⁵⁴ When we refer back to the summary for *Brady v. United States*, we are reminded that the majority opinion of the case legitimized the use of plea agreements as constitutionally acceptable, but *did not* endow this practice with the status of being a constitutional right.⁵⁵ As a result, the trial penalty’s most aversive property is its proposition to inflict an unwarrantable consequence onto individuals who seek to uphold their constitutional right to a swift and fair trial.⁵⁶ In this way, plea bargaining is punishing defendants who choose not to enter into a plea agreement *because* of this choice, even though such a method lacks the substantive weight of a constitutional right (and should therefore not be valued as more relevant or more appropriate than one).

Section 3. Methodology

I seek to gain a better understanding of how returning citizens perceive the plea-bargaining system through the lens of their own unique experiences. This section provides a detailed outline of my research methodology, beginning by first summarizing the organizational support I received to execute my research study. This summary is then followed by a definition for the phrase “returning citizen,” along with an explanation for how this population differs from regular defendants and detainees. This section then provides an explanation for why the perspectives of this returning citizen population are relevant to the field of plea bargain research, before breaking down the protocols for conducting my thesis-specific research study. This section concludes with a review of the research study’s limits, while also addressing how the research contributes to the existing literature. To analyze the data, I will use a method of written response trend analysis (observing the

53 BURKE, *supra* note x, at 200.; GIFFORD, *supra* note x, at 67.

54 Missouri v. Frye, 566 U.S. 134 (2012).

55 Brady v. United States, 397 U.S. 752 (1970).

56 Another way to interpret this point is as follows: if we punish citizens for exercising their rights, then we are (in effect) denying the validity of those rights.

number of instances various responses appear to certain questions within my sample group), so that I may understand the impressions of the group of returning citizens individually and collectively.

Organization Support

I conducted a set of semi-structured interviews and structured surveys with ten returning citizens. Recruitment for the interviews and surveys took place with the assistance of a couple of Illinois- and Chicago-based nonprofit organizations who, for the sake of maintaining participant anonymity, have requested that their organizations not be named in this analysis. Both of the organizations involved specialize in providing various services in line with improving the quality of criminal justice activities throughout the state of Illinois. For one of the organizations, this takes the form of: 1) monitoring the activities of correctional facilities across Illinois; 2) reviewing substantial policies and practices around criminal justice procedures; and 3) advocating for relevant criminal justice policy reforms. The second organization provides a number of supportive services for individuals with criminal histories in multiple counties throughout the state of Illinois.

Defining “Returning Citizens”

As noted above, the individuals chosen to participate in my research study were selected because of their status as “returning citizens.” The phrase “returning citizens” is meant to refer to individuals who have returned to society after having spent time being incarcerated or serving out sentences that have followed other forms of criminal conviction.⁵⁷ While these individuals may have been characterized as “defendants” during their criminal court proceedings, and as “detainees,” “convicts,” or “felons” during the course of their confinement, the individuals interacting with me throughout this thesis are being neither prosecuted nor confined. They are free agents beginning new lives in the course of reestablishing themselves as members of society.

The Relevance of Returning Citizen Perspectives for Plea Bargaining

The plea-bargaining system functions through the activities and interactions observed between four key judicial actors: a trial judge, a prosecuting attorney, a defense attorney, and a defendant. The first three of these actors are responsible for establishing the conditions of any given plea agreement, while it is the last actor (the defendant) who is responsible for legitimizing the plea agreement by choosing to accept it. Having been defendants themselves, the information returning citizens

57 *Roadmap to Reentry*, DOJ (April 19, 2017), <https://www.justice.gov/archives/reentry/roadmap-reentry>.

can provide can serve as a proxy for at least some of the information I might have received from defendants or detainees. The freedom of movement returning citizens enjoy grants them an additional degree of agency that might otherwise prevent someone else who lacks this freedom from being willing and able to speak about their experiences with plea bargaining.

I. Breakdown of the Research Study Procedures

Conducting the Interviews and Surveys

To gain greater insight into the relevant perspectives of the target population, I found it necessary to discuss these various interests with the population directly. To that end, I conducted interviews with a group of returning citizens willing to speak on their impressions of the plea-bargaining system as previous participants. The first part of the research study consisted of an in-person interview, while the second part involved the use of a self-created, study-specific survey questionnaire. The entirety of my research study was subject to consideration and approval by my university's Institutional Review Board.

Eligibility for participation in the research study was based on the use of three critical standards. The first standard required that interested candidates had to have been convicted and sentenced to incarceration after pleading guilty to committing a criminal offense through a plea agreement in a Cook County court. The second standard required that interested candidates be competent enough to agree and consent to sharing information about their experiences in the plea-bargaining process. The third standard required that interested candidates spoke English as a first language, or at least well enough to hold extensive conversations with a native English speaker for a considerable period of time. To maintain response anonymity, I assigned a uniquely identifiable number (or "UIN") to each participant's answers for both the interview questions and survey questions following their respective sessions.

Recruitment for the research study took place over the phone for each candidate. Initial interest in the research study was gathered through the distribution of a recruitment flyer to various contact networks retained by the nonprofit organizations. Each candidate was screened for eligibility, and (once eligibility was confirmed) coordinated a time to meet with me in person for their study session during the same phone call. Nine of the ten research study sessions took place at one of two pre-established interview sites on my university campus. The final research study session, upon request, took place at the participant's personal residence.

A monetary incentive of \$65.00 was offered to each participant for their

contributions to the research study.⁵⁸ All candidates who attended the interview were offered an initial payment of \$15.00 for doing so. If a candidate decided to become a full participant during this meeting, they would receive \$50.00 upon completing the study. In showing up to the predetermined interview site, each candidate was guaranteed to receive this initial \$15.00 payment regardless of whether they decided to continue on and complete the entire study. Participants retained the right to withdraw from participation at any time and were guaranteed to receive compensation proportional to the amount of time they had spent participating.

During the interview portion of the study, each participant was asked a series of thirty-four questions about their plea-bargaining experiences.⁵⁹ These questions were adapted from prior research conducted with criminal defendants by Dr. Jeanette M. Husseman in her 2013 Ph.D. criminology dissertation. These questions concerned topics ranging from how and why defendants decided to plead guilty pursuant to a plea agreement to attitudes toward specific judicial actors within the court (trial judges, prosecutors, and defense attorneys).

The presentation style used when discussing the returning citizen responses was also modeled after the work of Dr. Husseman. These style features include identifying each respondent by their respective charges *and* presenting significant response quotes as large, segmented fragments.⁶⁰ While she does not specify why she chose to display her findings in this way, I have distinct reasons of my own for doing so.

On the point of identifying each respondent by their respective charges, I believe it provides a means for allowing the respondents to identify their contributions to the research in a clear and concise manner. None of the information I have chosen to share is information that is inaccessible to the general public.⁶¹ Furthermore, this method ensures that I am retaining much of the nuance found in each case by highlighting the uniqueness of the individuals involved. The circumstances of these cases, whether positive or negative, are being experienced

58 Funding for the study consisted of a \$1,500.00 grant provided to me by a research fund available through my university

59 See *infra* Appendix D.

60 See Pg. 36 of Jeanette M. Husseman's "Negotiating Justice: Defendant Perspectives of Plea Bargaining in American Criminal Courts" for an example of this presentation style.

61 The exception to this statement may be found in quotes taken from the interviews conducted with UIN 2 and UIN 3. These individuals possessed identical genders, race, original counts, charge levels, and plea levels. This made it necessary to distinguish between the two by mentioning their ages whenever discussing their respective impressions.

by individual people: each of whom deserve to have their individuality upheld when their experiences are subjected to critique and analysis.

On the point of presenting the various response quotes as large, segmented fragments, I return to the clarification I stressed in the introduction. Very little research has been conducted on defendant experiences within criminal justice systems throughout the United States. The few studies and interviews that have been conducted are often isolated and ungeneralizable. At this point in the research field, providing as many sizable and uninterrupted concentrations of thought from this population can only be to the field's advantage. These perspectives have an intrinsic value because they are scarce, and will provide a greater depth of knowledge for appreciating how individuals from this population view the plea-bargaining system as they become more abundant.

All interviews were tape-recorded (audio only) and lasted anywhere between 30 minutes and an hour and 30 minutes. Each interview was transcribed verbatim using the Temi software program] and began with the returning citizen providing a brief summary of their case (including the type of charge and charge level they received) before moving on to more specific questions tied to the activities of the judicial actors involved.

Appendix G provides the complete case and demographic information made available to me from my interview sample. Two of the ten returning citizens interviewed identified as female, while the rest identified as male. All ten citizens interviewed were African-Americans. The average age of the returning citizens interviewed in my sample was 45.5 years old, with the youngest of the group being 27 years old, while the oldest was 61 years old. While two of the ten returning citizens were originally charged with committing misdemeanor offenses, all ten plea agreements ended with the returning citizens pleading guilty to felony charges.⁶²

Following the interview portion, each participant received a copy of the study-specific survey questionnaire to complete and return. The questionnaire consisted of ten, multiple choice questions in which each participant was instructed to select the answer choice (out of a given series of seven) that they believe best reflected their experiences with plea bargaining overall. Unlike the interview questions, the survey questions on the questionnaire were designed to be much more restrictive in how participants could express their beliefs (as limited by the available answer choices). Completion of this section was optional.

62 Charges pleaded guilty to include: robbery, criminal possession of a motor vehicle, possession of a controlled substance, theft of a person, aggravated criminal sexual abuse, burglary, and prostitution.

Upon completing the survey form, the research study was deemed completed for each individual participant. Following completion of the study, each participant received their completion payment of \$50.00. There were no follow-up requirements established in the execution of this research study on the part of the participants after this point had been reached.

Limitations of Research Methodology

First, as I noted in the introduction, this study was restricted to individuals residing within Cook County, Illinois. This range restriction limits the generalizability of the opinions and concerns that were expressed by these members in any attempts to draw comparisons between similar populations in the other 101 counties throughout Illinois.⁶³ This understanding is even greater for one seeking to draw comparisons between the responses obtained from Cook County, the other 101 Illinois counties, and the additional 3,040 additional United States “counties and county equivalents” that exist outside of the state of Illinois (“How Many Counties...”).⁶⁴

Second, my analysis is based on interviews and surveys collected from ten informants, many of whom were gathered through efforts of snowball sampling. This understanding presents two relevant caveats of the sample to consider: its *small size* and *non-random selectivity*. First, the sample size is small. This feature (like the geographical restriction) limits my ability to generalize from the results I encountered across groups of similarly-situated people. Second, the sample was not selected at random; participation was decided on a first come, first served basis, which (along with its size) may also affect the statistical generalizability of the results.

Thirdly, all of the participants I spoke with identified as Black, despite what the demographics of both Cook County’s general and prison populations suggest a more representative sample should look like. All ten returning citizens noted having been incarcerated as a condition of their plea agreements. As of December 31, 2018, the prison population of Illinois was 39,798, with 18,667 prisoners (or 46.9 percent) being held in Cook County detention facilities.⁶⁵ In comparison, Cook County’s general population was 5,211,263 in July of 2017, which (out of a state population of 12,802,023) constitutes 40.7 percent of the total

63 *Illinois Counties by Population*, ILLINOIS DEMOGRAPHICS BY CUBIT (Accessed Jan. 11, 2019), https://www.illinois-demographics.com/counties_by_population.

64 *How many counties are there in the United States?*, U.S. GEOLOGICAL SURVEY, (April 3, 2008), <https://www.usgs.gov/media/audio/how-many-counties-are-there-united-states>.

65 *Prison Population on 12-31-18 Data Set*, ILLINOIS DEPARTMENT OF CORRECTIONS (2014).

state population.⁶⁶ These percentages line up reasonably well with one another. Where the discrepancy lies is with the demographics of the prisoners being held in Cook County when compared to the demographics of the county's general population.

While accounting for only 24.0 percent of the county's general population, individuals who identify as Black account for 73.3 percent of the county's prison population. Individuals who identify as White account for 65.6 percent of the county's general population, but only 8.5 percent of the county's prison population. Individuals who identify as Hispanic comprise a similar percentage of the county's general population to those who identify as Black (25.5 percent), but only 17.4 percent of the county's prison population.⁶⁷ These figures reflect an overrepresentation of those who identify as Black in my sample, and an underrepresentation of those who identify as White, Hispanic, Asian, Bi-Racial, American Indian, and so forth in my sample. As a result, the individuals interviewed for this research do not represent the demographic distribution of individuals being subjected to these experiences in Cook County or the rest of the country.

Even with these caveats in mind, I believe this research still holds strong. Though the area of observation was limited to impressions obtained from individuals within a single county, the activities of Cook County's criminal justice system are extremely relevant to the field of criminal justice reform and critique. At the federal level, Cook County is the second most populous county in the United States,⁶⁸ and oversees the largest unified court system in the United States as well.⁶⁹ These features place Cook County in a unique position to observe, critique, and modify how to approach the various complications inherent to such a wide-ranging system.

Given its national presence, Cook County's success in implementing effective reforms is likely to encourage other national municipalities to seek out similar successes. Though the group of returning citizens I held discussions with constitute a small, non-representative sample of the total population of returning citizens throughout Cook County, it's important to remember that the purpose of this research was to be illustrative and informative. Regardless of whether the information gathered here can speak to the beliefs and experiences of others under

66 *U.S. Census Bureau QuickFacts, Illinois; Illinois*, UNITED STATES CENSUS BUREAU (July 1, 2017).

67 COULD NOT FIND SOURCE

68 *U.S. County Populations, on 12-31-18 Data Set*, ILLINOIS DEPARTMENT OF CORRECTIONS (2014).

69 *Organization of the Circuit Court*, ILLINOIS CIRCUIT COURT OF COOK COUNTY, <https://www.cookcountycourt.org/ABOUTTHECOURT/OrganizationoftheCircuitCourt.aspx>.

similar circumstances, the information itself possesses an intrinsic value: it gives us a greater depth of knowledge for appreciating how individuals from this population view the plea-bargaining system.

Section 4. Results – Returning Citizen Perceptions

This section offers a thorough analysis of various experiences and perceptions of the plea-bargaining system from the ten returning citizens who were interviewed. This section begins by reviewing how the returning citizens defined justice in the context of the criminal justice system and their plea bargaining experiences. These definitions of justice are followed by an analysis of the behavior and behavioral motivations for the public defender/defense attorney, prosecutor, and trial court judge in each returning citizen’s case. A similar analysis is then conducted for how the returning citizens perceive their respective sentence outcomes, in terms of both severity and deservedness. Finally, this section concludes with an evaluation of plea bargaining in comparison to trials as a tool of case disposal, and examines why returning citizens are hesitant to name one tool as outright better or worse than the other. A supplemental analysis of the survey question responses is available in Appendix B, but should be considered secondary to the information gathered and reviewed in this section.

I. Perceptions of Justice Attainment

Achieving Justice: Internal and External Perceptions

Seven out of the ten returning citizens indicated a belief that “justice had not been achieved” through the outcomes of their cases, while the remaining three returning citizens indicated a belief that “justice had been achieved.”⁷⁰ When asked whether the affected parties in their cases would agree or disagree that justice had been achieved, seven out of the ten returning citizens indicated a belief that the affected parties would have “disagreed that justice was achieved” given the case’s outcome.⁷¹ Two of the ten total returning citizens indicated a belief that the affected parties in their cases would have “agreed that justice was achieved,” while one returning citizen emphasized that they were in no position to speak on behalf of the affected parties’ preferences.⁷²

Of the seven returning citizens who expressed the belief that justice had not been achieved in their cases, five of them further supposed that the affected parties would also agree that justice had not been achieved.⁷³ One of two remaining returning citizens in this grouping indicated that the affected parties would have

70 See *infra* Appendix A, Table A5.

71 *Id.*

72 *Id.*

73 *Id.*

agreed that justice had been achieved, while the last of the two in the grouping maintained their inability to speak on behalf of the affected parties.⁷⁴ Of the three returning citizens who expressed the belief that justice had been achieved in their cases, only one of them further indicated that the affected parties would also agree that justice had been achieved. The other two returning citizens acknowledged beliefs that the affected parties would have disagreed that justice had been achieved.⁷⁵

Defining “Justice”

When granted an opportunity to shed light on how they defined the term “justice” in the context of the criminal justice system, the returning citizens provided me with a wide breadth of definitions: each applicable to various ways in which justice is defined and expected to be upheld by contemporary scholars and legal professionals. In some instances, “justice” was defined in terms of *how cases are resolved* (referring to the right of those accused of committing a crime to see their cases through to a fair and honest jury trial, and honoring the creed of “innocent until proven guilty” both before and during said trials):

When I think of the word “justice,” I think of a person [being] given ... their right to a trial. Um, I think justice is actually bringing your accusers before you and actually having their day in court to say what they have to say ... what you have to say, and you have both lawyers on both sides to argue whatever those cases are. (African-American, Male, Felony Conviction for Aggravated Criminal Sexual Abuse)

Well, I define “justice” as, is when a person is being punished for something that they did, and what it’s not (in our system) is you’re guilty until proven innocent. (African-American, Male, Felony Conviction for Burglary)

In other instances, “justice” was defined in terms of the *actions of the other judicial actors* (referring to the expectation that those receiving counsel from public defenders should be able to contribute to the choices in defense being made on their behalf in more clear and concise ways, and maintain a firm confidence that the top priority of their counsel will be to pursue their client’s interest above all others):

74 *Id.*

75 *Id.*

Um, I believe “justice” should stand for actually taking the time and caring about the individual that you’re defending. Take the time out to see what’s going on with the case. That way, at least I can say that you tried to fight for me, and if you tried to fight for me, then you’re showing that you’re gonna provide “justice.” (African-American, Male, 39, Felony Conviction for Possession of a Controlled Substance)

Even further still, “justice” was also defined in terms of the *proportionality of the sentence to the offense* (this embodies a sentiment I established earlier in the section of sentence deservedness, wherein what one deserves is subjective and open to interpretation, but is meant to reflect an equal reaction for one’s action).

I consider “justice” to be, the result of committing a wrong, and the “justice” comes in when the punishment is madded out. Uh, does the punishment fit the crime, or the offense, and, and, and, how does it serve society? And is the justice being madded out fairly to the person it’s being madded out to? If it’s not fair to the person who it’s being madded out to, and it’s not conducive to the growth of society, or the welfare of society, then it’s not justice: it’s injustice. (African-American, Male, Felony Conviction for Criminal Possession of a Motor Vehicle)

This passage does well in readdressing one of the key features of “justice” I established in the introduction: the courses of action taken to respond to a criminal offense must result in a sentence that is proportional in severity to the offense committed (if the offense is rightfully proven to have occurred). This passage takes a step further, however, and stresses that the sentence should also act to serve the “growth of society.” Otherwise, the sentence not only exists as an injustice to the accused individual, but to the society for which the individual is supposedly being punished in order to protect.

Why the Affected Parties Might Disagree that Justice was Achieved

When asked to elaborate on why they believed the affected parties involved in their cases would disagree that justice had been achieved as a result of their case outcome, the responses granted were, once again, diverse and numerous, offering perspectives often considered by members of the general public. In one way, disagreement (in favor of the accused) was suggested to exist on the basis of *poor defense attorney conduct in the area of client communication*. For this form,

it was argued that the lack of communication taking place between the accused and their defense attorney was egregious: so much so that any case victim should find it unacceptable and unsuitable for use as part of a well-functioning criminal justice system:

Lack of communication ... and very poor; very poor; uh, professionalism skills. Uh, like I said again, there's not much I could, uh, it's not much I can, uh, no much that I can tell you about the case as far as the person's, uh, professionalism. You would think somebody would want to, if they defending a person, take the time out to actually talk to them, instead of having less than five minutes to three minutes to go out in front of the judge. (African-American, Male, 39, Felony Conviction for Possession of a Controlled Substance)

In another way, disagreement (this time, in opposition to the accused) was suggested to exist on the basis of *disproportionate sentence outcomes*. Despite the fact that some punishment for the crimes committed was established, case victims may believe these sentences were not proportional to the severity of the offense (given the various forms of physical, emotional, and/or monetary damages they might have been afflicted with as a result):

I think they would disagree that [I] got enough time for "violating my home, my, my privacy, putting my, my family and children in danger, taking my property that I worked hard for and made sacrifices for: you took from me, and I don't think that your punishment was, was enough," and that's what I think they feel. (African-American, Male, Felony Conviction for Criminal Possession of a Motor Vehicle)

Why the Affected Parties Might Agree that Justice was Achieved

Two returning citizens stated their belief that the affected parties involved in their cases would agree that justice had been achieved as a result of their case outcome. In one way, agreement was suggested to exist on the basis of *receiving some kind of punishment for their wrongdoing as quickly as possible*. In other words, it was argued that for certain individuals, being punished (often in the form of incarceration) is considered better than delaying punishment or avoiding punishment altogether. One African-American male charged with a felony for robbery put it plainly:

The, uh, the kind of the people they were: they're like "As long as he gets some time," I guess.

This passage reiterates what I stated above: in some instances, having a defendant receive some kind of punishment as quickly as possible can be more desirable than the defendant receiving the most severe punishment later on or no punishment at all.

In another way, agreement was suggested to exist on the basis of *comparing the accused's current charges to previous convictions they've obtained*. That is to say, it was argued that a case victim's access to information on the returning citizen's criminal history might cement their belief that they are guilty of the charges being levied against them in the present (and therefore deserving of whatever outcome that follows). This may be so regardless of whether the evidence of the current charge (or lack thereof) suggests this is true, as one African-American male charged with a felony for theft of a person expressed:

Um, well, it wouldn't be so much the case, [as it would be] my background: it would be more on my background, than the case. Um, the background said I did it, so that's what they would be more [likely] to say was, you know, was part of that.

These findings suggest that perceptions of justice found among the returning citizens are, by no means, significantly different from what we might expect to find when asking a regular civilian. Justice (within the criminal justice system) is molded and measured by the fairness in how cases are being resolved, whether at the level of the system actors, the system outcomes, or the nature of the system itself. Many of the expectations for how the affected parties might perceive the case outcomes as being just or unjust rest in many of these same features (though with a much stronger emphasis on receiving some form of restorative legal repercussion).

II. Perceptions of Public Defenders/Defense Attorneys

Relationship and Communication with Defense Attorneys

When asked whether their defense attorneys were court-appointed or privately-hired, eight of the ten returning citizens confirmed that their attorneys were appointed by the court.⁷⁶ The two returning citizens who succeeded in retaining

76 See *infra* Appendix A, Table A1.

privately-hired attorneys, however, admitted that said attorneys were hired by close family members. This position appears to be in line with the understanding that a significant number of individuals facing criminal charges in courts within Cook County (and across the United States) are classifiable as “indigent,” and require court-appointed attorneys (i.e. “public defenders”) due to their inability to afford private ones.⁷⁷ In turn, many defendants rely on the decisions and activities of their public defenders when determining whether or not to plead guilty or attempt to bring their cases to trial.

The majority of the observations surrounding the attitudes and behaviors of the defense attorney were fairly negative in tone. Each of the eight returning citizens whose cases began with public defenders serving as their counsel expressed the belief that the outcome of their case would have been better (or more desirable overall) had they possessed access to privately-hired attorneys. Their reasons for saying so tended to converge on the belief that privately-hired attorneys (due to their being paid for by the client directly) are empowered to focus more time and resources on obtaining better outcomes for their client’s cases. These better outcomes may include receiving: a less severe charge; a less severe sentence; a more thorough investigation into the charge(s) they were convicted of; or even a complete dismissal of the charge(s). On the point of receiving a less severe sentence, one African-American male charged with a felony for aggravated criminal sexual abuse provided the following insight:

I would have probably been, um, given like house arrest or something around those lines. I was really pushing for because I did not want to concede to the charge. However, I did not want to continue living in the quarters I was living in either. So what I really was pushing for was house arrest.

This passage shows that returning citizens are more confident in the abilities of privately-hired defense attorneys to lower the severity of their sentences (even in circumstances when the accused would have preferred not to concede to the

⁷⁷ Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 683 (2010); Russell L. Weaver, *Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 436 (2004); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1170-78 (2003); Robert L. Spanenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 31-32 (1995); Randolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205, 213 (1993); Dallin H. Oaks & Warren Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 630 (1966).

charge in the first place). When the option to avoid accepting a plea agreement is nowhere to be found, concerns shift to mitigating the severity of one's charges or sentences: a feat believed to be best achieved with the help of a privately-hired attorney. On the point of receiving a more thorough investigation, another African-American male charged with a felony for the criminal possession of a motor vehicle offered this perspective:

I think they [referring to a private attorney]-tend to do more research and work for you, and more glad-handing, in order to reach a positive outcome for your case, because you-they're hired and they're paid to represent you and be on your behalf. Whereas, a court-appointed attorney simply looks at you as an extra file on his desk that he has to get off, because he doesn't want to have to deal with it.

This passage highlights a major concern returning citizens and defendants often have with the conduct of public defenders and other court-appointed attorneys: because court-appointed attorneys are often overworked and under-resourced, they possess an incentive to dispose of cases quickly, with little concern for the quality of the counsel they provide in the process. These defendants are being relegated to nothing more than case files and numbers, resulting in the impression that privately-hired attorneys are better for securing adequate legal representation.

Motivations for Defense Attorney Behavior

Eight of the ten returning citizens expressed serious degrees of dissatisfaction when discussing the intervention activities of their public defenders. This was best emphasized by statements made affirming beliefs that: at best, their public defenders had few to no intentions of fighting for them and their cases; and at worst, their public defenders were working to further the interests of themselves and the state (in contradiction to the interests of their clients). All ten of the returning citizens indicated a belief that the primary source of motivation for their defense attorneys' attitudes and behaviors was their desire to get rid of their case as soon as possible.⁷⁸ In turn, the average defense attorney rating for all ten returning citizens was a 3.5 out of 10 (with a median value of 3, a mode value of 1, and a range of 9), with eight of the ten returning citizens asserting that they would never want the defense attorney who represented them in the cases we discussed to do so again.⁷⁹

⁷⁸ See *infra* Appendix A, Table A1.

⁷⁹ On this scale (from "1" to "10") a rating of "1" is meant to represent the most unfair experience with the defense attorney, while a rating of "10" is meant to represent the fairest experience. Additionally, fairness specifically refers to the willingness of the defense attorney to listen to their client's input (as applicable) during the plea-bargaining

The first of the beliefs mentioned above provides an avenue for exploring how returning citizens might have encountered pressure to accept the plea agreements they were offered. That is to say: public defenders often express their unwillingness to fight a case by persuading their clients to plead guilty to the charges made against them instead.⁸⁰ Seven out of the ten returning citizens reported encountering such pressures.⁸¹ On this point, one African-American male charged with a felony for burglary described a situation in which he felt he was being pressured:

He told me out of [his] mouth, basically trying to force me to take the time (which I did) you know, but I didn't want to, I didn't want to take the time ... you know, all of that was like, alright, well I might as well take this time because do I really even want to go to trial with this guy that's telling me he don't want me to go to trial, or don't want me to fight or he feel that I'm guilty already?

In this passage, the respondent displays how their public defender's insistence on accepting the plea agreement (even though they wanted to continue on to trial) could be interpreted as pressuring. Even if they *had* been able to take their case to trial, the public defender had already made it clear that they had no real desire to contest the case on behalf of the respondent. In situations like this, it seems as if there is no other choice than to accept the plea agreement.

The second of the beliefs mentioned above focuses more on how the actions of the defense attorney might have led several returning citizens to believe that their counsel valued their personal interests (or those of the prosecutor) over their own. It is no secret that both prosecution offices and public defender offices receive various forms of government funding to carry out their respective operations.⁸² Several of the returning citizens I spoke with made statements highlighting a possible conflict of interest that this connection might impose: public process; See *infra* Appendix A, Table A1.

80 Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 912 (2005); Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 143 (1972).

81 Two of the three returning citizens who did not believe they were pressured into entering into a plea agreement happened to be the individuals who started their cases with privately-hired defense attorneys. The final case among these three is a bit of an outlier (as far as the overall sample beliefs have typically shown). This case involved a situation where the returning citizen possessed a court-appointed attorney, but believed the attorney had been completely upfront with them about their intentions from the beginning, allowing them to make a knowing and willing choice on the matter when the time came.

82 Ronald F. Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003); Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 715-16 (2010).

defenders and prosecutors can be viewed as incentivizing one another to resolve cases quickly (through the use of plea agreements) so that they may capitalize on whatever mutual resources are spared as a result. On this point, one 42 year-old African-American male charged with a felony for possession of a controlled substance had this to say:

You wouldn't even know, I'm talking about ... and they said they supposed to represent you, but basically they like this with the state [referring to the close relationship between the defense attorneys and state's attorneys], you know what I'm saying? They say they [work] for you, but they, all the time, they conversing with them [referring to the state's attorney] about every situation of the case, but not telling you what's going on.

This passage invokes considerations back to an earlier question I raised about the interests being pursued by encouraging the use of plea agreements over trials. While the tool is advertised as beneficial to defendants above all other actors, the activities of these other actors suggest this is not the case. The true interest being pursued appears to be the preservation of the resources being expended by the other non-defendant actors in processing these cases.

In a similar vein, another undesirable observation was the sense of “closeness” some felt existed between the public defenders and the prosecutors when it came to how the two parties would interact with one another over the course of a given case. The returning citizens detested how personal the public defender and prosecutor appeared to be with one another beyond the necessary congenialities of their profession.⁸³ The words of one African-American male charged with a felony for aggravated criminal sexual abuse speak well to this:

And I, and I believe too, that the state's attorney and the public defender are too close. Um, I would, you know, peek out and see that they're talking and laughing, you know, and I'm just thinking, "What, what the hell do you have to laugh with this person about?" You know, especially when my life at that particular time was in jeopardy, um, you know, and going back and forth ... I'm finding out more from these, uh, materials that they ... go out to

83 Marc G. Gertz, *The Impact of Prosecutor/Public Defender Interaction on Sentencing: An Exploratory Typology*, 5 CRIM. JUST. REV. 43, 45-46 (1980); Jackson B. Battle, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 50 DENV. L.J. 101, 103 (1973); Jonathan D. Casper & David Brereton, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 45-46 (1981).

lunch together. They have relationships, they're friends, you know, they go to each other's birthday parties and kids' birthday parties and things of that nature.

What these passages appear to reflect is a stark sense of mistrust between many of the returning citizens and their defense attorneys (specifically public defenders), much of which seems to be rooted in the lack of time and attention defense attorneys spend on their cases; the barrage of pressuring statements they receive from defense attorneys to plead guilty; and the degree of compliance that defense attorneys embrace for the wants of the prosecutor.

III. Perceptions of Prosecutors

Relationship and Communicating with Prosecutors

The majority of the observations surrounding the attitudes and behaviors of the prosecutor (just as with the defense attorney) were also fairly negative in tone. What is interesting to note, however, is the manner in which the prosecutor would express their impressions toward the returning citizen, and how they differed from what was witnessed when interacting with defense attorneys. While seven out of ten returning citizens reported experiencing behaviors in line with attempts to pressure them into accepting a plea agreement, several of the experiences highlighted were experienced *indirectly*. On this point, one 39 year-old African-American male charged with a felony for possession of a controlled substance was very descriptive:

Uh, it was because when he talked about my case, as far as my PD is trying to defend me, he would turn his back. Uh, it was very less-little eye contact. Um, he really gave off the demeanor that he really didn't care about the person he was trying to convict, as long as he convicted him, and just go to the next case ... He would always click his pen, like at the stroke of a stroke of a pen, you're gone, and it made me very uncomfortable.

In the abstract, this passage speaks well to the progression of practices in sentence uniformity observed in response to the growth in the use of plea bargaining since the 1970s. More concretely, this passage illustrates behaviors uncondusive to an environment of mutual respect and concern. Unlike with the

court-appointed attorneys, however, these behaviors were often delivered in indirect ways, providing no means for the respondent to make a more favorable impression.

One of the returning citizens refrained from offering a prosecutor rating, due to his lack of direct exposure to them during the deliberation process. Another returning citizen elected not to make a determination on whether she felt pressured by the prosecutor in her case to accept the plea agreement proposed to her for the same reason. This feature explains why very little information on the activities of the prosecutor (when compared to defense attorneys) was available at the time of the interviews: most returning citizens spent very little (if any) time interacting with prosecutors over the course of their case.⁸⁴

Motivations for Prosecutor Behavior

Six out of the ten returning citizens believed that the primary source of motivation for the prosecutor's attitudes and behaviors was their desire to get rid of their case as soon as possible.⁸⁵ This was followed in close proximity by five out of ten returning citizens indicating a belief that punishing them for the charges they were convicted of was a primary source of motivation.⁸⁶ When asked who served as the *key persuader in convincing them to enter into their plea agreements*, seven of the ten returning citizens placed most of the responsibility on their defense attorney.⁸⁷ One returning citizen placed equal responsibility for persuading them on both their defense attorney and the prosecutor, while two returning citizens placed most of the responsibility on the prosecutor. When asked who served as the *key condition setter for the terms of their plea agreements*, four of the returning citizens singled out their defense attorney, two returning citizens held both the defense attorney and the prosecutor responsible, and four others singled out the prosecutor.⁸⁸ The average prosecutor rating for all ten returning citizens was a 2.1 out of 10 (with a median value of 1, a mode value of 1, and a range of 5), making the overall impression of prosecutors (according to this value) *1.66 times lower than those held for defense attorneys*.⁸⁹

84 GERSHOWITZ & KILLINGER, *Supra* note x, at 279.

85 See *infra* Appendix A, Table A2.

86 To clarify, when asking the returning citizens to inform me of what they believe motivated the attitudes of the defense attorneys, prosecutors, and trial court judges assigned to their respective cases, they were allowed to offer up multiple positions (should they believe that doing so was the most appropriate way to describe their beliefs); See *infra* Appendix A, Table A2.

87 See *infra* Appendix A, Table A2.

88 *Ibid*

89 On this scale (from "1" to "10") a rating of "1" is meant to represent the most unfair experience with the prosecutor, while a rating of "10" is meant to represent the fairest experience. Additionally, fairness specifically refers to the willingness of the pros-

Despite the degree to which the returning citizens I spoke with appear to hold more contempt for the prosecutors they interacted with than they do for their defense attorneys (which, given the nature of each party's role, makes reasonable sense), this point of contention is distinguishable from how the returning citizens interpret the motivations of the prosecutor as part of their role in the criminal justice system. The lack of direct communication is an example of this phenomenon: while such an act is looked down upon when engaged in by a returning citizen's defense attorney, this same act is (in many ways) considered an occupational expectation when part of a prosecutor's behavior. In other words, returning citizens (and defendants in general) are aware that prosecutors will typically only communicate with them when doing so is necessary for fulfilling their judicial responsibilities (i.e. punishing those who break the law). Should prosecutors find themselves in a situation where direct communication with defendants is required, they will attempt to be as detached and neutral as possible.⁹⁰ One African-American male charged with a felony for the criminal possession of a motor vehicle offered a reflective take on how this sense of detachment can manifest among prosecutors:

I'm talking about the prosecutor, I think their, their, their goal is to convict ... they are the ... punishers. Their job is to punish you. If you have been-if you have been labeled a citizen who is against the well-being of the society, then their job is to make you pay for your offenses. That's why you're called an "offender," and they're called "prosecutors," because that's what they do: they prosecute you.

This response suggests a broad comprehension (on the part of the returning citizens) of the role prosecutors that serve in the criminal justice system. Under the provided framework, it is reasonable for a defendant to be kept at a distance from the desires and intentions of the prosecutor (whose actions are predicated on their responsibility to pursue the best interests of their plaintiff).

What becomes a concern is when this same position of distance is felt between a defendant and their defense attorney (whose actions should be predicated on their responsibility to represent the best interests of said defendant). In this way, the presence of congeniality from a prosecutor can, under some interpretations, almost seem to run counter to their demeanors as actors who are obligated to seek out

ecutor to listen to the returning citizen's input (as applicable) during the plea-bargaining process; See *infra* Appendix A, Table A2.

90 Bennett L. Gershman, *Prosecutorial Ethics and Victim's Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 562 (2005); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 839 (2004); Sarah Goodrum & Mark C. Stafford, *The Management of Emotions in the Criminal Justice System*, 36 SOC. FOCUS 179, 188 (2003).

punishment for criminal wrongdoings, while a lack of congeniality from a defense attorney can suggest the exact opposite.

IV. Perceptions of Trial Court Judges

Relationship and Communication with the Trial Court Judge

Similar to what was witnessed among prosecutor interactions, the times in which returning citizens reported having any meaningful interactions with the trial court judges overseeing their cases were few and far between. Unlike both the prosecutor *and* defense attorney interactions, however, the majority of observations surrounding the attitudes and behaviors of the trial court judges were fairly positive in tone. Nine out of the ten returning citizens reported experiencing no behaviors in line with attempts to pressure them into accepting a plea agreement, while seven out of the ten returning citizens described their trial court judge as being impartial, even-handed, and/or procedurally neutral in some way or manner.⁹¹ One 39 year-old African-American male charged with a felony for possession of a controlled substance expressed the following position on the matter:

She went into detail to explain about the nays and the yays about the case, the pros and the cons, to make sure I was more informed in what was going on around me. Whether I plead guilty or whether I plead innocent, she let me know in flat what the nature as far as the outcome of my case [would be] if I did either or, so, no.

Even the three returning citizens who *did* express a sense of dissatisfaction with their trial court judge interactions offered little detail on how their experiences were unsatisfactory. Just as with the prosecutors, much of the behaviors linked to this belief were experienced *indirectly*:

Like a piece of lint, like I wasn't even there. (African-American, Male, Felony Conviction for Burglary)

I think his attitude was like, uh, he thought I was guilty. I believe he thought I was guilty. (African-American, Male, Felony Conviction for Possession of a Controlled Substance with Intent to Distribute)

91 See *infra* Appendix A, Table A3.

Uh, just like, [the judge] never looked me in my eyes. You know, just looked at the paperwork and you know, it just was what it was. (African-American, Male, Felony Conviction for Burglary)

Whether or not these interactions are best described as a byproduct of judicial neutrality (similar to what has been observed in the opinions of prosecutor behavior) or are, instead, based on some other attribute relevant to the judge's decision-making, is up to the beholder. I believe much of the way in which this attribute comes into being is based on the features that motivate the attitudes and behaviors of trial court judges: working to be rid of these cases as soon as possible (which is to be explored in the following section).

One uniquely observed feature among the activities and interactions reviewed so far is the capacity to act in some sympathetic ways that trial court judges possess when making their judgments. For example, defendants charged with drug-related crimes as a consequence of addiction may find a judge's motion to prescribe them time in a rehabilitative treatment center as part of their sentence as an act of concern for their physical and mental health.⁹² On this point, one African-American male charged with a felony for possession of a controlled substance with intent to distribute had this to say on the matter concerning the trial court judge presiding over his case:

Uh, I would say ... the word I would use, uh, forgiving. She was more sympathetic to the case and overall, as far as me knowing what I need to know as far as the plea bargain, and me knowing what I could face as far as me saying no, and my background. So she was sympathetic to the case.

This passage emphasizes how the respondent views their trial court judge's decision to sentence them to time in a drug rehabilitation center as an act of forgiveness and sympathy. While this respondent reported still being required to spend time incarcerated as a result of their plea agreement, they stressed the extent to which being allowed to settle their addiction in the rehabilitation center positioned them to transition back into society following their incarceration time.

