NOVA LAW REVIEW

NOVA SOUTHEASTERN UNIVERSITY

THE FLORIDA BOOK

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I. INTRODUCTION

On March 30, 2021, two deputies from the Jacksonville Sherriff's Office arrived at a domestic violence call at an area hotel.[1] There, they would encounter an individual identified as Michael Leon Hughes, a thirty-two-year-old African American man who was accused of forcing his way into a hotel room belonging to a female companion.[2] Upon arrival, Hughes refused to leave, so a struggle with law enforcement ensued.[3] Hughes obtained one of the deputies' tasers during the commotion and shocked him.[4] In response, the officer discharged his firearm and killed Hughes.[5]

On May 27, 2020, approximately one year before the incident with Mr. Hughes, the Tallahassee Police Department encountered an African

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1. Marilyn Parker, *JSO Identifies Man Shot, Killed by Police at Argyle Forest Hotel*, NEWS4JAX, http://www.news4jax.com/news/local/2021/03/31/jso-identifies-man-shot-killed-by-police-at-argyle-forest-hotel/ (last updated Mar. 31, 2021, 7:15 PM); Mindy Wadley & Robert Bradfield, *'It Wasn't Supposed to Go That Way': Family of Man Killed by JSO at Jacksonville Hotel Demand Release of Video*, FIRST COAST NEWS (Apr. 6, 2021, 9:04 PM), http://www.firstcoastnews.com/article/news/local/family-of-man-killed-jso-demands-answers/77-f0f90fec-9be9-4d36-86de-15938a893509.
2. Parker, *supra* note 1.
3. *Id.*
4. *Id.*
5. *Id.*

American woman.[6] This woman was Natosha Tony McDade, who was accused of stabbing another individual outside an apartment complex.[7] While reports differ, law enforcement officers asserted that McDade aimed a firearm at police upon their arrival.[8] When she refused to comply with requests to lower her weapon, officers opened fire and killed her.[9]

On their face, these two instances seem to share many similarities.[10] For instance, both cases involve individuals who died at the hands of law enforcement.[11] Both individuals were African American and both seemed to have suffered from mental illness.[12] Yet, while the similarities between the alleged perpetrators seem quite evident, what may not be as immediately apparent are the similarities of the law enforcement officers involved in both the shootings[13] In both instances, the Tallahassee Police Department and the Jacksonville Sherriff's Office tried to prevent the identities of the officers and deputies from being divulged to the public under Florida's Crime Victim's Bill of Rights, more commonly known as, Florida's version of Marsy's Law.[14]

Currently pending before the Florida Supreme Court is a request from the City of Tallahassee, as well as numerous media groups, to accept jurisdiction over a First District Court of Appeal case specifically finding that the officers in these shootings are considered "victims" as defined by the Florida Constitution, and as such, they enjoy protections guaranteed to them under Marsy's Law, specifically preventing the disclosure of their identities to the public.[15]

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6. *See* Dara Kam, *Should Victims' Rights Law Shield Officer's Identity?*, NEWS4JAX (June 11, 2020, 8:20 PM), http://www.news4jax.com/news/florida/2020/06/12/should-victims-rights-law-shield-officers-identity/. It should be noted that while born a female, witnesses report that Ms. McDade self-identified as a male. *Id.*; Jeff Burlew, *Tallahassee Police Release Name of Person Shot and Killed by an Officer After Stabbing*, TALLAHASSEE DEMOCRAT., http://www.tallahassee.com/story/news/local/2020/05/28/tallahassee-police-releases-name-natosha-tony-shot-and-killed-officer-after-stabbing/5272571002/ (last updated May 30, 2020, 8:18 PM).

7. Burlew, *supra* note 6; *see also* Kam, *supra* note 6.

8. Kam, *supra* note 6.

9. *See* Burlew, *supra* note 6; Kam, *supra* note 6.

10. *See* Kam, *supra* note 6; Parker, *supra* note 1.

11. Kam, *supra* note 6; Parker, *supra* note 1.

12. *See* Kam, *supra* note 6; Burlew, *supra* note 6; Wadley & Bradfield, *supra* note 1.

13. *See* Kam, *supra* note 6; Parker, *supra* note 1.

14. *See* Kam, *supra* note 6; Parker, *supra* note 1; FLA. CONST. art. I, § 16.

15. The News Serv. of Fla., *City of Tallahassee & Media Groups Urge Florida Supreme Court to Hear 'Marsy's Law' Case*, WFSU PUB. MEDIA (June 15, 2021, 12:00 PM), http://news.wfsu.org/wfsu-local-news/2021-06-15/city-of-tallahassee-media-groups-urge-florida-supreme-court-to-hear-marsys-law-case.

While the possibility that law enforcement officers may be the target of a crime is not uncommon, receiving the designation of "victim" after employing deadly force is a unique and confounding concept worthy of discussion.[16] As such, this Article will attempt to tackle this question and gauge the argument on both sides as to the applicability of Marsy's Law in these scenarios.[17]

The Article will begin with a discussion of how the State of Florida has historically defined the term "victim" in criminal law over the years.[18] Next, a discussion follows about the history of Marsy's law and how courts have interpreted its provisions.[19] This Article will then explain in greater detail the arguments for, and against, Marsy's Law protecting police identities from disclosure, especially considering Sunshine Laws and the rights that citizens enjoy by obtaining access to information.[20] Ultimately, this Article attempts to predict if the Florida Supreme Court does choose to accept jurisdiction for cases that argue that law enforcement officers are victims under Marsy's Law—how the justices will rule on the issues in the case and, moving forward, where lines will be drawn as to the degree of victimization police must establish to be protected under Florida's Crime Victim Bill of Rights.[21]

II. IN FLORIDA WHAT DOES IT MEAN TO BE A VICTIM?

The legal definition of what exactly a "victim" is in Florida jurisprudence is actually not that old of a concept.[22] One of the first explanations of the term comes from a 1969 Florida Fourth District Court of Appeal case, which involves defendants charged with assault and battery in Palm Beach County.[23] In the case, the appellants focused on the trial court judge's use of the term "victim" during his final jury instruction before deliberation.[24] The instruction reads as follows: "One point I made in my Instructions, I said that—I emphasized you shouldn't have any sympathy or compassion either individually or collectively for the defendant in this case, nor should you have any sympathy or compassion for the *victim* of this case."[25]

16. *See id.*
17. *See* discussion *infra* Part V.
18. *See* discussion *infra* Part II.
19. *See* discussion *infra* Part III.
20. *See* discussion *infra* Part IV.
21. *See* discussion *infra* Part V.
22. *See* Lister v. State, 226 So. 2d 238, 239 (Fla. 4th Dist. Ct. App. 1969).
23. *Id.* at 238.
24. *Id.* at 239.
25. *Id.*

The jury returned a verdict of guilty of the offenses, and on appeal, the appellants argued that the trial judge created undue sympathy for the victim of the crimes by referring to him as a "victim."[26] In denying their appeal and affirming the conviction, the appellate court wrote that the definition of a victim is simply "someone injured under any of various conditions."[27] Citing Webster's Dictionary, the court found that the term, in and of itself, was neither offensive nor emotion invoking.[28] It simply designated the status of a party in a lawsuit.[29]

Under this somewhat direct and uncomplicated definition, it is not surprising that little litigation exists about the term from the perspective of physical injury.[30] Instead, as time progressed, most cases regarding the concept focused on individuals seeking financial compensation from the illegal acts of an accused.[31] This would often result from those close to an individual who was the target of the crime making a claim for relief.[32] For instance, in a 1982 case from Florida's Second District Court of Appeal, the son of a manslaughter victim sought review of a decision from the Bureau of Crime's Compensation for payment of psychiatric bills resulting from his father's death.[33] The parent had passed away as a result of injuries he sustained as the victim of a battery.[34] In dealing with the murder, the son experienced an exacerbation of a preexisting psychological issue, including a fixation on wanting to murder his father's killer.[35]

Initially, the boy was denied benefits for his psychiatric treatment.[36] He appealed to a deputy commissioner who overturned the denial finding that the heir of the deceased was a victim under the law at the time, which was Florida's Crime Compensation Act.[37] The Bureau appealed and ultimately persuaded the appellate court to rule in its favor.[38] In granting the appeal, the three-judge panel concluded that the appellee did not meet the requisite

26. *Id.* at 238–39.
27. *Lister*, 226 So. 2d at 239–40.
28. *See id.* at 239.
29. *See id.*
30. *Cf.* Div. of Workers' Comp., Etc. v. Brevda, 420 So. 2d 887, 889–90 (Fla. 1st Dist. Ct. App. 1982) (analyzing mental health injuries as a result of a physical injury).
31. *See* Bureau of Crimes Comp., Etc. v. Traas, 421 So. 2d 50, 51 (Fla. 2d Dist. Ct. App. 1982).
32. *See id.*; Koile v. State, 934 So. 2d 1226, 1229 (Fla. 2006).
33. *Traas*, 421 So. 2d at 51.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Traas*, 421 So. 2d at 51.

statutory definition of a victim because his injuries were not a "direct result of the crime."[39] While much of the court's reasoning centered on the difference between psychiatric benefits versus non-mental health-related payments,[40] a concern about the causation of the request being linked to the crime itself appeared germane in determining of victim status.[41]

Money also seemed to be the primary motivation for the Florida Supreme Court to finally begin to weigh in on the definition of the term "victim" in the 1992 case of *Battles v. State*.[42] In *Battles*, the court weighed in on a certified question from the district court, specifically, if a good faith purchaser of stolen goods could be considered a "victim" for purposes of restitution.[43]

In trial, Harry Battles, the appellant, was found guilty of selling a stolen firearm to Gary Murphy, whom the trial court believed had a good faith basis that the weapon belonged to Battles.[44] Murphy later learned that local law enforcement was investigating the disappearance of a gun belonging to Kelvin Jordan.[45] Having a reason to believe the firearm Battles sold him actually belonged to Jordan, Murphy turned the gun over to the police.[46] As part of his sentence, the court ordered Battles to pay Murphy forty-five dollars, the price he sold him the gun for.[47]

On appeal, Battles argued that Murphy was not a victim of the charge of dealing in stolen property, so the restitution award was improper.[48] The district court disagreed and affirmed the trial court's sentence.[49] However, the First District Court asked the Florida Supreme Court to review the decision with the case posing a novel issue.[50]

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39. *Id.*
40. *Id.*; *see also* Div. of Workers' Comp., Etc. v. Brevda, 420 So. 2d 887, 890 (Fla. 1st Dist. Ct. App. 1982). The issue of psychiatric benefits being reimbursable was further explored. *See id.* There, the First District Court of Appeal of Florida found that mental health benefits could be paid out by the victims' compensation fund if a finding was made that such treatment was a direct result of the crime. *Id.* at 889–90. Competent substantial medical evidence could be provided to show that mental health injuries were also physical injuries under Florida Statute section 960.03. *Id.* at 890. This would also be in accordance with Florida Statute section 960.08 authorizing reimbursement for medical care. *Id.*
41. *See Traas*, 421 So. 2d at 51.
42. 602 So. 2d 1287 (Fla. 1992).
43. *Id.* at 1287.
44. *See id.*
45. *Id.*
46. *Id.*
47. Battles, 593 So. 2d at 1287.
48. *Id.* at 1288.
49. *Id.* at 1287.
50. *Id.*

In making their judgment to affirm the appellate court's ruling, the justices focused on Florida Statute section 775.089, which provides that "the court shall order the defendant to make restitution to the victim for damage or loss caused directly or indirectly by the defendant's offense unless it finds clear and compelling reasons not to order such restitution."[51] Subsection (1)(c) of the statute further defines the term victim as a "person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode . . . ."[52] The court found a good faith purchaser is, by the very nature of term, an "aggrieved party."[53] The only person that the individual can seek restitution from would be the individual guilty of dealing in stolen property.[54]

Jordan had been made whole when the firearm was returned to him by the police.[55] However, Murphy was still out of the forty-five dollars he purchased the gun for.[56] As such, the court wrote, "[i]f restitution is not imposed, we are left with the incongruent result of having Battles, a person convicted of a felony offense, retain the profits of his criminal enterprise at the expense of a good faith purchaser."[57] Therefore, with this ruling, we begin to see a further expansion of the term "victim," beyond those directly affected by a crime, and later to those individuals with a familial bond to the targeted prey.[58]

As time progressed and additional case law developed on the issue of the expansion of the term "victim," it is extremely important to point out that there is a litany of cases finding that law enforcement agencies are not victims in some Florida jurisdictions and, in a sense, these cases pull the reigns of the ever-expanding definition of the term "victim."[59]

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51. *Id.* at 1287–88; FLA. STAT. § 775.089(1)(a) (2021).
52. FLA. STAT. § 775.089(1)(c); *Battles*, 602 So. 2d at 1288.
53. *Battles*, 602 So. 2d at 1288.
54. *See id.*
55. *See id.*
56. *Id.*
57. *Id.*
58. *See Battles*, 602 So. 2d at 1288; FLA. STAT. § 775.089(1)(c) (2021).
59. *See e.g.*, Seidman v. State, 847 So. 2d 1144, 1146 (Fla. 4th Dist. Ct. App. 2003); Sam v. State, 741 So. 2d 1247, 1247 (Fla. 2d Dist. Ct. App. 1999) (per curiam); Taylor v. State, 672 So. 2d 605, 606 (Fla. 4th Dist. Ct. App. 1996) (per curiam).

For instance, in 1990, the Florida Fourth District Court of Appeal determined that an award of restitution was improper specifically because it was directed to a police agency which "[i]s not a 'victim' . . . " under the law.[60] A similar result occurred in the Second District Court of Appeal in 1994, where a Sheriff's department was denied restitution under the statute.[61] In both these cases, it is important to note that these expenditures were reimbursable under Florida Statute section 939.01.[62] Yet, of importance to this discussion is the Florida Legislature's responsibility to create an entirely new statute for the payment of these fees, as opposed to the court's belief that it needed to use its discretion in expanding the term "victim."[63]

Not surprisingly, Florida's Fourth District Court of Appeal continued its retraction of the definition of "victim" in the early twenty-first century, beyond just law enforcement agencies, with the case of *P.H. v. State*.[64] The case questioned the validity of a restitution payment made to a mother of a battery victim who incurred lost wages in the amount of $240.[65] In reversing a trial court's order granting the state's request for this amount to be considered restitution, the Florida Fourth District Court of Appeal determined that the mother of the battery victim was not a "victim" under the statute.[66] The court reviewed the statute at the time of the victim's compensation, noting that it specifically read:

> Each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, and the victim's next of kin if the victim is deceased as a result of the offense. The term includes governmental entities and political subdivisions, as those terms are defined in s. 11.45, when such entities are a direct victim of the defendant's offense or criminal episode and not merely providing public services in response to the offense or criminal episode.[67]

60. Bain v. State, 559 So. 2d 106, 106 (Fla. 4th Dist. Ct. App. 1990) (per curiam); *see also* Staudt v. State, 616 So. 2d 600, 600 (Fla. 4th Dist. Ct. App. 1993) (per curiam) (reversing a trial court's decision to award the City of Stuart's police department restitution, concluding that investigative costs, while a byproduct of a crime, do not somehow make the investigative agency a victim under the statute).

61. Knaus v. State, 638 So. 2d 156, 156 (Fla. 2d Dist. Ct. App. 1994).

62. *See id.*; *Staudt*, 616 So. 2d at 600.

63. *Staudt*, 616 So. 2d at 600.

64. 774 So. 2d 728 (Fla. 2d Dist. Ct. App. 2000).

65. *Id.* at 729.

66. *Id.*

67. *Id.*; FLA. STAT. § 775.089(1)(c)(1) (2021).

Nowhere in the statute does there appear to be any inclusion of parents' expenses under restitution.[68] Interestingly, the court remarked that if an argument had been made that the mother's expenses could have been "attributed to" her daughter, then a different result may have been reached.[69] While the desire to help the mother seemed apparent, the method was not present in the arguments before the court.[70] This final statement by the judges provides insight into an overarching theme in this Article's inquiry.[71]

Perhaps the question is not whether there is a desire among the court to expand or contract how Florida defines the term "victim."[72] Rather, maybe the more appropriate examination is whether the courts will follow a strict constructionist approach and look to the plain meaning of the word, as opposed to reading something into the term that is not there.[73] Assuming this as a possible guiding principle, the Florida Supreme Court decision in *Koile v. State*[74] may provide the reader with the most ample guidance of all.[75] In *Koile*, a defendant charged with murder entered into a plea agreement with the state during his trial.[76] The defendant agreed to serve time in prison and pay an undetermined amount of restitution.[77] The trial court subsequently held a restitution hearing wherein the deceased's father testified.[78] While evidence was presented regarding burial expenses and costs associated with the funeral, the father also explained that he lost $12,000 in income in order to testify and attend the trial.[79] The deceased's mother made a similar plea for lost income, except in the amount of $1,500.[80]

The decedent's estate made an additional restitution claim for lost wages on behalf of the murder victim himself.[81] He was a first officer for an

68. *See* FLA. STAT. § 775.089(1)(c)(1).
69. *P.H.*, 774 So. 2d at 729.
70. *See id.*
71. *See id.*
72. *See id.*; FLA. STAT. § 775.089(1)(c).
73. *See* Koile v. State, 934 So. 2d 1226, 1230–31 (Fla. 2006).
74. 934 So. 2d 1226 (Fla. 2006).
75. *See id.* at 1230–31.
76. *Id.* at 1228; *see also* Willoughby Mariano, *Convict in Murder Plot Loses Appeal-Bond Plea*, S. FLA. SUNSENTINEL (Nov. 13, 2003), http://www.sun-sentinel.com/news/fl-xpm-2003-11-13-0311121452-story.html.
77. *Koile*, 934 So. 2d at 1228.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

airline and anticipated being promoted to captain soon.[82] Ultimately, he would have earned over three million dollars if he had lived to the age of sixty.[83]

The trial judge granted both parents' requests for lost wages.[84] Further, an order was entered awarding the decedent's estate just over two million dollars in lost wages.[85] The defendant appealed to the Fifth District Court of Appeal, which reversed both awards.[86] However, the appellate court recognized the importance of the decision it faced and certified two questions to the Florida Supreme Court.[87] The first was: "Does section 775.089, Florida Statutes (2003), authorize a restitution award for the lost wages of a next of kin voluntarily attending the murder trial of the person accused of killing the victim?"[88] The second was: "Does section 775.089, Florida Statutes (2003), authorize a restitution award for the estate of a murder victim of an amount consisting of the lost future income of the victim?"[89]

After concluding that the standard of review in the case was *de novo*, the court decided that it was appropriate to follow strict constructionism and did not need to expand beyond the statute's plain language.[90] The court first pointed out that the statute reads, "the term 'victim' includes not only the person injured by the defendant, but also the person's estate if he or she is deceased, as well as the person's next of kin if he or she is deceased as a result of the offense."[91] As such, both the decedent's estate and the decedent's parents would be eligible for restitution in this scenario.[92] The court then continued reviewing the text of the statute.[93]

> Accordingly, reading section 775.089(2)(a)(3) by using the full definition of "victim" if a crime results in bodily injury, a court must "reimburse the victim [including his estate and next of kin] for income lost by the victim [including his estate and next of kin] as a result of the offense."[94]

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82. *Koile*, 934 So. 2d at 1228.
83. *Id.* at 1228–29.
84. *Id.* at 1229.
85. *Id.*
86. *Id.*
87. *Koile*, 934 So. 2d at 1229.
88. *Id.* at 1228.
89. *Id.* (emphasis omitted).
90. *Id.* at 1229, 1230–31.
91. *Id.* at 1231.
92. *See Koile*, 934 So. 2d at 1231.
93. *See id.*
94. *Id.*

While the court ultimately sustained the Fifth District Court of Appeal's decision to deny the parents their lost wages,[95] it did conclude the decedent's estate was a victim, and as such, entitled to an award of lost wages nonetheless.[96]

III. MARSY'S LAW IN FLORIDA

Voters in 2018 took to the polls to strengthen victims' rights in the state with the passage of Amendment 6 to the Florida Constitution.[97] The Amendment was passed with support by more than sixty percent of the state's population.[98] Touted as Florida's Crime Victim's Bill of Rights, Article 1 Section 16 of the Florida Constitution adopted the language of Marsy's Law to prevent disclosing the identities of victims to stop others from "harass[ing] the victim or the victim's family, or [records] which could disclose confidential or privileged information of the victim" being made public.[99]

Marsy's law originated from a case in California involving an individual named Marsalee Nicholas who was then a college student.[100] In 1983, Ms. Nicholas' ex-boyfriend murdered her, and years later bumped into Ms. Nicholas' family at a local grocery store.[101] The family had no idea that the alleged murderer had been released, causing them a great deal of distress upon seeing him in the store.[102] Since February 2020, voters across the country have approved versions of Marsy's Law in California, Illinois, North Dakota, Ohio, Florida, Georgia, North Carolina, Nevada, Oklahoma, and South

95. *Id.* at 1234. The decision to deny the lost wages claim was not based on a finding that the parents were not victims under the statute. *See id.* Rather, the issues focused on the parents choosing to be present for the entirety of the three-week trial. *See Koile*, 934 So. 2d at 1234. The court concluded that had the mother and father been subpoenaed to attend the whole event, the result may have been different. *See id.* However, because of the voluntary nature of their attendance, no causal link existed between the crime and the costs. *See id.* Interestingly, the possible other outcome may have been a reduction in the amount of the award, at least for the father, as there was evidence that his testimony was required for a small part of the event. *See id.*

96. *Id.*

97. *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, MARSY'S L. FOR FLA., http://www.marsyslawforfl.com/amendment_6_marsy_s_law_for_florida_approved_by_florida_voters (last updated Dec. 6, 2018).

98. *Id.*

99. FLA. CONST. art. I, § 16(b)(5).

100. *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

101. *Id.*

102. *See id.*

Dakota.[103] Marsy's Law was also passed, but later overturned, in Montana and Kentucky.[104] Additionally, seventy-four percent of the electorate approved the law in Pennsylvania; however, those results have not yet been certified because the Amendment's constitutionality is in litigation.[105] A similar situation now exists in Wisconsin.[106]

Though it has only been around for a short period of time, there has already been litigation surrounding Florida's version of Marsy's Law and its implementation in the Sunshine State.[107] For instance, in 2019, the Fourth District Court of Appeal struggled to see with how Marsy's Law changed the state's role in advocating for restitution for a victim in the case of *Morrill v. State*.[108] In *Morrill*, the defendant pled guilty to a charge of dealing in stolen property.[109] One of the items that was alleged to have been pawned was a necklace belonging to the victim.[110] During a restitution hearing, the trial court ordered $2,200 be paid to the victim for the stolen jewelry.[111]

The defendant appealed the trial court's valuation based on a failure to follow the *Hawthorne* test.[112] *Hawthorne* requires that certain factors be employed to arrive at a fair determination.[113] These factors include: "(1) original market cost; (2) [the] manner in which the item was used; (3) the

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103. *State Efforts*, MARSY'S L., http://www.marsyslaw.us/states (last visited Jan. 10, 2021).

104. Katie Meyer, *Marsy's Law Explained: What You Need to Know About the Victims' Rights Amendment on the Nov. 5 Ballot*, WITF, http://www.witf.org/2019/10/28/marsys-law-explained/ (last updated Nov. 5, 2019, 8:40 AM).

105. *See id.*

106. Marco Kirchner, *State Used Wrong Standard in "Marsy's Law" Defense*, WIS. JUST. INITIATIVE: BLOG (Mar. 22, 2021), http://www.wjiinc.org/blog/category/marsys-law.

107. *See* Toole v. State, 270 So. 3d 371, 374 (Fla. 4th Dist. Ct. App. 2019). It should be noted that while Marsy's Law was only implemented in 2019, case law that predates its passage plays an important role in understanding its content. *See id.* For instance, in the case of *Barnett v. Antonacci*, the appellate court concluded that that a prosecutor's decision to enter a Nolle Prosequi is not a "stage" in the proceeding within the meaning of the constitutional provision guaranteeing victims of crime the right to be informed, present, and to be heard. 122 So. 3d 400, 406 (Fla. 4th Dist. Ct. App. 2013). As such, Marsy's Law would not be applicable in these instances. *Id.* Therefore, this decision holds great significance in the discussion of who a would-be victim would be under the law, as it clearly creates precedent that courts may look to before 2019 in determining this question and need not attempt to extrapolate beyond previous case law should guidance already exist. *See id.*; FLA. CONST. art. I, § 16(b).

108. 268 So. 3d 160 (Fla. 4th Dist. Ct. App. 2019).

109. *Id.* at 161.

110. *Id.*

111. *Id.* at 161–62.

112. *See id.* at 162.

113. *Morrill*, 268 So. 3d at 162.

general condition and quality of the item; and (4) the percentage of depreciation."[114] In this case, the state failed to follow these requirements and only provided hearsay regarding value.[115]

However, the court did express concern regarding how Marsy's Law may have reduced the burden on victims in establishing restitution amounts, and in fact, the court imposed a new requirement upon prosecutors.[116] The appellate court cited its own recent decision in *Toole v. State*,[117] where it recognized that "proving restitution continues to be difficult for victims, and receiving compensation for their loss continues to be elusive."[118] Further, the court proposed that under Marsy's Law, the state must *now* provide assistance in establishing the condition and quality of stolen property to determine the replacement cost.[119]

In *Morrill*, the court acknowledged that the State had not provided this assistance.[120] In fact, it went as far as to say that the State took no steps to meet its potential burden to the victim under Marsy's Law.[121] While it maintained its final ruling in favor of the appellant, it also provided clear dicta that Marsy's Law may have created mandates on Florida state prosecutors to advocate more rigorously for victims' rights.[122]

One finds similar advice in a case from Florida's Third District Court of Appeal called *Alvarez-Hernandez v. State*.[123] While this case could be viewed as a cautionary tale regarding vindictive sentencing, it holds equal relevance to Marsy's Law in admonishing courts to ensure victims' have input in plea negotiations.[124] The defendant—charged with second-degree murder with a deadly weapon, aggravated battery with great bodily harm or with a

114. *Id.*
115. *Id.*
116. *See id.* at 163.
117. 270 So. 3d 371 (Fla. 4th Dist. Ct. App. 2019). Ultimately, the court in *Toole v. State* certified the following question to the Supreme Court of Florida:

> Is *Hawthorne's* formula for determining restitution based on the fair market value of the victim's property still viable after the passage of Amendment 6 (Marsy's Law), or should a trial court no longer be bound by fair market value as the sole standard for determining restitution amounts, and instead exercise such discretion as required to further the purposes of restitution, including consideration of hearsay?

Id. at 375. Unfortunately, the Supreme Court of Florida dismissed the question as moot due to defendant's death. State v. Toole, No. SC19-456, 2019 WL 2275025, at *1 (Fla. May 29, 2019).
118. *Toole*, 270 So. 3d at 374; *Morrill*, 268 So. 3d at 163.
119. *Morrill*, 268 So. 3d at 163.
120. *Id.*
121. *Id.*
122. *See id.*
123. 319 So. 3d 121 (Fla. 3d Dist. Ct. App. 2021).
124. *Id.* at 123.

deadly weapon, and aggravated assault with a deadly weapon—appealed his sentence of twenty-five years in prison followed by ten years of probation.[125] During a pretrial conference, the state attorney offered the defendant eleven years in prison.[126] The defendant rejected this offer in open court.[127] Defense counsel also alerted the judge, in chambers, that the previously assigned trial judge had offered the defendant a six-year prison sentence, followed by five years of probation.[128] That too had been spurned by the defendant.[129] The sitting judge then re-extended the six-year offer to the defendant, who again refused it.[130] The defendant argued on appeal that the court's twenty-five-year (300 months) sentence, which was over double the minimum sentence on his criminal code scoresheet, was vindicative.[131]

While the opinion focused on whether indeed the trial court's disposition order constituted vindicative sentencing for exercising one's right to go to trial, the appellate court expressed its displeasure that the victim was not present for the in-chambers plea negotiations.[132] "[W]e are concerned by the in-chambers, off-the-record plea discussions engaged in by the predecessor judge, and take this opportunity to caution trial judges . . . ."[133] The appellate court further explained that the right for a victim to be present, informed, and provide input is sacred, especially with the passage of Marsy's Law.[134]

> This record requirement is all the more important in light of the provisions of Marsy's Law, which in 2018 amended Article I, Section 16 of the Florida Constitution to, inter alia, "preserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents."[135]

But perhaps one of the best examples of how powerful victims' rights are under Marsy's Law can be seen in a recent 2021 case from Florida's Fourth

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125. *Id.* at 122.
126. *Id.*
127. *Id.*
128. *Alvarez-Hernandez*, 319 So. 3d at 122.
129. *Id.*
130. *Id.* at 123.
131. *Id.* at 122–23.
132. *Id.* at 123, 125.
133. *Alvarez-Hernandez*, 319 So. 3d at 125.
134. *Id.*
135. *Id.* (quoting FLA. CONST. art. I § 16(b)).

District Court of Appeal, where the appellate court found that a victim's right to be present trumps a defendant's right to have witnesses sequestered.[136] In that case, the defendant and the victim were siblings who got into an altercation at a family event.[137] The defendant found a knife and stabbed the victim during the squabble, ultimately killing him.[138]

At trial, the State invoked the rule of sequestration and requested the defendant's father—who was also the decedent victim's father—to wait outside the courtroom before testifying for the defense.[139] The trial court judge agreed, and ordered the father to leave the courtroom.[140] After the completion of several witnesses' testimony, the defendant requested that the father be permitted to return to the courtroom.[141] The trial court denied this request.[142] Ultimately, the jury convicted the defendant of a lesser included offense, and the judge sentenced him to thirty years in prison.[143]

On appeal, the defendant brought forth three issues for review.[144] However, the appellate court focused on whether the trial court had violated the father's right as the decedent victim's next of kin to be present under Marsy's Law.[145] While the appellate court quickly found that any potential error in excluding the father was harmless error, it still discussed the importance of the rights of a victim versus the rights of a defendant.[146]

The court's analysis referenced a Florida Supreme Court case from 2000 called *Booker v. State*.[147] In that case, similar to *Butler v. State*,[148] the defendant argued that the victim's great-niece should have been present during the sentencing phase of a murder trial.[149] However, even though the Florida Supreme Court found that it was an error to exclude the great-niece, the court found that the defendant suffered no prejudice, and as such, the error was harmless.[150] Therefore, while the appellate court alluded that the *Butler* trial judge incorrectly excluded the father, no harm had occurred, and the

136. *See* Butler v. State, 315 So. 3d 30, 34 (Fla. 4th Dist. Ct. App. 2021).
137. *Id.* at 32.
138. *Id.*
139. *See id.* at 33.
140. *See id.*
141. *Butler*, 315 So. 3d at 32–33.
142. *Id.* at 33.
143. *Id.*
144. *Id.* at 32.
145. *See id.* at 33.
146. *Butler*, 315 So. 3d at 33.
147. *Id.* at 33–34; 773 So. 2d 1079 (Fla. 2000).
148. 315 So. 3d 30 (Fla. 4th Dist. Ct. App. 2021).
149. *Booker*, 773 So. 2d at 1086–87.
150. *Id.* at 1095–96.

conviction was affirmed.[151] But in doing this, the appellate court created a precedent that Marsy's Law trumps a defendant's rights in certain circumstances.[152]

Perhaps, however, one of the Florida Court of Appeals' most important pronouncements as to Marsy's Law comes not from the analysis of what the law does but rather what it fails to do.[153] In 2020, the Florida First District Court of Appeal concluded that in the fervor of creating stronger rights for victims, the legislature had failed to include a method to implement and protect these rights for the very people the law was meant to protect.[154] In the case of *L.T. v. State*,[155] the appellate court observed "[a]s written, Marsy's Law does not provide procedures to implement and enforce the victim's rights set forth in the law or remedies for failure to recognize those rights."[156] In the case, L.T., a juvenile crime victim, claimed the trial court violated her rights under Marsy's Law when it failed to notify her regarding certain stages in the delinquency process.[157]

After being arrested for the alleged molestation of L.T., the juvenile defendant attended a detention hearing, where over the state attorney's objection, he was released to home detention.[158] The victim never received notice of the detention hearing; however, the Department of Juvenile Justice did alert L.T. of the court's final decision after it had occurred.[159] The victim's mother then filed a Notice of Appearance on behalf of the victim.[160] A month later, a second attorney filed a Notice of Appearance indicating she would be acting as co-counsel for the victim.[161] Shortly thereafter, the victim's attorneys filed a pleading notifying the court, the State, and the defense of the victim's intent to exercise her rights under Marsy's Law.[162]

Counsel for the defense moved to strike all pleadings filed on behalf of L.T., citing a lack of standing as she was not a party to the case.[163] During a hearing, the trial court granted the defense's request.[164] In doing so, the court

151. *Butler*, 315 So. 3d at 34.
152. *See id.*
153. *See* L.T. v. State, 296 So. 3d 490, 499 (Fla. 1st Dist. Ct. App. 2020).
154. *See id.* at 499–500.
155. 296 So. 3d 490 (Fla. 1st Dist. Ct. App. 2020).
156. *Id.* at 499.
157. *Id.* at 492.
158. *Id.*
159. *Id.*
160. *L.T.*, 296 So. 3d at 493.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 494.

pronounced, "there is no express language contained in [Marsy's Law] that allows the victim or the victim's representative to file a Notice of Appearance on behalf of the victim and become a party to criminal proceedings."[165]

On appeal, attorneys for the victim asserted that under Marsy's Law, the legislature envisioned granting victims of crimes similar rights and protections afforded to defendants in the criminal process.[166] Yet, the appellate court believed that a careful balance between the rights of both entities needs to occur "without impacting the basic constitutional foundations of the criminal justice system."[167] While the court believed Marsy's Law provided a framework for victims to have a "legally cognizable interest in a criminal proceeding," this was not equivalent to elevating them to the status of a party in the case.[168] As such, the appellate court concluded that there was no error in striking the victim's pleadings, as she still had meaningful input in the case pursuant to the requirements of Florida's Constitution.[169]

In closing, the District Court of Appeals opined that trial courts lacked the authority to create a system to implement victims' rights under Marsy's Law.[170] Instead, this responsibility rested squarely with the legislature and its rulemaking authority.[171] In response, the Florida Bar created a joint subcommittee charged with addressing this lack of guidance regarding the execution of the law.[172] Born from that subcommittee, Rule 2.423 of Judicial Administration has been proposed.[173] Rule 2.423 provides three procedures for the invocation of victim rights.[174] The first falls to the filer of the report.[175] This could be either the initial law enforcement agency or the intake unit for the state attorney's office.[176] However, the option provides for the victims themselves to file a request.[177]

165. *L.T.*, 296 So. 3d at 494.
166. *Id.* at 495.
167. *Id.*
168. *Id.* at 497.
169. *See id.* at 497, 499.
170. *L.T.*, 296 So. 3d at 499–500.
171. *Id.*
172. *See Rule of Judicial Administration Amendment Concerning Marsy's Law*, FLA. BAR (Mar. 24, 2020), http://www.floridabar.org/the-florida-bar-news/rule-of-judicial-administration-amendment-concerning-marsys-law/.
173. *Id.*
174. *See id.*
175. *Id.*
176. *See id.*
177. *Rule of Judicial Administration Amendment Concerning Marsy's Law*, *supra* note 172.

Unfortunately, the subcommittee focused only on the confidentiality right of Marsy's Law and not the privileges found within the document.[178] The Florida Supreme Court held oral arguments regarding the proposed rule on June 2, 2021.[179] Yet, since writing this Article, no further guidance has been provided.[180] As such, much remains uncertain regarding the interpretation and realization of Marsy's Law moving forward.[181]

IV. FLORIDA POLICE BENEVOLENT ASS'N, INC. V. CITY OF TALLAHASSEE, 314 SO. 3D 796 (FLA. 1ST DCA 2021)

Perhaps one of the greatest debates arising from the text of Marsy's Law itself is the self-contained definition of the term "victim."[182] Specifically, section 16(b)(11)(e) of the Florida Constitution reads in relevant part:

> As used in this section, a "victim" is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. The term "victim" includes the victim's lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term "victim" does not include the accused. The terms "crime" and "criminal" include delinquent acts and conduct.[183]

This definition may sufficiently encompass all possible parties protected under the law; however, like with most instances of newly passed legislation, a new debate is on the horizon as one turns to the issue of whether

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178. *See id.*

179. *6/2/21 Florida Supreme Court Oral Arguments: In Re: Amendments to Florida Rule of Judicial Administration 2.423 SC20-1128*, FLA. CHANNEL, http://thefloridachannel.org/videos/6-2-21-florida-supreme-court-oral-arguments-in-re-amendments-to-florida-rule-of-judicial-administration-2-423-sc20-1128/ (last visited Jan. 10, 2022) [hereinafter *Oral Arguments*].

180. *See id.* (noting that a hearing regarding Rule 2.423 by Florida's Supreme Court has been the last official conduct on the matter).

181. *See* The News Serv. Of Fla., *supra* note 15.

182. *See* FLA. CONST. art. 1, § 16, cl. (b)(11)(e).

183. *Id.*

law enforcement officers—in use of force cases—are considered potential victims under Marsy's Law.[184]

After two different encounters, law enforcement in Florida shot and killed criminal suspects who endangered Tallahassee police officers.[185] Following these two events, the City of Tallahassee announced it would release the names of the officers involved in the shootings.[186] In response, the officers sought to prevent the disclosure of their names through their bargaining agency—the Police Benevolent Association.[187] In doing so, the Association cited Marsy's Law, arguing that the officers were victims under Florida Law and enjoyed the right of confidentiality.[188]

At the trial court level, the judge found that the officers were not protected under the confidentiality provision of Marsy's Law.[189] Further, the trial court judge concluded that this outcome existed for the police even if they were "victims" under the legislation.[190] In doing so, the judge specifically concluded that "a law enforcement officer acting in his official capacity could not be a victim under [A]rticle I, [S]ection 16."[191] The trial court's rationale focused on the purpose of Marsy's Law being to protect victims from harassment and threats from assailant-defendants.[192] Here, with their assailants dead, the officers were not seeking protection from them but from others in the community who would view the shootings as immoral or excessive.[193] This was not meant to be the purpose of Marsy's Law.[194] The judge also asserted that the safeguards of the law exist only once "a criminal proceeding begins."[195]

On appeal, the First District Court of Appeal began with a reading of the plain language of the Florida Constitution.[196] In doing so, it found that the trial court judge improperly relied on Article I, Section 24 of the Florida Constitution when denying the officers' request, instead of focusing solely on

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184. *But see* Fla. Police Benevolent Ass'n v. City of Tallahassee, 314 So. 3d 796, 799 (Fla. 1st Dist. Ct. App. 2021).
185. *Id.* at 797.
186. *Id.*; *see also* The News Serv. Of Fla., *supra* note 15.
187. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 797.
188. *Id.*
189. *Id.*
190. *Id.* at 797–98.
191. *Id.* at 799.
192. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 801.
193. *See id.* at 799.
194. *Id.*
195. *Id.*
196. *Id.* at 799–80.

the four corners of the document.[197] Article I, Section 24 of the Florida Constitution speaks to the public's right to information and access to meetings.[198] Although at the trial court level, the judge found Marsy's Law and this constitutional section to be in conflict, the appellate court disagreed.[199] It determined that no conflict existed, and there was no need to venture beyond the text of Marsy's Law to begin with.[200]

When ruling in this fashion, the appellate court quickly pointed out that Marsy's Law represented a clear edict from the Florida citizenry.[201] This was not an occasion where a partisan legislature or a rogue judge diverted from the clear intent of an already existing law.[202] In passing Amendment 6, the state's people voiced their belief in how important victim's rights should be.[203] Additionally, Article I, Section 24 of the Florida Constitution includes language that specifically says:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, *except with respect to records exempted under this section or specifically made confidential by this Constitution*.[204]

Therefore, no conflict between the two constitutional provisions existed.[205]

The appellate court next discussed whether a police officer who is threatened with deadly force falls within the definition of a "victim" under Marsy's Law.[206] As stated previously, the Amendment's text defines the term "victim."[207] The appellate court noted that it specifically states, "[a] . . . victim is a 'person who suffers direct or threatened physical, psychological, or financial harm . . . .'"[208] Thus, a law enforcement officer who is threatened on the job with deadly force clearly suffers "direct or threatened physical" harm

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197. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 800.
198. FLA. CONST. art. I, § 24(a).
199. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 800.
200. *Id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 801 (emphasis added) (quoting to FLA. CONST. art. I, §24(a)).
205. *Id.*
206. *Id.*
207. FLA. CONST. art. I, § 16(e); *see* discussion *supra* Part IV.
208. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 801 (quoting to FLA. CONST. art. I, § 16(e)).

and is, therefore, a victim.[209] Acting in self-defense or killing the perpetrator before he or she kills the officer in no way negates this status.[210]

In making this determination, the appellate court acknowledged the importance of public interest in holding law enforcement officers responsible for misconduct while on duty.[211] However, the court found that other avenues could be utilized to hold officers accountable without necessarily revealing their identities.[212] This included procedures such as internal affair investigations and grand jury proceedings.[213] The court also conceded that Florida's Sunshine Laws intend to grant public-wide and unhindered access to information.[214] Despite this clear intent, the court remarked it was not the judicial branch's prerogative to impute into constitutional text greater breadth than what exists.[215]

The appellate court then moved to discuss the trial court's determination that one does not become a victim until the criminal process commences.[216] Again, the appellate court found this interpretation was not the clear wording of Marsy's Law's.[217] Instead, the document reads that those rights begin at the time of "victimization."[218] Furthermore, there is no requirement that a prosecution case be filed for rights to apply in the law itself.[219] While many of the protections found in Marsy's Law apply to different proceedings throughout the court process, the appellate court determined that the trial judge moved beyond the plain language to establish a requirement that did not exist.[220]

Lastly, the appellate court addressed the trial court's belief that Marsy's Law applied only to "information" and "records" and not necessarily the identity of the person's name.[221] It quickly rejected this argument stating that "information . . . that could be used to locate or harass the victim or the victim's family includes records that could reveal the victim's name or

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209. *Id.*
210. *Id.*
211. *Id.* at 802.
212. *See id.*
213. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 802.
214. *Id.*
215. *Id.* at 802–03.
216. *See id.* at 803.
217. *Id.*
218. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 803.
219. *Id.*
220. *See id.* at 802–04.
221. *Id.* at 804 (emphasis added) (citing FLA. CONST. art. I, § 16(b)(5)).

identity."[222] To rule otherwise would create a result contrary to the clear intent of the Amendment's passage to begin with.[223]

V. ANALYSIS

Beginning in 2015, The Washington Post started to keep track of every individual who was killed by law enforcement in the United States.[224] As of September 30, 2021, that number was over 5,000 individuals.[225] While most of the individuals killed were Caucasian, African Americans were disproportionately killed in larger numbers.[226] In 2019, out of the top twenty law enforcement agencies with the most killings caused by police, two resided in Florida.[227] The Miami-Dade Police Department was fourteenth in the nation, and the Jacksonville Sherriff's Office was sixteenth.[228]

Since 2005, there have been forty-two officers arrested for murder in the United States.[229] Of those arrested, only five were convicted of murder.[230] The most prevalent conviction was for manslaughter, with eleven convictions.[231] However, the list of resolutions run the gamut from improper discharge of a firearm to involuntary manslaughter.[232]

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222. *Id.*
223. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 804.
224. *925 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST, http://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last updated Jan. 10, 2022) [hereinafter *Shot by Police in 2021*].
225. *Id.*
226. *Id.* While African Americans account for only thirteen percent of the United States' population, they make up one-quarter of all police shootings. *Id.*; Joe Fox et al., *What We've Learned About Police Shootings 5 Years After Ferguson*, WASH. POST (Aug. 9, 2019), http://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/. Additionally, over one-third of the unarmed victims of police shootings were also African American. Fox et al., *supra*. In fact, an African American man is four times more likely to be shot by police than their white counterparts. *Id.*
227. *See id.*
228. *See id.*
229. Statista Rsch. Dep't, *Number of NonFederal Police Officers Arrested for Murder Who Have Been Convicted Between 2005 and 2020, by Charge*, STATISTA (June 10, 2020), http://www.statista.com/statistics/1123386/convictions-police-officers-arrested-murder-charge-us/.
230. *Id.*
231. *Id.*
232. *Id.*

Noting these statistics, it would be remiss not to point out the political climate at the time this Article is being written.[233] Names like George Floyd and Breonna Taylor will forever live in infamy as individuals whose deaths began a conversation about police accountability.[234] Equally important are names like Derek Chauvin and the role public pressure played in demanding justice in his trial.[235] One cannot help but ponder—if Derek Chauvin's name was not made public when it was, would a similar result have been reached?* While examples of public pressure assisting in accountability are available, so too are examples of when the will of the people thwarted the smooth pursuit of justice.[236]

With these realities in mind, predicting that the Florida Supreme Court will accept jurisdiction over *Florida Police Benevolent Ass'n v. City of Tallahassee*[237] seems plausible.[238] While our highest court may wish to avoid controversy, it seems evident that with the First District Court's decision, more Florida law enforcement agencies will soon follow suit.[239] And with media companies leading the charge for disclosure, there appears to be both people and money behind both sides.[240]

233. *See* Julie Pierce Onos, *How Journalists Cover Police Brutality Is a Matter of Life and Death*, MEDIA DIVERSITY INST. (June 9, 2020), http://www.media-diversity.org/how-journalists-cover-police-brutality-is-a-matter-of-life-and-death/.

234. *Id.*; *Black Lives Taken: George Floyd, Breonna Taylor, and Ahmaud Arbery*, DOSOMETHING.ORG, http://www.dosomething.org/us/articles/black-lives-taken (last visited Jan. 10, 2022).

235. *See Black Lives Taken: George Floyd, Breonna Taylor, and Ahmaud Arbery*, *supra* note 234; Onos, *supra* note 233.

236. *See Promoting Accountability*, OPPORTUNITY AGENDA, http://transformingthesystem.org/criminal-justice-policy-solutions/create-fair-and-effective-policing-practices/promoting-accountability/ (last visited Dec. 29, 2021); *Importance of Accountability in Law Enforcement*, POWERDMS (Dec. 22, 2020), http://www.powerdms.com/why-powerdms/law-enforcement/importance-of-accountability-in-law-enforcement. Kim Potter was charged with the death of Daunte Wright in Minneapolis, Minnesota when she claimed she mistook her firearm for her taser. N'dea Yancey-Bragg, *Prosecutor Assigned to Case of Ex-cop Charged in Daunte Wright's Death Resigns Over 'Vitriol' and 'Partisan Politics'*, USA TODAY, http://www.usatoday.com/story/news/nation/2021/05/25/prosecutor-assigned-to-kim-potterdaunte-wright-case-resigns/7426386002/ (May 25, 2021, 11:48 AM). The prosecutor resigned after ten years of service to his community because of the public pressure surrounding the case. *Id.* His resignation letter which was made public cited that "'vitriol' and 'partisan politics' made it difficult to pursue justice." *Id.*

237. 314 So. 3d 796 (Fla. 1st Dist. Ct. App. 2021).

238. *Id.* at 803–04.

239. *See id.* at 804.

240. *See* Onos, *supra* note 233.

Surely, the Florida Supreme Court recognizes that striking a balance between two of the most sacred principles will need to occur.[241] On the one hand, we have a sharp mandate that victims' rights are of paramount importance in our communities.[242] On the other hand, transparency and access have been hallmarks of Florida from very early on.[243] The existence of our Sunshine Laws reflect a desire by the public to hold government officials accountable for misconduct while granting citizens access to information.[244] Assuming the Florida Supreme Court does eventually weigh in on the case, how can one predict what the outcome will be?[245]

Perhaps, in foretelling the outcome, previous Florida Supreme Court cases acknowledging the deference that the court provides the will of people is instructive.[246] Indeed, a long line of precedent establishes the court's willingness to bend to the desires of its citizenry to the point of permitting votes, in some circumstances, to overwrite technical or minor defects in the Amendment process itself.[247]

With this in mind, all courts that have weighed in on Marsy's Law agree that the will of the people was to extend the rights of victims in the State of Florida.[248] Therefore, it would be consistent with this goal not only to extend the rights of victims, but also who may be considered a victim, to appease the will of the electorate.[249]

Yet, it is important to recognize the slippery slope that could occur should law enforcement officers involved in lethal force cases be granted this status.[250] For instance, would the same argument not apply to officers who are involved in shootings where the perpetrators do not die?[251] In both cases, the law enforcement officer is "a person who suffers direct or threatened physical, psychological, or financial harm . . . ."[252] For that matter, cases involving charges of battery on a law enforcement officer or resisting an officer with

241. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 799, 802.

242. *See id.* at 802–04.

243. Joseph T. Eagleton, *Walking on Sunshine Laws: How Florida's Free Press History in the U.S. Supreme Court Undermines Open Government*, FLA. B.J., Sept.–Oct. 2012, at 23–24.

244. *Id.* at 24, 26.

245. *See id.* at 31–32; *Fla. Police Benevolent Ass'n*, 314, So. 3d at 803–04.

246. *See* Eagleton, *supra* note 243, at 31–32.

247. *See id.* at 31–32; Sylvester v. Tindall, 18 So. 2d 892, 895 (Fla. 1944).

248. *See* Morrill v. State, 268 So. 3d 160, 162–63 (Fla. 4th Dist. Ct. App. 2019).

249. *See id.* at 163.

250. *See* Kam, *supra* note 6.

251. *See* Fla. Police Benevolent Ass'n, v. City of Tallahassee, 314 So. 3d 796, 801 (Fla. 1st Dist. Ct. App. 2021).

252. *Id.*

violence all potentially possess legitimate legal arguments that Marsy's Law is applicable.[253] If the Florida Supreme Court does affirm the decision in *Florida Police Benevolent Ass'n v. City of Tallahassee*, a potential plethora of battery and assault cases may emerge, insulating police from disclosure.[254]

However, even if this were to pass, it is necessary to remind ourselves that the criminal justice system is built on a foundation to protect the rights of the accused, not the media nor the public's right to information.[255] If, indeed, law enforcement is no longer the subject of public scrutiny, ultimately, this could have very little impact on a defendant accused of a crime.[256] Marsy's Law refers to public disclosure.[257] This does not necessarily equate to private disclosure to a defense attorney.[258] It does not prevent a defense attorney from taking a deposition, subpoenaing employment records, or cross-examining a witness.[259] It simply requires additional steps to keep this information private.[260]

As such, should the Florida Supreme Court affirm the ruling when it potentially will have little, if any, effect on our criminal justice system as a whole.[261] So, the question remains: how important is knowing who these officers are to Floridians?[262] For many, the answer may simply be: not that much.[263] In a recent article from 2019, Florida was in the top twenty-five states to be a police officer in.[264] Florida is considered to be quite conservative by many, which some equate to meaning pro-law enforcement.[265] Therefore, the average Floridian may not care if officer names are disclosed or not.[266]

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253. *See id.*
254. *See id.*
255. *See* Eagleton, *supra* note 243, at 26.
256. *See Fla. Police Benevolent Ass'n*, 314 So. 3d at 802.
257. *See* FLA. CONST. art. I, § 16.
258. *See* Meyer, *supra* note 104.
259. *See id.*
260. *See id.*
261. *See id.*
262. *See Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.
263. *See id.*
264. D'Ann Lawrence White, *What State Can Beat Being a Beat Cop in Florida?*, PATCH, http://patch.com/florida/southtampa/how-does-florida-rank-careers-law-enforcement (last updated May 14, 2019, 2:33 PM).
265. *See* Emily Ekins & Matthew Feeney, *Why Liberals and Conservatives Disagree on Police: Column*, USA TODAY (Apr. 20, 2017, 4:34 PM), http://usatoday.com/story/opinion/policing/2017/04/20/why-liberals-and-conservatives-disagree-police-column/97827888/.
266. *See* Fla. Police Benevolent Ass'n v. City of Tallahassee, 314 So. 3d 796, 800 (Fla. 1st Dist. Ct. App. 2021).

