CONNECTICUT
PUBLIC INTEREST
LAW JOURNAL

ARTICLES

NOTES

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 20 FALL – WINTER 2020 NUMBER 1

CONTENTS

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 20 FALL - WINTER 2020 NUMBER 1

Associate Editors

Julia Audibert
Morgen Barroso
Amy Browen
Alexandra Bostick
Isabella De Lisi
Sharmy Dhaliwal
Nathan Genest
James Hamilton
Lindsey Heiman
Emily Klawitter
John Ludtke
Alison McHorney
Margaret O'Neil
Peter Reynolds
Tess Shaw
Cole von Richthofen
William Weishaupt

Faculty Advisor

Susan Schmeiser

Symposium Advisor

Timothy Fisher

The Connecticut Public Interest Law Journal (ISSN 1932-2038) is published in the fall and spring of each year by the Connecticut Public Interest Law Journal, University of Connecticut School of Law, 55 Elizabeth Street, Hartford, Connecticut 06105, and printed by Western Newspaper Publishing Company, Inc., 537 East Ohio Street, Indianapolis, Indiana 46204. Periodicals postage paid at Hartford, Connecticut and additional mailing offices.

Postmaster: Send address changes to the Connecticut Public Interest Law Journal, 55 Elizabeth Street, Hartford, Connecticut 06105.

The subscription price is $20.00 per year. Absent timely notice of termination, subscriptions are renewed annually. Please address all subscriptions and inquiries to the Administrative Editor at the Journal's office. Advertising rates available upon request.

UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW

FACULTY AND OFFICERS OF ADMINISTRATION
FOR THE ACADEMIC YEAR 2020 - 2021

Officers of Administration

Thomas Katsouleas, Ph.D., *President, University of Connecticut*
John A. Elliot, Ph.D., *Interim Provost and Executive Vice President for Academic Affairs*
Eboni S. Nelson, J.D., *Dean, School of Law*
Paul Chill, J.D., *Associate Dean for Clinical and Experiential Education*
Darcy Kirk, J.D., *Associate Dean for Academic Affairs, Associate Dean for Library and Technology and Distinguished Professor of Law*
Leslie C. Levin, J.D., *Associate Dean for Research and Faculty Development*
Karen L. DeMeola, J.D., *Assistant Dean for Finance, Administration and Enrollment*

Faculty Emeriti

Robin Barnes, B.A., J.D., *Professor of Law Emerita*
Loftus E. Becker, Jr., A.B., LL.B., *Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Phillip I. Blumberg, A.B., J.D., LL.D. (Hon.), *Dean and Professor of Law and Business, Emeritus*
John C. Brittain, B.A., J.D., *Professor of Law Emeritus*
Deborah A. Calloway, B.A., J.D., *Professor of Law Emerita*
Clifford Davis, S.B., LL.B., *Professor of Law Emeritus*
Richard S. Kay, A.B., M.A., J.D., *Wallace Stevens Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Lewis S. Kurlantzick, B.A., LL.B., *Zephaniah Swift Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Hon. Ellen Ash Peters, B.A., Swarthmore College; LL.B., Yale University; LL.D., Yale University; University of Connecticut; et al.; *Visiting Professor of Law*
Patricia A. McCoy, B.A., J.D., *Professor of Law Emerita*
R. Kent Newmyer, Ph.D., *Professor of Law and History Emeritus*
Nell J. Newton, B.A., J.D., *Dean and Professor of Law Emerita*
Leonard Orland, B.A., LL.B., *Professor of Law Emeritus*
Jeremy R. Paul, A.B., J.D., *Dean and Professor of Law Emeritus*
Howard Sacks, A.B., LL.B., *Dean and Professor of Law Emeritus*
Eileen Silverstein, A.D., J.D., *Professor of Law Emerita*
Lester B. Snyder, B.S., LL.B., LL.M., *Professor of Law Emeritus*
James H. Stark, A.B., J.D., *Roger Sherman Professor of Law Emeritus and Oliver Ellsworth Research Professor of Law*
Kurt A. Strasser, B.A., J.D., LL.M., J.S.D., *Phillip Blumberg Professor of Law Emeritus*
Colin C. Tait, B.A., LL.B., *Professor of Law Emeritus*
Carol Ann Weisbrod, J.D., *Professor of Law Emerita*
Nicholas Wolfson, A.B., J.D., *Professor of Law Emeritus*

Faculty of Law

Jill C. Anderson, B.A., University of Washington; J.D., Columbia University; *Professor of Law*
Jon Bauer, A.B., Cornell University; J.D., Yale University; *Richard D. Tulisano '69 Human Rights Scholar and Clinical Professor of Law*
Mary Beattie, B.A., Providence College; J.D., University of Bridgeport; *Assistant Clinical Professor of Law and Director, Academic Support*
Bethany Berger, B.A., Wesleyan University; J.D., Yale University; *Wallace Stevens Professor of Law*
Robert L. Birmingham, A.B., J.D., Ph.D. (Econ.), Ph.D. (Phil.), University of Pittsburgh; LL.M., Harvard University; *Professor of Law*
Kiel Brennan-Marquez, B.A., Pomona College; J.D., Yale University; *Associate Professor of Law and William T. Golden Scholar*
Sara C. Bronin, B.A., University of Texas; M.Sc., University of Oxford (Magdalen College); J.D., Yale University; *Thomas F. Gallivan, Jr. Chair in Real Property Law and Faculty Director, Center for Energy and Environmental Law*

Paul Chill, B.A., Wesleyan University; J.D., University of Connecticut; *Associate Dean for Clinical and Experiential Education and Clinical Professor of Law*

John A. Cogan, Jr., B.A., University of Massachusetts Amherst; M.A., University of Texas; J.D., University of Texas School of Law; *Associate Professor of Law and Roger S. Baldwin Scholar*

Mathilde Cohen, B.A., M.A., L.L.B., Sorbonne-École Normale Supérieure; LL.M., J.S.D., Columbia University, *Professor of Law*

Diane F. Covello, B.S., University of Kansas; J.D., Duke University School of Law; *Assistant Clinical Professor of Law and Co-Director, Intellectual Property and Entrepreneurship Law Clinic*

Anne C. Dailey, B.A., Yale University; J.D., Harvard University; *Evangeline Starr Professor of Law*

Miguel F. P. de Figueiredo, B.A., Johns Hopkins University; M.A., University of Chicago; Ph.D., University of California, Berkeley; J.D., Yale University; *Associate Professor of Law and Terry J. Tondro Research Scholar*

Jessica de Perio Wittman, B.A., State University of New York at Stony Brook; B.A, M.L.S., State University of New York at Buffalo; J.D., Seattle University School of Law; *Associate Professor of Law, Cornelius J. Scanlon Scholar and Director, Law Library*

Timothy H. Everett, B.A., M.A., Clark University; J.D., University of Connecticut; *Clinical Professor of Law*

Todd D. Fernow, B.A., Cornell University; J.D., University of Connecticut; *Professor of Law and Director, Criminal Law Clinic*

Richard Michael Fischl, B.A., University of Illinois; J.D., Harvard University; *Professor of Law*

Timothy Fisher, B.A., Yale University; J.D., Columbia University; *Dean Emeritus and Professor of Law*

Valeria Gomez, B.A., Belmont University; J.D., University of Tennessee College of Law; *William R. Davis Clinical Teaching Fellow*

Hillary Greene, B.A., J.D., Yale University; *Zephaniah Swift Professor of Law*

Mark W. Janis, A.B., Princeton University; B.A., M.A., Oxford University; J.D., Harvard University; *William F. Starr Professor of Law*

Darcy Kirk, A.B., Vassar College; M.S., M.B.A., Simmons College; J.D., Boston College; *Distinguished Professor of Law, Associate Dean for Academic Affairs and Associate Dean for Library and Technology*

Peter R. Kochenburger, A.B., Yale University; J.D., Harvard University; *Associate Clinical Professor of Law, Executive Director of the Insurance LL.M. Program and Deputy Director of the Insurance Law Center*

James Kwak, A.B., Harvard College; Ph.D., University of California at Berkeley; J.D., Yale Law School; *Professor of Law*

Alexandra D. Lahav, A.B., Brown University; J.D., Harvard University; *Ellen Ash Peters Professor of Law*

Molly K. Land, B.A., Hamline University; J.D., Yale; *Professor of Law*

Leslie C. Levin, B.S.J., Northwestern University; J.D., Columbia University; *Associate Dean for Research and Faculty Development and Joel Barlow Professor of Law*

Peter L. Lindseth, B.A., J.D., Cornell University; M.A., M. Phil, Ph.D., Columbia University; *Olimpiad S. Ioffe Professor of International and Comparative Law and Director, International Programs*

Joseph A. MacDougald, A.B., Brown University; M.B.A., New York University; J.D., University of Connecticut; M.E.M., Yale University; *Professor-in-Residence; Executive Director, Center for Energy and Environmental Law; and Kurt Strasser Fellow*

Jennifer Brown Mailly, A.B., Brown University; J.D., Ohio State University; *Assistant Clinical Professor of Law and Field Placement Program Director*

Barbara S. McGrath, B.A., Yale University; J.D., University of Connecticut; *Executive Director, Connecticut Urban Legal Initiative, Inc.*

Willajeanne F. McLean, B.A., Wellesley College; B.S., University of Massachusetts; J.D., Fordham University; LL.M., Free University of Brussels; *Distinguished Professor of Law*

Thomas H. Morawetz, A.B., Harvard College; J.D., M.Phil., Ph.D., Yale University; *Tapping Reeve Professor of Law and Ethics*

Jamelia Morgan, B.A., M.A., Stanford University; J.D., Yale University; *Associate Professor of Law and Robert D. Glass Scholar*

Minor Myers, B.A., Connecticut College; J.D., Yale University; *Professor of Law*

Ángel R. Oquendo, A.B., M.A., Ph.D., Harvard University; J.D., Yale University; *George J. and Helen M. England Professor of Law*

Sachin S. Pandya, B.A., University of California, Berkeley; M.A., Columbia University; J.D., Yale University; *Professor of Law*

Richard W. Parker, A.B., Princeton University; J.D., Yale University; D.Phil., Oxford University; *Professor of Law, Director of the Semester in DC Program and Policy Director, Center for Energy and Environmental Law*

Lisa Perkins, B.S., J.D., Michigan State University; LL.M., Georgetown University Law Center; *Clinical Professor of Law and Director, Tax Clinic*

Richard D. Pomp, B.S., University of Michigan; J.D., Harvard University; *Alva P. Loiselle Professor of Law*

Jessica S. Rubin, B.S., J.D., Cornell University; *Clinical Professor of Law and Director, Legal Practice Program*

Susan R. Schmeiser, A.B., Princeton University; J.D., Yale University; Ph.D., Brown University; *Professor of Law*

Peter Siegelman, B.A., Swarthmore College; M.S.L., Ph.D., Yale University; *Phillip I. Blumberg Professor of Law*

Julia Simon-Kerr, B.A., Wesleyan University; J.D., Yale Law School; *Professor of Law*

Douglas M. Spencer, B.A., Columbia University; M.P.P., J.D., Ph.D., University of California Berkeley; *Professor of Law and Public Policy*

Martha Stone, B.A., Wheaton College; J.D., LL.M., Georgetown University; *Director, Center for Children's Advocacy*

Stephen G. Utz, B.A., Louisiana State University; J.D., University of Texas; Ph.D., Cambridge University; *Roger Sherman Professor of Law*

Steven Wilf, B.S., Arizona State University; Ph.D., J.D., Yale University; *Anthony J. Smits Professor of Global Commerce and Professor of Law*

Richard A. Wilson, BSc., Ph.D., London School of Economics and Political Science; *Gladstein Chair and Professor of Anthropology and Law*

Adjunct Faculty of Law

Anne D. Barry, B.S., University of Connecticut; M.S., Union College; J.D., University of Connecticut; *Adjunct Professor of Law*

James W. Bergenn, B.A., Catholic University; J.D., Columbia University; *Adjunct Professor of Law*

Michael A. Cantor, B.S., J.D., University of Connecticut; *Adjunct Professor of Law*

Thomas O. Farrish, B.A., J.D., University of Connecticut; *Adjunct Professor of Law*

William D. Goddard, B.A., M.B.A., Dartmouth College, J.D., University of Connecticut; *Adjunct Professor of Law*

Andrew S. Groher, B.A., University of Virginia; J.D., University of Connecticut; *Adjunct Professor of Law*

Wesley Horton, B.A., Harvard University; J.D., University of Connecticut; *Adjunct Professor of Law*

John J. Houlihan, Jr., B.A., Providence College; J.D., St. John's University; *Adjunct Professor of Law*

Nancy Kennedy, B.A., University of Massachusetts; J.D., University of Connecticut; *Adjunct Professor of Law*

Daniel Klau, B.A., University of California; J.D., Boston University; *Adjunct Professor of Law*

John Lawrence, B.S., Washington and Lee University; J.D., University of Virginia; *Adjunct Professor of Law*

Erik T. Lohr, B.S., Thomas A. Edison State College; J.D., University of Connecticut; *Adjunct Professor of Law*

Thomas S. Marrion, A.B., College of the Holy Cross; J.D., University of Connecticut; *Adjunct Professor of Law*

Joseph Mirrione, B.A., Marist College; J.D., Vermont Law School; *Adjunct Professor of Law*

Thomas B. Mooney, B.A., Yale University; J.D., Harvard University; *Adjunct Professor of Law*

Cornelius O'Leary, B.A., Williams College; M.A., Trinity College; J.D., University of Connecticut; *Adjunct Professor of Law and Mark A. Weinstein Clinical Teaching Fellow*

Rosemarie Paine, B.S., Southern Connecticut State University; J.D., University of Connecticut; *Adjunct Professor of Law*

Humbert J. Polito, Jr., A.B., College of the Holy Cross; J.D., University of Connecticut; *Adjunct Professor of Law*

Leah M. Reimer, B.S. Baylor University; J.D., University of Connecticut; Ph.D., Stanford University; *Adjunct Professor of Law*

Patrick J. Salve, B.S., J.D., University of Pennsylvania; *Adjunct Professor of Law*

Carl Schiessl, B.A., Trinity College; J.D., University of Connecticut; *Adjunct Professor of Law*

Hon. Michael R. Sheldon, A.B., Princeton University; J.D., Yale University; *Adjunct Professor of Law*

Sandra Sherlock-White, B.A., Central Connecticut State University; J.D., Western New England College; *Adjunct Professor of Law*

Jay E. Sicklick, B.A., Colgate University; J.D., Boston College; *Adjunct Professor of Law*

Walter C. Welsh, B.S., Tufts Engineering; J.D., University of Connecticut; LL.M., New York University; *Adjunct Professor of Law*

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 20 FALL - WINTER 2020 NUMBER 1

Letter from the Editors

The Connecticut Public Interest Law Journal is proud to celebrate its twentieth anniversary in the 2020-2021 academic year. Unfortunately, the editors are limited in how we could observe this momentous occasion due to the challenges posed by the COVID-19 pandemic.

In honor of our twentieth anniversary, we have decided to re-print some our "greatest hits" from the journal's past. We hope that by showcasing some of our scholarship, we can honor the contributions of all those scholars and students who have helped to make our journal a success for the past two decades.

In this issue, this re-printing begins with the journal's very first article, *An Uncivil Action*, by Mumia Abu-Jamal, first published in 2001. Mr. Abu-Jamal is a journalist who labored to expose police violence against minority communities and is currently serving a life sentence after being convicted of killing a police officer, a conviction he contests. Mr. Abu-Jamal's article was this journal's first, but it is indicative of the type of scholarship we have published for the past two decades. Especially in light of the protest movement that arose after the murders of George Floyd and Breonna Taylor by police, the Connecticut Public Interest Law Journal is honored to contribute to the national conversation about police accountability.

In our next issue, look for additional re-prints from volumes past. In the meantime, please visit cpilj.law.uconn.edu to view our full archive. On behalf of the editorial board, I would like to thank all previous authors and editors of the Connecticut Public Interest Law Journal for their contribution towards twenty years of scholarship. We cannot wait to read what the journal publishes in the next twenty years.

Amanda C. Farrish
Editor-in-Chief
Connecticut Public Interest Law Journal, Vol. 20

An Uncivil Action

MUMIA ABU-JAMAL[†]

We are under a constitution, but the constitution is what the judges say it is.

--U.S. Supreme Court Chief Justice Charles Evans Hughes (1862-1948)

For most people in the nation who wear the label of "American," the courts of the land are like memorial sites in the heart of a city; many, perhaps most, folks know they are there, but few people actually go to see them. In an age when the national town meeting is more apt to be experienced while sitting on one's sofa than actually going out of the house into the public, what happens in the nation's courts depends upon what the media reports happens.

Popular reporting of such events depends upon the objectives, biases, and expertise of the reporter and the interests of the publisher, editor, or owner.

Every civil trial is, at base, a conflict, a contest, or a war of words. The arbiter of that conflict is also engaged in a struggle, for although we like to think judges are Olympians who rule over courts with Delphic equanimity, they are but mortals driven and sometimes driven by the same passions as other men and women.

The civil case Abu-Jamal v. Price[1] began, as so many cases, with a small step. As the writer waited for the magistrate's ruling, with a date to die, a guard sidled up to Cell B-4 and laid a write-up on the opened tray slot. Typed on the pressure-sensitive, yellow-tinted paper was a damning indictment: the writing of the book Live from Death Row, and articles for Scoop newspaper, Against the Current journal, and other publications, were proof that inmate Jamal was guilty of operating "a business or profession" of "journalism." Also, inmate Jamal was a "professor of economics" for the New York-based

---

[†] Mumia Abu-Jamal is a Pennsylvania journalist who labored to expose police violence against minority communities in the 1970s and 1980s. In 1982, Mr. Abu-Jamal was convicted of the first-degree murder of Philadelphia police officer Daniel Faulkner. Mr. Abu-Jamal, who maintains his innocence, is currently on death row in Pennsylvania.

[1] 154 F.3d 128 (3d Cir. 1998).

Henry George Institute (and thus, perhaps, guilty of the profession of "teacher" of a correspondence course). The June 1995 write-up, served up on the writer's second day of the magistrate's hearing, made writing (and teaching) an institutional offense, punishable by a sharp reduction in privileges. Sentenced to thirty days in the "hole," with fewer than sixty days to live, meant no phone calls, no visits, no TV, no radio, and no commissary privileges. It was being placed in a prison within a prison within a prison—for writing. I was sentenced to die in silence.

While waiting for the institutional "hearing," I got word to some friends, and they in turn got in touch with one of the foremost prisoner's rights lawyers, Jere Krakoff, in nearby Pittsburgh.

Krakoff wrote and offered his considerable assistance, which was accepted quickly. I was aware of his work as a jailhouse lawyer, principally in the landmark Tillery v. Owens2 case, where the court found, in a conditions-of-confinement case, that double-ceiling was an element in determining that Western State Correctional Institution at Pittsburgh was being operated in an unconstitutional manner, in violation of the "cruel and unusual" clause of the Eighth Amendment. Given the conservative bent of the judiciary and the repressive tenor of the times, such a decision was a product of remarkable lawyering, and I realized similar skills were needed in this case.

We went to work.

I. THE HEARING

When one claims a violation of the First Amendment (regarding freedom of speech, of the press, of religious practice, and to petition the government for redress of grievances) in an institutional misconduct hearing, it may be more fruitful to claim a violation of the Ten Commandments, for it certainly cannot go any worse.

Misconduct "hearings" are held before a prison official called a hearing examiner, who is untrained in the law. Prisoners brought before the examiners have no right to legal counsel and may be assisted by only a willing inmate or staff. All the same, I requested the presence of Jere Krakoff, Esquire, to represent me at the hearing, but this was denied out- of-hand.

Failing this, I presented my written version, arguing that any prison rule must yield to the U.S. and Pennsylvania Constitutions, which both have provisions that protect freedom of speech and freedom of the press. No intentional role, I argued, could trump the first article in Pennsylvania's Declaration of Rights, nor the First Amendment to the U.S. Constitution.

---

[2] 907 F.2d 41 (3d Cir. 1990).

The hearing examiner disagreed, saying essentially that punishing someone for writing a book, or an article, had "nothing to do with first amendment Rites [sic]" (a Freudian slip?).

On June 9, 1995, she found me guilty of "engaging in the profession of journalism," writing

> I find an abundance of evidence exists in the misconduct report that Jamal has been actively engaged in the profession of journalism. He has authored a book known as Live from Death Row, he currently writes columns for different newspapers including, Scoop USA, First Day and the Jamal Journal. In addition Jamal has made taped commentaries for broadcast over National Public Radio. These undisputed facts combine to establish a clear preponderance of evidence that Jamal has been engaged in both the business and profession of journalism.

And with that, on to court.

II. THE COURT HEARING

When one enters a U.S. court, in a civil action, the basis for action is claimed violation of the U.S. Constitution. Presumably, any prison rule must fall when it violates what has been called the supreme law of the land (the Constitution). But, as we have learned, courts engage in complex, extensive "balancing tests" when state rules and constitutional rights collide. Our case would prove no different.

In many such civil cases, the case opens with what is called a motion for a temporary restraining order or a preliminary injunction (TRO/PI). These motions, although rarely granted, place cases on a fast track, as it usually requires a prompt hearing to test the claims in a case and to determine the likelihood of success for the side bringing the suit.

In a case where a person is being punished by the state for writing (a form of speech), the First Amendment comes into play, and a violation of the First Amendment requires what courts have called "strict scrutiny" (or closer-than-usual judicial attention).

The magistrate judge selected to hear the TRO/PI motion was Kenneth J. Benson, a relatively short, mustached, blue-eyed man. The hearing was held in a carpeted, highly air-conditioned courtroom that had once been assigned to former Third Circuit Judge Tim Lewis, in the federal building in central, downtown Pittsburgh. Although this was only sixty-one miles from SCI Greene, the Department of Corrections (DOC) chose to bind me in

chains and shackles and to temporarily transfer me to the state prison in Pittsburgh for the duration of the TRO/PI hearings.

SCI Pittsburgh is one of the oldest prisons in the state, over a century old, situated in the city's north side, a collection of mostly black and ethnic neighborhoods, with some areas zoned for industrial use.

Assigned to a pod of nine other cells, I could easily sense the lower degree of tension on Pittsburgh's death row. Men spoke to each other easily, whether guard or inmate. A thirty-something guard with three chevrons on the shoulders of his gray uniform walked up to the door, identified himself, and gave what seemed to be his standard rap: "Here at Pittsburgh the rules are simple: you don't fuck with us—we don't fuck with you; you treat us like men—we'll treat you like a man; if you give us shit—we'll give you shit."

When I discussed this with guys on the pod, they said everybody got the same rap—and I was assured they meant it. As a rule, I was informed, they did not harass the men, and they did not set up and "false- ticket" prisoners (give bogus misconduct reports based on lies or concoctions). That accounted for the low level of tension sensed there. For the duration of the civil TRO/PI hearing, this would be where I slept. Although the civil court session began at nine o'clock in the morning, court began for me shortly before 5 a.m., with a guard opening the pie slot in the door and placing a tray therein. A quickly swallowed breakfast, a shower, and it was on to the receiving room. There, a dark suit jacket and trousers would be found, and inseams would be stapled to make the slacks stay up.

By a quarter after six, I would be chained, shackled, and seat- belted in the back of a white DOC vehicle, en route to the federal building. The armed DOC guards were a Mutt and Jeff team, one short, the other tall; one driving, the other riding shotgun. The daily escort was a state trooper, in a marked vehicle, with lights flashing through the streets of the north side.

Arriving at the federal building meant being met by at least twelve U.S. Marshals, who took custody of the prisoner. It is difficult to describe the sensation of being "escorted" to and from the courtroom by a phalanx of approximately twelve armed U.S. marshals, but it happened so often (at least four times a day) that it seems it should have become routine.

The magistrate judge began the day's session by stating:

> Good morning, all. Before we begin—and I sincerely want this not to be offensive or insulting to anyone, because no one has given me any reason to believe that there will be any misbehavior or misconduct of any kind—but it is important, I think, that I begin by informing all concerned that I will rigorously enforce... the principle that behavior in court must be appropriate at all times . . . .

> Consequently it is appropriate for me to say at the beginning that if there is any display of emotion, if there is any outburst, if there is any misbehavior or misconduct, then I will ask that the marshals and court security personnel remove the person who engages in that misconduct. There will be no second chance. Once someone is removed from the courtroom, they will not be allowed back in . . . .

Clearly, the tone was set. The warning seemed virtually to expect some form of disruption, but where did this notion come from? Perhaps the marshals, who seemed to anticipate some form of violence, had whispered such suggestions in the judge's ear. It was unclear.

There was a barely audible grumble of resentment, but it passed quickly. Jere, who visited me briefly down in the holding cell area, accompanied by attorney Rachel Wolkenstein, confided that the magistrate had formerly been in the employ of the Department of Corrections, and as such, might not prove impartial in a case where prison officials were named as defendants. Under the Federal Rules of Civil Procedure, a motion could be brought to recuse him, Jere counseled. After some consideration, this option was rejected. He would do.

As I sat shackled in the plaintiff's seat, I looked at the man, seeking a gestalt-like impression of him. Yet he rarely, if ever, looked in my direction. As the civil TRO/PI hearings took place in the same period as the state PCRA (post-conviction) criminal hearings in Philadelphia, I was struck by the apparent differences between this federal magistrate and former common pleas judge Albert F. Sabo. Although both appeared to be relatively short men, Sabo would occasionally glare down at the defendant's bench, his hatred a palpable, tangible thing. Where Benson seemed glacial and professionally distant, Sabo seemed invested. His long, baleful, venomous stare, lasting for perhaps a quarter of a minute, was so nasty that I almost prayed someone else took notice of it.

Seeing no such overt expressions of malevolence, I reasoned Benson would be no better or worse than any other jurist. The hearing began with attorney Leonard I. Weinglass taking the stand. Speaking of the initial reason the suit was filed, Weinglass spoke of learning that letters he wrote to me were seized, opened, held, and delivered in that state to me over a week later. He spoke of his paralegals being unceremoniously turned away from the prison. He spoke slowly, lawyerly, of learning that my letters to him never arrived at his office. He called this succession of events "unprecedented" and "shocking." In nearly thirty years of law practice, Weinglass said, he had never seen such interference with his and his client's legal correspondence.

It was for this very reason, he explained, that paralegals were utilized; to provide a channel of communication that was not compromised.

Under prompting by counsel, Weinglass recounted receiving a letter written by me, explaining that the "state has opened and reviewed your letters/documents . . . outside of my presence—there isn't even the pretense of client-lawyer confidentiality." This was confirmed when a photocopy of my letter to Weinglass, and this letter to me, turned up in the Commonwealth's file, found during the course of discovery for the case. Krakoff continued his examination of Weinglass:

> Q: When you wrote Mr. Jamal on August 16, 1994, did you send a copy of the letter to prison officials or to the Department of Corrections personnel?
>
> A: No.
>
> Q: Prior to writing Mr. Jamal on August 16, had you authorized prison officials or the Office of General Counsel or anyone within the Governor's Office or the Department of Corrections to read your mail?
>
> A: No, hardly.
>
> Q: Had you authorized any of them to photocopy your mail?
>
> A: No.
>
> Q: Had you authorized them to read the enclosed materials that you sent to Mr. Jamal on the 16th?
>
> A: No.
>
> Q: Had you authorized them to distribute your letters to anybody?
>
> A: No.
>
> Q: Had you authorized them to retain your letters in a file?
>
> A: No.
>
> Q: Did you expect that your letter would not be read by prison official when you sent it to Mumia Abu-Jamal on the 16th of August?
>
> A: In over twenty years of practicing law, to my knowledge no letter that I had ever written to an inmate had ever been opened or read by prison officials. And I expected the same would apply in this instance.

Informed of this breach of confidentiality, neither counsel nor client could dare write the other, for fear such correspondence would find its way into the hands of the state. Similarly, mail from another of my lawyers, Rachel Wolkenstein, was seized by the DOC, photocopied, and forwarded to various government officials. Her letter, properly marked as legal mail, contained a copy of a witness statement that was helpful to the defense. Her mail, she testified, went the same way as Len's mail: out of the prison, out

of the DOC, and to various agencies of government.

Like Weinglass, Wolkenstein, an experienced criminal lawyer found this experience to be "unprecedented." Neither this witness statement, nor a lawyer's memo, were ever returned, nor acknowledged by the state.

The DOC's attorney, David Horwitz, would attempt to mitigate these actions by prison officials by arguing that the seizure of legal papers was justified by the ongoing "investigation" into whether a rule prohibiting prisoners from engaging in a business or profession was being violated.

In this testimony, Horwitz ordered further investigation even as prison officials announced they had more than sufficient evidence to prepare an institutional misconduct as noted in a memo written by Horwitz liaison and grievance officer Diane Baney:

> It has recently been brought to our attention that Mumia Abu-Jamal, AM-8335, may be violating Department of Corrections policy by accepting payment for interviews, essays, etc. This information came to light when National Public Radio announced that Abu-Jamal had produced 10 three to four minute commentary radio shows which he would be compensated for in the amount of $150.00 apiece. Upon reviewing his account, it was detected that he had received payment from other publications which went unnoticed and were placed in his account. On 5-16-94, NPR issued a decision that the commentaries would not be run. However, they did indicate that Abu-Jamal would be compensated with a standard "kill fee" of $75.00 each, which is given when work is accepted but not used.
>
> It is clear that Abu-Jamal is in violation of Department of Corrections policy . . . .

This Baney memo, sent to Horwitz, was dated May 18, 1994. Yet the so-called investigation continued for over a year, thus allowing the state to peruse my legal mail, dealing with critical issues involving my state court appeals and conviction, with impunity!

The warden at Huntingdon Prison advised his superiors at the DOC Central Office that sufficient information had been gathered to prove a violation of DOC policy, and therefore further mail scrutiny was unnecessary. Horwitz rejected the warden's recommendation and ordered the "investigation" to continue. He admitted at the TRO/PI hearing that he ordered all legal mail intercepted, had its contents removed and photocopied, and sent copies to his office. He copied these items, and forwarded them to Brian Gottlieb of the governor's office in Harrisburg, and to Cheryl Young, chief counsel. Horwitz testified he had no idea what these persons did with

these items of privileged legal correspondence: [Questions on direct examination by the plaintiff's co- counsel, Timothy O'Brien:]

> Q: Now, one thing is clear, Mr. Horwitz, with respect to Mr. Weinglass's letter—to whatever extent you read it—you came to the conclusion, did you not, that only two paragraphs in that entire correspondence could conceivably have anything to do with the investigation that you were conducting, isn't that so?
>
> A: Yes.
>
> Q: With respect to Mr. Jamal's letter to Mr. Weinglass, you came to the conclusion that nothing in that correspondence could be of assistance to you in your investigation; isn't that correct?
>
> A: That's correct.
>
> Q: So you, before you disseminated this information to anyone else, you had concluded that there was privileged material in the correspondence that had nothing to do with your investigation, correct?
>
> A: That's correct.
>
> Q: You also came to the conclusion that there are materials in the correspondence that had to do with Mr. Jamal's defense of the death case; isn't that correct?
>
> A: That's correct.

He further stated that the invasion of the attorney-client correspondent privilege was needed to determine whether lawyers were helping me to evade the business or profession rules.

Another witness who testified for the defendants was James Hassett, the head of Greene's security staff. It was he who actually opened, read, and photocopied legal letters and documents for forwarding to David Horwitz of DOC central office, and who wrote the misconduct report of June 2, 1995, and signed the document. The report the writer attempted to explain the delay by claiming "the justification for the timing of the misconduct is that the investigation was not completed until May 19, 1995, and that the assembly of the evidentiary materials in presentation format required additional time." In fact, Hassett's explanation fell flat when he testified at the hearing, for there he admitted that Horwitz had prepared the report, not he. And as we have seen from the Baney memo of May 18, 1994, Horwitz had more than enough "evidentiary materials" to show a violation of the business and profession rule—if that was their actual intent—fully a year before!

Thomas Fulcomer, a former warden at Huntingdon and later deputy regional commissioner of the DOC, advanced the department's justification

for their punishment for my writing. The DOC, Fulcomer announced with a straight face and an impressive title, was concerned about what he termed the "big wheel syndrome," or the circumstance where a prisoner "persistently and flagrantly violates Department of Corrections policies," and by so doing becomes a countervailing authority in the prison. Fulcomer's testimony was a smart one, as it was designed to tickle a judge's core fear and concern when deciding any prison case: security. It had several key problems, however: (a) Hassett, the DOC's point man during the so-called investigation, and Greene's chief of security, could point to no "big wheel" effects at Greene, and when asked about the impact of the publishing of Live from Death Row on the prison, admitted that guards had to field questions from prisoners about how they could put out books; and (b) Ted Alleman, a former teacher at Huntingdon, testified that the prison not only had not opposed the publishing of a book by a prisoner there, but had supported and facilitated it. Alleman set up a small publishing outfit to put out a book written by the late Aubrey "Buddy" Martin, a former death row prisoner at Huntingdon. Guess who was the warden at that time? When testimony was provided showing that the prison had actually allowed and assisted in radio interview of Martin to promote his book, Fulcomer's "big wheel" theory sprang a major leak, for he never utilized this rationale when he was the warden at Huntingdon. Martin was never given a misconduct sanction for this book, or even threatened in that regard. In fact, he was praised for it.

Martin, serving several life terms stemming from the January 1970 slayings of United Mine Workers leader Joseph "Jack" Yablonsky along with his wife and daughter, was an accomplished painter and sculptor. Huntingdon officials provided him studio-like space to do his work, and later applauded the publishing of his book, which featured photographs of many of his works of art. In direct examination by Mr. O'Brien, Alleman testified:

> Q: Mr. Alleman, after you came to know Mr. Martin, did you become aware of a book that he was writing?
>
> A: Buddy Martin was a student of mine in my class and I knew him for many years, and over a period of time we started to talk about documenting his life story, and that eventually resulted in a book.
>
> Q: And was this book written by him while he was incarcerated at the State Correctional Institution in Huntingdon?
>
> A: Yes.
>
> Q: And when the book was written and while it was being written, was it understood that this book would be published for purposes of sale outside the institution?
>
> A: Yes.

Q: And did you in fact have a publishing company at that point in time?

A: The publishing company was formed in 1985 and it was formed for the purpose of publishing this book.

Q: And was there a contract between yourself and Mr. Martin with respect to the publishing of the book?

A: Yes.

Q: And could you tell the Court whether, in accordance with the contract, if there were sales of the book in question, whether Mr. Martin was to receive any royalties?

A: The contract was that the publishing company would receive the initial revenue from the book up to the point where the costs of publication were covered, and then there was a fifty-fifty split on royalties of the book.

Q: And could you tell the Court, with respect to any of these efforts to involve the media with Mr. Martin regarding the sale of this book, if there was any involvement whatsoever with SCI Huntingdon?

A: The book was partially promoted through talk shows, and the situation was such that I was live on the air with a talk show host from my office at Tower Press, and the institution provided the capability for Buddy Martin to be in a room with a telephone and he was also live on the air and we answered questions from both the host of the show and the general public that would call in with questions....

Q: Now, aside from these particular interviews, was the institution otherwise aware of this book having been written and published?

A: Yes.

Q: Were there any reviews of the book in the local newspapers, for example?

A: Yes.

Q: What were these?

A: Well, the Huntingdon paper did a review, an extensive review of the book, and also I was on a talk show with the local host in the town of Huntingdon.

Q: Okay. And when the book was published, was there any accompanying public opposition to the book by any influential political group?

A: No, not that I know of.

Q: To your knowledge, from the date that the book was published to the date that Mr. Martin passed away, was he ever disciplined for writing the book on the basis that he had

> violated a rule at SCI Huntingdon prohibiting the conduct of a business or a profession?
>
> A: No, not at all.

So much for the "big wheel" theory. The trial, like all trials, was only tangentially about truth; central to these public performances is power, and how power is defended, articulated, used, and hidden. The state, of course, is used to exercising power, but it is rarely asked to justify its use. And when forced to answer to its use of power behind prison doors, it resorted to the handiest tool in an age-old arsenal—lies. Nonsense about "big wheels" and "security" and "burdens upon staff" were administrative lies designed to obscure a naked political attack against a radical voice that they opposed.

III. THE MAGISTRATE RULES

Magistrate Judge Benson heard all of the principals testify at hearings in September and October 1995. Lawyers Jere Krakoff and Tim O'Brien battled in raging paper wars against Thomas Halloran of the attorney general's office.

In early June 1996 Benson issued a remarkable "Report and Recommendation" that was sixty-six pages long. Among the sources quoted or cited from were former British Prime Minister Winston Churchill3 and U.S. President Abraham Lincoln.4 He lauds the defendants as "conscientious" and "scrupulous" men,5 and goes out of his way to describe one of the defendants: "Superintendent Price appeared to this court to be an estimable man in every way."6 He goes on, however, to point out how they lied either on the stand or in sworn depositions, for example:

> [Finding of Fact] 64. Superintendent Price's explanation that requests for interviews with plaintiff were denied due to limited staff resources are not entirely credible[7]
>
> . . .
>
> [T]he decisions to deny plaintiff media interviews were first made Immediately [sic] after plaintiff's decision to publish his book was communicated to defendants [DOC deputy general counsel David] Horwitz and Price. The decisions continued, with a variety of purported justifications,

---

[3] Abu-Jamal v. Price, No. 95-618, 1996 U.S Dist. LEXIS 8570, at *5 (W.D. Pa. June 6, 1996). *Id.* at *4.

[4] *Id.* at *3-*4.

[5] *Id.* at *5.

[6] *Id.* at *6.

[7] *Id.* at *34.

for several months. These purported reasons are demonstrably false. There is no credible evidence that the conditions at the prison were such that security concerns necessitated denying the requests for interviews.[8]

Despite the court's finding that prison officials put forth "demonstrably false"[9] evidence in support of their actions, Benson found their "big wheel" defense a "reasonable" one, and a "legitimate concern of the institution."[10] He therefore upheld the "business or profession" rule as constitutional, and upheld the state's right to open and read privileged legal mail, if that rule was being violated.[11] To this U.S. judge at least, a prison rule was more important than the First Amendment to the U.S. Constitution. If I wrote for publication, I could be punished for doing so, and my legal mail could be rifled. The state was allowed to refuse paralegals if unlicensed, even if no such licensure is now possible. The state was enjoined from denying media interviews and from disclosing the contents of legal mail to persons outside of the DOC.

After my years of studying civil cases, nothing in the opinion was unexpected to me. Krakoff prepared for appeals.

I resolved to continue writing, no matter what. The district court upheld the main points of the magistrate's recommendation, although expanding the legal mail provisions. We therefore had to go on.

IV. THE COURT OF APPEALS

Although relatively little known in America (quick—name three judges on your circuit court of appeals!) the circuit courts of appeal are the final arbiters of almost every legal conflict in the nation. They are the last court before the U.S. Supreme Court, a body that hears (in the last decade or so) roughly seventy-five cases a year, and as such refuses to hear thousands of cases throughout the court term.

Pennsylvania is the largest state in both population and area in the U.S. Court of Appeals for the Third Circuit. It was to this court, one described as among the most conservative, that the case would be appealed. The panel randomly selected to hear the case were similarly some of the court's more conservative jurists, Judges Richard L. Nygaard, Samuel A. Alito, Jr., and Donald P. Lay, a judge from the Eighth Circuit (having jurisdiction over the southern and mid-western areas of the country), sitting by designation.

---

[8] *Id*. at *75.

[9] *Id.* at *75.

[10] *Id.* at *60 (footnote omitted).

[11] *Id.* at *88-*89.

Initially, the Third Circuit noted the "formidable barrier"[12] to a prisoner's claim that a prison regulation is unconstitutional. That "barrier" is a 1987 U.S. Supreme Court case known as the Turner v. Safley[13] ruling. In Turner, the nations highest court ordered deference to prison officials in many of their administrative decisions if those decisions were "reasonable."[14] Turner established a four-part test as to whether a given prison regulation is reasonable: (1) there must be a valid, rational correlation between the regulation and the government objective at issue; (2) alternative means must exist to exercise the prisoner's asserted right; (3) the impact that accommodation would have on the prison environment, and prison resources generally, must be taken into account; and (4) the existence (or absence) of ready alternatives must be considered.[15]

When the First Amendment is implicated, the regulation, to be approved, must be content-neutral.[16] The Third Circuit panel looked at the appeal through that four-part test, and declared that

> [t]he superintendent of the S.C.I. Huntingdon was aware of Jamal's writings when Jamal published the Yale article in 1991. An August 16, 1992 letter to the Department noted that Jamal was approaching publishers regarding a book deal. Nevertheless, the Department did not begin to investigate him until May 6, 1994, after National Public Radio sought permission to broadcast Jamal's interviews as regular commentaries. The district court determined that "the investigation was initiated after public complaints concerning Jamal's proposed NPR commentaries were made by the Fraternal Order of Police" and concluded that any delay in the Department's enforcement of the rule was attributable to its investigatory procedures. As a result, it held that Jamal was unlikely to succeed in showing that the action was in retaliation against the content of his writings. We disagree, and conclude that the district court erred.[17]

Without specifically mentioning the "big wheel" theory, the court's opinion seemed to give this idea little weight, finding the prison could easily accommodate the activities of a writer, because "the record contains no

---

[12] Abu-Jamal v. Price, 154 F.3d 128, 132 (3d Cir. 1998).

[13] 482 U.S. 78 (1987).

[14] *Id.* at 89.

[15] *Price*, 154 F.3d at 133 (citing *Turner*, 482 U.S. at 89-91).

[16] *Id.*

[17] *Id.* at 134 (emphasis added).

evidence of such a 'ripple effect.' As explained before, Jamal was acting as a journalist from 1986, and the Department did not claim to be burdened by his actions until the Fraternal Order of Police outcry in 1994."[18]

The court found the justification for the state's rifling of attorney privileged mail to be pretextual, writing

> [t]he district court held that the reading and copying Jamal's legal mail was acceptable if the prison officials had "a reasonable suspicion that plaintiff was violating an institutional regulation by engaging in a business or profession in which wittingly or not one or more of his attorneys was complicit." The Department argues in support that its decision to open Jamal's legal mail was necessitated by its investigation into whether Jamal was conducting a business or profession. This argument is nonsensical. We have difficulty seeing the need to investigate an act that Jamal openly confesses he is doing. Jamal's writing is published, and he freely admits his intent to continue. Continued investigation and enforcement of the rule invades the privacy of his legal mail and thus directly interferes with his ability to communicate with counsel.[19]

We had won two of the three issues appealed to the court and lost the third. On the state's barring of paralegals, the circuit court agreed. The court determined that a paralegal was also a social visitor (even though she actually did act as a courier for legal papers from counsel), and paralegal visits were pretexts for what were really social visits.[20]

Thus, the court approved the application of a "rule" that had never been applied elsewhere, and was neither written nor disseminated to the general population. As such, it was as much a new "rule" (that is, one never utilized) as the "business or profession" rule, if not more so. For here was a "regulation" that required satisfaction that was impossible to meet: state licensure. SCI Greene's Superintendent Price wrote a letter to my lawyers dated February 24, 1995, that stated:

> It is not sufficient merely to designate persons as investigators and paralegals unless the identified individuals can produce documentation that they are investigators or credentialed paralegals acting under

---

[18] *Id*. at 135.

[19] *Id*. at 136 (emphasis added).

[20] *Id*. at 136-37.

> contract with or as employees of the attorney. Accordingly, please submit copies of the state licensure documents and paralegal credentials under which these individuals conduct business as investigators, or paralegals and such contract or employment documents which verify their relationship with your office as independent contractors or employees.

Krakoff assembled an impressive array of affidavits from another state prison superintendent, secretaries, and other personnel associated with several state legal services programs, which proved these conditions were unprecedented. Indeed, many working paralegals had no such formal training, or certification, or degrees. Indeed, at trial the DOC softened its stance, suggesting that some equivalent training would suffice in lieu of credentialing (although Horwitz never communicated this to defense counsel). In fact, in Pennsylvania, no licensure for paralegals is provided.

On this issue, however, the circuit court deferred to the state, reasoning that "visitation—whether it is legal or personal—may jeopardize the security of a facility" (Third Circuit, 15). Thus, the interests of the state prevailed.

