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TEXAS UNDERGRADUATE LAW REVIEW

ARTICLES

Spring 2020 Volume VIII.II Pages 69 - 133

Texas Undergraduate Law Review

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Special Thanks

The *Texas Undergraduate Law Review* thanks McMinn Law Firm, an Austin-based personal injury law firm, and both the University of Texas at Austin's Student Government and Liberal Arts Council for their financial support.

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Texas Undergraduate Law Review

Vol VIII.II Spring 2020

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Texas Undergraduate Law Review

Volume VIII, Issue II, Spring 2020

Articles

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The Resounding Promise of *Roe v. Wade*: Gender Equality in Contemporary Abortion Law

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Justice Anthony Kennedy began the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* by stating, "Liberty finds no refuge in the jurisprudence of doubt."[2] Yet nearly 30 years later, and despite *Casey*'s efforts to create a standard of constitutional review strong enough to safeguard the right to reproductive autonomy, abortion rights remain largely contentious.[3] Since the 1973 landmark ruling in *Roe v. Wade*,[4] state legislatures have enacted laws making abortion access more difficult while paradoxically promising to ensure the health and safety of women seeking abortions,[5] such as the overturned Texas law at issue in *Whole Woman's Health v. Hellerstedt*.[6] Lawmakers in Ohio, Florida, Minnesota, and Tennessee have also recently considered, introduced,

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[1] I would like to express my special thanks to Professor Jeffrey Abramson for inspiring this paper. Thank you to Will, Megh, and the editors of the *Texas Undergraduate Law Review* for all of their diligent work and thoughtful comments. Finally, I would like to acknowledge my family for patiently listening to my ideas, encouraging me to continue writing, and supporting me through this entire process.

[2] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

[3] In March 2020, the Supreme Court heard oral arguments in *June Medical Services v. Russo*, a challenge to a 2014 Louisiana law requiring abortion providers to have admitting privileges (agreements between hospitals and doctors allowing doctors to admit patients) at nearby hospitals. *See* Anna North, *Getting an abortion in "the most pro-life state in America"*, Vox (Feb. 19, 2020), https://www.vox.com/2020/2/19/21070703/louisiana-abortion-case-supreme-court-law-roe.

[4] Roe v. Wade, 410 U.S. 113 (1973).

[5] Sheryl Gay Stolberg, *More Than 200 Republicans Urge Supreme Court to Weigh Overturning Roe v. Wade*, N.Y. Times, Jan. 2, 2020, *available at* https://www.nytimes.com/2020/01/02/us/politics/republicans-abortion-supreme-court.html.

[6] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), in which the Court struck down a law that required those providing abortions to have admitting privileges at nearby hospitals and to comply with building standards that would have effectively placed an "undue burden" on women seeking abortion services.

or passed bills outlawing abortion if *Roe* is overturned.[7] In spite of the flaws in *Hellerstedt*, the decision protected abortion rights in states with similar admitting privileges requirements and served as a beacon vindicating women's reproductive freedoms for both past and future cases.

I. The Trimester Framework

Roe overturned a Texas law that criminalized all abortions except in circumstances in which the mother's life must be saved.[8] In the majority opinion delivered by Justice Blackmun, the Supreme Court held that women had a constitutional right to abortion rooted in an implied right of personal privacy within the Due Process Clause of the Fourteenth Amendment, and this right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[9] While the Constitution does not explicitly express a right of privacy, the Court recognized that there are certain implied zones, or penumbras, of privacy protected under the Constitution from governmental interference.[10] Formed in earlier cases such as *Griswold v. Connecticut*,[11] in which the Court invalidated a ban on the use or sale of contraceptives to married couples because it violated the right to privacy, the guarantee of privacy further solidified in *Roe* what the Court deemed as a fundamental personal right.[12]

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[7] Aris Folley, *Ohio bill would ban abortion in event Supreme Court overturns Roe v. Wade,* The Hill (March 4, 2020), https://thehill.com/homenews/state-watch/486041-ohio-bill-would-ban-abortion-in-event-supreme-court-overturns-roe-v-wade; *See also* Axios, *Restrictive abortion laws challenged in courts across America's red states*, Axios (Dec. 14, 2020), https://www.axios.com/abortion-restriction-states-passed-laws-8326c9aa-6631-4bd1-b02b-c6ba6cd0a335.html.

[8] *Roe*, 410 U.S. 113 (1973).

[9] *Id.* at 153.

[10] *See id.* at 152, in which Justice Blackmun cited multiple decisions relating to various aspects of the Constitution where "the Court has recognized that a right of personal privacy ... does exist."

[11] Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Poe v. Ullman, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting), in which Justice Harlan wrote that the intimate details of an individual's personal life cannot be criminalized.

[12] Fundamental rights are rights the Supreme Court has recognized as requiring a high degree of protection from government interference. Some are identified in the Constitution, and others, like the privacy right established in *Roe*, have been enumerated through the Court's use of the Due Process Clause. Laws encroaching on

Justice Blackmun reasoned that the state's denial of the choice to terminate pregnancy could impose damage upon a pregnant woman's mental and physical health, citing that forcing a woman into motherhood may render her life extremely distressful.[13] In recognizing that pregnancy directly and profoundly affects the mother's ability to fully participate in the public sphere, the Court broadly protected the freedom to have an abortion.[14] The Court went as far to state that "psychological harm may be imminent"[15] in an unwanted pregnancy and that issues arise when a family is ill-equipped physically and psychologically to care for it.[16]

Roe did not hold that women have an unlimited right to abortion. Rather, the Court refuted the argument that a woman has the right to terminate her pregnancy at any time for any reason, claiming that a "state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[17] While the Court did not attempt to resolve the complicated question of when life begins, it held that the law has never recognized the unborn as full-fledged persons with constitutional rights.[18] In opposition to the Texas law, the Court stated that the definition of a "person" is not included in the Constitution, and the three references in the Fourteenth Amendment only apply postnatally, not prenatally.[19]

Moreover, although a fetus is not considered a person by the Fourteenth Amendment and thus does not have its own constitutional

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a fundamental right generally must pass strict scrutiny to be upheld as constitutional. *See also Roe*, 410 U.S. 113, 152 (1973).

[13] *Id.* at 153, stating that "[t]he detriment the State would impose upon the pregnant woman by denying this choice altogether is apparent."

[14] *Id.* at 166, stating that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."

[15] *Id.* at 153.

[16] *Id.*

[17] *Id.* at 154.

[18] *Id.* at 162, stating that "[the] unborn have never been recognized in the law as persons in the whole sense."

[19] *Id.* at 157, stating that "Section 1 of the Fourteenth Amendment contains three references to 'person' ... [but] in nearly all these instances, the use of the word is such that it has application only postnatally."

rights, it possesses the potentiality of life. The Court found that along with the legitimate government interest in protecting the pregnant woman's health, the state also has a legitimate interest in protecting potential life that becomes compelling in tandem with the progression of pregnancy.[20] Because of the low rate of mortality and complications resulting from abortion in the first trimester, the Court decided that the compelling point for the state interest of protecting the health of the mother is approximately the end of the first trimester. The Court noted that from this point on, the state is free to regulate abortion for the purpose of protecting and preserving maternal health. Women and their doctors are free to determine without state interference whether a pregnancy should be terminated during the first trimester.

The opposing compelling point of protecting potential life is at viability, or when a fetus can live independently outside of the womb. A fetus becomes viable at the start of the third trimester, or between the 24th and 28th week of pregnancy.[21] The protective power of fetal life after viability allows a state to prohibit abortion after that point—unless the mother's life or health is at stake.[22] In creating the trimester framework, the Court resolved two extremes: a woman's *prima facie* right[23] to end her pregnancy and a state's compelling interest to restrict abortion for purposes relating to the mother's health and potential life. Toward the end of the first trimester, the state could not prohibit abortions and judgment is reserved for the pregnant woman's physician. During the beginning of the second trimester, the state could regulate abortions to protect maternal health. During the third trimester, or the time following viability, the state's compelling interest in potential life outweighs a mother's interest in terminating the pregnancy. The state is also allowed to regulate and even ban

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[20] *Id.* at 162–63, stating that "each [interest] grows in substantiality as the women approaches term and, at a point during pregnancy, each becomes 'compelling.'"

[21] Franklin Foer, *Fetal Viability*, Slate, May 25, 1997, https://slate.com/news-and-politics/1997/05/fetal-viability.html.

[22] *Roe*, 410 U.S. 113, 163–64 (1973), stating that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."

[23] A right that can be outweighed by other interests.

abortions after viability, except in the interest of the mother's life.[24] In sum, the Court has reconciled the fundamental right to privacy with compelling government interests by stressing that the decision of first trimester abortion must be left to the medical judgment of the physician.

II. *Casey*'s Undue Burden Standard

Almost 20 years later in *Casey*, the Court upheld *Roe* in an attempt to stabilize the law and end the debate on abortion incited by *Roe*. The Court reaffirmed that a woman's implied constitutional right to have an abortion cannot be unduly limited by the state until viability is reached.[25] In a plurality opinion, Justices O'Connor, Kennedy, and Souter upheld the locating of *Roe*'s right to privacy in the Due Process Clause, declaring that the clause includes a substantive component[26] that reserves a "realm of personal liberty which the government may not enter."[27] This extension of the right to privacy stressed, however, that state regulation of personal behavior could still limit personal autonomy and prosecution of intimate choices could be publicly scrutinized. While abortion may be at odds with principles of morality, the Court in *Casey* mirrored *Roe'*s neutrality by insisting that its responsibility lie not in infusing its own moral code into the law, but in defining the "liberty of all."[28] Here, the Court protected the dignity of women as well as state interests in potential life without rooting its decision in ethical or religious premises. The Court also acknowledged the fundamental nature of the right to choose established in *Roe* by

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[24] *Roe*, 410 U.S. 113, 163–64 (1973).
[25] *See id.*
[26] *Casey*, 505 U.S. 833, 847–48, stating that "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th cenutry, but the Court was no doubt correct in finding it an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)."
[27] *Id.* at 847.
[28] *Id.* at 850, stating that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter [except in instances of rape or incest, or when her life is in danger]."

affirming that a state may not force upon women its interests considering the factors of bodily integrity, a woman's intimate suffering of carrying a child, and the responsibility necessary for the begetting of children. In accordance with the doctrine of *stare decisis*, or the act of courts to defer to previous decisions, the Court reasoned that *Roe* was still enforceable, and that the societal understanding of abortion had not drastically changed from the basis of *Roe*.

At the heart of *Casey* lies the historical grounds latent in the argument that *Roe* should not and cannot be overturned. Because the precedent of *Roe* has ingrained ideas of women's freedoms to equally participate in social and economic spheres into many people, overruling *Roe* without a compelling reason would severely weaken the Court's legitimacy. The Court's affirmation of *Roe*'s holding that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislation ban on nontherapeutic abortions"[29] can furthermore be seen as more of a good-faith response to political and institutional pressures rather than an active effort to expand access to reproductive health care.

Despite its fervently professed adherence to the spirit of *Roe*, *Casey* changed the law on abortion by creating the undue burden standard. From the struggle within the Court emerged a holding that aimed to respect a woman's constitutionally protected right to decide whether to become a mother and the government's interest in persuading her to do so. Where *Roe* broadly protected a woman's right to choose an abortion as guided by medical judgment in the first trimester to the point of viability, *Casey* permitted government efforts to persuade a woman to choose childbirth in the earliest stages of pregnancy so long as the state does not unduly impose a woman's right to decide whether to carry a pregnancy to term.[30] The Court in *Casey* partially abandoned *Roe*'s trimester-based framework in favor of this new legal standard, which proscribed laws restricting abortion if they imposed an "undue burden" on a woman's right to abortion. This

[29] *Id.* at 860.
[30] *See id.*

undue burden standard is defined by the Court as the "conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[31] Under the undue burden test, *Casey* prohibited statutes aimed to purposely obstruct a woman's right of free choice and gave states more regulatory power to restrict abortion through structural mechanisms that respect the potential life of the unborn.

Casey further strayed from *Roe*'s protection of abortion rights by holding that a statute created to persuade a woman to choose childbirth over abortion can be upheld for the legitimate interest of fetal life and regulations designed to promote the health of a woman seeking an abortion are constitutional so long as they do not impose an undue burden. Although the Court in *Casey* similarly reaffirmed that the Due Process Clause protected the right of women to choose to terminate a pregnancy as in *Roe*, it simultaneously weakened the constitutional protection central to *Roe*, stating that on one hand "[a]n undue burden exists ... if [a law's] purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability;"[32] while on the other hand, the Court said a state may deliberately persuade a woman not to terminate a pregnancy on behalf of promoting the state's interest in potential life.[33] The Court failed to indicate whether such persuasive efforts may coincidentally constitute the very substantial obstacle it condemns.

In accordance with the undue burden standard, *Casey* upheld a 24-hour waiting period provision, a parental consent requirement of a law limiting abortion availability, and a provision mandating facilities performing abortions to file a report on the conditions of the abortions, but struck down a spousal notification provision.[34] The 24-hour waiting period upheld in *Casey* included the requirement of having physicians inform a patient about the procedure before performing it. While the Court acknowledged the obstacles this waiting period could

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[31] *Id.* at 877.
[32] *Id.* at 878.
[33] *Id.* at 879.
[34] *See id.*

impose on economically disadvantaged and rural women, it ultimately found that these obstacles were not serious enough for the waiting period to constitute an undue burden.[35] Instead of relying on *Roe*'s trimester framework to balance government interests with a woman's fundamental right to abortion, the Court expanded the state's ability to enact legislation that protects potential life, even if the state demonstrates a preference for childbirth.[36] A woman's access to abortion is ultimately somewhat hindered as a result of this application of the undue burden standard.

Another provision of *Casey* stated, however, that a procedure may not be performed unless a woman provides a signed statement from her spouse about her impending abortion. Because many women may be at severe risks of being physically and psychologically abused by their husbands for wanting to terminate their pregnancies, the Court determined that the spousal notification requirement would constitute a substantial and unacceptable obstacle to a woman's freedom to obtain an abortion.[37] The Court noted that such a requirement would "enable the husband to wield an effective veto over his wife's decision,"[38] and that women do not surrender their constitutional freedom by entering into a marriage. Moreover, in this context, even the spouse's interest in fetal life may not justify the wielding of excessive power over his wife.

