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LETTER FROM THE EDITOR

Dear Reader,

Volume 21, Number 1 is the TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS' Austin Issue, highlighting the ideas of authors who live in Austin, the capital of Texas and home of The University of Texas School of Law. This issue discusses legal and policy issues that resound both locally and globally.

Prison chaplains in Texas have a larger role in the execution of prisoners than in other death-penalty states. Walter Long's Article discusses the ethics and constitutionality of prison chaplains' participation in Texas's executions, arguing that the chaplains' involvement in executions violates the First Amendment's Establishment Clause and urging them not to participate in executions on professional and ethical grounds.

Under the Special Needs Doctrine, the Fourth Amendment's probable cause and warrant requirements do not apply in limited situations. Karly Jo Dixon argues in her Note that general concerns about terrorism, absent an imminent threat, do not trigger the Special Needs Doctrine and that these concerns should not be used to justify broad warrantless searches.

Texas is home to several private and federal immigration detention centers, which house many infants, children, and adults fleeing violence and seeking asylum. Daniel Hatoum's Note argues that because the United States is a co-belligerent in the Drug War in Central America, these detainees should be treated as refugees under international humanitarian law rather than as criminals.

In summer 2015, Sandra Bland committed suicide in a Texas jail days after she was arrested following a routine traffic stop. Advocates and community members were appropriately outraged. Matti Hautala's Note discusses the need for improved mental health screenings in Texas jails and how revamping the jail intake process potentially could have prevented Bland's death.

To learn more about this issue's authors and work, visit http://sites.utexas.edu/tjclcr/ for photographs and video of our Fall Publication Preview.

Thank you for your continued support,

Hannah Alexander
Editor in Chief

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ARTICLE

NOTES

Article

The Constitutionality and Ethics of Execution-Day Prison Chaplaincy

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I. INTRODUCTION

Before 1995, Texas law required executions to occur between

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midnight and sunrise.[1] On Sunday, December 11, 1994, after a night of intense legal wrangling, Raymond Carl Kinnamon's lawyer finally ran out of appeals as sunrise approached. At 5:15 a.m., Kinnamon was brought into the execution chamber at the Walls Unit in Huntsville, Texas, and tied down to the gurney. Left alone in the chamber with the warden and the execution-day chaplain, Kinnamon began saying his "last words" into the microphone, and he kept talking—to the point that prison officials might have worried that Kinnamon would filibuster his way out of his death sentence. Around 5:45 a.m., Kinnamon stated, "I see no reason for my death," and he began squirming in his tight leather straps and trying to sit up on the gurney. The warden and chaplain both reached out to restrain the inmate. The chaplain put his hands on Kinnamon's shoulders and pushed him back down on the pallet as the executioner in a hidden room began the lethal injection. Eleven minutes later, Kinnamon was pronounced dead.[2]

Texas execution-day chaplains are assigned by the prison system to work with condemned inmates in the immediate days and hours before their execution and to accompany them in the execution chamber when the lethal injection is administered.[3] The system considers chaplains invaluable participants in the execution process because they provide an air of solemnity to the process, assist with the emotional needs of the prison staff, and help make the inmate compliant.[4] The chaplains, on the other hand, report that they see themselves as playing roles of grief

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[1] Tex. Code Crim. Proc. art. 43.14 (1995).

[2] *Killer Executed at Texas Prison*, N.Y. TIMES, Dec. 12, 1994 www.nytimes.com/1994/12/12/us/killer-executed-at-texas-prison.html, <perma.cc/YZZ9-BPW7>; CARROLL PICKETT & CARLTON STOWERS, WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN 243–45 (2002).

[3] *Interview with Reverend Carroll Pickett*, FRONTLINE: THE EXECUTION (Feb. 9, 1999), http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/pickett.html, <http://perma.cc/358R-QCZM> [hereinafter *Pickett Interview*].

[4] ROBERT M. BOHM, ULTIMATE SANCTION: UNDERSTANDING THE DEATH PENALTY THROUGH ITS MANY VOICES AND MANY SIDES 206 (2010) ("Prison chaplains are an instrumental part of the execution team. . . . Prison administrators believe that it is important to have the prison chaplain present during the deathwatch and execution to address any staff problems. . . . Importantly, they also help to make condemned inmates compliant for execution. They do this by offering inmates a way to salvation—that is, 'deliverance by the grace of God from eternal punishment for sin.'") (citation omitted); Salatheia Bryant, *Chaplains Offer Faith to Those on Death Row: Inmates have a Diverse Range of Beliefs*, HOUS. CHRON., July 30, 2007, http://www.chron.com/life/houston-belief/article/Chaplains-offer-faith-to-those-on-death-row-1806245.php, <http://perma.cc/YA57-3MFZ> ("Sometimes [chaplains] are there to listen. Other times it is the chaplain who is a calming presence when the inmate has vowed to physically fight his fate; 'In a number of cases, the inmates have made peace with their situation and are looking to what's beyond. . . . The chaplains have made a big impact on the day of execution. In spending the last hours with the chaplain, we've seen the prisoner 'turn around.'") (quoting Michelle Lyons, spokesperson for the Texas Department of Criminal Justice); ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 83–85 (2000) (describing execution-day chaplains as "offer[ing] active spiritual participation that helps energize the overall execution process" and concluding that "when[] spiritual advisers lend support to the condemned man . . . they become part of the execution project" securing an execution that "looks humane and dignified and is not sullied in any way by obvious violence."); PICKETT & STOWERS, *supra* note 2, at 246 ("We can't do executions without him.") (quoting Wayne Scott, director of the institutional division of the Texas Department of Criminal Justice, referring to execution-day chaplain Carroll Pickett).

counselor and hospice worker.[5] They consider themselves as being there for the soon-to-be-dying prisoner.[6] By placing their hand on the inmate's body at the time of injection,[7] they emphasize the importance of being there because they believe no one should have to die alone.[8]

All chaplains employed by the Texas prison system—not just the small number involved in executions—have roles that inherently conflict due to their simultaneous duties to institutional and inmate stakeholders.[9] Execution-day chaplains work for the State, but there should be no question that they also form quick and strong emotional bonds with the men and women they are assigned to counsel and accompany to their deaths.[10] Because of this, when Texas began executing inmates in the 1980s following reinstatement of the death penalty, the director of the prison system, W. James Estelle, assigned new chaplains with no prior relationship to the condemned prisoners to work with them in their last days and hours.[11] This strategy attempted to protect the execution-day chaplains against psychological strain[12] and also to maintain some credibility for the other chaplains who worked daily with the inmates on death row.[13] It has experienced limited success because execution-day

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[5] *See Interview with Reverend Jim Brazzil*, FRONTLINE: THE EXECUTION (Feb. 9, 1999), http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/brazzil.html, <http://perma.cc/L7GK-NNHK> [hereinafter *Brazzil Interview*] (comparing execution chaplaincy to comforting patients in a hospital or hospice, and adding that "anytime you're dealing with grief, any time you're dealing with that kind of major crisis, there's going to be anger, there's going to be strong emotions. And so you have to deal with every man or person on an individual kind of level just to meet their needs and not to go in there with any kind of agenda or any kind of motives other than to just be with that person."); *Pickett Interview*, *supra* note 3 ("[T]hey want to talk about things that a lot of people don't know and a lot of people are going to never know, because I'm not going to tell. . .they just want to talk about things that may have been sitting there on their hearts and their spirits and their souls for a long, long time."); VIRGINIA S. OWENS & DAVID C. OWENS, LIVING NEXT DOOR TO THE DEATH HOUSE 192, 198 (2003).

[6] *Brazzil Interview*, *supra* note 5 ("I look at my job as strictly being there for the inmate").

[7] Virginia Stem Owens, *Watchman on the Walls*, CHRISTIANITY TODAY, May 21, 2001, at 46; INTO THE ABYSS (IFC Films 2011); WITNESS TO AN EXECUTION (National Public Radio 2000).

[8] *Pickett Interview*, *supra* note 3; INTO THE ABYSS, *supra* note 7.

[9] It has been suggested that chaplains inevitably are corrupted by the prison setting. Jody L. Sundt & Francis T. Cullen, *The Correctional Ideology of Prison Chaplains: A National Survey*, 30 J. CRIM. JUST. 369, 371 (2002) (quoting T. O. Murton, *The Prison Chaplain: Prophet or Pretender?*, REFORMED J. 7, 11 (1979)) (observing that chaplains operate under "an erroneous assumption: that the objects of ministerial service are the prison inmates while in fact . . . it is the prison administration [they] serve[]."). However, recent studies show that a majority of prison chaplains identify with inmate-centered treatment and rehabilitation goals, believing that treatment works. Catholics and those who reject a fundamentalist orientation indeed are more likely to support treatment and rehabilitation. *Id.* at 381.

[10] In the documentary film *Into the Abyss*, Texas execution-day chaplain Richard Lopez uses an incongruous and yet moving analogy to express the great emotional tension and impotence he feels being in the execution chamber with an inmate. INTO THE ABYSS, *supra* note 7. He tells a story about having been on a golfing outing when, as he was driving his cart down a trail, two playing squirrels dashed right in front of his wheels. *Id.* He had only a second to stop but successfully missed them by jamming on the brake. *Id.* Visibly very upset on camera, he then laments that, in his role as an execution-day chaplain, he has no brake that can stop the machine from killing. *Id.*

[11] *Pickett Interview*, *supra* note 3; PICKETT & STOWERS, *supra* note 2, at 244.

[12] *See Pickett Interview*, *supra* note 3 (noting that when a chaplain works with an inmate for some time, execution is "difficult.").

[13] *Id.* (observing that if he had said he was opposed to the death penalty to inmates, the prison system would have fired him; if he had told inmates he was in favor of capital punishment, some of the

chaplains are unavoidably emotionally damaged by the executions of men and women they had never previously met.[14] Chaplains report that they frequently suffer strong psychological trauma and need to receive their own ongoing professional therapy.[15] Unfortunately, Carl Kinnamon's chaplain had accepted the role due to the unavailability of the assigned execution-day chaplain.[16] Since his day job was chaplain to inmates on death row, his awkward behavior in the execution chamber may have been due to distress over the killing of a man he had known for years.[17]

This essay explores the legal and ethical parameters of the unique Texas job of execution-day chaplaincy. It is intended as a resource for prison chaplains themselves who may be considering the role, and for chaplaincy organizations and coalitions that are articulating ethical standards for state-employed prison spiritual advisors. It has been written with great sympathy toward those employees of the Texas Department of Criminal Justice who feel a calling to minister to our society's condemned. The sobering history of participation by Christian clergy in executions is explored as the seedbed from which the relatively recent rise of prisons and the chaplaincy profession have sprung. Then, the specific job of the Texas execution-day chaplain is first considered in regard to its constitutionality because the law is an entrée into ethics—the initial question is whether the practice of execution-day chaplaincy is legal. An arguable failure of a practice to withstand legal scrutiny does not prove necessarily that it is unethical, but it does raise heightened ethical concern. Two distinct aspects of the execution-day job are evaluated: work with the inmate before her entry into the execution chamber and work with her in the chamber itself. It is concluded that the execution-day chaplain's religious or therapeutic support of a condemned inmate before her entry into the execution chamber may be legal and ethical if it is freely requested by the inmate. However, chaplain participation in the execution chamber itself almost certainly violates the U.S. Constitution's rule against the establishment of religion. Examination of nascent professional chaplaincy codes, more established ethics codes in other related caregiving professions, and general ethical principles also finds chaplain participation with the inmate in the execution chamber unethical.[18]

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inmates would not have talked to him).

[14] INTO THE ABYSS, *supra* note 7; *Brazzil Interview*, *supra* note 5; PICKETT & STOWERS, *supra* note 2, at xiii.

[15] PICKETT & STOWERS, *supra* note 2, at xiii.

[16] *Id.* at 243.

[17] *Id.* at 244. Following the next day's Huntsville, Texas, newspaper headline ("Chaplain Restrains Inmate During Execution"), the prison demoted Kinnamon's chaplain to a desk job—he eventually left the system. *Id.* at 245.

[18] Modern prison chaplains, often trained in psychology and clinical pastoral theology, are considered members of inmates' treatment teams. Jody L. Sundt & Francis T. Cullen, *The Role of the Contemporary Prison Chaplain*, 78:3 PRISON J. 271, 274 (1998). Chaplains assert that, like their medical and psychological colleagues, their sole aim is the beneficence of the inmate. For further discussion of beneficence, see *infra* notes 131–133.

In determining whether their execution-day tasks are ethical, prison chaplains should consider not only professional ethics rules and practices but also the deep history of the Christian clergy's role in executions. They must also confront the most fundamental and common ethical question with which the modern chaplaincy wrestles: in their professional role as chaplain and prison employee, whom do they serve? To whom is their duty?

II. CHRISTIAN CLERGY AND THE EXECUTION RITUAL

Over the course of Western history, Christian clergy have moved from the background to the foreground of the execution performance. Prior to Rome's adoption of Christianity as its official state religion, church leaders showed either opposition or ambivalence toward Christian participation in capital punishment or war.[19] Early on, however, church fathers such as Ambrose (in the late fourth century) began articulating an enduring model of the "two coordinated arms" of public authority: the partnership between bishop and emperor allowing the church to hand over heretics to the "'secular arm' for execution, while maintaining an appearance thereby that all church responsibility for the bloodshed was avoided."[20] Saint Jerome expressed around the same time the even more lasting distinction—still found today in the Roman Catholic Catechism[21]—between "innocent blood" and other "blood" worthy of punishment, including that of murderers, whose execution Jerome deemed "not the shedding of blood but the administration of laws."[22] Since the fourth century, therefore, church fathers, priests, and ministers have considered innocent lives morally inviolate and, concomitantly, non-innocent lives expendable under various circumstances for the sake of punishment.[23] Until the post-Enlightenment era of the freedom of

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[19] *See generally* JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY 19–27 (1997) (briefing on early Christian thinkers' views of capital punishment).

[20] *Id.* at 31.

[21] CATECHISM OF THE CATHOLIC CHURCH para. 2270 ("From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life."). The complicated, ancient theological discussion of sin and innocence is beyond the scope of this article. However, it should be emphasized here that the theological essentializing of some humans as innocent and some not—dividing humanity into innocent and non-innocent being—appears to be a precedent dangerous to human dignity and life, akin to unfounded, invidious distinctions over race, gender, gender orientation, nationality, *indeed religion*, that have proven to nurture human violence and discord.

[22] MEGIVERN, *supra* note 19, at 34.

[23] *See* CATECHISM, *supra* note 21, at para. 2267 (accepting capital punishment when "bloodless means" to defend against aggression are unavailable). The Catholic Church now rejects the death penalty in the United States, at minimum because bloodless means are available (life sentences), and Pope Francis has rejected the penalty in no uncertain terms: "Nowadays the death penalty is inadmissible, no matter how serious the crime committed. It is an offense against the inviolability of life and the dignity of the human person, which contradicts God's plan for man and society, and his merciful justice, and impedes the penalty from fulfilling any just objective. It does not render justice to the victims, but rather fosters vengeance. . . . For the rule of law, the death penalty represents a

conscience and religion, the crimes most harshly punished by the "secular arm" were religious offenses, because such offenses were directed against "collective things (whether ideal or material), of which the principal examples [were] public authority and its representatives" (i.e., the sometimes subtle, sometimes overt, team of church and state).[24]

From at least the eighth century, when Charlemagne ordered thousands of Saxons beheaded whom he had found to flaunt his "Christian" laws,[25] until the middle of the nineteenth century, public executions in Christian regimes were staged as "demonstrations of the power of God—and of the monarch [or state] in as much as he [or it] was God's regent on earth—against rebellion."[26] The pretense to separation of secular and religious authority waxed and waned over the millennium. In 1231, Pope Gregory IX introduced the first Inquisition, authorizing the church to use torture on heretics.[27] In Medieval Europe, convicted criminals undertook a public ritual of atonement acknowledging their guilt and expressing repentance:[28]

> Addressing the crowd . . . felons might recount their life stories, implore the judges for mercy, or ask the spectators for their prayers. Finally, on the way to the place of execution, or on the scaffold itself, the criminal was given an opportunity to confess his sins to an attending priest or friar, who provided spiritual solace, implored repentance, heard confession, and focused the condemned person's mind [and the minds of the audience members] on the salvation which awaited.[29]

This public-expiation formula took hold in the diverse corners of Christendom.[30] In Catholic and Protestant realms alike, clergy promoted

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failure, as it obliges the state to kill in the name of justice. . . . Justice can never be wrought by killing [a] human being." NRC Staff, *Pope's Quotes: No Justice*, NAT'L CATH. REP., July 20, 2015, http://ncronline.org/blogs/francis-chronicles/pope-s-quotes-no-justice, <http://perma.cc/SF3G-V3EN>. Note the "nowadays" at the outset of the Pope's statement, rendering his unqualified opposition to the death penalty consistent with the Catechism, but begging the question whether human dignity ever was not offended by judicial killing.

[24] Emile Durkheim, *Two Laws of Penal Evolution*, *in* READINGS FROM EMILE DURKHEIM, 41 (K. Thompson ed., rev. ed. 2004); *see also* Earl F. Martin, *Masking the Evil of Capital Punishment*, 10 VA. J. SOC. POL'Y & L. 179, 227 (2002) ("The identification of human institutions and actions with the divine cosmos means that those actions take on a rightness that is normally associated with the higher power itself. In this fashion, 'human power, government and punishment, thus become sacramental phenomena [and are seen] as channels by which divine forces are made to impinge upon the lives of men.'") (quoting PETER L. BERGER, THE SOCIAL REALITY OF RELIGION 33–42 (1967)).

[25] RITA NAKASHIMA BROCK & REBECCA ANN PARKER, SAVING PARADISE: HOW CHRISTIANITY TRADED LOVE OF THIS WORLD FOR CRUCIFIXION AND EMPIRE 229 (2008).

[26] HARRY POTTER, HANGING IN JUDGMENT: RELIGION AND THE DEATH PENALTY IN ENGLAND FROM THE BLOODY CODE TO ABOLITION 161 (1993).

[27] BROCK & PARKER, *supra* note 25, at 310.

[28] *See* MITCHELL B. MERBACK, THE THIEF, THE CROSS, AND THE WHEEL: PAIN AND SPECTACLE OF PUNISHMENT IN MEDIEVAL AND RENAISSANCE EUROPE 147–48 (1999) ("Atonement rituals often included an *amende honorable*, or public acknowledgment of guilt, and a proclamation of repentance.").

[29] *Id.*

[30] Nineteenth century poet John Greenleaf Whittier, a critic of capital punishment, captured the power of the public-expiation formula in a work entitled "The Human Sacrifice," in which he

the church's temporal power by using the imminent death presented by executions to encourage belief in a future, more real judgment in a world to come.[31] For example, in the Spanish Inquisition, Catholic priests dramatically ministered to heretics on the stake, seeking to achieve their public conversion before they were dispatched in flame by the nominally secular authority.[32] In the case of one "judaizer"[33] who converted on the stake in 1719, the priest wrote in his diary that he was "desirous that the soul which had given so many signs of conversion should not be lost, [so] I went round casually behind the stake to where the executioner was, and gave [the executioner] the order to strangle him immediately because it was very important not to delay."[34] Persons sentenced to death in contemporary France and regions under French control had to undergo an elaborate ritual called the "amende honorable."[35]

> The condemned man was escorted by court-appointed guards and the executioner to the front door of the local church, where he knelt and declared loudly that he had falsely and wickedly offended God, the king, and justice, and that he repented for this offence and now begged for their forgiveness. This formulaic declaration was as fixed as the canon of the Mass.[36]

In Protestant, Georgian England, the "purificatory liturgy" was performed on the day before the execution, followed by a processional on execution day in which the parson and offender performed a "carefully stage-managed theatre of guilt" displaying "exhortation,

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referred to ministers involved in executions as the "hangman's ghostly ally" who was "blessing with solemn text and word the gallows-drop and strangling cord; lending the sacred Gospel's awe and sanction to the crime of Law." *Id.* at 130 (quoting John Greenleaf Whittier, *The Human Sacrifice*, *in* ANTI-SLAVERY POEMS: SONGS OF LABOR AND REFORM 284 (1888)).

[31] *See* POTTER, *supra* note 26, at 160–61. ("In Christian times and in Christian states, in part because the crucifixion of Jesus had always been seen in sacrificial terms, judicial execution took the place of [the historic practice of] overtly sacrificial disposal of criminals" that had been conducted in many societies to repudiate evil by "ridding the land of its blood-guilt. . . The criminal was still said to be 'sacrificed to the laws of his country" but the "death penalty also allowed for the possibility of salvation, for the real judgment was not pronounced in this world but the next, and the threat of imminent death could accomplish repentance and salvation in the most inveterate sinner").

[32] *See, e.g.*, HENRY KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVISION 211–12 (1998) (illustrating the scene of an execution by burning at the stake, wherein "a lighted torch is passed before [the accused's] face to warn him of what awaits him if he does not repent. Around [him] are numbers of religious who pressed the accused with greater anxiety and zeal to convert himself.").

[33] "Judaizing" was a term used by clergy in the Spanish Inquisition to describe recent converts to Christianity who were charged with the "heresy" of slipping back into Jewish practices. Marvin Lunenfeld, *Pedagogy of Fear: Making the Secret-Jew Visible at the Public Autos de Fe of the Spanish Royal Inquisition*, 18:3 SHOFAR 77, 79 (2000). Nation formation was accomplished by state and church cooperation in the scapegoating of Jews and other social outcasts. *Id.* "Whenever tensions damaging to the state were high, verbal and visual stratagems were mustered to bring into view during some great public spectacle the Secret-Jew, or Crypto-Jew, segregated out from the ranks of New Christians and disgraced through stereotyped charges of 'Judaizing' heresy." *Id.*

[34] KAMEN, *supra* note 32, at 211.

[35] Peter N. Moogk, *The Liturgy of Humiliation, Pain, and Death: The Execution of Criminals in New France*, 88:1 CAN. HIST. REV. 91, 93–94 (2007).

[36] *Id.* at 94–95.

confession and repentance before an awed and approving crowd."[37]

Protestant ministers in colonial and post-colonial United States adopted the public-expiation formula to reinforce their own social influence. They published widely circulated execution sermons given in pulpits and on the gallows from the last quarter of the seventeenth century into the first half of the nineteenth century.[38] "A consistent message delivered in execution sermons was the importance of paying attention to ministers—not just at hangings, but every day. . . . And with the power of the state on display, an execution was perfect for underscoring secular authority as well."[39] The sermons recounted how the ministers had labored to achieve the repentance and conversion of the condemned in the brief days or hours between sentence and punishment.[40] Sentenced "to die by civil authorities who believed they acted in accordance with divine precepts, criminals were encouraged and manipulated to recant publicly their sins and plea for the mercy of God."[41] The execution ritual sanctioned violence to unify the community against outsiders and, thus, to reinforce social order and stability.[42] Consequently, in colonial America, religious crimes such as heresy or blasphemy continued to be deemed among the worst offenses to which the death penalty applied.[43] Massachusetts authorities, for example, targeted and executed Quakers because they were viewed as trying to "'undermine and ruine' [sic] authority, making their heresy far worse than mere religious error."[44]

Today, Texas inmates executed in private participate in vestigial aspects of the age-old public-expiatory ritual.[45] Half make some kind of religious reference in their last words, the majority of those alluding to an afterlife.[46] One recently said, apparently without irony, "Warden, since I don't have anything to say, you can go ahead and send me to my

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[37] POTTER, *supra* note 26, at 20.

[38] DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1674–1860 3–4 (1993).

[39] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 34 (2002).

[40] *See id.* at 18–19 ("While in jail awaiting execution, the condemned person was not alone. A steady stream of ministers came to call, armed with advice on how to prepare for the death and the afterlife that awaited.").

[41] LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 41 (1989).

[42] *Id.* at 39.

[43] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 32 (1994); United States v. Hillyard, 52 F. Supp. 612, 613–14 (E.D. Wash. 1943) ("Even the 'Act of Toleration' of which Maryland so proudly boasts, provided the death penalty for those who might thrice be convicted of violating the statute defining blasphemy to be to 'deny our Savior to be the Son of God, or deny the Holy Trinity, or the Godhead of any of the three Persons, or the Unity of the Godhead.'") (quoting BACON'S LAWS OF MARYLAND ch. 16, § 1).

[44] FRIEDMAN, *supra* note 43, at 32; *see also* Horatio Rogers, *Mary Dyer Did Hang as a Flag*, *in* THE QUAKER READER 171–178 (Jessamyn West ed., 1992) (telling the story of a Quaker hanged after refusing banishment for unrepentant religious dissent).

[45] *See* Scott Vollum & Dennis R. Longmire, *Giving Voice to the Dead: Last Statements of the Condemned*, 12:1 CONTEMP. JUST. REV. 5, 13–16 (2009) (highlighting themes of faith, contrition, and gratitude in condemned inmates' last words before execution).

[46] *Id.* at 13–14.

Heavenly Father."[47] Not infrequently, they continue the ritual idea that contrite execution is a vehicle to salvation. Earl Behringer, for example, announced, "I belong to Jesus Christ. I confess my sins. I have been baptized. I am going home with Him."[48] However, there are also some significant departures from the formula in the words of the condemned that may reflect the post-Enlightenment demystification of State power. There are essentially no apologies to the State or Church. Less than 7% of inmates ask for forgiveness from God.[49] A full third of final statements contain words of contrition, but most are direct apologies to the human "co-victims" (the survivors of the inmate's victim).[50] Remarkably, the most frequent statements (more than 50%) are "well wishes," statements of love and encouragement, most often made to family and friends.[51] The former majesty of the church-state partnership in execution, designed to maintain social control through terror, is lost, although the connection between church and state continues behind the walls on execution day and remains ardently supported by a segment of the modern Church.[52] This loss of majesty is reflected in today's general public apathy toward the execution ritual, as compared to the crowds garnered by executions and the vast popularity of execution sermons in the nineteenth century.

III. PRISON CHAPLAINCY AND EXECUTION RITUALS

The nineteenth century saw the rise of the prison institution and the introduction of proportionality (between crime and severity of punishment) into penal codes, springing from Quaker Pennsylvania's

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[47] Larry Wooten, executed October 21, 2010. *Offender Information*, TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_info/wootenlarrylast.html, <http://perma.cc/P8NJ-N9L5>.

[48] Vollum & Longmire, *supra* note 45, at 14.

[49] *Id.* at 16.

[50] *Id.* at 15.

[51] *Id.* at 11–12.

[52] *See generally* Harold G. Grasmick, Elizabeth Davenport, Mitchell B. Chamlin, & Robert J. Bursik, Jr., *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, 30:1 CRIMINOLOGY 21 (1992) (linking retributive beliefs of Protestant fundamentalists and the death penalty), *and* Robert L. Young, *Punishment at All Costs: On Religion, Convicting the Innocent, and Supporting the Death Penalty*, 9 WM. & MARY BILL RTS. J. 237 (2000) (same); *see also* Randall Styers, *Capital Punishment, Atonement, and the Christian Right*, 18:5 DIFFERENCES: A J. OF FEM. CULT. STUD. 97, 116 (2007) (reflecting on modern Christian belief in blood atonement for crime and citing the affirmation of a Christian proponent of capital punishment that "many prison chaplains have testified to the spiritual benefits of capital punishment in focusing the criminal's attention on the afterlife."). *Cf.* Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, http://www.firstthings.com/article/2002/05/gods-justice-and-ours, <http://perma.cc/8J8E-KATQ> ("The current predominance of opposition to the death penalty is the legacy of Napoleon, Hegel, and Freud rather than St. Paul and St. Augustine."). *But see* James D. Unnever & Francis T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43:2 J. RES. CRIME & DELINQUENCY 169, 192–93 (2006) (finding fundamentalists not more likely to support death penalty than moderate or liberal Christians because, although they hold views predicting support (a harsh understanding of God), they also express beliefs negatively supporting the death penalty (in compassion)).

abolition of the death penalty in 1794 for all crimes other than first-degree murder.[53] Pennsylvania's reform announced secular bases for punishment—prevention of crime and reparation of injury—and denounced the use of the death penalty for murder unless it was "absolutely necessary for the public safety."[54] Rehabilitation became recognized as a punishment goal and experimental prisons called "penitentiary houses" were built in Pennsylvania and New York that became the models for the American penitentiary system that prevails to this day.[55]

With the removal of condemned prisoners to penitentiaries, the clergy's role in the execution-day drama also drifted into the prisons and became the purview of professional prison chaplains.[56] In the United States and England, public executions also began to devolve into carnival-like, unruly mob scenes—the opposite of their order-creating purpose.[57] In 1830, Connecticut became the first state to respond by removing executions from public view.[58] Texas and other former slave states were among the last, waiting until the twentieth century to take executions inside.[59] In 1923, following a series of horrific public lynching-executions of African- American men—including one in Waco, Texas, where the victim was burned alive before a white crowd of 10,000 to 15,000[60]—the Texas legislature ordered executions moved from the counties to the interior of a Huntsville prison unit, where they are carried

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[53] POTTER, *supra* note 26, at 32–33.