Ultimately, in deciding whether or not the Florida Supreme Court decides to address the decision, what the public does or does not want may not be all that germane to their conclusion.[267] The First District Court of Appeal provided a very rational and logical analysis in employing the plain language test to the text in Marsy's Law.[268] This strict construction analysis was consistent with the approach that multiple courts have used in Florida for over fifty years when defining the term "victim."[269] The District Court of Appeals also recognized the traditional role of the judiciary and did not extend its authority by creating new law, rather, the court simply interpreted the existing law.[270] As the appellate court wrote, should the public wish to exclude officers from Marsy's Law, mechanisms already exist to accomplish that very goal.[271] These include a proposal of a joint resolution of the legislature, a constitution revision commission, a citizen initiative petition, a constitutional convention, or a taxation and budget reform commission.[272] But having judges discern exclusions into already existing laws would be improper.[273] Simply stated, it does not fall on the courts to read an exclusion into a portion of the Florida Constitution when one clearly does not exist there to begin with.[274] Why would the Florida Supreme Court, therefore, engage in such a practice, when instead they could continue the time-honored practice of using strict constructionism and follow the document's plain language?[275]

VI. CONCLUSION

At the time of writing this Article, the Florida Supreme Court has yet to decide if it will accept jurisdiction over the case of *Florida Police Benevolent Ass'n v. City of Tallahassee*.[276] The court may be waiting to see if other district courts weigh in on the issue and if a conflict between jurisdictions

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267. *See* The News Serv. of Fla., *supra* note 15.

268. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 803–04.

269. *Id.* at 802; *see, e.g.*, L.T. v. State, 296 So. 3d 490, 499 (Fla. 1st Dist. Ct. App. 2020); Koile v. State, 934 So. 2d 1226, 1231 (Fla. 2006).

270. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 802–03.

271. *Id.* at 803.

272. *Id.*

273. *See, e.g.*, Eagleton, *supra* note 243, at 32 (criticizing a Florida judge's decision to hold The Miami Herald in contempt for publishing a cartoon that was critical of the judicial system). *Id.* ("[T]he conduct of the judges in the case represented both an abuse of power and a constraint on the core liberty enshrined in the First Amendment").

274. *Fla. Police Benevolent Ass'n*, 314 So. 3d at 802–03.

275. *See id.* at 804 (finding the trial court's construction of Article I, Section 16 of the Florida Constitution incorrect and straying from the plain meaning of the words).

276. The News Serv. of Fla., *supra* note 15.

arises.[277] On the other hand, the court may simply be deciding if the case is truly worthy of review, depending on the amount of public outcry.[278] In either scenario, Marsy's Law may ultimately be a cautionary tale for people to be careful what they wish for, or rather, the electorate to be careful what they vote for.[279]

As stated previously, Amendment 6—Marsy's Law—passed in 2018, with over sixty-one percent of the electorate voting "yes."[280] In a state where thirty-six percent of voters identify as Republican and thirty-six percent as Democrats, the Amendment appeared to have bipartisan support.[281] Of course, billed as a victim's bill of rights, few, if any, could have foreseen the proposal as a tool to hide the identities of officers in fatal shootings.[282] But even if this outcome was unforeseeable, it may not necessarily matter to many.[283]

While the role of the press in identifying certain law enforcement misconduct is undeniable, it may not always be understood.[284] In a June 2020 article composed by Julie Pierce Onos for Media Diversity Institute, the author wrote, "[f]or Black people, media coverage of police brutality is a matter of life and death."[285] The article surmises that the role of the press in shining a light on the injustices suffered by African Americans at the hands of law enforcement is undeniable.[286] In fact, the author argues if the press had not been so slow to recognize its role in supporting minorities, many past injustices may have been resolved differently.[287] But while the public is now waking up to the vital role the press plays in exposing police brutality, this arousal is only recent.[288] As such, many do not realize how the press's inability

277. *See id.*

278. *See id.*

279. *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

280. *Marsy's Law for Florida Passes!*, MARSY'S L. FOR FLA., http://www.marsyslawforfl.com/ (last visited Dec. 29, 2021).

281. *Voter Registration by Party Affiliation*, FLA. DIV. ELECTIONS, http://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/voter-registration-by-party-affiliation/ (last visited Dec. 29, 2021); *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

282. The News Serv. of Fla., *supra* note 15.

283. *See id.* (explaining that the interpretation of Marcy's Law is a question which turns on state constitutional interpretation and thus the "Supreme Court is the *final arbiter*").

284. Phil Sudo, *The News Media: Fourth Branch of Government*, SCHOLASTIC UPDATE, Sept. 8, 1989, at 15, 15.

285. Onos, *supra* note 233.

286. *See id.*

287. *Id.*

288. *See id.*

to report on these matters could impact justice in these cases.[289] This may result in numerous Floridians not recognizing the role the media plays in obtaining justice for minorities when identifying individual officers in fatal shootings.[290]

Ultimately, the effect of Marsy's Law in protecting the identity of law enforcement in use of force cases may already reflect the will of most Floridians.[291] However, if this comes at the cost of allowing the public to supervise potentially the most powerful branch of government, for some, the cost may be too high.[292] If the Florida Supreme Court does weigh in on the issue, the justice who submits their opinion will most likely affirm the First District's decision.[293] In doing so, the outcome may do a little more than retrace the well-thought-out and reasoned opinion of the lower court.[294] Additionally, this approach will be consistent with precedent in following strict constructionism and adhering to the plain language of the text.[295] But in doing so, the outcome may forever weaken what some call the fourth branch of government—the press.[296] For if the press cannot ultimately provide oversight in these cases, is the public ready for the police to police their own?[297]

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289. *See id.*

290. *See* Onos, *supra* note 233; *Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

291. *See Amendment 6/Marsy's Law for Florida Approved by Florida Voters*, *supra* note 97.

292. *See* The News Serv. of Fla., *supra* note 15; *Rule of Judicial Administration Amendment Concerning Marsy's Law*, *supra* note 172.

293. *See* The News Serv. of Fla., *supra* note 15.

294. *See* Fla. Police Benevolent Ass'n v. City of Tallahassee, 314 So. 3d 796, 804 (Fla. 1st Dist. Ct. App. 2021).

295. *See id.* at 803–04.

296. *See id.*; Sudo, *supra* note 284, at 15.

297. *See* Ann C. Hodges & Justin Pugh, *Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle*, 52 U.C. DAVIS L. REV. ONLINE 1, 39 (2018). For those interested in the police's ability to police itself, this is an excellent law review article detailing the legal ramifications when officers report fellow officers for misconduct and the potential blowback they face. *See id.* at 1–2.

FREEDOM OF SPEECH IN THE ERA OF SOCIAL MEDIA: A REVIEW OF SENATE BILL 7072, FLORIDA'S ANTI-CENSORSHIP BILL AIMED AT BIG TECH

LUCIA E. RODRIGUEZ*

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I. INTRODUCTION

Social media platforms have become one of the most prevalent forms of communication and will undoubtedly continue to be the preferred and most pervasive form of communication worldwide.[1] Social media is one of the fastest adopted technologies, with about 4.48 billion users today.[2] Approximately 56.8% of the world's population uses some form of social network, including 231.47 million people in the United States.[3] According to a Pew Research Center poll, Americans under fifty years old turn to digital devices for news.[4] In addition, social media serves as the primary news source for eighteen through twenty-nine-year-olds.[5] Today's leading social media companies are Twitter, Facebook, Google, TikTok, YouTube, and Instagram.[6] Collectively, they are commonly referred to as "Big Tech."[7]

The pervasiveness of information posted on these social media sites prompted the federal government, under former President Bill Clinton, to sign into law section 230 of the Communications Decency Act in 1996.[8] The Act served as a way for Big Tech to censor indecent material on the internet.[9] After several lawsuits challenging the law's constitutionality, section 230 was amended in 1998 and 2018.[10] Now, section 230 provides tech companies with legal protection from civil liability for hosting the content of others and from

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1. *See* discussion *infra* Part II; Brian Dean, *Social Network Usage & Growth Statistics: How Many People Use Social Media in 2021?*, BACKLINKO, http://backlinko.com/social-media-users (last updated Oct. 10, 2021).
2. Dean, *supra* note 1.
3. *Id.*
4. Elisa Shearer, *More Than Eight-in-Ten Americans Get News From Digital Devices*, PEW RSCH. CTR. (Jan. 12, 2021), http://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/.
5. *See id.*
6. Dean, *supra* note 1; *see* discussion *infra* Section II.B.
7. *See* discussion *infra* Section II.B.
8. Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143; *see also* Adi Robertson, *Section 230 is 25 Years Old, and It's Never Been More Important*, VERGE (Feb. 8, 2021, 2:08 PM), http://www.theverge.com/22268421/cda-section-230-25th-anniversary-reform-stakes-big-tech-internet.
9. *See* discussion *infra* Section II.B; Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143 (1996); Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL'Y 553, 559 (2018).
10. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115–164, § 4(a), 132 Stat. 1253, 1254 (2018); *see* discussion *infra* Section II.B; *see also* 47 U.S.C. § 230; Reno v. ACLU, 521 U.S. 844, 849 (1997) (challenging the constitutionality of provisions of the Communications Decency Act seeking to protect minors from indecent material posted on the internet).

restricting access to or availability of material they deem "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[11]

On May 24, 2021, Florida Governor Ron DeSantis signed into law Senate Bill 7072 ("SB 7072"), which is aimed at these Big Tech companies.[12] The law comes as a response to Big Tech's alleged bias and censorship of conservative views, especially at the height of the 2020 election.[13] Most notable was the removal of former President Donald J. Trump from Twitter.[14] According to Governor DeSantis, social media is allegedly responsible for censoring conservative views and prioritizing "Silicon Valley leftist narratives."[15] SB 7072 provides penalties of $250,000 a day for deplatforming a candidate for state office and $25,000 a day for deplatforming a local government candidate.[16] SB 7072 also requires social media companies to publish detailed standards on how it determines to *deplatform* and *shadow ban* their users and disclosure of post-prioritization algorithms on its users.[17]

This Bill is the first of its kind.[18] SB 7072 mirrors some of the language in section 230 of the Communications Decency Act; however, critics claim the law is not only preempted by the federal statute, but it goes too far.[19] Others argue that the law itself is unconstitutional.[20] Not even three days after

11. 47 U.S.C. § 230(c)(2)(a).

12. S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021); Catherine Thorbecke, *Critics Slam Florida's Law Banning Big Tech 'De-Platforming' as 'Unconstitutional'*, ABC NEWS (May 25, 2021, 4:27 PM), http://abcnews.go.com/Technology/critics-slam-floridas-law-banning-big-tech-de/story?id=77891650.

13. Fla. S.B. 7072; *see* discussion *infra* Section II.C; Thorbecke, *supra* note 12.

14. *See* William L. Kovacs, *Section 230's Unconstitutional Delegation of Power to Big Tech*, HILL (Jan. 23, 2021, 6:00 PM), http://thehill.com/opinion/technology/535497-section-230s-unconstitutional-delegation-of-power-to-big-tech.

15. Fox10 News, *Governor Ron DeSantis Press Conference in Miami*, YOUTUBE (May 24, 2021), http://www.youtube.com/watch?v=O67BF-2IWiY [hereinafter *DeSantis Press Conference*].

16. Fla. S.B. 7072.FLA. STAT. § 106.072(3) (2021).

17. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(a) (2021); *see* discussion *infra* Section III.B.1.

18. Fla. S.B. 7072; *see DeSantis Press Conference*, *supra* note 15; Casey Feindt, *Gov. DeSantis Signs Bill Aimed at Holding 'Big Tech' Firms Accountable for Banning, Blocking Accounts*, FIRST COAST NEWS (May 24, 2021, 12:23 PM), http://www.firstcoastnews.com/article/news/regional/florida/watch-governor-ron-desantis-speaks-in-miami/77-f1bd0b1e-decf-4843-9e5b-d203752d1353.

19. Fla. S.B. 7072; *see* Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143 (1996); Complaint at 2, NetChoice, L.L.C. v. Moody, (No. 21-CV-220), 2021 WL 2690876, at 2 [hereinafter NetChoice Complaint]; 47 U.S.C. § 230(c)(2)(a).

20. Thorbecke, *supra* note 12.

Governor DeSantis signed the Bill into law, NetChoice and Computer and Communications Industry Association ("CCIA"), two large not-for-profit trade associations whose members include social-media providers, filed suit in federal court challenging the Bill's constitutionality and seeking to enjoin its enforcement.[21] SB 7072 was to take effect July 1, 2021; however, on June 30, 2021, a Federal Judge granted CCIA's preliminary injunction.[22] This Note will explore the constitutionality of SB 7072.[23] Part II will discuss the events that led to the drafting of the Bill, Part III will describe its contents, and Part IV will explore whether SB 7072 is constitutional.[24]

II. EVENTS THAT LED TO SENATE BILL 7072

A. *Marketplace for Ideas*

The First Amendment to the United States Constitution states, "[C]ongress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[25] The Supreme Court has classified certain types of speech, like political speech, as warranting more protection than others.[26] A regulation that directly infringes on political speech will only be upheld if the government meets the high burden of showing that the law is "narrowly tailored to [achieve] a compelling [government] interest."[27] Classifications of

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21. Fla. S.B. 7072; *see* Jordan Kirkland, *DeSantis's "Big Tech" Crackdown Bill Slapped with Free Speech Lawsuit*, CAPITOLIST (May 28, 2021), http://thecapitolist.com/desantiss-big-tech-crackdown-bill-slapped-with-free-speech-lawsuit/.

22. Fla. S.B. 7072; *see* Renzo Downey, *Judge Blocks Florida Law Aimed at Punishing Social Media*, FLA. POL. (July 1, 2021), http://floridapolitics.com/archives/438675-judge-halts-big-tech-bill-hours-before-it-kicks-in/.

23. *See* discussion *infra* Part IV; Fla. S.B. 7072.

24. *See* discussion *infra* Parts II–V; Fla. S.B. 7072.

25. U.S. CONST. amend. I.

26. *See, e.g.*, W. Va. State Bd. Of Educ. V. Barnette, 319 U.S. 624, 642 (1943) (finding a school board resolution that required students to salute the American flag during activity programs in all public schools unconstitutional because it compelled involuntary speech).

27. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231–32 (2015) (striking down a town ordinance that restricted the postage of certain signs because the government's purpose for the regulation, which was aesthetic appeal and traffic management, was not a compelling reason and the ordinance was not narrowly tailored to achieve the government's purpose, thus failing the strict scrutiny standard applied).

speech such as obscenity,[28] fighting words,[29] true threats,[30] incitement to violence,[31] and defamation,[32] on the other hand, are considered low-value speech that does not receive the same heightened legal protection as political speech.[33] Laws that regulate these lower-level categories of speech will be upheld if they are rationally related to a legitimate interest,[34] or sometimes, upon a showing that the law is substantially related to an important state interest.[35]

The high protection of political speech evinces the Founding Fathers' aversion to tyrannical British regulations on expression, such as the licensing laws that plagued the sixteenth century.[36] These were followed by prosecutions for seditious libel in the late sixteenth and early seventeenth centuries.[37] With the advent of the printing press in the sixteenth century, licensing laws sought to punish those who published material criticizing the King.[38] Licensing in the colonies was considered inconsistent with freedom of expression and was interpreted as prior restraints on speech.[39] According to one commentator, "since licensing schemes had expired in England in 1695 and in the colonies by 1725, the Framers of the First Amendment intended to

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28. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973).

29. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The Supreme Court found that the First Amendment does not protect "fighting words" — words that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574.

30. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003). "True threats" occur when the speaker "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* Not to be confused with "political hyperbole." *Id.*

31. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

32. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring the showing of actual malice to prove the publication was defamatory against a public official). Depending on who the speech was intended for, like a public official, the Supreme Court requires different levels of intent to prove that the statement was defamatory. *Id.*

33. VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH 1–2 (2019).

34. *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (upholding a village zoning ordinance under the rational basis standard that restricted land use to a family dwelling).

35. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994). This is the intermediate scrutiny standard, which the Court uses when a classification based on gender or legitimacy is involved. *Id.*

36. *See* RONALD J. KROTOSZYNSKI, JR. ET AL., THE FIRST AMENDMENT: CASES & THEORY 5–6 (3d ed. Wolters Kluwer 2017).

37. *Id.* at 6–7. These prosecutions were much like those involving libel of private persons. *Id.* at 7.

38. *Id.* at 5–6.

39. *See id.* at 9.

do more than simply prohibit prior restraints."[40] Colonial defenders of free expression, like Thomas Jefferson, argued that free debate would lead to truth.[41] The learned John Stuart Mill knew the value of truth and the importance of expressing one's views in an open marketplace for ideas:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.[42]

Essentially, the free marketplace fosters debate and the exchange of ideas in pursuit of the truth.[43] According to Thomas Jefferson, "[t]ruth . . . will prevail if left to herself. . . . [S]he is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument, and debate."[44] Today's marketplace for ideas has changed from the public square to virtual platforms.[45] These virtual platforms provide avenues for historically

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40. KROTOSZYNSKI, JR. ET AL., *supra* note 36, at 9.

41. *Id.* at 13–14; 2 THE PAPERS OF THOMAS JEFFERSON 546 (Julian P. Boyd ed., 1950).

42. JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

43. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes J., dissenting).

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophesy based upon imperfect knowledge.

Id.

44. KROTOSZYNSKI, JR. ET AL., *supra* note 36, at 13–14.

45. *See* Mason C. Shefa, *First Amendment 2.0: Revisiting* Marsh *and the Quasi-Public Forum in the Age of Social Media*, 41 U. HAW. L. REV. 159, 161–62 (2018).

unprecedented amounts of speech.[46] Never has material traveled so quickly and reached so many people.[47] Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties.[48]

B. *Section 230 of the Communications Decency Act*

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[49] the plaintiff sued Prodigy, an interactive computer service, for defamatory comments made by an unidentified third party on one of Prodigy's bulletin boards.[50] The New York court held Prodigy strictly liable for the defamatory post because Prodigy acted more like an original publisher than a distributor.[51] Original publishers of defamatory statements are held strictly liable for any defamatory information they publish.[52] On the other hand, distributors like book stores and libraries are held to a lower *knowledge* standard, in which liability is imposed on the distributor of defamatory statements if it is proven that the distributor *knew* of the statement's defamatory nature.[53] The *Stratton Oakmont* court found that Prodigy was acting more akin to a publisher because it advertised its practice of controlling content on its service and because it actively screened and edited messages posted on its bulletin boards.[54]

Congress enacted section 230 of the Communications Decency Act to remove the disincentives to self-regulate created by the *Stratton Oakmont* decision.[55] Under the court's decision, interactive computer services would be opening themselves to liability for regulating the material posted on their platforms because such regulation casts the service provider in the role of a publisher.[56] Congress, recognizing the importance of the Internet's continued growth and the need to regulate indecent online material, drafted section 230 of the Communications Decency Act codified in Title V of the

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46. *See id.* at 164. ("[A]s early as 2001, courts have treated computers and Internet access as 'virtually indispensable in the modern world of communications and information gathering.'") (quoting United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001) (per curiam)).

47. *See id.* at 165.

48. *See id.* at 161–62.

49. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

50. *Id.* at *1–*2.

51. *Id.* at *4.

52. *See id.* at *3.

53. *Id.*; *see also* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

54. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4.

55. *See* 47 U.S.C. § 230; John A. LoNigro, Comment, *Deplatformed: Social Network Censorship, the First Amendment, and the Argument to Amend Section 230 of the Communications Decency Act*, 37 TOURO L. REV. 427, 459–60 (2021); *Zeran*, 129 F.3d at 331.

56. *Zeran*, 129 F.3d at 331.

Telecommunications Act of 1996.[57] Nebraska Senator James Exon and Washington State Senator Slade Gorton introduced section 230 to the Senate Committee of Commerce, Science, and Transportation in 1995.[58] According to Senator Exon, the Act's purpose was to "provide much needed protection for children" from indecent material posted on the Internet.[59] The Act prohibits the knowing dissemination of obscene material to children and empowers "interactive computer service[s]" to remove such content from their platforms without risk of liability.[60] "'Interactive computer service' [is defined as] any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[61] This definition includes social media networks.[62] Thus, Twitter, Instagram, Google, YouTube, and Facebook are all covered under section 230.[63]

1. Policy Goals

The Act's policy is explicitly outlined in the text, and provides that it is the policy of the United States:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of

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57. Communications Decency Act of 1996, Pub. L. No. 104–104, § 501, 110 Stat. 133–143 (1996); Leary, *supra* note 9, at 558–59.

58. *Senator J. James Exon*, CONGRESS.GOV, http://www.congress.gov/member/john-exon/E000284?r=2&q=%7B%22bill-status%22%3A%22introduced%22%7D (last visited Jan. 10, 2022); S.314, 104th Cong. (1st Sess. 1995).

59. *See* Leary, *supra* note 9, at 559 n.19 (quoting Senator Exon, author of the CDA) ("The fundamental purpose of the Communications Decency Act is to provide much needed protection for children.").

60. *See* 47 U.S.C. § 230(c).

61. *Id.* § 230(f)(2).

62. *See* LoNigro, *supra* note 55, at 457–58.

63. *See id.*

> blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[64]

The Act was first struck down in *Reno v. American Civil Liberties Union*[65] in 1997 when the Supreme Court held that portions of the Act were unconstitutionally vague.[66] For instance, the Act's prohibition of the "transmission of 'indecent material'" was specifically found to be vague.[67] However, the Act itself was not challenged, and remains effective law today.[68]

2. Publisher vs. Distributor

Section 230 explicitly exempts interactive computer services as "publishers of information" posted on their platforms by third parties.[69] This designation came as a response to the *Stratton Oakmont* decision.[70] One year after section 230 was enacted, the Fourth Circuit dealt with the publisher versus distributor distinction in *Zeran v. American Online, Inc*.[71] The plaintiff, Zeran, sued AOL for failing to remove defamatory messages posted by an unidentified third party, failing to screen for similar posts thereafter, and refusing to post retractions of those messages.[72] Zeran argued that Congress' chosen designation, to explicitly treat interactive service providers as publishers, means that they did not mean to limit distributor liability by exclusion.[73] Therefore, because AOL knew of the defamatory nature of the posts, they should be held liable as distributors.[74]

The Fourth Circuit disagreed, reasoning that "imposition of distributor liability . . . is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by [section] 230."[75] The distinction between publishers and distributors is important because section 230 has granted social

64. 47 U.S.C. § 230(b).
65. 521 U.S. 844 (1997); *see also* Leary, *supra* note 9, at 559.
66. *Reno*, 521 U.S. at 874; Leary, *supra* note 9, at 559.
67. *Reno*, 521 U.S. at 870–74; Leary, *supra* note 9, at 559.
68. Leary, *supra* note 9, at 559.
69. 47 U.S.C. § 230(c)(1).
70. LoNigro, *supra* note 55, at 464.
71. 129 F.3d 327 (4th Cir. 1997); *see also* Leary, *supra* note 9, at 575.
72. *Zeran*, 129 F.3d at 328.
73. *Id.* at 331. Zeran notified AOL "repeatedly" about the defamatory posts. *Id.* at 329. Thus, the Company was on notice. *See id.*
74. *See id.* at 331.
75. *Id.* at 332.

media platforms free reign to remove content they otherwise find objectionable without being classified as a *publisher* of such editorial choices.[76] As such, Big Tech companies are immune from civil liability.[77]

C. *2020 Election*

With more Americans turning to social media for their daily news, it is no surprise that political candidates have relied so heavily on these virtual platforms.[78] Social media platforms are amenable to political candidates' messages because of their capacity to reach a vast amount of people.[79] The 2020 election was unprecedented in that it occurred in the middle of a pandemic, where the majority of Americans were forced to stay at home and connect with people via social media.[80] Political ads on these social networks were an essential tool used by 2020 candidates to reach voters throughout their campaigns.[81]

While political ads that run on broadcast television remain the largest expenditure, online political ads are not far behind.[82] From 2018 through 2019, former President Donald J. Trump spent the most money of all online ad-spenders and more on Google and Facebook political advertisements than every other 2020 candidate.[83] Former President Trump spent approximately $852,000 on Facebook advertisements, which surpassed every other

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76. *See* 47 U.S.C. § 230(c)(2)(A).

77. *See id.* at § 230(e). The only exceptions to the liability shield granted to Big Tech companies is if they violate a criminal law, violate intellectual property laws, or violate sex trafficking laws. *Id.* at § 230(e)(1)–(5).

78. *See* LoNigro, *supra* note 55, at 429.

79. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("While in the past there may have been difficulty in identifying the most important places — in a spatial sense — for the exchange of views, today the answer is clear. It is cyberspace — the 'vast democratic forums of the Internet' in general, and social media in particular.") (citation omitted).

80. *See* Miles Parks, *Social Media Usage Is at an All-Time High. That Could Mean a Nightmare for Democracy*, NPR (May 27, 2020, 5:02 AM), http://www.npr.org/2020/05/27/860369744/social-media-usage-is-at-an-all-time-high-that-could-mean-a-nightmare-for-democr.

81. *See* Statista Rsch. Dep't, *2020 Presidential Election and the Media – Statistics & Facts*, STATISTA (Feb. 25, 2021), http://www.statista.com/topics/5934/2020-presidential-election-and-the-media/.

82. *Id.*

83. *Id.*

candidate's spending.[84] Twitter[85] and TikTok[86] currently prohibit political ads, but Facebook does not.[87] While these amounts may seem staggering to the average person, to a political candidate, they are essential to reach the voters.[88] For instance, every 2020 presidential candidate had a Twitter account.[89] One of the Democratic candidates in the 2020 presidential race, Bernie Sanders, had over ten million followers on Twitter, while President Joe Biden had over four million.[90] Former President Trump had nearly 88.9 million followers before he was banned from Twitter on January 7, 2021.[91] Former President Trump's use of Twitter was widely criticized, and according to a poll mid-way through his presidency, sixty percent of the pollsters claimed his Tweets were inappropriate.[92]

Whatever the content of his tweets, former President Trump was able to speak directly to his millions of followers and skip the *middleman* of mainstream news that would require one to sift through and interpret what the former President "meant."[93] In fact, he was not the only politician to see the

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84. *Id.*

85. *Political Content*, TWITTER BUS., http://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html (last visited Jan. 10, 2022) ("Twitter globally prohibits the promotion of political content. . . . [w]e define political content as content that references a candidate, political party, elected or appointed government official, . . . referendum, ballot measure, legislation, regulation, directive, or judicial outcome.").

86. Blake Chandlee, *Understanding Our Policies Around Paid Ads*, TIKTOK NEWSROOM, http://newsroom.tiktok.com/en-us/understanding-our-policies-around-paid-ads, (last visited Jan. 10, 2022) ("[W]e will not allow paid ads that promote or oppose a candidate, current leader, political party or group, or issue at the federal, state, or local level — including election-related ads, advocacy ads, or issue ads.").

87. *See Get Authorized to Run Ads About Social Issues, Elections or Politics*, FACEBOOK FOR BUS., http://www.facebook.com/business/help/208949576550051?id=288762101909005 (last visited Jan. 10, 2022) [hereinafter *Get Authorized to Run Ads*] (requiring advertisers that wish to run or edit political ads on Facebook in the United States to get special authorization first).

88. *See* Statista Rsch. Dep't, *supra* note 81.

89. *See* Bridget Coyne, *Helping Identify 2020 U.S. Election Candidates on Twitter*, TWITTER: BLOG (Dec. 12, 2019), http://blog.twitter.com/en_us/topics/company/2019/helping-identify-2020-us-election-candidates-on-twitter (noting that all presidential candidates that have been confirmed by Ballotopia will have Election Labels — the blue checks — next to their name).

90. Statista Rsch. Dep't, *supra* note 81.

91. *Twitter 'Permanently Suspends' Trump's Account*, BBC NEWS, http://www.bbc.com/news/world-us-canada-55597840 (last visited Jan. 10, 2022).

92. Statista Rsch. Dep't, *supra* note 81.

93. *See Twitter 'Permanently Suspends' Trump's Account*, *supra* note 91; Brice C. Barnard, Comment, *The Tweet Stops Here: Politicians Must Address Emerging Freedom of Speech Issues in Social Media*, 88 UMKC L. REV. 1019, 1025 (2020).

value in speaking directly to his constituency.[94] President Biden relied heavily on social media networks, especially to connect with younger voters.[95]

D. *Deplatforming of Candidates*

Claims of Big Tech's censorship have recently come to the forefront of the news.[96] Because of section 230's protection, these companies do not risk civil liability for removing content posted on their platforms that violate their "terms of service."[97] Algorithms, which automate the detection of "misinformation" and violations of these platforms' terms of services, enable Big Tech to remove content, usually without warning and without a clear explanation of the standards that resulted in the removal.[98] Although technically not state actors, Big Tech companies have amassed such a large base and influence that they should be held to the same degree of scrutiny as government actors.[99] The fact that a few private companies essentially have an editorial monopoly over the vast amount of content posted on their sites is contrary to the principles of the Constitution.[100] Ostensibly, these social media sites should serve to foster more speech.[101] Big Tech's censorship of certain viewpoints was evident throughout the 2020 election.[102]

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94. *See Twitter 'Permanently Suspends' Trump's Account*, *supra* note 91; Peter Suciu, *Social Media Proved Crucial for Joe Biden — It Allowed Him to Connect with Young Voters and Avoid His Infamous Gaffes*, FORBES (Nov. 17, 2020, 4:35 PM), http://www.forbes.com/sites/petersuciu/2020/11/17/social-media-proved-crucial-for-joe-biden--it-allowed-him-to-connect-with-young-voters-and-avoid-his-infamous-gaffes/?sh=b49856841482.

95. Suciu, *supra* note 94.

96. *See, e.g.*, *How Big Tech Censorship is Harming Free Speech*, LIBERTIES (May 5, 2021), http://www.liberties.eu/en/stories/big-tech-censorship/43511.

97. LoNigro, *supra* note 55, at 431; *Twitter Terms of Service*, TWITTER, http://twitter.com/en/tos (last visited Jan. 10, 2022). Under its terms of service, Twitter can "suspend or terminate your account or cease providing you with all or part of the [s]ervices at any time for any or no reason . . . ." *Id.*

98. *See How Big Tech Censorship is Harming Free Speech*, *supra* note 96.

99. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 506 (1946) (finding company-owned town was subject to the First Amendment because town was open to the public and used for public purposes, similar to the government); *see* LoNigro, *supra* note 55, at 429.

100. *See* discussion *supra* Section II.A; U.S. CONST. amend. I.

101. *See* 47 U.S.C. § 230.

102. *See* discussion *infra* Section II.D.1; Carla Marinucci & Daniel Strauss, *Tulsi Gabbard Sues Google Over Post-Debate Ad Suspension*, POLITICO (July 25, 2019, 1:35 PM), http://www.politico.com/story/2019/07/25/tulsi-gabbard-sues-google-account-suspension-1435405.

1. Congresswoman Tulsi Gabbard

The 2020 Democratic Party presidential candidate, Tulsi Gabbard of Hawaii, fell victim to Big Tech's censorship during her campaign.[103] Throughout her campaign, Representative Gabbard was critical of Big Tech.[104] Gabbard frequently voiced her concern about Facebook banning users and voiced her support for net neutrality as a "cornerstone of our democracy."[105] Right after the Democratic presidential debate in June 2019, Google suspended Gabbard's campaign ad account.[106] Only hours after the debate, Gabbard's performance earned her the title of one of Google's most searched candidates.[107] It was never proven why her campaign ad account was suspended at such a critical time.[108] Gabbard only received a message from Google that said her account was suspended "for violations of billing practices and advertising practices."[109] In July 2019, Representative Gabbard filed suit against Google, claiming they violated her First Amendment right of free speech by suspending her campaign account.[110] In a short decision, the court dismissed the case, finding Google was not a state actor and, therefore, not subject to the First Amendment.[111]

Representative Gabbard is not the only political official who faced Big Tech's censorship.[112] On September 13, 2019, Twitter suspended Republican Texas House Representative Briscoe Cain's account for one

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103. Marinucci & Strauss, *supra* note 102; *see* LoNigro, *supra* note 55, at 430.

104. Marinucci & Strauss, *supra* note 102.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. Marinucci & Strauss, *supra* note 102.

110. *See id.*; Tulsi Now, Inc. v. Google, LLC, No. 2:19-CV-06444, 2020 WL 4353686 at *1 (C.D. Cal. Mar. 3, 2020).

111. *Tulsi Now, Inc.*, 2020 WL 4353686 at *2.

> What Plaintiff fails to establish is how Google's regulation of its own platform is in any way equivalent to a governmental regulation of an election. Google does not hold primaries, it does not select candidates, and it does not prevent anyone from running for office or voting in election. To the extent Google "regulates" anything, it regulates its own private speech and platform.

Id.

112. *See* Marinucci & Strauss, *supra* note 102; Joseph Menn & Katie Paul, *Twitter, Facebook Suspend Some Accounts as U.S. Election Misinformation Spreads Online*, REUTERS (Nov. 3, 2020, 5:08 PM), http://www.reuters.com/article/us-usa-election-socialmedia/twitter-facebook-suspend-some-accounts-as-u-s-election-misinformation-spreads-online-idUSKBN27J2S4 ("Twitter, Inc.[] and Facebook, Inc.[] on Tuesday suspended several recently created and mostly right-leaning news accounts posting information about voting in the hotly contested U.S. election for violating their policies.").

hundred forty-one days.[113] On January 17, 2021, Twitter suspended Republican House Representative Marjorie Taylor Greene for twelve hours.[114] On June 11, 2021, Republican Senator Ron Johnson was suspended from YouTube for seven days,[115] and on January 9, 2021, Republican House Representative Barry Moore's Twitter account was suspended temporarily.[116]

2. Former President Donald J. Trump

During his presidency, former President Trump was also critical of Big Tech and called for the policing of section 230.[117] On May 28, 2020, President Trump issued an Executive Order ("EO") that commented on the selective censorship that Twitter, Facebook, Instagram, and YouTube were exercising over Americans.[118] One of the directives in the EO ordered the Department of Justice to develop proposed amendments to section 230 that

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113. Dave Montgomery & Nick Corsaniti, *Exchange Over Texas Ballot's 'Purity' Puts G.O.P. Firebrand in Hot Seat*, N.Y. TIMES, May 13, 2021, at A19; Texas Tribune Staff, *Briscoe Cain Says His "My AR is Ready For You" Tweet Benefited Him, Beto O'Rouke*, TEXAS TRIB. (Sept. 28, 2019, 3:00 PM), http://www.texastribune.org/2019/09/28/briscoe-cain-beto-orourke-gun-tweet/ (discussing how Republican Representative Briscoe Gain's Twitter account was suspended after he tweeted an alleged death threat towards Democratic presidential candidate Beto O'Rourke).

114. Bill Chappell, *Twitter Suspends Rep. Marjorie Taylor Greene's Account*, NPR (Jan. 17, 2021), http://www.npr.org/sections/insurrection-at-the-capitol/2021/01/17/957891462/twitter-suspends-rep-marjorie-taylor-greene-s-account-temporarily; *Twitter Suspends Republican Lawmaker's Account Over Violations of 'Integrity Policy'*, KOREA TIMES, http://www.koreatimes.co.kr/www/tech/2021/09/133_302634.html?KK (Jan. 18, 2021, 1:48 PM) (explaining how Representative Greene's account was suspended for tweeting about alleged 2020 election fraud, which was in violation of Twitter's civic integrity policy).

115. Shawn Johnson, *Republican US Sen. Ron Johnson Suspended from YouTube*, WIS. PUB. RADIO (June 11, 2021, 5:50 PM), http://www.wpr.org/republican-us-sen-ron-johnson-suspended-youtube (discussing how Senator Johnson was suspended for "violat[ing] the company's [COVID-19] medical misinformation [policy]").

116. *See* Zack Budryk, *Newly Sworn in GOP Rep Deletes Twitter Account After Suspension Following Controversial Riot Posts*, HILL (Jan. 11, 2021, 11:52 AM), http://thehill.com/homenews/house/533625-newly-sworn-in-gop-rep-deletes-twitter-account-after-suspension-following; *Barry Moore Deactivates Twitter Account After Being Suspended From Platform*, ALA. NEWS NETWORK, http://www.alabamanews.net/2021/01/11/barry-moore-deactivates-twitter-account-after-being-suspended-from-platform/ (Jan. 11, 2021, 3:04 PM) (discussing how House Representative Moore's Twitter account was suspended after tweets he shared following the riot at the U.S. Capitol).

117. Talia Kaplan, *Trump Lawsuit Against Big Tech Could 'Break New Ground' on First Amendment Protections: Parler Interim CEO*, FOX NEWS (July 8, 2021), http://www.foxnews.com/media/trump-lawsuit-big-tech-first-amendment-parler-ceo; *see* Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

118. *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079.

would promote the policy goals outlined within the EO.[119] One of those goals was the "commitment to free and open debate on the internet" because it is "essential to sustaining our democracy."[120]

On January 8, 2021, Twitter permanently banned President Trump's account.[121] Following the United States Capitol protest—turned riot by fringed far-right members—on January 6, 2021, Twitter decided to permanently disable the President's account.[122] Twitter initially locked President Trump's account citing that "the risks of keeping his commentary live on its site [were] too high."[123] The company told former President Trump that he would be allowed back onto his account, provided he remove the offending posts.[124] After removing the posts that allegedly violated Twitter's policies, former President Trump was reinstated onto the site.[125] Shortly after being reinstated, the former President posted two tweets: one calling his

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119. *See id.* ("Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.").

120. *Id.* The Department of Justice hosted a "Public Workshop," a private "Expert Roundtable" discussion and "Industry Listening Sessions" where "the Department met individually with a diverse group of businesses that had attended the public event or otherwise expressed interest in Section 230." *Department of Justice's Review of Section 230 of the Communications Decency Act of 1996*, U.S. DEPT. OF JUST. ARCHIVES, http://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 (last visited Dec. 29, 2021) ("[These meetings] were private and confidential to foster frank discussions about their use of Section 230 [of the Communications Decency Act of 1996] . . . .").

121. *Permanent Suspension of @realDonaldTrump*, TWITTER: BLOG (Jan. 8, 2021), http://blog.twitter.com/en_us/topics/company/2020/suspension.

122. *Id.*; *see also* Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES, http://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html (last updated Jan. 12, 2021).

123. Conger & Isaac, *supra* note 122. The events that led to Former President Trump's first temporary suspension resulted from a rally held on the White House Ellipse, where the former President said:

> Now it is up to Congress to confront this egregious assault on our democracy, and after this, we're gonna walk down and I'll be there with you. We're gonna walk down . . . to the Capitol and we're gonna cheer on our brave Senators and Congressmen and women and we'll probably not gonna be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength, and you have to be strong.

NBC News, *Trump Encourages Those at His Rally to March to the Capitol NBC News NOW*, YOUTUBE (Jan. 7, 2021), http://www.youtube.com/watch?v=5fiT6c0MQ58&ab_channel=NBCNews.

124. Conger & Isaac, *supra* note 122.

125. *Id.*

supporters "American Patriots" and another informing his followers that he would not be attending President Joe Biden's inauguration.[126]

Twitter found these tweets to condone the United States Capitol riot and claimed that the President was inciting violence.[127] A Twitter employee told the Washington Post that a petition signed by hundreds of employees asked the company to immediately remove President Trump's account.[128] After a meeting, Twitter stood by its decision and permanently banned the President from its platform.[129] Facebook, Snapchat, YouTube, and Reddit followed suit and limited the President's access to their platforms as well.[130]

Both Twitter and Facebook have decided to maintain their ban on the former President.[131] As a result, on July 7, 2021, President Trump filed a class action lawsuit in Federal court challenging Twitter's unilateral decision to ban him from its platform.[132] The lawsuit alleges that the Tech giant violated his First Amendment right to free speech.[133] As a way around the lack of state action that has already been alleged by various suits challenging Big Tech's censorship,[134] Trump claims that Twitter has been "engag[ing] in impermissible censorship resulting from . . . legislative action, a misguided reliance upon [s]ection 230 of the Communications Decency Act . . . and willful participation in joint activity with federal actors."[135] Twitter's status, the lawsuit goes on to say, "rises beyond that of a private company to that of a state actor, and as such, [Twitter] is constrained by the First Amendment

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126. *Id.* ("In one, he wrote: 'The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!'"); *Twitter 'Permanently Suspends' Trump's Account*, *supra* note 91.

127. *See Permanent Suspension of @realDonaldTrump*, *supra* note 121.

128. Conger & Isaac, *supra* note 122.

129. *Permanent Suspension of @realDonaldTrump*, *supra* note 121.

130. Conger & Isaac, *supra* note 122.

131. *See* Haley Messenger, *Twitter to Uphold Permanent Ban Against Trump, Even if He Were to Run for Office Again*, NBC NEWS, http://www.nbcnews.com/business/business-news/twitter-uphold-permanent-ban-against-trump-even-if-he-were-n1257269 (last updated Feb. 10, 2021, 10:36 AM); *Facebook's Trump Ban Upheld by Oversight Board for Now*, BBC NEWS, http://www.bbc.com/news/technology-56985583 (last updated May 25, 2021).

132. Complaint at 1–2, Trump v. Twitter, Inc., 21-CV-22441 (S.D. Fla. July 7, 2021) [hereinafter Trump Complaint].

133. *Id.* at 3.

134. *See, e.g.*, Prager Univ. v. Google LLC, 951 F.3d 991, 999 (9th Cir. 2020) ("Because the state action doctrine precludes constitutional scrutiny of YouTube's content moderation pursuant to its Terms of Service and Community Guidelines, we affirm the District Court's dismissal of PragerU's First Amendment claim.").

135. Trump Complaint, *supra* note 132, at 2.

right to free speech in the censorship decisions it makes."[136] This *arm of the government* argument has not been alleged in any suit against Big Tech companies before, and we will have to wait to see if it will be successful.[137] As a result of these events, on May 24, 2021, Florida Governor Ron DeSantis signed into law SB 7072.[138] With the midterm elections just a year away, it is no surprise that the Governor does not want to be the next victim of Big Tech's censorship and thus fashioned a law that would monetarily affect Big Tech's decision to deplatform a candidate.[139]

III. SENATE BILL 7072

The impetus for SB 7072 was to hold Big Tech accountable for silencing dissent and certain viewpoints that were not consistent with "the dominant Silicon Valley ideology."[140] Lieutenant Governor of Florida, Jeanette Nuñez, commented that "by signing SB 7072 into law, Florida is taking back the virtual public square as a place where information and ideas can flow freely."[141] The Governor went on to note that many of Florida's constituents have had experience living in countries where speech is silenced, specifically in Venezuela and Cuba.[142] Florida Senator Ray Rodrigues, one of the co-sponsors of the bill, said that "[r]equiring Big Tech to define the behaviors that will lead to someone being deplatformed is a significant victory for free speech . . . ."[143]

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136. *Id.*

137. *See* Kaplan, *supra* note 117.

138. S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021); *see DeSantis Press Conference*, *supra* note 15.

139. *See* discussion *infra* Part III; *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS 46TH GOVERNOR OF FLA. (May 24, 2021), http://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/; Dan Trujillo, *DeSantis Running for Re-election and Not Considering Presidential Run, Governor Announces*, WFTS ABC ACTION NEWS (Oct. 1, 2021, 2:18 PM), http://www.abcactionnews.com/news/state/desantis-running-for-re-election-and-not-considering-presidential-run-governor-announces.

140. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139 ("A social media platform may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast."); *see also* Fla. S.B. 7072

141. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* Fla. S.B. 7072.

142. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139.

143. *Id.*

SB 7072 creates three new Florida Statutes: section 106.072, section 287.137, and section 501.2041.[144] Under SB 7072, all Floridians, not just political candidates, will be able to directly sue companies that violate the law and seek monetary damages.[145] The bill enables the Attorney General of Florida to bring an action against Big Tech for violating the law under Florida's Unfair and Deceptive Practices Act.[146] Violations of antitrust laws will also enable the Attorney General to bring an action against the technology companies, and will result in these companies being added to an "antitrust violator vendor list."[147] Being placed on the antitrust violator vendor list will affect these companies' ability to receive government contracts.[148] Finally, the law imposes monetary repercussions with fees of up to $250,000 a day for state and local offices deplatforming political candidates.[149]

A. *Section 2*

1. Removing Candidates

Section 2 of SB 7072 is entitled: "Social media deplatforming of political candidates."[150] Under this section, "'[d]eplatform' has the same meaning as [it does] in [Florida Statute section] 501.2041," which defines "[d]eplatform" as "the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than [fourteen] days."[151] Social media platform is defined as:

> [A]ny information service, system, Internet search engine, or access software provider that: [p]rovides or enables computer access by

144. Fla. S.B. 7072; FLA. STAT. § 106.072 (2021); FLA. STAT. § 287.137 (2021); FLA. STAT. § 501.2041 (2021); NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *2 (N.D. Fla. June 30, 2021).

145. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* FLA. STAT. § 501.2041(6); Fla. S.B. 7072.

146. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* Fla S.B. 7072; FLA. STAT. § 501.2041.

147. *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139; *see also* FLA. STAT. § 287.137(2)(a)–(b).

148. FLA. STAT. § 287.137(2)(a)–(b) ("A public entity may not accept a bid, proposal, or reply from, award a new contract to, or transact new business with any person or affiliate on the antitrust violator vendor list . . . .").

149. FLA. STAT. § 106.072(3); *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, *supra* note 139.

150. Fla. S.B. 7072 (codified as FLA. STAT. § 106.072 (2021)).

151. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(c) (2021).

> multiple users to a computer server; . . . [o]perates as a sole proprietorship, partnership, limited liability company, corporation, association; . . . [d]oes business in the [S]tate [of Florida], and [either] [h]as annual gross revenues in excess of $100 million . . . [or] [h]as at least 100 million monthly individual platform participants . . . .[152]

The definition of "social media platform" explicitly exempts "any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex . . . ."[153]

Section 2 goes on to prohibit the willful deplatforming of "a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate."[154] As noted above, violating section 2 of SB 7072 may result in "the social media platform [being] fined $250,000 per day for a candidate for statewide office and $25,000 per day for a candidate for other offices."[155] Section 2 also states that any willful free advertising provided by the social media platform must be disclosed to the candidate.[156] Explicitly in section 2 is a provision that states the law "may only be enforced to the extent not inconsistent with federal law and 47 U.S.C. § 230(e)(3) . . . ." otherwise known as the Communications Decency Act.[157]

B. *Section 4*

Section 4 of the bill, which creates Florida Statute section 501.2041, is entitled: "Unlawful acts and practices by social media platforms."[158] Section 4 provides that "[a] social media platform that fails to comply with any of the provisions of this subsection commits an unfair or deceptive . . . practice . . . ."[159]

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152. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(g).
153. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(g).
154. Fla. S.B. 7072; FLA. STAT. § 106.072(2).
155. Fla. S.B. 7072; FLA. STAT. § 106.072(3).
156. Fla. S.B. 7072; FLA. STAT. § 106.072(4).
157. Fla. S.B. 7072; FLA. STAT. § 106.072(5); *see also* 47 U.S.C. § 230.
158. Fla. S.B. 7072 (codified as FLA. STAT. § 501.2041 (2021)).
159. Fla. S.B. 7072; FLA. STAT. § 501.2041(2).

1. Censor, Shadow Ban, and Use of Post-Prioritization Algorithms

Section 4 prohibits any social media platform from "censor[ing]" or "shadow ban[ning] a user's content . . . or deplatform[ing] a [candidate]," without first notifying them of the action taken against them.[160] "Shadow ban" is defined in this section to be "action by a social media platform . . . to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform."[161] "Censor" is also defined in section 4 to include "any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user."[162]

Any use of "post-prioritization," which is "action by the social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, feed, or search results," is also prohibited against any political candidate.[163] The social media platform must allow "user[s] to opt-out of post-prioritization and shadow ban[] algorithms . . . ."[164] These platforms must also provide an annual notice to users on the use of such algorithms and shadow banning and to reoffer the opt-out opportunity annually.[165] The prohibition on post-prioritization algorithms, however, does not apply to advertisements or content the platform is paid to carry.[166]

2. Consistent Application of Standards

The provisions of this subsection require "[a] social media platform . . . [to] publish the standards, including detailed definitions, it uses . . . [to] determin[e] how to censor, deplatform, and shadow ban" a user.[167] The social media platform must apply those detailed standards "consistent[ly]" among all users on the platform.[168] Section 4 goes on to require "social media platform[s] [to] inform each user about any changes to its user rules, terms, and agreements before implementing the changes . . . ."[169]

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160. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(d).
161. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(f).
162. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(b).
163. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(e), (2)(h).
164. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(f)(2).
165. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(g).
166. Fla. S.B. 7072; FLA. STAT. § 501.2041(1)(e).
167. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(a).
168. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(b).
169. Fla. S.B. 7072; FLA. STAT. § 501.2041(2)(c).

3. Damages

A private citizen can bring a cause of action against a social media platform for violating this section, for failing to apply consistent censorship standards among its users, or for shadow banning a user without notice.[170] The remedy provides "$100,000 in statutory damages per . . . claim" along with "actual damages," "punitive damages"—"if aggravating factors are present"—and "other forms of equitable relief".[171] Further, if the user was deplatformed in a manner that is inconsistent with the detailed standards required by section 4, then the user is entitled to "costs and reasonable attorney fees."[172]

IV. THE CONSTITUTIONALITY OF SECTION 2 AND 4 OF SENATE BILL 7072

In analyzing the constitutionality of the regulation at issue, a court must first determine if the speech is content-based or content-neutral, which in turn, determines the appropriate standard of review.[173] Laws that distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based and are subject to strict scrutiny.[174] By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral and are subject to intermediate scrutiny.[175] Cases have recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.[176]

A. NetChoice v. Moody

Three days after SB 7072 was signed into law by Governor DeSantis, NetChoice and CCIA sued to enjoin its enforcement.[177] Count one of the complaint alleged that SB 7072 violated the plaintiff's First Amendment free speech rights by interfering with the providers' editorial judgment, compelling

170. Fla. S.B.7072; *see* FLA. STAT. § 501.2041(6).
171. Fla. S.B. 7072; FLA. STAT. § 501.2041(6)(a)–(d).
172. Fla. S.B. 7072; FLA. STAT. § 501.2041(6)(e).
173. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994).
174. *Id.* at 642, 658.
175. *Id.* at 642.
176. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 315 (1990).
177. Kirkland, *supra* note 21; Fla. S.B. 7072.

speech, and prohibiting speech.[178] Count two alleged that SB 7072 was vague, and therefore in violation of the Fourteenth Amendment.[179] Count three claimed SB 7072 violated the Fourteenth Amendment's Equal Protection Clause by impermissibly discriminating between providers that do or do not meet the bill's size requirements.[180] Count four alleged that SB 7072 violated the Constitution's Dormant Commerce Clause,[181] and count five alleged that the bill was preempted by federal statute, namely section 230 of the Communications Decency Act.[182]

The discussion below will address the constitutionality of certain provisions of sections 2 and 4 of the bill, which encompasses counts one and five of the complaint.[183] On June 30, 2021, the United States District Court for the Northern District of Florida granted NetChoice and CCIA's preliminary injunction against SB 7072's enforcement.[184] Judge Robert Hinkle's order discussed the constitutionality of the provisions of SB 7072 to assess whether there is a likelihood of success on the merits because it is one of the elements a court must consider when issuing a preliminary injunction.[185]

Judge Hinkle noted that further factual developments may change the analysis of the constitutionality of the challenged sections of the law and that statements about the merits should be understood only as statements about the likelihood of success.[186]

1. Content-Based Restrictions

One of the first arguments the plaintiffs made was that SB 7072 violated the First Amendment's Free Speech Clause.[187] Specifically, sections 2 and 4 were alleged to "restrict speech based on its content and based on its

178. NetChoice Complaint, *supra* note 19, at 44–54; Fla. S.B. 7072.
179. NetChoice Complaint, *supra* note 19, at 55–58; Fla. S.B. 7072.
180. NetChoice Complaint, *supra* note 19, at 59–62; Fla. S.B. 7072.
181. NetChoice Complaint, *supra* note 19, at 62–64.
182. NetChoice Complaint, *supra* note 19, at 64–68.
183. Fla. S.B. 7072; *see* discussion *infra* Sections IV.A.1–3.
184. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *12 (N.D. Fla. June 30, 2021); *see also* Fla. S.B. 7072.
185. *NetChoice*, 2021 WL 2690876, at *2; *see also* Fla. S.B. 7072; *see, e.g.*, Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1354 (11th Cir. 2005)

> As a prerequisite to a preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that the plaintiff will suffer irreparable injury if the injunction does not issue, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest.

