

Texas Undergraduate Law Review

Vol VIII.I

Fall 2019

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Colorado voters approved the addition of Amendment Two to the Colorado Constitution. This amendment would have prohibited the enactment of any judicial, legislative, or executive motion intended to protect LGBTQ+ people from discrimination. Court challenges to the amendment emerged shortly after, arguing that it violated the Fourteenth Amendment's Equal Protection Clause. *Romer* reached the Supreme Court in 1995, and the majority opinion, authored by Justice Kennedy, was released in 1996. The final paragraph of the ruling presents a significant shift in opinion by the Supreme Court from the *Bowers* decision a decade earlier. In the opinion, Justice Kennedy explained that the Court "must conclude that Amendment Two classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."¹³ The justices supported the plaintiff's argument that LGBTQ+ people should be treated no different from their heterosexual and cisgender counterparts. Through *Romer*, the Supreme Court conclusively ended classification of LGBTQ+ people as second-class citizens and, in doing so, established a precedent for many important decisions to come.

Romer created a domino effect of successful case results for the LGBTQ+ community before the Supreme Court. *Lawrence* finished the job that Hardwick began in *Bowers*. In *Lawrence*, the law in question was a Texas statute that specifically prohibited same-sex sodomy. This time, however, the Court struck down the statute and overturned *Bowers*. Justice Kennedy again wrote the majority opinion, stating that "the liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons."¹⁴ Justice Kennedy then cited *Romer*, describing how while *Romer* did not overturn *Bowers*, it cast doubt on the constitutionality of upholding "class-based legislation directed at homosexuals."¹⁵ Thanks to *Romer*, *Lawrence* was the next step in the

¹³ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

¹⁴ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

¹⁵ *Id.* at 559.

Roberts Court looks significantly different. Justice Kennedy, the Court's swing vote who wrote most of the significant opinions protecting LGBTQ+ rights, left the Court and has since been replaced by the conservative Justice Brett Kavanaugh. This change in the Court's composition jeopardizes future cases that could protect LGBTQ+ people from discrimination. Three of these such cases will be heard in the 2019 term.

III. At Stake Today

Three cases concerning the scope of federal employment statutes are set for oral argument before the Supreme Court beginning in October 2019. The Court, for the first time in decades, is poised to issue decisions that restrict the freedoms of LGBTQ+ individuals and effectively enshrine discrimination against queer and transgender people in the U.S. Constitution. Although the cases are not yet officially decided, the jurisprudential history of justices on the Roberts Court indicates trouble for the plaintiffs. Two concern treatment of gay and lesbian individuals, while the third involves treatment of transgender individuals.

Bostock v. Clayton County came to fruition following Clayton County's firing of a gay child-welfare-services coordinator, Gerald Bostock. Bostock claims that the county fired him for being gay, despite the fact that he worked in his capacity for over a decade and received great reviews from clients. Bostock's case found its way before the Eleventh Circuit, where he argued that his firing violated Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex. The Eleventh Circuit disagreed, and the Supreme Court granted certiorari on April 22, 2019.

In *Altitude Express v. Zarda*, another case concerning the firing of a gay employee, the Second Circuit Court of Appeals interpreted the statute in a different light than the Eleventh Circuit. Donald Zarda, who argues he was fired for being gay, was a skydiving instructor in New York. Zarda often told female clients about his sexuality to help them overcome discomfort associated with the close-quarters arrangements necessitated by his profession. Zarda's case found its way to the Second Circuit, where he, like Bostock, argued that his

conjunction with all of the other information available to the officer at the time of the stop, the officer knows the registered owner of the vehicle has a suspended license and the officer is unaware of any other evidence or circumstances from which an inference could be drawn that the registered owner is not the driver of the vehicle.²

The Kansas Supreme Court overturned the Kansas Court of Appeals, claiming that “the State has the burden to prove the officer had reasonable suspicion, and this burden cannot be shifted to the defendant.”³ After exhausting all options at the state level, the State of Kansas filed a petition for a writ of certiorari on Oct. 25, 2018. This petition was granted on April 1, 2019. As of publication, the court is accepting amicus curiae briefs. Oral arguments began on November 4, 2019.⁴

II. Argument from the Petitioner

On June 17, 2019, the State of Kansas filed a brief that laid out its argument, which has three parts. The first section supports the claim that “[a]n officer has reasonable suspicion to stop a vehicle when the officer knows the registered owner cannot legally drive, absent information that the owner is not the driver.”⁵ The second section refutes the Kansas Supreme Court’s decision, stating that it adopted a more stringent standard than reasonable suspicion.⁶ The final section demonstrates the substantial burden that the Supreme Court of Kansas placed on police officers with their ruling.⁷

The first section establishes what the state requires of police officers to initiate a search. Kansas provided the standard set by *Terry v. Ohio* (1968), which established that for an officer to have reasonable

² *State v. Glover*, 54 Kan. App. 2d 377, 400 P.3d 182 (2017).

³ *Id.*

⁴ Damon Root, *The Supreme Court’s Next Big Fourth Amendment Case*, REASON, (2019), <https://reason.com/2019/09/10/the-supreme-courts-next-big-fourth-amendment-case/>.

⁵ Brief for the Petitioner, *supra* note 1 at 9.

⁶ *Id.* at 20.

⁷ *Id.* at 21.

suspicion, they must “be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”⁸ The State of Kansas emphasized that initiating a stop only requires a “minimal level of objective justification.”⁹ This intends to show the court that there is not a high standard for the initiation of a stop similar to the one committed by the officer in this case. Kansas then attempted to establish the reasonableness of the officer’s actions, asserting that “[c]ourts have repeatedly found that an officer may reasonably suspect that the registered owner of a vehicle is the driver of his or her vehicle.”¹⁰ One of the many cases Kansas mentioned as precedent for its assertion is *State of Iowa v. Vance* (2010), in which the judge ruled that it is “reasonable for an officer to infer the registered owner of the vehicle will do the vast amount of the driving.”¹¹ This argument emphasizes that officers could justify their actions because they could “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹²

The second part of Kansas’ argument claimed that “[t]he Kansas Supreme Court adopted a standard more demanding than reasonable suspicion.”¹³ For a police officer to intrude upon a suspect’s Fourth Amendment rights, the officer must have a “minimal level of objective justification.”¹⁴ Kansas stated in its brief that “requiring corroborating evidence imposes a higher burden than reasonable suspicion requires.”¹⁵ Kansas attempted to demonstrate that the Supreme Court of Kansas’ decision created a new standard that is considerably more stringent than the standard previously upheld by the U.S. Supreme Court through *United States v. Cortez-Galaviz* (2007).¹⁶

⁸ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

⁹ *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

¹⁰ Brief for the Petitioner, *supra* note 1 at 5.

¹¹ *State of Iowa v. Vance*, 790 N.W.2d 775, 781 (2010).

¹² Brief for the Petitioner, *supra* note 1 at 9.

¹³ *Id.* at 20.

¹⁴ *Supra* note 9.

¹⁵ Brief for the Petitioner, *supra* note 1 at 21.

¹⁶ See *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1207 (2007) (stating that requiring “an officer to know the identity of the driver . . . would take us from *Terry* .

of police investigations of possibly unrelated infractions would result in a vast decrease in individual liberty.

The expansion of governmental power that would result from the U.S. Supreme Court ruling in favor of the State of Kansas would dramatically reduce the amount of privacy an individual has while driving. In 2017, 1.7 million people had their licenses suspended in Florida alone.⁴³ In one year, nearly 10 percent of the Florida population and anyone that 10 percent lent their cars to could have been subjected to a police stop. If the U.S. Supreme Court rules in favor of the State of Kansas, millions of drivers could be subjected to being pulled over by the police while following every traffic law. The ability to drive your car without being accosted by the police falls directly under the right to privacy. If the U.S. Supreme Court rules in favor of the State of Kansas, anyone driving a car borrowed from someone with a suspended license would have their rights to privacy made obsolete. Additionally, one should question whether it is in the best interest of a U.S. citizen to give the police the power to constantly check license plates to discern whether owners of cars have had their licenses suspended. Considering the vast array of offences that individuals have their licenses' suspended for, it becomes evident that this power is not justifiable. It is not in the interest of U.S. citizens for police to have the power to initiate millions of stops and discern whether they, for example, did or did not pay a court fee. This is clearly an instance where the government's interest to enforce the law does not supersede the right to privacy. Kansas vastly understated the intrusiveness of a "stop," the consequential restriction of liberty, and the vast reduction of privacy for drivers.

It is incumbent on those who wish to uphold the liberty and rights granted to them by the Fourth Amendment to ensure that any case challenging these rights is scrupulously examined. If the court is to rule in favor of Kansas, these rights will be diminished. The interest of the State to maintain a safe roadway does not excuse the

⁴³ Wayne K. Roustan, *Florida suspends nearly 2 million driver's licenses. Help may be on way.*, SUN SENTINEL, Feb. 16, 2018, available at <https://www.sun-sentinel.com/news/transportation/fl-reg-drivers-license-suspensions-20180208-story.html>

infringement on individual liberty resulting from the Supreme Court ruling in Kansas' favor.

Hong Kong's Extradition Controversy: Adjudicating Jurisdiction Under "One Country, Two Systems"

Hubert Ning

In the bright skyscraper lights, among the city sounds and urban hustle, exists the beating heart of democracy in East Asia—Hong Kong. Maintained under the “one country, two systems” principle, Hong Kong has conserved governing autonomy by separating its political and economic systems from those of mainland China since 1997.¹ Under Article 31 of the Constitution of the People’s Republic of China, Hong Kong is one of China’s two special administrative regions (SARs).² Despite categorization as provincial-level administrative districts under China’s realm, these regions possess the highest degree of autonomy possible and are granted liberties such as the right to vote and the freedom of speech, unlike their counterparts.³ However, unlike other Chinese provinces, Hong Kong remains free from direct Communist Party control. With its executive, legislative, and judicial powers devolved from China’s national government, Hong Kong serves as a safe haven for democracy. This democratic model houses seven million individuals who breathe life into the freedoms and civil liberties which separate Hong Kong from mainland China and democracy from subjugation.

The introduction of Hong Kong’s extradition bill threatened this democratic model. It laid out new provisions and amendments to current Hong Kong extradition laws and treaties, which would have allowed mainland China to extradite individuals whenever they saw fit. International and domestic backlash filled the streets, courts, forums, and social media. Questions of the bill’s legality created virulent discourse among legal scholars and bureaucratic officials arguments its ethical implications. A factor of intense discourse

¹ The Central People’s Government of the People’s Republic of China, *中华人民共和国行政区划* [*Administrative Divisions of the People’s Republic of China*], GOV.CN (June 15, 2005), http://www.gov.cn/test/2005-06/15/content_18253.htm.

² *Id.*

³ HONG KONG BASIC LAW, ch. 3, art. 31.

stemmed from the increased the risk of torture and ill-treatment for extradited individuals.