⁹² O'HEAR, *supra* note x, at 488; Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 826 (2008); Stacy L. Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416, 419 (2003); Robert Granfield, Cynthia Eby & Thomas Brewster, *An Examination of the Denver Drug Court: The Impact of a Treatment-Oriented Drug-Offender System*, 20 L. & POL'Y 183, 186 (1998).

Even more so, there are many instances wherein trial court judges are expected to resolve a case with an outcome that they themselves find to be far beyond what is necessary given the circumstances of a given case.⁹³ A second 42 year-old African-American male charged with a felony for possession of a controlled substance provides insight into this interpretation below:

I say he basically, he didn't want to send me to the penitentiary, but the state was pushing like mad. I think they was pushing harder than the judge was. You know, the judge was like, "I'm going to give you this. I'm gonna give you the program," and they act like they didn't want me to get it, you know? So I don't think the judge really, he had really nothing to do with it.

This passage highlights the presence of a phenomenon I discussed earlier in reviewing the relevant literature surrounding plea agreements and plea bargaining: the understanding that many trial court judges are disenfranchised from using any discretion to establish more situationally-aware sentences to defendants. In some circumstances, a judge may not feel that incarceration is the best medium of reform for a defendant under the influence of illicit substances, but may be obligated by various sentencing guidelines and statutes to incarcerate a defendant nonetheless. This procedural restraint has serious ramifications for understanding the ways in which defendants may interpret their sentencing outcomes as just or unjust (many of which will be discussed in the sections to follow).

Motivations for Trial Court Judge Behavior

Four out of the ten returning citizens indicated a belief that the primary source of motivation for the trial court judge's attitudes and behaviors was their desire to get rid of their case as soon as possible.⁹⁴ Following this, two returning citizens indicated a belief that punishing them for the charges they were convicted of was a primary source of motivation.⁹⁵ Two more returning citizens indicated that determining their guilt was the primary motivation behind their trial court judge's behavior.⁹⁶ A single returning citizen cited both getting rid of their case as soon as possible *and* punishing them for the charges that they were convicted of, and a final returning citizen offered no response that could be categorized. The average trial

93 Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007); SCHULHOFER, *supra* note x, at 853; William W. Shwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCING REP. 339, 340 (1991).

94 See *infra* Appendix A, Table A3.

95 *Id*

96 *Id*

court judge rating for all ten returning citizens was a 6 out of 10 (with a median value of 5, a mode value of 5, and a range of 9), making the overall impression of trial court judges (according to this value) *1.71 times greater* than that afforded to defense attorneys, and *2.85 times greater* than that afforded to prosecutors.⁹⁷

On the matter of getting rid of certain cases as soon as possible, impressions discussed tended to only show concern for this feature whenever the trial court judge was reviewing a case that had been on their docket for an extended period of time. On this matter, one African-American male charged with a felony for aggravated criminal sexual abuse characterizes this position well:

Well, with this judge, I know, uh, three, um, because, because I had gotten rid of one [referring to his public defender], and got another one, and went "pro se" for a while as well ... So, but I do know that this was before him for quite some time and he wanted, and he was saying, um, "You need to get rid of this. You need, you need, you, you all need to come up with something and get, and get rid of this. Either we're going to go to court, we're going to go to trial rather, or you're going to come up with some kind of plea agreement, but you need to get this from pretty much out in front of me. I've seen this for, for, too, for too long now."

Not enough information was provided by any of the returning citizens to determine how or why they perceived the trial court judges' motivations as being centered on determining their guilt or punishing them for the charges that they were accused of. When considered in the context of interests within the criminal justice system, it becomes easy to equate the decisions and interests of the trial court judge with those of the prosecutor. That is, according to the returning citizens, *what* trial court judges seek to achieve may be more important than *why* or *how* they succeed in doing so. In turn, this may grant trial court judges a greater spectrum of behavior tolerance by returning citizens, as long as they guarantee that their judicial responsibilities are being fulfilled in the process.

V. Perceptions of Imposed Sentences

⁹⁷ On this scale (from "1" to "10") a rating of "1" is meant to represent the most unfair experience with the trial court judge, while a rating of "10" is meant to represent the fairest experience. Additionally, fairness specifically refers to the willingness of the trial court judge to listen to the returning citizen's input (as applicable) during the plea-bargaining process; See *infra* Appendix A, Table A3.

Influences and Deservedness Determinations for Sentence Outcomes

When asked to compare the severity of their sentence outcomes to others with similar case circumstances to their own, the majority of the returning citizens (six out of ten) indicated a belief that their sentence was “roughly average.”⁹⁸ Three other returning citizens indicated a belief that their sentence was “less severe,” while only one indicated a clear belief that their sentence was “more severe” (Appendix A, Table A4, Page 78). It is also interesting to note that when asked whether or not they believed some personal demographic characteristic about them might have influenced their sentence outcome, five out of the ten returning citizens (four of which stemmed from the “roughly average” sentence severity group) indicated a belief that some feature (most commonly race and sex) had influenced the outcome.⁹⁹ These positions appear to be in line with the understanding that a significant number of individuals facing criminal charges in courts within Cook County (and across the United States) are minorities, and are faced with various discrepancies in their sentencing based on their race and sex.¹⁰⁰

Related to these measures of sentence severity is the determination of whether or not a given sentence is one that the returning citizen felt they deserved. In this area (before consulting any of the findings), it is important to understand that how a defendant perceives their own sentence’s *severity* does not necessitate how they will perceive its *deservedness*. Receiving a less severe sentence than what others have received does not, in and of itself, guarantee that a defendant will perceive it as an outcome that they deserved, and vice versa: a more severe outcome than others have received does not guarantee that defendants will perceive it as an outcome that they did not deserve. When asked to determine whether or not the outcome was one that they felt they deserved (given the nature of the charge that they pled guilty): half of the returning citizens indicated a belief that

98 It’s important that I emphasize now that, when asking the returning citizens this question, I didn’t provide them with any internal or external metrics through which they could quantitatively compare their sentence outcomes to someone else’s. The purpose of this question was to allow them an opportunity to draw on their personal knowledge and direct interactions with other similarly-situated individuals within the criminal justice system to determine where they believed their sentence rested; See *infra* Appendix A, Table A4.

99 See *infra* Appendix A, Table A4.

100 *Cook County’s Criminal Justice System: Trends and Issues Report*, LOYOLA UNIVERSITY CHICAGO - CENTER FOR CRIMINAL JUSTICE RESEARCH, POLICY & PRACTICE 1, 12 (2018); *Cook County State’s Attorney Data Report*, OFFICE OF THE COOK COUNTY STATE’S ATTORNEY 1, 10 (2017); Lauren E. Glaze & Daneille Kaeble, *Correctional Populations in the United States, 2013*, THE UNITED STATES DEPARTMENT OF JUSTICE – BUREAU OF JUSTICE STATISTICS, 1, 6 (2014); David E. Olson, *Population Dynamics and the Characteristics of Inmates in the Cook County Jail*, CRIMINAL JUSTICE AND CRIMINALITY: FACULTY PUBLICATIONS AND OTHER WORKS 1, 4 (2012).

their sentence was “worse than they deserved,” three returning citizens indicated a belief that their sentence was “better than they deserved,” and two returning citizens indicated a belief that their sentence was within the boundaries of what they deserved (Appendix A, Table A4, Page 78).

What Makes a Sentence Appear Worse than What May Be Deserved?

The interview questions about how a given sentence could be considered worse than what a returning citizen believed they deserved brought a couple of distinguishable positions to light. The first of these positions was the one where the greatest claims of dissatisfaction were rooted: being charged with a crime that either exceeded the substantive weight of the evidence available or was based on uncorroborated information from the discovery stage. In such cases, the returning citizens suggested that some of the evidence used to signify their guilt was either too circumstantial, legally inaccurate, or falsified. One of the more detailed accounts of this claim came from a 39 year-old African-American male charged with a felony for possession of a controlled substance:

Uh, the, the, the officer that arrested me, he said he was so many feet away where I can see him, and he said he observed me doing hand-to-hand transaction. So that ended up turning to from a “possession” to an “intend.” Uh, he said he’d seen a couple of vehicles pull up to the side of the curb, where he could see me doing hand to hand. He saw one individual, he said he walked up and he seen another hand-to-hand. He described the car: the car didn’t match the color, first of all. He said it was daylight: it was night when they arrested me ... uh, things of that nature.

In this case, the passage highlights information the respondent states was used to signify their guilt, despite their belief that the information was too inconsistent with their own recollection of the events leading to their arrest and prosecution to be considered reliable.

The second of these positions (highlighted by only one of the returning citizens who reported a less-than-deserved outcome) voices how the type of defense attorney can make all the difference in their case outcome: being charged with a crime that someone else with similar case circumstances (save their race and ability to retain a private attorney) would later be dismissed. On this position, one African-American female charged with a felony for prostitution made the following comments:

Because it was a similar [case] there was this, this, this, this white girl. She had, she had a lawyer. Me and her [were being charged] on the same thing, but she got caught up north, [and] I got caught out west. Her lawyer got her off with time considered served: she did not go in the back and get processed. He [referring to the other woman's privately-hired defense attorney] broke it down. The lawyer broke it down. Everything that the police said: he countered it. He caught them in a lie...When she came back there and told me she was going home (for the same charge I got, but she had a lawyer, and I had a public defender). I think a lawyer [is going to] always [provide a better] outcome 'cause he got the skills to pay the bills.

These findings suggest that (within the boundaries of this study) returning citizens who find their sentence outcomes to be worse than deserved during the plea bargaining process will feel it is based on how their charges are established. If defendants believe they are being given a fair opportunity to have as many mitigating factors as are available in their thoroughly reviewed and considered cases, then they are more likely to accept the outcome as one they deserve. In this way, sentence severity appears to be less significant to the returning citizens than whether said sentence was rightfully deserved.

Additionally, race and sex are demographic characteristics believed to be influential in how a sentence outcome is established during the plea bargaining process. In situations where negative considerations of race and sex are believed to have influenced the sentence outcome, returning citizens are more likely to perceive their sentence outcome as worse than what their case circumstances would have otherwise demanded. This is not true in every case, but it is enough to suggest that avoiding this consideration is desirable.

What Makes a Sentence Appear Better than or Equal to What May Be Deserved?

Despite the existence of the discrepancies outlined above, not every citizen felt that their sentence outcome was worse than what was deserved. Half of the returning citizens interviewed believed that their sentence outcome was either better than or equal to what they deserved. When discussing ways in which a given sentence could be considered better than what a returning citizen believed they deserved, only one clear position was made available: being provided with rehabilitative treatment (hand-in-hand with or in lieu of imprisonment) for a drug-related charge. This was particularly the case with rehabilitative treatment in addition to incarceration. The returning citizens in question were able to articulate

their desire to obtain treatment for addiction to both their defense attorneys and the judge, and were fortunate enough to have a prosecutor that was willing to grant access to the treatment as part of the plea agreement's conditions. While the more intimate details surrounding these features are limited, two of the four returning citizens who asserted that their sentence was better than they deserved did so on this premise:

Better, because I got the chance to go somewhere, get some help, and go home. (African-American, Male, 42, Felony Conviction for Possession of a Controlled Substance) [Confirmed having received treatment for drug addiction]

Well, to be-I felt that it was better than I deserved, because they was able to get me in their treatment program right away. (African-American, Female, Felony Convictions for Theft of a Person) [Confirmed having received treatment for drug addiction]

The two returning citizens who indicated that their sentence outcome was within the boundaries of what they deserved did not provide enough information to determine a reason for why they felt this way. What can be taken away from these observations is that (within the boundaries of this study) returning citizens found favor in rehabilitative intervention practices over those designed to be punitive for drug-related offenses. When granted an opportunity to overcome habitual behaviors linked to engaging in specific types of crime, returning citizens are more likely to take advantage of them, and work to do so.

VI. General Plea Bargaining Reflections

Relying on Plea Agreement Use: Internal and External Perceptions

When asked whether plea agreements were better to use than traditional trials, the returning citizen responses were equally divided (Appendix A, Table A6, Page 79). The greatest figure for this inquiry was found among four of the ten returning citizens, who stressed that determining whether or not plea agreements were better than trials should be done at the level of each individual case (Appendix A, Table A6, Page 79). This amount was then followed by a tie between the remaining extremes: three more of the ten returning citizens indicated a belief that plea agreements "are not better than trials," while the last three returning citizens indicated a belief that plea agreement "are better than trials" (Appendix A, Table A6, Page 79).

When questioned on whether plea agreements (and by extension, the plea-bargaining system) should be used more than trials to resolve criminal cases, another even distribution occurred. In this case, another tie between the extremes occurred (though this time, they both shared greater portions of the total count): four of the ten returning citizens indicated a belief that plea agreements “should not be used more than trials are” in resolving criminal cases, while four other returning citizens indicated a belief that plea agreements “should be used more than trials are” in resolving criminal cases (Appendix A, Table A6, Page 79). The last two of the ten returning citizens illustrated their belief that the use of plea agreements and trials should depend on the circumstances of each individual case (Appendix A, Table A6, Page 79).

When asked whether or not they had encountered periods of confusion or uncertainty during the process of establishing their plea agreements, six out of the ten returning citizens confirmed having such encounters during their cases. Three more returning citizens emphasized that they had possessed a clear and complete understanding of what they were expected to do, while one returning citizen admitted their uncertainty (of being uncertain) at the time the agreement was being created. This position lines up with the general understanding that the more exposure an individual has to plea bargaining, the more familiar they become with its procedural components.

These beliefs suggest that whether a returning citizen believes that plea agreements are better than trials does not necessitate how they will determine the degree to which they should be used in resolving criminal cases altogether. The dominant perspective available among the responses given is that both systems of case disposal have their advantages and disadvantages. Categorizing one system as objectively better is considered naïve over the long-term. What establishes the interpersonal morality of a chosen system is its capacity to ensure that each case within said system is granted its due diligence. Achieving this due diligence requires that each case be exposed to enough thought and resources to be resolved in accordance to the strength of the evidence, regardless of the method used to resolve it.

Section 5. Conclusion

In this paper, I have attempted to gain a better understanding of how returning citizens (and by extension defendants) view the plea-bargaining system within Cook County, Illinois. This section summarizes the conclusions I have reached based on the findings of my study.

After completing my research, I believe the overall findings suggest

that my original argument was correct: plea bargaining, in many ways, *does* deliberately sacrifice what returning citizens would classify as just outcomes for the sake of expediency (i.e. being rid of as many cases as possible as quickly as possible). However, this is not the only conclusion worth noting, nor does it appear to be the most substantial one. This status belongs to its accompanying conclusion: determining the suitability of the plea-bargaining system is as much of an interpersonal and contextual analysis as it is a logistical one.

As discussed within the previous sections, much of the available literature on the plea-bargaining system from the perspective of trial court judges, prosecutors, and defense attorneys highlights the pursuit of expediency in resolving criminal cases as a top priority (even if done at the expense of ensuring that just outcomes are achieved). Often times, this focus is defended on the basis of several recurring reasons, including the ability of plea agreements to: 1) minimize overwhelming caseloads; 2) maximize the allocation of resources used in managing overwhelming caseloads; and 3) minimize the uncertainties of conviction and sentencing outcomes confronted when taking cases to trial.

While recognizing the weight these reasons possess, they do not speak to most of the beliefs expressed by the returning citizens of this study. In fact, the perspectives of returning citizens are more in line with reasons expressed for abolishing the use of plea agreements and plea bargaining. These beliefs include acknowledgments for how plea agreements often: 1) empower prosecutors to wield unchecked discretion in determining charge and sentence severity; 2) disenfranchise judges from using discretion to establish more situationally-aware sentences; 3) incentivize innocent people to plead guilty to crimes they did not commit; and 4) reprimand defendants who choose to see their cases through to trial.

The analysis conducted here also affirms the position that the returning citizens *do* consider expediency in resolving a case to be a top priority. However, the analysis also illuminates several features inherent to the current functionality of the plea-bargaining system that often overshadow this consideration. The most prominent of these features included: 1) pressure experienced by both defense attorneys and prosecutors to plead guilty, even if doing so is not an action the returning citizen wanted to pursue; 2) a mistrust among returning citizens for their defense attorneys due to interactions that suggested a favorability toward the interests of the prosecutor over their own; and 3) the perception of a lack of flexibility in detention sentences for nonviolent and simple drug-related offenses.

Despite the discrepancies emphasized above and elsewhere throughout this paper, the returning citizens are not entirely committed to the position of abolishing the plea-bargaining system in favor of relying on the use of trials. In the

aggregate, they believe attempting to categorize one system as objectively better than the other is naïve, as it fails to acknowledge the existence of experienced nuances that might make one option seem more appropriate for use than the other at any given time. What makes the use of either system just or fair is whether they ensure that each case is well-considered, well-deliberated, and decided in accordance to what the available evidence can prove took place. In other words, the interpersonal morality of plea bargaining is contextual—it depends on the circumstances surrounding the decision to use it.

Section 6. Recommendations

This section discusses several recommendations for making use of the findings disclosed throughout this paper. This section begins by considering three noteworthy recommendations proposed by the returning citizens themselves during the course of the interviews. This section concludes with a consideration for three external recommendations based on additional findings and propositions in the pre-existing literature. I note that these recommendations are being made tentatively, as the information I have gathered comes from an unrepresentative sample of both Cook County’s general and (former) prison populations.

Returning Citizen Recommendations

When the returning citizens were asked what they believed the Cook County criminal court system could do to try and make the plea-bargaining system better, an array of ranged responses followed. For the sake of time, I will not disclose what was said in every interview, but will instead present a rough outline of some of the suggestions I encountered below:

1. Allowing the accused to be kept under house arrest or confined to the home of an available relative, rather than undergo pretrial detention or be required to post bond, while awaiting the initiation of their case (when charged with a nonviolent offense). [*Recommended by UIN 1*]
2. Investing in retributive options based in rehabilitative treatment, rather than undergo incarceration, to make amends for criminal activities conducted under the influence of a drug addiction or mental health complication (when charged with a nonviolent offense). [*Recommended by UIN 4, UIN 6, and UIN 7*]

3. Reevaluating the pre-trial detainment and bond systems, excluding the use of either against individuals with no steady sources of income, and (as long as they are not considered to be a threat of any sort) allowing them to work to find employment and retain a private attorney in the time leading up to the deliberation of their cases. [*Recommendation by UIN 9*]

These recommendations convey that, beyond what those on the outside of the criminal justice system may understand, the returning citizens are aware of the structural constraints that restrict them. Not only are they mindful of how their actions have influenced or impacted the lives of others, but they also recognize where certain activities within the system meant to remedy their wrongdoings are perpetuating a different series of wrongdoings against them in the process. This, in my opinion, validates the strength of these recommendations to a greater extent (even if many of them would take a considerable amount of time to assess).

Individual Research-Based Recommendations

The bottom-line is this: the plea-bargaining system is, without question, flawed. However, the top priority should be to understand what internal features within the system produce said flaws and amend them, while leaving the rest of the beneficial features of the system intact (Covey 2008, 1240-1241; Guidorizzi 1998, 772-773; Dubber 1997, 591-593; Casper and Brereton 1984, 131-133; Schlesinger and Malloy 1980, 582-584). To address some of the more internalized complications, I propose the following solutions:

1. Increasing the number of defense attorneys and prosecutors, as a means of unburdening some of the current groups of these attorneys from their overwhelming caseloads (Joe 2016, 394; Burkhart 2015, 26; Johnson 2014, 405-406; Dandurand 2011, 209-210; Gershowitz and Killinger 2011, 297-300). This, in theory, could de-incentivize both groups of attorneys from feeling the need to pressure the majority of the defendants they interact with to plead guilty in their cases.
2. Working to decriminalize activities based within the influences of a drug addiction or mental health complication in favor of strengthening rehabilitation services tailored to ending and preventing the recurrence of these activities among otherwise non-threatening individuals (Russoniello 2012, 425; Hughes and Stevens 2010, 1008-1010; Bretteville-Jensen 2006, 560-565). This, in theory, could mitigate many of the complications

encountered with the nature of overwhelming caseloads faced by trial court judges, prosecutors, and defense attorneys.

3. Pursuing ways in which to offer vouchers to indigent defendants designed to grant them the means to secure competitively invested private attorneys to represent them (Schulhofer and Friedman 2010, 12-14; Tague 2000, 277-279; Schulhofer and Friedman 1993, 112-115). This, in theory, could mitigate a considerable amount of mistrust defendants hold with the likes of court-appointed attorneys (i.e. public defenders), as there would be no intimate, monetary connections that could drive them to seek out the interest of the prosecutor over that of their client.

Of course, the expectation for making these recommendations is not to suggest that a complete overhaul in which each and every perceivable change imaginable should be pursued at once. Effective, long-term improvements take a great deal of time, resources, and analysis to maintain. Instead, I wish to encourage future researchers to consider how these recommendations may be explored in greater depth when larger concentrations of perspectives from this population are more accessible and well-known.

This position plays right into the final recommendation, that is, a continued interest in seeking out more of these returning citizen and/or defendant perspectives to analyze and evaluate. Recruitment for this study initiated on Saturday, February 9th, 2019. All but one of the original ten candidates showed up for their scheduled interview times, and completed the study from start to finish. The vacancy that appeared in response to the one candidate who was unable to make their appointment was filled by the late afternoon of Monday, February 18th, 2019. In the ten days between the start of the recruitment stage, and the completion of the final interview, 31 individuals reached out to me about participating in the study.

This information shows that individuals from these backgrounds *want* their experiences to be shared. They want the rest of us who have never been subjected to the criminal justice system to understand what they have encountered. As I have emphasized, plea bargaining scholarship has often neglected the significance of these perspectives when discussing the benefits or discrepancies of the plea-bargaining system. To that end, this study has provided another perspective through which considerations for these benefits and discrepancies can be viewed.

References

Adelstein, Richard P. and Thomas J. Miceli. "Toward a Comparative Economics of Plea Bargaining." *European Journal of Law and Economics*, vol. 11, no. 1 (January 2001): pp. 47-67. p 55-56. *SpringerLink*, <https://link.springer.com/content/pdf/10.1023%2FA%3A1008713729015.pdf>.

Albonetti, Celesta A. "An Integration of Theories to Explain Judicial Discretion." *Social Problems*, vol. 38, no. 2 (May 1991): pp. 247-266. p. 255. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/socprob38&i=257>.

Alschuler, Albert W. "The Prosecutor's Role in Plea Bargaining." *The University of Chicago Law Review*, vol. 36, no. 1 (1968): pp. 50-112. p. 52. *JSTOR*, <https://www.jstor.org/stable/1598832>.

"The Defense Attorney's Role in Plea Bargaining." *The Yale Law Journal*, vol. 84, no. 6 (1975): pp. 1179-1314. p. 1191. *JSTOR*, <https://www.jstor.org/stable/795498>.

"The Trial Judge's Role in Plea Bargaining, Part I." *Columbia Law Review*, vol. 76, no. 7 (1976): pp. 1059-1154. *JSTOR*, <https://www.jstor.org/stable/1121673>.

"The Changing Plea Bargaining Debate." *California Law Review*, vol. 69, no. 3 (May 1981): pp. 652-730. p. 656, 707. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/calr69&i=674>.

"The Failure of Sentencing Guidelines: A Plea for Less Aggregation." *The University of Chicago Law Review*, vol. 58, no. 3 (1991): pp. 901-951. p. 908, 926. *JSTOR*, www.jstor.org/stable/1599992.

Anderson, Amy L. and Cassia Spohn. "Lawlessness in the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentence Outcomes." *Justice Quarterly Review*, vol. 27, no. 3 (2010): pp. 362-393. p. 363. *Taylor and Francis Online*, <https://www.tandfonline.com/doi/abs/10.1080/07418820902936683>.

Arango, John B. "Defense Services for the Poor." *Criminal Justice*, vol. 4, no. 1 (Spring 1989): pp. 24-25. p. 25. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/cjust4&i=26>.

Asimow, Michael. "When Lawyers Were Heroes." *University of San Francisco Law Review*, vol. 30, no. 4 (Summer 1996): pp. 1131-1138. p. 1133. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/usflr30&i=1145>.

Baker, Scott and Claudio Mezzetti. "Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial." *The Journal of Law, Economics, and Organization*, vol. 17, no. 1 (1 April 2001): pp. 149-167. p. 150. <https://doi>.

org/10.1093/jleo/17.1.149.

Barkow, Rachel E. "Organizational Guidelines for the Prosecutor's Office." *Cardozo Law Review*, vol. 31, no. 6 (June 2010): pp. 2089-2118. p. 2091. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/cdozo31&i=2105>.

Battle, Jackson B. "Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver." *Denver Law Journal*, vol. 50, no. 1 (1973): pp. 101-136. p. 103. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/denlr50&i=115>.

Benesh, Sarah C. "Understanding Public Confidence in American Courts." *The Journal of Politics*, vol. 68, no. 3 (2006): pp. 696-707. p. 703. *The University of Chicago Press Journals*, <https://www.journals.uchicago.edu/doi/pdfplus/10.1111/j.1468-2508.2006.00455.x>.

Bjerk, David. "Guilt Shall Not Escape or Innocence Suffer? The Limits of Plea Bargaining When Defendant Guilt is Uncertain." *American Law and Economics Review*, vol. 9, no. 2 (1 October 2007): pp. 305-329. p. 311. <https://doi.org/10.1093/aler/ahm010>.

Bowers, Josh. "Contraindicated Drug Courts." *UCLA Law Review*, vol. 55, no. 4 (April 2008): pp. 783-836. p. 826-827. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/uclalr55&i=791>.

Brady v. United States. 397 U.S. 742-752. Supreme Court of the United States. 1970. *Google Scholar*. Web.

Breen, Patricia D. "The Trial Penalty and Jury Sentencing: A Study of Air Force Courts- Martial." *Journal of Empirical Legal Studies*, vol. 8 (17 February 2011): pp. 206-235. p. 213. *Wiley Online Library*, <https://doi.org/10.1111/j.1740-1461.2010.01206.x>.

Brennan, James T. "Judicial Fiscal Independence." *University of Florida Law Review*, vol. 23, no. 2 (Winter 1971): pp. 277-288. p. 279. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/uflr23&i=299>.

Brereton, David and Jonathan D. Casper. "Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts." *Law & Society Review*, vol. 16, no. 1 (1981): pp. 45-70. p. 45, 47. *JSTOR*, www.jstor.org/stable/3053549.

Bretteville-Jensen, Anne L. "To Legalize or Not To Legalize? Economic Approaches to the Decriminalization of Drugs." *Journal of Substance Use & Misuse*, vol 41, no. 4 (2006): pp. 555-565. p. 560-565. *Taylor and Francis*

Online, <https://doi.org/10.1080/10826080500521565>.

Bright, Stephen B. “Legal Representation for the Poor: Can Society Afford This Much Injustice?” *Missouri Law Review*, vol. 75, no. 3 (Summer 2010): pp. 683-714. p. 683. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/molr75&i=689>.

Britt, Chester L. “Social Context and Racial Disparities in Punishment Decisions.” *Justice Quarterly Review*, vol. 17, no. 4 (2000): pp. 707-732. p. 720. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/jquart17&i=727>.

Brown, Darryl K. “Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response.” *Ohio State Journal of Criminal Law*, vol. 6, no. 2 (Spring 2009): pp. 453-466. p. 463. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/osjcl6&i=457>.

Burke, Alafair S. “Prosecutorial Passion, Cognitive Bias, and Plea Bargaining.” *Marquette Law Review*, vol. 91, no. 1 (Fall 2007): pp. 183-212. p. 184, 200. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/marqlr91&i=187>.

Burkhart, Geoff. “Public Defense: The New York Story.” *Criminal Justice* vol. 3, no. 3 (Fall 2015): pp. 22-29. p. 26. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/cjust30&i=157>.

Burns, Stacy L. and Mark Peyrot. “Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts.” *Social Problems*, vol. 50, no. 3 (1 August 2003): pp. 416-438. p. 419. *Oxford Academic*, <https://doi.org/10.1525/spp.2003.50.3.416>.

Caldwell, H. Mitchell. “Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System.” *Catholic University Law Review*, vol. 61, no. 1 (Winter 2011): pp. 63-96. p. 72. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/cathu61&i=65>.

Callan, Sam W. “An Experience in Justice without Plea Negotiation.” *Law & Society Review*, vol. 13, no. 2 (Winter 1979): pp. 327-348. p. 327, 330. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/lwsocrw13&i=329>.

Carney, Francis J. and Ann L. Fuller. “A Study of Plea Bargaining in Murder Cases in Massachusetts.” *Suffolk University Law Review*, vol. 3, no. 2 (Spring 1969): pp. 292-307. p. 293. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/sufflr3&i=300>.

Casper, Jonathan D. and David Brereton. “Evaluating Criminal Justice

Reforms.” *Law & Society Review*, vol. 18, no. 1 (1984): pp. 121-148. p. 131-133. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/lwsocrw18&i=123>.

“Did You Have a Lawyer When You Went to Court - No, I Had a Public Defender.” *Yale Review of Law and Social Action*, vol. 1, no. 4 (Spring 1971): pp. 4-9. p. 5-6. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/yrlsa1&i=252>.

Chasse, Ken. “No Votes in Justice Means More Wrongful Convictions.” (5 June 2016). pp. 1-28. p. 22. Available at SSRN: <https://ssrn.com/abstract=2790625> or <http://dx.doi.org/10.2139/ssrn.2790625>.

Church, Thomas W. Jr. “In Defense of Bargain Justice.” *Law & Society Review*, vol. 13, no. 2 (Winter 1979): pp. 509-526. p. 522. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/lwsocrw13&i=511>.

Clarke, Charles H. “Plea Bargaining and Trial Penalties: When May the State Legitimately Require Criminal Defendants to Surrender Their Trial Rights.” *Indiana Law Journal*, vol. 55, no. 1 (1979-1980): pp. 71-90. p. 86. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/indana55&i=81>.

Clark, David E. and Kevin J. Murtagh. “Flood of New Court Fees Drown Indigent Defendants.” *North Carolina State Bar Journal*, vol. 22, no. 4 (Winter 2017): pp. 8-13. p. 9. *HeinOnline*, <https://heinonline.org/proxy.uchicago.edu/HOL/P?h=hein.barjournals/ncarb0022&i=176>.

Cleary, John J. “Preparing a Client to Plead Guilty.” *Practical Lawyer*, vol. 24, no. 4 (1 June 1978): pp. 43-56. p. 45. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.ali/praclaw0024&i=339>.

“Cook County’s Criminal Justice System: Trends and Issues Report,” *Loyola University Chicago - Center for Criminal Justice Research, Policy and Practice* (June 2018): pp. 1-24. p. 12. <https://luc.edu/media/luc.edu/criminaljustice/pdfs/Cook%20County%20Trends%20and%20Issues%20Report%20June%202018.pdf>.

“Cook County State’s Attorney Data Report,” *Office of the Cook County State’s Attorney* (October 2017): pp. 1-16. p. 10. https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao_2017_data_report_180220.pdf

Covey, Russell D. “Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings.” *Tulane Law Review*, vol. 82, no. 4 (March 2008): pp. 1237-1290.

p. 1240-1241. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/tulr82&i=1255>.

“Plea Bargaining and Price Theory.” *George Washington Law Review*, vol. 84, no. 4 (July 2016): pp. 920-971. p. 928. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/gwlr84&i=968>.

Crespo, Andrew Manuel, “The Hidden Law of Plea Bargaining.” *Columbia Law Review*, vol. 118, No. 5 (12 June 2018). *Harvard Public Law Working Paper* No. 18-43. pp. 1304 -1424. p. 1313-1314, 1366. Available at SSRN: <https://ssrn.com/abstract=3196002>.

Dandurand, Chris. “Walking out on the Check: How Missouri Abandoned Its Public Defenders and Left the Poor to Foot the Bill.” *Missouri Law Review* vol. 76, no. 1 (Winter 2011): pp. 185-212. p. 209-210. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/molr76&i=187>.

Dervan, Lucian E. and Vanessa A. Edkins. “The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem.” *The Journal of Criminal Law and Criminology (1973-)*, vol. 103, no. 1 (2013): pp. 1-48. p. 6. *JSTOR*, <https://www.jstor.org/stable/24615609>.

Dubber, Markus Dirk. “American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure.” *Stanford Law Review*, vol. 49, no. 3 (1997): pp. 547-605. p. 591-593. *JSTOR*, www.jstor.org/stable/1229343.

Ellingstad, Susan E. “The Sentencing Guidelines: Downward Departures Based on a Defendant’s Extraordinary Family Ties and Responsibilities.” *Minnesota Law Review*, vol. 76, no. 4 (April 1992): pp. 957-984. p. 961. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/mnlr76&i=973>.

“Fairness.” *Merriam-Webster*, www.merriam-webster.com/dictionary/fairness (accessed November 3rd, 2018).

“Federal Sentencing Statistics (2017).” *United States Sentencing Commission*, Table 2, pp. 3. <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2017/7c17.pdf>.

Feeley, Malcolm M. “Perspectives on Plea Bargaining.” *Law & Society Review*, vol. 13, no. 2 (Winter 1979): pp. 199-210. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/lwsocrw13&i=201>.

Feinberg, Kenneth R. “Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission.” *Wake Forest Law Review*, vol. 28, no. 2

(1993): pp. 291-304. p. 292. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/wflr28&i=301>.

Findley, Keith A. "Reducing Error in the Criminal Justice System." *Seton Hall Law Review*, vol. 48, no. 4 (2018): pp. 1265-1318. p. 1293. *HeinOnline*, <https://heinonline-org.proxy.uchicago.edu/HOL/P?h=hein.journals/shlr48&i=1293>.

Fine, Ralph Adam. "Plea Bargaining: An Unnecessary Evil." *Marquette Law Review*, vol. 70, no. 4 (Summer 1987): pp. 615-632. p. 623. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/marqlr70&i=623>.

Freed, Daniel J. "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers." *Yale Law Journal*, vol. 101, no. 8 (June 1992): pp. 1681-1754. p. 1686. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ylr101&i=1699>.

Freedman, Monroe H. "An Ethical Manifesto for Public Defenders." *Valparaiso University Law Review*, vol. 39, no. 4 (Summer 2005): pp. 911-924. p. 912. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/valur39&i=924>.

Friedman, Lawrence M. "Plea Bargaining in Historical Perspective." *Law & Society Review*, vol. 13, no. 2 (Winter 1979): pp. 247-260. p. 255. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/lwsocrw13&i=249>.

Garoupa, Nuno and Frank H. Stephen. "Law and Economics of Plea-Bargaining." (July 2006). pp. 1-28. p. 7. Available at SSRN: <https://ssrn.com/abstract=917922> or <http://dx.doi.org/10.2139/ssrn.917922>.

Gershman, Bennett L. "Prosecutorial Ethics and Victim's Rights: The Prosecutor's Duty of Neutrality." *Lewis & Clark Law Review*, vol. 9, no. 3 (Fall 2005): pp. 559-580. P. 562-563. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/lewclr9&i=579>.

Gershowitz, Adam M. and Laura R. Killinger. "The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants," *Northwestern University Law Review*, vol. 105, no. 1 (Winter 2011): pp. 261-302. p. 263, 279-280, 297-300. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/illlr105&i=263>.

Gertner, Nancy. "From Omnipotence to Impotence: American Judges and Sentencing." *Ohio State Journal of Criminal Law*, vol. 4, no. 2 (Spring 2007): pp. 523-540. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/osjcl4&i=530>.

Gertz, Marc G. "The Impact of Prosecutor/Public Defender Interaction on Sentencing: An Exploratory Typology." *Criminal Justice Review*, vol. 5, no. 1 (May 1980): pp. 43–54. p. 45-46. *SAGE Publications*, <https://journals.sagepub.com/doi/pdf/10.1177/073401688000500105>.

Gifford, Donald G. "Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion." *University of Illinois Law Review*, vol. 1983, no. 1 (1983): pp. 37-98. p. 65, 67, 75. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/unilllr1983&i=45>.

Gilchrist, Gregory M. "Plea Bargains, Convictions and Legitimacy." *American Criminal Law Review*, vol. 48, no. 1 (Winter 2011): pp. 143-184. p. 160. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/amcrimlr48&i=145>.

Glaze, Lauren E. and Danielle Kaeble. "Correctional Populations in the United States, 2013." *The United States Department of Justice – Bureau of Justice Statistics* (December 2014): pp. 1-14. p. 6. *Office of Justice Programs*, <https://bjs.gov/content/pub/pdf/cpus13.pdf>.

Goodrum, Sarah and Mark C. Stafford. "The Management of Emotions in the Criminal Justice System." *Sociological Focus*, vol. 36, no. 3, (August 2003): pp. 179–196. p. 188. *JSTOR*, www.jstor.org/stable/20832202.

Graham, Kyle. "Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials." *California Law Review*, vol. 100, no. 6 (December 2012): pp. 1573-1630. p. 1595, 1578. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/calr100&i=1597>.

"Overcharging." *Ohio State Journal of Criminal Law*, vol. 11, no. 2 (Spring 2014): pp. 701-724. p. 704-705. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/osjcl11&i=715>.

Granfield, Robert, Cynthia Eby, and Thomas Brewster. "An Examination of the Denver Drug Court: The Impact of a Treatment-Oriented Drug-Offender System," *Law & Policy*, vol. 20, no. 2 (April 1998): pp. 183-202. p. 186-187. *Wiley Online Library*, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-9930.00047>.

Green, Bruce A. "Criminal Neglect: Indigent Defense from a Legal Ethics Perspective." *Emory Law Journal*, vol. 52, no. Special Edition (2003): pp. 1169-1200. P. 1170, 1178. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/emlj52&i=1181>. and Fred C. Zacharias. "Prosecutorial Neutrality." *Wisconsin Law Review*, vol. 2004, no. 3 (2004): pp. 837-904. p. 839.

- HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/wlr2004&i=851>.
- Griffin, Leslie C., “The Prudent Prosecutor.” *Georgetown Journal of Legal Ethics*, vol. 14, no. 2, (Winter 2001); *University of Houston Law Center* No. 2007-A-33. pp. 259-307. p. 266. Available at SSRN: <https://ssrn.com/abstract=283027>.
- Grossman, Gene M. and Michael L. Katz. “Plea Bargaining and Social Welfare.” *The American Economic Review*, vol. 73, no. 4 (1983): pp. 749–757. p. 749. *JSTOR*, www.jstor.org/stable/1816572.
- Guidorizzi, Douglas D. “Should we Really Ban Plea Bargaining: The Core Concerns of Plea Bargaining Critics.” *Emory Law Journal*, vol. 47, no. 2 (Spring 1998): pp. 753-784. p.772-773. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/emlj47&i=763>.
- Harlow, Caroline W. “Defense Counsel in Criminal Cases.” *The United States Department of Justice – Bureau of Justice Statistics* (Nov. 2000): pp. 1-12. *Office of Justice Programs*, <https://www.bjs.gov/content/pub/pdf/dccc.pdf>.
- Hatch, Orrin G. “The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System.” *Wake Forest Law Review*, vol. 28, no. 2 (1993): pp. 185-198. p. 188. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/wflr28&i=195>.
- “How Many Counties Are There in the United States?” *Mapping, Remote Sensing, and Geospatial Data*, United States Geological Survey, <https://www.usgs.gov/faqs/how-many-counties-are-there-united-states> (accessed January 11, 2019).
- Howe, Scott W. “The Value of Plea Bargaining.” *Oklahoma Law Review*, vol. 58, no. 4 (Winter 2005): pp. 599-636. p. 629-630. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/oklr58&i=612>.
- Hughes, Caitlin E. and Alex Stevens. “What Can We Learn From The Portuguese Decriminalization of Illicit Drugs?” *The British Journal of Criminology*, vol. 50, no. 6 (1 November 2010): pp. 999–1022. p. 1008-1010. *Oxford Academic*, <https://doi.org/10.1093/bjc/azq038>.
- Hussemann, Jeanette M. “Negotiating Justice: Defendant Perspectives of Plea Bargaining in American Criminal Courts.” *PhD diss., University of Minnesota*, 2013, pp. 1-150. *ProQuest LLC*, https://conservancy.umn.edu/bitstream/handle/11299/155864/Hussemann_umn_0130E_1_3764.pdf;sequence=1.
- Illinois Circuit Court of Cook County. “Organization of the Circuit Court.” *About*

the Court, The State of Illinois - Circuit Court of Cook County, <https://www.cookcountycourt.org/ABOUTTHECOURT/OrganizationoftheCircuitCourt.aspx> (accessed January 11, 2019)

“Illinois Counties by Population.” *Illinois Outline* (2010). Cubit Planning, Inc., https://www.illinois-demographics.com/counties_by_population (accessed January 11, 2019).

