

Diversity & Social Justice Forum's

THE FORUM

VOLUME 2



SILENCED JUSTICE

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THE DEAN'S WELCOME

Matthew J. Parlow

Welcome to the second publication by our Diversity & Social Justice Forum. At the Fowler School of Law, we are deeply committed to fostering a welcoming and supportive environment that enables each student to succeed. This means, among other things, developing an academic program that is not only rigorous but also relevant, creating opportunities for students to gain skills by engaging with the many communities that we serve, and encouraging thoughtful innovation in tackling new and complex problems of society. Perhaps most of all, it means bringing together a diverse and dedicated group of faculty and students that will make the achievement of these goals both possible and worthwhile.

It is, therefore, unsurprising that when a group of students proposed starting this journal two years ago, the idea was embraced by the faculty and the Fowler Law community more generally. Since its launch, our Diversity & Social Justice Forum has accomplished a great deal: three symposia and, now, its second publication. As our society struggles to discuss complicated issues of law and policy, we are proud of the Diversity & Social Justice Forum for living out its mission to “promote a climate of engagement and dialogue with a wide spectrum of views and values.” Indeed, during these times, this type of medium for discussions of diversity, inclusion, and social justice makes a significant contribution to civic discourse.

Best,

Matthew J. Parlow
Dean and Donald P. Kennedy Chair in Law

THE DIVERSITY & SOCIAL JUSTICE FORUM: VOICES FOR JUSTICE

Marisa S. Cianciarulo-Associate Dean for Academic Affairs, Professor of Law

“Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.”

~Frederick Douglass

“Southern Barbarism,” 24th Anniversary of Emancipation, Washington, DC, 1886 in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 434 (Philip Foner, ed., 1955).

This year, the mission of the Diversity and Social Justice Forum – providing a forum that can give expression and representation to a wide spectrum of progressive and diverse voices at Chapman – is more important than ever. The chasm between “liberal” and “conservative,” “red state” and “blue state,” threatens to engulf shared values that sustain our society. It pits “us” versus “them,” it obscures our commonalities, it breeds suspicion and hate, it kills compassion and empathy. And in so doing, it threatens the achievement of justice and ultimately, as Frederick Douglass warned, the security of our society.

Dialogue can help span this ever-growing divide. But the tools for true dialogue face their own threats. We live in a world where elected leaders – grown adults with monumental responsibilities – trade insults and barbs on social media, a behavior of which parents of teenage children would not be proud. Facts, the basis for any true dialogue, have become optional. False narratives, and just plain falsehoods, provide

an alternate reality to suit any worldview, no matter how extreme and hate-filled. And most importantly, key voices have often been silenced, removed altogether from the dialogue.

Publications such as our Diversity and Social Justice Forum are invaluable in creating a space where dialogue can begin. The goal of this Forum is to improve the world in which we live, and to do so in a way that fosters understanding: to find common ground despite differences, to bring attention to overlooked societal ills, and to discuss and debate proposed solutions to the problems in our world.

In these pages, facts matter. Facts are facts because they have been researched exhaustively. They are not a collection of partial and distorted truths cobbled together to support an untenable position.

In these pages, respectful, professional commentary matters. These articles are not 140-character invectives. They are insightful, provocative,

carefully written products of research and critical thought.

In these pages, the voiceless are heard. The articles in this year’s *Forum* present the views of groups in our society whose voices have been silenced through marginalization and oppression: indigenous peoples, bullied youths, minority youths, the victims of corporation-sponsored or corporation-abetted human rights violations.

The theme of the 2016 *Forum* is “Silenced Justice.” But justice cannot be silenced, because it is not a voice. It does not speak for us. It does not exist on its own. Justice is achieved through the voices and actions of individuals who fight in ways big and small for their own and others’ right to live a safe, fulfilling life.

Justice cannot be silenced, but dialogue can. This Forum recognizes that many voices essential to dialogue have been silenced through fear, oppression, and inequality. It recognizes that with those voices absent, the dialogue is incomplete, and thus the bridge towards justice obstructed. It

provides a platform for voices calling for justice. And for that, our community of scholars, educators, lawyers, and soon-to-be lawyers is grateful. Thank you, to all of the authors, speakers, students, professors, and members of the Chapman University community who support the Diversity and Social Justice Forum, for being a voice for justice.

A NOTE FROM THE 2017-2018 DIVERSITY & SOCIAL JUSTICE FORUM CHAIR

Rick Reneer Jr.

In my first year of law school, I had the opportunity to submit my name for consideration to what was then The Diversity Initiative Symposium and Publication, at the time only in its inaugural year. It was my understanding that the group was here to provide a forum, a space, for diverse voices and ensure that progressive ideals had a place here at Chapman and were connected to the community we would one day serve as attorneys. Working this organization through the final approval process with the faculty, and the amazing students involved, instilled in me an intense work ethic and an understanding of perhaps the most important aspect of what we do. We work not for us today, not for a title or a line on a resume, we work for those that come after in the hopes that they will be that one step further ahead at the starting point of life than we were. Platitudes aside, it is hard work. It is hard, often thankless, energizing, invigorating, and essential work.

The organization has since grown, incrementally, and now is known as the Diversity and Social Justice Forum, having been fully approved by the faculty. Our purpose has not changed though. We will always be a space where diverse voices can come together and discuss the challenges facing their communities both here on campus and beyond. We will always seek to connect the legal community with like-minded grassroots organizations that work to promote the equal and just standing of every single member of our county, our state, our nation, and the world. We will always foster the growth of groups and organizations who, like ours, magnify the voices of the under heard and underserved.

The Diversity and Social Justice Forum, with increasing necessity, will continue on that mission. It has been my singular honor to be a part of this organization as an Articles Editor, then Vice-Chair of Symposium, and now Chair. It has impacted everything from my attendance, to my grades, to even my success at competitions, and it has most certainly been worth every single moment. The writings here, inside this publication, and the voices heard at our annual symposium, are irrefutable evidence of that. I hope that all who lead and work within this organization will always see that value, that worth, and dedicate themselves accordingly.

The Diversity and Social Justice Forum would like to wholeheartedly thank President Daniele Struppa and the Office of the President of Chapman University, Dean Matthew Parlow and the Dale E. Fowler School of Law, and Faculty Advisor and Professor of Law, Dr. Denis Binder, SJD. Without their past and continued support, none of this would be possible.



VOTING RIGHTS IN INDIAN COUNTY

Jean Reith Schroedel and Robert Saporito

From the very earliest period of Euro-American settlement, there have been disputes over the civic status of indigenous peoples within the country. Although the 1924 passage of the Indian Citizenship Act resolved the citizenship question, it did not ensure the right to vote. In the years immediately following the passage of the ICA, states with large Native populations passed a range of laws designed to disenfranchise American Indians and Alaska Natives and many were still in place when the Voting Rights Act was passed in 1965. Despite widespread and egregious voting rights abuses against Native Americans, there was little initial interest in challenging voting rights abuses against Native Americans. In a similar vein, more recent commentaries about the Shelby County v. Holder (2013) decision have largely ignored its impact on Native American voting rights. In this paper, we consider the unique aspects of Native American voting rights litigation in the post-Shelby era.

Introduction

On June 25th, 2013---the 137th anniversary of Custer’s defeat at the Battle of Little Big Horn---the Supreme Court in a 5-4 decision in *Shelby v. Holder* (2013) rendered Section 5, one of the most important provisions of the 1965 Voting Rights Act, unenforceable. Unlike other parts of the Act, Section 5 was designed to proactively stop political jurisdictions with histories of voting rights abuses from implementing new laws and provisions that could undermine equal access to voting. In *Shelby v. Holder*

(2013), the Court ruled that Section 4(b), which provided the mechanism for implementing Section 5, was unconstitutional because it violated “the equal sovereignty of the states” by treating them differently based on “40 year old facts.”¹ This ruling meant that the previously “covered” jurisdictions were no longer required to pre-clear changes to their election laws and procedures with the Department of Justice or the Circuit Court for the District of Columbia.²

In his decision, Chief Justice Roberts wrote, “Regardless of how to look at

the record no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965.”³ This decision reversed lower court rulings that stated discrimination still was widespread,⁴ but the Justices argued that large increases in African American elected officials showed pre-clearance was no longer needed. While accurate, this ignored that most scholars attribute the increase to the protection provided by Section 5.⁵ Pundits immediately began to consider the ruling’s implications.

¹ *Shelby County v. Holder*, 570 U.S. ____ (2013).

² A county or state would be covered under section 4(b) if:

- a) As of November 1, 1964, 1968, or 1972, the jurisdiction used a “test or device” to restrict the opportunity to register and vote; and
- b) Less than half of the jurisdiction’s eligible citizens were registered to vote on November 1, 1964, 1968, or 1972; or less than half of eligible citizens voted in the presidential election of November 1964, 1968, or 1972

Section 4(b) was struck down in the 2013 Supreme Court case *Shelby County v. Holder* forbidding this test for restrictions under section 5. The Court did not rule however on the constitutionality of section 5 itself meaning that if Congress were to establish a new test, the affected states and counties could still be limited under section 5.

³ *Shelby County, supra*.

⁴ In reaching this decision, the *Shelby* majority went against rulings by a district court and the U.S. Court of Appeals for the District of Columbia Circuit; the latter which had favorably cited House Report No. 109-478 that had been submitted as part of the 2006 re-authorization of the

Voting Rights Act. The House Report focused on “second-generational tactics” that dilute minority voting clout in ways that are “more subtle than the visible methods used in 1965,” but stated their “effects and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates of choice.”

⁵ For an early example of this research, see Davidson, Chandler and Bernard Grofman. 1994. *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*. Princeton, NJ: Princeton University Press. For more recent research, see Bentele, Keith Gunnar and

Liberals raised concerns about what they saw as a growing voter dilution problem among African American and Latino communities. Whereas conservatives saw the decision as a victory for federalism and states' rights, returning what they saw as a constitutionally protected power back to the states where it belonged.

But neither the Justices, nor the pundits, considered the ruling's impact on Native Americans.⁶ At the time of the *Shelby* decision, there were two states (Alaska and Arizona), as well as two counties in South Dakota, which were covered due to their past histories of discriminatory electoral practices against Native Americans. Alaska and Arizona had become "covered" in late 1975. The South Dakota counties, with borders were entirely within the boundaries of Indian reservations had been "covered" since early 1976.⁷

In the post-*Shelby* era, most voting rights cases are argued as violations of Section 2, which prohibits laws and other practices that "deny or abridge the right of any citizen of the United States to vote on account of race or color."⁸ Given that American Indians generally were not covered by Section 5 prior to the 1975 renewal of the Voting Rights Act, their experiences with litigation using Section 2 and the Fourteenth and Fifteenth Amendments during those early years are of particular interest, as well as recent cases arguing Section 2 violations in Indian Country. But we believe these current voting rights disputes are best understood within an historical context that situates them as an outgrowth of long-established practices designed to deny civic equality to Native Americans. For this reason, we have divided our research into the following three sections: 1).

The Historical Context, 2). The Voting Rights Act comes to Indian Country, and 3). Recent Section 2 Litigation.

The Historical Context

Throughout the nineteenth century, there were extensive discussions among the nation's elites over the civic status of indigenous peoples within the United States. During the 1820s and 1830s, the Supreme Court issued three very important, albeit confusing rulings, the "Marshall Trilogy," that left ambiguous the question of whether Native peoples had any recognizable American civic status.⁹ A quarter of a century later, the question was still unresolved. In 1856, Attorney General Caleb Cushing rejected any possible route to citizenship through naturalization, stating that only applied to "white men."¹⁰ One year later, Chief Justice Taney in his infamous

Erin E. O'Brien. 2013. "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voting Access Policies." *Perspectives on Politics* 11(4): 1088-1116.

⁶ A content analysis of the more than 300 articles published in the immediate aftermath of the *Shelby* ruling and using Major World Publications as the source, failed to uncover a single one that mentioned the impact on American Indians. A subsequent Google search found two articles: one that briefly mentioned "Indians" in a general discussion of the ruling and another in *Huffington Post* that focused on Native Americans. For more, see Schroedel, Jean and Ryan Hart. 2015. "Vote Dilution and Suppression in Indian Country." *Studies in American Political Development* 29: 1-28.

⁷ The geographic reach of Section 5 was expanded as a result of the 1975 renewal of the non-permanent provisions of the Voting Rights Act. Alaska, Arizona and Shannon County (recently renamed Oglala Lakota County) and Todd County in South Dakota were subjected to pre-clearance almost immediately after the 1975 renewal (41 Fed. Reg. 783, 784 Jan.5, 1976). These two counties, as well as Bennett, Charles Mix, Corson, Lyman, Mellette and Washabaugh Counties, also were subjected to pre-clearance due to 1975 minority language provisions in 1976 (41 Fed. Reg. 29,998, 30,002, July 20, 1976).

⁸ *Voting Rights Act of 1965*, 79 Stat. 437, 42 U.S. Code § 1973.

⁹ In the first ruling, *Johnson v. McIntosh* (1823), Chief Justice Marshall, drew upon the "discovery principle" to argue that

American Indians were "merely occupants of the land" upon which they and their ancestors had dwelled for millennium, thereby abrogating any legal claim that they might have to owning the land. Then in *Cherokee Nation v. Georgia* (1831), Marshall stated that Native Nations were "dependent nations" whose relations with the United States government resembled that of a "ward to his guardian." However, one year later in *Worcester v. Georgia* (1832), Marshall seemed to reverse his earlier positions, stating that the United States considers "Indian nations as distinct political communities having territorial boundaries within which their authority is exclusive."

¹⁰ For more on the differences that Taney saw between American Indians and people of African Descent, see Horsman, Reginald. 1981. *Race and Manifest*

Dred Scott v. Sandford (1857) ruling, which stated people of African descent could never become citizens, suggested that American Indians, who took on the customs of white people could become citizens.¹¹ This confusion continued during the post-bellum era with the 1866 Civil Rights Act explicitly excluding “Indians not taxed” from citizenship, a phrase that was not included in the Fourteenth Amendment, but only after the bill’s sponsors assured other members of Congress that the amendment would not apply to “Indian savages.”¹² The possibility of citizenship was further undermined by the Supreme Court’s *Elk v. Wilkins* (1884) decision that American Indians were not citizens; instead their status was akin to that of foreign ambassador’s U.S. born children.¹³ Shortly thereafter, Congress provided a path for U.S. citizenship through the Dawes Act (also known as the General Allotment Act) and subsequent acts in 1901 and 1906, which allowed American Indians to gain citizenship after they gave up reservation lands

in exchange for taking on individual allotments of land.¹⁴ A federal court, however, in 1901 held that the citizenship status of those who had gained it through these congressional acts was not the same as the citizenship of other Americans. The court ruled they were still “wards” of the federal government.¹⁵

By the early 1920s, nearly two-thirds of American Indians had gained citizenship through congressional action or their military service in World War I and the remainder gained it in 1924, when Congress passed the Indian Citizenship Act.¹⁶ In keeping with the earlier judicial decision that the citizenship status of American Indians did not eliminate their status as “wards” of the federal government, political leaders in states with large Native populations refused to extend the right to vote to these “new” citizens. Indian Affairs Commissioner Charles Burke was quite aware of this and sent a letter to local Indian superintendents pointing out that citizenship did not

necessarily include the right to vote.¹⁷

“Some of these laws closely resembled those employed in the Jim Crow South, while others were uniquely related to the existence of Native Nations and reservations.”

When the Indian Citizenship Act was signed into law, there were clauses in at least seven state constitutions that statutorily disenfranchised Native Americans.¹⁸ Following the passage of the Indian Citizenship Act, a number of states reacted by passing additional laws to ensure the disenfranchisement of Native Americans. Some of these laws closely resembled those employed in the Jim Crow South, while others were uniquely related to the existence of Native Nations and reservations. Six western states instituted literacy tests that required American Indians to prove to registrars that they were able to read and write

Destiny: The Origins of American Racial Anglo-Saxonism. Cambridge, MA: Harvard University Press: 253.

¹¹ *Dred Scott v. Sandford* 60 U.S. 393 (1857).

¹² Schroedel and Hart, *supra* note 7, at 7.

¹³ *Elk v. Wilkins* 112 U.S. 994 (1884).

¹⁴ The reservations of Native Nations that accepted provisions of these Acts were divided up into individual allotments (160 acres for heads of household, 80 acres for single adults, and 40 acres for minors) with the remaining lands sold off to non-Indians. Between 1890 and 1901, nearly

155,000 American Indians were granted U.S. citizenship through the Dawes Act. Wolfey, Jeanette. 1991. “Jim Crow, Indian Style: The Disenfranchisement of American Indians.” *American Indian Law Review* 16: 167-202. The price in terms of the land lost was very steep. For example, the Arapaho and Cherokee lost over 80% of their reservation lands as a result of their being made “surplus.” Wilkins, David E. and Heidi Kiiwetinepinesik Stark. 2011. *American Indian Politics and the American Political System*, 3rd edition. Lanham, MD: Rowman & Littlefield, 127-128.

¹⁵ *Farrell v. United States* 110 Fed. 942 (1901).

¹⁶ See Bruyneel, Kevin. 2004.

“Challenging American Boundaries: Indigenous Peoples and the ‘Gift’ of U.S. Citizenship.” *Studies in American Political Development* 18: 30-43 for a discussion of how Native Americans viewed the “gift” of citizenship.

¹⁷ Schroedel and Hart, *supra* note 7, at 8.

¹⁸ Cohen, Felix. 1942. *Handbook of Federal Indian Law*. Washington, DC: Government Printing Office: 157-158.

English.¹⁹ New Mexico, Utah, and Arizona had provisions stating that Native peoples living on reservations were not actually residents of the states and therefore could not vote.²⁰ The legal justification for these laws came from an early Minnesota Supreme Court ruling that the Red Law Chippewa, living on a reservation could be excluded from the voting rolls because they had not “yielded obedience and submission” to the state, as shown by the payment of property taxes on reservation lands.²¹ Minnesota, South Dakota, and North Dakota, required Indians to prove they were no longer “Indian” by self-terminating their tribal affiliations in order to vote.²² Registrars in Arizona argued that the guardianship clauses that kept the mentally incompetent from voting in their state constitutions applied to Native Americans even though those provisions had been struck down by a North Dakota court.²³

The Voting Rights Act Comes to Indian Country

Many of these discriminatory provisions were still in place when the Voting Rights Act was passed, but in the 1965 *Congressional Record*'s nearly 1,000 pages of debates and reports over the Act, there are only two very brief mentions of American Indians.²⁴ Even though most parts of the country with large Native populations initially were not covered by Section 5, the Voting Rights Act became an important tool in Native Americans' struggle for the franchise. During the decade prior to Congress' decision to extend the geographic reach of Section 5, Native American claims about voting rights abuses had to be litigated using Section 2 that prohibits any “qualification or prerequisite to voting or standard, practice, or procedure [that] shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...”,

along with the Fourteenth and Fifteenth Amendments.²⁵

There were only a handful of these Section 2 voting rights cases, involving American Indian populations, prior to the Act's 1975 renewal, but the egregious nature of these cases figured prominently in discussions over extending the reach of the Act's non-permanent provisions.²⁶ The U.S. Civil Rights Commission 1975 report, *The Voting Rights Act: Ten Years After*, focused attention on practices in Arizona that were designed to systematically deny Navajo representation within county governments.²⁷ The report paid particular attention to Apache County, which is located in the northeastern corner of the state, and includes a land mass of more than 11,200 miles. The upper half of the county is part of the Navajo Reservation, and American Indians (mostly Navajo, but also Hopi and Apache) comprised roughly three-quarters of the county's residents, but they had never gained representation on the three-person Board of Supervisors. In 1973, Tom

¹⁹ McCool, Daniel, Susan M. Olson, and Jennifer L. Robinson. 2007. *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*. Cambridge: Cambridge University Press: 11-12.

²⁰ *Id.*

²¹ *Opsahl v. Johnson*, 1917. 163 N.W. 988 (Minn.). This provision in the New Mexico constitution was ruled unconstitutional in *Trujillo v. Garley*, 1948. Civ. No. 1353 (D.N.M.).

²² McCool et. al. *supra* note 20.

²³ *Swift v. Leach*, 45 N.D. 437 (1920).

²⁴ Schroedel and Hart, *supra* note 7, at 10.

²⁵ 42 U.S.C. § 1973 : US Code - Section 1973: Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.

²⁶ Courts generally have required a higher standard of proof in Section 2 cases than in Section 5 litigation---sometimes requiring the proof of intentional discrimination rather than discriminatory outcomes. While direct evidence of intent to discriminate is desirable, that is difficult to obtain. Plaintiffs typically are

left piecing together circumstantial evidence to show a “totality of circumstance” that strongly points to discriminatory intent. See, for example, *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 49 U.S. 252 (1977).

²⁷ United States Commission on Civil Rights. 1975. *The Voting Rights Act: Ten Years After*. Washington, DC: Government Printing Office.

Shirley, a member of the Navajo Nation, got three times as many votes as a white candidate running for the District 3 seat that included the reservation. The Board of Supervisors refused to seat Shirley, arguing that his failure to pay property taxes, because he lived on a reservation, rendered him ineligible for elected office. The fact that Shirley paid a full range of other taxes and was a military veteran was irrelevant in the eyes of the Board. Shirley fought the case all the way up to the Arizona Supreme Court, which ordered the Apache County Board of Supervisors to seat Shirley.²⁸

“This up to 10:1 population disparity in the electoral districts was challenged in a case filed in 1973, and eventually resulted in the county being found to have violated the Fourteenth and Fifteenth Amendments and Section 2.”

Even though Shirley succeeded in gaining a place on the Board, the

county still engaged in a range of vote denial and dilution strategies that prevented Native Americans in the county from equal representation.²⁹ The Board of Supervisors, which established the geographic boundaries of the three supervisory districts, used that power to create districts with enormous population disparities. The overwhelmingly Navajo District 3 had a population of 26,700, but Districts 1 and 2, which were nearly all white, had populations of 1,700 and 3,900 respectively.³⁰ This up to 10:1 population disparity in the electoral districts was challenged in a case filed in 1973, and eventually resulted in the county being found to have violated the Fourteenth and Fifteenth Amendments and Section 2.³¹ These actions paved the way for increased registration and voting among Navajo and led to the Board of Supervisors gaining a Navajo majority, as well as the first Navajo being elected to the state legislature.³²

There were a range of the early voting rights cases involving denial of the franchise, such as the South Dakota law challenged in *Little Thunder v. South Dakota* (1975) and *U.S. v. South Dakota* (1980).³³ The law stated that residents of “unorganized counties,” such counties that included the Pine Ridge and Rosebud Sioux reservations, could not vote nor run for county political office. Instead

all of those governmental functions were handled by adjacent counties with nearly all white populations. The extension of Section 5 coverage to the “unorganized” counties made it possible for Native Americans to have access to the ballot box and elect representatives of their choice to political office.³⁴ But that did not mean that places with long histories of vote denial were going to quietly acquiesce to Native voting. There were number of other vote denial cases in South Dakota during the 1980s, such as *American Horse v. Kindert* (1984) and *Fiddler v. Sieker* (1986) that involved county registrars refusing to accept voter registration cards from reservations, arguing they had to be fraudulent.³⁵

Recent Section 2 Litigation

Most contemporary Section 2 cases have involved vote dilution (e.g., voters are fully able to cast votes, but do not have an equal opportunity to elect representatives of their choice), such as occurs when there is mal-apportionment of districts. The question of voting abridgement, however, has become an increasingly important element in recent Section 2 litigation, and one that particularly affects Native Americans. Forty years ago, nearly all voting took place at local precincts on Election Day, but in 2016 nearly 40%, over 47 million, of all the votes cast were done via early in-person or absentee voting.³⁶

²⁸ *Shirley v. Superior Court*. 1973. 513. P. 2d 939 (Ariz.): 109 Ariz 510.

²⁹ The county used literacy tests to prevent Navajo, many of whom had limited English proficiency, from being added to the voting rolls. For more on the barriers faced by Shirley and others in the 1970s, see Yurth, Cindy. 2009. “A Leader with Backbone: 35 Years Later, Apache County’s First Dine Supervisor Speaks Out.” *Navajo Times* September 3. <http://navajotimes.com/politics/2009/09/09/supe.php>. Accessed 2/15/2017.

³⁰ *Goodluck v. Apache County* 1975. 417 F. Supp. 13 (D. Ariz.); 1976. Aff’d 429 U.S. 976.

³¹ *Id.*

³² United States Commission on Civil Rights, *supra* note 28.

³³ *Little Thunder v. South Dakota*. 1975. 518 F. 2d 1253 (8th Cir.); *U.S. v. South Dakota*. 636 F 2d. 241 (8th Cir.).

³⁴ Prior to the extension of Section 5 to two South Dakota counties, no American Indians had ever been elected to the state

legislature, despite comprising large population majorities in reservation districts. They also had been excluded from electing their own to county council seats. See Schroedel, Jean and Artour Aslanian. 2015. “Native American Vote Suppression: The Case of South Dakota.” *Race, Gender & Class* 22(1-2): 308-323.

³⁵ *American Horse v. Kindert*. 1984. Civ. No. 84-5159 (D.S.D.); *Fiddler v. Sieker*. 1986. Civ. No. 86-3050 (D.S.D.).

³⁶ The United States Election Project. electproject.org.

As early voting becomes more prevalent, Native American populations, especially those concentrated on reservations, have had to fight to establish access to forms of early voting. The recent cases, involving Native Americans are Section 2 voting abridgement cases, where the electoral practices include material limitations that affect the minority community more heavily than the white community.³⁷ If that type of a limitation is found, the court then examines the “totality of circumstances” in the local community to ascertain whether the practices under dispute work in combination with historical circumstances and the political, social and economic conditions (e.g., the Senate Factors) to produce a result that is discriminatory.³⁸ The four cases outlined in the next section are example of Section 2 voting abridgement violations.

Brooks v. Gant (2012)

Shannon County in South Dakota is contained entirely within the Pine Ridge Indian Reservation.³⁹ In 2012 members of the Oglala Sioux Tribe, living on the western half of the Pine Ridge Reservation, sued the South Dakota Secretary of State asking for the establishment of a “full period of statutorily authorized early voting” in Shannon County.⁴⁰ When *Brooks v. Gant* (2012) was filed, residents of the county had substantially less access to early voting than was available to other South Dakota residents. State law provided

residents with the opportunity to vote at the county auditor’s office starting 46 days prior to Election Day, but Shannon County residents were only provided with an in-county site for six days. Because Shannon County was classified as “unorganized,” residents wanting vote early, apply for an absentee ballot or take advantage of late registration, had to travel to the courthouse in the neighboring Fall River County. The Fall River courthouse is located in Hot Springs, “which is between 53 minutes and 2 hours and 45 minutes from voters in Shannon County depending on the residence of the voter.”⁴¹

Facing a likely injunction, the Secretary of State agreed to provide early voting services for the 2012 election. “This decision was made in part due to the Secretary of State’s commitment to provide an additional \$12,000 through Help America Vote Act (HAVA) funds.”⁴² Because the county had voluntarily met the plaintiffs’ demands, their request for a preliminary injunction was dismissed. The motion for a permanent injunction continued, and the parties began discovery. During the discovery period Shannon County entered into an agreement with the Secretary of State, ensuring that these satellite voting offices will remain open and funded through January 1st, 2019. This agreement led to the case being dismissed without prejudice.⁴³

“While he did not take active steps to stop voters, many elderly people, with memories of violent clashes with law enforcement were too intimidated to enter and left without voting.”

Despite the agreement, there were still attempts to limit the voting of reservation residents. The Oglala Sioux Tribe asked for the early voting center to be staffed by at least one tribal member. The request was granted, but to ensure that there weren’t any “problems” the county sheriff was assigned to watch over the location during its operating hours. Anecdotal reports tell of the sheriff, a large white man, with a handle bar mustache, sunglasses, revolver, and cowboy hat standing right by the door. While he did not take active steps to stop voters, many elderly people, with memories of violent clashes with law enforcement were too intimidated to enter and left without voting.⁴⁴

Poor Bear v. County of Jackson (2015)

Residents in the eastern half of the Pine Ridge Reservation, which is part of Jackson

³⁷ See for example, *Veasey v. Abbott*, 830 F. 3d 216, 2016 WL 3923868, at *17 (5th Cir. 2016).

³⁸ *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2016).

³⁹ In 2015, the name of Shannon County was changed to Oglala Lakota County, which better reflects the make-up and history of the county.

⁴⁰ United States District Court District of South Dakota Western Division. *Order Denying Defendants Motion to Dismiss and Granting Defendants Motion to Extend*. Case No. CIV. 12-5003-KES. October 4th 2012.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ *Brooks v. Gant*, No. 5: 2012 cv05003-Doc. 66 (D.S.D.).

⁴⁴ It should be noted that Shannon County and the Pine Ridge Reservation are often seen as the epicenter of the tumultuous history between the United States Government and the Plains Indians. The Reservation is home to the site of the Wounded Knee Massacre as well as the 1973 standoff between U.S. Marshalls and American Indian Movement protesters.

County, also faced substantial travel distance barriers. The southern half of the county is part of the Pine Ridge Reservation while the northern half is mostly white.⁴⁵ The county seat of Kadoka is located in the northern half, roughly 27 miles from Wanblee, the main reservation population center. In 2013, reservation residents asked the county to establish an early voting satellite office in Wanblee, but county board of commissioners decided it would be too expensive without state assistance, which they did not believe would be available.⁴⁶

Following this vote, reservation residents filed suit against the county in *Poor Bear v. County of Jackson* (2015). They claimed that, “South Dakota’s Help America Vote Act Task Force had approved a plan in February 2014 which included a provision for Jackson County to use HAVA funds to establish a satellite office.”⁴⁷ Because the county refused to establish the office even after receiving notification from the state that HAVA funding was available, plaintiffs argued the refusal

was a violation of Section 2 and the 14th Amendment. They also filed for a preliminary injunction to establish a satellite voting office in time for the 2014 elections. Before this request could be heard before a judge, the parties reached a settlement establishing a satellite office in Wanblee for the next three election cycles.

