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Inquiries into the Legal Dilemmas of Our Time

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STUDENT RIGHTS IN HIGHER EDUCATION

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ABSTRACT

When a student is accepted and enrolled at one of the many colleges or universities in the United States, their primary focus is on the pursuit of a degree in higher education. Upon admission, the next several years will be spent enrolled as a student engaged in that pursuit. Little concern, if any, is given as to how that student might face severe sanctions by their institution as a consequence of their deeds, whether on or off the college or university campus.

For the most part, students do not realize that upon admission to an institution of higher education, certain commonly assumed civil liberties and rights may no longer exist in the relationship with their institution. Basic rights such as free speech, expression, association, substantive and procedural due process, and others, may be limited as a result of the institutional rules and regulations.

In recent years, several cases involving universities taking disciplinary action against students have brought attention to this issue. In light of these cases, and others, a debate has emerged as to the rights of students in relationship to the institutions of higher education in which those students are enrolled.

This paper will review the current law in the United States with respect to the issue of student rights in higher education. It will conclude with some recommended changes that universities could easily implement.

INTRODUCTION

Amid the modern university culture of championing diversity, civility, and sensitivity to the rights of minorities on college campuses, it is surprising that today's universities do not always support traditional human rights as guaranteed under the Bill of Rights of the United States Constitution—especially the First, Fifth, Sixth, and Fourteenth amendments. In growing numbers, college campuses are restricting free speech if it is "hurtful", often at the expense of intellectual inquiry. Of particular focus in this paper are the assaults on the Fifth, Sixth, and Fourteenth Amendments, as it relates to disciplinary proceedings for student conduct violations, both on and off campus. While the rules and procedures for taking disciplinary action may be clearly communicated, common civil liberties outside the university context do no function with the same power and authority within the university. These common civil liberties as established in the Bill of Rights include the right of representation by another during a disciplinary hearing, the right to avoid self-incrimination, the right to face and question the accusers, the presumption of innocence until proven guilty, and the right of an unbiased hearing.

This paper is a case study that examines the rights of the student in a student conduct hearing. It more broadly examines student rights in public institutions. The scope of the paper is limited to the laws applicable to public institutions. Private colleges and universities are not bound by the dictates of our Bill of Rights since their actions are not state actions. Through this paper, we hope to educate public universities about their obligations under the constitution to our students. After all, they are paying our bills and they deserve to be treated with respect and afforded the rights of humanity that are guaranteed to them in our constitution.

BACKGROUND ON THE CASE

It was a typical early fall evening in Middle America in the backyard of an off campus home rented by some university students. With permission of the owner of the property, these students had a bonfire and decided to burn some trash. Unfortunately, the bon-fire got larger than desired, and the heat caused some minor damage to the vinyl siding on the neighboring property—also a student rental. Ironically, it was the trash from that neighboring property that caused the excess heat. The student who was at the bonfire contacted the owner of the adjacent property and arranged and made satisfactory restitution. One of the tenants of that adjacent property contacted the local police the next day. At a time later a public police officer investigated the event and interviewed only people who, although not present, had

heard of the event from others. The local police officer filed a criminal complaint against the student. However, at the preliminary hearing, the court properly dismissed the complaint as unfounded and no further action was taken.

Upon learning of the criminal complaint, the University Student Conduct officer filed a disciplinary complaint against the student and brought the student before the student conduct board the following semester—almost four months later. By this time, the student was in the last semester of his senior year. At the hearing, the student was allowed to have an "advisor" at the hearing but the advisor was not allowed to speak during the proceedings. During the hearing, the student was questioned and the police officer who conducted the investigation subsequent to the event "testified" as to what others had reported to the officer. It is important to note that one of the most damaging reports given the officer was from someone who was not present but told the officer what he had heard from someone else. During the hearing, a letter from the adjacent property owner stating that he was pleased with the restitution made by the student and had no complaint about what had transpired. Direct testimony was also given that the student did not start the fire nor had the student been present when the trash from the neighboring property was added to the fire. Upon presentation of the evidence, the student was dismissed from the hearing while the Conduct Board and the Student Conduct officer deliberated as to the guilt of the student and as to the penalty to be assessed if found guilty. The student was called back into the hearing and was told of his immediate expulsion from the university.

Following the ruling of the Conduct Board, the student reached out to faculty members for assistance in pursuing an appeal. He provided those faculty members a recorded transcript of the hearing. These faculty members attempted to communicate with the appeal officer assigned to the case; however, in a complete misreading and misapplication of the law of confidentiality and privilege the university refused to discuss the matter. The privilege and the confidentiality belongs to the student, not the university. It is the student's right to waive confidentiality. Confidentiality is a shield to protect the student, the university subverted confidentiality by using it as a sword to punish the student.

EXAMINATION OF APPLICABLE LAW

Over the years, law has developed which lays out bright lines as to what must be afforded to students before the state expels them from a state educational institution. The language of these bright lines are used by university administrations. The problem is that administrations do not use personnel who understand the definitions of the bright lines. Moreover, the personnel empowered to follow the law do not understand how to implement the law when conducting a disciplinary hearing. In a university setting, we do not allow Ph.Ds. in sociology to teach microbiology for the obvious reason that it is out of their field and they would have no understanding of the terms used in such class. As academicians we do this to ensure that our students are truly learning micro-biology. However, we allow Ph.Ds. in Sociology or Biology or History to apply terms and principles they don't understand and, therefore, our students are not truly receiving due process. It is obvious that we care about academic integrity in the class room halls, but not so much about integrity when seeking justice. As educators, we need held to a stronger standard.

The sentinel case in this area is *Goss V Lopez*[1] a 1975 case challenging the constitutionality of an Ohio statute that allowed public school administrators to suspend students for up to ten days without a prior hearing. The Court ruled that any school suspension from a public institution required that the due process clause of the Fourteenth Amendment be adhered to. Clearly, the Ohio statute was unconstitutional in that it deprived the students of "…life, liberty, or property without due process of law".[2] The Court found the students to have a property interest in Ohio's decision to provide free public education and a liberty interest in their reputations. At a minimum due process requires prior notice of the charges against the students and an opportunity to be heard and to confront one's accusers.

There is a bright line that has logically been drawn between disciplinary punishments and academic failure. In *University of Michigan v Ewing*[3], the United States Supreme Court was faced with an issue where a student was dismissed for academic reasons. He was enrolled in a six-year program that provided a B.S and an M.D. at completion.

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[1] *Gross v Lopez,* 419 US 565 (1975)
[2] U.S. Constitution, Fourteenth Amendment
[3] *University of Michigan v Ewing*, 474 US 214 (1985)

At the end of his first four years, he failed an examination that would have allowed him to complete his final two years. Other students had been given the opportunity to retake the exam, however, Scott Ewing was not. The University of Michigan argued that the student had a number of incomplete classes, poor grades generally, and on a number of semesters was reduced to less than full time study. The student was allowed to appeal his dismissal and his academic dismissal was upheld. Although the court reasoned that Ewing had a due process right to his education, they would not second guess an academic decision. "When judges are asked to review the substance of a genuinely academic decision… they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." [4]

The Third Circuit Court of Appeals in *Hankins v Temple University* summed up precisely the state of the law regarding academic discipline by stating that "an informal faculty evaluation is all that is required."[5] This demarcation line between academic and conduct discipline was a crucial issue discussed in *Valentine v Lock Haven University of Pennsylvania*.[6] The court had to determine if a dismissal for plagiarism was academic or conduct. "The Defendants' argument relies on the assumption that Valentine's dismissal for plagiarism was "academic" in nature; Valentine disputes this assumption, arguing that her dismissal was "disciplinary," and with good reason because the distinction has implications for the process due before a student can be expelled. Disciplinary dismissals must be preceded by, at least, notice to the student of the charges against her, an explanation of evidence underlying the charges, and an opportunity for the student to present her side of the story." [7]

These rights are non-existent if the institution is private. Without state action, there are no due process requirements. [8] With public institutions, a limited form of due process is required. This limited amount of due process results in flawed outcomes. Moreover, the perception of bias is propagated. At the end of the day, the goal of all educational institutions should be fair and just in disciplinary determinations. Currently, the systems of determination being used are a hindrance to accuracy. The courts have allowed this lack of accuracy to prevail because of the perceived cost of conducting legitimate hearings and because the loss of liberty and property, school expulsion, is less than the loss of liberty and property in typical criminal hearings.[9] However, any definition of "fundamental fairness" which is the linchpin of any due process analysis requires some fundamentals regardless of balancing of constitutional rights with cost due to the perceived lesser penalties involved in public education disciplinary procedures.

The first is a fair and impartial tribunal. Under any logical analysis, the tribunal should be independent from the prosecution. In our case study, the prosecutor brought the charges, presented the evidence, ruled on the admissibility of his own evidence and then deliberated **WITH** the hearing board while the defendant was relegated to another room. Following the determination of guilt the University's prosecutor (titled Coordinator of Judicial Affairs) then met with the jury to determine a sentence. It is often said as joke that someone wants "to be judge, jury, and executioner". That joke is a reality in many of the nation's public universities.

The lack of legal expertise at the conduct board hearings, and more importantly the denial of a right to effective assistance of counsel, end up being a double-edged sword that cuts both ways against the student. *Ruane v Shippensburg University*[10] found that charged students have no right to legal representation. However, the same courts use the back side of the sword against students by denying them their day in court because of their failure to make timely objections at a disciplinary board hearing. As an example in *Jackson v Indiana University of Pennsylvania*,[11] the student attempted to argue in Commonwealth Court that the procedures violated due process because the tribunal and prosecutorial duties were comingled. The argument was blocked by the court because the student "failed to

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[4] *Ewing* at 225
[5] *Hankins v Temple,* 829 F2d 437, 445 (3rd Cir. 1987)
[6] *Valentine v Lock Haven University,* 2014 WL 3508257 (M.D. PA 2014) Slip Opinion
[7] *Valentine*
[8] *Althiabat v Howard University*, 76 F .Supp 3d (D.C. 2014)
[9] *Mathews v. Eldridge*, 424 U.S. 319 (1976)
[10] *Ruane v Shippensburg University of Pennsylvania*, 871 A.2d 859 (Com. Ct. 2005)
[11] *Jackson v Indiana University of Pennsylvania*, 695 A.2d 980 (Com. Ct. 1997)

preserve the second issue for appeal, whether prosecutorial and adjudicatory functions were commingled, because she failed to raise the matters before the governmental agency." It is highly doubtful that any undergraduate or member of a disciplinary board understands the concept of preserving an issue for appeal. However, it is beyond any doubt that the impermissible comingling of duties creates the impossibility of an accurate fact finding tribunal.

One of the most troubling areas in any due process analysis of higher education is the use of evidence in reaching a decision. University administrators are almost proud of the fact that the rules of evidence are not followed. This is troubling because the rules of evidence have been developed over hundreds of years with one purpose in mind the finding of truth. The abandonment of such tried and true methods in and of itself makes the accuracy of university tribunals necessarily error prone. Many states have taken the step of outlining hearing requirements for state institutions of higher education. Pennsylvania forbids the use of hearsay evidence[12] but that law was of no effect in our case study since the concept of hearsay was not something understood by the prosecutor, or the person who reviewed the case on appeal.

In *Coulter v East Strousburg University,*[13] the federal district court issued an injunction blocking the suspension of a student because the procedures at East Strousburg University did not allow for active cross-examination of witnesses against the student/defendant. *East Strousburg* is exactly on point as the university involved in our case study also violates the student's constitutional right to confront witnesses against him. In the case study, all ~~of~~ the evidence presented by the university was wholly unreliable because no one who witnessed any of the events was on hand to testify. The entire presentation by the university prosecuting the student was from a police officer testifying what someone had told him that somebody else had said. The right to confrontation of witnesses was denied to the student in the case study. According to *East Strousburg University,* this problem could have been completely resolved and truth could have been ascertained if the student "… could have had counsel or some other representative, Chief Olson could have been cross-examined to disclose his lack of personal knowledge of the situation." [14]Since this right to confrontation was denied the injunction against the discipline of the student was issued.

Our system of government, including the freedom of the press and free speech, start from the premise that free and open debate will allow us to reach truth through the market place of ideas. Our court system is premised on the ideal of giving a fair and impartial hearing where allegations are tested by vigorous debate before a fair and open tribunal. The allegations presented against a student should be able to stand the test of accuracy. Without allowing a representative of the student, or the student himself, to cross examine the real witnesses against him there is no way to establish truth or accuracy. Lay people, which includes those on university discipline tribunals, may have a strong misconception of cross-examination and its role in determining truth. Perhaps, through fictional television and movies lay people believe that cross examination is a shouting match, or an effort to belittle a witness, or an effort to cause them to misstate something. Nothing could be further from the truth.

Proper and effective cross-examination delves into five specific areas. Very few witnesses take the stand in a court room with the intention of deceiving. However, it is very likely that their testimony is not completely accurate. To test this accuracy and insure the discovery of truth every witness must be challenged in regard to the following issues:

1. Problems with perception: This delves into mistakes in perception that the witness may have had. Was the witness wearing her glasses? Was it dark out? How far away was the witness? Was the witness sober? Was the witnesses view obstructed? All areas that affected the witness's ability to perceive an event must be delved into. This can only be done through effective cross examination. Effective cross-examination can only be completed by someone educated in trial practice.

2. Defects with memory: Time passes and details tend to be forgotten. Interviews and retelling of events tends to adjust a person's remembrance to what the listener wants to hear. Psychologists have long told us that honest eyewitness testimony is suspect.[15] Often good cross-examination questions will jog a person's

[12] 22 PA Code § 505.6

[13] Coulter v East Strousburg University, 2010 WL 1816632 (M.D.PA 2010)

[14] *Strousburg* at 1816632

[15] Sporer, et. al, *Psychological Issues in Eyewitness Identification*, Psychology Press, 2014

memory.