Illinois Department of Corrections. “Prison Population on 12-31-18 Data Set.” *Prison Population Data Sets*. Illinois Department of Corrections, 2018. <https://www2.illinois.gov/idoc/reportsandstatistics/Pages/Prison-Population-Data-Sets.aspx> (accessed March 27, 2019).

Israel, Jerold H. “Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom.” *Florida Law Review*, vol. 48, no. 5 (December 1996): pp. 761-780. p. 761. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/uflr48&i=777>.

Jain, Eisha. “Capitalizing on Criminal Justice.” *Duke Law Journal* vol. 114, no. 4 (April 2005): pp. 1381-1432. p. 1393, 1404-1405. *HeinOnline*, <https://heinonline-org.proxy.uchicago.edu/HOL/P?h=hein.journals/duklr67&i=1411>.

Joe, Irene Oritseweyinmi. “Systematizing Public Defender Rationing.” *Denver Law Review*, vol. 93, no. 2 (2016): pp. 389-430. p. 394. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/denlr93&i=399>.

Johnson, Vida B. “A Plea for Funds: Suing Padilla, Lafler, and Frye to Increase Public Defender Resources.” *American Criminal Law Review*, vol. 51, no. 2 (Spring 2014): pp. 403- 432. p. 405-406. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/amcrimlr51&i=421>.

King, Nancy J. and Rosevelt L. Noble. “Felony Jury Sentencing in Practice: A Three-State Study,” *Vanderbilt Law Review*, vol. 57, no. 3 (April 2004): pp. 885-962. p. 896. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/vanlr57&i=899>.

Kobayashi, Bruce H. and John R Lott, Jr. “In defense of criminal defense expenditures and plea bargaining,” *International Review of Law and Economics*, vol. 16, no. 4 (December 1996): pp. 397-416. p. 397-398. *ScienceDirect*, <https://www.sciencedirect.com/science/article/pii/S0144818896000348>.

Kura, James. “Prove You Need the Money: Public Defenders Should Use Caseload Data to Raise Funds and Influence People.” *Criminal Justice*, vol. 4, no. 1

(Spring 1989): pp. 21-41. p. 21. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/cjust4&i=23>.

Langbein, John H. "Torture and Plea Bargaining." *The University of Chicago Law Review*, vol. 46, no. 1 (1978): pp. 3-22. p. 12. *JSTOR*, www.jstor.org/stable/1599287.

Levin, Martin A. "Delay in Five Criminal Courts." The University of Chicago Press for The University of Chicago Law School, *The Journal of Legal Studies*, Vol. 4, No. 1 (January 1975): pp. 83-131. p. 83. *JSTOR*, www.jstor.org/stable/724103.

LII Staff. "Alford Plea." *Cornell Law School - LII / Legal Information Institute*, Cornell Law School. Last Updated 9 November 2014. https://www.law.cornell.edu/wex/alford_plea (accessed July 17, 2018).

LII Staff. "Nolo Contendere." *Cornell Law School - LII / Legal Information Institute*, Cornell Law School. Last Updated 3 June 2015. https://www.law.cornell.edu/wex/nolo_contendere (accessed July 17, 2018).

Llorente, Monica. "Criminalizing Poverty through Fines, Fees, and Costs." *Children's Rights Litigation*, vol. 19, no. 1 (Fall 2016): pp. 18-27. p. 19. *HeinOnline*, <https://heinonline-org.proxy.uchicago.edu/HOL/P?h=hein.aba/chrglit0019&i=18>.

Ma, Yue. "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective." *International Criminal Justice Review*, vol. 12, no. 1 (1 May 2002): pp. 22-52. p. 23. *SAGE Publications*, <https://doi.org/10.1177/105756770201200102>.

Mann, Phyllis E. "Ethical Obligations of Indigent Defense Attorneys to Their Clients." *Missouri Law Review*, vol. 75, no. 3 (Summer 2010): pp. 715-750. p. 715-716. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/molr75&i=721>.

McCarthy, Belinda R. and Charles A. Lindquist. "Certainty of Punishment and Sentence Mitigation in Plea Behavior." *Justice Quarterly Review*, vol. 2, no. 3 (1985): pp. 363-383. p. 369. *Taylor and Francis Online*, www.tandfonline.com/doi/abs/10.1080/07418828500088611.

McCoy, Candace. "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform." *Criminal Law Quarterly*, vol. 50, no. 1 & 2 (April 2005): pp. 67-107. p. 87. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/clwqrty50&i=83>.

Melilli, Kenneth J. "Prosecutorial Discretion in an Adversary System." *Brigham*

Young University Law Review, vol. 1992, no. 3 (1992): pp. 669-704. p. 672. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/byulr1992&i=682>.

Menkel-Meadow, Carrie and Robert G. Meadow. "Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities." *Law & Policy*, vol. 5 (April 1983): pp. 237-256. p. 239-240. *Wiley Online Library*, <https://doi.org/10.1111/j.1467-9930.1983.tb00297.x>.

Miner, Roger J. "The Consequences of Federalizing Criminal Law: Overloaded Courts and a Dissatisfied Public." *Criminal Justice*, vol. 4, no. 1 (Spring 1989): pp. 16-40. p. 18. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/cjust4&i=20>.

Misner, Robert L. "Recasting Prosecutorial Discretion." *Journal of Criminal Law and Criminology*, vol. 86, no. 3 (Spring 1996): pp. 717-777. p. 755, 756. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/jclc86&i=729>.

Missouri v. Frye. 566 U.S. 134. Supreme Court of the United States. 2012. *Google Scholar*. Web.

Mnookin, Jennifer L. "Uncertain Bargains: The Rise of Plea Bargaining in America." *Stanford Law Review*, vol. 57, no. 5 (April 2005): pp. 1721-1744. p. 1722-1723. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/stflr57&i=1737>.

Nagel, Ilene H. "Structuring Sentencing Discretion: The New Federal Sentencing Guidelines." *Journal of Criminal Law and Criminology*, vol. 80, no. 4 (Winter 1990): pp. 883-943. p. 887. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/jclc80&i=895>.

Oaks, Dallin H. and Warren Lehman. "The Criminal Process of Cook County and the Indigent Defendant." *University of Illinois Law Forum*, vol. 1966, no. 3 (Fall 1966): pp. 584-740. p. 630. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/unilllr1966&i=623>.

Ogletree, Jr., Charles J. "The Death of Discretion Reflections on the Federal Sentencing Guidelines." *Harvard Law Review*, vol. 101, no. 8 (June 1988): pp. 1938-1960. p. 1951. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/hlr101&i=1956>.

O'Hear, Michael M. "The Original Intent of Uniformity in Federal Sentencing." *University of Cincinnati Law Review*, vol. 74, no. 3 (Spring 2006): pp. 749-818. p. 749. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ucinlr74&i=763>.

“Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice.” *Stanford Law & Policy Review*, vol. 20, no. 2 (2009): pp. 463-500. p. 488. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/stanlp20&i=469>.

Oliss, Philip. “Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines.” *University of Cincinnati Law Review*, vol. 63, no. 4 (Summer 1995): pp. 1851-1892. p. 1854. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ucinlr63&i=1866>.

Olson, David E. “Population Dynamics and the Characteristics of Inmates in the Cook County Jail.” *Criminal Justice & Criminology: Faculty Publications & Other Works* (February 2012): pp. 1-9. p. 4. *Loyola eCommons*, https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1000&context=criminaljustice_fac_pubs.

Osler, Mark. “The Promise of Trailing-Edge Sentencing Guidelines to Resolve the Conflict between Uniformity and Judicial Discretion.” *North Carolina Journal of Law & Technology*, vol. 14, no. 1 (Fall 2012): pp. 203-248. p. 217. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ncjl14&i=211>.

Perry, Steven W. and Duren Banks. “Prosecutors in State Courts, 2007 - Statistical Tables,” *The United States Department of Justice – Bureau of Justice Statistics* (Dec. 2011): pp. 1-12. p. 1. *Office of Justice Programs*, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1749>.

Pinard, Michael. “Poor, Black and Wanted: Criminal Justice in Ferguson and Baltimore.” *Howard Law Journal*, vol. 58, no. 3 (Spring 2015): pp. 857-880. p. 870. *HeinOnline*, <https://heinonline-org.proxy.uchicago.edu/HOL/P?h=hein.journals/howlj58&i=889>.

“Plea Bargains: In Depth.” *Findlaw.com*, <https://www.criminal.findlaw.com/criminal-procedure/plea-bargains-in-depth.html> (accessed September 24, 2018).

Redlich, Allison D. and Alicia A. Summers. “Voluntary, knowing, and intelligent pleas: Understanding the plea inquiry.” *Psychology, Public Policy, and Law*, vol. 18, no. 4 (2012): pp. 626-643. p. 627. *PsycNET*, <http://dx.doi.org/10.1037/a0026066>.

“Roadmap to Reentry.” *The United States Department of Justice*, Department of Justice, Last Updated 19 April 2017. <http://www.justice.gov/archives/reentry/roadmap-reentry> (accessed October 18, 2018).

Russoniello, Kellen. "The Devil (and Drugs) in the Details: Portugal's Focus on Public Health as a Model for Decriminalization of Drugs in Mexico." *Yale Journal of Health Policy, Law, and Ethics*, vol. 12, no. 2 (Summer 2012): pp. 371-432. p. 425. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/yjhple12&i=381>.

Safiedine, Salma S. and K. Jeannie Chung. "The Price for Justice: The Economic Barriers That Contribute to an Unfair and Unjust Criminal Justice System." *Criminal Justice*, vol. 32, no. 4 (Winter 2018): pp. 40-44. p. 41-42. *HeinOnline*, <https://heinonline-org.proxy.uchicago.edu/HOL/P?h=hein.journals/cjust32&i=230>.

Santobello v. New York. 404 U.S. 257, Supreme Court of the United States. 1971. *Google Scholar*. Web.

Schlesinger, Steven R. and Elizabeth A. Malloy. "Plea Bargaining and the Judiciary: An Argument for Reform." *Drake Law Review*, vol. 30, no. 3 (1980-1981): pp. 581-598. p. 582-584. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/drklr30&i=591>.

Schneider, Andrea Kupfer. "Cooperating or Caving In: Are Defense Attorneys Shrewed or Exploited in Plea Bargaining Negotiations." *Marquette Law Review*, vol. 91, no. 1 (Fall 2007): pp. 145-162. p. 161. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/marqlr91&i=150>.

Schulhofer, Stephen J. "Criminal Justice Discretion as a Regulatory System." *Journal of Legal Studies*, vol. 17, no. 1 (January 1988): pp. 43-82. p. 43. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/legstud17&i=47>.

"Plea Bargaining as Disaster." *Yale Law Journal*, vol. 101, no. 8 (June 1992): pp. 1979-2010. p. 1981-1982, 1992, 1996. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ylr101&i=1995>.

"Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity." *American Criminal Law Review*, vol. 29, no. 3 (Spring 1992): pp. 833-874. p. 853. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/amcrimlr29&i=849>.

"Rethinking Mandatory Minimums." *Wake Forest Law Review*, vol. 28, no. 2 (1993): pp. 199-222. p. 215. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/wflr28&i=209>.

and David D. Friedman. "Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of

Choice for All Criminal Defendants.” *American Criminal Law Review*, vol. 31, no. 1 (Fall 1993): pp. 73-122. p. 112-115. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/amcrimlr31&i=89>.

and David D. Friedman. “Reforming Indigent Defense How Free Market Principles Can Help to Fix a Broken System.” (1 September, 2010). pp. 1-24. p. 12-14. Available at SSRN: <https://ssrn.com/abstract=1710780> or <http://dx.doi.org/10.2139/ssrn.1710780>.

Schwarzer, William W. “Judicial Discretion in Sentencing.” *Federal Sentencing Reporter*, vol. 3, no. 6 (June 1991): pp. 339-341. p. 340. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/fedsen3&i=341>.

Scott, Robert E. and William J. Stuntz. “Plea Bargaining as Contract.” *Yale Law Journal*, vol. 101, no. 8 (June 1992): pp. 1909-1968. p. 1915, 1916. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ylr101&i=1925>.

Secunda, Paul M. “Cleaning up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors through the Use of the Model Rules of Professional Conduct.” *American Criminal Law Review*, vol. 34, no. 3 (Spring 1997): pp. 1267-1292. p. 1275. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/amcrimlr34&i=1279>.

Shapiro, Joseph. “As Court Fees Rise, The Poor Are Paying The Price.” *NPR*, *NPR* (Published May 19, 2014) 4:02 p.m., www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor (accessed January 23, 2019).

Sherman, Lawrence W. “Trust and Confidence in Criminal Justice.” (July 2002). *National Criminal Justice Reference Service (NCJRS)*. pp. 1-38. p. 14. <https://www.ncjrs.gov/pdffiles1/nij/189106-1.pdf?q=ideas-in>.

Spangenberg, Robert L. and Marea L. Beeman. “Indigent Defense Systems in the United States.” *Law and Contemporary Problems*, vol. 58, no. 1 (Winter 1995): pp. 31-50. p. 31 -32. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/lcp58&i=35>.

Stewart, Julie. “The Effects of Mandatory Minimums on Families and Society.” *Thomas M. Cooley Law Review*, vol. 16, no. 1 (1999): pp. 37-46. p. 37, 38. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/tmclr16&i=45>.

Stith, Kate and Steve Y. Koh. “The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines.” *Wake Forest Law Review*, vol. 28, no. 2 (1993): pp. 223-290. p. 223. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/wflr28&i=233>.

Stone, Randolph N. "The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases." *American Journal of Trial Advocacy*, vol. 17, no. 1 (Summer 1993): pp. 205-224. p. 213. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/amjtrad17&i=213>.

Sullivan, Gail M. and Anthony R. Artino. "Analyzing and Interpreting Data from Likert-Type Scales." *Journal of Graduate Medical Education*, vol. 5, no. 4 (December 2013): pp. 541-542. *National Center for Biotechnology Information*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3886444/>.

Tague, Peter W. "Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England." *University of Cincinnati Law Review*, vol. 69, no. 1 (Fall 2000): pp. 273-288. p. 277. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ucinlr69&i=283>.

Tonry, Michael. "Mandatory Minimum Penalties and the U.S. Sentencing Commission's 'Mandatory Guidelines.'" *Federal Sentencing Reporter*, vol. 4, no. 3 (1991): pp. 129-133. p. 129. *JSTOR*, www.jstor.org/stable/20639424.

Turner, Jenia Iontcheva. "Judicial Participation in Plea Negotiations: A Comparative View." *The American Journal of Comparative Law*, vol. 54, no. 1 (1 January 2006): pp. 199-267. p. 212. *Oxford Academic*, <https://doi.org/10.1093/ajcl/54.1.199>.

Ulmer, Jeffery T. and John H. Kramer. "The Use and Transformation of Formal Decision Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies." *Social Problems*, vol. 45, no. 2 (1998): pp. 248-267. p. 259. *JSTOR*, www.jstor.org/stable/3097246.

United States v. Jackson. 390 U.S. 570-586. Supreme Court of the United States. 1968. *Google Scholar*. Web.

"U.S. Census Bureau QuickFacts: Cook County, Illinois; Illinois." *Census Bureau QuickFacts*, United States Census Bureau. Last Updated 1 July, 2017. <https://www.census.gov/quickfacts/fact/table/cookcountyillinois,il/PST045217> (accessed January 26, 2019).

"U.S. Census Bureau QuickFacts: Illinois." *Census Bureau QuickFacts*, United States Census Bureau. Last Updated 1 July 2017. <https://www.census.gov/quickfacts/fact/table/il/PST045217> (accessed January 26, 2019)

"U.S. County Populations 2019." *Total Population by Country 2018*, World Population Review, <https://www.worldpopulationreview.com/us-counties/> (accessed January 11, 2019).

Vorenberg, James. "Decent Restraint of Prosecutorial Power." *Harvard Law Review*, vol. 94, no. 7 (May 1981): pp. 1521-1573. p. 1525. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/hlr94&i=1539>.

Weaver, Russell L. "Perils of Being Poor: Indigent Defense and Effective Assistance." *Brandeis Law Journal* vol. 42, no. 2 (2003): pp. 430-446. p. 436. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/branlaj42&i=443>.

Weinstein, Jack B. "The Effect of Sentencing on Women, Men, the Family, and the Community." *Columbia Journal of Gender and Law*, vol. 5, no. 2 (1996): pp. 169-181. p. 170. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/coljgl5&i=175>.

Welling, Sarah N. "Victim Participation in Plea Bargains." *Washington University Law Review*, vol. 65, no. 2 (1987): pp. 302-356. p. 312-313, 316. https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2085&context=law_lawreview.

"What Is PLEA BARGAINING? Definition of PLEA BARGAINING (Black's Law Dictionary)." *The Law Dictionary*, Black's Law Dictionary. Last Updated 2 March 2013. <https://www.thelawdictionary.org/plea-bargaining/> (accessed May 15, 2018).

White, Welsh S. "Proposal for Reform of the Plea Bargaining Process." *University of Pennsylvania Law Review*, vol. 119, no. 3 (January 1971): pp. 439-465. p. 440, 447. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/pnlr119&i=453>.

Wilkerson, Glen. "Public Defenders as Their Clients See Them." *American Journal of Criminal Law*, vol. 1, no. 2 (April 1972): pp. 141-155. p. 143. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ajcl1&i=155>.

Wilkins, Jr., William W. and John R. Steer. "The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity." *Washington and Lee Law Review*, vol. 50, no. 1 (Winter 1993): pp. 63-88. p. 71. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/waslee50&i=73>.

Williams, Lisa D. "Sizing Up the Prosecution: A Quick Guide to Local Prosecution." (Harvard Law School, Cambridge, MA, 2010). pp. 1- 25. p. 5. <http://hls.harvard.edu/content/uploads/2008/07/prosecution2010.pdf>.

Williams-Fisher, Renada. "Plea Bargaining Negotiations." *Southern University Law Review*, vol. 33, no. 1 (2005): pp. 237-248. p. 237. *HeinOnline*,

<https://heinonline.org/HOL/P?h=hein.journals/soulr33&i=243>.

Wilson, Molly J. Walker. "Defense Attorney Bias and the Rush to the Plea." *University of Kansas Law Review*, vol. 65, no. 2 (December 2016): pp. 271-326. p. 272. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/ukalr65&i=307>.

Wright, Ronald F. and Marc Miller. "Honesty and Opacity in Charge Bargains." *Stanford Law Review*, vol. 55, no. 4 (April 2003): pp. 1409-1418. p. 1410. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/stflr55&i=1423>.

"Reinventing American Prosecution Systems." *Crime and Justice*, vol. 46, no. 1 (2017): pp. 395-439. p. 414. *The University of Chicago Press Journals*, <https://www.journals.uchicago.edu/doi/pdfplus/10.1086/688463>.

Yin, Tung. "Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing under the Federal Guidelines." *California Law Review*, vol. 83, no. 1 (January 1995): pp. 419-470. p. 443. *HeinOnline*, <https://heinonline.org/HOL/P?h=hein.journals/calr83&i=433>.

Appendix A – Returning Citizen Interview Response Tables

Table A1. Collective impressions of defense attorney activity during the plea-bargaining process in the Cook County criminal justice system

| <i>UI N</i> | <i>Type</i> | <i>Pressured to Plead Guilty?</i> | <i>Motivations *</i> | <i>Rating* *</i> | <i>Would You Want This Lawyer to Serve Again?</i> |
|-------------|-------------|-----------------------------------|----------------------|------------------|---|
| 1 | CA (PD) | Yes | BRC | 2 | No |
| 2 | CA (PD) | Yes | BRC | 1 | No |
| 3 | CA (PD) | Yes | BRC | 1 | No |
| 4 | PH | No | BRC; MP | 10 | Yes |
| 5 | PH | No | BRC; MP | 4 | No |
| 6 | CA (PD) | Yes | BRC | 2 | No |
| 7 | CA (PD) | Yes | BRC | 5 | No |
| 8 | CA (PD) | Yes | BRC | 4 | No |
| 9 | CA (PD) | Yes | BRC | 1 | No |
| 10 | CA (PD) | No | BRC | 5 | Yes |

Notes: (*Types*): "CA (PD)" stands for "Court-Appointed (Public Defender)", "PH" stands for "Privately-Hired"; (*Motivations*): "BRC" stands for "Being Rid of the Case", "MP" stands for "Minimizing Punishment"

*While there was no hard limit on what a returning citizen could say they believe motivated the activities of their defense attorney, due to the nature of the questions I asked, most of the responses trended towards three possibilities: fairly proving their innocence (FPI); minimizing their punishment for the charge(s) (MP); or being rid of the case as soon as possible (BRC).

**On this scale (from "1" to "10") a rating of "1" is meant to represent the most unfair experience with the defense attorney, while a rating of "10" is meant to represent the fairest experience. Additionally, fairness specifically refers to the willingness of the defense attorney to listen to their client's input (as applicable) during the plea-bargaining process.

Table A2. Collective impressions of prosecutor activity during the plea-bargaining process in the Cook County criminal justice system

| <i>UI N</i> | <i>Pressured to Plead Guilty?</i> | <i>Motivations *</i> | <i>Rating* *</i> | <i>Key Persuader to Enter Plea</i> | <i>Key Condition Setter for Deal</i> |
|-------------|-----------------------------------|----------------------|------------------|------------------------------------|--------------------------------------|
| 1 | Yes | BRC | 2 | Public Defender (PD) | Prosecutor (Pros) |
| 2 | Yes | BRC | 1 | Public Defender (PD) | Public Defender (Pros) |
| 3 | Yes | PC | 1 | Both PD and Pros | Both PD and Pros |
| 4 | Yes | BRC; PC | 1 | Private Attorney (PA) | Private Attorney (PA) |
| 5 | No | PC | 5 | Private Attorney (PA) | Prosecutor (Pros) |
| 6 | Yes | BRC | 1 | Public Defender (PD) | Prosecutor (Pros) |
| 7 | Yes | PC | ..*** | Prosecutor (Pros) | Prosecutor (Pros) |
| 8 | -- | BRC | 4 | Public Defender (PD) | Both PD and Pros |
| 9 | Yes | BRC; PC | 1 | Public Defender (PD) | Public Defender (PD) |
| 10 | No | FPG | 5 | Prosecutor (Pros) | Public Defender (PD) |

Notes: (*Motivations*): "BRC" stands for "Being Rid of the Case"; "PC" stands for "Punishment [for the] Charges"; "FPG" stands for "Fairly Proving Guilt"

*While there was no hard limit on what a returning citizen could say they believe motivated the activities of their prosecutor, due to the nature of the questions I asked, most of the responses trended towards three possibilities: fairly proving their guilt (FPG); punishing them for the charge(s) (PC); or being rid of the case as soon as possible (BRC).

**On this scale (from "1" to "10") a rating of "1" is meant to represent the most unfair experience with the prosecutor, while a rating of "10" is meant to represent the fairest experience. Additionally, fairness specifically refers to the willingness of the prosecutor to listen to the returning citizen's input (as applicable) during the plea-bargaining process.

***For the sake of calculating the average rating value, this response possesses the value of "0".

Table A3. Collective impressions of trial court judge activity during the plea-bargaining process in the Cook County criminal justice system

| <i>UI N</i> | <i>Pressured to Guilty?</i> | <i>Plead *</i> | <i>Motivations *</i> | <i>Rating*</i> * |
|-----------------|---------------------------------|--------------------|--------------------------|---------------------|
| 1 | No | | BRC | 5 |
| 2 | No | | DG | 10 |
| 3 | No | | -- | 9 |
| 4 | No | | BRC | 10 |
| 5 | No | | PC | 5 |
| 6 | No | | BRC | 5 |
| 7 | No | | BRC; PC | 7 |
| 8 | No | | DG | 5 |
| 9 | No | | BRC | 1 |
| 10 | Yes | | PC | 3 |

Notes: (*Motivations*): "BRC" stands for "Being Rid of the Case"; "PC" stands for "Punishment [for the] Charges"; "DG" stands for "Determining Guilt"

*While there was no hard limit on what a returning citizen could say they believe motivated the activities of the trial court judge, due to the nature of the questions I asked, most of the responses trended towards three possibilities: determining your guilt (DG); punishing you for the charge(s) (PC); or being rid of the case as soon as possible (BRC).

**On this scale (from "1" to "10") a rating of "1" is meant to represent the most unfair experience with the trial court judge, while a rating of "10" is meant to represent the fairest experience. Additionally, fairness specifically refers to the willingness of the trial court judge to listen to the returning citizen's input (as applicable) during the plea-bargaining process.



Table A4. Collective impressions of sentence outcomes (relative to perceptions of what others with similar case circumstances receive) resulting from the plea-bargaining process in the Cook County criminal justice system

| <i>UI N</i> | <i>Sentence Outcome</i> | <i>Influenced by Demographics?</i> | <i>Which Demographics?*</i> | <i>Did You Deserve the Outcome? **</i> |
|-------------|-------------------------|------------------------------------|-----------------------------|--|
| 1 | More Severe | Yes | Race; Sex (Male) | Outcome was Worse than Deserved |
| 2 | Roughly Average | Yes | Race; Sex (Male) | Outcome was Worse than Deserved |
| 3 | Less Severe | No | -- | Outcome was Better than Deserved |
| 4 | Roughly Average | No | -- | Outcome was Better than Deserved |
| 5 | Roughly Average | No | -- | Outcome was Deserved |
| 6 | Roughly Average | Yes | Race | Outcome was Better than Deserved |
| 7 | Less Severe | No | -- | Outcome was Worse than Deserved |
| 8 | Roughly Average | Yes | Race | Outcome was Worse than Deserved |
| 9 | Roughly Average | Yes | Race | Outcome was Worse than Deserved |
| 10 | Less Severe | No | -- | Outcome was Deserved |

* While there was no hard limit on which demographics returning citizens could say they believe influenced the sentence outcome they received, due to the nature of the question I asked, most of the responses reflected concerns with influences stemming from their: 1) race; 2) sex; 3) age; and 4) nationality.

**What one deserves is subjective and open to interpretation, but is meant to reflect an equal reaction for one's action.

Table A5. Collective impressions of justice attainment in the overall case outcomes resulting from plea agreements in the Cook County criminal justice system

| <i>UI N</i> | <i>Was Justice Achieved in Your Case?</i> | <i>Would the Affected Parties AGREE or DISAGREE that Justice was Achieved?*</i> |
|-------------|---|---|
| 1 | Justice was Not Achieved | I believe the affected parties would disagree that justice was achieved |
| 2 | Justice was Not Achieved | I believe the affected parties would disagree that justice was achieved |
| 3 | Justice was Not Achieved | I'm not sure how the affected parties would feel |
| 4 | Justice was Achieved | I believe the affected parties would disagree that justice was achieved |
| 5 | Justice was Achieved | I believe the affected parties would agree that justice was achieved |
| 6 | Justice was Not Achieved | I believe the affected parties would agree that justice was achieved |
| 7 | Justice was Not Achieved | I believe the affected parties would disagree that justice was achieved |
| 8 | Justice was Not Achieved | I believe the affected parties would disagree that justice was achieved |
| 9 | Justice was Not Achieved | I believe the affected parties would disagree that justice was achieved |
| 10 | Justice was Achieved | I believe the affected parties would disagree that justice was achieved |

*The term affected parties is intended to refer to the individual, individuals, or other entities who are argued to have been wronged (and/or subjected to wrongdoing) in the course of a criminal act. There are some instances in which a given crime has a clear and specific victim, and other instances where such a victim is hard to pinpoint. Victims can consist of an individual person, a group of people, or a distant (but consequentially relevant) entity with a vested interest in not being subjected to a crime. For example, if someone were to commit a robbery at a regional bank, the bank (as a collective entity) would be classified as the victim that was wronged. As another example, if someone were to commit perjury (i.e. lie while under oath to speak truthfully), the government (as another collective entity) would be classified as the victim that was wronged.

Table A6. Collective impressions of plea agreement use and reliability overall within the Cook County criminal justice system

| <i>UI N</i> | <i>Are Plea Agreements Better Than Trials?</i> | <i>Should Plea Bargains Should Be Used More Than Trials?</i> |
|-----------------|--|--|
| 1 | No; Plea Agreements Are Not Better | No; Plea Agreements Should Not Be Used More |
| 2 | No; Plea Agreements Are Not Better | Yes; Plea Agreements Should Be Used More |
| 3 | It Depends on the Case | It Depends on the Case |
| 4 | It Depends on the Case | Yes; Plea Agreements Should Be Used More |
| 5 | It Depends on the Case | Yes; Plea Agreements Should Be Used More |
| 6 | Yes; Plea Agreements Are Better | Yes; Plea Agreements Should Be Used More |
| 7 | Yes; Plea Agreements Are Better | No; Plea Agreements Should Not Be Used More |
| 8 | It Depends on the Case | No; Plea Agreements Should Not Be Used More |
| 9 | Yes; Plea Agreements Are Better | No; Plea Agreements Should Not Be Used More |
| 10 | No; Plea Agreements Are Not Better | It Depends on the Case |

Appendix B – Returning Citizen Survey Response Tables

The following tables offer a look into some additional perspectives regarding various impressions of the plea-bargaining system and the actors through which this system maintains its functionality. Each table reflects the opinions of the total group of returning citizens (n = 10) for each individual question asked as part of the study-specific survey questionnaire. These considerations exclude the tenth question: one which asked for a numerical value approximation on the entirety of the returning citizen’s experience. This survey question was removed from final consideration due to determinations of its redundancy.¹⁰¹

Table B1. Participant responses (n=10) to Survey Question 1: “In my opinion, the belief that defense attorneys do everything in their power to inform people like me of what plea agreements are and how they work is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 30% | 0% | 0% | 10% | 20% | 10% | 30% |

In selecting the applicable answer value for Survey Question 1, 60 percent of the respondents indicated that the statement possessed a greater degree of truth than untruth (compared to 30 percent that suggested otherwise, and 10 percent that remained neutral). That being said, the average degree of belief for this statement (among all ten of the returning citizens) was a 4.4 out of a total of 7, placing it within the Likert Scale approximation of “Somewhat True” overall (See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation). This approximation is highly consistent with much of the descriptive information on defense attorneys reviewed in Section 4 of the thesis. In their commitment to encouraging more defendants to plead guilty, defense attorneys (of all kinds) would want to ensure that the plea option is well-understood and marketed to as many defendants as possible.

Table B2. Participant response (n=10) to Survey Question 2: “In my opinion, the belief that prosecutors do everything in their power to inform people like me of what plea agreements are and how they work is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 20% | 20% | 0% | 20% | 40% | 0% | 0% |

101 The questions I asked during the interview portion of the study offered enough of a medium through which returning citizens could express their overall pleasure or displeasure with their experiences to make the tenth survey question redundant.

In selecting the applicable answer value for Survey Question 2, a fairly even distribution of responses occurred. 40 percent of the respondents indicated that the statement possessed a greater degree of truth over untruth, 40 percent suggested the opposite, and the final 20 percent remained neutral on the matter. The average degree of belief for this statement (between all ten of the returning citizens) was a 3.4 out of a total of 7, placing it within the Likert Scale approximation of “Somewhat Untrue” overall (*See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation*). This approximation is highly consistent with much of the descriptive information on prosecutors reviewed in Section 4 of the thesis. As the actor tasked with speaking on behalf of the state, and one with a limited amount of interaction time with the defendant, it makes sense for much of the explanation on the plea option to stem from the defense attorney, and not the prosecutor.

Table B3. Participant response ($n=10$) to Survey Question 3: “In my opinion, the belief that trial judges do everything in their power to inform people like me of what plea agreements are and how they work is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 10% | 0% | 0% | 0% | 40% | 10% | 40% |

In selecting the applicable answer value for Survey Question 3, 90 percent of the respondents indicated that the statement possessed a greater degree of truth than untruth. The average degree of belief for this statement (among all ten of the returning citizens) was a 5.5 out of a total of 7, placing it within the Likert Scale approximation of “Mostly True” overall (*See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation*). This approximation is highly consistent with much of the descriptive information on trial court judges reviewed in Section 4 of the thesis. Plea agreements can only be considered entered into in a knowing and voluntary manner when they satisfy a number of establishment criteria overseen by the presiding trial court judge. In this way, trial court judges have a vested interest in ensuring that the parameters of any given plea agreement are well-explained and accessible for consideration by the defendant.

Table B4. Participant response ($n=10$) to Survey Question 4: “I believe that the amount of time I had to consider all of the positive and negative consequences of accepting my plea agreement was...”

| <i>Clearly Enough</i> | <i>Not Enough</i> | <i>Mostly Not Enough</i> | <i>Somewhat Not Enough</i> | <i>I Know</i> | <i>Don't</i> | <i>Somewhat Enough</i> | <i>Mostly Enough</i> | <i>Clearly Enough</i> |
|-----------------------|-------------------|--------------------------|----------------------------|---------------|--------------|------------------------|----------------------|-----------------------|
| 20% | | 0% | 30% | 20% | | 10% | 10% | 10% |

In selecting the applicable answer value for Survey Question 4, 50 percent of the respondents indicated that the statement possessed a greater degree of untruth than truth (compared to 30 percent that suggested otherwise,

and 20 percent that remained neutral). Interestingly enough, the average degree of belief for this statement (among all ten of the returning citizens) was a 3.7 out of a total of 7, placing it within the Likert Scale approximation of “Neither True nor Untrue” overall (See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation). I believe this approximation to be reasonably consistent with much of the descriptive information on plea agreement establishment reviewed in Section 4 of the thesis. The amount of time afforded to creating the conditions of any given plea agreement, and then accepting said plea agreement, tends to heavily rely on the actions of the other judicial actors at the time of consideration (as well as the circumstances surrounding the case). Thorough contemplations for the positive and negative consequences of accepting a plea agreement require more time than what is commonly afforded to plea agreement hearings. Such additional time would delay resolving the case expediently if it were not actively discouraged.

Table B5. Participant response (n=10) to Survey Question 5: “In my opinion, the belief that the amount of information I possessed about plea agreements would have allowed me to understand if a procedural error in its use had occurred is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 0% | 10% | 20% | 10% | 30% | 10% | 20% |

In selecting the applicable answer value for Survey Question 5, 60 percent of the respondents indicated that the statement possessed a greater degree of truth than untruth (compared to 30 percent that suggested otherwise, and 10 percent that remained neutral). The average degree of belief for this statement (among all ten of the returning citizens) was a 4.7 out of a total of 7, placing it within the Likert Scale approximation of “Somewhat True” overall (See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation). This approximation actually appears to be slightly inconsistent with much of the descriptive information on understanding plea agreements reviewed in Section 4 of the thesis. In the cases discussed, acknowledgments were made by six of the returning citizens suggesting the existence of periods of confusion or uncertainty during the process of establishing their plea agreements. There is always the chance that the distortion observed here was due to a communication error on my part. In any case, it’s a notable divergence from what was mentioned in the interviews.

Table B6. Participant response (n=10) to Survey Question 6: “In my opinion, the belief that the amount of knowledge I possessed about plea agreements would have allowed me to understand if I was being coerced/pressured into entering into the agreement by any of the other judicial actors (i.e. the prosecutor, the defense attorney, or the judge) is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 0% | 10% | 0% | 20% | 40% | 20% | 10% |

In selecting the applicable answer value for Survey Question 6, 70 percent of the respondents indicated that the statement possessed a greater degree of truth than untruth (compared to 10 percent that suggested otherwise, and 20 percent that remained neutral). The average degree of belief for this statement (among all ten of the returning citizens) was a 4.9 out of a total of 7, placing it within the Likert Scale approximation of “Somewhat True” overall (*See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation*). This approximation is highly consistent with much of the descriptive information on pressure experienced from the judicial actors reviewed in Section 4 of the thesis. A greater majority of the returning citizens indicated experiencing various forms of pressure to accept their plea agreements, and highlighted specific actions from both the defense attorneys and prosecutors involved to contextualize their claims.

Table B7. Participant response ($n=10$) to Survey Question 7: “In my opinion, the belief that using plea agreements to settle most criminal cases is more time efficient than taking those cases to trial is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 0% | 10% | 10% | 0% | 10% | 40% | 30% |

In selecting the applicable answer value for Survey Question 7, 80 percent of the respondents indicated that the statement possessed a greater degree of truth than untruth (compared to 20 percent that suggested otherwise). The average degree of belief for this statement (among all ten of the returning citizens) was a 5.5 out of a total of 7, placing it within the Likert Scale approximation of “Mostly True” overall (*See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation*). This approximation is highly consistent with much of the descriptive information on the advantages and disadvantages of plea agreements discussed in Section 4 of the thesis. Many of the returning citizens indicated possessing some complication with taking their cases to trial on the basis of how long it could take for their cases to be decided. One of the most attractive features of a plea agreement has consistently been the speed in which using one can resolve a defendant’s case.

Table B8. Participant response ($n=10$) to Survey Question 8: “In my opinion, the belief that using plea agreements to settle most criminal cases is more cost efficient than taking those cases to trial is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 10% | 0% | 0% | 20% | 30% | 20% | 20% |

In selecting the applicable answer value for Survey Question 8, 70 percent of the respondents indicated that the statement possessed a greater degree of truth than untruth (compared to 10 percent that suggested otherwise, and 20

percent that remained neutral). The average degree of belief for this statement (among all ten of the returning citizens) was a 5 out of a total of 7, placing it within the Likert Scale approximation of “Somewhat True” overall (*See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation*). This approximation is, again, highly consistent with much of the descriptive information on the advantages and disadvantages of plea agreements discussed in Section 4 of the thesis. Along with concerns for time, many of the returning citizen also indicated possessing some complication with taking their cases to trial on the basis of how expensive doing so would be over the long-term. It has already been confirmed that a majority of the returning citizens were represented by court-appointed attorneys during their cases, making it reasonable to infer that affording any of the additional expenses connected to a trial would be (more than likely) completely out of the question.