Hong Kong serves as a model of a fair and equitable legal system; the principle of equality before the law reverberates through every courtroom's halls and resonates in the hearts of every lawyer and judge. Regardless of crime, the cost of delivering justice should not be equated with perpetrating injustice. Criticism of Hong Kong's extradition bill speaks to protect the values, core principles, and ideals that have separated Hong Kong from mainland China for over 100 years. Even though the extradition bill did not pass, it is important to recognize how the bill would have threatened Hong Kong's democratic liberties and to look into the implications the bill would have had on extradition law.⁴

I. Background

Legal scholars describe China's criminal process as "plagued by deep flaws, including the lack of an independent judiciary, arbitrary detention, lack of fair public trial, lack of access to legal representation and poor prison conditions."⁵ Additionally, as codified in mainland China's legal system, courts do not enforce precedents in their judicial interpretations.⁶ The system allows for vast interpretation with no accountability from previous decisions, allowing judges to maneuver legal interpretation on a case-by-case basis to benefit government motives. Meanwhile, residents under Hong Kong's legal system, a hallmark of autonomy, enjoy rights not found in mainland China. Article 35 of the Basic Law guarantees access to courts, a right to confidential legal advice, universal choice of lawyers, legal aid, and an independent judiciary with the power of final adjudication to Hong

⁴ Jessie Pang & Twinnie Siu, *Hong Kong Extradition Bill Officially Killed, but More Unrest Likely*, REUTERS, Oct. 23, 2019, available at <https://www.reuters.com/article/us-hongkong-protests/hong-kong-extradition-bill-officially-killed-but-more-unrest-likely-idUSKBN1X200F>.

⁵ Jeffie Lam, *Extradition agreement with mainland China would damage Hong Kong's 'safe reputation' for business, AmCham says*, SOUTH CHINA MORNING POST, March 6, 2019, available at <https://www.scmp.com/news/hong-kong/politics/article/2188915/extradition-agreement-mainland-china-would-damage-hong-kongs>.

⁶ Library of Congress, *Legal Research Guide: China*, LIBRARY OF CONGRESS (May 3, 2012), <https://www.loc.gov/law/help/legal-research-guide/china.php>.

Kong residents.⁷ As a result, Hong Kong arguably has the oldest equitable contemporary justice system in Asia, serving as the premier model for impartiality in the Pacific East.

The complicated relationship between Hong Kong and China extends beyond legal and administrative systems and into politics, laws, trade, economies, and people. With different cultures, viewpoints, and verbal dialect, Hong Kong residents do not consider themselves Chinese. The century-long separation between the two created greater cultural gaps that cannot easily be bridged. Naturally, any attempt to merge the two entities, whether bureaucratically or culturally, will be met with friction.

II. The Extradition Bill

In February 2018, Hong Kong resident Chan Tong-Kai allegedly murdered his pregnant girlfriend, Poon Hiu-wing, in Taiwan. However, upon Chan's return to Hong Kong, the police could not charge him with murder or extradite him to Taiwan.⁸ Under normal circumstances, the Hong Kong government would have referred to the Fugitive Offenders Ordinance (FOO) and the Mutual Legal Assistance in Criminal Matters Ordinance (MLAO). The two Hong Kong ordinances, however, were not codified to open requests for surrendering fugitives to Taiwan. Beside these two ordinances, Hong Kong has no mutual legal assistance nor any formal extradition treaty between itself and other extraterritorial regions, including mainland China.⁹

Without the ability to legally charge Chan for the murder, the Hong Kong government only punished Chan for money laundering, as he had used Poon's debit card to pay off credit bills and loans after her

⁷ HONG KONG BASIC LAW, ch. 3, art. 35.

⁸ Agence France-Presse, *Taiwan Won't Ask for Murder Suspect If Hong Kong Passes 'Politically Motivated' Extradition Law*, HONG KONG FREE PRESS (May 10, 2019), <https://www.hongkongfp.com/2019/05/10/taiwan-wont-ask-murder-suspect-hong-kong-passes-politically-motivated-extradition-law/>.

⁹ *Id.*

death.¹⁰ One year after the murder, Hong Kong proposed amendments to the FOO and MLAO. It wished to establish a legal apparatus known as special case arrangements: the ability to transfer fugitives to any jurisdiction on a case-by-case basis, regardless of whether or not there is a pre-existing formal extradition treaty. To accomplish this goal, Hong Kong proposed seven key provisions, which summed to applying special case arrangements to Hong Kong fugitives and expanding its coverage to 37 of the 46 existing offenses described under FOO.¹¹

These provisions came to be known as the “Hong Kong Extradition Bill.” Beijing’s involvement with the proposed bill has raised concerns, both domestically and abroad, from legal professions, journalists, business groups, and foreign governments. Opponents feared the erosion of Hong Kong’s autonomous legal system and safeguards, arguing that Hong Kong would open itself to control of mainland Chinese law and put its residents at risk of authoritative scrutiny. Opponents also urged Hong Kong to establish an extradition arrangement with only Taiwan and cease the arrangement after surrendering Chan.¹²

III. Principles of Extradition Law

Extradition is the process by which states, upon requests from another, return accused individuals for trials of punishable crimes committed outside jurisdictional bounds of the requesting state. Principles of criminal law restrict penal law to states’ territorial boundaries; however, in an effort to reduce crime, states form treaties

¹⁰ Jasmine Siu, *‘Body folded in suitcase’: gruesome details emerge of Hong Kong man’s killing of pregnant girlfriend in Taiwan*, SOUTH CHINA MORNING POST, April 13, 2019, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/3005990/body-folded-suitcase-gruesome-details-emerge-hong-kong>.

¹¹ Press Release, The Government of the Hong Kong Special Administrative Region, Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 to be submitted to LegCo (March 26, 2019), available at <https://www.info.gov.hk/gia/general/201903/26/P2019032600708.htm>.

¹² Christy Leung, *Extradition bill not made to measure for mainland China and won’t be abandoned, Hong Kong leader Carrie Lam says*, SOUTH CHINA MORNING POST, April 1, 2019, available at <https://www.scmp.com/news/hong-kong/politics/article/3004067/extradition-bill-not-made-measure-mainland-china-and-wont>.

to deliver fugitives and accused criminals to justice. In general, extradition is regulated internationally through diplomatic treaties and domestically through internal extradition acts. Extradition acts, by international standard, specify extraditable crimes, explicate extradition procedures, clarify safeguards and liberties, and provide the relationship between the acts and pre-existing diplomatic extradition treaties. Many countries only grant extradition to countries with pre-existing relations or agreements on the transferring of fugitives. In China, extradition only exists between 58 different nations it has had good relations with.¹³ The United States, Britain, and Argentina extradite nationals only if the governing diplomatic treaty authorizes such action.¹⁴ Many states ignore obligations to surrender their citizens to another country. For example, until 1997, Slovenia and Colombia did not allow the extradition of their own nationals, regardless of pre-existing extradition treaties.

Double criminality, the principle of specificity, and the right to asylum are other elements embedded within most extradition acts and treaties. Double criminality stipulates that the purported crime for which extradition is sought for must be a criminal offense in both countries of the shared treaty. The principle of specificity claims that the demanding state can prosecute the extradited fugitive only for the criminal offenses for which extradition was granted. The principle of specificity is closely tied to the right to asylum, which protects individuals from ulterior political motives from state governments. If demanding states were to try fugitives for an offense which suits the purpose of the government, extradition could be used as a political weapon to fulfill the needs of the state rather than to equate justice.¹⁵

¹³ The Central People's Government of the People's Republic of China, *条约与协定 汇总* [Summary of Treaties and Agreements], GOV.CN (n. d.), http://www.gd.jcy.gov.cn/jcyw/sfxz/flfgytyxd/201812/t20181212_2440091.shtml.

¹⁴ The Editors of Encyclopaedia Britannica, *Extradition*, ENCYCLOPAEDIA BRITANNICA (n. d.), <https://www.britannica.com/topic/extradition>.

¹⁵ Leung, *supra* note 12

IV. Hong Kong's Extradition Bill in Relation to International Norms

The unique relationship between China and Hong Kong differentiated the Hong Kong Extradition Bill from most intrastate extradition treaties. As one of China's SARs, Hong Kong possesses both near governmental and legal autonomy, thereby granting itself a completely different administrative and legal system. Being more akin to a separate state, Hong Kong and its bill compare more suitably with international extradition standards.

The bill included 37 types of crimes extraditable to mainland China, including vague crimes such as "unlawful use of computers," "environmental pollution," and "fiscal matters."¹⁶ The ambiguity of these categories allowed for broad interpretations at the Chinese government's convenience, including the unlawful prosecution of a citizen.¹⁷ The bill's ambiguity also jeopardized the principle of specificity. Vague crimes listed under the bill lacked specificity and failed to provide accountable provisions for the exact codified penal crime that was committed. With the chance of individuals being tried for crimes not originally extradited for, Hong Kong's bill failed international extradition law standards and risked being manipulated into a political weapon. Before the bill was introduced, some political fugitives of the Chinese mainland government treated Hong Kong as an asylum, both as a safe haven and a check on China's political overreach.¹⁸

Since the 1989 Tiananmen Square pro-democracy protest, China has consistently jailed its political opponents.¹⁹ Those with

¹⁶ Elise Mak, *HK Effort to Ease Extradition Law Concerns Fall Short; Many Rendition Routes to China Remain*, HARBOUR TIMES (April 23, 2019), <https://harbourtimes.com/2019/04/23/hk-effort-to-ease-extradition-law-concerns-fall-short-many-rendition-routes-to-china-remain/>.

¹⁷ Kris Cheng, *Hong Kong Scraps 9 Types of Commercial Crimes from China Extradition Plan amid Pressure from Business Sector*, HONG KONG FREE PRESS (March 26, 2019), <https://www.hongkongfp.com/2019/03/26/hong-kong-scraps-9-types-commercial-crimes-china-extradition-plan-amid-pressure-business-sector/>.

¹⁸ *Id.*

¹⁹ Arch Puddington, *China: The Global Leader in Political Prisoners*, FREEDOM HOUSE (July 26, 2018), <https://freedomhouse.org/blog/china-global-leader-political-prisoners>.

contradicting political ideologies, such as Liu Xiaobo, Qin Yongmin, and a slew of other lawyers, journalists, and bloggers are still targeted by China today.²⁰ With this extradition bill, mainland China's government could have produced a retrospective view of criminality, endangering its political opponents and everyone else within its jurisdiction, which would have extended to Hong Kong.²¹ Ultimately, due to the threat of retrospectivity, individuals who escaped to Hong Kong would have lived in fear of extradition as Hong Kong lost its asylum status.

V. The Threat Against Hong Kong's Autonomy

While unable to directly jeopardize Hong Kong's right to vote, the extradition bill threatened Hong Kong residents' freedom of speech and protections against unlawful persecution. The bill would have allowed China's government to extradite individuals deemed political threats, hushing any voice that seems damaging to the state's reputation. Major political activists such as Yang Maodong, Liu Xiaobo, and Anastasia Lin were all arrested and sentenced by the Chinese government for promoting speaking out against government policies and practices.²² The danger of speaking against the mainland government and the threat of extradition quiets the voices wishing to take a stand. The bill nullified the liberties guaranteed in Article 27 of Hong Kong's Basic Law, which allows for the freedom of expression, speech, belief, and thought. Ultimately, the bill almost entirely shifted Hong Kong's democratic climate from where it stands today.

