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Texas Journal on Civil Liberties & Civil Rights
Letter from the Editor

Dear Reader,

Thank you for your subscription to the Texas Journal on Civil Liberties & Civil Rights. The past few months have kept civil rights and civil liberties issues at the forefront of our consciousness, and this issue of the Journal dives into a number of them in illuminating ways. In this issue, our authors discuss the Supreme Court's recent ruling about racial bias on juries, and the religious freedom legislation that Texas has passed in response to growing acceptance of same-sex marriage. We are also delighted to have two policy pieces, from policy students at the University of Texas's own LBJ School of Public Affairs, which address the plight of people who are elderly in Texas prisons, and the educational hurdles faced by youth reentering society after incarceration.

Last term, the U.S. Supreme Court issued a narrow decision in *Peña-Rodriguez v. Colorado*, which created a racial bias exception to the previously settled principle that a jury's verdict was not to be impeached. Taurus Myhand traces the history of this "no-impeachment rule," and argues that the *Peña-Rodriguez* holding actually threatens to damage the American jury trial system that it claims to uphold.

Formerly incarcerated youth face a multiplicity of challenges after completing their sentences, not least of which is getting an education. Sonia Pace examines the barriers these youth face, the federal protections that are intended to help safeguard their educational rights, and the steps that states can take to better ensure these youth have access to the education they need to be successful.

At the other end of the age spectrum, people who are elderly face unique issues in prisons as well. Erika Parks discusses the growing number of older people in prison and the increased risk of death such people face. Parks analyzes data on recent deaths in Texas prisons, and recommends steps Texas can take to allow greater numbers of older people live out their remaining days outside prison walls.

In the wake of the Supreme Court's decision in *Obergefell v. Hodges*, the Texas legislature proposed and passed increased number of bills related to religious freedom. Kimberly Saindon explores the origins of and judicial challenges to the federal Religious Freedom Restoration Act, which inspired much of Texas's religious freedom legislation, and analyzes the impact of Texas's laws on the issue of religious adoption agencies who refuse to place children with same-sex couples.

I hope you enjoy this issue of the Texas Journal on Civil Liberties & Civil Rights, and I am grateful for your continued support.

Sincerely,

Marissa Latta
Editor in Chief

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NOTES

Notes

Will the Jury System Survive the *Peña-Rodriguez* Exception to Rule 606(b)?: The Court's Response to Racial Discrimination by a Juror Leaves the Future of the American Jury Trial System in Jeopardy

Taurus Myhand*

INTRODUCTION

The jury room has been closely guarded as a "sacred" space throughout the history of the United States. The secretive nature of jury deliberations helps to ensure the jury functions properly in rendering a verdict.[1] The protection extended to jury deliberations is important to promoting finality in cases, while also deterring frivolous attempts at undermining a verdict rendered by ordinary persons with no interest in a case.[2] Additionally, the protection was designed to encourage free discussions during jury deliberations while preventing the harassment of jurors regarding those discussions.[3] It has long been considered more suitable to lose important evidence than to interfere with a "confidential communication" that is so valuable to our legal system.[4] Accordingly, jurors have generally not been allowed to testify to prove misconduct that occurred during jury deliberations "to impeach the verdict, particularly as to a juror's subjective decision-making process, motives, or intra-jury influences on the jury during its deliberative process."[5]

In March 2017, the Supreme Court changed course from centuries of jurisprudence and superseded the Federal Rules of Evidence with a new exception to Rule 606(b) in the Court's decision in *Peña-Rodriguez v. Colorado*.[6] Prior to *Peña-Rodriguez*, the only exceptions to Rule 606(b)

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1 Jacob J. Key, *Walking the Fine Line of Admissibility: Should Statements of Racial Bias Fall Under an Exception to Federal Rule of Evidence 606(b)?*, 39 AM. J. TRIAL ADVOC. 131, 133 (2015) (citing United States v. Thomas, 116 F.3d 606, 618 (2d Cir. 1997)).

2 *See* Arizona v. Washington, 434 U.S. 497, 504 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'").

3 Terrence W. McCarthy & Callie D. Brister, *The Newly-Created Racial Bias Exception to the General Rule that Precludes Jurors from Offering Testimony to Impeach Their Own Verdict*, 78 ALA. LAW. 285, 286 (2017) (citing CHARLES W. GAMBLE & ROBERT J. GOODWIN, MCELROY'S ALABAMA EVIDENCE § 94.06(1) (6th ed. 2009)).

4 *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 874 (2017) (Alito, J., dissenting) (comparing the protection of jury deliberations to the confidentiality privileges extended to physicians, spouses, and clergy).

5 23A C.J.S. *Criminal Procedure and Rights of Accused* § 1979 (updated 2018).

6 *See Peña-Rodriguez*, 137 S. Ct. at 855 (finding an exception to Rule 606(b)); *see also* FED. R. EVID. 606(b) (preventing jurors from testifying about deliberations during an inquiry into the validity of a verdict or indictment).

allowed jurors to "testify about: (A) 'extraneous prejudicial information' improperly brought to their attention, (B) 'outside influences' improperly brought to bear on any juror, and (C) a mistake on the verdict form."[7] Notwithstanding the federal statutory rules, in *Peña-Rodriguez*, the Court held that when a "juror makes a clear statement that indicates the juror relied on racial stereotypes or animus to convict a criminal defendant," the trial court may consider evidence of the juror's statement.[8] There are legitimate arguments for wanting to curtail the no-impeachment rule, but those arguments are more appropriately made in the legislature.[9] Moreover, it is not yet clear if the American jury system will survive the Court's efforts to "perfect" it.[10]

While it is true that "racism has become more subtle and sophisticated,"[11] racism is not cured by prying open the doors of the jury room. In fact, the parade of post-verdict jury investigations that will result from the new exception to Rule 606(b) risks the intentional filtering of discussions during jury deliberations causing the racism to be even more clandestine.[12] Criminal defendants should not be nearly as concerned with the outspoken bigot that broadcasts hate as they should be concerned with the person who fails to recognize implicit racial biases that impact their decisions and highlights the individual's lack of intercultural competence.[13]

Part I of this Note explores the history of the no-impeachment rule as well as the codification of the rule in Rule 606(b).[14] This Note examines some of the Court's jurisprudence that involved racial discrimination in the context of how a jury operates. Part II of this Note explores the Court's decision in *Peña-Rodriguez* and the new exception that is created.[15] The *Peña-Rodriguez* exception is discussed in consideration of how it will affect the future of the American jury system in Part III.[16] This Note concludes with a discussion of how the Court's decision creates many possible outcomes that will prove dangerous to the survival of the American jury trial system.

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[7] McCarthy & Brister, *supra* note 3, at 286. *See* FED. R. EVID. 606(b) (referring to juror testimony and its exceptions); *Peña-Rodriguez*, 137 S. Ct. at 855.

[8] *Peña-Rodriguez*, 137 S. Ct. at 869.

[9] *Id.* at 874 (Thomas, J., dissenting).

[10] Tanner v. United States, 483 U.S. 107, 120 (1987).

[11] Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2303–04 (2017).

[12] Although Rule 606(b) has not been statutorily amended, the Supreme Court's decision in *Peña-Rodriguez* created a new exception to the rule. *See Peña-Rodriguez*, 137 S. Ct. at 855 (discussing the new exception to Rule 606(b)); *see also* FED. R. EVID. 606(b) (preventing jurors from testifying about deliberations during an inquiry into the validity of a verdict or indictment).

[13] *See* Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.").

[14] FED. R. EVID. 606(b).

[15] *Peña-Rodriguez*, 137 S. Ct. at 855.

[16] *Id.*

I. THE NO-IMPEACHMENT RULE

A. History of the No-Impeachment Rule

The birth of the no-impeachment rule occurred in 1785 in the opinion of a case decided by Lord Mansfield in England.[17] In *Vaise v. Delaval*, Lord Mansfield, the Chief Justice, was confronted by the affidavits of two jurors who claimed the verdict had been reached by a "tossup" rather than deliberation.[18] Lord Mansfield refused to receive the affidavits or set aside the verdict even though it may have been reached by casting lots.[19] In the *Vaise* opinion, Lord Mansfield stated:

> The Court cannot (a) receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor (b): but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.[20]

The decision was not only an affirmation of Lord Mansfield's previous decision in *Rex v. Almon*,[21] but also affirmed the doctrine of *nemo turpitudiem suam alligans audietu*—i.e., a witness shall not be heard to allege his own turpitude.[22] Other courts in England began following Lord Mansfield's lead in changing course to the new standard of no-impeachment. *Straker v. Graham* held that it would be "most dangerous" to set aside verdicts that have been openly concurred upon by the jury by allowing a juror's testimony about the jury's misconduct.[23] The *Vaise* decision marked a clear change in course from the previous practice of courts receiving testimony from jurors in similarly situated cases. However, even though some courts received testimony from jurors prior to 1785, those affidavits were always received with great caution.[24]

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[17] *See* Vaise v. Delaval, 99 Eng. Rep. 944, 944 (K.B. 1785) (announcing the no-impeachment rule).

[18] *Id.*

[19] *Id.; see* Renee B. Lettlow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 532 (1996) ("After the jury gave its verdict, the losing party might canvass the jurors, questioning them as to what occurred during deliberations or elsewhere. If some impropriety or mistake emerged, the losing party could ask if the juror or jurors would be willing to give an affidavit. Alternatively, one or more members of the jury might seek out the losing party to offer their support. The losing party would then move for a new trial and offer to support the motion with juror affidavits. In most of the reported cases, the court found out about the jurors' affidavits or offers to give affidavits through one of the parties.").

[20] *Vaise,* 99 Eng. Rep. at 944.

[21] Rex v. Almon, 98 Eng. Rep. 411, 411 (K.B. 1770) (finding that a court cannot read a juror's affidavit to impeach the verdict).

[22] John L. Rosshirt, *Evidence: Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME L. REV. 484, 484 (1956).

[23] Straker v. Graham, 150 Eng. Rep. 1612, 1614 (Ex. 1839); Rosshirt, *supra* note 22, at 485.

[24] McDonald v. Pless, 238 U.S. 264, 268 (1915).

In the United States, Lord Mansfield's no-impeachment rule was followed by many of the states.[25] In fact, no-impeachment rules "pre-date the ratification of the Constitution."[26] The no-impeachment rule was eventually adopted by all of the states in some form[27] even though the approaches by the states were mixed.[28] The common law rule prohibiting "the admission of juror testimony to impeach a jury verdict" was firmly established in the United States "by the beginning of the 20th century."[29] Even though a few jurisdictions allowed the affidavit of a juror to be received to prove juror misconduct, some by statute and others by court decisions, "the weight of authority is that a juror cannot impeach [the jury's] own verdict."[30]

B. The Supreme Court Adopts the No-Impeachment Rule in 1915

The well-established no-impeachment rule was also adopted by the United States Supreme Court in 1915 when the Court decided *McDonald v. Pless*.[31] Although the subject matter was before the Court in three prior instances, the question of whether a juror may testify to impeach their own verdict had not been decided prior to *McDonald*.[32] In *McDonald*, the jurors agreed, among themselves, to write down an amount individually and to divide the aggregated sum by twelve as a means of reaching the verdict.[33] Some of the jurors were dissatisfied with the amount being much larger than expected, but the protesting jurors eventually conceded because of their agreement.[34] After doing so, the jury returned the verdict to the court.[35] The defendant moved to set aside the verdict alleging misconduct by the jury.[36] The trial court did not allow the testimony by the willing jurors on the ground that the jurors were not competent to testify.[37]

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[25] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 872–73 (2017) (Thomas, J., dissenting). *See, e.g.*, State v. Freeman, 5 Conn. 348, 350–52 (1824) ("The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and, in my opinion, on invincible foundations.").

[26] *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

[27] McCarthy & Brister, *supra* note 3, at 286.

[28] *Peña-Rodriguez*, 137 S. Ct. at 872 (Thomas, J., dissenting).

[29] *Id.* at 875 (Alito, J., dissenting) (citing Tanner v. United States, 483 U.S. 107, 117 (1987)).

[30] McDonald v. Pless, 238 U.S. 264, 267 (1915). *See Tanner*, 483 U.S. at 117 (stating that the rule prohibiting the admission of juror testimony to impeach a jury verdict is "firmly established"); *see id.* at 875 (Thomas, J., dissenting) (citing 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 6071 (2d ed. 2007) (discussing how Lord Mansfield's approach "came to be accepted by almost all states")).

[31] *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

[32] *McDonald*, 238 U.S. at 268–69 (citing United States v. Reid, 53 U.S. 361 (1851); Mattox v. United States, 146 U.S. 140 (1892); Hyde v. United States, 225 U.S. 347 (1912)).

[33] *See id.* at 265 (holding that a juror's testimony could not be used to impeach the verdict).

[34] *Id.*

[35] *Id.* at 266.

[36] *Id.* at 265.

[37] *Id.*

The *McDonald* Court affirmed the trial court's decision in holding that jurors may not testify as to impeach their own verdict.[38] The Court reasoned that, although the method used by the jury was unjust, the defendant could have obtained relief only if the facts could have been proven by a witness who was competent to testify as to set aside a verdict.[39] The Court also reasoned that changing the rule "would open the door to the most pernicious arts and tampering with jurors."[40] Further, "[t]he practice would be replete with dangerous consequences," it "would lead to the grossest fraud and abuse," and "no verdict would be safe."[41]

C. Congress Adopts the No-Impeachment Rule in 1975

The no-impeachment rule was codified as Rule 606(b) of the Federal Rules of Evidence.[42] The "process that culminated in the adoption" of Rule 606(b) "was the epitome of reasoned democratic rulemaking."[43] The "Advisory Committee went through a 7-year drafting process, 'produced two well-circulated drafts,' and 'considered numerous comments from persons involved in nearly every area of the court-related law.'"[44] The debate centered around whether to adopt the "firm no-impeachment approach [that] came to be known as 'the federal rule,'" or the more permissive "Iowa rule."[45] The Iowa rule allowed jurors to "testify about any subject except their 'subjective intentions and thought processes in reaching a verdict.'"[46] The Advisory Committee on the Federal Rules of Evidence included the Iowa rule in an early draft, but after forceful criticism, the Committee retained the more stricter federal rule.[47] The revised draft of the rule—the version sent to Congress—expressly repudiated the Iowa rule in providing that jurors, generally, "could not testify 'as to any matter or statement occurring during the course of the

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[38] *Id.* at 269.

[39] *Id.* at 267 (citing Cluggage v. Swan, 4 Binn. 150, 155 (1811) (finding that "the testimony of jurors ought not to
be admitted to invalidate their verdicts" when there was a claim that "the jury decided the cause by drawing lots"); Straker v. Graham, 150 Eng. Rep. 1612 (Ex. 1839) (refusing to "receive an affidavit by the attorney of an admission made to him by one of the jurymen, that the verdict was decided by lot")).

[40] *Id.* at 268.

[41] *Id.* (internal quotation marks omitted).

[42] *See* FED. R. EVID. 606(b) (referring to juror testimony and its exceptions).

[43] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 877 (2017) (Alito, J., dissenting).

[44] *Id.* (citing Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125 (1973)).

[45] *Id.* at 876.

[46] *Id.* (citing Warger v. Shauers, 135 S. Ct. 521, 526 (2014)).

[47] *Peña-Rodriguez*, 137 S. Ct. at 876 (citing Tanner v. United States, 483 U.S. 107, 122 (1987)); *see id.* at n.3 (discussing a letter from Deputy Attorney General Kliendienst explaining that "recent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations").

jury's deliberations.'"[48]

The debate continued after the rule was adopted by the Court and sent to Congress.[49] Only this time, the split was between the House of Representatives, which preferred the more permissive draft, and the Senate, which favored the Court's stricter rule.[50] The Senate rejected the House rule suggesting that the permissive rule "would have undermined the finality of verdicts" and "violated 'common fairness.'"[51] Likewise, the Senate also suggested that the permissive rule would have "permitted the harassment of former jurors as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors."[52] The strict Senate version of the rule, which was adopted by the Conference Committee, was passed by both the House and the Senate and signed into law.[53] The final version signed into law read:

> Rule 606. Competency of juror as witness
>
> (a) At the Trial.—a member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> (b) Inquiry Into Validity Of Verdict Or Indictment.—upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.[54]

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[48] *Id.* at 877.

[49] *Id.*

[50] *Id.*

[51] Peña-Rodriguez, 137 S. Ct. at 877 (Alito, J., dissenting) (citing S. REP. NO. 93-1277, at 760 (1974)).

[52] *Id.* (internal quotation marks omitted).

[53] *Id.*

[54] Pub. L. No. 93–595, 88 Stat. 1926 (1975).

D. Jurisprudence that Followed the Enactment of Rule 606(b)

After the enactment of Rule 606(b) of the Federal Rules of Evidence, the debate shifted to whether the Constitution mandated an exception to the rule.[55] The Court addressed that precise question in two instances prior to *Peña-Rodriguez*.[56] The first instance was *Tanner v. United States* in 1987 and the second instance was *Warger v. Shauers* in 2014.[57] In both cases, the Court affirmed the long-standing practice of not allowing a juror to testify in order to impeach the jury's verdict.

The *Tanner* Court rejected the proposition that the Sixth Amendment required an exception to Rule 606(b) to allow jurors to provide testimony as "evidence that some jurors were under the influence of drugs and alcohol during the trial."[58] The Court reasoned that the long-standing, serious concerns for allowing "intrusive inquiry" into jury deliberations warranted that no exception be given.[59] The Court also considered the influences on the jury to be internal rather than external.[60] In the Court's view, the voluntary ingestion of drugs and alcohol by a juror is no more external "than a virus, poorly prepared food, or a lack of sleep."[61] The *Tanner* Court emphasized that Congress considered and rejected whether such a case requires an exception and further stated:

> Thus, the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including juror intoxication. This legislative history provides strong support for the most reasonable reading of the language of Rule 606(b)—that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict.[62]

Most notably, the *Tanner* Court emphasized that there were four safeguards in place during the trial that protected the defendant's Sixth Amendment right to an "unimpaired" jury.[63] The first safeguard was the *voir dire* examination which is designed to ensure the prospective juror is suitable to carry out the responsibility of serving in the jury.[64] The second safeguard was the opportunity for the court, counsel, and court personnel

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[55] *Peña-Rodriguez*, 137 S. Ct. at 866; *see* FED. R. EVID. 606(b) (referring to juror testimony and its exceptions).

[56] *Peña-Rodriguez*, 137 S. Ct. at 866.

[57] Tanner v. United States, 483 U.S. 107 (1987); Warger v. Shauers, 135 S. Ct. 521 (2014).

[58] *Peña-Rodriguez*, 137 S. Ct. at 866 (citing *Tanner*, 483 U.S. at 107). *See also* U.S. CONST. amend VI (guaranteeing a criminal defendant the right to speedy and public trial before an impartial jury).

[59] *Tanner*, 483 U.S. at 127.

[60] *Id.* at 122.

[61] *Id.*

[62] *Id.* at 125.

[63] *Id.* at 127.

[64] *Id.* at 127.

to observe the jurors during the trial.[65] The third safeguard was the opportunity for jurors to observe each other and report any "inappropriate behavior" before the jury returns a verdict to the court.[66] The fourth safeguard was the opportunity for either party to impeach the verdict by evidence of juror misconduct so long as the evidence is not offered by a juror.[67] The *Tanner* Court concluded that those protections rendered an exception to Rule 606(b) unnecessary.[68]

Similarly, the *Warger* Court rejected the proposition that the Sixth Amendment required an exception to Rule 606(b) to allow jurors to provide testimony that a juror was dishonest during the *voir dire* examination to impeach the jury's verdict.[69] In *Warger*, the Court held that Rule 606(b) precluded the use of an affidavit by a juror that discussed statements by another juror during deliberations to prove the juror's dishonesty during *voir dire*.[70] The Court reasoned that since the alleged dishonesty during *voir dire* would have resulted in the juror being dismissed for cause, the challenge made was clearly inquiring into the validity of the verdict.[71] Accordingly, the Court concluded that Rule 606(b) did not allow juror testimony to pursue that inquiry during the post-verdict stage.[72] Further, the *Warger* Court reasoned that "[e]ven if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered."[73]

E. Congressional Amendments to Rule 606(b)

There were no substantive changes made to Rule 606(b) until the rule was amended in 2006.[74] The amended rule allowed jurors to provide testimony in order "to prove that the verdict reported was the result of a

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[65] *Id.* (citing United States v. Provenzano, 620 F.2d 985, 996–97 (3d Cir. 1980) (discussing incident where a marshal discovered a sequestered juror and two alternate jurors smoking marijuana at about 3:00 a.m.)).

[66] *Id.* (citing Lee v. United States, 454 A.2d 770, 772 (D.C. Cir. 1982), *cert. denied sub nom.* McIlwain v. United States, 464 U.S. 972 (1983) (describing how jurors sent a trial judge a note on the second day of deliberations requesting a different foreperson when there was a question about whether that person was intoxicated)).

[67] *Id.* (citing United States v. Taliaferro, 558 F.2d 724, 725–26 (4th Cir. 1977) (noting that defendant had not shown that any jurors became intoxicated during dinner so as to prejudice the defendant)).

[68] *Id.*

[69] Warger v. Shauers, 135 S. Ct. 521, 524 (2014).

[70] *Id.*

[71] *Id.* at 525 (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555–56 (1984)).

[72] *Id.* at 524.

[73] *Id.* at 529.