Table B9. Participant response (n=10) to Survey Question 9: “In my opinion, the belief that using plea agreements to settle most criminal cases is more just than taking those cases to trial is...”

| <i>Clearly Untrue</i> | <i>Mostly Untrue</i> | <i>Somewhat Untrue</i> | <i>Neither True nor Untrue</i> | <i>Somewhat True</i> | <i>Mostly True</i> | <i>Clearly True</i> |
|-----------------------|----------------------|------------------------|--------------------------------|----------------------|--------------------|---------------------|
| 20% | 20% | 0% | 10% | 30% | 10% | 10% |

In selecting the applicable answer value for Survey Question 9, 50 percent of the respondents indicated that the statement possessed a greater degree of truth than untruth (compared to 40 percent that suggested otherwise, and 10 percent that remained neutral). The average degree of belief for this statement (among all ten of the returning citizens) was a 3.8 out of a total of 7, placing it within the Likert Scale approximation of “Neither True nor Untrue” overall (*See Table B10 at the end of this Appendix for a comprehensive breakdown of the Likert Scale Item Level range calculation*). This approximation is highly consistent with much of the descriptive information on determining the just or unjust nature of plea agreements reviewed in Section 4 of the thesis. As stated in the subsection on plea bargain reliance, the dominant perspective on the use of plea agreements versus the use of trials has been that both systems of case disposal have their advantages and disadvantages. What makes them just is whether they offer each case its due diligence (embodied in an adequate amount of time, thought, and resources) to ensure that their outcomes are reasonable, given the unique circumstances surrounding each case.

Table B10. Average degree of belief among the total number of participant responses ($n=10$) for each individual survey question (1= clearly untrue; 7 = clearly true)

| <i>Question</i> | <i>Degree of Belief</i> |
|-----------------|-------------------------|
| 1 | 4.4 |
| 2 | 3.4 |
| 3 | 5.5 |
| 4 | 3.7 |
| 5 | 4.7 |
| 6 | 4.9 |
| 7 | 5.5 |
| 8 | 5 |
| 9 | 3.8 |

Note: The values for the agreement range were established by using the Likert Scale Item Level range calculation, which can be obtained by subtracting the highest point of the Likert Scale from the lowest point, and dividing that by the total number of levels used [Sullivan and Artino 2013]. For this analysis, seven levels were used, thereby establishing the values between intervals as the following: $(7-1)/7 = 0.86$;

0.86-1.72 = Clearly Untrue

1.73-2.59 = Mostly Untrue

2.6-3.46 = Somewhat Untrue

3.47-4.33 = Neither True nor Untrue

4.34-5.2 = Somewhat True

5.21-6.07 = Mostly True

6.08-7.00 = Clearly True

As stated earlier, the above table provides a comprehensive breakdown of the Likert Scale Item Level range calculation for each survey question.

Figure C1. Aggregate participant responses (n=10) by survey question number

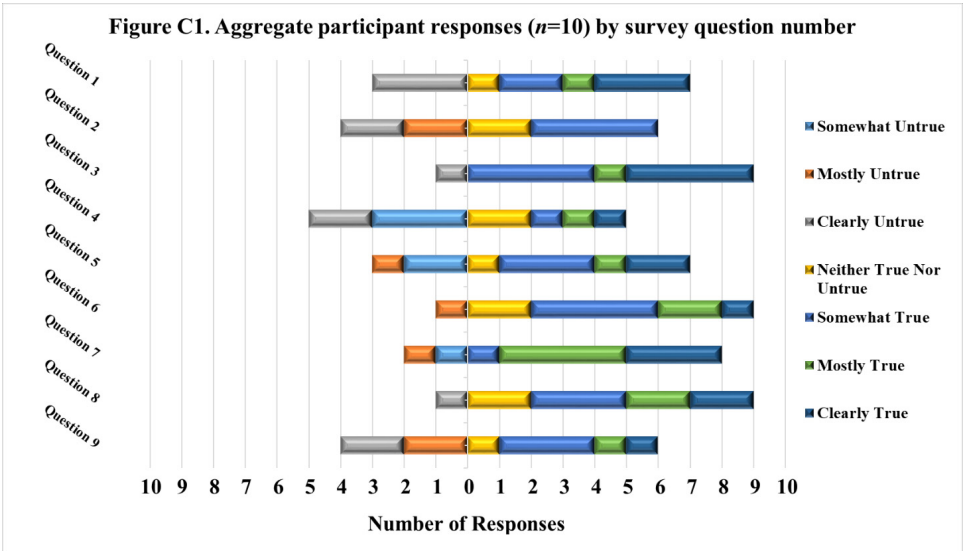
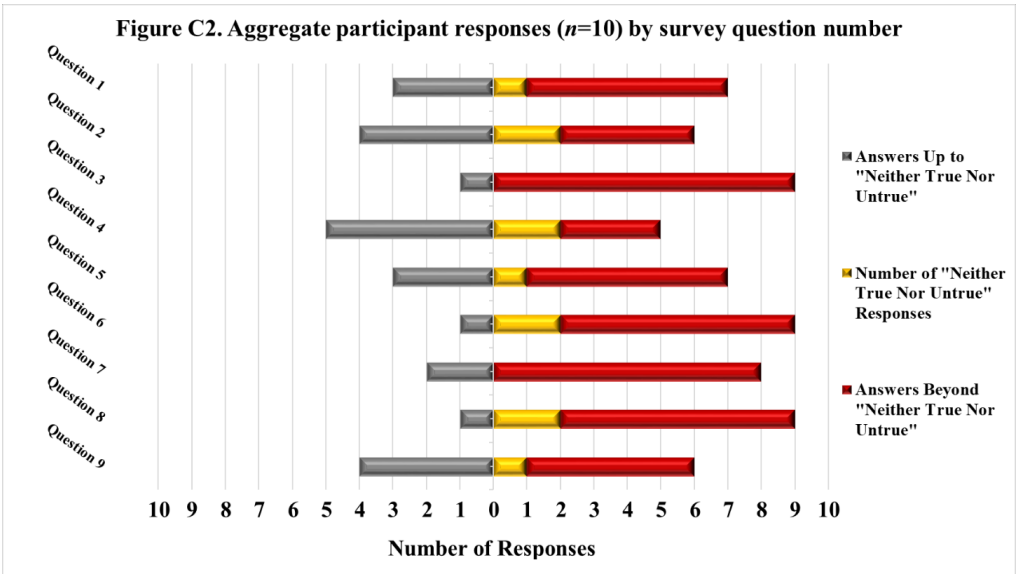


Figure C2. Aggregate participant responses (n=10) by survey question number



Appendix D – Returning Citizen Interview Questions

General Case Related Questions: *This first series of questions concern information surrounding the nature of your case, your knowledge of plea agreements and plea bargaining at the time of your case, and your opinions on the use of pressure in encouraging defendants to enter into plea agreements. We can begin whenever you're ready.*

1. “Tell me about your case. This is specifically referring to the case in which you decided to plead guilty to whatever charge was made against you under the conditions of a plea agreement. Information concerning the specific charge(s) and charge level(s) of the case (i.e. general misconduct, misdemeanor, felony) is particularly helpful.”
2. “Were you aware of what a plea agreement was before agreeing to enter into one yourself?”
 - a. FOLLOW UP: “If you were, can you tell me what you knew about them at the time? Feel free to be as descriptive as you are comfortable with being.”
3. “Did you originally intend to plead guilty or not guilty to the charge(s) made against you?”
 - a. FOLLOW UP: “If you originally choose to plead *not guilty* to the charge(s), what would say the most ‘crucial factor’ in changing your mind and convincing you to plead guilty was?”
4. “Even after choosing to plead guilty, did you ever claim to be innocent [i.e. *not guilty*] (either to yourself or someone else) at any other point in time during the process?”

Defense Attorney Related Questions: *This second series of questions concern your impressions of the defense attorney that represented you during the case in question. We can begin whenever you're ready.*

1. “How did you obtain the defense attorney you had for your case? Was your defense attorney court-appointed or privately hired?”
 - a. FOLLOW UP: “If your defense attorney was *court-appointed*, do you have any reason to believe that you would have ended up with a different outcome with a privately hired attorney? What do you think that outcome would have been?”
 - b. FOLLOW UP: “If your defense attorney was *privately hired*, can

- you tell me who hired them?”
- i. SUBFOLLOW UP: “Do you have any reason to believe that you would have ended up with a different outcome with a court-appointed attorney? What do you think that outcome would have been?”
2. “How would you describe your defense attorney’s attitude and behavior towards you?”
 - a. FOLLOW UP: “Did you ever feel pressured by your defense attorney to plead guilty to the charge(s) made against you? If so, what part of their behavior led you to feel this way?”
 - b. FOLLOW UP: “Do you believe that your defense attorney believed you to be innocent or guilty of the charge made against you? If so, what part of their behavior led you to feel this way?”
 3. “What do you think *motivated* your defense attorney’s attitude and behavior towards you? For this question, motivations can include (but are not limited to): fairly proving your innocence; minimizing your punishment for the charge(s); or being rid of the case as soon as possible.”
 - a. FOLLOW UP: “What part of their behavior led you to feel this way?”
 4. “Did anything about your defense attorney’s attitude and behavior make you feel like they were uninterested in you and your case?”
 5. “On a scale of 1 to 10 (“1” being the least fair, and “10” being the most fair), how fair do you feel your defense attorney was to you and your case? For this question, fairness is referring to their willingness to listen to your input during the process.”
 6. “If you were charged with a crime again, would you want your defense attorney that represented you in this case to represent you again?”

Prosecutor Related Questions: This third series of questions concern your impressions of the prosecuting attorney that prosecuted you during the case in question. We can begin whenever you’re ready.

1. “How would you describe the prosecutor’s attitude and behavior towards you?”
 - a. FOLLOW UP: “Did you ever feel pressured by the prosecutor to plead guilty to the charge(s) made against you? If so, what part of their behavior led you to feel this way?”

2. “What do you think *motivated* the prosecutor’s attitude and behavior towards you? For this question, motivations can include (but are not limited to): fairly proving your guilt; punishing you for the charge(s); or being rid of the case as soon as possible.”
 - a. FOLLOW UP: “What part of their behavior led you to feel this way?”
3. “Did anything about the prosecutor’s attitude and behavior make you feel like they were uninterested in you and your case?”
4. “On a scale of 1 to 10 (“1” being the least fair, and “10” being the most fair), how fair do you feel the prosecutor was to you and your case? For this question, fairness is referring to their willingness to listen to your input during the process.”
5. “Who do you believe played the bigger part in trying to get you to enter into a plea agreement: the prosecutor or your defense attorney?”
 - a. FOLLOW UP: “What part of this individual’s behavior led you to feel this way?”
6. “Who do you believe played the bigger part in deciding the conditions of your plea agreement during the plea negotiation: the prosecutor or your defense attorney?”
 - a. FOLLOW UP: “What part of this individual’s behavior led you to feel this way?”

Trial Judge Related Questions: This fourth series of questions concern your impressions of the trial court judge that presided over your case during the case in question. We can begin whenever you’re ready.

1. “How would you describe the trial judge’s attitude and behavior towards you?”
 - a. FOLLOW UP: “Did you ever feel pressured by the trial judge to plead guilty to the charge(s) made against you? If so, what part of their behavior led you to feel this way?”
2. “What do you think *motivated* the trial judge’s attitude and behavior towards you? For this question, motivations can include (but are not limited to): determining your guilt; punishing you for the charge(s); or being rid of the case as soon as possible.”
 - a. FOLLOW UP: “What part of their behavior led you to feel this way?”

3. “On a scale of 1 to 10 (“1” being the least fair, and “10” being the most fair), how fair do you feel the trial judge was to you and your case? For this question, fairness is referring to their willingness to listen to your input during the process.”
4. “Suppose you were a judge and were presiding over a case in which someone had come before you to receive their sentence. Further suppose that this person had the same characteristics as you did and chose to plead guilty pursuant to the same plea agreement you agreed to. How likely do you believe it would be that you would accept that individual’s plea agreement?”

Sentence Related Questions: This fifth series of questions concern your impressions of the sentence you received as part of your plea agreement to plead guilty. We can begin whenever you’re ready.

1. “How do you feel your sentencing outcome compares with the sentencing outcomes of other people with similar case circumstances to you?”
 - a. FOLLOW UP: “Was the sentence you received as part of your plea agreement what you would have expected it to be given the conviction you plead guilty to?”
 - b. FOLLOW UP: “Do you feel that your sentencing outcome was *more severe*, *less severe*, or *roughly average* to the sentencing outcomes of other people with similar case circumstances to you?”
2. “Do you feel that you received a worse sentencing outcome than other people with similar case circumstances to you would have received because of your race, sex, age, nationality, or any other demographical characteristic about you?”
 - a. FOLLOW-UP: “If you do, which characteristic(s) do you think influenced this outcome?”
 - b. FOLLOW-UP: “If you do, did anything about the attitudes and behaviors of the trial judge, prosecutor, or your defense attorney lead you to feel this way?”
 - c. FOLLOW-UP: “If you do not, did anything about the attitudes and behaviors of the trial judge, prosecutor, or your defense attorney lead you to feel this way?”
3. “Not counting the case in question, do you have any other criminal convictions on your record?”
 - a. FOLLOW UP: “If so, did you plead guilty to the charge(s) made against you in those cases under the terms of a plea agreement?”
 - b. FOLLOW UP: “If so, how does the sentencing outcome of this

case's plea agreement compare to sentencing outcomes you have received in prior plea agreements you have entered into?"

- c. FOLLOW UP: "*If you DO possess other criminal convictions, but DID NOT plead guilty to the charge(s) under the terms of a plea agreement in those cases,* what circumstances led you to not plead guilty in those cases?"
4. "Do you feel that you received the sentence outcome that you deserved, given the nature of the crime you plead guilty to? For this question, what one deserves is subjective and open to interpretation, but is meant to reflect an equal reaction for one's action."
 - a. FOLLOW UP: "To clarify, do you believe that your sentence outcome was a *better outcome* than you deserved or a *worse outcome* that you deserved?"
 5. "Were there any other important pieces of information about your case that have gone unmentioned or unmentioned that you feel were handled in a way you believe to be unfair?"
 - a. FOLLOW UP: "*If so,* what is the information?"

Justice Related Questions: *This sixth series of questions concern your impressions of "justice", and how the concept may be applied to the sentence outcome you received under the terms of your plea agreement. We can begin whenever you're ready.*

1. "How would you personally define the word 'justice'? Feel free to take a few seconds to think through what you might like to say."
2. "Do you feel that justice was fairly reached in your case (given the sentence outcome you received under the terms of your plea agreement)?"
3. "Do you feel that the individual, individuals, or other entities you wronged by committing the crime you plead guilty to would *agree* or *disagree* that justice was fairly reached in your case (given the sentence outcome you received under the terms of your plea agreement)?"
 - a. FOLLOW UP: "*If you believe they would AGREE that justice was achieved,* can you tell me what aspects of your case lead you to feel this way?"
 - b. FOLLOW UP: "*If you believe they would DISAGREE that justice was achieved,* can you tell me what aspects of your case lead you to feel this way?"

Process Reflection Related Questions: *This seventh series of questions concern*

your overall impressions of the experience you went through as the outcome of your case was being decided.

1. “Was there ever a moment during the plea-bargaining process where you felt unsure of what the plea agreement was asking you to do or agree to do? What rights the plea agreement was asking you to give up by accepting it? If so, can you recall what some of those conditions might have been?”
2. “Thinking over everything you’ve experienced (from the time the charges of your case were brought to your attention until the time that you entered your plea of guilty and your plea agreement was accepted), if you had an opportunity to do it all over again, is there anything that you would have wanted to differently?”
3. “Is there anything that you think the Cook County court system can or should to be open to changing to make the plea-bargaining process better?”
4. “Do you feel that the use of plea agreements and plea bargaining is generally better for settling criminal cases than trials are?”
 - a. FOLLOW UP: “*If so*, what aspects of the process do you feel make it better to use than trials?”
 - b. FOLLOW UP: “*If so*, are there any areas in which you feel trials might be more appropriate for use than plea agreements?”
 - c. FOLLOW UP: “*If not so*, what aspects of the process do you feel make it worse to use than trials?”
 - d. FOLLOW UP: “*If not so*, what external circumstances do you feel encouraged you to plead guilty in this case? For this question, circumstances may include (but are not limited): being unable to afford a private attorney, being unable to afford taking your case to trial, the possibility of a more lenient sentence, and the ability to resolve the case quickly.”
5. “Do you feel that the individual, individuals, or other entities you wronged by committing the crime you plead guilty to would have preferred that your case be sent to trial rather than be resolved with a plea agreement?”
 - a. FOLLOW UP: “*If you believe they WOULD have preferred to see your case go to trial*, can you tell me what aspects of your case lead you to feel this way?”
 - b. FOLLOW UP: “*If you believe they WOULD NOT have preferred to see your case go to trial*, can you tell me what aspects of your case lead you to feel this way?”
6. “Do you feel that the use of plea agreements and plea bargaining should be

the main way in which criminal cases are settled? In other words, should trials be used to a more limited degree than plea agreements are?”

Appendix E – Returning Citizen Survey Questions

1. **“In my opinion, the belief that defense attorneys do everything in their power to inform people like me of what plea agreements are and how they work is:”**
 - c. Clearly True When Applied to My Case
 - d. Mostly True When Applied to My Case
 - e. Somewhat True When Applied to My Case
 - f. Neither True nor Untrue When Applied to My Case
 - g. Somewhat Untrue When Applied to My Case
 - h. Mostly Untrue When Applied to My Case
 - i. Clearly Untrue When Applied to My Case

2. **“In my opinion, the belief that prosecutors do everything in their power to inform people like me of what plea agreements are and how they work is:”**
 - a. Clearly True When Applied to My Case
 - b. Mostly True When Applied to My Case
 - c. Somewhat True When Applied to My Case
 - d. Neither True nor Untrue When Applied to My Case
 - e. Somewhat Untrue When Applied to My Case
 - f. Mostly Untrue When Applied to My Case
 - g. Clearly Untrue When Applied to My Case

3. **“In my opinion, the belief that trial judges do everything in their power to inform people like me of what plea agreements are and how they work is:”**
 - a. Clearly True When Applied to My Case
 - b. Mostly True When Applied to My Case
 - c. Somewhat True When Applied to My Case
 - d. Neither True nor Untrue When Applied to My Case
 - e. Somewhat Untrue When Applied to My Case
 - f. Mostly Untrue When Applied to My Case
 - g. Clearly Untrue When Applied to My Case

4. **“I believe that the amount of time I had to consider all of the positive and negative consequences of accepting my plea agreement was:”**
 - a. Clearly Enough Time
 - b. Mostly Enough Time
 - c. Somewhat Enough Time

- d. I Don't Know Enough to Say
 - e. Somewhat Not Enough Time
 - f. Mostly Not Enough Time
 - g. Clearly Not Enough Time
5. **“In my opinion, the belief that the amount of information I possessed about plea agreements would have allowed me to understand if a procedural error in its use had occurred is:”**
- a. Clearly True When Applied to My Case
 - b. Mostly True When Applied to My Case
 - c. Somewhat True When Applied to My Case
 - d. Neither True nor Untrue When Applied to My Case
 - e. Somewhat Untrue When Applied to My Case
 - f. Mostly Untrue When Applied to My Case
 - g. Clearly Untrue When Applied to My Case
6. **“In my opinion, the belief that the amount of knowledge I possessed about plea agreements would have allowed me to understand if I was being coerced/pressured into entering into the agreement by any of the other judicial actors (i.e. the prosecutor, the defense attorney, or the judge) is:”**
- a. Clearly True When Applied to My Case
 - b. Mostly True When Applied to My Case
 - c. Somewhat True When Applied to My Case
 - d. Neither True nor Untrue When Applied to My Case
 - e. Somewhat Untrue When Applied to My Case
 - f. Mostly Untrue When Applied to My Case
 - g. Clearly Untrue When Applied to My Case
7. **“In my opinion, the belief that using plea agreements to settle most criminal cases is more time efficient than taking those cases to trial is:”**
- a. Clearly True When Applied to My Case
 - b. Mostly True When Applied to My Case
 - c. Somewhat True When Applied to My Case
 - d. Neither True nor Untrue When Applied to My Case
 - e. Somewhat Untrue When Applied to My Case
 - f. Mostly Untrue When Applied to My Case
 - g. Clearly Untrue When Applied to My Case
8. **“In my opinion, the belief that using plea agreements to settle most criminal cases is more cost efficient than taking those cases to trial is:”**

- a. Clearly True When Applied to My Case
 - b. Mostly True When Applied to My Case
 - c. Somewhat True When Applied to My Case
 - d. Neither True nor Untrue When Applied to My Case
 - e. Somewhat Untrue When Applied to My Case
 - f. Mostly Untrue When Applied to My Case
 - g. Clearly Untrue When Applied to My Case
9. **“In my opinion, the belief that using plea agreements to settle most criminal cases is more just than taking those cases to trial is:”**
- a. Clearly True When Applied to My Case
 - b. Mostly True When Applied to My Case
 - c. Somewhat True When Applied to My Case
 - d. Neither True nor Untrue When Applied to My Case
 - e. Somewhat Untrue When Applied to My Case
 - f. Mostly Untrue When Applied to My Case
 - g. Clearly Untrue When Applied to My Case
10. **“If asked to give my entire experience (dealing with my defense attorney, dealing with the prosecutor, dealing with the trial judge, and entering my plea agreement) a rating on a scale of 1 to 10 [“1” representing the worst possible experience, and “10” representing the best possible experience], I would give it a:”**
- a. 1
 - b. 2
 - c. 3
 - d. 4
 - e. 5
 - f. 6
 - g. 7
 - h. 8
 - i. 9
 - j. 10

Demographical Information:

Please fill in the blanks below concerning your personal demographical information.

Gender _____

Race/Ethnicity _____

Age _____

Any Other Prior Convictions? _____

Any Time Detained Prior to Convictions? _____

Original Count/Charge Made Against You _____

Original Charge Level of Case _____

Final Plea Level of Case _____

Total Incarceration Time as Result of Plea _____

Appendix F – Returning Citizen Consent Form

Study Title: “An Exploration into Returning Citizen Perspectives on Plea Bargaining and Plea Agreement Utilization in the Cook County Criminal Justice System”

Principal Investigator: James Leitzel

Student Researcher: Keelly M. Jones

IRB Study Number: 18-1299

I am a student at [XXX University] in the Departments of Political Science and Public Policy Studies. I wish to conduct a research study, which I invite you to take part in. This form has important information about the purpose of this study. It also describes what I will ask you to do as a participant, and the ways I would like to use the information you provide.

Why am I doing this study?

You are being asked to participate in a research study about how people view their treatment during the process of plea bargaining. You were selected as a possible participant because of your history with plea agreements and the fact that you are no longer being detained. The purpose of this study is to help me understand the experiences of individuals like you with the plea-bargaining system.

What will I do if I choose to be in this study?

If you agree to be in this study, you will be asked to complete an in-person interview and follow-up survey about your experiences with plea bargaining. The interview portion will contain thirty-eight flexible questions, while the survey portion will contain ten multiple choice questions. The interview questions will focus on specific areas of the research topic, while the survey questions will focus on broader areas. The study will take place within the room we are currently in and require around two hours to complete.

What are the possible risks or discomforts I may be subjected to?

Your participation in this study may involve the following risks:

- You may feel uncomfortable with some of the topics I will ask about. If so, feel free to not answer or skip to the next question.
- You may find looking back on these experiences to be emotionally painful. If so, we can take a break or stop the interview entirely at any time.

As with all research, there is also a chance that a confidentiality breach may occur. I will take steps to minimize this chance, as explained below.

What are the possible benefits for me or others?

There are no direct benefits for you in choosing to participate in this research study.

How will you protect the information you collect, and how will that information be shared?

Any information that is collected about you will be kept private. Your name and any other personal information will be used for research purposes only. This information will never be made publicly available. Your name will not appear on any record or reports involved in this research when published. When the research is complete, I will destroy any private information I have about you.

Research records will be stored securely and only I will have access to those records. I will audio record my interview with you to ensure that I have an accurate account of your story. If you do not want your interview recorded, I will take notes

instead. Your name will never be linked with your interview. After the study is complete all tape recordings will be destroyed.

NOTE: The following information is not limited by confidentiality and may be released as governed by law:

- 1) information about a child being abused or mistreated;
- 2) information about an individual's plan to seriously harm themselves; or
- 3) information about an individual's plan to seriously harm someone else

If this kind of information is brought to my attention, I may need to report it to the appropriate authorities.

Financial Information

You will be responsible for securing transportation to the interview site. You will receive \$15.00 for coming to the interview site and hearing out the study's purpose. Should you decide to participate, you can receive up to \$50.00 for your full input. You will receive the initial \$15.00 regardless of whether you decide to complete the entire study. You may withdraw from the study at any time and will be paid for the time you participated.

What are my rights as a research participant?

Participation in this study is voluntary. You may decline to answer any question you are uncomfortable with. Should you wish to stop participating for any reason, please tell me. We can take a break, continue later, or stop completely. Should you decide to stop completely, you retain the right to request that I destroy your responses. You give up no legal rights by agreeing to participate.

Who can I contact if I have questions or concerns about this research study?

If you have questions now, please ask them. If you have questions later, please contact me: **Keelly M. Jones, by cell, #660-281-5044, or by email, keellym-jones@uchicago.edu.**

If you have any further questions, you are encouraged to contact the following office:

[THE INFORMATION REGARDING MY UNIVERSITY CONTACTS HAS BEEN OMITTED FOR THE SAKE OF THE SUBMISSION PROCESS]

You will be given a copy of this information to keep for your records.

[SELECT ONLY ONE OF THE OPTIONS LISTED BELOW]

Consent Option 1: Signature for Written Consent

I have read the consent form and the research study has been explained to me. I have been given the opportunity to ask questions and my questions have been answered. If I have more questions, I have been told whom to contact. I agree to participate in the research study described above.

Participant’s Name (Printed)

Date

Participant’s Signature

UIN (For Researcher Only)

Consent Option 2: Statement of Verbal Consent

If you agree to participate in this research study, please say so now.

Date

UIN (For Researcher Only)



Consent Option 3: Statement of Verbal UIN Identification Consent

“To maintain response anonymity, the student researcher plans to assign uniquely identifiable numbers (or “UINs”) to each participant’s answers for both the interview questions and survey questions. These UINs will be created for each participant regardless of whether they choose to confirm their consent to participating using another method of identification. At no time before or after the individual sessions will any of the participants be informed of what their UIN is, or how UINs are created. Only the student researcher will have access to this information.”

If you agree to grant the student researcher consent to pair your study responses with your assigned UIN for the purposes of identifying your responses during later research analysis, please say so now.

Date

UIN (For Researcher Only)

Appendix G – Interviewee Information

| UIN | Gender | Race | Age | Prior | Pre-Conviction Detainment? | Original Count | Charge Level | Plea Level | Post-Conviction Detainment? |
|-----|--------|-----------|-----|-------|-------------------------------|--|-----------------|---------------|--------------------------------|
| 1 | M | Blac k | 36 | No | No | Aggravated Criminal Sexual Abuse | FEL | FEL | 29 Months |
| 2 | M | Blac k | 39 | Yes | 36 Months | Possession of a Controlled Substance | FEL | FEL | 36 Months |
| 3 | M | Blac k | 42 | Yes | No | Possession of a Controlled Substance | FEL | FEL | 4 Months |
| 4 | F | Blac k | 61 | Yes | 6 Months | Theft of a Person | MSD | FEL | 24 Months |
| 5 | M | Blac k | 27 | Yes | No | Robbery | FEL | FEL | 36 Months |
| 6 | M | Blac k | 55 | Yes | Yes (No Specified) | Theft of a Person | FEL | FEL | 18 Months |
| 7 | M | Blac k | 55 | Yes | 15 Months | Possession of a Motor Vehicle | FEL | FEL | 24 Months |
| 8 | F | Blac k | 53 | Yes | 12 Months | Prostitution | MSD | FEL | 45 Days |
| 9 | M | Blac k | 30 | Yes | 48 Months | Burglary | FEL | FEL | 36 Months Total |
| 10 | M | Blac k | 57 | Yes | Yes (No Specified) | Possession of a Controlled Substance with Intent to Distribute | FEL | FEL | 36 Months Total |

| |
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| ARTICLE |
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LEGAL THEORY AND THE EIGHTH AMENDMENT: THE LAW AND MORALITY OF CAPITAL PUNISHMENT IN THE UNITED STATES

Clayton Pierce, Colorado College

Abstract

The text of the Eighth Amendment to the Constitution of the United States reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹ The bulk of this thesis concerns the Cruel and Unusual Punishments Clause and whether capital punishment violates it. I will use four theories of legal interpretation—exclusive legal positivism, inclusive legal positivism, natural law theory, and integrity theory—in this thesis.

In the course of my analysis, I elucidate the core tenets of each theory of legal interpretation and the central components of the Supreme Court cases at issue. I also identify ongoing through lines of constitutional interpretation throughout these cases. Most importantly, I endeavor to provide a framework for the reader to ascertain whether, under these theories, the death penalty might violate the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Acknowledgements

I have yet to comprehend the extent of my fortune and privilege in attending Colorado College. Many thanks are due to the brilliant professors of our institution who instilled in me a passion for learning and urged me to question everything I learned. I am grateful to Professors Eve Grace, Doug Monroy, Christian Sorace, Schuyler Foerster, and Timothy Fuller, who challenged me to think differently about political questions and consider the role of philosophy in our world. I am especially appreciative of Professors Elizabeth Coggins, John Gould, and Sylvan Goldberg, who pushed me to write with clarity and purpose.

Thanks to my fellow students at Colorado College, whose drive, intellect, and collegiality made the frigid morning walks to Palmer Hall worthwhile. Sincere thanks are due to Anna Marcus and Elliott Williams, who generously provided edits to this work.

I am endlessly grateful to my family and friends, whose words of encouragement mean more than they know. My parents and sister put up with far too many dinner table conversations on legal theory; thank you

for indulging me. Thanks also to my de-facto family member, Ann Ziegler, for her edits of this work and for our invigorating conversations on justice.

I am indebted to my mentors at the Center for Death Penalty Litigation, including Shelagh Kenney, Gretchen Engel, David Weiss, Madhu Swarna, Olivia Warren, Elizabeth Hambourger, and Hannah Autry. Their unyielding representation of those facing death continues to inspire me.

I am grateful beyond words for the mentorship of Professor Douglas Edlin, without whom I could not have written this thesis. He extended unrelenting patience and generosity during this arduous process, as he has for so many other fortunate students. Professor Edlin taught me to love the law and to love learning about the law. His deeply rooted compassion and ceaseless humility exemplify a thoughtful presence I aspire to. One of my classmates once asked Professor Edlin why he chose to pursue teaching. He told us that as a student, a great teacher took care to mentor him; this mentorship changed the course of his life. Professor Edlin's mentorship changed the course of mine.

Introduction

Nearly 1,500 Americans currently face the imminent prospect of execution.² A further 1,000 or more sit on death row without the immediate threat of being killed by their state, nonetheless suffering disgraceful living conditions.³ My thesis asks whether the Eighth Amendment to the Constitution, and the Cruel and Unusual Punishments Clause specifically, should be understood to preclude the death penalty in the United States. This thesis uses four legal theories to determine whether the Justices who decided this issue employed sound legal reasoning in each decision, and whether the body of precedent as a whole is coherent.

In Part I of this thesis, I outline four legal theories: exclusive legal positivism, inclusive legal positivism, natural law theory, and integrity theory. I explain how they approach the source of law's authority, the role of morality in law, and how judges should interpret the law, among other things.

In Part II, I use the frameworks of these four legal theories to analyze several Supreme Court cases on capital punishment and the Eighth Amendment. I delineate the content of each Supreme Court decision and relevant concurrences and dissents as clearly as possible. I then utilize these legal theories to determine if a decision, concurrence, or dissent was a valid interpretation of the Constitution, laws, and circumstances of the case. In some cases, parts of an opinion are in line with a legal theory while other parts are contradictory to it. My goal is not to determine whether the Justices themselves sought to employ any theory in

2 Deborah Fins, *Death Row U.S.A.: Fall 2020 Report* (NAACP Legal Defense and Educational Fund, Inc., 2020), 1.

3 *Ibid.*

particular, but rather to determine the legal validity of the Court's decisions and Justices' concurrences and dissents, from the perspective of these legal theories.

Finally, I apply each legal theory to the body of precedent as a whole. I try to answer the question: According to each theory of legal interpretation, does the body of precedent make sense, *i.e.*, do the cases build on previous precedent correctly? Inherent in this analysis is also the question: According to each legal theory, does the Eighth Amendment prohibit capital punishment? Some theories have a clear answer to this latter question; others do not.

This analytical approach differs in significant ways from the bulk of scholarship on the Supreme Court, the Eighth Amendment, and the death penalty. Much ink has already been spilled over the Court's interpretation of capital punishment as it relates to the Eighth Amendment. Indeed, a lively scholarly debate continues to evolve on the constitutionality of capital punishment.⁴ Likewise, thinkers much more adept and qualified than myself have deeply considered the nuances and implications of these legal theories.⁵ In this thesis, I aim to examine the *intersection* of legal theory and Supreme Court precedent on the Eighth Amendment and capital punishment. To my knowledge, this avenue of analysis has yet to be pursued, at least in readily accessible venues.

In Part III, I examine the implications of this lineage of jurisprudence. Given the history of case law and the respective legal theories' interpretation of it, where might the Court go now? I identify three broad paths which the Court might follow in future capital cases and the implications of each path.

4 For forceful commentary on the constitutionality of capital punishment, see: Joseph Blocker, "The Death Penalty and the Fifth Amendment," *Northwestern University Law Review* 111, no. 1 (2016): 275-293.

Arthur J. Goldberg and Alan M. Dershowitz, "Declaring the Death Penalty Unconstitutional," *Harvard Law Review* 83, no. 8 (June 1970): 1773-1819.

Marah Stith McLeod, "The Death Penalty as Incapacitation," *Virginia Law Review* 104, no. 6 (October 2018): 1123-1198.

Jeffrey A. Rosen, "The Death Penalty Can Ensure 'Justice Is Being Done,'" *The New York Times*, July 27, 2020, <https://www.nytimes.com/2020/07/27/opinion/federal-death-penalty.html>.

Carol S. Steiker and Jordan M. Steiker, "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment," *Harvard Law Review* 109, no. 2 (December 1995): 335-438.

5 For illuminating explication of these legal theories, start with: H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (February 1958): 593-629.

Joseph Raz, "Dworkin: A New Link in the Chain," review of *A Matter of Principle*, by Ronald Dworkin, *California Law Review* 74, no. 3 (May 1986): 1103-1119.

W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994), 9-29, 80-140, 239-269.

In the bulk of this thesis, I refrain from referencing scholars aside from the proponents of the four legal theories. This is a conscious choice so that other interpretations of these theories do not influence my own. In Part III, I introduce a breadth of scholars who contemplate potential paths for the Court to take on capital punishment.

Part I: Legal Theory

A. Introduction to Legal Theory and Selection of Sources

The genre of legal theory encompasses a range of topics, from philosophical ruminations on the purpose of law, to intricate analyses of specific legal systems, to in-depth debates on the validity of various sources of law. I will limit my endeavors here to the exploration and discussion of four canonical legal theories: exclusive legal positivism, inclusive legal positivism, natural law theory, and Dworkin's integrity theory of interpretation. These theories were not chosen on a whim; they are the leading theories of law, and are, not incidentally, most relevant to this analysis.¹ Other theories of legal and constitutional interpretation may play a supporting role, but they are not crucial to this analysis and therefore will not be explained in this section.

My thesis focuses on the Eighth Amendment of the United States and the evolution of Supreme Court jurisprudence on capital punishment. Some theories of import for my purposes originate from a canon of Anglophone Legal Theory. While authors such as Joseph Raz, H.L.A. Hart, and John Finnis reference English case law and the particularities of the English judicial system more often than those of the United States, their theories still apply to any common-law system.

Central to this thesis is the connection between law and morality. Few people today would likely posit that there exists no connection between law and morality whatsoever. This position perhaps enjoyed more popularity in past centuries but since has been largely rejected as an inaccurate reading of the actualities of law. Renowned positivists such as H.L.A. Hart and Joseph Raz go to great lengths to distance themselves from this caricature of positivism and both openly concede a connection between law and morals in some fashion.² The fundamental distinction among the theories at hand, then, boils down to this question: To what degree, and of what significance, are law and morality intertwined? Joseph Raz put it simply: "There are inherent connections between legal concepts and moral concepts, and between law and morality. The question is what are they."³

1 Michael Sevel and Brian Leiter, "Philosophy of Law," *Encyclopædia Britannica*, last modified August 12, 2016, <https://www.britannica.com/topic/philosophy-of-law>.

2 Hart, "Positivism and the Separation of Law and Morals," 594-595.
Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979), 39.

3 Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and*

In Part I, I aim to elucidate the multitude of answers to this question offered by the four legal theories identified. In doing so, I will undoubtedly touch on other relevant aspects of these legal theories. The purpose of this section is to lay a foundation of knowledge. To understand how these theories apply to Eighth Amendment Jurisprudence and Capital Punishment in the U.S., one must first grasp the basics of each theory. Much of this analysis centers on the above-mentioned relationship between law and morality. But not all. Also at play are the theories' arguments on the appropriateness of overruling precedent, the proper means of identifying sources of law, and whether there are embedded principles flowing throughout a system of law.

B. Legal Positivism

Proponents of legal positivism view law to be authoritative in and of itself. They generally understand law to exist as a matter of social fact, regardless of its moral worth. Legal positivists propound that law is found flowing from a determinate source. It does not appear magically and does not take the form of ambiguous norms or ideals. John Austin, a proponent of the Command Theory of Law and a forefather of positivism, wrote that laws consist of a command from the sovereign "backed by the threat of sanction."⁴ This was a foundational principle of legal positivism. H.L.A. Hart defines legal positivism generally as, "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."⁵ In other words, the mere coincidence that popularly held morals coincide with law does not mean it is the law's purpose or duty to uphold those morals.

Along with Austin, this theory finds its philosophical roots in Thomas Hobbes, Jeremy Bentham, and others. For the sake of simplicity and brevity, in this thesis I will draw from Joseph Raz, a self-proclaimed positivist who is widely understood to support exclusive legal positivism, and H.L.A. Hart, his mentor, who provides the clearest account of inclusive legal positivism. It is worth noting that both claim their theory to represent the truest form of legal positivism, although scholars without a stake in this debate find it most useful to distinguish between inclusive and exclusive legal positivism. These were not the first and will not be the last prominent thinkers to advocate legal positivism as the correct theory of legal interpretation; they are simply the most useful in this context.

Politics (New York: Oxford University Press, 1994), vi.

4 John Austin, *The Province of Jurisprudence Determined*, ed. Wilfred E. Rumble (Cambridge: Cambridge University Press, 1995), 21-22.

5 H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), 185-186.

C. Inclusive Legal Positivism

Inclusive legal positivism and exclusive legal positivism share two fundamental assertions about legal sources and morality. Core to both theories are the sources thesis and the separability thesis. The sources thesis asserts that valid legal rules must originate from a determinate source.⁶ The separability thesis posits that a law's authority need not be tied to its adherence to moral precepts or perceived moral merit.⁷ The crucial distinction between these two strands of legal positivism is that inclusive legal positivism allows for the rule of recognition to incorporate the moral concepts of a system of law, while exclusive legal positivism does not, at least in the rule of recognition's capacity to identify the law. The rule of recognition itself is central to understanding both legal theories, but particularly inclusive legal positivism.