Wandering Medicine v. McCulloch (2014)

Similar issues affected the ability of Native Americans living on reservations in Montana, where members of the Gros Ventre, Northern Cheyenne, Crow and Assinboine Tribes in the Bighorn, Rosebud, and Blaine Counties, filed for a preliminary injunction in the weeks prior to the 2012 election. On October 30th 2012, that motion was denied by District Judge Richard F. Cebull who argued that:

It is undisputed that Native Americans living on the three Indian Reservations face greater hardships to in-

*person absentee voting than residents of the three counties who do not live on the reservations. But because the evidence also established that Montana law provides several other ways of voting and that Native Americans living on the three reservations are able to elect representatives of their choice, the Court concluded Plaintiffs were not very likely to succeed on the merits their § 2 Voting Rights Act claim.*⁴⁸

Judge Cebull went on to argue that in order to claim a violation of the Equal Protection Clause, the plaintiffs would have to prove that the counties intended to discriminate in refusing to establish these offices. Additionally, there would be “significant hardship that would be imposed on the County elections administrators to implement new procedures on short notice during what is likely to be a close election in many statewide races.”⁴⁹ The counties would not have

⁴⁵ Until the early 1980s, the eastern portion of the Pine Ridge Reservation was the “unorganized” Washabaugh County. After being part of several early voting rights cases, Washabaugh County was subsumed into Jackson County that was directly to its north.

⁴⁶ The minutes from the June 20, 2014 meeting state: “Discussion was held on the information received that Jackson County meets the criteria to establish a satellite absentee voting site through the

South Dakota HAVA plan, but that reimbursement of expenses to Jackson County through HAVA grant funding is not shown. Vicki Wilson, Auditor, reported that she had sent an email to Secretary of State Gant about reimbursement of expenses for such sites, but has not received a response. Stilwell moved, Denke seconded, that Jackson County not establish satellite voting sites due to no response on state or federal

funding for such sites, and also due to no county funding available.” United States District Court District of South Dakota Western Division. *Complaint for Injunctive and Declaratory Relief*. Case No. 14-5059. September 18th, 2014.

⁴⁷ *Id.*

⁴⁸ *Mark Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083 - Dist. Court, D. Montana 2012.

⁴⁹ *Id.*

satellite offices opened on the reservations in time for the 2012 election, but the case moved forward to the appeals process.

In the appeal, the Department of Justice submitted a statement concurring with the plaintiffs and argued that the vastly greater travel distances faced by the Native American population in these counties when trying to cast an early in-person or absentee ballot compared to the white population amounted to a denial of equal access.⁵⁰ The amicus brief showed that Native Americans on average would have to travel from 189% to 322% more than their white counterparts to access these types of ballots. The Ninth Circuit declined to hear the case, rendering the original 2012 request for a preliminary injunction moot. The case was allowed to continue based on the additional Section 2 questions brought forward, but the parties settled on June 10th, 2014 establishing satellite offices on the three reservations in question.⁵¹

Sanchez v. Cegvaske (2016)

In 2016 the impact of differential travel distances was raised in a Nevada case, involving Paiutes and Shoshones living on the Pyramid Lake Reservation in Washoe County and the Walker River Reservation in Mineral County. After their request for an on-reservation early voting center was turned down, tribal members sought a preliminary injunction. Nixon, the population center of the Pyramid Lake Reservation is 48 miles from the Mineral County seat in Reno. Residents of the Walker River Reservation faced a similar situation in Washoe County, where the county seat, Hawthorne, is 35 miles away. The Nevada Secretary of State and the two county governments faced a public relations disaster when it was revealed that the state had established 21 early voting sites, largely in affluent white communities. On September 7, 2016, Judge Miranda Du issued a preliminary injunction and directed the state of Nevada

and the counties to provide early voting sites on the two reservations. In her decision, Judge Du strenuously rejected the state's argument that the plaintiffs "must show complete denial of the ability to vote or participate."⁵² The judge accepted the plaintiffs' argument that the differential access, combined with some of the "Senate factors," constituted "abridgement" of the defendants' right to vote in violation of Section 2.⁵³

"There is a constant cry for recognition that presses against a similarly constant movement pushing them to the fringes of American society."

There are two very significant take-aways from this litigation. First, unlike the earlier travel distance cases, *Sanchez v. Cegvaske* (2016) was not resolved through the parties reaching a settlement. Instead there was a judicial ruling---the first---that could be cited as precedent in Section 2 abridgement cases involving unequal access due by travel

⁵⁰ United States District Court of Montana Billings Division. *Statement of Interest of the United States of America*. Case No. 1:12-CV-135-RFC. October 24th, 2012.

⁵¹ Had the case been reheard at the district court level, there would have been a new judge, because in the intervening period, Judge Richard Cebull had taken early retirement after being found to have violated numerous ethical codes. In early 2012, right at the time when Judge Cebull was ruling in the *Wandering Medicine* case, the *Great Falls Tribune*

was running stories about the hundreds of racist emails that he had sent out from his courthouse chambers. The most provocative of these was an email suggesting that President Obama's mother had sex with a dog. Adams, John S. 2014. "Cebull Probe Finds More Emails: Hundreds are Related to 'Race, Politics, Gender.'" *Great Falls Tribune*. January 16.

<http://www.greatfallstribune.com/story/news/2014/01/17/federal-panel-releases-findings-in-cebull-misc...> Accessed

3/16/2017. Journalists from the *Great Falls Tribune* subsequently tried to gain access to these emails, after being told that many of the derogatory ones dealt with Native Americans, but their request was denied. *Adams v. Committee on Judicial Conduct & Disability*, Case No. 15-CV-01046-YGR. 165 F. Supp. 3d 911(2016).

⁵² *Sanchez v. Cegvaske*, 2016 Westlaw 5936918.

⁵³ *Id.*

distance combined with socio-demographic factors.⁵⁴ This is extremely important development. Second, the reaction of government officials to the ruling, however, suggests that those opposed to Native American voting rights will not acquiesce to enhanced access unless forced to do so. After the *Sanchez* ruling, the Inter-Tribal Council of Nevada asked the state to create satellite early-voting locations for the remaining seven tribes not covered by the ruling, but they were refused.

Conclusion

The struggle for equal voting rights for Native Americans is very much a continuation of Native Americans' ongoing struggle for civic equality. There is a constant cry for recognition that presses against a similarly constant movement pushing them to the fringes of American society. While Native Americans can no longer be statutorily prohibited from voting, achieving equal access to the ballot box is a continuing concern. As the ways available for Americans to vote have changed, new forms of discounting their vote have emerged. Does the Voting Rights Act require equality of access to all types of voting or is differential access allowed, as long as there are some means of voting?

This is what the legal dispute over abridgement concerns. We would argue that nothing less than full equality in access is the appropriate legal standard.

The Supreme Court's decision in *Shelby County v. Holder* (2013) decision has made this struggle more challenging. No longer are political jurisdictions with histories of voting rights abuses required to "pre-clear" changes to their election laws and procedures. This opens up the possibility that both old and new forms of vote denial dilution, and abridgement will have to be fought in the courts, and at great expense to litigants. Moreover, these cases will have to argue that the procedures violate the standard of proof required in Section 2 litigation. Cases, such as *Brooks v. Gant* (2012), *Poor Bear v. The County of Jackson* (2014), and *Sanchez v. Cegvaske* (2016), show that plaintiffs can get redress through Section 2 litigation, but it depends upon whether individual judges, such as Judge Miranda Du, recognize the seriousness of vote abridgement. Yet even were the Supreme Court to accept the legal test developed in *Sanchez v. Cegvaske*, the problem would still not be fully addressed. As a result of the *Shelby* ruling, American Indians (and other minority populations) still lack a way to

proactively prevent political jurisdictions from adopting procedures that make it harder for them to have access to the ballot box----and given the long history of discrimination against Native peoples, this is not likely to disappear in the near future.

⁵⁴ *Id.*

LANGUAGE SUPPRESSION, REVITALIZATION, AND NATIVE HAWAIIAN IDENTITY

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I ka ‘ōlelo nō ke ola, i ka ‘ōlelo nō ka make¹
Through language there is life; through language there is death

Having been the target of colonialist suppression for over a century and a half, the Hawaiian language has experienced a period of revitalization that began with the Native Hawaiian cultural and political renaissance of the 1970s. This revitalization, achieved largely through the growth and development of immersion schools, has led to a dramatic increase in the number of official speakers of Hawaiian and to more widespread acceptance of the language. Suppression of the language, however, is still ongoing in different contexts, particularly in education, government, and the courts. This holds true despite Hawaiian’s designation as one of the two official languages of Hawai‘i. Yet there are legal steps that might be taken to solidify the status of Hawaiian as an official language—not just in theory, but also in practice.

I. The Native Hawaiian Renaissance

In the 1970s, Hawai‘i was witness to an extraordinary Native Hawaiian renaissance that revitalized an indigenous people long subjected to Western colonial domination and suppression.¹ This renaissance was multifaceted and complex. On one level, it was a cultural renaissance, as it heralded a resurgence of interest in various aspects of Native Hawaiian heritage: traditional chants (oli), music, and dance (hula kahiko); the cultivation of traditional crops such as taro (kalo) and the practice of aquaculture through the use of fishponds (loko i‘a),

both by means of ancient methods; and the spiritual practices of the ancient religion, including the preservation and maintenance of sacred spaces. Moreover, the renaissance gave rise to a renewed interest in learning the Native Hawaiians’ ancestral methods of navigation. In 1976, the newly-founded Polynesian Voyaging Society² launched the Polynesian voyaging canoe Hōkūle‘a (“Star of Gladness”), which made a revolutionary journey to Tahiti and back by means of those ancient navigation techniques, using only celestial signs and ocean currents as guides.³

On another level, the Native Hawaiian renaissance

was political, as it precipitated long overdue official recognition of Native Hawaiian rights. To this end, the Hawai‘i State Constitutional Convention in 1978 enacted amendments to the Hawai‘i State Constitution that committed the state to the preservation and promotion of Native Hawaiian culture. One of these amendments established the Office of Hawaiian Affairs, charged with the mission of improving the well-being of Native Hawaiians. The sovereignty movement for Native Hawaiian self-determination also gained ground during the renaissance, as Native Hawaiian political leaders and activists belonging

¹ See William H. Wilson, *The Sociopolitical Context of Establishing Hawaiian-medium Education, in* INDIGENOUS COMMUNITY-BASED EDUCATION 95, 98–100 (Stephen May ed., 1999); William H. Wilson, *I ka ‘ōlelo*

Hawai‘i ke ola, ‘Life is found in the Hawaiian language,’ INT’L J. SOC. LANGUAGE 123, 130–131 (1998).

² POLYNESIAN VOYAGING SOCIETY, <http://www.hokulea.com/>.
[<https://perma.cc/8QFF-A98J>]

³ *Polynesian Navigation*, POLYNESIAN VOYAGING SOCIETY, <http://www.hokulea.com/education-at-sea/polynesian-navigation/>.
[<https://perma.cc/AV5T-84MM>]

to different grassroots organizations began organizing and demonstrating on a regular basis for the sovereignty cause.⁴

“By 1983, there were only two thousand native speakers in Hawai‘i.”

Especially crucial, however, to the Native Hawaiian renaissance was the start of the revitalization of the Hawaiian language (‘ōlelo Hawai‘i). The language had been banned in 1896 as a medium of instruction in schools, and almost eighty years later, it was in serious danger of extinction.

By 1983, there were only two thousand native speakers in Hawai‘i, including fifty under the age of eighteen, in addition to a number of much older native speakers, most of them living in a community of full-blooded Native Hawaiians on the small island of Ni‘ihau.⁵ Via a constitutional amendment in 1978, the state had designated Hawaiian as one of the two official languages of Hawai‘i. Due to the concerted efforts of a grassroots organization of parents who wanted Hawaiian to be their children’s primary language, independent Hawaiian

immersion schools began operating in 1984.⁶ These were the first official immersion schools in the United States with an indigenous language as the medium of instruction. In 1987, the state Board of Education agreed to a pilot program of Hawaiian language immersion in selected public schools.⁷ Full-fledged Hawaiian language programs and Hawaiian studies programs—taught in Hawaiian—at the University of Hawai‘i, which had gotten off the ground in the 1970s, burgeoned in the 1980s.⁸

This process of language revitalization has served as an attempt to resist the colonialist suppression that the language had undergone over the past century and a half.

“The language of a people is an inextricable part of the identity of that people. Therefore, a revitalization of a suppressed language goes hand in hand with a revitalization of a suppressed cultural and political identity.”

The language of a people is an inextricable part of the identity of that people. Therefore, a revitalization of a

suppressed language goes hand in hand with a revitalization of a suppressed cultural and political identity. Revitalizing the Hawaiian language means revitalizing Native Hawaiian identity. This Native Hawaiian identity was erased in the nineteenth century by a “language shift and sovereignty shift in government and education domains” that were “simultaneous and symbiotic.”⁹ Just as English supplanted the Hawaiian language as the language of education and governance, so did the United States supplant Hawaiian sovereignty. Indeed, the linguistic dominance of English was largely dependent upon the language being granted the “sole legitimacy of governance.”¹⁰

In a number of ways, the revitalization of the Hawaiian language is no longer suppressed as it once was. It is now recognized, of course, as one of Hawai‘i’s two official languages.¹¹ It is now possible to receive a K-12 Hawaiian-medium education in selected public schools. The University of Hawai‘i at Hilo offers graduate degrees taught in Hawaiian: an M.A. in Hawaiian Language and Literature and

⁴ For overviews of the sovereignty movement, see, e.g., *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* (Noelani Goodyear-Ka‘ōpua, Ikaika Hussey & Erin Kahunawaika‘ala Wright eds., 2014); J. KEHAULANI KAUNUI, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY* (2008); HAUNANI-KAY TRASK, *FROM A NATIVE*

DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I (1999).

⁵ *NATIVE HAWAIIAN LAW: A TREATISE* 1274 (Melody Kapilialoha MacKenzie ed., 2015).

⁶ See *A Timeline of Revitalization*, E OLA KA ‘OLELO HAWAI‘I, http://www.ahapunaleo.org/index.php?/about/a_timeline_of_revitalization/ [<https://perma.cc/C6VL-3FQB>]

⁷ *Id.*

⁸ *Id.*

⁹ Breann Nu‘uhiwa, “*Language Is Never About Language*”: *Eliminating Language Bias in Federal Education Law to Further Indigenous Rights*, 37 U. HAW. L. REV. 381, 406 (2015).

¹⁰ *Id.* at 405.

¹¹ Hawai‘i is the only state in the nation with two official languages.

Hawaiian¹² and a Ph.D. in Indigenous Language and Cultural Revitalization.¹³ The official state motto and anthem are in Hawaiian.¹⁴ The state and municipal governments use official Hawaiian orthography for words and names in official documents and street signs.¹⁵ There is a weekly radio program broadcast entirely in Hawaiian.¹⁶ There is also a television station that broadcasts programs in Hawaiian,¹⁷ and the prestigious hula competition at the Merrie Monarch Festival is now broadcast in both English and Hawaiian.¹⁸ Banks in Hawai‘i even accept checks drafted in Hawaiian.¹⁹

Yet in other ways, the current situation belies the Hawaiian language’s designated official status. The total number of speakers (including second-language speakers) is estimated to be just over 18,000 out of a state population of 1.4 million.²⁰ Advocates for Hawaiian

immersion schools have regularly faced uphill battles for recognition and state funding, notwithstanding the commitment to the preservation and promotion of Native Hawaiian culture in the state constitutional amendments of 1978. These advocates have also faced the skepticism of those who believe that Hawaiian immersion schools will produce individuals who are monolingual and unable to make their way in a country where English is the de facto official language. Moreover, despite its official status, Hawaiian is not an official language of government in Hawai‘i. Article XV, Section 4 of the Hawai‘i State Constitution designates English and Hawaiian as the state’s official languages, “except that Hawaiian shall be required for public acts and transactions only as provided by law.” With very few exceptions, state statutes and city ordinances are published only in English.

Courts neither accept documents in Hawaiian nor allow Hawaiian to be spoken in court proceedings.

The revitalization of the Hawaiian language and Native Hawaiian identity thus continues to face various challenges. For all the achievements of the Native Hawaiian renaissance, and despite the progress that the language has made over the past forty years in avoiding extinction, the Hawaiian language is still far from being an official language in practice. The aim of this paper is to interrogate the Hawaiian language’s status as an official language of Hawai‘i by examining how and why suppression of the language continues to this day, both in ways that are different from those implemented in the nineteenth century, but also in ways that are not very different at all. Part II of the paper will trace the history of the colonialist suppression of the

¹² *Master of Arts (M.A.) in Hawaiian Language and Literature*, KA HAKA ‘ULA O KE‘ELIKŌLANI (“COLLEGE OF HAWAIIAN LANGUAGE”),

<http://www.olelo.hawaii.edu/khuok/mhhma.php>. [<https://perma.cc/F9QV-GN9G>]

¹³ *Doctor of Philosophy (Ph.D.) in Hawaiian and Indigenous Language and Cultural Revitalization*, KA HAKA ‘ULA O KE‘ELIKŌLANI (“COLLEGE OF HAWAIIAN LANGUAGE”),

<http://www.olelo.hawaii.edu/khuok/mhhd.php>. [<https://perma.cc/F9QV-GN9G>]

¹⁴ The state motto is *Ua mau ke ea o ka ‘āina i ka pono* (attributed to King Kamehameha III and translated literally as “The sovereignty of the land is restored, as it should be,” but generally mistranslated as “The life of the land is perpetuated in righteousness.”). The state anthem (with Hawaiian lyrics) is Hawai‘i

Pono‘ī, composed by King David Kalākaua.

¹⁵ On the use of Hawaiian and non-Hawaiian place names in Hawai‘i, see R.D.K. Herman, *The Aloha State: Place Names and the Anti-conquest of Hawai‘i*, 89 ANNALS ASS’N AM. GEOGRAPHERS 76 (1999).

¹⁶ The program is called *Alana I Kai Ikina* (“Rising in the Eastern Sea”), on KWXX-FM, broadcast from Hilo, Hawai‘i.

¹⁷ The Native Hawaiian-owned and operated station is called ‘Ōiwi TV. ‘Ōiwi is the Hawaiian word for “native.”

¹⁸ *Instructions for SAP-Hawaiian Language*, MERRIE MONARCH FESTIVAL, <http://merriemonarch.com/instructions-sap-hawaiian-language>.

[<https://perma.cc/XH7D-2JLF>]

¹⁹ Paul F. Nahoia Lucas, *E Ola Mau Kākou I Ka ‘Ōlelo Makuahine: Hawaiian*

Language Policy and the Courts, 34 HAW. J. HIST. 1, 12 (2000).

²⁰ With 18,610 self-reported speakers, Hawaiian ranks fifth in a list of languages other than English that people speak at home in Hawai‘i. RESEARCH AND ECONOMIC ANALYSIS DIVISION, DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, STATE OF HAWAII, DETAILED LANGUAGES SPOKEN AT HOME IN THE STATE OF HAWAII 8 (2016),

http://files.hawaii.gov/dbedt/census/acs/Report/Detailed_Language_March2016.pdf. [<https://perma.cc/FL9F-ROCR>] On the various categories of speakers of Hawaiian, see Matthias Brenzinger & Patrick Heinrich, *The Return of Hawaiian: Language Networks of the Revival Movement*, 14 CURRENT ISSUES LANGUAGE PLAN. 300, 306–09 (2013).

language, from the arrival of the missionaries in the 1820s to the years following statehood in 1959. Part III will trace the key steps taken towards the revitalization of the language during and after the Hawaiian renaissance. Part IV will examine the ways in which suppression of the language is still ongoing in the face of this revitalization. Part V will discuss a number of steps that might be taken to solidify the status of Hawaiian as an official language of Hawai‘i not just in theory, but also in practice.

II. The Colonialist Suppression of the Hawaiian Language

In what is generally known as the pre-contact period (i.e., before the arrival of the first Europeans in 1778), the Hawaiian language was entirely oral, and had no written form. It was rich, nuanced, and sophisticated, with words having a multitude of meanings (kaona), both literal and figurative, and it abounded in poetic concepts.²¹ Spoken words embodied a host of life forces (mana) with “significant physical and spiritual powers unknown in Western society.”²² The

language developed a long tradition of oral literature, including chants, prayers, histories, myths, and traditional sayings.²³ Traditional Native Hawaiian schooling took place first in the home and then through instruction via the equivalent of apprenticeships to elders. Apprentices were taught to “observe, listen, and imitate.”²⁴

The American missionaries²⁵ introduced Western-style formal schooling in 1824, but with Hawaiian as the initial medium of instruction.²⁶ The missionaries found it urgent to educate the natives as quickly as possible in order to save them from what they perceived to be superstitious and immoral ways through conversion to Christianity. In addition, they believed that they would risk losing control over the natives if the population at large were to acquire English proficiency. To this end, the missionaries found it simpler to learn Hawaiian themselves and then to teach the natives in their own language. It was the missionaries who created an alphabet for the language, based on English. Having brought a printing press with them to Hawai‘i, the missionaries were soon

producing instructional materials, newspapers, and a Bible, all in the Hawaiian language.

Despite the success of the Hawaiian-medium schools, as shown by the high levels of literacy among Native Hawaiian adults in the 1850s,²⁷ growing numbers of educators were advocating an “English mainly” policy by the middle of the century.²⁸ In 1839, the missionaries had already established the Royal School, which was the first English-medium school in Hawai‘i. This private school was intended to educate the Native Hawaiian elite (royalty and chiefs) who expressed a desire to learn a language that was quickly making its presence felt in the kingdom²⁹—not only due to the missionaries, but also because of the increasing influence of Westerners (largely Americans) in business and politics. Advocates of the “English mainly” policy viewed instruction in English as a logical response to the steadily increasing English-speaking population, the rapidly decreasing Native Hawaiian population (due to disease), the influx of immigrants, and the “heathen practices” of the Native Hawaiians that had persisted

²¹ Lucas, *supra* note 20, at 1–2.

²² *Id.* at 2.

²³ THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 134 (Leanne Hinton & Ken Hale eds., 2001).

²⁴ NATIVE HAWAIIAN LAW, *supra* note 6, at 1261.

²⁵ The American Board of Commissioners for Foreign Missions, founded in 1810 in

Massachusetts, sent missionaries to Hawai‘i over a period of more than thirty years. These missionaries belonged to the United Church of Christ.

²⁶ Nu‘uhiwa, *supra* note 10, at 398.

²⁷ MAENETTE K.P. BENHAM & RONALD H. HECK, CULTURE AND EDUCATIONAL POLICY IN HAWAII‘I: THE SILENCING OF NATIVE VOICES 70 (1998).

²⁸ Lucas, *supra* note 20, at 4–5.

²⁹ Both King Kamehameha III and King Kamehameha IV publicly espoused the advantages of learning English, which they believed would allow Native Hawaiians to engage with Westerners on equal terms. NATIVE HAWAIIAN LAW, *supra* note 6, at 1264.

despite the missionaries' best efforts.³⁰ These advocates supported the establishment of English-medium government-run schools that would be open to all. These schools, which began operating in 1854, came to be better funded than the Hawaiian-medium schools and had more resources overall in terms of literature and teacher training.³¹ As a result, enrollments began to decline in the Hawaiian-medium schools. Growing numbers of Native Hawaiians started enrolling their children in the English-medium schools in order to take advantage of their superior resources. Even the Kamehameha Schools, founded later in the century (1887) for the education of Native Hawaiian children, began by using English as the sole medium of instruction. The decline of Hawaiian-medium schools increased through the latter half of the nineteenth century as the numbers of immigrants to Hawai'i increased, owing to the large-scale recruitment of workers for the sugar plantations. The children of immigrants were taught only in English-medium schools. By 1888, only 15.7 percent of all students were enrolled in Hawaiian-medium schools.³²

Although Hawaiian was an official language of government in Hawai'i throughout most of the nineteenth century, its status shifted over the years. A statute enacted in 1846 required all laws to be published in both Hawaiian and English.³³ Indeed, laws as well as all other government documents were bilingual, in order to meet the needs of both Native Hawaiians and Westerners.³⁴ The Hawai'i Supreme Court had even initially legitimized Hawaiian as the dominant language, but Hawaiian came to be perceived as ill-adapted to the uses of lawmakers and the courts.³⁵ In 1859, the Hawai'i legislature passed a law providing that the English version of any statute would be binding over the Hawaiian language version.³⁶ Reenacted six years later, the law provided that "[w]henver there exists a radical and irreconcilable difference between the English and Hawaiian versions of the laws of the Kingdom, the English version shall be held binding."³⁷ Although the legislature included both Native Hawaiian and American representatives, the former group was largely missionary-educated, a fact that may have "sway[ed] government decisions toward dominant

colonial activity."³⁸ By the end of the Kamehameha dynasty in the early 1870s, the legislature was publishing laws and documents in English first and having them translated into Hawaiian afterwards.³⁹

There were, to be sure, some voices of resistance to the growing dominance of English in the kingdom. In 1864, the Native Hawaiian head of the Board of Education severely criticized the legislature's practice of prioritizing English-medium schools over the Hawaiian-medium schools. He saw the preservation of the Hawaiian language as necessary for the kingdom's identity as a Native Hawaiian nation, but instruction in English was teaching Native Hawaiians to view their own language as inferior and not worth preserving.⁴⁰ There were even some missionaries who argued against these perceptions of the Hawaiian language as inferior.⁴¹

In the latter half of the nineteenth century, King David Kalākaua fostered a resurgence of Hawaiian culture⁴² in opposition to Western influences—yet this was met by counter-resistance on the part of government. Kalākaua sponsored efforts to permanently record ancient chants and genealogies in

³⁰ Nu'uhiwa, *supra* note 10, at 399.

³¹ Lucas, *supra* note 20, at 5–6.

³² NATIVE HAWAIIAN LAW, *supra* note 6, at 1265.

³³ Act of April 27, 1846, ch. 1, art. 1, sec. 5.

³⁴ JOHN E. REINECKE, LANGUAGE AND DIALECT IN HAWAII: A SOCIOLINGUISTIC

HISTORY TO 1935, 32 (Stanley M. Tsuzaki ed., 1969).

³⁵ *Id.*

³⁶ Civil Code of 1859, sec. 1493.

³⁷ Act of Jan. 10, 1865, sec. 1.

³⁸ BENHAM & HECK, *supra* note 25, at 50.

³⁹ REINECKE, *supra* note 32.

⁴⁰ NATIVE HAWAIIAN LAW, *supra* note 6, at 1267.

⁴¹ *Id.* at 1267–68.

⁴² This resurgence is sometimes referred to as the first Hawaiian renaissance, as opposed to the renaissance of the 1970s.

writing, supported performances of ancient music and hula, encouraged Native Hawaiian religious practices and ancient medicinal healing, and collected and preserved cultural artifacts.⁴³ In 1883, during Kalākaua's reign, the Hawai'i Supreme Court heard a case in which a non-Hawaiian printer was convicted of publishing a program of hula written in Hawaiian for Kalākaua's coronation.⁴⁴ The government deemed the hula to be obscene. The court reversed the conviction on the narrow grounds that the printer did not know Hawaiian and, therefore, had no criminal intent. The fact that the government criminalized the publication of Hawaiian and the court did not comment on the government's obscenity claim indicated that the "free and open exercise of Hawaiian" was clearly coming to an end.⁴⁵

The illegal overthrow of the Hawaiian Kingdom in 1893 by American businessmen (a number of whom belonged to missionary families), with the aid of military forces, dealt a crippling blow to the Hawaiian language. In 1896, the government of the new Republic of Hawai'i implemented an "English only" policy by enacting a law establishing English as the exclusive medium of

instruction in both public and private schools.⁴⁶ This law effectively banned all non-English languages (not just Hawaiian) as a medium of instruction. As an "English only" advocate observed, "With this knowledge of English will go into the young American republican and Christian ideas; and as this knowledge goes in, kahunaism, fetishism and heathenism generally will largely go out."⁴⁷ Since education in a language is crucial for language survival, the survival of the Hawaiian language was now put to an extreme test. In 1880, there were as many as 150 Hawaiian-medium schools still in operation.⁴⁸ Prior to the 1896 law, there were seventy-seven; after 1896, only one of these schools remained.⁴⁹ By 1902, it was gone.⁵⁰ The very act of speaking Hawaiian was forbidden and severely punished in schools; teachers even paid home visits to reprimand parents for speaking Hawaiian to their children in their own homes.⁵¹ The Organic Act of 1900, which was enacted two years after the U.S. annexation of Hawai'i, ensured the dominance of English in the new Territory of Hawai'i by providing that all government business was to be conducted in English only.⁵²

"These 'English only' laws were part of the federal government's broader effort at the time to eradicate the indigenous languages of Native Americans on the mainland."

These "English only" laws were part of the federal government's broader effort at the time to eradicate the indigenous languages of Native Americans on the mainland, which included the removal of children to English-medium boarding schools.⁵³ The goal of this "English only" policy was to assimilate, eradicate native cultures, and promote national unity via the creation of a national character; in addition, it had the added purpose of protecting indigenous people in their business dealings and transforming them into good citizens.⁵⁴

After annexation, the Hawaiian language entered a linguistic dark age that was to last for a good part of the twentieth century. The language went underground and largely found refuge in some churches, particularly in sermons and various church publications.⁵⁵ A small group of ministers from these churches taught the language at the University of Hawai'i for a

⁴³ *Id.* at 1268–69.

⁴⁴ *The King v. Grieve*, 6 Haw. 740 (1883).

⁴⁵ Lucas, *supra* note 20, at 8.

⁴⁶ Act of June 8, 1896, ch. 57, sec. 30.

⁴⁷ Lucas, *supra* note 20, at 8.

⁴⁸ ALBERT J. SCHÜTZ, *THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES* 352 (1994).

⁴⁹ David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & C.R. L. REV. 1, 33 (2006).

⁵⁰ SCHÜTZ, *supra* note 49.

⁵¹ Lucas, *supra* note 20, at 9.

⁵² Organic Act of April 30, 1900, ch. 339, §44, 31 Stat. 141 (1900).

⁵³ Nu'uhiwa, *supra* note 10, at 407–08.

⁵⁴ *Id.* at 408.