NetChoice, 2021 WL 2690876, at *2.
186. *NetChoice*, 2021 WL 2690876, at *2.
187. *See* NetChoice Complaint, *supra* note 19, at 45; Fla. S.B. 7072.

speaker . . . ."[188] The plaintiffs contended that SB 7072, namely section 4, "authorizes the State to engage in highly intrusive investigations of content moderation processes and judgments, . . . " which requires detailed explanations of the algorithms used to censor political candidates.[189] Because both these provisions are content-based, the plaintiffs argued they are subject to strict scrutiny.[190] The plaintiffs claimed that neither section survives strict scrutiny because the government has no legitimate interest that supports sections 2 and 4's constraints, let alone a compelling interest.[191]

In the preliminary injunction, the court agreed with the plaintiffs, noting that "[t]he Florida Statutes at issue are about as content-based as it gets."[192] First, Florida Statute section 106.072 only applies to the deplatforming of political candidates, no one else.[193] This, the court writes, is a content-based restriction.[194] Second, the court points to the factual support asserted by the plaintiffs of the actual motivation for the legislation, which "was hostility to the social media platforms' perceived liberal viewpoint."[195]

According to the complaint, the plaintiffs claimed that the core goal of SB 7072 was to "punish the targeted companies because the Legislature and Governor dislike[d] the perceived political and ideological viewpoints that those private businesses supposedly express[ed] through their content judgments."[196] The order quotes the Lieutenant Governor, who said:

> 'What we've been seeing across the U.S. is an effort to silence, intimidate, and wipe out dissenting voices by the leftist media and big corporations . . . . Thankfully in Florida we have a Governor that fights against big tech oligarchs that contrive, manipulate, and censor if you voice views that run contrary to their radical leftist narrative.'[197]

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188. *See* NetChoice Complaint, *supra* note 19, at 45; Fla. S.B. 7072.

189. *See* NetChoice Complaint, *supra* note 19; Fla. S.B. 7072.

190. *Id.*; *see* Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 285 (2009).

191. NetChoice Complaint, *supra* note 19, at 45. ("Because the State has no legitimate —much less compelling— governmental interest that supports these provisions, and because none of the provisions are narrowly tailored, they do not survive strict scrutiny. Indeed, they would fail under any standard of review."); *see* Fla. S.B. 7072.

192. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *10 (N.D. Fla. June 30, 2021).

193. *Id.*

194. *Id.*

195. *Id.*

196. NetChoice Complaint, *supra* note 19, at 50; *see* Fla. S.B. 7072.

197. *NetChoice*, 2021 WL 2690876, at *10.

The State could not assert a justification for the law, and the court contended that leveling the playing field by promoting speech on one side of an issue, or restricting speech on the other, was not a legitimate state interest.[198] According to the court, because the law was clearly motivated by the content of the speech, strict scrutiny applied, and the government's asserted reason, or lack of reason, for the legislation was neither legitimate nor compelling.[199]

2. Compelled Speech

Next, the plaintiffs asserted that SB 7072 compels speech by forcing the private social media platforms to carry content that the companies would not otherwise host.[200] The plaintiffs argued that they have a right to choose what to post on their platforms and section 4 of SB 7072 directly infringed on their protected editorial ability to do so.[201] The plaintiffs cited three cases to support their argument: (1) *Miami Herald Publishing Co. v. Tornillo*;[202] (2) *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*;[203] and (3) *Pacific Gas & Electric Co.* ("*PG&E*") *v. Public Utilities Commission of California*.[204] In *Tornillo*, the Supreme Court struck down a Florida law that required newspapers to offer candidates a right to reply to the newspapers' published criticisms of candidates.[205] The Supreme Court held that this was a form of compelled speech which infringed on the publishers' editorial freedom, and was therefore unconstitutional.[206]

Similarly, in *Hurley*, the Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB") challenged a decision of the South Boston Allied War Veterans Council ("Veterans Council") that denied GLIB the opportunity to walk in an annual parade organized by the Veterans Council as being a violation of Massachusetts' public accommodations law.[207] The Veterans Council claimed that including GLIB in their parade would contravene what the association was attempting to communicate.[208] The Supreme Court held

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198. *Id.* at *11; *see also* Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 749 (2011).
199. *NetChoice*, 2021 WL 2690876, at *10.
200. *See* NetChoice Complaint, *supra* note 19, at 46; *see* Fla. S.B. 7072.
201. *See* NetChoice Complaint, *supra* note 19, at 2–3.
202. 418 U.S. 241 (1974).
203. 515 U.S. 557 (1995).
204. 475 U.S. 1 (1986); *see also NetChoice*, 2021 WL 2690876, at *7–*8.
205. *See Tornillo*, 418 U.S. at 256–57.
206. *See id.* at 258.
207. *Hurley*, 515 U.S. at 561.
208. *Id.* at 562–63.

that the Veterans Council had a First Amendment right to exclude GLIB from the parade because a state may not require a private group to include a group whose message the organizers do not wish to promote.[209] Lastly, the legislation being challenged in *PG&E* required a private utility company to include newsletters from other organizations that held differing views from those of PG&E in their billing envelopes.[210] The Supreme Court held this legislation to be unconstitutional because it was a form of compelled speech.[211]

The United States District Court for the Northern District of Florida found that these three cases established that a "private party that creates or uses its editorial judgment to select content for publication cannot be required by the government to also publish content with which [they] disagree[d]" or would not otherwise publish.[212] Further, the court noted that social media providers' editorial process was different than those of the cases cited, in that the social media providers post material invisibly.[213] Algorithms do much of the sorting of the content posted by third parties, as opposed to the social media providers doing the sifting themselves, like a traditional publisher would.[214]

The State offers two cases in support of their legislation: (1) *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*[215] and (2) *PruneYard Shopping Center v. Robins*.[216] In *Rumsfeld*, the Supreme Court upheld a Federal statute that conditioned law schools' receipt of Federal funds on allowing military recruiters access to the school's campus.[217] The Court found that this was conduct, not speech; thus, the Federal law was not compelling the law school to adhere to the military's *speech*, but rather, they were simply opening their doors to the recruiters.[218] Similarly, in *PruneYard*, the Supreme Court found no First Amendment violation when the California Supreme Court upheld students' right to peacefully solicit signatures in a private

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209. *See id.* at 575–76. ("[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

210. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15–16 (1986).

211. *Id.* at 20–21.

212. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *8 (N.D. Fla. June 30, 2021).

213. *Id.*

214. *See id.*; *see* discussion *supra* Section II.B.2.

215. 547 U.S. 47 (2006).

216. 447 U.S. 74 (1980).

217. *F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 51, 70 (2006).

218. *Id.* at 56–57.

shopping mall that removed the students from the premises because the students were violating PruneYard's regulations that forbade their conduct.[219]

The Northern District Court of Florida, in ruling on NetChoice and CCIA's preliminary injunction, noted that the cases raised by the State only established that:

> [C]ompelling a person to allow a visitor access to the person's property, for the purpose of speaking, is not a First Amendment violation, so long as the person is not compelled to speak, the person is not restricted from speaking, and the message of the visitor is not likely to be attributed to the person.[220]

SB 7072 is different, the court concluded, because it explicitly forbids social media platforms from adding their own statements, such as warnings to posts by other users and compelling speech by requiring the social media platforms to arrange their material in a certain way.[221]

3. Preemption

The plaintiffs also assert that SB 7072 is preempted by section 230 of the Communications Decency Act, and the Florida District Court agreed.[222] As noted above, section 230 provides a legal shield for interactive computer services—social media platforms—for "[any] action voluntarily taken in good faith to restrict to or availability of material that the provider or user considers [to be] obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . ."[223] Thus, social media providers will likewise not be held liable for action taken to restrict access to material described above.[224]

According to the Florida District Court, because section 4 of SB 7072 explicitly imposes a daily fine for deplatforming a candidate and gives private citizens statutory damages for shadow banning them, SB 7072 contravenes section 230.[225] The Federal statute also explicitly states that "[n]o cause of

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219. *PruneYard Shopping Ctr.*, 447 U.S. at 88.

220. NetChoice, LLC v. Moody, No. 21-CV-220, 2021 WL 2690876, at *9 (N.D. Fla. June 30, 2021).

221. *NetChoice*, 2021 WL 2690876, at *9; S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021).

222. *NetChoice*, 2021 WL 2690876, at at *6; NetChoice Complaint, *supra* note 19, at 67–68; Fla. S.B. 7072; 47 U.S.C. § 230.

223. 47 U.S.C. § 230(c)(2)(A); *see* discussion *supra* Section II.B; *NetChoice*, 2021 WL 2690876, at *6.

224. 47 U.S.C. § 230(c)(2)(B); *see* discussion *supra* Section II.B.

225. Fla. S.B. 7072; 47 U.S.C. § 230; *see NetChoice*, 2021 WL 2690876, at *6.

action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[226] The District Court found that the plaintiffs are likely to prevail on their challenge of the preempted provisions of SB 7072.[227]

V. CONCLUSION

The Florida District Court's discussion of the constitutionality of SB 7072 was only to assess the likelihood of success on the merits as part of the ruling on the preliminary injunction.[228] With further discovery, it may be found that these social media companies are not actually removing and regulating content on their platforms in good faith, which would affect their legal immunity.[229] Governor DeSantis fully expected a challenge to SB 7072 and filed a Notice of Appeal of the District Court's decision on July 12, 2021.[230] Texas, Louisiana, and North Carolina have recently passed laws similar to Florida's SB 7072.[231]

One of the arguments that the defendants may raise on appeal is the *invisible* editorial process.[232] The District Court notes that social media platforms are different from traditional publishers in that they do not sort and sift through the material, rather they use algorithms to conduct this editorial feature.[233] If social media companies are creating the algorithmic equations to sort out certain material, however, then there is an argument that such *invisible* editing is actually manufactured to remove and filter material outlined by the companies and codified in their algorithms.[234]

Many of the District Court's decisions pertaining to the constitutionality of SB 7072 will likely be upheld because certain provisions

226. 47 U.S.C. § 230(e)(3).

227. *NetChoice*, 2021 WL 2690876, at *6; *see* Fla. S.B. 7072.

228. *NetChoice*, 2021 WL 2690876, at *2.

229. *See id.* at *2, *6.

230. Notice of Appeal at 1, NetChoice, L.L.C. v. Moody, (No. 21-CV-220), 2021 WL 2690876, at *1; *see* Fla. S.B. 7072.

231. Debra Kaufman, *Federal Judge Blocks Florida Law That Restricts Social Media*, ETCENTRIC (July 2, 2021), http://www.etcentric.org/federal-judge-blocks-florida-law-that-restricts-social-media/; *see* Fla. S.B. 7072.

232. *See* discussion *supra* Section IV.A.2; *NetChoice*, 2021 WL 2690876, at *8.

233. *See* discussion *supra* Section IV.A.2; *NetChoice*, 2021 WL 2690876, at *8.

234. *See* Chris Meserole, *How Misinformation Spreads on Social Media — and What to Do About It*, BROOKINGS (May 9, 2018), http://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/. After Twitter moved away from chronological feeds in 2016, they incorporated algorithmic feeds, which sort material that the user would find most relevant. *Id.*

seem to be a clear case of the government interfering with private speech.[235] Presumably, Governor DeSantis thought it necessary to act when Congress did not.[236] Calls to reform section 230 are mounting from both sides of the political spectrum.[237] Federal government officials have discussed potential regulatory intervention, legislative reform, and amending or even dispensing section 230 entirely.[238] Even Justice Clarence Thomas has commented on the expansive scope of section 230 immunity and how it has exceeded its initial intended goal.[239]

One legislative proposal to change section 230 is the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act ("EARN IT Act").[240] Proposed in early March 2020 and sponsored by bipartisan legislators, the EARN IT Act would change section 230 by exempting "'child exploitation law'" from its scope of immunity.[241]

The EARN IT Act proposes to remove section 230 immunity for challenges brought by minors who were victims of sexual abuse material posted on social media platforms.[242] Critics of the EARN IT Act claim the act violates the First and Fourth Amendments of the Constitution by impermissibly regulating online platforms' editorial activity and allowing online platforms to engage in government action by searching users' accounts without a warrant based on probable cause.[243]

Other proposed legislation to curtail section 230 immunity includes, "'Stop the Censorship Act of 2020,'"[244] "'Online Freedom and Viewpoint

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235. *See* discussion *supra* Part IV; Fla. S.B. 7072.

236. *See* Ryan Mrazik & Natasha Amlani, *Cover Story Section 230: A Law on the Cusp of Change?*, ANTITRUST, Fall 2020, at 26, 27–28 (discussing the various bills the legislature has proposed to curtail section 230, but that have not "progressed meaningfully"); NetChoice Complaint, *supra* note 19 at 3–5.

237. *See* Mrazik & Amlani, *supra* note 236, at 26.

238. *Id.*; Chris Riley & David Morar, *Legislative Efforts and Policy Frameworks Within the Section 230 Debate*, BROOKINGS TECHSTREAM (Sept. 21, 2021), http://www.brookings.edu/techstream/legislative-efforts-and-policy-frameworks-within-the-section-230-debate/.

239. *See* Mrazik & Amlani, *supra* note 236, at 26; Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 13 (2020).

240. *See* Mrazik & Amlani, *supra* note 236, at 27–28; S. 3398, 116th Cong. § 3 (2020).

241. Mrazik & Amlani, *supra* note 236, at 27; *see* S. 3398.

242. Mrazik & Amlani, *supra* note 236, at 27; *see* S. 3398.

243. Sophia Cope et al., *The EARN IT Act Violates the Constitution*, ELEC. FRONTIER FOUND. (Mar. 31, 2020), http://www.eff.org/deeplinks/2020/03/earn-it-act-violates-constitution; S. 3398.

244. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Congressman Paul Gosar. *Id.*; H.R. 4027, 116th Cong. (2019).

Diversity Act,'"[245] "'Stopping Big Tech's Censorship Act,'"[246] "'Limiting Section 230 Immunity to Good Samaritans Act,'"[247] and "'Ending Support for Internet Censorship Act.'"[248] None of these bills have progressed as far as the EARN IT Act, but they are all aimed at what the representative sponsors believe to be politically biased removal and censorship of content by social media providers.[249]

Another approach worth noting is one proposed by Justice Clarence Thomas in his concurring opinion in *Biden v. Knight First Amendment Institute at Columbia University*.[250] Justice Thomas suggests that the doctrines that limit the right of a private company to exclude might be the proper avenue to combat Big Tech's centralized control on communication, as opposed to First Amendment grounds.[251] One such doctrine is the treatment of certain large, private entities as common carriers, like communication and transportation providers.[252] In exchange for regulating these industries, federal and state governments have given these massive industries special government favors, such as liability immunity from suit.[253] Similarly, section 230 already grants Big Tech civil immunity from suit; however, serious regulation of these tech industries is missing.[254]

Justice Thomas also suggests that public accommodation laws are another avenue in which the government has limited a company's right to exclude.[255] Digital platforms may be subject to public accommodation laws because of the services they provide to the general public at large.[256] The Legislature may choose to treat Big Tech companies as public accommodations, making them susceptible to anti-discrimination laws such that digital platforms deal with consumers equally.[257] Justice Thomas notes,

245. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Roger Wicker. *Id.*; S. 4534, 116th Cong. § 1 (2020).

246. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Kelly Loeffler. Mrazik & Amlani, *supra* note 236, at 28; S. 4062, 116th Cong. (2020).

247. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Josh Hawley. *Id.*; S. 3983, 116th Cong. (2020).

248. Mrazik & Amlani, *supra* note 236, at 28. Legislation proposed by Republican Senator Josh Hawley as well. *Id.*; S. 1914, 116th Cong. (2019).

249. *See* Mrazik & Amlani, *supra* note 236, at 28.

250. 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

251. *See id.* at 1222.

252. *Id.* at 1222–23.

253. *Id.* at 1223.

254. *See* 47 U.S.C. § 230(c)(2).

255. *Knight First Amend. Inst.*, 141 S. Ct. at 1223.

256. *See id.* at 1225.

257. *Id.* at 1225–26.

however, that the change would be better served coming from Congress.[258] Nonetheless, these are two arguments that potential plaintiffs may soon assert.[259]

Whichever approach the legislature ultimately decides to take, it is evident that Big Tech is affecting the dissemination of speech in the United States, and the rest of the world.[260] Many argue that allowing social media companies free reign to remove, silence, and otherwise edit content with impunity requires oversight.[261] SB 7072 will likely be struck down as unconstitutional, but that does not mean that Americans cannot act by voting for candidates that fight for a marketplace of ideas that is open and robust with debate in search of the truth.[262] In the words of Justice Oliver Wendell Holmes Jr., "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[263] Holmes continues, "[t]hat at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[264]

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258. *Id.* at 1226.

259. *Id.* at 1223.

260. *See* discussion *supra* Sections II.C–D; Gregg Jarrett, *Gregg Jarrett: It's Time to Crush Big Tech Censorship Before Facebook, Twitter and Others Crush Us*, FOX NEWS (May 12, 2021), http://www.foxnews.com/opinion/big-tech-censor-gregg-jarrett.

261. *See, e.g.*, Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

262. S.B. 7072, 27th Leg., 1st Reg. Sess. (Fla. 2021); *see* discussion *supra* Section II.A; *Thorbecke*, *supra* note 12; WFLA 8 On Your Side Staff, *Big Tech Associations Sue Florida Over New Social Media Censorship Law*, WFLA (May 27, 2021, 4:48 PM), http://www.wfla.com/news/politics/big-tech-associations-sue-florida-over-new-social-media-censorship-law/.

263. Abrams v. United States, 250 U.S. 616, 630 (1919).

264. *Id.*

TRANSGENDER INMATES AND SEX REASSIGNMENT SURGERY IN FLORIDA: WHY FAILING TO PROVIDE THIS STANDARD OF CARE IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE 8TH AMENDMENT

EDWYNA ESTIME*

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I. INTRODUCTION

The Eighth Amendment of the United States Constitution protects against cruel and unusual punishment.[1] This constitutional right is afforded to prison inmates to ensure that prison systems refrain from unnecessary and wanton infliction of pain on those convicted of crimes.[2] This right includes adequate healthcare for prison inmates.[3] The Supreme Court has declared that

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1. U.S. CONST. amend. VIII.
2. *Id.*; *see* Estelle v. Gamble, 429 U.S. 97, 104 (1976).
3. *Gamble*, 429 U.S. at 103.

prison officials have an obligation to all prisoners to provide adequate medical care for severe medical conditions under the Eighth Amendment.[4] Among those entitled to adequate healthcare are incarcerated transgender prisoners suffering from a severe illness called "gender dysphoria."[5] This Comment will discuss the appropriate standards of care for treating transgender inmates and the responsibility of Florida prisons to adopt a necessary treatment option.[6] Part II of this Comment will briefly examine the history of gender dysphoria in prison systems, the cases that made it possible to consider the standards of care necessary to treat gender dysphoria, and the necessity for sex reassignment surgery.[7] Part III of this Comment will explain the cases that sparked the conversation of applying the deliberate indifference standard to a prison's refusal to provide sex reassignment surgery and the need for Florida prisons to adopt this specific standard of care.[8]

II. HISTORY OF GENDER DYSPHORIA IN TRANSGENDER PRISON INMATES

Protecting transgender prisoners has not always been at the forefront of America's framework.[9] However, courts and prison systems have recently attempted to provide legal protections for transgender prisoners.[10] In 2013, the Diagnostic and Statistical Manual of Mental Disorders coined the term "gender dysphoria" as a "psychological . . . [illness] that results from . . . [a discrepancy] between one's sex assigned at birth and one's gender identity."[11] In other words, gender dysphoria is when a person feels as though their external genitalia does not match the gender they are born with.[12] Gender dysphoria may be experienced and diagnosed in adolescents and adults, with manifestations lasting at least six months.[13] These manifestations include:

4. Farmer v. Brennan, 511 U.S. 825, 832 (1994); *see also Gamble*, 429 U.S. at 103–05.

5. Lindsey Ruff, Note, *Trans-cending the Medicalization of Gender: Improving Legal Protections for People Who Are Transgender and Incarcerated*, 28 CORNELL J.L. & PUB. POL'Y 127, 142–43 (2018); *see also Gamble*, 429 U.S. at 103.

6. *See* discussion *infra* Parts II–III.

7. *See* discussion *infra* Part II.

8. *See* discussion *infra* Part III.

9. *See* Ruff, *supra* note 5, at 127.

10. *Id.*

11. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited Jan. 10, 2021); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

12. *See What Is Gender Dysphoria?*, *supra* note 11.

13. *Id.*

"[a] strong desire to be rid of one's primary . . . sex characteristics, . . . [a] strong desire to be treated as the other gender," and a firm conviction of having "typical feelings and reactions of the other gender."[14] Gender dysphoria may produce symptoms of anxiety, depression, and suicidal thoughts.[15]

There are specific treatments that the World Professional Association for Transgender Health ("WPATH") has deemed appropriate to treat gender dysphoria.[16] It may be treated in several ways, including "changes in gender expression and role, hormone therapy, and psychotherapy . . . ."[17] Accordingly, sex reassignment surgery is appropriate for inmates who suffer from severe cases of gender dysphoria.[18] To be in accordance with the principles that govern inmate care, an inmate is entitled to be provided with adequate medical care.[19] This right came from the seminal case *Estelle v. Gamble*,[20] where the Supreme Court ruled that deliberate indifference to an inmate's medical needs constitutes cruel and unusual punishment under the Eighth Amendment.[21]

A. Estelle v. Gamble's *Role in Securing Adequate Medical Care for Inmates*

Before the ruling in *Gamble*, prison policies did not implicate the Eighth Amendment in prioritizing the medical needs of inmates.[22] This Supreme Court case created the serious medical need standard used today to bring a successful Eighth Amendment claim.[23] The Court held that when prison authorities are deliberately indifferent to an inmate's serious medical need, those actions constitute cruel and unusual punishment in violation of the Eighth Amendment.[24] Due to an inmate's inability to care for themselves medically because of their incarceration, the Court reasoned that an inmate

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14. *Id.*
15. Victor J. Genchi, Note, *Sex Reassignment Surgery & the New Standard of Care: An Analysis of the Role the Federal Court System, the States, Society, and the Medical Community Serve in Paving the Way for Incarcerated Transgendered Persons' Constitutional Right to a Sex Change*, 22 BARRY L. REV. 93, 94 (2016).
16. *Id.*
17. *Id.*
18. *Id.*
19. Estelle v. Gamble, 429 U.S. 97, 103 (1976).
20. 429 U.S. 97 (1976).
21. *See id.* at 101, 104.
22. *See* Alexa Raspa, Note, *Protecting Transgender Prisoners: Defending Access to Gender Confirmation Surgery*, 27 WIDENER L. REV. 91, 96 (2021).
23. *Id.*
24. *See Gamble*, 429 U.S. at 101, 104.

must rely on prison authorities to treat his or her medical needs.[25] If prison authorities ignore an inmate's medical needs, their actions could produce excruciating physical pain for the inmate, or even worse, death.[26] Therefore, the effects that come from ignoring an inmate's medical needs can lead to a wanton infliction of pain and suffering in violation of a prisoner's right to be free from cruel and unusual punishment.[27]

Although *Gamble* ensured that medical care is given to prisoners, a later case provided a two-prong analysis to determine what constitutes an Eighth Amendment violation.[28] In *Kosilek v. Spencer*,[29] the United States Court of Appeals for the First Circuit established a two-prong test that an inmate must satisfy to prevail on an Eighth Amendment claim.[30] To prove an Eighth Amendment violation, an inmate must: (1) provide proof of a serious medical need, and (2) show prison authorities' deliberate indifference to that need.[31] The first prong is an objective standard, where an inmate's need can be satisfied by a diagnosis from a physician, or the need is so apparent that "a layperson would easily recognize the necessity for medical" treatment.[32] The second prong is a subjective standard that requires a showing that prison authorities purposefully failed to treat an inmate's serious medical need.[33] There has not been a clear, concise definition of what a "serious" medical need is, yet many courts acknowledge diagnosis by physicians.[34] Although the court in *Kosilek* held that denial of gender confirmation surgery was not a violation of the Eighth Amendment, it grappled with whether the treatment plan prison authorities provided violated the Eighth Amendment.[35]

The court in *Kosilek* analyzed each prong respectively, holding, as to the objective prong, it was adequate medical care to provide the inmate with hormone therapy, mental health counseling, facial hair removal, and feminine clothing.[36] Regarding the subjective prong, the court held that the treatment plan provided, and did not blatantly ignore, the inmate's medical needs.[37] The court stated that when two treatment options relieve an inmate's pain and

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25. Raspa, *supra* note 22, at 96; *see Gamble*, 429 U.S. at 103.
26. Raspa, *supra* note 22, at 96; *Gamble*, 429 U.S. at 103.
27. *See* Raspa, *supra* note 22, at 96.
28. *Id.* at 97; *see also* Kosilek v. Spencer, 774 F.3d 63, 82 (1st Cir. 2014).
29. 774 F.3d 63 (1st Cir. 2014).
30. *Id.* at 82.
31. *Id.*
32. *Id.*
33. *Id.* at 83.
34. Raspa, *supra* note 22, at 97; *Kosilek*, 774 F.3d at 82.
35. *See Kosilek*, 774 F.3d at 89.
36. *See id.* at 90.
37. *See id.* at 91–92.

suffering, courts do not have to force medical professionals to adopt a specific one.[38] There is no genuine dispute that gender dysphoria is a serious medical need under the Eighth Amendment, which satisfies the objective prong of *Kosilek's* two-prong test.[39] Several federal appellate courts have recognized that gender dysphoria is a serious medical need to be taken seriously with adequate medical care.[40] The debate, on the other hand, is whether inmates diagnosed with gender dysphoria have been given suitable treatment.[41]

B. *Standards of Care Suitable to Treat Gender Dysphoria*

The Standards of Care under the WPATH have become a popular source for managing the health of transsexuals.[42] Since 1979, the WPATH has been recognized, both internationally and locally, by health professionals as a guide on managing transsexual and transgender people seeking medical attention.[43] Although there are highly suggested treatment options offered by the WPATH, treatment ultimately depends on the person.[44] The treatment options include: hormone therapy, feminine or masculine products, psychotherapy, mental health counseling, and sex reassignment surgery.[45] Some individuals may benefit from hormones, and others may benefit from psychotherapy; however, it is clear that each treatment option, including sex reassignment surgery, is not adequate for every individual diagnosed with gender dysphoria.[46]

1. Hormone Therapy

Severe forms of gender dysphoria may produce harmful effects such as psychological distress, self-mutilation, depression, and suicide.[47] Individuals that experience a severe form of gender dysphoria may be prescribed hormones to relieve the effects of psychological distress.[48] In cases where one does not wish to undergo surgery, hormone therapy is a desirable

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38. *Id.* at 90.
39. *See id.* at 86.
40. Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J.C.R. & C.L. 283, 295 (2016).
41. *Id.* at 296.
42. *Id.* at 299.
43. *See id.* at 299–300; Genchi, *supra* note 15, at 101.
44. Ruff, *supra* note 5, at 139.
45. *See* Bourcicot & Woofter, *supra* note 40, at 299–300.
46. *See id.* at 300.
47. *See id.* at 285–86.
48. *Id.* at 305.

treatment option.[49] To be prescribed hormone therapy, one must have "[p]ersistent, well-documented gender dysphoria", "[c]apacity to make a fully informed decision and consent to treatment", meet the age required for that jurisdiction, and any "significant medical [and] mental health concerns . . . must be reasonably well-controlled."[50]

Hormone therapy can, and is intended to, cause male-to-female transsexual individuals to experience breast enlargement, sterilization, and the feeling of living their lives as the gender they believe they are.[51] In instances where hormone therapy is not maintained, it may result in pain, suffering, and even life-threatening conditions.[52] Courts have not always encouraged prisons to offer hormone therapy due to the high-security risks of providing a real-life experience to transgender inmates.[53] Therefore, prisons have been more willing to offer less invasive treatments, such as psychotherapy, instead of hormone therapy.[54] Courts rarely require prisons to adopt policies that require hormone therapy.[55] Instead, the medical opinion of prison physicians is considered and given deference when needed.[56]

2. Psychotherapy

Psychotherapy is a treatment that encourages gender identity, gender role, and gender expression, as well as the familiarization of the negative impact of gender dysphoria by addressing one's mental health related to suffering from gender dysphoria.[57] Unlike hormone therapy or sex reassignment surgery—where the form of treatment targets one's physicality—psychotherapy focuses more on an individual's mental stability and how he or she can seek relief psychologically from the pressures and symptoms of gender dysphoria.[58] To be prescribed psychotherapy, an individual is encouraged to be evaluated by a health professional.[59] A "[m]ental health professional[] may serve as a psychotherapist, counselor, or

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49. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 24, 34 (2012), http://www.wpath.org/publications/soc.
50. *Id.*
51. Bourcicot & Woofter, *supra* note 40, at 305.
52. *Id.*
53. *See id.* at 307.
54. *See id.* at 306.
55. *See id.* at 307.
56. Bourcicot & Woofter, *supra* note 40, at 307.
57. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 10.
58. *See id.* at 10, 29.
59. *Id.* at 28.

family therapist," where they determine an individual's reason for seeking treatment based on that person's particular issues.[60] The evaluation includes "an assessment of gender identity and gender dysphoria," a discussion of the "history and development of gender dysphoric feelings," an assessment of the "impact of stigma attached to gender nonconformity on mental health," and considers the available support from family, friends, and peers, if there is any.[61]

While hormone therapy is a prerequisite for sex reassignment surgery, psychotherapy is not.[62] Psychotherapy is a recommended treatment, but it is still effective in matters where an individual's needs are severe.[63] According to the WPATH, psychotherapy assists transsexuals and transgender people with the following:

> (i) clarifying and exploring gender identity and role, (ii) addressing the impact of stigma and minority stress on one's mental health and human development, and (iii) facilitating a coming-out process, which for some individuals may include changes in gender role and expression and the use of feminizing [or] masculinizing medical interventions.[64]

In cases where an individual who suffers from gender dysphoria severely needs psychotherapy, it may also treat anxiety and depression.[65]

3. Sex Reassignment Surgery

Sex reassignment surgery is a medical procedure that involves genital reassignment, chest surgery, facial reconstruction, liposuction, gluteal augmentation, and feminine or masculine surgery.[66] In instances where an individual's gender dysphoria is severe, sex reassignment surgery is almost necessary.[67] According to the WPATH, for an individual to qualify for sex reassignment surgery, one must meet the following criteria:

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60. *Id.* at 23.
61. *Id.*
62. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 28.
63. *See* Bourcicot & Woofter, *supra* note 40, at 300–01.
64. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 29 (citations omitted).
65. *Id.*
66. Bourcicot & Woofter, *supra* note 40, at 307–08.
67. *Id.* at 307.

> (1) persistent, well-documented gender dysphoria, (2) capacity to make a fully informed decision and to consent for treatment, (3) age of majority in the individual's given country, (4) well-controlled significant medical or mental health concerns (when present), (5) twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless hormones are not clinically indicated for the individual, and (6) twelve continuous months of living in a gender role that is congruent with the patient's gender identity.[68]

The WPATH does not require an individual to meet all of the criteria, but inmates suffering from gender dysphoria are better inclined to need sex reassignment surgery if he or she can meet all of the criteria.[69] Sex reassignment surgery involves many types of procedures.[70] For transgender men, it may encompass the removal of ovaries, restructuring the clitoris, performing a hysterectomy, and removing the fallopian tubes.[71] For transgender women, it may include genital castration, creating a neovagina, and any other post-operative changes needed.[72] Members of the medical community have advocated for sex reassignment surgery as a necessary treatment for severe forms of gender dysphoria.[73] However, the courts and many prison systems have not agreed that it is a treatment option that should be adopted everywhere.[74] A few reasons for this include the cost and security risks that exist with affording every transgender inmate with surgery.[75] In addition, transgender inmates suffer an increased risk of sexual violence compared to any other inmate.[76] Some courts have held that the denial of sex reassignment surgery is not a violation of the Eighth Amendment, while other courts have agreed that surgery is a necessary procedure in extreme cases.[77] However, in many cases, inmates are not provided just surgery alone but are treated with a combination of treatment options that are part of a routine prescribed by the prison's physician.[78]

Since sex reassignment surgery is unnecessary for every transgender person and an inmate's condition solely individualizes it, the courts place a

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68. *Id.* at 308.
69. *See id.*
70. Travis Cox, Comment, *Medically Necessary Treatments for Transgender Prisoners and the Misguided Law in Wisconsin*, 24 WIS. J.L. GENDER & SOC'Y 341, 368 (2009).
71. *Id.* at 367.
72. *Id.*
73. *See* Bourcicot & Woofter, *supra* note 40, at 308.
74. *Id.* at 308–09.
75. *See id.* at 298–99; Ruff, *supra* note 5, at 148; Cox, *supra* note 70, at 349.
76. Ruff, *supra* note 5, at 149.
77. *See* Bourcicot & Woofter, *supra* note 40, at 309; Ruff, *supra* note 5, at 145.
78. Bourcicot & Woofter, *supra* note 40, at 309.

great deal of deference on prison authorities and physicians to provide the best possible forms of care to treat gender dysphoria.[79] This is not always efficient because, although the Eighth Amendment does not explicitly require sex reassignment surgery, it does require inmates to be provided adequate treatment options.[80] With this sentiment in mind, prison authorities are put in a position to assess the inmate's condition balanced with what treatment can be feasibly provided by the prison to be under the Eighth Amendment.[81] Accordingly, one issue that has been presented as a challenge for prison systems regarding transgender inmates and the medical care they are given is housing restrictions.[82] Historically, prison systems did not adopt policies determining housing placements based on an inmate's gender identity, but instead on his or her sex assigned at birth.[83] When an inmate sought to be placed in a housing facility equal to an inmate's gender identity, he or she must have legally changed his or her sex.[84] Therefore, most states require that a physician provide a medical opinion towards a person seeking genital reassignment or body modification.[85] Even then, surgery is not always performed due to issues affecting the transgender population, such as being underage, poor, or the individuals are not citizens of the country they are seeking the surgery from.[86]

Sex reassignment surgery is ultimately considered the last step in treating gender dysphoria because it is the most invasive treatment option.[87] For some, surgery is unnecessary, but for others with severe gender dysphoria, surgery may be the only option for relief.[88] Furthermore, it may be important for individuals with severe gender dysphoria to undergo genital surgery to be comfortable in society.[89] In addition to feeling more comfortable in their own bodies, surgery can help alleviate discomfort in settings such as doctors' offices, swimming pools, and health clubs.[90] Therefore, sex reassignment surgery is often necessary for individuals who have tried other forms of treatment, but have not felt complete relief from the symptoms of gender

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79. *See id.* at 287, 309.
80. *Id.* at 291; *Know Your Rights: Medical, Dental and Mental Health Care*, 21 NAT'L PRISON PROJECT J. 13, 16 (2009).
81. Bourcicot & Woofter, *supra* note 40, at 292.
82. Ruff, *supra* note 5, at 138.
83. *Id.*
84. *Id.* at 138–39.
85. *Id.* at 139.
86. *Id.*
87. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 54.
88. *Id.*
89. *See id.* at 54–55.
90. *Id.* at 55.

dysphoria.[91] Although it may be a necessary form of treatment, the underlying ethical issues that it can present may be looked at as disturbing for health professionals.[92] Health professionals take an oath to "above all do no harm," so to reconstruct, remove, and add functions to one's normal body may cause some health professionals to feel as though they are behaving unethically.[93] Therefore, it is important for health professionals to understand that: (1) the symptoms the individual is experiencing are severe, and (2) surgery is the last resort and may be the only thing that can help.[94] This requires the professional conducting the surgery to ask various questions, discuss the patient's history, and request the patient provide insight on what led to the decision to have the surgery.[95] Once the surgeon has been informed of the patient's pertinent information, it is also important for the surgeon to discuss the limitations, risks, advantages, and disadvantages of the surgery.[96]

After consulting a health professional and securing a surgeon, transgender and transsexual individuals who decide to have surgery may be prevented from undergoing surgery for lack of health care coverage.[97] Unless the individual seeking sex reassignment surgery can pay for the operation out of pocket, it may be difficult to receive the operation because some private insurance companies decline to cover this type of operation.[98] Due to the nature of the operation, many transgender and transsexual individuals experience discrimination and hostility, which causes that individual to be declined health care coverage for the surgery.[99] The denial of sex reassignment surgery is largely due to some states declaring that surgery is not medically necessary and placing the surgery in the category of "cosmetic" services.[100] This belief cannot be further from the truth.[101] Treatments such as hormone therapy, psychotherapy, and sex reassignment surgery are as medically necessary for treating gender dysphoria as pain medication is for treating a bodily injury.[102] Preventing this treatment option from happening could have severe health consequences including depression, anxiety, and

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91. *Id.* at 54–55.
92. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 55.
93. *Id.*
94. *See id.* at 55.
95. *Id.* at 55–56.
96. *Id.* at 56.
97. Nancie Palmer et al., *Identity: Societal and Legal Ramification with Special Focus on Transsexuals*, 39 NOVA L. REV. 119, 154 (2015).
98. *Id.*
99. *Id.*
100. *Id.* at 155.
101. *Id.*
102. *See* Palmer et al., *supra* note 97, at 155.

suicide.[103] This is not to say that a few states have not taken action to reduce the health care discrimination directed toward transgender people and transsexuals.[104] For example, California has expressly prohibited health insurance discrimination against transgender people, thus making equal access to healthcare possible.[105] Following California, states such as Colorado, Oregon, and Vermont have prohibited health insurance discrimination based on gender identity and expression related to transgender and transsexual people.[106] The majority of states in the United States should model California, Colorado, Oregon, and Vermont in outlawing insurance discrimination because equal access to healthcare should be provided to all people of any race, gender, gender preference, or nationality.[107]

III. WHY FLORIDA PRISONS SHOULD ADOPT SEX REASSIGNMENT SURGERY AS A SUITABLE TREATMENT OPTION

According to the Florida Department of Corrections, Florida has the third-largest state prison system in the country with about 80,000 incarcerated inmates and a budget of $2.7 billion dollars.[108] In addition, the Florida Department of Corrections happens to be Florida's largest state agency.[109] Prisons and correctional facilities are required to provide health care *and* adequate health care to their inmates.[110] In the larger prison systems, on-site infirmaries exist to provide medical care to the inmates.[111] Unfortunately, those sentenced to incarceration are usually low-income and uninsured people, and a considerable amount of inmates enter the prison system with significant physical and mental health needs.[112] These needs include tuberculosis, HIV, Hepatitis B and C, arthritis, diabetes, and sexually transmitted diseases, with almost half of the prison population suffering from mental health disorders.[113]

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103. *Id.* at 156.
104. *Id.*
105. *Id.*
106. *Id.*
107. Palmer et al., *supra* note 97, at 157.
108. *About the Florida Department of Corrections*, FLA. DEP'T CORR., http://www.dc.state.fl.us/about.html (last visited Jan. 10, 2022).
109. *Id.*
110. *See* Alexandra Gates et al., *Health Coverage and Care for the Adult Criminal Justice-Involved Population*, KFF (Sept. 5, 2014), http://www.kff.org/uninsured/issue-brief/health-coverage-and-care-for-the-adult-criminal-justice-involved-population/.
111. *Id.*
112. *See id.*
113. *Id.*

Accordingly, there are approximately 300 transgender individuals in Florida's state prisons.[114] When inmates enter the prison system, they are required to go through "reception," where they are examined by doctors and interviewed about their medical and emotional needs.[115] In addition, an inmate may disclose his or her level of education, drug abuse history, and sexual orientation for the prison to be informed of the necessities an inmate may need during their incarceration.[116] Therefore, transgender inmates are able to express their preferred gender and disclose relevant information to prison officials who can subsequently decide what accommodations are afforded for that particular inmate.[117] However, Florida prisons base an inmate's housing on the gender he or she has at birth, so it is not a smooth transition for transgender people when sentenced to incarceration after living a transgender life in society.[118]

In situations where transgender inmates live their life as their preferred gender outside of prison, then enter the prison system living a completely different life, the immediate change can be traumatic.[119] This can produce a tremendous amount of mental and physical distress that requires prison officials to comply with the ruling of providing adequate medical care to all incarcerated persons.[120] With gender dysphoria becoming more prevalent across the nation and incarceration rates significantly rising, there have been increasing civil and constitutional rights claims that further the conversation of allowing suitable treatment options.[121] However, the conversation did not start in Florida prisons, nor is it a recent conversation.[122] The 1994 Supreme Court case *Farmer v. Brennan*[123] became a vital case to the transgender and transsexual community because it held that prison officials might be held liable under the Eighth Amendment for acting with "deliberate indifference" to an inmate's health or safety.[124] This not only held prison officials

114. Romy Ellenbogen, *Outcasts Among the Outcasts,* MIAMI HERALD, Dec. 17, 2019, at A1.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.*

119. *See* Armstrong v. Mid-Level Practitioner John B. Connally Unit, No. SA-18-CV-00677, 2020 WL 230887, at *1 (W.D. Tex. Jan. 15, 2020).

120. *See id.*; Estelle v. Gamble, 429 U.S. 97, 103 (1976).

121. *See Armstrong*, 2020 WL 230887, at *4.

122. *See id.* at *4–5.

123. 511 U.S. 825 (1994).

124. *See id.* at 825, 828, 832.

accountable for turning a blind eye to inmates' needs, but it ensured inmates received proper food, clothing, shelter, and medical care.[125]

In *Farmer*, the petitioner, Dee Farmer—who is biologically male but identifies as a woman—is a transsexual sentenced to incarceration for credit card fraud.[126] The petitioner was diagnosed by medical personnel of the Bureau of Prisons as suffering from a rare psychiatric disorder, similar to gender dysphoria, where she felt consistently uncomfortable with the genitals she was born with.[127] According to the American Medical Association Encyclopedia of Medicine, this psychiatric disorder can be treated with hormone therapy and surgery to provide relief and ultimately permanently change one's sex.[128] Since the history of prisons has been to house inmates according to their biological sex, it is utterly traumatic for inmates to live their lives as the sex they feel they are, only to be incarcerated as the opposite sex, creating an almost out-of-body experience.[129] In this case, before becoming incarcerated, the petitioner essentially lived life as a woman by wearing women's clothing, undergoing estrogen therapy, having breast implants, and unsuccessfully trying to receive "testicle-removal surgery" from the black market.[130] Since petitioner exhibited feminine behavior inside and outside of prison, it was no surprise that she was subjected to physical and sexual violence after being transferred to a high-security prison that generally houses inmates with more troublesome factors than medium or low-security prisons.[131] The petitioner alleged she was beaten and raped by another inmate in her cell within two weeks of transferring to the United States Penitentiary in Terre Haute, Indiana, after she was placed in the general population with the other inmates.[132]

Before the ruling of this case, it was not common knowledge for prison officials to take delicate care in treating transgender people and transsexuals with proper confinement conditions.[133] However, it can be said that prison officials—who know that the prison has a violent atmosphere because of the number of violent inmates it houses and the history of inmate assaults or deaths—should provide certain precautions for incoming

125. *Id.* at 832.
126. *Id.* at 829.
127. *Id.*
128. *Farmer*, 511 U.S. at 829 (citing 2 AM. MED. ASS'N, ENCYCLOPEDIA OF MED. 1006 (Charles B. Clayman ed., 1989)).
129. *See id.*
130. *Id.*
131. *See id.* at 830.
132. *Id.*
133. *Farmer*, 511 U.S. at 831–32.

vulnerable inmates like the petitioner, Dee Farmer.[134] Although prison officials failed to do this in the petitioner's case, the Supreme Court did not outrightly rule the prison's actions as deliberately indifferent because the petitioner never voiced any concern for her safety.[135] Therefore, with *Gamble* setting a standard for adequate medical care to all inmates and *Farmer* holding prison officials accountable for not only inmates' health but also their safety, there is a clear line to draw when it comes to transgender people receiving proper confinement conditions under the Eighth Amendment.[136]

Nearly twenty years later, the conversation of deliberate indifference under the Eighth Amendment has been introduced into the transgender community in the 2013 case *De'lonta v. Johnson*.[137] The District Court of Appeals for the Fourth Circuit ruled that Ophelia De'lonta, an incarcerated transsexual, had a plausible Eighth Amendment claim against prison officials that had denied De'lonta consideration for sex reassignment surgery.[138] De'lonta was convicted of bank robbery and sentenced to incarceration at the Virginia Department of Corrections for seventy-three years.[139] Not only is she a preoperative transsexual, but she also suffers from an illness, much like gender dysphoria, that causes mental anguish called "gender identity disorder."[140] Gender identity disorder is described as the "feeling of being trapped in a body of the wrong gender. . . ." and produces severe forms of mental pain and agony.[141] De'lonta expressed to prison officials, on numerous occasions, her desire to self-castrate and perform her own sex reassignment surgery because the distress of her gender identity disorder was too much to bear.[142] As outlined above, the adequate treatment options for disorders pertaining to gender happen to be hormone therapy, psychotherapy, and, in the most severe cases, sex reassignment surgery.[143] Since an inmate is not entitled to *all* forms of treatment options under the Eighth Amendment, but is still entitled to an *adequate* treatment option, an inmate in De'lonta's position should be considered for sex reassignment surgery.[144] In response to De'lonta's condition, the Virginia Department of Corrections allowed De'lonta to live as a woman inside the prison system and provided hormone

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134. *See id.* at 831.
135. *See id.* at 832.
136. *See id.* at 837; Estelle v. Gamble, 429 U.S. 97, 103 (1976).
137. 708 F.3d 520 (4th Cir. 2013).
138. *Id.* at 522.
139. *Id.*
140. *Id.*
141. *Id.*
142. *See De'lonta*, 708 F.3d at 522.
143. *Id.* at 522–23.
144. *See id.* at 526; Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

therapy, as well as allowing her to wear women's clothing and obtain consistent psychological counseling.[145]

However, despite the treatment plan for De'lonta, she still felt an overwhelming need to self-castrate and even wrote countless letters and formal grievances to prison officials to notify them of the inadequacy of the treatment provided.[146] Unfortunately, after years of inadequate treatment and ignored repeated pleas for help, De'lonta was hospitalized after attempting to self-castrate.[147] This is a direct violation of an inmate's Eighth Amendment right to be free from cruel and unusual punishment because De'lonta underwent the treatment plan provided by prison officials, voiced her concerns that the treatment had not provided relief, and ultimately was harmed after prison officials refused to consider other options.[148] Moreover, prison officials cannot hide behind the excuse of *not knowing* a substantial risk of harm exists when inmates outrightly request a certain type of treatment option.[149] The WPATH considers sex reassignment surgery a last resort option, and since De'lonta did many years of hormone therapy, psychiatric counseling, and is now requesting sex reassignment surgery, it is in accordance with the Standards of Care for transgender health.[150] The Virginia Department of Corrections denied De'lonta consideration for sex reassignment surgery despite all the factors and threats of self-mutilation, and such denial should constitute a deliberate indifference to an inmate's serious medical needs.[151] However, the court in De'lonta's case did not decide that Virginia Department of Corrections' prison officials acted with deliberate indifference; rather, the court held that De'lonta had a "sufficient basis" for an Eighth Amendment violation.[152]

This is an unfortunate conclusion to the traumatic experience of De'lonta; it should not take an attempt to severely harm oneself for the intervention of the justice system.[153] Nor should a possible life-threatening situation occur to hold prison officials accountable for their blatant disregard for an inmate's life.[154]

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145. *De'lonta*, 708 F.3d at 522.
146. *Id.*
147. *See id.*
148. *See id.* at 525.
149. *See id.* at 525–26.
150. *See De'lonta*, 708 F.3d at 522–23.
151. *See id.*
152. *Id.* at 526.
153. *See id.* at 525–26.
154. *See id.*

Although the ruling in *De'lonta* made it possible for transgender inmates to bring forth an Eighth Amendment claim due to inadequate treatment options, later cases are split on whether sex reassignment surgery is a necessary treatment option.[155] *Gibson v. Collier*[156] expanded the conversation of what actions rise to the level of deliberate indifference related to a medical professional's opinion of treatment.[157] The Fifth Circuit Court held that a "[p]laintiff's disagreement with the diagnostic decisions of medical professionals does not provide the basis for a civil rights lawsuit."[158] Now, this ruling imposes a cap on Eighth Amendment claims that can be brought; while it is possible to bring forth an Eighth Amendment claim based on inadequate treatment, an inmate must now provide a showing more than just a mere disagreement or dislike in the treatment being delivered.[159] Therefore, in cases where transgender inmates are suffering from gender dysphoria, it is not enough to just express that a treatment option is not working.[160] One example of this is Scott Lynn Gibson, a transgender prison inmate at the Texas Department of Criminal Justice, who was convicted of two counts of aggravated robbery.[161] Gibson is biologically male but suffers from gender dysphoria, and has identified as a female since the age of fifteen.[162] Due to her illness, she experiences acute distress, depression, and has attempted self-castration and suicide.[163] As a result, the Texas Department of Criminal Justice started her on mental health counseling and hormone therapy, which Gibson expressed to prison officials did not fully relieve her symptoms of gender dysphoria.[164]

After receiving hormone therapy and counseling, Gibson requested sex reassignment surgery; she asserted that the prison's policy of evaluation by appropriate medical and mental health professionals, along with treatment determined individually, reflected the accepted standards of care.[165]

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155. *See De'lonta*, 708 F.3d at 526; Gibson v. Collier, 920 F.3d 212, 221 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019); Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019), *cert. denied sub nom.* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020); Armstrong v. Mid-Level Practitioner John B. Connally Unit, No. SA-18-CV-00677, 2020 WL 230887, at *9 (W.D. Tex. Jan. 15, 2020); Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1275–76 (11th Cir.), *reh'g denied*, 981 F.3d 994 (11th Cir. 2020) (en banc).
156. 920 F.3d 212 (5th Cir. 2019).
157. *Id.* at 220.
158. *Id.*
159. *See id.*
160. *See id.*
161. *Gibson*, 920 F.3d at 216–17.
162. *Id.* at 217.
163. *Id.*
164. *Id.*
165. *Id.* at 217–18.

