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ISOLATED AND FORGOTTEN: END THE USE AND PRACTICE OF SOLITARY CONFINEMENT IN THE JUVENILE JUSTICE SYSTEM

Lauren M. Coler

"Being human is relational, plain and simple. We exist in relationship to one another, to ideas, and to the world. It's the most essential thing about us as a species: how we realize our potential as individuals and create meaningful lives. Without that, we shrink. Day by day, we slowly die." –Jean Casella and James Ridgeway, Authors of Hell is a Very Small Place: Voices from Solitary Confinement.

SECTION I: INTRODUCTION

For 23 hours a day, imagine yourself locked away in a small, confined, cold cell no bigger than a parking space—no space to move around—just an arm's length away from where you lay your head and where you defecate. No windows to see the sky or feel a breeze. No window or bars on the door—just a small slot through the metal door to receive your food. The bed inside your cell is made of cement with a cot no thicker than a kindergartener's mat to sleep on. Isolated and trapped; and, with no human interaction, you feel anxious, lonely, hopeless, and even experience depressed-like emotions. Juvenile youth in solitary confinement have these same experiences every day in jails and prisons. Many young people reported significant psychological pain and suffering while in solitary confinement.

The American Civil Liberties Union ("ACLU") conducted detailed interviews with juveniles about their experiences in solitary confinement. Carter P., 14 at the time of his confinement said, "I feel like was going mad, nothing but a wall to stare at."[1] Marvin Q., who spent a week in protective solitary said, "I was really, really lonely. . . .I would try [to] dissociate myself."[2] Phillip J., said, "The claustrophobia set in and I would feel I was having anxiety attacks and

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[1] Human Rights Watch/ACLU, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* 26 Human Rights Watch interviews (October 2012), https://www.aclu.org/sites/default/files/field_document/us1012webwcover.pdf.

[2] *Id.*

go over to get water and try and calm down. . . .the slightest noise and I would be on guard."[3] These reports of juvenile youth's descriptions of their experiences in solitary confinement, like these mentioned, are endless. In this Article, I will propose in detail ways to reform facilities to accommodate the fragility of a juvenile's psychological, physical, social development. There must be a better way to reprimand, refocus, and rehabilitate the youth.

Unlike adult prisons that refer to solitary confinement as "restrictive housing" or "isolation," juvenile facilities frequently refer to solitary confinement as "time out," "room confinement," "restricted engagement," or the "reflection cottage."[4] Although a short amount of time spent alone can sometimes neutralize a momentary crisis, long hours of isolation can be extremely damaging to juvenile youth.[5] Solitary confinement has become one of the most common disciplinary practices within correctional facilities in the United States.[6] There are many different practices for solitary confinement, including its use as a punishment for rule violations, by removing individuals who may pose a risk to the general population's safety and security, or the use of isolation as protection for high profile and vulnerable inmates at risk of abuse within the general prison population.[7] "While confined, juvenile youth are regularly deprived of the services, programming, and other tools that they need for healthy growth, education, and development."[8] Further, some facilities barely provided access to school books and materials needed for youths to keep up with their learning for their current school grade level.

This Article focuses on the problematic practice of solitary confinement on juvenile youth and its exacerbation of short and long-term mental illness. Juvenile solitary confinement is nationwide problem.[9] According to the Department of Justice ("DOJ"), on any

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[3] *Id.*

[4] Alone & Afraid: Juvenile Youth Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities (June 2004 Revised) 2, https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf.

[5] *Id.*

[6] Zyvoloski, Sarah. (2018). *Impacts of and Alternatives to Solitary Confinement in Adult Correctional Facilities.* Retrieved from Sophia, the St. Catherine U. repository website: https://sophia.stkate.edu/msw_papers/841. (29 Dec 2019).

[7] *Id.* at 6.

[8] Alone & Afraid, *supra* note 4, at 2.

[9] Brielle Basso, *Solitary Confinement Reform Act: A Blueprint for Restricted Use of Solitary Confinement of Juveniles Across the States*, 48 SETON HALL L. REV. 1602.

given day, in the more than 2,000 juvenile facilities around the country, there are over 60,000 juveniles, of which roughly one in five are subjected to isolation.[10] This Article proposes unified federal legislation that will ban the use of solitary confinement and practices associated with such isolation on juveniles that are blatant violations to Human Rights laws as well as International Treaties deeply vested in protecting the rights of juvenile youth.

I will produce crucial yet disturbing information on the practice of solitary confinement in the United States jail and prison systems when it involves youth offenders under the age of 18 and in juvenile detention facilities. This Article argues that the particular risks and harm juveniles face in conjunction with developmental and social differences between juveniles and adults calls for exclusive standards when considering the use of solitary confinement on juvenile youth. This Article will also provide how international laws, United States Constitutional law, and medical standards are relevant evidence to challenge the use of solitary confinement on juveniles.

This Article will proceed in eight sections. The remainder of Section I introduces the issues with imperiling juveniles to solitary confinement and provides a range of relevant evidence to support federal legislation. This section is organized to frame the issue while providing awareness to the use of such isolation and its many perilous risk factors. Section II will introduce the historical origin of the juvenile justice system over the past decades to shed light on its evolution to current policy. Section III will then discuss the question of why juveniles are held in isolation and articulate the methods in which juvenile facilities, jails, and prisons validate their use of such isolation on youth. Section IV will convey the general background and history of solitary confinement, including the origin of the practice of solitary confinement in the United States prison system. Section V is organized to frame the impact of solitary confinement by addressing how it harms juvenile youth; the first part of Section V will discuss the psychological harm of solitary confinement; the second part of Section V will examine the physical harm of juveniles; the third part of Section V will expand on the physical harm by explaining how a lack of exercise and proper nutrition is detrimental to juvenile health; and, the fourth part of Section V observes the social and developmental harm solitary confinement imposes on juveniles and how to facilitate healthy adult social development. Section VI will articulate in two parts how

[10] *Id*.

solitary confinement falls under the Eighth Amendment for Cruel and Unusual Punishment in the first part, and the international human rights treaties that provide specific protections for juvenile youth while further discussing the need to ban the use and practice of solitary confinement on juveniles in the second part. Section VII will introduce proposed alternative reform solutions implemented by other states and express need to ban the practice of solitary confinement on juvenile youth. Section VIII will conclude this Article by discussing the steps already taken by some state and local jurisdictions while reinforcing the argument that the Supreme Court must invoke unified federal legislation to ban solitary confinement uses in American jails, prisons, and juvenile facilities.

SECTION II: HISTORICAL CONTENT OF THE JUVENILE JUSTICE SYSTEM OVER THE YEARS

Since the first juvenile court was established in Chicago in 1899, the juvenile justice policy in the United States has evolved. In the 1960s, during a rehabilitative vision of the Progressive Era, reformers viewed juvenile offenders as "innocent children" and saw juvenile criminal activity as "symptomatic of an impoverished social content."[11] Under the rehabilitative model, the purpose of correctional interventions was to provide treatment to juveniles offender to prevent a life of crime.[12] Between the 1960s and 1970s, policy makers then shifted their focus on the belief that the juvenile court was failing in its rehabilitative mission and that juvenile offenders were actually harmed to a paternalistic approach that introduced procedural due process into youth delinquency proceedings.[13] During this time, lawmakers recognized that a justice system, which aims to protect juvenile youth and promote their welfare must also adhere the same principles of fairness when dealing with young offenders.[14] By the late 1980s, a stricter attitude towards juvenile crime had emerged.

Harsher reform of the juvenile justice system was triggered by an increase in violent youth crime, particularly homicide, that generated hostility and fear of juvenile offenders.[15] Policy reformers in the 1990s began to refer to youthful offenders as "super predators"

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[11] Reforming Juvenile Justice: A Developmental Approach 31 (Richard Bonnie, Robert Johnson, Betty Chemers, & Julie Schuck eds., 2013).
[12] *Id*.
[13] *Id*.
[14] *Id.*
[15] *Id.* at 38.

who were deemed to be a serious threat to public safety.[16] Policymakers across the country drastically reformed juvenile crime policy to facilitate the adult prosecution and punishment of young offenders while also increasing the length of confinement for those who remained in the juvenile system longer.[17] Despite the criticism of overt leniency from the juvenile courts, dispositions became severe during this period with heightened use of secure placement and longer periods of time sentenced.[18] By 2000, the initial rehabilitative vision and mission to create a separate juvenile justice system had vanished.[19] Within the past decade, lawmakers have been reconsidering their harsh approach to juveniles. Across the states, there has been a widespread dissatisfaction with past polices and an increasing interest in taking a less punitive approach to the juvenile justice system. Relevant research evidence indicates that imposing punitive sentences on juvenile offenders is unlikely to reduce them from reoffending or contributing to public safety like those in favor of "get tough on crime" policies assumed.[20] Sending juveniles to jails and prisons may actually increase the possibility of recidivism.

SECTION III: WHY ARE JUVENILE YOUTH PLACED IN SOLITARY CONFINEMENT?

Juvenile detention facilities generally justify solitary confinement among other forms of isolation for one of four reasons including but not limited to: disciplinary isolation, protective isolation, administrative isolation, and medical isolation. Disciplinary isolation is the physical and social isolation used to correct juvenile youth when they violate facility rules, such as those prohibiting talking back, possessing contraband, or fighting.[21] Protective isolation is the physical and social isolation used to safeguard a child from other juvenile youth.[22] Administrative isolation is the physical and social isolation—"sometimes for a short period of time but other times without any time on duration"—used during initial processing at a new facility because officials do not know how else to oversee a child or

[16] *Id*. at 32.
[17] Reforming Juvenile Justice: A Developmental Approach 32 (Richard Bonnie, Robert Johnson, Betty Chemers, & Julie Schuck eds., 2013).
[18] *Id.* at 40.
[19] *Id*. at 32.
[20] *Id*. *See* (Task Force on Transforming Juvenile Justice, 2009).
[21] Alone & Afraid, *supra* note 4, at 6.
[22] *Id.*

when a child is considered to be too disruptive to the safe or systematic operation of an institution, such as when he or she is regarded as out of control.[23] Medical isolation is the physical and social isolation to medically treat juvenile youth for a contagious disease or to treat them if they have expressed a need to commit suicide.[24] The government generally justifies the practice of solitary confinement from these means listed above, but juveniles are more vulnerable to the negative effects of such isolation compared to adults because solitary confinement can severely inhibit juvenile's natural growth and development.

SECTION IV: BACKGROUND AND HISTORY OF SOLITARY CONFINEMENT IN THE UNITED STATES

Historically, the use of solitary confinement in correctional settings has been a continuing point of contention between prison administrators, mental health professionals, and legal decision makers.[25] British humanitarians discussed solitary confinement and its powerful effect believing that "this enhanced punishment would serve as a greater deterrent and increase its reformative effect."[26] While penologist were surprised by the orderliness that solitary confinement allotted them to have with prison order, one historian noted the harsh system of "perfect order and perfect silence" conducted at Petonville prison resulted in "twenty times more cases of mental disease than in any other prison in the country."[27] English reformers of capital punishment thought solitary confinement was "the most terrible penalty short of death that a society could inflict and the most humane."[28] By maximizing control over the prisoners, solitary confinement was believed to strengthen the prison's ability to change or transform them:

> "Uprooted from his universe, the inmate in solitary confinement gradually becomes aware of his weakness, of his fragility, of his absolute dependence upon the

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[23] *Id*.
[24] *Id*.
[25] Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & Soc. Change 481, 500 (1997).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 482.

> administration, that is, on the "other"; thus he becomes aware of himself as a subject-of-need. This is what can be described as the first stage of reformation: transformation of the real subject (criminal) into an 'ideal subject" (prisoner).[29]

The first solitary confinement cell blocks were authorized by the Pennsylvania legislature in 1790, to house "the more hardened and atrocious offenders"[30] Some jurists recognized solitary confinement was "a greater evil than certain death" and reported prisoners in solitary "beg, with the greatest earnestness, that they may be hanged out of their misery.[31] Many states experimented with Pennsylvania's solitary system during the nineteenth century, but abandoned the practice due to its daunting effects.[32] Under *In re Medley*, the peculiarities of this system were to complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct interaction with or sight of any human beings, and no employment or instruction.[33] A considerable number of prisoners, regardless to the length of confinement, fell into a semi-fatuous condition from which it was nearly impossible to awaken them, and others became violently insane.[34] Others committed suicide while those who managed the practice of solitary confinement were not generally reformed, and in most cases, did not recover sufficient mental activity to be of any subsequent service to the community.[35] Moreover, it became evident that changes had to be made in the system originated by the Philadelphia Society of Ameliorating the Miseries of Public Prisons established in 1787.[36]

Supermax prisons began with a lockdown on October 1973 in Marion in Illinois followed by the killing of two prison guards on two separate occasions.[37] In 1979, Marion Penitentiary became the first

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[29] Dario Melossi & Massimo Pavarini, *The Prison and The Factory: Origins of the Penitentiary System* 150 (Glynis Cousin trans., Books) (1981).
[30] Harry Elmer Barnes, The Evolution of Penology in Pennsylvania. 120 (1927).
[31] Louis P. Masur, Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865 (1989).
[32] Haney & Lynch *supra* note 4, at 484.
[33] *In re Medley*, 134 U.S. 168, 10 S. Ct. 384, 33 L. Ed. 835, (1890).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 443, 448 (2006).

level six "super-maximum-security prison" in the United States.[38] In 1983, this "regime" was superseded when the October lockdown was never lifted: "inmates were confined to their cells without access to communal activities, and the use of solitary confinement as a tool used against disruptive prisoners become an ordinary measure."[39] This lockdown was the inspiration for similar practices in many states here in the U.S., and by 1997, there were 55 supermax facilities in 34 states holding approximately 20,000 inmates by 1998.[40] Currently, there are at least 57 supermax prisons in the United States.[41] While the Marion lockdown may have set the model for modern-day solitary confinement on a broad scale, a number of facilities, all of them closely linked to the rise of mass incarceration, provided the momentum.[42] Under *Wilkinson v. Austin*, supermax prisons were maximum-security state and federal facilities with highly restrictive conditions that were designed to segregate the most dangerous prisoners from the general prison population.[43] By understanding the historical catalyst for solitary confinement, one can begin to dive in and understand how and why this form of isolation became so popular among prison systems. With a disregard for the effects experienced by individuals whether positive or negative, these experiences have such permanent effects on their personalities and mental health.

SECTION V: THE IMPACT OF SOLITARY CONFINEMENT AND HOW IT HARMS JUVENILE YOUTH

Although many prison systems, including the juvenile facilities, use solitary confinement as a means to maintain order within the daily operations, such as protection for vulnerable individuals, for medical treatment, and as a means to discipline, the psychological and physical effects of solitary confinement are unhealthy. In *Novak v. Beto*, solitary confinement isolates prisoners in a "punishment status" by placing them on a restricted diet and loss of privileges for a duration

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[38] *Id.* at 442.
[39] *Id.* at 443.
[40] *Id.*
[41] *Id.*
[42] Jean Casella & James Ridgeway, *Hell Is a Very Small Place: Voices from Solitary Confinement.* 5 (2016).
[43] *Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174, 2005 U.S., 73 U.S.L.W. 4473, 18 Fla. L. Weekly Fed. S 371.

of time varying on the type of infraction.[44] According to research found by Haney and Lynch on solitary confinement, "the empirical record compels an unmistakable conclusion: this experience is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term emotional and even physical damage."[45]

According to 2012 data research released from the Campaign for Youth Justice, United States courts handle approximately 1.7 million juvenile delinquency cases per year, which translates to roughly 4,600 cases per day, and 21 percent of these cases are in solitary confinement.[46] There is no explicit ban or direct regulation by federal legislation of solitary confinement.[47] Because solitary confinement can lead to serious psychological, physical, and developmental harm emerging in constant mental health complications among the youth, the federal government agencies and experts have agreed the use of isolation on juvenile youth can be harmful and counterproductive.[48] The DOJ has stated that the "isolation of juvenile youth can constitute cruel and unusual punishment."[49] Juvenile youth need natural human contact, a variety of age-appropriate service, and programming to ensure their development, education, and rehabilitation are not hindered as they grow older in society. Juvenile youth who are subjected to solitary confinement often have experiences that hinder their ability to grow up socially and keep up educationally with their peers. Juvenile youth are still developing; they are not psychologically able to handle such isolation with the strength of an adult, and because of this, traumatic experiences like solitary confinement may have a profound effect on their chance to rehabilitate and grow.[50]

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[44] *Novak v. Beto*, 453 F.2d 661, 667 1971 U.S. App.
[45] Haney & Lynch, *supra* note 4, at 477.
[46] Reed, Marty, *Movement to End Juvenile Solitary Confinement Gains Ground, But Hundreds of Kids Remain in Isolation*. (4 Jan 2017), https://solitarywatch.org/2017/01/04/movement-to-end-juvenile-solitary-confinement-gains-ground-but-hundreds-of-kids-remain-in-isolation.
[47] Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Juvenile Youth in Jails and Prisons*, 40 N.Y.U. REV. L. & SOC. CHANGE 675. (2016).
[48] *Id.*
[49] Letter from Robert L. Listenbee, Administrator, U.S. Dep't of Just., to Jesselyn McCurdy, Senior Legis. Counsel, American Civil Liberties Union 1 (Jul. 5, 2013).
[50] Human Rights Watch/ACLU, *supra* note 1, at 2.

PSYCHOLOGICAL HARM

The story of Kalief Browder helped bring more awareness the psychological harm juveniles face in solitary confinement and further shows the pressing need to abolish the practice of solitary confinement on juveniles across America. In May 2010, at the age of 16, Kalief Browder was sent to Rikers Island after being accused of stealing a backpack.[51] Although Browder continued to maintain his innocence, he was on probation at the time of his arrest and held on bond.[52] Browder roughly spent two of his three years in solitary confinement on Rikers Island, as known as the "bing."[53] During his time in solitary confinement, Browder attempted suicide several times.[54] Two years later in February 2012, Browder made another attempt at suicide; he ripped his bed sheets to shreds, tied them together like a noose, and attempted to hang himself from the light fixture suspended from the ceiling.[55] The charges were dismissed once the prosecutor lost their sole witness, and Browser was released from Rikers Island.[56] After Browder's release, for a while it appeared he was adjusting well by earning a high school equivalency diploma and by beginning community college, but he struggled reintegrating into society.[57] In an interview by Jennifer Gonnerman, Browder told her "Being home is way better than being in jail," "but in my mind right now I feel like I'm still in jail, because I'm still feeling the side effects from what happened in there."[58] On June 6, 2015, Kalief Browder hanged himself.[59] In Gonnerman's "Kalief Browder 1993-2015" article,

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[51] Michael Schwirtz and Michael Winerip, "Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide." (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html.

[52] Brielle Basso, Solitary Confinement Reform Act: A Blueprint for Restricted Use of Solitary Confinement of Juveniles Across the States, 48 SETON HALL L. REV. 1601.

[53] *Id*. at 1602.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] Michael Schwirtz & Michael Winerip, "Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide." (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html.

[58] Jennifer Gonnerman, *"Before the Law: A boy was accused of taking a backpack. The courts took the next three years of his life*," https://www.newyorker.com/magazine/2014/10/06/before-the-law. (07 Jul 2020).

[59] Basso, *supra* note 39, at 1602.

Browder's father explained that Browder pulled out the air conditioner and pushed himself through the hole in the wall feet first with bedsheets wrapped around his neck.[60] Browder's mother was home at the time when she heard a loud thumping noise; when his mother went outside, it was then realize she realized that her youngest child had hanged himself.[61]

Throughout the adolescence period, the brain's circuitry and behavior are beginning to become established.[62] These changes in brain circuitry and functioning, which occur during adolescence, materially impact the regions in the brain associated with self-consciousness, planning the calibration of risk and reward, and regulating emotion.[63] Relevant research suggests that isolation adversely affects adolescent brain development; essentially, for a juvenile brain to fully develop, it needs environmental stimuli and social interaction.[64] Deprived of such stimuli and social interaction during this pivotal stage in development, the brain will be substantially impaired.[65] The harm inflicted on juveniles by isolation is materially different and more severe than the harm caused to adults because of its irreparability.[66] Juvenile youth have fewer psychological resources at their disposal than adults do to help them maintain the stress, anxiety and discomfort experienced in solitary confinement.[67] Once the developmental period passes for a juvenile youth, the brain cannot go back and redevelop later on; the developmental effects are conceivably permanent.[68]

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[60] Jennifer Gonnerman, "Kalief Browder 1993-2015." https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015. (last visited 07 Jul 2020).
[61] *Id.*
[62] Anthony Giannetti, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment*? 45, 46 BUFF. PUB. INT. L.J. 31 (2011) (last visited 09 Jul 2020). *See* DANIEL R. WEINBERGER ET AL., THE NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, THE ADOLESCENT BRAIN: A WORK IN PROGRESS 2 (2005), http://www.thenationalcampaign.org/resources/pdf/BRAIN.pdf.
[63] *Id.* at 46; *See also* Laurence Steinberg et al., *Adolescent Development and Juvenile Justice,* 5 ANN. REV. CLINICAL PSYCHOL. 459, 466 (2009).
[64] Giannetti, *supra* note 48, at 46.
[65] *Id*.
[66] *Id*.
[67] Human Rights Watch/ACLU, *supra* note 1, at 24; *See* Human Rights Watch telephone interview with Deborah DePrato, (June 6, 2012).
[68] Giannetti, *supra* note 48, at 47.

The Human Rights Watch ("HRW") and the ACLU published the first national report to analyze solitary confinement use on juveniles based on interviews conducted with various juveniles across the country who spoke in disturbing detail about their struggles with one or more serious mental health problems while they were subjected to solitary confinement. Most mentioned thoughts about self-harm and suicide, visual and auditory hallucinations, shifting sleep patterns, acute anxiety, feelings of depression, nightmares, traumatic memories, and irrepressible anger or rage.[69] The psychological effects caused by long periods of isolation often increase a youth's risk of becoming acutely psychotic and/or acutely suicidal.[70] Not only does solitary confinement harm juvenile youth psychologically, but also, such practices further increase the substantial harm to juvenile youth's physical health by the lack of recreational exercise, inadequate nutrition, self-harm and suicide, physical abuse from staff members, or other juveniles.