"The courts' reliance on witnesses is built into the common-law judicial system, **a reliance that is placed in check by the opposing counsel's right to cross-examination—**an important component of the adversarial legal process—and the law's trust of the jury's common sense. The fixation on witnesses reflects the weight given to personal testimony. As shown by recent studies, this weight must be balanced by an awareness that it is not necessary for a witness to lie or be coaxed by prosecutorial error to inaccurately state the facts—the mere fault of being human results in distorted memory and inaccurate testimony."[16] Without effective cross-examination there is no way that the university tribunals are conducting effective truth determining procedures.

3. Defects in Veracity: There are also times when people simply do not tell the truth. It may be that they are hiding their own complicity or protecting another. The list of possible motivations to not tell the entire truth are as long and wide as the human condition.

4. Defects in Transmission: Slang terms, misstatements, failures to be clear and concise are all problems that every nervous witness confronts and yet only effective cross-examination can correct.

Of course, if the university tribunal allows hearsay evidence to be introduced any right to cross-examination is by definition absent since the person who is truly testifying is not present. In this case study, no one who witnessed the events was present to testify. Pennsylvania, like many other states, has created a short series of regulations dealing with a few of the issues present in public university discipline procedures. Pennsylvania specifically states that "Hearsay evidence may not be used to establish a fact necessary to establish guilt or innocence in a case."[17] However, this regulation provides no protection for the student if those conducting the hearing are unaware of what hearsay is. In the case study, a police officer testified as to what others had told him and as to what others had told others. No one who witnessed the events in question were present. Therefore the board was prevented from doing their job. They had no idea if the statements were credible because they could not judge any of the issues that may have made their statements believable. If Bob tells Linda something and Linda tells a police officer and the police officer testifies to Bob's statements in court, all of the problems with accuracy are multiplied again and again. The tribunal in the case study had to blindly believe that Bob, Linda and the police officer had no defects in perception, memory, veracity, or transmission. What if Bob and/or Linda had simply made it up? There is no way for the tribunal to perform their function of seeking the truth.

Hearsay is " statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[18] If the police officer testifies that Linda told Bob the car was dark blue, the information is coming from the perceptions of Bob. The accuracy of Bob's statements can only be accurately assessed if Bob is there to answer the questions. When he is not, it is inadmissible hearsay.

In the case study, the only evidence presented was hearsay. Therefore, the procedure violated both the Fourteenth Amendment's Due Process clause and the Confrontation Clause found in the Sixth Amendment. The Sixth Amendment gives everyone in a hearing the right "…to be confronted with the witnesses against him…." Clearly, when those testifying against the student are not present at the hearing there is no right to be confronted with those witnesses.

The law does not require strict enforcement of due process principles at an academic disciplinary hearing. However, it does require a balancing test between the need for accuracy and the burden on the educational institution. In

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[16] Fisher and Traversky, *The Problem with Eyewitness Testimony*, Stanford Journal of Legal Studies, Vol 1:1, December 1999, page 29. (emphasis added)
[17] 22 PA. Code § 505.6 (2015)
[18] Black's Law Dictionary

Matthews v Eldrige,[19] the United States Supreme Court laid out the balancing test that courts need to apply in determining how much process is due.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[20]

The first issue is a determination of how damaging to the student's property interests an adverse decision would be. Will the student be expelled, will the student's reputation be harmed, and will there be a substantial financial burden? An answer of yes to these questions necessitates a greater degree of safeguards to insure accuracy. The second question asks if additional procedural safeguards would in fact insure accuracy while the third ask how much improving the accuracy of the tribunals would cost.

In this case, at the public university the student was initially permanently expelled. Following an appeal process the punishment was reduced to an expulsion of one year. A one-year loss in education is a significant loss of a property interest. Further, the stigmatism of such a decision may well follow the student through a significant portion of his working life. As to the second issue, accuracy of the tribunal could have easily been assured by simply not allowing hearsay evidence to be used as the basis for the adverse decision.

Another difficulty with the administration of justice in student conduct hearings is that the standard of proof is set at the lowest level of a burden of proof. The policy at the state institution of higher education in question establishes a standard of the preponderance of the evidence when identifying truth. This standard is identified as a fact being more probable than not. This is the standard in civil court in litigation between two parties. The presumption behind this standard is that neither party's interest supersedes the other. For example, if "A" sues "B" for breach of contract, the standard is appropriately a preponderance of the evidence. If, however, the government is attempting to deprive an individual of liberty or property, the burden of proof requires a higher standard—either "clear and convincing evidence" or the highest burden of proof, "beyond a reasonable doubt."

A standard of proof of the preponderance of evidence might be appropriate for a private university where the relationship between the student and the university more closely resembles a bilateral contract. As a private university, students can be required to give up many of the freedoms allowed by students at public institutions. An extreme example would be Bob Jones University where students are prohibited from listening to any radio station other than the university station. Religious colleges can allow professors to engage in public prayer in the classroom. Public colleges and universities must adhere to the doctrine of the separation of church and state. As a public institution, the requirement should be higher. The United States Supreme Court case *In Re Winship*,[21] identified three compelling public interests in using the reasonable doubt standard of proof—the defendant's liberty, to protect the innocent from the stigma of conviction, and to give confidence that the procedure protects the presumption of innocence.

We currently have a situation where if one is charged with a minor traffic offense which risks one hundred dollars in fines, the state must prove its case beyond a reasonable doubt. However, if a public university wishes to deprive a student of thousands of dollars in tuition, fees and room and board by expelling that student from the university only a preponderance of the evidence is required. This problem becomes even more critical as public universities have now taken it upon themselves to discipline students for conduct that occurs off campus whether school is in session or not. We have created a situation where egregious deprivations of basic legal rights are forced on citizens, in the guise of student discipline, for actions totally in the realm of the public police and legal authorities best equipped to handle them. The case study is an example of a public university bringing its deprivations of basic civil rights out into community law enforcement.

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[19] *Matthews v Eldridge*, 424 US 319 (1976)
[20] *Nash v Auburn University,* 812 F.2d 655, 660 (11th Cir. 1987)
[21] In Re Wiship, 397 US 358, 364 (1970)

The problem lies largely in whom public institutions employ to handle their disciplinary hearings. Clearly, those involved in the decision making at the public university had no idea of what hearsay was. Those conducting the hearings should have at least a one-day presentation on basic tried and true methods of testing the reliability of evidence. An understanding of the hearsay rule is simply mandatory if we, as educators, are going to provide any degree of due process in our discipline determinations.

As of the writing of this paper there are proposals for regulatory changes to the methodology used by educational institutions in disciplining sexual misconduct under Title IX of the Education Amendments of 1972.[22] The two most relevant proposals to the subject matter of this paper commands the university to seek accuracy in their adjudication processes by forbidding the investigator from also acting as judge and jury and instituting the fundamental right of cross-examination.[23] As Title IX coordinators and adjudicators tend to have degrees in student services or education, they have no background in fundamental legal principles or understanding of the laws they are attempting to enforce. These problems in the Title IX area were brought out in two recent federal cases. The first involved a student in a three plus four pre-med program at Penn State University.[24] The student was accused of sexual assault, which he denied, but was expelled from the university for two years. The student brought a suit in federal court and sought a preliminary injunction blocking the enforcement of the punishment. The preliminary objection was granted since Penn State University did not follow its published conduct board procedures, failed to allow effective cross-examination, and blocked the introduction of relevant evidence.

However, Penn State University compounded their errors by violating the court order. They elected to conduct a new hearing charging the student with the same acts as under the first hearing. Penn State's Vice President for Student Affairs, Danny Shaha, went so far as to email the accused laying out the decision to violate the federal court order. A contempt petition was filed against Danny Shaha and the Interim Director of Student Conduct.[25] Penn State never conducted the second hearing following the contempt petition. The accused is continuing his studies at Penn State. On March 19, 2019 the case was settled with Penn State paying an undisclosed amount.[26]

In *Doe v Baum*[27] the issue was much simpler. The University of Michigan conducted a sexual assault discipline hearing and found against the accused. The accused filed a federal court action alleging a violation of due process since the accused was not allowed to cross examine the accuser. The Sixth Circuit Court of Appeals held that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[28]

To avoid costly civil rights suits and more importantly to be fair and accurate in our determinations public educational institutions must at a minimum:

1. Provide advance notice of the charges against a student. The charges need to be stated in sufficient specificity to allow for the preparation of a defense. Today in to many universities, including the one which produced the case study, the same person who writes the charges and the person who determines if they are of sufficient specificity is one and the same.

2. Provide adequate time between the charge and the hearing to allow the student to prepare a defense.

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[22] 20 U.S.C. § 1661-1668 (1972)
[23] Proposed Rules Department of Education 34 CFR Part 106
[24] *Doe V Penn State University*, 276 F.Supp. 3d 300 (MD of PA 2017)
[25] MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CIVIL CONTEMPT AS AGAINST THE PENNSYLVANIA STATE UNIVERSITY,DANNY SHAHA AND KAREN FELDBAUM, No:4:17-CV-01315
[26] https://www.pennlive.com/news/2019/03/penn-state-settles-lawsuit-over-handling-of-claims-of-student-sexual-misconduct.html
[27] *Doe v Baum*, 903 F.3d 575 (6th Cir. 2018)
[28] 903 F.3d 575, 578

3. Have a mandatory process similar to a subpoena available to the charged student. Those facing discipline need to have the ability to call witnesses in their favor without fear of retribution. Some universities, including the one that produced the case study, go so far as to forbid student/defendants from speaking to potential witnesses.

4. Allow the charged student the opportunity to face his accusers.

5. Allow the charged student to have an active advisor, which may be an attorney to represent him. This active advisor must have the right to speak and to cross-examine witnesses so that the accuracy of the witness's statements can be deduced by the finder of fact. Without this basic right, there is no opportunity for accuracy.

6. Ensure that the prosecution and the tribunal fact finder are separated. Allowing the person serving as prosecutor to be part of the panel determining liability is on its face silly.

7. Allow cross examination to test the list of hearsay dangers.

8. Allow for a meaningful appeal process.

9. Change the burden of proof from a "preponderance of the evidence" to at least "clear and convincing evidence" or even the highest burden of proof, "beyond a reasonable doubt." Through all of the attempts to define the three burdens of proof known to our legal system the best simply says that with a preponderance of the evidence we are "sure"; with clear and convincing we are "very sure", with beyond a reasonable doubt we are "extremely sure". Our students at least deserve that we are "very sure" before we strip them of education, take their property, and destroy their careers.

10. With whatever procedures are put in place, they have to be enforced by someone knowledgeable in the administration of justice. Ideally the person in charge of these hearings should have some minimum legal education. At least someone with a degree in paralegal studies should be the head of the judicial branch of a public university. With serious charges, our students deserve a competent, qualified, member of the bar who can conduct a fair and impartial hearing. It is difficult for expert judges to reach decisions in complicated cases, let alone a layperson university administrator.

We typically do not ask sociologists to be experts in chemistry or accountants to be experts in physics. Yet when it comes to legal decisions universities typically entrust their appeal process to those with no education at determining whether a fair hearing was conducted. Since law is a part of everything in our society, every university has those holding Doctors of Jurisprudence as part of their faculty. It is an anathema that universities do not take advantage of this expertise by having those who process the credentials and the expertise in these matters to review the decisions. This would become a self improving process as the attorney could be able to point out practices that do not comport with due process or other areas of the law.

Higher education should not be entirely focused upon imparting technical knowledge to be used only in the student's career path. Learning the skill sets necessary to be an engineer, an architect, a social worker, a teacher, or a business person is important, but not everything a student needs to know to become "educated." If learning skill sets were all a student needed, perhaps trade schools would be more appropriate. An important element to being an educated person is acquiring moral and ethical perspectives to assist the person in life as well as in their career.

The institutions of higher education boast that they are teaching moral and ethical principles. Most every accreditation body for institutions of higher education has a moral and ethical component to their quality assessment. As such, institutions of higher education have a responsibility to model moral and ethical behavior. Current procedures for handling student misconduct fail in modeling the moral and ethical principles taught in the Bill of Rights and demanded by basic human dignity and the pursuit of justice.

White-Collar Crimes and the Benczkowski Memorandum

Carri Pakozdi

As defined by the Federal Bureau of Investigation (FBI), white-collar crimes are "frauds committed by businesses and government professionals… characterized by deceit, concealment, or violation of trust… the motivation behind these crimes if financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage."[1]

White-collar crime is an ever-growing topic of conversation. Human nature gives people the craving for status and success which can drive them to do things they would otherwise not do. This occurs especially in financial crime. The term white-collar crime encompasses a vast array of topics to include public corruption, money laundering, corporate fraud, securities and commodities fraud, mortgage fraud, financial institution fraud, bank fraud and embezzlement, fraud against the government, election law violations, mass marketing fraud, and healthcare fraud.[2] White-collar crime is the term coined by sociologist Edwin Sutherland in the mid 1900s, who defined it as "crime committed by a person of respectability and high social status in the course of their occupation".[3]

White-collar crimes are considered to be nonviolent crimes committed to create some form of financial gain. In the United States (US) white-collar crimes account for $250 billion to $1 trillion in economic damages each year.[4]

Over the last 30 years, there has been a drop in prosecution of white-collar crime. According to Syracuse University's Transactional Records Access Clearinghouse (TRAC) there are half as many white-collar crimes being federally prosecuted as there was in 2011. In the last year alone, indictments have fallen 8.5%. Part of this drop can be explained by the strain on resources. The Attorney General (AG) looks at each case to determine the worthiness of cases to see if the resources available would be beneficial to the gain. Cornell Law School states that "perpetrators use sophisticated means to conceal their activities through a series of complex transactions."[5] This sophistication increases the costs involved with investigating and prosecuting white-

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[1,2] "White-Collar Crime." *FBI*, FBI, 3 May 2016, www.fbi.gov/investigate/white-collar-crime.

