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Editor Introduction

Continuing with last year’s goal, the Law Journal for Social Justice will publish twice a year. Very special thanks to our staff and editors who are integral to accomplishing our mission of bringing social justice scholarship to the public.

Our tenth volume begins with Blazing a New Trail: How First-Generation Law Students Perform in and Experience Law School. This article examines how first-generation law students experience law school and dispels myths about their performance. First-generation students help diversify the legal profession, which in turn helps bring social justice issues to the forefront of the legal profession. Next, two articles discuss pressing issues in our criminal justice system. Daniel Rosenfeld examines the decision of charging juveniles as adult criminal defendants versus resolving the cases in juvenile court in A Child Until the End: Moving the Decision to Waive Juvenile Court Jurisdiction Until After Trial. Further, Megan Reed examines When Injustice Becomes Law: Legal Philosophy Principles Applies to Actual-Innocence Claims in Federal Habeas Petitions.

Next, the intersection of environmental rights and the First Amendment is examined by Kacee Benson in Pipelines, Protects, and Possible Punishment: Environmental Rights and the First Amendment in the United States. Finally, this volume concludes with an examination of the Violence Against Women Act and Special Domestic Violence Criminal Jurisdiction, which allows Native American tribes to exercise jurisdiction over select non-Indians.

Katherine A. Nelson
2018-2019 Editor-in-Chief
Blazing a New Trail: How First-Generation Law Students Perform in and Experience Law School
Andrea M. Flynn, Brian A. Sundermeier, & Jean Boylan

I. BACKGROUND

Law schools experienced a 30% decrease in admitted applicants in just five years (2010 to 2015),\(^2\) causing serious concern among law schools about their continued viability.\(^3\)

Admitting and enrolling first-generation students to law schools may be one way to offset some of the financial and other strains caused by decreased admission and enrollment. College students whose parents did not complete college are referred to as “first-generation students.”\(^4\)

Although numerous studies have examined first-generation undergraduate students, very little has been written about first-generation law students.\(^5\) Some preliminary descriptive data have been published,\(^6\) but there are still many unanswered questions about this population. Therefore,

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1 Andrea M. Flynn, PhD, DePaul University; MA, DePaul University; BS, Northern Illinois University. Currently an associate professor of psychology at Concordia University Chicago; Brian Sundermeier, PhD, University of Minnesota - Twin Cities; BA, St. Olaf College. Currently an associate professor of psychology at Concordia University Chicago; Jean Boylan, JD, Loyola Law School – Los Angeles; BS, Loyola Marymount University. Currently clinical professor at Loyola Law School- Los Angeles. Formerly a partner at Gibbs, Giden, Locher and Acret.


4 JENNIFER ENGLE & VINCENT TINTO, MOVING BEYOND ACCESS: COLLEGE SUCCESS FOR LOW-INCOME, FIRST-GENERATION STUDENTS (2008), http://www.pellinstitute.org/downloads/publications-Moving_Beyond_Access_2008.pdf. The term “first-generation student” is widely used in the academic literature to describe students whose parents did not attend or complete college.

5 For the purposes of this paper, law students whose parents did not attend or complete college will be referred to as “first-generation students.” Students whose parents completed college or beyond will be referred to as “other students.”

the goal of this study is to better understand the preparedness of first-generation law students and some of their experiences once enrolled, compared to other students (defined as students whose parents completed a bachelor’s degree). Based on the findings of this study, we suggest programmatic initiatives, tailored such that law schools can attract, retain, and graduate more first-generation students.

Law schools stand to gain from attracting more first-generation students. As previously described, increasing student diversity is a proposed solution to law schools’ unprecedented decline in enrollment. Although “diversity” is often used interchangeably with race/ethnicity, diversity represents a wide range of factors, including parental educational achievement. Increasing diversity among members is valued by the legal community and is also believed to promote the public’s perceptions of fairness and equity in the judicial system. Further, societal changes are altering the legal profession, with lawyers increasingly needing to understand and communicate with clients of varying backgrounds. Thus, expanding access to law school for first-generation students will not only ameliorate enrollment declines, but also help achieve larger goals within the legal community.

A. Why study first-generation law students?

Although 27% of all law students are first-generation, little is known about this population’s experiences in law school and their needs. For instance, we do not yet have answers to the following:

11 LAW SCH. SURVEY OF STUDENT ENGAGEMENT, ASSESSMENT IN LEGAL EDUCATION, supra note 5, at 10.
● Are first-generation law students equally distributed among law schools, particularly those that have higher rankings and more established reputations?
● Do first-generation students perform as well in law school as other students?
● Do first-generation students find law school more stressful than other students?
● Are first-generation students experiencing more stressors outside of law school than college experienced students?

B. What do we know about first-generation law students?

Even though over one-quarter of all law students are first-generation, there is reason to believe that these students may be drawn from highly resourced families. For instance, in a study of recent J.D. recipients, 57% of graduates from “top ten” law schools and 39% of graduates from all law schools had families in the top 10% of familial socioeconomic status (SES). Only 1% of graduates from the “top ten” law schools and 5% of graduates from all law schools had familial SES in the bottom quartile.

Although adjusting to law school requires adjustment for all students, many first-generation law students may also experience other forms of marginalization. Consider, for example, that in addition to being the first in their families to graduate from college, first-generation law students are much more likely to be Latino/a (48%) and African American (43%)

12 Id.
13 APA TASK FORCE ON SOCIOECONOMIC STATUS, supra note 7, at 27-28. In 2007, the American Psychological Association (APA) issued a statement regarding socioeconomic status (SES) and research. Education is very often a major component of SES calculations. Although SES can be defined in a wide variety of ways, it is inherently linked to educational attainment and access to education. The APA urged researchers to not only increase the inclusion of (SES) variables into research studies, but to also increase the complexity of the definitions and measurements used.
15 Id.
compared to Asian (25%) or White (23%). First-generation students are also likely to be struggling to obtain financial support. For instance, first-generation law students are less likely to receive merit-based scholarships and have higher student loan debt than their other peers. Although it has been argued that first-generation students’ weaker academic backgrounds contribute to differences in scholarships and student loan debt, closer examinations do not show dramatic differences between first-generation students and other students’ admissions criteria. For instance, first-generation law students had only slightly lower undergraduate GPAs (3.28 v. 3.32). First-generation students have lower average LSAT scores compared to other students (152.5 v. 155.9), but the value of the LSAT has been disputed. Furthermore, to increase diversity and economic equality, some schools, including Harvard Law School, have replaced the LSAT with other admissions determinants, such as the GRE or other less conventional metrics. Thus, it is unclear whether these average differences in LSAT scores are meaningful.

First-generation students may struggle to participate in activities that may increase their career opportunities. For instance, first-generation law students are less likely to be involved in law school activities, such as law journals, moot courts, and research with faculty, compared to other students. It is unclear, however, why first-generation law students’ participation in these

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17 LAW SCH. SURVEY OF STUDENT ENGAGEMENT, ASSESSMENT IN LEGAL EDUCATION, supra note 5, at 10.  
18 LAW SCH. SURVEY OF STUDENT ENGAGEMENT, LAW SCHOOL SCHOLARSHIP POLICIES, supra note 5, at 10.  
19 Id. at 12.  
20 LAW SCH. SURVEY OF STUDENT ENGAGEMENT, ASSESSMENT IN LEGAL EDUCATION, supra note 5, at 10.  
21 Id.  
22 Id.  
25 LAW SCH. SURVEY OF STUDENT ENGAGEMENT, ASSESSMENT IN LEGAL EDUCATION, supra note 5, at 11.
activities is lower, although it could be related to having additional responsibilities. For example, first-generation students work 25%-40% more outside of law school compared to their other peers.\textsuperscript{26} Despite this, they perform about as well in law school as other students (B average v. B+ average), possibly because they study more for their classes.\textsuperscript{27}

Although the LSSSE surveys are descriptive, these results of these studies do not provide information about whether these differences are statistically significant or practically meaningful. For instance, the 2014 LSSSE survey includes descriptive statistics such as 13% of first-generation students participate in moot court, compared to 15% of other students.\textsuperscript{28} In another example, the 2014 LSSSE report found that first-generation students were more satisfied with their advising experiences. Upon closer examination of third year students, 66% of first-generation compared to 65% of other law students were satisfied with advising.\textsuperscript{29} It is unclear how statistically or practically meaningful these findings are. Consequently, the goals of this study are to better understand the background characteristics, stressors, and law school performance of first-generation law students by using more in-depth statistical analyses that have been previously used with this population.

C. What do we know about first-generation undergraduate students?

Because so little is known about first-generation law students, many of our questions are based on the much more extensive literature on first-generation undergraduate college students. Some of the differences in first-generation students compared to other students may emerge even before students set foot into a college or university.\textsuperscript{30} For instance, students whose parents

\textsuperscript{26} Id.
\textsuperscript{27} See id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Ann Owens et al., Income Segregation Between Schools and School Districts, 53 AM. EDUC. RES. J. 1159, 1181 (2016). A review of the literature on children and adolescence is beyond the scope of this paper. However, there is evidence of increasingly inequality in schools. For instance, children and adolescents in the U.S.
attended college may have an extra boost in the college admissions process through “legacy admissions, defined as the preferential treatment of college applicants whose parent/grandparent attended the same institution.31 Because of the long history of exclusionary practices of colleges and universities in the U.S., first-generation, low-income, and applicants of color are negatively affected by legacy admissions practices.32

We also know that first-generation students are less likely to attend prestigious undergraduate institutions. As of 2000, students with parents with the highest levels of education experienced a 500% increase in admission to the most selective institutions compared to first-generation students.33 Furthermore, first-generation students are increasingly enrolling in institutions with the lowest selectivity.34 For instance, first-generation students are much more likely to enroll in two-year colleges (52% of first-generation students) than other students (28%).35 First-generation students being less aware of educational opportunities to which they are eligible compared to their other peers may explain this.36 By extension, we hypothesize that because undergraduate institutional quality is considered in law school admissions, first-generation students may have greater difficulty than other students entering highly-ranked law schools.

31 Kathryn Ladeweski, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 Mich. L. Rev. 577, 578 (2010) (many institutions believe that legacy admissions benefit the university through alumni donations and relations. However, Ladeweski (2010) analyzed institutions before and after utilizing “legacy admissions.” Her results showed that there was no change in alumni donation rates following the elimination of legacy admissions. She therefore concluded that the use of legacy admissions as a basis for university fundraising is misguided and incorrect).

32 Id.


34 Id. at 334.


Once enrolled in college, first-generation college students are less likely to graduate. The differences in graduation rates between first-generation and other students exist four, five, and six years after starting college. Students who are both low-income and first-generation students are even less likely to complete college. For instance, first-generation/low-income college students are four times more likely to leave school during their first year and only 11% of these students earn a bachelor’s degree after six years. Moreover, research also suggests this problem is getting worse, not better. Over the past thirty-five years, the bachelor’s degree attainment gap has doubled between first-generation/low-income and high-income students.

Matriculation and graduation difficulties experienced by first-generation students are probably at least partially explained by financial issues. For instance, first-generation college students’ parents have lower incomes. More specifically, 27% of first-generation students have family incomes of $20,000 or less per year and 77% have family incomes of $50,000 or less (compared to 6% and 29%, respectively, of other students). Moreover, accessing financial aid is increasingly difficult for first-generation students. To compensate, first-generation students take on higher amounts of student loan debt than other students. First-generation students also receive less social support for their educational endeavors than other students.

38 ENGLE & TINTO, supra note 3, at 9.
39 Id. at 2.
40 Id. at 5.
42 JEREMY REDFORD & KATHLEEN MULVANEY HOYER, supra note 34, at 20.
45 See Terenzini et al, supra note 40, at 9.
To compensate for having fewer financial resources, first-generation students are more likely to work outside of school to finance their education.\textsuperscript{46} Moreover, job responsibilities are more likely to impact first-generation students’ academic success than other students.\textsuperscript{47} These students have more responsibilities outside of school, including dependents to care for, compared to their peers.\textsuperscript{48} Family responsibilities are more likely to significantly impact first-generation students than other students.\textsuperscript{49} Additionally, first-generation college students tend to be older and have more geographic constraints that restrict their school choices.\textsuperscript{50}

Attending college requires adapting to a new culture, complete with norms of behavior, knowledge about opportunities and support systems, and ways of interacting with faculty, students, and staff. It is unknown whether first-generation students are less prepared for college, but these students report feeling less prepared.\textsuperscript{51} Other psychosocial factors may also impact first-generation students. For instance, once in college, first-generation students may experience a mismatch between the university culture and their background culture. More specifically, universities tend to promote individual independence and personal growth, whereas first-generation students report more motivation to pursue an education to help their families and


\textsuperscript{48}See Terenzini et al., supra note 40, at 8; PELL INST. FOR THE STUDY OF OPPORTUNITY IN HIGHER EDUC., supra note 3, at 8; see Inman & Mayes, supra note 45, at 9.

\textsuperscript{49}Stebleton & Soria, supra note 46, at 13-14.

\textsuperscript{50}Terenzini et al., supra note 40, at 8; PELL INST. FOR THE STUDY OF OPPORTUNITY IN HIGHER EDUC., supra note 3, at 8; Inman & Mayes, supra note 45, at 8; see Inman & Mayes, supra note 45, at 12.

\textsuperscript{51}Nancy Shields, \textit{Anticipatory Socialization, Adjustment to University Life, and Perceived Stress: Generational and Sibling Effects}, 5 SOC. PSYCHOL. EDUCATION 365, 372 (2002); see Inman & Mayes, supra note 45, at 13.
communities. Additionally, first-generation students tend to know less about the norms and unspoken rules of the college environment which may undermine their academic performance. First-generation students are less likely to feel they belong on their college campuses. Consequently, first-generation students are less likely to form important relationships on campus. More specifically, first-generation students are less likely to perceive faculty as being concerned with their well-being, communicate and connect with faculty university staff, study in groups with other students, and participate in extracurricular activities on campus. In part, this could be due to the fact that first-generation students report facing more discrimination on campus. First-generation students also report more feelings of stress and depression and lower mental health overall. Despite all of these challenges, first-generation college students may feel more commitment to completing their education, endorse hard-work as a personal value modeled in their families, and earn grades that do not differ significantly from other students.

To date, no studies exist directly comparing the likelihood of admission to law school between first-generation students to other students. However, students with more resourced

53 Id. at 1192.
55 Terenzini et al., supra note 40, at 10.
58 Stebleton, Soria & Huesman, supra note 54, at 13; see Stebleton & Soria, supra note 46, at 13-14.
59 See Inman & Mayes, supra note 45, at 15.
60 Melinda M. Gibbons & Marianne Woodside, Addressing the Needs of First-Generation College Students: Lessons Learned from Adults from Low-Education Families, 17 J.C. COUNSELING 21, 29 (2014).
61 Inman & Mayes, supra note 45, at 16.
families may have an admissions advantage.\textsuperscript{62} For instance, having “interesting” experiences, such as studying abroad or having a “gap year” of unpaid work, may only be accessible to students who can afford these opportunities.\textsuperscript{63} Students with more resourced backgrounds may have certain social connections, such as prestigious internships or mentoring relationships, of which other students may not even be aware.\textsuperscript{64} Furthermore, grade inflation is higher at private colleges and universities.\textsuperscript{65} National enrollment studies show that 23\% of college experienced students attend private colleges/universities, compared to only 9\% of first-generation students.\textsuperscript{66} Thus, first-generation students may be less likely to benefit from undergraduate grade inflation.

**Rationale**

Based on the undergraduate literature, first-generation college students generally experience a variety of obstacles that make educational attainment more difficult. Despite these challenges, many first-generation students enter law school. However, very little is known about these students. Therefore, the goal of this study is to employ additional statistical analyses to advance our understanding of the backgrounds and experiences of first-generation law students compared to other students. By answering these questions, we hope law school faculty and administrators can better meet the needs of first-generation students in their programs.

This paper addresses the following research questions:

Research Question 1: Do first-generation law students have lower LSAT scores than other students?

\textsuperscript{62} See Terenzini et al., *supra* note 40, at 8 (as previously stated, first-generation student not only lack the social capital of having a parent who completed college, but have lower family incomes and more student loan debt than other students).


\textsuperscript{64} *Id.*

\textsuperscript{65} STUART ROJSTACZER & CHRISTOPHER HEALY, GRADING IN AMERICAN COLLEGES AND UNIVERSITIES 4 (2010).

\textsuperscript{66} REDFORD & HOYER, *supra* note 34, at 10.
Research Question 2: How do first-generation law students perform in law school compared to other students?

Research Question 3: Does a higher-ranked law school enroll fewer first-generation law students than a lower-ranked law school?

Research Question 4: Do first-generation law students experience the law school environment as more stressful than other law students?

Research Question 5: Do first-generation law students experience more stressors outside of law school than other law students?

Research Question 6: What are the primary stressors experienced by first-generation law students and are these comparable to those experienced by other students?

II. METHODOLOGY

A. Participants

Participants were recruited from two law schools (Schools A and B) in a large, Midwestern city. At that time, School A was ranked among the top 100 law schools in the U.S., and School B was ranked among the top 20.67

Surveys were given to first, second, and third-year law (J. D.) students during the middle of their spring semester. All measures and procedures were approved by the respective Institutional Review Boards. Participants received an email from a law school administrator describing the study with instructions. Participants were told they would receive a $25 gift card to their university’s bookstore upon completion of the survey. Paper versions of the measures

were also made available to students who were unable to complete the measures online.

Participants’ grades for the semester were obtained from their transcripts at the end of the term.

A total of 322 participants completed the Law School Stressor Measure (LSSM), and of this group, 290 participants answered all the questions pertinent to the analysis described in the next section of the paper.

Demographically, the sample resembled the J.D. population at each respective law school. Of the 290 participants (see Table 1) who completed the study, the majority were White/European American (72%) and female (59%). Participants ranged from 21 to 39 years of age, with a mean of 26.46 (SD = 2.95).

Table 1

<table>
<thead>
<tr>
<th>Demographic characteristics of study participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent of participants (N = 290)</td>
</tr>
<tr>
<td>Institution</td>
</tr>
<tr>
<td>School A</td>
</tr>
<tr>
<td>School B</td>
</tr>
<tr>
<td>Year in law school</td>
</tr>
<tr>
<td>First-year</td>
</tr>
<tr>
<td>Second-year</td>
</tr>
<tr>
<td>Third-year</td>
</tr>
<tr>
<td>Missing</td>
</tr>
<tr>
<td>Gender</td>
</tr>
<tr>
<td>Male</td>
</tr>
<tr>
<td>Female</td>
</tr>
<tr>
<td>Other</td>
</tr>
</tbody>
</table>

68 Andrea M. Flynn at al., Law School Stress: Moving from Narratives to Measurement, 56 Washburn L.J. 259, 269 (2017) (explaining the LSSM was developed to measure the objective properties of the law school environment, rather than students’ subjective appraisals of stress. This measure was used to assess the direct effects of environmental stressors on individuals. Other processes, like perceptions of the stressor, reactivity, and coping strategies, are measured separately to identify their independent effects).

69 See Beth Morling, Research Methods in Psychology; Evaluating a World of Information 555 (2d ed. 2015) (explaining that in statistics, a mean represents an average of the values used in the analysis. The standard deviation is an average of how different each score is from the mean. The standard deviation can be used to interpret the variability within the data since a mean can be affected by extreme scores, outliers, or variability in general).
Missing
Race/ethnicity
European American 72%
Asian 8%
American/Asian/Other Pac. Islander 8%
Hispanic/Latino/a 7%
American Indian/Other 6%
African American 7%

B. Measures

**Grade Point Average (GPA).** Students’ semester GPA was collected from participants’ transcripts at the end of the semester. GPAs can range from 0.0 to 4.0 (4.0 = A, 3.67 = A-, etc.).

**Demographics.** Participants self-reported their race/ethnicity, gender, institution, age, year in school, and items about parents’ highest level of educational attainment. Consistent with other studies, participants were coded as “first-generation law students” if they reported that no parent completed high school or college. This group included students who had parent(s) who attended college but did not earn a bachelor’s degree. Students who had at least one parent complete a bachelor’s degree or beyond were coded as “other.”

**Law School Stressor Measure (LSSM).** The LSSM was used to measure stressors within the law school environment. The LSSM is comprised of 52 items. Each LSSM item assesses one objective stressor experienced by students in the law school setting. Participants are asked to rate the frequency of each occurrence during the students’ current academic term using the following scale: 0 = never (0% of the time), 1 = infrequently (25% of the time), 2 = sometimes (50% of the time), 3 = often (75% of the time), 4 = always (100% of the time). Of the 52 items, 27 of these items are reverse-scored, meaning that lower scores on these items

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70 See **Engle & Tinto**, supra note 3, at 2.
71 Flynn et al., supra note 70, at 259-87.
reflect higher stressor frequency. These items are reverse-scored before further calculations are conducted.

The LSSM is scored by calculating the LSSM composite and five subscale scores. The LSSM composite is calculated by averaging all 52 items. LSSM subscales were not used in this study. Ideally a measure such as the LSSM should consist of closely related items. One way to measure the internal consistency of a measure is with Cronbach’s alpha, possible scores ranging from 0 to 1, with higher scores indicating more variance attributed to a shared source. The Cronbach’s alpha for the LSSM composite was .90, reflecting that the LSSM is internally consistent.

**Social Readjustment Rating Scale-Revised.** The SRRS-R measures general life stressors (non-academic) and was used to measure students’ stressors outside of law school. The SRRS-R includes 51 events such as “divorce” and “change in residence.” Participants provide the number of times they experienced each event in the past 12 months. The frequency of each endorsed event is multiplied by the standardized “stressfulness” weight for that item. Weighted items are summed to calculate SRRS-R scores.

C. Procedure

Participants consented to the study, then completed the LSSM, SRRS-R, and demographic measure in the middle of their spring semester. Students’ GPAs were obtained at the end of the semester.

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72 *Id.* at 271.
75 See Hobson et al., *supra* note 76, at 7; Hobson & Delunas, *surpa* note 76, at 310.
III. Results

A. Preliminary Analyses

The primary purpose of this study was to examine whether first-generation students experience the law school environment differently than other students. In order to test these differences, an Analysis of Variance (ANOVA) was conducted on the variables of interest. Our selected (independent) variables were institution (School A vs. School B) and participants’ parents’ level of educational attainment (first-generation law student vs. other law student). The dependent measures varied according to the research question being tested. Each of the earlier mentioned research questions in this study will be addressed next.

B. Research Question 1: Do first-generation students have lower LSAT scores than other students?

Yes. Our analysis showed that first-generation law students had significantly lower LSAT scores than other peers (see Table 2), \( F(1, 286) = 11.41, p = .001, \eta^2 p = .038 \). This was a small effect, suggesting that only about 4% of the variance in student LSAT scores is explained by whether the student was a first-generation student. School A was ranked among the top 100 law schools in the U.S., and School B was ranked among the top 20.\(^{76}\) Not surprisingly, students in School B had higher LSAT scores (\( M = 168.3, SD = 6.00 \)) than students in School A (\( M = 158.79, SD = 5.00 \)), \( F(1, 286) = 89.75, p = .000, \eta^2 p = .239 \). This was a large effect, suggesting that 24% of the variance in student LSAT scores is explained by the type of institution attended.

\(^{76}\) U.S. News, supra note 68.
Table 2

**LSAT scores based on students’ parents’ educational background**

<table>
<thead>
<tr>
<th>Type of student</th>
<th>N</th>
<th>M (SD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>First-generation students</td>
<td>47</td>
<td>159.8 (7.79)</td>
</tr>
<tr>
<td>Other students</td>
<td>243</td>
<td>164.0 (6.98)</td>
</tr>
</tbody>
</table>

C. Research Question 2: How do first-generation students perform in law school compared to other students?

Our results showed that there was no evidence that law school GPA significantly differed between first-generation law students and other law students, $F(1, 286) = 2.96, p = .087 = .010$. Although first-generation students’ GPAs were slightly lower than other students’ (see Table 3), the statistical results suggest that this difference is well within the expected random variation in GPAs.

Again, not surprisingly, students in School B had higher GPA’s ($M = 3.58, SD = .353$) than students in School A ($M = 3.31, SD = .438$), $F(1, 286) = 20.86, p = .000, \eta^2 p = .068$.

Table 3

**GPA based on students’ parents’ educational background**

<table>
<thead>
<tr>
<th>Type of student</th>
<th>N</th>
<th>M (SD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>First-generation student</td>
<td>47</td>
<td>3.29 (.45)</td>
</tr>
<tr>
<td>Other student</td>
<td>243</td>
<td>3.47 (.42)</td>
</tr>
</tbody>
</table>
D. Research Question 3: Does a higher-ranked law school enroll fewer first-generation law students than other students?

We predicted that School A (lower ranked) would have significantly more first-generation law students enrolled in their program than School B (higher ranked). A Chi-square test showed that School A had significantly more first-generation law students than School B, $\chi^2 (1, N = 290) = 3.92, p = .048$. First-generation law students made up only 20% of students at School A and 12% of students at School B (see Table 4); smaller percentages than typically found at law schools as a whole (27%).

Table 4

<table>
<thead>
<tr>
<th>Number of first-generation students</th>
<th>Number of other-students</th>
<th>Total samples</th>
<th>Percentage of sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>School A</td>
<td>31</td>
<td>122</td>
<td>153</td>
</tr>
<tr>
<td>School B</td>
<td>16</td>
<td>121</td>
<td>137</td>
</tr>
</tbody>
</table>

E. Research Question 4: Do first-generation law students experience the law school environment as more stressful than other students?

Because the existing literature shows first-generation undergraduate students face a number of stressors and other obstacles that may interfere with their degree completion, we were interested in learning if the law school environment itself was more stressful to first-generation students. In order to do this, we analyzed both first-generation and other students’ scores on the LSSM.

There were no significant differences between first-generation students and other students (see Table 5), $F (1, 286) = .14, p = .704$, partial $\eta^2 p = .001$. Thus, first-generation students and
college-experienced students experience roughly the same level of stressors within the law school environment as other students. Interestingly, students at the lower-ranked school had higher LSSM scores ($M = 2.13, SD = .357$), i.e., more law-school related stress, than students at the higher-ranked school ($M = 1.77, SD = .374$), $F(1, 286) = 34.20, p = .000, \eta^2 p = .107$.

In addition to law school stressors, we were interested in knowing whether first-generation law students experience more stressors outside of law school. This question is addressed next.

Table 5

*LSSM scores based on institution and students’ parents’ educational background*

<table>
<thead>
<tr>
<th>Type of student</th>
<th>N</th>
<th>M (SD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>First-generation students</td>
<td>47</td>
<td>2.03 (.35)</td>
</tr>
<tr>
<td>Other students</td>
<td>243</td>
<td>1.95 (.42)</td>
</tr>
</tbody>
</table>

F. Research Question 5: Do first-generation law students experience more stressors outside of law school than other students?

Yes. Our results showed that first-generation law students had higher SRRS-R scores than other students (see Table 6), $F(1, 286) = 3.952, p = .048, \eta^2 p = .014$. There was not a significant difference in SRRS-R scores between School A and School B, $F(1, 286) = 3.301, p = .07, \eta^2 p = .011$. In the next question, we use descriptive statistics to explain which general life stressors are most frequently experienced by first-generation law students.
Table 6

**SSRS-R scores based on students’ parents’ educational background**

<table>
<thead>
<tr>
<th>Type of student</th>
<th>N</th>
<th>M (SD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>First-generation</td>
<td>47</td>
<td>420.72 (306.34)</td>
</tr>
<tr>
<td>Other</td>
<td>243</td>
<td>308.44 (282.59)</td>
</tr>
</tbody>
</table>

G. Research Question 6: What are the primary stressors experienced by first-generation law students?

Table 7 lists the general life stressors experienced by the first-generation students in this sample. The sample size listed (N) includes the number of participants who experienced each stressor at least one time in the past twelve months. Whereas the percentage of students experiencing stressors is similar for each category, there seem to be a few differences between first-generation and other students. Overall, it seems that first-generation law students are more likely than their other peers to have experienced financial problems, starting and stopping education, changing employers, being fired or laid off, and assuming responsibility for a loved one. Seeing that the factors outside of law school more greatly affect first-generation law students in comparison to other students, we suggest that efforts to retain and provide support for first-generation law students should particularly focus on the students’ total environment, both within and outside of law school.

Table 7

**SSRS-R stressors ranked by percentage affected**

<table>
<thead>
<tr>
<th>Stressor</th>
<th>First-Generation</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>57%</td>
<td>56%</td>
</tr>
<tr>
<td>Change in residence</td>
<td>Percentage 1</td>
<td>Percentage 2</td>
</tr>
<tr>
<td>---------------------------------------------------------</td>
<td>--------------</td>
<td>--------------</td>
</tr>
<tr>
<td>Experiencing financial problems / difficulties</td>
<td>55%</td>
<td>48%</td>
</tr>
<tr>
<td>Beginning / ceasing formal education</td>
<td>38%</td>
<td>23%</td>
</tr>
<tr>
<td>Major injury or illness to self</td>
<td>38%</td>
<td>31%</td>
</tr>
<tr>
<td>Changing employers or careers</td>
<td>34%</td>
<td>25%</td>
</tr>
<tr>
<td>Changing work responsibilities</td>
<td>28%</td>
<td>25%</td>
</tr>
<tr>
<td>Receiving ticket for violating the law</td>
<td>23%</td>
<td>16%</td>
</tr>
<tr>
<td>Attempting to modify addictive behavior to self</td>
<td>21%</td>
<td>19%</td>
</tr>
<tr>
<td>Loss of or major reduction in health insurance benefits</td>
<td>21%</td>
<td>16%</td>
</tr>
<tr>
<td>Being fired or laid off / unemployed</td>
<td>19%</td>
<td>7%</td>
</tr>
<tr>
<td>Death of a close family member</td>
<td>19%</td>
<td>19%</td>
</tr>
<tr>
<td>Major injury illness to a close family member</td>
<td>19%</td>
<td>14%</td>
</tr>
<tr>
<td>Changing positions, transfer, or promotion</td>
<td>17%</td>
<td>12%</td>
</tr>
<tr>
<td>Gaining a new family member</td>
<td>15%</td>
<td>9%</td>
</tr>
<tr>
<td>Separation or reconciliation with spouse/mate</td>
<td>15%</td>
<td>17%</td>
</tr>
<tr>
<td>Discovering/attempting to modify addictive behavior of close family member</td>
<td>13%</td>
<td>7%</td>
</tr>
<tr>
<td>Being a victim of a crime</td>
<td>11%</td>
<td>12%</td>
</tr>
<tr>
<td>Experiencing discrimination/harassment outside the workplace</td>
<td>11%</td>
<td>5%</td>
</tr>
<tr>
<td>Experiencing involved in an auto accident</td>
<td>11%</td>
<td>7%</td>
</tr>
<tr>
<td>Spouse/mate begins/ceases work outside the home</td>
<td>11%</td>
<td>5%</td>
</tr>
<tr>
<td>Assuming responsibility for sick/elderly loved one</td>
<td>9%</td>
<td>2%</td>
</tr>
<tr>
<td>Getting married/remarried</td>
<td>9%</td>
<td>4%</td>
</tr>
<tr>
<td>Obtaining a home mortgage</td>
<td>9%</td>
<td>5%</td>
</tr>
<tr>
<td>Self/close family member being arrested for violating the law</td>
<td>9%</td>
<td>6%</td>
</tr>
<tr>
<td>Experiencing a large/unexpected monetary gain</td>
<td>6%</td>
<td>4%</td>
</tr>
<tr>
<td>Major disagreement with boss/coworker</td>
<td>6%</td>
<td>6%</td>
</tr>
<tr>
<td>Being disciplined at work/demoted</td>
<td>4%</td>
<td>3%</td>
</tr>
<tr>
<td>Experiencing employment discrimination/sexual harassment</td>
<td>4%</td>
<td>2%</td>
</tr>
<tr>
<td>Adult child moving with parent/parent moving in with adult child</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Dealing with infertility/miscarriage</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Dealing with unwanted pregnancy</td>
<td>2%</td>
<td>0%</td>
</tr>
<tr>
<td>Death of a close friend</td>
<td>2%</td>
<td>5%</td>
</tr>
<tr>
<td>Employer reorganization/downsizing</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Failure to obtain/qualify for a mortgage</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Finding appropriate childcare/daycare</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Pregnancy of self/spouse/mate</td>
<td>2%</td>
<td>2%</td>
</tr>
<tr>
<td>Becoming a single parent</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Being the victim of police brutality</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Child develops behavior/learning problem</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Child leaving home</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Death of a spouse/mate</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Detention in jail or other institution</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>
IV. DISCUSSION

The goal of this study was to better understand first-generation students’ experiences in law school. Several interesting results emerged from this study. First, in terms of matriculation, first-generation students in our study were significantly less likely to attend the higher-ranked law school. As previously reported, an optimistic-sounding 27% of all law students are first-generation. However, our results suggest that first-generation students were more likely to enroll in a lower-ranked law school than a higher-ranked law school. More specifically, only 12% of students at the “top 20” law school were first-generation, compared to 20% of the student at the law school in the “top 100.” It is unclear from this study why this disparity exists. However, differences in prestige of undergraduate institution, problems with financing college, balancing responsibilities that compete with academics, less knowledge about how to succeed in college, and other psychosocial stressors likely contribute to fewer first-generation students’ enrollment in higher-ranked law schools. It is also possible that highly-educated parents may be able to provide a boost to their children’s admission through their legacy status. Although it is unknown how legacy admissions affect law school admissions, there is at least some evidence

77 See LAW SCH. SURVEY OF STUDENT ENGAGEMENT, supra note 5, at 10.
for their impact on undergraduate admissions. Future studies should examine if and how these factors play a role in first-generation students’ acceptance to law school.