The Court also upheld the state's provision requiring a female under 18 to provide informed consent from herself and one of her parents in order to obtain an abortion.[39] If consent is denied, courts may allow the procedure upon confirming that the woman is mature and capable of giving consent to a procedure that "would be in her best

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[35] *Id*. at 937.
[36] *Id.* at 883, stating that "[a] state may further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."
[37] *Id.* at 893.
[38] *Id.* at 897.
[39] *Id.* at 899–900.

interests"[40] through judicial bypass. Lastly, the Court upheld a provision requiring facilities to present a data file regarding abortions performed. The Court noted that the privacy of women who underwent abortions would be protected, and that data collection regarding abortions had a legitimate benefit to medical research.[41]

By upholding three of these four provisions, the Court reasoned that the requirements did not pose a substantial obstacle, but merely "increase[d] the cost of some abortions by a slight amount."[42] The Court also disregarded that the 24-hour waiting period and parental consent requirements could deliberately persuade women to choose childbirth over abortion. Women living in economic hardship, for example, may not have the privilege of waiting 24 hours to obtain a procedure because they are dependent on their jobs and childcare.[43] Yet it is precisely financially disadvantaged women who constitute the majority of abortion patients.[44] In failing to take away this invidious power, *Casey* impinged upon the decision in *Roe* that protected a woman's decisional and personal autonomy from the state's subterfuge. Whereas *Roe* offers a factual analysis under heightened scrutiny to determine the constitutionality of a law, the more subjective undue burden standard in *Casey* can be easily molded to the justices' personal preferences whenever abortion statutes reach the Court—all at the expense of women and the impact of childbearing and childbirth on their lives.

III. A Return to *Roe*

In *Whole Woman's Health v. Hellerstedt*, the Court struck down both provisions of Texas' 2013 House Bill 2 in its examination of

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[40] *Id.* at 899.
[41] *Id.* at 900–01.
[42] *Id.* at 901.
[43] Joel Dodge, *The Supreme Court & Abortion Access for Women Living in Poverty*, American Constitution Society (Oct. 7, 2019), https://www.acslaw.org/issue_brief/briefs-landing/we-must-not-blind-ourselves-the-supreme-court-abortion-access-for-women-living-in-poverty/.
[44] Rachel Goodling, *24-hour waiting periods: an 'undue burden' or a minor inconvenience?* Campbell Law Observer (June 22, 2015), http://campbelllawobserver.com/24-hour-waiting-periods-an-undue-burden-or-a-minor-inconvenience/.

whether the law's medical benefits justified the burden on abortion rights.[45] The first provision at issue required that a physician performing an abortion must have active admitting privileges at a nearby hospital, while the second provision required abortion facilities to meet standards adopted by ambulatory surgical centers. The Court held that both provisions were facially unconstitutional under the Fourteenth Amendment as interpreted in *Casey* because the laws did not benefit women and they did not seek to cure any significant health problem. In accordance with *Casey*, the Court in *Hellerstedt* considered the "burdens a law imposes on abortion access together with the benefits."[46] The Court also reflected *Casey* by relying on evidence and expert testimony to find that abortion was a safe procedure with very low rates of complications and no deaths prior to the enactment of H.B. 2.

Although the supposed purpose of the admitting-privileges requirement was to help ensure that women had easy access to a hospital if complications arose during an abortion procedure, the U.S. Court of Appeals for the Fifth Circuit found no evidence of complications before the passage of H.B. 2.[47] The absence of health problems discovered is critical because it supports the Supreme Court's opinion that Texas had underlying intent to prevent women from obtaining an abortion by creating arbitrary requirements that would have effectually closed 75 percent[48] of statewide clinics. In the rare instance that hospitalization is necessary, the district court determined that the physician's possession of admitting privileges had no effect on the quality of care received by the patient, and that most patients would "seek medical attention at the hospital nearest [their] home[s]."[49] The Supreme Court used the undue burden standard outlined in *Casey* to find that the admitting privileges requirement had

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[45] *Hellerstedt*, 136 S. Ct. 2292 (2016).
[46] *Id.* at 2298.
[47] *Id.* at 2300–01.
[48] Brief of Constitutional Accountability Center as Amicus Curiae in Support of Petitioners at 2, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15–274).
[49] *Hellerstedt*, 136 S. Ct. 2292, 2311.

the purpose of placing a "substantial obstacle in the path of a woman's choice."[50] The record used by the Supreme Court demonstrated that facilities operating after H.B. 2 went into effect were unable to accommodate the increased demand of abortions, showing that the provision led to the closure of half of Texas' clinics.[51] These closures resulted in a shortage of doctors, staff burnout, prolonged waiting times, and overcrowding.[52] According to the majority opinion of the Court, the provisions claimed to have a legitimate state interest in increasing the quality of care and protecting women's health, yet the burden of the requirements fell heaviest on poor, rural, or disadvantaged women.[53]

The Supreme Court similarly affirmed the findings of the district court, concluding that the surgical-center requirement provided no benefit to patients and was therefore unnecessary when complications arise in the context of an abortion produced through medication.[54] The surgical-center provision would have reduced the number of abortion facilities available down to seven or eight facilities in Texas' major cities, substantially increasing the number of abortions performed at each clinic.[55] This provision would have forced women to travel long distances to receive less individualized care at crowded facilities and would have prevented women from receiving correct care, therefore increasing the risk to their health and safety for receiving an abortion outside a hospital.[56] While the obstacle of distance did not constitute an undue burden in the eyes of the Court, it should be considered as an additional burden because of the long distances many women would have to travel—sometimes more than

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[50] *Id.* at 2312, citing *Casey*, 505 U.S. 833, 877.
[51] *Id.* at 2312–13.
[52] *Id.* at 2318.
[53] *Id.* at 2302, citing *Whole Woman's Health v. Lakey*, 46 F.Supp.3d. 673, 683 (2014).
[54] *Id.* at 2315.
[55] *Id.* at 2296.
[56] *Id.* at 2321, stating that "[w]hen a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, [for lack of something better], at great risk to their health and safety" (Ginsburg, J., concurring).

200 miles.[57] Taken together with additional burdensome factors and the absence of any health benefit, the Court ultimately affirmed the district court's undue burden conclusion but abandoned the relative balancing standard used in *Casey*.

The Court in *Hellerstedt* applied *Casey*'s standard to arrive at a decision resonant with *Roe*'s holding. Although *Hellerstedt* borrowed *Casey's* undue burden standard, it was decided with greater adherence to the precedent in *Roe* that abortion is a fundamental right rather than the balancing test in *Casey.* In accordance with the strict scrutiny analysis used in *Roe*, the Court's decision in *Hellerstedt* rested on the notion that the state has a legitimate interest to ensure that an abortion is performed under the safest circumstances possible for the patient; however, the Court evaluated the burdens of abortion restrictions with the same sensitivity it devoted to the benefits of abortion restrictions. By identifying the burdens imposed by the Texas law, the Court recognized that the enforcement of this law would transform women's lived experiences of abortion and that the changes of access were not trivial inconveniences but constitutionally cognizable obstacles to the exercise of their rights. To this Court, it mattered not only whether women could obtain an abortion, but also how the state could deterioriate the circumstances by which women make critical decisions and actions about abortion.[58] The Supreme Court's decision in *Hellerstedt*, then*,* resembled *Roe*'s stringent skepticism of abortion restrictions to a greater extent than *Casey*, concluding that extraneous health regulations with the purpose or effect of placing substantial obstacles violate the principle at the core of the Court's protection of the abortion right.

IV. Conclusion

In the same way *Roe*'s analysis was grounded in the factually supported trimester model, *Hellerstedt* used evidence and facts to

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[57] Rebecca Santana & Mark Sherman, *A clinic prepares for Supreme Court abortion fight*, Associated Press (March 2, 2020), https://apnews.com/6d10cb3de220233dcda0c6ff7ecc60af.

[58] Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*. 125 Yale L.J. 1150–1547 (2016).

determine whether provisions posed an undue burden. Such a factual analysis enabled the Court to determine the benefits of a law while weighing its degree of burden. The Court in *Hellerstedt* dismissed Texas' argument of *res judicata*, or the doctrine that prohibits further litigation of a settled claim, but the petitioners brought a challenge to the surgical-center requirement after its enforcement and the closing of many clinics—consequences that were unknowable before the law at issue took effect. By noting that the petitioners' challenge differed from the pre-enforcement challenge,[59] the Court prioritized the direct impact on the life and health of women that could result from abortion restrictions over claim preclusion. In contrast, *Casey* relied entirely on precedent when striking down the parental notification requirement and was more deferential to the state's interest in unborn life, despite claiming to follow the precedent of *Roe* and invalidating only one of three burdensome provisions. The Court in *Casey* argued that abortion regulations made in the name of women's health do not trigger heightened scrutiny because the significant life interests at stake outweigh the minimal inconveniences imposed on women obtaining a procedure.[60] In so holding, *Casey* departed from *Roe* by creating an exception to *Roe*'s virtually indisputable right to a pre-viability abortion by allowing the state to interfere at the outset of pregnancy. *Casey*'s articulation that a state has a compelling interest in protecting women's health and that laws may discourage abortions resembles the overturned Texas H.B. 2 provisions.

Unlike *Casey*, *Hellerstedt* struck down both provisions at issue and held that courts must consider both the burdens and the benefits that a law confers on abortion access when determining the constitutionality of a law. Even if an individual law posed only a minor obstacle, the post-*Hellerstedt* Court should continue to recognize the collective power of laws to block abortion access and strike them down if they did not provide necessary medical benefits. The *Hellerstedt* Court's emphasis on the benefits of legislation regulating

[59] *Hellerstedt*, 136 S. Ct. 2292, 2297.
[60] *Casey*, 505 U.S. 833, 851.

abortion reflected *Roe*'s heightened scrutiny in deciding if such restrictions truly further compelling state interests and do not instead obstruct a woman's access to abortion. Scrutinizing the facts that justify the government's interest in protecting potential life and maternal health thus serves a crucial function of securing protection for women's dignity.

Hellerstedt hewed closer to the vision expressed in *Roe* by invalidating laws restricting abortion under the guise of protecting women's health and safety. It is clear from *Roe*, *Casey*, and *Hellerstedt* that abortion is not an absolute right—state interests and a woman's constitutionally protected freedom to terminate her pregnancy must be balanced. The potentiality of human life in a moral light constitutes a legitimate state interest. But notions of morality and public opinion should not be given unwarranted power to temper *Roe*'s fundamental protections involving the right to choose. As stated in *Roe*, implicit in the Fourteenth Amendment of the Constitution is a right to privacy that encompasses the decision to have an abortion. The question of when life begins is complex and greatly contested; therefore, opinions rooted in personal beliefs can not be the sole basis of a neutral legal standard.

In upholding two laws that supposedly protected the health and safety of women against the undue burden standard, *Casey* introduced an uncertain environment where a woman's full control and unaffected conscience over a decision could be subject to the personal whims of the justices. This environment of wavering jurisprudence allows for laws with pernicious intent similar to Texas' H.B. 2 to slip through the cracks of a fair legal standard and restrict women's rights to bodily autonomy. Furthermore, abortion laws must continue to be examined under a strict scrutiny analysis rooted in factual evidence as demonstrated by the precedents of *Roe* and *Hellerstedt*. In the face of diverging viewpoints, the state's interests in protecting the health of the woman undergoing an abortion and the potentiality of human life must be compelling enough to justify curtailment on a woman's fundamental right to privacy.

The decision made in *Roe* elicited a clear message to women,

girls, and society that the reproductive lives of women should not be governed by fate, nature, misfortune, or men; rather, it signaled an empowering age of choice and agency for women. Furthermore, the right to abortion is tied to a concept of personal autonomy implicit in the due process guarantee.[61] In the same way the notion of equality informed the understanding of the Due Process Clause in *Casey*, the government should not be able to coerce, manipulate, or stereotype pregnant women. Moreover, Justice Kennedy wrote in the joint opinion for *Casey* that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[62] and that the "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[63] If the goal of the Constitution is to serve the essential human values of equality and liberty as *Casey* affirms, women should have an unassailable right to legal abortion unless it is outweighed by a sufficiently compelling state interest such as the protection of maternal health and the potentiality of human life.[64]

Defining abortion as a privacy issue free from governmental intervention as established through *Griswold v. Connecticut*[65] may not effectively protect the equality and liberty of women. Furthermore, the debate on abortion is far from ending, as current and future legislative measures threaten to close abortion clinics across the country, leaving many women hundreds of miles away from a safe procedure. *Stare decisis* notwithstanding, the vitality of *Roe* is on the line as much as the restrictions posing an obstacle to abortion: a case soon to be decided by the Court, *June Medical Services v. Russo*, includes a challenge from the State of Louisiana regarding the rights of abortion

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[61] *Roe*, 410 U.S. 113 (1973).
[62] *Id.* at 851.
[63] *Id.* at 852.
[64] *See* Kathleen Sullivan & Noah Feldman, Constitutional Law 524 (20th ed. 2016).
[65] *Griswold*, 381 U.S. 479 (1965), struck down a statute criminalizing use of contraceptive devices to prevent conception. The *Casey* Court later upheld the right of privacy implied in the Due Process Clause as stated in *Roe* and introduced in *Griswold* that governments may not interfere within the privacy of matters such as marriages, procreation, contraception, or family relationships.

providers and organizations to represent patients.[66] Should the Court decide in favor of Louisiana, individual women would have to challenge abortion restrictions themselves, exposing their names and identities to public scrutiny in a way that could violate their personal liberties. The ultimate issue at stake is not just balancing the fetus' interest with a woman's interests, but also preserving a woman's power to dictate her life's course as an equal citizen.

[66] Alexandra Svokos, *Over 350 lawyers, legal professionals who had abortions file brief in landmark Supreme Court case*, ABC News (Dec. 2, 2019), https://abcnews.go.com/US/350-lawyers-legal-professionals-abortions-file-supreme-court/story?id=67441723.