[3]Chen, James. "White-Collar Crime." *Investopedia*, Investopedia, 26 Nov. 2019, www.investopedia.com/terms/w/white-collar-crime.asp.

[4] Martinez, Joseph P. "Unpunished Criminals: The Social Acceptablity of White Collar Crimes in America." *Unpunished Criminals: The Social Acceptablity of White Collar Crimes in America*, *Eastern Michigan University*, 2014, commons.emich.edu/cgi/viewcontent.cgi?article=1381&context=honors.

[5] Stockler, Asher. "Prosecutions of White-Collar Crimes Are on Track to Fall to the Lowest Levels in over 30 Years." *Newsweek*, Newsweek, 3 Oct. 2019, www.newsweek.com/white-collar-crimes-prosecutions-fraud-justice-department-1463083.

collar crimes which causes the AG to not want to continue the investigation unless it hits a certain threshold of potential gain.

In conflict with the drop in prosecution, there is an increase in the opportunity to commit a white-collar crime. Over the last 30 years more and more people have shifted from working in more agricultural environments to more industrial environments opening more opportunities for fraud. According to the US Borough of Labor Statistics, the number of employees in labeled Financial Activities Industry has increased from 6.5 million to 8.5 million in the last 30 years.[6] Along with this shift, the technological advances that have occurred, make it easier to commit a white-collar crime.

On October 8, 2019 Brian Benczkowski, Assistant Attorney General for DOJ's Criminal Division, made an announcement discussing new guidance on inability to pay and the renaming and restructuring of the Securities and Financial Fraud Unit. The new guidance on inability to pay goes into detail as to how prosecutors should evaluate requests by corporate defendants for a reduction in fines and penalties. This announcement also discussed the renaming of the Securities and Financial Fraud Unit within the Fraud Section to Market Integrity and Major Frauds Unit and restructuring of the unit into five categories.[7]

The "Benczkowski Memorandum" outlines the analytical framework for evaluation after an appropriate resolution that has been accepted by the parties involved. The memorandum then outlines the factors that are considered. These include the source of the organization's current financial condition, alternative sources of capital, significant and likely collateral consequences of the fine or penalty to the company and if the proposed fine or penalty will impair the company's ability to pay restitution to victims.[8] The last two are considered to be the two factors of most significance.

The second part of Benczkowski's address was the renaming and restructuring of the Securities and Financial Fraud Unit within the Fraud Section. The Unit was renamed Market Integrity and Major Frauds Unit and structured into five categories. The five categories include Securities Fraud, Commodities Fraud, Government Procurement Fraud, Fraud on Financial Institutions, and Consumer Fraud, Regulatory Deceit, and

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[6] https://data.bls.gov/pdq/SurveyOutputServlet

[7,8,9] Hollingsworth, Adam, et al. "DOJ Announces Changes In White-Collar Criminal Enforcement In The Interest Of Transparency - Criminal Law - United States." *DOJ Announces Changes In White-Collar Criminal Enforcement In The Interest Of Transparency - Criminal Law - United States*, 24 Oct. 2019, www.mondaq.com/unitedstates/x/856908/Corporate+Crime/DOJ+Announces+Changes+in+WhiteCollar+Criminal+Enforcement+in+the+Interest+of+Transparency.

Investor Schemes. He stated that the restructuring was “done to capture the broad range of fraud enforcement work that its prosecutors actually perform.”[9]

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Hours Unrequited
By
Carl Shepard

Theft takes many forms, harms many victims, and enriches many criminals. Yet, when we hear that word, or any of its many variations, we are often left with a very specific set of images. We see a burglar breaking into a house to steal a television or jewelry; we see a robber holding a cashier at gunpoint. These popular conceptions are certainly well-founded, however, they illustrate a great flaw in the understanding of what constitutes theft -- one that seems to be reflected in the halls of justice. Simply put, the majority of theft by every metric is not the kind that comes to mind. The images of threatening men in ski masks obscures this, misdirecting public fears and resources away from a far more common and widespread type of thievery: wage theft.

Wage theft is a broad category of offenses outlined in the Fair Labor Standards Act[1] (FLSA) and in a number of state statutes that can be generally defined as the failure of an employer to pay an employee the full wages legally entitled to them under the law. Some specific examples include paying an employee less than the minimum wage, not paying an employee for the total hours worked, making an employee work off the clock, or not paying an employee overtime. Like so-called “white-collar crime”, wage theft is often institutionalized and largely overlooked by law enforcement, making data on the issue from government agencies drastically insufficient -- at times even deeply suspect.[2] However, wage theft also suffers from a lack of serious academic scrutiny, further complicating attempts to fully grasp the scope of the offenses. Nonetheless, what work has been done paints a picture of systemic theft impacting tens of millions of people a year, with lost wages in the tens of billions.

There are many approaches to dealing with the gap in available information on wage theft in the United States caused by this limited data. One can start by simply looking at the records of recovered wages from legal action. This first level of analysis is the least speculative but also vastly underestimates the total impact, only accounting for the actual dollar amount recovered in successfully prosecuted lawsuits both by government agencies and private attorneys. In 2012, the Economic Policy Institute surveyed state labor departments and attorneys general and consulted the U.S. Department of Labor’s annual budget to compile the total recovered wages by government agencies. Their findings show that in that year alone $466 million was

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[1] 29 U.S.C. § 201-219

[2] Judith M. Conti & Victoria L. Bor, *Wage underpayment and DOL’s Wage and Hour Division,* 38 Labor & Employment Law, 8, 2010. http://search.ebscohost.com.proxy-clarion.klnpa.org/login.aspx?direct=true&db=bth&AN=48015716&site=eds-live&scope=site

recovered from wage theft violations.[3] However, this study leaves out the amount received in private litigation in that year, a gap filled in by NERA Economic Consulting's annual report on wage and hour settlements. In its 2012 report, NERA found that a total of $467 million was paid in private wage and hour settlements,[4] bringing the total amount to $933 million. This only begins to scratch the surface of actual wage theft in the United States.

As is the case with many other legal violations, the majority of instances of wage theft go unreported, with most of those reported not leading to successful prosecution. Any attempt to estimate the true scale of wage theft will require going beyond these hard numbers. One attempt to do so was undertaken by the National Employment Law Project (NELP) in 2008. The study was a large-scale survey of frontline workers[5] in low wage industries in the cities of Chicago, Los Angeles, and New York, providing a deep well of information. The first and most striking feature of the survey is just how common wage theft is for workers of this kind: 68% of those surveyed had experienced at least one pay-related violation in the previous week.[6] Extrapolating this data to the total population of such workers in these three cities alone amounts to over a million workers facing wage theft in any given week. The cash value of these violations is staggering. The average amount lost for each worker in this study was $51 a week, leading to total losses of more than $56.4 million per week, or nearly $3 billion a year, when extrapolated to the total of such workers in the three cities.[7] If generalized to the entire United States, thirteen million workers would face at least one pay-based violation a week, losing nearly $1 billion per week or over $50 billion annually.[8] To place these numbers in context, the total dollar amount lost to all other forms of theft in 2008 was estimated at $14 billion.[9]

What this data shows, however limited it may be, is that wage theft is running rampant in the United States. Furthermore, it demonstrates that the legal environment is grossly inadequate to address the problem. Some of these shortcomings are all too familiar in the broader scope of "white-collar crime" enforcement, whether that be a lack of resources, public pressure and interest, or attention from policy makers. For one

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[3] Brady Meixell, Ross Eisenbrery, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year,* EPI, 2014. https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/

[4] Dr. Denise Martin, Dr. Stephanie Plancich, and Janeen McIntosh, *Trends in Wages and Hour Settlements: 2012 Update,* NERA Economic Consulting, 2013. https://www.nera.com/publications/archive/2013/trends-in-wage-and-hour-settlements-2012-update.html

[5] Defined in the study as non-management, non-technical, and non-professional workers.

[6] Annette Bernhardt et al. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Law in America's Cities*, NELP, 27, 2009. https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf

[7] Annette Bernhardt et al, *Broken Laws,* 50

[8] Brady Meixell, *An Epidemic of Wage Theft*

[9] Federal Bureau of Investigation, *Crime in the United States 2008, "Table 23: Offense Analysis",* https://ucr.fbi.gov/crime-in-the-u.s/2008

example, the Wages and Hours Division (WHD), the enforcement agency created to enforce the FLSA, has approximately the same number of investigators today as it did in 1948, while the total workers it is tasked to protect has sextupled.[10] To put this glaring lack of resources into context, in 1948 there was one investigator for every 22,600 workers while today that ratio is one for every 135,000. The outcome of such dramatic changes in the investigator to worker ratio has led to a less than 0.5% chance of a workplace being investigated in any given year.[11] In addition, the fines and restitution levied against offenders is often drastically lower than the costs avoided by committing wage theft, with the bulk of any settlement being backwages,[12] leading to little if any real deterrence to violations. Yet, there is more to consider when analyzing the environment that has produced such conditions than just enforcement failures. As with all forms of crime, the conditions that produce them in first place must also be understood.

Any attempt to truly grapple with the structural causes and the endemic nature of wage theft in the United States must begin with an examination of workplace relations, in particular the deeply uneven power relations between employer and employee. The United States is largely unique in the developed world since the vast majority of employment is at-will, which is to say employment may be terminated without any established reason. Anti-discrimination and a few state-level exceptions aside, this framework of employment places an enormous amount of power in the hands of employers when engaging in workplace disputes. With relatively little resources provided to protect against abuses of at-will employment, the threat of termination is a powerful cudgel used to keep reporting of wage theft low. This essential context, highlighted by the NELP study found that 43% of workers who made complaints or attempted to form unions faced some form of retaliation,[13] with threats of reduced wages/hours and firing being the most common.[14] The presence of such threats had a broader chilling effect, as 61% of those who experienced a violation and made no complaint said they did so out of fear of retaliation, with 51% noting firing as the primary concern.[15] These threats are made all the more potent when victims of wage theft come from a disadvantaged community, denying them the opportunity to choose other employment or seek help from law enforcement. This is likely a major reason why women and people of color are overrepresented among those who are victimized. However, the explanatory power of this observation becomes even more evident when it comes to the widely high rates of wage theft among Latino women, many of whom

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[10] Danel J. Gavin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, Perspectives on Politics, Volume 14, Issue 2, June 2016, 327. doi:http://dx.doi.org.proxy-clarion.klnpa.org/10.1017/S1537592716000050

[11] Danel J. Gavin, *Deterring Wage Theft*, 327

[12] Brady Meixell, *An Epidemic of Wage Theft*

[13] Annette Bernhardt et al, *Broken Laws,* 27

[14] Annette Bernhardt et al, *Broken Laws,* 24

[15] Annette Berbhardt et al, *Broken Laws,* 24

may be undocumented or have undocumented family members. Fears of deportation or punishment for immigration violations are certainly driving their overrepresentation[16].

Beyond these employer empowering factors, many employee disempowering factors must also be addressed to fully grasp how wage theft became so widespread. The first of these that comes to mind is the dramatic change in the structure of employment that has occurred in the past few decades. In particular, the process termed “fissuring”, which describes the increase in subcontracting and franchising alongside the decrease in direct employment, has played a major role. This is because work relationships defined as “independent contractors” are left uncovered by the totality of the FLSA, and are thus excluded from what little protections its regulatory regime provides.[17] This legal and regulatory loophole explains the high concentration of pay-based violations in sectors not fully covered by the FLSA such as private households and repair services.[18]

Additionally, the increasing number of workers who are unaware of their rights and therefore cannot exercise or defend them must also be accounted for in this analysis.[19] Issues of transparency and information are also covered in the NELP study, connecting pay systems other than per-hour wages to increased violations.[20] For example, flat-rate pay or piece-rate pay systems both often have variable per-hour wages. This variability makes it much harder for workers to notice when violations occur as they can arise randomly from pay-period to pay-period. This structural feature explains the very high rates of wage theft in the garment industry, as it is dominated by piece-rate pay. Finally, the lack of legally required pay statements further disempowers workers by depriving them of a clear and honest accounting of their wages. The widespread neglect to provide such statements found in the NELP study, 57% among all those surveyed, illustrates the ways withholding information facilities wage theft across industries.[21]

The multifaceted and complex nexus of factors and failures that have led to the current moment have no simple solutions. Yet, there are several reforms and policy changes that can absolutely mitigate the underlying conditions. The first and most straightforward of these would be to expand the current enforcement apparatus to try and close the gaping hole in oversight and legal protection. At a minimum, the WHD should immediately double the number of investigators, with a long term goal of reducing the investigator to worker ratio to near 1948 levels. A parallel reform to expanded oversight would be an increase in fines and other penalties to actually

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[16] Annette Berbhardt et al, *Broken Laws, 48*
[17] Daniel Gavin, *Deterring Wage Theft,* 325
[18] Annette Bernhardt et al, *Broken Laws*, 30
[19] Daniel Gavin, *Deterring Wage Theft,* 325
[20] Annette Bernhardt et al, *Broken Laws,* 30
[21] Annette Bernhardt et al, *Broken Laws,* 32

produce net costs for offenders. Both of these simple changes would likely increase the number of prosecutions as well as provide a strong deterrence against wage theft. In addition to these regulatory changes, statutory change to expand both the depth and width of FLSA protections would also have a significant impact by reducing the effects of fissuring. Broadening protections against employer retaliation, and in particular the adoption of justifiable termination standards, would greatly reduce the chilling effect that keeps reports so low. Finally, a status-neutral approach should be implemented and advertised for all violation investigations to decrease the likelihood of the undocumented in reporting.

