Undergraduate Law Review At Auburn University

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OUR MISSION

The Undergraduate Law Review at Auburn University strives to foster intellectual curiosity, critical thinking, and scholarly discourse among Auburn students interested in the field of law. We aim to provide a platform for aspiring law students to engage in legal research and writing while contributing to meaningful scholarship.

We are committed to promoting diversity, equity, and inclusion within our publication, ensuring that a wide range of perspectives and voices are represented. Through our editorial process, we aim to uphold the highest standards of academic integrity and excellence, while also providing valuable opportunities for students to gain practical experience in legal research, writing, and editing.

Furthermore, we seek to serve as a bridge between undergraduate students and the broader legal community, fostering connections and collaborations that enrich both academic and professional development.

In pursuit of these goals, the Undergraduate Law Review at Auburn University is dedicated to publishing high-quality, thought-provoking pieces that advance understanding of the law and its impact on society.

Letter from the Editor

Dear Reader,

I am honored to present you with the second ever issue of the Undergraduate Law Review at Auburn University. As the Editor-in-Chief, I would like to extend my sincerest thank you for your support as we continue to expand academic opportunities for the undergraduate pre-law community.

Our Law Review focuses on compelling legal issues as well as topics which our pre-law students regularly face in classroom discussions. Students are encouraged to to focus on major issues facing the law and the legal profession of their interest in addition to encouraging a scholarly debate on topics pertaining to current or historical issues.

I cannot thank enough my managing editor, Grace Crim, and all of our executive and associate editors for diligently working this semester. I would also like to express my appreciation to the faculty and staff who have continued to support our growth, especially to Dr. Liberman, Dr. Clary, and Mr. Walker who so graciously wrote for this issue. Further, our review would not continue to flourish without the help of our faculty advisor Dr. Steven Brown. Lastly, to our authors, this publication would not be possible without your contributions.

We hope that this publication will spark scholarly discussions and expand the outreach of the knowledge of our community. We aspire to continue to expand our authors and subject matter with each publication. I hope to continue to see our platform grow and I encourage you to get involved.

Sincerely,

Izzy Johnson
Editor in Chief
Undergraduate Law Review at Auburn University


LAW REVIEW

City of Grants Pass, Oregon
v.
Johnson

Authored by
Lily Cobine and Kyra Kervick

Statement of the Facts

City of Grants Pass, Oregon v. Johnson presents city ordinances that restrict the "involuntarily homeless" class of individuals living within the city limits. The City of Grants Pass has a population of about thirty-eight thousand, including upwards of six hundred homeless people. Involuntary homelessness is defined as the unavoidable consequences of a person's status or having no consistent access to options for shelter. The City of Grants Pass initiated five ordinance regulations that aim to address City Park homelessness on the basis of criminal trespass. The first ordinance is the "anti-sleeping" ordinance that prohibits sleeping on sidewalks, streets, alleys, or within doorways. City of Grants Pass, Oregon v. Johnson, 72 F.4th 868, 876 (9th Cir. 2023). The second ordinance is the "anti-camping" ordinance that prohibits individuals from making a "campsite," on public property. *Id.* A campsite is defined as any place where bedding, a stove, or fire is established or maintained for living ordinances that overlap with two parking-related directives that restrict overnight parking in public parks and parking in lots for longer than two hours from 12:00 am to 6:00 am. *Id.* The "park exclusion" ordinance allows police officers to ban individuals from public parks for thirty days if they have had two or more citations within a year regarding park regulations, and the other ordinances. *Id.* The "park exclusion appeals" ordinance allowed individuals to appeal to the City Council but if found in City Park they would be prosecuted for criminal trespass. The strict enforcement of these ordinances on the homeless class of individuals led to a challenge in the U.S. District Court. When the ordinances were challenged, the U.S. District Court held that the ordinances violated the Eighth Amendment's ban on cruel and unusual punishment. This decision was brought up on appeal in the Ninth Circuit which upheld the judgement that the ordinances violated an individual's rights protected under the Eighth Amendment. On January 12th, 2024, the Supreme Court granted certiorari to the case.

Constitutional Question

1. Whether the enforcement of generally applicable laws regulating camping on public property constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment.

Argument

In the case of *City of Grants Pass v. Johnson*, there is no specification regarding how the solutions affect the involuntary status of the homeless population. The ordinances that are being constitutionally questioned were created to discriminate through a façade of betterment to the city's streets and community. This is a case of broad stereotyping of a specific class of unprotected individuals. This is not an ordinance aimed at finding a solution to homelessness, instead, it is a punitive goal of removing their presence from the City of Grants Pass.

The punishment clause was established by *Robinson v. California* which prohibited the discrimination of a class of people solely based on their status. *Robinson v. California*, 370 U.S. 660 (1962). Robinson refers to the status of being a drug addict rather than the drug abuse that occurred. As applied in *Johnson*, the status of homelessness is questioned when being stripped of resources normally allocated to this class of people. The resources being stripped are ones that prevent illness and disease in individuals, and by criminalizing these resources, Grants Pass is punishing based on what is exhibited rather than what is considered a crime. The Eighth Amendment's excessive fine clause prohibits the enforcement of excessive punishment without due reasoning and remedial purpose. The City of Grants Pass enforced the ordinances in question to "clean up the streets" of Oregon and push out a protected class of United States and Oregon citizens. The City Council President stated, "to make it uncomfortable enough for homeless persons in our city so they will want to move on down the road." Brief for Johnson as Amicus Curiae p.5, *City of Grants Pass, Oregon v. Johnson*, 72 F.4th 868 (11th Cir. 2023).

Manning v. Caldwell for City of Roanoke addressed the difference between possession and status associated with possession regarding alcohol. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019). Criminal sanctions can only be applied with direct possession to properly protect an individual's status as a citizen. The use of the term "habitual drunkards" targeted this specific group for their involuntary illness which would be lawful if it did not coincide with the homeless individuals in Virginia who had alcoholism. In *Johnson*, the act of being homeless rather than the ordinance guidelines regulating blanket use, sleep, and public campsites is what is being criminalized. *Manning* held that it was cruel and unusual punishment to target a specific group who are only defined as that class involuntarily. A homeless person's citizenship rights are directly infringed on because due to their involuntary status, they must break at least one of these ordinances to survive in the city of Grants Pass. The prohibition of camping materials causes a direct impact on homeless individuals with involuntary status as they are forbidden from the minimal measures needed to remain warm, dry, and protected. *City of Grants Pass*, 891.

The lack of minimal measures afforded to this class of individuals brings into consideration governmental neglect and the duty to protect its citizens. In *DeShaney v. Winnebago County of Social Services*, the Supreme Court upheld the DeShaney Doctrine that stated so long as the state created the danger, it can be held liable for failing to protect the individual. *DeShaney v. Winnebago County of Social Services*, 489 U.S. 189 (1989). The DeShaney Doctrine introduced the expectation of general responsibility of its citizens without direct liability. While this case addressed the duty to a child in danger of abuse and the duty to provide adequate protection, the Grants Pass ordinances go against their duty to protect a different class of individuals. *DeShaney,* 194.

In *Johnson*, the enforcement of deprivation to the homeless class violates the general

responsibility of a city to protect its citizens. The fines forced onto individuals for protecting themselves from harsh Oregon weather elements criminalize these individuals and hinder their ability to rehabilitate into working society. In the City of Grants Pass between November and February, the maximum temperature reaches fifty-four degrees Fahrenheit. There is a reasonable belief that the natural conditions of the state of Oregon are known and there is deliberate enforcement against the opportunity for individuals to protect themselves against those conditions in the City of Grants Pass.

In the case of *Helling v. McKinney*, governmental deliberate indifference towards exposure as a result of smoking in public prison facilities violates the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25 (1993). In *McKinney*, they included that "an injunction cannot be denied to inmates who plainly prove an unsafe, life-threatening condition on the ground that nothing yet has happened to them." *Hutto v. Finney*, 437 U.S. 678, 682 (1978). In the City of Grants Pass, there is a deliberate indifference to the imminent and future health risks that come from sleep deprivation, improper weather protection, and lack of options for a safe place to reside. These risks occur in public parks funded and maintained by local government. They are deliberately ignored without recognition of the risk of exposure or regard for the individuals as citizens of the state. There are multitudes of risks that come from increased exposure to elements and by making it illegal for the homeless class to protect themselves against natural elements the city is rendering this class of individuals incapable of caring for themselves.

The DeShaney Doctrine defines this deprivation as neglect instead of undertaking the duty of protection for an individual or class of people. *DeShaney*, 201. The responsibility for an entire class of citizens is based on one trait and, in the case of *Johnson*, it is the fact that they are involuntarily homeless. The Ninth Circuit opinion recognized that the city has no obligation to make homeless individuals comfortable, but in *Rhodes v. Chapman* the Court held that a

government cannot take away necessary materials for survival. *Rhodes v. Chapman*, 452 U.S. 337 (1981). The ordinance enacted by the City of Grants Pass deliberately deprives individuals of these necessary materials for basic survival and well-being.

On the surface, the City of Grants Pass ordinances are based on the objective idea of regulating the use of public places and facilities. However, in application, the ordinances have subjected a singular class of individuals to unfair and unusual hardship based solely on their status as homeless. The targeting that occurred because of the ordinances resulted in the "unnecessary and wantonly infliction of pain on individuals." *Rhodes*, 337. Therefore, the ordinances are no longer objective and violate the Eighth Amendment. The City of Grants Pass is not required to provide materials for the homeless class of individuals, but withdrawing the option to use materials violates the personal autonomy granted to an individual as a United States citizen as well as the fundamental right to not be subjected to cruel and unusual punishment.

The Search and Seizure Clause of the Fourth Amendment protects an individual from unreasonable search and seizure; it is not a guaranteed protection but protects those treated unreasonably under the law. There is a plausible extension of this amendment in the case of *Johnson*, as it is unreasonable to punish the homeless class for their only form of protection against harsh weather conditions. The Supreme Court stated in *Minnesota v. Olson*, that Fourth Amendment protections are afforded to a person who resides in temporary housing as an expectation of privacy is still afforded without legal interest or authority present. *Minnesota v. Olson*, 495 U.S. 91 (1990). The involuntary homeless class that is being targeted through the local ordinances does not have a traditional domicile that would be seen as a place with a reasonable expectation of privacy. However, society recognizes a homeless person's property as their own. Therefore, there is a subjective expectation that a homeless individual's property is private, even though it is an unconventional view of what is fundamentally private.

The anti-camping ordinance limits an option to an unmanageable extent. Based on the current vacancy rate in Grants Pass of one percent there is almost no affordable housing for the over six hundred homeless individuals living within the city. This statistic does not include the "precariously housed" that are also affected by the Grants Pass ordinances, which is believed to be over one thousand individuals. Brief for Johnson as Amicus Curiae p.2, *City of Grants Pass, Oregon v. Johnson*, 72 F.4th 868 (11th Cir. 2023). The ordinances that criminalize protective behaviors and property violate the fundamental right to protect oneself from unreasonable punishment and treatment. In the case of *State v. Mooney*, the court held an individual has an inherent right to privacy regarding a duffle bag and box as it was reasonable for him to expect a level of privacy regarding his personal belongings. *United States v. Mooney*, 116 U.S. 104 (1885). Even if found in public places it is reasonably assumed to be private property. Regarding Grants Pass, there is now an unreasonable belief that private belongings and property should not be afforded this protection solely as the involuntary homeless class resides in public places. However, this belief and restriction is not shared across state borders nor accepted under the Eighth Amendment.

The City of Grants Pass currently has one "warming station" that they believe provides protection but was not offered through city government, instead funded, and operated by a nonprofit organization. This warming station, which was originally intended to provide a shelter to those who are involuntarily homeless in harsh weather conditions, fails to provide enough room for all individuals fighting the elements. The warming center is only capable of housing forty individuals at a time, with no beds or places to sleep. In addition, it was not open and operating during the winter months of 2020 and 2021. Brief for Johnson as Amicus Curiae p.5, *City of Grants Pass, Oregon v. Johnson*, 72 F.4th 868 (11th Cir. 2023). The Court has recognized that "warmth" is a basic human need in *Wilson v. Seiter,* and Grants Pass is indirectly denying

this basic human need by potential relocation and other punitive measures. *Wilson v. Seiter*, 501 U.S. 294 (1991).

There is an unavoidable human need to sleep, and Grants Pass is currently punishing this basic need by either prosecuting this specific class or providing lackluster alternatives that cannot accommodate every individual in need of public assistance. This is just one example of the lack of opportunities and resources available to this specific population and why criminalizing their most dependable options of using camping equipment or temporary bedding and shelter wherever they can find it, is cruel and unusual.

A first-time offender of the anti-camping ordinance receives a fine of up to $295, and if this is left unpaid the fine amount rises to $537. *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2022). The fines fail to accurately reflect the current wages of the involuntary homeless class. These fines are heavy and restrictive for anyone found in violation of the ordinances. Grants Pass stacks fine amounts to the point of debilitating individuals who already are struggling to remain safe in their city and diminishes the opportunities for these individuals to rehabilitate into working society. The Excessive Fines Clause, found in the Eighth Amendment, prohibits unreasonable fines imposed on US citizens. Grants Pass is directly violating this clause by providing no reasonable purpose to large fines outside of exterminating the homeless problem from their city. This further proves that the city is punishing the status of being homeless rather than the actual act of using public property to rest.

The punishments for violating these ordinances do not stop at fines, as an officer can ban an individual from a park following failure or inability to pay the large fines. This can easily morph into jail sentences due to someone's inability to pay. The Grants Pass Municipal Code states that if a person has twice been cited for violating park regulation, city officers can issue an exclusion order barring an individual from entering a park for thirty days. This is thirty days

where an individual is limited, even more than they are already, regarding safety in the city of Grants Pass. The exclusion order is a form of banishment through removing them from a place to take refuge, which is only precipitated through an unreasonable punishment in the form of fines.

According to the Supreme Court in the case of *Trop v. Dulles*, banishment is a form of cruel and unusual punishment that cannot be imposed for even extreme serious offenses. *Trop v. Dulles,* 356 U.S. 86, 103 (1958). Sleeping on a park bench with a blanket to stay warm on a cold November night, is neither extreme nor serious but is still being punished as such. In this case, the Supreme Court held that any technique of punishment outside of prison, execution, and fines is constitutionally suspect under the Eighth Amendment. *Dulles*, 100. Punishing homelessness through fines first would be constitutionally permissible if it did not have a second tier to the type of punishment that occurs. The park exclusion ordinance allows for a police officer to prohibit an individual from entering a public park and, for this specific class, stripping a homeless individual of their status in society. This is defined as a stripping of an individual's rights because the involuntary homeless class relies heavily on sanctuary in public places when there are no other options. An officer banning a member of this class is exhibiting an act of banishment which was ruled unconstitutional in *Dulles*.

According to the Constitution, there must be substantive limits on what can be made punishable by law. The substantive limits were clearly defined by the Supreme Court in *Ingraham v. Wright*. This case held that corporal punishment must match the crime to be reasonably enforced and punishment must be regulated through plain language on what is allowed or not allowed to be enforced by state or federal government. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). Grants Pass is enforcing unduly restrictive ordinances on its citizens in violation of the substantive limits established by the Supreme Court. The Grants Pass ordinances do not account for the involuntary status of individuals nor recognize the future effects of

withdrawal of resources from their persons.

The ordinance fines and the direct consequences of enforcement do not match the act that is put into question regarding the public safety of citizens. In the opinion of *Graham v. Florida*, the Supreme Court stated that "the City's ordinances inflict overly harsh punishments for wholly innocent, universally unavoidable behavior." When assessing whether a given punishment is "unconstitutionally excessive," courts compare "the gravity of the offense and the severity of the sentence." *Graham v. Florida*, 560 U.S. 48, 59-60 (2010). The ordinances fail to include the involuntary homeless class as a class of citizens and therefore excessively punish them outside the bounds of their responsibilities. Hence the ordinances in Grants Pass do not protect the innocent but instead target an unprotected population that has the unavoidable status of homelessness and, therefore, the city is violating the Eighth Amendment by continuing to enforce them.