PHYSICAL HARM

Solitary confinement, along with its various methods, can cause serious physical harm to juvenile youth. When juveniles are placed at a facility, they are often "physically immature."[71] Juveniles subjected to solitary confinement are allowed one hour out of their cells. Human Rights Watch and the ACLU interviewed 12 juveniles about their thoughts or attempts at suicide while in solitary confinement. Paul K., who spent 60 days in protective solitary confinement when he was 14, described in detail how he decided to want to end his life:

> "The hardest thing about isolation is that you are trapped in such a small room by yourself. There is nothing to do so you start talking to yourself and getting lost in your own little world. It is crushing. You get depressed and wonder if it is even worth living. Your thoughts turn over to the more death-oriented side of life. . . . I want[ed] to kill myself."[72]

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[69] *Supra* note 53, at 24.
[70] Basso, *supra* note 39, at 1605.
[71] *Id*. at 1604.
[72] Human Rights Watch/ACLU, *supra* note 1, at 31; *See* Human Rights Watch interview with Paul K. (pseudonym) March 2012.

In another interview with ACLU, 12 juveniles opened up about their experiences having suicidal thoughts or actual attempted suicide while in solitary confinement; some had attempted suicide before they were in jail or prison, and others detailed witnessing suicides whether they were attempts or successful suicides.[73] Luz M. said her suicidal thoughts stemmed from her immediate release from solitary confinement:

> "I just felt I wanted to die, like there was no way out—I was stressed out. I hung up [tried to hang myself] the first day. I took a sheet and tied it to my light and they came around. . . . The officer, when she was doing rounds, found me. She was banging on the window: "Are you alive? Are you alive?" I could hear her, but I felt like I was going to die. I couldn't breathe."[74]

According to a national expert on suicides in jails, prisons, and juvenile facilities, evidence suggests that most suicides occur in juvenile facilities when juvenile youth are isolated in their room.[75]

INADEQUATE EXERCISE AND LACK OF PROPER NUTRITION

For one hour each day whether it's a hallway, dayroom, or a metal cage, the youth are permitted to walk around or exercise.[76] In light of the lack of proper exercise associated with such isolation, there is also inadequate nutrition available, which can lead to physical changes and stunted growth.[77] The ACLU and HRW conducted a study with roughly 125 juveniles in solitary confinement across 19 states; most juveniles reported stating they often go to bed without dinner.[78] In solitary, juveniles further reported that they experienced hair and weight loss from the stress.[79] Young girls reported their menstrual

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[73] *Id.*
[74] *Id*; *See* Human Rights Watch interview with Luz M. (pseudonym), New York, April 2012.
[75] *Id; See* also Human Rights Watch telephone interview with Lindsay Hayes, Project Director, National Center on Institutions and Alternatives, Massachusetts, June 13, 2012.
[76] *Supra* note 53, at 37.
[77] *Id.*
[78] *Id.* at 1604, 1605; see Civil Liberties Union & Human Rights Watch, Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the U.S. 38-40 (2012), https://www.aclu.org/sites/default/files/field_document/us1012webwcover.pdf. (last visited 13 Jul 2020).
[79] *Id*.

cycle stopped flowing while in solitary confinement, which is concurrent to stress, trauma, and inadequate nutrition.[80]

In addition to the lack of exercise that contributes to the stress and trauma of being in solitary confinement, juveniles also live in fear of attacks from staff members and other youth.[81] A culmination of data from juvenile facilities discovered that between 2004 and 2007 there were approximately 12,000 documented reports of physical, sexual, or emotional abuse by staff members—averaging 10 assaults a day.[82] Moreover, since juvenile youth are often afraid to report such abuse by staff, the reports are likely higher than what some facilities have documented. For this reason, it important to realize that juvenile youth in solitary confinement are not only at risk of physical harm by self-infliction, stress, or staff members, but also, social and developmental harm—due to the lack of educational material and limited to zero family contract or visits that some facilities have implemented.

SOCIAL AND DEVELOPMENTAL HARM

Juvenile youth who are placed in solitary confinement may also suffer from social and developmental harm. When juveniles are placed in isolation, they are often denied access to the same general programming as those youth who are in general population. Based on the facility, juveniles have limited access to educational and reading materials. When a juvenile facility limits or completely restricts educational material access, juveniles become less likely to develop into a functional, contributing member of society.[83] Many facilities deny juveniles contact with their families while in solitary confinement—i.e. no visits, no letters, and no phone calls.[84] Because facilities often view these things as privileges, juveniles in solitary confinement can be denied such privileges as a result of their isolation

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[80] *Id*.

[81] Atty' Gen.'s Nat'l Task Force on Juvenile Youth Exposed to Violence, Rep. of the Atty' Gen.'s Nat'l Task Force on Juvenile Youth Exposed to Violence, Defending Childhood: Protect, Heal, Thrive 175 (2012), available at http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf. (13 Jul 2020).

[82] *Id*; see Mohr, H. (2008, March 2). 13K claims of abuse in juvenile detention since '04. *USA Today*. Retrieved from http://www.usatoday.com/news/nation/2008-03- 02-juvenileddetention_N.htm. (13 Jul 2020).

[83] Basso, *supra* note 38, at 1607.

[84] Human Rights Watch/ACLU, *supra* note 36, at 41.

or as a means of a behavioral correction tactic. For some juveniles, having a connection to a family member on the outside gives them hope.[85] Being denied physical contact from one's family, a female juvenile reported to the HRW and ACLU, "[is] torture," referring to not being able to touch her family.[86] Intimacy on a minimal level such as a kind hug or a gentle hand of encouragement is a very intricate part of being human, and to deny youth this contact can create depressive, dissociative emotions. However, this Article is not suggesting that a corrective and rehabilitative facility treat youth offenders as delicate, small children, but rather acknowledge that juvenile rehabilitation should not be binary, atrociously harmful, or detrimentally benign.

In some juvenile facilities, youth offenders were given educational material to self-study, however, their work would often go unchecked and their questions unanswered.[87] In some jails and prisons, access to education ends the moment the doors to solitary confinement slam shut, regardless of age.[88] The denial of education also destabilizes the purpose of juvenile justice, which is to rehabilitate juveniles to be able to successfully integrate back to their lives before being incarcerated.[89] Craig Haney, a psychology professor at University of Santa Cruz stated that, "not only are you putting [juveniles] in a situation where they have nothing to rely on but their own, underdeveloped internal mechanisms, but [facilities] re making it impossible to develop healthy functioning adult social identity."[90]

Adolescence is a period during which juveniles usually make important progress toward building skills and capacities necessary to successfully transition into adult roles like becoming a spouse, an employee, and a law-biding citizen.[91] During this developmental process, a healthy social environment provides "opportunity structures" that aid in facilitating positive development.[92] Juvenile facilities that place an importance on social content for youths' ongoing development have a strong potential for enabling healthy maturation.[93] Juvenile justice rehabilitative methods, both residential

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[85] *Id*.
[86] *Id.* at 42.
[87] *Id*.
[88] *Id*. at 43.
[89] Basso, *supra* note 39, at 1607.
[90] *Id*. at 1608; see Matt Olson, Kids in the Hole, The Progressive, Aug. 2003, at 27.
[91] *Supra* note 11, at 120.
[92] *Id*.
[93] *Id*.

and community-based, that genuinely aspire to reduce recidivism will strive to provide opportunity structures that can promote juvenile offenders' development into productive adults.[94] Without these facilities attempting the cater to the immature nature of juvenile adolescence, or state and local lawmakers aggressively reforming juvenile justice to create uniformed change, our society will continue to produce hopeless stories like Kalief Browder. Ending the practice of solitary confinement completely would greatly reduce the harm youths suffer from such isolation that perpetually hinder their social development, crushing their ability to rehabilitate and evolve into a law-abiding way of life.

SECTION VI: U.S. CONSTITUTIONAL LAW AND HUMAN RIGHTS LAW PROTECTIONS FOR JUVENILE YOUTH

Although the use of solitary confinement has been criticized for decades, it has not gained the public's attention until recently. The Eighth Amendment provides in part a guarantee against cruel and unusual punishment by providing constitutional protections applicable to the conditions of solitary confinement of adults. With the recognized conditions of punitive solitary confinement make slow, successful challenges through some federal court systems, and these cases can likely have a significant impact with juvenile youth in solitary confinement.[95] Thus far, nine states have recently passed laws to limit or prohibit using solitary confinement for juvenile offenders.[96] Although the limits and restrictions on the use and practice of solitary confinement on juvenile youth vary from between these states, it is a step in the right direction to increase more reform at the federal level. Notably, during President Barack Obama's presidency, he announced in January 2016 that the United States would ban the practice of punitive solitary confinement on juvenile offenders.[97] As mentioned below, it is evident that the use of solitary confinement violates the Eighth Amendment and international law protections in place to shield juvenile youth from the cruel or inhuman and degrading treatment of solitary confinement.

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[94] *Id*. at 121.
[95] Kysel, *supra* note 33, at 696-97.
[96] ANNE TEIGEN & SARAH BROWN, RETHINKING SOLITARY CONFINEMENT FOR JUVENILES. VOL. 24, NO. 20 (May 2016).
[97] *Id*.

EIGHTH AMENDMENT

Solitary confinement violates the Eighth Amendment because it detrimentally damages and effects juvenile's future health. The Eight Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[98] The Supreme Court has adopted a two-prong test to determine if the conditions of the confinement constitute a risk to inmate health sufficient to warrant Eight Amendment scrutiny.[99] The Court considers whether:

> (1) the risk involved was 'unreasonable' in that the challenged conditions were 'sure,' 'very likely,' or 'imminent[ly]' likely to cause 'serious' damage to the inmate's future health, and (2) whether society considers the risk to be 'so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."[100]

In *Madrid,* the Court held solitary confinement involves the Eighth Amendment when it is applied to inmates "who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health."[101] Historically, in determining whether a condition of confinement is serious enough to involve the Eighth Amendment, courts have focused on the basic factors of physical substance such as food, shelter, and medical care.[102] Recently, courts have acknowledged the "inhumanity of institutionally-imposed psychological pain and suffering" as violating the Eighth Amendment.[103] Solitary confinement, in regards to juveniles, satisfies the test because the psychological harm that is intensified from such isolation causes serious damage to their development. As mentioned earlier in the first part of Section IV, such confinement can be irreversible to juvenile's cognitive and social development because as juveniles go through the adolescence period, such trauma like solitary, severely hinders their brain development and functions. Juveniles are at a higher risk of suffering extreme injury to their mental health because their brains cannot fully develop in solitary.[104] Upon a juvenile

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[98] U.S. CONST. amend VIII.
[99] Giannetti, *supra* note 48, at 39.
[100] *Id.* (citing *Madrid,* 889 F. Supp. at 1264.)
[101] *Madrid v. Gomez*, 889 F. Supp. 1265 (9th Cir. 1986).
[102] *Giannetti, supra* note 48, at 39.
[103] *Id*.
[104] *Id*. at 48.

release back into society, the risk of them reoffending is likely or in the unfortunate case of Kalief Browder, taking their own life because they cannot adapt to the social norms.

INTERNATIONAL LAW PROTECTIONS

International law has acknowledged that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."[105] The International Covenant on Civil and Political Rights ("ICCPR"), ratified by the United States in 1992, mirrors the international consensus that juveniles have special status under international law.[106] ICCPR provides heightened protection measures and obligates States to treat juvenile youth differently from adults when they act adverse to the law and to prioritize juveniles rehabilitation.[107] Further the ICCPR mandates that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[108] When determining whether such confinement rises to the level of torture or other forms of cruel, inhuman, or degrading treatment, the law considers "the victim's age, legal status, and individual and developmental characteristics."[109] Given these points, international law provides a heightened degree of protection for juvenile youth than the United States current domestic law.

The Convention on the Rights of the Child ("CRC"), one of the most widely ratified human rights treaties, further acknowledges the obligation of governments to provide juvenile youth with special measures of protection.[110] Even though the United States has signed, but not yet ratified the CRC, the United Nation Convention on the Rights of the Child ("UNCRC"), has determined that disciplinary solitary confinement violates the prohibition against cruel, inhumane,

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[105] Kysel, *supra* note 33, at 693; see G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, at 19 (Nov. 20, 1959).
[106] *Id*. at 694; see International Covenant on Civil and Political Rights, Art. 24, Dec. 16, 1966, S. Exec. Rep. 10223, 999 U.N.T.S. 171 [hereinafter ICCPR] (guaranteeing to every child "the right to such measures of protection as are required by his status as a minor").
[107] *Id*.
[108] ICCPR, supra note 81, Art. 10(1).
[109] Kysel, *supra* note 33, at 694.
[110] *Id*; *See generally* Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] Article 37 of the CRC provides a number of protections for juvenile youth in the criminal justice system, including a prohibition on CIDT. *Id*. at Art. 37.

or degrading treatment of punishment.[111] By establishing these international laws and standards, the harmful psychological and physical consequences of solitary confinement along with the lack of juvenile youth's cognitive development is the reason for this call to abolish the practice of solitary confinement in the juvenile justice system.

SECTION VII: PROPOSED ALTERNATIVES FOR THE USE OF SOLITARY CONFINEMENT OF JUVENILE YOUTH

Absent of the Supreme Court holding the use of punitive solitary confinement is per se unconstitutional, ultimately, the reformation of solitary confinement will be left to the states.[112] Although some states have taken measures to reform their use of solitary confinement, these policies vary between states. Not only is there a lack of consensus with the reformation between the states, but also, these policies vary within the counties of each state. However, the nation as a whole appears to be moving away from the use of punitive solitary confinement for juvenile youth.[113] Twenty-nine jurisdictions in the country have completely prohibited the practice of solitary confinement.[114] While these states have banned the use of solitary confinement as form of punishment, many states still permit juvenile youth to be subjected to isolation for administrative or protective reasons.[115] Regardless of the reason for the isolation, solitary confinement still adversely affects juveniles all the same. When juvenile youth are placed in solitary confinement, usually as a form of discipline, or behavioral control, or administrative convenience, youth are deprived of the rehabilitative programming that is required by law in juvenile facilities.[116] More than 50 percent of suicides in youth facilities were committed by juveniles being held in solitary confinement, and more than 60 percent of all juvenile youth who commit suicide have been placed in institutional isolation prior to jail or prison.[117] Something has to be done to end the irreparable

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[111] *Id*. at 694-95.
[112] Basso, *supra* note 39, at 1615.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] Reed, *supra* note 33.
[117] *Id*; *See also* American Civil Liberties Union's "No Child Left Alone." https://www.aclu.org/sites/default/files/field_document/no_child_left_alone_toolkit_-_web.pdf.

psychological, physical, and social developmental harm juvenile youths in America's justice system are subjected to in solitary confinement.

TIME-OUT ISOLATION

Juvenile justice experts generally distinguish between the practice of solitary confinement as a punishment and time-out practices when a juvenile is deemed out of control for their behavior or when they pose a threat to themselves or others.[118] Experts note that timeout confinement should last minutes, not hours, not days nor weeks, and the staff should tentatively supervise the youth.[119] The Massachusetts Department of Youth Services ("DYS"), banned the use of solitary confinement or "room confinement" in 2009 after two suicides occurred around late 2003, 2004—both suicides were committed with bed sheets, although neither victim was held in isolation at the time.[120] The suicides in conjunction with dozens of cases of juveniles inflicting harm upon themselves in juvenile facilities within the state, Peter Forbes, commissioner of DYS was compelled to reassess its room confinement policy.[121] Forbes stated that the current timeout policy where juveniles are kept in their rooms for an average of 40 minutes has helped avoid the overuse of room confinement.[122] Other experts like Forbes state that it is essential to keep juvenile youth occupied with engaging programming as a way of carrying out the rehabilitative methods of the juvenile justice system.[123]

> "The goal for us is if school's in session, we want the kids in their seats," Forbes said, "If groups are being run, we want kids in their seats. If the kids are going to gym, we want kids in the gym. We don't want them back on the unit on restriction or whatever. … It's a rehabilitative focus in the agency, and we really understand that this is a really important shot every time we get a kid."[124]

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[118] Gately, Gary. Growing Number of States Moving Away from Juvenile Solitary Confinement. (Mar. 21, 2014). https://jjie.org/2014/03/21/growing-number-of-states-moving-away-from-juvenile-solitary-confinement/106550.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id.*
[123] *Id.*
[124] *Id.*

Applying these methods between states to reduce the isolation of juveniles, can likely have a positive effect on their ability to be rehabilitated and integrate more seamlessly into society.

"THE OHIO METHOD"

The Ohio Department of Youth Services ("DYS"), has successfully transformed their juvenile correctional system from an excessively punitive and dangerous one into a model for nation-wide reform.[125] Using financial incentives, DYS worked with juvenile courts within the state to expand services throughout the county; and in recent years, the DYS managed to reduce its juvenile youth detention from over 2,000 to less than 500.[126] Ohio DYS also successfully banned the use of disciplinary isolation, greatly reduced pre-trial seclusion, and ended the use of "Special Unit Housing," which managed difficult juveniles for 23 exhaustively monitored and meticulously documented.[127]

Ohio DYS has implemented many policy changes within its juvenile facilities to make this transition to almost zero use of solitary confinement. Their use of educational services has been improved by investing in teacher training, expanded quality assurance practices, eliminated school suspensions, and extended full day educational programming to all youth including mental health and other special units.[128] DYS has established the use of small, specialized treatment teams to intervene in disciplinary actions. Further, DYS has expanded their direct care responsibilities from mainly prison guard staff to all staff being direct care with diverse responsibilities to include program development, treatment team participation, and juvenile youth mentoring duties.[129] DYS has implemented positive point-based incentive programs with rewards for juvenile youth like commissary items, additional telephone privileges, and access to special events to give youth a reason to want to behave and allow them control their experience within these programs.[130] Gang-related issues are no longer handled with punitive disciplinary actions, but rather Ohio DYS staff creates a safe space for juveniles to communicate their experiences while providing alternatives and support for those who wish to

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[125] Reed, *supra* note 33.
[126] *Id*.
[127] *Id.*
[128] *Id*.
[129] *Id*.
[130] *Id*.

disengage.[131] Additionally, DYS has also increased family and community involvement with juvenile youth in their facilities by offering transportation for families and video calls for families that cannot make the trip.

Like Ohio, California is also one of many states that has created immense reform with juveniles in solitary confinement. California used to run one of the largest facilities with nearly 10,000 juveniles; in recent years, that number has significantly decreased to approximately 700 juveniles being held in the four remaining state juvenile facilities.[132] This is due to a major decrease in juvenile crime over the past two decades; influential policy reform which transferred juveniles from state to local facilities, advocacy groups, and the media exposing the wild, inhuman treatment of juveniles in state facilities, and litigation, which has been responsible for facilities shutting down, heightened oversight, and the mandate for state facilities to be held accountable for its mistreatment of the juveniles in its care.[133]

Overall, with states like Ohio and California who can reduce and completely ban the use of solitary confinement as a punitive disciplinary action by legislation and other policy reforms, it is possible for the Supreme Court to mandate federal legislation to holistically ban the use and practice of solitary confinement of juveniles in jails, prisons, and youth facilities. There must be uniformity between states and their local governments to ensure the protection of theses juveniles offenders get the rehabilitation that the juvenile justice system hangs its hat on.

SECTION VIII: CONCLUSION

A ban on solitary confinement would merely be only one step out of thousands needed to solve the flagrant problems of the American juvenile justice system. Real reform would require that all juvenile youth be removed from the adult justice system and allowed a real benefit of education and true rehabilitation in a system specially designed for at-risk juveniles rather than harsh punishment. Creating and passing uniformed federal legislation to restructure and ban solitary confinement practices can be done. Many state jurisdictions

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[131] *Id.*

[132] Reed, Marty. *Movement to End Juvenile Solitary Confinement Gains Ground, But Hundreds of Kids Remain in Isolation*. 4 Jan 2017. https://solitarywatch.org/2017/01/04/movement-to-end-juvenile-solitary-confinement-gains-ground-but-hundreds-of-kids-remain-in-isolation. (22 Jul 2020).

[133] *Id.*

have already shown their remarkable reform efforts to be successful. From local to state to federal government, the Supreme Court can put an end to solitary confinement along with its punitive practices and refocus their original juvenile justice mission—to promote the welfare of youth involved in criminal activity and provide treatment to young offenders to avoid a future life of crime. A better future starts with the youth of America.

MOOTED AND BOOTED: HOW THE MOOTNESS DOCTRINE HAS BEEN USED TO SILENCE VIOLATIONS OF PRISONERS' CONSTITUTIONAL RIGHTS

Tamika D. Temple

"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."
— Nelson Mandela

ABSTRACT

This article argues that the mootness doctrine is an instrument that has been used by the judicial system to impede justice to prisoners, whose basic rights are at the mercy of the correction system—which has systematically violated them.[1] Not only are prisoners subjected to procedural difficulties when deciding to sue a state or federal prison, but they are also faced with the physical realities of retaliation for "snitching[2]." After overcoming layers of roadblocks to justice, prisoners are then faced with an insurmountable doctrine, mootness. Instead of revising outdated and unethical prison policy, prison officials strategically concoct ways to avoid litigation. For example, by transferring prisoners to another division within the prison, to another prison, or releasing them, the prison can moot prisoners' cases before the court is able to hear the merits.

In prisoner litigation, the mootness doctrine has perpetuated violations of prisoners' constitutional rights by allowing mistakes made by prisons to go unchecked, leaving hundreds of prisoners subjected to unethical policies. I will prove this by analyzing the mootness doctrine through the lens of the rule of law and by analyzing the decision-making process courts have used in applying it to prisoner

[1]Michele C. Nielsen, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. REV. 760, 805 (2016).

[2] The term "snitching" in this context refers to a person who gives information to someone in authority that another person has done something that can be deemed bad or wrong.

litigation. Finally, I will interpret this data to show that the mootness doctrine has been used to facilitate injustice and should be abolished from prisoner litigation or revised to serve the purpose of justice. Originally, the mootness doctrine was devised to ensure that federal courts would only hear cases where the parties involved had a live controversy through all stages of litigation.[3] However, in the prison setting, this doctrine has been employed to silence a particularly vulnerable class of citizens—prisoners.