However, these reforms alone would only scratch the surface. A great deal of wage theft goes undiscovered and would likely remain so even with increased oversight coupled with regulatory and statutory change due to the institutionalized nature of the practice. This reality requires any serious consideration of addressing wage theft to move beyond enforcement and towards prevention and victim empowerment. Simple concrete reforms to do this could include increasing public funding for non-profit legal and community organizations that provide much needed support to victims, as well as educational efforts to raise awareness among workers of their rights. Yet, the single most empowering option available to anyone considering how to lower rates of wage theft would be increasing levels of unionization among affected industries. Unionization was highly correlated to lower levels of wage theft, and would provide all the above services to workers in a single organization, in the direct context of their workplace.[22]

There is no silver bullet to this problem, no simple cure to a disease as deeply rooted and as widely spread as wage theft. The cultural, institutional, and structural factors are multi-varied and intersecting, meaning only a multi-varied and coordinated approach across all these areas can hope to have real lasting effects. Theft on this scale, with victims this vulnerable and this numerous, demands to be at the forefront of legal and social reform in the United States. In a nation where so many already work for so little, the guarantee of fair and legal wages for honest work should be as basic a foundation to the rule of law as the security of personal property. The cascading effects of increased income for the poor and marginalized cannot be adequately measured, but there is little doubt they would be deep and overwhelmingly positive.

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[22] David Cooper, Teresa Kroeger, *Employers Steal Billions Paychecks Each Year,* EPI, 2017 https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/#epi-toc-3

An Eye for an Eye?

Capital Punishment

By Nadia Pitts

Capital Punishment is one of the most continuous and debatable topics within society; deeming it to be justifiable. There are now in the United States, over 2,696 people on death row and about 46 executions will be done each year. There are exactly 30 states that practice the death penalty and it is practiced throughout 29 other foreign countries[1]. The death penalty goes back to ancient times when society stated establishing itself and creating a form of punishment for crimes. The death penalty was created to inflict a source of punishment. The question is, do they really deserve it? Kidnapping, treason, piracy, murder and there are about 37 more crimes that can be punishable by death. In the last decade, many states have abolished the death penalty; finding that is indeed too "cruel" and "unseal" and in fact violates its constitutional definition.

Shortly after 1971, after capital punishment was declared unconstitutional by Fred Speaker, former Attorney General, Attorney General J. Shane Creamer had concluded that the death penalty should be determined by the legislature or the courts. In the state of Pennsylvania there are 18 crimes punishable by the death penalty[2]. The death penalty is and may be applied in cases that the defendant is found guilty of first-degree murder. There is another hearing after the initial trial to go through the process of aggravating and mitigating circumstances. During trial when it comes to dealing with the fate of the defendant if none of the eight mitigating factors[3];

(1) If the victim was a firefighter, public servant, peace officer, any representative from the judicial system. Governor, federal law enforcement who was killed while on duty.
(2) Being paid or was paid by someone to conspire to kill someone
(3) The defendant holding victim for ransom, or hostage
(4) When result in death by the defendant when hijacking of an aircraft
(5) When defendant murders a prosecution witness to prevent testimony against the defendant
(6) The defendant killing while committing a felony offense

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[1] *Death Penalty Statistics* https://criminal.findlaw.com/criminal-procedure/recent-death-penalty-statistics.html

[2] *The Death Penalty* https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Death%20Penalty.aspx

[3] *Aggravated Factors by State*
https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state

(7) The defendant creating a life-threatening risk to the victim of the offense
(8) Torture
(9) History of a violent past of felony convictions that cause threat to another person
(10) Conviction of a Federal or State offense when already being processed for life imprisonment or death penalty
(11) Defendant committing another murder in any jurisdiction either before or at other time of offense at issue
(12) Voluntary Manslaughter
(13) Accomplice in killing
(14) Selling, manufacturing, distribution or delivery of controlled substance offered by the defendant that result in the death of another person
(15) The victim was an informant to an investigation
(16) Victim was under the age of 12
(17) The victim was pregnant, and the defendant was aware of it; the defendant commits murder and victim was in her third trimester of pregnancy
(18) The defendant committing murder when there is a PFA, charges, or a restraining order against he or she

If these factors are met, the court will determine the fate of the defendant.

In Pennsylvania the last person put to death was in 1961, death by electrocution Death row in Pennsylvania is currently all male inmates; there are currently 148 men on death row in state and about 74% have been serving for more than 10 years. In Pennsylvania there is no minimum age and only one form of execution. One of the key and alarming problems with the death penalty is the cost; according to the York Daily Record, Pennsylvania spends about $42,000 a year; about $46 million to keep inmates on death row, along with carrying out executions of the inmates. Pennsylvania within itself has estimated to have spent over $816 billion dollars on capital punishment.[4] The time that a death row mate spends on their actual sentence is more than the estimated amount that will spend for keeping the inmate alive and ensuring their sentence is fully repaid.

When it comes to fairly distributing the verdict of the death penalty, there is a prejudice and swayed opinion that weighs heavy within the system. We see this now rising within our society of people committing the same crimes and not being held to the same standard. Now a days, we are so prone to letting our opinions and our judgements press us to make decisions that are clouding our ethical and moral thought process. We see it starting to flow into our judicial system when it comes to so many social and economic issues that we are battling with currently.

In 2017, a New Kensington police officer was shot and killed by Rahmael Holt during a traffic stop. This year Rahmael was found guilty of all charges and sentenced to death for the murder of officer Brian Shaw[5]. In 2018, almost a year to date of the murder of Brian Shaw, Amber Guyger, a Dallas Police officer, entered into an apartment, off duty, shooting and killing

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[4] *Pa spends over $40k a year per inmate; Shannon, Joel:* https://www.ydr.com/story/news/2017/09/21/pa-spends-over-40-k-year-per-inmate-yes-thats-lot/678903001/

[5] *Rahmael Holt Sentenced to Death in The Murder of Officer Brian Shaw; Schiller, Megan;* https://pittsburgh.cbslocal.com/2019/11/14/rahmael-holt-trial-sentencing-phase-day-2-defense-witnesses/

Botham Jean thinking he was a home invader. Guyger was found guilty and sentenced to 10 years, possible parole after 5 years. The two have both committed the same crime, both hold heavy in weight of standard to be sentenced to death, but why?

There is a social and economic divide between a white female cop killing an innocent civilian compared to a African American male killing a cop just doing his job. The problem lies where society's opinion of how one's life is more important than another. We bring more social and economic opinions when it comes to determining whether the defendant is to be sentenced to death. In the Rahmael Holt case, there is no concrete evidence that he is the one that shot and killed officer Shaw, compared to the Amber Guyger case where she in fact admitted to killing Botham Jean. This is where our misjudgment has posed a deep problem in determining and using the death penalty. Society does not use this to bring justice to the world, but to show how they can use this to bring the injustice to the people who are being put on death row that has done the same crime as some that have not been fully punished. In the 1980s in New York City there was a case that involved 5 young boys that were accused of raping and beating a woman jogging in Central Park. Donald Trump, a businessman at the time, was offering money to put these young teens to death for the crime they did not commit. The fact that there was a consideration to the notation of the death penalty shows that there is a problem within society; that the death penalty is used out of proportion against racial, ethnic, religious and poor minority groups. The problem is that sooner or later, an innocent life can be lost because of these biases and prejudices that are held within the judicial system. The fact is that these people; jurors, witnesses and prosecutors are prone to making a mistake. Mistakes that can place an innocent person for their life to be on the line at a price that is not caused by them; placing this in the hands of people to determine if a crime is punishable by death that have biased, swayed opinions that can be an unjust and overly evaluated. Capital punishment is not used consistently and that rises the alarming question, is this right?

As a judicial system, these problems should not exist when it comes to using the death penalty, and this is where the problem lies. In the future, as a society we need to be more aware of how the death penalty is to provide justice and a sense of triumph for a family, victim and the judicial system.

My name is Nadia Pitts, I am a senior Paralegal Studies major at Clarion University of Pennsylvania and I wish to further my career as a Legal Assistant at a Law Firm somewhere in Philadelphia or Maryland, or continuing my education into obtaining my Master’s degree in Political Science and becoming a professor in Paralegal Studies at a University.

The Doctrine of Paternity by Estoppel

Madison Campos

This article describes the methods of establishing paternity with a focus on the doctrine of paternity by estoppel. Application, public policy, and case law will be utilized to understand current Pennsylvania law.

Paternity can be established in four main ways including formal acknowledgment, the presumption of paternity, paternity by estoppel and DNA/blood testing. Formal acknowledgment of paternity requires the legal acceptance of paternity, documented with the courts. Presumption of paternity is the determination that a child born during the marriage is presumed to be a child born of the marriage. This presumption can be rebutted with clear and convincing evidence that the husband is impotent, the parties are separated during the time of conception, or if the marriage is not intact. Paternity by estoppel, "embodies the fiction that, regardless of biology, in the absence of marriage, the person who has cared for the child is the parent."[1] Finally, DNA testing can be admissible due to the "Uniform Act on Blood Tests to Determine Paternity" only in cases where paternity is a "relevant fact". These methods of paternity while different are all intended to provide children with the security of emotional and financial support.

Paternity by estoppel is a legal theory that "Because of a person's conduct… that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father."[2] Examples of this conduct could be holding a child out to be his own, forming a close emotional bond, supporting the child financially, and performing parental duties. This doctrine can be applied in many scenarios as, "the number of years or months involved is not determinative of paternity by estoppel; rather it is the nature of conduct and the effect on the father and child and their relationship that is the proper focus of the courts attention."[3] Another example in which paternity by estoppel can be utilized is in cases, "where the putative father's relationship with the mother began years after the child's birth and where it was undisputed that the putative father was not the biological father."[4] The purpose of paternity by estoppel is to achieve fairness in holding both parents to their conduct regarding the paternity of the child.[5]

In the case, S.M.C v. C.A.W. (2019 PA Super 318 Oct. 22, 2019) an adult male lived with an adult female and her daughter for approximately twelve years. The appellant held himself as the child's father and performed parental duties, and financially supported the child. When the relationship between the parties ended the father figure refused to continue to financially support the child and cut off virtually all contact. The child's mother filed an action for him to pay child support which was granted by the trial court, and upheld by the Superior

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[1] 8 Standard Pennsylvania Practice 2d § 52:31; V.E. v. W.M., 2012 PA Super 203, 54 A.3d 368 (2012).

[2] Jacqulyn A. West, Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania, 42 Duq. L. Rev. 577, 577–78 (2004); J.C., 826 A.2d at 3-4

[3] 15 Summ. Pa. Jur. 2d Family Law § 8:21 (2d ed.); Conroy v. Rosenwald, 2007 PA Super 400, 940 A.2d 409 (2007)

[4] S.M.C. v. C.A.W., 2019 PA Super 318 (Oct. 22, 2019)

[5] 15 Summ. Pa. Jur. 2d Family Law § 8:21 (2d ed.); R.K.J. v. S.P.K., 2013 PA Super 259, 77 A.3d 33 (2013)

Court of Pennsylvania. During testimony it was revealed that the natural mother and father had never married, he had no contact with the child and never provided financial support or performed parental duties. When the mother filed and action for child support from the natural father, the action was dismissed because he could not be located. Using the doctrine of paternity by estoppel the trial court found that the appellant held the child out as his own, treating the child the same as his own biological children. He claimed the child as a dependent on tax returns for seven years, and performed many parental duties. When the relationship between the parties ended the appellant ceased financial support and all contact with the child. The child was ordered to meet with a child psychologist who diagnosed the child with an adjustment disorder with mixed anxiety and depression. With this information, the court determined the child suffered a serious adverse emotional impact. Considering all of the relevant facts above and the child's best interest the court used the doctrine of paternity by estoppel to require the father figure to pay child support.

The ideals of the doctrine of paternity by estoppel are, "grounded in a fairness principle that those who mislead a child as to the identity of his natural father cannot then turn around and disprove their own fiction to the detriment of the child."[6] When courts determine if the doctrine of paternity is applicable, they must review the specific facts of each individual case in addition to the policy set forth by the Pennsylvania Supreme Court. This policy states that "Estoppel is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not, in fact, his father."[7] In Pennsylvania paternity by estoppel is often used in cases dealing with child support, "but it will apply only where it can be shown, on a developed record, that is in the best interest of the involved child."[8] Although this is an established doctrine, there are also challenges associated with determining paternity by estoppel.

With the best interest of children involved in mind, this doctrine is intended to protect children from emotional distress and give them a sense of security in their financial and emotional support. However, this can have unintended consequences for both children and parent figures involved. For example, "these legal fictions often punish the innocent spouse or party by forcing him to continue to support a child that is not his."[9]This can have a negative emotional impact on the child as well as the mother, while also creating the possibility of financial hardship for the child. Although this possible negative scenario can be related to the doctrine of paternity by estoppel, all court decisions issued are in the best interest of the involved child.

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[6] 15 Summ. Pa. Jur. 2d Family Law § 8:21 (2d ed.); T.E.B. v. C.A.B., 2013 PA Super 211, 74 A.3d 170 (2013); Moyer v. Gresh, 2006 PA Super 194, 904 A.2d 958 (2006); Bahl v. Lambert Farms, Inc., 572 Pa. 675, 819 A.2d 534 (2003)

[7] Jacqulyn A. West, Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania, 42 Duq. L. Rev. 577, 584 (2004); Brinkley, 701 A.2d at 180

[8] 8 Standard Pennsylvania Practice 2d § 52:31; K.E.M. v. P.C.S., 614 Pa. 508, 38 A.3d 798 (2012).

