# THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

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THE

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Roe v. Wade and State Regulation of Abortion

Erin McNamara

January 22, 2013 marked the fortieth anniversary of the landmark Supreme Court decision of Roe v. Wade,¹ which legalized abortion throughout the United States. While a woman’s right to obtain an abortion has been upheld federally, so has the states’ ability to restrict abortion practices. Now more than ever, the abortion debate continues, particularly at the state level. Although the central holding of Roe v. Wade remains untouched, an increasing number of state restrictions threaten to regulate abortion to the point that it can no longer be practiced. There is a growing need for the Supreme Court to carefully scrutinize the practical effects of these measures, in order to ensure not only that a woman has the right to obtain an abortion, but that the necessary resources are available for her to do so.

Background

Prior to the 1973 decision of Roe v. Wade, abortion was not regulated by the federal government, but instead was an issue left for individual states to decide. The procedure was illegal in most states, aside from special cases such as rape, incest, or for other reasons relating to maternal health.² Roe v. Wade concerned a Texas

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woman named Norma McCorvey who sought to terminate her third pregnancy. After she was unable to obtain a legal abortion by falsely claiming that she had been raped, she attempted to get an illegal abortion at an unauthorized site only to discover that police had shut down the clinic. McCorvey filed suit under the alias Jane Roe, and the case reached the Supreme Court on appeal. In a 7-2 majority vote, the Court decided to strike down the Texas statute banning abortion, arguing that the right to privacy is broad enough to encompass a woman’s decision to terminate her pregnancy based on the Fourteenth Amendment’s concept of personal liberty. However, the Court also recognized that the woman’s right to choose abortion is not absolute, and at some point it may be outweighed by a “compelling state interest” for the protection of maternal health and prenatal life. The Court laid out a three-trimester framework in an attempt to balance the state’s interests with the woman’s right. Under the three-trimester framework, a state could not interfere with abortion during the first trimester, but could only do so during the second and third trimesters. During the second trimester, the state’s interest was considered legitimate only when necessary to protect the mother’s health. When the fetus became viable or capable of surviving outside of the womb, prenatal life could also be considered a legitimate state interest. After the point of viability, which the Court determined to occur at 28 weeks, a state could interfere in order to protect the potential of human life.

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4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
This framework would later be challenged and modified by several other Supreme Court cases in the years to come.

The abortion issue appeared again before the Supreme Court in *Webster v. Reproductive Health Services*, which concerned the constitutionality of a Missouri law limiting the use of state resources for abortion purposes. The Supreme Court decided to uphold the law, indicating to many states that they could legislate abortion in a way previously not thought possible. Though the ruling proved a small victory for anti-abortionists, the Court made it clear that it would not revisit the central holding of *Roe v. Wade* at that point in time.⁹

In 1992, pro-life advocates were presented with their first tangible opportunity to reverse the landmark decision. The case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* concerned the constitutionality of five provisions of the Pennsylvania Abortion Control Act, namely the requirements of (1) informed consent; (2) spousal notification; (3) parental consent for minors; (4) a 24-hour waiting period; and (5) certain reporting requirements for facilities providing abortion services. Pennsylvania defended the Act in part by urging the Court to overturn *Roe v. Wade*, but in a 5-4 decision the Court reaffirmed its central holding.¹¹ However, the majority of the Pennsylvania provisions were also upheld. Abandoning the trimester framework, the Court ruled that “even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the woman] to

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¹¹ The central holding of *Roe v. Wade* is essentially that the 14th Amendment protects a woman’s right to end her pregnancy in the early stages.
know that there are philosophical and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term.”\(^{12}\) Additionally the strict scrutiny test\(^{13}\) was replaced with the “undue burden” test for determining legitimate state interest, which holds that a state may not create regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”\(^{14}\) The ruling also placed viability at 23 or 24 weeks, rather than 28 weeks.

In addition to the Supreme Court cases discussed above, a number of federal restrictions were enacted to limit the practice of abortion. The first major legislative victory for the anti-abortion movement was the Hyde Amendment, which excludes abortion from federal funding provided to low-income individuals (except in cases of rape, incest, and the protection of maternal health).\(^{15}\) Additionally the Partial-Birth Abortion Ban Act, enacted in 2003, prohibits late-term intact dilation and extraction abortions, without exception.\(^{16}\) The Supreme Court upheld the act in *Gonzales v. Carhart*,\(^{17}\) ruling that the ban on partial birth abortions does not create an undue burden. “That was a real turning point for Supreme Court observers,” remarked Charmaine Yoest, President of Americans


\(^{13}\) The Supreme Court applied the strict scrutiny test in *Roe v. Wade*, which required the state to show that there was a compelling state interest to which the statute was narrowly tailored.


United for Life. “They allowed this prohibition, what else will they allow?”\textsuperscript{18}

Likewise, many states are beginning to experiment with tougher legislative measures restricting the practice of abortion. A report issued by the Guttmacher Institute indicates that a record high of 92 new abortion restrictions were enacted across the country in 2011, almost three times the previous record of 34 set back in 2005.\textsuperscript{19} The year 2012 produced 43 more restrictions.\textsuperscript{20} The majority of these provisions sought to limit the gestational age at which abortions are allowed, to restrict the insurance coverage of abortion, or to regulate medication abortion.\textsuperscript{21} While some have been blocked in court, an increasing number have been successful in incrementally chipping away at a woman's access to abortion. Such laws threaten to undermine the central holding of \textit{Roe v. Wade}, that the woman should have the ultimate decision in whether to terminate her pregnancy before the point of viability.

\section*{State Laws Protecting Prenatal Life}

One way that states have sought to limit the practice of abortion is by shortening the window of opportunity for a woman to obtain one. While viability is considered to begin at 23 to 24 weeks into pregnancy, several states have introduced legislation

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\textsuperscript{19} States Enact Record Number of Abortion Restrictions in 2011, Guttmacher Institute, (January 5, 2012), http://www.guttmacher.org/media/ithenews/2012/01/05/endofyear.html.


\end{flushright}
attempting to decrease this period. Since 2010, ten states have enacted laws based on the scientific claim that a fetus can feel pain as early as 20 weeks, and that the state has a legal obligation to prevent that pain.\footnote{Cohen, I. Glenn, \textit{The Flawed Basis Behind Fetal-Pain Abortion Laws}, The Washington Post, (August 1, 2012), http://articles.washingtonpost.com/2012-08-01/opinions/35490667_1_fetal-pain-new-abortion-law-abortion-rights.} Idaho recently became the first state to have its fetal pain law struck down by the federal courts.\footnote{Rebecca Boone, \textit{Idaho First State To Have Fetal Pain Law Rejected}, Associated Press, (March 7, 2013) http://bigstory.ap.org/article/idaho-first-state-have-fetal-pain-law-rejected.} A similar argument has been made from the audibility of the fetal heartbeat, which could limit abortion to as early as six weeks. On March 26, 2013, North Dakota became the first state to adopt a bill banning abortion if a fetal heartbeat is detected, effectively making North Dakota’s abortion laws the most restrictive in the nation.\footnote{Id.} There is no doubt other states will soon follow suit.

Along with earlier bans, many states have adopted provisions imposing pre-abortion requirements such as counseling, ultrasounds and waiting periods for women seeking to undergo the procedure. According to the decision in \textit{Planned Parenthood}, “[in order] to promote the State’s profound interest in protecting potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated so long as their purpose is to choose childbirth over abortion.”\footnote{505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (U.S., 1992).} While such measures intend to educate women about the consequences of abortion, provision of morally and politically biased information does not encourage an “informed” medical decision. Pre-abortion counseling is a common prerequisite, currently required by 35
states. Twenty-seven of these states detail the medical information that is to be provided during counseling sessions, and several require language that supporters of abortion rights consider prejudicial or medically questionable. For example, a federal appeals court upheld a South Dakota law requiring doctors to warn women that abortion increases the risk of suicide. Another law in Texas requires doctors advise women that abortion is linked with breast cancer, despite findings that have indicated no link between the two. In fact, studies show it is more dangerous for a woman to proceed with childbirth than to undergo an abortion. Virginia recently joined seven other states with laws requiring the performance of an ultrasound on each woman seeking to terminate her pregnancy. Two of those states also require that the mother listen to the fetal heartbeat before choosing to continue with the procedure. The proposed bill in Virginia would have forced a transvaginal procedure to make the fetal heartbeat audible, but that provision was ultimately did not pass. In addition, over half the

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29 Tanner, Lindsey, In dozens of states, restrictive laws make it hard to get an abortion, (October 21, 2012), http://minnesota.publicradio.org/display/web/2012/10/20/politics/state-abortion-laws.
31 Id.
nation’s states require waiting periods between the initial
counseling visit and the actual procedure, generally around a length
of 24 hours.\textsuperscript{33} South Dakota has the longest waiting period in the
nation, a three-day requirement that makes it particularly difficult
for women who must travel across the state to visit the only
remaining abortion clinic.\textsuperscript{34} Although such provisions may not
impose an undue burden in their own right, these politically
motivated procedural requirements are becoming quite intrusive
and subject women to emotional hurdles that may not be necessary
for them to make a reasonable and informed medical decision.

If the moral consequences are not high enough to deter
women from obtaining abortions, then perhaps the price tag will be.
In 2009, the median cost was $470 for a surgical abortion at ten
weeks gestation.\textsuperscript{35} The median charge was slightly higher at $490
for the medicinal abortificant mifepristone, which has been
approved for use through seven weeks gestation.\textsuperscript{36} While insurance
could help alleviate the expense, many states have enacted laws
restricting coverage for abortion. Twenty-four states now prohibit
insurance plans from covering abortion services for public
employees and/or private sector individuals.\textsuperscript{37} Nine states have

\begin{footnotesize}
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\item[33] Richard Wolf, \textit{Protracted Fight Over Abortion Rights Comes Due}, USA
2013/01/18/abortion-roe-wade-supreme-court/1566458/.
\item[34] Condon, Stephanie, \textit{South Dakota governor signs law requiring three-
day waiting period for abortion}, CBS News, (March 22, 2011),
\item[35] Jones RK and Kooistra K, Abortion incidence and access to services in the
United States, 2008, \textit{Perspectives on Sexual and Reproductive Health}, 2011,
\item[36] \textit{Id.}
\item[37] \textit{State policies in Brief: Restricting Insurance Coverage of Abortion},
Guttmacher Institute, (February 1, 2013), http://www.guttmacher.org/
statecenter/spibs/spib_RICA.pdf.
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outlawed coverage on the entire private insurance market.\textsuperscript{38} The pending case of \textit{Kansas and Western Missouri v. Praeger} is among the first challenges to provisions that prohibit insurance companies from including abortion coverage in their comprehensive plans.\textsuperscript{39} In effect, such restrictions make the procedure nearly impossible for some women to afford. While such laws may not be unconstitutional within the guidelines established by \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, it is yet another step in the direction of making it progressively more difficult for women to access abortion.

\textbf{State Laws Protecting Maternal Health}

Another way that states aim to circumvent the right established in \textit{Roe v. Wade} is by placing the burden on abortion clinics through the “targeted regulation of abortion providers,” or TRAP laws. Such restrictions aim to make running an abortion clinic impossible in practice by imposing burdensome requirements on abortion clinics, which differ from, and are more stringent than, regulations placed on other medical practices.

For example, a Kansas bill enacted in 2011 requires clinics be set to a temperature between 68 and 73 degrees, have a janitor’s closet of at least 50 square feet and an operating room of 150 square feet, separate dressing rooms for patients and staff, among other requirements.\textsuperscript{40} These building requirements seem to have no

\textsuperscript{38} \textit{Id.}


immediate medical purpose, and are particularly stringent considering the relatively low level of risk associated with abortion. “These rules go way beyond what’s necessary for a safe, frequently-performed procedure,” remarked Peter Brownlie, the President and CEO of Planned Parenthood of Kansas and Mid-Missouri. “There are other kinds of surgeries done without these regulations that carry a much higher risk. This is a response to a problem that doesn’t exist.”41 Such limitations are superfluous if they do not serve any legitimate medical purpose, which suggests that they are ultimately motivated by political efforts to impede access. “We have doubts that any of the abortion clinics can meet the safety requirements of the new law,” said Operation Rescue President Troy Newman. “If they cannot comply, all three abortion clinics would be forced to cease abortion operations, making Kansas the first abortion-free state in the nation.”42 Several other states are currently facing a similar predicament.

In Mississippi, the laws have become so strict that only one clinic remains in the state. The pending case of Jackson Women’s Health Organization et. al. v. Mary Currier et al.43 challenges Mississippi House Bill 1390, which requires that any physician performing abortions be a board-certified obstetrician-gynecologist with admitting privileges at a local hospital. On June 22, 2012, the Department of Health announced that they would be enforcing the bill beginning on July 1, 2012, although it was originally indicated to


go into effect in mid-August. However the process for acquiring admitting privileges can take several months, and there is no legal requirement for hospitals to grant them. Area hospitals have so far refused to grant admitting privileges to any of the abortion clinic’s physicians, and several hospitals have declined to even process their applications. To quote a letter sent by one hospital in response, “the nature of your proposed medical practice is inconsistent with this Hospital’s policies and practices as concerns abortion and, in particular, elective abortions.” Although all of the clinic’s physicians are board-certified obstetrician-gynecologists, supporters of the bill argue that the requirement for admitting privileges makes abortions safer. “If something goes wrong, which it might […] that physician could follow the patient to a local hospital. That’s the intent,” remarked State Representative Sam Mims, who sponsored the legislation. However, elected officials have also made statements expressing the intent to rid Mississippi of its last abortion clinic. At the bill-signing event Governor Phil Bryant remarked, “It’s historic. Today you see the first step in a movement, I believe, to do what we campaigned on—to say that we’re going to try to end abortion in Mississippi.” The Jackson Women’s Health Organization remains in operation while the case is pending, but

45 Id.
47 Id.
49 Id.
Mississippi may very likely become the first abortion-free state if the bill is ultimately upheld.

In addition to Kansas and Mississippi, many other states have followed suit in imposing onerous requirements on abortion providers. After a yearlong battle, Virginia recently enacted a law requiring clinics to meet the same building, parking and record-keeping requirements as hospitals.\(^{50}\) The National Abortion Federation claims that at least 34 states currently have some kind of TRAP law in place.\(^{51}\) NARAL Pro-Choice America maintains that the number is as high as 45 states, plus the District of Columbia.\(^{52}\) So far, TRAP laws have proven difficult to challenge in court.

**A Legitimate State Interest?**

According to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, “the fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the [protected] liberty.”\(^ {53}\) Thus, it is important to determine whether a state law serves a valid purpose of either protecting maternal or prenatal health when determining the law’s

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constitutionality. While *Roe v. Wade* prevented the state from interfering during the first trimester, *Planned Parenthood* modified this to allow the state to intervene at any point during the pregnancy. As a result, the woman’s right to obtain an abortion has since become subordinate to the state’s interest in restricting the practice.

On the one hand, measures based on the state’s interest in protecting prenatal life seem to most directly affect the pregnant woman. While supporters argue that counseling, ultrasounds, and waiting periods allow women to fully comprehend the reality of the decision, abortion rights activists do not agree. “What they’ve really done is make women walk through a gauntlet to get access,” says Cecile Richards, President of Planned Parenthood.54

On the other hand, measures aiming to protect maternal health have weighed most heavily on abortion clinics. In defense of the tougher restrictions, supporters emphasize the dangers posed by poorly managed clinics. They point to the “house of horrors” run by Kermit Gosnell, who was charged with eight counts of murder after at least one woman and seven infants died in his office.55 Despite the gruesome details of the case, it is important to note that Gosnell was performing illegal abortions, long after the point of viability and with the assistance of untrained, unlicensed employees.56 Such conditions would not be permitted in any state, and certainly would not have passed a health inspection. Opponents of TRAP laws argue that the measures are a political maneuver in
disguise. “They are not about health and they’re not about safety,” says Elizabeth Nash, the Guttmacher Institute’s state issues manager.57 “It’s a way to bypass a court case to overturn Roe v. Wade and simply eliminate access by regulating abortion providers out of business.”58

Conclusion

While the central holding of Roe v. Wade has remained untouched, increasing state regulation has made it considerably more difficult for women to obtain an abortion. State restrictions are justifiable insofar as they serve a valid purpose of protecting either maternal or prenatal health, but it is difficult to say whether they accomplish a legitimate goal without restricting access altogether. As the battle continues at the state level, the next few years will prove crucial in determining the appropriate extent of state regulation, as well as the ultimate fate of women’s reproductive rights established by Roe v. Wade.

58 Id.
Alabama’s Strictest Law and the National Debate on Immigration

Chloe Colbert

In the midst of a heated immigration debate, individual states of the United States have taken it upon themselves to pass their own immigration laws regulating the rights of undocumented immigrants, which has especially affected undocumented Latinos and Hispanics. Some states including Arizona, Alabama, and Georgia have pursued the restriction of rights for undocumented immigrants. Illinois and California were pursuing the empowerment of underage and undocumented immigrants attempting to seek an education through their versions of the Development, Relief, and Education of Alien Minors (DREAM) Act.¹ In this article, I will describe the current state of the immigration debate in America as it pertains to the federal district court ruling on the Beason-Hammon Alabama Taxpayer and Citizen Protection Act. I will also determine whether immigration should be a matter of state jurisdiction or federal jurisdiction using state immigration law analysis and the U.S. Constitution.

Background

The Beason-Hammon Alabama Taxpayer and Citizen Protection Act (Ala. H.B. 56) is the topic of this article. In addition to strict immigration measures, the law also contains a clause that

specifically targets children (both documented and undocumented) of undocumented immigrants within the state. In the preamble to the Alabama law, it defines undocumented immigrants as those who do not have the proper documentation of residency in the state of Alabama and furthermore the U.S.\textsuperscript{2} This law specifically targets undocumented immigrant children, who are also undocumented immigrants, in the following text:

Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state.\textsuperscript{3}

The law marks children, most of whom did not voluntarily choose to come with their parents to the U.S. without documentation, as criminals, and the law calls for schools to keep a record of all undocumented immigrant children who may be removed from the system. In addition, undocumented immigrants are prohibited from enrolling in public post-secondary institutions (i.e. colleges, universities, etc.) without the proper U.S. residency and/or citizenship status. This law also seeks to prohibit students from receiving financial aid, grants, scholarships and other resources if

\textsuperscript{3} Id.
attending the university and found to be undocumented.\textsuperscript{4} These measures are the opposite objectives of the proposed federal DREAM Act, which would allow for federal financial aid including to be appropriated for undocumented immigrant children to continue their education.\textsuperscript{5}

Another controversial element of this Alabama state law is its mandate that businesses and employers must verify the citizenship status of their employees:

As a condition for the award of any contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity to a business entity or employer that employs one or more employees, the business entity or employer shall provide documentation establishing that the business entity or employer is enrolled in the E-Verify program. During the performance of the contract, the business entity or employer shall participate in the E-Verify program and shall verify every employee that is required to be verified according to the applicable federal rules and regulations.\textsuperscript{6}

The E-Verify program would mandate all businesses in Alabama to verify the residency of each of its employees, forcing businesses to fire employees who do not have valid documentation to be in the U.S.\textsuperscript{7} There are also many errors within the E-Verify system that have negatively affected Alabama's economy. E-Verify was improved in the last several years by the U.S. Citizenship and Immigration Services (U.S.CIS) as recently as in 2010, which "reported that 98.3 percent of queries submitted to the system

\textsuperscript{4} Id.
\textsuperscript{5} Development, Relief, and Education for Alien Minors Act of 2011, S. 952, 112\textsuperscript{th} Cong. (2011).
\textsuperscript{7} Id.
resulted in confirmations within 24 hours." Yet, E-Verify misidentified ineligible and “illegal” employees nearly 50 percent of the time as well as incorrectly confirmed approximately 3.4 million employees between April and June 2008. E-Verify also is also incapable of detecting identity fraud. These mentioned errors of the E-Verify system are just some but not all of the problems with the employment program.

**Comparison to Georgia’s Immigration Law**

The precursor to the Alabama law is Georgia’s Illegal Immigration Reform and Enforcement Act (Ga. H.B. 87), which was enacted in early 2011. Its provisions are very similar to that of the Arizona immigration law. The Georgia law requires contractors and businesses within the state to “verify” and confirm the legal documentation of citizenship of each employee in the state using E-Verify or another database as means of verification. It reads:

> Federal work authorization program’ means any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify employment eligibility information of newly hired employees commonly known as E-Verify, or any subsequent replacement 56 program.

The Georgia State Legislature accepted the federal Immigration

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9 *Id.*


Alabama's Strictest Law and the National Debate on Immigration

Reform and Control Act of 1986 in order to replace previous immigration procedures with the E-Verify program or similar programs used. The law also punishes those who transport undocumented immigrants into and throughout the state for the purpose of extending the undocumented immigrants’ residency in Georgia.\(^{12}\) Section 5 of the law has one of the most severe provisions:

(b) Except as provided in subsection (f) of this Code section, during any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect’s immigration status when the suspect is unable to provide one of the following:

1. A secure and verifiable document as defined in Code Section 50-36-2;
2. A valid Georgia driver’s license;
3. A valid Georgia identification card issued by the Department of Driver Services;
4. If the entity requires proof of legal presence in the United States before issuance, any valid driver’s license from a state or district of the United States or any valid identification document issued by the United States federal government;
5. A document used in compliance with paragraph (2) of subsection (a) of Code Section 40-5-21; or
6. Other information as to the suspect’s identity that is sufficient to allow the peace officer to independently identify the suspect.\(^{13}\)

Law enforcement officers, including local police officers, will receive the authority from this law to rid their communities of local undesired and undocumented immigrants. Yet, there is the

\(^{12}\) Id.
\(^{13}\) Id.
potential consequence of racial profiling as a result of the Georgia law as law officers now have the right to inquire those appearing to be of Latino origin about their immigration status. While the Georgia law criminalizes the act of harboring undocumented immigrants within the state, the Alabama law intensifies the punishments in its own version of the law.

**Enactment of the Alabama Law and Its Effects Economically and Politically in Alabama**

Within months of enactment of H.B. 56, Alabama witnessed mass emigration of undocumented migrants from its state. Meanwhile, farmers began facing severe employee shortages due to this emigration. According to an article in the *Los Angeles Times*, children, being one of the largest affected groups of the Alabama law, were being removed in large numbers from the Alabama public schools, possibly in fear that school and state officials will question their U.S. citizenship and residency status. According to the Migration Policy Institute, U.S. Northern District Court Judge Sharon Lovelace Blackburn’s court opinion influenced the decision for 2,000 children to remain in their homes rather than attend school because of the deportation threat posed by the new immigration law placed. Judge Blackburn’s ruling created some panic in many immigrant communities in the state, influencing some immigrants’ decision to refrain from using public services, including emergency


medical services. Farmers and agricultural employers were contemplating the negative effects of the law on their businesses, including the new mandate to use the E-Verify program to verify the citizenship and immigration status of their employees and farm hands.

The Alabama law has already had negative consequences on the state's economy. The unemployment rate has continued to decrease in Alabama, but the number of undocumented immigrants leaving the state after the enactment of the Alabama law has made the labor pool smaller. This group included approximately 6,258 people who left the labor pool. These laborers who fled Alabama decreased the total income brought into Alabama with vacant employment. For example, Alabama’s Jefferson County faced a $4.1 billion deficit in 2011. The introduction of the Alabama law, which taxed County residents more for services provided by the law, increased the deficit by approximately $40 million needed for immigration enforcement. Ala. H.B.56 currently permits police officers to perform immigration officer duties such as reporting and recording undocumented immigrants to the authorities, but this has made work more strenuous for the limited number of police officers in Jefferson County. Because of the budget deficit in the County, economic analysts speculated that the state would have to let go 101 deputies in 2012 as well as postpone some arrests of suspected undocumented immigrants.

Comparative data from the Ga. H.B.87 (Georgia’s Illegal Immigration Reform and Enforcement Act), a similar law to Ala.

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18 Id.
19 Id.
H.B.56, is speculated to have decreased income for the agricultural sector in the range of millions of dollars due to the similar requirement to use the E-Verify program.\(^{20}\) The Ga. H.B.87 has already significantly affected the agricultural sector, costing the state agro-businesses an estimated $300 million in 2011.\(^{21}\) In 2011, a survey of 47,600 farms in Georgia witnessed a “shortage of 11,080 farm workers,” many of whom left the state for states without strict immigration laws such as Florida and North Carolina.\(^{22}\) To fill this labor shortage, Georgia Governor Nathan Deal proposed the use of prison parolees to fill the gap; however, this proved futile when many of the employees did not work the full workday.\(^{23}\) A quote from a Georgian farmer, Ben Strickland, reads: “‘If I couldn’t get [the berries] picked, I’d lose half a million dollars just in the blink of an eye,’ Strickland said. ‘More than that, really. You get to thinking about all the investments, I’d say it’s over a million dollars.’”\(^{24}\) This law has produced dire consequences for the immigrant community as well as for the Georgia’s economy, which would imply that the Alabama law would have dire consequences for Alabama’s economy, which presents an interstate commerce issue.

**Legal Appeal to U.S. District Judge Blackburn in the 11th Circuit Court of Appeals**

The Alabama state legislature passed the Beason-Hammon Alabama Taxpayer and Citizen Protection Act in June 2011. The U.S. Northern District Court of Alabama in an opinion by Chief U.S.

\(^{20}\) Id.
\(^{22}\) Id.
\(^{23}\) Id.
\(^{24}\) Id.
District Judge Sharon Lovelace Blackburn has ruled on the constitutionality of the law. The court analyzed various sections of the law relevant to businesses and undocumented immigrants, the removal of children of undocumented workers from schools and the duty of police officers to verify the residency of suspected undocumented immigrants in order to explore their constitutionality. The court cited the federal Immigration and Nationality Act, stating that one of the reasons the U.S. federal government would allow undocumented immigrants or “aliens” to reside in the country was so that they could later obtain legal immigration status in the U.S. based on “inter alia, family, employment, or diversity characteristics.”

The court also stated that Congress and federal law “preempt[s] state law,” meaning than federal law supersedes any state conflicting immigration law.

The portion of Alabama’s law regarding the removal of children of undocumented immigrants from Alabama schools conflicts with federal law that gives permission for minors younger than 14 years of age to remain in the U.S., even if undocumented, and to apply for “alien documentation.” The court recognized that if police forces and school administrators within the state of Alabama were given the power to remove students from schools, they would not be abiding by the U.S. federal law provision. The court dismissed U.S. injunctions against §§ 10, 12(a), 18, 27, 28 and 30, ruling that they violated federal law and including the reason that Congress had not previously “preempted the power of states to

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26 Id.
27 Id.
28 Id.
refuse to license an unlawfully-present alien.”\(^{29}\) However, the court did grant injunctions §§ 11(a), 13, 16 and 17 since these were likely to be “preempted by federal law.”\(^{30}\)

The decision to overturn some of the Alabama law’s provisions and not others ignited more debate about the law. The decision prohibited the enactment of the law’s provisions, making it a state crime to host undocumented immigrants in one’s home or to transport them. The ruling also vacated the provision that would keep undocumented immigrants “from enrolling in or attending public universities.”\(^{31}\) Different activist groups, including churches and civil rights groups, were calling for a repeal of the law as well as hoping that the U.S. Department of Justice (DOJ) would take further action against the law. The provision that allows for children of undocumented immigrants, who attend public schools, to be questioned on their citizenship status was also contested by the activist groups, but Judge Blackburn did not rule specifically on this provision, thus allowing it to take effect.\(^{32}\)

**Immigration: Federal and State Controversy**

Immigration has been a contesting issue throughout American history. However, in recent years, states including Arizona, Georgia, Alabama, Indiana, Utah, and South Carolina have instituted stringent state immigration laws in response to the rise of undocumented over the past few decades. The Alabama law is the main topic of this article, but I will also elaborate on the larger

\(^{29}\) Id.

\(^{30}\) Id.


\(^{32}\) Id.
immigration debate in the U.S. particularly regarding the immigration laws in Arizona and Georgia.

The Arizona Support Our Law Enforcement and Safe Neighborhoods Act (S.B.1070) has become one of the most controversial state immigration laws in the U.S. in this century. Many have contended that the law will lead to racial profiling. Az. S.B.1070 criminalizes undocumented immigrants who pursue work in the U.S. as well as those who do not register with the federal government. One of the most controversial parts in the law was the provision that gave state enforcement and police officials the authority to question the immigration status of those suspected of being undocumented immigrants and to arrest and detain them.\textsuperscript{33}

The 9\textsuperscript{th} U.S. Circuit Court ruled on Az. S.B.1070, blocking the implementation of several provisions. The four blocked provisions read:

- requiring local law enforcement officers to ask about the immigration status of an individual stopped by the police if an officer has a "reasonable suspicion" that the person is an unauthorized immigrant; requiring officers to verify the immigration status of anyone arrested before releasing that person from detention
- making it a state crime for immigrants to fail to carry proof of their immigration status
- making it a state crime for unauthorized immigrants to solicit or perform work
- allowing police officers to arrest without a warrant anyone suspected of having committed a public offense that renders him or her removable from the United States.\textsuperscript{34}


\textsuperscript{34} Muzaffar Chisti and Claire Bergeron, \textit{Federal Judge Blocks Key Provisions of Arizona Law, Setting Stage for Long Legal Battle}, Migration Policy
The blocking of these provisions barred the police officers in Arizona in regards to a dual duty in immigration enforcement.

The U.S. Supreme Court ruled on the Arizona immigration law in summer 2012 in *Arizona v. United States.* The Supreme Court upheld portions of the law and revoked other measures, most significantly upholding the measure to allow state police “to check immigration status of people they detain and suspect to be in the country illegally.” The consequences of this Supreme Court ruling on state immigration laws held precedence for other concurrent state laws as well, according to the *Washington Post.*

According to Supreme Court Justice Anthony Kennedy, the states had limited roles in immigration procedures although Congress and the executive branch had not explicitly created policies and laws in recent times. However, the Supreme Court struck down the provisions that criminalized immigrants for not carrying documents the provision that criminalized undocumented immigrants for pursuing jobs and the provision that mandated police officials to arrest individuals who they deemed eligible for deportation based on the type of crime the individual committed. Arizona Governor Jan Brewer stated that police officials would be able to implement the law without racial profiling. However, the real test for this will come within a year of the Supreme Court’s decision and record of


Id.

Id.

Id.

Id.

Id.
the law. The implications for the ruling and consequential for the Alabama law are its influence on how the Alabama law will be implemented and whether or not state officials inquiring of the immigration status of individuals will be deemed to be racial profiling.

Georgia’s Illegal Immigration Reform and Enforcement Act faced similar criticism and controversy to that of the Alabama law. Recently the Georgia Agriculture Commissioner Gary Black pressed upon Congress to create “a national guest worker program that’s easier for farmers to use now that states including Georgia have passed laws targeting illegal immigrants that threaten possible labor shortages in the fields.”

The Georgia law has affected many of the farms in the state, especially with its requirement to use the E-Verify employment program. In June 2011 Georgia law faced a lawsuit in a U.S. District Court leading to the obstruction some of its provisions. U.S. District Court Judge Thomas blocked the provision that delegated tasks to police officers to research the backgrounds of those who have committed crimes and may be an undocumented immigrant. Judge Thomas also blocked the provision that criminalized people who used transportation means and residence services for undocumented immigrants. These provisions were some of the most controversial included in the Georgia immigration law. Yet, Georgia Agricultural Commissioner Black recommended the U.S. Department of Agriculture (USDA) to create and facilitate a guest-worker program to aggregate and assimilate agricultural labor.

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43 Id.
sector employment issues regarding undocumented immigrants for all the states. Therefore, state immigration laws like the Georgia law mirrors the Arizona law in several of its provisions as well as its consequences for state residents, particularly those involved in the agricultural sectors. These similarities and treatment of the Arizona and Georgia laws will have implications also for the Alabama law.

**Argument**

After an analysis of the Alabama immigration law, I will argue that immigration enforcement and registration should be handled by the federal government rather than by the state. I will present this argument through analysis of the Commerce Clause, the *McCulloch v. Maryland* Supreme Court decision, an analysis of state versus federal jurisdiction and cases of mistreatment of undocumented immigrants on a state and local level. Following this analysis, I will present the obstacles to federal jurisdiction over immigration laws.

The U.S. Constitution, Article I, Section 8, clause 4 establishes the right for Congress to oversee naturalization. Referring to the powers of Congress, the text reads: “to establish a uniform rule of naturalization [...] throughout the United States.” The U.S. Code, Title 8, §1421 states, “The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General.” While many federal laws have described measures regarding immigration, the Constitution contains little material on

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44 Id.
45 *McCulloch v. Md.*, 17 U.S. 316 (Marshall, Circuit Justice 1819), (Cornell Univ. Law School Legal Information Institute(LII)).
47 U.S. CONST. art. I, § 8, cl. 4. (Cornell Univ. Law School LII).
immigration responsibilities. Both the U.S. Code and U.S. Constitution are binding as law, and the “commerce clause” of the Constitution Art. I, § 8, clause 3, describes that Congressional statutes can precede state power in any matter that involves interstate commerce. In respect to Congress’s powers, the clause grants Congress the power, “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

Therefore, Congress supersedes state powers because immigration creates inter-state commerce among states whose labor and production travel between states. Federal supremacy over state law was established in *McCulloch v. Maryland*.

In *McCulloch v. Maryland*, the U.S. Supreme Court established new precedent for federal laws to supersede state laws that are in conflict with federal laws. The story of the case is the following: Mr. James William McCulloch was the cashier at the Baltimore branch of the federal Bank of the United States when a newly created Maryland law required the bank to pay a tax for being an out-of-state bank. When it was time for the bank to pay the tax, McCulloch refused, bringing his complaint to the County Court of Baltimore against the state law, which eventually reached the U.S. Supreme Court.

The Supreme Court ruled that the state of Maryland could not impose laws to deter a federal bank from conducting business in the state. “The court reversed the decision to uphold the tax on the Bank of the United States and held that the tax was unconstitutional because the states had no power to burden the

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49 U.S. CONST. art. I, § 8, cl. 3. (Cornell Univ. Law School LII).
51 *Id.*
52 *Id.*
operations of the constitutional laws enacted by Congress.”53 In other words, a state law could not impede upon federal operations.

Within the federal branches of the U.S. government, Congress fundamentally gives power to institutions through the creation of laws. After the September 11, 2001 tragedy, Congress used its legislative powers to create the U.S. Department of Homeland Security (DHS) through the Homeland Security Act of 2002 in order to organize national security measures and aggregate 22 federal agencies under a central agency, including immigration standards and processes.54 Through this act, many of the powers that previously existed within other agencies and departments like DOJ were transferred to the DHS. The DOJ granted the administration of immigration and naturalization policies to the DHS, giving one agency the power over immigration enforcement in the U.S.55 The Homeland Security Act of 2002 placed immigration and naturalization issues under one federal jurisdiction, creating another justification for immigration as a federal responsibility.

The U.S.C, Title 8, contains a section on the registration of aliens and how aliens must register with the U.S. as enforced by Congress’s Alien Registration Act.56 Congressional agencies have been given power to oversee registration since the Alien Registration Act’s establishment in 1940. In the U.S.C, Title 8, Congress also grants authority to the U.S. Attorney General to “make such improvements in infrastructure as may be necessary to

53 Id.
56 § 12 (II) (VII - §§ 1302).
effectively provide immigration services.” These duties of the Attorney General and the DOJ are in coordination with the DOJ’s legal action to prevent state infringement of immigration services, which would disturb federal immigration practices. Current U.S. Attorney General Eric Holder and the DOJ took the measure to stop state infringement of immigration services when it filed a lawsuit against the Alabama law. During the case filing against the Alabama law, which was eventually brought before the federal Alabama Northern District Court, the DOJ “argued that only the federal government is authorized to set immigration policy” even after Alabama Northern District Court Judge Sharon Lovelace Blackburn delivered a decision in favor of the Alabama law. In this instance, the DOJ and the U.S. Attorney General performed their constitutional duty in responding to obstacles within immigration services on a local level.

State officials sometimes take the liberty of formulating immigration policies. When the U.S. Supreme Court ruled on the constitutionality of the Arizona law, Justice Kennedy noted that sometimes states created policies and law where Congress and the executive branch had not created them, specifically regarding immigration policies. The fact that individual states like Arizona, Alabama and Georgia can create different polices about immigration, although the issue affects multiple states and

59 Id.
interstate relations, is another reason why immigration policies should come from the federal government. The U.S. federal courts and the U.S. Supreme Court can challenge state laws on immigration and provide precedents for other state laws on immigration. However, it is the duty of Congress and the executive branch to produce immigration policies that cover all the states in multiple areas, as seen in the Immigration and Nationality Act of 1952 and the U.S.C., Title 8.61

The most recent instance of the mistreatment of immigrants was in the case of Arizona Sheriff Joe Arpaio, a sheriff who became well-known for arresting and detaining suspected undocumented immigrants.62 The DOJ has deemed Sheriff Arpaio’s treatment of immigrants, particularly Latino immigrants, as “illegal” for at the time “unlawfully stopping, detaining and arresting” undocumented immigrants and at times using violence to detain and arrest them.63 Sheriff Arpaio has targeted the Hispanic population, using racial profiling and discriminatory tactics according to DOJ.64 In Sheriff Arpaio’s department, “Hispanics are punished if they fail to understand commands in English and denied access to basic services such as new clothes or sheets or information about early-release programs.”65 In a response from the DHS on Sheriff Arpaio’s behavior, Secretary Janet Napolitano agreed to terminate a joint

63 Id.
64 Id.
65 Id.
program between federal immigration officers and state enforcement officials in the Maricopa County Sheriff’s office due to the mistreatment of and discrimination against Hispanics immigrants. Two federal agencies, DHS and DOJ, have taken action to cease state power in immigration enforcement in an attempt to make immigration enforcement solely a power of the federal government. Strict immigration laws in Alabama and Georgia have likewise targeted immigrants, using discriminatory practices, harassment and abuse. Since the states were mistreating immigrants, causing more immigrants to immigrate to other states, it added to the interstate commercial issue, and the federal government is the only entity with the authority to regulate interstate commerce. Although the U.S. Supreme Court upheld measures of the Arizona law, the issue of immigration will now lie with how states will treat immigrants and how the federal government will address interstate immigration. Therefore, the Arizona law and Supreme Court case was a testament of a need for federal precedence in immigration policies before states establish certain policies, some which have proved unconstitutional.