[54] *Id.* at 33.

[55] FRIEDMAN, *supra* note 43, at 78–79; Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 BYU L. REV. 857, 862 (1992) (noting that the Pennsylvania "break with colonial savagery of punishment necessitated the establishment of a prison system to house the convicted.").

[56] POTTER, *supra* note 26, at 46, 51; BANNER, *supra* note 39, at 35.

[57] *See* James R. Acker, Thomas Brewer, Eamonn Cunningham, Allison Fitzgerald, Jamie Flexon, Julie Lombard, Barbara Ryn & Bivette Stodghill, *A Glimmer of Light in the Shadows of Death: Comdemned Prisoners' Access to Spiritual Advisors—An Assessment of Policies and Practices*, 2:3 CONTEMP. JUST. REV. 235, 239 (1999) ("Crowds became so large, ribald, and unruly that pubic executions turned into degrading and embarrassing displays, representing more of a threat to and repudiation of social order and moral values than a source of their reinforcement.") (internal citations omitted).

[58] *Id.*

[59] BANNER, *supra* note 39, at 35–36 ("The sermon remained a standard part of the execution ceremony as long as executions were held in public, throughout the first half of the nineteenth century in the North and well into the twentieth in parts of the South. After executions were moved into the jail yard and the sermon was abandoned, ministers would remain on hand to counsel the condemned prisoners and to lead those present in prayer. Even today, when executions are attended by only a few carefully chosen spectators and officials, there is often a clergyman in the room, a vestige of a time when the clergy played an important role in political life, when the line between secular and religious power was not drawn as sharply as it is today.").

[60] PATRICIA BERNSTEIN, THE FIRST WACO HORROR: THE LYNCHING OF JESSE WASHINGTON AND THE RISE OF THE NAACP 110 (2005); *see also* WILLIAM CARRIGAN, THE MAKING OF A LYNCHING CULTURE: VIOLENCE AND VIGILANTISM IN CENTRAL TEXAS, 1836–1916 4–7 (2004) (providing photographs of Jesse Washington's burned corpse and the crowd that attended the lynching); *and* WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 17, 82, 173–74 (James Allen ed., 2000) (showing Washington's burned corpse, the spectators who attended the lynching, and explaining Washington's alleged offense and subsequent trial).

out to this day.[61]

The curtailed public influence of clergy during executions preceded a similar progressive diminution of the power and influence of chaplains in state prisons and the transformation of their tasks from primarily religious to reformative and therapeutic.[62] In the nineteenth century, prison chaplains wielded political influence within prisons and with policy makers.[63] However, by the early twentieth century, as social science began to guide prison policy in many states, influential tasks previously assigned to chaplains were given to other professionals, such as educators and social workers.[64] Chaplains adjusted by presenting themselves as specialists in the moral reform of the offender: as "soul doctors" or "moral physicians."[65] By the mid-1950s, chaplains became trained in psychology and clinical pastoral education and were incorporated in prison "treatment teams" that focused on rehabilitating offenders.[66] In the mid-1970s, the United States Supreme Court added another secularizing influence when it made clear that the federal Bill of Rights protects state prison inmates.[67] The First Amendment Free Exercise Clause obligated state chaplains to become ecumenical and to defer to prisoners' expressed religious preferences.[68]

The Texas execution-day chaplain's routine includes the following. The chaplain arrives at the death row unit to visit with the inmate some time before the execution date to prepare him or her for the process.[69] With the inmate's permission, the chaplain talks to the inmate's family ahead of the execution date, attempting to prepare them for what to expect.[70] Chaplains report that, on the day of execution, they stay with the inmate from the time he or she is brought to the Walls Unit where the execution occurs or until a stay is granted.[71] Chaplains experience

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[61] JAMES W. MARQUART, SHELDON EKLAND-OLSON & JONATHAN R. SORENSEN, THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990 13 (1994).

[62] *See* Acker et al., *supra* note 57, at 240 ("The participation and role of religious counselors . . . changed as swift, public hangings gave way to modern, cloistered executions performed years after the pronouncement of a death sentence."); Sundt & Cullen, *The Role of the Contemporary Prison Chaplain*, *supra* note 18, at 273–74 (summarizing the evolution of the prison chaplain's role from the nineteenth to twentieth centuries).

[63] *See* Sundt & Cullen, *supra* note 18, at 272–273 (chronicling the "considerable importance" of the prison chaplain throughout the 1800s, noting that at the time "the chaplain's influence and political clout rivaled those of the warden.") (internal citation omitted).

[64] Sundt & Cullen, *supra* note 18, at 273.

[65] *Id.* at 274 (internal citation omitted).

[66] *Id.*

[67] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

[68] *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) (holding that even in the state prison context, "[t]he First Amendment, applicable to the states by reason of the Fourteenth Amendment, prohibits government from making a law prohibiting the free exercise of religion.") (internal citations omitted) (internal quotations omitted).

[69] *See, e.g.*, Owens, *supra* note 7, at 46 ("A day or two before the execution date, I go out to the unit and visit with them"). *But see* OWENS & OWENS, *supra* note 5, at 192 ("Unlike Rev. Pickett . . . who never met the condemned man until the day of his execution, [Jim] Brazzil was able to visit the person scheduled for death as soon as the judge set the execution date.").

[70] *See, e.g.*, Owens, *supra* note 7, at 46 ("If they approve, I call their family ahead of time and talk to them.").

[71] *Id.*

varying degrees of trust and antagonism with the inmates.[72] They pray with and counsel receptive inmates.[73] They help inmates receive approved phone calls, and they sit with them during their last meals.[74] Chaplains assist the inmates to craft their last statements, which the inmates will deliver from the execution gurney.[75] Chaplains prepare the inmates for the logistics of the execution: how they are to enter the execution chamber, which direction they will sit, and where they will place their feet.[76] Finally, when legal appeals are over and the execution tie-down team comes to escort the inmate from the holding cell to the chamber, the chaplain leads the inmate into the chamber.[77] Once the inmate is strapped down on the gurney, the chaplain stands next to the warden and places his hand on the inmate until he or she is dead.[78]

The current milieu of professionalism, ecumenism, inmate legal rights, and the continuing institutional goal of rehabilitation, reinforces the natural emotional empathy that chaplains historically have had for prisoners.[79] The same milieu also tends to frustrate the deeply historical two-dimensional template presenting condemned prisoners as mere objects of spiritual conversion for the consequential goal of public order.[80] Nevertheless, the strong political influence of fundamentalist Christianity in Texas and other prolific executing states is notable.[81] When the Texas Legislature reinstated the death penalty in 1973, the authors of the legislation argued that it was supported by Biblical authority in Genesis, Numbers, and other books of the Hebrew

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[72] *Id.*

[73] *Id.*

[74] Bryant, *supra* note 4.

[75] *Pickett Interview*, *supra* note 3.

[76] *Id.*

[77] *Id.*

[78] *See* OWENS & OWENS, *supra* note 5, at 192 ("As a prison chaplain, [Brazzil] used to stand beside the gurney, his hand resting just below the knee of the condemned. His was the last human touch they ever felt in this world."); INTO THE ABYSS, *supra* note 7 (recounting chaplain Richard Lopez's hand placement on the inmate during the execution).

[79] *See generally* Sundt & Cullen, *The Role of the Contemporary Prison Chaplain*, *supra* note 18 (describing evolving role of prison chaplain).

[80] Acker et al., *supra* note 57, at 239–40 ("Public executions were ceremonials, the symbolic significance of which was to reinforce the political authority of the secular state, the moral authority of the church, and the awful consequences of breaching legal and religious injunctions . . . . After executions were moved inside of jails, and later behind prison walls, they were stripped of their ceremonial character.") (internal citation omitted).

[81] *See generally* Harold G. Grasmick, John K. Cochran, Robert J. Bursik, Jr. & M'Lou Kimpel, *Religion, Punitive Justice, and Support for the Death Penalty*, 10 JUST. Q. 289 (finding greater support for punitive measures and the death penalty among evangelical/fundamentalist Christians); Grasmick et al,, *Protestant Fundamentalism and the Retributive Doctrine of Punishment*, *supra* note 52 (indicating a link between support for retributive doctrine and fundamentalist Protestant denominations and religious beliefs); Michael J. Lieber, Anne C. Woodrick & E. Michele Roudebush, *Religion, Discriminatory Attitudes, and the Orientations of Juvenile Justice Personnel: A Research Note*, 33:3 CRIMINOLOGY 431 (1995) (reporting that Biblical-literalist juvenile court personnel support the death penalty for juveniles); Robert L. Young, *Religious Orientation, Race and Support for the Death Penalty*, 3 J. SCI. STUD. RELIGION 76, 85 (1992) (highlighting correlation between Protestant fundamentalism and high support for the death penalty while noting that the "absolutism of a fundamentalist orientation appears to eliminate some of the uncertainty which others experience in considering the appropriateness of [the death penalty].").

Scriptures.[82] Prison employees influenced by literalist Christian beliefs may adopt the passive position that because human law is divinely sanctioned and God is in control of history, their participation in executions is a moral good, however strange and emotionally troubling they find their own participation. For example, when asked how God would view his participation in execution-day proceedings, Richard Lopez, a lay Roman Catholic execution-day chaplain in Texas, said—tears of empathy for executed inmates streaming down his face—that he took comfort in the belief that God wills all things to be and is behind the operation of human government.[83]

IV. CONSTITUTIONALITY OF TEXAS EXECUTION-DAY PRISON CHAPLAINCY

Texas chaplains should view the question of the constitutionality and legality of their practice with condemned inmates on execution day as a component of a broader inquiry into the ethics of the practice. The discussion below of the constitutionality of the practice illumines values involved in the broader ethical consideration, in particular, principles respecting the dignity of the inmate.

Death-penalty states differ on the access allowed to spiritual advisors and chaplains as execution approaches. It appears that no other state allows clergy to participate in executions the way Texas does.[84] Nearly all death-penalty states require any contact between the inmate and spiritual advisor or chaplain to terminate before the inmate enters the execution chamber.[85] Colorado, which has not seen an execution since 1997,[86] would allow a spiritual advisor of the inmates' choice to be in the

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[82] H.B. 200, 63rd Leg., Reg. Sess. (Tex. 1973) (floor debate, May 10, 1973) (transcript on file with author). After the author of the bill to reinstate the death penalty, Representative L. Dean Cobb, introduced several biblical passages from Genesis, Numbers, and Exodus as arguably good grounds for the legislation, one of his co-sponsors asked him how he could "reconcile" his actual bill, which would provide the death penalty only for a limited set of circumstances, with the biblical references. *Id.* Rep. Cobb responded that, "philosophically" he did not know that he could, because he had "some difficulty in singling out specific types of murder for which a life will be taken, as opposed to anyone taking with malice aforethought . . . another person's life." *Id.* In other words, he could not reconcile the "blood for blood" biblical commands with the limited bill, but he said the criminal jurisprudence committee "felt that it had to be defined into the specific categories" in order to meet United States Supreme Court muster. *Id. See also* Holberg v. State, 38 S.W.3d 137, 140 (Tex. Crim. App. 2000) (holding that, despite the appeal to scripture by the death penalty bills' authors, "it [was] at least as likely that the Legislature's actual purpose in enacting the statutes was . . . secular.").

[83] INTO THE ABYSS, *supra* note 7.

[84] Acker et al,, *supra* note 57, at 249–53 tbl. 1.

[85] *See id.* (Alabama, Arizona, Arkansas, California, Delaware (unclear; up to discretion of warden), Florida (unclear; "varies"), Georgia, Indiana, Kentucky, Louisiana, Kansas, Mississippi, Missouri, Montana, Nevada, New Hampshire (no information; no post-*Furman* executions), New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota (unclear)).

[86] John Ingold, *A History of the Death Penalty in Colorado*, DENVER POST, Mar. 23, 2012, http://blogs.denverpost.com/crime/2012/03/23/history-death-penalty-colorado/3921/, <http://perma.cc/S5FQ-VH29>.

chamber during execution.[87] Idaho similarly allows a spiritual advisor of the inmate's choice to be present to the inmate "as long as the inmate wishes."[88] Utah and Virginia allow a spiritual advisor of choice to accompany the inmate as he goes into the chamber.[89] Both Oklahoma and Texas require an execution-day prison chaplain to be ordained before he can participate.[90] But in Oklahoma, the prison chaplain is required to leave before the execution process begins.[91] Only in Texas does the chaplain stay and participate in the execution. The circumstances create two important constitutional queries for a Texas chaplain: whether the requirements of the First Amendment religious clauses of the federal and Texas constitutions are met by, first, the chaplain's pre-execution counseling with a condemned inmate and, second, the chaplain's presence and participation in the execution chamber during execution.[92]

The First Amendment Establishment Clause guards against excessive government involvement with religion.[93] Thus, Texas' employment of chaplains triggers constitutional scrutiny.[94] Practices they may perform on behalf of the state raise additional constitutional questions.[95] Texas prison chaplains are ordained by Christian

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[87] Acker et al., *supra* note 57, at 249 tbl. 1.

[88] *Id.* at 250.

[89] *Id.* at 253.

[90] *Id.* at 252–53.

[91] *See* OKLAHOMA DEPARTMENT OF CORRECTIONS, PROCEDURES FOR THE EXECUTION OF INMATES SENTENCED TO DEATH IV(C)(3) (2014), https://s3.amazonaws.com/s3.documentcloud.org/documents/1175017/oklahoma-execution-protocol.pdf <http://perma.cc/DLK8-5B3A> ("The inmate will be advised that the facility chaplain and/or spiritual advisor are not permitted to be present in the execution chamber during the execution process.").

[92] *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986) ("The federal constitution sets the floor for constitutional rights; state constitutions establish the ceiling."). Accordingly, on occasion the Texas Constitution has been held to provide "individuals greater safeguards to their personal freedom" than the federal Constitution. *E.g.*, State v. Morales, 826 S.W.2d 201, 204 (Tex. App. 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). However, if a state law or practice is found to violate federal rights, the constitutionality query is answered and need not proceed further. The language of the Texas constitution's "Freedom of Worship" clause conveys a strong purpose to protect the individual's autonomy of religious belief and practice from Government interference, either imposing or prohibiting religion. The clause asserts, "No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." TEX. CONST. art. I § 6. This would by all appearances prohibit the State's provision of a prison chaplain at any time the inmate does not consent. The same clause asserts an "indefeasible" positive right possessed by "all men" to "worship Almighty God according to the dictates of their own consciences." *Id.* So it likewise would suggest that the State is almost categorically bound to provide a chaplain at all times that the inmate desires. The State clause essentially amplifies the federal First Amendment rights.

[93] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) ("[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'") (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992))); Cnty. Of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 594 (1989) ("The Establishment Clause . . . prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 672 (1984))).

[94] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 296–97 (1962) (Brennan, J., concurring) ("There are certain practices, conceivably violative of the Establishment Clause. . . . [P]rovision by state and federal governments for chaplains in penal institutions may afford an[] example.").

[95] Obviously, not only the chaplain's employment by the State, but also what the chaplain does in

denominations—Roman Catholic and Protestant—but they are all employed by the state of Texas.[96] Chaplains' jobs are defined in large part by the prison system; according to some chaplains' self-reporting, they may be terminated if they publicly express their opinion on the death penalty.[97]

The United States Supreme Court has issued several tests for determining if state or federal government actions violate the Establishment Clause.[98] First, a government act must have a secular, non-religious purpose.[99] A government's secular rationale usually will be allowed so long as it does not appear to be a sham.[100] Second, the primary effect of the government act must not advance or inhibit religion.[101] Third, the government act may not be excessively entangled with religion.[102] Entanglement can occur when "the involvement" between government and religion "is excessive, and [constitutes a] continuing [involvement] calling for official and continuing surveillance leading to an impermissible degree of entanglement."[103] Fourth, a government act will not be allowed if the act sends a message endorsing religion.[104] Finally, a government act will not be allowed if it coerces persons into a religious exercise.[105]

Inmates' constitutional rights are enforced so long as those "First Amendment rights are not inconsistent with [their] status as a prisoner or with the legitimate penological objectives of the corrections system."[106] The "legitimate penological objectives" test allows regulations that

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connection with that employment, is relevant. The chaplain's presence in the chamber with his hand on the inmate's leg or ankle while the lethal drugs are administered is not mere witnessing or accompaniment. It is participation in the State's execution.

[96] Brandi Grissom, *Texas Prison Chaplains Pray, Plead for Funds*, TEX. TR., Feb. 17, 2011, http://www.texastribune.org/2011/02/17/texas-prison-chaplains-pray-plead-for-funds/ <http://perma.cc/4LDE-9Q86>; *see generally Rehabilitation Programs Division*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://www.tdcj.state.tx.us/divisions/rpd/rpd_chaplaincy.html, <http://perma.cc/2N3G-EAGT> (providing mission and overview of Texas prison chaplaincy program).

[97] *See, e.g.*, *Pickett Interview*, *supra* note 3 ("[I]f I said I was opposed to [the death penalty], they'd fire me.").

[98] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (laying out test to determine when government action has a religious purpose).

[99] *Id.*

[100] *Id.* at 586–87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham. 'It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice.'") (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)) (internal citations omitted).

[101] *Id.* at 583.

[102] *Edwards*, 482 U.S. at 583.

[103] Walz v. Tax Comm'n of the City of N.Y., 397 U.S. 664, 675 (1970).

[104] Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 600–01 (1989).

[105] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[106] Pell v. Procunier, 417 U.S. 817, 822 (1974). The Supreme Court has explicitly recognized inmates' retention of the right to free exercise of religion. *See generally* Cruz v. Beto, 405 U.S. 319 (1972).

restrict an inmate's rights when (1) a valid, rational connection exists between the regulation and the legitimate governmental interests advanced; (2) the prisoner has alternative means to exercise the right in question; (3) accommodating the inmate's right might have a significant impact on guards, other prisoners, or the allocation of prison resources, generally; or (4) alternative means exist for the prison to accommodate the prisoner's asserted right.[107] Under that test, courts have recognized that death row inmates have a free exercise right to meet with spiritual advisors of their choice on the day of their execution. However, the law permits prisons to place restrictions on that right, due to concern about security risks with inmates and their spiritual advisors just before execution, as well as administrative burdens on the staff that monitor spiritual advisor visits, when no monitoring is needed for a prison's own execution-day chaplain.[108] Thus, all death-penalty states accommodate condemned inmates' First Amendment free exercise rights by allowing them to select a personal spiritual advisor to accompany them on execution day, even from among persons unaffiliated with the prison.[109] Practices vary as to when inmates and their chosen advisors are required to separate: from up to twenty-four hours in advance of execution to not at all.[110] Texas requires the personal spiritual adviser (as opposed to the execution-day chaplain) to depart a couple of hours before the execution, although that person may witness the execution from a separate room.[111]

Governments may constitutionally employ prison chaplains because prison creates an "exceptional government-created burden" on the "private religious exercise" of inmates.[112] In other words, chaplains employed by the government are constitutionally allowed insofar as they are surrogates for the religious resources inmates would otherwise seek to avail themselves of in the free world.[113] There is no constitutional ground for prison chaplaincy other than accommodation of inmates' free exercise, as Justice William Brennan made clear in his concurring opinion in *Abington School District v. Schempp*[114]:

> The . . . provision by state and federal governments for chaplains in penal institutions [arguably may] . . . be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the . . .

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[107] Turner v. Safley, 482 U.S. 78, 89 (1987).

[108] Card v. Dugger, 709 F. Supp. 1098, 1104–07 (M.D. Fla. 1988), *aff'd*, 871 F.2d 1023 (11th Cir. 1989).

[109] Acker et al., *supra* note 57, at 254.

[110] *Id.* at 249–53.

[111] *Id.* at 253

[112] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[113] *See* Rudd v. Ray, 248 N.W.2d 125, 128 (Iowa 1976) ("The crucial and controlling fact in this case is that it deals with the exercise of religion by prison inmates. Prison inmates are restrained and consequently deprived of their liberty. By reason of their status they are displaced from their homes and communities. They are thereby denied the opportunity to exercise their individual rights to worship in the same manner as could an ordinary citizen.").

[114] Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

> prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be.... The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners . . . cut off by the State from all civilian opportunities for public communion.[115]

If a condemned inmate informs the authorities that she does not want the institutional execution-day chaplain to meet with her, counsel her, or even be present around her during the day of the execution or in the execution chamber, then the chaplain's continuing presence would be a federal establishment violation and state "freedom of worship" violation.[116] The prison chaplain's sole *legal* justification for being in the prison, much less near the holding tank outside the execution chamber, is a pure accommodation of the inmates' free exercise rights.[117] A chaplain cannot constitutionally argue with an inmate who exercises those rights by asking that he be removed.[118] According to Supreme Court jurisprudence, this would likely be a hostile use of religion by the state and improper coercion.[119] As a result, Texas execution-day chaplains have, by their own admission, violated the federal and state constitutions, although it would be difficult to know how often. Chaplain Jim Brazzil, for example, admitted in a 2001 interview that arguments sometimes

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[115] *Id.* at 296–299 (Brennan, J., concurring).

[116] Lee v. Weisman, 505 U.S. 577, 587 (1992); TEX. CONST. art. I § 6 ("No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent.").

[117] *See Schempp*, 374 U.S. at 296–299 (Brennan, J., concurring); Montano v. Hedgepeth, 120 F.3d 844, 850 n.10 (8th Cir. 1997) ("[S]tates might commit a technical violation of the Establishment Clause by even hiring prison chaplains. Nonetheless, this is condoned as a permissible accommodation for persons whose free exercise rights would otherwise suffer."); *see also* Steven H. Aden, *The Navy's Perfect Storm: Has a Military Chaplaincy Forfeited Its Constitutional Legitimacy by Establishing Denominational Preferences?*, 31 W. ST. L. REV. 185, 186 ("A military chaplaincy system only passes constitutional muster . . . if it strictly adheres to its constitutionally permissible purpose: to provide for accommodation of free exercise of religion for service personnel.").

[118] *See* Wallace v. Jaffree, 472 U.S. 38, 53–54 (1985) ("Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. . . [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

[119] *See* Walz v. Tax Commission, 397 U.S. 664, 669 (1970) (holding that the purpose of the Establishment and Free Exercise Clauses "is to insure that no religion be . . . commanded."); *see also Schempp*, 374 U.S. at 223 (holding that opening of the public school day with selections and readings of verses from the Holy Bible "and the law requiring [such] exercises are in violation of the Establishment Clause.").

occur between inmate and chaplain.[120] "Generally," he said, "I have been received wonderfully. There've been a few [inmates] who were antagonistic. But I've been in the death chamber with every one of them. I've never had one of them turn me down."[121]

Provision by the prison of an execution-day chaplain up until the time of execution, even within the two-hour window right before it, could be constitutionally permissible, especially if the inmate requests it with no signs of coercion.[122] The State, however, should have a hard time providing a reasonable, neutral, non-religious motive for having the chaplain in the execution chamber.[123] If the rationale is the usually stated one—that chaplains help keep the inmate and guards calm—the State probably cannot make a reasonable argument that a secular individual trained in therapy would not do as well, or that the substitution of trauma and grief training for inmates and guards would not do as well.[124] If the State must argue that it is the additional religious training, experience, expertise, authority, or mere religious professional status of the chaplain that is the most calming element, it is in constitutional trouble because it is arguing for the chaplain's service to the State to an equal or higher degree than the chaplain's service to the inmate. Effectively, this is arguing for State-imposed religious service vis-a-vis the inmate, and the government cannot show that an equally situated, secular state employee would be less effective in the role. In short, this would be an argument for the endorsement of religion.[125] If the State must argue that chaplains are needed because they are *Christian* or will be most effective to calm the *Christian* inmates, further constitutional red flags would be raised because the State would be moving from promotion of religion generally to promotion of a specific religion.[126] If the State argues that *chaplains* are necessary, then it is likely taking the position that it cannot carry out

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[120] Owens, *supra* note 7.

[121] *Id.* Rev. Carroll Pickett also suggested that he would fairly insistently offer his services. "There have been a couple of them who came in and said they didn't want to talk, but after a couple of hours I will just tell them, 'Okay, if that's your choice, I will be available.' I will not leave the unit, or I can go down to Cell 7 and be out of the way. But basically . . . of the 95 that I have been with all the way, there has been only one who refused to talk at all." *Pickett Interview*, *supra* note 3.

[122] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (prohibiting religious coercion).

[123] *See* Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987). The Establishment Clause requires the State to provide a non-sham, non-religious purpose for the presence of its Christian chaplain employee in the execution chamber. *Id.* In light of the history of the expiatory ritual reinforcing the temporal power of the State with Christian religious authority and the aura of solemnity and sanctity that the execution-day prison chaplain continues to bring today's non-public spectacle, this would not seem possible.

[124] *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). There is no valid, rational connection between the use of a *chaplain* over a therapist and accomplishment of the "legitimate governmental interest" of obtaining a *calm* execution. The therapeutic training that chaplains now obtain, giving them the tools to help calm inmates, guards, and the prison milieu, arguably makes chaplains *substitutes* for therapists in that regard.

[125] *See generally* Cnty. Of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

[126] *See id.* at 601 (discussing endorsement of Christian faith by the government through display of Christmas crèche at county building).

its allegedly secular punishment without delegating part of the task to a religious person—this would effectuate an unconstitutional entanglement, an unconstitutional endorsement of religion, and an unconstitutional coercive use of religion.[127]

A Texas execution-day chaplain should consider that his presence in the execution chamber is unconstitutional. In addition, he should recognize the great progress our society has made from the time that prisoners were considered in some states to be slaves with no constitutional or other human rights.[128] Today, inmates' rights, as well as a conception of their autonomy and dignity as persons, are legally recognized and supported. Legal execution, however, is an anomaly in today's world of rights because it literally erases the rights holder.[129] To the extent that a state may want to argue that an inmate has no rights by the time of execution—and, thus, the chaplain's unconstitutional presence in the chamber would not matter—the state is arguing for a return to the time when people could be owned and disposed of like objects.[130] Execution-day participation by chaplains stands on shaky legal ground.

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[127] *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (discussing unconstitutional entanglement); *Allegheny*, 492 U.S. at 601 (discussing unconstitutional endorsement of religion); and *Lee*, 505 U.S. at 587 (discussing unconstitutional coercive use of religion).

[128] *See, e.g.*, Ruffin v. Commonwealth, 62 Va. 790, 796 (1871) ("The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. . . . They are the slaves of the State undergoing punishment.").

[129] Only persons may bring claims of constitutional violations in federal courts. Diamond v. Charles, 476 U.S. 54, 62 (1986). At the point right before execution, the person being subjected to capital punishment retains constitutional rights. However, in most cases, due to the finality principle built into state and federal habeas statutes, realistic opportunities to gain access to the courts to vindicate those rights have been exhausted. *See, e.g.*, 28 U.S.C. 2244(b) (laying out federal habeas finality principle); Tex. Code Crim. Proc. art. 11.071 § 5 (1965) (laying out state habeas finality principle); Evans v. Muncy, 498 U.S. 927, 930 (1990) (Marshall, J., dissenting) (explaining that observance of finality sometimes means judicial tolerance of unlawful execution). *During* execution by lethal injection, the inmate would appear to have a limited right not to be subjected by prison officials to "severe pain" while being killed, an act which, once accomplished, renders the right moot. Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015) (quoting Baze v. Rees, 553 U.S. 35, 61 (2008)). The diminution (and destruction) of legal personhood and access to redress rights involved in the execution process seems concomitant with the deprivation of human dignity identified by jurists as execution's principal flaw. *See infra* note 128.