Japan's Elder-Care Crisis: The Role of Immigration

Samiya Javed[1]

I. Introduction

Japan is currently facing two critical problems: a rapidly aging population and a workforce unequipped to care for its elderly. In 2025, there will be approximately 7.8 million people above the age of 65 who will require nursing care.[2] To care for this aging population, Japan's Ministry of Health, Labor and Welfare (MHLW) notes that the aging population needs an additional 550,000 to 2.45 million caregivers by 2025.[3] Japan faces an urgent demand to fill the empty caregiving roles but experiences complications in hiring due to its restrictive immigration policies.[4] Research in this paper thus far indicates that immigration policies have not alleviated the employment shortage in Japan's elder-care industry and at most provide a short-term solution to the problem. Currently, immigration policies require foreign workers to maintain a full-time job, study for certification examinations, gain fluency in Japanese, and leave their families, collectively creating a tremendous strain on immigrant workers. A majority of workers are unable to gain permanent residence, too, and they are forced to return to their home countries after three to five years. This paper shows the trouble Japan faces in caring for its elderly absent any reforms on its immigration policies surrounding foreign caregivers.

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[1] I graduated from the University of Texas at Austin with a bachelors of arts in international relations and global studies. I plan to attend law school in the fall of 2020 to pursue public interest and international law. Thank you to Dr. Patricia Maclachlan, who encouraged me to research the issue surrounding foreign care-givers in Japan. Thank you to my family for providing constant support and guidance in all my work and endeavors.

[2] Jeff Kingston, *Demographic Dilemmas, Women and Immigration*, *in* Critical Issues in Contemporary Japan, 189 (Jeff Kingston ed., 2019).

[3] The Japan Times, *Fill the Gap in Nursing Care Workers*, Japan Times, June 26, 2018, *available at* https://www.japantimes.co.jp/opinion/2018/06/26/editorials/fill-gap-nursing-care-workers/#.XaJVzS3MzOR.

[4] Kingston, *supra* note 2, at 185–97.

To describe the context of the elder-care employment shortage, alternative causes behind Japan's elder-care employment shortage, such as the demographics of the shrinking labor force and women's entrance into the workforce, will be explored. The assessment of government documents will reveal details of Japan's Economic Partnership Agreements and other immigration policies that affect care-workers, such as the Technical Intern Trainee Program and the 2019 Specified Skills Visas.[5] After highlighting the restrictive nature of these policies, the policies will be linked to the homogenous culture and xenophobic fears of Japanese society, the influence of relevant political associations, and the job-location constraints of immigration policies. The conclusion of this paper will describe the greater implications of Japan's restrictive immigration policies for the Japanese government and citizens.

II. Explanations of the Elder-Care Employment Shortage

An aging population, low fertility rate, and limited number of foreign residents are some of the main causes of such a drastic shortage.[6] A study found that about 35 million people, or around 28 percent of Japan's population, were over 65 years old in 2017 and 40 percent of the population will be over 65 by 2055.[7] A low fertility rate, which was at a record low of 1.29 babies per woman in 2003,[8] negatively affects the country's ability to care for its elders because women are now having fewer children who can later enter the workforce and care for the country's post-World War II generation. The country's entire labor force will soon decline to 70.8 million people, compared to the high of 87 million people in 1995.[9] Various cultural and social factors are driving down the fertility rate. The proportion of women who chose to not marry increased from 18 percent in 1970 to 60 percent in 2010, and many of the women who

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[5] David Green, *As Its Population Ages, Japan Quietly Turns to Immigration*, Migration Policy Institute (March 28, 2017), https://www.migrationpolicy.org/article/its-population-ages-japan-quietly-turns-immigration.
[6] Kingston, *supra* note 2, at 185.
[7] *Id.*
[8] *Id.*
[9] The Japan Times, *supra* note 3.

marry decide to not have children because of the high cost of raising children in Japan.[10] Between 1984 and 2004, the lifecycle deficit (LCD), a measurement of consumption minus the amount of income, increased by 61 percent in Japan. The LCD for people aged 0 to 19, which shows the approximate cost of having a child in Japan, equaled approximately ¥2.3 million (approximately $21,000) per person by 2004.[11]

Japanese women have historically assumed the care-giving role in their families and local communities, as approximately 85 percent of caregivers are female relatives.[12] Another driving force of the shortage of care-workers is the decision of many women to enter the workforce, with approximately 70 percent of women participating in the labor market in 2017.[13] By joining the workforce, women become likely to bear children and assume the caregiver role in their families. Japanese women additionally face long working hours, a lack of family-friendly work environments, and an undue pressure to quit their jobs when pregnant.[14]

Lastly, Japan's privatization of its care-industry under the Long Term Care Insurance (LTCI) program beginning in 2006 worsened the elder care employment shortage by deteriorating the working conditions of home caregivers.[15] The privatization of the LTCI has minimized the costs of care-giving while simultaneously increasing the demand for home caregivers.[16] In doing so, the LTCI also reduced wages, decreased job security, and increased working hours,[17] and because of the deteriorating environment for elder-care workers after

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[10] Kingston, *supra* note 2, at 186.
[11] Naohiro Ogawa et al., *Declining Fertility and the Rising Cost of Children*, 5 Asian Population Stud, n.3 289–307 (2009).
[12] Kingston, *supra* note 2, at 188.
[13] *Id.* at 195.
[14] *Id.* at 186–87.
[15] *See* Kaye Broadbent, *'I'd Rather Work in a Supermarket': Privatization of Home Care Work in Japan,* 28 Work, Emp. & Soc'y, 702–17 (2014).
[16] *Id.* at 703.
[17] *Id.*

the implementation of the LTCI, some Japanese workers are now hesitant to become home caregivers.[18]

III. Immigration Policies

The Japanese government has recognized the importance of admitting foreign caregivers into Japan as a form of skilled labor and has refined its policies regarding caregivers many times over the past three decades. As of 2017, foreign residents consisted of 1.95 percent of the population in Japan, with the majority of the foreign residents having a permanent resident status, special permanent resident status, long-term resident status, or a trainees and technical interns visa.[19] Current immigration policy is built upon the Immigration Control and Refugee Recognition Act.[20] The law was reformed in 1990 to establish the Technical Intern Training Program (TITP), which permits unskilled laborers to work in Japan for a designated time period. Collectively, the Economic Partnership Agreements (EPAs), TITP reforms and the 2019 Specified Skills visa have allowed a low percentage of caregivers to work in Japan.

EPAs with other Southeast Asian countries allow foreign caregivers to work in Japan, even though the Japanese government officially states the EPAs were intended to strengthen economic partnerships and not to relieve Japan's elder-care employment shortage.[21] The number of agreements is small, but they have helped bring caregivers to Japan:[22] They allow up to 1,000 foreign nurses and caregivers from Indonesia, the Philippines, and Vietnam each year.[23] Despite this, the government has brought in far fewer than 1,000 workers from each country. In 2008 and 2009, Japan offered work to 101 Indonesian caregivers, which reflects Japan's difficulties

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[18] *Id.* at 713–14, n.14.
[19] Michael Strausz, Help (Not) Wanted: Immigration Politics in Japan, 62 (2019).
[20] Shutsunyūkoku Kanri Oyobi Nanmin Nintei-hō [Immigration Control and Immigration Control Act], Cabinet Order No. 319 of 1951.
[21] Strausz, *supra* note 19, at 79.
[22] *Id.*
[23] Kingston, *supra* note 2, at 189.

recruiting qualified Indonesian candidates.[24] Indonesian caregivers face many challenges put forward by the Japan's government, including a requirement that candidates attend vocational and language training and master Japanese in six months.[25] After taking the expedited training, Indonesian caregivers then must work in Japan for four years, after which they are required to pass certification examinations for care-giving and the Japanese language in order to remain in Japan on a renewable three-year visa.[26]

Under the agreement with the Philippines, Japan's elder-care infrastructure has similarly experienced difficulty recruiting caregivers and brought in only 323 care-workers from 2009 to 2011.[27] Caregivers from the Philippines are required to have a degree from a four-year vocational program and pass certification examinations to work in Japan.[28] Unlike the Indonesian caregivers, Filipinos who pass the examination are allowed to stay in Japan indefinitely.[29] Vietnam's EPA closely resembles the Philippines' and Indonesia's, especially in regards to the degree and certification exam requirements.[30]

The limited number of people able to pass the certification examinations has contributed to the EPAs remarkably limited benefit in lowering the elder-care employment shortage. Thirty-six out of 95 eligible foreign caregivers passed the certification examination in 2012, 104 foreign caregivers passed in 2016, and 213 foreign caregivers passed in 2017.[31] Though the number of foreign givers who

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[24] The recruitment challenges faced by the Japanese government stem from concerns of the foreign caregivers having limited success in passing certification exams and gaining extended visas. *See id.* at 189–90.

[25] *See* Agreement Between Japan and the Republic of Indonesia for an Economic Partnership, Annex 10 § 6, Japan-Indon., July 1, 2008 [hereinafter Japan-Indonesia EPA].

[26] Kingston, *supra* note 2, at 190.

[27] Gabriele Vogt, Population Aging and International Health-Caregiver Migration to Japan, 28, 47 (2018).

[28] *See* Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, Annex 8 § 6, Japan-Phil., Nov. 29, 2004.

[29] Kingston, *supra* note 2, at 190.

[30] In 2017, only 89 Vietnamese caregivers, 62 Indonesian caregivers, and 62 Filipino caregivers passed the certification exam. *See id.*

[31] *Id.* at 190.

pass the certification exam is increasing, their passing rate, compared to the rate of native Japanese caregivers, is considerably lower.[32] Around 65,574 caregivers, Japanese and foreign, passed the exam and earned the proper certification to work in Japan in 2017, yet with a projected loss of employees entering the industry, the government estimates there will still be a shortage of 380,000 caregivers in 2025.[33] The number of foreign caregivers passing the examination will remain considerably low relative to the expected shortage of caregivers in 2025 unless the current certification policy is changed to enable more foreign workers to have extended time on their visas.

Japan's Technical Intern Training Program (TITP) was originally created in the 1990s to allow unskilled laborers to intern in Japan for two years but has since been amended multiple times to strengthen legal protections for interns.[34] More recently, the TITP was reformed in 2009 and 2010 to include labor laws to prevent employers from infringing on the interns' human rights and to prevent them from scamming interns into debt bondage and forced labor.[35] While the TITP has been a useful way to allow foreign employees to enter Japan's elder-care industry, it has not been widely helpful in alleviating the caregiver shortage. The program requires the interns to pass certain proficiency tests in order to apply for the program.[36] These tests are offered in specific foreign countries a limited number of times each year, so individuals must prepare far in advance for the examination. While working full-time, the interns are expected to attend 240 hours worth of Japanese lectures before the examination. Additionally, the program has not been widely beneficial in reducing the elder-care

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[32] The pass rate for Indonesian and Filipino caregivers in 2017 was around 38 percent, while the overall pass rate was 71 percent for the Japanese and foreign populations combined. *See id.*

[33] *Id.*

[34] Daniel Kremers, *Transnational Migrant Advocacy from Japan: Tipping the Scales in the Policy-Making Process*, 87 Pac. Affairs 715, 715–18 (2014).

[35] *Id.* at 718.

[36] JITCO, *Technical Intern Training Program*, Japan International Trainee & Skilled Worker Cooperation Organization (2019), https://www.jitco.or.jp/en/regulation/care.html.

employment shortage because of prior work experience and other certification requirements.[37]

Most recently, Japan launched the Specified Skills visa program in April 2019 to allow and encourage skilled foreign caregivers to work in Japan's elder-care field.[38] This differs from previous immigration policies because it includes procedures that will help foreign workers adapt and coexist in Japan.[39] These measures, which include the dissemination of information from the government in various languages and assistance in finding housing, were included in the Specified Skills visa program to help foreigners adjust to life in Japan.[40] Applicants for caregiving must pass both the Japanese proficiency and nursing skills evaluation test, which was created by the MHLW to ensure that caregivers have the necessary knowledge to succeed in this field.[41] Through this visa program, Japan is widening its reach for caregivers beyond Southeast Asia and into Cambodia, Nepal, Myanmar, and Mongolia.[42]

Yet, these new measures may not have a positive impact on the elder-care industry. Two different classifications of the visa, SSV-1 and SSV-2 classifications, are contingent upon the field of work of the foreign worker. The SSV-1 classification is renewed either annually, every six months, or every four months for a maximum of a five-year stay in Japan.[43] After the five years have been completed on the SSV-1 visa, the visa-holders are eligible to apply for the SSV-2 classification. Unfortunately, the SSV-2 visa does not apply to the field of elder-care.

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[37] Kingston, *supra* note 2, at 191.
[38] *See* Press Release, Ministry of Foreign Affairs of Japan, A New Status of Residence "Specified Skilled Worker" Has Been Created (April 2019) *available at* https://www.mofa.go.jp/files/000459527.pdf.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Kyodo News, *Japan to Conduct Tests for Caregivers in 4 Asian Nations This Fall*, Kyodo News+ (July 24, 2019), *available at* english.kyodonews.net/news/2019/07/4c9e6e410c03-japan-to-conduct-tests-for-caregivers-in-4-asian-nations-this-fall.html.
[43] Ministry of Foreign Affairs of Japan, *Working Visa: Specified skilled worker (i)/(ii)*, Ministry of Foreign Affairs of Japan (April 1, 2019), https://www.mofa.go.jp/ca/fna/page4e_000996.html.

Thus, elder-care workers are only able to reside and work in Japan for a maximum of five years on the SSV-1 visa.[44] This immigration policy is ultimately limited in its long-term benefit in increasing the number of caregivers.

An overview of the EPAs, TITP, and the 2019 Specified Skills visa program indicates that Japanese immigration policies are not supplying an adequate number of caregivers to prepare the country for its tremendous increase in demand over the coming years and are preventing the elder-care labor force from growing substantially over time.