When confronting the ethics of state and federal power, state issues fall in one domain, and federal issues fall in another. Amendment X to the Constitution reads: “the 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.\textsuperscript{70} These powers have included the right for individual states to create their own abortion laws, regarding \textit{Roe v. Wade},\textsuperscript{71} and driver license laws. Returning to the Constitution, the Commerce Clause is the legal right for Congress and the federal government to intercede into matters of individual states that involve financial and monetary transactions affecting interstate commerce.\textsuperscript{72} However, the power to control immigration, being an inter-state, international and national security issue, resides with the federal government. Immigration policy resembles national security and antiterrorism laws in that it affects all states, not simply border states. Since the U.S. has already delegated immigration policy to the U.S. federal government in the Constitution, art. I, § 8, immigration policy is not reserved for the states to create. As seen in past incidents, the federal government, specifically the DHS, can employ the services of state government patrol officials to assist in immigration enforcement.\textsuperscript{73} The U.S. federal government has taken responsive action against state infringement of immigration policies (e.g. Supreme Court cases, circuit court cases, etc.), but even within the federal government, there resides obstacles to federal immigration reform.

\textsuperscript{70} U.S. CONST. amend. X, (Cornell University Law School LII).
\textsuperscript{71} Roe v. Wade, McCulloch v. Md., 410 U.S. 113, (Blackmun, 1819), (Cornell Univ. Law School LII).
\textsuperscript{72} U.S. CONST. art. I, § 8, cl. 3, (Cornell Univ. Law School LII).
Counter-Arguments and Rebuttals

Since the U.S. Supreme Court upheld parts of the *Arizona v. United States* case and struck down others, there has been some discussion whether the case was either a victory or defeat for the federal government in terms of immigration policy. Because the Supreme Court upheld parts of the law, it can be deemed that states would have a part to play in creating immigration policy. The Supreme Court struck down §§3, 5(c) and 6 but upheld §2(B) of the Arizona law:

Section 3 makes failure to comply with federal alien-registration requirements a state misdemeanor; §5(c) makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State; §6 authorizes state and local officers to arrest without a warrant a person ‘the officer has probable cause to believe...has committed any public offense that makes the person removable from the United States; and §2(B) requires officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person’s immigration status with the Federal Government.

The Supreme Court struck down these provisions for the following reasons: U.S. Constitution Art. 1, §8, cl. 4, which states that Congress has the power of naturalization and immigration; the Supremacy Clause, where Congress’s authorities surpass state power; and federal law surpassing §§3, 5(c), and 6 of the law. However, the Supreme Court upheld §2(B) because it had not been enacted yet, so there was no prompting for injunctions against it unless the

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Supreme Court would later detect racial profiling or improper detention of suspected documented immigrants.\(^77\) Although the Supreme Court had upheld a principal portion of the Arizona law, which would set precedents for other state laws, it is has to be confirmed by example whether Arizona will implement immigration policies in concordance with federal laws; otherwise, the last remaining portion of the law will be overturned.

Another obstacle to immigration reform and consolidation of immigration reform is that some states (i.e. Arizona, California, Alabama.) will claim different circumstances for their state if the federal government imposes a federal law on immigration because of varying percentages and conditions of undocumented immigrants in that state. For example, California has a large immigrant population, especially Latino, which utilizes the education and public services of the state. The California state legislature recently passed its own version of the federal DREAM Act in July 2011, granting undocumented immigrant students to ability to be eligible for financial aid for higher education.\(^78\) California has a larger immigrant population than other states may, which may not be the same circumstance to compel states to pass their own version of the DREAM Act. On the contrary, the state of Alabama could claim special state circumstances regarding immigration enforcement because of severe economic turmoil in their state. That economic turmoil includes a bankruptcy in Jefferson County and a large immigrant population involved in the agricultural sector.\(^79\)

\(^{77}\) Arizona et. al. v. United States, 567 U.S. 1, 3-4 (2012).
have the same policies towards immigration as will the state of New York because of different state economic factors. Alabama, also being a southern state and having ties to segregation before the Civil Rights Movement in the 1960’s, has a different political mentality towards discrimination of inhabitants not like the domestic population. This is another reason why several states have created individual immigration enforcement laws rather than impressing upon their U.S. Congressmen to bring such severe immigration reform to the U.S. Congress.

**Conclusion**

The Ala. H.B.56 is a strict immigration enforcement law that reflects the power states will take when there is not a clear federal jurisdiction in the area. Immigration has been and will remain a controversial and tense issue as long as states continue to pass laws that interfere with congressional and federal agency power with regard to immigration. However, the future of the federal versus state immigration debate depends upon the bipartisanship of Congress on immigration reform and the efficiency of U.S. agencies such as the Department of Homeland Security to carry out these measures. Yet, when states like Georgia and Alabama have taken such strict immigration reform, these states have experienced economic turmoil following their mistreatment of and discrimination against immigrants, particularly Hispanics. Immigration policies should emanate from federal power and be instituted on a nationwide basis. Otherwise, states may adopt policies that distort federal immigration policy intentions and disrupt interstate commerce to serve their individual interests.
Human trafficking is a brutal, global reality faced by people every day. It has existed for much of recorded human history, known more commonly as slavery. The Trafficking Victims Protection Act, the primary law that addresses human trafficking in the United States, defines human trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”\(^1\) This definition closely resembles the internationally accepted definition of human trafficking in the Palermo Protocol.\(^2\) According to data from the International Labor Organization (ILO), a report from June 1, 2012 shows global estimates of forced labor at over 20.9 million victims.\(^3\) The ILO estimates that “55 percent of forced labor victims are women and girls, as are 98 percent of sex trafficking victims.”\(^4\) Although efforts to combat human trafficking have expanded in the past few decades, the primary approach has been focused on imposing punishments for traffickers as a deterrent. Since human trafficking is so


\(^4\) *Id.* at 45.
widespread, and there are risk factors such as poverty and social marginalization, efforts to combat human trafficking should be targeted at the structures that put individuals at risk for being trafficked. A structurally based approach that focuses on preventing conditions that expose potential victims to exploitation is a missing aspect of combating this complicated issue. In order to understand the potential success of a structural approach to combating human trafficking, the scope of this article will be limited to sex trafficking. The purpose of this article is to explain the current international law regarding sex trafficking and how implementation of this law has been ineffective in causing systemic change. The existing international law has not been an effective tool in combating sex trafficking due to its failure to consider the structural causes of sex trafficking, focusing instead on a law enforcement approach that is based on imposing punishments for perpetrators as a deterrent.

**Defining the Terms**

When re-conceptualizing the conventional approach to sex trafficking, it is vital to examine the issue through the lens of the concept of structuralism. Structuralism is a theoretical paradigm proposed by anthropologist Claude Lévi-Strauss. Lévi-Strauss identified and understood cultural “structures,” such as, “spatial arrangements, economics, political hierarchy, totemism, art, ritual [...] social organization, mode of production, and ecology.” By studying structures in a given culture, Lévi-Strauss began to uncover that the motivations for cultural practices exist only in relation to other structures in that society. The central idea is that by

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6 *Id.*
understanding structures in a given culture, we can begin to explain behavior and other cultural practices, but only within that context. Therefore, in order to understand cultural practices, one must understand their basic structures and their interrelation. Another concept derived from structuralism is the idea of structural violence. Structures that correspond with the systemic ways in which a given regime prevents an individual from achieving their full potential are known as structurally violent. The concept of structural violence can also be conceptualized as “social injustice.” Some examples of structural violence include institutionalized elitism, ethnocentrism, classism, racism, sexism, adultism, nationalism, heterosexism, ageism, and casteism. The concepts of structuralism and structural violence are useful concepts for examining sex trafficking because potential victims of are typically marginalized by structural violence through structures such as gender inequality and poverty.

The defining characteristics of human trafficking are force, fraud and coercion. Among the many forms of human trafficking, perhaps the most brutal and exploitative is sex trafficking. Sex trafficking varies depending on the country in which it occurs. According to the US-based anti-trafficking organization Polaris Project, some of the most common venues for sex trafficking are residential brothels, hostess clubs, online escort services, fake massage businesses, strip clubs and street prostitution. Pimps are also commonly traffickers, especially in cases of commercial sexual

8 Id.
exploitation of children.\textsuperscript{11} It is a common misconception that victims must cross borders to become victims of trafficking.\textsuperscript{12} Outside of the United States, sex trafficking is a major issue, especially in countries where underlying gender inequalities and poverty are present.

Sex trafficking at its root is a human rights violation, and policies to combat it should reflect this; however, there is not necessarily the same consensus in the international community. In the international community, human trafficking is approached as a criminal issue, an error in framing the issue that has given shape to an inadequate enforcement regime. Since human trafficking is so widespread and there are risk factors such as poverty and social marginalization, efforts to combat human trafficking should be targeted at the structures that put individuals at risk for being trafficked. An ideal, holistic anti-trafficking approach would address the inequalities that cause certain groups to be continually victimized, rather than only imposing punishments and consequences for the perpetrators.

With an issue that exists on such a massive scale, the threat of punishment to the traffickers is an inadequate method of responding to the problem. Although deterrence through the law enforcement approach is a necessary aspect of ending sex trafficking, it is only one part of the puzzle. The current legal statutes guiding law enforcement’s approach to sex trafficking are ineffective because they confront the problem after the fact, and the profits yielded for perpetrators are far too high for the threat of incarceration to be enough of a deterrent. A more effective way to stop this practice from continuing is a structural-based approach,

\textsuperscript{11} Id.
\textsuperscript{12} Id.
one that is founded on research that examines the social structures that make people vulnerable to becoming victims of trafficking. A combination of the structural approach and existing law enforcement approach would be more effective, as it would work toward preventing the need for eventual law enforcement intervention.

The International Law of Human Trafficking: The Law Enforcement Approach

The international law relating to human trafficking includes treaties, legislation and statues at the international and national levels. The primary international treaty on human trafficking is the Palermo Protocol, which focuses on suppressing and punishing trafficking in persons, especially women and children. The Palermo Protocol was developed under the auspices of the UN Office on Drugs and Crime, and is therefore framed in the context of international criminal law. This focus on human trafficking as a criminal problem shapes the law-enforcement focused approach that has been adopted by ratifying countries of the Palermo Protocol. In addition, it is important to note that the Palermo Protocol uses an all-inclusive definition of human trafficking and does not differentiate between sex trafficking and labor trafficking in the requirements it outlines for States Party.\(^{13}\)

Due to the nature of international law, the only way for the Palermo Protocol to be significantly effective is for it to be implemented through legislation by the ratifying states. For example, in the United States, the primary implementation mechanism of the Palermo Protocol is the Trafficking Victims

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Protection Act (TVPA).\textsuperscript{14} The Palermo Protocol is the preeminent instrument of international law on human trafficking. The Protocol was adopted and opened for signature, ratification, and accession in Palermo, Italy in 2000. As of December 5, 2012, the Protocol had 117 signatories and 154 parties.\textsuperscript{15} The Palermo Protocol was designed as a protocol to the \textit{Convention Against Transnational Organized Crime}, a treaty that focused on creating a body of international criminal law to confront criminal organizations. Essentially, “the provisions of both the Convention and the Protocol operate to require that the offence of trafficking be established in the domestic law of every State Party, independently of its transnational nature or the involvement of an organized criminal group.”\textsuperscript{16} Although the Palermo Protocol is an extremely important piece of international law, it does not go far enough in confronting human trafficking because it does not give any weight to identifying the structural causes of trafficking when it addresses prevention.

The Protocol defines itself as “an international instrument for the prevention, suppression, and punishment of trafficking in persons, especially women and children, [and] will be useful in preventing and combating that crime” by facilitating the “prevention, investigation and prosecution of [trafficking] offences.”\textsuperscript{17} The primary provision of the Protocol is Article 5, which states that “each party shall adopt such legislative and other measures as may be necessary to establish as criminal offences


\textsuperscript{17} \textit{Id.}
[human trafficking], when committed intentionally." This part of the Protocol is predicated on the assumption that criminalization of human trafficking will eventually serve as a deterrence. While criminalization is emphasized as the overarching goal of the Protocol within the first few paragraphs, it is, by itself, an inadequate preventative measure, because the Protocol does not mandate any specific actions to deal with the structures that allow trafficking to occur such as poverty, gender roles and gender inequality.

The Protocol also addresses the protection of victims of sex trafficking. For victim protection, the Protocol is supposed to ensure that member states institute mechanisms to assist victims. These requirements not only apply to the realm of legal assistance, but also for providing counseling, medical, psychological, and material assistance, employment, educational and training opportunities. Unfortunately, this section is not binding, as it reads,

Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

If these mechanisms were put into practice by the states, they would likely be effective in providing existing sex trafficking victims with the means to escape from the cycle of victimization through access to social welfare programs with a focus on recovery from the trauma the victims experienced. This is again, a starting point, but only deals with assistance to existing victims. Another part of the

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18 Id.
20 Id. (emphasis added).
Protocol requires States Party to “protect the privacy and identity” of victims and provide them with information and assistance in legal cases.\textsuperscript{21} According to the US Department of Health and Human Services Office of Refugee Resettlement, in the United States this part of the Protocol is implemented through the establishment of the T-Visa program and immigration remedies such as Continued Presence for victims involved in ongoing criminal cases.\textsuperscript{22} If not for its lack of enforceability, the Protocol would potentially support a structural approach to combating sex trafficking in these ways, but only for individuals who have already been victims of sex trafficking. These provisions of the Protocol are intended to prevent already existing individuals from being re-victimized. Although this is an important aspect of the fight against sex trafficking, it is not sufficient because it fails to prevent their initial exploitation. An ideal policy would allow for intervention prior to the initial victimization.

The Protocol goes on to attempt to address other prevention measures, but falls short of effecting significant change in many ways. The Protocol states, States Party “shall \textit{endeavour} to undertake research” geared specifically at targeting trafficking more effectively, and encouraging cooperation with non-governmental organizations.\textsuperscript{23} The Protocol almost requires States to take action to mitigate structural causes of trafficking in this provision, but uses vague, weak language such as: “States Parties shall take or strengthen \textit{measures} [...] to alleviate the factors that make persons

\textsuperscript{21} Id.
\textsuperscript{23} Id. (emphasis added).
International Law and Sex Trafficking: A Structural Approach

[...] vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity." The Protocol does not specify measures nor require that any specific actions be taken on the part of the States to comply with this provision. If the Protocol were to identify how the States could address the issues of poverty, underdevelopment, and lack of equal opportunity to employment, this part of the Protocol might be more effective. However, as with most international law, what the Protocol lacks in tangible and specific instructions, it makes up for with its ability to be applicable for the all of the States Party. This is both a strength and weakness as it allows the Protocol to be ratified by many countries, but it does not put forth specific methods and makes progress difficult, if not impossible, to measure. It is easier to agree upon specific requirements regarding implementing punishments for perpetrators in existing legal systems than to consider policies that would lead to systemic social change. Overall, the Protocol “suggests” that States “take action” but does not mandate any specific measures in response to the structural causes of sex trafficking, allowing it to have more States ratify it. However, regardless of the number of States Party to the Protocol, its limited enforceability and inability to measure progress weaken the Protocol as a tool for ending human trafficking internationally.

Perhaps the lack of focus on systemic, structural change as a means of prevention occurred because the Palermo Protocol is a supplement to the Convention against Transnational Organized Crime, making it a criminal law treaty. By nature, it is not oriented towards prevention. Another example of this is seen in the Palermo Protocol’s focus on border security. Although “border controls,

\[24\]Id. (emphasis added).
sanctions on commercial carriers, and measures relating to travel or identity documents are all seen as important means of making it more difficult for traffickers to operate,“\textsuperscript{25} this does nothing to actually prevent the occurrence of sex trafficking in the first place, besides interfering with the process of transportation. Once a victim is being transported, by that point it is too late for the victim because trafficking has already occurred. To make a real difference, the Protocol would have to address the root causes of sex trafficking, and prevention would have to occur much earlier.

If the treaty were more oriented towards protecting human rights, it would be a heavily preventative measure. Article 15.2, which was ratified, albeit with reservations, applies the compulsory jurisdiction of the International Court of Justice (ICJ) as a method of dispute settlement.\textsuperscript{26} This means that States who ratify the Protocol can bring a case against other States in the ICJ if they believe the other State is not upholding their treaty obligations. The Protocol does not set forth specific enforcement mechanisms outside of this section, and, like most international law, it is almost impossible to enforce because States have the option to opt out of this jurisdiction through reservations to this article. Despite the vagueness of the Protocol, many States have at least attempted to implement the requirements of the Protocol through domestic legislation. Although ideally all States Party would implement domestic laws, many countries with high rates of human trafficking have not effectively implemented the Protocol, rendering it ineffective in those countries.

\textsuperscript{25} ANN E T. GALLAGHER, \textit{THE INTERNATIONAL LAW OF HUMAN TRAFFICKING} 79 (2010).

Re-Framing International Approaches to Sex Trafficking

In re-framing approaches to combating sex trafficking on an international scale, it is important to look towards existing international law relating to human rights. The Universal Declaration of Human Rights (UDHR) prohibits sex trafficking through a number of its articles, especially when it discusses slavery. The UDHR states that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” The Declaration goes on to state, “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” In order to ‘break’ the victims and encourage their cooperation, traffickers often subject their victims to cruel forms of torture and psychological control. Key to sex trafficking is the element of dehumanization of victims whereby the trafficker views his or her victim as an object for obtaining more money. The UDHR addresses violations of human rights that result in dehumanization and for this reason is applicable when combating sex trafficking. A structural approach to combating sex trafficking would emphasize the human rights violations inherent in this practice and would be aimed at preventing the conditions which allow for the dehumanization of its victims.

One of the mechanisms through which dehumanization of victims occurs can be understood within the concept of “otherness” as explained by Jonathan Todres. Todres examines the concept of

28 Id.
29 Id.
“otherness,” and how it has shaped perceptions of sex trafficking. The mechanism that allows this to happen is known as the “Self/Other dichotomy,” which “shapes the phenomenon of human trafficking, driving demand for trafficked persons, influencing perceptions of the problem, and constraining legal initiatives to end the practice.” According to this paradigm, the result is

(1) A devalued and dehumanized Other, enabling differential treatment of the Other; (2) a conception of a virtuous Self and corresponding assumption that the Self (or dominant group) is representative of the norm; and (3) distancing of the Other from the Self.

In sex trafficking, this often applies along the lines of gender, causing women to be disproportionately vulnerable. Todres explains that the Self/Other dichotomy extends beyond the micro relationship between the perpetrator and victim and can be expanded to apply in a much broader context. In examining structural causes in countries where sex trafficking occurs, writers of international treaties domestic laws are more prone to conceptually separate themselves from the victims who seem so distant and difficult to relate to. The Self/Other dichotomy helps to explain how inefficient laws allow structural violence continue in the context of sex trafficking.

Todres argues that the Self/Other dichotomy goes beyond the individual and applies to groups as well, reinforced by the apparatus of the State. This resulting structure allows one dominant group to treat another group inhumanely. The Self/Other distinction leads to brutal and widespread exploitation of

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32 Id.
33 Id.
34 Id. at 614.
35 Id. at 615.
disadvantaged groups who fall into the “Other” category. At the international level, it becomes easy for “Global North to blame the problem exclusively on peoples and governments ‘over there’ who ‘do not value life (or their children) the way we do’ rather than recognizing the interconnected nature of global problems.”36 This is a reoccurring theme especially when human rights violations occur in developing countries. A common misconception about sex trafficking is that it does not exist in the developed world due to widely accepted ethnocentric opinions. Child sex tourism is a type of sex trafficking, and is characterized by the fact that it typically involves crossing of international borders for the purpose of purchasing commercial sex from minors. The existence of sex tourism is evidence of the Self/Other dichotomy playing out not only between the trafficker and victim, but also between consumers of commercial sex and the individuals they engage in commercial sex with, who are victims of human trafficking. In the United States for example, child sex tourism is always human trafficking because children involved in commercial sex are automatic victims since they cannot consent to commercial sex according to the Trafficking Victims Protection Act.37

Child sex tourism is evidence of the existence of the Self/Other dichotomy because sex tourism predominantly affects children in the developing world, where “sex tour operators” bring individuals - usually men from the developed world - to engage in commercial sex with minors in foreign countries.38 This practice is evidence of the Self/Other dichotomy, as it plays into the “exotic”

36 Id. at 623.
stereotype of the Other. Consumers of commercial sex, who might not otherwise purchase commercial sex from minors in their home country, are able to do so when they travel because they dehumanize the individuals they are engaging in commercial sex with by employing this dichotomy. Todres gives the example of the sex tourism industry in the United States, Europe and Australia, which “draws upon crude stereotypes of Asian women, for example, by emphasizing the ‘submissiveness of Asian prostitutes and the [supposed] complicity of their families in their situation.”39 In sex tourism and other types of sex trafficking, one group is viewed as the “Other,” a consequence that perpetuates the cycle of exploitation but also reflects the root structures. These causes may include gender roles and expectations, racial stereotypes, or even, colonialist attitudes.

De-Linking Sex Trafficking and Prostitution

Another article of the UDHR relating to sex trafficking is Article 23, which states that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work [...] without discrimination, has the right to equal pay for equal work.”40 By looking at sex trafficking from the perspective of labor rights, it is possible to see how the structurally violent factors that prevent certain populations, such as women, access to gainful employment could be a structural cause of sex trafficking that is a push factor. This article of the UDHR is related to the argument made by Weitzer and Ditmore claiming that sex trafficking should be de-linked from

39 Id. at 626.
prostitution. If sex trafficking and prostitution were de-linked, it might allow for more effective laws to be implemented.

Scholars have identified five “fictions” about sex trafficking that have made responses to trafficking problematic and unsuccessful. The fictions they describe are,

1. Sex trafficking is inseparable from prostitution, and prostitution is evil by definition
2. Violence is omnipresent in prostitution and trafficking
3. Sex workers lack agency
4. Sex trafficking is prevalent and increasing, now at epidemic levels
5. Legalization would make the situation far worse than it is at present.

These fictions are the result of what scholars describe as a “moral crusade” taken up by activists opposed to the commercial sex industry. Scholars argue that religious and moral biases are injected into the discussion on sex trafficking, therefore people’s moral and religious objections to prostitution are applied to sex trafficking as well. This bias causes people to inaccurately define sex trafficking and prostitution as the same issue.

While by definition sex trafficking involves the element of commercial sex, there are crucial differences between the two: primarily the elements of force, fraud and coercion, which define a trafficking situation. Not all women or men participating in the commercial sex industry are victims of sex trafficking. The United States Senate Human Rights Caucus (HRC) adopted this approach of

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“de-linking” prostitution and sex trafficking. According to Jo Doezema, “the HRC supported a definition that focused on coercion, and that did not specify the purpose for which a person was trafficked.” By separating prostitution and sex trafficking the HRC was able to have a more effective definition that did not pull in the negative cultural assumptions and judgments people have towards prostitution. It is difficult, if not impossible, to understand the complex issue of sex trafficking when victims are confused with other individuals involved in the commercial sex industry.

The authors propose an “alternative model” which directs legislators to:

1. Pay more attention to the socioeconomic conditions that promote sex work,
2. focus on unfree labor rather than prostitution per se,
3. faithfully represent workers’ varied experiences in prostitution,
4. identify concrete ways of enhancing worker’s health, safety, and control over working conditions.

This is an example of how a structural approach can be more effective than a law enforcement approach and why the current mechanisms are insufficient. In the case of the United States, Weitzer and Ditmore’s proposal advocates for examining the root causes that lead to a demand for forced labor in the form of commercial sex and protecting people already involved in the commercial sex trade from becoming involved in trafficking situations. By conceptually de-linking sex trafficking and

44 Id.
45 Id. at 344.
prostitution, Weitzer and Ditmore are able to suggest a productive response that would address the question of prevention and protecting victims. One important aspect of their proposed definition involves changing how human trafficking is defined. Their approach advocates for viewing sex trafficking as a subset of labor trafficking occurring in the commercial sex industry and therefore making the worker protections that are available to workers in other industries also available to people in the commercial sex industry. According to the “alternative model” that they propose, structures that stand in the way of preventing sex trafficking in the context of the United States are socioeconomic conditions that promote sex work, conditions that promote unfree labor, the “moral crusade” and religiously-based stereotypes about the commercial sex industry. These structures and the resulting biases lead to the inability of existing policies to protect individuals in the commercial sex industry.

**Push and Pull Factors**

The concept of push and pull factors are pulled from migration theory. According to E. G. Ravenstein who first proposed migration theory, push and pull factors are the social conditions that encourage migration flows. This theory can be used to understand why victims of sex trafficking would migrate across borders, but also stands to explain why sex trafficking victims would be pulled into sex trafficking situations domestically. In the context of sex trafficking, push factors are the incentives that motivate individuals to enter into a sex trafficking situation. By identifying the push factors, we can better understand how individuals are drawn into this industry and the systemic conditions that perpetuate their exploitation.

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47 Id.
factors that cause individuals to be lured into sex trafficking, the inherently violent structures that allow this process to continue can be identified. In the case of sex trafficking, by looking at the problem through the lens of structuralism, it is clear that the structures that predispose certain individuals to become victims of trafficking must be identified first in order to make any type of substantive progress. The idea of a one-size-fits-all solution such as criminalization of trafficking and the punishment of traffickers, as put forth in the Palermo Protocol, is a starting point to confronting the problem, but does not address any of the root structures that allow the practice to continue. Poverty and gender inequality are two of the most common and significant structural push factors in sex trafficking.\(^49\) These structures are commonly associated with sex trafficking, but there are countless others that could arise in a given cultural context such as corruption, religious or cultural beliefs that encourage discrimination as well as any institution that discriminates against a certain population.

In migration theory, pull factors are the factors that entice a population to migrate to a specific country or region.\(^50\) This can apply in sex trafficking situations when the crossing of international borders is involved.\(^51\) Another way of thinking about pull factors can be as the conditions that encourage traffickers to take advantage of these vulnerabilities. Important pull factors are economic promise, the demand for consumer sex, profit seeking, and the minimization of expenses.\(^52\) Through examining push and pull factors in countries where sex trafficking occurs, it may be possible to then confront

\(^49\) KATHRYN CULLEN-DUPONT, HUMAN TRAFFICKING 23-27 (Facts on File, 2009).
\(^50\) Id.
\(^51\) Id.
\(^52\) Id.
them by implementing policies that address these factors. While these push and pull factors may be unknown to potential victims of sex trafficking, traffickers and recruiters are well aware of the structures and use them to their advantage. A structural approach would incorporate research into push and pull factors and the underlying structures that allow them to influence people’s decisions. This research would give shape to a policy with a focus on prevention that addresses the social structures that “push” victims into trafficking situations and “pull” traffickers into the commercial sex industry.

Although country-specific analysis is necessary, poverty is “perhaps the greatest underlying cause of human trafficking” because it forces people into situations in which they are inclined to accept any job offer as a “survival strategy.” This is a clear trend in countries where sex trafficking is a major problem. This is an example of structural violence because where poverty exists, potential victims turn to risky or dangerous ways of making a living and sometimes fall victim to traffickers because of their vulnerabilities. Potential victims of sex trafficking who are impoverished are often so desperate to escape their present circumstances that they do not fully consider the harm risky decisions may bring to themselves or their families.

The ethnographer Susan Dewey tells the story of Liana, an Armenian woman who becomes a victim of sex trafficking. Dewey writes that Liana, “like many women in the depressed economies of the former Soviet Union, believed that short term-emigration for

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53 Id. at 23-24.
54 SUSAN DEWEY, HOLLOW BODIES: INSTITUTIONAL RESPONSES TO SEX TRAFFICKING IN ARMENIA, BOSNIA, AND INDIA 57 (Kumarian Press, 2008).
work was the only way she could continue to support her children alone.”\(^{55}\) Dewey continues,

It was only when Liana arrived in Dubai that the woman who had offered to help in finding a job revealed herself to be a trafficker who insisted that Liana owed her an exorbitant sum of money for travel and other expenses—money she would have to pay with interest by working as a prostitute...she had just escaped from months of forced prostitution in a foreign country, was in fear of retribution from her trafficker, and desperately hoped that the counter-trafficking program at the IOM mission in Yerevan could help her regain custody of her children from her mother, who had rejected Liana as a prostitute after learning of her ordeal in Dubai\(^{56}\).

This demonstrates the futility of Liana’s situation, and that of victims like her, revealing the structurally violent connection between poverty and sex trafficking. Returning to the idea of the “Self/Other” dichotomy, Liana’s mother disowned her after learning of her involvement in commercial sex when she viewed Liana as the “Other.”\(^{57}\) In accordance with Armenian cultural expectations, Liana’s mother saw herself as the “virtuous Self” and representative of the norm. Once she learned of her daughter’s involvement in commercial sex, her daughter was dehumanized in her eyes. Through this dehumanization, Liana’s mother could then disown her daughter. This process or dehumanization also occurred with the recruiter and trafficker who dehumanized Liana when they saw her as a potential source of income instead of a human being.

\(^{55}\) Id.

\(^{56}\) Id. at 57

Sex trafficking of women occurs at higher rates in developing countries due to a lack of job opportunities and women’s dependence on others for their basic needs. When women cannot provide for themselves, they are vulnerable to exploitation. While poverty is one of the underlying structures that contributed to Liana’s situation, the effect of institutionalized gender roles is also evident in this case. Due to the fact that Liana was a single mother, she could not find work in her home country and thought that she needed to travel in order to make enough money to support her children. Her situation was only worsened after the trafficking situation had been resolved because in her culture, prostitution is inexcusable and caused her own mother to disown her and lose her children, regardless of the fact that she was forced to do it. All of these factors aggravated Liana’s situation, but the structural causes of her situation are poverty and the cultural expectations associated with women’s gender roles in her culture. If those factors had not been present, Liana might not have felt the need to look for work abroad and avoided the situation altogether.

Other scholars have applied Black’s Theory of Law to explain the ineffectiveness of existing anti-trafficking policies. Black’s Theory of Law is defined as “a theory that explains the invocation or application of law as dependent on social structural variations in culture, morphology, organization, stratification, and social control.” Black’s Theory of Law is directly related to the discussion

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59 SUSAN DEWEY, HOLLOW BODIES: INSTITUTIONAL RESPONSES TO SEX TRAFFICKING IN ARMENIA, BOSNIA, AND INDIA 57 (Kumarian Press, 2008).
60 Id.
on structural causes of sex trafficking because it examines how social conditions relate to the effectiveness of anti-trafficking policies. By measuring a number of different variables, a single aspect of Black’s Theory of Law can be applied to explain the failure of countries in combating sex trafficking. One study found that “as the status of women increases, trafficking-related prosecution also increases.” This demonstrates a correlation between sex trafficking and women’s status in society. This correlation could be interpreted in a few different ways. One potential interpretation of this correlation could be that as the status of women increases, social acceptance of practices that take advantage of women, such as sex trafficking, are no longer tolerated by the society, as evidenced by increased prosecution of traffickers. If this explanation of the correlation were valid, it would prove that gender discrimination against women is a structurally violent social construct that increases the vulnerability of women to being involved in sex trafficking.

This study uses quantifiable aspects of social life to confirm what many others have argued: that structural elements have a higher impact on sex trafficking than does law enforcement, and a more comprehensive approach which addresses these social structures is necessary in order to truly address the problem. The Commonwealth Secretariat, or the Commonwealth, as it is also known, is a voluntary international organization composed of 54 states that were formerly colonies of the British empire. Many of the member countries of the Commonwealth are developing countries and because of this have experience with sex trafficking occurring in their countries. The Commonwealth advocates for a “gender-
responsive, rights-based perspective on trafficking.” In a publication on best practices in confronting human trafficking of women and children, the Commonwealth Secretariat describes the ideal response as one that:

[A]ddresses the sex and gender-specific differences and inequities in the magnitude, causes, impacts and consequences of trafficking, including differential and discriminatory policy, legal and programme impacts on trafficked men and women. It grounds these in a combination of biological differences and socially constructed gender and other interacting hierarchies.63

By considering the particular causes and social structures that lead to the victimization of specific social groups through human trafficking, more effective prevention and response mechanisms can be implemented.

The TVPA and TIP Reports: The Role of US Foreign Policy

In the United States, Trafficking Victims Protection Act (TVPA) was implemented in 2000 after the country signed the Palermo Protocol.64 TVPA sets forth the “minimum standards for the elimination of trafficking” which can be applied both within and outside of the United States.65 In addition to implementing a federal law related to human trafficking, the TVPA also set forth a foreign policy mechanism for combating human trafficking. The standards provided in TVPA established the standards by which the Department of State ranks countries in the annually published

65 OFFICE OF THE UNDERSECRETARY FOR CIVILIAN SECURITY, DEMOCRACY, AND HUMAN RIGHTS, TRAFFICKING IN PERSONS REPORT, 388 US Department of State (Washington, DC).
Trafficking in Persons Report, or TIP Report. The combination of these two mechanisms combats human trafficking within the United States, and is the main foreign policy tool used by the Department of State for establishing sanctions on noncompliant members.

The tier-ranking system implemented by the TIP consists of four divisions: Tier 1 is defined as including “countries whose governments fully comply with the Trafficking Victims Protection Act’s (TVPA) minimum standards.”66 Tier 2 rankings are “countries whose governments do not fully comply with the TVPA’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards.”67 Tier 2 Watch List countries are classified under Tier 2 and “a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking [...] [and] c) the determination that a country is making significant efforts...based on commitments by the country to take additional future steps over the next year.”68 Tier 3 countries are “countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.”69 Tier 3 and Tier 2 Watch List countries face economic sanctions as described in the TVPA. In the most recent version of the TIP Report, published in June 2012, countries ranked as Tier 3 included Algeria, Central African Republic, Congo (DRC), Cuba, Equatorial Guinea, Eritrea, Iran, North Korea, Kuwait,

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\begin{align*}
\text{\textsuperscript{66}} & \text{Id. at 51.} \\
\text{\textsuperscript{67}} & \text{Id.} \\
\text{\textsuperscript{68}} & \text{Id.} \\
\text{\textsuperscript{69}} & \text{Id.}
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Libya, Madagascar, Papua New Guinea, Saudi Arabia, Sudan, Syria, Yemen and Zimbabwe.\textsuperscript{70} According to the June 2012 TIP Report,

Pursuant to the TVPA, governments of countries on Tier 3 may be subject to certain sanctions, whereby the U.S. government may withhold or withdraw nonhumanitarian, non-trade-related foreign assistance. In addition, countries on Tier 3 may not receive funding for government employees’ participation in educational and cultural exchange programs. Consistent with the TVPA, governments subject to sanctions would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions such as the International Monetary Fund and the World Bank.\textsuperscript{71}

Through its implementation of TVPA, the U.S. government takes international law into its own hands by imposing these sanctions, including through international institutions supported by the US government, like the World Bank and IMF.

Although the TIP Report is an effective tool for identifying countries where sex trafficking is an issue, the policy also impacts countries that did not ratify the Palermo Protocol or had reservations about specific aspects of it. This is a common and controversial theme in U.S. foreign policy. The purpose of international institutions such as the United Nations is to facilitate international cooperation, and while the United States government does participate in the UN, it often imposes its own version of the internationally agreed-upon enforcement mechanisms. As mentioned before, many countries ratified the Palermo Protocol, but it is extremely difficult to enforce due to the general difficulties

\textsuperscript{70} Id. at 52.
\textsuperscript{71} Id.
inherent in enforcing international law. The TIP Report, however allocates the tools for encouraging compliance to the United States government through the ability to impose sanctions based on the TVPA minimum standards.

Besides the use of the implementation of TVPA as a foreign policy tool, the TVPA also sets minimum standards for approaching human trafficking at the federal, state, and local levels within the United States, but has faced challenges in domestic enforcement.\textsuperscript{72} These challenges faced were “rooted in the nature of crime, especially in its hidden victims,”\textsuperscript{73} since so many victims of human trafficking are reluctant to come forward, and often are punished if their trafficker learns of police involvement. The problems of TVPA result from the “decentralization of the U.S. criminal justice system.”\textsuperscript{74} To this end, scholars have proposed four recommendations for improving law-enforcement identification of trafficking:

1. Train more officers to identify and respond to human trafficking.
2. Develop protocols to guide human trafficking identification and response.
3. Collect and report data on human trafficking investigations.
4. Integrate human trafficking response into local crime activities.\textsuperscript{75}

While these policy suggestions are useful in the context of the United States, they still do not sufficiently address prevention of structural causes or “push” factors. Implementation of the Palermo

\textsuperscript{72} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 271.
Protocol in other countries will be most effective when focused on the landscape of sex trafficking as it occurs in that particular country. Origin and transit countries especially should address structural violence that occurs through poverty and gender-related causes that perpetuate the victimization and cyclical revictimization that fosters human trafficking and allows it to thrive. These institutions – such as gender inequality – contribute to women being disproportionately targeted for sex trafficking in many contexts.