Law school rankings are controversial and criticized. Empirical research demonstrating that attending a highly-ranked law school results in a better education or better legal skills is scant. However, the U.S. News and World Report Law School Rankings law school rankings are still widely used and known. Although this reasoning may be somewhat circuitous since job-placement is one of the most heavily weighted criteria in the rankings by U.S. News and World Report, the ranking of one’s law school can impact a student’s career trajectory. For instance, some evidence exists to suggest that students attending “top 14” law schools are more likely to find full-time employment and also work at “top law firms.” Understanding how one’s law school prepares a student for the job market is essential; competition for jobs in the legal profession is fierce, with just 61.8 percent of graduates securing jobs that are full-time, long-term, and that require bar examination passage. Although this study did not follow students post-graduation, it stands to reason that first-generation students are more likely to struggle to find employment in the legal profession after law school if they disproportionately enroll at lower-tiered law schools.

78 Ladewski, supra note 30, at 577.
80 Id. at 792.
Second, first-generation students had significantly lower LSAT scores than other students upon entering law school. However, the effect of the difference between first-generation students and other students is rather small, with first-generation status accounting for only 4% of the variance in students’ LSAT scores. In addition to the small difference in LSAT scores, it is possible that first-generation students may have less access to LSAT preparation courses and materials. For instance, Kaplan offers LSAT training starting at $799 up to $2599. Given the numerous financial constraints described earlier, it stands to reason that many first-generation students may be unable to afford LSAT preparation resources.

Perhaps more importantly, we did not find a significant difference in first-generation students’ law school GPAs compared to their other peers. In other words, despite slightly lower LSAT scores, first-generation students performed as well as other students once in law school. This is particularly impressive considering that first-generation students work a great deal more outside of law school compared to their other peers. Our findings also cast more doubt on the utility of the LSAT. Using the LSAT as a primary determinant of admission to law school has been challenged and criticized. Even according to the Law School Admissions Council, the LSAT is only weakly to moderately correlated with law students’ first year grades. Moreover, the LSAT is only one tool for evaluating students’ potential for success in law school. Our results show that this may be especially true for first-generation students. Thus, the applications of first-generation law students should potentially be examined more holistically, with greater

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85 See LAW SCH. SURVEY OF STUDENT ENGAGEMENT, supra note 5, at 11.
86 Edwards, supra note 22, at 159; Kidder, supra note 22, at 1057.
87 See LAW SCH. ADMISSION COUNCIL, LSAT Scores as Predictors of Law School Performance, https://www.lsac.org/jd/lsat/your-score/law-school-performance (last visited Sept. 9, 2018) (finding that the correlation coefficients between LSAT scores and first-year grades in law school range from .12 to .61 based on LSAC’s median correlation coefficient of .41). But see PETT ET AL., supra note 75, at 60 (explaining that a correlation coefficient of .12 is “low” and coefficients of .41 and .61 are “moderate.” Thus, the LSAT is only “moderately” related to grades in the best-case research outcomes).
emphasis on other factors that may demonstrate their potential to succeed in law school. Since this study’s results show that first-generation law students perform just as well as other students, and that law school applications have decreased over the past several years, we conclude that initiatives aimed at attracting first-generation students is a viable strategy for law schools.

We were also interested in whether first-generation students experienced higher levels of stressors within the law school environment. Previous studies have shown that experiencing higher levels of law school stressors is associated with higher levels of anxiety, depression, and overall mental health symptoms. Our results showed that first-generation students did not find the law school environment to be more stressful than other students. On the other hand, first-generation students experienced significantly more stressors outside of law school than their other peers. Some of the most commonly experienced stressors were moving, having financial problems, and dealing with ill or injured family members. These findings have important implications for law schools. To more fully promote the performance of first-generation law students, support services should be directed at factors outside of law school, rather than those within the law school itself. Since preliminary evidence suggests that first-generation students participate less in activities like law journals, moot courts, and research with faculty, providing financial aid and other support, like mentoring and emergency assistance, is essential for first-generation students.

V. LIMITATIONS OF THIS STUDY AND FUTURE DIRECTIONS
One of the primary limitations of this study is that data was collected from only two law schools. Within these schools, only 16% qualified as a first-generation student, meaning that

88 See LAW SCH. ADMISSION COUNCIL, supra note 1.
89 See Flynn et al., supra note 70, at 259-287; Andrea M. Flynn et al., The Role of Law School Stressors on Depression, Anxiety, and Overall Psychological Distress in Law Students, J.C. COUNSELING, in press.
90 See LAW SCH. SURVEY OF STUDENT ENGAGEMENT, supra note 5, at 11.
they did not have a parent who finished college or another advanced degree. It is unknown whether first-generation students apply to or are accepted by highly-ranked institutions as frequently as other students. Since we did not examine this in our study, further investigation is warranted.

Another limitation of this study is that we showed that first-generation students are more likely to attend a lower-ranked law school, but we did not follow-up with these students to systematically examine their employment rates or other long-term outcomes. It would be useful to further disentangle how the rank of a student’s law school, the student’s performance in law school, and the impact of support services affects their career trajectory.

**Conclusion**

This study described some important and promising findings in terms of first-generation law students’ experiences within law school. Namely, first-generation students’ LSAT scores are slightly lower than other students, but they do not have lower law school GPAs. Our lower-ranked law school attracted a higher proportion of first-generation students. In general, students in the lower-ranked law school experienced higher law school stressors, but this did not disproportionately affect first-generation students. Finally, first-generation law students experienced greater stressors outside of law school. In addition, the stressors experienced by first-generation law students differed from the stressors experienced by other law students. Efforts aimed at supporting first-generation students should integrate these findings.

Beyond the findings in this study, we believe this paper represents an important alliance between the psychological and legal communities. We hope this study represents the first of many studies that use scientific methodologies to promote law students’ achievement and well-
being. More specifically, future studies should examine which types of support programs work for first-generation law students, as well as how they work.
A Child Until the End: Moving the Decision to Waive Juvenile Court Jurisdiction Until After Trial

By: Daniel Rosenfeld

I. Introduction

In June 2009, fourteen-year-old John Smith shot and killed another teenager to prove his allegiance to a gang. A few months later, in the same city, fifteen-year-old Andrew Lorek did the same. While John remained in juvenile court, Andrew was waived to adult court. Both teenagers pleaded guilty. Andrew was sentenced to twenty-eight years in adult prison and will be released when he is forty-three. John will be released when he is twenty-one.

Waiving a juvenile into the adult system can have dramatic consequences. Most of those waived from juvenile court to adult court are not charged with a violent crime and are disproportionately youth of color. Once indicted as adults, juveniles are five times more likely to be sexually assaulted and five times more likely to commit suicide than an adult. Moreover, juveniles, who are waived, receive longer sentences than those charged with

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2 A pseudonym.


4 Id.

5 Id.

6 Id.

7 Id.


9 Id.

10 Id.; Robin Walker Sterling, Fundamental Unfairness: In Re Gault and the Road Not Taken, 72 MD. L. REV. 607, 661 (2013) (showing that youth of color are more likely to be transferred to adult court).

11 Childhood on Trial: The Failure of Trying and Sentencing Youth in the Adult Criminal Court, supra note 7, at 2.

12 Id.
comparable crimes and who are not waived. With such dire consequences for being waived, the waiver hearing must be as accurate as possible in assessing juveniles’ culpability, dangerousness, and amenability to rehabilitation when deciding who should be waived.

All fifty states have separate court systems for juveniles and a mechanism to waive juveniles accused of serious crimes to adult court. In most states, juvenile courts have fewer procedural protections and correspondingly less disciplinary power. Therefore, waiver to adult criminal court triggers more protections, but also more exposure to punishment.

In every state save one, the waiver to adult court occurs before guilt is adjudicated. In the exception, New Mexico, the decision is made after an adjudication of guilt. Shifting the decision until after trial allows the juvenile to retain the many advantages of the juvenile system while enjoying the protections of the adult system.

Part I of this Note examines the history, rationale for, and current state of the juvenile waiver system. Part II compares the New Mexico model with the Tennessee juvenile waiver system, which is an example of a representative state waiver system. Finally, Part III explains the

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13 Barry C. Feld, Juvenile and Criminal Justice Systems’ Responses to Youth Violence, 24 CRIME & JUST. 189, 191 (1998) (“[V]iolent offenders transferred to adult courts receive much harsher sentences than comparable violent offenders who were not transferred . . . .”).

14 See generally Jessica Lahey, The Steep Costs of Keeping Juveniles in Adult Prisons, ATLANTIC (Jan. 8, 2016), https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/ (explaining that hundreds of thousands of juveniles are tried each year as adults. Once there, they are more likely to be assaulted and more likely to reoffend); Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America, CAMPAIGN FOR YOUTH JUST. 4–6 (Nov. 2007), http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf (noting that prosecuting juveniles as adults has negative impacts on their mental health and education and makes them more likely to reoffend).


16 Id.

17 Feld, supra note 12, at 191; Martin Guggenheim, Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing, 47 HARV. C.R.-C.L. L. REV. 457, 471 (2012) (“[T]he preeminent quality of these cases is that . . . the only thing the juveniles sought was to secure the same rights enjoyed by adults. They won this argument three times and lost twice. [T]he entire second period of . . . cases . . . focused almost exclusively on whether juveniles deserve equal rights possessed by adults.”).

18 Teigen, supra note 14.


20 Teigen, supra note 14; See generally Beth Schwartzapfel, There Are Practically No Juveniles in Federal Prison — Here’s Why, THE MARSHALL PROJECT (Jan. 27, 2016, 7:13 AM), https://www.themarshallproject.org/2016/01/27/there-are-practically-no-juveniles-in-federal-prison-here-s-why (https://perma.cc/2VNM-NCPM) (explaining the federal juvenile court waiver system generally only applies to crimes committed on tribal land or in Washington D.C. As of December 2015, there are only twenty-six juveniles in federal custody.).
advantages that the New Mexico system provides in sorting between juveniles who should be waived to the adult system and those who should not.

II. Why Have a Juvenile Waiver Mechanism?

Part I provides a general background of juvenile waiver. Juvenile waiver has a complicated history and a variety of justifications; correspondingly, it has developed into a number of different forms. Section A describes the history of the juvenile court and the development of the waiver process. Section B discusses theoretical justifications for waiving juveniles into adult court. Section C outlines the different kinds of waiver systems that have developed, with an emphasis on judicial waiver.

A. The History of Juvenile Waiver

There cannot be juvenile waiver without a juvenile court. The original juvenile court and correctional system were part of the reforms made by the “child savers.”21 “Child savers” were intended to “save” children from being institutionalized.22 First established in the early 1900s, these courts were designed to divert children from the criminal justice system by creating a special structure for them.23 The early juvenile courts fully embraced the rehabilitative ideal and were therefore paternalistic.24 They attempted to correct juveniles’ behavior rather than punish them.25 Positivist criminology theory dominated the reform movement, arguing that crime was not a product of free will, but rather an artifact of disease and circumstance.26 Using the parens

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22 Id. at 9.
23 Id. at 10.
24 Id. at 12; See also In re Gault, 387 U.S. 1, 26 (1967) (“The . . . proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and . . . [the] benevolent and wise institutions of the State provided guidance and help ‘to save him from a downward career.’”).
25 See PLATT, supra note 20, at 16.
26 Barry C. Feld, The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes, 68 B.U. L. REV. 821, 824 (1988) (“By attributing criminal behavior to external forces, the Progressive movement reduced an actor's moral responsibility for crime . . . focus[ing] efforts to reform rather than punish the offender. Criminology borrowed both methodology and vocabulary from the medical profession; pathology, infection, diagnosis, and treatment provided popular analogues for criminal justice professionals.”).
patriae model as justification, the juvenile courts began to emphasize treatment and control as the appropriate response to juvenile misbehavior.

The early juvenile court model focused on having an experienced judge develop an individualized treatment plan for each child, with social services personnel, clinicians, and probation officers providing support.

Principles of psychology and social work guided decisionmakers. The court collected as much information as possible about the child—his life history, character, social environment, and individual circumstances—on the assumption that a scientific analysis of the child's past would reveal the proper diagnosis and cure.

Reformers’ focus on treatment led them initially to exclude lawyers, juries, rules of evidence, and formal procedures from delinquency proceedings. Their concern was not guilt or innocence, but rather the underlying cause of the offense. To this end, sentences were “indeterminate, nonproportional, and continued for the duration of the child’s minority.” Sentences were non-proportional because the goal was to “cure” juveniles, not punish them. For example, in 1964, fifteen-year-old Gerald Gault was sentenced to a state reformatory institution for an indeterminate period, perhaps until he was twenty-one, for making an obscene phone call. An adult similarly charged would have faced a fifty-dollar

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27 Sarah Abramowicz, Note, English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody, 99 Colum. L. Rev. 1344, 1346–47 (1999) Parens Patriae is the doctrine that the State, as the “parent” of the weak, can intervene in the lives of citizens, namely children, mentally ill, and mentally-handicapped.
28 Feld, supra note 25, at 893.
30 Feld, supra note 25, at 825.
31 Barry C. Feld, The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts, 38 Wake Forest L. Rev. 1111, 1139 (2003) (“Reformers envisioned a social welfare system rather than a judicial one, and they excluded lawyers, juries, rules of evidence, and formal procedures from delinquency proceedings.”).
32 Janet E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C. L. Rev. 1083, 1101 (1991) (“[T]rial by jury was eliminated in most juvenile courts as irrelevant to the proper determination before the court, because the court was less concerned with factually determining whether the child had broken the law than with sensitively diagnosing and treating the child's social pathology.”).
35 Id. at 159 (citing In re Gault, 387 U.S. 1, 4 (1967)).
fine or two-month sentence.\textsuperscript{36} Non-proportional and indeterminate sentencing was long deemed constitutional under the theory it was rehabilitative, not punitive.\textsuperscript{37}

This changed in the 1960s. Liberal reformers began to recognize that the rehabilitative model had deprived juveniles of constitutional protections while at the same time failing to deliver rehabilitation.\textsuperscript{38} In 1966, the Supreme Court in \textit{Kent v. United States} required effective investigation into the facts before a waiver to adult court, and to have those findings stated on the record at a hearing.\textsuperscript{39} However, the Court did not guarantee all the trappings of the adult system at the waiver hearing, such as a grand jury, bail, or the right to a jury trial.\textsuperscript{40} A few years later, the Court in \textit{In Re Gault} recognized additional juvenile due process rights, including the right to notice of the charges, right to counsel, right to cross-examine witnesses, the privilege against self-incrimination, right to a transcript of the proceedings, and right to appellate review.\textsuperscript{41} These cases provided more due process rights to juveniles, both at the waiver hearing and the adjudication hearing.

\textit{Kent} presaged the juvenile system becoming more punitive.\textsuperscript{42} The new model of juvenile justice, called the “Just Deserts” model, started in Washington State in the 1970s.\textsuperscript{43} The “Just Deserts” model focused on punishing juveniles for their crimes.\textsuperscript{44} It arose in a handful of states, replacing the Progressive Reformers’ informal, individualized, and indeterminate system with one of strict rules of evidence and determinate sentencing, creating a system that was identical to the adult criminal court, except for the absence of the jury trial.\textsuperscript{45}

\textsuperscript{36 Id.}
\textsuperscript{37 Id. at 154.}
\textsuperscript{38 ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 8 (2008).}
\textsuperscript{39 Kent v. United States, 383 U.S. 541, 561 (1966) (“[W]e hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor[e]. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact.”).}
\textsuperscript{40 Id. at 562 (“We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.”).}
\textsuperscript{41 In re Gault, 387 U.S. 1, 1 (1967).}
\textsuperscript{42 Janet E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C. L. REV. 1083, 1110 (1991) (arguing that creation of “adolescence” required breaking down the binary of adulthood and childhood. This intermediary stage meant that some adolescents were as culpable as adults and some were not. Therefore, juvenile courts needed the ability to punish as adults).
\textsuperscript{43 Id. at 1106.}
\textsuperscript{44 Id. at 1106-07.}
\textsuperscript{45 Id. at 1109.}
Over the next twenty years, juvenile justice systems oscillated between the punitive and rehabilitative models.\textsuperscript{46} An increase in juvenile violent crime in the 1990s prompted a “moral panic.”\textsuperscript{47} The rising threat caused legislatures to shift jurisdiction into adult court for more and more violent, and even non-violent, juvenile crimes.\textsuperscript{48} In fact, even New Mexico’s novel approach was adopted in 1993 in response to the juvenile system’s inability to waive any but the most serious juvenile offenders.\textsuperscript{49} Recently, the moral panic seems to have subsided; legislators and other advocacy groups have started trying to repeal the enhanced juvenile punishments.\textsuperscript{50} The system that remains is not the paternalistic model that the Progressive Reformers imagined, but it is no longer as unforgiving as its strictest form in the 1990s.\textsuperscript{51}

B. Theory of Juvenile Waiver

There are many possible purposes for waiving juveniles from juvenile to adult court. Section B will discuss three. First, Subsection 1 will discuss the incapacitation-related reasons society might want to try juveniles in adult court. Second, Subsection 2 will outline how a waiver procedure could have deterrence value. Third, Subsection 3 will analyze how a waiver procedure might allow for consideration of mitigating factors. Waiver creates a mechanism to remove juveniles not deemed appropriate for the juvenile system.

\textsuperscript{46} SCOTT & STEINBERG, supra note 37, at 8-10.
\textsuperscript{47} Id. at 10.
\textsuperscript{48} Id. at 11.
\textsuperscript{50} SCOTT & STEINBERG, supra note 37, at 11; Nicole D. Porter, The State of Sentencing in 2015: Developments in Policy and Practice, THE SENTENCING PROJECT (Feb. 10, 2016), http://www.sentencingproject.org/publications/the-state-of-sentencing-2015-developments-in-policy-and-practice/#VI [https://perma.cc/S58Z-BJX3] (explaining that ten states have restricted adult court jurisdiction by mandating juveniles sentenced to confinement must be held in youth facilities; other states have increased the minimum age to transfer to adult court).
1. **Incapacitation**

Incapacitation could potentially justify trying some juveniles in adult court, thereby requiring a waiver system between juvenile and adult court.\(^{52}\) Incapacitation seeks to maximize public utility by restraining people from committing previous offenses again.\(^{53}\) It can be justified on utilitarian grounds, as restricting one person’s liberty decreases that person’s utility while greatly increasing the utility in everyone else: their potential victims.\(^{54}\) Whether the net utility for society is negative or positive likely depends on the crime, the criminal, and the social costs. Incapacitating a criminal who inspires terror in her fellow citizens will probably create a net positive in utility. Incapacitating a one-time, non-violent offender might create a net negative utility because the social costs incurred to incapacitate the individual outweigh the public benefit of having that person incapacitated.\(^{55}\)

Under the theory of incapacitation, a juvenile waiver system allows society to better protect itself by restraining those juveniles who commit anti-social acts. Lenient treatment of all juveniles would sacrifice public protection, leaving some incorrigible juveniles free to harm others.\(^{56}\) Having a juvenile waiver system allows society to incapacitate the most dangerous offenders by subjecting them to the more forceful penalties of the adult court while keeping the vast majority of juveniles in juvenile court.


\(^{54}\) *Id.* at 7.

\(^{55}\) *Id.* at 2–3.

\(^{56}\) Arya *supra* note 51, at 127 (citing Graham v. Florida, 560 U.S. 48 (2010)).
2. Deterrence

Some proponents of the juvenile waiver system claim it provides deterrence value.\textsuperscript{57} Juveniles might not commit crimes because they know that they are subject to a harsher penalty if the juvenile court waives its jurisdiction. Conversely, if juveniles know beforehand that they face at most a short sentence, they might be more willing to offend. The practical value of deterrence for juveniles is contested.\textsuperscript{58} Juveniles might not be cognitively developed enough to be deter-able; neuroscience research indicates that juveniles have limited ability to perceive future threats or weigh them appropriately.\textsuperscript{59} During adolescence, logical reasoning ability gradually improves, slowly increasing juveniles’ ability to anticipate the future consequences of their choices.\textsuperscript{60} Further, juveniles’ tendency towards emotional arousal increases, causing them to have more intense emotional responses.\textsuperscript{61} Moreover, there is a large social shift as relationships with peers become more important and relationships with parents become less so.\textsuperscript{62} Finally, the desire for independence increases, causing some juveniles to act in opposition to authority.\textsuperscript{63} The Supreme Court cited all of these factors as concerns in the landmark case, \textit{Roper v. Simmons}, which abolished the death penalty for juveniles, in part because of deterrence concerns.\textsuperscript{64}

Empirical evidence indicates that the Supreme Court’s concerns were well-founded; juveniles are not deterred by the possibility of waiver into adult court.\textsuperscript{65} Two studies have evaluated the possible deterrent effect of juvenile waiver. A 1978 study analyzing the effects of New York State lowering the eligible age for waiver for murder from sixteen to thirteen found no difference in arrest rates, despite the well-publicized change.\textsuperscript{66} A second study conducted in


\textsuperscript{58}Id. at 260–63; Laurence Steinberg & Elizabeth S. Scott, \textit{Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty}, 58 AM. PSYCHOL. 1009 (2003).

\textsuperscript{59} Steinberg & Scott, supra note 57, at 1016–17.

\textsuperscript{60} SCOTT \& STEINBERG, supra note 37, at 34.

\textsuperscript{61} Id. at 34.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

\textsuperscript{65} Ward, supra note 56, at 260–63.

\textsuperscript{66} Id. at 261 (“Despite the fact that the law was well-publicized and effectively implemented, the threat of the harsher consequences of the adult system appeared to have little effect on the criminal behavior of New York
1981 analyzed the effect of a new mandatory waiver statute on arrest rates in Idaho.\textsuperscript{67} The study considered arrest rates both before and after, and in neighboring states, and found no change.\textsuperscript{68} In fact, neighboring states Montana and Wyoming had lower comparative arrest rates after controlling for demographics, “suggesting that juveniles in Idaho were not discouraged by the rigid new law.”\textsuperscript{69}

Thus, although deterrence motivates those who implement juvenile waiver laws, new neuroscience research and empirical studies have cast doubt on how effective juvenile waiver actually is as a deterrent.

3. Mitigation

A third reason for a juvenile waiver system is that it allows for a nuanced consideration of mitigating factors that weigh in favor of retaining some juveniles in juvenile court. Without a waiver system, juveniles would either all be tried in juvenile court or all be tried in adult court. Having a waiver system allows for consideration of factors for and against trying the juvenile as an adult.

There are numerous endogenous and exogenous factors that influence the waiver decision.\textsuperscript{70} Endogenous factors include facts specific to the particular individual, which might include short-term decision-making skills,\textsuperscript{71} conception of a future self,\textsuperscript{72} and tolerance for peer pressure.\textsuperscript{73} Exogenous factors include economic background, role models and opportunities for economic improvement.\textsuperscript{74} Finally, the Supreme Court has suggested that a child’s character is

\footnotesize{\textsuperscript{67} Id. at 261–62 (“Researchers tracked arrest data for five years before and five years after implementation of the law and compared arrest rates with the neighboring states of Montana and Wyoming over the same period . . . . As with the New York study, no notable evidence of general deterrent effects was found.”).}

\footnotesuperscript{68} Id.

\footnotesuperscript{69} Id.

\footnotesuperscript{70} Steinberg & Scott, supra note 57.

\footnotesuperscript{71} Id. at 1011–12.

\footnotesuperscript{72} Id. at 1012.

\footnotesuperscript{73} Id. at 1012–13.

not fully formed, and that trial courts should be able to consider character when making a waiver determination.\textsuperscript{75}

Juvenile waiver allows judges to consider facts about individual juveniles when determining if they are able to be rehabilitated or if they are incorrigible and need to be incapacitated. In contrast, if there is no waiver system, then no individualized circumstances can be considered. \textsuperscript{76} Instead, juveniles accused of certain crimes will automatically go to adult criminal court, and juveniles accused of other crimes will not go to adult criminal court.

C. Kinds of Waiver

Every state has a juvenile waiver system.\textsuperscript{77} There are three types of waiver: statutory, judicial, and prosecutorial.\textsuperscript{78} This Note is concerned with judicial waiver, so it will only briefly summarize statutory and prosecutorial waiver.

A statutory waiver causes juveniles to be waived automatically to adult court even if they are charged with an enumerated crime under a designated maximum age.\textsuperscript{79} The legislature designates certain crimes as requiring adult court jurisdiction and deserving of adult sanctions.\textsuperscript{80} This typically happens when a legislature believes the punishment for the offense exceeds the maximum sanctions in the juvenile court.\textsuperscript{81} While statutory waiver eliminates the opportunity for judicial bias, it focuses only on the alleged crime and not on the juvenile as an individual.\textsuperscript{82}

\textsuperscript{75} See Roper v. Simmons, 543 U.S. 551, 570 (2005).
\textsuperscript{76} See, e.g., A.B.A. Div. for Pub. Educ., Part 1: The History of Juvenile, Am. B. Ass’n 4 (2007), https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf [https://perma.cc/LW8F-CHEJ] (explaining at common law, children under age seven were not eligible for criminal court because they, by rule, could not possess the appropriate mens rea. Children over fourteen were punished as adults. Children aged eight to thirteen were treated on an individual basis.).
\textsuperscript{77} Teigen, supra note 14.
\textsuperscript{79} Feld, supra note 28, at 488–89 (discussing statutory waiver from juvenile court).
\textsuperscript{80} \textit{Id.} at 494.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} Guttman, supra note 51, at 521–22. For an example of statutory waiver, see Part II, Section B of this Note \textit{infra}, which discusses New Mexico’s statutory waiver of first-degree murder.
Prosecutorial waiver allows the prosecutor to decide where to charge the juvenile. When both adult and juvenile courts have concurrent jurisdiction, the prosecutor has discretion where to file charges.

Prosecutorial waiver typically works in one of two ways. First, certain crime and minimum age combinations can be filed in either court. For example, in Georgia, a juvenile accused of assault between the ages of thirteen and seventeen can be tried in either juvenile or adult court. Second, some “once an adult always an adult” statutes allow prosecutors to choose to file charges in adult court if a juvenile has ever been prosecuted in adult court for a previous crime. Therefore, if a juvenile was previously waived into adult court via statutory waiver or judicial waiver, he or she can be tried in adult court again, with the prosecutor’s discretion, if charged with another crime.

