

2022

THE REPORTER

Social Justice Law Center Magazine

Following in the footsteps of CWRU alumnus **Fred Gray**
to address the inequities in our legal system



SCHOOL OF LAW
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THE REPORTER

Social Justice Law Center Magazine

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ABOUT THE CENTER

Case Western Reserve University School of Law's Social Justice Law Center educates and guides the next generation of lawyers to develop solutions that will rectify inequality, oppression and social inequities created and reinforced by the American legal system.

Learn more at case.edu/law/social-justice.

ABOUT THE MAGAZINE

The Reporter is an annual magazine written by students enrolled in a year-long social justice writing seminar at the Center. Taught by Ayesha Bell Hardaway and Ashley Everett, this seminar allows students to fulfill their writing requirement by exploring existing and emerging scholarship, current and proposed laws and judicial opinions on current social justice issues.

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ON THE COVER:

Alumnus Fred Gray, who was recently awarded the Presidential Medal of Freedom, is a legendary attorney who represented both Martin Luther King Jr. and Rosa Parks during the early days of the civil rights movement. Our students hope to follow in his pathbreaking footsteps.



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Ayesha Bell Hardaway

Greetings!

I'm proud to present the inaugural issue of *The Reporter*, a collection of essays written by students at Case Western Reserve University School of Law's Social Justice Law Center.

Our students have long expressed strong interest in a legal education that includes a full understanding of the ways in which the law undermines the nation's ideals and aspirations. Indeed, many enter our institution seeking to understand and rectify the ways that the American legal system creates and compounds societal inequities. *The Reporter*, which I co-teach with Ashley

Everett, is a yearlong course designed to give law students an avenue to write about their review and analysis of contemporary social justice matters. It's the product of their intellectual curiosity and bold commitment to social justice. In this first issue, students grapple with topics such as housing evictions during the pandemic, wrongful convictions, employment discrimination, reproductive rights and domestic terrorism. Everett worked diligently with student-authors throughout the writing process.

Featured on the cover of this issue is perhaps the law school's most famous alumnus, legendary attorney and activist **Fred D. Gray (LAW '54)**—a shining example for today's students. Earlier this year, Gray received the Presidential Medal of Freedom from President Joe Biden. Gray, who came to our law school with the personal commitment to "[destroy] everything segregated [he] could find,"¹ devoted his entire legal career to remedying institutional racism. Within two years of graduating and passing the Alabama bar, a young and determined Gray represented Rosa Parks and Martin Luther King Jr. in the push to make racial segregation illegal in Alabama. It was through his representation of Parks and related involvement in the Montgomery bus boycott that Gray successfully handled the first of his four cases before the U.S. Supreme Court.

Throughout the years, Gray has returned regularly to campus to connect with our law students and the broader Cleveland community. He continues to inspire all of us to not give up on creating a more just United States.

At a time when our nation is once again abandoning its promises to correct systemic injustices, it is essential that young lawyers understand the breadth, depth and regurgitated nature of the problem. As one student recently reminded me by quoting Octavia Butler, "There's nothing new / under the sun." I am encouraged, however, by the unwavering commitment of the students who authored the articles in this publication. In that way, they personify the rest of Ancestor Butler's quote, "... but there are new suns."

It is my sincere hope that the student essays found in *The Reporter* inspire you to work toward creating a more just legal system. Through our collective efforts, I truly believe that new suns are on the horizon.

Ayesha Bell Hardaway (LAW '04)

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¹ Jonathan L. Entin, "Bus Ride to Justice: A Conversation with Fred Gray," 64 *Case W. Res. L. Rev.* 733, 739 (2014).



Fred Gray poses with Ayesha Bell Hardaway in front of his portrait at Case Western Reserve University School of Law.



Alumnus Fred Gray received the Presidential Medal of Freedom from President Joseph R. Biden in July.



"DE MINIMIS 'DIMINI-MISSED?'"

How *Threat* Threatened, But Preserved, Title VII's Materially Adverse Requirement in §703(a)(1) Employment Discrimination Actions

By Michael Mahoney and Lucas Allison

In *McDonnell Douglas v. Green*, the Supreme Court stated "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that that Title VII tolerates no racial discrimination, *subtle or otherwise*."¹ (Emphasis added.) As Title VII is currently interpreted by American courts, this is simply not true. Proof of discrimination alone has never been enough, though courts initially understood that Congress intended to let the law grow and change over time to reflect new social attitudes.²

Threat v. City of Cleveland

Title VII of the Civil Rights Act of 1964 (commonly referred to as "Title VII") is the portion of that law focused on discrimination against employees by employers.³ In §703(a)(1), Title VII describes unlawful employment practices:

It shall be an unlawful employment practice for an employer.
... to discriminate against any individual with respect to his
compensation, terms, conditions, or privileges of employment
because of such individual's race. . . .⁴

In July 2021, Cleveland EMS captains brought a Title VII lawsuit against the City of Cleveland and their supervisor, Nicole Carlton. Carlton made decisions on how to assign captains to shifts based on their race: To "diversify" shifts, Carlton moved a number of

Black captains from their preferred day shift to the night shift. The captains recognized that these shift changes were improper and, consequently, filed suit against Carlton and the City of Cleveland. However, the trial court turned *Threat* and the other plaintiffs away. The District Court decided that, "[the Plaintiffs] must still show a genuine dispute of material fact as to whether Defendants took a *materially adverse* employment action against them."⁵ (Emphasis added.) In other words, prior Sixth Circuit cases have held that shift changes are not harmful to employees. Therefore, the Court dismissed the captains' complaint as *de minimis non curat lex*, or "the law does not concern itself with trifles."⁶

As shown above, Title VII §703(a)(1) mentions an employee's "terms, conditions, or privileges" of employment, but does not mention "materially adverse" anywhere.⁷ Despite the absence of "materially

adverse” in the language of §703(a)(1), the Sixth Circuit has consistently applied the *de minimis* standard in prior §703(a)(1) cases. Ultimately, the Court adopts language from §703(b), the “materially adverse” requirement, and introduces a test applicable to that part of the law (the *de minimis* standard) to fact patterns inappropriately. The Department of Justice asserted as much in its brief in support of neither party.⁸

This raises the question: What does “materially adverse” *really* mean in §703(a)(1) employment discrimination cases? In the Sixth Circuit, “materially adverse” used to mean that shift changes were *de minimis* harms—a mere “trifle.” *Threat* has called this precedent into question, but under very specific factual circumstances

A case of first impression

Threat was the first employment discrimination case in the Sixth Circuit involving a shift change that altered *both* a term and privilege of employment under §703(a)(1). This presented the Court with an opportunity to shine new light onto the application of §703(a)(1) to discriminatory shift change cases. Unfortunately, instead of breaking down each key term of §703(a)(1) and clarifying the weight and scope of each term, the Court produced an analytical half-measure, and missed the opportunity to simplify Title VII: instead of removing hurdles for Title VII plaintiffs, the Sixth Circuit lowered these hurdles to an unclear degree in an uncertain number of situations.⁹

In this paper, the authors address *Threat*’s key takeaway: that an employer is now less likely to successfully claim an employment action is *de minimis* under Title VII §703(a)(1) than before *Threat*. This conclusion seems to run against the Supreme Court’s decisions in *Burlington Industries, Inc. v. Ellerth*¹⁰ and *Burlington Northern and Santa Fe*, two cases that outline the *de minimis* standard for Title VII’s anti-retaliation provision, § 704.¹¹ Part II discusses in greater detail the facts of *Threat v. City of Cleveland, Ohio*, and the Court’s holding.¹² Part III analyzes the Court’s reasoning, and explains why the Court’s analysis of the facts is both unhelpful and problematic. Part IV discusses the ramifications of *Threat*. Part V concludes with an attempt to solve the riddle and make *Threat* more informative for other courts and potential litigants.

Threat’s facts and the court’s holding

In Cleveland, EMS captains are assigned shifts through a seniority-based bidding system, “giving longer-tenured captains shift preference.”¹³ In 2017, EMS captains bid for their 2018 shift assignments, and the bidding system produced a day shift staffed entirely by Black captains.¹⁴ The EMS Commissioner, Nicole Carlton, reassigned Reginald Anderson, a Black captain, to the night shift over his seniority-based objection and replaced him with a white captain to “diversify the shift.”¹⁵ When Anderson voiced frustration with Carlton’s race-based shift reassignment, Carlton asked all captains to rebid for their shifts.¹⁶ When the rebidding process reproduced a day shift staffed by all Black captains, Carlton again reassigned Anderson to the night shift and replaced him with a white captain.¹⁷ Anderson and four other Black captains filed a Title VII employment discrimination action against the City of Cleveland and Commissioner Carlton.¹⁸

The district court granted Carlton’s motion for summary judgement on the employment discrimination claim, holding that the shift reassignment was not a “materially adverse employment action.”¹⁹ The Sixth Circuit reversed, finding that Anderson had presented sufficient evidence to support a finding that Carlton’s discriminatory shift change was more than a mere trifle.²⁰

In holding that the shift assignment was “materially adverse,” the Court stated, “[S]urely the distinction between an 8:00 a.m. and 8:00 p.m. start time is a term of employment. How could the *when* of employment not be a *term* of employment?”²¹ As to Anderson’s seniority privileges, the Court concluded that his seniority-based privileges of employment were altered when Carlton changed his shift based on his race over his objections.²² Ultimately, the court held that “[w]hen an employee’s race is a basis for a shift change that denies the privileges of that employee’s seniority, the employer has discriminated on the basis of race in the terms and privileges of employment.”²³

The Court’s reasoning: pulling together terms and privileges of employment

Threat was the first Sixth Circuit case to address both a term and a privilege of employment in a Title VII §703(a)(1) claim.

For lower courts, attorneys and litigants looking to the Sixth Circuit for guidance, one would imagine that the Court would thoughtfully lay out how Anderson’s seniority-based privileges impacted the materially adverse analysis. Instead, the Court merely provides dictionary definitions of “term” and “privilege,” then states that,

Pulling the meaning of these key terms together... [t]he race-based shift change... prohibited [Anderson] from exercising his seniority rights, and diminished his supervisory responsibilities when the city imposed the night shift on him.²⁴

The City and Carlton attacked this reasoning. Both argued that under Title VII, employee lawsuits must state a claim using the words materially “adverse employment action.”²⁵ The Court rejected their interpretation, reasoning that whether an employee states her claim using the words “discrimination based on race in ‘terms’ or ‘privileges’ of employment” or “discrimination based on race in materially adverse terms of employment,” the conclusion is the same: a cognizable Title VII claim.²⁶

The Court’s reasoning is unhelpful and problematic. The reasoning is unhelpful because it does not specify how the Court weighed Anderson’s seniority-based privileges when it conducted the “materially adverse” analysis. Readers are left to wonder how, and under what circumstances, Sixth Circuit courts should weigh employment privileges that define the scope and importance of an employee’s terms of employment.

The Court’s reasoning is also problematic: by reasoning that “materially adverse terms” is not required language in a Title VII lawsuit, and that discrimination based on race in ‘terms’ or ‘privileges’ of employment is sufficient, the Court clarified one issue but created another. The Court’s reasoning blurs the line between the race-based shift change and the race-based erosion of Anderson’s seniority-based privileges. Readers must wonder what role Anderson’s seniority-based privileges played in the “materially adverse” analysis. The Court

continued on next page >

never indicated any meaningful difference between the race-based shift change and the race-based erosion of Anderson's seniority-based privileges. As far as one can tell, the Court merely determined that the shift change was "materially adverse" and concluded, therefore, the employment action was also "materially adverse" to Anderson's seniority-based privileges.

By "pulling the meaning of these key terms together," the Court also pulled together the analysis of the race-based shift change and race-based erosion of Anderson's seniority privileges. This was an incredible mistake. The Court missed a valuable opportunity to explain how the presence of a seniority-based privilege affects the "materially adverse" analysis. "Like the game of telephone," the Court's silence on how a privilege affects the "materially adverse" analysis has created a risk that Sixth Circuit courts will "convert the ultimate message" of *Threat* "into something quite different from the original message":²⁷ that a privilege which affects a term is reducible to the term itself.

Threat's implications

The most serious ramification of *Threat* is that the *de minimis* standard is weakened. The *Threat* court "sweeps in" a substantial amount of materiality and adversity to either a term or to a privilege of employment when discrimination occurs on the basis of race, and provides little clarity on the interaction of those two elements, as discussed above. This new development for the Sixth Circuit loosens the harm and injury requirements of Title VII litigation. Nevertheless, because the Court chose to analyze "terms" and "privileges" together, *Threat* has a safety valve: another judge could have the same fact pattern in front of her, save for a union bargaining for the privilege of choosing shifts, and that Court could say that the *de minimis* threshold has not been reached. The "privilege" negotiated by the union in *Threat* is not present, so the same employer action yields a different result.

Scaling the *de minimis* threshold back is ultimately a positive development for workers who are discriminated against by their employers, but the change also has an ambiguous scope. At face value, more claims should be able to pass summary judgment if they can prove discrimination,

which will give the law more teeth in litigation. But it's never quite that simple—what will come when an employer decides to appeal an adverse summary judgment ruling? The Court held here that "When an employee's race is a basis for a shift change that denies the privileges of that employee's seniority, the employer has discriminated on the basis of race in the terms and privileges of employment."²⁸ (Emphasis added.) This compound ruling leaves wiggle room for a less sympathetic judge to apply the *de minimis* standard with respect to a term or privilege if either one exists in isolation. Where *Threat* weakens this *de minimis* standard and recognizes the harm in discrimination itself, a case without a union to establish a privilege may not make a compelling enough showing of harm. Because the Court does not discuss the terms in isolation, and because the shift change has been seen as *de minimis* by the Sixth Circuit in situations where a worker's union did not establish a privilege to select a shift, *Threat* may not actually depart from the previous decisions as radically as it first appears. This would make *Threat* a much less significant and much more narrow precedent.

Another weakness of *Threat* as precedent is the Sixth Circuit precedent that changes to employee shifts are almost always *de minimis*.²⁹ The District Court recognized "no material difference between a day shift and night shift" in *Threat*, and decisions as recent as 2020 held this seemingly contrary position to *Threat*.³⁰ The Court's decision in *Threat* was not appealed, so it will not be heard *en banc* by the Sixth Circuit. But if a similar fact pattern emerges, *Threat*'s language about shift changes may prevail over this rather extensive body of case law.

Additionally, experts are unsure how the *Threat* ruling may impact an employer's diversity initiatives.³¹ While an initiative should never cause harm to an applicant or employee, an employer may struggle to craft an initiative without a clear definition of Title VII harm. The *Threat* court was unwilling to say shift changes show a materially adverse action in all cases despite making clear that shift hours are *always* a term of employment.

Because of this ambiguity from the Court, a worker whose shift is changed by his or her employer will not know the chances of

success in a lawsuit. A worker without a union would be discouraged from filing a Title VII lawsuit due to the narrowness of *Threat*. Also, while employers are more likely to settle now than before *Threat*, they would be more inclined to settle these cases if the Court more firmly stated these involuntary shift changes with discriminatory intent (or pretext) are categorically impermissible. From the employer's perspective, the law is unclear as to how much an employer can change an employee's shift before it becomes a Title VII infraction, and this "we will know it when we see it" type of jurisprudence may worry employers who are making good faith efforts to comply with the law.

Down the road, the Sixth Circuit could become a bright red thumb in the jurisprudence on Title VII, diverging from Supreme Court precedent in similar cases such as *Burlington Northern and Santa Fe*.³² The split between §§703 and 704 may draw attention to the issue, as the majority of these prior cases deal solely with §704.³³ Because these retaliation cases have defined a materially adverse employment action, the Supreme Court may draw from *Burlington Northern* or *Ellerth* to help define the term in this context. The current disposition of the Supreme Court on this issue is unclear, but there has been an undeniable ideological shift in the Court over the past five years. Additionally, a more liberal Supreme Court ruled on at least one previous 5-4 decision on Title VII early in the decade that significantly narrowed Title VII workplace harassment claims.³⁴ Pulling the two together, there is cause for concern about the future of §703(a) (1) Title VII requirements if the Supreme Court weighs in.

As it stands, *Threat* has been cited for its holding on one occasion by the D.C. Circuit about a month after the case was decided in *Smith v. Blinken*.³⁵ It is unclear how influential *Threat* will be outside the Sixth Circuit, but it has already been used in a judge's opinion denying summary judgment on a Title VII action. That is remarkable, and the authors hope *Threat* continues to press the issue when used as a precedent to avoid granting summary judgment. For the reasons outlined in this paper, the authors have reservations about the long-term viability of *Threat* to do this, but perhaps *Smith v. Blinken* will be the start of a positive trend.

Threat had the potential to be a much stronger precedent for §703(a)(1) claims under Title VII. It seems the Court wanted to toe the line between the Sixth Circuit's prior decisions that applied the *de minimis* standard in §703(1) while moving toward the position of the Department of Justice that no threshold for a discriminatory employer action exists.³⁶ In choosing to toe this line, the *de minimis* standard is weakened, so it should be easier for employees suing in the Sixth Circuit to show they have a case. That is a step in the right direction, and it should be commended even if it is ultimately a half-measure.

If one must live with *Threat*, what needs to be clarified in future cases? Above all, the "terms," "privileges" and "conditions" of this opinion need to be sorted with respect to the "materially adverse" test the Court preserved. Each of these three words carries some weight in the analysis performed by the *Threat* Court, but how much weight is given to each word and at what balance is unclear.³⁷ If *Threat* is going to be a useful template for other courts, then clarifying the threshold for an action on these factors when discrimination occurs is key.

For example, the decision could have said that a shift change exceeds the *de minimis* threshold with respect to "terms" when a shift is changed from day to night, or perhaps a twelve-hour change in shift times is material *per se*. Alternatively, those facts could give a plaintiff a rebuttable presumption, making the employer prove that the harm caused by this action was not substantial enough. This could be repeated for "conditions" (which were left untouched by *Threat*) and "privileges." It is not a perfect solution, but this direction would have been clearer than "§703(a)(1) means what we have said it means."³⁸ Additionally and most importantly, this solution would make employers work harder to dismiss a complaint that has merit under §703(a)(1).

However, at the outset, the authors remarked that the decision in *Threat* was a missed opportunity. It was a chance for the Court to stop reading in language that is not found in the law being applied. The Court refused to take that step, claiming it "cannot just toss the *de minimis* rule aside."³⁹ As the authors observed, this is simply not true; courts made that rule, and courts could stop

applying it tomorrow. As the *McDonnell Douglas* decision stated, "it is abundantly clear that that Title VII tolerates no racial discrimination."⁴⁰ The Sixth Circuit took a step in the right direction, but refused to continue walking to the proper conclusion.⁴¹ The authors have offered bridge analyses that might make this decision workable, but the ultimate solution is to live up to the words of the *McDonnell Douglas* court and tolerate no discrimination.⁴²

1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).
2. *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), at 238.
3. 42 U.S.C. 2000e-2.
4. *Id.*
5. *Threat v. City of Cleveland*, 1:19-CV-2105, 2020 WL 5982303, at *3 (N.D. Ohio Oct. 8, 2020), *aff'd in part, rev'd in part and remanded sub nom. Threat v. City of Cleveland, Ohio*, 6 F.4th 672 (6th Cir. 2021).
6. *Id.* "Not all undesirable or unfair work conditions that employees face are material for purposes of Title VII. . . 'Reassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions.'" (Citation omitted.)
7. 42 U.S.C. 2000e-2(a)(1).
8. *Michael THREAT, et al., Plaintiffs-Appellants, v. CITY OF CLEVELAND, OH, et al., Defendants-Appellees*, 2021 WL 124790 (C.A.6), 5, in pertinent part: "The United States files this brief to inform the Court of its view that a shift assignment on the basis of race is actionable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), and that no further showing of "material" harm or adversity is required."
9. *Id.*
10. 524 U.S. 742 (where an employee had not suffered a *tangible* employment action in relation to multiple instances of workplace sexual harassment; defining *tangible* employment actions as discharge, demotion, or undesirable assignment).
11. 548 U.S. 53 at 68-70, the Court imported the *tangible* employment action language from *Ellerth*, renaming it *materially adverse* employment actions to better fit the statutory language. *See also* EEOC guidelines for Race and Color based Employment Actions, <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#V>.
12. *Policastro v. Northwest Airlines*, 297 F.3d 535 (6th Cir. 2002) at 540 (describing the judicial standard for adverse employment actions).
13. *Threat* at 675.
14. *Id.*
15. *Id.* at 676.
16. *Id.*

17. *Id.*
18. *Id.*
19. *Id.* at 676-677.
20. *Id.* at 678. (holding that "[m]oving an employee from the day shift to the night shift over the employee's seniority based objections alters the 'terms' and the 'privileges' of an individual's employment.>").
21. *Id.* at 677.
22. *Id.* at 678. (stating that "losing out on a preferred shift may diminish benefits that a senior employee has earned.>").
23. *Id.* at 680.
24. *Id.* at 678.
25. *Id.* (Citing *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008)) (stating that "materially adverse employment actions" are actions which "constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.>").
26. *Id.* at 679.
27. *Id.*
28. *Threat*, 6 F.4th 672 at 678.
29. *See generally Harper v. Elder*, 803 Fed.Appx 853 (6th Cir. 2020); *Stewart v. Esper*, 815 Fed. Appx. 8 (6th Cir. 2020).
30. *See Supra*, note 9.
31. Race-Based Shift Change to Diversify Shift Staffing Can Be Adverse Employment Action, Constitute Discrimination Under Title VII: Sixth Circuit, Practical Law Legal Update w-032-0823.
32. 548 U.S. 53.
33. *Id.*
34. *Vance v. Ball State University*, 570 U.S. 421 (2013), holding that Title VII supervisors are those with the ability to take a tangible employment action against a victim, which essentially abrogated the doctrine of hostile work environments established in *Mack v. Otis Elevator Co.*, 326 F.3d 116.
35. *Smith v. Blinken*, 2021 WL 3737455 (D.D.C. 2021) (in pertinent part, an employee of the State Department who feared interacting with a harasser at the gym, access to which is a privilege of employment, or giving up working late hours to avoid the perpetrator could reasonably claim that she was unable to take advantage of the privileges and conditions of her employment due to a materially adverse employer action).
36. *Michael THREAT, et al., Plaintiffs-Appellants, v. CITY OF CLEVELAND, OH, et al., Defendants-Appellees*, 2021 WL 124790 (C.A.6), 5.
37. *Threat* (6th Cir.) at 680.
38. *Id.*
39. *Id.* at 679.
40. *McDonnell Douglas* at 801.
41. *Threat* (6th Cir) at 679.
42. *McDonnell Douglas* at 801.

REVIEW: DOMESTIC TERRORISM IN THE UNITED STATES

By Hannah Yeack

The problem

One of the most pressing issues facing United States' national security today is rising domestic terrorism, as demonstrated by the attack on the nation's capital on January 6, 2021. There is disagreement in the legal community about how best to address the issue of domestic terrorism.¹ One of the most popular routes that has been proposed is creating a federal domestic terrorism law. This comment reviews a law review article on the issue of domestic terrorism which suggests a federal domestic terrorism law is the best course of action.² The main argument presented in the article advocates for a federal law to maintain continuity and clarity of the United States' stance on domestic terrorism, and to increase efficacy of enforcement. The article fails, however, to fully consider the impact of law enforcement culture, and the risk of borrowing language from existing foreign-terrorism laws and incorporating them into a domestic terrorism law.

As it stands today, no uniformity exists in domestic terrorism laws in the United States, with each state adopting its own definitions and consequences of domestic terrorism. This lack of uniformity causes several problems, including 1) an inability to accurately track and measure acts of domestic terrorism due to inconsistent definitions and charges;³ 2) an inability to study and understand why and how domestic terrorism is born;⁴ and 3) perhaps most important, a lack of uniformity in charging, prosecuting and sentencing perpetrators of domestic terrorism.⁵ Further, most of the current state laws do not include acts of violence committed with guns or cars, as these are not considered to be "weapons of mass destruction."⁶ Under this framework, domestic terror attacks such as the 2015 arson of a mosque while Muslims prayed inside⁷ and the 2018 gun massacre at a synagogue which killed 11 people⁸ are often charged as hate crimes instead of domestic terrorism, with charges dropping as low as disruption of the peace in some cases.⁹

The issue is not ultimately if the offenders face charges, but rather how—and to what degree—law enforcement charges them. Creating a federal domestic terrorism law would be a great first step in addressing this issue, but is only part of the solution and must not be relied upon to remedy the entire issue.

The remainder of this comment discusses the pitfalls of instituting a federal law without being critical first of how the law is created and second of how the law enforcement culture will affect the practical implications of any law created. This comment asserts that to make a meaningful change in domestic terrorism in the United States, the federal government must review and rework its current terrorism laws and then implement a federal domestic terrorism law in light of its new framework, while simultaneously facilitating an overhaul of internal policing policies and culture.

A new law

If the United States were to revamp its current foreign terrorism laws into a new domestic terrorism law, there would be a significant concern about civil liberties. American citizens have already faced versions of this in the past through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) that followed 9/11,¹⁰ and even earlier through Japanese internment camps.¹¹ The federal government has expanded its definition of terrorism to include domestic terrorism under the USA PATRIOT Act, but did so by creating an overbroad definition without taking actual steps to address domestic terrorism.¹² Under the executive branch, The National Security Council developed and published a *National Strategy for Countering Domestic Terrorism* in June of 2021. But such publications are only statements of policy that have no real effect on national law.¹³ Notably, in a foreword from President Biden, the publication referred to

gun violence as domestic terrorism, when, as mentioned above, offenses committed by use of guns are rarely labeled as terrorism at the state level.

The enforcement—and even the conception of—a new federal domestic terrorism law is riddled with issues. Enforcement is a vital part of any law though. Without enforcement, a law, regardless of how well it is written, is obsolete. The United States *needs* a domestic terrorism law that is properly enforced as there is a legitimate concern of non-governmental threats to citizens' safety. A society must have rules and these rules must be enforced to maintain peace. The issue is that the current American scheme for foreign terrorism does not do this while also respecting human rights.¹⁴ Should the government extend this to its own citizens, the human rights of Americans—particularly Muslims and minorities—would be on the chopping block. The issue becomes a balancing act of how much power citizens wish to give to the government, and how much power they wish to reserve for themselves. Put simply, do American citizens want the person who is pointing a gun at them to wear a uniform or plain clothes?

The Icelandic Human Rights Center ("The Center") advocates for terrorism to be fought "within the framework of the law and with respect for the principle of proportionality and non-discrimination."¹⁵ The Center argues that there is no trade-off between effective government action combating terrorism and respect for human rights, unlike the current United States' government believes.¹⁶ Instead, The Center asserts counter-terrorism acts to best take form in promoting societal cohesion, multicultural tolerance and inter-religious dialogue.¹⁷ The Center's proposal is that for a world without terrorism, there needs to first be a world rooted in acceptance and tolerance.

A changed culture

If the legislature only creates a federal statute and does not address law enforcement culture, multiple problems will arise, and even more will be left untreated.

By only creating a statute, the culture of law enforcement, which is widely known to facilitate racist and xenophobic double standards while, in too many cases, openly supporting white nationalistic behavior,¹⁸ will go unchanged. Without a cultural shift in America's law enforcement agencies, there is a risk, based on a long history of abuse of power,¹⁹ that enforcement agencies will use any new laws to target minorities and those viewed as "others," even if the laws are created to target white supremacist organizations.²⁰

Law enforcement has significant ties to far-right and to white supremacist organizations.²¹ This is not by accident. Organizations, such as the Oath Keepers,²² explicitly target law enforcement and ex-military personnel in their recruitment.²³ These ties are suspected, in part, to be the reason the FBI and Homeland Security did not release a threat report before the January 6 attack on the capitol.²⁴ The logic being that law enforcement does not view people who look and possibly think like them to be a threat,²⁵ creating a blind spot to terrorism even among top federal agencies. This is not a quality unique to law enforcement,²⁶ but it is something the nation needs to be aware of as it makes policy based on predictions and assumptions surrounding what cops do and might do.