The city ordinances are depriving the homeless class of their ability to care for themselves regarding basic health and safety needs. The indirect result of the expectations placed because of their strict anti-camping, anti-sleeping, and park exclusion ordinances is an entire class of citizens left unprotected, vulnerable, and mistreated in their city. Grants Pass' lack of decency and evaluation of what society finds acceptable behavior is shown through the enforcement of the ordinances in question.

In the case of *Weems v. United States*, the Court held that the Eighth Amendment is overly broad and therefore the scope has to be willing to widen in order to accommodate the changing standards in society. *Weems v. United States*, 217 U.S. 349 (1910). This case accommodates current times and programs and has evolved throughout societal development. In current society, this is applicable in regard to healthcare, public welfare, and social welfare programs. Grants Pass has failed to apply tangible programs and benefits for all of its citizens

and therefore does not accommodate the widened scope of the Eighth Amendment.

The fines in place are not in an effort for rehabilitation, they are an effort to push the involuntary homeless farther down the social ladder in order to improve the appearance of the city at large. In *Shapiro v. Thompson*, the majority held that preventing "needy persons" from entering the state is not constitutionally allowed nor can you distinguish classes of people based on tax contributions. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). Grants Pass is not preventing the homeless class from being in their city, but they are preventing them from protection and equal access to governmental resources. The ordinances in place limit where involuntary homeless individuals can go and what they can do within their own city. They are not being equally protected by the government by limiting their ability to survive and therefore committing cruel and unusual punishment.

The Grants Pass ordinances currently only apply within the city limits, however, if deemed constitutional, it will have a nationwide effect on society. The ordinances do not currently fix the homeless problem nor give resources to those living in extreme poverty like the involuntary class. There are rudimentary protections that are being put into question across the nation. There is a severe discrepancy between the number of unhoused individuals and shelter beds nationwide. If ordinances similar to the City of Grants Pass are allowed, these shelters will be overrun in cities that want to continue to protect those rudimentary protections not valued in places such as Grants Pass. This city has criminalized the homeless class and will subsequently force other cities to decide whether to criminalize their citizens or have an influx of homeless individuals with no real support system to provide adequate services to everyone.

There are checks in place on what a government can criminalize to provide a sufficient system for all citizens in the United States. The City of Grants Pass established five ordinances to discourage people from sleeping or living on the streets. The goal of these ordinances is

excessive punishment and removal of an entire class solely based on their involuntary status. These ordinances do not perpetuate a goal of rehabilitation and deterrence of dangerous activity in their city. The lack of boundaries that these ordinances set goes further than the government's purpose to protect and serve its citizens and fails to place the necessary checks and balances on the local government. The potential ruling of this case will put into question what the criminal justice system is designed to do and what equates a crime during a time of mass incarceration, extreme poverty, and a mental health crisis in this country.

Grants Pass does not want a solution for the violence in their city, they want an enhanced image to the people outside of their city. The ordinances fail to accommodate the many marginalized groups of people affected by the heavy fines and removal enforcements. The unhoused population is already limited in their options for survival and does not have the governmental support to enroll in programs, systems, or benefits. The added pressure as a result of the ordinances creates undue stress and turmoil amongst an already struggling class of people. This turmoil is cruel and unusual as it serves no reasonable purpose for societal growth outside of subjecting a singular group to more punishment and condescension from the government that is meant to support them. The ordinances invade this class of people’s fundamental rights to fair treatment and privacy regarding their property and basic human needs.

Conclusion

Grants Pass passed five ordinances in an attempt to punish the involuntary status of homeless individuals within the city. There is a punishment being enforced solely based on status that goes beyond what is rendered acceptable punishment for a crime. The ordinances violate the search and seizure clause of the Fourth Amendment by failing to recognize individual property as private property. Grants Pass has a general responsibility to protect all of its citizens and they are failing to do that by criminalizing the resources this class needs to survive. This is a case of

basic human needs that are not being valued and, as a result, rendering a class of individuals incapable of caring for themselves. The Eighth Amendment affords every United States citizen the fundamental right to fair treatment that is neither cruel nor unusual and Grants Pass is directly violating this right. In the case of *City of Grants Pass v. Johnson*, the involuntary homeless class is being directly discriminated against with no reasonable purpose other than removing the class from city limits. The Eighth Amendment was created broadly in order to grow with society and the changing definition of what fair treatment is and what constitutes cruelty. Grants Pass is excessively fining and punishing a group of individuals that should be protected by the government, without regard to the risk of criminalizing the status of an entire class of individuals. The City of Grants Pass has violated the Eighth Amendment's Cruel and Unusual Punishment Clause by enforcing the five ordinances against homeless people in city limits. **WHEREFORE, PREMISES CONSIDERED,** the plaintiffs pray this Honorable Court affirms the trial court's ruling.

Glossip
v.
Oklahoma

Authored by
Emily Miller

I

Barry Van Treese owned two Best Budget Inns, one in Tulsa and the other in Oklahoma City. At the Oklahoma City location, the appellant, Richard Eugene Glossip, worked as a manager. On January 6th, 1997, Mr. Van Treese, alongside his wife, Donna Van Treese, reviewed the financial records of the Oklahoma City hotel for the fiscal year of 1996 and discovered shortages amounting to $6,101.92. Following this, Mrs. Van Treese' testified that Mr. Van Treese left for the Oklahoma City location to speak to Glossip about the shortages. Mr. Van Treese arrived at the Best Budget Inn at approximately 5:30 p.m. Billye Hooper, the day desk clerk at the Oklahoma City location, reported Mr. Van Treese left for the Tulsa location at approximately 8:00 p.m. - 9:00 p.m. In Tulsa, the manager of the hotel, William Bender, confirmed with Mr. Van Treese that the inconsistencies within the Oklahoma City records pointed towards Glossip's culpability. Bender testified that Mr. Van Treese told him that Glossip had until he reached the hotel to supply missing receipts and another week to set straight the other inconsistencies.

At approximately 3:00 a.m. the next morning, Glossip approached Justin Sneed, an employee who provided maintenance work for the hotel in exchange for room and board. Sneed testified at trial that Glossip asked Sneed to kill Mr. Van Treese in exchange for the sum of ten-thousand dollars. Glossip instructed Sneed to bludgeon Mr. Van Treese in his room with a baseball bat and, afterwards, leave his car parked in a nearby parking lot. After employees spotted Mr. Van Treese's car in the parking lot, they contacted the police about his disappearance. When asked about Mr. Van Treese's whereabouts, Glossip claimed that he went out to get supplies for repairs. Cliff Everhart, a security worker at the hotel, and Oklahoma City Police Sgt. Tim Brown decided to search the hotel for Mr. Van Treese, and at approximately 10:00 p.m., Mr. Van Treese's body was discovered in room 102.

On January 27, 2023, twenty-two years after the state sentenced Glossip to death for the murder of Mr. Van Treese, the Attorney General of Oklahoma turned over an eighth box of prosecutor notes to Glossip's defense team, which they believed contained potentially exculpatory evidence. Glossip discovered through these documents, allegedly for the first time, that during his original trial for murder, Justin Sneed was under the care of a psychiatrist for bipolar disorder, which he falsely testified he was not. Glossip made his fifth and current appeal based on the evidence he found in this box.

Following four subsequent appeals on various issues, Glossip petitioned this Court to consider questions pertaining to the prosecution's suppression of evidence in the original trial. We granted certiorari to determine four propositions raised by Glossip: whether the state suppressed the key witness' admission that he was under the care of a psychiatrist and failed to correct the witness' false testimony about that care and related diagnosis, violating the due process of law under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959); whether the Court must consider all the suppressed evidence when asserting the materiality of *Brady* and *Napue* claims; whether due process of law requires reversal where a capital conviction becomes so infected with errors that the state no longer seeks to defend it; and whether the Oklahoma Court of Criminal Appeals' ruling that the Oklahoma Post Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

II

It is the opinion of this Court that the suppressed evidence violated the due process of law under *Brady* and *Napue*. The prosecution's failure to supply the defense with knowledge of evidence that is material to a case is barred under *Brady*. The lower court reasoned that because the omission of evidence was unlikely to sway a jury regarding Glossip's factual

innocence, the suppression of the evidence was by definition incapable of being material. *Glossip v. State*, 529 P.3d 218 (2023). However, this Court is clear in *Brady* that, "[a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." *Brady v. Maryland*, 373 U. S. 83, 88 (1963). Therefore, it is not only the likelihood of a difference in the determination of the defendant's factual innocence that establishes materiality, but also whether the punishment or penalty of the defendant would have differed had the evidence in question been made available. Furthermore, the suppression of evidence created a *Napue* violation. The lower court held that the state did not commit such a violation because, "[d]efense counsel was aware or should have been aware that Sneed was taking lithium at the time of trial," and that, "[t]his fact was not knowingly concealed by the prosecution." *Glossip*, 226. However, the claim that the prosecution had no obligation to correct Sneed's false testimony because the defense "should have been aware" does not meet the criteria presented in *Napue*. The Court stated in *Napue* that, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," and, "[t]he same result [occurs] when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 269.Thus, regardless of whether the defense knew or should have known that Sneed's testimony was false, the state had an obligation to correct Sneed's false testimony at the time of the trial, which they failed to do. The lower court also ruled that, "[t]he evidence of factual innocence must be more than that which merely tends to discredit or impeach a witness." *Glossip*, 225. *Napue* provides that, "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility

of the witness." The Court further delineates, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 269. Thus, while impeaching a witness's credibility may be a "subtle factor" in the grand scheme of the evidence presented at trial, it does not mean that it is not an incredibly influential factor to a jury. One cannot logically conclude that the jury would have been indifferent to the fact that Sneed was untruthful in his testimony when deliberating.

III

In regard to the suppressed evidence presented by Glossip in his appeal, it is necessary to evaluate all items in their entirety, particularly for their cumulative effect. In *Bagley*, the Court held that determining the evidence's materiality depends on the concept of its "reasonable probability." *U.S. v. Bagley*, 473 U.S. 667 (1985). Justice O'Connor defined the concept as, "a probability sufficient to undermine confidence in the outcome," and that, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at 682. When considering the suppressed evidence in this case, reasonable probability cannot be fully ascertained unless viewed through a holistic lens. The question of whether Glossip was denied a fair trial depends on the effect of the totality of the suppressed evidence. The Court expresses the evidentiary effect in *Kyles*:

> [T]he state's obligation under *Brady v. Maryland*, 373 U.S. 83, 83 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government. Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial.

Kyles v. Whitley, 514 U.S. 419 (1995).

Therefore, to determine the "reasonable probability" that Glossip's case would have had a different outcome, we must base the determination on the entirety of the evidence's net cumulative effect on the case, rather than evaluate each piece of evidence individually for materiality.

IV

In addressing petitioner's third question, the fact that a state no longer seeks to defend a case due to the number of cumulative errors that exist therein is not in itself a sufficient reason to warrant reversal. The sheer number of errors in a case is not what creates a question of its fairness but rather the effect of such errors. Additionally, a reversal in this case could only come about from a discretionary decision as this Court has held in *Dominguez Benitez* that it is, "only for certain structural errors undermining the fairness of a criminal proceeding as a whole" that requires reversal. *United States v. Dominguez Benitez,* 542 U.S. 74 (2004). Requiring reversal based solely on the number of errors, fails to take into account the distinctions among harmless, plain, and structural errors. The reason structural errors meet the requirement for reversal without having to determine prejudice is because the court has found "the effects of the error are simply too hard to measure." *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017). In other words, while the error is undoubtedly harmful, there is no clear metric to quantify the extent of the damage. Furthermore, in order to issue a reversal based on cumulative errors, the errors would also have to be preserved. The very errors claimed to provide evidence of the need for reversal by the appellant have never been established, and or affirmed, in any of his previous appeals. For such a reason, this Court denies the necessity of reversal.

In response to appellant's jurisdictional challenge in this case, it is evident that the Oklahoma Post-Conviction Procedure Act does not satisfy the requirements of both adequate and

independent state grounds. The Court first determined the standard of adequate and independent state grounds with its decision in *Murdock*:

> (1) That it is essential to the jurisdiction of this court over the judgment of a State court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the State court. (2) That it must have been decided by the State court, or that its decision was necessary to the judgment or decree, rendered in the case. (3) That the decision must have been against the right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws, or authority of the United States. (4) These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

Murdock v. City of Memphis, 87 U.S. 590, 592 (1874).

For the Oklahoma state court to have jurisdiction over this Court, the Oklahoma Post Conviction Procedure Act must have adequate grounds to provide a remedy and a statute that is independent from existing federal law and not in violation of the Constitution. The Oklahoma Post Conviction Procedure Act is incompatible with the Due Process Clause of the Fourteenth Amendment of the Constitution. Amendment XIV, Section 1, of the U.S. Constitution, states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In modern American jurisprudence, procedural due process encompasses (1) notice and (2) the opportunity to be heard. In the case of Glossip, the Oklahoma Post-Conviction Procedure Act infringes upon his right to be heard based on insufficient grounds. The state's decision to block an opportunity for Glossip to present potentially exonerating evidence due to a statutory limitation goes beyond the scope of ensuring finality into arbitrariness, and even more egregious, violates the petitioner's constitutional right to due process.

The Court hereby reverses and remands the Court of Criminal Appeals of Oklahoma's decision.

Glossip

V.

Oklahoma

Authored by

Michaela King

The case *Glossip v. State* reviewed appellant Richard Glossip's initial case in which he was tried and convicted of the first-degree murder of Bary Van Treese, the owner of the Best Budget Inn. *Glossip v. State*, 29 P.3d 597 (Okla. Crim. 2001). The appeal addressed the issue that Glossip's counsel was ineffective. The Criminal Court of Appeals of Oklahoma found the appellant's claim of ineffective counsel "compelling," such that it "requires relief." *Glossip*, 29 P.3d at 599. The court remanded and reversed the original first-degree murder conviction of Glossip on these grounds.

Following the reversal, Glossip was retried for the first-degree murder of Barry Van Treese. The court again found him guilty and sentenced him to death. *Glossip v. State*, 157 P.3d 143 (Okla. Crim. 2007). The case presented the following facts that led to the conviction of Glossip. Two Best Budget Inn Motels in the State of Oklahoma were owned by Van Treese, one of which employed Glossip as the manager. Van Treese would visit both motels "every two weeks to pick up the receipts, inspect the motel and make payroll." *Id*. at 148. During these visits, Van Treese often found issues with the management of receipts. Additionally, there were missing funds without documentation to account for them. Van Treese often found issues with the management of receipts; he was suspicious of Glossip when these issues arose, as he was responsible for the operations of the motel in Van Treese's absence. Glossip hired Justin Sneed, an unemployed maintenance worker, in exchange for food, room, and board at the Best Budget Motel. Van Treese and Glossip never formalized an agreement allowing this, meaning it was likely one of the issues Van Treese referred to. Opposing counsel established that Sneed "was totally dependent on Glossip." *Id.*

Following his arrival and departure at the Best Budget Inn in Oklahoma City to complete his routine collection of the motel's receipts and payroll, Van Treese arrived at the second

location of the motel in Tulsa. According to the witness testimony of manager William Bender, "Mr. Van Treese was terribly upset. He had never seen him that angry…There were missing registration cards, missing receipts, and unregistered occupants at the Oklahoma City Motel." *Id.* A summation of the conversation between Williams and Van Treese seemed to place the blame of the issues on Glossip, as he was responsible for the operations of the motel.

Sneed testified that Glossip came into his room at three o'clock in the morning on January 7th, 1997, and offered him ten-thousand dollars to kill Van Treese. This was not the first time Sneed was offered money in exchange for killing Van Treese. In fact, Glossip had offered him multiple deals in the past for smaller amounts of money. *Id.* at 158. During the struggle between Sneed and Van Treese, multiple murder attempts occurred involving both a baseball bat and a small knife, both utilized by Sneed. The scuffle resulted in a broken window in the motel room. Sneed sustained minor injuries. Following the murder of Van Treese, Sneed testified that both him and Glossip worked together to cover up the scene and take care of any evidence, including moving Van Treese's car and fixing the broken window.