INTRO: MOOTNESS DOCTRINE USED TO CLOSE THE DOORS OF JUSTICE TO PRISONERS

Visualize this: prisoner, Shaidon Blake, is scheduled to be escorted by two guards to another cell block.[4] The two guards enter his cell and handcuff his hands behind his back.[5] As Blake is walking up a flight of stairs, one of the guards, without provocation, pushes him from behind. After falling to the bottom of the steps, the guard pushes him again.[6] The same guard wraps a key ring around his fingers and punches Blake in the face four times. He takes a brief pause, and then punches Blake a fifth time in the face. This causes Blake to fall face first onto the ground.[7] Afterwards, the two guards lift Blake from the ground only to slam his body onto the concrete floor. Blake's hands are tethered behind his back, so he has nothing to stop his face from smashing into the ground.[8] The responding officers take Blake to the medical center, however, because Blake was in fear of being assaulted again, he declines medical treatment even though he was in excruciating pain.[9] Days later, Blake is diagnosed with nerve damage.[10]

Blake reported the incident to a correctional officer, who then referred it to an Investigative Unit.[11] In its proceedings, the investigator condemned the assaulting officer's actions, finding the

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[3] Corey C. Watson, *Mootness and the Constitution*, 86 NW. U.L. REV. 143, 147-48 (1991).
[4] *Blake v. Ross*, 787 F.3d 693, 695 (4th Cir. 2015).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Ross v. Blake*, 136 S. Ct. 1850, 1852 (2016).

guard liable.[12] However, the U.S. District Court for the District of Maryland found against Blake and dismissed his case. They concluded that he had failed to follow all the required prison procedures. Procedures created and carried out by the very people who assaulted him.[13] The Fourth Circuit reversed, finding that Blake's case fell under the "special circumstances" exception to the strict prison procedures.[14] The U.S. Supreme Court, however, reversed and remanded Blake's case back to the District Court, holding that Blake should have followed all prison protocol.[15] While awaiting his day in court, Blake was forced to move to another prison. The prison transferred Blake to avoid litigation. Subsequently, Blake's case was mooted and dismissed.

The scene described above has played out in prisons across the country. In its natural state, the mootness doctrine limits federal courts to hearing only those cases where the parties involved have a live controversy through all stages of litigation.[16] However, it can be perverted and used as a means to deny justice to a particularly vulnerable class of citizens—prisoners.

This paper posits that prisoners, a particularly vulnerable class subject to the will of the prison system, need to be protected against the mootness doctrine. The rigid application of this doctrine has resulted in the absolution of prison officials' misconduct, unethical prison policy, and a continuing violation of prisoners' civil rights. Any doctrine that perpetuates the violation of prisoners' constitutional rights should be abolished or revised to preserve those rights. The mootness doctrine perpetuates the violation of prisoners' constitutional rights. Therefore, the mootness doctrine should be abolished or revised to serve the purpose of justice, equality, and fairness.

Courts are in the best position to prevent suits brought by prisoners from being strategically and involuntarily mooted by prisons. By transferring a prisoner to another division within the prison system to another jail or releasing prisoners, the prison can moot a prisoner's case before the court is able to hear the merits. For

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1853.
[16] Corey C. Watson, *Mootness and the Constitution*, 86 NW. U.L. REV. 143, 147-48 (1991).

this reason, courts should consider whether the above actions taken by the prison are retaliatory to avoid litigation. Next, courts should scrutinize the motive behind the transfer, and consider whether the prison's actions constitute voluntary cessation. Lastly, after a prisoner files suit against a prison, courts could require the prison to get its permission prior to moving the prisoner.

In Section I, I will trace the perilous path that prisoners must tread to try to achieve justice. For prisoners, the road to justice is an uphill battle both substantively and procedurally. As such, this section shows the reader why prisoners are a uniquely vulnerable class in need of protection from the mootness doctrine, when comparatively, non-incarcerated persons do not face the same sorts of procedural obstacles. After familiarizing the reader with the unique challenges for prisoners seeking justice, Section II will give the reader a brief overview of the basic mechanics of the mootness doctrine. This section will show the reader how the mootness doctrine was intended to promote fairness, however, when applied to prisoner litigation, it has done quite the opposite. Further, Section III will present an analysis of how the mootness doctrine has been used to condone inhumane prison conditions, unethical prison policies, and unchecked power by prison officials. As such, this section highlights the ways prisons strategically moot prisoners' cases. Ultimately, this section underscores how the mootness doctrine has primarily been used to thwart justice to prisoners. Moreover, Section IV will illustrate the crafty and creative ways prisons have used the mootness doctrine to moot prisoners' class action claims prior to certification. This section is intended to bring the argument full circle for the reader by showing the need to either abolish the mootness doctrine from prisoner litigation or revise it to achieve the goal of justice. Lastly, Section V synthesizes the previous sections to advocate for the abolishment of the mootness doctrine in prisoner litigation. Alternatively, this section also proposes that revising the mootness doctrine would aim to preserve justice, equality, and fairness for prisoner litigants.

SECTION I: SUING PRISONS: ROADBLOCKS, UPHILL BATTLES TO OBTAIN JUSTICE

Courts should protect prisoners' suits from being involuntarily mooted because prisoners encounter considerably greater substantive and procedural barriers than those who are not imprisoned. The U.S Supreme Court has aided in reforming prison

litigation to the detriment of prisoners by diminishing their substantive rights, this propensity is prevalent in *Sandin v. Conner*.[17] In *Sandin*, a prisoner brought suit against the prison on the grounds that he was deprived of his right to due process, given that he was denied the right to present witnesses to refute the charges of misconduct.[18] The U.S. Supreme Court held that "[t]he due process clause of the Federal Constitution's Fourteenth Amendment, standing alone, confers on a state prison inmate no liberty interest in freedom from state action taken within the sentence imposed."[19] This case illustrates how the U.S. Supreme Court placed its shoulder on the door of justice, keeping prisoners out of court by minimizing their rights to due process.[20]

Prisoners face arduous roadblocks when deciding to sue a prison.[21] They are faced with a lack of access to comprehensive legal resources, the inability to afford an attorney, and severe limitation to accessing the internet, telephones, and printed media.[22] As a result, many prisoners represent themselves with inadequate legal resources to challenge unethical prison conditions.[23] Notwithstanding the above obstacles, prisoner litigants are faced with greater personal barriers than non-imprisoned people.[24] According to the Program for the International Assessment of Adult Competencies ("PIAAC") 2016 survey of incarcerated adults, out of 1,315 prisoners 30 percent did not complete high school.[25] In

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[17] Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue,* 77 OR. L. REV. 1230 (1998).
[18] *Sandin v. Conner*, 515 U.S. 472, 475-76 (1995). (Conner was sentenced to 30 days in disciplinary segregation where he was to be placed in a special holding unit for four hours of segregation for each charge for 30 days. *Id.*)
[19] *Id.* at 480.
[20] Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1230 (1998).
[21] Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 277 (2010).
[22] *Id*. at 278.
[23] *Id.* at 279.
[24] *Id.*
[25] Bobby D. Rampey and Shelley Keiper, *Highlights from the U.S. PIAAC Surv. of Incarcerated Adults: Their Skills, Work Experience, Educ., and Training: Program for the Inter'l Assessment of Adult Competencies: 2014. U.S. Dep't of Educ. Wash., DC: Nat'l Ctr for Educ. Stat.* (November 2016), https://nces.ed.gov/pubs2016/2016040.pdf.

addition, the PIAAC reported that 29 percent of the prisoners were unable to read proficiently.[26]

Given the unique personal obstacles prisoners face, one would think that the powers would implement procedural safeguards that would assist prisoner litigants. Instead, Congress erected an additional barrier that would further limit prisoners' access to courts, the Prison Litigation Reform Act ("PLRA"). The PLRA was designed to make it more difficult for prisoners to get their day in court. Even if a prisoner succeeds in getting into court, the PLRA makes it harder for the prisoner to be granted relief.[27] The PLRA limits prisoners from accessing courts by:[28]

> (1)[R]equiring state prisoners to exhaust all internal prison grievance procedures before filing a case in federal court; (2) imposing filing fees on indigent prisoner litigants; (3) enabling courts to reject claims of emotional injury without corresponding physical injury; and (4) initiating a "three-strikes" rule that forbids prisoners from filing in federal court after three previous claims have been dismissed as frivolous.[29]

Of the four provisions, the three strikes rule is the most offensive to justice.[30] This provision bars prisoners from using the *in forma pauperis,* which allows prisoners to proceed without liability for court costs and court fees if they already had three or more complaints that were dismissed.[31] The only exception to this provision is for prisoners who are in imminent danger of serious physical injury.[32] However, this exception does not apply to prisoners who seek remedy for past serious injuries nor does it apply to prisoners who can prove that there is imminent danger of loss of

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[26] *Id.*
[27] John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429 (2021).
[28] *Id.* at 430-432.
[29] Robyn D. Hoffman, *Adding Insult To Injury?: The Untoward Impact of Requiring More Than De Minimis Injury in an Eighth Amendment Excessive Force Case*, 77 FORDHAM L. REV. 3163, 3182 (2009).
[30] Boston, *supra* note 27, at 432.
[31] *Id.*
[32] *Id.* at 432-33.

their constitutional rights.[33] For prisoners who violate the three strikes rule, they must pay $150 or more up-front, or they will not have their day in court.[34] Consequently, this provision places more than just a hardship on prisoners. It places an absolute roadblock on indigent prisoner litigants, many of whom cannot afford court cost fees.[35] Approximately six years after the enactment of the PLRA, there was a 43 percent decrease in federal inmate court filings.[36] Furthermore, the decrease of federal inmate court filings was also a result of prisoners' fear of retaliation for filing grievances.

The PLRA provision mandating prisoners to exhaust all internal prison grievance procedures before filing a case in federal court has left many prisoners vulnerable to retaliation.[37] Prison officials wield extraordinary power over prisoners' lives, and when a prisoner attempts to defend their rights, they become a target for retaliation.[38] Retaliation may come in the form of being raped, beaten, transferred to another facility far away from family, denied medical care, or placed in solitary confinement.[39] With this in mind, prisoners are fully aware that they are at the "mercy of their keepers," and if they decide to defend their constitutional rights, they can be made to suffer for it.[40]

SECTION II: THE PURPOSE BEHIND THE MOOTNESS DOCTRINE WAS TO PROMOTE FAIRNESS

Originally, the mootness doctrine was designed to make courts function more efficiently by ensuring an adversary presentation of issues.[41] The mootness doctrine takes its roots in Article III of the U.S. Constitution, which requires federal courts to hear cases where the parties involved have a live controversy through all stages of litigation; however, there are three exceptions later discussed.[42] Notably, when courts began applying the mootness doctrine to

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[33] *Id.*
[34] *Id*.
[35] *Id*.
[36] Hoffman, *supra* note 29*,* at 3182.
[37] David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2056 (2018).
[38] *Id.*
[39] *Id.*
[40] *Id.* at 2057.
[41] Watson, *supra* note 15*,* at 155.
[42] *Id.* at 147-48.

prisoner litigation, there were unresolved inconsistencies in its application.

The mootness doctrine requires that an actual case and controversy exist at all stages of litigation, and not just at the date the action was initiated.[43] Therefore, a case will be found moot if its resolution would have no effect on the rights of the parties involved.[44] The following are examples of when a case will most likely become moot: 1) when the alleged wrong passes and cannot be expected to happen again; 2) when a defendant pays money owned and does not wish to appeal; 3) when a criminal defendant dies while appealing his or her case; and, 4) when the law under which the suit was brought has changed since the filing of the suit, and the party is no longer affected by the challenged statute.[45] In addition, the parties must continue to have a live issue and personal stake in the outcome of the case.[46] In order for an issue to be considered live, a party must have sustained or is in immediate danger of sustaining a direct and real injury as a result of the other party's conduct.[47]

As with every rule of law there are exceptions, and the mootness doctrine has three exceptions that are prominent including: 1) capable of repetition, yet evading review; 2) voluntary cessation; and, 3) collateral legal consequences.[48] The first exception, capable of repetition, yet evading review involves cases where a change in circumstances would render it moot; however, the same issue is likely to arise again, each time becoming moot prior to being fully adjudicated.[49] The second exception, voluntary cessation, involves cases where the defendant unilaterally and voluntarily ceases doing the alleged wrongful conduct; however, the defendant remains free to resume the alleged wrongful conduct at any time.[50] The last exception, collateral legal consequences, involves cases where a prisoner is released from custody and moves to appeal his or her

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[43] *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974).
[44] *Id.* at 316.
[45] Watson, *supra* note 15, at 147-48.
[46] *Id.*
[47] *Id.*
[48] Steven B. Dow, *Navigating Through the Problem of Mootness in Corrections Litig.*, 43 CAP. U.L. REV. 651, 657-62 (2015).
[49] *Id.* at 657.
[50] *Id.* at 659.

criminal conviction.[51] Instead of dismissing the case, the Court finds that there are presumed collateral consequences of the conviction that prevent mootness.[52]

The first U.S. Supreme Court case defining capable of repetition, yet evading review was *Southern Pacific Terminal Co*. In this case, the Court found that the terminal company violated the Interstate Commerce Act by not charging a shipper wharfage fees that were charged against other shippers.[53] Furthermore, the Court reasoned that the order against the terminal company demanding it to cease its arrangement with the shipper was legit despite the fact that the order expired prior to reaching the court.[54] Therefore, even though there was no longer a live injury, the case was not moot. Because the order term was so short, the expiration would continue to come before the usual appellate process, thereby rendering it capable of repetition, yet evading review.[55] Additionally, there is a second element attached to this exception: reasonable expectation, which was discussed in the U.S. Supreme Court case *Los Angeles v. Lyons*.

In *Lyons*, the U.S. Supreme Court concluded that in order for a party to successfully prove capable of repetition, he or she must show that there is a reasonable expectation of being subjected to the same action again.[56] The Court reasoned that Lyons failed to show sufficient likelihood that he would be stopped by officers and put in a chock-hold again.[57] Thus, in order to successfully prove the situation is capable of repetition, the party must demonstrate that the expiration of injury would come before the usual appellate process is completed,[58] and sufficient likelihood that he or she would again be subjected to the same injury by the defendant.[59]

Next, the second exception to the mootness doctrine: voluntary cessation. A case will not be rendered moot if the defendant voluntarily ceases the alleged misconduct but is free to resume at

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[51] *Id.* at 662.
[52] *Id.*
[53] *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 517 (1911).
[54] *Id.*
[55] *Id.*
[56] *L.A. v. Lyons*, 461 U.S. 95, 109 (1983).
[57] *Id.* at 111.
[58] *Roe v. Wade*, 410 U.S. 113, 125 (1973).
[59] *Lyons*, 461 U.S. at 111.

any time.[60] Specifically, the U.S. Supreme Court has found that a controversy remains unsettled where the defendant ceased the wrongful conduct, yet there still remains a dispute over the legality of the challenged conduct.[61] This exception is most prevalent in cases involving employment discrimination. For example, in *City. of L.A. v. Davis*, three men brought a suit against their employer alleging that they were overlooked for promotion solely because of their gender. After they filed their claim, their employer ceased the discriminatory conduct and moved to dismiss the case as moot. In this scenario, a court would likely find that the case is not moot if the men provided substantial evidence proving a history of discrimination. Furthermore, they must show a strong likelihood that those same procedures would be implemented in the future.[62]

Finally, the third exception to the mootness doctrine: collateral legal consequences. In *Carafas v. LaVallee*, the U.S. Supreme Court defined collateral legal consequences as an exception to the mootness doctrine. In *Carafas*, the petitioner applied for a writ of habeas corpus while in prison asserting that the prosecutor illegally obtained evidence that was used against him during trial.[63] The issue before the U.S. Supreme Court was whether the expiration of the petitioner's sentence, while he was awaiting appellate review, put an end to federal jurisdiction.[64] The Court found that the petitioner's case was not moot, and "he was entitled to consideration of his application for relief on its merits."[65] The Court reasoned that due to the consequences of the petitioner's conviction, he cannot engage in certain businesses, cannot serve as an official of a labor union, cannot vote, and cannot serve as a juror.[66] Therefore, the Court found that even though the petitioner's sentence had expired, his case was not moot because of the collateral consequences that had attached to his conviction.[67] Yet, the Court has not consistently applied this exception to similar cases involving prisoner litigation.

In *Spencer v. Kemna*, the U.S. Supreme Court found that the collateral consequences exception was not applicable because the

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[60] *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953).
[61] *Id.*
[62] *City. of L.A. v. Davis*, 440 U.S. 625, 631 (1979).
[63] *Carafas v. LaVallee*, 391 U.S. 234, 235-36 (1968).
[64] *Id.* at 237.
[65] *Id.*
[66] *Id.*
[67] *Id.*

petitioner had completed his entire sentence underlying the parole revocation; therefore, his case was mooted.[68] In *Spencer*, the petitioner filed a writ of habeas corpus asserting that he was denied due process in his parole revocation hearing.[69] Before the district court issued its ruling, the petitioner was re-released on parole.[70] As a result, the Court dismissed the petitioner's case as moot, and the court of appeals affirmed.[71] The U.S. Supreme Court refused to extend the presumption of collateral consequences to the parole revocation despite the fact that the revocation could authorize the parole board to deny the petitioner's parole in the future.[72]

The U.S. Supreme Court has inconsistently applied the collateral consequence exception, and this inconsistency is apparent in *Carafas* and *Spencer*. In *Spencer*, the petitioner challenged the factual findings of which the parole revocation was based, which rested on whether the petitioner committed the crime of forcible rape .[73] The crime of forcible rape is serious, and the collateral consequences the petitioner would suffer include loss of future employment and housing opportunities.[74] Similarly, in *Carafas*, the Court found that collateral consequences attached where the petitioner would suffer from loss of opportunities to engage in certain jobs, the right to vote, and to serve as a juror.[75] In the above cases, both prisoners demonstrated the collateral consequences that would attach as a result of the convictions; however, the Court reached completely different decisions.

SECTION III: MOOTNESS DOCTRINE USED TO THWART JUSTICE FOR PRISONERS

Next, we will examine how the mootness doctrine has been used to silence prisoners who challenge inhumane prison conditions. During the last several decades, the mootness doctrine has been used to silence prisoners who challenge inhumane prison conditions. Instead of protecting prisoners from dangerous prison conditions,

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[68] *Spencer v. Kemna*, 523 U.S. 3, 6 (1998).
[69] *Id.* at 3.
[70] *Id.* at 6.
[71] *Id.*
[72] *Id.* at 12-13.
[73] *Kenma*, 523 U.S. at 22 (Stevens, J., dissenting).
[74] *Id.* at 24-25.
[75] *Carafas,* 391 U.S. at 237.

courts have grown more and more deferential to prison officials at the expense of prisoners' dignity.

During the 1970s, the U.S. Supreme Court began to pay serious attention to the outcry of prisoners concerning inhumane prison conditions, which is apparent in *Cruz v. Beto*.[76] In *Cruz*, the prisoner, a Buddhist, was placed in solitary confinement for two weeks solely for his religious beliefs, and he was only supplied bread and water.[77] The lower courts denied him relief without a hearing.[78] However, the U.S. Supreme Court held that it was the duty of the federal courts to "enforce the constitutional rights of all persons, including prisoners."[79] The Court reasoned that prisoners have a constitutional right to be free from racial and religious discrimination.[80] Furthermore, the Court held that the lower courts inappropriately denied the prisoner a reasonable opportunity of pursuing his faith, which was provided to other prisoners of conventional religious beliefs.[81]

Unfortunately, nearly two decades later, courts shifted focus from protecting prisoners' constitutional rights to giving greater deference to prisons.[82] For instance in November 1980, a prisoner brought suit in the U.S. District Court for the Northern District of Alabama against the prison asserting that the prison conditions were cruel and inhumane.[83] The prisoner sought declaratory and injunctive relief on behalf of himself and all his fellow inmates.[84] The prisoner asserted that the prison: 1) was overcrowded; 2) was unsanitary; 3) lacked adequate internal security; 4) was poorly ventilated; 5) lacked adequate plumbing; and, 6) fed the prisoners disgusting food.[85] By November 1981, the prisoner was mysteriously transferred.[86] Afterwards, the prison successfully dismissed the case on mootness grounds, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.[87] There was no thorough

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[76] Herman, *supra,* note 16 at 1242.
[77] *Cruz v. Beto*, 405 U.S. 319 (1972).
[78] *Id.* at 321-22.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Herman, *supra,* note 16 at 1245-46.
[83] *McKinnon v. Talladega City*., 745 F.2d 1360, 1361-62 (11th Cir. 1984).
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1361.

investigation conducted to disprove the prisoner's claims of inhumane prison conditions. In fact, the prisoner offered substantial evidence proving the existence of such conditions. Yet, instead of initiating a plan to correct the inhumane prison conditions, the prison transferred the prisoner to another prison in order to avoid litigation.

In the 1994 case *Meneweather v. Ylst*, a California state prisoner brought suit against the prison for cruel and unusual punishment for its failure to test all inmates for HIV and failure to segregate those who tested positive.[88] In *Meneweather*, a prisoner brought suit in the U.S. District Court for the Eastern District of California, asserting that the prison's failure to test all inmates for HIV placed him at a greater risk of exposure.[89] "The prevalence of HIV/AIDs is about five times higher among jail and prison populations than the general public."[90] This increase is largely due to the increased risk behaviors associated with the prison setting. For instance, violence and sexual assault are more prevalent in the prison setting, which places prisoners at greater risk of contracting HIV. With this in mind, the prison's failure to mandate HIV testing for all of its prisoners demonstrates the blatant disregard for their health and safety.