Unfortunately, the court concluded that since there is no consensus in the medical community about the necessity of sex reassignment surgery, there are no standards binding medical professionals to provide it.[166] The court relied on the fact that Gibson never actually harmed herself, coupled with the existence of alternative treatment options that the WPATH also recommends in cases similar to Gibson's.[167] This case gives great deference to medical professionals who may or may not have experience treating transgender inmates diagnosed with gender dysphoria, instead of considering the WPATH's recommendation that sex reassignment surgery is a last resort option.[168] It should be quite clear that when treatment options are not working, the consideration of a treatment that has not been used is the next best thing.[169] Prisons that refuse to consider sex reassignment surgery and ignore an inmate's plea for efficient care should be declared as going against the very principle set out under the Eighth Amendment: To provide adequate care and confinement conditions to inmates.[170] In fact, the dissent in this case correctly explains that the Eighth Amendment requires individualized assessments of an inmate's medical needs, and should not provide a blanket ban on sex reassignment surgery as a whole solely because the majority of the medical community has yet to adopt it.[171] Unfortunately, the court did not decide this case in the best interest of a human life suffering mental distress, but rather took the side of medical professionals, who simply did not believe in a treatment that could very well relieve symptoms of an illness that neither the court nor medical professionals had ever experienced.[172]

Interestingly, a case in the same year took a different route and finally decided in favor of sex reassignment surgery, making significant headway in the conversation concerning transgender inmates and gender dysphoria.[173] In *Edmo v. Corizon, Inc.*,[174] the Ninth Circuit Court of Appeals held that a transgender prisoner's treating psychiatrist acted with deliberate indifference to that inmate's serious medical needs after denying her a gender confirmation surgery.[175] Adree Edmo, a male-to-female transgender prisoner serving a

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166. *Gibson*, 920 F.3d at 221.

167. *See id.*

168. *Id.* at 222–23; *see also* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 54.

169. *See Gibson*, 920 F.3d at 241 (Barksdale, J., dissenting).

170. *See id.* at 238 (Barksdale, J., dissenting).

171. *See id.* at 225.

172. *See id.*

173. Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019), *cert. denied sub nom.* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020).

174. 935 F.3d 757 (9th Cir. 2019).

175. *Id.* at 767.

prison term at the Idaho Department of Correction, suffers from gender dysphoria.[176] Edmo has experienced severe mental distress, which caused her to attempt to remove her male genitalia twice.[177] Although Edmo experienced the same symptoms as the plaintiff's in cases mentioned above, her case and the ruling of the Ninth Circuit are different because prison authorities were deliberately indifferent to Edmo's ongoing, extreme suffering.[178] Edmo's first attempt at castration occurred after she was being treated with hormone therapy and attending counseling.[179] Although unsuccessful, it was noted by Edmo's treating physician that Edmo left a note stating that she did not want to commit suicide—instead, she just wanted to help herself.[180] At that time, the treating physician reviewed the prison's policy which stated that gender confirmation surgery would not be considered within the Idaho Department of Correction, unless deemed medically necessary according to the treating physician.[181] Even after Edmo's first castration attempt, gender confirmation surgery was not contemplated.[182]

Unfortunately, Edmo's second attempt *was* successful, and she was able to self-mutilate by removing her genitals with a razor blade.[183] Still, she only received hormone therapy, and prison officials refused to consider gender confirmation surgery, even after the gruesome attempt from Edmo to perform the procedure herself.[184]

At this point, something should be said about how much emotional and mental torment the transgender community must go through in order to have their rights protected.[185] It is not enough for transgender prisoners to contemplate enduring life-threatening injuries, suffer physical or mental turmoil, and submit countless complaints of inadequate medical care, as they are *only considered* for an alternative form of treatment *after* they have injured themselves.[186] The Ninth Circuit Court should be applauded for coming to the proper ruling, however, the cost that Edmo—and all the other transgender prisoners that came before—had to pay hardly seems like a win for the transgender community.[187] In reaching their holding, the court considered the

176. *Id.*
177. *Id.*
178. *Id.*
179. *Edmo*, 935 F.3d at 773.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 774.
184. *Edmo*, 935 F.3d at 774.
185. *Id.* at 774, 785.
186. *Id.* at 774; De'lonta v. Johnson, 708 F.3d 520, 522 (4th Cir. 2013).
187. *See Edmo*, 935 F.3d at 780; *De'lonta*, 708 F.3d at 522.

record and the judgments of prison medical officials versus the views of prudent medical professionals in the field to decide whether the decision of prison medical officials was acceptable.[188] The court assured its ruling did not stem from pitting both sides of medical professionals against each other; instead, they gave great deference to Edmo's medical experts, who had years of experience in treating individuals with gender dysphoria, and correctly decided that Edmo needed gender confirmation surgery based on her ongoing and extreme suffering.[189] The court ultimately found that the prison's medical professionals, acting as the State's expert witnesses, lacked the qualifications and expertise necessary to treat inmates with gender dysphoria and inappropriately decided that gender confirmation surgery was unnecessary.[190]

Unfortunately, subsequent cases that do not hold a similar record as *Edmo* get the same results as cases holding that sex reassignment surgery is medically unnecessary for inmates with severe gender dysphoria.[191] For example, in *Armstrong v. Mid-Level Practitioner John B. Connally Unit*,[192] the San Antonio District Court held that an inmate's medical records lacked a showing of deliberate indifference.[193] Perzia Bakari Armstrong was sentenced to life imprisonment in 1995.[194] Since childhood, she identified and lived as a woman despite being born a biological male.[195] In 2016, Armstrong was diagnosed with gender dysphoria and expressed "great mental and physical distress . . . threaten[ed] self-castration, attempt[ed] suicide, and engag[ed] in drug use . . . ." to cope with her illness.[196] Armstrong was prescribed hormone therapy, the common treatment option, but still felt that it was insufficient to deal with her symptoms.[197] After Armstrong initiated the lawsuit against the prison, the District Court reviewed her medical records and decided that deliberate indifference did not exist because there was no evidence suggesting inadequate treatment, despite her claims that hormone therapy was not helping.[198]

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188. *Edmo*, 935 F.3d at 786.

189. *Id.* at 787.

190. *Id.*

191. *See id.* at 767; Armstrong v. Mid-Level Practitioner John B. Connally Unit, No. SA-18-CV-00677, 2020 WL 230887, at *6 (W.D. Tex. Jan. 15, 2020); Gibson v. Collier, 920 F.3d 212, 221 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019).

192. *Armstrong*, 2020 WL 230887, at *1.

193. *Id.* at *4–5.

194. *Id.* at *1.

195. *Id.*

196. *Id.*

197. *Armstrong*, 2020 WL 230887, at *1

198. *Id.* at *2, *6.

Accordingly, the precedent that has been set across the nation for transgender inmates suffering from gender dysphoria is clear, absent actual *physical* harm, no relief is granted to inmates suffering from severe gender dysphoria.[199] Unfortunately, this 2020 case is no different, illustrating that even as time goes on and courts become more aware of what the transgender community is experiencing, not much progress has been made in securing the rights of transgender people who are also incarcerated.[200]

However, it should be noted that while many gender dysphoria inmates do in fact need and rightfully request reassignment surgery, not *all* transgender prisoners suffering from gender dysphoria meet the requirements to undergo sex reassignment surgery and therefore, prison officials should not be *forced* to incur the monetary and physical constraints that come with housing a post-operative inmate.[201] Sex reassignment surgery, on the other hand, should be performed in prisons as a treatment of last resort when alternative and less invasive treatments fail to alleviate the pain and suffering from these individuals, therefore, it is critical to distinguish an *eligible candidate* from an inmate with gender dysphoria who seeks the comfort of having genitalia they identify with, but who does not otherwise meet the criteria for a sex reassignment surgery.[202] This in no way suggests that prisons should have unfettered discretion to deny sex reassignment surgeries—this outcome should only be reached after properly consulting with medical professionals who are experienced with the transgender community.[203] Similar to the state prisons mentioned above, Florida has not adopted sex reassignment surgery as an adequate treatment option.[204] In fact, Florida prisons are less progressive than the prisons previously examined because, in Florida, a transgender inmate cannot receive *the common forms* of treatment to treat gender dysphoria.[205]

In *Keohane v. Florida Department of Corrections Secretary*,[206] the Eleventh Circuit Court of Appeals held that denying a transgender inmate's social-transitioning related requests did not amount to deliberate

199. *See id.* at *6.

200. *See id.* at *5; Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019), *cert. denied sub nom.* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020).

201. *See* Raspa, *supra* note 22, at 94; Kosilek v. Spencer, 774 F.3d 63, 81 (1st Cir. 2014).

202. WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 54–55.

203. *See Armstrong*, 2020 WL 230887, at *5.

204. *See* Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1275–76 (11th Cir.), *reh'g denied*, 981 F.3d 994 (11th Cir. 2020) (en banc).

205. *See id.* at 1262–63.

206. 952 F.3d 1257 (11th Cir. 2020).

indifference.[207] Reiyn Keohane is a male-to-female transgender inmate serving a fifteen-year sentence at the Florida Department of Corrections for attempted murder.[208] At fourteen years old, she began identifying as female, and by the time she turned sixteen, she was diagnosed with gender dysphoria.[209] At nineteen years old—six months before starting her incarceration sentence—Keohane began the hormone therapy prescribed by her pediatric endocrinologist.[210] Surprisingly, she was denied hormone therapy when she was housed at a county jail following her arrest.[211] Months later, when she was transferred to the Florida Department of Corrections and was again denied hormone therapy treatment, even after submitting a written grievance stating she would have harmed herself and considered suicide without it.[212] For the next two years, despite Keohane's continued requests and repeated threats to harm herself, every single request was denied due to the prison's "freeze-frame policy" that stated: "Inmates who have undergone treatment for [gender dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department."[213] This means that inmates suffering from gender dysphoria can only receive the treatment they were receiving at the time of their incarceration; thus, the care of an inmate is not determined by an inmate's current medical needs.[214]

The treatment options that Keohane requested included her ability to live consistently with her identity by dressing in female undergarments, wearing makeup, and utilizing women's hairstyles.[215] Since Keohane had not undergone these social-transitioning steps before incarceration, prison officials refused to grant her requests, claiming it would violate the prison's policy of requiring male inmates to wear undershorts and cut their hair.[216] In addition, the prison officials noted safety concerns associated with Keohane's social-transitioning that would have resulted in the use of additional protection for Keohane and extra responsibility for prison officials to prevent future endangerment.[217]

As a result of the prison's denial of Keohane's social-transitioning requests, she tried to hang herself as well as castrate herself as a result of the

207. *Id.* at 1277.
208. *Id.* at 1262.
209. *Id.*
210. *Id.*
211. *Keohane*, 952 F.3d at 1262.
212. *Id.*
213. *Id.* at 1262–63.
214. *See id.* at 1263.
215. *Id.*
216. *Keohane*, 952 F.3d at 1263.
217. *Id.*

distress caused by her gender dysphoria.[218] It was only after a lawsuit was initiated that the prison referred her to an endocrinologist who immediately prescribed hormone therapy.[219] This is yet another devastating instance where a transgender inmate believed they had no other choice but to physically harm themselves in order to successfully petition the courts to receive some type of relief.[220] Thereafter, the Florida Department of Corrections attempted to rectify their behavior by lifting the freeze-frame policy and replacing it with a policy that permits the individualized assessment and treatment of inmates suffering from gender dysphoria.[221] However, despite the new policy, prison officials refused to grant Keohane's social-transitioning requests, except for allowing a sports bra to assist with her breast enlargement that stemmed from hormone therapy.[222]

Like the cases discussed above, the opinions of the medical professionals differed in *Keohane*.[223] During the bench trial, Keohane presented a medical expert who confirmed that social transitioning to encourage gender dysphoria patients to live out their gender identity is medically necessary.[224] The medical expert testified:

> (1) [A]llowing an individual to present consistently with her gender identity is one "of the medically necessary components for the treatment of Gender Dysphoria," (2) that it would be "medically and logically inconsistent" and "potentially harmful" to provide Keohane hormone therapy while denying her the ability to socially transition, and (3) [f]orcing one to live in conformity with a gender with which she doesn't identity "would likely" cause her to engage in self-harm.[225]

On the other hand, the prison's medical officials who granted Keohane's hormone therapy disagreed with Keohane's expert at trial, stating that Keohane's social transition was not medically necessary due to her current regimen, which was sufficient to treat her gender dysphoria at the time.[226] Prison officials claimed that Keohane's treatment plan of mental health counseling, the use of female pronouns, safer housing accommodations,

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218. *Id.*
219. *Id.*
220. *See id.*
221. *Keohane*, 952 F.3d at 1263.
222. *Id.*
223. *Id.* at 1264.
224. *Id.*
225. *Id.*
226. *See Keohane*, 952 F.3d at 1264.

private shower facilities, and hormone therapy should have been enough to treat her condition.[227] The Florida Department of Corrections seemed to overlook the fact that an individual assessment of transgender inmates with gender dysphoria is essential to build a treatment plan, and because every transgender inmate suffering from gender dysphoria is different, all available treatment options should be considered.[228] The State contended that the treatment plan in place was sufficient, and permitting social distancing would pose high-security risks.[229] This contention held no merit due to prisons requiring high-security functions regardless of whether a transgender inmate is receiving treatment or not.[230] The nature of prison itself can be a violent and threatening place for an ordinary person, such as a corrections officer or security guard, to spend countless hours providing safety measures for those housed in a prison.[231] Independent of housing a post-operative inmate, a prison will have to provide exclusive safety measures for any inmate, so utilizing security concerns as a justification for denying adequate inmate care is unacceptable.[232] Still, the Eleventh Circuit Court refers to deliberate indifference only as an official acknowledgment of an inmate's serious "[m]edical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate . . . ."[233]

Alongside the Florida Department of Corrections, the court seemed to misunderstand the standards of care relevant to transgender health.[234] The WPATH rightfully mentioned that stigma attached to gender nonconformity can lead to prejudice and discrimination; it is uncommon to live in a world where individuals are uncomfortable with their bodies while attempting to rectify them.[235] Society has not entirely accepted that some individuals do not conform to their gender roles, spurring tension in our county's militaries, school systems, employment contexts, prisons systems, and most importantly, the criminal justice system—designed to safeguard our rights.[236] New developments are researched, discovered, and experimented with each day, providing further information about the up-keep of transgender health and providing a stable life for transgender people, whether diagnosed with gender

227. *Id.*
228. *See id.* at 1297, 1298 (Wilson, J., dissenting).
229. *Id.* at 1264.
230. *See id.*
231. *See Keohane*, 952 F.3d at 1275–76.
232. *See id.* at 1294–95 (Wilson, J., dissenting).
233. *Id.* at 1266–67.
234. *See id.* at 1296 (Wilson, J., dissenting).
235. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 4.
236. *See id.* at 31–32.

dysphoria or not.[237] Unfortunately, over the past two years, Keohane was compelled to fight for adequate medical care and unprejudiced consideration of the disparities between the needs of transgender inmates and the inflexible policies affecting them.[238] The balancing act that takes place, with regard to providing exemplary care to inmates versus the prison's legitimate security concerns, is often used as a shield to avoid addressing the bigger issue.[239] The more significant problem is the failure of prisons to adopt acceptable forms of treatment capable of sufficiently treating inmates with gender dysphoria.[240] Unfortunately, Florida prisons are slower than other states' prisons because sex reassignment surgery is not even a topic addressed for the approximately three-hundred transgender inmates currently jailed in Florida's prisons.[241] Instead, social-transitioning is a contested treatment option despite being a standard treatment option in other states.[242]

The Eleventh Circuit held that the subjective prong of the deliberate indifference standard, which requires knowledge of a substantial risk of harm and the action of disregarding said risk, had not risen past mere negligence when the Florida Department of Corrections denied Keohane's social-transitioning requests.[243] Similar to *Edmo*, the court grappled with the medical opinions of both sides' experts, who were divided on whether a sex re-assignment surgery was needed in order to treat Keohane's gender dysphoria after looking at the totality of the circumstances.[244] Mere disagreements about an inmate's course of treatment between medical experts do not rise to the level of deliberate indifference, and the court is in no position to force prisons to adopt one treatment option over the other, if both options provide relief.[245] The court explained that for the prison to violate the Eighth Amendment, the treatment it provides must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be tolerable to fundamental fairness," and that was not the case here.[246] It seems the court and Florida prisons collectively have not progressed as much as the rest of the nation in

237. *See id.* at 89.

238. *See id.* at 4; *Keohane*, 952 F.3d 1262–63.

239. *See* Cox, *supra* note 70, at 351; Bourcicot & Woofter, *supra* note 40, at 298–99.

240. *See* Cox, *supra* note 70, at 351; Ruff, *supra* note 5, at 142–43.

241. Ellenbogen, *supra* note 114.

242. *See Keohane*, 952 F.3d at 1275–76.

243. *Id.* at 1296 (Wilson, J., dissenting).

244. *Id.* at 1260.

245. *Id.* at 1274.

246. *Id.* at 1275 (quoting Harris v. Thigpen, 941 F.2d 1495, 1505 (11th Cir. 1991) (quotation omitted)).

lieu of its recent decision in what constitutes adequate care for transgender inmates suffering from gender dysphoria.[247]

The attempt to address the needs of transgender inmates by Florida Prison's are not adequate enough to *actually* treat the inmates' gender dysphoria.[248] For instance, a male-to-female transgender inmate at Dade Correctional Institution was found hanged in her cell after prison officials refused to legally change the inmate's name to a female name.[249] Unfortunately, the horrors of Florida prisons for the transgender community do not end at social-transitioning requests or sex reassignment surgery.[250] It goes as far as a simple name change, which depicts how difficult it is for transgender inmates to receive an ounce of protection for their rights to identify and live wholeheartedly as the gender they believe themselves to be.[251] Florida prisons have some work to do when it comes to understanding the mental health of its transgender inmates, and empathically reflect on the true *necessity* of basic standards of care for transgender health.[252]

Regardless of whether health professional accept the WPATH or not, it exists to ensure those who are uneducated in transgender health, like Florida prisons, have clear guidelines on what is appropriate to help the uneducated to begin to grasp what is medically needed for the well-being of transgender inmates.[253]

IV. CONCLUSION

Understanding gender dysphoria is difficult for the average person, so it is especially difficult for prison officials to know whether inmates are suffering from gender dysphoria, as explained in various cases and periodicals discussed throughout this Comment.[254] Even qualified health professionals grapple with suitable treatments for gender dysphoria, further complicating the appropriate standard of care.[255] However, there is something to be said about society's evolving standards, coupled with how far the history of the Eighth Amendment's Cruel and Unusual Punishment Clause has come.[256] Society

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247. *See Keohane*, 952 F.3d at 1277–78.
248. *See* Ellenbogen, *supra* note 114.
249. *Id.*
250. *See id.*; *Keohane*, 952 F.3d at 1262.
251. *See* Ellenbogen, *supra* note 114.
252. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 49, at 4.
253. *Id.* at 1.
254. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 773 (9th Cir. 2019), *cert. denied sub nom.* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020).
255. *See Keohane*, 952 F.3d at 1274.
256. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976).

has progressed from ensuring adequate medical care for prisoners to holding prison officials accountable for failure to provide adequate healthcare and living conditions, to expanding the deliberate indifference standard to apply to transgender health.[257] Though the courts are not qualified to deem what is the best course of treatment to treat gender dysphoria, it is the courts' responsibility to apply the deliberate indifference standard accurately, and decide each case properly on its merits.[258] Hopefully, transgender inmates in Florida prisons will be shown more significant consideration for the rights they too are afforded by the Constitution, and though there are still hurdles to overcome, at some point, sex reassignment surgery will become the new standard of care.[259]

257. *See id.* at 103–04.
258. *See id.* at 106.
259. *See id.* at 109 (Stevens, J., dissenting).

A PROPOSED SOLUTION TO LIMIT THE COLLATERAL CONSEQUENCES OF ARRESTS WITHOUT CONVICTION IN THE UNITED STATES

ANNIE O'LEARY*

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I. INTRODUCTION

When an individual is arrested and charged with a crime in the United States, that arrest creates a mark on the individual's criminal record, regardless of whether the charge is later dropped, dismissed, or otherwise resolved in the arrestee's favor.[1] There will, of course, be no conviction on that individual's criminal record; however, it is not as though the arrest never happened.[2] "The [United States'] criminal records system is based on arrests," meaning that even "arrests that [do] not result in a conviction are included in [an individual's] criminal record . . . ."[3] Therefore, records of arrest can be just as consequential as convictions.[4] In fact, there is a common public belief that if an individual is arrested or charged with a crime, that individual *must* be guilty of violating some law.[5] When an arrestee's interaction with the criminal justice system does not result in a conviction, many people assume that the arrestee "beat the system."[6] A presumption of guilt flows from arrests that do

1. *See* Kenny Lo, *Expunging and Sealing Criminal Records: How Jurisdictions Can Expand Access to Second Chances*, CTR. FOR AM. PROGRESS, http://cdn.americanprogress.org/content/uploads/2020/04/23094720/04-23_Expunging-and-Sealing.pdf?_ga=2.170378210.396687133.1633282993-1341886711.1633282993 (last updated Apr. 23, 2020).

2. *Criminal Records Do Not Go Away on Their Own*, ERIC J. DIRGA, P.A. (Dec. 8, 2018), http://ejdirga.com/2018/12/08/criminal-records-public-records/; Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 ("There is a myth that if you are arrested and cleared that it has no impact . . . it's not like the arrest never happened.").

3. James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union, and Interpol Compared*, 30 LOY. L.A. INT'L & COMPAR. L. REV. 125, 130 (2008); Lo, *supra* note 1.

4. Karen Lantz & Lisa Minutola, *Why the American Dream is Out of Reach*, 37 DEL. LAW., Summer 2019, at 12, 12 ("[Arrest records] can be [just] as devastating as conviction[s]."); *see* Matthew D. Callanan, Note, *Protecting the Unconvicted: Limiting Iowa's Rights to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 IOWA L. REV. 1275, 1278 (2013).

5. Callanan, *supra* note 4, at 1278.

6. *Id.* at 1279.

not result in conviction, thus, causing innocent individuals to face collateral consequences that may last a lifetime.[7]

To help decrease the aforementioned collateral consequences, policymakers developed legal processes to make an individual's criminal record "invisible" to the public through expungement or sealing.[8] Prior to the advent of the digital age, expungement worked well because once the official documents of an individual's criminal record were *destroyed* by government agencies, the existence of a criminal record could only live on through public memory and printed newspapers.[9] The destruction of official government records is worthless for individuals whose criminal history information is widely available on the internet because expungement orders rarely pertain to criminal history information maintained by unofficial sources.[10] Thus, the complex legal process of expungement is inevitably unrewarding in the digital age because constitutional rights, such as freedom of speech and freedom of the press, prevent "granting individuals [the] right to compel private companies to expunge their records . . . ."[11] Being that the United States' criminal justice system operates under the principle "innocent until proven

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7. Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–98 (2019) [hereinafter *Arrests as Guilt*].

> The legal consequences of arrest that appear to rely on an assumption of guilt . . . include a permanent record that is accessible to the police and to others, violations of probation and parole, occupational license suspension, civil asset forfeiture, bars on public benefits, and threats to child custody. An arrest on one's record can make one ineligible for jury service. It can also make one ineligible for legal relief, as exemplified by a New York case in which a judge dismissed misdemeanor charges in the interests of justice for those defendants who had no arrest record but declined to dismiss for those who had such a record. Referring to the arrest records as "record[s] of prior unlawful activity," the judge explained his dichotomous decision: dismissal was appropriate where the defendants had previously led "a law abiding life," but in cases "where a defendant previously has had or exercised that opportunity, but has thereafter again disregarded the law, a different matter is presented. Defendants whose criminal records or records of prior unlawful activity thereby present a history of disregard of the law, will not be permitted to benefit" from dismissal.

Id. (footnotes omitted).

8. *See* Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337, 347–48 (2018).

9. *Id.* at 338.

10. *Id.*; Brian M. Murray, *Newspaper Expungement*, 116 NW. U. L. REV. ONLINE 68, 70 (2021), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1311&context=nulr_online. Unofficial sources include background screening companies, newspapers, media outlets, social media, and other internet websites. *Id.*

11. Haber, *supra* note 8, at 338.

guilty," the system demands a solution that enables the non-convicted to retain their innocence.[12]

Part II of this Comment provides background on criminal records and addresses how the public can access criminal history records in the United States.[13] Additionally, Part II addresses the collateral consequences faced by individuals with an arrest record.[14] Part III of this Comment discusses how individuals can get arrests wiped from their record through the process of expungement and addresses the difference between expungement and sealing.[15] Furthermore, Part III focuses on Florida's expungement laws and provides suggestions to make the Florida's expungement process less complex for innocent arrestees.[16] Part III also discusses the ineffectiveness of expungement in the digital age.[17] Part IV compares the United States' criminal record system to that of the European Union's ("EU") and explores possible solutions for the United States to improve the effectiveness of expungement.[18] After Part IV—which addresses that most solutions to improve the effectiveness of expungement conflict with constitutional guarantees—Part V proposes limiting the collateral consequences of arrests by modeling aspects of the United States criminal record system after the EU's criminal record system—mainly, a system based on convictions, rather than arrests.[19]

II. CRIMINAL RECORDS IN THE UNITED STATES

A criminal record is a list of an individual's criminal history, including arrests and convictions, maintained by the criminal justice system.[20] When an individual is arrested, his or her criminal history *should* list the date of the arrest, the charges, and the final disposition.[21] When an individual is

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12. *See* Callanan, *supra* note 4, at 1278.

> The presumption of innocence should last in perpetuity for the unconvicted criminal defendant, and the criminal defendant who was not convicted at trial or via a plea bargain — regardless of the reason for the court's inability to convict — should not suffer consequences outside of court due to society's skepticism in the legal outcome.

Id.

13. *See* discussion *infra* Section II.A.
14. *See* discussion *infra* Sections II.B–C.
15. *See* discussion *infra* Part III.
16. *See* discussion *infra* Section III.A.
17. *See* discussion *infra* Section III.B.
18. *See* discussion *infra* Section IV.A.
19. *See* discussion *infra* Sections IV.A.2–V.
20. Lo, *supra* note 1, at 1; *Information About Criminal Records*, LEGAL AID WORK, http://legalaidatwork.org/factsheet/records/ (last visited Jan. 10, 2022).
21. *Information About Criminal Records*, *supra* note 20.

convicted, his or her criminal history should include "the date of . . . conviction, the charges, the sentence, and [indicate] whether the crime [constitutes] a felony or misdemeanor."[22]

In Florida, a criminal history record is created when an individual is arrested and fingerprinted and should include the outcome of the charges stemming from the arrest.[23] Generally, Florida's criminal history records include personal information about the arrested individual, including his or her full name, alias, gender, date of birth, nationality, ethnicity, unique physical attributes, mugshot, full set of fingerprints, misdemeanor and felony offenses, arrest history, indictments, convictions, and pending dispositions.[24]

A. *Access to Criminal Records*

Police, prosecutors, courts, and members of the general public can search for, and obtain access, to an individual's criminal history records.[25] Criminal justice agencies and members of the public can obtain access to an individual's criminal history information in a variety of ways, including through: Court records, law enforcement, and corrections agency records, registries, watch lists, state criminal record repositories, and the Federal Bureau of Investigation's ("FBI") Interstate Identification Index.[26]

Courthouses typically maintain comprehensive criminal records, which include information regarding "criminal charges, . . . convictions, . . . arraignments, trials, pleas, and other dispositions."[27] Depending on the jurisdiction, county courthouses may require records to be retrieved on-site, but some courthouses make records available online.[28] In Florida, courthouse records can be accessed online by the general public.[29] Law enforcement and corrections agencies maintain "records of complaints, investigations, arrests,

22. *Id.*

23. *Seal and Expunge FAQ*, FLA. DEP'T L. ENF'T, http://www.fdle.state.fl.us/Seal-and-Expunge-Process/Frequently-Asked-Questions (last visited Jan. 10, 2022).

24. *Florida Criminal Records*, STATERECORDS.ORG, http://florida.staterecords.org/criminal.php (last visited Jan. 10, 2022).

25. Lo, *supra* note 1, at 1.

26. U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 4–5 (2012), http://www.eeoc.gov/sites/default/files/migrated_files/laws/guidance/arrest_conviction.pdf [hereinafter ENFORCEMENT GUIDANCE].

27. *Id.* at 4.

28. *Id.*

29. *Florida Public Records*, STATERECORDS.ORG, http://florida.staterecords.org/ (last visited Jan. 10, 2022).

indictments, . . . incarceration[s], probation[s], and parole[s]."[30] Depending on the agency, these records may be available on-site or online.[31]

"Most states maintain . . . [a] centralized repository of criminal records" submitted by the criminal justice agencies and courthouses within the state, including Florida.[32] "The FBI maintains the most comprehensive collection of criminal records . . . [as it] compiles records from each of the states' [own] repositories" in a centralized system known as the 'Interstate Identification Index' ("III").[33] The FBI maintains criminal history information created for criminal justice agency use; however, the FBI's III database is now accessible to non-government agencies for non-criminal justice purposes.[34] Currently, "access to FBI-maintained criminal history information is governed by . . . state and federal statutes."[35] The primary means of gaining access to the FBI-maintained databases for non-criminal justice purposes has been through state statutes passed pursuant to Public Law 92-544, a federal law that "allow[s] sharing of FBI-maintained criminal history records" with state and local government agencies for use in certain licensing and employment decisions.[36] Background checks run pursuant to these state statutes are "processed through state record repositories."[37] They include a check of state records, and the results of these checks are supplied to public agencies.[38] Put simply, the FBI's III database can be accessed for non-criminal justice purposes by employers in certain state-regulated industries, "such as individuals employed as civil servants, daycare [workers], school [staff], nursing home workers, taxi drivers, [and] private security guards . . . .[39] Access to FBI-maintained records has also been authorized by federal statutes, which allows employers in certain industries "to go directly to the FBI for . . . employment, licensing, [and] volunteer check[s] without . . . going through state [repositories] and . . . checking state records."[40] These federal statutes

30. ENFORCEMENT GUIDANCE, *supra* note 26, at 4.

31. *See id.*

32. *Id.*; *see also Criminal Justice Information Services*, FLA. DEP'T L. ENF'T, http://www.fdle.state.fl.us/CJIS/CJIS-Home.aspx (last visited Jan. 10, 2022).

33. ENFORCEMENT GUIDANCE, *supra* note 26, at 4–5.

34. U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 3 (2006), http://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag_bgchecks_report.pdf [hereinafter ATTORNEY GENERAL'S REPORT].

35. *Id.* at 4.

36. *Id.*; Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, Pub. L. No. 92-544, 86 Stat. 1109, 1115 (1973).

37. ATTORNEY GENERAL'S REPORT, *supra* note 34, at 4.

38. *Id.*

39. *See id.* at 4–5.

40. *Id.* at 4.

seek to promote national security and public safety by authorizing access to FBI-maintained criminal history information for employers in industries regulated by the federal government, including banking, securities, private security guard industries, and transportation workers.[41]

Florida's Public Records Act provides information on public records, including general information on accessing the records.[42] Pursuant to the Act, "which presumes that all government information and records are available to the public," online sites—such as the Florida Department of Law Enforcement's ("FDLE") website—provide tools for members of the general public to access and obtain public records.[43] Anyone can access another individual's public records through the FDLE's website for only twenty-five dollars.[44]

Criminal records have long been available to the public—since 1849 in the State of Florida[45]—although technological advancements have made accessing criminal records much easier.[46] With wide accessibility to criminal records through a quick, informal internet search or paying a fee to private companies, "everyday citizens, employers, and landlords [can] now routinely consult criminal databases" to conduct background checks.[47] Thus, with a criminal record system based on arrests, "even [arrestees who were] never charged with a crime . . . bear the mark of a criminal record."[48]

B. *Arrests Generally*

There is a common misconception about when a criminal record starts.[49] A criminal record is an arrest record, as criminal records are created at the moment of arrest.[50] From the moment of arrest and onward, everything that occurs in relation to the arrest is documented on the arrestee's criminal record and made public.[51] Thus, as previously mentioned, both arrests and

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41. *Id.* at 4–5.
42. FLA. STAT. § 119.01(1) (2021).
43. *Id.* § 119.01(2)(f); *Florida Public Records*, *supra* note 29; *see also FDLE's Criminal History Search Overview*, FLA. DEP'T L. ENF'T, http://cchinet.fdle.state.fl.us/search/app/default?3 (last visited Jan. 10, 2022) [hereinafter *Fees*].
44. *Fees*, *supra* note 43.
45. *See Florida Public Records*, *supra* note 29.
46. Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628 (2014).
47. *Id.*
48. *Id.*
49. *Criminal Records Do Not Go Away on Their Own*, *supra* note 2.
50. *Id.*
51. *Id.*

convictions make up an individual's criminal record.[52] Arrests and convictions, however, are very different things.[53] Convictions are typically sufficient proof that an individual engaged in criminal conduct.[54]

On the other hand, arrests do not establish that criminal conduct occurred and do not serve as proof that an individual engaged in criminal conduct.[55] "Florida arrest records are officially recorded documents" that detail information about a person and his or her suspected crimes.[56] Florida arrest records typically include the arrestee's full name, date of birth, gender, place, and date of arrest, details of the alleged criminal activity, name of the arresting officer, law enforcement agency, name of the holding facility, and the status of the arrestee's case.[57] Conviction records contain similar details along with the sentence received, the nature of the crime, and any prosecutorial information.[58]

Another common misconception about criminal records is that after a criminal case is dropped, dismissed, or otherwise resolved in the individual's favor, the record goes away or never existed.[59] In reality, an arrestee's record remains with the arrestee regardless of the outcome.[60] Thus, individuals arrested for a crime but never charged or convicted face the ill effects of having a criminal record, regardless of the fact that arrests alone are not sufficient proof that criminal conduct occurred.[61]

1. Arrests by the Numbers

Someone is arrested every three seconds in the United States; this accounts for nearly 10.5 million arrests every year.[62] To put the vast number of individuals with an arrest record in the United States into perspective:

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52. *See id.*; Lo, *supra* note 1.
53. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 12–14 (distinguishing between arrests and convictions).
54. *See id.* at 13.
55. *Id.* at 12.
56. *Florida Criminal Records*, *supra* note 24.
57. *Id.*
58. *Id.*
59. *Criminal Records Do Not Go Away on Their Own*, *supra* note 2.
60. *Id.*
61. *See* Uggen et al., *supra* note 46, at 628; ENFORCEMENT GUIDANCE, *supra* note 26, at 12.
62. *Emerging Findings*, VERA, http://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings (last visited Jan. 10, 2022).

> If all arrested Americans were a nation, they would be the world's [eighteenth] largest. Larger than Canada. Larger than France. More than three times the size of Australia. The number of Americans with criminal records today is larger than the entire U.S. population in 1900. Holding hands, Americans with arrest records could circle the earth three times.[63]

2. Arrests Are Not Always Carried Out in Response to Crime Commission

Alarmingly, "non-serious, low-level offenses, such as 'drug abuse violations' and 'disorderly conduct,' make up over [eighty] percent of [these] arrests . . . ."[64] This results from the criminal justice system being relied upon for social problems unrelated to public safety issues.[65] For instance, "law enforcement is called upon to respond punitively to medical and economic problems unrelated to public safety issues."[66] Thus, people who need medical care and social services are often arrested and booked when they should not have come into police contact in the first place.[67]

It is estimated that a minimum of 4.9 million people were arrested in 2017, and "at least one in [four] of those individuals" were arrested multiple times.[68] Recidivism rates are related to race, poverty, mental illness, and substance use disorders.[69] "In many cities, arrests are used in predominantly black and Latino neighborhoods as a means of intimidation and social control. 'Move along,' the police say, and those who [do not] are brought in for loitering or disorderly conduct."[70] Cities that saw large protests against police violence in 2020 also saw a large number of arrests, with over ten thousand

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63. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), http://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas.

64. *Emerging Findings*, *supra* note 62.

65. Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POL'Y INITIATIVE (Aug. 26, 2019), http://www.prisonpolicy.org/reports/repeatarrests.html.

66. *Id.*

67. *See id.*

68. *Id.*

69. *See id.*

70. Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES, http://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html (last updated May 25, 2016).

arrests as early as June 4th, 2020.[71] Many individuals arrested during protests were arrested for low-level offenses such as curfew violations and failure to disperse.[72] Most individuals arrested at protests will not be charged, but their arrest will leave them with a criminal record.[73]

Most arrests generally do not result in charges, and even when they result in charges, many do not result in a conviction.[74] A significant number of individuals arrested are legally innocent and arguably should not have come in contact with the police in the first place, yet they will forever suffer the collateral consequences that flow from their unfortunate interaction with the criminal justice system.[75]

C. *Invisible Punishments for Innocent Arrestees*

Even a minor, isolated interaction with the juvenile or adult criminal justice system can create a lifetime of barriers.[76] The National Inventory of Collateral Consequences of Conviction—a database created by the Criminal Justice Section of the American Bar Association—catalogs over 1000 explicit legal consequences that can arise from a conviction in the state of Florida, and over 1950 explicit legal consequences that arise when federal statutes are accounted for.[77] "And that is only a tally of explicit barriers—it does not attempt to catalog the continuing stigma around a criminal record that makes . . . applicant[s] with a record, less likely to be successful than one without."[78]

Arrest records can be just as consequential as convictions.[79] Any individual with an arrest record faces adversity as a result of the collateral consequences that stem from having a criminal record.[80] The state may impose

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71. Margaret Love & David Schlussel, *Protesting Should Not Result in a Lifelong Criminal Record*, WASH. POST (June 15, 2020, 8:00 AM), http://www.washingtonpost.com/opinions/2020/06/15/protesters-should-not-get-lifelong-criminal-record/.

72. *Id.*

73. *See id.*

74. ENFORCEMENT GUIDANCE, *supra* note 26, at 12.

75. *See* Rosenberg, *supra* note 70.

76. *Id.*; Lantz & Minutola, *supra* note 4, at 12.

77. *See Collateral Consequences Inventory*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, http://niccc.nationalreentryresourcecenter.org/consequences (choose "Florida" from "Jurisdiction" dropdown) (last visited Jan. 10, 2022); Lantz & Minutola, *supra* note 4, at 12.

78. Lantz & Minutola, *supra* note 4, at 12.

79. *Id.*

80. Haber, *supra* note 8, at 342 ("Sometimes referred to as 'invisible punishment[s],' collateral consequences generally refer to any additional penalties outside the

such collateral consequences, including the inability to obtain a professional license and restrictions on obtaining state-based services.[81] On the other hand, society may deny employment, housing, or admission to educational institutions and impose social stigmas.[82]

Employers, understandably, want to employ individuals they can trust.[83] Thus, it is reasonable to assume that applicants without a criminal record would fare better in the employment arena than applicants with, even if an applicant's record consists of a mere arrest with no resulting charges or convictions.[84] In 2019, there were around 10.5 million arrests in the United States.[85] Many of those arrests did not lead to charges being filed, and *millions* of innocent individuals never convicted of a crime now have a criminal record.[86] With so many individuals holding a criminal record, it stands to reason that employers pass over many valuable, competent employees for less competent employees that do not have a criminal record.[87] Also, applicants with arrest records may gravitate toward less selective occupations that do not match their skill set and often pay less.[88] A study conducted in 2014 found that even a single arrest for disorderly conduct that did not result in a conviction, depressed job offers.[89] The study found that individuals with a sole arrest for disorderly conduct, with no resulting charge or conviction, were four percentage points less likely to receive an initial call back from employers.[90] Notably, a single disorderly conduct arrest should be one of the most minimally stigmatizing records because disorderly conduct is a low-level offense, yet even the most minimally stigmatizing record still reduced employer callbacks to legally innocent applicants.[91] This study demonstrated that arrests—at least low-level ones—do not universally disqualify applicants from employment; however, mere arrests *do* limit applicants' ability to acquire

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criminal law realm that individuals with criminal history, and perhaps even their families, incur.") (footnotes omitted).

81. *Id.* at 344.

82. *Id.*

83. Friedman, *supra* note 63.

84. *See id.*

85. *See Emerging Findings*, *supra* note 62.

86. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 12. ("Many arrests do not result in criminal charges, or the charges are dismissed.") (footnotes omitted).

87. Friedman, *supra* note 63.

88. *Id.*

89. *See* Uggen et al., *supra* note 46, at 627.

90. *Id.* at 649.

91. *See id.* at 632.

positions that may best match their skill sets.[92] Ultimately, employers often discredit arrestees by equating a criminal record with low work productivity.[93]

There are many reasons why individuals who have been arrested but never convicted are still affected by their arrest record.[94] One reason is a lack of knowledge by end-users (i.e., individuals inspecting another's criminal record) of criminal history information.[95] For example, an individual searching a criminal record may not understand the legal jargon used to describe the final disposition, such as the term *nolle prosequi*, which means that the prosecutor was unwilling to pursue the case against the arrested individual.[96] Many employers, landlords, and everyday persons may be unfamiliar with legal jargon and may not understand that a particular charge did not result in a conviction.[97] Another reason is that end-users may give greater weight to the arrest itself than to the end result by assuming that an individual arrested for a crime must be guilty of violating some law.[98] Further, arrest records reduce employability; employers want to prevent losses due to theft and protect themselves against negligent hiring lawsuits.[99]

The digital age has only exacerbated the negative effects felt by individuals with an arrest record.[100] The development of electronic databases has made arrest histories much more accessible and highly visible.[101] "[A]rrestees can no longer 'pass' as normal, and this stigma colors their

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92. Freidman, *supra* note 63; *see* Uggen et al., *supra* note 46, at 627, 637.

93. Uggen et al., *supra* note 46, at 630.

94. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 6 ("[Employers use criminal history information to] combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks."); Rosenberg, *supra* note 70 (stating that a brief interaction with the criminal justice system can create permanent barriers to obtaining a job, housing, education, and an occupational license).

95. *See* Rosenberg, *supra* note 70.

96. *Id.*

97. *Id.*

98. *See id.*; Callanan, *supra* note 4, at 1293 ("When the average American hears that someone has been arrested or charged with a crime, there is a general feeling that the person has done something wrong and is guilty of violating some law.") (citing Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1305–07 (2000)); James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 UNIV. ST. THOMAS L.J. 387, 390 (2006) ("Employers often associate a criminal record with unreliability, untrustworthiness, and dangerousness.").

99. *Employers Are Looking at Your Florida Criminal Background Check: How Your Background Check Affects Your Job*, SEALMYRECORD.COM, http://sealmyrecord.com/blog/employers-are-looking-your-florida-criminal-background-check (last visited Jan. 10, 2022) [hereinafter *Florida Criminal Background Check*].

100. *See* Haber, *supra* note 8, at 338; Uggen et al., *supra* note 46, at 630.

101. Uggen et al., *supra* note 46, at 630.

interactions with employers and others."[102] With widespread access to criminal records, around nine in ten employers, four in five landlords, and three in five colleges conduct criminal background checks on applicants.[103] Currently, legislation does not regulate employers or other end-users when they access criminal history records on the internet.[104] However, the Equal Employment Opportunity Commission ("EEOC") issued an Enforcement Guidance on how employers should approach the use of arrest records in their hiring process.[105] The EEOC's Enforcement Guidance makes it clear that an employer cannot impose a blanket ban on all applicants with an arrest record but may rely on the conduct underlying the arrest to deny applicants from employment.[106] This requires employers to conduct a fact-based analysis of the underlying conduct to justify an adverse employment reaction.[107] However, the Enforcement Guidance still warns that employers should not rely on arrest records in their exclusionary practices because arrest records may not report the final disposition of an arrest or may include inaccuracies.[108] Regardless of the EEOC's cautions against employers using arrest records in their exclusionary practices, the pervasiveness and easy accessibility of criminal history records in the United States make employers' use of criminal records nearly obligatory.[109] More than half of employers admitted that their reason for searching an applicant's criminal background "was to [avoid potential] legal liability rather than to ensure a safe work environment . . . ."[110]

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102. *Id.*
103. Lo, *supra* note 1.
104. Haber, *supra* note 8, at 357.
105. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 3.
106. *Id.* at 12.
107. *See id.*
108. *Id.* at 13.
109. *See id.* at 12; Michael Klazema, *Are Background Checks Required?*, BACKGROUNDCHECKS.COM (Apr. 11, 2018), http://www.backgroundchecks.com/blog/are-background-checks-required.

> While most employers technically have the right to skip the background check step when hiring new workers, doing so is always a risk. Employers have an obligation to provide their employees with a safe place to work. They also have an obligation to make sure their company operations—and, by extension, the people they hire—do not pose a risk to customers, clients, or the public. Because of these obligations, a pre-employment background check is usually viewed as due diligence even if the employer is not technically required to run the check.

Klazema, *supra*.

110. Friedman, *supra* note 63 ("According to the Society of Human Resource Management survey, more than half of employers (52 percent) said their primary reason for checking candidates' backgrounds was to reduce legal liability rather than to ensure a safe work environment (49 percent) or to assess trustworthiness (17 percent).").

Altogether, arrest records decrease an individual's employment prospects and erect socioeconomic barriers that expand across generations because a parent's criminal record places barriers on their child's long-term well-being.[111] So how can individuals wrapped up in the criminal justice system but never found guilty of anything, keep their criminal records from "poisoning" their future?[112] One way is by "destroying" their record through expungement.[113]

III. EXPUNGEMENT & SEALING

Expungement in the United States was initially limited and created for individuals whose arrest did not result in a conviction, making an innocent arrestee's criminal history invisible to the public.[114] Expungement is the process by which an individual's criminal record is "eras[ed]."[115] Generally, expungement may be ordered by a judge or court and requires removing a particular incident from an individual's criminal record.[116] Congress has not provided a statute governing the application of expungement at the federal level.[117]

Most expungement proceedings occur in state courts, and the states create their own laws regarding the application of expungement, including who may have their record expunged, the process for expungement, and which offenses are eligible for expungement.[118]

Expunging a record and sealing a record is not the same thing; however, both aim to restrict public access to an individual's criminal record.[119] Sealing does not destroy a criminal record as expungement does;

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111. Lo, *supra* note 1, at 1.

112. *See* Rosenberg, *supra* note 70.

113. *See* Haber, *supra* note 8, at 337 ("[E]xpungement: a legal process by which criminal history records are later vacated, reversed, sealed, purged, or destroyed by the state.") (footnote omitted).

114. *See id.* at 346–47.

115. *See* Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPECTUS 123, 128 (2010); *What Is "Expungement?"*, AM. B. ASS'N (Nov. 20, 2018), http://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-_expungement-/.

116. Lo, *supra* note 1, at 1–2.

117. *What Is "Expungement?"*, *supra* note 115; James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 80 (1992).

118. *What Is "Expungement?"*, *supra* note 115.

119. *See* Lo, *supra* note 1, at 1–2 (explaining differences between sealing and expunging).

however, sealing a record makes the record accessible only through a court order.[120] Expungement varies from state to state; therefore, this comment focuses on the State of Florida's expungement process.[121]

A. *Expungement & Sealing in the State of Florida*

In Florida, an individual may have his or her criminal record expunged under certain conditions.[122] An individual who has not been convicted of a crime is eligible to have his or her criminal record expunged if he or she has not had a criminal record sealed or expunged in the past.[123] An individual can only have his or her criminal record expunged one time, making expungement a limited remedy for clearing a criminal record.[124] In Florida, "'*expunction* of a criminal history record'" is expressly defined as:

> [T]he court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order, except that criminal history records in the custody of the department must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction.[125]

In contrast, the "*sealing* of a criminal history record [is] the preservation of a record under such circumstances that it is secure and inaccessible to any person not having a legal right of access to the record or the information contained and preserved therein."[126]

For a Florida court to consider an individual's petition for expungement, the individual must fill out an application to receive a Certification of Eligibility ("COE") from the FDLE.[127] After filling out the application and obtaining supporting documentation, the individual must submit the application and supporting documents to FDLE.[128] If the individual

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120. *Id.*
121. *What Is "Expungement?"*, *supra* note 115.
122. *See* FLA. STAT. § 943.0585(1)(a)–(h) (2021).
123. *Id.* §§ 943.0585(1)(g), 943.059(1)(e).
124. *See id.* §§ 943.0585(1)(g), 943.059(1)(e).
125. *Id.* § 943.045(16).
126. *Id.* § 943.045(19).
127. FLA. STAT. § 943.0585(2).
128. *Id.*

qualifies for expungement, FDLE will respond with a COE.[129] To qualify for expunction of an arrest record in Florida, the charges against the individual seeking expungement must have been dropped, dismissed, or the individual must have been acquitted of the charges by a judge or jury.[130] Further, the individual seeking expungement must have never been convicted of a criminal offense in Florida and never have sealed or expunged another arrest record in Florida.[131] To qualify for sealing an arrest record in Florida, the individual must have entered a guilty or no contest plea, or the court must have withheld the adjudication of guilt.[132] Further, the individual seeking to seal their arrest record must never have been convicted of a criminal offense in Florida and never have sealed or expunged another arrest record in Florida.[133] Finally, the individual must petition the court, and the COE issued by the FDLE must accompany the petition.[134]

Florida law provides that "any request for [expungement] of a criminal history record may be denied at the sole discretion of the court."[135] Florida courts, however, have consistently found that the discretion is not completely unconstrained, meaning that a court may not use its *sole* discretion to arbitrarily deny petitions for expungement.[136]

The courts may not deny a petition for expungement based solely on the nature of the crime and must look to all the facts and circumstances.[137] Thus, to properly exercise its discretion, a court must provide a reason for denying a petition for expungement.[138]

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129. *Id.* § 943.0585(2)(a).
130. *Id.* § 943.0585(1)(a)–(b).
131. *Id.* §§ 943.0585(1)(c)–(d), (1)(g).
132. FLA. STAT. § 943.059(1)(b).
133. *Id.* §§ 943.059(1)(b), (1)(e).
134. *Id.* § 943.0585(3)(a).
135. *Id.* § 943.0585(4)(e).
136. *E.g.*, Anderson v. State, 692 So. 2d 250, 253 (Fla. 3d Dist. Ct. App. 1997) ("Obviously, the words 'sole discretion' as used in section 943.058, Florida Statutes (1989), do not permit arbitrary, capricious or whimsical denial of expunction. Instead, this court must decide whether the trial judge used reasonable discretion in denying expunction.") (citation omitted).
137. Baker v. State, 53 So. 3d 1147, 1149 (Fla. 1st Dist. Ct. App. 2011) (per curiam) ("The court's discretion must be exercised based on the Sectionicular facts and circumstances surrounding the records at issue, and not solely on the nature of the charge."); Harman v. State, 12 So. 3d 898, 899 (Fla. 2d Dist. Ct. App. 2009) ("A trial court has the discretion to deny a petition 'if there is a good reason for denial based on the facts and circumstances of the individual case.'") (quoting *Anderson*, 692 So. 2d at 252); Godoy v. State, 845 So. 2d 1016, 1017 (Fla. 3d Dist. Ct. App. 2003) (reversing the trial court's denial of petition based solely on the nature of the charge).
138. VFD v. State, 19 So. 3d 1172, 1175 (Fla. 1st Dist. Ct. App. 2009) (finding the trial court must articulate an evidence-based reason for denying expungement).