[74] FED. R. EVID. 606 advisory committee's note to 2006 amendments (stating that the 1987 amendments were technical and the Committee did not intend any substantive changes).

mistake in entering the verdict on the verdict form."[75] A growing number of U.S. Courts of Appeals were in agreement that allowing juror testimony regarding a clerical error in announcing a verdict that was different than the verdict the jury agreed upon was not an attempt to impeach the verdict.[76] Accordingly, such testimony was not subject to the exclusionary rule.[77] The amendment rejected the practice by some courts of allowing juror testimony to prove that the jury misunderstood the consequences of the verdict it consented to or misapplied the instructions it was given.[78] The Advisory Committee's notes assert that the practice improperly allowed an inquiry into the mental processes of the deliberators.[79]

The rule was stylistically amended in 2011, along with other rules in the Federal Rules of Evidence, in order to make the rule more easily understood and to ensure the terminology was consistent throughout the rules.[80] The 2011 amendment provided a clearer statement of the exceptions to Rule 606, which read in relevant part:

> (b) During an Inquiry Into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these

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[75] *Id.*

[76] *Id.* (citing Plummer v. Springfield Terminal Ry., 5 F.3d 1, 3 (1st Cir. 1993) (stating that a number of circuits hold that juror testimony regarding an alleged clerical error does not challenge the validity of the verdict or the deliberation of mental processes and therefore not subject to the exclusionary rule)). *See* Karl v. Burlington Northern Ry. Co., 880 F.2d 68, 73–74 (8th Cir. 1989) (explaining that it was error to receive juror testimony on whether the verdict was the result of the jurors' misunderstanding of the instructions); Eastridge Dev. Co. v. Halpert Assocs., 853 F.2d 772, 783 (10th Cir. 1988) (noting that the trial court "found that Rule 606(b) did not preclude the court from interrogating the jury concerning its verdict for the possibility of discovering clerical errors, and the Rule did not prevent a juror from testifying that the verdict did not accurately reflect the decision of the jury" and approving a verdict amended to "reflect the jury's true decision"); Robles v. Exxon Corp., 862 F.2d 1201, 1207–08 (5th Cir. 1989) ("The district court was correct when it noted that we have held that rule 606(b) does not bar juror testimony as to whether the verdict delivered in open court was actually that agreed upon by the jury.").

[77] FED. R. EVID. 606 advisory committee notes to 2006 amendments.

[78] *Id. See also* Davis v. United States, 47 F.2d 1071, 1071–72 (5th Cir. 1931) (rejecting the testimony of two jurors offered as evidence that the jurors did not hear the court's instruction not to consider the failure of the defendant to testify); Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987) (rejecting the appellants' argument that the post-trial interviews induced the jurors to impeach their original verdict in violation of Rule 606(b)); *Karl*, 880 F.2d at 74 (explaining that it was error to receive juror testimony on whether the verdict was the result of the jurors' misunderstanding of the instructions because the "the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule").

[79] FED. R. EVID. 606 advisory committee's notes to 2006 amendments.

[80] *Id.*

matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.[81]

The most drastic change to Rule 606 and the no-impeachment rule occurred when the Court delivered the *Peña-Rodriguez* decision.[82] The Court's jurisprudence added a new exception beyond the amendments to Rule 606(b).[83]

II. THE PEÑA-RODRIGUEZ DECISION

A. The Background and Facts of *Peña-Rodriguez*

The *Peña-Rodriguez* case presented the Court with a challenge to Rule 606(b) of the Colorado Rules of Evidence that, like the corresponding federal rule, generally prohibits jurors from testifying about matters or statements made in the course of the jury's deliberations.[84] At the trial court level, the State of Colorado charged Miguel Angel Peña-Rodriguez with harassment, unlawful sexual contact, and attempted sexual assault on a child.[85] The charges were based upon allegations that stemmed from a 2007 incident in a bathroom at a horse racing facility where a man sexually assaulted two teenage sisters.[86] Both girls identified the man as an employee of the facility and they separately identified Peña-Rodriguez as the assailant.[87] The jury found Peña-Rodriguez guilty of unlawful sexual

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[81] FED. R. EVID. 606(b).

[82] *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (holding that where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider evidence of the juror's statement any resulting denial of the jury trial guarantee).

[83] *Id.*

[84] COLO. R. EVID. 606(b); *Id.* at 862. *Compare* COLO. R. EVID. 606(b), *with* FED. R. EVID. 606(b).

[85] *Peña-Rodriguez*, 137 S. Ct. at 861.

[86] *Id.*

[87] *Id.*

contact and harassment.[88]

After the jury was discharged, Peña-Rodriguez's counsel "entered the jury room to discuss the trial with the jurors."[89] As the jury was leaving, two jurors stayed behind to speak with the counsel privately, stating that another juror expressed anti-Hispanic bias toward Peña-Rodriguez and one of his witnesses during the deliberations.[90] The two jurors provided affidavits describing racially-biased statements by another juror referred to as Juror H.C.[91]

"According to the two jurors, H.C. told the other jurors that he 'believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.'"[92] The jurors also discussed that "H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement and further stated, 'I think he did it because he's Mexican and Mexican men take whatever they want.'"[93] Among other reported statements, the jurors discussed that H.C. stated he did not believe Peña-Rodriguez's alibi witness because the witness was "an illegal."[94]

B. Procedural History of *Peña-Rodriguez*

The trial court recognized that H.C. was biased after reviewing the affidavits of the two jurors.[95] However, the trial court held that Rule 606(b) of the Colorado Rules of Evidence protected jury deliberations from the type of inquiry sought.[96] The court also held that the verdict was final, and Peña-Rodriguez was sentenced to two years of probation and was required to register as a sex offender.[97] The trial court reasoned that during the extensive *voir dire*, there was no mention of race, national origin, or immigration status.[98] Moreover, there were no questions asked about

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[88] *Id.* (discussing how the jurors were asked about whether they could be impartial as members of the venire and during *voir dire*, and none of them expressed they could not be impartial because of racial bias).

[89] *Id.*

[90] *Peña-Rodriguez*, 137 S. Ct. at 861.

[91] *Id.* at 862.

[92] *Id.*

[93] *Id.*

[94] *Id. Cf. id.* ("In fact, the witness testified during trial that he was a legal resident of the United States.").

[95] *Peña-Rodriguez*, 137 S. Ct. at 862.

[96] *Id.* (comparing COLO. R. EVID. 606(b) with FED. R. EVID. 606(b)).

[97] *Id.*

[98] People v. Peña-Rodriguez, No. 11CA0034, 2012 WL 5457362, at *4 (Colo. App. Nov. 8, 2012), *aff'd,* 350 P.3d 287 (Colo. 2015), *rev'd and remanded sub nom.* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017); *see id.* (discussing how the trial court judge who conducted *voir dire* instructed defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. I don't know if that's an issue for your or your client, but you may want to address it," although the defense counsel never mentioned race, national origin, or immigration

Peña-Rodriguez's ethnicity or whether H.C. harbored racial bias.[99] Accordingly, the questions "were not specific enough to find that [H.C.] had misrepresented information about his possible bias in *voir dire*."[100]

The Colorado Court of Appeals affirmed the trial court's decision, holding that the alleged statements were inadmissible in an inquiry into the validity of the verdict because the statements were barred under Rule 606(b).[101] The appellate court refused to disturb the trial court's ruling that the questions were not specific enough to determine whether H.C. harbored racial bias.[102] The court also held that the alleged statements of bias were not an external influence on the jury deliberations.[103] Rather, the alleged statements were illustrations of a belief about a particular ethnic group based on the individual's experiences.[104]

In the same way, the Colorado Supreme Court affirmed the decision of the appellate court, holding that there was no basis to allow impeachment of the verdict rendered by the jury.[105] The Colorado Supreme Court rejected the proposition that enforcement of Rule 606(b) of the Colorado Rules of Evidence violated Peña-Rodriguez's Sixth Amendment rights.[106] The court concluded that the rule clearly precluded the admission of the affidavits provided by the two jurors regarding H.C.'s alleged statements of racial bias during deliberations.[107] The court further reasoned that Rule 606(b) "promote[s] finality of verdicts, shield[s] verdicts from impeachment, and protect[s] jurors from harassment and coercion."[108]

C. The United States Supreme Court's Decision

The Supreme Court of the United States granted certiorari on the issue of whether the Constitution requires an exception to the no-impeachment rule for instances of racial bias.[109] The Court held that:

[W]here a juror makes a clear statement that indicates he or she

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status).

[99] *Id.*

[100] *Id. See also* Seventh Day Adventist Ass'n of Colo. v. Underwood, 99 Colo. 139, 141–42 (Colo. 1936) (refusing to address in a motion for new trial the assertion that potentially biased jurors prevented a fair trial, as no "specific questions" were asked about this bias in *voir dire*).

[101] *Peña-Rodriguez*, 2012 WL 5457362, at *1.

[102] *Id.* at *4.

[103] *Id.* at *7.

[104] *Id.*

[105] Peña-Rodriguez v. People, 350 P.3d 287, 289 (Colo. 2015), *reh'g denied* (June 15, 2015), *cert. granted sub nom.* Peña-Rodriguez v. Colorado, 136 S. Ct. 1513 (2016), and *rev'd and remanded sub nom.* Peña-Rodriguez v. Colorado, 137 S. Ct. at 855.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 290 (citing People v. Harlan, 109 P.3d 616, 624 (Colo. 2015)).

[109] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

> relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[110]

The Court reasoned that the safeguards discussed in *Tanner* may not be as effective as they are necessary in "rooting out" racial bias.[111] The Court further reasoned that "[t]he duty to confront racial animus in the justice system is not the legislature's alone."[112] Justice Kennedy, writing for the majority, referred to the no-impeachment rule as a centuries-old principle.[113] Justice Kennedy went on to say that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons."[114] The Court also reasoned that the racial bias in *Peña-Rodriguez* was different "in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*."[115]

D. The Dissents in *Peña-Rodriguez*

Justice Thomas argued the Court's holding was incompatible with both the Sixth Amendment and the Court's precedents.[116] Justice Thomas continued that the common law right to a jury trial did not include the right to impeach the verdict with testimony from one of the jurors regarding juror misconduct.[117] Accordingly, the no-impeachment rule is well-established and any abandonment or curtailment of the rule "should be left to the political process. . . ."[118] As such, Justice Thomas disagreed with the holding of the Court allowing an exception to Rule 606(b).[119]

Justice Alito also dissented from the Court's holding in *Peña-Rodriguez*, arguing that the no-impeachment rule advances crucial interests.[120] Justice Alito compared the protections that have been extended to jury deliberations by the no-impeachment rule to the protections extended in other areas of confidentiality, such as statements made by a client to an attorney, statements made by a patient to a treating

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[110] *Id.* at 869.
[111] *Id.*
[112] *Id.* at 867.
[113] *Id.* at 861.
[114] *Peña-Rodriguez*, 137 S. Ct. at 867.
[115] *Id.* at 868.
[116] *Id.* at 871 (Thomas, J., dissenting) (asserting that the right to a trial by an impartial jury is limited to the common law protections that existed during ratification of the Sixth Amendment).
[117] *Id.* at 872.
[118] *Id.* at 874.
[119] *Id.*
[120] *Id.* at 879 (Alito, J., dissenting).

physician, and statements made by an individual to a spouse.[121] "Even if a criminal defendant whose constitutional rights are at stake has a critical need to obtain and introduce evidence of such statements, long-established rules stand in the way."[122] Justice Alito reasoned that the Court has repeatedly recognized the importance of the no-impeachment rule in rebuffing efforts to create a Sixth Amendment exception to Rule 606(b) in *Tanner* and *Warger*. Further, Justice Alito suggested the Sixth Amendment rights of a defendant are "adequately protected by mechanisms other than the use of juror testimony regarding jury deliberations."[123]

III. THE FUTURE OF THE AMERICAN JURY TRIAL SYSTEM AFTER *PEÑA-RODRIGUEZ*

A. The New Exception to Rule 606(b) Raises Several Unanswered Questions

Like many other tests arising out of the Court's jurisprudence, the ambiguity in the new standard—"clear signs of racial animus"—abandons any concept of sovereign authority[124] creating a test that will require constant litigation to glean what is meant by the Court's decision.[125] This is a recurring problem when new standards are drawn out of the Court's effort to reach "fairness" rather than committing to the fundamental nature of judicial review.[126] The Court's decision settling one question raises several others for lower courts, practitioners, and litigants who may find themselves on either side of the courtroom.[127] A few issues raised are: (1) how severe the racially biased statement must be before the exception is triggered, (2) whether the holding applies to other types of bias (such as religious or gender-based bias), and (3) whether the holding applies to civil cases.[128]

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[121] *Id.* at 874 (Alito, J., dissenting).

[122] *Id.* (Alito, J., dissenting).

[123] *Id.* at 879 (Alito, J., dissenting).

[124] *See* J. McIntrye Machinery, Ltd. v. Nicastro, 564 U.S. 873, 882 (2011) (citing Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 117 (1987) and discussing how the *Asahi* Court "discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability").

[125] *See Peña-Rodriguez*, 137 S. Ct. at 867 (discussing the need for racial animus to be a "significant motivating factor").

[126] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting) (discussing his contempt for the "practice of constitutional revision by an unelected committee of nine," which is "always accompanied . . . by extravagant praise of liberty, [robbing] the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves").

[127] McCarthy & Brister, *supra* note 3, at 288–90.

[128] *Id.*

To be sure, there is no bright-line rule developed in *Peña-Rodriguez* as to how severe the racially biased statements must be to meet the threshold created by the exception. Although the Court notes that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar . . . ," the decision leaves trial judges with a substantial amount of discretion in deciding whether the statements made meet the new standard.[129] There are instances where increased judicial discretion leads to increased disparities among racial and ethnic minorities.[130] This reality undermines the Court's expressed goal of fulfilling a duty to confront racial animus in the justice system.[131] Indeed, the discretion held by a trial judge can be a much more dangerous tool.[132] This Note does not suggest that the danger is the intentional exploitation of the discretion by trial judges. Rather, the danger lies in the cultural barriers,[133] such as language, that may exist between the trial judge and a defendant, and any implicit bias held by the judge that may negatively impact the outcome of the defendant's case.

Moreover, the Court's specific application of the exception to racial animus is not likely to restrict courts from seeking to apply the same test to other classes of individuals. Even more, why should they? Other forms of discrimination are just as harmful as discrimination against racial and ethnic minorities in violating the constitutional rights guaranteed to criminal defendants. For instance, severe gender bias toward a female defendant may produce the same result as a minority defendant facing severe bias based on race or ethnicity. "While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, 'overpower those differences.'"[134] Prejudicial views regarding gender and gender stereotypes lead to disparate outcomes for female defendants. "The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or

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[129] *Id.* at 288 (quoting *Peña-Rodriguez*, 137 S. Ct. at 869).

[130] *See, e.g.*, Paul J. Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 FED. SENT. R. 311, 311 (2013).

[131] *Peña-Rodriguez*, 137 S. Ct. at 867.

[132] *See* Amber Hall, *Using Legal Ethics to Improve Implicit Bias in Prosecutorial Discretion*, 42 J. LEGAL PROF. 111, 111–12 (2017) (discussing how prosecutorial discretion facilitates mass incarceration in the United States).

[133] Even language may be a cultural barrier between a defendant and the trial judge or law enforcement. *See, e.g.*, State v. Demesme, 228 So.3d 1206, 1206–07 (La. 2017). This case involved an arrestee who stated during his police interrogation, "I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up." *Id.* at 1206. The Louisiana Supreme Court agreed with the trial court that the defendant had not invoked his right to counsel, *id.*, and a concurring judge noted that "the defendant's ambiguous and equivocal reference to a 'lawyer dog' does not constitute an invocation of counsel that warrants termination of the interview." *Id.* at 1207. However, the use of the slang word "dawg" is very commonly used to refer to another person. *See Dawg*, MERRIAM-WEBSTER DICTIONARY (2016 ed). Thus, it is much more likely that Demesme was requesting a lawyer rather than asking for a non-existent "lawyer dog."

[134] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135–36 (1994) (quoting Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)).

paternity."[135]

Furthermore, the Court's decision leaves, unanswered, the question of whether the new exception will eventually be applied to civil cases.[136] Notwithstanding the Court's expressed language applying the holding to criminal cases, the expansion of *Peña-Rodriguez* into civil cases is not impossible.[137] Merely five years after the Court's decision in *Batson v. Kentucky*, the Court's holding in that criminal case was expanded to civil cases in *Edmonson v. Leesville Concrete Company*.[138] In *Edmonson*, the Court's "determination that a civil litigant's use of peremptory strikes was state action was based on the legal formality of the jury selection process and the fact that struck jurors are discharged by the judge, who thus becomes a party to discrimination if a strike was race-motivated."[139] The import of *Batson* into civil cases rested on the Sixth Amendment's application to the states by way of the Fourteenth Amendment.[140] Admittedly, the import of *Peña-Rodriguez* into civil cases would be more difficult considering the Seventh Amendment has not been applied to the states.[141] However, the uncertainty of how the new exception will be applied in the future will undoubtedly keep practitioners and litigants on guard for future changes to the *Peña-Rodriguez* exception to Rule 606(b).

B. More Damaging to Free Debate Than Curative of Racial Discrimination

The roots of racism run too wide and too deep to somehow be "cured" by creating a racial animus exception to the no-impeachment rule. Americans "share a common historical and cultural heritage in which racism has played and still plays a dominant role."[142] Racism has pervaded

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[135] *Id.* at 140.

[136] *See Peña-Rodriguez*, 137 S. Ct. at 869 (holding that the opinion is limited to criminal cases).

[137] McCarthy & Brister, *supra* note 3, at 289–90.

[138] *See id.* (citing Edmondson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (applying the holding in *Batson* to civil cases); Batson v. Kentucky, 476 U.S. 79, 79 (1986) (holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race").

[139] M. Christian King & Wesley B. Gilchrist, *Will* Pena-Rodriguez v. Colorado *Apply to Civil Cases?*, LAW 360 (Mar. 13, 2017), https://www.law360.com/articles/900903/will-penarodriguez-v-colorado-apply-to-civil-cases [https://perma.cc/ZBU5-TS22].

[140] *Id.*

[141] *See id.* (noting that the right to trial by jury "in civil cases in state courts is governed by state constitutions or statutes"); *see also* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

[142] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). *See generally* DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); LERONE BENNETT, BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA (5th ed. 1982); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (5th ed. 1980); VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1981); A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978); JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970);

American culture, including institutions of justice, since the founding of our Nation.[143] America's "schizophrenic personality" has often resulted in the pronouncement of "the great principles of democracy" on one hand, while also practicing "the very antithesis of those principles" on the other hand.[144] Our Nation claimed a self-evident truth that "all men are created equal," yet resolved the conflict between human property and human liberty by positing that blacks are less than human.[145] Racism has been so deeply ingrained in American culture that it has been transmitted by tacit understandings.[146]

Professor Charles Lawrence III suggests that "[e]ven if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others."[147] "These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level."[148]

> Furthermore, because children learn lessons about race at this early stage, most of the lessons are tacit rather than explicit. Children learn not so much through an intellectual understanding of what their parents tell them about race as through an emotional identification with who their parents are and what they see and feel their parents do. Small children will adopt their parents' beliefs because they experience them as their own. If we do learn lessons about race in this way, we are not likely to be aware that the lessons have even taken place. If we are unaware that we have been taught to be afraid of blacks or to think of them as lazy or stupid, then we may not be conscious of our internalization of those feelings and beliefs.[149]
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> . . . .
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> . . . If an individual has never known a black doctor or lawyer or is exposed to blacks only through a mass media where they are portrayed in the stereotyped roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for

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MANNING MARABLE, BLACK AMERICAN POLITICS: FROM THE WASHINGTON MARCHES TO JESSE JACKSON (1985); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135–43 (1982).

[143] *See* Martin Luther King, Jr., Guest Speaker, Drew University: The American Dream (Feb. 5, 1964) (speaking on civil rights issues in the United States based on his personal experiences).

[144] *Id.*

[145] *See id.* (discussing Thomas Jefferson); Charles R. Lawrence III, Georgetown University Law Center Commencement Address: Don't Go Back to Egypt After God Done Took You Out of There: Reconciliation, Reparations, and the New Abolitionists 56, 57 (May 21, 2017).

[146] Lawrence III, *supra* note 143, at 323.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 338.

certain roles.[150]

Moreover, the political process should always be the preferred venue for lawmaking. This Note does not suggest that the aim should not be ensuring every individual receives a fair and impartial trial that is free from racial animus. However, the benefit gained from prying open the doors of jury deliberations does little for reaching that goal. In fact, the damage to the jury system may prove to be more harmful to individuals who identify as a racial or ethnic minority than those who identify as non-minorities. Courts must resist the temptation to confuse personal preferences with what is required by law.[151] This is not to say that racial animus should be tolerated; rather, that courts must acknowledge the "restrained conception of the judicial role."[152] The courts have "neither force nor will, but merely judgment . . . ."[153] In order for liberty to truly exist, the power of judging must be separated from the power to legislate.[154] For that reason, courts must embrace the text of the Constitution in judging what the Constitution requires.

C. Implicit Bias is More Dangerous to a Defendant

In *A Time To Kill*, the fictional defense attorney in a vigilante murder trial, Jake Brigance, wrestled with the issue of implicit bias while offering his closing argument to the jury. Brigance stated:

> I set out to prove a Black man could receive a fair trial in the South, that we are all equal in the eyes of the law. That's not the truth, because the eyes of the law are human eyes—yours and mine—and until we can see each other as equals, justice is never going to be evenhanded. It will remain nothing more than a reflection of our own prejudices, so until that day, we have a duty under God to seek the truth. Not with our eyes and not with our minds where fear and hate turn commonality into prejudice, but with our hearts—where we don't know better.[155]

The fictional attorney, speaking to a panel of white jurors, continued to provoke their self-examination by describing the horrible details of the rape and assault of the black defendant's young daughter.[156] Brigance finished his closing argument with the words, "[n]ow imagine she's

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[150] *Id.* at 343.
[151] Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting).
[152] *Id.*
[153] THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis omitted).
[154] *Id.*
[155] A TIME TO KILL (Warner Bros. 1996).
[156] *Id.*

white."[157] The defense strategy was developed with a clear recognition of the added challenge imposed on the defendant of having to deal with the implicit biases held by some, or all, of the jurors.[158]

Psychological and social science research suggest that an individual's perception is often defined and limited by the individual's personal background and experience.[159] Personal background and experience not only help to shape implicit attitudes, but also contribute to the development of "thin slice judgments" that are both unconscious and are made at a glance.[160] "These thoughts give support to racial and gender bias, even when an individual truly believes they are unbiased and do not hold prejudicial beliefs."[161] An individual's inability to identify racial discrimination when it is seen mostly results from a failure to recognize that discrimination is "both a crime and a disease":[162]

> This failure is compounded by a reluctance to admit that the illness of [discrimination] infects almost everyone. Acknowledging and understanding the malignancy are prerequisites to the discovery of an appropriate cure. But the diagnosis is difficult, because our own contamination with the very illness for which a cure is sought impairs our comprehension of the disorder.[163]

Hence, the challenge of eliminating the impact of racial animus during jury deliberations requires a different remedy than the new exception provided by the Court in *Peña-Rodriguez*. The pervasiveness of implicit biases held by jurors poses the most dangerous threat to defendants that are susceptible to racial or gender discrimination. Accordingly, any remedy must effectively address implicit racial biases of jurors and the effects of the same on the American system of justice.