Oftentimes in legal theory, good cops are assumed. Despite the current political climate, it is impractical to assume all good or all bad cops. The profession is made up of a vast array of individuals so, like any large group, stereotypes do not cover all of the people who make up the United States' police force. The danger of the current policing system is that even those who are neutral and good are blemished by the repugnant lack of accountability for their actions.²⁷ Regardless of whether the wrongs are mistakes or are intentional, there are rarely repercussions at all, much less proportional repercussions, for actions with horrifying consequences for the general public.

Nearly 40% of cops are predicted to have committed an act of domestic violence.²⁸ In fact, domestic violence is two to four

times more likely in police families than the average American family.²⁹ When the victims in these cases report the violence, the case is handled informally, something that would rarely happen for a case where the offender is a civilian. There is often no official report, investigations, and most shocking, no check on the victim's safety.³⁰

If our law enforcement systematically fails to hold "their own kind" accountable for individualized violence, there is doubt as to whether law enforcement would hold domestic terrorists accountable under any law. While white supremacist groups may be more than comfortable, oppressed groups may end up being the ones suffering the weight of the law if police attempt to misappropriate the law.

Domestic terrorism is one of the most complex issues facing the United States' legal world today. The ramifications of any potential laws imposed, or not imposed, include the lives of many—both in quality of life and, in some cases, continuation of life. Creating a federal law is the best path forward, but all steps must be taken carefully and thoughtfully by those involved. Domestic terrorism is a long-term, complex problem that requires a long-term and complex solution.

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20. Nicole Anderson, *Exploring the Viability of a Federal Domestic Terrorism Statute*, *Gonzaga Law Review* (2020) at 136. ("Calling Islamist attacks 'terrorism' in court, but not doing the same for white supremacist attacks, is a racist double standard that undermines such trust").
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DOBBS V. JACKSON

WOMEN'S HEALTH ORGANIZATION

*This paper was written during the spring before the U.S. Supreme Court released its decision on the *Dobbs* case on June 24, 2022.

By Elena Gutbrod

On December 1, 2021, the Supreme Court of the United States heard oral arguments in the matter *Dobbs v. Jackson Women's Health Organization* to determine whether the current framework for abortion restrictions will remain in place.¹ Perhaps one of the most divisive² social issues the past century, *Dobbs* surrounds a Mississippi law prohibiting abortions after 15 weeks' gestational age with limited exceptions.³ The Mississippi law requires the physician to determine the fetus's probable gestational age,⁴ and, unless there is a medical emergency or a "severe fetal abnormality,"⁵ no physician may perform an abortion if the gestational age is greater than 15 weeks.⁶

The Mississippi law, if upheld, will overturn the current framework provided by *Roe v. Wade*⁷ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Roe* and *Casey*,⁸ as discussed *infra* in Part II delineate guidelines by which states must abide in restrictions, prohibitions or regulations on abortions.⁹ If the Supreme Court overturns *Roe* and *Casey*, the ruling would grant states more authority to pass more restrictive abortion legislation by repealing the "viability line."¹⁰

The road to *Dobbs* is paved by *stare decisis*

In 1973, the Supreme Court heard and decided *Roe v. Wade*, the case which overturned a Texas ordinance making it illegal to procure an abortion except upon medical advice for saving the life of the mother.¹¹ In overturning the ordinance, the Supreme Court held the ordinance violated the 14th Amendment right to privacy and set forth the "trimester framework."¹² The "trimester framework" provided that through the end of the first trimester, the state must leave the decision to have an abortion to the woman and her physician.¹³ During the first trimester, however, the state could regulate abortions if the regulation was "reasonably related to maternal health."¹⁴ From viability forward, the state could regulate and even ban abortions.¹⁵ In *Roe*, the Court also discussed extensively whether a fetus was a person for purposes of the 14th Amendment.¹⁶ The Court

determined the State's interest in potential life reaches a "compelling point" at viability¹⁷ of the fetus.¹⁸ Therein the Supreme Court established the viability line.

Twenty years later in 1992, the Court decided *Casey* which concerned amendments to Pennsylvania abortion legislation.¹⁹ The Pennsylvania amendments required a woman seeking an abortion to satisfy certain procedural requirements: the woman must be provided certain information 24 hours prior to the abortion; informed parental consent for a minor; and signed notification to the husbands of married women.²⁰ The Court reaffirmed *Roe*'s essential holding recognizing a woman's right to choose to have an abortion before fetal viability and without "undue interference from the State."²¹ The holding further recognized the State's power to restrict abortions after viability with the caveat that the law contain exceptions for pregnancies endangering the woman's life.²² The Court reemphasized the States' legitimate interests in protecting the health of the woman and the potential life of the fetus.²³

In the *Casey* opinion, the Court extensively discussed *stare decisis*—the doctrine of the obligation to follow prior precedent.²⁴ In examining a potential overturning of prior precedent, the Court considers the following: whether the rule has proven intolerable in practical workability; whether the rule has

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been subject to reliance which would work special hardship in overruling; whether related principles of law have developed to leave the old rule as a remnant; and whether the facts have changed so significantly to render the old rule void of significant application or justification.²⁵

In analyzing these four considerations, the Court determined the *Roe* holding was not unworkable as it provides a “simple limitation beyond which a state law is enforceable.”²⁶ The Court found women had relied significantly upon *Roe* to participate equally in the economic and social life of the nation.²⁷ The Supreme Court failed to find a development of constitutional law during the prior twenty years which rendered *Roe* obsolete.²⁸ Lastly, the Court found the factual assumptions surrounding *Roe*—medical advances in maternal and neonatal healthcare—had no bearing on the holding (viability marks the earliest point where the State’s interest is adequate to impose a ban on abortions).²⁹ The *Casey* Court ultimately determined the precedential inquiry of *Roe* remained unweakened in the prior 20 years notwithstanding that “it ha[d] engendered disapproval.”³⁰

Since *Casey*, numerous petitioners and state legislatures have sought to overturn *Roe*.³¹ But for nearly 50 years, the *Roe* viability line and the *Casey* undue burden standard remain unbroken in Supreme Court precedent.

Jackson Women’s Health Org. v. Dobbs

The *Dobbs* case was filed on March 19, 2018, when Mississippi passed the Gestational Age Act which, sought to prohibit abortions beyond 15 weeks’ gestation with certain exceptions.³²

Mississippi asserts the Constitution contains no right to abortion, nor limit to the states’ rights to restrict abortion and advocates for overturning *Roe* and *Casey* because the factors of *stare decisis* are in contravention with the original rules of *Roe* and *Casey*.³³ In the alternative, or at a minimum, Mississippi argues the viability line must be abandoned in favor of a rational basis review when it comes to pre-viability restrictions on abortions.³⁴ Jackson Women’s Health Organization (“Women’s Health”) counters that there is no justification for overruling *Roe* and *Casey*,

and the viability line is firmly grounded in the Constitution.³⁵ Women’s Health argues Mississippi presents no alternative to the viability line which would retain a stable right to abortion.³⁶

Is a right to abortion rooted in the Constitution even though the Constitution is silent on the issue?

Mississippi asserts that the Constitution permits restrictions on elective abortions if a rational basis supports doing so.³⁷ The text of the Constitution never mentions abortion and the “right to abortion is not a ‘liberty’ that enjoys substantive protection under the Due Process Clause.”³⁸ Moreover, Mississippi asserts that the right to abortion is not deeply rooted in the nation’s history and tradition. Mississippi points to the 27 states that had prohibited abortion in 1868 and proffers that, “The public would have understood that, consistent with the 14th Amendment, States could restrict abortion to pursue legitimate interests and could do so throughout pregnancy.”³⁹ Mississippi also argues *Obergefell*⁴⁰ has no relevance on the topic: *Obergefell* addressed “who may exercise” the right and not whether the right exists at all.⁴¹ Lastly, Mississippi asserts abortion restrictions must only be rationally related to legitimate government interests, “[b]ecause nothing in text, structure, history or tradition makes abortion a fundamental right or denies States the power to restrict.”⁴²

Although the Constitution does not explicitly mention abortion, Women’s Health asserts that the right to abortion is, “grounded in the 14th Amendment’s protection against deprivation of a person’s liberty without due process of law.”⁴³ Women’s Health believes the Constitution implicates women’s liberty interests, including “the right to make family decisions and the right to physical autonomy.”⁴⁴ Respondents cite extensive Supreme Court jurisprudence in support of the contention that physical autonomy and bodily integrity are “integral components of liberty.”⁴⁵ Women’s Health contends the right to end a pregnancy logically and directly follows from the Supreme Court’s jurisprudence that recognizes bodily integrity, the family, intimate relations and whether or not to bear a child.⁴⁶ Women’s Health argues that allowing states to control this intimate decision “would result in a radical displacement of personal

liberty[.]”⁴⁷ Moreover, Women’s Health argues, *Casey* struck the balance between state interests and bodily integrity through the viability line.⁴⁸ Women’s Health contends the viability line is the point where the state interest becomes strong enough to justify a legislative ban.⁴⁹

The two sides of the argument are in such tension, the decision may come down to whether or not *stare decisis* requires affirming *Roe* and *Casey*. The briefs side by side find almost no common ground. However, when placed side by side, Jackson Women’s Health Organization sheds light on the holes in Mississippi’s arguments. Namely, Women’s Health argues that the right to privacy and bodily autonomy *is grounded* in the 14th Amendment, there has been no substantial change since *Casey* to justify overturning the precedent and that without the viability line, no feasible alternative exists.

Does stare decisis require affirming Roe and Casey?

Mississippi unequivocally believes all four *stare decisis* elements support overruling *Roe* and *Casey*. The State asserts “[t]his Court’s Abortion Precedents Are Egregiously Wrong.”⁵⁰ Petitioners assert *Roe* and *Casey* are “hopelessly unworkable[,]” they have “inflicted profound damage[,]” progress has “overtaken them[,]” and lastly, their holdings find no relief in reliance interests.⁵¹ In support of the contention that the cases are wrong, Mississippi points to the Constitution’s lack of a “general right of privacy” or specific right to abortion. Mississippi alleges that using *Casey* to determine whether or not a restriction is an “undue burden” makes the standard unworkable, and does not promote administrability, clarity or predictability.⁵² Rather, the State contends, the only workable part of *Casey* is that it required striking nearly any pre-viability state abortion law.⁵³ Interestingly, Mississippi cites severe damage as a result of the current framework, because the *Roe* framework blocks states from “fully protecting unborn life, women’s health and their professions.”⁵⁴ The legal and factual underpinnings of *Roe* and *Casey*, the State argues, are eroded.⁵⁵ Legally, the right to abortion is not rooted by history and tradition. Factually, advances in childcare assistance, maternity leave and laws

addressing pregnancy discrimination permit women to pursue career success and a rich family life.⁵⁶ In support of the contention that reliance on *stare decisis* does not support reaffirming *Roe*, Mississippi points to the “fractured, unsettled [abortion] jurisprudence” and that for 50 years since *Roe*, abortion was a “wholly unsettled policy issue.”⁵⁷ In conclusion, Mississippi states *Roe* and *Casey* do more damage to *stare decisis* than the cases advance it.⁵⁸

In response, Women’s Health contends the four factors of *stare decisis* support affirming *Roe* and *Casey*. The organization asserts that federal courts have uniformly applied the viability line.⁵⁹ It also disregards the State’s argument of the undue burden standard as irrelevant because the *Dobbs* case surrounds a ban, not a regulation.⁶⁰ Women’s Health underscores that every factual argument raised by Mississippi has been presented to and rejected by the Court—stating there exists no significant and unaddressed factual change in the instant matter to justify overruling.⁶¹ Rather, Women’s Health alleges abortions have gotten safer and childbirth has grown comparatively more dangerous, swaying any argument for women’s health in favor of *Roe* and *Casey*.⁶² So, too, Women’s Health disregards the argument of fetal pain as that has already been presented and rejected by the Supreme Court.⁶³ Women’s Health asserts no policy change could ever dull the concerns that surround when, if and how many children to have.⁶⁴ Rejecting the argument that contraceptives are more effective and widespread now, Women’s Health responds that access is not universal nor affordable, particularly for young people.⁶⁵

Women’s Health further argues that the continued choice to decide whether to continue a pregnancy remains absolutely integral to women’s equal participation in society.⁶⁶ Women’s Health then argues the lack of access to abortion or more stringent abortion restrictions disproportionately affects women of color, women of lower socioeconomic status and women in low-income housing.⁶⁷

Lastly, Jackson Women’s Health Organization argues that Mississippi failed to provide a reasonable alternative.⁶⁸ Women’s Health contends that Mississippi’s suggestion of “any scrutiny” destroys any uniformity among the federal courts and provides no guidance to analyze an abortion law on a case-by-case basis.⁶⁹

PROCEDURAL POSTURE OF *DOBBS*

The District Court of Mississippi struck the Gestational Age Act because the Act is a facially unconstitutional ban on pre-viability abortions

The same day Mississippi passed the Gestational Age Act,⁷⁰ Jackson Women’s Health Organization sought an emergency temporary restraining order (“TRO”).⁷¹ The Southern District Court of Mississippi granted the TRO.⁷² The district court granted Women’s Health’s summary judgment motion on November 20, 2018.⁷³ The court answered the narrow question of “whether the 15-week mark is before or after viability[.]”⁷⁴ with “no” because viability typically begins at 23 or 24 weeks.⁷⁵ Mississippi argued the law was a “regulation” which should only be subject to the restriction that it does not place an undue burden on a woman’s right to choose.⁷⁶ While the State was correct that regulations on abortions must

only pass the “undue burden” standard delineated in *Casey*, the district court determined the law was a ban, “forbidding certain women from choosing pre-viability abortions rather than specifying the conditions under which such abortions are to be allowed.”⁷⁷ Mississippi alternatively requested the court disregard the *Roe* and *Casey* precedent and instead look to “fetal pain” instead of viability.⁷⁸ In no uncertain terms, the court rejected this, stating, “[n]o, the real reason we are here is simple. The State chose to pass a law it knew was unconstitutional to endorse a decades-long campaign, fueled by national interest groups, to ask the Supreme Court to overturn *Roe v. Wade*.”⁷⁹

Relying on *Roe* and *Casey* as controlling law, the district court determined, “Courts across the country are required to follow *Casey*’s holding that, ‘viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic⁸⁰ abortions.’”⁸¹

The Fifth Circuit affirmed the decision of the district court, finding the Act directly conflicts with *Casey*

On appeal to the Fifth Circuit, the State raised one substantive argument and two procedural arguments.⁸² whether the summary judgment standard properly applied Supreme Court abortion precedent, whether limiting discovery to viability was an abuse of discretion and whether injunctive relief was proper.⁸³

As to the first issue, the Fifth Circuit found in light of *Casey*’s holding “no state interest can justify a pre-viability ban.”⁸⁴ In determining the law was a ban and not a regulation, the court stated,

The Act pegs the availability of abortions to a specific gestational age that undisputedly prevents the abortions of some non-viable fetuses. It is a prohibition on pre-viability abortion. *Gonzales* is distinguishable for the same reason that any case considering a pre-viability *regulation* is distinguishable: laws that limit certain methods of abortion or impose certain requirements on those seeking abortions are distinct under *Casey* from those that prevent women from choosing to have abortions before viability.⁸⁵

The court unequivocally stated that *Casey* does not tolerate bans on pre-viability abortions because the Supreme Court’s viability framework has already balanced the State’s asserted interests and beliefs. “Until viability, it is for the woman, not the state, to weigh any risks to maternal health and to consider personal values and beliefs in deciding whether to have an abortion.”⁸⁶ The court found that no issue existed as to whether the law was a regulation or a ban, and because pre-viability bans are not tolerated by *Casey*, the district court properly awarded summary judgment.

Of note in the Fifth Circuit opinion was the scathing concurrence of Circuit Judge James C. Ho, wherein he chastised the district court’s handling of the case.⁸⁷ Judge Ho believed the district court, “display[ed] an alarming disrespect for the millions of Americans

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who believe that babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic and violent taking of innocent human life.” Finding the district court opinion gave unequal consideration of both sides of the debate, Judge Ho asserted, “the district court opinion disparages the Mississippi legislature as ‘pure-gaslighting.’ It equates belief in the sanctity of life with sexism,⁸⁸ disregarding the millions of women who strongly oppose abortion.”⁸⁹ Judge Ho, although “duty bound to affirm the judgment of the district court[,]” concurred, nevertheless providing the opposing side of the argument: “Nothing in the text or the original understanding of the Constitution establishes a right to an abortion.”⁹⁰

Judge Ho certainly provided the moral argument against abortion. However, the issue before the Fifth Circuit was whether the Mississippi ban was legal—not whether it was moral or ethical. In presenting the non-legal argument, the author believes Judge Ho simply fueled the already raging fire surrounding abortion by using such inflammatory language such as “immoral, tragic and violent” and “offensive” in regard to abortion, while ultimately agreeing that the supreme law of the land nonetheless required affirming the district court’s decision.

“Will this institution survive the stench that this creates in the public perception—that the Constitution and its reading are just political acts?”⁹¹

The United States Supreme Court granted certiorari on May 17, 2021⁹² and held oral arguments on December 1, 2021. Certiorari was limited to the question of “whether all pre-viability prohibitions on elective abortions are unconstitutional.”⁹³ The ramifications of answering this question are perhaps wider than the question explicitly contemplates. If the Court upholds the 15-week ban, they will effectively overturn *Roe* and *Casey* and abandon the viability line, which will open an avenue for other states to implement similar or more restrictive limitations on abortion access. If the Court strikes the Mississippi law, the current framework will continue along the viability line wherein states may restrict abortions past viability or regulate abortions pre-viability provided the regulations do not

work an undue burden upon the woman seeking an abortion.⁹⁴

The continued accessibility of abortion unfortunately may hinge on the composition of the Court

Unfortunately, it may not matter who has the better argument in this battle—pro-life or pro-choice advocates. As the Bench exists now, six of the nine justices are conservative and at the oral arguments, the majority of the six seemed poised to overturn *Roe*.⁹⁵ Justice Sotomayor, addressing this very question, asked, “Will this institution survive the stench that this creates in the public perception—that the Constitution and its reading are just political acts? I don’t see how it is possible.”⁹⁶ At oral arguments, Justice Kavanaugh agreed that the Constitution does not directly address abortion and should be left to the democratic process.⁹⁷ Instead, he asserts the Court should remain “scrupulously neutral.”⁹⁸ The author believes this may be the most detrimental potential outcome of the Supreme Court decision—if the matter were wholly left to the states, 20 states have “trigger laws” which will automatically ban or severely restrict abortion in the first and second trimesters the instant *Roe* is overturned.⁹⁹

Alito similarly seemed inclined to overrule *Roe* when he asked whether *Roe* could be overruled regardless of whether something has changed if it was found to be “egregiously wrong.”¹⁰⁰ Chief Justice Roberts suggested the 15-week ban would be enough time to decide whether to have an abortion.¹⁰¹ Justice Barrett questioned the speaker for the Respondents about “safe haven laws,” wherein a parent can anonymously give her child up for adoption.¹⁰² This question lacks relevance because it ignores the fact that carrying a fetus to full term and giving birth is 14 times more dangerous than having an abortion—not even mentioning the fact that safe haven laws have no bearing on whether abortion is a protected right. Justice Gorsuch asked the Respondent representative to address the argument of unworkability of the “undue burden” prior to viability.¹⁰³ The undue burden standard is irrelevant to this matter because the law at bar was a prohibition, not a regulation subject to the undue burden standard.

Either way the Court decides, it is likely the hotly disputed debate will continue for years to come. The two sides of the debate are so polarized it is almost guaranteed both sides will not be satisfied with whatever decision the Court makes. Unfortunately, the matter will be held in limbo until some point in the summer when the Court is anticipated to make its decision.

1. Case No. 19-1392. On appeal from Fifth Circuit Court of Appeals.
2. Sheila A.M. McLean, *Abortion Law: Is Consensual Reform Possible*, 17 J.L. & Soc’y 106 (1990).
3. Miss. Code Ann. § 41-41-191 (2018).
4. § 41-41-191(4).
5. Severe fetal abnormality is defined as “a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb.”
6. § 41-41-191(4).
7. 410, U.S. 113 (1973).
8. 505 U.S. 833, 112 S.Ct. 2791 (1992).
9. *Roe v. Wade*, 410, U.S. 113, 162 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992).
10. *Casey*, 505 U.S. at 870. *Casey* affirmed *Roe* in that a woman has a right to choose to have an abortion before fetal viability and without “undue influence” from the state. *Id.* at 834. Fetal viability is recognized at approximately 28 weeks gestation but may be as early as 23 to 24 weeks. *Id.* at 860. “Viability” of the fetus is defined as the point at which the fetus is “potentially able to live outside the mother’s womb, albeit with artificial aid.” *Danforth v. Planned Parenthood of Central Missouri et al.*, 428 U.S. 52, 96 S.Ct. 2831 (1976).
11. 410 U.S. at 164.
12. *Roe*, 410 U.S. at 164. The essential holding of *Roe* existed until 1992 when the Court redefined the holding in *Casey*, 505 U.S. at 872.
13. *Id.*
14. *Id.*
15. *Id.* at 164-165.
16. *Id.* at 163.
17. *Id.* The Court defines “viability” as the point where “the fetus then presumably has the capability of meaningful life outside the mother’s womb.” *Id.*
18. *Roe*, 410 U.S. at 163.
19. *Casey*, 505 U.S. at syllabus.
20. *Id.*
21. *Id.*
22. *Id.*

23. *Id.*
24. *Id.*
25. *Id.* at 854–55.
26. *Id.* at 855.
27. *Id.* at 856.
28. *Id.* at 857.
29. *Id.* at 860.
30. *Id.* at 860.
31. See e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (the Court held a ban on partial birth abortions was unconstitutional because it placed an undue burden on the woman seeking an abortion); *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1620 (2007) (upholding a regulation preventing a certain type of abortions in the second trimester without the caveat of “necessary for the woman’s health” because it did not work an undue burden pre-viability); *Whole Women’s Health v. Hellerstedt*, 579 U.S. 582 (2016) (striking a Texas statute requiring the abortion-performing doctor to have admitting privileges within 30 miles, and requiring the abortion center to have surgical ambulatory standards); *Box v. Planned Parenthood*, 139 S.Ct. 1780 (2019) (upholding a restriction on disposal of fetal remains as not unduly burdensome on the woman and a legitimate interest for the state).
32. Miss. Code Ann. 41-41-191.
33. Brief for Petitioners, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 at table of contents.
34. *Id.*
35. Brief for Respondents, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 at table of contents.
36. *Id.*
37. Brief for Petitioners at p. 12.
38. *Id.*
39. *Id.* at p. 13.
40. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing a fundamental right to marry). The State is actually incorrect here. The essential holding of *Obergefell* is that “[t]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of the right and that liberty.” *Id.* at 645.
41. Brief for Petitioners at p. 13.
42. *Id.*
43. Brief for Respondents, at p. 17.
44. *Id.* citing *Casey*, 505 U.S. at 844.
45. *Id.* at 18. See also e.g., *Casey*, 505 U.S. at 857, 884; *Sell v. United States*, 539 U.S. 166, 178–79, 183 (2003); *Ferguson v. City of Charleston*, 532 U.S. 67, 78 & 78 n.14 (2001) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003); *Obergefell v. Hodges*, 576 U.S. 644, 665–66, 675 (2015); *United States v. Windsor*, 570 U.S. 744, 772 (2013); *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).
46. Brief for Respondents at p.19. See also, *Casey* 505 U.S. at 857.
47. *Id.* at p. 21.
48. *Id.* at p. 21–22.
49. *Id.* at p. 22.
50. Brief for Petitioners at p. 14.
51. *Id.*
52. *Id.* at p. 19.
53. *Id.* at p. 22.
54. *Id.* at p. 28. It is actually a reality that carrying a baby to full term is 14 times more likely than abortion to result in death. See Brief for Respondents at p.28; *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. at 2315. Astonishingly, giving birth in Mississippi is worse—75 times more dangerous than having an abortion. *Id.*
55. Brief for Petitioners at p. 28.
56. *Id.* at p. 29.
57. *Id.* at p. 32–33. This Author is unsure why abortion being an unsettled policy issue takes away from women’s fifty years of reliance.
58. *Id.* at p. 36.
59. Brief for Respondents at p. 22.
60. *Id.* at p. 23.
61. *Id.* at p. 23–24.
62. *Id.* at p. 25–26.
63. *Id.* at p. 31.
64. *Id.* at p. 34.
65. *Id.* at p. 35.
66. *Id.* at p. 36.
67. *Id.*
68. *Id.* at p. 42.
69. *Id.* at p. 44.
70. Miss. Code Ann. 41-41-191.
71. *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019).
72. *Jackson Women’s Health Org. v. Currier*, 349 F.Supp.3d 536, 538 (S.D.Miss. 2018).
73. *Jackson Women’s Health Org. v. Currier*, 349 F.Supp.3d 536 (S.D.Miss. 2018).
74. *Id.* at 539–40.
75. *Id.* at 539.
76. *Id.* at 540–41.
77. *Id.* at 541.
78. *Id.* at 542.
79. *Id.*
80. Nontherapeutic abortion means an abortion performed that is not directly and medically necessary to prevent the death of the woman. *Dobbs*, 945 F.3d at 280.
81. *Jackson Women’s Health Org. v. Currier*, 349 F.Supp.3d 536 (S.D.Miss. 2018) citing *Casey*, 505 U.S. at 860.
82. The procedural errors asserted by the State will be omitted for purposes of this piece.
83. *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019).
84. *Id.* at 271.
85. *Id.* at 273–74.
86. *Id.* at 274.
87. *Id.* at 277–86.
88. Although Judge Ho does not expound upon this claim, it likely stems from a comment by the district court opinion acknowledging that “men, myself included, are determining how women may choose to manage their reproductive health is a sad irony not lost on the Court.” *Jackson Women’s Health Org. v. Currier*, 349 F.Supp.3d at 545.
89. *Dobbs*, 945 F.3d at 278.
90. *Id.*
91. Transcript of Oral Arguments, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392 at p. 15.
92. *Dobbs v. Jackson Women’s Health Org.*, 141 S.Ct. 2619 (2021).
93. See Docket of *Dobbs v. Jackson Women’s Health Organization*, et al., Case No. 19-1392.
94. *Casey*, 505 U.S. 833.
95. See generally, Transcript of Oral Arguments, *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392.
96. *Id.* at p. 15.
97. *Id.* at p. 77.
98. *Id.*
99. Sarah McCammon, National Public Radio, ‘Trigger laws’ are abortion bans ready to go if ‘Roe v. Wade’ is overturned” NPR.ORG (Dec. 6, 2021) <https://www.npr.org/2021/12/06/1061896291/trigger-laws-are-abortion-bans-ready-to-go-if-roe-v-wade-is-overturned>.
100. *Id.* at p. 92.
101. *Id.* at p. 53.
102. *Id.* at p. 56.
103. *Id.* at p. 60.