Many states are taking steps to make record expungement more accessible by adopting laws that streamline the process for expungement in certain situations and by "making more . . . records eligible for expungement [or] sealing . . . ."[139] Florida adopted legislation providing for automatic sealing in cases where charges were either not filed, dropped, or dismissed prior to trial, and in cases where the trial resulted in an acquittal or a verdict of not guilty.[140] Florida's administrative sealing does not require an individual to take any action in sealing his or her record.[141] The clerk is supposed to forward all records eligible for administrative sealing to FDLE to be processed for a seal.[142] However, Florida's automatic sealing process only seals criminal history information maintained by FDLE—it does not seal records at the local level.[143] This process may benefit some individuals; however, some may still have to go through the expungement process to *destroy* their entire criminal record, including mugshots and other information on the sheriff's office website.[144]

Florida also offers administrative expungements, exclusively for mistaken arrests and non-judicial records.[145] Administrative expungements do not require destruction of records by the arresting agency and do not seal court records.[146] Further, the arresting agency must apply to FDLE to have an arrest administratively expunged, or the individual who was mistakenly arrested can apply for an administrative expungement if "the application is supported by the endorsement of the head of the arresting agency or his or her designee or the state attorney of the judicial circuit in which the arrest occurred or his or her designee."[147] Getting the arresting agency to file the application for an

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139. Lo, *supra* note 1.

140. FLA. STAT. § 943.0595(a)(1)–(4).

141. *Auto-Seal Under Section 943.0595*, SAMMIS L. FIRM, http://criminaldefenseattorneytampa.com/seal-and-expunge-criminal-record/auto-seal/ (last updated Apr. 7, 2020); *see also* FLA. STAT. § 943.0595(3)(b).

142. *Auto-Seal Under Section 943.0595*, *supra* note 141; FLA. STAT. § 943.0595(3)(a).

143. *See* FLA. STAT. § 943.0595(3)(b).

144. *See Auto-Seal Under Section 943.0595*, *supra* note 141 (further explaining automatic sealing under Florida law).

145. *Administrative Expungements*, ERIC J. DIRGA, P.A., http://ejdirga.com/florida-expungement/expungement-options/administrative_expungements/ (last visited Jan. 10, 2022) ("Administrative expungements: Are only for mistaken arrests. They do not replace the standard adult expungement. They do not provide the same benefits as standard adult expungement.").

146. *Id.*; FLA. STAT. § 943.0581(1) (stating that administrative expungements apply to nonjudicial records of arrest).

147. FLA. STAT. § 943.0581(2)–(3).

administrative expungement as a result of a mistaken or unlawful arrest can be difficult and often requires court involvement.[148]

For example, on a Tuesday afternoon in April 2016, a sixty-year-old Florida resident ("Plaintiff") was riding his bike on Meridian Avenue in Miami Beach when he approached a Florida Power and Light construction area.[149] The area was closed to motor vehicle traffic but remained open to pedestrian traffic.[150] Pedestrians were walking in the street, as well as on the sidewalks.[151] Plaintiff rode his bike another block and then exited the construction area by lifting up the single piece of yellow tape that strung across the roadway, as other pedestrians in front of Plaintiff had just done.[152] As Plaintiff walked his bike out of the construction area, he passed a Miami Beach police car parked outside the construction site.[153] The Miami Beach police officer ("Officer-Defendant") did not ask any other passing pedestrians questions, but got out of his police car to ask Plaintiff one question, "[w]here are you coming from?"[154] Plaintiff responded, "[f]rom up the road," then rode his bike away after the Officer-Defendant took no further action to speak with Plaintiff.[155] For reasons unknown, Officer-Defendant got back into his police car and began following Plaintiff without using sirens or the PA system to alert Plaintiff, who was completely unaware that Officer-Defendant was following him.[156]

Plaintiff turned onto a narrow road which, under Florida law, was "too narrow for a bicycle and another vehicle to [ride] safely side by side . . . ."[157] Despite this law, Officer-Defendant drove his vehicle alongside Plaintiff, then proceeded to intentionally turn his vehicle into Plaintiff, placing Plaintiff in "significant danger of serious physical injury and even death."[158] As a result of the Officer-Defendant striking Plaintiff with the police car, Plaintiff "lost control of his bicycle and crashed into a steel picket fence enclosure, . . ." which caused Plaintiff to hit his head and suffer wounds above and below his left eye.[159] The crash also broke Plaintiff's sunglasses, which left small

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148. *Administrative Expungements*, *supra* note 145.
149. Halmu v. Beck, No. 20-21410, 2021 WL 980912, at *1 (S.D. Fla. Mar. 15, 2021).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Halmu*, 2021 WL 980912, at *2.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Halmu*, 2021 WL 980912, at *3.

wounds with glass fragments embedded into Plaintiff's face.[160] Officer-Defendant proceeded to demand Plaintiff's I.D., and Plaintiff complied with no resistance.[161]

Despite having no reason to arrest Plaintiff, Officer-Defendant handcuffed Plaintiff and placed him under arrest.[162] Officer-Defendant made no report about his "use of excessive force to stop [Plaintiff] . . .", and did not issue Plaintiff any civil citations or a notice to appear for violating any statute or ordinance.[163] Instead, Officer-Defendant informed Plaintiff, he was "being arrested for resisting . . . commands."[164] A Fort Lauderdale officer then arrived at the scene and was ordered to transport Plaintiff to jail, rather than the Miami Beach Police Department ("MBPD").[165] Plaintiff was transferred from MBPD to Miami-Dade County Jail around 9:30 PM, and despite posting bail at 1:30 AM, was not released until 11:30 AM the next morning.[166] Plaintiff was charged with two criminal misdemeanors, including: (1) "[r]esisting an officer without violence . . . ", and (2) "willful failure or refusal to comply with any lawful order or direction of any law enforcement officer . . . ."[167] A *nolle prosse* was filed as to the first charge, and the second charge was dismissed.[168] As a result of Plaintiff's overnight jail stay, Plaintiff became ill with a severe case of pneumonia.[169] Plaintiff also suffered from "severe psychological and emotional trauma, including insomnia and nightmares," "[a]s a direct consequence of the unlawful arrest [and] excessive force" used against him.[170]

Plaintiff brought claims against Officer-Defendant—for false arrest, excessive force, and malicious prosecution—and sought injunctive relief for the expungement of his arrest records.[171] Officer-Defendant moved to strike or dismiss Plaintiff's request for injunctive relief, and Plaintiff's responded that the court had the authority to order the Miami Beach Police Department to apply for an administrative expungement upon the court's entry of a final order that Plaintiff's arrest was made contrary to law.[172] The court explained that an administrative expungement did not apply to Plaintiff's arrest records

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Halmu*, 2021 WL 980912, at *3.
165. *See id.*
166. *Id.* at *4.
167. *Id.*
168. *Id.*
169. *Halmu*, 2021 WL 980912, at *4.
170. *Id.*
171. *Id.*
172. *Id.* at *5; FLA. STAT. § 943.0581(2) (2021).

because Plaintiff failed to allege that a law enforcement agency or a court had determined the arrest was made contrary to law.[173] Further, Plaintiff's complaint sought injunctive relief against the Officer-Defendant to expunge records in his individual capacity, rather than the Miami Beach Police Department, for which there was no precedent.[174] The court granted Officer-Defendant's motion to strike and directed Plaintiff to amend his complaint.[175] As this incident illustrates, administrative expungements are difficult to obtain and do not replace the standard adult expungement.[176]

1. A Proposed Solution to Improve the Expungement Process in Florida

Florida has recently enacted legislation making more individuals eligible for expungement, however it should follow Delaware's new legislation providing expungement for all charges and arrests that do not result in conviction through the submission of an application to the State Bureau of Identification.[177] In Florida, this would mean that eligible individuals are automatically granted an expungement after they apply for and receive a COE from the FDLE without petitioning the courts.[178]

On the other hand, even with easier access, expungement in the digital age does not ensure that the arrested and accused will be restored their "innocent" status.[179]

B. *Pitfalls of Expungement in the Digital Age*

Individuals that successfully get their criminal record expunged obtain certain benefits, such as the ability to deny the existence of that record.[180] Giving an innocent person the ability to deny that their arrest ever occurred can have a positive impact; however, the positive impact of expungement

173. *Halmu*, 2021 WL 980912, at *5–6; FLA. STAT. § 943.0581(2).
174. *Halmu*, 2021 WL 980912, at *6.
175. *Id.*
176. *See Administrative Expungements*, *supra* note 145.
177. *See* FLA. STAT. § 943.0585; Lantz & Minutola, *supra* note 4, at 14.
178. *See* Lantz & Minutola, *supra* note 4, at 14 (stating that cutting out the process of petitioning the courts for individuals whose charges or arrests did not terminate in conviction would minimize the difficulties faced by the innocent in Florida's expungement process); Calvert & Bruno, *supra* note 115, at 142 (describing the difficulties that even individuals with dismissed charges face when seeking expungement in Florida).
179. *See* Haber, *supra* note 8, at 338 (Prior to the digital age, "if one's records were expunged, one would have largely been treated by the public as if one never had a record in the first place.").
180. *See* FLA. STAT. § 943.0585(6)(b).

statutes is severely limited in the digital age.[181] Expungement orders do not pertain to news reports, social media posts, blogs, or other internet sites with user-generated content.[182] While consumer reporting agencies ("CRA") are required to update their criminal record databases (i.e., exclude expunged records in their reports) under the Fair Credit Reporting Act ("FCRA"), this "requirement" is not often enforced.[183] Thus, even after expungement, an individual's arrest information can still be visible to employers, landlords, and educational institutions.[184] As a result, even those entitled to deny their arrest might refrain from doing so, so as not to appear untruthful to an employer, landlord, or educational institution.[185]

The digitization of public records has greatly changed the nature of expungement.[186] With the advent of electronic databases and digital technology, information regarding an individual's interactions with the criminal justice system has become widely available online and, thus, the internet poses a great threat to the effectiveness of expungement.[187] When records were held solely in paper form within a courthouse or law enforcement agency, it took a great effort to obtain criminal history information because individuals had to take a trip to the courthouse or arresting agency to obtain

181. *See* Haber, *supra* note 8, at 338.

182. *Id.*; Murray, *supra* note 10, at 70.

183. Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 25 (2016) ("[N]either the Federal Trade Commission nor courts considering lawsuits for willful and negligent noncompliance with the Fair Credit Reporting Act (FCRA) have historically been willing to relentlessly control or sanction disclosure of inaccurate conviction data."); *see also* Logan Danielle Wayne, Comment, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 270 (2013) ("[C]ourts have interpreted the responsibilities of data brokers under the FCRA's accuracy provisions to be so minimal that plaintiffs rarely prevail in such suits.").

184. Haber, *supra* note 8, at 338.

185. *Id.* at 353 n.108 (stating that denying an arrest that an employer can simply search for, and find, on Google may be detrimental for applicants with expunged records):

> Some employers might not even mind the criminal record, but rather the fact that a candidate was untruthful. That could occur when candidates have denied having a criminal record, as the record was sealed or expunged and therefore they are entitled to say they do not have a criminal record, and are perceived as lying to the employer.

Id.

186. *See id.* at 338, 356.

187. Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism*, 30 FED. SENT'G REP. 241, 241–43 (2018) [hereinafter *Beyond Totem and Taboo*].

criminal records.[188] When criminal records were only kept physically within these buildings, the records could easily be destroyed, making expungement much more effective.[189]

Today, records are also kept on electronic databases available to the general public via the internet.[190] Thus, criminal records must not only be physically destroyed but they must be electronically destroyed as well.[191] However, deleting a criminal record from an agency's database does not *undo* the fact that the information was "widely available [on the internet] for several years."[192] Destroying an individual's criminal record from an electronic database does not completely erase all evidence of the arrest because "[i]n the age of Google and social media, there is no way to eliminate all traces of the underlying event . . . ."[193] "The fact that the internet is capable of remembering everything makes expungement statutes ineffective in the digital era."[194]

1. Criminal History Information on the Internet

Criminal history information makes its way onto the internet in several ways, including governmental databases, courthouse online records, data brokers' online databases, news stories, social media posts, blogs, for-profit mugshot websites, and police blotter sites to name a few.[195] Thus, in the digital age, accessing criminal history information on the internet is easy.[196]

a. *Consumer Reporting Agencies/Data Brokers*

Before the digital age, even non-expunged records were hard to access.[197] Instead of going to the courthouse or governmental agencies, employers, landlords, and educational institutions often relied on third-party

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188. *See* Haber, *supra* note 8, at 338; Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 328 (2015) (discussing that prior to the digital age, "employer[s]", "landlord[s]", [and] "neighbor[s]" interested in an individual's "criminal [history] record had to go to the . . . courthouse to view the physical file . . . .").

189. *See* Haber, *supra* note 8, at 348–49.

190. *See id.* at 349–50.

191. *See* Corda, *supra* note 183, at 22.

192. *Id.* at 25.

193. Joshua D. Carter, *A Practitioner's Guide to Expunging and Sealing Criminal Records in Illinois*, 100 ILL. B.J. 642, 644 (2012).

194. Haber, *supra* note 8, at 338.

195. *See id.* at 351, 356–57.

196. Corda, *supra* note 183, at 3.

197. *See* Roberts, *supra* note 188, at 328; James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 183 (2008).

background screening businesses, such as data brokers, to prepare a criminal history report on an individual.[198] Data brokers are individuals or companies that collect personal data from public records and sell that information to third parties such as employers, landlords, and educational institutions.[199] To prepare a report, the background screening companies would send a *runner* to the courthouse and other governmental agencies to compile criminal history information on an individual.[200] Expunged records would not show up in an individual's criminal history because the state and federal agencies had destroyed the record, and the record was not accessible on the internet.[201] As the governmental agencies began using digital technology, these background screening companies were able to buy criminal records in bulk from government agencies and create their own criminal record databases.[202] Thus, obtaining vast amounts of criminal records, including criminal records that would later be expunged.[203] These data collection companies conducting background checks and selling criminal history information as *consumer reports* to third parties are considered CRAs under the FCRA.[204]

CRAs do not only make criminal history information more accessible but they also make expunged criminal records more accessible.[205] With infrequent updates, data brokers' databases contain inaccurate records that include expunged records.[206]

To remedy issues caused by the outdated records maintained by CRAs, the FCRA imposed obligations on CRAs to adopt reasonable measures to obtain maximum possible accuracy of criminal history information.[207] The obligations imposed on CRAs by the FCRA, however, are insufficient because the FCRA does not impose affirmative duties on CRAs to update their records.[208] Instead, the FCRA places the duty of ensuring CRA compliance with the FCRA on individuals by granting a private right of action to individuals who must demonstrate that, due to the CRAs' practices, they

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198. Haber, *supra* note 8, at 352; Jacobs & Crepet, *supra* note 197, at 185.
199. *See* Haber, *supra* note 8, at 352 (describing work of data brokers).
200. *Id.*
201. *See id.*
202. *Id.*
203. *See id.* at 352–53.
204. ENFORCEMENT GUIDANCE, *supra* note 26, at 5.
205. *See* Haber, *supra* note 8, at 353.
206. *See id.*
207. 15 U.S.C. § 1681e.
208. Wayne, *supra* note 183, at 268 ("[T]he FCRA does not impose any affirmative duties on data brokers to update their records, and its enforcement provisions still put the onus of ensuring compliance on individual persons.").

suffered an injury in fact.[209] Plaintiffs rarely win in such suits.[210] Further, CRAs have a few incentives to not update their criminal history databases.[211] First, frequent updates of these massive databases would be costly and time consuming.[212] Second, there is a demand for un-updated records because employers, landlords, and educational institutions want to know an applicant's complete criminal history, including expunged records.[213] Further, the FCRA also imposed regulations on employers, including the obligation to inform and obtain consent from applicants before the employer obtains an applicant's criminal history report from a CRA.[214] These FCRA regulations are also insufficient because employers can simply conduct an informal background check using other internet sources, rather than requesting a report from a CRA, because current legislation does not regulate employers' access to criminal history records through the internet.[215]

b. *For-Profit Websites, Social Media Posts, and Online News Stories*

Internet sources that encumber the effectiveness of expungement in the digital age include "for-profit mugshot websites, police blotter websites, social media posts, and online news stories."[216] For-profit mugshot websites collect mugshots and arrest information from police departments to later charge a remove fee for such content.[217] These sites sometimes charge hundreds of dollars for mugshot removals, placing another economic barrier upon individuals who successfully expunged their records.[218] Mugshots and arrest information typically remain on these for-profit websites even after an individual is granted expungement unless a payment is made for its removal.[219] Police blotter websites often retain information regarding arrests and suspected criminal activity, regardless of whether an arrest is expunged.[220]

209. *Id.* at 268, 270; Haber, *supra* note 8, at 355.
210. Wayne, *supra* note 183, at 270.
211. Haber, s*upra* note 8, at 362.
212. *Id.* at 353–54, 362.
213. *Id.* at 354, 361–62.
214. *Id.* at 355.
215. *Id.* at 355, 357.
216. Elizabeth Westrope, Comment, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy*, 108 J. CRIM. L. & CRIMINOLOGY 367, 373–74 (2018).
217. *Id.* at 374.
218. *Id.* ("Fees to remove mug shots or other information pertaining to an arrest can be as much as $400.").
219. Haber, *supra* note 8, at 356.
220. Westrope, *supra* note 216, at 374.

Therefore, employers, landlords, and educational institutions may still have easy access to expunged arrests through mugshot websites and police blotter sites.[221]

Social media posts may also contain information about expunged arrests, and court expungement orders certainly do not require individuals to delete old posts that reveal information about an individual's expunged arrest.[222]

Finally, another serious limitation on expungement in the digital age is news stories published by journalists.[223] Local media reports may provide information about individuals and their alleged criminal activity, which may remain available online after the expungement is granted.[224] The First Amendment's guarantee of freedom of the press and freedom of speech ensures the public's right to publish stories regarding criminal events, including arrests.[225] Thus, journalists are not legally obligated to edit their articles containing alleged criminal conduct and arrest information after a court issues an expungement order.[226] Therefore, an individual's arrest information may remain indefinitely in articles on the internet, traceable with just a few keystrokes via an internet search engine.[227]

States like Florida have begun to take step in the right direction to limit online exposure of arrest information for individuals whose arrests resulted in no charges being filed or the charges being dropped.[228] In 2019, the FDLE's criminal history database stopped showing results for "arrests that result[ed] in no charges being filed or . . . charges being dropped."[229] This information, however, can still be obtained from private background checking companies and may posted online by nongovernmental sources.[230] Further, Florida made it illegal for websites to require payment for removing

221. *See id.*; Haber, *supra* note 8, at 357.

222. *See* Westrope, *supra* note 216, at 374–75.

223. *See id.* at 375.

224. *See* Haber, *supra* note 8, at 356–57.

225. *See* Westrope, *supra* note 216, at 375.

226. *See id.*; Calvert & Bruno, *supra* note 115, at 137 ("[N]ewspapers . . . cannot be in the business of erasing the past. Corrections, yes. Obliterations, no.").

227. *See* Westrope, *supra* note 216, at 375.

228. *See Florida Expungement Qualification*, ERIC J. DIRGA, P.A., http://ejdirga.com/florida-expungement/expungement-qualification/ (last visited Jan. 10, 2021) ("As of October 1, 2019, FDLE's criminal history will not show arrest information on arrests that result in no charges being filed or all charges being dropped.").

229. *Id.*

230. *See id.* (stating that individuals whose arrest resulted in no charges being filed or charges being dropped must obtain their arrest information from private background checking companies, rather than the FDLE, as of October 1, 2019).

mugshots.[231] Due to the market demand for this information, however, operators of for-profit websites found legal ways to make a profit.[232] Instead of requiring payment for the removal of mugshots, these companies switched to an ad-based operation model.[233] After these for-profit websites found a loophole in the Florida law by switching to an ad-based model of operation, Florida's Governor signed a new piece of legislation that extends to "[f]or-profit website[s] generating ad revenue for the sole purpose of embarrassing people."[234] The Florida law took effect on October 1, 2021, and allows individuals to make a written request, sent via registered mail, to the for-profit website to have their mugshot removed from the site.[235] The for-profit site will then have ten days to respond to the request, and failure to respond will result in a $1,000 fine per day.[236] Merely restricting the practice of charging a fee for mugshot removals does not mean that these companies cannot publish mugshots and arrest information; it just means they cannot profit from publishing that information.[237] Therefore, the Florida bill is a step in the right direction, but it will not eliminate the mugshot industry.[238] Eliminating the ability of mugshot websites to publish this information altogether would likely invoke constitutional concerns because such a restriction may violate the First Amendment's protection of free speech and freedom of the press.[239] Therefore, regulating the initial dissemination of mugshots, such as preventing the Sheriff's office from posting mugshots online, may be the only way to eliminate the mugshot industry.[240] On the other hand, the public places a high

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231. Mike Vasilinda, *Mugshot Websites Under New Scrutiny After Florida Law Signed*, NEWS4JAX, http://www.news4jax.com/news/local/2021/06/22/florida-mugshot-websites-under-new-scrutiny-after-law-signed/ (last updated June 22, 2021, 6:30 PM).

232. *See* Haber, *supra* note 8, at 370.

> [E]ven upon regulating direct profits of these websites, it is rather intuitive that as long as there will be a market demand for this information, their operators will find a legal way to still make profits. Subsequently, these restrictions could perhaps lead to the formation of grey or black markets for this type of information.

Id.

233. Vasilinda, *supra* note 231.

234. *Id.*

235. *See id.*

236. *Id.*

237. *See* Haber, *supra* note 8, at 369–70.

238. Vasilinda, *supra* note 231.

239. *See* Haber, *supra* note 8, at 370 ("[P]roscribing this practice altogether might be difficult, if not almost constitutionally impermissible as such restrictions could raise First Amendment concerns . . . .") (footnote omitted).

240. *See* Vasilinda, *supra* note 231.

value on their right to be informed, even when it comes to alleged criminal activity.[241]

Ultimately, innocent individuals who successfully go through the complex and costly process of expungement will likely continue to face the stigma and barriers associated with a criminal record because the digital age has made expungement more of a symbolic gesture rather than a solution to eliminating the barriers faced by the arrested and accused.[242] Under Florida law, once a record is expunged or sealed, state and federal agencies generally cannot disclose the record to the public.[243] However, once the information is public (i.e., on the internet), there are generally no laws that prohibit disclosure and circulation of that information.[244] Thus, expungement statutes do not provide a sufficient solution to innocent individuals arrested for offenses they did not commit.[245] These innocent individuals deserve a proper solution that emulates one of the core principles of the United States criminal justice system: the presumption of innocence.[246]

IV. POSSIBLE SOLUTIONS TO THE INEFFECTIVENESS OF EXPUNGEMENT IN THE DIGITAL AGE

A. *Comparing the European Union and United States Criminal Record Systems*

The EU views criminal history information as private, personal information.[247] The EU's criminal record system is based on convictions rather than arrests.[248] Each EU country maintains its own registers that are generally not accessible to the public.[249] Judicial authorities—and sometimes police and other public authorities—may be able to access an individual's criminal record, which only includes convictions, but private individuals, such as employers, generally cannot obtain another individual's criminal conviction

241. *See* Corda, *supra* note 183, at 5.

242. *Id.* at 25.

243. FLA. STAT. § 943.0585(6)(a) (2021).

244. *See* FLA. STAT. § 943.0585(6)(d); Haber, *supra* note 8, at 355, 357.

245. *See* Haber, *supra* note 8, at 384.

246. *See* Callanan, *supra* note 4, at 1308 ("The U.S. criminal justice system was founded on the principle of 'innocent until proven guilty,' and the only way to properly respect that sentiment is to create additional safeguards to protect criminal defendants from the collateral consequences of a criminal charge lacking a conviction.").

247. Haber, *supra* note 8, at 359.

248. Jacobs & Blitsa, *supra* note 3, at 136.

249. *Id.* at 136, 142–43.

record.[250] EU nationals can also obtain access to their criminal history records, and some EU countries do not require individuals to specify their reason for requesting their criminal record.[251] Thus, employers may bypass the strict privacy laws by indirectly obtaining criminal records through applicants themselves.[252] Still, applicants' criminal conviction records do not contain information about arrests, and the EU's General Data Protection Regulation ("GDPR") prevents data-processing companies from processing personal data regarding criminal convictions; thus, strict regulations and the EU criminal record system itself make it difficult for employers to bypass restrictive privacy laws in the EU.[253] In the EU, information regarding arrests and suspects taken into custody is maintained by the police.[254] The information kept by police is not included in criminal conviction records and is not disseminated to the public,[255] which altogether allows innocent individuals to avoid collateral consequences stemming from their interaction with the criminal justice system.[256] In compliance with Article 6 of the Convention of Human Rights, which requires that individuals receive a fair and public hearing, EU court records are public, but restrictions are placed on press reports regarding cases and court records, sometimes providing anonymity to defendants.[257]

In contrast, the United States views criminal history information as a public record,[258] and the United States criminal record system is based on arrests.[259] The United States generally does not have restrictive privacy laws that prevent arrest records from being published on the internet because

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250. *Id.* at 142–43.

251. *Id.* at 143; James B. Jacobs & Elena Larrauri, *European Employment Discrimination Based on Criminal Record II – Discretionary Bars*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 13, 2015), http://ccresourcecenter.org/2015/01/13/european-discretionary-employment-discrimination-based-criminal-record/.

252. Jacobs & Larrauri, *supra* note 251.

253. *See* Aaron Schildhaus, *EU's General Data Protection Regulation (GDPR): Key Provisions and Best Practices*, 46 INT'L L. NEWS, Winter 2018, at 11, 11 (explaining background on GDPR); Jacobs & Blitsa, *supra* note 3, at 142–43.

254. Jacobs & Blitsa, *supra* note 3, at 137.

255. *See id.* (explaining that EU police keep their own intelligence information, which is not integrated with the judicial system's conviction information).

256. *See* Sarah E. Lageson et al., *Privatizing Criminal Stigma: Experience, Intergroup Contact, and Public Views About Publicizing Arrest Records*, 21 PUNISHMENT & SOC'Y 315, 318 (2019) (explaining that negative consequences stemming from even minor interactions with the criminal justice system are exacerbated when criminal history information is publishable online).

257. Haber, *supra* note 8, at 359.

258. *Id.* at 351; Jacobs & Blitsa, *supra* note 3, at 142 ("In the United States, criminal records are effectively public, either by law or in practice.").

259. Jacobs & Blitsa, *supra* note 3, at 130.

criminal records are considered public records.[260] Thus, even if an individual is granted an expungement order, that order only pertains to the destruction of official government documents, not arrest information published by journalists or other internet users.[261] The United States does not have restrictions that prevent employers and other internet users from conducting an informal background check by searching an applicant's name on Google.[262] Once official government documents are destroyed following an expungement order, "'digital memory . . . prevents society from moving beyond the past because it cannot forget the past.'"[263] Proposed solutions to the digital memory problem include the right to be forgotten.[264]

1. Recognizing the Right to be Forgotten

The EU recognizes the "'right to be forgotten,'" which grants individuals the right to control their personal data by deleting information on the internet that meets certain criteria.[265] Thus, while it is less likely for sensitive information, such as criminal history records, to surface on the internet in the EU because of Europe's restrictive privacy laws, the recognition of the right to be forgotten ensures that EU citizens and residents can remove sensitive personal information that does end up on the internet.[266] Recent case decisions in Europe made it clear that data authorities in Europe can compel data controllers, such as Google, to remove offending material for users located in Europe.[267] While France's data authority, the Commission Nationale de l'Informatique et des Libertés ("CNIL"), could not compel Google to remove links to the offending material worldwide, CNIL could

260. *See* Haber, *supra* note 8, at 373 (addressing that regulations restricting the use and dissemination of public records, such as criminal records, would be considered unconstitutional).

261. *See id.* at 371; Murray, *supra* note 10, at 70.

262. *See* Murray, *supra* note 10, at 70.

263. *See* Edward J. George, Note, *The Pursuit of Happiness in the Digital Age: Using Bankruptcy and Copyright Law as a Blueprint for Implementing the Right to Be Forgotten in the U.S.*, 106 GEO. L.J. 905, 908 (2018) (quoting MEG LETA JONES, CTRL+Z: THE RIGHT TO BE FORGOTTEN 11 (2016)); Murray, *supra* note 10, at 70.

264. *Id.*

265. *See* Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 1 (EU) ("The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay . . . .").

266. Haber, *supra* note 8, at 338–39, 359–60.

267. *See* Case C-507/17, Google LLC v. Comm'n nationale de l'informatique et des libertés, ECLI:EU:C:2019:772, ¶73 (Sept. 24, 2019).

certainly control accessibility to the material within Europe.[268] Further, the court did not rule out the possibility for future worldwide injunction orders compelling data collectors, like Google, to remove listings globally.[269]

Currently, the United States does not guarantee a right to be forgotten that allows individuals to request the delisting of internet search results concerning their private life, such as information pertaining to expunged arrests.[270] Many Americans view the right to be forgotten as a form of censorship that would chill speech and conflict with democratic values.[271] Further, many Americans believe that the right to be informed outweighs the right to privacy, at least in the context of the right to be forgotten.[272]

While the United States does not guarantee a right to be forgotten, some scholars have asserted that the right to be forgotten has judicial precedence in American law.[273] For instance, in a 1931 case, California's Fourth District Court of Appeals held in favor of a woman, formerly named Gabrielle Darley, who claimed that a movie connecting her to her previous interactions with the criminal justice system violated her privacy rights.[274] Darley was previously a prostitute who was tried, but acquitted of murder.[275] Following her trial, Darley abandoned her life as a prostitute and got married, took her spouse's name, and lived an honorable life with friends who did not know the details of her past life, until the film connected Darley's married name to her maiden name.[276] The court found that Darley "should have been permitted to continue [the] course without having her reputation and social

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268. *See id.*

269. *See id.* at ¶72; Andrew Keane Woods, *Three Things to Remember from Europe's 'Right to Be Forgotten' Decisions*, LAWFARE (Oct. 1, 2019, 10:11 AM), http://www.lawfareblog.com/three-things-remember-europes-right-be-forgotten-decisions#.

> While the court said that EU law does not give France express authority to compel Google to remove listings worldwide, 'it also does not prohibit such a practice.' The Court of Justice suggested that, even absent any new statutory authority from the EU, regulators—though it is unclear which ones—might nonetheless have good reason to order a global injunction, as long as they balance privacy with freedom of information.

Woods, *supra*.

270. *See* Woods, *supra* note 269; George, *supra* note 263, at 907.

271. George, *supra* note 263, at 909–10.

272. David Zax, *Will There Ever Be an "Internet Erase Button"?*, MIT TECH. REV. (Apr. 27, 2011), http://www.technologyreview.com/2011/04/27/259428/will-there-ever-be-an-internet-erase-button/ ("Sometimes the right to information ought to outweigh the right to privacy. What incentive will there ever be for a journalist to rake muck if the information can simply be taken down upon request?").

273. George, *supra* note 263, at 913.

274. *See* Melvin v. Reid, 297 P. 91, 91, 94 (Cal. Ct. App. 1931).

275. *Id.* at 91.

276. *Id.*

standing destroyed by the publication . . . ."[277] The court in the *Melvin* case set the precedent to be the first instance of the right to be forgotten in the United States, even though the court did not actually allow Darley a right to be forgotten.[278] The court included in its opinion that if the film only depicted the events that were on the public record from Darley's trial, there would have been no violation of a right of privacy.[279] Thus, Darley's privacy rights would not have been violated had the film only portrayed details available to the public in Darley's trial records.[280] The court does not suggest that individuals like Darley have a right to compel the media to erase criminal history information about them.[281]

Today, courts in the United States overwhelmingly agree that the publication of true information concerning an individual's criminal history is unlikely to constitute a violation of privacy, even if the record is later expunged.[282] Thus, it is unlikely that the United States would recognize a right to be forgotten that requires journalists, along with other members of the public, to delete information about expunged arrests because such a requirement is likely to infringe upon constitutional guarantees, such as freedom of the press, freedom of speech, and freedom of expression.[283]

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277. *Id.* at 93.

278. *Id.*; George, *supra* note 263, at 913.

279. *Melvin*, 297 P. at 93.

> Had respondents, in the story of 'The Red Kimono,' stopped with the use of those incidents from the life of appellant which were spread upon the record of her trial, no right of action would have accrued. They went further, and in the formation of the plot used the true maiden name of appellant. If any right of action exists, it arises from the use of this true name in connection with the true incidents from her life together with their advertisements in which they stated that the story of the picture was taken from true incidents in the life of Gabrielle Darley, who was Gabrielle Darley Melvin.

Id.

280. *Id.*

281. *Id.* Darley could not have compelled the filmmakers to refrain from using the information contained in Darley's trial record in the plot. *Id.* A right of privacy is different from right to be forgotten, as a right of privacy is the "'right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity.'" *Melvin*, 297 P. at 92 (citation omitted). While a right to be forgotten gives the data subject the "right . . . to obtain from the operator the deletion of the personal data regarding him or her." Eugen Chelaru & Marius Chelaru, *Right to Be Forgotten*, 16 ANNALES UNIVERSITATIS APULENSIS SERIES JURISPRUDENTIA 26, 31 (2013).

282. Haber, *supra* note 8, at 366–67.

283. *See Spanish Claim "Right to be Forgotten" on Web*, CBS NEWS (Apr. 20, 2011, 12:34 PM), http://www.cbsnews.com/news/spanish-claim-right-to-be-forgotten-on-web/ ("'In the United States we have a very strong tradition of free speech freedom of expression. We would strongly caution against any interpretation of the right to be forgotten that infringes upon that . . . .'"). The constitutional guarantees that would likely be infringed upon would be the freedom of the press, freedom of speech, and freedom of expression. *Id.*

2. Exploring Narrowly Tailored Solutions for the United States

A right to be forgotten that allows Americans to request the removal of internet search results concerning information about their private lives that is inadequate, irrelevant, or no longer relevant may be too broad to conform with existing American values.[284] However, a narrower approach, such as allowing exonerated arrestees to request that search results concerning their arrest be delisted from search engines, may be more plausible.[285] One scholar suggested narrowly tailoring a right to be forgotten that allows only individuals with expunged criminal history records the right to compel online providers to remove the expunged information from their site, making the information inaccessible to the public.[286] Nevertheless, the scholar explained that even this narrowly tailored solution might be an unconstitutional infringement on the First Amendment because requiring online sites to erase information from their site may constitute censorship of speech and censorship of the press.[287]

It has also been suggested that state legislators and governors could further limit state and local agencies' initial dissemination of data.[288] To accomplish this, the government could stop selling criminal history information in bulk and, instead, return to a case-by-case request paradigm by selling each record separately.[289] Thus, the effectiveness of expungement would improve because records expunged before a record request is made will not appear in the criminal history information that is sold to data brokers by the government.[290] However, this solution would not increase the effectiveness of expungement for individuals whose arrest information was already sold to data collection companies before they were expunged.[291] It has also been argued that because the open approach to criminal records can be overcome by showing that "closure is essential to preserve higher values and is narrowly tailored to serve those values," making only expunged criminal

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284. *See* Haber, *supra* note 8, at 371.

285. *See id.* at 372 ("If Congress were to impose restrictions based on the content of criminal history, those restrictions must be narrowly tailored to serve a state interest of the highest order and be the least restrictive means available to further the articulated interest.") (footnote omitted).

286. *Id.* at 370.

287. *Id.* at 371.

288. *Id.* at 368.

289. Haber, *supra* note 8, at 364.

290. *See id.* at 352 (discussing that these reports would exclude expunged records as long as the database of the public office was updated).

291. *Id.* at 364.

records private could be a narrowly tailored solution.[292] This solution would greatly decrease the public's ability to disseminate expunged arrest information because once the information is deemed *private*, publishing the information may be considered an invasion of privacy.[293] However, this approach only affects the dissemination of arrest information after it is expunged, which could take years.[294] Thus, until the record is expunged, the information contained in the record can still be legally disseminated and published on the internet.[295]

Once the information is on the internet, it is difficult to erase all traces of it.[296] Further, erasing all traces of the expunged information by requiring nongovernmental sources, such as news outlets, journalists, or other members of the public, to erase or alter internet publications containing expunged information likely conflicts with constitutional guarantees.[297]

Thus, not only is expungement completely ineffective, but most solutions to improve the effectiveness of expungement are legally impractical solutions in the United States.[298] Therefore, alternative solutions for decreasing the collateral consequences of an arrest record for innocent individuals *must* be explored.[299]

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292. *Id.* at 381 (quoting Press-Enter. Co. v. Superior Ct. of Cal., Riverside Cnty., 464 U.S. 501, 510 (1984)).

293. *See id.* at 377–78 (stating if criminal records were considered private information, that information would not be of public concern); Haber, *supra* note 8, at 377. The media can be held liable for publishing true information if that information is not of concern to the public. *See* George, *supra* note 263, at 916.

294. *See* Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 695 (2021) (stating that some states have begun decreasing waiting periods, Sectionicularly for non-conviction records correlating to different types of public criminal records); *How Long Does a Florida Expungement Take*, ERIC J. DIRGA, P.A., http://ejdirga.com/2018/11/06/florida-expungement-how-long/ (last updated Aug. 2020) [hereinafter *Length of FL Expungement*] (explaining the Florida expungement process will take around seven to ten months once the application process begins, if no delays occur).

295. *See* Haber, *supra* note 8, at 357 (discussing that publishing criminal records online is lawful even if a record is expunged because criminal records are considered public information).

296. *See* Nunez v. Pachman, 578 F.3d 228, 229 (3d Cir. 2009) (holding that expunged information is "never truly private" because the criminal record is publicly available prior to expungement).

297. Haber, *supra* note 8, at 338 ("It might be technically impossible to effectively expunge information in the digital age, and expungement is legally challenging, as granting individuals a right to compel private companies to expunge their records is a constraint on freedom of speech, freedom of information, and the freedom of the press.").

298. *Id.*

299. *See* Callanan, *supra* note 4, at 1278.

V. A PROPOSED SOLUTION TO LIMIT THE COLLATERAL CONSEQUENCES OF ARRESTS

Ultimately, it is difficult to retract or eliminate information once it is disseminated to the public via the internet because (1) the internet remembers everything[300] and (2) requiring the press to retract or remove information would likely infringe upon First Amendment rights.[301] Thus, solutions for limiting the collateral consequences faced by arrested individuals—later found to be innocent—must focus on the initial dissemination of arrest records, rather than eliminating traces of the information after it circulates on the web.[302]

Therefore, the best solution would be to model the United States' criminal record system after the EU's criminal record system by basing the United States' criminal record system on convictions rather than arrests.[303] Doing so would help decrease the collateral consequences faced by innocent individuals arrested for crimes that they did not commit and will bolster the American value of the presumption of innocence.[304]

In the United States, individuals accused of a crime are supposed to be innocent until proven guilty.[305] Yet, plenty of innocent individuals have a criminal record.[306] Having a criminal record for a mere arrest imposes a punishment upon innocent individuals by erecting obstacles they must face for the rest of their lives.[307] By making arrest information available only to government agencies, it will cease to be disseminated to the public, which will advance protections for innocent arrestees and uphold the presumption of

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300. Haber, *supra* note 8, at 338.

301. *Id.* at 338, 371.

302. *See id.* at 380–81 (mentioning that there is precedent in the United States for limiting initial disclosure of criminal history information as a few states regulate the initial dissemination of criminal history records).

303. *See* Jacobs & Blitsa, *supra* note 3, at 136–37 (explaining the European Union's criminal record system).

304. *See* Fields & Emshwiller, *supra* note 2 (explaining that lingering arrest records can ruin chances for securing employment, loans, and housing for people who have never even faced charges or conviction); Uggen et al., *supra* note 46, at 627 (explaining that the presumption of innocence has been at the foundation of Anglo-American criminal law since the eighteenth century, yet criminal records can haunt the accused).

305. Uggen et al., *supra* note 46, at 627.

306. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1334 (2012) (discussing police tactics that generate arrests of innocent people thus leaving innocent people with a criminal record); Callanan, *supra* note 4, at 1278.

307. *See Arrests as Guilt*, *supra* note 7, at 997–98 (explaining that there are numerous legal consequences from arrests that rely on an assumption of guilt).

innocence by putting an end to arrests being considered an indication of guilt.[308]

A. *Public Safety*

Criminal records should be based on criminal convictions rather than arrests because arrests are not always carried out in response to the commission of a crime.[309] Police are relied on to deal with social and medical issues causing many individuals—who in some cases should have received an alternative form of help—to end up in the criminal justice system.[310] Further, individuals are arrested at very high rates in the United States for reasons other than guilt or dangerousness.[311] For example, police may face pressures to increase their volume of arrests to meet quotas[312] or police may also need to rely on arrests to obtain control of a situation.[313] Since many arrests do not result in criminal charges, basing criminal records on convictions is necessary to adequately protect innocent arrestees from a lifetime of adversity, resulting from the presumption that individuals arrested for a crime must be guilty of something.[314] Potential opposition to basing criminal records on convictions, rather than arrests, may involve public safety concerns.[315] The public should be aware of all criminal activity including alleged criminal activity, regardless of the outcome.[316] However, the government and local police typically do not

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308. *See id.* at 997 ("[T]he concepts of arrest and guilt often appear to be fused.").

309. Natapoff, *supra* note 306, at 1331.

> A growing literature indicates that urban police routinely arrest people for reasons other than probable cause, that high-volume arrest policies such as zero tolerance and order maintenance create a substantial risk of evidentiarily weak arrests, that mechanisms for checking whether arrests are based on probable cause are sporadic, and finally that, if those mechanisms do kick in, police sometimes lie about whether there was sufficient evidence for an arrest.

Id.

310. Jones & Sawyer, *supra* note 65.

311. *See* Friedman, *supra* note 63 ("Regardless of race or gender, researchers estimate that by age [twenty-three] nearly one in three Americans will have been arrested.").

312. Natapoff, *supra* note 306, at 1332; *see Arrests as Guilt*, *supra* note 7, at 992 ("[F]actors other than a belief in guilt incentivize police officers to arrest. Law enforcement officers may experience pressure—external and/or internal—to increase the volume of their arrests for job advancement (or job preservation).") (footnotes omitted).

313. *Arrests as Guilt*, *supra* note 7, at 992–93.

314. Callanan, *supra* note 4, at 1277–78.

315. *See* Haber, *supra* note 8, at 377.

316. *See id.* ("Criminal activity is perceived as a legitimate concern to the public. Such legitimate concerns extend to any public records and documents. Even alleged criminal activity falls within this public safety argument . . . .").

name those accused of crimes until after they have been arrested, at which point the public safety concerns have been satisfied with the arrest itself.[317] Thus, the public can still be informed about local criminal activity because police departments can still send out alerts warning the public about criminal activity in their area.[318] Once the individuals are taken into custody, police departments can still update the public that an individual has been taken into custody without specifying who the individual is.[319] For example, the Boca Raton Police Department maintains a Twitter account that sends out alerts to residents such as, "DIXIE HWY temporarily closed in both directions between Camino Real & SW 18th St due to @bocapolice activity in the immediate area."[320] The Boca Raton Police Department later follows alerts with updates such as, "@BocaPolice were assisting @browardsheriff with an arrest warrant. The suspect barricaded himself in an apartment along the 100 blk of SW 15th St. Our crisis negotiators responded & the suspect . . . walked out unarmed and was taken into custody."[321] This shows it is possible to keep the public safe by informing them about criminal activity in the area without releasing the name of the arrestee.[322]

To minimize problems that arise from affording all suspects and arrestees anonymity, exceptions can be made to account for the fact that naming a suspect may lead to more victims coming forward or to the discovery of more evidence.[323] Thus, in the interest of justice, a judge could allow identification of arrestees or suspects in cases where their identification may: (1) "lead to additional [victims or] complaint[s] coming forward," (2) "lead to information that assists [in] the investigation of the offence," or (3) "lead to information that assists [in] the arrested [individual's defense]."[324]

317. Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 802 (2005).

318. *See id.* (discussing that the accused is typically not named until after his or her arrest, but, if the accused is named before his or her arrest, it is rarely "because the suspect is dangerous and at large . . . .").

319. *See id.* (explaining that once an arrest has been made, the public safety concern has been satisfied with the arrest itself, thus naming the individual after arrest does not advance public safety).

320. Boca Raton Police (@BocaPolice), TWITTER (July 12, 2021, 6:30 AM), http://twitter.com/bocapolice/status/1414532640061992962?s=21 [hereinafter Boca PD Alert].

321. Boca Raton Police (@BocaPolice), TWITTER (July 12, 2021, 9:55 AM), http://twitter.com/BocaPolice/status/1414584275572297731 [hereinafter Boca PD Update].

322. *See id.*

323. David Malone, *At the Cliff Edge...Should Defendants Remain Anonymous Pre-Charge?*, LAW. MONTHLY, http://www.lawyer-monthly.com/2018/08/at-the-cliff-edge-should-defendants-remain-anonymous-pre-charge/ (last updated Sept. 3, 2018).

324. *Id.*

Also, employers, landlords, and other members of the public should be warned about *potential* offenders before employing them, leasing to them, or befriending them.[325] However, an arrest is not a clear indicator that an individual engaged in criminal conduct or is a potential offender.[326] Non-conviction records are "irrelevant" to the public because arrests do not establish that criminal conduct occurred and are not proof of guilt.[327] Further, many arrests that lead to criminal charges result in the charges being dropped, dismissed, or otherwise resolved in the defendant's favor.[328] Ultimately, the public does have a legitimate concern regarding actual criminal activity, but access to arrest information that did not involve an adjudication of guilt does not make the public safer since the subject of the information was legally innocent.[329] Further, more than half of employers admitted that their reason for searching an applicant's criminal background is to avoid potential "legal liability rather than to ensure a safe work environment."[330] With the wide availability of arrest and conviction records, employers that fail to do a criminal history screening on applicants open themselves up to negligent hiring lawsuits for failing to perform their *due diligence* before hiring an applicant.[331] As long as employers have access to criminal history information, they will seek it to avoid legal liability.[332] Once employers obtain criminal history information, the mere knowledge of a criminal past, even a mere arrest, plays a role in an employer's decision-making process.[333] Thus, basing the United States' criminal record system on convictions rather than arrests will limit end-users' exposure to outdated, incorrect, and expunged

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325. Haber, *supra* note 8, at 377 (discussing that this public safety argument illustrates the stigmatizing effects of an arrest by indicating that employers, landlords, and members of the public classify non-convicted arrestees as potential offenders).

326. ENFORCEMENT GUIDANCE, *supra* note 26, at 12; *see also* Natapoff, *supra* note 306, at 1331 ("[P]olice arrest people for a variety of reasons that may or may not involve probable cause.").

327. Haber, *supra* note 8, at 377.

328. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 12.

329. Haber, *supra* note 8, at 377.

330. Friedman, *supra* note 63 ("According to the Society of Human Resource Management survey, more than half of employers, [fifty-two] percent, said their primary reason for checking candidates' backgrounds was to reduce legal liability rather than to ensure a safe work environment, [forty-nine] percent, or to assess trustworthiness, [seventeen] percent.").

331. Jacobs & Crepet, *supra* note 197, at 178 ("Private information service companies warn employers, landlords, hotels, and other businesses that failure to conduct criminal background checks could result in significant tort liabilities. Consequently, the market for criminal background checks has increased dramatically.").

332. *See* Haber, *supra* note 8, at 344 n.44, 351–52, 361.

333. *See id.* at 369 (explaining that "mere knowledge of [a] criminal history [record] could . . . play an important role in the employer's [hiring process]," as the employer may "fear potential tort liability for negligent hiring").

arrest records and limit employers' ability to make employment decisions based on that exposure.[334]

B. *Public Oversight of the Judiciary*

Basing criminal records on convictions, rather than arrests, promotes the presumption of innocence by ensuring that only guilty individuals obtain a criminal record.[335] Innocent individuals should not have a criminal record or suffer negative effects in their personal and professional lives for a crime they did not commit.[336]

Potential opposition to basing criminal records on convictions, rather than arrests or non-convictions, may involve governmental transparency concerns.[337] "[A]ny government records deemed public are accessible [to the public through] the Freedom of Information Act ("FOIA")."[338] If criminal records were based on convictions, not arrests, then arrests would not be considered public information, which some fear could lead to a lack of public oversight allowing for corruption and more unlawful arrests.[339] However, there would still be public oversight and transparency for a few reasons.[340] First, there would still be governmental transparency through the court system because, just like in the EU, court records in the United States would still be open to the public.[341] In the EU, even though both arrest history and conviction information is private information, court records are still public to allow for "fair and public trials."[342] While the United States government likely could not restrict press reporting regarding these public trials like the EU,[343]

334. *See id.* at 368 (discussing that policymakers can limit end-users', such as employers', exposure to expunged records).

335. *See* Callanan, *supra* note 4, at 1278, 1292–93 (discussing that the presumption of innocence should be permanent for the non-convicted criminal defendant).

336. *See id.* at 1292–93 ("Society views a criminal charge as an indication of . . . guilt regardless of the . . . outcome of the case.").

337. Haber, *supra* note 8, at 378.

338. *Id.* at 376; *see also* Freedom of Information Act, 5 U.S.C. § 522.

339. *See* Haber, *supra* note 8, at 378 (explaining that public oversight helps ensure that governmental agencies do not abuse their power).

340. *Id.* at 379.

341. *See id.* at 359 ("[EU] court records must generally be 'fair and public' and . . . judgements must be . . . publicly [announced] . . ."); U.S. CONST. amend. VI (explaining that to be in accordance with the Sixth Amendment, trials in the United States must remain public because criminal defendants are guaranteed the right to a public trial).

342. Haber, *supra* note 8, at 359.

343. *Id.*; Calvert & Bruno, *supra* note 115, at 126 ("[T]he freedom of the press provided by the First Amendment to journalists allows the news media to freely and truthfully report on all varieties of criminal matters as watchdogs on government . . . .") (footnote omitted).

defendants in the U.S. can be provided anonymity until the conclusion of their case.[344] Individuals found to be innocent after trial will maintain their anonymity, while individuals convicted after trial will lose their anonymity and will acquire a public criminal conviction record.[345] Public oversight to maintain the integrity of the court system can still be accomplished while affording defendants anonymity because: (1) lawyers are typically involved in the legal process until adjudication, (2) the true names of the lawyers, prosecutors, and judges will still be available in court proceedings, and (3) the defendants have the right to appeal their final decisions for appellate court review.[346] Removing identifying information about a criminal defendant from case records still enables public oversight of the judiciary to ensure proper decisions are being handed down.[347]

Currently, basing the criminal record system on arrests does not necessarily provide the public with any more public oversight or governmental "transparency" than if arrest records were not considered public criminal history information because the underlying events of an arrest are accounted for from the officer's perspective.[348] Arrest information does not necessarily ensure governmental "transparency" and public oversight of law enforcement because police reports do not necessarily relay the underlying events of an arrest with complete accuracy.[349]

Overall, basing criminal records on convictions will promote the presumption of innocence while still allowing for public oversight of the judiciary to ensure that proper decisions are being handed down.[350]

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344. *See* Haber, *supra* note 8, at 380 ("There are a few exceptions to the American approach towards the publication of criminal records, as court proceedings are not always open, and the dissemination of personal information is not always permissible."). (footnote omitted).

345. Callanan, *supra* note 4, at 1305 (discussing that courts could remove identifying information about defendants when courts find defendants not guilty or dismiss the case, which protects privacy rights and maintains public access to courts).

346. Haber, *supra* note 8, at 379.

347. Callanan, *supra* note 4, at 1305.

348. *See* Haber, *supra* note 8, at 378–79; Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, L. & CONTEMP. PROBS., Autumn 2008, at 93, 95–96 ("In covering crime stories, journalists typically rely on law-enforcement officials' views, downplaying the defense perspective while minimally acknowledging the innocence presumption. Thus, news of crime generally exhibits a pro-prosecution bias, rooted most importantly in this dependence of reporters on official and, therefore, purportedly credible sources.") (footnotes omitted).