Judicial waiver is far more common than prosecutorial or statutory waiver, although many states use two or even all three kinds of waiver. Judicial waiver allows a juvenile court judge to waive jurisdiction and have the case bound over to adult court. United States v. Kent formalized many procedural requirements of judicial waiver, including a right to counsel, a right to a full investigation into the charges, and a right to formal hearing with the findings of the investigation stated on the record. Breed v. Jones applied double jeopardy protections to

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83 Vanella, supra note 77, at 742–43.
84 See, e.g., MONT. CODE ANN. § 41-5-206(1) (2017); See also Juleyka Lantigua-Williams, Treating Young Offenders Like Adults Is Bad Parenting, ATLANTIC (Sept. 9, 2016), https://www.theatlantic.com/politics/archive/2016/09/direct-file-in-california-and-prop-57/498641 [https://perma.cc/WGR7-5WU2] (explaining the characteristics of the district attorney may influence whether or not a juvenile will be “direct filed” into adult court by finding Republican district attorneys “direct file” more juveniles than Democratic ones do).
85 Vanella, supra note 77, at 742–43.
87 OKLA. STAT. ANN. tit. 10A § 2-5-204(H) (West 2018) (“Except as otherwise provided in the Youthful Offender Act, a person who has been certified as a youthful offender shall be prosecuted as a youthful offender in all subsequent criminal proceedings until the youthful offender has attained eighteen (18) years of age.”).
88 Vanella, supra note 77, at 744–45.
89 PATRICK GRIFFIN ET AL., U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 3 (Sept. 2011), https://www.ncjrs.gov/pdfs1/ojjdp/232434.pdf [https://perma.cc/2L3J-LMWH] (Forty-five states have judicial waiver. Twenty-nine states use statutory waiver and only fifteen use prosecutorial waiver. All fifty states have some combination of the three.).
90 Vanella, supra note 77, at 738–41.
juvenile court by forbidding states from trying a juvenile in adult court and then again in juvenile court if acquitted. 92

Judicial waiver 93 is discretionary, individualized, and based on each state’s varying interpretation of the Kent factors. 94 Kent instructed state court judges to consider the characteristics of the offense, such as its seriousness, whether it was premeditated or willful and at whom it was directed. 95 Moreover, judges should consider the characteristics of the accused, including their maturity and background. 96 Finally, judges should weigh the societal efficiency interest, considering probable cause, the amount of evidence, and the likelihood of conviction. 97 States vary in how heavily they weigh the characteristics of the accused and how heavily they weigh the seriousness of the offense. At one extreme, states such as Minnesota focus almost entirely on the offense and the danger to the community. 98 By contrast, the most progressive

93 The forms of waiver from juvenile to adult court and their advantages and disadvantages have been discussed extensively. See generally Donna M. Bishop, Juvenile Offenders in the Adult Criminal Justice System, 27 CRIME & JUST. 81 (2000) (analyzing the increase in transfers during the 1990s and how it did not decrease juvenile crime, but rather only increased recidivism among racial minorities); John D. Burrow, Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute, 9 U.C. DAVIS J. U.V. L. & POL'Y 1 (2005) (showing that judges may refuse to transfer even the worst offenders and therefore prosecutorial waiver is more suited to punishing the “worst” offenders); Robert O. Dawson, An Empirical Study of Kent Style Juvenile Transfers to Criminal Court, 23 ST. MARY'S L.J. 975, 1052 (1992) (arguing that the practical role of court is “limited to finding required facts and reviewing prosecutorial” screening and charging discretion); Eric L. Jensen, The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change, 31 IDAHO L. REV. 173, 200–03 (1994) (arguing that judicial waiver should be limited to older (age sixteen and above) juveniles accused of crimes against people and that judicial waiver serves no deterrent value); Marcy Rasmussen Podkopacz & Barry C. Feld, Judicial Waiver Policy and Practice: Persistence, Seriousness and Race, 14 LAW & INEQ. 73 (1995) (finding that race plays a significant role in juvenile waiver and therefore juvenile waiver should be less discretionary); Stacey Sabo, Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction, 64 FORDHAM L. REV. 2425 (1996) (arguing that judicial waiver is the fairest form of waiver because it affords a full hearing to the juvenile).
94 Kent, 383 U.S. at 566–67 (defining the Kent factors as (1) seriousness of the crime, (2) if the crime was premeditated, (3) if the crime was against a person, (4) the merit of the complaint, (5) the desirability of trying the juvenile with his adult associates, (6) the maturity of the juvenile, (7) the previous record of the juvenile, and (8) the prospects of public safety and adequate rehabilitation for the juvenile).
95 Id. (“[The judge considers] 1. The seriousness of the alleged offense . . . and whether the protection of the community requires waiver. 2. Whether the alleged offense was . . . aggressive, violent, premeditated or willful . . . 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons . . . . ”).
96 Id. at 567 (“[The judge considers] 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living. 7. The record and previous history of the juvenile, including previous contacts with . . . other law enforcement agencies [and] juvenile courts . . . . ”).
97 Id. (“[The judge considers] 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . . 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . . ”).
98 MINN. STAT. § 260B.125 (2017) (“[If the court finds] the child has not rebutted the presumption by clear and convincing evidence demonstrating that retaining the proceeding in the juvenile court serves public safety . . . or
states, like California, take into account the background and characteristics of the juvenile, including sociological and psychological factors that may militate towards retaining juvenile court jurisdiction. 99

Each state’s exact instantiation of juvenile waiver can vary, but each attempts to sort those juveniles who belong in juvenile court from those who do not by weighing the Kent factors in some form. 100

III. New Mexico’s Unique Approach

Part II compares a typical state waiver system, Tennessee’s, with New Mexico’s unique approach to provide context for Part II’s discussion of the New Mexican model’s many advantages. Section A discusses the Tennessee waiver system as an example of a waiver system. Section B describes the New Mexico model of judicial waiver. Finally, Section C highlights the differences between the two regimes.

A. Tennessee

Tennessee’s waiver system is a good comparison for several reasons. First, Tennessee only has judicial waiver, just as in New Mexico. 101 Second, states vary in which factors they consider in waiving juveniles to adult court. The least progressive states, such as Tennessee and Minnesota, only consider the characteristics of the offense. 102 A more progressive approach, exemplified by California and New Mexico, considers the characteristics of the juvenile, with an emphasis on his or her rehabilitation, in addition to the characteristics of the offense. 103

[if the court finds that the prosecutor has not demonstrated [that public safety requires transfer], the court shall retain the proceeding in juvenile court.”].

99 CAL. WELF. & INST. CODE § 707(a)(2)(A)(ii) (West 2018) (“[T]he juvenile court may give weight to any relevant factor, including . . . age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor’s impetuosity or failure to appreciate risks . . . the effect of familial, adult, or peer pressure on the minor’s actions, and the effect of the minor’s family and community environment and childhood trauma . . . .”).


101 See infra Subsection II.B. (discussing New Mexico’s statutory exemption for juveniles accused of first-degree murder).

102 MINN. STAT. ANN. § 260B.125 (West 2017).

Tennessee, in mostly ignoring personal characteristics, provides a helpful comparison to New Mexico’s more progressive system.\textsuperscript{104}

Tennessee’s waiver process begins with a motion made by a prosecutor to waive the juvenile from juvenile court to adult criminal court.\textsuperscript{105} Prosecutors may seek to waive any juvenile sixteen or older, or a child younger than sixteen if charged with a violent felony or attempt at such.\textsuperscript{106}

If the prosecutor files a motion to waive the juvenile, a hearing is held to determine to establish probable cause on three issues.\textsuperscript{107} First, whether there is probable cause that the child committed the act, second whether there is probable cause that the child is not eligible for commitment to an institution for the mentally ill, and third, whether there is probable cause that “[t]he interests of the community require that the child be put under legal restraint or discipline.”\textsuperscript{108}

In determining whether the child should be tried as an adult, the judge is directed to weigh six factors, including the juvenile’s criminal history,\textsuperscript{109} past treatment efforts,\textsuperscript{110} the nature and severity of the crime,\textsuperscript{111} if the crime was premeditated or aggressive,\textsuperscript{112} any possible rehabilitation,\textsuperscript{113} and if it was a gang crime.\textsuperscript{114}

The juvenile is afforded at least fourteen days of notice of the hearing.\textsuperscript{115} At the hearing, the juvenile is guaranteed several basic rights, including the right to present information and confront witnesses against him,\textsuperscript{116} the right to a lawyer,\textsuperscript{117} and the same evidentiary protections

\textsuperscript{104} N.M. STAT. ANN. § 32A-2-20(B) (West 2018).
\textsuperscript{105} TENN. CODE ANN. § 37-1-134(a)(1) (2018).
\textsuperscript{106} Id. § 37-1-134(a)(1)(A) (listing violent felonies eligible for waiver to adult court).
\textsuperscript{107} Id. § 37-1-134(a)(4).
\textsuperscript{108} Id.
\textsuperscript{109} Id. § 37-1-134(b)(1) (”[t]he extent and nature of the child’s prior delinquency records”).
\textsuperscript{110} TENN. CODE ANN.§ 37-1-134(b)(2) (2018) (”[t]he nature of past treatment efforts and the nature of the child’s response thereto”).
\textsuperscript{111} Id. § 37-1-134(b)(3) (”[w]hether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person”).
\textsuperscript{112} Id. § 37-1-134(b)(4) (”[w]hether the offense was committed in an aggressive and premeditated manner”).
\textsuperscript{113} Id. § 37-1-134(b)(5) (”[t]he possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state”).
\textsuperscript{114} Id. § 37-1-134(b)(6) (”[w]hether the child's conduct would be a criminal gang offense . . . if committed by an adult”).
\textsuperscript{116} TENN. CODE ANN. § 37-1-127(a) (2018) (requiring a hearing to include the right to challenge parties and introduce evidence).
\textsuperscript{117} Id. § 37-1-126(a) (2018) (guaranteeing a right to a lawyer, appointed or retained).
that an adult has. Notably, a confession, if corroborated, can be used to waive a juvenile to adult court. Finally, a child has the right to notice if a conviction would label him or her as a sex offender.

If the judge finds probable cause on all three issues, then the case is waived to adult criminal court. A waiver causes any subsequent delinquent charges to be filed in adult court, even if those charges are for other incidents. However, if the charge that caused the transfer is dismissed or acquitted in adult court, then the juvenile court regains jurisdiction over any concomitant charges. Finally, the same judge cannot sit on both the juvenile waiver hearing and the subsequent proceeding, whether juvenile court adjudication or adult criminal trial. If the judge does not find probable cause on all three issues, then the case proceeds in juvenile court. If they are adjudicated guilty, the court can detain them until they turn nineteen. There is no right to a jury trial as the consequences are supposed to be rehabilitative and not punitive.

Tennessee’s system uses only judicial waivers to move juveniles to adult criminal court. However, this determination happens before trial and the juvenile’s rights and ability to defend him or herself are limited.

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118 Id. § 37-1-127(a)–(d) (prohibiting use of evidence and testimony acquired in violation of constitutional protections).
119 Id. § 37-1-127(e) (“A confession validly made by a child out of court is insufficient to support an adjudication of delinquency unless it is corroborated in whole or in part by other evidence.”).
120 Id. §37-1-127(f) (“If a child is charged with a delinquent act that could qualify such child as a violent juvenile sexual offender . . . such child shall be given verbal and written notice of the violent juvenile sexual offender registration requirements prior to a hearing on whether the child committed such act.”).
122 Id. § 37-1-134(c) (“[C]hild shall thereafter be dealt with as an adult as to all pending and subsequent criminal charges.”).
123 Id. § 37-1-134(c) (“[I]f such charge or charges are dismissed in [adult] court, this subsection (c) shall not apply and the juvenile court shall retain jurisdiction over such child.”).
124 Id. § 37-1-134(g) (“If the case is not transferred, the judge who conducted the hearing shall not over objection of an interested party preside at the hearing on the petition. If the case is transferred to a[n] [adult] court [with the same judge] . . . the judge . . . is disqualified from presiding in the prosecution.”).
125 Id. § 37-1-134(a)(4).
126 TENN. CODE ANN. § 37-1-131(a)(4) (2018) (explaining the court can “commit the child to the department of children's services, which commitment shall not extend past the child's nineteenth birthday”).
127 Id. §37-1-124(a) (2018) (“Hearings pursuant to this part shall be conducted by the court without a jury, in an informal but orderly manner . . . .”).
B. New Mexico

New Mexico’s juvenile waiver system does not actually waive juveniles into adult court. Rather, New Mexico allows a juvenile court judge to sentence a juvenile to an adult prison term after an adjudication of guilt and a hearing on amenability to rehabilitation. New Mexico’s statutory regime divides accused juveniles into three categories: serious youthful offenders, youthful offenders, and delinquent offenders. Serious youthful offenders are juveniles between age fifteen and eighteen who have been indicted for first degree murder. Youthful offenders are either fourteen-year-olds indicted for first degree murder, or juveniles between fourteen and eighteen who have been indicted for a violent crime other than first-degree murder. Alternatively, a juvenile can be categorized as a youthful offender if they have been convicted of three separate prior felonies within three years of the instant offense. Delinquent offenders are juveniles who have been indicted for any other felony crime, including non-violent felonies, drug crimes, traffic crimes, and most property crimes.

The New Mexico juvenile waiver process applies only to youthful offenders. Serious youthful offenders are automatically transferred to adult criminal court, a form of statutory waiver. They are therefore eligible for adult sanctions. However, if their charge is reduced

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128 See generally N.M. STAT. ANN. § 32A-2-2 (West 2018) (“The purpose of the Delinquency Act is consistent with the protection of public interest, to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children . . . accountable . . . to the extent of the child’s age, education, mental and physical condition . . . and to provide a program of supervision, care and rehabilitation . . . .”).
129 N.M. STAT. ANN. § 32A-2-20(A) (West 2018).
130 Id. § 32A-2-3(C), (H), (J) (defining delinquent offenders, serious youthful offenders, and youthful offenders).
131 Id. § 32A-2-3(H) (“‘Serious youthful offender’ means an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder.”).
132 Id. § 32A-2-3(J)(3) (distinguishing juveniles fifteen and older who commit first degree murder as serious youthful offenders and fourteen-year-old juveniles as youthful offenders).
133 Id. § 32A-2-3(J)(1) (listing the violent crimes that qualify a juvenile for adjudication as a youthful offender).
134 N.M. STAT. ANN. § 32A-2-3(J)(2) (West 2018). (A juvenile who is “fourteen to eighteen years of age at the time of the offense, who is adjudicated for any felony offense and who has had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense” can be indicted as a youthful offender.).
135 Id. § 32A-2-3(A) (defining which acts are delinquent).
136 Id. § 32A-2-3(J) (defining youthful offenders).
137 Id. § 32A-2-3(H) (decreeing that serious youthful offenders are not subject to juvenile court jurisdiction).
138 State v. Jones, 229 P.3d 474, 477 (N.M. 2010) (“Once charged with first-degree murder, a serious youthful offender is no longer a juvenile within the meaning of the Delinquency Act, and therefore is no longer entitled to its protections. As a result, serious youthful offenders . . . are automatically sentenced as adults if convicted.”) (citation omitted).
from first degree murder, or if they are convicted of something less than first degree murder, they are sentenced as a youthful offender. Delinquent offenders are not eligible for sentencing as adults.

The prosecutor must notify a youthful offender within ten days of indictment of the prosecutor’s intent to seek adult sanctions. This is a mandatory step; the court cannot move by itself. This requirement means that in order to punish a juvenile as an adult, all three branches of government must agree. The legislature must designate the crime as serious enough as to implicate its perpetrator as a “youthful offender.” The executive branch, represented by the prosecutor, must believe this particular instance of that crime is deserving of potentially greater punishment and then move for adult sanctions. Finally, the judge must agree the juvenile is not amenable to treatment after an adversarial hearing.

After the prosecutor’s motion, the juvenile gains access to the full due process rights afforded to an adult, including a right to counsel, right to a grand jury hearing, right to bail, and right to a jury trial. However, juveniles cannot waive their amenability hearing or plead to an adult sentence. This reduces their bargaining power, but protects them from coercive outside influences.

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139 Id. at 479 (“Rather, from the moment the State dropped the first-degree murder charge, Defendant was a child charged with a youthful offender offense—a potential youthful offender—and as such, he was entitled to the full range of protections afforded by the Delinquency Act . . . .”).

140 N.M. STAT. ANN. § 32A-2-3(C) (West 2018).

141 N.M. STAT. ANN. § 32A-2-20(A) (West 2018) (“The children’s court attorney shall file a notice of intent to invoke an adult sentence within ten working days of the filing of the petition . . . .”).

142 Id. § 32A-2-20(A).

143 In re Gault, 387 U.S. 1, 41 (1967) (“We conclude that the Due Process Clause of the Fourteenth Amendment requires . . . the child and his parents must be notified of the child’s right to be represented by counsel . . . .”).

144 Id. § 32A-2-20(A) (“[a] preliminary hearing by the court or a hearing before a grand jury shall be held . . . .”).

145 N.M. STAT. ANN. § 32A-2-14(M) (West 2018) (“A serious youthful offender who is detained prior to trial in an adult facility has a right to bail as provided under SCRA 1986, Rule 5-401 [5-401 NMRA]. A child held in a juvenile facility designated as a place of detention prior to adjudication does not have a right to bail but may be released pursuant to the provisions of the Delinquency Act [32A-2-1 NMSA 1978].”).

146 N.M. STAT. ANN. § 32A-2-16(A) (West 2018) (“A jury trial on the issues of alleged delinquent acts may be demanded by the child, parent, guardian, custodian or counsel in proceedings on petitions alleging delinquency when the offense alleged would be triable by jury if committed by an adult.”).

147 State v. Jones, 229 P.3d 474, 485 (N.M. 2010) (“[T]he Legislature did not intend this responsibility to be bargained away.”).
If the juvenile is adjudicated as a youthful offender, there is a mandatory amenability hearing before a judge to determine if the juvenile is “amenable to treatment.” The judge must find, first, whether the juvenile is amenable to treatment, and second, whether there is a facility in the state capable of treating the juvenile. If the judge finds affirmatively on both questions, then the juvenile is eligible only for juvenile sanctions, which could include only a fine or probation but, at most, could extend to detaining the juvenile until age twenty-one. At the amenability hearing, the judge will consider the same factors the Supreme Court laid out in Kent, but with a major adjustment. In Kent, amenability was a factor for consideration in waiving the juvenile to adult court for a potential adult sanction. In New Mexico, rehabilitation is the primary focus at this stage of the process. The other Kent factors help a judge determine whether a juvenile is amenable to rehabilitation, with the overriding goal of rehabilitating the juvenile. New Mexico requires that judges consider the characteristics of the juvenile, such as trauma history, brain development, and disability, in addition to the characteristics of the offense, including the kind of offense and its seriousness, premeditation, and victim (person or property).

If the judge finds either that the juvenile is not amenable to treatment or that there is not a facility in the state capable of treating the juvenile, the juvenile becomes eligible for an adult sentence. A juvenile may receive to up to the maximum adult sentence but is not subject to

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148 Id. § 32A-2-20(B) (“[T]he court shall make the following findings in order to invoke an adult sentence: (1) the child is not amenable to treatment or rehabilitation as a child in available facilities[.]”).

149 Id.

150 Id. § 32A-2-20(F).

151 Kent v. United States, 383 U.S. 541, 566–67 (1966) (defining Kent criteria as (1) seriousness of the crime, (2) if the crime was premeditated, (3) if the crime was against a person, (4) the merit of the complaint, (5) the desirability of trying the juvenile with his adult associates, (6) the maturity of the juvenile, and (7) the previous record of the juvenile).

152 Id. § 32A-2-20(B) (“[T]he court shall make the following findings in order to invoke an adult sentence: (1) the child is not amenable to treatment or rehabilitation as a child in available facilities[.]”).

153 Id. § 32A-2-20(C) The New Mexico Statute lists the criteria as: “(1) the seriousness of the alleged offense; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether a firearm was used to commit the alleged offense; (4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted; (5) the maturity of the child as determined by consideration of the child’s home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability; (6) the record and previous history of the child; (7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available; and (8) any other relevant factor, provided that factor is stated on the record.”

154 Id. § 32A-2-20(C).

155 Id. § 32A-2-20(B).
mandatory minimum sentence.\textsuperscript{156} When sentencing adults, judges in New Mexico may depart downwards by up to one third of the “base” sentence; in the case of youthful offenders, the judge may depart downwards as much as they wish.\textsuperscript{157} If the juvenile receives an adult sentence, he or she is transferred to an adult facility and juvenile court’s jurisdiction is terminated.\textsuperscript{158} Finally, one last quirk of the New Mexico regime is that a finding of guilt for a youthful offender is not considered a “conviction” but rather considered an “adjudication” and is not admissible in any other proceeding, nor is it disqualifying for civil service.\textsuperscript{159} However, if the youthful offender is given an adult sentence, the adjudication becomes a conviction, along with all the standard resulting civil disabilities.\textsuperscript{160} In either case, the juvenile’s records are sealed once he or she reaches the age of 18, except as needed for the purposes of setting bail.\textsuperscript{161}

C. Analyzing the Differences Between the Two Systems

New Mexico and Tennessee’s systems can be distinguished in a number of ways. First, in New Mexico, the juvenile stays in juvenile court for the entire process whereas Tennessee’s system transfers the juvenile to adult court. Second, the New Mexico system provides juveniles exposed to an adult sentence with adult due process rights, while Tennessee’s set of rights is less extensive. Finally, New Mexico’s system uses amenability to treatment as the goal of the waiver system, whereas the Tennessee system uses it merely as a factor. First, a juvenile in New Mexico stays in juvenile court for the pretrial hearings, the trial, and the post-trial amenability hearing.\textsuperscript{162} It is only after the juvenile is adjudicated guilty, found

\textsuperscript{156} Id. § 32A-2-20(E) (“If the court invokes an adult sentence, the court may sentence the child to less than, but shall not exceed, the mandatory adult sentence.”).

\textsuperscript{157} N.M. STAT. ANN. § 31-18-15.1(G) (West 2018) (“The amount of the alteration of the basic sentence for noncapital felonies shall be determined by the judge. However, in no case shall the alteration exceed one-third of the basic sentence; provided that when the offender is a serious youthful offender or a youthful offender, the judge may reduce the sentence by more than one-third of the basic sentence.”).

\textsuperscript{158} Id. § 32A-2-20(E) (“A youthful offender given an adult sentence shall be treated as an adult offender and shall be transferred to the legal custody of an agency responsible for incarceration of persons sentenced to adult sentences. This transfer terminates the jurisdiction of the court over the child . . . .”).

\textsuperscript{159} N.M. STAT. ANN. § 32A-2-18(A) (West 2018) (“A judgment in proceedings on a petition under the Delinquency Act resulting in a juvenile disposition shall not be deemed a conviction of crime nor shall it impose any civil disabilities ordinarily resulting from conviction of a crime . . . .”).

\textsuperscript{160} Id. § 32A-2-18(C) (“If a judgment on a proceeding under the Delinquency Act results in an adult sentence, the determination of guilt at trial becomes a conviction . . . .”).

\textsuperscript{161} N.M. STAT. ANN. § 32A-2-26(H) (West 2018) (“The department shall seal the child’s files and records when the child reaches the age of eighteen or at the expiration of the disposition . . . .”).

\textsuperscript{162} See N. M. STAT. ANN. § 32A-2-3 (West 2018).
unamenable to treatment, and sentenced to an adult sentence that he or she is transferred to the adult system. In contrast, in Tennessee, the juvenile is guaranteed only a hearing of fitness in juvenile court, perhaps having a trial in adult court if he or she is waived. The entire New Mexico juvenile proceeding, from pre-trial to sentencing, occurs in front of a single juvenile court judge. The Tennessee juvenile court proceedings are bifurcated, the juvenile first appears before a juvenile court judge, and then before either a different juvenile court judge (if he or she remains in juvenile court), or an adult court judge (if he or she is transferred to the adult system).

Second, New Mexico gives juveniles more substantial due process protections than Tennessee does. New Mexico juveniles have the same basic procedural rights as adults. This includes the right to grand jury, bail, and a jury trial. Tennessee gives none of those rights to juveniles while they are in juvenile court. Even though a juvenile court is not, under the Constitution, required to give a juvenile the same due process as an adult, it is clear that the New Mexico system includes more due process protections than the Tennessee system.

Third, New Mexico uses amenability as the goal rather than as one factor in the decision. Both regimes consider the same Kent factors, including the nature and seriousness of the crime, prior criminal history, and prior rehabilitative history. However, New Mexico’s goal is to assess amenability. If the defendant is amenable to treatment, and there is a facility that can treat him

\[163\] Id. § 32A-2-20(E) (“A youthful offender given an adult sentence shall be treated as an adult offender and shall be transferred to the legal custody of an agency responsible for incarceration of persons sentenced to adult sentences. This transfer terminates the jurisdiction of the court over the child with respect to the delinquent acts alleged in the petition.”).


\[165\] N.M. Stat. Ann. § 37-1-134(g) (“If the case is not transferred, the judge who conducted the hearing shall not over objection of an interested party preside at the hearing on the petition. If the case is transferred to an adult court [with the same judge] the judge . . . is disqualified from presiding in the prosecution.”).

\[166\] N.M. Stat. Ann. § 32A-2-14(A) (West 2018) (“A child . . . is entitled to the same basic rights as an adult . . . .”).

\[167\] Id. § 32A-2-20(A) (“A preliminary hearing by the court or a hearing before a grand jury shall be held . . . .”).

\[168\] Id. § 32A-2-14(M) (“A serious youthful offender who is detained prior to trial in an adult facility has a right to bail . . . . A child held in a juvenile facility designated as a place of detention prior to adjudication does not have a right to bail but may be released . . . .”).

\[169\] N.M. Stat. Ann. § 32A-2-16(A) (West 2018) (“A jury trial on the issues of alleged delinquent acts may be demanded by the child, parent, guardian, custodian or counsel in proceedings on petitions alleging delinquency when the offense alleged would be triable by jury if committed by an adult.”).

\[170\] See generally McKeiver v. Pennsylvania, 403 U.S. 528, 528 (1971) (holding that there is no right to a jury trial in juvenile court, rather the standard is fundamental fairness and jury trial might remake informal system into adversarial system).

\[171\] Id. § 32A-2-20(B).
or her, then the defendant will be adjudicated as a juvenile.\textsuperscript{172} Tennessee only considers amenability as one of six factors when determining whether a juvenile is fit for juvenile court or not.\textsuperscript{173}

The two systems have similarities. They both have a right to counsel for juvenile court proceedings, as mandated in \textit{Kent}.\textsuperscript{174} Both systems include more lenient sentences for juveniles, as juvenile courts can only incarcerate juveniles until age twenty-one in New Mexico\textsuperscript{175} or until age nineteen in Tennessee.\textsuperscript{176} Indeed, New Mexico describes its decisions as “dispositions,” not as convictions, to avoid triggering civil liabilities.\textsuperscript{177} Finally, both systems require juveniles be held in juvenile detention, not adult detention, unless absolutely necessary for safety purposes.\textsuperscript{178}

While the systems can be similar in some respects, the differences lead the New Mexico system to do a better job of determining which juveniles should be punished more harshly.

IV. Advantages of the New Mexico System

Part III of this Note argues that the New Mexico system improves upon the “standard” juvenile waiver system in sorting between youth who can be rehabilitated in the juvenile justice system and those who cannot.\textsuperscript{179} New Mexico’s system, which moves the sorting mechanism

\begin{footnotesize}
\begin{enumerate}[itemsep=0pt]
\item \textsuperscript{172} It is unclear how many juveniles are deemed unamenable to treatment, but the number is clearly very small. In 2007, just 23 juveniles out of 23,866 juveniles arrested were sentenced to adult terms. \textit{See} Dorian Dodson, \textit{Selected Statistics for New Mexico Counties, JUVENILE JUSTICE SERVICES} 1, 2 (2007) https://cyfd.org/docs/County_Profiles.pdf [https://perma.cc/C5LQ-3722]; Torbet et al., supra note 48, at 24 (finding that from 1995 to 1998, the Second Judicial District (Albuquerque) sought adult sanctions in 192 cases. Of the 166 cases completed, 139 ended in convictions, with 104 ending in youth offender offenses. Of the 104 youthful offender offenses, 51 were given juvenile sanctions and 53 were given adult sanctions.).
\item \textsuperscript{173} \textit{TENN. CODE ANN.} § 37-1-314(b)(1)-(3) (2018).
\item \textsuperscript{174} \textit{Kent v. United States}, 383 U.S. 541, 561 (1966) (“The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a ‘critically important’ decision is tantamount to denial of counsel.”).
\item \textsuperscript{175} \textit{Id.} § 32A-2-20(F).
\item \textsuperscript{176} \textit{N.M. STAT. ANN.} § 37-1-131(a)(4) (West 2018) (“commit the child to the department of children’s services, which commitment shall not extend past the child's nineteenth birthday”).
\item \textsuperscript{177} \textit{N.M. STAT. ANN.} § 32A-2-18(A) (West 2018).
\item \textsuperscript{178} \textit{N.M. STAT. ANN.} § 32A-2-12 (West 2018); \textit{N.M. STAT. ANN.} § 37-1-114 (West 2018).
\item \textsuperscript{179} For more about the scope of the problem, see generally Edward P. Mulvey & Carol A. Shubert, \textit{Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court, U.S. DEP’T OF JUST., OFF. OF JUV. JUST. AND DELINQ. PREVENTION} (Dec. 2012) https://www.ojjdp.gov/pubs/232932.pdf [https://perma.cc/MMM6-DDUB] (transferring a juvenile increases their risk of being assaulted and having their education disrupted, and it does not materially decrease their risk of recidivism. However, there might be differences between juveniles transferred and those not transferred that better explain the differential outcomes); Isaac Wolf, \textit{Many Say Moving Juveniles to Adult Court a Mistake}, ABC NEWS (Jan. 30, 2014) https://www.abcnews.com/homepage-showcase/many-say-moving-juveniles-to-adult-court-a-mistake [https://perma.cc/UTQ4-J59Y] (explaining comments by former American Judge Association President Kevin Burke, who argues that too many juveniles are transferred to adult court with too little process into their background). \textit{But see generally} David Boroff, \textit{Convicted Teen Killer Who Fatally Shot Pregnant
from before to after trial generates positive effects in several ways. Section A explains that moving the amenability hearing to after trial allows for more evaluation of whether juveniles should be dealt with as a juvenile or an adult. Section B argues that juvenile court judges are more accurate when adjudicating juvenile trials. Section C analyzes the additional due process protections that New Mexico gives to juveniles. Section D outlines the benefits of New Mexico’s focus on amenability. Finally, Section E addresses and resolves two Constitutional challenges that opponents have raised to the New Mexico system. First, Subsection 1 deals with an objection that New Mexico’s system violates the prohibition on judge-found facts increasing sentences stemming from Apprendi v. New Jersey. Second, Subsection 2 addresses concerns that New Mexico’s system is unconstitutionally vague.

A. More Accuracy in Evaluation

Accuracy in evaluating whether a juvenile should be dealt with as a juvenile or an adult should be a crucial component of a juvenile waiver system.\(^{180}\) Accuracy is defined by having the fewest false positives and the fewest false negatives.\(^{181}\) A false positive is when a juvenile is waived to adult court who should not have been. A false negative is the reverse, when a juvenile is not waived who should have been. False positives are arguably more concerning than false negatives, because false negatives will likely be rearrested.\(^{182}\) That is, if a juvenile likely to reoffend is given a juvenile disposition, and thereafter released to the community, he or she will then reoffend and will be more likely to be waived in his or her next hearing. A false positive is

\(^{180}\) Lisa Ells, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 COLUM. L. REV. 158, 176 (2005) (“Identifying youthful offenders who are likely to become lifelong criminals is a fundamental concern of the waiver system. . . . [T]he desire to predict ongoing criminality and the belief that science can accurately achieve this function have been firmly entrenched since the early days of the court.”); Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 26, 29 (2017) (arguing that only those juveniles who cannot be treated in the juvenile system should be transferred).


\(^{182}\) *Id.* at 454, 491 (noting that 42% of juveniles who were not waived reoffended within a two-year period. Moreover, one might be concerned that the false negatives will injure the community in their subsequent offense. However, most juvenile crime is against property, not against a person).
harder to identify. A false positive is instead given a long sentence and never gets a chance to show counterfactually that he or she would not have reoffended if released. Further, it is important to note that the incentives for judges are generally in favor of false positives. A judge who releases a false negative (does not waive a dangerous juvenile) risks negative publicity if the juvenile is given a short sentence and then reoffends. A judge who gives a long sentence to a juvenile who would not have reoffended does not risk negative publicity or negative feedback from the community, because it is never proven that the juvenile wouldn’t have reoffended.

New Mexico’s system lends itself to fewer erroneous decisions about waiver. Because the decision about how to treat a juvenile happens after trial, there are more facts in the record. For example, a judge may want a psychologist to talk to the juvenile to discuss the offense. There are incentives to downplay one’s role to minimize the risk of self-incrimination. In the Tennessee system, because the indictment is only an accusation and the report is admissible in either the waiver hearing or subsequent trial, the juvenile should only talk generally about the offense. Because any evaluation in New Mexico would happen after adjudication, the juvenile can talk more freely about the offense without fear of affecting the adjudication of guilt, although there remain many of the same incentives to downplay one’s culpability to minimize the

183 Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 116 (2011) (“Participants in the study were concerned about public perception of their judging abilities, including the expectations of police, the media, and government agencies. Such considerations may force excessive attention to how cases will play in the public eye. Judges ‘who are afraid [for their reputations] are heavy sentencers.’”).