⁵⁵ Lucas, *supra* note 20, at 9–10.

period of thirty years.⁵⁶ Yet the churches were unable to sustain the language for long, as the Hawaiian-speaking ministers died one by one and there were no qualified individuals to take their place.⁵⁷ The language also disappeared from the public media. While over a hundred Hawaiian-language newspapers had been published since 1834, there was only one remaining in circulation by 1948.⁵⁸ Moreover, there was no place for Hawaiian on the radio or on television.⁵⁹ There were attempts in 1919 and 1935 to reintroduce the language into the schools by amending the 1986 law. But Hawaiian was to be reintroduced as a course of instruction rather than as a medium of instruction, and in the form of woefully inadequate lessons lasting ten minutes a day.⁶⁰ Reversing the practice of a century of bilingual publication, the legislature enacted a statute in 1943 that required laws to be published in English only.⁶¹ When Hawai‘i became a state in 1959 and tourism developed into a booming industry, the influx of English-speaking visitors and the commodification and debasement of Native Hawaiian culture for the benefit of these visitors only further reinforced the “English only”

imperative in both education and government.⁶²

III. The Revitalization of the Hawaiian Language

The revitalization of the Hawaiian language towards the end of the twentieth century began with acts of formal recognition by the supreme law of the state. The heightened public attention brought to Native Hawaiian culture and identity by the renaissance of the 1970s laid the foundations for three crucial amendments to the Hawai‘i State Constitution in 1978. These amendments support, both directly and indirectly, the preservation and promotion of the Hawaiian language. First, Article XV, Section 4 recognizes Hawaiian as an official language of the state: “English and Hawaiian shall be the official languages of Hawai‘i, except that Hawaiian shall be required for public acts and transactions only as provided by law.” This amendment gives what appeared to be legal status to a language that had been driven underground for almost a century and was rendered nearly extinct. Granted, the amendment includes a disclaimer to the effect that despite its official status, Hawaiian is not automatically deemed a language of

government. Instead, the amendment allows for exceptions, “as provided by law,” to the rule that English remains the language of government in Hawai‘i.

Second, Article X, Section 4 affirms the state’s commitment to promoting Native Hawaiian culture through educational programming in the public schools:

The State shall promote the study of Hawaiian culture, history and language. The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.

This amendment acknowledges the importance of including Native Hawaiian culture in the public school curriculum.⁶³ While the amendment does not explicitly mandate instruction with the Hawaiian language actually used as a medium of instruction, it does clearly provide for the study of the language.⁶⁴

⁵⁶ NATIVE HAWAIIAN LAW, *supra* note 6, at 1273.

⁵⁷ *Id.*

⁵⁸ Lucas, *supra* note 20, at 9.

⁵⁹ *Id.*

⁶⁰ *Id.* at 10; Ka‘ano‘i Walk, “Officially” *What? The Legal Rights and Implications*

of ‘Ōlelo Hawai‘i, 30 U. HAW. L. REV. 243, 250 (2008).

⁶¹ 1943 Haw. Sess. Laws, ch. 218, sec. 1.

⁶² THE GREEN BOOK, *supra* note 24, at 135.

⁶³ In 1978, a semester-long course in modern Hawaiian history (1778–present)

became a requirement for graduation from a public high school. Wilson (1999), *supra* note 2, at 100.

⁶⁴ In contrast with the history requirement, a language requirement was not something that could be implemented immediately, due to a lack of qualified

Third, Article XII, Section 7 asserts the state's commitment to protecting various Native Hawaiian rights: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a⁶⁵ tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights." This amendment covers the rights enjoyed by the ancient Native Hawaiians before European contact, including cultural rights. Granted, the amendment includes a disclaimer regarding the state's prerogative to "regulate such rights," which appears to limit the reaffirmation and protection of these rights asserted at the beginning of the section.

The renewed interest in revitalizing the Hawaiian language led to the establishment of the first Hawaiian-language immersion preschools in the early 1980s. Native Hawaiian parents seeking to raise their children to speak Hawaiian as their first

language gathered together in 1983 to establish a nonprofit organization, 'Aha Pūnana Leo, Inc. ("Language Nest Corporation") for the purpose of Hawaiian-medium instruction.⁶⁶ The organization created the first Pūnana Leo immersion preschool in the following year, modeled after the successful Maori language preschools Te Kohango Reo in Aotearoa (New Zealand).⁶⁷ Additional preschools opened in 1985.⁶⁸

Because of the 1896 "English only" law, however, these initial Pūnana Leo immersion preschools did not operate under the auspices of the state Department of Education. As a result of intense lobbying efforts by 'Aha Pūnana Leo, the state legislature passed an amendment in 1986 to the 1896 law, allowing special projects using the Hawaiian language with approval by the state Board of Education.⁶⁹ The Board itself then approved a pilot Hawaiian Language Immersion Program in 1987 for children wishing to continue with their immersion in the language after graduating from the Pūnana Leo preschools.

This pilot program, called Papahana Kula Kaiapuni, was gradually extended over the years, one grade per year, to grade 12.⁷⁰ The goals of this pilot program were "to assist the Hawaiian-speaking families in the revitalization of the language and culture and maintain usage of the language, to assist those families who wish to integrate into the Hawaiian-speaking community by eventually replacing their home language with Hawaiian for future generations, and to assist those families who wish to use Hawaiian as a second or third language in interacting with the Hawaiian-speaking community."⁷¹ In 1999, the first class of students to have received a K-12 education taught entirely in Hawaiian received their high school diplomas.⁷² In 2011, reports indicated that Hawaiian immersion students were maintaining a 100% graduation rate from high school, with over 80% going on to higher education.⁷³ By 2015, twenty-one immersion schools across

instructors. Indeed, "short lessons in colours, body parts and greetings" were decidedly not what proponents had in mind. *Id.* at 100–101.

⁶⁵ The ahupua'a was the traditional Hawaiian pie-shaped land division, extending from the mountains all the way down to the seashore. Under the rule of a chief and under supervision by an overseer, the common people maintained the ahupua'a, which was self-sufficient due to the sustainable resources that it provided.

⁶⁶ *Timeline, supra* note 7. On the advantages of Hawaiian-medium education, see William H. Wilson & Kauanoie Kamanā, "For the Interest of the Hawaiians Themselves": Reclaiming the Benefits of Hawaiian-Medium Education, 3 HŪLILI 153 (2006); Keiki K.C. Kawai'ae'a, Alohalani Kaluhiokalani (Kaina) Housman & Makalapua (Ka'awa) Alencastre, *Pū'ā i ka 'Ōlelo, Ola ka 'Ohana: Three Generations of Hawaiian Language Revitalization*, 4 HŪLILI 183 (2007).

⁶⁷ Lucas, *supra* note 20, at 11; Nu'uhiwa, *supra* note 10, at 416–17.

⁶⁸ *Timeline, supra* note 7.

⁶⁹ Haw. Rev. Stat. sec. 298-2(b) (1993).

⁷⁰ Lucas, *supra* note 20, at 11.

⁷¹ Lucas, *supra* note 20, at 11.

⁷² *Timeline, supra* note 7.

⁷³ *Celebrating Success of Hawaiian Immersion Schools*, HAWAII ISLAND JOURNAL, <http://www.hawaiiislandjournal.com/2011/06/celebrating-success-of-hawaiian-immersion-schools/>.

the state were educating about 2,000 students each year.⁷⁴

“These charter schools provide students with an education that emphasizes Native Hawaiian culture and values.”

A network of seventeen public Native Hawaiian charter schools has also developed, partly out of a desire for autonomy from the traditional public school system and for the freedom to explore innovative pedagogical methods. These charter schools provide students with an education that emphasizes Native Hawaiian culture and values.⁷⁵ While the instruction in some of these schools is in English, six of these schools are actual Hawaiian language immersion schools.⁷⁶

In the 1990s, the revitalization of the Hawaiian language received legal validation through Congress. The federal Native American Languages Act (NALA), enacted in 1990, encourages the preservation and promotion of native languages by encouraging children to be educated in their own language.⁷⁷ The Act applies to Native Americans, Native

Alaskans, Aleut peoples, Native Hawaiians, and descendants of the aboriginal peoples of Pacific islands that are U.S. possessions or territories. Pursuant to § 2904 of the Act, “[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.” The federal Native Hawaiian Education Act (NHEA), enacted in 1994, has the goal of improving educational opportunities for Native Hawaiians and restoring the linguistic integrity of the Hawaiian language.⁷⁸ The Native Hawaiian Education Council, which implements programs under the NHEA, is comprised of members recommended by the Native Hawaiian community. The Council awards grants to Native Hawaiian educational and community-based organizations engaged in projects supporting Native Hawaiian education. Hawaiian-medium classroom instruction is on the list of prioritized projects eligible for these grants.

“The resolution thus grants implicit approval for future efforts to repair the relationship between the United States and the descendants of subjects of the kingdom.”

In 1993, Congress passed an Apology Resolution in official recognition of the illegal overthrow of the Hawaiian Kingdom in 1893.⁷⁹ This joint resolution acknowledges the “historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people.”⁸⁰ The resolution also notes the public apology granted in the same year by the United Church of Christ (the church of the missionaries sent to Hawai‘i), which acknowledged its “historical complicity” in the illegal overthrow.⁸¹ The resolution expresses Congress’ “commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai‘i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.”⁸² By acknowledging Native Hawaiian suppression and the need for reconciliation between

⁷⁴ Nu‘uhiwa, *supra* note 10, at 417. For a list of these immersion schools, see *Kaiapuni schools—Hawaiian language immersion*, HAWAII STATE DEPARTMENT OF EDUCATION, <http://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/Hawaiian-language-immersion-schools.aspx>.

⁷⁵ For an overview of the development and philosophy of these Native Hawaiian

charter schools, see Nina K. Buchanan, Robert A. Fox, Susan Leigh Osborne & C. Puanani Wilhelm, *Kua O Ka Lā: A Hawaiian Culturally Focused Charter School*, in *PROUD TO BE DIFFERENT: ETHNOCENTRIC NICHE CHARTER SCHOOLS IN AMERICA* 21, 28–33 (Robert A. Fox & Nina K. Buchanan eds., 2014).

⁷⁶ *Kaiapuni schools*, *supra* note 75.

⁷⁷ Native American Languages Act, 25 U.S.C. §§ 2902 et seq.

⁷⁸ Native Hawaiian Education Act, 25 U.S.C. §§ 7511 et seq.

⁷⁹ Joint Resolution, 103d Congress, Nov. 23, 1993, Publ. L. No. 103-150, 107 Stat. 1510.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Native Hawaiians and their colonial oppressor, the resolution thus grants implicit approval for future efforts to repair the relationship between the United States and the descendants of subjects of the kingdom. The illegal overthrow was a colonial act that led directly to the legal prohibition of the Hawaiian language in the schools as well as in government. Therefore, the resolution arguably apologizes as well for this legal prohibition of the language.⁸³ While the resolution does include a disclaimer asserting that “[n]othing in this Joint Resolution is intended to serve as a settlement of any claims against the United States,”⁸⁴ the resolution’s official gesture towards reconciliation efforts is nonetheless significant.

IV. The Ongoing Suppression of the Hawaiian Language

A. Education

While neither the federal nor state government generally cannot enact laws restricting the use of non-English languages,⁸⁵ the government does not necessarily have an affirmative duty to provide non-English speakers with programs and/or services in their own language.⁸⁶ Indeed, the Hawai‘i state Board of

Education has not recognized any affirmative duty to fully fund the Hawaiian language immersion schools. The Board’s official position in 1997 was that the program is a program of choice and not of right.⁸⁷ Therefore, the immersion schools can and do receive funds if they are available, but not at the expense of other public schools and school programs where English is the medium of instruction.

A lack of adequate funding and support for the Hawaiian immersion schools gave rise in the 1990s to a legal challenge to the state Department of Education (DOE). At stake was the potential for such funding and support, in the form of curriculum materials and teacher training, to put the immersion schools on a level equaling or exceeding English-language instruction in the public schools. In *Office of Hawaiian Affairs v. Department of Education*, 951 F. Supp. 1484 (D. Haw. 1996), the Office of Hawaiian Affairs claimed that the DOE’s failure to provide sufficient support and resources for the immersion schools violated both state law and the Native American Languages Act (NALA). The State argued that OHA’s claim under NALA should be dismissed because

NALA creates no enforceable rights or implied private right of action: in other words, NALA does not impose an affirmative duty on the state to provide what OHA requested.

The court ruled in favor of the DOE. It found that § 2904 of NALA provides that the “right of Native Americans to express themselves through use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.” However, the court did not see this provision as creating an enforceable right: “at most it prevents the state from barring the use of Hawaiian languages in schools.”⁸⁸ Yet the court failed to consider the historical context for the decline of Hawaiian-medium schools in the nineteenth century—particularly the fact that English-medium schools were better funded and enjoyed superior resources in comparison.⁸⁹ The court also failed to acknowledge the skepticism (and even hostility) of certain DOE administrators and school principals regarding the viability of the Hawaiian immersion schools.⁹⁰ The refile of portions of the OHA’s lawsuit in 1998 led to a settlement in 2000 for increased funding for the immersion schools over the

⁸³ Summer Kupau, *Judicial Enforcement of “Official” Indigenous Languages: A Comparative Analysis of the Māori and Hawaiian Struggles for Cultural Language Rights*, 26 U. HAW. L. REV. 495, 520 (2004).

⁸⁴ *Id.*

⁸⁵ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁸⁶ See, e.g., *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022 (9th Cir. 1978).

⁸⁷ *Lucas*, *supra* note 20, at 12.

⁸⁸ *Office of Hawaiian Affairs v. Department of Education*, 951 F. Supp. 1484, 1495 (D. Haw. 1996).

⁸⁹ NATIVE HAWAIIAN LAW, *supra* note 6, at 1278.

⁹⁰ *Id.*

next five years, with the OHA partially matching funds allocated by the DOE.⁹¹

“The immersion schools as well as the Native Hawaiian charter schools have also come into conflict with the No Child Left Behind Act (NCLB) of 2001.”

The immersion schools as well as the Native Hawaiian charter schools have also come into conflict with the No Child Left Behind Act (NCLB) of 2001.⁹² The charter schools in particular have the autonomy to use innovative and culturally based pedagogical methods, but these methods do not meet the goals of the NCLB, which are based on standardization.⁹³ The immersion schools have also encountered problems with the NCLB’s standardized testing requirements. Although these schools formally introduce English into the curriculum at a later stage than do English language schools, the NCLB assessment tests in English are still required for all students at the same time.⁹⁴ There has been ongoing experimentation with standard assessment tests translated into Hawaiian, but with mixed results. In 2015, the DOE received a one-year waiver from the U.S. Department of Education that

allowed third and fourth graders to take assessment tests written in Hawaiian.⁹⁵

B. Government

The right to use the Hawaiian language in the courtroom was the subject of a legal challenge in 1994, sixteen years after Hawaiian was designated an official language in the state constitution. In *Tagupa v. Odo*, 843 F. Supp. 630 (D. Haw. 1994), a bilingual Native Hawaiian attorney (fluent in both Hawaiian and English) contested a court order requiring him to give his oral deposition in English for an employment discrimination lawsuit. He claimed that he had the right to give the deposition in Hawaiian. He argued that this right came from Article XV, Section 4 of the state constitution (recognizing Hawaiian as an official language) and from NALA (recognizing the right of Native Americans to express themselves through the use of Native American languages is not restricted in public proceedings).

“The right to use the Hawaiian language in the courtroom was the subject of a legal challenge in 1994, sixteen years after Hawaiian was designated

an official language in the state constitution.”

The court ruled against the plaintiff. It rejected the argument based on the state constitution, holding that Article XV, Section 4 “provides little guidance” for the court to determine whether there indeed existed a right to give a deposition in Hawaiian.⁹⁶ The court also held that it was not Congress’ intent to extend the reach of NALA, a statute that dealt primarily with education, to judicial proceedings in federal courts.⁹⁷ In addition, the court decided that allowing depositions in Hawaiian would result in unnecessary delays and expenses involved in finding qualified interpreters. Because the plaintiff was bilingual and spoke English, it was more expedient for him to give his deposition in English.⁹⁸ The court thus found practical concerns to be controlling. Ultimately, the court found that “a definitive judicial determination of this issue is better left to the Hawaii state courts.”⁹⁹ However, no state courts have yet interpreted the legal effect of Article XV, Section 4. The discouraging message conveyed by the *Tagupa* decision is that “language revitalization and perpetuation efforts end in the

⁹¹ *Id.*

⁹² No Child Left Behind Act, 20 U.S.C. §§ 6301 et seq.

⁹³ NATIVE HAWAIIAN LAW, *supra* note 6, at 1280.

⁹⁴ *Id.*

⁹⁵ *E ola ka ‘ōlelo Hawai‘i: Assessment tests in Hawaiian language granted federal waiver*, OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/news/assessment-tests-in-hawaiian-language-granted-federal-waiver/>.

⁹⁶ *Tagupa v. Odo*, 843 F. Supp. 630, 631 (D. Haw. 1994).

⁹⁷ *Id.* at 632.

⁹⁸ *Id.* at 631.

⁹⁹ *Id.*

schools and homes, with no place in the government and the courts.”¹⁰⁰

The holding in *Tagupa* stands in contrast with the holding in the 2003 case *Commonwealth of the Northern Mariana Islands v. Guerrero*.¹⁰¹ In this case, the appellant sought to overturn his conviction on the grounds that the trial court did not allow him to use the Chamorro language during trial. The appellant based his right to use Chamorro on Article XXII, Section 3 of the Commonwealth Constitution, which designates Chamorro as an official language of the Northern Mariana Islands, along with Carolinian and English. The Supreme Court of the Northern Mariana Islands reversed the trial court, holding that a native speaker of Chamorro or Carolinian has the constitutional right to speak that language in court.¹⁰² Indeed, this right applies even if that native speaker is fluent in English as well—as was the appellant in *Guerrero*.

The *Tagupa* holding also stands in contrast with the legal situation regarding the indigenous Māori language (Te Reo Māori) in Aotearoa (New Zealand).¹⁰³ The Treaty of Waitangi Act of 1975¹⁰⁴ created the Waitangi Tribunal,

which had the authority to investigate Māori claims under the 1840 Treaty of Waitangi (by which Māori tribes arguably ceded sovereignty to England). The Tribunal recommended that official recognition of Te Reo Māori must be more than “mere tokenism . . . those who want to use our official language on any public occasion or when dealing with any public authority ought to be able to do so.”¹⁰⁵

Although the court in *Mihaka v. Police* (1980) held that English was the official language of the courts,¹⁰⁶ Te Reo Māori can now be used in any legal proceeding, thanks to ensuing legislation. The Treaty of Waitangi Amendment Act of 1985¹⁰⁷ allowed the Tribunal to investigate claims dating back to the Treaty of 1840. The resulting Tribunal’s Report of 1986 on the Te Reo Māori claim considered whether the New Zealand Crown was obligated to preserve Te Reo Māori under the 1840 Treaty.¹⁰⁸ The Māori Language Act of 1987 established the expressed right to speak Te Reo Māori in legal proceedings, regardless of the speaker’s English proficiency.¹⁰⁹ This Act generated a number of court decisions, culminating in

Wharepapa v. Police in 2002.¹¹⁰ In this case, the court held that a person “ought not to be presumed to have committed an offence merely because he is speaking a language other than English, particularly when the language being spoken is an official language of New Zealand.”¹¹¹

V. Hawaiian as an Official Language of Hawai‘i

What does the future portend for the Hawaiian language as an official language of the state? Having stepped back from the brink of extinction, the language has made remarkable progress over the past forty years. Yet the fact remains that despite the ever-increasing numbers of individuals who now speak and write Hawaiian in immersion schools and in their homes, Hawaiian is not the language of government or the courts. Forty years ago, of course, it could not have been so. Today, the 18,000 individuals who identify Hawaiian as the language they speak at home show that it is a living language, and it is thriving. If the same kind of progress continues, the number of Hawaiian language speakers will only grow. The question, then, remains as to what it will

¹⁰⁰ Kupau, *supra* note 84, at 500.

¹⁰¹ *Commonwealth of the Northern Mariana Islands v. Guerrero*, 2003 MP 15.

¹⁰² *Id.* ¶ 10.

¹⁰³ For a comparative analysis of the revitalization movements for the Māori and the Hawaiian languages, see Kupau, *supra* note 84.

¹⁰⁴ Treaty of Waitangi Act, 1975 (N.Z.).

¹⁰⁵ WAITANGI TRIBUNAL, DEP’T OF JUSTICE, REPORT OF THE WAITANGI TRIBUNAL ON THE TE REO MAORI CLAIM (Wai 11) § 8.2.8 (1986) (N.Z.).

¹⁰⁶ *Mihaka v. Police*, [1980] 1 N.Z.L.R. 460.

¹⁰⁷ Treaty of Waitangi Amendment Act, 1975 (N.Z.).

¹⁰⁸ WAITANGI TRIBUNAL, *supra* note 103.

¹⁰⁹ Māori Language Act, 1987 (N.Z.).

¹¹⁰ *Wharepapa v. Police*, [2002] N.Z.L.R. 611.

¹¹¹ *Id.* at 617.

truly mean for Hawaiian to be an official language of the state.

An important consideration with regard to this question involves the ways in which the state constitutional amendments of 1978 “can be used as a tool to increase benefits for Hawaiian speakers.”¹¹² Although the court in *Tagupa* found “little guidance” in Article XV, Section 4 of the state constitution, there have been proposals regarding possible ways of framing the amendments so as to build a case for the use of Hawaiian in government and in the courts.

Because the court in *Tagupa* reasoned that the plaintiff was not actually prevented from giving his deposition, albeit in a language that he did not want to use, a distinction has arisen between an individual’s right of self-expression and the cultural right of a people.¹¹³ While the court in *Tagupa* viewed the plaintiff’s fluency in English as a practical solution to an immediate problem and saw no violation of his right to self-expression and due process, it failed to consider the significance of using the Hawaiian language as a means of revitalizing both the language itself and the culture of the Native Hawaiian people. If the use of Hawaiian is framed as a cultural right, then

bilingualism is rendered meaningless: it would not matter whether an individual knows English or not.

“If the use of Hawaiian is framed as a cultural right, then bilingualism is rendered meaningless: it would not matter whether an individual knows English or not.”

There has been some discussion over how to affirm the cultural rights of Native Hawaiians by advocating for the traditional and customary rights of Native Hawaiians pursuant to Article XII, Section 7 of the state constitution. In *Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission (PASH)*, 903 P.2d 1246 (Haw. 1995), the Hawai‘i Supreme Court held that the state was obligated to protect Native Hawaiians’ legitimate exercise of traditional access and gathering rights that had been established by 1892. Hawai‘i’s custom and usage law established English common law in Hawai‘i in 1892, with a special exception for existing Hawaiian judicial precedent or established usage.¹¹⁴ In effect, this law subordinated English and American common law to traditional and customary Native Hawaiian practices. The court in *PASH* reaffirmed all traditional and customary rights

existing under state law, and outlined “specific, although not necessarily exhaustive, guidelines” in interpreting the rights in Article XII, Section 7 of the state constitution.¹¹⁵ The right that is sought must be “reasonable” and “traditional” and in place prior to 1892.¹¹⁶ The state (or opposing party) must then show that some actual harm would result by implementation of this right.

The language of Article XII, Section 7 of the state constitution creates an enforceable right in ahupua‘a tenants (tenants of the traditional Hawaiian land division) choosing to practice their traditions and customs under state law. The amendment specifically refers to these traditions and customs as “all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua‘a tenants.” It has been argued that because Article XII, Section 7 applies to “all rights,” it should apply to the use of the Hawaiian language, as it is a “well-documented and customary practice that has been exercised by Native Hawaiians for centuries.”¹¹⁷ The *PASH* holding might thus support the reaffirmation and protection of the traditional and customary practice of using Hawaiian in government and in the courts.¹¹⁸ Indeed, it can be

¹¹² Lucas, *supra* note 20, at 18.

¹¹³ Kupau, *supra* note 84, at 501; NATIVE HAWAIIAN LAW, *supra* note 6, at 1288.

¹¹⁴ HAW. REV. STAT. § 1-1 (2013).

¹¹⁵ *Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission (PASH)*, 903 P.2d 1246, 1259 (Haw. 1995).

¹¹⁶ *Id.* at 1263.

¹¹⁷ Lucas, *supra* note 20, at 19.

¹¹⁸ *Id.*

argued that the right to use Hawaiian is already framed as a cultural right in the amendment. Analogized to the traditional and customary rights in PASH, the right to use Hawaiian could be an enforceable right as well.

In 2013, the Hawai‘i state legislature enacted the first bilingual statute in seventy years.¹¹⁹ Enacted to establish February as ‘Ōlelo Hawai‘i Month (“Month of the Hawaiian Language”) to “celebrate and encourage the use of Hawaiian language,” the statute was largely symbolic. But the historic gesture is significant. Even if the process is incremental, the revitalization of the Hawaiian language continues. As the first half of the Hawaiian proverb goes, “I ka ‘ōlelo nō ke ola.” (“Through language there is life.”)

¹¹⁹ Haw. Rev. Stat. § 8-24 (2013).

A DISCUSSION WITH PAULETTE BROWN; HER LIFE AND HER PERSPECTIVES

Robert Skrinayaz

When Paulette Brown spoke at the Diversity & Social Justice Forum's Fall 2016 Symposium, she was the Immediate Past President of the American Bar Association. Ms. Brown honored our organization with her Keynote Address and inspired our students during lunches and walks around the university campus. One of those students was Robert Skrinayaz, who formulated the questions for this discussion with the help of Board Member and then The Forum Editor, Sumangala Bhattacharya.

Q: What set you on the path to becoming a lawyer? What other vocations did you eliminate along the way?

A: I originally went to college with the intent of becoming a social worker because I thought I could save the world. After getting to college, I ended up having, two young ladies who wanted to go to law school and become attorneys as roommates. I was persuaded by them, along with some professors who were lawyers, that I could help more people with a law degree.

Q: Did you receive unexpected support for your decision to go into law that really surprised and energized you?

A: I do not recall any unexpected support.

Q: Did you receive friction or resistance that surprised you?

A: I received resistance that I thought to be extremely odd. For example, at my going away party, one of my co-workers said to me: "don't feel bad (ly) when you flunk out your first

year. Fifty percent of law students do."

Q: You received your undergraduate degree from at Howard University, a historically black university in the political heart of the nation—how do you think your experience there influenced your career trajectory? How do you think the University's role and relevance have stayed the same since you graduated, or how have they changed?

A: Attending Howard taught me many things. It taught me a degree of confidence and that as an African American that it is okay to be confident and not have a fear of expressing it. Additionally, without expressly stating, Howard had and continues to have an expectation that its graduates would and will obtain advanced degrees. Howard taught me that while my self-expectations were high, they needed to be higher. Living in DC, I had the extraordinary opportunity during my senior year in college to work in the office of the Secretary (Frank Carlucci) of the then Department of

Health Education & Welfare, now Health and Human Services. I am reasonably certain I would not have had this opportunity, but for the fact that I was a student at Howard University. At the time, and to be quite honest, I was not considering a "career trajectory;" but clearly, the impact is there.

Q: In a recent panel discussion of diverse women lawyers at Chapman University Dale E. Fowler School of Law each speaker independently brought up two specific challenges: (1) establishing their authority, whether with partners or clients, and (2) the importance of living their "authentic selves" while still adapting to and negotiating the "boys' club" of many law firms. As this is still an issue today, how did you approach these challenges when you started?

A: I did not work for a law firm when I first graduated from law school. I did not work for a large firm until January 2000, at which point, I had been out of law school 24 years. I began my legal career with a steel

company. There were more gender issues than anything else. I was able to make inroads into certain areas where women had not gone, but there were some areas where, until the day I left, I was unable to crack the code. I was never allowed to participate in face to face union negotiations. I find that it's okay to question, and we should. Not in a way that may be embarrassing to the other person such that it appears to be a challenge, but in a manner in which both parties can learn.

Q: You have extensive experience in labor and employment law, often defending major corporations against claims brought under the Equal Employment Opportunity Commission (EEOC). How do you personally balance respect for the high-level aims of that body in promoting non-discriminatory workplaces, while vigorously advocating for your client's interests? Is there room for all parties to improve?

A: Many of the claims I handle do not go through the EEOC. I am fortunate to have clients who really try to do the right thing. Occasionally, mistakes are made, and it's my duty to counsel them. I have to also say, some employees knowingly bring cases that have absolutely no merit. They are looking for a quick settlement with the hopes that the client would rather get rid

of a case early than spend the money to litigate.

Q: Diversity and inclusion were hallmarks of your goals as ABA president, described in the executive summary of the Diversity and Inclusion 360 Commission. Part of that initiative outlined how firms can better support diverse attorneys: how can new and soon-to-be attorneys contribute to creating and supporting more diverse and inclusive workplaces?

A: New and soon-to-be-attorneys can do what I recommend most people do—engage in a critical self-analysis. First, determine whether they possess any implicit biases. One tool that can be used to make this determination is to take some of the implicit association test at www.implicit.harvard.edu. Second, new and soon-to-be-attorneys can also participate with groups and in activities that are outside of their natural affinity groups. Third, when in a situation wherein a slight or discriminatory practice is observed, if it is safe to do so, speak up. Inclusiveness may also extend to the consumers of legal services—the advent of the “app” and web-based solutions make legal forms, fill-in-the-blank contracts, and other legal or quasi-legal services more available to consumers reluctant or unable to pay for traditional representation.

Q: What can the legal community do to promote access for those who may not need frequent legal representation, as an alternative? Is there a way to leverage the technology to lower costs, but not sacrifice high standards of client advocacy?

A: There are several young lawyers who are already thinking about this and developing means by which they can provide affordable legal services and still be able to sustain themselves financially. Additionally, there are a few law schools who are developing incubators within their schools to prepare students to provide legal services to the underserved. It is my belief that some consumers are faced with no other options than the online services, but as with anything, an extreme amount of caution is required and to the extent possible, “live” people are better than machines—for now.