VI. Recent Criticisms and Confrontations

Within Hong Kong's government, the proposed extradition bill raised concerns among pro-business parties. The Business and Professionals Alliance for Hong Kong (BPA) and the Liberal Party fought to exempt themselves from 15 of the 46 criminal offenses under

²⁰ *Id.*

²¹ *Id.*

²² Te-Ping Chen, *China Sentences Free-Speech Activist to Six Years in Prison*, WALL ST. J., Nov. 27, 2015, available at <https://www.wsj.com/articles/china-sentences-free-speech-activist-to-six-years-in-prison-1448617679>.

the extradition proposal.²³ A strategic location, productive workforce, stable economic environment, and lucrative tax-regimes give Hong Kong a world-class infrastructure attractive to corporations across the globe.²⁴ The bill jeopardized Hong Kong's status as a safe haven for multinational corporations. From a domestic standpoint, the extradition bill produced fear that it would destroy freedoms businesses in Hong Kong have grown to expect. From an international standpoint, the extradition bill would have impeded foreign investment due to the fear that preexisting structures, such as the current tax regime, would fall apart.²⁵ Many businesses sign contracts with China under a common contractual provision that resolves disputes under Hong Kong's preexisting laws, not mainland China's. The vast skewness of power from officials of the mainland legal system deters individuals and companies from wanting to do business within Chinese regulations. The Hong Kong Bar Association raised concerns from legal and ethical standpoints, arguing that the preexisting lack of application for extraditing fugitives to mainland China was intentional. It existed because of the fundamental differences in each justice system and the lack of protection for fundamental rights in mainland China.²⁶ Seemingly, the guarantee of civil liberties and rights under Hong Kong's Basic Law—the hallmark expectations separating mainland China's legal system from Hong Kong's—were being eroded

²³ Kimmy Chung, Jeffie Lam, & Alvin Lum, *Ex-Hong Kong chief secretary Henry Tang and Exco member Jeffrey Lam join business sector in criticising extradition deal with mainland China*, SOUTH CHINA MORNING POST, March 7, 2019, available at <https://www.scmp.com/news/hong-kong/law-and-crime/article/2189080/security-minister-wont-back-down-extradition-agreement>.

²⁴ Hawksford, *Why Run Your Business in, or from, Hong Kong?*, GUIDEMEHONGKONG (n. d.), <https://www.guidemehongkong.com/why-hong-kong>.

²⁵ Don Pittis, *Why China Might Be Willing to Sacrifice Hong Kong's Economy: Don Pittis*, CBC NEWS (Oct. 1, 2014), <https://www.cbc.ca/news/business/why-china-might-be-willing-to-sacrifice-hong-kong-s-economy-don-pittis-1.2784555>.

²⁶ CitizenNews Reader, *Observations of the Hong Kong Bar Association on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, CITIZENNEWS (April 4, 2019), https://www.hknews.com/article/19529/bar_association-fugitives_bill-19529/observations-of-the-hong-kong-bar-association-on-the-fugitive-offenders-and-mutual-legal-assistance-in-criminal-matters-legislation-amendment-bill-2019.

Freeland voiced their concerns about the potential effects of the bill on the United Kingdom and Canadian citizens residing in Hong Kong.³⁰

Because of this backlash, Hong Kong's Secretary of Security John Lee proposed new measures to amend the bill, including safeguards in line with common human right protections, such as the presumption of innocence, open trials, legal representation, the right to appeal, and freedom from coerced confessions.³¹ The new bill also appropriated post surrender means and arrangements and raised the threshold for applicable offenses from three to seven or more years.

On paper, these concessions met many of the opposition's demands; however, legal scholars and pro-democrats argued that Lee's proposal still failed to guarantee fair treatment and complete human rights protection for extradited fugitives.³² Lee refused to embed additional safeguards against torture, ill-treatment, detention in poor conditions for indefinite periods, and other human rights violations, claiming he confidently believes Chinese authorities will guarantee fair treatment as promised—regardless of whether protection clauses existed in the bill.³³ Hong Kong lawyers also expressed their reservations about the impartiality of mainland China's justice system, the prevalence of torture, and Hong Kong citizens' limited access to lawyers. What began as a legal loophole in Hong Kong's extradition policies expanded into a battle of life and death regarding civil liberties and human rights.

³⁰ Press Release, Jeremy Hunt & Chrystia Freeland, Proposed extradition law changes in Hong Kong: UK and Canada joint statement (May 30, 2019), available at <https://www.gov.uk/government/news/uk-and-canada-joint-statement-on-hong-kong>.

³¹ The Government of the Hong Kong Special Administrative Region, *LCQ2: Human rights safeguards under Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, GovHK (June 5, 2019), <https://www.info.gov.hk/gia/general/201906/05/P2019060500760.htm>.

³² Alvin Lum et al., *Hong Kong extradition bill: security chief announces safeguards to win support of major business groups and political allies*, SOUTH CHINA MORNING POST, May 30, 2019, available at <https://www.scmp.com/news/hong-kong/politics/article/3012498/hong-kong-security-chief-john-lee-rolls-out-new-measures>.

³³ Jeffie Lam, *Hong Kong extradition bill: security chief John Lee says he expects Beijing to keep its promises on human rights safeguards*, SOUTH CHINA MORNING POST, June 2, 2019, available at <https://www.scmp.com/news/hong-kong/politics/article/3012778/hong-kong-extradition-bill-security-chief-john-lee-says-he>.

Some form of enforceability could establish an equitable justice system that promotes impartiality and due process. Extradition would then be used less as a political weapon and instead as a mechanism for perpetuating equality before the law.

VIII. Two Countries; Two Systems

The extradition bill would have shattered protections and liberties granted by Hong Kong's Basic Law and ultimately changed Hong Kong's legal system. Since March 2019, protests by Hong Kong residents have escalated to historical numbers. Millions have both peacefully expressed their reservations and clashed with Hong Kong police.³⁵ Protestors issued five demands: total withdrawal of the extradition bill; a commission inquiry into alleged police brutality; retraction of the classification of protestors as rioters; amnesty for arrested protestors; and universal suffrage and direct elections for the legislative council and chief executive.³⁶ After months of internal strife, external conflict, foreign intervention, domestic rallies, and partisan politics, the legislative council moved to withdraw the bill on Oct. 23, 2019. Yet, the bill's death is not the end.

In an effort to protect their own legal system, freedom of expression, voice, and democracy, the people of Hong Kong have taken to the streets, courts, and legislature to fight. On the surface, the extradition bill started a battle of mutual legal assistance and extradition treaties, but at its core, it is a battle to retain freedom of speech, press, demonstration, movement, conscience, and so many more basic human rights and liberties. Though the Hong Kong government formally withdrew the bill, the people of Hong Kong—and the people of the world—cannot forget the encroachment Hong Kong faced and nearly fell victim to.

³⁵ Annie Li et al., *Almost 2 Million Protesters Hit Hong Kong Streets*, BLOOMBERG, June 16, 2019, <https://www.bloomberg.com/news/articles/2019-06-16/protests-swell-as-hong-kong-rejects-leader-s-compromise>.

³⁶ Wong Tsui-kai, *Hong Kong Protests: What Are the 'Five Demands'? What Do Protesters Want?*, SOUTH CHINA MORNING POST, Aug. 20, 2019, available at <https://yp.scmp.com/hongkongprotests5demands>.

A Case for Abolishing Alford and No-Contest Plea Deals in Criminal Sexual Assault Cases

Pranav Vijayan

In March 2012, the U.S. Supreme Court ruled in *Missouri v. Frye* that defendants may pursue claims of ineffective counsel if their lawyers do not disclose acceptable plea offers before they expire.¹ In the majority opinion for this case, Justice Anthony Kennedy wrote that “plea bargaining is not some adjunct to the criminal justice system — it *is* the criminal justice system.”² Justice Kennedy is correct; today, over 95 percent of criminal cases that result in a conviction are plea bargained.³ It is unequivocally true that plea deals are ubiquitous in the modern age, as they can be found in almost all cases, including DUIs, aggravated assault, and murder cases. For the purposes of this paper, I will analyze plea deals in sexual assault cases and some of our legal system’s gravest injustices found within them.

I. Background

In the United States, only 8 percent of sexual assault convictions go to trial.⁴ The majority of the remaining 92 percent are “pled down”—that is, the prosecution, defense, and the judge negotiate a deal that results in a guaranteed conviction for a “lesser crime.” Upwards of 400,000 sexual assaults occur in the United States every year,⁵ and approximately 35 percent of those assaults result in a criminal charge.⁶

¹ *Missouri v. Frye*, 566 U.S. 134 (2012).

² *Id.*

³ Christopher Durocher, *The Rise of Plea Bargains and Fall of the Right to Trial*, AMERICAN CONSTITUTION SOCIETY (April 4, 2018), <https://www.acslaw.org/expertforum/the-rise-of-plea-bargains-and-fall-of-the-right-to-trial/>.

⁴ Simon McCarthy-Jones, *Survivors of Sexual Violence are let down by the criminal justice system*, THE CONVERSATION (March 29, 2018), <http://theconversation.com/survivors-of-sexual-violence-are-let-down-by-the-criminal-justice-system-heres-what-should-happen-next-94138>.

⁵ *Victims of Sexual Violence: Statistics*, RAINN (2019), <https://www.rainn.org/statistics/victims-sexual-violence>.

⁶ Jennifer L. Truman & Lynn Langton, *Criminal Victimization*, U.S. DEPT. OF JUST. (September 2019), available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5111>.

Only about 12,000 cases actually reach the ears of a jury or a judge.⁷ Statistically speaking, if you're a victim of a sexual crime in the United States, you have essentially already waived your Sixth Amendment right to a speedy trial.

Before *Gideon v. Wainwright* (1963),⁸ judges heard 12 to 20 felony cases per day, as no explicit right to legal representation for an indigent defendant existed. Additionally, before *Gideon*, plea bargain demands were unheard of—almost all cases were resolved through summary judgment. However, providing legal representation to every defendant meant that felony cases took longer to adjudicate and resulted with higher standards for acceptable evidence, more statements from counsel and witnesses, and a rigorous adherence to courtroom norms. Judges and counsel have a legal incentive to negotiate deals outside the courtroom to minimize the time, effort, and money spent on a trial. Furthermore, *Brady v. United States* (1970) established precedent regarding the constitutionality of overturning a plea offer after exculpatory evidence had been released, with the mandate that the evidence be provided at the request of the defendant.⁹ Before *Brady*, defendants were more hesitant to accept a guilty plea, as a competent prosecutor would only extend the offer after extensive consultation with the facts. After *Brady*, however, prosecutors were encouraged to strike plea deals before consultation, knowing that the defendant could overturn it.¹⁰ *Brady* aligned the economic interests of the prosecution with the defendant's constitutional right to an impartial and speedy trial, thereby creating an environment tailored for attorneys to make a quick buck at the expense of their defendants' freedoms.

Naturally, this effect played out in sexual crime cases. Victims in these cases are typically ill-informed of the conditions of their plea deals. Fortunately, *Brady* established that both the plaintiff and the

⁷ *Supra* note 5.