V. AFTER THE COURT DECISION

No case is really over when a court issues its decision. This is especially so in prison civil rights cases, when the winner (a prisoner) goes back into the custody of the loser (the prison). While courts regard prisons as institutions to which they owe deference, prison administrators regard courts as institutions that deserve a barely concealed contempt. They are to courts what pimps are to prostitutes: useful perhaps, but hardly ever respected.

Prison administrators oppose court orders as the work of interlopers, and are sure to undermine such edicts, if not openly. After Jamal v. Price it would seem that if anything is safe, it would be privileged legal mail from lawyers. Several months after the circuit court ruling a letter arrived from a lawyer, with her name, her title (Esquire), her law office address, and the legend "legal mail" stamped on the front of the envelope. The envelope was ripped open and taped shut, and the words "opened by mistake" were scribbled on the envelope face.

Neat, huh?

See with what ease a court's order is made obsolete?

In a nation that claims to be run in strict accordance with the tenets of the Constitution, in which the Constitution and its amendments are termed the "supreme law of the land," what should be the fate of one who violates the "supreme law"?

What about nothing at all?

The prison warden who ordered and participated in some of the unconstitutional acts, and who lied on the stand, James Price, remained prison superintendent, working briefly at SCI Pittsburgh in that role, until his return to Greene, retiring from the post in the spring of 1999. He remains a consultant to the superintendent at Greene.

The deputy commissioner, Thomas Fulcomer, who signed off on some (if not all) of the unconstitutional actions of his subordinates at Huntingdon and Greene, who propounded the preposterous "big wheel" theory in court (while applauding the publication of one of his prisoner's books while warden at SCI Huntingdon) remains western regional deputy commissioner of the DOC.

The Greene head of security, James Hassett, who actually illegally opened, read, and copied legal correspondence from both the court and counsel (and from me to the court and to counsel) was a captain when he testified. He is now a major.

The lesson could hardly be clearer that the DOC regards violations of the so-called supreme law of the land as little more than a mere annoyance.

In such a context, what can the word "unconstitutional" really mean? That term, which seems to go to the core principles upon which the state rests, is instead a minor obstruction, which pales beside the state's coercive powers. It is, in fact, the civil equivalent to the slap on the wrist given to the offender. In the midst of the hearings I asked Jere to speak to the magistrate judge about wearing the shackles for hours on end in the courtroom. After several long days in shackles, of sitting in pain, I thought it was time for the court to act. Jere did talk to the judge, who said it was out of his hands. It was a decision made by the marshals, and he had no say in the matter.

To sit in pain, for hours, for days, in a U.S. courtroom during a so-called hearing to determine if someone's civil rights were violated months before is an exercise in Kafkaesque absurdity. Is this not an admission of judicial impotence for something that happens right there in the courtroom? "Out of my hands, pally."

Indeed, how can any court that draws its authority and jurisdictional powers from the Constitution decide, in any case, that any administrative regulation, which contemplates punishment for exercise of one's constitutional rights, is superior to the Constitution?

In such a context, how can the constitution be deemed to be anything other than irrelevant? Courts are inherently conservative institutions that loathe change, and defer to the status quo. That is, they tend to perpetuate existing power relations, even though their rhetoric perpetuates the illusion of social equality. In many instances, courts barely conceal their hostility to prisoner litigants, as evinced by increasingly restrictive readings of rights raised in the courts these days.

In that sense then, Abu-Jamal v. Price was different from some cases, yet strikingly similar to others.

From death row, this is Mumia Abu-Jamal.

Has the Marijuana Classification Under the Controlled Substances Act Outlived Its Definition?

JUDGE MARY A. CELESTE & MELIA THOMPSON-DUDIAK[†]

I. INTRODUCTION

Under the Control Substances Act ("CSA"), marijuana is currently scheduled as an "I" drug.[1] In a classification of "V" schedules, "I" is considered the most dangerous because it is deemed to have a "high potential for abuse" and "no medical value."[2] It ranks alongside other substances such as heroin and phencyclidine ("PCP"), thereby signifying that the federal government considers marijuana more dangerous than cocaine (Schedule II) and Xanax (Schedule IV).[3] According to the CSA, any violation of a substance listed as a schedule "I" drug is subject to the harshest penalties.[4] Accordingly, using, manufacturing, importing, or distributing marijuana could result in various penalties.[5] Individuals involved in marijuana businesses can receive up to five years in prison and simple possession with no intent to distribute is a misdemeanor with fines ranging from $250,000 to $1 million,[6] or punishable by up to one year in prison and a minimum fine of $1,000.[7]

[†] Judge Mary A. Celeste (ret.) sat on the Denver County Court bench 2000-2015. She was the Presiding Judge 2009-10 and the co-founder of the Denver County Court Sobriety Court. She is currently a law school professor teaching Marijuana and the Law at California Western School of Law. She is a national expert and speaker on the topic of marijuana and has also written on the topic. Please visit her website at judgemaryceleste.com for more information.

Melia Thompson-Dudiak's work aims to empower women and people of color by exploring issues of social justice, global public policy, and equity. She also operates a private law practice in California, which focuses on building generational wealth and establishing strong foundations through Estate Planning and Business Development. Additionally, she is writing a novel based on her life and world travels.

The author may be reached at mthompsondudiaklaw@gmail.com.

[1] 21 U.S.C. §812 (2018).

[2] *Id.*

[3] U.S. DRUG ENF'T ADMIN., *Drugs of Abuse, a DEA Res. Guide*, https://www.dea.gov/drug-scheduling (last visited May 17, 2020).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Federal Marijuana Laws*, FINDLAW (Jan. 23, 2019), https://criminal.findlaw.com/criminal-charges/federal-marijuana-laws.html.

Despite marijuana's classification under the CSA and its established corresponding penalties, with the exception of federally-controlled land,[8] the military, and other federally-related agencies,[9] the Attorney General's ("AG") offices under both the Obama Administration[10] and under the current Trump Administration,[11] have not sought to prosecute either states that have adopted marijuana laws, or businesses and individuals who sell or use marijuana in accordance with state marijuana regulations and laws.[12] Among several factors, the federal government's inclination to refrain from prosecuting under the CSA has opened the door and invited challenges against marijuana's current CSA classification.

Over the years, the National Organization for the Reform of Marijuana Laws ("NORML"),[13] which first challenged the CSA's classification of marijuana in 1974 as plaintiffs,[14] has brought the lion's share of cases objecting to marijuana's classification.[15] The classic arguments presented include challenging the classification on the basis that there is indeed evidence proving some medical benefits of marijuana and it is not as dangerous or as potentially abusive as heroin and PCP, two of its classification mates.[16] The typical defendants for such cases have been the AG's Office and the Drug Enforcement Administration ("DEA") on behalf

---

[8] *Federal Laws and Penalties*, NORML, https://norml.org/laws/federal-penalties-2/ (last visited July 15, 2020).

[9] *See e.g.*, A.G. Herrington, *Federal Aviation Administration Issues Advisory on Cannabis Policy for Pilots*, HIGH TIMES (June 18, 2019), https://hightimes.com/news/federal-aviation-administration-issues-advisory-cannabis-policy-pilots/; *see also* Angela Robinson, *Updating Drug Screen Protocols in Light of New Marijuana Laws*, OCCUPATIONAL HEALTH & SAFETY (Apr. 30, 2020), https://ohsonline.com/articles/2020/04/30/updating-drug-screen-protocols-in-light-of-new-marijuana-laws.aspx

[10] Memorandum from the U.S. Dep't of Just., Off. of Att'y General: To all United States Att'ys (Feb. 14, 2014), https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf [hereinafter Cole Memo]; Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just. To all United States Att'ys, Guidance Regarding Marijuana Enf't 3 (Aug. 29, 2013), https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf.

[11] Memorandum from the U.S. Dep't of Just., Off. of Att'y Gen. to all U.S. Att'ys, (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement; *Barr on Marijuana Laws: 'We can't Stay in the Current Situation,'* WASH. POST (Jan. 15, 2019), https://www.washingtonpost.com/video/politics/barr-on-marijuana-laws-we-cant-stay-in-the-current-situation/2019/01/15/6eae9fe7-68bb-4ee6-95bb-7937d732dca3_video.html.

[12] *Id.*

[13] *See generally* NORML, https://norml.org/ (last visited May 20, 2020).

[14] Nat'l Org. for the Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 654-55 (D.C.Cir. 1974).

[15] Nat'l Org. for the Reform of Marijuana Laws v. Drug Enf't Admin., 559 F.2d 735 (D.C. Cir. 1977); Nat'l Org. for the Reform of Marijuana Laws v. Drug Enf't Admin., No. 79–1660 (D.C. Cir. 1980); *see also* Alliance for Cannabis Therapeutics, v. Drug Enf't Admin., 930 F.2d 936 (D.C. Cir. 1991); U.S. v. Pickard, 100 F. Supp. 3d 981 (2015); *Washington v. Sessions*, 17 Civ. 5625 (AKH) (S.D.N.Y. 2018); *Judge Tosses Lawsuit Challenging Federal Marijuana Laws*, WASH. POST (Feb. 27, 2018),https://www.pressherald.com/2018/02/27/judge-tosses-lawsuit-challenging-federal-marijuana-laws/

[16] U.S. DRUG ENF'T ADMIN., *supra* note 3.

of the federal government.[17]

Often, courts defer to Congress on the matter of CSA classifications under the theory that courts should not legislate from the bench.[18] Some courts have defended the current CSA classification by focusing on international treaties,[19] while some have concentrated on procedural issues such as exhausting administrative remedies arguments;[20] others, perhaps most commonly, have pointed to a lack of sufficient scientific evidence supporting marijuana's purported medical benefits.[21] However, as medical marijuana perceptions change, arguments regarding marijuana's medical benefits seem to be strengthening. For instance, courts have addressed this issue by acknowledging the growing number of states allowing medical marijuana and the growing science around marijuana's potential medical benefits.[22] Still, none have yet found that the current science meets the threshold of an actual medical benefit.[23]

Considering these several challenges, every case up through the 2019 *Barr* case has been unsuccessful.[24] The *Barr* case, however, was a departure from the usual arguments in that among the plaintiffs were actual individuals who alleged the current scheduling of marijuana poses a serious, life or death threat to their health.[25] It also deviated from other court challenges in that the federal court of appeals held the case in abeyance. The court stated:

> [w]e agree with the District Court's ruling that, since Plaintiffs failed to exhaust their administrative remedies, we should not hear their suit at this time. In view of the unusual circumstances of this case, however, we retain jurisdiction in this panel for the sole purpose of promoting speedy

---

[17] *Id.*

[18] Gonzales v. Raich, 545 U.S. 1, 2 (2005) (Congress may regulate the use and production of home-grown marijuana as this activity, taken in the aggregate, could rationally be seen as having a substantial economic effect on interstate commerce.).

[19] Nat'l Org. for Reform of Marijuana L. v. U.S. Dep't of State, 452 F. Supp. 1226, 1235 (D.D.C. 1978).

[20] Washington v. Barr, No. 18-859, 3 (2nd Cir. 2019), https://law.justia.com/cases/federal/appellate-courts/ca2/18-859/18-859-2019-05-30.html (dismissing, with prejudice, plaintiffs' complaint for failure to exhaust administrative remedies and, in the alternative, failure to state a claim.).

[21] Isbell v. State, 428 So. 2d 215, 217 (Ala. Crim. App. 1983) (While marijuana *may* be useful in the treatment of some medical conditions, it has not achieved *accepted* medical use or safety in its prescription and application.).

[22] *Id.*

[23] *Id.*

[24] Stephen Jiwanmall, *Medical Marijuana Case Prompts Push for Reform*, LEHIGH VALLEY PUB. MEDIA (Oct. 9, 2019), https://www.wlvt.org/blogs/lehigh/medical-marijuana-case-prompts-push-for-reform/.

[25] *See Barr*, No. 18-859, at 4–5.

administrative review.[26]

This position could indicate that courts may be more open to recognizing the potential medical benefits of marijuana, which is contrary to the classification's definition. However, in October 2020, the Supreme Court declined to hear the appeal on dismissal.[27] The newest challenge to the classification has been brought by scientists and veterans filed in May 2020.[28] The plaintiffs stated that the DEA's determination that there's a "lack of accepted safety for use of marijuana under medical supervision" is wrong because it "misconstrues the statute and is arbitrary, capricious, and contrary to law because the agency has improperly imported a clinical efficacy requirement."[29] They also argue that it is "'an unconstitutional delegation of legislative authority' that 'violates core separation of powers principles' by granting the attorney general authority to schedule drugs on his or her discretion based on an interpretation of international treaty obligations."[30] Even if it did meet the threshold, however, there is no guarantee this court would not still be hesitant to assume Congress' responsibilities by altering marijuana's scheduling, as such action could be perceived as legislating from the bench.

Recently, Congress, aware of the challenges for courts and the schism between state medical and recreational marijuana laws and marijuana's federal CSA classification, has presented many bills. The majority of these bills attempted to protect and defend legalizing marijuana, and have ranged from making marijuana's legality a matter of states' rights,[31] to full legalization,[32] to rescheduling,[33] to de-scheduling, to banking and

---

[26] *Id.* at 2.

[27] Order for Denial of Cert. (20A35), Arrana-Molina v. Barr, 592 U.S. (2020)

[28] Kyle Jaegar, *Scientists and Veterans File Lawsuits Challenging DEA's Marijuana Rescheduling Denials*, MARIJUANA MOMENT (May 28, 2020), https://www.marijuanamoment.net/scientists-and-veterans-file-lawsuit-challenging-deas-marijuana-rescheduling-denials/

[29] *Id.*

[30] *Id.*

[31] Strengthening the Tenth Amendment Through Entrusting States Act, H.R. 2093, 116th Cong. §2 (2019) (protecting states' rights to enact their own marijuana polices without federal interference.); *see also* Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884, 116th Cong. §2 (2019) (allowing states to set their own polices by decriminalizing and descheduling cannabis. It also contains strong social equity provisions emphasizing restorative justice for communities most impacted by cannabis prohibition.).

[32] *See, e.g.*, Regulate Marijuana Like Alcohol Act, H.R. 420, 116th Cong. §201 (2019).

[33] Marijuana Opportunity Reinvestment and Expungement Act, *supra* note 31

bankruptcy protections,[34] to veteran issues,[35] and more. Historically, Democrats have been more supportive of legalizing marijuana;[36] however, two recent bills have included bi-partisan sponsorship. One bill seeking to protect medical marijuana was sponsored by Congressmen Matt Gaetz (R-FL) and Steve Cohen (D-TN),[37] while the States Act included Senators Cory Gardner (R-CO) and Elizabeth Warren (D-MA).[38]

Additionally, the federal budgets from 2014[39] through 2019[40] included amendments ("rider(s)"), which legally prevent the Department of Justice ("DOJ") from using DOJ funds to prosecute medical marijuana in all of its related associations such as end users and dispensaries.[41] As long as states developed and enforced their own regulatory systems, the DOJ would "use [its] limited resources efficiently" by deferring prosecutorial measures to states.[42] As a result, the DOJ is constrained through these budget amendments from prosecuting offenders in states with medical marijuana laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[43]

However, the Trump administration has remained firm that even "clear and unambiguous compliance with state law . . . did not provide a legal defense in a federal prosecution for CSA crimes," and regardless of state law, those in violation of the CSA "remained subject to federal

---

[34] Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. § 10 (2019) (aimed at preventing federal regulators from punishing financial institutions for providing services to cannabis-related businesses operating in compliance with state laws.).

[35] The Compassionate Access, Research Expansion and Respect States (CARES) Act of 2019, H.R. 127, 116th Cong. (2019) (aimed at permitting states to implement medical cannabis programs without federal intervention. It would also allow physicians with the U.S. Department of Veterans Affairs to recommend cannabis to veterans.).

[36] *Political Issue: Marijuana*, HARV. KENNEDY SCH. INST. OF POL., https://iop.harvard.edu/survey/details/political-issue-marijuana (last visited May 19, 2020).

[37] The Compassionate Access, Research Expansion and Respect States (CARES) Act of 2019, H.R. 127, 116th Cong. (2019).

[38] *See generally Federal: Legislation to Protect State-Lawful Marijuana Businesses*, NORML, https://norml.org/act/federal-legislation-to-protect-state-lawful-marijuana-businesses/ (last visited May 19, 2020); *see also* Chloe Aiello, *Senators Gardner and Warren Release Bipartisan Marijuana Bill that Prioritizes State's Rights,* CNBC (Jun. 7, 2018 1:11 PM), https://www.cnbc.com/2018/06/07/senators-gardner-and-warren-release-bipartisan-marijuana-bill.html.

[39] Commerce, Justice, Science, and Related agencies Appropriations Act, H.R. 4660, 113th Cong. (2014).

[40] *Congress Extends State-Legal Medical Cannabis Programs' Protections Timing.* MARIJUANA BUS. DAILY. (Feb. 19, 2019), https://mjbizdaily.com/feds-extend-state-legal-medical-cannibs-programs-protections-2019

[41] Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348, §538 (extending §538 through September 30, 2018).

[42] *Id.*

[43] Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, 133 Stat. 13 §537 (2019).

prosecution."[44] In 2019, President Trump conditionally and begrudgingly signed the newest rider.[45] This protection was addressed in United States v. McIntosh,[46] in which the Ninth Circuit Court of Appeals interpreted the amendment's language and held that defendants may seek to enjoin the expenditure of such funds on federal drug trafficking prosecutions involving individuals who engaged in conduct authorized by state medical marijuana laws and who fully complied with such laws.[47] The Ninth Circuit noted that such a restriction by Congress on the DOJ was subject to change in the future because "Congress could appropriate funds for such prosecutions tomorrow."[48] Apart from this congressional rider, the only proposed congressional bill with any potential for success was the Secure and Fair Enforcement Banking Act ("SAFE Act") of 2019, which addressed issues with marijuana and banking.[49] The SAFE Act passed in the House of Representatives in 2019,[50] but ultimately joined the graveyard of thwarted marijuana bills when it failed to gain the needed support in the Senate.[51] The Marijuana Opportunity Reinvestment and Expungement Act (MORE 2019), which would allow states to set their own polices by decriminalizing and de-scheduling cannabis, and contained strong social equity provisions emphasizing restorative justice for communities most impacted by cannabis prohibition, has passed the House and will probably move on to the reconfigured newly elected Senate.[52]

Additionally, in January 2019, the WHO expressly recommended that cannabis be rescheduled and provided clarity to its treatment of

---

[44] *See* Tom Angell, *Congress Protects Medical Marijuana from Jeff Sessions in New Federal Spending Bill*, FORBES (Mar. 21, 2018, 8:02 PM), https://www.forbes.com/sites/tomangell/2018/03/21/congress-protects-medical-marijuana-from-jeff-sessions-in-new-federal-spending-bill/#7247d9fb3575; RIKER DANZIG SCHERER HYLAND & PERRETTI LLP, *Rohrabacher-Blumenauer Amendment is Renewed Through September 2018*, LEXOLOGY (Apr. 3, 2018), https://www.lexology.com/library/detail.aspx?g=49575d57-77b9-4e1d-9e2e-15b9c9925878.

[45] *Budget of the U.S. Government*, USA.GOV, https://www.usa.gov/budget (last visited May 2019); Tom Angell, *Trump Says He Can Ignore Medical Marijuana Protections Passed by Congress*, FORBES (Dec. 21, 2019), https://www.forbes.com/sites/tomangell/2019/12/21/trump-says-he-can-ignore-medical-marijuana-protections-passed-by-congress/#dfd764256fa3.

[46] U.S. v. McIntosh, 833 F.3d 1163 (9th Cir. 2016).

[47] *Id.* at 1173, 1177.

[48] *Id.* at 1179.

[49] Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. § 10 (2019).

[50] *Id.*

[51] *Id.*

[52] Alicia Wallace, *Cannabis Got a Big Win in Congress, but Legal Weed Isn't Around the Corner,* CNN.COM (Dec. 4, 2020 6:53 PM ET), https://www.cnn.com/2020/12/04/business/cannabis-more-act-house-vote/index.html

cannabinoids, like CBD.[53] While the UN has delayed taking action on the recommendation, it begs the question of whether or not we are on the verge of global cannabis policy reform.

Despite these failed Congressional attempts, in 2018, Congress removed Hemp's Schedule "I" classification with the passage of the Hemp Farming Act of 2018.[54] The hemp plant is part of the cannabis family along with the marijuana plant, but contains minuscule levels of the active psychoactive ingredient called tetrahydrocannabinol ("THC"), which is found in marijuana in much higher levels.[55] This Act not only declassified hemp, it carved out an exception to marijuana's scheduling by permitting the manufacture and use of marijuana plants to produce cannabidiol ("CBD") so long as the active ingredient, tetrahydrocannabinol ("THC"), was kept below .03 nanograms.[56] In conjunction with this change comes nearly sixty-six percent public support for legalizing marijuana,[57] with roughly sixty-five percent of states having legalized marijuana for medical use, recreational use, or both.[58] This perfect storm, along with the somewhat contradictory guidance from Congress regarding marijuana's classification, further complicates marijuana's definition under the CSA.

The following factors, including the growing court cases; the lack of a legislative solution in the face of the barrage of failed congressional bills to reconcile the CSA classification with state marijuana laws; the Farm Act permitting the use of the marijuana plant for very low level THC uses such as CBD; the hemp rescheduling; the increased passage of state marijuana laws; the continuation of the congressional riders protecting medical marijuana users from DOJ prosecutions; the increased research indicating at least some medical benefit to marijuana and a lack of a high potential for abuse; the federal government's sporadic and sometimes irrational enforcement and prosecution under the CSA with regards to marijuana; and the level of support from the populace;, indicate that an evaluation of whether marijuana's classification has outlived its usefulness may be necessary. Moreover, the federal classification of marijuana as a Schedule

---

[53] Robert Hoban, *The World Health Organization Says Reschedule Cannabis: Will the UN Agree?*, FORBES (July 13, 2020 9:00 AM), https://www.forbes.com/sites/roberthoban/2020/07/13/the-world-health-organization-says-reschedule-cannabis-will-the-un-agree/#30c5a56f6eef.

[54] Hemp Farming Act of 2018, H.R. 5485, 115th Cong. (2018).

[55] *Hemp*, ENCYCLOPEDIA BRITANNICA (Aug. 6, 2019), https://www.britannica.com/plant/hemp.

[56] Hemp Farming Act of 2018, H.R. 5485, 115th Cong. (2018).

[57] Scott Gacek, *Gallop Poll: 1 in 8 US Adults Smoke Marijuana Regularly, Nearly Half Have Tried It*, THE DAILY CHRONIC (Aug. 8, 2019), http://www.thedailychronic.net/2016/60927/poll-1-in-8-us-adults-smoke-marijuana-regularly-nearly-half-have-tried-it/; *see also* Aaron Homer, *A Record High 60 Percent of Americans Support Legalizing Marijuana*, INQUISITR (Oct. 20, 2016), https://www.inquisitr.com/3618748/a-record-high-60-percent-of-americans-support-legalizing-marijuana/#4UUoUvXlm3a5rzPW.99.

[58] Homer, *supra* note 57.

"I" drug under the CSA may have become "invalid through its long and continued non-use"[59] under the legal doctrine of, and applicable caselaw rooted in, desuetude, which holds that a statute may be abrogated because of its long disuse.[60]

As a base analysis, this article presents a preliminary overview of the constitutional division of authority between federal and state government on the issue of marijuana. By using employment issues as an example, this article will review how this legal schism has caused a split of authority in the courts on the topic of marijuana use. It will also explore whether marijuana's classification as a "most dangerous drug" with "no currently accepted medical use" and a "high potential for abuse" is consistent with its CSA definition. It will then turn to review standard equal protection and due process arguments along with such arguments under the legal doctrine of desuetude. Finally, the article will conclude by addressing whether the shift in modern perceptions about marijuana outlives the CSA classification also based on desuetude.

II. CONSTITUTIONAL DIVISION OF AUTHORITY BETWEEN FEDERAL AND STATE GOVERNMENT

The legal and regulatory regime surrounding marijuana leads to inconsistent expectations, as state and federal laws conflict, often to the extreme.[61] On one hand, the federal power to regulate marijuana emanates from Congress' Commerce Clause power[62] and the Supremacy Clause.[63] As such, the Supreme Court has held that the legality of marijuana ultimately rests with Congress' enumerated authority to regulate commerce.[64] Through the Commerce Clause, the federal government may regulate the "non-commercial intrastate possession and cultivation of marijuana."[65] Thus, because marijuana cultivation could be rationally related to having a substantial economic effect on interstate commerce, regulating its

---

[59] *Desuetude Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/d/desuetude/ (last visited May 15, 2020).

[60] *Desuetude*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/desuetude (last visited July 14, 2020).

[61] ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY 278 (2017); 21 U.S.C. § 812 (2018).

[62] U.S. CONST. art. I, § 8.

[63] U.S. CONST. art. VI, cl. 2.

[64] *See* Gonzales v. Raich, 545 U.S. 1 (2005) (establishing that Congress may regulate the use and production of home-grown marijuana as this activity, taken in the aggregate, could rationally be seen as having a substantial economic effect on interstate commerce.).

[65] *Id.* at 32.

production is a valid exercise of Congress's Commerce Clause power.[66] Additionally, the Supremacy Clause of the U.S. Constitution[67] ordains federal law as supreme and, hence, as preempting state law when the two conflict.[68] This also implicates another constitutional constraint–preemption.[69] With the exception of the Farm Act legalizing low levels of THC from the marijuana plant as CBD, due to this constitutional framework, all other forms of marijuana are illegal under federal law.[70]

In accordance with its designated control over the matter, the federal government has maintained laws and regulations concerning marijuana in all things under its jurisdiction. For example, the federal government has impacted the legality of marijuana in a variety of federal settings including federal lands and parklands,[71] airports and aviation,[72] active military personnel,[73] military installations,[74] veterans,[75] all Department of Transportation ("DOT") matters,[76] all federal government employees' marijuana zero tolerance policies,[77] and all immigration matters.[78] This federal treatment of marijuana reaches and extends even further with federal bankruptcy courts affording minimal protection to matters relating to the

---

[66] Mikos, *supra* note 61, at 278. (The Necessary and Proper Clause may also play a role); *see Gonzales*, 545 U.S. at 34 (Scalia, J., concurring) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.").

[67] U.S. CONST. art. VI, cl. 2 (Article VI, Clause 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." It means that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over a conflicting or inconsistent state exercise of power.)

[68] *Id.*

[69] U.S. CONST. amend. X.

[70] *Id.*

[71] 41 C.F.R. § 102-74.400 (2005) (Prohibits marijuana activity on all federal property).

[72] 14 C.F.R. § 121.15 (2015).

[73] A.R. 135-178, 12-1d (repealed); *see also* U.S. v. Gonzales, No. ACM S32386, 2017 WL 4004050, at *1 (A.F. Ct. Crim. App. Aug. 2, 2017).

[74] 10 U.S.C. §912a, art. 112 (2012).

[75] *See* DEP'T OF VETERANS AFFAIRS, VETERANS HEALTH ADMIN. DIRECTIVE 1315, *Access to VHA Clinical Programs for veterans Participating in State-Approved Marijuana Programs*, (Dec. 8, 2017), file:///Users/pica/Downloads/1315_D_2017-12-08.pdf.

[76] *DOT Says No to Marijuana*, GO BY TRUCK GLOBAL NEWS (Jan. 6, 2014), https://www.gobytrucknews.com/dot-says-no-to-marijuana/123.

[77] Memorandum from Katherine Archuleta, Dir. Of U.S. Off. of Pers. Mgmt., on Federal Laws and Policies Prohibiting Marijuana Use to the Heads of Exec. Dep'ts and Agencies, (May 26, 2015), https://chcoc.gov/content/federal-laws-and-policies-prohibiting-marijuana-use.

[78] U.S. DEP'T OF STATE, 9 FAM 302.4-(B)(2), CONTROLLED SUBSTANCE INCLUDES MARIJUANA, https://fam.state.gov/searchapps/viewer?format=html&query=marijuana&links=MARIJUANA&url=/FAM/09FAM/09FAM030204.html#M302_4_2_B_2.

marijuana industry;[79] restrictions on federal housing accommodations and federal unemployment benefits;[80] federal laws prohibiting federally charted banks from engaging in transactions deriving from, or involving, the marijuana industry;[81] and sanctioning colleges receiving federal funding to deny protections for students who use medical marijuana.[82]

On the other hand, states' rights to regulate marijuana emanates from the Tenth Amendment of the Constitution.[83] The Tenth Amendment is the section of the Bill of Rights that extends any power that is not *explicitly* given to the federal government to the states.[84] It was included in the Bill of Rights to further define the balance of power between the federal government and the states. As the final amendment in the United States Constitution's original Bill of Rights, it was added to assure delegates that the federal government would not overstep the boundaries established in the Constitution.[85]

One may argue that this Tenth Amendment right under the U.S. Constitution does not give the federal government any authority to criminalize marijuana. The Tenth Amendment constrains Congress' preemption and supremacy powers through its "anti-commandeering rule."[86] That is, Congress cannot compel states to use their resources to carry out its regulation schemes or to enforce a federal law.[87] To further this position by analogy, though the Constitution may automatically afford Congress the power to outlaw marijuana, it was necessary to amend the Constitution to give Congress the power to ban alcohol under the Eighteenth Amendment[88]

---

[79] *In re* Way to Grow, Inc., No. 18-cv-3245-WJM, 2019 U.S. Dist. LEXIS 207846, at *14 (D. Colo. Sept. 18, 2019); *but see* Garvin v. Cook Invest., 922 F.3d 1031 (9th Cir. 2019) (The Bankruptcy Code does not require courts examine the terms of a plan to determine whether the plan at issue is unlawful, instead courts need only look to the proposal itself.).

[80] Memorandum from Helen R. Kanovsky, U.S. DEP'T OF HOUS. AND URBAN DEV., on Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing (Jan. 20, 2011), https://www.nhlp.org/files/3.%20KanovskyMedicalMarijunanaReasAccomm(012011).pdf.

[81] Kellie Pantekoek, *Can Marijuana Dispensaries Use Traditional Banks?*, FINDLAW, https://public.findlaw.com/cannabis-law/starting-a-cannabis-business/can-marijuana-dispensaries-use-traditional-banks-.html (last updated Apr. 21, 2020); James J. Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, ABA (Feb. 6, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking/.

[82] Dave Collins, *She Was Expelled for Using Prescribed Medical Marijuana, Now She's Suing the College*, USA TODAY (Oct. 24, 2019), https://www.usatoday.com/story/news/education/2019/10/24/should-medical-marijuana-legal-college-campuses-some-say-no/4083245002/.

[83] U.S. CONST. amend. X.

[84] *Id.; see* U.S. v. Louisiana, 363 U.S. 1, 16, (1960).

[85] *Louisiana*, 363 U.S. at 16.

[86] *Id.*

[87] *Id.*

[88] U.S. CONST. amend. XVIII (repealed 1933).

and then repeal it under the Twenty-First Amendment.[89] Thus, under this reasoning, the question of whether the federal government forcing states to regulate marijuana is constitutional becomes relevant.

Notwithstanding the discrepancies between state and federal powers, and despite severe limitations placed at the federal level, states continue to bypass federal laws designed to prevent the widespread legal use of marijuana.[90] Notably, some states are conservative, legalizing only medical marijuana, while other states have adopted liberal approaches, encompassing recreational and medical uses.[91] This rift is best illustrated by court decisions in the areas of employment, with some courts upholding the federal position and some states eclipsing it.

A. The Division of Authority between States and the Federal Government has Created a Schism Amongst Courts

In 2017, a federal court addressed whether federal law preempted a Connecticut law, which precluded Connecticut employers from firing or refusing to hire someone because of medical marijuana use.92 The district court concluded that the state law was not preempted the federal statutes in question – the CSA, the American with Disabilities Act ("ADA"), or the Food, Drug, or Cosmetic act ("FDCA").[93] Furthermore, the court rejected the employer's contention that because it was required by federal law to comply with the federal Drug Free workplace Act ("DFWA"), it was prohibited from hiring or employing state-qualified medical marijuana users.[94] The court clarified that the DFWA was expressly inapplicable to an "employee who uses medical marijuana outside the workplace in accordance with a program approved by state law."[95]

This holding concentrates on the Connecticut law's provision aimed at protecting medical patients from discrimination in their workplaces. As such, the court avoided tackling whether the employee's marijuana use was legal under state or federal law. Other state courts including Massachusetts,[96]

---

[89] U.S. CONST. amend. XXI.

[90] *State Marijuana Laws in 2018 Map*, GOVERNING.COM, https://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html (last updated June 25, 2019).

[91] *Id.*

[92] Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326, 330 (D. Conn. 2017); *see also*, Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181, at *19 (R.I. Super. Ct. 2017).

[93] *Noffsinger*, 273 F. Supp. 3d at 338.

[94] *Id.* at 336.

[95] *Id.*

[96] Barbuto v. Advantage Sales & Mktg., 78 N.E.3d 37, 45 (Mass. 2017).

Arizona,[97] Delaware,[98] and Rhode Island[99] have included anti-discrimination provisions in their state medical marijuana statutes. These types of provisions enable courts to adjudicate matters based on statutory interpretation and not on the legality of marijuana use. Comparatively, the Oregon Supreme Court determined Oregon's medical marijuana statute was preempted by the CSA.[100] Unlike the Connecticut state law, Oregon's medical marijuana statute was silent with respect to employment discrimination.[101]

Thus, absent a veil of a statutory or other legal nuance, such as anti-discrimination provisions, courts pressed to decide issues directly involving marijuana seem to adhere to the federal government's fixed stance.[102] The Colorado Supreme Court held that a quadriplegic person who used medical marijuana in accordance with state law was not protected from being fired after testing positive on a drug test at work.[103] There, the court was compelled to resolve the issue of whether medical marijuana use was a "lawful activity."[104] In response, it explained that: the U.S. Department of Justice's announcement to forgo prosecuting certain medical marijuana patients in accordance with state law and that the 2014 appropriation bill prohibiting the Department of Justice from using funds appropriated under the act to prevent states from implementing medical marijuana laws, did not make the defendant's use of medical marijuana lawful.[105] Ultimately, the court cited marijuana's status under the CSA and concluded that, even when used for medical purposes, marijuana use is still a federal criminal offense.[106]

As courts in different states apply marijuana's federal classification differently, while also eagerly using loopholes to avoid adjudicating the issue of marijuana, the results are unpredictable and incongruent. This is problematic because such inconsistent treatment could trigger other constitutional concerns under equal protection and due process and could fuel arguments to support nullifying the CSA definition itself.

---

[97] Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761, 774 (D. Ariz. 2019).

[98] Chance v. Kraft Heinz Foods Co., No. K18C-01-056 NEP, 2018 WL 6655670, at *2 (Del. Super. Ct. 2018).

[99] Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181 at *17 (R.I. Super. Ct. 2017).

[100] Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus., 230 P.3d 518, 536 (Or. 2010) (Plaintiff was fired by his employer one week after disclosing his status as a state-law-authorized user of medical marijuana.).

[101] *Id.*

[102] Coats v. Dish Network, 350 P.3d 849, 852 (Colo. 2015).

[103] *Id.* at 850.

[104] *Id.*

[105] *Id.* at 852, n.2.

[106] *Id.* at 852–53.

III. MARIJUANA'S CSA CLASSIFICATION IS NOT CONSISTENT WITH ITS CSA DEFINITION

A. Federal and State Actions Contradict Marijuana's CSA Classification

A Schedule "I" drug under the CSA is defined as having no "currently accepted medical use" and a "high potential for abuse."[107] The inapplicability of this definition to marijuana has so far been unsuccessfully litigated over the years, yet still invites several arguments that weaken the reasoning in support of marijuana's classification. For example, there is the continued passage of state medical marijuana laws across the country including their stated qualifying medical conditions;[108] the continued expansion of qualifying conditions under those medical marijuana laws; and the passage of new state laws permitting the use of medical marijuana for opioid use disorder.[109] States' passages of marijuana laws are particularly overwhelming.

Over two-thirds of states have some type of medical marijuana law.[110] Each of these laws contain conditions that qualify a medical marijuana patient to use medical marijuana. The more common qualifying conditions include use for chronic pain; PTSD; Amyotrophic Lateral Sclerosis (ALS); cancer; Crohn's disease; Glaucoma; HIV or AIDS; Hepatitis C; Multiple Sclerosis; Parkinson's disease; multiple sclerosis; cystic fibrosis; and typically other conditions as determined in writing by a qualifying patient's physician.[111] For example, Connecticut has one of the most extensive medical marijuana qualifying condition lists with over twenty-five qualifying conditions,[112] while Texas has one of the most limited qualifying

---

[107] *Drug Schedules*, DEA, https://www.dea.gov/drug-scheduling (last visited Jan. 11, 2021).

[108] Arron Smith, *The U.S. Legal Marijuana Industry is Booming*, CNN (Jan. 31, 2018 4:30 PM), https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/index.html.

[109] *See e.g.*, Steven Aliano, *New Jersey to Allow Medical Marijuana for Opioid Addiction Treatment*, PRACTICAL PAIN MANAGEMENT (June 17, 2020), https://www.practicalpainmanagement.com/treatments/pharmacological/new-jersey-allow-medical-marijuana-opioid-addiction-treatment

[110] *State-By-State Marijuana Policies*, THE NAT'L CANNABIS INDUS., https://thecannabisindustry.org/ncia-news-resources/state-by-state-policies/ (last visited May 16, 2020).

[111] *See* e.g. CONN. GEN. STAT. ANN. § 21a-408a, § 21a-408p (2012); R.I. GEN. LAWS ANN. §§ 21-28.6-4, 21-28.6-7 (2019); ME. REV. STAT. ANN. tit. 22 § 2421, §2423-E, §2426 (2009); ARIZ. REV. STAT. ANN. tit. 36, ch. 28.1, § 36-2802, § 36-2807, § 36-2813, § 362814 (2010); DEL. CODE ANN. tit. 16, ch. 49A, § 4902A, § 4904A, § 4905A, § 4907A, § 4921A (2020).

[112] See generally, *Medical Marijuana Qualifying Conditions by* State, MARIJUANA AND THE LAW https://www.marijuanaandthelaw.com/resources/medical-marijuana-qualifying-conditions-state/ [hereinafter Qualifying Conditions] (last accessed Jan. 11, 2021). *Qualification Requirements*, CT STATE DEP'T OF CONSUMER PROTECTION, https://portal.ct.gov/DCP/Medical-Marijuana-Program/Qualification-Requirements (last visited June 15, 2020).

conditions with only a limited low-THC law for epilepsy.[113] In New York, patients may use marijuana to treat qualifying conditions such as: cancer; HIV infection or AIDS; amyotrophic lateral sclerosis ("ALS"); Parkinson's disease, multiple sclerosis, epilepsy, inflammatory bowel disease, neuropathy, PTSD, and "[chronic pain (as defined by 10 NYCRR §1004.2(a)(8)(xi)) or any condition for which an opioid could be prescribed (provided precise underlying condition is expressly stated on the patient's certification.)"[114] Several states have amended their qualifying conditions over the years to become even more extensive.[115]

There is also a growing trend to permit physicians to prescribe medical marijuana for opioid use disorder.[116] New York,[117] Pennsylvania,[118] Illinois,[119] and Colorado[120] have all made this concession in one form or another over the last couple of years. At least eight states from Maine to California, along with Washington, D.C., recognize opioid dependency as a qualifying condition for medical marijuana use, either explicitly or within the bounds of significant medical conditions.[121] However, as of November 2019, and in keeping with the federal government's hold on federal agencies regarding marijuana, federal addiction treatment dollars remain off-limits

---

[113] Alex Samuels, *Texas House Passes Second, More Limited Bill Expanding Access to Medical Cannabis*, TEXAS TRIBUNE (May 7, 2019 4:00 PM), https://www.texastribune.org/2019/05/07/texas-house-medical-cannabis-limited-expansion/.

[114] Qualifying Conditions, *supra* note 112.

[115] *Id.*

[116] *See e.g. New Jersey Joins States that Allow Medical Cannabis as Opioid Alternative*, MARIJUANA BUS. DAILY, (Jan. 24, 2019), https://mjbizdaily.com/new-jersey-adds-opioid-addiction-as-medical-cannabis-qualifying-condition/.

[117] *New York State Department of Health Announces Opioid Use to be Added as a Qualifying Condition for Medical Marijuana*, N.Y. State DEP'T OF HEALTH (June 18, 2018), https://www.health.ny.gov/press/releases/2018/2018-06-18_opioid_use.htm.

[118] Sam Wood, *Pa. Approves Sale of Marijuana 'Flower,' and Will Allow Cannabis to Treat Opioid Addiction*, THE PHILA. INQUIRER (Apr. 16, 2018), https://www.inquirer.com/philly/business/cannabis/marijuana-medical-flower-opioid-addiction-therapy-rachel-levine-cresco-terravida-20180416.html.

[119] Bill Lukitsch & Monique Garcia, *People with Opioid Prescriptions Could get Medical Marijuana Instead Under Illinois Senate Plan*, THE CHI. TRIBUNE (Apr. 27, 2018), https://www.chicagotribune.com/news/local/politics/ct-met-illinois-medical-marijuana-opiod-20180426-story.html; *Bill Status of SB0336*, ILL. GEN. ASSEMBLY (Aug. 8, 2018), http://www.ilga.gov/legislation/BillStatus.asp?GA=99&DocTypeID=SB&DocNum=336&GAID=14&SessionID=91&LegID=100276.

[120] Derek Maiolo, *Colorado Doctors Can Now Recommend Medical Marijuana in Place of Opioids*, SUMMIT DAILY (Aug. 25, 2019), https://www.summitdaily.com/news/colorado-doctors-can-now-recommend-medical-marijuana-in-place-of-opioids/.

[121] *See e.g.*, Morgan Lee, *New Mexico Adds Opioid Use to Qualifying Conditions for Medical Marijuana*, LAS CRUCES SUN NEWS (June 7, 2019, 5:50 PM), https://www.lcsun-news.com/story/news/local/new-mexico/2019/06/07/new-mexico-adds-opioid-use-condition-medical-marijuana/1377010001.

for medical marijuana.[122] This new federal restriction applies to the federal government's two main grant programs for opioid treatment and an older grant program supporting state efforts to treat alcoholism and drug addiction.[123] The rule affects billions of dollars from the federal Substance Abuse and Mental Health Services Administration.[124]

On the federal front, the Food and Drug Administration ("FDA") took action to approve marijuana compounds or derivatives, such as marinol, cesamet, epidiolex, and to declassify both marijuana and hemp-based CBD, to be used as part of various medical treatments.[125] Then there is the DEA and the National Institutes of Health's ("NIH") willingness to loosen marijuana restrictions to facilitate additional research for medical marijuana. The federal government is enlarging research and studies on marijuana through its agencies, and even directly.[126] The "number of active researchers registered with DEA to conduct research with marijuana, marijuana extracts, and marijuana derivatives – [went] from 377 in January 2017 to 595 in March 2020."[127]

In 2016, there was some speculation that the DEA was going to change marijuana's classification under the CSA; however, instead it sought to expand research by increasing the number of licensed growers from a single producer at the University of Mississippi.[128] In March 2020, the DEA further extended opportunities for scientific and medical research on marijuana in the United States through new regulations.[129] "The new regulations enable the DEA to evaluate each of the thirty-seven then pending applications to grow marijuana for research under the applicable legal standard and conform the overall program to relevant laws."[130] In 2019, the University of Georgia ("UGA") promulgated a study on Medical Marijuana's Impact on Chronic

---

[122] Carla K. Johnson, *Federal Addiction Treatment Dollars Off-limits for Medical Marijuana*, PRESS HERALD (Nov. 22, 2019), https://www.pressherald.com/2019/11/22/federal-addiction-treatment-dollars-off-limits-for-medical-marijuana/.

[123] *Id.*

[124] *Id.*

[125] *FDA and Cannabis: Research and Drug Approval Process*, U.S. FOOD AND DRUG ADMIN., https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process#:~:text=To%20date,%20the%20FDA%20has%20not%20approved%20a,products:%20Marinol%20(dronabinol),%20Syndros%20(dronabinol),%20and%20Cesamet%20(nabilone) (last visited Jan. 12, 2021)

[126] Press Release, Drug Enf't Admin., *DEA Proposes Process to Expand Marijuana Research in the United States*, (Mar. 20, 2020), https://www.dea.gov/press-releases/2020/03/20/dea-proposes-process-expand-marijuana-research-united-states.