At the outset, this Note discussed the contention that political processes are the most appropriate venues for crafting remedies to the problems created by showings of racial animus during jury deliberations. The Congress, the state legislatures, and, most importantly, the people must recognize the task of addressing the impact of implicit racial bias in the judicial system as one of the most immediate and necessary priorities. It has been more than forty-six years since an amendment to the

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[157] *Id.*

[158] *See id.* (addressing representing an African-American defendant in a predominantly white southern town).

[159] Hall, *supra* note 133, at 115.

[160] *Id.* (citing Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities? The Perils of "Doing" Gender and Race in the Classroom*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 164, 171 (Gabriella Gutierrez y Muhs ed. 2012)).

[161] *Id.* at 115 (citing Eisenhower Foundation, *What Together We Can Do: A Forty Year Update of the National Advisory Commission on Civil Disorder: Executive Summary, Preliminary Findings, and Recommendations* (Washington, DC: Eisenhower Foundation, 2008)).

[162] Lawrence III, *supra* note 143, at 321.

[163] *Id.*

Constitution has been submitted for ratification.[164] Considering the number of problems that have plagued American institutions of justice over the past fifty years, as well as the general society, the lack of submissions is startling. Perhaps the no-impeachment rule offers the American people a unique opportunity to remind the courts and themselves that the future of the jury trial system should depend on political processes rather than the jurisprudence of nine justices.

D. A Recipe for Even More Litigation

Another troubling, but likely outcome that may follow the Court's decision in *Peña-Rodriguez* is seemingly endless litigation by unsatisfied litigants seeking to undermine the jury's verdict. Rule 606(b) has served a door-keeping function protecting verdicts from being followed by a regular practice of "searching for any and all evidence of jury misconduct that could invalidate the [] verdict."[165]

Jurors "will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation."[166] Rule 606(b) of the Federal Rules of Evidence was enacted, in part, to protect the interest of jurors in shielding the internal deliberations from scrutiny after the trial has ended.[167] The finality of the verdict is important for both the defendant and the court to know that the verdict will not be reopened.[168] Post-trial investigations gathering testimony from jurors regarding deliberations will have a severely negative impact on future trials as it relates to open debate and free discussion among jurors during deliberations.

"If what went on in the jury room were judicially reviewable for reasonableness and fairness, trials would no longer truly be by jury, as the Constitution commands."[169] Having jurors that fear having to provide testimony or having another juror provide a written account of their statements would undermine the goal of fruitful debate and the sharing of ideas among ordinary citizens. The *Peña-Rodriguez* exception opens the door to the very post-trial investigations that the no-impeachment rule was developed to prevent.

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[164] *See* BRITANNICA EDUCATIONAL PUBLISHING, THE UNITED STATES CONSTITUTION AND CONSTITUTIONAL LAW 105–08 (2012) (explaining that the Twenty-Sixth Amendment was submitted for ratification on March 23, 1971, and the Twenty-Seventh Amendment was first submitted September 25, 1789, but the latter was not ratified until more than 200 years after the original proposal).

[165] Lindsey Y. Rogers, *Rule 606(b) and the Sixth Amendment: The Impracticalities of a Structural Conflict*, 6 WAKE FOREST J.L. & POL'Y 19, 21 (2015).

[166] S. REP. NO. 93–1277, at 14 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

[167] *See id.* (asserting that "rule 606 should not permit any inquiry into the internal deliberation of the jurors").

[168] Rogers, *supra* note 166, at 21.

[169] United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008).

CONCLUSION

"No verdict would be safe."[170] Those words are as true today as they were in *McDonald*. The Court's creation of a new exception to Rule 606(b) poses a real threat to the survival of the American jury system. The risk is too great, especially considering that the new policy has little to no chance at accomplishing the goal of curing the effects of racial animus. This Note does not attempt to ignore the damaging effects of discrimination in the American legal system; however, prying open the door to jury deliberations is not the answer. The new exception does little toward achieving the goal of dealing with implicit biases of jurors that may impact jury verdicts.

Moreover, the *Tanner* safeguards provide an effective tool for dealing with issues related to jurors.[171] Indeed, the safeguards were more than sufficient to ensure the adequate protection of the defendant's Sixth Amendment rights in *Peña-Rodriguez*.[172] First, the defendant had every opportunity to question Juror H.C. regarding any racial bias during *voir dire*. The defendant's failure to question H.C. regarding the defendant's race, national origin, or immigration status during *voir dire* effectively waived any claim for such bias as well as undermines the Court's reasoning that an exception is necessary. Second, the jurors, including H.C., were observed throughout the course of the trial by the court, the court's staff, and the attorneys. The likelihood that an individual who harbored such extreme racial bias toward the defendant waited until jury deliberations before making any statements or expressions that indicated his racial bias is close to naught. Third, H.C. was observed by the other jurors, making it even more probable that H.C. made some observable statement or expression before jury deliberations began. Finally, the Court's decision would not offend the no-impeachment rule, if the evidence offered was from a source other than a juror. The constitutional protections extended by the Sixth Amendment were not designed to usurp the long-standing no-impeachment rule.[173]

What is more, Congress debated the no-impeachment rule and codified the same.[174] The rejection of a permissive no-impeachment rule was clear.[175] The Court's creation of a new exception is not a result of a new area of law not yet considered by the legislature. Rather, the Court's decision runs contrary to the promulgated no-impeachment rule that was established by the very body the Constitution empowered to make law, which is undisputedly Congress. The new exception is not only

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[170] McDonald v. Pless, 238 U.S. 264, 268 (1915) (quoting Straker v. Graham, 150 Eng. Rep. 1612 (Ex. 1839)).

[171] *See* Tanner v. United States, 483 U.S. 107, 116–27 (1987) (reciting the history of the safeguards).

[172] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 879 (2017) (Alito, J., dissenting).

[173] *See id.* (noting that this is the first exception to the no-impeachment rules).

[174] *Id.* at 877 (Alito, J., dissenting).

[175] *Id.* (Alito, J., dissenting).

unnecessary but risks damaging the American jury trial system for many years to come.

From Correctional Education to School Reentry: How Formerly Incarcerated Youth Can Achieve Better Educational Outcomes

Sonia Pace*

I. INTRODUCTION

Though education may be essential to reducing the risk of recidivism, research shows that many formerly incarcerated youth still experience dismal educational outcomes.[1] Each year, approximately 100,000 youths are discharged from juvenile justice facilities and return to their communities[2] to face a myriad of challenges, including difficulties with high school reentry[3] and diploma attainment.[4] Many released juveniles do not return to school.[5] By contrast, eighty-eight percent of the general U.S. population graduates from high school or has a GED.[6] These outcomes suggest an ineffective continuum of correctional education and school-reentry processes. This Note seeks to identify how correctional education, school-reentry processes, and education-transition programs contribute to the educational outcomes of formerly incarcerated youth. This Note also provides recommendations on how stakeholders can achieve better educational outcomes for youths who have been in correctional settings.

II. YOUTH AT REENTRY

Formerly incarcerated youths are more likely to experience distinct personal and academic challenges at reentry. They are more likely have been involved in child welfare systems, as well as being relatively more likely to be a racial minority or male.[7] They are more likely to have

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1 JENNIFER LOWMAN & SHARI A. MAMAS, EDUC. L. CTR. – PA, EDUCATIONAL AFTERCARE & REINTEGRATION TOOLKIT FOR JUVENILE JUSTICE PROFESSIONALS 15 (2009).

2 ASHLEY NELLIS & RICHARD HOOKS WAYMAN, YOUTH REENTRY TASK FORCE OF THE JUV. JUST. AND DELINQ. PREVENTION COALITION, BACK ON TRACK: SUPPORTING YOUTH REENTRY FROM OUT-OF-HOME PLACEMENT TO THE COMMUNITY 5 (2009).

3 *Infra* Part II.

4 *Infra* Part IV.

5 NAT'L CONF. OF STATE LEGIS., REENTRY & AFTERCARE: JUVENILE JUSTICE GUIDE FOR LEGISLATORS 4 (2011).

6 CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015 1 (2016).

7 *See* PETER LEONE & LOIS WEINBERG, CTR. FOR JUV. JUST. REFORM, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 6–7 (2012) ("Over the course of a year, almost 800,000 abused or neglected

experienced trauma and neglect before incarceration, and to have significant need for mental health services and substance abuse treatment.[8] They are also more likely to experience poverty and to have financial responsibilities,[9] with one in eleven reporting having children of their own.[10]

Formerly incarcerated youths also face academic challenges. Twenty-three percent of incarcerated youth have learning disabilities, though experts suspect the actual figure may be higher.[11] These youths are likely to be behind in literacy and schooling when they enter the juvenile justice system; an estimated seventy-five percent of the 150,000 youth in detention in 2009 were high school dropouts, and many were not fully literate.[12] Correctional education often does not get students up to speed, in part because it may lack sufficient services for special education, English Language Learner (ELL) programs, and remedial education.[13] Furthermore, incarceration during youth—a crucial point of intellectual development—has a fundamentally disruptive effect on education attainment.[14]

All of these factors place formerly incarcerated youth reentering their communities at a high risk of recidivism; over half are re-incarcerated within three years of release.[15] In 2015, Former Attorney General Loretta Lynch said of the challenges facing formerly incarcerated people: "[T]oo often, justice-involved individuals who have paid their debt to society confront daunting obstacles to good jobs, decent housing, adequate health care, [and] quality education."[16] To successfully

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children in the United States are in the foster care system. . . . [S]tatistics show that 19.5 Black children per 1,000 [Black children] are in foster care compared to 16.5 American Indian and Alaskan Native children, 16.1 Pacific Islander children, 10.8 White children, and 10.7 Hispanic children. . . . [And d]ata suggest that girls are less likely to be detained and committed than boys for most categories of delinquent offenses[.]").

[8] U.S. DEP'TS OF EDUC. & JUST., GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS 1 (2014) (discussing trauma and neglect); *Re-entry: Reform Trends*, JUV. JUST. INFO. EXCHANGE, http://jjie.org/hub/reentry/reform-trends/ [https://perma.cc/5Y3R-M7PZ] ("Over half the youth in the justice system have been found to suffer from mental health or substance use disorders.").

[9] NAT'L CTR. FOR JUV. JUST. & U.S. DEP'T OF EDUC. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 7 (Melissa Sickmund & Charles Puzzanchera eds., 2014).

[10] NAT'L CONF. OF STATE LEGIS., *supra* note 5, at 4.

[11] *See* U.S. DEP'T OF EDUC., PROTECTING THE CIVIL RIGHTS OF STUDENTS IN THE JUVENILE JUSTICE SYSTEM 3 (2016) (noting that students with disabilities represent 12% "of all students in public high schools served by the Individuals with Disabilities Education Act (IDEA)").

[12] Ed Risler & Tom O'Rourke, *Thinking Exit at Entry: Exploring Outcomes of Georgia's Juvenile Justice Educational Programs*, 60 J. CORRECTIONAL EDUC. 225, 225–29 (2009).

[13] *See, e.g.*, U.S. DEP'T OF EDUC., *supra* note 11 (highlighting national issues in providing services to youths in correction and spotlighting San Bernardino County).

[14] *See* AMBER FERN & JILL ADAMS, CTR. FOR JUV. JUST. REFORM, EDUCATION AND INTERAGENCY COLLABORATION: A LIFELINE FOR JUSTICE-INVOLVED YOUTH 5 (2016) ("Juvenile justice involvement, such as attending court hearings during school hours, can disrupt students' school experience.").

[15] DAVID M. ALTSCHULER ET AL., THE URBAN INST., THE SUSTAINABILITY OF JUVENILE PROGRAMS BEYOND SECOND CHANCE ACT FUNDING: THE CASE OF TWO GRANTEES 1 (2016).

[16] *Department of Justice to Launch Inaugural National Reentry Week*, U.S. DEP'T OF JUST. (Apr.

divert from this pipeline, youth need the necessary knowledge and skills to secure employment, which will help them to reintegrate into their communities.[17]

Beyond the devastating effects of insufficient education experienced by formerly incarcerated youth, communities may face negative fiscal impact from low rates of high school graduation. A 2009 study by the Center for Labor Market Studies at Northeastern University found that each high school dropout costs taxpayers over $292,000 in lost tax revenues, incarceration costs, and social services.[18] Investing in better correctional and reentry education is thus sound fiscal policy that may yield long-term savings. Indeed, in a 2014 joint letter to state education officials, the Attorney General and Secretary of Education encouraged states to prudently allocate taxpayer dollars to improve correctional education and expand access to vocational education to help improve educational outcomes for justice-involved youth.[19]

III. RELEVANT FEDERAL POLICIES

There is no federal policy on school reentry regarding formerly incarcerated youth. Youth over the age of sixteen are not always required by state law to return to school.[20] The Juvenile Justice and Delinquency Prevention Act of 1974 does not explicitly address the educational needs of students exiting the juvenile justice system.[21]

Other laws based on different federal policies may apply to students in or exiting the juvenile justice system. The McKinney–Vento Homeless Assistance Act of 1987 provides educational guarantees for any homeless youth.[22] The protections of the Individuals with Disabilities Education Act of 1990 (IDEA) guarantee all youth with special needs a "free and

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22, 2016), https://www.justice.gov/opa/pr/department-justice-launch-inaugural-national-reentry-week [https://perma.cc/B9KC-BA89].

[17] *See id.* (discussing formerly incarcerated persons generally).

[18] ANDREW SUM ET AL., CTR. FOR LABOR MKT. STUDS., THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL 16 (2009).

[19] Policy Letter, U.S. DEP'TS OF EDUC. & JUST. (Dec. 8, 2014), https://www2.ed.gov/policy/elsec/guid/secletter/141208.html [https://perma.cc/T5BS-CAWX].

[20] *Compulsory school attendance laws, minimum and maximum age limits for required free education, by state: 2017,* NAT'L CTR. FOR EDUC. STATS. (2015), https://nces.ed.gov/programs/statereform/tab5 1.asp [https://perma.cc/6LA9-KB47] (indicating some states do not require students to attend schools past age sixteen).

[21] *Re-entry: Reform Trends*, *supra* note 8 (discussing the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109, and noting that "[w]hile JJDPA funds may be used by states for re-entry services, few states use it for that purpose because they need to direct the limited federal dollars available to comply with the core requirements"); CAMPAIGN FOR YOUTH JUSTICE, YOUTH IN THE ADULT SYSTEM FACT SHEET 2 (2014) ("Although the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) requires that youth in the juvenile justice system be removed from adult jails or be sight-and-sound separated from other adults, these protections do not apply to youth prosecuted in the adult criminal justice system.").

[22] LEONE & WEINBERG, *supra* note 7, at 23 (discussing the McKinney–Vento Homeless Assistance Act of 1987, Pub. L. 100-77, 101 Stat. 482).

appropriate public education,"[23] and require adult transition planning for youth with disabilities beginning at age fourteen.[24] The No Child Left Behind Act of 2001 established standards for education that apply to the education received in the juvenile justice system.[25] The Every Student Succeeds Act of 2015, which replaced the No Child Left Behind Act,[26] requires states to ensure certain protections for students in or exiting the juvenile justice system.[27]

IV. CORRECTIONAL EDUCATION

Though juvenile justice facilities are legally required to educate youth in placement under age seventeen,[28] the quality of correctional education may differ between jurisdictions. The oversight bodies for correctional education, for example, vary by state: in forty-one states, juvenile justice staff, public education agencies, and private education providers together oversee correctional education; in six states, juvenile justice staff solely oversee it; in three states, public education agencies solely oversee it.[29] Education providers also vary by state and facility. Teachers from local school districts in some cases may deliver correctional education.[30] In other cases, private contractors, education-department staff, or juvenile justice staff deliver it.[31] Private providers frequently execute Memoranda of Understanding with state education departments to provide particular and limited services.[32] Given the variations in delivery and oversight, the quality of correctional education likely varies by jurisdiction and site, and in some cases this variation may

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[23] Lauri Goldkind, *A Leadership Opportunity for School Social Workers: Bridging the Gaps in School Reentry for Juvenile Justice System Youths*, 33 CHILD. & SCHS. 229, 232 (2011) (discussing the Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1142 (1990)).

[24] Healther M. Boltadano, et al., *Transition of Incarcerated Youth with Disabilities Across Systems and Into Adulthood*, 13 EXCEPTIONALITY 103, 104 (2005).

[25] *See, e.g.*, No Child Left Behind Act of 2001 § 1414(c)(19), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. § 6434 (2012)) ("[T]he program under this subpart will be coordinated with any programs operated under the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. § 5601 *et seq.*) or other comparable programs, if applicable.").

[26] *See, e.g.*, Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 940 n.103 (2016) (noting replacement).

[27] Every Student Succeeds Act § 1401(4)(A)(ii), Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended at 20 U.S.C. § 6435) (noting the purpose of this part of the law is to "prevent at-risk youth from dropping out of school, and to provide dropouts, and children and youth returning from correctional facilities or institutions for neglected or delinquent children and youth, with a support system to ensure their continued education and the involvement of their families and communities").

[28] LOWMAN & MAMAS, *supra* note 1, at 15.

[29] COUNCIL OF STATE GOV'TS JUST. CTR., LOCKED OUT: IMPROVING EDUCATIONAL AND VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 2 (2015).

[30] *Id.*

[31] *Id.*

[32] THOMAS G. BLOMBERG ET AL., FLA. STATE U. CTR. FOR CRIM. AND PUB. POL'Y RES. THE JUVENILE JUSTICE NO CHILD LEFT BEHIND COLLABORATION PROJECT 61 (2008).

keep youth from closing the gap in their educational achievement relative to their peers.

While correctional education curricula and standards might be most effective if aligned with state academic standards,[33] this may not always be the case. Students frequently do not earn credit transferrable to public schools for courses completed in detention.[34] Correctional education programs also offer fewer math and science courses than public secondary schools.[35] Academic standards in correctional education may fall short because of the many challenges teachers face in shaping a curriculum for students with different situations and educational needs: students have different lengths of sentences; students may transfer detention facilities abruptly due to lack of space;[36] many students need remedial and special education;[37] and, due to limited staffing, students across grade levels and languages often share a classroom.[38]

Students in juvenile detention are also disadvantaged by lower attendance by and less interaction with their teachers. While technologies such as computer exercises are meant only to enhance correctional education,[39] they may sometimes detrimentally replace in-person teacher instruction.[40] In addition, a report by the Department of Justice's Civil Rights Division found that correctional teachers are eight percent more likely to be absent from the classroom for over ten days than teachers in public high schools.[41] Students may also face disciplinary measures that interfere with class attendance; for example, youth offenders with disabilities sued Contra Costa County Juvenile Hall in California for frequent use of solitary confinement that resulted in "miss[ing] hundreds of hours of education combined," violating protections of IDEA.[42]

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[33] Paul Hirschfield, *Effective and Promising Practices in Transitional Planning and School Reentry*, 65 J. CORRECTIONAL EDUC. 84, 87 (2014).

[34] *Id.*

[35] U.S. DEP'T OF EDUC., *supra* note 11, at 1.

[36] BLOMBERG ET AL., *supra* note 32, at 56.

[37] COUNCIL OF STATE GOV'TS JUST. CTR., *supra* note 29, at 1 ("At least one in three incarcerated youth is identified as needing or already receiving special education services—a rate nearly four times higher than youth attending school in the community.").

[38] U.S. DEP'TS OF EDUC. & JUST., *supra* note 8, at 3 ("Secure care facilities typically do not have the capacity to provide a 'traditional' school setting with individual grade-level classrooms and core subject teachers. Instead, education staff often must provide instruction to students at a variety of ages and academic levels in one room at the same time.").

[39] MICHELLE TOLBERT, U.S. DEP'T OF EDUC., A REENTRY EDUCATION MODEL: SUPPORTING EDUCATION AND CAREER ADVANCEMENT FOR LOW-SKILL INDIVIDUALS IN CORRECTIONS 6 (2010).

[40] BLOMBERG ET AL., *supra* note 32, at 51 ("[O]ne state reported that the result of using the internet to address highly qualified teacher needs has been mixed. Although online classes have allowed each program to address its individual highly qualified teacher needs, one state found that the online instruction has not been as effective as in-person classroom instruction. Specifically, engaging students is more difficult in a virtual classroom."); U.S. DEP'TS OF EDUC. & JUST., *supra* note 8, at 4 ("[T]echnology should not be used as a substitute for teachers and classroom instruction in a secure setting any more than it would replace classroom teaching and engagement in a regular educational setting.").

[41] *See* U.S. DEP'T OF EDUC., *supra* note 11, at 1 ("While 27% of teachers nationally are absent more than 10 school days per year for reasons unrelated to school activities, 35% of teachers at justice facilities are absent more than 10 days per year.").

[42] Sarah Cate, The Politics of Prison Reform: Juvenile Justice Policy in Texas, California, and

Data on student performance and educational outcomes while in correctional education programs is sparse and incomplete. One source of data stems from a mandate from the No Child Left Behind Act,[43] which required states to report standardized test scores for youth who have been in custody for one academic year,[44] but excludes the test scores of many other students.[45] As of 2006, only thirty of forty-three states surveyed by the Center for Criminology and Policy Research had implemented the formal evaluations of their correctional education programs as required by the Act.[46] Another source of data comes from efforts by some states to track attainment of transferrable credits, high school diplomas, and GEDs by incarcerated youth in correctional education:[47] as of 2015, twenty-seven states tracked attainment of transferrable post-secondary credits; forty-six tracked high school diploma attainment; and eighteen tracked attainment of post-secondary degrees.[48]

V. EDUCATION REENTRY TRANSITION SERVICES AND PROGRAMS

Some states provide transition services to support youth reentering their communities. Research shows that engagement is the most important factor for youth during the transition process, and that the type of reentry program—educational, vocational, or community-oriented—is less important to diversion from recidivism than engagement.[49] One of the earliest developed and most commonly used models for reentry programs is the Intensive Aftercare Program (IAP), developed in 1994 by researchers David Altschuler and Troy Armstrong.[50] IAP includes reentry services commonly considered best practices today, such as continuity of care, family involvement, and cultural competency.[51] Evaluations of IAP, however, still show relatively high recidivism rates for participating youth that are equivalent to rates of the control group.[52]

Pennsylvania 139 (Jan. 1, 2016) (Ph.D. dissertation, University of Pennsylvania), https://repository.upenn.edu/cgi/viewcontent.cgi?article=3425&context=edissertations.

[43] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

[44] Peter Leone & Candace Cutting, *Appropriate Educations, Juvenile Corrections, and No Child Left Behind*, 29 BEHAVIORAL DISORDERS 260, 263 (2004).