Sneed claimed that Glossip instructed him on how to correctly dispose of the body. *Id*. John Beavers, who lived at the motel at the time of the murder, testified that he heard strange noises coming from the room in which Van Treese was presumably murdered. D-Anna Wood, Glossip's significant other, gave an alibi for Glossip at the time of the murder. Wood stated that they were interrupted in the middle of the night, which Glossip claimed was merely Sneed reporting a fight that occurred elsewhere in the motel. Upon inquiries about the location of Van Treese from multiple parties, including the police, Glossip denied knowing of his whereabouts. Following the murder of Van Treese, Sneed testified that there had been a delivery of four thousand dollars split between Glossip and himself. At the time of the arrest, Sneed "possessed

approximately $1,700 and Glossip approximately $1,200." *Id.* at 150. After Van Treese's body was found, Glossip was arrested. A week later, Sneed was also arrested.

In Glossip's fifth plea of appeal, he hoped to bring to light other evidence that had potentially been suppressed at the initial hearing. He requested an additional evidentiary hearing. The Oklahoma Court of Criminal Appeals affirmed the previous judgement upholding Glossip's conviction of first-degree murder. *Glossip v. State*, 157 P.3d 143 (Okla. Crim. 2007). Glossip aimed to enter new evidence on his co-assailant Justin Sneed, who pleaded guilty to the murder of Van Treese but testified that Glossip had planned and paid him for the murder.

In his plea for post-conviction relief, Glossip presented information about Sneed's apparent mental health concerns that he claimed were never properly disclosed by the prosecution and were suppressed. Following Sneed's competency exam before trial, a report was made available to counsel about Sneed's lithium prescription. Glossip aimed to present issues with the suppressed testimony of Sneed, in which he denied any claims he had seen a psychiatrist. Information on Sneed's diagnosis was available to counsel at the time of the hearing but was not corrected by opposing counsel when the error was made. The court states that "this issue could have been raised with reasonable diligence much earlier than this fifth application for post conviction relief." *Glossip v. State*, 529 P.3d 218, 225 (Okla. Crim. 2023). The issues before this Court today include:

(1) Whether the state's suppression of the key prosecution witness' admission that he was under the care of the psychiatrist and failure to correct that witness' false testimony about that care and related diagnosis violate the due process of law under *Brady* and *Napue. Brady v. Maryland*, 373 U.S. 83 (1963). *Napue v. Illinois*, 360 U.S. 264 (1959).

(2) Whether the entirety of the suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims.

(3) Whether due process of law requires reversal where a capital conviction is so infected with errors that the state no longer seeks to defend it.

(4) Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgement.

Previous precedent, established in *Brady*, addresses the issue of key evidence suppression. In that case, both Brady and Boblit were on trial for murder, and both were convicted and given the death penalty. While the facts of the case are disputable on fault of the murder, the key issue visited by the Court dealt with Boblit's confession of the murder, which was suppressed and not shared with Brady prior to his separate trial. The court of appeals, which visited the issue based on a due process violation, found that the suppression of the confession, which was key evidence in the trial, did in fact violate Brady's Fourteenth Amendment rights. U.S. Const. amend. XIV.

The court of appeals referenced both *Mooney* and *Pyle*, which outlined grounds for the issue in *Brady*. *Mooney v. Hoolahan*, 294 U.S. 103 (1935). *Pyle v. Kansas*, 317 U.S. 213 (1942). *Pyle* stated, "they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him." *Pyle*, 317 U.S. at 215-16. While the appeal in *Brady* focused on evidence suppression and its effect on sentencing, not the issue of guilt, *Pyle* more accurately can be applied. In *Brady*, the Court used both *Pyle* and *Mooney* to establish that both the (1) key evidence favored to the defendant was suppressed and that, (2) when recognized as an issue, was not corrected, leading to the defendant's due process violation. To constitute a *Brady* violation, the evidence

suppressed must be both favorable towards the petitioner and materially relevant.

The Oklahoma Court of Criminal Appeals would argue that materiality was established due to the weight of Sneed's testimony in convicting Glossip. In *Napue*, the Court ruled in favor of Napue, who filed an appeal for post-conviction relief, stating that key witness testimony had been false and recognized by the prosecutor, but was not recognized as error until after trial. Accomplice, Hamer, who testified against Napue in the robbery case, made false statements about lack of consideration from prosecution for his testimony against Napue. Per his request for relief, the Court reversed the lower court's ruling that any false testimony given must be recognized as an error, even if the false testimony has no effect on the direct conviction itself. The Court more eloquently states that this rule "does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Napue*, 360 U.S. at 269. The decisions in *Brady* and *Napue* can be applied to this case before the Court today. The suppression of key evidence pertaining to a witness or testimony by a witness is a violation of petitioner's due process, along with the prosecution's lack of action for the error of suppressed evidence. The lower court established that Sneed's mental health was not in violation of precedents set in the *Brady* case. *Glossip v. State*, 529 P.3d 218 (Okla. Crim. 2023). The lower court stated that the evidence was not material or in favor of Glossip as the petitioner. However, per the precedent set in *Napue*, if key testimonial evidence is suppressed, even if it is only serving to attack witness credibility, it is a violation of the Fourteenth Amendment.

The issue that comes into focus about whether the Glossip testimonial evidence suppression is a violation concerns its materiality. The case *Brown v. State,* which is referenced in *Brady*, also deals with suppression of witness testimony and materiality of evidence. *Brown v. State*, 422 P.3d 155 (Okla. Crim. 2018). The court defines materiality by referencing

Bagley: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *US v. Bagley*, 473 U.S. 667, 681 (1985). The court must look at the weight of Sneed's testimony, which incriminates Glossip, in order to determine its materiality. While the lower court held that the suppression of Sneed's testimony did not warrant a *Brady* violation, as it was not material to the case, this Court disagrees. The requirement for "reasonable probability" of the suppressed evidence is integral in determining materiality. *Id*. In the most recent *Glossip* case, the court found that evidence of Sneed's suppressed mental health diagnosis would not have established reasonable probability that the outcome of the trial would be different, on its own. However, due to the weight of Glossip's conviction relying heavily on Sneed's testimony, the suppressed evidence does establish potential reasonable probability, as it aims to discredit Sneed as the witness. In addition to determining the materiality of the testimony, *Napue* can once again be referenced for the precedent it set, which determines violation of due process based on prosecution ignoring testimonial errors. It stated that errored testimony cannot be ignored due to its only purpose being to attack witness credibility. *Napue*, at 269. This allowance creates a dangerous precedent in which errors could potentially be ignored by the prosecution if they appear irrelevant at the time of the case.

It also presents the issue of diligence in appealing upon this "new evidence" which was accessible following the trial and could have been recognized sooner. Diligence of errors gains more importance in situations such as this where petitioner Glossip has appealed his case numerous times. Due to the Post Conviction Procedure Act, in capital cases specifically, "evidence of factual innocence must be more than that which merely tends to discredit or impeach a witness." 22 Okla. St. Ann. § 1089. The lower court also dismissed claims of a *Napue* violation, saying that the prosecution did not knowingly hide

the evidence of Sneed's testimony. *Glossip*, 529 P.3d at 226. However, due to the weight of Sneed's testimony in accusing Glossip, the opportunity to discredit the witness is integral and should have been acknowledged by the court. Glossip's unique situation, which is presented with this case, in which he is steadfast in his right to appeal. Therefore, the court must attempt to discover any possible error that may have occurred during the many appeals. The Oklahoma Post Conviction Procedure Act is referenced multiple times in the most recent appeal of the *Glossip* case. The Court of Criminal Appeals of Oklahoma found that many of Glossip's requests for relief or claims for appeal were dismissed under the act. The act itself states that "[t]he only issues that may be raised in an application for post conviction relief are those that: Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22 Okla. St. Ann. § 1089.

That appellate court found that this statute was inapplicable to the case, as they relied on their initial line of reasoning that the suppressed evidence was not material to the case. However, this Court has already discussed the potentiality of Sneed's lack of credibility as a witness, and the weight of his testimony in accusing Glossip is, in fact, material to the outcome of the case. The Court finds the Act and its application to this case unconstitutional, as it violates petitioners due process right of appeal.

While most of the remaining issues dismissed under this statute by the appellate court are invalid per this Court's reasoning of materiality, the issue of diligence remains. Glossip has filed for appeal three times in the high state courts under the guise of this case. One of the main arguments was the diligence of Glossip's most recent appeal for an evidentiary hearing: "This is a claim that could have been raised much earlier on direct appeal or in a timely original application through the exercise of reasonable diligence." *Glossip*, 529 P.3d at 226.

However, in the most recent brief filed by Glossip, Glossip received the information in 2022 "Oklahoma Attorney General recently turned over a box of "prosecutor's notes" to his appellate attorneys. The Attorney General previously turned over seven (7) boxes of material in September 2022." *Id.* at 224. Glossip filed his appeal based on the information he received in September 2022 "within sixty (60) days of the discovery of the evidence in box 8, as required by Rule 9.7, *Rules of the Oklahoma Court of Appeals,* Title 22, Ch.18, App. (2023)." *Id.* Based on the reasoning and the pertinent information above, this Court finds that the reliance upon the Oklahoma Post Conviction Procedure Act on the issue of the petitioner's appeal, is invalid.

Lastly, the issue pertaining to the integrity of the whole case is recognized. Glossip was convicted in 2001 and is still pursuing his innocence in 2024. He has made numerous appeals, most of which were denied. Additionally, his conviction and sentencing of capital punishment has been upheld. It is the judicial systems' main priority to deliver justice to the American people, and a case like the one this Court has heard has failed to do so. The Oklahoma Attorney General, who filed a concurring brief with the petitioner on his stay of execution, remarked that justice would not be served with the upholding of Glossip's current conviction. There is clear and concise evidence, as demonstrated above, that the prominent errors in Glossip's case demand remedy. On a conviction so reliant upon accomplice testimony, fastidious attention should be given to the credibility of said witness. The lower court's dismissal of known errors regarding witness testimony, and therefore credibility, create a burden upon the courts to be remedied. The intricate issues within the case are not, however, what this Court sought to decide. There are several monumental capital cases that exemplify court error and their remedies, hoping to instill what little justice they can back to the petitioners who have been wronged by the court system. Cases like *Wainwright* and *Sawyer,*

exemplify capital charges which have been reversed through insistent appeals and relief requests by petitioners, leading to justice being served. *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986). *Sawyer v. Whitley*, 505 U.S. 333 (1992). Additionally, through these cases, an important precedent has been set in regard to limiting errors in capital cases. *Sawyer* exemplified this through its reliance on petitioner's claims of innocence as a reason for appeal.

The court had the burden and the requirement to provide Richard Glossip with justice. It is extremely clear that major errors have occurred during the trial of Richard Glossip, violating previous statutes set as precedent from a multitude of cases on the suppression of material evidence and the dismissal of errors by the prosecution. Through established case law and persuading oral arguments from both Glossip's counsel and the state representative counsel, the Court reverses the lower court's decision. The Court of Criminal Appeals of Oklahoma denied his request of post-conviction relief and evidentiary hearing, as well as his stay of execution. The Supreme Court of the United States reverses this decision.

Glossip

V.

Oklahoma

Authored by

Michael Di Egidio

I.

A.

The events of this case began in January of 1997, when Barry Van Treese was the owner of the Best Budget Inn located in Oklahoma City, Oklahoma. In addition to this location, he owned another in Tulsa, Oklahoma. Richard Glossip was the manager of the Oklahoma City location, and another man named William Bender was the manager at the Tulsa location. Justin Sneed, the confessed killer to Van Treese, was originally hired by Glossip as a maintenance worker for the premises of the Oklahoma City location after a failed attempt working as a roofer. In exchange for his services, he was offered room and board, from Glossip. Part of Van Treese's routine of owning the two locations was to drive back and forth to and from each location and collect receipts, check the list of registered occupants, and keep each place under control in conjunction with each of the managers. The following events leading up to Van Treese's killing began on January 6, 1997.

Around 5:30 p.m. on January 6, 1997, Barry Van Treese arrived at the Oklahoma City Best Budget Inn. Because it was the beginning of the year, Van Treese decided to do an audit on the Oklahoma City location, after discovering that there had been many shortcomings with money. Upon discovery of missing receipts and unregistered guests, Van Treese ordered Glossip to come up with the missing receipts. Around 8:00 p.m. on January 6, 1997, Van Treese began to make his trek to the Tulsa location, where William Bender, the manager of the Tulsa location, had testified that Van Treese was upset about what was happening in Oklahoma City, and that he had never seen Van Treese that mad before. Van Treese had advised Bender that Glossip had until he got back to Oklahoma City in a few hours to come up with the missing receipts, and that if Glossip had to be fired, Bender would manage the Oklahoma City location.

Van Treese drove back to Oklahoma City and arrived at approximately 2:00 a.m. on January 7th. Sneed had testified that around 3:30 a.m., Glossip had entered his room, and acting "nervous and jittery" told Sneed that he would give him ten thousand dollars to kill Van Treese with a baseball bat. *Glossip v. State*, 157 P.3d 143, 148 (2007). Around 4:00 a.m., Sneed entered Van Treese's room and proceeded to fight with Van Treese. A struggle ensued, and Sneed eventually killed Van Treese by bludgeoning him with a baseball bat. After the murder, Sneed was told to drive Van Treese's car to a nearby parking lot, where he would find four thousand dollars underneath the passenger seat. The body was found in Sneed's room later on the night after the attack. Sneed agreed to testify on behalf of the state in exchange for a non-capital sentence. Glossip was later convicted of first-degree murder in violation of *21 O.S. Supp. 1996 § 701.7(A)* and sentenced to death.

B.

Glossip had previously raised issues multiple times post conviction, including the one on appeal today. The issue pertinent to the case being heard today is the result of a box of files containing prosecutor's notes that was turned over to Glossip's appellate attorneys. Glossip further contends that the prosecution suppressed evidence that Sneed was under the care of a psychiatrist and taking medicine to treat a mental condition. Glossip claims that the evidence that was not disclosed affects his right to a fair trial and was a violation of case law that has been produced by this Court.

Today, the Court decides (1) whether the state's suppression of the key prosecution witness' admission that care and related diagnosis violate due process of law under *Brady* and *Napue*; (2) Whether the entirety of the suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims; (3) Whether due process of law requires reversal where a capital conviction is so infected with errors that the state no longer seeks to defend it; and (4) Whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post

Conviction Procedure Act precluded post-conviction relief in an adequate and independent state law ground for the judgment. *Brady v. Maryland*, 373 U.S. 83 (1963). *Napue v. Illinois*, 360 U.S. 264 (1959).

II.

A.

This Court has long recognized the importance of a fair trial and protection of the adversarial system. The Sixth Amendment to the United States Constitution guarantees the right to a "speedy and public trial" for which the accused shall enjoy "the Assistance of Counsel for his defense". U.S. Const. amend. VI. Necessary for the adversarial system and a proper defense from the accused, we have previously held that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 87. We held in *Mooney* that, "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Further, this Court has expanded on this, saying, when presenting evidence of this nature and it is false, we have said that, "[a] lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue*, 269-70. Presenting perjured testimony can not only induce false convictions, but as a whole, it can insult the judicial system and taint the integrity of the courts. The precedents established in *Brady* and *Napue* seek to protect the innocent from false convictions, and hold prosecutors and the State to higher standards in which the goals of justice but the protection of the innocent can still be met. Moreover, this Court has long established that certain things are necessary in order to be able to

conduct a proper defense at trial, for example, the ability to have ample time to prepare a defense. *Powell v. Alabama*, 287 U.S. 445 (1932). Being able to conduct a proper defense is extended to the idea that prosecutors must turn over all exculpatory evidence to the defense, giving the defendant the best opportunity to prepare a defense with the accusations against him. It is fundamental to be able to create a defense with the material you know will be used against you at trial, which the decision in *Brady* aims to protect.

The Oklahoma Court of Criminal Appeals finds that the suppression of this evidence would not have created a likely probability that the outcome of the case would have been different, and therefore does not amount to *Brady* violation. We affirm that holding.