The (In)effectiveness of Current Policies in Eastern Europe

In other parts of the world where sex trafficking is a major issue, the fight is taken up in very different ways. The former Soviet states, for example, are typically classified by the TIP Report as “source countries” or “countries of origin” due to their “push factors” of poverty, gender inequality, and corruption. A structural cause of sex trafficking that is specific to this region is corruption. Since corruption is institutionalized into the power structures of the government, sex trafficking is very hard to combat. Even if international agreements such as the Palermo Protocol are ratified, it is up to state governments to implement them. In highly corrupt states, it is unlikely that governments will actually effectively implement the Protocol requirements because corrupt officials are often involved in organized crime, may even have a role in sex trafficking, and there are few mechanisms in the international law arena to enforce compliance.

In Armenia, for example, “fragile economies, institutionalized corruption, and lack of political will all hinder counter-trafficking efforts, but the fact remains that sex trafficking could not exist if not
for highly stigmatized and gendered social structures.”

Armenia signed the Palermo Protocol on November 15, 2001 and ratified it on July 11, 2003. Although the government is party to the Protocol, the “minimum standards” of the TIP Report and the sanctions imposed on Armenia by the U.S. are what actually motivate compliance.

As explained by the story of Liana, a trafficking victim, the impact of U.S. foreign policy in Armenia is actually paradoxically contributing to the re-victimization of trafficked individuals due to the fact that they have not adequately addressed the structural problem of corruption:

Within weeks of approaching IOM for assistance, Liana was arrested and prosecuted by the government of Armenia as the leader of a trafficking ring. Her trafficker had raised enough funds to bribe the Prosecutor’s Office, which was desperate to convict someone of sex trafficking in order to demonstrate compliance with US minimum standards and avoid jeopardizing future donor aid through a reduction in tier status...although the Armenian IOM staff members knew that Liana was innocent, they were powerless to do much in the absence of a strong (and, some argued, Western) central figure to organize support for her.

Ironically, in this case, Liana’s human rights were violated again in an effort to protect those very rights. This shows how easily the efforts made through international legislation and foreign policy decisions can fall apart and impair the lives of so many individuals, especially those already at risk when they do not address the root

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76 SUSAN DEWEY, HOLLOW BODIES: INSTITUTIONAL RESPONSES TO SEX TRAFFICKING IN ARMENIA, BOSNIA, AND INDIA 59 (Kumarian Press, 2008).
78 SUSAN DEWEY, HOLLOW BODIES: INSTITUTIONAL RESPONSES TO SEX TRAFFICKING IN ARMENIA, BOSNIA, AND INDIA 67 (Kumarian Press, 2008).
causes of the problem. Superficially, the policies in Armenia seemed effective as evidenced by the presence of the IOM as well as awareness of the problem and of the consequences of noncompliance with US minimum standards. However, the preeminent structural problem in this case is corruption. Corruption stood in the way of Liana receiving assistance from the IOM and the threat of jeopardizing future donor aid increases the motivation for corrupt officials to cover up her situation. According to the TIP Report, Armenia has been ranked as Tier 2 since 2009, and was ranked as Tier 2 Watch List from 2005 to 2008. An Armenia-specific policy focused on the structural causes of sex trafficking would probably be oriented toward addressing corruption and would be more effective than the current policies.

Moldova, another former Soviet country, is also known for having high rates of sex trafficking. Siddharth notes that this is “because Moldova is the poorest country in Europe, desperation for income is the Moldovan trafficker’s top recruitment tool...[and] false job promises are utilized in eight of ten trafficking cases.” The story of Moldova is similar to many in the former Soviet Union; poverty, desperation, and corruption. Moldova became a signatory to the Palermo Protocol on December 14, 2000 and ratified it on September 16, 2005. Siddharth argues that Moldova’s anti-trafficking legislation was passed in July 2003 in response to pressure from Western countries. While these laws are on the books, their effectiveness is debatable. Siddharth explains,

Articles 165 (trafficking in persons), 206 (trafficking in children), and 220 (pimping) of

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80 Id.
The Moldovan Criminal Code provide detailed definitions of trafficking and slavery, as well as penalties ranging from seven to fifteen years for trafficking in adults or children and up to twenty-five years if the perpetrator is a member of an organized crime group. Articles 165 and 206 were updated in 2003 to allow for fines of up to two thousand five hundred U.S. dollars for “moral damages.” For pimping convictions, fines are only a few hundred dollars...of ninety-five total cases, only sixteen involved prison time. None of the traffickers were fined. The average prison time per trafficking infraction was a little over two years.²²

In Moldova and other former Soviet countries, anti-trafficking laws are weak and do not carry heavy penalties for violations. Sex trafficking is far too profitable and widespread for these laws to be effective, and so they are not taken seriously. Some 40 anti-trafficking legal initiatives have been enacted in Romania and Moldova alone.²³ Efforts reflect pressure from the international community to uphold their Protocol commitments and to continue receiving donor aid from the United States, but since this pressure comes from outside the country and there has not been significant organic work to identify and resolve the structural obstacles, current efforts will not be effective. These initiatives include: “creation and implementation of legislative frameworks; law enforcement; regional and international cooperation; prevention and raising awareness; assistance to victims of trafficking (legal, material, psychological, reintegration); information campaigns and awareness-raising; training programmes (of judiciary, police, and

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²³ EWA MORAWSKA *Trafficking into and from Eastern Europe*, in HUMAN TRAFFICKING 105 (Willan Publishing 2007).
educators); research and coordination; and networking.”

Sadly, none of these programs have been effective because while the programs have attempted to bring attention to trafficking by raising awareness, they did not focus enough on identifying the social structures that are directly connected to trafficking, such as women’s gender roles, access to education and the labor market, and the local economy. So long as mechanisms that foster human trafficking such as “economic (core-periphery structural imbalances), political (lack of coordination of law enforcement and corruption of officials), and social (effective transnational criminal networks)” stay in force, these trends will continue. These economic, political and social factors identified by Ewa Morawska are the structural causes of sex trafficking in the context of Eastern Europe. These factors contribute to the prevalence and persistence of sex trafficking because the implementation of the Palermo Protocol within Eastern European countries is insufficient and it is extremely difficult, if not impossible, for other ratifying countries of the Protocol to enforce compliance, especially when they have taken some action.

The TIP Report currently ranks Moldova as a Tier 2 country, but this is only a recent improvement. Moldova was ranked as Tier 2 in 2005 and 2006, Tier 2 Watch List in 2007, Tier 3 in 2008, returned to Tier 2 Watch List in 2009 and 2010 and has been at Tier 2 since 2011. Moldova is classified by the TIP Report as a “source and, to a lesser extent, a transit and destination country for women

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84 Id.
85 Id. at 108.
86 Id.
87 OFFICE OF THE UNDERSECRETARY FOR CIVILIAN SECURITY, DEMOCRACY, AND HUMAN RIGHTS, TRAFFICKING IN PERSONS REPORT, 388 US Department of State (Washington, DC).
and girls subjected to sex trafficking, and for men, women, and children subjected to conditions of forced labor.”\textsuperscript{88} In the Department of State’s evaluation of Moldova it cited the country’s significant “efforts” to eliminate trafficking, but noted that the country “did not show sufficient progress in addressing widespread complicity in trafficking by law enforcement and other public officials. Reports of widespread corruption in the police and judicial system persisted and no officials were convicted for trafficking–related offenses.”\textsuperscript{89} In Moldova and similar countries, the legal approach to sex trafficking needs to be overhauled. Although pressure from international organizations has led to some progress, sex trafficking will continue unless serious steps are taken to address corruption and change the gendered social structures that perpetuate the cycle of violence and exploitation.

**Conclusion**

Human trafficking presents one of the most significant threats to human rights in the world today. Trafficking is a widespread practice that thrives on the dehumanization of individuals through exploitation and coercion. An appropriate response to sex trafficking would be targeted towards the actual structural causes of sex trafficking, specific to the context in which it occurs. This approach would address the ‘push’ and ‘pull’ factors of sex trafficking and would be founded on the conditions that allow individuals to be initially victimized. The current international regime is focused on implementing and enforcing laws that criminalize sex trafficking. This is a beginning to effective change to

\textsuperscript{88} Id. at 250.
\textsuperscript{89} Id. at 251.
combat the problem, but it only superficially addresses the issues. The existing laws that address sex trafficking are oriented towards punishing perpetrators and preventing the re-victimization of existing trafficking victims. Again, while this is a start, policies that address structurally violent institutions such as gender inequalities, poverty, and corruption are necessary in making progress towards ending modern slavery once and for all.
On American Immigration: The Loss of Foreign Entrepreneurs and the Gain of Unauthorized Immigrants

Arjang Asadi

In his 1908 play of the same name, Israel Zangwill coined the oft used American term, “the melting pot,” to describe the mixing of many identities in the United States of America.1 Indeed, throughout its history, America has attracted numerous ethnic groups from all corners of the globe to live within its borders and contribute to its rise.2 Many of the United States’ greatest innovators came from abroad, bringing with them concepts and ideas that together propelled this nation to the level of a world power.3 Immigrants once viewed America as a land of opportunity, and that spirit fueled its advancement as a nation. Now, caustic immigration policies create barriers to innovation and growth while spreading stigma from illegal immigration to immigration as a whole. At the same time, other nations have established innovative ways to attract foreign entrepreneurs. Start-Up Chile, a program in Chile that offers venture capital and a year’s visa to newly-founded firms with nowhere else to go, reported to The Economist on October 12, 2012 that it had admitted more firms leaving the United States than the

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1 The Best Plays of 1909-1919 399 (Burns Mantle and Garrison P. Sherwood, eds., 1933).
next eight countries on the list combined. While countries such as Chile are undertaking successful efforts to attract foreign entrepreneurs, the United States government has shifted away from a sound history of attracting skilled labor with the consistent rejection of such legislation as the Development, Relief, and Education for Alien Minors (DREAM) Act and the Startup Act. In 2011, the Pew Hispanic Center reported that there are approximately 11.1 million unauthorized immigrants living in the U.S. While debate rages as to the causes of immigration, in a nation where over six percent of the population is residing within its borders illegally and 13 percent are foreign-born, a viable immigration policy is crucial. Novel reforms are needed to progress the legal methods of addressing illegal immigration in order to allow the United States to, once again, become the prime destination for potential innovators. This article argues for the passage of two pieces of legislation, the DREAM Act and The Startup Act, because of the potential benefit that both bills serve for the United States’ population, economy, and immigration policy. Section I of this article outlines the current status of the United States’ immigration policy. Section II details the benefits of the DREAM Act. Section III goes on to explain the benefits of the Startup Act, while Section IV concludes and summarizes the paper.

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I. Current Status of United States’ Immigration Policy

Current federal immigration policy makes it increasingly difficult for immigrants of all nations to contribute to job creation and economic growth in the United States. In the past decade, the nature of the issue of immigration has shifted to take on more negative tones with respect to public opinion and policy approaches. The 2008 presidential election featured immigration, with unauthorized immigrants in particular, as a “hot” issue. The increasingly hostile nature of state legislation, federal legislation, and public opinion towards illegal immigration has had the unintended consequence of demonizing all forms of immigration, including the economically crucial entrepreneurial immigration. It also drawing attention away from the economics of the “legalization” approach to dealing with current unauthorized immigrants. While public opinion with regards to immigration policy often follows clearly defined party lines, the consequences of unreformed policy are overlooked. The persistently high unemployment figures since the 2008 financial crisis have prioritized job creation as an issue in all sections of the United States’ Congress. Meanwhile, a 2011 survey by the National

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Foundation for American Policy, a research nonprofit organization out of Arlington, Virginia, found that “48 percent of the country’s top venture-funded companies had at least one immigrant founder,” and “76 percent had at least one immigrant helping the company grow and innovate by filling a key management or product development position” (with CEO, CTO, and VP being the most common positions). These statistics highlight the importance of a vigilant and modern immigration policy, particularly with respect to job creation, and the benefits that immigration contributes to the United States economy as a whole.

In a 2011 speech to the United States Chamber of Commerce, New York City Mayor Michael Bloomberg called the overly bureaucratic and aggressively limiting United States Visa policies as a “form of national suicide.” Affirming the assertions of Mayor Bloomberg is the Council on Foreign Relations’ report on United States immigration policy. The Independent Task Force’s report, co-chaired by former Florida governor Jeb Bush and former White House Chief of Staff Thomas McLarty, concludes that “the continued failure to devise and implement a sound and sustainable immigration policy threatens to weaken America’s economy, to jeopardize its diplomacy, and to imperil its national security.” The United States immigrant population may be pictured in a pyramid

15 *Id.*
shape, with the most skilled members being at the top and the least skilled members being at the bottom. The top-down strategy of the Startup Act, addressing the most skilled immigrants at the top, coupled with the bottom-up strategy of the DREAM Act, addressing the much larger base of unskilled immigrants, serve as a dual approach method of taking the first step in fundamentally changing and strengthening the United States’ immigration policy.

II. The DREAM Act

The DREAM Act is a proposed legislation creating a two-step, six-year program for citizenship for immigrants that were brought to the United States under illegal premises as minors—specifically defined as before the age of 16 and capped at 29 years of age. As prerequisites for citizenship in the most recent version of this act, those wishing to utilize the program have to have entered the United States as minors as well as displayed good moral character, graduated from high school or acquired a GED, and resided in the United States for five continuous years prior to the enactment of the legislation. Meeting these requirements, the subjects would receive a “conditional nonimmigrant” status, temporary residency, and be placed in the six-year program. Upon completion of the six-year program, subjects would finally acquire Legal Permanent Resident (LPR) status in the United States after receiving a degree from a U.S. institution of higher learning, completion of at least two years in a bachelor’s degree program, or two years of service in the United States Armed Services. As the Migration Policy Institute

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17 Id.
18 Id.
19 Id.
wrote in its July 2010 report on the DREAM Act, “DREAM vs. Reality,” of the approximately 11 million undocumented immigrants in the United States, upwards of 2.1 million of them could be potential beneficiaries of the DREAM Act were it to be implemented as of the date of said report.\textsuperscript{20} The DREAM Act has the potential to integrate a large amount of unauthorized immigrants into American Society, changing their lives and the country for the better.

Throughout its history of rejections, revisions, and reintroductions to the United States Congress since 2001, the DREAM Act has gained both popularity and notoriety throughout the country.\textsuperscript{21} Built upon the concept of earned residency rather than outright amnesty, the DREAM Act has drawn support from both sides of the political spectrum.\textsuperscript{22} State statutes similar to the DREAM Act have passed in some states, including states with large immigrant population such as California to Texas.\textsuperscript{23} Immigration is primarily a federal issue, however, and thus needs to be addressed on the federal level. Supporters of the legislation have a wide variety of potential societal benefits from which they can draw arguments.\textsuperscript{24} The Congressional Budget Office (CBO) reported in December 2010 that the DREAM Act would reduce deficits by $1.4 billion and increase government revenue by $2.3 billion by the year 2020.\textsuperscript{25} An

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{22}] Id.
\item[\textsuperscript{24}] Id.
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October 1, 2012 article from the Center for American Progress, a progressive think tank, projected that passing the DREAM Act would “add $329 billion to the United States economy and create 1.4 million new jobs by 2030.” Further, in 2010, UCLA’s North American Integration and Development Center, an advocacy and research group, projected that the beneficiaries of the DREAM Act would generate between $1.4 trillion and $3.6 trillion in consumption-based, taxable income over a 40 year period based on the aforementioned Migration Policy Institute’s findings. Such large tax revenues will not go unnoticed and these points only highlight the quantifiable benefits of fully including unauthorized immigrants in American society.

From a fiscal perspective alone, the DREAM Act creates an environment that is highly conducive to an overall net benefit to society, meaning its economic and social benefits outweigh any postulated costs. The broadened tax base, larger labor pool, and strengthened consumer force are all part of the largely positive fiscal benefit that comes from the implementation of the DREAM Act and the integration of numerous undocumented immigrants that are currently in limbo in American society. The aforementioned $1.4 billion deficit reduction predicted by the CBO in the case of the DREAM Act’s passage reflects another aspect of fiscal benefit from the DREAM Act – the money saved from the legalization of DREAM Act beneficiaries and subsequent decrease in deportation and enforcement costs.

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Another conceptual cost saver would be the reduction in crime and dropout rates stemming from the powerful incentive to pursue an education, obey the law, and display good moral behavior in order to receive LPR status. Since criminal behavior disqualifies possible DREAM Act beneficiaries from being able to apply, they are incentivized to practice good moral behavior and obey the law. In an economic and political climate where debates about the budget and the United States’ fiscal future are dominating headlines and dinner tables alike, the cost-cutting maneuver of the DREAM Act coupled with its humanitarian motives serve to better the United States’ policies towards immigration on the federal level.

Moving beyond the economics of the issue, former Secretary of Defense Robert Gates, writing to DREAM Act sponsors, asserted, “the DREAM Act represents an opportunity to expand [the recruiting] pool, to the advantage of military recruiting and readiness.” Moreover, the DREAM Act can also serve as an important tool for increasing the national security of the United States, especially through its powerful incentives for undocumented immigrants to pursue service in the armed forces as a route towards legalization. Secretary Gates’ words also reflect on how useful the beneficiaries of the DREAM Act can be to this country. President Barack Obama has already worked to replace deportation with work permits during his presidential term as the go-to action for immigrants who came to the U.S. as children through established executive authority in the form of “prosecutorial authority” as defined by *Heckler v. Chaney* in 1985. With the executive branch already taking steps toward helping those immigrants who came to

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America without their own consent, in a way, it should be that legislative action follows in suit to codify the effort to help undocumented immigrant children and transform them into productive citizens of the United States. Rather than be a threat to national security as many claim in opposition to the DREAM Act, the beneficiaries can be used to make this country safer and more secure through earned legalization and a demonstration of responsibility and commitment to the betterment of the United States rather than through outright amnesty.

As can only be expected, the DREAM Act is not without its drawbacks. In a technicality that once threatened to nullify most of the Act’s benefits, Section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) made it so that undocumented immigrants were “not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit.”\(^\text{30}\) In essence, while the DREAM Act asserts that brought here as children could earn LPR status by attending college, the 1996 IIRIRA prevented these same immigrants from being granted in-state tuition levels and in some cases, prevented most forms of federal and state financial aid.\(^\text{31}\) With the price of higher education at its highest levels in history, the lack of the most crucial forms of financial aid make it nearly impossible for DREAM Act beneficiaries from receiving the higher education necessary to become a legal permanent resident of the


United States.\textsuperscript{32} In response to this flaw, as previously mentioned in this article, numerous individual state legislatures took it upon themselves to act where the federal government could not when it comes to state-level financial aid. Whereas states themselves cannot carve out paths toward legalization considering that immigration is a federal issue, many states including California, Texas, and Illinois have passed their own respective DREAM Acts that provide possible DREAM Act beneficiaries within those states with the possibility of receiving in-state tuition benefits along with the ability to apply for private financial aid.\textsuperscript{33} Still, some states have not passed their own version of the DREAM Act and thus the flaw in funding a college education for the beneficiaries still exists in some areas. Even with state-level rectifications of the higher education funding flaw, some argue that it is unfair to current American citizens trying to pay for their own education to have to compete with unauthorized immigrants for funding and for taxpayers who fund these ventures to have to inadvertently pay for unauthorized immigrants. This may create some uncertainty for the DREAM Act but can be seen as worth it for some when compared to the Act’s possible benefits. To the contrary, the military route towards legalization, which includes joining the armed forces in order to qualify for citizenship, will have no such flaw in the event of the DREAM Act’s passage.

Since the DREAM Act has not yet been passed, points on both sides of the debate are mostly conceptual. With that in mind, those in opposition to the bill also make the popular contention that the legalization path, which such legislations as the DREAM Act provide, only serve to incentivize illegal immigration and grant amnesty to

\textsuperscript{32} Id.
\textsuperscript{33} Id.
those whose very presence in the United States is a crime in and of itself. It must be noted, however, that the prerequisites for the DREAM Act’s benefits alone are enough to make any kind of legalization an earned legalization, not to mention the long and rigorous path towards LPR status that the entire legislation calls for. The Migration Policy Institute’s projections for the DREAM Act go so far as to say that only “roughly 38 percent of potential beneficiaries – 825,000 people – would likely obtain permanent legal status through the DREAM Act’s education and military routes.” This path towards legalization is far from simple amnesty and calls for years of vigilant dedication to contributing to society in order to earn LPR status. Adding to this is the fact that the DREAM Act’s provisions only apply to those undocumented immigrants who are already in the United States and have been so for five years prior to the passing of the bill, thus being unable to serve as an incentive for illegal immigration.

The DREAM Act serves as an effective bottom-up, legalization method for reforming the United States’ outdated and hostile immigration policy. The bottom-up approach serves to begin the process of dealing with the millions of undocumented immigrants that live in limbo in American society. While not immediately solving all of the United States’ immigration problems, the DREAM Act begins to do so by providing a path towards legal residence that is difficult enough to ensure only those that want to contribute to society and are willing to work hard for their right to remain in this country will have a way to do so. The economics behind the DREAM

34 Id.
Act are statistically solid with a wide variety of economic benefits that extend throughout the entire economy and benefit almost all United States citizens as well as those who wish become citizens.

III. The Startup Act

On the other side of the same coin, the Startup Act presents a top-down, legalization-extension approach to deal with the migration of immigrants that are crucial to society. Startup Act 3.0 is legislation introduced by Kansas Senator Jerry Moran that would help foreign, graduate-level students studying in science, engineering, technology, and mathematics with entrepreneurial ideas gain opportunities in the United States. It also creates an “employment based” visa, aptly named the Startup Visa under the prospectively established EB-6 category of business related visas that allows current entrepreneurs to remain in the U.S. to continue their business.\(^{37}\) Along with this general advancement, the Startup Act includes numerous sections that reform different aspects of the United States immigration policy, allowing for easier skill and business importation, something in which the United States is heavily lacking.\(^{38}\) For example, Section 5 of the Startup Act 3.0 “eliminates the per-country numerical limitation for employment-based immigrant Visas” in order to expand the possibility of importing businesses from other countries.\(^{39}\) 53,510 Indian students graduated from United States Masters and Doctorate


programs in 2009 alone with many of them being sent home to participate in, or even found, businesses that compete against the U.S. This “brain drain,” or fleeing of talented minds, acts as a severe detriment to the American spirit of entrepreneurialism. The Startup Act 3.0 remedies this.

When it comes to students and entrepreneurs alike, the United States’ visa policies are seriously flawed and in need of rectification. According to a paper published by the Kauffman Foundation in August 2012, the most common visa used by foreign students to study in the United States is the F-1 Visa, which allows for internships to be held by the students in question but bars them from all employment within the U.S. The rules and regulations of the F-1 visa make it so that foreign students at all levels of education are prevented from establishing entrepreneurial business ventures because self-employment is a form of employment and thus endangers their visa status. As can be seen through these rules and regulations, the current visa policy employed by the federal government is almost contradictory and entirely counter-intuitive to the foundational concept of free enterprise. Whereas, on one hand, the United States has almost 11 million undocumented immigrants that migrated to it and cannot realistically be removed, on the other hand it also has tens of thousands of highly educated students with strong potential being prevented from staying in the United States with their business ventures. The Startup Act makes

significant work towards rectifying this issue, establishing numerous new pathways towards attaining the proper visas for continued stay and business operation in the U.S. while simultaneously streamlining existing pathways.

Since its introduction to the United States House of Representatives in 2011, the Startup Act has been met with outstanding bipartisan support for its ideas and projected accomplishments.\textsuperscript{42} The Kauffman Foundation’s in-depth analysis of the Startup Act also reveals that foreign nationals not only start new businesses almost twice as often as American citizens, but they are “represented disproportionately among the ranks of founding executives at technology firms around the country.”\textsuperscript{43} Even top American firms such as Yahoo!, Ebay, Intel, and Google all have at least one foreign student founder.\textsuperscript{44} The importance of foreign national students cannot be overlooked in this context and neither can the positive utility of the contentions of the Startup Act.

Related to this is the fact that all of the engineering and technology firms created in the United States between 1995 and 2005, more than one fourth, or 25 percent, had at least one foreign born founder.\textsuperscript{45} These companies accounted for more than $52 billion in conducted business and 450,000 employed workers.\textsuperscript{46} The possibilities opened up by the Startup Act are countless in light of these statistics. However, since the Startup Act has not been passed into law yet, its effects have not yet taken hold and, quite the opposite, the “brain drain” from the United States is visibly profound. The Economist revealed data from Startup Chile that

\textsuperscript{42} Id. at 8.  
\textsuperscript{43} Id.  
\textsuperscript{44} Id.  
\textsuperscript{45} Id.  
\textsuperscript{46} Id.
showed the country’s venture capital incentives program had captured more foreign entrepreneurs that were denied work visas from the United States than the next eight countries on the list combined.\textsuperscript{47} The Startup Act 3.0 could provide opportunities and ways to remain in the U.S. for over 100,000 foreign-born nationals that received Masters and Doctorate degrees from American colleges in 2009.\textsuperscript{48}

Rather than allow some of the brightest minds in the world to compete against the United States, the bureaucratic inefficiencies of the U.S. immigration policies should be reformed and reduced to keep huge, possible success stories such as Google and Yahoo in the country. As Steven D. Levitt, academic economist and author of \textit{Freakonomics}, likes to quip, “it’s all about incentives.”\textsuperscript{49} In the case of the Startup Act, one of the bill’s most powerful tools is the incentive it creates for students, businesses, and universities alike. The Kauffman Foundation’s report postulated that the Startup Act would increases incentives to invest in ventures and helps university expand research through grants derived from existing research and development of federal funds.\textsuperscript{50} Through something of a cycle, students hoping to attract investors will have an easier time doing so since the Startup Visa would create a more stable business environment for investors to entrust venture capital to foreign

\textsuperscript{48} Masters and Doctorate Degrees in Computer Science, Engineering, and Math Fields Awarded to Foreign Nationals in 2009, Department of Homeland Security (2010).
\textsuperscript{49} Kate Vitasek, Steven D. Levitt, Outsourc Magazine, September 1, 2011, http://www.outsourcemagazine.co.uk/steven-d-levitt-its-all-about-incentives/.
students. In turn, students can better attract the money necessary to meet the requirements under the Startup Act to become permanent residents of the United States in order to continue their businesses. This legislation’s reworking of the system of skill importation, a basic element of the historical success of the United States, would do wonders for the venture-business environment of the United States and in turn, the economy and employment as a whole. Implementation of the Startup Act also has an incentive side effect of creating a path to United States residency through business ventures. Non-entrepreneurial foreign students could attempt to establish successful business ventures as a method of gaining residency (called “incentivized entrepreneurialism”). A possible issue here would be that immigrant students would strive to establish front businesses as a means of remaining in the U.S. However, the Startup Act’s strict guidelines for the success of the business, from high venture capital requirements to revenue expectations of up to $1 million, required to attain a proper visa dispels this problem. The Startup Act would not just help highly educated students with business plans to manifest their dealings in the United States, but would encourage students with simple ideas to follow through with them and continue the American tradition of immigrant entrepreneurialism.

As with just about anything that makes its way through the hallowed halls of Congress, the Startup Act has its own set of flaws. For one, it can be vehemently argued that the Startup Act does too little. In its current form, the Startup Act only applies to graduate

51 Id.
52 Id. at 9.
54 Id.
level students involved in STEM programs (Science, Technology, Engineering, Mathematics). The Startup Act could do even more for foreign entrepreneurs by expanding its reach to include undergraduate as well as graduate-level students with business ventures. The STEM programs could integrate business minded students of all kinds and offer them the world’s largest consumer market to grow their businesses. On the negative side, the Startup Act includes a few clauses that expand the bureaucracy of the United States’s laws. Section 9 of the Startup Act calls for federal agencies to undergo extensive studies of any new regulations that come after the passing of this bill in order to determine whether those regulations would generate more costs than benefits for the government, an enormous burden. Section 9 establishes what on the surface seems like an enormous amount of extra red tape and gratuitous legislation. Section 9 of the Startup Act cannot be effectively argued for and could pose a realistic threat in the passing of the legislation as a whole. Taking into consideration the section is completely unrelated to the issue of immigration policy, if it were to be disregarded for the purposes of this article, the net benefit of the Startup Act 3.0 would far outweigh its prospective costs.

IV. Conclusion

Both the DREAM Act and the Startup Act represent crucial steps toward a comprehensive immigration policy reform on the federal level. Inversely related, the DREAM Act works from the

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bottom up, attempting to integrate undocumented immigrants into the United States with a drive to earn an education or serve in the United States’ military. The Startup Act works from the top down, opening America up to ambitious immigrant minds that have contributed to its rise. As the Council on Foreign Relations’ Independent Task Force on Immigration Policy summarized, "the stakes are too high to fail. If the United States continues to mishandle its immigration policy, it will damage one of the vital underpinnings of American prosperity and security." As the pinnacle of free markets and new opportunities, as the birthplace of the American Dream, and as the global center of equal opportunity, reform to the policies that dictate who can be a part of this nation’s history is fundamental. The Development, Relief, and Education for Alien Minors (DREAM) Act and the Startup Act serve to address the currently deficient system and would benefit current and future citizens of the United States.

The Unconstitutionality of the Oklahoma Personhood Bill

Giulia Stavropoulos

In July 2012, the Oklahoma division of Personhood USA filed a petition for writ of certiorari for the United States Supreme Court to review the constitutionality of the Oklahoma Personhood Bill and the Oklahoma Personhood Initiative in the case *Oklahoma v. Barber*.¹ The Oklahoma Personhood Bill proposes a new law entitled “The Personhood Act” which states that human life begins at the moment of conception.² If passed, this law would provide a legal definition for personhood and would set the foundation for ballot initiatives and subsequent acts banning abortion. Although there have been similar personhood bills in 2012 that have purported to define personhood, such as the Virginia and Mississippi Personhood Bills, they pose serious implications for future legislation. The act proposed by the Oklahoma Personhood Bill is unconstitutional and conflicts with previous Supreme Court decisions because in the Supreme Court cases *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Gonzales v. Carhart*, the Court held that a woman’s right to obtain an abortion was protected under the Constitution. The Fourth, Fifth, and Fourteenth Amendments to the Constitution are used in the aforementioned Supreme Court cases to establish a woman’s constitutional right to obtain an abortion and can be used to analyze

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² S.B. 1433 (Okla. 2012).
the unconstitutionality of the Oklahoma Personhood Bill and the proposed Personhood Act.

**Personhood Movement**

Personhood, as defined by Personhood USA, is “a movement working to respect the God-given right to life by recognizing all human beings as persons who are ‘created in the image of God’ from the beginning of their biological development, without exceptions.”\(^3\)

Although this organization is a Christian ministry, not all advocates of the Personhood Movement attribute their support to religious principles, and not all religious individuals are pro-life.\(^4\)\(^5\) Personhood USA is currently the leading organization of the Personhood Movement and is working to abolish abortion in the United States by introducing new pieces of legislation and ballot initiatives relating to the legal definition of personhood since there is currently no legal definition for personhood.\(^6\)\(^7\) This organization represents and exemplifies the values and beliefs of the pro-life community and works to initiate legislative and political action to progress towards “the ultimate goal of the pro-life movement: personhood rights for all innocent humans.”\(^8\)

The controversy surrounding the Personhood Movement stems from the conflict between the rights of a woman and those of

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\(^3\) About Us, PERSONHOOD USA, http://www.personhoodusa.com/about/ (last visited Feb. 22, 2013).

\(^4\) Id.


\(^7\) About Us, PERSONHOOD USA, http://www.personhoodusa.com/about/ (last visited Feb. 22, 2013).

\(^8\) Id.
her unborn child. The Personhood Movement embodies the idea that humans should be protected under the law from the moment of conception and from that moment should not be deprived of their human rights. This idea, however, is not currently supported by law, since unborn children are not legally defined as persons. The Supreme Court recognized in the 1973 case, Roe v. Wade, that the United States Constitution does not explicitly define “person.” This ruling was upheld in subsequent cases such as Planned Parenthood v. Casey and Gonzales v. Carhart. As a result of this lack of legal definition of “personhood,” tension exists between those fighting for unborn children to be legally defined as persons and those who support the constitutional rights of women. While the United States does not have an explicit definition of a legal person, it instead has a history of case law that can be used to understand interpretations of constitutional rights as well as the various situational applications of those rights. Personhood USA seeks to abolish abortion, which remains legal nationwide as a result of the 1973 Supreme Court decision of Roe v. Wade and subsequent cases upholding this ruling. Although the Personhood Movement has made progress in legislation through personhood bills such as the Mississippi House Bill and the Virginia Personhood Bill that purport to define personhood, the decision of Roe v. Wade has yet to be overturned. Cases similar to Oklahoma v. Barber, such as Planned Parenthood v. Casey and Gonzales v. Carhart, that have upheld the Supreme Court decision.

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9 Id.
decision of *Roe v. Wade* and address personhood and female reproductive rights, offer insight into the unconstitutionality of the Oklahoma Personhood Bill.

### History of the Oklahoma Personhood Bill

On February 15, 2012, the Oklahoma Senate passed the Oklahoma Personhood Bill proposing a Personhood Act that states, “the life of each human being begins at conception.”\(^{14}\) The Act also states that an unborn child is defined as any developing human being “from the moment of conception until birth at every stage of biological development.”\(^{15}\) Given these definitions, all unborn children would be legally considered human and protected under the Constitution. This bill, however, failed in the state’s Legislature before reaching the floor of the Oklahoma House of Representatives in April 2012.\(^{16}\) On April 30, 2012, the Oklahoma Supreme Court denied the personhood ballot initiative because it was unconstitutional under the Supreme Court’s decision to uphold abortion rights in the case of *Planned Parenthood v. Casey* in 1992.\(^{17}\) Personhood Oklahoma, the Oklahoma division of Personhood USA, appealed the Oklahoma Supreme Court’s rejection to the United States Supreme Court and filed a petition for writ of certiorari.\(^{18}\) The petition for writ of certiorari, which was filed as the Oklahoma Personhood Initiative case *Oklahoma v. Barber*, argued that the

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\(^{14}\) S.B. 1433 (Okla. 2012).

\(^{15}\) *Id.*


Bible’s recognition of unborn children as persons conflicts with the 1973 ruling of *Roe v. Wade*. Personhood Oklahoma argued in their petition that although the Supreme Court defines a “person” as any fetus able to survive outside of the womb, the Tenth Amendment grants citizens the power to amend the State Constitution. This Tenth Amendment right would grant Personhood Oklahoma the opportunity to legally define “personhood” in their state’s Constitution. The case was placed on the Supreme Court docket in October 2012, but the United States Supreme Court declined to hear the case on October 29, 2012. Although *Oklahoma v. Barber* was ultimately rejected, the case nevertheless generated legal and media attention because it purported to challenge the ruling of *Roe v. Wade*. The United States Supreme Court gave no reason as to why the case was denied.

**Similar Cases**

The Supreme Court has previously heard cases similar to the *Oklahoma v. Barber* case, such as *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Gonzales v. Carhart*. In *Roe v. Wade*, a woman under the pseudonym Jane Roe challenged the Texas abortion laws that prohibited her from obtaining a legal abortion and declared the laws unconstitutional. In this 1973 case, the Supreme Court ruled that the ability to have an abortion is considered a personal liberty protected by the Fourteenth Amendment’s Due Process Clause.

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20 *Id.*


22 *Id.*


24 *Id.*
This clause prevents states from depriving individuals from their right to liberty and equality.\textsuperscript{25} The Supreme Court also recognized that the right to privacy does exist under the Constitution in the penumbras, or guaranteed rights, of the Bill of Rights and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.\textsuperscript{26}

The 1992 Supreme Court case \textit{Planned Parenthood v. Casey} attempted to overturn the ruling of \textit{Roe v. Wade}, but the Supreme Court upheld the 1973 ruling and reaffirmed that the right to an abortion is protected under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{27} \textit{Planned Parenthood v. Casey} challenged the constitutionality of Pennsylvania laws regarding abortion, specifically the Pennsylvania Abortion Control Act of 1982.\textsuperscript{28} A number of the provisions under the Pennsylvania Abortion Control Act were ruled constitutional in this case, such as the requirements for parental and informed consent.\textsuperscript{29} Additionally, the Supreme Court ruled that states have the ability to impose restrictions on abortion, but must include exceptions if continuing the pregnancy would threaten the life and health of the woman.\textsuperscript{30} Despite this ruling, however, the Supreme Court ultimately upheld the \textit{Roe v. Wade} decision that states that a woman’s right to have an abortion is protected under the Constitution.\textsuperscript{31}

In 2007, the Supreme Court decision of \textit{Gonzales v. Carhart} upheld the Partial-Birth Abortion Ban Act when it was challenged.\textsuperscript{32}

\textsuperscript{26} \textit{Roe v. Wade}, 410 U.S. 113 (1973).
\textsuperscript{28} \textit{Id}.
\textsuperscript{29} \textit{Id}.
\textsuperscript{30} \textit{Id}.
\textsuperscript{31} \textit{Id}.
This act banned partial-birth abortion, an abortion method in which an unborn child is partially delivered “for the purpose of performing an overt act…that the person knows will kill the partially delivered infant.”