[45] *Id.*

[46] BLOMBERG ET AL., *supra* note 32, at 17, 43.

[47] LOCKED OUT, *supra* 29, at 7.

[48] *Id.*

[49] William H. Barton & G. Roger Jarjoura, *Applying a Developmental Lens to Juvenile Reentry and Reintegration*, 1 J. OF JUV. JUST. 95, 97-98 (2012).

[50] *Id.* at 95.

[51] *See, e.g.*, *Re-entry: Reform Trends*, *supra* note 8 ("The IAP model focused on 'the identification, preparation, transition, and re-entry of 'high-risk' juvenile offenders from secure confinement back into the community in a gradual, highly structured, and closely monitored fashion.' This model was one of the first to acknowledge that effective aftercare planning must begin from the moment a young person enters a correctional facility.").

[52] Barton & Jarjoura, *supra* note 49, at 95-96.

To work toward better educational outcomes, states must commit sufficient resources to reentry planning. Texas is among the states that appear to have invested significantly in such planning. The Texas Juvenile Justice Department's (TJJD) education goal is to "provide each youth quality academic and vocational experiences in order to better equip them for a successful reentry into community life."[53] TJJD begins reentry planning at the moment of intake by creating the plan by doing "a comprehensive and accurate assessment," and continues these assessments "at regular intervals during the youth's time in" custody.[54] TJJD also employs Education Reentry Liaisons and Workforce Development Re-entry Specialists in both its facilities and parole offices to assist with navigating the school reentry process, preparing for GED exams, finding vocational training opportunities, and otherwise achieving a post-secondary education.[55] Texas has also pursued additional programs in the past, such as the now-discontinued Gang Intervention Treatment: Reentry Development for Youth (GitRedy) initiative in Houston that had some success in developing strategies for reentry services.[56]

A state may also use federal funding for its youth reentry services, though availability of such funding is limited. The Department of Labor formerly offered some funding through Youth Opportunity Grants as part of the Workforce Investment Act of 1998.[57] The thirty-six grants under this program ranged in amount between $3.1 and $43.8 million and served more than 90,000 youths aged fourteen to twenty-one in high-poverty communities.[58] In 2007, the Second Chance Act[59] provided the Department of Justice with $53 million to fund state and local reentry programs and the evaluation of correctional education, meant to reduce recidivism among youth and adults.[60]

The federal government recently issued voluntary guidelines meant to help states decrease the school dropout rate and improve reentry transitions. In 2012, the Department of Education issued a Reentry Education model as an evidence-based approach to aligning correctional and educational services.[61] The model recommends staff training, data

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[53] *TJJD Strategic Plan 2015-2019*, TEX. JUV. JUST. DEP'T (Apr. 11, 2017), https://www.tjjd.texas.gov/programs/education.aspx [https://perma.cc/67KB-EJVS].

[54] TEX. JUV. JUST. DEP'T, COMPREHENSIVE REPORT: YOUTH REENTRY AND REINTEGRATION 7 (2012).

[55] *TJJD Strategic Plan*, *supra* note 53, at 52.

[56] ALTSCHULER ET AL., *supra* note 15, at 5 ("Since the end of the Second Chance Act grant in September 2014, GitRedy has not continued funding the staff positions of project reentry specialist and gang intervention specialist, and as such the program has been formally terminated.").

[57] LINDA HARRIS, CTR. FOR L. AND SOC. POL'Y, LEARNING FROM THE YOUTH OPPORTUNITY EXPERIENCE 3 (2006); *see also* Workforce Investment Act of 1998 § 169, Pub. L. 105-220, 112 Stat. 936 (codified at 29 U.S.C. § 2811) (section entitled "Youth Opportunity Grants").

[58] HARRIS, *supra* note 57 at 3–4.

[59] Second Chance Act of 2007, H.R. 1593, 110th Cong. (2008).

[60] *Attorney General Loretta E. Lynch Delivers Remarks at Second Chance Act – Justice and Mental Health Collaboration Program National Conference*, U.S. DEP'T OF JUST. (Dec. 16, 2015), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-second-chance-act-justice-and-mental [https://perma.cc/CF29-G7JU].

[61] MICHELLE TOLBERT & LAURA RASMUSSEN FOSTER, U.S. DEP'T OF EDUC., REENTRY

tracking of long-term student outcomes, and formal evaluation of correctional education.[62] The model's stated goal is "long-term employment in living-wage occupation without recidivating."[63]

State divisions may also directly collaborate on improving reentry services. The Family Court and the Department of Human Services in Philadelphia, for example, led a 2005 reintegration initiative to improve correctional education and reentry processes.[64] Not long before the improvements, as little as ten percent of youth placed in the Philadelphia juvenile justice system graduated from Philadelphia public schools.[65] As a result of the collaboration, the city established a "streamlined" record transferal process, created a dual-credit program with a local community college, accelerated high schools for older youth, and evening programs for students with daytime jobs.[66] By 2008, thirty-one percent of the youth released from placement received a high school diploma, GED, or both.[67]

VI. OBSTACLES TO SCHOOL REENTRY

Certain state laws can hinder or disincentivize reenrollment. The maximum age until which free public education is guaranteed, for example, is lower in some states than others; as of 2015, the maximum age was seventeen in one state, nineteen in two states, twenty in nine states, and twenty-one or older in thirty-one states.[68] See Figure 1. The age until which school attendance is compulsory is higher in some states than others; as of 2015, this age was sixteen in fifteen states, seventeen in eleven states, and eighteen in twenty-four states.[69] See Figure 2.

EDUCATION FRAMEWORK: GUIDELINES FOR PROVIDING HIGH-QUALITY EDUCATION FOR ADULTS INVOLVED IN THE CRIMINAL JUSTICE SYSTEM 6 (2016).

62 TOLBERT, *supra* note 39, at 5.

63 TOLBERT, *supra* note 61, at 5.

64 ROBERT G. SCHWARTZ, JUV. L. CTR., PENNSYLVANIA AND MACARTHUR'S MODELS FOR CHANGE: THE STORY OF A SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIP 18 (2013); PATRICK GRIFFIN & MARY HUNNINEN, NAT'L CTR. FOR JUV. JUST., PENNSYLVANIA PROGRESS: PREPARING YOUTH FOR PRODUCTIVE FUTURES 2 (2008).

65 GRIFFEN & HUNNINEN, *supra* note 64, at 3 (noting that a study between 2000 and 2005 found that "in one cohort analyzed, 90% of those with a juvenile justice placement never graduate from the Philadelphia School system, [with] some of them complet[ing] school in placement [but with] the vast majority simply dropp[ing] out").

66 *Id.* at 3, 6.

67 *Re-entry: Reform Trends*, *supra* note 8.

68 *Compulsory school attendance laws*, *supra* note 20 (noting that Texas has the highest age until which free education is offered, at twenty-six).

69 *Id.*

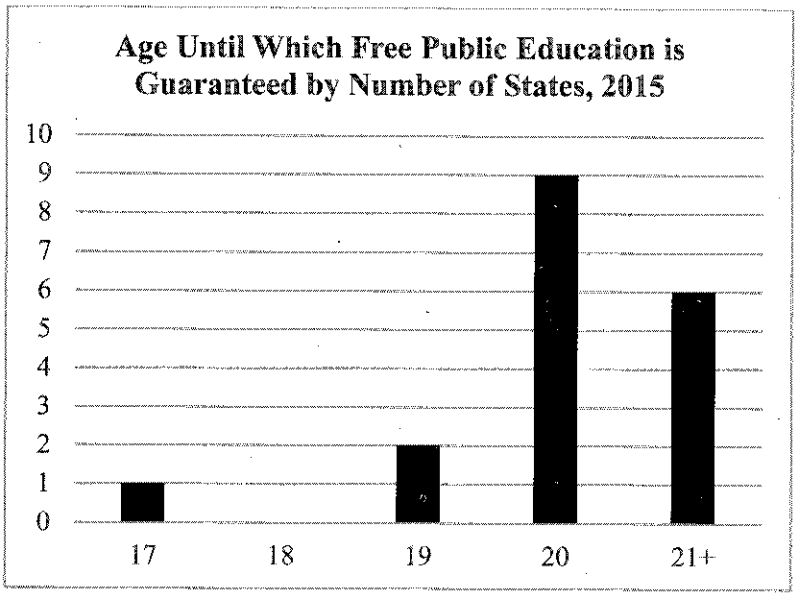

Figure 1

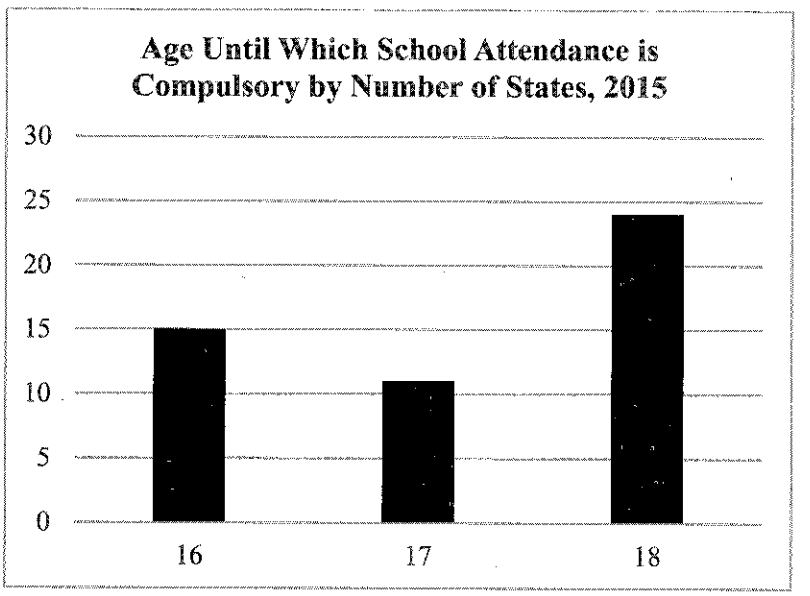

Figure 2

Administrative practices within local school districts may also be complicated. Some local school districts do not always grant students course credit for correctional education.[70] More difficult record transfer procedures, in place partly due to the privacy protections of student

[70] Hirschfield, *supra* note 33, at 87.

records under the Family Educational Rights and Privacy Act of 1974,[71] can create unintended complications. Long and complex registration procedures can result in postponement of reenrollment until the start of the next school semester.[72] Certain documentation requirements, such as proof of age, residence, and immunizations, can pose barriers to reenrollment.[73] These difficulties and delays can have a dramatic effect on the likelihood that released youths will return to school.

Public school districts may also be reluctant to accept formerly incarcerated youth.[74] These schools perhaps fear that accepting formerly incarcerated youth will negatively affect standardized test score averages, graduation rates, and school attendance rates. These kinds of concerns may be some of the major issues today in policy discussions around school reentry.

Public school districts may also be concerned about the safety implications of enrolling formerly incarcerated youth,[75] despite the fact that the majority of the released youth committed only nonviolent offenses.[76] Some school districts will narrowly elect to not reenroll youth convicted of a sex offense.[77] More broadly, other school districts may not enroll students who have been expelled for any reason from a school within the system.[78]

These obstacles to school reentry, combined with conditions of release, can push youth into alternatives. Regular school attendance may perhaps be a condition of probation, the violation of which can quickly result in re-incarceration. Such a condition may have the effect of pushing youth who cannot enroll in public schools into alternate education, discussed *infra*, and GED programs.[79]

Released youth, once enrolled, may also lack the means or incentives to stay in school or remain engaged in work. A longitudinal study in Oregon by the Transition Research on Adjudicated Youth in Community Settings (TRACS) project, for example, found a significant drop in continuing enrollment or work engagement shortly after release; findings indicated that at six months after release, forty-seven percent of

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[71] LEONE & WEINBERG, *supra* note 7, at 22 (discussing the Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, 88 Stat. 5).

[72] *Id.* at 25.

[73] LOWMAN & MAMAS, supra note 1, at 26.

[74] *See infra* Part VII.

[75] *See, e.g.*, Michael Bullis et al., *Life on the "Outs"—Examination of the Facility-to-Community Transition of Incarcerated Youth*, 69 EXCEPTIONAL CHILD. 7, 19 (2016) (noting that "there is reason to incarcerate youth who commit certain crimes for the reason of public safety").

[76] NELLIS & WAYMAN, *supra* note 2, at 13 ("Nearly two-thirds of juveniles in out-of-home placements are held for nonviolent offenses.").

[77] Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, THE CHAMPION, 24 July/August 2011, at 24.

[78] JUV. L. CTR., JUSTICE FOR JUVENILES: YOUTH RECOMMENDATIONS TO IMPROVE EDUCATIONAL OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 11 (2015) (discussing zero tolerance policies).

[79] LOWMAN & MAMAS, *supra* note 1, at 21.

the 531 youth participants were engaged in school or work, but at one year after release, only thirty-one percent of the participants remained engaged.[80] The study also found that participants with learning disabilities experienced worse educational and employment outcomes.[81]

VII. ALTERNATIVE SCHOOLS OFFER AN "EASY OUT"

Some school districts may recommend released youth enroll in or transfer to alternative schools. According to a 2008 survey by the Department of Education, forty-two percent of public school districts administered alternative schools and programs meant for students previously arrested or involved in the juvenile justice system.[82] Some states have no protections limiting the ability of school districts to refuse to enroll previously incarcerated youth in their main school systems.[83] Other states may only have certain procedural protections.

Alternative schools and programs are controversial. Some commentators celebrate the success of prominent programs such as the Maya Angelou Public Charter Schools in Washington, D.C.[84] Others question if alternative school programs consistently provide sufficient educational quality.[85] On this point, a former director of the Maya Angelou Charter Schools said, "If you want to see really dysfunctional schools, just go visit the designated alternative schools in any city around the country. These schools are just dumping grounds where schools throw kids they don't want to deal with. . . . [Their] presence just gives everybody an easy out."[86]

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[80] Bullis et al., *supra* note 75, at 7 (summarizing the Transition Research on Adjudicated Youth in Community Settings (TRACS) project, a longitudinal study published in 2002 that tracked 531 youth released from juvenile justice facilities in Oregon over five years and sought to identify factors that contributed to success upon community reentry).

[81] *See id.* at 18 ("[It] is clear that participants with special education disabilities fared worse than their peers without disabilities.").

[82] PRISCILLA R. CARVER ET AL., NAT'L CTR. FOR EDUC. STATS., ALTERNATIVE SCHOOLS AND PROGRAMS FOR PUBLIC SCHOOL STUDENTS AT RISK OF EDUCATIONAL FAILURE: 2007–08 11 (2010).

[83] JUV. L. CTR., *supra* note 78, at 11.

[84] *See* AMBER FARN & JILL ADAMS, CTR. FOR JUV. JUST. REFORM, EDUCATION AND INTERAGENCY COLLABORATION: A LIFELINE FOR JUSTICE-INVOLVED YOUTH 10–11 (2016) (discussing the successes of students at Maya Angelou Academy at New Beginnings).

[85] *See* Melinda D. Anderson, *Learning Behind Bars*, THE ATLANTIC (Jun. 6, 2016), https://www.theatlantic.com/education/archive/2016/06/learning-behind-bars/485663/ [https://perma.cc/86CJ-SYWX] (discussing the fact that education quality in correctional settings can vary greatly).

[86] *See Forever Board*, MAYA ANGELOU SCHOOLS SEE FOREVER FOUNDATION, http://www.seeforever.org/the-foundation/see-forever-board/ [https://perma.cc/BQ5M-GNAF] (quoting David Domenici, Director of the Center for Educational Excellence in Alternative Settings).

VIII. RECOMMENDATIONS

1. Implement individualized, long-term educational planning from intake to discharge.

From the moment of intake, correctional staff should develop and implement an individualized educational plan for each student that both targets specific educational outcomes and contains possible routes for school reentry. One example of a model for this approach is Georgia's Student Transition Model, which includes a four-stage timeline for correctional education: intake, ongoing educational activities, review for release, and a formal exit interview.[87] Correctional staff compiles important documents in a student portfolio, which contains official documentation of previous academic records, completed correctional education, and information on next steps for reenrollment.[88] To further facilitate education reentry, correctional staff should give the student a transition portfolio consisting of official documentation of completed correctional education and information on next steps for reenrollment, including application timeliness and credit equivalency charts, to facilitate knowledge about the reenrollment process.

2. Encourage greater collaboration between state education agencies, local school districts, and juvenile justice facilities.

Policymakers should encourage greater collaboration on correctional education between state and local education agencies, local school districts, and juvenile justice facilities. Policymakers should help standardize and streamline the education reenrollment process, including increased use of integrated electronic systems. Juvenile justice facilities should work directly with home school districts to timely transfer records and place students immediately upon release. They should also connect the released youth with probation departments, child welfare systems, mental health agencies, and community organizations to help initiate wraparound aftercare services. In particular, similarly focused probation departments may aid the reentry process; Pennsylvanian probation officers, for example, improved their rates of reenrolling youth under their supervision in public school after training to advocate education reentry.[89]

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[87] Ed Risler & Tom O'Rourke, *Thinking Exit at Entry: Exploring Outcomes of Georgia's Juvenile Justice Education Programs*, 60 J. CORRECTIONAL EDUC. 225, 230 (2009).

[88] *Id.*

[89] *See* SCHWARTZ, *supra* note 64, at 21 ("Probation officers became education advocates. They

Some private parties help create the necessary connection between education and justice departments. A New York City nonprofit organization, for example, supports reentry by assessing current levels of student education, expediting school reenrollment and record transfer where possible, and tutoring students in reading.[90] Program data on student outcomes indicate a sixty-six percent student retention rate, on average, from one academic year to the next.[91]

3. Align correctional education curricula and standards with local school districts.

Policymakers should align correctional education curricula and standards with those of local school districts. Students should always be able to earn transferrable course credit for schooling completed in detention. State correctional education standards, when fully aligned with local school district standards, could provide benchmarks of quality related to minimum daily hours of classroom instruction, maximum student-teacher ratios, and minimum teacher credentials. Aligned educational standards could also make available professional development opportunities, instruction for English Language Learners in their native language, services for students with learning disabilities and remedial needs, and a more complete offering of core courses.

4. Increase tracking and evaluation of academic outcomes.

Long-term academic outcomes for students who formerly attended correctional education should be tracked. This tracking should include data points that measure performance and completion in correctional courses as well as subsequent secondary and post-secondary courses, attainment rates for high school diplomas and General Education Development (GED) certificates, performance and completion in any vocational training programs, and results from evaluations of the efficacy of local correctional education led by State juvenile justice departments. Policymakers can then use this information to inform and develop policy change and reform.

State juvenile justice departments may vary in evaluation methods for their correctional education programs. If cost permits, state

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were much more successful with school enrollment when youth left placement.").

[90] CORA ROY-STEVENS, U.S. DEP'T OF JUST., OVERCOMING BARRIERS TO SCHOOL REENTRY 1–2 (2004) (discussing services available at Community Prep High School, a transitional school for students who are ready to attend community schools on release from custody).

[91] *Id.*

juvenile justice departments may develop their own evaluation methods for correctional education and perform these evaluations on a regular and formal basis; if budgets are constrained, they should at a minimum implement wider use of already available evaluation tools modeled after publicly available options. The State Correctional Education Self-Assessment (SCES) tool developed by the Department of Education, for example, is publicly accessible online to help state governments complete voluntary self-assessments of special education within correctional programs.[92]

5. Place more social workers in public schools to support youth in transition.

Policymakers should place more social workers in public schools to emphasize transition services around release and to provide integral support to youths. The process of school reenrollment frequently throws youth off-track.[93] Social workers can act as liaisons between schools and correctional staff at juvenile justice facilities to smooth the transition and increase reenrollment.

6. Mandate that schools accept formerly incarcerated students.

Due to the poor educational quality of many alternative programs,[94] state legislators should support legislation to remove barriers to school reenrollment for formerly incarcerated youth. States should follow the lead of Connecticut[95] and Washington,[96] which have laws favorable to youths that may allow them to be more easily readmitted or otherwise protect them from being expelled in certain circumstances.

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[92] U.S. DEP'T OF EDUC. OFF. OF SPEC. EDU. PROGRAMS (OSEP), STATE CORRECTIONAL EDUCATION SELF-ASSESSMENT (SCES) (2014) ("The Office of Special Education Programs (OSEP) has developed a voluntary State Correctional Education Self-Assessment (SCES) to assist States in self-assessing their systems for providing special education and related services to students with disabilities in correctional facilities.").

[93] *See supra* Part IV.

[94] *See* Anderson, *supra* note 85 (discussing the fact that education quality in correctional settings can vary greatly).

[95] *See* Conn. Gen. Stat. § 10-233d (2017) (requiring boards of education to readmit students to the district if such student has been in an out-of-district placement in lieu of expulsion).

[96] *See, e.g.*, Wash. Rev. Code § 28A.635.020 (protecting students' freedom of speech while in school).

7. Increase investment in and funding for correctional education and reentry programs.

States and the federal government should increase investment and funding for correctional education. This investment may be needed for adequate staffing[97] and will likely yield long-term savings. A 2009 study by the RAND Corporation found that each dollar invested in adult correctional education returns five dollars in savings during the first three years following release.[98] Given the importance of education for youth in transition, it seems likely that similar investments in juvenile correctional education would yield similar, if not greater, benefits.

Availability of federal funding should be revisited and increased. For example, the Department of Education in 2016 allocated a small federal grant of $5.6 million to only four secondary and post-secondary grantees across the country.[99] Many more programs likely need this kind of funding to improve their correction education. A 2012 report by educational foundations and stakeholders recommended that policymakers amend the Elementary and Secondary Education Act (ESEA) to require states and localities to use ESEA funding in part for educational services for reentering youth, with accountability to the Department of Education.[100] Policymakers could also revisit federal funding formulas[101] for state and local education to incentivize spending on reentry services, and expand eligibility for federal Pell grants[102] that support post-secondary education to include funding at the secondary school level.

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[97] *See* U.S. DEP'T OF EDUC., *supra* note 11, at 1 ("While 27% of teachers nationally are absent more than 10 school days per year for reasons unrelated to school activities, 35% of teachers at justice facilities are absent more than 10 days per year.").

[98] LOIS M. DAVIS ET AL., RAND CORP., HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE?: THE RESULTS OF A COMPREHENSIVE EVALUATION 78 (2014) ("Our meta-analysis results . . . suggest that . . . for every dollar spent on correctional education programs, five dollars are saved in three-year reincarceration costs.").