184 *Id.* at 116 (“The Harris study found that an ‘important aim’ among judges was to retain their current positions or achieve promotions that would ‘lead them beyond the juvenile court.’ They ‘sought to create reputations that would generate prestige and connections to elected [office].’”).

185 *Id.* (“‘Judges ‘who are afraid [for their reputations] are heavy sentencers.’”).

186 N.M. STAT. ANN. § 32A-2-20(B) (West 2018) (“[T]he court shall make the following findings in order to invoke an adult sentence: (1) the child is not amenable to treatment or rehabilitation as a child in available facilities[,]”).

187 Dia N. Brennan et al., *Transfer to Adult Court: A National Study of How Juvenile Court Judges Weigh Pertinent Kent Criteria*, 12 PSYCHOL. PUB’L. POL’Y & L. 332, 349 (2006) (“Specifically, the vast majority of the judges’ responses regarding the quality of psychological reports indicated they were very helpful and generally of high quality. Further, many of the judges believed they were obtaining important and necessary information to help steer their decisions.”).

possibility of waiver.\textsuperscript{189} Moreover, the number of intrusive, unpleasant\textsuperscript{190} interviews decreases because only the juveniles who are adjudicated as guilty are interviewed, rather than all juveniles accused.\textsuperscript{191}

Furthermore, creating an accurate and complete workup of a juvenile’s biopsychosocial history takes time,\textsuperscript{192} and having a waiver hearing after trial allows more time.\textsuperscript{193} Often, strict speedy-trial rules apply to juveniles.\textsuperscript{194} When the waiver hearing occurs after trial, the juvenile has more time to prepare an accurate, complete history and may include mitigating facts.

Finally, trials bring out facts that are relevant to amenability. Before trial, facts about the crime are mere allegations, found only by probable cause.\textsuperscript{195} After trial, the facts about the crime have been found, either by judge or jury, beyond a reasonable doubt.\textsuperscript{196} Other facts, about the juvenile’s history and development, can be brought up at trial if relevant, or separately at the amenability hearing.\textsuperscript{197} In New Mexico, the same judge presides over the juvenile’s trial and the

\textsuperscript{189} N.M. STAT. ANN. § 32A-2-17 (West 2018) (defining the New Mexico juvenile pre-disposition report statute). \textit{See} State v. Doe, 639 P.2d 72, 74 (N.M. Ct. App. 1981) (holding that the court can order a juvenile to discuss his or her crime with a psychologist); Christopher P. v. State, 816 P.2d 485, 488–89 (N.M. 1991) (holding that the results of such evaluation are admissible, but the Fifth Amendment applies).

\textsuperscript{190} Russenberger v. Russenberger, 639 So. 2d 963, 965 (Fla. 1994) (holding that a psychological “evaluation may subject a child to a battery of tests and extensive interviews that could negatively impact or traumatize the child.”).

\textsuperscript{191} \textit{Id.} Admittedly, judges have discretion over ordering evaluations and do not necessarily order an evaluation in every case, but the point remains: the pool of accused juveniles is larger than the pool of convicted juveniles.

\textsuperscript{192} Developing a biopsychosocial history takes a lot of time. One mitigation specialist writes: “As to developing the social history of the client, the mitigation specialist spends many, many hours interviewing the client and potential mitigation witnesses. While the case is pending, the mitigation specialist should meet with the client multiple times. The specialist should also interview the client’s family members, current friends and childhood friends, the client’s employers/former employers, the client’s school teachers/administrators, jail/prison officials, people who have been positively affected by the client, and people who positively influenced the client.” Paul J. Bruno, \textit{The Mitigation Specialist}, 34 CHAMPION 26, 27 (Jun. 2010).

\textsuperscript{193} There is no time limit for adjudication in New Mexico. Until 2010, there was a “six-month rule,” but that was withdrawn and replaced by a right that defendants can assert. N.M.R.A. 5-604(B). \textit{See} State v. Savedra, 236 P.3d 20, 23 (N.M. 2010) (“In its place, defendants may rely upon and assert their right to a speedy trial whenever they believe impermissible delay has occurred; whether that delay is the result of a dismissal and refiling or any other cause.”).

\textsuperscript{194} Jeffrey A. Butts, \textit{Juvenile Justice and the Criminal Law: Speedy Trial in the Juvenile Court}, 23 AM. J. CRIM. L. 515, 540 (1996) (“In thirty-one states, there are deadlines for holding adjudication hearings in delinquency cases. For example, several states set maximum allowable times between initial case referral and adjudication hearings . . . . More commonly, states set a maximum number of days allowed between the filing of the delinquency charges and the adjudication hearing.”).

\textsuperscript{195} N.M. STAT. ANN. § 32A-2-20(A) (West 2018) (holding that probable cause is needed to indict).

\textsuperscript{196} \textit{In re} Winship, 397 U.S. 358, 362 (1970) (holding that the Constitution requires a finding of guilt “beyond a reasonable doubt” to sustain a criminal conviction).

\textsuperscript{197} \textit{Id.} § 32A-2-20(C).
amenability hearing. By presiding over both proceedings, the judge hears more facts, and hears them in context of the crime. The judge can hear all of the testimony to understand the full account of the background of the crime and any justifications or excuses the juvenile might have. Then, he or she hears the mitigating factors again at the amenability hearing, in addition to more facts about the juvenile’s biopsychosocial history. Only then, after the court determines beyond a reasonable doubt that the juvenile committed the crime and has conducted a full hearing on the juvenile’s amenability, does the judge evaluate whether to sentence the juvenile as an adult or a juvenile. Having the waiver decision point after trial produces for more accurate sorting of juveniles by allowing time to establish more facts that better inform the sorting decision.

B. The Benefits of Having a Juvenile Court Judge Conduct the Trial

In New Mexico, a juvenile court judge presides over all proceedings, from the first appearance to sentencing. In Tennessee, a juvenile court judge presides over only the waiver hearing. If the juvenile is transferred to adult court, an adult court judge presides over the criminal trial.

Having a juvenile court judge preside over the trial has many benefits, both for the individual juveniles and for the system as a whole. First, juvenile court judges are repeat players. By virtue of working extensively with children, they understand (whether through experience, training, or trial testimony) developmental facts about juveniles better than an adult court judge does. The judge’s understanding of juvenile neurology and development can lead

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198 Id. § 32A-2-20.
199 Id.
200 Id.
201 Id. § 32A-2-20(E) (“A youthful offender given an adult sentence shall be treated as an adult offender and shall be transferred to the legal custody of an agency responsible for incarceration of persons sentenced to adult sentences. This transfer terminates the jurisdiction of the court over the child . . . .”).
202 TENN. CODE ANN. § 37-1-134(g) (2018) (“If the case is not transferred, the judge who conducted the hearing shall not over objection of an interested party preside at the hearing on the petition. If the case is transferred to a[n] [adult] court [with the same judge] . . . the judge . . . is disqualified from presiding in the prosecution.”).
203 Id. § 37-1-134(g).
204 Martin Guggenheim & Randy Hertz, Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, 33 WAKE FOREST L. REV. 553, 574 (1998) (“[J]udges who sit for years in a criminal or juvenile court tend to hear the same stories over and over.”).
205 See Neitz, supra note 182, at 113 (“[J]uvenile judges] appear to be some of the most experienced and trained bench officers in any specialized court. This suggests that juveniles appearing in delinquency court could have the benefit of a judge who understands both the law and the considerable array of sentencing options available
to more accurate determination of whether the juvenile should be transferred.\textsuperscript{206} In a bench trial, a judge with a better understanding of juvenile development will be better able to analyze the juvenile’s mens rea and mitigating factors than a judge who rarely or never works with juveniles.\textsuperscript{207} This expertise will likely lead to more accurate adjudications.\textsuperscript{208}

Furthermore, this expertise has benefits that extend beyond accused juveniles. Two-thirds of victims of violent juvenile crime are other juveniles.\textsuperscript{209} Therefore, many key witnesses will be children.\textsuperscript{210} Juvenile court judges are better able to determine appropriate questions due to their better understanding of juvenile psychological development. Children are suggestible, and leading questions can cause their testimony to shift over time, especially when led by a skillful or biased questioner.\textsuperscript{211} In order to receive accurate testimony, it is crucial that a questioner use non-leading questions and age-appropriate language.\textsuperscript{212} Moreover, children are more willing to go along with either “implied or intentional suggestions.”\textsuperscript{213} Therefore, children should not be asked “forced-choice” questions which limit the amount of information a child can give.\textsuperscript{214} This approach to questioning is very different from the typical approach, which involves building little rapport and asking direct, pointed questions designed to elicit the relevant information and no more.\textsuperscript{215} A juvenile court judge who understands how children respond as witnesses can have beneficial impacts on the trial as the judge will better understand what kinds of questions should (and should not) be asked of child witnesses.

Another benefit of having a juvenile court judge conduct the entire proceeding, from pre-trial to adjudication, is that juvenile court judges are more likely to be knowledgeable about

\begin{itemize}
\item \textsuperscript{206} Id. at 127.
\item \textsuperscript{207} See id. at 128 (“Minimum term requirements reflect an understanding that the ‘expertise necessary’ to be a successful juvenile court judge ‘can come only from years on the job.’ . . . [A] juvenile court judge who serves on the bench for more than two to three years ‘understands a lot of things by osmosis’ . . . .”).
\item \textsuperscript{208} Id. But see Guggenheim & Hertz, supra note 203, at 574 (arguing that judges are more prone to convict than juries as they hear more evidence and this can subconsciously affect their perception of evidence as a whole).
\item \textsuperscript{209} Steven A. Drizin & Greg Luloff, Are Juvenile Courts Breeding Grounds for Wrongful Convictions?, 34 N. Ky. L. Rev. 257, 278 (2007).
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id. at 279.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id. at 279–80.
\end{itemize}
alternative programming for juveniles. Both Tennessee and New Mexico require judges to consider possible rehabilitation for juveniles when deciding whether or not to waive them. However, New Mexico judges are more familiar with treatment options, programming, and juvenile facilities available because they must consider the available facilities in sentencing. Tennessee judges are only required to evaluate rehabilitation in a theoretical sense, not explicitly if there is a facility capable of treating the juvenile. A juvenile judge’s knowledge advantage makes him or her a better adjudicator than an adult court judge.

C. More Structural Protections

Typically, there is a binary choice between juvenile and adult court. Juvenile courts have fewer due process protections and less ability to punish. Adult courts have more of both. The New Mexico system is an exception to this rule because it provides juveniles with the same procedural rights as an adult, but with less inclination to punish. New Mexico provides

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216 This advantage exists in several different institutions:
Because juvenile court judges deal with youth on a daily basis, they are more likely to be sensitive to the developmental issues that influence juvenile criminality and are more likely to be knowledgeable about programming alternatives for youthful defendants. Moreover, adult probation officers and adult clinicians who often conduct evaluations of juveniles and make recommendations to criminal court judges in transfer hearings, also lack the knowledge and training of their juvenile court counterparts.


217 N.M. STAT. ANN. § 32A-2-20(B) (2018) (“[T]he court shall make the following findings in order to invoke an adult sentence: (1) the child is not amenable to treatment or rehabilitation as a child in available facilities . . . .”); Neitz, supra note 182, at 113 (“[Juvenile judges] appear to be some of the most experienced and trained bench officers in any specialized court. This suggests that juveniles appearing in delinquency court could have the benefit of a judge who understands both the law and the considerable array of sentencing options available to individual minors.”).

218 TENN. CODE ANN. § 37-1-134(b)(1)-(6) (2018) (defining the criteria for waiving a juvenile to adult criminal court).

219 See Richard E. Redding, Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research, 1997 UTAH L. REV. 709, 755 (1997) (“Moreover, juvenile court judges are more familiar with the various community-based treatment options available for juveniles; given the historically rehabilitative ideal of the juvenile court, they are more likely to espouse a rehabilitative (or rehabilitative/punitive) philosophy of juvenile justice.”).

220 Feld, supra note 12, at 191 (“[V]iolent offenders transferred to adult courts receive much harsher sentences than comparable violent offenders who were not transferred . . . .”); Guggenheim, supra note 16, at 471 (“[T]he preeminent quality of these cases is that . . . the only thing the juveniles sought was to secure the same rights enjoyed by adults. They won this argument three times and lost twice. . . . [T]he entire second period of . . . cases . . . focused almost exclusively on whether juveniles deserve equal rights possessed by adults.”).

221 N.M. STAT. ANN. § 32A-2-14(A) (2018) (“A child subject to the provisions of the Delinquency Act is entitled to the same basic rights as an adult . . . .”).
juveniles with the right to counsel, indictment by grand jury, bail, trial, and all the same evidentiary protections as adults. This ensures that an adjudication corresponds with the Constitution’s trade-off between due process rights and accuracy. New Mexican juveniles, if determined to not be amenable to treatment, are eligible for a reduction in their sentence by more than one third, as well as not being subject to mandatory minimums.

The benefit of this system is that it gives judges discretion to determine an individualized sentence for juveniles while maintaining procedural and evidentiary protections of the adult system. Judges, who have heard all the evidence from the indictment through the trial and the amenability hearing, determine the sentence. The judge can give a juvenile the statutory maximum that an adult would get, or they can sentence a juvenile to substantially less time. This also benefits juveniles because it allows them to be sentenced based on their individual culpability, which can vary dramatically due to the spectrum of emotional maturity and brain development in juveniles.

D. Focus on Amenability

New Mexico’s waiver system does a better job of sorting juveniles by rehabilitability due to its focus on amenability as the goal, rather than as a mere criterion. In New Mexico, if a juvenile is found guilty, a hearing determines if he or she is amenable to treatment and if there is a facility in New Mexico that can treat them. Even if not, a judge may still decide to sentence the juvenile as a juvenile, or to give the juvenile as less harsh sentence than an adult disposition.

222 Id. § 32A-2-14(A).
223 Id. § 31-18-15.1(G) (“The amount of the alteration of the basic sentence for noncapital felonies shall be determined by the judge . . . provided that when the offender is a . . . youthful offender, the judge may reduce the sentence by more than one-third of the basic sentence.”).
224 Id. § 32A-2-20(E) (“If the court invokes an adult sentence, the court may sentence the child to less than, but shall not exceed, the mandatory adult sentence.”).
225 Id. § 32A-2-20(E).
226 See id. § 31-18-15.1(G) (“The amount of the alteration of the basic sentence for noncapital felonies shall be determined by the judge . . . provided that when the offender is a . . . youthful offender, the judge may reduce the sentence by more than one-third of the basic sentence.”); id. § 32A-2-14(A).
227 See supra Section I.B.2.
228 Id. § 32A-2-20(B) (defining the criteria for giving a youthful offender an adult sentence).
would mandate.\textsuperscript{229} In Tennessee, a judge merely considers amenability to treatment as one factor among many in deciding whether or not to waive a juvenile.\textsuperscript{230}

Rehabilitation was the original goal of the juvenile justice system.\textsuperscript{231} Today, focusing on amenability to rehabilitation recognizes that a child is subject to numerous external forces and that his or her character is changing and developing, and that the criminal decision may have been a product of transient immaturity.\textsuperscript{232} Therefore, before imposing harsh sanctions on a child, society should evaluate whether and how much he or she can change.\textsuperscript{233}

Arguably, the characteristics and the victim of a crime should not matter for purposes of gauging rehabilitation. An action by a juvenile with poor impulse control may have serious consequences, while a similar action by another may have relatively minor consequences, without reflecting on the perpetrator’s culpability or amenability to rehabilitation. Stealing a car is a crime against property. Stealing a car and hitting someone with it, even unintentionally, is a crime against a person.\textsuperscript{234} The mens rea in both cases can be the same, even if the consequences are different. In both cases, the juvenile broke the law,\textsuperscript{235} and the underlying causes can be identified and addressed.

New Mexico’s system focuses on the characteristics of the juvenile. It attempts to ascertain what caused the juvenile to commit the crime: the background of the juvenile’s

\textsuperscript{229} See id. § 31-18-15.1(G) (“The amount of the alteration of the basic sentence for noncapital felonies shall be determined by the judge . . . provided that when the offender is a . . . youthful offender, the judge may reduce the sentence by more than one-third of the basic sentence.”); id. § 32A-2-14(A).

\textsuperscript{230} TENN. CODE ANN. § 37-1-134(b)(1)–(6) (2018) (defining the criteria for waiving a juvenile to adult criminal court).

\textsuperscript{231} Kent v. United States, 383 U.S. 541, 554 (1966) (“The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.”).

\textsuperscript{232} Roper v. Simmons, 543 U.S. 551, 571–74 (2005) (discussing how a juvenile’s character changes over time and it is “difficult” to predict if a juvenile is truly incorrigible); Steinberg & Scott, supra note 57, at 1014 (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.”).

\textsuperscript{233} Roper, 543 U.S. at 572–73 (holding that the risk of executing juveniles who are not culpable enough outweighs the benefit of executing those who are and psychology is not advanced enough to sort between the two groups).

\textsuperscript{234} Kent, 383 U.S. at 566–67 (“1. The seriousness of the alleged offense . . . and whether the protection of the community requires waiver. 2. Whether the alleged offense was . . . aggressive, violent, premeditated or willful . . . 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons . . . .”)

\textsuperscript{235} MODEL PENAL CODE § 2.02(1) (AM. LAW. INST. 2017) (either intentionally, knowingly, or recklessly).
biopsychosocial history. The crime itself matters, but only as evidence of the juvenile’s amenability to rehabilitation. Sometimes juveniles are not amenable to rehabilitation. But rarely. Because juveniles are less culpable than adults, and, further, their ability to be culpable can be in flux, the New Mexico’s system focuses on their amenability to treatment. In Tennessee’s system, a juvenile could be amenable to rehabilitation, but the judge waives jurisdiction anyway due to the overwhelming heinousness of the crime or the severity of the juvenile’s criminal history. This means that the system will punish children who could be rehabilitated. New Mexico’s system would identify the rehabilitatable juvenile despite his or her long criminal history or accusation of a serious crime and try to help him or her, whereas the Tennessee system would simply waive the juvenile to the adult system.

E. Answering Constitutional Challenges to the New Mexico System

New Mexico’s system has been challenged on constitutional grounds. This section will discuss two objections to the New Mexico waiver system and explain why they are not constitutionally problematic. Subsection 1 will confront the challenge that having a waiver hearing in front of a judge rather than a jury violates Apprendi v. New Jersey. Subsection 2 will rebut the argument that having the waiver hearing after trial raises uncertainty and vagueness concerns for a juvenile defendant.

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236 N.M. STAT. ANN. § 32-A-20(C) (2018) (“[T]he judge shall consider . . . (5) the maturity of the child [considering] the child’s home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability; (6) [the child’s criminal record]; (7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child . . . .”).

237 Id. § 32A-2-20(B) (“[T]he court shall make the following findings in order to invoke an adult sentence: (1) the child is not amenable to treatment or rehabilitation as a child in available facilities . . . .”).

238 See State v. Ira, 43 P.3d 359, 368 (N.M. Ct. App. 2002) (holding that the juvenile’s sentence was constitutional). Here, the Juvenile was sentenced to 91.5 years for a series of rapes committed when he was fourteen, id. at 361. Three independent mental health experts testified that the juvenile needed inpatient treatment that would surely extend longer than until his twenty-first birthday, id. at 363–64. Therefore, the judge found the juvenile not amenable to rehabilitation, id. at 364.

239 It is unclear how many juveniles are deemed “unamenable” to treatment, but the number is clearly very small. In 2007, just 23 juveniles out of 23,866 juveniles arrested had their cases transferred to adult court. See Dorian Dodson, Selected Statistics for New Mexico Counties, JUVENILE JUSTICE SERVICES 1, 2 (2007) https://cyfd.org/docs/County_Profiles.pdf [https://perma.cc/C5LQ-3722]; Torbet et al., supra note 48, at 24 (finding that from 1995 to 1998, the Second Judicial District (Albuquerque) sought adult sanctions in 192 cases. Of the 166 cases completed, 139 ended in convictions, with 104 ending in youth offender offenses. Of the 104 youthful offender offenses, 51 were given juvenile sanctions and 53 were given adult sanctions.).

240 Id. § 32A-2-20(B).

241 See TENN. CODE ANN. § 37-1-134(a)(4)(C) (2018) (“[T]he interests of the community require that the child be put under legal restraint or discipline.”).
1. **Apprendi Concerns**

Juvenile defendants in New Mexico have argued that judicial waiver violates *Apprendi v. New Jersey*.\(^{242}\) *Apprendi* holds that the Sixth Amendment requires that any fact that increases a defendant’s maximum sentence be found by a jury.\(^{243}\) In *Apprendi*, the defendant was convicted by a jury, and then a judge found after trial that the defendant had committed a “hate crime,” which increased the sentencing range.\(^{244}\) The Supreme Court ruled this unconstitutional and held that because the finding of “hate crime” increased the maximum sentence, it needed to be found by a jury beyond a reasonable doubt.\(^{245}\) Further, *Blakely v. Washington* clarified that the maximum sentence was the maximum sentence eligible to be imposed purely based on the facts found by a jury.\(^{246}\)

Applying this to the New Mexico system, defendants have argued that, because a finding of “non-amenability” dramatically increases the maximum sentence, *Apprendi* requires that it be found by a jury, instead of a judge.\(^{247}\) In convicting the juvenile, the jury only finds that the juvenile committed the crime, not that he or she is unamenable for rehabilitation or ineligible for commitment. This determination is a crucial one for juveniles; it is the most important sentencing decision a judge makes.\(^{248}\) It can be the difference between being held in a juvenile facility until one is at most twenty-one and being held in an adult facility for the rest of one’s life.\(^{249}\)

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\(^{242}\) State v. Rudy B., 243 P.3d 726, 735 (N.M. 2010).


\(^{244}\) *Id.* at 471 (“Having found ‘by a preponderance of the evidence’ that Apprendi’s actions were taken ‘with a purpose to intimidate’ as provided by the statute, the trial judge held that the hate crime enhancement applied.”) (citation omitted).

\(^{245}\) *Id.* at 490 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

\(^{246}\) Blakely v. Washington, 542 U.S. 296, 303 (2004) (“Our precedents make clear, however, that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”) (emphasis in original).

\(^{247}\) *Apprendi*, 530 U.S. at 470.

\(^{248}\) Feld, *supra* note 30, at 1214 (“Waiver of juveniles to criminal court for adult prosecution represents the single most important sentencing decision that juvenile court judges make.”).

\(^{249}\) See *State v. Ira*, 43 P.3d 359, 361 (N.M. Ct. App. 2002) (holding that sentencing a fifteen-year-old to 91.5 years was not cruel and unusual punishment and affirmed the sentence).
This is not an argument specific to New Mexico. Any waiver decision, before or after adjudication of guilt, has a drastic consequence on the juvenile’s exposure. However, courts have exempted the juvenile decision from Apprendi in at least three different ways.

First, courts have found that a waiver decision is jurisdictional, and thus outside of Apprendi’s purview, because it does not involve sentencing or an element of a crime, but only which court hears the case. However, this argument is inapplicable to the New Mexico system, because the case stays in the juvenile system for its entirety and the waiver hearing merely determines how a juvenile will be sentenced. Therefore, one cannot say the New Mexico decision is a jurisdictional one.

Second, the Supreme Court has held that due process requires fundamental fairness, and fundamental fairness, at least in the juvenile system, does not require a jury at all. If there is no right for a juvenile to have a jury trial, then a juvenile cannot complain that a jury did not find him guilty beyond a reasonable doubt. However, this argument is also inapplicable to the New Mexico system because the waiver authorizes an adult sentence. It does not follow that because a juvenile does not have a right to a jury determination for a juvenile delinquency proceeding that they therefore do not have a right to a jury determination about their eligibility for an adult sentence. In fact, juveniles do have the right to a jury trial if eligible for an adult sentence.

Third, courts have distinguished the kinds of findings that juries are able to make. Juries are able to find historical facts, not to make predictions about future dangerousness.

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250 United States v. Miguel, 338 F.3d 995, 1004 (9th Cir. 2003) (“Apprendi does not require that a jury find the facts that allow the [waiver] to district court. The [waiver] proceeding establishes the district court’s jurisdiction over a defendant.”); United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000) (rejecting the claim that the waiver of a juvenile to an adult court increases punishment and holding that “it merely establishes a basis for district court jurisdiction”) (internal quotation marks omitted).

251 Gonzales v. Tafoya, 515 F.3d 1097, 1113 (10th Cir. 2008) (“Here, when a New Mexico court determined to sentence Mr. Gonzales as an adult, the court already had jurisdiction, and it had already adjudicated him guilty of the charged offenses. The amenability and commitment findings ‘greatly increased the maximum sentence which [Mr. Gonzales] faced.’”).

252 McKeiver v. Pennsylvania, 403 U.S. 528, 528 (1971) (holding that there is no right to a jury trial in juvenile court).

253 Gonzales, 515 F.3d at 1113 (“[T]his distinction appears to sanction ‘a constitutional no man’s land,’ in which a youth could be denied both the benefits of the juvenile system (i.e., limited sentences and an emphasis on rehabilitation) and the Sixth Amendment right to a jury trial afforded to adult offenders.”) (internal citations omitted).

254 N.M. STAT. ANN. § 32A-2-16(A) (2018) (“A jury trial on the issues of alleged delinquent acts may be demanded by the child, parent, guardian, custodian or counsel in proceedings on petitions alleging delinquency when the offense alleged would be triable by jury if committed by an adult.”).

255 Gonzales, 515 F.3d at 1113.
Therefore, predictive facts, such as amenability to treatment, are better found by a judge.\textsuperscript{256} Furthermore, questions about whether any facility can successfully hold or treat a juvenile are almost impossible for juries to answer and are beyond their traditional scope.\textsuperscript{257} These questions are similar to the kinds of determination that judges make in civil commitment hearings, which are not subject to proof submitted to a jury beyond reasonable doubt.\textsuperscript{258} Further, a determination of amenability can only be made by “weighing a thorough knowledge of the resources for treatment and rehabilitation offered by the State against various, and often conflicting, psychological and social evaluations of ‘the child’s home, environmental situation, social and emotional health, pattern of living, brain development, trauma history and disability.’”\textsuperscript{259} Juries do not know what facilities a state has, those facilities’ success rates, and asking juries to make determinations without this knowledge is beyond their capacity or traditional scope.\textsuperscript{260}

So, while \textit{Apprendi} might seem to pose a challenge to the New Mexico system, the distinction between predictive and retrospective factors allows the New Mexico system to sidestep the dilemma.\textsuperscript{261}

2. \textbf{Uncertainty for the Juvenile}

Another potential problem with the New Mexico system is that it is unacceptably indefinite because juveniles might conduct their defense differently if they knew ahead of time that they faced an adult sentence. These differences can manifest themselves before, during, and even after trial.

\begin{itemize}
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} \textit{Id.} at 1112.
\item \textsuperscript{258} \textit{Id.} at 1113 ("[M]any of these [waiver] judgments may benefit from special skills and experience and involve ‘a predictive, more than historical, analysis.’ Moreover, the judge is required to evaluate contrasting testimony from mental health professionals, and in that way his task resembles that of the judge in adult civil commitment proceedings.") (internal citations omitted).
\item \textsuperscript{259} State v. Rudy B., 243 P.3d 726, 735 (N.M. 2010).
\item \textsuperscript{260} \textit{Gonzales}, 515 F.3d at 1113–14.
\item \textsuperscript{261} However, in the interest of hewing as closely as possible to \textit{Apprendi}, it is worth noting that three of New Mexico’s six factors when determining amenability are offense-specific. The New Mexico Supreme Court has suggested in dicta that the judge refer these criteria to the jury as interrogatories, holding that: Nonetheless, though we hold that the context and purpose of the findings required under Section 32A-2-20(B) insulate them from the \textit{Apprendi} rule, we think it prudent to submit the offense-specific factors in Section 32A-2-20(C)(2) [whether a crime was aggressive, willful or premiediated], (3) [whether a fire arm was used] and (4) [whether the crime was against person or property] to the jury during the trial perhaps by way of special interrogatories. Doing so will place only a minimal burden on the process because it can be done during the trial.
\end{itemize}

\textbf{State v. Rudy B., 243 P.3d at 735.}
Before trial, a juvenile with the resources to retain counsel might hire a more expensive lawyer, or give that lawyer more resources, if they know they would face a long sentence. If not, they might choose to get a less expensive lawyer.\textsuperscript{262}

Additionally, in preparing for trial, juveniles might choose to deploy their resources differently knowing that they are not exposed to an adult sentence. They might not hire an investigator to track down every witness.\textsuperscript{263} They might not pay for an independent psychiatric examination.\textsuperscript{264} They might not pay for an independent DNA test. Even if a juvenile is assigned a public defender as counsel, that public defender might request more mitigating resources, and have a stronger argument in doing so, if the juvenile is eligible for an adult sentence.\textsuperscript{265}

Further, assuming the juvenile has a public defender, the public defender might work less if he or she knows the juvenile faces “only” a year or two in jail, rather than decades in adult prison. Unfortunately, public defenders “triage” their client and the uncertainty in the New Mexico system prevents a juvenile from knowing (or could cause a public defender to misjudge) the juvenile’s exposure going into the trial.\textsuperscript{266}

During trial, the possible sentence might shape a juvenile’s trial strategy. It might influence which witnesses the defense puts on and in which order. The more the exposure, the more thorough the defense will need to be. Or, the shorter the exposure, the more the defense could choose a high-risk strategy.\textsuperscript{267} The juvenile might choose to testify, or not, as part of

\begin{footnotes}
\item[262] Arger singer v. Hamlin, 407 U.S. 25, 49 (1972) (Powell, J., concurring) (“Nor does every defendant who can afford to do so hire lawyers to defend petty charges. Where the possibility of a jail sentence is remote and the probable fine seems small, or where the evidence of guilt is overwhelming, the costs of assistance of counsel may exceed the benefits.”); Pamela S. Karlan, Fee Shifting in Criminal Cases, 71 CHI.-KENT L. REV. 583, 596 (1995) (“That the defendant with retained counsel selected his attorney, and even that he may have ‘settled’ for a cheaper lawyer with some level of awareness that this might reduce his chances of prevailing . . . .”).
\item[263] Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 BUFF. L. REV. 329, 375 (1995) (“[As of 1995, i]n California, $15,000 is spent on psychiatrists and other expert witnesses in the typical capital case, with an additional $25,000-$50,000 spent on investigation costs.”).
\item[264] Id. at 374 n.195 ([As of 1995, t]he hourly rates charged by psychologists for pre-trial work range from a low of $50 to a high of $125 . . . . The average daily rate for trial testimony is $1200 per day; daily rates range from $800 to $3000.”).
\item[265] Id. at 391 (“The reluctance to spend taxpayer money on indigent defense also manifests itself in the states' failure to provide adequate funding for defense experts and investigators.”).
\item[266] Irene Oritseweyinmi Joe, Systematizing Public Defender Rationing, 93 DENV. L. REV. 389, 404–05 (2016) (“The lack of adequate funding leads to a dearth of available resources and public defender systems, where even the most committed and skilled of public defenders are faced with the difficult task of representing significantly more people than the available resources make entirely possible.”).
\item[267] If the juvenile faces, at most, a year or two in juvenile custody, he or she might attempt to present a riskier defense, knowing that the downside of losing is less. If he or she is exposed to an adult sentence, he or she might either plead guilty or adopt a less risky strategy in order to minimize their risk.
\end{footnotes}
adopting a riskier or safer strategy. Therefore, the time of waiver has implications even on the defendant’s right to testify. Further, a juvenile might put on a different defense if they know that they will have an amenability hearing afterwards. Juveniles with unconvincing alibis might choose not to take the stand, but during the subsequent amenability hearing might wish that they had because they would want the judge to have heard their alibi. Juveniles might wish to deny responsibility for purposes of the trial but admit responsibility and claim peer pressure for purposes of the amenability hearing, a switch, which would understandably be met with skepticism by a trial judge.268

Regardless, the New Mexico system provides enough notice to juveniles to avoid any sort of vagueness or due process concerns because the juveniles have notice.269 Juveniles know, well before any crucial hearing, whether or not they could be sentenced as an adult. The prosecutor must file, within ten days of filing the charges, a notice that he or she will seek adult sanctions.270 If the prosecutor fails to file the notice, they cannot later seek adult sanctions.271 If, after further investigation, or even after adjudication, the prosecutor decide that the state’s best interests are not served by seeking adult sanctions, he or she can inform the court and the juvenile will be sentenced as a juvenile.