349. *See* Haber, *supra* note 8, at 378; *Arrests as Guilt*, *supra* note 7, at 1019 ("If a police account is seen as the truth, and if acts are commonly assumed to equal crimes, then the police account of an alleged act, which can suffice for the purposes of an arrest, may also be taken as sufficient to establish guilt.") (footnotes omitted).

350. *See* Callanan, *supra* note 4, at 1305.

V. CONCLUSION

In conclusion, criminal records that consist of mere arrests without a conviction still erect barriers that may last a lifetime for legally innocent individuals.[351] In a system that values the presumption of innocence, records of arrests should not be as damaging as records of convictions.[352] Yet, arrests can be just as consequential as convictions in a system that bases its criminal records on arrests rather than convictions.[353] Expungement used to be able to restore arrestees' innocent status by effectively making criminal history records invisible to the public.[354] The digital age, however, has gutted the effectiveness of expungement.[355] There are solutions proposed to make expungement more effective and thus, limit the collateral consequences faced by innocent individuals with an arrest record.[356] Most proposed solutions, however, have focused on retracting public exposure to arrest information after that information was already disseminated to CRAs or was already made public by news reports, social media posts, or mugshot websites.[357] Once information is legally disseminated and published on the internet, later requiring its removal conflicts with constitutional guarantees like the freedom of the press and the freedom of speech.[358] Thus, proposed solutions like recognizing a right to be forgotten or implementing laws that make criminal history information private only after expungement are bound to conflict with constitutional rights, since these solutions require the erasure of information that was already lawfully published.[359] Ultimately, expungement in the digital age is merely a symbolic gesture from the government because any attempt to extend expungement requirements to nongovernmental sources—to make expungement more effective in the digital age—will likely be deemed a form of censorship.[360]

Consequently, the original goal behind expungement statutes—to make innocent arrestees' criminal history invisible to the public—must be satisfied by other means.[361] The United States should follow the EU by basing its criminal record system on convictions rather than arrests to make an

351. *See Arrests as Guilt*, *supra* note 7, at 997–98.
352. *See* Callanan, *supra* note 45, at 1308.
353. Lantz & Minutola, *supra* note 4, at 12.
354. Haber, *supra* note 8, at 348.
355. *Id.* at 338.
356. *Id.* at 368, 370.
357. *Id.* at 370–71.
358. Westrope, *supra* note 216, at 375; Calvert & Bruno, *supra* note 115, at 138.
359. Haber, *supra* note 8, at 371.
360. Corda, *supra* note 183, at 25.
361. *See* Haber, *supra* note 8, at 347.

innocent arrestee's arrest information invisible to the public and to preserve the presumption of innocence.[362] Basing the criminal record system on arrests has led to a common belief that when an individual is arrested or charged with a crime, that individual must be guilty of something.[363] In reality, arrests are carried out for many reasons other than as a response to criminal conduct.[364] Basing the United States' criminal record system on convictions rather than arrests will limit public exposure to innocent individuals' interactions with the criminal justice system, which will help preserve their innocence without compromising public safety or governmental transparency.[365]

The answer to the age-old question, "if they [were] innocent, why did they run from the police?", is quite clear in a country where mere arrests paint innocent individuals as criminals.[366] There are many reasons why innocent individuals may attempt to evade arrest, including the fact that innocent individuals want to retain their innocence in a society where arrests can be just as socially and professionally stigmatizing as convictions.[367] In the *Land of the Free*, criminal records should be based on guilt rather than accusation.[368]

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362. Jacobs & Blitsa, *supra* note 3, at 136–37.
363. Callanan, *supra* note 4, at 1278.
364. Natapoff, *supra* note 306, at 1331–32.
365. *See* Reza, *supra* note 317, at 803 (footnote omitted); Callanan, *supra* note 4, at 1305.
366. *See Why Innocent People Fear and Run from the Police*, LEARNABOUTGUNS.COM (Sept. 2, 2020), http://www.learnaboutguns.com/2020/09/02/why-innocent-people-run-from-the-police/.
367. *See id.* (explaining reasons why innocent individuals may run from the police).
368. Callanan, *supra* note 4, at 1278 (discussing that the non-convicted should not suffer consequences outside of court due to society's skepticism in the legal outcome).

MAKING THE CASE AGAINST DEATH: INTRODUCTION TO THE SYMPOSIUM ON THE DEATH PENALTY IN FLORIDA

JANE E. CROSS[1]

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I. INTRODUCTION

"*The death penalty is modern lynching; they took me to the tree six times.*"
Derrick Jamison[2]

On October 15, 2021, Nova Southeastern University ("NSU") Law Center hosted a virtual symposium titled *The Death Penalty in Florida: The Case Against Death*.[3] The one-day event presented the case against the use of the death penalty in Florida and nationwide. The symposium's panelists presented information to challenge the continued use of the death penalty. The event featured nationally recognized activists, advocates, scholars, and exonerees to discuss the legal and racial issues, in addition to the social, moral, and financial costs, to highlight the clear dangers of maintaining the death penalty.

1. Associate Dean for Diversity, Inclusion, & Public Impact, Director of the Caribbean Law Program, and Professor of Law.

2. *Race and the Death Penalty in Florida*, FLORIDIANS FOR ALTS. TO DEATH PENALTY, http://www.fadp.org/race-fact-sheet/ (last visited Mar. 25, 2022) ("[Derrick Jamison is] a Black Florida resident who spent twenty years on Ohio's death row for a crime someone else committed. He survived six execution dates before being exonerated and freed."); Alexandra Gross, *Derrick Jamison*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3323 (last updated July 23, 2020) ("[Derrick Jamison] once came within 90 minutes of execution.").

3. *The Death Penalty in Florida: The Case Against Death*, NSU FLA. SHEPARD BROAD COLL. L. (Oct. 15, 2021), http://www.law.nova.edu/alumni/2021-deathpenalty-symposium.html.

> [This program was] a collaboration of Nova Southeastern University Shepard Broad College of Law; Members' Advisory Committee of the Lifelong Learning Institute from Nova Southeastern University Dr. Kiran C. Patel College of Osteopathic Medicine; Barry University's Department of Sociology & Criminology and Anti-Racism and Equity; Amnesty International USA; Witness to Innocence; and Floridians for Alternatives to the Death Penalty.

Id.

Florida is one of twenty-four states that has not abolished the death penalty and has the highest number of exonerees. Dr. Laura Finley, Professor of Sociology & Criminology at Barry University, presented this information to lay a foundation for the discussion of the work of Floridians for Alternative to the Death Penalty ("FADP"). Dr. Finley also discussed the research work of the Death Penalty Information Center ("DPIC") to catalogue the methods of executions still in use in the United States, especially the controversial use of lethal injections. To close remarks, Dr. Finley noted that sixty two percent of Floridians favor life imprisonment without parole over the use of the death penalty.

Mr. Mark Elliott, Executive Director of FADP, noted that the shift in public opposition to the death penalty is accompanied by an increasing awareness of the issues attendant to the death sentence, particularly, its continued inhumane and costly use in Florida and elsewhere. Mr. Elliott noted that Floridians spend over $50 million per year to maintain the death penalty. Mr. Elliot discussed the exoneration of Derrick Jamison after Mr. Jamison survived six execution dates and the youngest people executed by electric chair in Florida were *only* sixteen years old, and all four were Black.[4] Describing the exoneration of thirty people in Florida as a miracle, Mr. Elliott urged the event's attendees to visit FADP's website and to become involved in anti-death advocacy groups in Florida.[5]

A. *Legal Issues Panel Summary*

Four speakers on the legal issues panel explored how the laws and legal system regrettably preserved the death penalty in Florida. Ms. Linda Harris, an NSU Law alumnus, noted the origins of the death penalty began with the Code of Hammurabi in the eighteenth century, B.C., and the long practice of capital punishment in Florida started in 1827 with the execution of Benjamin Donica. Ms. Harris discussed the evolution in the methods of execution, which started with hanging individuals, to the electric chair, and finally to lethal injection. In addition, Ms. Harris chronicled the constitutional challenges to Florida's death penalty from *Furman v. Georgia*,[6] through *Hurst v. Florida*,[7] as well as the 2017 Florida death penalty sentencing statute, § 921.141(2) of the Florida Statutes.[8] Further, she pointed out three key issues

4. *Death Row*, FLA. DEP'T CORR., http://www.dc.state.fl.us/ci/deathrow.html (last visited Mar. 25, 2022).

5. *Race and the Death Penalty in Florida*, *supra* note 2.

6. 408 U.S. 238 (1972).

7. 136 S. Ct. 616 (2016).

8. FLA. STAT. § 921.141(2) (2021).

with the death penalty: (1) the rate of error; (2) the cost; and (3) racial disparities. With regard to racial disparities, Ms. Harris stated that in Florida, prosecutors are three times more likely to seek the death penalty when the victim is White than when the victim is Black. Furthermore, she emphatically remarked that never in the history of Florida has a White person been executed for the killing of a Black person.[9]

The next speaker on the legal issues panel, Mr. Jonathan Perez, a third-year law student at NSU Law, Goodwin Alumni Editor, and Articles Editor for the *Nova Law Review*, discussed the death penalty's lack of deterrent effect. Mr. Perez addressed this topic in 2020 through his Note published in the *Nova Law Review* titled *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*.[10] Mr. Perez's Note provides data showing that the abolition of the death penalty directly correlates with a decrease in murder rates in jurisdictions where it had since been abolished.[11] In his Note, Mr. Perez analyzed a 2018 study that compared eleven different countries that abolished the death penalty.[12] The results of the study concluded that there was an average decline of nearly six murders per 100,000 per year amongst the eleven countries that participated in the study.[13] Similarly, in the United States since 1999, death penalty states have experienced a twenty-eight percent higher average murder rate as compared to non-death penalty states. Therefore, using the results from both this data and the 2008 survey discussed above, one could reasonably conclude that the death penalty does not deter people from murder.

Brian Stull, Senior Staff Attorney for the American Civil Liberties Union ("ACLU") Capital Punishment Project and the third speaker on this panel, posited a *new beginning* in the battle for justice within the criminal

9. There is some dispute over this assertion. *See* JAMES M. DENHAM, A ROGUE'S PARADISE: CRIME AND PUNISHMENT IN ANTEBELLUM FLORIDA, 1821–1861, 139 (2005) (stating that Ferdinand McCaskill was executed for killing a Black man in 1857); David Moye, *Florida Executes White Man for Killing Black Victim For the First Time Ever*, HUFFPOST (Aug. 24, 2017, 4:52 PM), http://www.huffpost.com/entry/mark-asay-executed-florida_n_599f2403e4b05710aa5ad65b (reporting the execution of Mark Asay by lethal injection on August 24, 2017 for "two racially motivated, premeditated murders . . . .").

10. Jonathan Perez, Note, *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*, 45 NOVA L. REV. 115 (2020).

11. *Id.* at 133.

12. *Id.*; *see* ABDORRAHMAN BOROUMAND CTR., WHAT HAPPENS TO MURDER RATES WHEN THE DEATH PENALTY IS SCRAPPED? A LOOK AT ELEVEN COUNTRIES MIGHT SURPRISE YOU (2018), http://www.iranrights.org/library/document/3501.

13. Perez, *supra* note 10, at 133; *see* ABDORRAHMAN BOROUMAND CTR., *supra* note 12.

punishment system. Recalling the right to a jury as postulated by Sir William Blackstone in his commentaries, Mr. Stull evoked the *lofty promise* of the right to a unanimous jury in death penalty cases. Mr. Stull noted the United States Supreme Court's rejection in 2020 of state statutes that permitted non-unanimous jury verdicts in death penalty cases.[14] Mr. Stull explained that for forty years, Florida allowed non-unanimous jury verdicts for death sentences, and these verdicts resulted in ninety-two executions. The Florida Supreme Court struck down this practice in 2016,[15] and in 2017 the Florida Legislature amended § 921.141(2) of the Florida Statutes to require unanimous jury decisions for the death sentence.[16] Mr. Stull made note that this statutory amendment did not grant relief to all 290 people currently sitting on death row following a non-unanimous jury verdict. Of those individuals, only 157 received relief under the new statutes because their cases were not final until after June 2002.

The final issue that Mr. Stull raised was the disqualification of jurors who oppose the death penalty. This disqualification excludes twice as many Black jurors as White jurors. As a result, he concluded that death qualification is not race neutral, and therefore perpetuates racism in the criminal justice system.

The final speaker on the legal issues panel, Melissa Minsk Donoho, Chief Assistant and Managing Attorney for the Florida Regional Conflicts Counsel Office, shared her experiences working on death penalty cases in Broward County, Florida. Ms. Donoho stated that her office is working on ten death penalty cases and five *Hurst* resentencing cases. Based on her practice, Ms. Donoho opined that the change of Broward State Attorney has not yielded the progressive changes once anticipated, and that she is not optimistic those changes will occur. For example, a newly created Death Review Panel has denied all four of her offices' requests to avoid seeking the death sentence. While remarking that these results were disheartening, Ms. Donoho noted the legislature has not yet amended the requirement of a unanimous jury in Florida Statute § 921.141, even though the Florida Supreme Court backtracked on this requirement in 2020.[17] Ms. Donoho ended the discussion stating "[t]he death penalty is certainly not the way [that] we as a society should treat people."

14. Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016) (per curiam).

15. *Id.*

16. S.B. 280, 2017 Leg., Reg. Sess. (Fla. 2017).

17. State v. Poole, 297 So. 3d 487, 503–04 (Fla. 2020) (per curiam) (holding that § 921.141(3)(b) does not require "a finding of fact, but a moral judgment" and thus is not subject to the *Hurst v. State* requirement of a unanimous jury recommendation).

B. *Keynote Address by Sister Helen Prejean*

In the keynote address, Sister Helen Prejean, Founder of the Ministry Against the Death Penalty, shared her experiences recounted in *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*.[18] Sister Prejean recounted her experiences corresponding with, counseling, and witnessing the execution of Robert Lee Willie, and stated that the experience changed her life's work. She reflected, "[t]he journey in *Dead Man Walking* is the journey into the deep moral ambivalence that most of us feel about the death penalty."

Sister Prejean noted that although her observation of Robert Lee Willie's execution was overwhelming, this experience led her to study and read about death penalty issues as well as interacting with anti-death penalty and human rights activists. Thereafter, she came to realize that the American public needs to deal morally with the death penalty, but unfortunately most Americans have not thought about it. Initially her book was going to deal with the facts showing how racism and poverty put people on death row. Instead, with the urging of her editor, the book details her emotional and spiritual journey.

Sister Prejean noted that while there is power in storytelling, it is important to talk to people to convey the journey more fully "from the outrage of the crime and the suffering of the victims' families into the horror of the execution chamber." In her story, she also acknowledges her own mistake of not initially talking to the victims' families. In her contact with the victims' parents, Sister Prejean learned that victims' families can be angry and remain in that state or can transform so that they can forgive. By sharing her journey, Sister Prejean hoped to awaken the public to the death penalty, the nature of mercy, and the path of forgiveness.

Sister Prejean then discussed what happens when political rhetoric demonizes murderers who commit atrocious crimes and noted that this political rhetoric has found its way into United States Supreme Court cases like *Gregg v. Georgia*.[19] She remarked that even in those cases, prosecutors still do not need to seek the death penalty, and in fact, if they did not, this change alone would end the use of the death penalty.

Sister Prejean stated, "all human beings have the potential to change." From a faith perspective, "that is the divine spark within us"; from a human

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18. SISTER HELEN PREJEAN, DEAD MAN WALKING: THE EYEWITNESS ACCOUNT OF THE DEATH PENALTY THAT SPARKED A NATIONAL DEBATE (Random House, Inc., N.Y., 1993).

19. 428 U.S. 153 (1976).

rights perspective, "that is the inalienable right to life." A discussion on the evolution of consciousness on the death penalty within the Catholic Church and the global community followed. In 1948, when the United Nations proclaimed the Universal Declaration of Human Rights, few nations had abolished the death penalty.[20] Today, 108 out of 195 nations no longer have the death penalty.[21] Following this humanitarian trend, Pope Francis revised the Catechism of the Roman Catholic Church in 2018 to proclaim, "the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person."[22]

Despite this global status, nearly half of the United States retains the death penalty.[23] Changing this trend requires education, especially for district attorneys and jurors. Sister Prejean noted that public pressure was key to convincing a district attorney not to pursue the death penalty for a mentally ill person who killed two priests in Pueblo, Colorado. Similarly, Sister Prejean noted the importance of educating jurors on their rights and how they do not have to be pressured into voting for a death sentence

The discussion emphasized that jurors need to be aware that the death penalty is broken because, among other things, there are currently 185 people who were wrongfully convicted, sent to death row, and later exonerated.[24] Innocent defendants assume they will not be convicted, but the prosecutors possess the evidence. More than ninety percent of wrongful death penalty convictions result from prosecutorial misconduct.

It is important to recognize the deep racism in the criminal justice system. Sister Prejean said, "[t]here is a direct line between slavery, lynching, mass incarceration, and the death penalty." Currently in the United States, nearly fifty-eight percent of death row prisoners are People of Color while

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20. *Limiting the Death Penalty*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/limiting-the-death-penalty (last visited Mar. 25, 2022).

21. *Death Penalty*, AMNESTY INT'L, http://www.amnesty.org/en/what-we-do/death-penalty/ (last visited Mar. 25, 2022).

22. Letter from the Off. of the Congregation for the Doctrine of the Faith to the Bishops (Aug. 2, 2018), http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802b.pdf.

23. *States with the Death Penalty, Death Penalty Bans, and Death Penalty Moratoriums*, BRITANNICA PROCON.ORG, http://deathpenalty.procon.org/states-with-the-death-penalty-and-states-with-death-penalty-bans/ (last updated Mar. 24, 2021) (noting that twenty-four states retain the death penalty, three states have death penalty moratoria, and twenty-three states and the District of Columbia have abolished the death penalty).

24. *Innocence*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/policy-issues/innocence (last visited Mar. 25, 2022) ("Since 1973, at least 186 people who had been wrongly convicted and sentenced to death in the U.S. have been exonerated.").

forty-two percent are White.[25] Moreover, Sister Prejean emphasized that of the people executed since 1977, "eight out of ten of them were put to death because they killed a White person."[26]

Next, Sister Prejean commented on the impact of the defense counsel's competence. Sister Prejean recounted the example of Dobie Gillis Williams, a Black man who was convicted of the murder of a White woman.[27] Defense counsel in that case failed to raise an objection to the seating of an all-White jury and thus failed to preserve the issue for appeal.[28] Sister Prejean recognized that poor people cannot choose their lawyers; rather, they "have to take any lawyer they are given." Rich defendants, on the other hand, do not go to death row because the district attorney will not want to fight that battle against a wealthy defendant who can mount a formidable defense. In those cases, the district attorneys will offer a plea bargain to avoid losing on numerous pretrial motions. Still, Sister Prejean heralded public defenders as heroes, especially those who represent defendants out of principle and who fight against the death penalty.

Near the end of her talk, Sister Prejean stated that while we are working toward shutting down the death penalty in this country, there have been many setbacks, particularly during the Trump Administration.[29] From 2020 to 2021, there were thirteen federal executions after a seventeen-year hiatus.[30] Sister Prejean noted that these thirteen executed prisoners did not just die; they were killed. The execution of Lisa Montgomery, on January 13, 2021, was particularly tragic.[31] Ms. Montgomery was a mentally ill woman

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25. NGOZI NDULUE, ENDURING INJUSTICE: THE PERSISTENCE OF RACIAL DISCRIMINATION IN THE U.S. DEATH PENALTY 28–29 (Robert Dunham ed., 2020), http://documents.deathpenaltyinfo.org/pdf/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf.

26. *See id.* at 29–30 (stating that two-hundred and ninety-five Black prisoners were executed for the murder of White victims, compared to twenty-one White prisoners executed for the murders of Black victims).

27. SISTER HELEN PREJEAN, THE DEATH OF INNOCENTS: ANY EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS 18–19 (Canterbury Press 2005).

28. *Id.* at 20.

29. *'This is Not Justice' — Federal Execution Spree Ends with Planned Execution of African-American on Martin Luther King Jr's Birthday*, DEATH PENALTY INFO. CTR. (Jan. 18, 2021), http://deathpenaltyinfo.org/news/this-is-not-justice-federal-execution-spree-ends-with-planned-execution-of-african-american-on-martin-luther-king-jr-s-birthday.

30. *Id.*; *Chaos Surrounds Attempts to Resume Federal Executions*, DEATH PENALTY INFO. CTR. (July 13, 2020), http://deathpenaltyinfo.org/news/chaos-surrounds-attempts-to-resume-federal-executions.

31. *'This is Not Justice' — Federal Execution Spree Ends with Planned Execution of African-American on Martin Luther King Jr's Birthday*, *supra* note 29.

whose execution was pushed back from December 2020 to just a week before President Biden took office on January 20, 2021.[32]

Sister Prejean exclaimed "we, as a nation, *are* waking up" due to education about racism and the testimony of death row exonerees. On March 24, 2021, Virginia was the twenty-third state—and the first southern state—to abolish the death penalty.[33] This change in consciousness arose out of the efforts of Virginians for Alternatives to the Death Penalty, George Floyd's murder, Black Lives Matter, and the moving of Confederate monuments.[34] Prior to this abolition, Sister Prejean stated, Virginia, the largest and longest-lasting slave state, carried out more executions than any state in the history of our nation.[35]

Sister Prejean claims the seeds that were sowed in Virginia to eliminate the death penalty are now being sown in Florida. It is important to educate Floridians about how broken the death penalty system is and to raise the moral and economic issues. Hopefully, through these efforts, the death penalty will soon end in Florida.

C. *Racial Issues Panel Summary*

Ngozi Ndulue, Director of Research and Special Projects, Death Penalty Information Center, started the racial issues discussion by introducing a September 2020 Death Penalty Information Center Report titled, *Enduring Injustice*: *The Persistence of Racial Discrimination in the U.S. Death Penalty*.[36] Ms. Ndulue notes that the report examines the racial history of the death penalty and explores the role that race continues to play in the death penalty.[37] As shown in the report, the victim's race is a key factor that determines whether a person convicted of murder receives the death penalty.[38] Ms. Ndulue points out that the roots of this phenomena arose from the colonial

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32. *Id.*
33. *Virginia Becomes 23rd State and the First in the South to Abolish the Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 24, 2021), http://deathpenaltyinfo.org/news/virginia-becomes-23rd-state-and-the-first-in-the-south-to-abolish-the-death-penalty.
34. Madeleine Carlisle, *Why It's So Significant Virginia Just Abolished the Death Penalty*, TIME (Mar. 24, 2021, 3:24 PM), http://time.com/5937804/virginia-death-penalty-abolished/.
35. *See id.*
36. *See* NDULUE, *supra* note 25, at 1.
37. *Id.*
38. *Id.* at 3.

South where "very specific and specified differential crimes . . . would result in the death penalty."[39]

Although the death penalty and lynching have had a disproportionate effect on Black people, it also affected other ethnic groups such as Native Americans and Mexican Americans. In the United States–Dakota war, thirty-eight men were executed on December 26, 1862, the largest mass execution in United States history.[40] Similarly, the westward expansion of the United States resulted in "hundreds of lynchings and episodes of mob violence that occurred in the Southwest between 1848 and 1928."[41] Ms. Ndulue emphasized that there is a "connection between legal executions, lynchings, and mob violence." Thus, lynchings were treated as an alternative to legal executions.[42]

This connection is illustrated in the story of the Groveland Four that is depicted in *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America*.[43] The book discusses the intersection between mob violence and the death penalty.[44] It also shows the duplicity of law enforcement's alternate roles in preventing, allowing, and even participating in mob violence.[45] Ms. Ndulue noted, "[t]hese multiple roles played by law enforcement were sometimes the only hope for some type of protection and safety, not actually being that for the Black community at that time, until today."

As shown in the *Devil in the Grove*, the work of the National Association for the Advancement of Colored People Legal Defense Fund ("NAACP LDF") initially started to advocate for the civil rights of Black men who were being punished for alleged rapes or sexual improprieties to White women.[46] For example, a Virginia study showed that between 1930 and 1969, eighty-percent of the executed prisoners were Black men and that only Black men were executed for rape or attempted rape.[47] Accordingly, the NAACP LDF broadened its focus from getting legal representation for Black men facing executions to challenging the entire death penalty system.[48]

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39. *See id.*
40. *Id.* at 23.
41. NDULUE, *supra* note 25, at 25.
42. *See id.* at 26.
43. GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA 1 (2012).
44. *Id.* at 10.
45. *Id.* at 149.
46. *Id.* at 10.
47. *Id.* at 19; *see also* Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97, 114 (1972).
48. KING, *supra* note 43, at 12.

These challenges to the death penalty led to United States Supreme Court cases that included a tacit recognition of the role of race in the application of the death penalty and how that phenomenon relates to extrajudicial killings.[49] Historically, those southern counties with the largest number of lynchings have the highest number of legal executions.

This connection is also evident in the race of the victim and execution. Ms. Ndulue reported that in "about [seventy five percent] of the cases in which there has been an execution, the victim in the case was White" even though about half of the homicide victims were White.[50] Thus, the punishment for murder differs based on the race of the person killed.

Ms. Ndulue highlighted the fact that the complexion of the defendant is relevant when the victim is White. A study in Philadelphia showed that defendants with "more traditionally stereotypically African American traits" such as a darker complexion, broader lips, and kinkier hair, were more likely to get the death penalty than defendants with lighter skin and other less stereotypically African American features.[51] Ms. Ndulue concluded that not just race but racial stereotypes play a role in the criminal justice system.

Finally, Ms. Ndulue explained that race plays a clear role at trial. First, death qualification ensures the selection of jurors "with more anti-Black racial bias" and excludes jurors of color. Second, a less diverse jury is more likely to convict a defendant of color and is less receptive to mitigating evidence. As a result, Ms. Ndulue noted "a majority of folks who are having their cases . . . reversed based on intellectual disability are People of Color." Finally, it takes more time for the exoneration of Black defendants convicted of murder and there is more jail time for Black exonerees after being wrongfully convicted.[52]

The second speaker on the racial issues panel, Dr. Matthew Barry Johnson, Associate Professor of Psychology at John Jay College of Criminal Justice, started by discussing his anti-death penalty work in New Jersey starting in the early 2000s.[53] Dr. Johnson worked on a campaign that led to the abolition of the death penalty in New Jersey in 2007.[54] Through this work, Dr. Barry noticed convergences between anti-death penalty movements and

49. *See* Furman v. Georgia, 408 U.S. 238, 242, 310 (1972) (per curiam); Gregg v. Georgia, 428 U.S. 153, 168 (1976).

50. NDULUE, *supra* note 25, at 29.

51. *Id.* at 46.

52. *Id.* at 48.

53. Matthew B. Johnson, Member, Nat'l Ass'n of Black Psych., New Jersey Resolution to Abolish the Death Penalty (July 2022), *in* 46 PSYCH DISCOURSE, Fall 2012.

54. *New Jersey Abolishes the Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 11, 2007), http://deathpenaltyinfo.org/news/new-jersey-abolishes-the-death-penalty.

movements against mass incarceration and police brutality.[55] All of these efforts, including working for victims' rights, are part of the fight for criminal justice reform.

After New Jersey's abolition of the death penalty, Dr. Johnson focused his research on wrongful conviction and published a book in 2021 titled *Wrongful Conviction in Sexual Assault: Stranger Rape, Acquaintance Rape, and Intra-familial Child Sexual Assaults*.[56] His book focused on the fact that the primary reason for exoneration is the wrongful conviction for sexual assault.[57] In this book Dr. Johnson links this phenomenon to "the history of lynching and discrimination against African American defendants."

Next, Dr. Johnson recognized three African-American freedom fighters who were anti-death penalty activists—Frederick Douglass, Thurgood Marshall, and Coretta Scott King. Frederick Douglass, a well-known slavery abolitionist, was also an anti-death penalty advocate. At the same time that Mr. Douglas was working against slavery, he also campaigned against state executions. In particular, Dr. Johnson recited and discussed a resolution made by Frederick Douglass at an Anti-Capital Punishment Meeting in Rochester, New York, in 1858.

Similarly, Thurgood Marshall fought life and death battles to argue against the death penalty in the United States Supreme Court. Dr. Johnson also focused on a famous passage from Justice Marshall's dissent in *Gregg v. Georgia*.[58] Dr. Johnson surmised that Justice Marshall's statement about the death penalty in that case reflected the Justice's awareness of "racial bias and hostility" and "the selfish ambitions of prosecutors and politicians." Dr. Johnson also believed that this statement reflected the Justice's understanding that the death penalty was "arbitrarily applied" and thus "inherently cruel."

Finally, Dr. Johnson discussed Coretta Scott King's anti-death penalty advocacy. In 1981, Mrs. King opposed the death penalty and provided three reasons. First, Mrs. King stated that the death penalty makes it impossible to reverse miscarriages of justice. Second, capital punishment assumes there is no redemption for the murder. Third, Mrs. King noted the racial inequities in the imposition of the death penalty. Dr. Johnson concluded by stating that although he drew inspiration from the three persons mentioned, the work of many others could have also been highlighted.

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55. MATTHEW BARRY JOHNSON, WRONGFUL CONVICTION IN SEXUAL ASSAULT: STRANGER RAPE, ACQUAINTANCE RAPE, AND INTRA-FAMILIAL CHILD SEXUAL ASSAULTS 77 (2021).

56. *Id.*

57. *Id.* at xi.

58. 428 U.S. 153, 231–241 (1976) (Marshall, J., dissenting).

The final speaker, Kristina Roth, Senior Advocate for the Criminal Justice Program of Amnesty International USA, discussed the forty-year effort of her organization to abolish the death penalty globally and the fact that the United States is the "only active executioner in the Americas." Like the earlier speakers, Ms. Roth noted racism in the death penalty's roots and the criminal justice system. Ms. Roth explained that racism impacts the trials of Black defendants, results in bias in the jury, and supports the arbitrary application of the death penalty.

Ms. Roth then discussed the importance of studies that show disparities in the capital punishment system. Ms. Roth noted a study from 1976 to 2021 that showed that Black people were thirty-four percent of those executed and that today, fifty-eight percent of the inmates on death row are People of Color.[59] All-White juries sentenced some of the Black men convicted, and many of those on federal death row were sentenced after the 1994 wide-reaching expansion of the Federal Death Penalty Act.

Also, in 1994, Congress considered the Racial Justice Act,[60] which would have allowed challenges to a death sentence based on evidence of racial discrimination in its administration. These acts have been enacted in various states, including Kentucky, North Carolina, and California, except that North Carolina repealed its statute.[61] In 2021, advocates sought to make such legislation retroactive, but Ms. Roth noted that such efforts have been unsuccessful.

Ms. Roth reported that although some cases and legislation have been fruitful, the death penalty in the United States is still racially biased. This bias violates the "right to freedom from discrimination and the right to equal protection of the law." Moreover, under the International Convention on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, the United States has an obligation to "respect, protect, and fulfill these rights."[62] Thus, racial bias is one of many reasons that Amnesty International opposes the death penalty in the United States.

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59. *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim (last visited Mar. 25, 2022).

60. Racial Justice Act, H.R. 4017, 103d Cong. (1994).

61. Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300–532.309; North Carolina Racial Justice Act, N.C. GEN. STAT. § 15A-2010 (2009), *repealed by* Act of June 19, 2013, ch. 154, § 5(a), 2013 N.C. Sess. Laws 368, 372; California Racial Justice Act, CAL. PEN. CODE § 745 (West 2021).

62. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195.

D. *Closing Comments: Florida's Regrettable History with the Death Penalty*

Florida's long history with the death penalty is laced with racism and subjugation. From 1608 to 2002, almost sixty-three percent of those executed in Florida were Black, and thirty-five percent were White.[63] In addition, for executions between 1976 and 2014, seventy-two percent were for crimes involving White homicide victims even though only fifty-six percent of all homicide victims during that period were White.[64] Moreover, "[h]omicides involving White female victims are six and a half times more likely to result in an execution than homicides involving Black male victims."[65] This information supported the conclusion that "the race and the gender of the victim is a determining factor in deciding who faces execution in Florida," and on that basis, "Florida's death penalty system is arbitrary."[66]

The intersections of race and the death penalty are tragically apparent in the case of Celia, a biracial woman who murdered a White master on December 10, 1847.[67] According to historical accounts, Jacob Bryan was her master and father.[68] There was also speculation that Mr. Bryan was the father of Celia's four children.[69] Celia, who had no last name on record, killed Jacob Bryan five years after freeing Celia and the rest of his slaves.[70]

Purportedly, the incident took place after Mr. Bryan attempted to discipline Celia.[71] Mr. Bryan tried to punish Celia, who at the time was making a hoe-handle with an instrument called a drawing knife.[72] Celia tried to resist with the hoe-handle and later struck Mr. Bryan in the head with the drawing knife, killing him instantly.[73]

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63. *The ESPY List: US Executions 1608–2002*, BRITANNICA PROCON.ORG, http://deathpenalty.procon.org/us-executions/ (last updated Aug. 19, 2021).

64. Frank R. Baumgartner, *The Impact of Race, Gender, and Geography on Florida Executions*, UNIV. N.C. CHAPEL HILL (Jan. 14, 2016), http://fbaum.unc.edu/articles/Baumgartner-Florida-executions-Jan2016.pdf.

65. *Id.*

66. *Id.* at 6.

67. H. Franklin Robbins, Jr. & Steven G. Mason, *Florida's Forgotten Execution: The Strange Case of Celia*, FLA. SUP. CT. HIST. REV., Spring/Summer 2014 at 9, 9–10; *In re Estate of Jacob Bryan*, No. 47-99B (Fla. Duval County Probate Ct. 1847).

68. Robbins & Mason, *supra* note 67, at 9.

69. *Id.*

70. *Id.* ("On November 25, 1842 . . . Jacob Bryan executed a 'deed of manumission' whereby he freed all the slaves who comprised his family.").

71. *Id.*

72. *Id.*

73. Robbins & Mason, *supra* note 67, at 9.

Judge Thomas Douglas, the first judge of Florida's Eastern Circuit Court, presided over Celia's trial in the spring of 1848.[74] The jury found her guilty of manslaughter but made a recommendation of clemency.[75] Despite the jury's recommendation, Judge Douglas sentenced Celia to death on May 26, 1848.[76] Judge Douglas may have felt legally compelled to pronounce a death sentence based on the 1840 territorial slave code.[77] After Celia's sentencing, appeals were made to Florida's Governor, William D. Moseley, to exercise clemency before Celia's scheduled hanging on August 11, 1848.[78] Even though the Governor delayed Celia's execution until September 22, 1848, no action was taken to set aside Celia's death sentence. Celia was hanged at noon on the execution date.[79]

Like many of the death penalty cases discussed during this symposium, Celia's implicitly racist and tragic case elicits a sense of dread based on Celia's life circumstances and the arbitrariness of the death sentence.[80] As similarly shown in modern statistics, Celia was sentenced because she was a Black woman who killed a White person.[81] Although Celia may have received adequate representation, that assistance did not save her.[82] Indeed, according to newspaper accounts, there was concern that granting Celia clemency could embolden other enslaved Blacks to do the same to their White masters.[83]

The abolition of Florida's death penalty is long overdue. Based on statistics, it is clear that the death penalty punishes African American defendants more frequently for killing White victims. This phenomenon has a lineage that rests in racism, slavery, slave codes, and lynchings. The death penalty uses unjust and arbitrary punishment in a criminal justice system that imposes disproportionate sentences on Black defendants, excludes people of color from juries, and nullifies exculpatory and mitigating circumstances.

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74. *Id.* at 10; *In re Estate of Jacob Bryan*, No. 47-99B (Fla. Duval County Probate Ct. 1847).

75. Robbins & Mason, *supra* note 67, at 9.

76. *Id.*

77. *Id.* ("[I]f any slave, free Negro or mulatto, shall be guilty of man-slaughter of any white person . . . they shall suffer death." (alteration and omission in original)) (citing An Act Relating to Crimes and Misdemeanors Committed by Slaves, Free Negroes and Mulattoes, § 38, 1828 Fla. Laws 174).

78. *Id.*

79. *Id.*

80. *See* Robbins & Mason, *supra* note 67, at 12.

81. *Id.* at 9; *see also Racial Demographics*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/death-row/overview/demographics (last visited Mar. 25, 2022).

82. Robbins, Jr. & Mason, *supra* note 67, at 9.

83. *See id.*

This one-day conference featured nationally recognized activists, advocates, and scholars to make this case against death. The evidence is in, and the case is closed. At last, it is time to render the final verdict against the death penalty in Florida and elsewhere.

THE DEATH PENALTY IN FLORIDA: THE CASE AGAINST DEATH

FRIDAY, OCTOBER 15, 2021[1]

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KEYNOTE SPEAKER

Sister Helen Prejean[2]

PANELISTS

Dr. Phyllis Scott[3]
Dr. Laura Finley[4]
Mark Elliot[5]
Linda Harris[6]
Jonathan Perez[7]
Brian Stull[8]
Melissa Minsk Donoho[9]
Ngozi Ndulue[10]
Dr. Matthew Barry Johnson[11]
Kristina Roth[12]

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1. This event was coordinated and sponsored by Nova Southeastern University Shepard Broad College of Law; Nova Law Review; Members' Advisory Committee of the Lifelong Learning Institute from Nova Southeastern University Dr. Kiran C. Patel College of Osteopathic Medicine; Barry University's Department of Sociology & Criminology and Anti-Racism and Equity; Amnesty International USA; Witness to Innocence; and Floridians for Alternatives to the Death Penalty.
2. Founder of the Ministry Against the Death Penalty.
3. Director of Barry University's Anti-Racism and Equity Coalition, and former Dean of the School of Social Work, Barry University.
4. Professor of Sociology & Criminology, Barry University.
5. Executive Director, Floridians for Alternatives to the Death Penalty.
6. NSU Shepard Broad College of Law Alumnus and former Vice-President of Black Law Student Association.
7. NSU Shepard Broad College of Law Student and Goodwin Alumni Editor for *Nova Law Review* Volume 46.
8. Senior Staff Attorney, American Civil Liberties Union Capital Punishment Project.
9. Chief Assistant and Managing Attorney for the Florida Regional Conflicts Counsel Office.
10. Director of Research and Special Projects, Death Penalty Information Center.
11. Associate Professor of Psychology, John Jay College of Criminal Justice.
12. Senior Advocate, Criminal Justice Program, Amnesty International USA.

I. INTRODUCTION

DR. PHYLLIS SCOTT: Good morning. I am honored to have the opportunity to welcome each of you to this important event. Those attending this event, thank you for taking the time to join in the conversation and contributing to a dialogue on a subject that has, over the years, aroused heated debates; taken the lives of innocents; cost taxpayers millions of dollars [in] funds that could have been used in other progressive ways; deepened discriminatory practices; and in many states, including Florida, violated the Constitution.

The rule issued by our courts [is] that the death penalty does not invariably violate the Constitution if administered in a manner designed to guard against arbitrariness and discrimination. Many states agreed, including Florida. This statement, rendered in a society where institutionalized racism is entrenched throughout the halls of justice—and in a society that has held little regard for the poor—was painfully laughable. That one statement gave way for minority groups and the poor to be further victimized; yet the debate actually continues. That one statement needs to be reexamined, and I am so glad you are all gathered here to have that conversation.

Despite all of the debates, what cannot be debated is that this form of punishment does not deter crime. What cannot be debated is [that] the economic inequalities and inequities [are] to the disadvantage of the poor. What cannot be debated is that there is a disproportionate number of persons from minorit[y] groups sitting on death row, who have, in the past, also been executed. What cannot be debated is the cost of such penalties. It is extraordinary to our society. We are better than this. Thus, what can be debated is whether, as a society, are we striving to cultivate a fair and just society. What can be debated is [the] price are we willing to pay for change.

On behalf of the Barry University Anti-Racism and Equity Coalition, I welcome you to this forum and hope you walk away enlightened, inspired, and with a stronger commitment to stand up for justice. Thank you.

DR. LAURA FINLEY: I just wanted to give us an introductory sense of where we are at with the death penalty in the United States. [The death penalty] is a centuries old practice. It has been found in many historic societies and came to the [pre-United States] colonies through practices the colonists were accustomed to in England and other places. However, there has always been opposition to the death penalty, and in fact, I am quite proud to say that my home state of Michigan was the first state in the United States to abolish the death penalty in 1846. Since then, there have been surges, or waves, in abolition of the death penalty.

We still retain the death penalty in the United States at the federal level, and although we very rarely actually assign somebody a death sentence at the federal level, there was a surge of death sentences under President Trump. President Biden and his administration have said they oppose the death penalty at the federal level, so there may be some change on that front.

We also have the death penalty in twenty-four states currently, and three states are on a governor-issued moratorium. What that means is they still technically retain the death penalty, but they are not currently issuing death sentences. We [therefore have] many states we still need to work on in terms of the death penalty. Florida is of course one of [these states]. [Florida is] a retention state and some of us are involved in efforts to change that situation, hence part of today's effort.

This is a map of which states still retain the death penalty—as you can see there are twenty-four— [and three states] are under a moratorium. There are waves of abolition, and the most recent positive movement for those of us who are death penalty abolitionists is that Virginia, in March of 2021, abolished the death penalty. Virginia is the first southern state to abolish the death penalty, [which] is huge because southern states overwhelmingly use the death penalty. For a southern state to abolish it is a big move.

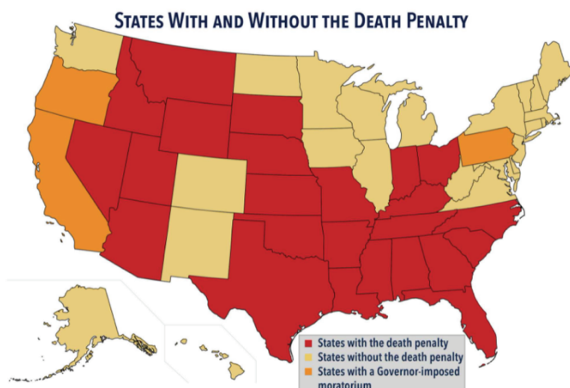

Figure 1: Map of States and Death Penalty Status[13]

13. *The Death Penalty in 2021: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2021), http://reports.deathpenaltyinfo.org/year-end/YearEndReport2021.pdf.

There are a variety of methods of execution, and as Dr. Scott mentioned briefly, there are a lot of issues with the death penalty, some of which we are going to touch on and some we probably would not give as much attention to, not because they are not important, but simply because you can only do so much in a six-hour window on an issue that is super complex. As Dr. Scott mentioned, there are cost-related issues, issues of arbitrariness—these may come up a little bit, but [are] not always the focus of our efforts but they are important.

One of the controversial issues now is the methods that we use to execute people. This [information] is from the Death Penalty Information Center—a wonderful resource about everything death penalty. [Of] the primary methods of execution most commonly used in the United States, it is most often lethal injection.[14] Several states still authorize use of electrocution, lethal gas, hanging, and firing squads; those are used far less frequently, but may be still authorized in those states.[15]

[The use of lethal injection as a method of execution] is controversial in many ways, but one of those is that the protocols involve use of three different chemicals, one of which is very hard to acquire right now. One of the reasons it is hard to acquire because it is primarily produced in places that now oppose the death penalty. A lot of this particular chemical comes from the European Union. The European Union has outlawed the death penalty and said *we do not want to send those chemicals to the United States for use of execution*. Several pharmaceutical companies in the United States that produce these kinds of chemicals have also said *we no longer want to participate in this*. That is leading to a shortage of the chemicals being used for lethal injection, which would seemingly be a good thing, because it might tell states, *hey maybe just do not do it, maybe do not execute people*. Instead, [those states are] using dubious methods of acquiring some of these chemicals and/or turning back to some of these older methods, like firing squad. In some cases, lethal gas like cyanide is being proposed to be used more, for instance in Arizona. That is harkening back to things that happened during the Holocaust. It is a very disturbing trend. This is where we are today in terms of states that retain the death penalty and methods that are being used.

One thing that is important is that in Florida, most people do not support the death penalty, or they support life in prison without parole as opposed to a death sentence [for] crimes that would make someone eligible for a death sentence. [According to Floridians for Alternatives to the Death

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14. *Authorized Methods by State*, DEATH PENALTY INFO. CTR. http://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state (last visited Mar. 25, 2022).

15. *Id.*

Penalty (FADP),] sixty two percent of Floridians now favor life without parole as opposed to an execution. If public opinion is what we want to base our policy on, [then our policy in not following public opinion] in the state of Florida.

MARK ELLIOTT: Public opinion has shifted and there is a growing awareness. We have known for some time that the end of the death penalty in Florida is inevitable. What is now becoming clear is it is going to happen sooner, rather than later. I have been working on this probably twenty years now and I have seen an acceleration recently that is just mind blowing as far as the people and the organizations coming together, and [the] networking and planning on this. Underlying it all is—there is a saying I heard once—*the more you know about the death penalty, the less you like it*. That was true for me; that has been true for almost anyone that find[s] out more about the death penalty.

That is why this event today is so exciting. You are going to hear from people with a variety of perspectives, a lot of them with direct experiences, on the death penalty. This event provides the chance to learn more and to really find out how this affects people in all walks of life. Criminal legal reform or criminal justice reform is a hot issue today.

The death penalty is the linchpin that sits on top of criminal justice reform efforts. The death penalty is totally about punishment; it is not about redemption, reform, rehabilitation, or restoration. Bryan Stevenson, the Director of the Equal Justice Initiative in Montgomery, Alabama, said it well: "Only in a state where the government is intoxicated with the power to kill, would a sentence of life in prison without parole seem like leniency." That is the reality for things below this to get new looks, new energy, and new reforms; the death penalty has to come off the top of it. This is what holds it all back.

To find out more about Florida's death penalty, please visit the http://www.fadp.org website. There are actions you can take—there is a lot going on right now—we have fact sheets available; we have sign on letters for murders of family members, law enforcement, a variety of different groups and perspectives. Speaking of groups, we have a page we just put up: a preliminary list of groups that support ending the death penalty in Florida. If you belong to a group who supports ending the death penalty (or would), please get in touch with us. Our email address is at the bottom of every page on our site. Let us know. We will send you a form. We will get you added to that list.

One of the issues going to be raised today that strikes me is, if I supported the death penalty, and I found out that one innocent person was on

death row, that would be it for me. I could never support a government program that would kill innocent people and a lot of times arbitrarily. In Florida, we have thirty innocent people who have been released from death row, most of them with a lot of opposition to from the state. It was a miracle, and a lot of times, it was just luck, a lot of work and pro bono attorneys and so forth, and people writing notes with the little teeny pencils they have in the cell to try to get some attention to their predicament of being on death row for a crime that someone else committed. It happens a lot and it happens more in Florida than any other state.

You are going to hear from some of those folks today. They are extraordinary and their stories are powerful. This is the reality. That is what people do not always know and understand is the reality of it: this system does not work the way most people think it does; it is the worst of the worst. It just does not work that way. The main thing people on death row have in common is they could not afford a lawyer at the time of their arrest. It is just a mess. It is not what like people think it is or in theory is supposed to be. It just does [not] work that way. I could spend the hour and a half talking about that, but I am not going to do it. I am going to let some of the other folks really deliver the information that can help you answer questions about the death penalty. If someone asks *well, why do you think this or why do you think that*, you are going to get those answers today. Some extraordinary people are on this program.

I have a friend who was on death row for twenty years in Ohio. He had six execution dates. The last one, he came within just a few hours being executed. His name is Derrick Jamison. He had his last meal, wrote his last words, and then they stayed the execution. He was exonerated and released, but not before he saw—I do not how many—a dozen or two dozen of his friends who he got to know on death row marched out and executed. He told me, "The death penalty is modern day lynching. They took me to the tree six times." That was his direct experience. That is the way he saw it and that has a lot to do with what it really is. You are going to hear about the legacy of lynching and how that simply just transformed into today's death penalty. Even though it is also about due process and legalities, it is still just a remnant from lynching.

If you go on the Florida Department of Corrections website for death row, they have a list of the four youngest people ever executed in Florida.[16] All four were killed in the electric chair. All four were sixteen years old. And this happened not that long ago. What they do not have on their website is that

16. *Death Row*, FLA. DEP'T CORR., http://www.dc.state.fl.us/ci/deathrow.html (last visited Mar. 25, 2022).

all four children were Black. Two of them were thirteen years old when they were tried and convicted. One of them—Fortune Ferguson, Jr.—was thirteen years old when he was brought into court. He was arrested, tried, and convicted within twenty-four hours. Maybe it was due process, maybe it was legal, but it is essentially legalized lynching. That is the reality of it. Maybe it takes a little longer with more legal steps, but this is the roots of it. This is where it came from. That is how it is still applied. The same people are subjected to it by the same people; it just has the trappings of legality. I looked for years to find some redeeming value or virtue of having the death penalty and I have never found one. There is nothing that stands the light of truth and inspection; the death penalty is totally unnecessary.

We, Floridians, spend over $50 million a year just to have the death penalty, and that is over and above the cost of sentencing those same people to life in prison. How could that money to be used? We have got 14,000 unsolved homicides that could be solved; we could help murder victims' families in real and immediate ways instead of telling them, *one day you are going to feel better. Years from now you [are] going to get justice. We are going to kill this person and you get to come and watch*. That is just so crazy.

This event is all about people learning more about the death penalty and what to do about it. That is important. On our website you will see ways you can end the death penalty for people with serious mental illness. Almost everyone thinks that it is already illegal to execute and get the death penalty for someone who is seriously mentally ill, but that is not the case in Florida. It is not supposed to be happening nationally, but Florida has found loopholes and ways to work around that, so we are sentencing people who committed a crime while they were seriously mentally ill. They are going to death row, and some of them, unfortunately, have been executed. So please take action. Get involved. Take a look at the petition. If you want to sign it, sign it. If you want to contact us about the group you belong to and they will join the list of organizations in Florida that want to end the death penalty, that will be a big help. That is power. That is what it looks like; all of you and all the groups working together to end the death penalty. That is how it is going to take place. It is a new day in Florida. Thank you all. Let us move forward together and get across the finish line and end this madness once and for all.

DR. LAURA FINLEY: There is so many complex issues with the death penalty that will come up through the day. Just to be clear, those of us who seek to abolish the death penalty do not necessarily believe our prisons are amazing places either. We are also about prison reform, criminal justice reform, [and] we recognize there are certainly some deep issues within our criminal justice systems. But the ultimate sanction—the death penalty—is

something we believe no longer should exist for some of the reason[s] that you have already heard and more that you will hear throughout the day.

Next, we will turn the event over to experts on legal issues. Exploring what are the legal issues related to, why we have the death penalty, and why do prosecutors seek it in certain cases and not in others.

II. LEGAL ISSUES PANEL

OLYMPIA DUHART: [17] It is truly past time to make the case against death. The law can be used as a tool for oppression or an instrument of justice and change. In today's symposium, we are going to explore the many different arguments advanced by these amazing social justice warriors who pursue justice through legal reform and beyond, in an effort to confront the persistent threat of the death penalty. As we put the death penalty on trial [today], we are going to hear from different distinguished experts, including some of NSU's best advocates, students and alum—some seasoned and some new to the death penalty abolition movement—acclaimed scholars, national advocates, and importantly people who survived being on death row despite their actual innocence.

Our work today is consistent with NSU's core value of community. We take a special pride in exchanging with the community through professional and intellectual support that complements our educational mission. Today's symposium is a prime example of this effort. Really this event represents the best of community collaboration, impact collaboration.