Deliberately concealing material evidence amounts to a denial of due process. However, in the case of Glossip, it is noted that Sneed participated in an evaluation that determined that he was taking lithium medication for a mental diagnosis. *Glossip v. State*, 529 P.3d 218 (2023). The file was shared with the defense counsel, so they had access to that material. *Id*. It was the defense counsel's strategy to not go further into that information on cross-examination. So, this does not constitute the level of a *Brady* violation that is needed to create a reasonable probability that the outcome of the case would have been different. Glossip's defense counsel was aware of the file that contained Sneed's medical examination and mental health conditions. The decision to not go further into the materials during trial was at the discretion of defense counsel, and we conclude that this does not amount to a *Brady* violation as a matter of law.

There are a multitude of cases where witnesses have suffered mental or physical trauma, and general psychological issues such as anxiety or depression that can affect a person's ability to testify. It was noted by the lower court that Sneed's testimony "was not clearly false." *Glossip,* 529 P.3d at 227. We do not agree with the assertion that Sneed's testimony, the medical examination file which defense counsel knew or should have known about that was not further developed at trial, amounts to a denial of due process under *Brady* and *Napue*. The

simple possibility of weakening the State's case is not sufficient to overhaul the case and demand a retrial or reversal of a conviction due to information that was previously presented but not explored further; therefore, we say today that this does not make a prima facie case of a *Brady* or *Napue* violation.

Further, this is not a *Napue* violation because there was nothing obvious to correct. It is fundamental to *Napue* that a prosecutor correct false testimony. But in this case here, there was nothing to correct because Sneed's testimony "was not clearly false." *Id.* Because we cannot guarantee that the testimony was false, and then the prosecutor failed to correct it on a non guarantee basis, we cannot conclude that this was a *Napue* violation because there was nothing guaranteed to be corrected. We further conclude that in order to be a *Napue* violation, the testimony needs to be obviously false, and the prosecution knowingly does not correct it, for it to be a *Napue* violation.

We further conclude today that it is not fundamental to *Brady* that when the State turns over exculpatory evidence, it is the job of the State to educate them on the evidence. It is the job of defense counsel to take the exculpatory evidence given to them and create the proper defense for their client. It is not the job of the State to explain, educate, or otherwise help the defense process what evidence the State plans on using at trial. We today are not willing to extend the *Brady* rules and expand them to the point where the State is effectively doing more than is necessary for the practicality of this method of advancing justice.

B.

In determining whether the entirety of suppressed evidence must be considered in all or piecemeal, the Court today holds that all evidence must be considered. We have previously held that, "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976). "Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt". *Id.* "It

necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id*. "This means that the omission must be evaluated in the context of the entire record." *Id*. The Court today does not agree with the premise that a single piece of contradictory evidence can always entirely overhaul a case and prove the defendant not guilty. Even though a piece of evidence can undermine the prosecution's case and enhance the defense's, perhaps weaken the credibility of a primary witness, or cast doubt on an expert's opinion, it is necessary that all evidence is considered because material evidence, "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley* at 682. And, "[a] reasonable probability" is a probability sufficient to undermine confidence in the outcome." *Id*. One piece of evidence that could have been considered does not guarantee that a defendant will all of a sudden be not guilty and guarantee that it will undermine the outcome of the case.

Whenever there is a possible *Brady* violation, we cannot err on the side of it being a violation each and every time. It is not adequate to claim in the context of *Brady* violations that perhaps a single piece of evidence undermines the case and proves the defendant not guilty. It is only fair that the entirety of the evidence is weighed and analyzed while determining guilt, as the jury must conclude guilt based on all presented evidence.

It is a fundamental aspect of the justice system that a jury analyzes all of the evidence presented by the State to a burden beyond a reasonable doubt to determine guilt; it is therefore likewise appropriate to say that a defendant must take into account all of the evidence in the record presented against him that could amount to a *Brady* violation and make a determination that it is a reasonable probability that it could have resulted in a not guilty verdict. As we have previously held, "the question is not whether the State would have had a case go to the jury if it

had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Kyles v. Whitley*, 514 U.S. 419, 453 (1995). In light of all of the evidence, if the defendant has determined that the jury's verdict would have been different, then it is appropriate to consider the fact that a possible *Brady* violation has occurred.

This Court has previously held in many cases that there are procedural protections in order to protect the defendant from a trial infected with errors and protect the fundamental constitutional rights outlined in the Bill of Rights. For instance, we have before held that admitting evidence obtained unlawfully is unconstitutional and is a violation of due process of law under the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). We have also held that obtaining a confession through violence and police brutality that will later be used as evidence at trial is a violation of due process under the Fourteenth Amendment. *Brown v. Mississippi*, 297 U.S. 278 (1936). A trial infected with so many errors in violation of due process does require reversal and a new trial; but in the case of Glossip, no reversal is necessary.

We believe that it is implicit that conviction based on unfair trials be reversed so proper justice can be served. But based on our analysis of Glossip's case, we are not entitled to reverse his conviction.

In Glossip's case, the State did not necessarily commit a *Brady* violation. Defense counsel had clear and unprecedented access to the files as noted by the Oklahoma Criminal Court of Appeals. The fact that defense counsel chose to not further inquire into the evidence at trial is not the fault of the State. The lower court contends that defense counsel "knew or should have known" about the information that was turned over to them. *Glossip* at 226. We previously held in *Agurs* that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines

confidence in the outcome of the trial." *Agurs* at 112. In *Pyle*, we held that, "[p]etitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him." *Pyle* at 216. If there were a major constitutional violation here, reversal of conviction would be the case and we would consider; but because there was no violation of a constitutional right and the evidence was not material and did not give the impression that it would have ultimately changed the outcome of the trial; and these claims of the evidence do not amount to a *Brady* violation, no reversal is required here.

D.

Whether the Oklahoma Court of Criminal Appeals' ruling is an adequate and independent state law ground for the judgment is indeed the case. It is also highly frowned upon for this Court to be an exhaustive appeal venue; especially in the case of Glossip where he has made several post-conviction appeals. This Court is not designed to take an endless string of appeals where prior justice has been done. The lower court contends that the Oklahoma Post Conviction Procedure Act was not designed to allow limitless appeals upon a non-ending discovery of possible violations that warrant reversal. The Oklahoma Criminal Court of Appeals provided an adequate remedy for the matter pursuant to the law passed by their state legislature, satisfying adequacy. It is further declared independent because it is independent of federal law, it relies on state substantive law, and it does not conflict with federal law or our established precedent. The ruling is hereby declared an adequate and independent state-ground.

The judgment of the Oklahoma Court of Criminal Appeals is hereby Affirmed.

Thornell

v.

Jones

Authored by

Cade Allen

Mr. Robert Weaver was entertaining defendant Mr. Danny Lee Jones in the garage of his grandmother's house. Both Mr. Weaver and Mr. Jones were under the influence of both alcohol and meth. At some point that night, Mr. Jones murdered both Mr. Weaver and his seven-year-old daughter Tisha, as well as severely injuring Ms. Gumina, the owner of the house. The events were presented to the Jury in trial court as thus: Mr. Jones beat Mr. Weaver over the head with a bat repeatedly. He then walked into the house where Ms. Gumina was watching TV, and seven year-old Tisha was playing with toys. He proceeded to hit Ms. Gumina over the head, leaving her unconscious on the ground. Meanwhile, Tisha ran into the other room and hid under her bed. Mr. Jones then followed Tisha into her room, dragged her out from under the bed, then beat and strangled her to death. He then stole Mr. Weaver's guns and put them into Ms. Gumina's vehicle. On the way to the vehicle, he encountered the injured but still living Mr. Weaver once again and proceeded to strike him multiple more times until he died. Mr. Jones then attempted to escape capture by fleeing to Las Vegas. On the way there, he threw out the bat used in the murders. Ms. Weaver, now the widow of Mr. Weaver, discovered her murdered family when she came home from work. She called the police, who pronounced Mr. Weaver and Tisha dead on arrival, while Ms. Gumina later died (her death was not added to Mr. Jones' charges as it occurred after the legal process began). The police then found the guns in Las Vegas that Mr. Jones had stolen and sold, as they had been reported by his customers, and Mr. Jones was then tracked down and arrested.

At his trial, Jones was appointed a public defender who had very little experience in the law and had only ever assisted in a capital punishment case. Jones' counsel knew of potential issues regarding Jones' mental health and troubled past, yet did not investigate them until after conviction. In the sentencing hearing, Counsel presented Dr. Potts, a neutrally affiliated mental health expert. Due to the limited time and budget available, Dr. Potts prepared a short report on a few possibilities of mental health problems. In his report, he concluded that if given more time or funds, he may be able to find more significant evidence. The sentencing judge found that in

comparison with the aggravating factors, the mitigating factors were not persuasive, and sentenced Jones to two death sentences for his actions.

Jones then requested post-conviction relief and brought claims of ineffective counsel using the rights recognized in *Strickland*. *Strickland v. Washington*, 466 U.S. 668 (1984). Jones claimed that his counsel was deficient because counsel did not bring a mental health expert before sentencing and did not seek any form of mental health testing to support Jones claim.

After the claims were denied, Jones went to district court, where he brought forth those same claims. In district court, Jones brought more mental health experts who testified to a variety of mental issues. Jones also introduced more evidence about his history of abuse and his past head injuries to support his claims. The district court stated that Jones' claims did not meet the prejudice prong of *Strickland*, as Dr. Potts' previous testimony during sentencing coupled with the few low-level claims of mental disorders that the judge believed were sufficiently supported would not have been able to reasonably undermine the findings of the trial court.

The Ninth Circuit Court of Appeals reversed the district court's finding, stating that Jones was able to meet the two-pronged requirements of the *Strickland* test. The Ninth Circuit claimed that because the district court clearly erred and applied *Strickland* unreasonably based on unreasonable factual determinations, 28 U.S.C. § 2254(d) allowed it to overturn its ruling. Additionally, the court believed that it was proper to *de novo* rule on the issue of prejudice. *Jones v. Ryan*, 52 F.4th 1104 (9th Cir. 2022). The State appealed and thus, this question came before this Court.

Question Presented

Whether the U.S. Court of Appeals for the Ninth Circuit violated the Court's precedents

by employing a flawed methodology for assessing prejudice under *Strickland v. Washington* when it disregarded the district court's factual and credibility findings and excluded evidence in aggravation and the state's rebuttal when it reversed the district court and granted habeas relief.

Opinion of the Court

This Court finds that the U.S. Court of Appeals for the Ninth Circuit violated this Court's precedents by improperly applying *Strickland v. Washington*'s prejudice requirement to the district court's factual and credibility findings and excluded evidence in aggravation when it reversed the district court and granted habeas relief.

The essence of the question presented before us regards the ability of the reviewing court to weigh the veracity of evidence and experts presented before it. It also asks whether the current standards for *Strickland* still apply and asks to re-establish the ability of circuit courts to overrule district courts.

The Sixth Amendment establishes the right to "the assistance of counsel for his defense" for criminal defendants. U.S. Const. amend. VI. As questions have been presented to this Court as to what "assistance of counsel" is, this Court has repeatedly redefined the proper definition. *In McMann v. Richardson*, this Court specified what the right to counsel looks like in practical application, stating that, "… if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel…" *McMann v. Richardson,* 397 U.S. 759, 771 (1970). Out of this logical standard, one of the most foundational and most cited aspects of the Sixth Amendment arose. The *Strickland* test, which was created in the titular case, clearly defines what truly constitutes a violation of the right to effective counsel. The bar comes in two main parts:

[a] convicted defendant's claim that counsel's assistance was so defective as to

> require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

Strickland at 669.

As this test is two-pronged, both prongs must be proven to succeed in a claim of a constitutional violation. The State does not contend that Jones' counsel was deficient. Thus, this Court only considers the application of the second prong of the *Strickland* test, and whether the district court properly applied the test.

This Court has held that reviewing courts must assess prejudice by "reweighing the evidence in aggravation against the totality of mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Logically, this "reweighing" includes weighing the actual credibility and impact of the evidence on both sides. In fact, this Court held that because "…the court partially relied on an erroneous factual assumption…," the Court of Appeals in the *Wiggins* case "…unreasonably applied *Strickland*." *Id.* at 534. Similarly, the Ninth Circuit unreasonably applied *Strickland* by stating, "It was improper for the district court to weigh the testimony of the experts against each other in order to determine who was the most credible and whether Jones had presented "evidence *confirming* that [he] suffers from neurological damage caused by head trauma or other factors." *Jones v. Ryan*, 52 F.4th 1104, 1127 (9thCir. 2022).

If, as in *Wiggins*, erroneous factual assumptions can lead to unreasonable applications of *Strickland*, then it is clear that reviewing courts must make sure not to make unreasonable factual assumptions in their re-weighing of evidence by determining the credibility of the facts presented. *Wiggins* at 534. Expert testimony is also evidence that stands as an aggravating or mitigating factor, and thus it deserves to be weighed along with the rest of the evidence. This is precisely what the district court did. It is true that to succeed in a claim of prejudice under

Strickland, a petitioner must only show "...that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. However, as "[a] reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result." A reviewing court must truly weigh the probability of the expert testimony in undermining a decision, and not simply consider pure plausibility. *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). This means that it is within the reviewing court's discretion to determine whether the facts present a reasonable probability of undermining confidence, and at least a reasonable probability of being true. In *Eddings v. Oklahoma*, this Court ruled directly on this matter, saying, "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982). The district court, then, was within its discretion when it determined that the relevant mitigating evidence did not stand up to the test and meet the requirement of a reasonable probability of undermining the evidence. Considering the practical implications, if bounds are placed that limit reviewing courts to considering only the probability of the evidence's ability to undermine confidence and not the credibility of the evidence itself, a true crisis would occur. Petitioners would only need to bring evidence that has a reasonable probability of undermining confidence, regardless of whether that evidence is true, or fabricated to simply achieve a result. Obviously, this cannot occur.

Hence, the Ninth Circuit erred when it overruled the district court. Circuit courts are held to a high standard when attempting to review mixed questions of law and fact ruled on by district courts. Strickland says that "…district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland* at

698. This standard is extended to circuit courts in *Knowles v. Mirzayance*, "courts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous." *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009). The district court's findings are not clearly erroneous as the district court stayed within its boundaries by weighing materiality of evidence and whether that evidence was true. Additionally, "clearly erroneous" has been given further logical weight by this Court. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). And, "[I]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), quoting *Bessemer City*, 573–74. Plausibility is a low standard. As the district court's decision was both permissible and plausible in light of the whole record, and it ruled on a mixed question of law and fact, it did not clearly err in its findings. If the district court did not clearly err in its findings, the circuit court owes the reviewing district court deference in its findings. If this Court allowed the Ninth Circuit's ruling to stand, direct precedent would be overturned, allowing future circuit court panels to put aside a district court's well-reasoned and possibly correct factual and credibility findings in order to impose their own opinions.

Additionally, the Ninth Circuit did not only improperly overstep its authority by reversing the district court's decision absent clear error, but it also failed to properly apply *Strickland* in its own ruling. In fact, the circuit court's panel in *Jones* was denounced by almost the entirety of the rest of the Ninth Circuit's bench for the same reasons as above. *Jones* at 1137. This Court agrees with the dissent issued by the rest of the Ninth Circuit. In the Ninth Circuit's application of *Strickland*, the high bar that the test sets was lowered in a material and

unconstitutional way. The test set forth by this Court is meant to be difficult to overcome. This Court has ruled that, "As is obvious, *Strickland*'s standard, although by no means insurmountable, is highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). If "…the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice…," then both the good and the bad must be given the weight that they properly deserve when they are weighed against each other in order to properly pass the high standards set forth. *Wong v. Belmontes,* 558 U.S. 15, 26 (2009). Essentially, misrepresentations of the true weight of the evidence in consideration, whether mitigating or aggravating, is a violation of the purpose of *Strickland*. By giving a lackadaisical and grossly misrepresentative analysis of the aggravating evidence in their application of *Strickland*, the Ninth Circuit made it much easier for petitioners to claim habeas relief through *Strickland*.

Strickland also has a very important caveat that the Ninth Circuit did not properly consider in their ruling, "The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency." *Strickland* at 695.