Instead of implementing a plan to protect its prisoners from contracting HIV, the prison transferred the prisoner, and successfully dismissed his case as moot.[91] The U.S. Court of Appeals for the Ninth Circuit found that the prisoner's complaints referred only to those policies within California Medical Facility ("CMF"), and not the facility he was transferred to.[92] Moreover, the Ninth Circuit stated that because "there [was] absolutely no showing in the record that Meneweather had a reasonable expectation of being returned to that facility," his case did not qualify as being capable of repetition.[93] Although the transferred prisoner was no longer subjected to the prison policy of not mandating HIV testing for all of its prisoners, what about all of the other prisoners left behind? Why does this prisoner's situation not qualify as capable of

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[88] *Meneweather v. Ylst,* No. 92-15206, 1994 U.S. App. LEXIS 6097, at *1-2 (9th Cir. Mar. 22, 1994).
[89] *Id.* at 2.
[90] John D. Kraemer, *Screening of Prisoners for HIV: Pub. Health, Legal, And Ethical Implications*, 13 MICH. ST. J. MED. & LAW 187, 190 (2009).
[91] *See Meneweather*, 1994 U.S. App. LEXIS 6097 at *4.
[92] *Id.* at 5-6.
[93] *Id.* at 5.

repetition? The fact remains that all his fellow inmates are placed at a greater risk of contracting HIV.

Prisons have used the mootness doctrine to condone policies that violate homosexuals' First Amendment rights, and this is apparent in *Tucker v. Dall. Cnty. Sheriff's Dep't.* In *Tucker*, an inmate filed suit against the prison in the U.S. District Court for the Northern District of Texas, challenging the prison's policy of segregating homosexual inmates from the general population.[94] By segregating the homosexual inmates, the prison was depriving them of the opportunity to attend religious services, access to computer classes, and rehabilitation programs.[95] After the inmate was transferred from the prison, the Court dismissed his case as moot.[96] So, what about the remaining homosexual inmates who had a First Amendment right to attend religious services? By mooting this prisoner's case, the Court effectively permitted the prison to continue denying homosexual inmates access to religious services, rendering this violation capable of repetition, yet evading review.

In the above three cases, each of the prisoners' transfers resulted in their cases being involuntarily mooted due to an act totally outside of their control. Prisons possess the ability to transfer inmates to different areas within the prison or to a new prison within a matter of days.[97] Consequently, prisoners have no protected right to confinement in any particular prison, even if the transfer involves long distances.[98] Because transfers are completely outside of a prisoner's control and can occur in a matter of days, the commonality and typicality are inherently transitory; thereby, always capable of repetition.[99] For this reason, courts should consider the transfer of prisoner litigants as capable of repetition, rendering it outside of the mootness grasp.

Notwithstanding the fact that transfers are totally outside of prisoners' control, there are several cases that suggest that transfers

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[94] *Tucker v. Dall. Cnty. Sheriff's Dep't,* No. 3-04-CV-1630-B, 2004 U.S. Dist. LEXIS 22900, at *1-2 (N.D. Tex. Nov. 8, 2004). Check case, prior case is where the opinion is stated. *Tucker v. Dall. Cnty. Sheriff's Dep't,* No. 3-04-CV-1630-B, 2004 U.S. Dist. LEXIS 20526, at *2 (N.D. Tex. Oct. 13, 2004).
[95] *Id.*
[96] *Id.* at 4. *See* footnote 1.
[97] *See* Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1833 (2020).
[98] *Id.* at 1834.
[99] Nielsen, *supra* note 1, at 784.

are strategically implemented by prisons to moot prisoners' cases, and this is apparent in *Preiser v. Newkirk*. In *Preiser*, Newkirk, along with other inmates, formed a prisoners' union that did not involve violence nor was in violation of any prison regulation.[100] Yet, when Newkirk was identified by prison officers as a solicitor for the union, he was moved from a medium-security prison to a maximum-security prison.[101] The conditions within medium and maximum security were substantially different. In maximum security, the cells were locked and access to the library, recreational facilities, and rehabilitation programs was much more limited than in medium security. In addition, Newkirk's family lived 300 miles away from the maximum-security prison, as opposed to only 80 miles away from the medium-security prison.[102] Newkirk was transferred without explanation nor the opportunity to be heard.[103] Thereafter, Newkirk filed suit in the U.S. District Court for the Southern District of New York, requesting a declaratory judgment against the prison for violating his due process rights.[104] Even though the district court denied the injunction, the case was set for trial on an accelerated basis.[105] Immediately afterwards, Newkirk was returned to medium security.[106]

The district court and U.S. Court of Appeals for the Second Circuit found in favor of Newkirk; however, the U.S. Supreme Court dismissed his case on mootness grounds because he was transferred.[107] The district court found that the transfer violated Newkirk's right to due process.[108] In addition, the Court entered a declaratory judgment that required Newkirk to be provided an explanation and the opportunity to be heard before being transferred in the future.[109] The Second Circuit agreed with the district court and found that Newkirk's case was not moot since "even after his return, he remained subject to a new transfer at any time."[110] However, the

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[100] *See Preiser v. Newkirk*, 422 U.S. 395, 397 (1975).
[101] *Id.* at 398.
[102] *Id.*
[103] *Id.* at 397-98.
[104] *Id.* at 398.
[105] *Id.*
[106] *Id.* at 399.
[107] *See* Preiser, 422 U.S. at 403-04.
[108] *Id*.
[109] *Id.* at 399.
[110] *Id.* at 400.

U.S. Supreme Court found that because the prison voluntarily transferred Newkirk back to medium security, there was no longer a case or controversy.[111] The Court reasoned that his case was not capable of repetition because he had "no reasonable expectation that the wrong [would] be repeated."[112]

In its reasoning, the Court stated that because Newkirk was transferred back to a medium-security facility in which no adverse actions had been made, Newkirk had no reason to believe that the prison would transfer him back to maximum security.[113] On the contrary, Newkirk had every reason to believe that he could be transferred back to maximum security seeing that he was originally transferred without reason, notice, or a hearing. Secondly, since the Court determined that the transfer occurred in violation of Newkirk's constitutional rights, how could the Court conclude that absent some justification for the transfer, it is unlikely to happen to him again? The prison voluntarily ceased its wrongful conduct and was free to resume at any time; therefore, this case should not have been mooted.

There are several cases that seriously suggest that prisons strategically transfer its prisoners in order to moot their cases. This is prevalent in *Wiggins v. Rushen*. In this case, prisoner, Wiggins, filed suit in the U.S District Court for the Northern District of California in February 1982 against the prison, asserting that the Soledad's law library was constitutionally inadequate.[114] By April 1982, Wiggins was transferred to another prison, while his case was still pending.[115] Nevertheless, the district court agreed with Wiggins, rejected the prison's attempt to dismiss the case as moot, and issued a mandatory injunction governing access to legal material.[116] The Court reasoned that Wiggins' claim should not be mooted because he could maintain his claim on behalf of the other prisoners.[117] Furthermore, the Court reasoned that "Wiggins' claim was capable of repetition, yet evading review."[118] The prison appealed to the U.S. Court of Appeals for the Ninth Circuit, claiming that the district

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[111] *Id.* at 403-04.
[112] *Id.* at 402.
[113] *Id.*
[114] *Wiggins v. Rushen*, 760 F.2d 1009, 1010 (9th Cir. 1985).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

court erred by denying its motion to dismiss for mootness and by unjustly intervening in the prison's administration.[119]

On appeal, the Court found in favor of the prison and dismissed the case as moot.[120] The Ninth Circuit reasoned that Wiggins' claim was not capable of repetition because he was unable to show sufficient likelihood, as opposed to possibility, that he would be retransferred back to Soledad where the wrong supposedly occurred.[121] Furthermore, the Court reasoned that the sheer possibility that Wiggins would be transferred back to Soledad was too speculative to rise to the level of reasonable expectation and therefore, would not evade review.[122] On the contrary, the court of appeals' reasoning for finding Wiggins' claim moot, required it to speculate on facts that were unresolved by the district court.[123]

The Ninth Circuit concluded that Wiggins' return to Soledad was speculative and decided on factual questions that were unresolved on the record.[124] First, from the record provided to the Ninth Circuit there was no way of knowing the likelihood of Wiggins returning to Soledad, and this uncertainty could only be resolved by the district court.[125] In fact, there have been other cases with similar facts where federal courts have found that a prisoner's case was capable of repetition, yet evading review.

Federal courts have rendered several decisions finding that a prisoner's case was not moot because it was capable of repetition, even though the prisoner was transferred. For instance, in *Withers v. Levine*, the Fourth Circuit found that the prisoner's claim that the prison's inadequate prison procedures failed to protect prisoners against sexual assault was capable of repetition despite the fact that the prisoner was transferred to another prison.[126] Similarly, in *Vitek v. Jones*, the U.S. Supreme Court found that the prisoner's involuntary transfer to a mental hospital was capable of repetition despite the fact that the prisoner was released from prison.[127] The Court concluded that the prisoner's case was not moot, stating that

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[119] *Id.*
[120] *Wiggins v. Rushen*, 760 F.2d 1009, 1010 (9th Cir. 1985).
[121] *Id.* at 1011.
[122] *Id.*
[123] *Id.* at 1012.
[124] *Id.*
[125] *Id.*
[126] *Withers v. Levine*, 615 F.2d 158, 161 (4th Cir. 1980).
[127] *Vitek v. Jones*, 445 U.S. 480, 485-86 (1980).

"it is not absolutely clear, absent an injunction, that the allegedly wrongful behavior could not reasonably be expected to recur."[128] Given these points, whether a prisoner is capable of being reincarcerated and subjected to the same constitutional right violations is deserving of a factual finding by the district courts.[129] Considering each of the above cases, it seems too convenient to transfer a prisoner from one prison to another when he files a complaint, and then, dismiss his case as moot.[130]

In *Dilley v. Gunn*, the Ninth Circuit remanded the case back to the lower court in order to determine whether the prisoner was transferred in order to moot his case. In *Dilley*, prisoner, Dilley, filed a claim under 42 U.S.C. § 1983 asserting that the warden failed to provide adequate access to the law library, and thereby, violated his right of access to the Court.[131] The district court found in favor of Dilley and appointed a magistrate judge as Special Master to recommend a plan to improve library access.[132] Dilley was transferred, and the prison appealed on mootness grounds.[133] On appeal, the Ninth Circuit concluded that Dilley's case was moot due to his transfer, however, the Court remanded the case in order for the lower court to determine whether the injunction should be vacated.[134] The Court reasoned that if the district court found that the defendant played a role in Dilley's transfer and the transfer was related to the pendency of the appeal, then it must decide whether to dismiss the case as moot.[135] In light of the above case, courts must seriously take into account that transfers are of limited duration, and as a result, any claim brought by a prisoner may evade review.[136] Most importantly, a prisoner's case should not be rendered moot simply by virtue of a prison's control over their status.[137] Finally, we will examine a case where it was undeniably obvious that the prison attempted to moot its prisoner's case for the sole purpose of avoiding litigation.

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[128] *Id.* at 487.
[129] *Wiggins*, 760 F.2d at 1012.
[130] *Id.* at 1013.
[131] *Dilley v. Gunn*, 64 F.3d 1365, 1367 (9th Cir. 1995).
[132] *Id.*
[133] *Id.*
[134] *Id.* at 1372-73.
[135] *Id.* at 1372.
[136] *Wiggins*, 760 F.2d at 1013.
[137] *Id.*

There are occasions where courts have found that a prisoner's case was not moot merely because the prison voluntarily ceased its wrongful conduct. This is apparent in *Heyer v. United States Bureau of Prison* ("the BOP"). In *Heyer*, a deaf prisoner sued the BOP in December 2008 for its failure to provide him a sign-language interpreter in order to care for his serious medical conditions and to attend religious services.[138] After multiple requests for an interpreter, the BOP denied his requests until 2012—more than a year after he filed his case.[139] In attempt to moot Heyer's claim, the prison offered him an interpreter.[140] As a result, the District Court dismissed Heyer's claim on mootness grounds.[141] However, "the Fourth Circuit reversed, concluding that an equivocal, mid-litigation change of course does not satisfy the high bar necessary to moot a case."[142] In other words, the Fourth Circuit found that because the prison waited several years to assign Heyer an interpreter, their failure amounted to deliberate indifference and created serious harm to his health.[143] Hence, the Court found that the prison's future promise to provide interpreters if necessary "amount[ed] to little more than a "bald assertion" of future compliance."[144] Unlike the other cases where the prison transferred its prisoners in order to moot their case, in *Heyer*, the prison attempted to moot Heyer's case by voluntarily ceasing the wrongful conduct.[145]

The above cases illustrate that the transfer of prisoners is solely within the prison's discretion and has been used to moot prisoners' cases—effectively denying justice, and this has proven to be capable of repetition. The cases within this section have one major thing in common: the mootness doctrine was used to perpetuate the violations of prisoners' constitutional rights. Specifically, each prisoner challenged inhumane prison conditions, and while their case was pending, the prison either transferred the prisoner or

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[138] *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 206 (4th Cir. 2017).
[139] *Id.*
[140] Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Gov't Abuse of the Voluntary-Cessation Doctrine,* 129 YALE L.J. F. 325, 330 (2019).
[141] *Id.*
[142] *Id.*
[143] *Heyer*, 849 F.3d at 212.
[144] *Id.* at 220.
[145] *Id.* at 206.

voluntarily ceased its wrongful conduct.[146] With this in mind, and because transfers are highly discretionary, there is a strong probability that a prisoner will be returned to the facility where the constitutional violation occurred.[147] Therefore, the transfer of prisoners is capable of repetition, yet evading review, which renders it beyond the reach of the mootness doctrine.

Next, we will examine how the mootness doctrine has been used to condone the sexual assault of prisoners. There is no prison condition that has proven to be more capable of repetition than cases involving sexual assault. Therefore, these cases should fall outside of the scope of the mootness doctrine. Specifically, these cases arise when a prisoner brings suit against prison officials for sexual abuse or for failure to protect the prisoner from sexual abuse.[148] In these cases, courts should not only look at the injury inflicted on the prisoner bringing the suit, but also scrutinize the impact the sexual misconduct would have on the entire prison population. Unlike non-incarcerated persons, prisoners are similarly situated and subjected to the same amount of control and abuse from the prison system. If even one prisoner is sexually assaulted by a prison official or because of the lack of adequate protection, it is safe to say that every prisoner is at risk of being sexually assaulted. The injury inflicted in sexual assault cases goes beyond the prisoner bringing the suit; therefore, it is an ongoing case and controversy outside the scope of mootness.

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[146] Dow, *supra* note 48, at 673.

[147] *Id.* at 672.

[148] "When Rodney was 16, they sentenced him to 8 years in an adult prison. Then our worst nightmares came true. Rodney wrote us a letter telling us he had been raped. A medical examiner had confirmed the rape. The doctor found tears in his rectum and ordered an HIV test, because, he told us, one-third of the prisoners there are HIV positive. [Rodney] wrote to the authorities, requesting to be moved to a safer place…but he was denied. After the first rape, he returned to the general population. There, he was repeatedly beaten and forced to perform oral sex and raped. He wrote for help again….'have been sexually and physically assaulted several times, by several inmates. I am afraid to go to sleep, to shower, and just about anything else. I am afraid that when I am doing these things, I would die at any minute. Please, sir, help me.' Still, officials told him that he did not meet the emergency criteria… I called the warden, trying to figure out what was going on. He said, 'Rodney needs to grow up.' He said, 'This happens every day. Learn to deal with it. It is no big deal.'" Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Pub. Law 108-79 The Prison Rape Elimination Act Of 2003*, 32 J. Legis. 142 (2006).

Prisons have used the mootness doctrine to silence prisoners who sought justice after being sexually assaulted. This propensity is prevalent in the cases *Amador v. Superintendents of the Dep't of Corr. Servs.* and *S.M.B. v. W. Va. Reg'l Jail & Corr. Facility Auth.* In *Amador*, seventeen female prisoners filed suit in the U.S. District Court for the Southern District of New York against several correctional officers at seven state prisons.[149] The female prisoners alleged being sexually assaulted, "by the line officer defendants and that the supervisory defendants contributed thereto by maintaining inadequate policies and practices."[150] The defendants filed a motion to dismiss several plaintiffs' claims as moot.[151] As a result, the Court issued an order dismissing various plaintiffs' claims as moot due to their release from prison.[152] Similarly, in *S.M.B.*, a prisoner filed suit in the U.S. District Court for the Southern District of West Virginia asserting that he was sexually assaulted because of the defendant's failure to maintain appropriate policies.[153] Specifically, the plaintiff asked the Court "to grant him equitable relief in the form of requiring [the prison] to reform those policies and procedures and to enforce them against its employees."[154] The defendant filed a motion to dismiss for mootness claiming that the plaintiff was no longer a prisoner at their facility.[155] In response, the plaintiff asserted that his case should not be mooted, because it was "capable of repetition, yet evading review."[156] However, the Court found that the plaintiff's case was not capable of repetition and dismissed the case as moot.[157]

The passage of the Prison Rape Elimination Act ("PREA") signifies that prison rape cases are an ongoing controversy that has persistently evaded review. In *Amador* and *S.M.B.*, the Courts found that the rape of the prisoners did not qualify as capable of repetition, yet evading review. However, if sexual assault was not capable of repetition, why would Congress unanimously pass the PREA in

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[149] *Amador v. Superintendents of the Dep't of Corr. Servs*., 2007 U.S. Dist. LEXIS 89648, at *6 (S.D.N.Y. 2007).
[150] *Id.*
[151] *Id.*
[152] *Id.* at 7.
[153] *S.M.B. v. W. Va. Reg'l Jail & Corr. Facility Auth.*, No. 3:17-1300, 2017 U.S. Dist. LEXIS 177668, *at 1 (S.D. W. Va. 2017).
[154] *Id.* at 4.
[155] *Id.* at 1-2.
[156] *Id.* at 4.
[157] *Id.* at 15.

order to prevent and eliminate the staggering numbers of prisoners who are victims of rape?[158] In fact, "Congress determined that in the past twenty years, it is likely that more than one million prisoners have been sexually assaulted while in government custody."[159] Even more disturbing is the fact that sexual predators often target juveniles in adult prisons as well as the mentally ill.[160] Hence, the staggering number of prison rape cases have proven to be capable of repetition, yet evading review and are thereby, considered outside of the scope of mootness.

In cases involving sexual assault, the mootness doctrine has served the sole purpose of obstructing justice to prisoners. As previously stated, the passage of the PREA demonstrates that sexual abuse is rampant in the prison system. For this reason, courts should be more willing to protect the constitutional rights of prisoners who place themselves at great risk of retaliation when confronting their abusers. Furthermore, due to the frequency in which sexual assault occurs in prisons, the debilitating effect it has on prisoners, and prisoners' lack of control over their lives, safety, and health, these cases should be interpreted as capable of repetition. Therefore, in prisoner litigation cases involving rape, the mootness doctrine does not serve the purpose of justice, but instead it has been used to perpetuate the sexual assault of prisoners. Therefore, it should be abolished.

SECTION IV: MOOTNESS LEAVES PRISONERS' CLASS ACTION SUITS WRONGED WITHOUT REMEDY

Next, we will examine how the mootness doctrine has been used to silence prisoners who attempt to bring class action suits. Prisons have used loopholes within the mootness doctrine by effectively denying courts the ability to address serious human rights violations, which ultimately renders the mootness doctrine counterproductive.

In *United States Parole Comm'n v. Geraghty*, the U.S. Supreme Court set out rules governing how the mootness doctrine would apply to class action suits brought by prisoners.[161] Yet, there

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[158] 34 U.S.C.S. § 30301.

[159] Kevin R. Corlew, *Cong. Attempts to Shine a Light on a Dark Problem: An In-Depth Look at the Prison Rape Elimination Act of 2003*, 33 AM. J. CRIM. L. 157, 159 (2006).

[160] *Id.* at 160.

[161] *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

is still ambiguity regarding how the doctrine would be applied pre-certification. The Court in *Geraghty* established that when an action is brought on behalf of a class, "[it] does not become moot upon the expiration of the named prisoner's […] claim, even [if] class certification was denied."[162] In addition, when the named prisoner has a personal stake at the beginning of the lawsuit, the litigation may still continue despite the named prisoner's current lack of personal stake.[163] A class action can avoid mootness, "through certification of a class prior to the expiration of the named prisoner's personal claim."[164] Notwithstanding the U.S. Supreme Court's effort to protect prisoners' class action suits against mootness, there remained confusion amongst the lower courts regarding the application of the doctrine pre-certification, which provoked prisons to find loopholes within the doctrine in order to dismiss prisoners' cases.[165]

There are three main approaches taken by the lower courts regarding the application of the mootness doctrine pre-certification, which would either permit or eliminate opportunities for prisons to moot prisoners' claims.[166] In the first approach, "[courts] would strictly find] class action suits moot if the named prisoner's claim was mooted prior to certification."[167] In the second approach, courts "would [permit] a class action if the named prisoner's claim was not mooted at the exact date of certification."[168] Finally, the most relaxed approached would permit a class action, "even if the named [prisoner's] claim is found moot prior to […] certification."[169] In this approach, the Court would look to the date of the class complaint to determine whether there was a live controversy.[170] In those jurisdictions that apply the first approach, prisons have strategically concocted ways to moot prisoners' claims prior to class certification.

Prisons have used loopholes within the mootness doctrine in order to silence prisoners who bring class action suits and deny the

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[162] *Id.*
[163] *Id.* at 397-98.
[164] *Id.*
[165] Nielsen, *supra note 1,* at 784.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*

Court jurisdiction to address serious human rights violations. This is apparent in *Ashker v. Brown*. In *Ashker*, 10 inmates at Pelican Bay State Prison brought a putative class action suit against the prison in the U.S. District Court for the Northern District of California for Constitutional violations of the Eighth and Fourteenth Amendments.[171] In this case, the inmates asserted that they were placed in the Special Handling Unit ("SHU"), which is a form of solitary confinement with no natural light for indefinite terms without justification or any meaningful review.[172] In fact, plaintiffs Ashker and Troxell lived in solitary confinement for more than two decades.[173]

Once the prisoners filed suit against the prison, the prison began using retaliatory measures in order to cripple their case. For instance, the prison officials denied the plaintiffs access to photocopies of legal documents, searched their cells and seized important legal documents, and transferred Askher in order to impede his interactions with his fellow inmates who were involved in the lawsuit.[174] The prison continued to impede the plaintiffs' attempts to efficiently facilitate litigation by withdrawing access to a room large enough to accommodate all the plaintiffs.[175]

Despite the obstacles, the men obtained class certification. However, the prison successfully managed to strategically moot several of the plaintiffs.[176] The Court certified a due process class on the basis of civil rights for all the prisoners who were assigned to an indefinite term in the SHU, which included most of the 1,100 inmates held in Pelican Bay.[177] However, before the class was certified, the prison unilaterally concocted a transitory plan called

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[171] *Ashker v. Brown*, No. C 09-5796 CW, 2013 U.S. Dist. LEXIS 51148, *at 2 (N.D. Cal. 2013).