[99] *Education Department Announces New Tools to Support Successful Reentry for Formerly Incarcerated Youth and Adults*, U.S. DEP'T OF EDUC. (Apr. 25, 2016), https://www.ed.gov/news/press-releases/education-department-announces-new-tools-support-successful-reentry-formerly-incarcerated-youth-and-adults [https://perma.cc/BY37-6NMT].

[100] JUV. LAW CTR. ET AL., TOOL IX: FEDERAL POLICY RECOMMENDATIONS 10 (2013) (discussing the Elementary and Secondary Education Act (ESEA), Pub. L. 89-10, 79 Stat. 27 (1965)).

[101] For more information on federal funding formulas, *see How Do School Funding Formulas Work?*, URBAN INST. (Nov. 29, 2017), https://apps.urban.org/features/funding-formulas/ [https://perma.cc/YWN3-2R4F].

[102] For more information of federal Pell grants, *see Federal Pell Grant Program*, U.S. DEP'T OF EDUC., https://www2.ed.gov/programs/fpg/index.html [https://perma.cc/VD2X-HHL9].

8. Implement best practices in the continuum of educational services.

States should consider implementing the following best practices in the continuum of educational services:

First, states should ensure sufficient reentry planning. States should start planning at intake and continue planning through release, identify skill-building opportunities, complete a transition portfolio, and collaborate and share information between agencies during the process.

Second, states should ensure quality correctional education. Sates should create an individualized case plan with defined outcomes; align curricular with local school districts; offer remedial, ELL, and special education services; offer sufficient core courses; and conduct regular and formal evaluations of their programs.

Third, states should give proper emphasis to transitional services. Sates should coordinate with probation departments, emphasize engagement, provide access to affordable GED testing and preparation, and provide access to vocational training.

Lastly, states should focus on school reentry services. States should transfer records in a timely manner, reenroll students within two days of release, ensure students earn transferable credits, and provide classes with evening and weekend hours offered at alternative schools.

CONCLUSION

Central to juvenile justice reform are the principles that the rights and welfare of youth in the system matter and that this population is not expendable. Strengthening correctional education and reentry services will provide a powerful and desperately needed means to mend the damage caused by the school-to-prison pipeline and criminalization of underprivileged minorities in the criminal justice system in the United States.[103] Education must become a higher priority for stakeholders, as it represents a crucial component of how youth involved in the juvenile justice system may work toward better life outcomes and reduce their likelihood of recidivism. The evidence outlined in this Note points to the need for increased investment and innovative solutions that strengthen correctional education, remove barriers to school reentry, and provide released youth with the support and tools they need to succeed.

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[103] *See* Christopher A. Mallett, *The School-to-Prison Pipeline*, 49 EDUC. & URBAN SOC'Y 563, 572–73 (2017) (referencing the connection between race and juvenile corrections).

Elderly and Incarcerated: Preventing the Medical Deaths of Older People in Texas Prisons

Erika A. Parks*

I. INTRODUCTION

In Texas, the older population in prison[1] has grown in both number and percentage of the overall prison population in recent years, with the population that is fifty years of age or older increasing from 18,067 (11.9 percent) in 2005 to 30,131 (20.3 percent) in 2015.[2] This growth trend is mirrored across the United States.[3] Experts point to several factors contributing to the rise in the number of older people in prison, including the aging of the U.S. population as a whole, the tendency of people to live longer, and, importantly, the effects of the "tough-on-crime" sentencing practices of the 1980s and 1990s.[4] As people sentenced under those laws continue to sit in prison without release, it is likely that this population will only continue to grow.

The large number of older people in Texas prisons causes logistical challenges for the Texas Department of Criminal Justice (TDCJ) as well as for the people in prison themselves. Older people have different challenges in prison than their younger counterparts, including mobility prob-

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[1] This Note uses the term "older people in prison" to refer to those fifty-five years of age or older unless otherwise indicated. While this term is used throughout this Note, a common if not consistently defined term in literature and practice is "geriatric." The Texas Department of Criminal Justice (TDCJ) uses the latter term to refer to those fifty-five years of age or older. *See, e.g.*, TEX. DEP'T OF CRIM. JUST., CORRECTIONAL MANAGED HEALTH CARE POLICY MANUAL: ADMISSION TO A GERIATRIC CENTER (2017), http://tdcj.state.tx.us/divisions/cmhc/docs/cmhc_policy_manual/G-51.02.pdf [https://perma.cc/A28T-RPY2] (stating that "[a]ge will be 55 or older" in the admission criteria for geriatric units). Some states categorize people in their prisons as "geriatric" beginning as early as age forty-five or as late as age seventy, and others do not categorize at all. TINA CHIU, VERA INST. OF JUST., IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 7 (2010). Most states use "geriatric" to refer to someone at least age fifty or older. *See id.* at 4. People in prison are also commonly considered to have physical characteristics approximately ten years older than their chronological age, due to a lack of preventative care, a risky lifestyle before coming to prison, and the stresses of prison life. *See, e.g.*, Mike Mitka, *Aging Prisoners Stressing Health Care System*, 292 JAMA 423, 423 (2004).

[2] TEX. DEP'T OF CRIM. JUST., TEXAS DEPARTMENT OF CRIMINAL JUSTICE STATISTICAL REPORT: FISCAL YEAR 2005 8 (2006), https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2005.pdf [https://perma.cc/BT96-Z33E]; TEX. DEP'T OF CRIM. JUST., TEXAS DEPARTMENT OF CRIMINAL JUSTICE STATISTICAL REPORT: FISCAL YEAR 2015 8 (2016), https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2015.pdf [https://perma.cc/AR7R-MZ2K].

[3] *See* Carrie Abner, *Graying Prisons: States Face Challenges of an Aging Inmate Population*, STATE NEWS, Nov./Dec. 2006, at 9, http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf [https://perma.cc/78YK-ZHG7].

[4] *Id.* at 9.

lems, other physical and mental disabilities, and a variety of medical issues.[5]

Although Texas has a responsibility to protect public safety and appropriately punish people for their crimes, the data clearly indicates that crime decreases with age, and older people are less likely to be a public safety risk. According to one study, those over the age of fifty-five have a one-year recidivism rate of just 3.2 percent, compared to forty-five percent for people between the ages of eighteen and twenty-nine.[6] Despite these facts, many older people in Texas prisons will never be released and will instead die in custody. Between 2005 and 2015, 2,286 people over the age of fifty-five died in Texas prisons.[7] All but fifty-five of these deaths were due to natural causes.[8]

This Note explores current conditions for older people in Texas prisons and analyzes data on older people who died of natural causes in prison. It addresses research questions that ask what the demographic characteristics and criminal histories of these people are and what policy options can be implemented to reduce the number of their deaths in prison.

II. THE COSTS OF LIFE AND DEATH IN PRISON

The costs incurred by older people in prison are very high compared to the costs of incarcerating younger people with fewer medical issues. According to a 2012 report from the American Civil Liberties Union (ACLU), the average cost to incarcerate an older person is approximately $68,000 per year, which is twice the cost of incarcerating the average person in prison.[9] If the older person has serious medical problems, however, this cost can be much higher; for example, TDCJ spent almost $2 million

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[5] *See generally* B. JAYE ANNO ET AL., NAT'L INST. OF CORR., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 9 (2004).

[6] Emily Ramshaw, *Few Texas Inmates Get Released on Medical Parole*, TEX. TRIB. (Jun. 3, 2010), https://www.texastribune.org/2010/06/03/few-texas-inmates-get-released-on-medical-parole/ [https://perma.cc/3YN2-8GT6].

[7] *See* Erika Parks, *Analysis of Texas Justice Initiative (TJI) Dataset from 2005 through 2015* (2018) (unpublished analysis, on file with author); *see also infra* Appendix (highlighting results of the analysis). This Note makes significant use of data compiled by the TJI regarding deaths of people in TDCJ custody between 2005 and 2015, specifically regarding people who died in a prison while in TDCJ custody. The TJI is funded by organizations at the University of Texas at Austin and "seeks to build narratives around who is dying in Texas'[s] criminal justice system, bring attention to the lives that have been lost, and provide a foundation for research toward solutions that will save lives." *About Us*, TEX. JUST. INIT., http://www.texasjusticeinitiative.org/about/ [https://perma.cc/8TDE-LFZT]. Amanda Woog, TJI project director, originally provided the data to the author for analysis after compiling and organizing the records, which were provided by the Texas Attorney General's Office and other entities. *Id.* The author recoded and analyzed the variables presented in the dataset, and takes responsibilities for any errors within. A user-friendly version of this data is available for public download on the TJI website. *See Overview*, TEX. JUST. INIT., http://www.texasjusticeinitiative.org [https://perma.cc/J6FN-RC4T].

[8] *Id.*

[9] AM. C.L. UNION, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY xiv (2012).

in 2011 on medical expenses for the ten most ill people in its prisons.[10]

Because many people in prison do not have the support of family members outside, their deaths can also incur costs to the state. In 2015, 104 people died in Missouri prisons, and the remains of fifty-five of them were not claimed by family members.[11] This cost the state $62,000 in burial expenses.[12] By comparison, 416 people died in Texas prisons in 2015,[13] and the remains of perhaps 100 went unclaimed.[14] Burial for these 100 likely cost the state around $100,000.[15]

III. OLDER PEOPLE IN TEXAS PRISONS

TDCJ houses older people in prison within regular units as well as in several specific geriatric units.[16] An older person in Texas prisons may be referred to a geriatric unit when, among other criteria, the person would "be able to function in sheltered general population setting and able to independently perform all activities of daily living" and when "[h]ousing" the person "with general population is difficult due to age and/or general health condition."[17] The Robert H. Duncan Geriatric Facility, which has a capacity of 606 people, is the only standalone unit in TDCJ designed specifically for older people in prison.[18] Most of the geriatric-specific units are embedded in larger facilities.[19] The W.J. Estelle Unit, home of the Region 1 Medical Center, also has an embedded geriatric facility, as do the C.T. Terrell Unit, Wallace Pack Unit, John Montford Unit, L.V. Hightower Unit, Louis C. Powledge Unit, and Allan B. Polunsky Unit.[20] These embedded geriatric facilities have all services available on a single level, with assisted disability services showers and housing to accommodate

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[10] Matt Clarke, *Medical Parole for Texas Prisoners on the Decline*, PRISON LEGAL NEWS (Feb. 15, 2015), https://www.prisonlegalnews.org/news/2014/feb/15/medical-parole-for-texas-prisoners-on-the-decline/ [https://perma.cc/K24D-BBCH].

[11] K. Erickson, *Missouri seeks way to cut cost of burying prisoners*, ST. LOUIS POST-DISPATCH (Nov. 27, 2016), http://www.stltoday.com/news/local/govt-and-politics/missouri-looking-for-way-to-cut-burial-costs-on-dead/article_9774b122-c035-5ad9-be14-f23a3b37c604.html [https://perma.cc/XM83-VETK].

[12] *Id.*

[13] Parks, *supra* note 7.

[14] *See* Robyn Ross, *Laid to Rest in Huntsville*, TEX. OBSERVER (Mar. 11, 2014), https://www.texasobserver.org/prison-inmates-laid-rest-huntsville/ [https://perma.cc/25YL-B5T6] ("Of the roughly 450 inmates who die in Texas prisons each year, about 100 are laid to rest in Captain Joe Byrd Cemetery.").

[15] *See id.* ("When family members can't be located, or when they decline to claim the body, the state picks up the tab for the funeral and buries the body in TDCJ's Byrd Cemetery. . . . [It] costs about $2,000 per inmate.").

[16] *See Unit Directory*, TEX. DEP'T OF CRIM. JUST., http://tdcj.state.tx.us/unit_directory/ [https://perma.cc/98JT-RNVR] (listing available geriatric facilities and information about each facility).

[17] TEX. DEP'T OF CRIM. JUST., *supra* note 1, at 1.

[18] *See id.*

[19] *See Unit Directory*, *supra* note 16.

[20] *Id.*

breathing machines.[21] The only unit available to women with these needs is the Carole S. Young Medical Facility, which houses the majority of women in TDCJ with special medical needs.[22]

TDCJ also contracts with the University of Texas Medical Branch (UTMB) to run hospital facilities within its prisons[23] and with a freestanding hospital in Galveston specifically for those in TDCJ custody.[24] Of the 4,219 people who died of medical causes in TDCJ custody between 2005 and 2015, nearly a quarter died in this hospital in Galveston.[25]

IV. DATA ON DEATHS IN STATE CUSTODY NATIONWIDE

According to national data from a report published by the federal Bureau of Justice Statistics' (BJS) Deaths in Custody Reporting Program, the top four causes of death in state prisons between 2001 and 2004 were heart diseases, cancer, liver diseases, and AIDS; together, these four causes accounted for two-thirds of deaths in state prisons.[26]

Although the vast majority of deaths in state prison are categorized as "natural" or due to illness,[27] some people contend that the underlying cause of a portion of these deaths is medical neglect, lack of appropriate health care, or even guard brutality.[28] Although there is no way of knowing how many deaths categorized as "natural" could have actually been prevented, short of intensive investigations, it is clear from the research that simply being an older person in prison leads to higher mortality. BJS researchers found that those fifty-five or older died in prison at a rate three times that of people aged forty-five to fifty-four, and eleven times the rate of those aged thirty-five to forty-four.[29] Although the death rate in prison is actually lower than the rate in the overall population for most people, for those over age fifty-five, it is fifty-six percent higher.[30]

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[21] *See, e.g.*, *Pack (P1)*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/unit_directory/p1.html [https://perma.cc/W3S8-8SXG] (noting that as a "Type I Geriatric Facility" it has "[a]ll services on a single level, including assisted disability services (ADS) showers and CPAP accommodating housing").

[22] *See Unit Directory*, *supra* note 16; *Young Medical Facility (GC)*, TEX. DEP'T OF CRIM. JUST., http://tdcj.state.tx.us/unit_directory/gc.html [https://perma.cc/U8ZL-SMLW].

[23] *Texas Correctional Managed Health Care Committee*, TEX. DEP'T OF CRIM. JUST., http://www.tdcj.texas.gov/divisions/cmhc/index.html [https://perma.cc/Z7SR-2KPQ].

[24] *See UTMB TDCJ Hospital*, UTMB HEALTH, https://www.utmb.edu/tdcj/mission.asp [https://perma.cc/T3KT-KFM5].

[25] Parks, *supra* note 7.

[26] C.J. MUMOLA, BUREAU OF JUST. STATS., MEDICAL CAUSES OF DEATH IN STATE PRISONS, 2001–2004 1 (2007), https://www.bjs.gov/content/pub/pdf/mcdsp04.pdf [https://perma.cc/67YD-MKW8].

[27] MARGARET E. NOONAN, BUREAU OF JUST. STATS., MORTALITY IN STATE PRISONS, 2001–2014 - STATISTICAL TABLES 2 (2016), https://www.bjs.gov/content/pub/pdf/msp0114st.pdf [https://perma.cc/4ZEA-RWLL].

[28] *See, e.g.*, Joseph Dole, *Death in Prison: The Top 3 Killers*, PRISON WRITERS (Jun. 4, 2017), http://prisonwriters.com/death-in-prison-the-top-3-killes/ [https://perma.cc/Q8CY-JBNU].

[29] MUMOLA, *supra* note 26, at 2.

[30] *Id.* at 3.

The mortality rate for those released from prison who have served ten or more years in prison is more than triple the mortality rate of people who have served fewer than five years,[31] which reflects the toll that prison itself takes on a person's health. Jeffrey Ian Ross, a criminologist at the University of Maryland, reviewed research indicating that prison sentences increasingly lead to death in custody due to four interrelated factors: unsanitary prison conditions, below-average healthcare, high levels of violence, and people with chronic diseases living in close proximity.[32] The former director of the Florida Department of Corrections' Office of Health Services remarked, "The stress of incarceration—including lack of support systems and a lack of trust in fellow prisoners—leads to chronically stressful and debilitating environments."[33] This stress of living in prison, combined with traumatic previous experiences and lack of access to healthcare throughout the lifespan all contribute to accelerated aging, susceptibility to disease, and increases risk of death for older people in prison.[34]

Texas's large prison population makes it unsurprising that the state had the highest number of deaths in custody nationally between 2001 and 2004. Texas had 1,582 deaths in state custody during these years, followed by California with 1,306. Florida, New York, and Pennsylvania were the next highest with a combined forty-one percent of deaths in state prisons during those years.[35] In terms of the number of deaths per 100,000 people in prison, Texas ranked fourteenth among states, with 241 deaths per 100,000 people in prison, behind most other southern states but ahead of many states in other regions.[36] Although this data is somewhat outdated, it provides a good baseline for examining deaths in custody in Texas between 2005 and 2015.

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[31] *Id.* at 2.

[32] Jeffrey Ian Ross, *Why a Jail or Prison Sentence is Increasingly Like a Death Sentence*, 15 CONTEMP. JUST. REV. 309, 309 (2012).

[33] Abner, *supra* note, at 3 (quoting Dr. David Thomas, Former Director of the Florida Department of Corrections' Office of Health Services).

[34] *Id.* at 9–10 ("[Some commentators] point to a number of factors contributing to this phenomenon [of inmates appearing physically and medically older than they are], including lack of access to health care services prior to entry, poor dietary and exercise habits, and substance abuse. . . . A 2000 study by the Florida Department of Corrections' Office of Health Services found that almost two-thirds of inmates received their first significant health care experience, defined as any surgery or filled and started prescription, while in prison. . . . As a result [of accelerated aging caused by stress], older inmates tend to develop age-related health problems earlier. According to [the director of the Project for Older Prisoners], an elderly inmate will experience an average of three chronic illnesses during his or her term. The National Institute of Corrections lists arthritis, hypertension, ulcer disease, prostate problems and myocardial infarction among the most common chronic diseases among elderly inmates. Diabetes, Hepatitis C and cancer are also common.").

[35] MUMOLA, *supra* note 26, at 3.

[36] *Id.*

V. ANALYSIS OF DEATHS IN TDCJ CUSTODY

This Note makes use of the Texas Justice Initiative (TJI) dataset.[37] The TJI was able to collect this data in part because Texas law requires TDCJ, as well as county jails and police departments, to report deaths in custody to the Texas Attorney General's Office.[38] While TDCJ generally appears to be compliant, there are some concerns about compliance by local jails and police departments.[39]

In general, few states have a publicly available record of deaths in custody.[40] The federal Deaths in Custody Act of 2000 allowed the federal Bureau of Justice Statistics (BJS) to begin collecting this information from states,[41] but prior to the law's passage, only Texas and California were actively reporting deaths in custody.[42] Providers of aggregate data may also vary among states. For example, while aggregate data is accessible in California on a state government website,[43] aggregate data in Texas is currently only available to the public on a non-governmental website hosted by the TJI.[44]

The TJI dataset is detailed in some ways and insufficiently detailed in others. For many of the people whose deaths are listed as natural causes or illness, there is a specific cause of death listed. In most cases, however, there is no information about the details leading up to someone's death, including the quality and timing of medical treatment they received, whether the death was expected, and whether anything could have been done to prevent it. In fact, it is not necessarily even the case that a death listed as natural causes or illness was not influenced by the behavior of an officer or other person in prison. For example, the 2015 death of Michael Sabbie in a Texas prison made state news and was described as a natural death, even though video released of guards being physically aggressive and information about the lack of medical assistance he received point to

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[37] Parks, *supra* note 7.

[38] TEX. CODE OF CRIM. PROC. § 49.18(b) ("If a person dies while in the custody of a peace officer or as a result of a peace officer's use of force or if a person incarcerated in a jail, correctional facility, or state juvenile facility dies, the director of the law enforcement agency of which the officer is a member or of the facility in which the person was incarcerated shall investigate the death and file a written report of the cause of death with the attorney general no later than the 30th day after the date on which the person in custody or the incarcerated person died.").

[39] *See, e.g.*, Lise Olsen, *In Texas and California, police fail to record use-of-force-fatalities from 2005-2015*, HOUS. CHRON. (Oct. 9, 2016), https://www.houstonchronicle.com/news/houston-texas/houston/article/In-Texas-and-California-police-fail-to-report-9958631.php [https://perma.cc/DWU2-A7YV].

[40] *Id.* ("Texas and California are the only states to require the reporting of all in-custody deaths . . . .").

[41] ZHEN ZENG ET AL., BUREAU OF JUST. STATS., ASSESSING INMATE CAUSE OF DEATH: DEATHS IN CUSTODY REPORTING PROGRAM AND NATIONAL DEATH INDEX 1 (2016).

[42] Olsen, *supra* note 39.

[43] *See* OPEN JUSTICE, http://www.openjustice.doj.ca.gov [https://perma.cc/JAN2-NTUQ].

[44] TEX. JUST. INIT., *supra* note 7.

additional causes of his death.[45] Because of these limitations, the TJI dataset analysis is confined primarily to characteristics of the people who died rather than the circumstances surrounding their deaths.

VI. OVERALL DATA

Analysis of the TJI dataset shows that between 2005 and 2015, 4,221 people died in Texas prisons of natural causes or illness.[46] Of these, just over half (2,231) were fifty-five years of age or older, with an average age of death of sixty-four years old.[47] All but fifty-five of these deaths were listed as due to natural causes or illness during this period.[48] See Figure 1, below.

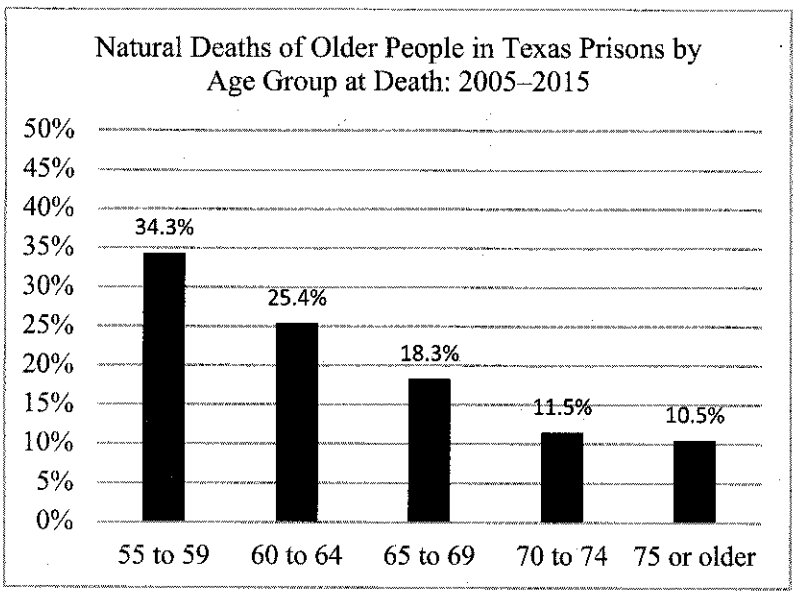

Figure 1

Of these older person deaths, more than ninety-seven percent were men, fifty percent were white, twenty-six percent were black, and twenty-three percent were Hispanic. By comparison, the racial breakdown of the general Texas prison population in 2015 was thirty-two percent white,

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[45] Eliott C. McLaughlin, *Texas prisoner's death casts spotlight on privatized health care*, CNN (Nov. 1, 2016), http://www.cnn.com/2016/10/27/us/michael-sabbie-death-private-prison-health-care/ [https://perma.cc/2GDD-9HBH].