The Ninth Circuit did not properly consider what an Arizona Court would have ruled in this case using the standards that an Arizona Court typically operates by. The application of these standards may add more or less weight to the aggravating or mitigating factors, and thus when ruling on prejudice and weighing the evidence, it is of utmost importance to consider the standards the locale typically uses. In fact, it could be said that the application of the standards from their respective locales and the weight they have on the factors in prejudice is one of the most foundational principles in *Strickland*. To consider what standards the particular locale typically operates under, the best place to look is in what that locale itself has said is particularly

weighty or not. The Ninth Circuit failed to do this in its ruling. Had it looked into Arizona case law, it would have found that numerous cases give heavy weight to the aggravating factors in the *Jones* case. The aggravating factors that were found against Danny Lee Jones were thus, "the trial judge found three aggravating circumstances for each murder: (1) multiple homicides, (2) pecuniary gain, and (3) cruelty, heinousness, or depravity… And for Tisha's murder, the aggravators are even more substantial as the trial judge found a fourth aggravator: she was under fifteen years old." *Jones*, 1153-1154. Historically in Arizona Courts, each of these aggravating factors are considered weighty. The standard that the Arizona State Courts have set forth in regard to multiple homicides is, "we have consistently given "extraordinary weight" to this aggravator… Even when the multiple homicides aggravator is the only aggravator weighed against multiple mitigating factors, we have found the mitigation insufficient to warrant leniency." *State v. Poyson*, 475 P.3d 293, 302 (Ariz. 2020). Additionally, Arizona has clearly set forth the weight to be placed on the "pecuniary gain" aggravator, "The pecuniary gain aggravator is also especially strong and "weighs heavily in favor of a death sentence," when pecuniary gain is the "catalyst for the entire chain of events leading to the murders." *Id.*, citing *State v. McKinney*, 917 P.2d 1214, 1231 (Ariz. 1996). In *Jones*, the trial court and the Arizona Supreme Court found that the entire chain of events occurred because of Mr. Jones' hope for pecuniary gain when he sold his friend's weapons. *State v. Jones,* 917 P.2d 200, 215 (Ariz. 1996). Their findings thus gave the aggravating factor of pecuniary gain extra weight according to the Arizona Court's standards. There is also the factor of the undeniably brutal way that Jones killed his victims. According to Arizona precedent, "The cruelty aggravator is 'entitled to great weight.'" *Poyson,* citing *McKinney* at 1228. As the trial court, the Arizona Supreme Court, and the reviewing district court found that Jones was especially cruel in his killings, this aggravator also adds a heavy burden onto the aggravating evidence. These three aggravating

factors alone are incredibly weighty. In contrast to its lack of investigation regarding the aggravating factors, the Ninth Circuit went into heavy detail as to what the mitigating factors were. In fact, it presented nearly fourteen pages of detail, from supporting case law to the actual facts of the case themselves, all supporting claims of, "1) cognitive dysfunction (organic brain damage and a history of numerous closed head injuries); (2) poly-substance abuse; (3) post-traumatic stress disorder ("PTSD"); (4) attention deficit/hyperactivity disorder ("AD/HD"); (5) mood disorder; (6) bipolar depressive disorder; and (7) a learning disorder." *Jones* at 1123-1137.

This stands in heavy contrast to the little detail or investigation posed by the Ninth Circuit on aggravating factors. In fact, as discussed above, the Ninth Circuit did not allow the reviewing district court to make credibility determinations, and it also did not make credibility determinations when reviewing the mitigating evidence. The Ninth Circuit lacked in its reviewing of the entirety of aggravating evidence, yet added heavy weight to the mitigating factors, while also not considering the veracity of the factual statements themselves. Additionally, the Ninth Circuit neglected to consider how an Arizona court would have ruled on both the new aggravating and mitigating evidence in its entirety, as has been mandated by this Court in multiple opinions.

Due to an overstepping in authority by overruling the reviewing district court's findings absent clear error, a wholly improper and inappropriate application of *Strickland* through lack of consideration of the whole evidence on both sides, and a lack of consideration of what an Arizona Court would have ruled, we, the Court, reverse the decision of the Ninth Circuit.

On the Civic and Moral Value of An Accessible Legal Education

Authored by
Ariel J. Liberman[1]

[1] Assistant Professor of Law and Legal Studies in the Department of Political Science at Auburn University. His research focus is on the broader interdisciplinary fields of 'law and society' and 'law and religion,' within which he studies education, jurisprudence and comparative law topics. His deepest gratitude goes out to the staff of the Auburn University Law Review for commissioning this piece. The contents contained in this essay foreshadows two forthcoming monographs which more extensively deal with the subjects discussed. The first, *Law as Civic Education* is set to be released by Routledge in 2025. The second, *Implementing Law as Civic Education* is set to be released by Palgrave Macmillan in 2025. The reader is highly encouraged to consult these titles when they are available.

I. Introduction
II. A Brief Tale of Law Schools and Law Study
III. The Current Pitfalls in Civic Education and How Law Can Help
IV. Conclusion: Rethinking a Law Classroom

> [Law] operates upon the fringe. But that fringe is a fringe of high necessity . . . . [I]ntelligent use of law is often capable of arranging matters so that this climax of need has no occasion to occur. Or, if I may have to resort to another image, it is a safety valve – a minor and unimportant feature of an engine, *most* of the time.[2]

Introduction

One of the starkest academic shifts that I had ever experienced took place during my transition from college to law school. It was not about getting used to the new library, collaborating with new colleagues, or even about starting to learn new material; the jolt was rather from the stark change in the *delivery* and *style* of my new instruction.

I studied literature as an undergraduate, but more-or-less always with the firm awareness that I wanted to be a lawyer. I honed my writing and communication skills, strengthened my approach to detangling complicated questions, and read voraciously all in service of this ultimate goal of succeeding in graduate school and, thereafter, in practice. And to be sure, my hard work in college did pay off. The reading in law school – dense cases, complicated statutes, long legislative histories – was somewhat new to me, but nothing I felt I could not handle. Still, the *way* I was learning confused me endlessly.[3] Particularly jarring was the overtly constant focus – manifesting in the tailoring of cases and the scope of discussions – on how the law meets practice. Every course emphasized discrete, practical questions of law, how the parties were impacted, how disputes were resolved, and what to do if the same matters happened again; comments were then made on the way in which such problems arise in an attorney's work today. This was, for the most part, to the exclusion of any other sort of approach to law study (philosophical, historical, etc.) that might have helped contextualize what it was that I was learning. Unlike in the confines of my literature classroom, in law school we were no longer preoccupied with deeper meanings – in fact, we hardly ever engaged the broader question of 'what law is,' or what is 'the broader role of the lawyer' beyond rudimentary introductory welcome speeches.[4] To put it bluntly: *I felt like I went through three years of law school not even asking what law was, why it mattered, why systems existed or did not, and how I ought to be working to help strengthen them! I simply learned how to work within the system – "to practice, not to problem solve; to litigate, not to lead*."[5] And, I know that I am not alone.

While I certainly do not mean to disparage the law school's emphasis on vocation and practice-readiness, it's something that strikes me as very odd given law's role in so much of our

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[2] Karl N. Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford University Press, 2008, pp. 120-21. [Emphasis in Original]

[3] The storied Socratic Method or the 'cold call' culture of the law school education machine – though there is much to be said about that! – were rather innocuous in my opinion, to be honest.

[4] Such criticisms are by no means novel. For a very early exploration of the place of 'jurisprudence' curricula in the law school – which necessarily invites the questions I offer above – *see, e.g.*, Lon Fuller, "The Place and Uses of Jurisprudence In The Law School Curriculum," 1 J. Legal Educ. 495 (1949).

[5] *See e.g.*, Heather K. Gerken, "Resisting the Theory/Practice Divide: Why the "Theory School" is Ambitious About Practice," 132 Harv. L. Rev. F. 134 (2019).

policy, democracy, political and philosophical conversations. Gone were the days of asking contentious, timeless questions and seeing how authors attempted to offer guidance; gone were the days of open discussion on how leaders used writing to approximate questions of justice, democratic ideals, and capture notions like freedom and strength. This broader education is easily dispensed with in the interest of hyper-focusing us to "think like a lawyer." This is 'law-think' *not* in the sense of having critical thinking skills, discernment, detail-orientation, or those important qualities, but 'law-think' in the sense that I was ready to hit the ground running at a firm, governmental outfit, or judicial clerkship. Even fields that I now know interrogate these other questions – law and literature; jurisprudence; law and religion; law and emotions – were out of reach for the average law student. This intense obsession with preparing the practitioner, I argue, appears to me a double-edged sword – at once this type of professional 'law-think' does provide important skills, like the above, but also a potential hindrance in the narrowness of its scope.

Fast forward a few years (and one circuitous professional journey), I found myself back at school finishing further graduate study in law. It was at this second stage where I began to ask the deeper questions of my field:

> -Why do we need the law?
> -What is the relationship between law and democracy?
> -As lawyers, what is our *real* role in the broader project of justice?
> -As a citizen (rather than a professional), what is my obligation when it comes to knowing how the law works and how to operate within it?

As to the last question, I began inquiring more deeply from the vantage point of legal education. Specifically, I asked after the history and science 'legal education' – when did we start seeing 'law' as *only* for the lawyers?[6] Has the delivery of law education and its new focus foreclosed the lawyer from being a broader civic leader? In a pair of writings,[7] I asked whether 'law study' can, and should, be more than just a professional education – and indeed, as it is such an important subject that pushes the learner to look at questions in unique ways, where it can be open and accessible to more people. While others have made similar calls,[8] my theorizing about the matter is distinct: *the study of law in its most 'robust' way can be a particularly exceptional – and very necessary – civic education and character education for all citizens interested in preserving a discursive democratic community.*

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[6] This alludes, of course, to the stellar chapter by Marianne Constable, "On Not Leaving Law to the Lawyers," *in Law in the Liberal Arts* (ed. Austin Sarat) (Cornell University Press, 2004).

[7] Ariel J. Liberman and Michael J. Broyde, "Learning Law in Elementary and High School: Innovating Civics Education for a More Empowered Citizenry," 19 NORTHWESTERN J. L. & SOC. POLICY 264 (2024); Michael J. Broyde and Ariel J. Liberman, "Learning Law Young: Towards a More Robust, Impactful, and Ethical Civic Education Modeled Off of Jewish Law Learning," 52 J. L. & EDUCATION 1 (2023).

[8] In fact, many of these thinkers are writing from the same position that I am: as law professors in the undergraduate setting. It is here, I wager, that we are able to confront law, together with our students, in the most 'robust' sense – preparing folks for the trials and travails of law school, while also inculcating in them broader perspectives on the role of law in society, as a force of order and justice, and systemic tool for change. Here – and in Auburn's Law and Justice Program, especially, a premium is placed on both the formal study of law – its major fields, concepts, processes, principles – and the simultaneously development of a student's values (one's identity), their perspectives on legal change and social order, the capacity for critical thinking, higher reasoning, and self-examination through the lens of law and its institutions. This is done so as to educate for, yes, law school, but also for the aspiring non-lawyer interested in participating in legalistic national democracy as we have in America.

This short piece is a preview to two forthcoming projects where I endeavor to expand on this framing of 'law study' as an essential civic and character education *outside of law school*, in both the undergraduate *and* K-12 setting. Part of this is theoretical – working towards a loftier view of "law-think" and advocating for its service as a central civic education – and part of this practical – envisioning a law learning curriculum, and a 'law classroom' (for elementary, middle, high school students, undergraduates) reconceived from merely 'training to be a lawyer' to a broader view of law learning as a citizenship enterprise. Here, I provide merely a few ruminations to students and colleagues on some ideas from both of these aspects of the argument.

The work, consequently, begins by interrogating the historically dualist view of 'law study' as *either* a professional discipline and a theoretical field of inquiry, and arguing how this diminishes the civically instructive power of law learning. Then, the piece briefly touches on the pitfalls of the current civic education paradigm and previews an argument as to *why* law learning – from a skills and character perspective – is a necessary democratic education for our nation's intensely legalistic culture. And, finally, it expounds on the unique dimensions of the law classroom that make it beneficial to the civic project.

A Brief Tale of Law Schools and Law Study

So, can 'law study' in America be effective outside of the law school? To answer this question, I would like to spend a little time formally parsing out two, albeit complimentary, aspects of law education: 'law' as a professional occupation and 'law' as an academic field of study. If we answered our question in light of the former 'law-as-profession' lens, I should say 'no' pretty easily –law schools can and should train lawyers for a multitude of compelling reasons.[9] But, if we approach the question from the 'law-as-discipline' lens, we can offer a wholly different answer. To see why, let us briefly consider the history of the modern law school.

From the colonial period to the 1800s, there were no law schools.[10] Exposure to the field came by way of lectures in the college setting, which were "not meant to train lawyers at all, they were lectures on law for the general [liberal arts] education of the student."[11] These lectures were meant to "prepare men to take their place as informed leaders in society."[12] Consequently, I might add, any effort to bring law from outside the law school can be conceived as a revitalization of a long-forgotten approach to law study: *open, accessible law learning that emphasizes its moral and civic value as an education for leaders, not just its merits as a pre-professional education*. But I digress. When then, did we start seeing 'law' be reconceptualized as a predominantly practical education?

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[9] Of course, this is not the case in Europe, though the emphasis on 'professionalism' can be seen as a thru-line connecting the American and Continental legal education regimes. *See e.g.*, Norbert Reich, "Recent Trends in European Legal Education: The Place of the European Law Faculties Association," 21 Penn. State. Int'l. L. Rev. 21, 22 (2002); James Maxeiner, "The Professional in Legal Education: Foreign Perspectives, 38 Himeji L. Rev. 246 (2003).

[10] Susan Katcher, "Legal Training in the United States," 24 Wisconsin International L. J. 335, 339 (2006) (internal quotations and citations omitted).

[11] Susan Katcher, "Legal Training in the United States," 24 Wisconsin International L. J. 335, 339 (2006) (internal quotations and citations omitted).

[12] Susan Katcher, "Legal Training in the United States," 24 Wisconsin International L. J. 335, 339 (2006) (internal quotations and citations omitted).

The late 1700s saw the advent of the first proprietary law schools, most famously the Litchfield School which ran from 1784-1833.[13] From that point, formal institutional legal education began to overtake other professional routes for admission to the bar, especially as these independent professional schools began to be absorbed into universities.[14] Newly endowed with resources and bolstered by substantial financing, the modern 'law school' amassed on staff more than just practiced attorneys, but a new cadre of academic legal experts who were poised to teach the next generation of lawyers about 'law' as a theory and as a practice. The education was an especially organized, efficient, structured, cutting-edge substantive education for the betterment of a 'learned profession.'[15]

It has been this way ever since with merely a few 'stand-alone' law schools remaining in the United States.[16] With only four states in the union allowing students to 'read for the bar,'[17] a graduate law degree from a law school has become, for the most part, a stable requirement for the profession – and for all the reasons stated above and more. Over time, and with the gradual acculturation of the bar to the institutional 'law school,' college programs that retained aspiring law students began to be devoted to supporting the students' law school ambitions, rather than occupying the business of independently educating them in law for the profession. And even those newly arising courses of study in law have recently gained traction at our nation's premier colleges[18] – of which Auburn's program in Law and Justice is one! – they are avowedly in service of the college-to-law school pipeline, rather than stand-alone sites for cultivating practicing lawyers. Law school, then is, with little doubt, *the* way to mint lawyers. Contemporarily, law schools are able to access high amounts of funding and support for research, professional development, practical training, networking, clinical education, and more.

Yet, in these places, time and the nature of the legal profession have changed the way law students are being educated in the doctrinal classroom. Today, they are exposed to a very certain view of law as a historic system and field of inquiry to get them 'practice ready.' This professionalism-bend, describes Karl Llewellyn (1893-1962), a renowned scholar and teacher of law, inculcates them to the lawyer's infamous "two-edge ethic."[19] The first edge is to "insist upon the need for a fair hearing when a fat client's case looks bad; and [the second is] to insist upon the need for believing in your case, either when you do by good fortune believe in a fat client's case, or when you find it difficult to believe some starved punched fellow."[20] In other words, the

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[13] To learn law at the graduate level was (and is) seen as an improvement over what was once the preferred apprenticeship model of law learning, where once upon a time a lawyer could pay a fee and clerk for a few years in a law office, or even the still available route of 'reading for the bar' – both of which, among other things, lack adequate acculturation to the complexities of the law. Susan Katcher, "Legal Training in the United States," 24 Wisconsin International L. J. 335, 339 (2006) (internal quotations and citations omitted).