Q: So you established a career, and started garnering accomplishments and achievements: when did your ABA involvement mature into the desire to pursue a leadership position? The travel, speaking engagements, and general life disruption are significant demands— where do you feel that your appearances have made the most impact and made the sacrifices most worthwhile?

A: During my term as President of the ABA, I had an opportunity to visit more than 40 Boys & Girls Clubs around the country—talking to those boys and girls, knowing so many of them, like me never had an opportunity to know any lawyers, letting them know they have options. Young lawyers and/or law students always accompanied me on these visits. I observed that in most instances, these young lawyers and law students achieved as much of a benefit as did the boys and girls. Many of them continue to have a relationship with the clubs. Sometimes, one does not know what one can be until they see it. I learned from my extensive travels (I visited all 50 states at least once) that almost all lawyers have a common goal—to help people. Lawyers do so much pro bono work without receiving recognition. We are in a profession that requires service to others. I don't think I ever thought about being tired. It was one of the best experiences of my career.

Q: When you spoke at the Symposium last autumn, you detailed how many big law firms miss out on talent from middle-tier schools. What can students at these institutions do to assert this talent and make themselves known?

A: To be perfectly honest, it may be somewhat difficult to make yourselves known. You need help. Most of the push comes from within the firms.

On your end, it is important for you to let your law school career counselor know you want the envelope pushed. Also, try to connect with alums. One thing I have learned is that there are some alums who have not gone to “top tier” schools, but when they are recruiting, want students from only top tier schools. I think there is a way to question that. I would wonder whether these recruiters think their degrees are worth less now than when the recruiters the new law graduates obtained their degree. I am not speaking spherically to Chapman graduates, but in general. I would also point out the number of GC's and leaders in corporations who have not gone to “top tier” schools. Keep in mind: I am not downplaying the value of any school that provides a quality education and provides its students with the necessary tools to succeed. My primary point is: many good and great lawyers graduated from schools that are not in the “top tier”.

Q: If you could leave your past-self one post-it note of advice, encouragement, or warning, (1) what would you say, and (2) when would you say it?

A: Pay close attention to and follow the advice I give others to be successful. I would have told myself be more strategic and search outside of my comfort zone.

Q: What do you hope for your legacy? If you could be remembered for one thing, above all: what would that be? Is that answer different for your personal and professional lives?

A: That I was able to make a difference in a positive way with respect to how people think and talk about diversity and inclusion, particularly in the legal profession, with the understanding that law affects everything we do.

Q: What part of your unique and valuable journey should be shared, but does not directly answer any of the previous questions?

A: What I like to do if I have “spare” time. I love to walk, cook, and read (books that do not require a lot of thought).

STATEWIDE RESTORATIVE JUSTICE LEGISLATION AND DECLINING TRENDS IN THE U.S. CRIMINAL JUSTICE SYSTEM: WHAT IMPACT, IF ANY?

Suneeta H. Israni

The United States has one of the highest youth incarceration rates and arrest rates in the world.[1] [2] National averages show that the cost to keep a youth locked up, \$88,000 a year, exceeds the cost the U.S. spends per public school student, \$12,296.[3] [4] School districts like Los Angeles Unified School District have aimed to dismantle the school-to-prison pipeline by adopting restorative justice (“RJ”) legislation. This article seeks to understand what impact, if any, RJ legislation has on the juvenile justice system. This article explores a quantitative relationship between RJ legislation and three declining trends (juvenile petition counts, juvenile homicide offenders, and juvenile arrest rates) in 50 U.S. states generally across a five-year period (2008-2012). The results of this inquiry are mixed. While the results are not statistically significant for those given years, textual analysis of the bills, qualitative research, and trendlines forecasting the future indicate otherwise. Trendlines indicate that as more states introduce RJ legislation, the more those states will experience declines in each of those trends. The results inspire a need for more states to explore or experiment with RJ legislation so that in-depth studies by criminologists can more accurately measure the statistical significance of these relationships between RJ legislation and declining trends in the U.S. criminal justice system. Finally, other numerical data shows that an impressive percentage of states that introduced at least one RJ bill exceeded the national averages in each of those declining trends.

I. INTRODUCTION: STATEMENT OF THE PROBLEM

While the United States [hereinafter U.S.] experienced a decline in three areas [petitions filed against youths, rates of youth offenders in homicide matters, and juvenile arrest rates]¹, it still has one of the highest youth incarceration

rates and arrest rates in the world.^{2 3} It “leads the industrialized world in the number and percentage of children it locks up in juvenile detention facilities, with over 60,000 children in such facilities in 2011.”⁴ “The American rate of juvenile incarceration is seven times that of Great Britain, and 18 times that of France.”⁵ (See

Figure 1). Human Rights Watch and the American Civil Liberties Union estimated that the “U.S. also sends an extraordinary number of children to adult jails and prisons—more than 95,000 in 2011...with few opportunities for meaningful education or rehabilitation.”⁶

¹ See Appendix A for graphs of declines.

² NEAL HAZEL, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE 60 (YJB 2008), http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf [<https://perma.cc/Z6YZ-9WHP>].

³ RICHARD A. MENDEL, NO PLACE FOR KIDS (2011), <https://perma.cc/26XE-RHK2>.

⁴ BERNSTEIN, NELL. BURNING DOWN THE HOUSE: THE END OF JUVENILE

PRISON (The New Press, 2014); Michael Garcia Bochenek, *Children Behind Bars: The Global Overuse of Detention of Children*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2016/children-behind-bars> [<https://perma.cc/GE8S-VP6C>] (last visited Apr. 24, 2017).

⁵ BERNSTEIN, NELL. BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON (The New Press, 2014); ‘Burning Down the House’ Makes the Case Against Juvenile Incarceration,

NPR (June 4, 2014, 3:19PM ET), <http://www.npr.org/2014/06/04/318801651/burning-down-the-house-makes-the-case-against-juvenile-incarceration> [<https://perma.cc/796R-9EYT>].

⁶ Michael Garcia Bochenek, *Children Behind Bars: The Global Overuse of Detention of Children*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2016/children-behind-bars> [<https://perma.cc/PF8W-BFJQ>] (last visited Apr. 24, 2017).

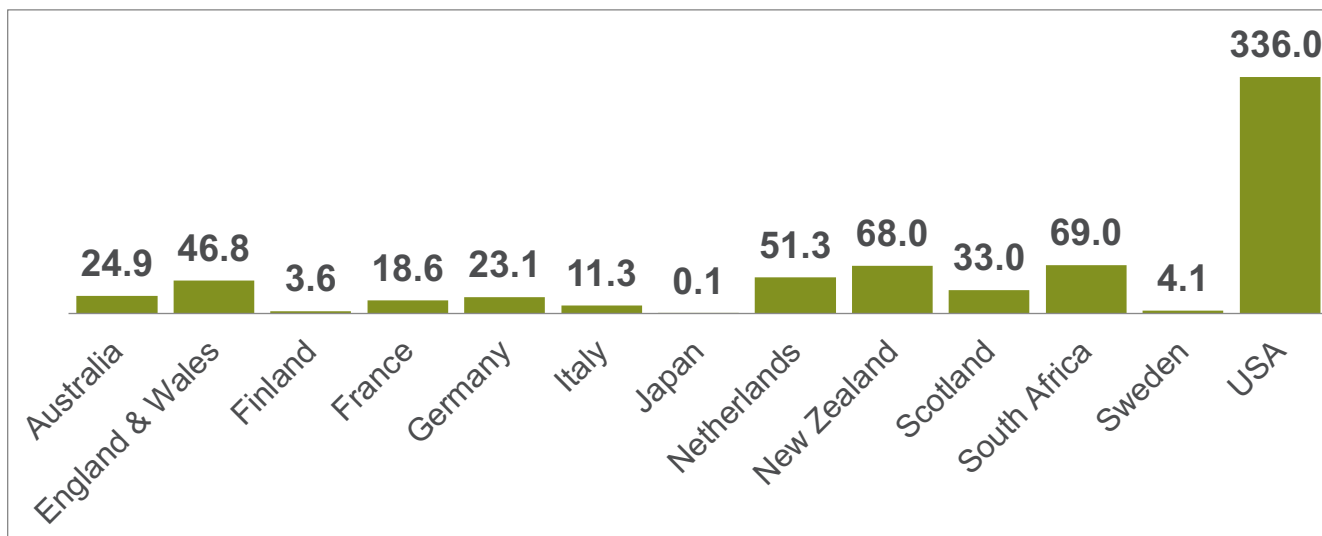


Figure 1

The cost of imprisoning criminals is already exorbitant.⁷ The U.S. spends \$20 billion annually on prison expansion.⁸ \$20 billion could provide child care to every family that cannot afford it, a college education for every high school graduate, or a living wage to every unemployed youth.⁹ More specifically, national averages show the cost to keep a youth locked up exceeds the cost the U.S. spends per public school student. “It costs, on average, \$88,000 a year to keep a youth locked up[.]”¹⁰ Compare that with \$12,296—the amount the U.S. spends per public school student.¹¹ (See Figure 2).

The same is true at the state level. Education and prison data (collected by the

U.S. Census and Vera Institute of Justice) showed how the cost per inmate exceeded the cost

per student in every state (see Figure 3 below).¹² These costs continue to climb.¹³

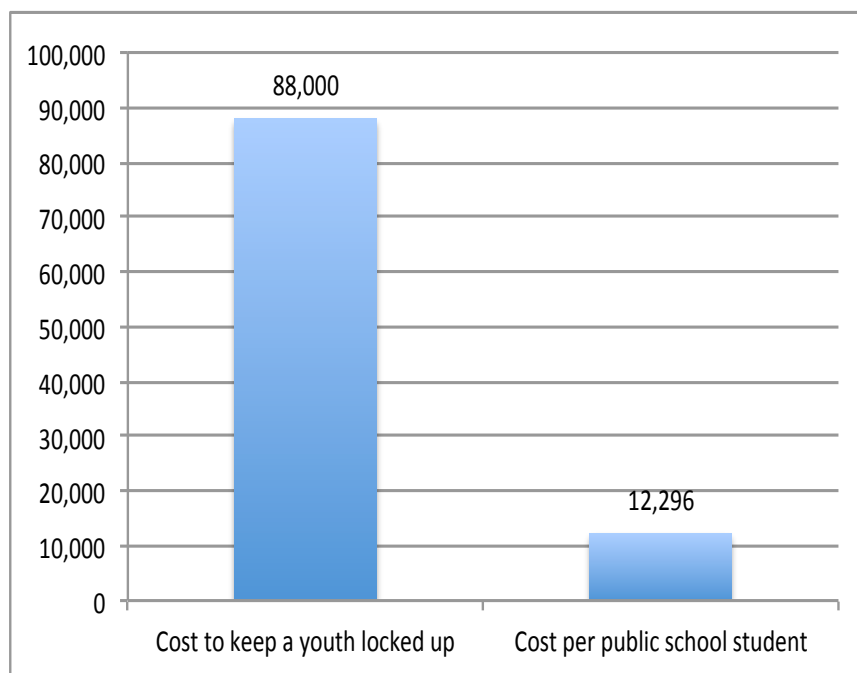


Figure 2

⁷ See William Spelman, *The Limited Importance of Prison Expansion*, in *The Crime Drop in America* 97, 97 (Alfred Blumstein & Joel Wallman eds., 2000).

⁸ *Id.*

⁹ *Id.*

¹⁰ BERNSTEIN, *supra* note 5.

¹¹ See Inst. of Educ. Sciences, Nat’l Ctr. for Educ. Stat., *Total and current*

expenditures per pupil in public elementary and secondary schools: Selected years, 1919-20 through 2012-13, tbl.236.55 (2015), https://nces.ed.gov/programs/digest/d15/tables/dt15_236.55.asp (based on fall enrollment, in constant 2014–15 dollars, and the Consumer Price Index) [<https://perma.cc/48TR-8JNZ>]. (based on fall enrollment, in

constant 2014–15 dollars, and the Consumer Price Index)

¹² Tal Yellin, CNN Money, *Educ. v. Prison costs*, <http://money.cnn.com/infoGraphic/economy/education-vs-prison-costs/> [<https://perma.cc/26HE-CQUE>] (40 states responded).

¹³ Amelia M. Inman & Millard W. Ramsey, Jr., Comment, *Putting Parole*

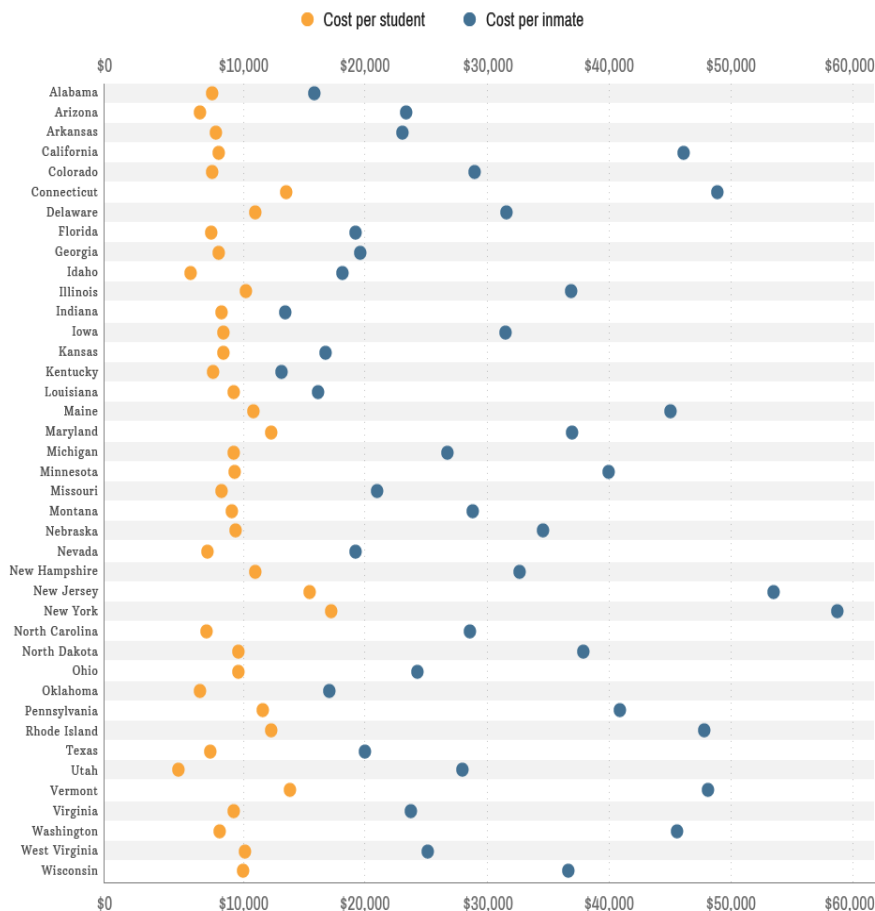


Figure 3

According to author and journalist Nell Berstein¹⁴, the most troubling issue is that “[t]he greatest predictor of adult incarceration and adult criminality wasn’t gang involvement, wasn’t family issues, wasn’t delinquency itself ... [t]he greatest predictor that a

kid would grow up to be a criminal was being incarcerated in a juvenile facility.”¹⁵ Incarceration “deprives the offender of the reassurance and confidence that he [or she] is capable of reform.”¹⁶ This decreases the individual’s “self-esteem and motivation to

rehabilitate themselves and increases the probability that the offender will become a recidivist.”¹⁷ To quote John Braithwaite, “individuals would not be repeat offenders if we did not force them into ‘daily interaction’ with other criminals through incarceration.”¹⁸

Fortunately, this is a problem to which there is a solution and that solution is restorative justice [hereinafter RJ].¹⁹

II. WHAT IS RESTORATIVE JUSTICE?

Defining RJ. The Model Code on Education and Dignity—approved by the American Bar Association—defines RJ as “a theory of justice that emphasizes repairing the harm caused or revealed by misconduct rather than punishment by:

- a. Identifying the misconduct and attempting to repair the damage;
- b. Including all people impacted in the process

learn new skills in the illegitimate labor market”).

¹⁹ Judy C. Tsui, *COMMENT: BREAKING FREE OF THE PRISON PARADIGM: INTEGRATING RESTORATIVE JUSTICE TECHNIQUES INTO CHICAGO'S JUVENILE JUSTICE SYSTEM*, 104 J. CRIM. L. & CRIMINOLOGY 635 (high costs associated with juvenile detention centers may be circumvented through RJ techniques) 229.

Back on the Table: An Efficiency Approach to Georgia's Aging Prison Population, 1 J. MARSHALL L.J. 239, 242 (2008).

¹⁴ Nell Berstein, <http://www.nellberstein.com/> [<https://perma.cc/W8CU-HLNY>] (last visited Apr. 24, 2017) (Nell Berstein is a former Soros Justice Media Fellow in New York, and winner of a White House Champion of Change award).

¹⁵ BERNSTEIN, *supra* note 5.

¹⁶ Christopher D. Lee, *COMMENT: THEY ALL LAUGHED AT CHRISTOPHER COLUMBUS WHEN HE SAID THE WORLD WAS ROUND: THE NOT-SO-RADICAL AND REASONABLE NEED FOR A RESTORATIVE JUSTICE MODEL STATUTE*, 30 ST. LOUIS U. PUB. L. REV. 533.

¹⁷ *Id.* at 533.

¹⁸ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 65 (1999) (“Prisoners in jail

of responding to conflict; and

- c. Creating a process that promotes healing, reconciliation and the rebuilding of relationships.”²⁰

Put simply, RJ focuses on: repairing the harm, involving stakeholders, and transforming the community relationship.²¹

RJ is not a new notion.²²

It was around when humans first began developing civilizations.²³ For example, the Navajo people in the U.S. and Maori tribe in New Zealand²⁴ used it as one of their primary forms of justice.²⁵ Understanding RJ requires a philosophical shift away from punitive/retributive justice.²⁶ Punitive justice, “the MPC, and our traditional justice system are concerned more with a combination of ‘righting a wrong’ and punishing the wicked.”²⁷ The goal of RJ is not punishing the offender but

the restoration of the offender and victim.²⁸ While punitive justice focuses on punishing the wrongs of the past, RJ focuses on how to change future behavior.²⁹ This idea of integrating an offender back into the community through appropriate discipline while still providing “peace-of-mind and comfort to victims”³⁰ makes RJ similar to “therapeutic justice.”³¹ Like therapeutic justice, RJ focuses on “the law’s healing potential.”³² Thus, “one can view restorative justice as a balancing of different considerations: ‘a balance between the therapeutic and retributive models of justice[,] a balance between the rights of offenders and the needs of victims[, and] a balance between the need to rehabilitate offenders and the duty to protect the public.’”³³

The benefits of RJ.

Common examples of RJ

include: victim-offender mediation, community and family group conferencing, circle sentencing, and victim impact panels and surrogate groups.³⁴ These practices have benefitted many stakeholders. In fact, stakeholders have “repeatedly expressed significantly higher satisfaction with the capacity of [RJ] to truly repair the harm caused by crime, as compared with traditional criminal justice procedures.”³⁵ Because RJ can “go deeper and address human aspects of reparation, healing, and relational connection, there is greater potential for a more profound and lasting positive impact” for stakeholders.³⁶ First, RJ benefits victims. “Victims emerge from a restorative justice setting feeling ‘less upset about the crime, less apprehensive, and less afraid of re-

²⁰ MODEL CODE ON EDUCATION AND DIGNITY §3.1.B. (DIGNITY IN SCHOOLS CAMPAIGN AND AM. BAR ASS’N 2013).

²¹ Thalia Gonzales, *ARTICLE: Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281; see also Marilyn Peterson Armour et al., *Bridges to Life: Evaluation of an In-Prison Restorative Justice Intervention*, 24 MED. & L. 831, 832 (2005) (describing the three prongs of RJ as offender accountability victim empowerment, and the active role of the community).

²² Lee, *supra* note 17.

²³ *Id.*

²⁴ Robert P. Mosteller, *New Dimensions in Sentencing Reform in*

the Twenty-First Century, 82 OR. L. REV. 1, 20-21 (2003).

²⁵ Lee, *supra* note 17.

²⁶ Gonzales, *supra* note 22.

²⁷ Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1663 (1992).

²⁸ Lee, *supra* note 17; but see Michael Wenzel et al., *Retributive and Restorative Justice*, 32 Law & Hum. Behav. 375, 376 (2008) (explaining that punishment can play a part in RJ techniques despite it not being the central focus).

²⁹ Lee, *supra* note 17.

³⁰ Katherine Beaty Chiste, *The Justice of the Peace in History: Community and Restorative Justice*, 68 SASK. L. REV. 153, 153 (2005).

³¹ Teresa W. Carns et al., *Therapeutic Justice in Alaska’s Courts*, 19 ALASKA L. REV. 1, 2 (2002).

³² *Id.*

³³ MARIAN LIEBMANN, *RESTORATIVE JUSTICE: HOW IT WORKS* 33 (2007).

³⁴ Lee, *supra* note 17.

³⁵ Mosteller, *supra* note 26, at 22; see also Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-site Assessment*, 1 W. Criminology Rev. 1 (1998), available at <http://goo.gl/85ftRJ> [<https://perma.cc/YMM7-UTSK>] (where a study showed victims are far more likely to benefit from mediation than a normal court process).

³⁶ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 22-24 (2002).

victimization.”³⁷ RJ environments are also “far more likely to produce sincere apologies”³⁸ and full restitution payments from offenders (than if ordered by a court)³⁹—a significant aspect to the victim’s recovery.⁴⁰ RJ also benefits communities. Violent crimes like murder or hate crimes can damage communities in a long-lasting way.⁴¹ Peacemaking committees that integrate restorative practices not only restore the status quo and produce “tranquility and harmony within a community,” but also can address poverty-ridden conflicts such as unemployment or lack of basic necessities.⁴² Finally, RJ practices benefit recidivism rates.⁴³ “While recidivism

reduction is not the overarching goal of restorative justice, researchers have found that one ‘happy side-effect’ of a [well-structured] restorative justice program is a decrease in recidivism.”⁴⁴ The idea is that because RJ emphasizes both offender accountability and empowerment, “a returning offender is more likely to ‘buy-in’ to his or her reentry plan, yielding better outcomes.”⁴⁵

III. WHY EMPIRICAL RESEARCH ON RESTORATIVE JUSTICE LEGISLATION?

Lack of RJ Legislation.

Despite its age, benefits, and popularity, there is currently no federal RJ statute.⁴⁶ A search

for a federal RJ statute on Westlaw yields only five results. In one statute, RJ operates as a buzzword. For example, the statute defines “school resource officer” as an individual who trains students in RJ.⁴⁷ Nowhere in the neighboring statutes, however, is RJ defined.⁴⁸ In a federal statute that uses the term more substantively, the substantive portion only applies to Alaska.⁴⁹ While another statute authorizes the Attorney General to give states grants for RJ programs, RJ is merely one out of a laundry list of programs for it to get any meaningful attention.⁵⁰ Other statutes cited to a case that had RJ in the case name.⁵¹ That case, however, dealt with the right to intervene rather than a

a corresponding widespread decline in reoffending.”)

³⁷ Lucy Clark Sanders, *Restorative Justice: The Attempt To Rehabilitate Criminal Offenders and Victims*, 2 CHARLESTON L. REV. 923, 929 (2008).

³⁸ *Id.*

³⁹ Umbreit, *supra* note 36, at 97; see also CHRISTA PELIKAN & THOMAS TRENCZEK, VICTIM OFFENDER MEDIATION AND RESTORATIVE JUSTICE: THE EUROPEAN LANDSCAPE, IN HANDBOOK OF RESTORATIVE JUSTICE 63, 78 (Dennis Sullivan & Larry Tiff eds. 2006); see also Michael Wenzel et al., *Retributive and Restorative Justice*, 32 LAW & HUM. BEHAV. 375, 377 (2008) (explaining that RJ techniques tend to decrease instances of reoffending at a higher rate than court processes); see also Nancy Rodriguez, *Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism*, 53 CRIME & DELINQ. 355, 371 (2007) (“When comparing juveniles in a restorative justice program with juveniles in a comparison group,

multivariate analysis shows that after 24 months of successfully completing diversion, juveniles in the restorative justice program had slightly lower rates of recidivism.”). Note, however, that effectiveness may vary depending on a multitude of factors, including gender and a previous criminal record.

⁴⁰ Sherman, *supra* note 39.

⁴¹ See Declan Roche, *Restorative Justice and the Regulatory State in South African Townships*, 42 BRIT. J. CRIMINOLOGY 514, 515 (2002).

⁴² *Id.*

⁴³ Lee, *supra* note 17.

⁴⁴ Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 BRIT. J. CRIMINOLOGY 337, 339-40 (2008); see also Wenzel, *supra* note 41 (noting that despite reduced recidivism being an important argument for RJ, “complicating factors make it nearly impossible to accurately predict whether widespread implementation of RJ techniques would necessarily result in

⁴⁵ Faye S. Taxman, *The Offender and Reentry: Supporting Active Participation in Reintegration*, 68-SEP FED. PROB 31,33 (2004).

⁴⁶ Sandra Pavelka, *Restorative Juvenile Justice Legislation and Policy: A National Assessment*, 4 INT’L J. RESTORATIVE JUST. 100, 100-01 (2008).

⁴⁷ 42 U.S.C.A. § 3796dd-8 (West).

⁴⁸ *Id.*

⁴⁹ CONSOLIDATED APPROPRIATIONS ACT, 2004, 108 P.L. 199, 118 Stat. 3 *, 108 P.L. 199, 2004 Enacted H.R. 2673, 108 Enacted H.R. 2673

⁵⁰ 42 U.S.C.A. § 3796ee (West).

⁵¹ 18 U.S.C.A. § 3771 (West); U.S. Const. amend. VIII.

discussion on whether RJ programs should be mandated.⁵²

On the state side, the impression is misleading. If someone looks for statutes or codes that merely incorporate the term RJ or terms associated with restorative practices (e.g., victim-offender mediation, community conferencing, circles, neighborhood accountability boards and reparative boards), then one will find that a majority of states have incorporated RJ in their statutes or codes.⁵³ If someone looks for statutes or codes that encompasses all approaches to RJ, such as the balanced and restorative justice approach, then one will find that 20 states articulate this approach in their statutes or codes. If an individual is only interested in the RJ approach, however, then one will find that even now, in 2017, only 11 states “emulate restorative justice principles in statute or code reference.”⁵⁴ Thus, while many statutes are identified by terms often associated with restorative practices, many do not convey authentic ‘restorativeness.’⁵⁵ To make matters complicated, expanding

RJ legislation in many ways reminds one of the vicious cycle of poverty. To expand RJ legislation, more empirical research is needed; but to conduct empirical research, more RJ legislation is needed. “Without a more systemic implementation of restorative justice programs, there is not enough data to support” further empirical research.⁵⁶ Hence, it is no surprise that a major barrier to expanding RJ legislation is “the lack of empirical research to prove its objective outcomes.”⁵⁷

Why Study RJ Legislation. So why should researchers care to conduct further empirical research on RJ legislation? Because RJ is a “growing international movement within the fields of juvenile and criminal justice.”⁵⁸ RJ is accepted and practiced throughout the United States. New York, Vermont, and Ohio establish it as their underlying philosophy, guiding principle, or cornerstone for their justice systems.⁵⁹ Minnesota maintains an office to develop RJ programs throughout their state.⁶⁰ It is a common topic of discussion at professional conferences and the federal

Justice Department sponsors conferences, seminars, and teleconferences on the topic.⁶¹ Thus, RJ is not an abstract concept. While RJ has its critics, “world-wide acceptance of ... [RJ programs] . . . suggest that these criticisms are more likely to influence *how* restorative justice is incorporated into conventional criminal justice responses rather than *whether* they are incorporated.”⁶²

While RJ programs do not require legislation, legislation can be a preferable option. First, legislation can positively promote RJ as a priority and imperative.⁶³ Section 1170 of California’s Penal Code is living proof of this idea. In 2010, California Senator Leeland Yee introduced a bill authorizing prisoners—who committed an offense as a juvenile—to ask courts to re-examine their sentences after serving 15 years for that specific offense.⁶⁴ The first sentence of the bill’s text incorporates the term “restorative justice” as a means through which public safety is accomplished.⁶⁵ The binding power of this law forces California courts to re-assess

⁵² 18 U.S.C.A. § 3771 (West).

⁵³ Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy* (Center on Juvenile and Criminal Justice 2016), http://www.cjcj.org/uploads/cjcj/documents/jpj_restorative_justice_in_the_states.pdf [<https://perma.cc/9XQX-AXER>].

⁵⁴ *Id.* at 7.

⁵⁵ *Id.* at 12.

⁵⁶ Vi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 369 (2005).

⁵⁷ Peterson, *supra* note 22, at 849;

Mosteller, *supra* note 26, at 22.

⁵⁸ Daniel W. Van Ness, *Article: Legislation for Restorative Justice*, 10

REGENT U.L. REV. 53, 53 (1998).

⁵⁹ *Id.* at 91.

⁶⁰ *Id.*

⁶¹ *Id.* at 91.

⁶² *Id.* at 55.

⁶³ Lee, *supra* note 17, at 537.

⁶⁴ CAL. PENAL CODE § 1170 (Deering 2017).

⁶⁵ *Id.*

whether an inmate is fit for a reduced sentence.

Second, programs are restorative to the extent they reflect RJ principles and values.⁶⁶ Legislation can help to articulate guiding principles for operating and evaluating RJ programs.⁶⁷ For example, family group conferences can be conducted from a perspective concerned with the offender or the victim or the community.⁶⁸ Often this is a result of state funding programs attaching restrictions when issuing funds for those programs.⁶⁹ Guiding principles and monitoring mechanisms increase the likelihood that programs identified as restorative will truly be restorative.⁷⁰ In Minnesota, the Community Justice Services Act guides state officials by requiring them to “develop outcome measurements that would enable assessment of whether the goals of the act ... were actually being accomplished.”⁷¹ Guiding principles such as this one can create opportunities through which compliance can be enforced.⁷² Guiding principles can also help provide uniformity. Finally, monitoring mechanisms allow for extensive data to be collected;

thereby, serving as an impetus for further in-depth quantitative and qualitative research. The data can also serve as criterion for stakeholders to consider when evaluating the merits of future RJ policy.