⁸ *Gideon v. Wainwright*, 372 U.S. 355 (1963).

⁹ *Brady v. United States*, 397 U.S. 742 (1970).

¹⁰ Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 612 U. CHI. L. SCH. PUB. L. & LEGAL THEORY WORKING PAPERS (February 2017).

defendant has a right to reasonable knowledge of the terms of their settlement and that mutual consent of the deal is necessary for its execution.¹¹ Yet a study of Alford pleas in Washington State proves otherwise; prosecutors in state courts denied two-thirds of rape victims' term requests, allowing for 80 percent of those denials to result in plea agreements that were contrary to the victim's wishes for restitution.¹² The study also found that the frequent denial of term requests resulted from Washington State's victim's rights program. In an attempt to make plea sentencing more just, Washington State required all victims to testify if they accept a plea deal offered prior to consultation and negotiation. While this law intended to incentivize collecting facts about the case, it disincentivized victims from pursuing robust, clear understandings of their plea deals. Because prosecutors understood that victims of sexual crimes did not want to be revictimized through forced testimony, they preemptively denied victims' term requests in order to avoid starting the plea negotiation process prior to consultation. Furthermore, denying requests economically incentivizes prosecutors to keep cases as short as possible, regardless of their propensities for administering justice. For prosecutors, this is a clear win—their actions avoid the risk of psychological trauma for the victim and keep plea negotiations clear and concise. On the other hand, the victims who accept plea deals without receiving a robust report of the terms and conditions often either have their wishes expressly denied or come out lacking restitution.

II. *Minnesota v. Finch*: A Test Case

Minnesota v. Finch, a 2014 criminal sexual assault case in which then-36-year-old Eugene Robert Finch was charged with second-degree criminal sexual conduct, puts the theoretical arguments against plea bargaining in more concrete terms.¹³ Finch rented out his

¹¹ Aaron Larson, *How Do Plea Bargains Work*, EXPERT LAW (May 8, 2018), https://www.expertlaw.com/library/criminal/plea_bargains.html.

¹² Mary B. Koss et al., *Expanding a Community's Justice Response to Sex Crimes Through Advocacy, Prosecutorial, and Public Health Collaboration*, SAGE (2004).

¹³ *State of Minnesota v. Finch*, 80 N.W. 856 (2014).

to face the consequences of his actions encouraged him to repeat his offense.

III. The Case Against Alford and No-Contest Deals

What is the real product of the plea bargaining system in sexual assault cases? What has really occurred as a result of *Brady* and every deal following it? Plea bargains obstructed justice in *Finch* by not registering a pedophile on the sex offender database, allowing him to become a repeat offender. Structurally, plea bargains continue courts' perceptions of sexual crimes as inevitable and part of daily life.¹⁹ When sexual crimes are pled to a lesser offense, courts lack regulatory mechanisms to prevent repeat offenses. For instance, courts do not require offenders to register in a database²⁰ or prohibit them from legally purchasing firearms²¹ in the case of domestic violence, both of which increase recidivism.²² As a result, courts normalize sexual crimes by erasing the legal distinction between sexual crime and non-sexual violent crime. This nullifies the explicit legislative intent in sex offenders' sentencing requirements and reduces the laws' deterrent effects. Furthermore, plea deals artificially deflate statistics for sexual and domestic assault convictions by reclassifying them as "regular" assault or battery, sustaining the stereotype of certain sex offenders as "lone wolves" rather than symptoms of a broader sociological phenomena.

In the context of public policy, perpetuating the idea of the "lone wolf" means blocking government-funded research into the causes of sexual and domestic violence. In the 1996 omnibus federal spending bill, a rider was inserted to mandate that no CDC-allocated funds or injury prevention funds could be used to "advocate or

¹⁹ Claire Molesworth, *Knowledge Versus Acknowledgement: Rethinking the Alford Plea in Sexual Assault Cases*, 6 *Soc. J. & L.* (2007).

²⁰ Neal Davis, *What You Need To Know About Sex Offender Plea Bargain Agreements*, *N.D. & L.F.* (Sept. 10, 2018), <https://www.nealdavislaw.com/blog/sex-crimes/sex-offender-plea-bargains>.

²¹ *Domestic Violence & Firearms*, *Giffords Law Center*, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> (last visited Nov. 15, 2019).

²² *Id.*

promote” gun control.²³ Known as the Dickey Amendment, the rider acted as a deterrent to gun control research, in fear that federal CDC funding could be summarily withdrawn by Congress, potentially setting back years of federal statistics on gun policy. There is little evidence to say that the same would not occur in the instance of sexual assault. The Trump Administration is already hostile to victims’ rights: It rolled back limitations on forced arbitration contracts for reporting sexual assault in the workplace; removed a Department of Labor rule combatting sexual assault in healthcare settings; and has threatened to cut millions of dollars in sexual assault prevention policy funds for cities that refuse to comply with new immigration standards.²⁴ America is on the brink of explicit anti-victim violence, and “pleading down” is contrary to the interests of victims and advocates alike.

Another response to *Brady* justifies the curtailing of plea bargains on the grounds that the plea system risks criminal courts’ legitimacy. In no-contest deals, defendants admit to the facts of the case but do not plead guilty to the accused crime.²⁵ While no-contest pleas are taken in only 5 percent of federal sexual assault cases, they severely undercut procedural and substantive courtroom norms.²⁶ Imagine if the defendant in *Finch* had accepted a no-contest plea; Finch would have been able to publicly proclaim his innocence and not been held responsible for public restoration to his victims.

His continued proclamation of innocence also would have cast doubt on both the facts of the case and the public’s opinion of the judiciary’s punitive and restorative powers. Had Finch denounced his culpability to the press while accepting punishment from the court, he

²³ 1 U.S.C. § 244 (1996).

²⁴ *Sexual Assault Policy and the Trump Administration*, DEMOCRACY FORWARD (Nov. 1, 2017), https://democracyforward.org/updates/sexual_assault_and_the_trump_administration/.

²⁵ Micah Schwartzbach, “No Contest” Pleas (*Nolo Contendere*), LAWYERS, <https://www.lawyers.com/legal-info/criminal/criminal-law-basics/no-contest-pleas-nolo-contendere.html> (last visited Nov. 15, 2019).

²⁶ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004).

would have tarnished the court's legitimacy. The public would view the court as punishing someone innocent, even if the facts played out differently. Effectively, the ruling makes the perpetrator a social martyr, which further validates the false denial of criminal acts and perpetuates the problematic norms discussed previously.

The other type of problematic plea deal is an Alford plea, which is more egregious than no-contest pleas in harming judicial legitimacy and foregoing victims' restoration. In contrast to no-contest pleas, in which the defendant does not plead guilty, Alford pleas force defendants to plead guilty while allowing an assertion of innocence in court.²⁷ In essence, Alford pleas supercharge the detrimental effects of no-contest pleas. They delegitimize the courts by granting legitimacy to false claims of innocence in a court of law. Additionally, if a defendant accepts an Alford plea, the court fails its obligation to make a victim whole again. Especially in cases of violent crimes such as sexual assault and rape, the process of convicting a defendant often acts as a morality play by expressing a community's commitment to safety and educating future generations. However, Alford pleas sidestep this entire process by allowing perpetrators to avoid apologizing, paying restorations, or even acknowledging the suffering they have caused, re-trenching a cycle of violence that inhibits the victim's mental and physical healing.

IV. Conclusion

Fundamentally, Alford and no-contest pleas arise as a result of a legal structure that tells attorneys that securing even an unethical conviction is necessary for their reputations. Attorneys with a penchant for guilty pleas are not exclusively unscrupulous and cold-hearted people, but rather a product of the competitive and profit-oriented culture that permeates American law. To morally condemn one attorney's choice in presenting an Alford or no-contest offer to their indigent defendant solves one problem and nothing

²⁷*Alford Plea*, *DICTIONARY OF POLITICS: SELECTED AMERICAN AND FOREIGN POLITICAL AND LEGAL TERMS* (7th ed. 1992).

more. It is more effective to critique the structures that shape and mold society's decisions.

Native American Precedent in the 2020 Census Citizenship Question Debate

Maria Villegas Bravo

There are currently upwards of 11 million unauthorized immigrants residing in the United States, and roughly 8 million are ethnically Latinx.¹ For the upcoming 2020 census, Secretary of Commerce Wilbur Ross announced his intention to introduce a question concerning the citizenship status of each individual who receives a census form in the United States. His official reasoning was that reinstating the question would give the Department of Justice accurate citizenship information to better enforce Section 10301 of the Voting Rights Act of 1965, which bans a dilution of minority voting power.² In *Department of Commerce v. New York*, the plaintiffs brought those motives into question, alleging that the decision to reinstate the question was a ploy to disenfranchise the Latinx community. There is evidence that adding Ross' question would dramatically reduce the response rate of noncitizens, especially in the Latinx community.³ Despite not having legal status, unauthorized immigrants still have a stake in public policy, and this deliberate attack against their communities should be condemned.

On appeal to the U.S. Supreme Court, the case evolved to become an accusation of Secretary Ross violating the Administrative Procedure Act of 1946 by being “arbitrary” and “capricious” in making the decision to include the citizenship question.⁴ The Supreme Court, in a majority opinion written by Chief Justice John Roberts, held that while Secretary Ross weighed all the relevant evidence, his error was procedural. The addition of the question to the 2020 census was unconstitutional because Ross provided a flawed official

¹ Jeanne Batalova, Sarah Hooker, & Randy Capps Jennifer Van Hook, *Profile of the Unauthorized Population: United States*, MIGRATION POLICY INSTITUTE, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US>.

² Opinion of the Court, *Department of Commerce v. New York*, No. 18-966, 588 U.S. 1, 4 (2019).

³ *Department of Commerce v. New York*, 588 U.S. 1, 8 (Breyer, J., dissenting) (2019).

⁴ 5 U. S. C. §706 (1966).

reasoning for proceeding, not because of his personal motives or logical processes. Justice Stephen Breyer's dissent, however, states that Secretary Ross *did* violate the Administrative Procedure Act by ignoring scientifically sound reports to push forward his policy.

As stated in Chief Justice Roberts' majority opinion, "[the] history matters," and in such cases, the Supreme Court bases its interpretation of the Constitution on government practices that are "open, widespread, and unchallenged since the early days of the republic."⁵ Like the Latinx community, Native Americans have had a troubled history with citizenship and interactions with the federal government. However, the federal government has worked diligently to drastically improve the census data gathered about Native Americans since 1915. The government created task forces and adapted the census questions to better fit the tribes, citing the importance of accurate census data.⁶ There is no reason that the Latinx community should be any different. This community should still be treated with a level of fairness and respect that has been historically afforded to similarly situated groups. The record shows that Secretary Ross ignored these longstanding Congressional practices and willingly opted for a practice that would dramatically reduce the accuracy of the census data and millions of people's political power.

I. Undercounting Native Americans

The U.S. Constitution establishes that the population should be enumerated with only vague directions for Congress.⁷ Section 2 of Article 1 of the Constitution specifies that "Indians not taxed" shall not be enumerated.⁸ Despite a long and complicated history of colonization and exploitation, Congress has made significant steps to improve Native American census data, understanding the improved data's impact on the population.