[172] "'I didn't talk for 15 days. I couldn't hear clearly. You can't see - you're blind - block everything out - disoriented, awareness is very bad… I think I was drooling - a complete standstill. I seem to see movements - real fast motions in front of me. Then seems like they're doing things behind your back - can't quite see them. Did someone just hit me? I dwell on it for hours.' The above statement of a prisoner's experience in solitary confinement only begins to describe the intense psychological disorder now termed SHU Syndrome." Nielsen, *supra* note 1, at 762.

[173] *Ashker v. Brown*, No. C 09-5796 CW, 2013 U.S. Dist. LEXIS 51148, *at 2 (N.D. Cal. 2013).

[174] Nielsen, *supra* note 1, at 768-69.

[175] *Id.*

[176] *Id.* at 770-71.

[177] Nielsen, *supra* note 1, at 770-71.

the Security Threat Group ("STG"). Under this plan, the prison transferred class members out of Pelican Bay's SHU to other facilities in an attempt to moot the class.[178] Furthermore, because the plan was impermanent, the prison would be free to abandon the program as soon as the Court dismissed the class's claim.[179] Even though the Court did not dismiss the class's due process claim, the prison successfully transferred several class members to other facilities.[180] As a result of the involuntary transfers, half of the named plaintiffs were permanently excluded from class membership.[181] Specifically, the Court found that because the transferred inmates lacked commonality with the inmates that remained in the SHU, a requirement for class certification, they were mooted from the class.[182]

The prison's pernicious actions not only mooted a substantial number of inmates, it created a much smaller, defendant-defined, and strategically chosen class.[183] First, the unnamed transferred inmates lost their stake in the litigation and were relocated to similar inhumane conditions.[184] Second, the five named plaintiffs who were transferred prior to certification were left to go forward with their own inefficient individual claims.[185] Consequently, the prison was able to deny a countless number of inmates justice with the assistance of the mootness doctrine.

The application of the mootness doctrine in prisoner litigation has robbed the courts from hearing important issues regarding the constitutional rights of prisoners, and its effectiveness in thwarting justice to prisoners has made it counterproductive.[186] Since its inception, the U.S. Supreme Court has defined mootness and made several exceptions to its application.[187] These exceptions were made out of public policy concerns that the mootness doctrine would prevent courts from addressing important constitutional issues. The

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[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] Nielsen, *supra* note 1, at 772.
[183] *Id.* at 773.
[184] *Id.*
[185] *Id.*
[186] Corey C. Watson, *Mootness and the Const.*, 86 NW. U. L. REV. 143, 152-53 (1991).
[187] *Id.*

issues surrounding prisoners' constitutional rights, moral dignity, mental and physical health are important and worthy of the Court's review and protection. As it stands, the mootness doctrine is being used by prisons to silence prisoners whose cases are thrown out of court for reasons completely outside of their control. Unless the mootness doctrine undergoes serious revisions in prisoner litigation, its counter-productiveness renders it as useless as a gun without a trigger. Thus, any doctrine that perpetuates the violation of prisoners' constitutional rights should be abolished or revised to preserve those rights. The mootness doctrine perpetuates the violation of prisoners' constitutional rights. Therefore, the mootness doctrine should be abolished or revised to preserve such rights.

SECTION V: MOVING FORWARD: ABOLISHING THE MOOTNESS DOCTRINE FROM PRISONER LITIGATION OR REVISING IT TO SERVE ITS RIGHTFUL PURPOSE

MOVING FORWARD: PRISONER LITIGATION IN ABSENCE OF THE MOOTNESS DOCTRINE

Recall the story of the prisoner, Blake, in the introduction, and think for a moment of what the outcome of this case would have been in absence of the mootness doctrine. A few outcomes would have been that: 1) Blake would have had his day in court to confront the officer who assaulted him, and would have received justice for his irreversible injuries, and 2) If Blake was successful in defending his civil rights case against the prison, it would have given the prison a wakeup call that the Court would no longer sit on its hands while prisoners' civil rights were under attack. As a result, the prison would be compelled to improve its policies concerning the treatment of its prisoners. Unless courts collectively hold that violations of prisoners' civil rights are an ongoing controversy that has persistently repeated itself and has yet to be resolved, the injustice experienced by prisoners such as Blake will continue to prevail over justice.

ABOLITION:

In prisoner litigation, the use of the mootness doctrine has resulted in a grave miscarriage of justice, which renders it not only useless but also prejudicial toward prisoner litigants. Therefore, the use of the mootness doctrine in prisoner litigation should be abolished. Many scholars, including Chief Justice Rehnquist, have

suggested that the mootness doctrine is essentially a prudential doctrine, "that may be overridden where there are strong reasons to override it."[188] Several compelling reasons that override the use of this doctrine include when its use directly results in: 1) the absolution of transgression, 2) the perpetuation of abuse and rape, 3) the denial of basic human rights, and 4) the continued use of unethical prison policies. In the cases discussed throughout this paper, each prisoner suffered from one of the above offenses at the hand of the prison system, and the mootness doctrine defended the culprit rather than the victim. It is for this reason that the mootness doctrine should be abolished from prisoner litigation.

Objections to the abolishment of the mootness doctrine in prisoner litigation are unpersuasive. Specifically, opponents of abolishment may argue that by removing the mootness doctrine from prisoner litigation this would effectively: 1) open up the flood gates for prisoners to bring cases where there is no longer an injury due to transfer or release from the prison where the wrong occurred, or 2) where the Court's decision would not provide the injured prisoner remedy. However, this argument is unpersuasive.

As proven throughout this paper, the issues surrounding prisoner litigation qualify as capable of repetition, yet evading review, which is beyond the reach of mootness. This is because, unlike non-incarcerated persons, prisoners are similarly situated and subjected to the same level of control and abuse from the prison system. Therefore, when prisoners bring suit against the prison for violating their constitutional rights, they are also bringing the suit on behalf of their fellow inmates. In addition, opponents may ask that if we abolish the mootness doctrine, what would be put in its place? However, this question assumes that this doctrine has served a useful purpose in prisoner litigation. As stated above, the application of the mootness doctrine has been counterproductive in prisoner litigation. Therefore, the abolishment of this doctrine is the remedy with no need for replacement.

ALTERNATIVES TO ABOLITION: REFORMING THE MOOTNESS DOCTRINE TO PRESERVE PRISONERS' CONSTITUTIONAL RIGHTS

[188] *Honig v. Doe*, 484 U.S. 305, 331 (1988).

Instead of abolishing the mootness doctrine, there are protective measures that courts could enforce to prevent prisons from changing prisoners' statuses in order to dismiss their cases as moot. First, courts could require prisons to get the Court's permission prior to relocating a prisoner after he or she has filed suit against the prison. This would help prevent prisons from taking retaliatory measures against prisoners, such as transferring or placing the prisoners in solitary confinement. Second, courts could consider using the relation back doctrine. Under this doctrine, "an act done at one time is considered by a fiction of the law to have been done on a preceding date."[189] Hence, under this principle, courts would permit a relation back to the date the prisoner filed his or her complaint to treat the action as a live controversy.[190] This would prevent prisons from mooting prisoners' cases by simply releasing them from prison.[191] Third, courts could issue a preliminary injunction to halt prisons from using evasive tactics to moot prisoners' cases, such as subjecting them to abuse or denying them medical care. [192] This would allow prisoners to defend their constitutional rights without being in fear of their lives.

THE ABOVE PROTECTIVE MEASURES WOULD HELP TO PRESERVE PRISONERS' CONSTITUTIONAL RIGHTS BY CLOSING LOOPHOLES WITHIN THE MOOTNESS DOCTRINE.[193] MOST IMPORTANTLY, IT WOULD ENABLE PRISONERS TO EFFICIENTLY DEFEND THEIR CONSTITUTIONAL RIGHTS AND PROMOTE FAIRNESS WITHIN A SYSTEM THAT NEEDS MUCH IMPROVEMENT.

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[189] 13 AM JUR 2D *Burglary* § 9.
[190] Nielsen, *supra* note 1, at 801.
[191] *Id.*
[192] *Id.* at 805.
[193] *Id.* 808.

THEIR BODY, THEIR CHOICE: DEATH ROW INMATES SHOULD HAVE A RIGHT TO BE ORGAN DONORS

Abigail B. Ventress[*]

"Donation gives nobility to final moments. . . .It is an act of extending the gift of life, a giving back, a passing on. It is a way to affirm life, to shout a note of victory into the face of death."[1]
–Rev. Edward Mcrae In Memory of His Son, Stuart Mcrae.

ABSTRACT

This Article argues that death row inmates have a right to be organ donors. As such, this Article represents a push to make the most out of having the death penalty. The ability for death row inmates to be organ donors is particularly critical in the midst of a shortage for transplants. This Article compares data from United Network for Organ Sharing ("UNOS") and Death Penalty Information supplied by states that impose the death penalty. The work asserts the right of death row inmates to elect the choice to be donors despite excuses made by states uninterested in making the necessary changes for the choice to be exercised successfully. Additionally, the work urges that if states are going to impose the death penalty and take lives, the states must at least allow the lives taken the opportunity to save the lives of others. Furthermore, this Article addresses the positive impact that providing this choice would have on the nation and especially on minorities. This Article examines the government's duty to act and explores the challenges that states need to overcome in order to afford the option for death row inmates to be suitable organ donors. As the demand for organs continuously increases, more donations would benefit society. This Article argues for the right to a choice, and a person does not have

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[1] JOSHUA D. MEZRICH, WHEN DEATH BECOMES LIFE 239, 271 (HarperCollins Publishers, 2019).

to support the death penalty to support the right of death row inmates to be organ donors.

INTRODUCTION: DISCOUNTING A POTENTIAL SOLUTION TO THE IMPERATIVE DEMAND FOR ORGAN TRANSPLANTS

This Article builds from the proposition that if states are going to embrace the death penalty, states should allow as much good to come out of the situation as possible. Accepting the organs from inmates who are put to death would save the lives of Americans in desperate need of transplants to live. This Article also seeks to educate readers about the ever-growing demand for organs and the incompatible supply. For many whose organs have failed, organ transplant surgery vastly improves their health, quality of life, and the length of their lifetime.[2] Unfortunately, the likelihood of receiving a transplant is drastically reduced due to the lack of organ donors yet the number of prisoners on death row in some states like Texas, Virginia, Oklahoma, and Florida is significantly high.[3] These death row inmates could be suitable donors for suffering Americans, but lawmakers ignore this idea out of convenience.

The work embraces the potential conflicts with pursuing this plan to allow death row inmates to become organ donors but argues that each potential conflict is worth overcoming. Potential conflicts include inmates' rights to make decisions about their bodies after death, the procedures needed to ensure death row inmate organs will be suitable for transplant, and the psychological issues that could arise in the recipients of death row inmate organs. Furthermore, this Article examines Utah's experiment of allowing general population prisoner organ donations and compares it to Texas' unwillingness to pursue the idea. Other concerns with allowing death row inmates to be organ donors include the healthcare operations crucial to determine whether death row inmates have diseases and the effort to prevent unexposed death row inmates from exposure.

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[2] MARY KITTREDGE, *ORGAN TRANSPLANTS* 51 (Chelsea House Publishers, 2000).
[3] *See* Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 331 (2004); *See also* Death Penalty Info. Cent. (2020), https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976.

No matter the list of potential conflicts, the solution is simple. People are put to death with the very organs that could save lives, but society cannot benefit from them. The burdens seem too high and not worth the hassle. Any solution with the potential to save even one life should be pursued. This is a solution with the potential to save several lives. How is it that states can decide that someone should die involuntarily, but not let them volunteer to help someone else live?

"The death penalty represents a most expansive government power and intrusion into the life of a civilian, one that discords with conservative ideals of limited government," however, death penalty states do not expand government power to provide death row inmates the choice to become organ donors.[4] The government always has a choice to either act or omit to act when it comes to policy regimes.[5] "Some acts are morally obligatory, while some omissions are morally culpable."[6] The government has a duty to assist people and is especially culpable when death is a predictable consequence.[7] Therefore, state prisons have a duty to act and accept organs from death row inmates who are willing to become organ donors. Doing so could save lives. American lawmakers in death penalty states should recognize the dignity of their state's death row inmates and care about citizens in need of life-saving organs. These lawmakers have a duty to act and to allow the people that they are killing to save others who are dying.

This Article argues that allowing death row inmates to exercise their right to be organ donors would contribute toward a solution to the growing demand for organs for transplants. The purposes of this Article are to shed light on an issue in America and to stress the need to pursue an option that is overlooked. This Article is not arguing that all death row inmates must or should be organ donors, as there are many reasons like religion or personal preference that influence people to choose not to be organ donors. The right of death row inmates to be able to make a choice is what this Article supports.

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[4] SpearIt, *Reimagining the Death Penalty: Targeting Christians, Conservatives*, 68 BUFF. L. REV. 93, 132.
[5] Cass R. Sunstein, *The Ethics and Empirics of Capital Punishment: Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 709.
[6] *Id.*
[7] *Id.* at 726.

SECTION I: SOCIETY IS READY TO ALLOW DEATH ROW INMATES TO BECOME ORGAN DONORS

This section shows that modern medicine is equipped to more easily perform transplants, that transplants are especially needed now more than ever before, and how death penalty state lawmakers lag in accommodating the major health issue. Progress with successful organ transplants has moved faster than social policy and the law.[8] In turn, with the success rates of organ transplants, comes new ethical issues for society.[9] The facts outlined in this section further support the need for more organ donors, which could be obtained by allowing death row inmates to become organ donors.

THE DEVELOPMENT OF ORGAN TRANSPLANTS ALLOWS FOR MORE SUCCESSFUL SURGERIES

There was a time when transplants were not as simple as they are now.[10] In fact, average people used to think that transplants were impossible.[11] However, 25 transplantable organs are contained within the human body.[12] Once attempts at transplants began, they were seldom successful until the 1960s.[13] Before the 1960s, patients with failed kidneys were out of luck and would die.[14] Alexis Carrel sought a solution and began practicing kidney transplants on animals.[15] This step sparked further progress for transplants because it showed that a kidney could possibly be transplanted from one living being to another and helped develop transplant procedures.[16]

Dialysis and anti-rejection medicine were game changers for patients in need of organ transplants. In the 1960s, transplants significantly advanced with dialysis.[17] Dialysis is a machine that filters

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[8] Kittredge, *supra* note 2, at 78.
[9] *Id.* at 16.
[10] Mezrich, *supra* note 1, at 39.
[11] *Id.* at 21.
[12] Donny J. Perales, *Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to Those on Organ Donor Waiting Lists*, 34 ST. MARY'S L.J. 687, 688 (2003).
[13] Kittredge, *supra* note 2, at 13.
[14] Mezrich, *supra* note 1, at 40.
[15] *Id*.
[16] *Id*. at 40, 43.
[17] *Id*.

the impurities out of patients' blood.[18] By 1983, an anti-rejection drug called cyclosporine was approved and substantially improved kidney, liver, and heart transplants.[19] Cyclosporine is an immunosuppressive combined with steroids to reduce the toxicity to kidneys, and it helps prevent the recipient's body from rejecting a donor organ.[20] By 1999, 95 percent of kidney transplant patients survived past the first year.[21]

Now, transplants are performed so regularly that they are considered safe.[22] Part of this is due to medical advancements and the implementation of new requirements to strategically match donors and recipients. Patients receive transplants based on a medical criteria, and the hospital at which the organs are retrieved notifies a national organization to match the organs to recipients through a computerized system.[23] To determine a candidate's suitability to receive an organ, doctors make sure that the organ is of correct size for the candidate's body.[24] Also, the donor's and recipient's blood types have to match, and their tissues need to be similar in order to better prevent the recipient's body from rejecting the organ.[25] If the patient is on the verge of dying, doctors may use an organ with tissue that does not match as closely as preferred, but the patient will be prescribed higher doses of the anti-rejection medication.[26]

Transplants have lifelong side effects requiring frequent medical visits and the consumption of immune-suppressing drugs.[27] Modern anti-rejection medicines for transplant recipients are taken to control the immune-defense mechanisms against the foreign organ.[28] The medications usually have side effects ranging from substantial changes in the recipient's face to an increased risk of cancer and infections.[29] Furthermore, recipients of organ transplants confront emotional problems and challenges.[30] Fortunately, most transplants

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[18] *Id.* at 40.
[19] *Id*. at 99.
[20] *Id*. at 97, 99.
[21] Kittredge, *supra* note 2, at 13.
[22] *Id.* at 27.
[23] *Id.* at 40-1.
[24] *Id*. at 41.
[25] *Id*. at 42.
[26] Kittredge, *supra* note 2, at 43.
[27] *Id.* at 27.
[28] *Id*. at 43.
[29] *Id*. at 61.
[30] *Id*.

are successful during the first year after the transplant.[31] Most recipients today are able to enjoy a good quality life.[32]

THE DEMAND FOR ORGANS AND SHORTAGE OF DONORS MAKE ANY CONTRIBUTION SIGNIFICANT

Unfortunately, thousands die every year because the supply of organs is always outweighed by the demand and because the waitlist to get a transplant is overwhelmingly long.[33] Almost 12,000 kidneys were transplanted in 1998, but 44,000 people were still waiting for kidney transplants.[34] Still waiting for liver transplants were 13,000 people, even though over 4,000 were donated that year.[35] Additionally, 4,000 people were still needing heart transplants after 2,300 heart transplant operations were already performed.[36] In 1999, about 58,000 Americans were waiting for an organ transplant, but only 5,500 transplants were received.[37] The United Network for Organ Sharing ("UNOS") data shows that from 1998 to 2003, donations of organs did not increase at a rate that impacted the demand.[38] It is estimated that about 18 people die while waiting for a transplant each day.[39] UNOS reported that in 2004, over 6,000 Americans passed away still on the waitlist.[40] There were still 8,000 living patients on the waitlist that same year.[41] In 2015, 122,427 people needed organ donations, and a new person was added to the list every 10 minutes.[42]

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[31] Robert Lechler, *From Rejection to Renewal: The Future of Organ Transplants*, Fin. Times Mag. Life and Arts (Aug. 23, 2019), https://www.ft.com/content/800ec9bc-c391-11e9-a8e9-296ca66511c9.
[32] *Id.*
[33] Kittredge, *supra* note 2, at 45.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 77.
[38] Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 315 (2004).
[39] David Schwark, *Organ Conscription: How the Dead Can Save the Living*, CLEV. MARSHALL L.J. 323-24 (2011).
[40] *Id.*
[41] *Id.*
[42] Jaclyn M. Palmerson, *Inmate Organ Donation: Utah's Unique Approach to Increasing the Pool of Organ Donors and Allowing Prisoners to Give Back*, 68 RUTGERS U. L. REV. 479, 479 (2015).

The serious shortage of organs creates ethical issues when it comes to who gets to receive an organ when one becomes available.[43] A transplant candidate usually has to be terribly ill by the time the transplant candidate can receive a transplant but cannot be too ill to endure the procedure.[44] The U.S. Government passed a law in 1987 that was designed to make the process fairer when pairing a donor to a recipient.[45] However, the decision of who gets what organ would not be such a big issue if there were more organs available.[46]

The process of awaiting an organ transplant takes its toles on patients in need. Chronically ill patients can become highly dependent on others during the time they await a transplant and worry about the challenges a transplant could cause.[47] A patient may fantasize about how much better his or her life is going to be once he or she receives a new organ and may become depressed or disappointed if the results do not match his or her expectations.[48] If the new organ is rejected, recipients may feel guilty for not being able to make the gift work and for the destruction of a suitable organ.[49] Also, recipients may be angry for having gone through the surgery process.[50]

Transplants can be financially burdensome for recipients.[51] In *Stroeder v. Office of Med. Assistance Programs*, a cystic fibrosis patient's physician requested that she be referred for a transplant of both a liver and lungs.[52] The request was denied because the Oregon Health Plan did not cover combination transplants.[53] The Court found that denying the request did not violate the Americans with Disabilities Act reasoning that the denial did not prevent the patient from receiving the procedure.[54]

An organ donor can be either deceased or alive.[55] Brain-dead donors are the most common, and they are referred to as DBD donors

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[43] Kittredge, *supra* note 2, at 77.
[44] *Id.* at 62.
[45] *Id.* at 78.
[46] *Id.*
[47] *Id. at* 62.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Kittredge, *supra* note 2, at 81.
[52] *Stroeder v. Office of Med. Assistance Programs*, 178 Or. App. 374, 37 P.3d 1012 (2001).
[53] *Id*. at 2.
[54] *Id*.
[55] Mezrich, *supra* note 1, at 271.

for "donation after brain death."[56] The Uniform Determination of Death Act passed in 1980 and declared brain death to be the legal equivalent of death among all 50 states.[57] Even though their hearts are still beating, brain-dead patients are legally dead.[58] A DBD donor can donate more organs than the other types of donors.[59] The donations are not as rushed as the other types of donations.[60] Preparing to receive organs from a DBD donor can take 24 to 36 hours because of the time necessary to determine the organ recipients across the country and to conduct the tests to determine the quality of the donor's organs.[61] The doctors are required to find out if the donor was exposed to diseases before they can receive the organs for transplant.[62] Also, when a donor is declared brain dead, the donor's family has to provide consent before the organs can be obtained for transplantation.[63]

Donors may also be patients who suffer a life-threatening experience and have made it known that they wish to donate their organs in the event of their death.[64] These are the next most common type of donor.[65] If the patient is not brain dead, but suffers considerable damage, the patient is referred to as a DCD donor for "donation after circulatory death" once the patient is taken off life support.[66] DCD donors cannot typically donate their hearts because they are not legally dead until they are taken off their life support, and if their hearts were obtained before they were legally dead, their cause of death would be organ donation.[67] Families of DCD donors make the decision to remove the ventilator, and then the organs are quickly received for transplant.[68] After a DCD donor is removed from life support, doctors can wait two hours to obtain kidneys and 30 minutes for the lungs, liver, and pancreas.[69]

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[56] *Id.*at 271-73.
[57] *Id*. at 291.
[58] *Id*. at 271-73.
[59] *Id*. at 291.
[60] *Id*.
[61] *Id*. at 281.
[62] *Id*.
[63] Kittredge, *supra* note 2, at 44.
[64] Mezrich, *supra* note 1, at 272.
[65] *Id.*
[66] *Id*. at 273.
[67] *Id*.
[68] *Id*.
[69] *Id*.