[46] Parks, *supra* note 7.

[47] *Id.*

[48] *Id.*

thirty-four percent black, and thirty-three percent Hispanic.[49] This comparison reveals a higher death rate among white people in prison. This mirrors national statistics: BJS found that the mortality rate for black and Hispanic people in prison was 206 deaths per 100,000 people, while for white people it was 343 per 100,000, a rate sixty-seven percent higher.[50] This disparity is likely due to the fact that white people in prison are more likely to be older.[51]

Though analysis of this TJI dataset is limited to deaths in TDCJ custody rather than information about those who are living but at risk for death, the data is likely useful in predicting future mortality rates for people currently in prison based on demographic characteristics such as age, criminal history, length of time in prison, and type of offense. The following sections examine this population on those measures and begin to discuss policy options for reducing the rate of their deaths.

VII. ELDERLY PEOPLE ENTERING PRISON

Before making recommendations on policy options to reduce the rate of older people dying in custody, it is important to examine the characteristics of those who died, including whether they entered prison at an advanced age or grew old there. Just under fifty percent of older people who died in prison entered after the age of fifty-five, and nearly eight percent were first incarcerated after the age of seventy.[52] See Figure 2, below. This points to a misperception that the majority of older people in prison are serving long sentences, but it also suggests a policy to prevent the incarceration of older people.

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[49] TEX. DEP'T OF CRIM. JUST. 2015, *supra* note 2, at 8. The author adjusted the TJI dataset to recategorize ethnicities initially categorized as "other" based on offered ethnic descriptions, including recategorizations of "Belize," "Brazilian," and "Cuban" as Hispanic; "Caucasian," "white," and "white nonhispanic" as white; and "Sudanese black" as black. "Arabian" and "Anglo & Middle East" remained as other.

[50] *See* MUMOLA, *supra* note 26, at 2.

[51] *See* Michael Schwirtz, Michael Winerip, & Robert Gebeloff, *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 3, 2016), http://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html.

[52] Parks, *supra* note 7 (analyzing data showing that of the 2,231 older people in prison who died in custody, 0.7 percent entered when they were younger than twenty-five, 11.1 percent entered between ages twenty-five and thirty-nine, 38.0 percent entered between ages forty to fifty-four, 42.5 percent entered between ages fifty-five to sixty-nine, 7.7 percent entered after reaching seventy years of age, with the remainder missing the data necessary to calculate these statistics).

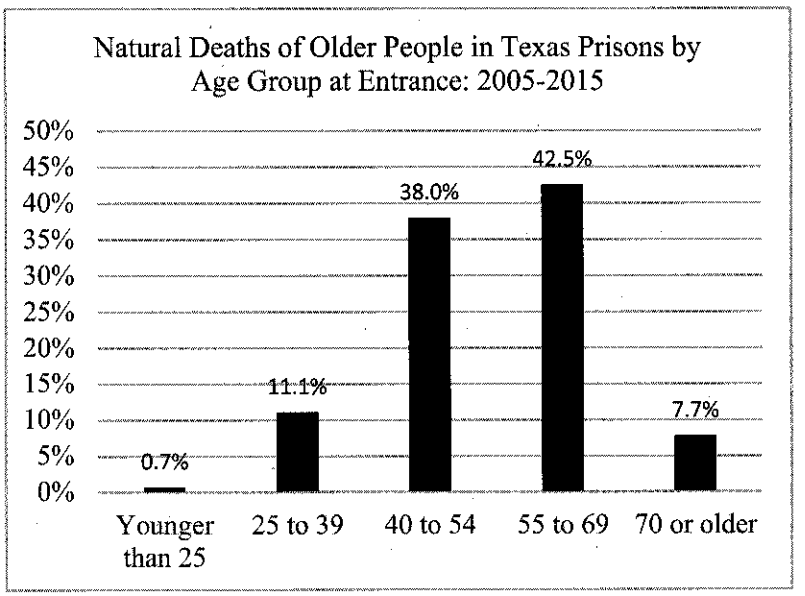

Figure 2

Texas judges and lawmakers should consider whether prison makes sense as a punishment for people over a certain age. Some older people may be of sufficiently sound body and mind for whom prison might be the right option. However, others may not be. Infirmities may make prison inappropriate as a punishment for these older perpetrators because it may exacerbate their conditions.[53]

Some of those who entered prison after reaching the age of seventy—approximately 43.7 percent—committed crimes against children, the majority of which were sex crimes.[54] These crimes are undoubtedly serious and the perpetrators must be held accountable, but in most cases, the perpetrators are not a threat to adults, and precluding their access to children can ensure public safety. There are options that will allow for this while incurring fewer costs for the state and holding people in more appropriate placements. One option is to sentence frail older people to intensive supervision and apply restrictions like those for people who have committed sex offenses, preventing them from accessing potential victims. Less restrictive options may sufficiently ensure public safety in some cases.

For those people entering custody after reaching seventy years of age, analysis shows that a significant part of this population—up to 20 percent—committed crimes of a non-violent, non-sexual nature.[55] These

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[53] *See infra* Part XII.

[54] *Id.*

[55] Parks, *supra* note 7. The analysis indicated 19.54 percent of people incarcerated after reaching the age of seventy committed crimes of a non-violent, non-sexual nature. This analysis was subject to variability due to data quality concerns and limitations; the author used only the official indicator of

individuals should also not be sentenced to prison in most cases, as probation restrictions are frequently enough to hold them accountable for their crimes. For individuals who are sentenced as younger people and grow old in prison, however, different concerns are present.

VIII. GROWING OLD IN PRISON

While not all people who died in Texas prisons between 2005 and 2015 were serving long sentences, many were. Among people who died in Texas prisons after the age of fifty-five, a plurality had served less than five years.[56] Nearly thirty percent had served at least fifteen years, while nearly forty percent had served less than five years.[57] Of those who had served at least fifteen years, more than ninety percent entered prison before the age of fifty-five,[58] with an average age at prison entry of about forty years old.[59] See Figure 3, below.

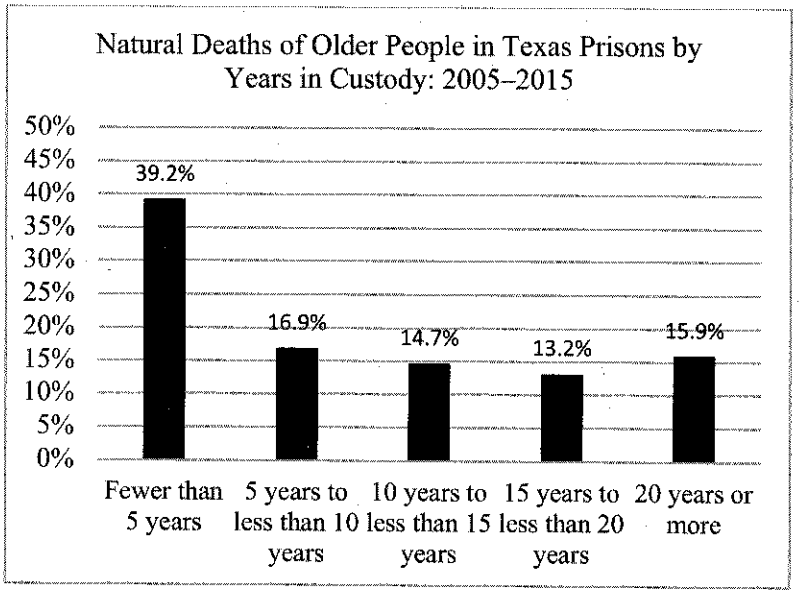

Figure 3

violence in determining whether a crime committed was violent. The dataset did not flag sex crimes, however, so the author analyzed the non-standard fields describing the crimes to determine common words tied to crimes of a sexual nature. The author used variations on the following words to indicate a sex crime: "sex," "rape," "indecency," "porn," or "minor."

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

As indicated by their lengthy sentences, the crimes committed by people who had served at least fifteen years at the time of their deaths were in many cases quite serious. Nearly seventy percent of this group had committed a violent crime, and almost thirty-eight percent had committed a sex crime.[60] Because these individuals had been in prison for so long, however, many of these people may have completed extensive programming and been rehabilitated. This reality, along with the recidivism rate of just 3.2 percent for those over the age of fifty-five, indicates that these older people in prison are very unlikely to be a threat to public safety if they were to be released.[61]

IX. FALLING ILL AND DYING IN PRISON

Most older people who died in Texas prison between 2005 to 2015 had a known medical condition. Of the 2,284 people who died in Texas prisons, roughly 63.1 percent had a cause of death related to a reported pre-existing condition: 57.6 percent were categorized as having a medical condition when they entered prison, and an additional 5.5 percent were listed as developing a medical condition after admission.[62] In addition, just over eighty percent received medical treatment related to their fatal illness before their death, though only 42.8 percent received a medical evaluation after death, i.e., an autopsy.[63] Mirroring the national statistics, the majority of causes of death listed were related to heart disease, cancer, or liver diseases.[64] The high rate of medical conditions among older people in Texas prisons again shows that these individuals are less likely to pose a serious threat to public safety if released early.

X. GERIATRIC RELEASE IN TEXAS

Like a number of other states, Texas allows for geriatric release,[65] which allows for the release of people with significant medical problems.

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[60] *Id.*

[61] Ramshaw, *supra* note 6.

[62] Parks, *supra* note 7.

[63] *Id.*

[64] *Id.* This analysis was done by searching through the causes of death and classifying them as follows: first, those containing the terms "heart," "cardi," or "coronary" (heart disease); second, those containing the terms "cancer" or "carcinoma" (cancer); and third, those containing the terms "liver," "cirrhosis," or "hepat" (liver disease); MUMOLA, *supra* note 26 (noting national data).

[65] This Note defines "geriatric release" statutes as those that either explicitly focus on elderly people in prison or that focus on medical conditions and specifically refer to age or age-related medical conditions. Others similarly define the term. *See, e.g.*, CHIU, *supra* note 1, at 6.

Texas's geriatric release program is called Medically Recommended Intensive Supervision (MRIS).[66] This law allows for the release of people serving most sentences,[67] but disallows release for certain types of crimes, including murder, aggravated robbery, kidnapping, some types of burglary, and a variety of sex crimes—crimes committed by many of the people who died in prison.[68] The program mandates a "supervision plan that requires the inmate to submit to electronic monitoring, places the inmate on super-intensive supervision, or otherwise ensures appropriate supervision of the inmate."[69] The program allows for certain exceptions to these requirements, however, including for "elderly" people.[70] TDCJ guidelines define "elderly" as being at least sixty-five years of age.[71]

Under the review process, the parole panel must determine "that, based on the inmate's condition and a medical evaluation, the inmate does not constitute a threat to public safety."[72] In 2015, less than five percent of individuals released pursuant to MRIS returned to TDCJ custody, and approximately two-thirds of the released individuals died shortly after release.[73] Processing applications for MRIS typically take a long time, and a number of people have died while their applications were pending.[74]

Because of the restrictions on eligibility, the vast majority of people who apply for MRIS are denied.[75] In 2015, the Board of Pardons and Paroles received 1,738 applications for MRIS, considered 213, and ultimately approved eighty-five, for a rate of just 4.9 percent.[76] By contrast, the Texas Board of Pardons and Paroles granted parole to nearly 29,000 of the more than 82,000 cases it considered in 2015, for an approval rate of thirty-five percent,[77] up from approximately twenty-five percent in its 2001 fiscal year.[78]

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[66] TEX. GOV'T CODE § 508.146(a) (2017).

[67] *Id.* (excluding people sentenced to death or to life without parole).

[68] *Id.*; TEX. CODE OF CRIM. PROC. § 42A.054 (2017) (listing certain serious crimes); TEX. CODE OF CRIM. PROC. Ch. 62 (2017).

[69] GOV'T § 508.146(a)(3).

[70] *See* GOV'T § 508.146(a)(1)(A) ("An inmate other than an inmate who is serving a sentence of death or life without parole may be released on [MRIS] . . . except that an inmate with an instant offense that is [one of a list of severe crimes] or an inmate who has a reportable conviction or adjudication [as a sex offender] may only be considered [for MRIS] if a medical condition of terminal illness or long-term care has been diagnosed by a physician, if [the appropriate authority] identifies the inmate as being . . . elderly . . . if the inmate is an inmate with an instant offense that is [one from the list of certain serious crimes.]").

[71] TEX. DEP'T OF CRIM. JUST., PROGRAM GUIDELINES AND PROCESSES FOR MEDICALLY RECOMMENDED INTENSIVE SUPERVISION (MRIS) 10 (2014), http://tdcj.state.tx.us/documents/rid/TCOOMMI_PGP_0104_MRIS.pdf [https://perma.cc/H8U4-8GRR].

[72] GOV'T § 508.146(a)(2).

[73] TEX. BD. OF PARDONS AND PAROLES, TEXAS BOARD OF PARDONS AND PAROLES ANNUAL STATISTICAL REPORT FY 2015 12 (2015), https://www.tdcj.state.tx.us/bpp/publications/FY%202015%20AnnualStatisticalReport.pdf [https://perma.cc/JX8Y-MN34].

[74] Clarke, *supra* note 10.

[75] TEX. BD. OF PARDONS AND PAROLES, *supra* note 73, at 12.

[76] *Id.*

[77] *Id.* at 5.

[78] *Id.*

XI. COMPARISONS WITH GERIATRIC RELEASE PROGRAMS IN OTHER STATES

The District of Columbia and fifteen states, including Texas, have laws about various types of medical or geriatric release, also called compassionate release.[79] Most of these jurisdictions require the applicant to have reached a minimum age, ranging from forty-five to sixty-five.[80] A few states require applicants to serve a minimum number of years in prison before becoming eligible, ranging from five to twenty years.[81] Texas's law does not include either of these restrictions.[82]

Unlike Texas, however, some of these states allow for more flexibility to release people who are old and infirm but not necessarily extremely ill, and in some states, people may become automatically eligible after a certain age, regardless of health status.[83] In Virginia, for example, people in prison can be considered for release at age sixty if they have served at least ten years, or at age sixty-five if they have served at least five years, provided the person did not commit certain types of serious felonies.[84] However, of the 500 people eligible for geriatric release in Virginia in 2007, only fifty-two individuals even applied.[85] This low application rate indicates that people in prison often lack the knowledge or means to apply for programs for which they are eligible.

Like in Texas, many states have requirements in place that exclude people with certain kinds of felonies, such as homicide or sexual assault, from eligibility for medical release.[86] As seen in the analysis above, older people, especially those who have served long sentences, are likely to have committed these kinds of violent crimes. Thus, geriatric release may not apply to the majority of people for whom it is designed.[87] Geriatric release laws, like many general parole release regulations, do not take into account the potentially rehabilitative effects of years in prison nor the desistance-inducing effects of growing older.

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79 CHIU, *supra* note 1, at 7.

80 *Id.*

81 *Id.*

82 *See* TEX. DEP'T OF CRIM. JUST., *supra* note 71 (noting age sixty-five as the minimum age for which elderly inmates qualify for special consideration under a medical release program).

83 CHIU, *supra* note 1, at 6.

84 VA. CODE § 53.1-40.01 (2009) (Class 1 felonies).

85 CHIU, *supra* note 1, at 9.

86 *See* TEX. GOV'T CODE § 508.146(a) (2017); TEX. CODE OF CRIM. PROC. § 42A.054 (2017); CRIM. Ch. 62 (2017); CHIU, *supra* note 1, at 7.

87 *See infra* Part X (noting that elderly people in prison are not eligible for MRIS on the basis of advanced age alone if they have a life sentence or if they have a reportable adjudication or conviction as a sex offender).

XII. POLICY RECOMMENDATIONS

There are a number of policies that should be implemented to improve health care availability and quality for all people in prison. However, many older people who die in prison should not be there in the first place. The following recommendations focus on ways in which older people can be safely released into the community, or not incarcerated in the first place, thereby improving their end-of-life quality and reducing the cost burden on the state.

1. Loosen restrictions on eligibility for compassionate and medical release, and automatically consider eligible people for release without requiring an application.

Texas is one of a number of states that has a medical release statute, but, like other states, does not use it often. Texas should select an age, such as sixty-five, at which people in prison who did not commit certain serious crimes will become eligible for geriatric release, regardless of their health status. Texas should also allow older people to be eligible for geriatric release even if they were convicted of serious crimes once they have served significant portions of their long prison sentences. In addition, Texas should automatically consider and continually review people in prison for release without requiring an application. Automatic review would remove the barriers that people in prison may face in accessing the knowledge and means to apply for release themselves.

2. Prioritize alternatives to prison for people sentenced when they are older.

A significant number of people in prison were first incarcerated after the age of seventy for nonviolent, non-sex crimes, and these people should be strongly considered for alternative placements, as discussed below. Even those convicted for crimes against children could be considered for alternative placements, since they may not be a danger to society at large and could be appropriately restricted through requirements such as those placed on others who have committed sex crimes.

3. Establish residential facilities to safely house older people released under parole supervision or alternatively sentenced.

Most older people in prison have committed serious crimes and may not be able to safely live in the community unsupervised. By releasing these people into nursing homes and monitoring them on parole, they will be appropriately supervised while more easily receiving medical treatment and end-of-life care. In addition, the majority of the cost for their care will be supported by the federal government rather than by the state of Texas. This is because the federal government pays two-thirds of the cost of nursing home services through Medicaid, and the full cost if the older person on parole is eligible for Medicare.[88] Some estimates have projected that this could save Texas up to $50 million per year.[89] Although there are challenges with private nursing homes accepting older people with criminal records,[90] Marc Levin of the Texas Public Policy Foundation has suggested special nursing homes that are monitored by parole officers.[91]

4. Reform harsh sentencing guidelines, increase the granting of parole, and improve parole release practices.

The only way to reduce the older population in prison in the long term is to make sure people who commit serious crimes when they are young are given the opportunity to parole out of prison before they reach an age when they may become seriously ill or infirm. There are a number of ways to do this, including: 1) reducing the upper limit of sentencing ranges for some crimes, which are very wide in Texas; 2) granting parole to those eligible on a more regular basis; and 3) improving parole and release services to help prevent failure on parole and recidivism more generally.

XIII. CONCLUSION

When visiting the geriatric wing of the Estelle Prison Unit, one is reminded that there are men in prison who cannot walk or take care of themselves and who are likely to die while in custody. It is neither humane nor cost-effective to hold these people in Texas prisons. By increasing the

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[88] Ramshaw, *supra* note 6.

[89] *Id.*

[90] HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 80 (2012).

[91] Ramshaw, *supra* note 6.

availability and use of medical and compassionate release, and by reducing the incarceration of older people to begin with, Texas can avoid significant expense while still protecting public safety and allowing people to spend the last years of their lives in a more comfortable and appropriate setting for their needs.

Appendix

Table 1: Cause of death for people age fifty-five or older who died in Texas prisons, 2005–2015[92]

People age fifty-five or older who died in Texas prisons, 2005-2015		2,286	
Cause of death		N	%
	Died of natural causes/illness	2,231	97.59%
	Died of accidental injury	18	0.79%
	Died of suicide	17	0.74%
	Died of homicide	10	0.44%
	Died of other causes	10	0.44%

[92] Parks, *supra* note 7.

Table 2: Demographics of people age fifty-five or older who died of natural causes or illness in Texas prisons, 2005–2015[93]

People age fifty-five or older who died of natural causes or illness in Texas prisons, 2005-2015	2,231	
Age at Death	N	%
55 to 59	766	34.33%
60 to 64	566	25.37%
65 to 69	408	18.29%
70 to 74	257	11.52%
75 or older	234	10.49%
Age at Custody	N	%
Younger than 25	15	0.67%
25 to 39	247	11.07%
40 to 54	847	37.97%
55 to 69	948	42.49%
70 or older	172	7.71%
Missing data	2	0.09%
Gender	N	%
Male	2,176	97.53%
Female	55	2.47%
Race/Ethnicity	N	%
White	1,117	50.07%
Black	580	26.00%
Hispanic	522	23.40%
Other	12	0.54%
Time in Custody	N	%
Less than 5 years	874	39.18%
5 years to less than 10 years	378	16.94%
10 years to less than 15 years	327	14.66%
15 years to less than 20 years	294	13.18%
20 years or more	355	15.91%
Missing data	3	0.13%

[93] *Id.*

Medical Information (not mutually exclusive categories)		N	%
	Cause of death related to pre-existing medical condition at prison entry	1,285	57.60%
	Cause of death related to medical condition developed while in prison	123	5.51%
	Received medical treatment for condition related to cause of death	1,787	80.10%
	Received post-mortem evaluation to determine cause of death	955	42.81%

Religious Freedom Legislation in Texas Takes Aim at Same-Sex Marriage

Kimberly Saindon*

INTRODUCTION

The Religious Freedom Restoration Act (RFRA) requires that the government reach a high standard in order to burden an individual's free exercise of religion. Texas has its own RFRA, and since its inception, most RFRA-related bills in Texas have provided exemptions for individuals with sincerely held religious beliefs. The legalization of same-sex marriage in the United States in *Obergefell v. Hodges* changed the nature of RFRA-related legislation in Texas.[1] Many bills from the 2017 Texas

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legislative session now address same-sex marriage and create exemptions for individuals who oppose same-sex marriage based on religious beliefs.[2] The number of RFRA-related bills introduced during the 2017 legislative session also increased. This increase is due to the addition of same-sex marriage RFRA bills to the usual RFRA bills and because the success of the original plaintiff in *Burwell v. Hobby Lobby* has bolstered the strength of the RFRA doctrine and sparked more RFRA-related legislation. Recent Texas RFRA-related legislation includes the Pastor Protection Act and the Adoption Bill, the latter of which has created significant controversy and is potentially vulnerable to constitutional and other legal challenges.[3] Barring a change in state leadership, Texans can expect to see more RFRA-related bills addressing same-sex marriage in the future.