⁵ *Supra* note 2 at 13.

⁶ Margaret M. Jobe, *Native Americans and the Census: a Brief Historical Survey* 30 J. OF GOV'T INFO. 66-80 (2004).

⁷ U.S. CONST. art. I, § 2.

⁸ *Id.*

Native American tribes were originally treated as foreign nations and were not taxed by the federal government. Westward expansion pushed the Native Americans further out onto reservations, and policymakers became more interested in the Native American population.⁹ In 1846, Congress passed an appropriations bill that gave funding for Native American Census Bureau officials to account for Native Americans in the communities and on reservations. The 1850 census was the first to include official information on Native Americans who counted as taxed individuals.¹⁰

As the years progressed and the nation fulfilled its manifest destiny, the census called for even more detailed data points regarding Native Americans. The 1880 census asked Native Americans outrageous questions, including the rate of which they felt they have adopted European ways of life.¹¹ The new data were all estimates, varying wildly between the Census Bureau officials due to personal individual biases. Interracial marriages between Native Americans and white people became more common during this period, and because there was not a mixed race category on the census, census takers had to choose one race over the other, which skewed the data.¹² A series of conflicts collectively known as the Sioux and Plains Wars in the latter half of the 19th century contributed to harsh cultural barriers.¹³ These wars pitted Native Americans and American soldiers against each other as Native Americans were chased onto reservations and slaughtered. Native Americans had a credible fear that their personal information would be used against them to gain an advantage in the increasingly violent conflicts.¹⁴

In 1887, Congress passed the Dawes Act and changed the landscape of Native American communities forever. This act stripped Native Americans of their communal land ownership by breaking up

⁹ Jobe, *supra* note 6 at 70.

¹⁰ Jobe, *supra* note 6.

¹¹ *Id.* at 72.

¹² *Id.* at 71.

¹³ *History and Culture: Sioux Wars 1851-1890*, AMERICAN INDIAN RELIEF COUNCIL, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_siouxwars.

¹⁴ Jobe, *supra* note 6 at 72.

the land to be owned by heads of households or individuals over 18.¹⁵ Since this was against the customs of most tribes, not all the land was claimed, and the remaining land was made available for sale to American settlers. The division of land made it easier to account for Native Americans in the census blocks instead of attempting to count large groups of roaming people.

Despite this advance, Native Americans were still severely undercounted and erroneously labeled. Each iteration of the census since has inched toward better enumerating the Native American population in a respectful way. For example, in a 1915 special report by the Census Bureau, a more objective anthropological angle was adopted with terms like “half breed” being replaced with “mixed blood.”¹⁶ In 1960, the Census Bureau overhauled the system and moved to self-identification for racial identity instead of guesswork on the part of a Census Bureau official. The numbers of recorded Native Americans skyrocketed. People who did not previously disclose their Native American ancestry or were not counted due to not looking the part were finally able to count themselves.¹⁷

In 1924, Congress passed the Indian Citizenship Act, which gave all Native Americans citizenship, pursuant to the Fourteenth Amendment. Different tribes had different requirements for being “full blooded,” and wildly different proportions of the population lived on reservations as opposed to in the general population. This made it difficult to cohesively implement widespread legislation in regards to the Native American population. These changes still left linguistic, cultural, and physical barriers to accurate enumeration. Many Native American populations were labelled as “hard to count” communities that required special attention to acquire more accurate data as recently as the 2000 census. Consequently, the bureau teamed up with tribes, taking recommendations from within the tribal governments. They also hired a throng of new Census Bureau officials who could act as

¹⁵ *Id.*

¹⁶ *Id.* at 73.

¹⁷ *Id.* at 76.

translators for the tribes and do in-person interviews to collect data.¹⁸ The Census Bureau even ran dress rehearsals in 1999 to collect data in person before it was supposed to be recorded and recommended creating a task force specifically focused on ensuring a complete count of the Native American population.

When evidence exists of a large population being undercounted, great lengths are taken to fix them. The plight of noncitizens and the Latinx community should be no different to that of the Native Americans and should get the same level of both respect and care in enumeration.

II. Credible Fear and What Noncitizens Stand to Lose

Secretary Ross and the Department of Commerce argued that their decision to implement the citizenship question should not be penalized for the “unfounded” fear of noncitizens’ reactions to the question.¹⁹ The Trump administration argues that the census information is confidential and personal information will not be shared on an individual level, so the Census Bureau should not be at fault for the way respondents answer the survey.²⁰ However, this is not necessarily true.

In its amicus brief, the Puerto Rico Legal Defense and Education Fund (PRLDEF), a Latinx civil rights group, included an analysis that validates a credible fear on the part of noncitizens and the Latinx community.²¹ Executive Order No. 13767 mandated all executive departments to take actions to “repatriate illegal aliens swiftly.”²² This led to a sharp increase in deportations, and the Latinx community was understandably scared. Members of the Latinx community started reporting crimes at lower rates, did not seek government assistance after Hurricane Harvey devastated Texas, and avoided court proceedings due to a risk of being deported as a result of their

¹⁸ *Oversight Hearing on the Census 2000 Implementation in Indian Country; Hearing before the Senate Comm. on Indian Affairs*, 106th Cong. 9 (1999).

¹⁹ *Supra* note 2 at 10.

²⁰ *Id.*

²¹ Amici curiae briefs from PRLDEF and 15 Other Organizations in Support of Respondents, *Commerce v. New York*, No. 18-966, 588 U.S., at 8 (April 1, 2019).

²² Exec. Order No. 13767, 82 FR 8793 (2017).

immigration statuses.²³ This fear stretches back to the Great Depression, when approximately 1 to 2 million Mexicans and Mexican-Americans were deported from cities across the nation, regardless of proof of their nationalities.²⁴

Like the Native American community during the Sioux Wars, the noncitizen-Latinx community has a real, credible fear that its information will be used against it. The Census Bureau conservatively asserted that based on the 2010 census and three analyses they conducted, at least 5.8 percent of noncitizen households would either not respond or would respond erroneously to the short form census if the question was added.²⁵ This means billions of dollars in federal funding for education, healthcare, and many other important programs would not be appropriately dispersed and Congressional seats would not be correctly apportioned.²⁶ This would be a loss to any population, but in a population that has already been designated a “hard to count population” similar to Native Americans before them, it is disastrous.²⁷

III. The Present Case

At the beginning of his tenure as Secretary of Commerce in 2017, Ross reached out to several executive agencies and departments to request their opinions on instating a citizenship question on the census. The Department of Justice responded affirmatively, saying that it could use the information to enforce Section 10301 Voting Rights Act of 1965, which bans the deprivation of single-member districts from areas with high percentages of minority voters.²⁸ Despite this response, the Department of Justice declined to discuss alternative ways to gather the information, suggesting that the department was more interested in helping the Department of Commerce than

²³ *Supra* note 21.

²⁴ Christine Valenciana, *Unconstitutional Deportation of Mexican Americans during the 1930s: Family History and Oral History*, 13 MULTICULTURAL EDUC. 3, 4–9 (2006).

²⁵ *Supra* note 2 at 9–10.

²⁶ *Supra* note 21 at 18.

²⁷ Maryann M. Chapin et al., *2020 Census: Counting Everyone Once, Only Once, and in the Right Place*, UNITED STATES CENSUS BUREAU 1 (Nov. 2, 2018).

²⁸ *Supra* note 2 at 4.

collecting accurate data.²⁹ Ross' explanation that the citizenship question should be added at the request of the Department of Justice is pretextual, since he was the one who first suggested it to the Department of Justice and was the driving factor for the formal request. Furthermore, the information that the Department of Justice requested regarding the enumeration of citizens and noncitizens in the United States could easily be found in other administrative data collected by the federal government, such as the Annual Alien Registration.³⁰

The Supreme Court stopped short of deciding whether Secretary Ross violated the Administrative Procedure Act by acting in an "arbitrary" or "capricious" manner in his decision making.³¹ The Supreme Court held that Secretary Ross' repudiation of the Census Bureau, the American Sociological Association, and countless other relevant data analysis experts was his own to decide.³² He was appointed to the position and confirmed by the Senate, and the Census Act of 1790 gives him broad and unchallenged power on what he may or may not do.³³ The Supreme Court ruled narrowly, zeroing in on his explanation and whether or not it adhered to Section 706 (2)(a) of the Administrative Procedure Act.

Justice Breyer's dissent, joined by Justices Ginsburg, Sotomayor, and Kagan, points out that this power is not completely unchallenged. Under the Act, the Court can decide "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement."³⁴ There must be a "rational connection between the facts found and the choice made" after examining "the relevant data" and giving a "satisfactory explanation."³⁵ Justice Breyer asserts that Secretary Ross failed to

²⁹ *Id.* at 27.

³⁰ *Ib.* at 3.

³¹ *Supra* note 2 at 21.

³² *Supra* note 3 at 10.

³³ 13 U.S.C. § 141(c) (1976).

³⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 416 (1971).

³⁵ *Motor Veh. Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

consider serious risks of harm, failed to link his conclusion to available evidence, and failed to explain his refusal to minimize risks.³⁶

When deciding whether or not to add the question, Secretary Ross placed three options on the table to calculate how many people in America are citizens. The first option would have continued asking the citizenship question on the American Community Survey, a long-form questionnaire which is sent to a rotating 3 percent of the population. The numbers for the rest of the population would be estimated using statistical models. The second option was to add the question to the short-form questionnaire sent to each household in America for a complete headcount. The final option was to use existing citizenship data to provide the Department of Justice the requested information. The Census Bureau warned that using the shorter form for the citizenship question would discourage people from responding to the short form at all, or at the very least, stop them from responding once they reached the citizenship question.

The bureau conducted three analyses of the 2010 census to determine the predicted nonresponse rates for a census form with the citizenship question. Based off of these data analyses, the bureau estimates that over 630,000 households would not respond if the citizenship question were added. This means that Census Bureau officials will have to go into the field and either follow up on the survey or get proxy information, which can lead to a great deal of error in the data.³⁷

Not only did Secretary Ross ignore these warnings, he directly contradicted and attempted to discredit them. He asserted that the data the Census Bureau found were not statistically significant, despite the clear statement by the Census Bureau in its report to the Secretary.³⁸ The third-party researchers that Secretary Ross cited, however, stepped forward and urged Ross to not include the question by arguing that their findings were different since the respondents in their surveys

³⁶ *Supra* note 3 at 4.

³⁷ *Id.* at 9.

³⁸ *Id.* at 11.

were directly paid to complete the surveys, whereas the census does not offer that incentive.

The empirical evidence clearly spells out that the Latinx community, especially the noncitizen Latinx community, would be drastically undercounted if the citizenship question is added to the short-form questionnaire. Being undercounted in the census directly accounts for losing federal funding, representation in Congress, Spanish voting ballots, and many other benefits that would ordinarily be received by these communities.³⁹

When previous groups have been so drastically undercounted in the past, Congress took measures to ameliorate the situation and accurately enumerate the people. Despite this historical precedent, Congress has recently taken action *against* the Latinx community. For both the 1990 and 2020 censuses, members considered changing the apportionment base from “persons” to “citizens,” arguing that since noncitizens are not able to vote, they should not be counted for seats in the House of Representatives.⁴⁰ Only the 2016 Supreme Court decision in *Evenwel v. Abbott* began the wave of protection for the noncitizen population.