Transplants are best when the organs come from living donors.[70] The problem is that most organs cannot be transplanted from a living donor since most organs are needed to sustain life.[71] Reasons living donor organs are best include that the organ will have a longer life and that there are more options available for patients who find willing living donors like the swap system through The National Kidney Registry ("NKR").[72]

Some families try to increase donations by expressing their loved one's desire to have their organs donated, but the hospital cannot complete the request. In *Carey v. New Eng. Org Bank*, parents sued the New England Organ, Eye, and Tissue Transplant Banks.[73] The parents consented to their son's organ donation, and his tissue was received for transplantation.[74] Unfortunately, his lack of blood rendered his tissue unusable for transplantation.[75] Before realizing that the tissue could not be used, the donation organization alerted hospitals of its availability.[76] The Court held that the organization was immune and granted summary judgment for the defense.[77]

Another instance shows how the transplant process can be tainted by racial discrimination. In 1968, a hospital completed organ transplantations without getting consent from the donor's family. Bruce Tucker, a 56-year-old Black man had been drinking, and he fell and hit his head on pavement.[78] At the hospital, his EEG scan showed no brain activity, and the physician wrote "Death is imminent."[79] The doctors disconnected his respirator and obtained his heart and kidneys for transplant before locating his family members.[80] Tucker's family was upset that they did not have knowledge of the circumstances and did not give their consent.[81] They brought suit against the doctors,

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[70] Kittredge, *supra* note 2, at 43.
[71] *Id*.
[72] *Id*. at 293. The NKR has a program for patients in need of organ transplants that allows the patients with willing, living donors who do not match the specific patient they got tested for to basically trade donors amongst each other in order to find a better match for themselves.
[73] *Carey v. New Eng. Organ Bank*, 17 Mass. L. Rep. 582 (2004).
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] Mezrich, *supra* note 1, at 152.
[79] *Id*.
[80] *Id*. at 153.
[81] *Id*.

Hume and Lower, and were represented by the first African American to be elected governor of the United States, Douglas Wilder.[82] Governor Wilder argued "the transplant team engaged in a systematic and nefarious scheme to use Tucker's heart and hastened his death by shutting off the mechanical support systems" while Tucker was labeled "unclaimed dead."[83] He also emphasized that Tucker was among the "faceless [B]lack masses of society."[84]

Another issue related to race is that among the different racial and ethnic groups, Blacks have the greatest demand for organs.[85] However, Blacks also have to wait the longest.[86] Blacks also have the highest death rate while waiting on the list.[87] To highlight this issue, three out of four patients referred for organ transplants between 1996 and 1998 in New York were white.[88] There are some socio-economic factors that may impede minorities from receiving transplants because minorities may have less access to healthcare or could maintain poor health habits due to their environment.[89] Some healthcare officials argue that if minorities donated more, then there would be more suitable organs to be transplanted to minority patients.[90]

SECTION II: THE DEATH PENALTY IS CURRENTLY A WASTED SOLUTION

The purpose of this section is to recognize the right to die in dignity and to choose what happens to one's body after death as a solution to the demand for organs. This section discusses the frequency of imposing the death penalty and the potential to use the death penalty to offer a positive impact on society.

Allowing the death penalty to serve as a benefit for organ transplants has been advocated for by death row inmates.[91] The first death row inmate to advocate for his right to be able to choose to be an

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[82] *Id*. at 153-54.
[83] *Id*. at 154.
[84] *Id*.
[85] Goodwin, *supra* note 38, at 328.
[86] *Id.* at 328, 347.
[87] *Id.*
[88] *Id.* at 332.
[89] *Id*. at 335.
[90] *Id*.
[91] Amanda Seals Bersinger & Lisa Milot, *Posthumous Organ Donation as Prisoner Agency and Rehabilitation*, DEPAUL U. L. REV. 1193, 1203 (2016).

organ donor was Christian Longo from Oregon.[92] Longo pushed for policy changes to permit him to donate his organs when he was put to death.[93] Change did not happen in time for Longo, but he started a movement that will hopefully influence lawmakers to provide the choice to other death row inmates.[94]

Interestingly, prisoners are always allowed to be recipients of organ transplants because their status cannot prevent them from receiving a transplant, but their status can prevent them from donating an organ to someone else.[95] The state in which the prisoner recipient is imprisoned is financially responsible for the prisoner's transplant surgery.[96] However, when a prisoner in Ohio and a prisoner in Florida wished to donate their organs after their executions, they were denied this request.[97] Dr. Joshua D. Mezrich M.D. wrote that in the operating room, "It doesn't matter if the patient is nice or a jerk, rich or poor, loving of mankind or a complete racist (like the guy with the swastika tattoo I recently put a kidney into.) Most of the patients I evaluate for liver transplants have led difficult lives and made poor choices with regard to their health. I don't judge them for it, though, and I certainly don't claim to understand what their lives were like."[98] The freedom to make the choice to be an organ donor should be treated the same as the freedom to receive an organ transplant. It does not make sense that death row inmates are refrained from giving, but not from taking.

By nature, death row is nothing more than a storage or a warehousing operation that accounts for prisoners until they can be executed.[99] The Fourteenth Amendment does not prevent states from having the discretion to impose the death penalty.[100] Historically, the death penalty was issued sparingly by the colonies.[101] Then, the issuing of the death penalty got popular, and once, there were more than 2,000

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[92] *Id.* at 1194.
[93] *Id.* at 1203.
[94] *Id.*
[95] Palmerson, *supra* note 42, at 484.
[96] *Id.*
[97] *Id*. at 486.
[98] Mezrich, *supra* note 1, at 210.
[99] The Eds. of the Crim. L. Rep., *The Crim. L. Revolution and Its Aftermath*, The Bureau of Nat'l Affairs, Inc. (1972).
[100] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AM. HIST. 284 (HarperCollins Publishers, 1993).
[101] *Id*. at 42.

death row prisoners in America.[102] To timely perform all of the executions, for four straight years 10 people each week would have to be executed.[103] More recently, there are not a significant amount of death row inmates, and few executions occur in America each year.[104] Currently, there are 213 prisoners on death row in Texas.[105] In 2019, Texas issued only four death sentences and performed nine of the nation's 22 executions.[106] Also in Texas, there were seven executions arranged to occur in 2020 and four set for 2021 with Harris County responsible for most.[107]

When it comes to the racial issues in organ transplantation, the fact that most prisoners punished by the death penalty are minorities is significant. In Texas, 70 percent of death row prisoners are minorities.[108] Blacks are the majority on death row in Texas at 43.7 percent.[109] Allowing executed prisoners to donate their organs could be beneficial for minority patients awaiting transplants seeing that Blacks wait the longest to receive transplants and considering the close matching that must occur for a successful transplant.

SECTION III: DIFFERENT APPROACHES TO INMATE ORGAN DONATION SHOW THE PROGRESS THAT CAN BE MADE BY IMPLEMENTING SMALL REGULATIONS

The purpose of this section is to compare briefly two different states with different approaches to inmate organ donation. Although no states currently allow death row inmates to be organ donors, there are states like Utah making progress by allowing general population prisoners to be organ donors. However, there are other states like Texas that have not made any progress toward allowing this option for death row inmates despite having the ability to save the most lives considering the amount of death sentences imposed by the state.

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[102] MELVIN I. UROFSKY, LETTING GO: DEATH, DYING, AND THE LAW 25, 78 (Charles Scribner's Sons, 1993).
[103] *Id*. at 91.
[104] Palmerson, *supra* note 42, at 484.
[105] *Texas Death Penalty Facts*, Texas Coalition to Abolish the Death Penalty (2019), https://tcadp.org/get-informed/texas-death-penalty-facts/.
[106] *Id*.
[107] *Id*.
[108] *Id.*
[109] *Id*.

UTAH IS MAKING PROGRESS IN ALLOWING DEATH ROW INMATES TO SAVE LIVES

Utah is unique in its approach to its prisoners and organ donation, although states like Florida and New Jersey are similar.[110] Utah has a statute that recognizes the "potential medical benefit" that prisoners can have on society.[111] A Utah prisoner named Gary Gilmore was executed by a firing squad, and his organs were voluntarily donated for scientific study or transplantation in 1977.[112] This may have contributed to Utah's progress in exploring further ways to allow inmates to contribute to the growing demand for organ donations.

In 2013, Utah passed H.B. 26 requiring that general population prisoners be presented the opportunity to indicate on a form their desire for their organs to be donated if the inmate dies while in custody.[113] With the passing of the bill, Utah became the first of the states to permit explicitly prisoners of the general population to become organ donors while incarcerated and to impose a duty on the prisons.[114] Although Utah still does not allow for the donation of organs from executed prisoners, Utah's bill was a successful step in the right direction seeing that almost 250 general population prisoners indicated their wish to be organ donors within the first week of the new law's enactment.[115]

TEXAS IS A PART OF THE SHORTAGE PROBLEM BECAUSE IT GENERALLY DENIES PRISONERS THE ABILITY TO SAVE LIVES

Texas lags behind Utah in allowing death row inmates to become organ donors. Texas finds that the challenges associated with the solution outweigh the benefits.[116] However, prisoners in the general prison population in Texas are, in some rare cases, allowed to donate organs while they are alive and after their death if they are

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[110] Palmerson, *supra* note 42, at 484.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] Bersinger & Milot, *supra* note 91, at 1194.
[116] Brandi Grissom, *Considering Death Row for Organ Donation*, The Tex.Tribune (Sept. 10, 2012), https://www.texastribune.org/2012/09/10/death-organ-donation-fraught-ethical-dilemmas/.

registered donors.[117] These rare cases typically occur when an inmate's family member is in dire need of an organ transplant, and the inmate is the only match.

As for funding in Texas, taxpayer money is already used to provide prisoners with healthcare.[118] When a prisoner needs a transplant, taxpayer money pays for the procedure. However, when a free citizen needs a transplant, it is considered a burden for taxpayer money to fund the resources needed in prisons. Typically, the insured's insurance covers the expenses accompanied with a transplant in Texas, and with healthcare already being provided in prisons, no substantial financial burdens would arise from the implementation of further efforts.[119]

Texas has the view that even if all the potential problems could be solved, the choice should not be offered because only a small number of organs from death row inmate donations would actually be usable, but Texas does not deny that lives could be saved.[120]

SECTION IV: CHALLENGES TO OVERCOME FOR DEATH ROW DONORS ARE OUTWEIGHED BY THE BENEFITS OF SAVING LIVES

The purpose of this section is to rebut the idea that the presence of challenges overshadows a solution. Opponents of allowing death row donors the choice to be organ donors oppose the solution because they think the challenges outweigh the benefits. However, the potential to save human lives makes overcoming those challenges worth the effort.

DISEASED INMATES CAN STILL BE ORGAN DONORS, AND POOR HEALTH REGULATIONS IN PRISONS CAN BE IMPROVED

An estimate suggests that about one-half of prisoners are suitable to be organ donors.[121] A kidney can be defective and not function properly for a recipient if it is damaged from prior diseases.[122] A liver can be damaged from a donor's excessive alcoholism or use of

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[117] *Id.*
[118] Kate Douglas, *Prison Inmates are Constitutionally Entitled to Organ Transplants-So What Now?*, 49 ST. LOUIS L.J. 539 (2005).
[119] *Id*.
[120] Grissom, *supra* note 116.
[121] Bersinger & Milot, *supra* note 91, at 1207.
[122] Kittredge, *supra* note 2, at 44.

drugs.[123] Health requirements limit the supply of suitable organs.[124] In 2010, a study found that prisoners were five times more likely to have HIV.[125] In 2012, almost 7,000 prisoners had HIV.[126] This fact means that organs from prisoners have a high likelihood to be rejected more than organs from non-prisoners, but it does not mean that there are no suitable organs for donation from prisoners. Even infected organs can be transplanted if the recipient also carries the same disease. Access to infected organs could be beneficial for people waiting for transplants who could only receive an organ from a donor who has the same disease.[127]

When it comes to disease-free prisoners, prisons could put forth effort to prevent inmates from exposure to diseases and screen for organ viability.[128] Precautions could also be taken when a prisoner is diseased in order to keep a prisoner's diseased status confidential. In *Leher v. Bailey*, a prisoner's positive HIV status was disclosed to fellow prisoners who retaliated.[129] The HIV positive prisoner sued claiming that the disclosure violated his constitutional rights and caused the other prisoners to retaliate against him.[130] However, the Court found that the prisoner's constitutional rights were not violated.[131]

LETTING DEATH ROW INMATES BECOME ORGAN DONORS IS BETTER FOR TAXPAYERS

Despite severe disabilities, some patients make major contributions to society and live fruitful lives when others, if placed in the same situation, would view the situation as mere existence and would rather choose to die.[132] The benefit of a life-saving organ

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[123] *Id.*
[124] *Id*. at 45.
[125] Palmerson, *supra* note 42, at 484.
[126] *Id.*
[127] *Id*.
[128] *Id*.
[129] *Leher v. Bailey*, No. 4:03CV000953 U.S. Dist. LEXIS 31862, at *1, *4 (E.D. Ark. Apr. 24, 2006).
[130] *Id.* at 19-20.
[131] *Id.*
[132] Urofsky, *supra* note 102, at 25.

donation is immeasurable.[133] Any preventable death is a tragedy.[134] One organ donor can save 50 lives, and that results in 50 more people that can contribute to the nation in a positive way for a lot longer than they could without receiving a transplant.[135]

The arguments against allowing death row inmates to become organ donors due to the expense for taxpayers are ironic because in this situation, death happens to be more expensive than life. Additionally, providing dialysis to all of the patients awaiting transplants costs taxpayers over 10 million dollars per year.[136] Since organ transplants are covered by the recipient's insurance in most states, taxpayers would end up saving money.[137] Furthermore, it costs on average 1.12 million dollars per death row inmate, and can cost up to $16, 500 per dose to a death row inmate with the most common method of execution, lethal injection.[138] The U.S. spent 500 million dollars in 1993 to maintain the death penalty.[139] If it is justified to spend that much taxpayer money to kill one person, it should be justified to spend even less taxpayer money to save up to 50 peoples' lives.

METHODS OF EXECUTION ARE IMPORTANT TO THE SUCCESS OF ALLOWING DEATH ROW INMATES TO BECOME ORGAN DONORS

Damage to organs can occur as a result of execution by lethal injection. The chemicals used destroy the lungs and heart fairly quickly, but the liver and kidneys could last a while longer.[140] The executed inmate would need to be close to or inside a hospital when executed.[141] With the use of lethal injection, the organs with a chance

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[133] Bersinger & Milot, *supra* note 91, at 1208.
[134] Adam J. Kolber, *A Matter of Priority: Transplanting Organs Preferentially to Registered Donors*, 55 RUTGERS U. L. REV. 671, 675 (2003).
[135] Bersinger & Milot, *supra* note 91, at 1207.
[136] Mark S. Nadel & Carolina A. Nadel, *Using Reciprocity to Motivate Organ Donations*, YALE L. REV. 293, 294 (2004).
[137] *Id.*
[138] *What Criminal Sentence Costs More: Death or Life in Prison?* (Nov. 29, 2019), https://www.thebalance.com/comparing-the-costs-of-death-penalty-vs-life-in-prison-4689874.
[139] Woody R. Clermont, *Crim. Law Issue: Featured Contributor: Your Lethal Injection Bill: A Fight to the Death Over an Expensive Yellow Jacket*, 24 ST. THOMAS L. REV. 248, 388.
[140] Palmerson, *supra* note 42, at 484.
[141] *Id*.

of being suitable for transplant could only be kidneys and livers, but these are also the organs in highest demand. Kidneys are the organ in greatest demand in America.[142] In 2003, 55,664 patients were waiting for kidney transplants.[143] The second most in-demand organ is the liver.[144] Also, retrieving organs from prisoners executed by lethal injection would require the participation of physicians.[145] Not all physicians would be on board with participating in executions when they have an ethical obligation to save lives; however, some physicians may be willing to participate because the goal would still be to save lives with a successful transplant.[146]

Other methods of execution impact death row inmates' choice to be organ donors. Texas has stopped using the three-dose cocktail type of lethal injection and now uses one dose, which is strong enough to render the injected prisoner brain dead.[147] This would be like donations from DBD donors. If firing squads were an optional method, it would be easier to retrieve viable organs for transplants.[148] Electrocution is not a suitable option because the executed prisoner's heart would be stopped, and their other organs and flesh would basically be cooked.[149] A death row prisoner from Georgia wanted to postpone his electrocution until there was a method that would allow him to donate his organs but was denied this request.[150] Hanging would also not be a good method because it takes too long before death is pronounced, and the organs are too damaged by the lack of oxygen.[151] Anesthesia-induced brain death would be a more suitable alternative to accomplish both the objective to execute prisoners less violently, and to preserve organs for transplant.[152] This type of execution would allow for the collection of organs to be the same procedure as done with regular brain-dead donors.[153]

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[142] Goodwin, *supra* note 38, at 345.
[143] *Id.*
[144] *Id.* at 346.
[145] Brandi L. Kellam, *A Life for a Life: Why Death Row Inmates Should be Allowed to Donate Their Organs Following Execution*, 81 UMKC L. REV 461, 477 (2012).
[146] *Id.*
[147] Grissom, *supra* note 116.
[148] Palmerson, *supra* note 42, at 484.
[149] Laura-Hill M. Patton, *A Call for Common Sense: Organ Donation and the Executed Prisoner*, 3 VA. J. SOC. POL'Y & L. 387 (1996).
[150] Bersinger & Milot, *supra* note 91 at 1203.
[151] Patton, *supra* note 149.
[152] Perales, *supra* note 12.
[153] Patton, *supra* note 149.

POTENTIAL CORRUPTION FAILS TO JUSTIFY REJECTION OF THE ENTIRE IDEA OF GIVING DEATH ROW INMATES THE CHOICE TO BECOME ORGAN DONORS

Some try to profit from selling their organs the way some donate blood for money.[154] The sale of underground organs is driven by demand in America.[155] However, the sale of organs is a violation of federal law.[156] The National Organ Transplant Act ("NOTA") was passed in 1984 by Congress for the purpose of making it a federal offense for donors to receive valuable consideration for their donation.[157] The punishment can be up to five years in prison and a fine of up to $50,000.[158] Negotiations for organs occur privately in shadows of the law.[159] Some argue that allowing death row inmates to donate their organs in America would entice a normal practice of selling organs in the U.S.[160] The truth is that the shortage of organs in general entices Americans to participate in black market organ sales and displays the failure of the current system.[161] If organs from prisoners could be donated, maybe there would be a decline in black market organ sales.[162]

There have been instances in America where people have illegally engaged in the sale of organs and bone marrow. In *United States v. Cheng Yong Wang*, the defendants were charged with conspiring to sell human organs from Chinese prisoners.[163] Their plan was to transfer corneas from China to New York.[164] Telephone conversations occurred, and the defendants were arrested by an undercover FBI agent at a hotel in New York.[165] However, the defendants got their motion to dismiss the indictment granted due to the absence of a witness testimony that would violate due process.[166]

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[154] Kittredge, *supra* note 2, at 80.
[155] Goodwin, *supra* note 38, at 331.
[156] *Wilson v. Adkins*, 57 Ark. App. 43, 941 S.W.2d 440 (1997).
[157] Schwark, *supra* note 39, at 327.
[158] *Id.*
[159] Goodwin, *supra* note 38, at 331.
[160] Kellam, *supra* note 145.
[161] Schwark, *supra* note 39, at 333.
[162] Kellam, *supra* note 145.
[163] *U.S. v. Cheng Yong Wang*, 98 Cr. 199 (DAB), 1999 U.S. Dist. LEXIS 2913 at *1, *1 (S.D.N.Y. Mar. 15, 1999).
[164] *Id.*
[165] *Id.* at 1-3.
[166] *Id.* 168.

Also, in *Wilson v. Adkins*, an aunt and her nephew made a contract that the aunt would donate bone marrow to the nephew's mom, who was also the aunt's sister, for a price of over $100,000.[167] The aunt then tried to sue the nephew based on detrimental reliance, but the case was dismissed because of the illegal nature of the contract.[168] The Court described the contract as blatantly illegal because it involved the sale of organs.[169] The contract was considered void, and the aunt did not get any money for her bone marrow donation.[170]

Consent is a concern when considering organ donations from prisoners because a prisoner can be considered property of the state as a consequence of the loss of freedom.[171] Some believe that the donation of organs from executed prisoners should be part of the death sentence, regardless of consent. Most people would likely believe that to impose presumed consent would abrogate constitutional rights.[172] However, giving death row inmates the choice would not violate any rights. Questions pertaining to the sanity of a prisoner who willingly consents to being an organ donor could also be raised because of harsh prison environments and the common presence of mental illnesses within the prison population.[173] In 2002, an inmate from Connecticut expressed his belief that he was entitled to take advantage of his right to die and donate his organs as he wished.[174] His argument was based on the view that time in prison was a waste of his life and that technically he could kill himself at any time, but would rather his life benefit someone else.[175] However, his request for assisted suicide was denied.[176]

Another factor to consider is that a prisoner who chooses to be a donor may expect a reward for doing so.[177] Death row inmates may choose to agree to become organ donors with an alternative goal of delaying their execution or to buy more time. On the other hand, once a prisoner is executed, the prisoner cannot expect a reward.[178]

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[167] *Wilson v. Adkins*, 57 Ark. App. 43, 941 S.W.2d 440 (1997).
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] Palmerson, *supra* note 42, at 484.
[172] *Id*.
[173] *Id.*
[174] Kellam, *supra* note 145, at 477.
[175] *Id.*
[176] *Id.*
[177] Palmerson, *supra* note 42, at 484.
[178] *Id.*

The nation determined that organ donation should be voluntary but does not let death row inmates volunteer. In 1967, the federal government created the Uniform Anatomical Gift Act, which allows citizens to sign a Uniform Donor Card as an attempt to increase voluntary donations. This did not help with the shortage of organ donation.[179] In 1999, although some people believed organ donation needed to become mandatory, more people believed that organ donation needed to remain voluntary.[180] Society tends to view organ donation as a decision people have a right to make since it involves what happens to their bodies, even after death. However, society seems to have forgotten that death row inmates also possess this right. Today, states give licensed driver's the opportunity to indicate their wish to be an organ donor on their driver's licenses.[181] Although it is easy to be an organ donor, people are not fond of the thought that parts of their body will be removed, even if it happens when they are dead.[182] There are other reasons people do not want their organs to be donated like religion and the fear that doctors would not try as hard to save them if they were involved in an accident.[183] However, states have laws defining brain death, and doctors diagnose brain death on the basis of medical fact rather than depending on the need for organs. Most importantly, the nation has acknowledged that there is a right to choose to be an organ donor.