Under this system, juveniles have notice that they face adult exposure. A rational defendant should therefore prepare as if he or she is going to face adult sanctions and deploy his or her resources accordingly. This could lead to cases where resources are “wasted” if the defense deploys their resources and the prosecutor decides to not seek adult sanctions. However, one could argue that if juveniles deploy their resources and the prosecutor decides not to seek adult sanctions, then the resources aren’t wasted at all. The resources achieved their function by mitigating the juvenile’s eventual sentence.

At a minimum, due process requires notice.272 Juveniles are put on notice that they could face adult sanctions and are given several opportunities to show that they should not be given such

268 Guggenheim & Hertz, supra note 203, at 574 (“[A] judge’s experience in presiding over criminal and juvenile cases may make the judge unduly skeptical of the testimony of the accused.”).
269 N.M. STAT. ANN. § 32A-2-20(A) (2018) (“The children’s court attorney shall file a notice of intent to invoke an adult sentence within ten working days of the filing of the petition . . . .”).
270 Id.
271 Id.
sanctions, either because they are innocent (as shown at trial) or because they are amenable to rehabilitation (as shown at the amenability hearing).

V. CONCLUSION

Juvenile courts have struggled to determine which juveniles to retain in juvenile court and which juveniles to waive to adult court. Originally, juvenile courts had broad discretion to try to rehabilitate juveniles, leading to non-proportionate and indefinite sentences. The Supreme Court then recognized juveniles had some procedural rights in juvenile court. However, following a rise in juvenile crime in the 1990s, legislatures shrunk juvenile court jurisdiction dramatically. Today, there are a myriad of different forms of jurisdiction, and ways to waive juveniles to adult court. Some states give discretion to the prosecutor, some to the judge, and some to the legislature. All, however, determine which court has jurisdiction at the beginning. New Mexico alone allows the juvenile to remain in the juvenile court for the entire process. This seemingly small shift has seismic consequences later on. It allows the juvenile to have his or her case heard by a more expert juvenile court judge. It allows the judge to have more facts on the record to make a more informed decision. Furthermore, New Mexico bifurcates the decision, allowing a jury to make historical factual findings, but then requiring a judge to make predictive findings about amenability to rehabilitation. New Mexico’s focus on amenability causes fewer juveniles to be waived to adult court, and of those, the ones least able to be rehabilitated, rather than the ones whose crimes are the most heinous. This shift creates substantial immediate and long-term benefits for the juvenile and the community.
When Injustice Becomes Law: Legal Philosophy Principles Applied To Actual-Innocence Claims in Federal Habeas Petitions

By: Megan Reed*

I. INTRODUCTION

Imagine yourself in a prison cell, lying on an uncomfortable bed and wearing a bright orange jumpsuit. For the last few years, prison guards told you when you can and cannot eat, shower, shave, go outside, or watch TV. For people convicted of serious crimes, this sounds like reasonable punishment. Yet there is one problem: you are innocent of the crime for which you were convicted, and no one seems to care. Recent statistics demonstrate that this scenario is not far-fetched: since 1989, 2,221 people were exonerated of crimes for which they were wrongfully convicted. Collectively, our criminal justice system stole 19,610 years of freedom from those people. But even with those terrifying statistics, the Supreme Court declined to recognize a constitutional claim of “actual innocence.” And Congress has not amended the federal habeas statute to add “actual innocence” as a ground for relief.

Through legal philosophy principles, this Article demonstrates the need for federal habeas reform to recognize actual-innocence claims. The first Section provides a brief history of federal habeas review of state criminal convictions. It also uses a specific case to illustrate the problems with current federal habeas review. The second Section shows how rules alone do not ensure justice, and how adhering to strict finality of convictions prevent federal habeas from achieving just outcomes. The third Section demonstrates the

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3 Id.
5 King, supra note 3.
moral dilemma federal habeas laws created for judges. The fourth Section shows that federal habeas reform must be approached from behind a veil of ignorance of our personal situations and with the mindset of avoiding extreme outcomes. And finally, the last Section recommends a pathway for considering innocence claims under federal habeas law.

II. BACKGROUND

“There is no greater tyranny than that which is perpetuated under the shield of the law and in the name of justice.”

—Charles de Montesquieu

A. History of Federal Habeas Review of State Criminal Convictions

Prior to the 1950s and ’60s, constitutional rules of criminal procedure were applied only to federal criminal trials and not state criminal trials. But during the 1950s and ’60s, the Supreme Court, through multiple opinions, declared that the constitutional rules of criminal procedure applied to state criminal trials through the Fourteenth Amendment’s Due Process Clause. Using habeas corpus review, which is provided for in the U.S. Constitution, federal courts began vacating state-court convictions and ordering states to either release the defendant or re-prosecute using constitutionally valid procedures.

In response, states developed new postconviction remedies; by the 1970s, “every state had adopted a new, primary postconviction remedy—a means for petitioners to enforce these new constitutional procedural rules in state court.” Also during the 1970s, the number of state-court prosecutions considerably increased, which lead to a heavy increase in federal habeas petitions from state prisoners. In

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7 Id. at 222.
8 Id. (“States for the first time were ordered to enforce new procedural rules in their criminal cases, including the Fourth Amendment’s exclusionary rule for unreasonable searches and seizures, Miranda protections for the Fifth Amendment privilege against self-incrimination, and rights to appointed counsel and a jury drawn from a representative cross-section of the community under the Sixth Amendment.”).
9 U.S. Const. art. I, § 9, cl. 2 (“The Privileges of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
10 Id.
11 Id.
12 Id.
response to the petition influx and with knowledge that state courts reviewed constitutional violations in criminal cases, “the Supreme Court began to scale back federal habeas review.”

During that scale back, the DNA revolution began, which proved with scientific certainty that innocent people were wrongly convicted. The Supreme Court then created “innocence gateways,” which are exceptions for prisoners who can show probable innocence. But those gateways proved ineffective for innocence claims because the focus remained on constitutional procedural claims. The Supreme Court declined to recognize a constitutional claim of “actual innocence” and Congress has not amended the habeas statute to add “actual innocence” as a ground for relief. Instead, Congress’s last amendment—the 1996 Antiterrorism and Effective Death Penalty Act (“AEDPA”)—further restricted federal court review of state convictions through various procedural hurdles.

Those procedural hurdles often lead to unjust outcomes. Unless a prisoner has a viable procedural claim, new evidence of the prisoner’s innocence is useless. Also, because state and federal postconviction procedures create many obstacles for innocence claims, courts often dispose of those claims on procedural grounds and rarely on the merits. Lewis v. Wilson, the case explained in the next Section, illustrates how these procedural bars create unjust outcomes.

13 Id.
14 Id.
15 Id. at 223.
16 Id.
18 King, supra note 3.
19 Id. at 224; GARRETT, supra note 3, at 205.
20 King, supra note 3.
B. Lewis v. Wilson: An Unjust Outcome

“For some [of the wrongfully convicted], the bright flame of their innocence can light the way through this endless darkness, but rarely can they allow themselves to experience unabashed hope.”

—Jeff Deskovic

In August 1996, Philadelphia police officers responded to a reported shooting and found 57-year-old Hulon Bernard Howard lying on his back and “obviously dead.” Bernard’s girlfriend, who told officers she went by “Star,” stated that three men in their late teens or early 20s came over to their house earlier that night. She further stated that “[o]ne of them fired a sawed off shotgun into the ceiling, and another went around turning out the pockets of everyone in the house, robbing them. And then, when it was over, the one called Mellow shot Bernard, and all three of the men ran out of the [house].”

About eight months later, officers showed Star a photo spread, where she picked out 17-year-old Terrance Lewis. In the months following, officers showed Star more photo arrays, and she eventually picked out the two young men who became Lewis’s codefendants. At trial, the only evidence against the three men was Star’s eyewitness identification. The prosecutor stated during his opening arguments that this was a “virtually perfect case”—or at least it seemed so on the surface.

But Star’s eyewitness testimony at trial had many problems. First, the statement of another woman present during Bernard’s murder, Denise, contradicted Star’s testimony about when Star smoked crack that day, and about who was present when Bernard was murdered. Yet neither the prosecution nor defense called Denise to testify at trial.

24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 The Virtually Perfect Witness, supra note 19.
31 The Bootstrap Paradox, supra note 27.
Second, Star testified that one of the men fired a shotgun into the ceiling. But there were “[n]o bullet holes in the kitchen ceiling, or anywhere else in the house. No sign that the shotgun had been pointed up and fired like she [said].” Third, the lineups shown to both Denise and Star appear to be highly suggestive, which was likely done so intentionally so that both women would pick Lewis.

Fourth, “a whole slew of witnesses” who were on the street outside the house on the night of Bernard’s murder came forward in the years since Lewis’s conviction. “And all of them stated, on the record, that [Lewis] was not one of the three men who went into Star and Bernard’s house that night.” And finally, Lewis’s codefendants both agreed with the street witnesses that Lewis was not there when Bernard was murdered.

In 1999, Terrance Lewis was convicted of second degree murder, robbery, and criminal conspiracy, and was sentenced to life imprisonment. In 2011, a federal magistrate judge found that Lewis was actually innocent of Bernard’s murder. But in 2018, Lewis remains in prison due to AEDPA procedural bars. To be entitled to an evidentiary hearing in federal court, the AEDPA requires a petitioner to develop the factual basis for the claim in previous state-court proceedings. A petitioner fails to develop the factual basis for the claim if there is a “lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” And a petitioner lacks diligence if the petitioner did not support the request for a state evidentiary hearing with available and reliable evidence.

The judge found that Lewis failed to meet the diligence requirement for three reasons, all dealing with counsel’s mistakes. As stated above, unless a person wrongfully convicted has a viable procedural

32 *The Virtually Perfect Witness*, supra note 19.
33 *Id.*
34 *The Bootstrap Paradox*, supra note 27.
35 *Id.*
36 *Id.*
37 *Id.*
39 *Id.* at 414 (2010).
40 *Id.* at 421.
41 *Id.* (quoting Williams v. Taylor, 529 U.S. 420, 432 (2000)).
42 *Id.* at 422.
43 The three reasons were: (1) postconviction counsel failed to request that trial counsel testify at the state postconviction hearing; (2) postconviction counsel failed to include ground seven—ineffective assistance of counsel...
claim, new evidence of that person’s innocence is useless. Thus, the judge recommended that the court deny relief because his innocence claim was “merely a gateway to consider the merits of his defaulted constitutional claim.”

III. ADHERENCE TO THE RULES OF “FINALITY” DOES NOT ENSURE JUSTICE

A. Billy Budd: Rules Alone are Not Enough

“Errors do not cease to be errors simply because they were ratified into law.”
—E.A. Bucchianeri

For centuries, the criminal justice system developed a body of legal rules and procedures designed to ensure that only the guilty are convicted and that the innocent walk free. Once a person is convicted, the innocence presumption disappears, and the convicted person then follows other legal rules and procedures to file appeals and postconviction petitions. But legal rules and procedural safeguards alone are not enough to ensure a fair society and do not provide absolute certainty. Melville’s *Billy Budd* illustrates this point.

In *Billy Budd*, there was a rule of law—the Mutiny Act—which “was justified because of its necessity for the order demanded on a ship in time of war.” But that law, when applied, provided a deeply unsatisfying result: an innocent man was hung. Thus, in *Billy Budd*, there was a rule of law, but that rule alone did not ensure fairness for Billy Budd or absolute certainty that he was guilty.

The unfortunate facts surrounding Billy Budd’s wrongful conviction sadly translate to modern day situations. The idea that the rule of law alone does not ensure justice is not just a fiction used in Melville’s *Billy Budd*—it is a reality for too many in the United States today. For Billy Budd’s situation, we do not

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for failure to investigate and present testimony from a specific witness—in the state postconviction appeal; and (3) postconviction counsel failed to properly file the statement of matters complained of on postconviction appeal. *Id.*

44 King, *supra* note 3, at 224.

45 Lewis, 748 F. Supp. 2d at 422.


50 As of March 2018, DNA testing has exonerated 354 people who were wrongfully convicted. Collectively, those exonerees spent a total of 4,832.5 years in prison. *DNA Exonerations in the United States, INNOCENCE PROJECT*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Mar. 27, 2018).
have the opportunity to change the applicable law to his case—even though we may want to. Luckily, that case is merely fiction. But for Lewis and others similarly situated, we adhere to current rules of finality even when they lead to extremely unjust and deeply dissatisfying outcomes. The rules and procedures designed to protect those like Lewis clearly neither ensured fairness nor certainty.

There is unease of single eyewitness cases in legal systems worldwide for as long as legal systems existed. For example, the Bible discusses, multiple times, the requirement of more than one witness. And scholars discussed for centuries the idea that eyewitness identification is unreliable. Now, DNA testing confirms that eyewitness identification is the leading cause of wrongful convictions. Yet in Lewis’s case, Star was the “only eye-witness at [his] trial. Actually, she’s the only evidence against [him], period.” And many discrepancies called Star’s testimony into question. But in the current federal habeas system, the lack of confidence in eyewitness testimony for centuries, along with DNA exonerations that show it is the leading cause for wrongful convictions, simply do not matter. This outcome—which is deeply dissatisfying and contradicts general assumptions about the rule of law—tells society that the law is arbitrary, which leads to decreased confidence in the criminal justice system. Thus, we must rethink the justifications for federal habeas rules.

B. Federal Habeas Rules Depart from Justice Without Sufficient Reason

“It [is] better that ten guilty persons escape, than that one innocent party suffer.”

—William Blackstone

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52 Deuteronomy 19:15 states: “A single witness shall not suffice against a person for any crime or for any wrong in connection with any offense that he has committed. Only on the evidence of two witnesses or of three witnesses shall a charge be established.” Deuteronomy 19:15. 1 Corinthians 13:1 states: “Every matter must be established by the testimony of two or three witnesses.” 1 Corinthians 13:1. And in Matthew 18:16, Jesus reminds his disciples that “every matter may be established by the testimony of two or three witnesses.” Matthew 18:16.
53 EDWIN BORCHARD, CONVICTING THE INNOCENT (1932); HUGO MUNSTERBERG, ON THE WITNESS STAND (1907).
55 The Virtually Perfect Witness, supra note 19.
56 The Bootstrap Paradox, supra note 27.
57 MACCORMICK, supra note 43.
58 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 713 (WM Hardcastle Browne, A.M., ed. 1892).
According to political and moral philosopher John Rawls, we must achieve a just society when possible. We must judge existing institutions in light of this conception and deem them “unjust to the extent that they depart from it without sufficient reason.” This Section demonstrates how current federal habeas rules depart from justice without sufficient reason, showing that the current system is unjust.

Federal habeas’s original purpose was to provide redress to innocent prisoners who were wrongfully convicted. Yet in 1996, the AEDPA essentially gutted the viability of most innocence claims, flipping federal habeas’s original purpose on its head. When Congress passed the AEDPA, most exoneration data we have today was unavailable. Congress therefore did not factor that data into its balance between fairness and finality. We now know that innocent people are wrongfully convicted more often than we thought in 1996. Over 20 years later, this warrants a rebalancing of fairness versus finality.

In 1963, Professor Paul M. Bator, a “champion of finality,” argued that a court can never determine that a prisoner’s detention is 100% lawful because human-designed systems are inherently fallible. Thus, according to Bator, the solution is to design a criminal justice system that provides an “acceptable probability that justice will be done, that the facts found will be ‘true’ and the law applied ‘correct.’”

Bator supported his arguments with four negative impacts of endless litigation: (1) it wastes resources (economic, intellectual, moral, and political); (2) it damages a trial judge’s sense of responsibility; (3) it compromises the rehabilitative goals of substantive criminal law; and (4) it causes unreasonable anxiety in society that the criminal justice system is fallible. I will address each of these justifications in turn and show how each justification insufficiently justifies the departure of federal habeas from a just society.

60 Id.
61 Hartung, supra note 18, at 253.
62 Id. at 254.
63 Id.
64 Id. at 255.
66 Id. at 448 (emphasis added).
67 Id. at 451–52.
1. **Wasting Resources**

According to Bator, federal habeas must be limited because endless litigation wastes economic, intellectual, moral, and political resources.\(^{68}\) Each resource will be addressed in turn.

a. **Economic Resources**

Endless litigation undoubtedly is economically inefficient. For litigation, a state often must pay court-appointed attorneys, judges, law clerks, court staff, security, etc. Also, postconviction litigation may lead to a finding that a person has been wrongfully convicted, and the state may have to pay damages. For example, in Texas, if someone is found “actually innocent” after being wrongfully convicted, that person is entitled to, at a minimum, a lump sum of $80,000 per year of wrongful incarceration, a monthly annuity, health benefits, and up to 120 credit hours at an educational institution.\(^{69}\)

Incarcerating an innocent person, however, is also economically inefficient. “[R]obust habeas relief routes, insofar as they result in the release of incarcerated prisoners, may reduce the cost of state prisons to taxpayers, a cost that has nearly quadrupled over the last two decades and exceeded $39 billion in 2010.”\(^{70}\) As of 2010, New York had the highest cost per prisoner at $60,076 annually.\(^{71}\) Pennsylvania came in ninth place at $42,330 per prisoner annually.\(^{72}\) Lewis has spent about 20 years in prison, costing Pennsylvania approximately $846,600 total to incarcerate him. And the State has spent about $296,310 of that since the federal magistrate judge found Lewis actually innocent in 2011.

The story of Larry Youngblood also provides perspective here. After Youngblood’s conviction for sexual assault, kidnapping, and child molestation, his case made its way to the U.S. Supreme Court, which denied him relief.\(^{73}\) After that, Youngblood spent many more years in prison before DNA exonerated him.

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\(^{68}\) *Id.* at 451.

\(^{69}\) *TEX. CIV. PRAC. & REM. CODE § 103 (West 2011).*


\(^{72}\) *Id.*

of the crime.74 “The State of Arizona spent more than $109,000 to keep him behind bars for six and a half years, while the true perpetrator remained free. The DNA test that freed him cost $32.”75

Endless litigation is economically inefficient, but so is imprisoning innocent people. And while the average cost of DNA testing is likely higher than the $32 in Youngblood’s case, the cost of incarcerating an innocent individual, combined with litigation costs to fight DNA testing, likely outweigh the cost of the DNA test itself. Solely looking at the litigation costs to support the economic-resources argument is insufficient. Other costs must be considered too. Creating a specific federal habeas pathway for innocence claims (discussed further in Section IV) strikes a middle ground between these competing economic theories.

b. Intellectual Resources

Bator argued that endless litigation wastes intellectual resources; but it is unclear exactly what Bator meant by this, and “it is difficult to pin down the existence of any such strain.”76 It has even been argued that federal courts considering constitutional rights strengthens intellectual resources because, “[a]fter all, the Supreme Court’s . . . expansion of individuals rights has certainly made not only the courts, but also the bar and lay public, more sensitive to due process considerations.”77 Therefore, this justification holds little weight.

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74 Id.; See also GARRETT, supra note 3, at 234.
75 GARRETT, supra note 3, at 234.
77 Id. at 743–44.
c. Political Resources

Political resources are the skills and political assets of an individual or group used to influence others. It is unclear how exactly Bator envisioned that finality conserved political resources. But one thing for sure is that strict finality fosters political corruption.

Consider the case of Randy Steidl, a man who wrongly spent 17 years in prison, 12 of which were on death row. He was convicted in 1987 for the murder of a newlywed couple, Mr. and Mrs. Rhoads, in Paris, Illinois. About 14 years later, there was an impending 48 Hours episode on CBS about the case. In response, the case was assigned for review to Investigations Commander Michale Callahan.

After Callahan completed his investigation and discovered significant misconduct in the original investigation, he was convinced that Steidl and his codefendant were innocent. But when Callahan took his investigative findings to his Lieutenant Colonel, she told him, “You cannot re-open the Rhoads case. You cannot touch it . . . It’s too politically sensitive.” Callahan received significant pushback from his politically corrupt superiors and essentially tanked his career in a fight for the truth.

In June 2003, a federal judge overturned Steidl’s conviction and ordered the State of Illinois to release or retry him within 120 days (with a stay pending appeal). A new Illinois Attorney General, Lisa Madigan, was then elected. The Attorney General’s office ultimately decided not to appeal the judge’s ruling, and Steidl was eventually freed. Although the final outcome in Steidl’s case was the right one, the

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78 See Jean-Philippe Bonardi, Corporate Political Resources and the Resource-Based View of the Firm, STRATEGIC ORG. 1 (2011); see also Michael Lipsky, Protest as a Political Resource, 62 AM. POL. SCI. REV. 1144, 1114 (1968).
80 Id.
81 Id. at 125.
82 Id. at 134 (emphasis added).
83 Id. at 134 (emphasis added).
84 Michale Callahan, TOO POLITICALLY SENSITIVE 25 (2009).
85 Id.
86 Id. at 246.
87 Gordon Steidl, supra note 73.
political corruption likely would not have come to light if the federal judge barred Steidl’s claims on
procedural grounds.

Strict rules of finality foster corruption because police departments can keep information from
coming to light. The overarching question in Steidl’s case is: since when is murder politically sensitive?
Federal habeas review of state court convictions helps prevent police departments from becoming so
entrenched in certain views, such as murder being politically sensitive, that they forget about the overall
goal: justice. Federal habeas review is not a waste of political resources, but instead a benefit that prevents
and exposes political corruption.

d. Moral Resources

Moral resources are “certain human needs and psychological tendencies [that] work against
narrowly selfish behavi[or],” making “it natural for people to display self-restraint, and to respect and care
for others.” Moral resources include “human responses,” two of which are important restraints: respect
and sympathy.

One important human response is the tendency to respect others, which includes respecting
someone’s dignity, regardless of that person’s social standing. As Immanuel Kant stated: “Humanity
itself is a dignity . . . . [A person] is under obligation to acknowledge, in a practical way, the dignity of
humanity in every other man.” Prison strips people of all their dignity. Inmates are told when they can
shower, eat, talk with their family, go outside, go to the bathroom, etc.

Thus, when people rightly deserve their dignity back because it was wrongfully stripped from them
when they were convicted of a crime they did not commit, we are morally obligated to acknowledge and
correct it. For example, when the federal magistrate judge found that Lewis was actually innocent, she
essentially found that Lewis was wrongfully stripped of his dignity; yet our criminal justice system currently

89 Id.
90 Id.
91 Id. at 23.
provides him no relief. This is completely contradictory to our moral obligation. This is why our current system must be reformed.

The second human response is sympathy: “caring about the miseries and the happiness of others, and perhaps feeling a degree of identification with them.”\(^92\) We do not have to know people to have sympathy for them.\(^93\) Undoubtedly we have all experienced a situation where we were treated unfairly, allowing us all to feel a degree—even if a small one—of identification with the wrongfully convicted. And when you hear the stories of those wrongfully convicted, who experienced injustices for what probably felt like an eternity, a natural human reaction would be sympathy.

I am not sure how Professor Bator would view this as a waste of that resource. Those wrongfully convicted deserve our sympathy—they have more than earned it by enduring the horrors of injustice. To categorize that as a “waste” of moral resources is repulsive; but maybe this characterization is due to the limits on sympathy.

Feeling sympathy for a person outside your group or community is often harder than feeling sympathy for a person inside your group or community.\(^94\) It is quite possible that the limits on Bator’s sympathy prevented him from sympathizing with a prisoner. But when we open our mind to the possibility of innocence and realize that a wrongfully convicted person did not commit that crime just as much as we did not commit that crime, I find it near impossible that someone could not feel sympathy. The argument that federal habeas review wastes our moral resources is unpersuasive.

2. **Damaging a Trial Judge’s Sense of Responsibility**

Bator argued that endless litigation damages a trial judge’s sense of responsibility because there is “an indiscriminate acceptance of the notion that all the shots will always be called by someone else.”\(^95\) But this statement is extreme: federal habeas review does not require all the shots to always be called by

\(^{92}\) *Id.* at 22.
\(^{93}\) *Id.*
\(^{94}\) *Id.* at 28.
\(^{95}\) Bator, *supra* note 59, at 451 (emphasis added).
someone else. Instead, as discussed above, it is limited to constitutional issues.\textsuperscript{96} Also, state judges knowing that federal judges may check their work on constitutional issues likely causes state judges to be more attentive to constitutional rights.\textsuperscript{97}

Further, when discussing people wrongfully imprisoned, a judge’s ego does not compare in importance. Wrongful convictions have wide-reaching effects beyond merely the wrongfully convicted person—they affect that person’s parents, siblings, children, spouse, cousins, and others close to them. Instead, judges, along with prosecutors, police officers, and others in the criminal justice system, must understand and accept human limitations.\textsuperscript{98} As defense attorney Dean Strange stated:

Most of what ails our criminal justice system lie[s] in an unwarranted certitude on the part of police officers and prosecutors and defense lawyers and judges and jurors that they are getting it right, that they are simply right. Just a tragic lack of humility of everyone who participates in our criminal justice system.\textsuperscript{99}

The criminal justice system does not need to protect egos; it needs humility so that it can “recognize . . . and correct serious mistakes.”\textsuperscript{100} In 1963, however, Bator could not envision the impending DNA revolution that has proved our criminal justice system is more fallible than anyone thought. The justification of damaging a judge’s sense of responsibility may have held more weight in the 1960s; but in 2018, it is a justification as unpersuasive as they come.

3. \textit{Compromising the Rehabilitative Goal of Substantive Criminal Law}

Bator argued that expansive federal habeas review undermines the rehabilitative goal of substantive criminal law.\textsuperscript{101} Bator stated: “The first step in achieving that aim may be a realization by the convict that he is justly subject to sanction.”\textsuperscript{102} But people know in their own minds—regardless of whether they admit it aloud—if they are guilty of the crime for which they are convicted. The finality of a conviction will not

\textsuperscript{96} Schwartz, \textit{supra} note 70, at 744.
\textsuperscript{97} Id.
\textsuperscript{98} MARK GODSEY, BLIND INJUSTICE 213 (2007).
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Bator, \textit{supra} note 59, at 452–53.
\textsuperscript{102} Id.
cause inmates to realize they committed a crime—they know. And for the wrongfully convicted, the finality of a conviction will never cause them to realize they committed a crime because, well, they did not. Innocent persons will never accept that their wrongful incarceration is just. Accordingly, this justification for finality is unpersuasive.

4. Causing Unreasonable Anxiety in Society that the Criminal Justice System is Fallible

“If innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, ‘whether I do good or whether I do evil is immaterial, for innocence itself is no protection.’”

—John Adams

In 1963, Bator acknowledged society’s lack of confidence or complacency with the criminal justice system. But Bator unlikely knew that in about 55 years, we would have scientific proof of the criminal justice system’s faults. Now, DNA testing has shown to an extremely high probability that certain individuals were wrongfully convicted. Other scientific studies (e.g., bite-mark evidence and eyewitness testimony) also demonstrated the criminal justice system’s faults. In the 1960s, Bator criticized finality opponents, yet they were on to something long before DNA and other scientific methods exonerated the innocent.

Now that society has scientific proof of wrongful convictions, people are no longer anxious that the criminal justice system may be fallible—they know it is. For example, a podcast called Undisclosed
covered Lewis’s case.\textsuperscript{109} As of March 2018, \textit{Undisclosed} has been downloaded 240 million times.\textsuperscript{110} Another example is \textit{Making a Murderer}, a wrongful-conviction documentary on Netflix that covered Steven Avery’s case, which 19 million people in the United States watched.\textsuperscript{111} And there are many other books, documentaries, and podcasts about wrongful convictions that received widespread attention.\textsuperscript{112} People now ask, “How do innocent people end up in prison? Did I contribute to it? What can I do to help correct it?” And worst of all, “Will this happen to me?” In 2018, the idea of finality does not relieve anxiety—it causes anxiety.

Further, ignoring public safety in the name of finality increases society’s anxiety. When innocent people are convicted, the true perpetrator of the crime is free in society to choose another victim.\textsuperscript{113} According to a 2011 study of 250 wrongful conviction cases, “45% of . . . DNA exonerations ha[d] resulted in the inculpation of the actual perpetrator (112 out of 250 cases).”\textsuperscript{114} Collectively, at least 40 of those perpetrators “were convicted of approximately fifty-six rapes and nineteen murders after innocent people were convicted of their earlier crimes.”\textsuperscript{115} And these crimes are only the ones we know about—it is quite possible that the actual perpetrators committed many more crimes that went unpunished.

If the right person were convicted to begin with, 19 murder victims may be alive today and 56 rapes may have been prevented. The sooner courts consider actual-innocence claims, the sooner actual

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{109} The State v. Terrance Lewis, UNDISCLOSED (last visited Mar. 27, 2018), http://undisclosed-podcast.com/episodes/terrance-lewis/.
\item \textsuperscript{110} @Undisclosedpod, TWITTER (Mar. 19, 2018, 4:22 PM), https://twitter.com/Undisclosedpod/status/975845053808762880.
\item \textsuperscript{114} See GARRETT, supra note 3, at 231.
\item \textsuperscript{115} Id. at 232.
\end{itemize}
\end{footnotesize}
perpetrators may be taken off the streets, preventing further harm to society. If the system continues to prevent actual justice in the name of finality, society’s anxiety will continue to increase. If the public believes that someone is innocent, but the courts refuse to even consider evidence of innocence, society will become more anxious about, and uncomfortable with, the criminal justice system.

IV. **CAPITAN VERE: THE MORAL-FORMAL DILEMMA**

“When injustice becomes law, resistance becomes duty.”