[130] *See* Gregg v. Georgia, 428 U.S. 153, 230 (Brennan, J., dissenting) (quoting Furman v. Georgia, 408 U.S. 238, 272–73 (Brennan, J., concurring)). Justice William J. Brennan suggested that the death penalty was such a temporal throwback, yet still inconsistent with the Constitution's original Eighth Amendment Cruel and Unusual Punishment Clause. "The fatal constitutional infirmity in the punishment of death is that it 'treats members of the human race as non-humans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the [Eighth Amendment Cruel and Unusual Punishment] Clause that even the vilest criminal remains a human being possessed of common human dignity.'" *Id.* Brennan's position highlights the tension that existed within our original Constitution which one the one hand uncritically recognized and incorporated slavery, and on the other hand barred cruel and unusual punishments. It points to the unfinished work of the Thirteenth and Fourteenth Amendments, because slavery and the death penalty share the same disrespect for human dignity and are so closely intertwined in U.S. history, and yet the death penalty persists.

V. ETHICS OF TEXAS EXECUTION-DAY PRISON CHAPLAINCY

There is a reasonably strong basis for finding that chaplain participation in executions violates the federal and state Constitutions' religion clauses, but can an argument nevertheless be made that, aside from the religious role of the chaplain, the practice is ethical? Execution-day chaplains de-emphasize purely religious functions when they describe their work with condemned inmates, frequently asserting that what they do is therapeutic, palliative, or hospice related.[131] Again, chaplains themselves report their duty as being there for the inmate because no person should have to die alone.[132] They should be considered sincere. Since Texas chaplains consistently identify their role in the execution chamber as committed to the benefit of the inmate, and additionally would not be employed by the prison but for the accommodation that they are there for the good of inmates, beneficence, the duty to "do good"—and its companion non-maleficence, the duty to "do no harm"—should be the *minimal* ethical standards by which they assess and govern the appropriateness of their actions in relation to the inmate.[133] Beneficence is the first principle of ethics for all health and mental health care professionals.[134] Although they arise from different sources, the chaplaincy and health professional communities share a core ethic of caring for others; comparison between codes and ethical analyses in the disciplines is therefore apropos, and provides a foundation on which to analyze the ethical question of execution-day chaplaincy.[135]

Unlike health care regulatory communities, chaplaincy professional associations seem to have been slow to develop relevant ethical standards and also have been silent on the subject of the ethics of participation in the death penalty.[136] There is a dearth of literature applying ethics to

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[131] *See* discussion of chaplain role, *supra* notes 5–8.

[132] *See supra* note 8.

[133] Beneficence and corresponding non-maleficence also commonly have been considered "prima facie duties" of ethics. THOMAS A. MAPPES & JANE S. ZEMBATY, BIOMEDICAL ETHICS, 1–2, 21–22 (3d ed. 1991). According to the English philosopher W.D. Ross, "prima facie duties" arise from our "morally significant relations"—"promisee to promisor, creditor to debtor, spouse to spouse, child to parent, friend to friend, citizen to the state, fellow human being to fellow human being." *Id.* at 22.

[134] *See, e.g.*, AM. PSYCHOL. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, General Principle A (2010), http://www.apa.org/ethics/code/index.aspx, <http://perma.cc/8K44-F9G3> (stating that the first General Principle of the professional code is "Beneficence and Nonmaleficence: Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons.").

[135] *See* Margaret E. Mohrmann, *Ethical Grounding for a Profession of Hospital Chaplaincy*, 38 HASTINGS CENTER REP'T 6, 19–20 (2008) ("Medical ethics tends to ground the patient's central status in general principles of respect for persons and in more specific, relationship-generated obligations of care for others' well-being. Theological or religious ethics tends to base similar principles and obligations on claims about common humanity, with or without reference to a creator-god, and on (divine) injunctions to love others. But the two ethical frameworks are agreed on much that might be called an ethic of caring for patients [or inmates], the practice that forms the large area of overlap in the work of these professions.").

[136] The American Correctional Chaplains Association (ACCA), for example, is presently governed

chaplaincy work in prison. However, in 2004, the Association for Clinical Pastoral Education (ACPE) brought together six major chaplaincy groups, including prison chaplains, to adopt an appropriate *Common Code of Ethics for Chaplains, Pastoral Counselors, Pastoral Educators and Students.*[137] The Code's norms read like an exposition of the principle of beneficence, requiring chaplains to support the autonomy, dignity, and healing of their client.[138] This begs the question of who the prison chaplain's client really is, since the execution instance is loaded with conflicting interests. As long as chaplains assert that they seek the inmate's beneficence, then the object of their duty should be the inmate. Yet the inmate's beneficence is under lethal assault by the chaplain's employer, supervisor, and colleagues at the time of execution.

A. Execution-Day Chaplains Have a Conflict of Interest.

The ACPE Code requires that, in order to carry out a professionally ethical practice, chaplains must avoid all conflicts of interest and coercive relationships with clients that might impose the values or beliefs of others.[139] Strikingly, execution-day chaplains seem compromised at

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by a 1992 ethics code that has little to say about duties owed by chaplains to the persons under their care. AM. CORRECTIONAL CHAPLAINS ASS'N, CODE OF ETHICS, http://www.correctionalchaplains.org/, <http://perma.cc/2AJX-KTSW> [hereinafter ACCA CODE]. Indeed, the principle of beneficence can only be weakly inferred. The code otherwise stresses maintenance of an image of professionalism: "All members make use of their skill and training to maintain the integrity and enhance the image of religious ministry in a correctional setting." *Id.* at Principle II. The absence of any focus on duties toward or the rights of beneficiaries of chaplaincy care is unsettling.

[137] *See* ASS'N FOR CLINICAL PASTORAL EDUC., COMMON CODE OF ETHICS FOR CHAPLAINS, PASTORAL COUNSELORS, PASTORAL EDUCATORS AND STUDENTS (2004), http://www.professionalchaplains.org/files/professional_standards/common_standards/common_code_ethics.pdf, <http://perma.cc/M8Q2-9AH7> [hereinafter COMMON CODE]. The six groups were the Association of Professional Chaplains, American Association of Pastoral Counselors, Association for Clinical Pastoral Education, National Association of Catholic Chaplains, National Association of Jewish Chaplains, and the Canadian Association for Pastoral Practice and Education. According to the ACPE, "[t]he membership of the participating groups represent[ed] over 10,000 members who currently serve[d] as chaplains, pastoral counselors, and clinical pastoral educators in specialized settings as varied as healthcare, counseling centers, prisons or the military." *Id.* at 1.

[138] *See generally* COMMON CODE. Notably, the 2004 COMMON CODE was superseded by the "Code of Professional Ethics for ACPE Members" in 2010, which weakens the prior ethical code by removing a positive duty to provide care intended to "promote the best interest of the client and to foster strength, integrity and healing," and replacing it with a negative duty to "respect the integrity and welfare of those served or supervised, refraining from disparagement . . . and . . . exploitation." ASS'N FOR CLINICAL PASTORAL EDUC., ACPE STANDARDS & MANUALS: 2010 STANDARDS 3 (2010), http://s531162813.onlinehome.us/pdf/2010%20Manuals/2010%20Standards.pdf, <http://perma.cc/34UA-ZFFU>. The new code removes the prior code's provisions on avoiding conflicts of interest between duties to institutions, third parties, and the client, and avoiding all coercive behavior with the client. The removal of the conflict of interest provision from an ethical code is curious, but especially from a code that is designed to guide professionals working in institutional settings that frequently raise conflict issues. The discussion herein is confined, therefore, to the code of 2004.

[139] The Code requires chaplains to "refrain from imposing [their] own values and beliefs on those served[,]" "refrain from exploit[ing] . . . the imbalance of power in the professional/client relationship[,]" "avoid any conflicts of interest or appearance of conflicting interest(s)[,]" and

the outset by others' interests, which conflict directly with the survival of the inmates they purport to help. They are impeded by their position as an agent of the State from advocating for the inmate's survival or from otherwise countering the values, beliefs, or actions of other state agents who are preparing to kill the inmate. Yet chaplains' mere ineffectiveness to assist their "client" in any truly beneficial way still does not sufficiently describe the ethical concerns inherent in the practice of execution-day chaplaincy.

Within the chamber, chaplains are compromised by their employment status because they cannot object to the inmate's execution, much less try to stop it, and they arguably *do* assist the warden in killing the inmate.[140] As clergy always have, execution-day chaplains bring the spiritual aura of their presence as a religious authority into the chamber, authenticating the State's action as morally legitimate before the assembled participants and witnesses. They help the warden, tie-down guard team, and executioner think of their mission as sanctified and necessary, albeit emotionally difficult, not only by the chaplains' presence, but additionally by laying their hands on the inmate until he or she has no pulse.[141] Within the execution chamber, the inmate is no more an object of their clerical beneficence than those assisted on their heavenly journey by the Inquisitor. The chaplains are players in an ancient drama of redemptive violence and not, as they would like to portray themselves, present healers. Rather than carrying out a duty to "do good" and "do no harm" to their clients, execution-day chaplains' work in fact benefits the other side—the state seeking to enact ultimate violence on the inmates the chaplains ostensibly serve.

B. Execution-Day Chaplains Are Required to Act Against Dignity of Prisoner.

The ACPE Code requires chaplains to "affirm the dignity and value

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"refrain from any form of . . . coercion . . . in relationships with clients." COMMON CODE, *supra* note 135, at paras. 1.4, 1.6, and 1.8. The ACCA Code contains a weak counterpart: "Chaplains function as religious professionals within the correctional setting and do not undertake roles that are contrary to that of pastoral care provider." ACCA CODE, *supra* note 134 at 3.

[140] *See supra* note 4 (discussing chaplain assistance in execution-day proceedings).

[141] *See, e.g.*, Alberta Phillips, *Questioning the Myth of a Painless Execution*, AUSTIN AM. STATESMAN, Dec. 11, 2003, at A21 ("In the 32 executions Pickett had witnessed before [Carlos DeLuna's], the condemneds' pulses had stopped before the second lethal chemical was injected into their veins. Carlos' pulse continued after the first drug and anesthesia sodium thiopental flowed through one of the young man's veins. Pickett could feel Carlos' pulse as he clutched his ankle and stared into his big brown eyes, which never blinked. Carlos' ankle jerked after the second lethal drug, pancuronium bromide, dripped into another vein. His eyes remained open. The pulse kept throbbing until a third drug kicked in."); *see also* LIFTON, *supra* note 4 (describing execution-day chaplains as "offer[ing] active spiritual participation that helps energize the overall execution process" and concluding that "when[] spiritual advisers lend support to the condemned man . . . they become part of the execution project" securing an execution that "looks humane and dignified and is not sullied in any way by obvious violence.").

of each individual[,]" and to "act in ways that honor the dignity and value of every individual."[142] It is important to take stock of our place in history. We are only three centuries from the time in human development when drawing and quartering—execution by pulling a person apart with four horses tied to each of her limbs—was not considered illegal, immoral, unethical, or prohibited.[143] In the late eighteenth century, the Bill of Rights of the United States Constitution and the French Declaration of the Rights of Man and of the Citizen changed that by giving effect to rights summoned to protect humanity from itself.[144] Cruel punishments were brought into question at that time, in a way that could not have been comprehended by the Inquisitor only a century before because society was undergoing a revolutionary new awareness of the affective interior life of others.[145] The new constitutional societies outlawed cruel punishments

> because the traditional framework of pain and personhood [had fallen] apart, [and was being] replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies as in themselves.[146]

In other words, every person possessed an inviolable dignity.[147]

The Enlightenment philosopher Immanuel Kant is largely credited with originating the use of dignity in moral discourse as an innate characteristic possessed by all members of humanity.[148] Within Kant's

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[142] COMMON CODE, *supra* note 135, at Preamble, para. 1.1.

[143] LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY 77–79 (2007).

[144] *See* U.S. CONST. amends. I–X; DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 1 (Fr. 1789). The French declaration that all humans "are born and remain free and equal in rights" is an obvious source for the United Nations Universal Declaration of Human Rights' foundational principle, "All human beings are born free and equal in dignity and rights." HUNT, *supra* note 141, at 17; Universal Declaration of Human Rights, art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[145] HUNT, *supra* note 141, at 112.

[146] *Id.*

[147] Many human rights authorities consider the death penalty incompatible with respect for and protection of human dignity, which is the foundational principle of modern human rights law. International Covenant on Civil and Political Rights, pmbl., G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, 999 U.N.T.S. 171, U.N. Doc. A/6316, at 173 (Dec. 19, 1966) (stating that all human rights "derive from the inherent dignity of the human person."); International Covenant on Economic, Social, and Cultural Rights, pmbl., G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/63/16 (Dec. 16, 1966) (stating the same); High Commission for Human Rights Res. 1997/12, U.N. GAOR, 37th Sess. (April 3, 1997) (The "abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights."); Kindler v. Can., 1991 Carswell Nat 3 (Can.) (WL) ("The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being. It is the annihilation of the very essence of human dignity."); The State v. Makwanyane, 1995 (3) S.A. (CC) at 271 (S. Afr.) (holding that the death penalty violates the South African Constitution because it "destroys life" and "it annihilates human dignity.").

[148] *See* Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 152–53 (Michael J. Meyer & William A. Parent eds., 1992) ("It may well be that the Kantian idea of human dignity is nothing more than the secular counterpart to the Biblical notion of the sanctity of human life,

conception:

> [a] person's worth must be kept distinct from other attributes of the person, in particular the person's merit or value or usefulness. Above all, a person's dignity . . . is not to be seen as a result or product of decent conduct, virtuous behavior, moral rectitude, or respect for the moral law. Rather, it is to be seen as a result of the *capacity* for such conduct.[149]

Dignity is an attribute recognized between persons as stemming from their mutual innate capacity for autonomous moral conduct. Actions that tend to prevent others from exercising that innate capacity violate dignity. Invidious discrimination is a clear example: treating others as though they possess inferior moral capacity and have no *right* to assert their own rights.[150] Torture is another clear example since torture requires treating others as though they have no moral capacity nor right to defend themselves even from severe physical aggression.[151] On the other hand, dignity means that, even in the light of evidence that psychopaths may exist (i.e., persons who seem inherently unable to respect autonomous moral capacity in others), all persons are to be treated as capable of some rehabilitation.[152] Denial to any prison inmate of an opportunity for rehabilitation is a denial of that person's dignity.[153] This was the crux of former California death row chaplain Byron Eschelman's criticism of the death penalty:

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according to which our dignity is established by having been 'created in the image' of God."). Church bodies that traditionally have found the value of humanity in its creation in the "image of God" now also use the term dignity to articulate that ultimate characteristic requiring respect. *See, e.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS, STATEMENT ON CAPITAL PUNISHMENT, http://www.pbs.org/wgbh/pages/frontline/angel/procon/bishopstate.html, <http://perma.cc/6LYG-3FJB> [hereinafter USCCB STATEMENT] ("[A]bolition of capital punishment is [] a manifestation of our belief in the unique worth and dignity of each person from the moment of conception, a creature made in the image and likeness of God.").

[149] Bedau, *supra* note 146 at 153 (emphasis in original).

[150] *See, e.g.*, William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 57 (Michael J. Meyer & William A. Parent eds., 1992) ("[Martin Luther] King's concern with the 'degenerating sense of "nobodiness" . . . experienced by black people in a racist culture is a concern for human dignity.").

[151] *E.g.*, Manfred Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 HUM. RTS. Q. 809, 832 (2006) ("Both torture and slavery can be described as direct and brutal attacks on the core of human dignity and personality.").

[152] *See, e.g.*, U.S. CONFERENCE OF CATHOLIC BISHOPS, RESPONSIBILITY, REHABILITATION, AND RESTORATION: A CATHOLIC PERSPECTIVE ON CRIME AND CRIMINAL JUSTICES (2000), http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm, <http://perma.cc/BL7H-DCJS> ("[B]oth the most wounded victim and the most callous criminal retain their humanity. All are created in the image of God and possess a dignity, value, and worth that must be recognized, promoted, safeguarded, and defended. For this reason, any system of penal justice must provide those necessities that enable inmates to live in dignity.").

[153] *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 166 (2007–2008) ("The U.S. Supreme Court has found no constitutional right to rehabilitation for prisoners, although some lower courts have found Eighth Amendment violations where prison conditions made debilitation likely. By contrast, international law incorporates a right to progressive social reintegration of prisoners. International law has found that barriers to a prisoner's successful reintegration violate his fundamental dignity rights.").

> Those who embrace the death penalty are paying tribute to the static belief that an offender is beyond fundamental growth and dynamic development. They assert that what he seems to be, he is; that what he has been, he always will be. They deny the reality of transformation and redemption. Or they reject the reality of change for everyone but themselves: 'I can change if necessary, but you cannot.'[154]

Over recent decades, massive anecdotal evidence from chaplains, guards, attorneys, relatives, and friends of death row inmates has exposed such dogmatic blanket denial of the capacity for moral change in dangerous offenders as without evidentiary foundation.[155]

The coercion utilized in the death penalty is on a different order than that employed in imprisonment.[156] Imprisonment is restraint; execution is annihilation. The State threatens for years to physically annihilate the inmate and then carries out the threat. Current debates about the "cruelty" of lethal injection—over whether the inmate silently suffers an agonizingly painful heart attack under insufficient sedation—miss what is more fundamentally cruel about execution. One of the principal justifications of execution as punishment for murder is that it might project sufficient terror to deter would-be murderers.[157] The threat of extinction is designed to inspire emotional anguish and fear,[158] and it succeeds in inducing psychological dysregulation in many persons who come into contact with a death penalty case.[159] The cruelty of this

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[154] BYRON ESCHELMAN, DEATH ROW CHAPLAIN 239–240 (1962); *see also* USCCB STATEMENT, *supra* note 146 ("With respect to the difficulties inherent in capital punishment, we note first that infliction of the death penalty extinguishes possibilities for reform and rehabilitation for the person executed as well as the opportunity for the criminal to make some creative compensation for the evil he or she has done. It also cuts off the possibility for a new beginning and of moral growth in a human life which has been seriously deformed.").

[155] Bedau, *supra* note 146, at 173 (internal citations omitted); *see also* PICKETT & STOWERS, *supra* note 2, at xiii ("I met men who had, indeed, committed the crimes for which they were sentenced to die and who displayed genuine remorse. In those years between their crime and their punishment, some changed dramatically. Even on Death Row I saw some men whose lives had regained some degree of promise, purpose, and even dignity. Yet they died the same death as the unrepentant."); Walter C. Long, *Karla Faye Tucker: A Case for Restorative Justice*, 27 AM. J. CRIM. L. 117, 127 (observing how "a remarkable . . . measure of restoration can occur [in the offender] even following [the] most heinous offense.").

[156] *See* Bedau, *supra* note 146, at 169–170 (comparing the coercive control needed to incarcerate offenders with the control exercised over a condemned inmate when they are executed).

[157] *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

[158] BANNER, *supra* note 39, at 10 (quoting VIRGINIA GAZETTE, January 31, 1751, at 1:1) (describing capital punishment as a means of "counterbalancing Temptation by Terror, and alarming the Vicious by the Prospect of Misery.").

[159] *See* BOHM, *supra* note 4, at 236 (arguing that capital punishment's "collateral damage" to, inter alia, defense attorneys, prosecutors, judges, jurors, governors, wardens, death row correctional officers, chaplains, execution team members, and execution witnesses is a "good argument for rethinking the wisdom of the ultimate sanction."); *see generally* Cynthia Adcock, *The Collateral Anti-therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 298 (2010) (addressing the traumatic impact of death sentencing on death penalty lawyers, prison officials, murder victim survivors, and death row families). Arguably, the death penalty also assaults the dignity of those who carry it out. Donald Cabana, a Mississippi warden who participated in executions, observed that the executioner "dies with his prisoner." LIFTON & MITCHELL, *supra* note 4 at 106 (quoting DONALD

psychological impact is compounded by the overwhelming power of the State being brought to bear against an ultimately helpless individual who, at the time of execution, is stripped by the State's action of any recognition of his moral agency, every right ever afforded him, and any possibility to defend himself.[160] This display of "total activity smashing total passivity" highlights the "heart of cruelty."[161]

Prior to the Enlightenment, dignity was an attribute of nobility of station, a characteristic attributed to the royalty of kings or popes.[162] Inquisitors or regular clergy would not attempt to protect the dignity of society's victims, who were many social strata below them and were more likely to be afforded pity than respect. Today, in modern democracies born within the Enlightenment tradition of respecting fundamental human rights, dignity is considered inherent and inviolate in every human being.[163] Every human is to be afforded respect for the potential she holds, *qua* human, to be a moral agent. Texas chaplains participating in executions should ask whether they understand dignity in some way other than such a respect for the moral agency of the prisoner or whether they are in effect hitting the "off" button to their usual attention to the dignity of the prisoners under their care and accepting a "ranking of cruelties."[164]

C. Execution-Day Chaplains Are Required to Act Against Health of Prisoner.

The ACPE Code's provisions prioritizing healing are also at odds with chaplain participation in executions. The Code requires provision of "care that is intended to promote the best interest of the client and to foster strength, integrity, and healing."[165] During the long period of public executions, clergy openly celebrated executions as triumphs for

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CABANA, DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER (1996)). *See also* Sara Rimer, *In the Busiest Death Chamber, Duty Carries Its Own Burdens*, N.Y. TIMES, Dec. 17, 2000 ("Just from a Christian standpoint, you can't see one of these and not consider that maybe it's not right.") (quoting Texas warden Jim Willett, who participated in scores of executions).

[160] During execution, the inmate would appear only to retain a right not to be subjected to severe pain; a right rapidly mooted by his or her own annihilation. *See* discussion *supra* note 127.

[161] Bedau, *supra* note 146, at 168 (quoting PHILLIP P. HALLIE, THE PARADOX OF CRUELTY 90 (1969)).

[162] *See, e.g.*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (including in its definitions of "dignity": "[a]n elevated office, civil or ecclesiastical, giving a high rank in society; advancement; preferment, or the rank attached to it" and "[t]he rank or title of a nobleman.").

[163] *See, e.g.*, William J. Brennan, Jr., Associate Justice, U.S. Sup. Ct., Speech at Georgetown University: The Constitution of the United States: Contemporary Ratification (Oct. 12, 1985) (positing that dignity is the fundamental value underlying the U.S. Constitution: "the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law.").

[164] TERRY K. ALADJEM, THE CULTURE OF VENGEANCE AND THE FATE OF AMERICAN JUSTICE 92 (2008).

[165] COMMON CODE, *supra* note 135, at para. 1.2.

the individual being killed, preaching even at the gallows about the change in eternal fate that would result from the inmate's newfound conversion of heart and belief.[166] In this world view, the condemned was not annihilated; to the contrary, he was marvelously transformed as his earthly body was replaced with a heavenly one and he enjoyed the fellowship of God himself.[167] However, a prison chaplain making such public pronouncement today would not only be violating the Constitution with such an ostentatious endorsement of Christian belief, he would be offending many in today's non-homogenous society since he would be declaring antipathy to what would be considered the inmate's well-being.[168] Today, most prison chaplains—whatever they might believe about an afterlife—probably would constrain themselves to say that only persons who are biologically alive possess the potential for "strength, integrity, and healing."[169] Yet, chaplain participation in an execution actively undermines those traits in the inmate.

D. Virtually All Other Professions Bar Participation in Executions as Unethical.

Virtually all other health, mental health, and social work professional organizations bar participation in state executions as unethical.[170] The American Medical Association (AMA) provides helpful

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[166] *See, e.g.*, COHEN, *supra* note 38, at 63 (describing the "superb gallows theater" of Esther Rodgers' execution). Northern states ended public executions before the Civil War and western states just afterward. Michael A. Trotti, *The Scaffold's Revival: Race and Public Execution in the South*, 45:1 J. SOC. HIST. 195, 201 (2011). However, public executions in the South lasted into the twentieth century, where the principal objects of executions were African Americans, and whites came to resent the "benevolent" religious aspect of executions for making the condemned black man on the gallows—about to enter heaven—appear too heroic to black crowds. *Id.* at 205. The argument has been made that executions went inside in the South (and that public lynchings increased in the region) in order to *deny* black crowds at executions the consolation of religious spectacle, thereby enhancing the terror aspect of executions for them. *Id.* at 209.

[167] *See, e.g.*, COHEN, *supra* note 38, at 44 (quoting SAMUEL CLARK, THE MARROW OF ECCLESIASTICAL HISTORY 851 (1654)) (describing sixteenth century English Puritan evangelist William Perkins as accompanying condemned men to the gallows in order to carry out a public display of last-minute conversion. One prisoner "rose from his knees chearfully; and went up the Ladder again so comforted, and tooke his death with such patience, and alacrity, as if he actually saw himself delivered from the hell which he feared before, and heaven opened for the receiving of his soul, to the great rejoycing of the beholders.").

[168] *See* Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (holding that "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). An inmate's family members, moreover, arguably would have family association rights to be present under the First and Fourteenth Amendments. *See generally* Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 BOSTON U. PUB. INT. L. J. 195 (2000) (defending substantive due process family rights of inmates' families). On the basis of personal experience as a death penalty habeas attorney, the author is well aware of instances in which inmates' families have found chaplain participation on execution day to violate their consciences.

[169] COMMON CODE, *supra* note 135, at para. 1.2.

[170] *See, e.g.*, AM. B. OF ANESTHESIOLOGY, COMMENTARY: ANESTHESIOLOGISTS AND CAPITAL PUNISHMENT (2010), www.theaba.org/pdf/CapitalPunishmentCommentary.pdf, <perma.cc/WWX5-E2Y9> (providing that anesthesiologists should not participate in an execution "on the grounds that

insight into what "participation" in executions means:

> (1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; and (3) an action which could automatically cause an execution to be carried out on a condemned prisoner.[171]

Professionals may not provide medications contributing to execution, monitor vital signs, or render technical information.[172] "Attending or observing an execution as a physician" also is barred as unethical, while witnessing an execution in a "nonprofessional capacity" or as an invitee of the condemned person is explicitly not barred.[173] Pre-execution medical care for the condemned, by "relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution" is allowed.[174]

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physicians are members of a profession dedicated to preserving life when there is hope of doing so."); AM. CORRECTIONAL HEALTH SERVICES ASS'N, THE ACHSA CODE OF ETHICS No. 10 (1996), http://achsa.tripod.com/cofe.htm, <http://perma.cc/396P-GHBL> ("Not be involved in any aspect of execution of the death penalty."); AM. MED. ASS'N, AMA CODE OF ETHICS: OPINION 2.06—CAPITAL PUNISHMENT (1980), http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page, <http://perma.cc/KK9D-SURK> ("A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."); AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON CAPITAL PUNISHMENT (2008) (adopting the American Medical Association statement); AM. PUB. HEALTH ASS'N, PARTICIPATION OF HEALTH PROFESSIONALS IN CAPITAL PUNISHMENT (2001), http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/13/02/participation-of-health-professionals-in-capital-punishment, <http://perma.cc/BPP8-WB4Q> ("[r]esolv[ing] that the APHA publicly reaffirm its March 1994 collaborative statement to all health professional societies and state licensing and discipline boards that health professional participation in executions or pre-execution procedures is a serious violation of ethical codes."); INT'L FED'N OF SOC. WORKERS, WORLD DAY AGAINST THE DEATH PENALTY: IFSW STATEMENT (2010), http://ifsw.org/news/world-day-against-the-death-penalty-ifsw-statement/, <http://perma.cc/MLV6-HRFG> ("The Social Work profession respects the inherent dignity and worth of each person. The International Social Work Code of Ethics prohibits contributing to inhumane treatment of people. . . . For these reasons IFSW urges all nations to abolish the death penalty."); NAT'L ASS'N OF SOC. WORKERS, SOCIAL WORK SPEAKS: EIGHTH EDITION—NASW POLICY STATEMENTS 2009–2012 40–41 (8th ed., 2009) ("NASW's broad ethical principle that social workers respect the inherent dignity and worth of each person prohibits support of the death penalty. . . [A]ll state authorities, which have laws that provide for capital punishment, should abolish the death penalty for all crimes."); SOC'Y OF CORRECTIONAL PHYSICIANS, THE SCP'S CODE OF ETHICS (1997), http://societyofcorrectionalphysicians.org/resources/code-of-ethics <http://perma.cc/4NKN-3754> ("Not be involved in any aspect of execution of the death penalty."); WORLD MED. ASS'N, WMA DECLARATION OF TOKYO—GUIDELINES FOR PHYSICIANS CONCERNING TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN RELATION TO DETENTION AND IMPRISONMENT (1975), http://www.wma.net/en/30publications/10policies/c18/, <http://perma.cc/2DCV-7GQ9> ("The physician shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offense of which the victim of such procedures is suspected.").