[14] Susan Katcher, "Legal Training in the United States," 24 Wisconsin International L. J. 335, 339 (2006).

[15] It also made everyone seem fancier. (internal quotations and citations omitted).

[16] By the count of the American Bar Association, there are 15 such independent, accredited law schools remaining in the United States. *See* https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/independent-law-schools/

[17] These are California, Washington, Virginia, and Vermont. More information on these processes can be found on the states' bar websites.

[18] There are new programs at the University of Southern California, Amherst College, Auburn University, Emory University, University of Central Florida, and more. A partial list can be located on the website of the Consortium of Undergraduate Law and Justice Programs, http://www.culjp.com/programs.html. Commentary on the development of these programs and what it means for the future of legal education is, in my opinion, sparse.

[19] Llewellyn, *The Bramble Bush*, pp. 165-66.

[20] Llewellyn, *The Bramble Bush*, pp. 165-66.

lawyer – learning to zealously advocate on behalf of a physical client, always – learns at once to use the law for personal gain or for public good but only in a narrow sense.[21] Straying away from its roots in theory of law, leadership, and one could say almost 'justice-studies,' legal education emphasizes that students view narrowly law and law activity as an avowedly client-centered education, and come to know the law system only through its adversarial and technical manifestations.[22] The focus has been placed on "the lawyer's central role [as] an agent and advocate for a *client* whose interests are opposed to other parties."[23] This, it is argued (and perhaps been proven true), promotes success professionally in our adversarial system.[24]

But let us consider this client-centeredness further for a moment. While it might benefit the professional development of the lawyer, it can also be somewhat *poisonous* to other parts of the project of developing students' character and, in broader terms, systemic growth. As Ann Shalleck argues, it is the central focus on the "constructed client" in legal learning that really invites adversarialism to get in the way of other goals. This is a client that is unidentified, that lacks a world or context, that exists in one-dimensionality only to serve one purpose: to have an interest and set the scene for advocacy.[25] The constructed client "wants something, but they have chosen the wrong means of obtaining it;" they come to the student's attention either knowing already what they want or are constrained and directed enough to fuel the student's competitiveness.[26] "Motivation and constraint are central" to the "constructed client;" but neglected are the "ambiguities and complexities of the client's actual situation, the multiplicity and confusion of goals that commonly characterize client behavior, even behavior that violates common norms of conduct."[27] "Students, therefore, do not see the worlds that the clients come from, the institutions that shape the clients' lives, and the choices, or the conflicts, confusion, and uncertainty that some bring with them to the lawyer's office," and they certainly do not see the humanity in the opposition.[28] Rather, every case, every dispute centers around some anonymous client whose purpose is single-minded and absolute, who exists in a vacuum, and whose needs *you* must address or else be construed as failing.

Consider, for instance, an educator addressing a student in a law school class: they might ask, "if you represented the plaintiff, what would you argue in support of this rule?"; "what's the counterargument for the defendant?"; or "how would the plaintiff respond?"[29] Of course then the student would respond competitively and adversarially, "my client is right because of X and the opposition is wrong because of Y," or else "my cause is just and consistent with the law and the other has no merit." In this way, because we are focused on clients and causes rather than ideas and relationships and larger questions, the lawyer develops a proclivity towards antagonism rather than seeking out truth or rightness. While "philosophers may seek the truth, "lawyers seek to achieve their client's interests and to 'win,' which may entail simply obfuscating the other

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[21] *See e.g.*, Deborah L. Rhode, "Leadership in Law," 69 Stanford L. Rev. 1603 (2017) (reflecting on the way in which lawyers are not taught, and therefore fail to understand, their role as leaders).

[22] For more information on the role of the client in the legal education framework, *see* Ann Shalleck, "Constructions of the Client within Legal Education," 45 Stanford L. Rev. 1732 (1993); Pierre Schlag, The Problem of the Subject, 69 Tex. L. Rev. 1627 (1991).

[23] *Supra* note 683.

[24] This is especially the case since the advent of 'clinical legal education.' *See e.g.*, Eduardo R.C. Capulong, "Client As Subject: Humanizing The Legal Curriculum," 23 Clinical L. Rev. 27 (2016).

[25] Ann Shalleck, "Constructions of the Client within Legal Education," 45 Stanford L. Rev. 1732 (1993).

[26] Ann Shalleck, "Constructions of the Client within Legal Education," 45 Stanford L. Rev. 1732 (1993).

[27] Ann Shalleck, "Constructions of the Client within Legal Education," 45 Stanford L. Rev. 1732 (1993).

[28] Ann Shalleck, "Constructions of the Client within Legal Education," 45 Stanford L. Rev. 1732 (1993).

[29] Ann Shalleck, "Constructions of the Client within Legal Education," 45 Stanford L. Rev. 1732 (1993).

side's case-as in the 'creation' of reasonable doubt in the criminal case-or leaving out important facts if they are deemed harmful."[30] This, unsurprisingly, can have deleterious effects on a system presumably predicated on justice and rightness.

Even where the particular use of the adversarial model can be defended as a procedure of truth finding in other settings, it does not pass muster as a genuine exercise in knowledge.[31] Especially in the law school setting, where students are constantly judged against one another,[32] the need to defend this 'clients' interest exacerbates differences and conflict in ways that justify our critics' concern that the 'adversarial nature of law' cannot be overcome. Indeed, even the Socratic method, if applied in a law school setting where students are vigorously trying to defend the interest of a client against, say, a professor who takes the opposing position, proves little more than a confrontation between a "hapless novice and an imperious authority."[33] And, further, when applied in a vacuous conversation about a case devoid of emotional and cultural context, Socratic method can be conceived of as perpetuating the notion that "presumed objectivity of the law is from the white, middle-class perspective" and that there are no alternative means of understanding or reasoning a legal question.[34]

To put a finer point on it – and to echo my own experience that I discussed at the outset of this essay – in most cases, the law student can thus no more answer valuable questions about the law's purpose or major function from jurisprudential, historical, or social lenses than can an uninitiated undergraduate. They simply know how to work in the system better. Yet, as Llewellyn points out, nevertheless the American lawyer, by virtue of their *initiation* into the profession, their *perceived* expertise, and *exclusive* exposure to legal terms of arts, judicial systems, complex legal questions, simultaneously "carry the burden of making the law worth having—over the long run, and from day to day." [35] In this sense, they are custodians of a public good without really having studied law's role in cultivating that public good or demonstrated themselves capable of having the 'public good' in mind in their practice.

So, let us think back to our central question: should law belong only in law schools? If we were to consider law as something within independent potential as a theoretical field of study – divorced from the project of creating lawyers – most certainly it should! We can imagine a new approach to law study that engenders in students 'law-think' skills while remaining free from the 'weeds' of focusing on preparing students for law practice: law as a leadership education, a humanistic education, a civic education.

Harold Berman (1918-2007), law scholar and founder of the contemporary study of law and religion, contemplated such a view of law education in 1986: law as providing a forum for

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[30]Carrie Menkel-Meadow, "The Trouble with the Adversary System a Postmodern, Multicultural World," 38 Wm. & Mary L. Rev. 5-44.

[31]Carrie Menkel-Meadow, "The Trouble with the Adversary System a Postmodern, Multicultural World," 38 Wm. & Mary L. Rev. 5-44.

[32] Susan Sturm and Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 Vanderbilt Law Review 515 (2019); "Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum," 37 Monash U. L. Rev. 40, 47 (2013) ("While the stereotypic law school 'paper chase' may be out of date, the competitive, cut-throat mood of the law school has not necessarily softened over the years.").

[33] "Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum," 37 Monash U. L. Rev. 40, 47 (2013)

[34] S.S. Kuo, 'Culture Clash: Teaching Cultural Defenses in the Criminal Law Classroom', St. Louis Law Journal 48 (2004), pp. 1297-1311.

[35] Llewellyn, *The Bramble Bush*, pp. 165-66.

skills cultivation and morals before law school.[36] Berman explored how law can "enrich the minds of students[37] if it were taught – not just as a separate course but integrated into other academic disciplines[38] – especially in college. For him, law obviates "a method of reasoning adapted to the reaching of decisions for action and to the establishing of frameworks or relationships;" it helps them become aware of the institutions in which they are presently, inextricably involved; it helps students to appreciate the role law has had as a part of the "tradition of western thought and action."[39] Law compliments the politics student eager "to grasp more fully underlying premises" and the philosophy student needing "to understand better the nature of inductive and deductive reasoning, the relation of ends to means, and the meaning of justice."[40] And, of course, by studying the law, "the student enlarges his own intellectual responsibility and his moral capacity to judge between competing claims and to strike a proper balance between rule and discretion."[41] Implicit in this, of course, is also that the student can "develop [their own] sense of justice and a capacity for responsible judgment."[42] For, in "studying the factors which enter the reaching of legal decisions and the making of legal rules, students can enlarge their own capacity to judge between competing claims and to apply general principles to the concrete circumstances of particular situations." [43]

While law schools are a long way off the mark when it comes to proffering a strong theoretical legal education that contextualizes practical law study as a character and civic education, Berman believed in such a re-oriented law curriculum for the college-setting.[44] And, in fact, time might have proved him correct. We might consider the rise of some of the newest undergraduate programs in law as a function or reaction to the negative aspects of siloed professional law learning. Consider, again, the Bachelor of Science in Legal Studies Program at the University of Southern California,[45] or Amherst College's Program in Law, Jurisprudence, and Social Thought,[46] or, closer to home, Auburn University's Bachelor of Arts in Law and Justice.[47] While, as I mentioned above, they still serve the college-to-law school pipeline, these

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[36] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986). He argued for law in the college setting, and that law should not just be a class you take but incorporated as "an integral part of the teaching of other disciplines-history, political science, sociology, economics, philosophy, and others" but that this "cannot happen until professors in those other disciplines are themselves exposed to some sort of basic education in law."

[37] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).

[38] This could be a next step in the context of our primary and secondary school civics discussion as well. While I would advocate for reconstructing civic education classes – which already exist and are a disservice to students – with learning law, a more effective way of empowering students would be to integrate law – and thereby the civic and philosophical questions it propounds – in all classes. This is also along the lines of what Nussbaum advocates (in terms of philosophy) and Dewey (in terms of values education).

[39] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).

[40] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).

[41] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).

[42] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986). There is a difference, Berman contended, between "a 'concept' of justice," and a "sense of justice" – law study contributes to the latter, "apply[ing] concepts of justice to specific situations [and] relating concepts or theories of justice to particular circumstances." The student of law is "continually confronted with concrete problems to which pre-existing concepts give conflicting solutions. In testing the solutions against the theories and the theories against the solutions, he can learn how concepts of justice are created in the very process of application."

[43] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).

[44] And this has been argued time and time again to be important from philosophers, pedagogues, and law teachers. Lon Fuller, "The Place and Uses of Jurisprudence in The Law School Curriculum," 1 J. Legal Educ. 495 (1949),

[45] https://gould.usc.edu/academics/undergraduate/bs-legal-studies/

[46] https://www.amherst.edu/academiclife/departments/ljst

[47] https://cla.auburn.edu/polisci/law-and-justice/

programs can be considered on varied grounds as providing needed preparatory contexts for many students, not just aspiring lawyers. Such law programs, for example, offer that students will gain early exposure to legal concepts, develop essential critical thinking skills, and allow students to think early and often about the law as they meet with it in society. They foster inquiry, inclusive dialogue, debate, and creativity. For Auburn's Law and Justice program specifically, Steven Brown has noted that among the most important aspects of an undergraduate law education (and a college education generally) is instruction in "how to listen, evaluate information and argue effectively."[48] I might add that such programs are important additions to college academics because they emphasize: 'law effects and impacts everyone' – its processes, norms, and values – and therefore the prospect of making law classes available – to majors and non-majors – is an invaluable general education.

Teaching students' law in the 'grand' sense[49] – for values, as conduits for political discussions, as a tool for engaging controversy, rights, and responsibilities, and more – I wager is an essential education for today's citizens. Indeed, that is why I find myself here at Auburn teaching in 'Law and Justice.'But, this is true not just in the college setting, but also for elementary, middle, and high school classes. To learn law in this way can help augment civic education efforts across our country. Students of all ages, I argue, could benefit from studying a discipline that is not specifically outcome oriented – it is not about building the better protester, the better voter, but simply acculturating ourselves to an aspect of how we conceive of order, relationships change. The law classroom is a space where students can be reflective, gaining skills in criticality and self-examination so that they might come to appreciate their role in our civic order generally *and* be capable of forming their own views above easy political sway, abuse, and mass indoctrination.[50] To learn law is both about cultivating skills for external interactions with individuals and social controversies, as well as internal deliberations.[51] In terms of external-facing skills, students gain capabilities to combat complacency, invest in issues, communicate ideas, assess one's relationship with authority, hear other opinions and respect them, appreciate the diversity of democratic institutions that impact us, and more. In terms of internal deliberation skills, students strengthen the capabilities to reflect on one's own values in the context of the social demands of a democracy, one's internal sense of justice, one's sense of the common good, and one's ability to bring personally held beliefs in conversation with

[48] https://wire.auburn.edu/content/provost/2023/11/301514-steve-brown-faculty.php

[49] This term harkens to Justice Holmes' view intimating that legal education had a dimension beyond technical law learning. In this way, "law learning," as I propose it, is distinct from law taught in other public law courses and programs such as, for example, Georgetown's Street Law Program, some iCivics resources, and the HarlanConnect virtual mentor program, which are all designed to literally teach law. For our purposes, that is just a small part of the lesson. We are more interested in the critical thinking and civic values-learning that happens as a byproduct of discussing law texts.

[50] Martha Nussbaum's *Not For Profit: Why Democracy Needs the Humanities* (Princeton University Press, 2010) makes a strong theoretical case that this is a chief-most pressing preoccupation.

[51] To be sure, law learning in the way I describe – with a focus on legal reasoning, law think, and values-learning – has not been conducted in public schools. We do know, however, that such an education will yield the results I describe above. We know this through the robust research literature on "law-think." We also know this from an exploration of the Jewish Tradition's focus on law as civics, which serves as an inspirational foundation for the immediate argument. I go into this more deeply in several of my older articles and in my forthcoming projects.

perceived 'universal or national values.'[52] Law as civics, therefore, *is a practical and a valued education* and one that is urgently needed today.[53]

The Current Failure in K-12 Civic Education and How Law Can Help

If one was to survey the national K-12 civic education landscape, they would come across very troublesome realities. I study this at length in my forthcoming works, but one aspect that is, by my estimation, particularly irksome is the emphasis of many courses in civics on the rote memorization of descriptive facts. While they stress the cultivation of 'competent and responsible'citizens, this pacifies learners by focusing on technical details without vibrant application. But, where there are courses with a greater focus on engaging actively with the system – stressing lessons on voting, for example, or, in recent years, placing a particular emphasis on protest and community service – these courses are problematic in that they often emphasize only singular visions of what constitutes civic behavior at the expense of a multi-dimensional understanding of civics.[54] Still other civics courses delimit points of view, inculcate values, and define the nature of good citizenship in polarizing ways.

This confused landscape only exacerbates a greater problem we face today: not only is civic literacy objectively at all-time lows, but our citizenry is becoming demonstrably distrusting of our civic institutions, frustrated, and disconnected. [55] This means that, even if they act, they can be disinterested in engaging *within* our system to effect social change – a potential problem for our democratic survival. There is a broader, pressing concern thus far poorly addressed: that our nation's public schools are not producing civically literate citizens who *trust* our institutions, *care* to address social causes through our institutional apparatuses,[56] or are capable of robust,

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[52] This aligns well with existing standards and competencies for civic dispositions as defined by the Campaign for the Civic Mission of Schools. Namely, skills like the following: tolerance and respect, appreciation of difference, personal efficacy, sense of belonging to the collective, readiness to compromise personal interests to achieve shared ends.