Primary rules require abstention from action or action; secondary rules regulate primary rules. To H.L.A. Hart, the rule of recognition is a form of a secondary rule. Another way to think of primary and secondary rules are those that convey commands and those that confer powers. A law requiring drivers to stop at red lights is a primary rule. A law instating term limits for governing officials is a secondary rule. Hart writes that there are two minimum and sufficient conditions for a legal system to carry authority: On the one hand, those rules of behaviour [primary rules] which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication [secondary rules] must be effectively adopted as common standards of official behaviour by its officials.⁸ For a legal system to function, the people within its jurisdiction must recognize primary and secondary rules as valid and conferring authority; this includes officials who have the authority to enact primary rules. In essence, this is the rule of recognition. Hart says that in any individual legal system, officials may understand the rules governing them to incorporate moral concepts; therefore, the rule of recognition can incorporate moral concepts in its identification the law.⁹

Hart differentiates between laws and "orders backed by threats," as Austin describes them. The "Cardinal Issue" to Hart is, "How... do law and legal obligation differ from, and how are they related to, orders backed by threats?"¹⁰ Most of the answer here can be found in the rule of recognition: To Hart, laws are commands which convey authority, not solely threats, empty or

6 Hart, *The Concept of Law*, 97, 106.

Raz, *The Authority of Law*, 47-48.

7 Hart, *The Concept of Law*, 156-157, 185-186.

Raz, *The Ethics in the Public Domain*, 317.

8 Hart, *The Concept of Law*, 116.

9 Hart, *The Concept of Law*, 116-117.

10 Hart, *The Concept of Law*, 7.

otherwise. This is a crucial point of contention between Hart's theory and Austin's: Austin finds law's authority deriving from the existence of a threat of sanction. Hart says that whether the threat of sanction is menacing or benign, the people subject to laws must recognize those laws as such and generally follow them. To Hart, if people feel threatened by a law but do not recognize it as a law, then it is not one.

For Hart, the internal aspect of rules is that subjects to the rule not only understand it and its implications, but reinforce it themselves. It is generally understood within society that if someone controverts a rule, they will face social backlash. This internal aspect of rules is essential in distinguishing rules from a convergence on behavior and to Hart, "is crucial for the understanding of law..."¹¹ To continue the example posed previously, if someone runs a red light in the United States and others are present to witness this, the rule-breaker is likely to be honked at, yelled at, or otherwise face backlash. (Crucially, they will face backlash from their fellow citizens, not just the possibility of fine or arrest if a law enforcement officer is present). Thus, the fact that drivers in the United States generally do not run red lights is not due to their convergence of behavior, but because there is an internal aspect of each state's traffic laws.

As previously noted, a crucial distinction between Hart and Raz's theories (inclusive and exclusive legal positivism, respectively) is that Hart's theory allows for morality to play a role in identifying the law through the rule of recognition, while Raz's does not. To Hart, laws and commonly held moral beliefs in any society both have duties, rights, and obligations, which obviously overlap on occasion; this is not a bad thing. There are certain basic rules in any modern society, he points out, that necessarily overlap with moral beliefs tied to religion and other sources: Rules prohibiting violence against others are just one example of this.¹² While he readily accepts that moral concepts can be incorporated into the rule of recognition, Hart criticizes natural law theory for its assertion that law is *based on* commonly held morals. As I will get to shortly, natural law theory is grounded in a conception of basic goods. Hart argues that in law-making, legislators necessarily choose between competing basic goods.¹³ Natural Law theory asserts that all basic goods enumerated are essential, none more than the other; this would seem to be at odds with the choice that legislators often face between basic goods, Hart argues. Hart also asks, in a pluralistic society, who is to determine the common morality of society?¹⁴ No doubt, he says, the law has been and still is influenced by moral conceptions and ideals of various groups. This does not mean the law must conform to moral standards of a society or group of people, or that the law relies on people's personal moral obligation to abide by rules in all cases. Although morality and law are oftentimes inextricably connected, he says, "it does

11 Hart, *The Concept of Law*, 12.

12 Hart, *The Concept of Law*, 204-205.

13 Hart, *The Concept of Law*, 183-184.

14 Ibid.

not follow... that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.”¹⁵ The core of Hart’s theory of interpretation is the rule of recognition, which asserts that law’s authority is found not in a threat of sanction or convergence of behavior, but the fact that the subjects of the law—including officials who create and enforce laws—recognize the law as such. Inclusive legal positivism is most clearly distinguished from exclusive legal positivism in that it allows for morality to be incorporated into the rule of recognition. It does not go so far as natural law theory to say that the bedrock of a legal system should be a common conception of morality.

Exclusive Legal Positivism

At its core, exclusive legal positivism gets its name from its assertion that the rule of recognition of a legal system cannot involve moral concepts or tests in its identification of the law. In other words, exclusive legal positivists assert that the law is exclusively identified by valid legal sources, which cannot incorporate moral components.¹⁶ In *The Authority of Law*, Joseph Raz explains his stance this way: “I am assuming no necessary connection between law and morality. I am taking it to be a necessary truth, however, that whatever people do they do because they believe it to be good or valuable, however misguided and even reckless their beliefs may be.”¹⁷ This central tenet of Raz’s theory can be properly understood as the separability thesis, although often referred to by the misnomer, “separation thesis.” It is crucial to understand that Raz does not claim law is *always* separated from morality, but that the *identification* of law cannot be tied to moral concepts, and that a law need not be morally meritorious to be followed or properly considered law.

Raz asserts that the identification of law depends on the “social fact” that it originates from a determinate valid legal source.¹⁸ In contrast to Hart, he says its identification does not depend on moral concepts. This formulation of the identification of law is called the sources thesis. Raz writes: A law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people’s moral views and intentions, which are necessary for interpretation, for example)... The sources of law thus understood are never a single act (of legislation, etc.) alone, but a whole range of facts of a variety of kinds.¹⁹ This concept works in two ways for Raz: It provides a theoretical foundation for identifying valid law and describes the reality of how law

15 Hart, *The Concept of Law*, 185.

16 Raz, *The Authority of Law*, 47-48.

17 Raz, *Ethics in the Public Domain*, 317.

18 Raz, *The Authority of Law*, 37.

19 Raz, *The Authority of Law*, 47-48.

functions. To Raz, one need not hold a position that requires them to interpret law (such as a judge or juror) to participate in the interpretive exercise. In fact, most people interpret various laws and judicial decisions to be good or bad, which may or may not be tied to their interpretation of the morality of that law or decision. This exercise of interpretation itself helps to prove Raz's sources thesis, in his mind.

Raz lays out a relatively straightforward approach for judicial interpretation of law. He distinguishes between settled and unsettled law. Deciding cases that pertain to settled law is simple for Raz, and occurs, "When legally binding sources provide its solution."²⁰ Unsettled law concerns cases when courts must "fill in the gaps" of law.²¹ Other legal philosophers such as Ronald Dworkin call these "hard cases." Raz maintains that in general, lower courts should follow precedent when deciding cases of settled law and distinguish from precedent in cases of unsettled law. It is the duty of the superior court to distinguish from or overrule precedent when appropriate. He argues that the sources thesis is not incompatible with this inevitability. Superior courts must distinguish the case before them from precedent when it does not apply and overrule it when precedent is in error. In these cases, Raz argues, judges may rely on moral considerations as part of their decision.²² Crucially, though, any morality imbued in a decision is not what identifies on the decision as a valid legal source. He writes, "From the fact that the question, 'how, all things considered, should the courts decide the case?' is a moral question it does not follow that the question 'how according to law, should cases be decided?' is a moral question."²³ In simpler terms, Raz says that precedent must be overruled by reasons other than its perceived moral worth. In sum, Raz finds no necessary connection between morality and the identification of law; broadly speaking, this is the separability thesis. The sources thesis provides a means of identifying valid sources of law. A law has a source if it can be identified without considering its morality. In cases of unsettled law, superior courts may distinguish from and overrule precedent, and even incorporate moral reasoning in their deliberative process. The resulting decision, though, is not considered a legal source because of its morality, says Raz.

D. Natural Law Theory

Fortunately, natural law theory is more easily dissected than exclusive and inclusive legal positivism. The core of natural law theory is what John Finnis calls basic goods.²⁴ Finnis asserts that anyone exercising practical

20 Raz, *The Authority of Law*, 49.

21 Ibid.

22 Raz, *The Authority of Law*, 49-50.

23 Raz, *Ethics in the Public Domain*, 312.

24 Finnis uses "basic goods" while his predecessor Aquinas refers to them as "human goods." For the sake of simplicity and to use the modern variant of natural law theo-

reasonableness can come to the conclusion that there are identifiable basic goods which the law should uphold; to him, upholding these basic goods allows for human flourishing. He explicates this theory in *Natural Law and Natural Rights*:

There is (i) a set of practical principles which indicate the basic forms of human flourishing goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide criteria for distinguishing between acts that... are reasonable-all-things-considered... and acts that are unreasonable-all-things-considered, i.e. between ways of acting that are morally right or morally wrong--thus enabling one to formulate (iii) a set of general moral standards."²⁵

To Finnis, there are identifiable and distinct basic goods; humans exercising practical reasonableness distinguish their thinking from those who are not; and those exercising practical reasonableness can come to a common understanding of these basic goods.

Central to Finnis's thesis is the assertion that these basic goods are discernible, distinct, and all-encompassing. Any other basic good which someone might put forth, Finnis says, is encompassed within one of his seven basic goods: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.²⁶ Although Finnis firmly maintains each basic good is no more or less important than another, there are two that are of particular relevance for the framework of this thesis.

Religion, to Finnis, is more an interrogation of the cosmic order than a devotion to the divine.²⁷ He asks whether one's actions are influenced by the perception of a higher power, and whether, as a result, laws should be created with this in mind. This will become important later. Also of note is the basic good preceding religion, practical reasonableness. This good, as previously discussed, is imperative to the whole of upholding all basic goods--one must exercise practical reasonableness to properly identify basic goods, in Finnis's mind. Practical reasonableness has an internal aspect (being honest with oneself) and an external aspect (representing yourself authentically with others); both are necessary to achieve human flourishing.²⁸

To Finnis, legislators draft and judges uphold unjust laws when the law violates a basic good.²⁹ (This aspect of natural law theory is part of Hart's

ry, I will refer to them as "basic goods" and use Finnis's version of natural law theory.

John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), 85-90.

25 Finnis, *Natural Law & Natural Rights*, 23.

26 Finnis, *Natural Law & Natural Rights*, 85-90.

27 Finnis, *Natural Law & Natural Rights*, 89-90.

28 Finnis, *Natural Law & Natural Rights*, 87-88, 100-103.

29 Finnis, *Natural Law & Natural Rights*, 359-360.

criticism--choosing between basic goods). Importantly, Finnis does not say an unjust law is not a law at all. Rather, those who write or uphold an unjust law forfeit their authority.³⁰ Quite apart from the position of Hart and Raz, Finnis writes that, "rulers have, very strictly speaking, no right to be obeyed... but they have the authority to give directions and make laws that are morally obligatory and that they have the responsibility of enforcing. They have this authority for the sake of the common good..."³¹ Rather than the law being authoritative because it is followed or because it is the law, to Finnis, the law is authoritative when it upholds human flourishing. When rulers fail to exercise practical reasonableness or act against basic goods, they forfeit their delegated authority.

Finally, while not entirely central to Finnis's thesis, but very much so to my investigation here, is his distinction between rights and absolute rights. This is a clear retort to utilitarians who might assert that there are no absolute human rights. To Finnis, absolute rights take higher precedence over rights and there are no exceptions to violating them.³² Crucially, Finnis writes that there are, "exceptionless or absolute human claim-rights--most obviously, the right not to have one's life taken directly as a means to any further end..."³³ (He goes on to list other exceptionless human rights). It will become important later that not only is life the first basic good, but an absolute right, to Finnis (and indeed all natural lawyers).

Natural law theory rests on the assumption that there are identifiable, separate, and comprehensive basic goods. These basic goods must be upheld in law-making and adjudicating to assure human flourishing. A law's authority, to Finnis, lies not in citizens' recognition of it as a law, (Hart), or whether it has a source apart from morality, (Raz), but in its ability to uphold basic goods. Likewise, law-makers' and adjudicators' authority is forfeited when they pass or enforce unjust laws which violate basic rights. To reach these conclusions, Finnis says one must maintain a sense of practical reasonableness, itself a basic good.

E. Integrity Theory

Altogether distinct from exclusive legal positivism, inclusive legal positivism, and natural law theory, (though written with these theories in mind), the integrity theory of interpretation conceived by Ronald Dworkin advocates for upholding rights which originate in principles flowing from a body of law. A crucial component of Dworkin's integrity theory is the rights thesis. Dworkin writes, "The rights thesis provides that judges decide hard cases by confirming or denying concrete rights."³⁴ Analogous to what Raz describes as cases involving

30 Ibid.

31 Finnis, *Natural Law & Natural Rights*, 359.

32 Finnis, *Natural Law & Natural Rights*, 223-226.

33 Finnis, *Natural Law & Natural Rights*, 225.

34 Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University

unsettled law, to Dworkin, hard cases are those in which judges must consider competing rights. In hard cases, judicial decisions should be made on the basis of principle, rather than policy.³⁵ Broadly speaking, legal positivists argue judicial decisions should be made based on the text of the law and natural lawyers say to uphold basic goods. Dworkin argues judicial decisions should be made to uphold individual and group rights clearly established by the principles in a body of law.

Dworkin does not disregard morality in the interpretive process, though. To him, judges *do* and *should* strive to achieve the best outcome in every case which comes before them. This inevitably involves moral considerations, especially in hard cases. The best outcome can be reached when judges correctly apply principle and try to reach the right answer.³⁶ How does a judge choose between competing principles, someone like Hart might ask? Dworkin says judges must make distinctions between principles based on those that most closely align with the community and those clearly delineated in a body of law.³⁷ According to Dworkin, judges should look to a single author of the law: “the community personified,” when adjudicating cases.³⁸ The Constitution, for example, should be prioritized above almost all else: “A particular judge may think or assume, for example, that political decisions should mainly respect majority opinion, and yet believe that this requirement relaxes and even disappears when serious constitutional rights are in question.”³⁹ This hierarchical delineation of sources to consider when adjudicating cases is crucial to my application of Dworkin’s theory later.

Dworkin’s theory of legal interpretation can be encapsulated in what he calls law as integrity, or integrity theory. He frames this as an answer to conventionalism and legal pragmatism, and can be understood here as an answer to exclusive and inclusive legal positivism, and to some extent natural law theory. Dworkin defines integrity theory in *Law’s Empire*:

Law as integrity denies that statements of law are either backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.⁴⁰

Later on he writes: “[Law as integrity] argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in those decisions but also when they flow from the principles of

Press, 1978), 101.

35 Dworkin, *Taking Rights Seriously*, 86-87.

36 Ronald Dworkin, *Law’s Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986), 255-258.

37 Dworkin, *Law’s Empire*, 255-256.

38 Dworkin, *Law’s Empire*, 225.

39 Dworkin, *Law’s Empire*, 256-257.

40 Dworkin, *Law’s Empire*, 225.

personal and political morality the explicit decisions presuppose by way of justification.”⁴¹ What does all this mean? Put simply, integrity theory asserts that it is not just the text of the law, its moral value, or its role in upholding rights that matters. A judge must look beyond these factors to the underlying principles flowing from the originating text(s) and subsequent decisions to adjudicate hard cases.

Like natural law theory sees it as a judge’s role to uphold basic goods, Dworkin thinks judges must uphold rights found within principles in the body of law. To him, judges should always strive to reach the best outcome, and listen to the singular voice of the community personified when interpreting the law. Integrity theory claims that there are discernible principles found within any common-law system’s body of law, and that judges should seek to uphold them.

Part II: Application and Analysis

With a framework of four competing legal theories, each with their own method of interpretation, I will analyze Supreme Court precedent pertaining to capital punishment and the Eighth Amendment (though not always both in the same case). Some cases serve primarily as foundational precedent which the Court relies on later; they will accordingly receive less attention in terms of their alignment with one legal theory or another. I will analyze these cases chronologically, not because this matches their relative importance. Each case expands on—or in some cases refines, delineates from, or overrules—previous precedent, as is the design of any common-law system of judicial review. Many of the cases I analyze include dissents and concurrences, which should not be ignored by any reader of the judicial record. For the sake of brevity and clarity, I will contain my analysis to the dissents and concurrences that bear most significance to Eighth Amendment precedent (those that are referenced in subsequent opinions or otherwise add to the structure of precedent).

It is worth noting that some Justices proclaim to adhere to a certain method of legal interpretation; Justice Kagan, for example, said, “We’re all textualists now.”⁴² Their annunciated or actual adherence to textualism or any other theory of interpretation is of little importance to this endeavor. Instead, the bulk of my analysis focuses on whether each decision itself follows reasoning or reaches an outcome which might align with or stray from one theory or another. I will also focus on how each theory might address the body of law concerning capital punishment and the Eighth Amendment. The connection between legal theory and precedent may seem strained at first. I will endeavor to clarify how each case is aligned with or against a given legal theory, always

41 Dworkin, *Law’s Empire*, 96.

42 Elena Kagan, “The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes,” interview by John Manning, *Antonin Scalia Lecture Series*, Harvard Law School, November 18, 2015, video, <https://www.youtube.com/watch?v=d-pEtszFT0Tg>.

returning to the initial framework of the four legal theories outlined already.

My thesis is focused on the application of these four legal theories and their proposed methods of interpretation; the authors' personal views on capital punishment, if they have any, are irrelevant to this analysis.

A. The Eighth Amendment and Its Connection to the Fourteenth

The core of this analysis concerns the Cruel and Unusual Punishments clause of the Eighth Amendment and the Supreme Court's interpretation of it. Once again, the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁴³ I will take this statement at face value, not reading into the thoughts of those who wrote and passed it. What people in the 18th Century thought constituted cruel and unusual punishments is unimportant to this analysis; this thesis examines Supreme Court cases, which themselves involve interpretive processes. Thus, the analysis uses theories of legal interpretation. Originalism, Living Constitutionalism, and other theories of constitutional interpretation are not central to this thesis.⁴⁴

The Eighth Amendment's roots are found in the Magna Carta and English Bill of Rights of 1689.⁴⁵ The English Bill of Rights of 1689 lists "excessive bail... excessive crimes... And illegal and cruel punishments" in their grievances against King James II and his surrogates in their pattern of corruption and misdeeds.⁴⁶ The historical and philosophical origins of the Eighth Amendment are important to this analysis, not because I seek insight into the minds of those

43 U.S. Const. Amend. VIII.

44 Some may take issue with my decision to leave Originalism, Living Constitutionalism, and other theories of Constitutional interpretation out of this analysis; this was a deliberate choice, and one not taken lightly. I am concerned with the Justices' interpretive processes and end result in the Court's decision in these cases. Whether they adhere to an original understanding (or original public meaning) of the Constitution is, in my view, separate from the process of interpreting the facts of each case, the text of the Amendment, and morality's role this process. Further, the four theories of legal interpretation included in my thesis offer more comprehensive interpretive theories than any theory of constitutional interpretation. Originalism, itself a close cousin of textualism, overlaps substantially with aspects of legal positivism. Living Constitutionalism can be said to take a similar approach to Dworkin's integrity theory of interpretation. For these reasons, I thought it unnecessary and potentially confusing to include theories of constitutional interpretation in my analysis. An examination of similar precedent through those lenses would likely prove elucidating.

45 John Bessler, "A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment," *William & Mary Bill of Rights Journal* 27 (2019): 996-999.

46 "English Bill of Rights 1689," The Avalon Project, Yale Law School, last modified 2008, https://avalon.law.yale.edu/17th_century/england.asp.

who drafted it, but because they are clearly part of the philosophical bedrock of this amendment. This is particularly important for Dworkin, as it marks the origination, ancient as it may be, of principles in this part of the Constitution.

Scholars, lawyers, and judges alike continue to debate whether capital punishment violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.⁴⁷ Indeed, some cases in this analysis involve equal protection challenges, too. That question is outside the scope of this thesis, though no less important to the Court and those on death row. It is necessary, however, to link a different clause of the Fourteenth Amendment to this analysis of the Eighth Amendment.

After establishing qualifications for citizens of the U.S., the Fourteenth Amendment Reads, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law...”⁴⁸ The Eighth Amendment itself is understood to apply to the U.S. federal government; the Privileges or Immunities Clause along with the Due Process Clause are necessary to extend this prohibition on cruel and unusual punishments to the states themselves.⁴⁹ The cases I analyze concern state death penalty statutes and their enforcement of the death penalty on citizens of the United States. Therefore, the Privileges or Immunities and Due Process Clauses are necessary to extend Eighth Amendment protections to people sentenced to death by their state.⁵⁰ The extension of Eighth Amendment applicability to states become particularly relevant in *Furman* and *McCleskey*. With a theoretical framework to examine cases and the necessary understanding of how the Eighth Amendment applies, I will delve into the precedent.

47 For discourse on the Equal Protection Clause and capital punishment, see: Kwéku Hanson, “Racial Disparities and the Law of Death: The Case for a New Hard Look at Race-Based Challenges to Capital Punishment,” *National Black Law Journal* 10, no. 3 (1988): 298-317.

Brad Snyder, “Disparate Impact on Death Row: M. L. B. and the Indigent’s Rights to Counsel at State Postconviction Proceedings,” *The Yale Law Journal* 107, no. 7 (May 1998): 2211-2247.

48 U.S. Const. Amend XIV, § 1.

49 *In re Kemmler*, 136 U.S. 436 (1890) at 437, 447-449.

Robinson v. California, 370 U.S. 660 (1962) at 660, 667.

50 The Court in *In re Kemmler* does not take the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment to clearly prohibit states from imposing capital punishment. They do acknowledge, however, that if the Court were to make such a decision, this connection would be necessary, and that the Privileges or Immunities and Due Process Clauses extend the Eighth Amendment to apply to the states. In subsequent cases (*Luisiana ex rel. Francis v. Resweber*, *Trop v. Dulles*, *Furman v. Georgia*, etc), the Court recognizes the Fourteenth Amendment’s Privileges or Immunities and Due Process clauses to extend the Eighth Amendment to the states.

B. The Foundation: *In re Kemmler* (1890)

In re Kemmler (1890) concerns New York's death penalty statute at the time and petitioner William Kemmler's writ of *habeas corpus*, which contended that the statute and its imposition on him violated the Eighth and Fourteenth Amendments.⁵¹ Kemmler argued his life and liberty were deprived without due process of law and that he was subject to cruel and unusual punishment in his botched execution. He further contended that death by electrocution in any circumstance constituted cruel and unusual punishment. Kemmler was condemned to the electric chair because the New York State Legislature had amended their death penalty statute to change its method of execution from hanging to electrocution; the legislature's commission on this subject was supposed to investigate "the most human and practical method" of execution.⁵²

The attempted electrocution of Mr. Kemmler could be described as nothing less than horrendous. After an initial botched electrocution, the warden instructed the executioner to try again at a higher voltage, which also proved unsuccessful in laying him to rest. According to a *New York Times* article titled, "Far Worse Than Hanging," his blood vessels burst and, "it was seen that the hair under and around the electrode on the head and the flesh under and around the electrode at the base of the spine was singeing."⁵³ The Court ultimately ruled this punishment outside the scope of the Eighth Amendment's Cruel and Unusual Punishment Clause and allowed for Mr. Kemmler to be sent to the execution chamber once more.⁵⁴

In reaching the conclusion that the death penalty, grotesque electrocutions included, did not violate the Eighth Amendment, the Court referenced *Wilkerson v. Utah* and the legendary jurist Blackstone. The Court wrote, "Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the extinguishment of life."⁵⁵ How the Justices looked at the facts of this case and found Mr. Kemmler's experience to not involve torture or a lingering death is, quite frankly, beyond me. That issue aside, the reason this case is important to Eighth

51 *In re Kemmler*, 136 U.S.

52 *In re Kemmler*, 136 U.S. at 444.

The Governor of New York wrote to the New York Legislature: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature."

53 "Far Worse Than Hanging; Kemmler's Death Proves an Awful Spectacle," *New York Times*, August 7, 1890, 1-2. <https://www.nytimes.com/1890/08/07/archives/far-worse-than-hanging-kemmlers-death-proves-an-awful-spectacle-the.html>.

54 *In re Kemmler*, 136 U.S.

55 *In re Kemmler*, 136 U.S. at 447.

Amendment precedent is that the Court made a distinction between the “mere extinguishment of life” and more “inhuman and barbarous” punishments; the former not in violation of the Eighth Amendment.⁵⁶ The Court codified its stance that the death penalty did not violate the Eighth Amendment, that punishment must be more cruel than death itself to approach this threshold. The twice-botched electrocution of Mr. Kemmler did not meet this standard, either.

Natural law theory has a clear answer to the Court in this case: “the extinguishment of life” is not only cruel; it violates the basic goods inherent to humankind. To natural law theorists, and Finnis specifically, life is not just a basic good—and the first one, at that—it is an absolute right.⁵⁷ These rights, among them the right to life, are to natural lawyers, exceptionless in that there cannot be any reasonable grounds for violating them. Recognizing and upholding absolute rights is itself a facet of practical reasonableness; judges who do not uphold absolute rights or basic goods forfeit their delegated authority.⁵⁸ Laws that controvert basic goods, to Finnis, “lack the moral authority that in other cases comes simply from their origin, ‘pedigree’, or formal source.”⁵⁹

To natural lawyers, the New York death penalty statute, although amended for the purposes of being less barbarous, lacked authority. Likewise, the Justices who upheld the statute forfeited their moral authority. Natural law theory would view the Court’s opinion in *In re Kemmler* to be erroneous in that it failed to use practical reasonableness and uphold basic goods. Natural law theorists would implore the Court to overturn this precedent and thus regain its moral authority.

Exclusive legal positivism does not allow for morality in the identification of legislation as a valid source of law. Raz writes, “A law has a source if its contents and existence can be determined without using moral arguments...”⁶⁰ Exclusive legal positivists, then, would likely determine the Court’s standard of identifying a law in violation of the Eighth Amendment to lack valid legal reasoning. The Court asserts that only punishments which were “inhuman and barbarous” violated the Cruel and Unusual Punishments Clause.⁶¹ This threshold test, for exclusive legal positivists, does not work because it involves morality in the identification of laws that violated the Eighth Amendment.

Inclusive legal positivism and integrity theory do not provide further substantial insight into the Justices’ reasoning in this case, and I will employ their theories frequently in the following cases. In sum, natural law theorists would disapprove of the Court’s reasoning and outcome because it violated the basic good of life; exclusive legal positivists view the Court’s Eighth Amendment

56 *In re Kemmler*, 136 U.S. at 447.

57 Finnis, *Natural Law & Natural Rights*, 85-90, 225.

58 Finnis, *Natural Law & Natural Rights*, 225, 359-360.

59 Finnis, *Natural Law & Natural Rights*, 360.

60 Raz, *The Authority of Law*, 47.

61 *In Re Kemmler*, 136 U.S. at 447.

threshold test as flawed legal reasoning because of its moral components.

C. Refining Eighth Amendment Applicability: *Trop v. Dulles* (1958)

In *Trop v. Dulles* (1958) the Supreme Court was asked to consider whether revoking someone's U.S. citizenship constituted cruel and unusual punishment.⁶² The Court said emphatically, "[The] use of denationalization as a punishment is barred by the Eighth Amendment."⁶³ This standard remains unchanged more than a half-century since later; it is unconstitutional to revoke someone's U.S. citizenship as a form of punishment in almost all circumstances. This case does not directly relate to capital punishment. It is nonetheless essential in elucidating the Court's understanding of the Eighth Amendment; the Court did mention capital punishment in their decision, which is useful to this analysis.

This case concerns former U.S. Army Private Albert Trop. He was confined in a stockade for disciplinary reasons in French Morocco where he was serving.⁶⁴ Mr. Trop escaped his confines and was subsequently found by service members; he was put in the custody of military police and charged with desertion.⁶⁵ Mr. Trop was dishonorably discharged from the Army and sentenced to three years hard labor by a general court-martial.⁶⁶ After serving this sentence, Mr. Trop applied for a passport and was denied under the amended Nationality Act of 1940. He lost his citizenship as a punishment for desertion.⁶⁷

Mr. Trop appealed this in Federal District Court, seeking the sole remedy of citizenship.⁶⁸ The District Court sided with the government, who sought to prohibit Mr. Trop from gaining citizenship through summary judgment; the Second Circuit Court of Appeals affirmed the District Court's decision. In an opinion written by Chief Justice Warren, the high Court reversed the District Court's judgment. Part I of the Court's decision asserted that citizenship was not subject to the Federal Government's authority. Thus, Section 401 (g) of the Nationality Act of 1940—the amended section which provided for denationalization as a punishment for deserters—was null.⁶⁹ The Court made clear that the only acceptable circumstances for denationalization occurred when an

62 *Trop v. Dulles*, 356 U.S. 86 (1958) at 86, 100-104.

63 *Trop*, 356 U.S. at 101.

64 *Trop*, 356 U.S. at 87.

65 *Ibid.*

66 *Trop*, 356 U.S. at 88.

Interestingly, the Court did not find his sentence of three years hard labor to violate the Eighth Amendment. Only his subsequent revocation of U.S. citizenship crossed that line, according to the Court.

67 *Trop*, 356 U.S. at 88.

68 *Ibid.*

69 *Trop*, 356 U.S. at 92.

individual allied himself with a foreign nation. Here, the Justices expressed their explicit willingness to consider “the ultimate penalty,” (capital punishment) for deserters, but not denationalization.⁷⁰ This marked a delineation in the Court’s hierarchy of what may or may not violate the Eighth Amendment.

The Court could have stopped here. The government did not have the power to revoke deserters’ citizenship unless they explicitly renounced it or otherwise expressed allegiance to a foreign nation. The Justices further enunciated how denationalization violated the Eighth Amendment (with narrow exceptions). The Court distinguished this case from *Perez v. Brownell*, which allowed for “citizenship [to] be divested in the exercise of some governmental power...”⁷¹ *Perez*, quite apart from the circumstances of *Trop*, involved a citizen voting in foreign elections. Given that separate question of national allegiance, the Court made clear that in cases which this question does not arise, denationalization violated the Constitution.⁷²

The Court categorized Section 401 (g) of the Nationality Act of 1940 as a penal law, clearly subject to the Eighth Amendment’s prohibition of cruel and unusual punishment. Here the Court explicitly referenced capital punishment; at the time it was an alternative to denationalization for deserters.⁷³ The Court sidestepped the constitutionality of capital punishment, implicitly affirming its congruence with the Eighth Amendment as outlined in earlier cases. The decision reads:

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination. The exact scope of the constitutional phrase “cruel and unusual” has not been detailed by this Court.⁷⁴

The Court cited *Francis v. Resweber*, *In re Kemmler*, and *Wilkerson v. Utah*, among other cases to show the ambiguity of the bounds of cruel and unusual punishment as interpreted by the Supreme Court.

Having sidestepped the elephant in the room, the Chief Justice, writing for the Court, identified the dominant principle of the Eighth Amendment:

70 *Trop*, 356 U.S. at 92.

71 *Trop*, 356 U.S. at 93.

72 Another crucial distinction between *Perez* and *Trop* involves the difference between a regulatory provision and penal law. The government’s authority to revoke citizenship in *Perez* rested on national security interests and citizens who vote in foreign elections. Here, there is no such question; Section 401 (g) of the Nationality Act of 1940 is expressly a Penal Code, says the Court.

73 *Trop*, 356 U.S. at 99.

74 *Trop*, 356 U.S. at 99.

“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁷⁵ To the Justices, denationalization for deserting one’s post in the armed forces belied “the dignity of man.” They continued, “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷⁶ The “evolving standards of decency” which the Court referenced was a novel concept in Eighth Amendment jurisprudence. This sentence signaled a willingness of the Court to depart from precedent not just when legislation clearly violated the Constitution or precedent, but when it contradicted the “standards of decency” of society.

Implicit, perhaps even explicit in this opinion, was the position that death at the hands of one’s state did not contradict the “standards of decency” of society at the time. The Court acknowledged that, while no physical pain was inflicted in revoking Mr. Trop’s citizenship, it constituted “the total destruction of the individual’s status in organized society.”⁷⁷ If the U.S. left him stateless, he would in effect have “lost the right to have rights.”⁷⁸ In a phrase integrity theorists might read fondly, the Chief Justice wrote, “This punishment is offensive to cardinal principles for which the Constitution stands.”⁷⁹ The Court said that denationalization not only violated the provisions of the Eighth Amendment, but its underlying principles, and those of the Constitution itself, too.

At this point, the Justices had firmly established that denationalization violated the Eighth Amendment’s prohibition of cruel and unusual punishment and the principles of the Constitution. They did not stop there. The Justices made abundantly clear that when rights outlined by the Constitution seem to be under threat, the Court must exact extraordinary scrutiny on Congress.⁸⁰ The Justices asserted their obligation to defend the Constitution and wrote, “The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights.”⁸¹ In an emphatic rejection of Congress’s audacity to enact the legislation in question, the Chief Justice wrote, “The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation.”⁸² In this majority opinion, the Court explicitly recognized the need to uphold individual rights as enumerated in the Constitution. It went further: it must uphold not just the rights which can

75 *Trop*, 356 U.S. at 100.

76 *Trop*, 356 U.S. at 101.

77 *Ibid*.

78 *Trop*, 356 U.S. at 102.

79 *Trop*, 356 U.S. at 102.

80 *Trop*, 356 U.S. at 103.

The Court did not use the now-familiar phrase “strict scrutiny” but said, “When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.”

81 *Ibid*.

82 *Ibid*.

be clearly divined from the text, but rights emanating from the principles of the Constitution, too.⁸³ The implications of this case go well beyond Mr. Trop's denationalization, though the significance of his renewed citizenship in the country for which he fought should not be understated. It may come as no surprise that Dworkin's integrity theory of interpretation would applaud the Court's recognition of principles embedded in the Constitution. The lenses of natural law theory and exclusive and inclusive legal positivism prove useful to this analysis, too.

Dworkin's integrity theory of interpretation advocates enforcing and defending rights and identifying principles flowing from the body of law; in this case, the Court does both. As detailed earlier, Dworkin's rights thesis states, "that judicial decisions enforce existing political rights..."⁸⁴ This is central to the Court's decision in this case. The Justices were concerned with Mr. Trop's rights as a U.S. Citizen and how he might have been deprived of his rights without that status: "...his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights."⁸⁵ In *Trop*, the Court was concerned not just with the petitioner's right to be free from cruel and unusual punishment but his "right to have rights" generally. The Court went beyond protecting Mr. Trop's "right to have rights," and affirmed its own duty to protect the rights of all. They wrote, "The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."⁸⁶ This is precisely in line with an integrity theorist's view of the role of the judiciary: to affirm and protect individual and group rights.

An integrity theorist would also likely support the Chief Justice's willingness to identify principles emanating from the Constitution. The opinion reads, "The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, *living principles* that authorize and limit governmental powers in our nation."⁸⁷ (Emphasis added). Integrity theory posits that judges reach the best outcome in a case by upholding principles within a body of law and applying them to the case at hand.

The Court established a new test in *Trop*: whether a law was in line with the "evolving standards of decency" of society.⁸⁸ From this point on, penal codes were tested against this amorphous standard in Eighth Amendment cases. To an integrity theorist, the "evolving standards of decency" is similar, if not synonymous with the community personified. In *Law's Empire*, Dworkin writes that integrity theory, "...instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—

83 Ibid.

84 Dworkin, *Taking Rights Seriously*, 87.

85 *Trop*, 356 U.S. at 101-102.

86 *Trop*, 356 U.S. at 103.

87 *Trop*, 356 U.S. at 103.

88 *Trop*, 356 U.S. at 101.

expressing a coherent conception of justice and fairness.”⁸⁹ Certainly the singular author—to integrity theorists, the community personified—is not stuck in time at the drafting of the Constitution, adoption of the Eighth Amendment, or even in 1944 when the amended Nationality Act was passed. The community continues to change and evolve with time. Integrity theorists understand this and urge judges to adapt to the changing conceptions of morality and standards of decency, without disregarding rights. It seems the Court in *Trop* understood this, too.

In contrast to integrity theorists, exclusive legal positivists might be quite displeased with the Court for considering society’s understanding of morality and decency in this case. To them, the Court should look at the law and the text of the Eighth Amendment, along with previous precedent, to identify the law as in line with or in violation of the Constitution. In *The Authority of Law*, Raz concedes that, “Naturally, their decisions in such cases [of unsettled law] rely at least partly on moral and other extra-legal considerations.”⁹⁰ While the Court may take into account moral *considerations*, morality should not, in an exclusive legal positivist’s mind, enter be involved in the *identification* of the law as constitutional or unconstitutional. Exclusive legal positivists would likely contend with the Chief Justice’s statement that, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁹¹ This was a codified recognition of dignity as something that should be upheld by the Court. Decency, evaluated by the evolving standards of society, should be taken into consideration when evaluating Eighth Amendment claims, said the Court. An exclusive legal positivist would likely say that taken together, these two statements represent unsound legal reasoning.

This does not mean an exclusive legal positivist would necessarily take issue with the Court ruling denationalization unconstitutional under the Fourteenth Amendment. An exclusive legal positivist would likely consider this case one involving unsettled law, defined by Raz as a case in which, “a legal question is not answered by standards deriving from legal sources...”⁹² The Court clearly distinguished this case from previous precedent involving denationalization (*Perez*) and Eighth Amendment challenges (*In re Kemmler*, *Resweber*, and *Wilkerson*). An exclusive legal positivist would likely approve of the Court’s reasoning in Part I of the majority opinion: “...citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers.”⁹³ If the Justices in this case had followed the framework of exclusive legal positivism, they would have stopped at Part I: The Constitution prohibits the government from wielding citizenship as a penal power. Exclusive legal positivism urges judges to reform

89 Dworkin, *Law’s Empire*, 225.

90 Raz, *The Authority of Law*, 50.

91 *Trop*, 356 U.S. at 100.

92 Raz, *The Authority of Law*, 50.

93 *Trop*, 356 U.S. at 92.

precedent gradually. Without Part II of the opinion, this case solely concerns the government's power to revoke someone's citizenship as a punishment. So, an exclusive legal positivist would not take issue with the decision as a whole in *Trop*, only Part II and its broader implications.

An inclusive legal positivist would likely take the same view of Part I of the decision as an exclusive legal positivist would. In contrast to exclusive legal positivism, inclusive legal positivism allows for morality to play a role in identifying valid law, though the law being moral is not necessary for it to hold authority. In *The Concept of Law*, Hart writes:

The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values.⁹⁴

Inclusive legal positivists, then, would not take issue with the Court stating that Eighth Amendment challenges involve assessing whether "the dignity of man" might be degraded by a punishment. The Court's reference to "evolving standards of decency" would likely be viewed in the same light by inclusive legal positivists. The framework of inclusive legal positivism, then, does not provide substantive critiques of this decision as exclusive legal positivism does.