[171] AM. MED. ASS'N, *supra* note 168.

[172] *Id.*

[173] *Id.*

[174] *Id.*

Under the AMA terms, the Texas chaplain's presence in the execution chamber with the warden, no matter the chaplain's motive, would be prohibited participation "contribut[ing] to the ability of another individual to directly cause the death of the condemned."[175] However, AMA rules probably would not prohibit the chaplain from merely witnessing the execution from outside of the chamber—especially if the chaplain is not working in an official capacity.[176] A question remains: does the soothing of an inmate by pastoral means, up until the moment he is ushered into the execution chamber, contribute to the ability of the authorities to cause the death of the inmate? Such aid arguably induces the defendant not to defend himself to the extent that he is able under the circumstances.[177] The AMA rules allowing physicians to tranquilize the prisoner before execution are distinguishable because the physician treats only the physical symptoms of anxiety and only at the inmate's request.[178] The chaplain, on the other hand, may be engaged in trying to convince the inmate to be calm and submit to the procedure without protest.[179] This, unlike the physician's intervention, directly affects the inmate's autonomy as a moral agent in the most coercive of situations.

Ethics codes for the correctional health associations—the American Correctional Health Services Association and the Society of Correctional Physicians—may partially answer this question, as they require professionals to respect inmates' dignity, to always act in ways "that merit trust and prevent harm," to ensure the inmates' autonomy, and to "promote a safe environment" for the inmates.[180] One of "the essentials of honorable behavior for correctional health officials" is that they "[n]ot be involved in any aspect of execution of the death penalty."[181] The prison sees the chaplain's role as ensuring a safe environment for the execution—and a surely unsafe one for the inmate under his care—because the chaplain is an essential part of the execution team.[182] The correctional health service codes help to clarify that even the chaplain's work with the inmate outside the execution chamber in preparation for

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[175] *Id.*

[176] *See id.* (allowing physician to "witness[] an execution in a totally nonprofessional capacity" or "witness[] an execution at the specific voluntary request of the condemned person, provided that the physician observes the execution in a nonprofessional capacity.").

[177] *See* Editorial, *Many Will Continue to Doubt Graham's Guilt*, HOUS. CHRON., June 23, 2000, at A36 (describing Texas inmate Gary Graham, who declared his innocence to the end, having to be subdued by guards before execution); *Killer Resists Execution*, AMARILLO GLOBE-NEWS, Nov. 17, 1999, http://amarillo.com/stories/1999/11/17/tex_LD0696.001.shtml#.Vn9ChYvZPKA, <http://perma.cc/P3WP-84WU> (describing Texas inmate who resisted execution by obliging guards to carry him into the chamber).

[178] AM. MED. ASS'N, *supra* note 168.

[179] *See* sources cited *supra* note 4 and accompanying text.

[180] AM. CORRECTIONAL HEALTH SERVICES ASS'N, *supra* note 168; SOC'Y OF CORRECTIONAL PHYSICIANS, *supra* note 168.

[181] AM. CORRECTIONAL HEALTH SERVICES ASS'N, *supra* note 168.

[182] *See* Bohm, *supra* note 4 ("Prison chaplains are an instrumental part of the execution team. . . . Prison administrators believe that it is important to have the prison chaplain present during the deathwatch and execution to address any staff problems. . . . Importantly, they also help to make condemned inmates compliant for execution.").

the event may infringe upon the inmate's dignity and be ethically problematic, due to the codes' emphasis on trust, harm prevention, inmates' autonomy, creation of safe environment, and avoidance of "any aspect of execution of the death penalty."[183]

VI. CHAPLAIN PARTICIPATION IN EXECUTION IS UNETHICAL.

As long as the Texas Department of Criminal Justice assigns its prison chaplains to do execution-day work, each chaplain will be required to exercise his or her own conscience—weighing the law, ethics codes, general ethical considerations, and moral and religious norms—to determine what to do.[184] In the heat of execution preparation, chaplains will be tempted to allay their doubts about their already compromised role in relation to the inmate by thinking of themselves as serving not only the inmate and prison staff, but even other persons that they might imagine to have interests in a calm execution, such as relatives of the crime victim[185] or the inmate's family members[186] who Texas allows to observe the execution.

The chaplain must choose whether the inmate is his client. If that is the case, chaplaincy and healthcare ethics require chaplains to be "single minded in their focus" on the interests of the inmate.[187] Once the process has moved into the execution chamber, however much the chaplain "may wish to be there for [the] inmate," in that situation "the inmate is not really [his] patient."[188] Instead, clergy assistance "is being made an

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[183] SOC'Y OF CORRECTIONAL PHYSICIANS, *supra* note 168.

[184] *See* Gerald Dworkin, *Patients and Prisoners: the Ethics of Lethal Injection*, 62 ANALYSIS 181, 184 (2002) ("A citizen of a democratic society cannot regard the existence of an authorized law as irrelevant to her obligations. But citizens also retain the right and duty to critically evaluate the law and its impact in specific situations in order to form a judgment on its justice. As there are unjust laws, there may be codes which contain unjust or immoral provisions. The provisions of a professional code have to be judged in the light of general ethical considerations which are binding on persons independent of their particular professional status.").

[185] *Cf.* Michael Keane, *The Ethical "Elephant" in the Death Penalty "Room"*, 8 AM. J. BIOETHICS 45, 49 (2008) (arguing that physicians opposing the death penalty may harm relatives of the victim "who have already been through almost unimaginable torment" by causing delay, halting, or advocating against an execution). Execution-day chaplains likely also consider their role vis-à-vis the victim's family as they prepare for and carry out their duties.

[186] *Cf.* Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354:12 NEW ENG. J. MED. 1221, 1226 (2006) (quoting physician participant: "I think that if I had to face someone I loved being put to death, I would want that done by lethal injection, and I would want to know that it is done competently.") When considering the effect execution of a loved one will have on the inmate's family members, execution-day chaplains likewise probably view themselves as meeting deep emotional and spiritual needs on execution day by providing competent, experienced support.

[187] Dworkin, *supra* note 182, at 188.

[188] *Cf.* Gawande, *supra* note 183, at 1229 (noting that "the medical assistance provided [at an execution would] primarily serve[] the government's purposes—not the inmate's needs as a patient.") Similarly, chaplains serve the interest of the state in their facilitation roles on execution day, rather than purely serving their "client."

instrument of punishment."[189] Justifying the continued presence of the chaplain in the chamber is akin to excusing chaplain participation in torture on the ground that the chaplain's presence lessens the victim's pain.[190] In the ethics of medicine, it is impermissible for the "healing hand to act as the hurting hand."[191] So it should be in the ethics of chaplaincy.

The ACPE Code requires chaplains to "promote justice in relationships with others, in [one's] institutions and in society"[192] and to "advocate for changes in their institutions that would honor spiritual values and promote healing."[193] Indeed, for half a century, some American prison chaplains with years of experience participating in executions have pursued positive institutional change by becoming public advocates for condemned inmates and ardent opponents of the death penalty.[194] It remains to be seen how the system would adjust if prison chaplains chosen for execution-day service might begin to turn down that role in greater numbers. Undoubtedly, a publicly unknown number of chaplains have rejected service when asked, because the Texas job of execution-day chaplaincy must in part respect ethical or other qualms that chaplains might have. What might the system do if it became hard for it to find a willing chaplain?

Texas execution-day prison chaplains are players, not bystanders, in the execution drama as Christian clergy generally have been for centuries. When Texas chaplains are in the chamber, they are there for

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[189] *Cf. id.* (arguing that if doctors participate in executions, even under the auspice of providing competence and comfort to the inmate during the execution process, "[m]edicine is being made an instrument of punishment. The hand of comfort that more gently places the IV . . . is also the hand of death."). Chaplains inevitably face a similar quandary.

[190] Notably, the death penalty is torture in fact—an act by which severe "mental" pain is "intentionally inflicted on a person . . . punishing him for an act he . . has committed." United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, at art. 1 (Dec. 10, 1984). However, the death penalty is not recognized as torture in law because the drafters of the U.N. torture convention made an exception for it as a "lawful sanction" at a time, the 1950s, when widespread acceptance of the death penalty around the world would have frustrated adoption of the convention. Christina M. Cerna, *Universality of Human Rights: The Case of the Death Penalty*, 3 ILSA J. INT'L & COMP. L. 465, 475 (1997) ("[T]he imposition of the death penalty itself is the most extreme form of torture imaginable, but is excluded from the definition of torture by means of a legal fiction."). *See also* Eric Prokosch, *The Death Penalty Versus Human Rights*, *in* THE DEATH PENALTY: ABOLITION IN EUROPE 17, 18 (1999) ("Threatening to kill a prisoner can be one of the most fearsome forms of torture. As torture, it is prohibited. How can it be permissible to subject a prisoner to the same threat in the form of a death sentence, passed by a court of law and due to be carried out by the prison authorities?").

[191] Dworkin, *supra* note 182, at 185 ("[T]here is an argument against the participation of a doctor in torture that is not predicated on torture itself being morally forbidden. It is predicated on the impermissibility of the healing hand acting as the hurting hand. It is a perversion of a role which is defined in terms of healing, of alleviating pain, of increasing the patient's resistance to injury, to use one's skills, training and education to increase the pain and weaken the resistance of those to whom one administers these skills.").

[192] COMMON CODE, *supra* note 139, at para. 4.1.

[193] *Id.* at para. 4.8.

[194] *See e.g.*, ESCHELMAN, *supra* note 152, at 9 (reflecting on the futility of execution and presenting capital punishment as an "essential symptom of our cultural condition . . . . When the deeper condition is adequately healed, the surface symptom will vanish.").

the benefit of the warden, the guards, the prison officials observing from a hidden room, the press and public, and the respective witnesses on the inmate's and victim's sides. Carl Kinnamon's chaplain pressing him to the gurney is not an anomaly. It faithfully renders a tragic human tendency, captured in words by Lionel Trilling: "Some paradox of our nature leads us, when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion."[195] Kinnamon's chaplain failed in his performance on behalf of the system and a calm, orderly execution, perhaps because he panicked out of genuine and anguished care for the prisoner.

The participation of clergy in Texas executions should be held unconstitutional. Furthermore, chaplaincy professional licensing organizations should address the ethics of the prison chaplain's role in preparing the inmate for execution as well as executing him. Chaplains themselves should discern their own duty by reflecting on chaplaincy ethics rules, correctional health care ethics rules, general health care ethics rules and principles, and the history of clergy participation in executions. They also should consider that the "modern" respect for human dignity that undergirds ethical practice is reflected in the non-violent ethos championed by leaders of the Christian church before the church became aligned with the Constantine empire. The church fathers Origen, Tertullian, and Justin Martyr opposed the taking of human life for any reason.[196] Tertullian said that Jesus, "by taking away Peter's sword, disarmed every soldier thereafter."[197] An early Christian writer, Athenagorus of Athens, forcefully protested against the idea that Christians would participate in the Roman death penalty or any homicide: "[W]e, deeming that to see a man put to death is much the same as killing him, have abjured such spectacles. How then, *when we do not even look on*, lest we should contract guilt and pollution, can we put people to death?"[198]

With Roman adoption of Christianity as the official state religion and the consequent rising temptation to use violence against heresy, the church slowly adopted the sword. By 410 C.E., Augustine argued, "Since the agent of authority is but a sword in the hand, and is not responsible for the killing, it is in no way contrary to the commandment, 'Thou shalt not kill,' to wage war at God's bidding, or . . . to put criminals to death."[199] Many who condone the modern death penalty side with

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[195] James F. Childress & Courtney C. Campbell, *"Who is a Doctor to Decide Whether a Person Lives or Dies?" Reflections on Dax's Case*, *in* DAX'S CASE: ESSAYS IN MEDICAL ETHICS AND HUMAN MEANING 23, 40 (Lonnie D. Kliever ed. 1989) (quoting Lionel Trilling, *Manners, Morals, and the Novel*, 10:1 KENYON REVIEW 11 (1948)).

[196] BROCK & PARKER, *supra* note 25, at 183–184.

[197] *Id.* at 184 (internal quotations omitted).

[198] MEGIVERN, *supra* note 19, at 20–21 (internal quotation omitted) (emphasis added).

[199] *Id.* at 41 (internal quotation omitted).

Augustine,[200] and Augustine is strikingly "modern" in his pronouncement for he surely describes the situation in Texas and other death-penalty states where the execution process obscures responsibility for the killing:

> No one is responsible for this death. The juries merely decide on the facts, the judges merely utter the sentence prescribed by law, the prosecutors and lawyers are just doing their jobs. The warden is sympathetic and, on the last night, does everything he can to make the condemned comfortable. There is no one to be angry at. The participants are turned into agents, not people; the Condemned, the State, the Executioner. A priest stands by and certifies that it is a moral event.[201]

Texas ministers and priests should refuse to participate in execution-day chaplaincy. They should take responsibility when it most matters, *before* executions occur, and tell the state of Texas they will not "stand by" the killing of another person. They should consider the word of Jesus that he himself is found in the prisoner,[202] echoed in the exhortation of the church father Athanasius: "How does it come about that each one of us has turned away from his brother, despising the peace which we had been given? Yet your brother, your neighbor, is not only a man, but is God himself!"[203] They should join their brethren in other states where chaplains are not allowed to stay in the chamber during an execution and simply say they will no longer go there.

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[200] Justice Antonin Scalia, for example, has asserted that "the more Christian a country is the *less* likely it is to regard the death penalty as immoral. Abolition has taken its firmest hold in post-Christian Europe, and has least support in the church-going United States." Scalia, *supra* note 52 (emphasis in original). By this he must mean: the more Christian a country is in a *Constantinian* sense, the more support there will be for the death penalty. *Cf.* CORNELL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 147–49 (2005) ("America is undeniably a highly religious country, and the dominant religion by far is Christianity, and much of American Christianity is a form of Constantinian Christianity. . . . Constantinian Christianity has always been at odds with the prophetic legacy of Jesus Christ. . . . Constantinian strains of American Christianity have been on the wrong side of so many of our social troubles, such as the dogmatic justification of slavery and the parochial defense of women's inequality. It has been the prophetic Christian tradition, by contrast, that has so often pushed for social justice.").

[201] BRUCE JACKSON & DIANE CHRISTIAN, DEATH ROW: A DEVASTATING REPORT ON LIFE INSIDE THE TEXAS DEATH HOUSE 291–92 (1980).

[202] *Matthew* 25:34–36 (New International) ("Then the King will say to those on his right, . . . I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.").

[203] BROCK & PARKER, *supra* note 25, at 184 (quoting JEAN-MICHEL HORNUS, IT IS NOT LAWFUL FOR ME TO FIGHT: EARLY CHRISTIAN ATTITUDES TOWARD WAR, VIOLENCE, AND THE STATE (Trans. Alan Kreider & Oliver Coburn) 71 (1980)).

Notes

The Special Needs Doctrine, Terrorism, and Reasonableness

Karly Jo Dixon*

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual[,] and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[1]

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*B.A., The University of Texas, 2012; J.D., The University of Texas School of Law, expected May 2016. Thanks to the staff and board of the TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS, and especially to my editor, Kevin Lipscomb. I would also like to thank Professor Ronald Sievert, who encouraged me to write this note despite his disagreement with my conclusions.

I. INTRODUCTION

The last decade and a half has seen the rise of motivated and mobilized terrorists across the globe.[2] In order to protect citizens and to prevent future terrorist attacks, law enforcement agencies and the intelligence community in the United States are constantly monitoring communications and searching for those with plans to attack the U.S.[3] The search for terrorists, both through the use of electronic surveillance and through physical searches, implicates the Fourth Amendment of the United States Constitution. The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[4]

The constitutionality of a search conducted by a governmental actor turns on whether the search is reasonable in light of the circumstances in which it is conducted.[5] A search supported by probable cause and the issuance of a warrant is presumed to be reasonable and generally constitutional.[6] One of the exceptions to the probable cause standard for searches is when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[7]

This paper will discuss the special needs doctrine and the ways in which the doctrine applies to searches conducted in response to the threat of terrorism. First, this paper will discuss the special needs doctrine and three contexts in which the doctrine justifies searches lacking probable cause. These three proposed special needs are administrative searches, public safety, and foreign intelligence collection. The analysis will look at each of these special needs in turn and apply that specific situation to anti-terrorism searches. This application of the doctrine will be used to determine if and when terrorism can be a special need such that anti-

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[1] Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973) (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)) (internal quotations omitted).

[2] *See* Geraldine Baum & Maggie Farley, *Terror Attack*, L.A. TIMES (Sept. 11, 2001), http://articles.latimes.com/2001/sep/11/news/ss-44619, <http://perma.cc/2XU6-2DRW>; Tom Vanden Brook, ISIL Activity Drives Up Pentagon Threat Level, USA TODAY (May 8, 2015), http://www.usatoday.com/story/news/nation/2015/05/08/pentagon-security-isis/26976725/, <http://perma.cc/E6U7-EZ3H>.

[3] *See, e.g.*, Ric Simmons, *Searching for Terrorists: Why Public Safety is not a Special Need*, 59 Duke L.J. 843, 883 (2010).

[4] U.S. Const. amend. IV.

[5] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

[6] *Id.*

[7] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).

terrorism searches can be conducted absent probable cause. Next, the paper will argue that under the Fourth Amendment, as interpreted by the U.S. Supreme Court, searches justified by terrorism are only reasonable, and therefore constitutional, in certain limited contexts.

II. THE SPECIAL NEEDS DOCTRINE

The special needs doctrine evolved from the language of the Fourth Amendment, which determines that searches must be reasonable in order to be constitutional.[8] Absent individualized suspicion leading to probable cause and the issuing of a warrant, a search can be reasonable if the search serves a valid special need.[9] A valid special need exists in situations where the search's purpose is something other than the detection of crime and is outside of the normal needs of law enforcement.[10] The special needs doctrine provides a narrow exception to the probable cause requirement and is a "closely guarded category of constitutionally permissible suspicionless searches."[11]

An example of a search based on individualized suspicion of wrongdoing is a urinalysis test of an individual who is on probation for a drug offense.[12] This search comports with Fourth Amendment requirements, as would a urinalysis of a probationer after he tells his probation officer he has taken drugs.[13] The searching of a probationer who has not been arrested for or convicted of a drug-related offense and who does not have a history of substance abuse would lack probable cause and would be unreasonable absent a special need.[14] However, the courts have held that "a State's operation of a probation system" is a special need.[15] Supervision of probationers is outside the realm of ordinary crime control because it seeks to supervise offenders and manage their transition towards becoming law-abiding citizens, not to uncover further evidence of wrongdoing.[16] Other situations where the Court has found a special need include: drug urinalysis searches to deter drug use and to prevent promotion of drug users to sensitive positions within the U.S. Customs Service,[17] drugs tests of railroad employees to limit the threat to public safety of railway crashes,[18] and searches

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[8] *Id.*
[9] *Id.*
[10] *See id.*
[11] Chandler v. Miller, 520 U.S. 305, 309 (1997).
[12] *See* United States v. Knights, 534 U.S. 112, 122 (2001) (warrantless search of probationer is constitutional based on a showing of reasonableness).
[13] Berry v. District of Columbia, 833 F.2d 1031, 1035 (D.C. Cir, 1987).
[14] *Id.*
[15] *Knights*, 534 U.S. at 117.
[16] Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).
[17] Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988).
[18] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 633 (1989).

conducted of students within the school environment.[19] These situations create special needs, in part, because requiring a warrant would be impracticable[20] or would unduly frustrate or interfere with the government's proposed purpose for the search.[21] Although some of these situations resemble searches to find evidence of criminal activity and appear to serve a normal law enforcement function, they do not because the results of the search were not turned over to law enforcement.[22]

In contrast to the cases where the Supreme Court upheld the constitutionality of suspicionless drug urinalysis searches, in *Ferguson v. City of Charleston*, the Court declined to find a special need because there was no valid non-law enforcement purpose for the search.[23] Specifically, the Court found that pregnant women could not be drug tested for the purpose of collecting information that could lead to their prosecution for drug use while pregnant.[24] The Court called the distinction between whether the results of the search were turned over to law enforcement or not "critical" in the special needs analysis.[25] Even though a non-law enforcement purpose existed—to get drug addicted women into treatment—"the extensive involvement of law enforcement officials at every stage of the policy" pushed the search outside of the special needs doctrine and into the general category of crime control.[26]

After a court has determined that an important governmental interest other than crime control exists for a search, the court will engage in a balancing test to determine if the search is reasonable.[27] The test balances the governmental interest against the individual's privacy interests "to assess the practicality of the warrant and probable-cause requirements in the particular context."[28]

> These balancing factors include (1) the weight and immediacy of the governmental interest, (2) the nature of the privacy interest allegedly compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing the government interest.[29]

This balancing test is not a bright-line test, but is based on the facts

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[19] Vernonia Sch. Dist. v. Acton, 515 US 646, 657–60 (1995) (school district's drug testing of student athletes was reasonable due to special needs of the school environment and students lowered expectations of privacy).

[20] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).

[21] *Von Raab*, 489 U.S. at 666.

[22] *See Skinner*, 489 U.S. at 620–21 (drug tests are not conducted to prosecute employees for drug use, but to prevent train accidents).

[23] Ferguson v. City of Charleston, 532 U.S. 67, 83–84 (2001).

[24] *Id.* at 86.

[25] *Id.* at 79.

[26] *Id.* at 84.

[27] *Skinner*, 489 U.S at 619.

[28] *Id.*

[29] MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (citations omitted) (quotation marks omitted).

and interests in each case as a context-specific inquiry.[30] A special need exception to the probable cause requirement is reasonable when the individual's privacy interests intruded on by the search are low and the governmental needs furthered by the search are high.[31] For example, in *Chandler v. Miller*, the Supreme Court held that drug testing of all candidates for state office in Georgia was not a special need.[32] The Court noted that there was a non-law enforcement purpose and the intrusion on the individual's privacy interest was minimal.[33] However, the Court found the test unreasonable because there was not a substantial governmental interest that justified deviating from the probable cause requirement.[34] Whether suspicionless administrative searches, public safety, and the gathering of foreign intelligence are valid special needs in the face of terrorism concerns turns on whether this balancing test can be passed in the specific context within which each search is conducted.

III. SUSPICIONLESS ADMINISTRATIVE SEARCHES

The special needs doctrine is an extension and evolution of the doctrine of administrative searches. The Supreme Court did not use the phrase "special needs" until 1985.[35] However, the Supreme Court created the precedent for the special needs doctrine by allowing administrative searches without probable cause for non-law enforcement purposes where the burden of obtaining a warrant would be likely to "frustrate the governmental purpose behind the search."[36] In 1967, in *Camara v. Municipal Court*, the Court reasoned that code enforcement inspectors could conduct area inspections without probable cause or a criminal warrant.[37] The Court justified this holding by balancing the State's interest in preventing public hazards, such as fires, with the fact that the inspections "are neither personal in nature nor aimed at the discovery of evidence of crime."[38] Administrative searches for code enforcement purposes also "involve a relatively limited invasion of the urban citizen's privacy."[39] In this case, however, the Court ruled in favor of the plaintiff, who faced criminal consequences for refusing such a search.[40] The Court ruled for the plaintiff because there was no urgency or other frustrating factors to bring the warrantless search under the reasonableness

[30] Chandler v. Miller, 520 U.S. 305, 314 (1997).
[31] *Skinner*, 489 U.S. at 624.
[32] *Chandler*, 520 U.S. at 318.
[33] *Id.*
[34] *Id.* at 318–19.
[35] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).
[36] Camara v. Mun. Ct., 387 U.S. 523, 533–34 (1967).
[37] *Id.* at 537.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 540.

requirement of the Fourth Amendment.[41]

A. Closely Regulated Businesses

This doctrine of administrative searches articulated in *Camara* has extended to the warrantless administrative searches of closely regulated businesses.[42] Warrantless searches can be reasonable when there is a regulatory scheme that authorizes such searches.[43] The regulatory statute must act in place of a traditional warrant by "advis[ing] the owner of the commercial premises that the search is being made pursuant to the law, has a properly defined scope, and it must limit the discretion of the inspecting officers."[44] Administrative searches of closely regulated businesses follow the balancing scheme of special needs analysis. There must be a substantial governmental interest in both the regulatory scheme and the inspection, which weighs in favor of the government.[45] On the other side of the balance are the privacy interests of the individual, which are significantly lessened due to acquiescence to the regulatory scheme by engagement in the closely regulated business.[46] The Supreme Court has found valid suspicionless administrative searches across a wide range of regulated industries, including liquor purveyors,[47] federally licensed firearm dealers,[48] and vehicle dismantlers.[49]

Many closely regulated businesses and industries are key targets for terrorists' attacks. Terrorism, therefore, may be the justification for the regulatory scheme, but standing alone, it is not a justification for lowering the probable cause standard for these types of searches. Warrantless administrative searches are reasonable because the regulations provide the same notice and protections as a warrant.[50] Statutorily authorized searches must be regular and necessary to monitor the business within the statutory guidelines.[51] In *Club Retro LLC v. Hilton*, a raid conducted on a business engaged in liquor sales, which is a closely regulated business, was held to be unconstitutional because the statutes governing the business did not authorize the manner and scope of the search.[52] Although there is no case law directly on point, routine

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[41] *Id.*

[42] Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77 (1970) (liquor purveyor is engaged in a closely regulated industry, and Congress has created rules that govern inspection that are reasonable but do not require probable cause).

[43] New York v. Burger, 482 U.S. 691, 702 (1987).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 700.

[47] *Colonnade*, 397 U.S. at 75.

[48] United States v. Biswell, 406 U.S. 311, 317 (1972).

[49] *Burger*, 482 U.S. at 705.

[50] *Id.* at 702.

[51] *Id.*

[52] Club Retro LLC v. Hilton, 568 F.3d 181, 200 (5th Cir. 2009).

searches of closely regulated businesses that raise terrorism concerns—such as nuclear power plants and shipyards—fall within the administrative search doctrine and are constitutional, absent probable cause, when there is a valid statutory scheme.[53] The section on the special need of public safety will discuss when an otherwise unreasonable search conducted outside of the regulatory scheme might be constitutional absent the requisite probable cause.[54]

Because the airline industry is closely regulated, the courts have justified suspicionless searches of airline passengers with the statutes that authorize these routine searches.[55] The statutes that govern airline passenger searches were justified when enacted by Congress by the real threat of hijackings and terrorist activity related to air travel.[56] Although preventing terrorist attacks may be the goal of suspicionless airline passenger searches,[57] the special need is not terrorism. Rather, the special need is created by the statutory scheme that regulates and establishes a constitutionally reasonable justification for the searches.

B. Checkpoint Searches

Airport searches are also constitutional under the administrative search doctrine as checkpoint searches.[58] Suspicionless checkpoint searches are constitutional under the Fourth Amendment when there is a non-law enforcement purpose and a court finds a favorable balance between "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[59] Other examples of valid special needs in the context of checkpoint searches include sobriety checkpoints[60] and border checkpoints.[61] While rejecting drug interdiction as a valid non-law enforcement reason for a checkpoint, the Supreme Court said "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist

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[53] *See Burger*, 482 U.S. at 700 ("Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise.") (citations omitted).

[54] *See infra* text accompanying notes 74–125.

[55] United States v. Marquez, 410 F.3d 612, 616 (9th Cir. 2005).

[56] *See* Simmons, *supra* note 3, at 846.

[57] Corbett v. Transp. Sec. Admin., 767 F.3d 1171, 1180 (11th Cir. 2014).

[58] United States v. Hartwell, 436 F.3d 174, 178 (3d Cir. 2006).

[59] Illinois v. Lidster, 540 U.S. 419, 420 (2004) (internal quotations omitted) (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).

[60] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (noting the low level of intrusiveness of the brief searches and the magnitude of "alcohol-related death and mutilation on the nation's roads").