[9] Jacqulyn A. West, Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania, 42 Duq. L. Rev. 577, 587 (2004)

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Our Kids Deserve Blue Skies

By

Tiara Lamb

In the 50's and 60's, Congress reacted to an increase in the public's concern about the human "footprint" and the impact it could have on the environment. This introduced the idea of the Environmental Protection Agency (EPA). Enforcing environmental laws is a fundamental role of the Environmental Protection Agency and has been since it was established in 1970 by President Nixon's executive order. The power of the EPA enforcement include fines, sanctions, and other forms of punishment. William Ruckelshaus, an attorney and head of the EPA, famously described the role of the EPA in enforcing environmental law as that of a "gorilla in the closet"- muscular, dexterous, smart and formidable - not omnipresent, but ready to take decisive action to enforce laws if need be. This paper provides an analysis of the EPA enforcement and why it should be strengthened, based on interviews, statutes, cases, and data gathered.

The Trump Administration has sought to weaken the EPA in many ways, from staff and proposed budget cuts to attempts in undermining the use of science in policy making. Therefore, enforcement of environmental laws has fallen dramatically. Civil enforcement actions in fiscal year 2018 were the lowest they have been in at least ten years. The following graph shows the decrease in the number of enforcement actions from 2006 to 2018.

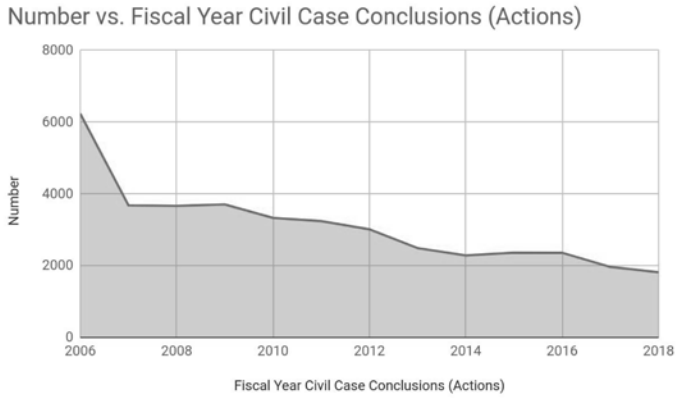

Chart: The Conversation, CC-BY-ND Source: Environmental Data & Government Initiative

On October 25, 2019, a federal appeals court rejected a challenge by California and sixteen other states to the Trump administration's decision to revise strict U.S. vehicle emissions and fuel efficiency rules put in place under former president Barack Obama. The states sued in May, 2018 after the Trump administration reopened a review of the vehicle efficiency standards through 2025. The Obama administration sought to cement the rules in place by completing a "midterm review" more than a year ahead of the April 2018 deadline (Reuters, 2019). The states argue that stringent vehicle efficiency rules are crucial to addressing climate change and will save consumers in fuel costs. The Trump Administration, as said, wants to weaken the nation's fuel efficiency standards and restrict California's power to set their own stricter greenhouse gas emission standards.

The clean air act, 42 U.S.C. §7401, is one of the major statutes regulating air emissions from stationary and mobile sources. Section 112 of the clean air act requires that EPA establish emission standards that require the maximum degree of reduction in emissions of hazardous air

pollutants. Revising the strict U.S. vehicle emissions would be harmful to the environment. Many car manufacturers are leaning towards hybrid and electric vehicles to help comply with the clean air act and be more environmentally friendly. Pushing these manufacturers to come up with more electric vehicles will prove to have a tremendous impact on the Earth.

People should want to protect the Earth we live in, not for us, for the next generation. Think about the children and future children that will have to grow up in a world where the skies aren't visible and the air is toxic. Even though the enforcement of environmental laws has weakened, the EPA is still striving to attempt and protect the Earth. A recent settlement took place on september 19th where Hyundai agreed to pay a $47 million civil penalty for violating Title II of the Clean Air Act. The Clean Air Act is a significant environmental law that should stay in place for many years. Under the Trump administration, the government has become too lenient when it comes to pollution and the environment.

History has shown that cutting EPA enforcement funding results in decreasing prosecution of environmental crimes. According to the Department of Justice, the number of environmental prosecutions in fiscal year 2019 was lower than the years under the Obama, Bush, or Clinton administrations. The fiscal year 2018 budget for EPA funding was released by the White House and showed a 24% cut to the EPA's office of enforcement. The White House released the funding for 2019 and it presented a nearly 20% cut to enforcement. The majority of the prosecutions in 2019 were from investigations by the U.S. Interior Department's Fish and Wild Life Service.

Large cuts to the EPA enforcement activities at both the federal and state level is almost guaranteeing some polluters getting away with their violations. Congress should ensure that

enforcement efforts are properly enforced as they should be and political leadership does not undermine the EPA's authority. To conclude, there is strong evidence that the enforcement of environmental laws has weakened over the years. However, if the enforcement can be strengthened, the environment can still come back to health.

References

Friedman, Lisa. "E.P.A. to Limit Science Used to Write Public Health Rules." *The New York Times*, The New York Times, 11 Nov. 2019, https://www.nytimes.com/2019/11/11/climate/epa-science-trump.html.

Iovino, Nicholas. "Environmental Prosecutions Drop to Lowest Level in Decades." *CNS*, 31 Oct. 2019, https://www.courthousenews.com/environmental-prosecutions-drop-to-lowest-level-in-decades/.

Peterson, Laura, and Laura Peterson. "Enforcement of Environmental Laws Drops Under Trump Administration." *Project On Government Oversight*, https://www.pogo.org/analysis/2018/02/enforcement-of-environmental-laws-drops-under-trump-administration/.

Sullivan, Marianne, et al. "The EPA Has Backed off Enforcement under Trump – Here Are the Numbers." *The Conversation*, 6 Oct. 2019, https://theconversation.com/the-epa-has-backed-off-enforcement-under-trump-here-are-the-numbers-108640.

"Summary of the Clean Air Act." *EPA*, Environmental Protection Agency, 15 Aug. 2019, https://www.epa.gov/laws-regulations/summary-clean-air-act.

About the Author

Tiara Lamb graduated from Clarion University of Pennsylvania where she majored in Paralegal Studies. Tiara plans to receive her MBA through Clarion University while working as a paralegal

or legal assistant. She is passionate about the legal field and is eager to start her journey in this line of work.

Should Private Medical Procedures Be Up for Public Discussion?

Brittany Schneider

The fight for women's autonomy has been debated for decades in America. The "heart beat bill" is the latest threat to reproductive freedom. The proposed bill will virtually ban abortions in America. Certain propositions offer no protection for victims of rape and incest. This proposed bill is an egregious threat to women.

The right to a safe abortion for women faces many roadblocks even without the restrictive "heart beat bill." Women are often faced with clinics that are hours away. They are then faced with a mandatory waiting period before the procedure will be done. In some states the patient is required to sit through a government mandated lecture by her physician. Some states require she must endure a sonogram, which is not medically needed. The patient is forced to hear the heartbeat. She must then make another trip for the procedure to be done. This means more time off from work, which isn't feasible for many. "48% of Pennsylvania women live in counties with no abortion clinic." [1]

The abortion is costly in itself, time off from work only adds to the burden. These guidelines are put in place to shame a woman for her private medical decision.

TRAP laws are a further attempt at taking away a woman's right to choose. The acronym comes from targeted regulation of abortion providers. Some states enact these laws as a loop hold to shut down clinics. The clinics are set to an extremely high standard despite the procedures that are performed. These laws demand clinics have the same licensing as an ambulatory surgical

[1] "Targeted Regulation of Abortion Providers (TRAP) Laws." *Guttmacher Institute*, 16 Feb. 2018, https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws.

center. TRAP laws also require clinics to be near a hospital. That is not feasible for many clinics. They also require the physician to have a relationship with the hospital. 9 states specify the size of procedure room.[2]

Many women are not aware they are pregnant at that point. Fetal anomalies sometimes don't present themselves until later in the pregnancy. This is forcing women to give birth to babies that have no chance of survival. This bill will make reproductive freedom harder to obtain than it already is.

Another issue that threatens the ban is late term abortions. "According to the Centers for Disease Control and Prevention, about 1.3 percent of abortions were performed at or greater than 21 weeks of gestation in 2015."[3] This type of abortion doesn't take place very often. When it does, it's usually because of a medical issue. There is a myth that this happens frequently. It is often used to cast a bad light on abortions in general. We must trust women to make the right decision for them. Women deserve the right to choose motherhood and not be legally mandated into it.

My name is Brittany Schneider, I am a senior Paralegal Studies major at Clarion University of Pennsylvania. I am continuing my education by obtaining my Master's degree in business.

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[2] [2] "Targeted Regulation of Abortion Providers (TRAP) Laws." *Guttmacher Institute*, 16 Feb. 2018, https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws.

[3] Cha, Ariana Eunjung. "Tough Questions - and Answers - on 'Late-Term' Abortions, the Law and the Women Who Get Them." *The Washington Post*, WP Company, 11 Feb. 2019, https://www.washingtonpost.com/us-policy/2019/02/06/tough-questions-answers-late-term-abortions-law-women-who-get-them/.

Minimum Wage Laws: To change, or not to change

Morgan Douglass

In today's society, everything is measured in terms of money. Money is a huge concern for many Americans. Many people find themselves thinking *How much will this cost me, how much will I be paid this week, and I cannot afford this.* Changing the minimum wage laws would affect millions of peoples' lives. The debate is weather increasing the minimum wage would have a good or bad effect on the economy.

United States minimum wage laws have been around since 1938. A minimum wage establishes a base line that employees can be paid. The first minimum wage was said to be set to aid stabilizing the American economy at the end of the Great Depression. A minimum wage helped protect workers and lower income families.[1]

In the 1920s, a minimum wage seemed like a radical idea at the time with great controversy.[2] The District of Columbia had a minimum wage law for women and children, however, in 1923, in *Adkins v. Children's Hospital* 43 U.S. 394 (1923), the Supreme Court affirmed the 1922 ruling that the minimum wage law was unconstitutional.[3] Despite the decisions and controversies, President Franklin D. Roosevelt felt a minimum wage law was important which led to the Fair Labor Standards Act of 1938, setting the minimum wage at $.25 per hour. President Roosevelt told the American people "do not let any calamity-howling executive with an income of $1000 a day…tell you…that a wage of $11 a week is going to have a disastrous effect on all American industry.[2]" Since then, the minimum wage has been raised twenty-two times.[2]

The current minimum wage is $7.25 which was made effective over nine years on July 24, 2009. Today, only twenty-one states use the $7.25 as their minimum wage while the other twenty-nine have higher minimum wage laws up to $11.50, and the District of Columbia is $13.25. One exemption of the law is that tipped employees can be paid no less than $2.13 per hour if they receive more than $30 a month in tips. Since the employees get tipped, the tips and $2.13 combined should equal $7.25.[2]

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[1] "Minimum Wage." Cornell Law School, Legal Information Institute, 24 Oct. 2017.

[2] *United States Department of Labor*, U.S. Department of Labor, 2018.

[3] *Westlaw,* Thomson Reuters, 2018.

Year	Minimum Wage ($)	Dollar Value Today ($)
1978	2.65	10.25
1979	2.90	10.07
1980	3.10	9.49
1981	3.35	9.29
1990	3.80	7.33
1991	4.25	7.87
1996	4.75	7.63
1997	5.15	8.09
2007	5.85	7.11
2008	6.55	7.67
2009	7.25	8.52

Table 1 shows the past eleven minimum wage increases by year and the equivalent value in todays dollars based on inflation rates. Calculations were made using the US Inflation Calculator.[4]

As shown above in Table 1, calculating for inflation, all past minimum wages, except for 2007, have a higher dollar value today than our current $7.25 minimum wage. Today, 2009's $7.25 is actually equivalent to $8.52, but the United States still keeps the minimum wage at $7.25.[4] Minimum wage, remaining unchanged for the past nine years, has not kept up with inflation which lowers the purchasing power of those working at minimum wage. As the dollar weakens and prices of goods go up, people working for minimum wage will be able to afford less and less.

A single person with no dependents working at $7.25 per hour, full time would make about $13,618, for the year, after taxes are taken out if the person takes no vacation or holidays.[5] The national average rent for a single bedroom apartment is $951 per month and $11,412 for the year.[5] According to the Debt Reduction Services, one person can live off of only $125 per month of groceries and $1,500 for the year.[7] After taxes, rent payments, and necessary grocery bills, the person is left with roughly $700 for the year to pay for, if applicable, insurances, car payments, gas, internet, cellphone, clothes, and continuing education. In 2017, the poverty threshold for single households was $12,752 a year which is barely above the yearly minimum wage.[8] Most people cannot live off of a $7.25 per hour income if this is the only source of income.

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[4] *US Inflation Calculator*, Coinnews Media Group LLC, 2018.

[5] "US Hourly Wage Tax Calculator 2018." *The Tax Calculator,* The Tax Calculator, 2018.

[6] "Apartment List Rental Data." *Rentonomics,* Apartment List, 1 Sept. 2018.

[7] Christensen, Todd. "Cost of Groceries per Person per Month." *Debt Reduction Services,* Debt Reduction Services, 4 May 2017.

[8] "Poverty Thresholds." *United States Census Bureau*, U.S. Department of Commerce, 2017.