I. THE ROAD TO TEXAS'S RFRA

The Religious Freedom Restoration Act (RFRA) doctrine has found a comfortable home in the state of Texas. But the RFRA doctrine took a winding path before coming to rest in Texas in its current form. RFRA began as a national response to the unpopular holding in *Employment Division v. Smith* in 1990.[4] The Supreme Court held in *Smith* that the state of Oregon could deny unemployment benefits to a Native American fired for using peyote (an illegal, hallucinogenic plant) during a tribal ritual, and that the plaintiff was not exempt from a neutral law of general applicability even if it conflicted with his religious beliefs.[5] *Smith* sent shockwaves around the nation, with many people feeling that the ruling had impermissibly imposed on the rights guaranteed by the Free Exercise Clause of the First Amendment.[6] Religious groups and civil rights organizations became unlikely bedfellows and lobbied Congress to pass RFRA to restore the religious liberties that many feared were lost in *Smith*.[7] The U.S. Senate voted astoundingly 97–3 in favor of RFRA, and the Act was

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who encouraged my interest in Texas RFRA legislation and helped guide my research and writing. Many thanks to the editors TJCLCR for their feedback and diligent editing.

1 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

2 Because of the high number of RFRA-related bills that are introduced in the Texas legislature and in order to create a more in-depth analysis of the enacted bills, this paper will focus primarily on the Texas, RFRA-related legislation that successfully became law.

3 S.B. 2065, 84th Leg., Reg. Sess. (Tx. 2015) (codified at TEX. FAM. CODE § 2.601; 2.602) (known as "The Pastor Protection Act"); H.B. 3859, 85th Leg., Reg. Sess. (Tx. 2017) (codified at TEX. HUM. RES. CODE § 45.004(1-2); 45.005) (hereinafter the "Adoption Bill").

4 Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

5 *Id.* at 890.

6 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

7 CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

signed into law by President Bill Clinton in 1993.[8]

The Act states that its purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . ."[9] *Sherbert* and *Yoder* constitute some of the country's most protective holdings on religious liberties.[10] The strict scrutiny standard, as applied in *Sherbert* and *Yoder*, requires that the state have a compelling governmental interest in order to burden an individual's religious convictions.[11] The 1993 federal RFRA marked the reintroduction of the strict scrutiny test.[12] RFRA adopts the same language as in *Sherbert* and *Yoder*—prohibiting the government from substantially burdening a person's free exercise of religion, unless 1) the agency demonstrates that this is in furtherance of a compelling state interest test, and 2) is it the least restrictive means of furthering that interest.[13]

Despite the Act's broad language, many were uncertain of its practical application. The statute was tested in *City of Boerne v. Flores*, when the Archbishop of San Antonio alleged that the denial of a permit to enlarge a church violated RFRA by imposing a substantial burden on the exercise of his religion without a compelling state interest.[14] The Supreme Court in *City of Boerne* struck down RFRA as it applied to the states as an unconstitutional use of the enforcement power of the Fourteenth Amendment.[15] The Court clarified that although Congress may enact legislation by virtue of Section Five of the Fourteenth Amendment to enforce constitutional rights (here, the First Amendment's Free Exercise Clause), in this case, Congress had exceeded its enforcement power by prescribing what constitutes a constitutional violation.[16] Although RFRA as it applies to states was invalidated in *Smith,* the federal RFRA was held constitutional in *Gonzales v. O Centro Espirita* and remains intact today.[17]

After the Supreme Court invalidated RFRA as it applied to the states in *City of Boerne*, many states hastened to draft state RFRAs (termed "little RFRAs") of their own.[18] Texas enacted its state RFRA in 1999

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[8] *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[9] 42 U.S.C. § 2000bb(b)(1) (1993) (referencing Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[10] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014).

[11] *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

[12] 42 U.S.C. § 2000bb-1.

[13] *Id.*; *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

[14] City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[15] *Id.* at 508 ("Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.").

[16] *Id.*

[17] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

[18] *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/S7ZH-TEJY].

and is one of twenty-one states to do so.[19] Most state RFRAs, including Texas's, track the same language as the federal RFRA and impose the same strict scrutiny standard.[20]

II. RELIGIOUS FREEDOM LEGISLATION IN TEXAS

After Texas's RFRA was passed in 1999, relatively few RFRA bills were introduced in Texas in the early years and an even smaller number of these bills became law.[21] The few early RFRA-related bills passed without much incident and were largely devoid of controversy. For example, Texas used RFRA language to amend the Education Code to provide additional leeway for students to receive excused absences for religious holidays.[22] Additional Texas RFRA legislation included an amendment to the property code that prohibits a property owner's association from adopting covenants prohibiting residents from displaying religiously motivated displays.[23] The legislature also protected the religious beliefs of non-Christians in creating criminal penalties for the intentional mislabeling of halal food, which is food prepared in accordance with Islamic religious requirements.[24] This law is not technically RFRA legislation since no government action burdened the individual's free exercise, except perhaps the lack of regulation. Nonetheless, it did protect the free exercise of religion, which was the underlying purpose of RFRA. The period following the establishment of the Texas RFRA was a time of expanding religious liberties, and these unoffending RFRA bills passed without much opposition.

A 2009 Texas RFRA-related law created an exemption from the required meningitis vaccine for students with sincerely held religious beliefs in public institutions of higher education.[25] The vaccine exemption bills caused some controversy—after all, unvaccinated students can increase the spread of meningitis, becoming a public health issue.[26] Recall

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[19] TEX. CIV. PRAC. & REM. CODE § 110.001 *et seq.* (2017); *State Public Accommodation Laws,* NATIONAL CONFERENCE OF STATE LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/SL62-GXS5].

[20] CIV. PRAC. & REM. § 110.006.

[21] CIV. PRAC. & REM. § 110.001. *See Bill Search,* TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/Search/BillSearch.aspx.

[22] *See* H.B. 217, 76th Leg., Reg. Sess. (Tex. 1999); H.B. 256, 78th Leg., Reg. Sess. (Tex. 2003).

[23] H.B. 1278, 82d Leg., Reg. Sess. (Tex. 2011) (amending the property code to provide for display motivated by sincere religious beliefs to be subject to limitations on offensive language and size).

[24] H.B. 470, 78th Leg., Reg. Sess. (Tex. 2003).

[25] H.B. 4189, 81st Leg., Reg. Sess. (Tex. 2009) (meningitis vaccine exemption); H.B. 62, 83d Leg., Reg. Sess. (Tex. 2013) (amending meningitis vaccine exemption).

[26] *See* Elizabeth Hatch, *To Vaccinate or Not to Vaccinate?: The Challenges and Benefits of the Implementation of the Jamie Schanbaum Act,* 15 TEX. TECH ADMIN. L.J. 187, 200 (2013); *see also* Reeve Hamilton, *Meningitis Vaccine Mandate Could Get Tweaked in 2013,* THE TEX. TRIB. (Aug.

the Texas RFRA strict scrutiny standard—prohibiting the government from substantially burdening a person's free exercise of religion unless 1) the government demonstrates that its action is in furtherance of a compelling state interest and 2) it is the least restrictive means of furthering that interest.[27] It can be assumed with most RFRA-related bills that a citizen's religious beliefs are or will be burdened by governmental action, and that burden prompts RFRA legislation seeking an exemption for those with sincerely held religious beliefs. To require all students to receive the meningitis vaccine regardless of religious beliefs would burden some individuals' free exercise of religion. The government can only substantially burden a person's free exercise of religion if it first shows that the government has a compelling state interest in requiring meningitis vaccinations.[28] The first prong is easily proven—the government has an incontrovertible interest in preventing the spread of meningitis by requiring the meningitis vaccine.

The second prong requires the state to prove that requiring mandatory meningitis vaccines without religious exceptions is the least restrictive means of furthering that interest.[29] This prong includes fact-specific inquiries such as the necessity of the law and the method that must be imposed to achieve that interest. In considering the effectiveness of the vaccine, the state would reasonably consider the "herd immunity phenomenon," in which most students getting vaccinated protects the small number in the population who are not or cannot be vaccinated.[30] In application, if relatively few students claim a religious belief exemption, the overwhelming majority that are vaccinated would theoretically protect the few unvaccinated from contracting meningitis.[31] Many states allow for non-medical vaccine exemptions, including exemptions based on religious beliefs, but this does reduce the effectiveness of the "herd immunity," particularly if a large number of students claim an exemption.[32] By providing for this exemption based on religious beliefs, Texas has concluded that the state can satisfy its indisputable interest in preventing the spread of meningitis through less restrictive means than refusing exemptions for religious beliefs. Should Texas have concluded that requiring meningitis vaccines without religious exemptions was the least restrictive means of preventing the spread of meningitis, this would have satisfied the RFRA strict scrutiny standard required to burden an individual's free exercise of religion.

10, 2012), http://www.texastribune.org/2012/08/10/meningitis-vaccine-mandate-could-get-tweaked-2013/ [https://perma.cc/EE89-7WNJ].

[27] CIV. PRAC. & REM. § 110.003.

[28] *Id.*

[29] *Id.*

[30] *See* Hatch, *supra* note 26.

[31] *Id.*

[32] *See, e.g.*, Majorie A. Shields, *Power of Court or Other Public Agency to Order Vaccination over Parental Religious Objection*, 94 A.L.R. 5th 613 (2001).

A. *Hobby Lobby*'s Effects on RFRA Legislation in Texas

The success of Hobby Lobby in *Burwell v. Hobby Lobby* bolstered the power of the RFRA doctrine, and has, in turn, encouraged more RFRA-related legislation.[33] In 2014, the religiously founded Hobby Lobby corporation challenged the 2010 Patient Protection and Affordable Care Act's preventative health services, covered under the "employer mandate," as a violation of RFRA, arguing that it would violate Hobby Lobby's religious beliefs to facilitate access to certain contraceptive drugs.[34] The Supreme Court ultimately held that RFRA granted an exemption for closely held, for-profit corporations if the corporation raised religious objections.[35]

In making its case against Hobby Lobby's RFRA claims, the government argued that the mandate served a compelling interest in ensuring that all women have access to FDA-approved contraceptives.[36] The Supreme Court agreed with this compelling state interest, but held that the government did not meet the requisite high standard of the least restrictive means prong.[37] The federal government failed to prove the second prong and therefore did not meet the RFRA threshold required to burden an individual's free exercise of religion.[38]

This case was instrumental in several ways. By ruling that closely-held corporations are entitled to RFRA protections, the Supreme Court significantly expanded the RFRA doctrine beyond free exercise protections to individual persons.[39] Justice Ginsburg in her dissent admonished this expanded reach of First Amendment protections of free exercise to corporations or "legal entities."[40] *Hobby Lobby*'s RFRA expansion is limited to closely held, for-profit corporations, but its expansion nonetheless makes RFRA an increasingly attractive law, both at the national level and in states with state RFRAs.[41] This expanded power helps explain the spike in religious freedom legislation in Texas following *Hobby Lobby*. During the 2017 regular legislative session alone, thirty-three bills were introduced in Texas that relate to religious freedom.[42] This is more than double the number of religious freedom-related bills that were

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[33] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014).

[34] *Id.* at 2759. *See also* 42 U.S.C. § 300gg-13(a)(4) (requiring employers providing health insurance to their employees to provide "additional preventive care" for women).

[35] *Burwell*, 134 S. Ct. at 2759.

[36] *Id.* at 2779.

[37] *Id.* at 2780.

[38] *Id.*

[39] *Id.* at 2774.

[40] *Id.* at 2794 (Ginsburg, J., dissenting).

[41] Gregory P. Magarian, Hobby Lobby *in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. EN BANC 67, 76 (2014).

[42] *Bill Search*, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/Search/BillSearch.aspx [https://perma.cc/RXY8-9JUG] (reflecting selections of "Religion (I0646)" under "Subject" and "85(R) - 2017" under "Legislature").

introduced in 2011, and a significant increase from the twenty-two introduced in both 2013 and 2015.[43] If the trend continues, Texans can expect even more RFRA-related bills introduced in Texas's 2019 legislative session.

B. Public Accommodation Protections

RFRA-related bills that offer exclusions for those with sincerely held religious beliefs are particularly susceptible to running afoul of Title II of the Civil Rights Act of 1964, or the additional public accommodation laws implemented on a state-by-state basis.[44] This is particularly true of post-*Obergefell* laws, many of which provide exemptions for those whose sincerely held religious beliefs conflict with same-sex marriage.[45] The Civil Rights Act of 1964, passed during the segregationist era, includes Title II, which prohibits discrimination of protected classes in places of public accommodation such as restaurants or hotels.[46] Title II provides that all persons "shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations [sic] without discrimination on the ground of race, color, religion, or national origin."[47] The Civil Rights Act has been an instrumental tool in reducing discrimination, particularly racial discrimination against African-Americans in the public sector. Private clubs and other establishments are exempt from these provisions because they are not open to the public and therefore are not places of public accommodation.[48]

Sexual orientation and gender identification are not included in this list of protected classes of people in the Civil Rights Act.[49] This is a vestige of the time, since LGBT discrimination concerns and certainly marriage equality would not take center-stage for several decades after the passage of the Civil Rights Act. Since the Civil Rights Act, forty-five of the fifty states have enacted public accommodation laws that prohibit discrimination against groups not covered by the Act, including marital status, sexual orientation, gender identity, and age.[50] Of the forty-five states with such public accommodation laws, twenty-two states prohibit

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[43] *Bill Search*, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/Search/BillSearch.aspx [https://perma.cc/4G3Q-KJ9N] (reflecting selections of "Religion (I0646)" under "Subject" and "82(R) - 2011" under "Legislature"). The same search may be performed for the 83rd (2013) and 84th (2015) regular legislative sessions.

[44] *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2564 (2015).

[45] *See id; see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

[46] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

[47] *Id.* § 2000a(a).

[48] *Id.* § 2000a(e).

[49] *Id.* § 2000a(a).

[50] NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 18.

discrimination based on sexual orientation, and nineteen prohibit discrimination based on gender identity.[51] Five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—do not have public accommodation laws, besides those for persons with disabilities.[52] Nonetheless, the Civil Rights Act of 1964 applies to all states, meaning that places of public accommodation in Texas cannot discriminate against members of the Act's protected groups.[53] However, there is no protection in Texas for groups not listed in the Civil Rights Act.

As a state that does not legally prohibit discrimination based on sexual orientation, many Texas businesses are within their legal rights to refuse business to LGBT individuals based on their sexual orientation.[54] Several Texas cities have passed anti-discrimination ordinances covering sexual orientation, but the penalties are limited to a few hundred dollars, and they do not provide the strict protections that statewide anti-discrimination laws could.[55] Because sexual orientation is not a protected class in the Civil Rights Act or at the Texas state level, LGBT individuals in Texas are particularly vulnerable to being denied services or opportunities by those claiming religious opposition to same-sex marriage. Religious opposition to same-sex marriage has sparked RFRA legislation, as well as litigation, in Texas.

Masterpiece Cakeshop is a pending Supreme Court case that has garnered national attention and is a quintessential example of the intersection of discrimination claims by LGBT individuals and individuals claiming protections based on religious opposition to same-sex marriage.[56] *Masterpiece* involves a bakery owner in Colorado who refused to bake a cake for a same-sex couple's wedding because same-sex marriage conflicts with the baker's sincerely held religious beliefs.[57] Specifically, *Masterpiece* involves Colorado's public accommodations act protecting LGBT individuals from discrimination and the bakery's free exercise of religion and free speech defenses.[58] Although the defendant, Masterpiece Cakeshop, relies on constitutional defenses, it does not rely on RFRA protections.[59] This is because Colorado does not have a state

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[51] *Id.*

[52] *Id.*

[53] Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2012) (prohibiting discrimination on the grounds of "race, color, religion, or national origin.").

[54] Alexa Ura et al., *Comparing Nondiscrimination Protections in Texas Cities*, THE TEX. TRIB. (June 9, 2016), https://www.texastribune.org/2016/06/09/comparing-nondiscrimination-ordinances-texas [https://perma.cc/W9JA-SQNL].

[55] *Id.*; John Wright, *About Those Nondiscrimination Ordinances. . .*, THE TEX. OBSERVER (Aug. 26, 2015), https://www.texasobserver.org/about-those-nondiscrimination-ordinances [https://perma.cc/E6PX-ZRAW].

[56] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Col. App. 2015), *cert. denied sub nom.* Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

[57] *Id.* at 276–77.

[58] *Id.* at 277; *see* Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-301 (2016).

[59] *Masterpiece Cakeshop, Inc.*, 370 P.3d at 277.

RFRA, and the federal RFRA as it applied to the states was struck down in *City of Boerne v. Flores*.[60] The State of Colorado thus represents the inverse of Texas's legal protections—Colorado, with its expansive public accommodation laws for LGBT individuals and no state RFRA, and Texas, with no public accommodation laws but a fiercely protected state RFRA.[61] Despite these differences, *Masterpiece* helps outline the complexities of these competing interests—protecting religious beliefs and prohibiting discrimination. This frequent collision of competing interests has occurred in both federal and state courts, including in Texas. The Supreme Court's holding in *Masterpiece* will help indicate the prioritization of these two interests and will in turn shape lower federal courts' and state courts' future holdings.

C. Texas's Initial Legislative Response to *Obergefell*

Since Texas RFRA's inception, most RFRA bills in Texas have carved out exceptions for those with sincerely held religious beliefs. Senate Bill 2065, introduced in 2015, was the first *Obergefell*-related bill in Texas, marking the shift to RFRA legislation addressing religious opposition to same-sex marriage.[62] Senate Bill 2065, known as the "Texas Pastor Protection Act," prohibits the state from requiring clergy or any staff member of a religious institution to provide services, including facilities and goods, to a marriage if that action violates the organization's or individual's sincerely held religious belief.[63] The Pastor Protection Act was introduced in April 2015, the same day the Supreme Court heard oral arguments in *Obergefell*.[64] The overlapping timeframe of these two legal processes is arguably not a coincidence; the Texas legislature plausibly wanted to create a legal safety net for religious congregations should same-sex marriage become the law of the land. The Texas Legislature passed the bill, and Senate Bill 2065 become effective immediately in June 2015.[65]

The bill was viewed by many as an essential piece of legislation needed to protect pastors' rights of conscience.[66] Texas Governor Greg Abbott signed the bill to much fanfare saying, "Religious leaders in the state of Texas must be absolutely secure in the knowledge that religious

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[60] City of Boerne v. Flores, 521 U.S. 507 (1997).

[61] Colo. Rev. Stat. § 24-34-601.

[62] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

[63] S.B. 2065, 84th Leg., Reg. Sess. (Tex. 2015).

[64] Mary Tuma, *Bill of the Week: Senate Bill 2065*, THE AUSTIN CHRONICLE (May 8, 2015), https://www.austinchronicle.com/news/2015-05-08/anti-lgbt-religious-freedom-laws-piling-up-at-the-lege [https://perma.cc/65B3-HAQM].

[65] S.B. 2065, 84th Leg. Reg. Sess. (Tex. 2015).

[66] Liz Crampton, *Abbott Signs "Pastor Protection Act" Into Law*, THE TEX. TRIB. (June 11, 2015), https://www.texastribune.org/2015/06/11/gov-abbott-signs-pastor-protection-act [https://perma.cc/GQQ7-7SWJ].

freedom is beyond the reach of government or coercion by the courts."[67] The bill did not garner much criticism from civil rights organizations, who generally agreed that pastors should be exempt as religious leaders.[68] Gay rights organizations and civil rights groups unsuccessfully advocated for an amendment to the Act that would have limited the protection to pastors or clerics "acting in that capacity [as a pastor or cleric]".[69] It is unclear whether the exclusion of this "capacity" limitation has had any significant effects, however.

Looking at the Pastor Protection Act as a whole, it is unclear how much protection the bill actually provides. A pastor's right of refusal is already protected by the First Amendment, namely by the Free Exercise and Free Speech Clauses. But Texas Governor Abbott said that "pastors now have the freedom to exercise their First Amendment rights."[70] Is the First Amendment insufficient, in itself, to protect pastors who refuse to officiate a same-sex wedding? What additional protection is offered by Senate Bill 2065?

A pastor's free speech and free exercise rights are guaranteed by the First Amendment, and a pastor's actions cannot be subject to discrimination claims because his or her actions do not fall under the purview of public accommodation laws.[71] Texas does not have a public accommodation law, except for individuals with disabilities, and the Civil Rights Act of 1964 does not include sexual orientation as a protected class.[72] Yet, even if Texas had a public accommodation law protecting sexual orientation, religious and private organizations are exempt from nearly all federal and state public accommodation laws.[73] In states with public accommodation laws that prohibit discrimination based on sexual orientation, like Colorado or Connecticut, a law like the Pastor Protection Act would be unnecessary because pastors and religious institutions are not places of public accommodation and, therefore, cannot fall under the purview of public accommodation laws.[74] Because there are no federal protections for sexual orientation and because religious institutions are not subject to state-enacted LGBT anti-discrimination laws, same-sex couples denied

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[67] *Id.*

[68] Tuma, *supra* note 64.

[69] *Id.*

[70] Crampton, *supra* note 66.

[71] *See infra* note 76.

[72] Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2012).

[73] *Id.* ("The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment."); Colo. Rev. Stat. § 24-34-601 (2016) ("'Place of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes."); Conn. Gen. Stat. § 46a-81p (1991) (prohibitions on sexual orientation discrimination ". . . shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.").

[74] *Id.*

services by these religious institutions do not have a cause of action against religious institutions.

Should a new state law somehow provide legal grounds for a plaintiff to challenge a pastor's right to refuse to officiate a same-sex wedding ceremony, the pastor would likely claim both Free Exercise and Freedom of Speech protections. In refusing to officiate the wedding, the pastor is both withholding his or her speech, which is protected under the First Amendment, and is exercising freedom of religion by refusing to officiate the wedding, which is also protected under the First Amendment.[75] Ultimately, there is no law under which to challenge the pastor's action and should there be, First Amendment constitutional protections would kick in and prevent such a suit's success. Since there are already safety nets in place to protect a pastor who refuses to officiate a same-sex wedding, the benefit of the Pastor Protection Act is questionable. Arguably, the primary benefit of the Act is a concrete, albeit redundant, reinforcement to existing legal and constitutional protections with the intent to shore up any doubt of this right of refusal.