[61] United States v. Martinez-Fuerte, 428 U.S. 543, 557–58 (1976) (noting the low level of intrusiveness of the visual searches, the lowered expectation of privacy in a vehicle, and the government's high concern at the border related to smuggling and immigration issues). *See infra* text accompanying notes 84–87.

attack."[62]

The Supreme Court of Massachusetts addressed this issue of how to appropriately tailor roadblocks to interdict terrorists in *Commonwealth v. Carkhuff*.[63] The Massachusetts court held that stopping all persons traveling near a reservoir with the goal of preventing terrorist attacks was not constitutional.[64] As a threshold matter, the court found that in light of the recent September 11 terrorist attacks,[65] "preventing potential terrorist saboteurs from contaminating or interrupting the water supply by keeping them away from the reservoir in the first place" was a valid non-law enforcement reason to set up a road block.[66] However, the search procedures instituted were too intrusive.[67] Also, no prior warning was given to motorists concerning the search and the court found "where the objective of a proper administrative search is prevention, not apprehension of criminals, the giving of notice operates to reduce the intrusiveness of the subsequent stop without undermining the government's legitimate objective."[68] Given the circumstances, the court ordered a suppression of the evidence because the search was not reasonable.[69]

In addition to searches being appropriately tailored to reduce intrusiveness, searches must be implemented because of imminent and exigent threats.[70] The reasonableness of a roadblock, absent probable cause or reasonable suspicion, depends upon the imminence and exigence of the terrorist threat. Roadblocks to stop general terrorism are not constitutional, just like roadblocks to stop general drug trafficking are not constitutional.[71] Stopping either terrorism or drug trafficking is a general crime control function and does not, in the eyes of the Court, rise to the same magnitude as drunk driving and border security.[72] Although terrorism is viewed as a constant threat in the United States today, without a specific and imminent threat, roadblocks are not a

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[62] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[63] *See generally* Commonwealth v. Carkhuff, 441 Mass. 122 (Mass. 2004).

[64] *Id.* at 129–30.

[65] *Id.* at 124. The stop occurred just days after the September 11, 2001 attacks on the World Trade Center in New York.

[66] *Id.* at 127.

[67] *Id.* at 127–28.

[68] *Id.* at 130.

[69] *Id.*

[70] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[71] *Id.*

[72] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (annual death toll on the nation's highways tops 25,000); U.S. DEPT. OF STATE, BUREAU OF COUNTERTERRORISM, TERRORISM DEATHS, INJURIES AND KIDNAPPINGS OF PRIVATE U.S. CITIZENS OVERSEAS IN 2013 (2013), http://www.state.gov/j/ct/rls/crt/2013/224833.htm, <http://perma.cc/SDZ3-MDRV> (sixteen non-military U.S. citizens were killed by terrorists oversees in 2013); Wm. Robert Johnston, TERRORIST ATTACKS AND RELATED INCIDENTS IN THE UNITED STATES (July 19, 2015), http://www.johnstonsarchive.net/terrorism/wrjp255a.html, <http://perma.cc/T8EQ-EGFY> (table detailing all terrorist related fatalities and injuries in the U.S. since 1865); John Mueller & Mark G. Stewart, *Witches, Communist, and Terrorists: Evaluating the Risks and Tallying the Costs*, 38 HUMAN RIGHTS 18, 18 (2011) (explaining the risk of terrorism in the U.S. is "massively exaggerated").

constitutional means to search for general terrorist activity, which is indistinguishable from general criminal activity.[73]

IV. PUBLIC SAFETY

Public safety is commonly invoked as a special need to lessen the probable cause standard. Although "the Court has repeatedly sanctioned searches conducted without probable cause where significant safety and security concerns were present,"[74] these safety concerns were both imminent and specific.[75] In the special needs analysis, the non-law enforcement purpose cannot be blanket public safety, but instead, public safety in a specific context.[76] "Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as reasonable .... [b]ut where ... public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search ...."[77]

In *Skinner v. Railway Labor Executives' Association*, the Supreme Court found the threat to public safety of railway crashes to be substantial, real, and a special need.[78] First, the prevention of railway accidents was determined to be a non-law enforcement purpose.[79] The analysis of whether railway safety was a law enforcement function was bolstered by the fact that these searches were "not to assist in the prosecution of employees," but rather "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."[80] After determining that a non-law enforcement purpose existed, the Court then balanced the government's interests, which included the need to act quickly after an accident to get accurate toxicology data with the minimal intrusion of a blood, breath, or urine test on an individual.[81] It was also noted that railway employees had a diminished expectation of privacy because of the high level of regulation that exists in the railroad industry.[82] The Court held that "in light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological

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[73] *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (U.S. FISA Ct. Rev. 2002) ("International terrorism refers to activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.") (internal quotations omitted).

[74] Ronald J. Sievert, *Time to Rewrite the Ill-Conceived and Dangerous Foreign Intelligence Surveillance Act of 1978*, 3 NAT'L SEC.. L.J. 47. 76–77 (2014).

[75] *E.g.*, Chandler v. Miller, 520 U.S. 305, 319 (1997).

[76] *Id.* at 323.

[77] *Id.* (citations omitted) (internal quotation marks omitted).

[78] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620 (1989).

[79] *Id.* at 620.

[80] *Id.* at 620–21.

[81] *Id.* at 624.

[82] *Id.* at 627.

tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees," these suspicionless searches were reasonable.[83]

The U.S. Supreme Court has also found there to be a special need related to public safety in deterring and preventing drug use among U.S. Customs Service employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.[84] The special need used to justify the searching of U.S. Customs Services employees overlaps with the public safety concerns that arise at the border.[85] Special concerns raised by the nature of the border have created a presumption of reasonableness for border searches that is unique in Fourth Amendment jurisprudence.[86] The border itself creates a special need "pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, [border searches] are reasonable simply by virtue of the fact that they occur at the border."[87] Searches at the border are reasonable absent probable cause or even reasonable suspicion.[88] A balancing test is still conducted, but "the government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," weighing the balance heavily in favor of the government's interest in conducting the search.[89] Unwanted persons at the border include terrorists who may try and cross the border to gain access to the U.S. It is these high level concerns—terrorists, diseases, smuggling of drugs, weapons, and persons, and related public safety implications—that have combined to create a special context for the border wherein most searches will balance in favor of the government even absent any individualized suspicion.

There is no U.S. Supreme Court opinion holding that ensuring public safety from terrorism is a special need. The Court has said in dicta that "the Fourth Amendment would almost certainly permit an appropriately tailored [search] set up to thwart an imminent terrorist attack" absent individualized suspicion that any one individual is the terrorist.[90] Lower courts have grappled with the issue of when keeping the public safe from terrorism constitutes a special need and makes suspicionless searches reasonable.

In *Bourgeois v. Peters*, the Eleventh Circuit interpreted the special

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[83] *Id.* at 634.

[84] Nat'l Treasury Emps. v. Von Raab , 489 U.S. 656, 666 (1988).

[85] *Id.* at 668.

[86] *See* United States v. Flores-Montano, 541 U.S. 149, 152 (1976) ("Time and again, we have stated that 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border'").

[87] United States v. Ramsey, 431 U.S. 606, 616 (1977).

[88] *See Flores-Montano*, 541 US at 152 (holding that a search of a vehicle's gas tank at a border crossing was reasonable even absent individualized suspicion of drug smuggling).

[89] *Id.*

[90] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

needs exception to exclude searches justified by concerns for "the safety of participants, spectators, and law enforcement" at a protest.[91] The State sought to use metal detectors to search all protestors due to the threat of terrorism that existed generally in the post-September 11 world.[92] The court found the reliance on terrorism and public safety "troubling."[93] The court acknowledged that "while the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people."[94] The Eleventh Circuit did note, as did the U.S. Supreme Court in *Indianapolis v. Edmond*, that evidence of a specific, imminent threat "that international terrorists would target or infiltrate this protest" could create a situation that a suspicionless search of all the protestors was reasonable.[95]

Additionally, the Eleventh Circuit questioned whether public safety could ever be a stand-alone special need.[96] The first step in finding a special need is articulating a valid non-law enforcement purpose for the warrantless search.[97] In this case, the government's proposed reason for lowering the search standard was public safety, and the government proposition to protect public safety was to conduct searches enforcing a law prohibiting certain objects, like weapons.[98] The objects found during these searches would be used to prosecute individuals for violating the law.[99] Here, the Eleventh Circuit said that it "is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined."[100] The court went on to find that no special need existed that could justify a deviation from standard Fourth Amendment requirements.[101]

The Second Circuit also addressed the issue of suspicionless searches conducted for the purpose of preventing terrorist attacks and public safety. In *MacWade v. Kelly*, the Second Circuit held that random, suspicionless subway baggage searches were constitutional.[102] This holding turned on the finding of a non-law enforcement purpose for the search—prevention, through deterrence and detection of "a terrorist attack on the subways."[103] This purpose for the suspicionless searches passed the balancing test in part because the threat to the New York subway system was real, not theoretical, as exemplified by past threats

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[91] Bourgeois v. Peters, 387 F.3d 1303, 1312 (11th Cir. 2004).
[92] *Id.* at 1311.
[93] *Id.*
[94] *Id.*
[95] *Id.*; *Edmond*, 531 U.S. at 44.
[96] *Bourgeois*, 387 F.3d at 1312–13.
[97] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).
[98] *Bourgeois*, 387 F.3d at 1312.
[99] *Id.* at 1313.
[100] *Id.* at 1312–13.
[101] *Id.* at 1316.
[102] MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006).
[103] *Id.* at 267.

and recent bombings of subway systems by terrorists abroad.[104] Subway passengers did not have a reduced expectation of privacy;[105] however, the nature of the searches was minimally intrusive, the officers conducting the searches were told to look for explosives, not regular contraband, and the officers had little discretion over who to search.[106]Additionally, notice of the search was given to every passenger, and passengers were free to refuse, so long as they left the station and did not return.[107] All of these factors, weighed together with the immediate and substantial governmental interest of preventing a terrorist attack on the subway, created, under these specific circumstances, a special need that made these suspicionless searches reasonable.[108]

Using similar reasoning, the Second Circuit also held that suspicionless searches of ferry passengers and their luggage were reasonable.[109] The court found that the government was seeking to deter an actual terrorist attack.[110] This finding was based on a risk assessment conducted by the Coast Guard, "pursuant to a Congressional directive," that determined that this particular vessel was a high-risk terrorism target.[111] "It is clear to the Court that the prevention of terrorist attacks on large vessels engaged in mass transportation and determined by the Coast Guard to be at heightened risk of attack constitutes a special need."[112] Like the subway searches in *MacWade*, these searches were minimally intrusive and notice was given to passengers, which would enable them to choose to avoid the search.[113] Airport searches, which are permissible under the administrative search doctrine, are also justified by the Second Circuit under the public safety doctrine, utilizing similar logic as was used to justify the suspicionless subway and ferry passenger searches.[114]

State courts have also weighed in on the issue of when the threat of terrorism to public safety creates a special need. The Supreme Court of North Dakota found that a search of all patrons who entered a hockey arena was unconstitutional.[115] The North Dakota court noted that patrons were given notice and that the search was minimally intrusive;[116] however, there was no non-law enforcement purpose that created a basis

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[104] *Id.* at 270.
[105] *Id.* at 272.
[106] *Id.* at 270.
[107] *Id.* at 264–65.
[108] *Id.* at 271–72.
[109] Cassidy v. Chertoff, 471 F.3d 67, 87 (2d Cir. 2006).
[110] *Id.* at 86.
[111] *Id.* at 83.
[112] *Id.* at 82 (internal quotation marks omitted).
[113] *Id.* at 73, 79 (Providing notice to passengers weighs in favor of the search being for a non-law enforcement purpose. Notice indicates that the search is not to detect criminal activity but to prevent terrorism. Even if the notice allows potential terrorist to avoid apprehension; the terrorist target, in this case the ferry, is unmolested when the notice diverts the attack due to fear of detection.).
[114] United States v. Edwards, 498 F.2d 496, 499–501 (2d Cir. 1974).
[115] State v. Seglen, 700 N.W.2d 702, 705 (N.D. 2005).
[116] *Id.* at 709.

for a special need because "there was no history of injury or violence presented in this case."[117] The alleged threat used to justify the search was not real or substantial, and the court found that terrorism in the abstract is not enough to bypass Fourth Amendment requirements.[118]

Suspicionless terrorism searches, in limited instances, can be justified by public safety.[119] As the case law indicates, these limited contexts include: situations where there is a valid non-law enforcement purpose for the search, which can, but does not always, include terrorism;[120] where a warrant would unduly frustrate the search and put the public unnecessarily in harm's way;[121] and where the risk to public safety is real, imminent, and not just symbolic.[122] Additionally, the balance between the intrusiveness of the search and the privacy safeguards in place weigh against the government's need to conduct the search without a warrant or probable cause.[123] The public safety exception to the warrant requirement is a narrow exception.[124] General terrorism threats that have become commonplace in the United States are not the kind of specific, imminent threat that the special needs doctrine covers.[125]

V. THE GATHERING OF FOREIGN INTELLIGENCE

One of the ways in which the U.S. law enforcement community monitors, prevents, and prosecutes terrorist activity is through the gathering of foreign intelligence related to terrorism. The Federal Intelligence Surveillance Act (FISA) governs the gathering of foreign intelligence.[126] FISA was enacted in 1978. FISA was legislation in response to documented abuses by the U.S. intelligence community such as the surveillance of those suspected of communism and anti-war and civil rights activists.[127] This legislation was a reform attempt by Congress aimed at documented constitutional violations and civil rights

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[117] *Id.* at 708.

[118] *Id.*

[119] MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006); *See* Chandler v. Miller, 520 U.S. 305, 321 (1997).

[120] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring); *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (FISA Ct. Rev. 2002).

[121] Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988); United States v. U.S. Dist. Court, 407 U.S. 297, 315 (1972).

[122] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000); *see* Chandler, 520 U.S. at 321.

[123] *Chandler*, 520 U.S. at 311.

[124] *Id.* at 309.

[125] *See Edmond*, 531 U.S. at 44; Bourgeois v. Peters, 387 F.3d 1303, 1318 (11th Cir. 2004).

[126] Foreign Intelligence Surveillance Act of 1978, 92 Stat. 1783 (codified as amended in sections of the United States Code, primarily §§ 18 and 50).

[127] ELIZABETH GOITEIN & FAIZA PATEL, BRENNAN CENTER FOR JUSTICE, WHAT WENT WRONG WITH THE FISA COURT 13–14 (2015) (These abuses were documented in the Church Report, which included analysis of government surveillance programs during the Red Scare and the U.S. government's Counter Intelligence Program (COINTELPRO).).

abuses that had resulted from warrantless searches conducted in the name of national security.[128] FISA created a specialized court, the Federal Intelligence Surveillance Court (FISC), to handle all electronic surveillance requests when the purpose of the surveillance was to gather foreign intelligence.[129] In addition to creating an oversight court, FISA created a standard of review for the court to use in deciding whether to issue a court order allowing electronic surveillance.[130] The standard of review is "probable cause to believe that . . . the target of the electronic surveillance is a foreign power or agent of a foreign power."[131] The definition of "agent of a foreign power" for U.S. persons differs from non-U.S persons.[132] "The statute defines 'foreign power' broadly, to include not only foreign governments, but also: factions of foreign nations, entities that foreign governments control, international terrorist groups, foreign-based political organizations, and foreign entities engaged in the proliferation of weapons of mass destruction."[133] For a U.S. person to be the subject of a FISA order there must also be a showing of a nexus to criminal activity.[134] In addition to the probable cause standard codified in FISA, the statute contains an emergency clause.[135] This clause allows for the deployment of "electronic surveillance to obtain foreign intelligence information" in an emergency situation without obtaining a FISA court order and based only on a reasonableness determination by the attorney general.[136]

A. The Federal Intelligence Surveillance Act

Since its enactment in 1978, Congress has amended FISA several times.[137] Originally, FISA only covered activities where foreign intelligence gathering was "the purpose" of the investigation.[138] In 2001, the Patriot Act amended the language so that foreign intelligence gathering only needs to be "a significant purpose."[139] This change is important because it has opened up the debate on whether the information gathered through FISA orders can constitutionally be used in

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[128] *Id.*
[129] 50 U.S.C. § 1803 (2012).
[130] *Id.* § 1805(a)(2)(A).
[131] *Id.*
[132] *Id.* §1801(a); Goitein, *supra* note 127, at 16.
[133] *Id.*
[134] 50 U.S.C. § 1801(i) (2012); *Id.* § 1801(b)(2).
[135] *Id.* § 1805(e).
[136] *Id.*
[137] See *e.g.*, FISA Amendments Act of 2008, Pub. L. No. 110–261, §§ 701–03, 122 Stat. 2436 (codified as 50 U.S.C. § 1881 (2008)).
[138] Goitein, *supra* note 127, at 23.
[139] 50 U.S.C. § 1804(a)(6)(B) (2012). In 2001 the words "a significant purpose" were substituted in the code for the words "the purpose" which was the original language of FISA.

criminal prosecutions.[140] The standard of review for warrants for electronic surveillance in a criminal investigation is if "there is probable cause for belief that an individual is committing, has committed, or is about to commit" a particular criminal offense.[141] This standard is much higher than the probable cause standard in FISA and historically justified the separation between using electronic surveillance to gather foreign intelligence and using electronic surveillance to gather evidence as a precursor to criminal prosecution.[142] The FISA Amendments Act of 2008 (FAA) amended FISA to include programmatic surveillance.[143] Although a current source of vigorous debate, the FAA is not relevant to an analysis of whether the gathering of foreign intelligence is a special need.[144]

Although, there is no Supreme Court case directly on point for the issues FISA was aimed at addressing, one case, decided before FISA was enacted, provides guidance on Congress's motivation for FISA.[145] In 1972, the Supreme Court heard *United States v. United States District Court (Keith)*.[146] *Keith* raised questions about whether purely domestic electronic surveillance of a domestic terrorist threat required a warrant under the Fourth Amendment.[147] The Court held that even in the face of national security concerns, domestic electronic surveillance could only be undertaken if law enforcement first obtained a warrant.[148] The Court justified its holding because Title III of the Omnibus Crime Control and Safe Streets Act articulates the standards for obtaining an order to conduct domestic electronic surveillance.[149] These standards include: probable cause that a crime is being or will be committed, timeline of the surveillance, and certification that other less-invasive investigative procedures have been unsuccessful.[150] The Court stated that "the Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the

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[140] Goitein, *supra* note 127, at 23–24.

[141] 18 U.S.C. § 2518(3)(a) (2012).

[142] *See* Goitein, *supra* note 127, at 24 (discussing whether the wall caused the terrorist attack on September 11, 2001). The historical divide between intelligence gathering and prosecution has been referred to as the wall.

[143] FISA Amendments Act of 2008, Pub. L. No. 110-261, §§ 701–3, 122 Stat. 2436 (codified at 50 U.S.C. § 1881 (2008)).

[144] *See* Goitein, *supra* note 127, at 23–24. The FAA broadened surveillance authority under FISA. It is this amendment that authorized the programmatic surveillance made public by the Snowden leaks. Although this amendment is important, this portion of FISA is not relevant to the analyses of whether the gathering of foreign intelligence is a special need.

[145] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 297 (1972).

[146] *Id.*

[147] *Id.* at 299 (The defendants were American citizens who conspired to destroy government property; one defendant was convicted of destroying government property with dynamite).

[148] *Id.* at 323–24.

[149] *Id.* at 301–02, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, §§ 801–02, 82 Stat. 197; *see* 18 U.S.C. §§ 2510–13, 2515–22 (2012).

[150] 18 U.S.C. § 2518 (2012).

constitutional requirements for electronic surveillance."[151] Although the holdings in *Keith* focused on domestic electronic surveillance, its dicta touched on the gathering of foreign intelligence.[152] The Court said that in some situations there may be standards other than probable cause that comport with Fourth Amendment requirements.[153] Drawing on the Court's previous decision in *Camara*, the Court in *Keith* noted that:

> Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.[154]

The dicta in *Keith* left open the question of what was the constitutional standard for the gathering of foreign intelligence.[155] It was in light of this that Congress enacted FISA with a lower probable cause standard for conducting electronic surveillance of foreign powers or their agents.[156]

B. The Foreign Intelligence Exception

In addition to creating the FISC to hear FISA applications, FISA also created the Foreign Intelligence Surveillance Court of Review (FISCR).[157] The FISCR hears appeals from the government for denials of FISA order applications.[158] The FISCR, on at least two occasions, has looked at the gathering of foreign intelligence and its relationship to the special needs doctrine.[159] In 2002, the FISCR decided *In re Sealed Case* and held that FISA as written was constitutional because a FISA order provided similar safeguards as a traditional criminal warrant under Title III.[160] Specifically, the court said that FISA orders meet Fourth Amendment standards of reasonableness because they are issued by a neutral magistrate, have a probable cause requirement, and describe what

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[151] *Keith*, 407 U.S. at 302.
[152] *See id.* at 322–24.
[153] *Id.* at 322–23.
[154] *Id.*
[155] Goitein, *supra* note 127, at 10–11.
[156] *See id.*
[157] 50 U.S.C. § 1803(b) (2012).
[158] Goitein, *supra* note 127, at 31.
[159] *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (U.S. FISA Ct. Rev. 2002); *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (FISA Ct. Rev. 2008).
[160] *In re Sealed Case*, 310 F.3d at 737–38.

is to be searched with particularity.[161] In addressing whether electronic searches conducted pursuant to a FISA order are constitutionally reasonable, the FISCR drew upon the doctrine of special needs.[162] The FISCR went through the special needs analysis, noting that the doctrine applies in "extraordinary situations" and involves a balancing test to determine whether a special needs search is reasonable.[163] The FISCR did not say that the gathering of foreign intelligence was a special need. Rather, it used the doctrine by analogy to show that searches made under FISA warrants are also reasonable because the procedures come close to the procedures for obtaining a criminal warrant, and in balance, FISA is reasonable and constitutional.[164] The *In re Sealed Case* court did not hold that the gathering of foreign intelligence was a special need and, therefore, the intelligence community does not need to follow the FISA statute when it conducts foreign intelligence searches. The court merely notes the similar justifications for the two doctrines, which both are exceptions to the warrant and probable cause standard of the Fourth Amendment.[165]

Six years after the FISCR decided *In re Sealed Case*, the court decided another case related to the gathering of foreign intelligence and the Fourth Amendment requirement of reasonableness.[166] The question in *In re Directives* was whether the Protect America Act (PAA),[167] which amended FISA and required service providers to assist in the gathering of foreign intelligence data, was constitutional.[168] The question regarding the constitutionality of the PAA is not relevant to the question of whether the gathering of foreign intelligence is a special need. What is relevant is the FISCR's discussion in this case of the foreign intelligence exception to the Fourth Amendment's warrant requirement.[169]

The FISCR held that, "the surveillance at issue satisf[ied] the Fourth Amendment reasonableness requirement."[170] The language of the court's holding is important because the court does not hold that the gathering of foreign intelligence *is* a special need.[171] Rather, the court's analysis used the special needs doctrine's reasoning to analogize and

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[161] *Id.* at 738.

[162] *Id.* at 745.

[163] *Id.* at 745–46.

[164] *See id.* at 742, 744 (indicating the totality of the circumstances test is not specific to the doctrine of special needs); *See* Robert C. Power, *"Intelligence" Searches and Purpose: A Significant Mismatch Between Constitutional Criminal Procedure and the Law of Intelligence-Gathering*, 30 PACE L. REV. 620, 666 (2010) ("The dominant theme of the last thirty years of Supreme Court jurisprudence on the Fourth Amendment. . .is built on the concept of the totality of the circumstances.").

[165] *Sealed Case*, 310 F.3d at 745–46.

[166] *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010 (FISA Ct. Rev. 2008).

[167] Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007) (expired 2008).

[168] *Directives*, 551 F.3d at 1006.

[169] *Id.* at 1010.

[170] *Id.* at 1016.

[171] *See id.*

justify "a foreign intelligence exception to the warrant requirement."[172] The court used language indicating that it was not creating a new category under the special needs doctrine, but that it was using the "reasoning" and applying the "principles derived from the special needs cases."[173] This reasoning and principals are what enabled the court, by analogy to the special needs doctrine, to conclude that "this type of foreign intelligence surveillance possesses *characteristics*," that take the case out of the strict rigors of a warrant requirement.[174] A FISC decision following *In re Directives*, held that the FISCR had not found a new special need, but that "the Court has previously concluded that the acquisition of foreign intelligence information pursuant to Section 702 falls within the *foreign intelligence exception* to the warrant requirement of the Fourth Amendment."[175]

The concept that there is a foreign intelligence exception to the warrant requirement in the Fourth Amendment is not a new one.[176] In fact, the U.S. Supreme Court in *Keith* articulated the idea that a lower standard for foreign intelligence searches might be reasonable.[177] The dicta in *Keith* were, at least in part, what led to the enactment of FISA, which took into account the foreign intelligence exception in the creation of the FISA probable cause standard.[178] This standard is the heart of FISA and is a lower standard than the probable cause and warrant requirement of the Fourth Amendment.[179] The factors articulated by the FISCR in *In re Directives* are the factors that make the lower probable cause standard in FISA reasonable and constitutional.[180]

Furthermore, the FISA statute itself creates a foreign intelligence exception by articulating a standard that is lower than the Title III warrant requirement.[181] The FISA standard is itself outside of the Fourth Amendment warrant requirement, but because of the limitations found in FISA, is still considered reasonable. In *Keith*, the Supreme Court found that Congress had created Title III with constitutionality in mind.[182] The Court gave deference to Congress's intention to create a standard for electronic surveillance related to criminal searches that comported with prior Court decisions and the Fourth Amendment.[183] In the context of foreign intelligence gathering, it should be assumed that Congress

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[172] *Id.* at 1009.
[173] *Id.* at 1011.
[174] *Id.* (emphasis added).
[175] Redacted, 2011 U.S. Dist. LEXIS 157706, at *95 (FISA Ct. Oct. 3, 2011) (emphasis added) (internal quotation marks omitted).
[176] *E.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 911 (4th Cir. 1980).
[177] United States v. U.S Dist. Court (*Keith*), 407 U.S. 297, 321–24 (1972).
[178] United States v. Duggan, 743 F.2d 59, 73 (2d Cir.1984).
[179] Goitein, *supra* note 127, at 18.
[180] *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1010–14 (FISA Ct. Rev. 2008); 50 U.S.C. § 1805(a)(2)(A) (2012).
[181] *Keith*, 407 U.S. at 302.
[182] *Id.* at 302.
[183] *Id.*

likewise enacted FISA with constitutionality in mind. In addition to constitutionality concerns, FISA was drafted "to accommodate the government's need to obtain surveillance orders secretly and in a hurry."[184] Congress could amend FISA to include a lesser standard, which might also satisfy the reasonableness requirement of the Fourth Amendment.[185] However, currently it would be circumventing Congress and FISA for a court to find that the gathering of foreign intelligence is a special need and therefore should be held to a separate, non-FISA lower standard. In passing FISA, Congress passed a clear statute that built the specific concerns of national security and the gathering of foreign intelligence directly into the statute.

The FISA statutes also include an emergency procedure that allows the attorney general to authorize electronic surveillance absent a FISA court order in the face of an emergency upon a showing of reasonableness.[186] This emergency procedure is further evidence that Congress drafted FISA with national security concerns in mind by providing flexibility for law enforcement to conduct surveillance quickly in emergency situations. This emergency provision is not the same as a special need, but a specific statutory response to the important question of foreign intelligence gathering. Other courts have recognized that a lesser probable cause standard exists for foreign intelligence gathering and concluded that the lower standard articulated in FISA satisfies the Fourth Amendment's reasonableness requirement.[187]

The previous discussion provides strong evidence that the foreign intelligence exception is a parallel exception, not a new branch of the special needs exception to the warrant and probable cause requirement of the Fourth Amendment. However, let us assume for the sake of argument that the FISCR was not using the special needs doctrine as an illustration of a parallel doctrine to bolster why the FISA probable cause standard is constitutionally reasonable, but was articulating a separate branch of the special needs doctrine.[188]

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[184] Goitein, *supra* note 127, at 7.

[185] *See* Sievert, *supra* note 74, at 98 (arguing that Congress should lower the FISA standard to reasonable suspicion); Goitein, *supra* note 127, at 45–49 (arguing for a wide-range of reforms, including narrowing what constitutes foreign intelligence).

[186] 50 U.S.C. § 1805(e) (2012).