Although this was the first time that the Supreme Court had banned an abortion act that did not harm the woman, this Supreme Court decision reaffirmed the essential holding of Roe v. Wade forbidding the state to interfere with a woman’s pregnancy in the first trimester. Despite the attempts of Planned Parenthood v. Casey and Gonzales v. Carhart to overturn Roe v. Wade, in both cases the Supreme Court reaffirmed the ruling that a woman’s right to an abortion is protected under her constitutional right to liberty.

**Unconstitutionality of the Oklahoma Personhood Bill**

The Oklahoma Personhood Initiative case Oklahoma v. Barber originated as the Oklahoma Personhood Bill. The rulings of similar Supreme Court cases of Roe v. Wade, Planned Parenthood v. Casey, and Gonzales v. Carhart can be used to demonstrate how the Oklahoma Personhood Bill is unconstitutional. The Bill, which was filed as an Initiative Petition to the Oklahoma Supreme Court, was rejected by the Oklahoma Supreme Court on the grounds that it was unconstitutional following the ruling of Planned Parenthood v. Casey and its interpretation of the law. In Planned Parenthood v. Casey, the ruling of Roe v. Wade was challenged, but the Supreme Court held that “the essential holding of Roe v. Wade should be retained and once again reaffirmed.”

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34 Id.
stated that “a state criminal abortion statute...is violative of the Due Process Clause of the Fourteenth Amendment.”38 The Fourteenth Amendment of the Constitution states, “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”39 Similarly, the Fifth Amendment states that no person shall be deprived of “life, liberty, or property, without due process of law.”40 Although it is not implied in the Constitution that abortion is considered a personal liberty, the Supreme Court ultimately ruled abortion as a personal liberty in *Roe v. Wade* stating that the roots of the right to personal privacy are found in the Fourth, Fifth, and Fourteenth Amendments.41 The proposed legal definition of personhood proposed by the Oklahoma Personhood Bill would grant a fetus a constitutional right to life, which would infringe upon the woman’s Fifth and Fourteenth Amendments’ rights to liberty.

Additionally, *Planned Parenthood v. Casey* also established that restrictions on abortion violate a woman’s constitutional right to privacy stating,

State restrictions on abortion violate a woman’s right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman’s right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm...Further, when the State restricts a woman’s right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and

39 U.S. Const. amend. XIV, § 1.
40 U.S. Const. amend. V.
family planning—critical life choices that this Court long has deemed central to the right to privacy.

The Fourth Amendment states that all people have a right to be “secure in their persons” and the Supreme Court has recognized that “the principle object of the Fourth Amendment is the protection of privacy.” In Planned Parenthood v. Casey, the Supreme Court established that state restrictions on abortion violate a woman’s right to privacy. Additionally, the Court recognized in Roe v. Wade that the foundation of the right to personal privacy could be found in the Fourth Amendment. Since the Supreme Court not only recognized in Roe v. Wade that a woman’s right to privacy is protected by the Fourth Amendment, but also established in Planned Parenthood v. Casey that restrictions on abortion infringe upon a woman’s right to privacy, it is apparent that prohibiting abortions infringe upon a woman’s Fourth Amendment right to privacy. The unconstitutionality of the Oklahoma Personhood Bill is evident under the Supreme Court’s interpretation of the Fourth Amendment right to privacy and its interpretations of the Fifth and Fourteenth Amendments’ rights to liberty.

**Arguments Supporting the Personhood Bill**

While prior Supreme Court decisions demonstrate the unconstitutionality of the Oklahoma Personhood Bill, the Constitution can also be used to support the Bill. Since the Constitution does not provide a definition for “personhood” nor does it explicitly state a right to privacy, the Bill can be interpreted

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as being constitutional. It was argued in *Roe v. Wade* that “the Constitution does not explicitly mention any right of privacy.”\(^{46}\)

Despite the abundance of case law supporting the right to an abortion and the lack of case law supporting the goals of the Personhood Movement, advocates of the movement argue that the movement has strong support under the assumption that life begins at the moment of conception.\(^{47}\) Since the United States does not currently have a legal definition of a ‘person,’ the Personhood Movement purports to provide a definition that states that a person is protected under the Constitution from the moment of conception without exceptions.\(^{48}\) Under this definition of personhood, from the moment of conception an unborn child would be legally considered a person and would therefore be protected under the Fifth and Fourteenth Amendments’ rights to life.\(^{49}\) This definition of a legal human would establish the unconstitutionality of abortion procedures, as these procedures would infringe upon a human’s constitutional right to life.\(^{50}\)

### Arguments Against the Personhood Bill

Despite the arguments supporting the Oklahoma Personhood Bill, the history of Supreme Court case law provides more extensive support against it. The Supreme Court’s interpretations of the Fourth, Fifth, and Fourteenth Amendments in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Gonzales v. Carhart* decisions show how the Personhood Movement infringes upon women’s constitutional

\(^{46}\) *Id.*


\(^{49}\) U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

\(^{50}\) U.S. Const. amend. V.
rights to privacy and liberty. While advocates of the Personhood Movement argue that unborn children are entitled to their constitutional rights, it is important to note that the Constitution does not explicitly define the beginning of personhood. Additionally, while fetuses are not yet entitled to explicit constitutional rights, women are still protected under their constitutional rights to liberty and privacy.

While the Personhood Movement has been trying to make legal advances through the Supreme Court, the Court has continually upheld the Roe v. Wade ruling as can be seen in both the Planned Parenthood v. Casey and Gonzales v. Carhart decisions. The mere fact that the United States Supreme Court ultimately denied review of Oklahoma v. Barber and removed it from the Supreme Court dockets also demonstrates how the Personhood Movement is finding it difficult to make progress in court. After the Supreme Court ruling of Roe v. Wade, the Court has struck down most attempts to restrict a woman’s ability to have an abortion. Furthermore, the Oklahoma State Supreme Court ruled that the Oklahoma Personhood Bill was unconstitutional under the previous Supreme Court ruling of Planned Parenthood v. Casey, which demonstrates the strength of previous Supreme Court rulings in state courts.

Progress for the Personhood Movement

Although state personhood organizations are trying to bring the Personhood Movement to the Supreme Court in an attempt to overturn *Roe v. Wade*, the Supreme Court has continuously reaffirmed the *Roe v. Wade* ruling. The cases of *Planned Parenthood v. Casey* and *Gonzales v. Carhart*, however, both marked progress for the Personhood Movement in court. Although *Planned Parenthood v. Casey* ultimately reaffirmed the ruling of *Roe v. Wade*, it also made some revisions to the 1973 court decision.\(^{56}\) While the right to have an abortion remained protected under the 1992 ruling, several provisions under the Pennsylvania Abortion Control Act of 1982 were ruled constitutional.\(^{57}\) These provisions included: the parental consent rule requiring minors obtaining an abortion to obtain the consent of a legal parent or guardian, the informed consent rule requiring doctors to inform women about health related implications of abortion, and the twenty-four hour informed consent rule requiring a woman to be provided information regarding her decision to obtain an abortion twenty-four hours prior to the procedure.\(^{58}\) Although these requirements did not hinder a woman’s right to an abortion, the established constitutionality of certain abortion regulations contributed to the Personhood Movement’s progression towards the banning of abortion.

The Supreme Court decision of *Gonzales v. Carhart* also marked progress for the Personhood Movement because it was the

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\(^{57}\) Id.
\(^{58}\) Id.
first decision that upheld a ban on an abortion method. While previous cases had allowed more room for state regulation of abortion practices, *Gonzales v. Carhart* was the first case that prohibited physicians from performing a medical procedure that could benefit the health of the patient. This case also weakened the “undue burden” standard for reviewing abortion standards, further justifying government restrictions on abortion practices. Additionally, this ban can act as legal support for future bans on abortion practices. Although this Supreme Court decision ultimately upheld the essential holding of *Roe v. Wade* and *Planned Parenthood v. Casey* by forbidding the state to interfere with a woman’s pregnancy in the first trimester under her Fourteenth Amendment right to liberty, it also established precedent for possible bans on abortion methods and marked progress for the Personhood Movement.

The Personhood Movement is also making advancements in legislature. Supporters of Personhood USA have begun to concentrate their efforts on proposing bills and ballot initiatives as a result of their lack of success in the Supreme Court. Both the Virginia Personhood Bill and the Mississippi House Bill are two bills similar to the Oklahoma Personhood Bill that were also passed in

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The Virginia Personhood Bill, which was passed by The Virginia House of Delegates on February 15, 2012, purports to outlaw abortions.\textsuperscript{63} This bill would have granted “unborn children at every stage of development...all the rights, privileges, and immunities available to other persons, citizens, and residents of the commonwealth,” but was defeated by the Virginia Senate that same month.\textsuperscript{64} The Mississippi House Bill that was passed on March 14, 2012, also proposed a law to prohibit abortion stating, “no person shall perform an abortion on a pregnant woman before determining if the unborn human individual that the pregnant woman is carrying has a detectable fetal heartbeat.”\textsuperscript{65} This proposed amendment to the state constitution was put on the ballot in November 2012; however, voters defeated this “personhood amendment,” and the initiative died in the Mississippi State Senate Committee in April 2012.\textsuperscript{66} Although both of these initiatives were declared dead in 2012, it is possible they can still make the ballot in 2014.\textsuperscript{67} Both of these bills, in addition to the Oklahoma Personhood Bill, show that although the Personhood Movement is not making a strong impact in the Supreme Court, it is beginning to make advancements in legislation.

\textsuperscript{63} H.B. 1 (Va. 2012).
\textsuperscript{65} H.B. 1196 (Miss. 2012).
Conclusion

The Oklahoma Personhood Bill embodies unconstitutional principles because it directly violates the Fourth, Fifth, and Fourteenth Amendments. The Supreme Court’s interpretations of these amendments in *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Gonzales v. Carhart*, act as support for the Bill’s unconstitutionality. Despite the Court’s continual reaffirmation of the *Roe v. Wade* decision limiting the restrictions that a state can put on abortion, the Personhood Movement is quickly gaining momentum. In 2012 alone, numerous bills similar to the Oklahoma Personhood Bill, such as the Virginia Personhood Bill and the Mississippi House Bill, made progress in legislature. While both the Virginia Personhood Bill and the Mississippi House Bill made it to the Virginia Senate and the Mississippi Senate respectively, it was in those two senates that both bills were ultimately defeated.68 Since the Personhood Movement is gaining increasing numbers of supporters, it is expected that more efforts will be made in the next few years to ban abortion and extend legal rights of persons to unborn children.69

There are many implications of the Personhood Movement’s progress with the Oklahoma Personhood Bill for the future. With the persistence of bills such as the Virginia Personhood Bill, which has plans to be carried over into 2013, the Personhood Movement could make significant progress in legislation.70 If such bills were to be passed, they would lay down the foundation for future pieces of

legislation and the changing of laws nationwide. Successful bills that turn into laws have the potential to make an impact in future Supreme Court rulings, particularly to overturn *Roe v. Wade*. Similarly, successful ballot initiatives may also succeed in changing state laws.

The Personhood Movement not only has future implications for legislation regarding abortion rights, but also for stem cell research, euthanasia, assisted suicide, birth control and infertility treatments. 71 A legal definition of personhood that embodies the values of the Personhood Movement could not only grant rights to embryos and prohibit abortion, but could also lead to legislation that prohibits euthanasia and assisted suicide. 72 Progress of the Personhood Movement and future pieces of personhood legislation could thus result in a broad range of legal changes. Nevertheless, the upheld decision of *Roe v. Wade* in *Planned Parenthood v. Casey*, and *Gonzales v. Carhart*, and the Supreme Court’s interpretations of unconstitutionality to the arguments made therein, demonstrate the strength of the obstacles that the Personhood Movement would have to overcome to legally define personhood.

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72 *Id.*
Is U.S. Food Aid Really Helping the World’s Poor?

Andrea L. Sestanovich

Approximately four billion tons of food was produced globally in 2012.¹ However, in the same year, the Food and Agriculture Organization of the United Nations (“FAO”) reported that roughly 12 percent of the world’s population was malnourished, and an estimated 868 million people faced food scarcity.² In order to address issues of malnutrition, food scarcity, and poverty alleviation, the United Nations established a binding international treaty on food assistance in 2012, with six countries and the European Union signing and ratifying the treaty.³ The Food Assistance Convention of 2012 established policy responsibilities based on the most current and effective methods of addressing hunger, food scarcity, and poverty for nations that ratified the treaty.⁴

Developed nations around the world have declared their intentions to end hunger and poverty throughout the developing world by means of international aid. Some of these seemingly humanitarian policies, however, have had detrimental effects on the

recipient nations’ economic and agricultural development.\(^5\) In addition, such policies contributed to the persistence of hunger and poverty in those nations, specifically in Sub-Saharan Africa.\(^6\) United States Public Law 480 (P.L. 480), also known as the Food for Peace Act, stands at the forefront of harmful international aid policies.\(^7\) This article will provide the history and context of the law, as well as an explanation of how the Food for Peace Act exacerbates hunger and poverty issues in recipient nations. In addition, the Act does not follow the newly adopted strategies outlined in the Food Assistance Convention, which the U.S. signed and ratified on September 26, 2012.\(^8\) This article will also explore the policies of Canada and the European Union to demonstrate how nations with similar agricultural sectors comply with international doctrine on food assistance.

**Food for Peace Act**

After World War II, the world market contained overwhelming surpluses of grain.\(^9\) These surpluses threatened commodity prices by offsetting the equilibrium of supply and demand\(^10\) - supply was too high, thereby driving down the price of grain and depleting farmers’ profits. In the U.S. alone, storage of the

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excess grain cost upwards of $1,000,000 per day.\textsuperscript{11} In order to reset the market and return grain prices to normal while easing the taxpayers’ burden of storing tons of surplus grain, Congress passed the Agricultural Trade and Development Act of 1954, later to be known as the Food for Peace Act.\textsuperscript{12}

The law has since been amended and reauthorized on several occasions. The most recent version of the law states that it is U.S. policy to:

(1) combat world hunger and malnutrition and their causes;
(2) promote broad-based, equitable, and sustainable development, including agricultural development;
(3) expand international trade;
(4) foster and encourage the development of private enterprise and democratic participation in developing countries; and
(5) prevent conflicts.\textsuperscript{13}

The policy objectives were to be carried out with the help of the surplus grain that was depleting tax revenue and threatening commodity prices.\textsuperscript{14} The U.S. government would purchase the surplus grain that American farmers could not sell, ensuring higher commodity prices and profits for farmers.\textsuperscript{15} This grain would then be shipped abroad in the form of food aid, following the strict regulations set forth in the legislation.

\textsuperscript{11} Id.
\textsuperscript{14} James Bovard, How American Food Aid Keeps the Third World Hungry, 665 The Heritage Foundation (1988)
\textsuperscript{15} Id.
Aid for U.S. Farmers

Initially, the Food for Peace Act was due to expire three years after its passage. It was intended to solve the problem of surplus grain within a few years - a short-term fix to a temporary problem. However, surpluses continued to grow despite over 25 percent of U.S. grain being shipped abroad. The problem was not that the Food for Peace Act was ineffective - in fact it was quite effective at distributing American grain abroad; however, the efficiency of the program created a different problem. Farmers took advantage of the U.S. government subsidies and continued to overproduce, knowing that they would be compensated for their product due to commodity price guarantees from the federal government. These unnecessary surpluses would then be shipped abroad in the form of food aid. This overproduction caused surpluses to grow to levels even higher than before the inception of the law.

Despite attempts to decrease surpluses, unused stockpiles of grain continue to mount due to subsidies provided by the U.S. government that encourage overproduction. One example of such a subsidy is the counter-cyclical payment provided under the Farm Security and Rural Investment Act of 2002. Under this law, farmers are ensured target prices for certain crops, even if market

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17 Id.
prices are below the stated target commodity price.\textsuperscript{23} If the market price for grain drops below the stated target price, the farmers receive a payment ensuring that they receive commodity price for their crops.\textsuperscript{24} This allows for farmers to generate a profit, even in weak market conditions. With such programs in place, farmers will continue to overproduce, knowing that even in unfavorable market conditions crops will still be profitable. Overproduction further depresses market prices, which perpetuates the use of price guarantees, like the counter-cyclical payment.\textsuperscript{25}

Although Food for Peace created domestic problems in the U.S. by encouraging overproduction, it had a far worse impact on the local and regional economies of the recipient nations. Because the law explicitly states that food aid must be delivered in the form of agricultural commodities,\textsuperscript{26} American grain is directly competing with locally grown grain in the recipient nations’ markets.\textsuperscript{27} This leads to unfair competition because American grain is either donated or sold at unnaturally low prices, thereby eliminating any competition from local farmers.\textsuperscript{28} Locally grown grain is expelled from the markets, leaving local farmers with a surplus of grain that cannot be sold for a profit. Without a means of generating a profit

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{27} Stephanie Pedersen A Darker Side to Food Aid The International (2012).
\end{itemize}
\end{footnotesize}
from their crops, the already destitute farmers are forced into cyclical poverty - which is exactly what the law was enacted to combat.

In regions with a shortage of grain, one may find it reasonable to ship American grain abroad since there is seemingly no threat of destroying an already existing market for domestic grain. This humanitarian effort, however, proves to be lethally inefficient. In times of crisis, such as severe drought or famine, food aid can take up to six months to reach those in need of grain. During the months nations await food aid, many people will die from starvation and malnutrition. By the time the food aid arrives from the U.S., it is often too late to save lives. After months of food crisis, many people have already died.  

A more effective policy would consist of purchasing grain from nearby regions, not experiencing a crisis, and redistributing it to nations in need of grain; this policy would allow the grain to reach those in need in a more timely manner. Such a policy is not possible under current law, because the Food for Peace Act only allows for the distribution of agricultural commodities as American food aid.

Consequences of Food for Peace

Prior to the early 1970’s, Africa was agriculturally self-sufficient. Between 1966 and 1970, an average of 1.3 million tons of food was exported from the continent per year. Between 1970

\[ \text{(29) John Norris & Connie Veillette Five Steps to Make Our Aid More Effective and Save More Than $2 Billion Center for American Progress (2011).} \]


\[ \text{(31) Food for Peace Act 7 U.S.C. § 102(a) (2008).} \]

\[ \text{(32) Walden Bello The Food Wars 68 (Verso 2009).} \]

\[ \text{(33) Id.} \]
and 1973, Africa’s per capita income increased by approximately 3 percent each year. In the years following decolonization, Africa was on the path of economic development.

This trend began to reverse with the introduction of Structural Adjustment Programs (SAPs) by the World Bank. These policies caused the money supply to shrink, causing cuts in essential government-run infrastructure and technology programs; interest rates skyrocketed, private investment stalled, fledgling industries failed, and prices of export commodities plummeted. Africa was no longer on the path toward development and was no longer self-sufficient.

With Africa in a weakened state, food aid pouring in from the West further eroded Africa’s markets and production. African farmers quickly realized that their locally produced grain could not compete against the artificially low prices of subsidized grain from Western nations. Farmers attempted to grow other crops to generate income, but subsidies continued to push local farmers out of production. With millions of people slipping into extreme poverty and a destroyed agricultural system, nations became dependent on Western food aid to survive.

Dependency on food aid perpetuates the cycle of poverty. First, it destroys the domestic market for locally grown grain because grain from food programs is either cheaper than domestic

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34 Walden Bello The Food Wars 70 (Verso 2009).
35 Id. at 71.
36 Id. at 72.
37 Id. at 76.
38 Id.
39 Id.
40 Id. at 77.
41 Dambisa Moyo Dead Aid 49 (Farrar, Straus and Giroux 2009).
grain or free.\textsuperscript{42} With local grain prices unable to compete with the artificially low prices of grain from food programs, demand for domestic grain is eliminated. This in turn causes a drop in domestic production, lost profits and eventually unemployment.\textsuperscript{43} These unemployed farmers are now dependent on food aid, along with the rest of the nation because it is no longer profitable to produce their own food.

Nations that receive food aid are also less attractive to foreign investors.\textsuperscript{44} Empirical studies have shown that as the amount of aid a country receives increases, the amount of foreign direct investment decreases.\textsuperscript{45} This is due to private investors’ lack of confidence in a country that is dependent on aid to survive.\textsuperscript{46} Without investment, the economy shrinks even further, leaving the nation without agricultural production or investments.

With the economy essentially destroyed, aid becomes institutionalized\textsuperscript{47} and nations become aid-dependent.\textsuperscript{48} The likelihood of economic development is low because aid chokes the economy and slows growth, which is the reason why the nation became aid-dependent in the first place.\textsuperscript{49} Leaders also begin to expect aid and even think of it as “permanent income.”\textsuperscript{50}

\textsuperscript{42} Walden Bello \textit{The Food Wars} 76 (Verso 2009).
\textsuperscript{43} Id. at 73.
\textsuperscript{44} Dambisa Moyo \textit{Dead Aid} 49 (Farrar, Straus and Giroux 2009).
\textsuperscript{46} Id.
\textsuperscript{47} Dambisa Moyo \textit{Dead Aid} 36 (Farrar, Straus and Giroux 2009).
\textsuperscript{48} Id. at 66.
\textsuperscript{49} Id. at 49.
\textsuperscript{50} Id. at 36.
means of development, the nation continues to receive food aid, trapped on a path of dependency, poverty and hunger.\textsuperscript{51}

**Food Assistance Convention**

The Food Assistance Convention is the only binding international treaty related to food aid.\textsuperscript{52} The United States, the European Union, Canada, Japan, Finland, Switzerland and Denmark have signed and ratified the treaty, which took effect on January 1, 2013.\textsuperscript{53} The treaty states that nations should:

(i) provide food assistance only when it is the most effective and appropriate means of addressing the food or nutrition needs of the most vulnerable populations;

(ii) provide food assistance, taking into account the long-term rehabilitation and development objectives of the recipient countries, while supporting the broader goal of achieving food security, whenever appropriate;

(iii) provide food assistance in a manner that protects livelihoods and strengthens the self-reliance and resilience of vulnerable populations, and local communities, and that prevents, prepares for, mitigates and responds to food security crisis;

(iv) provide food assistance in such a way as to avoid dependency and minimise direct and indirect negative impacts on beneficiaries and others;

(v) provide food assistance in a way that does not adversely affect local production,

\textsuperscript{51} Id.
market conditions, marketing structures and commercial trade of the price of essential goods for vulnerable populations; (vi) provide food aid in fully grant form, whenever possible;\textsuperscript{54}

The overarching goal of the Food Assistance Convention is to achieve food security by utilizing the most effective and appropriate strategies possible.\textsuperscript{55} The treaty encourages participating nations to deliver aid in the form of grants and cash, so that local and regional stocks of food can be used first.\textsuperscript{56} This will reduce costs, ensure a timely delivery, and promote the use of culturally acceptable food.\textsuperscript{57} The language of the treaty implies that other forms of food assistance, such as commodity-based food assistance, are acceptable under appropriate circumstances; however, grants and cash are the preferred methods of aid.\textsuperscript{58} The treaty also explicitly states that food aid should not be used with the intention of expanding markets for the donor country.\textsuperscript{59}

\textbf{Discrepancies Between Domestic and International Policy}

The current U.S. policy for food assistance under the Food for Peace Act is not compliant with the provisions set forth in the Food Assistance Convention, which the U.S. is obligated to follow. The first discrepancy between the policies is that the Food for Peace Act clearly states its intention to, “finance the sale and exportation of agricultural commodities,”\textsuperscript{60} and select nations for certain aid programs based upon, “[t]he potential to provide a viable and

\textsuperscript{54} Food Assistance Convention, \textit{adopted} April 25, 2012, U.N.T.S.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} Food for Peace Act 7 U.S.C. § 1701(b) (2008).
significant market for United States agricultural commodities or products of United States agricultural commodities.\textsuperscript{61} This is contradictory to the principles of the Food Assistance Convention, which states that food aid cannot be used to promote market development goals.\textsuperscript{62} Under the Food Peace Act, the policy regarding market expansion fundamentally contradicts the policy outlined by the Food Assistance Convention.

Another discrepancy between current U.S. policy and the Food Assistance Convention is that the Food for Peace Act is primarily focused on contributing aid in the form of agricultural commodities. Although there are provisions in the law that allow for the distribution of aid in the form of cash,\textsuperscript{63} the majority of aid distributed is still grain.\textsuperscript{64} The Food Assistance Convention states that, whenever possible, aid should be given in grant or cash form.\textsuperscript{65} U.S. policy is concerned with disseminating agricultural goods, even if it is not the best form of aid for the circumstances for which aid is provided. Canada and the EU, entities that produce and export a significant amount of agricultural goods like the U.S., contribute a mixture of agriculture commodities and cash. Unlike Canada and the EU, the U.S. contributes aid predominantly in the form of agricultural commodities and contributes very little aid in other forms, such as cash.\textsuperscript{66}

\textsuperscript{61} Id. at § 1737(B).
\textsuperscript{62} Food Assistance Convention, adopted April 25, 2012, U.N.T.S.
\textsuperscript{65} Food Assistance Convention, adopted April 25, 2012, U.N.T.S.
Canada’s Food Aid Policy

Like the U.S., Canada’s economy relies heavily on agriculture. However, Canada’s food aid policies are not a crutch for domestic agribusiness. Canada signed and ratified the Food Assistance Convention on November 23, 2012, and already boasts a policy that is consistent with the treaty.\(^\text{67}\) The Canadian International Development Agency (“CIDA”) formulates its assistance plan based on short-term, medium-term, and long-term development goal benchmarks determined on an individual basis.\(^\text{68}\) The Agency works with the nation’s government to ensure Canada’s aid is supportive of existing development goals set out by the recipient nation’s government.\(^\text{69}\) Development strategies take a comprehensive approach, not a one-size-fits-all solution, with activities that are proven to be effective.\(^\text{70}\) These strategies have two overarching goals: to ensure food security and promote economic development.\(^\text{71}\) To achieve these goals, CIDA focuses on sustainable agriculture development by investing in local farmers, most of whom are women, strengthening economic foundations and local business, and investing in research and development.\(^\text{72}\) Most recently, Canada’s government announced that it will work more closely with the private sector in order to prepare developing

\(^{67}\) Food Assistance Convention, adopted April 25, 2012, U.N.T.S.


\(^{69}\) *Aid Effectiveness Agenda* Canadian International Development Agency (June 21, 2012) available at http://www.acdi-cida.gc.ca/acdi-cida/ACDICIDA.nsf/eng/FRA-825105226-KFT.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id.
nations for foreign direct investments and further strengthen the private sector and the economies of those nations.\textsuperscript{73}

**European Union’s Food Aid Policy**

Another major exporter of agricultural commodities is the European Union (“EU”). The EU, like Canada, has adopted a policy on food assistance that upholds the principles of the Food Assistance Convention, which it signed and ratified on November 28, 2012.\textsuperscript{74} The European Consensus on Humanitarian Aid provides aid based on detailed global needs assessments and utilizes a multifaceted approach to international aid.\textsuperscript{75} The EU’s policy makes use of local and regional resources, which is not just cost effective but also helps to stimulate the local and regional economies and ensures that existing food stocks are not wasted.\textsuperscript{76} Furthermore, the EU also considers using non-food aid methods, such as monetary aid and vouchers.\textsuperscript{77} Importantly, the EU’s policy recognizes member states’ responsibility to, “ensure that aid delivered represents the best available option and does the job it is intended to do,”\textsuperscript{78} in addition to being well-tailored to the unique needs of the crisis being addressed and the needs of those being helped.\textsuperscript{79}


\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} Id.
Reports of Decreasing Hunger in the World

The Food and Agriculture Organization of the United Nations ("FAO") reported that malnutrition in the world is decreasing. The number of undernourished people in the world has decreased from being 19 percent of the world population in 1990-1992 to 12 percent of the total population in 2010-2012. This is a decrease of over 130 million people in 20 years. The FAO stated that reaching the UN Millennium Goal of decreasing hunger in the world by half by 2015 is possible if the appropriate measures are taken.

According to a study completed by the United States Agency for International Development in 2009, the top five nations receiving the most food assistance under the Food for Peace Act were: Sudan, Ethiopia, Zimbabwe, Chad and Kenya. All five nations have experienced a decline in the percentage of undernourished people in the population from 1990-2010. Ethiopia and Chad reported the most improvement, with the percentage of undernourished people dropping 28 percentage points in each nation over the 20 year period. Overall, the total percentage of undernourished people in these nations dropped from 53 percent in 1990 to 37 percent in 2010. These nations, like much of Africa, have been a major destination for food aid for the past several years.

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81 Id.
82 Id.
85 Id.
86 Id.
87 Id.
decades. These statistics show that the U.S.’s commitment to providing food aid to nations facing food insecurity contributed to saving lives and significantly reduced hunger and malnutrition in several African countries.

The U.S., keeping with the goal set out by the UN to reduce hunger in the world by half from 1990 to 2015, has consistently been the world’s top contributor of international food assistance. Under the Food Assistance Convention, the U.S. contributed over 51 percent of total food assistance received under the new convention. In previous years, the U.S. was the top contributor to the World Food Program, donating 45.2 percent of all food received under the UN program from 1996-2010. Food assistance from the U.S. program Food for Peace has fed 3 billion people since its inception in 1954 and assistance from the World Food Program (to which the U.S. is a top contributor) has fed over 1.4 billion people since 1963. In the past half century, the U.S. has been a leading nation in the fight against hunger.

The U.S. has consistently been the top contributor of food aid to the world’s developing nations largely because it has an enormous surplus of grain. In 2010 and 2011, the U.S. supply of

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90 Id.
91 Id.
94 Thomas J. Marchione, Foods Provided through U.S. Government Emergency Food Aid Programs: Policies and Customs Governing Their Formulation,
grain was recorded at 479.50 million metric tons, but domestic demand only accounted for 332.97 million metric tons. During the 1980’s, surplus was so large that the U.S. Department of Agriculture was forced to store food in warehouses and caves. During the 1950’s, the surplus cost taxpayers one million dollars per day in storage fees. It was during this time that the Agricultural Trade Development and Assistance Act of 1954, a precursor to the Food for Peace Act, was created to address the issue of surplus grain. As previously discussed, the provisions of this law enabled the U.S. to relieve its burden of agricultural surpluses by shipping it overseas to foreign markets.

Although the percentage of undernourished people in the top five nations receiving food aid (Sudan, Ethiopia, Zimbabwe, Chad and Kenya) decreased in the past 20 years, these nations are still facing food insecurity. It is true that food programs are feeding people in these nations, but these programs are not addressing the fundamental causes of food insecurity in the region, such as low-productivity and a lack of resource diversification. Even though

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98 Id.
99 Id.
101 The Elimination of Food Insecurity in the Horn of Africa Inter-Agency Task Force on the UN Response to Long-Term Food Security, Agricultural Development and Related Aspects in the Horn of Africa (2000).
102 Id.
the percentage of hungry people in several African countries is decreasing, food aid is not helping these nations become more equipped to feed themselves.\textsuperscript{103} Though the U.S. is a top contributor of commodities for food aid programs,\textsuperscript{104} its international counterparts are moving away from this type of aid for more the effective strategies outlined in the Food Assistance Convention.\textsuperscript{105} The policy of the U.S. is more akin to a support system for agribusiness than to aid for the hungry.\textsuperscript{106}

**Conclusion**

United States policy for international food aid under the Food for Peace Act is primarily concerned with expanding markets and providing an outlet for agricultural commodity surpluses. This policy has harmful effects on the economies and agricultural sector for recipient nations, such as damaging local markets and production. It can lead to cyclical poverty and food insecurity. This policy, Public Law 480, is in contradiction to the standards of the Food Assistance Convention, which the U.S. committed to uphold. Significant changes must be made to U.S. policy in order to comply with international doctrine on food aid.

Other entities, such as Canada and the European Union, have policies in compliance with the Food Assistance Convention. Canada,
the EU, and the U.S. have similar agricultural needs; however, the
U.S. has fundamentally different policy initiatives compared to those of Canada and the EU. These international actors are able to meet their agricultural needs while fulfilling their commitment to the Food Assistance Convention. On the other hand, the U.S. is neither in compliance with the treaty nor is it serving the interests of the world community.

Although the level of malnutrition has been decreasing in many nations that have been the top recipients of aid under the Food for Peace in the past 20 years, these nations are not moving towards becoming self-sufficient with regard to food supply. These nations still rely on foreign aid to fulfill their food necessities, and agricultural development is still lacking. The Food Assistance Convention strives to achieve food security without dependence on other nations, and there still remains significant progress to be made to achieve this goal.

The United States depends on international aid policy, such as the Food for Peace Act, to relieve its agricultural surplus burden caused by subsidies and overproduction. This policy tends to cause cyclical poverty and hinders development in the recipient nations. Development goals will not be successful if such policies persist, because these policies significantly inhibit development. Successful development can only occur once a comprehensive approach to aid is achieved.
We the People of the United States, in Order to Form a More Perfect Union, Say...“I Do.”

Marriage Equality: Judicial Scrutiny vs. Public Policy Effectiveness

Zoey M. Surdis

I. Introduction

As the millennium unfolded and social mores shifted from an emphasis on racial equality as the primary civil rights issue of the 21st century, sex discrimination, and more specifically, the issue of marriage equality, have come to the vanguard of anti-prejudice campaigns in the United States of America. It is insufficient to consider the issue of gay marriage through a strictly social lens; society is complex and often realigns its attitudes and protocols, but there are certain beliefs, written or conventional, that are timeless. Of these societal codes, deeply engrained and inestimable to that of the conjunction between male and female, is marriage. United States federal law states that marriage refers to “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”¹ In America, an individual is granted the option to legally engage in the act of marriage, yet, one is denied the option to choose their spouse in regards to their sex; marriage is strictly a

heterosexual phenomenon at the federal level. In the anticipation of accomplishing a legal discourse that addresses the revision of current marriage law to accommodate marriage equality for same-sex couples, there have been heated altercations, as well as strategies and campaigns, to dissolve discrimination of same-sex marriage in America. Thus, I propose my own model of the most effective and probable legal method of attaining complete marriage equality for same-sex couples via the United States Supreme Court. In this article, the word effective signifies that in comparison to all other possible legal action that could be taken, this is the most influential legal change, which will solidify same-sex marriage in the same legal realm as heterosexual marriage unions. The journey towards complete marriage equality goes beyond striking down the Defense of Marriage Act\(^2\) and other public policy measures that have been implemented at state levels. The most effective technique in acquiring marriage equality is through the judicial system: being deprived of marriage based on one’s sex is a violation of the Fourteenth Amendment.

The realm of public policy is effective; it can implement constructive, positive change at the state level in favor of marriage equality. However, in offering a comprehensive analysis of same-sex marriage, and a model for effective legal change, it is insufficient for this change to occur through solely state level legislation. Extensively, public policy conceivably is delineated as a composition of legal allowances and procedures in regards to a specific matter disseminated by contending interest groups and politicians.\(^3\) A key facet of public policy is regulation and how society, at any level,

\(^2\) Id.  
performs a legal measure. In regards to same-sex marriage, there are numerous ways in which public policy can manipulate a same-sex couple’s daily life, concerning the benefits and treatment they receive from the government. Specifically, a state’s voting process and system of public policy acquisition chiefly supplies a more direct method or representation of the people’s compulsions and requirements in a single state. Yet, in a country with fifty states, only nine of them have legalized same-sex marriage. Such a number displays the subjugation of same-sex couples in the remaining forty one states; state wide public policy measures do not permeate alternative state lines. Thus, marriage equality is not most effectively reached at a state level; rather, a universal, federally mandated United States Supreme Court decision in favor of same-sex marriage is the only method in activating complete, prompt, and adequate legal change. However, this does not mean that public policy is ineffective at the state level; relatively, for a timely legal change to occur over all fifty states, a United States Supreme Court decision in favor of invalidating the same-sex marriage ban must be reached.

In delineating my construction of an argument that guarantees a solution for a federally authorized decision in support of same-sex marriage, I initially discuss the legal significance of marriage, and the function of public policy and judicial examination in regards to its application both federally and among the states. Next, I examine past and future judicial cases concerning same-sex marriage, subsequently shifting to an inspection of U.S. Supreme Court cases regarding to sex discrimination. Furthermore, after

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dissecting cases that directly connect to sex discrimination, the article considers previous Supreme Court Cases relating to the unequal access to marriage, which specifically argue that the Equal Protection Clause of the Fourteenth Amendment invalidates such laws. Thus, since I establish that sex discrimination is a violation of the Constitution, and since it has been determined previously that the unequal access to marriage violates the Constitution as well, I conclude that the most effective means of attaining same-sex marriage legalization encompasses this argument.