Natural lawyers would likely take a different tack altogether in evaluating the Court's decision in *Trop*. Of utmost importance to natural law theorists are basic goods and absolute rights. Here, the Court acknowledged capital punishment as operative and valid: "...the death penalty has been employed throughout our history, and in a day when it is still widely accepted it cannot be said to violate the constitutional concept of cruelty."⁹⁵ When reading this case, a natural law theorist would stop here. Irrespective of society's willingness to accept capital punishment or its length of existence in the United States, the Court failed to protect the first basic good: life. At this point, a natural lawyer would likely stipulate that the interpreter of law (in this case, the Supreme Court) forfeited their moral authority.⁹⁶

This does not mean that in the eyes of a natural lawyer, the decision is not binding or unjust; the Court simply had its priorities out of order. Natural law theory stipulates that the highest priority of the Court should be to uphold basic goods (first among them life) to further human flourishing.⁹⁷ The Court had its priorities wrong: Citizenship is not a basic good, while life is. To a natural lawyer, excluding denationalization from one of the punishments available to the U.S. government might be positive for the common good. This should be addressed apart from, or without mentioning capital punishment.

94 Hart, *The Concept of Law*, 203-204.

95 *Trop*, 356 U.S. at 99.

96 Finnis, *Natural Law & Natural Rights*, 359-360.

97 Finnis, *Natural Law & Natural Rights*, 23.

The Court's decision in *Trop* aligns with integrity theory's formulations for interpreting law. The Justices incorporate morality into their identification of the constitutionality of law in Part II of the decision, which exclusive legal positivism identifies as invalid legal reasoning. Inclusive legal positivism, to the contrary, allows for moral concepts in the rule of recognition, and therefore would likely have no issue with the decision as a whole. Natural law theory would assert that the Court forfeited its moral authority, (though crucially, not its practical or legal authority), in its concession that capital punishment did not violate the Eighth Amendment. The standards established by the Justices in *Trop* are core to the Court's reasoning in many of the following cases involving capital punishment.

D. A Monumental Shift: *Furman v. Georgia* (1972)

In *Furman v. Georgia* (1972), the Court considered three petitions of people sentenced to death in Georgia and Texas. They were asked to consider whether the sentencing and execution of these individuals violated the Eighth and Fourteenth Amendments. In a one-page *Per Curiam* opinion, the Court held that, "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."⁹⁸ This case marked a significant shift in the Court's interpretation of the Eighth Amendment. For the first time in its history, the Court ruled a death sentence (three, in fact) unconstitutional for being cruel and unusual. The phrase "in these cases" left the door open to legislative refinement of death penalty statutes to properly comply with the provisions of the Constitution. The separate concurrences of Justices Douglas, Brennan, and Marshall prove useful in exploring the alternative routes the Court could have taken with this decision. They also provided persuasive arguments for the unconstitutionality of capital punishment in all cases.

This case involved three petitioners, one convicted of murder in Georgia (Mr. Furman), one convicted of rape in Georgia, and one convicted of rape in Texas.⁹⁹ In his concurrence, Justice Douglas wrote that each of their sentences should be vacated because, "the exaction of the death penalty does violate the Eighth and Fourteenth Amendments."¹⁰⁰ Justice Douglas acknowledged that previous decisions from the Court refused to rule any punishment—including capital punishment—cruel and unusual unless its infliction was "inhuman and barbarous."¹⁰¹ He also recognized the "evolving standards of decency" standard set forth in *Trop*. Justice Douglas differentiated between these standards, which evaluate the validity of *law*, to the case at hand, which involved the *application* of the death penalty statutes in Georgia and Texas. He wrote, "It would seem to be

98 *Furman v. Georgia*, 408 U.S. 238 (1972) at 239-240.

99 *Furman*, 408 U.S. at 239.

100 *Furman*, 408 U.S. at 240.

101 *Furman*, 408 U.S. at 241.

incontestable that the death penalty inflicted on one defendant is “unusual” if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under procedure that gives room for the play of such prejudices.”¹⁰² In this concurrence, Justice Douglas argued that the death penalty violated the Eighth Amendment if its *application*, in this case or in general, was discriminatory against various classes of people. He affirmed that all three petitioners were discriminated against based on their race; the application of these death penalty statutes was unconstitutional.

Justice Douglas delved beyond the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment, which he said both (and either one on their own) clearly extended the Eighth Amendment to apply to the states.¹⁰³ For him, the Equal Protection Clause prohibited discriminatory application of the death penalty, too.¹⁰⁴ While the Justices’ application of the Fourteenth Amendment on its own is unimportant to this analysis, it is worth noting the groundbreaking nature of this case in that regard, too. Justice Douglas wrote,

The high service rendered by the “cruel and unusual” punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.¹⁰⁵

The thrust of Justice Douglas’s concurrence was that discriminatory *application* of capital punishment or any other penal law, on an individual, statewide or societal level, violated the Cruel and Unusual Punishment Clause because this discrimination rendered the punishment both cruel and unusual. He declared unambiguously that the Georgia and Texas statutes allowing for broad jury discretion in sentencing people to death were “pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on “cruel and unusual” punishments.”¹⁰⁶ Justice Douglas wrote this blistering critique of Georgia’s and Texas’s capital punishment laws, and their application, specifically. Crucially, he refused to address “Whether a mandatory death penalty would otherwise be constitutional...”¹⁰⁷ This type of mandatory state statute would inherently remove discrimination from the sentencing process.¹⁰⁸

102 *Furman*, 408 U.S. at 242.

103 *Furman*, 408 U.S. at 241.

Justice Douglas provided a history of the drafting of the Fourteenth Amendment and wrote, “Whether the privileges and [sic] immunities route is followed, or the due process route, the result is the same.”

104 *Furman*, 408 U.S. at 255.

105 *Furman*, 408 U.S. at 256.

106 *Furman*, 408 U.S. at 257.

107 *Furman*, 408 U.S. at 257.

108 Though mandatory capital sentences would remove discrimination from sentencing, they would not remove prosecutorial discrimination in charging defendants, or the myriad other steps in the criminal justice process which allow for discretion.

He left that door open to the states to explore themselves, and refused to deem capital punishment facially unconstitutional, as Justices Brennan and Marshall did.

Justice Brennan began his concurrence by acknowledging the imprecise nature of the Cruel and Unusual Punishments Clause, recognized in *Wilkerson* and *Trop*. Despite the imprecision of this clause in the Eighth Amendment, Justice Brennan wrote, “we know that the values and ideals it embodies are basic to our scheme of government. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be.”¹⁰⁹

Justice Brennan went further than the Court’s *Per Curiam* opinion which ruled the individual punishments of death to the petitioners unconstitutional. He also went further than his colleague Justice Douglas, who explored the Eighth and Fourteenth Amendments and the nature of discriminatory application of the death penalty. Justice Brennan asserted that the Cruel and Unusual Punishments Clause embodies “values and ideals” which must be interpreted and upheld. As will soon become clear, Justice Brennan determined that according to the values and ideals of this clause, capital punishment of any form was unconstitutional.

After a lengthy explication of the Court’s authority to interpret punishments as cruel and unusual, Justice Brennan moved on to the core of his concurrence: that capital punishment did not comport with human dignity.¹¹⁰ Justice Brennan cited the majority opinion in *Trop*, which recognized the “dignity of man” as central to the Cruel and Unusual Punishments Clause. He wrote:

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments... There are principles recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity. The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings.¹¹¹

In *Trop*, the Court wrote that the underlying principle of the Eighth Amendment was upholding “the dignity of man.” They found denationalization to be so anathema to Mr. Trop’s dignity that it was unconstitutional. In *Furman*, Justice Brennan expanded on the Court’s opinion in *Trop*. He argued that the death penalty, not just inflicted on the petitioners, but on any person, so degraded “the dignity of human beings” that it was unconstitutional.

109 *Furman*, 408 U.S. at 258.

110 *Furman*, 408 U.S. at 269.

Justice Brennan made it abundantly clear that it was the Court’s duty, and the Court’s duty alone to interpret and enforce the Cruel and Unusual Punishments Clause. He wrote, “Judicial enforcement of the Clause... cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights.”

111 *Furman*, 408 U.S. at 270-271.

Justice Brennan established four principles to ascertain if a punishment comported with or degraded human dignity, and thus whether it violated the Cruel and Unusual Punishments Clause. The first principle was already outlined: If a punishment is so severe that it degrades human dignity, it violates the Clause. The second principle set forth by Justice Brennan was, “that the State must not arbitrarily inflict a severe punishment.”¹¹² In line with Justice Douglas’s reasoning about discriminatory application, Justice Brennan argued that arbitrary infliction of punishment violates the Cruel and Unusual Punishments Clause. The third principle involved society’s view of the punishment. Just as the Court wrote of the “evolving standards of decency” in *Trop*, Justice Brennan wrote here, “A third principle inherent in the Clause is that a severe punishment must not be unacceptable to a contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity.”¹¹³ Justice Brennan’s fourth principle of establishing a punishment’s congruence with the Clause was its excessiveness. He said, “A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering.”¹¹⁴

Justice Brennan argued that the Court had never encountered a case, nor would it ever be likely to encounter one, in which any of the four principles are clearly violated. Justice Brennan maintained that in cases which Court found a punishment to violate the Cruel and Unusual Punishments Clause, the punishment violated a combination of the four principles; that is what made them unconstitutional.¹¹⁵ Given that a penal code written by a legislative body would be unlikely to flagrantly violate any one principle on its own, Justice Brennan wrote that “The test, then, will ordinarily be a cumulative one...”¹¹⁶ He then turned attention to capital punishment to determine if the punishment of death cumulatively violated these principles; whether it comported with human dignity; and whether it violated the Cruel and Unusual Punishments Clause.

Justice Brennan delved deeply into capital punishment’s implications for each of the four principles; it is not necessary to review all of investigation. His survey of society’s view of capital punishment is useful to examine, though. Justice Brennan wrote, “Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.”¹¹⁷ He expanded on the unique nature of capital punishment: “The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its

112 *Furman*, 408 U.S. at 274.

113 *Furman*, 408 U.S. at 277.

114 *Furman*, 408 U.S. at 279.

115 *Furman*, 408 U.S. at 282.

116 *Ibid.*

117 *Furman*, 408 U.S. at 286.

pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.”¹¹⁸ The death penalty’s unique standing in society, its severity, and finality mattered to Justice Brennan.

Justice Brennan found the death penalty “uniquely degrading to human dignity,” and that save for the “longstanding use and acceptance” it unambiguously violated the Eighth Amendment. Justice Brennan then examined this historic practice of capital punishment in the United States. He found that, even as it may have been in use for years and recognized by the Fifth Amendment, “it is certainly doubtful that the infliction of death by the State does in fact strengthen the community’s moral code; if the deliberate extinguishment of life has any effect at all, it more likely tends to lower our respect for life and brutalize our values.”¹¹⁹ Two parts of this statement are important to legal theorists’ analysis of this case. Justice Brennan referenced the strength of a community’s collective morality and crucially, its respect for life. Exclusive legal positivists and natural lawyers both likely have much to say about this part of his concurrence.

After thorough analysis of the textual history and actual practice of the death penalty, Justice Brennan found that “the punishment of death is inconsistent with all four principles...”¹²⁰ He wrote, “The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.”¹²¹ Justice Brennan established these principles to test any punishment’s adherence to the Cruel and Unusual Punishments Clause. He found clearly that the death penalty, construed or applied in *any* form, violated this clause, and thus the Eighth Amendment. As if States needed further clarification, he wrote unequivocally, “The punishment of death is therefore “cruel and unusual” and the States may no longer inflict it as a punishment for crimes.”¹²² Of course, Justice Brennan here spoke only for himself and not the Court. This concurrence nonetheless proved meaningful in later cases addressing capital punishment.

Like his colleague Justice Brennan, Justice Marshall established a series of principles, or tests, to determine whether a punishment violated the Cruel and Unusual Punishments Clause; these principles stray from the four principles offered by his colleague, to be sure. The overarching test was whether it violates the “evolving standards of decency” of society. He wrote, “A penalty that was permissible at one time in our Nation’s history is not necessarily permissible today.”¹²³ Justice Marshall then established four principles of his own. They can be adequately generalized as such: Punishments which inflict pain and suffering; unusual punishments; those that are “excessive and serve[] no valid legislative

118 *Furman*, 408 U.S. at 287.

119 *Furman*, 408 U.S. at 303.

120 *Furman*, 408 U.S. at 305.

121 *Furman*, 408 U.S. at 305.

122 *Ibid.*

123 *Furman*, 408 U.S. at 329.

purpose”; and punishments which “popular sentiment abhors.”¹²⁴ Clearly differentiated from Justice Brennan’s four principles, but no doubt overlapping, Justice Marshall proceeded to evaluate the history of capital punishment in the U.S.’s common-law tradition and of its practice in the United States. He also examined the practical reasoning legislatures employed to incorporate capital punishment into their penal codes; these reasons are of little important to this analysis.

After much statistical analysis and historical fact-finding, Justice Marshall deduced that, “There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.”¹²⁵ This double-negative may seem unnecessary; in fact, it encapsulated the core of Justice Marshall’s argument in this concurrence. Namely, that under the principles he laid out previously, capital punishment was undeniably excessive and, therefore, unconstitutional. If one was not compelled by this argument, Justice Marshall wrote that capital punishment, “nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”¹²⁶ Justice Marshall reasoned that when presented with all available information on capital punishment, most Americans would find it cruel; they were simply un- or under-informed.¹²⁷ This contestation was not received well by some of his colleagues, and would doubtless trigger myriad reactions spanning the spectrum of endorsement to dismay from the legal theories at hand. In sum, Justice Marshall found the death penalty, in its application in 1972 and indeed *any* application, to violate the Eighth Amendment, and to be contrary to the moral conscience of society.

Each theory outlined in this thesis—exclusive legal positivism, inclusive legal positivism, natural law theory, and integrity theory—would likely approve of the Court’s *Per Curiam* opinion in *Furman*. It satisfies exclusive legal positivism’s requirement of sound legal reasoning in that it strictly applies the text of the Eighth Amendment to the punishment facing the petitioners; it identifies a valid legal source. Viewed through the lens of inclusive legal positivism, the *Per Curiam* opinion applies a secondary rule—limiting the power of states to enact penal codes—and reasserts the Court’s power to do so. More in the Justices’

124 *Furman*, 408 U.S. at 330-332.

125 *Furman*, 408 U.S. at 359.

126 *Furman*, 408 U.S. at 360.

127 *Furman*, 408 U.S. at 362-369.

Justice Marshall wrote, “the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.” (362) After detailing many statistics about the present state of capital punishment and Americans’ understanding of it, Justice Marshall came to an answer on this reformulated question. He wrote, “Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.” (369)

concurrences, but also in the opinion itself, the Court interrogates the core of settled meaning of the Eighth Amendment and its penumbra of uncertainty; inclusive legal positivists would say this is the right and the duty of the Justices. An integrity theorist would likely approve of the result of the Court's opinion. It does not go as far as Justices Brennan or Marshall would have liked, but it recognizes a principle of prohibiting cruel and unusual punishments in the Eighth Amendment and applies it to protect the rights of the petitioners. The natural law theory view of the opinion is perhaps the easiest to articulate: The Court protects the basic good of life and the absolute rights of the petitioners to their lives.

The more interesting analysis, then, is each theory's view of the diverging concurrences. I will not delve into each concurrence and dissent here, because a few are more important to precedent (they are cited in subsequent cases). Given that each theory would likely approve of the Court's reasoning and result in the *Per Curiam* opinion, there is little to glean from analyzing the dissents.

In his concurrence, Justice Douglas affirmed the *Per Curiam* opinion and emphasized that any discriminatory application of the death penalty violated the Eighth Amendment. Unlike two of his colleagues, he refused to proclaim capital punishment unconstitutional in general. Exclusive legal positivists, I believe, would be generally satisfied with this concurrence. Although the word "discrimination" cannot be found in the Eighth Amendment, Justice Douglas's concurrence does not rely on the laws of Georgia and Texas being immoral; they violate the Eighth and Fourteenth Amendments, he says. I do not believe exclusive legal positivists would take the same view of Justice Brennan's or Justice Marshall's concurrences.

Justice Brennan's concurrence extended the "evolving standards of decency" doctrine and "dignity of man" standard (both from *Trop*) to mean that any punishment which degrades human dignity violated the Cruel and Unusual Punishments Clause. He developed four principles, which, if violated, show that a punishment's unconstitutionality under the Clause. And Justice Brennan contended that cumulatively, the application of capital punishment in any scheme violated these principles. I think it is clear that, through the lens of exclusive legal positivism, Justice Brennan's concurrence does not hold weight. The four-principle test devised by Justice Brennan does not originate in the Eighth Amendment, previous precedent, or any law. The principles are rife with moral valuations—human dignity, severity, and excessiveness—thus lacking a formal source, in the eyes of an exclusive legal positivist.¹²⁸ Maybe even more offensive to exclusive legal positivism is Justice Brennan's third principle, "that a severe punishment must not be unacceptable to a contemporary society."¹²⁹ Exclusive legal positivists are primarily concerned that legal reasoning relies on valid sources

128 Raz, *The Authority of Law*, 47.

In *The Authority of Law*, Raz writes, "A law has a source if its contents and existence can be determined without using moral arguments..."

129 *Furman*, 408 U.S. at 277.

of law, not morality, to be authoritative. Here, Justice Brennan fails that test.

It may be hard to find an opinion written by a Supreme Court Justice more in line with Dworkin's integrity theory than Justice Brennan's concurrence in *Furman*. Justice Brennan upholds principles inherent in the Eighth Amendment and reinforces those established by the Court in previous cases (namely *Trop*). Justice Brennan's interpretation can be adequately encapsulated in the following sentence: "we know that the values and ideals [the Eighth Amendment] embodies are basic to our scheme of government."¹³⁰ To an integrity theorist, principles within a body of law should be codified and upheld by judges to protect individual and group rights. Justice Brennan not only upheld four principles inherent to the Cruel and Unusual Punishments Clause, but proclaimed the values and ideals of the Eighth Amendment core to the Constitution and U.S. government itself. Through the lens of integrity theory, this is exactly what judges should be doing.

Natural law theorists, I believe, would approve of Justice Brennan (and Justice Marshall) for further codifying a protection of the basic right, life, in his concurrence. I think a natural lawyer would take particular interest in Justice Brennan's discussion of the unique nature of the death penalty as a punishment in the United States. Justice Brennan wrote, "Death is a unique punishment in the United States. In a society that so strongly affirms *the sanctity of life*, not surprisingly the common view is that death is the ultimate sanction."¹³¹ (Emphasis added). Here, Justice Brennan explicitly acknowledged the commitment of society in the United States to the *sanctity of life*, a principle inherent to and originated from, natural law theory. In *Natural Law & Natural Rights*, Finnis writes that there are, "exceptionless or absolute human claim-rights--most obviously, the right not to have one's life taken directly as a means to any further end..."¹³² Although he does not use the phrase "sanctity of life," this concept, also known as the inviolability-of-life principle, is core to natural law theorists in the (mostly) Catholic tradition.¹³³

I believe the lens of natural law theory also approves of Justice Brennan's reference to the collective morality of society in the United States. Justice Brennan wrote, "It is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the extinguishment of life has any effect at all, it more likely tends to lower our respect for life and brutalize our values."¹³⁴ Natural lawyers likely view this part of his concurrence favorably for two reasons. Natural law theory is concerned with the collective morality of a community, and also concerned with the community's respect for life and values. Here, Justice Brennan addressed both of those concerns. Finnis, for example,

130 *Furman*, 408 U.S. at 258.

131 *Furman*, 408 U.S. at 286.

132 Finnis, *Natural Law & Natural Rights*, 225.

133 Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton: Princeton University Press, 2006), 157-165.

134 *Furman*, 408 U.S. at 303.

cites a strong sense of community as inherent to practical reasonableness and necessary for unity and order.¹³⁵ Finnis writes that without a common conception of community, or duty to one another, “the basic human values will seem, to any thoughtful person, to be weakened...”¹³⁶ Natural law theory is less concerned with the principles Justice Brennan articulated as core to the Cruel and Unusual Punishments Clause. Justice Brennan’s protection of the basic right of life and his reference to the sanctity of life and collective morality and values of a community all, through the lens of natural law theory, amount to well-founded legal reasoning.

Justice Marshall’s concurrence followed a similar argument to Justice Brennan’s and presented some different questions for these legal theories to tackle. Justice Marshall detailed four different principles of his own to test whether a punishment violated the Cruel and Unusual Punishments Clause. Although different in their specificity, I believe the relevant legal theories (exclusive legal positivism and integrity theory, primarily) would view Justice Marshall’s principles similarly. The key differentiation between Justice Marshall’s concurrence and Justice Brennan’s concurrence, for my purposes, is Justice Marshall’s in-depth analysis of popular sentiment and common moral understanding of capital punishment in the United States.

Justice Brennan ventured to say that, in effect, capital punishment corrupts the moral code of society and degrades common values. Justice Marshall went further. He wrote, “Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.”¹³⁷ Through the lens of natural law theory, this is both a correct evaluation of the actuality of human nature, and an important prioritization of the collective conscience and the basic good of life. As previously discussed, natural lawyers—Finnis being just one example—care deeply about the health of the collective community and its moral fiber. In explaining the “requirement of justice,” Finnis writes, “one must seek to realize and respect human goods not merely in oneself and for one’s own sake but also in common, in community.”¹³⁸ Any healthy society, then—one which upholds basic goods—necessarily protects the lives of all humans, those living in the community.

Just as an exclusive legal positivist would likely find Justice Brennan’s four principles to be erroneous to the case, they would also likely be taken aback by Justice Marshall’s statement about the moral acceptability of capital punishment to the American public. Justice Marshall declared that capital

135 Finnis, *Natural Law & Natural Rights*, 134-137, 150-153.

Finnis cites the cohesiveness of a group of people and their shared social norms as directly related to their respect for authority. He calls continued cooperation “the common good.” (153)

136 Finnis, *Natural Law & Natural Rights*, 373.

137 *Furman*, 408 U.S. at 369.

138 Finnis, *Natural Law & Natural Rights*, 161.

punishment, “violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.”¹³⁹ An exclusive legal positivist would be displeased that Justice Marshall brought up the common moral perception of capital punishment; whether it is morally unacceptable to the public is irrelevant to identifying its constitutionality. As discussed previously, the sources thesis, core to Raz’s conception of exclusive legal positivism, states that “A law has a source if its contents and existence can be determined without using moral arguments...”¹⁴⁰ Justice Marshall used moral arguments to identify the law as unconstitutional. To an exclusive legal positivist, Justice Marshall did not properly determine the source of the Eighth Amendment or the law at hand, or use a valid method of legal reasoning to ascertain the death penalty’s constitutionality.

So far, I have employed the frameworks of exclusive and inclusive legal positivism, natural law theory, and integrity theory. I argue they are unanimous in their approval of the *Per Curiam* opinion in *Furman*. Not incidentally, it is easier for competing legal theories to find agreement in the narrow one-page decision than in the two hundred pages of concurrences and dissents that follow. Natural law theory, exclusive legal positivism, and integrity theory each bring their own perspective to the analysis; some observe erroneous legal reasoning in the various concurrences, while others find the Justices’ reasoning to be sound.

In the cases that follow, many arguments within the decisions, concurrences, and dissents reference this decision and the concurrences therein. *Furman* itself marks a monumental shift in the posture of the Supreme Court towards capital punishment. For the first time in its history, it ruled the death penalty unconstitutional under the Eighth Amendment (at least, in its application here). For four years following *Furman*, no one in the United States was subject to having their life extinguished by the state. Meanwhile states wrote capital punishment schemes to respond to the Court’s decision. While *Furman* remains a central piece of precedent in this arena, the Court has yet to return to its posture here. From 1976 onwards, the Court refused to rule capital punishment cruel and unusual outright.

E. Deference to the Will of the People: *Gregg v. Georgia* (1976)

After *Furman*, the state of Georgia implemented a bifurcated capital trial process: the jury first ruled on the guilt of the defendant, and if found guilty, the jury chose between life without parole or the death penalty. Georgia made further amendments to their capital sentencing process, allowing the jury to consider aggravating and mitigating factors during sentencing. State Supreme Court was also required to review each death sentence to determine if discrimination or bias had affected the sentencing process. Many other states

139 *Furman*, 408 U.S. at 360.

140 Raz, *The Authority of Law*, 47.

made changes to their capital sentencing processes in response to *Furman*.¹⁴¹

Mr. Gregg was charged with armed robbery and murder, and subsequently sentenced to death.¹⁴² On appeal, the Georgia Supreme Court affirmed the death sentence for murder but vacated the death sentence for robbery.¹⁴³ Mr. Gregg challenged his death sentence as cruel and unusual under the precedent set by *Furman*. The Court in *Gregg* said that Georgia had sufficiently amended its death penalty statute to satisfy the requirements set by *Furman*, and that the death penalty implemented in these circumstances was constitutional.

The plurality opinion of the Court, written by Justices Stewart, Powell, and Stevens stated unambiguously that Georgia's amended capital punishment scheme did not violate the Eighth or Fourteenth Amendments, and satisfied the conditions set—or more accurately, did not fall within the bounds of prohibition—of *Furman*.¹⁴⁴ They rightly acknowledged that the constitutionality of capital punishment on the whole had never been squarely addressed by the Court. It was tacitly endorsed in *Trop* and other cases and tiptoed around in *Furman*. The Court wrote, “We now hold that the punishment of death does not invariably violate the Constitution.”¹⁴⁵ Under certain circumstances, then, capital punishment could comport with the Eighth Amendment and the *Furman* standard. Various Justices wrote concurrences and dissents of their own.¹⁴⁶

The Justices acknowledged the fluid and evolving meaning of the Eighth Amendment since its ratification and recognized their mandate to apply the current societal standards of decency to the case at hand.¹⁴⁷ They aimed to objectively

141 *Gregg v. Georgia*, 428 U.S. 153 (1976) at 179-181.

The Court wrote, “The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person... These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman*...” (179-180)

See footnote 23 for a comprehensive list of states' death penalty statutes.

142 *Gregg*, 428 U.S. at 153-154.

143 *Gregg*, 428 U.S. at 153-154.

144 *Gregg*, 428 U.S. at 168-169.

145 *Gregg*, 428 U.S. at 169.

146 *Gregg*, 428 U.S. at 154-157.

Justices White, Burger, and Rehnquist further criticized the petitioner's claims and commended the Georgia Supreme Court for a job well done. They were frustrated by the petitioner's claim that the use of capital punishment in the plea-bargaining process violated the standard of *Furman*.

Justices Brennan and Marshall wrote dissents, which I will describe later.

147 *Gregg*, 428 U.S. at 171-173.

The Court recounted the evolution of Eighth Amendment precedent and language within those cases which refer to the changing nature of Eighth Amendment interpretation and application. The Justices wrote, “It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept... Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the applica-

examine public attitude on capital punishment while not relying on this metric alone to determine whether the death penalty violated the Eighth Amendment.¹⁴⁸ The Court was particularly concerned with the Eighth Amendment standard set in *Trop*, that a punishment must not violate the “dignity of man.”¹⁴⁹ They set forth two components to define excessiveness. They wrote, “First, the punishment must not involve the unnecessary and wanton infliction of pain... Second, the punishment must not be grossly out of proportion to the severity of the crime.”¹⁵⁰ In the end, the Court decided that capital punishment, as applied in Georgia, did not violate “the dignity of man” or either of these components of excessiveness.

The Court considered the history and precedent of the death penalty and the Eighth (and Fourteenth) Amendments, too. They wrote, “The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers.”¹⁵¹ The Justices continued, “It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every state.”¹⁵² They also mentioned the Fifth Amendment’s reference to Capital Punishment, which reads, “No person shall be held to answer for a capital, or otherwise infamous crime... without due process of law.”¹⁵³ It is worth noting that the Fifth Amendment provides protections for those charged with a *capital crime*. A tacit endorsement of capital punishment perhaps; this Amendment cannot be said to explicitly enshrine the punishment of death in the Constitution, though. The legislative and constitutional history surrounding the death penalty was important to the Court, and so was the public’s opinion on the matter.

The fact legislatures continued to pass death penalty statutes after the Court’s decision in *Furman* mattered a great deal to the Justices. They wrote, “In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be appealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”¹⁵⁴ The Court found statistical studies on public perception and deterrence inconclusive, but state legislative action sufficiently representative of tion of the Eighth Amendment.” (172-173)

148 *Gregg*, 428 U.S. at 173.

The court wrote, “But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with “the dignity of man,” which is the “basic concept underlying the Eighth Amendment.” This means, at least, that the punishment not be “excessive.””

149 *Trop*, 356 U.S. at 100.

150 *Gregg*, 428 U.S. at 173.

151 *Gregg*, 428 U.S. at 176-177.

152 *Gregg*, 428 U.S. at 177.

153 U.S. Const. amend. V.

154 *Gregg*, 428 U.S. at 183.

“society’s moral outrage.”¹⁵⁵ They also maintained that the Court must be especially circumspect when considering striking down state laws. The Justices wrote:

Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.¹⁵⁶

In short, the Justices argued that they had to defer to state legislative bodies in determining the moral consensus of the people of a state. And that the state legislatures found justifications—deterrence, retribution, and moral repudiation of murder—for the death penalty meant its severity did not rise to the level of excessive. In capital murder cases, the Court deemed the punishment proportionate to the crime.

Justice White wrote a concurrence, joined by Chief Justice Burger and Justice Rehnquist. This largely affirmed the plurality opinion, while making further attempts to refute the petitioner’s argument. Justice White also left open the question of whether other crimes such as robbery and rape could merit the death penalty without violating the Eighth Amendment.

Justice Brennan wrote a blistering dissent, largely a reiteration of the arguments found in his concurrence in *Furman*. In a rebuke to the plurality opinion’s concern for federalism, he emphasized the Court’s duty to interpret the Constitution. Justice Brennan wrote:

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, “moral concepts” require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.¹⁵⁷

In no uncertain terms, he declared the death penalty morally unacceptable and unconstitutional. Justice Brennan reiterated his argument in *Furman* that civil society and the system of laws in the U.S. reached a point where the death penalty was not just unconstitutional given the *Trop* standard of evolving decency, but egregiously immoral. He insisted that the primary moral principle with which the Court should consider cases is the human dignity of the persons sentenced to death.¹⁵⁸ “A judicial determination whether the punishment of death comports with human dignity is therefore not only permitted but *compelled* by the

155 *Gregg*, 428 U.S. at 184-186.

156 *Gregg*, 428 U.S. at 186-187.

157 *Gregg*, 428 U.S. at 229.

158 *Gregg*, 428 U.S. at 229.

Justice Brennan wrote, “I emphasize only that foremost among the “moral concepts” recognizes in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings--a punishment must not be so severe as to be degrading to human dignity.”

Clause.”¹⁵⁹ (Emphasis added). Human dignity, to Justice Brennan, was paramount in the interpretation of the Cruel and Unusual Punishments Clause.

Justice Brennan also took issue with legislatures’ supposed penal justifications for the death penalty; he argued the lack of legitimate justification was in tension with the principles of excessiveness set by his colleagues in their plurality opinion. Justice Brennan wrote that the death penalty, “serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment.”¹⁶⁰ To Justice Brennan, the authors of the plurality opinion drew a line in the sand and the death penalty plainly crossed that line. He posited that life without parole (or other lesser punishments) serve the same penal purposes of retribution and deterrence and are far less excessive as they do not take a person’s life.

Justice Marshall penned a dissent of his own. He reaffirmed his position that the death penalty is excessive and “morally unacceptable.”¹⁶¹ In *Furman*, Justice Marshall asserted that if Americans were fully informed of the practices of the death penalty, they likely would find it morally repugnant. He conceded that the overwhelming number of states enacting new death penalty statutes in the intervening period challenges this contention.¹⁶² Justice Marshall maintained the position, however, that “the constitutionality of the death penalty turns... on the opinion of an *informed* citizenry...”¹⁶³ These new statutes, to him, did not indicate a citizenry any more informed four years later.

Justice Marshall challenged the death penalty on its penal merits. A study conducted by Isaac Ehrlich was purported to show death’s deterrent effect, and Justice Marshall made efforts to show that this study was inconclusive.¹⁶⁴ He took great interest in the moral argument his colleagues advanced in favor of the retributive benefits of the death penalty. Here, Justice Marshall engaged directly in contemplation of law’s authority and whether it may be derived from punishment for a given crime. (Theories of legal interpretation unsurprisingly have much to say on this subject). Justice Marshall wrote, “It is inconceivable that any individual

159 *Gregg*, 428 U.S. at 229-230.

160 *Gregg*, 428 U.S. at 230.

161 *Gregg*, 428 U.S. at 231-232.

162 *Gregg*, 428 U.S. at 232.

Justice Marshall wrote, “Since the decision in *Furman*, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes... I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people.”

163 *Ibid.*

164 *Gregg*, 428 U.S. at 233-236.

Justice Marshall wrote, “The Ehrlich study, in short, is of little, if any, assistance in assessing the deterrent impact of the death penalty.”

concerned about conforming his conduct to what society says is “right” would fail to realize that murder is “wrong” if the penalty were simply life imprisonment.”¹⁶⁵ Thus, Justice Marshall rebuked his colleagues’ arguments for deterrence and retribution—flimsy data supported the former and flawed logic involved in the latter.

There are two central debates in this case: (A) Whether the death penalty violates the Eighth and Fourteenth Amendments in all cases; and (B) Whether state legislatures by virtue of their position accurately represent the evolving standards of decency of the people within a state. The perspectives of the four legal theories provide much insight to both of these questions.

Exclusive legal positivists are not immediately concerned with the answer to the first question—they care more about whether that answer is found through identifying law from valid sources. An exclusive legal positivist would be pleased with the Justices who wrote the plurality opinion for distinguishing this case from *Furman*.¹⁶⁶ They did not overrule *Furman*, but instead decided that Georgia’s legislative scheme abided by the rules set by *Furman*. The Court went further than *Furman* in settling the question of whether the death penalty under all circumstances violated the Constitution; the Court here said no. The Justices also relied on the Fifth Amendment’s reference to capital punishment and the Framers’ acceptance of capital punishment. To exclusive legal positivists, the first reference would be accepted and encouraged; the Fifth Amendment in the eyes of exclusive legal positivism is a valid source of law. To exclusive legal positivists, the Framers’ intentions, whatever they may have been, are largely extraneous to the identification of valid legal sources.

On the second question—whether state legislators represent the evolving standards of decency of the people within a state—exclusive legal positivists would be skeptical of the Court’s answer. As previously noted, the Justices writing the plurality opinion wrote, “In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct.”¹⁶⁷ The Justices went on to use this as a vindication for their position that the death penalty did not violate the Constitution in all circumstances. Through the lens of exclusive legal positivism, this would be considered an erroneous legal reasoning. Raz’s separability thesis maintains there is no necessary connection between law and morality.¹⁶⁸ The Sources thesis finds legal sources valid only “if its contents and existence can be

165 *Gregg*, 428 U.S. at 238.

166 Here, the Court distinguished *Gregg* from *Furman*; I believe exclusive legal positivism sees this as valid legal reasoning. Later, I make the argument that exclusive legal positivism views the entire body of precedent and evolution of case-law unfavorably because of its contradictions—each case distinguishes from past cases without overruling them. In other words, the Court may be correctly distinguishing *Gregg* from *Furman* without overruling *Furman*. That the Court continues to distinguish from *Furman*, and later *Gregg* without overruling either case creates contradictory precedent; exclusive legal positivists would not approve of this pattern.

167 *Gregg*, 428 U.S. at 183.

168 Raz, *supra* note 7, at 317.

determined without using moral arguments.”¹⁶⁹ “Society’s moral outrage” is inherently a moral argument, and used here in the Court’s decision to legitimize capital punishment.

Exclusive legal positivism may take an even dimmer view of Justice Brennan and Justice Marshall’s dissents in *Gregg*. The bulk of Justice Brennan’s dissent concerns the moral standing of the death penalty and the evolving standard of decency standard set in *Trop*. An exclusive legal positivist would not care much for Justice Brennan’s moral postulations about the death penalty or the evolving standard of decency. Likewise, Justice Marshall’s dissent mostly concerned the opinion of an informed citizenry and the merits of the death penalty on the basis of retribution and deterrence. Again, exclusive legal positivists are not fond of validating or invalidating laws based on what a population—much less a theoretical *informed* population—might think.

This does not mean that the position of exclusive legal positivism is one which allows no room for overruling *Gregg*. Just as the Court in *Gregg* distinguished this case from *Furman*, exclusive legal positivism allows for improper precedent to be overturned. There are certainly flaws in the plurality opinion from an exclusive legal positivist’s point of view. Those flaws could be remedied by an opinion reaffirming the constitutionality of the death penalty with a different supporting argument. Similarly, the Court could overrule *Gregg* without using moral concepts in its identification of the Eighth Amendment as a valid legal source. An exclusive legal positivist would likely accept that resolution, too.

Inclusive legal positivism allows for morality to enter into the rule of recognition. Hart concedes that laws are often imbued with moral statements and that laws and common moral principles often overlap.¹⁷⁰ Murder is clearly one of those actions that is ubiquitously prohibited by criminal code and deplored by common morals in every common-law system. The plurality and dissenting opinions make similar use of moral arguments from opposing perspectives.

Inclusive legal positivism maintains that the rule of recognition identifies a valid legal system. In *The Concept of Law*, Hart outlines what a legal system might look like if the primary rules, those governing conduct, were not recognized as authoritative. He describes a system in which most individuals simply converge on behavior but don’t accept laws as societal standards of conduct. Hart writes:

The acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone... The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house.¹⁷¹

Hart here describes a theoretical legal system where most people do not engage in murders or lynchings, but derivation from that conduct is not seen as anathema to common standards of the society.

169 Raz, *supra* note 7, at 48.

170 Hart, *supra* note 5, at 11.

171 Hart, *supra* note 10, at 117.

A central reason for the Court upholding capital punishment, in their view, was to preserve the criminal justice system's authority so that citizens did not revert to "self-help to vindicate their wrongs."¹⁷² To inclusive legal positivists, this marks a deterioration of a valid legal system. Instead of white citizens refraining from lynching Black citizens because this would be abhorred by society and they would face criminal consequences, the state had to take on this burden themselves.¹⁷³ This marks the degradation of the rule of recognition.

The rule of recognition is a core tenet of inclusive legal positivism, and fundamentally a postulation about the source of law's authority. In a rebuke of Austin, Hart asserts that the law does not derive its authority from sanction; instead, it has authority when those subject to the laws recognize them as laws and recognize the secondary rules as authoritative, too. Justice Marshall directly addressed the question of law's authority in his dissent. He wrote, "It is inconceivable that any individual concerned about conforming his conduct to what society says is "right" would fail to realize that murder is "wrong" if the death penalty were simply life imprisonment."¹⁷⁴ Justice Marshall's argument here is twofold: (A) The deterrent potential of the death penalty is equal to that of life imprisonment; and (B) Would-be criminals are clearly unconcerned with society's moral view of their conduct, and the death penalty does not change this. The rule of recognition provides that laws which prohibit murder and other grievous acts are not valid because they carry a sanction for offenders, and the validity of these laws are not tied to or heightened by the severity of sanction. Justice Marshall's critique of the deterrence argument is in line with inclusive legal positivism in this respect. Thus, inclusive legal positivism likely disapproves of the plurality opinion inasmuch as it relies on the deterrence argument.

As I have already discussed, Justice Brennan's concurrence in *Furman* is almost perfectly aligned with the integrity theory of interpretation, as it upholds principles flowing from the body of law and Constitution itself. I believe integrity theorists would be equally pleased with Justice Brennan's reiteration of his concurrence in *Furman* in his dissent in *Gregg*.¹⁷⁵

172 *Gregg*, 428 U.S. at 183.