A new bill, H.R. 5787 115th Cong. (2018), was recently proposed that would amend the Fair Labor Standards Act where the minimum wage would be $9.25 per hour and go up year by year reaching $15.00 after seven years.[2] Accounting for inflation, if the minimum wage is $15.00 in 2024, then that would be equivalent to $12.50 today.

Raising the minimum wage would have both negative and positive effects on the economy which is why there is just as much controversy as there was back in the 1920s. A study done by the Economic Policy Institute found that the $15.00 minimum wage would increase pay for 41 million workers and have a ripple effect on workers making more than minimum wage. Evidence shows that a rise in minimum wage increases consumer spending which in turn would increase the United States' Gross Domestic Product (GDP). The increase in economic activity would support new jobs. Other positives of raising the minimum wage are that employee turnover would lower due to workers getting paid more and "better-paid workers are more productive since they value their employment opportunities more highly.[7]" However, some argue a higher minimum wage would lead to fewer jobs. Fewer jobs would be a result of employers having more wage expenses. The employers would have to choose between raising their product and service prices or having less employees to combat the extra wage expenses.

Many people base their opinions on minimum wage on one or two of the arguments above. Only focusing on one of the arguments skews views drastically. Rising the minimum wage looks bad when one says fewer jobs will be a direct result. However, if considering that the increase in wages positively effects consumer spending and GDP which promotes job growth, then the initial fewer jobs does not seem as daunting as before. The positives and negatives combined "…yields ambiguous theoretical predictions.[9]"

Minimum wage must increase eventually. People will probably always be arguing whether the minimum wage should rise or not and when it should be changed. Nevertheless, the United States cannot keep the minimum wage at $7.25 forever with inflation rates continuously going up. The fact of the matter is when will it rise, now or later?

[9] Michael, Reich, and Jesse Rothtsein. "Do Minimum Wages Really Kill Jobs?" Econofact, Tufts University, 29 Aug. 2017.

Insanity Defense: A Loophole for Criminals?

Abigail Caspar

To properly dive into the insanity defense, one should have a basic understanding of the defense and where it originated. During the middle ages, people who were mentally ill were thought to be possessed by the devil.[1] During the renaissance time period, the mentally ill were confined. This allowed the first studies and classifications to be done. However, treatment of the mentally ill did not get better. Mental institutions toyed with the notion that the insane were spectacles both for delight and insight into their psychotic secrets.[2]

The insanity defense first came in to the courts way back in 1843. Daniel M'Naghten suffered from severe delusions. He believed the British Prime Minister and the Pope were all out to get him. M'Naghten planned to assassinate the Prime Minister, but instead killed the secretary. During his trial, 9 medical experts testified to M'Naghten's mental state[3]. The chief justice was so impressed with the medical testimony that he directed a verdict: "Not guilty by reason of insanity". Critics believed M'Naghten was only simulating insanity to escape punishment. Following the trial and criticism, the court was ordered to develop a strict test to determine insanity. The M'Naghten rule was the first to give any basis for determining insanity. It is defined as "focusing on the cognitive state of the defendant at the time of the crime." In order for this defense to be used, the defendant must prove he either did not know the nature or quality of the act, or he did not know that it was wrong. There are a few problems with this rule. The first being that the defendant has met the legal requirements of the rule, but not necessarily the medical requirements. This rule makes it too easy for defendants with a severe mental disorder to escape responsibility for a crime, regardless of how big a role the disorder played a part.

Multiple rules came into effect to try to combat these problems. The irresistible impulse test, also referred to as Diminished Capacity, says the defendant knew his actions were wrong but he lost the ability to control these actions due to the mental illness.[4] Therefore, he should not be held criminally liable. The Durham Rule states that the criminal act was a product of the mental illness.[5] The Durham rule was overturned by the same D.C. circuit that adopted it.[6] In 1972, another attempt to modernize the legal standard for insanity came about. The American Law Institute developed a new rule under the Model Penal Code. Found in § 4.01 of the Code, says that a defendant is not responsible for criminal conduct where (s)he, as a result of mental disease or defect, did not possess a "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."[7] However, this rule also gained much criticism due to the broadness of the language.

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[1] *See* Rudolph Joseph Gerber, The Insanity Defense, Published 1984.
[2] *See* Rudolph Joseph Gerber, *supra* at 12.
[3] *See* Rudolph Joseph Gerber, *supra* at 22.
[4] *See* Parsons v. State, 81 Ala. 577.
[5] *See* Durham v. United States, 214 F.2d 862 (D.C. Cir.1954).
[6] *See* U.S. v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).
[7] *See Insanity Defense Overview,* LEGAL INFORMATION INSTITUTE. https://www.law.cornell.edu/wex/insanity_defense

In 1981, John Hinckley. Jr attempted the assassination of President Ronald Reagan. Although, Hinckley did suffer from a mental illness, he was unsuccessful at raising the insanity defense at trial. This led to the media and the public criticizing the defense saying it is an attempt at a light punishment. This ideology can be seen in society to this day. As a result, Congress passed the Comprehensive Crime Control Act. The federal insanity defense now requires the defendant to prove a mental disease or defect.[8] The act also contained the Insanity Defense Reform Act of 1984. The Insanity Defense Reform Act, signed into law on October 12, 1984, was the first comprehensive Federal legislation governing the insanity defense and the disposition of individuals suffering from a mental disease or defect who are involved in the criminal justice system.[9]

A number of states have followed the federal government and adopted the Insanity Defense Reform Act for state crimes. Some states have abolished the insanity defense completely and instead use 'watered down verdicts' including "Guilty but Mentally Ill" or "Guilty but Insane".[10] Mental health advocates believe these verdicts attach an unnecessary stigma. Pennsylvania has rejected all of these rules and remains solely on the M'Naghten rule.[11]

The process of bringing an insanity defense in the state of Pennsylvania is as follows[12]: The commonwealth must prove the defendant's guilt of every element charged beyond a reasonable doubt. Then, the burden shifts to the defendant who must prove his insanity by a preponderance of the evidence. Under § 402(c) of the Mental Health Procedures Act, the court must allow reasonable compensation for a psychiatrist of the defendant's choice. When a defendant places his mental health status at issue, he may be subjected to compulsory examination by court-appointed psychiatrists, and psychiatric testimony may be introduced by the Commonwealth at trial to rebut the defendant's mental status without violating the Fifth Amendment. If the accused is acquitted by reason of insanity, the jury/court must state the reason in its verdict. The Crimes Code also provides for a verdict or plea of guilty but mentally ill when an accused has asserted a defense of insanity[13]. The fact finder must determine, beyond a reasonable doubt, that the defendant is guilty of an offense, was mentally ill at the time of the commission of the offense, and was not legally insane at the time of the commission of the offense.[14]

Recently, the Insanity Defense gained even more attention after two highly-publicized cases: James Holmes and Eddie Ray Routh.[15] Both defendants attempted to raise the insanity defense at trial, but were unsuccessful. The media attention surrounding these two cases caused the public to believe they were attempting to get an easier sentence.

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[8] *See* 18 U.S.C. § 17.
[9] *See* 18 U.S.C. § 4241.
[10] *See* Louis Kachulis, *Insane in the Mens Rea: Why Insanity Defense is Long Overdue*, 26 SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL, at 361
[11] *See* 16A West's Pennsylvania Practice Series., Criminal Practice § 26:3.
[12] 18 Pa.C.S.A. § 315. Insanity.
[13] *See* 18 Pa.C.S.A. § 314.
[14] *See* West's Pa Prac., *supra* note 10.
[15] James Eagan Holmes is an American mass murderer responsible for the 2012 Aurora, Colorado shooting in which he killed 12 people and injured 70 others at a Century 16 movie theater on July 20, 2012. Eddie Ray Routh murdered Chris Kyle and Chad Littlefield on February 2, 2013, on the way to the shooting range near Chalk Mountain, Texas.

So how often is this defense used? Despite what is portrayed in the media and movies, less than 1% of all criminal court cases have successful plea of insanity.[16] Over 70% of defendants will withdraw their plea when a state-appointed expert finds they do not meet the legal definition of insanity.[17]

Some of the most famous cases, including Jeffery Dahmer, tried the insanity defense.[18] However, the court found Dahmer to be legally sane due to the fact that he intentionally hid the bodies, indicating he knew his actions were wrong. It is said that "What Dahmer did is in fact 'crazy' just not 'insane'.[19]

Nowadays, mental illness is a more prevalent topic than it was in the past.[20] So how can we [the justice system] protect those who are actually insane from those who are just plain crazy? It's time to reform the insanity defense. The first thing to be done is to raise awareness to an accurate representation of the defense. Views toward the mentally ill are to be as neutral and unbiased as possible. Second, the term Insanity has a negative connotation and is outdated. Instead the defense should be renamed: Mental Illness Contribution Defense[21]. If the defendant successfully raises this defense, it shouldn't mean a 'not-guilty' verdict. Instead, it should initiate separate sentencing guidelines that should include treatment and then incarceration to finish out the sentence.[22]

A great percentage of the US population is affected by some mental illness. Since it is so common, one would believe the issue receives the much-needed attention. However, the current legal system and media does a great disservice to criminal defendants who do have a mental illness. The Insanity Defense is long over-due for a change. It's time for the public and legal system to be properly informed, advocated for, and evolve to better serve the mentally ill.

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[16] *See* Kenneth B. Chiacchia, *Insanity Defense: Statistics, Problems with NGRI, & Guilty but Mentally Ill*. https://psychology.jrank.org/pages/336/Insanity-Defense.html

[17] *See Id.*

[18] *See* Terrence McCoy, *Trial of 'American Sniper' Chris Kyle's killer: Why the insanity defense failed*., WASHINGTON POST. https://www.washingtonpost.com/news/morning-mix/wp/2015/02/25/trial-of-american-sniper-chris-kyles-killer-why-the-insanity-defense-failed/

[19] *See* Adam Banner, *The James Holmes Trial and the Insanity Defense*, THE HUFFINGTON POST, June 1, 2015. https://www.huffpost.com/entry/the-james-holmes-trial-an_b_7418648

[20] *See Id.* ("The Bureau of Justice Statistics reports that 61 percent of state prison inmates with a current or past violent offense have a mental health problem. Up to 20 percent of all inmates have symptoms of serious mental illness, including 15 percent of state prison inmates exhibiting signs of psychotic disorder.")

[21] *See* Louis Kachulis, *supra* note 6, at 371-378.

[22] *See* Louis Kachulis, *supra* note 6 at 375.

Eric Boyer

Medical Marijuana Act

On April 16, 2017, Governor Tom Wolf signed the Medical Marijuana Act (MMA) into law, making Pennsylvania the 24th state to allow some form of legal marijuana for medical use. The act provides a way for growers, dispensaries, and patients to legally produce, sell and purchase/use medical marijuana, respectively. The Act tasks the Pennsylvania Department of Health with implementing and administering the program. Patients must provide medical records, proving the diagnosis of one or more of the 23 currently approved serious medical conditions, to a doctor who is certified to issue medical marijuana certifications. Physicians who wish to issue medical marijuana certifications must register with the Department of Health and complete a 4-hour training course. Once a patient has been issued a certification, a Patient ID card can then be purchased from the Department of Health for $50. Patients who participate in Medicaid, PACE/ PACENET, CHIP, SNAP and/or WIC may qualify for a discounted ID card.[1] Once a patient receives their ID card, they are able to purchase medical marijuana from a dispensary. Medical marijuana is offered in many forms in PA including whole flower, capsules, oils, concentrates and topical forms. Smoking is still prohibited under the law and vaporization of whole flower or concentrates are the only allowed inhalation method.

With the passage of the Controlled Substances Act by Congress in 1970, marijuana production, possession, and use were made illegal. Marijuana was listed under Schedule I of the act where it remains to this day. Substances listed under Schedule I are considered the most dangerous in the CSA and as having a "high potential for abuse", "no currently accepted medical use in treatment in the United States", and "there is a lack of accepted safety for use of the drug or other substance under medical supervision".[2] The fact that marijuana remains a Schedule I substance under federal law even as many states have legalized some use of marijuana has caused much confusion and many legal issues to arise. President Obama initially stated that his administration would not pursue prosecution of medical marijuana users and organizations, but the DOJ continued to go after medical marijuana organizations and patients more than even George W. Bush's administration.[3] On December 16, 2014, an appropriations act rider known as the Rohrabacher–Farr amendment was signed into law. This rider stated that none of the funds in the act may be used to prevent the States listed in the amendment from "…implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The rider has been renewed every year since first signed into law. While it didn't change the legality of marijuana it was meant to prevent the Justice Department from interfering with state medical marijuana programs with prosecution of patients, growers, and dispensaries operating within state law by defunding those types of medical marijuana prosecutions. The Justice Department continued prosecuting medical marijuana operations even after the amendment was signed into law stating that they didn't believe the amendment

[1] https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Patients.aspx

[2] 21 U.S.C.A. § 812

[3] Obama's War on Pot: https://www.rollingstone.com/politics/politics-news/obamas-war-on-pot-231820/

applies to cases involving individuals or organizations.[4] This caused the authors of the amendment to call for an investigation in a letter to the Inspector General of the Department of Justice.[5] This same argument was then used in a case out of the Northern District of California. In US v. Marin Alliance for Medical Marijuana (MAMM)[6] (139 F.Supp.3d. 1039), a medical marijuana dispensary brought action seeking to dissolve a permanent injunction prohibiting them from dispensing marijuana. The Government argued that such CSA enforcement actions against private individuals or businesses did not prevent States from implementing medical marijuana laws. The Court concluded that the plain reading of the text of the rider forbids the DOJ from enforcing the injunction against MAMM to the extent that MAMM operates within compliance of California law. This was the first major decision to interpret the language of the rider as prohibiting the DOJ from enforcing CSA actions against private individuals or businesses who are in compliance with State law regarding medical marijuana. In PA, an Eastern District judge ruled that DOJ involvement in a violation of supervised release hearing constitutes use of DOJ funds and that the rider effectively prohibits DOJ from using funds to prosecute a supervised release violation based on State law compliant use of medical marijuana.