[53] Law learning is also uniquely positioned to address the ideological debates currently impacting social studies, history, and civic education reform in some states over values-neutrality in the curriculum. This is because this education side-steps the central preoccupation of values inculcation or indoctrination in schools that prompt calls for values-neutrality *or* for values-inclusion depending on the state. Instead, law learning is a values-plural form of education, accessible across ideological divides and meant as a tool for internal reflections that lead to critical conversation in safe and sustainable ways through the use of universalizing law cases. For this book project, it ensures that the book can be used quite widely and universally.

[54] There is a popular clamor – from the political right and left – that civics classrooms try and promote a certain type of "good citizen." Consider, as one example, the robust debate around action civics as "protest civics" as featured in Sara O'Brien's and Meira Levinson's short piece, "Taking the Action Out of Civics?: Polarized Debates over Civic Education," Justice in Schools, https://www.justiceinschools.org/files/playpen/files/taking_action_out_of_civics.pdf. The proposal here does not purport to take a side on this debate. It only acknowledges that current reforms are fraught and offers a line of course materials more objectively focused on meeting the broadest interpretations of civic standards.

[55] For a representative scholarly discussion, *see e.g.,* Roberto Foa and Yascha Mounk, "The Signs of Deconsolidation," 28 Journal of Democracy 5 (2017) (discussing the generational rise of distrust, frustration, and disinterest in democracy). For a survey in support of this contention, *see e.g.*, "Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role," Pew Research Center Survey (June 2022) (detailing how just 20% of Americans "trust the government to do the right thing," while 8% describe the government as being "responsive to the needs of Americans," and just over half have only "some" confidence in the nation's future).

[56] The disaffection of activists for operating within the system to achieve social justice is also a highly discussed topic in the research literature. Such disaffection, for example, surrounds rising abolitionist rhetoric for effecting social change – dismantling systems rather than work within them in a traditionally democratic way. Prison

constructive discourse and disagreement. This opens us up to abuse by those who instrumentalize and exacerbate our political, social, and ethical differences – as well as our lack of civic institutional knowledge[57] – for the purposes of some gain.

While it is the project of civic education to combat this reality,[58] programs across the nation – and even current civic reform efforts – are failing[59] to cultivate capabilities of active and thoughtful citizenship for our robust, plural democracy. This, to my mind, is where 'law learning' as a civic education enters. To learn law – *not as a substitute, but a compliment to civic education material and programs* – promises a path toward a better civic education where students engage in critical dialogue, cultivate key civic skills, and nurture a greater awareness of their own values in a classroom devoted to inclusive and comprehensive roundtable discussion.[60] A law education for high schools, when properly conceived, ensures classroom environments where civic virtues and skills can flourish – environments that are inclusive, reflective, contentious, and yet creative.[61]

How does law as a subject do all this? And what does, say, a high school or elementary school law classroom look like? Let us begin with the former question. Learning law, to its core, is about instructing students about the institutions that touch one's life, but also cultivating a calculative and reflective temperament, appreciation for tradition, and respect for others. This alone is incredibly civic. Furthermore, when properly conceived, law learning empowers students to connect with systems, see their worth and value as changemakers, to *want to act*, and

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abolition is the most prevalent of such movements. *See e.g.*, Rachel E. Barkow, "Promise or Peril?: The Political Path of Prison Abolition in America," 58 Wake Forest L. Rev. 245 (2023) (noting, especially, that "there is the possibility that calls for abolition could lead to more harm than they prevent . . . because the rhetoric of abolition is absolutist, there is the risk that approach will frighten segments of the public who would otherwise support de-incarceration, even radical de-incarceration, but are not prepared to rule it out entirely.").

[57] For more on this, *see e.g.*, Kim Lane Scheppele, "Autocratic Legalism," 85 The University of Chicago L. Rev. 582-83 (2018).

[58] Of course, the goals of civic education are varied and dynamic, as I discuss in *Law as Civic Education*. However, understanding civic institutions, inviting change-making *through* our civic system, and evaluating the legitimacy of civic characters are all certainly aspects. This is exemplified by our national civic standards. *See e.g.*, "Goals and Standards of Civic Education," Center for Civic Education, https://www.civiced.org/standards?page=stds_toc_intro. This idea of generating *aware* and *participatory* citizens – civics as an intellectual and skills-based education – is also the subject of discussion more broadly in the literature. *See e.g,* Walter Parker, "Knowing and Doing in Democratic Citizenship Education," *in* Handbook of Research in Social Studies Education 65 (L.S. Levstik & C.A. Tyson, Eds.) (New York: Routledge, 2008). Both aspects are essential for a flourishing democracy. *See e.g.*, Richard Haass, *The Bill of Obligations: The Ten Habits of Good Citizens* 135 (Penguin Press, NY: 2023).

[59] This is also a well-developed point in the literature. Arguments for reform are myriad both from within the school system and by way of external institutions. *See. e.g.*, Michael Rebell, *Flunking Democracy: Schools, Courts And Civic Participation* (University Of Chicago Press, 2018).

[60] The reflective nature of law learning – emphasizing reason, values deliberation and critical thinking – is a well-discussed point. *See e.g,* Graham Ferries, *The Uses of Values in Legal Education* (Intersentia, 2015). Law learning naturally invites deep analysis, healthy disagreement, debate. Emphasizing legal reasoning as a reflective learning tool in high school civics classrooms – more than just learning law, rights, and obligation descriptively – is what is novel.

[61] In 2022, students' civic scores on the National Assessment of Educational Progress (NAEP) markedly declined. Where students are taking courses emphasizing government, civics, and democracy, lower percentages report high confidence in their civic skills. In America and globally, surveys show that students are *less* interested in democracy, and a shrinking number of citizens find it 'essential' to live in a democratic country. *See e.g.*, "The Civic Outlook of Young Adults in America," The Institute for Citizens and Scholars (2024); Foa, R.S., Klassen, A., Wenger, D., Rand, A. and M. Slade, "Youth and Satisfaction with Democracy: Reversing the Democratic Disconnect," University of Cambridge Bennet Institute for Public Policy, Center for the Future of Democracy (2020).

build relationships with that in mind.[62] Beneficiaries of this education, by virtue of learning about the arc of common law development, the justifications for decisions, and the way all levels of the legal system operate in the interest of getting to the 'right' decision, put stock in political and policy conversations that are now seen as 'not one's problem' or 'unsolvable.' A law classroom – much like a courtroom – looks like a place where students engage a difficult question, express differing views, and dialogue critically with the expectation that the results will not be stringently enshrined beliefs or ideas but yield a respectable myriad of dispositions and roundtable discussion. Children come together to discuss mutually important issues, critique the system, contend with differing perspectives, and resolve disputes. One big difference: their only client is something more like "truth" or "justice" than one discrete person or company. This education – loftily considered – combats superficial understanding that leaves one vulnerable to political sway; we develop the individual to think about some of our most divisive issues unfettered by external interests, a place of true *autonomy,* above manipulation.

This sort of learning – accessible to all citizens – would mean *so* much for our democracy. Consider, for a moment, the words of Llewellyn at the opening of this piece. They are excerpted from his famous *Bramble Bush* lectures – which law students across the country, every year, take time to read and process. To him (and he is by no means the last person to say this), the law operates on a "fringe of high necessity;" it is a "safety valve" for all of us. The law is preventative, doing its work behind the scenes so that "the climax of need has no occasion to occur." It is, in other words, of immeasurable benefit to us to know the law and operate within it as it makes its way into every aspect of our lives. Moreover, it would ensure that our democracy *runs* better. Consider the following words by Thomas Jefferson:

> Every man, and every body of men on earth, possesses the right of self-government. They receive it with their being from the hand of nature. Individuals exercise it by their single will, collections of men by that of their majority; for the law of the majority is the natural law of every society of men.[63]

Now, if Llewellyn is correct that law is everywhere and that its operation and ordering is acting counter always to some disquieting disaster, and, simultaneously, we are, ourselves self-governing, making our own choices according to "single will," weighing them with the interests of the collective, and then in turn being governed by the laws produced by that collective, then wouldn't it stand to reason that *we all* ought to know a little bit of how this law – operating always in the background, alongside our democratic discourse – works? How can the 'law' *not* impact our ability to self-govern ourselves, and thereby ensure that our democracy is as surely true to its objectives as can be?

Jürgen Habermas, a path-breaking contemporary philosopher of law and democracy, articulates a view of law that is "communicatively mediated" through "intentional social relations," implying that autonomous,[64] thoughtful "flesh-and-blood'

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[62] This aligns well with existing standards and competencies for civic participatory skills as defined by the Campaign for the Civic Mission of Schools, namely skills like the following: organizing, building consensus, understanding how to navigate institutions, communicating through public speaking.

[63] Thomas Jefferson, Constitutionality of the Residence Bill of 1790, July 15, 1790, *in* John P. Foley, ed. The Jeffersonian Cyclopedia (New York: Funk and Wagnalls, 1900), 798.

[64] Habermas, "Knowledge and Interest" (1966) 9 *Inquiry*, 285–300, 297. To Habermas, as a normative basis for his theory, humanity is autonomous by its nature. "The concern with emancipation from quasi-natural authority is not

individuals are in a regular dialogue with their laws and legal systems to best reflect their values."[65] On the ground, ethical-political reasoning influences the consensus of the affected that contribute to democratic law formation;[66] meaning, in turn, that *all* actors are empowered to take yes or no positions on "various claims pertaining to propositional truth, normative rightness, and subjective truthfulness" in a given matter.[67] Participants argue about validity claims, and, according to Habermas, are swayed by the "peculiarly constraint-free force of the better argument."[68] To persuade, rather than to coerce, becomes the *modus operandi* of the functioning democracy; law represents the output of peak persuasion, collective influence, and self-determination.[69]

This jurisprudential view – however classical and, some critics might say, naïve[70] – supports the ideas that a citizen's education is incomplete without an understanding of law, which is both substantive, in terms of learning what law is and how it works, *and* an active experience in which burgeoning citizens develop tools for intelligent criticism, robust understanding of competing values and legal processes, and awareness of larger ideas. In a sense, it is an education *of* and *for* the autonomist view of citizens and society. By the same token, if law is self-referential and reflective of larger social norms and agreement, then a solution to the perceived ills of our democracy today does not lie in passing laws or top-down change, but from its citizens from the bottom-up. Especially in America – as Jefferson hints at above – the language of change is the language of law, and so we must learn it!

Conclusion: Rethinking a Law Classroom

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just a vague idea that hovers before one's eyes: it can be *a priori* comprehended. What raises us above nature is indeed the only fact of which, due to its very nature, we *can* have knowledge: namely, language. The idea of autonomy is given to us with the structure of language. With the very first sentence the intention of a common and uncompelled consensus is unequivocally stated."

[65] James Chriss, "Review essay view essay of Jurgen Habermas' Between Facts and Norms," Sociology & Criminology Faculty Publications (1998)

[66] Mark C. Modack-Truran, "Habermas 's Discourse Theory of Law and the Relationship Between Law and Religion," 26 Cap. U L. Rev. (1997).

[67] James Chriss, "Review essay view essay of Jurgen Habermas' Between Facts and Norms," Sociology & Criminology Faculty Publications (1998)

[68] Habermas, *The Theory of Communicative Action*, *Vol 1: Reason and Rationalization of Society* (Polity, 1986, German original: 1981), p.28. In terms of the larger order, "decision makers at the political center cannot ignore such power (as they would otherwise be unlikely to be re-elected). Habermas's concept of legitimate law thus crucially rests on the communicative practices of civil society, which will channel their impulses into the political system and in this way prevent it from becoming self-reliant and detached from citizens. *See* https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12343*;* Chapter 8, Jürgen Habermas, *Between Facts and Norms* (Polity, 1997, German original: 1992), 107.

[69] Abdollah Payrow Shabani, BU Law Symposium, Habermas' Between Facts and Norms: Legitimating Power? Based on his earlier works, the process is thus: "Informal public opinion-formation generates "influence"; influence is transformed into "communicative power" through the channels of political elections; and communicative power is again transformed into 'administrative power' through legislation." Habermas, "Three Normative Models of Democracy", in *Constellation*, Vol. I, No:1, 1994, p. 8. Also, "legitimate lawmaking is understood as a result of institutionalized procedures that convert citizens' practice of self-determination in the form of communicative and participatory rights into the binding decision of political power."

[70] *See e.g.*, Abdollah Payrow Shabani, BU Law Symposium, Habermas' Between Facts and Norms: Legitimating Power? Notably, many of the philosophies here – whether on law or education – have been considered naïve. Even Martha Nussbaum in *Political Emotions: Why Love Matters for Justice* contends refers to his complimentary vision of 'constitutional patriotism' as "so moralized and so abstract that one can't have any confidence that it would work in real life." *Id.* at 222. However, she recognizes credit owed to him for recognizing the role emotions do play in his deliberate and discursive democracy with the 'autonomous' citizens.

While we now have the *why* of law as civics, let us consider briefly what the K-12 law classroom might look like structurally. Technically, the classroom begins with an annotated case study which declaims the civic skills, aptitudes, and objectives that the study of associated legal cases and law-related discussions strengthen. Then, there are facts, guiding questions, and, of course, the law (broadly conceived; annotated judicial opinions, party and amicus briefs, administrative orders, law review comments, statutes, and more). All of these resources help formulate a civics classroom that is unique, I argue, in four ways: reflective, inclusive, creative, and constructively contentious.

First, the classroom alights with energy as the space transforms into a place for *reflection*. Select cases and examples – from criminal law, constitutional law, tort law, and property law – cultivate reflective environments where students observe the legal mechanizations of inequality, disenfranchisement, resourcing, and fairness. Students focus in, through the medium of the annotated case study, on allocations of power, examine justifications for discrimination, and gain an awareness of how systems (historically and today) target communities, identify systemic priorities, and balance interests. Students practice thinking about complicated controversies, defending points and counterpoints with precedential support, and assess their role in future developments. They are also introduced objectively to different civic institutions and forms of law which form the basis of the social order to which they belong.

Then, the classroom re-focuses on *inclusivity*. Students note how law embraces a plural posture on values that allow for the reinforcement of privately held values in the context of social democratic values. Embedded in the curated case studies are glimpses of law's self-awareness that there are many approaches to solving an issue and many views on what constitutes 'right and proper' order. Through this, students cultivate the capabilities of reflecting on their own values in the context of the social demands of a democracy. Substantive and procedural law examples force meditation on one's internal sense of justice, sense of the common good, and bringing these instincts into conversation with 'national interest' or the 'American' values upon which our systems are structured. It is a process of self-examination and, thereafter, learning to articulate differences and disagreements with respect, so that students learn to live securely in their own ideas within a diverse society. And, from there, they can act *creatively* to identify how new frontiers can be forged *from and by* precedent and *through* law and institutional agents. Having this foresight into seeing *what things can be* can help transform their relationship to authority today. To this end, law lessons invite discussions about articulating ends to social justice and equity issues, ways to work democratically to achieve just outcomes, and robust study of current social movements through the lens of law.

All the while, law learning simultaneously proffers a space for students to debate. Through lessons that provoke *constructive contention*, students gain opportunities to build skills by engaging in debate, argument through reason, and confrontation. More controversial legal material will assist students in defending a position, handling divisiveness, and cultivating judgment. Students will mobilize newly acquired understandings of the different facets of our legal system to argue for vindications of rights and responsibilities. Experimentation, as well, in the exercise of protest rights and social activism through the lens of law can be explored. Students, in time, come to appreciate how small disagreements – in communities, within families – manifest on larger, systemic scales and yield polarization through the machinations of law.

All this and more brings to life the view of law to which Harold Berman held so steadfastly: at once professional and humanistic, *yet in this case interested in the professional*

cultivation of the citizen. As he remarked, "all good professional education is characterized by a focus on the interaction of ends and means in reaching decisions." [71] While there is much to be said in contravention to (and also in support of) the law school's overt focus on practice-readiness, a new 'legal education' could very much look like a project in support of educating students for the *profession* of citizenship by way of studying law in its most robust, philosophical sense. The study of law is, in fact, "closest to the subject matter of the liberal arts" as it instructs students in a "professional way of thought" while "deal[ing] with the problems of common men and are generally understandable. The decisions it makes, although they relate to individual persons or institutions, are made in a social setting." [72] The law further "records not only the decisions it makes but [also] the reasons the individual judges thought they had for making them" which causes the students to be "directly in contact with reality." [73] All law, not just cases, articulate "reasons for and against particular legal solutions to particular social problems; and further, in all types of legal decision-making, the reasons that are offered must fall within a framework not only of logic and of values but also of tradition and of authority." [74]

Such an education is immeasurably valuable to more than just those initiated individuals aspiring to law practice, but a much broader cadre of citizens whose character and civic preparedness can be strengthened in the interest of ensuring a robust and flourishing democracy. And this work ought not to begin merely in college, but in our earliest days in the classroom.