COMMENT ON STATE V. PORTER

By Jane Norris

Imagine this: You, a public defender, are about to participate in *voir dire* after weeks of trial preparation.¹ Your client, a Black woman, is accused of resisting arrest and aggravated assault of a police officer. You've read the studies on how racial discrimination is prevalent in jury selection.² You are aware of how the racial makeup of a jury affects sentencing.³ After asking your curated questions to the jury panel, you believe you know which jurors are going to hurt your client. After both you and the prosecutor have struck jurors for cause, the prosecutor uses peremptory challenges to strike the only prospective Black jurors.⁴ Believing that the prosecutor is operating on discriminatory grounds, you immediately raise a *Batson* challenge—an objection to a peremptory challenge—on the grounds that the opposing party used the peremptory challenge to exclude a potential juror based on race, ethnicity or sex.⁵

In response, the prosecutor offers a few explanations for striking the Black jurors. He states that the first struck juror's brother had a criminal history, and that juror had an uncertain demeanor when they described their ability to remain impartial.⁶ He defends his second peremptory challenge by bringing up the juror's history with the court.⁷ You respond by pointing to the court transcript, where the first struck Black juror said that she was confident that she would be able to be an impartial juror. Despite this, the judge finds the prosecutor's proffered reasons reasonable and race-neutral and allows the strikes. The all-white jury convicts your client of resisting arrest.⁸ You are confident that if the jury had been representative of the racial makeup of the court's jurisdiction, your client would have been found not guilty.⁹

These are the facts of *State v. Porter*, a case that was appealed to the Arizona Supreme Court on July 22, 2021.¹⁰ Unfortunately, this case demonstrates the many issues with *Batson* challenges.

The *Batson* challenge originated in the Supreme Court case *Batson v. Kentucky*, and involves three steps.¹¹ First, the objecting party makes a prima facie case of the striking party's intentional discrimination.¹² Then, the striking party articulates a racially neutral explanation for why it

struck a particular potential juror.¹³ These explanations may be based on the juror's background, education or other experience-based reasons. These explanations may also be based on the potential juror's external demeanor, such as uncertainty.¹⁴ When demeanor-based reasons are accepted by the trial court, appellate courts give these findings high deference because demeanors cannot be recorded in a transcript, and therefore, are very difficult to review.¹⁵ After the striking party proffers their explanations, the objecting party is given an opportunity to prove that the striking party's proffered neutral reason is pretext for discrimination.¹⁶ The court will then determine if the striking party had discriminatory intent, meaning purposeful discrimination.¹⁷ In making this determination, the court must "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'"¹⁸

While *Porter* questions the validity of a *Batson* challenge, the Arizona Supreme Court relied heavily upon *Snyder v. Louisiana*, a U.S. Supreme Court case. In *Snyder*, the plaintiff raised a *Batson* challenge after the prosecution used peremptory strikes against the only prospective Black jurors, one of whom was a student.¹⁹ In response, the prosecution offered two race-neutral reasons for the strike against the student: (1) the juror looked nervous throughout the questioning; and

(2) the juror may be tempted to give a lower sentence to shorten trial to quickly return to educational obligations.²⁰ The trial court made no express findings on the "nervous" demeanor, but it did expressly accept the second proffered explanation as valid.²¹

In its analysis regarding a lack of express finding, the Supreme Court reasoned that, "it is possible that the [trial] judge did not have any impression one way or the other concerning [the juror]'s demeanor.... we cannot presume that the trial judge credited the prosecutor's assertion that [the prosecutor] was nervous."²² The Court reasoned that this understanding was necessary for cases in which the trial judge may have been unable to make such a determination because of circumstantial reasons, such as the memory of the judge, the amount of time in between the challenge and the interview, etc.²³ However, the Supreme Court found the non-demeanor reason given by the prosecutor in *Snyder* to be pretextual, and without evidence of the demeanor based reason to consider, ordered a new trial.²⁴ The Arizona Supreme Court relied on this holding in *Porter*, and stated that the lack of express finding on the uncertainty of the juror was inconsequential: the non-demeanor based justification was found not to be pretextual.²⁵ By falling in line with *Snyder*, *Porter* fails to give minority defendants a chance at a fair trial.

Under *Snyder*, if the trial judge only makes express findings on the proffered reason that is found neutral, then it is inconsequential if the other demeanor-based reason, with no express findings, is discriminatory. The appellate court can only rely on express findings by the trial court in evaluating demeanor-based justifications, as there is no evidence for the appellate court to review regarding demeanor-based justifications. If the court is not required to make express findings, then it allows the trial court the option to decide if demeanor-based reasoning can be reviewed. A requirement for trial courts to make express findings is desperately needed, as *Batson* jurisprudence only requires the consideration of the parties' explanations and arguments.

Nevertheless, even if trial judges always made express findings, their findings would likely still be deferred to by appellate court, as "a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."²⁶ This is due to the unique position of the trial court has in evaluating *Batson* claims, as step three of the *Batson* inquiry, "involves an evaluation of the prosecutor's credibility... and 'the best evidence of [discriminatory intent] often will be the demeanor of the attorney who exercises the challenge."²⁷

The dissenting opinion to the Arizona Court of Appeal's reasoning, issued by Judge McMurdie, discusses the problems that this high level of deference causes.²⁸ While recognizing that the trial court has a unique role in deciding this question, it is nearly impossible to determine if the trial court clearly erred because demeanor-based justifications are indiscernible in a transcript, even if express findings on the validity of the demeanor based justifications are given.²⁹ McCurdie further contends that requiring the trial courts to make such express findings would not ensure that *Batson* is "meaningfully enforced," and believes the majority's finding is a result of their belief that *Batson* has been unable to end discrimination in juries from its creation.³⁰

Batson's inability to protect juries from racial bias has been stated beginning as early as Justice Marshall's concurrence in *Batson*.³¹ There, Justice Marshall stated that *Batson* is only a first step towards ending racial discrimination in jury selection, as it only enables defendants to challenge blatant examples of racism.³² Justice Marshall also contended that *Batson* fails to protect against a conscious or unconscious racism that could be possessed by a prosecutor or judge.³³

State v. Porter continues the nationwide tradition of puzzling *Batson* jurisprudence. While stating that the Arizona *Batson* jurisprudence does not require trial courts to make explicit determinations at each step of *Batson*, the Court refuses to change this, citing that, "Arizona precedent allows courts to defer to an implicit finding that a reason was nondiscriminatory even when the trial court did not expressly rule on the third *Batson* factor."³⁴ The Court ignores its ability to create its own rules to *Batson* jurisprudence. And, its preference for deference is illustrated by its continuous reference to the shared belief that "[demeanor] cannot be shown from a cold transcript."³⁵ This case demonstrates how broad the scope is for a peremptory challenge even under *Snyder's* limitations, and how easy it is to exercise a peremptory challenge without running afoul of *Batson*.

The impracticability of the *Batson* challenge has led states to adopt court rules that allow for easier prevention of racial and gender bias on juries. In 2018, the Washington Supreme Court adopted General Rule 37 ("GR 37").³⁶ This rule expanded the prohibition against using race-based peremptory challenges during jury selection to include instances that an "object observer" could view race or ethnicity as a factor in the use of the peremptory strike, such as the juror's demeanor, inattentiveness, failure to make eye contact or exhibited a problematic attitude.³⁷ The rule also finds having prior contact with law enforcement officers, expressing a distrust of law enforcement, having a child outside of marriage and living in a high-crime neighborhood presumptively invalid reasons for a peremptory challenge.³⁸

Similarly, the California legislature passed Assembly Bill 3070 ("AB 3070") in August of 2020.³⁹ While it has similar language to GR 37, it differs in its inclusion of gender, gender identity, sexual orientation, national origin, or religious affiliation, in the bases that may not be used to strike a juror.⁴⁰ However, even these rules are greatly criticized as being inadequate to fight racial discrimination.

Some scholars argue that rules like AB 3070 and GR 37 will not succeed without training in implicit bias because these laws don't help lawyers more accurately identify real, evidence-based concerns for juror bias on their own, which could lead to doubt or fear in utilizing a *Batson* challenge.⁴¹ Scholars also criticize these laws for failing to include an individual's socioeconomic status as a presumptively invalid reason in a peremptory strike, as socioeconomic status has been supported by research to be closely connected to race and ethnicity.⁴² Finally, these rules still do not identify an appellate standard of review for erroneous applications by trial judges.⁴³ Other scholars, however, argue that retaining the peremptory strikes with some reform is better than eliminating the peremptory strike altogether, as eliminating the peremptory strike "would likely result in an expansion of for-cause challenge jurisprudence, including appellate review of for-cause challenges" as jurors and judges hold racial biases, and there would still be debate about race and jury selection.⁴⁴

While these rules make it more difficult to use a peremptory challenge based on race, this legislation is inadequate in preventing discrimination in jury selection. Even though AB 3070 and GR 37 would have protected the minority defendant in *Porter*,⁴⁵ they do not prevent a lawyer from consciously or unconsciously developing a "cheat sheet" of justifications that would be sufficient in the case of a *Batson* challenge.⁴⁶ Furthermore, neither rule prevents an attorney from asking about these relationships, and an unconscious bias paired with a conscious awareness of these rules may allow a lawyer to use a peremptory strike for a proffered valid reason.

In their dissent, Judge McCurdie and Judge Swann raised additional compelling arguments for the abolition of peremptory strikes.⁴⁷ They argued that it is constitutionally required that juries be selected "from 'a representative cross section of the community [which] is an essential component of the Sixth Amendment right to a jury trial,'" and cited studies demonstrating that this is still not the case after *Batson*.⁴⁸ They further urged that the abolition of peremptory strikes

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was necessary to achieve a representative cross section of the community.⁴⁹ Thankfully, the Supreme Court of Arizona accepted these arguments in the petition, and became the first state to eliminate peremptory challenges. Beginning January 1, 2022, prospective jurors may only be excused for cause.⁵⁰ All eyes are on Arizona to see whether this legal experiment “will create a fairer jury selection process or if it will create other problems.”⁵¹

1. *Voir dire* refers to the process of questioning prospective jurors about their backgrounds and potential biases. See, e.g., Cathy E. Bennett ET AL., *How to Conduct a Meaningful & (and) Effective Voir Dire in Criminal Cases*, 46 SMU L. Rev. 659, 660 (2016).
2. See ELISABETH SEMEL ET AL., WHITEWASHING THE JURY BOX (Berkeley Law Death Penalty Clinic ed., 2020) (“Empirical evidence overwhelmingly shows that implicit biases play a significant role in prosecutors’ peremptory challenges. Strikes based on these biases most often adversely affect Black defendants and Black Jurors”).
3. See Shamena Anwar ET AL., *The Impact of Jury Race in Criminal Trials*, The Q. J. of Econ., May 2012, at 1017.
4. A peremptory challenge allows counsel to eliminate prospective jurors without providing explanation. See Black’s Law Dictionary 1136 (6th ed. 1990).
5. *Batson v. Kentucky*, 476 U.S. 79, 139, 1986 U.S. LEXIS 150, at *110-112 (1986) (“The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution”).
6. *State v. Porter*, 460 P. 3d 1276, 1279 Ariz. App. LEXIS 362, at *2 (The prosecutor struck this juror “because that juror’s ‘brother was convicted of a crime that is of the same nature as this matter, aggravated assault,’ and ‘[s]he did not seem to be very sure with her responses to the State whether how [sic] that impacted her or not.’”).
7. See *State v. Porter*, 460 P. 3d 1276, 1279 (Ariz. Ct. App. 2020) (“the prosecutor explained that she struck that juror because she ‘had been on a criminal jury in the past which had found an individual not guilty’ and ‘had also been the foreperson of that jury’”).
8. See *State v. Porter*, 460 P. 3d 1276, 1279. (The jury acquitted Porter of aggravated assault and convicted her of resisting arrest.)
9. Juries are required to be selected from “a representative cross section of the community [which] is an essential component of the Sixth Amendment right to a jury trial.” *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

10. The defendant appealed the trial court’s finding regarding the *Batson* challenges and argued that the prosecutor’s disparate treatment of jurors and failure to conduct *voir dire* on the topic of prior jury service revealed the prosecutor’s discriminatory intent in jury selection. The appellate court ruled in favor of the defendant. The State of Arizona then appealed the case before the Arizona Supreme Court. See *State v. Porter*, 491 P.3d 1100, 1104, 2021 Ariz. LEXIS 243, at *3 (Ariz. 2021).
11. This test is analogous to the *McDonnell Douglas* test used in the employment discrimination context. See Christopher L. Ekman, *Batson Challenges in State and Federal Courts in Alabama: A Refresher and Recent Decisions*, 72 Ala. Law. 46, 48 (2011).
12. *Batson v. Kentucky*, 475 U.S. 79, 97, 1986 U.S. LEXIS 150, at *110-112 (1986).
13. *Id.*
14. *Snyder v. Louisiana*, 552 U.S. 472, 477, 2008 U.S. LEXIS 2708, at *9 (2008).
15. *State v. Snyder*, 942 So. 2d 484, 496, 2006 La. LEXIS 2309, at *35 (La. 2006) (“[N]ervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge’s evaluation must be given much deference”).
16. See *Batson v. Kentucky*, 475 U.S. 79, 96.
17. See *Batson v. Kentucky*, 475 U.S. 79, 93.
18. *Id.*
19. *Snyder v. Louisiana*, 552 U.S. 472, 475-476, 2008 U.S. LEXIS 2708, at *8 (2008).
20. See *Snyder v. Louisiana*, 552 U.S. 472, 478.
21. See *Snyder v. Louisiana*, 552 U.S. 472, 479 (“Rather than making a specific finding on the record concerning Mr. Brooks’ demeanor, the trial judge simply allowed the challenge without explanation”).
22. See *Snyder v. Louisiana*, 552 U.S. 472, 487.
23. *Id.*
24. See *Snyder v. Louisiana*, 552 U.S. 472, 482-487.
25. See *State v. Porter*, 491 P.3d 1100, 1108-1109.
26. See *Snyder v. Louisiana*, 552 U.S. 472, 477.
27. *Id.*
28. *State v. Porter*, 460 P. 3d 1276, 1278, 2020 Ariz. App. LEXIS 362, at *2 (Ariz. Ct. App. 2020) (McCurdie, P., dissenting).
29. See *State v. Porter*, 460 P. 3d 1276, 1278.
30. See *State v. Porter*, 460 P. 3d 1276, 1289.
31. *Batson v. Kentucky*, 476 U.S. 79, 102-109, 1986 U.S. LEXIS 150, *46-58 (1986).
32. *Id.*
33. See *Batson v. Kentucky*, 476 U.S. 79, 106.

34. *State v. Porter*, 491 P.3d 1100, 1107, 2021 Ariz. LEXIS 243, at *3 (Ariz. 2021) (citing *State v. Smith*, 475 P.3d 558, 577, 2020 Ariz. LEXIS 308, *32 (Ariz. 2020)).
35. *State v. Snyder*, 942 So. 2d 484, 496, 2006 La. LEXIS 2309, at *35 (La. 2006).
36. Wash. General Rule 37 (effective 2018).
37. *Id.*
38. *Id.*
39. Jim Frederick & Kate M. Wittlake, *New Jury Selection Procedure in California: Is this the End of Peremptory Challenges? Is this the End of Batson?*, THE NAT’L L. REV. (Dec. 2, 2020), <https://www.natlawreview.com/article/new-jury-selection-procedure-california-end-peremptory-challenges-end-batson>.
40. Cal. Civ. Proc. Code § 237.1 (West 2021).
41. Brooks Holland, Article, *Confronting the Bias Dichotomy in Jury Selection*, 81 La. L. Rev. 165, 213-216 (2020).
42. Simon, *supra* note 44.
43. Holland, *supra* note 45, at 212.
44. Annie Sloan, “What to do About Batson?": Using a Court Rule to Address Implicit Bias in Jury Selection, 108 Calif. L. Rev. 233, 263-265 (2020).
45. Compare Cal. Civ. Proc. Code § 237.1 (West 2021) and Wash. General Rule 37 (effective 2018).
46. See Ian A. Mance, Article, *Cheat Sheets and Capital Juries: In State v. Tucker, North Carolina’s Attorney General and Supreme Court Contend with Evidence of Prosecutors’ Efforts to Circumvent Batson v. Kentucky*, 44 Campbell L. Rev. 3 (2021) (discusses a case involving North Carolina prosecutors’ use of a list, or “cheat sheet,” of justifications to recite to a judge that may overcome a *Batson* challenge).
47. Hon. Peter B. Swann & Hon. Paul J. McMurdie, *Petition to Amend Rules 18.4 and 18.5 of the Arizona Rules of Criminal Procedure and Rule 47(e) of the Arizona Rules of Civil Procedure*, (June 1, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1208>.
48. *Id.*
49. *Id.*
50. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, R-21-0020 (2021).
51. Cheryl Corley, *Arizona’s Supreme Court Eliminates Peremptory Challenges*, NPR (Sept. 6, 2021), <https://www.npr.org/2021/09/06/1034556234/arizonas-supreme-court-eliminates-peremptory-challenges>.

DEATH

BY A SINGLE SENTENCE

By Danielle DalPorto

In 1984, Victor Taylor, a 24-year-old Black man, was sentenced to death for the murder of two white teenagers in Louisville, Kentucky.¹ His cousin and co-defendant received a life sentence.² While the details of the crime are horrific,³ the author has omitted them from this analysis: One's constitutional rights are not contingent on the severity of the crime he has allegedly committed. The United States Constitution is exceedingly clear on this point, containing several safeguards to protect the rights of criminal defendants—none of which have provided any relief for Taylor. In fact, courts have repeatedly failed to uphold his constitutional rights, specifically his Fourteenth Amendment right to Equal Protection under the law.⁴ Most recently, the Sixth Circuit Court of Appeals affirmed the district court's denial of his *habeas corpus* claim,⁵ relying on a flimsy interpretation of a procedural technicality. Worse than that, the court's decision essentially punishes Taylor (and his counsel) for being too thorough in trying to appeal his death sentence.

Procedural History

It is impossible to analyze this case without the context of *Batson v. Kentucky*,⁶ which was decided three weeks before the trial court judge sentenced Taylor to death.⁷ In *Batson*, the Supreme Court ruled that striking Black members of a jury pool based on their race violates the Equal Protection rights of Black defendants under the Fourteenth Amendment.⁸ This decision overturned *Swain v. Alabama*,⁹ which required a defendant to show that the prosecutor had a systematic practice of excluding Black jurors from all criminal cases. As one of the dissenting judges from the Sixth Circuit points out, after *Batson*, excluding even one juror on the basis of race is unconstitutional.¹⁰ Taylor has maintained that his rights were violated under *Batson* throughout almost four decades of appeals.

Taylor I

Taylor raised a *Batson* claim in his first appeal directly to the Kentucky Supreme Court (*Taylor I*), arguing that the prosecutor excluded Black members of the jury pool because of their race.¹¹ Specifically, he argued that the prosecutor violated *Batson* by using half of his peremptory strikes to eliminate two-thirds of potential Black jurors without an alternative explanation.¹² The court summarily denied this claim and 41 others, choosing to expound on only two of Taylor's

assignments of error. It explained: "We have carefully reviewed all of the issues presented by Taylor.... Allegations of error which we consider to be without merit will not be addressed here."¹³ The word "*Batson*" does not appear anywhere in the opinion.

Taylor II

Seven years later, Taylor filed for post-conviction relief (*Taylor II*) under a local rule that barred him from bringing claims already adjudicated on direct review.¹⁴ As this precluded him from relying on *Batson*, he argued instead that the prosecutor violated his Equal Protection rights under *Swain*.¹⁵ To meet *Swain*'s higher burden of showing a systematic practice of discrimination, Taylor introduced five new pieces of evidence, including passages from the Kentucky Prosecutor's Handbook listing jurors of the same race or national origin as the defendant as "not preferable."¹⁶ While the dissent found this a clear violation of both *Swain* and *Batson*,¹⁷ the majority failed to address the issue head on. Instead, it categorized the claim as "an attempt to get around a long-established rule."¹⁸ In the Kentucky Supreme Court's view, invoking *Swain* was an attempt to retry the *Batson* claim, which was already reviewed on direct appeal.¹⁹ Therefore, additional evidence of discriminatory practices was irrelevant.²⁰

While the merits of such a narrow holding are debatable—to say the least—the court's analysis did not stop there. It went on to state that even if Taylor could bring a *Batson* claim in this appeal, it would fail on the merits.²¹ Here, the majority contended that a successful *Batson* claim requires a showing of "other relevant circumstances" that create an inference that the prosecutor struck potential jurors on the basis of race.²² By this logic, Taylor's original argument—or any argument based solely on the number of peremptory strikes used on Black jurors—could never prove a *Batson* violation. Once again, the court denied relief.²³

Taylor v. Jordan

Nearly 20 years later, the Sixth Circuit Court of Appeals heard the case *en banc*, and like every court before it, failed to provide Taylor any relief.²⁴ Somewhat surprisingly, the majority conceded that the Kentucky Supreme Court's reasoning in *Taylor II* misconstrued *Batson*.²⁵ It accepted Taylor's argument that *Batson* does not require a showing of "other relevant circumstances," yet decided to ignore this blatant misapplication of federal law. Instead, the court opted to review the *Batson* claim under the brief analysis in *Taylor I*,²⁶ which denied the claim and 41 others in a single sentence.²⁷

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The standard for such summary denials is extremely deferential; courts need only find that “any fair-minded jurist” could have adopted an argument or theory in support of the claim in question.²⁸ The majority—over the objections of one dissenting judge who found the racially-motivated jury selection so blatant that no fair-minded jurist could disagree²⁹—ruled that this standard was met.³⁰ The possible *Batson* violation is a point of contention between the majority and the dissenters, but because of the degree of deference the majority employed here, it is not an issue that the majority gave substantial weight to.

As dissenting Judge Moore argued, the majority did not have to ignore *Taylor II* in favor of “read[ing] tea leaves” in *Taylor I*.³¹ Indeed, the majority could have “looked through” *Taylor I* to *Taylor II* and imputed the latter’s error to the former—and therefore overturn *Taylor II* based on its clear misconstrual of federal law—a precedent set by *Wilson v. Sellers*.³² The majority rejected this argument, pointing out that *Wilson* only applies in instances where a court summarily affirms a lower court’s reasoning (as opposed to a later decision by the same court).³³ However, as Moore argues, there is no reason why *Wilson* cannot apply, as it stands for the proposition that “courts should defer to the last related state-court decision that does provide a relevant rationale.”³⁴ Here, the majority chose to evaluate what the court could have meant in its one sentence denial instead of what the same court—including a judge who joined both opinions³⁵—actually said.

The dissenting opinions explain exactly how Taylor’s constitutional rights were violated. They do not note, however, the contempt that the majority seems to have for Taylor’s insistence on pursuing these rights in the first place. The majority opinion emphasized the length of his appeal several times, noting, almost tangentially, that his brief was 145 pages long and included 44 claims for relief.³⁶ The court goes on to explain that it cannot blame state courts for issuing summary denials, especially in cases like Taylor’s, in which “the petitioner presented the state court with literally dozens of claims for relief.”³⁷ The majority’s focus on the thoroughness of this appeal is particularly baffling here, considering the stakes. Yes, Taylor presented “literally dozens” of claims; for him, the stakes are literally life or death. This sort of language not only obfuscates the importance of carefully considering each claim, it also raises an ethical question about summary denials in death penalty cases. As it stands, the state of Kentucky derives the authority to kill Taylor from a one-sentence denial of relief with no substantive rationale behind it.

Ultimately, there were a number of avenues through which the Sixth Circuit Court of Appeals could have protected Taylor’s constitutional rights, saving his life in the process. Its failure to do so in this way—using the strictest interpretation of a procedural issue—is perhaps the cruelest. Taylor remains on death row because of a state court’s decision to write only a few words, allowing subsequent courts to grant it the highest level of deference.

1. *Taylor v. Jordan*, 10 F.4th 625, 628 (6th Cir. 2021) (en banc).
2. This case also involved a potential violation of the Confrontation Clause. The trial court allowed Taylor’s co-defendant’s taped testimony into evidence without opportunity for cross-examination. Though this is an issue rife with injustice and worth further analysis, it is beyond the scope of this comment.
3. See *Taylor*, 10 F.4th at 628.
4. U.S. Const. amend. XIV, § 1.
5. *Taylor*, 10 F.4th at 628.
6. 476 U.S. 79 (1986).
7. *Taylor*, 10 F.4th at 631.
8. *Batson* 476 U.S. at 86.
9. 380 U.S. 202 (1965).
10. *Taylor* 10 F.4th at 622 (White, J., dissenting).
11. *Id.* at 631.
12. *Id.*
13. *Taylor v. Commonwealth*, 821 S.W.2d 72,73 (Ky.1990).
14. Ky. Rule Crim. Proc. 11.42.
15. *Taylor v. Commonwealth*, 63 S.W.3d 151, 156 (Ky. 2001).
16. *Id.* at 171.
17. *Id.* at 172.
18. *Id.* at 157.
19. *Id.*
20. *Id.*
21. *Id.* at 156.
22. *Id.* at 157.
23. *Id.*
24. *Taylor* 10 F.4th at 628.
25. *Id.* at 633.
26. *Id.*
27. See *supra* note 13.
28. 28 U.S.C. §2254(d)(1).
29. *Taylor* 10 F.4th at 646 (Cole, J., dissenting).
30. *Id.* at 636.
31. *Id.* at 642 (Moore, J., dissenting).
32. 138 S. Ct. 1188 (2018).
33. *Taylor* 10 F.4th at 633.
34. *Id.* at 643 (Moore, J., dissenting).
35. *Id.* at 634.
36. *Id.* at 631.
37. *Id.* at 632.