JANE CROSS: [18] I am going to introduce the legal issues panel. We have four amazing people. I am going to give their names in the order that they are going to speak and then I am going to turn it over to them. The first panelist is Linda Harris. She is an NSU Law alumnus, and she is also the former treasurer of NSU [Black Law Students Association]. Ms. Harris is going to talk about the history of the death penalty in Florida. Following Ms. Harris will be Jonathan Perez, who is an NSU law student and Articles Editor [as well as the Goodwin Alumni Editor] for [the] *Nova Law Review*. Mr. Perez is going to talk about data on deterrence and the death penalty. Next, we are going to have Brian Stull who is a staff attorney for the ACLU Capital Punishment Project. Mr. Stull is going talk about Florida specific legal practices in death penalty cases. Then we have Melissa Minsk Donoho, who

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17. Associate Dean for Faculty Development and Professor of Law.

18. Acting as an NSU Shepard Broad College of Law representative for this panel.

is Chief Assistant and Managing Attorney for the Florida Regional Conflicts Counsel Office. She is going to talk about current trends in Florida death penalty practice.

I want to just briefly tell you how I came to looking at the death penalty. My specialty is Caribbean law and I have written about the mandatory death penalty in the Commonwealth Caribbean. There is a case called *Pratt v. Attorney General for Jamaica*,[19] decided 1993, which basically [made] it illegal to execute someone after they have been sentenced for more than five years. That particular precedent was basically put into place because of the work of the Death Penalty Project, which is a human rights organization in Britain. Activism does work, and it does get the law changed.

LINDA HARRIS: As mentioned before, I am going to give a very brief history of capital punishment in Florida. I will probably be using the terms capital punishment and the death penalty interchangeably. So basically, I am saying the same thing. I [a]m [also] going to give a very brief overview of the death penalty in general.

You have already heard a lot about the death penalty and where it came from. [The death penalty] has been around since the Code of Hammurabi. The first legislated code is going back as far back as the eighteenth century [B.C.]. The American use of the death penalty was essentially the remnant of the colonists from Britain bringing that over, and it has evolved to the death penalty laws that [we] see today.

With that, I am going to start talking about the history of capital punishment in Florida. As of 2020, Florida is one of twenty-five states in the United States that have the death penalty. In Florida, the first known execution was in 1827 when Benjamin Donica was hung for murder. In 1923, a bill was placed that allowed all executions to no longer be done by hanging, and to then be done by the electric chair. In June of 1972, the Supreme Court struck down the death penalty nationwide in a court case called *Furman v. Georgia*.[20] Subsequently, [Florida] reintroduced a death penalty statute. [Florida] was actually the first state to reintroduce the death penalty after the Supreme Court struck it down nationwide in that *Furman v. Georgia* case.[21] Four years later, in 1976, the Supreme Court reinstated the death penalty nationwide when it upheld a Georgia [death penalty] statute in *Gregg v. Georgia*.[22] The pertinent

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19. [1993] UKPC 1, [1994] 2 A.C. 1, 20, 23 (appeal taken from Jam.).
20. 408 U.S. 238 (1972).
21. *Florida: History of the Death Penalty*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida (last visited Mar. 25, 2022); *Furman*, 408 U.S. at 238.
22. 428 U.S. 153 (1976).

Florida [case], *Proffitt v. Florida*,[23] upheld the reintroduction of the death penalty in Florida.

In 1979, Florida was the first state to carry out a non-voluntary execution following the *Gregg* case.[24] From there, [Florida had] a botched string of executions in the 1990's that essentially led the [Florida Supreme] Court and not only the court, but also the Florida legislature to say, *maybe we should not be using old sparky,* that is the term some people affectionately refer to as the electric chair. I do not think it was a nice name. In 2000, the Florida legislature decided, after those botched executions, that lethal injection was the way to go. In the year 2020, we shifted from using the electric chair to using lethal injection.

Florida has a very interesting history with the death penalty. [Florida has] one of the highest rates of folks on death row, and we have also had numerous issues and constitutional challenges to our death penalty. Now, I am going to briefly go over some of those. In 1982, in *Enmund v. Florida*,[25] the Court ruled that Florida violated the Eighth Amendment when it attempted to apply the death penalty to defendants who were minor participants in a crime that resulted in murder.[26] Essentially, the Court said if these defendants did not attempt to kill [or] intend to kill the victim [and] they were not active participants in the victim's murder, then it is cruel and unusual punishment to give these particular defendants the death penalty.

In *Hitchcock v. Dugger*,[27] a case in 1987, the Court ruled that Florida's death penalty statute was unconstitutional because it did not allow the advisory jury or the sentencing judge to consider reasons the defendant offered to spare his life unless those reasons were listed among the mitigating factors the legislature had set out in the state's death penalty statute.[28]

Then, in 2014, in *Hall v. Florida*,[29] the Court ruled that Florida unconstitutionally impaired the enforcement of the Eighth Amendment's prohibition against subjecting persons with intellectual disabilities to the death penalty by applying a hard cut off of seventy—an IQ cut off—to deny death row prisoners' intellectual disability claims.[30] And in 2016, in *Hurst v. Florida*, the Court ruled that a Florida sentencing statute, at the time, violated the Sixth Amendment right to a jury trial because it required that a judge,

23. 428 U.S. 242 (1976).
24. *Florida: History of the Death Penalty*, *supra* note 104.
25. 458 U.S. 782 (1982).
26. *Id.* at 801.
27. 481 U.S. 393 (1987).
28. *Id.* at 398–99.
29. 572 U.S. 701 (2014).
30. *Id.* at 724.

rather than a jury, make findings of fact as to whether the prosecution had proven that a defendant was eligible to face the death penalty.[31] That is just a brief, truncated history of some of the [cases] that have affected death penalty cases in Florida.

Until 2016, Florida was one of only three states that permitted trial judges to impose the death penalty based on a jury's non-unanimous recommendation for death.[32] The Florida Supreme Court in the *Hurst* case ruled th[is] particular practice violated Florida's constitution.[33] [However], in March of 2017, the Florida legislature decided to adopt a new sentencing law that requires a unanimous jury recommendation for death before the judge could impose a death sentence.[34] As previously mentioned, we are always finding loopholes in the state of Florida in order to get around getting rid of the death penalt[y]. You can see that in the history of Florida and the way that we have handled death penalty legislation.

Lastly, I would like to talk about a few issues about the death penalty, [which] is why we are here. Even though my main purpose was to talk about the legal history of death penalty cases in Florida, I want to talk about some of the impacts and the effects of the death penalty.

First, I want to talk about the rate of error. Since 1973, there have been thirty exonerations of people from death row in the state of Florida. That is the highest of any state in the United States of America. Essentially, what that means: For every three people on death row, [Florida has] exonerated one innocent person. If [even] one innocent person has the potential of being put on death row, that should be enough to eliminate the practice. If we can[not] make sure the people that the state wants to put to death, at a minimum, did what [the state] said they did, the state should not have the ability to then take the life of an innocent person if you cannot guarantee that this person did it. Now, I personally do not support the death penalty. That is the whole purpose of this panel. I want you to understand that the rate of error is so, so very high. You can[not] take death back; you can[not] come back from death. Once we kill this person, there is no coming back from that.

Secondly, I want to talk about the cost. I am not going to give you specific figures because I went to law school, and I did not become a mathematician for that reason. Florida taxpayers pay well over fifty-one million dollars annually to enforce the death penalty. That number is well above any of the costs associated with keeping somebody in prison [or] seeking life imprisonment for a particular defendant.

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31. Hurst v. Florida, 136 S. Ct. 616, 624 (2016).
32. Hurst v. State, 202 So. 3d 40, 61 (Fla. 2016) (per curiam).
33. *Id.* at 69.
34. FLA. STAT. § 921.141(2) (2021).

Lastly, I would like to discuss some of the racial issues. As previously mentioned, the death penalty, overall, has not been distributed fairly. There are a lot of racial disparities in the way the death penalty has been applied. Specifically, the way it has been applied to Florida, prosecutors are over three times more likely to seek the death penalty when a victim is White [compared to] when the victim is an African American. Never in the history of Florida has a White person been executed for killing an African American. Never. Not once.

I am going to give you some specific numbers about Duval County. Eighty percent of the people sentenced to death from Duval County were African American from 2009 to 2011. It was 100% in the year of 2012.[35] Like I said and as previously mentioned, [the death penalty] disproportionately affects African Americans. This is pretty much the history of the death penalty [in Florida].

JONATHAN PEREZ: My name is Jonathan Perez, and I am a 3L, currently at Nova's [Shepard Broad College of Law]. I am on law review. I had an article published over the winter dealing with the death penalty here in Florida. It is titled, *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*.[36] I am going to talk about the lack of deterrent effect of the death penalty. It is ironic that, in my opinion, most supporters of the death penalty like to point to the deterrent effect—that is, effective in deterring crime—when there is really not a lot of evidence to support that assertion. In my [Note], I quote Cesare Beccaria, the Italian criminologist a lot. He said: "For a punishment to be just, it must have only that degree of intensity that suffices to deter men from crime."[37] The critical question, in my opinion, is *not* whether the death penalty in-and-of-itself deters crime, because the death penalty does not exist in a vacuum. [Rather], it is whether it is more effective at deterring crime than life imprisonment without the possibility of parole. In my [Note], I cite to a few studies and trends that tend to say [the death penalty] is not more effective.

The first study I point to is one conducted in Iran in 2018. The study examined eleven countries that had abolished the death penalty at least ten years prior to the conduction of the study. The study plotted the murder rates

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35. *Corrections Offender Network: Death Row Roster*, FLA. DEP'T CORR., http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited Mar. 25, 2022).

36. Jonathan Perez, Note, *Barbaric Retributivism: New Hampshire and Washington Are Two of the Latest States to Abolish the Death Penalty. Here Is Why Florida Should Follow Suit*, 45 NOVA L. REV. 115 (2020).

37. *Id.* at 116.

in the eleven countries over the course of the ten years.[38] The findings demonstrated that death penalty abolition correlated, on average, with a decline in murder rates in all eleven countries. In fact, a country in this set which abolished the death penalty can expect an average of approximately six less murders per 100,000 people a decade after abolition.

This trend is also present within the United States. Collectively, the murder rate in death penalty states has been higher than the murder rates in non-death penalty states in every single year since 1990.[39] The difference is not particularly close either. Death penalty states have had a twenty eight percent higher murder rate on average than non-death penalty states since 1999.[40] The highest difference came in 2007, when there was a forty-seven percent difference.[41] So, the trends extrapolated from the study in Iran are also present within the United States.

Another study, conducted in 2008, examined the opinions of leading criminology experts on the deterrent effects of the death penalty. That study found that 88.2% of criminologists [who] were surveyed do not believe that the death penalty deters murder. That is a level of consensus comparable to the agreement among scientists regarding global climate change.

There is an abundance of evidence that supports the assertion that the death penalty, for all its might, does not succeed in its endeavor to deter crime. As I stated earlier, [the death penalty] cannot be looked at [and] does not exist in a vacuum. The question is whether or not it is more effective at deterring crime than life in prison without parole.

BRIAN STULL: I am so pleased and proud to be a part of this conference making the case to take down, and to do away with, the death penalty. A friend of mine from the Alabama ACLU put it aptly: *What we are trying to do with the death penalty and many other parts of the criminal punishment system is we are trying, as lawyers, to tear down the unjust system. But at the same time, we are fighting within that unjust system—battling for fairness for the people who are still stuck in before we get rid of the death penalty [and] who are facing death sentences, executions, and residing on death row.*

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38. *Id.* at 113; ABDORRAHMAN BOROUMAND CTR., *supra* note 12.

39. *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states (last visited Mar. 25, 2022).

40. *See id.*

41. *See id.*

So, I start with Tracy Chapman; yes, we need a new beginning.[42] My main goal is overall we need to get rid of the death penalty and so many aspects—if not in the entirety—of our criminal punishment system. My presentation today, however, is going to be about battling within that system for fairness.

First, I want to talk about promises that were made long ago within the system that we currently have. These are promises that we still have to fight for today. They often have become broken promises that relate to the whole broken criminal punishment system. I say criminal *punishment* system intentionally, instead of criminal justice system. These problems and broken promises are especially troubling with [regard to] the death penalty.

[We begin with] the first promise [of] a White guy, [Sir William Blackstone], in a powdered wig in England, back in pre-revolution times, talking about the right to [a] jury. It sounds pretty good: "[The right to a] jury is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the UNANIMOUS CONSENT of twelve of his neighbors and equals."[43]

[This understanding of the jury] was what was influencing the Framers of the United States Constitution when they adopted the Sixth Amendment—which provides rights during a criminal trial, including the right to an impartial jury—as part of the Bill of Rights. When the Framers came up with that right and put it in our Constitution, they were talking about the right that they understood from Blackstone, the preeminent scholar and jurist in England—whose law we were borrowing—that this is a right to a unanimous jury. So, these are some of the promises.

The United States Supreme Court has talked about this promise as well. They have talked about the jury and given it some of the highest praise. In *Flowers v. Mississippi*,[44] the Supreme Court stated: "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."[45] In *Flowers*, which was just a couple of years ago, the Court threw out the conviction and death sentence in Mississippi of Curtis Flowers, because the prosecutor was discriminating against Black jurors.[46] And that is just a side note. I am really talking about the promise of the jury right now, and how it plays out in Florida.

In 2020, the court also made clear something that advocates have been saying for many, many years and we have all known for many years. The

42. TRACY CHAPMAN, *New Beginning*, *on* NEW BEGINNING (Elektra 1995).
43. 3 WILLIAM BLACKSTONE, COMMENTARIES *218.
44. 139 S. Ct. 2228 (2019).
45. *Id.* at 2238.
46. *Id.* at 2252.

court threw out Louisiana and Oregon statutes that allowed non-unanimous jury verdicts. The court also recognized and made clear that these statutes were enacted to support White supremacy. And what do I mean by that? In the time of post-reconstruction, when the states who were wanting to join the Union realized they had to pass laws that allowed for some semblance of equal rights and equal treatment, these states recognized they were going to have to allow Black people to serve on juries. But they did not want the Black people on those juries to have a voice, so they came up with a non-unanimous jury. [In essence], they said, *it is okay, the majority of the jurors are going to be White anyway* (given the population numbers at that time); *so, we [will] let you on the jury, but you are not going to have a voice*. Last year, the Supreme Court finally threw out those statutes.

These are lofty promises about the right to a unanimous jury that even the United States Supreme Court has endorsed, but they are not consistently applied, and [as a result], they are leaving people in shallow graves. I will discuss two examples. The first begins with a question: Notwithstanding this history, notwithstanding Blackstone, notwithstanding the United States Supreme Court's recognition of the problems with non-unanimous jury verdicts, what two states have historically permitted death sentences based on non-unanimous juries? Florida is shamefully one of those states, and the other is Alabama. [Looking at a map from] 1862 underscores that this is a practice meant to uphold White supremacy.

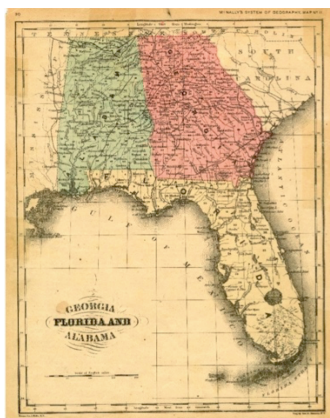

Figure 2: McNally's Map of Georgia, Florida, and Alabama, 1862.[47]

47. *McNally's Map of Georgia, Florida, and Alabama*, 1862, FLA. MEMORY, http://www.floridamemory.com/items/show/323074 (last visited Mar. 25, 2022).

For forty years, right out of the box, as soon as states were trying to refashion the death penalty [system], Florida was first. Florida started its system and used this system which allowed non-unanimous jury death sentences for forty years. Florida executed ninety-two people under this regime, almost all of which were for killing White people. That was going on for a very long time, until *Hurst v. Florida* in 2016, when the United States Supreme Court said a jury has to make all of the decisions that are necessary for a death sentence.[48] The Court sent the case back to the Florida Supreme Court, where many of us were arguing: because of Blackstone, because of our legal history, that means a unanimous jury.

The Florida Supreme Court agreed. In *Hurst v. State*, the court declared, *when we say jury, we mean unanimous jury*. *We are going to put an end to this*.[49] The legislature agreed as well—although, I wish they had abolished the death penalty—but they put that protection in.[50] So, are we putting an end to this, or are we not putting an end to this? The answer is *sort of*.

At the time of these rulings, there were still over 350 people on Florida's death row. Many of [them]—in fact, about 290 of [them]—had non-unanimous jury verdicts for their death sentence. [Consider] James Belcher, sixty-two-year-old Black man. Mr. Belcher is a father, former basketball standout, [and a] neighborhood coach. He was raised in tough Brooklyn projects. He was convicted of murder and sexual assault in Duval County for a crime that happened in 1996. When his case went to the jury—think about those juries that are deciding this; think about those Louisiana juries where they did [not] want everyone to have a voice—nine people said [Mr. Belcher] should be sentenced to death, but three said no, he should be spared.[51]

Then we have Steven Evans whose crime was three months later in 1996. A fifty-four-year-old Black man who has three children, a history of trauma as a child, and head injuries, [was] convicted of kidnapping and murder. He was sentenced to die [despite] a holdout juror who says, *I want him to have life*. But that juror is overridden by the majority who say he should have a death sentence. [Mr. Evans] is sentenced to death.

Which of these two men, then—Mr. Evans or Mr. Belcher—now gets relief, now that the Florida Supreme Court has said, *this is not allowed*? Which one? Is it the one whose crime occurred first, or the one whose crime occurred three months later?

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48. 136 S. Ct. 616, 624 (2016).
49. 202 So. 3d 40 (Fla. 2016).
50. *See* FLA. STAT. § 921.141(2) (2021).
51. Belcher v. State, 851 So. 2d 678 (Fla. 2003).

The answer is Mr. Belcher.[52] His crime came first—Mr. Evans' came second—but only Mr. Belcher is going to get the benefit of this new rule; [this is] because of retroactivity principles that the Florida Supreme Court decided to apply here. The Court said Mr. Belcher's case was not final until after June of 2002. This was a significant date because that is when the United States Supreme Court started talking about this jury right in death penalty cases,[53] and so the Florida Supreme Court should have been on notice of the problem by then. [Therefore, Mr. Belcher] gets relief. He is not sentenced to death anymore and he [is] going to have a new trial on whether he can be sentenced to death. Mr. Evans, however, whose crime was months later in 1996, gets no relief because his sentence became final before 2002.

Overall, [there are] 290 cases. Who gets first relief? A bunch [get relief], but a bunch do not. There are 157 whose cases became final after June 2002—they *do* get relief—but 133 do not because their cases came too early in the system.[54] Notwithstanding what Blackstone was telling us about this, or what we knew about this from the Sixth Amendment, these 133 cases came too early and do not get relief. This is the *height of arbitrariness* that the death penalty represents. I want to submit this as my "Exhibit A" against the death penalty.

Then, the problem with this also is—talking about battling injustice in the system—this has already gone to the Florida Supreme Court. It has already gone to the United States Supreme Court. This is not going to change. It is just going to remain as evidence that Florida's death penalty is irrevocably broken. It is racist and it is arbitrary.

Moving on to a more hopeful example called the problem with death qualification. In *Furman v. Georgia*, the Court said that the jurors in death penalty cases serve as the *conscience of the community*.[55] That makes sense. Jurors are saying, *what do we want for our community*?

The phrase *jury of peers* is another way that we have stated this promise, and that is related to the fair cross-section requirement that says when you [are] bringing in people for the jury, you can [not] just have all White

52. *See* Belcher v. State, 228 So. 3d 530 (Fla. 2017).

53. *See* Ring v. Arizona, 546 U.S. 584 (2002).

54. *See Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring (last visited Mar. 25, 2022); *Florida Death-Penalty Appeals Decided in Light of Hurst*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/stories/florida-death-penalty-appeals-decided-in-light-of-hurst (last updated Jan. 23, 2020).

55. 408 U.S. 238, 299 (1972) (Brennan, J., concurring).

people who are called for jury. You must have a diverse pool that reflects the community [in which] the case is being tried.

However, did you know if you oppose the death penalty, you could never serve on a capital jury? That is, when you take out all those people who oppose the death penalty, we say, *Those are not your peers*, *they cannot be on your jury*. This was challenged in *Lockhart v. McCree*[56] in 1986, where the United States Supreme Court heard—and rejected—that challenge.[57] The Court said it does not matter; these people who are against the death penalty are not a cognizable group, so their exclusion from jury panels does not pose a problem for the Sixth Amendment.

Since then, a lot of people have been doing a lot of studies about what impact death qualification has. There have been studies done in South Carolina,[58] Louisiana,[59] and [soon-to-be-released] studies in Florida, we are showing consistently that death qualification excludes Black jurors by a two to one margin over White jurors. [This means] forty percent of qualified Black jurors that show up, ready to serve, with no other conflict and no other for-cause challenge—forty percent—are excluded by death qualification. [By comparison], only twenty percent of similarly situated White jurors are excluded.

Is death qualification race neutral? I would submit, *no*. I would submit that the numbers speak for themselves. Moreover, for people who are proximate to the racism in our criminal punishment system—who have been victims of that racism—of course they are going to be skeptical of that system. Of course, they are going to say it is not fair. And the death penalty—the most egregious and most severe exercise of that power—is not proper for our government to undertake. Our government does not deserve to wield that power.[60] If you are Black, and that is your position about death penalty, that is an earned distrust,[61] and therefore, [death qualification] is not race neutral.

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56. 476 U.S. 162 (1986).

57. *Id.* at 165.

58. Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. UNIV. L. REV. 299, 333–34 (2017).

59. Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 IND. L.J. 113, 137 (2016).

60. *See* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 313 (2015) ("[T]he death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, do we deserve to kill?").

61. *See, e.g.*, Doug Dennis, *40 Percent of Black Americans Distrust the Criminal Justice System: Why I'm One of Them,* VOX (Dec. 21, 2016, 8:00 AM), http://www.vox.com/first-person/2016/12/21/13854666/criminal-justice-police-distrust.

Finally (and on a more hopeful note), although we lost in *Lockhart*, nevertheless, with this new data showing this disproportionate exclusion, advocates and lawyers are still hopeful we can win this battle to show that death qualification is wrong and can return just a little bit of fairness to the system.[62]

MELISSA MINSK DONOHO: I will share what I can with you this morning. I practice every day at the courthouse. I work in, basically, a public defender's office. There are two public defender offices in Florida: The elected public defender and then a conflict counsel. Whenever the public defender conflicts off the case, then conflict counsel gets the case, so we do the same thing. Currently in our office we have ten death penalty cases for trial and five *Hurst* re-sentencings, which are cases where people had non-unanimous death recommendations in the past and are back for new sentencings.

The interesting thing for me is that I do not feel optimistic as a practitioner, but when Mark Elliott spoke about his hope, I felt maybe some happiness. But as a practitioner, it does not feel that way. I feel like the courts have gone back twenty years. I feel like the Florida Supreme Court has continued to take rights away. Instead of being futuristic and progressive, we are going backwards. Maybe I will find some more hope after today, but I have been doing this since 1997 and [although] it felt like we were moving forward for a while, now it just feels like we are moving backwards.

I want to speak about what is going on locally, right here in Broward County. We recently had elections and got a new state attorney, and just so everybody knows, we have laws in place where the prosecutor has total discretion about when to seek the death penalty and against whom to seek the death penalty. It is a subjective process. The person who is the state attorney at the time gets to make that choice.

I was hopeful that we were getting a new progressive prosecutor and that does not seem to be the case. Since [Harold Pryor] became the prosecutor (Mike Satz was the prosecutor before) in the last six weeks, we have received four notices of new intents to seek death penalty in Broward County. That is just my office, not the public defender office; they probably have their own equal [number] of cases.

So where do we start [for progressive change]? I just battle it out in the courtroom and with individual prosecutors. If we cannot find a way to stop the beginning of the process, we are not changing the legislature right now to abolish it. That is, do we go prosecutor by prosecutor and vote in people who

62. *See* NDULUE, *supra* note 25, at 66–67; Cover, *supra* note 142, at 156.

do not want to seek [the death penalty] as often? That is something we all have to do, but as it stands right now, I am not optimistic about it.

Now, the new prosecutor has created what he calls a *Death Review Panel*, which is new, because [the prior prosecutor] Mr. Satz previously did not do that. [The Death Review Panel] gives us an opportunity to present mitigation on the front end—take our clients, investigate their backgrounds, and give the state attorney a reason to dismiss it or drop seeking the death penalty—and just move forward on a regular first-degree murder case. We have been doing that and, accordingly, have submitted about at least four memos requesting that the State Attorney not seek the death penalty. All of our requests have been denied.

We have not been granted one request to waive the death penalty on our current clients. That is disheartening as well, [especially] when we thought there was some local change and a fresh, new look at things. From a practitioner's perspective, we are putting all our [cards] on the table we have been showing our hand, in a way, for a possibility that our client[s] have a good review [of] why the prosecutor should not be seeking the death penalty against them. So far, we have not been very productive in that regard.

However, there are some tools we have, and maybe some new tools. There is a good note that the legislature has not gone back on unanimity. As my colleagues have talked about, *Hurst* said we need to have a unanimous jury and the legislature has kept it that way. The Florida Supreme Court has gone back on that and, frankly, at any point the legislature could change again and go back to non-unanimity. We, as practitioners, worry about this all the time.

I have had plenty of clients and I just would like to say that having been to death row and sitting in the local jails, on the phones with my clients, traveling around, meeting their families, and working hard to fight that fight every day—when you get to know a person, like I have gotten to know a lot of these clients—you realize they are not their worst day. The death penalty is certainly not the way we, as a society, should treat people.

JANE CROSS: There has been news about the [shooter] in the Marjory Stoneman Douglas [mass school shooting] case regarding whether the prosecutor is going to ask for the death penalty. Do you have any information on that case or know anything about it?

MELISSA MINSK DONOHO: Yes, they are seeking the death penalty on [Nikolas] Cruz for sure. The Defense has offered that he will accept life in prison without the possibility of parole, but the prosecutor's office will not offer that plea. Basically, he would change his plea from not guilty to

guilty and [on the condition that he is] sentenced to life. But the prosecutor's office will not do that. They are continuing to seek death against him.

Victims have rights, and the prosecutor's office takes very seriously the victims' request of how to proceed in a case. The families of the victims of the Cruz case have mixed feelings about it. There are some families that do not want them to seek death and there are some that do. [At this time], the prosecutor's office is continuing to seek it. Additionally, I think they feel that if you cannot seek the death penalty in the Cruz case, when can you seek it?

The Cruz case is the pinnacle of cases; if you let that go [without seeking death], it trickles down to everything else. In other words, you cannot let the worst of the worst cases, in their view, go, because then, what do you do with all the rest? There is always that backdrop of family and the victim's rights and the victim's say in the case. [On the other hand], I have had victims who did not want the death penalty and the State attorney still pursued it.

JANE CROSS: If you could see organizing to put pressure on the Broward State Attorney, what do you think would be the most effective tactic?

MELISSA MINSK DONOHO: I think that he is young, and he seems like a very nice guy and very, very reachable. People can sit down with him and talk to him. I was in a meeting a couple weeks ago about jail overcrowding, with the Chief Judge, Prosecutor, and Public Defender. We were talking about how to reduce jail overcrowding and at some point, I blurted out, *why are you filing a million death penalty cases*? Of course, he said, *well, it is not a million* and I said *okay, well you know I tend to exaggerate.* He looked at me across table and said, *it [is] the law*. I had to pick my jaw up off the floor. *It is not the law*. It is subjective. He has the choice to make that decision. In my opinion, he needs to be educated. He needs to be held accountable for his promises when he was campaigning as a progressive prosecutor.

Somebody could literally call him out on that. I have got the numbers. The Public Defender has the numbers. There is the newspaper; I am happy to talk to somebody, but we need people to get out there, make the case, put it in the paper, get his attention, talk to him, and call him out on what he is doing and why he is not holding true to his campaign promises.

We should not let people [who] win on progressive platforms [get away with], turn[ing] around and not follow[ing] through [with promises]. With that said, I do think people can sit down with him—he will give you the time of day, and he will sit down with you—so there are ways to do that for sure. And I hope people will.

JANE CROSS: Just one final question I wanted to ask Brian: In terms of the racial composition of juries, are they now predominantly White in death penalty cases (based on your research)?

BRIAN STULL: Our research is more about who is excluded. But if you exclude more people of color and Black people using death qualification, you are going to have less diverse juries. That is going to be the result. [Look at] Duval County, which has a pretty high percentage (thirty percent Black people on the jury rolls). When you start with a relatively small number, and then a large number for White jurors (above sixty percent), and you are excluding at different rates, you might not see it as much in the final jury. But the [political] right talks about the fair cross-section from which the jury is selected, and that cross section is basically being carved out of Black jurors and other jurors of color because they oppose the death penalty. It is because of trust and the distrust that is earned.

III. KEYNOTE ADDRESS

DR. LAURA FINLEY: Sister Helen Prejean is known around the world for her tireless work against the death penalty. She has been instrumental in sparking national dialogue on capital punishment and in shaping the Catholic Church's vigorous opposition to all executions. Born on April 21, 1939, in Baton Rouge, Louisiana, she joined the Sisters of Saint Joseph in 1957. After studies in the United States and Canada, she spent the following years teaching high school and serving as the religious education director at Saint Francis Cabrini Parish in New Orleans, as well as the formation director for her religious community.

In 1982, she moved into the Saint Thomas housing project in New Orleans in order to live and work with the poor. While there, Sister Helen began corresponding with Patrick Sonnier, who had been sentenced to death for the murder of two teenagers. Two years later, when Patrick was put to death in the electric chair, Sister Helen was there to witness his execution.[63]

In the following month, she became spiritual advisor to another death row inmate, Robert Lee Willie, who was to meet the same fate. After witnessing these executions, Sister Helen realized that this lethal ritual would remain unchallenged unless its secrecy was stripped away.

And so, she sat down and wrote a book, *Dead Man Walking: An Eyewitness Account of The Death Penalty in the United States*. *Dead Man*

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63. Ramona Anne Caponegro, *Sister Helen Prejean,* BRITANNICA, http://www.britannica.com/biography/Sister-Helen-Prejean (last visited Mar. 25, 2022).

Walking hit the shelves in 1993 when national support for the death penalty was over eighty percent, and in Sister Helen's native Louisiana, closer to ninety percent.[64] The book ignited a national debate on capital punishment and inspired an Academy Award–winning movie, a play, and an opera. Sister Helen also embarked on a speaking tour that continues to this day.

Sister Helen works with people of all faiths and those who follow no established faith, but her voice has had a special resonance with her fellow Catholics. Over the decades, Sister Helen has made personal approaches to two Popes, John Paul II and Pope Francis, urging them to establish the Catholic church's position as unequivocally opposed to capital punishment under any circumstances.

After Sister Helen's urging, under John Paul II, the catechism was revised to strengthen the Church's opposition to executions, although it allowed for a very few exceptions. Not long after meeting with Sister Helen in August of 2018, Pope Francis announced new language of the Catholic catechism which declares that the death penalty is inadmissible in all cases because it is an attack on inviolability and dignity of the person.[65]

Today, although capital punishment is still on the books in thirty states in the United States, it has fallen into disuse in most of those states. Prosecutors and juries alike are turning away from death sentences, with the death penalty becoming increasingly a geographical freak.

Sister Helen continues her work, dividing her time between educating the public, campaigning against the death penalty, counseling individual death row prisoners, and working with murder victims' family members.

Sister Helen's second book, *The Death of Innocents: An Eyewitness Account of Wrongful Executions*, was published in 2004, and her third book, *River of Fire: My Spiritual Journey*, in 2019.[66]

SISTER HELEN PREJEAN: Here is the thing: I was totally unprepared. It is like I got catapulted down a laundry chute. From being a nun that taught in school and led Bible study in a Catholic Parish—down this laundry chute (or down the rabbit hole, or whatever you want to call it)—here I am on death row in Louisiana with Patrick Sonnier, a man I have written a letter to.

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64. *See* Jessica Derr, *The Nun Is in Over Her Head: A Conversation with Sister Helen Prejean*, ARCADIA UNIV. (Oct. 25, 2018), http://www.arcadia.edu/blogs/because-arcadia/post/nun-over-her-head-conversation-sister-helen-prejean; PREJEAN, *supra* note 18.

65. Letter from the Off. of the Congregation for the Doctrine of the Faith to the Bishops, (Aug. 2, 2018), http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802b.pdf.

66. Caponegro, *supra* note 146.

And here I am again, a little over two years later in the execution chamber. This is in 1984. I had written him a letter in 1982 thinking I was only going to be writing letters. *Hey Sister, you want to be a pen pal with somebody on death row? Yeah, sure, I am an English major, I can write some nice letters*.

I did not know the guy was really going to be executed. When we started writing, we had not had an execution in Louisiana since 1961. There had been an unofficial, nationwide moratorium on the death penalty. It started in 1967, continued throughout the 1970s, and I had not even noticed that the Supreme Court brought the death penalty back in 1976. So here I am, writing this guy, he is writing back, and I say *yeah, I will come visit you,* and I start visiting him.

And then, right after midnight, April 5, 1984, I am in that execution chamber with this man who is going to be electrocuted to death. I am telling him, *Look at my face*. *Look at my face when they do this*. I will be the face of love. *I [will] be the face of Christ for you*. It is the dignity. He is being treated like disposable human waste: *You are so irredeemable; you are so evil; we can [not] even trust that we can put you in prison; we have to kill you for society's sake*.

I am there. When you are there and present in that situation—just in the moral exigency of it—you say, *Look at me, Look at my face*.

I came out of that execution chamber that night and I did not know how thoroughly changed I was. At first, you do not know; you cannot process all that is happening to you. Immediately in the parking lot, prison officials bring in a prison vehicle after the execution and deposit you at the gates. First thing I did was throw up.

I had never watched a protocol—cold, calculated, step-by-step protocol—where a live human being who had potential in him—who was better than the worst thing he had ever done in his life—was deliberately killed.

When I wrote *River of Fire*—which was about waking up to justice and becoming an activist, that the gospel of Jesus was going to have to be more than simply being charitable to people around me and praying that poor people will have a great reward one day in heaven.[67] I woke up to justice, which is what *River of Fire* is about.[68] In the Preface, I described this scene:

> They killed a man with fire one night.
> Strapped him in a wooden chair and pumped electricity through his body until he was dead.

67. SISTER HELEN PREJEAN, RIVER OF FIRE: MY SPIRITUAL JOURNEY (2019).
68. *Id.*

> His killing was a legal act.
> No religious leaders protested the killing that night.
> But I was there. I saw it with my own eyes.
> And what I saw set my soul on fire—a fire that burns in me still.[69]

No religious leaders protested the killing that night. We had an Archbishop, Philip M. Hannan, who supported the death penalty, so no other bishops in Louisiana could publicly protest it.

While Tim Robbins was working on the film, *Dead Man Walking*, he kept saying—and it was true—*The nun is in over her head*.[70] I found out while outside the prison gates that night, having witnessed the execution—that my life had been transformed. I stopped going to meetings that did not deal with urgent moral human rights issues, such as the deliberate killing of citizens by the government. That is what my life had to be about.

I did not know what I was going to do; I was completely overwhelmed. I did not know I was going to write a book. And I began doing what all of you do. I began moving into circles of people who were working on the issue. I began reading and I began learning. That led to my going out to the public, going into Dennis Kalob's sociology class at Loyola University, New Orleans. That is where I really learned to hone-in and learn how to talk to the public. While writing *Dead Man Walking*, at first, I focused only on the human rights of the person being executed and delayed for too long talking about the horror of the crime. But I was met with nothing but resistance when I focused solely on the offender. You have to remember, in the 1980s everybody *and their cat* was supporting the death penalty. They would say: *What about the victims? What about the victims? You do not care about the victims!*

When I wrote *Dead Man Walking*, I had an excellent editor at Random House. Thank you, Jason Epstein! Thank you, Jesus for giving me this good Jewish editor to work with a Catholic nun to write a book about the death penalty. When Jason looked at the first draft of *Dead Man Walking*, he said the same thing to me that the young college students at Loyola were saying: *Helen, nobody is going to read your book. You wait far too long before you talk about the crime. You [ha]ve got to talk about the crime and your own outrage at the crime in the first ten pages of this book, or everybody's going to say, well, she's a Catholic nun, she believes in Jesus, believes in forgiveness, and they [wi]ll expect every religious platitude is going to come out of your mouth in this book and they are not going to read it. Face the crime and your own outrage*.

69. *Id.* at xiii.
70. Derr, *supra* note 147.

Oh, what a crime it was. Patrick Sonnier and his brother Eddie, in cold blood, had shot a teenage couple in the back of their heads and raped the young girl. This young couple, David LeBlanc, who was seventeen, and Loretta Ann Bourque, who was eighteen, had gone to a homecoming football game and were not seen alive again. Earlier that night, David's mother had said to him, (because it was early November in Louisiana which can be chilly): *Here son, I got this new blue shirt for you, it is going to help keep you warm tonight*. And later his daddy said, *Yeah, but it could not keep him alive*.

The killing of two teenage kids who were just beginning to bud in their lives—with their bodies found in this sugar cane field, just lying there. That was the crime that this man—the man I am connected with on death row—that is what he and his brother had done.

My journey began. The journey in *Dead Man Walking* is the journey into the deep moral ambivalence that most of us feel about the death penalty.

The starting point with an un-awakened public cannot be to simply give them statistics. This is what I have learned over thirty-five years of crisscrossing this nation and talking to people: Most people have not thought about the death penalty. With the busy lives we have, who is thinking deeply about murderers on death row, and whether we ought to kill them? If anything, you know that the usual wisdom is: *they deserve it*. Instead, people think, *let us turn attention to at-risk kids, to education; let us deal with the other urgent issues of our day*.

The journey is going to have to take people deeply and in an imaginative way into the moral crux of this life and death issue. Facts are important but, believe me, you never would have heard of *Dead Man Walking* if I had not had that good editor, Jason Epstein, who taught me how to tell the story, and how to take people with you on your whole journey, and having to learn everything as you go. You have got to make the statistics real.

In the first draft of *Dead Man Walking*, I put all the facts in the footnotes about racism and about how only poor people are on death row, and why rich people are never sentenced to death. And Jason taught me that the secret of good writing is that people are going to read for the story. When people start reading DMW, they wonder if the person is going to be executed.

And I tried to weave facts into the storytelling so that by the end of the book, most people will know the most important truths about how the death penalty operates. And scholars will dig into the footnotes. But you have got to weave in fact with story, as every good journalist knows.

I had no idea about the potential power of a book. I am a Louisiana Cajun. We talk to each other, like I am talking to you now. There is real power in talking to each other: It is live, so you can adjust as you go, you can feel the crowd. And you do not notice, but I really have a feel for you, even

through this cyber space stuff, because I know who you are. I know why you have gathered, and I know what else you are doing on this day. I have got a feel for live audiences; Talking with people through live communication is the best. By comparison, I always thought books were kind of passive.

But oh man, I am going to tell you: call it the power of the universe or call it the power of God, but something took *Dead Man Walking* and propelled it into spaces I never thought it would go and it was Jason who helped me chart the journey for the ordinary reader.[71] To take them from the outrage of the crime and the suffering of the victims' families into the horror of the execution chamber.

Plus, I was making a huge mistake by initially staying away from the victims' families, and it was Jason who spotted this. I did not know what to do with the families. They lost their kids and I was the spiritual advisor to the two men who killed them, and I figured, I am the last person in the world they want to see. I did not want to get into a big ole argument with them about the death penalty. I have never done anything like this before and I am staying away. And Jason looked down at that first draft, and he said, *Helen, you [a]re letting yourself off too easy by simply saying you had never done this before. It was cowardice, wasn't it? You were scared, were [not] you?*

Yeah.

When you write your book, do n[o]t just take people with you on the peaks of the waves where you do everything with perfection. Take them in the troughs where you make mistakes.

It is probably one of the biggest mistakes of my life that I was avoiding talking about the murders and the families of those two precious kids. And then, at the pardon board, when I did meet the families just days before the scheduled execution, it was the worst possible time to meet them. Things could not have been more polarized.

Is Patrick Sonnier going to live or die? You sign the blooming book when you go into a pardon board hearing in Louisiana. Maybe it is the same here in Florida. *Are you for life, you want him to live? Or you want him to die?* It is a life-or-death thing, and you sign a book stating which side you are on. Well, all the signatures are on the side of, *Yeah, we want to see him executed.* And that is when I met the victims' families.

The Bourque family was there; their daughter had been killed. They were furious with me. They were the ones who got up and said, *Yeah, we want the execution to proceed.* Mr. Bourque, the father, had been to the press saying, *I want to see the person who killed my child, [die].*

71. PREJEAN, *supra* note 18.

Who does not understand that? We all can understand the rage after you have lost your child to a senseless and brutal murder. Ask somebody, *What would you like to see happen to the person who killed your child?* Of course, they are going to say what Mr. Bourque said, unless they are some kind of saint, and they have a reservoir in their soul where they have already been to some deep places and know that is not going to bring them peace. But vengeance is the starting place for most victims' families. I get it.

I have got to say though, in the African American community, often vengeance is *not* the starting point. First of all, they know not [to] expect justice from the government, especially from district attorneys. I have to make that little addendum right there. But most people are like Mr. Bourque.

So, I stayed away. *And when does the nun show up? Oh, to save the poor murderer's life to hold his hand but she was [not] there for us*.

But human beings can always surprise us. That is what David's father, Lloyd, did. I met David while we were walking outside while the pardon board was voting. *Sister, where you been? All this time I had nobody to talk to. My wife and I would even go to different Catholic churches on Sunday hoping some priest~~s~~ would say the death penalty is wrong. In my gut, I know it is wrong, but I have not had anybody to talk to. Where you been? You [ha]ve just been with those two brothers*.

I realized I made a terrible mistake. Eventually David and I would go pray together in this little chapel. David is really the one who taught me the journey that is possible in a human heart, where you start with this anger and outrage and all you want to do is kill the person who killed your loved one, then you can never move on. And to move to a place where you realize that if you keep that anger all the time, you will lose who you are. And that is what was happening with Lloyd. He was so angry all the time that he was losing who he truly was. He said, *I [ha]ve always been a kind person who loved to help people, yet I am snapping at my wife, I [a]m making her cry, I [a]m angry all the time.* Then at one point he put up his hand: *STOP*, and said, *nuh-uh, they killed my boy, but I am not going to let them kill me*.

David then made his way on the road to forgiveness—*forgive*—which means "to give before"—to not let what happened to you take over your soul, so that now you are an angry, vengeful creature yourself and all you can do is feed on that and thus lose your life. It is the great wisdom in all the spiritual traditions: Buddhist, Christian, and I do not know the Quran as well, but I know this—every chapter of the Quran, with the exception of chapter one, which is introductory, begins with the mercy of God. The nature of mercy is to know: *I realize this evil has happened to me, but there is more to life than seeking endless retaliation.* To have a depth of soul that can take [in] that evil

and not be overcome by it. Lloyd LeBlanc taught me the meaning of *forgiveness*.

Dead Man Walking is about a journey.[72] It is for people who have not thought about the death penalty. When I give public talks, many people who are for the death penalty, [show up]. [People who] read *Dead Man Walking*, at the start, are for the death penalty.[73] All they know is what they have been told. They know the political rhetoric of why we have to do this, how these people deserve to die, the demonizing of people that have done murders, and make them into this evil irredeemable person. You have to absolutize evil in order to have ordinary citizens say *it is okay, kill them*. We do it with terrorists. Consider everybody sitting in Guantanamo right now: it is because of that demonizing effect, if we call you a terrorist against our nation, there is no good in you and we have to rid ourselves from you in order to be safe.

That was the political rhetoric; that was what people were hearing, especially after the death penalty was reinstated in 1970's. In the eighties, we were executing people left and right in Louisiana and I know Florida has killed a lot of people because my friend Mike Radelet was very involved with the people on death row. He went through last visits with fifty inmates on the nights before their execution before moving from the University of Florida to the University of Colorado in 2001. He is a great sociologist and a great writer. You attorneys want him if you ever have a death penalty trial to just talk to the jury about this whole pattern of how this thing works *or does not work*. And to say that you are going to go after the worst of the worst is an impossible criterion which, from the beginning, has never been able to have clarity about what we mean by "the worst of the worst." The Supreme Court, in *Gregg*, said we are going to seek death for only "the worst of the worst".[74] It was a cruel joke.

I mean, you do [not] go for the death penalty for *ordinary* murders; not your *garden variety* murders; only *the worst of the worst*. If somebody kills my mother—*oh, but it did [not] happen during a felony, it did [not] have these aggravating circumstances*. Whenever a unique, irreplaceable human being has been ripped from the universe, and is irreplaceable, that is always the worst of the worst. *Oh, someone killed my mother, but the murderer was not the worst of the worst*. What?

Just like on our poor suffering planet right now, every twenty minutes, a new species is lost that can never be replaced. It is the worst of the worst when something—or someone—is irreplaceable.

72. *Id.*
73. *Id.*
74. Gregg v. Georgia, 428 U.S. 153, 182 (1976).

And then, the other thing that I have come to realize more clearly after seeing the executions of thirteen people by Donald Trump and former Attorney General William Barr in their last six months in office, is how completely arbitrary and capricious the death penalty can be.[75] The faults in *Gregg* are the extremely vague criterion—death only for the *worst of the worst*—coupled with complete discretionary power of the prosecutors to seek death or not and of government officials to decide who on death row will be killed.[76] I am sure you can point out counties in Florida where you have prosecutors that cut notches on their belts because they are determined to go for the death penalty from square one in a trial.

Prosecutors never *need* to seek death. And the fact is, if you do not have a prosecutor seeking death, you will not have the death penalty. And that is what smart lawyers, like so many of you, are figuring out: do not let it come to trial. Get to district attorney, go duck hunting with that district attorney as the late Georgia Defender Millard Farmer used to do. Have a relationship with the client and find mitigation in his or her life so that when the whole story is told to the jury, they can see there is more to this person than this one single act. It is a great fallacy when we try to make the identification of the essence of a person in one act.

One time, one of the wardens at the Louisiana State Prison, where I have been going for a number of years, said to me *Sister Helen, you know which guys make our best trustees, like what crime they come in here for?* I said no. He said, *Murder. Most people in this prison for murder did not know when they got up in the morning that they were going to murder somebody. Here they are in a bar, they get in a fight, they are mad, they are drinking, they got a gun—BANG! They murder somebody and here they are. And then, in the discipline of the prison—as imperfect as it is—over time, they learn to read (many of them), they reflect, and they become good guys. We can trust them to be trustees; they do not need a guard with them.*

All human beings have the potential to grow and change for the better. From the point of view of faith: that is a divine spark in us. From the point of view of human rights, that is the inalienable right to life that everyone has, simply because we are human beings.

It took 1,500 years of dialogue within the Catholic Church to align its teaching on the death penalty with the principles of the Universal Declaration of Human Rights. The Declaration in Article 3 states that everyone, simply

75. *See* Michael Tarm & Michael Kunzelman, *Trump Administration Carries out 13th and Final Execution*, ASSOC. PRESS, http://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50, (Jan. 15, 2021).

76. *But see Gregg*, 428 U.S. at 189.

by virtue of being a person, has an inalienable right to life—*inalienable*—which means life cannot be alienated or taken away.[77] Governments, therefore, have no authority to bestow these rights on people based for good behavior, nor take those rights from people for bad behavior.

And so, within my Catholic Church, there has been a lot of dialogue. How does dialogue happen? Just like here, just like in our society. There is a great Biblical psalm, *Truth Springs Up from the Ground*—as societies evolve, people evolve in consciousness and conscious. Look at the rapid evolution we have had in this society over the space of twenty-something years to recognize that gay and transgender people have human rights. How did that happen? It is because ordinary people relate to each other and share with each other and learn from other.

The *evolving standards of decency that mark the progress of a mature society*—we are always going to be on our way, and that is what happened with the Catholic Church. And it was not just because of the action of the Popes; it is because consciousness builds in a society through dialogue. Truth springs from the ground of the people.

The truth had been rising for a number of years. A big worldwide influence has been the Universal Declaration of Human Rights, enacted in 1948.[78] Forty years ago, there was a handful of countries that did not have the death penalty. Today, roughly 108 to 195 nations in the world do not have the death penalty.

What happens? So, with the Catholic Church, they kept holding onto the traditional teaching that was in the catechism, which acknowledged the state's right to take life. Once you have that as a principle—that governments have that right to take the lives of their own citizens—then you can leave it up to them to set the criteria, the procedures, and set up the rules for the legal system.

We can never give governments that right. That is finally the point that was reached in August 2018 when Pope Francis—after all these dialogues, always happening—reached the point of saying, *no matter how terrible or grave the crime, we can never give over to governments the right to execute their citizens*. It is principle. And for the first time, Catholic teaching on the death penalty coincided with the Universal Declaration of Human Rights.

Many of you are defense lawyers and people in the legal community doing your best to save lives. You are the M*A*S*H unit out there, where it

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77. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

78. *Id.* at 2.

really makes a difference in a case of whether a human being is going to live or die.

Over the years I have learned a few things about the art of persuasion. When I am communicating with people in the system like district attorney, I try to appeal to the angels of their better nature and have an honest conversation with them about why they wish to go for the death penalty. Once, in Pueblo, Colorado, two priests had been killed by a mentally ill person, and the whole community wrote and called that district attorney urging him not to seek the death penalty. Their public action as a community persuaded the district attorney to not seek the death penalty. It was persuasive. We persuade others by writing letters to the editor and by getting the stories out there. Any defense lawyer knows that when attorneys stand before a jury, the one who tells the whole story wins the case.

That defense lawyer, standing there with her or his hand on the shoulder of the person who is being considered disposable human waste, educates the jury about his life, and shows there is more to him than this horrible act that he has done—acknowledging the horror of what he has done, but showing there is more to this human being.

And then you have the attorneys like David Wymore in Colorado who, in capital cases, really gets in there with jurors in the voir dire and from the very beginning, tells them about a juror's right not to give in to pressure to return a death [penalty] verdict. Jurors do not even have to [explain] why they are voting for mercy. Each juror has the right—even the duty—to vote his or her conscience and to resist the pressure from other jurors to vote for death. In one of my books, I tell the story of an anguished juror who voted for the death of Robert Sawyer, executed in Louisiana in 1993.[79] In the jury deliberations, he was the only one holding out for life. But the other jurors kept saying, *look, we cannot go home until we get this unanimous decision. You are standing in the way*. He gave in to the pressure and voted for death. Then, the night Sawyer was executed, that juror, ex-juror then, was on the phone with the defense lawyer; he is drunk, and he is crying, saying, *I knew what I should have done. I gave in to the pressure and I voted for death, and now they are killing this man*.

A lot of times the jurors simply do not know how and why the death penalty system is broken. They do not know why we have now 185 people who were wrongfully convicted and sent to death row and later exonerated, and that number is regularly growing. You have already heard from the exonerees at this conference. Listen to their stories. Because as Louisiana Attorney Denny LeBoeuf, a really wonderful criminal defense attorney and

79. PREJEAN, *supra* note 18.

good friend of mine says, *The most vulnerable one walking into the courtroom for a death penalty trial is the defendant who is actually innocent, because they know they are innocent, and they say*, *as soon as they hear my story, you know, I am not even going to be convicted, much less get sentenced to death*. And what they do not know is that politically driven prosecutors are going to present a counter-narrative and make sure the defendant's narrative never gets told to the jury.