[187] United States v. Marzook, 435 F. Supp. 2d 778, 782–783 (N.D. Ill. 2006); United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) ("FISA's numerous safeguards provide sufficient protection for the rights guaranteed by the Fourth Amendment within the context of foreign intelligence activities."); United States v. Cavanagh, 807 F.2d 787, 790 (9th Cir. 1987) ("FISA satisfies the constraints the Fourth Amendment places on foreign intelligence surveillance conducted by the government."); *In re* Sealed Case No. 02-001, 310 F.3d 717, 746 (FISA Ct. App. 2002) ("[W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly. . . that FISA as amended is constitutional because the surveillances it authorizes are reasonable."); cf. United States v. Spanjol, 720 F.Supp. 55, 58 (E.D. Pa. 1989); United States v. Duggan, 743 F.2d 59, 73 (2d Cir.1984) (Such is the case, courts have reasoned, because "the procedures fashioned in FISA [are] a constitutionally adequate balancing of the individual's Fourth Amendment rights against the nation's need to obtain foreign intelligence information."); *Cavanagh*, 807 F.2d at 790 (Explaining FISA's probable cause standard satisfies Fourth Amendment's reasonableness requirement).

[188] *But see* Sievert, *supra* note 74, at 47 ("The FISA Court of Review explicitly found that the special

Even if assumed for arguments sake, that the FISCR held that the gathering of foreign intelligence is always a special need, the FISCR opinion, if it is binding at all, is only binding on the FISC and future decisions by the FISCR.[189] As to other non-FISA courts, FISCR opinions are persuasive at best.[190] The nature of FISC and FISCR opinions, which are usually secret and redacted if published, creates problems for both the courts' perceived legitimacy and their opinions' precedential value.[191] The only published FISCR opinions are the two previously discussed, and they are highly redacted.[192] On this issue, the secretive nature of the court creates a lack of opinions with precedential value.[193]

At least one U.S. District Court has "decline[d] to adopt the analysis and conclusion reached by the FISCR in *In re Sealed Case*."[194] The Oregon District Court disagreed that the gathering of foreign intelligence after the Patriot Act was analogous to a special need.[195] Specifically, the district court referred to the FISCR's analysis of the issue as "without merit."[196] Although vacated on other grounds, the *Mayfield v. United States* decision highlights the fact that FISCR decisions are not binding on courts outside of the FISA arena. This is important because it is these non-FISA courts that will ultimately decide issues related to the constitutionality of Fourth Amendment searches.

C. When Might the Gathering of Foreign Intelligence Fit Within the Special Needs Doctrine?

The first step in determining whether a special need exists is to articulate a non-law enforcement purpose to conduct the search.[197] There is considerable disagreement as to whether the gathering of foreign intelligence is a law enforcement function.[198] The FISCR has acknowledged that the definition of an "agent of a foreign power," at least as applicable to a U.S. person, "is closely tied to criminal activity."[199] The FISCR went further, noting that international terrorism

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needs doctrine should apply to these cases.").

[189] Jack Boeglin & Julius Taranto, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Court*, 124 YALE L.J. 2189, 2192 (2015).

[190] *See* Mayfield v. United States, 504 F. Supp. 2d 1023, 1041 (D. Or. 2007) (declining to follow the FISCR decision in *In re* Sealed Case No. 02-001).

[191] Boeglin, *supra* note 189, at 2193–94.

[192] *Id.* at 2191; *In re* Directives Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (FISA Ct. Rev. 2008); *In re* Sealed Case No. 02-001, 310 F.3d 717 (FISA Ct. Rev. 2002).

[193] Boeglin, *supra* note 189, at 2200 n.67.

[194] Mayfield, 504 F. Supp. 2d at 1041.

[195] *Id.*; *see also Sealed Case*, 310 F.3d at 742–46.

[196] *Mayfield*, 504 F. Supp. 2d at 1041.

[197] New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring).

[198] *See* Simmons, *supra* note 3, at 911–12.

[199] *Sealed Case*, 310 F.3d at 723.

refers to activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States.[200] If terrorism were generally defined as a criminal act, then stopping terrorism generally would be a law enforcement function.

Another argument for removing terrorism-related intelligence gathering from the rubric of general crime control is the magnitude of the threat of terrorism.[201] The U.S. Supreme Court has addressed this question in the context of the War on Drugs.[202] In *Edmond*, the Court held that drug interdiction was a law enforcement function.[203] The Court came to this holding fully aware of the "severe and intractable nature of the drug problem" in the United States.[204] However, the Court found that the "gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[205] This holding in *Edmond*, is transferrable to terrorism interdiction.[206] Terrorism, like drug trafficking, poses a severe problem, but is overarchingly a law enforcement function.

That is not to say that specific acts or instances of terrorism cannot create a non-law enforcement function. Whether a particular search falls under the doctrine of special needs can only be determined based on a context specific inquiry.[207] Some of the factors the U.S. Supreme Court has established as important in the special needs inquiry are if a warrant (or in this case a FISA order) would unduly frustrate the search and put the public unnecessarily in harm's way,[208] and whether the threat is real and imminent—not just symbolic.[209] There may be situations in the future that justify special needs searches outside of the constraints of FISA, perhaps when a person or organization "is engaged in an effort to employ a [weapon of mass destruction] in the United States" or an emergency situation of a similar magnitude.[210] But, there must be a showing that a proposed threat is substantial and real based on a case-by-case analysis in order to be compatible with the doctrine of special needs.[211] The special needs exception is a narrow exception, and without such a showing, this blanket category of searches is unconstitutional.[212]

For the sake of this analysis, let us assume that the gathering of

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

[201] *See* Sievert, *supra* note 74, at 50. *But see* Mueller, *supra* note 72, at 18 (comparing the hunt for terrorists to past witch hunts and the red scare).

[202] City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000).

[203] *Id.* at 41–42.

[204] *Id.* at 42.

[205] *Id.*

[206] *See id.* at 41 (stating "our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion").

[207] Chandler v. Miller, 520 U.S. 305, 314 (1997).

[208] Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988); United States v. U.S Dist. Court (*Keith*), 407 U.S. 297, 315 (1972).

[209] *Chandler*, 520 U.S. at 321–322; *Edmond*, 531 U.S. at 44.

[210] Sievert, *supra* note 74, at 98.

[211] *Chandler*, 520 U.S. at 319.

[212] *Id.* at 323 (citations omitted) (internal quotation marks omitted).

foreign intelligence is in some instances a non-law enforcement function. The special needs analysis will then move to the balancing test, balancing "(1) the weight and immediacy of the government interest, (2) the nature of the privacy interest allegedly compromised by the search, (3) the character of the intrusion imposed by the search, and (4) the efficacy of the search in advancing the government interest."[213] The government interest in preventing a terrorist attack is extremely weighty, and the weight of that interest grows exponentially based on the immediacy of an attack. In instances where the government interest is high and there is a non-law enforcement purpose, the search can be intrusive and still be constitutional because of the balance between the high governmental interest and the level of intrusiveness.[214] The search, however, still needs to be tailored to advance the actual governmental interest.[215] Because of the strong governmental interest involved in national security, an appropriately tailored search is likely to be constitutional if based on a valid non-law enforcement purpose.[216] As was noted previously, what qualifies as a non-law enforcement purpose, in the context of the gathering of foreign intelligence, is likely a narrow category based on factors of immediacy, undue frustration of obtaining the FISA order, and the substantial and real nature of the threat.[217]

It is difficult to compare the gathering of foreign intelligence, which under FISA is ordered by a secret court and conducted in secret, to other types of special needs searches. Whether a particular search is a special need often turns on whether notice was given that the search would be conducted, as the main purpose of special needs searches is often deterrence, not crime control.[218] "It would be as if Transportation Security Agents were told to look primarily for drugs and counterfeit money, but then expected to justify their searches as based on protecting airplanes and passengers."[219] As is noted in several special needs cases, deterrence is the main goal; even if the terrorist is not caught, then the search has performed its function if he chooses a different target.[220] The special needs model, which requires a search to have a primary purpose other than law enforcement, like deterrence, is not in accordance with the current model of gathering foreign intelligence; gathering foreign intelligence cannot be a deterrent if it is done in secret.[221] In special

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[213] MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (citations omitted) (quotation marks omitted).

[214] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 557–58 (1976).

[215] City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[216] *See id.*

[217] *Chandler*, 520 U.S. at 321; New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J. concurring); *In re* Sealed Case No. 02-001, 310 F.3d 717, 723 (FISA Ct. Rev. 2002); Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988); United States v. U.S Dist. Court (*Keith*), 407 U.S. 297, 315 (1972); *Edmond*, 531 U.S. at 44.

[218] *MacWade*, 460 F.3d at 264–65.

[219] Power, *supra* note 164, at 669.

[220] *MacWade*, 460 F.3d at 275.

[221] Power, *supra* note 164, at 668–69.

needs cases related to terrorism, deterrence is a victory.[222] In the context of the gathering of foreign intelligence, prevention and prosecution go hand in hand with fighting terrorism, and a terrorist abandoning a plan is not a law enforcement victory. [223]

VI. CONCLUSION

The U.S. Supreme Court has never specifically articulated under what circumstances terrorism is considered a special need. However, Supreme Court opinions in which the Court has declined to extend the special needs doctrine provide guidance.[224] In 1997, the Court held that requiring all candidates for state office in Georgia to pass a urinalysis was an unconstitutional search.[225] Georgia argued that this search "serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office."[226] However, the Court held that this did "not fit within the closely guarded category of constitutionally permissible suspicionless searches."[227] Furthermore, "nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical."[228] The main takeaway from this decision is that the risk to public safety must be real and supported by fact finding in order for there to be a special need.[229]

In 2000, the Supreme Court again decided a case involving a special needs argument by deciding that a roadblock to detect drugs was not conducted pursuant to a special need.[230] In *Edmond*, the Court found that the primary purpose of the roadblock was to detect drugs, which is evidence of ordinary criminal wrongdoing.[231] The Court held that this program to stop drugs from entering the community was not a special need because it was a crime control search, "notwithstanding the obvious public health and safety ramifications of illegal drug use."[232] What this means is that the special need must be the primary need of a search and not just a secondary need.[233] The *Edmond* decision "raises serious

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[222] *MacWade*, 460 F.3d at 275.

[223] *See* Goitein, *supra* note 127, at 23–24. (If deterrence and prevention were the main purpose of gathering foreign intelligence, there would have been no reason to change the language of FISA from purpose, to significant purpose, in order to bring down the barrier between intelligence and criminal prosecution.).

[224] City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Chandler v. Miller, 520 U.S. 305 (1997); Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[225] *Chandler*, 520 U.S. at 318.

[226] *Id.*

[227] *Id.* at 309.

[228] *Id.* at 319.

[229] *Id.* at 323.

[230] City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).

[231] *Id.*

[232] Power, *supra* note 164, at 662.

[233] *See id.* at 663.

questions about the attempts to shoehorn criminal enforcement purposes" into terrorism searches.[234]

Finally, in 2001, the Supreme Court decided *Ferguson v. City of Charleston*.[235] The Court held that a program that tested pregnant women for drugs and then reported the results to police was unconstitutional.[236] The Court struck down this law, despite having previously decided that drug testing in other contexts is a special need.[237]

> Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of special needs.[238]

The holdings in *Ferguson*, along with those in *Edmond*, highlight the line that the Court has drawn in special needs analysis between stopping crime and searches conducted for other civil purposes.[239]

Taking into account what the Supreme Court has held on the subject, in order for terrorism to be a special need, the threat must be real, substantial, imminent, and not primarily criminal in nature.[240] There are situations that would no doubt be a special need due to an actual imminent terrorist emergency. Furthermore, it must be shown that preventing the attack will be dangerously frustrated by the Fourth Amendment warrant and probable cause requirement.[241] However, the special needs doctrine is not to be used flippantly or for routine matters, as the safeguards built into the Constitution were done with emergency situations in mind.[242]

To summarize, there are some categories of special needs that overlap with terrorism searches. Suspicionless administrative searches pursuant to a valid regulatory statute are a special need, but are not specifically terrorism searches.[243] Roadblock searches can be conducted

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[234] *Id.* at 665.

[235] Ferguson v. City of Charleston, 532 U.S. 67 (2001). The author notes that the U.S. Supreme has not decided a major case on the special needs doctrine since the attacks of September 11, 2001. This fact could imply that the doctrine is out of date or it could imply that the Supreme Court believes the doctrine as it stands provides the appropriate limitations on Fourth Amendment searches.

[236] *Id.* at 86.

[237] *E.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 633 (1989); *See* Vernonia v. Acton 515 U.S. 646, 657–59 (1995).

[238] *Ferguson*, 532 U.S. at 84.

[239] *Id.* at 88 (Kennedy, J. concurring) ("The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.").

[240] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 52 (2000); Chandler v. Miller, 520 U.S. 305, 323 (1997); *Ferguson*, 532 U.S. at 85–86.

[241] *See* Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 666 (1988).

[242] *See Ex parte* Milligan, 71 U.S. 2, 120–21 (1866).

[243] *See* New York v. Burger, 482 U.S. 691, 702–03 (1987).

under the administrative search doctrine to stop an imminent terrorism threat.[244] When the threat of terrorism to public safety is real and imminent, public safety may be a special need.[245] And as was previously argued in this analysis, the gathering of foreign intelligence is not a special need.[246] This conclusion is based in the fact that the gathering of foreign intelligence is covered by FISA, which creates a lesser probable cause standard than criminal probable cause under Title III.[247] Additionally, FISA has an emergency provision worked into the statute, which shows Congress took the nature of the threat of international terrorism into account when it drafted the statute.

It is times like these, where citizens of the U.S. live under the constant threat of terrorism, that the protections and rights found in the Constitution matter the most. The government's adherence to the Fourth Amendment is not optional.[248] The special needs exception is meant to be a narrow exception that allows flexibility in searches without compromising the civil rights of those who are searched. As such, broad searches justified in the name of terrorism are not constitutional.

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[244] *Edmond*, 531 U.S. at 44.

[245] *Chandler*, 520 U.S. at 323.

[246] *See supra* text accompanying notes 157–196.

[247] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 302 (1972).

[248] Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973) (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

America's Modern Day Internment Camps: The Law of War and the Refugees of Central America's Drug Conflict

By Daniel Hatoum*

> It was a hot evening, so we chose to have a drink and cool off at the betting parlor. . . . Before I was able to order my third

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> beer, I heard the most horrible, terrifying, and loud noise I had ever heard. Time stopped, and every mille-second felt like an eternity.
>
> That unfamiliar and annoying sound was the explosion of AK-47s firing. From the moment the assault rifles began, everyone just panicked. There were about twenty guys inside, and maybe four of them pulled out guns and prepared to defend themselves. In the meantime, a couple of strangers already inside the betting place went to the front entrance to take a peek at what was happening. They screamed, "¡Ahí vienen para acá!" [They're coming this way!]. After those words, I felt a terror and fear I cannot compare to any threatening experience in my previous life. . . .
>
> . . . [T]he shots ceased after a minute or two, although to me it was like an hour of wanting to cry, scream, kill, hide, disappear, defend myself, or just not wanting to be there. About twenty seconds after the shooting stopped, sirens could be heard, but only about two of them. I asked myself, "Will two police be able to protect me and the rest of the people?
>
> . . . .
>
> . . . We stepped out to see what had happened, and with curiosity asked people around us . . . . One of the guys just pointed across the street at a dead body. It was a parquero [car parking attendant] whose life had been taken just for being at his job at the wrong time and in the wrong place. He had been standing or hiding close to where the shots were aimed, and they killed him. He was dead on the sidewalk next to a car and surrounded by his own pool of blood.
>
> I felt bad for him but worse for his family. It was unfair. He was innocent. . . .[1]

This author wishes that the above story were just an outlier. The opposite is true. In Mexico between 2006 and 2012 alone, the epidemic of drug violence took over 60,000 lives.[2] In 2006, with the election of President Felipe Calderón, Mexico "in conjunction with the United States, launched a massive crackdown against drug trafficking organizations" by "deploying tens of thousands of military personnel to supplement, and in many cases replace, local police forces, as well as to

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[1] HOWARD CAMPBELL, DRUG WAR ZONE 168–69 (1st ed. 2009) (recounting the story of a drug killing, as told by an anonymous citizen of Juarez, Mexico) (bracketed translations in original).

[2] HUMAN RIGHTS WATCH, MEXICO'S DISAPPEARED: THE ENDURING COST OF A CRISIS IGNORED 1 (2013), http://www.hrw.org/sites/default/files/reports/mexico0213_ForUpload_0_0_0.pdf, <http://perma.cc/7URF-9GXW>.

lead civilian law enforcement agencies."[3] But this problem is not just a "U.S.–Mexico" problem. Violence associated with drugs—and the gangs that profit and traffic drugs—has spread throughout Central America.[4] The organized groups that Mexico and the United States are now battling with military might are transnational in character.[5] Thus, considering the character of the current conflict, it is time that the United States acknowledges what many academic and media sources have already known for years: Central America's drug conflict is a war, and should be legally treated as such.[6]

However, the focus of this Note is not on Central America's Drug War itself, but on the people desperately fleeing the violence. With the rise in border apprehensions of children and their parents in the summer of 2014, many were saying the United States was facing an immigration crisis.[7] However, these migrants "are fleeing not poverty, but violence. As a result, what the United States is seeing on its borders now is not an immigration crisis. It is a refugee crisis."[8] Unfortunately, when these immigrants do reach American borders to seek safe harbor, the United States has instituted a practice of incarcerating them in secure facilities, a practice known as immigration detention.[9] This practice has also been described as the imprisonment of asylum seekers.[10] But if Central America's conflict with drug gangs and drug traffickers is a war, these immigrants can claim legally enforceable protections under the Geneva Conventions, and specifically, under Common Article 3—a provision the United States has ratified.[11]

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[3] Brianna Lee, *Mexico's Drug War*, COUNCIL ON FOREIGN REL. (last updated Mar. 5, 2014), http://www.cfr.org/mexico/mexicos-drug-war/p13689, <http://perma.cc/9NGN-5QFE>.

[4] *See* John F. Kelly, *SOUTHCOM Chief: Central America Drug War a Dire Threat to U.S. National Security*, ARMY TIMES (July 8, 2014), http://archive.armytimes.com/article/20140708/NEWS01/307080064/SOUTHCOM-chief-Central-America-drug-war-dire-threat-U-S-national-security, <http://perma.cc/5TD4-D2GW> (indicating that the drug gangs of Central America are transnational in character).

[5] *Id.*

[6] *See* CAMPBELL, *supra* note 2, at 6 (using the term "Drug War Zone" to describe the world of Mexico's drug trafficking and the relationship with law enforcement); Gabrielle D. Schneck, *A War on Civilians: Disaster Capitalism and the Drug War in Mexico*, 10 SEATTLE J. FOR SOC. JUST. 927, 928 (2012) (indicating that militarization in Mexico is on the rise in the wake of President Calderón declaring "war" on drugs); Jeremy Bender & Armin Rosen, *Mexico's Drug War is Entering a Dark Phase*, BUS. INSIDER (Oct. 24, 2014, 10:53 AM), http://www.businessinsider.com/mexicos-drug-war-is-entering-a-dangerous-phase-2014-10, <http://perma.cc/Q4Z4-F8ZC> (calling the conflict in Mexico a "drug war").

[7] Sonia Nazario, *The Children of the Drug Wars: A Refugee Crisis, Not an Immigration Crisis*, N.Y. TIMES (July 11, 2014), http://www.nytimes.com/2014/07/13/opinion/sunday/a-refugee-crisis-not-an-immigration-crisis.html, <http://perma.cc/N289-G7NK>.

[8] *Id.*

[9] Nick Valencia, *'Unjust': Rights Groups Slam Spread of Facilities for Immigrant Families*, CNN (Dec. 20, 2014 1:40 PM) http://www.cnn.com/2014/12/19/us/immigrant-family-detention-center/, <http://perma.cc/PQQ3-9VPW>.

[10] *See* Press Release, ALCU of Texas, ACLU sues Obama administration for detaining asylum seekers (Jan. 16, 2015), http://www.aclutx.org/2015/01/16/aclu-sues-obama-administration-for-detaining-asylum-seekers-as-intimidation-tactic/, <http://perma.cc/8QSD-EXYZ> (describing immigration detention as imprisonment).

[11] *See generally* THE BAR OF THE CITY OF NEW YORK, TASK FORCE ON NATIONAL SECURITY AND THE RULE OF LAW, REAFFIRMING THE U.S. COMMITMENT TO COMMON ARTICLE 3 OF THE GENEVA

Recognition that the Geneva Conventions apply is important because with their application comes a set of enforcement procedures.[12] For example, there has been a rise in litigation surrounding the Geneva Conventions in the United States due to the incarceration of suspected terrorists in Guantanamo Bay and other detention facilities.[13] The same protections that benefit suspected terrorists in detention should protect asylum seekers in detention. The law surrounding detention has developed so that there are decisions that bind the United States to follow Common Article 3 of the Geneva Conventions.[14] Courts have also found that the Geneva Conventions are self-executing.[15] In other words, the Geneva Conventions grant an independent cause of action, and detainees can sue under the Geneva Conventions in order to force compliance with them.[16] This Note, in part, will draw on this litigation surrounding the detention of suspected terrorists and the War on Terror and apply this body of law to immigration detention and Central America's Drug Conflict.

Thus, my thesis is this: the United States' current practice of detaining asylum seekers who are fleeing Central America's Drug Conflict violates the protections conferred to civilians under Common Article 3 of the Geneva Conventions. The purpose of this Note is to highlight those rights and indicate specifically how the Geneva Conventions apply to immigration detention. To that end, the first part of this Note will describe the practice of and problems with immigration detention in the United States. The second part of this Note will articulate why the law of war (also known as international humanitarian law) should be applied in this refugee context. The third section of this

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CONVENTIONS: AN EXAMINATION OF THE ADVERSE IMPACT OF THE MILITARY COMMISSIONS ACT AND EXECUTIVE ORDER GOVERNING CIA INTERROGATIONS, http://www.nycbar.org/pdf/report/GC_Report0702_all.pdf, <http://perma.cc/MET3-4CQG> (describing the United States' commitment to the Geneva Conventions in relation to issues of detention and focusing on Common Article 3).

[12] *See generally* Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3 (1984) (discussing various enforcement mechanisms of the Geneva Conventions).

[13] *See* Nathaniel H. Nesbitt, *Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244, 246–48 (2010) (indicating that there has been an increase in litigation surrounding detention in Guantanamo Bay).

[14] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (holding that the Geneva Conventions apply, and grants protections to detainees that are suspected terrorists); Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (applying principles of the Geneva Conventions to the length of detention for someone accused of terrorism).

[15] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005) *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008), *and vacated*, 282 F. App'x 844 (D.C. Cir. 2008), *and vacated sub nom.* Al Odah v. United States, 282 F. App'x 844 (D.C. Cir. 2008), *and vacated sub nom.* Al Odah v. United States, 559 F.3d 539 (D.C. Cir. 2009); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004) *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006); *See also* Hamdan, 548 U.S. at 627–28 (finding that the Geneva Conventions are incorporated by the U.S. government for purposes of the War on Terror, but leaving open the possibility that the Geneva Conventions are self-enforcing by rejecting the court of appeals' logic that the Geneva Conventions do not create a cause of action).

[16] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 478.

Note will argue that the treatment and detention of asylum seekers from Central America's Drug War violates the Geneva Conventions because these detainees are fleeing a non-international armed conflict (NIAC), and the United States is a co-belligerent in that conflict. Fourth and finally, this Note articulates the enforcement that can be used to bring the United States in compliance with U.S.-ratified Common Article 3.

I. THE UNITED STATES' POLICY OF DETAINING ASYLUM SEEKERS

> "Karnes [Immigration Family Detention Center] was quite the visit for me. There's nothing like walking into a prison and the first thing you hear is a crying baby." —Antonio Ginatta, Advocacy Director, U.S. Program, Human Rights Watch[17]

After arrival to the United States, refugees identify themselves and any potential asylum claims that they have.[18] This frequently takes place in the form of an interview with Customs and Border Protection (CBP). After they have indicated that they have viable asylum claims, the immigrants are detained in a CBP facility.[19] These short-term facilities are often called "*hieleras*," or "iceboxes," because the conditions are extremely cold.[20] Immigrants that are taken to *hieleras* are "held for days in rooms kept at temperatures so low that men, women[,] and children have developed illnesses associated with the cold, [and detainees have also suffered from] lack of sleep, overcrowding, and inadequate food, water[,] and toilet facilities."[21] This detention is meant to be short, and immigrants typically remain in a CBP facility for up to three days before they are transported to an immigration detention facility.[22] Because unlawful presence in the United States is not by itself a federal crime,[23] the nature of an immigrant's detention is civil.[24]

After an asylum seeker is taken to the detention center, she receives a credible fear interview (CFI) in which the federal government determines if she has a likely claim.[25] If an asylum seeker has a viable

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[17] LUTHERAN IMMIGRATION & REFUGEE SERV. AND THE WOMEN'S REFUGEE COMM'N, LOCKING UP FAMILY VALUES, AGAIN: THE CONTINUED FAILURE OF IMMIGRATION FAMILY DETENTION 1 (2014) [hereinafter LUTHERAN], http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUp FamilyValuesAgain_Report_141114.pdf, <http://perma.cc/M6DX-33FX>.

[18] *Id.* at 10.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Rachel Bale, *Detained Border Crossers May Find Themselves Sent to 'the Freezers,'* The Center for Investigative Reporting (Nov. 28, 2015), http://cironline.org/reports/detained-border-crossers-may-find-themselves-sent-to-freezers-5574, <http://perma.cc/HPH3-S2UB>.

[23] R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 171 (D.D.C. Feb. 20, 2015).

[24] Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 363 (2014).

[25] *See* 8 U.S.C. § 1225(b)(1)(A)–(B) (2012); 8 C.F.R. § 208.30(d)–(g) (2015) (proscribing procedure for the credible fear interview).

claim, the next step is to go through immigration proceedings in front of an immigration judge in the form of an asylum hearing.[26] If unsuccessful, the immigrant can then appeal to the Board of Immigration Appeals (BIA), which can remand the case for further proceedings.[27] If unsuccessful in front of the BIA, an asylum seeker can appeal to the circuit courts, which have jurisdiction to review all agency decisions.[28] It is also possible for an asylum seeker to initiate an action in district court in order to challenge her immigration determination under federal law or her confinement.[29]

Like most litigation, this procedure takes time. Immigration detention is where asylum seekers are interned while they are going through the immigration process.[30] Thus, asylum seekers can languish in detention for long periods of time waiting on their determinations—even before receiving their CFIs.[31] While asylum seekers are theoretically able to apply for a bond to be able to leave the detention center, Immigration and Customs Enforcement's (ICE) policy encourages an exorbitant bond that is so high that detainees cannot afford to pay it.[32]

There is reason to be skeptical of the CFI process as a whole. Agents for CBP have undermined the process by dissuading people from requesting asylum, not recording fears of persecution, and not referring asylum seekers to CFIs.[33] Recently, asylum officers have also been told to use "a more rigorous standard that is more akin to the standard applied at merit hearings. The new instructions may prevent many asylum seekers from passing the credible fear stage."[34] Even if the asylum seeker can overcome that obstacle, unreliable or incomplete paperwork from the CFIs have led immigration judges to make unfavorable decisions.[35]

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[26] 8 C.F.R. § 208.30(e)(4).

[27] *See generally* U.S. DEP'T OF JUST.: EXECUTIVE OFF. FOR IMMIGRATION REV., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL CH. 1 – THE BOARD OF IMMIGRATION APPEALS 1, https://www.justice.gov/sites/default/files/pages/attachments/2015/10/30/biapracticemanual_fy2016.pdf#page=11, <http://perma.cc/X96A-DB46> (describing the purpose and procedure of the Board of Immigration Appeals in relation to the immigration process).

[28] *See generally* COURT OF APPEALS FOR THE NINTH CIRCUIT, JURISDICTION OVER IMMIGRATION PETITIONS AND STANDARDS OF REVIEW, (Mar. 2015), http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/A.pdf, <http://perma.cc/5TA2-CQVR> (describing the jurisdiction of the Ninth Circuit Court of Appeals in relation to appeals from immigration proceedings).

[29] *See* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 459–60 (2006) (indicating that immigrants can utilize habeas corpus as a means of challenging immigration detention under federal law).

[30] *See* LUTHERAN, *supra* note 18, at 3 (stating that the purpose of family detention is to hold immigrants during expedited removal).