Justice Ruth Bader Ginsburg wrote in the opinion of the court for *Evenwell* that “the Framers of the Fourteenth Amendment considered at length the possibility of allocating House seats to States on the basis of voter population,” but ultimately still counted slaves as part of the apportionment population despite not enfranchising them.⁴¹ The history matters, and so does representation. Justice Ginsburg stated that “Nonvoters have an important stake in many policy debates,” and should therefore be accurately accounted for regarding those stakes.⁴²

³⁹ *Supra* note 21 at 4.

⁴⁰ ROYCE CROCKER, APPORTIONING SEATS IN THE U.S. HOUSE OF REPRESENTATIVES USING THE 2013 ESTIMATED CITIZEN POPULATION, H.R. REP. NO. R41636 (2015).

⁴¹ *Evenwel v. Abbott*, 578 U.S. 10 (2016).

⁴² *Id.* at 18.

IV. Conclusion

Secretary Ross intentionally ignored congressional precedent and multiple experts in the field. In his attempt to instate the citizenship question into the 2020 census short form, Ross turned his back on the precedent set by congressional treatment toward Native Americans. Now is the time to give the Latinx community, especially the noncitizen-Latinx community, an olive branch just like Congress gave the Native American community in 1915. This process began with Justice Ginsburg and President Obama, but there is still a long way to go. While an estimated 8 million people in the Latinx community are undocumented, there are still an estimated 42 million people who *are* documented United States citizens. None of them should be forgotten or lose political voting power due to an arbitrary and capricious decision by the Secretary of Commerce.

Environmental Law and Agents of Profit Through History

Molly Wancewicz

From the European colonization of North America to Nixon-era regulations of toxic chemicals, the legal system persists as an integral part of United States' environmental history. Throughout this history, the legal system has been closely intertwined with profit by supporting resource extraction and other economic activities. However, in the 20th century, the law became a battleground between regulation and profiteering.

I. Colonial Period: Environmental Exploitation for Profit

The interaction between the legal system and the environment emerged in the 16th and 17th centuries when European powers began settling North America. European colonization of the Americas was fundamentally rooted in the pursuit of profit. Notably, colonists pursued wealth by establishing charter companies centered around agriculture, as well as trapping and trading furs, both of which required the acquisition of significant expanses of land.¹ To justify their extraction of profit from the natural environment, colonists frequently weaponized the legal system. For instance, in early New England and Chesapeake settlements, colonists held the legal system as a body called upon to justify their claims to newly occupied land. In 1738, British colonial leader William Bull asserted that the British possessed the right to occupy Carolina due to military conquest and historical claims, writing that, because the land was conquered in war and because no other European nation possesses the land, Britain had the “best right” to the territory.² While Bull did not appear in a court of law to defend the British claim to the land, he invoked sworn affidavits and used legally accepted evidence and customs of international law—such as the principle that conquering land by force establishes

¹ U.S. Department of State, *Colonization of the United States*, THOUGHTCo. (Sept. 1, 2018), <https://www.thoughtco.com/economics-and-the-colonization-of-the-us-1148143>.

² William Bull, *Representation of President William Bull to Council of Trade and Plantations. Charleston*, THE CALENDAR OF STATE PAPERS, COLONIAL: NORTH AMERICA AND THE WEST INDIES 1574–1739, 10 (1860).

ownership—to bolster British claim to Carolina.³ British colonists seeking to establish rights also used the legal system to protect their claims to the lands they hoped to colonize. The arguments of Roger Williams, the founder of Rhode Island, exemplify this trend. To defend the legality of Salem’s territorial holdings, Williams argued that “in order for Indians [to] legitimately to sell their lands, they had first to own them.”⁴ Colonists did not consider Native Americans owners of tribal land because they conceptualized property differently in indigenous tribes. Native Americans distinguished between hunting land and other land, and they based allocation of property on resource distribution, not the “first come, first served” principle utilized by colonists.⁵ In addition, New England settlers built fences encircling individual properties they believed they had conquered, seeking to establish “a superior, civil right of ownership.”⁶ The settlers’ assertion of a civil right to property represents another manner in which legal reasoning backed colonial ownership claims. In both cases, colonists sought to maintain their claims to the land in order to extract profit.

II. Chattel Slavery: an Evolution of Exploitation

The legal system served as the cornerstone of European profit off of the North American environment as they forced enslaved laborers to extract resources from the land. Chattel slavery that exploited African slave labor served as the basis for plantation-style production of certain staple crops. Cotton plantations, for instance, eroded up to three-fourths of the natural topsoil in some areas.⁷ In an 1839 letter, Frances Anne Kemble, a well-known British writer, noted that the land was “exhausted by the careless and wasteful nature of the

³ *Id.* at 6, 10.

⁴ *Id.* at 6, 10.

⁵ Andrew P. Morriss, *Europe Meets America: Property Rights in the New World*, FOUNDATION FOR ECONOMIC EDUCATION (Jan. 1, 2007), <https://fee.org/articles/europe-meets-america-property-rights-in-the-new-world/>.

⁶ WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 56 (1st ed. 1983).

⁷ ROGER G. KENNEDY, *MR. JEFFERSON'S LOST CAUSE: LAND, FARMERS, SLAVERY, AND THE LOUISIANA PURCHASE* 233 (1st ed., 2003).

agriculture itself, [which] suggests a pretty serious prospect of declining prosperity.”⁸

Additionally, many Americans further dehumanized slaves by conceptualizing them in terms of profit, with 19th-century sources linking slavery to the efficiency of crop production. In 1861, landscape architect Frederick Law Olmsted described slaves in terms of hands, or units of labor.⁹ Olmsted also evaluated the productivity of the fields, drawing a connection between slave labor—which was counted in blunt and faceless terms—and agricultural production.¹⁰ However, years of environmental degradation ensued after Olmsted’s and Kemble’s writings. Despite arguments that slavery violated natural law and positive law, chattel slavery did not end until the 1865 ratification of the Thirteenth Amendment.

III. Gold Rush Period: A Legal Turning Point

During the legal battle over slavery, a struggle over rights and resource extraction occurred elsewhere in the U.S. In the American West, the legal system intensified ambiguity over water rights during the California Gold Rush. Water was necessary for both hydraulic gold mining and the survival of mining communities, which were often separated by large amounts of arid land.¹¹ Water evolved from being simply an environmental resource to an essential tool for the extraction of value from the environment. As water became a hotly contested resource, an unprecedented tension emerged between laws governing water use and those seeking to use water to profit from gold.

Water rights served as a turning point in American environmental law’s relationship to profit. For the first time, an adversarial relationship developed between the two entities.

⁸ FRANCES ANNE KEMBLE, *JOURNAL OF A RESIDENCE ON A GEORGIAN PLANTATION IN 1838–1839* 218 (John A. Scott ed., Brown Thrasher ed. 1984).

⁹ Frederick Law Olmsted, *Frederick Law Olmsted Describes Cotton Production and Environmental Deterioration*, 3 *MAJOR PROBLEMS IN AMERICAN ENVIRONMENTAL HISTORY, JOURNEYS AND EXPLORATIONS IN THE COTTON KINGDOM: A TRAVELLERS OBSERVATIONS ON COTTON AND SLAVERY IN THE AMERICAN SLAVE STATES* 222 (Carolyn Merchant ed., 1861).

¹⁰ *Id.*

¹¹ Douglas R. Littlefield, *Water Rights During the California Gold Rush: Conflicts Over Economic Points of View*, 14 *W. HIST. Q.* 415, 415–34 (1983).

Undergirding this turning point was the evolution from riparian water rights¹² to appropriative water rights,¹³ a shift best exemplified in California. Most legal conflicts over water rights during the Gold Rush occurred at the local and state levels, as the looming Civil War prevented the federal government from evaluating or regulating the natural resources of newly acquired California.¹⁴ Conflict over water began because both common law and the 1850 California constitution implied that California would use riparian law to govern water use.¹⁵ Beginning in the 1820s, however, legislation passed that contradicted the riparian rights and instead established prior appropriation water rights.¹⁶ The California Supreme Court established a new conception of water rights in its 1886 ruling in *Lux v. Haggin*.¹⁷ In *Lux*, the court ruled in a 4–3 decision that although riparian rights would remain superior to appropriative rights in the event of a conflict between the two types of rights, appropriative rights would continue to have legal standing.¹⁸ The court’s opinion also established that, in disputes between parties both claiming riparian rights to the same water, the concept of appropriate use would determine who had the right to the water.¹⁹ Similarly, in *Irwin v. Phillips* (1855), the plaintiff asked the California Supreme Court to rule on the legality of the “first-in-time, first-in-right” principle.²⁰ This gold miners’ custom of resolving conflicting claims to water and gold constituted prior appropriation. The court held that because the miners’ principle was commonly accepted, prior appropriation would be considered state law. Though

¹² Under riparian law or riparian rights, water belongs to the people living on the banks of bodies of water.

¹³ Under appropriative water rights, also called prior appropriation, the first person to use a water source productively has the right to that water.

¹⁴ Littlefield, *supra* note 12 at 419.

¹⁵ Jessica B. Teisch, *Miners versus Farmers in California*, in 3 MAJOR PROBLEMS IN AMERICAN ENVIRONMENTAL HISTORY: DOCUMENTS AND ESSAYS 273, (Carolyn Merchant ed., 2012).

¹⁶ *Id.* at 275.

¹⁷ ELLEN HANAK et al., MANAGING CALIFORNIA’S WATER: FROM CONFLICT TO RECONCILIATION, 29 (1st. ed. 2011).

¹⁸ *Charles Lux v. James B. Haggin*, 69 Cal. 255 (1886).

¹⁹ Hanak et al., *supra* note 17 at 29–30.

²⁰ *Matthew W. Irwin v. Robert Phillips*, 5 Cal. 140 (1855).

riparian rights were still valid under common law, appropriative rights gained legal recognition and would eventually become the accepted doctrine of water rights.²¹

With a backdrop of changing water rights, the California legal system established some of the earliest environmental protections in the U.S. In the latter half of the 19th century, most gold that had been washed downstream was panned from rivers, so profit-driven gold miners began using hydraulic mining to extract gold from the ground. While hydraulic mining yielded profits to the tune of \$5.5 billion,²² it wrought vast environmental consequences. Hydraulic mining entailed diversion of water from streams into flumes and penstocks to create hydraulic pressure. Miners blasted the pressurized water into rock and sifted through the massive piles of resulting debris to find gold. Millions of acres of debris generated from this process choked rivers, smothered fields and orchards, and increased flooding.²³ In two 1884 cases, *Woodruff v. North Bloomfield Mining Co.* and *People v. Gold Run Ditch & Mining Co.*, judges decisively ruled that “hydraulic mining constituted a general and destructive public and private nuisance that must be halted.”²⁴ These court rulings constituted an early form of environmental regulation that directly interacted with profit. However, much of each judge’s reasoning was based on the fact that the disruption to the environment negatively impacted agricultural capabilities, suggesting that even the courts’ establishment of regulations took motives of profit into consideration.²⁵

IV. The Evolution of Regulation

The environmental movement built upon regulations established during the conservation movement. The National Environmental Policy Act of 1969 (NEPA), which required federal agencies to submit environmental assessments and environmental impact statements for proposed projects, cemented national

²¹ Hanak et al., *supra* note 17 at 22–23.