State v. Andujar: WHY MEANINGFUL REFORM IS NEEDED

By Natalie Aguilar



State v. Andujar: Batson v. Kentucky Evaded

On July 13, 2021, the New Jersey State Supreme Court affirmed the appellate court's decision to reverse Edwin Andujar's conviction of first-degree murder and weapons offenses.¹ The Court held that the State violated Andujar's right to a fair trial because the State's racial discrimination infected the jury selection process.² This case gave the New Jersey Supreme Court the opportunity to discuss the critical role of jury selection and to consider the additional measures needed to prevent discrimination in jury selection.³

The Sixth Amendment of the Constitution guarantees the right to a trial by a fair and impartial jury.⁴ The criminal justice system has designed two stages to ensure fairness and impartiality among jury selection. Firstly, the pool from which juries are drawn from must be representative of the community.⁵ Secondly, the jury selection process identifies and removes jurors who cannot be impartial.⁶ Both attorneys and judges interview potential jurors to ensure impartiality.⁷

Attorneys have two different ways to exclude prospective jurors during the jury selection process.⁸ Counsel can challenge for cause, which requires convincing a judge that a prospective juror has a bias that precludes impartiality.⁹ Or, attorneys can issue a peremptory challenge, which allows lawyers to exclude jurors without explanation or evidence of impartiality.¹⁰

Usually, if a trial court rejects a challenge for cause, then the attorney who raised the for-cause challenge will issue a peremptory challenge, which can trigger a *Batson* analysis.¹¹ A *Batson* challenge is made by the party who believes the peremptory challenge is being used to exclude a juror on the basis of race.¹² A *Batson* challenge includes a three-step analysis, where the party contesting the peremptory challenge must show that the peremptory challenge was intentionally exercised on the basis of race or ethnicity.¹³ The burden then shifts to the party issuing the peremptory challenge to provide a race-neutral explanation supporting the peremptory challenge.¹⁴ Finally, the trial judge decides whether the proffered explanations are genuine and reasonable grounds to remove the juror or simply baseless excuses hiding discriminatory motivations.¹⁵

In *State v. Andujar*, the prosecution issued a challenge for cause against potential juror F.G.¹⁶ The state argued that, "F.G.'s background, associations and knowledge of the criminal justice system were problematic," and also suggested that F.G. had been evasive.¹⁷ The trial judge rejected the challenge and found F.G. would make a fair and impartial juror.¹⁸ The State then chose to run a criminal history check on F.G. and found that he had an outstanding warrant.¹⁹ He was arrested, though his charges were later dropped.²⁰ The State did not investigate any other juror to this extent.²¹

The trial court in the Andujar case never engaged in a *Batson* analysis: after the court rejected the for-cause challenge, the State did not raise a peremptory challenge. Instead, the State ran a "criminal history check on F.G... effectively evad[ing] any *Batson*...analysis."²²

The Supreme Court of New Jersey affirmed the appellate division's decision to reverse Andujar's conviction. The Court also held that, for future cases, "any party seeking to run a criminal history check on a prospective juror must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge."²³ A good-faith basis request requires the party to believe that a record check might reveal "pertinent information unlikely to be uncovered through the ordinary voir dire process."²⁴ "Mere hunches" are not enough to justify a criminal record check.²⁵

As indicated above, this new "standard," which determines whether a criminal history check was appropriate, was not met in Andujar's case.²⁶ In *Andujar*, the State neither presented a request—individualized, based in good faith or otherwise—nor obtained the judge's permission to run a background check on F.G.²⁷ Instead, the State ran the background check after the judge determined F.G. would make a fair and impartial juror.²⁸ Based upon the prosecution's disregard of this standard, the Court concluded that F.G.'s removal may have stemmed from the State's implicit bias.²⁹

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Batson's Failures

The *Batson* analysis explicitly applies to only peremptory challenges. Therefore, courts have not extended the doctrine to allegations of discrimination to for cause challenges.³⁰ Courts have held that there is no legal basis to apply the *Batson* analysis to for challenge.³¹ The courts reason that for-cause challenges already require the party issuing the challenge to provide a race-neutral reason.³² Therefore, there is no need to apply *Batson* because the *Batson* analysis would accomplish the same thing: require the issuing party to provide a race-neutral reason.³³ However, this disregards the ease in which race-neutral justifications are easily offered and accepted.³⁴

Surprisingly, in the Andujar case, the state supreme court appears to imply that the *Batson* analysis applies to for-cause challenges as well.³⁵ The Court accepted that, "implicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination."³⁶

The *Batson* analysis is meant to address racial discrimination in courts. However, legal scholars view the analysis to be ineffective.³⁷ An important reason the *Batson* challenge often fails is that it only addresses purposeful racial discrimination in jury selection. It does not address or combat implicit bias.³⁸ Therefore, the flaws in the *Batson* analysis allow for the "ease with which 'race-neutral' reasons are accepted by judges and the failure to account for the nuances of racial discrimination and bias."³⁹

Reform sought

Other states have recognized the effect of implicit bias upon jury selection and have accordingly revised the *Batson* analysis. For example, Washington state attempted to address *Batson's* failures,⁴⁰ by passing a statute⁴¹ that modified the *Batson* analysis.⁴² The statute removed the purposeful discrimination requirement from the *Batson* analysis and instead imposed an objective view inquiry.⁴³

Instead of inquiring whether the prosecutor was motivated by racial animus, Washington state implemented the "objective observer test." This test asks whether an average, reasonable person could view race or ethnicity as a motivator in issuing the

peremptory challenge.⁴⁴ In other words, the court no longer needs to inquire whether the prosecutor intentionally removed a potential juror on the basis of race. Instead, the court applies this objective standard to determine if the prosecutor acted in a racially discriminatory manner.

"The statute also provides a list of purported reasons, which are presumptively invalid, for striking a juror: (i) having prior conduct with law enforcement;...(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;... (iv) living in a high-crime neighborhood."⁴⁵

In *State v. Jefferson*,⁴⁶ the Washington Supreme Court defined the objective observer standard, "based on the average, reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision-making in nonexplicit, or implicit, unstated, ways."⁴⁷ "By moving the inquiry into how an objective observer would perceive the juror's removal, rather than probing a prosecutor's mind for overt racial animus, the test more effectively deals with the issue of implicit bias."⁴⁸

Ideally, a judge who imposes this "objective observer standard" will be able to rule on a *Batson* challenge impartially, detached from her personal feelings or opinions. But, how realistic is an objective standard, especially when this standard hinges on the assumption that the judge making the decisions is an objective ruler? What is to secure the "objective standard" from a judge's own implicit biases?

While this author is glad that the courts have acknowledged the pervasive failure of *Batson*, she is cautious to declare this reform as a complete fix to the problem. However, Washington has taken a step in the right direction to address implicit bias in jury selection. And now that New Jersey has acknowledged the real harm implicit bias creates, New Jersey needs to take real steps in addressing the problem as well.

A defendant's right to a fair and impartial jury is guaranteed by the Sixth Amendment of the Constitution and needs to be better protected. Prosecutors have constantly violated that right by removing potential diverse jurors for no reason other than racial

bias. Too often, the explanations offered in for-cause challenges and peremptory strikes are justifications that hide implicit or blatant racial biases.

While the Washington *Batson* reform does not explicitly involve for-cause challenges, for-cause challenges can also benefit from the same type of reform.⁴⁹ The *Batson* reform effectively deals with implicit bias by no longer requiring courts to find that the prosecutor had purposeful bias in removing a juror for a *Batson* challenge to succeed. The reform removes the subjective inquiry into the prosecutor's mind, and instead analyzes the reasoning offered for a peremptory strike under an objective standard. Thus, when the judge decides whether a for cause challenge was made for race neutral reasons or for racially discriminatory reasons, the judge no longer has to worry about the subjective intent of the prosecutor.

Since the state supreme court in the Andujar case has likely expanded the application of *Batson* to for-cause challenges, if New Jersey would apply the Washington-type of reform, the reformed analysis would most likely apply to for-cause challenges as well. While eliminating all bias from courts may be impossible, the New Jersey judicial system can continue to address bias by reforming its *Batson* analysis and protecting defendants' 6th Amendment rights.⁵⁰

Diversity in a jury pool is essential to a defendant's right to an impartial and fair trial. Diversity in the jury pool is needed to provide for diversity of thought, experience and socio-economic background. Studies have proven that diverse juries "deliberate longer, more thoroughly evaluate the evidence and are less likely to have a presumption of guilt."⁵¹ Instead of removing diverse jurors from the jury pool, the criminal system needs to ensure the diversity of juries, thereby increasing the probability of a fair and impartial trial.

1. *N.J. v. Andujar*, 247 N.J. 275 (2021).

2. *Id.*

3. *Id.* at 285.

4. Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, J. Behav. Dec. Making, 20: 467, 467 (2007).

5. *Andujar Id.*

6. *Id.*

7. *Id.*

8. *Id.*
9. *Id.*
10. *Id.*
11. *N.J. v. Andujar*, 247 N.J. 275, 284–285 (2021).
12. *Batson v. Kentucky*, 106 U.S. 79, 96 (1986).
13. *N.J. v. Andujar*, 247 N.J. 275, 300 (2021).
14. *Id.*
15. *Id.*
16. *N.J. v. Andujar*, 247 N.J. 275 (2021).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 313.
23. *Id.* at 284.
24. *Id.* at 308.
25. *Id.* at 308.
26. *Id.* at 284.
27. *Id.* at 284.
28. *Id.* at 283.
29. *Id.* at 284.
30. New Jersey State Bar Associate: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 42 (2021).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 40.
35. *Id.*
36. *N.J. v. Andujar*, 247 N.J. 275 (2021).
37. New Jersey State Bar Associate: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 32 (2021).
38. *N.J. v. Andujar*, 247 N.J. 275, 302 (2021).
39. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 33 (2021).
40. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 38 (2021).
41. Wash. Gen. R.37.
42. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
43. Annie Sloan, *What to Do about Batson?*: Using a Court Rule to Address Implicit Bias in Jury Selection, 108 Calif. L. Rev. 233, 253 (2020).
44. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
45. *Id.* at 36.
46. *State v. Jefferson*, 429 P.3d at 480 (2018). (The Court acknowledged that the *Batson* analysis fails to adequately address race discrimination in jury selection. Therefore, the Court changed *Batson*'s third step. The judge must now ask whether an objective observer could view race as a factor in the peremptory strike.)
47. New Jersey State Bar Association: Working Group on Jury Selection, *Interim Report to the Judicial Conference on Jury Selection*, 35 (2021).
48. *Id.* at 37.
49. *Id.* at 41.
50. *Id.* at 27.
51. Liane Jackson, *The Chauvin conviction shows why diverse juries matter* (Aug 1, 2021).



EViction SEALING

By Danielle DalPorto and Makela Hayford

Evictions do not tell a tenant's full story, or necessarily predict whether a potential tenant is likely to default on her rent. Yet landlords often search for eviction filings and judgments in making decisions about whether to rent to prospective tenants. Eviction sealing is a legal mechanism that may provide relief to those who have eviction filings or judgments on their record. It involves the removal of an eviction record on file with the court. This simple removal provides one less barrier to those seeking housing, a basic human need.

Few cities in the United States offer tenants the opportunity to seal their evictions. While Ohio does not create a right for eviction sealing, Cleveland's housing court offers tenants limited eviction sealing. In 2018, Housing Court Judge Ronald O'Leary, a Republican appointee, established Cleveland's formal eviction-sealing rule.¹ Currently, there are four potential options for a tenant to seal an eviction:

- a) The tenant defeats eviction or the Court dismisses the case;
- b) The landlord dismisses the case before adjudication;
- c) By written agreement of the landlord to seal the record; or
- d) The landlord prevails *and* the tenant remains eviction-free for five years, *and* extenuating circumstances brought about the eviction, *and* at least five years have passed since the landlord prevailed on the possession claim.²

Regardless of the sealing outcome, however, tenants must disclose prior evictions or filings if asked by prospective landlords.³

Although Cleveland Housing Court gives tenants the opportunity to seal their eviction records, the authors still find the existing eviction-sealing rule limiting and that it rules out a significant number of tenants. Viewing Cleveland's eviction-sealing rule from a critical perspective, the authors conclude that while sealing evictions to destigmatize individuals who have experienced eviction is a step in the right direction, lawmakers or judges acting in this capacity should amend the rule to broaden the population of individuals who may leverage it. This

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article explores Cleveland’s rule-making process for eviction records sealing, the limitations of the existing rule and provides alternatives that seek to remedy those limitations, and also critiques the housing court sealing process from both landlords and housing researchers.

The process of establishing Rule 6.13 in Cleveland

Although Cleveland Housing Court judges always had the authority to manage court records as they saw fit,⁴ there was no formal process for sealing civil records until 2018, when the Court implemented Rule 6.13.⁵ The authors are aware that a number of considerations went into crafting this rule, including advocacy and education from the Legal Aid Society of Cleveland,⁶ but will limit their analysis to the considerations of the individual who had the final, decision-making authority—Judge O’Leary. In discussing the rule’s creation, he recalled a conversation he had with one court employee whose 20-year-old eviction prevented her from renting an apartment.⁷

While this employee’s willingness to share her story is commendable, her experience is atypical, to say the least. Not many people with eviction judgments against them have the opportunity to relay the subsequent negative effects directly to a housing court judge, especially one with the power to shape housing court policy.⁸ In fact, the average eviction hearing in the Cleveland Housing Court lasts less than five minutes.⁹ Tenants get just a few minutes in front of a magistrate—generally without legal representation,¹⁰ to make the case to stay in their homes. In the aftermath of an adverse judgment, lobbying policymakers (such as housing court judges) to mitigate the harmful effects of that judgment is surely not a top priority for tenants who now have seven to 14 days to leave their homes.¹¹

The same is not necessarily true for landlords. After seeking feedback through its website and newsletter on the issue,¹² the Cleveland Housing Court received about 30 written responses from landlords.¹³ Some openly opposed the rule, including the following west side landlord: “Simply put, I am against expungement of evictions...It’s difficult enough weeding our good tenants from bad tenants. If you expunge these records, my hands will be further tied, and unwanted tenants will find their way back in.”¹⁴ Of course, the comments of one landlord cannot be extrapolated to represent the views of the entire class. It is notable, however, that an eviction—even one that was ultimately dismissed or occurred decades ago—serves as a proxy for “bad tenant.” Indeed, this sort of rubber stamping is common practice in screening rental applications.¹⁵

Judge O’Leary weighed these concerns, stating that he wanted to balance the interests of both landlords and tenants in creating the rule.¹⁶ Admittedly, sealing eviction records makes it harder for landlords to compile lists of tenants with evictions to avoid renting to. But a landlord’s primary interest is to profit from renting the units he owns.¹⁷ Sealing eviction records only inhibits this interest if one assumes that tenants with evictions are less likely to pay rent, thus limiting these profits. Even if one makes this assumption, the weighing of interests is still landlords’ profits versus tenants’ need for shelter. Though the authors do not know exactly how Judge O’Leary handled these calculations, they do know which of the two groups publicly opposed any version of the proposed rule.¹⁸ Incidentally, it is also the group that is much more familiar with the court system¹⁹—the same group that demonstrably benefits from “repeat player” biases in housing court.²⁰



Whatever considerations went into its drafting, the rule currently allows the Court to seal eviction records, “when the interest of justice in sealing the record outweighs the interest of the government and the public in maintaining a public record of the case, including, for example, in the following circumstances:

1. The court dismissed or entered judgment for the tenant/movant on the claim for eviction;
2. The landlord dismissed the claim for eviction before adjudication of that claim;
3. The landlord stipulates, in writing to the Court, to sealing the record, except that sealing of a record solely on the basis of the stipulation by the landlord shall be granted only once in any five-year period; or
4. The landlord prevailed on the merits on the claim for eviction and **all** of the following occurred:
 - a. Extenuating circumstances led to the eviction; and
 - b. At least five years have passed since judgment was entered for the landlord; and
 - c. At least five years have passed since the tenant has had an adverse judgment granting an eviction in any jurisdiction.”²¹

Additionally, the Court requires tenants to serve written motions on the landlord who brought the eviction action, presumably out of concern for due process. The Court also gives landlords the opportunity to object to these motions.²² Lastly, “the Court may consider all relevant factors when reviewing a Motion to Seal Eviction Record, which may include, but are not limited to:

1. The disposition of the eviction claim;
2. Whether the sealing of the record is agreed to or disputed by the opposing party;
3. If the landlord received judgment on the eviction, the grounds upon which the judgment was granted;
4. Whether the movant has satisfied any money judgment issued in favor of the opposing party in the eviction case; and
5. Any other information relevant to the determination of whether justice requires the sealing of the record.”²³

In conjunction with the text of the rule, the Court²⁴ provided additional online instructions at the time of the rule’s implementation. These instructions urge tenants to consult

with a lawyer or housing specialist before filing; remind tenants that eviction records are *only* sealed in *limited* circumstances; and inform tenants that the Court typically considers a motion to seal an eviction record only once.²⁵ The next section will address the ways in which this rule and its further specifications fail to adequately protect tenants and consider their interests.

How Rule 6.13 fails tenants despite good intentions

The Cleveland Housing Court’s rule fails tenants in a number of ways. First, the limited circumstances in which a tenant can prevail are too narrow to protect those who need it. Second, the fact that the rule still requires tenants to disclose past evictions even if the court records are sealed²⁶ calls into question if this can even be called a remedy at all. Third, the rule in its current form is inaccessible even to tenants who qualify, as it requires them to navigate a not particularly user-friendly court system.

Local critic of the rule, James Scherer addresses the first and second point in his piece, “Changing the Rule that Changes Nothing: Protecting Evicted Tenants by Amending Cleveland Housing Court Rule 6.13.”²⁷ Here, Scherer highlights the absurdity of forcing tenants to disclose past evictions even after a motion to seal the court record is granted. First, he argues, this results in tenants only applying to rent from landlords who do not directly ask, which eliminates a number of subsidized units.²⁸ A rule supposedly designed to protect tenants with eviction records somehow does little to help the poorest subset of that group. Second, Scherer points out that this sort of disclosure is not even required in criminal record sealing.²⁹ The authors are baffled: how did the Court conclude that landlords who simply ask about past evictions have a greater interest in that information than employers who ask about criminal history—*despite* court orders to seal the records in either case?

Scherer also compared Cleveland’s policy to that of other jurisdictions, which automatically seal records when the action is dismissed or the tenant prevails.³⁰ He argues that Cleveland should amend the rule to adopt this practice.³¹ The authors agree. Under the current rule, a tenant could be prevented from obtaining housing if her landlord filed an entirely frivolous eviction action. Prospective landlords often do not decipher between dismissed actions and cases in which the eviction was granted,³²

meaning that a tenant could potentially lose out on future housing due to personal feuds with their landlord or mere incompetence. The problem is even worse when one considers that it is not uncommon for dockets to mistakenly list dismissals as tenant losses.³³

The authors agree with Scherer that at the very least, Cleveland should consider modifying the rule in the two ways discussed above. However, Scherer does not discuss just how difficult it is for tenants to prevail under the current rule. For a tenant’s motion to be granted, she needs to determine her eligibility, submit all necessary documentation—including an actual written motion, court records and an affidavit—serve it to the correct party and pay a \$25 filing fee.³⁴ Additionally, if she fails to do any of this correctly the first time, or if the Court uses its broad discretion under the rule to determine maintaining the record is in the public’s interest, she does not get a second chance.³⁵

It is almost unbelievable that a rule purported to balance the interests of tenants and landlords requires tenants to possess a sophisticated understanding of court proceedings, or hire a lawyer on top of the \$25 filing fee.³⁶ The Court seems to disregard both the financial constraints of a number of people who might be eligible for this relief and the hardships following an eviction that might make complicated legal filings even more difficult. It is clear that in practice, this is not a situation in which two parties’ interests are equally balanced. Cleveland should amend Loc.R. 6.13 by implementing both easier procedures and looser requirements for record sealing.³⁷ The next section will discuss common arguments against doing so.

Addressing landlords and researchers who use eviction records

Although the authors believe that sealing evictions can be a mechanism to help tenants achieve housing stability, the authors also recognize that there are parties whose interests are against sealing eviction records. Indubitably, the largest opposition comes from landlords. Their main argument is that sealed eviction records make it difficult for the landlords to determine whether or not a potential tenant will pay their rent.

Landlords often use eviction judgments and filings to assess the risk of a tenant and the

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likelihood that the tenant will not fulfill their rent obligations. But, housing advocates note that oftentimes, landlords use eviction records incorrectly: “[they] do not understand that an eviction filing is not equivalent to an eviction.”³⁸ For example, when an eviction is filed and the tenant prevails, courts still keep a record of this. Even in these instances, where a court has sided with the tenant, some landlords use the mere filing of an eviction to deny a potential tenant housing. Additionally, given the statistics around who is most often evicted—in many metropolitan areas it is poor black women—the record of eviction almost serves as a proxy for race and gender, two protected classes that landlords are not allowed to factor in their decisions about whether to rent or not.

Others with oppositional interests are some researchers and individuals affiliated with universities. This argument stems from the perception that sealed eviction records will distort the issue of housing instability altogether. Indeed, prominent housing researchers and advocates rely on eviction data to problematize the housing issues and to understand their systemic nature. A reduction of publicly available eviction data could have the potential to further marginalize the issue of housing. It may deprioritize the issue in local governments. At worst, it could serve to reduce the amount of federal funds allocated to organizations serving those facing eviction such as the Legal Aid Society of Cleveland or Cleveland Housing Network.

Though eviction records carry significant data for researchers, it is also true that individuals who have experienced eviction suffer substantial collateral consequences. Collateral consequences are all the difficulties renters face with an eviction on their record—housing instability, mental health issues, familial strains, children struggling in school, loss of jobs, loss of income and other negative consequences. While the authors acknowledge the desire to research such issues is valid, there is also a clear need to remedy such issues. Sealing eviction records is a small step toward progress in that regard. It would seem quite counterproductive for researchers to prolong collateral consequences for the sake of academia.

While Cleveland Housing Court offers some support for tenants with past evictions, the rule for sealing eviction records needs to be amended to ensure that tenants’ interests

in privacy and the ability to rent housing in the future, free from stigma, are adequately protected. Additionally, when a judge acting as a policymaker purports to weigh the interests of two opposing parties, he must carefully consider which party has greater access to him as well as which group’s interests are more closely related to his own.

1. Before this, eviction record sealing was possible, but no formal rules existed on how to file such a motion. Additionally, The Legal Aid Society of Cleveland provided comments and recommendations on these rules. See Rachel Dissel, *Cleveland Housing Court Sets New Rules to Make Requests to Seal Evictions Easier*, CLEVELAND.COM, (Dec. 30, 2018) <https://www.cleveland.com/metro/2018/12/cleveland-housing-court-sets-new-rules-to-make-requests-to-seal-evictions-easier.html>.
2. Loc.R. 6.13(A).
3. Loc.R. 6.13(E).
4. See Rachel Dissel, *Cleveland Housing Court Sets New Rules to Make Requests to Seal Evictions Easier*, CLEVELAND.COM, (Dec. 30, 2018) <https://www.cleveland.com/metro/2018/12/cleveland-housing-court-sets-new-rules-to-make-requests-to-seal-evictions-easier.html>.
5. *Id.*
6. See *supra* note 1.
7. Dissel, *supra* note 2.
8. The authors acknowledge that Judge O’Leary made himself available to both tenants and landlords who wanted to discuss the rule. While this is commendable, it cannot fully account for the disparity in bargaining power and landlords’ greater ability to expend time and resources on this sort of issue. Nor does it rectify the general lack of access tenants have to the legal system as described in this article.
9. April Hirsh Urban, Aleksandra Tyler, *et al.*, *The Cleveland Eviction Study: Observations in Eviction Court and the Stories of People Facing Eviction*, Center on Urban Poverty and Community Development Case Western Reserve University (2019).
10. *Id.* at 19–22. The City of Cleveland increased access to representation by implementing a Right to Counsel program in 2019. This ordinance confers a legal right to representation for tenants who “occupy a dwelling with at least one child” and whose “annual gross income is less than or equal to 100% of the federal poverty guidelines.” Cleveland City Ordinance §375.12.
11. Tenants used to have such a resource—Cleveland Tenant Organization, but its closure further prohibits tenants’ voices from being heard. See Gus Chan, *Cleveland Tenants Organization, out of cash, suspends operations after more than 40 years*, *cleveland.com*, (Feb. 6, 2018).
12. Prior to the establishment of the local rule to seal evictions, the public was offered the opportunity to provide comments on the potential rule.
13. Dissel, *supra* note 2.
14. *Id.*
15. Kathryn A. Sabbath, *Erasing the “Scarlet E” of Eviction Records*, THEAPPEAL.ORG, (APR 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/>
16. Dissel, *supra* note 2.
17. The authors acknowledge that this is an assumption based on the idea that rental properties are an investment, and the purpose of an investment is to turn a profit. However, some exceptions certainly exist.
18. Dissel, *supra* note 2.
19. See *supra* note 5.
20. Robin M. White, *Increasing Substantive Fairness and Mitigating Social Costs in Eviction Proceedings: Instituting a Civil Right to Counsel for Indigent Tenants in Pennsylvania*, 125 DICK. L. REV. 801–802 (2021).
21. Cleveland Municipal Housing Court Local Rule 6.13 (as of January 24, 2022).
22. *Id.*
23. *Id.*
24. Currently, Judge W. Mona Scott presides over the Court after defeating O’Leary in a 2019 election. See Cliff Pinckard, *W. Mona Scott Defeats Incumbent Ronald J. H. O’Leary for Cleveland Housing Court Judge*, CLEVELAND.COM, (NOV. 7, 2019), <https://www.cleveland.com/election-results/2019/11/w-mona-scott-holds-lead-over-incumbent-ronald-j-h-oleary-for-cleveland-housing-court-judge.html>.
25. Judge W. Mona Scott, *Motion to Seal Eviction Record Instructions*, CLEVELANDMUNICIPAL.ORG, (JAN. 17, 2020), http://clevelandmunicipalcourt.org/docs/default-source/housing-court-documents/housing-court-forms/motion-to-seal-eviction-record-instructionsdf0246cc4f76bf3972ff0000463da2.pdf?sfvrsn=e2174f3d_2
26. *Id.*
27. James Scherer, *Changing the Rule that Changes Nothing: Protecting Evicted Tenants by Amending Cleveland Housing Court Rule 6.13*, 69 CLEV. ST. L. REV. 720 (2021).
28. *Id.* at 739.
29. *Id.* at 729.
30. *Id.* at 729–731.
31. *Id.* at 742.
32. Sabbath, see *supra* note 9.
33. Adam Porton, Ashley Gromis & Matthew Desmond, *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 3–5, Housing Policy Database 382–384 (2020).
34. See *supra* note 17.
35. *Id.*
36. A telephone call with a Cleveland Housing Court Specialist revealed that the Court is willing to accept notarized Poverty Affidavits, which will reduce the fee to \$10.
37. At this point, it is worth noting that Garfield Heights Municipal Court has an almost identical rule. See Garfield Heights Municipal Court Local Rule 33.1. If smaller, local courts are looking to Cleveland as a model, it is even more important that Cleveland Housing Court amends its rule in these ways.
38. <https://www.documentcloud.org/documents/5669990-Hazel-Remesh-for-LAS-Comments-2018-10-31-1.html>; See also <https://www.cleveland.com/metro/2018/12/cleveland-housing-court-sets-new-rules-to-make-requests-to-seal-evictions-easier.html>.

HOW THE FAIR HOUSING ACT FAILS INDIVIDUAL VICTIMS WITH CRIMINAL CONVICTIONS

By Jane Norris and Zhiwei Hua

Under the Fair Housing Act, it is unlawful for a housing provider to discriminate against a prospective tenant in the rental of housing based on her race, color, religion, sex, disability, familial status or national origin.¹ These “protected characteristics” are shielded from discrimination under the Fair Housing Act.

When plaintiffs who possess protected characteristics file a lawsuit under the Fair Housing Act, however, they often have a difficult time proving discrimination, particularly if the court finds the housing provider’s behavior can be rationalized in other ways.² Because of this rationalization, “typical” claims are extremely difficult to prove in court, even when landlords only allow, or steer, prospective tenants to rent apartments where the current tenants in the apartment share their race.³ This has led to African American victims⁴ being more

likely to establish sufficient evidence of discrimination only when they can lean on the experiences of white strangers through a practice known as “testing.”

Although the act of discrimination deeply affects those with protected characteristics, the act of discrimination itself can be elusive.⁵ While bringing mental images of blatantly racist narratives such as Jim Crow laws, discrimination in housing is a bit more subtle in practice. For example, a housing provider discriminates when she:

exclusively responds to inquiring voicemails from multiple “white women with a racially identifiable voice,” but not to “Black women with a racially identifiable voice;”⁶ shows homes to prospective Black home buyers exclusively in the integrated area of a city;⁷ and disproportionately neglects her home maintenance duties in communities of color.⁸ These more subtle discrimination claims often result in courts relying on testers to compare how the housing provider treated a white home seeker (or resident) versus an African American one.



Since these individuals looking for housing cannot compare their experiences with prospective landlords on their own, testers offer a valuable piece of evidence in housing discrimination claims.

Testing is a simulation that compares responses given by housing providers to different types of home seekers in order to determine whether or not discriminatory treatment is occurring.⁹ Testers are investigators, without an intent to rent a home or apartment, who pose as potential renters to provide evidence to prove discriminatory housing practices.¹⁰ In a typical test, a tester will view an apartment as a prospective tenant and write a factual, detailed and objective account of what transpired on her test.¹¹ The organizer of the test will compare the experiences of testers who are matched as closely as possible in terms of age, sex, familial status, income, and size and price of the home or apartment sought, to prevent any rationalization from the landlord to treat one tester differently from the other.¹²

The value of testers is exemplified in *United States v. SSM Properties, LLC*. There, the Louisiana Fair Housing Action Center conducted a series of simulations of housing transactions at Oak Manor and Pearl Manor, two apartment buildings owned and operated by SSM Properties.¹³ Throughout the tests, the defendant repeatedly encouraged white testers to rent at Pearl Manor by highlighting the positive aspects of property, and telling white testers that they would be “happy” and “fit in.”¹⁴ In contrast, the defendant failed to inform Black testers of available units at Pearl Manor and, in some tests, failed to mention that property at all.¹⁵ On one occasion, when specifically asked about Pearl Manor, the defendant told one Black tester, “I can’t put you at Pearl Manor. They will be thinking I done let the zoo out again.”¹⁶ Black testers were allowed to view units at Oak Manor.¹⁷ Additionally, the defendant refused to show units to Black testers until their rental applications were approved but showed units to white testers without approved applications.¹⁸ As a result, two testers filed complaints of housing discrimination with the Department of Housing and Urban Development (“HUD”).¹⁹ Not included as plaintiffs, however, were the individual victims who filed a complaint

with the Louisiana Fair Housing Center, the individuals already living in the segregated apartments, or the countless others in the community affected by the discrimination.

Testers represent victims of discrimination and the communities in which the discrimination occurred. As noted above, they are invaluable assets to fighting housing discrimination. However, this article argues that courts’ reliance on testers fails to protect one group of victims of housing discrimination—those who have a criminal record, and that significant amendments to federal funding programs are needed to protect those home seekers with convictions.

In order to better comprehend the Fair Housing Act and fair housing discrimination, the authors will next discuss the background of the Fair Housing Act, and how plaintiffs bring discrimination claims under the Fair Housing Act.

The history of Fair Housing Act

The Fair Housing Act of 1968 was passed in response to (1) riots that ensued nationwide throughout the 1960s, (2) the Kerner Report and (3) the assassination of Martin Luther King, Jr.²⁰ In the 1960s, America’s neighborhoods were starkly segregated by race, as Black families were routinely denied homes and apartments in white neighborhoods.²¹ Riots began occurring as a result of this segregation, with the “worst” occurring for two weeks in July of 1967.²² In response, President Johnson wanted to understand why these riots occurred, and what could be done to prevent them from happening again. To aid in this understanding, President Johnson created and commissioned the National Advisory Commission on Civil Disorders.²³

The National Advisory Commission on Civil Disorders, led by Otto Kerner, Jr., the Governor of Illinois, became commonly known as the Kerner Commission (“Commission”).²⁴ The goal of the Commission was to understand the discriminatory conditions that led to the riots and to study the factors that contributed to civil unrest by conducting a comprehensive investigation. This investigation included visiting cities affected by riots and consulting with scores of experts.²⁵ On March 1, 1968, the Commission released the Kerner report, which concluded

that the communities of geographic and social isolation of Black populations were the effects of “white racism.”²⁶ Although the effects of white racism are widely acknowledged today, the Kerner report was extraordinary at the time: After years of civil unrest, a report commissioned by a U.S. president directly acknowledged the crippling role white racism plays in Black communities. Furthermore, the Kerner report suggested national action with “anti-discrimination opening up the marketplace for African Americans who were financially empowered to choose to leave [their neighborhoods] and integrate.”²⁷

It took more than the Kerner report, however, to pass federal legislation preventing discriminatory housing practices. Senator Brooke of the Kerner Commission, with the support of others, argued for housing legislation in the senate, speaking personally of his return from World War II and his inability to provide a home of his choice because of his race.²⁸ The fair housing legislation passed the Senate, and went to the House of Representatives for passage.²⁹ In the midst of the House debate, Martin Luther King, Jr. was assassinated in Memphis, Tennessee.³⁰ As citizens rioted and protested this national tragedy, legislators found the motivation to respond quickly by signing housing legislation that prohibited discrimination concerning the sale, rental and financing of housing based on race, religion or national origin.³¹ On April 11, 1968, President Johnson signed the Civil Rights Act of 1968, which included titles commonly known as the Fair Housing Act (“FHA”).³²

The basis of claim under the Fair Housing Act

To establish a claim of discriminatory treatment under the Fair Housing Act, a plaintiff must prove disparate treatment on the basis of a protected characteristic.³³ In claims of disparate treatment discrimination, the court will apply the *McDonnell* burden-shifting analysis.³⁴ Although the *McDonnell* burden-shifting framework was developed in employment discrimination cases, it now dictates the evidentiary bar plaintiffs must meet in fair housing cases.³⁵ Once the plaintiff establishes the *McDonnell* elements, the burden shifts to the housing provider to articulate a legitimate nondiscriminatory reason for his actions. In response, the

plaintiff has an opportunity to prove that the reasons asserted by the housing provider are pretext for discrimination.³⁶

While the declared policy of the FHA is to provide for fair housing throughout the United States, “fair housing” is never defined in the statute, leaving it up to interpretation of the court.³⁷ The court has come to define “fair housing” to encompass both integration and equal choice opportunities for minority groups.³⁸ While the effect this lack of a definition has had on the court is beyond the scope of this article, it has had a part in the court’s reliance on testers. It is extremely difficult for victims of housing discrimination to establish a *prima facie* case of disparate treatment as the court seemingly only finds discriminatory housing practices when there is evidence of how the housing provider dealt with other home seekers who are alike in all respects except race.³⁹ Under this dilemma, the Fair Housing Tester emerges.

Housing testers

Like a key, housing testers play a critical role in unlocking the dilemma of establishing a *prima facie* case of disparate treatment.

What is a housing tester?

After the passage of the Fair Housing Act, Fair housing studies employed a research technique⁴⁰ in which two people inquire about the same advertised housing.⁴¹ These fair housing “auditors” were identical in every characteristic except one that was protected under the Fair Housing Act.⁴² The auditors then recorded what they were told and how they were treated.⁴³ The researchers who organized these studies theorized that discrimination occurred if the auditor from the protected class was treated less favorably than the white auditor.⁴⁴

Alongside HUD’s endorsement of this method, courts also found the evidence the testers provided extremely compelling.⁴⁵ Private fair housing organizations began to notice the effectiveness of testers in court and, thus, began to collect this “litigation quality” evidence of discrimination.⁴⁶

However, to receive federal funding from HUD, a private fair housing organization must ensure their testers abide by the guidelines placed by HUD’s Fair Housing Initiative Program (“FHIP”).⁴⁷ Under the FHIP, testers must receive training or be experienced

in testing procedures and techniques.⁴⁸ Testers may not have an economic interest in the outcome of the test, be a relative of any party in the case, have had any employment or other affiliation within one year with the person or organization to be tested or be a licensed competitor of the person or organization to be tested.⁴⁹ Furthermore, testers must not have prior felony convictions or convictions of crimes involving fraud or perjury.⁵⁰ Therefore, a fair housing organization must be careful in their methods of selecting testers to avoid violating these limitations.

The selection of testers

Each fair housing organization creates its own method to select testers.⁵¹ Usually, a prospective tester first fills out an application. This application will have questions that will allow a housing organization to determine if the applicant has an affiliation with the housing industry, ability to remain confidential and objective, to be matched and to play a role.⁵² If the applicant is found suitable, she will next have to complete training.⁵³ While the intricacies of the training may also differ among fair housing organizations, the housing organization’s goal is to teach the tester to be an objective fact finder and to report, but not interpret, the results of her tests.⁵⁴

The paired testing

Once properly trained, a pair of testers will be assigned profiles that enable each tester to present themselves as qualified for a housing transaction. The testers will present themselves to the housing provider as similar in every way, except one tester will be a member of the protected group.⁵⁵ The testers will visit the same housing provider at closely-spaced intervals to apply for the same housing.⁵⁶ Testers will document the information they obtain and write notes about the treatment they received from the housing provider.⁵⁷ The results are compared to determine whether and how the treatment experienced by the tester with the protected characteristic differs from the tester without the protected characteristic.⁵⁸ If the organizers of the test determine that discrimination has occurred—that the housing provider treated the tester with the protected characteristic differently—then they will file a complaint with HUD.

Housing advocates view this evidence collected by paired testers as highly

important, since testers provide a direct comparison of African American and white testers’ reports to identify “differences in treatment and to determine if there was evidence to support a claim of discrimination.”⁵⁹ For example, sufficient evidence of discrimination was found when a Black tester and white tester separately made inquiries to a housing provider about the availability of an apartment. On each occasion, the Black tester was told that no apartments were available, while the white tester was told there were vacancies.⁶⁰ The testers filed suit, and their factual experiences were sufficient evidence to establish that the housing provider violated the FHA.

The credibility of testers

Advocates and courts find testers especially credible when the test is organized to prevent as much bias as possible. For example, organizers will not let the tester know which protected class is being tested.⁶¹ Furthermore, they will pair the testers so that all testers are qualified for the units in which they are applying, with the protected-class tester possessing slightly more favorable characteristics.⁶² No tester has knowledge about the protected class being tested. Testers’ experiences are valuable in cases where the housing provider may deny an applicant for a seemingly reasonable explanation, such as the availability of the unit. Consider *Jackson v. Scott*, where the housing provider represented that the apartment was available to a white applicant 13 days after telling a Black applicant the apartment was not available. Even though the housing provider argued that the apartment was unavailable for the Black applicant because a tenant signed the lease for that apartment but backed out of the agreement, the court found that this scenario was unlikely: The housing provider could not provide the name of the tenant who had signed the lease.

Some critics, however, claim that testers may already suspect or want to show a housing provider’s discrimination and will subconsciously or intentionally document test interactions in a way that indicates discrimination.⁶³ To overcome this concern, it is critical for fair housing organizations to conduct their tests diligently to provide “quasi-scientific” evidence of intent that can be presented in court to enable a fact finder

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to draw inferences of discrimination.⁶⁴ If done correctly, testing can create powerful indirect evidence of intent to discriminate for a few reasons. First, as discussed above, testers typically do not know if they are the tester with the protected characteristic, or a tester acting as a control. Second, testers don't have a personal interest in the outcome of the test and this impartiality allows both testers in a pair to be compared with ease.⁶⁵ Third, fair housing organizations will conduct anywhere from two to six paired tests on a single residence in response to a complaint to ensure valid and consistent results.⁶⁶

While experts claim testing has been the most powerful tool for documenting housing discrimination,⁶⁷ testing is not able to protect minorities from discrimination in every scenario.

Testers cannot help victims with a criminal record

Home seekers with a criminal record disproportionately belong to minority communities. Such home seekers are hard to protect from discrimination through testing: currently, home providers have few restrictions against screening housing applications and then ultimately denying housing to those with a criminal record. Furthermore, as mentioned above, there is a limitation on fair housing organizations selecting housing testers with criminal records, which makes paired testing under criminal record discrimination difficult.

The current situation

Currently, there is no federal law prohibiting criminal background screening on housing applications,⁶⁸ as having a criminal background is not one of the protected classes under the Fair Housing Act. State and municipal laws have used this freedom to encourage or require private housing providers to complete criminal background checks for prospective tenants. Others have issued public nuisance ordinances that subject landlords to criminal fines and civil sanctions for failing to control the "disorderly behavior" of

residents.⁶⁹ However, HUD released limitations in 2016 that prohibit landlords from denying housing based on arrest records, issuing blanket bans on anyone with a criminal history or conducting background checks inconsistently.⁷⁰

This prohibition is important, as allowing landlords to conduct background checks inconsistently could intensify opportunities for discrimination. Housing discrimination against people with criminal convictions is more prevalent for people of color because people of color are disproportionately represented in the criminal justice system.⁷¹ African Americans are incarcerated at almost six times the rate of white people; members of the Latinx community are incarcerated at almost three times the rate of white people.⁷² Remarkably, courts are not willing to find that this disparate impact is enough to prove discriminatory treatment. For example, the Eastern District of New York recently held that a housing provider's statement of not accepting applicants with criminal records was not evidence of discriminatory treatment, though the court did acknowledge the disparate impact this would have on African Americans. The court further held that impact alone is not determinative of intent—the court must consider the totality of circumstances. Because housing providers' decision "to exclude individuals with criminal histories was unusual or a departure from normal procedure," there is no evidence of discriminatory intent without any statements suggesting discriminatory animus.⁷³ To find discriminatory intent, it is critical to find that the criminal conviction is pretext for a protected characteristic.⁷⁴

However, it is extremely difficult to find that criminal convictions were pretext for discrimination without comparing the experiences of Black and white testers. Yet under the Fair Housing Incentive Program, private fair housing organizations will not receive funding if they use testers with criminal backgrounds. The reasoning for this is unclear. Perhaps it is for a similar reason that landlords openly discriminated against those with criminal records—to maintain a

squeaky-clean reputation and to be “crime free.”⁷⁵ Or perhaps it is because criminals are perceived to be deceitful, even though studies show that seven years post-release, individuals with felony convictions are no more likely to lie than people with no felony conviction records.

Courts’ reliance on tester evidence is troubling because of the comparisons that occur while evaluating the evidence. In cases of racial discrimination supported by tester evidence, the Fair Housing Act protects minority groups when they can be compared to white people. As discussed, white people are not convicted at the same rate as minority groups and insisting on this comparison fails to consider the numerous hurdles minorities must overcome in comparison to white people. It especially fails to protect those when it doesn’t even let the comparison occur. Without allowing testers with criminal records, applicants who are discriminated against because of criminal records will not be able to file a complaint with a fair housing organization.⁷⁶

THE CHANGE OF ALLOWING TESTERS WITH CRIMINAL BACKGROUNDS

The length of time

There are reforms coming through legislation and litigation regarding home seekers with criminal records. For example, lawsuits have begun to challenge the length of time that housing providers are able to look back into an individual’s criminal record in order to deny housing, and they have reduced lifelong look back periods to five or 10 years, depending on the offense. These reforms have a positive influence. Litigation around reasonable lookback periods in public housing and reforms mandated by Fair Housing Act litigation will ensure that people’s criminal records do not stymie their housing applications for the rest of their lives.⁷⁷ It is unclear what lookback periods will be deemed reasonable, or to what degree a “less discriminatory alternative” will limit housing providers’ ability to consider past criminal activity. From a recent study about tenants’ convictions, a tester with a 10-year-old felony criminal record was more likely to be considered than a tester with a one-year-old felony criminal record, suggesting that property managers do consider recency in

their decisions.⁷⁸ Therefore, the reforms are going in the correct direction.

However, even if legislation is enacted that fully protects victims of discrimination due to criminal records, under the current fair housing act enforcement regimen, there will need to be testers with such records to compare to. The authors suggest that the Fair Housing Initiative Program allows fair housing organizations to accept applications of testers with criminal records, if these organizations complete an individualized evaluation of each applicant with a criminal history. To evaluate testers with a criminal history, the Fair Housing Initiative Program must require fair housing organizations to consider the following factors: how long ago the conviction was, the age of the applicant when the crime occurred and the nature of the crimes committed.

Federal rule of evidence and length of time since conviction

As mentioned previously, in disparate treatment claims, fair housing groups began to send matched pairs of testers to identify unlawful practices:⁷⁹ two individuals of the same sex who are matched as closely as possible in terms of age, general appearance, income and family size—that is, in every relative way except race (or any of the other classifications protected by the Fair Housing Act)—develop the evidence.⁸⁰ In this context, testers are fact witnesses, not experts.

The Federal Rules of Evidence (FRE) provide another argument for why individuals with criminal convictions should be allowed to be housing testers: The FRE take into consideration the credibility of witnesses with criminal records. According to FRE 601, “[E]very person is competent to be a witness unless these rules provide otherwise.”⁸² Furthermore, FRE 609 (a) provides an opportunity to impeach witnesses by evidence of criminal conviction.⁸³ However, Rule 609 (b) *limits* using such a conviction to impeach a witness if more than 10 years have passed since the conviction or release from confinement for it.⁸⁴ If more than 10 years have passed since the conviction or the release from confinement for it, the impeachment must meet heightened standards in order for the conviction to be admitted.⁸⁵ This kind of conviction—more than 10 years—is admissible “only if the probative value, supported by specific facts

and circumstances, substantially outweighs the unfair prejudice, and the offering party provides reasonable written notice of intent to use.”⁸⁶ As a result, using a criminal conviction to deny a witness’ credibility must be exercised with caution, since having a criminal conviction will not automatically make a witness not credible.

This spirit should apply to housing testers with criminal records. As civil-case witnesses, these testers can still be professional and credible witnesses. Therefore, the authors propose that, for prospective housing testers whose convictions are more than 10 years old, HUD should relax the restriction.

Fair housing discrimination is not rare in the United States. From 2000 to 2017, each year had between 20,000 and 31,000 housing discrimination complaints.⁸⁷ These are merely the cases that have been brought to the court, which are already excessive. Protecting people’s right to fair housing is becoming increasingly vital.

Fortunately, housing testers have evolved into a potent weapon in the fight against fair housing discrimination. Housing testers become professional and credible after going through a rigorous selection process and receiving expert training. Fair housing organizations use paired testing to demonstrate how landlords treat two testers differently, purely based upon race or other protected classes. The courts also hold that testimony from housing testers is highly valuable.

However, testing is not able to protect minorities from discrimination in every scenario so far. Because the legislation bans an applicant with a criminal background from being selected as a fair housing tester, it is difficult to allege discrimination based on criminal background.

As a result, reforms are occurring. Lawsuits have begun to challenge the length of time that housing providers are able to look back into an individual’s criminal record. Similarly, rather than a “blanket ban” on criminal records, the length of time between the crime and the present should be a factor when a person who has a criminal background applies to be a housing tester.

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The FRE also provides strong support in terms of length of time since the conviction in Rule 609. Therefore, the housing testers with criminal backgrounds should be credible and professional as well, if they satisfy certain conditions.

Hopefully, in the future, the Fair Housing Act and housing testers will perform more functions to defend people's legal rights in housing and minimize housing discrimination.

1. 42 U.S.C. § 3604. The fair housing act also encompasses sexual orientation and other gender identities. See generally J. Frank Vespa-Papaleo & Kenneth J. Carroll, *Proudly Opening the Doors to Fair Housing*, N.J. Law., the Mag., June 2013, at 31. ("The LGBT Equal Access Rule, as it is commonly referred to, requires housing assisted by HUD, housing subject to mortgages insured by the Federal Housing Administration (FHA), and FHA-insured mortgages to be provided without regard to actual or perceived sexual orientation, gender identity, or marital status.").
2. This may be due to aversive racism, which refers to the racial bias among people who openly endorse non-prejudiced beliefs, but whose negative implicit attitudes toward Blacks are expressed when the correct choice is unclear, and the discrimination against Blacks can be placed on some other factor besides race. See Victor D. Quintanilla, Article, *Beyond Common Sense: A Social Psychological Study of IQBAL'S Effect on Claims of Race Discrimination*, 17 Mich. J. Rac & L. 1, 9 (2011). (Discusses results of seminal experiments of hiring practices and recommendations, and ultimately concluded that participants recommended whites who were ambiguously qualified over Blacks who were ambiguously qualified, at a significantly higher rate.) This issue becomes more evasive and difficult to address in discriminatory housing cases, as housing providers may become more knowledgeable about housing discrimination laws. See, e.g., Teresa Coleman Hunter & Gary L. Fischer, *Fair Housing Testing- Uncovering Discriminatory Practices*, 28 Creighton L. Rev. 1127, 1129-1130. ("Even though it is hidden, a homeseeeker's belief that she has been the victim of unlawful discrimination is inadequate to prove discrimination actually took place. Because she likely received a seemingly nondiscriminatory reason for the refusal to rent or sell, direct evidence of discriminatory conduct may be difficult to obtain.")
3. Realtors, landlords and other housing providers practice "steering" when they influence a prospective buyer or renter's choice of communities based on the prospective buyer or renter's protected characteristics under the Fair Housing Act. See National Association of Realtors, *Steer Clear of "Steering"*, Fair Housing Corner: Legal Updates on the Fair Housing Act (July 10, 2020), <https://www.nar.realtor/fair-housing-corner/steer-clear-of-steering>. See also Teresa Coleman Hunter & Gary L. Fischer, Essay, *Fair Housing Testing - Uncovering Discriminatory Practices*, 28 Creighton L. Rev. 1127, 1128 (1995). ("Typically, a case of housing discrimination develops when a minority person is told that (1) a home, apartment, or other property is not available; (2) the unit is already sold, rented, or contracted for; or (3) the unit is available, but on different terms or prices than those offered to other applicants.")
4. For the purposes of this article, the authors will limit their focus to home seekers, specifically prospective tenants, who identify as people of color.
5. Whilst steering, landlords guide potential Black tenants and white tenants to different housing units, thereby continuing racial segregation by preventing minority families from accessing resources and communities they may desire. See A. Camille Karabaich, *More Than Hungry: How Political Narratives Built & Maintain Hunger in the United States*, 27 Wm. & Mary J. Race, Gender & Soc. Just. 541, 549, 550 (2021). ("Redlining... and racial steering, the practice of guiding Black and white families to look at and purchase homes in different areas, continued the tradition of racial segregation. Homes, of course, were of vastly different quality and value, assuring that white homeowners gained assets and access to recreation, schooling, and services that Black people did not.")
6. *Project Sentinel v. Komar*, No. 1:19-cv-00708-DAD-EPG, 2021 WL 1346025, at *1-2 (E.D.Cal. 2021).
7. *Gladstone v. Vill. of Bellwood*, 441 U.S. 91 (1979).
8. *Nat'l Fair Hous. All. v. Bank of Am.*, 401 F.Supp.3d 619, 623 (D. Md. 2019).
9. Complaint at 12, *United States v. SSM Properties, LLC* (S.D. Miss. filed Nov. 12, 2020) (No. 3:20-cv-729-CWR-LRA).
10. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).
11. *Become a Tester*, LOUISIANA FAIR HOUSING ACTION CENTER, <https://lafairhousing.org/get-involved/become-a-tester/> (last visited Feb. 1, 2022).
12. Leland Ware & Steven W. Pequet, *The Admissibility of Matched-Pair Testing Evidence in Fair Housing Cases Under Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 14 Journal of Affordable Housing and Community Development Law 23, 40 (2004). ("When matched-pair testing is aimed at uncovering single incidences of discrimination, the analysis of the testing data is simple and usually will not require anything more than a straightforward comparison of the results obtained by each of the two testers making up a patched pair.") See also LOUISIANA FAIR HOUSING ACTION CENTER, *supra* note 12.
13. Complaint, *supra* note 9, at 8.
14. Complaint, *supra* note 9, at 13.
15. Complaint at 13, *United States v. SSM Properties, LLC* (S.D. Miss. filed Nov. 12, 2020) (No. 3:20-cv-729-CWR- LRA).
16. Complaint, *supra* note 15, at 13.
17. *Id.*
18. *Id.*
19. Complaint, *supra* note 15, at 15.
20. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 Socio. F. 571, 571-578 (2015) (discusses the mentioned three events, among a multitude of other fascinating historical events).
21. See Margery Austin Turner, *Limits on Housing and Neighborhoods Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797 (2008)(considers evidence of discrimination throughout the decades and argues that while discrimination is still occurring, multiple other factors, such as disparity in wealth, private choice and avoidance led to segregation more heavily than discrimination). This is not to say, however, that neighborhoods are not still segregated by race. But see, e.g., DEVIN IORIO, *An Analysis of Racialized Housing Segregation in America*, (2021) reprinted in THE TRINITY PAPERS (2011-PRESENT) ("Many neighborhoods throughout the nation remain just as segregated today, if not more, than back in the 1960s."). See generally Terry Gross, A 'Forgotten History' Of How The U.S. Government Segregated America, NPR: FRESH AIR (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>. (contends that African-American families inability to buy homes in the suburbs began as a result of the New Deal, the housing shortage of the 1930s, and the housing programs at the time, which were designed to provide housing to middle class white families).
22. Susan T. Gooden & Samuel L. Myers, *The Kerner Commission Report Fifty Years Later: Revisiting the American Dream*, 4 The Russell Sage Foundation Journal of the Social Sciences 1, 4 (2018).
23. Susan T. Gooden & Samuel L. Myers, *The Kerner Commission Report Fifty Years Later: Revisiting the American Dream*, 4 The Russell Sage Foundation Journal of the Social Sciences 1, 2 (2018). See NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).
24. *Id.* at 2-4.
25. *Id.* at 2.
26. Brian Patrick Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 Colum. L. Rev. 1617, 1620 (2007). See NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). ("What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.")



27. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). The authors want to alert readers that they substituted the original term used in the quote—"ghetto"—with "their neighborhoods."
28. Even with Senator Brooke's powerful arguments, the bill would not have passed without the support of Senate Republican leader Everett Dirksen, who offered an amendment that reduced the bill's coverage and defeated a southern filibuster. See Massey, *supra* note 20, at 574-575. See generally *Fair Housing Act*, HISTORY.COM, <https://www.history.com/topics/black-history/fair-housing-act> (last visited February 3, 2022).
29. *Id.* See also Larkin, *supra* note 26, at 1624.
30. *Id.* See also Larkin, *supra* note 26, at 1624.
31. Massey, *supra* note 20, at 575.
32. Dep't of Hous., *HISTORY OF FAIR HOUSING*, HUD: FHEO HOME, https://www.hud.gov/program_offices/fair_housing_equal_opportunity/aboutfheo/history (last visited Nov. 22, 2021).
33. A violation of the Fair Housing Act can also be established by demonstrating that the defendant failed to make reasonable accommodations in rules, policies, or practices so as to afford people with disabilities an equal opportunity to live in a dwelling to afford people with disabilities an equal opportunity to live in the dwelling or disparate impact of a law, practice, or policy on a covered group. The key difference between disparate impact and discriminatory treatment is that no intent to discriminate is required in a disparate impact violation of the Fair Housing Act. See Mark S. Dennison, *Proof of Housing Discrimination Against a Prospective Tenant on Account of Race or National Origin*, 93 Am. Jur. Proof of Facts 3d 415 (2007).
34. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
35. Robert G. Schwemm, Fair Housing and the Causation Standard after Comcast, 66 Villanova Law Review 63, 105 (2021).
36. *United States Dep't Hous. & Urban Dev. v. Blackwell*, 908 F.2d 864 (11th Cir. 1990).
37. 42 U.S.C. § 3601 (1968).
38. This is surprising, as the Fair Housing Act was only meant to encompass equal choice opportunities for middle class families. See Brian Patrick Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 Colum. L. Rev. 1617, 1628-1631 (2007). See also 114 CONG. REC. 2,279 (1968) ("Fair housing does not promise to end the ghetto ... but it will make it possible for those who have the resources to escape").
39. Hunter, Teresa Coleman, Fischer, Gary L., *Fair Housing Testing - Uncovering Discriminatory Practices*, 28 Creighton L. Rev. 1127, 1130 (1994-1995).
40. Claudia L. Aranda and Sarale H. Sewell, *Fair Housing Testing: Selecting, Training, and Managing an Effective Tester Pool*, 17 Housing Discrimination Today, 263, 264 (2015). See also Peter E. Millsbaugh, *Fair Housing Testing: Its Legal Status and Policy Implications*, 13 U. Baltimore L. Rev. 215, 217 (1984). ("To examine discriminatory housing practices, [HUD's] study used information gained from fair housing testing.... The government's first published report of this project demonstrated the usefulness of testing as a research tool, and as 'an especially important tool in enforcing laws.'")
41. John Yinger, *Sustaining the Fair Housing Act*, 4 Cityscape 93, 95 (1999).
42. When this paired tester method is used for research, it is referred to as an audit, not a test. *Id.* *95.
43. *Id.*
44. *Id.*
45. Millsbaugh, *supra* note 39, at 225. ("Fair housing evidence generated by testing reached the court in the late 1960s. The favorable reception it received in a series of early cases encouraged further use and refinement of the technique.") See also *Richardson v. Howard*, 712 F.2d 319 (7th Cir.1983). ("It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable.")
46. Keith Fudge, *Fair Housing Enforcement Organizations Use Testing to Expose Discrimination*, Evidence Matters Spring/Summer 2014, at 5.
47. Testers, 24 C.F.R. § 125.107 (2022). See generally Press Release, HUD Makes More Than \$20 Million Available to fight Housing Discrimination, HUD No. 21-078 (May 3, 2021). (Last year, HUD announced that it is making \$20,229,156 available to fair housing organizations across the nation working to fight housing discrimination. The funds supported a variety of activities, including fair housing testing and were being provided through the FHIP.)
48. 24 C.F.R. § 125.107 (2003).
49. *Id.*
50. *Id.*
51. To create a pool of applicants, local testing organizations are strongly encouraged to achieve a diverse pool of testers by reaching out to social service agencies, community groups, student associations and nonprofit organizations. Claudia L. Aranda and Sarale H. Sewell, *Fair Housing Testing: Selecting, Training, and Managing an Effective Tester Pool*, 17 Housing Discrimination Today, 263, 265 (2015).

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52. *Id* at 264–266. (Ability to be matched refers to the applicant's characteristics and their ability to be matched with another tester's characteristics of "age, gender, and other relevant characteristics to compose suitable tester pairs.")
53. *Id* at 267.
54. Louisiana Fair Housing Action Center, Locked Out, *Criminal Background Checks as a Tool for Discrimination*, https://storage.googleapis.com/wzukusers/user-33549461/documents/5b465f279eaa5ynw5Wrs/Criminal_Background_Audit_FINAL.pdf (last visited February 1, 2022). See also Louisiana Fair Housing Action Center, *Denials, Discounts and Discrimination, An Investigation into Racial Discrimination in Rental Practices in the Gulf South*, Louisiana Fair Housing Center, <https://lafairhousing.org/wp-content/uploads/2021/07/LaFHAC-Denials-Discounts-and-Discrimination-in-the-Gulf-South.pdf> (last visited February 1, 2022). (For example, the Louisiana Fair Housing Action Center focuses their training on how to act as object fact finders and to report, but not interpret, the results of their tests.)
55. See Claudia L. Aranda & Sarale H. Sewell, *Fair Housing Testing: Selecting, Training, and Managing an Effective Tester Pool*, 17 *Citiescape* 3, 263, 264 (2015). ("For example, if an organization wanted to estimate the level of discrimination against families with children, two comparably qualified testers—one with children and one without children—inquire about available housing... If done correctly, testing provides 'quasi-scientific' evidence of the defendant's intent that can be presented in court to enable a fact finder to draw inferences of discrimination.")
56. Hunter, Teresa Coleman, Fischer, Gary L., *Fair Housing Testing - Uncovering Discriminatory Practices*, 28 *Creighton L. Rev.* 1127, 1132–1133 (1994–1995).
57. Louisiana Fair Housing Action Center, *Denials, Discounts and Discrimination, An Investigation into Racial Discrimination in Rental Practices in the Gulf South*, Louisiana Fair Housing Center, <https://lafairhousing.org/wp-content/uploads/2021/07/LaFHAC-Denials-Discounts-and-Discrimination-in-the-Gulf-South.pdf> (last visited February 1, 2022).
58. *Id*.
59. Hetzel, Otto J., *Introductory Comments on the Fair Housing Testing Conference and the Importance of Testing to Achieve Compliance with the Fair Housing Act*, 41.2 *The Urban Lawyer* 229, 233 (2009).
60. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 363 (1982).
61. Louisiana Fair Housing Action Center, *Denials, Discounts and Discrimination, An Investigation into Racial Discrimination in Rental Practices in the Gulf South*, Louisiana Fair Housing Center, <https://lafairhousing.org/wp-content/uploads/2021/07/LaFHAC-Denials-Discounts-and-Discrimination-in-the-Gulf-South.pdf> (last visited February 1, 2022).
62. Louisiana Fair Housing Action Center, *Denials, Discounts and Discrimination, An Investigation into Racial Discrimination in Rental Practices in the Gulf South*, Louisiana Fair Housing Center, <https://lafairhousing.org/wp-content/uploads/2021/07/LaFHAC-Denials-Discounts-and-Discrimination-in-the-Gulf-South.pdf> (last visited February 1, 2022).
63. *Quantitative Data Analysis*, Urban Institute, <https://www.urban.org/research/data-methods/data-analysis/quantitative-data-analysis/impact-analysis/paired-testing> (last visited Apr. 18, 2022).
64. Melvin J. Kelley, Testing One, Two, Three: Detecting and Proving Intersectional Discrimination in Housing Transactions, 42 *Harv. J. L. & Gender* 301, 308 (2019).
65. *Housing Discrim. Pr. Man.* § 4:2 (2022).
66. *Id*.
67. Fred Freiberg, Gregory D. Squires, *Changing Contexts and New Directions for the Use of Testing*, 17. 3 *Housing Discrimination Today* 87, 99 (2015).
68. *For People with a Criminal History*, Fair Housing Center for Right & Research https://www.thehousingcenter.org/wp-content/uploads/2020/02/CriminalHistory_Tri-revised-082018.pdf (last updated Aug. 08, 2018).
69. Kate Linden Morris, *Within Constitutional Limitations: Challenging Criminal Background Checks by Public Housing Authorities under the Fair Housing Act*, 47 *COLUM. HUM. Rts. L. REV.* 158, 166 (2015).
70. *For People with a Criminal History*, Fair Housing Center for Right & Research https://www.thehousingcenter.org/wp-content/uploads/2020/02/CriminalHistory_Tri-revised-082018.pdf (last updated Aug. 2018).
71. Hensleigh Crowell, *A Home of One's Own: The Fight against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left behind*, 95 *TEX. L. REV.* 1103, 1110 (2017).
72. *Id* *1111.
73. *Fortune Soc'y v. Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145, 179 (E.D.N.Y. 2019).
74. *Jones v. City of Faribault*, 2021 WL 1192466 1, 17 (D. Minn. Feb. 18, 2021). (A city's legislation could be found as having discriminatory intent when plaintiffs showed the crime rate had been dropping, and that there was no need for city legislation requiring landlords to perform criminal background checks on all rental applicants.)
75. Hensleigh Crowell, *A Home of One's Own: The Fight against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left behind*, 95 *TEX. L. REV.* 1103, 1009 (2017).
76. Hensleigh Crowell, *A Home of One's Own: The Fight against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left behind*, 95 *TEX. L. REV.* 1103, 1104 (2017).
77. *Id* *1131.
78. Leasure, Peter, Tara Martin, *Criminal records and housing: An experimental study*, 13.4 *Journal of Experimental Criminology* 527–535, 533 (2017).
79. Michael J. Yelnosky, *What Does "Testing" Tell Us About the Incidence of Discrimination in Housing Markets*, 29 *Seton Hall L. Rev.* 1488, 1491 (1999).
80. Leland Ware & Steven W. Peuquet, *The Admissibility of Matched-Pair Testing Evidence in Fair Housing Cases Under Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 14 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 23, 27 (2004).
81. *Id* *27.
82. *FED. R. Evid.* 601 (2011).
83. *FED. R. Evid.* 609 (2011): (a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
 - (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
 - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
 - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
 - (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.
84. *FED. R. Evid.* 609 (2011): (b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
 - (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
 - (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.
85. Anna Roberts, *Conviction by Prior Impeachment*, 96 *B.U. L. REV.* 1977, 1985 (2016).
86. *FED. R. Evid.* 609 (2011).
87. *Fair Housing by the Numbers*, National Low Income Housing Coalition (Oct. 23, 2018) <https://nlihc.org/resource/fair-housing-numbers>.

A SUMMARY ABOUT THE POSITIVE EFFECT OF THE LAW PROHIBITING THE SOURCE OF INCOME (SOI) DISCRIMINATION

By Zhiwei Hua



The Housing Choice Voucher Program (HCVP) is a federal program that assists families with very low incomes in finding safe and sanitary housing in the private market.¹ But the program only works if private landlords are willing to accept the subsidies and rent to voucher holders.² Federal law does not prevent landlords from rejecting all housing vouchers.³ Landlords often cite freedom of contract and the “administrative burden” of providing housing to voucher holders as reasons for this rejection.

Fortunately, a growing number of states and localities have enacted laws, known as source of income protection laws, which can increase voucher acceptance among landlords.⁴ A recent U.S. Department of Housing and Urban Development (HUD) study found voucher non-discrimination laws appear to be associated with substantial reductions in the share of landlords that refuse to accept vouchers.⁵ But, the enactment of a federal source of income law would ensure more consistent tenant protections.⁶

The positive effect of voucher non-discrimination laws

In practice, HCVP largely relies on *willing* private landlords that opt to work with housing agencies and voucher holders.⁷ To address the challenge of landlords’ unwillingness to participate and to make the HCVP work more effectively, 11 states, Washington, D.C. and more than 50 cities and counties have enacted laws that prohibit landlords from refusing to rent to voucher holders solely because of their source of income.⁸ Several studies have

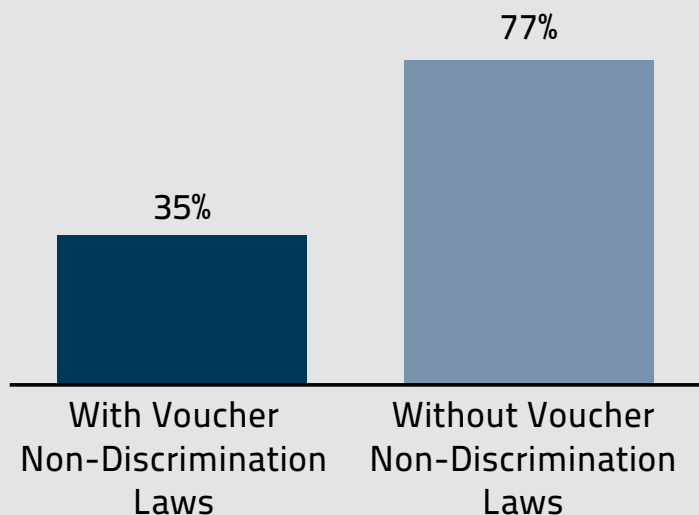
found that voucher holders in areas with voucher non-discrimination protections are more likely to succeed in using their vouchers to lease a unit.⁹

Two interrelated measures are used to help analyze the voucher non-discrimination laws’ effectiveness: utilization rate and success rate. HUD defines “utilization rate” as either the overall percentage of the annual budget authority spent, or the percentage of authorized vouchers leased, whichever is higher.¹⁰ The HCVP’s utilization rate was 99.9% in 2017, which means that nearly all available voucher funds were spent.¹¹ As to the success rate, it is the percent of vouchers issued to families in a year that result in an actual lease with a landlord, and a contract between the voucher holder and the landlord.¹² When HUD last studied voucher success rates in 2000, the national voucher success rate for public housing authorities (PHAs) in metropolitan areas was 69%, which means almost seven out of 10 families who were newly issued vouchers were able to lease

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Fewer Landlords Reject Vouchers in Areas Blocking Voucher Discrimination

Percentage of landlord rejections



Mary Cunningham et al., *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers*, Department of Housing and Urban Development (Sep. 2018)

a unit using their vouchers.¹³ These two measures reflect how the HCVP is executed in a certain area. Additionally, these measures can directly show the effectiveness of voucher non-discrimination laws. Conversely, voucher non-discrimination laws can be an effective way to address landlords' refusal to rent to voucher holders, which can help improve program success and utilization rates.¹⁴

Source of income discrimination and racial discrimination

While discriminating based on source of income (SOI) is legal in some jurisdictions in the United States, those who receive vouchers are disproportionately members of protected classes (race, color, national origin, religion, sex, family status and disability)¹⁵ under the federal Fair Housing Act and similar state laws. This suggests discrimination against HCVP recipients has a disparate impact upon members of a protected class—specifically, upon those who identify as people of color.

For example, the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. (2014), performed 50 matched-pair tests in suburban Cook County, Illinois, where there is an SOI antidiscrimination law. In 32% of the cases, landlords refused to rent to HCVP participants.¹⁶ In addition, 18% of the time, landlords only discriminated against Black—but not white—HCVP participants, which shows the intersectionality of discrimination based on race and SOI.¹⁷ Thus in practice, many disparate impact lawsuits also include SOI discrimination. As a result, these lawsuits have been highly impactful in forcing local governments to adopt laws banning SOI discrimination to reverse housing practices that have a disparate impact upon communities of color.¹⁸

The author has summarized the findings of two articles that show the positive effect of the voucher non-discrimination laws, but from different perspectives. The first article uses the data of the area where the voucher non-discrimination laws have been enacted to show the positive results upon HCVP participants. The second article combines SOI discrimination with racial discrimination to prove that the voucher non-discrimination laws can be good methods to help eliminate the disparate impact SOI discrimination has upon communities of color.

Based upon these articles, the author believes the federal government should enact a federal law to prohibit SOI discrimination to enhance enforcement, and to regulate states that do not have SOI protections for voucher holders, in order to have fair housing in the United States.

1. *Housing Choice Vouchers Fact Sheet*, U.S. Department of Housing and Urban Development https://www.hud.gov/topics/housing_choice_voucher_program_section_8#:~:text=increase%20landlord%20participation%3F-What%20are%20housing%20choice%20vouchers%3F,housing%20in%20the%20private%20market.
2. Bell, Alison, Barbara Sard, Becky Koepnick, *Prohibiting discrimination against renters using housing vouchers improves results*, Center on Budget and Policy Priorities (Dec. 20, 2018), <https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results>.
3. *Id**1.
4. *Id**1.
5. *Id**1.
6. *Id**1.
7. *Id**1.
8. *Id**2.
9. *Id**4.
10. *Id**5.
11. *Id**5.
12. *Id**6.
13. *Id**6.
14. *Id**7.
15. Tighe, J. Rosie, Megan E. Hatch, Joseph Mead, *Source of income discrimination and fair housing policy*, 32 *Journal of Planning Literature* 3, 6 (2017).
16. *Id**9.
17. *Id**9.
18. *Id**6.

LESSONS FROM BROOKLINE:

Lawsuits Won't Save Us From Racist Workplace Practices

By Makela Hayford

*"For the master's tools
will never dismantle the
master's house. They
may allow us temporarily
to beat him at his own
game, but they will never
enable us to bring about
genuine change."*¹

—Audre Lorde

In 2010, Paul Pender instigated an 11-year litigation nightmare resulting in an \$11 million settlement when he left a voicemail for Gerald Alston that concluded with the words "f...g n...r." Both men served as firefighters for the Town of Brookline and at the time. Pender, who is white, supervised Alston, who is Black.

When Alston took offense to the voicemail, Pender explained that the slur was not intended for Alston. Instead, Pender intended it for "a young black gangbanger" who had cut off Pender in traffic. This explanation worsened the impact of the slur, yet many individuals charged with responding to Alston's complaint believed that Pender's story sufficiently explained away Alston's claim of a personal attack.

If the Town officials believed that someone indeed cut Pender off in traffic, Pender's use of a historic slur in such a commonplace occurrence remains unjustified, revealing his casual use of a racial slur. Further, Pender's categorization of a stranger in traffic as a "gangbanger" reveals unabashed stereotyping and the use of another derogatory term directed at a Black person. Alston was implicated in these stereotypes and their harmful effects.

In actuality, the explanation served as Pender's second violation of the town's zero-tolerance policy for racism in the workplace. While Pender's explanation should have done more harm than good to his employment status given the zero-tolerance policy, the town chose to promote Pender, and ultimately to terminate Alston. Unfortunately for Alston, this counter-

intuitive HR decision marked only the beginning of the cascading destruction of his career as a firefighter as well as his sobriety and mental health.

The aftermath

As noted above, in 2010, Alston brought civil rights claims against the Town under 42 U.S.C. §§ 1981, 1983 and 1985.² In 2021, the Town settled with Alston for \$11 million. To some, the settlement award may seem excessive, but as Alston has acknowledged, it will never make him whole. Herein lies the absurdity of the legal fiction that money can right civil wrongs. One of the many implications of health inequities and reduced life expectancies is that, Black people especially, don't have the luxury of waiting on settlements to one day be made whole. Ta-Nehisi Coates described this aspect of his own mortality, writing, "You must wake up every morning knowing that no promise is unbreakable, least of all the promise of waking up at all." Mortality ought to be urgent enough for radical change in the legal system, but if that were true, Black Lives Matter would have already achieved it.

In hopes of pursuing change that falls somewhere between the status quo and radical re-imaginings, this paper seeks to highlight three of Brookline's failures: (1) how the Town of Brookline leveraged white fragility against Alston; (2) the Town's weaponization of mental health and mental health professionals; and (3) the Town's use of non-cooperation agreements.

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Coddling white fragility

As coined by Robin DiAngelo, white fragility encapsulates the defensive actions that white people take when confronted with racism.³ DiAngelo conceptualizes these actions as “an outcome of white people’s socialization into white supremacy and a means to protect, maintain and reproduce white supremacy.”⁴ In addition to causing significant harm to Alston, these responses prolonged the litigation and abused the Town’s resources.

The Town protected white supremacy by continuing to promote Pender despite his use of the n-word and despite his continued retaliatory behaviors. As a consequence of white supremacy, Pender was seen as extremely apologetic for his actions. He was also seen as deserving of continued promotions in order that one mistake wouldn’t derail his career. Even when Pender was disciplined for his voicemail by way of a 42-day suspension, he was instantaneously credited with 42 days of paid vacation days. This shows how Pender was protected from all consequences.

Additionally, Pender maintained white supremacy by admonishing Alston for coming forward. Days after Alston raised concerns about the voicemail incident, Pender told Alston that it was “the stupidest thing [Alston] could have ever done.” He then asked Alston, “Are you after my job or something?”⁵ These comments from Pender demonstrate maintaining white supremacy. Denigrating Alston’s decision to come forward and to challenge the racism he experienced is a form of retaliation that enforces a culture of silence: white supremacy can thrive if individuals do not report it or problematize it the way Alston did.

The Town also reproduced white supremacy by tokenizing Black voices. In September of 2013, Nancy Daly, a white town official, circulated a letter from a retired Black firefighter criticizing Alston and asserting that, “it was insulting to all firefighters for Alston to claim that he could not count on fellow firefighters to save him in a life-threatening situation.” This letter did not comment on the actual issues at hand; however, it was a Black voice that seemed to contradict Alston. Using a Black person to reflect the views of all Black people is a tactic to create the illusion of division and erode the credibility of a complaint of racism. White supremacy is maintained by this practice of discrediting Black people. In disseminating this letter, Pender also used this tactic when he spoke to five new minority firefighter recruits at his station. Allegedly these recruits agreed with Pender that Alston was drawing out the n-word incident and acting unreasonably. This account is problematic, given that the recruits were new and likely going to agree with anything their new supervisor would have said. Further, any offhand comments by individuals who were not intimately familiar with the situation must be evaluated critically. Instead, the comments by the recruits were used as true perspectives—not because of the context, but merely because the recruits were Black and Brown. Daly and Pender perpetuated a narrative that Alston was unreasonable and unwilling to move beyond the voicemail incident.

Both Pender’s and the Town’s response to Alston’s sharing of his concerns were rooted in the assumption that both Pender and the

Town are not racist. In fact, the town often cited its “zero tolerance” policy for workplace racism and retaliation. This was problematic because, instead of addressing Alston’s complaint, Pender and the Town focused on their reputations and public image instead of the substance of protecting employees from discrimination.

Gaslighting and weaponizing mental health professionals

At the end of his shift on December 19, 2013, Alston found the word “leave” written in the dust on the door next to the seat on the firetruck to which he had been assigned. He called this display to the attention of two coworkers, Ryan Monahan and Cormac Dowling. Chief Ford was informed of the incident, and he reported it to both DeBow and Murphy. Three days later, Alston referred to the incident in front of coworkers and stated that “people go postal over matters like this.” That night, Ford interviewed Alston about his statement and—concerned about Alston’s mental state—placed him on paid leave, pending a psychiatric evaluation. From that point forward, Alston never resumed work as a firefighter.

A particularly concerning response to Alston’s complaints of racism was the Town’s practice of gaslighting. Gaslighting is defined as a form of manipulation where one individual makes another question his reality.⁶ In other words, rather than address the racism Alston brought to the HR department’s attention, the HR department focused on undermining Alston’s experience of racism.

As another example, after Alston reported Pender for his use of the racial slur, the Town promoted Pender to higher positions and continued to afford him opportunities. Within four months of the voicemail incident, Pender was invited to the White House to accept an award for his heroism during a 2008 fire. At one point, Alston reached out to the fire chief to express his frustration with how Pender was seemingly rewarded for his behavior. In response, the fire chief suggested that Alston seek mental health counseling. In addition, Alston’s long-term colleagues began to isolate and shun him. It is common knowledge that firefighters work in a fire “house” sharing meals, and essentially living together until they are dispatched for an emergency. In Alston’s case, his colleagues would leave the room as soon as he entered, ignore him and leave him out of social events. This isolation, however, was not solely at the hands of other white firefighters: recall the retired black firefighter who wrote a widely-circulated letter disparaging Alston.

Equally concerning is how the Town weaponized mental health professionals by picking and choosing which parts of Alston’s mental health assessments to give weight to. The simplest explanation is that the Town only used the damning parts of the evaluations to keep Alston out of work (a positive cocaine test, outbursts, anger), but never implemented the proposed accommodations that would have facilitated his return to work (enforcing the non-retaliation policy, disciplining individuals who were antagonizing Alston). The mental health professionals that Alston met conditioned his return to work on the elimination of a racially-biased environment. In other words, the onus was placed on the Town to accommodate Alston by ceasing to subject him to racial stress. Despite requiring Alston to attend these sessions and relying on information

gleaned from Alston's private sessions to make determinations about Alston's employment status, the Town never made the accommodations the mental health professionals recommended.

Rather than improve the situation which would have improved Alston's mental health, the Town consistently made the situation worse and blamed Alston for his worsening mental health.

Enforcing non-cooperation agreements

In order to succeed on his equal protection claim, Alston needed to prove that he was treated worse compared with others who are similarly-situated, and that this treatment was on the basis of race. The First Circuit found that Alston did not meet his burden because he did not proffer evidence that non-Black firefighters were treated more favorably.⁷

A likely part of this difficulty was the Town's use of non-cooperation agreements in settlement cases with other Black firefighters. These agreements functioned to bar firefighters who participated in previous settlements from "voluntarily cooperat[ing] or assist[ing] any person or entity...in the prosecution of any claims against the defendants." Additionally, some of the non-cooperation agreements mentioned Alston by name and prohibited individuals from cooperating with the federal court complaint.

It is important to consider the relative positioning and power of the firefighters who signed the non-cooperation agreements as compared to the Town. If they experienced similar racial discrimination to Alston, as well as the backlash that followed, signing such an agreement in exchange for money and the end of the process might seem like the only option. Further, if the firefighters retained legal counsel to aid in the process, there may be incentives for counsel to encourage settlements rather than substantive change, or even cooperation, down the line with other firefighters who experience discrimination. The attorney pay structures must be examined in considering who the litigation process is serving. These considerations serve to highlight some of

the limitations of the status quo processes that continue to be overlooked.

The First Circuit court of appeals held that non-cooperation agreements are permissible in the interest of allowing private parties to settle and bargain with one another outside of court. Arguably, this saves the court system from overuse by encouraging parties to resolve matters on their own. This is an interesting take coming from a justice system that purports to rely on the truth; if silence can be bought, then the true nature of systemic racism will always be obscured. Allowing the Town to bargain for the silence of other firefighters who experienced the same discrimination as Alston makes it nearly impossible for Alston to prove his claim. It serves to erase any record of the systemic nature of the Town's racism, and makes Alston's claim less credible. Here, the Court remarked that Alston did "not make the slightest effort" to identify facts to show a disparity in treatment between white and Black firefighters; this remark contravenes any notion of justice. In reality, the Court-backed non-cooperation agreements served to thwart any of Alston's efforts to identify disparities.

Alston deserves compensation for the past 11 years of harm caused by his employer; however, if the goal is to deinstitutionalize workplace racism, the legal community must reckon with the shortcomings of the litigation processes and attempt to develop changes to workplace policies and mechanisms of enforcement that actually root out racism. There are a number of reasons that litigation alone cannot fix workplace racism: access to civil litigation is limited, litigation is expensive, takes a substantial amount of time and compounds stress to those who have been harmed. Litigation processes are adversarial with clear winners and losers, and do not support continuing relationships. In this case, Alston cannot work for the Town of Brookline, despite the Town's apology, \$11 million and recognition of its harmful actions against Alston. Further, as long as the harms of workplace racism are reduced to monetary quantities, employers will continue to commit so-called efficient breaches, or strategically calculated violations of

antidiscrimination policies, in order to avoid the process of rooting out policies—both formal and informal—that allow racism to flourish.

Looking beyond litigation is not a lofty, abstract idea. As demonstrated here, there are policy decisions that employers have the power to make each time they are presented with a complaint from an employee.

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1. Lorde, Audre. "The Master's Tools Will Never Dismantle the Master's House." 1984. *Sister Outsider: Essays and Speeches*. Ed. Berkeley, CA: Crossing Press. 110114. 2007. Print.
 2. The operative complaint named a long list of defendants, including the Town, the Brookline Board of Selectmen (the Board), the Town's counsel and human resources director, and select members of the Board (Nancy Daly, Betsy DeWitt, Ben Franco, Kenneth Goldstein, Bernard Greene, Nancy Heller, Jesse Mermell and Neil Wishinsky). All of the individual defendants were sued in both their personal and official capacities.
 3. DiAngelo, *White Fragility*.
 4. Page 112 (*White Fragility* chapter).
 5. *Alston v. Town of Brookline*, 997 F.3d 23, 30 (1st Cir. 2021).
 6. "APA Dictionary of Psychology." *APA.org*. American Psychological Association.
 7. "In his briefing, Alston does not make the slightest effort to identify any facts in the record that might show such a disparity in treatment." *Alston v. Town of Brookline*, 997 F.3d 23, 41 (1st Cir. 2021).

VIOLENCE AGAINST WOMEN ACT AND MARSY'S LAW

By Elena Gutbrod and Hannah Yeack

For battered women, thirty years¹ of unaccountability for domestic and sexual² violence crimes instilled distrust and an inclination to not report the violence they endured at the hands of their abusers,³ to suffer in silence and to be swept into a cycle of abuse, which often ends in death.⁴ The history of the domestic and sexual abuse of American Indian, Alaskan Indian and Native⁵ women⁶ has recently been brought to enough light only to spark remedial action. Community-based action designed to address these issues has been in place for centuries, but United States government action has been sparse to none.⁷ While the 2013 reauthorization of the Violence Against Women Act ("VAWA")⁸ implemented a minor victory for victim-survivors of domestic and sexual abuse, victim-survivors who identify as American Indian, Alaskan Indian or Native women⁹ find no path forward in VAWA.



This article advocates for an addition to and an expansion of VAWA that will forge a path for American Indian, Alaskan Indian and Native women to enjoy the same due process rights and the constitutional protections currently ensured to their assailants. By implementing a provision in VAWA like “Marsy’s Law,”¹⁰ tribal governments will have additional tools to rehabilitate¹¹ victim-survivors and to cultivate a path out of the cycle of violence that often chains these women.

Providing substantive and procedural protections for Native American victim-survivors of domestic violence on tribal reservations will help to cultivate trust in the legal system for Native victim-survivors and, consequently, will result in higher reporting rates, protect the legal rights and the emotional well-being of victim-survivors as they reconcile and recover from their trauma and enable them to take back their dignity and control over their life.

The federal government used statutes and Supreme Court decisions to strip tribal governments’ inherent sovereignty

The federal government’s history of infringement upon the inherent sovereignty of tribal governments is long-winded and far-reaching. In 1817, the federal government used the General Crimes Act to impose federal criminal laws on tribal reservations, eliminating tribal governments’ jurisdiction to prosecute certain crimes.¹² While the Act preserved tribal authority to prosecute intra-tribe crime—meaning a crime by an Indian against another Indian¹³—tribes lacked all authority to prosecute the enumerated crimes¹⁴ in the act, if committed by non-Indians, even if they were committed against a tribe member.

Soon after, the Supreme Court issued a decision in *Cherokee Nation v. Georgia*, wherein the Court characterized tribal governments as either not being “states” or as being “foreign states” for the purposes of the Constitution.¹⁵ The Court labeled tribal governments as such, relying primarily upon a short phrase from the eighth section of the third article of the Constitution which empowers Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹⁶ Removing the right of tribes to bring claims in federal courts, the Supreme Court



determined it was “not the tribunal which can redress the past or prevent the future.”¹⁷ However, even more concerning than the holding of the case was the dicta asserted by the Court regarding American Indians:

[M]eanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

This paternalistic view perpetuated a false narrative and perception of American Indian and Alaskan Indian people—that they were an incompetent people who would not survive nor thrive without the federal government.

In 1886, under the Major Crimes Act, the federal government further removed jurisdiction from tribes for certain serious crimes, this time including intra-tribe crimes.¹⁸ The Act removed tribal jurisdiction to prosecute the following crimes: murder, manslaughter, kidnapping, maiming, felony under chapter 109A, incest, assault with

intent to commit murder, assault with a deadly weapon, assault resulting in serious bodily injury, assault against a minor under 16 years old, arson, burglary, robbery, felony crimes under § 661 of Chapter 18 and felony child abuse or neglect.¹⁹ This rescission of jurisdiction resulted in the vast majority of these severe crimes going unpunished.²⁰

Public Law 280 then authorized the federal government to transfer partial criminal jurisdiction to the state where the crime occurred.²¹ This transfer of jurisdiction led to what scholars describe as “a complicated web of concurrent and exclusive jurisdictions between the tribal, state and federal governments that differed based on location, crime, offender and victim.”²² In 1978, the Supreme Court delivered the final, crushing blow to tribal governments in *Oliphant v. Suquamish Indian Tribe*.²³ The Court based its reasoning, in part, on one Arkansas district court’s decision that a tribe did not have jurisdiction to prosecute a non-Indian,²⁴ and the conclusory “shared presumption of Congress, the Executive Branch and lower federal courts that tribal courts do not have the power to try non-Indians[.]”²⁵ The Court ultimately held that tribes have no criminal jurisdiction over non-tribal members.²⁶

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The federal government created a prosecutorial nightmare

Without the jurisdiction to prosecute both non-tribal members and domestic violence crimes occurring on their own land, tribal courts lacked the power to punish domestic violence offenders and to protect the Native women living on reservations.

Unfortunately, non-Indian and non-tribal men are the main perpetrators of domestic and sexual violence against American Indian, Alaskan Indian and Native women.²⁷ The National Institute of Justice found that of the 55% of American Indian and Alaska Native women who experienced domestic violence at the hands of an intimate partner, 90% of these women reported the violence was at the hand of a non-Indian abuser.²⁸

The federal government's legislation ensured the U.S. Attorney's Office was the sole entity empowered to prosecute countless enumerated crimes. Yet, the U.S. Attorney's Office declined to prosecute 50% of the 9,000 Native and Indian country matters referred to them between 2005 and 2009.²⁹ Further, of the 77% of referred matters categorized as "violent," the office declined to prosecute 52% of them.³⁰ Thus, thousands of crimes go unprosecuted. Notably, these numbers reflect only the reported crimes.³¹

Victim-survivors of sexual violence historically underreport, with only 310 out of every 1,000 sexual assaults being reported to police, particularly by victim-survivors who believe, often with good reason, that reporting will do nothing to help their position and may actually end up causing them more pain.³² This high rejection rate for crimes on Native territory effectively renders these violent crimes immune from punishment.³³ The following review of current laws which purport to protect victim-survivors of domestic violence rarely do so.

The Tribal Law and Order Act fails to protect victim-survivors of domestic abuse while affording due process protections to defendants

In 2010, Congress enacted the Tribal Law and Order Act ("TLOA")³⁴ which "helps to address crime in tribal communities and places a strong emphasis on decreasing violence against American Indian and Alaska Native Women."³⁵ An important provision of TLOA grants tribal courts the sentencing power of up to three years imprisonment and up to a \$15,000 fine,³⁶ but the Act is specific to enumerated crimes³⁷ only.³⁸ Nevertheless, this provision and enhanced sentencing authority are only available to tribes that ensure specific procedural safeguards to the accused.³⁹ The tribal courts must: (1) provide the defendant with effective assistance of counsel at least equal to that guaranteed by the Constitution; (2) at its own expense, provide an indigent defendant a defense attorney licensed to practice; (3) require the judge to have sufficient legal training and be licensed to practice law; (4) make available the applicable criminal laws, rules of evidence and rules of criminal procedure of the tribal court; and (5) maintain a record of the proceeding.⁴⁰

While TLOA seems to be a step in the right direction, the Act fails to address the high rate of unprosecuted domestic violence crimes against American Indian, Alaskan Indian and Native women: TLOA provides higher sentencing power, but the Act did not extend tribal



jurisdiction to domestic violence and sexual crimes perpetrated by non-Native men.⁴¹ As discussed above, non-Native men commit the vast majority of domestic crimes against Native women,⁴² meaning TLOA fails to increase the number of crimes tribal governments can prosecute.⁴³

Violence Against Women Act

The Violence Against Women Act (VAWA) was landmark legislation first passed in 1994 and was signed into law as part of the Violent Crime Control and Law Enforcement Act.⁴⁴ It was the first federal law to explicitly provide recognition of several domestic violence and sexual crimes along with policies to address them as they often were, intimate partner violence.⁴⁵ The main policy goal of VAWA is to prevent and respond to crimes of sexual violence or of sexual motivation against women, while addressing the needs⁴⁶ of victim-survivors.⁴⁷ VAWA's main way of accomplishing this is through providing grants to governments, nonprofit organizations, and universities.⁴⁸ However, since this legislation was written predominantly for and by white people,⁴⁹ VAWA failed then, and continues to fail now, to understand and address the complexities of addressing sexual and domestic violence in non-white communities and cultures. Astonishingly, the 1994 enactment contained no provision addressing violence against Alaskan Indian and American Indian women and, even worse, Native women were not included under VAWA until 2013.⁵⁰

Included in the 2013 reauthorization was a provision called Special Domestic Violence Criminal Jurisdiction ("SDVCJ"), which granted tribal governments jurisdiction to prosecute domestic violence



crimes in narrow situations.⁵¹ Under SDVCJ, tribal courts may exercise jurisdiction for violence committed by the following: a current or former spouse or intimate partner of a victim, a person with whom the victim shares a child, a person who currently or previously cohabited with the victim or a person similarly situated to the spouse of the victim.⁵² While this seems to bridge the gap in prosecutions,⁵³ additional requirements, such as requiring the perpetrator to have “sufficient ties” to the tribe as well as the crime occurring on Indian territory⁵⁴ demonstrate the narrow situations in which SDVCJ may be exercised.⁵⁵

VAWA is currently up for reauthorization. It passed in the House of Representatives in March of 2021 and, as of April of 2022, has not yet been introduced in the Senate.⁵⁶ Proposed changes include adjustments to jurisdiction in tribal lands, validation of protection orders no matter if the entity issuing it is of the U.S. government or a tribal government and an expansion of *Title IX: Safety for Indian Women*.⁵⁷ The expansion of this section acknowledges that Native women are 2.5 times more likely

to experience violent crime and twice as likely to experience sexual violence when compared to all other races,⁵⁸ and seeks to address this through both more measures and an increase in available funding for tribal governments. The reauthorization also includes the new Forensic-medical and Advocacy Services for Tribes initiative (FAST).⁵⁹ FAST sets aside \$14,000,000 in grants for tribal governments, organizations, nonprofits and other recognized groups to help them offer medical services such as sexual assault forensic exams (SAFE exams), and to better fund their medical resources for victim-survivors of sexual violence.⁶⁰

However, despite expansion, the current proposed changes fail to address any of the core problems that were first created by the United States government and Supreme Court, such as the lack of societal recognition of Natives and all other minorities as individuals, rather than a monolith,⁶¹ and the systemic oppression of all Natives⁶² which has created countless double-binds and nearly inescapable oppression.⁶³ While VAWA works to provide funding and recognize tribal governments as the legitimate entities they are, it nonetheless provides (sometimes literally) band-aids for bullet wounds.

Marsy's Law

Marsy's Law (the “Law”) first came to existence in California following the 1983 murder of Marsalee Nicholas at the hands of her ex-boyfriend-turned-stalker.⁶⁴ One week after her death, her family ran into Marsalee's murderer in town: Courts released him on bail only days after his arrest and charging. The officials handling the murder case were under no obligation to inform the family of his release, resulting in further pain for the family.

Marsy's Law strives to resolve the discrepancy between the rights of the accused and the rights of victim-survivors.⁶⁵ Unlike numerous past victim's rights initiatives, Marsy's Law is the only major legislation that seeks to put victims and perpetrators on equal footing in the court.⁶⁶ Thus far, twelve states have enacted a version of Marsy's Law as a state constitutional amendment.⁶⁷

The goal of Marsy's Law is to “secure [justice] for victims” and provide them

with certain rights, including the right to be heard in court, to be protected from the accused, to be treated with dignity and respect, to refuse an interview or deposition at the request of the accused, to be notified of any changes in the criminal case of the perpetrator or any releases of the perpetrator from prison and of their rights as a victim.⁶⁸ Examples of how these rights may take form from one of the author's experiences in the field are given below.

First, the victims may be heard in a courtroom by reading a victim impact statement, which allows them the space to tell their story to the accused, the judge and, when applicable, the jury. This allows the victim's wishes in sentencing or other court outcomes to be part of the conversation. Second, protection from the accused may take the form of redacting their private information such as their address or phone number from all released court records, so the accused can not easily harass or harm the victim further. Third, the right to be treated with dignity and respect ensures cordial and professional behavior towards the victim from all members of the courtroom by making any lack of professional behavior a violation of the victim's rights and subject to redress. While the authors would like to believe that judges, prosecutors and even defense attorneys would be kind to victims regardless of their professional objectives, that is sadly not always the case. Fourth, they can refuse a deposition or interview. One right that the accused has is to request an interview or deposition be made by the victim, but many victims find this process overwhelming and extremely difficult. By providing them the right to decline such requests, Marsy's Law once again keeps their interests at the table as well as the accused. Fifth and lastly, the right to be notified of any changes in the criminal case or releases of the accused or perpetrator affords the victim peace of mind and a mild sense of control over their life again. Moving on from their victimization will always be hard, but Marsy's Law helps to ensure that victim-survivors do not have to wonder if or when their rapist or abuser might simply show up one day, released from government custody, and on their doorstep.

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In short, Marsy's Law aims to afford the victims the same rights as the accused perpetrators. The Law's aim, however, continues to draw criticism. Since the movement towards victims' rights began, scholars and organizations have written on the impacts and dangers of Marsy's law and its progeny—the main criticism being fear that implementation of this Law will violate a defendant's due process rights.⁶⁹ The American Civil Union (the "ACLU") and journalists objected to specific provisions allowing victims to be present and read statements at proceedings.⁷⁰ Susan Bandas, a writer for *The Atlantic*, wrote an article analyzing the Supreme Court decision in *Payne v. Tennessee* which permitted victim statements at sentencing hearings.⁷¹ "Researchers and others have found that emotional statements from the victim in court can make jurors angry and more eager to punish defendants—particularly when a victim is white."⁷²

While the ACLU and other critics present valid concerns, the authors are not persuaded by the criticism of Marsy's Law, especially given the authors' proposed use of the Law as a supplement to VAWA. For example, under TOLA, tribal courts have a ceiling on their sentencing power.⁷³ The tribal courts are without authority to impose a greater sentence of three years or a maximum of \$15,000. Therefore, the punitive tendencies of a jury will not be realizable with the current ceiling on sentencing.

Legislators must implement Marsy's Law into the current VAWA

As noted above, while the 2013 reauthorization of VAWA was a victory for American Indian, Alaskan Indian and Native women, the Special Domestic Violence Criminal Jurisdiction (SDVCJ), in conjunction with the Tribal Law and Order Act (TLOA), are assailant-centric. TLOA serves to provide the defendant with the rights afforded those in federal or state courts,⁷⁴ and SDVCJ provides no recourse for the victim-survivor beyond the prosecution of their perpetrator.⁷⁵ Implementing Marsy's Law⁷⁶ is instructive. Lawmakers should not look to Marsy's Law merely for guidance; they should actively adopt parts of the Law into VAWA to ensure the focus of the Act is actually victim-centric and to afford the affected victim-survivors the same protections afforded to their assailants.

Ohio implemented its version of Marsy's Law into the Ohio Constitution in February of 2018.⁷⁷ The introduction of the provision states, "To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused[.]"⁷⁸ In Ohio, Marsy's Law affords victims the right to be heard, the right to be present at proceedings, the right to restitution, the right to certain notifications surrounding the case and several others.⁷⁹ American Indian and Alaskan Indian women deserve the same protections afforded their assailants, and a pathway to help domestic violence victims achieve these protections, lawmakers must incorporate the following provisions of Marsy's Law into VAWA:

- Reasonable and timely notice of all public proceedings and the option to be present at all such proceedings;
- To be heard in any public proceeding involving release, plea, sentencing, disposition or parole in which a right of the victim is implicated;
- To reasonable protection from the accused or anyone acting on behalf of the accused;
- To reasonable notice of release or escape of the accused;
- To full and timely restitution from the accused;
- To confer with the attorney for the government; and
- To be informed, in writing, of all rights enumerated in this section.⁸⁰

Lawmakers must implement Marsy's Law for tribal governments through VAWA. The Law is a crucial step in building back trust between Native women and the federal government, and is essential to protect the rights and emotional well-being of victim-survivors as they take back their dignity and control of their life. This needs to happen at a federal level, not just at a state level, to ensure clarity and uniformity for victims across jurisdictions. As necessary as this is, it is still just one step among many, many more avenues of justice that need to be taken into consideration if the United States is ever going to atone for its history, and in many ways, its present.

1. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
2. Domestic and sexual violence are two distinct but deeply connected forms of abuse. While domestic violence often includes sexual violence, and vice versa, they can and do exist separately for many victims. For more background information about sexual violence see Types of sexual violence, RAINN, <https://www.rainn.org/types-sexual-violence>; and for domestic violence see What is domestic abuse?, United Nations, <https://www.un.org/en/coronavirus/what-is-domestic-abuse>.
3. Victor Holcomb, Prosecution of Non-Indians for Non-Serious Offenses Committed Against Indians in Indian Country, 75 N.D. L. REV. 761 (1999).
4. Rinku Sen, Between a Rock & a Hard Place: Domestic Violence in Communities of Color, *Colorlines Magazine*, 27 (1999).
5. Women belonging to these groups prefer differing terms to signify their heritage and culture. Other terms women may use include Tribal, Native American, Indigenous, and Indian. Some of these terms are used interchangeably throughout this article, depending on which word the authors felt best captured the concept at the time.
6. See generally, The Facts on Violence Against American Indian/American Native Women Fact Sheet, FUTURES WITHOUT VIOLENCE <https://www.futureswithoutviolence.org/wp-content/uploads/AI-AN-Fact-Sheet-2017.pdf>.
7. *Id.*
8. 42 U.S.C. § 136.
9. This article focuses on the unique issues suffered by American Indian, Alaskan Indian, and Native women but by no means seeks to discount or discredit the trauma suffered by all genders and persons who face domestic and sexual violence.
10. Ohio Revised Code § 2930.
11. When speaking of rehabilitating victims of domestic and sexual violence, the authors do not argue that victims are at fault for their trauma in any way. Instead, authors recognize the long-lasting mental, emotional, and physical damage such experiences can cause, and acknowledge that healing can and should be aided by the government.
12. 18 U.S.C. § 1152. The Act removed tribal jurisdiction to prosecute the following crimes: assault, maiming, theft, receiving stolen property, murder, manslaughter and sexual offenses. *Id.*
13. For purposes of this note, "intra-tribe" refers to incidents between two American Indians. "Inter-tribe" refers to incidents involving one or more non-American Indians.
14. The enumerated crimes are defined by distinct federal statutes.
15. *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831).
16. *Id.* at 18.
17. *Id.* at 20.

18. 18 U.S.C. § 1553.
19. *Id.*
20. Joshua B. Gurney, An “SDVCJ Fix” – Paths Forward in Tribal Domestic Violence Jurisdiction, 70 Hastings L.J. 887, 12 (2019).
21. 18 U.S.C. § 1162. The mandatory states that assumed criminal jurisdiction, regardless of whether the crime occurred within Indian country, were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.*
22. Joshua B. Gurney, An “SDVCJ Fix” – Paths Forward in Tribal Domestic Violence Jurisdiction, 70 Hastings L.J. 887, 10 (2019).
23. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
24. *Id.* at 200.
25. *Id.* at 206.
26. *Id.*
27. The Dep’t of Justice Nat’l Congress of American Indians, VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report 4 (2018).
28. *Id.* at 3.
29. U.S. Government Accountability Office, U.S. Department of Justice Declinations of Indian Country Criminal Matters, GAO-11-167R (Dec. 13, 2010) [gao.gov, https://www.gao.gov/products/gao-11-167r](https://www.gao.gov/products/gao-11-167r).
30. *Id.*
31. *Id.*
32. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2015-2019 (2020); Federal Bureau of Investigation, National Incident-Based Reporting System, 2012-2016 (2017).
33. Joshua B. Gurney, An “SDVCJ Fix” – Paths Forward in Tribal Domestic Violence Jurisdiction, 70 Hastings L.J. 887, 12 (2019).
34. 25 U.S.C. § 1302 (2012).
35. U.S. Dep’t of Justice, Tribal Law and Order Act, <https://www.justice.gov/tribal/tribal-law-and-order-act> (explaining the reasoning behind the Tribal Law and Order Act).
36. 25 U.S.C. § 1302 (2012). Compare these numbers with the previous sentencing authority of a maximum of three years and a maximum fine of \$5,000. Indian Civil Rights Act, 25 U.S.C. § 1301.
37. TLOA covers crimes such as domestic violence, sexual assault, and drug trafficking and attempts to reduce the rates of substance abuse.
38. 25 U.S.C. § 1302. To subject the defendant to the maximum fine or sentence, TLOA requires an accused who (1) has been previously convicted of the same or comparable offense; or (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment in the United States. *Id.*
39. *Id.*
40. *Id.*
41. Samuel D. Cardick, The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women, 31 St. Louis U. PUB. L. REV. 539, 574 (2012).
42. The Dep’t of Justice Nat’l Congress of American Indians, VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report 4 (2018).
43. Samuel D. Cardick, The Failure of the Tribal Law and Order Act of 2010 to End the Rape of American Indian Women, 31 St. Louis U. PUB. L. REV. 539, 574 (2012).
44. Leila Abolfazli, Violence Against Women Act (VAWA) HeinOnline (2021), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/grggen17&div=39&id=&page=>.
45. Violence Against Women Act, NNEDV, <https://nnedv.org/conwntent/violence-against-women-act/> (last visited Nov 10, 2021).
46. Needs of victim-survivors vary from person to person, but can be conceptualized in this context as affirmative rights and protective procedural processes.
47. Congressional research service & Lisa N. Sacco, The Violence Against Women Act (VAWA): Historical overview, funding, and Reauthorization (2019).
48. *Id.*
49. Committee on the Judiciary., The violence against women act of 1993: Report (to accompany S. 11, as amended) (1993).
50. S.Rept. 103-138 (1993).
51. 25 U.S.C. § 1304(b)(1).
52. *Id.*
53. SDVCJ was enacted to “specifically address[] the tribal exercise of Special Domestic Violence Criminal Jurisdiction over non-Indians to address the jurisdictional gap created by *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)” Tribal Protection Order Resources: Special Domestic Violence Criminal Jurisdiction, <http://tribalprotectionorder.org/special-domestic-violence-criminal-jurisdiction/#:~:text=The%20purpose%20of%20Section%20904,protection%20orders%20and%20dating%20violence>.
54. *Id.*
55. The Dep’t of Justice Nat’l Congress of American Indians, VAWA 2013’s Special Domestic Violence Criminal Jurisdiction Five-Year Report (2018).
56. Judiciary; Financial Services; Ways and Means; Education and Labor; Energy and Commerce; Veterans’ Affairs; Natural Resources, Violence Against Women Act Reauthorization Act of 2021.
57. *Id.* at Sec. 902.
58. *Id.*
59. *Id.* at Sec. 207.
60. *Id.*
61. G. William Domhoff, Who rules America?: The triumph of the corporate rich (2014).
62. Howard Zinn, A people’s history of the United States: 1492-present (2015).
63. Harold R. Kerbo, Social stratification and inequality (2008).
64. About Marsy’s Law, Marsy’s Law for All, https://www.marsyslaw.us/about_marsys_law (last visited Nov 10, 2021).
65. *Id.*
66. What is the difference between Marsy’s Law and previous national crime victims’ acts?, Marsy’s Law for All, https://www.marsyslaw.us/what_is_the_difference_between_marsys_law_and_previous_national_crime_victims_acts (last visited Nov 10, 2021).
67. State efforts, Marsy’s Law for All, <https://www.marsyslaw.us/states> (last visited Nov 10, 2021).
68. What is Marsy’s Law?, Marsy’s Law for All, https://www.marsyslaw.us/what_is_marsys_law (last visited Nov 10, 2021); Marsy’s law for all, Ballotpedia, https://ballotpedia.org/Marsy%27s_Law_for_All (last visited Nov 10, 2021).
69. David Straughan, Marsy’s Law Aims to Protect Victims of Violent Crimes, But At What Cost? (March 26, 2021), <https://interrogatingjustice.org/ending-mass-incarceration/marsys-law-aims-to-protect-victims-of-violent-crimes-but-at-what-cost/>.
70. *Id.* See also Jeanne Hruska & Holly Welborn, [aclu.org In Major Threat to Due Process, Marsy’s Law Gains Ground Nationwide](https://www.aclu.org/blog/criminal-law-reform/major-threat-dueprocess-marsys-law-gains-ground-nationwide), (November 30, 2018), <https://www.aclu.org/blog/criminal-law-reform/major-threat-dueprocess-marsys-law-gains-ground-nationwide>.
71. Susan A. Bandes, What Are Victim-Impact Statements For? The Atlantic (July 23, 2016) <https://www.theatlantic.com/politics/archive/2016/07/what-are-victim-impact-statements-for/492443/>.
72. *Id.* citing Paternoster R. and Deise, J., A Heavy Thumb On The Scale: The Effect of Victim Impact Evidence on Capital Decision Making*. Criminology, 49: 129-161 (2011). <https://doi.org/10.1111/j.1745-9125.2010.00220.x>.
73. 25 U.S.C. § 1302 (2012).
74. 25 U.S.C. § 1302 (2012).
75. 25 U.S.C. § 1302 (2012).
76. <https://www.marsyslaw.us/>.
77. Ohio Constitution Art. 1 § 10a.
78. *Id.*
79. Ohio Revised Code § 2930 *et seq.*
80. *Id.*

STATE OF TENNESSEE V. GILBERT COMMENTARY

By Thad Cwiklinski

*"We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population... It is unsurprising, then, that this Court has invalidated decisions reached by juries with a wide variety of different prejudices."*¹

—U.S. Supreme Court Justice Thurgood Marshall

The Sixth Amendment's guarantee of an "impartial jury" is an essential tenet of American jurisprudence. In criminal trials, courts implement an array of safeguards to prevent prejudicial information from reaching jurors and to keep verdicts unbiased. The *voir dire* process and juror anonymity are intended to accomplish these goals and, if they fail, judges may set aside jury verdicts that are "contrary to law and the evidence."² In *Peña-Rodriguez v. Colorado*, the Supreme Court recognized the necessity of combatting juror bias.³ The Court held that when a juror demonstrates that her conviction of a defendant is based on racial bias or animus, the verdict may be thrown out.⁴ To do so, though, it must be "clear" from the juror's statements that the juror acted on racial bias.⁵ Indeed, many jurors may not show enough outward bias to reach the high *Peña-Rodriguez* standard. Nevertheless, the case still marks a welcome departure from a justice system that favors finality but ignores juror bias.

Issues of racial bias in the jury room become complicated, however, when prejudicial information comes from the room itself rather than the jurors. Ideally, a jury room is a sacrosanct place where jurors may discuss a case free from outside pressures and influences to administer justice, not decisions based on personal belief.⁶ In *State of Tennessee v. Gilbert*,⁷ this was not the case.

In *Gilbert*, white jurors deliberated and convicted Tim Gilbert, a Black man, in a setting more reminiscent of a Civil War battleground than a sanctuary. The jury deliberated to convict Gilbert in the Giles County Courthouse's "United Daughters of the Confederacy Room" ("U.D.C. room").⁸ The United Daughters of the Confederacy, an organization for female descendants of Confederate soldiers, preserves the legacies

of these Confederate soldiers and "the Lost Cause." Since its inception, the organization carried out its mission through massive fundraising efforts for monuments to Confederate leaders as well as to the Ku Klux Klan.⁹ At times, the United Daughters of the Confederacy even acted as "a public relations agency" for the white supremacist group.¹⁰

The U.D.C. room overflowed with Confederate memorabilia: had designers intended solely to pack in as much prejudicial information as possible, they could not have been more successful. Even before entering the room, the twelve white jurors in Gilbert's case immediately saw a glass panel containing a Confederate flag, U.D.C. insignia and "U.D.C. Room" emblazoned on the door in gold paint.¹¹ As they entered, jurors were exposed to more memorabilia, including the room's

centerpiece: an unmistakable Confederate battle flag. In the anomaly that someone did not recognize the massive flag's glaring blue "X" slashed across a red background, it was labeled "Confederate Flag, Property of Giles County Chapter #257 UDC."¹² Portraits of Confederate leaders encircled the room. One portrait even designated the president of the Confederacy as "President Jefferson Davis" (rather than "Confederate President Jefferson Davis"). A framed letter from the national leader of the United Daughters of the Confederacy rounded out the room's decor.¹³

Strikingly, the jury deliberations in the United Daughters of the Confederacy Room in Gilbert's case were not a "one-off thing" resulting from a scheduling issue or isolated incompetence. Instead, the United Daughter of the Confederacy Room

served as the default jury room in the Giles County Courthouse for at least the past 43 years without anyone challenging its effect on jurors.¹⁴ Countless defendants before Gilbert, many of them Black, had their fates decided in the same environment.