[127] *Id.*

[128] *Id.*

[129] Controls to Enhance the Cultivation of Marijuana for Research in the United States, 85 Fed. Reg. 16292 (proposed Mar. 23, 2020) (to be codified at 21 C.F.R. pt. 1301, 1318).

[130] *DEA Proposes Process to Expand Marijuana Research in the United States*, *supra* note 126.

Pain.[131] The research project was funded by a $3.5 million grant from the National Institute on Drug Abuse ("NIDA"), a branch of the NIH.[132] The National Center for Biotechnology Information ("NCBI"), under the auspices of NIH, also conducted clinical trials for pain conditions, which indicated promising treatments.[133]

B. Scientific Evidence Raises Legitimate Concerns as to the Validity of Marijuana's CSA Classification

The notion that because marijuana is a toxic plant it should be highly scrutinized is spurious. Many medicines commonly used by humans are plant-based. These include the common drugs aspirin,[134] digoxin,[135] quinine,[136] opium,[137] and digitalis.[138] There is also a mounting number of studies supporting the use of marijuana for various diseases and ailments that are typically dependent upon the targeted disease or illness. There are thousands of studies and plentiful literature supporting the medical benefits of medical marijuana dating as far back as the 1840s.[139] The studies suggest that marijuana can be an effective treatment for conditions such as cancer,[140] pain, neurologic disorders, glaucoma, and nausea.[141] The National Academies of Science, Engineering, and Medicine worked together to create a comprehensive report for the current state of evidence regarding what is known about the health effects of cannabis and cannabis derived

---

[131] Caroline Paczkowski, *Researchers to Study Medical Cannabis and Chronic Pain*, UGA TODAY (Oct. 8, 2019), https://news.uga.edu/researchers-to-study-medical-cannabis-and-chronic-pain/.

[132] *Id.*

[133] Jorge Manzanares, *Role of the Cannabinoid System in Pain Control and Therapeutic Implications for the Management of Acute and Chronic Pain Episodes*, 4 CURRENT NEUROPHARMACOLOGY 239, 252 (2006).

[134] ALAN JONES, CHEMISTRY: AN INTRODUCTION FOR MEDICAL AND HEALTH SCIENCES 5 (2005); *see also* ENRIQUE RAVINA, THE EVOLUTION OF DRUG DISCOVERY: FROM TRADITIONAL MEDICINES TO MODERN DRUGS 24 (2011).

[135] *Digoxin*, DRUGS.COM, https://www.drugs.com/monograph/digoxin.html (last visited July 14, 2020).

[136] *Quinine sulfate*, DRUGS.COM, https://www.drugs.com/mtm/quinine.html (last visited Dec. 30, 2020).

[137] *Opium*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/science/opium (last visited July 14, 2020).

[138] *Digitalis*, DRUGS.COM, https://www.drugs.com/npp/digitalis.html (last updated Oct. 31, 2019).

[139] Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN (Aug. 8, 2013), https://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana/.

[140] Michele Moreau et al., *Flavonoid Derivative of Cannabis Demonstrates Therapeutic Potential in Preclinical Models of Metastatic Pancreatic Cancer*, FRONT. ONCOLOGY (July 23, 2019), https://www.frontiersin.org/articles/10.3389/fonc.2019.00660/full; *Marijuana and Cancer*, AM. CANCER SOC'Y, https://www.cancer.org/treatment/treatments-and-side-effects/complementary-and-alternative-medicine/marijuana-and-cancer.html (last updated Aug. 4, 2020).

[141] *See* W. J. Maule, *Medical Uses of Marijuana (Cannabis Sativa): Fact or Fallacy?*, 72 BRIT. J. OF BIOMEDICAL SCI. 85 (2015).

products.[142] Their extensive findings set forth the medical benefits and potential harms of using marijuana.[143]

Numerous scientific findings and publications also assert that medical marijuana may be harmful.[144] For example, marijuana has been found to be harmful to mental health[145] and to contribute to heart issues.[146] It is generally accepted that prolonged and consistent marijuana use produces side effects including, "relaxation, appetite stimulation, heightened sensation, increased heart rate, impairment of short-term memory and learning, and […] paranoia or psychosis."[147] Chronic cannabis use, especially among young people, has also led to altered brain development, cognitive impairment, chronic bronchitis, and increased risk of psychosis health disorders like schizophrenia and depression.[148] Yet, it is useful to note, much of this information is gleaned from limited clinical trial data and anecdotal studies of recreational marijuana users.[149] Notwithstanding the need for additional research to facilitate more precise conclusions, marijuana does pose some risk for abuse. According to Columbia's Mailman School of Public Health, illicit marijuana use and marijuana use disorders increased "at a greater rate in states that passed marijuana laws than in other states."[150] Permissive

---

[142] NAT'L ACAD. OF SCI., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH (2016); Ryan Scinta et al., *Evidence for Medicinal Use of Cannabis*, PHYSIOPEDIA, https://www.physiopedia.com/Evidence_for_Medicinal_Use_of_Cannabis (last visited June 15, 2020).

[143] NAT'L ACAD. OF SCI., *supra* note 142.

[144] *See generally National Library of Medicine*, PUBMED.GOV, https://pubmed.ncbi.nlm.nih.gov/?term=medical%20marijuana&page=5 (last visited July 14, 2020).

[145] *What Is Marijuana?*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/drugfacts/marijuana#:~:text=Long-term%20marijuana%20use%20has%20been%20linked%20to%20mental,symptoms%20such%20as%20hallucinations,%20paranoia,%20and%20disorganized%20thinking (last visited Jan. 12, 2021).

[146] *See generally The Truth About Marijuana*, FOUND. FOR A DRUG FREE WORLD, https://www.drugfreeworld.org/drugfacts/marijuana/short-and-long-term-effects.html (last visited June 15, 2020).

[147] Susan R.B. Weiss, et. al, *Building Smart Cannabis Policy from the Science Up*, 42 Int'l J. of Drug Policy 39 (2017).

[148] Helen Shen, *Cannabis and the adolescent brain*, PNAS (Jan. 7, 2020), https://www.pnas.org/content/117/1/7, *see also DEA Supports Expanding Cannabis Research, but Timing Uncertain*, MARIJUANA BUS. DAILY, (Aug. 26, 2019), https://mjbizdaily.com/dea-supports-expanding-cannabis-research-but-timing-uncertain/; *see also* Jeff Smith, *US House Panel Calls for Stepped-up Marijuana Research, which Could Prove Critical to Federal Reform*, MARIJUANA BUS. DAILY, (Jan. 15, 2019) https://mjbizdaily.com/us-house-panel-calls-for-stepped-up-marijuan-research-which-could-prove-critical-to-federal-reform.

[149] *Starting Age of Marijuana Use May Have Long-Term Effects on Brain Development*, CTR. FOR BRAIN HEALTH AT UNI. OF TX. AT DALLAS, https://brainhealth.utdallas.edu/starting-age-of-marijuana-use-may-have-long-term-effects-on-brain-developme/ (last visited Jan. 12, 2021).

[150] Donald Hagler, *Do Medical Marijuana Laws Promote Illicit Cannabis Use and Disorder*? COLUM. MAILMAN SCH. OF PUB. HEALTH (Apr. 26, 2017), https://www.mailman.columbia.edu/public-health-now/news/do-medical-marijuana-laws-promote-illicit-cannabis-use-and-disorder.

attitudes, stemming from legalizing marijuana, could potentially lead to addiction and pose unforeseen consequences for public and mental health.[151]

The possibilities are more concerning when examining youth populations.[152] The American College of Pediatricians found that marijuana is addictive and has adverse effects upon "the adolescent brain, is a risk for both cardio-respiratory disease and testicular cancer, and is associated with both psychiatric illness and negative social outcomes."[153] As marijuana becomes more commercialized, high-potency strains replace traditional herbal forms of marijuana.[154] High levels of potency can damage the brain's ability to function and pose even graver harms for adolescent brain development.[155] Some studies indicate that youth marijuana use increased in states where recreational marijuana as legal.[156] Colorado experienced a twelve percent increase in the three-year average since legalizing recreational marijuana.[157] Conversely, eleven separate studies dating back to 1991 using data from 4 large-scale U.S. surveys found no significant changes, increases, or decreases occurred in adolescent use following enactment of medical marijuana laws.[158]

According to Dr. Sanja Gupta, an American neurosurgeon, " . . . 6% of the current U.S. marijuana studies investigate the benefits of medical marijuana. The rest are designed to investigate harm that imbalance paints a highly distorted picture."[159] He goes on to admit that he " . . . mistakenly believed the DEA's listed marijuana as a schedule "I" substance was based upon of sound scientific proof."[160] Surely, he believed, there must have been "quality reasoning as to why marijuana is in the category of the most

---

[151] Joel Hilliker, *Marijuana Legalization—What Are the Effects?*, THE TRUMPET (Nov. 17, 2017), https://www.thetrumpet.com/16516-marijuana-legalization-what-are-the-effects.

[152] Donald Hagler, *Marijuana Use: Detrimental to Youth*, AM. COLL. OF PEDIATRICIANS (Apr. 2018), https://www.acpeds.org/the-college-speaks/position-statements/effect-of-marijuana-legalization-on-risky-behavior/marijuana-use-detrimental-to-youth.

[153] *Id.*

[154] *See* ROCKY MOUNTAIN HIGH INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, *The Legalization of Marijuana in Colorado: The Impact*, HIDTA 1, 132 (2017), https://www.rmhidta.org/html/FINAL%202017%20Legalization%20of%20Marijuana%20in@20Colorado%20The%20Impact.pdf.

[155] *Id.* at 147, 152.

[156] *Id.*

[157] *Id.* at 33.

[158] Aaron Sarvet, *Study Debunks Claim that Medical Marijuana Laws Have Increased Recreational Use of Marijuana Among U.S. Teens*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Feb. 22, 2018), https://www.mailman.columbia.edu/public-health-now/news/study-debunks-claim-medical-marijuana-laws-have-increased-recreational-use-marijuana-among-us-teens (Studies included Monitoring the Future; National Longitudinal Survey of Youth; National Survey on Drug Use and Health; and Youth Risk Behavior Survey.).

[159] Gupta, *supra* note 139.

[160] *Id.*

dangerous drugs that have 'no accepted medicinal use and a high potential for abuse.'"[161] However, he eventually realized the science to support that claim did not exist, and now he asserts that "when it comes to marijuana neither of those things are true."[162] In fact, he goes on to affirm, marijuana "does not have a high potential for abuse, and there are very legitimate medical applications."[163] Assuming *arguendo* that marijuana is found to have only limited medical benefit, this still presents a conflict with the CSA's definition, which states that there is *no* "currently accepted medical use," not limited beneficial use.

With regard to the second factor for marijuana's CSA classification, a "high potential for abuse," there has been mixed evidenced-based conclusions. According to the NIH:

> [m]arijuana use can lead to the development of problem use, known as a marijuana use disorder, which takes the form of addiction in severe cases. Recent data suggest that 30% of those who use marijuana may have some degree of marijuana use disorder. People who begin using marijuana before the age of 18 are four to seven times more likely to develop a marijuana use disorder than adults.[164]

A 1944 research project by the New York Academy of Science found "marijuana did not lead to significant addiction in the medical sense of the word. They also did not find any evidence marijuana led to morphine, heroin, or cocaine addiction."[165] Yet the accepted consensus seems to be that, ". . . [w]hile estimates vary, marijuana leads to dependence in around 9 to 10% of its adult users." [166] By comparison, "cocaine, *a Schedule ["II"] substance*, 'with less abuse potential than [S]chedule ["I"] drugs,' hooks 20% of those who use it."[167] Meanwhile, around 25% of heroin users become addicted.[168] In 2018, another study also concluded marijuana is not a gateway drug to heroin, cocaine, or other substances.[169]

---

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Marijuana Research Report: Is Marijuana Addictive?*, NAT'L INST. ON DRUG ABUSE (July 2020), https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-addictive.

[165] Gupta, *supra* note 139.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Michael Roberts, *Marijuana Isn't Gateway Drug to Heroin, Cocaine, Other Substances, Study*

If whether one can die from an overdose of a drug were included in the criteria for whether a drug is "most dangerous" and should therefore be classified as a Schedule "I" drug under the CSA, heroine, a Schedule "I" drug and cocaine a Schedule "II" drug, would probably be best placed as the most dangerous of drugs, entitling them both to a Schedule "I" drug classification. While "extreme discomfort" can be associated with a marijuana overdose, according to the CDC, a marijuana overdose is not fatal.[170] In fact, some studies found that providing broader access to medical marijuana may have the potential benefit of reducing abuse of highly addictive, potentially lethal painkillers.[171] Again under the definition of the classification, it requires a *high* potential for abuse, not *any potential* for abuse.

III. EQUAL PROTECTION ARGUMENTS

Selective enforcement and prosecution based on differing state marijuana laws, enforcement and prosecution based on federal verses state land, and inconsistent enforcement and prosecution within a state with protective marijuana laws, may constitute unequal treatment between states and disparate treatment within the same state. Equal protection requires the government treat people the same absent compelling justification.[172] Selective prosecution occurs in violation of the equal protection component of the Fifth Amendment's Due Process Clause, "when the decision to prosecute a particular criminal is 'based upon an unjustifiable factor such as race, religion, or another arbitrary classification.'"[173] The burden to establish

---

Finds, WESTWORD (June 25, 2018), https://www.westword.com/news/marijuana-isnt-gateway-drug-to-heroin-cocaine-other-substances-study-finds-10448451.

[170] *Is it Possible to "Overdose" or have a "Bad Reaction" to Marijuana?,* CDC, https://www.cdc.gov/marijuana/faqs/overdose-bad-reaction.html (last visited June 15, 2020); *but see* Olaf H. Drummer et al., *Cannabis as a Cause of Death: A Review*, FORENSIC SCI. INT'L 298, 301–06 (2019).

[171] David Powel et al., *Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers?*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 10.3386/w21345, 2015), https://www.nber.org/papers/w21345

[172] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

[173] Wayte v. U.S., 470 U.S. 598, 608 (1985); *see also* Abby Haglage, *Black People Are 9 Times More Likely to Be Arrested for Marijuana Possession in These States, ACLU Says,* YAHOO LIFE (Apr. 24, 2020), https://www.yahoo.com/lifestyle/black-people-9-times-more-likely-arrested-marijuana-possession-these-states-aclu-160324961.html ("The American Civil Liberties Union released a groundbreaking report in 2013 showing that Black people were 3.7 times more likely to be arrested for marijuana possession than whites."); Zachary Nelson, *If It Looks Like a Duck: Equal Protection, Selective Prosecution, and Geographic Differences in the Federal Prosecution of Marijuana Crimes Under the Controlled Substances Act*, 23 Lewis & Clark L. Rev. 1007, 1025 (2019) ("The necessary contextual focus of the evidence establishing discriminatory effect remains an open question. Regarding the necessary evidence, the Court noted that such 'raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*.'"); *see also* U. S. v. Bass, 536 U.S. 862 (2002) (*per curiam*).

a claim of selective prosecution is high.[174]

A. Selective Enforcement & Prosecutions Based Upon State

Selective enforcement differs from selective prosecution in that law enforcement is the official enforcing the law when they decide to cite or arrest someone for a violation, whereby a prosecutor is the official deciding whether to prosecute the citation and arrest. While the instances and facts surrounding the citation, arrest, and the prosecution may differ, the elements for selective enforcement and selective prosecution are "essentially the same."[175] Selective prosecution as an equal protection claim was addressed by the Supreme Court in *Wayte v. United States,* where the Court found selective prosecution claims may appropriately be judged according to ordinary equal protection standards. These standards require the petitioner to show both that the passive enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.[176] In *United States v. Armstrong* the court phrased it another way, explaining that "[i]order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose."[177] As commentator Zachary Nelson writes, "to establish discriminatory effect, a claimant must prove that similarly situated persons were treated differently."[178]

Applying and enforcing the CSA as a federal law prohibiting marijuana sales or use against a citizen in one state without any marijuana laws, while allowing citizens of another to sell and use marijuana in states where marijuana laws exist, could be considered a respective benefit or burden to the citizen of the first state. This raises potential equal protection geographical issues based on whether a state has passed a marijuana law. To illustrate, a person driving from the state of Illinois, where marijuana is both recreationally and medically legal, to the neighboring state of Indiana, which has no recreational marijuana law and a very limited use of medical marijuana, would face selective enforcement and prosecution issues. This citizen would be treated differently depending on which side of the state line they were on and potentially burdened with enforcement or prosecution. The reverse order, from Indiana to Illinois, would instead confer a benefit to the citizen by the lack of enforcement or prosecution.

However, these inequities do not automatically render a law

---

[174] United States v. Armstrong, 517 U.S. 456 (1996).

[175] U.S. v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006); *see also U.S. v. James,* 257 F.3d 1173, 1179 (10th Cir. 2001) (applying selective prosecution standards to selective enforcement claim).

[176] *Wayte*, 470 U.S. at 608–11.

[177] *Armstrong*, 517 U.S. at 457.

[178] Nelson, *supra* note 173, at 1026

unconstitutional.[179] Under the Fourteenth Amendment, which is applied to the federal government via the reverse incorporation of that guarantee into the Fifth Amendment's Due Process Clause,[180] if a law creates a burden or benefit based on a classification, then the law may be unconstitutional.[181] A court must review the law under the appropriate degree of scrutiny, that is, the level of skepticism the court holds as to the motive and purpose underlying a government action. Heightened scrutiny applies "when the law's classification burdens a suspect or quasi-suspect class or … when the classification "unconstitutionally burdens a fundamental right."[182] Laws that do not fall under those categories are subject to a very deferential standard known as "rational basis."[183] If a law is rationally related to a legitimate government interest, then the law will pass this lower level of scrutiny. So long as courts are convinced that any set of conceivable facts could be rationally related to the government's interest, the law is constitutional. [184]

In the *Davis* case the defendant, living in Missouri, a state without marijuana protective laws, argued the DOJ should be enjoined from prosecuting him for possession under the CSA because individuals in the states where marijuana was legalized were not prosecuted for similar conduct when they were found to be in compliance with their state law.[185] The court stated the CSA and its corresponding appropriation acts (riders) are neutral laws.[186] As such, it claimed there was no disparate treatment between courts.[187] The court further expounded by stating that even if it found unequal treatment under the law, defendant's failure to claim

---

[179] *Armstrong*, 517 U.S. at 465 (applying a "similarly situated" standard to selective prosecution claim based on alleged racial discrimination); *Wayte*, 470 U.S. at 605–07 (affirming the court of appeals' denial of the defendant's selective prosecution claim for failing to establish that "others similarly situated generally had not been prosecuted for conduct similar to" theirs.).

[180] *Wayte*, 470 U.S. at 608 n.9 (1985) ("Although the Fifth Amendment, unlike the Fourteenth, does not contain an equal protection clause, it does contain an equal protection component." (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[181] *Id.* at 608.

[182] Nelson, *supra* note 173, at 1019–20; *see also* Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 308 (2013) (noting that suspect classes include race, ethnicity, and nationality); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting) (noting that quasi-suspect classes include sex and bastardy); *Marijuana Arrests & Punishments*, ACLU, https://www.aclu.org/other/marijuana-arrests-punishments (last visited June 14, 2020).

[183] *Id.*

[184] Jarrett Dieterle, *Differing Levels of Scrutiny for Economic Regulations: "Anything Goes" Rational Basis v. Rational "With Bite,"* FEDERALIST SOC'Y (Apr. 26, 2017), https://fedsoc.org/commentary/fedsoc-blog/differing-levels-of-scrutiny-for-economic-regulations-anything-goes-rational-basis-v-rational-basis-with-bite.

[185] United States v. Davis, No. 4:16CR495 CDP/NCC, 2017 WL 2703863, at *1-2 (E.D. Mo. May 24, 2017).

[186] *Id.* at *3.

[187] *Id.*

he was prosecuted "arbitrarily," or "based on his membership in a suspect class," fell short of a prima facie case for violating equal protection.[188]

Given that the court concluded that the laws were neutral and the defendant failed to prove that the laws were discriminatory in purpose or effect, the court denied the claim that marijuana's classification under the CSA and its corresponding enforcement violated equal protection. It held the claim lacked merit because the CSA and the rider both "have a rational basis that furthers a legitimate governmental end."[189] In support of the holding, the court cited *United States v. White*.[190] "This reliance is problematic because: (1) *White* dealt only with a selective prosecution claim based on the Cole Memo and did not involve the rider; and (2) it did not identify that either the CSA or the rider were rationally related to a legitimate governmental end."[191]

The rider as an argument for non-enforcement and prosecution under the CSA was addressed in *United States v. Gilmore*,[192] where the defendants argued that because of the continued renewal of the rider, "[c]ongress's intention is "plain:" "to the extent that" [defendants'] actions were "in compliance with California law," Section 538 "forbids the Department of Justice from enforcing" the Controlled Substance Act against [them]...".[193] This argument however was not advanced in the Defendants' Motion to Dismiss and was precluded from going before a jury as it was deemed a matter of law.[194] Although not addressed by the court in *Gilmore*, the continued rider as an argument that the federal government does not have an intention of prosecuting those associated with medical marijuana sales and use is further enhanced as it was again signed into law through 2019.

Another court has addressed whether the 2014 rider protecting medical marijuana from the DOJ creates a selective enforcement violative of equal protection. The *McIntosh* case involved consolidated cases challenging prosecutions based on the rider argument. It established the "*McIntosh Hearing*": the objective is to determine a defendant's compliance with the pertinent medical marijuana state law as a condition to seeking the protection

---

[188] *Id.*

[189] *Id.*

[190] U. S. v. White, No. 12-cr-03045-BCW, 2016 WL 4473803 (W.D. Mo. Aug. 23, 2016).

[191] Nelson, *supra* note 173, at 1046; *but see* Drummer, *supra* note 170, at 298–306.

[192] U.S. v. Gilmore, No. 2-13-cr-00300-GEB, 2016 WL 74033, at *103 (E.D. Cal. 2016).

[193] *Id.* at *2.

[194] *Id.* ("[T]he legal effect of § 538 on the enforcement action taken by this prosecution is not a jury question, but instead is a legal question which defendants should have raised (if they wanted to advance this argument), but did not raise, in a motion to dismiss the indictment. Indeed, it makes no sense for the jury to hear and weigh legal arguments on the effect of Congress' passage of § 538 as the jury is not an arbiter of the law, and the Court should bar the defendants from mentioning or arguing § 538's effect on this case.").

from prosecution by the DOJ on the basis of the rider.[195] The unequal application of criminal liability for CSA violations has yet to reach the Supreme Court for consideration.[196] ". . . [T]he Supreme Court declined certiorari . . . the petition . . . did not focus on equal protection or selective prosecution claims but argued that the *McIntosh* 'strict compliance' standard,[197] as applied narrowly by courts, itself, violated several constitutional provisions."

In addition to the continuation of the rider, in 2018, the Farm Act removed hemp from the marijuana classification and permitted the use of the marijuana plant for very low-level THC.[198] This low-level of THC is currently being used in CBD products across the country[199] and raises the question of why the marijuana plant use, which is the subject of the CSA, is not permissible in one instance but is in another. Given the federal legislature passed the riders and the Act with bipartisan support and President Trump signed both, the government's intentions of enforcing marijuana's classification under the CSA are further eroded.

Additionally, the 2013 Cole Memorandum was prepared by Obama's Attorney General James Cole and stated that, "…so long as a marijuana business complied with state law, it would not be subject to federal prosecution unless it violated one of the Cole Memorandum priorities.[200]" The Cole Memo argument by itself, as a selective enforcement and prosecution argument, has failed in all federal court cases,[201] though one court, by way of dicta, demonstrated some concern about the potential for unequal enforcement of marijuana laws. However, this court was reviewing a supervised release issue and not a dismissal of the case based on selective enforcement.[202]

---

[195] U.S. v. McIntosh, 833 F. 3d 1163, 1178 (9th Cir. 2016).

[196] Nelson, *supra* note 173, at 1048; *see also McIntosh*, 833 F.3d at 1163; Gloor v. U.S., 139 S. Ct. 348 (2018).

[197] *McIntosh*, 833 F.3d at 1163.

[198] Juliegrace Brufke, *House Passes $867 Billion Farm Bill, Sending it to Trump*, THE HILL (Dec. 12, 2018), https://thehill.com/homenews/house/420990-house-passes-867-billion-farm-bill-sending-it-to-trump; *see also President Donald J. Trump Is Improving American Agriculture Programs*, WHITE HOUSE FACT SHEET (Dec. 20, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-improving-american-agriculture-programs/.

[199] Joan Oleck, "*There Is an Active Discussion of CBD Happening Across the Country," Says a New Report. And That Spells Opportunity*, FORBES (May 28, 2020), https://www.forbes.com/sites/joanoleck/2020/05/28/there-is-an-active-discussion-of-cbd-happening-across-the-country-says-a-new-report-and-that-spells-opportunity/#329dae6036f0.

[200] Tom Firestone, *The Sessions Memorandum: Two Years Later*, BAKER MCKENZIE (Jan. 6, 2020), http://globalcannabiscompliance.bakermckenzie.com/2020/01/06/the-sessions-memorandum-two-years-later (paraphrasing the Cole Memo, *supra* note 10, at 3).

[201] *See e.g.*, *Wayte*, 470 U.S. at 610.

[202] *United States v. Guess*, 216 F. Supp. 3d 689, 695 (E.D. Va. 2016).

While recent courts have held that the Cole Memo and its impact on the federal prosecution of marijuana CSA violations do not amount to selective prosecution and do not violate equal protection,[203] the fact that the government has continued with the Cole Memo principles for over seven years may strengthen the argument that the non-enforcement of the CSA is the rule rather than the exception. For example, the Trump Justice Department largely adheres to the Obama Administration's enforcement priorities and Attorney General Barr at his confirmation suggested that he would not prosecute state-compliant marijuana activity.[204]

Although the Trump administration issued a memo directing all U.S. Attorneys to "enforce the laws enacted by Congress and follow well-established principles when pursuing prosecutions related to marijuana activities,"[205] thus essentially overturning all previous DOJ policies pertaining to prosecutorial discretion in enforcing CSA violations,[206] thus far no Attorney General in any state has increased enforcement of the CSA beyond the scope of the Cole Memorandum[207] and the U.S. Attorneys' Office for the District of Colorado took the position that its non-enforcement would remain essentially unchanged.[208]

B. Selective Enforcement & Prosecution Based Upon Federal v. State Land

While state-legal cannabis industries have enjoyed some degree of protection from federal interference, if conducted on federal land, they are

---

[203] Nelson, *supra* note 173, at 1027, 1048; U.S. v. White, No. 12-cr-03045-BCW, 2016 WL 4473803, at *4 (W.D. Mo. Aug. 23, 2016); U. S. v. Nguyen, No. 2:15-cr-234-JAM, 2016 WL 3743143, at *1 (E.D. Cal. July 13, 2016); U. S. v. Apicelli, No. 14-cr-012-JD, 2016 WL 50436, at *15 (D.N.H. Jan. 4, 2016); U.S. v. Pickard, 100 F. Supp. 3d 981, 1009–11 (E.D. Cal. 2015); U.S. v. Vawter, No. 6:13-cr-03123-MDH, 2014 WL 5438382, at *8 (W.D. Mo. Oct.24, 2014); U.S. v. Taylor, No. 1:14-CR-67, 2014 WL 12676320, at *3 (W.D. Mich. Sept. 8, 2014); U.S. v. Heying, No. 14-CR-30 (JRT/SER), 2014 WL 5286153, at *12 (D. Minn. Aug. 15, 2014); U.S. v. Keller, No. 12-20083-41-KHV, 2014 WL 12695942, at *2 (D. Kan. Mar. 24, 2014). Similar challenges based on the Ogden Memo also failed. *See e.g.*, U. S. v. Canori, 737 F.3d 181, 185 (2d Cir. 2013); James v. City of Costa Mesa, 700 F.3d 394, 405 (9th Cir. 2012).

[204] Brandi Kellam, *Trump's Attorney General Nominee May Shift Policy on Marijuana Enforcement*, CBS NEWS (Jan. 18, 2019), https://www.cbsnews.com/news/william-barr-on-marijuana-legalization-attorney-general-nominee/?_sm_au_=iVV0HqSRVMkH5qnqKkM6NKsW8f6TG.

[205] *Justice Department Issues Memo on Marijuana Enforcement*, U.S. DEP'T OF JUST. (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement.

[206] Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone that Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html.

[207] Peter S. Murphy, *State Officials and U.S. Attorneys Respond to Sessions Move to Rescind Cole Memo*, ECKERT SEAMANS (Jan. 17, 2018), https://www.eckertseamans.com/stay-informed/blogs/controlled-substance/state-officials-and-u-s-attorneys-respond-to-sessions-move-to-rescind-cole-memo.

[208] Jarrett, *supra* note 206.

subject to punishment under the CSA.[209] Whether marijuana possession or use occurs on state verses federal land within the same state also raises equal protection issues. For example, someone driving into Yellowstone National Park, which is federal land, with possession of a medical marijuana card and medical marijuana, would not be prosecuted for possession on the state road, but, would be subject to enforcement and prosecution once they enter the park on a federal road. In 2018, a U.S. Appeals Court stated laws discouraging the DOJ from prosecuting some medical marijuana users and dispensaries (under the rider) did not apply to operations on federal land.[210] In 2012, three men were charged with violating the CSA after being caught with 118 cannabis plants in El Dorado County, California.[211] The men claimed they were growing medical marijuana, which under California law is "completely legal."[212] However, the court noted that because the land was actually federally-owned and controlled by the Bureau of Land Management, the men were criminally liable under the CSA.[213] The Ninth Circuit upheld the ruling noting, "[n]othing in California law purports to authorize the cultivation of marijuana on federal land."[214] Similarly, as recently as March 2020, a federal court in Nevada prosecuted three men for cultivating marijuana in the Humboldt-Toiyabe National Forest.[215] Meanwhile, other marijuana users are legally endowed with the protection of Nevada law for their recreational and medical uses.[216]

C. Selective Enforcement and Prosecutions on State Land in the Same State

Although courts have upheld convictions based on the Supremacy Clause and preemption, dissimilar treatment for the same offense on state land in the same state under the theory of equal protection selective enforcement and prosecution has not yet been addressed. The selective

---

[209] Bob Egelko, *Court Rules Protections for California Pot Suppliers Don't Cover Federal Land,* S.F. CHRON. *(*April 5, 2018*),* https://www.sfchronicle.com/news/article/Court-rules-protections-for-California-pot-12810541.php?src=hp_totn.

[210] *Appeals Court Limits Scope of Law Barring Pot Prosecutions,* U.S. NEWS (April 5, 2018), https://www.usnews.com/news/best-states/california/articles/2018-04-05/appeals-court-limits-scope-of-law-barring-pot-prosecutions?int=undefined-rec.

[211] Chris Moore, *Federal Court Rules That Cannabis Protections Do Not Apply to Federal Land,* MERRYJANE (Apr. 6, 2018), https://merryjane.com/news/californias-solution-to-fighting-the-illicit-weed-market-hire-more-cops?folded=true.

[212] U.S. v. Gilmore, 886 F.3d 1288 (9th Cir. 2018).

[213] *Id.*

[214] *Id.*

[215] *Two California Men Sentenced to Prison for Large-Scale Marijuana Grow Operation on Federal Land*, U.S. DEP'T OF JUST. (March 6, 2020), https://www.justice.gov/usao-nv/pr/two-california-men-sentenced-prison-large-scale-marijuana-grow-operation-federal-land.

[216] LAS VEGAS DEFENSE GROUP, *A Guide to Marijuana Laws in Law Vegas, Nevada,* SHOUSE L. (July 20, 2020), https://www.shouselaw.com/nv/defense/laws/marijuana/

enforcement and prosecution are even more egregious when the federal government picks and chooses to enforce or prosecute under the CSA classification in a state that *does* have marijuana laws. For example, between 2009-2012, in California

> . . . the Justice Department . . . conducted more than 170 aggressive SWAT-style raids in nine medical marijuana states, resulting in at least 61 federal indictments… also seized property from landlords who rent space to growers, threatening them with prosecution, and authorities have even considered taking action against newspapers selling ad space to dispensaries.[217]

In this instance one citizen may incur a burden while another may not.

These inconsistent federal marijuana "raids" under the CSA in a state that has protective marijuana laws are arbitrary and therefore have no rational basis. While again, the existence of the CSA may have a rational basis, short of non-compliance with a state medical marijuana law or regulation, there seems to be little or no rationale for enforcing and prosecuting one citizen legally engaged in a medical marijuana business as opposed to another within the same state. The case for a rational basis for the CSA classification seems greatly diminished in this instance and additionally raises a due process arbitrary and capricious argument as will be discussed below.

D. Equal Protection Arguments Under Desuetude

"'Desuetude' is "the obscure doctrine by which a legislative enactment is judicially abrogated following a long period of nonenforcement."[218] The doctrine "is primarily rooted in eliminating laws which due to a lack of enforcement have essentially become obsolete or serve no modern purpose."[219] Traditionally, and mostly to no avail, desuetude has been raised as a defense to the sudden enforcement of a statute with a long history of nonuse. Several cases across the country have attempted to use the desuetude doctrine as a defense to a criminal violation of a statutory scheme that was not enforced or enforced sporadically.[220]

---

[217] Lucia Graves, *Nancy Pelosi: Medical Marijuana Busts by Feds of 'Strong Concern',* HUFFPOST (May 3, 2012), https://www.huffpost.com/entry/nancy-pelosi-medical-marijuana_n_1474854.

[218] Note, *Desuetude,* 119 HARV. L. REV. 2209 (2006).

[219] U.S. v. Morrison, 596 F. Supp. 2d 661, 702 (E.D.N.Y. 2009) (citing *Desuetude, supra* note 215); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, not Powers*, 119 HARV. L. REV. 2212 (2006).

[220] *See e.g.,* Hill v. Smith, 70 (Iowa 1840), 1840 WL 2834 at *7; *see also e.g.*, Pearson v. Int'l Distillery, 34 N.W. 1, 5–6 (Iowa 1887).

The ACLU states "…because police lack the resources to enforce drug laws *{including those laws in violation under the CSA}* against all 17 million regular marijuana users, the prohibition of so commonplace an activity invites selective law enforcement. Similarly, the vast number of marijuana arrests also invites selective prosecution.[221] Simply put, the current situation around enforcing marijuana's legality extends deference to prosecutors in deciding which marijuana violations or crimes they will prosecute. The federal or state legislature may enact a criminal statute, as it did under the CSA, but the prosecutor may decide not to charge or indict under said statute. "When the state retains crimes that go largely unenforced and gives prosecutors . . . the power to decide which violators (if any) to charge," prosecutors become legislators.[222] As such, the desuetude doctrine severely mitigates the potential for prosecutorial abuse by placing the authority to make executive decisions into the hands of the courts.

Courts have acknowledged selective enforcement of a destuetudinal statute, that is a statute that has been long not used, may raise equal protection problems.[223] In some situations a desuetudinal statute triggers selective enforcement, which in turn, raises equal protection concerns.[224] This could be the case with marijuana legislation because the federal government's role does not explicitly and uniformly outlaw marijuana, and has to a certain extent accommodated state marijuana laws in the face of CSA restrictions. The ensuing result and consequences are that the federal government sporadically enforces the CSA.

Some courts do not recognize the doctrine as a legal defense, others permit the defense within strict parameters, and still others frame it within the context of due process or equal protection arguments. For example, in *Hill v. Smith, Morris*[225] an Iowa court, "pronounce[d] it contrary to the spirit of that Anglo-Saxon liberty . . . to revive, without notice, an obsolete statute."[226] The court reasoned that resuscitating a law after a "long disuse and a contrary policy had induced a reasonable belief that it was no longer in force."[227] Thus, the court invalidated the law on the basis of the law being desuetude.[228]

---

[221] *Marijuana Arrests & Punishments*, ACLU, https://www.aclu.org/other/marijuana-arrests-punishments (last visited July 14, 2020).

[222] William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 24 (1996).

[223] Elliott, 266 F. Supp. at 326.

[224] *Id.*

[225] *Smith*, 70 (Iowa 1840), 1840 WL 2834 at *7.

[226] *Id.* at 79.

[227] *Id.*

[228] *Id.*

Though, this finding was later overruled by *Pearson v. Int'l Distillery*,[229] in 1992, a West Virginia court recognized the desuetude doctrine as a valid defense in *Committee on Legal Ethics v. Printz*.[230] In 1967 in *United States v. Elliott*,[231] "a judge in the Southern District of New York suggested that *desuetude* might be a winning defense if framed in terms of a due process or equal protection challenge to an obsolete law."[232] However, since the reasoning explained in *Elliott* and the holding in *Printz*, no federal court has invalidated a criminal statute on *desuetude* grounds. Yet, additional courts have addressed this legal doctrine.

In *U.S. v. Jones*,[233] the court, quoting *Elliot*,[234] stated, "[a]lthough originally a civil law doctrine, courts have acknowledged that a desuetudinal statute could present 'serious problems of fair notice' in a criminal case."[235] A desuetudinal statute also contains the potential for abuse that rests in any over-broad administrative discretion; its selective enforcement raises equal protection problems." [236] For instance, in *United States v. Morrison*,[237] the government filed an indictment charging the defendant, a cigarette on-reservation retailer, with eleven counts of racketeering.[238] Racketeering Acts Four through Eighty of the indictment alleged that Morrison, ''knowingly and intentionally sold and distributed contraband cigarettes TTT lacking valid New York State tax stamps, in violation of Title 18, United States Code, Sections 2342(a) and 2; 18 U.S.C. § 2342(a) is part of the Contraband Cigarettes Trafficking Act (''CCTA''), 18 U.S.C. §§ 2341 et seq."[239]

---

[229] *Pearson*, 34 N.W. at 5–6 (A statute cannot lose its force by nonuser, unless such nonuser be accompanied by the enactment of irreconcilable statutes.).

[230] Comm., on Legal Ethics v. Printz, 416 S.E.2d 720, 727 (W. Va. 1992).

[231] *Elliott*, 266 F. Supp. at 318.

[232] *See id.* at 325–26. (There have been other federal court discussions of desuetude.). *See* Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury, 912 F.2d 897, 906 (7th Cir. 1990) (Posner, J.) (leaving open the propriety of a desuetude defense while ruling against the litigant on the issue); U.S. v. Jones, 347 F. Supp. 2d 626, 628–29 (E.D. Wis. 2004) (assuming validity of desuetude doctrine but denying its applicability to the case at hand); U. S. v. Moon Lake Elec. *Ass'n*, 45 F. Supp. 2d 1070, 1083 (D. Colo. 1999) (discussing the doctrinal requirements of the defense); *see also* Poe v. Ullman, 367 U.S. 497, 502 (1961) (implying that a Connecticut birth control statute had been reduced by nonuse to "dead words of . . . written text"); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (Invalidating a municipal laundry regulation that was only enforced as against Chinese immigrants. Had city authorities not arrested the Chinese laundry owners just a few years after passing the laundry ordinance at issue, the law would otherwise have fallen into complete desuetude with the passage of time; aside from its unconstitutional application against the Chinese, the statute does not seem to have been used at all.).

[233] *Jones*, 347 F. Supp. 2d at 628.

[234] *Elliott*, 266 F. Supp. at 326.

[235] *Jones*, 347 F. Supp. 2d at 628.

[236] *Elliot*, 266 F. Supp. at 326.

[237] U.S. v. Morrison, 596 F. Supp. 2d 661 (E.D.N.Y. 2009).

[238] *Id.* at 668.

[239] *Id.* at 669.

Among many arguments, the defendant contended the state, by not enforcing the tax statute, could not bring an indictment under that statutory scheme.[240]

The Court found New York's failure "to enforce its tax laws [was] not due to neglect; rather, it [was] due in large part to the ability of Native Americans to thwart enforcement."[241] The court explained that previous attempts to enforce the tax law precipitated civil unrest and legislative frustration.[242] Moreover, the Court explained this was not a case where a "statute's obsolescence [was] indicative of a shift in public morality.''[243] In fact, the Court highlighted, "there [was] nothing to indicate any shift in public opinion as presumably the public would not be receptive to a scheme that permit[ed] Native Americans to evade taxes in such a large-scale fashion."[244] Accordingly, the court determined that "to the extent the doctrine of desuetude breathes any life in this Circuit, it d[id] not apply to the instant prosecution."[245] As such, the Court concluded that "the failure of the executive branch to enforce the law [did not] undermine the viability of a statute duly enacted by the legislature."[246]

In a more recent case in 2017, *Jamgotchian v. State Horse Racing Commission*,[247] plaintiffs argued that Horse Racing Rule 163.255 should be invalidated because defendants had not enforced it.[248] This was particularly a concern in criminal prosecutions, as prosecution for a previously unenforced crime raised questions of fair notice and due process. The court decided not to address the validity of the doctrine " . . . because, even if desuetude [w]a s still a viable legal theory [it found] that it would not apply to the present matter."[249] The court explained that, Rule 163.255 was not in a "state of nonuse" simply because defendant never imposed penalties on violators.[250]

Indeed, the defendants continued to issue waivers under the Rule, indicating the law was still in effect.[251] The court also addressed the fairness and equal protection concerns underlying the doctrine and determined they were not present in that case. That is, plaintiffs were "not unaware of the

---

[240] *Id.* at 695.

[241] *Id.* at 703.

[242] *Id.*

[243] *Desuetude*, *supra* note 215.

[244] *Morrison*, 596 F. Supp. 2d at 703.

[245] *Id.*

[246] *Id.* at 683.

[247] Jamgotchian v. State Horse Racing Commission, 269 F.Supp.3d 604 (M.D. Pa. 2017).

[248] *Id.*at 618.

[249] *Id.*

[250] *Id.*

[251] *Id.*

Rule and unexpectedly faced with penalties as a result."[252] In fact, the court pointed out, plaintiffs, "possessed enough awareness of the Rule to request a waiver."[253] The court further explained that since the Rule had not been selectively enforced, equal protection concerns were not at issue.[254] In sum, the court concluded the desuetude doctrine did not apply to the facts, and thus, declined to abrogate Rule 163.255.

To illustrate this, Professor Cass Sunstein, of Harvard Law School, among other professors, suggests that desuetude was in play in *Lawrence v. Texas*,[255] in which the Supreme Court invalidated a homosexual sodomy statute that had never before been enforced against consenting adults acting in private."[256] There, the Court struck down the unenforced Texas statute not on the basis of desuetude but instead on substantive due process grounds.[257] Nevertheless, "[t]he pro-desuetude camp has not enjoyed much success, based on the separation powers argument that the courts should not usurp the power of the legislature. [258] In fact, some commentators have opined that the "legislature has a monopoly on the creation of criminal statutes, so only the legislature can repeal them.[259] On the other hand, the best argument in favor of desuetude might also be the simplest. In the words of one commentator, "it is part of the intelligent cooperation the courts owe the legislature to relieve it from the burden of seeking out and repealing statutes that clearly serve no modern purpose." [260]

Historically, courts have bypassed the desuetude doctrine all together, however, a judge in the Southern District of New York, suggested that desuetude might be a winning defense if framed in terms of a due process or equal protection challenge to an obsolete law."[261] Additionally, in *Committee on Legal Ethics v. Printz* in 1992, West Virginia recognized desuetude as a valid defense.[262] There, the Supreme Court of Appeals of West Virginia described a three-part inquiry for determining whether to abrogate a *desuete* penal statute: "(1) the crime in question must be malum prohibitum (wrong or prohibited); (2) there must be open, notorious, and

---

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] Lawrence v. Texas, 539 U.S. 558 (2003).

[256] *Desuetude*, *supra* note 215. *See also* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 30 (2003).

[257] *See* Sunstein, *supra* note 256.

[258] *Desuetude*, *supra* note 218, at 2218.

[259] *Id.* at 220.

[260] *Id.* at 2229.

[261] *See Cent. Nat'l Bank of Mattoon*, 912 F.2d at; *Jones*, 347 F. Supp. 2d at 628-29; *Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1083; *Yick Wo*, 118 U.S. at 374.

[262] *Printz*, 416 S.E.2d at 727.

pervasive violation of the statute for a long period; (3) and there must be a conspicuous policy of nonenforcement."[263] The non-enforcement and inconsistent enforcement of the marijuana classification under the CSA is based upon the fact that, teetering a very delicate balance of power, or in some cases, disregarding it altogether, states have passed marijuana laws and have developed their own frameworks for the marijuana industry in violation of the CSA. This rift calls into question whether the federal classification of marijuana is useless under the doctrine of desuetude.