173 It is worth noting here that by "self-help," the Court is widely understood to reference lynch mobs and other forms of racialized vigilante justice. Many argue the Court believed state governments needed to maintain a monopoly of violence. If they had to kill (disproportionately Black) people themselves, the Court implied, this was necessary to ensure its (white) citizens could trust their system of laws. See:

"Backlash to Civil Rights & the Creation of the Modern Death Penalty (1961-1990" *Racist Roots: Origins of North Carolina's Death Penalty*, Center for Death Penalty Litigation, accessed December 21, 2020, <https://racistroots.org/section-3/>.

174 *Gregg*, 428 U.S. at 238.

175 *Id.* at 227-230.

In his dissent, Justice Brennan wrote, "In *Furman v. Georgia*... I read 'evolving standards of decency' as requiring focus upon the essence of the death penalty itself and not pri-

Integrity theory also is concerned with the singular voice of the community personified. In *Law's Empire*, Dworkin writes, "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a singular author—the community personified—expressing a coherent conception of justice and fairness."¹⁷⁶ There are portions of both the plurality opinion and dissents that follow this part of integrity theory.

The plurality opinion emphasized the need for the Court to defer to the will of the people of Georgia (and other states), expressed through their state legislature. The Court wrote, "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."¹⁷⁷ The Justices, in essence, asserted that the community personified in this case was the Georgia State Legislature, and that they were obligated to defer to that voice. There is a second part of this aspect of the integrity theory thesis, though: In listening to that singular author, integrity theory instructs judges to, "identify legal rights and duties..."¹⁷⁸ In this plurality opinion, the Court maintained that they were upholding the rights of the Georgia citizens to not be murdered and exact justice on those who wrong people. But Justice Brennan's dissent also identified specific rights which to be upheld: Namely, the right of every person to not be subject to cruel and unusual punishment. Between Justice Brennan's clear articulation of rights and his reiteration of principles, integrity theorists would likely find his argument more compelling than the Court's.¹⁷⁹

As exhaustively delineated, natural law theory is primarily concerned with protecting basic goods; life is the first basic good. Natural law theory asserts there are certain absolute rights which should never be infringed upon. Finnis writes of these exceptionless rights, "most obviously, the right to not have one's life taken directly as a means to any further end..." is central to this.¹⁸⁰ Given these two paramount priorities of natural law theory, it seems clear that any natural law theorist would view the plurality opinion to be in error.

marily or solely upon the procedures under which the determination to inflict the penalty upon a particular person was made." The Justice proceeds to quote a lengthy passage from his concurrence in *Furman*. He then writes, "That continues to be my view. For the Clause forbidding cruel and unusual punishments under our constitutional system of government embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws." He emphasizes the State's duty to recognize its citizens' worth as human beings.

176 Dworkin, *supra* note 41, at 225.

177 *Gregg*, 428 U.S. at 183.

178 Dworkin, *supra* note 41, at 225.

179 I further examine the competing arguments on behalf of the rights of victims and their families and defendants in Section I: The Body of Precedent.

180 Finnis, *supra* note 29, at 225.

In sum, exclusive legal positivism finds faulty legal reasoning in the plurality opinion and the dissents of Justice Brennan and Justice Marshall; they all incorporate morality in their identification of the law. The plurality opinion, though, relies more on valid sources of law free from moral arguments, while the dissents cannot necessarily say the same. Inclusive legal positivism allows for morality in the rule of recognition, and in fact, accepts this as an inevitability. Justice Marshall's dissent is in line with the rule of recognition's theory of law's authority and therefore would likely be favored by inclusive legal positivists compared to the plurality opinion and Justice Brennan's dissent. Although each opinion attempts to identify the community personified, integrity theory would likely view Justice Brennan's dissent more favorably than the rest because it clearly reasserts the principles inherent in the Constitution that he articulated in *Furman*. Natural law theory is concerned with morality's role in the law, but more concerned with upholding basic goods; the Court's decision clearly transgresses the basic good of life.

Discrimination Allowed; Jury Discretion Prioritized: *McCleskey v. Kemp* (1987)

Mr. McCleskey, a Black man, was sentenced to death for murdering a white police officer.¹⁸¹ Mr. McCleskey challenged his sentence on the grounds that he was subject to racial discrimination, violating the Eighth and Fourteenth Amendments. The basis for his argument was the Baldus Study, which examined the effects of defendants' and victims' race on capital sentences across over 2,000 murder cases in Georgia. The study found that juries were most likely to sentence a Black person who had killed a white person to death, by exponential margins.¹⁸² Black defendants who were convicted of killing white victims received the death penalty in 22% of cases. White defendants overall received the death penalty in 8% of cases, and in just 3% of cases involving Black defendants.¹⁸³

Mr. McCleskey asserted that the Baldus Study showed discriminatory *application* of the death penalty in Georgia, in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁴ I will not detail the Fourteenth Amendment claim much further here, as it bears little relevance to my thesis; it is no less

181 *McCleskey v. Kemp*, 481 U.S. 279 (1987) at 279.

182 *Id.*, 481 U.S. at 279, 286-287.

183 *Id.*, 481 U.S. at 286.

184 *Id.*, 481 U.S. at 291-292.

Mr. McCleskey argued that the Georgia system was racially discriminatory in two ways and therefore violated the Fourteenth Amendment twice: Based on the race of the defendant and the race of the victim. Mr. McCleskey argued that he was subject to both forms of racial discrimination.

important than his Eighth Amendment claim, though.¹⁸⁵ Mr. McCleskey's second claim was that Georgia's capital sentencing *system* violated his Eighth Amendment protection against cruel and unusual punishment, in that he was subject to disproportionate punishment compared to the crime he committed.¹⁸⁶ Mr. McCleskey asserted that the death sentenced imposed upon him was pregnant with racial discrimination (shown by the Baldus Study) and disproportionate to the crime he committed: killing one person. Both of these factors, he said, violated the Cruel and Unusual Punishments Clause.

The majority opinion in this case was written by Justice Powell and joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. Justice Brennan wrote a dissent joined by Justice Marshall in its entirety and by Justices Blackmun and Stevens in all but Part I, which restated his opinion that the death penalty in all circumstances was unconstitutional. I will focus primarily on the majority opinion and Justice Brennan's dissent.

The Court did not find in favor of Mr. McCleskey on either the Fourteenth or Eighth Amendment claims; I will confine my analysis here to the Eighth Amendment claim. Mr. McCleskey asserted that his sentence was disproportionate to other murder sentences and pregnant with racial discrimination. He argued that both of these factors showed his sentence violated the Cruel and Unusual Punishments Clause. The Court first wrote that it was constrained primarily by *Furman* to decide the constitutionality of capital punishment under the Eighth Amendment.¹⁸⁷

The Court made clear that, as previous cases established, their decision was guided at least in part by societal standards.¹⁸⁸ The Court indicated it should ascertain those standards primarily by looking to state legislatures, as it did

185 The petitioner's Fourteenth Amendment claim is equally important as his Eighth Amendment claim. Readers should be just as concerned of the Court's inability to protect Mr. McCleskey's right to due process of law as their refusal to recognize the application of the death penalty here to be cruel and unusual. For further commentary on Mr. McCleskey's Fourteenth Amendment claim and the intersection of race and capital punishment, *see*:

Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Review. 1388 (1998).

Carol S. Steiker and Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi. L. Rev. 243 (2015)

186 *Id.* at 299.

187 *Id.* at 280.

The Court wrote, "Petitioner's argument that the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment's prohibition of cruel and unusual punishment must be analyzed in the light of this Court's prior decisions under that Amendment. Decisions since *Furman v. Georgia*... have identified a constitutionally permissible range of discretion in imposing the death penalty."

188 *Id.*, 481 U.S. at 300.

in *Gregg*.¹⁸⁹ The majority opinion here recognized that in *Gregg*, the Court already addressed the constitutionality of the death penalty broadly. It also noted that the Court had imposed requirements and further limits on capital sentencing in subsequent cases to *Gregg*. “In sum,” the Court wrote, “our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty.”¹⁹⁰ This case fell well within that range, the Court said.

The Justices then argued that Mr. McCleskey’s sentence, even if disproportionate (which the Court does not concede), was not unconstitutional unless it was arbitrary and capricious. The mere fact that, “other defendants who may be similarly situated did *not* receive the death penalty” was no reason to find his death sentence arbitrary and capricious, said the Court.¹⁹¹ The Justices were confident Mr. McCleskey’s sentence was not “wantonly and freakishly” applied.¹⁹² They asserted that juries must be delegated some amount of discretion. Their leniency towards other defendants—even if those were more often white defendants facing Black victims—did not prove the application of capital punishment cruel and unusual. They wrote, “Apparent disparities in sentencing are an inevitable part of our criminal justice system.”¹⁹³ To the Court, jury discretion was a foundational part of our criminal justice system, and any apparent disparities (some might say discrimination) did not violate the Constitution. As such, the Court was unsatisfied with Mr. McCleskey’s argument that his sentence was disproportionate to other murderers’ sentences.

The Justices in the majority also found his claims of racial discrimination, while perhaps systematically born out, to not violate the Eighth Amendment. They wrote, “Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey’s particular case.”¹⁹⁴ Perhaps his counsel needed an affidavit from each juror stating their racist intentions to convince the Court that racial discrimination, at least in part, led to Mr. McCleskey’s death sentence. The Justices were also deeply concerned with the broader implications of the case, if decided in favor of the petitioner. They wrote:

McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system... Thus, if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.¹⁹⁵

189 *Id.*

“In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain “objective indicia that reflect the public attitude toward a given sanction.” [*Gregg*]. First among these indicia are the decisions of state legislatures...”

190 *Id.* at 305.

191 *Id.* at 281.

192 *Id.* at 308.

193 *Id.* at 312.

194 *Id.* at 308.

195 *Id.* at 314-315.

The Court did not want to “throw into question” the entire criminal justice system, even if it was woefully pregnant with systemic racial discrimination. They were not fond of the prospect of addressing other Eighth (and Fourteenth) Amendment claims involving discrimination.

Justice Brennan began his dissent by restating his position in *Furman* and *Gregg* that the death penalty, under all circumstances, violates the Cruel and Unusual Punishments Clause.¹⁹⁶ (Only his colleague Justice Marshall joined this portion of the dissent. Justices Blackmun and Stevens joined in the rest of the dissent.) Justice Brennan argued that Mr. McCleskey’s case in particular had, “demonstrated precisely the type of risk of irrationality that we have consistently condemned in our Eighth Amendment jurisprudence.”¹⁹⁷ The fact that in Georgia, a group of people based on their own race and the race of the person they were alleged to have killed, were much more likely to be sentenced to death than other groups of people, proved the arbitrary and capricious nature of the death penalty, to Justice Brennan.

Justice Brennan recognized that it was nearly impossible for Mr. McCleskey to prove the influence of racial discrimination in his particular case. He wrote that since *Furman* and *Gregg*, “the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one.”¹⁹⁸ To Justice Brennan and some his colleagues, the risk was clear and overwhelming. Justice Brennan thoroughly investigated the evidence of racial discrimination in Georgia’s capital sentencing system. He said the Baldus study shows that, “the jury *more likely than not* would have spared McCleskey’s life had his victim been black.”¹⁹⁹ With this evidence along with a plethora of additional statistics revealing racial discrimination, Justice Brennan concluded that Mr. McCleskey’s specific death sentence was very likely influenced by racial discrimination.²⁰⁰ The nature of the punishment of death and the pattern of racial discrepancy itself risk arbitrary punishment beyond a threshold the Court should consider constitutional, Justice Brennan argued.²⁰¹ He also urged the Court to consider “history and human experience,” in addition to the statistics themselves.²⁰² To Justice Brennan, the racist history of Georgia’s criminal justice system warrants further reason for the Court to side with Mr. McCleskey.²⁰³

196 *Id.* at 320.

197 *Id.* at 321.

198 *Id.* at 322.

199 *Id.* at 325.

200 *Id.* at 328.

Justice Brennan wrote, “The statistical evidence in this case thus relentlessly documents the risk that McCleskey’s sentence was influenced by racial considerations.

201 *Id.*

202 *Id.*

Justice Brennan wrote, “We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience.”

203 *Id.* at 329.

Justice Brennan rebutted his colleagues in the majority who argued that if they sided with Mr. McCleskey, they would irreparably harm the role of jury discretion in the criminal justice system. He wrote, “Our desire for individualized moral judgments may lead us to accept some inconsistencies in sentencing outcomes... There is thus a presumption that actors in the criminal justice system exercise their discretion in responsible fashion...”²⁰⁴ He said the Court should not assume that individual actors always act responsibly. Justice Brennan pointed out that as recently as the year prior in *Batson v. Kentucky* (1986), the Court found substantial evidence of irresponsible discretion on the part of prosecutors.²⁰⁵

Justice Brennan emphasized the unique role of the Court to protect the interests of people who would not otherwise be listened to, however abhorrent their actions may have been. He wrote:

Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society’s demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.²⁰⁶

To Justice Brennan, the Court was tasked not with listening to the loud voices of the majority. To him, each person was inherently protected by the provisions of the Constitution. The Court’s duty was to protect the rights of those outside the majority, as their rights were most likely to be infringed upon.

Justice Brennan implored the Court to consider the moral implications of disproportionately sentencing a group of people to die who were not so long ago segregated and not so long before that enslaved. He acknowledged that death row may seem a distant existence to many in society, especially those sitting on the high Court. “Such an illusion is ultimately corrosive,” he wrote, “for the reverberations of injustice are not so easily confined.”²⁰⁷ Justice Brennan continued: “the way in which we choose those who will die reveals the depth of moral commitment among the living.”²⁰⁸ For Justice Brennan, the racial disparity in sentencing reflected more than the bad luck of Black defendants and people who face white victims: If gone overlooked and shoved aside, it would reflect a moral shortfall of the Justices and indeed, of all people of the United States.

I believe that an exclusive legal positivist would be displeased with the Court’s contemplation of the rippling effects of deciding the case on behalf of Mr. McCleskey. In *Ethics in the Public Domain*, Raz makes clear his disdain for the strong thesis of autonomy of legal reasoning, because it, “is an instance of moral

“For many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place.”

204 *Id.* at 337.

205 *Batson v. Kentucky*, 476 U.S. 79 (1986).

206 *McCleskey*, 481 U.S. at 343.

207 *Id.* at 344.

208 *Id.*

reasoning.”²⁰⁹ To exclusive legal positivists, the role of the courts is to *apply* the law before them, and in superior courts, *distinguish* and *overrule* precedent. They are not supposed to consider the implications of their decision or how it might make their interpretive task more difficult down the road; they should be solely concerned with whether their decision is founded on valid legal sources. To exclusive legal positivists, the Court should have considered the law before them (the Georgia capital sentencing scheme) and interpreted the provisions of the Constitution to determine whether that scheme violated those provisions. The Court went well beyond the bounds of those duties in this case.

This is not to say an exclusive legal positivist would necessarily find Justice Brennan’s reasoning any more valid. I have already addressed how exclusive legal positivism would view Part I of the dissent, as it is essentially a reiteration of part of his concurrence in *Furman*.

One aspect of Justice Brennan’s dissent an exclusive legal positivist might view more favorably is his discussion of the Court’s moral obligation to protect minority interests. This may seem counter to exclusive legal positivism at first glance. Raz describes directed powers of Courts, which give them special authority to make moral considerations. In *Ethics in the Public Domain*, Raz writes:

[Directed powers] require the courts to use extralegal considerations in developing the law. They refer them to moral considerations and thus open them up to the influence of social and political considerations. The degree to which this is so depends on the extent to which the courts have the power to develop the law at all, and the degree of discretion they are given and the kind of discretion in its use they are provided with.²¹⁰

Raz doesn’t say the phenomenon of directed powers is necessarily positive or negative in his eyes, he simply observes its existence. The degree to which judges can incorporate extralegal considerations in their decision depends on the legal system they operate in. In his dissent, Justice Brennan referred to the Constitution’s demand of courts to protect people whose voices might be drowned out by “the majoritarian chorus” of society.²¹¹ This is an extralegal consideration, but directed to the Justices by the Constitution. So perhaps exclusive legal positivism might view this part of his dissent to be an instance of valid legal reasoning and interpretation.

I think an inclusive legal positivist would pause to interrogate the moral fiber and standing of the Georgia legislature, who, at the time, represented a numerical majority of white Georgians. In *McCleskey*, as in *Gregg*, the Court was concerned with the voice of the people of Georgia and whether, in enacting a revised capital sentencing statute (which allowed for this racial discrepancy to take place) they were expressing the will of the people. The majority of Justices said they were.

A critique of natural law theory that inclusive legal positivists employ is that

209 Raz, *supra* note 8, at 324.

210 Raz, *supra* note 8, at 237.

211 *McCleskey*, 481 U.S. at 343.

society's morality, or the morality of a majority of people in a society, may in fact not be morally valuable or good. Hart writes, "It is always possible, when we come to examine the accepted morality either of our own or some other society, that we shall find much to criticize; it may, in light of currently available knowledge, appear unnecessarily repressive, cruel, superstitious, or unenlightened."²¹² He goes on to say, "Above all, a given society's morality may extend its protections from harm to its own members only, or even only to certain classes, leaving a slave or helot class at the mercy of their masters' whims."²¹³ In this case, inclusive legal positivists would find the common morality of Georgians repressive and cruel.

The Baldus Study indicated systemic racial variation, if not discrimination, in capital sentencing in Georgia. Black defendants facing white victims were by far the most likely to receive the death penalty.²¹⁴ Not incidentally, the same group of unlucky defendants were the most likely to be tried for the death penalty by prosecutors.²¹⁵ This shows through empirical measurements that white Georgians who held a numerical majority at the ballot box (without accounting for voter intimidation and disenfranchisement) and a numerical majority in the jury box (without accounting for racial discrimination in jury selection) were more lenient towards white Georgians and persecuted Black Georgians. An inclusive legal positivist would view this as the majority protecting its own members while attempting to oppress a group of people numerically in the minority.

As in *Gregg*, the Court here was concerned with understanding the contemporary values of society. This investigation was centered on the evolving standards of decency first delineated by the Court in *Trop*. As previously discussed, integrity theory is concerned with the principles flowing from a body of law and the singular author of the community personified; an integrity theorist is thus pleased with the benchmark of evolving standards of decency. While an integrity theorist is in this way satisfied with the majority opinion and Justice Brennan's dissent, one part of his dissent is more compelling to integrity theory.

This passage has already been elaborated, but it bears repeating because of its distinct interpretation from the perspective of integrity theory. Justice Brennan wrote, "It is the particular role of courts to hear these voices [those whom we would banish from society], for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life."²¹⁶ He recognized a principle which is explicitly written into the Constitution but not in so many words as he has interpreted it here. The Constitution provides for checks and balances, and the founders were unquestionably concerned with the tyranny of the

212 Hart, *supra* note 10, at 183.

213 *Id.*

214 *McCleskey*, 481 U.S. at 286.

215 *McCleskey*, 481 U.S. at 287.

216 *McCleskey*, 481 U.S. at 343.

majority.²¹⁷ Justice Brennan applied this principle here, which clearly flows from the Constitution. In what is becoming a familiar theme throughout these cases, the integrity theory lens would view Justice Brennan's dissent as the most correct interpretation of the Eighth Amendment and the Constitution generally in *McCleskey*.

The response of natural law theorists to the Court's opinion here would be similar to their view of the plurality opinion in *Gregg*: It fails to protect the basic right of life.

In sum, the application of integrity theory and natural law theory to the Court's decision in *McCleskey* are much the same as their application in *Gregg* and to some extent, *Furman*. Exclusive legal positivism takes a dim view of the Court's consideration of the rippling effect of deciding this case in favor of Mr. McCleskey and an equally dim view of Part I of Justice Brennan's dissent. Because of the directed powers which Raz acknowledges though, exclusive legal positivism may be more open to the Court embracing its role in protecting the voiceless minority, as directed by the Constitution. In this case, inclusive legal positivism likely finds the Court's acceptance of the will of the people through the Georgia legislature reprehensible; the morality of the majority of Georgians clearly tends toward protecting white people and oppressing Black people.

Capital punishment precedent in *McCleskey* further reinforced *Gregg*: The death penalty was ruled constitutional, even with clear evidence of systemic discrimination. The Court in this case points out the constraints placed on states in implementing capital punishment. In subsequent cases, the Court further narrows the circumstances in which someone could be sentenced to death, thus making death sentences and executions even rarer and perhaps, more arbitrary.

F. Carving Out Exceptions: *Atkins v. Virginia* (2002)

This case concerns Mr. Atkins, a man convicted of abduction, armed robbery, and murder. He was sentenced to death by a jury in Virginia for the murder charge and aggravating circumstances surrounding that crime.²¹⁸ Dr. Evan Nelson, a forensic psychologist, testified that Mr. Atkins was "mildly mentally

217 See Alexander Hamilton or James Madison, *Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments (From the New York Packet)*, LIBRARY OF CONGRESS, <https://guides.loc.gov/federalist-papers/text-51-60>. Under the pen name Publius, Hamilton or Madison wrote, "If a majority be united by a common interest, the rights of the minority will be insecure." They continued, "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger..."

218 *Atkins v. Virginia*, 536 U.S. 304 (2002) at 307-308.

retarded.”²¹⁹ A central component of this diagnosis and the case as a whole was Mr. Atkins’s IQ score of 59.²²⁰ Mr. Atkins challenged his death sentence and the Virginia Supreme Court’s affirmation of the sentence on the grounds that it violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Court sided with Mr. Atkins, concluding that, “Executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment.”²²¹

The majority opinion was written by Justice Stevens and joined by Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer. Their primary concern was whether sentencing to death and executing people with intellectual disabilities constituted a cruel and unusual punishment; they came to the conclusion that it did.

The Court explicitly stated that in evaluating the evolving standards of decency of society, they must evaluate the death penalty under current standards of excessiveness. The Justices in the majority wrote, “A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the “Bloody Assizes” or when the Bill of Rights was adopted, but rather by those that currently prevail.”²²² The primary way the Court ascertained current standards of excessiveness was through a review of state legislative action on this issue. The Court enumerated the dozens of state laws enacted in the preceding years which prohibited execution of people with intellectual disabilities. They also referenced the federal Congressional legislation of 1988 which reinstated the federal death penalty and as part of that reinstatement, prohibited people with intellectual disabilities from being executed. On this wave of legislative change, the Court wrote, “It is not so much the number of these States that is significant, but the consistency of the direction of change.”²²³

219 *Id.* at 308.

Dr. Nelson and the Justices used the word “retarded” to refer to Mr. Atkins and “mental retardation” to describe his intellectual disability. When quoting the case, I use the words as “retarded” and “retardation” as they used them. In my own analysis, I use the terms “intellectually disabled” and “intellectual disability.” For the purposes of my analysis, I am using the words synonymously. The U.S. government formally recognized these words as the proper terminology for persons with intellectual disabilities. I also believe using the term “intellectually disability” confers respect to Mr. Atkins and all people with intellectual disabilities, as the word “retarded” is now widely understood as a pejorative insult. For further information on the change in terminology in the medical community and government, see:

Social Security Administration, “Change in Terminology: “Mental Retardation” to “Intellectual Disability,”” Federal Register, August 1, 2013, <https://www.federalregister.gov/documents/2013/08/01/2013-18552/change-in-terminology-mental-retardation-to-intellectual-disability>.

220 *Atkins*, 536 U.S. at 309.

221 *Id.* at 304.

222 *Id.* at 311.

223 *Id.* at 315.

That no states reinstated executions for people with intellectual disabilities mattered to the Justices. They believed there was a growing consensus among people across the country that people with intellectual disabilities should not be executed.²²⁴ Any disagreement on this issue had to do with the threshold for determining when someone qualified as intellectually disabled.²²⁵

Given the consensus among states in barring the execution of people with intellectual disabilities, the Court applied two standards from previous cases which concerned capital punishment and the Eighth Amendment. First, they looked to *Gregg*, which established retribution and deterrence as penological functions of the death penalty.²²⁶ On the issue of retribution, the Court determined that people with mental disabilities like Mr. Atkins had severely diminished culpability for the crimes they committed; retribution served a diminished or nonexistent purpose for this group of people.²²⁷

They also determined that people with intellectual disabilities lack the capacity for premeditation, so deterrence could not factor in as a reason to execute Mr. Atkins.²²⁸ The diminished moral culpability of people with intellectual disabilities precluded the threat of execution from effectively deterring anyone with intellectual disabilities to commit murder or other horrific acts, said the Court.²²⁹ The purpose of deterrence, in the eyes of the Justices, was to prevent would-be murderers from killing people. Deterrence, they said, should reduce the number of people subject to execution over time, as fewer people commit murder. The Justices argued that the negligible deterrent effect of capital punishment on people with intellectual disabilities resulted in an outcome contrary to the deterrence goal: people with intellectual disabilities would continue to be executed at the same rate. This result made the execution of people with intellectual disabilities cruel, said the Court.

The Court also applied a standard from *Lockett v. Ohio* (1978), which directed the Court to not impose the death penalty, “in spite of factors which may call for a less severe penalty...”²³⁰ The Justices observed that people with intellectual disabilities were more likely to produce false confessions and less able to work with their lawyer to provide mitigating factors to the jury.²³¹ Given those circumstances

224 *Atkins*, 536 U.S. at 317.

The Court wrote, “This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.”

225 *Id.*

226 *Atkins*, 536 U.S. at 319.

227 *Id.*

228 *Atkins*, 536 U.S. at 319-320.

The Court wrote that premeditation, “is at the opposite end of the spectrum from behavior of mentally retarded offenders.”

229 *Id.* at 320.

230 *Atkins*, 536 U.S. at 320; *Lockett v. Ohio*, 438 U.S. 586 (1978) at 605.

231 *Atkins*, 536 U.S. at 320-321.

facing defendants with intellectual disabilities, the Court insisted that they had to find a lesser penalty for those defendants, to follow the precedent set in *Lockett*.

Both of these conclusions—that capital punishment had no deterrent or retributive effect for people with intellectual disabilities, and that circumstances called for a less severe penalty—led the Court to rule the death penalty unconstitutional for people with intellectual disabilities. The Court wrote, “Construing and applying the Eighth Amendment in light of our “evolving standards of decency,” we therefore conclude that such punishment is excessive and that the Constitution “places a substantive restriction on the State’s power to take life” of a mentally retarded offender.”²³² This decision was clearly impactful for Mr. Atkins and other people with intellectual disabilities convicted of capital murder. Importantly, in this decision the Court further restricts the circumstances in which someone could be sentenced to death.

Chief Justice Rehnquist, Justice Scalia, and Justice Thomas were unconvinced by the majority opinion. They emphatically rejected the notion that a consensus of state legislatures and Congress on this issue allowed the Court to rule capital punishment unconstitutional for people with intellectual disabilities. The Justices in the dissent argued that the Court should have deferred to Virginia on this issue. Chief Justice Rehnquist wrote, “There are strong reasons for limiting our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practices of sentencing juries in America. Here, the Court goes beyond these well-established indicators of contemporary values.”²³³ Chief Justice Rehnquist offered alternative yardsticks for the measurement of contemporary values. He asserted that the Court should have deferred to the laws of the specific state’s legislature (in this case Virginia) and the practices of their juries to ascertain the community’s standard of decency.²³⁴ To him, this deference was in line with the democratic notion that state legislatures and individual juries were much better equipped than the High Court to determine the acceptability of capital punishment for each individual defendant.²³⁵

Justice Scalia, who signed on to Justice Rehnquist’s dissent, wrote a strongly worded dissent of his own, which Chief Justice Rehnquist and Justice Thomas joined. He took issue with the Court’s apparent posture that “death-is-different” in Eighth Amendment capital cases.²³⁶ He was unconvinced by the national consensus claim because of the infancy of those laws and the extent to

232 *Id.* at 321.

233 *Id.* at 328.

234 *Atkins*, 536 U.S. at 324.

Chief Justice Rehnquist wrote, “In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.”

235 *Ibid.*

236 *Atkins*, 536 U.S. at 337.

which they represented the genuine feelings of Americans. Justice Scalia was more incensed, though, by the Court discounting juries' ability to recognize the diminished capacity of people with intellectual disabilities. He wrote, "The Court's analysis rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to properly account for the "diminished capacities" of the retarded."²³⁷ Justice Scalia challenged the contention that excessive punishments were inherently prohibited by the Eighth Amendment. And he asserted that the Court had no business declaring the unconstitutionality of sentencing intellectually disabled people to death. To him, judges and juries determine when someone's mental capacity is so diminished they should not be given the ultimate sanction.

Finally, Justice Scalia recognized that this decision narrowed the circumstances in which defendants could be sentenced to death; unlike his colleagues in the majority, he viewed this as deleterious to capital punishment jurisprudence. Justice Scalia wrote, "Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence."²³⁸ Justice Scalia contended that the death penalty should be treated no different than other punishments, and that the continued narrowing of circumstances in which it could be opposed was presumptuous of the Court and harmful to the criminal justice system.

An integrity theorist would approve of the Court's pursuit to identify a community personified in the national consensus of state legislatures.²³⁹ Contrary to Justice Scalia's assertion that the Justices in the majority imposed their own beliefs on the case, the integrity theory lens sees their opinion as applying the community personified, state legislatures, to the case. An integrity theorist would take particular issue with Chief Justice Rehnquist's dissent, insofar as it detracts from the legitimacy of the Court's attempts to ascertain the contemporary values of society.

It seems clear that a natural law theorist would be broadly satisfied with the Court's decision to protect the basic good of life, at least for people with intellectual disabilities. A natural law theorist would be particularly pleased with the Justices in the majority for placing a special emphasis on the value of life in their decision. The majority opinion reads, "we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take life" of a mentally retarded offender."²⁴⁰ The case the Court quoted from here is *Ford v. Wainwright* (1986).²⁴¹ To natural law theorists, life is not just a basic good but an absolute, exceptionless right, too.²⁴² Natural law

237 *Atkins*, 536 U.S. at 349.

238 *Id.* at 352.

239 Dworkin, *supra* note 41, at 225

240 *Atkins*, 536 U.S. at 321.

241 *Ford v. Wainwright*, 477 U.S. 399 (1986) at 405.

242 Finnis, *supra* note 29, at 225.

theorists would perceive the majority opinion as sound legal reasoning because it further reinforced restrictions on states' ability to take life.

An exclusive legal positivist would be compelled by Justice Scalia's argument that death should not be different. In his dissent, Justice Scalia wrote, "Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent the death-is-different jurisprudence."²⁴³ To exclusive legal positivists, the Court certainly had the power to distinguish their case from previous precedent. Raz writes, that to distinguish precedent, judges are subject to two conditions: "(1) The modified rule must be the rule laid down in the precedent restricted by the addition of a further application. (2) The modified rule must be such as to justify the order made in the precedent."²⁴⁴ In other words, in distinguishing from previous precedent judges must always taper the rule's application and stay true to the effect of the original rule. To exclusive legal positivists, Supreme Court Justices can overrule precedent as well, but this is an altogether separate endeavor from distinguishing from past precedent.

The Justice Scalia made the point that in cases involving the death penalty, the Court had a history of switching between distinguishing and overruling precedent, making it entirely murky. He said that the Court claimed to distinguish precedent by employing the language of *Gregg* and other cases that upheld the constitutionality of the death penalty. Because the Court declared an application of the death penalty unconstitutional, to an exclusive legal positivist this plainly violates the second principle of distinguishing precedent. Therefore, exclusive legal positivism would be open to Justice Scalia's death-is-different thesis; the precedent becomes murkier, rather than clearer, when the Court used *Gregg* to place further limits on capital punishment.

It is clear that exclusive legal positivists would say Justice Scalia employed more sound legal reasoning than the Justices in the majority did. As will be detailed later, however, the death-is-different thesis provides equal reason for exclusive legal positivists to favor an opinion that rules capital punishment unconstitutional altogether. Exclusive legal positivists are concerned with the clarity of precedent that is not being upheld through various decisions that attempt to distinguish from one another while reaching substantively conflicting conclusions. Exclusive legal positivism allows for judges to overrule precedent, and given that the death-is-different approach leads to this uncertain outcome, a definitive overruling of *Gregg* also could be also viewed as valid legal interpretation by exclusive legal positivism.

Integrity theory and natural law theory both likely find the majority opinion to best employ sound legal reasoning. For integrity theorists, the Justices in the majority made best use of the community personified. For natural law theorists, the Court practically protected the basic good of life, if only for a specific group of

243 *Atkins*, 536 U.S. at 352.

244 *Raz*, *supra* note 8, at 186

individuals. Exclusive legal positivists would likely be compelled by Justice Scalia's "death-is-different" critique of Supreme Court jurisprudence on capital punishment and the Eighth Amendment: that the Court continuously failed to properly distinguish from and overrule past precedent in a line of cases, including *Atkins*. Exclusive legal positivists' answer to this critique, however, is not necessarily to side with Justice Scalia. If the Court effectively overruled *Gregg* by identifying valid sources of law in the Eighth Amendment and elsewhere, this would be just as satisfactory to exclusive legal positivists.

Pain is Not Cruelty: *Glossip v. Gross* (2015)

Like *In re Kemmler*, the Court in *Glossip v. Gross* (2015) was asked to consider whether a particular method of execution violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. The petitioners in this case were Mr. Glossip and two other people on Oklahoma's death row. They challenged Oklahoma's execution procedure on the grounds that it violated the Cruel and Unusual Punishments Clause. The petitioners argued that the primary injection in a three-drug cocktail, a 500-milligram dose of midazolam, was incapable of inhibiting pain during the execution, rendering the process excruciating.²⁴⁵ This challenge followed the botched execution of Clayton Lockett, also an Oklahoma death row inmate, who suffered agonizing pain for over 40 minutes when a 100-milligram dose of midazolam failed to sedate him.²⁴⁶ The Court heard this case after it denied a writ of certiorari to Charles Warner, one of the original inmates who signed on to the preliminary injunction; he was executed by Oklahoma before *Glossip* case came to the High Court.²⁴⁷

The majority opinion, written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, rejects the petitioners' claim on two broad grounds. They asserted, that according to precedent established by the Court in *Baze v. Rees* (2008), the petitioners were required to identify a viable alternative to midazolam for the Court to rule the use of that drug unconstitutional.²⁴⁸ The Court said they failed to do so. The Justices also decided in favor of the respondents because the District Court did not commit a clear error, and the Justices were obliged to defer to the District Court's ruling.²⁴⁹

The Justices' central premise was that because the Court had ruled capital punishment constitutional in past cases, constitutional means of

245 *Glossip v. Gross*, 576 U.S. __ (2015) at 1 (of the Syllabus).

246 *Glossip*, 576 U.S. at 7 (of the Opinion of the Court).

247 *Glossip*, 576 U.S. at 7-8 (of the Opinion of the Court).

248 *Glossip*, 576 U.S. at 1, 13-16 (of the Opinion of the Court); *Baze v. Rees*, 553 U.S. 35 (2008) at 61.

249 *Glossip*, 576 U.S. at 1-2, 18-22 (of the Opinion of the Court).

execution must exist.²⁵⁰ In essence, the Court was unwilling to rule an admittedly painful method of execution cruel and unusual because capital punishment was constitutional, and the petitioners failed to find a viable alternative method of execution. While some may posit that this amounts to legal reasoning in reverse, the Court staunchly defended the constitutionality of capital punishment and maintained that its constitutionality demanded a readily available and constitutional means of execution.

The portion of the Court's opinion most relevant to this analysis addresses whether a painful execution violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Court said that the plurality opinion in *Baze*, "outlined what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim."²⁵¹ The Court in *Baze* stated that for an Eighth Amendment method-of-execution claim to succeed, the method of execution must have a high likelihood of causing "needless suffering" and "imminent dangers."²⁵² The second requirement for such a claim to succeed was that petitioners must identify a feasible and available alternative that would cause less suffering and danger.²⁵³ The Court listed the alternative drugs that petitioners suggested and rejected them because they were largely unavailable to the state of Oklahoma for the purposes of executing people.²⁵⁴ The Court wrote that the petitioners did not, "show[] a risk of pain so great that other acceptable, available methods must be used."²⁵⁵ In other words, the pain the petitioners might experience was not sufficient enough for the Court to prohibit Oklahoma from using midazolam.

In their majority opinion, the Justices further stated that it was the burden of the petitioners to prove a "substantial risk of severe pain" and that if the level of pain caused by this method of execution seemed unclear, they should defer to the expertise of the state.²⁵⁶ The Court

wrote that because midazolam had the power to "render a person insensate to pain"--it is, after all, a sedative-- the 500-milligram dose in Oklahoma's cocktail did not violate the Eighth Amendment.²⁶⁰

In short, the Court rejected the petitioners' claims because the alternative drugs, which could prevent pain in the lethal injection process, were unavailable to

250 *Id.* at 4 (of the Opinion of the Court).

The Court wrote, "Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." [*Baze*] at 47. And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain."

251 *Id.* at 12 (of the Opinion of the Court).

252 *Baze*, 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25 (1993) at 33, 34-35.)

253 *Glossip*, 576 U.S. at 12-13 (of the Opinion of the Court).

254 *Id.* at 14 (of the Opinion of the Court).

255 *Id.* (of the Opinion of the Court).

256 *Id.* at 17-19 (of the Opinion of the Court).

Oklahoma, because the level of pain they would experience in an execution with midazolam was unclear, and because the petitioners were unable to prove clear error in the District Court's findings. This decision in its entirety rested on the premise that if the death penalty is constitutional, which the Justices said it is, they needed to find a constitutional means of carrying it out. Midazolam satisfied this requirement for them.

We now turn our focus to one part of Justice Scalia's concurrence and Justice Breyer's dissent. Both of these opinions addressed the role of morality in *Glossip*.

Justice Breyer urged the Court to look beyond the intricacies of this case and address, "a more basic question: whether the death penalty violates the Constitution."²⁵⁷ He asserted that the circumstances under which the death penalty was upheld in *Gregg* and subsequent cases had substantially changed, and the Court was obligated to take up the question of its constitutionality again.²⁵⁸ He wrote:

Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.²⁵⁹

To Justice Breyer, the unreliability of capital sentences made them cruel. He referenced evidence that "in the past three decades, innocent people have been executed."²⁶⁰ Killing an innocent person is final, and people who are subject to lesser sentences can be released upon exoneration. He pointed out that "exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue."²⁶¹ This higher rate of exonerations for capital cases, he wrote, had much to do with the pressure juries, prosecutors, and police faced to secure capital convictions for particularly heinous crimes.²⁶²

Justice Breyer contended that capital punishment on the whole was cruel because of its arbitrary application. When the Court reinstated the death penalty with further restrictions, the Justices hoped that states would oversee the "fair administration" of capital punishment.²⁶³ "40 years of further experience make it increasingly clear," he said, "that the death penalty is imposed arbitrarily, *i.e.*, without the "reasonable consistency" legally necessary to reconcile its use with the Constitution's commands."²⁶⁴ The imposition of death continued to become rarer. While, factors that should not affect someone's likelihood of being killed by their state, like geography, race, and gender, had an outsized impact.

If the arbitrariness and unreliability of capital punishment techniques

257 *Glossip*, 576 U.S. at 2 (of Justice Breyer's Dissent).

258 *Id.* (of Justice Breyer's Dissent).

259 *Id.*

260 *Glossip*, 576 U.S. at 3 (of Justice Breyer's Dissent).

261 *Id.* at 5 (of Justice Breyer's Dissent).