—Thomas Jefferson

Federal habeas laws have forced judges into a conflict between moral conscience and the law, similar to Capitan Vere’s conflict in *Billy Budd*. Vere struggled with a conflict between his moral conscience and the King’s law when it came to the punishment of Billy Budd. But as soon as Vere addressed this conflict, he immediately rejected his moral conscience:

How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—Does that state it alright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King.117

Shortly thereafter, Vere asked the three-person jury: “[T]ell me whether or not, occupying the position we do, private conscience should not yield to that imperial one formulated in the code under which alone we officially proceed.”118 Vere’s statements tell us that the law—not nature—define judges’ roles and that law is not equivalent to nature or conscience.119

In Robert M. Cover’s book on the antislavery movement and judicial process, he analyzed *Billy Budd* in terms of the Fugitive Slave Act. Cover called Vere’s conflict a “moral-formal dilemma” and asserted that antislavery judges faced a similar moral-formal dilemma.120 In slavery cases, “time and time again, the judiciary paraded its helplessness before the law; lamented harsh results; intimated that in a more

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118 *Id.* at 97.
119 COVER, supra note 44, at 2–3.
120 *Id.* at 5.
perfect world, or at the end of days, a better law would emerge, but almost uniformly, marched to the music, steeled themselves, and hung Billy Budd.”

Similar to Fugitive Slave Act cases, today’s “judges face profound difficulties when judging innocence postconviction.” In the opinion that recommended the court deny Lewis relief, the federal magistrate judge faced a moral-formal dilemma. In the opinion’s opening, the judge stated: “Based upon credible testimony, the court believes that Petitioner may not have been present at or participated in the [murder]; he may be actually innocent.” The judge ends the opening by “[r]eluctantly” recommending that the court deny Lewis relief.

When addressing Lewis’s ineffective-assistance-of-counsel claim, the judge clearly struggled with this moral-formal dilemma. The judge wrote about six paragraphs on the claim’s merits, and stated: “The court found the testimony of the[] witnesses to be credible, hence, the court believes that Petitioner is innocent.” But immediately after discussing the merits, the judge stated that Lewis was barred from an evidentiary hearing on this claim. The judge could have skipped the discussion of the claim’s merits altogether; but for some reason the judge expended extra effort to discuss the merits. While the judge found the evidence “credible,” “consistent,” and “clearly exculpatory,” she concluded with the recommendation that the court deny Lewis relief. In other words, the judge was helpless before the law, so she “marched to the music . . . and hung Billy Budd.”

In Cover’s book, he also discussed the judicial “can’t.” He explained that judges generally write opinions to persuade the parties that the court fairly applied the law and that the ultimate decision is just. But occasionally, a judge mentions in an opinion the immorality of the law but also states that the judge is

121 Id. at 5–6.
122 GARRETT, supra note 3, at 210.
124 Id. at 414.
125 Id. at 420.
126 Id. at 421–23.
127 Id. at 420, 431.
128 COVER, supra note 44, at 5–6.
129 Id. at 119.
bound to the law regardless of the immorality.\textsuperscript{130} “The judge may be telling us: I know the result reached is morally indefensible and I wish primarily that you understand the sense in which I have been compelled to reach it.”\textsuperscript{131} Cover illustrated this point with an excerpt from a case involving the Fugitive Slave Act: “It is argued that slavery had its origin in usurpation and injustice, and is continued in violation of man, . . . these are topics which the court will not discuss. We look to the law, and only the law.”\textsuperscript{132}

In \textit{Billy Budd}, Vere makes a similar statement: “For the law and the rigor of it, we are not responsible. Our vowed responsibility is this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.”\textsuperscript{133} These excerpts are similar to the excerpt by the federal magistrate judge in Lewis’s case:

This court’s inability to grant [Lewis] habeas relief based upon his compelling showing of innocence is frustrating. However, that is the import of [the law] and, given the hierarchical structure of the federal court system, this court is required to follow [the law] and decline any direct habeas relief based upon [Lewis’s] showing of innocence.\textsuperscript{134}

The judge in Lewis’s case invoked the judicial “can’t.” Cover recognized “[t]he limits that ‘cannot’ invokes may not be physical ones, but rather logical or conventional ones.”\textsuperscript{135} But what about the judge’s option of refusing to follow the law? The judge then faces “[c]ompeting, inconsistent, moral demands,” which force her to make a moral choice.\textsuperscript{136} The judge took an oath to uphold the Constitution and laws of the United States.\textsuperscript{137} And when she chose between the morality of recommending to keep an innocent man in prison versus upholding her oath, she chose the latter.

Martin Luther King Jr. would likely believe that the judge made the wrong choice. In his Letter from Birmingham Jail, King stated “that there are two types of laws: just and unjust . . . . [A]n unjust law is no law at all.”\textsuperscript{138} In King’s view, any law that does not align with moral law or “degrades human

\begin{flushleft}
\textsuperscript{130} \textit{Id.} \\
\textsuperscript{131} \textit{Id.} \\
\textsuperscript{132} \textit{Id.} at 120. \\
\textsuperscript{133} \textit{MELVILLE}, supra note 108, at 97. \\
\textsuperscript{134} \textit{Lewis}, 748 F. Supp. 2d at 423. \\
\textsuperscript{135} \textit{COVER}, supra note 44, at 122. \\
\textsuperscript{136} \textit{Id.} \\
\textsuperscript{137} 28 U.S.C. § 453 (2012). \\
\end{flushleft}
The justifications for conviction finality, as discussed above, do not include any underlying moral purpose. Instead, “finality exists to serve practical purposes in a world of limited resources.” And keeping an innocent man in prison undoubtedly degrades human personality. In his letter, King also stated that segregation relegates persons to the status of things, which is equally applicable to the wrongfully incarcerated. In the criminal justice system’s eyes, Lewis is no longer a human but merely a “thing” that cannot be dealt with for administrative reasons.

My point here is not whether the judge made the right or wrong choice, as it is an ethical dilemma with no clear answer. Instead, my point is that, like with the Mutiny Act and Fugitive Slave Act, the federal habeas system forces judges into moral-formal dilemmas. When that happens, the “ethical man still must choose and choose well.” Instead of forcing federal judges into these ethical dilemmas, we must reform our federal habeas laws.

V. HOW TO APPROACH THE SOLUTION

A. Justice from Behind a Veil of Ignorance

“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”

—Martin Luther King, Jr.

According to John Rawls, we should not look at the principles of justice from where we are right now. Instead, we must look out from behind a veil of ignorance; we must consider different principles without knowing exactly how they will affect our current situation. Behind the veil of ignorance, there are no limits on general information about general laws and theories. But we cannot consider things like

139 Id.
140 Sigmund G. Popko, Putting Finality in Perspective: Collateral Review of Criminal Judgments in the DNA Era, 1 L.J. SOC. JUST. 75, 76 (2011).
141 King, supra note 129.
142 COVER, supra note 44, at 122.
143 King Jr., supra note 137.
144 RAWLS, supra note 53, at 118.
145 Id.
146 Id. at 119.
our place in society, class position, or social status.\textsuperscript{147} We also cannot consider our natural abilities, intelligence, strength, generation, etc.

The veil-of-ignorance approach puts everyone on a level playing field and removes the temptation to “exploit social and natural circumstances.”\textsuperscript{148} Knowledge of specific facts must be prohibited to prevent an outcome that “is biased by arbitrary contingencies.”\textsuperscript{149} This approach to federal habeas reform is necessary because wrongful convictions can truly happen to anyone, no matter what race, age, sexual orientation, occupation, etc. Before discussing solutions from behind the veil of ignorance, it is important to explain why we must also avoid extremes in our solutions.

\section*{B. \textit{Antigone}: The Dangers of Adhering to Extreme Views}

People often try to structure their lives in a way to avoid tragedy and conflict. \textit{Antigone} of Sophocles, however, demonstrates the danger of creating a strict and narrow approach to the world in order to prevent tragedy or conflicting values. Strict and narrow approaches lead to tragedy and conflict because of the world’s complexities. Zenon Bankowski, a professor of legal theory, briefly summarized \textit{Antigone}:

The story of \textit{Antigone} is simple. Eteocles and Polynices, the sons of Oedipus, had agreed to rule Thebes in alternate years. Eteocles decides to stay in power and Polynices flees to Argos. There, with the king of Argos, he raises an army which attacks Thebes. The two brothers kill each other and the Argive army flees. Creon, the brothers’ uncle, accedes to the throne and decrees that while Eteocles should be afforded funeral rites, Polynices, as an enemy of the city, cannot have them. Death shall be the punishment for those that disobey. Antigone, the sister of the two brothers vows to disregard this decree in recognition of her family obligations. She does this and is sentenced to be buried alive by Creon. Haemon, Creon’s son and Antigone’s fiancée cannot dissuade Creon. Creon changes his mind, the prophet Tiresias having warned him. But it is too late. Antigone has hanged herself and Haemon kills himself on discovering her dead. Euridyce, Creon’s wife, kills herself on hearing this. Creon is left alive seeing where his singlemindedness and misapplication of reason has led him.\textsuperscript{150}

The values of Creon and Antigone contradict. Creon’s highest value is the laws of the State; Antigone’s highest value is natural law. Both built a concrete wall around what they believe is the sum and

\begin{itemize}
  \item \textsuperscript{147} \textit{Id.} at 118.
  \item \textsuperscript{148} \textit{Id.}
  \item \textsuperscript{149} \textit{Id.} at 122.
  \item \textsuperscript{150} ZENON BANKOWSKI, \textsc{Living Lawfully: Love in Law and Law in Love} 28 (Francisco Laporta, Aleksander Peczenik & Frederik Schauer eds., 2001).
\end{itemize}
substance of life and become so imprisoned within their views that they cannot compromise. Each believes that their view is the only way to avoid tragedy and conflict, yet both approaches are too narrow. Both approaches preclude chance and luck, and “gives them safety and security and confidence in their answers.”\textsuperscript{151} When something goes awry, neither Antigone nor Creon have to take responsibility for the outcome as long as they followed their narrow approach. But the competing values between Antigone and Creon—natural law versus statutory law, family versus State, duty versus order—should not be mutually exclusive; instead, they should be held in tension with one another.\textsuperscript{152} Considering the values together can create a better-working society, along with “an ethically more aware individual and society.”\textsuperscript{153}

Like the values of Creon and Antigone that contradict, the values of limited habeas review versus expansive habeas review also contradict. This chart demonstrates some of those conflicting values:

<table>
<thead>
<tr>
<th>Limited Federal Habeas Review</th>
<th>Expansive Federal Habeas Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finality</td>
<td>Fairness</td>
</tr>
<tr>
<td>Resource conservation</td>
<td>Resource use</td>
</tr>
<tr>
<td>Sense of responsibility</td>
<td>Humility</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>Truth</td>
</tr>
<tr>
<td>Procedural claims</td>
<td>Substantive claims</td>
</tr>
<tr>
<td>Prioritizing convictions</td>
<td>Protect against wrongful convictions</td>
</tr>
<tr>
<td>Limited government</td>
<td>Government accountability</td>
</tr>
<tr>
<td>Justice of coercion</td>
<td>Justice of caring</td>
</tr>
<tr>
<td>Order</td>
<td>Duty</td>
</tr>
</tbody>
</table>

To create a better working society, we should not treat the values of diverging opinions on federal habeas as mutually exclusive—we do not have to pick one or the other. Currently, however, the federal habeas system has a concrete wall that blocks any compromise for viable innocence claims. With this strict and narrow approach, those in the criminal justice system do not have to take responsibility for wrongful convictions as long as the individual received fair procedures. But like \textit{Antigone} that ended in tragedy, wrongful convictions also ended in tragedy: innocent people were executed or died in prison before they

\textsuperscript{151} \textit{Id.} at 29.  
\textsuperscript{152} \textit{Id.} at 34.  
\textsuperscript{153} \textit{Id.} at 35.
were exonerated. Reform must remove the extreme, near impossible limitations placed upon federal habeas review and must acknowledge actual-innocence claims. And on the other hand, reform must also not allow endless litigation from unlimited habeas petitions. The solution for federal habeas review is somewhere in the middle of those two extreme views.

VI. PUSUING JUSTICE: THE INNOCENCE TRACK

“Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”

—James Madison

Wrongful convictions “almost defy the human capacity for empathy; it is nearly impossible to imagine oneself in such circumstances.” But for a moment, try hard to imagine you were wrongfully imprisoned. Do not consider your current status or any personal characteristics. Looking from behind a veil of ignorance, what would you want your safety net to look like? Ideas that come to mind likely include: the opportunity to be heard in a court of law, to present newly discovered evidence, to prove your innocence, and to be freed from your wrongful imprisonment. To further justice, we must reform federal habeas review to embody those ideas and principles.

Stephanie Roberts Hartung proposed a federal postconviction “innocence track” that embodies the veil-of-ignorance approach and avoids extremes by treating innocence claims differently than other claims. The innocence track would exempt the prisoner from the AEDPA’s procedural bars if the prisoner made a threshold showing of innocence by a preponderance of the evidence. That lower standard of proof ensures that all viable innocence claims are eligible for the innocence track. It also provides the

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155 FEDERALIST NO. 51 (James Madison).
157 Hartung, supra note 18, at 255.
158 Id.
159 Id. (Hartung rightly argues that “the modern public understanding of the depth of the wrongful conviction crisis” warrants this lower standard).
safety net that we would want when we consider ourselves in that situation from behind a veil of ignorance. If the prisoner makes the threshold showing of innocence, the court would then hold an evidentiary hearing, where the burden of proof would then become clear and convincing evidence.\textsuperscript{160}

As discussed above, the original purpose for federal habeas corpus was to provide redress to innocent prisoners who were wrongfully convicted.\textsuperscript{161} But the AEDPA shifted federal habeas away from that purpose. The innocence track, however, would restore federal habeas back to its original purpose.\textsuperscript{162} Further, the AEDPA imposed a Creon-like approach to federal habeas, and the innocence track would strike a more measured balance between the competing values, finding the solution somewhere in the middle of the two extremes. The innocence-track approach also aligns more adequately with modern data of wrongful convictions.\textsuperscript{163} This approach, Hartung argued, “would help bring about the systemic, backward-looking reform of the criminal justice system that is long overdue.”\textsuperscript{164}

If federal courts held more evidentiary hearings for actual-innocence claims, they would undoubtedly use more resources. But the allowance of unlimited evidentiary hearings, or the complete preclusion of those evidentiary hearings are both dangerous, extreme approaches. The requirement of a threshold showing of innocence before a hearing strikes a middle ground between resource conservation and resource use. It strikes a better balance between finality and fairness, a sense of responsibility and humility, procedural claims and substantive claims, along with the other competing values. We must reopen the gates to legitimate innocence claims. As Hartung stated: “[T]o fully address the depths of the wrongful conviction crisis in the American criminal justice system, the courts must be willing to exhaustively reexamine cases where a threshold showing of innocence has been met. To do otherwise is to turn a blind eye to profound and ongoing justice.”\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{160} \textit{Id.} at 255–56.
\item \textsuperscript{161} \textit{Id.} at 253.
\item \textsuperscript{162} \textit{Id.} at 255.
\item \textsuperscript{163} \textit{Id.} at 256.
\item \textsuperscript{164} \textit{Id.} at 257.
\item \textsuperscript{165} \textit{Id.} at 256.
\end{itemize}
The United States Constitution does not provide for environmental rights. In fact, it does not mention the environment whatsoever. An increasing number of countries enshrine environmental rights within their constitutions as the dangers of climate change press on. Environmental activists in the United States are left with environmental laws and regulations but no guaranteed legal right to enforce. The First Amendment does not provide implicit or explicit environmental rights or causes of action for environmental claims but assists environmental activists in promoting environmental rights. However, as they are used by activists, these rights are currently in jeopardy and at risk of being weakened, constituting a serious threat to democracy. This paper discusses the relationship between the First Amendment and environmental rights, arguing that the First Amendment is paramount to environmental activists when no constitutional environmental right exists. Further, the paper examines the current atmosphere of hostility towards the First Amendment rights of activists.

INTRODUCTION

In the United States, the federal Constitution does not guarantee citizens any fundamental environmental rights or protections. Instead, affected populations, their advocates, members of
the public, and activists must turn to other constitutional and statutory provisions to craft legal arguments for environmental rights and protections.\textsuperscript{2} Specifically, individuals and groups choose to use the rights and protections enumerated within the First Amendment to engage in many types of activism to advocate for changes in law, policy, or to make arguments against a particular government or private action or inaction. The rights provided within the First Amendment allow citizens to engage in public discussion, discourse, and dissent; in short, the First Amendment allows us to collectively participate in our democracy.\textsuperscript{3} When there are no other legal remedies available, environmental activists often find themselves limited to the tools found within the First Amendment to advance issues of environmental justice. Unfortunately, state and federal governments, businesses, and other entities are endangering these activists’ attempts to exercise their rights by threatening lawsuits, increasing legislation that criminalizes aspects of protest and assembly, engaging in police brutality, and creating a multitude of other consequences.

This paper will discuss the value and necessity of unfettered, inviolable access to First Amendment rights for environmental activists. Since the United States does not offer any environmental rights or protections through the federal Constitution and is fairly hostile to the recognition of new rights through constitutional amendments or Supreme Court jurisprudence, the First Amendment is often the only steadfast resource available to express dissent when no legal remedies exist. In Part I, I provide background to environmental rights abroad and the lack thereof in the United States. I also discuss the First Amendment and its application and usefulness to

\textsuperscript{2} See generally Randall S. Abate, \textit{Climate Change, the United States, and the Impact of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights}, 26 \textit{STAN. ENVTL. L. J.} 3, 16-17 (2007) (discussing that the argument for a right to a healthful environment might exist by borrowing provisions that guarantee the right to life using substantive due process under the Fifth and Fourteenth Amendments).

\textsuperscript{3} See, e.g., James R. May, \textit{Constitutional Directions in Procedural Environmental Rights}, 28 \textit{J. ENVTL. L. \& LITIG.} 27, 29-30 (2013) (suggesting that while participatory rights such as the right to assemble and vote coupled with access to process under statutes can assist in the furthering of environmental rights, those provisions alone are not enough to advance environmental protection norms without some sort of procedural right to accompany).
environmental activists. In Part II, I argue that the current treatment of environmental activists’ speech and protests constitutes violations of the First Amendment, and I conclude that the proposed legislation and the SLAAP suits discussed are chilling speech and threatening our democracy.

PART I. CONNECTING ENVIRONMENTAL RIGHTS AND THE FIRST AMENDMENT

A. Environmental Rights Abroad and in the United States

Environmental rights are difficult to define and may have different meanings across populations. Ensuring access to clean water and a safe and sustainable environment are just as important as the more widely recognized human rights, and some argue that other human rights depend upon environmental rights to exist. One way to think about environmental rights in a legal context is that they are basic legal provisions guaranteeing individuals some level of environmental quality. Environmental rights are present in an increasing number of constitutions worldwide. Environmental rights can be substantive, including civil and political rights, or procedural, providing opportunities for participation in decision-making and access to justice. According to the United Nations, the protection and promotion of procedural rights is an especially crucial tool for protecting the natural environment. In fact, Principle 10 of the Rio Declaration on Environment and Development declares “Environmental issues are best handled with participation of all concerned citizens, at the relevant level.”

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6 Id.
8 Id.
The United States has failed to constitutionally recognize at the federal level any environmental right.¹⁰ Five states, however, have chosen to explicitly include environmental rights within their state constitutions.¹¹ Other than state constitutions, our only source of environmental protection exists in federal statutes such as the National Environmental Policy Act (“NEPA”) and the legislative enactments imposed substantively as a consequence of NEPA such as the Clean Air Act, Clean Water Act, and Endangered Species Act.¹² Without a federal constitutional amendment, however, the country is in a pattern of seeing increased protections from one presidential administration to a rollback of protections upon the arrival of a new administration – first seen when Ronald Reagan became President and promised to appoint an EPA administrator willing to “bring EPA to its knees.”¹³ Although unsuccessful in his attempts to destroy the environmental protection progress made in the 1970s, Reagan’s attitude mirrors the same attitudes held by some today – that environmental regulations are too restrictive on economic growth.¹⁴ From withdrawing from the 2015 Paris Climate Accord to overriding the Clean Power Plan, President Trump has made his administration’s position on the environment clear: the environment is not worth protecting.¹⁵ Since the United States lacks federal environmental protection at the constitutional level, there is little that can be done about the changes in policies between administrations. This creates a level of uncertainty for activists and heightened vulnerability to

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¹¹ See id.
¹³ See id. at 86.
¹⁴ See id. at 86-87.
environmental offenses, leaving communities ill-equipped with tools to bring about meaningful changes or remedies until the next election cycle, if at all.

B. The First Amendment: A First Stop and Last Resort

The First Amendment to the United States Constitution guarantees the freedoms of religion, speech, press, peaceful assembly, and the right to petition the government for a redress of grievances. Throughout America’s tumultuous history, communication has been a distinctive and paramount tool within social movements, from the Revolutionary War era to the Civil Rights movement and beyond. Debate occurs amongst jurists, historians, legislators, and scholars about the meaning of the 45 words making up the First Amendment, particularly regarding the framers’ original intent. Regardless of the framers’ intent, the bundle of rights guaranteed by the First Amendment has now been litigated for slightly over two centuries and is far from being well-settled or well-understood, even now in the era of social media, “fake news,” and the re-emergence of hate groups from the shadows of America into mainstream society.

Historically, the Supreme Court has recognized the importance of prohibiting government interference with free speech and, in major decisions, has provided protection to a wide variety of speech. Free speech is an “affirmative value,” meaning that we encourage speech in almost the same frequency and capacity as we discourage government restriction on speech. Speech is “chilled” when a governmental action has the direct or indirect effect of deterring someone from

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16 The free-exercise clause of the First Amendment is not at issue in this paper and will not be addressed.
17 U.S. CONST. amend. I.
20 See Kreimer, supra note 18, at 122.
exercising First Amendment rights. The mechanisms of chilling are discussed in Part II, particularly as seen when environmental activists exercise their rights.

Without a constitutional right providing a cause of action for environmental rights violations, and with the staggering unreliability of different political regimes’ policies, environmental advocates find themselves looking to the First Amendment to advance their causes. In fact, according to Justice Black, disseminating communications is “essential to the poorly financed causes of little people.” While Justice Black was referring to the physical distribution of circulars in 1943, various organizations are using the internet in today’s society to disseminate information to a vast audience, almost instantaneously, through websites, online petitions, email blasts, and social media.

Environmental activists and defenders use these tools to mobilize communities and supporters and to bring national and even international attention to their cause. For example, the Standing Rock Sioux Tribe gained the support of many Americans and international groups when members of the tribe protested the Dakota Access Pipeline (“DAPL”) beginning in 2016 and continuing into 2017. The North Dakota government and law enforcement’s violent reactions to the Tribe’s lawful exercise of First Amendment rights put an international spotlight on the Tribe, the DAPL, and the violations of indigenous, human, and environmental rights that occurred. Following this media attention of the protests, the Standing Rock Sioux Chairman traveled to

23 See Kreimer, supra note 18, at 122 (quoting Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).
25 See Kreimer, supra note 18, at 132-33.
27 See id.
Geneva, Switzerland to meet with the UN Human Rights Council and engage in discussions about the rights of indigenous people in the United States, including the current issues faced by the Tribe due to the DAPL protests and law enforcement’s reaction.\(^{28}\) Additionally, the Standing Rock protests reached the hearts – or at least the minds and then the pockets – of a group of investors, who in turn encouraged banks and institutional financial supporters of the DAPL to pull out of the project.\(^{29}\) With no direct constitutional environmental right to stand on, a hostile administration entering the White House, and only a handful of environmental statutes at their disposal, the Standing Rock Sioux effectively used the First Amendment to fight for their environmental and human rights. Unfortunately, some of their actions had unprecedented consequences, which I discuss below in Part II.

PART II: THE ATTACK ON ENVIRONMENTAL PROTEST

In 2016, at least 200 people were murdered worldwide while protecting land, water, and wildlife in their communities.\(^{30}\) These murders were reported across 24 countries, an increase from 16 countries in 2015.\(^{31}\) While there were no reported murders of environmental activists in the United States during these years,\(^{32}\) engaging in environmental activism still proves to be dangerous. A woman protesting on behalf of the Standing Rock Sioux Tribe was one of several protesters severely injured during confrontations with heavily militarized law enforcement officers

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\(^{28}\) Id.


\(^{31}\) Leahy, *supra* note 30.

\(^{32}\) See id.
in November of 2016, and she has since lost functionality in her left arm.\textsuperscript{33} In addition to threats of physical violence during police confrontation, environmental activists in the United States face the possibility of criminal penalties, legal action, and harassment – all arguably in violation of their First Amendment rights.\textsuperscript{34}

Approximately 800 Standing Rock protestors were arrested and criminally charged with violating various ordinances and statutes.\textsuperscript{35} However, most of the charges were dismissed or dropped due to lack of evidence, and the prosecutors’ inability to meet their burden.\textsuperscript{36} Although states are free to police citizens for the protection of the public and to prohibit the incitement of crime and disturbances of the peace,\textsuperscript{37} a state cannot criminalize the “peaceful expression of unpopular views.”\textsuperscript{38} Yet, since the election of Donald Trump, nearly 50 state level bills across 30 states have been introduced that aim to criminalize or deter forms of political participation.\textsuperscript{39} Some of the bills introduced targeted individuals protesting oil and gas infrastructure projects, such as one in Pennsylvania, which defined a new type of “felon”: the “critical infrastructure facility trespasser.”\textsuperscript{40} In North Dakota, center of the Standing Rock protests, a bill was introduced that proposed to allow motorists to run over highway protestors, as long as it was an “accident.”


\textsuperscript{34} See generally Watts, supra note 29.


\textsuperscript{36} See id.


\textsuperscript{40} See Brown, supra note 39.
because the sponsor believes the bill is necessary to protect the “legal exercise of the right to drive” which protesters impede by being present on highways.\(^{41}\)

These bills, some of which have been passed into law and some of which are currently being debated, are arguably designed to limit the speech and political participation of protestors. Consequentially, uncertainty and fear about the legal ramifications of their speech and actions, which should be constitutionally protected, produces a chilling effect on the speech.\(^ {42}\) Since the government is not only under a duty to prohibit restrictions on protected speech but to also encourage protected speech, chilled speech should be combated by legal rules aimed at “reduc\[ing\] the likelihood that protected expression will be punished.”\(^ {43}\) What is occurring in relation to environmental activists, and supported by mostly Republican legislators, is creating a constitutional crisis and quietly chipping away at First Amendment rights and the two centuries of jurisprudence aimed towards upholding them.\(^ {44}\)

Legislators and law enforcement bodies are also attempting to deter protest activity by linking economic protest to terrorist activity. In 1999, then-FBI director Louis Freeh determined that animal rights and environmental activists were among the “most recognizable single-issue terrorists at the present time.”\(^ {45}\) Laws charging environmental protestors as economic terrorists

were considered in Washington and North Carolina during the most recent legislative session. Not only does this characterization potentially chill speech and deter protected protest, but it also affects other constitutional freedoms. For example, the FBI Joint Terrorist Task Force knocked on doors of at least three Standing Rock activists to demand interviews without warrants or subpoenas, potentially in violation of the fourth amendment.

Standing Rock was not the first attempt at labeling environmental activists as terrorists in Washington State. In 2010, a bill was introduced to define an “animal or eco-terrorist organization” as “two or more persons with the primary or incidental purpose of intimidating, coercing, causing fear with the intent to obstruct, or impeding any person from participating in any activity involving animals or natural resources.” While the first clause of the definition may be constitutional, the second clause is troublesome because its broadness classifies any group that impedes business operations as terrorists. Further, under this bill “entering or remaining on the premises of an animal or horticultural facility” after receiving notice to leave is considered terrorist activity. If applied in the era and context of the civil rights movement, citizens who participated in sit-ins could be classified as terrorists. The final aspect of this bill raises another First Amendment concern: speech itself. The bill prohibits any activity, including any and all communications, used “in whole or in part to encourage, plan, prepare, carry out, publicize,

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46 See Jenna Bitar, 6 Ways the Government is Going After Environmental Activists, ACLU.ORG (Feb. 6, 2018), https://www.aclu.org/blog/free-speech/rights-protesters/6-ways-government-going-after-environmental-activists (last visited July 8, 2018).
47 See id. See also Sam Levin, Revealed: FBI Terrorism taskforce investigating Standing Rock activists, THE GUARDIAN (Feb. 10, 2017), https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access (last visited October 31, 2018) (noting that the activists questioned by agents asserted their Fifth Amendment rights and refused to give interviews. The activists then contacted a civil rights attorney, who claimed that the contact between agents and activists was “outrageous, it’s unwarranted…and it’s unconstitutional.”)
49 See id.
50 See id.
promote, or aid an act of animal or ecological terrorism.” This particular bill did not pass the legislative session but has been rewritten and revisited since its introduction.

The act of protesting – the right to peaceful assembly – is not the only aspect of the First Amendment being chipped away at and affecting environmental activists. Strategic lawsuits against public participation (“SLAPP suits”) are on the rise. SLAAP suits are brought by corporations and organizations against ordinary citizens and groups who engage in activities in opposition to the corporation’s interests. People who engage in a wide variety of public participation such as writing editorials, speaking out at town halls, and becoming involved in environmental projects and protests may find themselves defending a costly lawsuit against a powerful corporation with deep pockets and plentiful legal resources. Although corporations and businesses rarely win SLAAP suits on the merits, average citizens often lack the resources to defend such suits, and as a result, citizens are less likely to speak out during and after the suit. The effect of SLAAP suits on the exercise of free speech is impossible to determine – as it is impossible to know how many instances a person self-censored his or her speech in fear of being sued. Thus many states are recognizing the chilling effect that SLAAP suits have on speech and enacting their own anti-SLAPP laws, yet there has been no action taken at the federal level.

Attacks on the First Amendment should frighten everyone regardless of political affiliation. If a bill limiting the rights of protestors can pass or if a SLAAP suit can succeed limiting the speech

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51 See id.
52 See id.
53 See George W. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, 7 PACE ENVT'L. L. REV. 3, 7-8 (1989). For further reading on the historical rise and prevalence of SLAAP suits and the chilling of speech, including a study revealing that an overwhelming majority of SLAAP plaintiffs lose their case but achieve their political pursuit, see Pring at 7-9.
55 See id.
or lawful protest of an environmental activist, any other classification of activism is also threatened. Natural Resource Defense Council (NRDC) chief counsel Mitch Bernard notes the troubling trend of these prohibitions and states that when the government or powerful corporations have the ability to “undermine the rights of environmental dissidents to assemble, associate, and speak, [it] should concern every citizen who cherishes the right of peaceful political expression, no matter where you are situated on the ideological spectrum.”57 Bernard’s statement is reminiscent of Justice Black’s dissenting opinion in *Yates v. United States*, where he defends speech that the government may not agree with:

> Unless there is complete freedom of expression of all ideas, whether we like them or not…I doubt if any views in the long run can be secured against the censor. The First Amendment provides the only kind of security system that can preserve a free government – one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.58

The Supreme Court has upheld protection for hate speech, as much as it pained the Court to do so, because it believed that we must protect the freedom to express even “the thoughts we hate”59 in order to protect our democracy and its ideals. If the Court has held that hate speech deserves protection, then surely environmental activists’ speech deserves protection as well. After all, environmental activists are simply advocating for human rights that many countries already provide, constitutionally or otherwise, to their citizens.