Applying desuetude factors as set forth in the West Virginia *Printz* case above, if the defendants in both the California and Nevada cases would have made a desuetude argument, they could have possibly passed the three-part inquiry to abrogate the CSA statutory classification. Although the first factor that the crime in question must be *malum prohibitum* is questionable because the CSA can be characterized as either *malum prohibitum* or *malum in se* under the definition that a *malum in se* offense is "naturally evil as adjudged by the sense of a civilized community," whereas a *malum prohibitum* offense is wrong only because a statute makes it so.[264] The CSA classification of marijuana is clearly a statutory animal, but some may argue that marijuana itself is "evil."

With respect to factor two, there must be open, notorious, and pervasive violation of the statute for a long period. The first medical marijuana law passed in California in 1996, twenty-four years ago, and has to date never been subject to governmental estoppel under the CSA. A defendant would likely encounter a challenge with the third factor: that is, whether there is a conspicuous policy of nonenforcement. While the non-enforcement of the CSA may be conspicuous, there is an inconsistent approach and policy to that non-enforcement. The Executive Branch has certainly not totally failed to enforce the CSA. The DOJ's choice to prioritize certain types of prosecutions unequivocally does not mean that some types of marijuana use are now legal under the CSA, nor that the DOJ has now abandoned its enforcement position. Rather, courts have held "prosecutors are permitted discretion as to which crimes to charge and which sentences to seek."[265]

All things considered, if a court were to apply the *Printz* factors where a defendant defends against a criminal charge under the CSA for possession of marijuana on the basis of desuetude, they may have a fighting chance especially if the jurisdiction of the case were in West Virginia; the *Printz* precedent may apply.

---

[263] *Id.* at 726–27.

[264] State v. Horton, 51 S.E. 945, 946 (N.C. 1905).

[265] *James*, 700 F.3d at 405.

IV. DUE PROCESS SELECTIVE ENFORCEMENT AND PROSECUTION

The due process doctrine is found in the Fifth and Fourteenth Amendments to the United States Constitution and encompasses both substantive and procedural arguments.[266] The Supreme Court has held that a person making a selective-prosecution claim must establish two elements: "[1] the federal prosecutorial policy had a discriminatory effect and [2] it was motivated by a discriminatory purpose." [267] Laws that neither burden a fundamental right nor target a suspect or quasi-suspect class are subject to rational basis review.[268] The best case to advance a lack of a rational basis on the selective enforcement and prosecution argument is when there are "raids" on some businesses or individuals in a legal marijuana state, while others in the same state have not been raided. This inconsistent approach has a discriminatory effect with some business or individuals subject to the CSA while others are not.

We can only speculate on the basis and motivation for this inconsistency. What was it that made law enforcement raid one business as opposed to another, when both are conducting the same business? Was it just an exercise to assert the CSA? Was there something about the person or persons or business being raided? To establish the discriminatory purpose prong for a selective enforcement and prosecution claim, more facts need to be elucidated. But it should be noted that the Supreme Court recently acknowledged that, "[g]iven the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[269]

Yet what if the raid is directed to a medical marijuana user or dispensary that supplies a medical marijuana user? Historically, courts have applied a "rational basis with a bite" analysis in cases involving sexual orientation classifications.[270] If persons legitimately using *medical* marijuana are considered disabled, should they also receive a heightened rational basis analysis? To this point, Justices Marshall and Blackmun indicated acceptance for a heightened review of some state action on the basis of disability; noting that "…it should not be considered futile to believe that some universe of people with disabilities should find greater protection in a progressive vision of the Constitution."[271] Furthermore, in the *Garrett*[272]

---

[266] *Id.*

[267] *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480.

[268] Timothy Snowball, *All Rights Were Created Equal*, PAC. LEGAL FOUND. (Mar. 27, 2018), https://pacificlegal.org/all-rights-were-created-equal/.

[269] Trump v. Haw., 138 S. Ct. 2392, 2420 (2018).

[270] Romer v. Evans, 517 U.S. 620, 640 (1996).

[271] *Id.*

[272] Bd. of Trs. of the Univ. of Ala. v. Garret, 531 U.S. 356 (2001) (Breyer, J., dissenting).

dissent, Justice Breyer (joined by Justices Souter, Ginsburg, and Stevens) demonstrated amenability to a more nuanced consideration of the constitutional dimension of state discrimination on the basis of disability.[273] Also, several state supreme courts have demonstrated a "willingness to raise the standard of review for certain disability considerations."[274] The argument for medical marijuana users as a disabled population is bolstered as more courts protect employees who use medical marijuana under disability and discrimination statutes[275] and allow medical marijuana as a treatment for worker's compensation injuries.[276]

There is also the added argument that states with medical marijuana laws have determined medical marijuana users have a variety of medical conditions that may be disabling. This is evidenced by the fact that medical marijuana laws are fashioned to include a variety of medical qualifying conditions. Some of these conditions, like Tourette's Syndrome, epilepsy, and multiple sclerosis, are considered disabling.

A. Substantive Due Process

While the CSA marijuana classification itself may have a rational basis for its existence–for example, to protect citizens from a perceived potentially dangerous drug–what is the rational basis for inconsistently applying the CSA? With the exception of the rider mandate barring the DOJ from using federal funds to enforce the CSA against medical marijuana use, possession, and sales, one conceivable rational basis for the differing approaches to CSA enforcement and prosecution between states may be based on the government's power of prosecutorial discretion under the Cole Memo priorities. Additionally, this Memo, irrespective of its machinations through the Sessions and Barr approaches, which did not truly rescind it, has not been found to violate equal protection "because everyone in the nation could be prosecuted . . . the Cole Memo's non-binding nature on federal prosecutors was a core reason for its constitutionality."[277]

Another rational basis may be the mere differences between federal and state laws. The federal law prohibits marijuana use, sale, and possession while some states permit those things within their regulatory schemes. This argument may be specious as the threshold question should be, whether the federal government is enforcing and prosecuting the CSA marijuana classification *in toto* or not, not whether the CSA itself is rational. Further, the federal government continually and inconsistently surrenders power to

---

[273] *Id.*

[274] Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 559 (2014).

[275] *Id.*

[276] *Id.*

[277] Nelson, *supra* note 173, at 1049.

state governments by sporadic non-enforcement. To this end, the federal government maintains its supremacy in one instance, but not in another. This begs the question of whether the CSA classification really means anything legal at all.[278] That is, the federal government, by its action and inaction, is essentially voiding marijuana's CSA classification by sometimes waiving its supremacy and preemption constructs to enforce the CSA and other times ceding its supremacy and preemption to states' rights under the Tenth Amendment.

The counter argument is that, "because the federal government has authority to determine the insufficiency of a state's regulatory or enforcement systems, it is inaccurate to portray the federal government as deferring to state authority rather than simply wielding traditional prosecutorial discretion."[279] Nevertheless, the best substantive due process argument arises when the federal government picks and chooses to raid a marijuana enterprise under the CSA classification in a state that *does* have marijuana laws in place. Unless a rational basis for this uneven approach is advanced, it may be deemed arbitrary and capricious. Take for example two neighboring medical marijuana dispensaries that are equivalent in all respects. Law enforcement, without any known reason, decides to raid one of the dispensaries but not the other. The absence of a rational connection between the facts found and the choice made to raid conveys a notion of abuse of power.[280]

B. Due Process Void for Vagueness Under Desuetude

Under the Fifth and Fourteenth Amendments of the U.S. Constitution, void for vagueness is a construct "that requires criminal laws to state explicitly and definitely what conduct is punishable."[281] Laws that do not give adequate notice to a potential defendant of the offense charged may also fall under due process doctrine.[282] The void for vagueness doctrine requires a penal statute to define the criminal offense with "sufficient definiteness that ordinary people can understand what conduct is prohibited."[283] Moreover, the criminal offense must be clear to avoid encouraging "arbitrary

---

[278] *See* 41 C.F.R. § 102–74.400.

[279] Nelson, *supra* note 173, at 1015, n.43.

[280] *Arbitrary and Capricious Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/a/arbitrary-and-capricious/ (last visited July 15, 2020).

[281] *Vagueness Doctrine*, CORNELL L. SCH., https://www.law.cornell.edu/wex/vagueness_doctrine (last visited June 15, 2019); *see also* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

[282] *The Void-For-Vagueness Doctrine in the Supreme Court*, *supra* note 281.

[283] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

and discriminatory enforcement."[284]

However, in a U.S. Court of Appeals case, *not* on the basis of desuetude, the court held that a defendant's use and possession of marijuana, though illegal, outweighed the harm caused by him violating the law against cultivating marijuana.[285] The court reasoned that there was no other alternative to treat his glaucoma and thus, the necessity defense was valid.[286] The availability of the medical necessity defense may further subvert the CSA with regards to marijuana.[287] The CSA in its statutory language does not permit this or any other exception and the courts seem to be starting to carve out exceptions to the legislative act. Along with the sparse case law, several legal commentators have taken some interesting positions on the desuetude doctrine. One stated "a penal enactment which is linguistically clear, but has been notoriously ignored by both its administrators and the community for an unduly extended period, imparts no more notice of its proscriptions than a statute which is phrased in vague terms."[288] This position makes the case for a due process argument on the basis of "void for vagueness."

While the CSA clearly defines punishment for a marijuana-related offense, varying laws at the state level could produce confusion as to whether conduct involving marijuana is prohibited. The Court in in *Jamgotchian* acknowledged particular concern in criminal prosecutions relating to adequate fair notice and due process.[289] Although the court decided not to address the validity of the doctrine ". . . because, even if desuetude is still a viable legal theory," it determined "it would not apply to the present matter," it did not nullify the potential due process argument under desuetude.[290] Under this concept, potential defendants may argue both state and federal statutes may or may not result in prosecutions and are also dependent on how a court views marijuana in the context of federal law versus state law. Consequently, these inconsistencies fail to give proper due

---

[284] *U.S. v. Zachariah*, No. SA-16-CR-694-XR, 2018 WL 3017362, at *1 (W.D. Tex. June 15, 2018).

[285] U.S. v. Randall, D.C., Crim. No. 65923-75 (D.C. Super. Ct. Nov. 24, 1976), https://www.casebriefs.com/blog/law/marijuana-law/marijuana-law-keyed-to-mikos/the-regulation-of-marijuana-users-in-prohibition-regimes/united-states-v-randall/.

[286] *Id.*

[287] *But see* U.S. v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001), (no medical necessity defense exists for the illegal distribution of marijuana because the Controlled Substances Act). For an extensive review of the medical necessity defense in marijuana cases; *see* Jay M. Zitter, Annotation, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R. 6th 353 (2009).

[288] NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTION § 34:6 at 44 (7th ed. 2019) (quoting Arthur Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 416 (1964)).

[289] *Jamgotchian*, 269 F. Supp. 3d at 604.

[290] *Id.* at 618.

process notice to the ordinary person**.**

C. Modern Times Outlive the Classification Under Desuetude

In *Morrison*, in response to an indictment charging defendant, a cigarette on-reservation retailer, with eleven counts of racketeering, the defendant contended the state's failure to enforce a cigarette tax statute precluded it from brining an indictment under that statutory scheme.[291] The Court rejected defendant's argument, stating there was no evidence indicating a "shift in public opinion" and that presumably, the public would condemn a scheme that permitted defendant and others similarly situated to evade taxes on a large scale.[292] Based on the reasoning set forth in the *Morrison* desuetude case, a shift in public opinion supports an argument for voiding the CSA marijuana classification based on desuetude.

The clearest and strongest basis for rendering marijuana's federal classification desuetude rests with the significant shift in public opinion; court rulings protecting medical marijuana users inside and outside the employment setting and congressional support for protecting and legalizing marijuana.[293] This is evidenced by: (1) the passage of permissive marijuana laws in thirty-three states; (2) support from more than two-thirds of the general population for legalizing marijuana – reflecting the highest percentage of support since the late 1960s;[294] (3) several court cases, in state and federal courts permitting the use of medical marijuana;[295] (4) the fact that courts are reluctant to condemn marijuana for medical purposes; (5) the federal government's often permissive approaches towards prosecuting marijuana offenses by virtue of the sustained Cole Memo principles and the continuing riders; and (6) albeit unsuccessful, the Congressional attempts to modify and protect marijuana legalization. Together, these contributing factors could be interpreted as a reflection of a shift in public opinion and morality. This is unlike *Morrison*, where there was not an extensive rationale to not enforce the pertinent law.

In response to growing public approval, states continue to forge their own paths toward legal marijuana use. This is not very alarming, considering marijuana is not the only mind-altering substance that governments have carefully controlled. Alcohol, while once illegal, is now a commonly used substance that the government regulates to mitigate the effects of its

---

[291] *Morrison*, 596 F. Supp. 2d at 683.

[292] *Id.* at 703.

[293] Homer, *supra* note 57.

[294] Gacek, *supra note* at 57.

[295] Lewis A. Grossman, *Life, Liberty, (and the Pursuit of Happiness): Medical Marijuana Regulation in Historical Context*, 74 FOOD & DRUG L.J. 280, 283–84 (2019).

abuse.[296] Even with government restrictions, alcohol remains the "third leading cause of preventable death in the United States," suggesting its potential for abuse.[297] Nevertheless, the federal government has accepted the risks of alcohol, which allowed societal demands to prevail.

The removal of the CSA marijuana definition, whether a complete removal from the CSA or a rescheduling to a less dangerous drug classification, may be seen as creating new problems among an emerging generation that we, as a society, may not be equipped to address. Notably however, states with medical and/or recreational marijuana are permitted to introduce legislative safeguards, to warn consumers and protect adolescents.[298] For example, in California, you must be eighteen years or older and have a qualifying condition for medical marijuana or be over the age of twenty-one for recreational marijuana.[299] These examples demonstrate some of the many ways that, in spite of marijuana's potential for abuse, state legislatures are attempting to strike a balance between legal marijuana use, its conceivable medicinal benefits, public demand, and its risks for abuse. States have accepted marijuana's widespread use and have attempted to cope with the reality of its existence within our society. This reality sets forth a clear argument for declassification based on a shift in modern perceptions about marijuana.

Nonetheless, when an argument rooted in the principles of the desuetude doctrine seems to be substantial, courts have opted to nullify the law on alternate grounds. In *Lawrence v. Texas* the Supreme Court invalidated a homosexual sodomy statute that had never before been enforced against consenting adults acting in private.[300] In that case, the Court struck down the unenforced Texas statute not on a theory of *desuetude* but instead on substantive due process grounds.[301] There, even though the sodomy law at issue had never been enforced, and thus, under the theory, was eligible to be rendered desuetude, the court focused on the due process implications.

Additionally, early decisions recognizing the doctrine have been overturned. For example, in *Hill v. Smith, Morris*[302] an Iowa court stated, "[w]e pronounce it contrary to the spirit of that Anglo-Saxon liberty which we inherit, to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that

---

[296] *Id.*

[297] *Alcohol Facts and Statistics*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-facts-and-statistics (last visited May 15, 2020).

[298] *State-by-State Marijuana Policies*, *supra* note 110.

[299] *Id.*

[300] *Desuetude*, *supra* note 218, at 2212. *See* Sunstein, *supra* note 256.

[301] *See* Sunstein, *supra* note 256.

[302] *Smith* 70 (Iowa 1840), 1840 WL 2834 at *7 (Iowa Terr.); *Pearson*, 34 N.W. at 5–6.

it was no longer in force."[303], but this position and finding was later overruled by *Pearson v. Int'l Distillery*.[304] There, the court distinguished the case in *Hill v. Smith, Morris*, explaining that an old statute was inoperative and repealed by other irreconcilable statutes and "by the establishment of an opposite legislative policy."[305] As such, the court explained, " a statute cannot lose its force by nonuser, unless such nonuser be accompanied by the enactment of irreconcilable statutes."[306] Even if the passage and promulgation of state marijuana statutes and federal government riders are enough to argue "irreconcilable" statutes or opposite legislative policy, the Supreme Court increased the reluctance to void a statute on the basis of it being *desuetude*, by affirming that the "failure of the executive branch to enforce a law does not result in its modification or repeal."[307]

V. CONCLUSION

Notwithstanding potential constitutional arguments on whether the subject of marijuana should be governed by the federal government or by the states, the legitimate science alluding to *some* potential benefits from medical marijuana, the lack of science concluding that there is not a *high* potential for abuse with marijuana use, and the relationship to the definition of other drugs contained within the CSA classifications brings into question whether the CSA definition of a Schedule "I" drug truly applies to marijuana. Using parts of the marijuana plant for CBD also raises definitional issues.

The continuation of the passage of state marijuana laws coupled with the lack of enforcement of the CSA under executive policies throughout the Obama and Trump Administrations, and, the continued riders barring the DOJ from prosecuting medical marijuana matters, weakens the supremacy and preemption arguments that form the basis for enforcing the CSA with regards to marijuana.

With Congress unable to reach a legislative solution, marijuana's CSA classification continues to be diluted by piecemeal enforcement and prosecution under the CSA. Standard equal protection and due process arguments are beginning to emerge, especially when enforcement can be characterized as arbitrary and citizens are not duly notified, thereby inviting confusion about the potential enforcement under the CSA. The change regarding marijuana public opinion and morality, also bring forward additional arguments based on the legal doctrine of desuetude.

---

[303] *Smith*, 1840 WL 2834 at* 7.

[304] *Pearson*, 34 N.W. at 5–6.

[305] *Smith*, 1840 WL 2834 at *7.

[306] Dist. of D.C. v. Thompson, 346 U.S. 100 (1953).

[307] *Id.*

An examination of case law on the matter of equal protection, due process and desuetude demonstrates that courts are mostly not willing to directly address the utility of marijuana's CSA classification. There are, however, some novel and limited arguments available under the desuetude doctrine, including strong arguments for reevaluating the merits of the law to conform with current social, science, and practical trends.

The inaction by the federal government to reclassify marijuana under the CSA and the inability of the Congress to do so, leave the courts with varying and contrary positions regarding medical marijuana use inside and outside of the workplace. Law enforcement, prosecutors, and the courts are all reluctant to change the classification claiming that it would constitute a fiat and would instead be better left to Congress. Many cases have come before the courts over the years asking to overturn the CSA classification of marijuana to no avail. Perhaps courts should start addressing this growing issue, rather than doing nothing out of fear of legislating from the bench. Is it not the courts that are the last arbiter between the executive and legislative branch?[308]

Courts have previously alluded to rendering laws desuetude in response to a "shift in public morality."[309] An early Harvard Law Review study makes the case succinctly:

> in the face of overwhelming indication that those necessities had changed since its enactment, they *[the courts]* might well apply the modern policy instead of that of the earlier statute. More pragmatically, justification for such departure might be found in the view that it is part of the intelligent cooperation the courts we the legislature to relieve it from the burden of seeking out and repealing statutes that clearly serve no modern purpose.[310]

Now that the Democrats control the Senate and the House, the MORE ACT has a better chance of being passed, which would absolve the courts from taking any action on this issue. If the Act does not pass and we are left with this quagmire, perhaps it is time for courts to apply modern marijuana policies to an outdated federal law.

---

[308] *Judicial Branch*, HISTORY (Aug. 21, 2018), https://www.history.com/topics/us-government/judicial-branch.

[309] *Morrison*, 596 F. Supp. 2d at 703.

[310] *Judicial Abrogation of the Obsolete Statute: A Comparative Study*, 64 HARV. L. REV. 1181, 1184 (1951).

Do the Homeless Possess an Implied Right to Public Support? Exploring Professor Walker's Social Compact Theory

TIM DONALDSON†

Justice Robert H. Jackson wrote in *Edwards v. California* that "'[i]ndigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."[1] The Ninth Circuit United States Court of Appeals held many years later in *Martin v. Boise* that the Cruel and Unusual Punishments Clause of the "Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."[2] Yet, the court characterized its ruling as a "narrow one."[3] It stated that the court did not dictate that sufficient shelter must be provided for the homeless or that anyone could sit, lie, or sleep anywhere, anytime.[4] The court explained that "[n]othing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter."[5] In summary, the Cruel and Unusual Punishments Clause prohibits punishing unavoidable subsistence activities by homeless persons "on the false premise they had a choice in the matter."[6] However, the Constitution does not appear to require adoption of "any particular social policy, plan, or law to care for the homeless."[7]

---

[1] Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring).

[2] Martin v. Boise, 920 F.3d 584, 616 (9th Cir. 2019).

[3] *Id.* at 617.

[4] *Id.* at 617; *see also* Jones v. City of Los Angeles, 444 F.3d 1118, 1137-38 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

[5] *Martin*, 920 F.3d at 589 (Berzon, J., concurring in denial of rehearing en banc).

[6] *Id.* at 617; *see generally* Tim Donaldson, *Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status*, 4 CONCORDIA L. REV. 1 (2019).

[7] *Jones*, 444 F.3d at 1138, *vacated*, 505 F.3d at 1006 (9th Cir. 2007); *see also Martin*, 920 F.3d, 616-17; *cf.* Kincaid v. City of Fresno, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at *35 (E.D. Cal. Dec. 8, 2006) (concluding that rights to due process and protection against unreasonable seizures were violated by sweeps to remove homeless encampments, but asserting that "[t]he Court will not presume to tell elected officials of the City of Fresno how to address and resolve problems presented by the homeless."). The practical effect rulings that foreclose municipal remedies unless homeless relief is provided may however arguably lead to the same result. *See* Johnson v. City of Dallas, 860 F.Supp. 344, 350-51 (N.D. Tex. 1994), *rev'd in part, vacated in part by* Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

Professor Timothy Walker expressed a different viewpoint in his early commentary, an *Introduction to American Law*.[8] Walker noted that a few constitutional provisions favor the poor but acknowledged that "[t]here is no one which directly asserts, that those who cannot support themselves, shall be maintained at the public expense."[9] He theorized however that one might be implied from social compact principles that underlie American conceptions of government:

> [T]heir right of maintenance would seem to result, not only from the dictates of humanity, but from all the great principles of social organization. In a state of nature, the poor might appropriate to themselves the first property within their reach. By entering into the social compact, they have been obliged to renounce this right; and among the chances of life, it has fallen to their lot to be destitute. May they not then claim a bare support as a right? Life is the first and highest of all rights; but what is life, without the means of living?[10]

Walker found it unnecessary to pursue his reasoning, because he believed that adequate provision for the poor had been made by county poor-houses and supply of other government support when no poor-house was available.[11]

This article picks up where Professor Walker left off in 1837. It explores social compact theory and how that political idea was understood at the time of the nation's founding. The article further examines whether a social compact principle is embedded in the Constitution that provides a basis for individual rights. Lastly, it considers whether the poor possess a social compact right to bare support.

---

[8] TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW § 195, at 197-98 (1837). Timothy Walker founded the University of Cincinnati College of Law in 1833 and his *Introduction to American Law* gained a reputation as "the American Blackstone." Irwin Rutter and Samuel Wilson, *The College of Law: an Overview 1833-1983*, 52 U. CIN. L. REV. 311, 311-13 (1983). Walker's *Introduction to American Law* is now largely forgotten, but it has been cited by the Supreme Court as an authoritative resource for determining founding era intent. *See* District of Columbia v. Heller, 554 U.S. 570, 585 (2008).

[9] WALKER, *supra* note 8, at 197.

[10] *Id.* Some writers alternatively refer to a social compact and a social contract. *E.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 54-55 (Victor Gourevitch ed. and trans., Cambridge Univ. Press 2d ed. 2019) (1748). This article uses the social compact terminology adopted by Professor Walker except in quoted material and when necessary to discuss passages that expressly reference social contracts.

[11] WALKER, *supra* note 8, at 197-98.

I. SOCIAL COMPACT THEORY

Thomas Hobbes theorized in *Leviathan* that men are equal in nature and at conflict with each other for survival.[12] In Hobbes' view, this inherent disposition of man was evident from the way ordinary men safeguarded themselves when traveling and regularly secured their belongings to prevent them from being taken by others, and the manner in which kings took precautions to protect their kingdoms.[13] He considered this a condition of war where there cannot be assurance even during the abeyance of actual battle that another might not still take one's freedom, family, or property by violence at any time.[14] Hobbes opined that this condition is neither right nor wrong in the absence of society.[15] It is simply the way things are in nature, where life is "solitary, poore [sic], nasty, brutish, and short."[16]

Hobbes wrote that each man in nature has the liberty to do whatever he thinks is necessary to preserve his own life and to make use of whatever and whoever he sees fit.[17] This however provides no security to anyone, and men are therefore willing to surrender some of their liberty for peace; provided, others are willing to do the same.[18] To achieve the security that comes from peace, a person amenably forgoes the right in nature to do anything he wishes and is "*contented with so much liberty against other men, as he would allow other men against himselfe* [sic]."[19]

Hobbes asserted that the object of a man's surrender of natural liberty is his own benefit; therefore, some rights are inalienable.[20] For example, a man does not relinquish the right to defend himself against assault by others, because this cannot be understood to do himself any good.[21] Hobbes also acknowledged however that others are not dependent upon an individual's capitulation of rights for authority to act against that individual, because they already have a co-equal right in nature to act as they see fit.[22] Peaceful society therefore depends upon a reciprocal or mutual transfer or renunciation of certain rights.[23] This process, Hobbes explained, "is that which men call CONTRACT."[24]

---

[12] THOMAS HOBBES, LEVIATHAN 86-89 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651).

[13] *Id.* at 89-90.

[14] *Id.* at 88-89.

[15] *Id.* at 90.

[16] *Id.* at 89.

[17] *Id.* at 91.

[18] *Id.* at 91-92.

[19] *Id.* at 92. *But see* CHARLES MONTESQUIEU, THE SPIRIT OF THE LAWS 6-9 (Anne Cohler et al. eds., Cambridge Univ. Press 1989) (1748) (disputing Hobbes' views on the nature of man but still concluding that societies consist of a union of individual wills and strengths).

[20] HOBBES, *supra* note 12, at 93.

[21] *Id.* at 93, 98, 151.

[22] *Id.* at 92.

[23] *Id.* at 92-94, 117-21.

[24] *Id.* at 94.

A commonwealth is instituted, according to Hobbes, when a multitude agree, "*every one, with every one*," to give some person or assembly the right to represent them and authorize the actions and judgments of that person or assembly as if they were the multitude's own, "to the end, to live peaceably amongst themselves, and be protected against other men."[25] It is a product of necessity.[26] Hobbes believed that certain natural laws, such as justice, arise when men reciprocally pursue peace.[27] They are however incapable of enforcement without some power to cause their observance, because they are contrary to natural passions.[28] The only way, in Hobbes' view, to secure a lasting social contract is to appoint someone or some assembly with authority to act in matters concerning common peace and safety, and submit the individual wills of the multitude to the will of those appointed.[29] Sovereign power is therefore "conferred by the consent of the People assembled."[30]

John Locke similarly wrote in his *Two Treatises of Government* that "[m]en being . . . by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*."[31] Locke theorized that all men were naturally in a state of perfect freedom to do as they see fit within the bounds of the law of nature.[32] They also existed in a state of equality where power was reciprocal, and no one was subordinate to another absent divine declaration.[33] Locke did not however believe that someone in nature possessed license to harm others unless necessary for the person's own preservation.[34] Since all were equal, he perceived that every individual had a corresponding obligation to defend the rest of mankind and the life, liberty, health, limb, and goods of others.[35] He further explained that each person held power to execute the law of nature and therefore protect the innocent and punish offenders.[36] The law of nature requiring the peace and preservation of all mankind, in Locke's words, would:

> be in vain, if there were no body that in the State of Nature, had a *Power to Execute* that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State

---

[25] *Id.* at 121.
[26] *See id.* at 96, 117-21.
[27] *Id.* at 100-05.
[28] *Id.* at 117-18.
[29] *Id.* at 120-21.
[30] *Id.* at 121.
[31] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690).
[32] *Id.* at 269, 323-24.
[33] *Id.* at 269.
[34] *Id.* at 270-71.
[35] *Id.* at 271.
[36] *Id.* at 271-72, 323-24.

> of Nature may punish another, for any evil he has done, every one may do so. For in that *State of perfect Equality*, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do.[37]

Locke wrote that God imbued people with "strong Obligations of Necessity, Convenience, and Inclination to drive [them] into *Society*. . . ."[38] As an example, he cited the conjugal society of a man and woman that is needed not only for procreation but also care of their young for the species to survive.[39] Additionally, Locke cited the dangers and uncertainties in the state of nature as impetus for men to willingly give up their personal executory power and take sanctuary under society and established rules.[40] Particular communities were not however dictated by man's predisposition for society, and were instead, in Locke's view, dependent upon men joining into a community "for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it."[41] When doing so, each was understood to "give up all the power necessary to the ends for which they unite into Society. . . ."[42] Locke called this "*all the Compact*" needed to form a commonwealth and wrote, "this is that, and that only, which did, or could give *beginning* to any *lawful Government* in the World."[43]

Locke disagreed with Hobbes regarding the duration of consent given by those who enter into a social compact.[44] Hobbes wrote that the consent given to sovereign power by the multitude is essentially irrevocable.[45] In contrast, Locke asserted that men gave up their equality, liberty, and executive power in nature to form society "only with an intention in every one the better to preserve himself his Liberty and Property. . . ."[46] Therefore, whoever possessed supreme power in a commonwealth could only exercise that authority for the peace, safety, and public good of the people and for no other end.[47] When those in power breach their public trust by ambition, fear, folly or corruption, "it devolves to the People, who have a Right to resume

---

[37] *Id.* at 271-72.
[38] *Id.* at 318.
[39] *Id.* at 319-22.
[40] *Id.* at 350-52.
[41] *Id.* at 331.
[42] *Id.* at 333.
[43] *Id.*
[44] *Compare Id.* at 406-428 (describing the circumstances in which government may be dissolved), *with* HOBBES, *supra* note 12, at 122-23 (opining that subjects cannot be freed from their covenant to a sovereign).
[45] *See* HOBBES at 121-23.
[46] LOCKE, *supra* note 31, at 353.
[47] *Id.* at 353, 357-63.

their original Liberty, and . . . provide for their own Safety and Security, which is the end for which they are in Society."[48]

In contrast to Locke's view that members of a social compact give up some of the rights they have in nature to the extent necessary for the ends of society,[49] Jean-Jacques Rousseau declared in *The Social Contract* that they alienate all of their rights to the whole community when entering into a social contract.[50] However, Rousseau agreed with the central premise that man in nature has "an unlimited right to everything that tempts him and he can reach[,]" and that right is given up when joining with others into a society.[51] Therefore, sovereignty is solely the product of the association of individuals and cannot have any interests contrary to those who have associated.[52] In Rousseau's words, the "Sovereign owes its being solely to the sanctity of the contract."[53] The contract was not however between the governed and the government, but was instead the association among the governed who are in fact the sovereign.[54]

Rousseau theorized that the surrender of all natural rights to the community by individuals creates a condition of equality.[55] This equality brings into being a moral and collective body made up of its members.[56] The transition "produces a most remarkable change in man by substituting justice for instinct in his conduct . . . ."[57] In summary, Rousseau believed that the trade-off for an individual surrendering natural freedom is civil freedom.[58] So-called rights in nature, which amounted only to an unfettered and unprotected ability to usurp, transformed into genuine rights protected by society.[59]

By the time of the American revolution, social compact theory (and Locke's views in particular) had gained recognition beyond political thought and penetrated into legal discourse.[60] William Blackstone wrote in his *Commentaries on the Laws of England* that a system of laws is designed to maintain civil liberty except to the extent that the "public good requires some

---

[48] *Id.* at 412-13.
[49] *Id.* at 333.
[50] ROUSSEAU, *supra* note 10, at 52.
[51] *Id.* at 55-56.
[52] *Id.* at 51-55.
[53] *Id.* at 54.
[54] *Id.* at 119-21.
[55] *Id.* at 52, 64-65.
[56] *Id.* at 52-53.
[57] *Id.* at 55.
[58] *Id.* at 55-56.
[59] *Id.* at 55-58. Rousseau's views differ from the idea of reserved natural rights advocated by the Constitution's Founders. *See e.g.* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 429 (Philadelphia, J.B. Lippincott Co. 2d ed. 1941) (comments by James Wilson). There is however some support for Rousseau's belief that natural rights were replaced by civil rights through the social compact. *See e.g.* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 319-21 (1827) (Trimble, J., concurring).
[60] *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121-22 (Oxford, Clarendon Press 1765) (promoting social compact theory and citing Locke).

direction or restraint."[61] Blackstone endorsed the view that man in nature possessed absolute rights that could be exercised as he saw fit as a "free agent."[62] He recognized that every man, "when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish."[63] Therefore, "the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals."[64] Political or civil liberty, in Blackstone's view, was "no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick [sic]."[65]

II. CONSTITUTIONAL INFLUENCE OF SOCIAL COMPACT THEORY

Modern scholars disagree upon the extent to which social compact theory actually guided the drafting of the Constitution.[66] It did however at least influence colonial thought. Locke is expressly mentioned in a list of rights asserted by Bostonians in 1772 which declares:

> The natural liberty of Men by entring [sic] into society is abridg'd or restrained so far only as is necessary for the Great end of Society the best good of the whole—
>
> In the state of nature, every man is under God, Judge and sole Judge, of his own rights and the injuries done him: By entering into society, he agrees to an Arbiter or indifferent Judge between him and his neighbours [sic]; but he no more renounces his original right, than by taking a cause out of the ordinary course of law, and leaving the decision to Referees or indifferent Arbitrations.[67]

According to the Bostonian list: "Every natural Right not expressly given up or from the nature of a Social Compact necessarily ceded remains."[68] In addition, the Declaration of Independence echoes Lockean ideas. For example, it contends that governments derive "their just powers from the

---

[61] *Id.* at 122.
[62] *Id.* at 121.
[63] *Id.*
[64] *Id.* at 120.
[65] *Id.* at 121.
[66] Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2-5 (1999) (citing authorities and explaining different points of view).
[67] THE RIGHTS OF THE COLONISTS AND A LIST OF INFRINGEMENTS AND VIOLATIONS OF RIGHTS, 1772, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 200, 201 (1971) (referring to Locke as "Mr. Lock").
[68] *Id.* at 200.

consent of the governed."[69] This contention is identical to Locke's hypothesis that no one can be subjected to the political power of another "without his own *Consent*."[70] The Declaration of Independence also asserts a right to dissolve political bands and assume "the separate and equal station to which the laws of nature and of nature's God entitle them. . . ."[71] This assertion appears quite similar to Locke's views that men are independent, equal, and subordinate to no one in nature, and that they have the right to resume their original liberty and establish new government when existing government abuses its authority.[72]

Social compact theory was repeatedly raised during the debates surrounding the writing of the Constitution.[73] At the federal convention, delegate James Wilson analogized the willingness of States to cede power to a federal government to the willingness of men in nature to surrender personal freedom to form society:

> Federal liberty is to States, what civil liberty, is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, tha[n] the savage is to purchase civil liberty by the surrender of his personal sovereignty, which he enjoys in a State of nature.[74]

Wilson elaborated in the Pennsylvania State convention:

> Civil liberty is natural liberty itself, divested of only that part which, placed in the government, produces more good and happiness to the community than if it had remained in the individual. Hence it follows that civil liberty, while it resigns a part of natural liberty, retains the free and generous exercise of all the human faculties, so far as it is compatible with the public welfare . . . . When a single government is instituted, the individuals of which it is composed surrender

---

[69] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[70] LOCKE, *supra* note 31, at 330.

[71] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[72] LOCKE, *supra* note 31, at 269, 330-31, 412-14, 427-28.

[73] Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467, 472-77 (1900).

[74] JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 77 (Gaillard Hunt & James Brown Scott, eds., 1920) (James Wilson was an original Supreme Court Associate Justice. Re: Appointment of Justices, 2 U.S. (2 Dall.) 399 (1790). Wilson is also one of only a handful of the Founders who both signed the Declaration of Independence and served as a delegate to the Constitutional Convention of 1787). *See* 1 ST. HIST. SOC. OF WIS., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 76, 317 (Merrill Jenson, ed., 1976) (identifying signatories to the Declaration of Independence and Constitution).

> to it a part of their natural independence, which they before enjoyed as men.[75]

Wilson later wrote that a state may be described as "a complete body of free persons, united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others."[76] Wilson believed that the only method of constituting civil society was "by the convention or consent of the members, who compose it."[77] He concluded that it was "indispensably necessary, that the wills and the power of all the members be united in such a manner, that they shall never act nor desire but one and the same thing, in whatever relates to the end, for which the society [was] established."[78] In Wilson's view, each individual in the social compact thus "engages with the whole collectively, and the whole collectively engage with each individual. These engagements are obligatory, because they are mutual."[79] Wilson called such civil society a state even without some form of government attached, and concluded that government therefore must serve the happiness of society.[80] Since this social compact concept of "state" underlies all government, Wilson wrote: "[l]et government - let even the constitution be, as they ought to be, the handmaids; let them not be for they ought not to be, the mistresses of the state."[81]

Constitutional debaters seemed to accept that social compact theory underlies American democracy and instead, argued whether arrangements which formed a national government should be considered a compact between States or something different.[82] The Founders' belief in social compact principles is evidenced by the September 17, 1787 letter from the Constitutional Convention to Congress transmitting the Constitution:

---

[75] *See* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 429 (Philadelphia, J.B. Lippincott Co. 2d ed. 1941) (comments by James Wilson).

[76] 1 JAMES WILSON, THE WORKS OF JAMES WILSON 239 (Robert Green McCloskey ed. Belknap Press, 1967).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 238-39.

[81] *Id.* at 239.

[82] *See* McLaughlin, *supra* note 73, at, 473-81; *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 306-72, at 279-343 (1833); 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. 140-56 (1803). (It should however be noted that McLaughlin reports some remarks made by Wilson in the Pennsylvania convention that might at first glance appear to deny that the Constitution has a compact origin, however, any confusion likely arises from context. McLaughlin, *supra* note 73, at 478-79. Wilson later clarified that the Constitution, in his view, is an agreement between the people of the various States rather than a compact among completely sovereign States, and he submitted that the source of confusion and perplexity was the emphasis given to State-politics by several publications of that time.) *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 462-64 (1793) (opinion of Wilson, J.).

> Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was encreased [sic] by a difference among the several States as to their situation, extent, habits, and particular interests.[83]

The Ninth Amendment to the U.S. Constitution memorializes the premise of reserved rights that is central to Lockean social compact theory, by stating:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[84]

Justice James Wilson relied upon social compact principles when rejecting an argument in *Chisholm v. Georgia* that a State could assert sovereign immunity against the jurisdiction of the Supreme Court,

---

[83] Letter from George Washington, President of the Constitutional Convention, to the President of Congress (Sept. 17, 1787), *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION , *supra* note 74, at 305; *see also* THE FEDERALIST NO. 84 (Alexander Hamilton) (arguing that bills of rights are stipulations between kings and subjects and unnecessary in the Constitution which recognized reserved popular rights by asserting that the people ordained and established it: "Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations."), *reprinted in* ALEXANDER HAMILTON ET. AL., THE FEDERALIST 578 (Jacob E. Cook ed., 1961).

[84] U.S. CONST. amend. IX; *see* 3 STORY, *supra* note 82, §§ 1861, 1898, at 720-21, 751-52. (The Tenth Amendment similarly indicates a reserved rights philosophy, and provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X.). Application of the Ninth Amendment is beyond the scope of this article, but its history and purposes are ably covered elsewhere. *E.g.* CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (Temple University Press 1995); BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 DRAKE L. REV. 875 (2008); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L. J. 309 (1936). The Chicago-Kent Law Review published an instructive issue devoted primarily to a Ninth Amendment symposium which contains contributions from many preeminent scholars. *E.g.*, Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI-KENT L. REV. 37 (1988). It later published rebuttal papers by other top scholars on the Ninth Amendment. Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI-KENT L. REV. 1001 (1988); Calvin R. Massey, *Antifederalism and the Ninth Amendment*, 64 CHI-KENT L. REV. 987 (1988); Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: a Comment on the Ninth Amendment Symposium*, 64 CHI-KENT L. REV. 981 (1988).

explaining that Georgia was not sovereign in a feudal sense.[85] Wilson described a State as "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others."[86] Wilson wrote that "laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The *sovereign*, when traced to his source, must be found in the *man*."[87] Wilson concluded that the citizens of Georgia "did *not* surrender the Supreme or sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is* NOT *a sovereign State*."[88] Therefore, in Wilson's opinion, Georgia was subject to the jurisdiction of United States courts, because the people of the United States (which included the people of Georgia) exercised their reserved sovereignty to vest the Union with judicial power through the Constitution.[89]

Chief Justice John Jay explained in *Chisholm* that sovereignty in the United States rests with the people, and government is only the agent of the people.[90] He wrote that the Constitution recognizes this sovereignty with the expression that it was established by "[w]e the *people* of the *United States*."[91] In Jay's view:

> Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the *United States* is likewise a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner.[92]

He opined that the residuary sovereignty of each State belonged to the people of that State.[93] Jay concluded that Georgia could be sued in federal courts by the citizens of another State, because it would be strange if the people of this country, "the joint and equal sovereigns[,]" would grant the collective citizens of one State the right to sue a citizen of another while denying those citizens the right of suing them.[94]

---

[85] Chisholm, 2 U.S. (2 Dall.) at 454-58 (opinion of Wilson, J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *see also* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (holding that U.S. CONST. amend. XI superseded Chisholm).

[86] Chisholm, 2 U.S. (2 Dall.) at 455.

[87] *Id.* at 458.

[88] *Id.* at 457.

[89] *Id.* at 457-58, 463.

[90] *Id.* at 472 (opinion of Jay, C.J.).

[91] *Id.* at 471.

[92] *Id.*

[93] *Id.* at 471-72.

[94] *Id.* at 477.

Justice James Iredell dissented in *Chisholm*, writing that the Judiciary Act of 1789 required the Court to respect the common law doctrine of sovereign immunity which he believed the States possessed.[95] In addition, the majority's view regarding sovereign immunity was quickly repudiated by the adoption of the Eleventh Amendment.[96] The Court later stated in *Hans v. Louisiana* that the *Chisholm* majority decision:

> created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.[97]

The text of the Eleventh Amendment does not directly address or abandon the social compact principles relied upon by Jay and Wilson in *Chisholm*.[98] It must, however, be conceded with respect to the question of sovereign immunity that "*Chisholm* was contrary to the well-understood meaning of the Constitution[,]"[99] given the speed with which it was publicly rejected. The Supreme Court quickly acknowledged and yielded to the reversal of *Chisholm* by constitutional amendment.[100]

Another Supreme Court Justice also expressed the belief that social compact principles might be used to invalidate contradictory legislation.[101] Justice Samuel Chase surmised in *Calder v. Bull* that it would be political heresy to maintain that legislative authority was unlimited except as expressly retrained by the Constitution or other fundamental law of a State.[102] Chase wrote that "[t]he *nature* and *ends* of *legislative* power will limit the *exercise* of it."[103] Chase further explained that the social compact is the foundation of legislative power, and the terms of the social compact therefore determine the proper objects of legislation.[104] In his view, "[t]he people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from

---

[95] *Chisholm*, 2 U.S. (2 Dall.) at 434-36 (opinion of Iredell, J.).
[96] *See* U.S. CONST. amend. XI.
[97] Hans v. Louisiana, 134 U.S. 1, 11 (1890).
[98] *See* U.S. CONST. amend. XI; *cf.* Munn v. Illinois, 94 U.S. 113, 124-25 (1876) (later reconfirming adherence to social compact principles), *and* Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1874).
[99] Seminole Tribe v. Florida, 517 U.S. 44, 69 (1996).
[100] *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798).
[101] Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-89 (1798) (opinion of Chase, J.).
[102] *Id.* at 388-89.
[103] *Id.* at 388.
[104] *Id.*

violence."[105] Chase reasoned that vital principles of government prohibit flagrant abuses of legislative power such as "*authoriz*[ing] *manifest injustice by positive law*; or . . . tak[ing] away that security for *personal liberty*, or *private property*, for the protection whereof the government was established."[106] Chase concluded that "[a]n ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*; cannot be considered a *rightful exercise* of *legislative* authority."[107] The Supreme Court later held in *Loan Association v. Topeka* that a State legislature may not authorize imposition of taxes purely in aid of private enterprise.[108] The Court did not point to a specific constitutional provision that would invalidate a tax collected for private purposes, and instead reasoned: "[i]t must be conceded that there are such rights in every free government beyond the control of the State."[109] In the Court's view, government could quickly devolve into despotism without such limitations.[110] It went on to explain:

> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.[111]

The Court expressed concern that the power to tax is most liable to abuse and therefore limited it by a principle derived from the social compact

---

[105] *Id.*

[106] *Id*.