II. Marriage: The Legal Definition and Cultural Characterizations

Marriage is an officially authorized indenture composed by a specific state; those who are married obtain certain benefits under state law as well as federal law. The marriage contract solidifies many of these benefits, which are supportive of same-sex couples in states that legally permit it. Hitherto, same-sex couples are rejected the benefits that a heterosexual couple collects at a federal level in the United States of America; this is a result of the passage of the Defense of Marriage Act (DOMA). Although the federal government does not recognize gay marriage, a same-sex couple can journey to states where marriage equality is legal. In certain instances, a same-sex couple married in a state where gay marriage is legal can travel to states, such as New York, that will regard them as a legal married couple regardless of not performing same-sex marriage ceremonies.

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8 Id.
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In the state itself. In addition, if a same-sex couple marries outside the borders of America in a location where it is legal to do so, under the federal DOMA, as well as under state implemented mini-DOMAs, this marriage will not be recognized as legitimate.

In the United States of America, same-sex couples are denied a total of 1,138 rights and benefits at the federal level under the marriage contract, which range from joint taxation advantages to Social Security eligibility. Depending on the state, civil unions, or domestic partnerships, correspond as a valid counterpart of marriage for same-sex couples. In order to wed in the United States of America, each couple must act in accordance with the state’s official conditions to do so; it is often these diktats that inhibit the acknowledgement of marriage equality in a state. This does not mean that same-sex couples do not receive statewide benefits; it depends on the laws of the state. Rather, they are currently being denied all federal benefits that a heterosexual couple receives when they are recognized as a federally married couple. Thus, such subjugation limits them from thousands of rights that heterosexual couples have.

III. The Defense of Marriage Act

The Defense of Marriage Act, state laws, and the implementation of prejudiced cultural mentalities in the United States of America in regards to the legitimacy of same-sex marriage

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13 Id.
denies same-sex couples legal access to marriage itself, and in turn, to federal assistance. DOMA, signed into law by President Bill Clinton in 1996 is exclusive; it denies federal benefits to same-sex couples, and strictly restricts marriage to heterosexual couples.\textsuperscript{15} In addition to the federal law, many states passed their own Defense of Marriage laws as well. States are capable of implementing their own mini-DOMAs, as well as legislation in favor of homosexual marriage.\textsuperscript{16} Yet, when a legally married couple of the same gender crosses states lines to a new state where it is judged as illegal, their marriage is void. It is imperative to consider why states have not legalized marriage equality; there are many dimensions to such reasoning. Sociologically, there is a historical mentality and prejudice towards homosexual people in the United States of America. Lesbian and Gay erudition did not formally subsist as a field of study until the 1980s in the United States.\textsuperscript{17} Considering this realm of academia was formalized three decades ago, it is evidently a modern phenomenon in America; it will take a large backing and support in order to drive the movement forward towards complete equality.\textsuperscript{18} Religiously, in the political dialogue regarding the legalization of same-sex marriage, various religious opposition groups deem such a relation to be morally problematic and entrenched in deep-rooted religious disagreement over the violation of traditional marriage principles in accordance to their religion. These principles articulate the act of marriage to stringently be between a man and woman; violating this code is considered sinful.

\textsuperscript{15} Id.
\textsuperscript{17} George E. Haggerty, Gay Histories and Cultures: An Encyclopedia xi (2000).
\textsuperscript{18} Id.
on religious grounds. Such religious and moral arguments have augmented the impassioned quarrel against legalization proponents.

IV. The States and the Contract of Marriage

Of the fifty states in the United States of America, only nine of them (Iowa, Connecticut, Maine, Maryland, New Hampshire, New York, Washington, and Vermont) have passed state laws in support of same-sex marriage. At this point in time, seventeen percent of Americans reside in a state that has legalized gay marriages or recognizes out of state gay marriages. Delaware, Illinois, Hawaii, Rhode Island, and New Jersey acknowledge the use of civil union; California, Oregon, and Nevada utilize domestic partnerships, and thirty nine percent of Americans reside in a state with gay marriage, civil unions, and domestic partnerships. Mainly, forty two percent of the United States public resides in a state with protection for gay couples. This goes to show that there have been immense strides in the fight towards marriage equality; yet, there are states that still very much deprive same-sex couples of their rights and benefits that arise with the state and federal contract of marriage.

In view of the Tenth Amendment of the United States Constitution, which states that “the 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,” explains that states have the power to decide laws and protocols not written.

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20 Id.
21 Id.
22 Id.
in the Constitution by their own regard. In this sense, as much as states have the ability to legalize same-sex marriage, they are just as capable of preventing and renouncing the rights given to married same-sex couples. Thus, it has legally been established that states have autonomy over their choice to allow and to invoke marriage laws, and which, if any, rights and benefits are assigned under those marriage contracts, and more specifically, to whom.

The Full Faith and Credit Clause in Article 4 Section 1 of the Constitution states that,

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

When examining this Clause, the peculiarity of court-mandated judgments in comparison to the effects of a public policy measure is highlighted. This means that when a married couple receives recognition from a judicial court on some sort of benefit, that benefit might not apply to another state’s laws on which benefits they might receive. However, when the couple travels to that other state, they should be granted those rights as a result of the judgment of the Full Faith and Credit Clause. Essentially, the state where the couple is owed some right, even if they conflict with the laws implemented where the judgment occurred, are restricted from neglecting the other state court’s judgment. Thus, it is compulsory that states

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23 U.S. CONST. amend. X.
24 U.S. CONST. art. IV, § 1.
26 Id.
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recognize such judgments despite being contrary to their viewpoints, as a result of the implementation of the Full Faith and Credit clause. Unfortunately, when it comes to issues of marriage, a state court is not required to make any judgment on the matter, and rather, the same-sex couple is under the jurisdiction of the legal system of the state. In this sense, the acknowledgement of one state’s marriage laws in another becomes a resolution of public policy. It is important to note that public policy measures in one state might completely omit another state’s marriage laws, but under the Full Faith and Credit Clause, the first state’s court must carry out in practice the judgment in a lawsuit that occurred in the second state.

In court, a state can select to decline the acknowledgement of out-of-state marriages; this is especially evident in circumstances with states that maintain a mini-DOMA. In spite of the Full Faith and Credit Clause, state legislatures that have strict mini-DOMAs against the protection of out-of-state marriages in their own state, can, and often, decline to recognize marriages that infringe on public policy measures in the state. The unequivocal declaration of such measures against this recognition has posed to be a considerable setback for same-sex couples choosing to wed in states where it is legalized, and who then return to their home state where such statutes explicitly reject their union. Essentially, these mini-DOMA

28 U.S. CONST. art. IV, § 1.
statutes cause states to disallow the recognition of these marriages. It is therefore evident that the location where a same-sex couple resides greatly controls the benefits and rights they receive from the state they live in. From its creation in 1996 to the year 2010, forty-two out of the fifty U.S. states have implemented mini-DOMAs in their state legislature.\(^{31}\)

While states possess power of their own right, it is important to note Article VI of the United States Constitution, which states,

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.\(^{32}\)

Thus, the “supreme law of the land,” by means of the Supreme Court and the Constitution it defends, takes precedent over statewide constitutions.\(^{33}\) Interestingly, despite these explicit powers granted to the federal government, the Defense of Marriage Acts in state public policy measures outweighs the Full Faith and Credit Clause of Article IV. As noted in the Supreme Court case *Marbury v. Madison* (1803), Constitutional law eclipses general legislation\(^ {34}\); this legislation includes the Defense of Marriage Act.\(^ {35}\)


\(^{32}\) U.S. CONST. art. VI.

\(^{33}\) *Id.*

\(^{34}\) Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

V. History of Same-Sex Marriage

Undisclosed homosexual acts among permissive adults was sanctioned for the first time in the state of Illinois in 1962; twenty years later, Wisconsin pioneered the movement of overriding sex discrimination by prohibiting prejudice due to one’s sex; only nine years earlier was homosexuality eradicated from the American Psychiatric Associations list of authorized mental disorders.\(^{36}\) It was not until the millennium came about that the state of Vermont lawfully acknowledged civil unions among same-sex couples.\(^{37}\) An important lawsuit, which served as the instigator of the marriage equality debate in America, was *Baehr v. Lewin* (1993). This lawsuit, which ultimately led to the passage of a Hawaiian state amendment in 1998, favored heterosexual marriage.\(^{38}\) The case, which arose in 1990 when three homosexual couples disputed that the state’s restriction of same-sex marriage went against the Constitution, eventually lead to the landmark 1993 decision, when Hawaii judged that excluding homosexual marriage was unfair.\(^{39}\) Unfortunately, this decision, along with a court trial that followed in 1996 on the same premises, created intense social repercussions from homophobic organizations and individuals, which in turn caused the passage of a state amendment excusing same-sex couples from the same equal protection that heterosexual couples receive. This decision signified a shift in the state legislature by labeling marriage to be exclusive to heterosexual couples. A year later, in the case

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\(^{37}\) *Id.*


\(^{39}\) *Id.*
The court determined that Hawaii’s constitution invalidated same-sex marriage.40

The *Baehr v. Lewin* lawsuit instigated a countrywide plea towards protecting marriage as a union between a man and a woman. This federal law would be amended three years after the initial *Baehr v. Lewin* ruling.41 On September 21, 1996, the Defense of Marriage Act was enacted after being voted on in Congress and later signed by President Bill Clinton. According to the Defense of Marriage Act, marriage is described as a lawful relationship between opposite sexes at a federal level, and also claims that diverse states do not need to acknowledge out of state same-sex marriages.42

Currently, Sections 2 and 3 of the Defense of Marriage Act are being heavily debated. Section 2 states,

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word `marriage' means only a legal union between one man and one woman as husband and wife, and the word `spouse' refers only to a person of the opposite sex who is a husband or a wife.43

Essentially, this Section allows states to rebuff distinguishing legitimate civil marriages of same-sex couples. Section 3, which states that

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship

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40 *Id.*
42 *Id.*
between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationships, denies same-sex couples over one thousand federal benefits and protections. Generally, one can view Section 2 as setting aside state influence and control, and Section 3 as serving as a definition of marriage. Petitioners have challenged the Defense of Marriage Act, and it has been deemed unconstitutional in federal courts. On March 27, 2013, the United States Supreme Court will hear the case *Windsor v. United States*, which directly seeks to strike down the law.

There are only thirteen states that do not have state laws in their governments that make marriage exclusive to opposite sexes. From the time of the Defense of Marriage Act’s passing in 1996 to 2004, thirty-nine states voted to amend their constitution to limit marriage to heterosexual couples. Such a concept is perplexing considering the implementation of the Full Faith and Credit Clause in the United States Constitution and the lack of attention and scrutiny the Clause receives. The Full Faith and Credit Clause is crucial to the greater functioning of America’s justice system considering it hinders citizens from absconding a state’s judgment to escape to an alternative state; an individual does not divert the imposition of a decision that was resolved somewhere else. Yet, the Defense of Marriage Act still isolates same-sex couples and their protection under the United States Constitution. Is this equal

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47 *Id.*
protection under law? Essentially, this Act dissolves the Full Faith and Credit Clause model in the areas of a state recognizing “acts, records, and proceedings.”

VI. The Future: U.S. Supreme Court Cases Involving Same-Sex Marriage Legalization

Edie Windsor and Thea Spyer were engaged in 1967 and married in Canada in 2007; unfortunately, Spyer died in 2009. According to federal tax law, a wife or husband can acquire the assets of their deceased significant other without paying certain taxes. In New York, the state they resided in, the women’s marriage was considered and recognized as a marriage union, but because of DOMA, the federal government did not acknowledge their relationship as a legitimate marriage and Windsor was deprived of protections from the tax law when acquiring Spyer’s assets. In the lawsuit *Windsor v. United States*, the defendant’s claim is that Section 3 of the Defense of Marriage Act is unconstitutional. Essentially, the Act favors heterosexual couples over same-sex couples. The Second Circuit Court found DOMA to be unconstitutional since it discriminates against gay and lesbian people; this opinion is incredibly significant in regards to same-sex marriage discrimination.

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48 U.S. CONST. art. IV, § 1.
50 Id.
51 Id.
53 Id.
In 2008, through its referendum process, California passed Proposition 8, which made same-sex marriage illegal in the state by amending its constitution to claim that marriage was only valid between a male and a female.\(^{54}\) Two same-sex couples filed a lawsuit against Proposition 8 and argued that it violated the Equal Protection Clause of the Fourteenth Amendment. Initially, the District Court believed it violated the United States Constitution, and the U.S. Court of Appeals ultimately supported this judgment for the Ninth Circuit. In his opinion, Chief Justice Vaughn Walker stated, “indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples.”\(^{55}\) This case has been appealed to the United States Supreme Court and will be heard on March 26, 2013.\(^{56}\) It is this case on which the grounds used in previous Supreme Court Cases, which will be described in the following sections, can be utilized in favor of affirming same-sex marriage nationwide.

**VII. Sex Discrimination and Same-Sex Marriage**

Denying same-sex couples the rights and benefits they receive under the contract of marriage, as well as the right to marry in the first place, is an issue of sex discrimination on the basis that they are being denied legal rights.\(^{57}\) Yet, an individual’s sex does not impact the workings of the law itself; a gay man is still allowed to wed, just to an individual of the opposite sex. Sex discrimination

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\(^{55}\) Hollingsworth v. Perry, 704 F. Supp. 2d at 921.


occurs when an individual is treated in a hostile manner because of their sex, and this antagonism can manifest in ways that range from being paid, to being promoted or demoted in the workplace.\textsuperscript{58} The outlawing of same-sex marriage is sex discrimination, not the discrimination of sexual orientation in assessing the law.\textsuperscript{59} It is also important to keep in mind that sexism is not required to discriminate against someone based on his or her sex; homophobia is just as much sex discrimination as sexism is. Opponents of same-sex marriage have claimed that banning gay marriage is not sex discrimination because it is not exclusive to one’s sex, and rather impacts both genders. Such thinking is legally prejudiced and requires careful scrutiny from a social, as well as a lawful perspective.

In a group of three people, two of which are of the same-sex, and the other is of the opposite sex, the individual of the opposite sex has the legal right to marry one of the two individuals of the same-sex, but the two individuals of the same-sex cannot marry each other. Essentially, the individuals are denied their rights to marriage solely because they are of the same gender.\textsuperscript{60} This refusal exhibits the fundamental nature of sex discrimination by disallowing both sexes from marrying the same sex. It is important to note that even though the Fourteenth Amendment of the United States Constitution does not explicitly state anything about sex discrimination, as a result of successive lawsuits and legislation, its extent and capacity for the interpretation of the law has shifted as a

\textsuperscript{58} Id.


result of amendments to legislation.\textsuperscript{61} Considering this idea, one cannot view the Fourteenth Amendment of the Constitution with its original text; it is important that its original meaning is, of course, considered, but by no means its only process of interpretation. Rather, it is not an outlandish claim to say that sex discrimination is unconstitutional, and that denying same-sex couples the rights to marry is, in fact, sex discrimination. Sex discrimination is very much a tangible, legal doctrine and is present and pervades our United States Constitution, which is evident in previous Supreme Court decisions. Thus it is effective to use the premise of sex discrimination to argue that a ban on gay marriage is illegal because it violates the Fourteenth Amendment of the Constitution.

Sex discrimination has been constitutionalized in a case regarding an Idaho Probate Code, which held a provision that conferred partiality to males as opposed to women of identical privileges in regards to who can have stake over a deceased individual’s estate.\textsuperscript{62} Sally and Cecil Reed, two divorced Idaho residents sought to be deemed the administrators of their dead, adopted son’s estate. Cecil, the father, was appointed as the administrator based on the law, and Sally, in turn, chose to take this decision to court.\textsuperscript{63} In the Supreme Court case 	extit{Reed v. Reed} (1971), unanimously, the Court judged that the Idaho Probate Code violated the Equal Protection Clause of the Fourteenth Amendment on the basis that it was sex discrimination because the law dissimilarly behaved toward males and females; essentially, it gave preference

\textsuperscript{61} Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 22 Ill. 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971).
\textsuperscript{63} Reed v. Reed, 22 Ill. 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971).
to males in being appointed administrators of estates.\textsuperscript{64} This is an instance when the court utilized the Equal Protection Clause to expose sex discrimination. Sally Reed was denied a right to her son’s estate solely because she was female.\textsuperscript{65}

\textit{Reed v. Reed} (1971) is an instance of the law favoring one sex over another sex.\textsuperscript{66} In the legal realm of marriage equality, this is not an adequate argument to be used in showing how the same-sex marriage ban is sex discrimination. Rather, \textit{Reed v. Reed} is useful in explaining how sex discrimination in general can be divulged as an illegal act on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{67} Thus, the Supreme Court of the United States found that sex discrimination could be deemed unconstitutional. This idea is imperative in judging the same-sex marriage ban to be illegal. Gay and lesbian individuals are being denied rights that other American citizens possess from the contract of marriage because they desire to wed with an individual of the same-sex. Again, this illustrates that even though two people of the same-sex are in a relationship, and a third individual of the opposite sex happens to be present, the third individual of the opposite sex can wed each of those people of the same-sex, but they cannot marry each other. This epitomizes sex discrimination in the sense that genders as a whole are being denied their rights.

In the Supreme Court Case \textit{Craig v. Boren} (1976), originating from an appeal from the United States District Court for the Western District of Oklahoma, a young adult male and a vendor claimed that

\begin{flushright}
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\end{flushright}
Oklahoma’s drinking law was discriminatory. Males under the age of twenty-one were unable to buy beer, while females purchasing beer were allowed to do so at the age of eighteen. They argued that this was sex-based discrimination that rebuffed the equal protection of the state law. The state had made such a law as a result of “statistical evidence” that provided the state with limited reasons for implementing such a law. The Court found that the “statistical evidence” the proponents of the law utilized was not enough of a reason to regulate the age of drinking based on one’s sex. Thus, they determined that the Oklahoma law had violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Court, in a seven to two judgment, considered the state law to be unconstitutional on the grounds that it was gender discrimination. The statistics provided by the state were inadequate displays of the connection between traffic precautions and the law. Thus, by implementing different drinking ages for females and males, the Oklahoma statute was deemed to be unconstitutional. It is important to consider the statistical evidence aspect of this case. The Court found that there was an inadequate amount of evidence to help the state prove their point that drinking was related to an immense increase in drunk driving. Essentially, the statistical evidence was weak. As noted previously, forty two percent of Americans live in a state where same-sex marriage is protected in a certain manner. This is grander than the scope of the single state of Oklahoma; rather, we are now discussing the entire

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69 Id.
70 Id.
population of the United States of America. Accordingly, there is empirical evidence in revealing that homosexuality increasingly pervades American life. According to an ABC News-Washington Post poll released in March of 2013, after asking a group of Americans if same-sex marriage should be legalized, 58 percent of Americans voted that it should be. This is over a 20 percent increase in public approval of same-sex marriage legalization from a decade ago. This divulges that the cultural mentality in support of gay rights is very much augmenting in the minds of Americas, more than can be said for the state of Oklahoma in regards to underage drinking matters. It should be noted that alcohol consumption is not being equated to the contract of marriage in this review; rather, this statistic divulges that the Fourteenth Amendment can be used to deem sex discrimination as unconstitutional, and thus, should and can be used in the argument in favor of marriage equality as well.

After reviewing these two cases, it is important to reiterate how sex discrimination is applied in regards to the ban on same-sex marriage, despite it not favoring one gender over another. This viewpoint is incredibly narrow, and disregards the original meaning of sex discrimination. Sex discrimination is the unfair treatment of an individual based on their sex. Gay people are denied their rights to marry because of their sex since, for example, as a man, he cannot marry another man, and vice versa in regards to lesbian women, thus denying them thousands of federal benefits that are enacted with the union of marriage. It is accurate that homosexual

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73 Id.

individuals can get married, just to people of the opposite sex, but it is unjust to deny them the right of marriage because they choose to do so with an individual of the same-sex. This is the exact definition of sex discrimination; Gays and Lesbians are being discriminated against because they will legally be denied benefits that a heterosexual, one male, one female, couple would receive.

VIII. The Fourteenth Amendment and the Ban on Same-Sex Marriage

There is a strong argument that the interdiction of same-sex marriage is illegal because such laws violate the Fourteenth Amendment. Section one of the Fourteenth Amendment of the United States Constitution reads,

all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\footnote{U.S. CONST. amend. XIV, § 1.}

The Fourteenth Amendment of the United States Constitution was implemented in 1868 and has enthused more court cases than any other stipulation in the Constitution.\footnote{14th Amendment Summary - What is the fourteenth amendment, American History From About, http://americanhistory.about.com/od/usconstitution/a/14th-Amendment-Summary.htm.} Most directly affecting marriage equality is Section 1, which disallows state governments from unrecognizing the people of their state “privileges or immunities” that are permissible as a result of being an American citizen.
citizen.\textsuperscript{77} It guarantees American citizens equal protection of the laws of the United States as well as due process. It is important to note that the Equal Protection Clause in the Fourteenth Amendment is exclusive to the action of the states, but that there is Fifth Amendment Due Process Clause that reads,

\begin{quote}
...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation,\textsuperscript{78}
\end{quote}

which applies to the nation as a whole. Once viewing the same-sex marriage ban from a Fourteenth Amendment, state perspective, it can and should be applied to the Fifth Amendment Due Process Clause.

In \textit{Loving v. Virginia} (1967), the Supreme Court applied the Equal Protection Clause to invalidate a law forbidding interracial marriage; this case was filed by an African-American woman and a white man who were indicted for breaking Virginia’s anti-miscegenation statute that specifically outlawed interracial marriage, after getting married in the District of Columbia.\textsuperscript{79} According to the Virginia statute, the couple was found guilty and sentenced to jail time for one year. The Supreme Court of the United States unanimously voted in favor of the couple, claiming that the statute was unconstitutional because it violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.\textsuperscript{80} This case overturned \textit{Pace v. Alabama} (1883) and thus terminated the ban on interracial marriage in the country.\textsuperscript{81}

\begin{footnotes}
\item[77] Id.
\item[78] U.S. CONST. amend. V.
\item[79] Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, 1967.
\item[80] Id.
\item[81] Pace v. Alabama, 106 U.S. 583. 1 S. Ct. 637; 27 L. Ed. 207.
\end{footnotes}
There has been heavy debate surrounding the concept that race and sex are dissimilar ideas; opponents of same-sex marriage claim that one cannot choose what color skin they possess and are simply born with it, whereas homosexual individuals make an active choice in deciding their sexual orientation. This article does not make an opinion regarding the similarities between race and sex. Rather, this article divulges that sex discrimination has been ‘unconstitutionalized’ under the Equal Protection Clause. Since the case *Loving v. Virginia*, it has been legally proven that the Supreme Court specifically implemented the circumstances, which in the words of Chief Justice Earl Warren, imply that

> The Fourteenth Amendment requires that the freedom of choice to marry not to be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual, and cannot be infringed by the State.\(^\text{82}\)

Thus, it is on these legal grounds that sex discrimination, as well as a ban on marriage equality, is a matter that can be invalidated using the Fourteenth Amendment.

**IX. Conclusion**

The cases *Reed v. Reed, Craig v. Boren, and Loving v. Virginia* demonstrate that laws that prevent recognition of same-sex marriage represent impermissible prejudice based on sex and should be struck down. This principle applies to the cases currently before the U.S. Supreme Court, *Windsor v. United States* and *Hollingsworth v. Perry*. These grounds illustrate the most valid, legal,

and most effective means of attaining complete marriage equality in the United States of America. As previously noted, striking down the Defense of Marriage Act would be incredibly beneficial to same-sex couples throughout the nation, yet not as profoundly effective as legalizing same-sex marriage completely. The United States is a nation rooted in the ideals of freedom and equality, and it is crucial that individuals are not harmfully differentiated, and in turn subordinated, as a consequence of their private convictions in regards to matters of personal love and intimacy. As citizens, same-sex couples face this dilemma and are deprived of thousands of benefits a heterosexual couple would receive because they are federally incapable of legally engaging in the act of marriage. This is not just a matter of public policy to be determined by voters or legislators of a particular state, but one warranting close judicial scrutiny under the constitutional principle of equal protection under law.
Mandatory Minimum Sentencing Drug Laws: A Time For Change?

Maddy Bortes

Mandatory minimum sentencing laws have noble intentions—to decrease crime rates by implementing a harsh sentencing time as a deterrent, to generally keep dangerous offenders off the streets by means of incapacitating them for prolonged periods of time, and to minimize discrepancies in criminal sentencing. Despite these intentions, these laws—now found in all 50 states—have not led to decreased crime and recidivism rates, but rather to an increasing gap between sentences for the economically subjugated and those that are able to hire private legal representation.1 This article will focus on drug crimes and mandatory minimum sentences, specifically tailored for narcotics.

Federal Sentencing Guidelines Versus Mandatory Minimum Sentencing Statutes

It is important to note the difference between sentencing guidelines and mandatory minimum sentences.2 The former, established by the bipartisan congressionally created Sentencing Guidelines Commission in 1981, provides guidance to judges.3

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3 Id.
Booker (2005)\textsuperscript{4} deemed the U.S. sentencing guidelines as merely advisory, not mandatory. Therefore, a judge may consult the guidelines at sentencing, but he may issue the defendant a sentence that is either above or below the guidelines if he sees fit. This allows for a personalized sentence that provides unique circumstances due consideration. For instance, if the defendant is a first time offender, if the crime was not violent, if the defendant was an accomplice or conspiring, or any other legitimate circumstances that would decrease the culpability of the defendant so as to not match the sentence put forth by the statute. This option afforded to judges in non-mandatory minimum sentence cases is critical because it provides the judge the authority to act as the final unbiased arbitrator of justice, able to bypass the prosecutor’s recommendations if he deems it so necessary. On the contrary, mandatory minimum sentences legally require the judge to issue the defendant the sentence set forth by the statute. At the onset this does not seem problematic or very different from the guidelines because the judge is simply sentencing within a legally required boundary. However, mandatory minimum sentencing statutes strip judges of their authority to act as the final checks on power by placing that authority in the sole hands of the charging prosecutor. Mandatory minimum sentencing statutes legally require judges to the sentence individuals to a significantly longer prison time than often advised by the U.S. sentencing guidelines, without room for consideration of mitigating circumstances.

The Reasoning Behind Mandatory Minimum Sentencing Statutes

Mandatory minimum sentencing statutes employ basic deterrence theory. When drawing up these statutes, lawmakers assumed that harsh penalties would effectively deter individuals from committing crimes, thus lowering crime rates. David Bjerk\(^5\) explains that the theoretical crime models employed by lawmakers when they determine the appropriate sentencing statutes assume that knowledge of “the probability of conviction and the sentence given at conviction” is available and accurate.\(^6\) Thus, in such a scenario, the cost-efficient method is increasing sentencing so it may serve as a deterrent, as opposed to focusing on individual convicted defendants. The problems with this method arise from the all too common lack of information. For example, the probability of conviction and the effectiveness of deterrence are not widely known either at the charging phase or before an individual commits a crime.\(^7\) When there is uncertainty about the conviction rate, prosecutors are incentivized to strengthen their cases with the only resources at their disposal—more charges, also known as “stacking,” and charging defendants under a statute that employs a mandatory minimum sentence, such as 18 U.S.C. § 924(c). Consequently, a simple burglary offence becomes a multifaceted endeavor. Two or three other charges are introduced because it increases the likelihood of a guilty plea—and thus, a win for the prosecutor.

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\(^6\) *Id.*

\(^7\) *Id.* at 591.
Judge Paul G. Cassell of the Judicial Conference of the United States spoke about the prevalence of this practice by prosecutors when he testified before the House Judiciary Committee. He explained that, “mandatory minimums are basically a charge-specific approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.”

Thus, the prosecutor can make the first and final call, because if the defendant accepts a guilty plea or is found guilty by a jury, the judge must sentence them to the mandatory sentence set forth by the statute the prosecutor chose to pursue. In most situations, prosecutors have the authority to pursue the charge they see fit, and to pursue several charges in hopes of strengthening their cases. That is a responsibility legislatures have accepted to provide prosecutors, trusting their judgments and their promise to uphold their oath.

However, it has been demonstrated that problems arise when mandatory minimum sentences are introduced. When this happens, judges are no longer at liberty to use their own valued judgments, to step in and ensure that the defendant’s journey through the criminal justice system is both fair and just. This discredits the relevance of the judge’s role in sentencing because the judge must apply the statute the prosecutor chooses to pursue.

Another aspect of mandatory minimum sentencing is the “same crime, same time” reasoning. “Mandatory minimum provisions typically use a limited number of aggravating factors to

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trigger the prescribed penalty, without regard to the possibility that mitigating circumstances surrounding the offense or the offender may justify a lower sentence.”

The reasoning behind this policy arises from the desire to decrease sentence length discrepancies across different jurisdictions. However, it has resulted not in fairer sentencing, but harsher sentencing without targeting the most culpable criminals. This has occurred due to the quantity-sentence scheme of drug mandatory minimum sentences. The mandatory sentence length increases exponentially as the narcotic amount increases. This reasoning assumes that the most dangerous drug dealers have the highest amount of drugs within their immediate control. However, this assumption does not translate to the realities of drug dealing.

To more effectively explain the workings of drug crime as a whole, I shall turn to the U.S. Sentencing Commission’s coding project of drug offenders. In a 2011 report, the Commission assessed a fifteen percent sample of drug cases reported in 2009, coding the varying functions the arrestees played in the drug crime hierarchy. The commission developed nine categories of drug crime function:

- **High-Level Supplier/Importer**: Imports or supplies large quantities of drugs (one kilogram or more); is near the top of the distribution chain; has ownership interest in the drugs; usually supplies drugs to other drug distributors and generally does not deal in retail amounts.

- **Organizer/Leader**: Organizes or leads a drug distribution organization; has the largest share

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11 Id. at 166-167.
of the profits; possesses the most decision-making authority.

**Grower/Manufacturer:** Cultivates or manufactures a controlled substance and is the principal owner of the drugs.

**Wholesaler:** Sells more than retail/user-level quantities (more than one ounce) in a single transaction, purchases two or more ounces in a single transaction, or possesses two ounces or more on a single occasion, or sells any amount to another dealer for resale.

**Manager/Supervisor:** Takes instruction from higher-level individual and manages a significant portion of drug business or supervises at least one other co-participant but has limited authority.

**Street-Level Dealer:** Distributes retail quantities (less than one ounce) directly to users.

**Broker/Steerer:** Arranges for drug sales by directing potential buyers to potential sellers.

**Courier:** Transports or carries drugs using a vehicle or other equipment.

**Mule:** Transports or carries drugs internally or on his or her person.¹²

Within the sample, Courier was the most prevalent arrestee, accounting for 23 percent of those arrested, followed by Wholesaler (21.2 percent), and Street-Level Dealer (17.2 percent).¹³

Realistically, the individuals at top of the drug dealing hierarchy do not possess the highest quantity of the narcotic; it is dispersed among the other individuals. Therefore, the most culpable individual, the leader of the drug dealing enterprise, is not subject to the highest mandatory minimum sentence simply because when

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¹² *Id.* at 166-167.

¹³ *Id.*
arrested he is not in possession or control of the highest amount of narcotics. The U.S. Sentencing Commission explains that, “the quantity of drugs involved in an offense is not as closely related to the offender’s function in the offense as perhaps Congress expected,”\textsuperscript{14} depicting the flaw in the quantity-sentence scheme and the need for inclusion of mitigating circumstances, which mandatory minimum sentencing statutes preclude.

**Popularity of Mandatory Minimum Sentencing Statutes**

Mandatory minimum laws have been enacted at the federal and state levels for several reasons, most prevalent among them, the promise of increasing safety by keeping dangerous criminals off the streets and the attractive tough-on-crime policy that is easy to sell. The promise of safety is especially compelling. Mandatory minimum laws are advertised to provide public safety by increasing the cost of committing crime exponentially. That cost comes in the form of dramatic prison sentence lengths. The most heinous crimes are not at the core of these policies however; rather, drug and firearm crimes are at the heart of mandatory minimum laws. These are also the crimes most common among Black offenders from lower-income backgrounds; effectively resulting in disproportionate prosecution and sentence lengths for this group.

*The Promise of Safety*

This promise of safety via mandatory enhancements to sentences for certain crimes is most recently seen in Chicago, a city that has experienced heightened gun related crimes in 2013. Rahm Emanuel, the city’s mayor, Anita Alvarez, Cook County State’s

\textsuperscript{14} *Id.* at 346.
Attorney, and Garry McCarthy, the Police Superintendent announced legislative developments intended to decrease gun crimes in the city. At a news conference, Anita Alvarez stated, “The proposed reforms would deter more people from carrying guns illegally and would help curb violence.”¹⁵ These reforms include a mandatory minimum sentence of three years for individuals convicted of gun possession, a two-year increase from the status quo. Alvarez’s statement depicts a widely held belief that being tougher on crime will decrease crime rates and in turn increase public safety. It is not difficult to see why mandatory minimums are branded with a safer streets message. However, despite this branding, these policies are not effective means of making streets safer.

**Tough-on-Crime: The Easy-to-Sell Message**

The tough-on-crime message has been popular for decades and understandably so. Increasing the sentence length for crime with the idea of it serving as a deterrent from crime all together is well perceived by the public, elected officials, and law enforcement because it is a simple and mostly agreed-upon message. The media, public officials, and law enforcement do not depict criminals as victims of society or as individuals that society should invest resources in to reform. Prisoners are depicted as dangerous criminals, that should not be in communities and that are not easily rehabilitated. All in all, mandatory minimum sentences are very attractive to elected officials and to the public. Elected officials

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benefit from appearing tough-on-crime and having a simple message to sell to their constituents and those constituents usually agree that, as a society, we should be tough-on-crime. The public has little trouble increasing penalties for individuals branded as “the other.” However, tough-on-crime policies, with mandatory minimum sentencing for drug offenses at their core, are costly and do not make streets safer.

**The Effects of Mandatory Minimum Sentencing Statutes**

As a result of mandatory minimum sentencing statutes, we have seen an increase in the incarceration rate for drug crimes and an increase in sentence length for these offenses. The specific factors propelling these results are prosecutorial power, arrest and conviction rates, and the statutory increase of sentence lengths.

**Prosecutorial Power**

In a mandatory minimum sentencing situation, the prosecutor has much more discretion because the prosecutor decides which offense to charge, forcing the judge to grant the mandatory minimum sentence if a plea bargain is submitted or if the defendant is found guilty by the jury.\(^\text{16}\) Thus, the prosecutor is the key player at every step of the process. Prosecutors heavily rely on mandatory minimum statutes, often charging individuals under those statutes. "As of the end of fiscal year 2010, there were 191,757 offenders in BOP custody, of whom 111,460 (58.1 percent) were

convicted of an offense carrying a mandatory minimum penalty.”

Not only do prosecutors rely on mandatory minimum statutes, but they also rely on a process known as “stacking.” Eric Luna of the US Sentencing Commission explains that during this process,

The government divides up a single criminal episode into multiple crimes, each carrying its own mandatory sentence that can then be stacked, one on top of the other, to produce heavier punishment.

The direct results of stacking, usually under 18 U.S.C. § 924(c) is a severely long criminal sentence, averaging “351 months of imprisonment, which was more than twice the length of the average sentence of 151 months of imprisonment received by offenders convicted of only a single count of an offense under section 924(c).”

Judge Paul G. Cassell of the Judicial Conference of the United States testified before Congress about one of his cases in the District Court of Utah under 18 U.S.C. § 924(c). He was legally obligated to sentence Weldon Angelos to 55 years in federal prison for concealed possession, not use, of a firearm at a two marijuana drug deals. Mr. Angelos was a music executive and first-time offender. He conducted two $350 marijuana drug deals, and unbeknownst to him, it was to a federal agent. Mr. Angelos regularly carried a

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concealed gun on his person during drug deals as a means of protection. The prosecutor in the case charged Mr. Angelos under mandatory minimum statute 18 U.S.C. § 924(c) which requires a mandatory five years of prison for a first time drug dealer that carries a gun. The statute increases that sentence to twenty-five years for each additional gun offense. Since Mr. Angelos carried a gun at both drug deals and then possessed firearms in his home, the prosecutor charged him twice more for each possession, increasing his 18 U.S.C. § 924(c) violations to three. This effectively required that Mr. Angelos—a first time non-violent offender—be sentenced to 55 years in prison. Judge Cassell testified before Congress about this case, saying that

adding 55 years on top of a sentence for drug dealing is far beyond the roughly two-year sentence that the US Sentencing Commission indicates is appropriate for possessing firearms under the same circumstances.  

Judge Cassell was legally required to give this sentence for two reasons: the federal prosecutor chose to charge Ms. Angelos under this statute, without providing him a deal for a reduced sentence that would not fall within this statute, and because Judge Cassell's authority was stripped by the prosecutor's relentless charging decisions. Judges can only sentence someone below the statutory mandatory minimum sentence if the punishment is so irrational that it calls forth an Eighth Amendment cruel and unusual punishment violation. This is not a challenge many judges are willing to submit. As a result, very few instances arise where judges

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21 Id. at 49.
sentence someone below the mandatory minimum and submit the apropos justification for approval. Judges do not see themselves as questioners of penal code; they are not intended to be either. Cook County Judge Nicholas Ford explains that

A lot of judges bristle at mandatory minimum sentences. It's not my position to question it. It's my job to enforce whatever the legislature forwards me.\textsuperscript{22}

This implies that we are not likely to ever see a significant judicial activism undertaking by judges refusing to comply with mandatory minimum sentences. It is up to the federal government or the states to scrap or seriously reform these legislatively enacted draconian statutes.