[71] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).
[72] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).
[73] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).
[74] Harold J. Berman, "Law in the University," 10 Legal Stud. F. 53 (1986).

The Normative Power of Terrorism: ISIS and the Politics of Statehood

Authored by
Matthew Q. Clary, Ph.D. and Riggs Walker, Auburn University

The rise of ISIS has challenged conceptions of terrorism and statehood, revealing the normative nature of international law. The definition of terrorism is vacuous, with the label being used normatively against ISIS, although ISIS is more accurately described as a state. This distinction is important: dealing with terrorist organizations is necessarily different from dealing with states, however, there are valid reasons for governments to continue referring to certain bad actors like ISIS as terrorist organizations and even formally denying recognition of their statehood.

National designations of terrorist organizations are heterogeneous. Masri and Phillips explain, "Governments around the world have implemented so-called terrorist designation lists, which label groups as terrorists for counter-terrorism purposes. However, there is no consensus about the designated organizations, and lists vary considerably."[75] Several countries have varying definitions that are intentionally ambiguous. States have strong reasons to keep it that way, using the label normatively. The difficulty in classifying a group such as ISIS as a terrorist organization stems from the lack of a universally agreed-upon definition of terrorism.[76]

These differing designations are given for a variety of reasons. Governments will often use the label to "name and shame"[77] groups they are in conflict with, legally justifying action (like sanctions) against them. O'Connell uses Chechnya as an example.[78] The Russian government refused to refer to rebels as combatants, instead labeling them as terrorists. This was done to avoid the embarrassment of admitting that Russia was losing ground in a bloody

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[75] Mirna El Masri & Brian J. Phillips, *Threat Perception, Policy Diffusion, and the Logic of Terrorist Group Designation,* 47 Stud. in Conflict & Terrorism 838, 838 (Dec 13, 2021).
[76] Chris Meserole & Daniel L. Byman, *Terrorist Definitions and Designations Lists,* Glob. Rsch. Network on Terrorism & Tech., Paper No. 7 (July 19, 2019), https://www.brookings.edu/articles/terrorist-definitions-and-designations-lists/.
[77] Masri, *supra* note 1.
[78] Mary E. O'Connell, Enhancing the Status of Non-State Actors Through a Global War on Terror?, 43 Colum. J. Transnat'l L. 435 (2005).

conventional war. This approach was used again during Ukraine's Kursk incursion, with the Russian government declaring a counter-terrorism regime in Sumy, Kursk, and Belgorod to delegitimize Ukrainian Military operations.[79] Other states similarly use terrorist designations normatively.

The inconsistency of state classifications of terrorism does not preclude the finding of common attributes. Schmid explains, "... this impossibility is mainly a political one, linked to the divergent interests of those holding state power, defending their own interests in their domestic and foreign rivalries and conflicts - not one linked to the limitations of the legal and social sciences."[80] Phillips conducted a literature review and found that most definitions of terrorist organizations share three key characteristics: they engage in terrorism, have political objectives, and are subnational groups.[81] ISIS meets some of these attributes, but not all. ISIS engages in acts of terrorism. Schmid says acts of terrorism "[C]an be understood as a special kind of violence; the peacetime equivalent of war crimes. Terrorist acts terrorize, … Terrorism distinguishes itself from combat through disregards for principles of chivalry and humanity contained in the Hague Regulations and Geneva Conventions."[82] These acts inflict terror by making others fear they could be targeted. ISIS's 2015 Paris attack created terror precisely because it was perceived that the victims could be *anybody*. Further, these actions were distinguished from combat by the purposeful disregard of protections outlined in the laws of war, which ISIS violated in its intentional targeting of civilians.

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[79] Jaroslav Lukiv, *Russia in Counter-Terror' Mode Over Ukraine Attack*, BBC News (Aug. 10, 2024), https://www.bbc.com/news/articles/c0qedq0penko.
[80] Alex P. Schmid, *Defining Terrorism*, Int'l Ctr. for Counter-Terrorism 23 (Mar. 13, 2023), https://www.icct.nl/publication/defining-terrorism.
[81] Brian J. Phillips, *What is a Terrorist Group? Conceptual issues and Empirical Implications*, 24 Terrorism and Political Violence 225 (2014).
[82] Alex P. Schmid, *Frameworks for Conceptualising Terrorism*, 16 Terrorism and Political Violence 197, 203 (2004).

Terrorist organizations are political, meaning they use terrorism to achieve varying political aims, such as pursuing self-determination or asymmetrically challenging the policies of more powerful actors. For example, the Red Army Faction in West Germany used terrorism to further its goal of starting a communist revolution. The provisional Irish Republican Army engaged in terrorism to effect a British exit from Northern Ireland. Al Qaeda used terrorism to force a complete withdrawal of the West from the Middle East, paving the way for a caliphate. Likewise, ISIS used terrorism with the goal of actually establishing a caliphate. Terrorist organizations are also subnational, or non-state actors.[83] This means that if an organization is best described as a state, it cannot be considered a terrorist organization. Even if states engage in terrorism they are still states, just states engaging in or sponsoring terrorism.

The modern conception of statehood is articulated in the Montevideo Convention, where if any organization meets its criteria for statehood it is a state, regardless if others recognize it as such. The Montevideo Convention on the Rights and Duties of States has significance in international law for its four criteria of statehood found in Article One: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[84]

ISIS, at its height in 2015, met all four criteria for statehood under the Montevideo convention. Since it could best be described as a state, it could not be considered a terrorist organization. Cronin believed that ISIS was not a terrorist organization because it more closely resembles a state, "Isis . . . boasts some 30,000 fighters, holds territory in both Iraq and Syria,

[83] O'Connel, *supra* note 4.
[84] Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

maintains extensive military capabilities, controls lines of communication, commands infrastructure, funds itself, and engages in sophisticated military operations."[85]

The first requirement of statehood is a permanent population. A permanent population is a group of people who reside in an area for an extended period. For example, cities have permanent populations but seasonal villages do not. Hernández-Campos explains that this criterion is not limited by the size of the population, the cultures, the ethnicities, or even their identification with the state.[86] Although much of the citizenry residing in ISIS controlled-territory did not identify with the state in a traditional sense, ISIS met this criterion simply by possessing a permanent population living within its controlled territorial boundaries, having a population of more than 11 million people at its peak in 2014.[87]

The next criterion for statehood is a defined territory. This means having some amount of permanent territory that an entity governs.[88] This requirement was explored during Israel's accession process to the United Nations in 1948, where the representative for the United States argued, "Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority."[89] Crawford explains how even grave territorial disputes do not preclude a defined territory, "a State for the purpose of this rule means any entity established as a state in a given territory, whether or not that territory formerly belonged to or is claimed by another state,"[90] ISIS met this

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[85] Audrey Kurth Cronin, *ISIS is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist Threat*, 94 Foreign Aff. 87, 88 (Mar./Apr. 2015).
[86] Augusto Hernández-Campos, *The Criteria of Statehood in International Law and the Hallstein Doctrine: The Case of the Republic of China on Taiwan*, 24 Chi. (Taiwan) Y.B. Int'l L. & Aff 75 (2006).
[87] Seth G. Jones et al., *Rolling Back the Islamic State*, RAND Corporation, (Apr. 20, 2017).
[88] Amy E. Eckert, *Constructing States: The Role of the International Community in the Creation of New States*, 13 J. Pub. & Int'l Aff. 19 (2002).
[89] U.N. SCOR, 3d Year, 383d mtg. at 11, U.N. Doc. S/PV.383 (Dec. 2, 1948).
[90] Eckert, *supra* note 14.

requirement by possessing over a hundred thousand square kilometers of territory previously governed by the governments of Syria and Iraq.[91]

The third criterion for statehood is government. A government is a body that exercises political and legal authority over its citizens. That means it can pass laws, raise money, enforce its will, and so forth. This broad definition allows any government, regardless of kind, to meet this criterion.[92] ISIS met this criterion by possessing a government capable of exercising strict control over its population in the territory it effectively controlled.[93] It carried out common functions of government: providing services (including a healthcare system modeled after the British National Health Service), collecting taxes, and maintaining order through the rule of law.[94] It developed a legal foundation for statehood from a strict interpretation of Islamic law. For example, the group released a fatwa (a legal analysis based on Islamic law) justifying immolation as a legitimate form of punishment to defend the burning of a Jordanian pilot in 2015.[95] Revkin explains why that justification is important. He indicates that it was ISIS's "reliance on law to legitimize power and violence is hardly unique and is in fact consistent with patterns of state formation seen all over the world."[96] Regardless of how brutal ISIS's law was, ISIS was nevertheless the law.

The fourth, and final, criterion for statehood is the capacity to enter into relations with other states. This criterion concerns the *capacity* of a state to enter into relations with other

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[91] Jones, *supra* note 13.
[92] Eckert, *supra* note 14.
[93] Charles C. Caris & Samuel Reynolds, *ISIS Governance in Syria*, Middle East Security (July 2014), https://www.understandingwar.org/report/isis-governance-syria.
[94] Archit Baskaran, *The Islamic State Healthcare Paradox: A Caliphate in Crisis*, 7 Inquiries Journal (2015), http://www.inquiriesjournal.com/a?id=1054.
[95] Middle East Media Research Institute, *ISIS Issues Fatwa to Justify Burning of Jordanian Pilot* (Feb. 3, 2015), https://www.memri.org/jttm/isis-issues-fatwa-justify-burning-jordanian-pilot.
[96] Mara Revkin, *The Legal Foundations of the Islamic State*, The Brookings Project on U.S. Relations with the Islamic World, 6 (July 2016), https://www.brookings.edu/articles/the-legal-foundations-of-the-islamic-state/.

states, not whether they actually do enter into relations with other states. Eckert explains that this means having *actual independence* from another power, granting a state the constitutional and *actual* ability to engage with other powers (2002).[97] Having the constitutional or legal authority to engage with other states is the state recognizing itself as sovereign. For example, the United States did not receive any recognition, tacit or explicit, for nearly a year after independence. However, the early US was still a state because it had the legal and actual capacity to engage in relations with other states because they were in effect independent of British rule.

ISIS possessed the capacity to enter into relations with other states because they were independent of another governing power. The case of ISIS is unique because it denied itself positive relations with other states through war. Because this denial was self-inflicted and not dictated by another power this refusal revealed a real independence. Further, recognition of statehood is irrelevant to the question of statehood itself. There are two dominant theories describing statehood and recognition, the declarative theory of statehood and the constitutive view of statehood. The declarative theory suggests that the possession of statehood is a fact that exists independently of international recognition, adhering to the Montevideo Convention. This has become the prevailing view in international law.[98]

The constitutive theory posits that statehood is only achieved upon recognition by other states. Those who accept this view would not consider ISIS a state. Adherents argue that since statehood is an artificial concept, it only has as much meaning as actors ascribe. States do not exist in a vacuum; their existence depends on the framing of others. If other states do not see an entity as a state, it is not a state. States may espouse the Montevideo Convention, but it is rarely perfectly followed.

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[97] Eckert, *supra* note 14
[98] Eckert, *supra* note 14

The constitutive theory is useful but does not provide a comprehensive explanation of state recognition. The constitutive theory is less concerned with questions of fact and instead focuses on actual behavior. In contrast, the declarative theory is *descriptive*. If an organization acts like a state it *is* a state. Article 3 of the Montevideo Convention begins, "The political existence of the state is independent of recognition by other states."[99]This is true whenever an entity meets the criteria for statehood, no matter how unsavory their means of achieving it. Kilibarda explained how this applies to even "illegally created" states, "[a] State either exists or it does not exist; there is no such thing as an 'illegal' State. Thus, even entities such as Southern Rhodesia or Northern Cyprus must be considered States despite the violation of peremptory norms …"[100]

These theories are useful because they frame state interactions. The declarative view frames statehood more successfully than the constitutive view because it accepts the reality that statehood is a fact that is at least implicitly always understood. The constitutive view can rightfully claim that under international law ISIS cannot be recognized as a state. However, it fails to provide a useful alternative description. International law is fundamental to international relations, but it is not always in line with practical realities. If a state meets the definition of a state, it should be at least implicitly considered a state. This is important, as state interactions are very different from state-non-state interactions.

Regardless of recognition, other states implicitly treated ISIS as an enemy state. O'Connell explains "The traditional U.S. position, like that of the United Kingdom, is that a group using terrorist tactics should be equated with states only when sponsored by a state or in control of territory."[101] Regardless of whatever tactics a group uses, if it acts like a state it is

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[99] Montevideo Convention, *supra* note 10, at 3-4.
[100] Pavle Kilibarda, *States in International Law*, States in International Law 99, 98 (August 2024).
[101] O'Connel, *supra* note 4, at 448.

treated like a state. Watson believes this treatment was borne out in the international response to defeat ISIS, meaning a counterinsurgency operation was insufficient to contain the threat (2020).[102] The response to ISIS was not designed to destroy a terrorist organization or an insurgency, it was designed to dismantle a state. Defeating ISIS meant *conquering* ISIS. That entailed a large-scale conventional war, one between state actors. This reflected a reality states refused to acknowledge but one they nonetheless understood: ISIS was a state.

Regardless of the fact of statehood, states ought not to grant legitimacy to ISIS or other states that originate in norm-breaking ways. The ICJ issued an advisory opinion explaining that states have a duty not to recognize states that come about from violations of international law or norms in order to more effectively combat them.[103] ISIS's rise to power through conquest was itself illegitimate under Article 2(4) of the United Nations Charter, which states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[104] Further, the group engaged in genocide,[105] ethnic cleansing, systematic sexual violence, [106] and more. ISIS's egregious violations rightfully precluded its inclusion in the community of nations.

States were right to classify ISIS as a terrorist organization, even if the classification was not technically correct. This classification is based "on normative or moral judgments about the

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[102] Mason W. Watson, *The Conflict with ISIS: Operation Inherent Resolve, June 2014-January 2020*, 78 U.S. Army Ctr. of Mil. Hist. (2021).
[103] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.CJ. 403, para. 81 (July 22).
[104] U.N. Charter art. 2, para. 2.
[105] U.N. Office of the High Comm'r for Human Rights, U.N. Comm'n of Inquiry on Syria: ISIS is Committing Genocide Against the Yazidis (June 16, 2016), https://www.ohchr.org/en/press-releases/2016/06/un-commission-inquiry-syria-isis-committing-genocide-against-yazidis.
[106] Human Rights Watch, *Iraq: ISIS Escapees Describe Systematic Rape* (Apr. 14, 2015), https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape.

legitimacy of a given regime and how it exercises violence."[107] Given the necessity to fight ISIS, it was proper that states make the normative judgment to classify ISIS as a terrorist organization. For example, the US designation of ISIS as a Foreign Terrorist Organization (FTO) provided the legal foundation to aggressively cut off key cash flows to ISIS.[108] This special designation served as a powerful tool, creating a chilling effect by threatening retaliation for any affiliation by a private or state actor with harmful groups like ISIS.

Ultimately, the challenge ISIS posed to the international order revealed the normative nature of international law. It is applied only as far as actors will it. That is borne out in arbitrary designations of terrorism and even statehood. These applications do not change the facts on the ground: ISIS was not a terrorist organization, ISIS was a state. However, it was beneficial for actors to adapt language to serve their interests and those of the international community. This flexibility is not a flaw, it is a feature. Actors need only recognize that language and reality need not always converge and act accordingly.

[107] Meserole, *supra* note 2, at 4.
[108] U.S. Dep't of the Treasury, *National Strategy for Combating Terrorist and Other Illicit Financing* (2018), https://home.treasury.gov/system/files/136/nationalstrategyforcombatingterroristandotherillicitfinancing.pdf.