Confusion still exists at the state level as well. Law enforcement are not being properly trained on what the law allows and doesn't allow.[7] And while the Act intends to give some legal protection to patients and other participants in the program with § 10231.2103 (a) of the act stating "…None of the following shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, including civil penalty or disciplinary action by a Commonwealth licensing board or commission, solely for lawful use of medical marijuana or manufacture or sale or dispensing of medical marijuana, or for any other action taken in accordance with this act…", it fails to protect patients from DUI arrests or convictions even if the patient is not actually impaired. PA DUI law requires testing for both active substances and metabolites of the substances in a person's blood. Marijuana metabolites are detectable in a person's blood up to a week after last use. So, if you're a patient who takes medical marijuana on a daily basis then you're in constant violation of the PA DUI law whether you are actually impaired or not. In August of this year, a Lehigh County Court of Common Pleas Judge ruled that if a patient shows a police officer their patient ID card then the smell of marijuana is no longer probable cause to search their vehicle.[8] This is a major departure from previous decisions that have held that the smell of marijuana alone is probable cause for a vehicle

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[4] Justice Department says it can still prosecute medical marijuana cases: https://www.latimes.com/nation/nationnow/la-na-nn-medical-marijuana-abusers-20150401-story.html

[5] Lawmakers Call For Investigation Into DOJ's Continued Crackdown On Medical Marijuana: https://www.huffpost.com/entry/lawmakers-call-for-investigation-into-dojs-continued-crackdown-of-medical-marijuana_n_55bba4f4e4b0d4f33a0296ab

[6] 139 F.Supp.3d. 1039

[7] Law enforcement have many concerns with medical, recreational marijuana: https://www.sharonherald.com/news/local_news/law-enforcement-have-many-concerns-with-medical-recreational-marijuana/article_10d74217-b5e1-5f78-aa43-be7a24956638.html

[8] Police searched a Pennsylvania man's car because it reeked of pot. A judge just ruled that's illegal: https://www.mcall.com/news/police/mc-nws-lehigh-county-judge-medical-marijuana-traffic-stop-opinion-20190807-qgyapkqk6ndltf4yzr7uak4ujy-story.html

search. Some counties have issued policies preventing probationers from using medical marijuana which has already led to at least one lawsuit. The ACLU Pennsylvania sued Lebanon County Judicial District on behalf of three medical marijuana patients on October 8, 2019 after the county issued a policy prohibiting the use of medical marijuana by persons under the supervision of Lebanon County Probation Services. On October 30, 2019, the PA Supreme Court ordered the county to not enforce its policy until the Supreme Court can hear the case. The ACLU Pennsylvania knew of seven other counties with similar policies.[9]

Policies such as the one Lebanon County enacted can have severe negative effects on people's quality of life who have come to rely on medical marijuana as therapy for their conditions. These people are then forced to rely on drugs, which often have terrible side effects, and that they've most likely tried before but found medical marijuana to be more effective. Them being on parole or probation should not prohibit them from taking a doctor recommended drug. As more states legalize medical marijuana and even adult use marijuana it has become obvious that more and more American's believe that the outright prohibition of marijuana cultivation and use is wrong. Our Federal government should respond to this by either full legalization or by at least leaving more decisions about drug policy up to the States. The most reasonable solution to these issues is to regulate marijuana like alcohol and create a legal market for cannabis which could also be a large source of tax revenue. Then law enforcement can focus on black market sellers and growers instead of wasting tax dollars going after otherwise law-abiding marijuana establishments.

[9] Gass v. 52nd Judicial District: https://www.aclupa.org/en/cases/gass-v-52nd-judicial-district

Sobriety Checkpoints

By

Stephen Hartley

I Introduction

Driving under the influence of drugs or alcohol is an inherently dangerous and selfish activity. In an age of cellphones and drive share applications like Uber and Lyft, there is truly no need for people to risk their own lives or the lives of others by operating a motor vehicle while impaired. According to the CDC, between the years of 2003 and 2012 over four thousand Pennsylvanians were killed in accidents involving drunk drivers.[1] All of these deaths were easily preventable. I don't believe that drunk drivers choose to drive with malicious intent, however there need to be safeguards to help prevent as many of these deaths as possible.

One of the safeguards that has been put in place to protect drivers are sobriety checkpoints. Many drivers are or should be aware of what they are, however, for those who may not know these checkpoints are designed as a way for the police to stop drivers along a road without cause to perform a sobriety check. Drivers who pass the sobriety check and have committed no other criminal wrongdoing are free to continue driving. Those who do not pass the sobriety check are subsequently charged with a DUI and arrested, but these checkpoints also serve as a method for discovering other criminal wrongdoing.

In fact, only a very small number of the infractions cited at sobriety checkpoints are at all related to driving under the influence. According to an article in the *Chicago Tribune* from 2015,

[1] https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/Drunk_Driving_in_PA.pdf

over the six years previous to its publication, there had been over 14,000 citations administered at the Chicago area's sobriety checkpoints, but less than 3% of which were sobriety related.[2] Motorists were more likely to get cited for broken taillights, not carrying insurance, or other minor infractions. Citing these infractions allowed the department to gain an additional $853,000 in grant funding offset the costs of these checkpoints as well as pay overtime and other costs. The gross disproportion in citations begs the question of whether these checkpoints are actually being used for their stated purpose.

In fact, when analyzing the implementation of sobriety checkpoints, questions about their constitutionality begin to arise. Normally, when stopping an individual on a road, police must have probable cause to do so or witness you commit an infraction of some sort. Probable cause is not a hard standard, it is more of a totality of the circumstance's standard, whereby a police officer must determine that there is a higher probability than not that a crime is being committed. This can come from reports of an infraction by a vehicle matching your description, by their own observations of your driving behavior, etc. Only then can a police officer pull you over, thus seizing you under the Fourth Amendment, and attempt to test your sobriety. These checkpoints circumvent the Fourth Amendment protections from searches and seizures and allow officers to stop drivers without probable cause to do so.

In this article I will attempt to answer why these sobriety checkpoints have been upheld by the Supreme Court, why I believe the Court's decisions on these checkpoints are contradictory and potentially violate the Fourth Amendment, and what effective alternatives could be used to avoid illegal seizures by the police at these checkpoints.

I. The Fourth Amendment Standard for Search and Seizure

[2] https://www.chicagotribune.com/investigations/ct-dui-checkpoints-suburbs-met-20150507-story.html

As part of the Bill of Rights, the United States wanted to protect individuals from unreasonable searches and seizures of themselves and their belongings without a finding of probable cause by the government to do so. The Fourth Amendment protects individuals from searches, necessitating that police obtain a warrant, supported by probable cause, that specifies the area to be searched and the people or things the police expect to find there. The Fourth Amendment also protects from the unreasonable seizure of an individual without a finding of probable cause. The case *United States v. Mendenhall* described a seizure under the Fourth Amendment as occurring when a reasonable person believes that they are not free to leave from the police's effective custody.[3] For instance, if a police officer pulls up next to you on your walk to work and begins to ask you questions, you are not being seized under the Fourth Amendment and can decline to be questioned while walking away. Alternatively, on your walk to work, if two officers' corner you from both directions and walk you up against a wall, it is unlikely that a reasonable person in your position would feel that they are free to leave.

This is the same for when you are being pulled over for a traffic stop. When you see the lights and hear the sirens go on behind you, and you pull over to find the officer has pulled over with you and exits their car, you are being seized under the Fourth Amendment. Thus, the officer would need probable cause to stop you in this case.

II. The Supreme Court's Decisions in Warrantless Suspicionless Police Checkpoints

Sobriety checkpoints gained favor with domestic police forces in the early 1980's as a way to deal with what was an epidemic of drunk drivers in the country. The constitutionality of these checkpoints was challenged in the case *Michigan Department of State Police v. Sitz* (1990).[4] The case arose out of a challenge by a number of the drivers going through a Michigan based sobriety

[3] *United States v. Mendenhall*, 446 U.S. 544 (1980)
[4] *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990)

checkpoint regarding wither these suspicionless seizures by police violated the driver's Fourth Amendment rights. The drivers won at both the trial and appeals levels, with both Courts finding that yes, these checkpoints were unreasonable seizures under the Fourth Amendment and thus violated the constitutional rights of drivers.

The Supreme Court here was tasked with determining whether these seizures were in fact unreasonable. In determining this, the court used a three factor test from *Brown v. Texas* (1979)[5] which included that the Court consider: (1) the state's interest being served by the checkpoints; (2) the effectiveness of the checkpoints in achieving the state's goal; and (3) the level of intrusion of an individual's privacy caused by the checkpoint. The court found, based on these factors, that sobriety checkpoints were in fact reasonable seizures under the Fourth Amendment and that they would be permitted to continue.

Judge Rehnquist detailed the Court's reasoning on each factor in the opinion, starting with the state's interest in maintaining these sobriety checkpoints. On this factor I could not agree more with the Court finding that driving under the influence of alcohol is a gravely serious offense and should be punished and deterred. During the time this case was brought, around 40% of traffic fatalities were alcohol related, and the total number of fatalities related to alcohol was almost double what it is today.[6] The state had a clear interest in preventing deaths caused by impaired drivers.

On the second factor regarding the effectiveness of these checkpoints in meeting the state's goal, the Court essentially punted on the issue. The opinion states that only around 1.6% of drivers arrested at these checkpoints were arrested for drunk driving, and although there may be other more effective ways of achieving the state's goal, it is not up to the court to regulate law

[5] *Brown v. Texas*, 443 U.S. 47 (1979)
[6] https://www.iii.org/fact-statistic/facts-statistics-alcohol-impaired-driving

enforcement techniques for effectiveness. I find this to be a soft excuse for not wanting to prevent these sobriety checkpoints. The effectiveness of this practice needs to be weighed against the alternatives in order to come to a determination and the Court refused to do this. They even state in the opinion that around one percent of motorists nationally whop are pulled over were driving drunk, so these checkpoints aren't especially more effective at discovering and arresting drunk drivers, which would weigh against their reasonableness.

The Court opined that the intrusion on one's privacy during these stops was also not an issue. One of the main arguments against these stops by Sitz was that a driver would experience significant fear and surprise when being pulled over at one of these stops in just the same was as if they were being pulled over by an officer on the road, and that this intrusion without cause was in violation of the Fourth Amendment. The Court disagreed, stating that the minor intrusion on your time was not an issue and that if you were a reasonable, law-abiding driver, you would not be afraid of pulling through a checkpoint. I feel as though this isn't a precedent the court wants to set regarding other issues of privacy. I believe myself to be a law-abiding driver, however I still feel a profound sense of fear when being pulled over by police. Tickets for driving infractions can be expensive and if my brake light was out, or a sticker was out of date, or perhaps I swerved without realizing it, that could become a serious financial hardship for me. Although the stated purpose for these checkpoints was to detect and prevent inebriated driving, the vast majority of citations and arrests were for other non-alcohol related offenses.

Justices Brennan and Stevens both dissented for similar reasons to thew ones I cited above. Brennan took a constitutional approach, stating that individualized suspicion is central to Fourth Amendment protections and that being stopped by police without any suspicion could lead to police misconduct. Stevens also noted that the Court did not consider the full weight of the publics

constitutional right to be free from suspicionless seizures, but also noted that the intrusion on one's privacy by preventing citizens from avoiding these checkpoints and the fear and surprise caused to innocent drivers should be given more focus. He also brought up how these checkpoint systems are not notably more effective than traditional patrols which do not come with so many constitutional concerns. The strongest argument for the majority was the fact that these checkpoints were regarding road safety and that the state has a legitimate interest in protecting drivers. It wouldn't be long before the Supreme Court would have to rule on checkpoints whose express purpose was general crime control.

In *City of Indianapolis v. Edmond* (2000)[7], Indianapolis had set up road blocks in order to discover illegal drugs. They would use a system to stop a predetermined number of vehicles, and could only search the vehicles if given consent or if they had a "particularized suspicion" that the vehicle contained drugs. They were then allowed to use a drug sniffing dog to determine whether the car contained drugs. According to the facts, over 1,100 vehicles were stopped, and 104 motorists were arrested, 55 of which were for drug related offenses.

The Court was tasked with answering whether checkpoints on roads could be used to detect general criminal activity not related to road safety. In the opinion they admit that they have created exceptions for certain such roadblocks, like those found at our borders in order to detect human and drug trafficking by non-citizens attempting to enter the country, however the majority did not believe that the drug interdiction stops found in Indianapolis fit this exception. The Court cited the case *Chandler v. Miller* (1997) in which they determine that, absent special circumstances, there must be an individualized suspicion of wrongdoing before a search or seizure under the Fourth Amendment can be conducted.[8] The majority stated that, because the primary stated

[7] *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)
[8] *Chandler v. Miller*, 520 U.S. 305 (1997)

purpose was not road safety, even if that was a stated secondary purpose, the program could not be sanctioned for it could lead to any manner of illegal searches under the guise of protecting drivers.

The dissent by Chief Justice Rehnquist is pretty scathing towards the majority. He believes that there is essentially no difference between *Edmoind* and *Sitz*, because their success rate is similar, the state's interest is being served, and the roadblocks are conducted in a neutral way absent officers' own subjectivity. Rehnquist doesn't think that the majority's use of a new "primary purpose" test fits with the Fourth Amendment whatsoever and will only cause confusion regarding the "purpose" of seizures in future analyses. He is of the opinion that of they were to allow the roadblocks in *Sitz*, then these should also be allowed. Justice Thomas also wrote a dissenting opinion, joining with Rehnquist; however, instead of believing that this form of checkpoint should be allowed, he ponders on whether any of these suspicionless seizures were constitutional in the first place and perhaps should be overturned.