Third, legislation helps to remove legal or systemic barriers to RJ programs. Prior to the Minnesota Community Correctional Services Act, Minnesota did not have pre-trial diversionary alternatives.⁷³ The act required every county prosecutor to establish a pre-trial diversion program for offenders to address this void. Hence, further research on RJ legislation can also help to cure market failures like the one that that used to exist in Minnesota.

Fourth, legislation can ensure a smooth or at least similar transition. Traditionally, RJ programs have developed independent of legislative mandate while our conventional criminal justice system has been governed by legislation.⁷⁴ If RJ is looking to replace, or at the very least supplement, the criminal justice system, then the hope is that utilizing a similar approach will allow for a more normal transition.

Fifth, legislation clarifies roles and subsequently creates

incentives for members of the community to use RJ programs. “Authorizing legislation would ensure that police, prosecutors, judges and correctional workers interested in using restorative programs could do so without fear of subsequent rulings that they lacked authority.”⁷⁵ In Indiana, judges were unsure whether they could mandate victim-offender mediation in sentencing orders and were thus reluctant to do so.⁷⁶ To resolve this qualm, legislators introduced a bill that explicitly included victim-offender mediation in the definition of “community correction programs.” One of the bills discovered in this research also had a similar effect. In Colorado, officers, judges, and schools had the discretion to divert cases from the criminal system and refer offenders to RJ programs. Beverly Title (a member of the statewide restorative justice council) said “[b]efore, people were doing RJ, but sometimes felt like they were operating on the fringe of legitimacy. The new law establishes RJ as part of the Children’s Code. It legitimizes this as a diversion.” Title believes bills like CO H 1117 are the reason courts will

⁶⁶ Van Ness, *supra* note 60, at 65.

⁶⁷ *Id.*

⁶⁸ Martin Wright, *The Development of Restorative Justice*, Paper Presented to International Conference on Restorative Justice for Juveniles, conducted at Leuven, Belgium (May 12-14, 1997).

⁶⁹ Marty Price, *Personalizing Crime*, 7 DISP. RESOL. MAG. 8, 9 (2000).

⁷⁰ Van Ness, *supra* note 60, at 65.

⁷¹ MINN. STAT. § 388.24(2) (1997).

⁷² Van Ness, *supra* note 60, at 66.

⁷³ MINN. STAT. § 388.24(2) (1997).

⁷⁴ Van Ness, *supra* note 60, at 56.

⁷⁵ *Id.* at 58.

⁷⁶ IND. CODE ANN. § 11-12-8-1(5) (Michie 1992).

likely make more referrals to RJ programs.⁷⁷

Finally, RJ legislation can reduce high costs and backlogged court dockets.⁷⁸ “There is a general consensus that RJ practices are ‘less costly and require less time,’ overall.”⁷⁹ “The implementation of restorative justice has resulted in significant and real changes: fewer young offenders now appear in courts, fewer young offenders are now placed in [welfare shelters] [,]and fewer young offenders are now sentenced to custody. This all, of course, had to result in considerable cost [and time] savings.”⁸⁰

Why Study RJ Legislation Specific to Juveniles. Why should researchers care about studying RJ legislation *specific to juveniles*? Recent Supreme Court jurisprudence calls on us to recognize the distinction between adult and juvenile offenders.⁸¹ In *Roper v. Simmons*, the Court held capital punishment of minors was

unconstitutional.⁸² Given that their immaturity diminishes their culpability and given their heightened capacity for reform, the Court found the death penalty as a disproportionate sentence for juveniles.⁸³ Justice Kennedy specifically reasoned “juveniles are not trusted with the privileges and responsibilities of an adult ... their irresponsible conduct is not as morally reprehensible as that of an adult.”⁸⁴ Having barred the use of capital punishment for juveniles, the Roper Court left the sentence of life without parole as the harshest sentence available for juveniles.

In *Graham v. Florida*, the Supreme Court banned the use of life without parole for non-homicide juvenile offenders.⁸⁵ In arriving at this holding, the Court relied on an amicus briefs that argued “medical science confirms both the need for categorical distinctions in the treatment of juvenile vs. adult offenders.”⁸⁶ “Studies conclusively establish that the brain of an adolescent is not

fully developed[;] particularly in the area of the prefrontal cortex, which is critical to higher order cognitive functioning and impulse control. When a juvenile is confined either to the juvenile or adult corrections system, regardless of sentence, the institution is responsible for addressing those neurobiological-based deficiencies.”⁸⁷ The amicus brief heightens John Braithwaite’s words that “individuals would not be repeat offenders if we did not force them into ‘daily interaction’ with other criminals through incarceration” for juveniles.⁸⁸ Having barred the use of life without parole for non-homicide juvenile offenders, the Graham Court left life without parole as the harshest sentence available for juvenile homicide offenders. In *Miller v. Alabama*, the Court then held that mandatory life without parole sentences for juvenile homicide offenders violated the

⁷⁷ Joshua Wachtel, *New Colorado Law Authorizes Restorative Justice Conferences for Adjudicated Youth*, INT’L INST. FOR RESTORATIVE JUSTICE (May 21, 2008), <http://www.iirp.edu/eforum-archive/4398-new-colorado-law-authorizes-restorative-justice-conferences-for-adjudicated-youth> [http://perma.cc/MJ6K-LEZ5].

⁷⁸ Edward J. Imwinkelried, *The Right to “Plead Out” Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L. J. 341, 381 (1991).

⁷⁹ Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 369 (2005) (study showed that the cost of a case through a RJ program was \$80 versus \$ 2649.50 through the court system); T. Bennett Burkemper et al., *Restorative Justice in Missouri’s Juvenile System*, 63 J. Mo. B. 128, 129 (2007) (noting that Genesee County in New York estimates that it saved more than \$ 4 million using a restorative system).

⁸⁰ Allison Morris, *Critiquing the Critics: A Brief Response to Critics of*

Restorative Justice, 42 BRIT. J. CRIMINOLOGY 596, 605 (2002).

⁸¹ Tsui, *supra* note 20, at 644.

⁸² *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).

⁸³ *Id.* at 571.

⁸⁴ *Id.* at 561.

⁸⁵ *Graham v. Florida*, 560 U.S. 48, 74 (2010).

⁸⁶ See Brief of Council of Juvenile Correctional Administrators et al. as Amici Curiae in Support of Petitioners at 4, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412).

⁸⁷ *Id.*

⁸⁸ Braithwaite, *supra* note 19.

Eighth Amendment.⁸⁹ It is decisions like these that add more fuel to the growing RJ movement and decisions like these that lead senators like California Senator Leeland Yee to introduce the bill he did.

Acknowledgement of Researcher’s Personal Bias. Aside from the fact this topic is non-existent in the current and available literature, pursuing this topic was also motivated by personal bias. My time as an educator in Los Angeles around 2013 was an exciting year. After months of community organizing, the Brothers, Sons, Selves Coalition made civil rights history when its efforts successfully led the Los Angeles Unified School District [hereinafter LAUSD] to adopt the School Climate Bill of Rights⁹⁰—a bill aimed at dismantling the school-to-prison pipeline by outlawing suspensions or expulsions for a willful defiance (48900(k)) offense.⁹¹⁹² As an alternative to these suspensions or expulsions, the bill mandated all schools develop and implement RJ by 2020.⁹³ As a former K-12 public school teacher in Los Angeles, I witnessed firsthand the successful implementation of this initiative. I participated in numerous RJ learning

communities, RJ professional developments, and meetings with RJ coordinators to implement RJ practices in my classroom. Not one student was suspended or expelled for willful defiance during my tenure because of this initiative. My observations of the initiative’s success, however, are limited to the educational realm. After transitioning to the legal field, I sought to understand whether initiatives like LAUSD’s School Climate Bill of Rights are actually successful at dismantling the school-to-prison pipeline. I also wonder whether more community organizing campaigns should center around pushing state-wide restorative justice legislation forward, given that is why I pursued law—to see the impact of my efforts reach beyond the four walls of my classroom and reach students across the state. The answer to this question depends on what impact, if any, state-wide RJ legislation has on the juvenile justice system.

IV. INTRODUCTION TO THE RESEARCH

This article seeks to explore a mere quantitative relationship between RJ legislation and three declining trends that exist within the “school-to-prison”

pipeline. It is important to clarify that the purpose of this article is not to analyze the costs, feasibility, and availability of such legislation. This research is targeted to answer the following research question(s):

1. What relationship, if any, did states that introduced RJ legislation have with states that experienced a decline in juvenile petitions in the United States from 2008 to 2013?
2. What relationship, if any, did states that introduced RJ legislation have with states that experienced a decline in juvenile homicide offenders in the United States from 2008 to 2014?
3. What relationship, if any, did states that introduced RJ legislation have with states that experienced a decline in juvenile arrest rates in the United States from 2008 to 2012?
4. How did states that introduced RJ legislation compare with states that did not introduce RJ legislation when examining the national average decline for each of these trends?
5. What do future trendlines forecast about the impact RJ legislation will have on

⁸⁹ *Miller v. Alabama*, 567 U.S. 460, 463 (2012).

⁹⁰ Monica Garcia, *2013 School Discipline Policy and School Climate Bill of Rights*, DIGNITY IN SCHOOLS (2013), www.dignityinschools.org/sites/default

files/2013%20SD%20Policy%20and%20SCBR%20Resolution%20FINAL.pdf [<https://perma.cc/4VXL-E882>].

⁹¹ Manuel Criollo, *Equal Protection Plan Timeline*, THE LAB./COMMUNITY STRATEGY CTR.

(Aug. 19, 2014), <http://www.thestrategycenter.org/blog/2014/08/19/equal-protection-plan-timeline> [<https://perma.cc/V7V8-N847>].

⁹² DIGNITY, *supra* NOTE 90, at 3.

⁹³ *Id.*

the three aforementioned trends?

Methodology. This article surveys RJ legislation, juvenile petition counts, juvenile homicide offenders, and juvenile arrest rates in 50 U.S. states generally across a five-year period (2008-2012). This article relies on five national databases to collect data. The first two databases track restorative justices bills from the criminal, civil, and education contexts while the third, fourth and fifth databases track juvenile petition, juvenile homicide offender, and juvenile arrest. Any states with bills, petitions, homicide incidences, and arrests that are either (1) outside of the respective year ranges; or (2) simply do not have sufficient or available data

are intentionally excluded from this inquiry for the sake of consistency. The databases, the declining trends, and the time frames are selected based on the sake of consistency and to collect a large volume of data efficiently in a relatively short time frame (approximately three months).⁹⁴

Texas, and Washington. (See figure 4)

While statistical analysis revealed that the relationship was of moderate strength with an overall result of being non-significant, textual analysis of the RJ bills explains a more common-sense link between these bills and the decline in petition counts. For example, in 2011, Colorado enacted a bill which among other things encourages “each school district in the state and the state charter school institute to implement restorative justice practices for use in disciplinary programs.”⁹⁵ North High School is an example of a school in Denver, Colorado that implemented RJ practices for use in disciplinary programs.⁹⁶ North High School

V. FINDINGS AND DISCUSSION

RJ Legislation and Juveniles in Court Results.

Between 2008 and 2013, the following 10 states introduced at least one, if not more, restorative justice bills: Arizona, Colorado, Florida, Hawaii, Indiana, Montana, New Jersey, New Mexico, New Jersey, New Mexico, Texas, and Washington.

RJ Legislation Introduced (2008-2013)

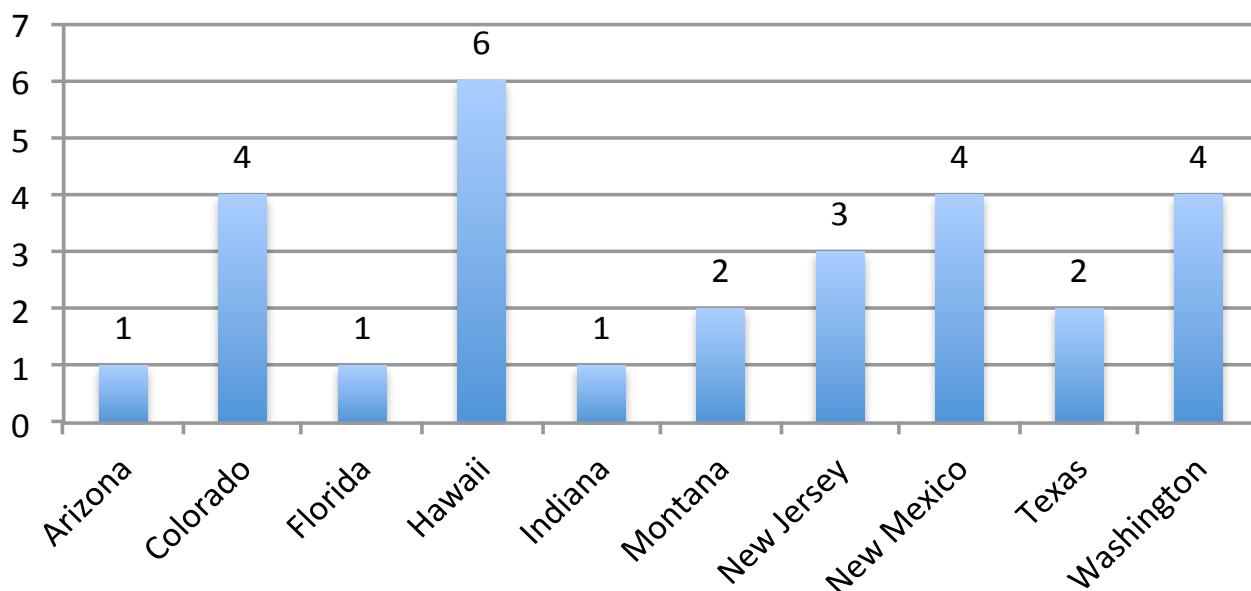


Figure 2

⁹⁴ See Appendix B for more on methodology.

⁹⁵ 2011 Bill Text CO H.B. 1032(2)(6).

⁹⁶ Gonzales, *supra* note 22, at 321.

had been identified as “high-need, with some of the district’s largest numbers of suspensions, tickets, and arrests.”⁹⁷ Since the program’s development and implementation, the school conducted over 830 formal and 100 informal restorative interventions. The result? Referrals to law enforcement decreased by 70%.⁹⁸ One can then understand the decrease in petition counts. In 2012, Washington enacted WA H 1775. The bill required prosecutors to divert the case rather than file a complaint if any juvenile committed a misdemeanor or gross misdemeanor, and it was his or her first violation. Again, one can see how bills like this can yield reductions in petition counts.

RJ Legislation and Juvenile Homicide Offender Results. Between 2008 and 2014, the following nine states introduced at least one, if not more, restorative justice bills: Arizona, California, Hawaii, Minnesota, Montana, New Jersey, South Carolina, Texas, and Washington. (See figure 5)

While statistical analysis revealed that the relationship was of moderate strength with an overall result of being non-significant, textual analysis of the RJ bills explains a more common-sense link between these bills and the decline in juvenile homicide offender rates. Hawaii is particularly illustrative. In 2013, Hawaii introduced a bill allowing juvenile offenders and their family to meet with the victim and victim’s supporters.⁹⁹

Hawaii also introduced a bill allowing courts to dispose of a juvenile’s case by referring them to a RJ program where the juvenile admits guilt.¹⁰⁰ Finally, Hawaii introduced a bill requiring family courts to order the adjudicated minor (or his parents) to pay restitution to the victim.¹⁰¹ While bills like these use restorative justice as a means to discipline offenders once they’ve entered the juvenile justice system, these bills allow for powerful, emotional human dialogue to occur and provide the offender a second chance all while still holding the juvenile and the juvenile’s parents accountable. Bills like these make it easy to see why a reduction in recidivism rates is a happy “side effect” of RJ legislation and why there would be a

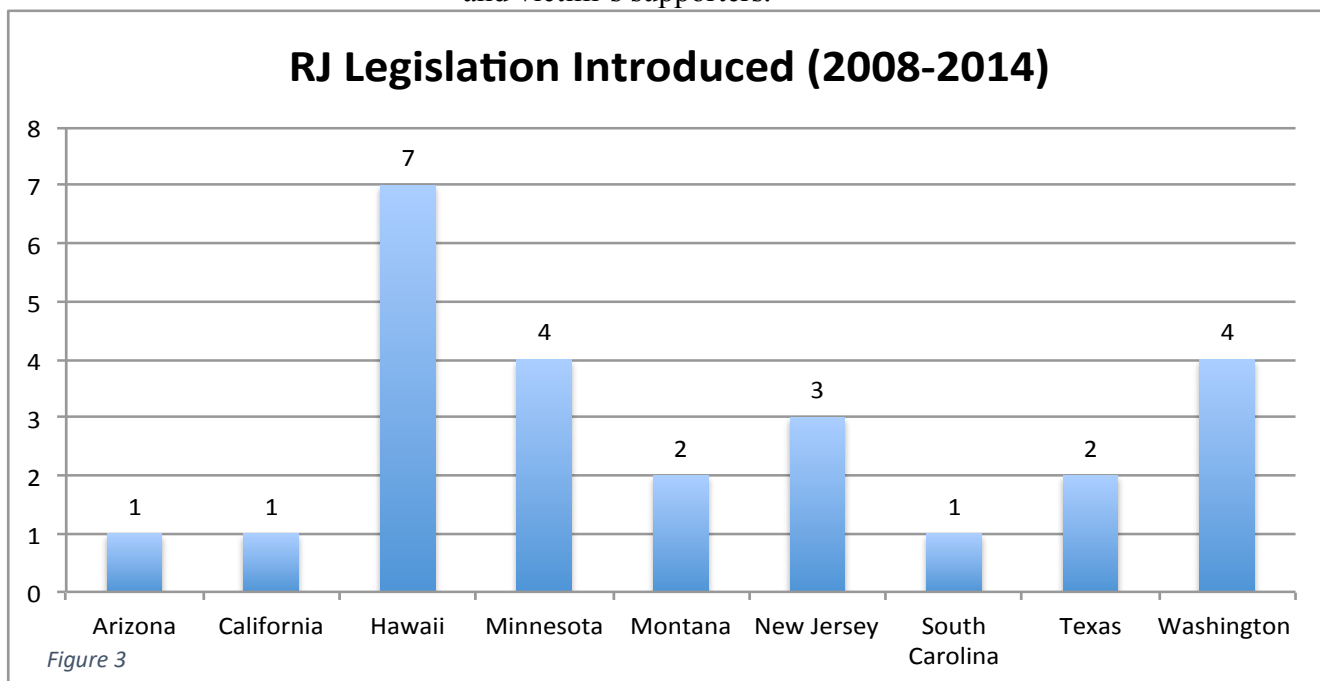


Figure 3

⁹⁷ *Id.* at 324.

⁹⁸ Myriam L. Baker, *DPS Restorative Justice Project: Year Four 2009-*

2010. Executive Summary, Denver Pub. Sch., 1, 334 (2010).

⁹⁹ 2013 Bill Tracking HI S.B. 61.

¹⁰⁰ 2013 Bill Tracking HI H.B. 182.

¹⁰¹ 2013 Bill Tracking HI H.B. 239.

decline in juveniles committing homicide.

RJ Legislation and Juvenile Arrest Rate

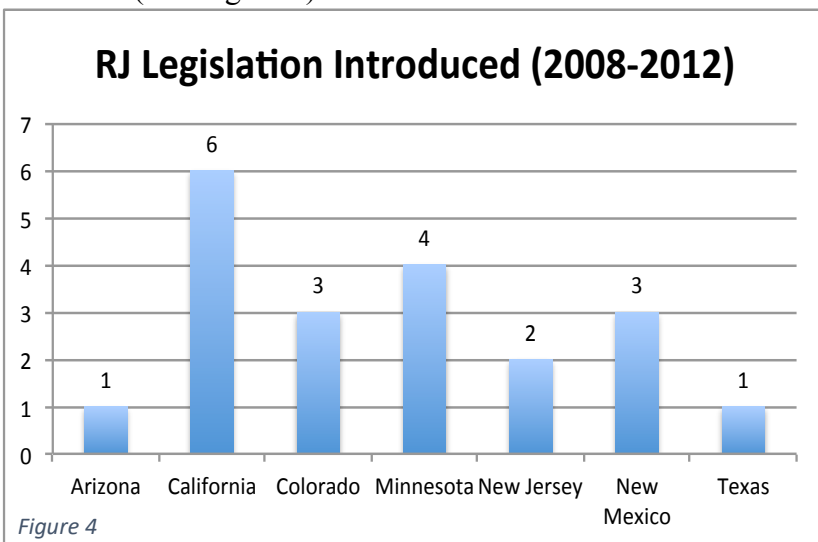
Results. Between 2008 and 2012, the following seven states introduced at least one, if not more, restorative justice bills: Arizona, California, Colorado, Minnesota, New Jersey, New Mexico, and Texas.¹⁰² (See Figure 6)

introduced a bill that would “\$270,000 is appropriated from the general fund to the sixth judicial district court for expenditure in fiscal year 2009 to provide juvenile and adult offender restorative justice services in the sixth judicial district, including mediation, community conferencing and justice circles.”¹⁰³ A fiscal impact report stated the

failed both times. And of all states that introduced RJ legislation, New Mexico saw the second to lowest decline in arrest rates. New Mexico’s example lends credibility to the idea that RJ legislation appropriating funds would allow for implementation of RJ initiatives that would result in a vital and genuine difference such as fewer young offenders being arrested and appearing in court; thereby reducing the high costs and backlogged court dockets that plague our system.

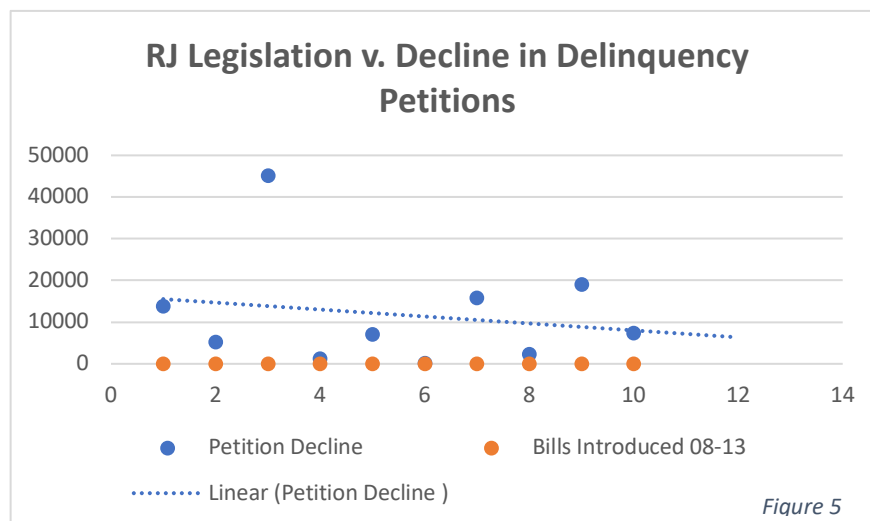
Overall Interpretation of the Results. Textual analysis aside, there is even more hope for RJ legislation activists. Trendlines forecasting the future indicate that as more RJ legislation is introduced, the count in delinquency petitions will decline. (See Figure 7)

Another trendline shows how as more RJ legislation is introduced, the count of juvenile homicide offenders will decline. (See Figure 8)



While statistical analysis revealed that the relationship was weak with an overall result of being non-significant, textual analysis of the RJ bills explains a more common-sense link between these bills and the decline in juvenile arrest rates. Colorado’s bill not only explains why one would see a decline in petition counts but arrest rates as well. And of all states that introduced bills, Colorado saw the largest decline in arrest rates. Interestingly enough, studying the converse also allows us to see the impact of RJ legislation. In 2008 and 2009, New Mexico

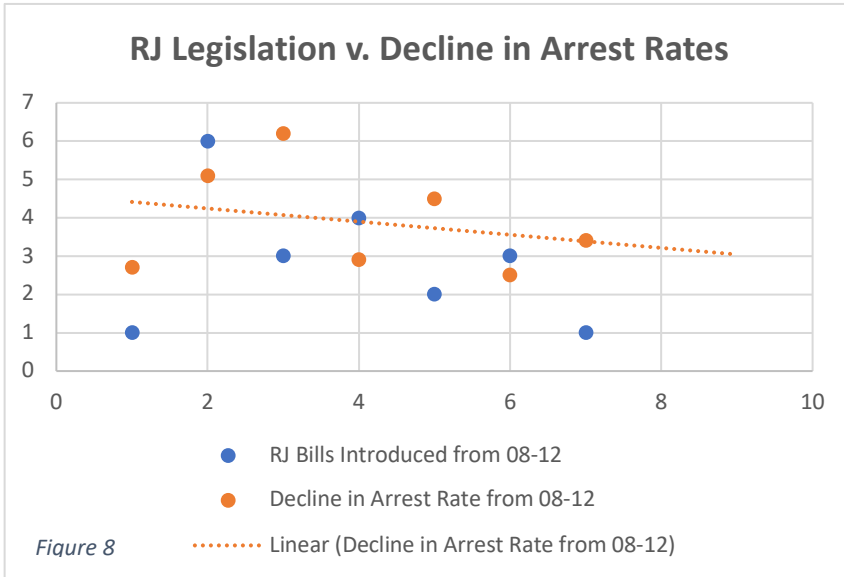
consequences of not enacting the bill would mean the 6th Judicial District will not be able to provide restorative justice services.¹⁰⁴ This bill



¹⁰² Data on file with author.

¹⁰³ 2008 Bill Tracking NM S.B. 254.

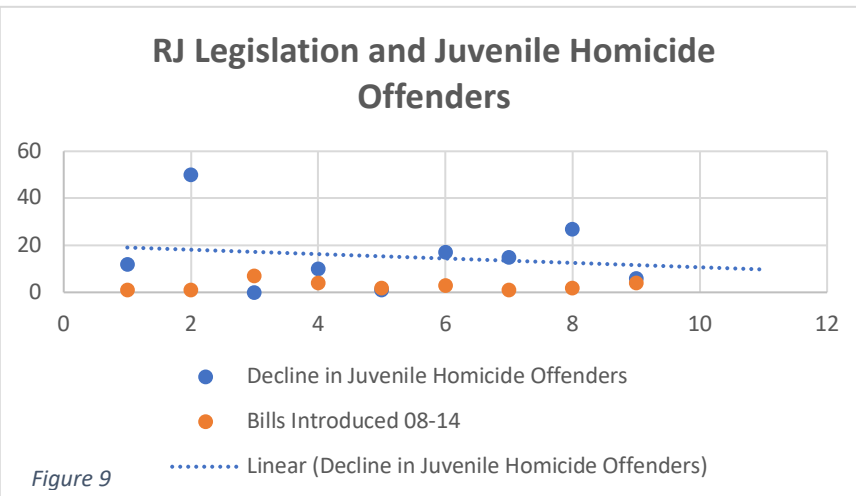
¹⁰⁴ *Id.*



The same result for decline in arrest rates. (See Figure 9) RJ legislation activists can have more confidence in these trendlines, than in the statistical analyses *supra* given how sensitive the P-Values were to the sample size. The largest sample in this research contains ten states. Hence, these trendlines and logic demonstrate how even one more restorative justice bill can make a statistical relationship more significant.

There are additional observations from this data for RJ legislation activists to be

proud of and for stakeholders to consider. Not only does the data show that states that introduce RJ legislation saw a reduction in their delinquency petitions, juvenile homicide offenders, and arrest rates but also shows how each of these states exceeded the U.S. averages with impressive figures. 78% of states that introduced at least one RJ bill exceeded the U.S. average of decline in juvenile homicide offenders. 50% of the states that exceeded the U.S. average rate of decline in delinquency petitions were states that



introduced at least one RJ bill. 43% of states that introduced at least one RJ bill also exceeded the U.S. average decline in juvenile arrest rates. If there is any lesson to take away from these results, it is that introducing more statewide RJ legislation can only help the current state.

VI. CONCLUSIONS AND RECOMMENDATIONS

Summary. The results of this inquiry are mixed. While the results are not statistically significant for those given years, textual analysis of the bills, qualitative research, and trendlines forecasting the future indicate otherwise. Trendlines indicate that as more states introduce RJ legislation, the more those states will experience declines in each of those trends. The results inspire a need for more states to explore or experiment with RJ legislation so that in-depth studies by criminologists can more accurately measure the statistical significance of these relationships between RJ legislation and declining trends in the U.S. criminal justice system. Finally, other numerical data shows that an impressive percentage of states that introduced at least one RJ bill exceeded the national averages in each of those declining trends.

Limitations. These results are a byproduct of certain limitations and biases that are necessary to account for. The first limitation is this study did

not contain a simple random sample but rather convenience sampling. This inquiry only explores those states that record and report sufficient data to the national databases. While there are practical purposes for choosing convenience sampling, such as my limited time frame of three months, it still acts as a bias because it excludes states that could alter the results for the better. An implication of convenience sampling is voluntary response bias. Here, only data from those law enforcement agencies, states, or jurisdictions that volunteer to report data are included. Not only does convenience sampling and voluntary response bias restrict sample *size*, but the data may not be reflective of states for which data is either not recorded or reported for that year range. For example, in the inquiries that exclude either California, Colorado, or Minnesota, the data from other states could not possibly reflect the much success states like California, Colorado, or Minnesota experience with the RJ movement. Another form of sampling bias present in this study is nonresponse bias. Because timing of data collection is limited to less than three months, it severely limits the number of states that may eventually report data three-months, six-months, or even a year from now.

For the same reason above, this inquiry is severely limited by the time frame for which data is collected. The highest

year range for one of these inquiries is seven years, which is a relatively short time span for a growing movement. It is important to note, however, that states with bills, petitions, homicide incidences, or arrests that are either (1) outside of the respective year ranges; or (2) simply do not have sufficient or available data are intentionally excluded from this inquiry for the sake of consistency as well. Perhaps the most obvious limitation is that this inquiry is conducted by a law student and not a criminologist or statistician. Hence, this study does not adopt truly scientific/sophisticated measurement and analysis protocols because the research had to comply with deadlines within a short time frame making those methods unfeasible. Finally, even a criminologist or statistician who employs truly scientific or sophisticated protocols can still miss data because these databases are ultimately maintained by human beings. Bills that are introduced by a state legislature may not always be accounted for purely due to human error/measurement error on the database end. Overall, the examples of limitations and biases listed above are by no means exhaustive but are mentioned because they are identified as having the most profound impact on the results.