III. WHERE WE ARE NOW: THE ADOPTION BILL

Prior to *Obergefell,* nearly all Texas RFRA-related bills provided exemptions for those with sincerely held religious beliefs, and now, many Texas RFRA bills relate specifically to exemptions for those with religious objections to same-sex marriage.[76] The reverberations of *Hobby Lobby* and *Obergefell* were felt during Texas's most recent regular legislative session, with a distinct change in both the volume and type of RFRA-related bills.[77] Bolstered by Hobby Lobby's success in 2014, RFRA never looked so powerful and became an obvious defense for those concerned with the effects of *Obergefell.*[78] More than a third of the thirty-three RFRA-related bills involved exemptions or protections for those with sincerely held religious objections to same-sex marriage.[79]

Of the thirty-three religious freedom bills that were introduced during the 2017 legislative session, only three became law.[80] One of these

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[75] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . ." These claims are known as "'hybrid' decisions"); *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[76] *See* TEXAS LEGISLATURE ONLINE, *supra* note 42.

[77] *Id.*

[78] Magarian, *supra* note 41.

[79] *Id.*

[80] *See* H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 897, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 24, 85th Leg., Reg. Sess. (Tex. 2017). *See also Legislative Statistics,* TEXAS

RFRA bills was House Bill 897, which amended the tax code to exempt churches, religious organizations, and private schools from taxes and fees imposed on the sale of vehicles owned by the organizations and also exempted such organizations from annual vehicle registration fees.[81] The other, Senate Bill 24, amended a chapter on discovery to exempt religious leaders from disclosing evidence from a sermon in a civil or administrative proceeding where the government is a party.[82]

The third RFRA bill that successfully became law during the 2017 legislative session, House Bill 3859, was one of the most highly contested bills of the session and garnered nationwide media attention.[83] House Bill 3859 (the "Adoption Bill") protects child welfare agencies from adverse action if a provider declines to place a child with, or in the guardianship and care of, a child welfare service, if it "conflict[s] with [sic] the provider's sincerely held religious beliefs."[84] The Adoption Bill also protects adoption and foster agencies who may decline to provide or refer a person in their care to abortion or contraception services if doing so would conflict with the agencies' sincerely held religious beliefs.[85] The Adoption Bill's effects on religious freedom cut both ways; the bill gives greater deference to religious foster and adoption agencies to choose where to place the children in their care, but also disadvantages others who may be turned away by these religious agencies because of their lifestyles or religious beliefs.

Proponents of the Adoption Bill say that this bill allows religious adoption agencies to comply with their sincerely held religious beliefs and thus expands religious freedom. Jonathan Saenz, President of Texas Values, praised the bill in saying, "the Freedom to Serve Children Act (HB 3859) is a major victory for children and for religious liberty in Texas. Faith-based providers across Texas are now free to recruit foster families and place children with loving families."[86] Under the law, agencies who deny service based on religious beliefs are required to refer the prospective parents to another service provider.[87] Proponents say that this

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LEGISLATURE ONLINE (May 8, 2018), http://www.capitol.state.tx.us/Reports/Report.aspx?ID=legislativestatistics [https://perma.cc/N7V5-SN9T]. This passage rate of religious liberty bills is on par with the overall number of bills introduced and those that became law.

[81] H.B. 897, 85th Leg., Reg. Sess. (Tex. 2017).

[82] S.B. 24, 85th Leg., Reg. Sess. (Tex. 2017).

[83] Lindsey Bever, *Texas bill allows child agencies to deny services based on religion. Some say it targets LGBT families.*, THE WASH. POST (May 22, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/22%20/texas-bill-allows-child-agencies-to-deny-services-based-on-religion-some-say-it-targets-lgbt-families [https://perma.cc/SE2Y-G9Q6].

[84] H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017) (codified at TEX. HUM. RES. CODE §§ 45.004(1)-(2), 45.005) (referred to as the "Adoption Bill") This bill's predecessors were two 2015 bills, also entitled "Protection of Rights of Conscience for Child Welfare Services Providers," containing nearly identical wording but which never made it to a vote. *See* H.B. 3864, 84th Leg., Reg. Sess. (Tex. 2015); S.B. 1935, 84th Leg., Reg. Sess. (Tex. 2015).

[85] H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

[86] *Victory! Gov. Abbott Signs Religious Liberty Bill, Freedom to Serve Children Act*, TEX. VALUES (June 15, 2017), https://txvalues.org/2017/06/15/victory-gov-abbott-signs-religious-liberty-bill-freedom-to-serve-children-act [https://perma.cc/X7H2-6EQA].

[87] TEX. HUM. RES. CODE § 45.005(c)(1)-(3) (2017).

provision in the law addresses discrimination concerns since prospective adopters denied services will be referred to and served by non-religious providers.[88]

The bill also serves a pragmatic purpose. Texas has been working to expand its adoption and foster agencies amongst increased need, and faith-based adoption and foster agencies are seen by some as a potential solution.[89] Texas government officials have courted such agencies, and Lieutenant Governor Dan Patrick and Texas First Lady Cecilia Abbott have publicly urged religious groups to participate in foster and adoption programs.[90] The protections afforded by the Adoption Bill help bolster support from these religious agencies and give the agencies confidence that their religiously-based placements will not be legally challenged.[91] Similar legislation protecting religious foster and adoption agencies has been passed in Michigan, North Dakota, South Dakota, and Virginia.[92] However, only South Dakota's bill is as sweeping as Texas's in extending these protections to state-funded agencies.[93]

Not all states have created protections for religious adoption agencies. Places such as Massachusetts, Illinois, San Francisco, and Washington, D.C. have faced backlash for refusing to create protections for religious agencies that refuse to consider same-sex couples.[94] Rather than comply with the requirement to serve same-sex adopters, Catholic Charities, a nationwide child welfare agency, has closed its adoption services in those areas.[95] In passing this bill, Texas avoided offending religious agencies that provide adoption and foster care services and whose potential departure would be problematic to the state. The law's opponents ask: at what cost?

Opponents have criticized the bill, saying that it disadvantages prospective LGBT adoptive and foster parents.[96] The bill has far-reaching consequences, according to Rebecca Robertson of the Texas chapter of the American Civil Liberties Union. Robertson contends that the bill "permit[s] lesbian, gay and transgender parents to be turned away, but there's nothing in the bill that prevents agencies from turning away, for

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[88] Marissa Evans, *Abbott OKs religious refusal of adoptions in Texas*, THE TEX. TRIB. (June 15, 2017), https://www.texastribune.org/2017/06/15/abbott-signs-religious-protections-child-welfare-agencies [https://perma.cc/E8F7-T4CH].

[89] Marissa Evans, *Senate passes religious protections for child welfare agencies*, THE TEX. TRIB. (May 21, 2017), https://www.texastribune.org/2017/05/21/senate-passes-religious-protections-child-welfare-agencies [https://perma.cc/B6GD-DSD4].

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Meredith Hoffman, *Under Texas bill, adoption agencies would reject Jews, gays, Muslims*, PBS NEWS HOUR, (May 6, 2017), https://www.pbs.org/newshour/nation/texas-adoption-jews-gays-muslims [https://perma.cc/YN9J-ALX4].

[94] David Crary, *For Advocates of Gay Adoption, Progress but Also Obstacles*, U.S. NEWS & WORLD REPORT (June 17, 2017), https://www.usnews.com/news/best-states/illinois/articles/2017-06-17/for-advocates-of-gay-adoption-progress-but-also-obstacles.

[95] *Id.*

[96] Bever, *supra* note 85.

example, people who have been divorced, people who are single, or people who don't go to church enough."[97] Opponents of the Adoption Bill argue that the bill focuses on protecting the agency and is not sufficiently concerned with ensuring that the child finds a loving home.[98]

The Adoption Bill also has the propensity to disadvantage prospective adoptive and foster parents who are of a different faith than the religious agency. Although the bill prohibits agencies from denying service based on a person's race, ethnicity, or national origin, all of which are protected classes under Title II of the Civil Rights Act, the bill does not prohibit agencies from denying service based on a person's religion, also a protected class under Title II.[99] Since all forty-one religiously-affiliated foster care and adoption agencies in Texas are Christian organizations, this can foreseeably disadvantage prospective adopters with minority religious beliefs, such as Muslim or Hindu parents, because their religion differs from the religion of the adoption or foster care agency.[100] Such an effect appears antithetical to the stated purpose of the bill—to protect people's right to religious freedom—and places individuals of minority faiths at a disadvantage. Because roughly one-fourth of all foster and adoption agencies in Texas are religious, the potential consequences of the Adoption Bill are not insignificant.[101]

The Adoption Bill is unique in its potentially far-reaching consequences. It is capable of negatively affecting the public at large, particularly vulnerable groups, and in that way, differs from most Texas RFRAs whose effects are limited to providing exemptions for individuals with sincerely held religious beliefs.[102] Additionally, the Adoption Bill addresses same-sex marriage, which remains a hot-button topic even after its legalization more than two years ago. The Adoption Bill's controversial subject matter and potential to affect not only the religious groups it seeks to protect, but also negatively impact others, helps explain the large amount of criticism that the Adoption Bill has received.

A. Possible Constitutional and Legal Challenges to the Adoption Bill

By funding religious adoption and foster agencies who can refuse

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[97] *Id.*

[98] Evans, *supra* note 91.

[99] H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

[100] *See Private Adoption Agencies in Texas*, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, https://www.dfps.state.tx.us/Adoption_and_Foster_Care/Adoption_Partners/private.asp [https://perma.cc/NS9Y-AJH9].

[101] Evans, *supra* note 91.

[102] By providing a beneficial RFRA exemption to those with sincerely held religious beliefs, those without such beliefs could be viewed as comparatively disadvantaged. This is a meaningful argument, but its scope exceeds the confines of this Note. For the purposes of this Note, the analysis is limited to Texas RFRA laws capable of direct, negative effects on the public.

service to a class of people, the state of Texas opens itself up to constitutional challenges. The Adoption Bill can foreseeably affect two primary groups of people: individuals whose sexual orientations do not comport with the agencies' religious beliefs, i.e. LGBT individuals, and individuals whose religious beliefs do not align with those of the adoption agency. As a state entity, Texas is bound to treat all people equally, and the Equal Protection Clause of the Fourteenth Amendment is a primary avenue to challenge Texas's support of potentially discriminatory agencies.[103] The Fourteenth Amendment's Equal Protection Clause is powerful and provides that the government "shall . . . not deny to any person within its jurisdiction the equal protection of the laws."[104] The Equal Protection Clause applies to states or those acting under state authority.[105] Conduct that is "'private' may become so entwined with governmental policies or so impregnated with a governmental character" that it becomes subject to constitutional limitations placed on state action.[106] To raise an Equal Protection claim concerning the Adoption Bill, an injured plaintiff must establish that the actions of the private adoption agencies are so intertwined with the state that their actions become state actions. As state actions, the agencies cannot deny equal protection of the laws to any person, which includes denying adoption services based on religious beliefs or sexual orientation.

The Supreme Court has applied several tests over the years to determine whether private action constitutes state action because of the government's excessive involvement.[107] The Court has considered 1) whether the alleged deprivation of rights was created or imposed by the state and 2) whether the party of the alleged deprivation can be fairly said to be a state actor.[108] Because the protections of the Adoption Bill that permit agencies to deny services to certain groups are a direct action of the Texas Legislature, the state can reasonably be said to have created this deprivation of rights. This would likely satisfy the first prong of the Supreme Court's state action test. In considering the second prong—whether the adoption agencies can fairly be said to be a state actor—it is important to remember that the foster and adoption agencies are serving a state purpose in caring for wards of the state. In the absence of these agencies, the responsibility to care for these children would otherwise fall to the state. Because of the agencies' role in facilitating a function of the state, they can fairly be said to be state actors and therefore meet the second prong of the Supreme Court's state actor test. The analysis may ultimately boil down to a significant nexus test—whether there is a "sufficiently close nexus between the state and the challenged action" for the

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[103] 16B C.J.S. *Constitutional Law* § 1263 (2017).

[104] U.S. CONST. amend. XIV, § 1.

[105] 16B C.J.S. *Constitutional Law* § 1263 (2017).

[106] Gilmore v. City of Montgomery, 417 U.S. 556, 565 (1974) (*quoting* Evans v. Newton, 382 U.S. 296, 299 (1966)).

[107] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1412 (2003).

[108] *Id.*

latter's action to be treated as the state itself.[109] The direct financial support of the religious adoption agencies by the state indicates a close nexus between the agencies and the State of Texas. South Dakota is the only other state whose adoption bill provides state funding to agencies with such protections.[110] Texas's close legislative, financial, and practical connections with these agencies make it likely, even under the several tests promulgated by the Supreme Court, that these private actions are sufficiently connected to the State of Texas to become state action.

The Equal Protection Clause is a powerful constitutional protection capable of doing some heavy lifting and was instrumental in legalizing same-sex marriage in *Obergefell*. The Supreme Court held that states' bans on gay marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and under these constitutional protections, same-sex couples may not be deprived of the right to marry.[111] Critics of the Adoption Bill can draw a comparison between states that once banned marriage of same-sex couples and states that are now protecting adoption agencies that refuse to service same-sex couples. Both result in a denial of Equal Protection to same-sex couples and likely also constitute a Due Process violation. *Obergefell* is particularly useful in challenging the agencies' denial of services to same-sex adopters, but these Equal Protection and Due Process arguments are similarly applicable to those denied service based on their religion. The significant nexus of the state-funded adoption agencies to the State of Texas requires that the adoption agencies comply with the Fourteenth Amendment's Equal Protection Clause and in failing to do so, both groups—those denied because of their sexual orientation and those denied because of their religion—will likely have strong Equal Protection and Due Process claims against the state of Texas.

B. Possible Arguments Available to those Denied Service Based on Religious Beliefs

Individuals denied service because of their religious beliefs will likely have an additional claim under the Civil Rights Act. The Adoption Bill prohibits agencies from denying services based on race, ethnicity, or national origin, all of which are protected classes under Title II of the Civil Rights Act, but the Bill does not include "religion" as a protected class.[112] Although private organizations, such as these religious adoption agencies, are exempt from compliance with public accommodation laws under Title II, the government is bound by these provisions and cannot

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[109] *Id.*; Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999).

[110] Evans, *supra* note 91.

[111] *Id.*

[112] TEX. HUM. RES. CODE § 45.009(f) (2017).

discriminate against the protected classes under the Civil Rights Act.[113] In contracting with agencies capable of denying service to prospective adopters because they are of a different faith, the state is supporting discrimination based on religious beliefs and in doing so opens itself up to Title II challenges.[114] Because religion is a protected class in the Civil Rights Act, unlike sexual orientation, this additional claim is only available to adopters denied service by these adoption agencies because of their religious beliefs.[115]

There is also a potential Establishment Clause claim for those turned away by adoption agencies because of their religion.[116] The three-part test articulated by the Supreme Court in *Lemon v. Kurtzman* says that for a law to be permissible under the Establishment Clause, the law must 1) have a secular purpose; 2) neither advance nor inhibit religion in its principal or primary effect; and 3) not foster an excessive entanglement with religion.[117] The first prong of *Lemon* looks at whether the intent of the law was to advance or inhibit a religion and the second *Lemon* prong looks at the effect of that law—whether the law conveys endorsement or disapproval of a religion.[118] Although the Adoption Bill does not explicitly favor a specific religion, one can reasonably claim an Establishment Clause violation based on the second *Lemon* prong because the bill disproportionately advances Christianity by protecting Texas religious adoption agencies, all of which are Christian.[119] The bill arguably violates the flip side of the second *Lemon* prong by disadvantaging non-Christian, prospective adopters who are denied services by the adoption agencies because their religion.[120] According to the Supreme Court, a government's endorsement or disapproval of a religion sends a message to "nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[121] The Adoption Bill arguably sends the message that Christianity is a privileged religion in Texas and that it is permissible to deny adoption services to non-Christians. This would understandably make non-Christians feel like outsiders and like they are not full members of the political community.

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[113] 12 TEX. JUR. 3D *Civil Rights* § 15 (2018).

[114] *Id.*

[115] *Id.*

[116] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[117] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). *See also* Michael A. Rosenhouse, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. Fed. 2d 573 (2006).

[118] *Lemon*, 403 U.S. at 613; Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

[119] *Lemon*, 403 U.S. at 612.

[120] TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, *supra* note 103; Laura Marie Thompson, *'Recipe for Discrimination': Legal Battle Brews Over New 'Religious Refusal' Child Welfare Law*, THE TEX. OBSERVER (June 5, 2017), https://www.texasobserver.org/recipe-discrimination-legal-battle-brews-new-religious-refusal-child-welfare-law/ [https://perma.cc/939F-WXB2].

[121] *Lynch*, 465 U.S. at 688.

Texas would likely counter a purported Establishment Clause violation by demonstrating compliance with *Lemon*'s purpose prong and asserting that the bill's intention was not to advance Christianity, only to give greater deference to religious adoption agencies.[122] Texas should also convey that state action is not responsible for the totality of Christian-affiliated adoption agencies in Texas and that these demographics should not prevent the state from enacting religious freedom protections.[123] Texas would likewise argue that it satisfies *Lemon*'s effect prong by disputing the bill's purported advantages and disadvantages on particular religions, perhaps pointing to the bill's mandatory referral of individuals who are denied service to other non-religious adoption agencies.[124] Relying on this provision, Texas could contend that individuals denied service by religious adoption agencies are not disadvantaged but merely redirected to a better suited agency.[125] Although courts are generally deferential to the bill's expressed non-preferential purpose, this does not preclude a judicial finding of an Establishment Clause violation.[126] If a court finds that the Adoption Bill effectually advances or inhibits a particular religion, the bill will be held unconstitutional as a violation of the Establishment Clause irrespective of a stated non-discriminatory purpose.[127] Those turned away by state-funded private adoption agencies have a strong Establishment Clause claim that should be included in any legal challenge to the bill.

C. Expectations Going Forward

In addition to addressing potential constitutional and legal challenges to current RFRA laws, it is also necessary to anticipate future RFRA legislation. Because of the propensity for reintroduction of failed bills from past legislative sessions, it is useful to look at previously introduced legislation to forecast future legislation. The Adoption Bill was first introduced in two companion bills during the 2015 legislative session, but neither made it to a vote.[128] The Adoption Bill ultimately became law after being reintroduced during the 2017 legislative session.[129] Failed RFRA legislation from the 2017 regular legislative session that

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[122] *Lemon*, 403 U.S. at 612.

[123] TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, *supra* note 103.

[124] TEX. HUM. RES. CODE § 45.005(c)(1-3) (2017); *Lemon*, 403 U.S. at 612.

[125] *Id.*

[126] Wallace v. Jaffree, 472 U.S. 38, 74–75 (1985).

[127] *See id.*

[128] Hum. Res. § 45.004(1)-(2). This bill's predecessors were two 2015 bills also entitled "Protection of Rights of Conscience for Child Welfare Services Providers" and contained nearly identical wording but never made it to a vote. *See* H.B. 3864, 84th Leg., Reg. Sess. (Tex. 2015); S.B. 1935, 84th Leg., Reg. Sess. (Tex. 2015).

[129] *Id.*

might make a reappearance in 2019 includes a bill to exempt psychologists from providing marriage and family counseling if doing so would violate their sincerely held religious beliefs.[130] This legislation was introduced via two bills in both the Texas House and Senate, but neither bill made it out of committee.[131] Such legislation would protect a psychologist who refuses to provide treatment to same-sex couples because of a conflict of religious beliefs.[132] Other unsuccessful RFRA bills from the 2017 legislative session include Senate Bill 522, which prohibits a county clerk from being required to certify or issue a marriage license if doing so would violate the clerk's sincerely held religious beliefs, and House Bill 2876, which protects wedding industry professionals from providing services if the wedding violates the professionals' sincerely held religious beliefs.[133] These RFRA-related bills involve protections for individuals that oppose same-sex marriage based on religious beliefs. Given the tendency for failed legislation to be reintroduced in later sessions, it is possible that these RFRA-related bills will make a reappearance in the 2019 Texas legislative session.

Texas should also look to the outcome of the *Masterpiece Cakeshop* case for how to address the clash of LGBT discrimination and religious freedom protections. Barring a change in direction in the Texas legislature or at the national level, Texans can expect more legislative efforts and RFRA-related bills meant to limit the reach of *Obergefell* by providing protections for individuals who oppose same-sex marriage based on their religious beliefs.

IV. CONCLUSION

The Religious Freedom Restoration Act started as a response to an unpopular Supreme Court holding and has evolved into a primary legal avenue to secure exemptions for those with sincerely held religious beliefs. Texas's RFRA adopts the same strict scrutiny standard as the federal RFRA and requires that the government meet a high standard in order to burden an individual's free exercise of religion. The legalization of same-sex marriage in the U.S. as a result of *Obergefell v. Hodges* changed the nature of RFRA-related bills in Texas. Many bills from the 2017 legislative session now address same-sex marriage and create exemptions for individuals who oppose same-sex marriage based on religious beliefs. The number of RFRA-related bills in the 2017 legislative session also increased from prior sessions. This increase is due to the addition of same-sex marriage-related RFRA bills to the usual RFRA

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[130] H.B. 3856, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 2096, 85th Leg., Reg. Sess. (Tex. 2017).
[131] *Id.*
[132] *Id.*
[133] S.B. 522, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 2876, 85th Leg., Reg. Sess. (Tex. 2017).

bills and because the expansion of RFRA protections to closely held, for-profit corporations in *Burwell v. Hobby Lobby* has bolstered the strength of the RFRA doctrine and sparked more RFRA-related legislation.

Recent Texas RFRA-related legislation includes the Pastor Protection Act from the 2015 legislative session, which protects pastors who refuse to officiate same-sex weddings if doing so is against his or her religious beliefs. Yet, the protections provided by the Act are already ensured by the First Amendment's Free Exercise and Free Speech clauses. The Pastor Protection Act's primary purpose is arguably to reassure Texans of these constitutional protections and to shore up any doubt of this right of refusal.

The Adoption Bill is one of Texas's most recent RFRA-related laws from the 2017 legislative session and has created significant controversy in providing protections for religious adoption agencies who may deny service to adopters, including LGBT adopters and adopters of different religions, based on an agency's sincerely held religious beliefs. The Adoption Bill is vulnerable to constitutional challenges, namely via the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Additionally, those denied service based on religious beliefs have an additional claim of discrimination under Title II of the Civil Rights Act and under the Establishment Clause of the First Amendment. Based on the current political climate at both state and federal levels, Texans can likely expect to see more RFRA-related legislation and, in particular, more RFRA legislation creating exemptions for individuals who oppose same-sex marriage based on religious beliefs. As demonstrated by this article, such legislation is particularly susceptible to running afoul of constitutional protections and anti-discrimination laws and should therefore be closely monitored and scrutinized.