\textit{Arrest and Conviction Rates for Drug Crimes}

Not surprisingly, drug crime has not decreased after mandatory minimums were strengthened in the mid-1990s. Only conviction rates and sentence lengths have increased. In 2011, over twelve million arrests were made nationally.\textsuperscript{23} Of those twelve million, 534,704 were for violent crime, 1,639,833 for property crime, and 1,531,251 for drug crimes. Of the drug crime arrests, 18 percent were for the sale or manufacturing of narcotics—6.2 percent for marijuana and 6.3 percent for cocaine and heroin—and 81.8 percent of the drug arrests were for possession, with marijuana


in the lead with 43.3 percent of the arrests.\textsuperscript{24} These statistics do not differ greatly from the 1995 crime report statistics. In fact, over fifteen million arrests were made in 1995, of which one and a half million were for larceny-theft and one and a half million for drug crimes, almost identical to the 1,531,251 drug crime arrests of 2011.\textsuperscript{25}

\textit{Sentence Lengths}

As a result of mandatory sentencing statutes the “average prison time per violent offense tripled between 1975 and 1989, without any appreciable effect on the level of violent crime.”\textsuperscript{26} Furthermore, incarceration for drug offenses has also increased. “In 1980, the drug incarceration rate was 15 drug offenders in state and federal prisons per 100,000 adults. By 1996, the rate had increased more than nine-fold to 148 per 100,000.”\textsuperscript{27} This staggering increase is due in part to increased arrest rates, mandatory minimum sentences, and prosecutorial power.

\textbf{Understanding the Presence of Mandatory Minimum Sentence Statutes Despite the Statistics}

If the research suggests that mandatory minimum sentences and general tough-on-crime policies are not effective means of reducing crime and recidivism rates, then the logical question

\begin{itemize}
\item\textsuperscript{24} Id.
\item\textsuperscript{26} Michael Tonry, \textit{Malign Neglect: Race, Crime and Punishment in America} 17 (1995).
\end{itemize}
follows: why have we seen an increase in these policies concurrent with public support? 28 Marie Gottschalk, professor of Political Science at the University of Pennsylvania, explains that, “the public began to identify crime as a leading problem in the mid-1990s, just as the crime rate was dramatically receding.” 29 This sentiment has not fully receded, thus providing ample opportunity for public officials to pass tough-on-crime policies. Examining different state penal codes in this time period of high velocity mandatory minimums coincides with the theory that the public was receptive to a tough-on-crime message and legislatures were more than willing to comply. For example, the state of Georgia passed a three-strikes law in 1995, which created life sentences without the possibility of parole. This was a significant change from the previous law, which required that life sentences be given to criminals who have a fourth felony conviction. 30 Georgia is not alone; Indiana passed a three-strikes law in 1994 amending its previous Ind. Code § 35-50-2-8.5 quite notably. Before 1994, a third felony conviction required enhanced sentencing. This was amended to a mandatory life without parole sentence for the second specified violent-felony

28 Bruce Western, Professor of Sociology and Director of the Malcolm Wiener Center for Social Policy at the Harvard Kennedy School of Government, “demonstrates that only 10% of the serious drop in crime between 1993 and 2001 was due to the gigantic growth in the state prison population. The remaining 90% was most likely would have happened anyway due to other factors, like changes in city policing.” Marie Gottschalk, The Prison and the Gallows: The Politics of Mass Incarceration in America 31 (Cambridge Univ. Press 2006).


conviction.\textsuperscript{31} That year, Tennessee also moved its enhanced sentence for habitual felons from mandatory life without parole for the third violent-felony conviction, to the second specified violent-felony conviction.\textsuperscript{32}

These mandatory minimum sentences can either be seen as dramatic responses to a false sense of danger from crime—given that crime rates were quite low in this time period—or as a legislature responding to a need for safety. The mandatory minimums specified above only affected a specific sector of the criminal population. Arguably the criminals affected—second and third time violent felons—were not likely to reform their ways or stop offending. Therefore, in theory these penal code changes were deemed necessary to keep community streets safe, and that is not a fully objectionable decision. However, the issue lies not with violent second and third felonies, but with mandatory minimum sentences for drug crimes. The main drug crimes are not even manufacturing or sale of narcotics, but rather possession—as noted above, in 2011, over 80 percent of drug crime arrests were for possession, with over 40 percent consisting of marijuana arrests.\textsuperscript{33} “In fiscal year 2010, more than three-quarters of the defendants convicted of an offense carrying a mandatory minimum penalty were convicted of a drug trafficking offense, and 11.9 percent were convicted of a firearms offense.”\textsuperscript{34} The sentences received for these offenses were not

\begin{itemize}
\item \textsuperscript{32} Tenn. Code Ann. § 43-35-120 (1994).
\item \textsuperscript{34} Id. at 122.
\end{itemize}
minimal. “The most frequently reported drug mandatory minimum penalty in fiscal year 2010 was ten years,”\textsuperscript{35} a sentence that “almost half of all drug offenders during that year received.”\textsuperscript{36} This means that most of the individuals committing crimes that fall within the purview of the mandatory minimum sentences were committing drug crimes. Not violent felonies, not burglaries, not rapes, but drug crimes. There is a difference between violent felonies and five grams of crack cocaine or marijuana. It would not be unheard of to say that average Americans would view the negative consequences to society from a possession of a controlled substance as far less than the consequence from violent felonies. Yet under mandatory minimum sentences, the two crimes are deemed the same, and sometimes the penalty for a drug crime is significantly higher than that of a violent felony.

**Mandatory Minimum Sentences Disproportionately Harm Black Defendants**

Another consequence of mandatory minimum sentences for drug offenses is the disproportionate effect on the Black male population. Most minimum laws applied are for drugs, and minorities mostly get arrested for these crimes. In addition, the majority of these individuals cannot afford private counsel and end up taking a plea deal instead of going to trial. The deterrent effect of mandatory minimum laws seems to deter the wrong thing: trials and not crimes. This method of conviction is widespread throughout the criminal justice system. “Of the 20,737 offenders convicted under a statute carrying a mandatory penalty in 2006, 93.2 percent

\textsuperscript{35} Id. at 153.
\textsuperscript{36} Id.
pled guilty and 6.8 percent were convicted via trial.”\textsuperscript{37} Mandatory minimums increase sentencing time to be served, thus giving prosecutors much more leverage to force a plea since going to trial is much riskier than before. In 2006, African Americans constituted 32.9 percent of the population convicted of a statute carrying a mandatory minimum penalty for a drug crime.\textsuperscript{38} As a result, African Americans were the sole ethnic group convicted more often under mandatory minimum statutes than their White, Latino, or Other counterparts.

The disproportionate consequences of mandatory minimum sentences continue past the conviction phase and into the sentencing phase. Relief from mandatory minimum sentencing is available through a mechanism known as a safety valve. This process effectively does away with part or all of the mandatory sentence and it is available to most individuals that are not several time offenders. While the option is available to all non-violent offenders, the racial disproportionality found in arrest and conviction rates extends to the relief phase. In 2010, “white offenders qualified for some form of relief from a mandatory minimum penalty most often, with 63.7 percent of all White offenders convicted of an offense carrying such a penalty obtaining relief from the penalty. Black offenders qualified for relief from mandatory minimum penalties least often, in 39.4 percent of cases in which they were convicted of an offense carrying such a penalty.


penalty.” This lack of relief stems from the criminal records of Black offenders—usually brought to their status quo by higher arrest and conviction rates in the first place. More crippling, this lack of relief results in significant sentence lengths for Black offenders alone. In 2010, “Black offenders convicted of an offense carrying a mandatory minimum penalty also received the highest average sentence (126 months), compared to White offenders (82 months), Hispanic Offenders (91 months), and Other Race offenders (120 months). Black offenders who remained subject to a mandatory minimum penalty at sentencing had a higher average sentence (148 months) than either White (120 months) or Hispanic offenders (105 months).” These sentences are appalling and will continue to be implemented without serious reform to the penal code and a return of judicial authority at sentencing.

**Mandatory Minimum Sentences Do Not Decrease Recidivism Rates**

Harsher penalties are not an effective crime deterrent. A 2007 Pennsylvania Sentencing Commission study "found that the recidivism rates three years after release were as follows: drug delivery offenders (54 percent), repeat violent offenders (54 percent) and firearms offenders (50 percent).” In drug crimes, especially drug delivery or trafficking, the individuals most often arrested are easily replaced and they also have a difficult time

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40 Id.

41 Id. Pennsylvania Commission on Sentencing available at http://pcs.la.psu.edu/.
reforming without a support system to greet them post-incarceration. Furthermore “states with neither a three strikes nor a truth-in-sentencing law had the lowest rates of index crimes, whereas index crime rates were highest in states with both types of get-tough laws.”\textsuperscript{42} It is not harsher sentencing that minimizes crime. It is the lack of necessity, the presence of social support systems, and a fair criminal justice system that minimizes drug crime.

**Room for Reform**

Fortunately, reform at the state level appears to constitute a viable option—though serious comprehensive national reform remains far-off. Democrats and Republicans have implemented reforms such as issuance of a citation in lieu of an arrest or reclassifying individuals arrested for non-violent drug offenses. Texas Governor Rick Perry, signed legislation into law that provided police officers the option to issue a citation for class A and B misdemeanors—such as marijuana possession—in lieu of an arrest.\textsuperscript{43} This keeps individuals that do not pose a threat to society in their communities, diverting them from the dangers of incarceration. More recently, New York City Mayor Bloomberg announced that police officers will no longer be arresting and booking individuals cited for minor marijuana possessions.\textsuperscript{44} This is


also an example of action taken by elected officials as a means of reducing the high incarceration rates.

Another practical reform is reclassification and diversion of minor non-violent criminal offenses. This method requires “reconfiguring criminal statutes into civil infractions that carry a fine.”

In celebration of the 50-year anniversary of *Gideon v. Wainright*, the National Indigent Defense Reform published a report with the American Bar Association in which they examined such a reform in Massachusetts. A November 2008 referendum in Massachusetts reclassified the crime of criminal possession of small amounts of marijuana as a civil infraction carrying a $100 fine. The results included lower prosecutorial and court costs and a different approach to marijuana use. Individuals were not irrationally deemed as dangerous individuals that must be incapacitated, but rather as members of society that needed to address their drug use.

A crucial reform involves returning the authority to judges in criminal law cases. “A recent poll shows that 3/4 of all Americans support allowing judges to set aside mandatory sentences if another sentence would be, in their judgment, more appropriate.” As the public has become more aware of the ineffectiveness and costliness of “tough-on-crime” policies, such as mandatory minimum statutes,

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46 *Id.*

47 *Id.*

they have become more receptive to elevating the judge’s role in the sentencing process. Perhaps the public has seen beyond the elusiveness of one-size fits all crime policies, signaling that now is the time to pass smart-on-crime legislation at the state and even federal level. The role of judicial influence in the pre-trial and sentencing stages is indispensable to a just criminal justice system. Petty prosecutions for minor drug crimes turn into guilty pleas and then remain on an individual’s record. Once they are on an individual’s record they can be used, often required by law, to increase the individual’s sentence if the individual is ever convicted of a crime again, even if that crime is a minor non-violent misdemeanor. If judges are not authorized to sentence individuals below the mandatory minimum sentence, even if they believe such a sentence is appropriate, then we will not escape the atrocities of criminals sentences applied disproportionately between the differing race and socio-economic classes.

Conclusion

Mandatory minimum sentences have been a popular tough-on-crime policy choice for several years. Their popularity is apparent at the state and federal level, and it is not limited to drug and firearm crimes. Fortunately, the ‘tough-on-crime’ rhetoric of the 1970s, furthered by the punitive nature of the Nixon administration, and continued by the Reagan administration has


\[\text{(50) A second offense of presenting illegal food stamps for redemption comes with a mandatory minimum sentence of one year in prison. 7 USC § 2024(C) §2(B1.1) (2009).}\]
seen a marginal dip in popularity recently. Many public figures, including some notable GOP members, have shifted the public conversation from a “tough-on-crime” to a “smart-on-crime” approach. The “smart-on-crime” approach seems to be taking hold on both the State and National fronts.

A full repeal of the status quo is not viable, but easing the process a judge must go through when he wants to sentence someone below the mandatory minimum floor would be a significant stride in the right direction. We have reached a point where we must follow through on commitments to rethink our crime policy and implement smart-on-crime policies that truly keep streets safe while allowing for a fair criminal justice system. It is imperative to use this shift in public opinion at the several socio-political levels to improve our criminal justice system, starting with mandatory minimum sentences for non-violent drug crimes. Letting this opportunity pass can decrease the legitimacy of our criminal justice system in the eyes of those who lawmakers try to control the most: criminals.

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Heather Pingree was six months pregnant with her second child.¹ She resided twelve miles off the coast of Maine, far from a major city or coal-fired power plant. Yet after a test, doctors found dangerously high levels of flame-retardants, mercury, phthalates, and other toxic chemicals within her body.² Pingree is among 99 percent of mothers-to-be carrying hazardous chemicals that could be transmitted to her baby via the umbilical cord.³ Such chemicals come from everyday products found in the home and food. Infants exposed to chemicals in the womb have a tendency to develop rashes, asthma, autism, learning disabilities, and other acute and chronic health effects as they develop.⁴ Pingree, who gave a testimony at a Senate hearing in 2012 regarding the Toxic Substances Control Act (TSCA), believed that after decades of inaction as well as misinformation campaigns, it is time to reform the current U.S. law pertaining to chemical safety, testing and regulation. An effective reform currently being discussed in Congress is the Safe Chemicals Act, which successfully addresses

² Id.
³ Id.
⁴ Id.
flaws in TSCA and incorporates the accomplishments of other state and national laws.

This case is not the first time that people have recognized the negative effects of inaction. Fifty years ago, Rachel Carson, author of *Silent Spring* and an environmental activist, noted, “like the constant dripping of water that in turn wears away the hardest stone, this birth-to-death contact with dangerous chemicals may in the end prove disastrous.”\(^5\) It is the hope of parents as well as politicians and industry representatives all over the U.S. that a reform to the current chemical safety law occurs sooner rather than later.

In 1976 Congress passed and signed TSCA into law under President Gerald Ford.\(^6\) The rationale for TSCA was that there were a vast number of potentially harmful chemical substances that humans and the environment were being exposed to each year. The Environmental Protection Agency (EPA) defines a chemical substance as “any organic or inorganic substance of a particular molecular identity including pesticides, tobacco products, mixtures, source materials, or any combination of such substances that are part of a chemical reaction.”\(^7\) Congress ordered a series of scientific tests that reported that certain chemical substances injure the health of humans and the environment including the land, air, and water during the stages of manufacturing, processing, distribution, commerce, use, or disposal.\(^8\) TSCA was established in order to regulate, test, and report those harmful chemical substances from being sold and used in industries in order to protect human and

\(^5\) *Id.*
\(^7\) *Id.* at 191.
\(^8\) *Id.* at 190.
environmental health from unnecessary chemical exposures during manufacturing and commercial use.\(^9\)

Currently, the EPA enforces TSCA\(^{10}\). The EPA is responsible for overseeing the use of chemicals and requiring harmful chemicals to be tested\(^{11}\). Under the present law, the EPA evaluates new and existing chemicals and their risks in addition to finding ways to prevent or reduce pollution before it enters into the environment\(^{12}\). The EPA also has the authority to regulate the chemicals, which includes restricting chemicals that are deemed risks to health\(^{13}\). The EPA must consider economic, medical, and social costs of chemicals present in the environment. However, if an unreasonable risk may be prevented or reduced by the action of the federal law, the EPA will hand over the power to the state administrators of said law\(^{14}\). If a chemical is considered an imminent hazard, or a substance likely to cause serious injury, damage, or death, the EPA will seize the hazardous substance and provide either temporary or permanent relief\(^{15}\). The EPA has the responsibility and legal obligations to prevent and stop the effects of harmful chemicals on Americans.

TSCA is an all-encompassing act that allows the government to regulate all chemical problems. While TSCA has established regulatory laws that aim to clean, protect, or eliminate harmful substances from the environment, TSCA also has several flaws. It is imperative for Congress to reform TSCA in order to protect

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\(^9\) Id.
\(^{10}\) Id. at 191.
\(^{11}\) Id. at 190.
\(^{12}\) Id. at 191.
\(^{13}\) Id. at 215.
\(^{14}\) Id. at 193.
American citizens from harm and to protect their “rights to life, liberty and the pursuit of happiness.”\(^{16}\) Current state and foreign laws and policies such as California Proposition 65 as well as the European Union’s Registration, Evaluation, Authorization, and Restriction of Chemical substances (REACH) program can act as models for effective TSCA reforms.

**Strengths of TSCA**

While the focus of this review is on the reforms for TSCA, it is also important to mention some of the accomplishments that the law has already achieved. Due to TSCA, several regulatory laws have been passed in order to protect human well-being and the environment. TSCA addresses the issues of toxic substances before they are emitted unlike other laws that address the issues of toxic substances after they have been emitted. By tackling the problem before emission, substances are easier to control. For instance, the Clean Air Act, amended in 1977 after the passing of TSCA, has reduced emissions of toxic lead by 98 percent.\(^ {17}\)

Successes attributed directly to TSCA include the Asbestos Hazard Emergency Act (AHERA) of 1986, which became a steppingstone to further laws and actions. Although the EPA findings proved asbestos to be a cancer causing substance, prior to the establishment of AHERA there was no regulation for asbestos in public and commercial buildings.\(^ {18}\) However, the EPA regulated asbestos by including it as a subchapter of TSCA under Title II

\(^{16}\) The Declaration of Independence para. 2 (U.S. 1776).
Although TSCA created many positive laws and regulations since its formation, there are a number of imperfections that need correcting.

**Weaknesses of TSCA**

TSCA’s principal drawback involves the problem of unreasonable risk and the burden of proof. Currently the burden of proof lies entirely on the federal government to demonstrate the unreasonable risk rather than requiring chemical producing industries to prove the safety of their chemicals.\(^2\) This issue causes problems because there are far too many chemicals for the EPA to accurately and diligently test. If industries were to take on the task of proving chemical safety, more chemicals would be tested.

Since its beginning, the EPA has only been able to ban one type of chemical: polychlorinated biphenyls (PCBs), which was typically used in electrical equipment.\(^3\) PCBs were banned only because Congress wrote them into the original law.\(^4\) For example, in 1971 the EPA classified asbestos as a hazardous air pollutant and dangerous human carcinogen. In 1989, the EPA issued a final rule banning most asbestos-containing products that lasted until 1991, when the Fifth Circuit Court of Appeals in New Orleans overturned the ban due to a lack of proof that asbestos caused unreasonable risk.\(^5\) As a result of the Court’s decision, many asbestos-containing

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\(^{21}\) *Id.*


products remain such as flooring felt, rollboard, corrugated, commercial, or specialty paper, and “new uses” of asbestos (i.e. its use in products that have not historically contained it). TSCA was unable to ban asbestos in spite of the large amount of evidence proving it to be a dangerous substance. Since then, the EPA has never tried to ban another chemical substance under TSCA for fear of another overturning of a ban. However, a reform to TSCA could make it easier for the EPA to ban chemicals by omitting the unreasonable risk requirement in the current law. In other words, if a chemical is known to have a negative health effect, the EPA can ban it without the need to prove the chemical poses an unreasonable risk.

Another error TSCA faces includes the issue of “grandfathered in” chemicals, which makes the law outdated. There are 62,000 existing chemicals that were grandfathered into the law and which were used in 1976. In other words, chemical companies could continue selling the chemicals without safety testing. The EPA has evaluated only 2 percent of the 62,000 chemicals for human health risks since 1976 and discovered that a majority of them contain potential toxicity. One example of such a chemical pertains to polybrominated diphenylethers (PBDEs), a type of flame retardant commonly used in furniture foam, plastics in television sets, computers, small appliances, consumer electronics,

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24 Id.
25 Id.
26 Id.
27 Id.
29 Id.
30 Id.
wire insulation, and upholstery.\textsuperscript{31} PBDEs slow both ignition and the rate of fire growth causing some United States regulators to deem PBDEs as life-saving flame retardant chemicals.\textsuperscript{32} On the other hand, environmental activists advocate the banning of PBDEs. After testing some of the chemicals, scientists concluded that the substances cause negative health effects such as the presence of chemicals found in breast milk, which leads to developmental problems in nursing infants.\textsuperscript{33} Today, most of the original 62,000 chemicals are on the market and still have never been tested. Due to this error, TSCA has been criticized for being outdated. Congress has yet to update TSCA despite advancements in science, technology, and health concerns.

The problem of industry secrecy has also proven problematic for TSCA and requires reform. Chemical companies have the ability to label information as “trade secrets” meaning that the EPA cannot share information declared as secret with the public, state or local governments, or even with foreign governments.\textsuperscript{34} This loophole pertains to the competitiveness of the chemical industry - secrecy provides protection for their research, which seems like a reasonable claim.\textsuperscript{35} However, chemical companies have misused this loophole to claim that 95 percent of their information is secret, which even prevents disclosure of health and safety data.\textsuperscript{36} The EPA’s Office of the Inspector General claims TSCA “protects industry

\begin{itemize}
\item \textsuperscript{31} Flame Retardants and TSCA, Safer Living with Chemicals, July 17, 2012, http://safechemicalpolicy.org/flame-retardants-and-tsca/.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\end{itemize}
information rather than to provide public access to health and safety studies.” As a result, information states that approximately 20 percent of the tens of thousands of chemicals in use in the United States including flame-retardants and detergent additives is not shared with consumers, scientists, and state government regulators. TSCA is supposed to protect consumers and the environment; however, as the law currently stands, it allows consumers to continually be exposed to toxic substances without their knowledge. There must be more reforms of TSCA in order to prevent chemical hazards and treat those who have been affected.

**State Law to Model After: CA Proposition 65**

There are two laws – California (CA) Proposition 65 and the European Union’s REACH program – that are more effective than TSCA and can serve as a model for reform. CA Proposition 65 follows TSCA and the EPA requirements; however, it contains stricter regulations for specific substances. For instance, Prop. 65 requires that Californian state officials publish a list of chemicals known to cause cancer, birth defects, or other harm. Unlike TSCA, Prop. 65’s chemical list is updated once a year and has grown to include 800 chemicals since first being published in 1986. This revision would help solve the problem of TSCA’s out-of-date standards and secrecy loophole.

Another useful feature of Prop. 65 involves the “grandfathered in” chemicals. While TSCA excludes 62,000

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37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
chemicals, Prop. 65 tests, regulates, and provides warnings on many of chemicals (e.g. heavy metals, mercury and cadmium), which are proven to cause health issues such as acute and chronic poisoning. Therefore, Congress should adopt reforms like California’s Prop. 65 to improve TSCA.

California’s Prop. 65 provides several advantages for human health and the environment, which TSCA lacks. Prop. 65 increases public awareness about the adverse effects of exposure to the listed chemicals. Furthermore, businesses are required to present a “clear and reasonable” warning before exposing anyone to a listed chemical. These warnings can be applied through labeling consumer products, posting signs at the workplace, distributing notices, or publishing notices in a newspaper. TSCA contains many loopholes that enable industries to keep this information secret from the public, a problem that is partly solved in CA Prop. 65. With warning label requirements, manufactures can no longer maintain secrecy in regards to harmful substances. Warning labels provide an incentive for manufacturers to remove listed chemicals from their products such as lead from electrical wires thus, keeping several harmful chemicals from being used by the public. On the other hand, TSCA’s secrecy loophole enables harmful on the market without the public knowing.

Prop. 65 has also succeeded in spurring significant reductions in emissions of the listed chemicals. Some of those

\begin{flushleft}
43 \textit{Id.}
45 \textit{Id.}
46 \textit{Id.}
47 \textit{Id.}
48 \textit{Id.}
\end{flushleft}
listed chemicals include hexavalent, chromium, and chloroform. Prop. 65 manages many of these chemicals better than TSCA and other federal laws do. For example, Prop. 65 prohibits trichloroethylene, a chemical that causes cancer and that is banned in the rest of the United States. Another example pertains to lead found and used in many Californian industries, which has also been significantly reduced in products such as ceramic tableware and wineries by 90 percent to 98 percent. Proposition 65 has reduced toxic air pollution both outdoor such as diesel bus and truck emissions and indoor such as toxic solvents in nail products. California air emissions of pollutants have declined more rapidly than anywhere else in the United States. For instance, Californian facilities have reduced their emission of perchloroethylene, a chemical used in dry cleaners and degreasers, by roughly 640,000 pounds. Proposition 65 has also induced “quiet compliance” meaning there is no need for litigation because manufacturers voluntarily comply with the law’s requirements. With the successes that California is experiencing under Proposition 65, the remaining states may too encounter similar successes if TSCA is amended to contain some features of CA Proposition 65 or if states pass their own versions of Prop. 65. Although CA Proposition 65 is

49 Id.
50 Id.
53 Rechtschaffen & Williams, 10850.
54 Id. at 10851.
only a state law, it could serve as a model for the federal law modifications much like how the foreign law titled REACH does.

**Foreign Law to Model After: REACH**

REACH, which stands for “Registration, Evaluation, Authorization and Restriction of Chemical substances,” started in 2007 by the European Community Regulation of Toxic Substances. REACH shifts the burden of proof regarding a chemical’s safety onto the industry rather than the government.\(^{56}\) Prior to REACH, the European Union relied on public authorities and the government to undertake assessments of the risks of substances instead of giving that responsibility to the manufacturers.\(^{57}\) This made information on the uses of substances difficult to obtain and information about exposure arising from industrial uses was scarce.\(^{58}\) Today, REACH places the burden on industries to prove the safety of chemicals, and the government reviews data submitted by industries. The government then approves the manufacturing of those tested substances to be put on the market, a valuable change to the original EU law.

An amendment to TSCA could be beneficial to the United States public health and environment by shifting the responsibility for managing chemical risks on industries taking examples from REACH.\(^{59}\) Originally, the EU followed Council Regulation No 793/93, which was similar to TSCA meaning that there were plenty of loopholes and gaps for the testing of chemicals by chemical


\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.
manufacturers.\textsuperscript{60} This shift of the burden of proof ensures risk prevention rather than minimization of damage. The shared accountability within industry for safe use of chemicals is to act as “enforcement in the supply chain.”\textsuperscript{61} “Enforcement in the supply chain” refers to a chemical manufacturer that produces a chemical such as chlorine and sells it to a company such as Clorox. Clorox then mixes that chemical to create the final product. Therefore, it becomes every production stage’s responsibility, from producer to manufacturer to user, to ensure the safety of substances that enter the environment when transported. Thus, by providing quality checks of safety data sheets and exposure scenarios all levels of production may share information and accountability.\textsuperscript{62} Today, REACH requires manufacturers to submit safety data for both new and existing chemicals produced in or exported to Europe.\textsuperscript{63} TSCA could benefit from this condition by applying it to the 62,000 grandfathered in chemicals.

So far, REACH has created several positive results proving the policy’s effectiveness. First off, under REACH chemical classification has become more restrictive lowering the overall levels of toxicity.\textsuperscript{64} Due to REACH’s mandatory assessment of hazard and exposure data as well as risk assessment and identification of risk management measures to ensure the safe use of chemicals, Europe has seen positive effects.\textsuperscript{65} The EU has also reported a reduction in environmental damage leading to less money spent remediating ecological harm due to better information

\textsuperscript{60} Id. at 5.  
\textsuperscript{61} Id. at 7.  
\textsuperscript{62} Id. at 10.  
\textsuperscript{63} Id. at 8.  
\textsuperscript{64} Id. at 7.  
\textsuperscript{65} Id. at 9.
on substances and properties in addition to safe conditions of use.\textsuperscript{66} Furthermore, REACH assists industry workers and the general public through reductions in exposures.\textsuperscript{67} There are fewer reported incidences of both occupational and public diseases due to better information through registration of chemicals and greater control of substances through authorization, something TSCA lacks.\textsuperscript{68} Aside from environmental benefits attributed to the policies of REACH, the EU program has also spurred greater innovation and technology in industries by encouraging substitutions and suitable alternatives to the hazardous chemicals.\textsuperscript{69}

**Current TSCA Reform: Safe Chemicals Act**

Fortunately, TSCA is presently up for reform. Senator Lautenberg took into consideration the achievements and success of the state law, CA Proposition 65 as well as the EU law, REACH when creating the Safe Chemicals Act. After more than three decades since the enactment of TSCA, people and the environment are still exposed to thousands of chemicals whose safety has not been adequately reviewed. Currently, there are more than 80,000 chemicals used in the United States in electronics, toys, mattresses, cleaning products, and clothing.\textsuperscript{70} Yet, the EPA has evaluated just 200 of them for safety due to lack of funding and resources.\textsuperscript{71} Scientific evidence shows that exposure to those untested chemicals

\begin{footnotes}
\item\textsuperscript{66} Id. at 12.
\item\textsuperscript{67} Id.
\item\textsuperscript{68} Id. at 11.
\item\textsuperscript{69} Id. at 13.
\item\textsuperscript{70} S. REP. NO. 112-1264, (2011).
\item\textsuperscript{71} Id.
\end{footnotes}
affects human health and may cause breast cancer, leukemia, and developmental disorders among children.\textsuperscript{72}

One such chemical includes Di(2-ethylhexyl) phthalate or DEHP.\textsuperscript{73} DEHP is a chemical commonly found in many plastics. One study conducted in 1995 followed men working in a plastics factory.\textsuperscript{74} The group of men who worked with DEHPs showed an increased risk for pancreatic cancer.\textsuperscript{75} In total, 28 male case subjects died from pancreatic cancer out of a subject group of 140.\textsuperscript{76} Another study was performed previously in 1992; however, this study was a population based case-control study rather than a specific group of men that worked with DEHP’s.\textsuperscript{77} Out of 4,169 control subjects, 1,098 cases of germ cell tumors were discovered due to the population’s exposure to DEHP.\textsuperscript{78} These studies show merely one chemical out of 80,000, which continues to be sold on the market despite possible evidence that it causes injury and death. Due to the numerous flaws and loopholes found in TSCA, Congress has finally initiated a reform.

The Safe Chemicals Act (S.847) introduced by New Jersey Senator Frank Lautenberg on April 14, 2011, aimed to reinvent TSCA.\textsuperscript{79} However, it failed to pass the 112\textsuperscript{th} Congress due to higher priorities such as health care and the economy, additionally TSCA is not well understood among members of Congress. Thus, Senator

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{72} Id.
\item \textsuperscript{74} Id. at 186.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id. at 187.
\item \textsuperscript{78} Id.
\end{itemize}
\end{footnotesize}
Lautenberg will have to reintroduce the Safe Chemicals Act in the 113th Congress. Nevertheless, TSCA reform has become a greater priority for Congress.

The bill intended to bring the United States chemical policy into the 21st century, and it is modeled after existing state and foreign policies. First and foremost, the Safe Chemicals Act is intended to remove TSCA’s “grandfather” loophole. Like Prop. 65, the reformed bill would close the loophole that allows 62,000 pre-existing chemicals to remain untested, by requiring those substances to be tested in order to continue being used and sold on the market. Next, the Safe Chemicals Act shifts the burden of proof from the EPA to chemical companies. By requiring industries to prove the safety of their chemicals, it requires manufacturers to develop and submit safety data for each chemical they produce and prioritize those chemicals based on risk. In this way, the EPA can focus its resources on evaluating those chemicals most likely to cause harm. By prioritizing action for chemicals of high concern, the EPA can subject high-risk substances to advanced action such as reducing their usage. Prompt action by the EPA will either phase out or reduce the most dangerous chemicals, hence prioritizing implementation.

\[\text{References}\]

80 Id.
81 Id.
84 Id.
86 Id.
Finally the Safe Chemicals Act would notify the public and the market about chemicals that pose a health and safety concern.87 The bill would close the loophole of secrecy, limiting the ability of industries to hide information about toxic chemicals.88 Warning labels and an established Internet-based public record would keep the public informed similar to CA Prop. 65’s warning label requirements.89 However, the federal government will continue to have a role in the Safe Chemicals Act through enforcement.

In order to require compliance with the Safe Chemicals Act the federal government is permitted to penalize violators. A criminal punishment requires an individual to knowingly abuse any provision of the Safe Chemicals Act that puts another person in imminent danger of death or serious injury.90 Fines under a criminal punishment can reach $250,000 or imprisonment for five to fifteen years.91 In some cases both a fine and imprisonment can occur. If an entire industry becomes liable for a criminal punishment, the federal government will give a $1,000,000 fine to the guilty industry.92 By incorporating severe penalties to any disobedience of the Safe Chemicals Act, the federal government can ensure compliance to the law.

**Benefits and Challenges to Safe Chemicals Act**

By enacting the Safe Chemicals Act, Congress hopes to improve the safety of chemicals used in everyday consumer products such as children’s toys, cleaners, and paints, thus,

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87 *Id.*
88 *Id.*
89 *Id.*
91 *Id.*
92 *Id.*
progressing overall human health and the environment.\textsuperscript{93} Furthermore, from an economic viewpoint, the Safe Chemicals Act would incentivize new, clean, and sustainable products much like REACH.\textsuperscript{94} Promotion of innovation and development of safe chemical alternatives would also aid in industry compliance.

The Safe Chemicals Act has several benefits for industries if the amendment passes. For one thing, chemical manufacturers could sell more economically in the United States.\textsuperscript{95} It was noted by a BASF, Badische Anilin- und Soda-Fabrik, (the largest chemical company in the world) executive in 2011 during a Senate hearing that an overhaul of TSCA would make it easier to sell chemicals across state lines.\textsuperscript{96} Currently, each state has its own state laws concerning chemical safety due to the failure that is TSCA. As of now, thirty states have passed more than 150 policies to regulate chemicals.\textsuperscript{97} By universalizing chemical safety and regulations under the Safe Chemicals Act, chemical manufacturers would have an easier time selling their products between states consequently enhancing the economy.\textsuperscript{98} This benefit could also contribute to greater communication between various sectors such as scientists, manufacturers, the federal government, and consumers. The amendment would also improve interstate and international chemical sales.

\textsuperscript{93} Lautenberg’s Safe Chemicals Act Approved by Committee, U.S. Senator Frank R. Lautenberg (July 25, 2012) (on file at Lautenberg Press Office).
\textsuperscript{94} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Lautenberg’s Safe Chemicals Act Approved by Committee, U.S. Senator Frank R. Lautenberg (July 25, 2012) (on file at Lautenberg Press Office).
A change to TSCA would involve a decrease in global compliance efforts. The Safe Chemicals Act aims to prove that chemical risks are controlled or that there are safer alternatives. Because the Safe Chemicals Act has many aspects similar to REACH’s regulatory structure, global companies would be able to streamline efforts and compliance costs of both REACH and the Safe Chemicals Act.

Aside from the sale of chemicals, industries could benefit from the lower costs in other areas. Chemical manufacturers can lower costs associated with storage and disposal of hazardous wastes. Furthermore, enhancing worker safety would reduce costs attributed to health care and liabilities due to the benefits of a safer workplace. On the down side, it could also cause more costs by forcing industries to individually test chemicals in order for a product to enter the market. Presently under TSCA, there is minimal testing with the federal government funding the research however; a change would place the burden of funding research on private industries. Nevertheless, to address this downside it is suggested that the federal government provide some research and development grant funding to effectively facilitate development and cooperation. The government can also supply analytical tools to allow industry to quickly access the potential health and environmental effects of its products. In this way, industries receive assistance from the government, thus minimizing the difficulties of funding that TSCA has encountered.

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99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
Aside from costs, differing opinions between chemical industries and environmental groups also pose as another challenge to overcome. Chemical industries agree that TSCA needs to be modernized however, not all of them believe that the Safe Chemicals Act is workable. Industry argues that the bill as is, does not balance chemical safety with continued manufacturing.\textsuperscript{104} The Society of Chemical Manufacturing (SOCMA) President Lawrence Sloan disputes, “ultimately the Safe Chemicals Act will have to consider how the costs and delays associated with increased data submission will impact U.S. jobs.”\textsuperscript{105} Furthermore, SOCMA worries about the role of industry’s small and medium-sized chemical manufacturers and the additional costs placed on them.\textsuperscript{106} SOCMA trusts that the EPA can exercise the authority it was originally intended to practice under TSCA with minimal reforms.\textsuperscript{107} Nevertheless, industries do not support the repeal of TSCA.

On the other hand, public health professionals, environmental groups, labor organizations, religious organizations, as well as families around the nation call for greater reform. Using evidence provided by scientists, they support reform by claiming the link between some chemicals and the rising incidences of serious illnesses.\textsuperscript{108} They accuse chemical industries of “playing politics with our health and well-being, constantly pressuring some members of Congress to overlook the health of America’s children in

\textsuperscript{104} SOCMA Reiterates Opposition to Safe Chemicals Act, Society of Chemical Manufacturers & Affiliates (Nov. 17, 2011), http://www.socma.com/pressRoom/?subSec=3&sub =71&articleID=3282).
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
favor of protecting the chemical industry’s profits.” Therefore, as with any law up for review in Congress, compromises will have to be made as divergences of thoughts occur.

For example, chemical industries deem the Safe Chemicals Act as “too extreme.” One politician, Senator James Inhofe of Oklahoma, argues that if the United States models its reforms after the EU’s REACH all chemicals including flame-retardants would have to be proven safe before being placed on shelves. However, Senator Lautenberg, author of the Safe Chemicals Act, and the environmental group NRDC (Natural Resources Defense Council) defend reform by arguing that American babies are born with the highest concentration of flame-retardants in the world, a chemical known to cause slow development of the brain and cancer later in life. Compromises will have to be made in order for the Safe Chemicals Act to overcome challenges and seek benefits.