[31] *See id.* (describing the difficulty of leaving immigration detention throughout the duration of immigration proceedings).

[32] SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT 7 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf, <http://perma.cc/YX62-U29A>.

[33] *Id.* at 9.

[34] *Id.* at 7.

[35] *Id.* at 9.

Additional problems exist in family detention facilities. For one, the lack of childcare forces mothers to conduct their CFIs in front of their children.[36] "Those who choose to share more details about the harm they suffered may re-traumatize their children through hearing the parent's stories or seeing the parent in a vulnerable posture."[37] So, due to the often-graphic nature of the stories, mothers either leave out parts or lie to protect their children. This can lead to accusations of dishonesty when a woman goes before an immigration judge and tells the whole story.[38] Such an accusation weakens the chance that the woman would be granted asylum in the United States. Furthermore, a similar phenomenon happens when children are interviewed in front of their parents, leading the children to recount fewer facts pertinent to asylum—even if the child may have a separate and distinct claim from his parent.[39] As a result, the methods of CFIs undermine the current legal processes that should be protecting the asylum seekers.

There are several different types of immigration detention facilities, including those that hold exclusively women,[40] those that hold both men and women,[41] and those that hold mothers with their children (family detention).[42] Immigration detention centers are secure, prison-like facilities.[43] In fact, ICE often contracts private prison companies—such as Corrections Corporation of America and GEO Group—to operate the facilities.[44] Private prison companies are infamous for creating secure facilities with abysmal conditions, and the appalling conditions extend to the immigration detention centers.[45]

This author has visited an immigration detention facility in Karnes, Texas and can corroborate that the facility looked strikingly like a prison

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[36] LUTHERAN, *supra* note 18, at 12.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See T. Don Hutto Residential Center*, CORRECTIONS CORPORATION OF AMERICA, http://www.cca.com/facilities/t-don-hutto-residential-center, <http://perma.cc/F8PL-JVVX> (noting that population of Hutto is exclusively female).

[41] *See Eloy Detention Center*, CORRECTIONS CORPORATION OF AMERICA, https://www.cca.com/facilities/eloy-detention-center, <http://perma.cc/7UBG-9HGR> (noting the population of the Eloy Immigration Detention center is both male and female).

[42] Valencia, *supra* note 10 (describing immigration detention facilities where women are kept with their children, commonly referred to as "family detention"). However, there is recent hope that at least this method of detention is unlawful, with Federal District Judge Dolly Gee of the Central District of California recently issuing an order that would effectively free almost every detainee in family detention centers. *Judge: Immigrant Kids Should Be Freed from Family Detention*, AP (October 23, 2015, 10:10 AM), http://bigstory.ap.org/article/59b1beed046440acb934a9bacce6d89e/judge-immigrant-kids-should-be-freed-family-detention, <http://perma.cc/WPH6-J4BG>.

[43] Raul A. Reyes, *America's Shameful Prison Camps,'* CNN (July 23, 2015, 11:00 PM), http://www.cnn.com/2015/07/23/opinions/reyes-immigration-detention/, <http://perma.cc/G9WA-WNDZ>.

[44] *Id.*

[45] Taylor Wofford, *The Operators of America's Largest Immigrant Detention Center Have A History of Inmate Abuse*, NEWSWEEK (Dec. 20, 2014 4:50 PM), http://www.newsweek.com/operators-americas-largest-immigrant-detention-center-have-history-inmate-293632, <http://perma.cc/883R-PZDB> (describing Corrections Corporation of America's poor record and that the company had recently been contracted to run an immigration detention facility).

facility—from the high cement walls to constant surveillance that the women and children held there were subjected to. This author also recently attended a special meeting in front of the Inter-American Commission on Human Rights Special Rappaport. Immigration attorneys there indicated that the treatment inside the facilities is prison-like, complete with daily body counts where the women and children of the facility were forced to stand outside of their rooms as guards tally them up. At this meeting, one immigration attorney also lamented that the guards bully the children, recounting a story in which a guard took milk out of the hand of a child and poured it onto the ground before forcing the child to return to her room empty handed. This incident only scratches the surface of the ill treatment women faced in the Karnes Family Detention Facility, as the Mexican American Legal Defense and Educational Fund has recently reported that there are also allegations of guards sexually abusing female asylum seekers.[46]

Separate from the poor conditions of internment, the mere act of internment is problematic because immigration detention "causes well-known negative and at times serious . . . psychological consequences."[47] Thus, immigration detention magnifies the pain and trauma that asylum seekers are already feeling. For example, immigrants in detention centers were found to suffer from anxiety, depression, post-traumatic stress disorder, self-harm, and suicidal ideation. The time in detention either caused or worsened these psychological conditions in detainees.[48]

Yet, there are alternative methods available, and the deplorable conditions of immigration detention should be contrasted with its possible alternatives. These alternatives would focus on individual assessments of the immigrants.[49] The Lutheran Immigration and Refugee Service lists several of these alternatives in its report on family detention: releasing on one's own recognizance; releasing on parole; releasing to a sponsor or family member; requiring periodic check-ins with a detention officer or caseworker; releasing with bond; telephonic monitoring, house arrest, or GPS tracking; and community support programs.[50] Because these alternatives are based on individualized assessment of the danger the asylum seeker poses to the community, the type of restrictions can be adjusted based on the individual under consideration.[51] Such methods would not be a major deviation from the process that immigrants already go through because at the beginning of the detention the immigrants are

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[46] Guillermo Contreras, *Complaint: Women at Karnes Immigration Facility are Preyed Upon by Guards*, MY SAN ANTONIO (Oct. 3, 2014), http://www.mysanantonio.com/news/local/article/Complaint-Women-at-Karnes-immigration-facility-5797039.php, <http://perma.cc/E39N-R2EU>.

[47] U.N. High Comm'r for Refugees, UNHCR Releases New Guidelines on Detention of Asylum Seekers (Sept. 21, 2012), http://www.unhcr.org/505c461f9.html, <http://perma.cc/NSN4-8PXU>.

[48] Katy Robjant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 BRIT. J. OF PSYCHIATRY 306, 306 (2009).

[49] LUTHERAN, *supra* note 18, at 20.

[50] *Id.*

[51] *Id.*

given an individualized bond determination.[52] The bond determination also requires an individual analysis, such as danger to the community and flight risk.[53] Thus, it would not be overly costly to implement the alternatives to immigration detention. In fact, alternatives to immigration detention would be more cost-effective. With less restrictive alternatives that do not rely on maintaining large, secure facilities,[54] the government would not pay as much for the cost of detention.[55] Many of the complaints lodged against immigration detention are rooted in its heavily restrictive nature; by using less restrictive alternatives, the immigration process would be more humane, and the United States would bring itself in line with the Geneva Conventions.

II. THE LAW OF WAR, WHAT IS IT GOOD FOR? (A LOT, ACTUALLY.)

> "War doesn't negate decency. It demands it, even more than in times of peace."—Khaled Hosseini, Goodwill Ambassador for the U.N. High Commissioner for Refugees and author.[56]

International humanitarian law governs conduct in war with the goal of ameliorating human suffering.[57] This body of law includes the Geneva Conventions, which regulate detention.[58] The Geneva Conventions acknowledge that the wars waged by politicians displace people's lives.[59] Further, they were created to protect civilians, not just enemy combatants, as there is a separate and specific section addressing the protection of civilians.[60] Thus, the purpose of the Geneva Conventions is a broad effort to force any belligerent nation in a conflict—any nation partly responsible for the human toll—to provide certain humanitarian protections.[61]

Considering that many of the asylum seekers in immigration

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[52] *See* Lornet Turnwell, *Judge: Detained Immigrants Must Get Bond Hearings*, SEATTLE TIMES (Mar. 13, 2014), http://www.seattletimes.com/seattle-news/judge-detained-immigrants-must-get-bond-hearings/, <http://perma.cc/KE24-NFZV> (indicating that detained immigrants are entitled to a bond hearing).

[53] U.S. DEP'T OF JUST., IMMIGRATION JUDGE BENCHBOOK: BOND/CUSTODY 7 (2015), http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Guide.pdf, <http://perma.cc/G3P6-FV4R>.

[54] LUTHERAN, *supra* note 18, at 20–22.

[55] *Id.* at 20–22.

[56] KHALED HOSSEINI, THE KITE RUNNER 115 (2003).

[57] David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1345 (2011) [hereinafter Weissbrodt].

[58] *See generally id.* (discussing applicability of the Hague Conventions and the Geneva Conventions which regulate conduct and detention).

[59] Refugees and Displaced Persons, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/war-and-law/protected-persons/refugees-displaced-persons, <http://perma.cc/QT6U-V9P5>.

[60] Weissbrodt, *supra* note 58 at 1373.

[61] *See id.*

detention are refugees, there is a separate sphere of law to protect them, the aptly named international refugee law.[62] However, recent years have shown that the international humanitarian law and international refugee law have considerable overlap.[63] This Note argues that this overlap is a good thing, as it offers asylum seekers, who are typically protected by refugee law, the opportunity to also be protected by international humanitarian law, specifically Common Article 3 of the Geneva Conventions.

At first, it might seem odd to the casual observer that these areas of law are not typically considered together or that many view them as incompatible. After all, international humanitarian law is the law of war, and the inhumanity of war is largely responsible for the flow of refugees.[64] Yet, in times of war, nations are less willing to follow human rights norms,[65] such as international refugee law systems. To borrow a colloquial phrase, war brings out the worst in us. Or put less colloquially, this is because war forces a set of strategic considerations due to the adversarial nature of the activity.[66] Moreover, war is costly.[67] On the line for nations in times of armed conflict are the national interests of the country and that typically includes the lives of the nation's civilian population.[68] Thus, we can know that these national interests are fairly strong, considering the heavy costs. In light of these costs, nations are more inclined to find that international human rights law regimes do not apply in times of war because the nations are more focused on other strategic considerations.

Yet, the International Court of Justice consistently has held that human rights law is applicable in times of war.[69] International refugee law and international humanitarian law are also compatible for several reasons. Both international humanitarian law and international refugee law share a common interest in protecting the dignity of people.[70] Both

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[62] *See generally* KATE JASTRAM & MARILYN ACHIRON, U.N. HIGH COMM'R FOR REFUGEES, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE (2001), http://www.unhcr.org/3d4aba564.html, <http://perma.cc/2GLJ-QDUK> (describing and summarizing refugee law).

[63] *See* Fannie Lafontaine, Joseph Rikhof & Laurel Baig, *Introduction*, 12 J INT'L CRIM. JUST. 901, 902 (2014) (comparing IHL and refugee law).

[64] *Id.* at 902.

[65] *See* Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 314 (2007) ("Still, the Universal Declaration [of Human Rights] was meant for times of peace.").

[66] *See id.* at 313 ("Humanitarian law, for its part, was primarily based on the reciprocal expectations of two parties at war.").

[67] *See* Evan Stephenson, *Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism? An Economic Analysis*, 44 VA. J. INT'L L. 1197, 1219 (2004) (discussing the costs of the United States War on Terror).

[68] *See id.* (comparing the costs of the War on Terror with the costs of passively being attacked).

[69] *See* Armed Activities on the Territory of the Congo (Dem, Rep. Congo v. Uganda), 2005 I.C.J. 116 (ruling on the applicability of IHRL in times of war when IHL applies); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

[70] *Id.*

share similar concepts, such as international humanitarian law's concept of "civilian" and international refugee law's concept of "civilian character."[71] Finally, both are triggered by exceptional circumstances that share some similarity—the failure of political protection for one set and the onset of the political exercise of war for the other.[72] Thus, international refugee law and international humanitarian law share the same goals, with the difference being that international humanitarian law takes into account nations' strategic considerations.

But the idea that war comes with separate strategic considerations raises a reason to apply the law of war to the immigration detention context—to neutralize the national security concerns raised by the United States government.[73] Unless the government attempts to deter immigrants by sending them to detention facilities, it claims that by allowing people into the United States, it encourages other undocumented immigrants to come to the United States and overwhelm border resources.[74] The importance of these concerns cannot be overstated; the United States has previously used national security to justify detention and human rights abuses and does so regularly.[75] However, international humanitarian law, since it is closely tied to war, is meant to balance with national security concerns.[76] International humanitarian law has twin aims of valuing human dignity and respecting strategic interests, such as national security.[77] The idea is that international humanitarian law balances the concerns in such a way that when a nation violates international humanitarian law, it is also overbalancing its national security concerns over the human dignity aspect.[78] Because international humanitarian law takes national security concerns into account, applying it in the context of immigration detention neutralizes the national security concerns claimed by the United States government.

Also, because international humanitarian law was designed for times when nations were less likely to follow international human rights law, international humanitarian law symbolizes a lower level of

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[71] *Id.* at 935.

[72] *Id.*

[73] *See R.I.L-R*, 80 F. Supp. 3d at 175 (recognizing that the governments justification is that the woman and children in Karnes pose a "national security" threat).

[74] *Id.*

[75] *See* Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 370 n.21 (2001) (After all, "[n]ational security is the Achilles' heel of international law."); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1629 (2009) (lamenting that the typical constitutional protections become riddled with exceptions when the government is concerned with national security).

[76] NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 11 (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, <http://perma.cc/K3FD-6N9F>.

[77] *Id.*

[78] *See id.* (arguing that international humanitarian law forces nations to adopt a balance).

compliance that nations must meet.[79] The fact that international humanitarian law is a lower level favors analyzing the United States' stance in relation to this bare minimum because it shows the extent to which the United States is non-compliant with requirements under international law. Exposing that the United States is unable to meet even a low level of compliance will have a stronger corrosive effect on U.S. legitimacy. Because legitimacy, both domestic and international, has a substantial effect on encouraging enforcement, it will benefit an attempt to end this detention practice.[80]

Another blow to U.S. legitimacy is that detainees are from regions where the United States has allies in combating drug gangs.[81] International humanitarian law has long recognized the importance of protecting civilians.[82] One reason to be concerned about the treatment of civilians is that proper treatment of allied nations' civilians in times of war creates better relationships between the nations.[83] Since international humanitarian law has strategic considerations in mind, applying the Geneva Conventions to uphold the dignity of Latin American citizens fleeing the violence will signify the United States' attempt to closely align with Central American nations in order to combat drug gangs. This is pertinent because better communication between the United States and Central American nations will improve the chances of defeating the drug gangs.[84]

Applying international humanitarian law in this context would benefit a larger group of detainees than those who can currently receive protection under international refugee law. The standards by which one can receive refugee status in the United States are rather high.[85] Because of these high standards, it can be extremely difficult for many Central American detainees to receive legal protections under international law even if they can show that they were fleeing violence in a war-torn

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[79] *See* Droege, *supra* note 66, at 314 (discussing why international humanitarian law norms are lower than international human rights law norms).

[80] Jonathan H. Marks, *Toward a Unified Theory of Professional Ethics and Human Rights*, 33 MICH. J. INT'L L. 215, 226 (2012) ("The more widespread and systematic a state's failure to comply with human rights obligations, the less legitimate that state will be.").

[81] *Immigrants' Rights and Detention*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention, <http://perma.cc/3T6Q-28SS> (indicating the many detainees are from nations in the Central American region); *see infra* introduction (discussing the U.S. alliance with Mexico, a power in the Central American region).

[82] MELZER, *supra* note 77, at 10.

[83] *See* Ron Moreau & Sami Yousafzai, *U.S. Soldier Murders Afghan Civilians, in Latest Blow to Afghan-American Relations*, DAILY BEAST (Mar. 11, 2012, 2:30 PM), http://www.thedailybeast.com/articles/2012/03/11/us-soldier-murders-afghan-civilians-in-latest-blow-to-afghan-american-relations.html, <http://perma.cc/8BTH-ELQJ> (noting that in Afghanistan, Afghani civilian deaths have decreased trust in the United States as an allied power).

[84] *See* Gina Harkins, *Marines Train Central American Allies to Battle Ruthless Cartels*, MARINE CORPS TIMES, (Jan. 9, 2015, 11:05 AM), http://www.marinecorpstimes.com/story/military/pentagon/2015/01/09/marines-central-america-drug-cartels/21419813/, <http://perma.cc/8DFB-4J9T> (describing improvements in the Central American fighting forces because of training from the United States' Marines).

[85] BEATRIZ MANZ, REFUGEES OF A HIDDEN WAR: THE AFTERMATH OF COUNTERINSURGENCY IN GUATEMALA 176 (1988).

nation.[86] But, refugees can much more easily seek the protections of the Geneva Conventions. Provided that the United States is a co-belligerent in a NIAC,[87] the asylum seeker need only show that she is a citizen of one of the nations involved in the conflict and that she is a civilian instead of a combatant.[88] Accordingly, applying the Geneva Conventions would also serve as a means of protecting a larger number of asylum seekers than relying purely on international refugee law.

III. THE PRACTICE OF FAMILY DETENTION VIOLATES THE GENEVA CONVENTIONS.

> "I know an American internment camp when I see one."—Satsuki Ina, Professor at California State University, who was born in a Japanese internment camp, describing an immigration detention center.[89]

The Geneva Conventions are part of international humanitarian law and place restrictions on detention procedures.[90] For the text of the Conventions to apply, there must be an armed conflict.[91] This Note builds on scholarship that argues that the ongoing international drug conflict in Mexico and Central America triggers the application of the law of war.[92] Since this is a NIAC, the United States is bound by the terms of Common Article 3 because the United States has signed and ratified that part of the Conventions. This author uses the term "Central American Drug Conflict" to indicate the ongoing conflict between Central American and Mexican governments and the gangs that profit from drug crime. This author also indicates that the United States is a co-belligerent in the conflict.[93]

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[86] *See Groups Ask Federal Court to Block Deportation Hearings for Children Without Legal Representation*, ACLU (Aug. 1, 2014), https://www.aclu.org/news/groups-ask-federal-court-block-deportation-hearings-children-without-legal-representation, <http://perma.cc/AC9R-LA6R> (discussing difficulty of attaining representation in children's deportation cases, even when children have compelling asylum cases); Sarah Mehta, *Immigrants Have No Access to Justice*, ACLU (Apr. 2, 2014, 5:08 PM), https://www.aclu.org/blog/immigrants-have-no-access-justice, <http://perma.cc/LGX9-2T5Q> (discussing issues of access to justice in immigration proceedings).

[87] *See infra* III (arguing that the United States is a co-belligerent in a NIAC).

[88] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

[89] Satsuki Ina, *I Know an American 'Internment' Camp When I See One*, ACLU (May 27, 2015, 10:45 AM), https://www.aclu.org/blog/speak-freely/i-know-american-internment-camp-when-i-see-one, <http://perma.cc/5AME-HC6P>.

[90] FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 16 (4th ed. 2011).

[91] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[92] *See generally* Carina Bergal, *The Mexican Drug War: The Case for Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042 (2011) (arguing that the Mexican Drug War should be recognized as a NIAC).

[93] *See infra* III (indicating why the United States is a co-belligerent in the conflict).

For the purposes of invoking the Geneva Conventions, the asylum seekers fleeing Central America to escape violence can show that they are fleeing a NIAC. Typically, for a conflict to be recognized as a NIAC, the conflict must reach a certain threshold of hostilities.[94] There are sections of the Geneva Conventions that explicitly discuss their applicability and sections that do not.[95] Common Article 3 does not contain such a provision, so by analogy, the standard of Protocol II is applied.[96] That standard is defined in the negative.[97] It states: "this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[98] This has been interpreted to mean that there are two major requirements. First, there must be "a minimum level of organization, [and] demonstration of a responsible command and capacity to meet minimum humanitarian requirements."[99] Second, there must be "hostilities that are collective and coordinated in nature, reaching such intensity that the government is compelled to respond with military forces rather than law enforcement."[100]

The Central American Drug Conflict meets each of these requirements. First, the Central American Drug Conflict has a minimum level of organization. Narco-trafficking organizations that operate throughout Central America are organized with a centralized command structure.[101] Large-scale drug production requires a large amount of land.[102] This land is needed both for cultivation[103] and access to trade routes.[104] The consequence is that the drug trade has organized itself into organizations that can provide tactical and logistical support.[105] The

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[94] *See* William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L.J. 907, 915 (2003) (indicating a standard requirement that the hostilities between the powers are protracted to define the conflict as a NIAC).

[95] *See* Elizabeth Holland, *The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?*, 34 SUFFOLK TRANSNAT'L L. REV. 145, 156 (2011) (nothing that protocol II contains such a provision, and common article three does not).

[96] *Id.*

[97] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609.

[98] *Id.*

[99] Holland, *supra* note 96, at 156.

[100] *Id.*

[101] *See* PETER CHALK, RAND CORP., THE LATIN AMERICAN DRUG TRADE: SCOPE, DIMENSIONS, IMPACT, AND RESPONSE 25–26 (2011), http://www.rand.org/content/dam/rand/pubs/monographs /2011/RAND_MG1076.pdf, <http://perma.cc/4RP9-S5N7> (describing the command structure and make up of major drug cartels).

[102] *See* U.N. OFFICE ON DRUGS AND CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT 11–13 (2012), http://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf, <http://perma.cc/E87P-J6GC> (discussing the use of land by crime syndicates and families).

[103] *Id.* at 17.

[104] *Id.* at 11–13.

[105] *See* John P. Sullivan & Adam Ekelus, *Tactics and Operations in the Mexican Drug War*, in INFANTRY 20, 20–23 (2011) (discussing the tactics employed by drug cartels).

cartels create sections of their organizations whose jobs are to battle other drug traffickers and the government for territory. The need for manpower has created a corporation-like structure within drug cartels.[106] These organizations contain command structures as well.[107] For example, the Arellano Félix family runs the Tijuana Cartel, and the Carrillo Fuentes family controls the Juarez Cartel.[108] In contrast, the Sinaloa Cartel is made up of small federation-like factions that are allied with one another.[109] The Zetas are known for having a military structure, since many of its members come from the Mexican military.[110]

Local gangs also partner with larger multi-national cartels.[111] In Guatemala, crime families, such as the Mendoza family, control territories and allow narco-traffickers to use the land as drug routes.[112] In El Salvador the Mara Salvatrucha is involved with narco-traffickers.[113] These organizations protect trade routes for narco-traffickers and help transport the goods across borders—such as across the Guatemala–Mexico border for drugs en route to the United States.[114] Looking at the structure of these narco-trafficking organizations, it is clear that the level of organization is higher than the "minimum" level necessary for invoking the Geneva Conventions.

Second, the Central American Drug Conflict has a high enough intensity to be characterized as a NIAC. In Mexico there have been over 60,000 deaths associated with drug crime.[115] In 2009 alone, in the small nation of Guatemala, there were 6,500 violent deaths, and 41% were related to the drug trade.[116] In El Salvador, there were sixteen murders *per day* in March 2015 with most related to drug and gang activity.[117] To accomplish this level of killing, drug cartels in the Central American region have acquired military grade technology.[118] The Central American

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[106] KAMALA D. HARRIS, CAL. DEP'T OF JUST.: OFFICE OF ATTORNEY GEN., CALIFORNIA AND THE FIGHT AGAINST TRANSNATIONAL ORGANIZED CRIME 2 (2014), https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report_2014.pdf?, <http://perma.cc/6N6S-ZGTP>.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 3.

[110] MAX G. MANWARING, GANGS, PSEUDO MERCENARIES AND OTHER MODERN MERCENARIES, 134–135 (2014).

[111] U.N. OFFICE ON DRUGS AND CRIME, *supra* note 103, at 11 ("*Transportistas*, in contrast, prefer to fly under the radar, simply moving contraband from place to place, paying tribute to territorial groups when necessary.").

[112] *See id.* at 11, 23 (describing land controllers, and the Mendoza family, a land controlling group associated with the cartels).

[113] *Id.* at 26.

[114] BRUCE BAGLEY, WOODROW WILSON INT'L CTR. FOR SCHOLARS, DRUG TRAFFICKING AND ORGANIZED CRIME IN THE AMERICAS: MAJOR TRENDS IN THE TWENTY-FIRST CENTURY 7 (2012), http://www.wilsoncenter.org/sites/default/files/BB%20Final.pdf, <http://perma.cc/B3CA-TTPU>.

[115] HUMAN RIGHTS WATCH, *supra* note 3, at 1.

[116] Arthur Brice, *Gangs, Drugs Fuel Violence in Guatemala*, CNN (September 9, 2011 8:50 PM), http://www.cnn.com/2011/WORLD/americas/09/09/guatemala.violence/, <http://perma.cc/DLN2-WFSR>.

[117] David Stout, *16 People Were Murdered Every Day in El Salvador in March*, TIME (Apr. 7, 2015), http://time.com/3773443/el-salvador-murder-gang-violence/, <http://perma.cc/8MDL-AN8B>.

[118] Ken Ellingwood & Tracy Wilkinson, *Drug Cartels' New Weaponry Means War*, L.A. TIMES

drug gangs have also begun assassinating government officials.[119] The militaries of Central America have reacted to this intensity; Mexico has dispatched its military because the police and judicial apparatus are incapable of overcoming the drug gangs.[120] The U.S. Marines are currently training the militaries of the United States' Central American allies to respond to and to battle the illegal drug trading organizations.[121] Considering this level of intensity, the Central American Drug Conflict should be recognized as a NIAC.

Finally, the United States can be recognized as a party to the Central American Drug Conflict as a co-belligerent. A "co-belligerent" means any state or armed force joining and directly engaged with a nation that is party to the hostilities, or one directly supporting hostilities against a common enemy.[122] The United States is currently training members of the Mexican military, as well as the militaries of other Central American nations.[123] The United States has also undertaken the "Mérida Initiative," a regional security agreement between Mexico and the United States to combat drug violence.[124] Funding for Mexico's attempt to combat drug violence in Central America is the United States' largest aid initiative, at $830 million.[125] The United States has also engaged in a policy of interdiction, breaking up drug trade lines by seizing drugs at the U.S. border or while the drugs are en route through Central America.[126] In addition, the United States has used police and military forces in order to eliminate crops before they can be harvested.[127] Of course, one reason the United States has gotten involved is because of the serious national security threat that Central American drug gangs pose to the United States' southern border.[128] Furthermore, the United States has also waged a "War on Drugs"[129] and battles within U.S. cities against the same drug gangs that Central America battles,

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(Mar. 15, 2009), http://www.latimes.com/world/la-fg-mexico-arms-race15-2009mar15-story.html#page=1, <http://perma.cc/ZA4M-C49H>.

[119] Harkins, *supra* note 85.

[120] Tony Payan, James A. Baker III Inst. for Pub. Pol'y, *Why Mexico's Military is Fighting the Country's Drug War*, HOUSTON CHRON. (Jun. 6, 2013 at 8:18 AM), http://blog.chron.com/bakerblog/2013/06/why-mexicos-military-is-fighting-the-countrys-drug-war/, <http://perma.cc/55Q2-E8MC>.

[121] Harkins, *supra* note 85.

[122] *See Practice Relating to Rule 3. Definition of Combatants*, INT'L COMM. OF THE RED CROSS, (2015), https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule3, <http://perma.cc/CZ4Y-CWD3> (defining co-belligerent in relation to the United States).

[123] Harkins, *supra* note 85.

[124] Suzanna Reiss, *Beyond Supply and Demand: Obama's Drug Wars in Latin America*, N. AM. CONG. ON LATIN AM., https://nacla.org/news/beyond-supply-and-demand-obama%E2%80%99s-drug-wars-latin-america, <http://perma.cc/SA9G-Q5ZW>.

[125] *Id.*

[126] DRUG POLICY ALLIANCE, THE DRUG WAR ACROSS BORDERS: US DRUG POLICY AND LATIN AMERICA, http://www.drugpolicy.org/docUploads/fact_sheet_borders.pdf, <http://perma.cc/4F4C-PBBD>.

[127] *Id.*

[128] Kelly, *supra* note 5.

[129] Seth Harp, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. REV. 1661, 1663–64 (2010).

such as the Mara Salvatrucha in Los Angeles.[130]

It is also fair to say that the United States is responsible for the hostilities and strength of Central American drug gangs. Demand for illegal drugs in the United States is a contributor to the success of drug gangs.[131] For example, "[n]inety percent of the cocaine that enters the U.S. transits through Mexico."[132] Also, a large supply of marijuana and methamphetamines come from Mexico and Central America.[133] In addition, a large amount of the guns used by drug gangs come from the United States as a result of loose gun laws.[134] "Nearly 70% of guns recovered from Mexican criminal activity from 2007 to 2011, and traced by the U.S. government, originated from sales in the United States."[135] United States involvement may be based partially on the national security threat of drug gangs and partially on a shared feeling of responsibility for the hostilities. Thus, by looking to how the United States has directly and indirectly contributed to the Central American Drug Conflict, it becomes apparent that the United States is a co-belligerent.