**CONCLUSION**

Human rights investigators from the United Nations called the current attempts to curb the freedom of speech and the right to protest in the United States an “alarming and problematic

57 See id.
trend.” Americans usually love to celebrate their freedom, yet, one of the constitutional pillars of our society, the very first right our founding fathers penned, is quietly under siege and taking hits from state and local governments, corporations, and our president who, less than a month after inauguration, tweeted that certain media organizations are not his enemy but “the enemy of the American people.” Environmental activists are not the only ones whose efforts have increased recently – activists from Black Lives Matter, the Women’s March, the March for Science, and Standing Rock and other Native American movements in opposition to the DAPL have mobilized in peaceful protests throughout the country. All of these groups have been affected or stand to be affected by this administration’s policies, and as such, all are targets of attempted restraint of free speech.

Even though violence occasionally occurs at protests, UN human rights experts maintain that there is no such thing as a violent protest – only violent individual protestors. As such, bills criminalizing or limiting entire protests and entire movements based upon the actions of a few completely strips away society’s right to freedom of assembly and are a threat to America’s democracy. Rather, violent protestors posing a legitimate threat to their communities should be dealt with in a constitutionally sound manner, while remaining respectful of the collective rights of others. When a clear and present danger exists, such as protestors inciting a riot, then “the power of the State to prevent or punish is obvious.” The issue with our present day protests is

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62 See id.
63 See Miles, supra note 60, at 3.
what the police consider to be “clear and present danger.” States may not “unduly suppress free communication of views…under the guise of conserving desirable conditions.”65 Shutting down protests, simply because that is more convenient for governments and law enforcement, constitutes a serious threat to our freedoms.

Finally, the power of governments or corporations to sue individuals through SLAAP suits, which are usually frivolous, have an overwhelmingly chilling effect on speech. Our right to express dissent and engage in public political participation is what formed this country, and unwavering defense of those rights is just as important now, especially since there is no federal constitutional protection for the environment. Activists must be able to rely on their first amendment rights to engage with the political system to advocate for change.

65 Id.
Federal jurisdiction largely governs non-Indian crimes in Indian Country. However, federal prosecutors decline to prosecute an astoundingly high number of sexual abuse charges. This jurisdictional gap creates a culture of impunity for non-Indian perpetrators. To address these problems, Congress reauthorized the Violence Against Women Act in 2013 with an additional provision called the Special Domestic Violence Criminal Jurisdiction (“SDVCJ”). SDVCJ enabled Indian tribes to exercise criminal jurisdiction over certain non-Indians. This statute marked the first time Congress recognized and affirmed tribal criminal jurisdiction over non-Indian offenders. Although SDVCJ has been celebrated, the statute has not escaped criticism. Tribal advocates argue the statute did not go far enough. Non-tribal advocates argue SDVCJ jurisdiction violates the United States Constitution. This article addresses these constitutional concerns. This article also addresses, for the first time, how the court might rule on these constitutional issues with the recent addition of Justice Gorsuch to the bench. If the court sustains the constitutionality of SDVCJ hundreds of non-Indian perpetrators could potentially be subject to tribal criminal jurisdiction. This article concludes that SDVCJ does not violate the constitution. Even more, SDVCJ advances what tribes and the government most desire: a return to traditional tribal sovereignty.

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I. INTRODUCTION

The United States government recognizes that tribes retain sovereignty to “make their own laws and be ruled by them.” Notwithstanding this pronouncement, the Supreme Court has imposed limitations on tribal criminal jurisdiction. Therefore, criminal matters arising in Indian Country are complex and onerous.

Three sovereigns—federal, state, and tribal—share authority. Jurisdiction differs based on the offender and the crime. To determine jurisdiction, a court must look to federal and tribal laws, treaties, and United States Supreme Court cases.

These jurisdictional challenges hinder effective law enforcement, which takes on added significance because Native Americans are victims of violent crime at least twice as often as other racial groups. Seventy percent of these crimes are interracial— involving either a non-Indian perpetrator and an Indian victim or an Indian perpetrator and a non-Indian victim. Moreover, non-Indian offenders regularly escape prosecution because of states’ limited criminal jurisdiction and the federal government's lack of resources and consistent commitment to prosecute such crimes effectively. This problem remains particularly prevalent in the context of domestic violence because Native American women are three times more likely to be raped or sexually assaulted, and 85 percent of the perpetrators are described as non-Indian.

To address these problems, Congress enacted the Special Domestic Violence Criminal Jurisdiction (“SDVCJ”). SDVCJ acknowledged the inherent authority of Indian tribes to prosecute “dating violence”

2 “Indian Country” is a legal term of art used to describe land within a reservation. See infra note 3, at 507.
6 Id.
8 Id. at 188–89.
and “domestic violence” perpetrated by non-Indians.\footnote{Id. § 1304(c).} However, SDVCJ limits a tribe’s prosecutorial authority to non-Indians with “ties” to the tribal community, including residence, employment, or an intimate relationship with a tribal member or resident non-member Indian.\footnote{Id. § 1304(b)(4)(B).}

Although tribal communities have celebrated SDVCJ, the statute has not escaped criticism. Tribal prosecutors for the original five pilot tribes\footnote{The Pilot Project comprised of five tribes: the Confederated Tribes of the Umatilla Indian Reservation, Pascua Yaqui Tribe, Tulalip Tribes of Washington, Assiniboine and Sioux Tribes of Fort Peck, and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North Dakota.} express frustration their jurisdiction remains somewhat limited.\footnote{VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 2013, https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0.} Specifically, prosecutors cannot charge defendants for crimes related to abuse or endangerment of a child. Alfred Urbina, the former Attorney General for the Pascua Yaqui Tribe, reported that all 18 of the cases that have been prosecuted under VAWA also included children as victims.\footnote{National Congress of American Indians, Tribal VAWA: Much Remains Undone, YOUTUBE (June 10, 2015), https://www.youtube.com/watch?v=xydojLiNoTU.}

SDVCJ represents a step toward greater tribal sovereignty, but effective SDVCJ implementation requires additional Congressional action. To date, no defendant has raised a constitutional challenge to his conviction under SDVCJ. Sooner or later, a non-Indian will challenge the constitutionality of SDVCJ; the only question is when.\footnote{To raise a constitutional challenge, a defendant files a habeas petition under 25 U.S.C. § 1303. In Arizona, there has been considerable activism from federal defenders in filing such petitions. See, e.g., Jackson v. Tracy, No. CV 11-00448-PHX-FJM at 2 (D. Ariz. Sept. 19, 2012); Alvarez v. Tracey, No. CV-08-02226-PHX-DGC at 1 (D. Ariz. Mar. 28, 2012).}

This article will explore the constitutionality of the Violence Against Women Reauthorization Act of 2013. Specifically, the article will investigate the Special Domestic Violence Criminal Jurisdiction, which enabled tribes to exercise criminal jurisdiction over certain non-Indians.\footnote{Non-Indian offenders include those who commit violence against Indian spouses, intimate partners or dating partners, or who violate protection orders in Indian country.} Section II will provide an overview of criminal jurisdiction in Indian Country. Section III will examine and refute the constitutional arguments against SDVCJ. Section IV will address the limitations of SDVCJ on implementing tribes.
Finally, Section V will discuss the future of VAWA and whether the Supreme Court will sustain the constitutionality of SDVCJ.

II. CRIMINAL JURISDICTION IN INDIAN COUNTRY

Supreme Court cases have produced a jurisdictional maze for criminal jurisdiction in Indian Country.\(^{17}\) Considerable conflict between federal, state, and tribal jurisdiction has created a complex jurisdictional framework. Accordingly, this section will explore the contours of criminal justice in Indian Country. First, it will discuss the major statutes affecting criminal jurisdiction. Second, it will survey tribal criminal jurisdiction and the *Oliphant, Duro*, and *Lara* decisions. Finally, it will examine the evolution of the Indian Civil Rights Act to the *Duro*-Fix to the Tribal Law and Order Act to the culmination of the VAWA extension.

a. Major Statutes Affecting Criminal Jurisdiction

A limited number of federal statutes govern criminal jurisdiction in Indian Country. In 18 U.S.C § 1151, federal law defines Indian Country as all land within a reservation, dependent Indian communities, and all allotments.\(^{18}\) The statute defines no offenses but sets forth the geographic scope of federal Indian Country jurisdiction. Judicial interpretation has both expanded and narrowed the scope of the statute’s plain language.\(^{19}\)

The current framework of criminal law in Indian Country developed as a result of several events in the late 1800s. In 1885, Congress enacted the Major Crimes Act (MCA).\(^{20}\) This legislation authorized federal prosecutors to prosecute crimes committed by Indians that occurred on Indian lands. Since the enactment of the MCA, the federal government has been the primary law enforcement actor in Indian Country.

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\(^{17}\) Clinton, *supra* note 3, at 547.

\(^{18}\) This statute defines “Indian country” as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C § 1151 (1949).


Congress enacted the MCA because of the Supreme Court’s decision in *Ex Parte Crow Dog*. In *Crow Dog*, the Court held that the federal courts lacked jurisdiction over intra-Indian crimes.\(^{21}\) This outraged the non-Indians in the Dakota territory. Although the tribe resolved the dispute in a traditional Sioux fashion, the non-Indians viewed the resolution as a miscarriage of justice.\(^{22}\) Consequently, Congress enacted the MCA and conferred federal criminal jurisdiction to crimes committed by Indians on Indian lands. Specifically, the MCA mandated federal jurisdiction over seven crimes—murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.\(^{23}\) The MCA has been amended numerous times and now covers more than 40 major crimes.\(^{24}\) Significantly, the federal government exercised almost no authority over Indians for actions within Indian Country prior to its enactment.\(^{25}\)

Although several laws confer federal jurisdiction over crimes in Indian Country, the most important ones are the Indian Country Crimes Act, extending federal law to interracial\(^{26}\) crimes in Indian Country; the aforementioned Major Crimes Act, punishing Indian offenders for commission of several felonies in Indian Country; and the Assimilative Crimes Act, allowing federal prosecutions for crimes contained in state code where no federal statute for the category of offense exists.\(^{27}\)

**b. Tribal Criminal Jurisdiction**

Criminal jurisdiction in Indian country involves federal, state, and tribal jurisdictions.\(^{28}\) Jurisdiction differs based on the offender and the crime.\(^{29}\) Tribes and the federal government share jurisdiction over crimes that arise on Indian reservations. In *United States v. Wheeler*, the Supreme Court held that prosecuting an individual in tribal and federal court does not violate the Double Jeopardy Clause of the Fifth Amendment because the source of an Indian tribe’s power to punish tribal offenders derives from the

\(^{21}\) *Ex Parte Crow Dog*, 109 U.S. 556, 557 (1883).

\(^{22}\) See Clinton, *supra* note 4, at 963.

\(^{23}\) Id.

\(^{24}\) DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 474 (7th ed. 2017).

\(^{25}\) See Clinton, *supra* note 3, at 505.

\(^{26}\) Crimes committed by non-Indians against Indians and crimes by Indians against non-Indians.

\(^{27}\) DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 585 (7th ed. 2017).

\(^{28}\) Clinton, *supra* note 3, at 575.

\(^{29}\) GETCHES ET AL., *supra* note 27.
tribe’s inherent sovereign powers and not from a delegation of federal power.\textsuperscript{30} \textit{Oliphant, Duro, and Lara} represent the three most significant cases that affect tribal criminal authority. Therefore, the progeny of the cases will be discussed below.

\textbf{i. Tribal Jurisdiction over Non-Indians}

Tribes originally exercised sovereign authority over both Indians and non-Indians.\textsuperscript{31} Tribes exercise inherent criminal jurisdiction over Indians. Therefore, the federal government need not confer this jurisdiction. However, tribes have no inherent criminal jurisdiction over non-Indians. Jurisdiction derives from the tribes’ sovereignty, not from the federal government. Accordingly, the laws of the United States are not the source of tribal authority but instead are limitations on tribal authority.\textsuperscript{32} Treaty or federal statutes may limit a tribes’ jurisdiction.\textsuperscript{33}

\textit{Oliphant v. Suquamish Indian Tribe}\textsuperscript{34} represents the first victim of the Supreme Court’s renewed efforts to limit tribal sovereignty. In \textit{Oliphant}, the Court held tribes lack inherent criminal jurisdiction over non-Indians except in a manner acceptable to Congress.\textsuperscript{35} The Court analyzed the history of criminal jurisdiction over non-Indians and concluded there was a presumption that tribes did not have authority over non-Indians who committed offenses within Indian Country.\textsuperscript{36} Although the Court conceded that the history was not “conclusive,” the Court determined that it “carries considerable weight.”\textsuperscript{37} However, a closer examination reveals the Court’s inaccuracies.

Considerable criticism mars \textit{Oliphant}’s historical account. For example, Professor Robert Clinton called the \textit{Oliphant} view “revisionist.”\textsuperscript{38} Indeed, many early treaties provided that tribes could punish non-Indians.

\textsuperscript{31} See Duro v. Reina, 495 U.S. 676, 685 (1990) (emphasis added) (“A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, \textit{whether citizens or aliens}.”).
\textsuperscript{32} Murray L. Crosse,\textit{ Criminal and Civil Jurisdiction in Indian Country}, 4 ARIZ. L. REV. 57, 57 (1962).
\textsuperscript{33} Id.
\textsuperscript{34} Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 206.
\textsuperscript{37} Id.
Indians. For example, the Choctaw, Cherokee, and Creek and Seminole treaties conferred tribal jurisdiction over offenses committed on the reservation.\textsuperscript{39} Unsurprisingly, the Court marginalized these treaties.\textsuperscript{40} To support its argument, the Court focused on the legislative history of the Western Territories Bill.\textsuperscript{41} However, Congress did not pass the bill because the tribes located within the Indian Territory already exercised exclusive jurisdiction.\textsuperscript{42}

The source of tribal criminal jurisdiction arose in the recent case of \textit{Means v. Dist. Court of Chinle Judicial District}. In \textit{Means}, the Navajo Supreme Court found the tribe’s 1868 Treaty provides for criminal jurisdiction over Means due to his presence in the Navajo Nation.\textsuperscript{43} Moreover, the court reasoned criminal jurisdiction over nonmembers or non-Indians can rest upon a treaty or federal statute.\textsuperscript{44} After exhausting his remedies in the Navajo courts, Means petitioned the United States District Court for a writ of habeas corpus. The district court denied Means’s petition. He subsequently appealed to the United States Court of Appeals for the Ninth Circuit. Significantly, the court did not address the Navajo Supreme Court’s reasoning and instead held Means’s argument had been answered in \textit{United States v. Lara}.\textsuperscript{45} Presumably, the \textit{Means} reasoning could be applied to a non-Indian as well. Moreover, pre-\textit{Oliphant} tribal codes asserted criminal jurisdiction over non-Indians.\textsuperscript{46}

A court interprets a treaty provision based on the result it hopes to achieve. \textit{Oliphant} illustrates the consequences of the Court’s failure to focus on tribal jurisdiction and tribal criminal justice systems, and

\textsuperscript{39} See, e.g., Treaty with the Cherokees, Cherokee Nation of Indians-U.S., July 19, 1866, art. XIII, 14 Stat. 799 (“[T]he judicial tribunals of the [Cherokee] nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation”); Treaty with the Creeks and Seminoles, Creek and Seminole Tribes of Indians-U.S., Aug. 7, 1856, art. IV, 11 Stat. 699 (treaty guarantee assuring that tribal land would never become part of or subject to the jurisdiction of any state or federal territory).

\textsuperscript{40} Clinton, \textit{supra} note 38, at 215.

\textsuperscript{41} \textit{Supra} note 38.

\textsuperscript{42} \textit{Id}.

\textsuperscript{43} Means v. Dist. Court of Chinle Judicial Dist., 7 Nav. R. 383 (Navajo 1999).

\textsuperscript{44} \textit{Id} at 388 (“There is a general and false assumption that Indian nations have no criminal jurisdiction over non-Indians and nonmember Indians.”).

\textsuperscript{45} Means v. Navajo Nation, 432 F.3d 924, 931 (9th Cir. 2005).

\textsuperscript{46} See \textit{Oliphant} v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978) (“Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians. Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians.”).
instead to focus on federal and state power. Thus, the historical assessment that the federal and state governments handled non-Indian crime to the exclusion of tribal governments resulted in a “commonly shared presumption” against the continued existence of tribal criminal jurisdiction.47

The Oliphant decision engendered an atmosphere of lawlessness on reservations and hindered tribal efforts to combat crimes committed by non-Indians.48 Thanks to the strident opposition of Indian law scholars and tribal advocates, a new shift in policy has commenced.49 This shift has impacted the law governing tribal criminal jurisdiction and resulted in a restoration of some tribal court jurisdiction.

ii. Tribal Jurisdiction over Non-member Indians

Duro v. Reina involved tribal criminal jurisdiction over nonmember Indians. Duro held tribes lack criminal jurisdiction over nonmember Indians because it would be inconsistent with the tribes’ status as domestic dependent nations without congressional authorization.50 However, because of Morton, the Court required an additional theory to prohibit tribes from prosecuting non-member Indians.51 To this end, the Court used the voluntary consent theory.52

Indians represent a political classification and not a racial one because Indians are citizens of tribal governments.53 A non-member Indian is not a citizen of a tribal government. Thus, tribal governments may not assert criminal jurisdiction over non-member Indians. Therefore, the Court employed the consent theory because the Court knew that classifying member Indians and non-member Indians would result in a racial classification. If tribes could not prosecute non-Indians, tribes also could not prosecute non-member Indians. In other words, the Court could not permit tribes to exercise criminal jurisdiction because if it did the Court would have drawn a racial line. Had the Court not used a voluntary consent theory, non-member Indians and member Indians would have been differentiated on racial grounds.

48 Id. at 854.
51 Id. at 693.
52 Id.
Congress swiftly responded with the *Duro* fix. In that legislation, Congress stated that tribal criminal jurisdiction over non-members Indians flowed from “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”54 Subsequently, in *United States v. Lara*, the Supreme Court found the *Duro* fix constitutional and endorsed the notion that tribal criminal jurisdiction over non-member Indians flowed from the tribes’ inherent sovereignty.55

c. A Romp through the Evolution of ICRA to VAWA Extension

Three additional laws shed light on criminal jurisdiction in Indian country. These laws also help explain Congress’s enactment of the VAWA extension. First, the Indian Civil Rights Act of 1968 (ICRA), which governs tribal-court proceedings, limits the punishment a tribal court can impose up to no more than a $5,000 fine and a year in jail.56 Because tribes pre-existed the formation of the federal government, the United States Constitution and Bill of Rights do not directly apply in tribal court.57 Therefore, Congress enacted ICRA to “ensure that the American Indian is afforded the broad Constitutional rights secured to other Americans . . . [and] protect individual Indians from arbitrary and unjust actions of tribal governments.”58

The ICRA applies the majority of the provisions of the Bill of Rights to Indian Country. To this end, ICRA conferred individual rights to tribal members that are enforceable against actions of tribal governments.59 However, ICRA does not require criminal defendants to have counsel paid at the expense of the government.60 Thus, the right in § 1302(a)(6) of the ICRA is a right to retained counsel. In contrast, the right guaranteed in state and federal courts under the Sixth Amendment is a right to appointed counsel.61 The legislative history indicates Congress did not extend a statutory right to appointed counsel in tribal

60 *Id*.
61 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”).
courts because of recognition of tribal sovereignty and concerns about federal funding. As discussed below, TOLA and the VAWA extension have amended the right to counsel in certain circumstances.

In 1990, the Court decided *Duro v. Reina*. As discussed, the Court addressed whether a tribal court had jurisdiction over non-member Indians. The Court found the tribal court did not have jurisdiction. Thereafter, Congress swiftly enacted the *Duro*-fix, which overturned *Duro* and amended ICRA to clarify that tribal courts have criminal jurisdiction over non-member Indians.

In 2009, Attorney General Eric Holder held a Tribal Nations Listening Tour because of tribal dissatisfaction with the dispensation of justice. Consequently, the Department of Justice dedicated funds to address violence in Indian Country. Thereafter, Congress enacted the Tribal Law and Order Act (TOLA) in 2010, which amends ICRA to allow Indian tribes to sentence convicted criminals to up to three years in jail per offense, with the total punishment no greater than nine years and a fine of up to $15,000.

If the tribal court exercises its authority and imposes a term of imprisonment greater than one year, TOLA requires the tribe to:

1. provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
2. at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
3. require that the judge presiding over the criminal proceeding—(A) has sufficient legal training to preside over criminal proceedings; and (B) is licensed to practice law by any jurisdiction in the United States;
4. prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
5. maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

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64 *Id.* at 677.
67 *Id.*
69 See id. § 1302(c).
Another unique provision of TOLA addresses alternatives to incarceration for tribal members. TOLA permits a tribal court to require the defendant:

1. to serve the sentence—
   (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
   (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;
   (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
   (D) in an alternative rehabilitation center of an Indian tribe; or
2. to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.\(^{70}\)

Three years after Congress enacted TOLA, Congress enacted the Violence Against Women Act (VAWA) extension. The 2013 Amendments to VAWA recognize and affirm tribal jurisdiction over non-Indians who commit crimes of domestic violence against Indians while in Indian country.\(^{71}\)

Neither TOLA nor SDVCJ strip the federal government of jurisdiction over criminal matters in Indian Country. Instead, both statutes restore and expand tribal court jurisdiction. Until eight years ago, tribal courts could only sentence a criminal up to one year in jail and levy a $5,000 fine. Additionally, a tribal court did not have criminal jurisdiction over a non-Indian perpetrator. Now, TOLA and VAWA enable tribes to restore and expand tribal criminal jurisdiction.

### III. THE CONSTITUTIONALITY OF THE SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PROVISION

“The wicked flee when no man pursueth…” —Proverb

Systemic violence plagues Indian Country.\(^{72}\) Native Americans experience violent crimes at a considerably higher rate than the general population.\(^{73}\) Native American women experience domestic and

\(^{70}\) See id. § 1302(d).
\(^{71}\) 25 U.S.C. § 1304(b)(1).
\(^{72}\) NEWTON ET AL., supra note 5.
dating violence at more than twice the rate of non-Indian women.\textsuperscript{74} The majority of this violence involves an offender of a different race.\textsuperscript{75} \textit{Oliphant} precludes tribes from prosecuting these offenders. Further compounding the problem, federal prosecutors declined to prosecute sixty-seven percent of the sexual abuse charges arising in Indian Country in the fiscal years of 2005-2009.\textsuperscript{76} This jurisdictional gap created a culture of impunity for non-Indian perpetrators.\textsuperscript{77} Indeed, sexual crimes in Indian Country frequently go unprosecuted and offenders may never face justice. To address these problems, Congress enacted the Special Domestic Violence Criminal Jurisdiction, which enabled tribes to exercise criminal jurisdiction over certain non-Indian perpetrators.

Notwithstanding the startling statistics and disjointed jurisdictional challenges, some scholars bemoan tribal jurisdiction. Specifically, scholars argue SDVCJ jurisdiction violates the Constitution.\textsuperscript{78} This section will first define SDVCJ and explain its narrow expansion of tribal criminal jurisdiction over non-Indian defendants. It will then briefly examine the success of the VAWA pilot projects. Finally, it will examine and refute the constitutional arguments against SDVCJ.

a) Special Domestic Violence Criminal Jurisdiction Defined

Special Domestic Violence Criminal Jurisdiction over non-Indian perpetrators took effect on March 7, 2015. The statute defines SDVCJ as “criminal jurisdiction that a participating tribe may exercise under [VAWA 2013] but could not otherwise exercise.”\textsuperscript{79} Further, the statute defines a participating tribe as “an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.”\textsuperscript{80} The definition of Indian country remains the same as the definition used for the Major Crimes Act in 18 U.S.C § 1153.\textsuperscript{81}

\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id.
\item \textsuperscript{77} \textit{Maze of Injustice: The Failure to Protect Native Women from Sexual Violence in the USA} 26–28 (2007), AMNESTY INT’L, https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf.
\item \textsuperscript{78} See Tom Gede, \textit{Criminal Jurisdiction of Indian Tribes: Should Non-Indians be Subject to Tribal Criminal Authority Under VAWA?}, 13 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 40, 42–43 (2012).
\item \textsuperscript{79} 25 U.S.C. § 1304(a)(6) (2012).
\item \textsuperscript{80} Id. § 1304(a)(4).
\item \textsuperscript{81} Id. § 1304(a)(3).
\end{itemize}
The statute limits tribal prosecution based on the non-Indian defendants’ and victims’ personal attributes. The reauthorization acknowledged the inherent authority of Indian tribes to prosecute “dating violence” and “domestic violence” perpetrated by non-Indians.\(^{82}\) However, the statute limits a tribe’s prosecutorial authority to non-Indians with ties to the tribal community including residence, employment, or an intimate relationship with a tribal member or resident non-member Indian.\(^{83}\)

To be eligible to exercise SDVCJ, a tribe must provide services similar to those required for the Tribal Law Order Act. For example, SDVCJ requires participating tribes to guarantee all the protections of the original Indian Civil Rights Act, the newer procedural requirements contained in TLOA, and new requirements on the composition of juries:

In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant

(1) all applicable rights under this Act;
(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;
(3) the right to a trial by an impartial jury that is drawn from sources that--
   (A) reflect a fair cross section of the community; and
   (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.\(^{84}\)

Tribes prosecuting non-Indians are required to empanel juries that “reflect a fair cross section of the community, and do not systematically exclude any distinctive group in the community, including non-Indians.”\(^{85}\) Congress enacted this provision to ensure juries consisted of tribal and non-tribal members.\(^{86}\)

\(^{82}\) See id. § 1304(c).
\(^{83}\) Id. § 1304(b)(4)(B).
\(^{84}\) Id. § 1304(d). Some tribes have expressed umbrage with § 1304(d)(4) because it requires tribes to further assimilate into a court system similar to federal and state courts. See Mary K. Mullen, The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence, 61 ST. LOUIS L.J. 811, 823 (2017) (“By requiring tribal courts to uphold United States constitutional norms, Congress infuses tribal courts with ‘American values,’ robbing tribal courts from reestablishing their traditional Native American tribal court systems.”).

\(^{85}\) Id.

\(^{86}\) Tribal courts lack authority to issue a criminal subpoena if a non-Indian declines to serve. How then does a tribe guarantee that a non-Indian defendant has a jury of his peers? See Danna R. Jackson, Cooperative (and Uncooperative) Federalism at Tribal, State, and Local Levels: A Case for Cooperative Charging Decisions in Indian Country, 76 MONT. L. REV. 127 (2015) (remarking that this question remains unanswered).
Apart from the VAWA 2013 statute, defendants must also receive other constitutional rights guaranteed by ICRA:

- the right “against unreasonable searches and seizures,” so that probable cause is required before a search or seizure;
- the right against double jeopardy;
- the right against self-incrimination;
- the right to a speedy and public trial;
- the right to be “confronted with the witnesses against him” and to subpoena friendly witnesses;
- the right against excessive bail, excessive fines, and cruel and unusual punishments;
- the right against bills of attainder or ex post facto laws; and
- the right to a trial by a jury of at least six persons.\(^{87}\)

Should a tribe elect to exercise SDVCJ, both tribal and federal authorities have the ability to prosecute the same non-Indian defendant.\(^{88}\) Indeed, SDVCJ states that “nothing in this section affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.”\(^{89}\)

**b) Success of Pilot Project**

SDVCJ took effect on March 7, 2015.\(^{90}\) However, select tribes could commence exercising SDVCJ before the start date if the tribe’s pilot project demonstrated to the Attorney General that the tribe had “adequate safeguards in place to protect defendants’ rights.”\(^{91}\) Five pilot project tribes participated: Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana; Confederated Tribes of the Umatilla Indian Reservation in Oregon; the Pascua Yaqui Tribe of Arizona; the Sisseton Wahpeton Oyate of the Lake Traverse Reservation in South Dakota; and the Tulalip Tribes of Washington.\(^{92}\)

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\(^{88}\) See id. § 1304(b)(2).

\(^{89}\) Id. § 1304(b)(3)(B).

\(^{90}\) Zhang, supra note 65, at 260.

\(^{91}\) Id.

\(^{92}\) Id.
The Pascua Yaqui Tribe was the first to bring prosecutions. By March 2015, the five pilot project tribes had prosecuted twenty-three defendants. The Pascua Yaqui Tribe had prosecuted sixteen, the Tulalip Tribes had prosecuted five, and the Confederated Tribes of the Umatilla had prosecuted two.

The tribes have implemented the Act with careful attention to the requirements of federal law to ensure if a defendant filed a habeas suit, the test case would be “a good vehicle.” Significantly, the Umatilla Tribe offered to waive tribal exhaustion requirements to encourage its first defendant to bring a habeas suit. The defendant declined.

a. Does Tribal Criminal Jurisdiction Pursuant to SDVCJ Violate the Constitution?

During the legislative debate of the VAWA extension, opponents raised several concerns regarding the constitutionality of the SDVCJ. This paper does not denote an exhaustive list of all the challenges that may be brought against SDVCJ; instead, it reviews the challenges that merit the most attention. The four most significant arguments against SDVCJ are constitutional violations of the due process clause, the equal protection clause, Article II and III of the Constitution, and limited federal appellate review.

1. SDVCJ as Violative of the Fifth Amendment’s Due Process Clause

The constitutional source for substantive due process rests on two clauses. First, the Due Process Clause of the Fifth Amendment, which applies to the federal government. Second, the Due Process Clause of the Fourteenth Amendment, which applies to state and local governments. Due process protections attach to tribal court proceedings through the Indian Civil Rights Act. If a law limits a fundamental right, strict scrutiny will be applied, and the law will be sustained only if the government can prove that the action is necessary to promote a compelling government interest.

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93 Id.
94 Id. at 261.
95 Id.
96 See infra note 178.
97 Zhang, supra note 65, at 262.
98 Id.
Opponents claim SDVCJ violates the due process clause in two ways. First, SDVCJ violates the requirement of the consent of the governed. Second, SDVCJ impermissibly subjects American citizens to a tribunal that lacks due process protections. These will both fail.

A. Consent of the Governed

In *Lara*, Justice Kennedy raised political representation concerns regarding substantive due process. Specifically, Justice Kennedy argued that subjecting a defendant “to a sovereignty outside the basic structure of the Constitution is a serious step” because “[t]he Constitution is based on a theory of original, and continuing, consent of the governed.” He stated that extending inherent tribal criminal jurisdiction over nonmember Indians was “unprecedented” and that there was a “historical exception for Indian tribes . . . only to the limited extent that a member of the tribe consents to be subject to the jurisdiction of his own tribe.”

Moreover, although a tribe’s members consent to that tribe’s extraconstitutional sovereignty, nonmember Indians and non-Indians do not. Thus, Kennedy wrote “in the criminal sphere, membership marks the bounds of tribal authority.” In other words, tribes lack criminal jurisdiction over Indians who were not members of the respective prosecuting tribes.

Congress responded with the *Duro* fix legislation, stating that tribal criminal jurisdiction over nonmember Indians flowed from “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Subsequently, in *Lara*, the Supreme Court found the *Duro* Fix legislation constitutional and endorsed the notion that tribal criminal jurisdiction over nonmember Indians flowed from the tribes’ inherent sovereignty.

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101 See *supra* note 78.
103 *Id.*
104 *Id.* at 213 (“[I]t should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject.”).
105 *Duro* v. Reina, 495 U.S. 676, 693 (1990). This argument was superseded by the “*Duro* Fix” and sustained in *Lara*, 541 U.S. 193 (2004).
106 *Id.*
The reasoning from *Lara* applies here because nonmember Indians and non-Indians share the same representational relationship with the prosecuting tribe. Although the petitioner in *Lara* did not directly raise the representation issue, *Lara* did affirm Congress’ power to relax the restriction on inherent tribal criminal jurisdiction over nonmembers. The same reasoning applies to SDVCJ.