Implications. The textual analysis of the bills, forecasting trendlines, and other numerical data observations present impressive findings that I hope,

at the very least, will serve as a catalyst for future dialogue on the role of RJ legislation in dismantling the school-to-prison pipeline. The data from this research should also serve as a catalyst for future research on RJ legislation. There will be a great need to research how legislation introduced impacts declining trends beyond the time frame (2008-2014) in this article. Researchers should also consider studying how RJ policy introduced in the local arena impacts declining trends especially given how many education decisions are made at the local level. Following that reasoning, another interesting area to explore (once more data is available of course) is what impact, if any, school discipline bills have on dismantling the school-to-prison pipeline. Finally, for the more equipped researcher, a natural and inevitable area for study is the impact of RJ legislation on recidivism.

I hope that as a result of reading this paper more students, criminologists, policy analysts, or statisticians are inspired to pursue more in-depth quantitative research on whether RJ legislation actually does dismantle the school-to-prison pipeline. I also hope state legislatures continue to introduce and experiment with RJ legislation because forecasting trendlines show that introducing RJ legislation can only help to dismantle the school-to-prison pipeline crisis.

VII. APPENDIX A: THE THREE DECLINING TRENDS

Between 2008 and 2013, the estimated count for juvenile delinquency petitions reduced by 292,131.¹⁰⁵ (See Figure 10)

methods involved for each survey.

RJ Legislation and Juveniles in Court. This article first surveyed restorative justice legislation and the decline in juvenile delinquency petitions in 50 states across a

legislation accounted for restorative justice bills in the criminal, civil, and educational contexts. This article examined the juvenile delinquency petitions for two reasons: (1) the delinquency petition is viewed as the formal entry point for juvenile prosecution¹⁰⁸; and (2) due to the relatively short time frame (approximately three months) of this project. This portion of the article explored the following research question(s):

1. What relationship, if any, did states that introduced RJ legislation have with states that experienced a decline in juvenile petitions in the United States from 2008 to 2013?

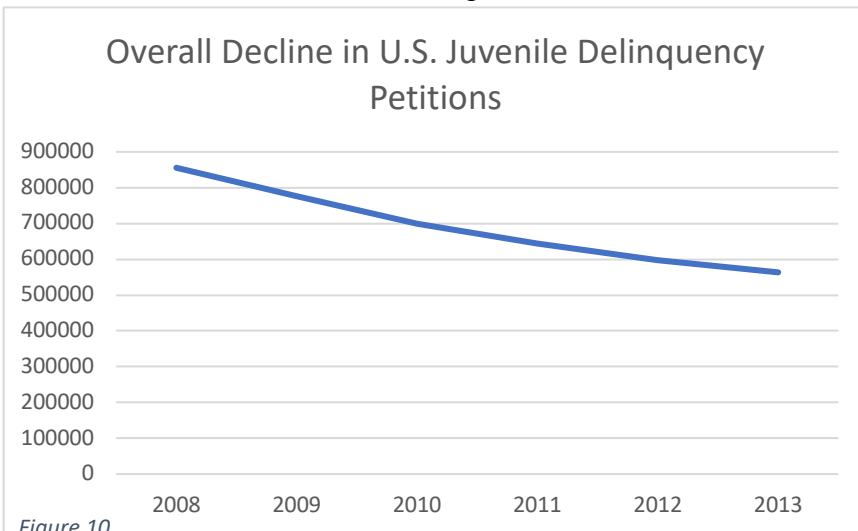


Figure 10

Between 2006 and 2014, the estimated number of murders involving a juvenile offender fell 39%.¹⁰⁶ (See Figure 11)

Between 2008 and 2012, the national total for juvenile arrests reduced by 4.2%.¹⁰⁷ (See Figure 12)

VIII. APPENDIX B: METHODOLOGY

This section provides context for what each survey was about and data collection

six-year period (2008-2013). The restorative justice

Number of homicide victims of known juvenile offenders, 1980-2014

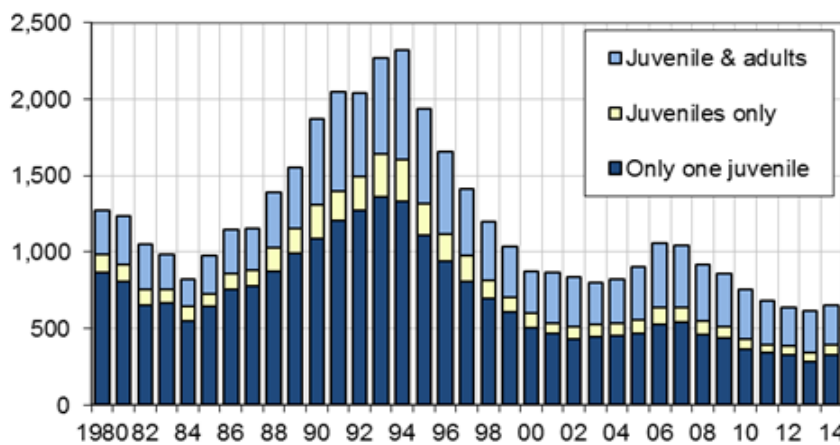


Figure 11

¹⁰⁵ Off. of Juv. Just. and Delinq. Prevention, *Offending by Juveniles*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (May 25, 2016), <http://www.ojjdp.gov/ojstatbb/offenders/qa03105.asp?qaDate=2014> [<https://perma.cc/HP5U-U3LC>].

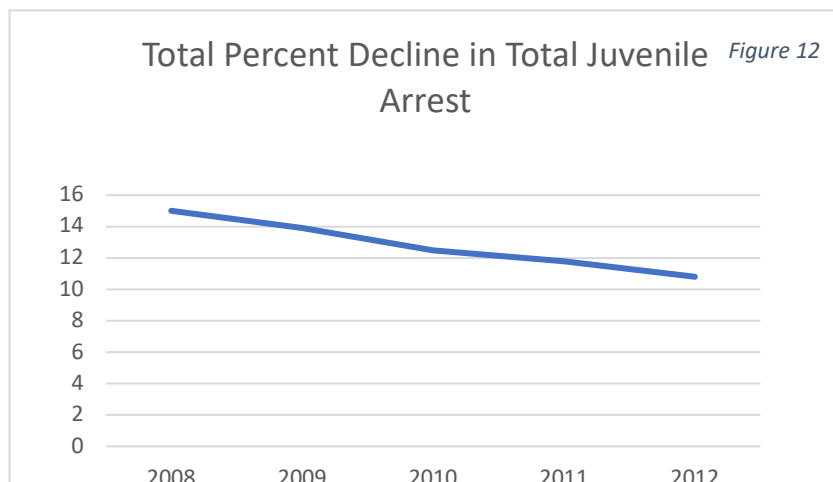
¹⁰⁶ *Id.*

¹⁰⁷ Puzzanchera, C. and Kang, W., *Easy Access to FBI Arrest Statistics 1994-2012*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (2014), <https://www.ojjdp.gov/ojstatbb/ezaucr/> [<https://perma.cc/JR2Z-DLJH>].

¹⁰⁸ Bureau of Just. Stat., *Criminal Justice System Flowchart*, OFF. OF JUST. PROGRAMS (Apr. 24, 2017),

<https://www.bjs.gov/content/largechart.cfm> [<https://perma.cc/2X4H-AY3G>]; Bureau of Just. Stat., *The Justice System Flowchart*, OFF. OF JUST. PROGRAMS (last visited Apr. 24, 2017)

<https://www.bjs.gov/content/justsys.cfm#juvenile> [<https://perma.cc/V7V8-N847>].



To collect data on RJ legislation, I utilized two Lexis Nexis State Net-powered databases, developed by the National Conference of State Legislatures, to track the status of RJ bills from 2008 to 2013 in each state.¹⁰⁹ The first database, the JUVENILE JUSTICE BILLS TRACKING DATABASE (also developed by the John D. and Catherine T. MacArthur Foundation), tracked the status of RJ bills in the civil and criminal justice context. The second database, Educational Bill Tracking Database, tracked the status of RJ bills in the educational context.¹¹⁰ To collect data on juvenile delinquency petitions, I utilized the Office of Juvenile

Justice and Delinquency Prevention's Easy Access to State and County Juvenile Court Case Counts database.¹¹¹ The primary reasons for using these databases allowed me to collect a large volume of data efficiently in a short period of time.

Under the first database, a search consisted of filtering by (1) the topic (here restorative justice was already a pre-populated field to be selected); (2) state; (3) status (here I selected "All" to account for even those bills which had failed, been vetoed, or were pending); and (4) year (here again, I selected "All" to account for bills from 2008-2013). Once the database

returned results, I set aside any bills introduced 2014 onwards and then individually recorded, for each state, the number of bills either enacted/adopted, introduced/pending, or not introduced at all in an excel spreadsheet. The search protocol for the second database was mostly the same as the first database except for two filters: (1) the topic (here restorative justice was not a pre-populated topic field and thus, this database required a natural language search); and (2) state (here I selected "All" after a preliminary search revealed very few states had introduced RJ education bills to begin with). A search within the State and County Juvenile Court Case Counts database consisted of filtering by (1) year and (2) state. Once the database returned results, I individually recorded, for each state (and accounting for all counties), the decline in delinquency petitions by subtracting the petition counts in 2013 from the petition counts in 2008 in an excel spreadsheet.¹¹²

¹⁰⁹ Both databases had the capacity to track bills to present (2017) but tracking was constrained to 2012 to align with arrest rate data and due to time considerations; Nat'l Conf. of State Legislatures, *Juvenile Justice Bills Tracking Database*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 24, 2017), [<https://perma.cc/G3ZF-NUEB>].

¹¹⁰ Nat'l Conf. of State Legislatures, *Education Bill Tracking Database*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 24, 2017),

<http://www.ncsl.org/research/education/education-bill-tracking-database.aspx>

[<https://perma.cc/5XGD-MRNQ>].
¹¹¹ Hockenberry, S., Smith, J., and Kang, W., *Easy Access to State and County Juvenile Court Case Counts, 2013*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (2015), <https://www.ojjdp.gov/ojstatbb/ezaco/> [<https://perma.cc/8XRX-82FM>].

¹¹² The following states were not included because either the case counts were not available for a given state or the data available was insufficient to remain consistent with other states: California, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, North Dakota, Virginia, and Minnesota. States that missed a year of data were, however, included because the data from the remaining years was sufficient to remain consistent with other states: Illinois,

Once all data was recorded, I sorted the data into two variables. Variable X was a list of every state that introduced at least one RJ bill between 2008 and 2013. Variable Y was a list of the declines in petition counts for each state that introduced at least one RJ bill between 2008 and 2013. To measure the strength and direction between the two variables, I utilized the Pearson Correlation Coefficient. After calculating the R value and value of R^2 , I then calculated the P value for the relationship to assess the statistical significance of the correlation. The results of the data are revealed and analyzed in section four of this article.

RJ Legislation and Juvenile Homicide

Offenders. This article also surveyed restorative justice legislation and the decline in juvenile homicide offenders in 50 states across a seven-year period (2008-2014). The author chose to also examine juvenile homicide offenders for two reasons: (1) homicide is undoubtedly one of the most serious criminal offenses and if restorative justice legislation may be impactful on one of the most severe offenses in our world, then it is certainly an area of great interest; and (2)

due to the relatively short time frame (approximately three months) of this project. This portion of the article explored the following research question(s):

1. What relationship, if any, did states that introduced RJ legislation have with states that saw a decline in juvenile homicide offenders in the United States from 2008 to 2014?

Collecting data on RJ legislation involved the same method mentioned previously, except the filtering process accounted for bills introduced from 2008-2014. To collect data on juvenile homicide offenders, I utilized the Office of Juvenile Justice and Delinquency Prevention's Easy Access to the FBI's Supplementary Homicide Reports: 1980-2014 database.¹¹³ Using this database allowed me to collect a large volume of data efficiently in a short period of time. A search within the FBI's Supplementary Homicide Reports database consisted of filtering by (1) known offenders; (2) year of incident (here I selected 2008-2014); (2) age of offender (here I selected ranges 0-11 and 12-17); (3)

state; (4) sex (here I selected both males and females to account for all sexes provided); (5) race (here I selected White, Black, American Indian/Alaskan native, and Asian/Nat. Hawaiian/Pacific Island to account for all races provided). Once the database returned results, I individually recorded, for each state, the decline in homicides by juvenile offenders by subtracting the incidences in 2014 from the incidences in 2008 in an excel spreadsheet.¹¹⁴

Once all data was recorded, I sorted the data into two variables. Variable X was a list of every state that introduced at least one RJ bill between 2008 and 2014. Variable Y was a list of the declines in homicide by juvenile offenders for each state that introduced at least one RJ bill between 2008 and 2014. To measure the relationship and statistical significance of the two variables, I followed the same method mentioned previously. The results of the data are revealed and analyzed in section four of this article.

RJ Legislation and Juvenile Arrest Rates.

Finally, this article surveyed restorative justice legislation and juvenile arrest rates in 50

Michigan, Nevada, New York, and Wyoming.

¹¹³ *Easy Access FBI's Supplementary Homicide Reports: 1980-2014*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION (May 25, 2016), <https://www.ojjdp.gov/ojstatbb/ezashr/> [<https://perma.cc/EPZ6-L34P>].

¹¹⁴ The following states were not included because either the case counts were not available for a given state or the data available was insufficient to remain consistent with other states: Alabama, Florida, and North Dakota. Although the District

of Columbia missed a year of data, it was, nonetheless, included because the data from the remaining years was sufficient to remain consistent with other states.

states across a four-year period (2008-2012). This study included juvenile arrest rates for two reasons: (1) it is viewed as the entry point to the criminal justice system¹¹⁵; and (2) due to the relatively short time frame (approximately three months) of this project. This study explored the following research questions:

1. What relationship, if any, did states that introduced RJ legislation have with states that experienced a decline in juvenile arrest rates in the United States from 2008 to 2012?

Collecting data on RJ legislation involved the same method mentioned previously, except the filtering process accounted for bills introduced from 2008-2012. To collect data on juvenile arrest rates, I utilized the Office of Juvenile Justice and Delinquency Prevention’s Easy Access to FBI Arrest Statistics: 1994-2012 database.¹¹⁶ Using this database as well allowed me to collect a large volume of data efficiently in a short period of time. A search within the FBI Arrest database consisted of filtering by (1) state; (2) county (here I selected “All counties” to account for arrest rates in the entire state); (3) data display option (here, I selected “percentage” for more convenient calculation); (4)

population (here I selected “juvenile” as that is naturally the focus of this study); and (5) time period (here I selected 2006-2012). Once the database returned results, I set aside any arrest rates from 2007 or previous years and then individually recorded, for each state, the reduction in arrest rates by subtracting the arrest rate in 2012 from the arrest rate in 2008 in an excel spreadsheet.

Once all data was recorded, I sorted the data into two variables. Variable X was a list of every state that introduced at least one RJ bill between 2008 and 2012. Variable Y was a list of the declines in juvenile arrests for every state that introduced at least one RJ bill between 2008 and 2012. The same method mentioned previously was utilized to measure the relationship and statistical significance of the two variables. The results of the data are revealed and analyzed in the subsequent section of this article.

**IX. APPENDIX C:
PEARSON
CORRELATION
COEFFICIENT
CALCULATIONS**

**RJ Legislation and
Juveniles in Court Results.**

A Pearson Correlation Coefficient Calculation

revealed the following results for the states above:

R Score	-0.5378
Strength	Moderate
Direction	Negative
R ² Value	0.2892
P-Value at 0.10 Significance Level	0.108841
Overall result	Not significant
N	10

RJ Legislation and Juvenile Homicide Offender Results. A Pearson Correlation Coefficient Calculation revealed the following results for the states above:

R Score	-0.5515
Strength	Moderate
Direction	Negative
R ² Value	0.3042
P-Value at 0.10 Significance Level	0.123739
Overall result	Not significant
N	9

RJ Legislation and Juvenile Arrest Rate Results. A Pearson Correlation Coefficient Calculation revealed the following results for the states above:

¹¹⁵ Bureau, *supra* note 108.

¹¹⁶ Puzanchera, C. and Kang, W., *Easy Access to FBI Arrest Statistics 1994-2012*, OFF. OF JUV. JUST. AND

DELINQ. PREVENTION (2014), https://www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp [<https://perma.cc/ZN3K-C2ZT>].

R Score	0.3629
Strength	Weak
Direction	Positive
R ² Value	0.1317
P-Value at 0.10 Significance Level	0.423675
Overall result	Not significant
<i>N</i>	7

GENDER VERIFICATION POLICIES IN ELITE SPORTS

Diana Isyanova

There have been decades of unsuccessful attempts to develop a fair and adequate gender verification test. The initial test, which used to be accomplished by visual observation, has evolved into a highly sophisticated molecular-level evaluation. Numerous elite-sport athletes exemplify the struggles the testing evolution has caused them. Furthermore, our deeper understanding of the human anatomy reveals an array of intricacies and variations that might nudge us to not only relax the current rigid definitions of “male” and “female,” but also to forgo the efforts of confining it into a single description. Furthermore, while the major sport authorities have been relentlessly chasing this elusive end of establishing the policy, the need for having the test has possibly become moot.

I. INTRODUCTION

In all Olympic sports, aside from the co-ed equestrian competitions, male athletes hold an athletic advantage over female athletes based on the records of every Olympic sport.¹ It remains true today.² To avoid unfair gains, major sports organizations implemented gender separation for athletes, as well as weight categories in sports where the variance is great enough to be a factor.³ However, while a reliable scale objectively resolves the equity question in weight, gender is still a highly subjective and complex combination of sex, cognitive self-perception,⁴ and social conventions.

The pursuit of a fair and precise gender verification test has been a challenge for at least the last eighty years and remains an elusive goal. The long history of unsuccessful policies and of the many devastated athletes who “failed” the tests begs the question: “Is it even possible to achieve a sound sex/gender verification test?” One possible answer is that perhaps it is not even worth trying to chase such an elusive goal because anti-doping procedures eliminate the danger of male imposters among female athletes and because defining “a female” for purposes of testing is neither possible nor natural.

This article lays out the reasons behind establishing

sex/gender verification policies, as well as different aspects and challenges of the policies since its first implementation. Based on those facts, one logical proposal may be to abolish the testing altogether.

At the outset, it is important to differentiate the terms “sex” and “gender.” “Sex” refers to the cluster of physically and medically verifiable biological indicators with which people are born.⁵ In this regard, the majority of the human population can be categorized at birth as either male or female. “Gender,” however, is a complex combination of physical, emotional, and socially constructed behaviors that a given society

¹ COLLINS M. TUCKER, *The Science and Management of Sex Verification in Sport*, 21 S. AFR. J. SPORTS MED. 148 (2009).

² Women’s for 100m freestyle time during the 2016 Olympic trials was 56.49 sec, where men’s time was 50.69 sec.; for 100m freestyle, the women’s time was 2:02.39 but men’s 1:51.89. *2016 Olympic Trials Time Standards*, U.S.A. SWIMMING. <https://www.usaswimming.org/docs>

/default-source/mediadocuments/2016-olympic-trials-media-center/2016-olympic-trials-qualifying-times.pdf?sfvrsn=2 [https://perma.cc/4X2C-7XTC]. The men’s world records in running are: 100m- 9.58; 200m – 19.19; 400 meters – 43.03; Women’s records in the same categories are: 100m- 10.49; 200m – 21.34; 400 meters – 47.60. *World Records*. IAAF, <https://www.iaaf.org/records/by->

category/world-records [https://perma.cc/34VK-CKN5], (last visited Nov15,2016).

³ COLLINS *supra* note 1 at148.

⁴ *Id.*

⁵ *Gender, Women and Health*, WORLD HEALTH ORGANIZATION (Aug. 2015), <http://apps.who.int/gender/whatisgender/en/> [https://perma.cc/3ZGW-DAUF].

characterizes as, and attributes to, a culturally defined gender,⁶ most often using the dichotomous terms “female” or “male” and “feminine” or “masculine.”⁷

Because the initial purpose of sex testing was to discover men acting as women imposters, it was labeled “sex-verification.”⁸ However, the implementation of those procedures has created circumstances and conditions that suggest an unfair biological advantage in some female athletes. Thus, the process became known as “gender-verification,” and as the name suggests, it is intended to verify conformity to gender.⁹ To encompass both sex- and gender-verification procedures, some have described such testing as “sex/gender verification procedure.”¹⁰ Labels for methods addressed in this article conform with the original label used by each organization discussed and, if used collectively, refer to both processes as sex/gender verification procedure. In addition, the term “transgender” is used following

the meaning defined by the American Psychological Association (APA), which is “an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth.”¹¹ Finally, the discussion below involves mostly elite sports and elite athletes. Authors have variably defined “elite.” For the purposes of this article “elite” is defined as national or international level competitors, Olympians, and professional or semi-professional world-class athletes.

II. REASONING BEHIND ESTABLISHING AND EFFECTIVENESS OF SEX/GENDER VERIFICATION POLICIES

The intention behind establishing such gender/sex verification policies was to ensure fairness in sports by eliminating unfair advantages. Concerns regarding advantage by pretense in competitions are not utterly unfounded. During

the 1936 Berlin Olympics, Nazis allegedly forced Dora Ratjen to disguise himself in order to compete as a female athlete; and he successfully misled his competitors.¹² Although some question the accuracy of this story, the general public’s conviction of unfair advantage has not been disproved.¹³ During the 1960 Olympic Games in Rome, the Soviet sisters, Tamara and Irina Press, were practically unbeatable in track and field.¹⁴ Their extraordinary joint collection of twenty-six world records led their competitors to question their legitimacy as female athletes,¹⁵ and although no specific facts ignited the controversy, none were presented to disprove it.¹⁶ The sisters’ retirement within just weeks of International Association of Athletics Federation’s (IAAF) announcement of their mandatory gender verification tests, added fuel to the allegations and has kept the controversy alive.¹⁷ Today, fears of gender-unfairness in worldwide professional and amateur sports remain, alongside a saga of crippled

⁶ *Id.*

⁷ *Id.*

⁸ LINDSAY PARKS PIEPER, *Sex Testing: Gender Policing in Women’s Sports* 3 (2016).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Transgender People, Gender Identity and Gender Expression*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/topics/lgbt/transgender.aspx>

[<https://perma.cc/5KLT-A366>], (last visited Dec 16, 2016).

¹² “[T]he story though a fascinating one but may not be accurate.” Stefan Berg, *How Dora the Man Competed in the Woman’s High Jump*, SPIEGEL ONLINE (Sept. 15, 2009), <http://www.spiegel.de/international/germany/1936-berlin-olympics-how-dora-the-man-competed-in-the-woman-s-high-jump-a-649104.html> [<https://perma.cc/X6LA-LY63>].

¹³ *Id.*

¹⁴ PIEPER, *supra* note 8, at 1.

¹⁵ *Id.*

¹⁶ *Olympic Gender Drama-the Press Sisters*, TRANSGRIOT (Nov. 9, 2011), <http://transgriot.blogspot.com/2011/11/olympic-gender-drama-press-sisters.html>

[<https://perma.cc/GY9R-YMXA>].

¹⁷ *Id.*

and inadequate testing procedures.

Up to the present time, the majority of athletes who have “failed” sex-verification tests have had at least one of various forms of chromosomal conditions, including androgen insensitivity,¹⁸ XY mosaicism,¹⁹ 5- α -reductase-deficiency,²⁰ or gonadal dysgenesis.²¹ To date, none of those alone clearly defines, medically or legally, the sex of an athlete, and the lack of a legally precise sex-verification policy is even more pronounced in the case of transgender athletes. Two specifying traits have surfaced through the implementation of various sports organizations' imperfect sex/verification policies. First, surprisingly, fairness concerns seem to apply

only to the women’s sports. Sex verification of male athletes is, apparently, “unnecessary and irrational.”²² To narrow that notion further, non-Western women have been the primary suspects of sex verification policies.²³ This raises the question of whether the so-called fairness pursued by the major sport organizations is, in any way, actually fair. Second, through their long history of gender-policing, neither of the two major sport organizations, the International Olympic Committee (“IOC”) and the International Association of Athletics Federation (“IAAF”), has yet ever detected even a single male athlete intentionally masquerading as a female.²⁴ Instead, the saddening multitude of

collateral damage resulting from testing policy implementation has led to the victimization of many gifted athletes who simply “failed” the test.

III. A PERSPECTIVE OF THE U.S. CULTURE TOWARD FEMININITY IN SPORTS

To understand our society’s inconsistent treatment of sportswomen, it is worthwhile to look at the various components that have shaped it. Susan Cahn, the author of “*Coming On Strong: Gender and Sexuality in Women’s Sport*,” states that sports in the Western world have been predominantly designed for and

¹⁸ “Androgen Insensitivity Syndrome is a condition that affects sexual development before birth and during puberty. People with this condition are genetically male, with one X chromosome and one Y chromosome in each cell. Because their bodies are unable to respond to certain male sex hormones (called androgens), they may have mostly female external sex characteristics or signs of both male and female sexual development.” *Androgen Insensitivity Syndrome*, U.S. NATIONAL LIBRARY OF MEDICINE: GENETIC HOME REFERENCE, <https://ghr.nlm.nih.gov/condition/androgen-insensitivity-syndrome> [https://perma.cc/4NP9-MS7Y], (last visited Dec. 16, 2016).

¹⁹ Also called 47, XYY. This syndrome is “characterized by an extra copy of the Y chromosome in each of a male’s cells. Although males with this condition maybe

taller average, this chromosomal change typically causes no unusual physical features. Most males with 47,XYY syndrome have normal sexual development and are able to father children.” *47, XYY Syndrome*, U.S. NATIONAL LIBRARY OF MEDICINE: GENETIC HOME REFERENCE, <https://ghr.nlm.nih.gov/condition/47xyy-syndrome> [https://perma.cc/LNK8-5WQM], (last visited Dec. 16, 2016).

²⁰ 5-Alpha-Reductase deficiency is a condition that affects male sexual development before birth and during puberty. People with this condition are genetically male, with one X and Y chromosome in each cell and they have male gonads (testes). Their bodies however, do not produce enough of a hormone called dihydrotestosterone (DHT)... a shortage of this hormone disrupts the formation of the external sex

organs before birth.” *5-Alpha-Reductase Deficiency*, U.S. NATIONAL LIBRARY OF MEDICINE: GENETIC HOME REFERENCE, <https://ghr.nlm.nih.gov/condition/5-alpha-reductase-deficiency> [https://perma.cc/HFS6-JTD7], (last visited Dec. 16, 2016).

²¹ Gonadal Dysgenesis is “defective development of the gonads, which may be accompanied by abnormalities of the sex chromosomes.” *Gonadal Dysgenesis*, THE FREE DICTIONARY: DYSGENESIS, <http://medical-dictionary.thefreedictionary.com/dysgenesis> [https://perma.cc/QE8X-L9MR], (last visited Dec. 16, 2016).

²² PIEPER, *supra* note 8, at 184.

²³ *Id.* at 185-86.

²⁴ PIEPER, *supra* note 8 at 2.; <http://jrs.sagepub.com/content/101/8/395> [https://perma.cc/RH3Z-8FGK], p. (footnote 11-12).

played by men.²⁵ She suggests that many attribute characteristics such as “aggression, competitiveness, strength, speed, and powers, and team work” to masculinity.²⁶ She states that traditionally for “many men sports have provided an arena in which to cultivate masculinity and achieve manhood.”²⁷ When women began claiming their places in the world of athletics in the early 1900s, however, some wondered whether female athletics would turn women into masculine facsimiles of the ‘opposite’ sex or, instead, “feminize” sports and erode the boundaries between male and female spheres of activity.²⁸ Eight decades later, such questions have not been put to rest. Therefore, it is only natural that in order for female-athletes to enter predominantly male sports and change societal perspectives regarding women in sports, it would require time, patience, and, unfortunately, humiliation.

In the 1950s the femininity was still a hot topic, and some perceived it as a weakness for female athletes. Ione Muir, the manager of the U.S. women's

swimming team, questioning whether the femininity was an obstacle preventing the team from maintaining the number one world position, remarked that the swimmers on the team “swim like girls” connotes his disassociation of femininity with success in sports.²⁹ Leaders in the sports industry have also shied away from encouraging female athletes’ participation.³⁰ When Jacques Rogge, a former IOC president, was highlighting the achievements of his predecessor Juan Antonio Samaranch, he noted that in 1980, the IOC remained a highly conservative organization, a “men-only club.”³¹ Among Olympian athletes, only eighteen percent were females.³² Among IOC members, there were none.³³

Despite the challenges, women’s successful collective efforts overcame the barriers that prevented females’ participation in public sports.³⁴ The current challenge is to ensure that *every* woman from any continent on the planet has a right to participate in her sport and to express herself as an athlete.

IV. IOC AND IAAF’S SEX/GENDER TESTS AND EXAMPLES OF ATHLETES WHO “FAILED” THEM

A. Mid-1960s – 1990. Chromosomal Testing.

Although the subject may still seem relatively new to the general public, the IOC felt the need to establish gender-verification policy decades ago. In 1966, the first and most simplistic and invasive gender verification tests were conducted by visual observation and gynecological examination.³⁵ In 1968, the IOC mandated that Olympians undergo a different test, less physically intrusive test, Barr Test.³⁶ A chromosomal analysis based on meaningful distinctions between the chromosomes of males and females, discovered by Murray Barr.³⁷ Ironically, lab-tested gender-verification, which was meant to circumvent advantageous unfairness, was itself flawed and unfair.³⁸ Its first victim was Ewa Klobukowska, a Polish sprinter athlete³⁹ who in 1964, won Olympic gold and bronze medals in the 4x100 meter

²⁵ SUSAN K. CAHN, COMING ON STRONG GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN’S SPORT 3 (1994).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Dudley Sargent, *Are Athletics Making Girls Masculine*, in WOMEN AND SPORTS IN THE UNITED STATES: A DOCUMENTARY READER 56 (Jean O’Reilly & Susan K. Cahn, ed., 2007).