[107] *Id.*; *see also* Kelo v. City of New London, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (quoting Chase); *Calder*, 3 U.S. (3 Dall.) at 397 (opinion of Paterson, J) ("It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact."); THE FEDERALIST NO. 44 (James Madison) ("Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact. . . ."), *reprinted in* ALEXANDER HAMILTON ET. AL., THE FEDERALIST 301 (Jacob E. Cooke ed., 1961).

[108] *Loan Ass'n*, 87 U.S. at 659-64.

[109] *Id.* at 662.

[110] *Id.*

[111] *Id.* at 663.

maxim that government exists only for the public good,[112] writing that "there can be no lawful tax which is not laid for a *public purpose*."[113]

A framework thus exists to at least entertain Walker's theory that unwritten rights might be based upon the social compact.[114] However, the foundation beneath it might no longer be that sound. Justice Iredell issued a strong concurrence in *Calder* that questioned the authority of courts to invalidate legislation based upon rights unexpressed by the Constitution.[115] Iredell explained that governments in America are framed by constitutions "to define with precision the objects of legislative power" and if legislation "violates those constitutional provisions, it is unquestionably void. . . ."[116] Iredell cautioned, however, "as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case."[117] Iredell elaborated that the Supreme Court cannot declare legislation void:

> merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.[118]

It is arguable that "[l]ater jurisprudence vindicated Justice Iredell's view, and the idea that 'first principles' or concepts of 'natural justice' might take precedence over the Constitution or other positive law 'all but disappeared in American discourse.'"[119] In addition, the Supreme Court in *Loan Association v. Topeka* and Justice Chase in *Calder v. Bull* held only that social compact principles might provide grounds to invalidate legislation

---

[112] *See generally* LOCKE, *supra* note 31, at, 363, 374-80 (explaining that men give up liberty in nature only for peace, safety, and public good, and that legislative authority and discretionary executive authority, *i.e.* prerogative, must be exercised only for public good).

[113] *Loan Ass'n*, 87 U.S. at 664.

[114] WALKER, *supra* note 8, at 197.

[115] *Calder*, 3 U.S. (3 Dall.) at 398-99 (1798) (opinion of Iredell, J.).

[116] *Id.* at 399.

[117] *Id.*

[118] *Id.*

[119] *Seminole Tribe*, 517 U.S. at 168 (Souter, J., dissenting) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 52 (1980)); *see also* Alden v. Maine, 527 U.S. 706, 736 (1999) ("the contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law."); Griswold v. Connecticut, 381 U.S. 479, 514-27 (1965) (Black, J., dissenting) (deriding use of "mysterious and uncertain" natural law concepts to strike down legislation); Adamson v. California, 332 U.S. 46, 69-92 (Black, J., dissenting); John M. Harlan, *The Bill of Rights and the Constitution*, 50 ABA J. 918, 920 (1964) ("There is no such thing in our constitutional jurisprudence as a doctrine of civil rights at large, standing independent of other constitutional limitations or giving rise to rights born only out of the personal predilections of judges as to what is good.").

and neither indicated that they could be used to impose affirmative obligations upon government.[120] The platform for consideration of Walker's proposal is therefore unsteady and may not extend far.[121]

III. RIGHTS OF THE POOR UNDER THE SOCIAL COMPACT

Walker's theory finds superficial validation in Hobbes. Hobbes believed that the right to defend oneself is inalienable.[122] He therefore espoused a complementary position that someone who is impoverished might be excused when taking action needed to survive:

> When a man is destitute of food, or other thing necessary for his life, and cannot preserve himself[] [sic] any other way, but by some fact against the Law; as if in a great famine he take the food by force, or stealth, which he cannot obtaine [sic] for money [sic] nor charity; or in defence [sic] of his life, snatch away another mans Sword, he is totally Excused. . . .[123]

One could therefore argue, as suggested by Walker, that a person might be entitled to support by forgoing appropriation by force or stealth.[124] It would however be inconsistent with Hobbes at root, because inalienable rights were not renounced or reciprocally transferred as part of a social compact.[125] This included: "the Right (he can never abandon) of defending his life, and means

---

[120] *See Loan Ass'n*, 87 U.S. at 663-64; *Calder*, 3 U.S. (3 Dall.) at 388-89 (1798); *see generally* Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 865-69 (2008). The opinions of Connecticut Supreme Court Justices in *Moore v. Ganim* contain an informative debate about whether unenumerated affirmative governmental obligations should be recognized. Moore v. Ganim, 660 A.2d 742, 761-62 (majority opinion), 774-76 (Peters, C.J., concurring), 808 n.61 (Berdon, J., dissenting) (Conn. 1995).

[121] The Supreme Court has rejected assertion of a social welfare right in other contexts. *See e.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980) (holding that the liberty interest protected by the due process "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution."); Maher v. Roe, 432 U.S. 464, 469 (1977) ("The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents"); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (explaining that "the Constitution does not provide judicial remedies for every social and economic ill."); *cf.* Bowen v. Gilliard, 483 U.S. 587, 598 (1987) (confirming the plenary power of Congress to terminate public welfare benefits and the deferential standard of review utilized by the Court); Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (writing, "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border."); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (stating that there need only be a reasonable basis for benefit classifications in social welfare regulations to satisfy equal protection requirements).

[122] HOBBES, supra note 12, at 93, 98, 151.

[123] *Id.* at 208.

[124] WALKER, *supra* note 8, at 197.

[125] *See* HOBBES, *supra* note 12, at 93-94.

of living."[126] These inalienable rights therefore could not transform into a correlative right to support.[127] A pact or covenant was created only when one contractor delivered something on promise of future delivery of something else.[128] In Hobbes' construct, a binding right to support would never arise, because the right to do whatever is necessary to defend one's own life was never exchanged for something in return.[129]

Hobbes supported public charity.[130] He maintained that a sovereign is obliged by the law of nature to procure the "*safety of the people*."[131] Safety meant more than just bare preservation, it also included protection of "all other Contentments of life, which every man by lawful[] [sic] Industry, without danger, or hurt to the Common-wealth, shall acquire to himself[] [sic]."[132] Hobbes wrote that those who by some unavoidable accident:

> become unable to maintain themselves by their labour ; they ought not to be left to the Charity of private persons; but to be provided for, (as far-forth as the necessities of Nature require,) by the Lawes [sic] of the Common-wealth. For as it is Uncharitablenesse [sic] in any man, to neglect the impotent; so it is in the Soveraign [sic] of a Common-wealth to expose them to the hazard of such uncertain Charity.[133]

It is doubtful however that Hobbes' advice for a sovereign to provide public charity was derived from a right that belonged to the poor by entry into a social compact, because transferring a right in hopes of gaining charity, in Hobbes view, "is not Contract, but GIFT, FREE-GIFT, GRACE. . . ."[134] Good laws benefitting the people were needed, but no law made by a sovereign could be considered unjust.[135] Grounds therefore would not exist under

---

[126] *Id.* at 96.

[127] *See Id.* at 92-94.

[128] *Id.* at 94.

[129] *Id.* at 93-94. It should also be noted the idea that poverty might excuse crime would be inimical with American justice. *See e.g.* United States v. Manzella, 791 F.2d 1263, 1269 (7th Cir. 1986) ("[P]overty is not a defense to larceny. Cause and responsibility are not synonyms."); Johnson v. City of Dallas, 860 F.Supp. 344, 349-50 (N.D. Texas 1994) (explaining that homelessness does not create a class of persons constitutionally immune from much of criminal law), *rev'd in part, vacated in part by* Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995); *see generally* Jeremy Waldron, *Why Indigence Is Not a Justification*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 98-113 (William C. Heffernan & John Kleinig eds., 2000).

[130] HOBBES, *supra* note 12, at 239.

[131] *Id.* at 231.

[132] *Id.*

[133] HOBBES, *supra* note 12, at 239. It should be noted that Hobbes also wrote that the sovereign should force the able-bodied poor to work or move to under-inhabited lands. *Id.*

[134] *Id.* at 94. Montesquieu also wrote that a state "owes all the citizens an assured sustenance, nourishment, suitable clothing, and a kind of life which is not contrary to health[,]" but he did not explain this as an individual right and instead advised it as a means to keep people from suffering and avoid rebellion, and he recommended only temporary relief measures. *See* MONTESQUIEU, *supra* note 19, at 455-56.

[135] HOBBES, *supra* note 12, at 124, 239.

Hobbes for individuals to demand that a sovereign provide support as a matter of compact right, because the "Soveraigne [sic] maketh no Covenant with his subjects before-hand. . . ."[136]

Walker finds more desultory support in Lockean ideology. Locke wrote that "Government has no other end but the preservation of Property."[137] This should not be misunderstood as mere protection of property in a narrow sense, because Locke described a person's property as "his Life, Liberty, and Estate."[138] As suggested by Walker, the argument could therefore be made that life is more important than an estate, and partial surrender of liberty by individuals entering into the social compact entitles them to the means of living.[139] However, this would be inconsistent with Locke's views upon property rights in the narrower sense.[140]

Locke agreed that people submit their possessions to the jurisdiction of the government when entering society.[141] He acknowledged that government has the power to regulate property but wrote that such power is not cannot be arbitrarily exercised.[142] Locke also recognized that everyone must pay their share for the maintenance of government.[143] He argued however that the preservation of property is an objective of government, and it would be absurd to suppose that men would lose their property by entering into society.[144] Locke wrote that "it is a mistake to think, that the Supream [sic] or *Legislative Power* of any Commonwealth, can do what it will, and dispose of the Estates of the Subject *arbitrarily*, or take any part of them at pleasure."[145]

Locke stated that every man has a property right in his own person.[146] He also postulated that a person's labor thus confers a right to other types of property (*i.e.* private possessions).[147] Locke thought that a person's natural right to property was limited to the extent of that person's needs, and the rest belonged to all in common.[148] However, the value attributed to property was a product of labor and industry which belonged to the person who applied them.[149] This gave rise to the invention of money by which men could

---

[136] *Id.* at 122.

[137] LOCKE, *supra* note 12, at 329, 330-31, 360.

[138] *Id.* at 323.

[139] WALKER, *supra* note 8, at 197. Locke arguably might not prioritize the right to life over estate in the manner suggested by Professor Walker. In his discussion of property rights, Locke wrote that an army officer's authority to send a soldier to his death does not give the officer a right to make the soldier "give him one penny of his Money." *Id.* at 362.

[140] *See* LOCKE, *supra* note 12, at 285-302, 360-62.

[141] *Id.* at 348.

[142] *Id.* at 361.

[143] *Id.* at 362.

[144] *Id.* at 360.

[145] *Id.* at 361.

[146] *Id.* at 287.

[147] *Id.* at 287-92.

[148] *Id.* at 285-87, 290-96, 299-300, 302.

[149] *Id.* at 296-300.

accumulate possessions in different proportions.[150] Locke concluded that persons have given up their natural common property rights and settled the right to property amongst themselves through compact and agreement.[151] In Locke's view, "[m]en have agreed to disproportionate and unequal Possession of the Earth. . . ."[152] It would be hard to reconcile a social welfare right with Locke's theoretical defense of unequal property rights in society.

Locke believed in charity,[153] but it is impossible to ignore his apparent disdain for the jobless poor.[154] He blamed them for their own condition.[155] Locke derisively described some as "begging drones, who live unnecessarily upon other people's labour [sic]."[156] He unkindly called others "idle vagabonds."[157] Locke proposed that able-bodied beggars in maritime counties between the ages of fourteen and fifty be indentured to serve three years on navy ships and those who were maimed or over the age of fifty be sent to houses of correction and kept at hard labor for three years.[158] He supported use of similarly draconian measures against female beggars.[159] Locke envisioned that his remedies would induce the poor to at least make pretense that they desired work, and he urged indentured servitude or jail for those who refused work that was offered to them.[160] Locke additionally proposed sending indigent children above the age of three to working schools.[161] While Locke revealed his Dickensian world-view on poverty in a separate paper,[162] it is consistent with his political perspective that property rights are created by labor.[163] He thought that the poor were a

---

[150] *Id.* at 293, 299-302.

[151] *Id.* at 299.

[152] *Id.* at 302.

[153] *Id.* at 170.

[154] JOHN LOCKE, BOARD OF TRADE PAPER ON THE POOR (1697), *reprinted in* H.R. FOX BOURNE, 2 THE LIFE OF JOHN LOCKE 377-91 (New York, Harper & Brothers 1876).

[155] LOCKE, *supra* note 31, at 171 ("[T]he Subjection of the Needy Beggar began not from the Possession of the Lord, but the Consent of the poor Man, who preferr'd being his Subject to starving."); *see also* LOCKE, *supra* note 154, at 378-79.

[156] LOCKE, supra note 154, at 378.

[157] *Id.* at 379.

[158] *Id.* at 379-80.

[159] *Id.* at 380-81.

[160] *Id.* at 381-82.

[161] *Id.* at 383-85.

[162] *Id.* at 377-91.

[163] *Compare id.*, *supra* note 154, at 382 (opining that the poor who are willing to work "either through want of fit work provided for them, or their unskillfulness in working in what might be a public advantage, do little that turns to any account, but live idly upon the parish allowance or begging, if not worse. Their labour, therefore, as far as they are able to work, should be saved to the public, and what their earnings come short of a full maintenance should be supplied out of the labor of others, that is, out of the parish allowance.") *with* LOCKE, *supra* note 31, at 296-302 (opining that productive labor entitles a laborer not only to property but also increases in property value).

burden upon the industrious,[164] and it is therefore difficult to conceptualize a Lockean-based right to depend, as Locke put it, on the labor of others.[165]

Founder John Adams did not advance an egalitarian view of economic rights in his *Defense of the Constitutions of Government of the United States of America* but instead indicated that rich and poor alike are protected by the structure of American government, writing:

> It is agreed that "the end of all government is the good and ease of the people, in a secure enjoyment of their rights, without oppression;" but it must be remembered, that the rich are *people* as well as the poor; that they have rights as well as others; that they have as clear and as *sacred* a right to their large property, and as wicked, as others have to theirs which is smaller; that oppression to them is as possible, as to others; that stealing, robbing, cheating, are the same crimes and sins, whether committed against them or others. The rich, therefore, ought to have an effectual barrier in the constitution against being robbed, plundered, and murdered, as well as the poor; and this can never be without an independent senate. The poor should have a bulwark against the same dangers and oppressions; and this can never be without a house of representatives of the people. But neither the rich nor the poor can be defended by their respective guardians in the constitution, without any executive power, vested with a negative, equal to either, to hold the balance even between them, and decide when they cannot agree.[166]

Adams' *Defense* later reemphasized the importance of having a senate to defend economic inequality, explaining:

> Without this the rich will never enjoy any liberty, property, reputation or life, in security. The rich have as clear a right to their liberty and property as the poor: it is essential to liberty that the rights of the rich be secured; if they are not, they will soon be robbed and become poor, and in their turn

---

[164] *See* LOCKE, *supra* note 154, at 378 ("Could all the able hands in England be brought to work, the greatest part of the burden that lies upon the industrious for maintaining the poor would immediately cease.").

[165] *Id.* at 378.

[166] 3 JOHN ADAMS, DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 293-94 (London, John Stockdale 1794). (John Adams was a signer of the Declaration of Independence. *See* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 74, at 76 (identifying signatories).).

> rob their robbers; and thus neither the liberty or property of any will be regarded.[167]

Adams did not exhibit the same contempt for the poor as Locke, but he did display a significant amount of distrust and concern for preservation of private fortunes.[168]

Rousseau would appear to support the broader principle behind Professor Walker's theory.[169] Rousseau wrote that "[w]hat is most needful and perhaps most difficult in government is a strict integrity to render justice to all, and above all to protect the poor against the tyranny of the rich."[170] Rousseau further stated, "as regards wealth, no citizen [should] be rich enough to be able to buy another, and none so poor that he is compelled to sell himself."[171] He believed that it is the task of government to "prevent extreme inequality of fortunes" by leveling the economic playing field and preventing the accumulation of disproportionate wealth.[172] Rousseau acknowledged that "the right of property is the most sacred of all the citizens' rights and in some respects more important than freedom itself . . . ."[173] He believed however that the social compact obligated everyone to contribute their share to public needs,[174] and Rousseau asserted that taxes should be assessed in proportion with ability to pay.[175]

Rousseau felt that it was an essential duty of government to give thought to the subsistence of its citizens, but his view on providing support is more nuanced.[176] He wrote that government's duty to consider the subsistence of its citizens "consists not in filling the granaries of private parties and to exempt them from labor, but in keeping plenty so within their reach that, in order to acquire it labor is always necessary and never useless."[177] He similarly indicated that government should prevent extreme inequality of fortunes not "by building poorhouses but by shielding citizens from becoming poor."[178] According to Rousseau, the obligation to the poor

---

[167] ADAMS, *supra* note 166, at 328.

[168] *See Id.* at 216-21, 293-94, 328-29, 334-40.

[169] *Compare* ROUSSEAU, *supra* note 10, at 23 ("It is not enough to have citizens and to protect them; it is also necessary to give thought to their subsistence. . . .") *with* WALKER, *supra* note 8, at 197 (The right of the poor to "maintenance would seem to result, not only from the dictates of humanity, but from all the great principles of social organization.").

[170] ROUSSEAU, *supra* note 10, at 19. Rousseau explained that equality is only illusory under bad governments and "serves only to keep the poor in his misery and the rich in his usurpation[,]" and therefore concluded that "the social state is advantageous to men only insofar as all have something and none of them has too much." *Id.* at 58.

[171] *Id.* at 80-81.

[172] *Id.* at 19-20.

[173] *Id.* at 23.

[174] *Id.* at 30.

[175] *Id.* at 30-33.

[176] *Id.* at 23.

[177] *Id.*

[178] *Id.* at 19-20.

therefore appears to be careful economic management and preservation of opportunity rather than direct financial aid.[179]

Similarly to Walker, James Wilson believed that American democracy was based upon social compact principles.[180] However, Wilson proposed a different compact-themed alternative for the impoverished rather than public support. Wilson wrote that:

> [T]here are certainly cases, in which a citizen has an unquestionable right to renounce his country, and go in quest of a settlement in some other part of the world. One of these cases is, when, in his own country, he cannot procure subsistence.[181]

Wilson's remedy is impractical in a modern world where readily accessible new frontiers have largely disappeared. In addition, Justice Joseph Story argued that recognition of a right to withdraw from a social compact is theoretically unsound.[182] In Story's opinion, a right to withdraw would be tantamount to giving an individual the power to "dissolve the whole government at his pleasure, or to absolve himself from all obligations and duties thereto, at his choice . . . ."[183] Wilson's viewpoint nonetheless reflects a noteworthy opinion of a Founder about the options of the poor under the American social compact.

In summary, Hobbes might not recognize a pact to provide support,[184] but he advocated in favor of public charity,[185] and would excuse theft by the destitute.[186] Locke believed that people are entitled to the fruits of their labor,[187] except possibly the unemployed,[188] and he thought that men by consent have agreed to disproportionate and unequal wealth.[189] Rousseau would consider it an essential duty of government to address economic inequality and the subsistence of citizens, but his approach would appear to be careful management of economic opportunities rather than direct financial support.[190] Wilson hypothesized that those in society who cannot procure subsistence may leave to seek greener pastures.[191]

---

[179] *See id.* at 17-23; *see also id.* at 81 n.* ("Do you, then, want to give the State stability? bring the extremes as close together as possible; tolerate neither very rich people nor beggars.").

[180] *Compare* WALKER, *supra* note 8, at 21-23 (explaining the origins of social organization) *with* WILSON, *supra* note 76, at 238-39 (describing the foundations of a state).

[181] 1WILSON, *supra* note 76, at 244.

[182] 1 STORY, *supra* note 82, § 333, at 302-03.

[183] *Id.* at 302.

[184] *See* HOBBES, *supra* note 12, at 92-94, 96.

[185] *Id.* at 239.

[186] *Id.* at 208.

[187] LOCKE, *supra* note 31, at 287-89.

[188] LOCKE, *supra* note 154, at 382.

[189] LOCKE, *supra* note 31, at 299-302.

[190] *See* ROUSSEAU, *supra* note 10, at 17-23.

[191] 1 WILSON, *supra* note 76, at 244.

This article does not maintain that Hobbes, Locke, Rousseau, or Wilson are correct. It does not join Adams' lamentations on behalf of the rich. It certainly does not endorse Locke's horrific proposals for solving poverty. In addition, this article does not arrogantly assert that its interpretation of Hobbes, Locke, Rousseau, and Wilson is beyond debate.[192] It does however, submit that their widely diverse opinions demonstrate a lack of unanimity among theorists regarding the rights of the poor under the social compact at the time of the Founding. A right to public support therefore cannot be assuredly based solely upon principles of social organization.

IV. *MOORE V. GANIM*[193]

Unlike the U.S. Constitution, the 1818 State Constitution of Connecticut included an express social compact clause that provides, "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."[194] As a consequence, the Connecticut Supreme Court was eventually called upon in *Moore v. Ganim* to decide whether "the right to governmentally provided minimal subsistence is one such right acquired by the people upon entering into the social compact."[195]

Persons dependent upon public assistance for survival challenged a statute in *Moore v. Ganim* that limited such support to nine months in a twelve-month period.[196] The court addressed two primary arguments: (1) whether the statute violated a provision of the Connecticut State Constitution that guaranteed court access and a remedy by due course of law;[197] and (2) whether the statute abrogated an unenumerated constitutional obligation that Connecticut provide subsistence benefits to citizens in need.[198] The *Moore* majority addressed social compact contentions in the context of its

---

[192] For alternative viewpoints *see e.g.*, John W. Seaman, *Hobbes on Public Charity & the Prevention of Idleness: A Liberal Case for Welfare*, 23 POLITY 105 (1990); Bruno Rea, *John Locke: Between Charity and Welfare Rights*, 18 J. OF SOC. PHIL. 13 (1987).

[193] Moore v. Ganim, 660 A.2d 742 (Conn. 1995).

[194] CONN. CONST. art. I, § 1; *see generally Moore* 660 A.2d at 763-64 (detailing the history of the clause). The Kentucky and Oregon constitutions contain similar clauses. KY. CONST. § 3 ("All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services. . . ."); OR. CONST. art. I, § 1 ("We declare that all men, when they form a social compact are equal in right. . . ."). The preamble to the Massachusetts constitution provides that "[t]he body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." MASS. CONST. pmbl.

[195] *Moore* 660 A.2d at 763.

[196] *Id.* at 746.

[197] *Id.* at 750-54.

[198] *Id.* at 754-69.

discussion about unenumerated rights.[199] The dissent focused upon the social compact during its examination of natural law.[200]

The majority in *Moore* acknowledged that individuals "relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.'"[201] It also agreed that early law of the colony and the State of Connecticut was based on natural law and "fundamental notions of what is morally right."[202] It nonetheless held that there should not be too much emphasis placed on the social compact clause in the Connecticut State Constitution, because there was little substantive debate when it was adopted and natural law may have been understood to be flexible.[203] The majority further wrote that "[t]he mere fact that the framers intended some unenumerated natural rights to survive the drafting of the written constitution . . . does not give us carte blanch to recognize new constitutional rights as inherent in natural law."[204]

The *Moore* majority recognized that early Connecticut jurists referenced obligations to support the poor, but it found that "the historical record, taken in its entirety, is too ambiguous and contradictory to provide a basis from which we, with any reasonable degree of confidence, can infer an implied unenumerated fundamental constitutional obligation to provide minimal subsistence."[205] It further determined that early Connecticut statutes regarding maintenance of the poor were too cryptic and contradictory to form the basis of a constitutional right to subsistence.[206] In its broader discussion of unenumerated rights, the majority reviewed decisions from other jurisdictions and concluded that none but New York recognized a right to subsistence support, and it attributed New York's position to a post-depression State constitutional amendment.[207]

Connecticut Chief Justice Ellen A. Peters ultimately concurred with the majority, because she concluded that the nine-month benefit limitation at issue in *Moore* was consistent with the State's obligation to provide support and imposed a reasonable inducement for the unemployed to seek work.[208] However, Chief Justice Peters strongly disagreed with the majority's interpretation of the historical record.[209] Peters acknowledged that history is always ambiguous and contradictory, but reasoned that ambiguity regarding the scope of a right says "nothing about the *existence* of such an obligation, because the scope of *every* constitutional principle is ambiguous *by*

---

[199] *See Id.* at 762-68.
[200] *Id.* at 801-02 (Berdon, J., dissenting).
[201] *Id.* at 762 (quoting LOCKE, *supra* note 31, at 350 (different edition of Locke cited in *Moore*)).
[202] *Id.* at 763.
[203] *Id.* at 763-64.
[204] *Id.* at 764.
[205] *Id.* at 765.
[206] *Id.* at 765-68.
[207] *Id.* at 755-59.
[208] *Id.* at 782-83 (Peters, C.J., concurring).
[209] *Id.* at 776-79.

design."[210] Peters' review of the historical record and contemporary considerations of law and public policy led her to conclude that Connecticut had a constitutional obligation to provide minimal subsistence support to the poor.[211]

The dissenters in *Moore* recognized that the legal theory of natural law has fallen into disfavor in recent times but "occupied a prominent position in our colonial jurisprudence."[212] They therefore felt that the court should not entirely disregard social compact principles.[213] The dissenters wrote that early views of natural law recognized obligations between citizens and a duty to help the needy.[214] They also disagreed with the majority's reading of the historical record, and thought the early statutory law of Connecticut and common law imparted into the State constitution an obligation to provide minimal subsistence to the poor.[215] They were critical of the majority's analysis of holdings from other jurisdictions and concluded that none undercut the dissenters' conclusion that the Connecticut State Constitution vested the poor with a right to support.[216] The dissenters concluded that "the affirmative obligation of the state to provide subsistence to the poor was part of the fabric of the social compact in Connecticut."[217]

The result in *Moore* should not be treated as a death-knell for Walker's theory, because, in reality, it was only a four to three decision against recognition of a right to subsistence support.[218] It instead provides a helpful roadmap for social compact issues. As a theoretical matter, philosophical sources are too varied to assemble a unitary viewpoint,[219] and Walker's thesis fares better as a component of a more encompassing unenumerated rights argument.[220] In addition, its success depends upon a particularized examination of a jurisdiction's historical record.[221]

Moore indicates that social compact considerations present more than just a theoretical question. The majority in *Moore* wrote that:

> in determining whether unenumerated rights were incorporated into the constitution, we must focus on the

---

[210] *Id.* at 776.
[211] *Id.* at 777-82.
[212] *Id.* at 801 (Berdon, J., dissenting).
[213] *Id.*
[214] *Id.* at 801-02.
[215] *Id.* at 793-801.
[216] *Id.* at 802-08 (Berdon, J., dissenting).
[217] *Id.* at 802.
[218] *See id.* at 771 (majority opinion of 4 justices), 782 (Peters, C.J., concurring), 809-10 (Berdon, J., dissenting opinion of 2 justices).
[219] *Compare* ROUSSEAU, *supra* note 10, at 19-20 (asserting that prevention of inequality of fortunes is one of the most important tasks of government) *with* LOCKE, *supra* note 31, at 301-02 (concluding that men have plainly agreed to disproportionate and unequal possession of the Earth).
[220] *Id.* at 791-810 (Berdon, J., dissenting).
[221] *Id.* at 762-68 (majority opinion), 777-79 (Peters, C.J., concurring), 792-801 (Berdon, J., dissenting).

> *framers*' understanding of whether a particular right was part of the natural law, i.e., on the framers' understanding of whether the particular right was so fundamental to an ordered society that it did not require explicit enumeration. We can discern the framers' understanding, of course, only by examining the historical sources.[222]

The dissent agreed and added that two primary sources are especially important when explicit constitutional provisions cannot be found: "law codified in statutory form and the common law" as it existed at the time a constitution was adopted or prior thereto.[223] The dissent in *Moore* further explained that the common law may consist of documented adjudications, evidence of customs and usages, and reported reliance on natural law.[224] Therefore, while recognition of a federal right seems unlikely,[225] plenty of room for debate remains at the State level.[226]

V. CONCLUSION

Professor Timothy Walker acknowledged in his *Introduction to American Law* that no constitutional provisions directly assert that the poor must be given public subsistence support, but he theorized that such a right might be derived from social compact principles.[227] During the period in which Professor Walker published his treatise, natural law was occasionally used to supplement express constitutional provisions.[228] It has since fallen into disfavor as a jurisprudential doctrine.[229] However, ideas of natural justice and considerations arising from social compact principles have not been entirely abandoned.[230]

Pre-founding political theorists did not agree about the rights of the poor. Thomas Hobbes supported public charity, but he did not appear to consider it a social compact right.[231] John Locke, in contrast, believed that men have agreed to disproportionate and unequal wealth,[232] and wrote that many of the

---

[222] *Id.* at 764.

[223] *Id.* at 792 (Berdon, J., dissenting). Chief Justice Peters also agreed that the test requires review of historical sources. *Id.* at 776 (Peters, C.J., concurring).

[224] *See id.* at 795-802 (Berdon, J., dissenting).

[225] *See e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (commenting that the Due Process Clauses generally provide no affirmative right to public aid).

[226] *Compare* Moore, 660 A.2d at 755-68 *with* 791-808 (expressing profound disagreement about how to interpret Connecticut's historical record and approaches taken in other jurisdictions).

[227] WALKER, *supra* note 8, at 197.

[228] *Eg.* Loan Ass'n, 87 U.S. at 663; Calder, 3 U.S. (3 Dall.) at 388-89 (Chase, J.).

[229] Seminole Tribe, 517 U.S. at 167-68 (Souter, J., dissenting); *cf.* Moore, 660 A.2d at 801 (Berdon, J., dissenting) (commenting that the philosophical theory of natural law has fallen into disfavor).

[230] *E.g.* Moore, 660 A.2d at 801-02 (Berdon, J., dissenting).

[231] *Compare* HOBBES, *supra* note 12, at 239 (advocating for public charity) *with* HOBBES, *supra* note 12, at 94 (opining that transfer of a right on hopes of charity is not contract but instead gift).

[232] LOCKE, *supra* note 31, at 301-02.

poor live unnecessarily on other people's labor.[233] Jean-Jacques Rousseau wrote that it is an essential duty of government to consider the subsistence of its citizens, but he indicated that the obligation is prevention rather than cure.[234] It therefore cannot be said with certainty that the social compact creates a right to public support as a matter of universally settled doctrine.

It seems unlikely that a federal constitutional right to subsistence support would be recognized. Social compact theory clearly influenced colonial thought.[235] However, modern scholars disagree upon the extent to which it actually guided the drafting of the Constitution.[236] With the theoretical uncertainty regarding the rights of the poor under natural law, recognition of an unwritten social compact right to support seems inconceivable given the Supreme Court's acknowledgment that its cases recognize "the Constitution 'generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'"[237]

Professor Walker's theory could however, gain traction at the state level.[238] A sharply divided Connecticut Supreme Court opted against recognition of a social compact right to support in *Moore v. Ganim*, but the varied opinions of the justices demonstrate that reasonable minds can differ, and the issue is fairly debatable.[239] The success of Walker's theory would likely depend upon an historical examination of a jurisdiction's common law, statutory sources, customs and usages, and articulations of natural law leading up to adoption of that State's constitution.[240] Public subsistence support may not technically be a contracted right arising from the social compact, but as Rousseau rhetorically asked, "is not the body of the nation committed to provide for the preservation of the least of its members with as much care as for that of all the others?"[241]

---

[233] LOCKE, *supra* note 154, at 378.

[234] *See* ROUSSEAU, *supra* note 10, at 23.

[235] *See e.g.*, SCHWARTZ, *supra* note 67, at 200-02.

[236] Allen, *supra* note 66, at 2-5.

[237] M.L.B. v. S.L.J., 519 U.S. 102, 125 (1996) (quoting DeShaney, 489 U.S. at 196).

[238] *See* Moore, 660 A.2d at 801-02 (Berdon, J., dissenting); *see generally* Pascal, *supra* note 120, at 868-77, 891-901.

[239] Moore, 660 A.2d at 762-68 (majority opinion), 801-02 (Berdon, J., dissenting).

[240] *Id.* at 764 (majority opinion), 776 (Peters, C.J., concurring), 791-802 (Berdon, J., dissenting).

[241] ROUSSEAU, *supra* note 10, at 17.

Health Should Be a Recognized Human Right in the US: How the Health Care System is Failing Under Federal Tax Policies

SAMUEL C. BRUDER[†]

I. INTRODUCTION

Access to affordable, quality health care should be a widely recognized, basic human right. The United States has a moral and legal obligation to provide protection and ensure such access, but is failing from a human rights perspective due to its insistence on using failing tax policies to address changes. International treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, enumerates rights for citizens to public health, medical care, social security and social services to be accessed without discrimination, and provides that the government has a responsibility to effectively promote equitable access to health care.[1] How those obligations are interpreted and implemented vary from country to country, including in the U.S., where access to health care is not fully considered a basic human right.

Access to health care is important because being healthy is a prerequisite for realizing the political rights enshrined in the United States' founding documents. Not having access to affordable quality health care also stymies a person's ability to pursue other enjoyments. For example, a working parent's child contracts a disease that requires ongoing medical attention and care. The family has access to medical insurance, but their insurance does not cover all the required treatments. The bills begin to pile up, and the parent cannot meet his/her/they financial responsibilities. The hospital providing care for their child ultimately sues the parent to collect these bills and is awarded the full judgment. Payments are ordered at $35.00 weekly, the standard nominal payment order in Connecticut's Small Claims court.[2]

[†] Samuel Bruder is an Assistant Clerk for the Tolland Judicial District of the Connecticut Judicial Branch. He has a Juris Doctor from Western New England University School of Law; a Master of Science in Legal Administration from the University of Denver; an LLM in Human Rights and Social Justice from the University of Connecticut School of Law; and a Graduate Certificate in Interfaith Dialogue from the Hartford Seminary, and an undergraduate degree from the University of Colorado-Boulder in International Affairs, Political Science, and Economics.

[1] G.A. Res. 2106 (XX), at 195 (Dec. 21, 1965) (where the specific right to "public health" is enumerated under Article 5(e)(iv) of the declaration).

[2] CONN. GEN. STAT. § 52-356d(c) (2003) (quoting in part "The amount which shall constitute an order of nominal payments shall be set by the judges of the Superior Court.") (Based on my professional experience working for the Connecticut Judicial Branch, $35.00 weekly has been the set nominal weekly payment fee amount.)

However, post judgment interest capped at five percent for all hospital debts renders it unlikely that the parents will ever get out from beneath this judgment.[3] That judgment negatively impacts the parent's credit report, and could threaten wages or bank accounts through garnishments. Negative reporting on a credit report then affects a person's ability to buy a home, get an affordable car loan, and can even disrupt the ability to gain various types of employment.

The U.S. government has primarily provided access to health care, in hopes to improve health levels of its citizens, through its use of tax policies. These policies are failing primarily because the laws do not enshrine access to health care as a basic human right, unlike antidiscrimination laws. This paper argues that the continued reliance on tax policies to effectuate health improvements is inadequate by itself, and has resulted in U.S. hospitals being more concerned about their bottom line than the health of their communities. If legislators persist in measuring success in health care primarily from a tax policy perspective, and thus in terms of financial efficiency, we will continue to have the same issues with gaining access to affordable, quality health care. Accessing the shortcomings of achieving a standard of health care as a basic human right requires evaluating the historical evolution of U.S. tax policies, their motivation, the country's founding documents and various international agreements. A human rights perspective is the best method of analysis for the purpose of measuring success in health care versus a tax regulation perspective. The United States continues to be home to people lacking access to affordable, quality health care. Without it, our country cannot begin fulfilling an essential prerequisite for the achievement of the rights promised to its citizens.

Throughout history, the U.S. government has addressed health care issues through federal tax statutes and regulations, yet the government has fallen short of ensuring health care as a basic human right. Analysis will illustrate how, historically, some federal policies have focused on promoting health care access through tax exemptions in addition to funding facility construction. Analysis will include examining efforts made by the government through its use of tax regulations to offer limited government health plans to populations deemed most at risk. These same historical federal regulations have encouraged the commercialization of nonprofit hospital behavior; to the point that it makes little financial sense to continue making tax-exemptions a legislative focus. Current federal policies under the Affordable Care Act, which, broadly speaking, promotes both access to health care and provides accountability measures for hospitals by tracking health outcomes. Neither stop the encouragement of commercialized

---

[3] CONN. GEN. STAT. § 37-3a(b) (2018) (quoting in part "[i]n the case of a debt arising out of services provided at a hospital, prejudgment and post judgment interest shall be no more than five per cent per year…").

behavior. This type of behavior is counteractive to a goal of achieving health care as a human right.

II. ACCESS TO AFFORDABLE QUALITY HEALTH CARE AS A HUMAN RIGHT

Understanding how well the U.S. meets its obligation to provide access to health care as a basic human right is difficult because conceptualizing the right to health is intricate and multi-dimensional. The lack of a single, universal standard of health for all nations does not allow for easy comparison between countries in this context. The complexity in interpreting health care as a basic human right and lack of a universal standard emphasizes the importance of analysis because: "[w]ithout good health, people may have great difficulty advocating for and benefiting from their human rights. Without adequate human rights protections, harmful conditions and practices that undermine health may persist."[4] In other words, not having access to affordable quality health care means a population will have enhanced difficulties in advocating for their other rights. In other words, managing your disease provides less time you can devote advocating for your rights. Thus, health and human rights are inextricably linked to one another.[5] The "[I]ntersection of human rights and health goes beyond the right to health and implicates a number of other rights (life, liberty, judicial redress, privacy, education, etc.) that have an impact on the ability of a person to achieve good health."[6] Human rights offer a level of minimum entitlement, which people can expect.[7] Some rights are founded in morality and some are founded in legal enactment. They can also be inalienable, absolute and/or universal depending on the context.[8]

The U.S. has shown its commitment to health care through the signing and ratifying of treaties. Protecting a minimum level health care right has been recognized by the U.S. at various levels both domestically and internationally. For example, in 1946 the World Health Organization (WHO) Preamble to the Constitution developed the concept of the right to health: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race,

---

[4] Lance Gable, *The Proliferation of Human Rights in Global Health Governance*, 35 J.L. MED. & ETHICS 534, 535 (2007).

[5] *Id.* (citing the works of Jonathan Mann and Larry Gostin).

[6] *Id.*4

[7] *Id.*

[8] Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence?*, 95 CAL. L. REV. 1151, 1154 (2007) (arguing that a legal right to health be first recognized through the federal courts to overcome Congress' inability to act; reviewing South African and Canadian experiences to support that argument, in efforts to achieve effective citizenship and equality of opportunity).

religion, political belief, economic or social condition."[9] The Constitution of the WHO defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[10]

Understanding of legal obligations includes the internationally recognized Universal Declaration of Human Rights (UDHR). The UDHR is not a treaty. It does not create legal obligations directly; it is an expression of the fundamental values which are shared by members of the international community. As such, it has influenced the development of international human rights law to the point where it could be argued as binding as a part of customary international law. The 1948 UDHR, passed by the General Assembly of the U.N., mentioned health as part of the right to an adequate standard of living in Article 25.[11] It recognizes the importance of human rights: "*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…"[12] The UDHR then charges all people and organs of society to "strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance…"[13] In addition, the UDHR outlines human rights in articles addressing specific rights; one unambiguously being health care.[14]

The U.S. has signed or ratified international treaties in a further expression of recognizing its legal obligations. For example, The U.S. has signed and ratified the International Covenant for Civil and Political Rights (ICCPR) and the Convention on the Elimination All Forms of Racial Discrimination, thus becoming legally obligated to these treaties as it would for any domestic law, subject to reservations[15].

The U.S. signed, but has not ratified, the International Covenant for Economic, Social and Cultural Rights (ICESR).[16] The ICESR, adopted by the U.N. General Assembly in 1966, is a major U.N. covenant that

---

[9] *Constitution of the World Health Organization*, 36 AM. J. PUB. HEALTH 1315 (1946).

[10] *Id.*

[11] G.A. Res. 217A (III), Universal Declaration of Human Rights at 52 (Dec. 10, 1948).

[12] *Id*. at 1.

[13] *Id.* at 3.

[14] *Id.* at 52.

[15] G.A. Res. 2200A (XXI) (Mar. 23, 1976); G.A. Res. 2106 (XX) (Dec. 21 1965).

[16] Amanda Littell, *Can A Constitutional Right to Health Guarantee Universal Health Care Coverage or Improved Health Outcomes?: A Survey of Selected States*, 35 CONN. L. REV. 289, 313 (2002) (concluding that "a constitutional right to health does not guarantee universal public coverage or improved health outcomes for a population. A right to health is not necessarily an individual right or a social right, but may be a combination of individual and social rights, and thus, does not fit neatly into the traditional rights dichotomy.").

recognizes health as a human right.[17] According to Article 12 of the ICESR, the right to health includes "the enjoyment of the highest attainable standard of physical and mental health."[18] Article 12 requires that all states recognize that as a right.[19] The U.N. Economic, Social and Cultural Rights Committee has published Comment 14 to ICESR, which outlines the content of the internationally recognized right to health and mandates that it should be implemented and enforced.[20] General Comment 14 provides for three levels of human rights obligations: to respect, protect, and fulfill.[21] The duty to respect requires state parties to refrain from interfering directly or indirectly with the enjoyment of the right to health.[22] The requirement to protect entails countries to take measures that prevent third parties from interfering with the guarantees of Article 12.[23] The responsibility to fulfill requires states to adopt appropriate measures toward the full realization of the right to health.[24] General Comment 14 addresses implementing policies towards the goal of full realization.[25]

The U.S., while having not ratified the ICESR, does draw parallels in its tax regulations from what is found in General Comment 14, Article 53. The comment claims a duty by countries "to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health."[26] When a country is implementing these steps, adopting "a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy" is paramount.[27] Moreover, the national health strategy ought to "identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources."[28] Parallels in U.S. tax regulations to General Comment 14 are reflected in passage of the Patient

---

[17] G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at 4 (Dec. 16, 1966).

[18] *Id.*

[19] *Id.*

[20] Comm. on Econ., Soc. & Cultural Rights, Gen. Comment 14, *The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

[21] *Id.* ¶ 33.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* ¶ 53.

[27] *Id.*

[28] *Id.*

Protection and Affordable Care Act (ACA), and illustrates the U.S.' movement towards full realization of health as a right.[29]

Another example of the U.S. recognizing its obligations to protect the right to health through international treaties is its signing, but not ratifying, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), where one of the recognized human rights was a right to health.[30] Demonstrating the founding principles of human rights in U.S. history was the U.S. report submitted to the ICESCR's Committee on the Elimination of Racial Discrimination.[31] In the report, the U.S. outlines its recognition of commitment to human rights while drawing direct references to its founding principles.[32] "Our nation's Founders, who enshrined in our Constitution their ambition 'to form a more perfect Union,' bequeathed to us not a static condition, but a perpetual aspiration and mission."[33] Connecting the commitment to human rights within its founding principles, the U.S. further illustrated its international commitment to the furtherance of human rights.

The U.S. has also shown its commitment to protect human rights through the passing of legislation that calls for the protection and furtherance of human rights. The 1964 Civil Rights Act is a major example of legislation being passed to protect human rights. Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, and its implementing regulations, which prohibit practices that have the effect of discriminating by state or local governments or private entities receiving federal financial assistance, including schools, *hospitals and health care facilitie*s . . . (emphasis added).[34]

In accordance with the language emphasized in the above quote, Congress ensured hospitals and health care facilities could not legally discriminate. Recent legislation related to discrimination, including discrimination based on race, color, and national origin, or minority groups, are significant to illustrating how the U.S. is making measured increments towards achieving recognition of health as a human right.[35] The quote above supports the argument that health as a human right is connected to other human rights.[36]

---

[29] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

[30] G.A. Res. 2200A *supra* note 17.

[31] Rep.'s Submitted by States Parties Under Art. 9 of the Convention, Comm. on the Elimination of Racial Discrimination, CERD/C/USA/7-9 (2013).

[32] *Id*.