MENTAL HEALTH EFFECTS OF RECIPIENTS ARE LIKELY PREFERRED WHEN DEATH IS THE ALTERNATIVE

Transplant candidates and recipients may experience mental and emotional disturbances.[184] A recipient of an organ from a dead donor may feel guilty that it took the loss of a life for the recipient to gain his or her life back. The recipient might feel ashamed after the surgery if the recipient had been waiting for a long time, and at one point wished that someone would die so that the recipient could receive a transplant. However, medical professionals consider the feelings of worry, sadness, fear, anger, and concern in transplant recipients as

[179] Kittredge, *supra* note 2, at 78.
[180] *Id*.
[181] *Id*.
[182] *Id*. at 79.
[183] *Id*. at 80.
[184] *Id.* at 62.

normal.[185] Most medical professionals also offer mental health support for transplant recipients.

Interestingly, some people oppose allowing death row inmates to be donors because they do not want death row prisoners to die in a heroic manner.[186] For example, an army ranger corporal is considered a hero for enhancing the lives of 75 people by donating his organs after he was mortally wounded in Afghanistan.[187] Those who oppose allowing death row inmates to be donors simply to prevent death row inmates from being heroes have clearly forsaken human dignity.

SECTION V: CONCLUSION

No potential problems can outweigh the positive impact that allowing death row inmates to be organ donors would have. Death row inmates are entitled to make a choice regarding what happens to their bodies after death. Allowing death row inmates to donate their organs would increase the organ pool for those in need, even if the increase is small. Any additional organs are an improvement for the overall health of the nation.

SECTION VI: LOOKING FORWARD TO A MORE HUMANE POLICY

There is hope for the future of medical advances in transplants.[188] Having an identical twin used to be the most promising way to survive a transplant, but now immune tolerance is progressing and tissues are becoming able to repair themselves.[189] With stem cell research, comes hopeful potential for medical improvements.[190] Stem cells from embryos can create bodily cells, which means there is potential for a limitless supply of transplantable tissue.[191]

Advancements in stem cell research may eventually eliminate the need for organ donors and, in turn, anti-rejection medications. Pluripotent stem cells ("iPS cells") are normal human cells reprogrammed to a stem-cell state that allows them to be altered to

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[185] Kittredge, *supra* note 2, at 63.
[186] Palmerson, *supra* note 42, at 484.
[187] Schwark, *supra* note 39, at 323.
[188] Lechler, *supra* note 31.
[189] *Id*.
[190] *Id*.
[191] *Id*.

whatever cell type is needed.[192] Generating organs for transplant by using iPS cells would be genetically identical to the recipient's tissue and would solve the rejection issue because the immune system would not attack the new organ.[193] The new organ would not be foreign in the body of the recipient.[194] Researchers have also created mini-kidneys and cartilage from the use of tissue.[195] Overtime, fully formed, functioning kidneys and possibly hearts might be able to be created.[196]

Heart muscle regeneration has been introduced, and it manipulates the patterns in gene expression in the tissue and can repair pig hearts after heart attacks.[197] It is a possibility that this technique could also be used to repair other organs.[198] One day, it may be possible to bio-print organs for transplants.[199] In June of 2018, BioLife4D successfully printed human cardiac tissue with a 3D printer over a number of days.[200]

Within the next two years, there are plans to modify regulatory T-cells genetically for the purpose of improving transplants.[201] The goal is to get the recipient's body to ignore the new organ, which the recipient's body is trained to attack.[202] However, the recipient's body still needs to be able to fight off viruses.[203]

In the meantime, allowing death row inmates to make the choice to be organ donors is another step toward a brighter future for those suffering from medical conditions requiring an organ transplant. This is a choice that death row prisoners have always been entitled to as people. This Article advocates not for the death penalty, but for making the most out of having the death penalty.

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[192] *Id*.
[193] *Id*.
[194] *Id.*
[195] *Id.*
[196] Lechler, *supra* note 31.
[197] *Id.*
[198] *Id*.
[199] *Bioprinting: The Future of Organ Transplant*, Verdict Med. Devices (Sept. 05, 2018), https://www.medicaldevice-network.com/comment/bioprinting-future-organ-transplant/.
[200] *Id*.
[201] Lechler, *supra* note 31.
[202] *Id*.
[203] *Id*.

EXPLORING PROTEST RIGHTS, UNREASONABLE POLICE CONDUCT, AND QUALIFIED IMMUNITY

L. Darnell Weeden[*]

SECTION I: INTRODUCTION

The issue to be addressed in this Article is whether the right to challenge government authority by means of protesting unreasonable police conduct on public sidewalks, public streets, public parks, or in court litigation is unreasonably restricted by qualified immunity. For example, a person's First Amendment right to protest is violated when a police officer unlawfully arrests that person without any probable cause. A police officer who violates a person's clearly established First Amendment right to protest in a public street, on a public sidewalk, or at a public park should not be eligible for qualified immunity. Qualified immunity is an acceptable form of protection only if the police officer's behavior in regulating a person's freedom to protest meets an arguably reasonable probable cause standard.[1] Because there are a number of good reasons for keeping the position that people have "a clearly established right to assemble, protest, and demonstrate peacefully"[2], police officers are not entitled to qualified immunity when violating a person's clearly established right to peaceful protest.[3] It should be considered unconstitutional for police officers to interfere with a person in order "to thwart or intrude upon First Amendment rights otherwise being validly asserted."[4]

This article will be separated into five sections: Section I will introduce the concept of government authority in restricting First Amendment rights. Section II will present a discussion of how the racial injustice associated with the death of both George Floyd ("Floyd") and

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[1] *Skop v. City of Atlanta*, 485 F.3d 1130, 1144 (11th Cir. 2007).

[2] *Keating v. City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010).

[3] *Toole v. City of Atlanta*, 798 Fed.App'x. 381, 387 (11th Cir. 2019).

[4] *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964).

Breonna Taylor ("Taylor") sparked widespread national protest demonstrations against police violence. Section III involves connecting the right to protest, protections against unlawful arrests and searches, and qualified immunity to unreasonable police conduct. Section IV analyzes the implication of the qualified immunity defense when police officers shoot and kill a person in the line of duty. In conclusion, Section V states that when police activity interferes with the First Amendment right to protest, the Fourth Amendment right to be protected against unreasonable searches and seizures ought to be triggered to combat against qualified privilege manipulation.

SECTION II: THE RACIAL INJUSTICE LINKED TO THE DEATHS OF BOTH GEORGE FLOYD AND BREONNA TAYLOR BECAUSE OF POLICE VIOLENCE RESULTED IN EXTENSIVE PROTEST DEMONSTRATIONS

Very often people exercise their right to peacefully protest in a public street, on a public sidewalk, or at a public park to express their strong rejection of the unreasonable conduct of either police brutality or police violence. Police brutality or police violence violates a person's civil rights each and every time law enforcement "officers exercise undue or excessive force against a person.[5] This includes but is not limited to bullying, physical or verbal harassment, physical or mental injury, property damage. . . and some cases, death."[6] As the number of fatal police shootings in the United States continues to rise, one may reasonably view these shootings as unreasonable acts of racial injustice where "the rate of fatal police shootings among Black Americans [is] much higher than that for any other ethnicity."[7] An act of racial injustice and police violence occurred when "[f]or 8 minutes and 46 seconds, Derek Chauvin pressed his knee into the neck of George Floyd, an unarmed Black man. This deadly use of force by the now-former Minneapolis police officer has reinvigorated a very public debate about police brutality and racism."[8] Not only did the clearly

[5] WIKIPEDIA, *Police brutality*, https://en.wikipedia.org/wiki/Police_brutality.
[6] *Id.*
[7] Statista, *People shot to death by U.S. police by race 2017-2021*, https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/.
[8] Lynne Peeples, *What the data say about police brutality and racial bias – and which reforms might work*, NATURE (Jun. 19, 2020), https://www.nature.com/articles/d41586-020-01846-z.

unreasonable use of deadly force by the police kill Floyd, but it also generated public debate and widespread protests about unreasonable use of deadly force by the police that caused Floyd's death.

UNFORTUNATELY, GEORGE FLOYD'S CASE IS NOT THE FIRST CASE TO PRODUCE WIDESPREAD PROTESTS RESULTING FROM AN UNREASONABLE DEATH OF AN AFRICAN AMERICAN WHILE IN POLICE CUSTODY.[9]

Significant protests occurred after the deaths of Tamir Rice, Michael Brown, and Eric Garner at the hands of deadly police violence.[10] "But this time seems different, with the response more sustained and widespread. There have been demonstrations across the US - in all 50 states and DC - including in cities and rural communities that are predominantly white. Local governments, sports and businesses appear readier to take a stand. . . ."[11] The Black Lives Matter protests following Floyd's death now appear to contain a greater degree of racial diversity, with protests consisting of a greater collection of white protesters and other ethnic groups supporting Black activists.[12]

Officer Chauvin kept his knee on Floyd's neck as a dying Floyd relentlessly told Chauvin "I can't breathe."[13] The deadly incident of police violence against Floyd was recorded on video and viewed by people around the world.[14] Frank Leon Roberts, an activist who teaches a course on the Black Lives Matter movement at New York University, asserted in many situations involving allegations of police violence, that there appears to be a plausible ambiguous narrative when the police officer claims that he had to make a split-second decision because he feared for his life.[15] Roberts said, "In this case, it was a completely unambiguous act of injustice - where people could see this man [Floyd] was completely unarmed and incapacitated."[16] The racial injustice associated with the death of Floyd as a result of police violence inspired many to become first-time protesters

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[9] Helier Cheung, *George Floyd death: Why US protests are so powerful this time*, BBC NEWS (Jun. 08, 2020), https://www.bbc.com/news/world-us-canada-52969905.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id.*
[16] Cheung, *supra* note 9.

because they said "seeing George Floyd's death made them feel that they simply couldn't stay at home anymore."[17]

ANGER REGARDING THE UNREASONABLE USE OF POLICE VIOLENCE IN THE KILLING OF BREONNA TAYLOR GENERATED ANXIOUS PROTEST DEMONSTRATIONS IN CITIES ACROSS THE COUNTRY, PARTICULARLY IN LOUISVILLE, KENTUCKY.[18]

Taylor, a Black medical worker, died in March of 2020 as a result of a police shooting wherein Louisville police officers conducted a bungled invasion of her apartment.[19] Because Taylor's death was caused by unreasonable police violence, many people were motivated to engage in wide-scale protest demonstrations during the spring and summer of 2020.[20] "A grand jury indicted a former Louisville police officer in late September for wanton endangerment for his actions during the raid … [however,]. . . no one was charged for causing Ms. Taylor's death."[21] As a result of the recent national protest demonstrations regarding police violence and systemic racism that started late in the spring of 2020, the city of Louisville abolished the use of no-knock warrants.[22] No-knock warrants allow police officers to use force when entering a person's home to search that person's home without first warning the person occupying the home.[23] It is my contention that no-knock warrants should be presumed to be an unconstitutional unreasonable search or seizure unless the warrant is necessary to protect either a police officer or another person from the imminent likelihood of serious bodily harm or death. I believe that no-knock warrants are never appropriate simply to seize illegal drugs or other disposable tangible property. The extreme risks associated with no-knock warrants unjustifiably endanger innocent lives.

Ms. Taylor's family is apparently using criminal charges against the police officers as a measuring stick for justice.[24] The city of Louisville has decided to settle the wrongful death claim filed by her mother for $12

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[17] *Id.*
[18] Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES, (Jan. 6, 2021), https://www.nytimes.com/article/breonna-taylor-police.html.
[19] Oppel Jr., et al., *supra* note 18.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

million and to establish improvements designed to stop future unreasonable police violence.[25] According to critics, progress in Ms. Taylor's case is very slow when it is compared to the Floyd case, wherein the officers were quickly discharged of their officer duties and charged with crimes.[26] One of the officers involved in Taylor's shooting death, Sergeant Mattingly, told ABC News and The Louisville Courier Journal that the Taylor case was *different* from those situations where the killing of Black people had motivated national protests.[27] According to Mattingly, the Taylor case ". . .[was] not relatable to a George Floyd. [It was] nothing like it. It [was] not an Ahmaud Arbery. It [was] nothing like it."[28] Mattingly further attempted to validate the conduct of the Louisville offers by stating that, "the Louisville officers were doing their job when they returned fire … '[t]his [was] not us going hunting somebody down, this [was] not kneeling on a neck.'"[29]

It appears that those protesters who demonstrated on the streets of Louisville and other U.S. cities on Thursday, September 23, 2020, believed that both the Floyd and Taylor killings represented racial injustice based on acts of police violence.[30] Protesters' public anger and sadness only increased after the announcement that *not a single* police officer faced any direct criminal charges in the shooting death of Ms. Taylor.[31] The city of Louisville experienced growing tension after peaceful protests turned violent when two police officers suffered injuries by way of gunshots fired at a protest.[32] Local officials had advised people to try to be peaceful while protesting. However, during the protest, police arrested several people, including Kentucky representative Attica Scott, a Democrat who believed Taylor deserves justice.[33] "At least 24 people were arrested throughout the

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[25] *Id.*
[26] Oppel Jr., et al., *supra* note 18.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Josh Wood et al., *Breonna Taylor Decision: Arrests as Protesters Take to Streets for Second Night*, THE GUARDIAN, (Sep. 25, 2020), https://www.theguardian.com/us-news/2020/sep/24/breonna-taylor-protests-louisville-grand-jury-decision.
[31] *Id.*
[32] *Id.*
[33] *Id.*

evening for charges including unlawful assembly, failure to disperse and riot in the first degree."[34]

There is no doubt that the protest demonstrations against police violence in the death of Ms. Taylor generated both significant national protest and interest.[35] "Hundreds of people also turned out again in New York, Philadelphia, St[.] Louis, Baltimore and elsewhere to mark the second night of largely peaceful action, with demonstrators chanting 'Say her name! Breonna Taylor!' and holding signs demanding justice."[36] Expressions of anger have been virtually nonstop nationwide because of a widespread perception of "a lack of justice for Taylor."[37] Furthermore, Democratic vice-presidential candidate, Kamala Harris, tweeted: "Tonight, I'm thinking of Breonna Taylor's family who is still grieving the loss of a daughter and sister. We must never stop speaking Breonna's name as we work to reform our justice system, including overhauling no-knock warrants."[38] Following this tweet, Democratic presidential candidate, Joe Biden tweeted: "Even amidst the profound grief & anger today's decision generated, violence is never & can never be the answer. Those who engage in it must be held accountable. Jill & I are keeping the officers shot tonight in Louisville in our prayers. We wish them both a swift & full recovery."[39] House Speaker Nancy Pelosi declared the lack of direct criminal charges for the death of Ms. Taylor was a denial of justice since Taylor was "murdered by the police."[40]

SECTION III. CONNECTING THE RIGHT TO PROTEST, PROTECTIONS AGAINST UNLAWFUL ARRESTS AND SEARCHES, AND QUALIFIED IMMUNITY TO UNREASONABLE POLICE CONDUCT

THE ROAD TO PROTESTING AGAINST RACIAL INJUSTICE STARTED IN THE 1960'S, WHEN THE SUPREME COURT BEGAN TO RECOGNIZE THAT PEOPLE HAVE A RIGHT TO ENGAGE IN AN ORGANIZED PROTEST AGAINST RACIAL INJUSTICE.

On December 14, 1961, 23 students from Southern University ("the University"), a Historically Black University, were arrested in downtown Baton Rouge, Louisiana for picketing stores that operated segregated lunch

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Wood et al., *supra* note 30.
[39] *Id.*
[40] *Id.*

counters.[41] Protesters in Louisiana were arrested in Baton Rouge for protesting the racial injustice of racial segregation in stores otherwise open to the public. The Congress of Racial Equality ("CORE"), a civil rights organization, sponsored and encouraged the boycotting of segregated stores, as part of a developing widespread protest movement challenging racial segregation.[42]

The Reverend, Mr. B. Elton Cox ("Cox"), a Field Secretary of CORE, served as an advisor to this protest movement.[43] On the evening of December 14, 1961, Ronnie Moore, student president of the local CORE chapter, spoke at a large gathering at the university.[44] In the course of this large gathering, students decided to demonstrate the next day in front of the courthouse in protest of both racial segregation and the arrest and imprisonment of the anti-segregation demonstrators who were being held in the parish jail, which was located in the courthouse.[45] Cox was convicted of violating a Louisiana "disturbing the peace" law, which stated: Whoever causes a breach of the peace "or congregates with others upon a public street, public sidewalk, or in public place and refuses to disperse and move on * * * when ordered … to by any law enforcement officer … , or any … authorized person * * * shall be guilty of disturbing the peace."[46] By convicting Cox under its breach of the peace statute, the state of Louisiana clearly interfered with Cox's rights of free speech and free assembly.[47]

Cox directed a group of young college students in a protest against segregation and racial discrimination experienced by African Americans and the arrest of 23 fellow students. The students assembled peaceably at the State Capitol and then proceeded to march down to the courthouse to sing, pray, and hear a speech. Sheriff Clemmons stated that the only part of the protest which he really opposed occurred when "Cox . . . told [the students] to 'go to four places on the protest list, sit down and if they don't feed you, sit there for one hour.' Yet this part of Cox's speech obviously did not deprive the demonstration of its protected character under the

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[41] *Cox v. State of La.*, 379 U.S. 536, 538; 85 S. Ct. 453, 455 (1965).
[42] *Id*. at 538-39.
[43] *Id*. at 539.
[44] *Id*.
[45] *Id*.
[46] *Id*. at 544 (citing LSA–Rev.Stat. § 14:103.1 (Cum.Supp.1962)).
[47] *Id*. at 545.

Constitution as free speech and assembly."[48] The Louisiana trial judge stated the reason for convicting Cox for disturbing the peace was based on his belief that it was inherently dangerous and a breach of the peace to bring 1,500 African Americans to the predominantly white business district in Baton Rouge and to allow those African Americans to assemble across the street from the courthouse and sing songs with the lyrics "black and white together" and to encourage 1,500 African Americans "to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace, and our statute 14:103.1 has made it so."[49]

Unlike the Louisiana trial court judge in *Cox v. State of La.*, Supreme Court Justice Goldberg's writing for the Court properly concluded "that constitutional rights may not be denied simply because of hostility to their assertion or exercise."[50] Under our Constitution, a person may not be punished simply for peacefully expressing an unpopular view about racial injustice.[51] One role for free speech in the American governmental scheme is to "invite dispute."[52] "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger … speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects."[53] The freedom of expression by means of a protest demonstration is by its very own nature provocative, and it ought to be protected against both censorship and punishment.[54] A failure to protect the right to protest would lead to governments or other dominant partisan groups controlling people's free thoughts.[55]

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[48] *Id*. at 550 (citing *Edwards v. S.C.*, 372 U.S. 229 (1963), *Cantwell v. State of Conn.*, 310 U.S. 296 (1940); *Thornhill v. State of Ala.*, 310 U.S. 88 (1940); *Garner v. State of La.*, 368 U.S. 157 (1961), (concurring opinion of Mr. Just. Harlan)).
[49] Cox*, supra* note 41, at 550.
[50] *Id*. at 551 (citing *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).
[51] *Id*.
[52] *Id*.
[53] *Id*. at 551-52
[54] *Id*. at 552.
[55] *Id*.

THE GOOD EFFECT OF PROTECTING THE RIGHT TO ENGAGE IN PROACTIVE PROTEST, AS ADVOCATED BY JUSTICE GOLDBERG IN THE *COX*[56] OPINION, WAS DEMONSTRATED ON DECEMBER 29, 2020, WHEN THE LOUISVILLE POLICE MOVED TO FIRE TWO POLICE OFFICERS IMPLICATED IN THE FATAL RAID ON BREONNA TAYLOR'S HOME.[57]

The Louisville Police Department's attempt to take any accountability for Taylor's heartbreaking death, in my opinion, would not have occurred without the widespread protests for racial justice that exploded throughout the country during the summer of 2020.[58] Detective Joshua Jaynes, who was responsible for obtaining the "no-knock" search warrant, received a pre-termination letter on December 29, 2020.[59] Jaynes's pre-termination letter accuses him of violating department policies about truthfulness and arranging for the execution of a warrant.[60] The Louisville Police Department is also taking steps to terminate Detective Myles Cosgrove, the officer who, according to an FBI ballistics report, fired the shot that killed Taylor.[61] Louisville interim police chief Yvette Gentry, wrote in the pre-termination letter that "Jaynes 'lied' in writing on the warrant application that he verified through a U.S. postal inspector that Taylor was receiving packages related to her ex-boyfriend's alleged drug activity."[63] In my view, without the Constitutional freedom to protest Taylor's death because of unreasonable police misconduct, the police killing of Taylor would have escaped any serious and accurate accountability for what occurred.