IV. Problems with Japanese Immigration Policies

Japanese society widely holds notions of distrusting immigrants and foreign residents, which is partly ignited by the media's depiction of foreigners.[45] Japanese media sensationalizes stories regarding undocumented foreign workers who remain in Japan after their visa has expired.[46] The media also dramatizes the criminal actions of foreigners, such as the murder of a child in Hiroshima in November 2005, reinforcing a belief that foreign workers are more likely to commit crime and bring violence into Japan.[47] The reflection of a homogenous cultural identity in Japan's immigration policies regarding care-giving are further "designed to fail" due to other influences of political associations and xenophobic fears of Japanese society.[48]

Japan appears to have a one-ethnicity cultural identity that it intends to keep. According to Momochi Akira, a law professor at Nihon University, foreign workers having the ability to gain Japanese citizenship "[pose] an existential threat to something fundamental

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[44] Katherine, *Japan's New Specified Skills Visa in April 2019*, FAIR Study in Japan, (Feb. 6, 2020), https://studyjapan.fairness-world.com/japans-new-specified-skills-visa.

[45] Vogt, *supra* note 27, at 27–8

[46] *Id.*

[47] Jeannette Behaghel & Gabriele Vogt, *Arbeitsmigration nach Japan: Rechtliche Rahmenbedingungen, politischer Diskurs* [Labor Migration to Japan: Legal Framework, Political Discourse], 18 Japanstudien 111, 141–42 (2017).

[48] *See* Vogt, *supra* note 27.

about Japan."[49] Some foreign caregivers and nurses note that Japanese elders are sometimes rude and prevent foreigners from feeling accepted into their culture.[50] Many political associations and lobbying groups contribute to pressuring the government to restrict the permanent residence and citizenship of foreign residents. The Japanese Nursing Association even argued that foreign workers would deteriorate working conditions, decline service quality, and undermine the professionalism of Japanese care workers and nurses.[51]

Xenophobia in Japan also influences the federal government's actions and the incorporation of foreigners into Japanese society. Some anti-immigrant labor unions, like the Japanese Trade Union Federation, publicly promote the idea that foreign workers are more prone to commit crimes than native ones.[52] While the government might not directly listen to the labor union's opinions, the unions still retain a loud and public voice. Additionally, xenophobia affects the social integration of foreign caregivers and the hiring practices of institutionalized elder-care facilities and hospitals. According to the head of a nursing home in Sendai, nursing homes and hospitals are concerned about hiring foreign caregivers because the nursing homes and hospitals have "xenophobic anxiety as to how patients and their relatives might react when facing foreign health-care-givers."[53] Studies show that 46.2 percent of Japanese people who responded to a World Value Survey do not trust foreign workers entirely, whereas 32.6 percent of the respondents answered they "do not trust very much" and

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[49] Michael Strausz, *Japanese Conservatism and the Integration of Foreign Residents*, 11 Jap. J. Pol. Sci. 245, 256 (2010).

[50] *See* Vogt, *supra* note 27, at 92, wherein Dewi Rachmawati, an Indonesian nurse who arrived in Japan through the Japan-Indonesian EPA, said that "her Japanese co-workers gave her the cold shoulder … kept looking down at her and bullied her." Rachmawati also noted that there was "a border that is nurtured mainly by exclusion based on the ground of ethnicity" between her native coworkers and herself.

[51] Junichi Akashi, *New Aspects of Japan's Immigration Policies: Is Population Decline Opening the Doors?*, 26 Contemp. Japan 175–96 (2014).

[52] *See id.*

[53] Vogt, *supra* note 27, at 28.

3.6% claimed not to "trust at all."[54] which could be one reason nursing homes and hospitals are wary of hiring foreign caregivers.

Japanese immigration policies employ foreign caregivers only at large hospitals and nursing homes, which misses employment opportunities available at private homes, neighborhood associations, and community centers. Neighborhood associations work with local governments to distribute food to local elderly populations, organize trips to nearby health-care facilities, and discuss health-care issues with the elderly, but foreign residents are largely unable to work in these neighborhood associations.[55] Because more than 90 percent of people 65 and older live independently at home and most of the Japanese elderly prefer to live at home, much of the elder-care opportunities are in private homes and local community centers.[56] By not employing foreign residents in these local environments, the federal government is not strategically employing the few foreign caregivers it admits into its labor force.

V. Dissatisfaction of Caregivers

The dissatisfaction caregivers face in their day-to-day lives presents another obstacle in reducing the elder-care employment shortage. Caregiving is a profession that demands significant effort, patience, and time. Foreign and local Japanese caregivers often express displeasure with their profession for various reasons. The results from a survey in 2015 by the Care Work Foundation indicated that 61.3 percent of respondents, who are Japanese and foreign caregivers, were dissatisfied with their profession.[57] When asked the reasons behind their discontent, the respondents most noted low wages, physically and mentally hard work, low esteem in society, difficulty taking vacation days, and unstable employment situations.[58] These hardships faced by both Japanese and foreign caregivers can

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[54] *Id.* at 90.

[55] Current migration policies permit employment of foreign caregivers only at large hospitals and nursing homes and prevent the recruitment of foreign caregivers at community centers and private homes. *See id.* at 27.

[56] Kingston, *supra* note 2, at 188.

[57] Vogt, *supra* note 27, at 23.

[58] *Id.* at 23–24.

derail those workers from working in Japan, which could exacerbate the shortage.

Foreign caregivers observe additional undue stress from their employment requirements. Even though employers are required to give foreign caregivers time to prepare for their Japanese examinations, many of them ignore that rule.[59] A few associations, like the Licensed Filipino Caregiver Association, have formed to provide foreign caregivers with training in less urbanized areas, but the majority of foreign caregivers are employed in institutionalized facilities in urban areas, which prevents these associations from having a larger overall benefit on the lives of foreign caregivers.[60]

Foreign caregivers experience an underutilization of skills and a downgrade in their employment status even though they have attained recognized degrees in their profession. With the extra certifications, they are overqualified for disproportionately low-paying jobs relative to their Japanese counterparts.[61] Foreign caregivers require supervision from a full-time Japanese caregiver and are not allowed to perform medical procedures until they pass the national certification examinations.[62] Moreover, after investing at least four years of their lives working in Japan, the caregivers are faced with the possibility of failing the examinations and being sent back to their home countries.[63] Even when foreign caregivers pass the national certification examinations and gain permanent visas, they are not guaranteed a pathway to citizenship,[64] which further discourages many international caregivers from working in Japan.

Foreign residents experience a difficult time adjusting to life in Japan because they encounter social discrimination and lack

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[59] *Id.* at 52.
[60] *Id.* at 29.
[61] Jasmine Zahra Bisheh, A Comparative Analysis of Divergent Immigration Policies for Foreign Elderly Care Workers in Japan and South Korea 25–26 (May 2017) (published M.A. thesis, University of Texas at Austin) (on file with University of Texas Libraries, University of Texas at Austin).
[62] *Id*.
[63] Vogt, *supra* note 27, at 51.
[64] *Id.* at 67–74.

opportunities to see their families. Besides dealing with anti-immigrant sentiments in their professional lives, foreign residents can experience this phenomenon in their personal lives as well. Though the government permits foreign residents to join the national health insurance system and pension programs, they have not passed thorough anti-discrimination policies regarding foreign workers.[65] The Japanese Supreme Court ruled in 2014 that municipalities are not required to distribute public welfare benefits to foreign workers and permanent residents. The decision was based on the court's opinion that foreign residents are not considered Japanese nationals, which allows municipalities to discriminate against foreigners.[66] Foreign caregivers can therefore be subjected to discrimination when joining an insurance program, setting up a pension program, or finding housing,[67] making their lives increasingly difficult.

VI. Conclusion

The Japanese government has tried to use immigration policies like the Economic Partnership Agreements and Technical Intern Training Program to encourage employment of temporary immigrant caregivers as one method to reduce the elder-care employment shortage, yet these policies have only a short-term impact. The limited duration of visas and mediocre pass rates on the national certification examinations suggest that foreign caregivers provide at best short-term relief for the employment shortage.

As Japan has designed its immigration policies, it has created a restrictive immigration system that ensures the country's self-preservation.[68] While state governments have the right and arguably the responsibility to regulate immigration, those governments should consider the possibility of reciprocity in their decision-making

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[65] Green, *supra* note 5.

[66] Tomohiro Osaki, *Welfare Ruling Stuns Foreigners*, Japan Times, July 19, 2014, *available at* https://www.japantimes.co.jp/news/2014/07/19/national/social-issues/welfare-ruling-stuns-foreigners/#.XqYJ1tNKijR.

[67] Green, *supra* note 5.

[68] Teresa Sullivan, *Immigration and the Ethics of Choice,* 30 Int'l Migration Rev. 90, 100 (1996).

regarding the long-term employment of foreign caregivers.[69] Strategic reciprocity has been used by governments to compel other national governments into implementing similar actions or programs.[70] The importance of reforming Japan's immigration policies rises partly out of concern for the reciprocal treatment of Japanese immigrants abroad, as other governments could envision Japan's policies as uncooperative and lead those governments to discriminate against Japanese workers abroad.[71] Compared to other countries seeking to import foreign labor to their own elder-care workforce, Japan has orchestrated its elder-care field and immigration policies to ultimately be inferior to other countries' policies. An analysis of government policy and anecdotes from foreign caregivers reveal that the restrictive immigration policies provide, at most, a short-term relief from the employment shortage. With the challenges of adjusting to a new one-ethnicity culture, balancing work and studying for exams, and the difficulty of certification exams themselves, foreign workers face more troubles building a permanent life in Japan than in other countries. Unless reforms are made to address these challenges, Japan will likely experience immense troubles as the elder-care employment shortage persists and increases when the youngest of the baby-boomers continue to age.

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[69] *Id.* at 96.

[70] Anita Manatschal, *Reciprocity as a Trigger of Social Cooperation in Contemporary Immigration Societies?*, 58 Acta Sociologica 233, 235 (2015).

[71] Deborah Milly, *The Rights of Foreign Migrant Workers in Asia: Contrasting Bases for Expanded Protections*, *in* Human Rights and Asian Values 300, 320–21 (Michael Jacobsen & Ole Bruun eds., RoutlegeCurzon 2003) (2000).

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Border Search Exception Doctrine in the Western District of Texas

Ruben Aguirre[1]

The jurisdiction of the United States District Court for the Western District of Texas covers one of the largest sections of the United States-Mexico border. With the district spreading over 92,000 square miles but lacking in settled populations,[2] the roads are frequently used to smuggle drugs and immigrants.[3] The district is also home to some of the largest cities in Texas, including El Paso, Midland, Pecos, Alpine, Del Rio, San Antonio, Austin, and Waco.[4] These cities, with access to major roads and waterways, serve as hubs for international drug smuggling and human trafficking.[5]

Distinguishing a truck carrying concrete bags from one moving hundreds of pounds of marijuana is a difficult task for border patrol agents. Apprehending every vehicle whose driver appears Mexican would blatantly disregard the Fourth Amendment, and Department of Homeland Security (DHS) officers must secure U.S. borders from illegal activity. A lack of uniform jurisprudence among lower courts fails to guide agents who must balance national security concerns and individual liberties, but the Supreme Court over the years has created the Border Search Exception Doctrine to help balance these interests properly.

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[1] I recently graduated from the University of Texas at El Paso with a bachelors of arts, majoring in political science and minoring in legal reasoning. I will be attending Northwestern Pritzker School of Law this upcoming semester. I would like to thank Judge Philip Martinez at United States District Court for the Western District of Texas, who inspired me to write this article while working for him. Furthermore, I would like to thank Kirk von Kreisler, a head editor of the *Texas Undergraduate Law Review*. I am very grateful for his help and for everyone else on the team who contributed to this article.

[2] The United States Attorney's Office Western District of Texas, *Offices of the Western District of Texas*, United States Department of Justice (Jan. 2, 2018), https://www.justice.gov/usao-wdtx/offices-western-district-texas.

[3] United States Sentencing Commission, Quick Facts on Federal Drug Trafficking Offenders (2016).

[4] The United States Attorney's Office Western District of Texas, *supra* note 2.

[5] United States Sentencing Commission, *supra* note 3.

I. History of the Border Search Exception Doctrine

Three specific cases established the Border Search Exception Doctrine allowed DHS officers to pull over a vehicle suspected of harboring undocumented immigrants or drugs: Terry v. Ohio,[6] United States v. Ramsey,[7] and United States. v. Brignoni-Ponce.[8] Collectively, these cases built upon each other and now give courts guidelines for cases arising from apprehensions of motor vehicles along the United States-Mexico border.

The Fourth Amendment states, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[9] One of the first instances of its enforcement was through the 1914 case *Weeks v. United States*, where the Court held that evidence obtained through an illegal search and seizure is inadmissible.[10] *Weeks* created the "exclusionary rule," which barred all illegally seized evidence from being admissible in court and has since helped the Court reinforce other constitutional protections.[11] The rule was later expanded in succeeding cases to exclude "evidence discovered later that is derivative of [the] illegality or constitutes 'fruit of a poisonous tree.'"[12] Because of this rule, any evidence obtained in an illegal traffic stop would be inadmissible in court.

The right protecting against unreasonable searches and seizures proved ineffective, however, as it could not be enforced by all state

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[6] *See* Terry v. Ohio, 392 U.S. 1 (1968), explaining how a "stop and frisk" search was deemed constitutional given the specific facts and the reasonable suspicion of the officers [hereinafter *Terry*].

[7] *See* United States v. Ramsey, 431 U.S. 606 (1977), wherein the Court stated that there was an exception to the requirement of probable cause or a warrant at the border [hereinafter *Ramsey*].

[8] *See* United States. v. Brignoni-Ponce, 422 U.S. 873 (1975), establishing the Border Search Exception doctrine [hereinafter *Brigoni-Ponce*].

[9] U.S. Const. amend. IX, § 1.

[10] Weeks v. United States, 232 U.S. 383 (1914).