There are clear differences in how strict and comprehensive the Safe Chemicals Act should be. From Congress to chemical manufacturers to environmental activists, each has their own opinion on how the TSCA reform should be created and implemented. Despite these differences, there are definite and reasonable advantages to reform. Policy makers need to reach a

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109 Id.
112 Id.
compromised agreement in order for TSCA to have any hope for change.

**Conclusion**

TSCA and most of Congress’s existing regulations pertaining to chemical safety are in dire need of an overhaul. While, states, other countries, and marketplaces continue to improve and modernize their chemical safety policies and practices, the U.S. as a whole has not. However, the Safe Chemicals Act provides improvements that would boost health protections and ease implementation and workability. A TSCA reform that should be a high priority for the 113th Congress must incorporate the positive and successful aspects of CA Prop. 65, as well as the intentions of the European Union’s REACH law.\textsuperscript{113} While there is much debate over a reform of TSCA, the advantages and benefits it would provide overpower objections and aversions from the reform.

In 2011, the Washington State Healthcare Authority (HCA) began to regulate Medicaid beneficiaries’ experiences in the emergency room. The HCA is the state’s Medicaid administrator and had recognized, to their standards, an incorrect usage of the emergency department. To address this concern, the Washington legislature attempted to incorporate regulations aimed at closing the gap created by Medicaid beneficiaries using the emergency room for circumstances that could have been addressed by a primary care physician. Often, hospitals are forced to take in a patient to the emergency room through the Prudent Layperson law.\(^1\) The Washington law requires the hospital to provide medical attention to anyone acclaiming a legitimate medical concern.\(^2\) However, the state conversely possesses the ability to retroactively bill Medicaid patients if they violate the terms of their Medicaid agreement by overusing the emergency room.\(^3\) The State attempted to implement restrictions on the number of times a Medicaid beneficiary could enter the emergency department for a “non-emergent” condition, in order to deal with the increase in people

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\(^1\) Wash. Rev. Code § 48.43.093.

\(^2\) Id.

overusing the hospital.\textsuperscript{4} This article analyzes the legality of the Washington emergency room regulations and their consequences, as well as their relation to aspects of Medicaid in the Patient Protection and Affordable Care Act.

\section*{Background}

The regulations that the HCA attempted to pass were unjust to those covered by Medicaid in Washington State. This article addresses the problems with those regulations, explains how HCA was halted, and provides potential solutions for Washington State. This article next discusses the major effects that the financial cuts have on daily emergency room operations, the shortcomings of the regulations, the violations of previous laws, and also offers a set of solutions to address some of the State’s main financial concerns. The specific regulations were a part of a plan to characterize 700 conditions that a patient may come into the emergency room with as “non-emergent,” even though many were characteristics of some serious diagnoses.\textsuperscript{5} In addition, patients using the state Medicaid plan would be only be allowed three “non-emergent” visits to the emergency room covered every year.\textsuperscript{6} Finally, the proposition included large cuts to emergency rooms that need those resources to maintain proper levels of care.\textsuperscript{7}

Washington planned to make immense cuts in spending starting in 2011 without foreseeing the potential impact it would

\\textsuperscript{4} Id.
\textsuperscript{6} Id.
\textsuperscript{7} Id.
have on the medical industry in the State. The regulations proposed by the HCA were not only constructed in a manner that attempted to decrease the quality of care, but it also used the Prudent Layperson law to make the lives of economically disadvantaged population even more difficult. Under the Prudent Layperson law, anyone who comes into the emergency room with what could be considered a health issue by the layman must receive treatment. If the Medicaid beneficiary has exceeded the three visit non-emergent limit, the beneficiary must bear the full cost of the visit. This has complicated the medical treatment process, because once the three visits are reached, hospitals would be forced to bill the patient. Eventually, citizens would be limited to only receiving medical care for certain treatments.

**Effects of Drastic Cuts in Spending**

As the United States continues to battle economic times, the government-run Medicaid care plan had reduced emergency departments to ineffective levels in forty-three states. In a few other states, including Washington, Medicaid emergency department reimbursements have been limited in specific cases that are considered non-emergent. On October 1, 2011, Washington State implemented regulations that would cut at least 70 million dollars over the following two years from the section of the budget

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8 *Id.*


that covered medical treatment in the emergency room.\textsuperscript{12} The reduction in the budget sought to limit the amount of times every year a person who possesses Medicaid can get emergency medical assistance.

The American College of Emergency Physicians (ACEP) once had a tremendous problem with Washington State’s regulations regarding Medicaid. Not only did the regulations limit patients to only three annual non-emergent visits under the coverage of Medicaid, as described in the Washington Administrative Code 182-550-1200, but it promoted self-diagnosis in an attempt to not overuse emergency room visits.\textsuperscript{13} A portion of the regulation, CR-103E of July 2011, reads, “(4) Coverage of emergency room visits that do not meet the definition of emergency services according to WAC 182-550-1050. (a) The agency covers a maximum of three emergency room visits that do not meet the definition of emergency services per client, per state fiscal year.”\textsuperscript{14} Consider the statements of Doug Myers, M.D. of the Washington State Medical Association with regard to the effects of the HCA’s regulations:

Limiting Medicaid patients to three emergency department visits poses a significant threat to patient safety, leaving many to avoid or delay seeking needed emergency care in fear it will be deemed a non-emergency and they will exceed the allowable limit. The end result of this kind of policy will be the need for prolonged and more intensive care, which not only harms the patients, but increases costs for everyone.\textsuperscript{15}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{12} Id.
\textsuperscript{14} Wash. Code Rev. CR-103E.
\end{footnotesize}
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Only a month after the legislation went into effect, Judge Paula Casey of the Thurston County Superior Court of Washington found a way to negate the law. The judge found that Washington State had failed to follow the proper protocol for implementing regulations; thus, the state had to craft an entirely new regulation. In Washington, only three percent of Medicaid subscribers actually cause a significant problem by overusing the emergency room. The other ninety-seven percent make less than three visits to the emergency room per year.

Doctor Malika Fair, an emergency physician in Cheverly, Maryland presents a contrasting view to this issue. He claimed, “I don’t think that people misuse the ER. Everyone thinks they have an emergency.” The healthcare system was designed in order to uphold a certain ideal or quality of care for its’ patients. However, the regulations the HCA wanted to pass undermined the process.

The Washington chapter of the ACEP boldly stepped into the situation, and on September 30, 2011, it sued the State to overturn the HCA’s regulations regarding non-emergent visits. After the ACEP initiated the legal process, the Washington State Medical Association (WSMA) provided their support, despite being a state-operated program that receives over 32 billion dollars in state

17 Id.
19 Id.
20 Id.
funding. The WSMA decided to put aside their loyalties and financial dependability on the State to take a stand for public health. This type of bold action from a state-funded organization demonstrates true injustice of the HCA’s proposed regulations.

Further support came from Washington’s Governor Christine Gregoire in April of 2012. She recognized the flaws with the regulations that the HCA had attempted to implement in the list of non-emergent conditions. Governor Gregoire helped to dismantle the zero tolerance policy that would have gone into effect otherwise. Though she assisted Washington State in making great strides in moving past this failure of the HCA, it took a significant amount of time to reach this solution. More than a year later, the State and HCA were still trying to amend this issue while the Medicaid beneficiaries were ultimately suffering as a result.

Iowa’s Relation to Medicaid Law

Other examples of drastic cuts in the field of healthcare exist across the nation and provide an anecdote of how some policies could have major effects on more than just the patients. Additionally, the laws had the ability to spread over the state’s entire economy. For example, a study conducted by Families USA regarding the Medicaid cuts in the proposed budget “would put as many as 13,280 jobs and as much as $1.3 billion in state activity at

\[\text{Id.}\]

\[\text{Id.}\]
risks.” Many of the congressional districts in Iowa have released reports in June 2011 summarizing the impact of Medicaid cuts into more relatable terms for the State’s citizens. In the second congressional district, there are about 213,000 emergency room visits each year, and Medicaid covered 22,000 of the visits. If Medicaid coverage is reduced statewide, hospitals will see reduced or eliminated coverage altogether, forcing many local hospitals to make significant cutbacks. Emergency care will not be as readily available due to a large increase in uncompensated care. It is not difficult to imagine how some of these same problems could come into effect in Washington State.

**Shortcomings of the List of Non-Emergent Conditions**

More controversy regarding the regulation stemmed from a list of 700 conditions that are not considered worthy of immediate medical care in the emergency room. When the Washington State Medical Association (WSMA), a state-run and funded institution, called for a change regarding a certain regulation, the HCA should really reflect on the merit of their regulations. Is it right to decide what is an emergency and what is not? Not necessarily, but it is true that each person who walks into the emergency room may not have an emergency. There are certain symptoms that are more serious in comparison to others, which deserve immediate medical treatment.

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27 Id.
Some of the symptoms on this list of 700 non-emergent conditions, however, are not too severe and could even be treated in a less timely manner. Warts, sunburn, and sore throats, which appear on the list, are some examples of what would constitute as non-emergent. Nevertheless, there are very serious conditions that appeared on this contentious list. The regulation that was previously in place until the ACEP lawsuit excluded compensation for patients who have chest pains or difficulty breathing, which may be the symptoms of a very serious illness. After further discussions, the Washington chapter of the ACEP was able to agree upon a smaller list.

The issue of Medicaid beneficiaries coming to the emergency room searching for treatment for non-urgent was and still is apparent. The HCA attempted to tackle this problem by restricting the amount of times someone covered by the state’s Medicaid program can come into the hospital per year. However, there are two sides to this story and the perspective of the Medicaid patient is much more unsettling. The ruling made by the HCA essentially decided how many times Medicaid enrollees can be sick and tried to put it into regulation. This regulation would have had the ability to force people to sit at home with a serious illness and remain untreated to avoid being footed with the bill by uncovered treatment. Many doctors agreed that there was a surplus of emergency room visits for conditions not deemed urgent, but the point was that the emergency room doctors do not know this right

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29 Id.
30 Id.
31 Id.
away.\textsuperscript{32} It requires testing and sometimes even keeping the patient for twenty-four hours to be certain.\textsuperscript{33} This not only makes patients with an actual emergency wait longer, but it also took away the time that doctors have to treat those really in need of medical care. Doctor Nathaniel Schlicher, the legislative chair of Washington’s chapter of the ACEP, said, “We continue to be interested in a truly collaborative process to reduce unnecessary emergency room visits. We will not, however, stand by and allow a policy damaging to Medicaid enrollees to take effect.”\textsuperscript{34} Doctor Schlicher and presumably other medical professionals across the State believe that a regulation limiting an individual to three non-emergent visits under Medicaid is not an appropriate method of reducing the number of people in the emergency room, nor is it consistent with the Prudent Layperson law.

When this regulation was put into motion, the bureaucrats at the HCA knew that it had the potential to affect a significant amount of people. For as many HCA officials who approved the list of 700 conditions, it is incredible to believe that so many serious symptoms were merely glanced over. The following are a list of symptoms not included on the list of 700: chest pain, heart attack, angina, aortic dissection, and pulmonary embolism.\textsuperscript{35} These conditions can potentially pose significant threats to people’s health. In many circumstances, immediate treatment can make a profound

\begin{flushleft}
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\end{flushleft}
difference with some of these diagnoses and lead to the correct treatment. However, the HCA chose to instead overlook these very serious symptoms and transfer the associated costs to Medicaid enrollees in order to avoid covering expensive medical bills.36 Numerous other potentially serious conditions are excluded from the list of treatable conditions. Understanding the structure of the policies potential effects they could have on Medicaid beneficiaries is what made these regulations so controversial. Patients were not covered for potentially serious conditions, and many people were not even provided adequate knowledge of this fact. A healthcare system like this was not working for the people, but rather against them.

Violations of Previous Legislation

The regulations that the HCA constructed has disregarded previous the classification of what constitutes a medical emergency. According to the definitions of key terms under the Washington Revision Code § 48.43.005:

A medical condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in a condition (a) placing the health of the individual, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy, (b) serious impairment to bodily

functions, or (c) serious dysfunction of any bodily organ or part. This definition states what should be considered an emergency medical condition, which is contrary to many of the symptoms that the state attempted to regard as non-urgent.

Washington designed a procedure that described how to handle medical emergencies, and this was a crucial part of showing that the HCA was not adhering to the law in attempting the pass their regulations. The Washington Revision Code § 48.43.093 established that it is the emergency room’s responsibility to stabilize a patient, even a Medicaid enrollee, no matter how many times that person has received medical services. The legislation reads:

A health carrier shall cover emergency services necessary to screen and stabilize a covered person if a prudent layperson acting reasonably would have believed that an emergency medical condition existed. In addition, a health carrier shall not require prior authorization of such services provided prior to the point of stabilization if a prudent layperson acting reasonably would have believed that an emergency medical condition existed.

The law was designed with the well-being of the patients in mind, not the crowds in the emergency room or the funds of Medicaid. The job of emergency department doctors is to treat and stabilize the people who need medical attention, which is what the Prudent Layperson law was designed to do.

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37 Wash. Rev. Code § 48.43.005.
40 Id.
The Road to Solutions

Making cuts in the budget for Medicaid is one way to reduce spending, but as mentioned earlier, it decreases the quality of care for all enrollees. A multitude of situations could play out if further budget cuts are implemented to decrease the quality of care even more. Smaller hospital staff and longer waiting times are cost-reducing options, but this may also result in a decrease in the standard of care. Doctor Stephen Anderson, President of the Washington chapter of the ACEP, mentioned in an interview “the state has been mandated to try and save 72 million dollars over the next two years [starting in 2011].”

The ACEP has come up with several alternative actions to save the Medicaid program millions of dollars per year. The first of these alternative methods was to employ a stricter prescription drugs policy that will cut down on the number of people who come to the emergency room solely to obtain pain relievers. This policy has the potential to save the state up to thirty million dollars.

The second option could save Washington upwards of 130 million dollars each year. This solution alone would exceed the State’s goal of saving 72 million dollars over the following two years. The ACEP states that this goal can be accomplished by simply escalating the use of generic psychiatric medicines. To follow in suit, the emergency department would also have to make

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42 Id.
43 Id.
the switch to generics as well.\textsuperscript{45} The quality of care for the patients will not decrease as a result of the switch to generic drugs. Generic drugs are, in both a chemical and functional sense, the same as the brand name counterpart.

The United States Food and Drug Administration (FDA) set regulations for quality that all medicines must meet in order to enter the market, so all medicine, whether generic or name brand, has the same level of quality.\textsuperscript{46} In fact, the FDA estimates that name brand companies are accountable for half of generic drug production.\textsuperscript{47} Ultimately, hospitals will not suffer if they decide to switch to generic drug according to research conducted by the FDA.\textsuperscript{48}

The final recommendation by Doctor Anderson was to establish hotlines that patients could call if they feel that they are experiencing an emergency.\textsuperscript{49} Resident nurses would run these hotlines and would speak with the caller to determine whether he or she has an emergent condition.\textsuperscript{50} If the caller’s description does not appear to be an emergency, the caller would be directed to a primary care alternative instead of the emergency room.\textsuperscript{51} This system directly reduces the amount of people crowding waiting

\textsuperscript{45} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
rooms with non-urgent medical conditions. All four methods outlined by Doctor Anderson, including a stricter prescription drug policy for emergency departments, an increased usage of psychiatric generic medicines, increased treatment through generic medicines, and hotlines staffed by resident nurses to direct callers to primary care physicians, could save more money than Washington had mandated in its Medicaid regulation.\textsuperscript{52}

\textbf{Conclusion}

The discussion and debate over Medicaid has not been centralized to Washington State but has attained national attention with the passing of the Patient Protection and Affordable Care Act (PPACA) in March of 2010.\textsuperscript{53} This federal statute had influence across the United States and relates to Medicaid and some of the details of this law are extremely influential on the ways that hospitals operate in Washington. The regulations made in this federal decree will go into effect on January 1, 2014 in Washington, and the State has been making preparations to be ready for this deadline.\textsuperscript{54} One of the details of this statute is that the number of people that are eligible for Medicaid will greatly decrease; an estimated 160,000 people in Washington would be approved if they applied for this program.\textsuperscript{55} In addition, the range of people eligible has been expanded due to the PPACA to allow anyone from ages 19 to 64 who has a household income that is 138 percent of the

\textsuperscript{52} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
national poverty level.\textsuperscript{56} The fact that an increasing number of residents are joining Medicaid in Washington indicates the importance of not favoring such unsound regulations as the HCA advanced.

The complete disregard for the Prudent Layperson law was one of the biggest shortcomings of the HCA’s legislative proposal, which is why it ultimately failed. This law clearly states that the State is required to provide initial emergency care, even without prior authorization by the healthcare provider, that a prudent layperson may come to the reasonable conclusion that care is needed would be more than enough cause to gain medical attention in an emergency room.\textsuperscript{57} When this was compared to the portion of the HCA’s regulation that claimed that some very serious symptoms are not worthy of treatment and the limited visits per year, there was a problem. Inconsistencies with the law were recognized by Washington State and thankfully these regulations were halted in its’ tracks. The significance of this issue lies in the roots of providing adequate care for the unhealthy. In order for the healthcare system to effectively provide medical services, it cannot be restricted to addressing a limited number of medical conditions. Forming regulations that aim to save money in exchange for treating those in need should not be tolerated.

\textsuperscript{56} Id.
\textsuperscript{57} Wash. Rev. Code § 48.43.005.
The Prosecution of Child Pornography Cases in the U.S.

Rosalba Gleijeses

While many acknowledge the perniciousness of the child pornography (CP) industry, few people are aware of the complex features that define it. Child molestation and sexual abuse are overwhelmingly reviled in the U.S. culture, but there is far less consensus on the extensive, sundry factors that may contribute to the CP industry. CP takes many forms and involves a collaboration of people in each individual case. From these issues, many significant obstacles are faced in the prosecution of these CP cases. In order to eradicate this industry, Congress must act to create a law that focuses on practices that have not traditionally been considered when crafting laws aimed at child pornography. The purpose of this article is to identify the most efficient strategies available by judicial and legislative establishments to prosecute child pornography cases.

This article will discuss five less commonly addressed variations of CP in order to emphasize the extensive difficulties posed by each. The first is virtual CP, in which graphic animation exclusively depicts a child engaging in a lewd sexual act. In addition, this article will explore pornography cases in which a person over the age of 18 is explicitly and purposely portrayed as a child. Arguably equally controversial are cases in which a child’s

face is transposed on the body of an adult engaging in sexually illicit activity. Similarly, this article will investigate cases in which children are electronically manipulated to depict such conduct. Finally, this article will discuss methods of prosecuting cases involving photographs and/or videos in which real children were actually engaging in these kinds of activities. Additionally, this article will address the major prosecutorial obstacles that overwhelmingly face all CP cases: whether or not to show images in jury trial, methods of ensuring effective child victim testimony and means of proving *mens rea*. By using the strategies provided by the structure of legislation that is already in place, in conjunction with innovated psychological methods of ensuring effective child testimony, child pornography cases will be more successfully prosecuted.

**Legislation and Supreme Court Cases**

To adequately propose plausible solutions to the gaps in prosecution, it is critical to establish what legislation is already in place and the purpose that it serves. Child pornography laws serve primarily to protect the best interest of the child. In *New York v. Ferber*, the Supreme Court removed CP from First Amendment protection.² The issue in this case was whether or not a New York statute prohibiting the knowing promotion of a child under the age of 16 engaging in sexual conduct was unconstitutional under the First and Fourteenth Amendments. The statute defined “sexual performance” as: “stimulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse,

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or lewd exhibition of the genitals."³ The Court held that the statute was in fact constitutional. This statute, by criminalizing such activity, not only addresses protection of children, but also serves to repress the deviant interests of the perpetrator that fuel the industry by categorizing the different categories illegal of impermissible sexual behavior as such.

In the opinion produced by the Court, Justice Byron White asserts that the obscenity test in *Miller v. California* does not adequately solve the problem of child pornography.⁴ He provides two main justifications for how child pornography is inextricably tied to sexual abuse. He states that:

First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of the material which requires the sexual exploitation of children is to be effectively controlled.

The first reason speaks to the defense of many perpetrators charged only with possession of CP, as opposed to possession and production. In such cases, a common justification was that the defendant was not inflicting harm on anyone by privately viewing CP images. However, as Justice White states, harm is caused merely by possession because it perpetuates the psychological repercussions endured by the child as the images continue to circulate throughout cyberspace and in print. Furthermore, the

⁴ Id.
possession of CP is the source of demand in the industry Protection of Children Against Sexual Exploitation Act of 1977.\(^5\)

The degree of danger posed to society by someone, who doesn’t have a criminal history but knowingly possesses and purposely views images or videos of CP, is a topic of controversy. In order to produce the products to accommodate the demand of the industry, children are convinced, coerced, or blatantly forced to engage in illicit sexual activity. Possession of CP is fueled by the same perverse, deviant interest of those inflicting the physical abuse upon the children. While mere possession does not necessitate acting upon such desires, its existence is the reason children continue to be violated as such.\(^6\)

The first criminal statute pertaining to child pornography passed by Congress was the “Protection of Children Against Sexual Exploitation Act of 1977”\(^7\). While this set the incipient standard for criminalizing CP, rapid advancements in technology have lead to a myriad of amendments to this statute. Hence, the act was amended many times, most significantly in 1996, in which Congress first addressed the emergent forms of virtual child pornography.\(^8\) This issue in itself is one of the greatest prosecutorial obstacles in CP cases. Increasing technological advancements leave the industry in perpetual flux. As websites and domains become more sophisticated, they become harder to trace. Investigative methods must constantly adapt to accommodate the increasing forums infiltrated by the industry.

\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
To accommodate the expanding outlets of child pornography, Congress introduced a new section to the criminal code, which enumerated specific, pursuant definitions. Title 18 U.S.C. § 2256 (8) defines child pornography:

Any visual depiction, including photograph, film, video, picture, or computer or computer-generated image of picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct.\(^9\)

The statute continues to provide specific criteria for what can be considered as “sexually explicit conduct.”\(^10\) While the addition of new definitions certainly has its utility in the prosecution of these cases, they can only be added after the fact. Legislation is always going to be a step behind evolution in technology, which poses obvious issues as perpetrators discover new means of perpetuating the industry. However, this approach is more productive, than sweepingly broad definitions that allow for far too much subjectivity in judgment. Yet, even these definitions proved to be overbroad in the Supreme Court case that followed.\(^11\)

After the passage of Title 18 U.S.C. 2252A\(^12\) and Title 18 U.S.C 2256(8)\(^13\), First Amendment claims were made to argue for the educational value of child pornography.\(^14\) *Ashcroft v. Free Speech Coalition* brought the issue to the Supreme Court again, after an organization of people dedicated the First Amendment defended a

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\(^9\) 18 U.S.C. § 2252A.

\(^10\) Id.


\(^12\) 18 U.S.C. § 2252A.

\(^13\) 18 U.S.C § 2256(8).

book published that included nude, erotic photos of minors.\textsuperscript{15} The Free Speech Coalition defended the philosophical and educational value of this study of nudism.\textsuperscript{16}

The Court found in favor of the Free Speech Coalition, holding that the definitions in Title 18 U.S.C. § 2256(8)(B) and Title 18 U.S.C. § 2256(8)(D) were unconstitutionally overbroad.\textsuperscript{17} In the Court opinion, Justice Kennedy writes that: “[teenage sexuality] is a fact of modern society and had been a theme in art and literature throughout the ages.”\textsuperscript{18} Congress followed by passing new amendments to the PROTECT Act in Title 18 U.S.C. § 2256 that enumerated more specific definitions, which include:

Such visual depiction is a digital image, computer image, or computer generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.\textsuperscript{19}

This preliminary set of guidelines is delineated into further specific definitions within the statute, including “sexually explicit conduct” which entails graphic sexual intercourse, graphic or lascivious simulated [bestiality, masturbation, or masochistic or sadistic abuse], and graphic or simulated lascivious exhibition of the genitals.\textsuperscript{20}

**Prosecutorial Obstacles**

*Proving Intent*

The single greatest prosecutorial challenge in child pornography cases is proving intent of those in possession,

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} 18 U.S.C. § 2256(8)(B).
\textsuperscript{20} 18 U.S.C. § 2256(8)(B).
differentiating it from a majority of other sexual offenses. It easy to say that one accidentally stumbled upon a CP website with a misleading domain name; it is much more difficult to argue that one unintentionally engaged in illicit sexual activity with a child.\textsuperscript{21} Misleading domain names produce considerable difficulty in prosecuting child pornography cases. While accidents as such surely exist, it is often the case that prior knowledge of the domain name was present, and that the perpetrator intentionally sought out the site.\textsuperscript{22}

While \textit{mens rea} is inextricable from successful CP convictions, there is currently legislation in place that more leniently accommodates cases in which misleading domain names are present.\textsuperscript{23} Title 18 U.S.C. § 2252B states that misleading domain names on the internet result in no more than two years imprisonment for cases in which the defendant is “knowingly using a misleading domain name to deceive a person into viewing obscenity.”\textsuperscript{24} It further establishes a maximum of ten years of imprisonment for cases in which the defendant is “knowingly using a misleading domain to deceive a minor into viewing material that is harmful to minors.”\textsuperscript{25} The same statutory maximum sentence is applied under Title 18 U.S.C. § 2252C, which focuses on misleading key words, rather than domain names.\textsuperscript{26} The aforementioned sentencing limit is applied to cases in which the defendants is:

\begin{quote}
Knowingly embedding words or images into the source code of a website with the intent to deceive a person into viewing obscenity, or to
\end{quote}

\begin{itemize}
\item \textsuperscript{21} 47 U.S.C. § 231.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} 18 U.S.C. § 2252B.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} 18 U.S.C. § 2252C.
\end{itemize}
deceive a minor into viewing material harmful to minors.\textsuperscript{27}

With all of these limitations on maximum sentences for cases involving misleading domain names, the issue of proving intent is amplified.

One of the more plausible methods of establishing \textit{mens rea} entails dismissing mental illness as a plausible defense. In the past 30 years, legislation has been passed to support this notion. The Insanity Defense and Reform Act of 1984 states:

\begin{quote}
It is an affirmative defense to a prosecution under any Federal Statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.\textsuperscript{28}
\end{quote}

While many defendants preach a psychological sickness as justification for their actions, this Federal Statute strikes such a defense.\textsuperscript{29} Such defendants argue that intent was not present because their illness impaired their judgment and incapacitated them from fully comprehending the consequences of their actions. Furthermore, the Supreme Court has found (in \textit{United States v. Pohlot}) that diminished capacity and diminished responsibility do not constitute as viable defenses in CP cases.\textsuperscript{30} Hence, while proving intent—a fundamental condition in CP convictions—is difficult, there are legal barriers in place that rule out many of the common defenses which need to be respected by both counsels.

\textsuperscript{27} \textit{Id}.
\textsuperscript{28} 18 U.S.C. § 17(a).
\textsuperscript{29} \textit{United States v. Pohlot}, 827 F.2d 889 (3rd Cir. 1987).
\textsuperscript{30} \textit{Id}.
Showing Images in Jury Trial

The presentation of evidence to a jury is a critical component in the process of jury trials. In addition to ensuring the fairness of a trial, establishing all admissible evidence to the jury can also be used strategically. The way in which evidence is presented by either side can evoke emotions from the jurors to swing them in a certain direction. Showing images of child pornography to a jury could help secure a conviction, but there is no consensus regarding the moral permissibility of this tactic.

The realization of such a crime manifesting before the eyes of the jury can spark revulsion fervent enough to assure a guilty conviction. These images firmly expose the trauma endured by the child. That being said, the trauma is perpetuated with each viewing of the images. In many cases, it is impossible for all images to be destroyed after the trial; frequently reminders of these atrocities float through cyberspace and accumulate perniciously in the basements of pedophiles. While there is clear utility to showing these images in jury trial, protecting the best interest of the child is overwhelmingly more important. Alternatives, while potentially exhaustive, may include explicitly enumerating the content of each image or video. This method certainly is not comforting, but it inflicts less shame and embarrassment on a child that has already endured so much.

Promoting Effective Child Testimony

The difficulties in promoting effective testimony from adults are considerably amplified when dealing with child victims and witnesses. These intensified obstacles, in addition to auxiliary problems specific to children—such as lack of intellectual and psychological development, make promoting veracious testimony especially difficult in child pornography cases.

The paramount reason for increased difficulty in a child’s testimony compared to that of an adult is unequivocal lack of mental development. Children’s communicative skills are considerably less advanced than those of a properly functioning adult. This, in conjunction with their similarly underdeveloped memory skills, makes it particularly complicated for children to recount stories of their abuse. There are several strategic solutions to approaching this issue. For instance, interviewers can rely upon potential memory triggers other than times and dates—with which they have a particularly hard time remembering. Cues such as what the child was wearing, i.e. a coat, shorts, etc.—can often provide substantial chronological information.33

Additionally, children are more readily susceptible to fatigue.34 Hence, the manner in which the interviews are conducted, their frequency, and the number of interviewers are all critical in aiding the child to accurately recount their story. It has been noted that children are far more receptive to being questioned by a single interviewer, rather than multiple. Recent research has indicated that “phased interviews” are more productive than multiple

33 Id.
34 Id.
interviews and multiple interviewers. This type of phased interview is divided into seven stages developed to ensure the child’s optimum comfort and correspondingly accurate testimony. The first step consists of establishing a rapport with between the child and the interviewer. This is a critical preliminary step in the process, because children are more apt to open up to someone with whom they feel comfortable. There are many methods for approaching this step. For instance, interviewers oftentimes include toys in their office to make it appear as a less threatening environment.

The second step is establishing legal competency. This stage is inextricably vital to the proceedings of the trial. If a child is not deemed legally competent, then their testimony will not stand in trial. Victim and witness testimony are obviously critical components in prosecuting sexual offenses. In order to meet this standard, the interviewer must make a record of the child’s observational, analytical, communicative, and memorization abilities pursuant to the harm that they have endured. Furthermore, it is conducive for the interviewer to have means of proving to the court that the child can differentiate between true and false.

The following protocol requires that the interviewer establish ground rules for the upcoming proceedings, both within the interview and in court. Vital to this step is stressing to the child the importance of acknowledging and noting lapses in memory. Additionally, it is important for the interview to make it clear to the child that they should correct any inconsistencies in the interviews.

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35 Id.
36 Id.
37 Id.
recantation of the child’s story. The next step precedes the portion of the interview in which the child tells their side of the story. In this phase, the interviewer asks the child to explain a non-abusive encounter. The child’s ability to coherently express a story unrelated to the events pursuant to the case is critical in establishing a standard by which the interviewer can assess the validity of their recitation of the crime itself. Once this step has been completed, the interviewer may address the topic of the sexual abuse endured or witnessed by the child.

The interviewer should not introduce this topic with language directly associated with sexual abuse. This can be both intimidating and confusing to the child. Instead, it is more productive to ease into the subject by inquiring while the child believes that they are partaking in the interview, or noting that they understand that something has happened to the child. In any case, it is critical to start with vague, circumstantial questions that provide the child with the opportunity to discuss their feelings before explicitly enumerating the most traumatic experiences of their lives. There are other tools available to interviewers that help foster an unintimidating environment for this phase, such as the usage of anatomical diagrams or dolls. These tricks can also ensure clarity in the specifics of the abuse, while ameliorating embarrassment for a child that is not comfortable enough to verbalize all facets of their trauma.

The final two stages, while equally important, require less strategy than the previous portions of the phase interview. Following the child’s recantation of their experience, the

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38 Id.
39 Id.
The Prosecution of Child Pornography Cases in the U.S.

The interviewer should ask the questions necessary for clarification—both to the interviewer and for the applicability in legal proceedings. Finally, the interviewer should repeat the child’s story to them and encourage them to come forward with any new information they may remember.\textsuperscript{40} This concept of phase interviewing is not currently the standard in child pornography cases. However, empirical research indicates its success. Hence, it should be adopted everywhere as an alternative to the multitudinous interviews and interviewers that often intimidate, fatigue, and confuse child victims.

In addition to this system, it is advisable that prosecutors utilize the legal mechanisms currently in place to protect children in this process. Title 18 U.S.C. § 3509 establishes the “Child Victims’ and Child Witnesses’ Rights.”\textsuperscript{41} The most notable advantage afforded by this law establishes the option for closed-circuit television testimony under certain circumstances.\textsuperscript{42} A child who successfully partook in a phase interview and offered credible, coherent chain of events may be paralyzed with fear upon taking the stand in court. Under this piece of legislation, the initiative for applying for this exemption falls on the prosecutor or the child’s guardian ad litem. In order for this accommodation to be granted, the court must find that the witness is unable to testify in open court for at least one of the following reasons:

i. Fear
ii. Substantial likelihood that the child would suffer emotional trauma from testifying.
iii. The child suffers from mental or other infirmary.

\textsuperscript{40} Id.
\textsuperscript{41} 18 U.S.C. § 3509.
\textsuperscript{42} 18 U.S.C. § 3509(b).
iv. The conduct by the defendant or defense counsel causes the child to be unable to continue testifying.\footnote{8 U.S.C. § 3509(b).}

It seems reasonable that any given victim in a child pornography case could satisfy at least one of these conditions, most likely the first. Arguments could plausibly be made in most cases for at least one of these conditions. It follows that prosecutors and guardian ad litems in CP cases should almost always apply for an exemption for the child from testifying in open court (extenuating circumstances excluded). If the court grants the request, the whole experience—of both overcoming the trauma caused by the crime and the corresponding legal proceedings—will be made more manageable and less stressful for the child.

The Confrontation Clause challenged the Closed-circuit television testimony because it violated the Sixth Amendment rights of the defendant.\footnote{MARYLAND v. CRAIG, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/cases/1980-1989/1989/1989_89_478 (last visited March 29, 2013).} The Supreme Court upheld the constitutionality of this statute in Maryland v. Craig, arguing that there was compelling governmental interest in protecting children that would suffer additionally as a result of confronting their defendant.\footnote{Id.} Again, when applying for such special circumstances is an option, it is in the best interest of both the prosecutor and the child to take advantage of the beneficial opportunity.

Title 18 U.S.C. § 3509(c)\footnote{18 U.S.C. § 3509(c).} presumes a child to be competent to testify unless proven otherwise. There do exist cases in which a child is not competent to testify, and doing so would only cause more harm to the victim. In such cases, while not necessarily in the
best interest of the prosecutor, a written motion should be filed requesting for a competency examination of the child. Oftentimes, so lost in the pursuit of conviction, one can forget the paramount issue at hand: protecting the child.

Several more special circumstances can be offered to those who apply. Title 18 U.S.C. § 3509(e)\(^{47}\) allows for a closed courtroom if it is found that testifying in open court would be detrimental to the child or that the presence of others in the courtroom would impair the child’s communicative abilities. Another rule gives children the option to have an adult attendant present while testifying on the stand. The attendant serves to comfort them. The child may sit on their lap, hold their hand, etc.\(^ {48}\)

**Conclusion**

The child pornography industry hosts a myriad of difficulties that pose the potential to obstruct successful prosecution. An overwhelmingly virtual enterprise, CP perpetually adapts in conjunction with technological advancements. Consequentially, criminal statutes need to be consistently amended to accommodate the expanding forums in which child pornography can manifest. Furthermore, means of ensuring effective child testimony must be taken. The pursuant legislative tools must be utilized and the phase interview method should be adopted in place of other alternatives. In so many facets of child pornography, the legislative tools are present to aid the prosecutors in the pursuit of conviction. The issue is taking advantage of all of opportunities afforded by the legal system in closing child pornography. Therefore, it is imperative for

\(^{47}\) 8 U.S.C. § 3509(e).
\(^{48}\) 8 U.S.C. § 3509(i).
the legal system to create means of charging and prosecuting child pornography in order to protect the most vulnerable citizens—children.
The DREAM Act: Education Stimulating the Economy

Luis Rishi Puno

Throughout its history, the United States has been defined by successive immigration waves that have had lasting socioeconomic impacts on American identity. The new immigrant wave of recent decades has been defined by illegal aliens coming into the United States without any proper documentation to stay, particularly from regions of Latin America. The Development, Relief, and Education for Alien Minors Act, or DREAM Act, is a legislative proposal for immigration reform that would provide illegal aliens, specifically minors, with citizenship or permanent residence in the United States. The potential passage of the DREAM Act is controversial due to the influx of illegal aliens into the United States within the past few decades.

The DREAM Act seeks to provide a path to legalization for eligible, unauthorized children and young adults. Aside from providing legal residency for these young adults and children, the DREAM Act can contribute to economic benefits for the United States. The economic benefits of the DREAM Act largely come from its provisions that allow these illegal youths access to higher education. It is imperative that Congress ratifies the DREAM Act because its ability to keep talented individuals in the U.S. through access to higher education effectively boosts the economy by adding higher paying job opportunities and more taxable incomes. By not
passing the DREAM Act, Congress is effectively decreasing economic growth by limiting potential “investments” for future generations.