The Fourth Amendment is intended to protect the public from unreasonable searches and seizures absent a finding of individualized suspicion by the police. These checkpoints eradicate that protection in favor of road safety, however their effectiveness in regards to detecting inebriation is the same as that of regular patrols by police. One could argue that perhaps these checkpoints have acted as a deterrence to drunk drivers as the total number of traffic fatalities has steadily decreased since 1985 (from 18,125 to 10,511)[9], however, I would argue that this could also be due to the steady decrease in traffic fatalities overall in that same span (from 43,825 to 36,560) and that there are other ways to deter drunk driving without foregoing our constitutional protections.

[9] https://www.iii.org/fact-statistic/facts-statistics-alcohol-impaired-driving

III. Alternatives to Warrantless Suspicionless Checkpoints for DUI Deterrence

I believe that the most effective part of sobriety checkpoints in deterring drunk driving is not the checkpoints themselves, but the publicity. When people are aware that there is a potential to be stopped by police, they are less likely to knowingly break the law. According to the CDC, West Virginian counties that operated these publicized checkpoints found that they had a lower rate of drunk drivers than those that did not.[10] Operating and publicizing these checkpoints can be costly however, as they are often manned by anywhere between 10 and 12 police officers and require funding to be publicized.

An effective alternative to sobriety checkpoints is known as a saturation patrol, or a dedicated DWI patrol. These patrols work by training and implementing a small dedicated team of patrol officers specifically patrolling highly trafficked areas looking for individualized suspicion of driving under the influence of drugs or alcohol. These groups are flexible in size depending on the population and size of the patrol area and do not interfere with individuals' constitutional rights from unreasonable seizure as these officers are looking for individualized suspicion prior to the seizure. There are publicity costs associated with these patrols as well in order to effectively deter potentially drunk drivers, however, The UNC Highway Safety Research Center found them to be proportionally more effective than sobriety checkpoints at arresting impaired drivers. A study in Minnesota in 2006 found that of the 290 saturation patrols done, there were 33,923 stops made, and of those stops 2,796 drivers were found to be impaired.[11] That's a rate of around 8%, far higher than sobriety checkpoints.

IV. Conclusion

[10] https://www.cdc.gov/motorvehiclesafety/calculator/factsheet/checkpoints.html
[11] https://www.cdc.gov/motorvehiclesafety/calculator/factsheet/patrols.html

The Supreme Court likely will not have an opportunity to overturn *Sitz* in the near future, nor will it likely do so if given the chance. Sobriety checkpoints have been outlawed in a number of states due to issues regarding their constitutionality at a state level however, and it would be my hope that the Pennsylvanian legislature would take a long and hard look at both their interest in preventing deaths related to drunk driving and alternative methods of reaching that goal. Safe, law-abiding, Pennsylvanian drivers do not deserve to have their lives taken by those who willfully ignore the risks involved with driving under the influence, but they also do not deserve to feel the fear and violation of an unreasonable seizure and search when they have done nothing to arouse suspicion by police.

MARIJUANNA DUI

BY

ERICA HANCOCK

While driving a vehicle, one should be alert, be able to think clearly, and be able to make rational decisions. Alcohol is a substance that impairs all these things. At a traffic stop, an officer can easily have a driver perform a field sobriety test, a breathalyzer test, or get a blood test to figure out a drivers Blood Alcohol Level (BAC). The legal limit for alcohol is 0.08. Another substance that impairs oneself is marijuana. Marijuana is now legal for recreational use in 9 states. So, how is it disciplined when it comes to operating a vehicle? Can one's level of substance, as it pertains to marijuana, be detected? What if it's needed for medical reasons? What is considered an "open container" when it comes to marijuana in a vehicle? These are all questions that need to be considered.

Assume you're an officer in Colorado and you pull a driver over for crossing the center line. The driver doesn't seem to be intoxicated, but there is an odor coming from the vehicle and the driver's eyes are red and glossy. For good measure, you perform a breathalyzer test, but it comes back clean. You still aren't fully convinced that the driver isn't under the influence of some substance. Marijuana is legal for recreational and medical use in Colorado, but there is a limit that can be present in your system while operating a vehicle. How should the officer detect the level of impairment?

Active marijuana in the system can be detected in the blood. Therefore, a blood test is needed. The legal limit while operating a vehicle is 5 nanograms. Anything past this is considered driving under the influence. There are questions raised when it comes to driving and

using marijuana for medical reason. This is where the law gets tricky because marijuana is often used for medical reason and alcohol is not. Marijuana has a very strong odor. This causes an issue because a driver can be completely sober, but the officer may smell marijuana and say that its probable cause to search the vehicle (Use of Medical Marijuana as Defense to Driving Offense, 2019). There are arguments as to whether or not this is right or wrong.

As far as open containers go, marijuana cannot have a broken seal in the passenger area of a car. It's illegal to consume marijuana on a public roadway. If an officer thinks you have consumed marijuana, they will perform a blood test. If a blood test is refused, then the driver is automatically considered a high-risk driver, and this could result in ignition interlock for up to 2 years.

Marijuana is regulated differently from one state to another. Some state have marijuana legalized but you aren't allowed to have any trace of it in your blood while you drive. Other states allow 5 nanograms as stated above. The issues with legalized marijuana is the lack of consistency within the law. The laws and regulations are different across the board, which are causing legal battles. The reasons for this most likely stem from the lack of agreement by people who are pro marijuana, and those who are anti marijuana.

Use of Medical Marijuana as Defense to Driving Offense or Challenge to Search of Motor Vehicle and Occupants **43 A.L.R.7th Art. 4 (2019)**

"Colorado Marijuana." *Colorado Marijuana* |, www.colorado.gov/marijuana.

"Safety." *FAQs: Cannabis and Driving* -, 20 Mar. 2017, www.codot.gov/safety/alcohol-and-impaired-driving/druggeddriving/marijuana-and-driving.

Operation Varsity Blues

Amanda Ginnis

Over twenty million people are enrolled in colleges and universities in the United States. Many perspective college students dream of getting into their top choice school and work hard to achieve academic excellence or perfect their chosen sport. These students will even lose sleep and forfeit a social life to ensure their admission. Somehow, not all of these students will be admitted to their first or second choice school. This happens because many of the country's famous and elite are involved in a criminal conspiracy to bribe college officials to guarantee admission for their children.

Earlier this year, a scandal arose over a criminal conspiracy to influence undergraduate admissions at American universities. In March, prosecutors unsealed a criminal complaint charging suspects with conspiracy to commit felony mail fraud and honest services mail fraud in violation of title 18 U.S.C. § 1349. The investigation was given the nickname "Operation Varsity Blues". The conspiracy took place between the years of 2011-2018 and is being investigated by the U.S. District Court for the District of Massachusetts, so far 51 people have been indicted, 33 of them are parents of college applicants. This case has blown up in the media due to some of the indicted being well known celebrities, including actresses Felicity Huffman and Lori Loughlin. This case is the largest of its kind to be prosecuted by the U.S. Justice department, with over $25 million being paid in bribes for college admissions.

The main organizer in this scheme was businessman William "Rick" Singer. Ironically, Rick Singer wrote a book entitled "Getting In; Gaining Admission to Your College of Choice". The book was full of legitimate and legal tips to hack the application process, such as how to

write the perfect college essay, or get a higher score on the ACT or SAT tests, etc. Despite this, he helped countless parents cheat their children's way into top universities such as Yale, UCLA, and Stanford.

Singer was in control of two firms involved in the conspiracy: Key Worldwide Foundation and The Edge College and Career Network. Key Worldwide is a nonprofit organization previously granted 501(c)(3) status; that status allowed Singer to avoid federal income taxes on the payments, while parents could deduct their "donations" from their own personal taxes. This status made it easy for Singer to launder the money for bribes.

There were two ways Singer would assist with getting fraudulent admission for students. The first way was cheating on college entrance exams. He would get in contact with psychologists to complete paperwork to falsely certify client's children as having a learning disability. This would give the student's more access to special accommodations, such as having extra time to take the entrance exams, in turn, boosting their scores. This paperwork was usually obtained for $4,000-$5,000. In other cases, he would hire people to pose as the students and take the tests for them. Someone guilty of taking tests for students was Harvard alumnus and college admission exam preparation director, Mark Riddell. Singer would pay him $10,000 per test. He was indicted in the investigation and pled guilty to one count of conspiracy to commit mail fraud and honest services mail fraud and one count of money laundering. The next way Singer helped students gain fraudulent admission was by fabricating sports credentials. He would do this by bribing college athletics departments and coaches directly, he would use Key Worldwide and bribe the coaches to label applicants as athletic recruits and have them highlight supposed athletic prowess or achievements by the students. Sometimes, he would even go far to use photoshop to insert a photo of a student's face onto a photograph of another person participating

in the sport to document a purported athletic activity. Oftentimes, a student would be "recruited" for a sport they have never even played!

Singer pled guilty in March of this year in the U.S. District court in Boston to conspiracy to commit money laundering, conspiracy to defraud the United States, and obstruction of justice. He has cooperated with authorities since and has helped the FBI with gathering incriminating evidence against his co-conspirators. He has said "I am responsible, I put all the people in place."

Rightly so, this scheme has enraged many people. So many students work hard to get into these elite colleges but instead are pushed to the side because other students' parents had more money and paid off the right people. But should the students who benefitted from the bribery be punished as well? It was recently announced by USC registrar's office that actress Lori Loughlin's two daughters are no longer enrolled at that university. Many argue that they should be 'kicked out" or forced to leave their universities. That opinion is understandable, but it is not fair. Children should not have to suffer any consequences on the behalf of their parents. They probably should not have been admitted in the first place, but they have been. The students did not break any laws, in most cases in this conspiracy, the children had no idea what their parents were doing, and they thought they legitimately were accepted. Or if they did know their admission was fraudulent and their parents told them to go, they felt insecure about going to these schools knowing they did not earn it. the fair thing to do is give the students a chance to retake the college admissions exams/ athletic performance tests to see if they can handle the curriculum or the sport. If they pass, they can stay and continue their studies. If not, they should be asked to leave so that someone more deserving can take place. The harsher punishments of fines and jail time should be reserved for the real criminals in this case, such as the parents, fake charities, the people taking the tests for others, the colleges, the coaches, etc.

About the Author

Amanda Ginnis is a full-time student in her senior year at Clarion University, graduating in December 2019 with a Bachelor's degree in Business Administration- Paralegal Studies. She works as a clerical assistant for Clarion Student's Association and as a team member at the Clarion University movie theater, she also volunteered for the university conduct board. Upon graduation she will start working as a paralegal for Dallas Hartman P.C. in New Castle, Pennsylvania.

Works Cited

Dickson, EJ. "Who Is Rick Singer, the Mastermind Behind the College Admissions Scam?" *Rolling Stone*, 13 Mar. 2019, https://www.rollingstone.com/culture/culture-news/rick-singer-college-admissions-scam-807736/?fbclid=IwAR179rgPQsBlrjXQH1D8x1quHO1bAILyGkzbQHPqIOAfPAB9_N9s7JJFR78.

"Investigations of College Admissions and Testing Bribery Scheme." *The United States Department of Justice*, 15 Nov. 2019, https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme.

US Census Bureau. "More Than 76 Million Students Enrolled in U.S. Schools." *The United States Census Bureau*, 4 June 2019, https://www.census.gov/newsroom/press-releases/2018/school-enrollment.html.

Vera, Amir. "Lori Loughlin's Daughters Are No Longer Enrolled at USC, University Says." *CNN*, Cable News Network, 22 Oct. 2019, https://www.cnn.com/2019/10/21/us/college-admissions-scandal-lori-loughlin-usc/index.html?fbclid=IwAR2hu2E_CIumC7RAR0EcyLVrIbs5jx3TOP9ZqJfX149Kderg_ZZC3q3beww.

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We wish to thank the Barbara Morgan Harvey Center for The Study of Oil Heritage for funding the publication of this Journal.

The Center is located in Suhr Library on Clarion University's Venango campus. It contains a fascinating collection of old photographs and texts concerning oil heritage. The center supports a lecture series highlighting the history of petroleum in our area. A few of the lectures are available to view at the Center's web site: www.clarion.edu/harveycenter.

In recognition of the Barbara Morgan Harvey Center for the Study of Oil Heritage and their support for this journal, each edition of the Clarion University Law Journal will contain an article on the history of the oil region of Western Pennsylvania.

The front cover is a picture of the Clarion County Court House. It was constructed between 1883 and 1885 and sits on the site of the first two courthouses which were destroyed by fire.

The back cover is a picture of the train station at Petroleum Centre, Pa. in what is now Oil Creek State Park. Petroleum Center was a company town started by the Central Petroleum Company. It quickly became known as the wildest town in the oil region filled with saloons and houses of prostitution. There was no law enforcement other than mob rule. One night a floating brothel came down Oil Creek and docked in Rouseville, Pa. In the middle of the night people of the town cut the barge lose. The inhabitants and their customers soon found themselves floating miles away on the Allegheny River. Such things were to stay largely in Petroleum Centre.

Today a passenger train runs from the Petroleum Centre Station through the sites of the old ghost towns along Oil Creek, past Drake Well, to Titusville, Pa. On select days tours of Petroleum Centre by those in period costume are included with the train ride.

Please forward any comments to shepard@clarion.edu

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