[11] *See* Dallin H. Oaks, *Studying the Exclusion Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

[12] United States v. Jackson, 596 F.3d 236, 241 (5th Cir. 2010) (the "fruit of a poisonous tree" metaphor is often used in Fourth Amendment cases to illustrate the effects of using evidence from an illegal source).

governments until *Mapp v. Ohio*, when the "fruit of a poisonous tree" defense expanded to state and local courts.[13] With the introduction of this defense to Texas state law, border patrol agents were required to exercise increased caution in searches. Though *Mapp* addressed the notion of being unable to admit illegally obtained evidence, it failed to provide distinct guidelines on determining if evidence had been illegally obtained. The aftermath of *Mapp* created confusion in differentiating a legal search and seizure from an illegal one, but *Terry v. Ohio* clarified this issue.[14]

In this case, petitioner John Terry and his two accomplices were pacing in front of a store in downtown Cleveland when their suspicious movement caught the attention of a local police officer, Martin McFadden. Officer McFadden approached the men, asked them questions, and then searched them for weapons.[15] He initially did not find anything, but after further inspection inside the store, he discovered Terry and one of his accomplices each possessed a pistol.[16]

Terry, which was decided in 1968, questioned the limits and legality of a "stop and frisk." Chief Justice Earl Warren wrote for the majority that the law did not give law enforcement full autonomy to stop anyone.[17] He wrote, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[18] Secondly, the Court ruled that only when law enforcement are "give[n] rise to a probable cause to believe that

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[13] Mapp v. Ohio, 367 U.S. 643, 658 (1961) [hereinafter *Mapp*].
[14] *Terry*, 392 U.S. at 30 (1968).
[15] *Id.* at 6–7.
[16] *Id.* at 7.
[17] *See id*. at 21–22 (quoting Cf. Carroll v. United States, 267 U.S. 132 (1925) and Beck v. Ohio, 379 U.S. 89, 96–97 (1964) [hereinafter *Beck*]) (citing *Beck*; Rios v. United States, 364 U.S. 253 (1960); and Henry v. United States, 361 U.S. 98 (1959)) (footnote omitted). "[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."
[18] *Id.* at 27, quoting Brinegar v. United States, 338 U.S. 160, 174–76 (1949).

the suspect has committed a crime, then the police can proceed to make a formal 'arrest,' and a full incident 'search' of the person."[19] This ruling gave officers a legal avenue to conduct "Terry Stops"—which have since justified officials who carried out questionable searches.[20]

About 10 years later, in *United States v. Ramsey*, the Court ruled that searches made at the border "pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into [the United States] are reasonable simply by virtue of the fact that they occur at the border."[21] The Court made clear in *Ramsey* that this statement was not an exemption to the entire Fourth Amendment, but rather an exemption to the requirement that "there be neither probable cause nor a warrant."[22]

Interpreting the law becomes complicated when determining what constitutes a legal apprehension of a motor vehicle outside a port of entry. The Court previously held that in certain circumstances, "the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime."[23] Consequently, by expanding the scope of the Fourth Amendment, courts have granted officers more authority to apprehend motor vehicles. But this vague limit of authority creates inconsistent guidelines for courts and officers and also invites the possibility for different rulings in similar cases.

In *United States. v. Brignoni-Ponce*, the Court clarified that the "searches and seizures were valid method[s] of protecting the public and preventing crime."[24] In *Brignoni-Ponce*, a roving border agent made a stop and "questioned [a vehicle's] occupants concerning their

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[19] *Id.* at 10.
[20] *See* Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of* Terry v. Ohio, 34 How. L.J. 567 (1991). *See also* Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 Mıss. L.J. 423 (2004).
[21] *Ramsey*, 431 U.S. at 616.
[22] *Id*. at 622.
[23] *Brignoni-Ponce*, 422 U.S. at 881. This sentence has been quoted many times in Fourth Amendment cases. *See e.g.*, Florida v. Royer, 460 U.S. 491, 512 (1983).
[24] *Brignoni-Ponce*, 422 U.S. at 883.

immigration status and citizenship where the occupants' apparent Mexican ancestry furnished the only ground for suspicion that the occupants were aliens."[25] The Court held that when an officer's observations lead them to suspect a vehicle contains undocumented immigrants, the officer may briefly stop it to investigate the vehicle and its contents.[26] Throughout the decision, Justice Powell laid out different prerequisites to help officers determine the scope of stops when they pull vehicles over near the border. In this instance, Justice Powell wrote that "the officer may question the driver and passenger about their citizenship and immigration status, and he may ask them to explain suspicion circumstances, but any further detention or search must be based on consent or probable cause."[27] Aside from these guidelines, the *Brignoni-Ponce* decision provided a total of eight central guidelines for determining the legality of the stop, which came to be known as Border Search Exception Doctrine.

II. Required Elements for Border Search Exception Doctrine

The *Brignoni-Ponce* motor vehicle apprehension guidelines only apply when the suspected undocumented immigrant is the driver of the vehicle, or if the officer believes there are undocumented immigrants in the motor vehicle.[28] The guidelines are: the characteristics of the area in which the vehicle is encountered; the arresting agent's previous experience with criminal activity; the area's proximity to the border; the usual traffic patterns on the road; information about recent illegal trafficking of people or narcotics in the area; the appearance of the vehicle; the driver's behavior; and the number of passengers, appearance, and behavior.[29]

Courts use these guidelines as a reference when determining if stopping a vehicle for the purpose of questioning a person's immigration status violates that individual's Fourth Amendment rights. Satisfying one guideline alone is not enough to make a stop legal. The

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[25] *Id.* at 883 n.11.
[26] *Id.* at 873.
[27] *Id* at 881–82.
[28] *See id*.
[29] *Id*. at 881–84.

U.S. Court of Appeals for the Fifth Circuit created a strong framework for itself and other courts to work within. It applies "a multi-factored analysis in deciding whether there is a reasonable suspicion to stop a car in the border area,"[30] and states that the government "bears the burden of showing the reasonableness of a warrantless search or seizure."[31] The guidelines from *Brignoni-Ponce* built upon the reasonable suspicion test, which originated from *Terry*, to establish the Border Search Exception.

As the Fifth Circuit explains, "[n]one of the factors alone is dispositive, and courts must analyze them as a whole, rather than each in isolation."[32] In other words, a factor in isolation is more likely to be viewed as innocent rather than being viewed as part of a whole incident. Additionally, the Fifth Circuit has held that a warrantless detention of an individual is legal only if justified with some reasonable suspicion of criminal activity.[33] "To temporarily detain a vehicle for investigatory purposes, a Border Patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants."[34] Lastly, reasonable suspicion "requires more than merely an unparticularized hunch."[35] Reasonable suspicion does not allow law enforcement officers to apprehend anyone for any reason they deem sufficient. The officer doesn't need proof of wrongdoing, but the consideration of a number of factors to determine the legality of the apprehension.[36] Overall, courts are not willing to deem a stop legal with only one factor in

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[30] United States v. Garza, 754 F.2d 1202 (5th Cir. 1985), quoting *Brignoni-Ponce*, 422 U.S. at 873 (1975).
[31] United States v. Monsivais, 848 F.3d 353, 357 (5th Cir. 2017).
[32] United States v. Rico-Soto, 690 F.3d 376, 380 (5th Cir. 2012).
[33] Maryland v. Pringle, 540 U.S. 366 (2003).
[34] United States v. Chavez-Chavez, 205 F.3d 145, 147 (5th Cir. 2000), quoting United States v. Inocencio, 40 F.3d 716, 722 (5th Cir. 1984) and citing *Brignoni-Ponce*, 422 U.S. at 884.
[35] United States v. Gonzalez, 190 F.3d 668, 671 (5th Cir. 1999).
[36] *See id.*

favor of the plaintiff, as it must be accompanied with other pieces of evidence.

The *Brignoni-Ponce* guidelines are left to the discretion of the courts. Factors such as the area's reputation as a smuggling route, as well as an officer's experience with trucks carrying plywood, weigh in favor of agents acting on more than a mere hunch.[37] On the other hand, even with suspicious factors present, those factors do not necessarily mean that the traffic stop is justified.[38] Moreover, if a vehicle is within 500 yards of the border, the officer cannot automatically assume that it just recently crossed the border.[39]

III. Geographical Limitations for Border Search Exception

In general, the geographical reach of the Border Search Exception within the Fifth Circuit is restrained to 50 miles from the border, but this restriction is not always applied. Even if an apprehension to question a person's immigration status occurred outside the 50-mile jurisdiction, it may not necessarily be unlawful. There has been an instance where the apprehension occurred a substantial distance from the border, and yet a court deemed the apprehension to be lawful.[40]Regardless of where the apprehension took place, courts should refer to the *Brignoni-Ponce* guidelines when looking at articulable facts to determine whether an apprehension was lawful.[41]

The Fifth Circuit held that "proximity to the border is a 'paramount factor' in determining reasonable suspicion."[42] *United*

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[37] United States v. Garza, 727 F.3d 436, 438 (5th Cir. 2013) [hereinafter *Garza*].
[38] *See* United States v. Freeman, 914 F.3d 337, 347 (5th Cir. 2019).
[39] *Id.*
[40] *See* United States v. Garcia, 732 F.2d 1221, 1228 (5th Cir. 1984).
[41] United States v. Escamilla, 560 F.2d 1229, 1232 (5th Cir. 1977).
[42] United States v. Orozco, 191 F.3d 578 (5th Cir. 1999), quoting United States v. Villalobos, 161 F.3d 285, 288 (5th Cir. 1998); *see also* United States v. Zapata-Ibarra, 212 F.3d 881 (5th Cir. 2000); and United States v. Melendez Gonzalez, 727 F.2d 407, 411 (5th Cir. 1984), stating that "[T]his Court has repeatedly emphasized that one of the vital elements in the *Brignoni-Ponce* reasonable suspicion test is whether the agents had reason to believe that the vehicle in question had recently crossed the border" (citing United States v. Pena–Cantu, 639 F.2d 1228, 1229 (5th Cir. 1981); United States v. Pacheco, 617 F.2d 84, 86 (5th Cir. 1980); and United States v. Lamas, 608 F.2d 547, 549 (5th Cir.1979)).

States v. Garza established in 2013 that "anything less than 50 miles implicates the proximity factor."[43] The circuit court has adopted the *Garza* decision to determine if the distance of the apprehension satisfies the *Brignoni-Ponce* guidelines.

However, the 50-mile proximity is one of many factors that needs to be assessed in determining the legality of an apprehension. In *United States v. Garcia*, the apprehension occurred between 50 and 100 miles from the U.S.-Mexico border.[44] Despite this aberration, the Fifth Circuit considered the "totality of the evidence" concluding that the border patrol agent "had reasonable suspicion" for a stop that occurred more than 50 miles from the border.[45]

The 2018 *Garcia* decision relied partly on *United States v. Cervantes*.[46] In *Cervantes*, U.S. Customs and Border Patrol agents pulled over a car that was traveling more than 200 miles from the U.S.-Mexico border, near Odessa, Texas. The agents saw the truck was sagging from the back with five passengers inside, and they proceeded to pull the vehicle over. Judge Owen wrote in the Fifth Circuit's decision that "even where a vehicle is beyond the fifty-mile benchmark, the fact that the northbound vehicle was traveling from the direction of the Mexico–United States border can be a legitimate factor when viewed in conjunction with other factors."[47] Hence, in *Garcia*, even though the initial apprehension and arrest occurred outside the 50-mile radius, the court denied Garcia's motion to suppress evidence. Moreover, the court ruled that if the area of apprehension is outside the Fifth Circuit's 50-mile radius but is a "notoriously known as a smuggling route," it can weigh in the favor of officers' assessments to suspect that a vehicle is carrying undocumented immigrants.[48]

Additionally, courts have held that a strip of highway allowing undocumented immigrants to circumvent a border patrol checkpoint

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[43] *Garza*, 727 F.3d at 441 (5th Cir. 2013).
[44] United States v. Garcia, 743 F. App'x 559 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1577, 203 L. Ed. 2d 736 (2019) [hereinafter *Garcia*].
[45] *See id.*
[46] United States v. Cervantes, 797 F.3d 326 (5th Cir. 2015) [hereinafter *Cervantes*].
[47] *Id.* at 330, quoting United States v. Soto, 649 F.3d 406, 410 (5th Cir. 2011).
[48] *Garcia*, 743 F. App'x 559 (5th Cir. 2018).

increases the rationality of an agent's suspicion.[49] Nevertheless, even if a court determines the proximity guideline is not satisfied, it can turn to the other *Brignoni-Ponce* guidelines—such as the "characteristics of the area, the agents' experience, information about recent immigrant and narcotics smuggling in the area, the unusual traffic patterns, the driver's behavior, and the vehicle's characteristics contribute to reasonable suspicion."[50]

IV. Increased Apprehensions Since the Start of the Trump Administration

Since the beginning of the Trump Administration, DHS officers have aggressively pursued undocumented immigrants attempting to enter the United States from Mexico. In the past three years, the number of apprehensions has increased at ports of entry, on the physical border, and outside the immediate vicinity of the border.[51] The Fifth Circuit has acknowledged this uptick in apprehensions.[52] Since then, there have been many cases that have challenged apprehension under the *Brignoni-Ponce* guidelines within the Fifth Circuit's jurisdiction, but only four petitioners have succeeded in suppressing evidence based on the legality of how it was obtained.[53] There will be more appeals in the future as the rate of apprehensions near the border increases, and because the *Brignoni-Ponce* factors are

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[49] See United States v. Compian, No. 2:16-CR-1045, 2017 WL 1650185, at 1 (S.D. Tex. May 2, 2017), explaining how "[h]uman smugglers commonly use FM 755 as a drop-off, where they unload undocumented immigrants so that the immigrants can circumvent the checkpoint on foot." *See also* United States v. Hernandez, 477 F.3d 210, 211 (5th Cir. 2007), explaining how immigrants "follow ranch or county roads or walk about six hours through the desert from the Rio Grande, approximately eighteen miles away, for pickup by smugglers on U.S. 83, north of any checkpoint."

[50] *Id*. at 736.

[51] John Gramlich, *How border apprehensions, ICE arrests and deportations have changed under Trump*, Pew Research Center (March 2, 2020), https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/.

[52] *See* United States v. Robles-Avalos, 895 F.3d 405, 408 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 493, 202 L. Ed. 2d 386 (2018).