²² The amount refers to the current value of the U.S. dollar.

²³ Hanak et al., *supra* note 17 at 24–25.

²⁴ Teisch, *supra* note 15 at 273.

²⁵ Teisch, *supra* note 15 at 273.

environmental protections for the first time.²⁶ A flurry of additional environmental legislation followed, including the 1970 Clean Air Act, the 1972 Clean Water Act, and the 1973 Endangered Species Act, which governed air quality, restricted water pollution, and protected critically imperiled species, respectively.²⁷ During this time, profit again stirred conflict between capitalists and the law.

The battle over regulation of damaging substances, such as diethylstilbestrol (DES), highlights the widespread conflict between profit and environmental law. DES is a synthetic estrogen initially prescribed to women for a variety of medical conditions and later used as a food additive to increase the size of cattle for slaughter.²⁸ In 1971, a study linking DES to cancer placed immense public pressure on the Food and Drug Administration (FDA) to regulate DES, especially its use in beef.²⁹ The preponderance of scientific evidence led the FDA to apply the Delaney Clause, a provision in the Food Additives Amendment of 1958 that bans cancer-causing agents from being used as food additives,³⁰ to ban DES in livestock feed. Feed companies then filed suit against the FDA, arguing that there was insufficient evidence that DES was a public health hazard.³¹ The U.S. District Court of Appeals for the District of Columbia overturned the FDA's ban on the grounds that the FDA had not appropriately considered economic issues, requiring that the FDA first conduct a "quantitative risk assessment that weighed the economic benefits of DES against the economic costs of cancer."³² Feed companies' use of the legal system to challenge environmental regulation constituted a battle between

²⁶ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970).

²⁷ DAVID STRADLING, *CONSERVATION IN THE PROGRESSIVE ERA* 9 (University of Washington Press, 2004).

²⁸ The Editors of Encyclopaedia Britannica, *Diethylstilbestrol*, ENCYCLOPAEDIA BRITANNICA (n. d.), <https://www.britannica.com/science/diethylstilbestrol>.

²⁹ NANCY LANGSTON, *TOXIC BODIES: HORMONE DISRUPTORS AND THE LEGACY OF DES* 98-100 (Yale University Press, 2010).

³⁰ J. H. Weisburger, *The 37 Year History of the Delaney Clause*, 48 *EXPERIMENTAL AND TOXICOLOGICAL PATHOLOGY* 183, 188 (1996).

³¹ *Hess & Clark, Division of Rhodia, Inc. v. Food & Drug Administration*, 495 F.2d 975 (1974).

³² Langston, *supra* note 29 at 107.

profit and environmental regulation. Capitalistic motives were heavily intertwined within the legal system; the court ruled that the FDA had to regulate based on economic reasons, not public health, which reflects the influence of corporate interests within the law. Companies sought to protect their profits from new environmental regulations by filing lawsuits, creating a “regulatory and judicial logjam” that “kept most toxic chemicals from regulation.”³³ In addition to federal regulations, “toxic torts,” or personal injury lawsuits alleging “exposure to a chemical caused injury or disease,” proliferated throughout the 1970s.³⁴ Companies fought back by inserting themselves into all possible court cases through means such as filing briefs to “convince juries that toxic torts were unfounded.”³⁵

Beyond toxic chemical regulations, companies and industries also fought back against legal proceedings related to construction projects. In the early 1960s, the City of Houston, Texas, pursued the construction of the Lake Livingston Reservoir by diverting the Trinity River.³⁶ The project aimed to increase Houston’s water supply so the city could provide for domestic water use while meeting commitments to industry actors, including petrochemical companies.³⁷ However, a lawsuit filed by a group of citizens in December 1962 temporarily halted the reservoir’s construction.³⁸ During the delay, Noah Hull, Houston’s surface water supply director, and H.R. Norman, an engineering consultant for the city, publicly called for the project to resume.³⁹ They characterized the lawsuit as frivolous, emphasizing how it was filed by “a small group” of people “as a result of complaints on high water bills.”⁴⁰ Subsequent lawsuits regarding similar projects, such as the 1971 suit filed by the Sierra Club against

³³ Langston, *supra* note 29 at 112.

³⁴ Langston, *supra* note 29 at 112.

³⁵ Langston, *supra* note 29 at 112.

³⁶ *Houston Needs Trinity River Water: City Water Consultant States Livingston Reservoir Needed Now*, TRINITY VALLEY PROGRESS, October 1963, at 18.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

the Trinity River Authority and the City of Houston, suggest that the 1962 plaintiffs voiced significant concerns about the reservoir's environmental impact.⁴¹ After their brief analysis of the lawsuit's claims, the city and industry representatives spent several paragraphs extolling the reservoir project's economic benefits, emphasizing how much additional water the project would bring to Houston. Clearly, the legal conflict was fundamentally rooted in motives of profit.

V. Conclusion

Throughout the past four centuries of American history, the legal system has fluctuated between protecting the sanctity of the environment and advancing economic interests, often revealing conflicts between the two. Its role evolved from an abstract source of justification to an often-used method of arbitration and environmental regulation by activists and industry representatives alike. For centuries, the interaction between the legal system and the environment governed the way people interact with natural resources. Over time, however, the law has evolved from being a tool justifying extraction of profit from the environment to a tool of regulation that systematically conflicts with agents of capitalism.

⁴¹ *Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977: Hearings on H.R. 14236 Before the Subcomm. of the Comm. on Appropriations, 94th Cong., 2d Sess (1977).*

Inquiry in to the Ethical Implications of Commercial Bail

Avery Leshan

Despite being relatively new, the United States' commercial bail system is already frowned upon by the majority of the developed world.¹ While commercial bail was originally intended to allow more defendants to leave jail and secure a fairer trial, it has actually resulted in discrimination against poorer socioeconomic groups and permitted dangerous offenders to roam free until their court dates. A bail system retaining only the indigent wastes taxpayer money and puts victims of interpersonal violence in danger when their abusers can afford bail. Pretrial detention results in higher conviction rates, and longer prison sentences.² To prevent the systemic inequities of commercial bail, the U.S. legislature and judiciary should consider the flaws of commercial bail and reevaluate the modern concept of pretrial release.

I. A Short History of Bail

Like many American institutions and practices, the concept of bail originated in England. First codified by the English in 1275, the 15th chapter of the Statute of Westminster I details how sheriffs—and later, judges—should determine whether a defendant is reliable enough to be released.³ It established that everyone—except those charged with treason or murder—deserved bail and fined judges or sheriffs who did not grant reasonable terms of bail.⁴ Over time, the notion of money bail in the place of personal sureties increased in popularity. Although money and property were not utilized to determine who would remain in jail as they are today, the personal surety system required collateral in the form of money or property if the defendant did not show up to court.⁵ The English government began to see bail as

¹ Shima Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1 (2017).

² *Pretrial Justice Center for Courts: Issues*, NATIONAL CENTER FOR STATE COURTS (2013), <https://www.ncsc.org/Microsites/PJCC/Home/Issues.aspx>.

³ Frederic William Maitland, *The Constitutional History of England: A Course of Lectures*, 3 LAWBOOK EXCHANGE, 232 (2001).

⁴ *Id.* at 315.

⁵ Timothy Schnake et al., *The History of Bail and Pretrial Release*, PRETRIAL JUSTICE INSTITUTION (Sept. 24, 2010), https://b.3cdn.net/crjustice/2b990da76de40361b_rzm6ii4zp.pdf.p6.

a successful form of generating revenue and increased the price of bail over time. By 1689, money bail had become so frequent that protection from excessive bail was included in the English Bill of Rights.⁶ Later, the U.S. limited excessive bail in the Eighth Amendment of its own Bill of Rights, which explicitly states that “excessive bail shall not be required, nor excessive fines imposed” on a U.S. citizen.⁷

Another difference between bail in England and the colonies was the number of defendants released on bail. In England, a gray area developed regarding who was permitted to post bail. To determine who was eligible for bail, judges not only looked at their charges but on character and personal connections as well. The American colonies, on the other hand, took character factors into consideration only when determining the conditions of the bail and maintained a rudimentary system that laid out which crimes wereailable and which were not.⁸

By the middle of the 19th century, judges in both England and the U.S. could not find enough people to serve as personal sureties, and the U.S. began to deviate from other countries’ common-law systems by introducing commercial sureties in the place of personal ones.⁹ While initially decreasing the number of defendants in jail who could be released on bail, this fundamentally altered the concept of money bail in a way that is now considered unacceptable in England and most other countries.¹⁰

II. Conceptual Development of Bail in the U.S.

The next major legislation regarding bail was the Bail Reform Act of 1966, which aimed to decrease classism within bail decisions. However, while the legislation emphasized the right of a defendant to post bail, it permitted judicial officers to require either an appearance bond or a bail bond when they doubted the defendant’s

⁶ Wendy Shang, *On the Long History of Bail*, PRETRIAL JUSTICE INSTITUTION (March 12, 2019), <https://www.pretrial.org/long-history-bail/>.

⁷ U.S. CONST. amend. VIII.

⁸ *Id.* at 6.

⁹ *Supra* note 5.

¹⁰ *Id.* at 6.

trustworthiness. This allowed the racial or economic biases of a police officer to determine whether an accused person would be incarcerated.¹¹ If defendants believed a decision was unfair, they could request a review, but their cases could only be reviewed by the judicial officer who made the original decision. This process ignored the need to hold officers accountable for racial or economic profiling.¹² The Bail Reform Act of 1984 later repealed the 1966 Act, giving judicial officers greater discretion in setting money bonds and determining bail conditions.¹³ The 1984 Act also expanded the list of crimes, including violent crimes, crimes resulting in a life-sentence or a capital punishment, some narcotics offenses, and crimes by defendants who are considered flight-risks, that require a detention hearing. By contrast, the 1966 Act focused only on the likelihood of flight by the defendant and not their “danger” to the community.¹⁴ The new law allows judicial officers to consider a defendant's past substance abuse in their decisions to grant and specify condition of bail,¹⁵ and since poorer, minority defendants are less likely to afford bail for the same crime, it further enables socioeconomic discrimination. Although several states have since created or updated their own legislations, there has been no significant federal reform since the Bail Reform Act of 1984.¹⁶

The U.S. Supreme Court has upheld the constitutionality of the various Bail Reform Acts in many cases. In *United States v. Salerno* (1987), the Supreme Court held that detaining defendants before their trials without bail violated the Eighth Amendment, and that pretrial detention should not be used as a form of punishment.¹⁷ Two leaders of the Genovese crime family were arrested and placed in pretrial detention, and the family filed a lawsuit claiming the Bail Reform Act of 1984 violated the Fifth Amendment's due process clause and the

¹¹ Bail Reform Act of 1966, 18 U.S.C. §§ 3146–3152 (1966).