[33] *Id.* at 6 (where the U.S. submitted a report on the status of racial discrimination, recognizing its legal obligation to address various areas of racial and ethnic discrimination; including in hospitals).

[34] *Id.* at 8.

[35] *Id.* at 11.

[36] *Id.* at 8.

One recently passed piece of tax legislation attempting to meet its obligation to health as a right is the Affordable Care Act (ACA).[37] It has been noted that the U.S. not only extends health insurance to many Americans under the ACA, it further provides additional protections against discrimination. Section 1557 [of the ACA] extends the application of federal civil rights laws to any health program or activity receiving federal financial assistance, any program or activity administered by an executive agency, or any entity established under Title 1 of the ACA.[38]

Under the ACA, nonprofit hospitals have required or are encouraged to behave in a way to better address access to health care for more Americans. The policy fails though to address health care as a human right by increasing the commercialization behavior of nonprofit hospitals. The ACA has also encouraged nonprofit hospitals to integrate their systems, leading to larger mergers that consequently reduce local community inputs in a negative manner from a human rights perspective. Given the role the Internal Revenue Service (IRS) has for regulating the health care sector and influencing its behavior–for example, IRS revenue rulings have shaped hospital behaviors–and that the ACA, as a piece of tax legislation, also is an expression of the U.S.' commitment to health as a human right, reinforces the original premise: calculating tax policies and rules, as related to a right to health, can be only fully accomplished if evaluated from a human rights perspective.

Evaluating tax policies and legislation from a human rights perspective provides the opportunity to determine how effective they are at protecting and ensuring the right to health. To better understand how the U.S. arrived at the current status of a right to health, a historical review of tax legislation is paramount.

When Congress initially provided that hospitals run by charitable religious organizations were exempted from taxable income in the early 20th century, the decision was not motivated by a desire to preserve charitable hospitals as a standalone function. Rather, charitable hospitals served a crucial role in the community, especially for those who would otherwise be financially unable to access this level of specialized health care. Charitable hospitals later become known as nonprofit hospitals. An in-depth historical review of the federal policies is provided in the next section. The physical building of hospitals and the administration of hospitals have both been supported by the federal government to increase the infrastructure needed for accessing health care services. Promoting development of the structural framework is important as seen in the following quote:

---

[37] Patient Protection and Affordable Care Act of 2010, *supra* note 29.

[38] Rep.'s Submitted by States Parties Under Art. 9 of the Convention, Comm. on the Elimination of Racial Discrimination, *supra* note 31 at 12.

> Altogether, the structural aspects of human rights can facilitate the recognition of human rights in the context of health; establish the procedural and jurisdictional contours of monitoring, oversight, and enforcement that uphold these rights; and delineate specific mechanisms to support and uphold human rights that affect health.[39]

Analysis of specific legislative efforts by Congress, reviewed later on, supports the notion that infrastructure development was recognized as an important need for health. Since the right to health is a human right, these infrastructure policies are supported from a human rights perspective. Promoting a healthy population motivated Congress when it enacted the legislation exempting taxable income for those qualifying entities and provided financial support to build up the infrastructure.

Over the history of the U.S., the normative behavior of policymakers has developed to increasingly recognize the importance of supporting a right to health beyond infrastructure development. "Human rights norms include the substantive rights set out in international and regional human rights systems and national laws, as well as the interpretive understandings of these rights that subsequently have been developed in multiple fora."[40] Initially, the need to develop an infrastructure for people to gain access to healthcare options was paramount, given the how little was in place at the time. Moving forward, and with additional infrastructure now built, the normative behavior of policymakers shifted to focus on more than buildings. By doing so, "the proliferation of normative interpretations within multiple systems and contexts potentially could have a cumulative and reiterative effect."[41] Health as a human right has not fully developed as the norm in the U.S. at this time, at least not to the extent as it has in other countries. Comparing the U.S. model of health to the systems in other countries is a useful comparison tool. A different perspective is required to fully understand the status of health as a right in the U.S.

Comparison of the U.S. system with other countries illustrates that, while there is not the same level of designating health as a human right, the U.S. does have a national commitment to opening up access to health care. A national commitment to improve access to health care has been a motivating factor for Congress regarding ACA rules that were passed to address accountability. Congress attempted to provide accountability through measures found in the ACA that also provided additional levels of transparency. According to General Comment 14, the national health strategy and plan of action should "be based on the principles of

---

[39] Gable, *supra* note 4, at 535.

[40] *Id.* 4

[41] *Id.*

accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health."[42] Good governance was also a motivating factor during the congressional hearings that compared nonprofit hospitals with the behavior of for-profit hospitals.

The federal government has an obligation to promote access to affordable quality health care, given health's role in allowing residents to access other rights, and thus is right to focus on health care in furthering its good governance. The concept of health care is considered a social good.[43] The conception of health care as a social good has been based on decades of public policy and philanthropic activity.[44] Evaluating U.S. health care policies from a tax policy perspective falls short, since it treats health care as a private good. Consideration for the concept of health care as a private good when drafting policies and regulations will continue the commercialization development we are experiencing now. Private goods, like cars, are at the mercy market actors' perception in determining which items will generate a net profit. Even nonprofit hospitals are becoming more commercialized and are moving toward treating health care as a private good. Treating health as a private good was not always the norm.

Health care services should not be about generating the best return by ramping up market size through acquisitions and solely focusing on profit-making efficiencies, which is what happens when health is treated as a private good. Focusing on the amount nonprofit hospitals receive in tax-exemptions falls short of a full analysis as well. The focus should, instead, be on the people being impacted. That is what makes analysis from a tax policy perspective or any other focus fall short of the full picture; the people who are impacted by legislations and the resulting behaviors of nonprofit hospitals are at the crux of why a human rights perspective is so important. In the U.S., there is a principled belief that all deserve a right to equality of opportunity.[45] As highlighted previously, the notion of a right to equality of opportunity can be seen in our founding documents and throughout our history. Over time, the U.S. has sought to achieve this principle. Without access to affordable quality health care though, that cannot be attained. Health is a prerequisite to all other rights. Addressing health as a prerequisite through tax policy is inadequate by itself. A historical review illustrates why this is true.

---

[42] Comm. on Econ. Soc. & Cultural Rights, Gen. Comment 14, *supra* note 20, ¶ 55.

[43] David M. Craig, HEALTH CARE AS A SOCIAL GOOD; RELIGIOUS VALUES AND AMERICAN DEMOCRACY 8 (2014).

[44] *Id.* at 117.

[45] Sandhu, *supra* note 8, at 1157.

III. EXEMPTING HOSPITALS FROM TAXES

Congress has passed a number of laws in an attempt to improve access to hospital care, including exempting certain hospitals that meet strict criteria from paying taxes. Early attempts by Congress sought to financially encourage behavior of hospitals so that more people would have access to health care. Hospitals were encouraged to behave a particular way and in exchange were exempted from paying taxes on income. One of the earliest statutory references to a tax-exempt status of charitable organizations came in 1894. The Wilson-Gorman Tariff Act sought to establish a requirement on tax-exempt charitable organizations to operate for charitable purposes.[46] The Revenue Act of 1909 not only mirrored but expanded the language of the 1894 Act to include the phrase: "the idea that tax-exempt charitable organizations should be free of private inurement—in other words, be nonprofit."[47] At the time, there were no large government agencies or anything approaching the complicated framework we have today. Rather, nongovernment organizations, including hospitals, addressed the social and economic issues that otherwise would be unaddressed or under addressed.

A. Development of a Strong Central Government

The U.S. government's original role in society was reduced due in part to some fears of it becoming another monarchy.[48] The origins of the federal government's role were reflected in executive departments at the time: State, Treasury and War. Currently, the number of executive departments has developed into a much farther-reaching, strong central government. Comparatively though, consider Germany's central government development. Social welfare benefits are currently provided through "a complex network of national agencies and a large number of independent regional and local entities-some public, some quasi-public, and many private and voluntary" that have a long history.[49] This is unlike in the U.S. where "[a]bsent an established Governmental framework, the early settlers formed charitable and other 'voluntary' associations, such as hospitals, fire departments, and orphanages, to confront a wide variety of issues and ills of the era."[50] Only in 1798 was legislation passed, "An Act for the Relief of Sick and Disabled Seamen", which established a tax of twenty cents per month from a seaman's wages to fund the building of hospitals that would

---

[46] Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. OF INCOME BULL., 106 (2008), https://www.irs.gov/pub/irs-soi/tehistory.pdf.

[47] *Id.* at 107.

[48] *Id.* at 105

[49] LIBR. OF CONG., FED. RSCH SERV., GERMANY: A COUNTRY STUDY 195 (Eric Solsten ed., 3rd ed. 1996).

[50] Arnsberger et. al., *supra* note 38, at 105.

then provide health care for sick and disabled seamen.[51] At the time, the government relied on the voluntary associations though for the masses.

In Germany, public-national agencies date from the nineteenth century but some started earlier, unlike the U.S. who did not develop them until the twentieth century.[52] In fact, the legislation "that established the basis of this system dates from the 1880s and was passed by imperial Germany's parliament, the Reichstag, with the dual purpose of helping German workers meet life's vicissitudes and thereby making them less susceptible to socialism."[53] That legislation has been shown to have laid the foundation from which Germany developed its main principles from, which includes:

> [m]embership in insurance programs is mandated by law; the administration of these programs is delegated to nonstate bodies with representatives of the insured and employers; entitlement to benefits is linked to past contributions rather than need; benefits and contributions are related to earnings; and financing is secured through wage taxes levied on the employer and the employee and, depending on the program, sometimes through additional state financing.[54]

Development in Germany offers a comparison to fully understand the U.S. system of providing health as a human right. The comparison highlights the extensive social policy infrastructure that Germany possessed so early– decades before such a network existed in the U.S. What the U.S. government did have at this time in history was the ability to support organizations, and promote values and principles important to the country. That support was made directly through enacting legislation related to taxes, such as exempting certain organizations from paying taxes.

B. The Historical Shift from Patients as Direct Consumers to Third-Party Payers

Passage of legislation related to taxable income was influenced by the societal needs at the moment. For instance, the need in the 19th century was for hospitals to be built for people to access health care services. Consider the comparison to Germany who at a similar time, was more advanced in their infrastructure. By providing exemption to taxable income, Congress was providing incentive to build up health care infrastructure in the U.S.

---

[51] An Act for the Relief of Sick and Disabled Seamen, ch. 77, § 1, 1789 Stat. 605 (1798).

[52] Steven A. Ramirez, *The Law and Macroeconomics of the New Deal*, 62 MD. L. REV. 515, 517 (2003).

[53] LIBR. OF CONG., FED. RSCH SERV., *supra* note 40, at 195.

[54] *Id.*

Given health insurance had not been widely needed and the costs of procedures were mostly paid out-of-pocket, emphasis on building the infrastructure was logical. "Prior to the turn of the 20th century, workers relied primarily on their own, their families', or the communities' resources in the event of a health or economic emergency."[55] This meant cost was controlled at the consumer level, since consumers were responsible for their own payments. That changed in the mid-20th century.

Noticeably in the U.S., beginning after World War II, employment-based health insurance started gaining momentum because employers could not give raises to their workers. "In 1948, less than half of Americans owned medical coverage."[56] With a tight labor market, employers looked for other options that would be attractive to people, but did not increase wages. At the same time, court decisions and federal legislation assisted in making worker benefits a genuine part of collective bargaining, which also helped accelerate the offering of employer-sponsored benefits.[57] Health insurance was one of the benefits employers used to attract workers. It was also a benefit to employees since it did not count in the calculation of the taxable benefits, as wages do.[58] In fact, these tax preferences provided significant subsidies for health insurance companies then, as today.[59] As employment-based health insurance began to proliferate–by 1982, over 80 percent of workers were eligible for health insurance at their jobs[60]–the need for coverage grew, as did medical costs.

Growing medical care costs meant a developing need for health insurance. Higher medical costs meant the traditional form of paying out of pocket for health care services was moving further out of reach for people and medical insurance assisted with bringing those higher-cost procedures into reach. Health insurance plans were primarily an employer-based benefit. The growing demand for an ability to pay for health care though

---

[55] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-285, EMPLOYEE COMPENSATION: EMPLOYER SPENDING ON BENEFITS HAS GROWN FASTER THAN WAGES, DUE LARGELY TO RISING COSTS FOR HEALTH INSURANCE AND RETIREMENT BENEFITS 5 (2006).

[56] Christy Ford Chapin, *Ensuring America's Health: Publicly Constructing the Private Health Insurance Industry, 1945–1970*, 13 ENTER. & SOC'Y 729, 734 (2012).

[57] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-285, EMPLOYEE COMPENSATION: EMPLOYER SPENDING ON BENEFITS HAS GROWN FASTER THAN WAGES, DUE LARGELY TO RISING COSTS FOR HEALTH INSURANCE AND RETIREMENT BENEFITS 5 (2006).

[58] Jacqueline Wallen & Sherman R. Williams, *Employer-Based Health Insurance*, 7 J. OF HEALTH, POL., POL'Y & THE L. 366 (1982) (whose authors state that "Employer-based health insurance (insurance that is purchased by employers for their employees and financed through employer or joint employer-employee contributions) is currently subsidized in part by the federal government through tax exclusions for employer contributions to employee health insurance plans. This subsidization costs the federal government close to 10 billion dollars a year in lost revenues." in their abstract).

[59] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-285, EMPLOYEE COMPENSATION: EMPLOYER SPENDING ON BENEFITS HAS GROWN FASTER THAN WAGES, DUE LARGELY TO RISING COSTS FOR HEALTH INSURANCE AND RETIREMENT BENEFITS 2 (2006).

[60] Wallen & Williams, *supra* note 49, at 366.

meant there was a need for health insurance beyond it being a benefit to employment. In reaction to this, the federal government began putting into place the infrastructure that would directly assist people, rather than relying on charitable hospitals, with their health care needs. In fact, by the mid-1960s, the emphasis was directly on government intervention to provide health services for citizens in need:

> Once the Medicare and Medicaid programs were added in 1965 to the existing system of employment-based health insurance and provided coverage to the elderly, disabled, and many of the poor, more than 85 percent of Americans had an arrangement whereby someone else paid for some or all of their medical services.[61]

That meant eighty-five percent of Americans had a third-party paying for their medical costs, whether it was an employer-based insurer or a government-backed program. The federal government was no longer solely reliant on charitable nongovernmental organizations to provide medical services to people who otherwise could not afford them. The demand for developing a hospital infrastructure where people could access charitable care was being replaced with a need to develop health insurance infrastructures.

Health care providers began to change with the shift in who was making the payments. The majority of individual patients no longer needed to negotiate pricing with their doctors, as payments were increasingly made by a third-party entity. With the removal of the consumers from the pricing model, came a large rise in medical costs; increasing the need for more comprehensive health insurance. "This system of third-party payment facilitated the rapid growth in health care expenditures that brought U.S. health care costs from 5 percent of gross national product (GNP) in 1960 to 14 percent by the mid-1990s."[62] Thus, while the privileged tax-exempt status continued to be offered to nonprofit hospitals, their treatment of patients, how treatment was offered, and the type of care offered, was changing all around, and that change was based upon who was making the payments. Tax-exemptions continued unchanged for nonprofit hospitals even though the shift from patients primarily being responsible for payment went to a third-party payer.

While tax policies remained unchanged for nonprofit hospitals through the shift from patient to third-party payers, the underlying need to assist people who could not pay out-of-pocket expenses was changing. When

---

[61] BRADFORD H. GRAY & MARK SCHLESINGER, THE STATE OF NONPROFIT AMERICA 73 (Lester M. Salamon ed., 3d ed. 2002).

[62] *Id.*

Congress passed legislation creating tax exemptions, it was the best tool the federal government had to further health care initiatives and influence behaviors. People were paying for their health care themselves and third-party payers were not as prevalent. Additionally, the health care system and overall governmental framework in the U.S. had not developed to the level we understand today. The motivations for tax-exemptions–to support and influence nonprofit hospital behavior by encouraging their work of providing health care to those who otherwise would lack services–no longer existed. Examination of the historical motivations for these tax policies provides a clearer understanding.

C. Historical Motivations for Nonprofit Status Have Changed Even Though Tax Policies Still Seek the Same Results

The historical motivation for nonprofit hospitals to be tax exempt no longer exists in the same manner; people typically no longer pay for health care out-of-pocket and thus are less reliant on the charitable works of nonprofit hospitals. A nonprofit organization is an entity that cannot distribute its net earnings, if there are any, to individuals who exercise control over it.[63] Earning a profit is permitted as a nonprofit entity. However, there are some restraints on how net earnings can be distributed. Any net earnings must be reserved to finance further production of the services it was created to provide.[64] In the case of a tax-exempt nonprofit hospital, this would likely be met by providing charity care to its patients and meeting the "community benefit" requirement.[65] The IRS has the authority to interpret congressional intent as it relates to whether a nonprofit hospital is meeting the legal requirement of "community benefit". Interpretation has developed over time, beginning with requiring nonprofit hospitals to be organized and operated for primarily charitable, scientific or educational purposes.

In 1954, the Internal Revenue Code (IRC) codified into law the tax-exemption status of nonprofit hospitals.[66] As discussed above, the law originally required nonprofit hospitals be organized and operate for primarily charitable, scientific or educational purposes, as codified in the IRC under Section 501(c)(3).[67] To qualify, a hospital had to show that it was, in fact, organized as a nonprofit charitable organization, with a mission of

---

[63] Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

[64] *Id.*

[65] Christine L. Noller, *Community Benefit, Accountable Care Organizations and Population Health: Tax Implications for ACOs and Nonprofit Hospital Participants*, 30 HEALTH L. 16, 21 (2017) (stating "IRS regulations acknowledge that health needs identified in a CHNA may include ensuring adequate nutrition or addressing social, behavioral and environmental factors that influence health in the community.").

[66] Rev. Rul. 56-185, 1956-1 C.B. 202 at *1.

[67] *Id.*

providing for the care of the sick. To do so, the hospital had to meet certain qualifications, such as the hospital operating in a way while still offering services for people who were not able to pay.[68] That meant the hospital could not operate exclusively for people with the ability to pay. Furthermore, its net earnings could not be paid to controlling members, but rather the net earnings had to be used to further the scope of why the organization was created–caring for people who could not pay for their medical care, themselves.[69] That changed fifteen years later.

In 1969, with Internal Revenue Ruling (IRC) 69-545, the IRS modified its stance on nonprofit hospitals, and changed the requirement of caring for patients at reduced rates or without charge.[70] With the new regulations, hospitals were free to accept all patients and still remain in compliance of the tax-exemption requirements. The IRS ruled a "nonprofit organization whose purpose and activity are providing hospital care is promoting health and may, therefore, qualify as organized and operated in furtherance of a charitable purpose."[71] Thus, the promotion of health was similar to the relief of poverty, advancement of education, and religion in that it was recognized as the purpose of the general law of charity. The IRS' ruling came from the government's perceived benefit of offering health services to the whole community.[72] In doing so, the IRS pivoted from the traditional notion that nonprofit hospitals were being granted these tax benefits to assist indigent members of the community, and instead focused on the whole community. No longer was there a restriction against exclusively serving those who are able and expected to pay; rather a hospital applying profits to expand and upgrade facilities and equipment, and to improving patient care, medical training, education and research would meet the requirements for nonprofit status.[73] The readjustment of interpreting Section 501(c)(3) in IRR 69-545 promoted a "community benefit" standard.

Granting tax-exemptions is a useful tool to encourage behaviors in nonprofit hospitals. Tax policies governing nonprofit hospitals seek to encourage access to health care services were necessary when enacted, since there was not a sufficient governmental framework to provide access to health services directly. Shaping the behavior of hospitals was accomplished by encouraging care for uninsured or underinsured patients who have limited means–or no means–to pay for their medical needs. "Early hospitals or 'alms houses' were supported solely by donations and staffed by volunteers–there

---

[68] *Id.*

[69] *Id.*

[70] Rev. Rul. 69-545, 1969-2 C.B. 117 at *4.

[71] *Id.* at *2.

[72] *Id.*

[73] *Id.* at *3.

was no expectation of payment from patients."[74] Tax policies have intentionally shaped nonprofit hospital behavior by impacting the way they treat patients, including who their patients are. Early on, Congress had enacted tax-exemptions to encourage nonprofit behavior in a way that avoided the need for the government to spend money on similar direct services in hopes that doing so will offset any revenue losses from exempt taxable income.[75] Encouraging nonprofit entities this way, at least in the case of hospitals, helps lift the financial burden of covering health care services.

Exempting otherwise taxable income for hospitals is not the only method Congress uses to encourage behavior in hospitals. Nonprofit hospitals also have access to tax-exempt bond financing and tax-deductible charitable donations (for the donor).[76] Over the years, these tax policies have greatly influenced nonprofit hospitals' behaviors.

D. A Brief Historical Review of Medicare and Medicaid

In addition to tax exemptions and attractive (and inexpensive) financing, the federal government sought to further influence nonprofit hospitals' behavior with other tools. For example, leading up to the 1980s, there were perceived and likely actual deficiencies in the method used by Medicaid and Medicare for calculating payments. Evidence of deficiencies is apparent when reviewing the lack of control either had over controlling what was paid for their policy individuals: "Prior to the 1980s, Medicare, Medicaid, and the health insurance industry had very inadequate means of controlling what they paid for, how much they paid for it, or both."[77] Medicaid and Medicare were created to provide coverage to people whom the government felt needed the most assistance in meeting their own health care needs. At the time, the initial focus was not on the rising medical care costs. Focusing on coverage and not accounting for potential future rising costs created an incentive to generate more costs by offering more services.

Medicare and Medicaid reimbursed hospitals for the services provided, but found the government could not control what would be now considered unnecessary care or an allowable cost.[78] The situation for private health insurance companies was not that much different. "Payments to institutions from insurance companies were based on the institutions' *bills*, so there was

---

[74] George A. Nation III., *Non-profit Charitable Tax-Exempt Hospital–Wolves in Sheep's Clothing: To Increase Fairness and Enhance Competition in Health Care to All Hospitals Should Be For-Profit and Taxable*, 42 RUTGERS L.J. 141, 155 (2010).

[75] U.S. GOV'T ACCOUNTABILITY OFFICE.GAO-08-880, NONPROFIT HOSPITALS: VARIATION IN STANDARDS AND GUIDANCE LIMITS COMPARISON OF HOW HOSPITALS MEET COMMUNITY BENEFIT REQUIREMENTS 1 (2008).

[76] *Id.*

[77] GRAY & SCHLESINGER, *supra* note 52.

[78] *Id.* at 73–74.

no constraint on costs there."[79] Without proper controls or accountability measures, prices increased.

At the beginning of the 1990s, several institutional changes occurred as a response to increased costs. These changes included adjusting payment methods, and creating new oversight and accountability mechanisms.[80] There is power in numbers, and so to gain those numbers, health insurance companies consolidated to have more leverage in negotiating terms with hospitals. The move to consolidate took two major forms. "First was the enrollment of insured populations into health plans that both provided managed care functions and negotiated terms with providers. Second was the consolidation among insurers and managed care organizations themselves."[81] Even as these changes occurred, the interpretation of satisfying the nonprofit requirement as a hospital did not.

The health care industry was the target of a perfect storm of affects, leading to increased pricing, given the IRR 69-545 standard of a "community benefit" and the increased reliance on third-party payers, such as Medicare and Medicaid. People used to pay for services directly. Supporting nonprofit hospitals was logical since they were serving underprivileged populations and the government lacked a comprehensive infrastructure in which to offer assistance. As the government has developed a larger set of tools to address societal concerns, including offering its own form of health insurance coverage with Medicare and Medicaid and granting income exceptions for employer provided health insurance to employees, the need for financially supporting nonprofit hospitals has decreased. That perfect storm came to the public's forefront as more people became overwhelmed financially due to medical bills; enough to spur congressional action.

E. Congressional Hearings

The IRS revenue rulings regarding Section 501(c)(3) for nonprofit hospitals did not fully address the concerns of Congress, spurring them to hold hearings. Specifically, Congress was concerned with the state of health care, the financial burdens on Americans and the lack of transparency of pricing. In June 2004, the U.S. Representative Committee on Ways and Means Subcommittee on Oversight issued an announcement regarding tax exemptions and pricing practices of hospitals.[82] The committee highlighted that "there are more than 300,000 reporting tax-exempt 501(c)(3) entities.

---

[79] *Id.* at 74.

[80] *Id.*

[81] *Id.*

[82] *Pricing Practices of Hospitals: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 108th Cong. 2 (2005).

Hospitals represented a small proportion (1.9 percent) of total reporting charitable 501(c)(3)s but, in 2001, constituted 41 percent ($337 billion) of total expenditures."[83] The announcement by the subcommittee was to review hospital pricing systems while focusing on the lack of transparency of those systems. The subcommittee expressed concern that a lack of transparency was creating barriers through which consumers could not make informed decisions. The subcommittee also reviewed where consumers get care and what options for increasing information about hospital pricing were available.[84]

Public awareness was raised when the *New York Times* published a story about lawsuits "contending that the hospitals violated their obligation as charities by overcharging people without insurance and then hounding them for the money."[85] Those lawsuits were eventually dismissed before trial. However, the lawsuits did serve as a starting point for the conversation for what Americans imagine as the benefit they were receiving for providing nonprofit hospitals tax-exempt status. The impressions did not line up with the reporting in these articles. For instance, the impression Chairman Bill Thomas of California held in regard to nonprofit hospitals compared with for-profits was: "If I blindfolded you, took you into a hospital, took the blindfold off you and led you around to look at the hospital, you would be hard pressed to determine whether it's a 501(c) not-for-profit or a for-profit."[86] Comparing nonprofit and for-profit hospitals, these are two entities that are recognized under the tax code very differently, even though they carry out identical duties and purposes.

The 2004 subcommittee hearing examined the current hospital pricing systems and focused on the lack of transparency in hospital charges. The hearing focused on the intended outcome versus the actual outcome of the Internal Revenue Code Section 501(c).[87] Taxable income is designated exempt from governmental collection in hopes of achieving an intended outcome. Based on the testimony, it can be expected that nonprofit hospitals would behave differently than for-profit hospitals. Chairman Thomas further illustrates this point when discussing the desire to differentiate between nonprofit versus for-profit hospitals: "[Y]ou would at some time and under some circumstances [want to differentiate], the not-for-profit aspect would display a different behavioral profile than the for-profits, and that is basically

---

[83] *Id.*

[84] *Id.*at 2–3.

[85] Reed Abelson & Jonathan D. Glater, *Suits Challenge Hospital Bills of Uninsured*, N.Y. TIMES (June 17, 2004), http://www.nytimes.com/2004/06/17/business/suits-challenge-hospital-bills-of-uninsured.html.

[86] *Pricing Practices of Hospitals*, *supra* note 72, at 7.

[87] *Id.* at 2–3.

what we are going to try to do."[88] Lawmakers wanted to determine the current status of hospital behavior and invited a select group of experts to provide testimony on the subject of tax exemptions and pricing practices of hospitals.

Hospital pricing methods lack transparency to a point that even the hospital's own staff may have no idea what a procedure costs, both for nonprofit and for-profit hospitals. Testimony provided by Dr. Nancy Kane, professor of Harvard School of Public Health, pointed out that hospital pricing models are "based on market-based negotiations, and the self-pay are not in a very good bargaining position when they arrive at the hospital door, or when they try to seek information on the Web..."[89] Ultimately, you have the scenario of groups of individuals being represented by their health insurance groups and you have people without representation as uninsured individual negotiators. The large insurance companies are able to negotiate discounts based on the perceived group's health that they represent. "So, the self-pay and only a few indemnity carriers are left paying on the basis of hospital charges, the charges are set indeed to cover the negotiated discounts of everyone else."[90] Large insurance companies use their market size to negotiate prices in favor of their members and that is a win for those members. However, such negotiations leave people who do not have a large insurance company negotiating on their behalf to cover the discounts awarded to those who do. Historically, this problem was not considered a culprit for pushing up costs for people without coverage, because not all insurance companies were aggressive in their negotiations. "[B]ack when the discounts were around 16 percent, back in 1982, and many more payers were indeed paying on the basis of charges . . . ." then it was not as a glaring issue.[91] However, this has been replaced by the process of negotiating pricing, which has "brought those discounts up to 46 percent (median) in 2002 . . .therefore, the markup of charges over hospital costs has grown from about 120 percent of cost to 180 percent, and again, that is the median."[92] Having discounts rise from around 16 percent in 1982 to 46 percent median in 2002 alone would be cause for concern. Good health insurance coverage becomes vital in order to receive savings on medical procedures. People without adequate health insurance are left to cover everyone else's discounts. People without health insurance at the time were often jobless because most Americans receive health coverage through their employer. Or the people were possibly working a number of part-time jobs, none of which offered health insurance. People in these scenarios are most at risk

---

[88] *Id.*at 8.

[89] *Id. at* 14.

[90] *Id.*

[91] *Id.*

[92] *Id. at 14.*

financially. The way the system functions, they are also most impacted by the prices since they are covering the discounts. If at-risk people do not pay, the hospitals sue them and often request post-judgment interest.[93]

In this analysis, the actual price hospitals charge to their patients is unrelated to the actual cost of the services the hospitals provide. How well any hospital does at negotiating prices with the health insurance companies influences the pricing to at-risk people, regardless if the hospitals are nonprofit. Negotiation of pricing benefits people with health insurance at the expense to those without; and, typically, those without are under employed. If the intended outcome of providing nonprofit hospitals tax exemptions is to benefit the community, unequal treatment of patients financially works against the intended outcome.

Another expert invited to provide testimony at the 2004 congressional subcommittee hearing was Dr. Karen Davis, president of the Commonwealth Fund, a healthcare research foundation. In her executive summary to the subcommittee, Dr. Davis testified that hospital costs were accelerating and at "the same time 71 million Americans [were] experiencing problems paying medical bills or [were] paying off accrued medical debt."[94] She also testified that financially vulnerable people were at risk because of the direct pricing policies of select hospitals.[95] In the historical analysis of how America got to where it was when she testified, Dr. Davis said that when the federal government was a leader in the healthcare sector, hospital costs grew at a slower rate. Dr. Davis testified:

> Given the resurgence in health care costs, the increasing numbers of uninsured, abundant evidence that the quality of care is not what we would have and have a right to expect, and the fact that administrative costs are now the fastest rising component of health care expenditures, it is time to consider a leadership role for the federal government in promoting efficiency and quality in the health care system.[96]

Congress and the American people had continued to believe that nonprofit hospitals, given their historical traditions with charitable care, would carry this leadership role as an agent for the federal government. Nonprofit hospitals were thought to be a solution for rising health costs and the increasing number of uninsured Americans; even though the legal

---

[93] Abelson & Glater, *supra* note 75.

[94] *Hospital Pricing Behavior and Patient Financial Risk: Hearing on 'Pricing Practices of Hospitals' Before the Sub. Comm. On Oversight of the H. Comm. on Ways and Means*, 108th Cong. 2 (2004) (submitted testimony of Karen Davis, President, The Commonwealth Fund).

[95] *Id.*

[96] *Id.* at 4.

standard for nonprofit status had become independent of assisting financially troubled individuals with IRR 69-545. Dr. Davis testified in favor of not only preserving a nonprofit hospital and health care sector, but also strengthening it. Dr. Davis felt that nonprofit hospitals were a "major source of uncompensated care and community benefit" that could be requested to "not…charge uninsured patients more, to work out feasible payment plans, and not to employ unreasonable collection tactics."[97] On average, research supports her conclusions.

Dr. Davis's testimony compared pricing behaviors of nonprofit hospitals and for-profit hospitals. Her research had shown "nonprofits are more willing to provide care that is marginally profitable or loses money in order to advance a broader mission of excellence in patient care, medical education and cutting-edge research" compared to for-profit hospitals that, in her opinion, were more focused on the bottom line as it related to profits.[98] Despite citing several newspaper reports that nonprofit hospitals were overcharging uninsured patients, Dr. Davis testified that nonprofit hospitals are the better model of delivering health care since their mission is focused on future health benefits.[99]

What Dr. Davis' testimony failed to address, however, was how similar these two entities are in their behavior. Similar behavior is not a concern if you do not consider the intended outcome of exempting nonprofit hospitals from taxes. While nonprofit hospitals may provide some services at, or below, net profit returns, both types of hospitals charge uninsured patients higher rates for services compared to insured patients charges and also pursue debt collection, including post-judgment interest. This is a concern if the intended outcome is to increase health. Charging more for services and assessing post-judgment interest to people already struggling to pay bills is counterproductive to the intended outcome of providing nonprofit hospitals benefits related to their income generation.

Lacking access to pricing information as a consumer has also contributed to artificially-inflating heath care costs. Unlike other areas affected by consumer behavior, hospital care is different in that the consumers do not have the pricing information available to make informed choices. The actual pricing varies from hospital to hospital, and depends on how well the health insurance companies have negotiated their discounts.[100] Peter Lee's, President and CEO of the Pacific Business Group on Health in

---

[97] *Id.*

[98] *Id.* at 6.

[99] *Id.* at 21.

[100] Leah Snyder Batchis, *Can Lawsuits Help the Uninsured Access Affordable Hospital Care?: Potential Theories for Uninsured Patient Plaintiffs*, 78 TEMPLE L. REV. 493, 501 (2005) (which stated "Private insurance and managed care companies negotiate discounts ranging from fifteen to fifty percent, often in return for including the hospital in their service network.").

San Francisco, California, testimony at the congressional hearing in 2004 highlights how the lack of information to consumers, coupled with varying pricing negotiations for services by insurance companies both create a challenge for market correction. He provided testimony on three issues relating to Chairman Thomas' blindfolded example of not knowing if a hospital was nonprofit versus a for profit. "[F]irst, staggering cost increases, second, huge variations in cost and quality of hospital care, and, third, the failure of the market to address these issues effectively."[101] Mr. Lee also testified that a lack of transparency hindering a patient's ability to compare hospitals' quality and efficiency, as well as hospital consolidation, which can stifle competition, have contributed to why pricing has risen to the levels being reported.[102] He does not differentiate between the nonprofit hospital behavior model versus the for-profit hospital behavior model as it relates to rising costs.

Mr. Lee testified about variations in costs at different hospitals both between different communities and within the same communities; variations which did not behave in response to typical market pressures.[103] For instance, "[g]all bladder and heart surgery costs three times as much in Sacramento as it does in San Diego. Cesarean sections cost twice as much in Sacramento as it does in Los Angeles."[104] Not drawing a distinction between nonprofit and for-profit hospital behaviors in this context indicates there is not a significant expectation in difference between the two behaviors.

Mr. Lee further testified there is no correlation between high costs and the quality of care provided. "A patient is about twice as likely to have a wound infected in the bottom 25 percent of hospitals as in the top 25 percent; a similar likelihood for getting pneumonia after surgery."[105] These examples demonstrate the importance of transparency and the need to ensure that tax dollars are effectively being used in the manner intended by Congress. Mr. Lee left the committee with the following; "[C]onsumers need to have the information to make informed treatment choices. They don't. Providers need to be paid differently for better performance. Today, they aren't. Without those two changes, we will never have a working market to reform hospital delivery."[106] The emphasis on consumers having greater access to information and providers being compensated based on quality of care would become components in the ACA. Improvement on these two fronts was believed to be better not only for the patients but also in providing

---

[101] *Pricing Practices of Hospitals*, *supra* note 72, at 22.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 23.

additional accountability in terms of pricing. Through surveys, like those the Center for Studying Health System Changes administer, data collected has indicated employers too are making adjustments to incentivize employees into playing a more active role in their health choices.

Dr. Peter Ginsburg, an economist and president of the Center for Studying Health System Change (HSC), testified on hospital pricing issues. "HSC is an independent, nonpartisan health policy research organization funded principally by The Robert Wood Johnson Foundation and affiliated with Mathematica Policy Research".[107] Through their work, they conduct surveys of households and physicians in order to get a national representation. At the time, they also performed visits to monitor any changes in the local health systems of 12 U.S. communities.[108] Through these visits and from the data collected, the organization has found "[e]mployers have been changing their health benefit plans to emphasize patient financial incentives to use less care and to be sensitive to prices."[109] Unfortunately for uninsured patients, Dr. Ginsburg also found that they were charged the highest prices of any patient unless a hospital has a pricing practice of setting the costs of services to a patient's income.[110] Dr. Ginsburg's research also found a correlation between new medical technologies and increased health care costs.[111] Nonprofit hospitals though can satisfy a requirement to remain compliant with their special tax exemption status by purchasing new technology. The newest medical facilities and technologies position nonprofit hospitals to be more competitive in the health care market while also justifying their tax status. When the consumer is incentivized though, through access to more information, better choices on care can be expected, per Regina E. Herzlinger.

Regina E. Herzlinger, the Nancy R. McPherson professor at the Harvard Business School, testified before the committee that consumers should be in charge of their spending.[112] However, consumers require information to effectively do so, much like information needed for good outcomes in the stock exchange. "When President Franklin Delano Roosevelt was elected President there was no transparency in the capital markets. There were no annual reports. There was no information that shareholders had."[113] Once the Securities and Exchange Commission (SEC) was organized, there was much better access to information by consumers that effectively allowed

---

[107] *Id.* at 19

[108] *Id.*

[109] *Id.* at 18.

[110] *Id.*

[111] *Id.*at 19.

[112] *Id.* at 54.

[113] *Id.*

them to make personal choices. SEC regulations require transparency for the buyer's protection and to foster efficiency. Disclosing and disseminating information are keys to achieving this goal.[114] Dr. Herzlinger used the following example: Consider the position of a consumer when that consumer buys a vehicle versus the issues when a consumer purchases health care services. When purchasing a car;

> 1. *Consumers are the buyers.*
> 2. *Manufacturers can freely vary prices* in response to changes in their production and sales. For example, they currently are slashing the prices of cars with large inventories, such as the Impala.
> 3. *Consumers have access to excellent information on both prices and quality* from private sector organizations, such as *Consumer Reports* and J.D. Power.[115]

These attributes of buying directly, freely adjusting pricing, and the consumer having access to comparable information are all missing in health care. Hospitals typically negotiate and have their services paid by third-party insurers, which remove consumers' market power to influence change. Once pricing has been negotiated, it cannot vary for patients under that plan until the next time the prices are negotiated–again without consumer input. Additionally, these prices vary depending on how well the third-party insurers are able to negotiate. Thus, it is not the cost of the service which drives how much is charged an insured patient, but rather the negotiated, predetermined pricing scheme.

> Further, because many of the third-party insurers demand discounts off list prices, hospitals raise the prices to convince the insurers that they are receiving substantial discounts. For this reason, hospital charges have risen three times faster than their costs from 1995–2002. These list prices are then typically charged to individual uninsured consumers who lack market power.[116]

Comparisons, like Dr. Herzlinger's, wielded influence on how Congress came to view their role in addressing the overarching issues in the health care industry. Specifically, the comparisons illustrate how Congress could use their role as the legislative body of government to shape the behavior of nonprofit hospitals. This testimony also addressed the notion that hospital

---

[114] *Id.*

[115] *Id.*

[116] *Id.* at 55.

pricing information is difficult to obtain and when consumers do get information, the quality of that data is not such that it is easy to analyze.[117]

Members of the committee were troubled with the lack of easily understandable data and some of the points made by those testifying. Chairman Thomas said "that it is just as charitable to charge a rich man as a poor man, which may be the theme of why we are looking at pricing under the 501(c) section of the Code."[118] He also questioned Dr. Ginsburg's assertion that medical technology is the driving force behind rising health care costs. As Chairman Thomas highlighted, the way the pricing system is structured and the mechanism in which we pay for services creates the correlation between new medical technologies and rising health care costs.[119] Dr. Ginsburg clarified her original testimony by saying: "I would differentiate between the capitated environment which has the incentives to use only valuable technology, and the fee-for-service environment, which unfortunately is our dominant payment mechanism, which tends to accept almost all technology."[120] The health care system was not making a distinction between valuable technologies versus new technologies when it came to pricing methods.

Congresswoman Nancy Johnson from Connecticut testified that the current payment system rewards technology that is expensive for diagnosis or treatment.[121] That way, the hospital can negotiate higher prices based on the fact the technology is expensive. The current payment system does not reward technologies that would improve care quality, increase efficiencies, and otherwise reduce overhead costs.[122] Thus, you are not financially rewarded for improving the process; you are rewarded for developing the newest, largest most advanced piece of technology. Tax exemption legislation intending to provide access to quality, affordable health care in order to achieve other protected human rights and the pricing methods appear to dilute achievement of the intended outcome.

Dr. Ginsburg agreed with regard to the role new technologies play and pointed out that there is a problem with medical services; ". . .inadvertently overpaying for some services, usually the newer ones where there are still productivity increases and underpaying the others."[123] A lack of transparency in market pricing, according to Dr. Herzlinger, hurts consumers because that means consumers lack information to make them

---

[117] *Id.*

[118] *Id.* at 68.

[119] *Id.* at 70.

[120] *Id.*

[121] *Id.* at 75.

[122] *Id.*

[123] *Id.*

good shoppers, which creates a misallocation of services.[124] A misallocation of resources was an important notion during this hearing that would play a major role in further motivating Congress to act and eventually pass the ACA. While there is not a direct link between the testimonies examined here and the passage of the ACA, there was an overarching move by Congress towards addressing the issues brought to light after the *New York Times* article.[125]

At the time of these hearings, despite all of Congress' actions, the U.S. had not achieved access to affordable quality health care in a manner consistent with what was intended by providing the special tax exemption status to hospitals meeting specific criteria. This lack of achievement motivated the committee's attention to how significant tax breaks are benefitting the American people and the difficulty in being able to even measure that benefit. Chairman Thomas said that "…given the significant tax break that not-for-profits provide, we should see to a certain degree discernible differences among a number of taxes that you would examine the materials."[126] However, throughout the examined testimony, none of the experts were able to provide enough evidence to make that decision in Chairman Thomas' opinion as to a perspective on how nonprofit and for-profit hospitals differ.[127] Further highlighting this, in his visits to communities around the country, Dr. Ginsburg found that both for-profit and nonprofit hospitals had expanded operations into the suburbs.[128] Typically, suburbs have a high percentage of privately-insured patients, which highlights that there are market incentives for both types of hospitals since privately-insured patients' insurance company will typically pay more for the same services as compared to other types of patients.[129]

Some pricing incentives are not evident in the data alone though, with one example coming from Duke Medical Center. Dr. Herzlinger provided the example of Ralph Snyderman, CEO of the Duke Medical Center, who innovated a new treatment for congestive heart failure that reduced the costs by twenty percent in one year.[130] These savings came from making people healthier so that they used hospitals less, and when they did use hospital services, their stays tended to be shorter–and less expensive. Dr. Herzlinger also said:

> In a normal marketplace, this kind of innovation would

---

[124] *Id.* at 79.

[125] Abelson & Glater, *supra* note 75.

[126] *Id.* at 71.

[127] *Id.*

[128] *Id.* at 74.

[129] *Id.*

[130] *Id.* at 83.

> reap large rewards. Ralph Snyderman lost virtually all the savings because under a large third-party system, which is not agile and not responsive to innovations, he gets paid for treating sick people and the healthier they are, the more money he loses. That is the problem with a volume-based model that says, well, the big insurer can get big discounts. Perhaps that is so. The big insurer can also stifle the innovation, which is the heartbeat of the productivity in America.[131]

Volume-based models require more patient visits to be successful, which in this scenario requires more sick people coming into the office. That is a particularly strange goal for the government to work toward. Focusing on commercial outcomes–rewards for more sick people coming in for visits–rather than on the quality of health or access to affordable health care does not ensure or protect individuals' basic right to health. Health is paramount in accessing other human rights and we should not have volume-based modeling when it comes to health.