It is important to indicate that this Note claims the Central American Drug Conflict is the conflict that triggers the application of the Geneva Conventions, and this Note does not focus on a specific nation. It may be easier for advocates to argue that one nation falls under this moniker than to characterize the conflict in broad swath. In fact, this author would encourage litigants to explore that option, and this Note does not attempt to foreclose that possibility. However, immigration detention focuses broadly on detaining people from Central America,[136] and this Note seeks to analyze that process under that same mode of thinking. Also, by showing that the Central American Drug Conflict as a whole should be characterized as a NIAC, it demonstrates that there should be a wide breadth of detainees who are subject to the protections of the Geneva Conventions.

However, one of the arguments against recognizing the Central

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[130] *See* Margot Kniffin, *Balancing National Security and International Responsibility: The Immigration System's Legal Duty to Asylees Fleeing Gang Violence in Central America*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 314, 315 (2011) (indicating the presence of the Maras, aka MS-13, in the United States).

[131] Reiss, *supra* note 125.

[132] CNN Library, *Mexico Drug War Fast Facts*, CNN (last updated Sept. 23, 2015, 4:41 PM ET), http://www.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts, <http://perma.cc/FX6T-TD39>.

[133] *Id.*

[134] Chris McGreal, *How Mexico's Drug Cartels Profit from Flow of Guns Across the Border*, GUARDIAN (Dec. 8, 2011), http://www.theguardian.com/world/2011/dec/08/us-guns-mexico-drug-cartels, <http://perma.cc/Q72L-XJ3Z>.

[135] Terry Frieden, *Data show most firearms recovered at Mexican crime scenes originated in U.S.*, CNN (Apr. 26, 2012), http://www.cnn.com/2012/04/26/us/mexico-crime-guns/, <http://perma.cc/94PC-6NX2>.

[136] *See* Wil S. Hylton, *A Federal Judge and a Hunger Strike Take on the Government's Immigration Detention Facilities*, N.Y. TIMES MAG. (Apr. 10, 2015), http://www.nytimes.com/2015/04/06/magazine/a-federal-judge-and-a-hunger-strike-take-on-the-governments-immigrant-detention-facilities.html, <http://perma.cc/7YQL-YXCY>.

American Drug Conflict as a NIAC is that NIACs were created to respond to instances of internal struggles. Opponents would argue that the Central American Drug Conflict spans multiple nations.[137] As a result, the term "non-international" itself implies that the types of conflict recognized by Common Article 3 of the Geneva Conventions are not international in character—which the Central American Drug Conflict surely is. In fact, it would almost seem contradictory that there exists an "international non-international armed conflict."[138] However, under the interpretation of NIACs expounded by the United States Supreme Court, that argument would surely fail.

The United States Supreme Court has ruled on what qualifies as a NIAC.[139] In *Hamdan v. Rumsfeld*, the United States Supreme Court was called on to determine if the military commissions of Guantanamo detainees were in compliance with the Geneva Conventions.[140] The Government advanced the argument that the Geneva Conventions did not apply because the war with Al-Qaeda was not a NIAC.[141] The Government argued that the war with Al-Qaeda was an international conflict, and thus, did not fall under the term *non*-international.[142] The Supreme Court rejected that claim.[143]

The Court held that Common Article 3 of the Geneva Conventions—the common article triggered by NIACs—applied to the United States' war with Al-Qaeda.[144] The Court articulated that "[t]he term 'conflict not of an international character' is used here in contradistinction to a conflict between nations."[145] The Supreme Court contrasted this with Common Article 2, which applies to international armed conflicts, and indicated that the protections of Common Article 3 apply to all conflicts that do not arise between two parties—albeit affording a lower level of protection than Common Article 2.[146]

This holding is significant for two reasons. First, it shows that the threshold for recognizing a NIAC under U.S. law is actually rather low. So, in analyzing the fighting between government groups and drug gangs, a logical conclusion based on the U.S. Supreme Court's interpretation is that the drug conflict is a NIAC in the same way that the conflict between Al-Qaeda and the United States is a NIAC. Second, this

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[137] *The Drug War Hits Central America: Organised Crime Is Moving South from Mexico into a Bunch of Small Countries Far Too Weak to Deal with It*, THE ECONOMIST (Apr. 14, 2011), http://www.economist.com/node/18560287, <http://perma.cc/F5R7-DXZM>.

[138] *See generally* Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145 (1983) (observing cases of internationalized NIACs).

[139] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (holding that the war on Al-Qaeda qualifies as a NIAC).

[140] *Id.* at 627.

[141] *See id.* at 628.

[142] *Id.* at 630.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 630–31.

holding shows that a NIAC can take place across several nations.[147] Thus, the Central American Drug Conflict, which has its roots in nations across Central America, is not disqualified because of its international nature.

The nature of the conflict demonstrates the nexus between the conflict and the detention of immigrants. The United States government claims that the detention of asylum seekers is animated by national security concerns.[148] Specifically, the government claims that mass migration, such as the kind reported at the border in summer of 2014, would overwhelm the immigration apparatus.[149] One of the purposes of the immigration apparatus is to protect the United States from admitting dangerous people.[150] In relation to Central American immigration, one large concern of some is that a compromised immigration apparatus will allow an inflow of drug cartel members or narco-traffickers.[151] To protect the immigration system and the nation from the violence of the drug conflict, the United States has implemented policies that detain refugees.[152] Therefore, there is a close nexus between the justifications for the detention and the conflict driving the influx of refugees.

A. The Protections Afforded to Women and Children Under Common Article 3 of the Geneva Conventions

The United States' current immigration detention practices violate Common Article 3 of the Geneva Conventions. The relevant provisions read:

> [There is a prohibition on] [(1)](a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . [(1)](c) outrages upon personal dignity, in particular humiliating and degrading treatment; . . . [and] (2)

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[147] Under the interpretation by the Supreme Court, one could say that the term "*Non*-International" Armed Conflict is a bit of a misnomer, but saying "Only-One-Signatory-Party-as-a-Participant" Armed Conflict is a bit of a mouthful.

[148] R.I.L-R. v. Johnson, 80 F. Supp. 3d 164, 175 (D.D.C. 2015). *See* MICHAEL TAN, AM. IMMIGRATION POLICY COUNCIL, LOCKED UP WITHOUT END: INDEFINITE DETENTION OF IMMIGRANTS WILL NOT MAKE AMERICA SAFER 9 (2011), http://www.immigrationpolicy.org/sites/default/files/docs/Tan_-_Locked_Up_Without_End_100611.pdf, <http://perma.cc/55HD-9HBJ> (describing the national security justification for immigration detention).

[149] *R.I.L-R.*, 80 F. Supp. 3d at 189.

[150] *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1681 (2011) (noting immigration law contains provisions that deport or limit the entry of people with a criminal background).

[151] *See* Frank Diez & Bill Vourvoulias, *Cartels Exploit Immigration Crisis To Smuggle More Drugs Across Border*, FOX NEWS LATINO (July 03, 2014), http://latino.foxnews.com/latino/news/2014/07/03/cartels-exploit-immigration-crisis-to-smuggle-more-drugs-across-border/, <http://perma.cc/C48Y-9S55> (arguing that drug cartels are utilizing the immigration crisis in order to gain access to the United States).

[152] *See R.I.L-R*, 80 F. Supp. 3d at 184 (calling the no release on bond policy a "blanket" policy).

The wounded and sick shall be collected and cared for.[153]

In applying facts to these scenarios, this author does not intend to provide an exhaustive list of causes of action, but instead provide examples of violations that litigants may use to model their own claims.

1. Current Immigration Detention Conditions Qualify as "Cruel Treatment and Torture."

The United National Committee against Torture recently weighed in on the United States' immigration detention practice and indicated that the process itself raises concerns of torture.[154] The Committee was concerned about taking immigrants with viable asylum claims who are trying to flee violence and placing them in secure "prison-like" facilities.[155] The Committee also indicated that the poor conditions cause unnecessary suffering to the immigrants detained in the secure facility.[156] This includes sexual abuse of female asylum seekers and the psychological impacts from the use of solitary confinement.[157] Further, these problems are exacerbated for the children held in the facilities.[158]

What is true under the United Nations Convention against Torture (CAT) should also be recognized as true under the Geneva Conventions. One reason for this is because the International Committee of the Red Cross[159] broadly adopts the United Nations' definition of torture when defining torture under the Geneva Conventions.[160] In fact, the only difference between the U.N. definition and the international humanitarian law definition is that the international humanitarian law definition does "not requir[e] the involvement of a person acting in an official capacity."[161] At their core, the purpose of the CAT and the purpose behind section (1)(a) of Common Article 3 of the Geneva Conventions are the same—to prevent cruel treatment of people.[162] Immigration

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[153] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

[154] *See* UNITED NATIONS COMM. AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE THIRD TO FIFTH PERIODIC REPORTS OF UNITED STATES OF AMERICA 9 (2014), https://www.justsecurity.org/wp-content/uploads/2014/11/UN-Committee-Against-Torture-Concluding-Observations-United-States.pdf, <http://perma.cc/JXY3-F53G> (discussing the policy of immigration detention in a periodic review of U.S. policy for concerns regarding torture).

[155] *Id.* at 8–9.

[156] *Id.* at 9.

[157] *Id.* at 9.

[158] *See id.* at 10 (describing increased incidence of sexual violence faced by children held in detention facilities).

[159] The International Committee of the Red Cross is the international organization that seeks to promulgate the standards of international humanitarian law across the world. *Humanitarian Diplomacy*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/en/what-we-do/humanitarian-diplomacy-and-communication, <http://perma.cc/BXZ3-UB9U>.

[160] *What Is the Definition of Torture and Ill Treatment?*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/eng/resources/documents/misc/69mjxc.htm, <http://perma.cc/L7UA-JMQU>.

[161] *Id.*

[162] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

detention should be recognized as torture under the Geneva Conventions for the same reasons that are recognized as torture by the Committee against Torture.

Even if the Committee had never weighed in, a litigant could prove that immigration detention is torture because it causes needless suffering. While a litigant could provide similar reasons to CAT—such as that asylum seekers are kept in cages—a litigant could argue that the poor conditions of the immigration detention centers amounts to torture. One point is that poor provision of medical care coupled with the inability to seek medical attention elsewhere exacerbates the pain that detainees are forced to endure when ill.[163] Even when medical care is provided, it is often provided poorly.[164] For example, recently 250 children were accidently administered an adult dose of the Hepatitis A vaccine, causing potentially debilitating illness.[165]

Accordingly, there are many ways an individual could bring such a claim—this Note only provides a brief list. Advocates who wish to bring causes of action should investigate the facilities in search of needless suffering. In this author's experience, it will not be hard to find.

2. The Current Practice of Immigration Detention Creates Outrages upon Personal Dignity.

The Geneva Conventions prevent conditions that are "outrages upon personal dignity."[166] This means that nations cannot "[s]ubject[] victims to treatment designed to subvert their self-regard."[167] The equivalent under international human rights law is "degrading treatment,"[168] and the Common Article 3 makes direct reference to this term.[169]

Punishment, Dec. 10, 1984, 14765 U.N.T.S. 85 (presenting U.N. provisions designed to prevent cruel treatment).

[163] *See* Press Release, Am. Immigration Council, Deplorable Medical Treatment at Family Detention Centers (July 20, 2015), http://www.americanimmigrationcouncil.org/newsroom/release/deplorable-medical-treatment-family-detention-centers, <http://perma.cc/5VEU-ZDK4> (describing the pain that poor provision of medical care forces detainees to endure while being detained).

[164] *Id.*

[165] Kerry Flynn, *Overdose of Hepatitis A Vaccine Given to 250 Immigrant Children Detained in Texas: Report*, INT'L BUS. TIMES (July 5. 2015, 2:53 PM), http://www.ibtimes.com/overdose-hepatitis-vaccine-given-250-immigrant-children-detained-texas-report-1996169, <http://perma.cc/4QJH-8RXJ>.

[166] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

[167] Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 285 (Jan. 27, 2000).

[168] *See generally* David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999) (discussing the principle of degrading treatment under international human rights law).

[169] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

The issues of degrading treatment and torture are closely related and are often treated together.[170] For the same reasons that detention is torture, it is also degrading treatment. Those reasons include the caging of asylum seekers, poor conditions of confinement, and causing mental illness.[171]

One example of a facility with conditions that subvert the self-regard of the detainees is the Eloy Facility in Arizona, which is operated by the Corrections Corporation of America and has recently been plagued by a string of suicides.[172] It has been called "the deadliest immigration detention center in the nation."[173] Some of the problems that have contributed to the infamous title are the harsh conditions of confinement, including a lack of "adequate medical care, effective suicide monitoring[,] and staffing levels."[174]

One specific issue that is typically treated under Common Article 3 section (1)(c) exclusively is sexual abuse, which is rampant in immigration detention facilities.[175] In 2011 the ACLU National Prison Project filed an open records request with the federal government requesting documents relating to allegations of sexual abuse at immigration detention facilities.[176] What the ACLU discovered is frightening. There were sixteen allegations of sexual abuse in Arizona, seventeen in California, and fifty-six in Texas.[177] There were an additional sixty-five allegations from states that have less robust immigration detention complexes.[178] In total "immigrants held in U.S. immigration detention facilities filed more than 170 allegations of sexual abuse over the last four years, mostly against guards and other staff at the centers."[179] No evidence was found that the majority of the complaints had been resolved or even investigated.[180] Furthermore, one former employee indicates that "officials attempted to cover up complaints of sexual abuse."[181] Current conditions in confinement continue to put

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[170] *See* Ali v. Rumsfeld, 649 F.3d 762, 782 (D.C. Cir. 2011) (treating Obama's executive order ending "outrages upon personal dignity" as an end to state sanctioned "torture" under the Bush Administration).

[171] *See infra* III(A)(i) (noting that immigration detention is torture due to mental anguish).

[172] Megan Jula & Daniel González, *Eloy Detention Center: Why So Many Suicides?*, THE ARIZ. REPUBLIC (July 29, 2015, 10:33 AM), http://www.azcentral.com/story/news/arizona/investigations/2015/07/28/eloy-detention-center-immigrant-suicides/30760545/, <http://perma.cc/Z7FM-3FMA>.

[173] *Id.*

[174] *Id.*

[175] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 327 (2003).

[176] *Sexual Abuse in Immigration Detention Facilities*, ACLU, https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities, <http://perma.cc/MVT7-Z5TG>.

[177] *Id.*

[178] *Id.*

[179] Catherine Rentz, *How Much Sexual Abuse Gets "Lost in Detention"?*, PBS (Oct. 19, 2011, 2:03 PM), http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention/, <http://perma.cc/98F5-A29L>.

[180] *Id.*

[181] *Id.*

asylum seekers at risk of sexual abuse.[182] In addition, there is consistent under-reporting of sexual assault and abuse.[183] This suggests sexual abuse in facilities is even more widespread than these numbers indicate. Therefore, the conditions in immigration detention facilities violate prohibitions on outrages against personal dignity.

3. The Wounded and Sick Are Not Cared for in Immigration Detention.

Common Article 3 of the Geneva Conventions contains a provision that makes failure to care for the sick and wounded a violation of the Conventions.[184] This is likely because international humanitarian law developed around attempts to care for the sick and wounded in combat. Unfortunately, immigration detention facilities in the United States do not comply with this requirement.[185] For example, at least one detention center does not have a full-time doctor, and children in detention are either not given medical attention or are given inadequate medical attention.[186] One habeas petition outlines how a little boy with allergies was denied adequate medical treatment for the entirety of his detention at the Karnes facility.[187] Another child who was vomiting blood was told to drink more water and was not given any additional care or a referral to an external medical care unit for several days.[188]

Because many of the immigrants are fleeing violence, cases of psychological trauma, such as post-traumatic stress disorder (PTSD), are rampant.[189] For example, the same habeas petition as the boy who could not receive allergy treatment also indicates that his mother suffered from

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[182] HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 19 (2010), https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf, <http://perma.cc/X72E-5JVA>.

[183] U. S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 18–19 (2013), http://www.gao.gov/assets/660/659145.pdf, <http://perma.cc/RJD2-NNV9>.

[184] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

[185] *See US: Immigration Detention Neglects Health: Two Studies – On Women and Systemic Abuses – Document Shortcomings and Lack of Accountability*, HUMAN RIGHTS WATCH (Mar. 17, 2009), https://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health, <http://perma.cc/V4N3-4Q3R> (describing a variety of ways in which current medical treatment received by detainees is below community standards).

[186] Letter from Trisha Trigilio, Fellow, Univ. of Tex. Sch. of Law Civil Rights Clinic, Ranjana Natarajan, Dir., Univ. of Tex. Sch. of Law Civil Rights Clinic & Kelly Haragan, Dir., Univ. of Tex. Sch. of Law Envtl. Law Clinic to Teresa R. Pohlman, Dir., Sustainability and Envtl. Programs, Dept. of Homeland Sec. & Susan Bromm, Dir., Office of Fed. Activities (Oct. 30, 2014), http://www.immigrantjustice.org/sites/immigrantjustice.org/files/UT_EnvironmentalImpactofDilley_2014_10_30.pdf, <http://perma.cc/5SSL-4GUJ>.

[187] Petition for Habeas Corpus, Castillo v. Thompson, 5:14-CV-01023 (W.D. Tex. Nov. 18, 2014).

[188] Press Release, Am. Immigration Council, *supra* note 164.

[189] *US: Trauma in Family Immigration Detention: Release Asylum-Seeking Mothers, Children*, HUMAN RIGHTS WATCH (May 15, 2015), https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0, <http://perma.cc/8F6Y-68E6>.

anxiety and depression related to her trauma.[190] This arose from multiple death threats from gangs, directed at her and her family, including attempts on her life and the murder of her uncle.[191] Her daughter—who had also experienced numerous death threats from gang members—had such a serious case of PTSD that it left her physically weak and made her prone to fainting.[192] Yet, the facility did not provide treatment.[193] In fact, psychiatric care provided by these detention centers has been found to be lacking across the board.[194]

Facilities also fail to provide adequate medical care for pregnant women.[195] "According to ICE statistics for just six detention facilities, at least 559 of the women detained between 2012 and 2014 were pregnant."[196] One woman held in the Eloy Detention facility describes her experience as follows:

> Despite my pregnancy, I and others like me were treated the same as any other detainee. I felt constantly humiliated. Beds were hard, and stools had no backs. We weren't allowed sufficient rest, because at 5am each morning, officials would enter our cells and yell at us to get up. The food was inedible – everything was pasta and rice, or rotting vegetables and sometimes undercooked chicken. There was nothing I could do but eat it.
>
> ICE insists that we get excellent pre-natal care. Yet during my monthly checkups, my nurse would always dismissively wave her hand and say "you are fine, no problem, go back to the pod," though I was dehydrated, depressed and tired, losing weight, and always feeling sick and worried. I believe that at least two women suffered miscarriages while I was detained. The stress of constantly fearing that I would lose my baby, too, was almost too much to bear.[197]

Since immigration detention facilities do not provide the proper care to asylum seekers that are detained, the current practice violates the requirement that the sick be cared for under Common Article 3 of the

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[190] Petition for Habeas Corpus, *supra* note 188.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] TRAVIS PACKER, IMMIGRATION POLICY CTR., NON-CITIZENS WITH MENTAL DISABILITIES: THE NEED FOR BETTER CARE IN DETENTION AND IN COURT 5 (2010), http://www.immigrationpolicy.org/sites/default/files/docs/Non-Citizens_with_Mental_Disabilities_112310.pdf, <http://perma.cc/FHS6-5GK9>.
[195] *See* Yamileth Garcia, *Immigration Detention Is Inhumane. But for Pregnant Women, It's Trauma*, GUARDIAN (July 27, 2015), http://www.theguardian.com/commentisfree/2015/jul/27/immigration-detention-pregnant-women-conditions, <http://perma.cc/KDF9-8YTW> (personal account describing the inhuman treatment she suffered during detention).
[196] *Id.*
[197] *Id.*

Geneva Conventions.

IV. ENFORCEMENT OF THE GENEVA CONVENTIONS

> "Where there is a will there is a lawsuit." - Addison Mizner, American Architect

Litigatory war should be declared on these facilities under the Geneva Conventions. With the application of the Geneva Conventions comes a set of enforcement mechanisms that can be used to force an improvement in the conditions of immigration detention. As part of the laws of the United States, immigrants in immigration detention can bring suit under Common Article 3 because the Geneva Conventions are likely self-executing.[198]

In the D.C. District Court where the litigation surrounding detention in Guantanamo Bay was filed, plaintiffs have already successfully argued that the Geneva Conventions are self-executing.[199] In *Hamdan*, the District Court, drawing on prior precedent,[200] indicated that to determine if a treaty is self-executing "a court interpreting a treaty . . . look[s] to the intent of the signatory parties as manifested by the language of the treaty and, if the language is uncertain, then . . . to the circumstances surrounding execution of the treaty."[201] Based on this test, a court finds a cause of action "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."[202] The court went on to provide four reasons why the Geneva Conventions are self-executing:

> [(1)] Because the Geneva Conventions were written to protect individuals, [(2)] because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, [(3)] because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and [(4)] because nothing in the Third Geneva Convention itself manifests the contracting parties'

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[198] *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008), *and vacated*, 282 F. App'x 844 (D.C. Cir. 2008), *and vacated sub nom.* Al Odah v. United States, 282 F. App'x 844 (D.C. Cir. 2008), *and vacated*, 559 F.3d 539 (D.C. Cir. 2009) (finding that the Geneva Conventions create an independent cause of action).

[199] *See id.* (finding that the Geneva Conventions are self-executing); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006) (holding that the Geneva Conventions are self-executing).

[200] *See* Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976) (establishing a test for determining self-executing treaties).

[201] *Hamdan*, 344 F. Supp. 2d at 164 (citing Diggs v. Richardson, 555 F. 2d 848, 851 (D.C. Cir. 1976))

[202] *Id.* (quoting *In re* Head Money Cases, 112 U.S. 580, 598 (1884)).

> intention that it not become effective as domestic law without the enactment of implementing legislation . . . .[203]

In *In re Guantanamo Detainees*, to reach the same conclusion that the Geneva Conventions are self-executing, the same District Court cited the same four reasons.[204]

The Supreme Court has also left open the possibility that the provisions of the Geneva Conventions are self-executing and expressly disavowed analysis that found the opposite.[205] After the District Court in *Hamdan* found that the Geneva Conventions were self-executing, the D.C. Circuit Court reversed that decision.[206] The Circuit Court believed prior precedent already foreclosed the question.[207] The Supreme Court reversed, and expressly disavowed the logic that the D.C. Circuit Court used to find that there was not a private right of action.[208] In doing so, the Supreme Court left open the possibility that the Geneva Conventions are self-executing—making way for future district court opinions similar to *In re Guantanamo Detainees*. It also counteracted one of the strongest government arguments against finding that the Geneva Conventions are self-executing, which is that prior precedent forecloses the possibility. Thus, those who oppose the current practice of immigration detention in the United States can sue using claims similar to those advanced by Guantanamo Bay detainees.

Additionally, the standards of the Geneva Conventions are enforceable through criminal law because the United States incorporated the Geneva Conventions into its criminal law with the passage of the War Crimes Act of 1996.[209] In order to be criminally punishable, a defendant must commit a "grave breach" of the Geneva Conventions.[210] A "grave breach" is also defined by statute.[211] Therefore, advocates can also file complaints with the Department of Justice on behalf of the detainees to encourage the prosecution of those that violate the Geneva Conventions.[212] Doing so would put pressure on the administration to abandon the practice of immigration detention.

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[203] *Id.* at 165.

[204] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 479 (D.D.C. 2005).

[205] Hamdan v. Rumsfeld, 548 U.S. 557, 627–29 (2006).

[206] Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006).

[207] *Id.*

[208] *See Hamdan*, 548 U.S. at 627–28.

[209] War Crimes Act of 1996, 18 U.S.C. § 2441 (1996).

[210] *Id.* § 2441(c)(1).

[211] *Id.* § 2441(d)(1).

[212] *Crime Victims' Rights Ombudsman – Filing a Complaint*, U.S. DEP'T OF JUST. (Dec. 9, 2014), http://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/filing-complaint, <http://perma.cc/X2YP-7Q7H>.

V. CONCLUSION

The Drug Conflict in Central America is a war. Men, women, and children have responded by fleeing their homes to save their lives. Once here, however, the United States has implemented policies that create additional barriers and force people to endure additional pain. The United States has already agreed to a set of protections to provide these asylum seekers under the Geneva Conventions. The United States should follow through on its agreement.

The chaos of war has driven these asylum seekers here. The laws of war should protect them. This author hopes that advocates use this research to help the men, women, and children trapped immigration detention. At its core, international humanitarian law seeks to protect human dignity. The pain these immigrants have suffered shows that they are the key candidates for the protection of international humanitarian law.

In the Shadow of Sandra Bland: The Importance of Mental Health Screening in U.S. Jails

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I. INTRODUCTION

The death of Sandra Bland on July 23, 2015, while in the Waller County Jail attracted widespread scrutiny of the jail staff's handling of inmates with mental health issues and to the jail's suicide prevention procedures.[1] Bland committed suicide three days after she was arrested and jailed following a routine traffic stop.[2] The resulting investigations into her death have revealed that prison staff, among other failures, did not complete a high-fidelity mental health screening process with Bland and failed to follow the minimum suicide prevention standards for jails, raising questions about whether her death could have been prevented.[3] While Waller County became a focal point in summer 2015 for the lack of appropriate mental health screenings and services for inmates at intake, other counties in Texas and across the country likely face similar problems that, if left unsolved, will continue to allow more and more preventable deaths in America's jails. Ensuring that the jail intake process is thorough and consistently implemented is paramount in making sure inmates with mental health issues receive proper treatment behind bars and diversion from incarceration when appropriate.[4] Improving how jails screen and treat inmates with mental illness will not only save lives, but it will also save taxpayer money by ultimately lowering re-incarceration rates[5] and by making more effective use of

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[1] *See* Leah Binkovitz, *Waller DA Releases More Jail Footage, Details in Sandra Bland Case*, HOUS. CHRON., July 28, 2015, http://www.houstonchronicle.com/news/houston-texas/houston/article/Waller-DA-releases-more-jail-footage-details-in-6411259.php, <https://perma.cc/U5CK-UXH5> (describing attention to Bland's death).

[2] Terri Langford, *Records Show Bland Revealed Previous Suicide Attempt*, TEX. TRIB., July 22, 2015, http://www.texastribune.org/2015/07/22/dps-sandra-bland-video-wasnt-doctored/, <https://perma.cc/P58B-RLKT>.

[3] *Id.*

[4] AM. BAR ASS'N, *ABA Criminal Justice Standards on the Treatment of Prisoners, Standard 23-1.2 Treatment of Prisoners* (June 2011), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/treatment_of_prisoners_commentary_website.authcheckdam.pdf, <https://perma.cc/36KP-7CC3> [hereinafter *ABA Standards*].

[5] Sarah D. Pahl, *Interim Testimony 2014: Senate Committee on Health & Human Services*, TEX. CRIMINAL JUSTICE COAL., 1, 4 (2014), http://www.texascjc.org/sites/default/files/uploads/2014%20Interim%20Testimony%20Senate%20HHS%20-%20MH%20and%20Sub%20Abuse.pdf, <https://perma.cc/9ZRN-XH69>.

available mental health and law enforcement resources.[5]

The shift over the past fifty years from treating individuals with mental illness in state-run hospitals to outpatient, community-based services has steadily increased the number of individuals with mental illness who are incarcerated in local jails.[7] While state-run mental health institutions closed due to assuredly inhumane conditions like overcrowding and overworking,[8] a concurrent national increase in the prevalence of mental illness coupled with a lack of adequate funding for community-based services made it difficult for patients being released from those hospitals to get outpatient treatment. Without adequate access to treatment, individuals' symptoms deteriorated to the point of arrest and incarceration before they could receive adequate treatment.[9]

Jails are locally operated facilities that hold inmates for usually less than two years, either because the incarcerated person is awaiting trial or was convicted of a low-level crime.[10] