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ARTICLES

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LETTER FROM THE EXECUTIVE EDITOR

Dear Reader,

On behalf of the Editorial Board and the Print Division, I am proud to present the Fall 2021 issue of the *Columbia Undergraduate Law Review*'s Print journal. This issue marks the longest issue to date with seven full-length articles written by talented undergraduates from universities across the United States. The articles featured in this edition were carefully selected from a pool of over fifty submissions to offer nuanced, insightful perspectives on pressing domestic issues. Our editors, spread across the seven teams, are highly dedicated Columbia undergraduates passionate about both the law and the written word. I am incredibly excited to showcase these fantastic pieces and all the hard work of our incredible editors this semester:

Due Process from Lochner *to* Roe *and Implications for Originalism* by David Haungs analyzes the similarities and differences between the rulings in *Lochner v New York* and *Roe v Wade*, tracking the development of substantive due process. Huangs suggests that although the two cases are ultimately dissimilar in this regard, the more aggressive standard of judicial enforcement of unenumerated rights in *Roe* would necessarily legitimize the level of activism in *Lochner*, with ramifications for the shape of modern constitutional law.

Erosion of the Asylum-Seeker's Right to Due Process: Department of Homeland Security v Thuraissigiam *Revisited* by Shreya Shivakumar looks at judicial review through the lens of immigration. Shivakumar analyzes the extent to which the Court has historically afforded non-citizens, especially asylum-seekers, constitutional rights and examines the implications of the Thuraissigiam decision concerning future immigration policies.

Presidential Speech Acts in the Digital Age: The Illusion of Authenticity by Kayla McKeon discusses social media as a political device, focusing on the constitutional implications of former President Trump's revolutionary use of Twitter as a political tool. McKeon identifies two particular digital speech acts undertaken by Trump—blocking and deletion—and the resulting friction with the Public Forum Doctrine and the Presidential Records Act.

Reasonable Expectation of Privacy in an IP Address: The Tor Browser and Other Anonymization Measures by Jonathan A. Goohs Jr. dives into the intersection between different online anonymization measures aimed at increasing user-privacy and the legal expectation of privacy. Goohs' piece attempts to discern if a legal expectation of privacy

exists in a user's IP address in scenarios both where a user is and is not attempting to disguise their IP address.

Re-examining Hoffman Plastic Compounds v NLRB *under the Trump Administration* by Michelle Goldberg examines the ramifications of the ruling in *Hoffman Plastic Compounds v NLRB* on worker protection laws and the ways in which bureaucratic agencies enforce those laws. Goldberg argues that the *Hoffman* decision misrepresents immigrants as well as immigration and labor laws, and has implications for workplace conditions, court cases following *Hoffman*, and the criminalization of undocumented status.

The Impact of Penn Central Transportation Company v City of New York *on Regulatory Takings, Due Process, and the Fifth and Fourteenth Amendments* by Lucie Abele analyzes the Court's majority opinion and, in dissecting the precedents sets by the cases used in *Penn Central*'s holding, identifies the majority opinion's failure to consider the economic effects of its decision. Abele suggests ways in which *Penn Central* might have swayed the Court's decision to a more favorable outcome.

The Lasting Criminalization of Poverty: Court Fees, Fines, and "Implicit" Sentence Enhancements by Gina Feliz illuminates the extensive systems that impose criminal justice debt on indigent defendants which often go unaddressed by policy solutions aimed at reducing prison populations and combatting mass incarceration. Feliz argues that court fees, fines, and restitution entrap low-income Americans within the criminal legal system, resulting in increased time spent incarcerated, under carceral supervision, or beholden to the criminal legal system in some way.

Through this publication, the *Columbia Undergraduate Law Review* seeks to continue in its long-standing tradition of promoting breaking legal scholarship and cultivating intellectual debate among its readers, especially undergraduates. I sincerely hope you enjoy reading our Fall 2021 Print journal and encourage you to delve deeper into the pressing issues our writers present.

Sincerely,
Sarah Howard
Executive Editor, Print

MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must include a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

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Due Process from Lochner *to* Roe *and Implications for Originalism*

David Haungs | University of Notre Dame

Edited by: Anushka Thorat, Joyce Liu, Grayson Hadley, Niharika Rao, Meghan Lannon, Karun Parek, Ali Alomari

Abstract

Since the day *Roe v Wade* was handed down in 1973, it has been a target of conservative criticism on the grounds that it embraced an anti-democratic form of judicial activism previously ascendant in the early twentieth century. Drawing from a review of the literature in the fields of American legal history and jurisprudential theory, this article examines the development of the "substantive due process" doctrine from the Supreme Court's controversial 1905 *Lochner v New York* decision to *Roe* with the goal of evaluating the criticism of abortion jurisprudence as *Lochner*-esque. This analysis rejects that comparison, finding that *Roe*'s version of substantive due process rests on a fundamentally different conception of liberty than its historical analog by conceiving of liberty as a fundamental personal right, rather than a privilege contingent on the individual's relation to society. In this way, however, the *Roe* Court placed the right it identified even further outside the reach of legislatures, sustaining the thrust of the critique made against the Court. The piece then concentrates on the implications for the conservative criticism which motivated this inquiry. Ultimately, it suggests that the new originalist movement which now promulgates a conservative jurisprudence possesses a distinct and substantive interpretive framework by which it might reject *Roe* without resorting to an unconditional posture of judicial restraint. As a result, as originalist scholars gain renewed interest in protecting economic liberties, their jurisprudential approach could revitalize *Lochner*-esque results without compromising their long-standing opposition to the Court's abortion jurisprudence.

I. Introduction

Few decisions of the Supreme Court of the United States have drawn the ire attracted by the 1905 ruling in *Lochner v New York*,[1] a case which set an "anti-precedent": an example which no reasonable, mainstream ruling can emulate.[2] The *Lochner* Court found that a New York law restricting the time for which bakery employees could work was a violation of an implicit right to contract.[3] It found this freedom in the Due Process Clause of the Fourteenth Amendment, which promises, in relevant part, that no state shall "deprive any person of . . . liberty . . . without due process of the law."[4] The decision was consistent with early-twentieth-century *laissez-faire* economic policies which opposed government intervention into the economy. This conclusion caused contemporary legal thinkers, like the dissenting Justice Oliver Wendell Holmes, to criticize the case as "decided upon an economic theory which a large part of the country does not entertain."[5] Due to its low status in the canon of constitutional law, *Lochner* can easily be trotted out for comparison with other controversial decisions.

One such decision arrived in 1973. In *Roe v Wade,*[6] the Supreme Court held that a woman's choice to procure an abortion in the first trimester of pregnancy is protected from state interference by a recently recognized constitutional right to privacy.[7] From the end of the first trimester until the point of fetal viability, the *Roe* Court only permitted regulations of abortion that were reasonably related to maternal health. After viability, the state could ban abortion entirely based on its interest in fetal life. Subsequently, the Court in *Planned Parenthood v Casey* upheld what it considered to be the central holding of *Roe*—that the viability line served as the barrier between permissible and impermissible prohibitions on abortion.[8] Additionally, it modified the pre-viability analysis laid out in *Roe*, eliminating the trimester framework and holding that no state may impose an "undue burden"[9] on the right to abortion at any point

before viability. Since then, the Court has wrestled with the contours of the undue burden test,[10] but it has not reconsidered the essential *Roe–Casey* viability line. While the context in which the Supreme Court analyzes the right to abortion has no doubt evolved since *Roe*, this seminal decision still receives the loudest objections and best embodies the version of judicial activism present in the 1960s and 70s that is pertinent to this article's focus.

The parallels with *Lochner* are clear. The Court took on a politically divisive topic and struck down democratically enacted laws in favor of a newly extended unenumerated right found in the Due Process Clause's guarantee of liberty.[11] By 1973, the idea that this clause could serve as a front for non-procedural rights had come to be called, perhaps oxymoronically, "substantive due process."[12] Critics of the doctrine of substantive due process, and the *Roe* decision more specifically, have compared the case to *Lochner* since the former decision's release. Chief Justice William Rehnquist, in dissent, argued: "The result [Roe] reaches is… closely attuned to the majority opinion of Mr. Justice Peckham in [*Lochner*]."[13] And thus, conservative critique of the *Roe* majority has since focused on the impropriety of judicial usurpation of the powers of democratically-elected legislatures. "Conservative" is not a legal term but is used here to describe those who disfavor the Court's ruling in *Roe* but might be open to protecting economic liberties. Rehnquist continued, "*Lochner* and similar cases applying substantive due process standards . . . will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies."[14] Therefore, the criticism of the *Roe* Court's supposed overreach relied on a comparison between the due process analysis applied in *Lochner* and *Roe*.

To determine the salience of this comparison, one must first note which aspect of the Lochner decision conservative critics such as Chief Justice Rehnquist found so objectionable. David Strauss, a professor of law at the University of Chicago, notes that despite the

near-universal condemnation of *Lochner*, "there is no consensus on why it is wrong."[15] He lists several possibilities: perhaps the Court was wrong in determining that "liberty" as used in the Fourteenth Amendment included freedom of contract, perhaps social concerns regarding excessive labor should have overridden this right, or perhaps—as Chief Justice Rehnquist seemed to suggest in dissenting from *Roe* by comparing it to *Lochner* on grounds of modesty—the question of how to best create social and economic policy should be left to the legislature.[16] This last concept is referred to as "judicial restraint," as opposed to "judicial activism."[17] It is primarily the degree of similarity between the two cases concerning this concept, the level of aggression with which the Court acted in striking down legislation, that determines the legitimacy of the conservative critique of *Roe*.

A study of this aspect of *Roe* is particularly relevant given the renewed interest in revising abortion jurisprudence displayed by the current Supreme Court. On May 17, 2021, the Court granted a writ of certiorari in *Dobbs v Jackson Women's Health Organization*, agreeing to hear and decide the case.[18] The case concerns a Mississippi law that prohibits abortions performed on women who are more than fifteen weeks pregnant, except in cases of a medical emergency or severe fetal abnormality.[19] The petition seeking a writ of certiorari presented three questions for the Court to decide, two of which would have allowed it to issue a narrow ruling for Mississippi on the grounds of standing or by clarifying the boundaries of its recent decisions.[20] Instead, the Court's grant was limited to the question of "whether all pre-viability prohibitions on elective abortions are unconstitutional,"[21] signaling a willingness to reconsider the foundational *Roe–Casey* viability line. Notably, the law does not merely test the pre-viability undue burden standard but instead seeks to proscribe abortion outright before fetal viability. Therefore, it violates the portion of *Roe*'s holding that remained untouched by *Casey* and its progeny, so an analysis of the earlier

decision is relevant to *Dobbs* even though *Casey* superseded other aspects of *Roe*. A key swing vote, Chief Justice Roberts, recently dissented from the Court's decision to overturn state same-sex marriage bans to *Lochner* in *Obergefell v Hodges*,[22] appealing to "the need for restraint in administering the strong medicine of substantive due process."[23] His opposition to judicial activism could become a significant determinant in the Court's decision in *Dobbs*.

In this article, I am concerned with the extent to which the Court has historically protected the contract and abortion rights, not with whether the Constitution should be read to contain these rights in the first place. I, therefore, assume that each liberty is indeed constitutionally protected. Under these strong assumptions, my analysis is relevant to the history of legal theory underlying these decisions, not their merits. Under this framework, I will argue that the comparison between *Lochner* and *Roe* is flawed because it does not sufficiently recognize the differences between due process doctrines in the early and late twentieth century. Nevertheless, the nature of this error is such that the *Roe* Court's application of substantive due process was even *more* aggressive than that of the *Lochner* Court. Therefore, the blueprint *Roe* outlined for testing whether legislation violates the Fourteenth Amendment is, in fact, more activist than that established in *Lochner*. As the conservative critics suggest, it then follows that endorsing *Roe* requires, at the very least, endorsing the *Lochner* Court's vision of judicial power in striking down duly enacted laws. The more aggressive judicial review envisioned by the *Roe* Court, however, leaves open the question of whether one may endorse the result of *Lochner* while rejecting *Roe*'s perception of the judicial role. Such a result might seem to suggest hypocrisy—a merely arbitrary method of picking and choosing when to exercise judicial restraint. However, upon examining in more detail the various schools of thought in the originalist legal philosophy ascendant in conservatism, I conclude that it is indeed possible to reach such a result through a principled jurisprudence that focuses

more on ascertaining the semantic meaning of the Constitution than on reflexively embracing judicial restraint.

II. Inconsistencies in Early- and Late-Twentieth-Century Due Process Jurisprudence

The question of whether the license granted to the judiciary in *Roe* necessarily implies the revitalization of *Lochner*, as Chief Justice Rehnquist suggested, depends first on the degree of similarity in the reading and application of the Due Process Clause in each case.

Nowhere in Lochner's majority opinion nor any individual justice's opinion was there mention of "substantive due process," a term which was not used in the judiciary for another thirty-five years.[24] However, the Lochner Court recognized unenumerated rights which provided citizens a substantive liberty—the freedom to contract—rather than affording merely procedural protections, such as the right to a jury trial. As a result, its approach may still be classified as "substantive due process" as it will be here. The *Lochner* and *Roe* Courts' versions of substantive due process possess two compelling similarities.

First, each majority opinion argued for the recognition of the liberty it identified—contracts or abortion—which operated distinctly at the level of the individual. Writing for the Court in *Lochner*, Justice Peckham declared, "The general right to make a contract in relation to his business is part of the liberty of the *individual* protected by the Fourteenth Amendment of the Federal Constitution."[25] Writing for the *Roe* Court, Justice Blackmun similarly declared, "This right of privacy . . . founded in the Fourteenth Amendment's concept of *personal* liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[26] Thus, each decision was based on the foundation that some especially "individual" or "personal" liberty was at stake in

the case.

Secondly, each majority opinion took care to avoid placing the proposed liberty beyond all possible government intervention. *Lochner*'s "right to purchase or to sell labor" was only protected "unless there are circumstances which exclude the right,"[27] and the *Roe* Court likewise acknowledged "that some state regulation in areas protected by [the right to abortion] is appropriate."[28] In each case, the Court seemed to anticipate and address criticism of its exercise of judicial review by limiting the precedent it set, clarifying for skeptics that the right asserted by a party in each case was not absolute. However, this point of similarity also serves as the cornerstone of the difference between the two cases. This difference was the extent to which each decision balanced the liberty at stake with competing state interests.

In the past few decades, such balancing tests determining the permissibility of state action have been formalized into levels of scrutiny. If a certain liberty derived from the Due Process Clause requires "strict scrutiny," the most exacting level of scrutiny in constitutional law, then laws that infringe on this liberty must be narrowly tailored to serve a compelling government interest in order to be upheld.[29] This was the bar *Roe* applied to post-viability abortion bans, a feature which later decisions, particularly *Casey*, have left untouched.[30] On the other hand, *Lochner*'s influence faded long before the development of formalized tiers of scrutiny,[31] so this convention is not helpful in comparing the degree of deference each decision gave to the government.

Nevertheless, the plain language of the opinions themselves, analyzed for their philosophical underpinnings, reveals a clear difference. While each decision paid lip service to the idea that the unenumerated rights they recognized had limits, the *Lochner* Court's reasoning permitted much more state regulation in areas protected by those rights. The *Lochner* Court's balance between individual liberties and government action was expressed in the holding: "If

the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment," where these police powers "relate to the safety, health, morals and general welfare of the public."[32] The focus of the analysis proposed by the *Lochner* Court, then, turned on the legitimacy of the "police powers" the state claimed to be exercising.

Writing in the *Texas Law Review*, Joshua Hawley analyzed the evolution of police powers by stating, "The police powers doctrine involved courts in reviewing the substantive reasonableness of legislation in order to protect a general value of liberty."[33] From Hawley's proposition, it is apparent that the "reasonableness" of legislation depends on the interplay between an individual and the public. This is because Hawley suggests that "the liberty the police powers doctrine protected was a social liberty."[34] This characterization of liberty as "social" by Hawley should not be read to contradict the *Lochner* Court's characterization of that same liberty as "individual." Liberty was, in fact, possessed by a single person; however, it was understood to relate that person to their society, and therefore contained a social dimension. This understanding of the type of liberty the Due Process Clause protects has natural a synergy with the list of police powers that could outweigh liberty interests. Combining Hawley's analysis of one's obligation to society with the wording of the majority opinion produces an intelligible principle: an individual's liberty, as a social entity, is inherently tied to the welfare of the public, and may therefore be limited by appropriate exercises of police powers when such welfare reasonably demands it.

This principle is consistent with the Lochner Court's approach. The Court found that since no public safety interest was reasonably related to the statute restricting freedom of contract, the exercise of police powers was prohibited. One must therefore imagine that if the restriction in question had been based on any

reasonable public purpose, the Court would have upheld it as a necessary interference with the right to contract.

The police powers doctrine did not persevere to the time of the *Roe* decision, at least not in name; it was never mentioned in any opinion in *Roe*. Instead, a different principle had developed by the time *Roe* was released: the doctrine of fundamental rights. These were articulated by the Court through the standard, "Where certain fundamental rights are involved . . . limiting these rights may be justified only by a compelling state interest . . . and legislative enactments must be narrowly drawn."[35] This is the language of strict scrutiny. On its face, this language already seems to suggest a stronger protection of court-recognized liberties than *Lochner*'s. The nature of fundamental rights is confirmed by an analysis of the doctrine's application to *Roe*: "The individual had a right to make her choices there—within, by her own lights—and then to play them out in public without state interference."[36] The difference between the two types of substantive due process again revolves around the relation of the individual to the public. While in the *Lochner* framework the citizen is viewed as intimately connected to the state, the *Roe* framework imagines the individual as their own sovereign within the private sphere. This is why the *Roe* Court established a different bar for the permissibility of state infringements on liberty: a *compelling* state interest rather than mere reasonability.

III. The One-Directional Implication from *Roe* to *Lochner*

The *Lochner* and *Roe* Courts maintained different philosophies of liberty, and as a result, diverged in their prescriptions for balancing liberty with state interests. The differences in their approaches are correlated with disparate practical consequences. Examining the impact of the theoretical shift from the police powers doctrine to the fundamental rights jurisprudence, Victoria Nourse confirms this phenomenon, noting in the *California Law*

Review, "Today, fundamental rights invoked under the Due Process Clause are presumed fatal in fact, but in 1905 when *Lochner* was decided, rights claims were common but rarely fatal."[37] The modern substantive due process jurisprudence has, as one would predict from the reasoning of its most famous decision, been hostile to those government actions that it subjects to such strict scrutiny. This hostility far outpaces that of even the *Lochner* Court, which, as Nourse notes, rarely struck down duly enacted laws.

Nourse's analysis also synthesizes well with the intuition mentioned above regarding the relationship between the individual and the state with respect to liberty. The principles I derived from each decision—and analysis of the doctrines upon which they rested—imply that the *Lochner* Court viewed liberties as more socially dependent than did the *Roe* Court. Nourse takes this general principle much farther, however, writing, "Today, fundamental rights trump the general welfare, whereas in 1905, under the police power of the state, the general welfare trumped rights."[38]

While Nourse's general argument about the increased weight the *Lochner* Court gave to public interest is insightful, the absolute statement that general welfare trumped rights seems to be a mischaracterization. The simplest proof, after all, comes from the *Lochner* decision itself, which is now criticized for *failing* to allow the general welfare to trump individual rights. And in analyzing that freedom of contract case, the Court did not start by looking for an excuse to squash the rights of the plaintiff; it demonstrated first that an "individual"[39] right existed and then checked to see whether some reasonable exercise of police power justified its infringement. Nourse's argument can be complicated by viewing the difference in the two Courts' approaches not as a dichotomy in which differing interests were absolutely superior, but rather as a conflict over how much significance one's connection to society holds in the analysis of their personal rights. This approach is more faithful both to the principles derived from each case and to the differences in due

process doctrines that Nourse recognizes.

Nevertheless, it is evident that *Lochner*'s standard was more restrained than that of *Roe*. Therefore, under the assumption that substantive due process is a legitimate means to invalidate laws contravening liberties of privacy and contract, a principled jurist who endorses the holding of *Roe* may not object to *Lochner* as judicial policy-making. *Roe*, to the extent that it strengthens judicial review, implies the validity of *Lochner*'s weaker version of judicial review. Therefore, conservative critics of *Roe'*s supposedly *Lochner*-esque activism are justified—not because of the decisions' similarities in applying substantive due process, but because of their differences. Those differences, particularly the *Lochner* Court's greater emphasis on the social dependence of individual liberty and the *Roe* Court's adoption of a fundamental rights jurisprudence, establish the one-directional implication from embracing *Roe*'s level of judicial activism to embracing *Lochner*'s.

IV. On Whether it is Also True That *Lochner* Implies *Roe*

Of course, the converse of the implication just established is not necessarily true. If accepted, the looser standards of *Lochner v New York* would not inherently bind the Court to accept the more stringent standard of *Roe v Wade*. In theory, this would allow *Roe*'s originalist critics to endorse *Lochner* while maintaining their firm opposition to *Roe*.

An originalist jurist could adopt the *Lochner* Court's balance of judicial activism and restraint and decide that the state's interests in either fetal life or maternal health give it a reasonable basis to exercise its police powers to restrict abortion however it desires. However, a hypothetical critic could argue that this solution reeks of the same arbitrary policy-making that characterizes the *Roe* decision. In the *Texas Law Review*, Geoffrey Stone suggests that such selective application of the notion of judicial neutrality

is common for ideologues in power in the judiciary.[40] Stone noted that while the exercise of judicial restraint was a hallmark of conservative jurisprudence during the liberal ascendancy, this quality instead defined progressive jurisprudence at the time of *Lochner*'s resolution.[41] Stone defines this ever-evolving approach to judging, which alternatively condemns and condones judicial activism at times of one's weakness and power, respectively, as "selective judicial activism."[42] I argue that this term can be applied to the restraint argument in the progressive resistance to Lochner, embodied by Justice Oliver Wendell Holmes's dissent,[43] just as it was clearly present in the conservative resistance to *Roe* and Chief Justice Rehnquist's dissent.[44]

However, in the *Brooklyn Law Review*, G. Edward White argues cogently against the narrative that Holmesian opposition to *Lochner* was a predecessor to the restraint-based critiques of the substantive due process doctrine which came later in the century.[45] To White, Holmes's dissent was based not on an overriding belief in judicial restraint but on the futility of limiting police powers in any principled method. This belief, White argues, led him to a plausible and coherent jurisprudence in which majoritarian interests could simply never be outweighed by judicially invented liberties.[46]

While White's focus on the police powers jurisprudence in analyzing Lochner is commendable, he does not sink the argument that judicial restraint, like the type which would later be taken up by conservative jurists, motivated Holmes. In fact, Holmes's dissent had some degree of anti-majoritarian sentiment, as he noted that the predominant status held by the *laissez-faire* economic theory could not be made the rule of law for the entire country.[47] Furthermore, the distinction that White draws between reflexive judicial restraint and the substantive philosophy he attributes to Holmes is unconvincing. If, as White argues, Holmes sought to empower the legislature to exercise the nation's police powers, then the Justice was acting in no notably different manner than a judge who believes that

certain decisions are always better left to the legislature. Deference is deference, and White's distinction is one of degree, not kind. Therefore, it is legitimate to point out that each side of the judicial debate has, at times, been affected by selectivity in its beliefs regarding the proper amount of judicial activism.

The inconsistent, hypocritical ambivalence typified by selective judicial activism cannot be described as a true philosophy of jurisprudence; it is merely a *normative* method of advancing one's political interests. It is worth considering, therefore, since the possibility of justifying *Lochner* but not *Roe* has not yet been foreclosed, whether there is some legitimate philosophy of judicial review which could achieve this end.

But why would such a result be desirable to originalists? After all, as discussed above, the result of *Lochner* has traditionally been anathema to the entire legal community.[48] However, in some originalist circles, the consensus is breaking. For example, Randy Barnett, a law professor at Georgetown University Law Center, argues in favor of *Lochner*, asserting that the right of contract is contained within the meaning of the Fourteenth Amendment and that the judiciary, therefore, has a duty to enforce it against the government.[49] Notably, Barnett reaches this conclusion by rejecting the emphasis on judicial restraint which characterizes the criticism of *Roe* dealt with thus far. He specifically singles out Justice Holmes's dissent, which he describes as "extreme in its deference to legislative discretion."[50] Clearly, then, at least part of the broader originalist legal movement which has fought against *Roe* is nevertheless interested in revitalizing the protection of economic liberties by leaving behind arguments about judicial restraint. This interest is not merely academic. In 2018, Justice Gorsuch, one of the Court's newest originalist justices, authored a solo dissent arguing for the protection of contracts from state interference.[51] Though that case turned on the Contracts Clause[52] rather than on due process, it nevertheless appears that a turn away from judicial restraint is well

underway in conservative legal thought.

V. Brands of Originalism and *Lochner's* Potential to Find a Home in its Semantic Variants

In revealing the conservative legal movement's shift from judicial restraint to active jurisprudence, Stone leaves open the question of what philosophy that movement, thrust into the spotlight in the 1980s[53] with the need to transform its rule of restraint into a substantive jurisprudence, might have adopted—and whether or not this new brand of originalism, while still hostile to *Roe*, could justify *Lochner*.

Unsurprisingly, scholarship uses the same time period that defines the ascendancy of the broader philosophy of originalism to differentiate between "new" and "old" originalism, terms referred to by Thomas Colby and Peter Smith.[54] The old originalism, obsessed with constraining judges to avoid their interference with democratic majorities, used history to tie the hands of judges. It did so by prohibiting them from straying outside the confines of the original intent of the drafters of the laws.[55] This relatively underdeveloped interpretive theory would accomplish the main goal of conservative legal thinkers at the time—to encourage judicial restraint. While it is by no means obvious that prioritizing original intent accomplishes the goal of judicial restraint, this relation holds in context. The cases which advocates of original intent criticized—cases like *Roe*—largely concerned personal liberties which were indicative of the progressive attitudes of the 1960s and 1970s, including sexual freedom.[56] It is fair to infer that the drafters of the Fourteenth Amendment did not intend to strike down laws preventing practices that would not be socially accepted for another century. As a result, in the context of its heyday, old originalism, or original intent, did indeed coincide with judicial restraint.

Though it still went by the name "originalism," the theory

developed by new originalists in response to the achievement of a conservative Supreme Court majority focused on a different piece of the original creation of a law. The only limit which new originalism places on judges is, "fidelity to the written Constitution as it was understood by those who adopted it, and nothing more."[57] Notice that this new originalism places the emphasis on the original *public understanding* of the *meaning* of a law, not the original *intent* of its *writers*. This shift in the focus of interpretation from the subjective inner thoughts of a few people to the objective meaning the law would rightly convey to the public represents a serious theoretical shift. It allows much more room for decisions to recognize rights set forth in the meaning of the Constitution's text, even if they weren't specifically intended by its framers.

Another way to view the difference between original intent—old originalism—and original public meaning—new originalism—is articulated by Ronald Dworkin. He distinguishes between "'semantic' originalism, which insists that the rights-granting clauses" be read according to what their drafters actually *wrote*, and "'expectation' originalism, which holds that these clauses should be understood to have the consequences that those who made them *expected them to have*."[58] In other words, semantic originalism focuses on the original meaning of a text, whereas expectation originalism focuses on the subjective hopes of a text's drafters.

Dworkin is certainly no originalist himself.[59] But despite this, I argue that his categories map onto those discussed by Colby and Smith. A jurist following Dworkin's semantic originalism, prioritizing what framers *wrote*, would primarily be concerned with examining the text of the Constitution rather than its drafters' secret, internal hopes. After all, these expectations and intentions, if they did not make it into the text of the law, are meaningless to the semantic originalist. Therefore, the interpretive task that Dworkin's semantic originalist must perform is exactly the same as what Colby and Smith's new originalist must do—put themselves in the context

of the enactment of a law or constitutional provision and decipher its objective meaning within that context. Contrast this to the method of Dworkin's expectation originalist, who I argue is identical to Colby and Smith's old originalist. An expectation originalist will examine what a writer of a law or clause did *not* include in the law's text, and yet believed the law would do. This is the same as examining the intent of the writer.

Having demonstrated the interchangeability of Colby and Smith's terms with Dworkin's, I will now use "old originalist" and "new originalist" exclusively to refer to those who emphasize original intent and original public meaning, respectively. An example can show the difference between the camps. Suppose the Speaker of the House of Representatives introduces a constitutional amendment in response to the coronavirus pandemic which states: "All citizens shall have the right to cast votes by mail if a biological threat endangers in-person voting." Perhaps, in her speeches promoting the amendment, the Speaker makes clear that she intends it to apply only to current and future pandemics. Now, suppose that the amendment passes, and in one hundred years, the Supreme Court considers the case of a county whose sole ballot box has been the site of frequent and unpreventable attacks by a large, newly-discovered species of animal. The state and county legislatures, in fear of voter fraud, refuse to offer mail-in voting. An old originalist, deferring to the judgment of the legislatures, might note the intent of the Speaker was limited to viral, disease-bearing biological agents and rule for the state. However, a new originalist, concerned primarily with the amendment's text, might rule against the state by placing themselves in the context of the twenty-first century and finding that contemporary understanding included animal attacks within the meaning of the phrase "biological threat."

As the hypothetical illustrates, the two variants of originalism allow for differing approaches to judicial restraint and activism. Since the old originalist reflexively exercises judicial restraint, they would

not uphold *Lochner*, even if its judicial activism is less aggressive than *Roe*'s. However, this principle does not bind the new originalist. Dworkin distinguishes such an originalist specifically regarding the Constitution's "rights-granting clauses,"[60] including the Due Process Clause. If the true meaning enacted by this clause would include the freedom to contract, a new originalist would enforce that contract liberty to the extent they believe the Constitution requires it—which could potentially be enough to endorse the result in Lochner. This would be true even if they believe that Roe errs by recognizing a non-existent constitutional right. In fact, Colby and Smith suggest that it is "entirely plausible, under [new originalism], to claim that the original meaning of the Constitution embraces unenumerated economic rights."[61] Therefore, it is also plausible that new originalism could provide a principled route through which conservative critics of *Roe v Wade* could uphold *Lochner v New York*, meaning that the implication from *Roe'*s degree of judicial activism to *Lochner*'s only goes one way.

A final potential objection is that no new originalist—one who sees fidelity to the words of the Constitution as paramount—could engage with the doctrine of substantive due process in the first place.[62] After all, the Due Process Clause forbids only those deprivations of liberty which occur *without* due process of the law,[63] which seems to indicate that the clause does not prohibit any procedurally sound deprivations of liberty. Therefore, the idea that the clause is a font of unenumerated substantive rights that cannot be violated even by a duly enacted law seems absurd. But for practical purposes, the Court does not seem prepared to abandon it. In 2010, it was given the option to do so in *McDonald v Chicago*, where litigants offered the Privileges and Immunities Clause to the Court as an alternative way to enforce the federal right to keep and bear arms[64] against the states. The Privileges and Immunities Clause, which provides that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,"[65] may

be a more plausible source of unenumerated rights than the Due Process Clause.[66] Yet, despite acknowledging the deficiencies in the substantive due process doctrine, the conservative majority in McDonald chose to rely on it in its ruling.[67] It seems that despite originalist antipathy towards the substantive due process doctrine, it will not disappear anytime soon, and so it remains the appropriate doctrine to examine in determining cases about fundamental rights. Therefore, despite this objection, the analysis of *Roe* and *Lochner* presented here retains its relevance due to the persistence of the substantive due process doctrine.

VI. Conclusion

This analysis began from the conservative charge that the decision in Roe and its use of substantive due process reflected the reckless judicial activism of the anticanonical, prototypically unrestrained Lochner decision. While the majority opinions in each case shared a framework of individual liberties competing with state interests, they are ultimately dissimilar. The cases had different approaches to the relation between liberty and society due to their respective reliances on the distinct doctrines of police powers and fundamental rights. However, this difference was not fatal for the conservative criticism; in fact, the more aggressive standard of judicial enforcement of unenumerated rights in *Roe* would necessarily legitimize the level of activism in Lochner, which reviewed legislation with greater deference.

The implication from *Roe*'s degree of judicial activism to Lochner's does not necessarily go both ways, as the weaker Lochner standard would not compel an anti-*Roe* originalist to endorse or condemn both decisions. While any jurist could, of course, choose just the right level of activism to get to *Lochner* without Roe, a more principled, substantive theory of interpretation would provide a better justification for such a stance. New originalists could be posed

to do just that. New originalists look to the semantic public meaning of the text of a law or provision, in contrast to old originalists, who focus on the intent of the framers in order to produce a judiciary that is systematically biased towards restraint. Understanding the Due Process Clause as containing a freedom to contract but not a right of abortion, as derived from a right to privacy, could produce a result completely opposed to current jurisprudence. A controversial staple of modern constitutional law could vanish, and the Court could revive one of its most reviled decisions more than a century after it was issued.

[1] *Lochner v New York*, 198 U.S. 45 (1904).
[2] David A. Strauss, "Why was *Lochner* Wrong?," The *University of Chicago Law Review* 70, no. 1 (2003), 373.
[3] *Lochner v New York*, 198 U.S. 45 (1904), 45.
[4] U.S. Const Amend. XIV, § 1.
[5] *Lochner v New York*, 198 U.S. 45 (1904), 75 (Holmes, J., dissenting).
[6] *Roe v Wade*, 410 U.S. 113 (1973).
[7] *Griswold v Connecticut*, 381 US 479 (1965).
[8] *Planned Parenthood of Southeastern Pennsylvania v Casey*, *Governor of Pennsylvania*, 505 U.S. 833 (1992).
[9] Ibid, 874.
[10] See, e.g., *Whole Woman's Health v Hellerstedt*, 579 U.S. ___ (2016), and *June Medical Services, LLC v Russo*, 591 U.S. ___ (2020).
[11] *Roe v Wade*.
[12] Ibid, 167.
[13] Ibid, 174 (Rehnquist, C. J., dissenting).
[14] Ibid.
[15] Strauss, "Why was *Lochner* Wrong?"
[16] Ibid.
[17] Ibid, 378.
[18] *Dobbs, MS Health Officer, et al. v Jackson Women's Health, et al*., No. 19-1392.
[19] Mississippi Legislature, "Gestational Age Act" (House Bill No. 1510, Mississippi, 2018).
[20] "Petition for a Writ of Certiorari," *Dobbs, MS Health Officer, et al. v Jackson Women's Health, et al.*, No. 19-1392 (2020), i.
[21] Ibid.
[22] *Obergefell v Hodges*, 576 U.S. 644 (2015).
[23] Ibid, 681 (Roberts, C. J., dissenting).
[24] G. Edward White, *The Constitution and the New Deal* (Harvard University Press, 2006), 239.

[25] *Lochner v New York*, emphasis added.
[26] *Roe v Wade*, 153, emphasis added.
[27] *Lochner v New York*, 53.
[28] *Roe v Wade*, 153.
[29] *Reed v Town of Gilbert*, 576 U.S. 155 (2015).
[30] See especially *Planned Parenthood of Southeastern Pennsylvania v Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992).
[31] See especially *West Coast Hotel Company v Parrish*, 300 U.S. 379 (1937).
[32] *Lochner v New York*, 53.
[33] Joshua D. Hawley, "The Intellectual Origins of (Modern) Substantive Due Process," *Texas Law Review* 93 (2014), 278.
[34] Ibid, 280.
[35] *Roe v Wade*, 153, internal quotations omitted.
[36] Hawley, "The Intellectual Origins of (Modern) Substantive Due Process," 300.
[37] Victoria Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97, no. 3 (2009), 752, internal quotations omitted.
[38] Ibid.
[39] *Lochner v New York*, 53.
[40] See especially Geoffrey R. Stone, "Selective Judicial Activism," *Texas Law Review* 89, no. 6 (2011), 1425 for quantitative analysis of the usual majority's ideology.
[41] Ibid, 1425.
[42] Ibid, 1423.
[43] *Lochner v New York*, 75 (Holmes, J., dissenting).
[44] *Roe v Wade*, 171 (Rehnquist, C. J., dissenting).
[45] G. Edward White, "Revisiting Substantive Due Process and Holmes's Lochner Dissent," *Brooklyn Law Review* 63, no. 1 (1997), 125.
[46] Ibid.

[47] *Lochner v New York*, 75 (Holmes, J., dissenting)
[48] Strauss, "Why was *Lochner* Wrong?," 373.
[49] Randy E. Barrett, "After All These Years, *Lochner* Was Not Crazy—It Was Good," *Georgetown Journal of Law and Public Policy* 16, no. 2 (2018), 437–443.
[50] Ibid, 437.
[51] *Sveen v Melin*, 584 US __ (2018).
[52] U.S. Const. art. I, § 10, cl. 1.
[53] Again, see Stone, "Selective Judicial Activism," 1425 for more quantitative precision regarding the dates and margins by which a conservative resurgence struck the Court.
[54] Thomas B. Colby and Peter J. Smith, "The Return of *Lochner*," *Cornell Law Review* 100 (2015), 583–589.
[55] Ibid, 584.
[56] See, e.g., *Griswold v Connecticut*, 381 US 479 (1965), and *Eisenstadt v Baird*, 405 U.S. 438 (1972).
[57] Colby and Smith, "The Return of *Lochner*," 598, quoting Keith Wittington, "Is Originalism too Conservative?," *Harvard Journal of Law and Public Policy* 29 (2011), 37.
[58] Dworkin, Ronald. "Comment," in *Matter of Interpretation*, ed. Antonin Scalia and Amy Gutmann (Princeton University Press, 1997), 115–127, emphasis added.
[59] See generally Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Oxford Press, 1999).
[60] Ibid, 116.
[61] Colby and Smith, "The Return of *Lochner*," 601.
[62] Recall that this paper assumes the validity of substantive due process.
[63] U.S. Const. amend. XIV, § 1.
[64] *McDonald v Chicago*, 561 U.S. 742 (2010).
[65] U.S. Const. amend. XIV, § 1.
[66] See generally *McDonald v Chicago*, 561 U.S. 742 (2010), 803-858 (Thomas, J., concurring).

[67] Ibid, 742.

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Erosion of the Asylum-Seeker's Right to Due Process: Department of Homeland Security v Thuraissigiam *Revisited*

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Abstract

Immigration law has become increasingly politicized in recent decades, strongly divided along partisan lines and influenced by the turning tides of public opinion. The recent surge of migrants over the U.S.-Mexico border and refugees fleeing humanitarian crises have exposed longstanding cracks in the U.S. immigration system. The recent Trump administration was the subject of harsh criticism from immigrants' rights advocates and the media after evidence began to surface showing inhumane conditions in Immigration and Customs Enforcement (ICE) detention centers.[1] Images of teary children being separated from their families at the border, then indefinitely detained in cages where they are prone to abuse and human rights violations, rightfully evoked concerned outrage from the American public. In light of these failings, the Supreme Court was forced to confront whether it is legal to allow the executive branch such expansive authority over immigration policy with minimal judicial oversight. In the landmark case *Department of Homeland Security v Thuraissigiam*,[2] the Court upheld the constitutionality of limited judicial review given to non-citizens facing expedited removal orders, and, in doing so, allowed executive power in the immigration courts to function freely without restraint. This article considers the extent to which the Court has historically afforded non-citizens constitutional rights and examines the implications of the *Thuraissigiam* decision concerning future immigration policies. Drawing upon legal precedent concerning the rights of habeas corpus and due process for immigrants, this paper argues that *Department of Homeland Security v Thuraissigiam* has contributed to the steady erosion of the asylum-seeker's due process rights and has stripped the judicial branch of its ability to check executive power within

the immigration system. This paper concludes by identifying potential reforms to ensure fair outcomes in immigration cases and restore independence to the American immigration system.

I. Introduction and Background

Administrative Process for Seeking Asylum

An asylum-seeker is a non-citizen who arrives at a port of entry without proper documentation and requests protection from another country.[3] If these criteria are met, the individual is entitled to a "credible fear interview" conducted by a U.S. Customs and Border Protection (CBP) asylum officer. The high-stakes credible fear interview determines whether the individual will obtain withholding of removal and protection under the Convention Against Torture (CAT) and acts as the first hurdle to asylum-seekers in the United States.[4] During a credible fear interview, the burden of proof lies with the asylum-seeker's ability to show a "significant possibility" of past persecution or a well-founded fear of persecution in the country of origin based on race, nationality, political affiliation, and other factors.[5]

In order to allow asylum-seekers the greatest chance for a hearing to review their claims, the credible fear threshold was intended to be set low. Asylum officers have an "affirmative duty" to elicit the necessary information to make a credible fear determination.[6] Asylum-seekers who successfully establish credible fear are referred to a full hearing with an Immigration Judge (IJ) to review their claims. If the asylum officer makes a negative credible fear determination, the applicant can request that an IJ review the decision. If the IJ affirms, the avenues for judicial review are extremely limited: the individual is usually ordered for expedited removal without an administrative hearing back to his or her home country.

Overview of Department of Homeland Security v Thuraissigiam

In 2017, while fleeing to the United States to seek asylum,

Vijayakumar Thuraissigiam was arrested by immigration officials at the southern border of Sri Lanka. Thuraissigiam is a Tamil, an ethnic minority and historically-oppressed group in Sri Lanka, who sought protection fearing hostility because of his ethnicity. He claimed that he was abducted and assaulted, but could not identify his assailants, their motives for the attack, or whether the Sri Lankan police would protect him in the future.[7] Because he did not sufficiently prove that these events were connected to any "protected characteristics," CBP officials determined that Thuraissigiam did not face a credible fear of persecution in his native country and placed him in expedited removal proceedings.[8] His negative credible fear determination was affirmed by an IJ shortly thereafter. Thuraissigiam filed a *habeas* petition—a request for a federal court to review the legality of his incarceration. Thuraissigiam asserted that he was denied his right to habeas review of his expedited removal decision in a violation of the Suspension Clause, which protects the writ of *habeas corpus* (the Great Writ) except in cases of rebellion, invasion, or when the public safety requires it.[9] The District Court dismissed his petition due to lack of subject matter jurisdiction, but the Ninth Circuit reversed, finding that 8 USC § 1252(e)(2) did, in fact, violate the Suspension Clause.10 The Ninth Circuit held that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provision regarding the restricted judicial review of expedited removal orders was unconstitutional because it wrongly suspended habeas corpus rights and denied due process to asylum-seekers.[11]

The Supreme Court granted certiorari at a critical turning point when the Trump administration used executive powers to create sweeping changes and restrictions to the immigration system.[12] *Thuraissigiam* was one of several cases in which the Court, consisting of a newly-conservative majority of Justices, attempted to clarify the complexities of immigration policy while carefully setting a legal precedent for immigration cases in future decades. The Court reversed and remanded, holding that 8 USC § 1252(e)(2)

does not violate the Suspension or Due Process Clauses.13 Justice Samuel Alito, writing for the majority, said that Thuraissigiam's request for another chance of gaining asylum was well outside the scope of the Great Writ.[14] It is unclear why the majority chose to rule on due process, considering that legal question was not initially raised in this case, but the decision reinforced that non-citizens who are unlawfully on American soil are only entitled to what Congress defines as due process.[15]

II. Legal Precedent Regarding Immigrants' Rights

Seeking Asylum in the United States: A Right or a Privilege?

Article Fourteen of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, established the right to "seek and to enjoy in other countries asylum from persecution."[16] Subsequently, the right of asylum was recognized by most nations and integrated into international human rights law. The district and circuit courts have grappled with determining whether and to what extent asylum-seekers have statutory, regulatory, and constitutional rights; however, the Supreme Court has rarely ruled on these issues since the "finality era," resulting in a lack of clarity surrounding the asylum-seeker's protected rights leading up to *Thuraissigiam*.

When the Court has ruled specifically on the right to seek asylum in the United States, it has interpreted it as a "privilege" that can be limited at the government's discretion.[17] Additionally, the plenary power doctrine ensures that Congress retains control over the immigration system while limiting the judicial branch's interference. The ruling in *United States ex rel. Knauff v Shaughnessy*[18] reinforced that "It is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of Government to exclude a given alien." Through these

holdings, the Court established the principle that non-resident aliens outside of the United States who do not hold constitutional rights are generally unable to challenge their exclusion or obtain judicial review of their expedited removal decision.

Immigration and Habeas Corpus

The principle of *habeas corpus* is a centuries-old legal procedure intended to protect against unlawful and indefinite imprisonment. The Suspension Clause in Article One, Section 9, Clause 2 of the Constitution ensures that the government honors habeas corpus and provides justification for detaining or imprisoning an individual, except in case of extraordinary circumstances.[19] The *Thuraissigiam* court failed to consider over sixty years of legal precedent from the "finality era," a sixty-year time period from 1890 to 1950 during which Congress made immigration decisions final and limited judicial review to the fullest extent. Therefore, the only cases granted judicial review in this period required it under the Suspension Clause. During the finality era, the Court repeatedly exercised habeas review over immigration cases similar to *Thuraissigiam* regarding deportation or exclusion.

A prominent finality-era case, *Nishimura Ekiu v United States*[20] was a challenge to the Immigration Act of 1891 in which the Court ultimately interpreted the Act as precluding only judicial review of executive fact-finding. In her scathing dissent of Thuraissigiam[21], Justice Sonia Sotomayor demonstrates that the Ekiu Court knew a complete elimination of judicial review of immigration decisions would violate the constitutional right to habeas corpus. As a result, in numerous later cases beginning with *Yamataya v Fisher*,[22] the Court allowed judicial review of procedural due process claims.
In the oral argument of *Thuraissigiam*,[23] Justice Sotomayor invoked the finality-era cases to demonstrate that asylum-seekers have long-held habeas rights to "challenge errors of law" and insisted

that *Thuraissigiam*'s situation was analogous to numerous Chinese exclusion cases. She was joined by Justice Elena Kagan, who pointed out that respondents in the finality cases were guaranteed habeas review despite a lack of credible fear of persecution or torture. Justices Sotomayor and Kagan agreed that it was neither logical nor just to deny Thuraissigiam, an asylum-seeker who claimed a mistaken negative credible fear determination, the right to habeas.[24] Despite their sound reasoning, the majority opinion advanced a strict constructionist view that the right to habeas corpus "as it existed in 1789" only encompasses securing relief from unlawful imprisonment.[25] The majority concluded that the finality-era decisions were not based on the Suspension Clause, but on the federal habeas statute, which allows non-citizens to request habeas review to review whether their detainment was in violation of federal laws.[26] The Court, maintaining that the finality-era cases were not applicable to Thuraissigiam's case because he claimed a violation of the Suspension Clause, decided that Thuraissigiam's challenge to his removal order was far beyond its scope.[27] Justice Alito advanced a deeply flawed interpretation that the writ of habeas corpus, in this case, was being used to create broader rights for non-citizens, which the founders did not intend. Thuraissigiam sought habeas relief on the grounds that the asylum officers had applied an overly strict legal standard, resulting in his wrongful determination of negative credible fear; because he failed to identify the men who attacked him in Sri Lanka, he was determined to lack a significant possibility of persecution. By framing the habeas petition as a desperate attempt to obtain asylum, the majority undermined the purpose of the Great Writ—to ensure government accountability in administering the rule of law—and effectively eliminated a crucial check on the executive branch, destroying the limited countervailing power that asylum-seekers depended upon throughout history to safeguard their liberties.

The Immigrant's Right to Due Process

The Court's 1886 holding in *Yick Wo v Hopkins*[28] affirmed that non-citizens are entitled to the due process protections of the Fourteenth Amendment "without regard to differences of race, of color, or of nationality." Almost a century later, in *Mathews v Diaz*,[29] a case concerning a five-year permanent residency requirement to gain eligibility for Social Security benefits, the Court reaffirmed that non-citizens are entitled to the Fifth and Fourteenth Amendment's due process rights regardless of immigration status. However, the Court also held that differential treatment between citizens and non-citizens is not necessarily unconstitutional and that Congress has the authority to determine benefits for these classes.

This ruling opened the door for Congress to provide constitutional protections to non-citizens based on the extent of their "affinity" to the United States, a mystifying standard determined by an individual's term of residency, personal ties, and other markers of connection to the country.[30] For example, the Court decided in *Kwong Hai Chew v Colding*[31] that lawful permanent residents who continue to be present in the United States are entitled to due process of law under the Fifth Amendment. It extended this principle to those attempting to enter the country in *Landon v Plasencia*,[32] a case where a permanent resident attempted to enter the United States while smuggling aliens across the border: the defendant had the right to due process because of her immigration status and personal connections to the United States. The *Mathews* decision and following cases regarding immigrant constitutional rights set the precedent that a non-citizen's right to due process is based heavily upon her immigration status. Moreover, the decision effectively set the possibilities of judicial review over immigration policy to be extremely narrow and reaffirmed Congress's plenary power in this area.

III. Implications of Department of Homeland Security v Thuraissigiam

Court Backsliding on Due Process Rights

In 1996, Congress utilized its unfettered control over immigration policy to pass the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a law that tightened immigration enforcement and fast-tracked millions of immigrants to deportation.[33] One of the IIRIRA's sweeping changes was creating the term "admission" to replace "entry," therefore denying protections to immigrants who were not inspected and legally admitted to the United States. The Court, attempting to clarify the distinction between entry and admission, held in *Zadvydas v Davis*[34] that "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." Following this decision, a non-citizen who had physically entered but was not legally admitted into the United States would be entitled to due process of law before the government deprives them of their substantive rights.

While the *Thuraissigiam* Court held that it had no authority to review the respondent's habeas claim, it did rule on and further restrict due process for asylum-seekers. The majority held that even though *Thuraissigiam* was apprehended 25 yards inside the U.S. border, his situation could not be defined to have "effected an entry" and thus he was only entitled to his statutory rights provided by Congress.[35] Since the Court maintained that *Thuraissigiam* did not enter the country, his due process claims were determined to be unreviewable because only the "procedure authorized by Congress suffices for 'due process as far as an alien denied entry is concerned.'"[36] Justice Samuel Alito's opinion uses the term "admission" as a valid substitute for "entry," a seemingly harmless

change that instead endangers the rights of millions of unauthorized non-citizens in the United States. Justice Alito's deliberate choice of terminology allowed for any non-citizen without proper documentation to be deported, given that they are unable to prove at least two years of residency in the United States, regardless of their personal ties to the country or contributions to their community.[37] This decision denied fundamental liberties and constitutional due process rights to undocumented immigrants who previously entered U.S. territory but were not legally admitted into the United States, putting pressure on a group already under attack due to the recent proliferation of anti-immigrant sentiments and nativist rhetoric.

Dangers of Congress's Plenary Power Over Immigration

Congress holds plenary power (exclusive authority) to regulate immigration, making the process impervious to judicial oversight except in limited cases of denied applications or removal orders.[38] The plenary power doctrine promotes efficiency in a process prone to large caseloads and ensures uniformity to make the system easier to navigate for newly arrived immigrants. However, the longstanding plenary power doctrine is especially dangerous to asylum-seekers who often flee their home countries fearing deprivation of life, liberty, and property as a result of persecution. Providing executive officers with free rein to exclude asylum-seekers from the United States and denying asylum-seekers the right to judicial review allows for erroneous immigration decisions.

Nevertheless, since the late nineteenth century, the Court has repeatedly deferred to Congress to create immigration policy and the executive branch's authority to enforce it. Signs of expanding executive authority over immigration are evident in cases as early as *Chae Chan Ping v United States*,[39] also known as the Chinese Exclusion Case, in which the executive branch gained the sovereign power to exclude foreigners at its discretion. Subsequent cases

challenging restrictive immigration laws helped develop consular nonreviewability, a doctrine related to the plenary power which ensures that visa decisions cannot be subject to judicial review, and further empowered the executive branch.[40] In *Fong Yue Ting v United States*,[41] the Court ruled that the courts must respect the plenary power doctrine and uphold Congress's immigration policies. In his dissent, Chief Justice Melville Fuller expressed that the "unlimited and arbitrary power" of Congress to regulate immigration that the Court so readily affirmed was "incompatible with the immutable principles of justice, inconsistent with the nature of our Government, and in conflict with the written Constitution."[42]

Despite such concerns, the Court, continuing to concede power to Congress and the executive, slowly began withholding immigrants' political rights. The holding in *Wong Wing v United States*[43] interpreted deportation as a sovereign right and not as a punishment, therefore exempting non-citizens denied entry from due process protections and allowing Congress to deport without a jury trial. Because Congress is granted the exclusive power to determine immigration policy, lawmakers incorporate federal court-stripping statutes in key legislation. For example, a 1996 revision to the IIRIRA eliminates judicial review of any deportation order that is based on a criminal offense as specified in the Act and places restrictions on remaining avenues for judicial review.[44] Court-stripping is used strategically by Congress to further weaken the judicial branch and prevent its interference in immigration matters. This process has cycled on for decades, resulting in a complicated legal framework heavily affected by political motives. It is evident that a just and stable immigration system requires separation from the volatility of shifting presidential administrations and the swinging political pendulum that characterizes modern-day American politics.

Potential Remedies

Congress should consider immigration reform measures to improve efficiency in resolving cases, increase accountability to reach fair immigration decisions, and prevent overreaching executive power. An important first step would be to guarantee the right to counsel in immigration proceedings by establishing a public defender's office for immigration offenders. Eighty-four percent of ICE detainees, as well as more than half of individuals in immigration court proceedings, are currently unrepresented.[45] Courts have determined that aliens have a right to counsel but not at the government's expense. As a result, many asylum-seekers, especially those who are unaccompanied minors, non-English speakers, or come from low-income backgrounds, are at an inherent disadvantage because they are forced to navigate the complex immigration system with no legal assistance. On the other hand, immigrants with legal representation are much more likely to show up in court and have higher rates of success in gaining relief from removal.[46] Creating a public defender system for individuals in immigration court would save taxpayer funds in the long term by expediting cases and streamlining the administrative process.

Pushing for a more complete overhaul of the current system, immigrant advocates have proposed the creation of an independent, Article I immigration court. Currently, immigration courts fall under the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice. This means that both the Immigration Judge who presides over hearings and the prosecutor who seeks to convict immigration offenders both ultimately answer to the Attorney General, creating a conflict of interest that disadvantages individuals in immigration proceedings.[47] This framework provides many opportunities for political manipulation from the executive that range from limiting the judges' discretion to reversing judges' rulings completely.[48] Creating an independent

immigration court would remedy systemic issues like backlogs of cases and chronic under-funding that have plagued the EOIR for decades. To minimize political influence and fix persistent flaws threatening the integrity of the EOIR, Congress should prioritize reforms to restore independence to the immigration court system.

IV. Conclusion

In Federalist No. 78, Alexander Hamilton advocated for judicial review as a method to strengthen the judiciary and defend essential rights of the people, declaring that the judiciary is the "least dangerous [branch] to the political rights of the Constitution."[49] Examining the Court's rulings on immigration cases such as Thuraissigiam proves otherwise: the Court has repeatedly used its *judgment* to diminish the fundamental rights of asylum-seekers. A thorough analysis of the holding in *Thuraissigiam* reveals that the Court deviated from legal precedent and backtracked on the issues of who is entitled to not only habeas corpus rights but also due process of law. The Court's actions will negatively impact future asylum-seekers to the United States, as well as unauthorized residents whom the *Thuraissigiam* Court essentially declared hold no guarantee to due process. In practice, this will leave undocumented immigrants vulnerable to expulsion from the United States, no matter how strong their ties to the community, if they cannot prove over two years of U.S. residency.[50] Moreover, consular nonreviewability and the plenary power doctrine threaten to ensure that when an immigrant enters our country, her fate is at the mercy of the executive branch, and she has limited rights to challenge her exclusion in the courts. An immigrant himself, Alexander Hamilton was joined by other founding fathers in advocating for an open immigration system consistent with the American ideals of opportunity and equality to provide immigrants with equal rights as citizens. The frightening and practically Orwellian plight that immigrants face today certainly

cannot be what Hamilton nor the other framers of the Constitution envisioned would await those who sought refuge on our nation's shores.

This article began by examining legal precedent regarding rights for immigrants to the United States, including the right to seek asylum, request for a writ of habeas corpus, and demand due process of law. A thorough study of the finality-era cases, Chinese Exclusion Cases, and other landmark Supreme Court rulings elucidated the following: (1) The Supreme Court has granted and rescinded legal rights to asylum-seekers throughout history, (2) The Court has repeatedly ruled in a manner which "handcuffs the judiciary" and allows Congress unchecked power over immigration, and by extension, the immigrants whose lives hang in the balance, and (3) The majority, deviating from strong legal precedent in Thuraissigiam, exploited Constitutional freedoms to deny due process of law to asylum-seekers and unauthorized non-citizens, thereby perpetuating the war on immigration.[51] Although the judiciary was intended by Constitutional framers such as Hamilton to be just, impartial, and immune to political pressure, recent decisions like *Thuraissigiam* have created a rift between the conservative and liberal justices and served to deny essential rights to asylum-seekers. Ensuring the right to legal counsel in immigration courts is integral to safeguarding the liberties of asylum-seekers as they navigate a complex system that was subtly designed for their failure. Restoring independence to the immigration courts, along with implementing judicial overview of final immigration decisions and chipping away at Congress's plenary power, could potentially alleviate the endless injustices caused by the current immigration framework. It is necessary to revive the immigration system with the values of justice and liberty on which it was established and enable it to render fair decisions while preserving the dignity and well-being of America's asylum-seekers.

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Presidential Speech Acts in the Digital Age: The Illusion of Authenticity

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Abstract

Human communication is constantly shifting as advancing technologies enhance our ability to instantaneously connect with each other and the broader world. Social media currently plays a central role in the transformation of social relations, societal trends, and communicative practices. This article discusses the use of social media as a political tool to connect with the general population, garner political support, and disseminate crucial information. More specifically, this piece concentrates on the constitutional implications of former President Trump's revolutionary use of Twitter as a political tool. Because there exists no longstanding history of presidential speech on social media, Trump's testing of the executive branch's power via Twitter will come to define the constitutional limits of digital presidential communication. The focus of this article's analysis is on the presidential use of two particular digital speech acts: blocking and deletion. Public Forum Doctrine challenges Trump's ability to block citizens on Twitter, suggesting that he is in violation of First Amendment rights. Similarly, the Presidential Records Act opposes presidential Tweet deletion in mandating that all presidential records—including Tweets—must be preserved in their unaltered state for posterity. Next, this paper examines how Trump's Twitter use has revolutionized American politics, arguing that digital activism has become a valid form of civic engagement in response to Trump's controversial Tweets. Finally, this piece postulates that the public's perception of Trump's digital persona as authentic and transparent garners misguided support from his followers.

I. Presidential Speech Acts in the Digital Age: Blocking and Deletion

As the first president ever to habitually use social media to make official governmental announcements to citizens, former President Donald Trump has revolutionized and politicized communication on social media platforms, particularly on Twitter.1 Trump's use of Twitter has drawn much criticism and praise, raising several legal and constitutional questions due to the communication method's unprecedented, unpredictable nature.[2] In fact, Kristina T. Bodnar, an attorney advisor at the United States Department of Housing and Urban Development,[3] argues that Trump's Twitter presence "exposes ambiguities in constitutional law because his posts test the power of the executive branch."[4] With no history or tradition of presidential speech on social media, Trump's testing of the executive branch's power via Twitter will come to define the constitutional limits of digital presidential communication.

According to Byung-Chul Han in *The Transparency Society*, social media links individual users so closely together that they often experience a sense of constant scrutiny and unsettling intimacy with other users.[5] Trump capitalized upon this intimate, unsettling relationship with other social media users, using it as a powerful political tool to garner trust and support. He Tweets his thoughts out to the world as if on a whim, sometimes without proofreading or fact-checking.[6] The unpredictability of Trump's online persona has drawn widespread public intrigue, criticism, and concern.[7] In some instances, such public opinion has led users to reply in large droves to Trump's Tweets, demonstrating active participation in live dialogue with a typically inaccessible political figure.[8] Social media alone presents citizens with this unprecedented ability to connect intimately and spontaneously with their president—a new opportunity which Trump seems to encourage for supporters and curtail for critics.

The continuous evolution of social media platforms routinely creates new, complex, and troublesome digital speech acts. The term "speech acts" refers to the ways in which the performative nature of speech imbues speakers' words with agency and the capacity to cause tangible effects in the material world.[9] Twitter, in particular, allows users to engage in two problematic speech acts: blocking and deletion. Both speech acts may have developed as viable responses to the feelings of inescapable intimacy with other users and utter lack of privacy on social media as described by Han.[10] When other users begin to engage in critique, blocking and deletion may provide relief from any sense of discomfort and vulnerability garnered by public criticism by digitally distancing a user from critics. Trump himself engaged in both of these acts during his presidency: he blocked his critics to avoid intimacy and deleted Tweets to protect his mistakes from public scrutiny.

The first variety of speech act, deletion, poses its own unique set of problems.[11] In normal, physical social interactions, one cannot just retract statements without the possibility of leaving a permanent, lasting impact on those who heard the statements. Typically, speech persists in the memories of those who heard it. Yet, in the digital realm, one can simply delete statements without consequence as long as others did not digitally witness those statements.[12] Thus, deletion online reduces the accountability inherent in traditional social interactions, granting users greater control over other users' memory and, in effect, their perceptions of that user's online persona.[13] Deletion, like blocking, poses an efficient strategy to handle the discomfort caused by digital critics by protecting the deleted content from further scrutiny.

Jessica Roberts, former editor-in-chief of University of Illinois College of Law's *Journal of Law, Technology, and Policy*,14 indicates that Trump deleted over 620 Tweets from the beginning of his presidency to 2019.[15] In fact, he deleted and reposted a Tweet on the first day of his presidency because it contained a

misspelling of the word "honored."[16] Though this Tweet deletion seems inconsequential, in other cases, many of Trump's Tweets have contained information of significant historical and political consequence.[17] For example, Jessica Roberts points out a Tweet in which then-President Trump could potentially be seen as threatening nuclear action against North Korea. In this Tweet, he wrote, "North Korean leader Kim Jong Un just stated that the 'Nuclear Button is on his desk at all times.' Will someone from his depleted and food starved regime please inform him that I too have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works!"[18] Deleting a Tweet such as this could have much more significant implications than deleting a Tweet because it contains a misspelling. The aforementioned Tweet could have sparked a nuclear war and deleting it would limit the general public's access to the only historical record of the threat that prompted a nuclear attack.[19]

Blocking, the other variety of speech act, poses a perfect solution to the problem of critics by effectively silencing them and limiting their access to the blocker's content.[20] With a click, the blocker effectively dismisses the blocked person and their unwanted opinions, demolishing discomfort alongside with the blocked user's ability to engage with their content. The blocker can skip the difficulty of ignoring someone else while still having to hear that person's opinion by, in a matter of seconds, preventing that person from speaking to them online ever again. Thus, any further direct confrontation with a critic and his or her objectionable opinions cannot occur.

Trump has blocked several users after they expressed unfavorable opinions of him or his policies. In fact, seven individuals filed a lawsuit against the former President for blocking them on Twitter.[21] One of the plaintiffs, Rebecca Buckwalter, was blocked by Trump after replying to Trump's Tweet in which he implied that fake news could have cost him the White House; she wrote, "To

be fair you didn't win the WH [White House]: Russia won it for you".[22] The other six plaintiffs each experienced similar backlashes from Trump after replying to his Tweets with critical remarks.[23] In blocking these critics, Trump revokes his digital intimacy with them and limits their ability to further scrutinize his future digital activity.

As previously discussed, presidential use of these two digital speech acts, deletion and blocking, problematizes their performative agency in the material world in new ways.[24] Critics have often admonished Trump for his use of these features on Twitter.[25] To understand the complex and unique legal problems posed by these two digital speech acts, one must first recognize how online platforms operate in the context of regulations on governmental and presidential speech.[26] To begin, I will use the Presidential Records Act to explore the issues posed by the deletion of presidential Tweets. Then, I will use the Public Forum Doctrine to situate blocking as a presidential speech act within various regulations on government speech. I will finish with an analysis of Trump's digital political strategy and explain its unique effects on American politics.

Tweet Deletion and the Presidential Records Act

Within 24 hours of assuming the presidency, then-President Trump had already deleted his first Tweet, violating the Presidential Records Act (PRA).[27] The Presidential Records Act requires the public preservation and protection of all records created by the president and their administration throughout the duration of their presidency.[28] The PRA also places the onus of archiving and preserving presidential records of "administrative, historical, or evidentiary value" on the president, allowing the [resident to exercise unchecked discretion concerning which records they preserve.[29] In 2018's *Knight First Amendment Institute at Columbia University v Trump*, the United States District Court of the Southern District of New York contended that the National Archives and Records Administration informed government officials in the Trump administration that the Tweets on Trump's personal account,

@realDonaldTrump, constitute official presidential records and thus require protection under the Presidential Records Act.[30]

In order to address the theoretical implications of the PRA on Trump's Tweets, one must assess whether those Tweets hold "administrative, historical, or evidentiary value."[31] Since then-President Trump announced policies and new appointments and even threatened other countries with nuclear retaliation through Twitter, his Tweets undeniably held "administrative, historical, or evidentiary value."[32] Roberts goes even further, contending that all "Tweets are presidential records, and their preservation is of paramount interest to historians, voters, and the American public" regardless of their content.[33] The preservation of these Tweets poses several other legal and jurisdictional questions.[34]

Although several measures exist to oversee the president's use of discretion in preserving their presidential records (such as obtaining an archivist's permission and submitting a "disposal schedule" to Congressional Committees),[35] none of these measures actively prevent the president from disposing of records.[36] Currently, there exists no process for judicial review of the president's handling and disposal of presidential records because the courts have deemed it "inappropriate."[37] The judiciary branch may shy away from implementing such a process due to fears of violating the separation of powers by subjecting the president to the power of the judiciary. In essence, if the president deletes a Tweet, there is no reversal: what is done is done, regardless of whether that Tweet ought to have been preserved according to the PRA. Though the judiciary branch may hesitate to implement a process to ensure compliance with the PRA, Roberts captures the gravity of preserving Trump's Tweets, writing, "the physical and financial security of the nation could be at the whim of two thumbs and a message that could be deleted at any time".[38]

Due to the significant impact of Trump's Tweets on American history, politics, and financial security, the lack of institutional

procedures to ensure that Trump preserves all of his Tweets in accordance with the PRA provokes uncertainty.[39] Roberts notes the complicated nature of defining the role of private social media platforms such as Twitter in preserving the [resident's activity.[40] Former President Obama navigated these difficulties efficiently during his presidency, attempting to set a precedent for preserving presidential speech when he vacated office.[41] Unlike Trump who used both his personal Twitter account and the official presidential Twitter account to communicate with the public, Obama solely used the official @POTUS account to disseminate information.[42] Upon vacating office, Obama wiped the @POTUS account clean and transferred the account's data to an account run by the National Archives and Records Administration, @POTUS44, to comply with the PRA.[43] Trump could ensure PRA compliance by adhering to the precedent set by Obama, but his use of a personal Twitter account in addition to the official presidential account may further complicate the process.

II. Potential Solutions to the Problem of PRA Compliance

In order to comply with the PRA, the National Archives and Records Administration may try to follow the precedent set by Obama by transferring data from both the @POTUS and @realDonaldTrump accounts into a new account which they will preserve and manage.[44] Yet there exists no obligation for Twitter to preserve a presidential Twitter account.[45] As a private entity, Twitter can exercise complete discretion in deciding whether and how to preserve a presidential account.[46] Twitter's private ownership of accounts on its servers allows it to delete accounts at will.[47] The federal government still must rely on Twitter for the preservation of presidential records via an account managed by the National Archives and Records Administration, which, without any legitimate institutional oversight, does not ensure these records will ultimately

be preserved. The combination of this lack of institutional oversight on private platforms such as Twitter and the president's unchecked discretionary power over the preservation of presidential records like Tweets makes the establishment of a standard process for complying with the PRA difficult.

Jessica Roberts proposes several effective solutions to the problems posed by the digital presidential speech act of deletion.[48] Roberts advocates for the adoption of the COVFEFE Act (named after a Tweet previously deleted by Trump), which would officially designate all presidential social media postings as presidential records that necessitate preservation under the PRA.[49] Roberts also recommends the creation of measures to curtail the president's discretion as to which presidential records get preserved, advocating for the adoption of the typical methods of enforcement of the Federal Records Act.[50] Lastly, Roberts prescribes the establishment of procedures that allow for the enforcement of the PRA via legal action initiated by the Attorney General, private legal action to allow the National Archivist to assume preservation duties, and a judicial review process to oversee the president's discretionary preservation of presidential records to prevent the unwarranted destruction of presidential records.[51]

III. Blocking and the Public Forum Doctrine

The Public Forum Doctrine arises out of the traditional Millian conception of the marketplace of ideas in which citizens should value all opinions as these opinions may aid them in their grand, noble pursuit of truth.[52] The Public Forum Doctrine provides citizens with spaces in which they can engage in public expression and debate, so long as the space in question has an extensive history of communicative use.[53] One may conceptualize Twitter as a digital marketplace or public forum through which citizens can instantaneously engage in public debate and expression, but one also

must acknowledge its lack of historical public debate and expression since Twitter was only recently developed.[54]

Since social media platforms, such as Twitter, developed recently, the communicative purposes of these spaces are shifting with new innovations and digital trends.[55] Given this reality, how should one go about analyzing the communicative history of social media platforms? Twitter morphed into a popular space for users to both engage in political debate and communicate with politicians only within the last few years.[56] Even though Twitter has only been considered political recently, one cannot underestimate the extent of Twitter's influence on political debate and the dissemination of information. In the words of Usma Sohail Ashraf-Khan, an associate attorney at Margolis Edelstein in New Jersey,[57] one may consider a government official's Twitter account the "modern-day equivalent to town hall and city council meetings."[58]

In order to apply the Public Forum Doctrine correctly, one must also decide what type of public forum a Twitter account constitutes. Three types of public fora exist: the traditional public forum, the designated public forum, and the limited public forum.[59] A traditional public forum is constituted as a physical space historically used for the purposes of public expression and debate that is monitored and sanctioned by the government.[60] A government official's Twitter account does not fit into this category of public fora as it possesses no longstanding history of public debate or expression nor does it exist in the physical realm.[61] Any space fits into the category of designated public forum so long as the government creates the space with the intent of allowing citizens to use it for "expressive activity".[62] A government official's Twitter account could fit into this category of public fora so long as one can establish that the government created it as a repository for private expressive speech.[63]

In both traditional public fora and designated public fora, any governmental restriction on speech based on content should withstand

strict scrutiny.[64] When the government creates a space for use only by specific groups or for the discussion of only specific topics, that space constitutes a limited public forum.[65] In a limited public forum, the government can limit speech based on content.[66] Though limited public forums permit governmental content restrictions, viewpoint discrimination in a limited public forum must still withstand strict scrutiny.[67] A government official's Twitter account may fit into this category if one determines that the government created it for limited expressive purposes.[68] Trump's personal Twitter account, @realDonaldTrump, could be an example of a limited public forum, but only if he were to limit the use of his Twitter to specific groups or for the discussion of specific topics. If one were to contend that his blocking of certain citizens constituted an act of limiting the use of his Twitter to a specific group of citizens, then Trump's @realDonaldTrump could be considered a limited public forum. Though the public forum doctrine permits viewpoint discrimination in a limited public forum, any act of viewpoint discrimination committed by Trump must still withstand strict scrutiny.[69]

IV. Private and Government Speech on Twitter

In order to further understand how constitutional law applies to a government official blocking a citizen on Twitter, one must also ascertain whether the government official's account constitutes private speech or government speech.[70] Traditionally, courts have interpreted the Free Speech Clause of the First Amendment to mean that the government cannot restrict speech pertaining to a certain viewpoint when engaging in official speech.[71] The government speech doctrine allows the government to express its official opinions as a singular entity by backing a certain viewpoint or advocating for a certain policy while excluding all other alternatives.[72] If the @realDonaldTrump account engages solely in government speech, then the public forum doctrine no longer applies and Trump could

engage in viewpoint discrimination without violating citizens' First Amendment Rights.[73]

Shelbie Rose, an associate attorney at Jones Day specializing in complex commercial litigation, internal investigations, and matters involving international trade and national security,[74] offers a solution to the problem of classifying the speech on Trump's personal Twitter account. Rose posits that some aspects of Trump's Twitter account constitute government speech while others constitute private speech.[75] For example, because Trump routinely used his personal Twitter account to communicate invaluable information about government policy,[76] the Tweets on @realDonaldTrump constitute government speech.[77] On the other hand, the expressive and communicative interface consisting of replies by other users to Trump's Tweets constitutes private speech.[78] While the government speech aspect of Trump's Twitter account may entitle him to engage in viewpoint discrimination, limiting any citizen's access to the designated public forum created by replies to those Tweets egregiously violates the Free Speech Clause of the First Amendment.[79]

V. The Presidential Block: A Violation of the First Amendment

The United States District Court of the Southern District of New York grappled with respecting citizens' rights under the First Amendment when deciding on *Knight First Amendment Institute at Columbia University v Trump* in 2018.[80] The plaintiffs in *Knight Institute v Trump* sued Trump for blocking them on Twitter after they expressed critical political opinions of Trump and his policies. The plaintiffs claimed that the block constituted a violation of their First Amendment rights.[81] Despite the lack of extensive communicative history on social media platforms, the court officially applied Public Forum Doctrine to Twitter's interactive platform.[82]

The court decided that Trump's Twitter constitutes a designated public forum and declared that his blocking of citizens

on Twitter amounts to a violation of their First Amendment Rights.[83] The plaintiffs sought injunctive and declaratory relief, but the court refused to grant injunctive relief against Trump because Judge Naomi Buchwald argued that "a declaratory judgement should be sufficient, as no government official—including the President—is above the law, and all government officials are presumed to follow the law as has been declared."[84] In refusing to grant injunctive relief, the court avoided the "legal thicket."[85]

By refusing to grant injunctive relief against then-President Trump, the court neglected to provide a sufficient deterrent for the President to abstain from blocking citizens based on their opposing political views.[86] The court may have identified the problem posed by Trump engaging in viewpoint discrimination, but it did not offer a solution. This problem will inevitably carry over into future court cases until a court can identify a proper solution to the complex constitutional problems posed by a president blocking a citizen on social media.[87] Additionally, the court's unwillingness to reward injunctive relief and their declaration that doing so poses a "legal thicket" emphasizes the importance of defining the limits of digital presidential speech. Defining the limits of digital presidential speech can potentially prevent future presidents from violating the constitutional rights of citizens without consequence.[88] The process of finding a proper solution to the constitutional issues raised by the digital presidential speech act of blocking will come to define acceptable and proper digital presidential speech.

VI. Presidential Immunity and the Block

Conceptualizing blocking as a presidential speech act within the context of presidential immunity offers an explanation for one facet of the issue faced by the court in *Knight Institute v Trump*.[89] Presidential immunity provides a president with the assurance that he or she possesses the ability to take action within the confines of his

or her office without fearing future legal consequences.[90] Absolving presidents of liability for any civil damages that may result from their conduct while in office grants them the necessary freedom to act with the urgency, efficiency, adaptability, and authority that their office demands.[91] Additionally, presidential immunity could serve as a viable defense for Trump in any lawsuit regarding the issue of blocking a citizen on Twitter.[92] Thus, presidential immunity complicates the court's ability to enforce the democratic values enumerated in the Constitution by granting injunctive relief against a president.[93]

Additionally, courts may neglect to grant injunctive relief against a president due to possible issues surrounding the separation of powers.[94] Citizens who wish to sue Trump take on a significant burden in order to establish standing. This burden entails proving that they have suffered "a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision".[95] This burden of proof presents a significant impediment for citizens, especially for those seeking injunctive relief.[96] The aforementioned requirement to prove standing includes the clause about a judicial decision's ability to redress the injury in order to avoid issues regarding separation of powers.[97] In granting injunctive relief for an injury caused by the conduct of the executive branch, the judiciary branch may accidentally overstep its capabilities by engaging in "government by injunction".[98] The court's capacity to bind the president to legal limits placed on his or her conduct via injunction may constitute an encroachment upon the power of the executive branch, violating the separation of powers.[99] This capability to unwittingly violate the separation of powers constitutes another aspect of the problem faced by courts when making a decision regarding the issue of a president's blocking his or her citizens on Twitter.[100]

In light of the issues noted above, Ashley Mongiello advocates for a different way of solving the constitutional issues

posed by Trump blocking users on Twitter.[101] In order to avoid the complicated issues faced by traditional litigation processes,[102] Mongiello suggests that representatives for Twitter, representatives for the citizens whose rights the former President violated, and the former President himself should engage in multi-party negotiation to resolve legal issues efficiently.[103] Since social media interfaces and their uses transform so rapidly, placing the onus of making a lasting decision about the constitutionality of certain digital speech acts on the courts creates uncertainty for future litigation relating to social media.[104] Mongiello argues that multi-party negotiation might offer a viable solution to those future litigation issues before they even arise.[105]

Multi-party litigation allows Twitter's representatives, Twitter's users, and the president to have some flexibility in their opinions and positions. Multi-party litigation also does not make any absolute, lasting determination that could have drastic implications on the resolution of future issues that may arise as social media platforms continually evolve.[106] Attempting to solve these constitutional issues via litigation subjects each party to a set of binding regulations that cannot adapt to the rapidly expanding role of social media in political debate and presidential communication with citizens.[107] When engaging in multi-party negotiation, no particular set of regulations binds each party for years to come.108 It offers each party the necessary flexibility to adapt to the ever-transforming role of social media and presents a more viable, dynamic solution to the constitutional issues that arise from digital presidential speech acts.[109]

VII. Digital Citizenship in the Wake of President Trump

I have discussed two speech acts that have provoked complex constitutional issues in the wake of former President Trump's unprecedented use of Twitter, though others will undoubtedly

continue to develop. Certainly, Trump's Twitter usage will have lasting implications on future forms of digital presidential speech acts and has already had a significant impact on the American political system. In fact, Ashraf-Khan contends that, due to the sheer amount of topical political conversations occurring on social media platforms like Twitter, the American public recognizes Twitter as representing both citizens' reactions to government policy as well as the government's perspective on policy simultaneously.[110] Trump's Twitter, in particular, exemplifies this phenomenon. Trump used his Twitter to disseminate information about government policy and express official government perspectives on issues of political import,[111] drawing members of the American public to the replies section of his Tweets to communicate their reactions to those policies and official opinions.

Damien Sánchez, who graduated from the University of New Mexico with a Ph.D. in Organizational Learning & Instructional Technology,[112] indicates that Trump's use of Twitter has contributed significantly to the general public's awareness of current political and economic issues and a dramatic increase in the civic engagement of citizens.[113] Sánchez sums up the immense significance of this increase in civic engagement and political awareness on Twitter, claiming that "people are awakening from their state of apathy because the President is forcing them into a state of dissonance" with his controversial Tweets.[114] In addition, Twitter has come to play an integral role in American political debate because it allows citizens to engage with government officials and their policies more directly than ever before.[115] Because Trump often responds directly to the criticisms aired by citizens in replies on his Twitter account, the American public has recognized Twitter as a platform on which they can communicate with the president and engage in activism by publicly criticizing the government policies and opinions he announces. Thus, Twitter and other social media platforms motivate American citizens to engage in activism by encouraging them to

express their opinions on government policy and to question political structures more broadly.

Conscientization has led a number of Americans to use digital platforms such as Twitter to identify and criticize contradictions in American social, political, and economic realities and to engage in digital forms of activism against the oppressive nature of those structures.[116] Danielle Citron, a professor at University of Virginia who theorizes about legal issues relating to privacy, free expression, and civil rights,[117] presents an accurate model for the phenomenon of conscientization via her concept of digital citizenship. Citron defines digital citizenship as "the various ways online activities deepen civic engagement, political and cultural participation, and public conversation."[118] The ability to speak freely in public and the opportunity to listen to other citizens speaking freely in public allows American citizens to "make more informed decisions about the kind of society they want to live in".[119] The invention of social media has revolutionized the American model of self-governance through fruitful public dialogue by allowing citizens to reach massive audiences with their opinions and giving citizens more effective and immediate access to politicians than ever before.[120]

Social media also presents citizens with the invaluable opportunity to "participate in the creation of culture" via online political discourse.[121] Social media platforms, most notably Twitter, promote the Millian conception of finding value in free speech.[122] Millian theorists value free speech because it leads to informed self-governance, which facilitates the creation of culture and values in a democratic society.[123] Yet, one cannot ignore the importance of regulating digital forms of speech that prevent certain groups from having an equal opportunity to participate in public discourse.[124] Citron advocates for the implementation of regulations on oppressive forms of speech such as cyber harassment.[125] Not only did Trump curtail citizens' ability to participate in online political debate through the use of Twitter's block feature, but he engaged

in forms of cyber harassment against his political opponents.[126] In a single Tweet, then-President Trump referred to Senator Elizabeth Warren with the racist moniker, "Pocahontas," disparaged former mayor of New York City Mike Bloomberg with the diminutive nickname "Mini Mike," and insulted Senator Bernie Sanders by dubbing him "Crazy Bernie."[127] How should citizens respond when their president curtails free and equal participation in political debate by engaging in oppressive digital speech acts, such as blocking and cyber harassment?

VIII. The Appeal of Authenticity: The Audience and The Message

Digital conduct such as Trump's ignites both oppositional and favorable political activism on social media.[128] The more controversial the Tweet, the more engagement Trump receives from both critics and supporters. Because algorithms prioritize Tweets with high levels of engagement, many of Trump's most controversial Tweets have thousands of likes, Retweets, and replies.[129] Galen Stolee, a graduate student in anthropology at Harvard University,[130] and Steve Caton, a professor in the anthropology department at Harvard University,[131] articulate this phenomenon of purposefully creating engagement, proposing that the strength of "the Message" behind Trump's speech bestows him with a unique ability to appeal to a base of supporters who trust him unwaveringly despite his low approval rating.[132]

Stolee and Caton argue that Trump's campaign strategy represented a departure from the traditional in favoring appeals to a small, niche audience of staunch supporters instead of appeals aimed at as large a number of citizens as possible,[133] such as Franklin D. Roosevelt's use of radio addresses.[134] Trump has consistently made efforts to address and appeal to his less-inclusive base of strong supporters, strengthening their trust in and support of him

while simultaneously hurting his chances of appealing to a wider audience.[135] Stolee and Caton postulate that Trump's message has led the alt-right members of his constituency to use Twitter to organize a "counterpublic" that advocates for a "white supremacist political agenda" while simultaneously "suppressing all opposition to it".[136] Twitter enables this counterpublic of alt-right supporters "to organize millions of people across thousands of events and present a true challenge to public figures" other than Trump, allowing them to suppress opposition to his political agenda.[137]

Further, Stolee and Caton argue that Trump expertly used Twitter to spread his message, which in turn increased solidarity amongst his supporters and led his supporters' to place unwavering trust in him.[138] Trump's "uninhibited" and unfiltered use of Twitter to "speak his mind" increases the perceived authenticity of his persona amongst his supporters.[139] Though the factual content of Trump's Tweets often promulgated falsehoods and misrepresentations, the perceived clarity and forthrightness of his intentions made Trump seem more authentic and transparent, especially in the context that traditional politicians are thought to lack transparency.[140]

Twitter presented the perfect opportunity for Trump to capitalize on the value of cultivated authenticity.[141] Sarah Haan, a professor at Washington and Lee University with a particular interest in corporate governance, corporate political speech, and disclosure,[142] emphasizes the commoditization of perceived authenticity on social media platforms, arguing that perceptions of authenticity present companies with opportunities to profit.[143] Social media giants promote authenticity as "a moral value, a pragmatic necessity, an essential component of 'meaningful speech,' and a limit on free expression" while using it to boost their revenues.[144] Haan also contends that "truthful presentations of self can have salutary effects on certain kinds of online expression, functioning as a proxy for truth."[145] By espousing the value of authenticity, Twitter and other social media platforms incentivize users to cultivate unrealistic online personas

that seem as authentic as possible.

Trump himself takes advantage of this phenomenon, profiting via exponential gains in trust, support, and power from his base of supporters by cultivating a seemingly authentic online persona. Stolee contends that while it can be argued that "Trump masterfully exploited Twitter to spread his message and gain power, . . . Twitter was always primed and ready to create his kind of persona; it was only waiting for Donald Trump to arrive".[146] This statement alludes to the possibility that future politicians could use the platform to create an illusory authentic and transparent persona similar to Trump's in order to gain trust, support, and power from their base of supporters.

Trump's rise to power via perceived authenticity represents a realization of the fears laid out by Byung-Chul Han in *The Transparency Society*.[147] Han critiques the democratic value of using transparency to cultivate greater freedom, arguing that valuing transparency creates a system of surveillance and control.[148] According to Han, by providing the world with access to the inner workings of his mind and publishing his personal thoughts on Twitter, Trump effectively demolishes the perception of distance between himself and those who read his Tweets. This lack of digital distance creates an illusion of intimacy between himself and his supporters, allowing him to lose his identity amongst them in the process.[149] Trump also creates the illusion of truth by seemingly handing over a "mass of information" via Twitter, but Han concludes that masses of information, such Trump's meticulously cultivated, seemingly transparent Tweets, "produce no truth."[150] In creating the perception that he is transparently illuminating his inner thoughts and motivations via Twitter, Trump eliminated the need build trust in other ways, supporting Han's claim that "transparency dismantles trust."[151]

While Trump's actions on Twitter helped him to gain power from his base of supporters, power that helped him win the 2016 election, the intimacy and truth on Twitter is only an digital

illusion.[152] Although the perceived authenticity and transparency of Trump's online persona allowed his supporters to place trust in him, the simultaneous use of blocking and deletion violated the rights of the citizens who opposed him and decreased his accountability to his critics.[153] Thus his online persona can never truly attain the values of authenticity and transparency that it convincingly pretends to promote.[154] In addition to subverting true authenticity and transparency, blocking and deletion also served to curtail the democratic values inherent to digital citizenship and prevented certain citizens from exercising their right to participate in political debate.[155] As noted throughout this piece, Trump's unprecedented Twitter use not only challenges constitutional law in new and diverse ways but also exemplifies the problematic nature of placing too much value on authenticity and transparency in the democratic search for truth.[156]

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[3] Krissy Bodnar, "Krissy Bodnar - LinkedIn," Krissy Bodnar - LinkedIn (LinkedIn), accessed November 8, 2021, https://www.linkedin.com/in/krissy-bodnar.
[4] Bodnar, "Sheer Force of Tweet," 2.
[5] Han, *The Transparency Society*, 35.
[6] Siddique, "Tweets that Break the Law: How the President's RealDonaldTrump Twitter Account is a Public Forum His Use of Twitter Violates the First Amendment and the President Records Act," 320.
[7] Siddique, "Tweets that Break the Law," 318–320.
[8] Ashraf-Khan, "The Government's Power to Block on Twitter: A First Amendment Analysis," 161.
[9] Judith Butler, *Excitable Speech: A Politics of the Performative*, 10–12.
[10] Han, *The Transparency Society*, 35.
[11] Jessica Roberts, "#280 Characters of Legal Trouble: Trump, Twitter, and the Presidential Records Act," 491.
[12] Ibid, 490.
[13] Ibid, 510.
[14] Ibid, 489.
[15] Ibid, 501.
[16] Siddique, "Tweets that Break the Law," 320.
[17] Jessica Roberts, "#280 Characters of Legal Trouble," 500–501.
[18] Ibid, 500.
[19] Ibid.
[20] Jemimah Roberts, "Trump, Twitter, and the First Amendment," 208.
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[22] Charlie Savage, "Trump Can't Block Critics From His Twitter Account, Appeals Court Rules," *The New York Times*, July 9 2019, accessed 11 December 2020, https://www.nytimes.com/2019/07/09/us/politics/trump-twitter-first-amendm ent.html.
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[24] Ibid, 497.
[25] Siddique, "Tweets that Break the Law," 318–320.
[26] Mongiello, "Is President Trump Violating the First Amendment When Blocking Citizens on Twitter?," 218.
[27] Siddique, "Tweets that Break the Law," 320.
[28] Ibid and Jessica Roberts, "#280 Characters of Legal Trouble," 490.
[29] Jessica Roberts, "#280 Characters of Legal Trouble," 493.
[30] *Knight Institute v Trump*, 302 F Supp 3d 541, 575 (S.D. of N.Y., 2018), 11.
[31] Jessica Roberts, "#280 Characters of Legal Trouble," 493.
[32] Ibid, 500–501.
[33] Ibid, 490.
[34] Ibid, 499.
[35] Ibid, 493–494.
[36] Ibid, 494.
[37] Ibid.
[38] Ibid, 503.
[39] Ibid, 494.
[40] Ibid, 506
[41] Ibid, 505–506.
[42] Ibid, 506.
[43] Ibid.
[44] Ibid.
[45] Ibid, 499.
[46] Ibid.
[47] Ibid, 505.

[48] Ibid, 509–514.
[49] Ibid, 511.
[50] Ibid, 512–514.
[51] Ibid, 514.
[52] John Stuart Mill, *The Basic Writings of John Stuart Mill: On Liberty, the Subjection of Women & Utilitarianism*, 22.
[53] Hack, "The Marketplace of Twitter: Social Media and the Public Forum Doctrine," 315.
[54] Ibid.
[55] Mongiello, "Is President Trump Violating the First Amendment When Blocking Citizens on Twitter?," 220.
[56] Hack, "The Marketplace of Twitter," 316.
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[59] Siddique, "Tweets that Break the Law," 323–327.
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[61] Ibid.
[62] Ibid, 324.
[63] Ibid.
[64] Ibid, 325.
[65] Ibid.
[66] Ibid.
[67] Ibid, 326.
[68] Ibid.
[69] Ibid.
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[71] Ashraf-Khan, "The Government's Power to Block on Twitter," 173.
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[76] Jemimah Roberts, "Trump, Twitter, and the First Amendment," 208.
[77] Rose, "Blocked by the @RealDonaldTrump Twitter Account," 513.
[78] Ibid.
[79] Ibid, 513–515.
[80] *Knight Institute v Trump*, 302 F Supp 3d 541, 575 (S.D. of N.Y., 2018).
[81] Ibid, 2.
[82] Ibid.
[83] Ibid.
[84] Ibid, 3–4.
[85] Ibid, 2.
[86] Ibid.
[87] Ibid.
[88] Mongiello, "Is President Trump Violating the First Amendment When Blocking Citizens on Twitter?," 224–227.
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[91] Ibid, 14.
[92] Mongiello, "Is President Trump Violating the First Amendment When Blocking Citizens on Twitter?," 227.
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[94] Ibid, 225.
[95] Ibid, 230.
[96] Ibid.

[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid and *Knight Institute v Trump*, 302 F Supp 3d 541, 575 (S.D. of N.Y., 2018), 2.
[101] Mongiello, "Is President Trump Violating the First Amendment When Blocking Citizens on Twitter?," 219.
[102] *Knight Institute v Trump*, 302 F Supp 3d 541, 575 (S.D. of N.Y., 2018), 2.
[103] Mongiello, "Is President Trump Violating the First Amendment When Blocking Citizens on Twitter?," 219.
[104] Ibid, 220.
[105] Ibid, 221.
[106] Ibid, 234.
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[144] Ibid, 627.
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[146] Stolee and Caton, "Twitter, Trump, and the Base," 157.
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Re-examining Hoffman Plastic Compounds v NLRB *under the Trump Administration*

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Abstract

When the U.S. Supreme Court issued its ruling in *Hoffman Plastic Compounds v NLRB*[1] in 2002, its decision reflected the post-9/11 national reckoning of American identity, prompting questions of inclusion and belonging that inevitably implicated immigration.[2] The key decision of how immigration law affects workers' rights was made against undocumented workers, who became ineligible to receive backpay, or the pay they would have received had they not been illegally fired under the National Labor Relations Act (NLRA). Academia extensively examined the *Hoffman* case when the ruling first came out; however, this attention has faded with time.[3] It was not until 2016 that immigration debates reemerged more charged than ever in response to the Trump administration's restrictive immigration policies.[4] Due to these restrictions, the current ramifications of *Hoffman* remain unclear. In the face of emerging threats to immigrants' rights, there is a renewed need to untangle the lasting effects of cases like *Hoffman* that arose from the nation's previous wave of xenophobia. This article reexamines the effects of *Hoffman Plastic Compounds v NLRB* since the beginning of the Trump administration in 2017. Particularly, I will focus on how the *Hoffman* decision has influenced other worker protection laws and how bureaucratic agencies enforce those laws. I aim to evaluate how *Hoffman* has impacted the rights of undocumented workers nineteen years since the U.S. Supreme Court issued its decision and four years since Donald Trump assumed office.

I argue that the *Hoffman* decision misrepresents immigrants as well as immigration and labor laws. This mischaracterization has had lasting effects on both workplaces—especially in low-wage industries—and later cases. Additionally, I explore the effects *Hoffman* has in the criminalization of undocumented status, which is reinforced by employers' weaponized use of *Hoffman* against their workers. The final section of my analysis focuses on administrative agencies' reactions to *Hoffman* in the past four years and how those reactions influence *Hoffman's* impact. I conclude by summarizing the outcomes of this study and proposing future work that can help minimize the *Hoffman* decision's ramifications.

I. Background on Hoffman

Prior to the *Hoffman* decision, courts had not encountered a conflict between immigration and labor laws.[4] The prevailing law regulating immigration, the Immigration and Nationality Act of 1965 (INA), had no bearing on immigrants' ability to work. Similarly, the National Labor Relations Act of 1935 (NLRA), which protects collective action between employees, did not discriminate between workers based on their citizenship status.[5] However, in 1986, immigration laws changed with the passage of the Immigration Reform and Control Act (IRCA).[6] IRCA, as an amendment to INA, banned the employment of unauthorized immigrants and required employers to verify the identity and status of potential workers prior to hiring.[7] These developments led to the 2002 U.S. Supreme Court case, *Hoffman Plastic Compounds, Inc. v NLRB*, which questioned how backpay aligns with the ICRA employment requirements.

In the *Hoffman* decision, the Court denied backpay to undocumented worker Jose Castro, who was dismissed for his participation in a union organizing campaign at a Hoffman Plastics Compounds plant. Although the Court agreed with the National Labor Relations Board (NLRB) that Hoffman Plastic Compounds clearly violated the NLRA labor laws, which cover undocumented workers, the majority opinion ruled backpay unavailable because the employees were not allowed to work under IRCA.[8] The majority opinion argued that backpay, as a calculation based on the hypothetical employment of the plaintiff, would not be valid since undocumented workers could not be employed. Additionally, the opinion speculated that providing backpay would further incentivize undocumented immigration and employment, which would run counter to the purposes of IRCA.[9] Following the majority opinion that labor law violations may be equally disincentivized by nonmonetary means such as a posted notice of a cease-and-desist order, the Court instructed the NLRB to impose consequences onto

employers other than backpay.[10]

While the majority opinion characterized backpay as a minor instrument used by the NLRB, the dissent argued that backpay is a significant tool because it is the only immediate financial consequence for employers violating the law.[11] Therefore, the dissent viewed the Court's decision as running counter to the purposes of the NLRA, which is to protect collective action. Similarly, the dissent objected to the majority's interpretation of IRCA, arguing that the statute's text does not address how it ought to affect labor laws.[12] The dissent reasoned that employers, on the other hand, might view the decision as a pass to treat undocumented workers poorly and provide substandard working conditions, which in turn would encourage the employment of unauthorized individuals and future violations of IRCA.[13] In the dissent's view, providing backpay to undocumented workers would discourage the employment of unauthorized immigrants and thus uphold the IRCA.

Immediately after *Hoffman*, employers began to argue in courts that their undocumented workers lacked labor rights. Simultaneously, undocumented workers began to retreat from bringing claims against their employers, fearing that their immigration status may be exposed and alert their presence to Immigration and Customs Enforcement (ICE).[14] The *Hoffman* decision heightened the risk of filing claims while vastly restricting any protection that labor laws could provide. Once backpay became off-limits, none of the remedies that an undocumented employee could receive under the NLRA included monetary assistance.[15]

Despite these new challenges, *Hoffman* did not completely end undocumented worker organizing.[16] Nonetheless, the lack of quantitative data on working conditions, combined with the prevalence of threatening tactics from employers, gave rise to concern as to whether *Hoffman* has had the disastrous effects on immigrant workforces predicted by the dissent. As attention to *Hoffman* has faded over the years, the present effects of this decision

become increasingly ambiguous. The mixed responses from state courts and lack of clear guidelines at the federal level make it hard to predict the results of claims filed by undocumented workers.\

II. Literature Review: Cases

Since 2016, sixty federal and state cases have cited *Hoffman* in their analysis. Of these cases, I found that twenty-one engaged with the ruling substantially in a way that impacts *Hoffman*'s application to future cases.[17] In general, the decisions in these cases chose to limit their interpretation of *Hoffman* to remedies similar to NLRA backpay. These cases covered a wide variety of laws, including wage and hour restrictions under the Fair Labor Standards Act (FLSA), employment discrimination targeted by Title VII of the Civil Rights Act, and state workers' compensation laws. I broadly categorized the issues discussed in these twenty-one cases as the discovery of immigration status, protection under the law, and damages awarded. Only three cases dealt with the discovery of immigration status.[18] In these cases, courts considered court motions to require plaintiffs to disclose their immigration status during the discovery phase of litigation wherein parties exchange evidence to expedite the trial. Courts tended to mirror each other in their reasoning for rejecting the argument that *Hoffman* might compel the court to consider immigration status in these cases. These opinions argued that immigration status was not relevant to the case as *Hoffman* did not apply to the law in question (FLSA[19] and tort claims[20]). Furthermore, these decisions cited the severe potential harm that could be inflicted on an undocumented person if their immigration status were to be revealed and reported to immigration enforcement.

A larger number of cases dealt with whether undocumented employees would be covered as employees under worker protection laws in consideration of *Hoffman*. Of these six cases, two dealt with state worker compensation laws,[21] two with Title VII,[22] one

with FLSA,[23] and one with torts.[24] These cases tended to side with employees, allowing undocumented workers to seek protection under these laws. The general opinion of the courts was that granting protection to these workers did not run contrary to IRCA as it would not encourage future employment of undocumented employees; furthermore, denying coverage would contradict the aim of worker protection statutes to create a common standard for all workers. Although *Hoffman* limited the types of awards available to undocumented employees, *Hoffman* nonetheless included these workers under the scope of NLRA protection. Therefore, these courts' interpretations of other worker protection statutes align with the *Hoffman* decision by extending the same protection.

The remaining cases focused on the damages and remedies available to undocumented immigrants under a wide variety of laws, which determined the financial compensation undocumented workers were eligible for in court decisions. These fifteen cases covered FLSA,[25] Federal Arbitration Act (FAA),[26] Employee Retirement Income Security Act (ERISA),[27] Title VII of the Civil Rights Act,[28] NLRA,[29] as well as various worker compensation laws[30] and tort remedies.[31] Defendants mainly used *Hoffman* to argue that the plaintiffs were not entitled to damages due to their immigration status. However, in all but four of these cases, the court granted the remedies in full despite the plaintiffs' immigration status.

The justification for these measures fell into several categories between these cases. Many of the FLSA and ERISA cases argued that the remedies paid for work done is an established distinction from the *Hoffman* case.[32] Other cases examined the intent of IRCA and the additional laws at issue, finding that the award would not encourage future unauthorized immigration. Rather, these opinions argued its denial would incentivize the recruitment of undocumented workers by granting an avenue by which employers can evade compliance with the law, thereby increasing migration.[33]

The remaining cases altered the damages awarded to the

plaintiff in some way to compensate for their immigration status, adopting reasoning similar to *Hoffman*. Two of these cases involved future lost wages: *Inamagua v Charlton St. Co*. and *Pacheco v Johnson*. In *Inamagua*, the New York Supreme Court ruled that the plaintiff, who had been injured on the job, was eligible for damages for future lost wages if the worker had either (1) not violated IRCA or (2) was in the process of obtaining authorization or had since obtained authorization and did not intentionally deceive the employer on their immigration status.[34] In *Pacheco*, the New York District Court reasoned that it could not grant future lost wages, compromising by awarding damages based on the plaintiff's earning capacity in El Salvador, his home country.[35]

In contrast, the courts in *Pro's Choice Beauty Care v Local 2013* and *EEOC v Phase 2 Investments Inc*. chose to simply foreclose certain remedies due to *Hoffman*. In *Pro's Choice Beauty*, decided in the Eastern District of New York, the district court denied enforcement to an arbitration award of reinstatement to an undocumented worker due to its conflict with IRCA.[36] Similarly, the District Court for the District of Maryland in Phase 2 Investments Inc. limited the Equal Employment Opportunity Commission (EEOC)'s awards to preclude reinstatement and backpay, following the reasoning in *Hoffman*.[37] The inconsistencies in *Hoffman*'s application illustrate the absence of consensus surrounding how to interpret *Hoffman* to non-NLRA cases, leaving workers with workplace claims in limbo.

III. Hoffman Sets Unclear and Dangerous Precedent

The precedent from *Hoffman* has yielded many decisions from courts that have challenged the rights of undocumented immigrants. Although courts have established clear guidelines for some legal issues, such as FLSA wage claims, other issues led to completely incongruous results between cases.[38] While many courts chose to limit *Hoffman* to NLRA cases, some courts interpreted the reasoning

in *Hoffman* so broadly to suggest that granting any sort of monetary compensation to undocumented immigrants will incentivize migration.[39] Cases following *Hoffman* have been inconsistent at best while providing ammunition for those seeking to restrict the rights of immigrant workers.

While the courts were mostly consistent on issues such as disclosure of immigration status and whether the law protects undocumented workers, there was a clear division between different jurisdictions on the topic of what damages workers can recover post-*Hoffman*. On some topics, such as FLSA wage theft, the courts agreed on an established distinction with *Hoffman*, arguing that wages for hours already worked need to be honored.[40] However, as courts began to deal with other forms of remedies for workers, this distinction began to fall apart. When discussing issues other than FLSA, there was a lack of clear standards to apply to the case of undocumented immigrants. In these opinions, courts were unsure which damages would disincentivize future migration, the aim of IRCA and the *Hoffman* decision.[41]

As a result, cases unrelated to FLSA-type wages were highly inconsistent with one another, even within the same legal issue. For example, in cases of loss of future earnings potential due to workplace injuries, one court chose to grant full damages without regard to status,[42] while another created a new test to determine employer and employee culpability under IRCA to decide whether damages can be awarded.[43] Meanwhile, another court granted damages calculated based on the plaintiff's home country, El Salvador, in order to account for the worker's ineligibility to work in the United States.[44] Here, there is an unclear brightline rule because these damages represent hypothetical work, similar to backpay, but in the future rather than the past. The potential for a worker to amend their work authorization status complicates the issue presented in Hoffman and makes the distinction less clear. These inconsistencies affect workplace conditions for unauthorized workers and the decision

calculus to go forward with claims for violation of workplace protections.

Another trend within the case law was the use of *Hoffman*'s logic to argue that any right or remedy can incentivize further unauthorized migration and IRCA violations. Employers generally attempted to argue this in court, with mixed success. While courts generally rejected these arguments, there were several instances where courts categorically denied remedies to undocumented immigrants, regardless of the degree of similarity between the case and *Hoffman*. For example, in *Phase II Investments Inc*., the court utilized the broad reasoning in Hoffman to deny backpay under Title VII, notwithstanding that the employer, in this case, was complicit in the violation of IRCA by providing with and instructing their employees to use false identification documents after a Department of Homeland Security (DHS) investigation.[45] Similar arguments also became the basis for these courts to deny rights unrelated to the NLRA to undocumented immigrants, such as state disability benefits.[46]

Ultimately, the *Hoffman* opinion failed to specify clearly what characteristic of backpay made it unique from other types of remedies and to what extent it would apply to other areas of the law. Without this clarification, courts lacked a clear direction, leading to inconsistency in how damages are calculated or awarded. In the worst scenarios, it allowed for any court to use *Hoffman*'s logic broadly to unilaterally forbid any type of monetary compensation to victims of workplace law violations. While many courts have drawn clear boundaries to the Hoffman decision and upheld the rights of immigrant workers, several courts have chosen to deny workers damages due to their immigration status. The discrepancy between courts' interpretations illustrates the ongoing need for Hoffman to be clarified or overturned.

IV. Employer Weaponization of *Hoffman*

Following the *Hoffman* decision, employers attempted to litigate immigration status in order to dismiss workplace claims using previous knowledge of status or filing claims for discovery of status.[47] Employers hope to unveil their workers' immigration status in court to eliminate any financial consequences of their labor law violations or to intimidate workers into withdrawing their claims. For potential immigrant plaintiffs, revealing their immigration status to the court could have serious consequences; their immigration status becoming public knowledge could lead to their deportation. As a result, some workers may choose to withdraw their claims altogether, deciding that this process is not worth the potential risk. This maneuver from employers could have a further chilling effect on worker organizing, as employees have no legal recourse to protect their labor rights. Similarly, it could dissuade other workers from filing claims against their employers once they are aware of the risk of exposing their status. These effects exacerbate an existing distrust of government officials, which stems from many undocumented people's fear of drawing attention to themselves to immigration authorities.

In court cases, discovery motions about immigration status are quite common. In a third of the cases in this study, employers attempted to use a discovery motion to force workers to publicly expose their immigration status to the court.[48] At times, employers testified that their workers had previously told them of their immigration status at the time that they were hired, ignoring that this confession implies that the employer violated IRCA.[49] In some of these cases, employers did not even bother to provide evidence that the worker was undocumented. These claims are most often dismissed for lack of relevance to the issue at hand or the risk that

it could bring to the plaintiff.[50] However, the risk associated with exposing status is so high that this tactic is inherently intimidating and chilling on worker organizing, substantiated or not.

Hoffman has empowered employers to use immigration status as a defense against labor law violations by proving that their workers' status prevents them from claiming protection under the law. These strategies, while often unsuccessful, are enough to intimidate workers against bringing claims against their employers. The threat of exposing a worker's status, implicitly a threat of deportation, multiplies existing fears that prevent many undocumented workers from speaking out about workplace violations. While administrative agencies have created clear guidelines for their agents on immigration status, they do little to counteract aggressive employer tactics.

V. Literature Review: Law Review Articles

Using LEXIS Advance, I identified seventeen articles since 2016 with significant analysis of *Hoffman Plastics*. Generally, the discussion in these articles fell under three categories: working conditions, norms, and congressional intent. Fewer articles covered topics such as balancing immigration and employment law, federal preemption, and the reaction of international bodies.

The largest category of articles discussed the effect that *Hoffman* had on working conditions and the work environment for both authorized and unauthorized workers. Most authors noted the significant chilling effect *Hoffman* had on undocumented workers organizing, marginalizing the population and preventing successfully organized campaigns.[51] Other work focused on the similar negative effect *Hoffman* has had on laws such as Occupational Safety and Health Act ("OSHA"), Title VII, and FLSA.[52] Generally, the consensus was that Hoffman made workers more vulnerable to their employers, who were now empowered to violate the law with few ramifications.

Beyond *Hoffman's* effect on working conditions, it also reinforced many negative stereotypes surrounding undocumented workers. Another subset of articles focused on how *Hoffman* affected the criminalization of undocumented work by shifting the blame onto workers rather than employers, which in turn enabled employers and state officials to increase policing on undocumented communities.[53] Many of these works argue that these effects have permeated throughout the low-wage industries where unauthorized workers are employed.[54] *Hoffman* has therefore also affected the working conditions of those who work alongside undocumented immigrants and may be disempowered in the workplace for reasons other than immigration status, such as race and wealth. These effects reinforce existing difficulties within low-wage working environments, where workers are seen as more disposable and conditions are poorer.

Although all the articles studied here oppose the majority opinion, few articles chose to confront *Hoffman* directly.[55] The three articles that provided direct challenges to the arguments made in *Hoffman* focus mainly on congressional intent underlying IRCA. To determine whether *Hoffman* aligns with IRCA's purposes, these authors used documents surrounding IRCA's passage to understand its goals and compared it to *Hoffman*'s negative impact on immigration enforcement.

The remaining articles discussed a variety of issues related to *Hoffman Plastics* that illustrate how this case is situated within the more general case law surrounding immigration and labor law. Two focused on the reaction of international bodies, in particular the United Nations and the International Labor Organization (ILO), to the Hoffman decision. These articles argued that the decision violated core labor rights outlined by the ILO and that U.S. immigration laws ought to be amended to take these rights into consideration.[56] Other articles focused on how to properly balance immigration and labor laws to resolve the precarity employees face due to status.[57] While these topics received considerably less focus, this scholarship

indicates that *Hoffman* has spawned a variety of broader questions concerning the place immigrant workers' rights holds in international and federal law. Although this project focuses on *Hoffman*'s impact on workplaces and worker experiences, *Hoffman*'s precedent also implicates issues surrounding the relationship between different areas of law.

VI. Normative Effects on Immigrants and Employers

The literature review reveals that *Hoffman* has had damaging effects on social norms surrounding undocumented employees and their employers. In the majority decision, the court in *Hoffman* relied heavily on the plaintiff's confession of having used false documents to obtain employment to unilaterally forbid backpay awards to undocumented immigrants, regardless of whether the employer was aware of the employee's immigration status.[58] The underlying assumption that unauthorized employment always occurs because of workers misleading employers about their immigration status reinforces an existing negative discourse that blames immigration violations on undocumented workers and further criminalizes immigration status. These narratives have been echoed in court cases and workplaces in the decades following *Hoffman*, encouraging employer intimidation tactics and worsening working conditions.[59]

When the *Hoffman* decision was released, many scholars were quick to highlight the majority opinion's assignment of blame to undocumented immigrants for their employment and IRCA violations. This narrative simultaneously victimizes employers, even though employers are often aware of their employee's status when hiring.[60] In depicting unauthorized workers as deceitful, the majority opinion casts its decision to revoke backpay as a punishment for workers who violate immigration laws. The role of the employer, who is often responsible for violations in both labor and immigration laws in *Hoffman*-type cases, is absent from

the opinion. Shifting culpability to undocumented workers allows courts to frame their decisions around fixing the employee's IRCA violation while downplaying the employer's role in infringing upon labor protections.

This framework echoes through the case law surrounding *Hoffman*. In cases where employers were defendants, slightly less than half (forty-five percent) considered the role of the employer in enabling unauthorized employment.[61] Many more cases focused on undocumented workers disguising their status and allegedly deceiving their employers into believing they are legally authorized to work.[62] IRCA enforcement, where employees are disproportionately more investigated and prosecuted than employers, mirrors these inequalities more broadly.[63] The disparity in responsibility for IRCA violations criminalizes undocumented status and promotes the perception that undocumented workers are subservient.[64]

Hoffman's arguments surrounding employer culpability also have normative effects that extend beyond the legal system. Casting undocumented immigrants as fraudulent plays into narratives that undocumented workers are lawbreakers who take jobs from white Americans by not "playing by the rules" of the immigration system.[65] Negative discourse about undocumented immigrants provides public justification for the criminalization of immigrants, which extends beyond undocumented workers to affect low-wage industries more broadly.[66] Employers' ability to limit worker organization and create poor working conditions affects other citizen employees who work alongside their undocumented counterparts, compelling them to compete in a "race-to-the-bottom" to access employment.[67]

These developments have enabled employers and state officials to police undocumented communities by threatening to fire employees or reveal undocumented status, potentially leading to deportation.[68] By criminalizing undocumented work, and therefore undocumented workers, *Hoffman* has seeped into areas of the law beyond the NLRA to control workers in low-wage industries,

authorized or not.[69] Employers can become integrated into the carceral state by their ability to report workers to immigration authorities, resulting in their deportation.[70] As a result, these power dynamics erase the mutuality that is a central characteristic of at-will employment, ironically positioning the employer to dictate the arrangement of employment despite the existing narrative of "deceitful" undocumented workers.[71]

Unsurprisingly, the growth in employer power over employees has had a detrimental effect on working conditions in the low-wage industries where undocumented workers are often employed.[72] Workers who face heightened precarity due to *Hoffman* experience less economic stability, particularly as wage and hour violations go ignored.[73] The lack of NLRA enforcement in these workplaces coupled with employers' ability to retaliate freely against organizers have created less free workplaces for all workers, regardless of immigration status.[74]

Hoffman has also encouraged racializing discourses surrounding undocumented immigrants as employers profile their workers in their decision to exploit certain workforces. The case law contained several instances of employers attempting to weaponize status in circumstances where workers had work authorization,[75] had acquired work authorization after being hired,[76] or even where there was no evidence to indicate anything suspicious about the workers' status.[77] Similarly, EEOC cases illustrated that employers treated their Hispanic workers worse, demanding longer hours for less pay. The same employers later argued that these workers' immigration status made them ineligible for court remedies. These cases indicate that employers are incentivized to racially profile their workers and subsequently view them as exploitable, regardless of their actual immigration status.[78] By furthering racializing discourses, *Hoffman* has increased the criminalization of status, which depends on these narratives to justify the treatment of immigrant workers.

To undocumented workers, *Hoffman* sends a message of

legal exclusion.[79] The prohibition on backpay represents one of the many ways undocumented immigrants are seen as less deserving of rights and protections under the law.[80] The lack of protections available to a vulnerable workforce reinforces poor working conditions and employers' exploitation of their employees, effects justified by portraying unauthorized migrants as willfully deceptive. Not only are these narratives misleading, but they also erase the employers' role in unauthorized employment and labor rights violations. Simultaneously, these narratives encourage employers to continue to use intimidation tactics in court, even if there is little evidence to substantiate them. By manipulating workers' vulnerabilities surrounding their immigration status, employers can retaliate against employees who attempt to improve their working conditions, as is their right under federal labor laws.

VII. Critique of the Majority Opinion

The examination of case law and law review articles together uncovered a myriad of criticisms of the *Hoffman* decision. Judges and scholars have pushed back on *Hoffman*'s reasoning from many directions, attacking the majority opinion's characterization of undocumented migrants, IRCA, and NLRA, as well as its perceived tension between immigration and labor laws. Meanwhile, the cases that mimic *Hoffman* realize the negative consequences that the dissent warned against almost two decades ago.

According to *Hoffman*'s critics, the root of its error begins with its misrepresentation of undocumented immigrants and their decision to migrate. The *Hoffman* decision argued that the awarding damages to workers for violations of federal protective statutes incentivizes unauthorized migration. However, immigration scholarship illustrates that this picture is much more complex. Scholars have proposed a wide range of theories on migrant decision-making, examining the effect that labor economics,

political environments, intrafamily dynamics, familial networks, and more can all have on the ultimate decision to stay or leave one's home country.[81] These theories indicate that these decisions can be multifaceted and are almost never taken lightly. Given the multitude of factors involved, many have argued that the distant possibility of receiving damages after filing claims under labor protection statutes cannot significantly impact the decision to migrate.[82]

Furthermore, winning these damages necessarily means that migrant workers would have to undergo some type of harm.[83] Potential migrants are unlikely to consider the distant possibility of experiencing such harm, even less the litigation that might follow. As such, court damages may not be a strong incentive for migration. Denying labor protections, meanwhile, may ironically encourage more unauthorized migration. Many courts have highlighted this by arguing that denying worker protections to immigrants makes migrant labor cheaper and more disposable for employers, increasing the demand for migrant workers.[84] Legal scholarship further indicates that employers often see this decision as a way to recruit and hire more undocumented workers while evading the costs of providing adequate working conditions and wages.[85]

These results indicate that *Hoffman* may have actually increased incentives for unauthorized employment, running counter to the purposes of IRCA.[86] *Hoffman* has also significantly undermined the NLRA for low-wage industries by worsening working conditions and obstructing workers' protests.[87] Without backpay obligations, employers no longer face financial consequences for NLRA violations against their undocumented workers. Therefore, Hoffman removed a significant deterrent against employers who might otherwise threaten workers for attempting to file claims with federal or state agencies for violations of workplace protections. Employers can weaponize unauthorized workers' status to silence them by threatening to report them to immigration authorities.[88] These negative effects have permeated other areas of labor and

employment law, such as OSHA,[89] FLSA,[89] and Title VII.[90] The subsequent decrease in claims and increase in workplace violations has led to a deterioration of workplace conditions on many fronts beyond collective activity, including wage and hour violations, decreases in workplace safety, and workplace discrimination.[91]
Seeing higher risks and fewer benefits available, undocumented workers have become discouraged from filing claims.[92] Worker confidence has decreased,[93] and attempts at workplace organizing campaigns have been thwarted.[94] These results illustrate the importance of backpay in preventing violations of the NLRA, which the *Hoffman* dissent predicted. Despite the arguments made by *Hoffman* majority, removing backpay for undocumented immigrants has had the opposite effect than the court's purported intentions by increasing incentives for unauthorized employment.[95]

Seen as how *Hoffman* has unintentionally increased incentives for unauthorized employment, the reasons prompting its decision might have similarly been based in error. Although *Hoffman*'s majority opinion heightened the tension between immigration and labor law, legal scholars have argued that these two areas of the law are not in conflict.[96] Academic research and case law analyzing the legislative history of IRCA have indicated that legislators did not intend to undo any labor protections for workers, undocumented or otherwise.[97] Similarly, the NLRA does not discriminate between workers who are authorized or unauthorized.[98] Therefore, extending the NLRA's protection to undocumented workers would not categorically necessitate any violations of IRCA.

These outcomes highlight the significance of *Hoffman*, even as the decision approaches its twentieth anniversary. The false narratives about migration incentives perpetuated by *Hoffman*'s majority opinion have had a lasting impact on the enforcement of IRCA and NLRA, encouraging more unauthorized employment while worsening working conditions in these industries. These results suggest that *Hoffman* may have ironically created more

tension between immigration and labor laws, where none might have existed otherwise.

VIII. Online Resources

Material on *Hoffman* available publicly on government websites revealed that labor and employment agencies have had vastly different reactions to the *Hoffman* decision. While the NLRB has since released a significant amount of guidance and training updates to deal with immigration status in their casework, the EEOC and Department of Labor (DOL) also made moves towards incorporating undocumented immigrants.

The EEOC is the least communicative and the most ambiguous with regards to undocumented status and how it affects Title VII protections. While their website contained a short statement on how undocumented workers were still protected after *Hoffman*, particularly focusing on citizenship discrimination[99], there is still no information available on potential court remedies. Within the past few years, the EEOC has created a Vulnerable Workers Task Force that will attempt to increase the protection of undocumented workers.[100]

An examination of the resources available on the NLRB indicates that immigration status remains a persistent difficulty within the NLRB; however, internal memoranda make clear that the NLRB is attempting to extend protection to undocumented immigrants despite the limitations set by Hoffman.[101] Since the decision in 2002, the NLRB has issued clear guidelines as to how agents and Administrative Law Judges (ALJs) should treat immigrant status in casework and hearings.[102] Training materials are similarly explicit as to when and how agents may discuss status.[103]

The DOL takes a strong stance on *Hoffman*, explicitly distinguishing FLSA from *Hoffman* and confirming that immigration status will not affect FLSA enforcement of wage

and hour protections.[104] Meanwhile, the OSHA website contains similar statements, though their outreach materials do not mention immigration status.[105] OSHA also has a history of partnering with local community organizations to increase outreach to undocumented workers.[106]

IX. Federal Agency Case Handling Policy Enables Hoffman's Influence

Federal enforcement of labor and employment laws is only possible if workers file claims. However, the process of filing workplace complaints can be overwhelming—workers must navigate a web of various agencies and accumulate an abundance of evidence they may not have access to while dealing with the fallout of the workplace issues themselves, such as job loss. As a result, undocumented workers often choose the "path of least resistance,"[107] at times giving up claims altogether if the costs of pursuing the claim through complicated bureaucratic systems are too high.[108] Federal agents, who are the first point of contact for workers, often influence workers' decisions to pursue claims by acting as gatekeepers of both information and the claims process.[109]

A comparison of NLRB, DOL, and EEOC guidelines on Hoffman illustrates that weak or vague federal guidance on how to treat citizenship status correlates with fewer lawsuits and greater potential for employers to undermine undocumented workers' rights based on their work authorization. While these bureaucratic agencies are making positive steps towards extending greater protection to undocumented workers, there remains an overall lack of worker outreach clarifying the workers' rights.

The DOL has taken a very explicit stance on the inapplicability of *Hoffman*, publicly asserting that immigration status will not affect FLSA or OSHA enforcement.[110] Its clear commitment to disregard immigration status in their cases is reflected in the consistency of

case law surrounding FLSA. In every case, courts reliably echoed the FLSA distinction from *Hoffman*, choosing to grant full damages and protection to unauthorized workers.[111] Furthermore, FLSA cases represented the largest proportion of cases, indicating that workers are more likely to report and pursue these workplace complaints in litigation.

In contrast, the EEOC had little information available on Title VII protections for undocumented workers. Notably, unlike the NLRA, workers under Title VII are generally eligible for monetary awards that are not calculated based on hypothetical past employment, but rather on the damage from discriminatory behavior that might have occurred during hours already worked.[112] There is potential for the EEOC to offer remedies other than backpay, but EEOC resources do not clarify to what extent these are available for undocumented workers. Similarly, there was no publicly available training documented on how to treat immigration status in case handling.

Case law on Title VII protections for undocumented workers is sparse and concerning. The only case of the past four years, *Phase 2 Invs. Inc*, affirmed Title VII protection while ironically foreclosing several remedies for Title VII violations, including backpay and reinstatement.[113] The lack of case law on this subject indicates that EEOC claims are not being sufficiently prosecuted, which could be substantially influenced by the lack of clear policy from the agency on undocumented worker rights. These results indicate that employers may be benefiting from the EEOC's ambiguity to escape liability under Title VII.

As the primary focus of the *Hoffman* decision, the NLRB has unsurprisingly issued an abundance of guidance to its agents on how to handle immigration status within claims and NLRB hearings. However, this guidance is oriented around how to avoid violating *Hoffman* restrictions, rather than to encourage undocumented workers to file claims or dissuade employers from using status

to intimidate workers. For example, the NLRB provides specific guidelines as to when hearing officers may permit employers to discuss immigration status in hearings,[114] as well as for instructions to bureaucratic agents on how to discuss immigration status in their interactions with workers.[115] Similarly, agents may not bring up immigration status themselves nor provide any advice with regards to immigration status.[116]

However, NLRB officers are required to begin pursuing remedies other than backpay (i.e., non-monetary awards) once learning of a complainant's immigration status.[117] Though not affiliated with Immigration and Customs Enforcement (ICE), bureaucratic agents are not able to protect those coming forward with workplace complaints from immigration enforcement agencies.[118] These types of rules, while specific and sufficient for bureaucrats, do not assist workers who may be unsure of their rights. Combined with a lack of public materials on undocumented worker rights, this silence from the NLRB, with the exception of a few warnings about ICE, creates ambiguity for undocumented workers not familiar with the intricacies of NLRA case law and increases their difficulties in navigating this system.

There has only been one NLRA case since 2016, suggesting that there is a lack of NLRA claims pursued in court by undocumented immigrants.[119] Though this absence could be due to a lack of violations, it is far more likely that NLRA complaints are being under-prosecuted. Although bureaucratic policy remains just one factor influencing these trends, it nonetheless illustrates a need for federal agencies to expand their training to encourage reporting on workplace violations rather than avoiding the issues presented in *Hoffman*.

The federal agents who intake worker claims are small actors in the process of enforcing workers' rights; however, they play an important role in the case management because they can "set the tone" for the worker's experience.[120] Therefore, the policies

and training available for these bureaucracies significantly influence the decision for undocumented workers to continue with workplace complaints.[121] The differences between the policies of these three agencies point to how *Hoffman* has complicated the legal process of claimsmaking. By obscuring the legal rights of unauthorized workers, *Hoffman* stands as a barrier in correcting workplace injustices. Without the confidence from federal agencies affirming workers' rights, undocumented workers are more likely to abandon their original claims in favor of violations that are easier for them to prove, such as wage theft.[122] As a result, workers pursue fewer claims overall and the enforcement of worker protection laws is uneven at best.

Despite these developments, federal agencies seem to be making positive steps towards the inclusion of undocumented workers. For example, the EEOC has prioritized undocumented workers in their guidance for 2021,123 while the NLRB has expanded its immigrant rights protections consistently over the past four years.[124] Perhaps most importantly, the EEOC, DOL, and NLRB have established a series of Memoranda of Understanding with DHS and the Department of Justice (DOJ) to prevent ICE involvement in workplace investigations.[125] However, to increase prosecution of unlawful employers, federal agencies must be thoughtful in their engagements with undocumented workers from the beginning of a workplace complaint.

X. Conclusions and Future Proposals

The Trump administration brought new threats to immigrants' rights, along with a call to reexamine the existing structural inequities that reinforce the difficulties faced by migrant workers in the United States. Although attention surrounding the *Hoffman* decision has faded, its effects still permeate wherever undocumented workers are employed, especially low-wage industries.[126] This effect has extended

beyond the scope of the NLRA, impacting rights and remedies that were not included in the original *Hoffman* decision. While most of the case law upheld undocumented worker rights, several challenges to these rights have had some success in restricting unauthorized workers' access to full remedies.[127]

These cases either altered or denied financial compensation to undocumented workers for legal issues not related to the NLRA. By adopting a watered-down version of the reasoning within the *Hoffman* decision, courts argued that granting compensation rewards criminal immigrants. This allowed courts to connect issues unrelated to the original *Hoffman* decision to change case outcomes for undocumented workers and deny them court remedies. Employers commonly attempted to use their employee's immigration status to escape liability under worker protections statutes, many times threatening to reveal their workers' status to the court through discovery. While these decisions are in the minority of recent case law, they nonetheless showcase *Hoffman's* alarming implications.

Even if the overall case law suggests most courts are limiting *Hoffman* to NLRA backpay, legal scholarship on the effect of Hoffman has indicated that its impact remains broad. *Hoffman* has had a negative effect on wages, health and safety, worker organizing, and more. The worsening of working conditions for undocumented workers has affected the conditions of authorized workers, who often work beside unauthorized workers in low-wage industries.[128] In addition to these effects on working conditions, *Hoffman* has influenced societal norms surrounding undocumented immigrants. The language and reasoning within the majority opinion depict immigrant workers as deceitful and criminal, contributing to the existing negative discourse on them. The criminalization and racialization of undocumented immigrants promoted by the *Hoffman* decision are echoed in recent case law, which calls upon false narratives of undocumented immigrants to justify the revocation of full remedies. More importantly, negative perceptions

of the undocumented community provide political justification for the policing of this community, as well as harsh and inhumane immigration enforcement tactics.[129]

Notably, the *Hoffman* decision has erased employer culpability in alleged immigration and labor law violations by refocusing on an undocumented worker's transgression of immigration law. This effect contributes to the outcomes seen in the case law, where employers chose to weaponize immigration status against their workers. Despite this growing threat to undocumented worker rights, the federal agencies charged with upholding these rights have given only incomplete responses to *Hoffman*. There remains a lack of public outreach materials on immigration status that inform undocumented workers of what their labor rights are. Training to federal agents is either similarly absent (in the cases of DOL and EEOC) or insufficient (in the case of NLRB). As a result, employers can, and often do, refocus the complaint process around immigration status.[130]

In a context where undocumented workers are already an incredibly precarious workforce,[131] *Hoffman* has only heightened this instability by weakening labor law protections for undocumented workers, producing the exact fears outlined in *Hoffman*'s dissent.[132] Each of these court cases and scholarly articles illustrate how the lives and livelihoods of unauthorized immigrants are at stake. Long working hours, job loss, low wages, and serious injury can have detrimental effects on the life of someone who is low-income or lacks a strong support network. In the wake of *Hoffman*, the choice to combat these abuses through workplace complaint mechanisms can have similarly destructive outcomes for workers' mental and physical health.[133]

Although the *Hoffman* decision is now reaching its twentieth birthday, the active harm it has created for undocumented worker rights is ongoing. The ambiguity left by the majority decision has created an alarming precedent that illustrates the need for *Hoffman*

to be clarified, if not overturned. Higher courts must be more specific about which remedies are affected by *Hoffman* and how these remedies are related to immigration laws by providing a clear connection between the unique features of backpay to what may incentivize unauthorized employment.

However, in the absence of court action, federal agencies can increase employer accountability for IRCA and labor/employment law violations. Reforming agency guidance on *Hoffman* to be more explicit on undocumented worker rights will increase the accessibility of complaint procedures.[134] Other financial remedies could be implemented to ensure equal protection of undocumented workers. For example, the NLRA could create a common fund for unfair labor practices or the EEOC could base backpay on hours that were already worked at an unequal pay rate. Such solutions would circumvent the issues of the *Hoffman* decision but provide the financial consequence needed to encourage compliance with worker protection laws.

This research was limited by the information that was published by legal databases and agency websites. These restrictions may obscure the exact prevalence of trends that are not encapsulated in publicly available material, such as bureaucratic treatment of immigration status, use of discovery, and employers' attempts to weaponize status. Furthermore, while I highlight many of the ways *Hoffman* disincentivizes workers from pursuing claims, the nature of this data only captures the claims that reach courts. Claims that are settled, abandoned, or never pursued in the first place, though influenced by *Hoffman*'s legacy, are not included within this piece. Future research would include qualitative work on how agents, employers, and workers are reacting to changes in immigrant workers' legal rights. This work would help establish the legal consciousness of *Hoffman* within the minds of workers and employers. While *Hoffman* is mentioned explicitly within court decisions, it remains unclear whether *Hoffman*'s use by everyday actors reflects general

anti-immigrant sentiments or specific knowledge of the law.

Additionally, there is a need for a greater understanding of undocumented worker rights and organizing. While the subject of this project is worker vulnerability, this research contains countless examples of undocumented workers' resiliency to speak out on workplace injustices despite the legal exclusion they face. More focus must be given to unauthorized workers that are organizing across the country. While it remains to be seen whether the policies of the Biden administration will bring real change for undocumented immigrants, only through understanding and supporting these communities can we assist in the assimilation and inclusion of these workers into American society.

[1] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 US 137 (2002)
[2] Ruben Garcia, "Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws," 36 *University of Michigan Journal of Law Reform* 737 (2003): 745.
3 Ruben Garcia, "Ten years after Hoffman Plastic Compounds, Inc. V. NLRB: the Power of a Labor Law Symbol," *Cornell JL & Pub. Policy*, 21, 659 (2011): 660.
[4] See, e.g., Emily Estrada, et. al. "Polarized Toward Apathy: An Analysis of the Privatized Immigration Control Debate in the Trump Era," *Political Science & Politics* 53, no. 4, 679 (2020).
[5] Jennifer J. Lee, "Redefining the Legality of Undocumented Work," 106 *California Law Review* 1617 (2018): 1366-1377.
[6] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S. Ct. 2803 (1984).
[7] Immigration Reform and Control Act, 8 U.S.C.S. § 1324a (1986).
[8] Ibid.
[9] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275 (2002).
[10] Ibid, 145.
[11] Ibid, 151-152.
[12] Ibid, 154.
[13] Ibid, 154-155.
[14] Elizabeth R. Baldwin, "Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After *Hoffman Plastic Compounds, Inc. v. NLRB*," 27 *Seattle University Law Review* 233 (2003): 250-251.
[15] Katherine E. Seitz, "Enter at Your Own Risk: The Impact of *Hoffman Plastic Compounds v. National Labor Relations Board* on the Undocumented Worker" 82 *North Carolina Law Review* 366, 387 (2003).
[16] Garcia, "Ten years after *Hoffman*," 668.
[17] Most often, cases mentioned *Hoffman* as a citation for the purposes of IRCA or to give example of a case where the Court is permitted to overturn agency decisions. Law review articles and cases that cited

Hoffman only briefly, without providing any significant analysis or discussion of the case were similarly not considered. For the purposes of this study, these articles and cases did not speak to how *Hoffman* is influencing current case law or scholarship.

[18] See *Herrera v. Decal Constr*., No. 19-2470-CM-TJJ, 2019 U.S. Dist. LEXIS 200799 (D. Kan. Nov. 18, 2019),
Molina v. Two Bros. Scrap Metal, Inc., 109 N.Y.S.3d 564 (Sup. Ct.), and *Ramirez v. Four Seasons Roofing & Contr., Inc*., 2017 Mass. Super. LEXIS 134.

[19] See *Herrera*, 2019 U.S. Dist. LEXIS 200799 and *Molina*, 109 N.Y.S.3d.

[20] See *Ramirez*, 2017 Mass. Super. LEXIS 134.

[21] See *Angel Altamirano v. Brickfence*, 2017 KS WRK.COMP. LEXIS 342 and *Sandoval v. Williamson*, No. M2018-01148-SC-R3-WC, 2019 WL 1411217 (Mar. 28, 2019).

[22] See *United States EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d 550 (D. Md. 2018) and *U.S. EEOC v. Mar. Autowash, Inc.*, 820 F.3d 662 (4th Cir. 2016).

[23] See *Pacheco v. Chickpea at 14th St., Inc.*, 2019 U.S. Dist. LEXIS 90714 (S.D.N.Y. May 30, 2019).

[24] See *Escamilla v. Shiel Sexton Co*., 73 N.E.3d 663 (Ind. 2017).

[25] See *Abundes v. Athens Food Servs.*, No. 3-14-1278, 2016 U.S. Dist. LEXIS 201809 (M.D. Tenn. Aug. 10, 2016), *Cordova v. R & A Oysters, Inc.*, 169 F. Supp. 3d 1288 (S.D. Ala. 2016), *Saavedra v. Mrs. Bloom's Direct, Inc.*, No. 17-CV-2180 (OTW), 2019 U.S. Dist. LEXIS 166866 (S.D.N.Y. Sep. 27, 2019), and *Molina*, 109 N.Y.S.3d.

[26] See *Pro's Choice Beauty Care, Inc. v. Local 2013, United Food & Commer. Worker*s, No. 16-cv- 2318(ADS)(ARL), 2017 U.S. Dist. LEXIS 33158 (E.D.N.Y. Mar. 7, 2017).

[27] See *Trs. of the Pavers & Rd. Builders Dist. Council Welfare v. M.C. Landscape Grp., Inc.*, No. 12-CV-834 (CBA) (VMS), 2016 U.S. Dist. LEXIS 41138 (E.D.N.Y. Mar. 28, 2016).

[28] See *United States EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d.

[29] See *Drew-King v. Deep Distribs. of Greater NY*, 194 F. Supp. 3d 191 (E.D.N.Y. 2016).
[30] S*ee Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267 (Minn. 2017) and *Torres v. Precision Indus.*, 437 F. Supp. 3d 623 (W.D. Tenn. 2020).
[31] See *Bear v. Del. Cty*., No. 2:14-cv-0043, 2016 U.S. Dist. LEXIS 6537 (S.D. Ohio Jan. 20, 2016), *Inamagua v. 68- 74 Charlton St. Co.*, LLC, 2019 NY Slip Op 30118(U) (Sup. Ct.), *Martinez v. Cont'l Tire the Ams., Ltd. Liab. Co.*, No. 1:17-cv-00922-KWR-JFR, 2020 U.S. Dist. LEXIS 138534 (D.N.M. Aug. 4, 2020), and *Pacheco v. Johnson*, No. 3:11-cv-00221, 2017 U.S. Dist. LEXIS 104268 (M.D. Tenn. July 6, 2017).
[32] See, for example, *Saavedra*, 2019 U.S. Dist. LEXIS 166866 at 7-9.
[33] *Sanchez*, 897 N.W.2d at 276-277; Cordova, 169 F. Supp. 3d at 1296; *Martinez*, 2020 U.S. Dist. LEXIS 138534 at 7-10; and Bear, 2016 U.S. Dist. LEXIS 6537 at 49-63.
[34] See *Inamagua* v. 68-74 Charlton St. Co., LLC, 2019 NY Slip Op 30118(U).
[35] See *Pacheco v. Johnson*, 2017 U.S. Dist. LEXIS 104268.
[36] See *Pro's Choice Beauty Care, Inc.* 2017 U.S. Dist. LEXIS 33158.
[37] See *EEOC v. Phase 2 Invs. Inc.,* 310 F. Supp. 3d 550.
[38] See, for example, court decisions in wage injury loss: *Bear*, 2016 U.S. Dist. LEXIS 6537 (full damages were granted); *Inamagua* 2019 NY Slip Op 30118(U) (set a new standard to determine whether damages should be granted); *Pacheco*, 2017 U.S. Dist. LEXIS 104268 (granted damages based on calculation of earning capacity in plaintiff's country of origin, El Salvador).
[39] See, for example, *Sandoval*, 2019 WL 1411217.
[40] See, e.g., *Herrera*, 2019 U.S. Dist. LEXIS 200799 at 3 ("Hoffman does not apply to FLSA cases").
[41] See, e.g., *Phase 2 Invs. Inc.*, 310 F. Supp. 3d at 580 ("Although the Court cannot award backpay to the undocumented aliens, if

Defendants are found liable, the public interest would be best served by
enforcing some monetary penalty… [b]ut it would be premature to draw the contours of a remedy at this time… Liability and, perhaps, remedies will be decided at some later date." [emphasis in original]).

[42] See *Bear*, 2016 U.S. Dist. LEXIS 6537.

[43] See *Inamagua*, 2019 NY Slip Op 30118(U).

[44] See *Pacheco*, 2017 U.S. Dist. LEXIS 104268.

[45] *Phase 2 Invs. Inc.*, 310 F. Supp. 3d.

[46] *Sandoval*, 2019 WL 1411217.

[47] *Baldwin*, "Damage Control," 250-251.

[48] *Abundes*, 2016 U.S. Dist. LEXIS 201809; *Drew-King*, 194 F. Supp. 3d; *Escamilla*, 73 N.E.3d; *Herrera*, 2019 U.S. Dist. LEXIS 200799; *Molina*, 109 N.Y.S.3d; *Ramirez*, 2017 Mass. Super. LEXIS 134; *Saavedra*, 2019 U.S. Dist. LEXIS 166866.

[49] See, for example, *Angel Altamirano*, 2017 Ks. Wrk.Comp. LEXIS 342.

[50] See *Herrera*, 2019 U.S. Dist. LEXIS 200799; *Molina*, 109 N.Y.S.3d; *Ramirez*, 2017 Mass. Super. LEXIS 134.

[51] Shirley Lin, "'And Ain't I a Woman?': Feminism, Immigrant Caregivers, and New Frontiers for Equality," 39 *Harvard Journal of Law & Gender* 67 (2016); Jayesh M. Rathod, "Danger and Dignity: Immigrant Day Laborers and Occupational Risk," 46 *Seton Hall Law Review* 813 (2016); Angela Stuesse, "When They're Done with You: Legal Violence and Structural Vulnerability among Injured Immigrant Poultry Workers," 39 *Anthropology of Work Review* 79 (2018); Rita Trivedi, "Restoring a Willingness to Act: Identifying and Remedying the Harm to Authorized Employees Ignored under Hoffman Plastics," 51 *University of Michigan Journal of Law Reform* 357 (2018).

[52] Elizabeth Lincoln, "Accountability for Pesticide Poisoning of Undocumented Farmworkers," 24 *Hastings W.-N.W. J. Env. L. & Pol'y* 383: (2018); Rachel Nadas and Jayesh

Rathod, "Damaged Bodies, Damaged Lives: Immigrant Worker Injuries as Dignity Takings," 92 *Chicago Kent Law Review* 1155: (2017); Rachel Nadas, Justice for Workplace Crimes: An Immigration Law Remedy, 19 *Harvard Latino Law Review* 137: (2016); Nicole Taykhman, "Defying Silence: Immigrant Women Workers, Wage Theft, and Anti-Retaliation Policy in the States," 32 *Columbia Journal of Gender & Law* 96: (2016).

[53] Shaakirrah Sanders, "Ag-gag Free Nation," 54 *Wake Forest Law Review* 491 (2019); Lin, "And Ain't I a Woman?" (2016); Shirely Lung, "Criminalizing Work and Non-Work: The Disciplining of Immigrant and African American Workers," 14 *University of Massachusetts Law Review* 290 (2019).

[54] Lung, "Criminalizing Work and Non-Work," 60; Angela Morrison, "Why Protect Unauthorized Workers? Imperfect Proxies Unaccountable Employers, and Antidiscrimination Law's Failures," 72 *Baylor Law Review* (2020).

[55] Lee "Redefining the Legality"; Trivedi, "Restoring a Willingness to Act"; Angela Morrison, "Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers," 11 *Harvard Law & Policy Review* 295 (2017).

[56] Lance Compa, "Migrant Workers in the United States: Connecting Domestic Law with International Labor Standards," 92 Chicago Kent Law Review 211 (2017); Beth Lyon, "Inter-American Human Rights System Affirms Equal Protection for US Undocumented Workers" 3 *International Labor Rights Case Law* 430 (2017).

[57] Rathod, "Danger and Dignity"; Trivedi, "Restoring a Willingness to Act."

[58] Hoffman, 535 U.S. at 148-150.

[59] See, for example, *Inamagua*, 2019 NY Slip Op 30118(U) at 3 ("The issue on this motion is whether Plaintiff's alleged fraudulent activities bar him from seeking lost wages regardless of his status as a Green Card holder.," where "fraudulent activities" refers to the plaintiff's presentation of false identification to the employer).

[60] Dannin, Ellen. "*Hoffman Plastics* as Labor Law-Equality at Last for Immigrant Workers." U.S.F.L. Rev. 44, 400-401 (2009).
[61] See *Cordova*, 169 F. Supp. 3d; *Drew-King*¸194 F. Supp. 3d; *Maritime Autowash*¸820 F.3d; Phase 2 Invs. Inc., 310 F. Supp. 3d; *Inamagua*, 2019 NY Slip Op 30118(U); *Ramirez*, 2017 Mass. Super. LEXIS 134; *Saavedra*, 2019 U.S. Dist. LEXIS 166866; *Sandoval*, 2019 Tenn. LEXIS 153 8; and *Torres*, 437 F. Supp. 3d.
[62] *Inamagua*, 2019 NY Slip Op 30118(U).
[63] Morrison, "Why Protect," 124 -125 ("Nonetheless, employers successfully lobbied to weaken some of IRCA's sanctions and the federal government, for the most part, has focused its enforcement on employees, rather than employers… One of the results has been uneven enforcement of IRCA's provisions against employers… Criminal prosecutions of employers are [rare]").
[64] Ibid, 125-127.
[65] Lung, "Criminalizing Work and Non-Work," 336.
[66] Morrison, "Why Protect."
[67] Lung, "Criminalizing Work and Non-Work," 276 and 298 ("Criminalization provides the coercive apparatus by which employers pit workers against one another and keep all workers in their place").
[68] Lin, "And Ain't I a Woman?."
[69] Lung, "Criminalizing Work and Non-Work" and Morrison, "Why Protect."
[70] Lin, "And Ain't I a Woman?."
[71] Ibid.
[72] Lung, "Criminalizing Work and Non-Work."
[73] Ibid.
[74] Ibid, see also Lin, "And Ain't I a Woman?."
[75] *Cordova*, 169 F. Supp. 3d.
[76] *Herrera*, 2019 U.S. Dist. LEXIS 200799.
[77] *Drew-King*¸194 F. Supp. 3d.
[78] See *Maritime Autowash*¸820 F.3d; Phase 2 Invs. Inc., 310 F. Supp.

3d.

[79] Kati L. Griffith & Shannon M. Gleeson, "The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims," 39 *Comparative Labor Law & Policy Journal* 111 (2019).

[80] Lin, "And Ain't I a Woman?."

[81] Douglas S. Massey, Joaquin Arango, Graeme Hugo, Ali Kouaouci, Adela Pellegrino, and J. Edward Taylor. "Theories of international migration: A review and appraisal." 19 *Population and Development Review* 431 (1993).

[82] Lee, "Redefining the Legality."

[83] See *Bear* 2016 U.S. Dist. LEXIS 6537 and *Martinez*, 2020 U.S. Dist. LEXIS 138534.

[84] See *Abundes*, 2016 U.S. Dist. LEXIS 201809; *Cordova*, 169 F. Supp. 3d; and *Molina*, 109 N.Y.S.3d.

[85] Stuesse, "When They're Done with You."

[86] Trivedi, "Restoring a Willingness to Act."

[87] Ibid.

[88] Lin, "And Ain't I a Woman?."

[89] Nadas, supra note 59; Sanders, supra note 60; Lung, supra note 60; Nadas & Rathod, supra note 59.

[90] Stuesse, supra note 52; Lung, supra; Taykhman, supra note 53.

[91] Morrison, supra note 61; Lung, supra note 60.

[92] Stuesse, "When They're Done with You."

[93] Trivedi, "Restoring a Willingness to Act," 377.

[94] Taykhman, "Defying Silence."

[95] Morrison, "Why Protect"; Lee, "Redefining the Legality."

[96] Rathod, "Danger and Dignity"; Trivedi, "Restoring a Willingness to Act."

[97] Lee, "Redefining the Legality"; Trivedi, "Restoring a Willingness to Act"; Morrison, "Why Protect"; see also Torres v. Precision Indus., 437 F. Supp. 3d.

[98] *Hoffman*, 535 U.S. at 144.

[99] "Fact Sheet: Immigrants' Employment Rights under Federal Anti-

Discrimination Laws," EEOC (Apr. 27 2010), available at: https://www.eeoc.gov/laws/guidance/fact-sheet-immigrants-employment-rights-under-federal-anti- discrimination-laws.

[100] "Vulnerable Workers Task Force," EEOC (n.d.), available at: https://www.eeoc.gov/vulnerable-workers-task- force.

[101] Barry Kearney, "Advice Memorandum re: Lifeway Foods Inc., Case 13-CA-169510," NLRB (Jun. 7, 2016) (interrogation of immigration status is prohibited by NLRA); Barry Kearney, "Advice Memorandum re: Zane's Inc., Cases 01-CA-167721, 01-CA-178261, 01-CA-181191," NLRB (Dec. 12, 2016) (investigation into immigration status in response to NLRA complaint is prohibited by NLRA); Jayme Sophir, "Advice Memorandum re: The Washington University, Case 14-CA-202172," NLRB (Oct. 31, 2017) (threats of deportation in response to collective activity is an unfair labor practice); Jayme Sophir, "Advice Memorandum re: International Warehouse Group Inc., Case 29-CA-197057," NLRB (Oct. 5, 2017) (immigrants' rights protest is protected strike activity).

[102] "Guide for Hearing Officers in NLRB Representation and Section 10{k) Proceedings," NLRB (Sept. 2003), available at: https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/hearingofficersguide.pdf; Jeffrey Wedekind, "Bench Book- An NLRB Trail Manual," NLRB (Jan. 2021), available at: https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/alj-bench-book-2021.pdf.

[103] Richard Siegel, "Public Inquiries and Investigations Involving Non-English Speaking Witnesses: OM 09- 44(CH)," NLRB (Mar. 16, 2009); Richard Griffin Jr., "Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Proceedings, GC 15-03," NLRB (Feb 27, 2015); Richard Griffin Jr., "Report on the Midwinter Meeting of the ABA Practice and Procedure Under the National Labor Relations Act Committee of the Labor and Employment Law Section GC 17-02," NLRB (Mar. 10, 2017).

[104] "Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division," FLSA (Jul. 2008), available at https://www.dol.gov/agencies/whd/fact-sheets/48-hoffman-plastics. See also "Handy Reference Guide to the Fair Labor Standards Act," FLSA (n.d.), available at: https://www.dol.gov/agencies/whd/compliance-assistance/handy- reference-guide-flsa.

[105] See, for example: "Workers' Rights," OSHA (2017), available at: https://www.osha.gov/sites/default/files/publications/osha3021.pdf.

[106] "OSHA Fact Sheet: Hispanic Outreach," OSHA (Apr. 7, 2014), available at: https://www.osha.gov/OshDoc/data_Hispanic/hispanic_outreach.html, see also "OSHA's Areas of Emphasis," OSHA (n.d.), available at: https://www.osha.gov/alliances/byemphasis#immigrant-workers-and-employers, and "Region 5 Alliance Annual Report," OSHA (Jul. 21, 2017), available at: https://www.osha.gov/alliances/regional/region5/alliance-annual-report_20170721.

[107] Shannon Gleeson, *Precarious claims: The Promise and Failure of Workplace Protections in the United States* (University of California Press: 2016), 85-86.

[108] Ibid, 98.

[109] Ibid, 89.

[110] "Fact Sheet #48"; and "Handy Reference."

[111] *Herrera*, 2019 U.S. Dist. LEXIS 200799; Molina, 109 N.Y.S.3d; *Pacheco*, 2019 U.S. Dist. LEXIS 90714;

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[112] F. Supp. 3d, *Saavedra*, No. 17-CV-2180 (OTW), 2019 U.S. Dist. LEXIS 166866.

[113] "Remedies for Employment Discrimination," EEOC (n.d.), available at: https://www.eeoc.gov/remedies- employment-discrimination.

[114] *Phase 2 Invs. Inc.*, 310 F. Supp. 3d.

[115] "Guide for Hearing Officers"; and Wedekind, "Bench Book."

[116] "NLRB Casehandling Manual"; Siegel, "Public Inquiries"; Griffin Jr., "Updated Procedures."
[117] Siegel, "Public Inquiries."
[118] Griffin Jr., "Updated Procedures."
[119] Siegel, "Public Inquiries."
[120] *Drew-King*¸194 F. Supp. 3d.
[121] Gleeson, *Precarious Claims*, 89.
[122] Ibid, 89.
[123] Ibid, 84-86.
[124] "Vulnerable Workers."
[125] Kearney, "Advice Memorandum re: Lifeway Foods Inc" and "Advice Memorandum re: Zane's Inc."; Sophir, "Advice Memorandum re: The Washington University" and "Advice Memorandum re: International Warehouse Group Inc.."
[126] "Addendum to the Revised Memorandum of Understanding."
[127] Lung, "Criminalizing Work and Non-Work."
[128] See *Escamilla*, 73 N.E.3d; *Pacheco*, 2017 U.S. Dist. LEXIS 104268; *Pro's Choice Beauty Care*. U.S. Dist. LEXIS 33158; Sandoval, No. M2018-01148-SC-R3-WC; *Phase 2 Invs. Inc.*, 310 F. Supp. 3d; and *Torres*, 437 F. Supp. 3d.
[129] Lung, "Criminalizing Work and Non-Work," 276.
[130] Lin, "And Ain't I a Woman?."
[131] "NLRB Casehandling Manual."
[132] Rathod, "Danger and Dignity."
[133] Nadas & Rathod, "Damaged Bodies, Damaged Lives."
[134] Gleeson, *Precarious Claims*, 100-104.
[135] Helen Marrow, "Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies," *American Sociological Review* 74, no. 5 756-76 (2009)

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Reasonable Expectation of Privacy in an IP Address: The Tor Browser and Other Anonymization Measures:

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Abstract

This article aims to answer whether there is a reasonable legal expectation of privacy in a user's Internet Protocol (IP) address, specifically when that user is using anonymization measures that attempt to mask their IP address. The claim that there should be a reasonable legal expectation of privacy if the user is employing proper anonymization techniques such as the Tor Browser, VPNs, TAILS, and Qubes-Whonix is analyzed. These anonymization measures are discussed in detail and compared on effectiveness for users who would like to maintain a private posture when surfing the web. This piece investigates the difference between the legal expectation of privacy in a user's IP address in disguised/not disguised scenarios. Major case law studies support the claim that there should be further consideration into the privacy of a user's metadata and whether or not sharing that metadata generated by online activities is presumed as voluntarily given up from a legal perspective. These elements are analyzed in detail through the use of legal case studies and examples of online anonymization measures to conclude whether a legal expectation of privacy exists in a user's IP address. In applying these case studies, the paper will provide opinions on how to increase digital privacy rights for the user and discuss court decisions and resulting implications on the Fourth Amendment landscape. The piece concludes with a further research section, which shines a light on some emerging topics surrounding the legality of privacy in the digital age.

I. Introduction:

The Fourth Amendment is one of the primary civil protections for a United States citizen. These protections are especially true for those being accused of a crime by a government entity or agent acting for the government in some capacity.[1] The U.S. Constitution's Fourth Amendment holds that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the emerging realm of digital privacy, the third-party doctrine[2] is an essential method the government can use to obtain information about someone without a warrant. The third-party doctrine states that when an individual voluntarily gives information to a third party, the information is no longer private.[3] This doctrine often results in the government going through a third party for the collection of information about an individual, working around the individual in question. For example, if someone was wanted for fraud, law enforcement may request financial information about them from their bank. In this scenario, they have no reasonable expectation of privacy in the information they had given to the bank. The same applies in the digital realm, such as with IP addresses.

Cases like *Katz v United States*[4] provide insight into the idea that the Fourth Amendment can extend into the digital realm and that a user's information can be protected.[5] Additionally, this legal expectation of privacy must pass the two-pronged test, which includes an actual (objective) expectation of privacy and a reasonable (subjective) expectation of privacy that is widely accepted by society.[6] This paper will address the technical details of IP addresses and other anonymization measures that users employ to

set up a more private digital landscape. Furthermore, this paper will assert the importance of a reasonable legal expectation of privacy in a user's IP address using anonymization measures, specifically in cases where users believe they are using proper techniques to remain private online.

II. Background

Without the attempt from a user to mask their IP address, U.S. case law has ruled that there is no reasonable expectation of privacy in a user's IP address via *United States v Hood*.[7] The case conclusion came from an appeal from a defendant who was using the messenger application, Kik, to transmit child pornography.[8] Due to the aforementioned third-party doctrine, the courts ruled that the information given up to Kik and the Internet Service Provider (ISP) would not be granted protection under the Fourth Amendment. This problem with the third-party doctrine extends to increasing digital privacy rights at large and the discussion of the third-party doctrine as it applies to the legal basis of reasonable expectation of privacy on the internet. Previous studies have explored this research question to analyze the legal casework of the Playpen cases and their corresponding Network Investigation Techniques (NITs).[9] Previous studies have also explored many of the same cases discussed in this paper, but there is neither a technical nor a legal discussion that combines some of the top methods for anonymizing online activity and discusses each method as they relate to that user's legal protections.

To show legal precedence, I will break down multiple cases relating to digital privacy and the Fourth Amendment. One of the key cases discussed in this paper is *Carpenter v United States*,[10] where the courts showed restraint in applying the third-party doctrine where private information is revealed.[11] Another case, *Smith v Maryland*,[12] provides an extension of the Fourth Amendment from physical

objects into what is referred to as "electronic information."[13] In the following case, *United States v Warshak*,[14] the courts compare an ISP and a physical post office or telephone company.[15] In *Katz v United States*, Katz had a reasonable expectation of privacy in protecting people, but not places.[16] *United States v Jones* presents an opinion for the courts to examine the third-party doctrine for possible amendment given the increasing amount of data a person gives up during daily activities.[17] In the latter sections, cases such as *United States v Matish*, *United States v Werdene*, *Riley v California*, *State v Quiday*, *Florida v Riley*, and *Kyllo v United States* will be discussed in-depth to support the central argument.

III. Analysis

A. Technical Discussions and Comparison

The following section aims to highlight the technical details discussed in the analysis section of this paper. It provides insight into legal professionals' considerations when deciding what is permissible in a court of law. Internet Protocol (IP) addresses are primarily discussed, as some find them the most important identifier for a user on the internet. Beyond IP addresses, this section will define the technology behind anonymization tools used to mask an IP address and, generally, a user's online identity.

An IP address is a unique identifier used to recognize different devices on the internet.[18] All computers and similar devices on the internet have one. Additionally, there are both static and dynamic IP addresses.19 In the United States, IP addresses are allocated by an Internet Service Provider (ISP) to customers who pay them for internet service.[20, 21] An IP address, if traced backward by law enforcement, for example, can identify the physical location of the associated computer.[22] If law enforcement cannot locate a computer as part of an investigation, they can subpoena the ISP to

get the IP address.[23] Understandably, this lack of clarity with ISPs due to the legal gaps in our internet law system raises concerns for citizens who use the internet. The United States came close to solving this retention problem with HR 1076 on February 13, 2009, which aimed to "require providers of electronic communication or remote computing services to retain certain user records for at least two years."[24] Beyond ISPs, anonymity networks also raise legal questions.

When discussing an anonymity network, the purpose is in the name: an interconnection of communicating machines that operate to use the internet anonymously.[25] In the wake of increasing tracking from big tech companies, like Google and Facebook, and fear of government surveillance, many internet users who seek privacy for their daily activities have turned to anonymity networks.[26] Additionally, with an increased desire to engage in free speech, anonymity networks allow an online user to obscure their activity and say what they want without having to worry that every move they make is being tracked.

The most popular anonymity network is The Onion Router (Tor), which is home to "onion services."[27] "Tor is a distributed overlay network designed to anonymize low-latency TCP-based applications such as web browsing, secure shell, and instant messaging. Clients choose a path through the network and build a 'circuit,' in which each node (or 'onion router') in the path knows its predecessor and successor, but no other nodes in the circuit."[28]

These services, hosted by sites only accessible through the Tor anonymity network, end in the ".onion" top-level domain (like .com for the public web) and can be used to host content anonymously.[29]

Tor also makes use of the SOCKS proxy protocol, which allows any SOCKS-applicable applications to proxy traffic via the SOCKS protocol rather than the default Internet connection protocols.30 More generally:

> The Tor project is open-source, community-based, and can be easily installed by anyone from their public website. Beyond the way in which Tor routes network traffic for the user, the Tor browser also comes bundled with other notable features to keep a user safe browsing the web such as HTTPS Everywhere (enables SSL encryption on websites), "NoScript" (prevents JavaScript from running malicious code on your machine), and only uses session cookies [which improves privacy] . . . .[31]

Qubes-Whonix employs another method for private internet activity, through both Tor and compartmentalization. This combined approach is an anonymization strategy attempting to achieve the goal of digital privacy.[32] Whonix makes use of two virtual machines (VM), which allows a user to interact with an application on their physical computer which acts as a computer itself, only virtually. Hence, the name virtual machine.[33] Specifically, Whonix's two VMs are a Gateway, which serves to route all traffic through the Tor Network, and a Workstation, which holds the applications and allows the user to carry out online activities with a privacy/anonymity focus.[34] Uniquely, "Qubes has implemented a strict security-by-isolation architecture. Hardware controllers and multiple user domains (qubes) are isolated using separate VMs that are explicitly assigned different levels of trust, yet the desktop experience is user-friendly and well-integrated."[35] Putting both measures together, Whonix can n on top of configured qubes (separate virtual machines) inside of VMs to create an environment that implements compartmentalization paired with all applications/network traffic being routed through Tor. The Whonix operating environment also includes other tools to increase privacy.

Tools such as the TAILS Operating System (OS) take a different approach towards anonymity: separation and portability. TAILS OS allows users the option to reboot their computer and startup using a USB stick with the software downloaded on it, temporarily

changing the system into a TAILS operating environment. This feature also deletes the operational environment when the user is finished using it.[36] Additionally, the 'A' in TAILS refers to your ability as a user to impart amnesia on your computer, meaning that no permanent records of activity are coded onto a disk or permanent log within the file system.[37] The TAILS operating system wipes web browsing history, passwords entered, file altering history, and devices connected during the session.[38] TAILS also comes with built-in features such as Pidgin (Off-the-Record Messaging), Onionshare (anonymous file sharing), Thunderbird (end-to-end encrypted email), among others. These features allow users to carry out basic computer functions while doing the most to remain anonymous.[39]

One popular tool that many individuals use to increase privacy is a Virtual Private Network (VPN). VPNs provide users with two-sided protection between their device and Internet Service Provider (ISP) and between their ISP and the internet by encrypting the traffic that flows through both channels.40 The concern from a data privacy standpoint is that the user's data is sent from your machine to the ISP without any encryption, meaning that the ISP can view all of your traffic.41 Consequently, using only a VPN without any other protections essentially redirects your traffic and data but does not provide additional privacy for the user.

In fact, the issue of VPN usage came up in 2017 when the House of Representatives voted to repeal limits on ISPs' control over their user's data, increasing the fear that "Big cable and big telecom have struck again . . . By doing the industry's bidding, the congressional majority is wiping away common-sense protections for the privacy of internet users' data and browsing history. If the president signs this bill, broadband providers will have free rein to sell user data to the highest bidder—without ever informing consumers."[42] This lack of trust with a user's ISP has raised concerns about VPNs as a valid method of protection, as well as the concern that the VPN itself may be selling your data directly.[43]

In summary, the Tor network design aims to protect the connection between two users. The Tor browser allows a user to safely navigate the surface and majority of the dark web, all while using the Tor network in a safe environment.[44] Next, Qubes-Whonix is an operating system that helps build a two-pronged approach, one to compartmentalize tasks and another to tunnel those tasks through a privacy-focused gateway.[45] Alternatively, TAILS takes a different approach with the integration of anti-forensic technology, allowing users to have a portable privacy-centered operating system on a USB drive that wipes the memory of user interaction every time the OS image is booted up.[46] Of the three operating systems, TAILS provides the best defense against temporary internet files leaking and an accidental Clearnet traffic leakage from occurring.[47] All three operating systems protect against IP address and web traffic leaks, which is essential for their user privacy goals.[48] On top of these operating systems, the use of VPNs provides a method to encrypt traffic to avoid recovery by your ISP, which in turn shifts the readability of traffic to your VPN provider. With this understanding of the technologies used to achieve anonymity when using the internet, the paper will now shift towards how they can be applied to provide a reasonable expectation of privacy from a legal perspective.

B. Legal Analysis

This portion of the paper will examine how these technologies are treated from a legal perspective by examining cases that involve their use. From *Carpenter v United States*, we know that the text of the Fourth Amendment explains a close relationship to property rights but does not explicitly define privacy. The legal foundation for privacy rights comes before the long-standing rights that protect an individual's private property.[49] *Carpenter v United States* involved a group of men who were hunted by the FBI for a series of bank robberies. When one man was caught, he gave up his

phone records and information freely so that the FBI could track his accomplices.[50] While *Carpenter* is the case that is famous for establishing the third-party doctrine, the Supreme Court still held that federal investigators needed a warrant to access the suspect's cell phone records and website information.[51] Thus, the case marked the beginning of protections for cell phone location and information related to those calls.

Another example where Fourth Amendment privacy protection was lost due to the third-party doctrine is *Smith v Maryland*. Smith lost his protection under the Fourth Amendment when he voluntarily gave up his telephone number to his telephone company. This meant that he could not claim a reasonable expectation of privacy.[52] This is another example of the tendency of someone who does not take proper technological precautions to hide their personal information to lose their Fourth Amendment protection when transmitting or communicating electronic information by giving that information to a third party.

The Fourth Amendment provides for the explicit protection of private property rights from the government. Personal computers are the private property of those who own them. Because of this, people might assume that there is a reasonable expectation of privacy regarding the IP address that identifies the physical computer. This relationship between private property and a reasonable expectation of privacy is best understood through an example regarding non-technological communication. When one communicates on private property, such as in their home, they can reasonably expect that they will not be overheard—that their privacy is protected.[53] The same principle should apply to a person's activity on their Wi-Fi router since that is their property.

The distinction outlined in *Carpenter* that private property rights inherently offer privacy protection is important because "if technology gives the government too much new power that can be abused based on old rules, the court expands legal protection

to restore old levels of power and limit abuses."[54] In other words, the decision of *Carpenter v United States* bolsters user protection and limits governmental overreach by ensuring that checks on government power adapt with society through technological advances.

However, while privacy protections may be grounded in private property rights, private property is not the only situation where the reasonable expectation of privacy provides protection from the government. For example, in *Katz v United States*, the FBI installed a listening device to a public payphone. In this case, the government believed that there was no reasonable expectation of privacy because the defendant was visible through the glass booth.[55] However, the courts ruled Katz did have a reasonable expectation of privacy because the listening device was used so investigators could hear the conversation that would not otherwise be heard.[56] Therefore, the court found the public payphone did have a reasonable expectation of privacy because the listening device was contained within a booth with closed doors.

As a result, a two-pronged test for the reasonable expectation of privacy was established. The first prong requires that an individual exhibit an actual subjective expectation of privacy. The second requires that subjective expectation of privacy is reasonable.[57] In other words, to create a legal reasonable expectation of privacy, an individual must actually feel that their communication is private and that a reasonable person would expect privacy in the same situation. For example, an individual talking on their cell phone in the lobby of a theater may feel that their conversation should be considered private, however, most people would not consider it reasonable to expect that speaking on your phone in a public lobby is private.

In *United States v Hood*, where the defendant was prosecuted for transporting child pornography, the defendant made use of the instant messenger application Kik.[58] Kik utilizes none of the previously discussed privacy or anonymity technologies,

allowing the government to obtain and review "specific IP addresses associated with dates and times" without a warrant.[59] Hood appealed the guilty verdict from the First Circuit trial court on the basis of the law enforcement's specific IP addresses.

In considering his appeal, the two-pronged test applies. First, the defendant may have believed his communications over Kik were private, as they were on his privately owned device, and thus by extension that the IP address identifying his device was also private. The second prong of the test has to do with whether the defendant's subjective belief that Kik and his device's IP address are private would be considered reasonable through "the eyes of society." This distinction in trying to be private is important, as the two prongs provide the courts with an understanding from an objective stance and one that a jury might reason with more in the subjective sense.

In addition to the above scenario, this case can also be analyzed under a different set of facts. For example, what if the defendant used the Tor network to mask his traffic while using the Kik messenger? If the defendant was using the Tor network, a warrant still would not be legally required in order to gain access to the network traffic of the defendant because of the third-party doctrine. This proves to be problematic, as the "entire purpose of the [Tor] network is to enable users to communicate privately and securely."

While it is true that users disclose information, including their IP addresses, to unknown individuals running Tor network servers, that information gets stripped from messages as they pass through Tor's private network pathways."[60] In other words, Tor users are fully intending on trying to mask their IP addresses, otherwise they would not use the service. In a legal view, they should be treated as such.

In *United States v Matish*, the defendant was prosecuted from evidence discovered through an NIT.[61] The court decision from *United States v Matish* creates the potential for a landscape

where "law enforcement would be free to remotely search and seize information from your computer, without a warrant, without probable cause, or without any suspicion at all."[62] This concern was based on the defendant aiming to suppress all evidence discovered because the search conducted "included false information and omitted material information, . . . that the warrant lacked specificity."[63] Thus, the defense from the government's perspective that disclosure of NITs would endanger national security or the effectiveness of future NITs is concerning to the defendant and United States citizens.[64]

The Tor browser came into play in the Playpen cases introduced at the beginning of this paper. These cases dealt with a massive watering hole (a term which refers to the tendency of law enforcement officials to remain on a site and wait for perpetrators) surveillance effort by the FBI on a child pornography site hosted on the Tor network in what was appropriately named Operation Pacifier.[65] The FBI exploited a classified vulnerability thought to be in the Firefox-based Tor Browser, after seizing the website through legal means, and silently monitored the target pornography website for almost two weeks.[66] They employed a classified payload to exploit the suspected Firefox vulnerability which revealed the public IP Addresses to over 8,000 computers in 120 different countries.[67] The classified nature of the FBI's vulnerability discovery, payload, and exploit remained hidden from the public, even as the Playpen cases were proceeding through the courts. This type of investigation was also seen in *United States v Matish*, where source code was developed in a way so that the FBI could log IP addresses, date and time of activity, the type of operating system running on the target machine, the target's host name, and the target's MAC address.[68]

Actions like these also raise the question of whether the government is grabbing IP addresses and information from a computer's registry, a deep part of the file system that stores settings and configuration files sensitive to a user's system operability.[69] Furthermore, the suspects have no idea if the payloads deployed by

the FBI were proven safe to use on consumer-grade machines. Often, similar exploits can harm the target machines. Another concern is whether the exploit remained on the target host machine even after the FBI concluded its operation.[70] Given the hidden nature of the vulnerability exploit and potential lack of understanding a defendant may have had to verify if the payload was still on their machines, the courts deemed that the defendants needed to respect the classified nature of the exploit.[71] This is because the defendants believed the FBI had no reason to hide the fact that the exploit was on the target's machines. Despite the efforts of the defendants to call out the FBI on their confidentiality claims, they lost the argument at large.

These issues and concerns turned into arguments common across many Playpen cases. However, the government stood firm in its stance to resist revealing the details of the vulnerability, payload, and exploit in order to protect national security (in other words, so that they could make use of the exploit in the future).[72] Professor Elizabeth Joh helps expand on the ambiguity with which the FBI carries out its confidential exploit/operations: "The public might want to know, how did the FBI figure out where on balance it's worth it to run a child porn website for two weeks, given some of what's involved in the covert operations will essentially permit more child porn to be distributed. Someone has to make [those] calculations … But we don't know how that calculation is made."[73] These words explain the concerns of users who are surfing the Tor network for non-nefarious purposes but have an increased chance of accidentally clicking on a link or stumbling across an illegal site like Playpen. Thus, these users could end up the targets of FBI investigations and have private non-criminal information exposed by law enforcement without cause. Given the technical complexity and oftentimes confidential nature of how law enforcement and government actors deploy NITs, which in this case means techniques used to hack and exploit the Firefox vulnerability, there is an increasing lack of trust between users attempting to exercise digital privacy and the

government.[74]

Another concern related to these cases was that they were all based on the warrant of one magistrate judge.[75] The idea that one judge could authorize the FBI, or any government agency for that matter, to hack and monitor 8,000 people from a single warrant raises several additional concerns.[76] First, these are often one-size-fits-all warrants that can extend into other countries with different laws, extradition guidelines, and legal constraints for prosecuting internet-related crimes. Second, there was no authority from the magistrate judge to authorize searches on the defendant's homes given that they were outside of her jurisdiction.[77] In fact, "in four cases, courts have since decided to throw out all evidence obtained by malware because of this jurisdiction violation."[78]

Assistant Attorney General Caldwell raised an important point at the time. Technology cannot create a "lawless zone" because the procedures and guidelines are slow to follow.[79] There is no disputing that the crimes committed should be prosecuted to the extent of the law, but there must exist a way to authorize cyber operations within the constraints of the Fourth Amendment. Since the majority of the Playpen cases have been adjudicated, there has been an amendment made to Rule 41(b) (which will be discussed later in this paper), which allows magistrates to issue nationwide warrants in situations where "a suspect has hidden the location of his or her computer using technological means . . . And second, where the crime involves criminals hacking computers located in five or more different judicial districts the changes to Rule 41 would ensure that federal agents may identify one judge to review an application for a search warrant rather than be required to submit separate warrant applications in each district—up to 94—with an affected computer."[80] This amendment provides legal means for which a judge may grant warrants in many districts, even when he or she presides over one.

In another Playpen case, *United States v Werdene*, the

defendant's IP address was again discovered via the magistrate-authorized FBI NIT.[81] This NIT also revealed the defendant's physical address, which was in Pennsylvania—which was in a different jurisdiction than where the warrant was issued in the Eastern District of Virginia.[82] Despite the incriminating evidence of child pornography found through the NIT, Werdene was able to successfully show the lack of jurisdiction over the search of his IP address and physical address.[83] This movement to suppress the evidence was based on the fact that the child pornography found was "located outside of Virginia, so the magistrate did not have authority to issue the warrant under Rule 41(b)(1)."84 A Rule 41(b) violation by anyone results in the following: "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."[85] Similarly, in *United States v Matish*, the defendant aimed to conceal his IP address by accessing the Playpen website via the Tor browser.[86] Using the same NIT, the FBI found Matish's IP address and obtained a warrant to search Matish's home and seize his various computers and electronic storage devices.[87] The Electronic Communications Privacy Act defines an electronic storage device as "a temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof and any storage of such communications by an electronic communications service for purposes of backup protection of such communications."[88] The courts hold the following counterpoint for why IP addresses cannot constitute a search or give a user a reasonable expectation of privacy:

Specifically, the court found that IP addresses are information revealed to a third party: "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Generally, a user has no reasonable expectation of privacy in an IP address when using the Internet. This stems from the fact that Internet users "should know that this information is provided to and used by Internet service providers

for the specific purpose of directing the routing of information" . . . The Court noted that Tor users might have a subjective expectation of privacy arising from their use of the network but they must disclose information, including their IP addresses, to unknown individuals running Tor nodes to direct communications toward their destinations."[89]

Despite the Tor project's description that explains the possibility of vulnerabilities in their software, this is still an invalid point to suggest that there is no reasonable expectation of privacy in your IP address. The very nature of software is that it is meant to be patched repeatedly and often, which results in instances where that software may be vulnerable to different types of attacks. Claiming that your software cannot provide an expectation of privacy because it may be hacked is equivalent to suggesting that you can't expect your money to be reasonably secured in a bank because it might be robbed.

The combination of the IP address and corresponding traffic is the most important to gather someone's activity. This premise is supported by the comparison that if the government wanted to search a set of information considered to be public, like birth records, but you stored that record in a safe in the privacy of your home, a government agent would still need a warrant to search your house.[90] To extend this analogy back into the virtual world, your computer would be your home which houses your birth record, or your IP address. We can make this same private/public connection to a series of ATM PIN combinations. There are a finite number of ATM PINs that one can have to unlock access to their bank account, and the math behind the permutations of PINs is all public information.[91] However, the private information is which PIN number is yours, and when combined with your account number (or physical debit card depending on the ATM), your bank account can be accessed. The same can be said for your IP address and the traffic correlation combination.[92] Even if someone was able to guess your

IP address (considering the finite number of IP addresses that start with the same digits), they would not be able to do much without correlating traffic to fully identify you on your machine at any given time.[93] These comparisons are important distinctions to make when discussing how the physical and virtual world relate, dimensions which are becoming increasingly interconnected.

The legal case studies discussed in this section are vital to understanding the importance of having a legal expectation of privacy in an IP address. The next section will analyze one of the fundamental relationships in our current digital world that many average citizens in the United States have no baseline knowledge of. Overall, the relationship between ISPs (who see all users' IP addresses and associated traffic) lacks a legal framework to support those looking to be digitally private.

C. ISPs-User Relationship

The following section discusses how an ISP and a user interact online, and how their relationship impacts user privacy. It will also discuss cases that relate to the ISP-user relationship and the Fourth Amendment.

When provided with a proper warrant by law enforcement, ISPs are required to give up IP addresses in order to cooperate with an ongoing criminal investigation.[94] Today, users must worry about ISPs selling their data. Parties can purchase and analyze data, such as browsing history, online purchasing history, or device information, in order to target users.[95] Because the information is available via the ISP, governments and malicious actors can easily gain access to it.[96]

One potential solution is to fully encrypt the data going from a user to the server, a process that renders the data unreadable to an ISP. Even then, user traffic is not fully anonymous because VPN providers can view what comes out of their end network node. However, "at least 14 states in 2020 introduced or are considering

measures requiring internet or telecommunications service providers to keep specified information confidential."[97] In some states, such as Wyoming, efforts to improve customer personal information protection for broadband internet services failed to pass.[98]

In *United States v Warshak*,[99] the government obtained thousands of emails belonging to a corporate executive who was involved in a fraud investigation. The emails were seized via subpoena, indicating that there was no probable cause necessary.[100] The courts stated that "if we accept that an email is analogous to a letter or a phone call, it is manifest that agents of the government cannot compel a commercial ISP to turn over the contents of an email without triggering the 4th amendment."[101]

Clearly, *United States v Warshak* not only provides a way for electronic information transmission to gain Fourth Amendment protection but also provides a two-pronged test for a reasonable expectation of privacy.[102] Furthermore, the case establishes a precedent for treating ISPs as legally analogous to post-offices or telephone companies.[103] This was a logical conclusion, as possessing an IP address is required to use the internet—an activity that is now a vital part of everyday life. For the vast majority of those in the United States, it is important to have both a mailing address and telephone number. In this day and age, the same logic applies to having an IP address. *Riley v California*[104] also supports the idea that the Fourth Amendment applies to electronic information just as much as it does to a physical object. That is because *Riley v California* concluded that warrantless searching of a cell phone's contents is unconstitutional.[105] Both *Warshak* and *Riley* serve to bridge the gap between the legal and digital realm in regards to Fourth Amendment protections. The majority of a user's data, browsing history, and online activity goes through their ISP, which is why understanding the ISP-user relationship is so important.

D. Digital Privacy Rights

Digital privacy rights for individuals in the United States are becoming increasingly relevant, as the Internet continues to grow exponentially. Since the expectation of privacy in an IP address is directly related to digital privacy rights, this section highlights the current standing of the legal framework in this area. In the aforementioned Playpen cases, the watering hole NIT employed by the FBI was not specific in the targets they aimed to find, considering the fact that they were not aware of who would visit the website in the coming two weeks while they carried out their warranted procedure.106 This detail creates an important distinction: if the FBI subpoenaed ISPs to learn the names or IP addresses of those not actively trying to mask their digital footprint, and the FBI has probable cause to do so, there is no reasonable expectation of privacy in the user's IP Address.107 However, the argument for a reasonable expectation of privacy arises when examining the desire of the user to be anonymous. The desire of a user to use TAILS or Qubes-Whonix, paired with the use of privacy-minded applications and behavior on those services would suggest that the user is actively taking steps to be private and, given these extensive efforts, would suggest they believe they are private as they surf the internet.

Society currently relies on the internet for much of work, socialization, and education. In *Carpenter v United States*,[108] the Court stated that "few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements," and continues to say that "a cell phone is almost a 'feature of human anatomy,' tracking almost all movements of its owners, who are 'compulsively' carrying these objects all the time, following them to places that can reveal private activities (doctor's offices, political headquarters, etc.)."[109] The required assistance from the telecommunications company of Carpenter would be in

part due to the passing of the Communications Assistance for Law Enforcement Act (CALEA). CALEA forces telecommunications carriers to help law enforcement carry out electronic surveillance such that there are proper warrants filed.110 The legal concern is that if someone is monitored for 127 days in a row, private times of their daily lives such as "familial, political, professional, religious, and sexual associations" come to light, even if those are not the focus of a specific investigation.[111] This problem becomes more complex with regards to a citizen's Fourth Amendment rights. These cases, which involve cell phone triangulation, can have a parallel drawn to a user's internet activity and inherent privacy rights related to an IP address.

For instance, *United States v Jones*[112] requires that law enforcement procure a warrant to place a GPS on a defendant's car. The case established that sophisticated GPS tracking—the kind that can track a person's every movement—surpasses the traditional understanding of what is considered the general tracking of a suspect, and as such requires a warrant.[113] Accordingly, it stands to reason that the sophisticated surveillance tools for monitoring communication technology allow the government to put together every second of someone's day, which is a breach of privacy, even to those being traced for criminal investigation. Many actions taken by users on the internet can be attributed to their private activities in the physical world. For instance, when you Google "hospitals near me," the search engine provides you with a list of nearby offices based on your physical location, and oftentimes can indicate that you may be involved in some sort of health emergency. This argument further supports why users should have a reasonable expectation of privacy in their IP addresses, given that their search history can be traced back to activities linking to the objectively private part of their lives in the eyes of the courts.

Despite the opinion that an internet user should be able to maintain a reasonably private posture when doing mundane activities,

some believe using measures such as Tor in order to protect privacy is insufficient in the eyes of the law. When analyzing the Silk Road case, in which a large illegal marketplace hosted on the Tor browser was taken down after a massive investigation, Judge Richard Jones argues that "under such a system [Tor browser], an individual would necessarily be disclosing their identifying information to complete strangers . . . such a submission is made despite the understanding that the Tor network has vulnerabilities and users may not remain anonymous."[114] This argument by Judge Jones, however, is extremely flawed. By the very extension of Jones's argument, the idea that any software can become vulnerable at some time presents the risk of one's machine being hacked. Therefore, since Tor can be vulnerable to some attacks, Jones believes these vulnerabilities invalidate the reasonable expectation of privacy. If extending this comparison into the physical world, one should look at a homeowner with regards to their privacy within their backyard.

From *State v Quiday*,[115] we know that "(1) people manifest a subjective and reasonable expectation of privacy in activities they conduct in their fenced backyards; (2) the home and curtilage are generally provided greater privacy protection than other areas; and (3) requiring a warrant to conduct aerial surveillance of homes and curtilage is the best way forward in an age of rapid technological advancement."[116] For example, in *Florida v Riley*,[117] a sheriff received an anonymous tip about marijuana being grown on someone's property, which, when visiting the property, the law enforcement agent could not see in plain sight. Upon noticing that the greenhouse was closed off from view in all ways but an aerial view, he used a helicopter to hover at around 400 feet and was able to see the marijuana plants. This observation led to a search warrant and the arrest of the defendant, which Riley appealed on the basis that the helicopter hovering over his backyard constituted a warrantless search.[118] The courts dismissed this appeal, as helicopters normally fly at this altitude and there was nothing to suggest that a non-law

enforcement related aircraft would not fly over Riley's property. The applicable part to this discussion is the lack of attempt to conceal the top of the greenhouse, which would have made the viewing of the plants via helicopter impossible. This case demonstrates the importance of showing intentions toward privacy, even in locations in which one feels that they may normally have a reasonable expectation of privacy.

In contrast, citizens generally do not have a reasonable expectation of privacy when in their unfenced front yards. The stipulation made for privacy granting seems to be centered around one idea—the fence, or any medium which provides the citizen with physical protection. Taking this argument back into a digital realm, we can compare putting a fence up around your property to making use of anonymization measures and security techniques like the Tor browser, Qubes-Whonix, TAILS, and high-end VPNs in order to increase privacy.

Another physical example is *Kyllo v United States*,[119] in which a State Department agent had reason to suspect marijuana growing inside the defendant's house. In order to see inside the house before getting a warrant, law enforcement made use of a thermal imaging camera, which allowed for the agents to see scans of inside the house, resulting in a warrant to search the home and find 100 marijuana plants.[120] The court held that Kyllo had shown no subjective expectation of privacy under the Fourth Amendment because there was no shown attempt to conceal any heat from escaping his house and the thermal imager used was not revealing any "intimate details" of his life.[121]

In contrast, *Silverman v United States*[122] shows that invasions of the home of any kind by law enforcement are not allowed without a warrant. However, in *Kyllo*, it is quite subjective of the courts to determine what is considered intimate, and from *Silverman*, we also understand that if a citizen's house is considered private, it is illogical to say one part of the home is not intimate whilst another part is. One

important quote which comes from *Kyllo* can be applied directly to law enforcement's employment of NITs: "Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant."[123]

Judge Jones, who delivered the opinion on the aforementioned Silk Road case, continued to write that the possibility for vulnerabilities leads to a lack of reasonable expectation of privacy in a user's IP address while on the Tor network.[124] However, users can make use of TAILS or Whonix-Qubes to increase their protection from surveillance. In accordance with Tor's documentation and community feedback, the onion routing design is not enough to keep a user completely private. The technical advantages given by anonymity networks must be coupled with proper user behavior, such as not visiting insecure sites, avoiding signing into any accounts, and, if one must partake in activities such as email and instant messaging, using end-to-end encrypted temporary services. This section covers digital privacy rights because they should be prioritized given the increased threat of cybercriminals, large corporations siphoning customer data, and the large transition of life into the online world.

IV. Further Research

Most of the further research that should be conducted involves expanding scenarios for ways to alter or mask an IP address. Additional case law and state legislation could be provided to further justify the need for a reasonable legal expectation of privacy in a user's IP address. Scenarios may include spoofed IP and MAC addresses.[124] Furthermore, with the Tor browser, a possible avenue for exploration could be analyzing how Tor's default path selection algorithm can be altered to provide a different statistical

chance of being observed. Combining studies of suggestions for improvements on the Tor selection algorithm may also be applied to this discussion of nodal choice, resulting in a reasonable expectation of privacy for a user's IP address.[126]

Similarly, it is useful to explore how a reasonable expectation of privacy in an IP address would apply if you were tunneling your traffic through specific countries for a desired output. For example, if you were attempting to use the Tor network for nefarious purposes, it would be interesting to determine whether there could be a node pattern that would give you a better level of privacy in your IP address. Another anonymization tool that could be applied to this research would be pluggable transports nested into Tor, which can aid in the obfuscation of network traffic through encryption—making your traffic look like signal noise via scrambling, changing your traffic to look like something else (shape-shifting), or hiding your traffic in plain sight (fronting).[127]

V. Conclusion

This paper dissected the elements of an IP address in its relation to the Fourth Amendment, specifically supporting the argument that a user should reserve a reasonable expectation of privacy when taking anonymization measures to privatize their own system. This paper also analyzed the technologies that can be used as a means to improve a user's anonymity on the internet such as the Tor browser, TAILS, Qubes-Whonix, and VPNs. Case studies related to the debate of reasonable expectation of privacy were discussed in length, including *United States v Carpenter*, *United States v Jon*es, and the Playpen cases. Given the heavy reliance of United States citizens on their technology, it is reasonable to believe IP addresses should become part of a user's private identity which must be maintained while surfing the internet. Given the idea that ISPs arguably hold the most important identifier of those online,

and that users must be given an IP address in order to be online, revisions in the legal system must be made to include IP addresses as temporary private property when given to users.

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The Impact of Penn Central Transportation Company v City of New York *on Regulatory Takings, Due Process, and the Fifth and Fourteenth Amendments*

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Abstract

The 1978 United States Supreme Court case *Penn Central Transportation Company v City of New York*[1] created a significant impact in the spheres of legal and economic developmen. In 1978, Penn Central Transportation Company wanted to construct a high-rise building atop Grand Central Terminal in New York City, New York, but its proposal was rejected under the city's Landmarks Preservation Law. Penn Central, which could have received significant economic gain by renting out office space in the proposed building, sued New York City. It claimed that the application of the Landmarks Law had violated the Fifth and Fourteen Amendments by depriving them of their property without just compensation and due process of law.

This article discusses the case and its history in the lower courts and analyzes the Court's majority opinion and its legal and economic impact. I also suggest that Penn Central could have been able to sway the Court's decision. My evaluation of the majority and dissenting opinions demonstrates the majority's failure to consider the economic effects of its decision, namely on the people and businesses whose livelihoods were impacted because their property was designated as a historical landmark.

I. Introduction

In *Penn Central Transportation Company v City of New York*,[2] the Supreme Court of the United States evaluated the legality of a regulatory taking, the necessity of just compensation, and the application of the Fifth and Fourteenth Amendments. In forming its opinion, the Court relied on Supreme Court precedents as well as various legal and economic aspects of the case. This article will describe the facts, history, and main legal issue to contextualize a legal analysis of the majority and dissenting opinions. It will analyze the Court's consideration, or lack of consideration, toward various economic factors. Finally, it will evaluate the role of those Supreme Court precedents in *Penn Central Transportation Company v City of New York* and examine the resulting decision's impact on subsequent cases and its public policy implications.

Facts of the Case

In 1978, Penn Central Transportation Company wanted to construct a fifty-five-story office building atop Grand Central Terminal in New York City. Their proposal was rejected by the city's Landmark Preservation Commission, because, under New York City's Landmarks Preservation Law, Grand Central Terminal had been designated a "landmark" in 1967 and the block it occupied a "landmark site." Although Penn Central had opposed the earlier designation of the site as a landmark in 1967, it did not seek judicial review of the action. The Landmarks Preservation Commission deemed Penn Central's proposed high-rise office building over the Terminal as destructive of the Terminal's historic and aesthetic features. Penn Central, which was struggling financially at the time, could have received significant financial gain by renting out office space in the proposed building. Because the Commission blocked the construction, Penn Central claimed that it suffered a

disproportionate burden of the costs of the landmark designation.

Procedural History

Penn Central sued New York City in state court claiming that the application of the Landmarks Law had taken their property without just compensation, in violation of the Fifth and Fourteenth Amendments, and deprived them of their property without due process of law. The trial court held that the Landmarks Law, as applied to the property at Grand Central Terminal, was an unconstitutional taking without compensation. This decision was subsequently reversed by a New York appellate court. New York's highest court, the New York Court of Appeals, agreed with the appellate court and concluded that there was no taking and thus no need for compensation. The case was brought to the Supreme Court of the United States, which affirmed the judgment of the New York Court of Appeals.

Legal Issue

The Fifth Amendment states that "private property shall not be taken for public use, without just compensation,"[3] and the Fourteenth Amendment protects due process of law,[4] which obligates the states (and all levels of the United States government) to operate within the law and provide fair procedures.[5] The New York Court of Appeals acknowledged that the Fifth Amendment was designed to bar the government from forcing individuals to bear public burdens that should be borne by the public as a whole. However, the New York Court of Appeals also noted that the requirement for when the government must compensate a party for an action that places a disproportionate concentration of the "public burden" on a few parties (such as the "landmark" designation under New York City's Landmarks Preservation Law) depends on a case-by-case analysis.

II. Legal Analysis

Majority Opinion

In a six-three decision in 1978, *Penn Central Transportation Company v City of New York* concluded that Penn Central was not unfairly or solely bearing the public burden of New York City's Landmarks Law. The Supreme Court stated that, within the meaning of the Fifth Amendment, the Landmarks Law had not transferred control of the property to the city but only restricted appellants' exploitation of it. Furthermore, the Court decided that there was no denial of due process for three reasons. First, by preventing the construction of a high-rise above the Terminal, the Landmark Preservation Commission had not prevented the previously permissible uses of the Terminal itself. Second, Penn Central could still earn a financial gain through the regularly permissible use of the Terminal. Third, the Landmark Preservation Commission did not fully prohibit all development above the Terminal but rejected only the proposal at hand. Thus, the Court concluded that there was no requirement for providing just compensation.

The primary issue in *Penn Central Transportation Company v City of New York* was whether the designation of the Terminal as a landmark, and the results that flowed from that designation, constituted a taking. In addressing this issue, the Court applied its interpretation of the government's police power, or the ability to enforce laws that concern "the health, safety, morals, or general welfare" of the public, as part of its application of the due process clause of the Fourteenth Amendment.[6] The Court concluded that the police power in this instance allowed the government to execute laws or programs, such as the Landmark Law, that have adverse economic effects on a party or persons without its action constituting a taking. Designating Grand Central Terminal to be a historic landmark, the Court concluded, served the public good economically and improved

the overall quality of city life. As Dukeminier and Krier state in their analysis,[7] the Preservation Committee placed an "affirmative duty" on Penn Central to maintain the Terminal in its present state and in "good repair." Thus, the Court felt that preventing the construction above the station was a reasonable restriction that was substantially related to the general welfare of the city. The ruling relied on the Supreme Court precedent of upholding regulations for land use that adversely affected real property interests in ways similar to Penn Central.

Additionally, in deciding whether the particular governmental action constituted a taking, the Court considered the extent of the interference with property rights. The Court rejected Penn Central's contention that it alone was burdened by this implementation of the Landmarks Law. While the Landmarks Law in this case affected Penn Central more severely than other members of the New York City public, the Court ruled that this fact alone did not result in the action being a taking. The Court also noted that Penn Central was not the solely impacted entity because the Landmarks Law also imposed restrictions on other landmark landowners. Finally, the Court noted that Penn Central had not sought judicial review of the original landmark designation. Thus, the Court concluded, the Landmarks Law did not impose the drastic interference with property rights that Penn Central claimed.

Discussion of Prior Cases

Penn Central analyzed the impact of several prior cases, relying on some as applicable precedents and distinguishing others as inadequate comparisons. Each of the three cases that Penn Central referenced presented similar circumstances to Penn Central, and in each, the Supreme Court upheld that the actions were not a taking. In one such case, *Goldblatt v Town of Hempstead, New York*,[8] Herbert W. Goldblatt owned thirty-eight acres of land within

the Town of Hempstead and often used the land for his business of mining sand and gravel. A city safety ordinance prohibited Goldblatt from operating his sand and gravel mining business below the surface water table. The Court upheld the ordinance against a taking challenge. Although the ordinance prohibited the most beneficial use of the property and severely and disproportionately affected Goldblatt, the Court reasoned that the ordinance did not prevent Goldblatt's reasonable use of the property.[9] In *Hadacheck v Sebastian*,[10] J.C. Hadacheck owned land positioned on a valuable bed of clay and built a great deal of machinery on the property for the purpose of manufacturing brick, but a certain city ordinance restricted Hadacheck's brickmaking operation. The Court concluded that the ordinance was not a taking because it was within the police power of the state to regulate the land,[11] prohibiting only the process of brick-making but not removing the clay; this separation of action taken on a property, but not the space of the property itself, became applicable in Penn Central. The application of the ordinance in Hadacheck was within the police power of the state for the purpose of protecting the city's development and promoting the community's general welfare. Finally, in *Miller v Schoene*[12], Casper O. Miller owned a large stand of ornamental red cedar trees on his property; the Cedar Rust Act of Virginia ordered that Miller must cut down his red cedar trees. While Miller argued that the Cedar Rust Act allowed for a government taking, requiring compensation, and violated the Due Process Clause, the Court decided that the promotion of the general welfare (which was the purported purpose of the Cedar Rust Act of Virginia) commonly burdens some more than others.[13] In each of *Goldblatt*, *Hadacheck*, and *Miller*, the landowners were uniquely burdened by legislation, but the Court decided that legislation that more severely affects some landowners but not others does not necessarily constitute a taking. The Court in *Penn Central* relied on these decisions to determine that the severe burden on *Penn Central* that resulted from the Landmarks Law did not equate a taking.

The Supreme Court subsequently distinguished the land ownership principles discussed in *Pennsylvania Coal Company v Mahon*.[14] In this case, the Court addressed whether the Kohler Act (legislation prohibiting mining that could affect the integrity of the surface land) was a legitimate exercise of police power or constituted a taking and thus required just compensation. The *Mahon* Court ruled that the Kohler Act was indeed a taking (and thus required compensation), concluding that while property may be regulated to a certain extent, regulation that "goes too far,"[15] or applies a regulation beyond its intended boundaries, will be recognized as a taking. The Kohler Act did so in prohibiting mining — a regulation intended for property below the surface land — that could affect the integrity of the surface land. In *Mahon*, the landowner sold the surface land but retained the subsurface mining rights abrogated by the Kohler Act. The *Penn Central* Court concluded that Mahon was not applicable; unlike the landowner in *Mahon*, Penn Central retained the use of the surface land, which the Landmarks Law did not interfere with.

The Supreme Court also differentiated *Penn Central* from other rulings such as *United States v Causby*.[16] The Penn Central Court found *Causby* to be relevant to *Penn Central* because it considers the use of airspace over a given land. Thomas Causby owned a chicken farm located near an airport used regularly by the United States military. The frequent flights by the United States military occurred at low altitudes and directly over the landowner's existing farm property, and the noise from the airport regularly frightened the animals and was so loud and recurrent that they eventually caused Causby to abandon his farming business.[17] The primary issue in the Supreme Court's 1946 *Causby* decision was whether the flights over Causby's land amounted to a taking of his property. In a majority opinion authored by Justice William O. Douglas, the Court decided that a taking had occurred.[18] The Court concluded, in Justice Douglas's majority opinion, that the flights of the aircraft would be lawful unless they occurred at such a low

altitude that they interfered with the existing use of the land or were dangerous to persons or property who were lawfully on the land[19]. In this case, the flights were so frequent that Causby was forced to abandon his pre-existing business. Thus, the Court concluded that the flights were indeed disruptive and therefore unlawful. The Court argued that ownership of the space above the land is vested in the owners of the surface of the land, and thus a taking could be found. The *Penn Central* Court, however, concluded that *Causby* was different because *Penn Central* did not involve an intrusion on the land by the government.

Evaluation of Majority Opinion

The Supreme Court held that the Landmarks Preservation Commission regulation of Grand Central Terminal for construction of a high-rise did not constitute a taking of private property by the government. The prevention of the use of the airspace above the Terminal, the majority opinion stated, did not require just compensation.[20] Arguably, this holding was only partially correct. The ruling that the use of the Landmarks Law did not constitute a taking is reasonable, but only because the Fifth and Fourteenth Amendments were not violated because the law did not interfere with the currently permissible uses of the building. As the Supreme Court stated, within the meaning of the Fifth Amendment the Landmarks Law had not transferred control of the property to the city but only restricted appellants' exploitation of it and thus did not violate the Fifth Amendment; there was no denial of due process and thus did not violate the Fourteenth Amendment.[21] *Penn Central* was able to proceed using the Terminal as it had in the past, so the owner could continue to profit from the building and obtain a reasonable return on its investment. However, the ruling erred in determining whether Penn Central should receive just compensation for the inability to use the air rights above the land. The Court had the responsibility to

mitigate the transaction costs between the landowner and the public. It could have accomplished this goal by providing compensation to Penn Central for shouldering the public benefit of the landmark designation of the building rather than earning a profit from the construction and use of the intended high-rise. Additionally, because Penn Central initially opposed the landmark designation of the site, compensation could have been provided for consenting to the space being considered a landmark.

Additionally, the Court rejected Penn Central's argument that it solely bore the burden of the Landmark Law. The Court concluded that the law preserved multiple landmarks, which benefited the public good. However, the benefit to the public good (or the benefits from the preservation of over four hundred other landmarks in New York City[22]) did not offset Penn Central's costs, as its loss reached several million dollars.

Finally, the holding that the imposed restrictions did not prevent Penn Central from ever constructing above the terminal in the future was unreasonable. The City of New York's objection was to the nature of the proposed construction project (a fifty-five-story high-rise) and not to all construction in the space in general.[23] However it was unlikely that any significant construction ever would be permitted in the future, given that the Landmark Preservation Commission rejected the addition for being destructive of the Terminal's historic features. With this in mind, this basis of the Court's decision may have lacked merit.

Dissenting Opinion

Justice William Rehnquist authored the dissenting opinion,[24] with the support of Chief Justice Burger and Justices Stevens, stating that after the designation of a building as a landmark, that status may impose a significant cost on the landowner. The landmark status indeed imposed such a cost on Penn Central by inhibiting the

construction of additions to the building and preventing the profit from the use of those proposed buildings. Furthermore, the dissenting opinion found the main question to be whether the cost associated with the City of New York's desire to preserve a certain number of "landmarks" should be borne by the general public, or instead be imposed entirely on the owners of the individual properties. The dissenting Justices reasoned that the Fifth Amendment bars the "government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[25] Thus, the dissenting opinion disagreed with a fundamental aspect of the majority opinion.

Lastly, the dissenting opinion highlighted that the proposed office building would greatly ameliorate Penn Central's precarious financial predicament and was in full compliance with all New York zoning laws and height limitations. Despite this, the dissenting opinion noted, the plans set by Penn Central still were rejected by the Landmarks Preservation Commission. The dissenting justices stated that the architectural plan of the building would have "preserved the facade of the Terminal," believing that the building would not be "destructive of the Terminal's historic and aesthetic features" as the Preservation Commission claimed. In its belief that the proposed office building would still preserve the historic and aesthetic features of the Terminal, the dissenting opinion again fundamentally disagreed with the majority opinion, which supported New York City's objection to the nature of the proposed construction.

III. Economic Analysis

The dissenting opinion in Penn Central[26] notably and effectively highlighted the economic factors of the court's decision, demonstrating not only the financial implication on Penn Central during times of financial difficulty, but also the economic concepts of

reciprocity of advantage (the idea that regulations should both benefit and burden affected owners), common benefit, and investment-backed expectations (the idea of whether or not an investor can earn a reasonable return on their investment in a property). This opinion expressed that, under typical zoning regulations, which do not constitute a taking, all individuals share the economic cost of the property: "all property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another."[27] This was, in the words of an opinion from *Pennsylvania Coal Co. v Mahon*, "an average reciprocity of advantage,"[28] a concept that conveys a subset of regulations that provide reciprocal benefits to the regulated parties, without rising to the level of a taking.[29] Justice Rehnquist argued, however, that in a case where a few individual buildings are singled out and treated differently from surrounding buildings, the reciprocity of advantage does not exist.[30] The resulting cost to the property owner from the imposition of restrictions is applicable only to the landowner's property and not that of their neighbors. Thus, the financial costs, and particularly forward-looking opportunity costs, can reach substantial levels; indeed, in Penn Central, the costs reached at least five million dollars,[31] without observable reciprocal benefits, to Penn Central's immediate loss.

Penn Central also examines[32] the economic concept of "investment-backed expectations"[33] in determining at what point a land-use regulation interferes with land use and constitutes a taking. Investment-backed expectations derive from the concept of diminution-in-value,[34] which examines whether there is profitability left in the property. Given Penn Central's financial hardship, the possible economic gain of at least five million dollars[35] by renting out office space in the proposed building could have made a significant difference for the corporation. William Fischel, in his analysis, questions whether the case interfered with Penn Central's "irretrievable investment in the project," or whether the loss was

rather entirely prospective. As Fischel notes, New York City permitted Penn Central to exceed zoning height limitations on the Grand Central Terminal in 1963 with the MetLife Building, as well as on nearby properties.[36] If Penn Central had plans to invest in the construction of an additional office building atop the Terminal, and if the building had residual profitability, then Penn Central would have an investment-backed expectation that would have warranted compensation. The Court neglected to take this into account. As noted in Frank Michelman's utilitarian analysis, the Court "effectively read investment-backed expectations out of takings law by holding expectations are frustrated only when a land-use regulation denies all economically viable use of land."[37] By imposing regulations on Grand Central Terminal, the Landmarks Law regulation denied its "economically viable use," and thus Penn Central could not earn a reasonable return on their investment in the property. This return on Penn Central's investment in the Terminal constitutes the potential investment-backed expectation for Penn Central that would have warranted compensation.

IV. Hypothetical Scenarios

The outcome in this case may have differed if a few essential elements of the case were changed or considered differently. A key factor that could have affected the outcome is if Penn Central had challenged the original landmark designation. With the knowledge that it intended to construct an office building atop the Terminal, the additional leverage could presumably have resulted in the Supreme Court swinging in their favor, given the six-three opinion of the Court and the strong dissenting opinion. Even more likely is that if Penn Central had originally challenged the landmark designation, and the New York City Landmark Preservation Commission still retained jurisdiction over the use of the airspace over the Terminal, it can be assumed that Penn Central would have been far more likely

to receive the just compensation to which they believed they were entitled.

Furthermore, if Penn Central had demonstrated that the primary use of the Terminal itself was unprofitable, and the only profit in owning the land was the ability to use the air rights above the Terminal, then they may have been able to change the outcome of the case. The Court's decision in part relied on Penn Central's ability to still earn a profit from the regularly permissible use of the Terminal, incorporating the fact that Penn Central could still earn a reasonable return on their investment in the Terminal in its decision.[38] Therefore, as the majority opinion noted,[39] Penn Central did not need to develop the airspace above the Terminal in order to turn a profit. If Penn Central had contended this, the Court may have taken the differing financial repercussions into account. If the only profit in owning the land was the ability to use the air rights above the Terminal, the Court may have evaluated the Landmarks Law as regulating too severely as it would have prevented Penn Central from obtaining any profit from their land ownership and thus possibly decided that it constituted a taking and required compensation on behalf of Penn Central.

A different analytical approach on the part of the Supreme Court may also have changed the outcome of the case: The Supreme Court could have considered Penn Central's air rights above Grand Central Station as independent of the use of the Terminal (in a similar manner to *Pennsylvania Coal Company v Mahon*, in which the Court considered the subsurface rights of the land to be independent from the surface of the land[40]). The Supreme Court decided that restrictions on the air rights above the Terminal were not onerous because Penn Central still could operate and profit from the remainder of the property. Had the air rights been regarded as a separate property interest, the Landmark Preservation Commission might not have been able to restrict construction using that air space or may have been required to provide Penn Central just compensation

for the taking of the air rights property.

V. Impact and Public Policy Implications

A myriad of subsequent court decisions have cited *Penn Central Transportation Company v City of New York*, but most have done so with negative treatment. One such case is *Port Clinton Associates v Board of Selectmen of the Town of Clinton*,[41] heard in the Supreme Court of Connecticut in 1991. In this case, the owners of a marina brought action alleging a taking of property when the Board of Selectmen denied them permission to expand their docks. Port Clinton argued that the marina regulation was an invalid use of police power. The Court cited Penn Central to explain that when the regulation itself is not a "valid" exercise of police power, the regulation may constitute a taking. Thus, the Court ruled that the regulation constituted a taking, given the adverse consequences to the landowner.

The case that cited *Penn Central* with the most negative treatment was the Ohio Supreme Court's 2002 decision in *R.T.G., Inc. v Ohio*,[42] which explored the legality of a regulatory taking concerning a coal mining operation. The Court in *R.T.G. v Ohio* asserted that *Penn Central* did not "develop any 'set formula' for determining when 'justice and fairness' require[d] that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[43] In *Penn Central*, the lower courts held that there was no 'taking,' thereby avoiding the question of 'just compensation' entirely. Although unable to develop a formula for compensation, the Court in *Penn Central* did identify three criteria to be examined in regard to a regulatory taking: (1) the nature of the governmental regulation, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations.[44]

Nevertheless, the Supreme Court of Ohio cited *Penn Central* in conversation with its discussion of the disputed taking being either above or below the surface of the land. The Ohio court decided that the facts in *R.T.G. v Ohio* did not constitute a taking because the surface estate of the land still had value, similar to the Terminal in Penn Central retaining its value despite the regulations of the landmark designation. This conclusion is surprising in its valuation of the value of the surface land, given that *R.T.G. v Ohio* considered rights below the surface to be separate from the surface of the land, and the main issue in *R.T.G. v Ohio* concerned the land below the surface.

Port Clinton Associates v Board of Selectmen and *R.T.G., Inc. v Ohio* demonstrate that *Penn Central Transportation Company v City of New York* effectively addressed two social issues and ineffectively addressed a third. The ruling in *Penn Central* was effective in addressing the public policy issue of landmark preservation: it determined that when an area is designated as a landmark under the Landmark Law in New York City, the government legitimately can determine the use of that property. The opinion also was constructive in establishing certain criteria for what must be examined in a takings cases, although the Court failed to give any indication of the weight with which each criterion should be evaluated by a jury.[45] Further, when determining what specifically constitutes "justice and fairness," the *Penn Central* opinion failed to determine what proportion of economic costs, when a public burden is placed on only a few individuals, would require economic compensation from the government.

VI. Conclusion

In *Penn Central Transportation Company v City of New York*, the Supreme Court of the United States concluded that the Fifth and Fourteenth Amendments were not violated, the restriction

on Penn Central did not constitute a taking, and just compensation was not required. The decision focused heavily on the importance of the preservation of historical landmarks while failing to adequately consider the economic costs of that goal and who should bear them. The Court's reliance on prior cases that arose under very different circumstances did not justify imposing the public costs of landmark preservation on a few individuals. Although the majority and dissenting opinions provided significant frameworks for future analysis in takings cases involving public landmarks, *Penn Central Transportation Company v City of New York* raised important questions about the determining factors in takings cases that may require economic compensation in alignment with the Fifth Amendment.

[1] *Penn Central Transportation Company v City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)
[2] Ibid.
[3] "Due Process." *Legal Information Institute*, Legal Information Institute, www.law.cornell.edu/wex/due_process
[4] "The Constitution: Amendments 11-27." *National Archives and Records Administration*, National Archives and Records Administration, www.archives.gov/founding-docs/amendments-11-27.
[5] "Due Process." Legal Information Institute.
[6] "DUE PROCESS OF LAW." *Legal Information Institute*, Legal Information Institute, www.law.cornell.edu/constitution-conan/amendment-14/section-1/due-process-of-law
[7] Jesse Dukeminier and James E. Krier, *Property*. Aspen Law and Business, 2002.
[8] *Goldblatt v Town of Hempstead, New York*, 369 U.S. 590, 594, 82 S. Ct. 987, 990, 8 L. Ed. 2d 130 (1962).
[9] Ibid.
[10] *Hadacheck v Sebastian*, 239 U.S. 394, 411, 36 S. Ct. 143, 146, 60 L. Ed. 348 (1915).
[11] Ibid.
[12] *Miller v Schoene*, 276 U.S. 272, 277, 48 S. Ct. 246, 247, 72 L. Ed. 568 (1928).
[13] Ibid.
[14] *Pennsylvania Coal Company v Mahon*, 260 U.S. 393 (1922).
[15] Ibid.
[16] *U.S. v Causby*, 328 U.S. 256 (1946).
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] *Penn Central Transportation Company v City of New York*.
[21] Ibid.
[22] Dukeminier and Krier, *Property*.

[23] *Penn Central Transportation Company v City of New York*.
[24] Ibid.
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The Lasting Criminalization of Poverty: Court Fees, Fines, and "Implicit" Sentence Enhancements:

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Abstract

In our criminal legal system, "paying your debt to society" colloquially references a debt of time served to the carceral apparatus of the criminal legal system, although many criminal justice reform advocates recognize that a justice-impacted individual's debt to society is never truly forgiven. Too often is this debt of time accompanied by criminal justice debt comprised of unpaid court fees, fines, and restitution. Policy solutions to reduce prison populations and combat mass incarceration often overlook the role of fines and fees in entrapping low-income Americans within the criminal legal system. However, the extensive systems that impose criminal justice debt on indigent defendants are too pervasive to be ignored. The imposition of different fees throughout the criminal legal process is said to "support the operational costs" of courts, but it is more successful in intimidating indigent defendants so that they are unable to properly advocate for themselves throughout the legal process. Fees and fines trap people in cycles of poverty, but they also trap people within the criminal legal system itself by increasing time spent incarcerated, under carceral supervision, or beholden to the criminal legal system in some form.

I. Introduction

On October 27, 2020, data privacy lawyer and Twitter user @fkaLuna__ took to social media to inform her followers and the internet at large that she was facing "'a fine of up to $1,000, up to 60 days in jail, or up to 60 days of community service . . . ' for being arrested at 9:02 pm for violating curfew while [she] was legal observing."[1] Her testimony followed the mass issuance of "pay-or-jail" sentences to protestors in Atlanta, Georgia[2] during the massive civil rights push following the murders of George Floyd, Breonna Taylor, and Rayshard Brooks. Even though formal debtor's prisons were abolished in 1833,[3] and a federal court ruling in Atlanta "unequivocally [prohibited] the Municipal Court from requiring an indigent defendant to pay a fine or serve a specified number of days in jail,"[4] wealth-based incarceration is still widely practiced and sanctioned in Atlanta, as well as all over the country. Even in the absence of a "pay-or-jail" sentence, criminal justice debt imposed by court fees and fines can prolong an individual's carceral punishment, either through extending time spent incarcerated in a jail or prison itself or time spent under surveillance by the criminal legal system in some form.

Not unlike the Atlanta example, court fees and fines have often been a point of discussion within past civil rights protests by Black Lives Matter activists; following the murder of Michael Brown in Ferguson, Missouri, a Department of Justice (DOJ) investigation found that the Ferguson Police Department and municipal courts were supplying an estimated 23.3 percent of the city's total revenue in 2015 through the issuance of court fees and fines.[5] Of the $13.26 million raised in revenue for 2015, $3.09 million came from preying on Ferguson's own residents.6 For the most part, the Department of Justice determined fines and fees in Ferguson were a driver of mistrust between the city's residents, its police, and the municipal court system.[7] However, the report is limited in scope, mostly in that it considers how court fees and fines impact revenue and the subsequent skewed priorities of the Ferguson police, and it does not necessarily confront how fines and fees may contribute to mass incarceration in the United States.

For the most part, scholarship is relatively consistent in this field, arguing that supplementing revenue through the collection of court fees and fines is largely

inefficient because local governments spend more money recovering debt than they receive as revenue. A study conducted by the New York University School of Law's Brennan Center for Justice found that counties in Texas and New Mexico with some of the largest prison populations in the country "effectively spend more than forty-one cents on every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone."[8] Scholars like those of the Brennan Center also tend to agree that cases like Ferguson are outliers and that there are many more counties that also impose excessive fines and fees but do not abuse them for the sole purpose of generating revenue. A case study of three Georgia cities, Morrow, Riverdale, and Clarkston (all low-income suburbs of Atlanta), revealed that fourteen to twenty-five percent of their revenue was generated by fines and fees. This is a percentage comparable to that of Ferguson, but other similarly sized cities only generated about three percent of the revenue from the same source.[9] However, court fees and fines permeate the entire criminal legal process, and their impacts go beyond "[supporting] the operational costs of the criminal justice system,"[10] deterring, or punishing crime through monetary sanctions.[11]

More and more, the lines become blurred between seemingly benign operational costs and explicit monetary punishments, which are the stated purposes of court fees and fines. Across the United States, forty-three out of fifty states and the District of Columbia impose some fee to use state-provided, constitutionally guaranteed legal representation.[12] Forty-three out of fifty states impose fees on defendants for probationary services.[13] Forty-eight states impose fees on defendants for the use of electronic monitoring, and forty states charge incarcerated individuals room and board for their time spent behind bars.[14] Every state charges defendants a fee for the use of at least one of these services.[15] However, these fees serve to burden low-income defendants, who are often unable to pay them in a timely manner; nonpayment will sometimes result in an indigent defendant's incarceration.

The obligation for low-income defendants to pay court fees, fines, and restitution cause issues at every stage of the criminal justice system, from the plea-bargaining stage to court proceedings to post-incarceration probation or parole, especially if the criminal legal system does not consider an individual's ability to pay financial sanctions during court proceedings. Because of this, the financial

burden of the criminal legal system falls most heavily on the most vulnerable and poorest populations in the United States. While much of the analysis of court fees and fines has in the past been concentrated around the supplementation of tax revenue, criminal justice debt also greatly impacts low-income individuals and their time spent entangled with the criminal legal system, often leading to lifelong punishment and cyclical poverty.

II. Sentence Prolongation as a Result of Criminal Justice Debt

Sentence enhancements, circumstances that contribute to the harsher sentencing for defendants in the criminal legal system, were popularized in the late twentieth century as the war on drugs and changing state and federal policy gave rise to mass incarceration.[16] By definition, these enhancements resulted from a prior conviction or interaction with the criminal legal system or proof that the nature of the offense of which a defendant is accused was particularly serious or dangerous.[17] In the 1980s and 1990s, some sentence enhancements took shape as three-strikes laws that would trigger a felony charge and mandatory minimum sentencing, regardless of how the offense would ordinarily be categorized.[18] The more severe sentence enhancements, such as these three-strikes laws, have since been reformed in parts of the country.[19] Today, sentence enhancements most often take form as evidence of a "particularly serious or dangerous" offense—including the presence of a weapon or the location in which a person is arrested (for example, a school zone)—and could potentially escalate a charge from a misdemeanor to a felony.[20]

Court fees and fines are not necessarily known for triggering sentence enhancements or other unjust sentencing practices such as habitual offender laws. Nevertheless, criminal justice debt in the form of unpaid fees, fines, or restitution can affect punitive sentences in other ways. Criminal justice debt can prolong an individual's carceral punishment, as a sort of "implicit" sentence enhancement, by way of prolonged entanglement with the criminal legal system and its processes. The presence of outstanding criminal justice debt can be manipulated to increase time spent incarcerated, time spent under surveillance by the criminal legal system, or the number of interactions someone has with the criminal

justice system. This is true even if sentencing upon conviction is not explicitly influenced by a defendant's finances or outstanding debt. These opportunities for implicit sentence enhancement, or prolonged punishment by the criminal legal system, occur at various moments throughout the criminal legal process. Thus, this section will analyze how monetary sanctions like court fines and fees do so at three different points: the plea-bargaining stage, sentencing and ability to pay determinations, and supervision post-incarceration.

Public Defender Fees & Plea Deals

The Sixth Amendment to the U.S. Constitution is known for its guarantee "to a speedy and public trial, by an impartial jury . . . " but also guarantees a right to "Assistance of Counsel."[21] In 1963, the U.S. Supreme Court decision Gideon v Wainwright held that courts must provide legal counsel to defendants free of charge if they are unable to afford it independently,[22] as the right to counsel was indeed guaranteed by the Sixth Amendment.[23] However, as stated previously, forty-three states and the District of Columbia still require defendants to pay the court (to some degree) for using a public defender or legal services in general, which is seemingly at odds with the intent apparent in the Sixth Amendment.[24] Despite the fact that a court may not legally deny an indigent defendant access to counsel, these surmounting fees could still influence someone to choose not to use state-appointed representation, even if it is not in their best interest.

Public defender or legal service fees for defendants in criminal proceedings generally require that defendants pay at least one if not both of two fees: a registration fee and a recoupment fee if a defendant is convicted of any charges. The first, registration fees, are flat fees ranging from $10 to $480 paid upon indication that a defendant will be represented by a public defender in criminal court proceedings.[25] Twenty-seven states require that defendants pay this cost in advance, no matter their ability to pay, while forty-three states may demand at least a portion of this registration fee if a defendant has not demonstrated a complete inability to pay.[26] If the defendant is unable to pay, the court has the subjective power and complete discretion to waive the fee entirely. Should the court choose not to do so, the defendant would not be denied counsel,[27] as that

would directly violate *Gideon v Wainwright* and the Sixth Amendment.[28] Instead, however, the court would be within its rights to "order future payment enforced through probation revocation, garnishment, or other coercive methods."[29] Garnishment as a way to enforce payment of fees or fines is especially troubling because it allows the court to take funds directly from a defendant's paycheck. This gives indigent defendants relatively no choice over how they can spend their money and may even have adverse effects with regard to being able to pay for necessities like housing, for example. Not only is this insistence on future payment an added pressure that may cause a defendant to waive their right to legal counsel, but it is also illogical. Most likely, a defendant's financial situation will not have drastically improved after court proceedings have been completed, making legal fees no more manageable at this later time. At the same time, whatever time a defendant spends while going through the criminal legal process may result in collateral consequences, namely a loss of employment, which could also prevent timely payment of future fees or fines.

On the other hand, a defendant may be considered "lucky" if they were only required to pay registration fees throughout court proceedings. The other looming financial burden standing between defendants and exercising their right to "free" legal representation is a recoupment fee, paid to the court as reimbursement for the use of a public defender upon a defendant's receipt of a guilty conviction.[30] Depending on an individual court's fee schedule, recoupment fees upon guilty conviction can cost several hundred dollars (as a flat fee) or can be valued at the hourly fee of the defendant's legal representation.[31] These fees are paid out in addition to the initial registration and other fees a defendant has already accrued throughout criminal court proceedings.

While the imposition of public defender and legal service fees seems to be in violation of both the Sixth Amendment and the protections guaranteed through *Gideon v Wainwright*, the U.S. Supreme Court's ruling in *Fuller v Oregon* protects sentencing courts' ability to obligate defendants' payment of these fees.[32] *Fuller v Oregon* has facilitated the abuse of these policies to target vulnerable low-income Americans.

Aside from the dubious constitutionality of these fees, registration and recoupment for legal services also have disastrous consequences, influencing a

defendant's likelihood to plead guilty throughout criminal court proceedings. (Plea deals account for approximately ninety-five percent of all guilty convictions charged in criminal court.[33]) The National Legal Aid and Defender Association (NLADA) conducted a 2008 case study in a randomized selection of Michigan municipal courts, where they found that public defender fees had a profound impact on a defendant's willingness to plead guilty.[34] Essentially, guilty pleas circumvent the tribunal system entirely and often lead a defendant to be incarcerated or under carceral supervision for a length of time to which they might not otherwise be sentenced. With indigence seemingly exacerbating the rate at which defendants plead guilty, this concept of a right to legal representation in criminal court appears to only apply to those who can afford their respective court fees.

In this same study, before the NLADA even evaluated the impact of fines and fees on the likelihood to plead guilty, it also evaluated how these surmounting fees increase the likelihood of a defendant waiving their right to counsel altogether. Waiving the right to counsel in court, much like a guilty plea, seems to violate the intent behind the Sixth Amendment to guarantee equal access to due process. The NLADA cites the lack of a standard for rigor in determining whether an indigent defendant should pay public defender fees in cost recovery as a reason why so many defendants waive their right to an attorney.[35] The American Civil Liberties Union (ACLU) of Southern California also argues that the looming threat of public defender fees may influence an indigent defendant to waive their right to counsel because "it undermines public defenders' efforts to build trust and rapport with their clients."[36] Public defenders in Los Angeles County are required to give their potential clients a form requiring a $50 flat fee in order to proceed as legal counsel upon their very first in-person meeting,[37] which could contribute to this erosion of trust and lead a defendant to believe a public defender would not be able to effectively advocate for them.

Furthermore, in Jackson County, Michigan, non-custodial defendants are asked whether or not they would like to plead guilty, a process which Jackson County has made even easier by providing defendants with a "plea-by-mail" option.[38] This "plea-by-mail" is a court process whereby a defendant circumvents the criminal legal process entirely, waiving their right to due process, and in the event a defendant wishes to plead "not guilty," they must expressly indicate so.[39]

This happens alongside the court staff informing the defendant of costs for court-provided counsel: $240 for misdemeanors and $482 for non-capital felonies.[40] Jackson County district judge Charles J. Falahee, Jr. recalls that approximately ninety-five percent of defendants waive their right to counsel for misdemeanors and fifty percent of those who waive their right to counsel plead guilty at the time of arraignment.[41] There is a large discrepancy in the ratio of misdemeanor- to felony-charged defendants who waive counsel in Jackson County versus the national ratio. The ratio in Jackson County is 3:1 but 0.4:1 in the nation.[42] The high rates of waiving counsel for misdemeanors in Jackson County seem to connote that the perceived costs of obtaining constitutionally guaranteed legal representation outweigh the benefits, despite the potential for a misdemeanor charge to result in a defendant's incarceration. Such alarmingly high rates of waiving counsel due to the intimidation of extensive fees likely also have an effect on a defendant's likelihood to plead guilty, though much of the evidence demonstrating so is anecdotal. However, hasty plea deals are much more likely to have unforeseen adverse effects (including the potential loss of permanent resident status or deportation for immigrant defendants),[43] and so any impact that court fees and fines may have should be mitigated to the fullest possible extent.

Judicial Discretion & Ability to Pay Determinations

Even though only four to five percent of cases make it to trial and are heard before a judge,[44] when a case does go to trial, judges ultimately have the final say in sentencing procedures for convicted defendants, so long as they are not constrained by laws that must dictate how long a defendant should be incarcerated given a guilty conviction on specific charges (as is the case with habitual offender laws). However, in the absence of these laws, judges have complete discretion in deciding the final sentence for a defendant in the event of a guilty conviction, and sometimes these sentences can be influenced and altered, either directly or indirectly, by a defendant's financial status or criminal justice debt.

The most salient connection between a judge's discretion in determining ability to pay and the influence of indigence on time spent incarcerated or under carceral supervision are "pay-or-jail" sentences like those faced by protestors in

Atlanta.[45] Most of the time, "pay-or-jail" sentences are offered to defendants so that they have the "choice" of working off criminal justice debt as generated by a fine,[46] but the illusion of choice by way of a community service option does not address the root of the problem. In 2019, a University of California, Los Angeles (UCLA) School of Law study examining the reach of community service sentences found that at least twenty-five percent of the cases that went through criminal court in Los Angeles County were required to work a minimum 155 hours of community service to offset jail time, or the equivalent of four weeks' worth of full-time work.[47] Sixty-six percent of the defendants who were working off a debt or fine from criminal court were unable to complete their hours by the initial deadline,[48] as were thirty-eight percent of the defendants from traffic court.[49] For criminal court defendants in this study, nineteen percent were at risk of violating the terms of their parole, and they had their parole revoked or were issued a bench warrant if they did not complete their community service hours.[50] The same external pressures, like raising a family or unstable employment, which may prevent a defendant from paying down criminal justice debt in a timely manner, can also affect a defendant's ability to complete community service by a court-specified deadline. In either scenario—where a defendant is sentenced to court-ordered monthly payments or court-ordered community service hours as a condition of sentencing—failure to adhere to time constraints may result in incarceration. These two paths are virtually indifferent: the valuation simply morphs from a debt of money to a debt of time and is nonetheless constraining. Thus, community service cannot be understood as an adequate alternative to wealth-based incarceration so long as defendants enrolled in community service programs can still end up behind bars. It falls again to judges to better exercise discretion in sentencing in ways that do not increase the likelihood that low-income individuals will face incarceration.

Sometimes, though, judges exercise their discretion to intentionally increase the amount of time indigent defendants spend incarcerated. For example, a Missouri public defender told the Brennan Center for Justice that a judge in his district court takes nonpayment of a fee or fine as an implicit request for a defendant's financial obligation to be converted into time spent incarcerated.[51] Though in 1971 *Tate v Short* declared it unconstitutional to automatically

incarcerate indigent defendants as a substitute for an inability to pay fees and fines,[52] this judge still allegedly uses this tactic to incarcerate defendants not represented by a public defender.[53] That means that any indigent defendant represented by a private lawyer (who may possibly be working pro bono, fifty hours of which are required yearly by the American Bar Association)[54] could be a target of wealth-based incarceration. This judge—and presumably, others like him—abuses his discretion in a way that shatters any illusion of choice for defendants who cannot pay steep fees and fines, but whose criminal justice debt has not been waived. This is just one way in which extreme judicial discretion, particularly in ability to pay determinations, might be weaponized against indigent defendants to prolong a carceral sentence.

Waivers for court debt, which would excuse nonpayment and relieve low-income people from time pressures to pay back money they do not have, are rare, largely due to a lack of standardization in how judges make ability to pay determinations. Some reforms have been instituted to better standardize ability to pay determinations: the state of Michigan established an "Ability to Pay Workgroup" in 2014,[55] and, in 2017, the Supreme Court of Arizona authorized the use of two different bench cards (see *Figure 1* and *Figure 2* in the Appendix) for judges to use in ability to pay determinations.[56] However, while these reforms were well-intentioned, they do not standardize ability to pay determinations across the nation. Without an expansion of the parameters for complete forgiveness of court debt, poor defendants are often still expected to pay fees and fines in full, at great personal and financial cost to themselves and their families.

Because judges often do not exercise discretion during ability to pay determinations by protecting indigent defendants from the potential of incarceration and waiving their criminal justice debt, low-income individuals are saddled with unmanageable criminal justice debt. When judges choose to exercise their immense power in ways that do not protect low-income defendants from the "modern-day debtors' prison," they make an implicit agreement to keep a defendant entangled within the criminal legal system in a way that may result in lifelong punishment.

Supervisory Services & Private Debt Collection

While part of the idea of "implicit" sentence enhancement is that economic costs and monetary sanctions might extend the time an indigent defendant is incarcerated, besides the possible extensions to incarceration time that come with implicit sentence enhancement, court fees and fines can also prolong carceral supervision via probation or parole. Supervisory services like probation and parole are typically ordered at initial sentencing or reviewed and approved after an individual has spent time incarcerated. In the United States, forty-three states charge defendants for their use of supervisory services, where indigent defendants are required to pay a $35 to $40 fee each month to a private company when municipalities outsource the administration of carceral surveillance.[57] One of the most prominent private supervisory services, Judicial Corrections Services (JCS), appeals to local governments by boasting that "[s]upervision is completely offender-funded . . . Court collections have increased in every community that has made the transition to JCS. This helps fund the court itself."[58] While courts can be obligated to accurately assess a defendant's ability to pay, these companies have no such responsibility. Furthermore, they also have a vested interest in extending the time it takes for a defendant to pay off court debt and work closely enough with local courts that they are sometimes able to recommend issuance of bench warrants for indigent defendants.[59]

Oftentimes, paying off court debt is a condition of release for people on probation or parole.[60] The costs that are most commonly made a condition of probation/parole upon release from incarceration are public defender and legal service fees and restitution.[61] Courts may not be legally allowed to incarcerate defendants solely on the basis of nonpayment, but private supervisory services operate in ways that circumvent this principle. For example, supervisory services employees often act as "abusive debt collectors" towards defendants to intimidate them out of advocating for themselves when they cannot afford steep debt payments.[62] One Sylacauga, Alabama resident, Dana Carden, filed a lawsuit in 2016 against the Harpersville local government which outsourced supervisory services to JCS, citing that she was incarcerated for failure to pay JCS fines and fees without consideration for her financial situation.[63] The court dismissed her

claim, despite evidence that the initial fines Carden was issued after a traffic stop "exceeded the statutory minimum for municipal-court fees" and that she was incarcerated without any inquiry into her ability to pay.[64]

This cost imposed by courts and private supervisory service companies is insurmountable. A 2014 report by Human Rights Watch (HRW) calculated that the total financial burden of a defendant sentenced to probation while saddled with $2,000 of court debt was around $6,000 paid in $60 installments over 100 months.[65] This report contained a graphical representation (see Figure 3 in the Appendix) of the exponential increase in financial burden as manageable monthly payments become smaller.[66] This figure depicts how a defendant who is only capable of paying an additional $60 monthly expense will pay approximately two-thirds of that $60 to a private supervision service such as JCS; someone who can afford to pay a fine outright will make fewer of those monthly payments throughout their sentence. These smaller incremental payments then prolong a probationer's or parolee's sentence under carceral supervision, since supervision is normally completed upon the repayment of debt. The burden of these supervisory service fees is even more apparent in the testimony of Cindy Rodriguez, a disabled single mother, who was sentenced to nearly twelve months' probation for shoplifting and was required to pay a monthly supervision fee.[67] Rodriguez's fines and associated fees amounted to $578 initially, and she still recalls that "there were times [she and her daughter] didn't eat, because [she] had to make payments to probation."[68]

Even more troubling, violations of probation or parole often result in the revocation of probation or parole, and criminal justice debt directly impacts the likelihood that an individual will violate parole. A 2015 study on adult probationers in Florida found that outstanding debt from prosecution fees increases the odds of a violation in probation by 5.3 percent, and having to pay any amount of restitution as a condition of probation increases the odds of a probation violation by 17.3 percent.[69] Defendants were also 2.3 percent more likely to violate probation for every additional month they were under supervision up to 120 months, and defendants who pled guilty (which is more attractive to indigent defendants who cannot afford public defender fees) were 2.23 times more likely to violate probation.[70] These violations have the potential to incarcerate or re-incarcerate indigent defendants, or at the very least prolong the time they are entangled with

the criminal legal system.

The systems of probation and parole are designed to encourage recidivism, as demonstrated in a report published by the American Civil Liberties Union and Human Rights Watch in 2020. The ACLU and HRW found that in 2018, twenty-eight percent of new prison admissions were from people who were being re-incarcerated for violating the terms of their probation or parole by a conservative estimate; some estimate this proportion to be as high as forty-five percent of all state prison admissions.[71] This report also cites specifically how probation violations are adjudicated without due process and how sentencing for violations is often excessive and disproportionate to the violation itself. For one, in Pennsylvania from 2016 to 2019, fifty-seven percent of the 12,241 defendants who had their probation revoked due to a violation were re-incarcerated in either a county jail or state prison.[72] Clearly, the potential for fines and fees to increase a defendant's likelihood of violating probation or parole is directly linked to a defendant's potential to be re-incarcerated, since violations of probation or parole so frequently end in re-incarceration.

III. Consequences of the Modern-Day Debtors' Prison

Scope of Fines and Fees in the Justice System

Court fees and fines are extremely pervasive, and defendants encounter them at several points throughout criminal and traffic court proceedings, as described above. According to the U.S. Bureau of Justice Statistics, there were almost 6.5 million adults who were under some form of correctional supervision in 2018, demonstrating how extensive the larger problem of mass incarceration is.[73] Specifically regarding criminal justice debt, a 2019 report from the Federal Reserve indicates that of the survey respondents, six percent of adults' families had some amount of court debt.[74] Assuming this survey is representative of the greater U.S. population of 331 million, an estimated 19.9 million adults would have family who are currently in debt to the legal system in some way. Though it is difficult to measure the impact court fees and fines directly have on incarceration rates when the existing databases on crime and incarceration do not measure

wealth-based incarceration,[75] it is undeniable that the numerous systems of court fees, fines, and the modern-day debtors' prison are equally, if not more, extensive than the systems of carceral supervision in the United States.

Exacerbating Racial Disparities

Fines and fees, like all other facets of the criminal legal system, also directly disadvantage low-income people of color in the United States. The 2019 Federal Reserve statistics reveal that the percentage of Black adults with families possessing outstanding criminal justice debt is 2.4 times that of white adults; for non-white Hispanic adults, the percentage is 1.5 times that of white adults.76 Additionally, fees and fines place an undue economic burden on racial minorities as those communities possess a significantly smaller portion of wealth than their white counterparts, as represented in Figure 4 (see Appendix).[77] Based on U.S. census data from 2019 measuring household income, thirty-three percent of Black families and twenty-three percent of Hispanic families were represented in the lowest quintile, compared to just seventeen percent of white families.[78] Monetary sanctions will never have the same effect on wealthier individuals as they do on vulnerable populations that are already disproportionately targeted by the criminal legal system.[79] Furthermore, they ultimately put more people into contact with the criminal legal system for extended periods of time.

Economic Strain & Bureaucratic Inefficiency of Collecting Court Debt

One of the main concerns regarding reforms to court fees and fines is that courts and local governments will no longer function effectively without the revenue garnered by fines and fees. In actuality, relying on and collecting criminal justice debt in courts leads to inefficient revenue collection. The Brennan Center for Justice identified in 2019 that municipal courts in Texas and New Mexico were paying almost 121 times what the Internal Revenue Service (IRS) spends to collect taxes.[80] In one extreme case, a county in New Mexico runs a deficit of at least seventeen cents for every dollar "recovered."[81] In cases where it is not possible to collect debt, local jails may spend as much as 115 percent of the value of the debt owed to enforce incarceration for indigence.[82] Court fees and fines are consistently an inefficient source of revenue for courts and governments, and they

ultimately fail to fulfill their purpose in "[supporting] the operational costs of the criminal justice system."[83]

IV. Recommendations

Abolish All Court Fees in Federal, State, and Municipal Courts

Though court fees are designed to support the operational costs of the criminal legal system, their efficacy in doing so is demonstrably questionable.[84] Former President Barack Obama acknowledged often that fines and fees were a growing problem in the criminal legal system following the DOJ report on the Ferguson Police Department. His administration made strides to encourage states to reevaluate their use of fines and fees as sources of revenue, in releasing guidance for state governance on the constitutionality of fines and fees and "providing support to local communities wishing to reform their justice system so that they do not rely on fees and fines for revenue."[85] Despite this, federal courts still have a robust fee schedule;[86] they may even charge interest on outstanding court debt.[87] Though the crux of this issue does lie with states, municipalities, and their court systems, it is imperative that the federal government eliminate court fees in federal circuit courts while encouraging states to do the same. The federal government should also offer to supplement any loss in revenue from discontinued court fees to encourage reform at the state and municipal levels since it has limited power to regulate local jurisdictions.

For Federal Government: Create a National Standard for Conducting Ability to Pay Hearings

As of now, movements for reforming ability to pay determinations are relatively disjointed, since most of these reforms are introduced at the state and local level. While there are significant benefits to local reform which can better respond to the unique needs of a single community, having basic guiding principles for ability to pay determinations would make this process easier for both judges and defendants. Some of the "reformed" ability to pay determinations

have extremely narrow definitions of who should qualify for fee waivers,[88] so guidelines with more lenient parameters can protect more low-income Americans from wealth-based incarceration and "implicit" sentence enhancements. All the while, individual judges should be encouraged to waive fees more frequently, aided by the issuance of bench memos that outline the procedure for doing so.

For Federal Government: Create a National Database to Accurately Measure the Impact of Fines & Fees

As of now, there is no national measure to accurately assess the causal link between court fees and fines and their effect on incarcerated populations at the federal, state, or local level. This is despite the fact that activists, legal professionals, and academics alike agree that fees and fines have a profound effect on the criminalization of poverty in the United States. Much of the data that needs to be collected has to do with processes administered on the local level[89], so the federal government should provide financial and logistical assistance as well as incentives for local governments to create a central database. Once such a resource is created and routinely updated, it will be easier to evaluate the carceral impact of court fees and fines as different reforms are implemented over time.

For State and Local Governments: Adopt a Model Similar to San Francisco's Financial Justice Project

In October 2016, the city of San Francisco's Financial Justice Project launched a Fines and Fees Task Force,[90] which worked with the community and city officials to implement reforms to significantly reduce outstanding criminal justice debt for San Francisco residents.[91] This included the development of a formulaic "low-income payment plan," forgiveness for $33 million in court administrative fees for over 21,000 people, the launch of a new ability to pay process in San Francisco traffic court, and many other reforms.[92] The Financial Justice Project also impressed the necessity of policymakers to engage with local advocates at every step.[93] Moreover, in instances in which courts are more willing to adopt methods of restorative justice, they should eliminate certain fines

V. Appendix

Figure 1:

In criminal cases, a court must impose "the full amount of the economic loss to the victim as determined by the court and in the manner as determined by the court or the court's designee," as required by ARS §§13-603(C), and 13-804(C)(&(E). Restitution is exempt from any payment alternatives imposed for other types of financial obligations, but may be the subject of a time payment plan.

Step 1 – Application of Credits

A. Apply Credit for Time Served if applicable. (§31-145).
B. Apply Credit for Community Restitution if applicable and when allowed. (§13-824)

Step 2 – Defendant Self-Declaration

A. "Can you pay this in full today?"
B. "How much can you pay today?"

Step 3 – Determination of Eligibility for Fine Reduction

A. Affidavit by defendant to claim a hardship.
B. Confirmation of hardship by:
   1. Proof that defendant receives income-based public assistance
   2. DES eligibility check
   3. Automated income check
   4. Defendant's affidavit or response to questions under oath

Step 4 – Granting a Hardship Mitigation[1]

At sentencing, the judge may impose a fine amount that is less than the court's presumptive fine amount, when the judge deems it to be appropriate and as allowed by law. Consider income as a percentage of the Federal Poverty Level (FPL) based on household size. Consider:

A. At least 25% mitigation if the household income is between 200% and130% of FPL;
B. At least 50% mitigation if the household income is less than 130% of FPL, or receipt of income-based public assistance.

Step 5 – Payment

A. Initial payment (what can be paid today)
B. Establishment of payment plan for the balance owed
C. Community restitution in lieu of monetary payment, if permitted by ARS §13-824

2017 Federal Poverty Level (FPL) Income Based on Family Size

Family Size	*130% of FPL*	*200% of FPL*	*Family Size*	*130% of FPL*	*200% of FPL*
Individual	*$15,678*	*$24,120*	*Household of 4*	*$31,980*	*$49,200*
Household of 2	*$21,112*	*$32,480*	*Household of 5*	*$37,414*	*$57,560*
Household of 3	*$26,546*	*$40,840*	*Household of 6*	*$42,848*	*$65,920*

Figure 2:

BENCH CARD FOR ABILITY TO PAY AT TIME OF SENTENCING IN CRIMINAL CASES AND CIVIL TRAFFIC CASES

The court may examine the following factors to help determine ability to pay:

a. Whether the defendant receives income-based public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state-based benefits provided through the Arizona DES. (All such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);

b. Income, including whether income is at or below 130% or between 130% and 200% of the Federal Poverty Level (FPL) (current guidelines available at https://aspe.hhs.gov/poverty-guidelines);

c. Financial resources, assets, financial obligations, and number of dependents;

d. Whether the defendant is homeless, incarcerated, or resides in a mental health facility;

e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;

f. The defendant's efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges;

g. Other LFOs owed to the court or other courts;

h. Whether a LFO payment would result in hardship to the defendant or his/her dependents; and

i. Any other special circumstances that may bear on the defendant's ability to pay.

Figure 3:

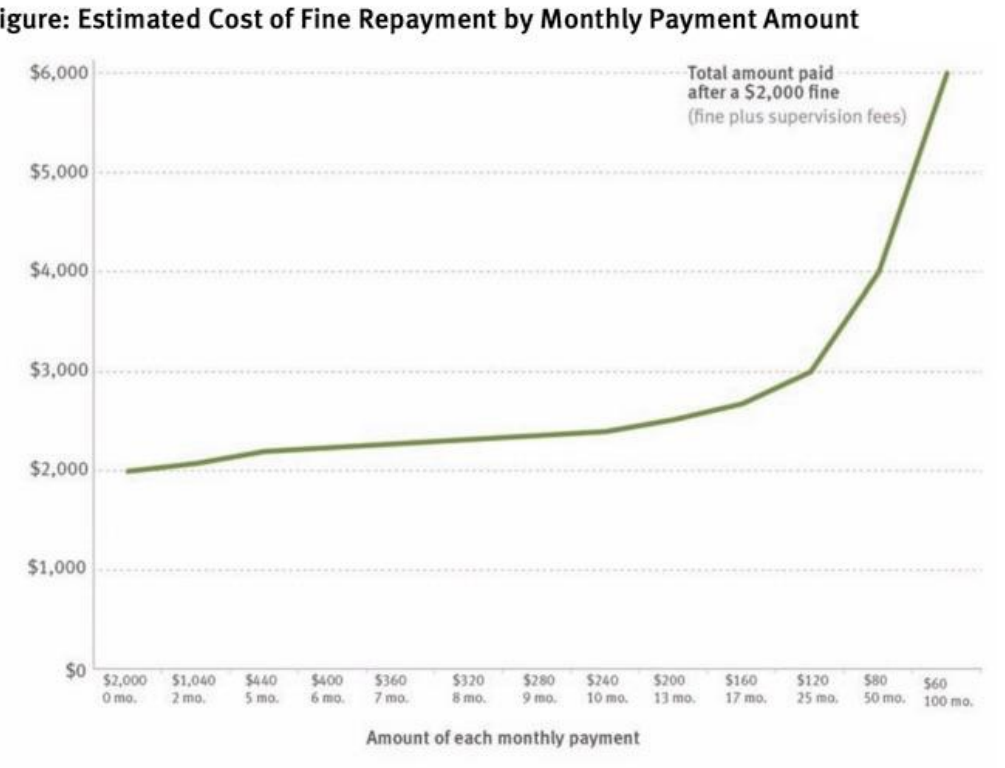
igure: Estimated Cost of Fine Repayment by Monthly Payment Amount
$6,000
$5,000
$4,000
$3,000
$2,000
$1,000
$0
Total amount paid
after a $2,000 fine
(fine plus supervision fees)
$2,000
0 mo.
$1,040
2 mo.
$440
5 mo.
$400
6 mo.
$360
7 mo.
$320
8 mo.
$280
9 mo.
$240
10 mo.
$200
13 mo.
$160
17 mo.
$120
25 mo.
$80
50 mo.
$60
100 mo.
Amount of each monthly payment

Figure 4:

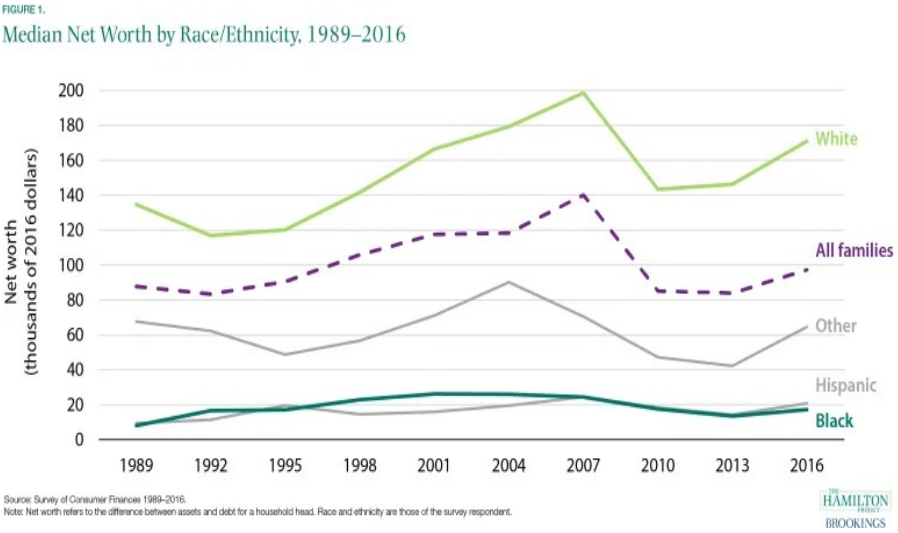
FIGURE 1.
Median Net Worth by Race/Ethnicity, 1989–2016
Net worth (thousands of 2016 dollars)
200
180
160
140
120
100
80
60
40
20
0
1989
1992
1995
1998
2001
2004
2007
2010
2013
2016
White
All families
Other
Hispanic
Black
Source: Survey of Consumer Finances 1989–2016.
Note: Net worth refers to the difference between assets and debt for a household head. Race and ethnicity are those of the survey respondent.
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