²⁹ Muir, “As I See It,” *Amateur Athlete* (February 1956) 22 (note 46, p. 349).

³⁰ CAHN, *supra* note 25, at 11.

³¹ PIEPER, *supra* note 8, at 137.

³² *Id.*

³³ *Id.*

³⁴ CAHN, *supra* note 25, at 1.

³⁵ Robert Ritchie, *Intersex and Olympic Games*, 101 J ROYAL SOC’Y MED. 395-99 (2008).

³⁶ *Id.*

³⁷ Murray Barr & Ewart G. Bertram, *A Morphological Distinction between Neurons of the Male and Female, and the Behavior of the Nucleolar Satellite during Accelerated Nucleoprotein Synthesis*. NATURE, Apr. 30, 1949, at 676.

³⁸ PIEPER, *supra* note 8, at 120.

³⁹ *Id.* at 121.

relay and 100-meter sprint, respectively.⁴⁰ Klobukowska is believed to have had a rare genetic abnormality called chromosomal mosaicism and so possessed, as the IAAF phrased it, “one chromosome too many.”⁴¹ Such abnormalities were unaccounted for by the criteria of the Barr Test; thus, based on test findings, the IOC unceremoniously stripped Klobukowska of her medals and banned her from future competition.⁴² Aside from the traumatic disappointment of exile from future events, she endured public humiliation, degradation, and subsequent stigmatization. A possible but unsatisfying silver lining of Klobukowska’s case was that the IOC decided to keep the future test results confidential.⁴³

As DNA testing emerged, the Barr test was replaced by polymerase chain reaction (PCR) analysis, another promising but far from the ideal testing method,⁴⁴ which purported to distinguish males from females by accurately

identifying the presence and number of X and Y chromosomes and then categorizing an athlete as male or female on that basis.⁴⁵ Yet the disqualification of athletes who had lived lifelong as men continued.⁴⁶ Similar to its predecessor, this chromosomal test failed women based on various chromosomal abnormalities such as 5- α -reductase-deficiency, gonadal dysgenesis, and androgen insensitivity syndrome (AIS).⁴⁷ The last of those was exemplified by Maria Martinez-Patino (Martinez-Patino), a Spanish hurdler who publicly challenged her sex-verification testing. She “failed” the test in 1985 at the University Games in Kobe, Japan, and so was disqualified from future events.⁴⁸ The results of IOC testing had declared that Martinez-Patino has 46 chromosomes, but with one X chromosome and one Y chromosome, classifying her, at least on the genetic level, as male.⁴⁹ This is precisely the danger of chromosomal testing on women with AIS who

usually exhibit the external characteristics of females and are raised as women. However, their XY chromosomes mean that they do not have uteruses and cannot birth children, the dichotomous gender definition of only two sexes means their chromosomes, not their lives and experiences, define them as males.⁵⁰

The news devastated the athlete but even more created in her a sense of helplessness upon being forced to excuse herself from the competition under the pretense of false injury.⁵¹ The societal tortures continued when she refused to skip the Track and Field Spanish National Games, and as a result, lost her sports scholarship, was banished from the athletes’ residence and saw her running records expunged.⁵² Nevertheless, in the true Olympian spirit, she fought back publicly⁵³ and may have been the tipping point that persuaded the IOC to abolish such humiliating disqualifications solely based on lab tests and subsequently

⁴⁰ Guy Adams, *Tarnished Gold: Some of the ‘Great’ Olympics Cheats*. INDEPENDENT. <http://www.independent.co.uk/sport/olympics/tarnished-gold-some-of-the-great-olympics-cheats-7869830.html> [https://perma.cc/PNN9-RGMH], (last visited 2012).

⁴¹ *Id.*

⁴² Ritchie, *supra* note 35.

⁴³ Schultz Jaime, *Disciplining Sex: ‘Gender Verification’ Policies and Women’s Sports*, in THE PALGRAVE HANDBOOK OF OLYMPIC STUDIES

443–60 (Helen Jefferson Lenskyj & Stephen Wagg 2012).

⁴⁴ Ritchie, *supra* note 35.

⁴⁵ Schultz, *supra* note 43, at 447.

⁴⁶ Ritchie, *supra* note 35.

⁴⁷ Although females with AIS who possess the “extra chromosome” will physiologically appear as a woman and have phenotype typical to a woman, they do not develop the strength and musculature of a male that is attributable to the testosterone hormones 253 Louis J. Elsas, *Gender Verification of*

Female Athletes. NATURE, Aug. 2000.

⁴⁸ Schultz, *supra* note 43, at 449.

⁴⁹ *Id.*

⁵⁰ Schultz, *supra* note 43, at 446–47.

⁵¹ PIEPER, *supra* note 8 at 135; 142 (She described the experience as rape. “I’m sure it’s the same sense of incredible shame and violation. The only difference is that, in my case, the whole world was watching”).

⁵² *Id.* at 135–36.

⁵³ Schultz, *supra* note 43 at 445.

make changes to its gender-verification policy.⁵⁴

**B. 1990 – 2015.
Abandonment of Mandatory Testing Does Not Mean Giving It Up Altogether.**

Following advice from experts, the IAAF officially abandoned sex verification in 1991,⁵⁵ and by 1996, “virtually all major U.S. medical societies” had declared their preference to abolish the Olympic Committee’s gender-verification procedures.⁵⁶ Then, the IOC officially suspended its testing policy in 1999,⁵⁷ and, in the Millennial Games of 2000 in Sydney, made an even more radical decision to abstain from gender testing of female athletes altogether. That policy shift, however, was a one-time free pass that did not last long.⁵⁸ Before the Olympic Games in Athens in 2004, the IOC adopted a new policy that allowed transgender-athletes to compete in the Games under the sex with which they identified.⁵⁹ The distinguishing

criteria for the IOC became *when* the sex-reassignment has taken place: if an athlete has undergone the sex reassignment *prior to* his or her puberty, he or she is acknowledged as of that assigned sex.⁶⁰ However, the assignment process became a little more intricate when the athlete had undergone the transgender process *after* puberty. Eligibility depended on the athlete meeting the following conditions:

1) Surgical anatomical changes must have been completed, including external genitalia changes and gonadectomy; 2) legal recognition of assigned sex must be conferred by appropriate official authorities; and 3) hormonal therapy appropriate for the assigned sex must be administered in a verifiable manner and for a period sufficient to minimize gender-related advantages in sport competitions.⁶¹

Moreover, the IOC also agreed that at least two years

must have passed before the athlete is eligible to compete⁶² and reserves a right to “take appropriate measures” if an athlete’s sex is questioned.⁶³ Needless to say, many other sport organizations followed the IOC’s lead. Although also well-established and influential, the IAAF relied on the IOC’s policies for guidance in creating its own policy on gender verification.⁶⁴ Consequently, the IAAF’s 2006 gender verification policy closely echoes the IOC’s.⁶⁵

Aside from outlining its requirements, the IAAF document also explicitly specifies for track and field competitors the chromosomal conditions under which no advantage over a fellow competitor exists and are thus allowable: (1) androgen insensitivity syndrome, whether complete or almost complete; (2) gonadal dysgenesis; and (3) Turner’s syndrome.⁶⁶ A list of some conditions that award slight advantage but are still deemed

⁵⁴ Anna Peterson, *But She Doesn’t Run Like A Girl . . . The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex*, 19 Tul. J. Int’l & Comp. L. 315 (2010).

⁵⁵ *IAAF Policy on Gender Verification 2006*, INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (2006).

⁵⁶ Elsas, *supra* note 47, at 253.

⁵⁷ *Id.*

⁵⁸ *Id.* (explains that the suspension of the policy was limited to the games in Sydney).

⁵⁹ *IOC Approves Consensus with Regard to Athletes Who Have Changed Sex*, IOC. <https://www.olympic.org/news/ioc->

[approves-consensus-with-regard-to-athletes-who-have-changed-sex \[https://perma.cc/MA4X-GWNN\]](https://perma.cc/MA4X-GWNN), (last visited Dec 16, 2016).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *IAAF Regulation Governing Eligibility of Athletes Who Have Undergone Sex Reassignment to Compete in Women’s Competitions*, IAAF. <https://www.iaaf.org/about-iaaf/documents/medical> [https://perma.cc/UXP8-EVZ7], (last visited Dec 16, 2016).

⁶⁵ *Id.* (1) “If sex change operations as well as appropriate hormone replacement therapy are performed before puberty, then the athlete is allowed to compete as a female. 2) If sex change and hormone therapy is done after puberty, then the athlete has to wait two years after gonadectomy before a physical and endocrinological evaluation is conducted. The crux of the matter is that the ‘female’ athlete should not be enjoying the benefits of the natural testosterone predominance usually present in a male.”)

⁶⁶ *Id.*

acceptable by the IAAF include (1) congenital adrenal hyperplasia; (2) androgen producing tumors; (3) anovulatory androgen excess.⁶⁷ Similarly to the IOC, the IAAF relaxed the mandatory testing but reserved the right to ask athletes to be medically evaluated if the athlete's gender is under "suspicion" or has been "challenged."⁶⁸

An athlete's gender can still be tested, as evident in 2006 at the Asian Games, the second largest multi-discipline, international athletic competition which is organized by the Olympic Council of Asia (OCA).⁶⁹ There, Santhi Soundarajan earned a silver medal in the women's 800-meter race.⁷⁰ After a thirty-minute examination, the IAAF doctors let Soundarajan go⁷¹ but left her clueless as to the results. To her dismay and shock, she, along with the rest of the world, learned of her test results from the evening news.⁷² She had failed.⁷³ She was then stripped of her silver medal and publicly humiliated, which she said made her feel,

"physically and mentally totally broken."⁷⁴ The world-class champion slipped into depression.⁷⁵

Caster Semenya, an eighteen-year-old track and field athlete from South Africa, found herself in a similar situation at the 2009 World Athletics Championship in Berlin where she won a gold medal.⁷⁶ Her case was especially delicate for several reasons. First, she was young, only 18 years old when she entered. Second, she is an African female, thus has a body type deemed atypical by Western society and which has led to an "utter disregard for *her* humanity" (emphasis added).⁷⁷ The author of "Caster Semenya: Twenty-First Century 'Hottentot Venus'?" draws parallels between Europeans' unceremonious fascination with African women's physiques in the early 1800s and the agitated media and public attention drawn by Semenya's frame.⁷⁸ She was directed to undergo gender testing before she could return to competing.⁷⁹ Semenya came

back winning a silver medal at the 2012 London Olympics and, later, a gold medal at the Rio 2016 Olympics, both in the women's 800-meters.⁸⁰ (Years later, as a result of disqualification of Mariya Savinova, the gold medalist at the 2012 London Olympics in the 800-meter race, Semenya's silver was upgraded to gold making her a double Olympic champion.)⁸¹ However, Semenya's naturally high levels of testosterone spurred the next generation of testing.⁸²

In April 2011, the struggle to achieve advantage-free competition continued. This time, excess levels of androgens became the main suspect of the unfair advantage scare.⁸³ In the preface of its hyperandrogenism regulations, the IAAF states, "The difference in athletic performance between males and females is known to be predominantly due to higher levels of androgenic hormones in males resulting in increased strength and muscle development."⁸⁴ That conclusion was a result of a

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Olympic Council of Asia <http://www.ocasia.org/Index.aspx> [<https://perma.cc/7Y3H-TRAU>], (last visited Dec 16, 2016).

⁷⁰ PIEPER, *supra* note 8 at 179.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 181.

⁷⁷ Carina Ray, *Caster Semenya: Twenty-First Century 'Hottentot Venus'?* 489 *NEW AFRICAN* (2009) + ⁷⁸ *Id.*

⁷⁹ Jeré Longman, *Understanding the Controversy Over Caster Semenya*, *N. Y. TIMES: RIO 2016* (Aug. 18, 2016), <https://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html>. [<https://perma.cc/KJ32-QQEM>]

⁸⁰ *Caster Semenya Given London 2012 Gold Medal After Rival is Stripped of the Title*,

THEGUARDIAN.COM: CASTER SEMENYA (Feb. 2017, 07:58PM), <https://www.theguardian.com/sport/2017/feb/10/caster-semenya-given-london-2012-gold-after-rival-is-stripped-title-mariya-savinova-farnosova>. [<https://perma.cc/D6Q9-LUK4>]

⁸¹ *Id.*

⁸² Longman, *supra* note 79.

⁸³ PIEPER, *supra* note 8, at 182.

⁸⁴ IAAF regulations 2011. Preface. Page 1 [<https://perma.cc/CR6Z-ZKSG>].

series of discussions sponsored collectively by IOC and IAAF⁸⁵ during which invited experts in sports and medicine worked together to produce adequate guidelines;⁸⁶ both organizations adopted similar policies encapsulating the notion of “advantageous excess androgens.”⁸⁷ At the 2012 London Olympics, four elite athletes were subsequently disqualified for hyperandrogenism and were recommended to undergo hormonal therapy if they wished to continue their sport careers.⁸⁸

However, major differences did exist between those athletes’ physiques and that of the usual female athlete. First and most observable, each was described as “tall, slim, muscular woman with a male bone morphotype, no breast development, clitoromegaly (larger than a typical clitoris), partial or complete labial fusion, and inguinal/intralabial testes.”⁸⁹ Second, the athletes, who were then ages 18, 20, 20, and 21, were all amenorrheic and had never had a menstrual period.⁹⁰ However, they had all

experienced “unexpected” virilization⁹¹ (characteristics associated with androgens) at puberty, whereas a male newborn expresses traits due to androgen exposure at birth.⁹² Furthermore, they displayed “strong motivation and high tolerance to intensive daily training, which made them good candidates for elite sports competition.”⁹³ Nonetheless, the athletes had never exhibited “male sex behavior,”⁹⁴ all came “from rural or mountainous regions of developing countries,” and their tests confirmed that at least three of them, and very possibly the fourth, shared a kinship.⁹⁵ Those cases were very rare. The diagnosis of one of them having had no known precedent,⁹⁶ and since all four desired to remain female and continue their careers in elite sports, they chose to follow the medical experts’ advice and undergo “partial clitoridectomy with bilateral gonadectomy, followed by a differed feminizing vaginoplasty and estrogen replacement.”⁹⁷ Those procedures almost definitely will decrease the athletes’

performance and were unnecessary for their health, yet they returned to competition as females one year after surgery.⁹⁸

A struggle to establish a sensible gender verification policy continued, and so did the contests by the “failed” athletes. In 2014, a 19-year-old athlete from India publicly challenged the validity of the IAAF’s hyperandrogenism regulations.⁹⁹ Dutee Chand won several medals, including gold, in the women’s 200-meter sprint and 400-meter sprint relay at national junior athletic events, Asian Championships, and World Youth Championships.¹⁰⁰ Then, the Athletic Federation of India (AFI), an IAAF’s member Federation for India, disqualified her from 2014 Commonwealth Games in Glasgow after her test results revealed that her “male hormones levels were too high.”¹⁰¹ Supported by the Sport Authority of India (SAI), Dutee appealed the decision in the Court of Arbitration for Sports (CAS), an independent authority established to resolve

⁸⁵ PIEPER, *supra* note 8 at 181.

⁸⁶ *Id.*

⁸⁷ *Id.* at 182.

⁸⁸ *Id.* at 183.

⁸⁹ Patrick Fènichel et al., *Molecular Diagnosis of 5- α -Reductase Deficiency in 4 Elite Young Female Athletes Through Hormonal Screening for Hyperandrogenism*, 1055 THE ENDOCRINE SOCIETY (June 2013), [http://www.bennington.edu/sites/default/files/sources/docs/Sherman_Betsy_Molecular%20diagnosis%20-](http://www.bennington.edu/sites/default/files/sources/docs/Sherman_Betsy_Molecular%20diagnosis%20-%20female%20athletes.pdf)

[%20female%20athletes.pdf](http://www.bennington.edu/sites/default/files/sources/docs/Sherman_Betsy_Molecular%20diagnosis%20-%20female%20athletes.pdf) [<https://perma.cc/9Z3C-KLR9>].

⁹⁰ *Id.* at 1056.

⁹¹ *Id.*

⁹² *Virilization*, U.S. NATIONAL LIBRARY OF MEDICINE: GENETIC HOME REFERENCE <https://medlineplus.gov/ency/article/002339.htm> (last visited Dec 17, 2016) [<https://perma.cc/B4GA-J9JF>].

⁹³ Fènichel et al., *supra* note 89 at 1056.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1057.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Dutee Chand v. Athletic Federation of India (AFI) & The International Ass’n of Athletics Federations (IAAF), CAS 2014/A/3759, Interim Arbitral Award at 2 (2014) [<https://perma.cc/MB8D-E2DF>].

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 5.

sport-related disputes.¹⁰² She fought to invalidate the hyperandrogenism regulations on the grounds that:

(a) they discriminate unlawfully against female athletes who possess a particular natural physical characteristic; (b) they are based on flawed factual assumption about the relationship between testosterone and athletic performance; (c) they are disproportionate to any legitimate objective; and (d) they are unauthorized form or doping control.¹⁰³

On July 2015, after hearing arguments on both sides, the CAS had decided that the IAAF failed to substantiate the link between hyperandrogenism and significant advantageous athletic performance.¹⁰⁴ The Panel suspended the regulation for a two-year period.¹⁰⁵ During this window, the IAAF has an opportunity to submit evidence that shows that “the quantitative relationship between enhanced testosterone levels and improved athletic performance in hyperandrogenic athletes.”¹⁰⁶

In case the evidence is not provided or insufficient in CAS’ opinion, the regulations will be declared void.¹⁰⁷ Furthermore, during the period, Ms. Dutee is eligible to participate in national and international level sport events.¹⁰⁸

In November 2015, the IOC released a revised policy of its “Sex Reassignment and Hyperandrogenism Policies.”¹⁰⁹ In response to the interim award, it urged other International Federations and Olympic Committees to submit supportive evidence and arguments to sustain the Hyperandrogenism Regulations in the name of fairness.¹¹⁰ The policy proposed that as an alternative option for those deemed to be ineligible to compete as females, the athletes should compete as males.¹¹¹ A key change included in that policy related to the transgender athletes—the IOC abolished its surgical requirement,¹¹² so that any such restrictions do not limit those who had transitioned from female to male.¹¹³ For males transitioning to females, however, the rule is as follows:

2.1 The athlete has declared that her gender identity is female. The declaration cannot be changed, for sporting purposes, for a minimum of four years.

2.2 The athlete must demonstrate that her total testosterone level in serum has been below 10 nmol/L for at least 12 months prior to her first competition (with the requirement for any longer period to be based on a confidential case-by-case evaluation, considering whether or not 12 months is a sufficient length of time to minimize any advantage in women’s competition).

2.3 The athlete’s total testosterone level in serum must remain below 10 nmol/L through the period of desired eligibility to compete in the female category.

2.4 Compliance with these conditions may be monitored by testing. In the event of non-compliance, the athlete’s eligibility for female competition will be suspended for 12 months.¹¹⁴

V. THE HURDLES FOR TRANSGENDER ATHLETES IN VARIOUS

¹⁰² History of the CAS: *Origins*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Dec 17, 2016) [<https://perma.cc/2QKB-C3VN>]

¹⁰³ Interim Arbitral Award, *supra* note 98 at 2.

¹⁰⁴ *Id.* at 158.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Nihal Koshie, *Dutee Chand Wins the Right to Compete*, EXPRESS SPORTS (July 29, 2015), <http://indianexpress.com/article/sports/sport-others/sprinter-dutee-chand-wins-right-to-compete/>

¹⁰⁹ *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism Nov 2015*, INTERNATIONAL OLYMPIC COMMITTEE,

http://www.triathlon.org/uploads/docs/6.b_2015.11_IOC_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-ENG.pdf [<https://perma.cc/E52F-W3TX>].

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*

¹¹² *Id.* at 2.

¹¹³ *Id.*

¹¹⁴ *Id.* at 2-3.

SPORTS UNDERLINE THE COMPLEXITY OF GENDER/SEX TESTING

A. Tennis.

Perhaps one of the most well-known transgender athletes is Dr. Renee Richards. Dr. Richards was born Richard Raskind in 1934.¹¹⁵ Already in her childhood, she sensed the divisiveness of genders within herself.¹¹⁶ At the age of 40, Dr. Richards decided to undergo gender reassignment.¹¹⁷ Before the main change, Dr. Richards had become one of the leading ophthalmologist surgeons in the country,¹¹⁸ was married and had a child and, of course, passionately played tennis.¹¹⁹ After the transition, it was not long before her past surfaced. Upon winning a local tournament, she was urged by others to play in the U.S. Open.¹²⁰ She applied but was denied entry in the women's competition.¹²¹ Even though Dr. Richards admitted that she never intended to play in the U.S. Open, the rejection enticed her to fight back.¹²² She

said, "You can't tell me what I can or cannot do – I'm a woman and if [I] want to play in the U.S. Open as a woman I'm going to do it."¹²³

Dr. Richards sued the United States Tennis Association (USTA) seeking an injunction on the usage of a sex-chromatin test.¹²⁴ Although Dr. Richards in her interview with BBC admitted that men are stronger and can hit harder, she insisted that it is not the only factor to consider.¹²⁵ The court's view aligns with Dr. Richards', but it refused to strike the Barr test altogether and reasoned that each case should be evaluated as a whole, including all its variables and circumstances.¹²⁶ In this case, the court viewed Richards as an individual with a successful career and a family but who found it "necessary for her own mental sanity to undergo a sex reassignment."¹²⁷ So, the court granted the injunction in all respects.¹²⁸ Subsequently, in the 1977 U.S. Open, Dr. Richards became the first transgender woman ever to

play in a professional tennis tournament. For that, an author for BBC neatly bestowed upon Dr. Richards the title of "Tennis's reluctant transgender pioneer."¹²⁹

B. Golf.

An amateur golfer, Bobbi Lancaster, drew controversy by deciding to try her skills professionally.¹³⁰ The 65-year-old golfer underwent her surgical transition in 2010 at the age of 59.¹³¹ She had been born Robert Lancaster.¹³² She married her first wife during medical school.¹³³ They had one child and adopted two others.¹³⁴ Even though she suppressed her urge to dress in women's clothes around her children to avoid perplexing their perceptions, the unsettling confusion between her sex and gender-identity made her feel "sinful and defective."¹³⁵ Moreover, this confusion – which is called *gender dysphoria* – was further tainted with suicidal thoughts.¹³⁶ Eventually, Lancaster divorced her first wife and married

¹¹⁵ Sara Lentati, *Tennis's Reluctant Transgender Pioneer*, BBC NEWS (June 26, 2015), <http://www.bbc.com/news/magazine-33062241> [<https://perma.cc/9NLQ-RT5K>].

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Michael Hainey, *The Woman Who Paved the Way for Men to Become Women*, GQ MAGAZINE (May 26, 2015), <http://www.gq.com/story/renee-richards-interview> [<https://perma.cc/TB2L-RYKX>].

¹¹⁹ Lentati, *supra* note 115.

¹²⁰ Hainey, *supra* note 118.

¹²¹ *Id.*

¹²² Lentati, *supra* note 115.

¹²³ *Id.*

¹²⁴ See generally Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267 (N.Y. Sup.Ct. 1977).

¹²⁵ Lentati, *supra* note 115.

¹²⁶ *Supra* note 124 at 272.

¹²⁷ *Id.*

¹²⁸ *Id.* at 273.

¹²⁹ Lentati, *supra* note 115.

¹³⁰ Paola Boivin, *Transgender Golfer Bobbi Lancaster Aims for PGA Tour in 2014*, USA TODAY (Dec. 30, 2013),

<http://www.usatoday.com/story/sports/golf/2013/12/30/lpga-2014-bobbi-lancaster-transgender-golfer/4247307/> [<https://perma.cc/7LTZ-6X2E>].

¹³¹ *Id.*

¹³² *Id.*

¹³³ Paola Boivin, *Transgender Golfer Dreams of Playing in PGA*, AZ CENTRAL (Mar. 11, 2013), <http://archive.azcentral.com/sports/golf/articles/20130307transgender-golfer-dreams-play-lpga.html> [<https://perma.cc/9NNA-CGSD>].

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

again.¹³⁷ A heart attack became the pivotal point after which she sought for a way to embrace her nature, which led her to gender-reassignment surgery.¹³⁸ Lancaster also pursued to fulfill her dream to play on the Ladies Professional Golf Association Tour (LPGA). However, when Lancaster was asked whether she had some advantage over her competitors, she replied:

“In my own humble opinion, I think it's very fair that I'm playing against the caliber of players I'm trying to play against, because I have no advantage there. But for me to be allowed to play against women my age, I have a huge advantage. It's not fair. And that's why I'm probably not playing against them, because I just feel like I have undue advantage with my length. [A]nd I was a male, exposed to testosterone most of my life. I've got longer arms, bigger

build. I've got leverage they don't have. It's not fair.”¹³⁹

C. *Mixed Martial Arts (M.M.A.)*

The debates about whether transgender athletes have a rightful place in the women's division reached Martial Art when Fallon Fox's success created fans and defeated opponents questioned her legitimacy as a woman. Fallon Fox, born Boyd Burton on November 29, 1975,¹⁴⁰ felt a gravitation to femininity, much like Bobbi Lancaster.¹⁴¹ By adolescence, those feelings had intensified, but she tried to conform herself to the male body in which she was born.¹⁴² At the age of twenty-eight, she told her family, to which she received an unsupportive backlash.¹⁴³ After unsuccessfully completing “gay-conversion therapy” required by her father, Fox initiated her sexual transformation, starting with

hormonal therapy, and then in 2006, sex-reassignment surgery.¹⁴⁴ Rejected by her mother, Fox moved to Chicago and found some solace and support at her M.M.A. gym.¹⁴⁵ She quickly rose to the highest level in the sport, turning pro in 2011.¹⁴⁶ In her athletic world, Fox was viewed and accepted solely as a female fighter. However, Fox felt hunted, fearing that someone would discover her past.¹⁴⁷ Once the news broke, so did Fox's life. She was humiliated and degraded by having been called “a sociopathic” and “disgusting freak.”¹⁴⁸ Unbeatable in her last ten consecutive fights, M.M.A.'s star Ronda Rousey refused to fight Fox,¹⁴⁹ and Joe Rogan, the Ultimate Fighting Championship's (U.F.C.) commentator, blatantly stated his disbelief that even after a decade of hormonal therapy and a complete surgical transition, Fox could be called a woman.¹⁵⁰

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Cyd Zeigler, *Trans Golfer Bobbi Lancaster: 'I Shouldn't Compete Against Women My Age*, SB NATION (Mar. 11 2013), <http://www.outsports.com/2013/3/11/4090230/trans-golfer-bobbi-lancaster-i-shouldnt-compete-against-women-my-age> [https://perma.cc/A5UZ-673G].

¹⁴⁰ *Fallon Fox*, WIKIPEDIA, https://en.wikipedia.org/wiki/Fallon_Fox (last visited Dec 16, 2016), [https://perma.cc/Y52W-5AEQ].

¹⁴¹ Loretta Hunt, *How Fallon Fox Became the First Known Transgender Athlete in MMA*, SPORTS ILLUSTRATED (Mar. 7, 2013),

<http://www.si.com/mma/2013/03/07/fallon-fox-profile> [http://perma.cc/SU3R-WYC].

¹⁴² *Id.*

¹⁴³ Cyd Zeigler, *Fallon Fox Comes Out as Trans Pro MMA Fighter*, SB NATION (Mar. 5, 2013), <http://www.outsports.com/2013/3/5/4068840/fallon-fox-trans-pro-mma-fighter> [https://perma.cc/3LAY-XLRU].

¹⁴⁴ *Id.*

¹⁴⁵ Greg Bishop, *A Pioneer, Reluctantly*, N.Y. TIMES (May 10, 2013), <http://www.nytimes.com/2013/05/13/sports/for-transgender-fighter-fallon-fox-there-is-solace-in-the-cage.html>; see also Hunt *supra* note 139.

¹⁴⁶ *Id.*

¹⁴⁷ Hunt, *supra* note 141 (“It’s not something I like to discuss with people, but I’ve been bracing for this for years, thinking when was the phone call going to come?”).

¹⁴⁸ Bishop, *supra* note 145.

¹⁴⁹ Mitch Kellaway, *UFC Women's Champ Refuses to Fight Trans Athlete Fallon Fox*, ADVOCATE (Sep. 14, 2014), <http://www.advocate.com/sports/2014/09/22/ufc-womens-champ-refuses-fight-trans-athlete-fallon-fox> [https://perma.cc/AVR4-KMCH].

¹⁵⁰ Hunter Felt, *Transgender MMA Fighter Fallon Fox Faces Toughest Opponent Yet: Prejudice*, THE GUARDIAN (Nov. 14, 2014),

VI. PROVIDED THAT THE MAIN REASON BEHIND ESTABLISHING THE POLICY HAS BECOME MOOT AND INABILITY TO DEFINE “A FEMALE” DUE TO DEFICIENCY IN SCIENTIFIC UNDERSTANDING OF HUMAN SEX, THE SEX/GENDER VERIFICATION SHOULD BE ABOLISHED

A. *The issue of detecting male imposters is moot.*

Because all athletes in the elite sports are subject to anti-doping requirements, the issue of detecting male imposters by visual examination is unnecessary. The anti-doping agents (or shepherds who travel with the agents) must be present in the athlete’s immediate presence during the urine collection procedure for testing purposes.¹⁵¹ Therefore, any inconsistencies with the athlete’s marked sex would be detected at that time.

B. *We may be not literate enough to be able to define “a female.”*

One theory is that lack of full understanding of gender leads to the inability to define gender which ultimately leads to failure to shape a valid sex/gender verification test. Contrary to general belief, some suggest that like everything else in nature, sex and gender are not fixed but rather fluid and ever changing notions.¹⁵² Many animals do not conform to the rigid gender roles assigned by humans, some species of fishes display hermaphroditism, and the fluidity of sex is also not uncommon in the botanical world.¹⁵³ Another commonly believed rare occurrence – intersex births – are not as rare as they thought to be.¹⁵⁴ (Interestingly, South Africa, the birthplace of Caster Semenya, has an unusually high level of intersex births.)¹⁵⁵ By the same token, the definition of sex for humans ought to encompass the fluidity and uncertainty. This is contrary to efforts of sport authorities to confine the

definition of a woman to a particular type and number of chromosomes, hormonal levels, and perhaps even appearances.