[53] *See* United States v. Martinez-Aleman, 706 F. App'x 816 (5th Cir. 2017); United States v. Alaniz, 278 F. Supp. 3d 944 (S.D. Tex. 2017); United States v. Aguilar-Garza, No. 5:18-CR-368, 2018 WL 5083885 (S.D. Tex. Oct. 17, 2018); and United States v. Freeman, 914 F.3d 337 (5th Cir. 2019).

not one definite algorithm, judges who will decide the legality of apprehensions and arrests risk expanding an existing gray area. This uncertainty will hurt the fairness of our judicial system, but—more importantly—those directly impacted by inconsistent decisions.

GDPR: The EU's Right to Privacy and Defense of Identity

Hubert Ning

I. Introduction

In the modernizing world, governments continue to restrict personal privacy. Since the 2013 global surveillance disclosures by Edward Snowden, the right to privacy has become a major point of international debate, throwing countries and their legal systems into fervid dialogue regarding a fundamental, inalienable right. Snowden's release of thousands of National Security Agency (NSA) documents revealed questionable details about it and its global partners' surveillance practices and the extent to which our information, data, and identity are protected.[1] The documents showed how governments and corporations conducted surveillance on hundreds of millions of individuals, monitoring calls, texts, online messages, and social media platforms without the public's knowledge or consent.[2] Amid the governments' invasions of privacy and private sector sharing of consumer information, the European Union (EU) has taken measures to safeguard the identities of millions of individuals. The EU's General Data Protection Regulation (GDPR)[3] regulates data protection, privacy, and information transfer for those living within the EU and the European Economic Area (EEA).[4] While other privacy laws exist around the world, the GDPR differentiates itself from predecessors by granting individuals complete control over their personal

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[1] *See* Hanna Kozlowska, *The Cambridge Analytica scandal affected nearly 40 million more people than we thought*, QUARTZ (April 4, 2018), https://qz.com/1245049/the-cambridge-analytica-scandal-affected-87-million-people-facebook-says/.

[2] *Id.*

[3] Regulation 2016/679 of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Advancement of Such Data, and repealing Directive 95/46/EC, 2016 O.J. (L 119/1) [hereinafter the GDPR].

[4] Julianna De Groot, *What Is the General Data Protection Regulation? Understanding & Complying with GDPR Requirements in 2019*, DIGITAL GUARDIAN (Dec. 2, 2019), https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection.

information—an element based on the EU's belief in every individual's right to privacy.[5]

II. The Right to Privacy Before the Contemporary Era of Technology

Natural rights, such as privacy, are not completely dependent upon the laws of any particular government; they are universal and inalienable. The longstanding right to privacy protects individuals, safeguards personal identities, offers a mechanism critical for self-expression. Recently, the concept of privacy has been extending to encompass new forms of personal information and data. But while violations of personal privacy have shocked contemporary society, including the Facebook-Cambridge Analytica scandal and the NSA surveillance program, the right of privacy extends back to the late 19th century. The *Harvard Law Review* contains one of the first instances of privacy rights advocacy in America.[6] Samuel Warren and Louis Brandeis, who later became a U.S. Supreme Court justice, articulated the principle of the "right of being let alone" and outlined the importance, both politically and socially, of such a right.[7]

Twelve years after being confirmed to the Court in 1916, Brandeis relied on this school of thought in his dissenting opinion in *Olmstead v. United States*.[8] In *Olmstead*, the Court ruled that the use of unapproved wiretapped private telephone conversations did not violate Fourth and Fifth Amendment rights.[9] In Brandeis' dissent, which drew upon his paper "The Right to Privacy," he wrote that personal privacy

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[5] *See* the GDPR, art. 1, at 32.

[6] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[7] *See id*. at 195–96. stating "Of the desirability—indeed of the necessity—of some such [privacy] protection, there can, it is believed, be no doubt … The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."

[8] Olmstead v. United States, 277 U.S. 438, 471–85 (1928) (Brandeis, J., dissenting).

[9] *See id.* at 438–69.

should be embedded in constitutional law.[10] However, it took nearly 40 years until privacy formally fell within the legal scope of the American judicial system through *Katz v. United States*.[11] Overturning *Olmstead*, the Court in *Katz* redefined limitations of the Fourth Amendment, enumerating the expectation of privacy as an inalienable right.[12] This expectation of privacy became crucial to clarifying the scope of privacy protection under the Fourth Amendment in the digital age. Not only did *Katz* establish the expectation of privacy, it also introduced the foundations of a legal test to determine whether an individual's "reasonable expectation of privacy"[13] was violated. The expectation contains two parts: "subjective expectations" and "objective and reasonable" expectations.[14] Subjective expectations of privacy revolve around an individual's opinion about situational privacy and whether it was violated.[15] Objective and reasonable expectations of privacy, however, are expectations generally accepted by society and laws.[16] Ultimately, the expectation of privacy that rose from *Katz* helped cement the importance of individual rights to privacy into the spectrum of significant legal issues the modern world would eventually need to adapt to and address.

III. The Right to Privacy During the Contemporary Era of Technology

The right to privacy has always safeguarded identity. Now, these rights seem almost nonexistent, as over 90 percent of consumers sign their rights away in terms and agreements they do not read.[17]

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[10] *See id.* at 476, stating "Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it" (Brandeis, J., dissenting).

[11] Katz v. United States, 389 U.S. 347 (1967) [hereinafter *Katz*].

[12] "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *See id.* at 359.

[13] *See id.* at 360 (Harlan, J., concurring).

[14] *Id.* at 361.

[15] *Id.*

[16] *Id.*

[17] Caroline Cakebread, *You're not alone, no one reads terms of service agreements*, Business Insider India (Nov. 15, 2017), https://www.businessinsider.in/Youre-not-alone-no-one-reads-terms-of-service-agreements/articleshow/61659553.cms.

Individuals give up their personal information, behavioral data, financial records, and more without considering the ramifications their actions could bring. This habit of unknowingly sacrificing data protections, signatures, and personal information erodes the safeguards of identity guaranteed through the right to privacy. Considering how intertwined privacy rights are with information and communication technology, it is important to recognize the personal liberties at stake as we progress toward an era defined by revolutionary, and once unimaginable, advancements in technology.

Advancements in telecommunication and computing technology ultimately led the United States Federal Trade Commission (FTC) to produce new regulations for new privacy issues.[18] These regulations, now known as the FTC Fair Information Practice Principles (FIPPs), are held as a worldwide standard for privacy laws and regulations, but the FTC failed to provide any actual guidance on the enforcement of the principles.[19] Even though the FTC promoted ideas of privacy and outlined reasonable expectations of how to fulfill and ensure that right, FIPPs only served as an idealistic example of what a 21st-century privacy law could be in the United States. It would not be until 2016, with a new set of privacy regulations carefully meticulated and built upon the FIPPs' foundations, that the world would see a new standard of enforceable privacy protections: the GDPR.[20]

IV. Overview of the General Data Protection Regulation

Adopted on April 14, 2016, and enforced following May 2, 2018, the GDPR is a binding regulation for data protection and privacy throughout the EU. Under the GDPR, every institution, organization, and company that collects and handles data from EU residents and members of the EEA community is lawfully required to adhere to its

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[18] *See* Federal Trade Commission, *Privacy Online: Fair Information Practices in the Online Marketplace: A Federal Trade Commission Report to Congress* (May 2020) (prepared by staff of the Division of Financial Practices, Bureau of Consumer Protection).

[19] *See id. See also* Heng Xu et al., *Market Philosophy and Information Privacy*, 18 Javnost-The Public 87 (2011).

[20] *See generally* the GDPR, *supra* note 3.

guidelines and policies.[21] The law breaks down into six bases that categorize legal collection of personal identifiable information: consent, contract, public task, vital interest, legitimate interest, and legal requirement.[22] If a piece of personal information falls outside these categories, it is unlawful to collect and process.[23] The preconditional categorization of information created a new international legal precedent; never before did processed information carry a legal association. By pre-categorizing collected information, the GDPR brands every piece of consumer data protected and enforced by EU law. Should information fall under the scope of the GDPR, all legal rights and protections outlined by law are guaranteed to the information's owner. The most significant and complex category within the GDPR is consent. Unlike other privacy laws, the GDPR gives primary control of personal data to consumers, not companies, and also requires an unprecedented degree of transparency from information collectors.[24] Following the GDPR's passage, data collectors must disclose any form of data collection to users and declare the purposes of that collection.[25] Data collectors must also state how long user data is retained and whether it is transferred or shared with third parties.[26] The GDPR regulates that all users have the right to revoke data processing at any time, along with the right to request copies of information and personal data collected and used.[27]

The EU has also provided a stringent, unambiguous definition of personal data. Data can only be considered personal if it allows a degree of identification connected to an individual.[28] This definition

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[21] *Id.* art. 2 and 3, at 32–33.
[22] *See id.* art. 6(1)(a)–6(1)(f), at 36, explaining the conditions for lawful collection of information.
[23] *See id.*
[24] Michelle Goddard, *The EU General Data Protection Regulation (GDPR): European regulation that has a global impact*, 59 Int'l J. Market Res. 703 (2017).
[25] GDPR art. 15, at 43.
[26] *Id.*
[27] *Id.* art. 7, at 37.
[28] *Id.* art. 4(1), at 33, defining "personal data" as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference

gives individuals within the EU large influence over what is truly considered their personal data—whether it be phone calls, financial information, texts, and emails—and is strongly protected by the GDPR against potential loop-holes.

Businesses and institutions that handle personal user data (with the exception of select medical, government, and emergency service institutions) within the EU are all subject to the GDPR.[29] Violators of the regulations encompassed within the GDPR, including any entity within the EU and those that do business with the EEA, are subject to fines up to four percent of their annual income.[30] The GDPR also outlines the civil laws that are violated, making it easier for EU residents to initiate legal lawsuits with strong foundational backing and proof of liability.[31] This enforceability is what makes the GDPR so legally powerful and politically sustainable. Ultimately, attempts at constructing impactful privacy regulations before the GDPR, such as the FTC's FIPPs, failed to produce noticeable effects due to their inability to implement any form of prosecution.[32] Privacy can not exist without a means to enforce it.

V. GDPR and Its Global Impact

The GDPR has impacted privacy policies and laws globally, becoming a model for multiple laws outside the EU. For instance, in the United States, California passed the California Consumer Privacy Act (CCPA) in 2018, which requires a degree of transparency similar to the GDPR but requires additional degrees of control over individual personal data by its owner.[33] Chile, in 2019, created and passed the 19.628 Law, which enforces full disclosure of the purposes for

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to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

[29] *Id.* art. 4(1)–4(3), at 33.

[30] *See id.* art. 83, at 82–83, outlining the general conditions for imposing fines.

[31] *Id.* art. 77–82, at 80–82, explaining the remedies available to individuals for the law's violations.

[32] Fred H. Cate, *The Failure of Fair Information Practice Principles*, *in* Consumer Protection in the Age of the Information Economy 343, 344 (Jane K. Winn ed., 2006).

[33] California Consumer Privacy Act, Cal. Civil Code § 1798.100–1798.199 (2018).

collecting data and disclosure of when data is collected—elements taken directly from the GDPR.[34] After failing to be whitelisted (approved) by the EU as a country with an adequate level of data protection, Japan passed the Japanese Act on Protection of Personal Information (APPI) in 2017.[35] Like the GDPR, it created a set of methods allowing enforceability, as well as its own provision similar to the GDPR's right to forget.[36]

The GDPR influenced international pieces of legislation and demonstrated that the EU will not withhold from punishing violators. In January 2019, the EU fined Google €50 million for failing to comply with the GDPR's privacy rule of acquiring adequate consent from users and for not providing reasonably easy and accessible information to users in regard to how data is collected and processed.[37] In its short timeline, the GDPR has already taken monumental and unprecedented steps in both foreign influence and enforceability, and it will continue to shape the foundations of many new privacy laws.

VI. GDPR and Individual Rights

The GDPR also highlights specific individual rights and protections that have, until recently, been overlooked. Under Article 15 of the GDPR, any individual within the EU or protected by the GDPR is guaranteed the right of access.[38] This right of access is present in a series of international laws, such as the U.S. Family Educational Rights and Privacy Act (FERPA), CCPA, Singapore's Personal Data

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[34] Nicolas Poggi, *The 19.628 Law: Chile's Take on Personal Data Protection*, The Missing Report (May 16, 2019), https://preyproject.com/blog/en/the-19-628-law-chiles-take-on-personal-data-protection/.

[35] Originally that Act on the Protection of Personal Information, Law No. 57 of 2003, Japan's data privacy law was recently amended to ensure compliance with the GDPR. *See* Andrada Coos, *Data Protection in Japan: All You Need to Know about APPI*, Endpoint Protection (Feb. 1, 2019), https://www.endpointprotector.com/blog/data-protection-in-japan-appi/.

[36] Kensaku Takase, *GDPR Matchup: Japan's Act on the Protection of Personal Information*, International Association of Privacy Professionals (Aug. 29, 2017), https://iapp.org/news/a/gdpr-matchup-japans-act-on-the-protection-of-personal-information/.

[37] Chris Fox, *Google hit with £44m GDPR fine over ads*, BBC News (Jan. 21, 2019), https://www.bbc.com/news/technology-46944696.

[38] GDPR, art. 15, at 43.

Protection Act of 2012 (PDPA), and the EU-U.S. Privacy Shield of 2015. But within the GDPR, individuals hold an unprecedented amount of control. They are able to obtain all forms of detailed information on demand and revoke data collection and processing services at any time. Known as the right to object, Article 21 guarantees individuals the right to stop or prevent their personal data from being collected and processed upon request.[39] The GDPR also requires that institutions handling personal data are legally expected to inform their clients of their rights to object, therefore removing the possibility of institutions using ignorance as a defense in civil and class-action lawsuits.[40] The right to object, coupled with the right to access, provides a holistic legal defense to protect people's right to privacy. For years, privacy laws and regulations have been incomplete; laws and regulations such as FERPA and FIPP have only provided narrow privacy protections. For the first time with the GDPR, an individual's right to privacy can be protected within a single legal framework encompassing all major privacy points FIPP tried to incorporate years prior—and more. Rectification, erasure, access, restriction, objection, portability—the GDPR consolidates all these rights into a single enforceable structured document. According to Article 56, should a consumer, entity, or institution encompassed by the GDPR refuse to comply with the right of access or right to object provisions, the Supervisory Authority, a committee of independent public authorities from EU member states whose role is to "contribute to the consistent application of this Regulation throughout the Union," can impose the standard four percent penalty loss and bring other legal consequences as listed in Article 57.[41] By creating such a consequential legal and financial penalty, the EU has truly created an

[39] "The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her ... The controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims." *See id.* art. 21, at 45–46.
[40] *Id.* art. 21(4), at 46.
[41] *Id.* art. 56–57, at 67–69.

effective, protective data protection shield for its residents.