262 *Id.* at 6 (of Justice Breyer's Dissent).

263 *Glossip*, 576 U.S. at 10 (of Justice Breyer's Dissent).

264 *Id.*

were not enough, Justice Breyer pointed out the cruelty of their excessive delays. While people wait to be executed, they suffer psychological torment, poor living conditions, and confinement, often for decades.²⁶⁵ Justice Breyer wrote, “The upshot is that lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale.”²⁶⁶ Justice Breyer indicated that the Court validated the use of death as punishment for its deterrent and retributive effects, and these lengthy delays made those considerations practically null.

To Justice Breyer, the unusual nature of capital sentences and executions in the 21st century revealed the extent of its arbitrary application and reflected a moral consensus of Americans. He wrote, “These circumstances perhaps reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter.”²⁶⁷ Justice Breyer urged the Court to deeply consider the consensus of citizens who disapproved of the death penalty.

The Justice reflected on the role of the Court in deciding this issue as well. Contrary to his colleagues in the majority who believed capital punishment should be a decision left up to the states, Justice Breyer argued that it was the Court’s obligation to prohibit cruel and unusual punishments. He wrote:

Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law... For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for a full briefing on the question.²⁶⁸

While Justice Breyer stopped short of answering this question outright, he raised compelling evidence that the Court should take up the mantle of considering the constitutionality of capital punishment as a whole, as it did in 1976.

Justice Scalia’s concurring opinion contained many rebukes of Justice Breyer’s dissent. This analysis focuses on his concern with extrapolating the meaning of the Eighth Amendment and introducing morality and popular consensus into the Court’s constitutional analysis of the death penalty.

Justice Scalia first took issue with Justice Breyer’s contention that the arbitrary application of the death penalty constituted its cruelty. Justice Breyer supported his argument with a study of the egregiousness of murders compared to the sentence each defendant received. In response, Justice Scalia wrote, “If only Aristotle, Aquinas, and Hume knew that moral philosophy could be so neatly distilled into a pocket-sized, *vade mecum* “system of metrics,” Of course it cannot: Egregiousness is a moral judgment susceptible to few hard-and-fast rules.”²⁶⁹ To him, it was not the Court’s place to evaluate the egregiousness of various acts, on an empirical scale or

265 *Glossip*, 576 U.S. at 19 (of Justice Breyer’s Dissent).

266 *Id.* at 28 (of Justice Breyer’s Dissent).

267 *Id.* at 38 (of Justice Breyer’s Dissent).

268 *Glossip*, 576 U.S. at 40-41 (of Justice Breyer’s Dissent).

269 *Glossip*, 576 U.S. at 3 (of Justice Scalia’s Concurrence).

otherwise. That determination belonged to victims' families on an individual basis.

Justice Scalia enumerated the historical enshrinement of the death penalty in the Constitution, starting with the Fifth Amendment's reference to capital crimes.²⁷⁰ He wrote that the Court should recognize that those who drafted and passed the Bill of Rights understood the death penalty to be constitutional. Justice Scalia took issue with Justice Breyer extracting further meaning from the words "cruel" and "unusual." He wrote:

Historically, the Eighth Amendment was understood to bar only those punishments that added "terror, pain, or disgrace" to an otherwise permissible capital sentence... Rather than bother with this troubling detail, JUSTICE BREYER elects to contort the constitutional text. Redefining "cruel" to mean "unreliable," "arbitrary," or causing "excessive delays," and "unusual" to include a "decline in use," he proceeds to offer up a white paper devoid of any meaningful legal argument.²⁷¹

It is worth noting here that Justice Breyer did not interpret arbitrariness or unreliability to *mean* cruelty, but that arbitrariness and unreliability constituted *forms* of cruelty. Regardless, Justice Scalia was uncomfortable with Justices drawing any further meaning from the Cruel and Unusual Punishments Clause than the words themselves or, "terror, pain, or disgrace," which, incidentally, were words written by Justice Thomas in his concurrence in *Baze*.²⁷²

Justice Scalia was equally contemptuous of the evolving standards of decency restriction set forth by the Court in *Trop*. He wrote that the Court was "eminently ill suited" for the task of ascertaining what the evolving standards of decency of society were.²⁷³ He accused a "vocal minority" of his colleagues on the court of seeking "to replace the judgments of the People with their own standards of decency."²⁷⁴ Justice Scalia argued that the only standard they needed to pay attention to were the laws which duly elected representatives passed.

Justice Scalia seemed open to his colleague's invitation for the Court to consider the facial constitutionality of the death penalty. In this investigation, he stated, "I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled."²⁷⁵ In other words, Justice Scalia was open to Justice Breyer's proposition to clean up precedent concerning capital punishment and the Eighth Amendment. To Justice Scalia, the Court needed to reform its "death-is-different" approach and remove the "labyrinthine restrictions" on the imposition of the death penalty, which might

270 *Glossip*, 576 U.S. at 2 (of Justice Scalia's Concurrence).

271 *Glossip*, 576 U.S. at 2 (of Justice Scalia's Concurrence).

272 *Ibid.*

273 *Glossip*, 576 U.S. at 6 (of Justice Scalia's Concurrence).

274 *Id.* at 7 (of Justice Scalia's Concurrence).

275 *Ibid.*

alleviate some of Justice Breyer's concerns about the arbitrariness of its infliction.²⁷⁶

Finally, Justice Scalia contemplated the moral component of capital punishment. To him, the death penalty presented profound moral questions, and the Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the people to decide.²⁷⁷ The issue of the death penalty, in all its moral contentiousness, he said, should be decided by the People. The Court should refrain from intervening.

Two theories of legal interpretation are relevant to analyzing this case. Valid legal reasoning in the eyes of natural law theory requires judges to uphold basic goods, which has already been described in this article. Natural law theory is also concerned with the suffering of people and the incorporation of morality into law. Inclusive legal positivism recognizes a penumbra of uncertainty in laws, including, the Eighth Amendment. The lens of inclusive legal positivism will prove useful in analyzing the opposing arguments for what the Eighth Amendment actually stands for.

Finnis includes in the basic good of life the ability to lead a healthy life free from psychological and physical pain. In *Natural Law & Natural Rights*, he writes, "life here includes bodily (including cerebral) health, and freedom from the pain that betokens organic malfunctioning or injury."²⁷⁸ Finnis goes on to list the myriad ways in which humans must look out for each other to prevent people from suffering pain. On its face, the death penalty violates the basic good of life. This case specifically concerns the pain petitioners would experience if subject to Oklahoma's three-drug cocktail, including the 500-milligram dose of midazolam. The Court conceded that some pain is inevitable in any execution. They wrote, "Because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain."²⁷⁹ To the Court, there was an acceptable level of pain that people must endure in executions. Natural law theorists would find this contention abhorrent.

The basic good of life requires citizens to take measures to prevent their fellow humans from experiencing pain. The burden of government then would be at minimum the burden that citizens themselves must meet to not inflict pain on others. The lens of natural law theory here provides insight that flips the Court's reasoning on its head. Instead of accepting an inherent amount of pain in execution, the pain which people endure in all executions further proves that decisions which reinforce the death penalty employ erroneous legal reasoning.

Inclusive legal positivism provides an alternative structure to analyze this case. Much of the Court's decision, especially the dissent of Justice Breyer and concurrence of Justice Scalia, concerned the meaning of the Cruel and Unusual Punishments Clause. Hart, the father of inclusive legal

276 *Glossip*, 576 U.S. at 6 (of Justice Scalia's Concurrence).

277 *Id.* at 7 (of Justice Scalia's Concurrence).

278 Finnis, *supra* note 29, at 86.

279 *Glossip*, 576 U.S. at 4.

positivism, posits that in all laws there is a core of settled meaning and a penumbra of uncertainty.²⁸⁰ (I find it useful to visualize this as two concentric circles).²⁸¹ In *The Concept of Law*, Hart writes, “all rules have a penumbra of uncertainty where the judge must choose between alternatives.”²⁸² He lists the Fifth and Fourteenth Amendments to the Constitution as provisions which have capacious penumbras of uncertainty.²⁸³ The Eighth Amendment, with its broad and vague protections, surely has an immense penumbra of uncertainty too. To inclusive legal positivists, this penumbra of uncertainty is open to the interpretation of the Courts.

In this case, the Court interpreted the Cruel and Unusual Punishments Clause to prohibit “needless suffering” and “imminent dangers.”²⁸⁴ They did not, however, interpret the Clause to prohibit methods of execution that inflict pain. In fact, they recognized that any method of execution inherently involves pain.²⁸⁵ Justice Scalia interpreted the Cruel and Unusual Punishments Clause more narrowly than Justice Breyer, and perhaps more narrowly than his colleagues in the majority. He wrote that the Clause could only be extrapolated to prohibit punishments which inflict “terror, pain, or disgrace.”²⁸⁶ Justice Breyer saw a much more expansive penumbra of uncertainty in the text of the Eighth Amendment. He wrote that capital punishment could be considered cruel because it was inflicted unreliably, arbitrarily, and with long delays between sentencing and execution.²⁸⁷ Justice Breyer clearly took the most expansive view of the penumbra of uncertainty of the Eighth Amendment in this case. Inclusive legal positivists allow for expansive and narrow penumbras of uncertainty, but Hart makes clear in *The Concept of Law* that documents that set forth principles, including the Bill of Rights, likely have larger penumbras of uncertainty. Thus, an inclusive legal positivist might be more sympathetic to Justice Breyer’s analysis, then.

In *Glossip*, natural law theory finds issue not just in the Court’s failure to protect the basic good of life, but also in its abdication of responsibility to protect citizens from pain. In their explicit acknowledgement of the inevitability of pain in *any* execution, the Justices proved the immorality of *all* executions in the eyes of a natural lawyer. Inclusive legal positivists allow for morality in the rule of recognition and thus are less concerned with Justice Breyer’s empirical analysis of egregiousness than Justice Scalia. Hart outlines a core of settled meaning and penumbra of uncertainty in all laws. The size of that penumbra of

280 Hart, *supra* note X, at 12.

281 Professor Douglas Edlin introduced me to legal theory and inclusive legal positivism. He taught our class to understand the core of settled meaning and penumbra of uncertainty as two concentric circles; I owe this helpful visualization to him.

282 Hart, *supra* note 5, at 12.

283 Hart, *supra* note 5, at 13.

284 *Id.* at 12.

285 *Id.* at 4.

286 *Glossip*, 576 U.S. at 2 (of Justice Scalia’s Concurrence).

287 *Id.*

uncertainty varies in each law and is likely to be more expansive in provisions like the Eighth Amendment which lay out broad ideas. Thus, inclusive legal positivists likely are more persuaded by Justice Breyer's expansive interpretation of the Eighth Amendment's meaning compared to Justice Scalia's narrow one.

G. The Body of Precedent

So far, each case in this lineage of Eighth Amendment precedent pertaining to capital punishment has been analyzed through the lens of four legal theories. One further question worth asking is: How would each legal theory interpret the body of precedent as a whole?

Let us begin with the most straightforward answer, which comes from natural law theory. In *Natural Law & Natural Rights*, Finnis clearly states that it is the legislators' job to create laws which uphold basic goods, and judges are tasked with interpreting those laws while seeking to protect basic goods.²⁸⁸ Any judge who fails to protect basic goods is in essence, protecting immoral laws and therefore abdicates their moral authority.²⁸⁹ They do not lose their adjudicative power in practice, but have temporarily lost the confidence of the people over whom they preside. Over time, this tends to degrade the legitimacy of the institution itself.²⁹⁰

The first basic good of natural law theory is life. Finnis writes, "A first basic value, corresponding to the drive for self-preservation, is the value of life."²⁹¹ He also says there are, "exceptionless or absolute human claim-rights-most obviously, the right not to have one's life taken directly as a means to any further end..."²⁹² Natural law theory unambiguously views killing someone as a cruel punishment. Irrespective of that analysis, though, when the Supreme Court upholds laws that violate the basic good of life by executing people, they engage in flawed legal reasoning according to a natural lawyer, because they are prioritizing the end of deterrence or retribution over the good of life. Capital punishment typifies a means to further an end. Natural law theory has a clear answer to the Court on this body of precedent: Do not uphold laws that extinguish the lives of people.

Exclusive legal positivism provides a distinct framework to analyze this body of precedent. It seems unclear whether the legal theory of exclusive legal positivism itself would provide a clear answer to the question: Does capital punishment violate the Eighth Amendment? Regardless, it does provide a useful perspective on this lineage of Supreme Court cases, though.

As touched on earlier in the analysis of Justice Scalia's dissent in *Atkins*,

288 Finnis, *supra* note 29, at 359-360.

289 *Ibid.*

290 *Ibid.*

291 *Id.* at 86.

292 *Id.* 225.

exclusive legal positivism provides two rules for distinguishing precedent. In *The Authority of Law*, Raz writes: “(1) The modified rule must be the rule laid down in the precedent restricted by the addition of further application. (2) The modified rule must be such to justify the order made in the precedent.”²⁹³ In other words, when distinguishing from precedent, judges must narrow the circumstances in which their rules apply, and their additional rules must be in line with the rule set forth in the precedent they distinguish from. The body of precedent on capital punishment and the Eighth Amendment violates both rules provided by exclusive legal positivism for distinguishing precedent.

The second rule of distinguishing precedent, according to Raz, is that new precedent must follow the original idea, or principle, of the older precedent it is being distinguished from.²⁹⁴ The Court failed to adhere to this rule on numerous occasions. In cases where the Court claimed to be distinguishing their case from previous precedent, rather than overrule it, the court failed to justify the original rule. The rule in *Furman* deemed capital punishment unconstitutional, and yet the Court in *Gregg* distinguished its decision from *Furman*, rather than overruling *Furman*. In *Atkins*, the Court distinguished the case from *Gregg* without bolstering the rule in *Gregg*.

The Court also failed to narrow precedent in each case, violating the first rule set forth by Raz on distinguishing precedent. In *Gregg*, the Court widened the circumstances in which someone could be sentenced to death.²⁹⁵ In *McCleskey*, they were seemingly further widened, in *Atkins* they were narrowed, and in *Glossip*, widened again.²⁹⁶ Thus, the lineage of precedent on the Eighth Amendment and capital punishment violates exclusive legal positivism’s rules for distinguishing precedent, while the Court largely refuses to overrule decisions of previous cases.

293 Raz, *supra* note 8, at 186.

294 *Ibid.*

295 *Gregg*, 428 U.S. at 154-155.

The very fact that the Court reinstated capital punishment after it had ruled it unconstitutional in the case of Mr. Furman expanded the circumstances in which the death penalty could be imposed. They also prioritized deference to state legislatures and wrote that retribution and deterrence were permissible considerations for those legislatures.

296 In *McCleskey*, the Court ruled a state capital sentencing scheme constitutional even though the Baldus study showed systematic discriminatory application. This widened the circumstances in which death could be imposed by confining unconstitutional imposition to only those cases in which defendants could show clear discriminatory intent in their death sentence. The Court in *Atkins* narrowed the circumstances in which death could be imposed by prohibiting death sentences for those with intellectual disabilities. In *Glossip*, they expanded the circumstances once more by stating that the mere existence of pain in the execution procedure did not violate the Eighth Amendment, and that defendants had to provide a viable alternative method of execution to challenge the existing method. Each decision purported to follow and distinguish from precedent set in *Furman* and *Gregg*.

Crucially, exclusive legal positivism allows for the Supreme Court to overrule precedent. To clarify precedent in this area and satisfy the conditions which exclusive legal positivists provide for valid legal interpretation, the Court could do one of two things: (A) The Court could follow Justice Scalia's approach, rid itself of the "death-is-different" standard, and remove all restrictions on the imposition of the death penalty except those that apply to all other punishments; or (B) The Court could rule the death penalty unconstitutional outright, in violation of the Cruel and Unusual Punishments Clause. Both courses of action would satisfy the demands of exclusive legal positivism and provide much-needed clarification to precedent on the Eighth Amendment and capital punishment. To be in line with exclusive legal positivism, the judgement in either direction would need to identify the Eighth Amendment without incorporating moral concepts about either grievous crimes and victims' families in the case of option A or the immorality of the death penalty for option B.

Integrity theory directs judges to make decisions with an ear towards a singular author: The community personified. Dworkin writes, "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness."²⁹⁷ In each case at hand, the Court considered this community personified, be it in the form of the will of the People in a state to enact death penalty statutes, or a national consensus of people opposed to the death penalty, or the waves of death penalty abolition and reform across the nation. Justices of various predilections make efforts to recognize and uphold the voice of the people, whether identified as state representatives or a unified moral consensus; I cannot say which arguments better identify the community personified. Integrity theory is chiefly concerned with upholding rights of individuals and principles flowing from a body of law. On these two requirements of integrity theory—protecting rights and upholding principles—the voice of Justice Brennan clearly rises above the rest.

Integrity theory is fundamentally a theory of upholding rights. Dworkin describes the rights thesis in *Taking Rights Seriously* as a roadmap for judges to decide hard cases (those in which precedent identifies conflicting answers). He writes, "The rights thesis, that judicial decisions enforce existing political rights, suggests an explanation that is more successful on both counts."²⁹⁸ Dworkin believes this thesis provides a superior method of legal interpretation for two reasons. To Dworkin, the rights thesis is more successful because it does not require judges to embed their own morality in the law, and it does not require them to either uphold or reject precedent. Instead, in following the rights thesis judges look to the totality of precedent and identify rights imbued in the body of law. Then, they examine the particular facts before them, assess whether those rights apply, and if so, uphold

297 Dworkin, *supra* note 4, at 225.

298 Dworkin, *supra* note 39, at 87.

the rights of those individuals in the case.

Integrity theorists would identify the Eighth Amendment as providing stalwart rights to defendants against cruel and unusual punishment, despite previous decisions which may have denied those rights. There are two strands of legal reasoning which identify rights in these cases. One strand of reasoning identifies retribution as a right of victims and their families. Also included may be the rights of all to be free from violence from their fellow citizens, *i.e.* protected against murder; the Court's role in those protections becomes muddled rather quickly, though. The Justices who support this strand of reasoning find capital punishment to be constitutional. The other strand of reasoning identifies the rights of defendants to their life, and more importantly, under the Eighth Amendment, to be free from cruel and unusual punishment.²⁹⁹ The Justices advocating this strand of reasoning find capital punishment to be unconstitutional. These opposing strands of legal reasoning help explain in part, why are hard cases to an integrity theorist: There are two plausible and mutually exclusive outcomes. In hard cases, integrity theorists direct judges to uphold individual and group rights, and in doing so, portray the body of law in the best light.

In my view, then, integrity theorists squarely side with the latter group of Justices who find the death penalty unconstitutional. This strand of reasoning achieves both of integrity theorists' goals in hard cases. It upholds the rights of defendants to be free from cruel and unusual punishment, a principle inherent in the Eighth Amendment and body of law. It also portrays the law of the United States in a better moral light; the government need not kill its own citizens to achieve order and safety. I believe integrity theorists would posit that the right of victims and their families to retribution and the right of all to be safe from would-be killers are satisfied by a life without parole sentence.

Integrity theory is also concerned with upholding principles flowing from a body of law. Dworkin writes that integrity theory:

does not require consistency in principle over all historical stages of a community's law... It insists that the law—the rights and duties that flow from past collective decisions and for that reason license or require coercion—contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them.³⁰⁰

In other words, integrity theory directs judges to pay attention to—and in some instances decide cases based on—principles within a body of law. A relevant example of just that is the principle the Justices upheld in *Trop* of the evolving standards of decency of society.³⁰¹ In subsequent cases, Justices referred back to

299 This dichotomy brings up the question of positive and negative rights. A discussion of this body of precedent as it relates to positive and negative rights is warranted, but extraneous here.

300 Dworkin, *supra* note 4, at 227.

301 *Trop*, 36 U.S. at 101.

this principle and each maintained their position best upheld society's evolving standards of decency. In *Trop*, the Court upheld this principle to find a punishment, denationalization, in violation of the Eighth Amendment.

To integrity theorists, the Justices who used this principle to find capital punishment in violation of the Eighth Amendment correctly upheld it. In *Trop*, the Court said that even though elected representatives enacted denationalization as a punishment for certain crimes, it did not reflect the evolved standards of decency of society. The same is true for death penalty statutes in Georgia and other states. The Justices who upheld the evolving standards of decency principle to find the death penalty in violation of the Eighth Amendment correctly followed the principle set by the Court in *Trop*, and therefore better satisfied the integrity theory framework for interpretation.

In each of these cases, Justices of various positions on this issue maintained their interpretation of the Eighth Amendment better encapsulated the voice of the people. It is unclear to me which 'side' of this argument—the constitutionality or unconstitutionality of capital punishment—better identified the community personified across the entire body of law. Integrity theory is a rights-based theory of interpretation. In the eyes of integrity theorists, Justices who identified rights of defendants within the Eighth Amendment have a stronger claim to their argument than Justices who identified rights writ large. Finally, integrity theory instructs judges to uphold principles within the law. The evolving standards of decency doctrine is an important principle in Eighth Amendment Jurisprudence, and Justices who utilized this principle to rule a punishment—capital punishment—unconstitutional, more closely followed that principle than their colleagues, in my view.

Finally, inclusive legal positivism has a potentially complicated interpretation of the body of precedent. Inclusive legal positivism allows for morality to enter into Justices' decisions and the rule of recognition, though this is not necessary for laws to be valid. In *The Concept of Law*, Hart writes:

Thus, it cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism rugged by individuals, whose moral horizon has transcended the morality currently accepted... it does not follow... that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.³⁰²

Applying this theory, then, judicial opinions that decry capital punishment for its immorality, arbitrariness, and reprehensibility are not necessarily predicated upon faulty reasoning. By the same token, moral postulations about victims' families and the viciousness of murder are also permissible within judicial opinions. Inclusive legal positivism does not take issue with the moral components of

Justices' identification of law. In the eyes of inclusive legal positivists, these moral arguments do not necessarily improve their legal interpretations or degrade them, they are simply permissible.

The central tenet of inclusive legal positivism is the rule of recognition. Hart writes:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change must be effectively accepted as common public standards of official behaviour by its officials.³⁰³

Simply, inclusive legal positivism contends that for a legal system to be valid, the citizens subject to its laws must generally obey those laws and recognize them as laws, and the legislators and other elected officials must recognize the laws that govern them (such as term limits). The rule of recognition is Hart's rebuke to Austin, who saw laws as orders backed by threats.³⁰⁴ To inclusive legal positivists, laws have authority because they are recognized as laws by ordinary citizens and governing officials alike, not because of their sanction. So, the penal value of retribution and deterrence, to inclusive legal positivists, do not make death penalty statutes valid sources of law. If officials who govern rely on the deterrent value of a punishment for citizens to follow the law, then the legal system lacks validity, to inclusive legal positivists.

From *Gregg* onwards, in cases which the Supreme Court upheld capital punishment as constitutional, the Justices in the majority primarily pointed to the retributive and deterrent benefits of the death penalty to justify its continued use. The Court also argued in each case that it needed to defer to state legislatures' decisions to use the death penalty. According to inclusive legal positivism, those legislatures were engaged in a faulty construction of law if they rely only on retribution and deterrence. By contrast, Justices in dissent in these cases, and indeed the Court's majority opinion in *Atkins*, point to the Eighth Amendment to support their argument: That capital punishment is unconstitutional. The Eighth Amendment satisfies the requirements of the rule of recognition, in that citizens of the United States recognize it as a valid law and legislators, prison guards, and judges alike recognize it as binding (however limited those bounds may be) on their actions and laws. As a whole, then, in cases in which the Court upheld capital punishment as constitutional for its retributive and deterrent effects, inclusive legal positivism finds its reasoning flawed. When the Court relied on the text of the Eighth Amendment, it satisfies the requirements of the rule of recognition and therefore the framework of inclusive legal positivism.

The current body of law on capital punishment and the Eighth Amendment

303 Hart, *supra* note 10, at 116.

304 Hart, *supra* note 10, at 6-7.

is incompatible with each legal theory. For different reasons, every theory finds flaws in the legal reasoning of the decisions in this lineage of precedent, and none are satisfied with the Court's current position on this issue. Natural law theory and integrity theory each provide a clear answer to the Court to remedy this issue: Interpret the Eighth Amendment to prohibit capital punishment. Inclusive legal positivism takes a more convoluted route, but likely arrives at the same conclusion. Exclusive legal positivism provides two distinct answers for the Court: Either remove the myriad restrictions on the death penalty or prohibit it altogether under the Eighth Amendment. In the next relevant case which comes before them, the Court must consider whether the death penalty constitutes cruel and unusual punishment. One answer alone to this question satisfies *every* legal theory: Yes, it does.

Part III: Implications of Jurisprudence: What Now?

Why does this matter? Why should the Justices, or anyone, care that widely respected legal theories find the Court's position on capital punishment and the Eighth Amendment unsound? Why should anyone care that precedent in this area is inconsistent, and that the Court still fails to articulate coherent reasoning to explain why the death penalty does not violate the Cruel and Unusual Punishments Clause?

The Justices of the Supreme Court are not obligated to follow any of the interpretive legal theories I study in this thesis. They are, however, bound by oath to uphold the Constitution.³⁰⁵ No reasonable method of legal interpretation can reach the conclusion they have. The precedent is convoluted, muddled, piecemeal, and contradictory; it fails to set forth clear reasoning and relies primarily on stubborn decisions from years past. It would benefit the Court, society, and people on death row, to clarify precedent and rule the death penalty unconstitutional as they did in *Furman*, this time applying it universally. To some, the authority of the Supreme Court is compromised by their flawed position on this issue. To some, the collective morality of our community, the United States, suffers because our country still kills its citizens for killing other people. All people of the United States should care that a flawed interpretation of the Constitution stands today.

305 "Text of the Oaths of Office for Supreme Court Justices," Office of the Curator, Supreme Court of the United States, <https://www.supremecourt.gov/about/oath/textofthe-oathsofoffice08-10-2009.pdf>.

The Combined Oath for Supreme Court Justices reads, "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [a Supreme Court Justice] under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic..."

This question of the constitutionality of the death penalty matters a great deal to the more than 1,500 Americans who currently await the extinguishment of their lives at the hands of their state.³⁰⁶ This should matter a great deal to anyone who holds sacred the genius of the Constitution of the United States; we should care that it is properly and thoughtfully interpreted. Surely, this should matter to the Justices themselves. Correct interpretation of the Constitution and the laws of the United States are their lives' work. In *Marbury v. Madison*, Chief Justice John Marshall wrote, "It is emphatically the province and duty of the Judicial Department to say what the law is."³⁰⁷ The Court must take its role seriously as the ultimate interpreter of the Constitution.

The Justices have three broad paths to follow to from the Court's current position on the Eighth Amendment and capital punishment: (A) The Court can continue the "death-is-different," muddled approach of allowing capital punishment with further restrictions; (B) The Court can return to *Furman* and place an effective nation-wide moratorium on the death penalty based on the current flawed application of capital sentences and executions; or (C) The Court can abolish the death penalty outright, because it violates the Eighth Amendment.

Following the cases of the last few decades, the Court could choose the first path and continue Eighth Amendment constitutional regulation of capital punishment without declaring it unconstitutional outright. If the Court follows this path, groups of defendants will likely continue to be excluded from death penalty applicability, while those who are still subject to capital punishment suffer flawed trials and painful executions, as Mr. McCleskey and Mr. Glossip did, respectively.

If death sentences are allowed by the Court, except when the defendant is mentally ill, a minor, convicted of crimes besides murder, not mentally culpable, and only under strict structures of bifurcated jury trials, why stop there? Might the Court soon rule capital punishment unconstitutional for those who murdered only one other person, or who present mitigating circumstances, or who express extraordinary remorse and potential for reform? These and other potential avenues for decreasing the number of death-eligible cases, along with the continued success of abolitionist movements at the state level, would likely lead to fewer death sentences and executions. While becoming increasingly rare, Black men living in the south would undoubtedly be disproportionately sentenced to death and executed.³⁰⁸ Its infrequent application would not fall benignly on those who committed the most egregious crimes; the voiceless minority, as Justice Brennan said, would continue to suffer.³⁰⁹ Several scholars examine the likelihood and consequences of this path in great detail; they are worth reading.³¹⁰

306 Fins, *supra* note 2, at 1.

307 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

308 *Glossip*, 576 U.S. at 10-17.

309 *McCleskey*, 481 U.S. at 343.

310 For further discussion of the likelihood of continued Eighth Amendment consti-

The Court is well within its right, when the next appropriate case comes before it, to cite the precedent of *Furman* and find the death penalty to be incompatible with the Eighth Amendment as currently administered. The concerns expressed within the *Per Curiam* opinion in *Furman* are more relevant today than they were in 1972. The Court need not go beyond a return to upholding this precedent to find capital punishment as currently administered, cruel and unusual. As it did in 1972, this path would leave open the door to new death penalty legislation at the state level. Southern states that account for an overwhelming majority of death sentences since *Gregg* would almost certainly seek to reinstate the death penalty.³¹¹ As in the years following *Furman*, they would pass new legislation addressing the constitutional concerns of the Court. This path is plausible, but does little remedy the muddled precedent in this area. It would only prevent death sentences until the Court heard a subsequent case on reformed death penalty legislation, as it did in *Gregg*.

The Court's final path, and arguably most sound from the perspective of these legal theories, is to rule the death penalty in any application cruel and unusual, and thus unconstitutional. This would cement the Court's clear stance on capital punishment and lay to rest the abundance of pending constitutional questions facing the death penalty. States, prosecutors, and people on death row would need not worry about how a later ruling from the Court might affect a death sentence. The Court could simply decide that anyone awaiting execution would instead serve life without the possibility of parole. Plenty of states and other countries have followed this path.³¹² The Court possesses the framework of precedent and the text of the Cruel and Unusual Punishments Clause to rely on. In addition to the concurrences and dissents of the Justices cited so far, several prolific legal scholars have written persuasively about the Court's path to abolition. Their clear articulations of this path and its constitutional underpinnings are worth exploring.³¹³

tutional regulation its implications, see:

Richard C. Dieter, "The Future of the Death Penalty in the United States," *University of Richmond Law Review* 49 (2015): 921-926.

Mark S. Hurwitz, "Given Him a Fair Trial, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence," *The Justice System Journal* 29, no. 3 (2008): 243-256.

Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* (Cambridge: The Belknap Press of Harvard University Press, 2016): 154-192, 236-246.

311 Fins, *supra* note 2, at 5-6.

As of October 1, 2020, the leading seven states in executions since reinstatement were Texas, Virginia, Oklahoma, Florida, Missouri, Georgia, and Alabama; they accounted for over 70% of executions since 1976.

312 Steiker and Steiker, *supra* note 4, at 271-317.

313 For further discussion of the abolition of the death penalty, see:

David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition*,

I have written about the particularities of just a few cases, with just a few names. The named petitioners—Kemmler, Furman, Gregg, McCleskey, Atkins, and Glossip—represent thousands of people who face death at the hands of their government. Since I began writing this thesis, ten people have been executed by their state or the federal government of the United States.³¹⁴ Their names are Lezmond Mitchell, Keith Nelson, William LeCroy, Christopher Vialva, Orlando Hall, Brandon Bernard, Alfred Bourgeois, Lisa Montgomery, Corey Johnson, and Dustin Higgs.³¹⁵ Regardless of their grievous mistakes and the unthinkable violence they inflicted (or were charged with inflicting), the brilliance of the Constitution is that they are guaranteed its protections just the same. At least, they should be.

The Constitution provides that all people of the United States have the right to be free from cruel and unusual punishments. The Supreme Court is unquestionably and uniquely empowered to decide whether death violates the Eighth Amendment. The Justices are obligated to properly interpret the provisions of the Constitution and to, “say what the law is.”³¹⁶ Now, they must do so.

Bibliography

- Atkins v. Virginia, 536 U.S. 304 (2002).
- Austin, John. *The Province of Jurisprudence Determined*. Edited by Wilfred E. Rumble. Cambridge: Cambridge University Press, 1995.
- Batson v. Kentucky, 476 U.S. 79 (1986).
- Baze v. Rees, 553 U.S. 35 (2008).
- Bessler, John. “A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution’s Eighth Amendment.” *William & Mary Bill of Rights Journal* 27 (2019): 989-1077.
- Blocker, Joseph. “The Death Penalty and the Fifth Amendment.” *Northwestern University Law Review* 111, no. 1 (2016): 275-293.
- Center for Death Penalty Litigation. “Backlash to Civil Rights & the Creation of
206-230 (2010)
- Dahlia Lithwick, “Fates Worse Than Death? Justice Kennedy’s own logic shows why he should make the Supreme Court abolish capital punishment,” *Slate*, July 14, 2015, <https://slate.com/news-and-politics/2015/07/will-kennedy-overturn-the-death-penalty-his-views-on-solitary-confinement-in-davis-v-ayala.html>.
- Steiker and Steiker, *Courting Death*, 271-317.
- L.S. Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment*, 51 Notre Dame L. Rev. 722 (1976).
- 314 “Execution Database,” Death Penalty Information Center, [https:// deathpenalty-info.org/executions/execution-database](https://deathpenalty-info.org/executions/execution-database). (Last accessed January 22, 2021)
- 315 Ibid.
- 316 *Marbury*, 5 U.S. at 177

- the Modern Death Penalty (1962-1990).” *Racist Roots: Origins of North Carolina’s Death Penalty*. Accessed December 21, 2020. <https://racistroots.org/section-3/>.
- Death Penalty Information Center. “Execution Database.” Accessed January 22, 2021. <https://deathpenaltyinfo.org/executions/execution-database>.
- Dieter, Richard C. “The Future of the Death Penalty in the United States.” *University of Richmond Law Review* 49 (2015): 921-938.
- Dworkin, Ronald. *Law’s Empire*. Cambridge: The Belknap Press of Harvard University Press, 1986.
- Dworkin, Ronald. *Taking Rights Seriously*. Cambridge: Harvard University Press, 1978.
- “English Bill of Rights 1689.” Yale Law School, *The Avalon Project*. Last modified 2008. https://avalon.law.yale.edu/17th_century/england.asp.
- “Far Worse Than Hanging; Kemmler’s Death Proves an Awful Spectacle.” *New York Times*, August 7, 1980. <https://www.nytimes.com/1890/08/07/archives/far-worse-than-hanging-kemmlers-death-proves-an-awful-spectacle-the.html>.
- Finnis, John. *Natural Law and Natural Rights*. 2nd ed. Oxford: Oxford University Press, 2011.
- Fins, Deborah. *Death Row U.S.A.: Fall 2020 Report*. NAACP Legal Defense and Educational Fund, Inc., 2020.
- Ford v. Wainwright, 477 U.S. 399 (1986).
- Furman v. Georgia, 408 U.S. 238 (1972).
- Garland, David. *Peculiar Institution: America’s Death Penalty in an Age of Abolition*. Cambridge: The Belknap Press of Harvard University Press, 2010.
- Gregg v. Georgia, 428 U.S. 153 (1976).
- Goldberg, Arthur J. and Alan M. Dershowitz. “Declaring the Death Penalty Unconstitutional.” *Harvard Law Review* 83, no. 8 (June 1970): 1773-1819.
- Gorsuch, Neil M. *The Future of Assisted Suicide and Euthanasia*. Princeton: Princeton University Press, 2006.
- Hamilton, Alexander or James Madison. “Federalist No. 51.” *New York Packet*, February 8, 1788. Library of Congress, <https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493427>.
- Hanson, Kwéku. “Racial Disparities and the Law of Death: The Case for a New Hard Look at Race-Based Challenges to Capital Punishment.” *National Black Law Journal* 10, no. 3 (1988): 298-317.
- Hart, H.L.A. *The Concept of Law*. 3rd ed. Oxford: Oxford University Press, 2012.
- Hart, H.L.A. “Positivism and the Separation of Law and Morals.” *Harvard Law Review* 71, no. 4 (February 1958): 593-629.
- Helling v. McKinney, 509 U.S. 25 (1993).
- Hurwitz, Mark S. “Given Him a Fair Trial, Then Hang Him: The Supreme Court’s Modern Death Penalty Jurisprudence.” *The Justice System Journal* 29, no. 3: 243-256.
- In re Kemmler*, 136 U.S. 436 (1890).

Kagan,
Elena.
“The

2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes.” Interview by John Manning. *Antonin Scalia Lecture Series*, Harvard Law School, November 18, 2015. Video. <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

Kennedy, Randall L. “McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court.” *Harvard Law Review* 101, no. 7 (May 1988): 1388-1443.

Lithwick, Dahlia. “Fates Worse Than Death? Justice Kennedy’s own logic shows why he should make the Supreme Court abolish capital punishment.” *Slate*, July 14, 2015. <https://slate.com/news-and-politics/2015/07/will-kennedy-overturn-the-death-penalty-his-views-on-solitary-confinement-in-davis-v-ayala.html>.

Lockett v. Ohio, 438 U.S. 586 (1978).

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

McCleskey v. Kemp, 481 U.S. 279 (1987).

McLeod, Marah Stith. “The Death Penalty as Incapacitation.” *Virginia Law Review* 104, no. 6 (October 2018): 1123-1198.

Raz, Joseph. “Dworkin: A New Link in the Chain.” Review of *A Matter of Principle*, by Ronald Dworkin. *California Law Review* 74, no. 3 (May 1986): 1103-1119.

Raz, Joseph. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. New York: Oxford University Press, 1994.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. New York: Oxford University Press, 1979.

Robinson v. California, 370 U.S. 660 (1962).

Rosen, Jeffrey A. “The Death Penalty Can Ensure ‘Justice is Being Done.’” *The New York Times*, July 27, 2020. <https://www.nytimes.com/2020/07/27/opinion/federal-death-penalty.html>.

Sevel, Michael and Brian Leiter. “Philosophy of Law.” *Encyclopædia Britannica*. Last modified August 12, 2016. <https://www.britannica.com/topic/philosophy-of-law>.

Snyder, Brad. “Disparate Impact on Death Row: M. L. B. and the Indigent’s Right to Counsel at Capital State Postconviction Proceedings.” *The Yale Law Journal* 107, no. 7 (May 1998): 2211-2247.

Social Security Administration. “Change in Terminology: “Mental Retardation” to “Intellectual Disability.”” Federal Register. August 1, 2013. <https://www.federalregister.gov/documents/2013/08/01/2013-18552/change-in-terminology-mental-retardation-to-intellectual-disability>.

Steiker, Carol S. and Jordan M. Steiker. “The American Death Penalty and the (In)Visibility of Race.” *The University of Chicago Law Review* 82, no. 1 (Winter 2015): 243-294.

Steiker, Carol S. and Jordan M. Steiker. *Courting Death: The Supreme Court and Capital Punishment*. Cambridge: The Belknap Press of Harvard University Press, 2016.

Steiker, Carol S. and Jordan M. Steiker. "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment." *Harvard Law Review* 83, no. 8 (June 1970): 335-438.

Supreme Court of the United States. "Text of the Oaths of Office for Supreme Court Justices." Office of the Curator. <https://www.supremecourt.gov/about/oath/textoftheoathsofoffice08-10-2009.pdf>.

Tao, L.S. "Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment." *Notre Dame Law Review* 51, no. 4 (1976): 722-736.

Trop v. Dulles, 356 U.S. 86 (1958).

U.S. Const. amend. V.

U.S. Const. amend. VIII.

U.S. Const. amend. XIV, § 1.

Waluchow, W.J. *Inclusive Legal Positivism*. Oxford: Oxford University Press, 1994.