F. Congressional Studies by the Government Accountability Office

Afterwards, the Government Accountability Office (GAO) launched a comprehensive study at the request of the House of Representatives Subcommittee on Oversight and Reform to determine how the tax-preferred status is achieving its goal.[132] The study was meant to better understand the benefits provided by nonprofit hospitals.[133] It examined whether nonprofit hospitals provided levels of uncompensated care and other community benefits that are different from other hospitals. From that 2005 study, government hospitals mostly dedicated much larger portions of their patient operating expenses to uncompensated care when compared to nonprofit and for-profit hospitals.[134] The study also found that while nonprofit hospitals as a whole were devoting more resources toward uncompensated care when compared to for-profit hospitals, this largely was concentrated within a small number of hospitals.[135] Consequently, uncompensated care costs were not evenly distributed throughout the examined hospital systems.[136] In 2006, the Chairman of the House Committee on Ways and Means requested the

---

[131] *Id.*

[132] U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-743T, NONPROFIT, FOR-PROFIT, AND GOVERNMENT HOSPITALS: UNCOMPENSATED CARE AND OTHER COMMUNITY BENEFITS 1 (2005).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

Congressional Budget Office (CBO) to examine different measurements in the surrounding communities for the levels of benefits as provided by different hospitals.[137]

The resulting analysis, focusing primarily on the differences in uncompensated care policy, is surprising. The CBO found "[n]onprofit hospitals were more likely than otherwise similar for-profit hospitals to provide certain specialized services but were found to provide care to fewer Medicaid-covered patients as a share of their total patient population."[138] The study sought to determine whether nonprofit hospitals were providing enough of a community benefit to warrant the government's exemption of taxes.[139] Researchers found no consensus among hospitals when determining how and what they measured as a community benefit as relating to Internal Revenue Ruling 69-545's interpretation of the requirements under Internal Revenue Code Section 501(c)(3).[140] To illustrate the lack of consensus researchers highlighted how uncompensated care typically is regarded as a proper measure by the IRS for determining the level of community benefit provided by a nonprofit hospital.

Research showed uncompensated care's limitations as a measuring tool given the term "uncompensated care" does not differentiate between charity care for the indigent, which is more clearly a type of community benefit, and bad debt, which is not necessarily a community benefit.[141] To better illustrate the difficulties of analyzing data on the basis of uncompensated care, consider the following example of bad debt: imagine a nonprofit hospital incurring debt as a result of a high-income individual, who has insurance, but fails to pay the deductible for provided hospital services. By law, that loss is then counted toward the community benefit requirement.[142] It might be argued that "community" includes all people, even those with high-incomes, but congressional intent in providing tax-exemptions to hospitals originally focused its efforts "to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay."[143] With IRC Section 501(c)(3)'s requirements developed under IRR 69-545 to include the community as a whole, Congress felt further clarification was warranted.

The need for further clarification led to the GAO's *Nonprofit Hospitals; Variation in Standards and Guidance Limits Comparison of How Hospitals*

---

[137] CONG. BUDGET OFF., NONPROFIT HOSPITALS AND THE PROVISION OF COMMUNITY BENEFITS (2006).

[138] *Id.* at 1.

[139] *Id.*

[140] U.S. GOV'T ACCOUNTABILITY OFF. *supra* note 132

[141] CONG. BUDGET OFF. *supra* note 137 at 9.

[142] *Id.* at 9–10.

[143] Rev. Rul. 56-185, 1956-1 C.B. 202.

Meet Community Benefits study in 2008.[144] The study included a description of intent, and noted that certain activities are performed by nonprofit hospitals to meet the community benefit standard in order to "to benefit the approximately 47 million uninsured individuals in the United States who need financial and other help to obtain medical care."[145] Fully examining the extent of how much a community benefit is and the quality of that benefit is difficult to gauge. While some consensus exists for certain standards and guidance, there is not an overall consensus as to how bad debt should be defined. The unreimbursed cost of Medicare (the difference between a hospital's costs and its payment from Medicare) as community benefit could be included by some hospitals when reporting on how they are meeting their community benefit goals.[146] The various activities defined as community benefits by nonprofit hospitals were found to create significant differences in the amount of community benefits reported. Additional limitations for accountability and comparison, useful for the government when creating public policy, resulted from different types of activities being defined and claimed as community benefits. One example is a hospital reporting their community benefit at the individual level while another hospital reports at the health care system level. Moreover, state data showed "differences in how nonprofit hospitals measure charity care costs and the unreimbursed costs of government health care programs can affect the amount of community benefit they report."[147] Together, these hearings, along with testimonies, and congressional studies, motivated Congress to address what was accurately perceived as a larger health care system concern. Ultimately, the testimonies and studies provided a backdrop for congressional discussions regarding health care reform in the United States and to the passage of the Affordable Care Act.

IV. COMMERCIALIZATION OF HOSPITAL BEHAVIOR

Nonprofit hospitals have historical and legal characteristics that set them apart from for-profit hospitals. This was intentional. "Economic theory suggests that government may want special tax treatment (either a subsidy or lower tax rate) for activities when a competitive market would fail to produce an efficient outcome."[148] Health care is different from a consumer

---

[144] U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-880, NONPROFIT HOSPITALS: VARIATION IN STANDARDS AND GUIDANCE LIMITS COMPARISON OF HOW HOSPITALS MEET COMMUNITY BENEFITS (2008).

[145] *Id.*

[146] *Id.* at 24.

[147] *Id.* at 7.

[148] William M. Gentry & John R. Penrod, *The Tax Benefits of Not-For-Profit Hospitals*, *in* THE CHANGING HOSPITAL INDUSTRY: COMPARING FOR-PROFIT AND NOT-FOR-PROFIT INSTITUTIONS 285, 289.

good in that a consumer can readily replace something like a watch, but a consumer would find it more difficult to do the same with his or her health.[149] Consider when a patient receives the wrong type of treatment for an ailment; the outcome is far different from when a consumer receives the wrong type of watch. Medical consumers want the right treatment to be available when the consumers need that treatment.

Consider, though, if treatment is only available in the market when it is offered at a cost-efficient level. Potentially, the patient has reduced access to care if the treatment is not available. On the other hand, having too much care available ultimately could reduce profitability of a treatment to a point that the treatment is priced out of the market. There is also the cost of having more treatments available at one facility to consider.

Costs would be high for any institution that attempts to have all treatments available, all the time. Failures in the market can develop when you have private agents responsible for providing a public good or goods that generate positive externalities and are not doing so to the fullest extent possible.[150] For example, consider medical research performed by hospitals. "Hospital activities that may create positive externalities include research and development, community education, medical education (to the degree health care professionals do not capture these benefits through returns to human capital), and disease control."[151] However, for-profit entities generally will not enter a market if they perceive an actual or future financial loss. When hospitals avoid offering certain services in the community it may reduce services since they may under-produce hospital outputs deemed to be unprofitable.[152] Not offering services to the community creates a problem in health care systems, since not every treatment that could benefit the community will be profitable. Encouraging the retention of unprofitable services is one reason the government has sought to keep nonprofit hospitals in the market. By providing hospitals with a large number of financial incentives, the goal is to keep hospitals in markets that would not be profitable.[153] The influence of governmental incentives has changed over

---

[149] U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-880, NONPROFIT HOSPITALS: VARIATION IN STANDARDS AND GUIDANCE LIMITS COMPARISON OF HOW HOSPITALS MEET COMMUNITY BENEFITS (2008).

[150] Gentry & Penrod, *supra* note 132.

[151] *Id.*

[152] *Id.*

[153] Nation, *supra* note 64, at 177 (providing an example of Ascension, a Roman Catholic affiliated hospital system that focuses on profits in deciding whether to keep hospitals open or close their doors.) ("However Ascension's charity care at two point five percent of its patient revenue for 2008 gave it the highest percentage among the nation's five largest nonprofit hospital systems. Nonetheless, Ascension recently closed an unprofitable hospital in Detroit, a city that had forty-two hospitals in 1960 and now has only four, even though or likely because the number of city residents without health insurance continues to increase.").

time, though, given that nonprofit hospitals are no longer primarily financed through donations and block government financing.

Historically, nonprofit hospitals were doing charitable work, and thus there were policy motivations to protect charitable hospitals from tort liability. Currently, nonprofit hospitals rely more heavily on revenues from the sale of services than on donations and block governmental financing. The historical development of tort liability for nonprofit hospitals explains this shift in reliance. Traditionally, nonprofit hospitals once enjoyed immunity from tort liability, unlike their for-profit counterparts. This immunity has slowly eroded, which further illustrates how similar nonprofit and for-profit hospitals have become. "A legal distinction that has now largely disappeared concerns *tort liability*, from which nonprofit hospitals enjoyed immunity as charitable institutions in many states."[154] There are several theories and policy arguments that were used to support tort liability immunity.

One popular theory is that if the nonprofit charitable organization was held liable, their payment would come from a trust fund and that type of payment would be a breach of the legally recognized trust entity.[155] A nonprofit hospital's employee liability factored into this theory as well. Another theory held that charities were not responsible for negligent acts of their employees, understood as *respondent superior*, since the nonprofit derives no profits.[156]

It was believed that anyone accepting charitable services would not then in turn hold the charity entity liable for negligence and use their assets for something other than what those assets were created to do. Pursuing a judgment against a nonprofit would be a violation that the court would not uphold.[157] Finally, there is a benefit to society with nonprofit charitable hospitals having a tort exemption in that it removes a risk, thus encouraging these types of organizations.[158] Not only were nonprofit hospitals free from paying taxes and getting access to various forms of governmental financing, they were also exempt from tort liabilities. Both of these influences changed, given that most of the financing now comes from sale of services and the exemption from tort liability has evolved to no longer provide the same understanding of "charitable immunity." These factors and others have led to the commercialization of nonprofit hospitals:

> Notwithstanding the basic legal distinctions, nonprofit

---

[154] BRADFORD H. GRAY, THE PROFIT MOTIVE AND PATIENT CARE: THE CHANGING ACCOUNTABILITY OF DOCTORS AND HOSPITALS 63 (1991).

[155] *Id.*

[156] *Id.*

[157] *Id.* at 63–64.

[158] *Id.* at 64.

> hospitals have undergone several changes that increase their similarity to investor-owned hospitals . . . (1) the heavy reliance on revenues from the sale of services, (2) hospitals' dependence on economic performance for gaining access to capital, (3) the decline of local control resulting from the rise of multi-institutional systems, and (4) the proliferation of hybrid for-profit-nonprofit organizations.[159]

The less a hospital relies on donations and government block funding, the more the hospital relies on revenues from the sale of services. This is a cause for concern because such reliance could impact decisions about patients' care.

If a nonprofit hospital is concerned about attracting patients and providing a range of services that will encourage patients and physicians to use their hospital versus another facility, then there likely will be, and has been, a move towards factoring market pricing and outcomes into health care treatment decisions. Doing so may leave patients without access to treatments that have been deemed to underperform financially. "These changes have implications for the premise on which accountability in health care has traditionally rested: that health care institutions as nonprofit organizations have been animated primarily by goals of community service, not by economic aims, and that local control provided needed accountability."[160] Economic outcomes shifted to be more and more important over time. There have been other influences impacting the shift towards the commercialization.

Furthering the underlying factors in the shift toward commercialization has been a nonprofit hospital's access to credit-approved loans. Nonprofit hospitals have traditionally relied on large donations and government block funding as a major source of funding, which is further evidenced by the following example: the federal government provided major funding to expand the number of hospital beds. The Hill-Burton program was enacted in 1946 under the Hospital Survey and Construction Act to provide substantial subsidies for construction of nonprofit and public hospitals.[161] It was considered a necessary intervention to expand access to health care for employees working in war production facilities during World War II in addition to addressing a lack of access to health care for individuals in poor, rural areas.[162] At the time, it was believed both these groups did not have sufficient access to health care, and the program remains the largest piece of

---

[159] *Id.* at 65.

[160] *Id.*

[161] Andrea Park Chung et al., *Subsidies and Structure: The Lasting Impact of the Hill-Burton Program on the Hospital Industry*, 99 REV. OF ECON. AND STAT. 926, 926–27 (2017).

[162] *Id.* at 926.

federal legislation of its type to focus on construction of nonprofit and public hospitals.[163] It became so popular that the federal government amended the original enactment to increase funding. "From July 1947 through June 1971, $28 billion in funds was distributed for the construction and modernization of health care institutions."[164] The legislation was a success from the perspective that it added hospital beds. Under it, the number of nonfederal short-term general hospitals grew from 4,375 hospitals in 1948 to 5,875 in 1975.[165] While this hospital bed expansion program was active, third-party payers were growing as employers began to offer health insurance to lure and retain employees. Third-party payers provided new revenue streams.

With the new funding streams, there was a reduction in revenue risk since the hospital no longer was solely reliant on government funding. By shifting to reliance on third-party payers, and with it the idea of more patients equaling more money, hospitals were provided stability in revenue as compared to government funding, which can be influenced by the political winds, and donations, which can be sporadic. As more patients received coverage under health insurance plans, the financial risk of patients not paying was reduced, and hospitals' revenue streams became more reliable.[166] A reliable, steady revenue stream reduces risk associated with investing which opened hospitals to a source of investment revenue previously unattainable.

Hospital bonds first got a credit rating in 1968, which made investing less risky. The reason for this was simple; independent rating agencies published their assessment of credit worthiness and allowed investors to compare risk in a more consistent manner. In 1968, Standard & Poor's credit rating gave its first health care bond.[167] The better your economic score, the lower your borrowing costs. Lower borrowing costs meant hospitals did not have to pay as much if their credit ratings were lower and that also influenced its access to more financing.[168] Any entity searching for funding will be concerned about borrowing costs. When a hospital is concerned about economic scores for tapping into investment pools, even as a nonprofit hospital that may not have a direct board of directors representing shareholders, adjustments are made to keep building new facilities.

Focusing on building new facilities is not the same as focusing on patient care, and a hospital's concern could arguably be the credit rating agencies that publish their credit-worthy assessments. With the expiration of the Hill-

---

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] Steven Golub, *The Role of Medicare Reimbursement in Contemporary Hospital Finance*, 11 AM. J.L. & MED. 501, 505 (1985).

[167] GRAY, *supra* note 139, at 69.

[168] *Id.* at 70.

Burton program, it would be a financially prudent decision, when finances are a key influence, to factor a hospital's credit rating to reduce borrowing costs for future facility construction. Future facility construction is also important when there is reliance on service-based funding as new facilities create new services to be offered to the community. Offering more services to the community has also been a way nonprofit hospitals satisfy the requirements for that status, while increasing the volume of patients seen and charging for procedures.

Hospitals have not always charged for every procedure, though, and doing so is an example of their commercialization. This developed as a result of the third-party payment entities demanding accountability for what their customers were receiving. When cost-based reimbursement was first introduced by the private Blue Cross Insurance plans and then adapted by Medicare and Medicaid, the reimbursement provided further justification for hospitals to focus on investment financing.[169] That was due to the need for revenue. More revenue meant a hospital could remain competitive as they expanded. This expansion included new facilities and equipment. "More importantly, Medicare and Medicaid incorporated a cost-based reimbursement system for capital costs."[170] Doing so led to an expansion spurred by these cost-based reimbursements and increased hospitals' use of debt financing.[171] Medicare's policy of paying a return on equity capital to those for-profit providers highlights another influencing factor on why nonprofit hospitals would seek out debt financing as well. It encouraged the reduction of equity financing that created a shift to debt financing.[172]

Access to tax-exempt debt as a common revenue source made it easier for hospitals to shift to that form of debt as a primary source of capital. By the 1980s, a majority of hospital construction was funded by debt**.**[173] The federal government had ended its national program aimed at building more hospitals. In fact, hospitals that could achieve higher performance and increase their creditworthiness, positioned themselves to participate in mergers.

Mergers are another example of hospitals' attempt to expand their services and increase the number of patients it provided care for. "Through mergers, hospitals might be able to remove ineffective management, promote economies of scale by reducing duplication of fixed assets and services, and allow for the synergistic benefits generally characteristic of mergers in other industries."[174] Concerns about achieving economies of

---

[169] Golub, *supra* note 151, 166at 505.

[170] *Id.* at 505–06.

[171] *Id.* at 506.

[172] *Id.*

[173] *Id.*

[174] *Id.* at 524.

scale, monitoring the credit ratings and the motivation to move into debt financing are all a move away from the original perspective many had regarding nonprofit hospitals and result in further convergence of behavior when compared to for-profit hospitals. Mergers mean there is less control locally–and, in turn, less accountability at the local level.

Accountability can be measured through a hospital's quality. Since nonprofit hospitals historically have not focused on economic outcomes or gains, they should be expected to place a higher emphasis on quality. Higher quality performance has traditionally been associated with a higher expenditure of costs. Thus, if you want to maintain quality performance based on market demands, like for-profit hospitals, then there can be a lower level of quality expected when compared to nonprofit hospitals, since the emphasis is on profits.

However, this was not found in a conducted survey that compared quality performance indicators between nonprofit and for-profit hospitals. Authors of a 1992 study concluded that both nonprofit and for-profit hospitals were able to provide similar overall quality.[175] This is troubling from a policy standpoint because ". . .the social expectation is that even persons who are disadvantaged because of their health, low income, or other factors, such as race or ethnicity, have access to high-quality health care."[176] If hospitals, both nonprofit and for-profit, are primarily concerned with economic outcomes, then patients will suffer. From a human rights perspective, this is important.

Important for public policy purposes is the question whether nonprofit hospitals are becoming less committed to such 'noncommercial' activities and when nonprofits convert to for-profits, whether these activities cease almost entirely.[177]

The conversion of nonprofit hospitals to a hybrid system–or an outright conversion to a for-profit system–signals the convergent behavior of these two types of hospitals. Leading up to the early 2000s, many nonprofit hospitals sought permission from public policymakers to convert themselves to for-profit status.[178] These conversions resulted in executive compensation to those skillful enough to perform a successful conversion.

The amount of conversions led to the IRS issuing regulation to control executive compensation. "In 1999 it issued regulations requiring the governing boards of nonprofit service providers, research organizations, and

---

[175] Frank A. Sloan, *Commercialism in Nonprofit Hospitals*, 17 J. POL'Y ANALYSIS AND MGMT. 234 (1998).

[176] *Id.* at 235.

[177] *Id.*

[178] Daniel M. Fox, *Policy Commercializing Nonprofits in Health: The History of a Paradox From the 19th Century to the ACA*, 93 MILBANK Q. 196 (2015).

foundations to document how they set executive pay."[179] To comply with this law, hospital boards hired consulting firms to analyze data in the region so that they were in compliance with the regulation. While doing so, these consultants did not factor in the distinction between nonprofit and for-profit entities' compensation levels, but rather used the health sector as a whole entity.[180] Comparisons across the health sector as a whole, in regards to executive compensation, further evidence the convergent behavior between nonprofit hospitals and their for-profit counterparts.

Convergent behavior was likely to happen. Nonprofit hospitals have not been required to act in a charitable manner since IRS Revenue Ruling 69-545, and they were encouraged through other policies to behave in a manner similar to their for-profit counterparts. Nonprofit hospitals behaving similarly to for-profit hospitals have had an impact. Consider characteristics of the health care field: a specialized field, with high expectations, and requires extensive knowledge. The characteristics support the importance of why health is a human right.

There are policy motivations to encourage behavior that is not market-seeking, founded in the importance of health as a human right. For instance, when a nonprofit hospital seeks to satisfy the community benefit requirement to retain its special legal status, it may consider offering services in the community that are missing. For-profit seeking entities can be expected to focus on maximizing profits. The consolidation of nonprofit hospitals, that are attempting to become more efficient by focusing on maximizing revenue streams, risks running counter to the intended policy encouragements Congress envisioned. "Hospital consolidation has the effect of dampening competition among providers and insurers and giving particularly large hospital groups bargaining leverage in the reimbursement negotiations."[181] Consolidation reduces local authority and control since the decision-makers are not typically part of the impacted community. Furthermore, consolidation of providers runs counter to what many people feel should be a nonprofit hospital's focus. Specifically, their role historically has been as a safety net for those who otherwise would be without health care.

The ACA expected to impact the consolidation trends, and, ultimately, the commercialization trend. "In addition to significantly expanding the number of insured patients, the ACA will bring new reimbursement models designed to incentivize the provision of more integrated and coordinated

---

[179] *Id.* at 197.

[180] *Id.*

[181] Susan Adler Channick, *Health Care Cost Containment: No Longer an Option but A Mandate*, 13 NEV. L.J. 792, 810 (2013).

care."[182] An easy method of developing integrated and coordinated care is for hospitals to consolidate. Passage of the ACA put pressure on nonprofit hospitals to consolidate, furthering the commercialization of hospitals. Unaffiliated nonprofit hospitals that may be financially distressed do not have access to sharing expertise and efficiencies available to multi-state organizations.[183] In fact, the "ACA is limited in its efforts to contain health care spending, and either does not address certain issues at all or does so insufficiently."[184] For many nonprofit hospitals, merging with another nonprofit hospital or selling to a for-profit hospital is potentially the most viable option financially. It potentially may be the only option to improve their operating margins, ensure continued access to credit and capital, acquire and implement information technology, and otherwise develop necessary efficiencies of scale and coordination–all foreseeably required to meet the new imperatives of the ACA.[185]

Passage of the ACA may have been motivated to increase access to health care coverage. However, it also has had the perhaps unintended effect of encouraging the commercialization of nonprofit hospitals. For example, the ACA made changes to existing law such as the addition of the Community Health Needs Assessment (CHNA) in its efforts to be more accountable. The ACA requires tax-exempt hospitals to create a CHNA every three years and should be developed alongside community stakeholders.

Other requirements of the ACA include identifying the community the hospital serves, surveying the community to determine health care issues, conducting a quantitative analysis of health care issues, and formulating a three year plan.[186] The result, though, of the CHNA section on hospital accountability from a revenue perspective, is more consolidation of hospitals so that the organizations can meet these requirements. Becoming part of a network that understands the new regulations and the most efficient manner to meet their requirements, like that of the CHNA section, can be appealing to avoid penalties.

Consolidating into a network that already understands and knows the path to satisfying the requirements of the ACA, like that of the CHNA, thus enhances the benefits perceived by hospital administrations to consolidate. "Provider consolidation is likely to get worse as health networks seek to take advantage of the ACA's economic incentives in favor of ACOs. Since the very definition of an ACO is provider integration, there is every reason to

---

[182] Terry L. Corbett, *Healthcare Corporate Structure and the ACA: A Need for Mission Primacy Through a New Organizational Paradigm?*, 12 IND. HEALTH L. REV. 103, 150–51 (2015).

[183] *Id.* at 151.

[184] Channick, *supra* note 165, at 793.

[185] Corbett, *supra* note 167, at 151.

[186] Patient Protection and Affordable Care Act, *supra* note 29

predict continued provider consolidation."[187] The government's attempt to encourage nonprofit hospital behavior through economic incentives has actually increased the incentive to integrate systems. A useful method to integrate systems is to buy other companies and consolidate.

Further incentivizing consolidation is the ACA deadline of when Medicaid payments will decrease with the anticipated reduction in payments being made to cover uninsured patients given the anticipated increase in coverage. Nonprofit hospitals that seek to offset those reductions in payment rates are consolidating to gain larger market shares because ". . .those with negotiating leverage with insurers are likely to continue to use their market power to get higher reimbursement rates from the private market in order to offset the losses that are anticipated from a higher percentage of Medicaid reimbursement."[188] Not only does the ACA incentivize consolidation by promoting integrated services, it also does so by reducing Medicaid reimbursements.[189] Without maintaining Medicaid reimbursements at prior levels, nonprofit hospitals have an incentive to consolidate so that they are able to negotiate with health insurers for better contractual rates.

In addition, the ACA encourages consolidations by its penalties for noncompliance. The ACA contains penalties beyond revocation of the non-profit status for noncompliance. Revocation was not widely used prior to the ACA, and the IRS provided hospitals an opportunity to make corrections that would allow them to move back into compliance. With the passage of the ACA, there are new "…monetary penalties or temporary suspension of tax-exempt status at the facility level" that are not levied for omissions or errors that are corrected quickly and are inadvertent or minor.[190] Additionally, hospitals that are not in compliance with the ACA regulations could be made to temporarily pay income tax as if the entity was not exempt from taxes under § 501(c)(3).[191]

Each development illustrates how commercialized behavior in nonprofit hospitals have developed over the years and further displays how nonprofit hospitals behave similarly to for-profit hospitals. Nonprofit hospitals increasingly are operating in a for-profit fashion; this commercialized behavior has been encouraged in part by federal policies, which include the passage of the ACA and continuing tax-exemption policies. This is important, not just from a tax policy standpoint or on a cost-basis analysis. Rather, the real importance is examination from a human rights welfare

---

[187] Channick, *supra* note 165, at 811.

[188] *Id.*

[189] *Id.* at 801

[190] Erica A. Clausen & Abbey L. Hendricks, *Cultivating the Benefit of § 501(r)(3): § 501(r)(3) Requirements for Nonprofit Hospitals*, 20 LEWIS & CLARK L. REV. 1025, 1038 (2016).

[191] *Id.* at 1039.

perspective; a perspective Congress impliedly had when it began offering entities the multitude of benefits afforded to nonprofits.

V. THE AFFORDABLE CARE ACT AND ITS IMPACT ON HOSPITALS QUALIFYING FOR TAX-EXEMPTION

The Affordable Care Act (ACA) has expanded the requirements of nonprofit hospitals and is attempting to ensure more accountability on the part of nonprofit hospitals. By requiring nonprofit hospitals to do more than simply provide a "community benefit," the ACA has impacted nonprofit hospitals' behavior. However, the ACA has resulted in the acceleration of nonprofit hospitals' commercialization when compared to for-profit hospital behavior.

The ACA's strategy to prioritize preventive services and population health through community health improvement activities gave a new focus to health care services. While its impact on nonprofit hospitals is still being examined, its passage has significantly affected all types of hospitals. Leading to the passage of the ACA, there was congressional scrutiny that resulted in new community benefit requirements that fell in line with the overall strategy of the ACA's priority of preventive care.[192] The new community benefit requirements also were intended to expand accountability and transparency.[193] This was due in part to congressional scrutiny, which questioned whether nonprofit hospitals were providing sufficient returns to justify their tax-exempt status.[194]

To qualify for tax exemptions, hospitals must continue to operate under the "community benefit" standard, in addition to meeting new requirements such as "the community health needs assessment requirements."[195] The community health needs assessment requires taking into account input from representatives of the community, which can represent broad interests. This includes representatives with special knowledge of or expertise in public health.[196] An organization can meet the requirements provided they have performed a community health needs assessment at certain intervals, while also showing they have adopted an implementation strategy to meet the community health needs identified through such an assessment.[197]

Nonprofit hospitals must also develop financial assistance policies that meet the requirements of charges, and the billing and collection

---

[192] Julia James, *Nonprofit Hospitals' Community Benefit Requirements*, HEALTH POL'Y BRIEF, (February 25, 2016), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_153.pdf.

[193] *Id.*

[194] *Id.*

[195] 26 U.S.C. § 501(r)(1)(A) (1909).

[196] *See generally* 26 U.S.C. § 501(r)(3) (1909).

[197] *Id.*

requirement.[198] The financial assistance policy requirements include creating criteria for determining eligibility for financial assistance, and whether such assistance includes free or discounted care.[199] There must also be a written policy that will inform people of the basis for calculating amounts charged to patients, the method for applying for financial assistance, and whether there is a separate collections and billing policy.[200]

The policy must also include a list of actions the organization may take in the event of non-payment, including collections action and reporting to credit agencies. The nonprofit hospital must also have taken the necessary measures to publicize the policy throughout the community that is served by the organization.[201] Additionally, there must be a written policy "requiring the organization to provide, without discrimination, care for emergency medical conditions (within the meaning of section 1867 of the Social Security Act (42 U.S.C. 1395dd)) to individuals regardless of their eligibility under the financial assistance policy . . . ."[202] To meet the obligations required under this section, the policy must restrict charges to no more than the amounts generally billed to individuals who have insurance that covers such care. The section also prohibits astronomical charges.[203] An organization will meet the billing and collection requirements:

> . . .only if the organization does not engage in extraordinary collection actions before the organization has made reasonable efforts to determine whether the individual is eligible for assistance under the financial assistance policy . . . .[204]

Determining the reasonableness of a hospital's efforts can be a challenge, given that each hospital may have unique interpretations of this. Requiring some additional measures prior to engaging in extraordinary collections, though, reflects congressional intent to provide people with an opportunity to ask for assistance if they are eligible.

To summarize, operators who wish to maintain their tax exemption status must implement a community health need assessment every three years, and adopt an implementation policy that relies, in some part, on people who can represent the broad interests of the community served. The operator must establish a financial assistance policy and an emergency

---

198 *See generally* 26 U.S.C. § 501(r)(4) (1909).

199 *Id.*

200 *Id.*

201 *Id.*

202 26 U.S.C. § 501(r)(4)(B) (1909).

203 *See generally* 26 U.S.C. § 501(r)(4) (1909).

204 26 U.S.C. § 501(r)(6) (1909).

medical care policy if they offer emergency services, place limits on charges so they are no more than the amounts generally billed to individuals with insurance covering the same care. Finally, these operators must forego extraordinary collection actions against an individual before making reasonable efforts to determine whether the individual is eligible for assistance under the hospital organization's financial assistance policy.

VI. CONCLUSION

In conclusion, access to affordable quality health care is important from a human right perspective. In the U.S., we have struggled for centuries to create a workable health care system. We have some of the best health care available in terms of quality and speed of care. However, it is not equally available and there are those that still do not have access to meaningful, quality health care that is free of financial burden to them. If you are lucky enough to work for an employer with access to good health care insurance, then you are a privileged person. Health care costs continue to rise, bringing more and more care out of the financial reach of people. That is a failure by the government of its implied responsibility owed to people; without health people will not be able to exercise their other afforded and constitutionally protected rights.

Access to Sex:

Sexuality Support for Adults with Intellectual & Developmental Disabilities

SHOSHANA RUBIN†

I. INTRODUCTION

Every Monday night, Jillian goes for dinner with her friends at Pietro's. She picks Pietro's because there is a waiter there who looks like Justin Bieber. She has been in love with Justin Bieber since she was five. The waiter's name is Anthony. Anthony says hello to Jillian when she comes in. He does not know it, but this makes Jillian happy for approximately seven days.[1]

Jillian does not drive to Pietro's because she does not have a license or a car. Jillian's mother organizes the dinner outings by emailing a list of Jillian's friends. Ten people respond. Fred cannot come. His support staff cannot work that night and there is no one else to take him. So, he stays home. Fred likes Anthony too. He is afraid to tell his parents. He tried to tell his support staff, but his support staff changed the subject.

---

†J.D. Candidate, 2021, City University of New York School of Law. The author thanks Professor Ruthann Robson for her encouragement, guidance and suggestions. Thank you to Professor Sofia Yakren and Professor Natalie Chin for their insight into disability law. Many thanks to the editorial team at CPILJ for their careful edits and suggestions. Finally, the author thanks her family for their support and inspiration.

[1] The names and some facts of the stories have been changed to protect the identities of all individuals.

Sam drives to Pietro's. Sam has a girlfriend. Her name is Athena. They first met in Ms. Stephanie's special education class, thirty years ago. Athena's parents do not let her go into Sam's car. When she wants to see him, they drive her to meet him in public places only. This bothers both of them.

On Saturdays, Maria has dinner with her parents. Sometimes her siblings join them, if they are not in their own homes, with their own partners, or with their own children. Sometimes everyone is together. On one of those nights, when everyone is studying their menu, Maria makes an announcement. "I want to have sex!" Everyone's menu drops.

Ask a group of young adults with intellectual and/or developmental disabilities what they think about dating, sexuality, and relationships, and their answers will be just as diverse as any other group of people. But they share a common theme:

> I like spending time with a friend.[2]
> I can get to know the person.[3]
> I have never dated . . . .[4]
> What I like about dating is the feeling of it and so you won't have to be alone. Also, you can do things together to make living easier.[5]

They want to connect. Some of them just need guidance to get there.

The World Health Organization gives a working definition of sexuality as a "central aspect of being human throughout life" encompassing "sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction."[6] Yet, the sexuality of people with intellectual and developmental disabilities has long been ignored or outright denied.[7] The American Association on Intellectual and Developmental Disabilities calls it a loss which has had a negative impact on "gender identity, friendships, self-esteem, body image and awareness, emotional growth and social behavior."[8]

This note argues that people with intellectual disabilities who are living

---

[2] E-mail from Anonymous, Self-Advocate, to Shoshana Rubin, J.D. Candidate, 2021, City University of New York School of Law (Apr. 19, 2020, 1:19 EST) (on file with the author).

[3] *Id.*

[4] E-mail from Anonymous, Self-Advocate, to Shoshana Rubin, J.D. Candidate, 2021, City University of New York School of Law (Apr. 19, 2020, 5:46 EST) (on file with the author).

[5] E-mail from Anonymous, Self-Advocate, to Shoshana Rubin, J.D. Candidate, 2021, City University of New York School of Law (Apr. 21, 2020, 12:55 EST) (on file with the author).

[6] WORLD HEALTH ORG., *Defining Sexual Health: Report of a Technical Consultation on Sexual Health* (2002), https://www.who.int/reproductivehealth/publications/sexual_health/defining_sexual_health.pdf.

[7] *See Sexuality: Joint Position Statement of AAIDD and The Arc*, AM. ASS'N ON INTELL. AND DEV. DISABILITIES (Nov. 8, 2008), https://www.aaidd.org/news-policy/policy/position-statements/sexuality

[8] *Id.*

independently with support are overlooked when it comes to sexuality. While much has changed since the days of *Buck v. Bell*, when the Supreme Court had upheld the practice of sterilization of people with disabilities, [9] much of the stigma has remained the same. While there has been a movement away from institutionalization towards independent living and community integration, there remains a lack of support services when it comes to intimacy and sexuality for individuals with disabilities. Part One of this note will look at the history of discrimination and desexualization of people with disabilities. Part Two will discuss consent, the way courts handle consent, and different theories on how to handle consent. Part Three will cover Medicaid's Home and Community Based Services Waiver Program and The Americans with Disabilities Act. Part Four looks at *Olmstead*,[10] the integration mandate and how the integration mandate has been expanded. Part Five considers ways of making sexuality services more accessible to people with disabilities. The conclusion shows that for community integration to be fully realized, sexuality support should be included for those who want it.[11]

II. DISABILITY DOES NOT ERASE SEXUALITY

A. Defining Intellectual and Developmental Disability

There are many different types of disability. This note focuses on adults with intellectual and/or developmental disabilities who are living independently with support services. The American Association of Intellectual and Developmental Disabilities (AAIDD) defines intellectual disability as "a disability characterized by significant limitations in both **intellectual functioning** and in **adaptive behavior**, which covers many everyday social and practical skills."[12] Intellectual functioning involves mental capacity and includes reasoning and problem solving.[13] Adaptive behaviors are practical,[14] conceptual,[15] and social skills.[16] "Developmental

---

[9] Buck v. Bell, 274 U.S. 200 (1927).

[10] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999).

[11] It is not the intention of this note to suggest that only people with intellectual disabilities need support when it comes to sexuality, or that all people with intellectual disabilities need support in this area. Everyone benefits from a greater understanding of the issues surrounding sexuality. Where support is wanted by a person, it should be made available.

[12] *Definition of Intellectual Disability*, AM. ASS'N ON INTELL. AND DEVELOPMENTAL DISABILITIES, https://www.aaidd.org/intellectual-disability/definition (last visited May 11, 2020), [hereinafter *Definition of Intellectual Disability*].

[13] *Id.*

[14] *Id.* (explaining that practical skills include "activities of daily living" such as caring for oneself, traveling, and using the telephone).

[15] *Id.* (explaining that conceptual skills include language and literacy as well as concepts of money and time).

[16] *Id.* (explaining that social skills include interpersonal skills, social responsibility, self-esteem, the ability to follow rules and to avoid being victimized).

disability" is another term that is sometimes used and includes people with autism[17] and cerebral palsy.[18] Sometimes people have more than one diagnosis.[19] These are basic, scientific descriptions of disability that do not take into account the many theories on disability and the layers that go into someone's identity.

B. History of Discrimination Against People with Disabilities

People with disabilities were not always welcome in the community and were thought to be "agents of the devil."[20] Beginning in the 1800s, people with disabilities were committed to institutions. Institutions were promoted as a way to prevent what was seen as a genetic and social problem (based on theories that have been discredited), to keep what was considered a "dangerous minority" separate from everyone else.[21] One of the earliest institutions in the United States, known as the "The Massachusetts School for Idiotic and Feeble-Minded Youth," opened in 1848.[22] People behind these institutions believed disability was a disease that could be cured.[23] The apparent interest in using education to "teach" the residents evolved into confinement and restraint.[24] From the 1880s to the 1950s, institutions began emphasizing "incarceration rather than treatment."[25] Within these institutions, men and women were kept separate so as to prevent sexual activity.[26] The eugenics movement was considered a "hunt for the feebleminded"—as those in power believed those with disabilities should be

---

[17] *What is Autism*? AUTISM SCI. FOUND., https://autismsciencefoundation.org/what-is-autism/ (last visited May 11, 2020) (autism refers to Autism Spectrum Disorders); *What is Autism Spectrum Disorder?*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/autism/facts.html (last visited May 11, 2020) ("Autism spectrum disorder (ASD) is a developmental disability that can cause significant social, communication and behavioral challenges.").

[18] CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ncbddd/cp/facts.html (last visited Jan. 11, 2020) ("Cerebral palsy (CP) is a group of disorders that affect a person's ability to move and maintain balance and posture.").

[19] *See* Hannah Furfaro, *Conditions that Accompany Autism, Explained*, SPECTRUM NEWS (July 25, 2018), https://www.spectrumnews.org/news/conditions-accompany-autism-explained/.

[20] *See* Soc'y for Good Will to Retarded Child., Inc. v. Cuomo, 572 F. Supp. 1300, 1304 (E.D.N.Y. 1983), *vacated*, 737 F.2d 1239 (2d Cir. 1984).

[21] *See* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 332-333 (1997) (describing how the eugenics movement in the twentieth century, spurred by concepts of evolution and natural selection, was a major factor in how people with intellectual disabilities were treated.).

[22] *Parallels In Time: A History of Developmental Disabilities*, THE MINN. GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES, https://mn.gov/mnddc/parallels/four/4b/5.html (last visited June 8, 2020).

[23] *See Soc'y for Good Will to Retarded Child.*, 572 F. Supp. at 1305 (1983).

[24] *See id.* at 1312−14, 1325, 1345.

[25] Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1435 (2013) ("The philosophy underlying these institutions also became more racist," turning to eugenics as a way to control a growing population that was seen as 'defective.'").

[26] *See* Denno, *supra* note 21, at 328, 333 (describing how institutionalization included separating the sexes to prevent sexual activity and the "social burden" that might result from it).

prevented from reproducing.[27]

In 1927, the Supreme Court considered *Buck v. Bell*.[28] The question before the Court was whether Virginia's law allowing for Carrie Buck's sterilization in an institution was a violation of her Fourteenth Amendment rights to equal protection and due process.[29] As the Court explained, Buck was "the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child."[30] Declaring that "[t]hree generations of imbeciles are enough," Justice Holmes found that the sterilization statute was constitutional.[31] While the *Buck v. Bell* holding has never been overturned, the Virginia statute at the heart of the case was repealed in 1974.[32] The decision led to more than 60,000 sterilizations across the country.[33] In many states today, a parent or legal guardian can still apply for the sterilization of their adult children for medical purposes, with approval from a judge.[34]

Advocates across the country started protesting the segregation and institutionalization of people with disabilities in the late 1960s and 1970s.[35] Their protests were modeled after those of the civil rights movement.[36] In 1973, Congress passed Section 504 of the Rehabilitation Act, which banned discrimination on the basis of disability by those programs that receive federal funds.[37]

Despite the legislative changes that followed the movement in support of people with disabilities, many of the stereotypes and stigmas surrounding them remain. Sociologist Tom Shakespeare explains, "disability is a very powerful identity, and one that has the potential to transcend other identities … it has the power to de-sex people, so that people are viewed as disabled" and not as having any other identity.[38] Much of that stigma is still felt by members of the disability community—who are seen as either childlike and asexual or hypersexual and out of control.[39] Those stereotypes are reflected

---

[27] RUTH COLKER & PAUL D. GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION 2 (8th ed. 2013).

[28] *See* Buck v. Bell, 274 U.S. 200 (1927).

[29] *See id.* at 205.

[30] *Id.*

[31] *Id.* at 207.

[32] *See* Colker, *supra* note 25, at 3.

[33] *G: Unfit*, WNYC STUDIOSRADIOLAB (July 17, 2019), https://www.wnycstudios.org/podcasts/radiolab/articles/g-unfit. [hereinafter *Unfit*].

[34] *Id.* at 24:44.

[35] *See* Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), https://dredf.org/about-us/publications/the-history-of-the-ada/

[36] Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1059 (2004).

[37] 29 U.S.C. § 794 (2018).

[38] Tom Shakespeare, *Disability, Identity and Difference*, *in* EXPLORING THE DIVIDE: ILLNESS AND DISABILITY 94, 109 (Colin Barnes & Geof Mercer eds., 1996).

[39] *See* Denno, *supra* note 21, at 321 (explaining how fears of procreation among people with disabilities fueled stereotypes that women with disabilities are either asexual or hypersexual and need to

in high rates of sexual abuse and consent statutes.

III. INTELLECTUAL DISABILITY AND CONSENT

People with intellectual disabilities experience one of the highest rates of sexual assault in the country.[40] According to Justice Department data, people with disabilities are victims of violence including sexual assault at a rate that is two and a half times higher than that of people who do not have disabilities.[41] It is a global issue too. One study in Australia found women with disabilities experienced sexual violence at "three times the rate" than those who did not have disabilities.[42]

A. Consent Statutes

A lack of consent is often an element of the crimes of rape and sexual assault.[43] Consent laws typically address non-consent to include incapacity on the basis of age, mental disability, physical helplessness, or intoxication.[44] However, state laws do not consistently define mental disability or incapacity, leaving it up to the courts to decide. Many factors can affect a person's capacity including age, education, support, and the circumstances of their situation.[45] In deciding whether a person has capacity to consent to sex, many courts use some type of "knowledge and consequences test" that assesses whether a person has the mental capacity to make a sexual decision.[46] This "functional" approach[47] is based on a

---

be protected or prevented from having sex); TEDx Talks, *Why Autism is Sexier Than You Think It Is*, YOUTUBE (Sept. 28, 2017), https://www.youtube.com/watch?v=shgy43CxBX8 [hereinafter *Amy Gravino Talk*] ("Society overall doesn't like the thought of autistic people getting laid, shagging, screwing, populating, doing the horizontal mambo.").

[40] National Organization for Women, *The Disability Community & Sexual Violence*, NOW, https://now.org/wp-content/uploads/2018/05/Disabled-Women-Sexual-Violence-4.pdf (last visited May 11, 2020) (citing Rape, Abuse & Incest National Network, *Sexual Abuse of People with Disabilities*, RAINN, https://www.rainn.org/articles/sexual-abuse-people-disabilities (last visited May 11, 2020)).

[41] *See* Erika Harrell, *Crime Against Persons with Disabilities, 2009–2015 - Statistical Tables*, BUREAU OF JUST. STAT. (July 11, 2017), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5986.

[42] *See* MEGAN MCCLOSKEY & STEPHEN MEYERS, UNITED NATIONS POPULATION FUND, YOUNG PERSONS WITH DISABILITIES: GLOBAL STUDY ON ENDING GENDER-BASED VIOLENCE, AND REALIZING SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS 116 (July 2018), https://www.unfpa.org/sites/default/files/pub-pdf/Final_Global_Study_English_3_Oct.pdf

[43] Kristin Booth Glen, *Introducing a "New" Human Right: Learning from Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1, 57 (2018).

[44] *See* Denno, *supra* note 21, at 340–41, 345-46 (explaining how different states determine consent).

[45] Natalie M. Chin, *Group Homes as Sex Police and the Role of the* Olmstead *Integration Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 401 (2018).

[46] Jasmine E. Harris, *The Role of Support in Sexual Decision-Making for People with Intellectual and Developmental Disabilities***,** 77 OHIO ST. L. J. FURTHERMORE 83, 98 (2016).