Background

From 1997 to 2001, the United States moved towards advocacy of major immigration reform that proposed fewer restrictions on immigration requirements making it easier to immigrate to the United States.\(^1\) Congress and President’s Clinton administration passed four laws between 1997 and 2000 granting certain groups relief from some of the most restrictive provisions of the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) such as the immediate deportation of unauthorized immigrants within a year.\(^2\) During this time, some unauthorized immigrants were permitted to legalize their status.\(^3\) The election and subsequent actions of George W. Bush in 2000 marked a turning point in United States immigration policy, after thirty-five years without major changes to the US immigration system, and two decades into an increasingly assertive, but mostly ineffective immigration enforcement policy.\(^4\) President Bush regarded immigration as a way to offer important benefits to the United States economy and took a pro-immigration stance.\(^5\) President Bush, seeing the growing Hispanic population as an important swing vote, called for a new and large-scale temporary worker programs, and met five times in nine months with Mexico’s


\(^2\) Id.

\(^3\) Id.

\(^4\) Id.

\(^5\) Id.
president Vicente Fox. In the first nine months of 2001, three different bills were proposed on immigration including the DREAM Act.

However, public attitudes about immigration in the U.S. were heavily impacted in the aftermath of the 9/11 attacks. In the post-9/11 period, Congress passed a series of that broadened the government's power to detain and deport immigrants. By extension, DREAM faced opposition in Congress due in no small part to the 9/11 attacks. Due to the increasing anti-immigration sentiment as a result of the 9/11 terrorist attacks, the DREAM Act faced harsh opposition in Congress. Anti-foreigner sentiments in the US during this period was captured by the Gallup poll which stated that 52 percent of Americans believed that immigration was a good thing overall for the U.S., down from 62 percent the year Gallup poll before, according to a 2009 study.

With the increasing anti-immigration sentiment and public division on this issue, several different versions of the DREAM Act were introduced in Congress but never passed. The earliest version of the DREAM Act was first introduced on April 25, 2001 by Representative Luis Gutiérrez as the "Immigrant Children’s Educational Advancement and Dropout Prevention Act of 2001" (H.R. 1582) during the 107th Congress. This bill received 34 cosponsors and would have allowed illegal immigrant students to

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6 Id.
7 Id.
8 Id.
apply to for protection from deportation and then apply to receive lawful permanent residency if they met the following criteria: good moral character, enrollment in a secondary or post-secondary education program or current application to a college or junior college, entrance to the United States by the age of 16 and younger than 25, and continuous residence in the United States for five years. However on May 21, 2001, Gutiérrez’s version of the bill was dismissed in favor of a more limited version entitled "Student Adjustment Act of 2001" (H.R. 1918). This version of the bill lowered age eligibility to 21 years of age and garnered 62 cosponsors. On August 1, 2001 a mirror bill to the "Student Adjustment Act of 2001" was introduced in the Senate by Republican Congressman Orrin Hatch. This legislation, S. 1291, was the first bill given the title of "Development, Relief, and Education for Alien Minors Act" or "DREAM Act." Since that time variations of the original DREAM Act have introduced in both the Senate and the House at various times. The text of the bill was placed in various other immigration-related bills, including the Comprehensive Immigration Reform Act of 2006 (S. 2611) and the Comprehensive Immigration Reform Act of 2007 (S. 1348). These bills failed to pass enough votes in senates due to critics point out the broad reforms creates amnesty for illegal immigrants. With the failure of these comprehensive reform bills, Richard Durbin, the chief proponent of

11 Id.
13 Id.
the DREAM Act in the Senate, made its passage a top priority for 2007.\textsuperscript{14}

In September 2007, Durbin filed to place the DREAM Act as an amendment to the 2008 Department of Defense Authorization Bill (S. 2919). On October 18, 2007, Durbin, along with Republican co-sponsors Charles Hagel and Richard Lugar, introduced the DREAM Act as S. 2205.\textsuperscript{15} Though nearly identical to the revised amendment to the Defense Bill, opponents continued to cite previous arguments such as being amnesty for illegal immigrants and encouraging illegal immigration. In order to bring the DREAM Act debate, a vote requiring a filibuster-proof count of 60 votes was scheduled on October but failed.\textsuperscript{16}

The comprehensive act was re-introduced in both chambers of Congress on Thursday, March 26, 2009, during the 111th Congress by Senators Dick Durbin (D-IL), Richard Lugar (R-IN), Harry Reid (D-NV), Mel Martinez (R-FL), Patrick Leahy (D-VT), Joseph Lieberman (I-CT), Ted Kennedy (D-MA), and Russ Feingold (D-WI)[31] and U.S. Representative Howard Berman (D-CA). Under this version of the DREAM Act, immigrants could qualify in part, by meeting the following requirements: Be between the ages of 12 and 35 at the time of the law’s enactment, arrival in the United States before the age of 16, continual residence in the U.S. for at least five consecutive years since the date of their arrival, graduation from a

\textsuperscript{15} Id.
\textsuperscript{16} Id.
U.S. high school or a General Education Diploma, and, good moral character.\(^\text{17}\)

The 111th Congress continued to consider the DREAM Act bill throughout 2010. S. 3992, a new version of the DREAM Act, included numerous changes to address concerns raised about certain provisions of the bill such as state tuition for illegal immigrants.\(^\text{18}\) It does not repeal the ban on in-state tuition for illegal immigrants.\(^\text{19}\) This version of the DREAM Act does not allow illegal immigrants to gain access to Federal Pell Grants and other financial aid.\(^\text{20}\) It lowers the age cap for eligibility to 29 on the date of enactment. Additionally, to be eligible, individuals still must have come to the U.S. as children (fifteen or under), graduated from a U.S. High School (or received a GED from a United States institution), and be long-term residents (at least five years).\(^\text{21}\) The DREAM Act differs from the earlier version introduced by Senator Orrin Hatch and Senator John McCain in the fact that it does not include an age cap, making the new bill more restrictive and appearing less like amnesty.\(^\text{22}\) This bill was approved by the Republican-controlled Senate Judiciary Committee on a 16–3 vote. It does not grant resident status to anyone for at least two years, while previous versions of the DREAM Act would have immediately granted


\(^{18}\) Id.


\(^{21}\) Id.

\(^{22}\) Id.
resident status to individuals who met the bill's requirements.\textsuperscript{23} The bill further limits eligibility for conditional non-immigrant status by specifically excluding anyone who has done the following: has committed one felony or three misdemeanors, is likely to become a public charge, has engaged in voter fraud or unlawful voting, has committed marriage fraud, has abused a student visa, has engaged in persecution, and/or poses a public health risk.\textsuperscript{24} There are also limits on “chain migration.”\textsuperscript{25} DREAM Act individuals would have very limited ability to sponsor family members for U.S. citizenship.\textsuperscript{26} They could never sponsor extended family members and could not begin sponsoring parents or siblings for at least twelve years. Parents and siblings who entered the U.S. illegally would have to leave the country for ten years before gaining resident status and the visa backlog for siblings is decades long. Conditional non-immigrants also would be ineligible for Medicaid, food stamps and other entitlement programs.\textsuperscript{27} While the DREAM Act is currently in an unresolved state in Congress, it is clear that immigration reform is needed. The division in Congress has also encouraged the Obama administration has advanced an agenda of immigration reform.

Since coming into the office, President Obama has promoted a pro-immigration stance to immigration reform, particularly by advocating the DREAM Act. The Obama administration has campaigned for the successful passage of the DREAM Act due because in the words of President Obama, “It is important to our economic competitiveness, military readiness, and law enforcement

\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
efforts. Additionally as the non-partisan Congressional Budget Office reported, the DREAM Act would cut the deficit by $2.2 billion over the next ten years. There was simply no reason not to pass this important legislation.”28 On June 15, 2012, President Barack Obama released a statement that his administration would stop deporting young undocumented immigrants who match certain criteria previously proposed under the DREAM ACT.29 This statement by President Obama allowed for a few changes to take place in how deportation cases are being handled. As a result of the speech, deportation cases will practice prosecutorial discretion to individuals under the age of sixteen that have been brought to the United States through no fault of their own. This prosecutorial discretion will be considered in cases in which the individuals at question have fulfilled certain requirements, such as having a high school degree or military service, and still be under 30. Those who meet the criteria can defer deportation proceedings (or the threat of same) for two years and seek work permits.30 Under the “deferred action” policy, a Department of Homeland Security directive, students in the U.S. who are already in deportation proceedings or those who qualify for the DREAM Act and have yet to come forward to Department of Homeland Security officials, will not be deported and will be allowed to work in the United States.31

29 Id.
31 Id.
Argument

Throughout the history of the U.S., immigration has been a controversial issue. Despite these differing sentiments throughout history, the social and economic benefits that would come with the passage of the DREAM Act cannot be disputed. The passage of the DREAM Act would add $329 billion to the U.S. economy and create 1.4 million new jobs by 2030, demonstrating the potential of the proposed law to boost economic growth and improve the United States’ fiscal health.\(^{32}\) According to the nonpartisan Congressional Budget Office, the DREAM Act will cut the deficit by $1.4 billion and increase government revenues by $2.3 billion over the next ten years.\(^{33}\) The economic growth that is estimated by the Congressional Budget Office is under the premise that a large portion of these former illegal youths will attend higher-educational institutions. According to a recent UCLA study, university students that would be impacted by the DREAM Act could potentially add from between $1.4 to $3.6 trillion in taxable income to the US economy over the course of their careers.\(^{34}\) This income is substantially higher than the income they would earn and therefore be taxed upon if they were unable to attend college and complete a college education. In fact, research indicates that the average college graduate earned nearly 60 percent more than a high-school graduate.\(^{35}\)

\(^{32}\) Id.
\(^{33}\) Id.
\(^{35}\) Id.
higher-paying jobs. This would indicate that enabling these 2.1 million eager-to-be-Americans to contribute to building the American dream would deliver a double boost to our economy.\textsuperscript{36} Enacting the DREAM Act will not only add opportunities for more individuals and, increase competitiveness and economic benefits but it will also improve the future well-being of generations to come.\textsuperscript{37} This upward trajectory results because eligible DREAMers will have a staggered entrance into the workforce, with many eligible youth still in elementary or secondary school at the time of passage.\textsuperscript{38} Research by the White House has indicated that an increase in college-educated immigrants directly increases U.S. gross domestic product—the largest measure of economic growth—which correlates to more jobs for all American workers.\textsuperscript{39}

Finally, by giving legal status to DREAMers, fewer employers would be able to use undocumented work and more would have to abide by a system that is fair to all workers. Gaining legal status itself translates into higher earnings for these youth since legal status allows DREAMers to apply to a broader range of high-paying jobs rather than having to resort to low-wage jobs from employers who are willing to pay for undocumented work.\textsuperscript{40} A recent report by researchers at the Pew Hispanic Center puts the number of illegal

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{36} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} Luis Miranda, \textit{The DREAM Act: Good For Our ECONOMY, Good For Our Security, Good For Our Nation}, White House (2010), http://www.whitehouse.gov/sites/default/files/DREAM-Act-WhiteHouse-FactSheet.pdf.
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The DREAM Act: Education Stimulating the Economy

aliens in the American workforce at 8 million.\textsuperscript{41} If the hiring of undocumented works is prevalent in a sector of the economy, which has been the case in particular industries such as seasonal crop agriculture, the willingness of foreign workers to accept lower wages because of their illegal status acts to depress wages and working conditions for all workers in that occupation. This in turn makes employment in that sector less attractive to U.S. workers who have other options.\textsuperscript{42} A 1997 study by the American Academy of Sciences found that the cheap labor of illegal immigrants and poor immigrants caused a 44 percent decrease in wages among the poorest Americans from 1980 to 1994.\textsuperscript{43} So by decreasing access to undocumented work, there are more incentives for these illegal youth to attend higher-educational institutions to obtain jobs, which increases economic growth.

Despite the failure of the DREAM Act to pass on a national level, many states have enacted laws that enact certain provisions of the DREAM Act at the state level. Some states such as Maryland have already made it possible for undocumented students to pursue their college dreams. While states cannot legalize the status of undocumented immigrants, they may allow undocumented students to attend their universities and qualify for in-state tuition.\textsuperscript{44} Each university follows their own admission procedures in regards to

\textsuperscript{42} Id.
\textsuperscript{44} T. H. Gindling and Marvin Mandell, Policy Brief Private and Government Fiscal Costs and Benefits of the Maryland Dream Act, Maryland Institute for Policy Analysis and Research (December 2012), http://www.umbc.edu/mipar/Documents/dreamactpolicybrief.pdf.
illegal individuals applying. Although some do admit undocumented students into their universities, the inability to prove in state residency creates a dilemma for these students.\textsuperscript{45} However, even when undocumented students are allowed to attend college, the tuition is often prohibitively expensive. If they cannot prove legal residency in a state, they must pay the much higher out-of-state or international-student tuition rates, and they do not qualify for federal student loans, work-study, or other financial assistance. To help undocumented students afford to attend college, 11 states have passed laws that provide undocumented students with the opportunity to receive in-state tuition.\textsuperscript{46} California, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Texas, Utah, Washington, and Wisconsin permit undocumented students who have attended and graduated from the state’s primary and secondary schools to pay the same college tuition as other state residents. It should be noted that four of these states are among the top 10 that have the most potential DREAM Act beneficiaries.\textsuperscript{47} The laws in these 11 states require undocumented students to: 1) attend a school in the state for a certain number of years; 2) graduate from high school in the state; and 3) sign an affidavit stating that they will apply to legalize their status as soon as they are eligible to do so. These laws are in compliance with federal law and do not overstep federal immigration laws.\textsuperscript{48}

For most categories of students who take advantage of the DREAM Act, the estimated total net fiscal plus private benefits are not only positive but also large. For example, one of the 11 states

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
that gives in-state tuition to undocumented students has given out their own report indicative of this decision contributing directly to the state’s economic viability. As described in a new report from the Maryland Institute for Policy Analysis and Research at the University of Maryland, Baltimore County, the Maryland Dream Act would be a financial and economic windfall for Maryland.\textsuperscript{49} The report, titled Private and Government Fiscal Costs and Benefits of the Maryland Dream Act, estimates that the Maryland Dream Act would add approximately 66 million dollars per year to the state’s economy.\textsuperscript{50} All of these potential benefits stemming from providing higher-educational opportunities to illegal youths that would have otherwise have not been able to attend such institutions. While the DREAM Act has not passed yet, studies from the Migration Policy Institute and Center for American Progress have shown that the passage of the DREAM Act will benefit the economy.\textsuperscript{51}

While there are many studies that show the benefits of the passing of the DREAM Act at a national and state level, there are still many criticisms surrounding the DREAM Act. Opponents of the DREAM Act criticize it for rewarding and encouraging illegal immigration by granting them “amnesty.”\textsuperscript{52} Other criticisms include it as importing poverty and cheap labor, being a military recruitment tool, having economic and social burdens (subsidies from state and federal taxes, degradation of the public school system and neighborhoods), and as being unfair to parents and children who are either American-born or legal immigrants who

\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} American Immigration Council, \textit{Dispelling Myths About the DREAM ACT}, Immigration Policy Center (November 2010), http://www.immigrationpolicy.org/just-facts/dispelling-dream-act-myths.
must pay full tuition at state universities and colleges.\textsuperscript{53} As a result, many opponents believe that passage of the DREAM Act will likely have significant negative implications for American citizens who wish to attend these same schools.\textsuperscript{54} Critics argue many of these institutions are already under enormous fiscal strain, as state and local governments struggle to close large budgetary shortfalls and providing more aid to these illegal students would increase the strain.\textsuperscript{55} Critics denounce the DREAM Act for not providing enough funding to states and counties to cover the costs it imposes. Critics say to compensate for the added enrollment the act will create; public institutions will have to increase tuition, increase taxes, or reduce the number of spaces available for American citizens at these schools.\textsuperscript{56} Opponents thus state that this influx of people to state universities will as a result in negative strains on the society as a whole.

While there is some validity in these criticisms, many studies refute these criticisms of the DREAM Act. The DREAM Act is not an amnesty. No one will automatically receive a green card. To apply for legal status, individuals have to meet stringent eligibility criteria. Programs like the DREAM Act, which have clear cut-off dates, offer no incentives for more illegal immigration. In order to qualify for the DREAM Act, a student must have entered the United States before the age of 15 or 16 (different versions of the bill vary on the age requirement) and have lived in the U.S. for at least five years before

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{56} Id.
Economic conditions have far more impact on illegal immigration than specific pieces of legislation. According to the National Immigration Law Center, most undocumented students are likely to have zero impact on admission rates of native-born students. Since 2001, 10 states have made it easier for undocumented state residents to attend college by offering in-state tuition to those who qualify. A significant portion of the students that took advantage of this opportunity have done so to attend community colleges, which have open enrollment. According to the Immigration Policy Center, students who do qualify and take advantage of this open enrollment are forecasted to not be that much of competitive disadvantage to legal students. The DREAM Act is not a scholarship or grant program since no monetary benefit is directly attached to this legislation. They are not eligible for federal grants, such as Pell Grants. Under the DREAM Act, previously undocumented youth adjusting to permanent resident status are only eligible for federal student loans (which must be paid back), and federal work-study programs in which they must work for any benefit they receive. DREAMers also receive no special public benefits and are subject to the same eligibility requirements for those benefits as other legal immigrants. DREAMers do not compete for visas with other applicants for legal permanent residence.

Instead, DREAM Act creates a separate program for students that

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58 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
require them to earn legal permanent residence by attending college or serving in the military for two years while in a temporary legal status.\textsuperscript{63} The DREAM Act will not adversely affect potential immigrants who plan on legally immigrating to the U.S. DREAM will also not affect the number of visas available or the time it takes to get a visa for those entering through traditional legal immigration.\textsuperscript{64}

Despite criticisms of the DREAM Act by opponents that the DREAM Act is amnesty and damaging to native-born American citizens, these criticisms can be refuted by many options. As stated before, some critics claim that the passage of the DREAM Act will grant automatic amnesty to applicants. However, the application process has many stringent regulations that will not allow for this "automatic amnesty" to take place. As stated before, the DREAM Act has strict requirements for allowing undocumented youth citizenship or permanent residence such as completing a high school education or receiving a GED and arriving in the United States before the age of 16.

**Conclusion**

It is essential to the U.S. economy that Congress passes the DREAM Act because it will significantly benefit the present and future economy through securing economic benefits for the eligible youth under the act. The DREAM Act will empower the eligible youth to equip themselves with education and skills to add to the U.S. labor force. College graduates earn more and their skills contribute to an overall societal and economic benefit. Another

\textsuperscript{63} American Immigration Council, *Dispelling Myths About the DREAM ACT*, Immigration Policy Center (November 2010), http://www.immigrationpolicy.org/just-facts/dispelling-dream-act-myths.

\textsuperscript{64} Id.
benefit that will arise as a result of the passage of this act is the taxes that will be taken from the higher income that the graduate students produce, spurring the economy as a result. The legalization of these youths will allow more taxable income with trillions of dollars being generated by 2030.\textsuperscript{65} Instead of these illegal youths competing for jobs with native-born American citizens, through the passing of the DREAM Act, these youths will complement native-born American citizens for jobs instead of simply taking them. While the DREAM Act has not been passed, it can be seen in the state versions of the DREAM Act specifically the Maryland DREAM Act how the economy gains from having this law passed.

\textsuperscript{65} Id.
A Case Against Plea-Bargaining in American Jurisprudence

Samuel A. James

I. Plea-Bargains

While it is not mentioned once in the Constitution or any of the original documents establishing judicial procedure in the United States, plea-bargains have become a dominant practice in the disposition of criminal cases. Though questioned in passing by scholars and jurists, there has not been a concerted challenge to the legitimacy of plea-bargaining as a system. Subsequently, what began as back-room dealings in judges' chambers now occurs every day in open court across the nation. Some statistics contend that upwards of ninety percent of criminal trials end in adjudication by a plea-bargain. With the severity of life and liberty for the accused hanging in the balance, a thorough examination of the largest factor in case dispositions is merited. To examine the legitimacy or lack thereof of plea-bargains, some context is required.

A plea-bargain in the simplest sense is a non-trial procedure for accelerating the disposition of criminal cases. There are several types of plea-bargain, but, at minimum, each requires foregoing a

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1 U.S. CONST. art. III.
3 Id.
trial and admitting guilt in return for some leniency from the prosecutor. Prosecutors can offer either a charge bargain or a sentencing bargain. Under the former, a prosecutor agrees to lower the charged offense, say from murder to manslaughter, in return for a guilty plea. Under this type of bargain, a prosecutor can dismiss certain charges entirely in return for pleading to others. Prosecutors can also engage in sentencing bargains where the defendant pleads guilty in return for a reduced sentence or leniency.\(^5\) Additionally, plea-bargains can be entertained in exchange for testimony against another accused party or general information that law enforcement believes to be highly useful.\(^6\)

Criminal trials and common law have historical lineage dating to ancient times, but the concept of a plea-bargain in the United States was not even documented until the nineteenth century.\(^7\) Since then, plea-bargains have become a preferred method for case adjudication by prosecutors and defense attorneys alike with excessive caseloads, and judges with equally long dockets of pending cases. Some statistics contend that currently upwards of ninety percent of criminal proceedings result in a non-trial disposition and legal scholars agree that number is rising.\(^8\)

This essay will not claim that plea-bargains do not promote efficiency, or even address the potential issue of whether they can functionally be abolished from legal practice. Such a bold

\(^5\) Id.


\(^7\) Id.

contention would require more analysis and research than this forum can provide, and the judgment rendered become somewhat irrelevant if doing so would cripple the system. However, I will endeavor to evaluate the flaws of plea-bargains from both a constitutional and philosophical point of view, as well as examine some of the dangers inherent in the application of plea-bargains. This will lead even the most consequentialist of scholars to the following conclusion: if justice is the paramount concern under American law, plea-bargains are seemingly unconstitutional and should not be considered as a legitimate form of dispensing criminal judgments.

II. Philosophical Evaluation of Plea-Bargains

Since the American legal system intends to promote an end result of just deserts for all parties involved, any scholarly evaluation must begin with the consideration of how eminent theorists on the subject of justice weigh in on plea-bargains. ‘Just deserts’ can be colloquially defined as the victim and the accused getting what they deserve. In examining past theorists, I looked at the works of John Rawls, Richard Lippke, and other scholars in the Kantian tradition. If their works can prove that plea-bargains are inconsistent with the pursuit of justice, then surely a system that seeks to promote justice ought reject them as an option.

In John Rawls’ main work, *A Theory of Justice*, he outlines several considerations and conditions for justice.⁹ He introduces justice unequivocally as the paramount concern in the introduction.

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Rawls contends that justice has an inviolable nature that would reject plea-bargaining:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship as settles; the rights secured by justice are not subject to political bargaining or the calculus of social interests.\(^\text{10}\)

Looking at passages from his treatise, I contend that plea-bargaining is dangerously inconsistent with the American conception of justice. The supplied justification for plea-bargaining over the years has been that of promoting efficiency of the system in processing and adjudicating courses as quickly as possible. Prosecutors and defense attorneys often handle dozens of cases at a time, and they often allege that if each required the time and full attention of a trial, there would be a crippling backlog in the docket.\(^\text{11}\)

Rawls rejects this defense. Plea-bargains strip rights from the accused and count them secondary to concerns of efficiency, even if entered into voluntarily as will be addressed later. If we

\(^{10}\) Id. at 3.

demand 'liberties of equal citizenship,' we cannot also allow plea-bargaining to weigh upon the scales of justice. The rights of due process and a fair trial where the accused receives a fair punishment, if any punishment, is deemed appropriate, ought not be subject to ‘political bargaining or calculus of social interests,’ but that is exactly what plea-bargaining is.

Rawls theory is elaborated in Russell Christopher’s article in the Fordham Law Review:

Justice is not a matter of bazaar haggling, but of thoughtful adjudication of claims. “To bargain” is different than “to present reasoned arguments,” and to reach a “bargain” or even an “agreement” is different than to obtain a “fair judgment.” A “bargain” is a discount, something obtained at a cut-rate. If judges and scholars squirm at the notion of “bargained justice,” the public, especially in our fearful times, should be even more unhappy about defendants who “get off cheap.”

Something as important as justice should not be obtained at ‘cut-rate,’ because as the proverb states, “You get what you pay for.” Victims of crime and the accused deserve the full matter of justice, which does not include a bargained sentence.

For Rawls, fairness centers on the idea of equality in treatment. A staunch believer in retributivism, if you believe this equality principle, there can only be one correct punishment for one crime. Plea-bargaining creates such a deviation from fair sentencing guidelines that it cannot be considered just. Rawls defends his notion of punishment in text:

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What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. That a criminal should be punished follows from his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.\textsuperscript{13}

If we accept that punishment is to be proportional, then we must also logically discard plea-bargaining.

Consider the hypothetical example of two different criminals who commit relatively identical capital crimes. Criminal A committed his violation in a district with a relatively low case volume, and, subsequently, the case receives full attention from the prosecutor. The case goes to trial, and after a rigorous prosecution, criminal A is found guilty by a jury and is sentenced to twenty-five years imprisonment. The prosecuting attorney in criminal A’s trial does not need to offer a plea deal of any sort, since he can devote the resources and time to assuring a conviction and full sentence. Criminal B, however, committed the same crime in a major urban district, where the caseload for prosecutors and public defense attorneys is overwhelming. As happens on a daily basis, the prosecutor and defense attorneys have a mutual interest in selling a plea-bargain to assure a conviction, and move-on to the next case, and the prosecutor still can count the case as a win, since a guilty

\textsuperscript{13} JOHN RAWLS, A THEORY OF JUSTICE 108 (Harvard Univ. Press 2009).
verdict is still achieved. However, per the terms of the plea deal, criminal B, who committed the same act as criminal A, only receives ten years imprisonment. Can this be fair?

How can there be proportionality in punishment when different districts have different punishments for the same crime? In fact, the same district may even have different punishments for the same crime depending on the amount of backlog in docket.

Richard Lippke explains the wide range of factors that are likely to influence a plea-bargain which detract from proportionality:

The sentence ranges that retributivism supports are premised on the notion that a given type of crime may produce a range of harms, some of which are considerably worse than others, or exhibit different degrees of offender culpability. Yet negotiated pleas seem unlikely to yield sentences that are related in any very systematic way to such factors. Rather, they are more likely to reflect such things as the defense attorney’s skill or experience, whether defendants are free on bail or not, or prosecutors’ perceptions of the strength of the case against defendants or the political importance of securing their conviction. However, none of these factors, should, if we are concerned with the harm and culpability of offenses, determine the sentences that convicted offenders receive.  

As Lippke explains, plea-bargaining invites a host of unwelcome influences on the sentence outcome of an adjudication that would be

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eliminated or minimized in an open trial with more procedural safeguards. With plea-bargaining in the equation, jurists and involved parties alike cannot say that the punishment always fits the crime as our legal proverb touts.

Plea-bargaining also severely disadvantages those accused who may be socioeconomically challenged, and it does not require statistical evidence to demonstrate that those accused are more likely to receive harsh sentences compared to their wealthier counterparts. Consider a second hypothetical where criminal A and criminal B commit the same crime, but the evidence against each is circumstantial and not fully damning. Criminal A is a wealthy executive, who retains high-priced defense attorney, and Criminal B is indigent and relies on the services of a pro-bono public defender. While the public defender may be a skilled attorney, he likely has many cases to represent at one time, whereas the high-end defense attorney charges enough money to allow him to devote his full attention to the case. Public defenders often have higher caseloads compared to for-hire private attorneys, which could potentially disadvantage some clients. When the prosecutor presents a plea offer to both of the hypothetical defense attorneys, the public defender is more likely to recommend the deal to his client since the private counselor can afford to devote significantly more resources to win the case outright in trial if the facts are close.\textsuperscript{15} The public defender recognizes that he or she has limited time to spend on each case and may not be able to secure a verdict in his or her client's favor, so he or she may recommend a plea deal. In this hypothetical,

wealthy criminal A is found not guilty at trial, while the impoverished criminal B accepts a plea-deal and receives some amount of punishment.\textsuperscript{16}

More than the trial system, plea-bargains disadvantage the poor and already disadvantaged populations, who must rely on the services of sometimes overburdened public defenders. There is a plausible case that, if one repeats the above hypothetical, where both criminal A and criminal B are innocent of their charged crimes, the outcome could very likely be the same.

After examining the philosophical texts of Rawls, Lippke, and Christopher, a persuasive argument is painted against the ‘just’ nature of plea-bargains. Rawls’s arguments indicate that plea-bargains can create a miscarriage of justice by subjecting it to the political calculus of efficiency. Rawls also makes a strong case that plea-bargains destroy fairness and equality in the legal system, as well as proportionality of punishment, a necessary component to achieving retributivism. Lippke effectively demonstrates that irrelevant characteristics, such as financial status, actually impact the sentences in a plea-bargained deal. Weighing all of the philosophical texts, a common conclusion is drawn: plea-bargains are not supported by these philosophical texts and are not consistent with pure justice.

### III. Plea-Bargains and the Constitution

It can be inferred from Article IV of the Constitution that the framers intended for a notion of equality in criminal adjudications that plea-bargains do not allow for. Article IV, Section 2 states, “The

\textsuperscript{16} Id.
Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” I contend that there can be no true equality among citizens of different states when the same criminal offense, committed in different districts, is likely to receive an entirely different trial outcome because of plea-bargains offered or not offered depending on the particular docket. Some states, such as Alaska, have banned plea-bargaining entirely.\textsuperscript{17} If one crime can result in completely different punishments solely based on where it was committed, we must recognize a flaw within the system. Further support for this argument can be found within the Equal Protection clause of the Fourteenth Amendment of the Constitution. The Amendment outlines two substantial objections to the constitutional legitimacy of plea-bargaining:

\begin{quote}
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{18}
\end{quote}

Plea-bargains deprive persons of liberty without due process of law because this section of the Constitution indicates that life, liberty, and property, the properties a convicted criminal can have taken from him or her, are too severe to be taken by anything other than due process of law. A trial is one of the many items intended by the founders’ phrase due process of law, and the unfair sit-down at the bargaining table is far from the intended due process. At this

\textsuperscript{17} Michael L. Rubinstein et al., \textit{Alaska Bans Plea Bargaining} (Univ. of Alaska-Anchorage 1980), http://www.ajc.state.ak.us/reports/plea91Exec.pdf.

\textsuperscript{18} U.S. Const. amend. XIV, § 1.
bargaining table, the prosecutor ultimately has the final authority to offer, accept, or reject a bargain. The prosecutor holds all of the power, because he or she is the only party that can offer or set the terms of a plea. While the defense can accept or reject a plea, it cannot set terms.\(^{19}\) Bluntly put, plea-bargains subvert due process for the sake of efficiency, a tradeoff which would likely cause the founders to cringe. Second, the government’s obligation to provide all citizens equal protection under the law is inhibited by the presence of plea-bargaining. This obligation is casually overlooked by prosecutors, as some of the accused are offered plea deals, while some are not depending on a myriad of non-applicable factors. Also, there cannot be true equal protection under the law when the accused are punished more harshly for exercising their constitutional right to a trial, while their counterparts who plead guilty are given leniency. Cato Institute scholar Timothy Lynch explains the unintended but arguable attack on constitutional rights which occurs from plea-bargaining:

Plea-bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury. Although the fictional nature of that proposition has been apparent to many for some time now, what is new is that more and more people are reaching the conclusion that it is intolerable. Chief Judge William G. Young of the Federal District Court in Massachusetts, for example, recently filed an opinion that was refreshingly candid about what

is happening in the modern criminal justice system.\textsuperscript{20}

Lynch elaborates that the system creates unfair incentives against individuals exercising constitutional rights:

Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible.... Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500 percent. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be 20 years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one’s peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people—and punish them severely — simply for going to trial.\textsuperscript{21}

Lynch and Chief Judge Young illustrate the dangerously growing gap in sentencing disparity for cases that go to trial relative to those cases that are plead out. This disparity in sentencing goes beyond incentivizing the accused not to exercise their trial rights; it creates an unconstitutional intimidation scenario that leads to more and more pleas, even from the innocent. The staunchest supporters of plea-bargains cling to the dangerous notion that plea-bargains are a justified foregoing of one’s right to trial, because pleas are entered


\textsuperscript{21}Id.
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into ‘voluntarily.’ Once one recognizes that plea-bargains are not always truly voluntary; plea-bargains ought to be ruled unconstitutional and unethical in nature.  From the analysis of the Constitution excerpts, there is no relevant text to support plea-bargaining from a constitutional basis. The Founders and the Constitution convey the intent that criminal trials are of too great importance to be decided by anyone other than a jury of the accused’s peers.

IV. Plea-Bargains in Application

Defenders of plea-bargaining have long combated claims of unconstitutionality by saying something akin to, “The forfeiture of the right to trial is justified since the entering into plea deals is voluntary.” This is a simplified understanding of the term ‘voluntary.’ Legal philosopher Alan Wertheimer explains the flaw in accepting plea-bargains as agreements voluntarily entered into:

It simply is not possible to accept the Court’s claim that guilty pleas are genuinely voluntary in the extreme (and, by implication, in the standard) cases of plea-bargaining. One version of that argument goes like this. Consider the case of the (ubiquitous) Gunman who holds up Jones, saying, "Agree to turn over your money or I will kill you." After considering the alternatives, Jones agrees to turn over his money. Jones’ agreement is a paradigm case of an involuntary (therefore, invalid) agreement. A defendant’s decision to accept a plea bargain is analogous to Jones’ decision, and therefore is involuntary (and invalid). Moreover, if Gunman is not morally or legally entitled to coerce Jones into making such an agreement (Jones would be entitled to recover), the state is not morally or legally

22 See Section IV.
entitled to coerce defendants into pleading guilty.\textsuperscript{23}

As Wertheimer suggests, the accused party is placed in a scenario where a metaphorical gun is pointed at them, and the accused is asked whether or not they want to accept a plea.\textsuperscript{24} Surrendering constitutional rights under threat and duress is no more consensual than surrendering your wallet under threat of being shot by the hypothetical mugger. If the prosecutor says, “You can take this deal of ten years in prison, or take your chances with the jury,” that might constitute a reasonable offer with minimal duress. But if said prosecutor follows with, “I have a 95 percent conviction rate, and if I win, I will push for life without the possibility of parole,” there is coercion in play beyond measure. Even an innocent man could be convinced under that kind of pressure to plead guilty and avoid the risk of life imprisonment, and scary as it may be, it has happened.\textsuperscript{25}

Consider the case of North Carolina v. Alford\textsuperscript{26} of 1963, where Henry Alford was charged with first-degree murder. After hearing the prosecutor’s list of witnesses his intention to seek the death penalty, and believing the likelihood of his conviction, Alford’s defense attorney recommended he accept a plea-bargain. He would in turn plead guilty to second-degree murder and remove the death penalty as a possible punishment. Alford plead guilty and the judge sentenced him to the maximum thirty-years imprisonment. While in prison, Alford appealed his conviction on the constitutional ground that his plea was the involuntary product of fear and intimidation tactics by the prosecutor. Throughout his life, Henry

\textsuperscript{24} Id.
\textsuperscript{26} Id.
Alford maintained his innocence and said that he only accepted the plea because he was afraid of the death penalty. The case was reversed on appeal, and the Supreme Court upheld the decision in a six-three decision. Justice William Brennan’s dissent has conveyed the unethical nature of the death penalty, and the intimidating role it plays in the plea-bargaining process. In his dissent, Brennan states that Alford’s plea was “the product of duress as much so as choice reflecting physical constraint.”

If duress exists, the consideration of such extreme pressure would invalidate the supposed voluntary nature of plea-bargains.

Additionally, it is worth noting that crimes committed by one criminal are not on equal sentencing ground with those crimes committed by a group, or with accomplices. Often in criminal cases involving multiple individuals, a prosecutor would likely offer one of the defendants a plea-bargain or full immunity in exchange for testimony against one’s co-conspirators. The justification for this is also consequentialist, because it is purely interested in securing as many convictions as possible, even if it means granting full immunity for one of the criminals in an act. While this might be in the ‘greater good’ for prosecutors, it is not justified by philosophical texts or the Constitution.

**Concluding Remarks**

Though this country strives for a perfect system of justice, it is possible that such goal is inevitably out of grasp. However, it is

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the duty of judges and lawmakers to recognize when a procedure becomes tainted and produces dangerous effects. In striving for a system where the innocent and guilty receive their due deserts, any instrument of the law that destabilizes the fragile scales of justice ought to be amended. Giving a thorough examination of the procedure of plea-bargaining, the results are clear and detrimental to the legitimacy of the process.

One can see by the comments of philosopher John Rawls that justice as an end goal demands more than the concerns of procedural efficiency, the main rebuttal by plea-bargaining supporters. Sacrificing the main charge of the system for speedy dispositions causes discomfort when one considers the range of factors that can go into a plea-bargained disposition, as Lippke explains. Surely, when a practice of law threatens just adjudications, which must be concerned with fairness and proportionality, it ought to be scrutinized.

When you take a combined look at the fragile-at-best support for plea-bargaining and the procedural flaws visible in its daily application, it becomes hard for anyone to continue supporting the practice. Surely, a process incentivizing innocents into pleading guilty and foregoing their rights of liberty for fear of prosecutorial retribution, presents a significant aberration of justice. The option to plea or not to plea has become a dangerously inegalitarian practice that Wertheimer and the Alford case explain has severe consequences. With such a high importance on the outcome of a trial, we ought to demand more of the legal system. If we can set aside concerns of efficiency and evaluate plea-bargains simply on their own merits, plea-bargaining is a practice that ought not be pursued.