Privacy rights have been intertwined with technology even before the invention of smartphones and the internet. Brandeis' dissenting opinion in *Olmstead* implored that privacy laws were of utmost importance, deserving a place within constitutional law.[42] Brandeis identified the government as a potential privacy invader and claimed that government and political institutions are enabled to, and will, hear what is individually, secretly discussed through developments in information and communication technology.[43] Yet while the GDPR is built upon fundamental ideas and liberties cornerstoned as far back as Brandeis' dissent, the EU regulation also introduced a more contemporary, and arguably revolutionary, legal right known as the right to be forgotten or the right of rectification and erasure.[44] In article 17 of the GDPR, the right to be forgotten provides the right to erase personal information and data as long as their interests, freedoms, and fundamental rights override those of the institutions holding the data.[45] The right to be forgotten revolves around individuals' abilities to determine the public's knowledge of their own lives however they see fit, without having to be stigmatized by the press or anonymous online users as a consequence of their actions.[46] Yet, as critics argue, there are conceivable negative effects of allowing people to remove information about themselves that they

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[42] *See Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting). Brandeis argued for the importance of privacy laws, stating that, "Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the Fourth and Fifth Amendments by specific language" (quoting Boyd v. United States, 116 U.S. 616, 630).

[43] *Id.*, stating "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

[44] *See generally* Dasha Brotherton, *The Right to be Forgotten and Contemporary American Society*, 7 Tex. Undergraduate L. Rev., 39 (2018); Francesco Di Ciommo, *Privacy in Europe after Regulation (EU) No 2016/679: What Will Remain of the Right to Be Forgotten*, 3 Italian L.J. 623 (2017); and Jeffrey Rosen, *The Right to Be Forgotten*, 64 Stan. L. Rev. Online 88 (2012).

[45] GDPR, art. 17, at 43–44.

[46] Alessandro Mantelero, *The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten',* 29 Comp. L. & Sec. Rev. 229 (2013).

perceive as harmful to their reputation.[47] Most importantly, removal could be akin to censorship and a chilling effect on the freedom of speech.[48] Removing videos of online debates, open speeches, and town halls at the request of one person removes the voices of hundreds of others. With this provision in the GDPR, it is possible that data-controlling organizations could delete wholesale pieces, invoking the right to be forgotten, to avoid fines or legal charges.[49]

Regardless of these claims, since the GDPR's implementation, critics have acknowledged the law's capability to regulate information policy by bringing personal data into a structured regime.[50] The GDPR is a developing structure, with numerous amendments and proposals. Critics have rightly brought up the issue of misconceiving the right to be forgotten, and to an extent, because of its excision characteristics, the right to erasure, but the historical significance of the GDPR should first be considered. In its entirety, the GDPR symbolizes a completed step towards combining multiple aspects of previously fragmented privacy policy spread across disparate statutes. As a considerably fresh fix to this previous issue, it will take considerable time before the GDPR can sufficiently address every topic of concern; yet, the brilliant impact of the GDPR is that it is capable of doing so. It provides a laid down system of addressing a vast variety of privacy issues without creating an entirely new regulatory law or statute. In effect, it provides a mechanism to develop and change information policies in response to the generational shifting attitudes of privacy.

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[47] *See* Paul Alexander Bernal, *A right to delete?*, 2 European J. L. & Tech. 1 (2011).
[48] *See id.*
[49] Rosen, *supra* note 49, at 90–91, explaining that "[T]he prospect of ruinous monetary sanctions for any data controller that 'does not comply with the right to be forgotten or to erasure'—a fine up to 1,000,000 euros or up to two percent of Facebook's annual worldwide income—could lead data controllers to opt for deletion in ambiguous cases, producing a serious chilling effect. For a preview of just how chilling that effect might be, consider the fact that the right to be forgotten can be asserted not only against the publisher of content (such as Facebook or a newspaper) but against search engines like Google and Yahoo that link to the content."
[50] *See* Chris Hoofnagle et al., *The European Union general data protection regulation: what it is and what it means*, 28 Info. & Comm. Tech. L. 65 (2019).

VII. The Defense of Identity

The world, now more than ever, is faced with physical, spiritual, and political attacks on our privacy. The right to privacy is long overdue and should be guaranteed to all. The GDPR is one of the most holistic, impermeable pieces of regulatory law protecting individuals' right to privacy. Never before have personal information and data been brought into such a singular and protective legal framework. By consolidating privacy protections into one defensive structure, the GDPR protects privacy to a larger extent than any previous privacy law and provides a workable apparatus for developing and updating itself in response to contemporary privacy standards. With its threat of immense fines, judicial foundations for legal actions, and list of guaranteed individual privacy rights, it is also arguably the first privacy law with a capacity for effective enforcement. The GDPR not only provides a standardized set of fundamental privacy rights but also acts a foundational springboard propelling us toward a new era of standards in the developing informational human society. Ultimately, it is a tremendous move toward protecting privacy, perhaps not an entirely perfect step, but definitely a strong one—one that defends our identities.

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The First Amendment and the Incarcerated

Caleb L. Logan[1]

I. Introduction

In only 45 words, the First Amendment of the United States Constitution sets forth several important liberties and establishes freedoms essential to individuals and to the depth of our civil society. The amendment states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[2]

The Free Exercise Clause and the freedom of speech are vital aspects of individual freedom in the United States, and the collective rights of the press and the right to peaceably assemble help facilitate important features of democracy. The salient question is whether these liberties, particularly free exercise and free speech, extend to those deemed incompetent to fully participate in society. In other words, the question is whether incarcerated United States citizens can be deprived of some of their most important constitutional rights.

The sheer size of the American prison population makes the application of constitutional and statutory protections even more important. The United States has around 2.3 million prisoners, half a million of which are non-violent drug offenders.[3] Among western

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[1] I am a 2020 graduate of Saint Louis University, where I majored in political science and minored in law, religion and politics. I will be pursuing a juris doctorate degree at Washington University School of Law this fall. This paper was inspired by my time as an intern at the ACLU of Missouri, where I encountered several of the topics discussed in this piece first-hand. I owe thanks to Emily Pierce and William Kosinski of the *TULR* for their editing. Lastly, I am grateful to my advisor, Morgan L. W. Hazelton, J.D., Ph.D.

[2] U.S. Const. amend. I.

[3] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019,* Prison Policy Initiative (March 24, 2020), https://www.prisonpolicy.org/reports/pie2020.

democracies, the United States has an incarceration rate five times higher than the next-highest nation, the United Kingdom.[4] American society has deemed some rights inalienable, but their extension to prisoners—especially those of minority faiths—has been precarious.

II. History

Individuals have historically given up many of their rights through offenses against both other individuals and society as a whole. For example, in 1871 the Supreme Court of Virginia wrote in *Ruffin v. Commonwealth*:

> "For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."[5]

According to this reasoning, prisoners gave up all rights as a result of their crimes. America has since advanced greatly in protecting the rights of individuals who have found themselves in its prison systems.[6] Although those in the prison system do not now receive every right enjoyed by those in the public sphere, America has come a long way in preserving the rights of the incarcerated, and the First Amendment plays a major role in this important task.

The Supreme Court ruled in *Johnson v. Avery* that disciplinary and administrative actions in state prison facilities are state functions, and when those state actions "conflict with [constitutional or statutory] rights, the regulations may be invalidated."[7] *Johnson* established the constitutionally derived right of prisoners to petition the government for redress of grievances. Similarly, the United States Commission on

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[4] *Id.*

[5] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

[6] *See* Barry M. Fox, *The First Amendment Rights of Prisoners*, 63 J. Crim. L., Criminology, & Police Sci. 162, 184 (1972). Fox notes the advancement in prisoners' constitutional rights through the courts' movement from the hands-off doctrine to the least restrictive means doctrine.

[7] Johnson v. Avery, 393 U.S. 483, 486 (1969) [hereinafter *Johnson*].

Civil Rights wrote in 2008 that when First Amendment cases involving incarcerated persons weigh individual rights against the "realities of prison life," a prisoner still retains rights "'not inconsistent with his status as a prisoner.'"[8] Thus, upon entering a prison facility, not all First Amendment rights are abandoned. Moreover, courts have thoroughly examined the actions and policies of prison administrators with regard to "preferred freedoms."[9] For example, in *Jackson v. Godwin*, inmate Herman Jackson was prevented from accessing magazines and newspapers originating from and relating to the African American community. The Fifth Circuit Court of Appeals had to determine whether prison officials could arbitrarily regulate the papers and magazines inmates could access and read.[10] The court clarified that official arbitrary actions made by prison administrators regarding the constitutional rights and preferred freedoms of the First Amendment were subject to the review of the courts.[11]

Generally, preferred freedoms, now often associated with the First Amendment, stem from Justice Harlan Stone's opinion in *United States v. Carolene Products Co*.[12] Justice Stone's opinion established that government regulations and actions at odds with the Bill of Rights are unconstitutional. It also placed heavy responsibility on the judiciary to uphold these rights and protect insular minorities.[13]

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[8] U.S. Commission on Civil Rights, *Enforcing Religious Freedom in Prison* at 5 (September 2008), quoting Pell v. Procunier, 417 U.S. 817, 822 (1974).

[9] The Preferred Freedoms Doctrine establishes some freedoms, especially those outlined in the First Amendment, are fundamental to society; they therefore can not be taken away while incarcerated. *See* Marian Conroy Haney, *The Prisoner and the First Amendment: Freedom Behind Bars?*, 4 Loy. U. Chi. L.J. 109 (1973).

[10] *See* Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

[11] *Id.* at 535, stating that "the area of arbitrary official action in the administration of prisons which involves the constitutional rights of inmates to be free from racial discrimination and to enjoy the 'preferred' freedoms of the First Amendment courts will not shrink from scrutinizing administrative actions."

[12] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), stating, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

[13] *Id.* at 152–54.

In sum, prisoners generally retain rights that courts have determined to be inherently important for all individuals and that do not conflict with their status as prisoners. A recurring theme for courts evaluating First Amendment claims is balancing these two interests.

In deciding which protections to extend to the incarcerated, courts must consider many factors. First, the state clearly has interests in limiting the rights of the incarcerated. The incarcerated have, in many cases, committed a crime and are being held due to their perceived danger to society. The Fourth Circuit in *Brown v. Peyton* offered possible state interests, such as keeping the public, employees of the facility, and other inmates safe.[14] In *Brown*, the court also determined that freedoms may be restricted in order to further the interests of prisoner rehabilitation.[15]

The state also has an interest in keeping the cost of prisons low. The Bureau of Justice Statistics reports that the cost of mass incarceration in state and federal facilities is around $81 billion per year.[16] Private organizations such as the Prison Policy Initiative claim that the overall cost, including externalities such as costs to families, is as much as $182 billion per year.[17] Correction facilities place a heavy burden on taxpayers, and many facilities routinely find new ways to cut corners and save money.[18] In many cases, prisons have a legitimate interest in limiting expenses; however, this consideration does not

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[14] Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971) [hereinafter *Brown*].

[15] *Id.* at 1231, holding that "[p]rison authorities have a legitimate interest in the rehabilitation of prisoners, and may legitimately restrict freedoms in order to further this interest, where a coherent, consistently-applied program of rehabilitation exists."

[16] "According to the Bureau of Justice Statistics, the annual cost of mass incarceration in the United States is $81 billion. But that figure addresses only the cost of operating prisons, jails, parole, and probation — leaving out policing and court costs, and costs paid by families to support incarcerated loved ones." *See Mass Incarceration Costs $182 Billion Every Year, Without Adding Much to Public Safety*, Equal Justice Initiative (Feb. 6, 2017), https://eji.org/news/mass-incarceration-costs-182-billion-annually/.

[17] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

[18] *Id.*

absolve the state of its need to demonstrate that a particular set of circumstances involves legitimate state interests.[19]

III. Legal Standards

The current legal standards for inmate First Amendment cases rest on two court decisions from 1987. In *Turner v. Safley*, Leonard Safley, a prisoner at Renz Correctional Institution in Cedar City, Missouri, challenged two regulations promulgated by the Missouri Department of Corrections and brought a class-action suit against Renz Superintendent William Turner, seeking injunctive relief and damages.[20] The first regulation gave discretion only to a small group in determining which inmate correspondence was allowed, while the second gave the prison superintendent broad discretion in deciding whether prisoners were allowed to marry.[21] The Supreme Court found that the correspondence regulation was constitutional, but the marriage regulation was facially unconstitutional.[22] The Court ruled that regulations affecting the constitutional rights of prisoners could only be valid if they were "reasonably related to legitimate penological interests."[23] The justices outlined four factors for determining the reasonableness of penal administrative actions. First, there must be a logical nexus between a prison regulation and the governmental interest. Importantly, the Court noted that "prison regulations restricting inmates' First Amendment rights [must be] operated in a neutral fashion, without regard to the content of expression."[24] The Court also dictated that when reviewing prison regulations, lower courts must consider if alternative means of exercising a right remain available to prisoners. Moreover, lower courts must consider whether accommodating prisoners' constitutional rights will negatively affect the allocation of scarce penal resources or the rights of other prisoners and inmates. When alternative means of exercising a right remain available to a prisoner and accommodations will negatively affect

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[19] Conroy Haney, *supra* note 9, at 110.
[20] *See* Turner v. Safley, 482 U.S. 78 (1987) [hereinafter *Safley*].
[21] *Id*. at 81–82.
[22] *Id.* at 91.
[23] *Id.* at 89.
[24] *Id.* at 90.

others, prison administrators are granted deference. Lastly, the Court outlined the need for the regulation to not be excessive. If a prisoner can show that the prison can advance its interests without transgressing the inmates' constitutional rights, the regulation is unreasonable.[25] When a less restrictive alternative exists that allows for a minimal cost to penological interests, the regulation in question may be deemed excessive and unconstitutional. The reasonableness standard in *Safley* finally set out a clear path for the lower courts to follow in balancing the interests of penal institutions and individual inmates.