[47] Stephanie L. Tang, Note, *When "Yes" Might Mean "No": Standardizing State Criteria to Evaluate the Capacity to Consent to Sexual Activity for Elderly with Neurocognitive Disorders*, 22 ELDER L. J. 449, 468 (2014).

person's ability to understand information related to the sexual act.[48] For example, New York courts require that a person has an "understanding of the nature and consequences of the sexual conduct" and an appreciation of the "moral dimensions" of the decision to have sex.[49]

B. How New York Courts Handle Consent

The issue of capacity to consent was taken up by the New York Court of Appeals in the 1977 case, *People v. Easley*.[50] The case involved Rita Waller, a woman with intellectual disabilities, who was living with her grandmother.[51] Frank Easley, a family friend, admitted to having sex with Waller and was convicted of rape.[52] In affirming the trial court's conviction, the court relied on IQ testing,[53] as well as testimony from a school psychologist, who testified that while Waller was "physically capable of 'indulg[ing] in the concrete act of sexual intercourse' and of comprehending that it could result in 'having a baby', she was incapable 'of thinking beyond the act in terms of what its consequences could be.'"[54] Waller's grandmother testified that she had tried to discuss sex with her granddaughter, but had been met with "almost total incomprehension."[55] Waller did not testify under oath since the court could not ascertain whether she understood what it meant to tell the truth.[56] The court found her performance as a witness was "replete with shouting, giggling, crying, incoherence, emotionalism and other inappropriate behavior."[57]

In deciding how to rule on the case, the court looked at the statutory language of subdivision five of section 130.00 of the New York Penal Law[58] and found that the scheme under which Easley was indicted stated that "mentally disabled" meant a person who "suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct."[59] The court acknowledged that the breadth of the language in the statute made it difficult to determine a person's mental capacity and that the "requisite degree of intelligence necessary to give consent may be found

---

[48] *Id.*

[49] Denno, *supra* note 21, at 344–45.

[50] People v. Easley, 42 N.Y.2d 50, 50 (1977).

[51] *Id.* at 52.

[52] *Id.*

[53] *But cf. Definition of Intellectual Disability*, *supra* note 12 (stressing that while an IQ test score of seventy or as high as seventy-five is indicative of a person having an intellectual disability, a more holistic view should be taken when assessing a person's capacity—by looking at factors such as the community environment, linguistic diversity, and strengths, taking note that a "person's level of life functioning will improve if appropriate personalized supports are provided over a sustained period").

[54] Easley, 42 N.Y.2d at 53.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] N.Y. PENAL LAW § 130.00 (McKinney 2010).

[59] *Id.*

to exist in a person of very limited intellect."[60] The court found that the issue of "moral quality" concerned whether the person involved was able to appreciate how the sexual act would be "regarded in the framework of the societal environment" including possible taboos that would go along with it.[61] The court clarified that "the law does not adopt the fiction that all persons are mentally or judgmentally equal" but "[e]ven mental retardation [sic] does not mean that an individual is incapable of consenting."[62]

In *People v. Cratsley*, a defendant admitted to having sex with a thirty-three-year-old woman who was intellectually disabled, even though he insisted she had consented.[63] Unlike *Easley*, the woman involved here—"Sherry K"—had told the defendant, "don't do no more."[64] The court points to how she only reported the incident to her counselors because she had been instructed to do so, and not because she understood that the incident was wrong.[65] Sherry K also had a boyfriend "with whom she went out to eat."[66] The court stated that the evidence did not suggest that "she comprehended what [the] defendant was doing when she asked him to stop touching her" and held that she did not have the capacity to consent.[67] In its decision, the court acknowledged that "[m]ental retardation [sic] is not necessarily a static condition, for experience has shown that with effective training and support, individuals are able to lead increasingly 'normal' lives."[68]

As Professor Deborah Denno writes, scholars have criticized both the *Easley* and *Cratsley* decisions for requiring too broad a standard of understanding and restricting too many people with intellectual disabilities from being able to engage in sex.[69] Denno points out, however, that both courts refused to "presume" that a person with intellectual disabilities was incapable of consent, emphasizing that proof of incapacity has to come not from proof of the intellectual disability alone but from other facts that show how the person functions, or participates, in society.[70]

C. How Federal Case Law Handles Consent

Some federal case law addresses the capacity to consent, including one case that took place on Native American land: *United States v. James*.[71] T.C.

---

[60] *Easley*, 42 N.Y.2d at 54.
[61] *Id.* at 56.
[62] *Id.* at 54.
[63] People v. Cratsley, 86 N.Y.2d 81, 84 (1995).
[64] *Id.*
[65] *Id.* at 88.
[66] *Id.* at 84.
[67] *Id.* at 83.
[68] *Id.* at 86 (citing William Christian, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 413 (1994)).
[69] *See* Denno, *supra* note 21, at 346.
[70] *Id.*
[71] United States v. James, 810 F.3d 674, 676–77 (9th Cir. 2016).

was a "severely disabled" twenty-eight-year-old woman living with her grandparents on the Fort Apache Reservation in Arizona.[72] A family member caught Christopher James, the defendant in the case, having sex with her in August 2011.[73] He admitted to investigators that he had sex with her and told them it was not her fault.[74] A written statement was introduced at trial, in which James said, "[i]t was intercourse, but it wasn't like sex, you know? . . . [W]ith her she's just laying there but I mean, you are inside her and you are moving up and down."[75]

James was charged with two counts of sexual abuse in violation of 18 U.S.C. § 2242(2)(B), which applies to cases where a person who is sexually assaulted may have the mental capacity to consent but is "physically incapable" of communicating refusal.[76] However, James was not charged under 18 U.S.C. § 2242(2)(A), in that it prohibits sex with someone who is "mentally incapable of understanding what is happening." [77] The jury convicted him at trial, but the district court granted an acquittal. The court of appeals reversed.

Judge Tallman, on behalf of the majority, wrote how the district court based its opinion on a narrow definition of "physically incapable"—finding that T.C. would have had to have been completely physically helpless to satisfy this statute.[78] She was largely non-verbal and used a wheelchair, which she needed to be strapped into.[79] She needed assistance with all major activities involved in daily living.[80] Her main way of communicating was through nodding her head or grunting.[81] T.C.'s full-time caretaker testified that her responses were "frequently inappropriate" or "nonsensical."[82] The court wrote that "physically helpless" and "physically incapable" are different standards.[83] The court defined it broadly, explaining someone could "have a physical incapacity to decline participation or be incapable of communicating unwillingness to engage in a sexual act and still not be physically helpless."[84]

The majority emphasized that its holding would not preclude people who are physically disabled from consenting,[85] but Judge Kozinski

---

[72] *Id*.
[73] *Id.* at 677.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 676.
[77] *Id.*
[78] *Id.* at 679.
[79] *Id.* at 676–77.
[80] *Id.* at 676.
[81] *Id.* at 677.
[82] *Id*.
[83] *Id.* at 681.
[84] *Id.*
[85] *Id.* at 683.

dissented.[86] He pointed out that the majority opinion "will make others more reticent about engaging in sex with people who are physically impaired. Their already difficult task of seeking out a partner for sexual gratification will become even more daunting."[87] This case, and the two New York cases, offer just brief examples of the difficulty of interpreting consent statutes and the implications these opinions have for people with disabilities.

D. When People with Disabilities are Defendants

People with disabilities who seek consent sometimes find themselves as defendants in criminal prosecutions. Brian Kelmar founded the non-profit "Legal Reform for People Intellectually & Developmentally Disabled"[88] after his son—who is autistic—was accused of sexually assaulting a minor.[89] Kelmar says it started when his son got a text from a girl a few years younger than him, inviting him to go out with her.[90] He thought she would be his friend, so he met her.[91] His father says she initiated oral sex—at which point his son asked her to stop, but later, he was arrested.[92] Kelmar says people with intellectual and developmental disabilities are "seven times more likely to get up and get caught up in the criminal justice system . . . because of their lack of education" when it comes to sex.[93] People with disabilities make up between forty and eighty percent of the population of incarcerated adults.[94] It is unclear how many of those people are incarcerated for sex crime convictions. However, more education for those with disabilities about consent and healthy relationships—as well as more education for those who work in the criminal justice system about people with disabilities—would likely reduce sex crimes and reduce the number of people who are incarcerated. It is difficult for a person to give or seek consent, or even answer questions about it, if they have never been given a chance to learn

---

[86] Judge Kozinski retired in 2017 after multiple sexual harassment accusations. *See* Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html

[87] *James*, 810 F.3d at 687 (Kozinski, J., dissenting).

[88] *Legal Reform for People Intellectually & Developmentally Disabled*, LRIDD (2017), https://lridd.org/.

[89] Melinda Wenner Moyer, *When Autistic People Commit Sexual Crimes*, SPECTRUM NEWS (July 17, 2019), https://www.spectrumnews.org/features/deep-dive/when-autistic-people-commit-sexual-crimes/.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See* Jessica Wetzler, *Bill Targeting Sexual Abuse Education for Those with Disabilities Moves Forward*, DAILY NEWS-RECORD (Jan. 23, 2020), https://www.dnronline.com/news/local/bill-targeting-sexual-abuse-education-for-those-with-disabilities-moves/article_d56a9e4c-7b16-5443-83a1-4e2c45fe45da.html.

[94] Talila A. Lewis & Dustin Gibson, *The Prison Strike Challenges Ableism and Defends Disability Rights*, TRUTHOUT (Sept. 5, 2018), https://truthout.org/articles/the-prison-strike-is-a-disability-rights-issue/.

about it.

E. Theories on Consent

Scholars have been examining disability and consent for decades. Professor Michael Perlin points out that "capacity" and "competency" are intertwined when courts determine a person's ability to consent.[95] Capacity is defined as a person's ability to "understand, appreciate, and form a relatively rational intention with regard to some act."[96] However, people in power—particularly judges, lawyers, and juries—need to understand the people who are in their courts. As Professor Susan Stefan explains, "competence" is "far from being an internal characteristic of an individual" and more of a "value judgment arising from an individual's conversation or communication" with those in power.[97] Professor Jasmine Harris points out that it is difficult for many people with intellectual and developmental disabilities to pass consent tests because courts may not understand the way a person with a disability is communicating.[98] Those with disabilities are asked and expected to respond appropriately to questions designed by people who do not communicate or think like them. Consent tests can also send a damaging message. As the Hon. Kristin Booth Glen explains, consent statutes stigmatize people with disabilities "in the most personal areas and reduce them to 'children' who also are prohibited, as a matter of law, from consenting to sex."[99] Professor Anna Arstein-Kerslake asserts that if the kind of functional tests to assess mental capacity to consent to sex were applied on an equal basis to all people, many people who do not have disabilities would find them difficult to pass.[100]

Denno was one of the first scholars to approach the issue of consent. In

---

[95] *See* Michael L. Perlin & Alison J. Lynch, "*All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 263–64 (2014).

[96] Steven B. Bisbing, *Competency and Capacity: A Primer*, *in* LEGAL MED. 325, 325 (S. Sandy Sanbar et al. eds., 7th ed. 2007).

[97] *See* Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 U. MIA. L. REV. 763, 766 (1993) (Professor Susan Stefan is a scholar and litigator on behalf of people with cognitive disabilities. She has written four books and numerous articles on legal and policy issues for people with disabilities.).

[98] *See* Harris, *supra* note 46 (Professor Jasmine Harris is a Professor of Law and Martin Luther King, Jr. Hall Research Scholar at the University of California – Davis School of Law. She is a law and equality scholar with a particular focus on disability.).

[99] *See* Glen, *supra* note 43, at 58 (The Honorable Kristin Booth Glen is Dean Emerita at CUNY School of Law. She served as Surrogate Judge of New York County, where she had jurisdiction over guardianships of people with intellectual disabilities, and wrote a number of groundbreaking decisions in that area. Her scholarship focuses on the human right of legal capacity and supported decision making, and she serves as Project Director of Suported Decision-Making New York).

[100] *See* Eilionóir Flynn & Anna Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, 32 BERKELEY J. INT'L L. 124, 128 (2014) (Eilionóir Flynn focuses on the ratification process for the United Nations Convention on the Rights of Persons with Disabilities in Ireland. Anna Arstein-Kerslake is an internationally recognized legal scholar focusing on human rights, disability rights and gender justice).

1997, Denno studied state statutes and legal tests, concluding that women with intellectual disabilities are held to a higher consent standard than women without disabilities.[101] She argues that consent statutes are ambiguous in how they define consent and intellectual disability.[102] Her concern is that too much room is left to the courts to determine whether someone has the capacity to consent.[103] Denno suggests courts apply a "contextual approach" to determine whether someone has the capacity to consent.[104] It incorporates knowledge about intellectual disability, individual attributes that go beyond the labels imposed by IQ and mental age, and the context of the sexual encounter at issue.

Professor Martha Nussbaum argues that defining the ability to consent ought to follow a capabilities approach, which she developed alongside economist/philosopher Amartya Sen.[105] This definition looks at what people are actually able to do and treats "diverse functions as all important"[106] when it comes to quality of life.[107] Nussbaum describes the relationship between capabilities and rights by explaining three different categories of capabilities.[108] There are basic capabilities; such as what we are born with; internal capabilities, such as the ability to use thought within one's own conscious; and combined, defined as "internal capabilities combined with suitable external conditions for the exercise of the function."[109] Nussbaum asserts that the good life is one which is self-directed, given what a person has and is capable of achieving.[110] She explains how a person who is secluded and forbidden to leave their home has "internal but not combined capabilities for sexual expression" and the goal should be to move everyone towards possessing combined capabilities.[111]

Professor Alexander Boni-Saenz builds on Nussbaum's theory, arguing that adults with "persistent cognitive impairments" should be granted legal capacity to make sexual decisions as long as they have support.[112] Boni-Saenz defines sexual capability as "the opportunity to achieve certain states of being or perform certain activities associated with sexuality, such as experiencing sexual pleasure or forming a sexual identity."[113] His

---

[101] *See* Denno, *supra* note 21, at 394.

[102] *Id.* at 341.

[103] *Id.* at 349–50.

[104] *Id.* at 394.

[105] Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 275 (1997).

[106] *Id.* at 285.

[107] *Id.* at 275 (describing how her use of this language was both independent of and reflective of how Aristotle used a notion of human capability and functioning to articulate goals of good political organization).

[108] *Id.* at 289.

[109] *Id.* at 289–90.

[110] *Id.* at 290.

[111] *Id.*

[112] Alexander A. Boni-Saenz, *Sexuality and Incapacity*, 76 OHIO ST. L.J. 1201, 1205 (2015) (focusing mostly on people diagnosed with dementia).

[113] *Id.*

"cognition-plus" test for assessing capacity to consent, particularly for people in nursing homes, includes the use of supported decision-making.[114] His theory incorporates a three-step test, asking first whether the person can express a preference for sex that is free from coercion; second, whether the person understands the nature and the consequences of the decision to have sex; and third, does the person have an adequate support network.[115] A person who fails on the understanding aspect can still be found capable of consent if an adequate support network exists to help with decision-making.[116] For a sexual capabilities approach to work, supported decision-making must be recognized.[117]

In 2006, the United Nations General Assembly adopted The Convention on the Rights of Persons with Disabilities (CRPD).[118] The resolution recognizes the right of people with disabilities to "enjoy legal capacity on an equal basis with others in all aspects of life."[119] Article 12 of the CRPD calls for the "right to recognition everywhere as persons before the law" and to provide support to people with disabilities that is required so they can exercise their capacity.[120] The CRPD model preserves the person's central role in making decisions and calls on a third party to make the best assessment as to what the will and preferences of the person would be.[121] Those decisions are based on knowledge of the person, prior interactions and an existence of an ongoing relationship.[122] The CRPD is unratified in the United States, but still has potential to influence policy.

There are multiple theories on how to handle consent. Part of what makes it complicated is the lens through which society views disability. There is a need for everyone to move away from biased views of disability as lacking or less than, to acknowledge the diversity and the potential within each person.[123] Professor Natalie Chin discusses the theory of human connectedness in the group home context, arguing there should be an initial presumption of competence and an acknowledgement that with support, people with disabilities can safely engage in sex and intimacy.[124] She does

---

[114] *Id.*

[115] *Id*. at 1234.

[116] *Id.*

[117] *Id.* at 1233.

[118] G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Jan. 24, 2007).

[119] *Id.* at art. 12.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See* Christopher Kliewer, Douglas Biklen & Amy J. Petersen, *At the End of Intellectual Disability*, 85 HARV. EDUC. REV. 1, 3-9, 11 (2015) (proposing a theory of human connectedness, inclusion, and a presumption of competence, while emphasizing persistence in challenging one's own bias about the ability of others is crucial towards moving forward).

[124] Chin, *supra* note 45, at 405-407 (citing Christopher Kliewer, Douglas Biklen & Amy J. Petersen, *At the End of Intellectual Disability*, 85 HARV. EDUC. REV. 1,3-9, 11 (2015) (explaining how human connectedness theory builds on the social model of disability to allow for a demonstration of competence in the context of consent tests used on residents of group homes.).

not take a position on what critera should be used to determine sexual consent capacity but she suggests "an individualized, fact-specific inquiry based on the circumstances of the desired sexuality choice of the individual as a baseline in any capacity determination. "[125]

Every person should have the right to be safe from unwanted sexual activity. Outside of consent, there are other ways to ensure safety for people with disabilities while also promoting sexual autonomy. One way to do that is by improving support for community integration.

IV. THE ROAD TO LIVING IN THE COMMUNITY

A. The Home and Community Based Services Waiver Program

People with disabilities who want to live in the community can receive support services through Medicaid's Home and Community Based Services Waiver Program ("HCBS").[126] In 1981, Congress added section 1915(c) to the Social Security Act.[127] It allows certain Medicaid statutory requirements to be waived for states receiving federal funding so they can develop community-based programs and services for people with disabilities.[128] One goal of the program was to challenge the "institutional bias" of Medicaid.[129] There is no limit to the number of waivers a state may develop, but the average annual cost of a state's waiver program cannot exceed that of institutionalized services.[130] Nearly all states offer services through HCBS waivers targeting different populations.[131] Eligibility requirements vary by state and require proof of disability.[132] The waiver program is just one way for states to comply with the Americans with Disabilities Act.

B. The Americans with Disabilities Act

In 1990, Congress passed the Americans with Disabilities Act (ADA).[133] In its "findings and purposes" section, Congress pointed to a history of segregation and isolation for people with disabilities as a "serious and

---

[125] *Id* at 405.

[126] *Home & Community-Based Services 1915(c)*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/index.html (last visited Apr. 24, 2020) [hereinafter *Home & Community Based Services Program*].

[127] *See* 42 U.S.C. § 1396n (2018).

[128] *Home & Community Based Services Program, supra* note 126.

[129] *See "Don't Tread on the ADA"*: Olmstead v. L.C. ex rel. Zimring *and the Future of Community Integration for Individuals with Mental Disabilities*, 40 B.C. L. REV. 1221, 1229–30 (1999).

[130] *Home & Community Based Services Program, supra* note 126.

[131] *Id.*

[132] *Id.*

[133] 42 U.S.C. § 12101 (2018).

pervasive social problem."[134] The statute was intended to prevent discrimination against people with disabilities in three areas: employment; public services from government entities; and public accommodations provided by private entities. Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[135] The Justice Department implements the regulations of the ADA for public entities, consistent with the regulations in Section 504 of the Rehabilitation Act of 1973.[136] Those regulations state "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[137]

The Americans with Disabilities Act (ADA) was the "first comprehensive civil rights law for people with disabilities."[138] Numerous cases went before the Supreme Court, where the Court narrowed the definition of "disability," leading to the amendments of the ADA in 2008 to broaden it again. In 1999, the Supreme Court took up a case that considered whether the anti-discrimination provision in Title II of the ADA[139] required the placement of people with mental disabilities in community settings rather than institutions. The Court found the answer to be "a qualified yes."[140]

V. OLMSTEAD V. L.C. AND THE INTEGRATION MANDATE

A. Olmstead v. L.C.

In the early 1990s, two women with cognitive disabilities were voluntarily admitted to a Georgia psychiatric hospitals for treatment.[141] After some time, both women improved enough to live in community-based treatment programs.[142] Instead, they were kept institutionalized.[143] In 1995, they challenged their confinement in a segregated setting as a violation of Title II of the ADA.[144] In 1999, the case went to the Supreme Court, where Justice Ruth Bader Ginsburg, who wrote the majority opinion, found "unjustified isolation" to be "discrimination based on disability" and held

---

[134] 42 U.S.C. §§ 12101(a)(2), (5) (2018).
[135] 42 U.S.C. § 12132 (2018).
[136] 42 U.S.C. §§ 12134(a), (b) (2018).
[137] 28 C.F.R. § 35.130(d) (2020).
[138] *ADA Findings, Purpose and History*, THE ADA NAT'L NETWORK, https://www.adaanniversary.org/findings_purpose (last visited Apr. 25, 2020).
[139] 42 U.S.C. § 12132 (2018).
[140] Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 587 (1999).
[141] *Id.* at 593.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 593–94.

Title II of the ADA requires that people with disabilities be placed in community settings when:

> the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[145]

In evaluating the state's fundamental alteration defense,[146] courts must consider "not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably."[147] If a state could show a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard [of the Americans with Disabilities Act] would be met."[148]

Justice Ginsburg explained two justifications for the Court's decision. First, placing people with disabilities in institutions when they were capable of living in the community only perpetuated stereotypes.[149] Second, confining them to institutions deprived them of the chance to have "family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[150] Advocates saw the decision as a victory—with some holes.[151] First, the Court did not clarify what a "reasonable pace" would be for states to place people in community settings.[152] Second, the opinion did not address what types of services would be necessary to ensure that people living in the community were getting adequate care.[153]

---

[145] *Id.* at 597.

[146] *Id.* (The regulations explain states could resist modifications that "would fundamentally alter the nature of the service, program, or activity").

[147] *Id.*

[148] *Id.* at 605–06.

[149] *Id.* at 600.

[150] *Id.* at 601.

[151] *See* Press Release, Laurie M. Flynn, Supreme Court Gives Incremental Victory to Persons with Mental Illness in Olmstead Decision, Nat'l All. on Mental Illness, (June 22, 1999), https://www.nami.org/Press-Media/Press-Releases/1999/Supreme-Court-Gives-Incremental-Victory-to-Persons.

[152] *Id.*

[153] *Id.*

B. Enforcing the Integration Mandate

In 2009, the Obama Administration launched "The Year of Community Living," calling for federal agencies to enforce Title II by making sure states were implementing the ruling from *Olmstead*.[154] In 2011, the Department of Justice (DOJ) issued a statement on enforcing the integration mandate.[155] It described an integrated setting as:

> . . .those that provide individuals with disabilities opportunities to live, work, and receive services in the greater community, like individuals without disabilities. Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible.[156]

It defines a "segregated setting" as including but not limited to one which limits a person's ability to "engage freely in community activities."[157] No showing of facial discrimination is required.[158] The mandate applies to individuals who are "at serious risk" of becoming institutionalized in addition to those who are already living in an institutionalized setting.[159] Since then, the Justice Department has filed or participated in numerous lawsuits based on states' implementation of the integration mandate as defined in *Olmstead*. Part of that enforcement has been investigating states that are found not to have a plan to end unnecessary segregation.[160] States are obligated to comply with the integration mandate and could be found in violation if a court finds people with disabilities are being unnecessarily excluded as a result of the state's direct or indirect operation of facilities.[161]

One example of how this has been applied is *Guggenberger v.*

---

[154] *Olmstead: Community Integration for Everyone*, U.S. DEP'T OF JUST., https://www.ada.gov/olmstead/ (last visited Mar. 8, 2020); Charles R. Moseley, *The ADA, Olmstead and Medicaid: Implications for People with Intellectual and Developmental Disabilities*, NAT'L ASS'N OF STATE DIR. OF DEV. DISABILITIES SERV. (2013), http://www.nasddds.org/uploads/documents/ADA_Olmstead_and_Medicaid.pdf.

[155] *See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead v. L.C., U.S. DEP'T OF JUST. (June 22, 2011), https://www.ada.gov/olmstead/q&a_olmstead.html, [hereinafter U.S. DEP'T OF JUST. Statement].

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] 28 C.F.R. § 35.130(b)(1) (2016).

Minnesota.[162] The 2016 case involved a group of people with developmental disabilities who sued Minnesota claiming they were eligible for the Home and Community Based Services Waiver program, but because they were on waiting lists, they were not receiving services.[163] The four named plaintiffs in the class action suit were in their early twenties and were living at home with their parents.[164] One of them was on a waiting list for over fourteen years.[165] All of them claimed they were receiving some services, but their needs required that they receive more, including "independent housing options; services to teach the individual to live on his or her own and access the community; behavioral support services; and services aimed at developing the individual's independent living skills in areas such as budgeting, nutrition, healthcare, and employment."[166] They each claimed that the placement on waiting lists created "feelings of isolation and segregation from society," while exacerbating their disabilities.[167] The court found that the plaintiffs had standing and thus the case moved forward.[168]

Another example was *Steimel v. Wernert*, where plaintiffs sued after Indiana officials shifted them to a different program, which meant cuts to funding their time in the community from forty hours a week down to ten to twelve hours a week.[169] The cut resulted in less supervision and assistance for traveling to work.[170] The court held that isolation in the home "may often be worse than confinement to an institution on every other measure of 'life activities' that *Olmstead* recognized."[171]

There is nothing in either opinion that explicitly references sexuality. But isolation can include sexual isolation. Chin argues that *Olmstead* and Title II of the Americans with Disabilities Act can be used to challenge what is ultimately the "sexual isolation" of people with intellectual disabilities who live in group homes and are prevented from forming intimate relationships.[172] She points to how regulations on residents of group homes, arbitrary denial of a resident's right to consent to sex, and a lack of access to sexuality services is a violation of the integration mandate, and is disability-based discrimination.[173] Chin writes that "integrated setting" can be expanded to fully address "the importance of sexuality in the lives of intellectually disabled individuals" since a lack of access to sexuality is a

---

[162] Guggenberger v. Minnesota, 198 F. Supp. 3d 973 (D. Minn. 2016).
[163] *Id.* at 986.
[164] *Id.* at 987.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 993.
[169] Steimel v. Wernert, 823 F.3d 902, 908 (7th Cir. 2016).
[170] *Id.* at 908-09.
[171] *Id.* at 911.
[172] *See* Chin, *supra* note 45, at 382.
[173] *Id.* at 382-84, 386.

form of isolation.[174] The same could be said for people who are living independently and receiving federally funded support. Any cuts to funding that make it difficult for them to participate in the community, or to understand their own sexuality or develop an intimate relationship, or the denial of access to information about sexuality or opportunities to learn about or experience intimacy by support staff amount to a form of isolation.[175]

Part of living independently is being able to make one's own decisions and to have choices. In New York, the guardianship law calls for the "least restrictive form of intervention" to provide for a person's needs while "affording that person the greatest amount of independence and self-determination in light of that person's understanding."[176] There is a move now to recognize supported decision-making, which allows people to receive support in order to understand what they need to know to make decisions based on their preferences.[177] Booth Glen explains how supported decision-making emphasizes full capacity, does away with substituted decision making seen in guardianship, and calls for providing supports so everyone can make their own decisions. [178] She writes that decision-making is a skill that needs to be taught to people with intellectual disabilities as early as pre-kindergarten.[179] Once they learn this skill, they can make their own decisions, with support.

For community integration to work, support needs to be provided so people with intellectual and developmental disabilities do not just exist in the community, but are able to actually live and interact within the community. That includes being able to make decisions and choices about their sexuality. It means acknowledging everything from identity, to dating and relationships, to intimacy, to sexual orientation, to reproduction and contraception. As Martha Nussbaum's capabilities approach demonstrates, life should be measured not by wealth, but by how much a person can pursue that which is important to that person, including sexuality.[180] Psychologist Alfred Adler identified three major areas of life: life in society or the community, useful work or vocation, and romantic and family love.[181] Some people need more support than others to achieve this. Professor Carlos Ball

---

[174] *Id.* at 390.

[175] This would apply only if they are part of the Home and Community Based Services Program and receiving services from the state.

[176] N.Y. MENTAL HYG. LAW § 81.03 (McKinney 2004).

[177] *See* Michael L. Perlin & Naomi Weinstein, *Said I, but You Have No Choice: Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even If It is Not What S/He Would Have Chosen*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 110 (2016).

[178] Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 98 (2012).

[179] Kristin Booth Glen, *Piloting Personhood: Reflections from the First Year of a Supported Decision-Making Project*, 39 CARDOZO L. REV. 495, 518 (2017).

[180] *See* Nussbaum, *supra* note 105, at 275.

[181] *See* ALFRED ADLER, SOCIAL INTEREST 39 (Colin Brett ed., 1998).

explains how "limitations in companionship, education, social acceptance, and sexual activity . . . are often at the core of what makes [people] disabled."[182] He argues that society has a moral obligation to provide assistance where it is needed, particularly with functional capabilities, to live an autonomous life.[183] This includes sexuality. Some critics might say it is paternalistic to claim people with disabilities need assistance. To them, Ball argues that all people need assistance to gain autonomy, and much of it is just so normalized that we do not realize we are being assisted.[184] The question is how to provide the proper supports so that people with intellectual disabilities—who are unique in all of their interests and needs—can experience sexuality in a way that is true to them.

VI. SEXUALITY SUPPORT AS PART OF COMMUNITY INTEGRATION

For community integration to be fully realized, society needs to do more. Commentator Hannah Hicks writes that there is "no shortage of sex-positive, educational resources for parents of individuals who experience mental disability and are living in deinstitutionalized settings."[185] The article's focus was on people who were living in institutionalized settings. However, parents may not be able to adequately or appropriately assist their adult children when it comes to intimacy, particularly if their kids don't want to talk to them about it.

Parents of people with intellectual and developmental disabilities spend a lot of time, and often face roadblocks, seeking support services for their adult children to begin with—such as a place to live, food to eat, and a job.[186] If those parents are lucky enough to have time and money, they typically meet with lawyers to make sure a support plan is in place for their kids, after they are dead. Some parents are already dead.[187]

Some have a hard time accepting that their adult children with intellectual disabilities are sexual, while others have trouble finding resources.[188] Educating parents and caregivers is important, and is one place

---

[182] Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 630 (2000).

[183] *Id.* at 604.

[184] *Id.* at 647.

[185] Hannah Hicks, *To the Right to Intimacy and Beyond: A Constitutional Argument for the Right to Sex in Mental Health Facilities*, 40 N.Y.U. REV. L. & SOC. CHANGE 621, 625 (2016).

[186] *See* Sally Abrahms, *Who Will Care for My Special Needs Adult Child?* THE HARTFORD: EXTRA MILE (Mar. 27, 2018), https://extramile.thehartford.com/family/parenting/caring-for-my-special-needs-adult-child/(interviews with parents describing efforts to plan for their adult children's futures including finding housing options beyond group home placements).

[187] *See* Joseph Goldstein, *What's Going to Happen to Junior, Now That His Mother is Dead?*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/nyregion/nyc-coronavirus-adult-disabled.html.

[188] *See* Lorna Collier, *Sex and Intellectual Disabilities*, THE AM. PSYCHOL. ASS'N: MONITOR ON PSYCHOL. (Dec. 2017), https://www.apa.org/monitor/2017/12/seeking-intimacy-sidebar.

to start, but leaving it to families is not a good enough solution.[189] The wider community needs to take a more active role in working towards inclusion that embraces every aspect of life, for every type of person, from jobs to housing, to socializing and sexuality.[190] This has not happened on a large enough scale. As Professor Martha Albertson Fineman writes:

> society has historically dealt with dependency by relegating the burden of caretaking to the family, which is located within a zone of privacy, beyond the scope of state concern . . . Thus largely rendered invisible within the family, dependency is comfortably and mistakenly assumed to be adequately managed for the vast majority of people.[191]

She asserts that everyone is vulnerable in various ways, and can suddenly become dependent at any point in time, but that people's experiences are influenced by the resources they have access to.[192] A wealthy family may be able to provide everything their adult child needs to live independently, but that leaves out a vast majority of the population. Commentator Mia Mingus calls for an awareness of the "interdependence that embraces need and tells the truth: no one does it on their own and the myth of independence is just that, a myth."[193] Families alone cannot support their adult children with intellectual disabilities in the many ways that they need support. Society needs to take more responsibility for everyone, and that includes supporting sexuality. The place to start is by offering more support through the program that is intended to provide that support in the first place—Medicaid's Home and Community Based Services Waiver program.[194]

C. HCBS Services for Sexuality Support

According to a study done in 2015 of 111 HCBS waiver programs, less than 12 percent covered sexuality services for intellectually disabled adults.[195] The researchers found ninety-two percent of those states' programs

---

[189] *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 11 (2008) (explaining how historically dependency is "mistakenly assumed to be adequately managed" for people who need support).

[190] *See* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18 (1999).

[191] Fineman, *supra* note 189.

[192] *Id.* at 10.

[193] Mia Mingus, *How Our Communities Can Move Beyond Access to Wholeness*, LEAVING EVIDENCE (Feb. 12, 2011, 1:56 PM), https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/.

[194] *See* Chin, *supra* note 45, at 439-40 (suggesting group home operators work with the agencies that administer HCBS waivers to incorporate sexuality support services into a resident's treatment plan).

[195] Carli Friedman & Aleksa L. Owen, *Sexual Health in the Community: Services for People with*

to be reactive (aimed at preventing "sexually inappropriate behaviors") rather than proactive services (which are aimed at sex education and awareness about safety).[196]

According to the study, New Mexico and Washington, DC are the only jurisdictions that explicitly provide proactive sexuality services through their HCBS waiver programs.[197] New Mexico's program includes classes that teach "social and sexuality skills needed . . . .to make the strongest connection possible between individual personal values and informed choices about relationships and sexuality."[198] Therapists, teachers, family, friends, support professionals, and peer self-advocates serve as role models in the classes.[199] The program also includes attendance at the class for a support staff member, who can help implement the lessons learned outside of the classroom in daily life.[200] The program calls for yearly evaluations by participants on the quality of the classes.[201] Similar programs can be implemented—and funded—in other states.

There are other ways to support people that fall outside of anti-discrimination legislation. Professor Joseph J. Fischel and Hilary R. O'Connell suggest that the way to make sexuality more accessible to people with intellectual and developmental disabilities is to approach it from a social welfare perspective.[202] They argue that access to sexuality cannot be something that is made possible through another "reasonable accommodation" but through "cross-sector reforms" such as more state investment into "transportation, healthcare, assistance with contraception, abortion and family planning . . . ."[203] Professor Elizabeth Emens explains how "inadequate implementation" of support when it comes to transportation, as well as low employment rates and relative poverty, all lead to a reduction in social capital, limiting people's ability to go out, meet and connect with other people.[204] Emens calls for improving access to public spaces and experiences where relationships can begin and develop, and for welfare laws to acknowledge that forming intimate relationships is a desired goal of people with intellectual and developmental disabilities.[205] One self-

---

Intellectual and Developmental Disabilities, 10 DISABILITY & HEALTH J. 387, 389 (2017) (finding only seven states offer sexual health services through their HCBS waiver program, and most of those programs are reactive—focusing solely on preventing harm).

[196] *Id.*

[197] *Id.*; N.M. DEP'T HEALTH, DEVELOPMENTAL DISABILITIES WAIVER SERVICES STANDARD, (2019), https://nmhealth.org/publication/view/regulations/3511/.

[198] N.M. DEP'T OF HEALTH, *supra* note 197, at 201.

[199] *Id.*

[200] *Id.*

[201] *Id.* at 213.

[202] Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 506 (2016).

[203] *Id.* at 506-07.

[204] Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1374-75 (2009).

[205] *Id.* at 1391-92.

advocate says, "I think the government can add more social groups that only focus on meeting people and developing romantic relationships."[206] A possible issue with focusing on the "welfare" perspective is that it could increase the stigma around people with disabilities. Professor Samuel Bagenstos argues the expansion of social rights for people with disabilities feeds into public attitudes that people with disabilities are not "entitled to be treated as full citizens" because they are seen as welfare dependent individuals.[207] A possible solution to this is to expand social support to all—not just to people with disabilities. Programs like single-payer healthcare, a universal basic income, and free college programs all contribute to the notion that everyone needs support, and helps to eliminate the stigma that exists when programs are designed for only a subset of the population.[208]

D. Expanding Sex Education for People with Intellectual and Developmental Disabilities

There is a lot of room for improvement in sex education for all students. But where schools do teach sex education, students with disabilities should be included. Often students with disabilities are taught in separate "special education" classes, where sex education is not part of their curriculum at all.[209] Advocates emphasize the importance of acknowledging that kids with disabilities are sexual beings too.[210] Programs should be sensitive and tailored to their learning styles so they can fully understand the material being taught.[211] Additionally, the kind of "informal learning" that takes place among kids outside the classroom is often missing for kids with disabilities; it is harder for them to find people they connect with to discuss sexuality in a natural way because they are often isolated from their peers.[212] For those who were denied sex education when they were growing up, Emens recommends helping them to develop confidence and relevant social skills as adults.[213]

Advocates are working to provide more access to sex education. The

---

[206] E-mail from Anonymous, Self-Advocate, to Shoshana Rubin, J.D. Candidate, 2021, City University of New York School of Law (Apr. 21, 2020, 12:55 EST) (on file with the author).

[207] Samuel R. Bagenstos, *Disability, Universalism, Social Rights, and Citizenship*, 39 CARDOZO L. REV. 413, 419, 424 (2017).

[208] *Id.* at 425.

[209] Jesse Krohn, *Sexual Harassment, Sexual Assault, and Students with Special Needs: Crafting an Effective Response for Schools*, 17 U. PA. J. L. & SOC. CHANGE 29, 33 (2014).

[210] S. E. Smith, *Where's the Sex Ed for Disabled Kids*? THIS AIN'T LIVIN' (Nov. 4, 2016), http://meloukhia.net/2016/11/wheres_the_sex_ed_for_disabled_kids/.

[211] *Id.* (pointing out there is nothing about sex-positive sex education programs in schools that are "disability-oriented").

[212] Katherine Marrone, *The Importance of Expanding Sex-Ed to People with Developmental Disabilities*, BITCHMEDIA (Feb. 18, 2016), https://www.bitchmedia.org/article/expanding-sex-ed-people-developmental-disabilities

[213] Emens, *supra* note 204, at 1391-92.

Organization for Autism Research published an online sex education module for individuals with autism,[214] created in part by Amy Gravino, who is also autistic.[215] It covers topics including consent, dating, sexual orientation, gender identity, healthy relationships, and puberty.[216] Katherine McLaughlin leads online workshops for parents and teachers who want to create a sexuality curriculum for students with disabilities.[217] McLaughlin says when she teaches "sexuality", the "sex" part is small, and it is more about relationships and communication.[218] McLaughlin adds that the best way to talk about sex with students who have developmental disabilities is to be concrete and sometimes graphic.[219] Meantime, parents have pushed for legislation in various states seeking to mandate sex education for students with disabilities.[220] One bill was introduced after a man became involved in an unexpected court case, which his father says was due in part to his lack of education on sexuality. [221]

E. Access to Reproductive Care and Contraception

People with intellectual disabilities should have equal access to reproductive healthcare and birth control. Medicare, the federal program that provides health insurance to those over sixty-five, also covers younger people with permanent disabilities.[222] Nearly 920,000 women ages eighteen to forty-four were covered by Medicare in 2011.[223] There is no federal requirement that Medicare cover contraception.[224] This leaves disabled women on the hook for paying out of pocket for birth control, unlike many women covered by other types of health insurances. It implies they are not and will not be sexually active and it deprives them of a choice when it comes to whether they want to have kids or not. Some adults with intellectual and developmental disabilities want to have children, which also needs to be recognized. Ivanova Smith is an activist with intellectual disabilities and

---

[214] ORG. FOR AUTISM RSCH., https://researchautism.org/, (last visited May 11, 2020).

[215] *Sex Ed for Self-Advocates*, ORG.. FOR AUTISM RSCH. https://researchautism.org/sex-ed-guide/ (last visited May 11, 2020); *see Amy Gravino Talk*, *supra* note 39 ("My parents and I never had that birds and the bees talk, which I almost feel cheated out of now in a bizarre way . . . There are many barriers to establishing that conversation and to teaching dating skills.").

[216] *Sex Ed for Self-Advocates*, *supra* note 215.

[217] *About Us*, ELEVATUS TRAINING, https://www.elevatustraining.com/about-us/ (last visited May 11, 2020).

[218] Marrone, *supra* note 212.

[219] *Id.*

[220] Wetzler, *supra* note 93.

[221] *Id.*

[222] KAISER FAMILY FOUND., *Private and Public Coverage of Contraceptives in the United States*, KAISER HEALTH NEWS (July 10, 2015), https://www.kff.org/womens-health-policy/fact-sheet/private-and-public-coverage-of-contraceptive-services-and-supplies-in-the-united-states/

[223] *Id.*

[224] *See* Clair Kaplan, *Special Issues in Contraception: Caring for Women with Disabilities*, 51(6) J. OF MIDWIFERY & WOMEN'S HEALTH 450, 450-56 (2006).

claims that when she became pregnant, healthcare providers immediately offered her information on how to have an abortion.[225] She told them she was going to have the baby—and she did.[226]

F. Amplifying the Voices of People with Disabilities Through Self-Advocacy

People with disabilities know their own needs best. Part of increasing access to sexuality services should include support for sexual self-advocacy. When Gravino was researching how to teach men with autism about how to ask someone out on a date, she found that "not one study" included people with disabilities.[227] Gravino argues for more research to be done on the sexuality of people with disabilities and for that research to include the voices of those with disabilities.[228] Doing so is important, in part, because people with intellectual and developmental disabilities often have a unique perspective which needs to be heard to move forward.[229] Advocates say some of those who need the most education on disability are judges. Professor Lennard J. Davis writes, "For intelligent and just decisions to be made, decisions based on knowledge and rationality rather than impulsive tropisms . . . the judiciary will have to learn a lot more."[230] Davis recommends courses on disability be available for students in grades Kindergarten through college.[231] Another way to improve everyone's understanding is for people who do not have disabilities to get to know people who do have disabilities. One researcher says disability "can invigorate sexuality, and disrupt our standard norms of gender and sexuality . . . giv[ing] us the chance to think outside the box."[232] There is plenty the

---

[225] *Unfit*, *supra* note 33.

[226] *Id.; see also* Robin Wilson-Beattie, *How the ADA Gave Birth to a Black Sexpert*, DISABILITY VISIBILITY PROJECT, https://disabilityvisibilityproject.com/2020/07/19/how-the-ada-gave-birth-to-a-black-sexpert/ ("[P]eople do not recognize the autonomy of people with disabilities in making decisions about their bodies.").

[227] *Amy Gravino Talk*, *supra* note 39 ("There's still such a taboo around this topic that it is difficult if not impossible to get funding for these types of studies.").

[228] *Id.* ("[W]e need more research . . . . we need studies on sexuality with autistic researchers . . . See us not as children needing to be taught, but as who we are: intelligent, capable adults, who want to engage in this discussion as equals among you.").

[229] *See* Aleksa Owen et al., *Nominal Group Technique: An Accessible and Interactive Method for Conceptualizing the Sexual Self-Advocacy of Adults with Intellectual and Developmental Disabilities*, 15(2) QUALITATIVE SOC. WORK 175-77 (2016).

[230] Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 211 (2000).

[231] *Id.*

[232] Katharine Quarmby, *Disabled and Fighting for a Sex Life*, THE ATLANTIC (Mar. 11, 2015), https://www.theatlantic.com/health/archive/2015/03/sex-and-disability/386866/; *see also, Amy Gravino Talk*, *supra* note 39 ("The idea that there is a right way to have sex or to be sexual is another misconception that won't quietly die. The experience of sex . . . is different for every person . . . and while the sensory issues that many autistic individuals face may alter how they have sex, it doesn't mean that they don't have it at all.").

rest of the world can learn from people with disabilities when it comes to sexuality—or any other aspect of life. By not including those with disabilities, there is a lot that is lost.

VII. CONCLUSION

There are ways to provide support services for people with intellectual and developmental disabilities so they can make decisions when it comes to sexuality. States can include support for sexuality services in their waiver programs. A comprehensive sex education, that is individually tailored to each person's needs and understanding, can be provided to empower people to make informed choices. At the same time, the rest of society—including judges, lawyers, and caretakers—need to become more educated on disability issues and people's individual needs.

If sexuality is a "central aspect of being human throughout life"[233] and an integrated setting is one which "provides opportunities to live . . . and receive services"[234] then sexuality must be included in the services that are provided. Without such support, many adults with intellectual and developmental disabilities will be left with questions to which they do not have answers. For true community integration, sexuality cannot be overlooked.

Whether those supports are provided or not, people with intellectual and developmental disabilities will still be thinking about sexuality and talking about it. Jillian, Sam, Fred, Maria, and the people with disabilities interviewed at the beginning of this note, will still be asking questions, seeking understanding and looking for intimacy in their own ways. It is time for them to be heard.

---

[233] *See* WORLD HEALTH ORG., *supra* note 6.

[234] *See* U.S. DEP'T OF JUST. Statement, *supra* note 155.