¹² *Id.*

¹³ Bail Reform Act of 1984, 2 U.S.C. § S.215 (1984).

¹⁴ *Supra* note 11.

¹⁵ *Supra* note 13.

¹⁶ *Id.*

¹⁷ *United States v. Salerno*, 481 U.S. 739 (1987).

Eighth Amendment's excessive bail clause.¹⁸ Chief Justice William Rehnquist, citing evidence procured by the United States District Court for the Southern District of New York, stated in the majority opinion that the pretrial detention of the two men was necessary to prevent the Genovese family from committing a future crime and did not violate the Eighth Amendment.¹⁹ This decision established that the Eighth Amendment does not always guarantee a right to bail when public safety is at risk. This ruling can be used to hold defendants accused of violent sexual crimes without bail as they pose risks to both past and potential victims.

In 2017, the U.S. Supreme Court ruled in *Jennings v. Rodriguez* that immigrants who may be undocumented can be detained for over six months without bond hearings or proof they are flight-risks,²⁰ thus overturning the decisions of the District Court of the Central District of California and the Ninth Circuit Court of Appeals.²¹ The dissenting judges found that the decision violated the presumption of innocence and denied constitutional rights to the defendants. Later, in 2018, the Vermont Supreme Court ruled that Jack Sawyer, an 18-year-old charged with planning a school shooting, could not be held without reasonable conditions for bail. The three-judge panel stated that due to a lack of sufficient evidence to hold Sawyer, his detention without bail was unlawful.²² Despite the violent nature of Sawyer's potential crimes, he was offered a reasonable bail, while an undocumented immigrant in the state could be held for indefinite periods without opportunity for bail. The stark contrast between these decisions demonstrates the way race (as nearly all detained undocumented immigrants are people of color), xenophobia, and

¹⁸ *Id.*

¹⁹ *Id.* at 742.

²⁰ *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

²¹ *Id.*

²² Emily Johnson & Henry Epp, *On Issue of Bail, Vermont Supreme Court Rules in Favor of Jack Sawyer*, VERMONT PUBLIC RADIO (April 11, 2018), <https://www.vpr.org/post/issue-bail-vt-supreme-court-rules-favor-jack-sawyer#stream/0>.

socioeconomic background influence whether a defendant is released on bail.²³

III. Continued Race and Class Discrimination

The United States' existing bail system perpetuates systematic racial and class discrimination by determining who is released on bail and who is detained. In the U.S., 2.3 million people are in correctional facilities, 465,000 of whom have not been charged or are awaiting their trials.²⁴ While two-thirds of those charged are non-violent offenders, many of these people are financially challenged and unable to post bail.²⁵

Current bail policy unfairly discriminates against certain low-level offenses like drug possession and contributes to disproportionate incarceration rates for people of color. For instance, Latinx populations are more likely to be held without bail or pay higher amounts to be released on bail.²⁶ A study by the American Civil Liberties Union of Miami further reveals that black people, on average, are detained for four days longer than white people.²⁷ Because pretrial detentions lead to higher rates of convictions and longer periods of incarceration, poorer minorities who cannot afford commercial bail unwillingly contribute to the disproportionate rates of incarceration.²⁸ The percentage of black people in prisons is three times higher than the percentage of black people in the total U.S. population. While the women's prison population is currently smaller

²³ Opal Tometi & Terence Courtney, *The State of Our Communities: Understanding Mass Incarceration and Migrant Detention*, BLACK ALLIANCE FOR JUSTICE IMMIGRATION,

http://www.racialequitytools.org/resourcefiles/BAJI_framingpaper.pdf.

²⁴ Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (March 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

²⁵ *Id.*

²⁶ Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 3 (August 2003), 873-908.

²⁷ *Unequal Treatment: Racial and Ethnic Disparities in Miami-Dade Criminal Justice*, ACLU OF FLORIDA AND ITS GREATER MIAMI CHAPTER (July 2018), <https://www.aclufi.org/sites/default/files/6440miamidadedisparities20180715spreads.pdf>.

²⁸ *Supra* note 2.

than the men's prison population, it is growing twice as quickly.²⁹ A small, critical part of female prison population growth results from privately funded prisons' and Immigration and Custom Enforcement's detention of 30,000 undocumented female immigrants.³⁰ Judges rarely offer cash bail to undocumented immigrants, and when they do, it is far too expensive for the immigrants to pay without the help of non-profit organizations.³¹ The United States' commercial bail system ignores protections guaranteed by the Eighth Amendment by focusing on at-risk communities, leaving the economically disadvantaged unable to prepare for cases in which they could be proven innocent.

In Philadelphia, Pennsylvania, where one-third of the prison population in 2018 consisted of people detained before trial, the city council passed a resolution to fight cash bail. The resolution aimed to mitigate the 12 percent increase in convictions of defendants who cannot afford bail by reducing the number of all pretrial detentions.³² This resolution pressures the State of Pennsylvania to join the Philadelphia City Council's movement toward eliminating cash bail and countering the race and class discrimination within the current method of pretrial detention.³³ Since the resolution's passage, Philadelphia has seen a 22 percent reduction in the number of pretrial detentions and a 23 percent increase of defendants released without monetary conditions. This occurred without an increase of defendants missing their court dates, proving that releasing defendants without monetary conditions does not impact their court attendance.³⁴

²⁹ *Id.*

³⁰ *Id.*

³¹ *Zero-Tolerance Criminal Prosecutions: Punishing Asylum Seekers and Separating Families*, HUMAN RIGHTS FIRST (July 18, 2018), https://www.humanrightsfirst.org/sites/default/files/Zero_Tolerance_Border_Report.pdf.

³² Teresa Mathew, *Bail Reform Takes Flight in Philly*, CITYLAB (Feb. 2, 2018), <https://www.citylab.com/equity/2018/02/bail-reform-takes-flight-in-philly/552212/>.

³³ *Id.*

³⁴ Aurelie Ouss & Megan Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail*, 19 GEO. MASON LEGAL STUD. RES. PAPER 8 (February 2019).

IV. Economic Impact

The existing commercial bail system places the U.S. at an economic disadvantage. Instead of giving people accused of non-violent crimes opportunities to work, support themselves, and add value to the economy, the current system incarcerates them and prevents them from contributing growth. The economic burden of incarcerating people who cannot afford bail is placed on taxpayers; on average, it costs \$22,650 to detain one person for one year, whereas pretrial release programs cost about \$4,000 per person.³⁵ By decreasing pretrial detentions and increasing the use of pretrial release programs, the U.S. will save money and allow defendants to remain a part of the workforce.

V. Solutions

Dr. Shima Baughman, a national expert on pretrial detention, suggests using G.P.S. monitors for people charged with non-capital offenses to allow them to work while preventing stalking and harassment.³⁶ A G.P.S. ankle bracelet monitor costs \$6 per day, which is significantly cheaper than incarcerating someone for \$83 per day.³⁷ New Jersey banned the practice of cash bail in 2016, giving judges greater discretion to either detain or release a defendant.³⁸ In less than a year, the prison population in New Jersey decreased by 15 percent while murder and robbery rates both decreased by 10 percent.³⁹

In 2017, the California Senate passed a bill that eliminates cash bail in exchange for a point-based mechanism that calculates a defendant's risk factor and determines whether that defendant is released or detained prior to their trial—except when a judge feels

³⁵ *Supra* note 1.

³⁶ *Id.*

³⁷ Tribune La Crosse & Anne Jungen, *GPS Ankle Bracelet Monitoring of Low-Risk Offenders Costs More than Anticipated*, GOVERNMENT TECHNOLOGY (May 3, 2016), <http://www.govtech.com/public-safety/GPS-Ankle-Bracelet-Monitoring-of-Low-Risk-Offenders-Costs-More-than-Anticipated.html>.

³⁸ N.J. Stat. Ann. § C.2A:162 (2017).

³⁹ Ted Sherman, *Why Is the N.J. Prison Population Shrinking?*, NJ.COM (September 2017), https://www.nj.com/news/2017/09/why_is_the_nj_prison_population_shrinking_its_not.html.

strongly that the system has evaluated a defendant incorrectly.⁴⁰ Although eliminating cash bail will reduce the impact of socioeconomic discrimination on pretrial detentions and convictions, the American Civil Liberties Union and other civil rights organizations are concerned judges will have too much power in deciding whether to detain or release a defendant before trial. Allowing judges to determine the fate of a charged person before trial could perpetuate racism through their explicit or implicit biases, thereby impacting a defendant's likelihood of pretrial detention.⁴¹ In Texas, past attempts to pass similar legislation have failed,⁴² but in February 2019, a new bill was introduced in the Texas House of Representatives that would reduce the number of pretrial detentions for non-violent, low-risk offenders made it out of committee.⁴³ The yet-to-be-determined successes of California's and Texas' laws will likely further support New Jersey's results: decreasing pretrial detentions will not decrease the number of defendants who show up to court. The success of these policies should encourage other states to adopt similar reforms or even prompt the passage of this legislation on a federal level.

VI. Conclusion

The U.S. needs new federal legislation that will reduce the number of people in pretrial detention for minor drug-related offenses while also keeping communities safe. The current system of bail permits judges to make critical decisions on pretrial release or detention, leaving room for human error and the continuation of racial and socioeconomic discrimination. Therefore, legislation should rely on an objective, calculated mechanism that ignores both race and class

⁴⁰ Cal. Pen. Code § 244 (2018).

⁴¹ Vanessa Romo, *California Becomes First State to End Cash Bail after 40-Year Fight*, NPR (Aug. 28, 2018), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail>.

⁴² Jolie McCullough, *Courts Have Called Texas Bail Practices Unconstitutional. Will That Push This Year's Reform Efforts to Success?* THE TEXAS TRIBUNE (Feb. 4, 2019), <https://www.texastribune.org/2019/02/04/bail-reform-texas-legislature-bills-filed/>.

⁴³ *H.R. 1323, 86th Leg.* (Tex., as introduced, Feb. 27, 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB1323>.

by focusing on the crime's nature and the defendant's danger to past and potential victims.

Several major federal changes will decrease the number of defendants in pretrial detention. The federal budget needs to allocate funding for tracking technology that is less gaudy, more difficult to remove, and less expensive to replace than the GPS ankle monitors currently used to track defendants. Tracking devices of this nature will decrease both the number of non-violent offenders in pretrial detention and public fears regarding pretrial release. New tracking technology will also eliminate the need for immigration detention centers, as the government will be able to locate undocumented immigrants without actually detaining them. These improvements will reduce the impact of racism, xenophobia, and discrimination against the poor and undocumented in the U.S.

The U.S. Congress also needs to pass federal legislation that will implement a point-based calculation mechanism similar to that described in California's H.R. 1323. This mechanism should place greater emphasis on tracking defendants accused of violent crimes and lesser emphasis on minor drug offenses. By using an impartial calculation in the place of judges and police officers, the impact of racism and socioeconomic discrimination on the decision to retain a defendant in pretrial detention will decrease.

* * *