Two weeks after *Safley*, the Court applied the standard to a free-exercise claim in *O'Lone v. Estate of Shabazz*.[26] In *O'Lone*, Muslim inmates challenged prison regulations in New Jersey, claiming they prohibited them from attending Jumu'ah, a weekly Muslim religious ceremony.[27] The state claimed it had a legitimate interest in keeping institutional order and safety, and attendance at the services created congestion in a particularly high-risk prison area.[28] The majority found for the state prison, claiming that they could not favor the inmates' rights to partake in the religious ceremony over the legitimate penological interests of keeping the facility safe.[29] These two cases became known as the *Safley-O'Lone* reasonableness standard and established the process for evaluating whether administrative practices limiting inmates' constitutional rights are related to legitimate penological interests. The *Safley-O'Lone* standard continues to balance the interests of correctional administrators and incarcerated persons in statutes and cases involving the Free Exercise Clause.

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[25] *Id*. at 78–92.
[26] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) [hereinafter *O'Lone*].
[27] *Id.* at 345.
[28] *Id.* at 351, 366.
[29] *Id.* at 353, stating that "concerns of prison administrators provide adequate support for the conclusion that accommodations of respondents' request to attend Jumu'ah would have undesirable results in the institution. These difficulties also make clear that there are no 'obvious, easy alternatives to the policy adopted by petitioners.'" (citing *Safley*, 482 U.S. 78, 93).

IV. Religion

Religion is a central aspect of millions of both free and incarcerated Americans' lives. The earliest roots of the nation involved religion, as the first European settlers came to the United States' shores to escape religious persecution. Now centuries later, the United States is a diverse nation where a seemingly endless variety of religions are practiced. The Free Exercise Clause of the First Amendment ensures the right to practice a plurality of religions.[30] Because religious rights are First Amendment freedoms, they fall into the category of preferred freedoms.[31] The perceived prospect of an individual's absolute eternity can depend on the actions resulting from deeply held religious beliefs and obligations. Moreover, religious freedom is deeply intertwined with the right to assemble, the freedom of speech, and freedom of conscience; all of these freedoms are essential for a free and pluralistic society.

In America's prisons, the penological interests of promoting safety and minimizing operating costs are often at odds with the rights of prisoners to exercise religious beliefs. Rights of prisoners of minority religions have especially been unjustifiably and excessively affected. Prison chaplains often provide pastoral care and counseling to inmates by programming religious services, dietary programs, staff training on religious rights, and coordinating access to other types of religious leaders. Christianity dominates the occupation. Of the 251 chaplains employed by the Federal Bureau of Prisons in 2008, 73.9 percent were Protestant, 17.4 percent were Catholic, and 0.8 percent were Orthodox Christian, while only 0.4 percent were Buddhist, 2.1 percent were Jewish, and 5.4 percent were Muslim.[32] The percentage of non-Christian prisoners is larger than in proportion to the public, and these minorities are more likely to file religious complaints.[33] The most common First Amendment grievances related to religion in prison were limitations on religious activities, lack of access to a

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[30] U.S. Const. amend. I.
[31] Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).
[32] United States Commission on Civil Rights, *supra* note 8, at 34.
[33] *Id.* at 13.

chaplain of a certain faith, grooming and covering issues, and a lack of dietary accommodations.[34] Religious complaints increased during the early 2000s, but remain a small proportion in comparison to the total number of individuals in the prison system.[35] Religious practice and spiritual development are integral to individual rehabilitation—and even reduce rates of recidivism.[36]

Courts and federal statutes have played a major role in protecting the religious freedoms of inmates. In 1963, the Supreme Court applied strict scrutiny to a religious accommodation claim under the Free Exercise Clause in *Sherbert v. Verner*.[37] The Court dictated that laws substantially burdening religious freedoms must show a compelling governmental interest and be implemented through the least restrictive means to be constitutional.[38] The *Sherbert* test regarding compelling interest stood for nearly 30 years and strongly upheld religious freedoms before the Court overruled it in *Employment Division v. Smith*.[39] When the respondents were fired from a drug rehabilitation organization for their ceremonial use of peyote, the Employment Division of Oregon denied them unemployment compensation because it was illegal to use peyote under a recent Oregon statute. In a 6–3 decision, the Supreme Court reversed the Oregon Supreme Court's ruling and found for the state because the statute was not directed at promoting or restricting the religious beliefs of individuals.[40] The central outcome of *Smith* was the Court's ruling that the Free Exercise Clause does not exempt religious individuals from laws of general applicability.[41] As scholar Frank Ravitch explained, *Smith* placed minority religions at a relative disadvantage, as generally applicable laws typically transgress minority religions

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[34] *Id.* at 22.
[35] *Id.*
[36] Noha Moustafa, *The Right to Free Exercise of Religion in Prisons: How Courts Should Determine Sincerity of Religious Belief Under RLUIPA*, 20 Mich. J. Race & L. 213, 214 (2014).
[37] Sherbert v. Verner, 374 U.S. 398 (1963) [hereinafter *Sherbert*].
[38] *Id.* at 403, 406.
[39] Employment Div. of Or. v. Smith, 494 U.S. 872 (1990) [hereinafter *Smith*].
[40] *Id.* at 880–81.
[41] *Id*.

rather than majority ones.[42] Clearly, this decision took a large step away from the standard set in *Sherbert* by shifting the burden away from the state.

V. Legislation

In 1980, the federal government passed the Civil Rights of Institutionalized Persons Act (CRIPA).[43] According to the United States Civil Rights Commission, the act provides a mechanism for the attorney general to initiate litigation against states, as well as a mechanism to seek relief for constitutional rights deprivations that caused grievous harm and represent a pattern of resistance.[44] Later incorporated into CRIPA was the Prison Litigation Reform Act of 1995 (PLRA).[45] The PLRA effectively ensured that administrative remedies were exhausted before a lawsuit could be filed.[46] Because of these limitations on inmates' access to the courts, the number of civil rights petitions decreased from 37 per 1000 inmates to 19 per 1000 inmates from 1995 to 2000.[47]

The next major piece of legislation affecting inmates' religious freedoms is the Religious Freedom Restoration Act (RFRA), crafted in response to denials of accommodations in *Smith*.[48] The bill passed the 1993 Senate with a 97–3 vote.[49] The RFRA prohibited states from "substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability."[50] The law reintroduced the compelling governmental interest and least restrictive means tests outlined in *Sherbert*.[51] However, the Court ruled the statute

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[42] Frank S. Ravitch, Law and Religion, A Reader: Concepts, Cases and Theory 12 (2004).
[43] Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq. (1980).
[44] United States Commission on Civil Rights, *supra* note 8, at 6.
[45] Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e (1995).
[46] *Id*. at § 1997e(a).
[47] U.S. Dep't of Justice, Bureau of Justice Statistics No. 189430, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 (2002).
[48] *See The Religious Freedom Restoration Act: Hearing Before the Committee on the Judiciary*, 102nd Cong. 1–2 (1992) (statement of Sen. Kennedy).
[49] 103 Cong Rec. H1308 (Oct. 27, 1993).
[50] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1 (2000).
[51] *Sherbert*, 374 U.S. 398 (1963); *See also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–1(b)(1)(2) (2000).

partially unconstitutional only four years later in *City of Boerne v. Flores*, when they determined it violated the Fourteenth Amendment and could not be applied to the states.[52] But the statute still applies to federal prisoners, as clarified in *Gonzalez v. O Centro Espírita Beneficente União Do Vegetal*.[53] Moreover, in response to *Flores*, many states, including Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas, all passed their own RFRAs.[54]

Finally, in 2000, Congress responded again with the Religious Land Use and Institutionalized Persons Act (RLUIPA).[55] This statute holds regulations to the highest constitutional standard in the courts.[56] It protects the religious exercise of inmates through a strict scrutiny standard.[57] In order to raise a claim under the RLUIPA, inmates must exhibit three central elements. First, they must show that the prison's policy interferes with their religious exercise. Second, inmates must prove that there is a substantial burden on the practice of their religion. After this prima facie claim is made, the burden falls on the state to show a compelling governmental interest exists and that the least restrictive means have been exacted to further that interest.[58]

The bill's original sponsors emphasized that, while they had good faith in prison administrators to craft regulations and procedures appropriately, policies promulgated with "exaggerated fears" or "post-hoc rationalizations" would not pass under the RLUIPA.[59] The

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[52] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997), stating that "Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."

[53] Gonzalez v. O Centro Espírita Beneficente União Do Vegetal**,** 546 U.S. 418 (2006).

[54] United States Commission on Civil Rights, *supra* note 8, at 8.

[55] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. (2000).

[56] Barrick Bollman, *Deference and Prisoner Accommodations Post-Holt: Moving RLUIPA Toward "Strict in Theory, Strict in Fact"*, 112 Nw. U. L. Rev. 839, 846–47.

[57] Moustafa, *supra* note 36, at 214.

[58] 42 U.S.C. § 2000cc-1.

[59] 146th Cong. Rec. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch and Sen. Kennedy, quoting S. Rep. No. 103–111 at 10 (1993)).

RLUIPA also bars prisons and courts from offering religious accommodations only to practices that are central to a belief.[60] Rather, the law holds encouraged practices as equally important as required ones.[61] This provision was vital, especially for disproportionately impacted minority religions, as it extended the number of religious freedom issues prisoners could protest.

Like the RFRA, the constitutionality of the RLUIPA was tested in courts, specifically in *Cutter v. Wilkinson*.[62] The Court unanimously ruled that the RLUIPA does not violate the Establishment Clause of the First Amendment.[63] The Court also dictated that lower courts should grant due deference to prison officials' determinations as recommended by the original sponsors of the RLUIPA.[64]

VI. Balancing Interests

Typically, prison officials offer two main responses to defend their compelling interest in a regulation in question. The first is prison security. Regulations protect security interests in several ways: they ensure expedient identification of prisoners; they ensure prisoners are not able to hide dangerous items; they promote the safety of officers; they impede gang related activity; and they remove perceptions of favoritism towards certain inmates.[65] The second important argument offered by prison officials is the compelling interest of keeping financial costs low, which has been broadly interpreted to restrict accomodations for inmates who practice minority religions.

For example, in *Baranowski v. Hart*, Thomas Baranowski, an inmate in the Huntsville Unit of the Texas Department of Criminal Justice, filed suit against the prison for a lack of accommodation for his Jewish faith.[66] In response to his requests for kosher meals, the

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[60] 42 U.S.C. § 2000cc-5.
[61] *Id.*
[62] Cutter v. Wilkinson, 544 U.S. 709 (2005).
[63] *Id*. at 720-21, stating, "On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."
[64] *Id*. at 723.
[65] Bollman, *supra* note 56, at 849.
[66] Baranowski v. Hart, 486 F. 3d 112 (5th Cir. 2007), *cert. denied*, 128 S.Ct. 707 (2007).

prison claimed its budget could not afford a separate kitchen for kosher meal preparation. Basing its decision on the standards of *Turner* and the RLUIPA, the Fifth Circuit Court found for the prison facility.[67] Dietary restrictions are still a common complaint stemming from a lack of accommodation for minority religions. Clearly, prison regulations justified by the balancing of compelling interests tend to be disfavorable to minority religions in the United States.

VII. Increased Deference to Prisoners

One of the central battles in increasing deference to prisoners of minority religions who raise First Amendment complaints is overcoming the various compelling interests of prisons. A more just and thorough enforcement of the least restrictive means test came in 2015. In *Holt v. Hobbs*, an inmate in the Arkansas Department of Corrections sought an injunction for temporary relief from a grooming policy that disallowed facial hair.[68] Holt, a Salafi Muslim, claimed the policy substantially burdened his ability to practice his religion and even offered to keep a half-inch beard in compromise.[69] In a unanimous decision, the Court found that the Arkansas Department of Corrections policy violated the RLUIPA.[70] By applying the compelling governmental interest and least restrictive means tests, the Court reasoned that the prison could have searched beards for safety purposes and used less restrictive means for identifying prisoners by having photos on file with and without beards. This decision further shows the difficulty in balancing penological interests and the constitutional rights of inmates who practice minority faiths.

Since *Holt*, courts have had a more clear precedent for judging not only the plaintiff's sincerity but also instances where inmates have been coerced to follow prison policy instead of their religious beliefs.

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[67] *See id*. at 120–26.

[68] Holt v. Hobbs, 135 S.Ct. 853 (2015).

[69] *Id.* at 860–61.

[70] *See id.* at 862, 867, stating that "The Department's grooming policy requires petitioner to shave his beard and thus to 'engage in conduct that seriously violates [his] religious beliefs' … [T]he Department's grooming policy violates RLUIPA insofar as it prevents petitioner from growing a 1/2-inch beard in accordance with his religious beliefs."

The *Holt* standard continues to place the burden of proof on the government to show that the policy is the least restrictive means possible to achieve a valid state interest.[71]

VIII. Conclusion

The Free Exercise Clause and the RLUIPA are central to the protection of the religious freedoms of incarcerated persons. Although the United States has greatly advanced in protecting prisoners' religious freedoms, there is still a long way to go. Incarcerated persons practicing minority religions face even more obstacles in gaining equal protection under the First Amendment and the RLUIPA. Throughout American history, the Court's decisions have often privileged majoritarian, Protestant views of religion at the expense of minority groups whose exercise of religion diverges from traditional norms.[72] Prisoners of religious minorities are already removed from their community. Removing access to any aspect of their faith may further remove them from the hope of rehabilitation our judicial system requires.[73] Moving forward, more must be done to accommodate the religious needs of prisoners of minority faiths while maintaining security and keeping costs low in tax-payer funded correctional facilities. By applying the strict scrutiny test as intended in the RFRAs and RLUIPA, courts can ensure that the most vital First Amendment rights of incarcerated individuals are indefinitely preserved.

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[71] Bollman, *supra* note 56, at 847.
[72] Ravitch, *supra* note 42, at 27.
[73] *O'Lone*, 482 U.S. 342, 368.

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