THE QUALIFIED IMMUNITY DOCTRINE IS DESIGNED TO SERVE AS A SHIELD OF PROTECTION FOR POLICE OFFICER CONDUCT, EXCEPT IN

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[56] *Id*.
[57] Marisa Iati, *Louisville Police Move to Fire Two More Officers Involved in Raid that Killed Breonna Taylor*, WASH. POST, (Dec. 30, 2020), https://www.washingtonpost.com/nation/2020/12/29/breonna-taylor-officers-fire/?wpmk=1&wpisrc=al_news__alert-national&utm_source=alert&utm_medium=email&utm.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[63] *Id.*

SITUATIONS WHERE A POLICE OFFICER ACTS OBVIOUSLY INCOMPETENT OR INTENTIONALLY DISREGARDS THE LAW.[64]

In *Toole v. City of Atlanta*, Aaron Zorn ("Zorn"), a sergeant in the Atlanta Police Department, was sued by Corey Toole ("Toole") for violating his First and Fourth Amendment rights. Toole's arrest for disorderly conduct during a protest march provides a good illustration of the intersection between the First and Fourth Amendments in cases involving allegations of police misconduct.[65] Before the Eleventh Circuit, Zorn explicitly challenged the federal district court's decision that he was not entitled to qualified immunity.[66] After reading the facts of the case in the light most favorable to Toole, the Eleventh Circuit affirmed the district court's decision and denied Zorn's challenge for qualified immunity.[67]

Toole was participating in a protest march on the streets of Atlanta because of a grand jury's decision not to indict the officer involved in the shooting death of Michael Brown in Ferguson, Missouri.[68] The Atlanta Police Department implemented a "leapfrogging" technique to block off the protesters' route and minimize the march's impact on city traffic.[69] Many of the protesters were peaceful, but some people engaged in violence and vandalism during the protest.[70] There was no evidence to suggest that Toole was involved in any of the unlawful violent conduct that took place by those who attempted to exploit an otherwise lawful peaceful protest demonstration.[71] The Atlanta Police Department directed protesters to disperse in fear that protesters may vandalize local businesses.[72]

After Toole heard officers telling people to get out of the street, he quickly obeyed the request by getting on the sidewalk.[73] Toole alleges that he heard some of the protesters express that the Atlanta Police Department was arresting people who were filming the protest demonstration.[74] Toole contends that Zorn removed him from the sidewalk and threw him to the

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[64] *Toole v. City of Atlanta*, 798 Fed. App'x at 385.
[65] *Id*. at 387.
[66] *Id*.
[67] *Id*. at 388.
[68] *Id.* at 383.
[69] *Id*.
[70] *Toole v. City of Atlanta*, 798 Fed. App'x at 383.
[71] *Id*.
[72] *Id*.
[73] *Id.*
[74] *Id*.

ground causing some injuries before Zorn cuffed Toole and escorted away from the scene..[75] Zorn, however, maintains that Toole was *not* on the sidewalk at the time of his arrest, but that he was located on the street.[76]

In the minutes or seconds prior to his arrest, Toole recorded a video of Atlanta police officers advising protesters to disperse.[77] Toole "zoomed in on an Officer Turner [and as] an officer beg[an] to grab [Toole], Toole can be heard in the video protesting that he was on the sidewalk."[78] Toole's videos fail to unambiguously demonstrate that he was on the sidewalk and not the street at the time of his arrest, but the videos do show "that he was seized after filming Officer Turner's name and face, and that he consistently contended that he had been on the sidewalk at the time of his arrest."[79] Zorn cited Toole for allegedly engaging in disorderly conduct under Atlanta City Ordinance § 106-81(9).[80] The citation issued by Zorn was eventually dismissed, and Toole was not prosecuted for any crime.[81]

The issue before the Eleventh Circuit on appeal was whether there was enough evidence to support the conclusion that Zorn violated Toole's First and Fourth Amendment rights under 42 U.S.C. § 1983.[82] Zorn moved for summary judgment on the First and Fourth Amendments claims based on the defense of qualified immunity.[83] The federal district court rejected Zorn's qualified immunity challenge to Toole's First and Fourth Amendment violation claims.[84] The district court held that Zorn's Fourth Amendment challenge was unacceptable because Zorn did not possess any actual or any arguable probable cause to arrest Toole.[85] Unequivocally, the district court held that "'it [was] impossible for Toole to impede traffic' at the time of his arrest, regardless of whether he had been standing on the sidewalk."[86] According to the federal district court, "logic dictate[d] that police cannot stop traffic—using patrol cars and barriers—to allow

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[75] *Id*.
[76] *Toole v. City of Atlanta*, 798 Fed. App'x at 383.
[77] *Id*.
[78] *Id*.
[79] *Id.*
[80] *Id*.
[81] *Id*. at 384.
[82] *Toole v. City of Atlanta*, 798 Fed. App'x at 384.
[83] *Id*.
[84] *Id.*
[85] *Id*.
[86] *Id.*

protestors to march in the street, and then arrest Toole for blocking traffic."[87] The evidence was unclear of whether Toole was located on the sidewalk or on the road at the time of his arrest.[88] Toole's unlawful arrest inhibited his right to participate in protected First Amendment speech— specifically, protesting and filming police activities.[89] Accordingly, the federal district court concluded Zorn violated Toole's clearly established First Amendment rights to protest and film police conduct.[90]

While addressing Zorn's unsuccessful qualified immunity defense, the federal appellate court said, "qualified immunity offers complete protection for individual public officials performing discretionary functions 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[91] The qualified immunity doctrine is designed to serve as a shield of protection to all except the obviously incompetent or those who intentionally disregard the law.[92] The Eleventh Circuit said it had a duty to determine whether Zorn was allowed qualified immunity after Zorn was charged with infringing upon Toole's First and Fourth Amendment rights.[93]

At the start of an analysis of qualified immunity, the question presented is whether Zorn "was acting within his discretionary authority."[94] Since Toole argues that Zorn was not acting within the scope of his discretionary authority, the burden of proof shifts to Toole as the plaintiff to demonstrate that Zorn is not eligible to receive qualified immunity.[95] During this two-step procedure, Toole must show: (1) "that the defendant's conduct violated a statutory or constitutional right" and (2) that this "violation was 'clearly established.'"[96] Toole asserts that Zorn infringed upon his clearly established rights under the Fourth and First Amendments.[97]

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[87] *Id*.
[88] *Toole v. City of Atlanta*, 798 Fed. App'x at 383.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 384-85 (citing *Sherrod v. Johnson*, 667 F.3d 1359, 1363 (11th Cir. 2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).
[92] *Id*. at 385.
[93] *Id*.
[94] *Id*. (quoting *Skop v. City of Atlanta*, 485 F.3d 1130, 1136 (11th Cir. 2007)).
[95] *Toole v. City of Atlanta*, 798 Fed. App'x at 385.
[96] *Id*.
[97] *Id*.

The Fourth Amendment gives a person the right to be free from "unreasonable searches and seizures."[98] An arrest is a "seizure of the person,"[99] …. and the 'reasonableness' of the arrest depends upon whether probable cause exists."[100] "Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime."[101]

An analysis of whether an officer has probable cause to arrest an individual is linked to both the elements of the alleged crime committed as well as the available facts.[102] Zorn claims that he had probable cause for a violation of Atlanta City Ordinance § 106-81(9). Accordingly, the analysis herein is appropriately limited to the elements of that ordinance.[103]

Atlanta City Ordinance § 106-81(9) provides that it is unlawful for an individual to "[s]tand or remain in or about any street, sidewalk, overpass or public way so as to impede the flow of vehicular or pedestrian traffic, and to fail to clear such street, sidewalk, overpass or public way after being ordered to do so by a police officer or other lawful authority."[104] However, the ordinance does not apply to a person who can "show that the predominant intent of such conduct was to exercise a constitutional right."[105] In this case, Officer Zorn claims that he possesses both actual and arguable "probable cause to believe that [Toole] stood and/or remained in the street in a way that impeded the flow of traffic and failed to clear the street after being given a lawful order to do so."[106]

At this stage in the litigation, where the arresting officer is requesting a summary judgment based on qualified immunity, the Court is required to interpret the facts in the light most favorable to the plaintiff, resolving all doubts in the plaintiff's favor.[107] In interpreting the facts herein in the light most favorable to Toole, the Court assumes that Toole followed police orders and got on the sidewalk, and thus *did not* violate Atlanta Police

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[98] *Id*. (citing U.S. CONST. amend. IV.).
[99] *Id*. (citing *Cal. v. Hodari D.*, 499 U.S. 621, 624 (1991) (citation omitted)).
[100] *Id*. at 385.
[101] *Toole v. City of Atlanta*, 798 Fed. App'x at 385. (citing *U.S. v. Floyd*, 281 F.3d 1346, 1348 (11th Cir. 2002) (quotation omitted)).
[102] *Id*. at 386 (citing *Crosby v. Monroe Cty.*, 394 F.3d 1328, 1333 (11th Cir. 2004)).
[103] *Id*. at 386.
[104] *Id*.
[105] *Id*.
[106] *Id*.
[107] *Id*.

Department orders to clear the streets when he was arrested.[108] The Court is also required to accept the allegation there was no traffic to impede at the time of Toole's arrest because the roads were closed (which Zorn concedes) and occupied by Atlanta Police Department officers.[109] Moreover, the primary purpose for Toole's attendance at the protest march was to express his First Amendment right to protest and film police behavior.[110] A demonstration of "arguable probable cause does not demand proving all elements of the crime."[111] Zion was unable to prove that any of the elements were met .[112]

In light of these facts and inferences, the Eleventh Circuit said it was required to conclude that Zorn failed to establish the needed probable cause to arrest Toole for blocking traffic in the street in violation of a lawful police order.[113] The Eleventh Circuit's holding serves as a clear example that any arrest compelled with no arguable probable cause disobeys the Fourth Amendment's ban on unreasonable searches and seizures.[114] No reasonable police officer would believe that probable cause existed to arrest Toole for standing in the street and blocking traffic, particularly when facts showed that Toole was on the sidewalk while the streets were closed to traffic.[117] Qualified immunity only offers police officers protection when the arguable probable cause standard is met.[118] When disputed critical facts exist about whether the officer's conduct met the arguable probable cause standard, summary judgment granting the police officer qualified immunity is inappropriate. Rather, that arrested protester is permitted to have his claim of police misconduct heard by a jury.[119]

Under the First Amendment, a police officer possessing arguable probable cause to arrest may plead the qualified immunity defense against claims for false arrest under the Fourth Amendment and claims stemming from the arrest under the First Amendment.[120] Since "Zorn did *not* have

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[108] *Toole v. City of Atlanta*, 798 Fed. App'x at 386.
[109] *Id*.
[110] *Id*.
[111] *Id*. (citing *Brown v. City of Huntsville*, 608 F.3d 724, 735 (11th Cir. 2010) (citation omitted)).
[112] *Id*. at 387.
[113] *Id*.
[114] *Id*. at 387.
[117] *Toole v. City of Atlanta*, 798 Fed. App'x at 387.
[118] *Id*.
[119] *Id*.
[120] *Id*. (citing *Gates v. Khokhar*, 884 F.3d 1290, 1298 (11th Cir. 2018)).

arguable probable cause to arrest Toole," Zorn was not automatically authorized to use the qualified immunity defense against Toole's First Amendment claim.[121] The Eleventh Circuit decisions have consistently recognized that people possess "a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct."[122] It is clearly established law in the Eleventh Circuit that during a protest involving a matter of public interest, the First Amendment guarantees the right to video record police conduct on public property. For almost 60 years, it has been established that police officers are prohibited from arresting a person in order "to thwart or intrude upon First Amendment rights otherwise being validly asserted."[123] Accordingly, as Zorn requested a summary judgment hearing based on the qualified immunity defense, the Court followed its duty to read the facts in plaintiff Toole's favor.[124] After reading the facts in Toole's favor, the Eleventh Circuit correctly concluded that Toole was involved in protected First Amendment expressive conduct when Zorn, without proper Constitutional, arrested Toole to keep him from filming police conduct on full public display.[125] Altogether, Zorn violated Toole's First Amendment right to film the protest.[126]

The Eleventh Circuit said that Toole's First Amendment right to protest was so plainly well-known and established at the time of his arrest that Zorn must be denied any qualified immunity regarding his violation of Toole's Fourth and First Amendments rights.[127] Qualified immunity is not available to police officers in three specific situations: (1) when a substantially comparable lawsuit was decided earlier and gave notice to the police to not infringe upon expressive protest activity;[128] (2) when clearly established legal principle control facts even in an uncommon situation; or (3) when a police officer's conduct very obviously violates a person's constitutional rights against unlawful arrest for involvement in a lawful, peaceful protest.[129]

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[121] *Id*.
[122] *Id*. (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000)).
[123] *Id*. (citing *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964)).
[124] *Toole v. City of Atlanta*, 798 Fed. App'x at 388.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id*.
[129] *Id*.

SECTION IV: THE IMPLICATION OF THE QUALIFIED IMMUNITY DEFENSE WHEN A POLICE SHOOTING RESULTS IN DEATH

IN THE 1985 CASE OF *TENNESSEE V. GARNER*,[130] THE COURT DECIDED THE CONSTITUTIONALITY OF THE USE OF DEADLY FORCE TO PREVENT THE ESCAPE OF AN APPARENTLY UNARMED SUSPECTED FELON.

In *Tennessee v. Garner*, the Court concluded that deadly force may not be used except when it is necessary to stop an escape, and the officer has probable cause to think that the suspect presents a substantial threat of death or serious physical injury to the police officer or others.[131] Around 10:45 p.m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright responded to a "prowler inside call" and noticed "a woman standing on her porch while pointing toward the house next-door" upon arrival at the scene.[132] The woman said that she heard glass breaking and thought "someone" was breaking into the house next door.[133] Thereafter, Officer Hymon saw someone fleeing run across the backyard. The fleeing suspect, decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard.[134] Officer Hymon was able to see Garner's face and hands, and saw no sign of a weapon and was "reasonably sure" Garner was unarmed.[135] Garner was at the fence when Officer Hymon called out "police, halt" and moved in Garner's direction.[136] As Garner attempted to climb over the fence, Officer Hymon shot and killed Garner, believing that if Garner made it over the fence, he would escape arrest.[137] The bullet struck Garner in the back of his head and was taken to a hospital, where he died on the operating table.[138] Ten dollars and a stolen purse were later located on Garner's body.[139]

Garner's father filed a claim in the federal district court seeking damages under 42 U.S.C. § 1983 for violating Garner's constitutional rights.[140] "The

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[130] *Tennessee v. Garner*, 105 S. Ct. 1694, 1697 (1985).
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Tennessee v. Garner*, 105 S. Ct. 1694, 1697 (1985).
[137] *Id*.
[138] *Id.*
[139] *Id*.
[140] *Id*. at 1698.

use of deadly force to [stop] the escape of all felony suspects [regardless of] the circumstances is unconstitutional because such an act is unreasonable."[141] "It is not better that all felony suspects die than that they escape…where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[142] A police officer is not allowed to seize an unarmed, non-dangerous suspect by shooting him dead.[143] The Tennessee statute is unconstitutional because it authorizes the use of deadly force against unarmed non-dangerous fleeing suspects.[144] When an officer has probable cause to believe that a suspect presents a threat of serious physical harm to the officer or to others it is constitutionally reasonable and permissible to stop a suspect's escape with deadly force.[145] For example, if the suspect threatens an officer with a weapon or there is probable cause to think that the suspect has committed a crime involving either actual or threaten serious physical harm, deadly force is permissible to stop an escape after an officer gives some reasonable warning.[146]

In 2020, a Texas federal district court took the position that Garner had been abrogated on the issue of qualified immunity that was no longer good law.[147] "In excessive force cases, federal courts once held that it was a violation of clearly established law to use deadly force on a suspect '[w]here the suspect poses no immediate threat to the officer and no threat to others.'"[148] According to the Texas federal district court, the Supreme Court's holding in *Mullenix,* and subsequent Fifth Circuit jurisprudence, the general test from *Garner* is no longer appropriate.[149] Assuming that the type of quick dismissal of qualified immunity defense grounded only on the general test articulated in *Garner* was ever good law, it is clearly no longer good law because *Mullenix* has described undue dependence on *Garne*r as a *mistake*. *Garner* and the jurisprudence following it "lay out excessive-force principles at only a general level.[150] The federal district court believes

[141] *Id*. at 1701.
[142] *Id*.
[143] *Tennessee v. Garner*, 105 S. Ct. 1694, 1701 (1985).
[144] *Id*. at 1696.
[145] *Id*.
[146] *Id*.
[147] *Pickett v. City of Perryton, Tex.*, 2:18-CV-75-Z-BP, 2020 WL 562672, at *6 (N.D. Tex. Feb. 4, 2020).
[148] *Id*. (citing *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).
[149] *Id*. (citing *See Mason v. Faul*, 929 F.3d 762, 766 n.1 (5th Cir. 2019)).
[150] *Id*. (citing *See White*, 137 S. Ct. at 552).

that *Garner* and *Graham* fail on their own to create clearly established law on the issue of qualified immunity, outside an obvious case where qualified immunity is not granted. This is very problematic since a very obvious case about whether to grant or deny qualified immunity is in the eye of the beholder.[151]

QUALIFIED IMMUNITY IS DESIGNED TO "ENSURE THAT 'INSUBSTANTIAL CLAIMS' AGAINST GOVERNMENT OFFICIALS BE RESOLVED PRIOR TO DISCOVERY."[152]

On June 2, 2015, law enforcement officers in Boston, Massachusetts, shot and killed Usaamah Abdullah Rahim.[153] Plaintiff, Rahimah Rahim, as the personal representative of Abdullah Rahim's estate, filed suit against the United States, FBI agent John Doe 1, and Boston police officer John Doe 2 (altogether "Defendants").[154] Defendants filed pre-discovery motions for summary judgment, insisting that the individual Defendants were protected by qualified immunity because Plaintiff could not show an unreasonable use of force.[155]

Qualified immunity is a strong remedy when a police officer can successfully raise it because it acts as an "immunity from suit, rather than a mere defense to liability."[156] The Supreme Court has consistently emphasized the significance of resolving immunity questions as soon as possible in litigation.[157] Usually, a motion for summary judgment is brought after the parties have completed discovery, alternatively, a court may dismiss a lawsuit before discovery with a summary judgment motion when a law enforcement officer is entitled to qualified immunity and there is no material issue of fact.[158] Qualified immunity is designed to "ensure that 'insubstantial claims' against government officials be resolved prior to

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[151] *Id*.
[152] *Est. of Rahim by Rahim v. U.S.,* 1:18-CV-11152-IT, 2020 WL 7055971, *1 (D. Mass. Dec. 2, 2020) (*U.S. Dist. Ct., D. Mass.)* (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2, (1987)).
[153] *Id.* at 5.
[154] *Id.* at 6.
[155] *Id.*
[156] *Id.* at 2 (U.S. Dist. Ct., D. Mass.) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).
[157] *Id.* at 2 (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).
[158] *Id.* at 2.

discovery."[159] Altogether, the qualified immunity defense is permitted on a motion to dismiss if the allegations in the complaint fail to state a credible claim for relief, or when a successful qualified immunity defense may avoid discovery completely.[160]

When the allegations of the complaint are accepted as true and raise a plausible claim for relief, the qualified immunity defense may be raised during a motion for summary judgment.[161] According to Federal Rule of Civil Procedure Rule 56, summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[162] Under the Supreme Court's holding in *Bivens,* a plaintiff has an implied cause of action for constitutional infringements caused by federal officials.[163] A *Bivens* claim is similar to one brought against state officials under 42 U.S.C. 1983.[164] Plaintiff's *Bivens* claim alleged that John Doe 1 and John Doe 2 violated the Fourth Amendment by using excessive force to detain Abdullah Rahim.[165] "A claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's 'reasonableness' standard."[166] Plaintiffs did not have the opportunity to cross-examine the witnesses on whose testimony the Defendants rely, and discovery had not been allowed that may reveal facts bearing on the reasonableness of Defendants' conduct under the totality of the circumstances.[167]

The Court held that Defendants failed to meet the burden of proof to show the lack of any genuine issues of material fact regarding whether Defendants infringed upon Abdullah Rahim's constitutional right to be free from an unreasonable seizure.[168] The Court has found the facts on summary judgment insufficient to adequately decide accurately the nature of the law

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[159] *Est. of Rahim by Rahim v. U.S.,* 1:18-CV-11152-IT, 2020 WL 7055971, *1 (D. Mass. Dec. 2, 2020) (*U.S. Dist. Ct., D. Mass.)* (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2, (1987)).
[160] *Id.* (citing *See Ashcroft v. Iqbal*, 556 U.S. 662, 684-85 (2009)).
[161] *Id.*
[162] *Id.* (citing FED. R. CIV. P. 56(a)).
[163] *Id.* at 6.
[164] *Id.* (citing *See Soto Torres v. Fraticelli*, 654 F.3d 153, 158 (1st Cir. 2011)).
[165] *Id.* at 6.
[166] *Est. of Rahim by Rahim v. U.S.,* 1:18-CV-11152-IT, 2020 WL 7055971, *1 (D. Mass. Dec. 2, 2020) (*U.S. Dist. Ct., D. Mass.)* (citing *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014)).
[167] *Id.* at 8.
[168] *Id.* (citing *Celotex Corp*, 477 U.S. 319, 322 (1986)).

enforcement conduct, let alone whether that law enforcement conduct violated Abdullah Rahim's constitutional rights. The Court cannot fairly decide the qualified immunity defense issue.[169] Under the circumstances of this case, summary judgment was premature. Defendants may reintroduce their motions once Plaintiff has been presented with an adequate opportunity to engage in limited discovery that is narrowly tailored to find facts that the Court requires in order to rule on the issue of qualified immunity for law enforcement officials.[170]

SECTION V: CONCLUSION

A police activity interfering with the First Amendment right to protest against police and violations of the Fourth Amendment right to be protected against unreasonable searches and seizures ought to be protected against qualified privilege manipulation. In order to discourage qualified privilege manipulation in excessive force cases, the federal courts ought to continue to hold, as a matter of sound public policy, that it is a violation of clearly established law to use deadly force on a suspect when the suspect poses no immediate threat to the police officer or anyone else.

[169] *Id.* at 9. (citing *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014)).
[170] *Id.*