Accordingly, *Lara* may be dispositive of whether SDVCJ violates non-Indian due process rights. Non-member Indians are similar to non-Indians. Specifically, neither non-member Indians nor non-Indians are members of the prosecuting tribe. Thus, neither group can participate in the prosecuting tribe’s political process.

Generally, those powers lawfully vested in an Indian tribe are not congressionally delegated powers, but rather “inherent powers of a limited sovereignty which has never been extinguished.” This principle guides determinations of the scope of tribal authority. *Lara* demonstrates inherent tribal power may be recognized in situations where federal courts have previously found the political branches to impose restrictions on that power. These powers are attributed to a tribe’s inherent sovereignty, not to the federal government.

**B. Congress Relaxed the Federal Preemption of Tribes to Prosecute Non-Indians**

Federal preemptive power arises from the United States Constitution while tribal government derives its power from inherent tribal sovereignty. Although retained by congressional permission, inherent tribal power authorizes tribes to prosecute non-member Indians, as well as non-Indians. Congress permits tribal governments to retain rights. To this end, tribal sovereign rights remain subject to federal sovereign powers. However, this does not preclude tribal sovereign power from operating independently of the federal government with respect to prosecutions of non-member Indians or non-Indians.

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110 NEWTON ET AL., supra note 5, at 207.

111 See infra note 138 (explaining United States v. Wheeler’s holding that federal and tribal criminal prosecutions act as separate sovereigns).
The Court does not use the word preemption, but _Lara_ appears to be based on this concept.\(^{112}\) There, the Court removed the preemption placed on tribal criminal jurisdiction over non-member Indians.\(^{113}\) Specifically, the Court held “Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe’s inherent legal authority.”\(^{114}\) In other words, Congress no longer preempted tribes from prosecuting non-member Indians because Congress relaxed such restrictions. Congress’s enactment of SDVCJ demonstrates the same relaxed restrictions. Prior to SDVCJ, Congress preempted tribes from prosecuting non-Indians. Through SDVCJ Congress relaxed those restrictions and enabled tribes to exercise their inherent legal authority to prosecute non-Indians.\(^{115}\)

**C. Non-Indian Participation in Political Process**

_Lara_ also answers the due process consent theory. This is because non-members can participate in the political process of the government that subjected them to tribal criminal jurisdiction. Namely, non-members are United States citizens and elect members of the United States Congress. Non-members can vote in the political process and voice opposition to Congress.

The same applies to non-Indians. Through _Oliphant_, the federal government preempted tribes from exercising criminal jurisdiction over non-Indians.\(^{116}\) When Congress enacted SDVCJ, Congress removed the federal preemption placed on non-Indians in those limited circumstances.\(^{117}\) Moreover, non-Indians can also participate in the political process that subjected them to tribal criminal jurisdiction.

A non-member Indian and a non-Indian have one thing in common: neither hold citizenship in the prosecuting tribe. However, both non-member Indians and non-Indians are citizens of the United States

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\(^{112}\) The court likely did not use the word preemption because that would have required the court to demonstrate what preempted tribes from exercising criminal jurisdiction over non-Indians in the first place, which is a question the court could not answer.


\(^{114}\) _Lara_, 541 U.S. at 196.


government. Congress relaxed the restrictions on tribal inherent sovereignty to prosecute non-members.\textsuperscript{118} Congress may also relax the restrictions on tribal inherent sovereignty to prosecute non-Indians.

The federal government exercises criminal jurisdiction over permanent resident aliens\textsuperscript{119} in this country without any question about the authority.\textsuperscript{120} Likewise, tribal governments should not be constrained to prosecute criminals who enter into reservations and commit crimes.

Finally, hypothetical consent also undermines the consent theory. Professor Matthew Fletcher argues “hypothetical consent” is presumed when “a reasonable person subjected to government control would consent to such control.”\textsuperscript{121} Here, non-Indians can only be subjected to tribal criminal jurisdiction if the non-Indians have significant ties to the tribe.\textsuperscript{122} Specifically, a non-Indian defendant must reside on tribal land, be employed on tribal land, or be a spouse or partner of a member of the prosecuting tribe.\textsuperscript{123} This restriction reflects the notion that those non-Indians are familiar with and already “subject to” the authority of the tribal government. This seems to satisfy the “hypothetical consent.” However, the court may consider hypothetical consent to apply only in the civil and regulatory context.\textsuperscript{124} Thus, the theory remains somewhat unclear as to whether this consent represents a legally sufficient reason to subject a non-Indian to the criminal process of a “third entity” within the territorial boundaries of the United States.\textsuperscript{125}

\textsuperscript{118} See supra note 113.
\textsuperscript{119} 3. "Permanent resident aliens" refers to those aliens authorized to remain indefinitely in the United States (provided they do not undertake conduct that renders them deportable) and generally eligible to seek naturalization. See T. Alexander Aleinikoff, \textit{Citizens, Aliens, Membership and the Constitution}, 7 Const. Comment. 9, 34 (1990).
\textsuperscript{120} See Siegfried Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel, 69 YALE L.J. 262, 293 (1959) (remarking that “[resident aliens] are [not] immune from criminal sanctions for any unlawful activities, any more than citizens are immune”); See also Wong Wing v. United States, 163 U.S. 228 (1896) (alien cannot be subjected to criminal penalties without following criminal procedure).
\textsuperscript{123} Id.
\textsuperscript{124} See supra note 120.
\textsuperscript{125} \textit{Lara}, 541 U.S. at 212. Justice Kennedy referred to tribal governments as a “third entity” within the territorial borders of the Nation and one of the States.
2. Tribunal Without Due Process

Even if non-Indians can participate in the political process and therefore consent to Congress’s ability to act in the field of Indian affairs, constitutional limitations still exist. Specifically, Congress cannot subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. This also implicates the due process clause.

The argument may be defeated on three grounds. First, SDVCJ mandates tribes provide defendants with “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.” Second, Congress relaxed the restrictions on inherent tribal criminal jurisdiction over non-Indians. To this end, Congress does not subject non-Indians to the tribunal; rather, the tribe subjects non-Indians to the tribunal through the tribe’s inherent sovereign power. Congress’ decision to lift the preemption placed on the tribe’s inherent authority does not represent a delegation but instead a decision to remove preemption. Third, non-Indians have the same status as non-member Indians in tribal court. Specifically, a non-Indian does not hold citizenship in the prosecuting tribe and therefore has the same status as a non-member Indian. Thus, if the Court applied the same rationale from Lara to non-Indian defendants, the subjection to a tribunal without due process would equally fail.

3. SDVCJ as Violative of the Equal Protection Component of the Fifth Amendment’s Due Process Clause

The next issue involves whether SDVCJ violates the equal protection clause. While the Fourteenth Amendment applies to the states, the equal protection component in the Fifth Amendment’s Due Process

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126 Id.
128 Lara, 541 U.S. at 196.
Clause binds the federal government. Therefore, a non-Indian defendant may bring an equal protection claim under the Fifth Amendment’s Due Process Clause.

The major issue regarding an equal protection claim involves the level of scrutiny a court will apply. Most courts have adjudicated equal protection claims in accordance with the standard of review mandated in Morton v. Mancari. Under Morton, the court employs a rational basis standard. However, a handful of decisions have rejected the Morton standard and instead reviewed legislation under strict scrutiny. Thus, the bite of an equal protection claim rests largely on whether the court will employ a rational basis review or strict scrutiny review. Alternatively, the court could reject both standards of review and embrace an Article I solution to the equal protection dilemma. This involves an acknowledgement that Indian legislation constitutes a racial classification but remains permissible because of Article I of the Constitution.

A. Indians as a Political Classification—Rational Basis Review

The equal protection argument rests on whether SDVCJ consists of an impermissible racial classification. Opponents argue SDVCJ violates equal protection because SDVCJ subjects non-Indians to tribal prosecution because of the race of their victim. The argument fails for three reasons. First, SDVCJ does not represent a racial classification; SDVCJ constitutes a political classification. Second, political classifications trigger a rational basis review. Third, SDVCJ passes this review.

SDVCJ represents a political classification. Since Morton v. Mancari the Court “has recognized that certain federal classifications singling out members of Indian tribes are not based on race but on a political classification.” Accordingly, equal protection analysis need not trigger the strict scrutiny generally applied to racial classifications. In Morton, the Court upheld an Indian preference for employment with the

132 See infra note 136, at 61.
133 See infra note 144.
134 Although defendant’s equal protection claim raises a serious standing issue, this paper will nevertheless assume the court finds that the defendant has standing to raise his claim.
135 See infra note 136, at 62.
136 Alex Tallchief Skibine, United States v. Lara, Indian Tribes, and the Dialectic of Incorporation, 40 TULSA L. REV. 47, 61 (2004).}
Bureau of Indian Affairs because the Indian-based classification was political rather than racial. The court sustains political classifications if “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”

SDVCJ applies to a non-Indian defendant because of the victim’s race. Specifically, the tribe has jurisdiction over the non-Indian defendant based not on his race but on the victim’s Indian race. Only the federal or state courts can prosecute non-Indian defendants who commit domestic violence against a non-Indian on a reservation. Conversely, SDVCJ subjects non-Indian defendants who commit domestic violence against an Indian to prosecution in both tribal and federal court. Under the scheme at issue, both tribal and federal authorities may prosecute non-Indians who engage in domestic assault of Indian women. Ironically, non-Indian defendants submit that SDVCJ subjects them to tribal prosecution because of the race of their victim. However, if Congress prohibited tribes from prosecuting non-Indian defendants that would be because of their race. Thus, SDVCJ actually makes the jurisdiction scheme less race-based.

Second, the Morton decision likely controls because the non-Indian defendant’s equal protection claim is based on the victim’s Indian status. The proper standard of judicial review would therefore be rational basis and not strict scrutiny. Accordingly, the question involves whether a law subjecting a non-Indian to tribal criminal jurisdiction passes the “rational tie” standard of Morton. Legislation that relates to Indian

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137 See Morton v. Mancari, 417 U.S. 535, 554 (1974) (“The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”).

138 Id. at 555.

139 As discussed, in United States v. Wheeler, 435 U.S. 313 (1978), the Supreme Court held that prosecuting an individual in tribal and federal court does not violate the Double Jeopardy Clause of the Fifth Amendment, because the source of an Indian tribe’s power to punish tribal offenders constitutes an inherent power of tribal sovereignty and not delegated from the federal government. Thus, the prosecutions were brought by separate sovereigns and did not violate double jeopardy.

140 Although Congress passed SDVCJ to combat against the pervasive violence against Native American women, the statute also protects men from domestic violence. The statute also applies to same-sex couples. For example, the Pascua Yaqui Tribe adjudicated a case that involved a same-sex couple. Although the tribe lost the jury trial against the defendant for failure to prove an “intimate” relationship, this early case helped illustrate the impartiality of tribal courts to carry out trials against non-Indian defendants. See, e.g., TRIBAL ACCESS TO JUSTICE INNOVATION, Violence Against Women Act Special Domestic Violence Criminal Jurisdiction, http://www.tribaljustice.org/program-profiles/violence-against-women-act-special-domestic-violence-criminal-jurisdiction (last visited Sept. 8, 2018) (overview of the tribe’s experience with SDVCJ).
land, tribal status, self-government or culture passes Morton’s rational relation test because “such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” \(^{141}\) As “a separate people,” Indians have a right to expect special protection for their land, political institutions, and culture. \(^{142}\)

SDVCJ meets the rational relation test in three significant ways. First, recognizing criminal jurisdiction of tribal courts over non-Indians strengthens tribal law enforcement because it places police powers in the hands of the tribe. Second, including non-Indian prosecution preserves tribal prosecutorial and judicial resources for cases where a strong tribal interest exists. Third, SDVCJ involves the protection of Native American women—an undeniable biological necessity to sustaining the life of the tribe. Finally, “the Supreme Court has never found any congressional attempt to enhance tribal sovereignty violative of the Fifth Amendment’s equal protection component.” \(^{143}\)

**B. Indians as a Racial Classification—Strict Scrutiny**

The larger question concerns whether the Supreme Court will continue to follow Morton. Recent cases cast doubt on the racial vs. political classification. \(^{144}\) Even if the court considers SDVCJ a racial classification, the statute still survives.

The Court may reject Morton and consider SDVCJ a racial classification. Should this occur, an equal protection claim still does not require the strict scrutiny typically applied to racial classifications. First, the Constitution draws racial classifications regarding Indians. Indeed, Indian classifications have existed since the drafting of the Constitution. Specifically, Article I of the Constitution authorizes Congress to legislate concerning commerce with the Indian tribes and federal Indian legislation; “the scope of Article I does not

\(^{142}\) See generally id.
\(^{144}\) See, e.g., Rice v. Cayetano, 528 U.S. 495 (2000) (holding that restricting the Office of Hawaiian Affairs electorate to descendants of Native Hawaiian’s was a racial classification); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (finding racial classifications by the federal government are subject to strict scrutiny). But see Fisher v. Dist. Court of Sixteenth Jud. Dist., 424 U.S. 382, 390 (1976) (holding that defendants denial of access to the Montana courts did not constitute impermissible racial discrimination because the exclusive jurisdiction of the tribal court was based on the sovereign status of the tribe under federal law).
create impermissible racial classifications.”

Thus, Indian law does not implicate race because of the language in Article I and in section two of the Fourteenth Amendment. Article I authorizes Congress “to regulate Commerce . . . with the Indians Tribes,” and excludes “Indians not taxed” “from apportionment for purposes of direct taxation.” Moreover, Section two of the Fourteenth Amendment reaffirms that representatives shall be apportioned “excluding Indians not taxed.” For these reasons, if Congress “[behaves] rationally in categorizing the individuals affected by its laws as “Indian,” [Congress] should be permitted, within the framework of Article I, to address Indians separately through legislation consistent with the trust responsibility.” Therefore, even if SDVCJ qualifies as a racial classification, the court should accept the Article I solution and reject strict scrutiny in the first place.

If the court found Morton inapplicable and dismissed the Article I argument, the court will inspect SDVCJ under strict scrutiny. For example, in Williams v. Babbitt, the court held the Reindeer Act classification as race-based and rejected the administrative interpretation of the act as an absolute ban on non-Native reindeer herding. The court further concluded that recent Supreme Court decisions undermined the force of Morton. Since the court found Morton inapplicable, the ancestry-based definition of Alaska Natives in the Reindeer Act had to be subjected to the strict scrutiny that the Equal Protection Clause reserves for race and race-like classifications. To survive that severe inspection, the classification must affect a “uniquely Indian” interest. Namely, the interest must be related to tribal land, self-government, and culture. Neither tribal lands nor traditional tribal practice applied to the reindeer hunting preference. Thus, the act could not supply a sufficiently compelling government interest.

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146 Id.
147 Id. at 189.
148 Id. at 190.
149 Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997).
150 Id. at 663.
151 Id. at 665.
152 Id.
153 Id.
154 Id. at 664.
155 Id. at 665.
Even if strict scrutiny applies, SDVCJ still survives. SDVCJ represents a narrowly tailored protection of a compelling government interest in reducing the high rate of domestic violence in Indian Country. Moreover, a significant number of non-Indians live on Indian reservations and most crimes against Indian women go unprosecuted. Congress passed SDVCJ squarely to address these concerns and remedy the void in law enforcement that existed with respect to crimes against Indian women on the reservation.

In any event, the court would likely find that United States v. Antelope controls. Antelope concerned “federal regulation of criminal conduct within Indian Country implicating Indian interests.”156 There, the Court found the statute to be rooted in the unique status of Indians as “a separate people,” who merit special protection from non-Indians.157 SDVCJ addresses similar concerns. Tribal prosecutorial power over non-Indian offenders should be considered part of the special protection.

In addition, Antelope held the prosecution of Indians under the Major Crimes Act did not deprive Indians of the equal protection of the laws.158 The Court found the federal criminal statutes were not based on racial classification.159 Instead, the statute applied to Indians because of their unique status as “a separate people” with their own political institutions and not as a racial group.160 Thus, the tribe may prosecute the non-Indian defendant not because of the victim’s Indian race but because the victim holds membership in a federally recognized tribe. In other words, SDVCJ would not apply to a non-Indian defendant if he committed domestic assault against a nonmember Indian woman. Finally, Antelope also held the disparity of law between two sovereigns does not constitute a basis for an equal protection claim.161 Thus, Congress has the constitutional power to prescribe a criminal code applicable in Indian country and the federal scheme will differ from the tribal scheme.

157 Id.
158 Id. at 647.
159 Id.
160 Id. at 646.
161 Id. at 648.
b. Constitutional Violations of Article II and III

Several of the purported constitutional violations rest on whether SDVCJ represents an exercise of inherent tribal sovereignty or delegated federal authority. If Congress delegated prosecutorial power to tribes, all the protections in the Bill of Rights apply. Alternatively, if Congress recognized the tribes’ inherent sovereignty, the Constitution does not apply. Thus, defendants rely on statutory protections under the Indian Civil Rights Act (“ICRA”). Although each afford similar protections, several important distinctions arise.

The first issue with congressional delegation concerns violations of Article II and III of the Constitution. Article II requires the President to appoint and the Senate to confirm federal judges. Specifically, the Constitution requires the President appoint any official who exercises the power of the federal government. Article III mandates life tenure and undiminished compensation for federal judges. Tribes appoint tribal judges and do not necessarily adhere to these requirements. Thus, tribal judges do not meet the Constitution’s Article II and Article III requirements. Accordingly, SDVCJ violates the Constitution as a delegation of federal authority.

Article II and III violations exist only if SDVCJ constitutes a delegated power. Several counterpoints demonstrate SDVCJ does not constitute a delegation of congressional power. First, the language of SDVCJ supports this proposition. SDVCJ’s statutory language mirrors the language used for the Duro fix. When Congress enacted the Duro fix, Congress wrote tribal criminal jurisdiction over non-member Indians flowed from “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Congress employed similar language to demonstrate tribal criminal jurisdiction over

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162 U.S. CONST. art. II, § 2.  
163 U.S. CONST. art III, §1.  
164 Tribes have varied approaches for the education and selection of tribal court judges. For an overview, see Gorden K. Wright, Recognition of Tribal Decisions in State Courts, 37 STAN. L. REV. 1397, 1403 (1985).  
165 This argument merits attention only if the court rules SDVCJ is a delegated power.  
non-Indians flowed from “the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”

Second, even if SDVCJ constitutes a delegated power, this argument fails when compared to federal magistrates. Specifically, the United States assigns certain functions in the criminal sphere to federal magistrates who act under the Federal Magistrates Act and are not Article III judges. Moreover, tribes assert judicial authority through two types of courts: the courts of Indian offenses (“CFR courts”) and specific tribal courts. For CFR courts, the Secretary of the Department of Interior formally appointed the judges. For tribal courts, tribal governments, pursuant to their inherent sovereignty, establish and control tribal courts.

c. Limited Federal Appellate Review

The final issue with SDVCJ concerns the limited federal appellate review of a defendant’s case. Specifically, no federal appellate right of review exists for violations of ICRA rights. Thus, Congress should reconsider using habeas as the sole form of review for convictions of non-Indians. First, in McKane v. Durston, the Court held that the due process clause does not create a constitutional right to appeal in a criminal case. Second, the low number of habeas petitions filed undermine this argument. Specifically, for non-Indian defendants, the court typically does not require exhaustion of tribal remedies. In Wetsit, the court stated “following the precedent of Duro we have examined the question of jurisdiction prior to the question of exhaustion of remedies.” Moreover, in Santa Clara Pueblo v. Martinez, the Court

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170 Id.
171 Id.
173 Tom Gede, Criminal Jurisdiction of Indian Tribes: Should Non-Indians be Subject to Tribal Criminal Authority Under VAWA?, 13 ENGAGE: J. FEDERALIST SOCI’Y PRAC. GROUPS 40, 42–43 (2012).
176 Id. at 151.
declared “[t]here is no question that federal courts have authority to review tribal court decisions which result in incarceration, and they have the authority to review whether a defendant has been accorded the rights required by ICRA.” Finally, the Attorney General’s Task Force recommended a specialized federal circuit to hear these appeals. Congress designed and “structured [SDVCJ] to survive [a] constitutional challenge,” and both the Article III and limited federal appellate review arguments matter only if SDVCJ constitutes a delegated power. As explained above, SDVCJ does not represent a delegation of power.

III. LIMITATIONS OF SDVCJ ON IMPLEMENTING TRIBES

Although viewed as a win for tribal communities, loopholes remain. Much of the frustration stems from the statute’s limited jurisdiction. Specifically, tribal courts cannot exercise SDVCJ over crimes between two strangers. Moreover, SDVCJ does not permit tribal prosecutors to charge defendants for crimes related to child endangerment or child abuse. Alfred Urbina, the former Attorney General for the Pascua Yaqui Tribe, reported that all eighteen of the cases that have been prosecuted under VAWA included children as victims. The tribe cannot bring charges under SDVCJ. Finally, detention issues and costs create implementation challenges. Thus, while SDVCJ represents a laudable achievement, certain limitations undermine its effectiveness. This section will explore these limitations.

a. SDVCJ Limitations—Jurisdictional Gaps, Child Abuse, and Detention Costs

SDVCJ sought to close the jurisdictional gap that allowed non-Indians to abuse Indians with impunity. Now the same problem remains with non-Indian defendants and Indian children. One author posits a “Child Abuse Extension” to cover child abuse committed by non-Indians on Indian land. Statistics support this

178 Id. at 336.
179 Id.
180 Id.
181 Id.
182 Id.
183 TRIBAL VAWA: MUCH REMAINS UNDONE, supra note 14.
185 Raia, supra note 147, at 336.
extension. For example, the U.S. Attorney General’s Task Force on American Indian and Alaska Native (AI/AN) Children Report noted that 70% of violent crimes committed against AI/AN children involve an offender of a different race. Moreover, the report showed that men who batter their companion also abuse their children in 49 to 70% of the cases. The reports reveal that domestic violence and child abuse are often concurrent. 

Because the tribe cannot prosecute the offender, the victim must rely on the federal government to prosecute. Similar to the lack of prosecution with domestic violence victims, from 2004 to 2007 the federal government declined to prosecute 72% of child sex crime cases in Indian Country. To eliminate this jurisdictional gap, proponents argue for an expansion of tribal criminal jurisdiction over non-Indians who commit child abuse.

Tribes have also encountered significant challenges regarding detention costs. Tribes rely on BIA-operated and funded facilities to provide healthcare to inmates. Non-Indian defendants do not qualify for healthcare at the Indian Health Service. Moreover, neither the BIA nor the IHS receive appropriated funds for non-Indian correctional health care purposes. These challenges demonstrate the need for increased funding to ensure tribes can sufficiently protect victims and properly detain SDVCJ offenders.

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187 Id. at 72.

188 Id. at 88.

189 Raia, supra note 147, at 318.


191 Id. at 31.

192 Id.

193 Currently, only $2.5 million is allocated for grants to tribal governments. See OFFICE ON VIOLENCE AGAINST WOMEN (OVW), FY 2017 BUDGET REQUEST AT A GLANCE 1, 2 (2017). The Office of Violence Against Women concedes that “[a]dditional funding is needed for a range of criminal justice improvements, including updating criminal codes, providing counsel to indigent defendants and supporting victims.” Tribes should lobby Congress for more grants. Although a novel approach, Congress can and should allocate more funds to improve SDVCJ. This represents a difficult task for tribes because most tribes do not have high-powered lobbyists and therefore the congressional expenditure process can be even more cumbersome.
IV. FUTURE OF VAWA

The Supreme Court has yet to adjudicate the constitutionality of the SDVCJ. Nevertheless, tribes welcome a legal challenge. Tribes currently exercise their inherent sovereignty over their members. However, *Oliphant* held tribes cannot exercise such authority over non-Indians. *Duro* held the same with respect to non-member Indians, a holding Congress later overturned. SDVCJ partially overrides *Oliphant*’s holding. Thus, the question remains: How will the Supreme Court rule when the eventual SDVCJ test case arrives? The next section explores two issues to help predict how the Court will rule. First, it will review whether the Supreme Court will follow its precedent in the *Oliphant* and *Lara* cases. Second, it will examine the members of the Roberts Court.

a. Will the Court follow *Oliphant*, *Lara* or go a different direction?

*Oliphant* held that tribes lack criminal jurisdiction over non-Indians because tribes submitted to the overriding sovereignty of the United States. Congress responded with SDVCJ and, like the *Duro* fix, stated tribal criminal jurisdiction over non-Indians flowed from “the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”

When the SDVCJ test case comes before the Supreme Court for review, the Court has three options. First, the Court could reaffirm *Lara* and sustain the constitutionality of tribal jurisdiction over non-Indians because Congress may relax the restrictions on tribes’ inherent sovereignty. Second, the Court could follow *Oliphant* and hold that tribes lack jurisdiction over non-Indians because the federal government’s overriding

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194 See, e.g., Lorelei Laird, *Indian Tribes are Retaking Jurisdiction over Domestic Violence on Their Own Land*, A.B.A. J., (Apr. 2015), http://www.abajournal.com/magazine/article/indian_tribes_are_retaking_jurisdiction_over_domestic_violence_on_their_own (highlighting how “cautious and thoughtful” the pilot project tribes are when the tribes make charging decisions).


197 Although defendants may file habeas petitions under 25 U.S.C. § 1303 (1968), no SDVCJ defendants have filed a petition to challenge their tribal court conviction.
sovereignty constrain them. Third, the Court could go a different direction and strike SDVCJ because the provision violates the Due Process Clause or the Equal Protection Clause.

b. The Roberts Court

The Roberts Court consists of five conservatives and four liberals. Although several Indian law cases have appeared before the Roberts court, none have addressed such a fundamental question of criminal jurisdiction. Given the changes to the Court since Lara, it is difficult to speculate how the Court will rule. Justice Thomas has stated that Indian law is “schizophrenic.” Moreover, Justice Kennedy raised the consent of the governed argument. Specifically, he took umbrage with the notion that Congress has the authority to subject citizens to a sovereign outside the structure of the Constitution. Presumably, Justices Breyer and Ginsburg would support inherent tribal criminal jurisdiction over non-Indians, as they authored the majority opinion in Lara. Justices Sotomayor and Kagan typically side with Breyer and Ginsburg.

Although Justices Scalia and Souter are no longer on the court, the reasoning in their dissents could apply with equal force to Justices Alito and Roberts. In this case, Justice Gorsuch may be the true swing vote. Justice Gorsuch has considerable experience with Indian law cases. Indeed, during his time on the Tenth Circuit, Gorsuch wrote eighteen legal opinions and participated in an additional forty-two cases relating to federal Indian law.

While one cannot predict how Justice Gorsuch will rule on SDVCJ, his opinions suggest a respect for tribal sovereignty. In Ute Indian Tribe v. State of Utah, he authored an opinion favoring tribal interests in a state-tribal criminal jurisdictional dispute. There, the tribe argued that the state unlawfully infringed

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198 U.S. v. Lara, 541 U.S. 193, 219 (2004) (“Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.”).
199 Id. at 212 (“[T]he National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.”).
200 Id. at 231 (Souter, J., dissenting) (Scalia, J., joining) (arguing that there is tribal authority to try nonmembers as a delegation of federal authority and that the tribes’ dependent status precluded the tribe from exercising inherent authority to try nonmembers).
202 Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah, 790 F.3d 1000 (10th Cir. 2015).
on tribal authority to prosecute tribal members for conduct on tribal lands. Gorsuch’s decision demonstrates an appreciation for the federal trust doctrine and the role of the federal government to protect tribal sovereignty from state intrusion:

Indeed, the harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time. Not only is the prosecution of Ms. Jenkins itself an infringement on tribal sovereignty, but the tortured litigation history that supplies its backdrop strongly suggests it is part of a renewed campaign to undo the tribal boundaries . . . .

Although Gorsuch’s position on tribal sovereignty may not be dispositive of how he will rule on SDVCJ, his respect for tribal sovereignty remains encouraging.

Alternatively, Justice Gorsuch’s inclination toward textual interpretation could pose a serious problem for SDVCJ. Specifically, Justice Gorsuch will likely need to answer what constitutes the sources of federal authority in Indian Country. The longstanding view of federal authority includes the plenary power doctrine derived from the Indian Commerce Clause. Although originally rejected in United States v. Kagama, the doctrine gained traction through a series of Supreme Court decisions that have supported the notion of congressional plenary power over Indian affairs. In Lara, however, Justice Thomas raised direct concerns:

As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases . . . . I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power . . . I cannot locate such congressional

203 Id. at 1005.
204 Id.
206 See U.S. v. Kagama, 118 U.S. 375, 378–79 (1886) (“The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress ‘power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.’ This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.”); see also U.S. v. Lara 541 U.S. 193, 200 (2004) (mentioned Congress’s plenary power over Indian affairs as one of the six reasons for finding inherent tribal criminal jurisdiction: “[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”); see also, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .”).
authority in the Treaty Clause, U.S. Const., Art. II, §2, cl. 2, or the Indian Commerce Clause, Art. I, §8, cl. 3.\textsuperscript{207}

If Gorsuch agrees with Thomas’ challenge to the plenary power doctrine, this will likely influence his decision on whether Congress has the authority to relax the restrictions placed on a tribe’s inherent sovereign powers to prosecute non-Indians. Thus, Justice Gorsuch may be the deciding vote that sustains or objects to the constitutionality of SDVCJ.

V. CONCLUSION

Tribes currently exercise their inherent sovereignty to prosecute Indians. Whether this theory will extend to tribal prosecutions of non-Indians remains unclear. Although a defendant may raise numerous legal claims, the primary argument will rest on two fundamental legal questions: First, whether SDVCJ violates Fifth Amendment Due Process rights of non-Indian defendants; or second, whether SDVCJ violates the Fifth Amendment’s Equal Protection Clause Component.

To date, no lawsuit has materialized, and it may be quite some time before one does. After Congress passed the \textit{Duro} fix legislation, thirteen years passed before the Supreme Court sustained the legislation in \textit{Lara}. Moreover, most defendants have no desire to bring a suit.\textsuperscript{208} Even with its limits, SDVCJ represents a significant step for criminal jurisdiction in Indian Country. How the court rules on SDVCJ could be a major defeat or a major victory for tribal criminal jurisdiction in Indian Country. Tribal advocates hope for the latter.

\textsuperscript{207} U.S. v. \textit{Lara}, 541 U.S. at 214–15. Indian scholars have long objected to the plenary power doctrine. See Michalyn Steele, \textit{Plenary Power, Political Questions, and Sovereignty in Indian Affairs}, 63 UCLA L. Rev. 666, 666 (2016) (“A generation of Indian law scholars has roundly, and rightly, criticized the Supreme Court’s invocation of the political question and plenary power doctrines to deprive tribes of meaningful judicial review when Congress has acted to the tribes’ detriment.”).

\textsuperscript{208} Laird, supra note 194. John Dossett, general counsel of the National Congress of American Indians, remarked: “I think most [defendants], they just want to get over it and get on with their lives,” he says, “and maybe they don’t want to be the big test case.”