Besides, if a stringent definition of a female should exclude natural variations of female bodies, such as elevated levels of testosterone, should other naturally occurring peculiarities be deemed abnormal? For example, Eero Mantyranta, a Finnish cross-country skier who won in the 1960s seven Olympic medals, including three gold, had a genetic mutation that awarded him up to 50 percent more oxygen in his blood.¹⁵⁶ More recently, Michael Phelps, the Olympic swimmer, allegedly has double-jointed ankles and unusually long arms and large hands which help him to swim faster.¹⁵⁷ It is undecided whether such attributes are merely natural variances of human bodies or abnormalities. It is even less certain whether such competitive advantages should prevent the athletes to compete.¹⁵⁸ Most would say they are just variations. Thus, a level playing field is probably

<https://www.theguardian.com/sport/2014/nov/14/transgender-mma-fighter-fallon-fox-joe-rogan> [https://perma.cc/H6YL-TU9H].

¹⁵¹ *Sample Collection Process*, U.S. ANTI-DOPING AGENCY, <http://www.usada.org/testing/sample-collection-process/> (last visited Dec 16, 2016) [https://perma.cc/6CT8-MRVJ].

¹⁵² FRANK BROWNING, *THE FATE OF GENDER: NATURE, NURTURE, AND THE HUMAN FUTURE* 56 (2016).

¹⁵³ “Male rams hump each other. Adult bulls demonstrate a variety of ‘sexual’ gestures toward both

male and female offspring... The California sheephead, a bright blue, green, and yellow fish... starts her life as a female bearing eggs; then after four years her gonads atrophy and she becomes a fertilizing male.... the ginkgo [tree], fairly frequently changes its sex.” *Id.* at 67-69.

¹⁵⁴ “One in every 1,500 children is born whether with ambiguous genitalia or with other less visible sexual characteristics.” *Id.* at 70.

¹⁵⁵ Ariel Levy, *Either/Or: Sport Sex, and the Case of Caster Semenya*, *THE NEW YORKER* (Nov. 30,

2009), <https://www.newyorker.com/magazine/2009/11/30/eitheror>.

¹⁵⁶ Longman, *supra* note 79.

¹⁵⁷ Valerie Siebert, *Michael Phelps: The Man Who Was Built to be a Swimmer*, *THE TELEGRAPH* (Apr. 25, 2014), <https://www.telegraph.co.uk/sport/olympics/swimming/10768083/Michael-Phelps-The-man-who-was-built-to-be-a-swimmer.html>

¹⁵⁸ Jesse Ellison, *Caster Semenya And The IOC’s Olympics Gender Bender*, *THE DAILY BEAST* (July 26, 2012),

unattainable because “[a]ll Olympians have some exceptional traits. That is why they are elite athletes.”¹⁵⁹

VII. CONCLUSION

The two main reasons for the policy were to level the field to ensure fairness and to impede male imposters. The issue of male imposters turned out to be an easy one. Today, the anti-doping agency performs the visual check with its procedures, and because, especially in this day and age, it is highly unlikely that a male will disguise as a female to compete in elite sports. Hence, the fear of imposters should fade away, leaving the fear of fairness as the only justification for sex/gender policies.

For decades, the sex/gender verification remains a highly complicated and controversial subject. However, the question of what is considered “a female,” for purposes of a sport competition remains unanswered. To answer this question, another question must be answered first: “is it even possible for us to define ‘a female?’” Some voiced an opinion that it is not feasible to reach the set goal due to the natural variety of variables in human bodies. Others questioned whether we

“genetically literate enough” to come up with a proper test to verify gender.¹⁶⁰ The fundamental theory of a binary division into males and females continues to be scientifically unsubstantiated.¹⁶¹ Many have discussed what the procedure ought to be.¹⁶²

To date, all of the attempted policies have not only failed to provide a definite answer but raised more questions. Evidently, the more effort is put toward defining “a female,” the more naturally occurring variations are discovered. It leads to an appropriate but hopeless debate on whether the naturally occurring abnormalities ought to be accepted as variations within a certain gender or abnormalities such as a form of deficiency or mutation. Sport authorities are diligent in their efforts to prevent athletes to enhance their abilities by use of science. However, many feel infuriated even when such enhancements occur naturally in an athlete’s body. Conversely, it is our current social aim to promote tolerance, acceptance, and all-inclusiveness of individuals’ diversity. It would be contrary to that view establishing limitations on the genetically enhanced athletes.

One thing is clear: the current policy has to change or

be abolished. The decades of unsuccessful attempts to define an ideal policy may be a clear sign that such policy, at least at this time, is not achievable. It may be wise to stop trying and allow all women athletes to participate in sport competitions. Perhaps not forever. If at a later time, a legitimate need arises, this issue could be revisited with a clear goal of addressing that particular need. The gender policies as they are today neither valid, fair, nor needed.

<https://www.thedailybeast.com/articles/2012/07/26/caster-semenya-and-the-ioc-s-olympics-gender-bender.html>

[<https://perma.cc/R9BG-B869>].

¹⁵⁹ Longman, *supra* note 79.

¹⁶⁰ Ambroise Wonkam et al., *Beyond the Caster Semenya Controversy: The Case of the Use of Genetics for Gender Testing in Sport*, RESEARCH GATE (Dec. 2010), <http://iddrc.wustl.edu/Portals/12/Wonkam-JOGC-2010.pdf>

¹⁶¹ *Id.*

¹⁶² M.A. Ferguson-Smith & Elizabeth A. Ferris, *Gender Verification in sport: The Need for Change?* BRITISH J. OF SPORTS MED. (1991).

BUSINESS AS USUAL?: RECENT DEVELOPMENTS IN CORPORATE LIABILITY FOR INTERNATIONAL CRIMES

Franziska Oehm

Although the vast majority of conflicts are based on or at least related to economic interests, the international community was reluctant for a long time to hold corporations criminally accountable for international crimes. The article provides a brief overview over the history as well as recent domestic and regional attempts to establish a regime of corporate criminal accountability to address the long-ignored entanglement of atrocity and economy.

I. Addressing root causes of armed conflicts

In times of increasing violence and conflict worldwide, the international community is under the obligation more than ever to rethink methods of both conflict prevention and protection of the civilian population from the devastating effects of atrocities – a goal that can only be achieved by addressing the root causes of conflict.¹

Although root causes for armed conflict are multi-dimensional and complex, it can be stated that the vast majority of armed conflicts are either based on or at least related to financial interests. However, the socio-economic dimensions of conflicts are often underrepresented in debates, reports and judicial proceedings.² While political leaders may have to fear criminal prosecutions for their

contributions, corporations or individual managers are not held accountable in most cases. The list of possible involvements of business in armed conflicts is long. Corporations can, *inter alia*, act as classical arms vendors; directly contribute to torture, extermination or persecutions; employ slave laborers from conflict regions in their supply chains; or fuel conflicts by maintaining business relations with conflict parties such as states, rebel groups or others.³ Conflict parties would often not be able to remain powerful and financially strong without the “help” of businesses.

As a result, business participation creates a “fueling effect” on the cause and duration of conflict. Failing to address the fueling effect through the means of criminal prosecution creates an accountability gap, removing the possibility of any deterrent effects on corporations

concerning their involvement in conflicts around the world. In the following, a brief history of corporate criminal accountability as well as two recent developments in domestic and regional international criminal law will be presented to demonstrate that the relationship between business and atrocity can no longer be ignored.

II. Corporate criminal liability for international crimes

Corporations have not always been immune from prosecutions, evidenced by historical accounts of corporate criminal accountability. The birthplace of modern international criminal law, Nuremberg, dealt with German business leaders who supported the rise of the Nazi party and the Holocaust machinery.⁴ A selection of the most responsible businessmen were

¹ S.C. Pres. Statement 2017/14 (Aug. 9, 2017).

² See, e.g., KAREN BALLENTINE & JAKE SHERMAN, INT’L PEACE ACAD., THE POLITICAL ECON. OF ARMED CONFLICT:

BEYOND GREED AND GRIEVANCE (2003).

³ *Id.*

⁴ Matthew Lippman, War Crimes Trials of German Industrialists: The “Other

Schindlers”, 9 Temp. Int’l & Comp. L.J. 173 (1995).

held accountable during the so-called Nuremberg subsequent trials.⁵ The main Nuremberg trial before the International Military Tribunal had no industrialist in the dock.⁶ The subsequent Nuremberg trials, a series of twelve U.S. military tribunals, took place from 1946 to 1949.⁷ With Telford Taylor as chief prosecutor, the list of defendants of the twelve Nuremberg trials included German doctors, judges, SS officers, politicians and industrialists.⁸ Industrialists in Nuremberg were represented as defendants in *United States v. Krauch*,⁹ better known as the I.G. Farben case, *United States v. Friedrich Flick at al.*,¹⁰ and *United States v. Krupp*,¹¹ leading to the convictions of twenty-seven businessmen for their role in Nazi Germany war crimes and crimes against humanity, such as slave labor programs, plunder and spoliation (collectively, the “Industrialist Trials”). During the preparation stage of the Industrialist Trials, evidence

was discovered implicating many more companies for their extensive involvement in the Third Reich, for instance by funding and benefitting from forced labor programs.¹²

In the aftermath of Nuremberg, international criminal tribunals such as the International Criminal Tribunals for Yugoslavia (herein, “ICTY”)¹³ and Ruanda (herein, “ICTR”)¹⁴ missed the chance to build on Nuremberg’s legacy by addressing the entanglement of economy and atrocity in substantial way.

Today, the greatest source of international criminal law, the International Criminal Court (herein, the “ICC”) in The Hague, has been reluctant to address the issue. The ICC began operating in 2002, after the ratification of the ICC Statute in 1998 in Rome, and became the first permanent international criminal law court. So far, 128 States have ratified the ICC Statute¹⁵ and have therefore submitted to the

jurisdiction of the court on four core international crimes: genocide, war crimes, crimes against humanity and the crime of aggression.¹⁶ Individuals of non-member states can only be subject to the jurisdiction of the court if either the state itself or the U.N. Security Council (unanimously via Security Council Resolution) refers the situation to the court.¹⁷ Corporate criminal liability is not foreseen in the ICC Statute, as Article 25 of the ICC Statute refers to jurisdiction over natural persons. As a result, the individual liability of businessman would fall under the scope of ICC’s jurisdiction and the court would be able to prosecute economic actors for their alleged contributions to international crimes. However, no such cases have been subject to prosecutions of the court so far.

III. National prosecutions of international crimes: Syria, ISIS, and a criminal complaint in France

⁵ Id.

⁶ Id.

⁷ See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford 2012).

⁸ Ben Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 *Pace Int. Law Rev.* 203, 206 (1998).

⁹ *United States v. Krauch*, 7 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 1102 (1953).

¹⁰ *United States v. Friedrich Flick*, 6 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 11 (1952).

¹¹ *United States v. Krupp*, 9 *Trials of War Criminals Before the Nuremberg Military*

Tribunals Under Control Council Law No. 10 (1950).

¹² See Hans Mommsen & Mit Manfred Grieger, *Das Volkswagenwerk und seine Arbeiter im Dritten Reich* [The Volkswagen and its Workers in the Third Reich] (1996); See also Bernard P. Bellon, *Mercedes in Peace and War: German Automobile Workers, 1903-1945* (1992); Peter Hayes, *From Cooperation to Complicity: Degussa in the Third Reich* (2007).

¹³ S.C. Res. 808 (Feb. 22, 1993).

¹⁴ S.C. Res. 955 (Nov. 8, 1994).

¹⁵ Rome Statute of the International Criminal Court [ICC Statute], U.N. Doc. A/Conf.183/9, Art. 25, 17-18 (1998) [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

[0a655eb30e16/0/rome_statute_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [<http://perma.cc/XZ52-DRU6>].

¹⁶ See ICC Statute, U.N. Doc. A/Conf.183/9, Art. 5, 3 (1998), [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

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¹⁷ See ICC Statute, U.N. Doc. A/Conf.183/9, Art. 13, 11 (1998), [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

[0a655eb30e16/0/rome_statute_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [<http://perma.cc/XZ52-DRU6>].

Apart from the ICC, the four international crimes are implemented in many domestic penal codes, providing a possible forum for prosecutions of corporate criminal misbehavior in domestic courts. A current example of the application to address corporate involvement in international crimes is a complaint filed in France concerning a French cement corporations' business in Syria.¹⁸

After pro-democracy protest in 2011, a bloody civil war arose in Syria causing the death of at least 300,00 Syrians as of March 2017.¹⁹ The U.N. High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, recently called the conflict "the worst man-made disaster the world has seen since World War II."²⁰ The terrorist group of the Islamic State of Iraq and Syria (herein, "ISIS") controls parts of North-East Syria, fighting its opponents in the region to gain territorial and political power. According to an U.N. report, the group committed massive war crimes and crimes against humanity, such as mass slaughters of ethnic and religious groups,

sexual violence, sexual slavery, and summary executions.²¹

In addition to their ideological agenda, the terrorist group is pursuing economic interests in the region.²² To do so, the group must have acquired necessary financial resources to remain a powerful player in the conflict.²³ The French cement company, Lafarge, is allegedly part of the financial support for ISIS.²⁴ According to a criminal complaint filed in France in 2016, Lafarge's Syrian subsidiary was involved in illegal activities and payments to ISIS, that amounted to complicity in war crimes and crimes against humanity, as well as the financing of terrorism and forced labor.²⁵ Despite the rising conflict and political instability in Syria in 2011, Lafarge decided to retain an active corporate presence and continue business in the Jalabiya subsidiary in North East Syria. When ISIS took gradual control over the region and committed large-scale atrocities in the area, Lafarge may have entered, via intermediaries that it hired, into negotiations with ISIS to purchase ISIS-controlled raw

materials such as oil and pozzolana.²⁶ According to the complaint filed against the company, large amounts of monetary fees have been allegedly paid by Lafarge to ISIS, for instance, for the crossing of checkpoints such that it appeared Lafarge had obtained official passes from the terrorist group.²⁷

The complaint serves as one example for corporate involvement in armed conflicts and the possibilities of addressing misbehavior in domestic courts.

IV. Regional legislative attempts: The African Court of Justice and Human Rights

Apart from litigation efforts, a notable recent legislative development can be reported from the African Union (AU). In 2014, the AU General Assembly surprised the international community with its proposal for the creation of an integrated African Court of Justice and Human Rights (herein, "ACJHR"), adopted through

¹⁸ French-Swiss Company LafargeHolcim Sued for Grave Crimes in Syria, European Cent. for Constitutional and Human Rights, <https://www.ecchr.eu/en/business-and-human-rights/lafarge-syria.html> [<https://perma.cc/99K9-4L890>].

¹⁹ Jack Moore, Syria War Death Toll Hits 321,000 with Further 145,000 Missing: Monitor, Newsweek (Mar. 13, 2017, 1:14 PM), <http://www.newsweek.com/sixth-anniversary-syrian-conflict-looms-war-monitor-says-465000-killed-or-567181> [<https://perma.cc/TB3V-PKQY>].

²⁰ Zeid Ra'ad Al Hussein, Syria Worst Man-Made Disaster Since World War II, United Nations Human Rights Office of the High Comm'r (Mar. 14, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21373&LangID=E> [<https://perma.cc/NN3W-8T8E>].

²¹ U.N. HRCOR, 34th Sess., U.N. Doc. A/HRC/34/64 (March 24, 2017).

²² European Cent. for Constitutional and Human Rights, *supra* note 18.

²³ *Id.*

²⁴ *Id.*

²⁵ See Dorotheé Myriam Kellou, Le jeu dangereux de Lafarge en Syrie [The Dangerous Game of Lafarge in Syria], *Le Monde.fr* (Nov. 12, 2016), http://www.lemonde.fr/international/article/2016/11/12/le-jeu-dangereux-de-lafarge-en-syrie_5030048_3210.html [<https://perma.cc/DD7B-TCB3>].

²⁶ European Ctr. for Constitutional and Human Rights, *supra* note 18.

²⁷ Kellou, *supra* note 25.

the Malabo Protocol.²⁸ The protocol has not yet reached the number of necessary ratifications, but the planned criminal law chamber already stirs scholars and practitioners, who questioned the compatibility with the ICC Statute, and even the legality of the establishment of the criminal chamber.²⁹ Critical voices view it as an attempt to undermine ICC investigations on the African continent.³⁰

Apart from that, the Malabo protocol adds a so far new perspective to international criminal law: jurisdiction *ratione personae* over legal persons together with an extended list of economically related crimes such as corruption (Art. 28 I), illicit exploitation of natural resources (Art. 28 L) or money laundering (Art. 28 I *bis*).

Consequently, the criminal chamber of the planned ACJHR would have jurisdiction over corporations for their criminally relevant misbehavior exceeding their alleged involvement in international (core) crimes. This development is particularly interesting as it points to inequalities in the prosecution of business and political leaders and sets a new framework for targeting

economic contributions to international crimes and should be taken seriously by the international community.

V. Conclusion

The short overview is intended to demonstrate that corporate complicity to international crimes is an emerging field of international and national criminal law prosecutions and that awareness of the problem has increased recently.

While criminal prosecutions are necessary to address the full scope of economy and atrocity, awareness and public debate on economy as a root cause for conflict must also be increased to address the issue. The Syrian case as well as the Malabo Protocol demonstrate that national and regional criminal proceedings have the potential to address corporate involvement in international crimes, hopefully leading to an end of the tradition of corporate impunity and helping to deter armed conflict in the future.

²⁸ African Union, Protocol on the Merger of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union to the African Court of Justice and Human Rights, Annex at p. 9 et seq., O.A.U. Doc. Assembly/AU/23 (June 27, 2014).

²⁹ See Chacha Bhoke Murungu, Towards a Criminal Chamber in the African Court

of Justice and Human Rights, 9 J. Int'l Crim. Just. 1067 (2011). Ademola Abass, Historical and Political Background to the Malabo Protocol, in 10 International Criminal Justice Series 21 (Gerhard Werle & Moritz Vormbaum eds., 1st ed. 2017).

³⁰ See, e.g., Max du Plessis, A Case of Negative Regional Complementarity? Giving the African Court of Justice and

Human Rights Jurisdiction over International Crimes, Blog of the European Journal of International Law (Aug. 27, 2012) <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> [<https://perma.cc/A2P2-DAUL>].

ARTICLE AUTHOR BIOGRAPHIES

The authors who have submitted articles for this edition of The Forum are quite literally the lifeblood of the publication. Without their voices, the Diversity & Social Justice Forum could not fulfill its mission. We are extremely grateful for the opportunity to publish these diverse and necessary voices of our community.

Jean Schroedel, Ph.D. MIT, is a professor in the Department of Politics and Government at Claremont Graduate University. She has an extensive record of academic publications, including most notably her book, *Is the Fetus a Person? A Comparison of Policies Across the Fifty States*, which was awarded the Victoria Schuck Prize by the American Political Science Association. Most of her recent scholarship, including a forthcoming University of Pennsylvania Press book, has focused on voting rights issues affecting Native Americans.

Diana Isyanova is a J.D. candidate at Chapman University, Dale E. Fowler School of Law. She graduated magna cum laude from UC Irvine with a Bachelor of Arts in Business Economics. Her passion for problem-solving often leads her to inquire into

current and thought-provoking issues. Diana believes that virtually any obstacle can be overcome with determination, diligence, and creativity.

Sharilyn Nakata, Ph.D., who was born and raised in Hawai'i, is a 2017 graduate of the UC Irvine School of Law. She also holds a Ph.D. in Classics from UC Irvine and was a professor of classical Greek and Latin prior to attending law school. She is currently working in the field of immigration law at Inland Counties Legal Services in Riverside.

Franziska Oehm, in 2016, was the Nuremberg Trials Commemoration and Ben-Ferencz Foundation LL.M. Fellow at Chapman University, Fowler School of Law. Before coming to Chapman, she studied International Law in Nürnberg and Madrid and holds a Law Degree from the

University of Erlangen-Nürnberg. Her research interest lies in international law, with a focus on international criminal law, international economic law and human rights. She is currently writing her dissertation on corporate accountability for international crimes.

Suneeta Israni is a third-year law student at Chapman University Dale E. Fowler School of Law. This paper is a product of Ms. Israni's participation in a directed research course. Her knowledge of and experience with restorative justice practices comes from her time as a former K-12 public school educator in an under-served community of Los Angeles. Her study of restorative justice as a theory comes from her time at Loyola Marymount University, where she obtained here M.Ed in Policy and Administration and professional development provided by Teach for America and Leadership for Educational Equity. Ms. Israni's immediate plans include enrolling in Professor David Dowling's Juvenile Restorative Justice Clinic.



2016 Diversity & Social Justice Forum

Heidi Mattson and Mackenna Waterhouse

The Dale E. Fowler School of Law Diversity & Social Justice Forum held its second Symposium on Friday, November 4th, 2016. The purpose of our group is to create a space for diverse voices on given topics and to that end we decided to title last year's event "Silenced Justice?" and draw focus to groups in our society whose voices are being quieted to varying degrees. We had panels ranging from discussing the politics of seeking asylum in the United States, to the impact of- and possible motives behind -Voter ID Laws in light of changes to the Voting Rights Act, to the path toward equal protection for the transgender community. The event ended with a Keynote Address by Immediate Past American Bar Association President, Paulette Brown. Aside from bringing diverse voices to campus on these increasingly important topics, we seek to bring community activists, the legal community, and university student and faculty together to act upon the initiatives discussed. Academic topics require action to truly change, however incrementally, the world in which we live. Be it on the front steps of the law school to the broader Orange County area, there is nothing if not a more urgent need to ensure that voices actually representing the communities impacted in these select spheres be heard. -Rick Reneer Jr., 2016 Vice-Chair of Symposium

On November 4, 2016 – just four days before the presidential election—Chapman University Dale E. Fowler School of Law’s Diversity and Social Justice Forum presented the symposium “Silenced Justice?” to a full audience in the law school’s Kennedy Hall. The symposium brought a diverse group of practitioners, activists, and academics to Chapman, providing a forum to discuss several highly charged issues – refugees and political asylum, voting rights, and transgender rights – all centering around the subject of justice. As Chapman



Speakers: Luis F. Gomez, Dean Marisa Cianciarulo, Victor Phan, and Julie Marzouk



Dean Matthew Parlow

Law Dean Matt Parlow observed in his opening remarks, “Society sometimes struggles to talk about complicated issues of justice. Institutions of higher education, and in particular Chapman University and the Fowler School of Law, are precisely the types of places where we can have ... civil and respectful conversations about these issues.”

During the first of three panels, “Refugees and the

Politics of Seeking Asylum,” invited speakers discussed how they believe institutionalized discrimination is used to further traumatize and punish refugees for being in the United States and to keep refugees out of the country altogether. Luis F. Gomez, Immigration Resources Specialist at the LGBT Center OC and an immigrant himself, spoke of LGBTQ immigrants’ double minority status. He noted that, with no United States contacts or command of

survival crimes, the most the English language, LGBTQ immigrants may resort to common being sex work, which can result in incarceration and subsequent injury to their immigration status. Victor Phan, Chair of the Vietnamese Refugee Palawan Association and a Vietnamese refugee, discussed how he and his family waited 16 years in a detention center in the Philippines until they could resettle in the United States as political refugees. Phan noted that, “we all value freedom because freedom is not free.” He further stated that detention for such a long period of time is unfortunately common for refugees since the United States government may use detention as a deterrent for seeking asylum. Professor Julie Marzouk, who teaches in the law school’s Family Protection Clinic, explained that asylum seekers cannot access attorneys from remote immigration detention facilities and do not have the right to counsel. Also, children and domestic violence victims cannot articulate the elements needed to qualify for asylum, and cases can be fast-tracked through “rocket dockets,” which on average take only 24 days, not nearly enough time to find counsel or mount a defense.

President-elect of the Thurgood Marshall Bar Association Kimberly La Salle began the second panel, “Changes in Voting Rights & Voter ID Laws,” with a video



Kimberly La Salle

presentation on the history and significance of voting rights laws in the United States. She pointed out that Americans take their right to vote very seriously, but they focus on fixing voter apathy instead of the voting access challenges faced by people who want their voice to be heard. Amira Hasenbush, Jim Kepner Law and Policy Fellow at the

Williams Institute, shed light on the impact of voter ID laws on voting access for the transgender community, who comprise about 0.58% of the U.S. population (about the same as the population of San Diego). She explained that America is losing voters because people who have fully transitioned may not have updated ID documents, and various state laws can make it difficult for someone to change their name or gender. Dr. John C. Eastman, Henry Salvatori Professor of Law and Community Service at Chapman, discussed the issue of voter fraud and his view of the importance of voting restrictions for minority districts where people are often bussed in from other states to vote fraudulently, negating legitimate votes. While it was argued by Dr. Eastman that voter ID laws protect people, there was fervent discussion as to whether people have been



Speakers: Jean Schroedel, John Eastman, and Amira Hasenbush

wrongfully disenfranchised by certain mechanisms put in place to enforce such laws. Dr. Jean Schroedel, Professor of Politics and Policy at Claremont Graduate University, spoke about voting access and the effects of voting restrictions unique to Native American and Native Alaskan communities. Despite being the first Americans, Dr. Schroedel noted that they were the last group of people born within the United States to get the franchise, they have the lowest registration and voting rights of any United States population, and even today they are forgotten in the discussion about voting issues. She also pointed out that, as a result of the holding in the United States Supreme Court case of *Shelby County v. Holder*, states can



Speakers: Stephen Hicklin, Tony Viramontes, Dannie Cesena, and Daniel B. Weddle

pass voter ID laws that remove provisions expanding means of voter registration as well as laws that greatly obstruct voting access with highly limited or unavailable mail service, intimidation tactics, and limited access to voting sites that require people to travel up to 200 miles to reach a voting site.



Kris DePedro

The final panel, “Transgender Rights and the Legal Hurdles to Equal Protection,” featured panelists Dannie Cesena, Transgender Services Coordinator for the LGBT Center OC; Tony Viramontes, Director of Prevention Services for the LGBT Center OC; Stephen Hicklin, lawyer and transgender law specialist; and Professor Daniel B. Weddle, Clinical Professor of Law and Director of Academic Support at the University of Missouri-Kansas School of Law. Their discussion addressed whether transgender individuals have been deprived of equal protection on the sole basis of their gender identity. It was noted that the federal government and the majority of states do not include gender identity in non-discrimination laws, suggesting that some people are more equal than others. Hicklin stated that such denigration can also be found in bathroom bills, which he called a “solution in search of a problem,” where states seek to stigmatize the transgender

community under the guise of addressing a public safety issue. Panelists described the difficulties and inequality transgender people face in accessing culturally competent healthcare, having their fundamental rights protected, and dealing with anti-transgender stigma and violence. Cesena noted that transgender women, particularly transgender women of color, comprise the vast majority of anti-transgender violence victims, adding that the average life expectancy of a transgender black woman is only 35 years due to either murder or suicide. To fix these issues, panelists said there must be more dialogue that focuses specifically on the experiences of the transgender community. As Hicklin observed, the transgender community is distinct from the LGB communities, and transgender-specific issues are overshadowed by the statistics and discourse broadly representing LGBT issues.

The symposium concluded with a special keynote address by Paulette Brown, Partner and Co-Chair of the firm-wide Diversity and Inclusion Committee at Locke Lord LLP and Immediate Past President



Paulette Brown

of the American Bar Association. Brown’s speech addressed the importance of diversity inclusion. She indicated that inclusion does not mean exclusion, as many people seem to believe, but instead it requires a level playing field for *everyone*. Brown expounded on the necessity of having diverse communities represented in the legal field in order to maintain the honor of the profession and to address the issues of inequality that exist in our nation.



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NOTE FROM THE EDITOR

Jessica Ewert

In a political climate marred by divisiveness, racial tension, and socioeconomic strife, citizens are in search of a moral authority to guide them. People have called on the President to act, desperate for a denunciation of those espousing prejudice—calls that have mostly fallen on deaf ears. While those calls have gone unanswered, the energy with which those voices cried out for moral authority helps them grow louder.

In this energy, I see the seed of a new American voice, struggling to be heard over the tantrums of “fake news.” As

this new American voice grows among the amber waves of grain, one can hear the echoes of those calling for both the conscience conservative and the pragmatic liberal to take the moral high ground away from those who trounce it.

It is in this new American voice that we at the Diversity & Social Justice Forum Publication, The Forum, strive to provide a thoughtful platform for informing public in the current political climate and beyond. Our goal is to unify as many voices as we can, speaking out against hate and prejudice in order to give

them a genuine chance to evolve, advance, and be heard. It is in these difficult times that we must double down as a society to ensure the civil rights so desperately fought for by the generations before us do not disappear.

**DIVERSITY & SOCIAL JUSTICE FORUM
CHAPMAN UNIVERSITY DALE E. FOWLER SCHOOL OF LAW**

CALL FOR PAPERS

The Chapman University Dale E. Fowler School of Law Diversity & Social Justice Forum's publication is published once a year and is seeking articles for publication that discuss issues of social justice, including any aspect of the underlying legal or humanitarian concerns, legal or policy solutions, or the work of movements organizing to address the problem. We aim to publish practice-oriented articles that discuss barriers to justice and the strategies implemented to overcome those barriers both in the courtroom and in the streets.

We especially welcome articles that address aspects of our symposium "Changing Institutions, Disappearing Protections" (November 2017). Topics may include (but are not limited to):

- Who Watches the Watchmen?: Civil Rights and Accountability Under the New Administration
- Crimmigration: A Critical Look at Rationales for Increasing Deportation
- American Health Care in the Face of Current Reform Efforts: How Much Should the Public Expect from Government Programs and Why?

Submissions should be no more than 5000 words in length, not including footnotes. Once a submission is selected, our editors will work with the author to prepare the submission for publication. Citations should conform to *The Bluebook: A Uniform System of Citation* (20th edition, 2015). Authors will retain copyrights after publication. Please address inquiries and unsolicited submissions to: dsjforum@gmail.com. Please list "***Submission Inquiry for 2018 DSJF Publication***" in your subject heading.

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