Gilbert argued that white jurors deciding a Black man's freedom in a Confederate shrine—that is also a jury room—exposed the jury to extraneous prejudicial information which “embolden[ed] jurors to act on racial animus.”¹⁵ The State merely responded that 1) Gilbert had waived his right to contest the location of jury deliberations by not raising his concerns before trial,¹⁶ and that 2) since another jury had acquitted Gilbert of a separate crime after deliberating in the same room, the contents of the room were not prejudicial.¹⁷ The Circuit Court for Giles County bluntly rejected both arguments. It held that defendants need not object to the location of jury deliberations before trial,¹⁸ and that the defendant's prior acquittal had no bearing on the case at hand.¹⁹ Further, the Giles County Circuit Court noted that, to many Americans, the Confederate flag represents “the attempt to perpetuate the subjugation of Black people through chattel slavery.”²⁰ Accordingly, the Gilbert County Circuit Court granted Gilbert a new trial.²¹

While *Gilbert* offers an egregious example of a setting prejudicing a jury verdict, its ruling displays the extreme end of a spectrum,

not a standard line for showing prejudice. The question remains after *Gilbert*: When does the location of jury deliberations cross the line and become prejudicial to the point that a new trial is necessary? Hopefully, the *Gilbert* ruling will function as a watershed moment for defendants seeking relief from jury verdicts originating in overtly racist environments. For this to occur, it is imperative that defense attorneys, jurors and citizens continue to “flag” such flagrant violations wherever they see them.

1. *Ham v. South Carolina*, 409 U.S. 524, 531–532 (1973) (Marshall, J. concurring in part and dissenting in part).
2. Lewis F. Powell, Jr. *The Right to a Fair Trial*, 51 AMERICAN BAR ASS'N J. 534 (1964).
3. Peña-Rodriguez v. Colorado, 137 S.Ct. 855, 869 (2017) (“where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.”); See also Harmann Singh, *Bias in the Jury Room: Where to Draw the Line*, HARVARD CIVIL RIGHTS–CIVIL LIBERTIES LAW REVIEW (Apr. 9, 2017), <https://harvardcrcl.org/bias-in-the-jury-room-where-to-draw-the-line/>.
4. *Id.*
5. *Id.*
6. *Lowrey v. State*, 197 P.2d 637, 653 (Okla. Crim. App. 1948) (“Courts cannot be too strict in compelling a rigid and vigilant observance of the provisions of the statutes designed to preserve inviolate the right of trial by jury and the purity of jury trials.”).

7. *State of Tennessee v. Gilbert*, No. M2020-01241-CCA-R3-CD, 2021 WL 5755018, at *1 (Tenn. Crim. App. Dec. 3, 2021).
8. *Id.* at *13.
9. Greg Huffman, *The Group Behind Confederate Monuments Also Built a Memorial to the Klan*, FACING SOUTH: A VOICE FOR A CHANGING SOUTH (June 8, 2018), <https://www.facingsouth.org/2018/06/group-behind-confederate-monuments-also-built-memorial-klan>.
10. *Id.* The original quote from Huffman's article accurately describes the Ku Klux Klan as a “terrorist group.” For the purposes of this article, the author shortens the quote to emphasize that the Klan's embodies white supremacy, but by omitting the quote in no way intends to diminish the fact that the Klan is terrorist group.
11. *Gilbert*, 2021 WL 5755018, at *13.
12. *Id.*
13. *Id.* at *16.
14. *Id.* at *15. The “over 43 years” estimation comes from the trial judge who says that the United Daughters of the Confederacy Room was the default jury room for his entire career. The jury foreman corroborated this, noting that during the 14 years of his employment at the Giles County Courthouse the United Daughters of the Confederacy Room had always been the default jury room.
15. *Id.* at *14.
16. *Id.* at *8.
17. *Id.* at *15.
18. *Id.*
19. *Id.* at *19.
20. *Id.* at *17.
21. *Id.* at *21.



STATE OF OHIO V. WRONGFUL CONVICTIONS

By Alireza Nourani-Dargiri

Last year, Ohio's Eighth District Court of Appeals awarded Michael Sutton and Kenny Phillips a new trial based on newly discovered evidence.¹ Sutton and Phillips were convicted in 2006 on several counts for attempted murder and resisting arrest during a hit-and-run shooting.² Sutton was sentenced to 46.5 years in prison and five years of post-release control.³ Phillips was sentenced to 92 years in prison—effectively life imprisonment.⁴ However, the Eighth District noted that these two men, convicted as minors, may have been imprisoned for more than a decade for a crime they did not commit.

In its unanimous opinion, the Eighth District underscored that the “total lack of physical evidence [used to convict the defendants] is extremely disturbing.”⁵ At the time of conviction, Officers Daniel Lentz and Michael Keane claimed—under oath and under penalty of perjury—that Sutton and Phillips shot at them after the hit-and-run shooting.⁶ In a case involving an alleged hit-and-run shooting, one expects *some* definitive evidence (i.e., bullet casings) at the crime scene linking Sutton and Phillips to the incident. Yet, “[n]ot a single gun, bullet hole, bullet casing, or evidence that any guns were present or fired by the defendants” was found at the scene.⁷

The only evidence the State recovered was a trace amount of gun residue from the front passenger side of Sutton and Phillips's car, and from the left hand of Phillips⁸. Phillips, however, is right-handed and was sitting in the rear driver's side seat.⁹ Tellingly, experts throughout the trial agreed that this residue did not and, more importantly, could not prove that either one ever possessed or fired a gun linked to the hit-and-run incident.¹⁰ Even if Phillips had sat in the front passenger side, experts testified that this amount of residue was so small that it could have been transferred to Phillips when he was transported in the police car.¹¹ Accordingly, expert witnesses for both

parties *agreed* that the “evidence [the State presented] did not prove that Phillips ever possessed or fired a gun.”¹²

The State had no evidence to present to the jury linking the two young men to the incident. The State had no direct evidence linking Sutton and Phillips to the alleged offense. The State had no evidence proving the defendants ever possessed or fired a gun. The State had no evidence to support the testimony of its police officers. Instead, the State attempted to bolster the officers' credibility to the jury to prove its case. The State lauded Lentz and Keane—two white police officers—as “highly decorated veteran



Cleveland officers,” even though these two officers may not have been as upstanding and flawless as the State purported them to be.¹³ On the other hand, the State described the two unconvicted, potentially innocent, Black teenage boys as liars, even though both “zealously, continuously and unequivocally maintained their innocence”¹⁴ from the start, insisting that “occupants of another car committed the shooting.”¹⁵

Recent definitive testimony now directly challenges the little evidence the State used to convict Sutton and Phillips.¹⁶ The Eighth District described how this new evidence “bolster[ed] the account” offered by Sutton and Phillips and presented “potentially exculpatory and impeaching information” that was not provided to the defense during their original trial.¹⁷ Moreover, the Court noted this potentially exculpatory evidence constituted a *Brady* violation—grounds to award the two a new trial.¹⁸

The Eighth District concluded its opinion with a discussion about the criminal legal system’s bias against Black youth. The court discussed “numerous studies confirm[ing] that African Americans are

disproportionately and often wrongfully convicted.”¹⁹ These studies include appalling statistics of innocent, Black defendants asserting they were being framed by police—the exact assertion Sutton and Phillips made.²⁰ Although there is no “one reason” for this discriminatory practice, the Court noted that the result is “approximately half of discovered individual exonerations” are Black.²¹

If found innocent and thereby wrongfully convicted, Sutton and Phillips will be included in a growing list of exonerees in Ohio. Notable examples over the past few years include: Isaiah Andrews (45 years wrongfully imprisoned);²² Ricky Jackson (39 years wrongfully imprisoned);²³ Raymond Towler (29 years wrongfully imprisoned);²⁴ Kwame Ajamu (28 years wrongfully imprisoned);²⁵ Charles Jackson (27 years wrongfully imprisoned);²⁶ Laurese Glover (20 years wrongfully imprisoned);²⁷ and Ru-El Sailor (15 years wrongfully imprisoned).²⁸ If the jury finds Sutton and Phillips innocent, the two will have one main thing in common with the exonerees: they were all innocent Black men.

1. *Ham v. SouthState v. Sutton*, 2021-Ohio-8542 (Mar. 18, 2021).
2. *Id.* at 27–28.
3. *Id.*
4. *Id.*
5. *Id.* at 104.
6. *Id.* at 97, 104.
7. *Id.* at 104.
8. *Id.* at 20, 105.
9. *Id.*
10. *Id.* at 105.
11. *Id.*
12. *Id.* at 21.
13. See Cory Shaffer, *No Felony Charge for Cleveland Police Officer Accused of Breaking Daughter’s Arm*, CLEVELAND.COM (Sept. 16, 2019, 3:30 PM), <https://www.cleveland.com/court-justice/2019/09/no-felony-charge-for-cleveland-police-officer-accused-of-breaking-daughters-arm.html>; Adam Ferrise, *Cleveland Police Officer Wrongfully Arrested Woman, Left Toddler with Man Accused of Child Abuse, Investigators Say*, CLEVELAND.COM (Jan. 13, 2021, 10:09 AM), <https://www.cleveland.com/metro/2021/01/cleveland-police-officer-wrongfully-arrested-woman-left-toddler-with-man-accused-of-child-abuse-investigators-say.html>.
14. *Sutton*, 2021-Ohio-854 at 29.
15. *Id.* at 74.
16. *Id.* at 40.
17. *Id.*
18. *Id.* at 84, 112, 156.
19. *Id.* at 144.
20. *Id.* at 99, 143–47.
21. *Id.* at 149.
22. Cory Shaffer, *Jury Finds Man Not Guilty in Retrial of Wife’s 1974 Killing in Cleveland*, CLEVELAND.COM (Oct. 27, 2021, 3:53 PM), <https://www.cleveland.com/court-justice/2021/10/jury-finds-man-not-guilty-in-retrial-of-wifes-1974-killing-in-cleveland.html>.
23. Ricky Jackson, *WITNESS TO INNOCENCE*, <https://www.witnesstoinnocence.org/single-post/ricky-jackson> (last visited 2022).
24. Raymond Towler, *INNOCENCE PROJECT*, <https://innocenceproject.org/cases/raymond-towler/> (last visited 2022).
25. Kwame Ajamu, *WITNESS TO INNOCENCE*, <https://www.witnesstoinnocence.org/single-post/kwame-ajamu> (last visited 2022).
26. Charles Jackson, *NAT’L REGISTRY OF EXONERATIONS*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5605> (last visited 2022).
27. Laurese Glover, *NAT’L REGISTRY OF EXONERATIONS*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4966> (last visited 2022).
28. Ru-El Sailor, *NAT’L REGISTRY OF EXONERATIONS*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5303> (last visited 2022).

A DECLARATION OF DEPENDENCE

FOR IOWA CIVIL RIGHTS COMMITTEES

By Makela Hayford

What does independent mean to you? In *Bribriesco-Ledger v. Klipsch*, Iowa's Supreme Court gave a surprising answer to Iowa's city civil rights commissions. Where one may be inclined to see independent commissions as insulated from both the political process and elected officials in turn, the Court saw independence as window-dressing. In overturning the trial court, Iowa's highest court declared that civil rights commissioners are removable by the elected officials they are supposed to hold accountable.

In this case, the mayor of Davenport, Iowa, fired Nicole Bribriesco-Ledger and three other commissioners shortly after learning that those commissioners discussed taking legal action against the city. Bribriesco-Ledger asserted that members of a city's civil rights commission could only be fired for cause, while the mayor claimed the commissioners served at the leisure of the executive and could be terminated at-will. The trial court agreed with Bribriesco-Ledger, as it was persuaded that part of what makes a commission "independent" is the members' employee status. The lower court held that the mayor, Frank Klipsch, only had the authority to remove committee members for cause. Therefore, because Bribriesco-Ledger was not fired for cause, her removal was unlawful.

On appeal, the Iowa Supreme Court reduced the fact pattern above to this sentence: "This appeal requires us to answer whether Davenport's mayor may remove an appointee from the Davenport Civil Rights Commission without cause." Immediately, the omission of relevant facts raises concerns about the Court's intent. The facts of this case are egregious, and they illustrate the type of situation from which an "independent" committee should be exempt. The Court spent no time on these facts, the implications of these facts or the way in which the law would be expected to interact with these facts. Ignoring the facts of a case is a poor way to deal with any ambiguity that arises in that case, as it allows a court to analyze the law in isolation, narrowing or broadening the scope of the words to achieve a desired outcome.

In reversing the trial court, the Iowa Supreme Court claimed that its interpretation of the law was the truest to the text of the 1990 Iowa Acts law. That law created civil rights committees in each city with a population over 29,000. Notably, the Court repeatedly cited former Supreme Court Justice Antonin Scalia's book, *Reading Law*, in conjunction with case law from the early 20th century as it declined to apply the first definition of "independent agency" from Black's Law Dictionary, a frequently updated publication of the 21st century. The Court finds this definition to be too broad for the purposes of this law.

Truth to the letter of the law is one matter, but truth to the spirit of the law is another. The Court asserted that the letter of Iowa law properly reflected the intended interaction of municipal law and civil rights commissions. The majority omitted almost any evaluation of supporting case law for her position, from Iowa or elsewhere. The closest the Court came to analyzing the merits of Bribriesco-Ledger's argument is to dismiss her assertion that members of "independent" committees may only be removed for cause. The Court employed whataboutism, citing the Iowa Code's provision that the independent commission has control over staff. The Court claimed no commission would have to specify this control if that commission was independent in the manner Bribriesco-Ledger asserted, so "independent" must not mean what Bribriesco-Ledger asserted. The Court applied a maxim of textual interpretation: inclusion of one term is an exclusion of all others. This is a maxim generally applied to lists, but here the Court applied it to portray a clarification as a contradiction.

Problematically, the Court neglected to mention that the mayor basically fired these members to preempt legal action. The Supreme Court ripped all context from this decision and insulated the law from the facts, then gave the law a brittle, textual skin. Proponents of this type of interpretation claim it is a principled approach to give certainty to legal outcomes. Here, the Court offers the panacea of more certain outcomes at the cost of context, willfully ignoring the negative externalities—chiefly the municipal authority being unaccountable to civil rights committee actions—caused by its decision. "The law is what it says," and one needs to look no further at the ramifications.

Those ramifications of the Court's decision will be felt most by citizens of Iowa's larger communities who cannot afford legal representation. Iowans who can afford representation can sue the city directly for civil rights violations, but this decision renders the civil rights committee toothless by de facto removing the commission's power to bring a lawsuit. As with the facts in this case, all a mayor or similar municipal

authority must do is fire the members of the civil rights committee that are planning to sue. They can then replace appointees at will, likely under the condition they do not pursue legal action against the city. If the new appointee defects, the municipal authority fires him or her, and the cycle begins anew. Ultimately, this power grants municipalities immunity from these civil rights committees. This is the context that the *Bribriesco-Ledger* court failed to consider in the majority opinion.

Judge Appel captured the urgency of this matter in his *Bribriesco-Ledger* dissent. His dissent contained the only full recounting of the facts from the trial court. He noted the dissociation of “independent” from its understood legal meaning by his colleagues and explained why their reasoning did not square with the history, intent or language of the statute the majority analyzed.

Judge Appel’s deep dive into the history of Iowa civil rights legislation is both illuminating for the reader and embarrassing for the majority. Where the majority applied a selective sort of textual argument, picking and choosing which statutes to analyze in concert with less frequently used definitions of “independent,” Judge Appel wrote a dissertation. He expertly cut through the veil of textualism to the matter at hand: These civil rights committees cannot function in claims against their own city if their members can be fired at will by the city’s elected officials. The mayor’s firings in anticipation of litigation were flagrant, and Judge Appel refused to allow his conduct to be cloaked as a mere “firing without cause” to an uninitiated reader.

Judge Appel noted that *Bribriesco-Ledger* is just one step further down the road for the court regarding municipal authority over “independent” committees. He cited multiple recent decisions showcasing this erosion, and the repercussions are summarized succinctly in his conclusion:

After today, unless there is a provision in the local ordinance protecting the “independence” of the commission,¹ a sincere local commission might consider disclosing to citizens in a candid brochure or other publication that it only has the resources to bring a handful of cases, that a [right-to-sue] letter is not available for violations of the local ordinance and that if the commission is considering bringing an action against the city itself, or

another politically connected entity, the mayor can fire the commissioners to stop it.²

Judge Appel dodged at least one inconvenient decision in *Seila Law LLC*, however: In that case, the Supreme Court ruled that the president has the authority to remove the head of the Consumer Financial Protection Bureau (“CFPB”), an “independent” agency, because the agency was led by one director instead of multiple commissioners. The Court claimed this organizational structure was incongruous with the Constitution and permitted the CFPB’s head to be fired. *Seila Law* was decided in 2020, so this case is representative of the Court’s current disposition on independent agencies.

While Judge Appel correctly noted that *Seila Law* did not overturn *Humphrey’s Executor*, the first Supreme Court case to recognize that heads of independent agencies can only be fired for cause, *Seila Law* limited the scope of protection for independent agencies. He also noted that *Morrison*, which held that “inferior executive agents” without rule making authority can be terminated on a for-cause basis, is closer to *Bribriesco-Ledger*’s position than the single director of the CFPB in *Seila Law*. Despite these caveats, *Seila Law* has undoubtedly eroded some long-standing federal precedents of independent agencies, and the Supreme Court may be amenable to further erosion when the opportunity presents itself.³ At least Justices Thomas and Gorsuch were prepared to overturn *Humphrey’s Executor* in *Seila Law*, and while it is unknown if Justice Coney Barrett would side with them, there is at least a pathway to a total overturn of *Humphrey’s Executor*, eliminating the concept of independent agencies in Federal

After today, unless there is a provision in the local ordinance protecting the “independence” of the commission,¹ a sincere local commission might consider disclosing to citizens in a candid brochure or other publication that it only has the resources to bring a handful of cases, that a [right-to-sue] letter is not available for violations of the local ordinance and that if the commission is considering bringing an action against the city itself, or another politically connected entity, the mayor can fire the commissioners to stop it.²

law. Thus, the Iowa Supreme Court’s majority opinion in *Bribriesco-Ledger* reflects the trend in federal law, and it is not a trend that favors Judge Appel’s dissent, no matter how well-reasoned, precise, and rooted in fact and precedent it is.

These trends away from independent commissions in Iowa and elsewhere will lead to more legal challenges for existing commissions, agencies, and otherwise. As seen here, an official like Mayor Klipsch may act egregiously in the face of legal action from an independent commission, and now there is no recourse for that official in the legal system. Sure, that official probably loses re-election. So what? The next person in the role will have the same free reign to avoid consequences as the last one.

In conclusion, independent agencies are viewed as blasphemy to constitutional originalists who see these agencies as an illegitimate fourth branch of government. This theory has become more popular in recent years, and it is all too easily expanded to municipalities. Municipal agents wield similar power to other executives over a smaller jurisdiction, enabling them to act swiftly and respond to the citizenry. Allowing mayors or similar units of municipal government to oust the commission preparing to sue them is a declaration of dependence, and that voice joins the growing chorus. States will see their independent agencies challenged in conjunction with the national trend, and these agencies will continue to be bent by jurists who see them as illegitimate until they finally break. That break must be done through individual challenges in each state, but a formal overturning of *Humphrey’s Executor* may open the floodgates. For those who have pushed to see these agencies brought back under the clear control of the executive branch, Iowa’s decision in *Bribriesco-Ledger* is a sweet victory. For those who may face discrimination in the future and find their complaints go unanswered by an agency that is no longer able to help them find justice, this so-called victory is unpalatable.

1. *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646 (Iowa 2021).

2. *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 668-69 (Iowa 2021).

3. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (Thomas, J. and Gorsuch, J. Concurring in Part and Dissenting in Part).

COMMENTARY: BEYOND DEBATE

MEANS BEYOND PROTECTION: COMMENTARY ON CONSENT AND CONSTITUTIONAL RIGHTS

By Lucas Allison

A racist hunch and a badge

Officer Nick McClendon pulled over Clarence Jamison for allegedly driving with an unsecured temporary tag on July 29, 2013.¹ This pretext quickly evaporated, however, and the real reason McClendon pulled Jamison over became apparent: McClendon stopped Jamison because he was a Black man driving a convertible Mercedes Benz. McClendon had a hunch and a badge, and he was not going to let Jamison's nettlesome constitutional rights get in his way. McClendon was going to search Jamison's vehicle with or without his consent.

After McClendon took Jamison's ID, registration and proof of insurance, he ran a background check on Jamison which immediately came back clear.² That did not satisfy McClendon, so he called the National Crime Information Center and asked the dispatcher to run a background check.³ While McClendon waited to

hear back from the NCIC, he walked back to Jamison's Mercedes and returned his paperwork.⁴

Jamison prepared to leave because he believed that the routine traffic stop had come to an end, but McClendon was not done with Jamison.⁵ McClendon had a hunch about the "vehicle."⁶ McClendon reached into Jamison's Mercedes through the passenger window and told him to "[h]old on a minute."⁷ McClendon then asked Jamison for consent to search his vehicle.⁸ When Jamison asked why, McClendon changed the subject.⁹ After discussing Jamison's work as a welder, McClendon asked Jamison to search his vehicle a second time.¹⁰ When Jamison asked why, McClendon told Jamison that someone reported him for transporting ten kilograms of cocaine in his car.¹¹ Jamison knew McClendon was lying, so he stood his ground and did not consent to a search.¹² McClendon asked



Jamison to search his vehicle a third time.¹³ Jamison told McClendon that there were no drugs in his car and that he did not consent to a search.¹⁴ McClendon lost his patience: he bent down, reached into Jamison's car again, suggestively tapped on the door panel, and told Jamison, "Come on man, let me search your car."¹⁵ Again, Jamison told McClendon no.¹⁶ McClendon was done asking and told Jamison, "I need to search your car because I got the phone call about 10 kilos of cocaine."¹⁷ Jamison finally relented and allowed McClendon to search his car.¹⁸

Jamison stood on the side of the road while McClendon searched his vehicle from top to bottom, inside and out, three times. When McClendon did not find anything suspicious, he called a K9 to the scene.¹⁹ When the K9 did not alert to drugs, McClendon was finally satisfied. All told, Jamison stood on the side of the road for 110 minutes,²⁰ and McClendon caused almost \$4,000 of damage to Jamison's vehicle.²¹ Jamison filed, among other claims, a § 1983 claim alleging unlawful seizure.²² McClendon filed a motion for summary judgment asserting a qualified immunity defense. Federal district court judge Carlton Reeves presided.

Qualified immunity: an insidious catch-22

Judge Reeves's opinion reads more like a scholarly article on qualified immunity than a legal opinion and it is a welcomed breath of fresh air in the otherwise stale and gloomy area of qualified immunity analysis. Judge Reeves does more than merely recite the facts, the relevant legal doctrine, and then apply doctrine to fact. Instead, Judge Reeves starts his opinion by reminding readers that Jamison's experience with McClendon is not unique.

Before reciting the facts of the case, Judge Reeves forces readers to confront the reality that Black Americans experience every day—that jaywalking, playing with a toy gun, looking like a suspicious person, selling loose cigarettes, passing a counterfeit \$20 bill, assisting a child with autism, walking home from work, eating ice cream in one's own apartment, sleeping in one's bed or car and driving over or under the speed limit can be life-threatening activities for Black Americans when police get involved. Reading the facts of the case with this in mind, Judge Reeves makes clear that we should be thankful Jamison, and not his estate, was a party to the lawsuit.

After placing Jamison's experience with McClendon in social context, Judge Reeves takes readers back to the Reconstruction Era to place § 1983 in historical context. Judge Reeves explains that Congress recognized the aid and comfort that state and local law enforcement provided the Ku Klux Klan,²³ and that it was Congress's purpose in passing the Ku Klux Klan Act (codified as § 1983) to put the federal government between the states and "We the People" as a guardian of our constitutional rights.²⁴ As Judge Reeves explains, however, the evolution of qualified immunity turned § 1983 on its head by imposing ever-increasing burdens on § 1983 plaintiffs. First, the Court held that § 1983 plaintiffs must prove that the officer acted in bad faith.²⁵ Next, the Supreme Court held that § 1983 plaintiffs must prove that the officer violated a clearly established constitutional right.²⁶ Later, the Supreme Court stated that qualified immunity protects all officers but "the plainly incompetent or those knowingly violating the law."²⁷ Finally, the Court added the language "beyond debate" to the clearly established requirement, forcing plaintiffs to prove that every reasonable officer would have known that his actions violated the plaintiff's constitutional rights.²⁸ The resulting formula is problematic, to say the least: No precedent = no clearly established law = no liability²⁹ = no justice for Black Americans.

Judge Reeves applies the formula to the facts

Judge Reeves granted McClendon qualified immunity because there was no clearly established law placing it "beyond debate" that McClendon reaching into Jamison's vehicle while waiting for the results of a second background check was an unconstitutional seizure. Some scholars have argued that Judge Reeves incorrectly applied qualified immunity, and missed the forest for the trees. Professor Orin Kerr argues, for example, that McClendon "[s]ticking his arm inside the car and patting down the inside of the door was obviously a search. It was governed by the [bright line] rule, long recognized in the Fifth Circuit as clearly-established law, that the officer needed some justification for that search—probable cause, or a warrant, a safety or special needs concern."³⁰

In the author's view, however, Kerr misperceives both the facts and Jamison's claim. Kerr mistakenly focuses on McClendon reaching into the car and patting on the door panel to ask Jamison for consent to search (the fourth time). These facts were not the basis of Jamison's fourth amendment claim, however. Jamison argued that McClendon reaching his arm into the vehicle to prevent him from leaving was an illegal seizure. Because Jamison based his claim

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on McClendon using his arm to seize him, the bright line rule for car searches was inapposite. This is precisely why McClendon’s waiting for the results of a second background check distinguished the case from clearly established law.

The cruel irony of this case is that McClendon’s racist hunch likely insulated him from liability. Do any of the readers really think that McClendon would have run a second background check to review Jamison’s criminal history if Jamison were white?

Facing hard truths

Judge Reeves makes clear that qualified immunity’s impact on society cannot be overstated. Any factual difference between instances of police abuse, no matter how trivial, is grounds for suspending one’s constitutional rights—especially if you are Black—to the whims of a police officer. Because of qualified immunity, Black Americans must fight for their constitutional rights case-by-case, detail by grueling detail. The author, Judges Reeves and millions of Americans realize that this is incompatible with the values of a free and just society. It is time for the Supreme Court to come to the same realization and abolish qualified immunity. What is required, however, is a Supreme Court willing to acknowledge that qualified immunity is a judicial manifestation of America’s problem with white supremacy. It is unclear whether the current Supreme Court is prepared to take on such a task.

1. *Jamison v. McClendon*, 476 F.Supp.3d 386, 392 (S.D. Miss. Aug. 2020). McClendon stated that Jamison’s temporary tag was “folded over where he couldn’t see it.” But Jamison’s temporary tag was secured with four screws, one in each corner. When McClendon was shown a picture of Jamison’s temporary tag during a deposition, the temporary tag was not creased. McClendon admitted that there were no creases on the temporary tag but argued that cardboard can fold without creasing or that someone may have ironed out the crease.

2. *Id.* at 393.

3. *Id.*

4. *Id.*

5. *Id.*

6. Compl., ¶ 31, *Jamison v. McClendon*, 476 F.Supp.3d 386 (S.D. Miss. Aug. 2020) (“The Defendant McClendon told Mr. Jamison that when he got a ‘hunch’ about a *vehicle*, that nine out of time times, his hunch proved true.”) (emphasis added).

7. *McClendon*, 476 F.Supp.3d at 393.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 394.

19. *Id.*

20. *Id.* at 395 n. 32. (Judge Reeves points out that, “In that amount of time, Dorothy and Toto could have made it up and down the yellow brick road and back to Kansas.”)

21. *Id.*

22. *Id.* at 395.

23. *Id.* at 397-399.

24. *Id.* at 402.

25. *Id.* at 403.

26. *Id.* at 404.

27. *Id.*

28. *Id.*

29. *Id.* at 408.

30. Orin Kerr, *Did Judge Reeves Reach the Correct Result in Jamison v. McClendon?* (Aug. 6, 2020). Available at <https://reason.com/volokh/2020/08/06/did-judge-reeves-reach-the-correct-result-in-jamison-v-mcclendon/>.

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