The prosecutors are in possession of the evidence. They have the rape kit. They can destroy it or not. They can say that it just disappeared along with all the rest of the forensic evidence. They have the original police report. And in over ninety percent of cases of those 185 wrongfully convicted people, it was because of prosecutorial misconduct—and prosecutors barely get a slap on the wrist for it. There is hardly any accountability for that, nor is there any guarantee that exonerated people who finally get out are going to be given any remuneration from the state. It changes from state to state and often they are thwarted in that effort.

It is really important when you write a book that you do not come off as the expert where people can resist and reject you, *oh yeah, tell me more, yeah, you are the expert, do you not think those . . . ought to all be killed*? The readers can come along with you much more easily when the readers can learn right along with you.

They have got to learn, first of all, about the deep racism in the system. There is a direct line between slavery, lynching, mass incarceration, and the death penalty. After the killing of George Floyd, our eyes began to open to systemic racism in law enforcement. And now in our nation we are deepening our understanding of how the legacy of slavery affects every institution in the country.

Most people have just a superficial understanding: *Look, these people did really terrible crimes and they deserve to die*. Simple justice: they kill, they die. There is a total lack of reflection, and so what we have to do is take them deeper. And just say, *well look on death row: it is roughly fifty percent White, fifty percent Black; it looks fair, doesn't it?* And then we have got to show how the deep racism is in the system. Overwhelmingly—you look at the over 1,500 people in this country, who have been gassed, shot, electrocuted, hanged, or lethally injected since 1977—eight out of every ten of them were put to death because they killed a White person.

In order to have the death penalty, in order to zero in on what many prosecutors say are the *worst of the worst*, the murder has to have happened to someone who has status in the community. Roughly, that is whether the person is White or not. That is what the track record shows, overwhelmingly, when you kill a White person, prosecutors are more likely to seek death. When

people of color are murdered—I witnessed this in New Orleans—it is hardly a blip on the screen. Often the murders were not even investigated by the police, or by the district attorney. *It is only a Black life*.

Long before our consciousness of Black Lives Matter, it was just the opposite when it comes to picking what is the worst of the worst murder. *Did you kill a White person or not*? People do not have a clue about this. How could they? The art of entering dialogue with the public is to get into these things with them. *Did you know? I understand that you did not because I did not know*. When you can say, *look, I only recently learned about this too, I am still learning about this*, you can take people with you. Then you can have real dialogue.

Another thing jurors and the larger public need to understand, and most do not have a clue about—I learned this from Patrick Sonnier—is how crucial the quality of defense is at trial. The Constitution lays out all your rights when you go into trial for your life, but that is just a document. All the words are printed in a document, and the one that makes that document come alive for you is that person by your side, the defense attorney.

In *The Death of Innocents*, I wrote about two men who were executed, who likely were innocent.[80] One was Dobie Gillis Williams, a Black man from the little town of Many, Louisiana. A White woman was killed in her bathroom—her husband claimed that her last words were *a Black man came through the bathroom window and killed me*. The conviction was based only on the word of the husband; there was no forensic evidence linking Dobie; and Dobie looks out and sees an all–White jury that will determine his fate. The defense attorney was cowed—overwhelmed—and made no objection to the seating of the jury. When somebody with high prominence in the community has been killed, the defense attorney has to deal with a whole community that, by and large, wants to see the death penalty. You are no Clarence Darrow; you are just a regular human being doing your best. You do not get invited to the cocktail parties in town when you are defending *that scum*.

As a defense lawyer, if you do not raise a formal objection at trial about that all-White jury being seated, the appellate court cannot even consider it. It is not in the trial transcript. There was not a formal objection. That means it has already been decided that those twelve people are going to be the best we can do for you, even if you do not have a chance. Poor people have to take any lawyer they are given, and you know this is true in Florida. There are very few funds for independent forensic testing, or even for DNA tests.

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80. SISTER HELEN PREJEAN, THE DEATH OF INNOCENTS: ANY EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS (Canterbury Press 2005).

That is why you never find a rich person on death row; it is not that rich people do not do terrible crimes, but they are not going to get an overwhelmed attorney to [represent] them from the beginning. With a rich person, the district attorney is going to think fifty times before he or she decides takes on that defendant and go for the death penalty. They know they are going to get a hundred pretrial motions; they know they are going to be fought every inch of the way and they do not want the public to see them lose. They are going to offer a plea bargain in a flash.

But a poor person? It is the public defender by his or her side that makes all the difference. That is why I love defense lawyers. Any chance I get to talk with them, I want to talk with them because they are the ones who stand in the breach. They go through so much. What is the latest thing I heard? I think maybe here in Florida where personal injury law firms are trying to draw off young people out of law school from criminal defense and suck them into being an injury lawyer where starting pay is $70,000. Law school graduates can make more money and have more job security by avoiding defending poor people. There is money in it. There is job security in it. And to go into public defense? Public defenders are heroes. I love them. For you public defenders sitting out there, I do not know how much love you have ever gotten from a nun, but you have got this nun's love for what you do. Of course, you do not need my love; you do what you do out of principle because you are who you are. Not for the money.

Where are we with the death penalty now in this country? We are shutting it down. It cannot happen too soon. On the other hand, on the federal level, after a seventeen-year hiatus, look at the horror stories that came out with the thirteen Trump/Barr executions in 2020–2021.[81] They first announced they were going to kill these people, and then they set out and methodically they did it. Why did they do it? Because of that discretionary power that is given to the prosecutors and to the Attorney General to kill or not.

Because it is up to them: if you do not pursue death, a person lives. Look at the vagaries of this, the built-in weakness to leave it up to human beings to decide death or not. All of the Trump executions were tragic, but none more so than the killing of Lisa Montgomery, a mentally ill woman who experienced nothing but horrendous abuse while growing up. I am close to some of the lawyers and investigators who defended her, and they are still in grief and mourning about what happened to her.

Her date of execution had been in December of 2020. It got pushed back to January. And when they told her the later date of the execution, she

81. Tarm & Kunzelman, *supra* note 158.

kind of looked away for a moment and just said, *eight days*. She would die just eight days before President-elect Biden would come into office and undoubtedly allow her to live. But Trump was President with Barr doing his work for him, and that meant she was going to die. And all thirteen died before they left office—no, they did not just die, they were killed.

And we, as a nation *are* waking up. The testimony of the death row exonerees is helping us a lot. The education about racism is helping us a lot. Look at Virginia. I am about to go there for the celebration of their abolition of the death penalty. They are going to honor that little energizer bunny, Virginians for Alternatives to the Death Penalty, who kept standing up and getting plowed over during thirty years of executions, but who stayed at it. Look at the transformative effects of what went on in Virginia—and is going on in Florida. And I want to just say this about hope: when we are acting, when we are involved in helping change happen, hope flows through us. But if we stand on the side, passively watching, we just keep getting overwhelmed with news pouring over us, which can paralyze us. When we reach out to take hold of a rope with even the smallest action, then hope becomes an active verb in us.

In Virginia, George Floyd's death, Black Lives Matter, and the moving of Confederate monuments into the basements of museums changed consciousness about race. Virginia, the largest and longest-lasting slave state, carried out more executions than any state in the history of our nation, bolstered most recently by an unspeakably terrible Fourth Circuit that upheld whatever prosecutors wanted. I was there for the killing of Joseph O'Dell in 1997. All he was asking for was a DNA test on the rape kit that had never been tested. He had Barry Scheck willing to do it for him for free. Virginia refused. They executed him, and then they destroyed the rape kit. O'Dell did not have a chance.

But what happened in Virginia? One of the things we see happening is that district attorney's around the country—like Larry Krasner in Philadelphia—are beginning to speak publicly about how the death penalty system is broken. And no small issue is its cost. We cannot separate moral issues from purely economic ones. How we spend our tax money *is* a deeply moral issue—like when we spend millions to kill one person when half the homicides in America are never solved. Look at what we could be doing with these resources. Look at education. When people are educated, they are more inclined to take mainstream jobs, and they do not commit crimes. More and more conservatives are speaking out about the financial waste of the death penalty.

The waking up that went on in Virginia is sowing the seeds of waking up that we can see here in Florida. And that is why I want to be with you today

and have a chance to talk to you. I *so* believe in what you are doing in Florida. And I do believe that one of these days, hopefully soon, the death penalty is going to end in Florida. Thank you for the privilege of being with you today.

DR. LAURA FINLEY: [question from the Zoom chat]: Are there some blind spots you see in death penalty abolitionist work right now?

SISTER HELEN PREJEAN: It is very hard for me, as someone who has so many blind spots of my own, to talk about other people's blind spots. When abolitionists talk with each other, they can help each other figure it out and where our blind spots are. We are getting there. Abolitionists in the United States have been learning from each other and tweaking the message for many years, and there are many unquestionable signs that we are doing better and better at getting the message through to the public.

DR. LAURA FINLEY: I have a couple other questions and comments that I want to share with you. From Celeste Fitzgerald, who I know you been colleagues and friends with for any years. She wanted you to know that we have new strategic plan for *Floridians for Alternatives to the Death Penalty* here in Florida. It is a new day here in this state. That includes a new bill to end the death penalty for folks with serious mental illness in 2023. We will be talking about that here at the conference later today.

SISTER HELEN PREJEAN: All the incremental steps toward life are important. Who knows what that door is going to open up as you get into the discussion with people about that! That is great.

DR. LAURA FINLEY: [question from the Zoom chat] Do you think *Dead Man Walking* can be used in law school classes?

SISTER HELEN PREJEAN: Yes. It is a readable book and students will find it to be a refreshing break from what they usually are assigned in their classes. The stories are gripping, and students can see how the courts work in practice, not just in theory.

DR. LAURA FINLEY: [question from the Zoom chat] How do we teach forgiveness to those who have been wrongfully convicted or accused?

SISTER HELEN PREJEAN: We cannot teach them forgiveness. That question is totally the wrong way to put it; *we* do not teach forgiveness. What we can do for them is stand by their side in their humanness and all they

have been through and help them to find resources in the community so they can love again; they can be agents in their own life again; and life can flow through them again because look at what they are up against. Just look at what they have been up against. Forgiveness can only come when they are ready for it, and we cannot tell them when they are ready.

The exonerees have many, many things they need to work through. Juan Roberto Melendez-Colon in Florida said when he got off of death row, his sister offered him any room in her house, and he chose a little bitty room up near the attic. He realized he chose a room the size of a cell because he could not handle too much space. Think of all the things he had to deal with. For seventeen years, eight months, and one day on death row, he had every decision made for him—he never even touched a doorknob—so what we can give them are resources they need to tap into their greatness and their humanness again. But it is not ours to say they need to forgive. No, we can never do that.

DR. LAURA FINLEY: [question from the Zoom chat] Do private prisons hold more death row inmates than government prisons? I know the answer to that is, but I think the question more broadly was, is there a profit motive on the death penalty, i.e., somebody financially gaining from that?

SISTER HELEN PREJEAN: There are no death-sentenced prisoners being held in private prisons in the United States However, we definitely have a problem with other prisoners being housed by profit-minded companies. The people who profit from the death penalty are those who argue that it is an effective weapon for fighting crime, or who argue that it actually renders help to families of the victims.

DR. LAURA FINLEY: [question from the Zoom chat] We are outliers from the rest of the globe in terms of having a death penalty. Can you add a little bit more about that international perspective?

SISTER HELEN PREJEAN: Sandra Day O'Connor was the first one on the Supreme Court that actually began to talk about international human rights. On the other hand, we had justices like Antonin Scalia, who was fond of saying things like *we do not get our wisdom from Europeans, they are not even Christian; they follow Freud more than they follow Jesus*. *We do not need to look to international rights; we have got our own*.[82]

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82. *See also* Justice Anton Scalia, Panelist, Politics and the Death Penalty at the University of Chicago & Pew Research Center Conference: A Call for Reckoning: Religion

IV. RACIAL ISSUES PANEL

NGOZI NDULUE: We are talking about race and the death penalty, and the Death Penalty Information Center , in September 2020, issued a report called, *Enduring Injustice*: *The Persistence of Racial Discrimination in the U.S. Death Penalty*.[83] My remarks are going to be shaped around the individual sections of that report, which are, first of all, talking about the racial history of the death penalty and exploring the role that race continues to play in the death penalty. When we are talking historically, it is not just so we know what was in the distant past. In fact, these issues are ever-present as Sister Helen touched on. Rather, it is thinking about the big picture: about connecting the racial bias in the death penalty to some of the issues that have been getting a lot more attention in recent time.

At the Death Penalty Information Center, our job is to provide information, analysis, and context to what is going on with the death penalty. Even before my time, we knew at DPIC that there was a lot of information about racial bias in the death penalty. It is one of the things that is pretty universally acknowledged, particularly when we think about the race of the victim and how that affects whether you get the death penalty or not. But we thought that it was important to think about this in the context of what we say that we are doing with the death penalty and what we have done throughout history. We started at the very beginning, and if we do that—we know that race matters from the very beginning—if we think about early United States history, there are different capital crimes for White people and Black people. A lot of times we focus on the deep South, which we definitely see some patterns there, but it was not limited to the Deep South, even in the colonial times, nor the colonies, where we were seeing disproportionate use of capital punishment against Black defendants.

The Colonies of the Deep South were more likely to have very specific and specified differential crimes that would result in capital punishment. But you still had the ways that the death penalty was being used in practice, being affected by race, even in the North. There is also this idea of using executions to send a message, so you would have more gruesome and torturous executions of Black defendants. Also, this idea of using the death penalty for social control to ensure that there were not going to be rebellions, to seeing crimes that were being committed by enslaved people against their masters as kind of

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and the Death Penalty (Jan. 25, 2002), (transcript available at http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/).

83. NDULUE, *supra* note 25, at 1.

a *petite treason* [as] they called it. So, there is this idea that there was something about disloyalty and upsetting the social order.

Although I will be talking about Black history and the effect of the death penalty on Black people, we also know that there is often a disproportionate effect on all groups considered [as] *other*. When we think about Native American sovereignty, there is a long history of the death penalty playing a role in pushing back attempts at Native Americans to keep their sovereignty and helping the United States in its quest on genocide and pushing people out of their lands.

The largest mass execution in United States history in 1862 was after the United States-Dakota war. Thirty-eight men were executed in a mass hanging on the day after Christmas, 1862. It is interesting too, because this is about crimes that were committed in the course of the war. But they were supposed to be limited to people who had committed crimes against civilians. Also interesting, President Lincoln was involved in granting clemency to a certain number of the people—there over three hundred who originally could have been executed—whittling it down to thirty-eight. But there were also political concerns about the clemency process, which we have seen throughout history and we continue to see to this day. I do not want to ignore the importance of the death penalty used to challenge and eat away at Native American sovereignty, we see that continuing to this day.

We also are going to be talking a lot about the connection between the death penalty and vigilante violence and lynching, and we see that as well in the Southwest, specifically thinking about Mexican Americans or people of Mexican descent, in the Southwest as well.

When we are thinking about the death penalty in context, we need to think about that connection between legal executions, lynchings, and mob violence. Often in popular telling of the story of lynchings, it is this idea of a disorganized mob that gets together, is very angry, and comes and commits a lynching. But there was often official sanction—either explicit or implicit—people turning the other way. People, for example, leaving the seventy-year-old lone sheriff's deputy at the jail for when they were pretty sure the mob was going to come.

This is Ed Johnson's [lynching] case in Tennessee, where there was this kind of wink-wink, nudge-nudge about, *oh, the mob overpowered law enforcement here and got the person out of jail, despite all the best efforts*. We have these connections between lynching's and legal executions, where [lynchings] were seen as alternatives. In some places where there was a lynch mob and the local officials thought, *this is not great for public relations, this makes us look kind of disorganized and not civilized*, [the officials] promised

folks who would otherwise have been the lynch mob that they will get a quick and speedy legal execution.

There are also places where officials were considering abolishing the death penalty, and in that consideration, there was this the idea of, *if we abolish it, we are going to have more lynchings again; lynchings are not great for public appearances, so we really need this death penalty for that reason.* We will see how those ideas persisted into modern day.

The Equal Justice Initiative has done a great job of documenting these racial terror lynchings. If you have not been to the Equal Justice Initiative Legacy Museum and Memorial in Alabama, please visit, because it really tells us the story that has for so long been untold or told without the proper context and without connecting it to the legacy of lynching today. We see this [legacy] in the post-Civil War Era with those laws that were supposed to provide different capital crimes depending on race. They were not permissible under the Fourteenth Amendment. These newly passed [civil rights] amendments were supposed to give, at least, surface-level equality. However, this was a time where extralegal violence was on the rise as well as public executions and capital trials that really were *show* trials. Theoretically, they were applying the same laws, but we knew they were not applying the same laws to everybody.

If we think about the civil rights era and the work that the NAACP Legal Defense Fund did to bring civil rights issues to the surface, one of the things that was important was the treatment of Black men in the South who were being accused of rape of White women or some type of sexual impropriety against White women. [Such accusations] were often a death sentence, either literally in the courts, or by lynching. For a Florida example, the story of the Groveland Four is instructive. *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* gives a great detailed history of the case.[84] It discusses how the official death penalty and mob violence interacted, and how law enforcement officials—the people you were supposed to be able to look to for protection—were at some points supposedly quelling the violent mobs, while at other points, implicitly, allowing mob violence. [Worse], at some points, a particular sheriff would actually engage in that violence.

These multiple roles played by law enforcement were sometimes the only hope for some type of protection and safety, not actually being that for the Black community at that time, until today. It is a great illustration. It is also an illustration of how the politics of the death penalty also had something to do with the economics. There were these orange or citrus groves and there

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84. KING, *supra* note 43.

was a need for cheap labor. Sister Helen brought up the connection between the criminal legal system and economic systems where, when the Black community started trying to organize and trying to escape that role, there was also the sense of the need to bring people down a peg to make it clear what is going on. A false accusation was the precipitating factor that allowed for making an example out of the Groveland Four and sending a message to the wider community. We can think about Black Wall Street and the Tulsa Massacre and other examples.

But we also see the increasing role of the NAACP LDF, which started saying, *we are doing these civil rights cases, we are focusing on these innocent people with very flimsy evidence that are facing executions*, but then realized there needed to be a broader challenge to the entire system of the death penalty. In doing so, they really wanted to slow down the system of executions and death sentences by getting people lawyers and getting them representation. Eventually, [the NAACP LDF] ended up bringing cases to the United States Supreme Court.

Before I get into the modern era, I want to talk about race effects as far as crimes [resulting] in executions. Black men accused of rape of White women was a clear prelude to a death sentence or lynching. Virginia was a great example, and this is not dissimilar to trends throughout the country. For example, there was a study of the people between 1930–1969, who were executed for rape, which found Black men accounted for more than eighty percent of the executions for murder. And, not even talking about within a certain time period—whether in the modern era or historical part of the death penalty—there is no record of any White man ever being executed for the rape of a Black woman, and when we are talking about this, we are talking about rape that does not also include murder. Today, you cannot get the death penalty for a non-murder crime generally, but [historically], while it was still possible, there was never a case of a White man getting executed for the rape of a Black woman. We know the opposite was very true where we see the combination of a Black man and an accusation by a White woman was often a sure sign that there [would] be an execution or lynching.

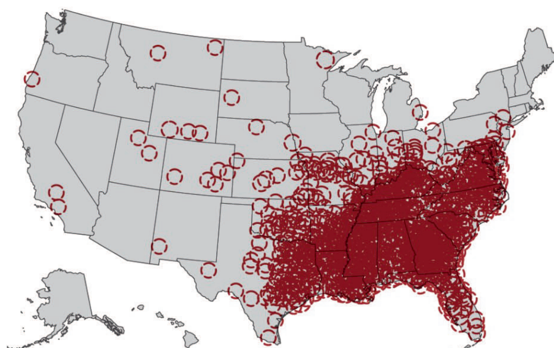
Putting that specific case aside, this was one of the starkest racial disparities that you can see at the time that [NAACP] LDF was bringing these challenges, but throughout the country, regardless of the underlying crime, it was still clear that race played a huge role in the death penalty. In *Furman v. Georgia*[85] in 1972—we are coming up on fifty years—the United States Supreme Court, not specifically relying on race, but just talking about the way that the death penalty was applied and saying that it was arbitrary and

85. 408 U.S. 238 (1972).

capricious, found that the way the death penalty was being applied across the country was violating the Eighth Amendment as cruel and unusual and that made states start from scratch. Florida was one of the first states that reinstated the death penalty by adopting new statutes.

But in *Furman*, some of the opinions by the Justices said, *if there is anything that we could say about why, if there is any kind of through-line that that explains how the death penalty is being applied, it is really race*.[86] The whole Court did not specifically support that, but that is true. The other thing that was in there—those seeds of lynching and violence whether there as well because Justice Stewart in his concurrence in *Furman* says, *well, I mean, retribution is a legitimate purpose of the criminal legal system, so if we do not have an avenue for retribution, there are sown the seeds of anarchy, vigilante violence, and lynch law*.[87] So, the lynchings were there, and in *Gregg v. Georgia*,[88] Justice Stewart writes the majority opinion and quotes that piece about, *well*, *if we do not have the death penalty, if we do not have a way to channel people's retributive impulses, we end up with chaos, including lynch law*.[89]

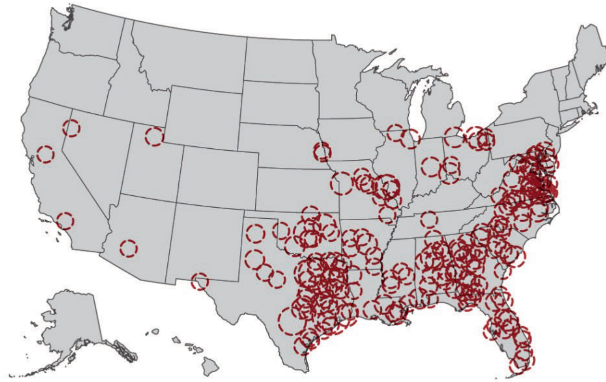
I think the idea that its very presence today is clear. We see here in a map that is from our report where we see the places that had the highest number of lynchings of Black people are also the places that have the highest numbers of executions of Black people. County by county is a little bit harder, but state by state it is very clear. There are also other correlations that we see throughout the history of lynching. That history of lynching and where that fits in our minds right now is very present.



Lynchings of Black Victims Between 1883 and 1940

86. *Furman*, 408 U.S. at 310.
87. *Furman*, 408 U.S. at 308 (Stewart, J., concurring).
88. 428 U.S. 153 (1976).
89. *Id.* at 237–38 (Marshall, J., dissenting).

Figure 3: Lynching of Black Victims by County—1883 and 1940[90]



Executions of Black Defendants Between 1972 and 2020

Figure 4: Executions of Black Defendants by County—1972 and 2020[91]

This is some commentary from a judge in Texas, not a criminal judge, but still a judge, on Facebook posting about somebody who was accused of killing a police officer being arrested. The comment says, "time for a tree and a rope."[92] There was an outcry—this was in the end of 2016 when this comment was made—and the judge got a slap on the wrist. The judge explained, *I do [not] understand why people were so angry, it was from a commercial about Wild West justice or something not racial at all.* Okay, sure.

In our report, we also talked about the case of Andrew Ramseur in North Carolina in 2010, when he is challenging the North Carolina Racial Justice Act, where we see the commentary about *Oh, in my day, you know, [we would have just] strung him up*. This idea is present in our minds and our psyches and in our courtrooms, though we would not acknowledge that. We see some of the results of that. We know that the people who are being executed are being executed for the death of White people. About seventy-five percent of the cases in which there has been an execution, the victim in the case was White. That is not saying that seventy-five percent of victims of homicide are White—it is about half—so this is disproportionate. We are just

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90. NDULUE, *supra* note 25, at 12.

91. *Id.* at 13.

92. *Texas Judge Comments 'Time for a Tree and a Rope' Following Arrest of Suspected Cop Killer*, FOX 29 (Nov. 23, 2016), http://foxsanantonio.com/news/local/texas-judge-comments-time-for-a-tree-and-rope-following-arrest-of-suspected-cop-killer.

punishing the crimes as they are being committed. We are punishing crimes differently depending on who the crime is committed against.

We also have sovereignty issues that we are going to skip over since I am already over my time. But we know that the race of victims effects our most consistent findings. There have been these detailed statistical studies of jurisdiction after jurisdiction and we [are] finding this almost everywhere. Race of defendants—we have [not] found them as much—but there have been strong findings that the race of the defendant matters. That combination too is one that is serious.

An example of this is when we are thinking about interracial crime, and this is example from a study of Philadelphia. I just want to mention, and this is for anybody who has ever heard the phrase *Black-on-Black* crime, it is ridiculous because most crime is intra-racial because of our patterns of segregation, who we live with, who we marry. We basically are still a pretty segregated society, so crimes are committed against people close to you most often, right? Nobody is talking about *White-on-White* crime, so why are we talking about it? That is my diversion. What researchers found in this study of Philadelphia is that when the victim was Black and the defendant was Black, appearance did not matter. But when the victim was White and the defendant was Black, it was very clear that appearance mattered. A defendant who had more traditionally stereotypically African American features—darker skin, kinkier hair, wider lips, etc.—was much more likely to get the death penalty than a lighter skin, less stereotypical of the African American person with less stereotypically African American features. We know it is not even just race, it is color. It is this idea that we [are] activating these stereotypes about crime, criminality, and future dangerousness.

I will end this with a slide where we think about race, retribution, and empathy. There is so much that is going on when there is this life-or-death decision being made in a case. There is a recent study by Justin D. Levinson [and co-authors] which was in 2019, that specifically looked at retribution.[93] They studied 500 jury-eligible people and the conclusion was that we [are] automatically associating payback and retribution with Black people and mercy and leniency with White people.[94] That is the association—the easier association on our brain—and also the stronger your anti-Black implicit bias, the more that you [are] co-signing the ideas of retribution. If you think about that, and you think about the way that capital cases work, we know that this can have a serious effect.

93. Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 839 (2019).

94. *Id.*

Race is going to matter at every stage, but thinking about jury selection, juries have to be death qualified to sit on a capital case. That means that they are able to impose a death sentence; there is a specific legal standard around that. But if you think about that, the people who most strongly believe in the death penalty—if they are the people who most strongly believe in retributive justice—you [are] going to end up, by design, with people with more of an anti-Black racial bias. There are also studies that default qualified juries are more likely to convict when the evidence is ambiguous. And we also know that death qualification takes out more people of color because people of color are less likely to support or be willing to impose a death penalty. We know that a less diverse jury is actually more conviction-prone, less likely to deliberate for a long time and less receptive to mitigation that is being presented and based on race too.

There was a California study about Latin defendants, and it was showing that the predominantly White juries were less receptive to their mitigating evidence. The idea is that these issues are going to compound throughout the course of the case, and we are going to see the huge impact of race throughout the case.

Some of the places where we see this is about intellectual disability. You are not supposed to be sentenced to death. You are not supposed to be executed if you have an intellectual disability. But just because you are not supposed to does not mean that is not how things are working, because we know people have.

We also see that the majority of folks who are having their cases, after the fact, reversed based on intellectual disability are people of color. We also know that race has an effect when we are talking about wrongful conviction. If we think about the people who have been exonerated on death row, we know the majority are people of color. We know that official misconduct, including police misconduct and prosecutorial misconduct is much more likely to be a factor in their case. And if we think about the connection between policing in communities that are majority people of color and how that can connect to the way that false confessions happen, [and] the way that false statements happen, that is clear. And we also know that people take longer to get exonerated if they are Black; Black exonerees spend more time between conviction and exoneration.

DR. MATTHEW BARRY JOHNSON: I want to make a few comments before I read my prepared presentation.

I am going to talk about my anti-death penalty work over the years. I began in the early 2000s. I am a professor at John Jay College of Criminal Justice in New York City, part of the CUNY system. I actually live and do

most of my work in New Jersey. In the early 2000s, I joined a campaign to abolish the death penalty in New Jersey. I joined it because I thought it was an important endeavor. I did not join it with the intention that we were going to abolish the death penalty, but that is actually what happened in 2007, as a result of the organizing and relentless work that was conducted. I learned a tremendous amount through that process.

Early on, I had some doubts about diving into the death penalty work because of my concern about other areas of criminal justice reform that I thought might be more critical and maybe should be prioritized. However, through my anti-death penalty work within New Jersey in terms of abolishing the death penalty, it was very apparent how there was a tremendous convergence in working against the death penalty, and also being concerned about working to fight back against mass incarceration, to fight back against police brutality and to stand up for victims of crime and violence. I would imagine all of us here today have some appreciation for these linkages and how it is important that we continue to advance this work to abolish the death penalty and the impact that will have on these other criminal justice reform issues.

One of the things—I did not develop it, but I maybe advanced it, during that time, was the whole idea of secondary trauma from state executions. I published a paper on how people other than the death row condemned inmates are often harmed by state executions.[95] However, that is not what I am going to talk about today.

After the abolition of the death penalty in New Jersey in 2007, I remained in contact with many other people who are working on these issues. But I began to focus most of my research on wrongful conviction. And I do want to mention, earlier this year I published a book titled, *Wrongful Conviction in Sexual Assault: Stranger Rape, Acquaintance Rape, and Intra-familial Child Sexual Assaults*,[96] which, the short story is, focused on the fact that, number one, most of the exonerations in the United States are related to people who were wrongfully convicted for sexual assaults. That finding is linked, in my book to, the history of lynching and discrimination against African American defendants.

Our struggle, to oppose the government's deliberate taking of the lives of its citizens, is complex and multifaceted. Today, I want to focus on one aspect of this journey to abolition. Our challenge to the death penalty draws

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95. Amanda Gil et al., *Secondary Trauma Associated with State Executions: Testimony Regarding Execution Procedures*, 34 J. PSYCHIATRY & L. 25, 25 (2006).

96. JOHNSON, *supra* note 30 at 18.

from social science data, legal arguments, and invokes human rights, moral, and ethical perspectives.

But today, I choose to focus on the people who convey our message: the activists—heroines and heroes—the campaigners who devote their time and energy to this grand effort. In particular, I will name and recognize African American freedom fighters who have asserted our message. I will name and comment on three. But I could have easily named another three (or another three). The three I am going to talk about briefly today are Frederick Douglass, Thurgood Marshall, and Coretta Scott King.

Frederick Douglass is significant because of his time. I first learned of Frederick Douglass's anti-death penalty advocacy from a source written by the Attorney Steven Bright.[97] Douglass is quoted as stating,

> [L]ife is the great primary and most precious and comprehensive of all human rights—that whether it be coupled with virtue, honor, and happiness, or with sin, disgrace, and misery, the continued possession of it is rightfully not a matter of volition; that it is . . . [not] to be deliberately nor voluntarily destroyed, either by individuals, or combined in what is called Government.[98]

Now, I became acquainted with this statement from Douglass early in my period of tenure doing anti-death penalty work. I knew prior to reading this quote, that Douglass was as brilliant as he was courageous. I was amazed at the clarity of this nineteenth century statement, as it resonated for me in the twenty-first century. A few days later, after my initial amazement by the statement, I returned to it because I wanted to check and see exactly what year Douglass made this statement. And I learned that he made a statement in 1858, which is even more remarkable in my mind.

Douglass was a brilliant orator, journalist, and organizer who physically fought his own enslavers and became one of the most admired men in the nineteenth century. He was best known as a slavery abolitionist. And although he worked tirelessly to bring an end to the system of human enslavement in the United States, even before the Civil War and emancipation, he devoted time to campaigning against state executions. Whenever I question whether my efforts to challenge the death penalty were prioritized properly, I remind myself that Douglass campaigned against the death penalty, while

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97. Stephen Bright is currently a Visiting Professor of Law at Georgetown Law Center, formerly the President and Senior Counsel of Southern Center for Human Rights in Atlanta.

98. FREDERICK DOUGLASS, *Resolutions Proposed for Anti-Capital Punishment Meeting*, Rochester, *in* SELECTED SPEECHES AND WRITINGS 369, 275–76 (Philip S. Foner eds., 1999).

simultaneously advancing the fight against the United States system of state-supported human enslavement.

Next, I want to talk about Thurgood Marshall. Thurgood Marshall carried out the fight against capital punishment throughout his adult life. He, in fact, risked life and limb litigating against the death penalty, often in front of all White juries and in Jim Crow courthouses, where his personal safety was in serious jeopardy, if he was not out of town by dark.

And from these life and death battles he rose to the highest court to the land, where he labored through legal arguments to abolish the death penalty. His famous quote from his *Gregg v. Georgia*[99] dissent remains true, and it outlines the work that is before us. Marshall said, "the American people, fully informed of the purposes of the death penalty and its liabilities, would in my view, reject it as morally unacceptable."[100] I believe wholeheartedly in that statement and I think that lays out our work for us—that what we need to do, what we have to do, and what we will do—is that we will inform the American people of the liabilities that surround the death penalty until it is brought to an end.

Now, what did Marshall mean by this? He knew that the death penalty was biased, based on race and other non-legal factors. Not only was it racial bias and hostility, but also the selfish ambitions of prosecutors and politicians. He knew it was arbitrarily applied and thus, it was inherently cruel. He knew it was no deterrent and thus, it did not contribute to any legitimate penological objectives.

Thirdly and finally, I am going to talk about Coretta Scott King and her personal authority on the death penalty from her lived experience. Coretta Scott King is widely known as a widow of the slain civil rights icon, Martin Luther King. However, she was no mere follower of her husband. She and Martin, in their early life, were together initiated and engaged in civil rights activism. After the assassination of her husband in 1968, Coretta continued to campaign for civil rights, for non-violence and peace, for LGBTQ rights, and also against apartheid.

Coretta's anti-death penalty advocacy is not widely known but was firm and substantial. In a 1981 speech at Delta College, Coretta Scott King advanced her position on state executions. Coretta was a murder victim family member, whose family had endured one of the most notorious murders in the United States history. And with her powerful voice, she stated:

> I remain firmly and unequivocally opposed to the death penalty for those convicted of capital offenses. An evil deed is not redeemed

99. Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting).
100. *Id.* at 232.

> by an evil deed in retaliation. Justice is never advanced in the taking of a human life. Morality is never upheld by legalized murder.[101]

Coretta added three additional practical reasons to support her convictions. First, Coretta said that "capital punishment makes irrevocable any possible miscarriage of justice."[102] It is important for us today to appreciate her wisdom here, as she made this statement prior to the DNA informed exonerations that did not begin until a decade later.

Her second point: the death penalty makes the "unwarranted assumption that a wrongdoer is beyond redemption."[103] Who is qualified to make such a judgment?

Coretta's third point is the continuing lack of equity in the use of capital punishment.[104] In noting this, she cited evidence of racial discrimination associated with defendants, as well as associated with victims of murder, as the prior panelists described in some detail.[105]

In closing, I want to say that I continue to draw inspiration from the work of these three. And I could have also highlighted others. For example, it would be equally compelling and important, had I highlighted Ida B. Wells, Reverend Jesse Jackson, and Mumia Abu-Jamal. Or, I could have highlighted James Weldon Johnson, Maulana Karenga, and Bryan Stevenson. Or, I could have highlighted Mary Talbert, Benjamin Todd Jealous, Christina Swarns and many, many others. Whenever I tire, I go back to their work, and it helps me continue. So that is my prepared presentation and thank you very much.

KRISTINA ROTH: Of course, it is wonderful to be here and thank you for having the event. I am so glad to see our Amnesty members coming together with folks on the ground to celebrate World Day Against the Death Penalty that just happened this past weekend on October 10, 2021. It is a delight to be here to talk about race and be with friends like Ngozi and meet new ones like Dr. Matthew. I am Kristina Roth with Amnesty International, U.S.A., and I lead AUSA's work on police accountability, looking closely at the use of force by law enforcement as well as what we [are] here to talk about today. I thank my co-panelists for seeing the linkage between these two issues, extrajudicial executions at the hands of law enforcement are very much also considered lynching's of today.

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101. Coretta Scott King, Address at San Joaquin Delta College: The Death Penalty is a Step Back. (Sept. 26, 1981).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*

I am sure you all have been given a background on Amnesty. Just in case you have not, Amnesty International has been working to eliminate the death penalty for over forty years around the globe. When we started this work, just sixteen countries had abolished the death penalty—this ultimate violation of human rights in law—and today, over half of the countries around the world have eliminated the ultimate cruel, humane, and degrading treatment.[106] Our movement is ten million activists strong (globally), committed to advancing the full realization of human rights. Back to the international piece, the United States is the only active executioner in the Americas, and so we really are an outlier there.

I know Dr. Matthew mentioned Ben Jealous, and he is one of the initial—if not the founder of—Amnesty's work to abolish the death penalty here in the United States, so giving some kudos to him as well for my ability to be here today representing this institution.

Based on the racist roots of the death penalty that Ngozi shared, it should serve as no surprise to any of us that these sentiments still fester throughout our criminal legal system today and are glaring in death penalty in particular. The death penalty has been inextricably intertwined with racism, from death qualification—as Ngozi spoke about—prohibiting Black people from serving on juries for those accused of capital offenses, wrongful convictions, exonerations, or executed by the state.

Racism has marred and prejudiced trials of Black defendants for as long as we have had a death penalty, and racism shows up as a factor in determining the future dangerousness. Duane Bunk, as an example for us to think of, from his trial in 1997, where based on expert testimony, he was convicted of the death penalty.[107] It contributed to his receiving a death sentence over a life sentence, specifically.[108]

Racism has showed up in jurors who believed that based on a defendant's race, that they were guilty and deserve the death penalty, invoking racial slurs, like in cases of Gary Sterling, who was executed by the State of Texas in 2005, and Keith Tharp, whose execution was stayed by the Supreme Court in 2017, but died of natural causes in prison in 2020.[109] And even despite the precedent of *Batson v. Kentucky*[110]—that prevents potential jurors

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106. *Death Penalty*, *supra* note 21.

107. *Duane Buck, Whose Death Sentence Was Tainted by Racial Bias, Is Resentenced to Life*, DEATH PENALTY INFO. CTR. (Oct. 4, 2017), http://deathpenaltyinfo.org/news/duane-buck-whose-death-sentence-was-tainted-by-racial-bias-is-resentenced-to-life.

108. *Id.*; *see also* Buck v. Davis, 137 S. Ct. 759, 780 (2017).

109. Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018); *see also* Sterling v. Dretke, 545 U.S. 1155, 1155 (2005) (petition for rehearing denied).

110. 476 U.S. 79 (1986).

from being struck on the basis of race—for Curtis Flowers' first four trials between 1997 and 2007, the prosecution used all thirty-six peremptory challenges to strike Black jurors from serving as jurors.[111] Curtis Flowers is a free man today, but the system, purported to uphold equal justice under the law, kept him on Georgia's death row for twenty-three years, before gaining his freedom eventually in 2020.[112]

Now, there have been some bright spots. In 2018, the Washington state Supreme Court found the death penalty was invalid because it imposed the death penalty in an arbitrary and racially biased manner.[113] The Court cited a study that had been mandated on the effect of race, which is somewhat of a blow to the 1987 ruling *McCleskey v. Kemp*,[114] that affirmed the disparities in the state's capital punishment system based on race were not enough to demonstrate intentional discrimination, at least in the individual case. It has made it more difficult throughout the years for these studies that are excellent and important and informative to necessarily contribute to what we would expect to see in advancing the very clear and real discrimination of the system.

From 1976 to May of 2021, Black people in the United States made up thirty-four percent of those people executed, far exceeding the Black population percentage in the United States in the same period.[115] Today, fifty-eight percent of those on federal death row—twenty-six out of every forty-five men—are people of color, including eighteen of which who are Black men.[116] Some of those Black men were convicted and sentenced to death by all-White juries. Many of those on federal death row were also sentenced under a broad expansion of the Federal Death Penalty Act in 1994,[117] part of the same set of policies that have accelerated mass incarceration and inflicted immeasurable harm on Black and Brown communities.

Now, at the same time, Congress advanced the 1994 Crime Bill[118]—and, I am sure based off of our last presidential election, many of you have

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111. Flowers v. Mississippi, 139 S. Ct. 2228, 2228 (2019).

112. *See id.* at 2252.

113. State v. Gregory, 427 P.3d 621, 642 (Wash. 2018) (holding the death penalty unconstitutional, as administered, because it was "imposed in an arbitrary and racially biased manner.")

114. 481 U.S. 279 (1987).

115. *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim (last visited Mar. 25, 2022).

116. *Racial Demographics*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/death-row/overview/demographics (last visited Mar. 25, 2022).

117. Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–3599.

118. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

heard of that—it also considered the Racial Justice Acts.[119] Given proof of significant racial discrimination in the administration of the death penalty the Racial Justice Act then would have required the prosecutor to show a non-race-based reason or explanation for the death sentence. And in fact, in 1994, the Racial Justice Act passed the House of Representatives as part of that same now-famed 1994 Crime Bill, but a threat of a filibuster from the Republican Party caused the Senate to remove or strike this part from the bill.[120] I feel like we are living in a familiar moment where folks are dragging their feet about a particular thing and things are getting held up in the Senate.

After Congress had that effort in the Racial Justice Act in 1994,[121] North Carolina also, many years later, had a Racial Justice Act that allowed capital defendants to challenge their death sentences if they could successfully prove that race was a significant factor in decisions to seek or impose the death penalty at the time of their trials. The law was unfortunately repealed in 2013, but before then, four men on the state's death row were re-sentenced to life from death, which is certainly important.[122]

Nonetheless, the work in North Carolina helped to inspire California to try their hand at a Racial Justice Act, and in 2020, California enacted a Racial Justice Act to prohibit the state from seeking or obtaining a criminal conviction based on race, ethnicity, or national origin.[123] Now, California—this is actually quite remarkable, in that the law that was passed in California—their racial justice act is an expansion upon that which was endeavored both at the federal level and in North Carolina because it applied to anyone who faced a criminal conviction, which obviously is a much larger population. It is also quite impressive that the bill—the year it was proposed—passed actually that year as well, which is unusual, I could say for something this significant.

This year, in 2021, advocates have attempted to make the bill or the law retroactive. They offered another piece of legislation since what was enacted last year was only prospective, so that those who have been sentenced already or already incarcerated might still seek relief under this law. However, their efforts have fallen short thus far. I am certain, though, that the fight will continue in the coming years.

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119. *See, e.g.*, Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300–532.309 (West 2021).

120. H.R. 4017.

121. H.R. 4017.

122. North Carolina Racial Justice Act, N.C GEN. STAT. § 15A-2010 (West 2009), *repealed by* Act of June 19, 2013, ch. 154, § 5(a), 2013 N.C. Sess. Laws 368, 372.

123. California Racial Justice Act, CAL. PENAL CODE §§ 745, 1473, 1473.7 (West 2021).

So, all this is to say, we have seen through the case work and through both steps forward and steps back, and we have seen attempts to change the law to address specifically the issue of race and bias beyond what our case law already says. But in the United States, the death penalty has proven time and time again to be racially biased, which also violates our right to freedom from discrimination and the right to equal protection of law. The United States has a legal obligation to respect, protect, and fulfill these human rights, and has ratified the International Convention on Civil and Political Rights[124] and the International Convention on the Elimination of All Forms of Racial Discrimination,[125] which explicitly would protect these rights (though clearly the United States, violates international law the time, so I would be remiss to make it seem as though this is particularly onerous, for our record).

For as long as we have a death penalty in the United States, racial bias will affect people of color's—and particularly Black people's—ability to have a fair trial. So, while race is among the multitude of reasons why Amnesty opposes the death penalty, in all cases and we [will] continue to work and shed light on this issue in our efforts to abolish the death penalty in the United States and everywhere that it exists.

DR. LAURA FINLEY: I just wanted to reiterate, again, the point that we have been making throughout the day, was that the death penalty is a broken system, and this is one more facet of why the system is so broken and it has been broken since it is started, which is what you all so nicely put. I remember reading at one point that, of all the lynchings, fifty percent of cases police were actually involved with that lynching, so it was very much a system problem. In about ninety percent of cases, they at least knew something was about to happen and yet again lacked a political will to do anything. I do not know if you want to comment again about how the system is—we are well aware of the flaws in the system and the courts continue to say no, we do not want to get rid of the death penalty.

DR. MATTHEW BARRY JOHNSON: Yeah, I [would] like to make a brief comment about the complicity of law enforcement in lynchings. I think Ngozi mentioned this idea that these lynchings were sort of a spontaneous act of a mob and there were some that had that character; there were some that occurred at night and under the cloak of darkness. But there were many, many lynchings that were announced in the press days, in advance, and special

124. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

125. International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195.

transportation and rail service was made available for people to come to observe the lynching; and schools were closed so children could observe the lynchings.

I do not know if this is new to everyone, but it was for me when I first learned about this because I saw this as this kind of vigilante justice at night or something like that, that kind of, you know, apology for it. But these were well-publicized events oftentimes, and photographs were taken of the lynched people—the people that were lynched—and the photographs were produced as postcards that commemorated the activity. The people in the local community would purchase the postcards and mail them to people and inform other people, '*see, this is a lynching we had last Saturday afternoon*.' This history of lynching really remains untold. So, that was my comment.

NGOZI NDULUE: Yes, absolutely, and I think that the popular assumptions about lynching are that a spontaneous mob just happened—could [not] be prevented—but I think all the things that folks are talking about is saying that there is official sanction, even if not, and so, in many ways, there was that parable system of, you kind of had your options like, *well, we could have a lynching or we could have this show trial that just results in a speedy execution*, right? And that was in some ways a political decision that happened, like press, press about this and issues there. So, it is definitely a question that is not just a matter of the past. If you think about that, and you think about that study about retribution, and how that is so racially coated in our minds it is not surprising to think that this idea of, *[you] must make an example of somebody, you must use the criminal legal system to make that statement*, is there and there is also a lot of great studies about it. Brandon Garrett at Duke Law School has a study about what the homicide rate's effect is on executions and death sentences, and what it showed was the places where there are more death sentences are places where the White homicide victimization rate goes higher in comparison to the Black homicide victimization rate.[126] Black people are much more likely to be victims of homicide, right? But when there is suddenly a gap getting less there, that is when—because there is this idea of a White Community threat is being felt and that is why *we need more death sentences, we need more of these tough on crime policies*—so we cannot really talk about the nation's death penalty without talking about our nation's continued racial injustice and how that is affecting the way we even think about crime and punishment.

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126. *See* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE (2017).

KRISTINA ROTH: I do not want to take up too much more time on this, but I just wanted to add, in a different lens to think about it now, as well. As we think about those individuals who are sentenced to death for the murder of a police officer, that is also an important way to look at this coin. In today's world, we think about Troy Davis, we think about all kinds of huge cases where there are compelling reasons why the individual may not have committed the crime. But the idea that the person who was harmed is a police officer who was killed brings a really different sort of tone to the conversation.

I want to shout out some important research from the Death Penalty Information Center. Certainly, we know that the death penalty is [not] a deterrent to crime, and that there is [not] really correlation in that officers are increasingly safer in places that do or do not have a death penalty.[127] We should think about that as far as how that argument comes up. But we certainly do think about, is this population—is someone that there is a need to preserve this particular punishment to protect this population.

DR. LAURA FINLEY: Thank you, and we did have a question in the Q&A. The person wanted to know if any of you can speak to the case of Julius Jones from Oklahoma, who is awaiting execution and is innocent.

NGOZI NDULUE: Yeah, I could say a little bit. He was actually one of—this case was one of the examples that we wrote about in our report. Julius Jones in Oklahoma is actually currently—I think there is a new clemency petition that was just filed today—so he has an execution date; has been requesting clemency; has a positive recommendation on that but is still in jeopardy. His case is that situation where the victim was a White man, it was very racially coated, there were some jurors who clearly had racist beliefs, and yet he still has not gotten relief on that. Now also putting into the broader context of the state and the county's histories, as far as race—the prosecutorial misconduct that I think has come up a couple times—Cowboy Bob Macy was the prosecutor who used the number of people who are sentenced to death under his watch as a badge of honor and was using campaign posters and who also was involved in significant misconduct at the time. There are so many issues that, in Julius Jones' case, to prove that you have a wrongful conviction, to actually get courts to recognize your claims of innocence, how hard it is despite the fact that we have at least 186 people who have been exonerated from death row and that we know that it is this uphill battle that innocent

127. *Deterrence*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/policy-issues/deterrence (last visited Mar. 25, 2022).

people do get sentenced to death. I think Julius Jones' case shows some important examples there of what is broken here.

DR. LAURA FINLEY: I think that is very important, and we have time for one more question if anyone has one, I [will] just ask everybody on the panel if there was one takeaway that you wanted people to do—like something you can do after they [have] learned about all this today—what would be the one thing you [would] like to see people do.

DR. MATTHEW BARRY JOHNSON: I would like to see people join an organization that is on the ground in their locality, their state, and get involved. There is so many things that need to be done in so many different ways, people can help out. And it is very rewarding, though it is difficult work, it is very rewarding; you learn a lot, you develop lifelong friendships with people. So that would be my message.

DR. LAURA FINLEY: Thank you and folks if you were joining us later, you might not have heard earlier, but one of our sponsors is Floridians for Alternatives to the Death Penalty (FADP). That is our statewide anti-death penalty coalition. If either of the other panelists want to speak to what would you like people to do.

KRISTINA ROTH: Well, I think this is a bit more my area then Ngozi's, so I [will] take the mic. Though I will shout out that I think that the research that Death Penalty Information Center has provided on this topic, particularly under Ngozi's leadership in this report, is really, really important for us to think about the historical context and the arc of this issue, particularly with regard to race. There are so many issues with the death penalty, and they [are] well documented through important research so as we endeavor to take action, I think it is just as important that we learn and understand. We may already be compelled to oppose the death penalty, but those who are around us, they may not have heard the right reason yet. So, I encourage you to continue to learn and find and try different arguments with those individuals in your life.

But naturally as someone who represents Amnesty International, I agree that you should get involved with organizations in your locality to do what you can. I think Amnesty's work is twofold: we are engaged with some cases, but not all death penalty cases, and we do not only work on cases where there is an active execution date. At this moment, we also are working on a long-term case of Rocky Myers. He [is] a Black man with an innocence claim, and also there was racism involved in his trial. The prosecutor has pictures

taken at a KKK rally, so it feels like there is some racial elements going on there. We [will] be bringing some of these claims to the UN Special Rapporteur later this year.

I think it is important to look at the cases as specific examples—as I know Sister Helen spoke about from some of the time I saw her—it is important to see it in actual effect, look at the cases and understand someone's life and how the system resulted in these particular and in their conviction and continues to deny them relief, where there are clearly issues that took place at the trial phase. But we also do engage in the work in the legislative manner, and I know folks from FADP will probably be talking about those opportunities. But there are opportunities as well if you are the one kind of person that wants to go talk to your lawmakers about it. At AUSA, we [are] deeply engaged and working to end the federal death penalty, but there are also efforts that are taking place around the States and so please contact Laura if you want to be involved with Amnesty or she can direct you to me if you [are] not a Floridian.

NGOZI NDULUE: And I [will] just note that something that comes through from both of my co-panelists' comments, is that so much of this is state and local, right? 1.2%—we have a 2% report, about 2% of the counties are responsible for more than half of executions and more than half of the people on death row—it is even less by now, it is probably about 1.2% right now. People who have worked to be talking about prosecutor's races, people who have worked on state legislation—there is so much that we think that it is big issues that we do not necessarily have a voice in. But I would just want folks to take the information that we can provide and use that to educate and inform on the state and local level, and even with the Federal death penalty there is activity going on there as well. So much is in our backyard, I do not think we always realize that.

DR. LAURA FINLEY: That was great, and we could have gone on forever because you all have lots more to say. But thank you for joining us. Thank you to all three of you, we really appreciate it.

there is activity going on there as well. So much is in our backyard, I do not think we always realize that.

DR. LAURA FINLEY: That was great, and we could have gone on forever because you all have lots more to say. But thank you for joining us. Thank you to all three of you, we really appreciate it.

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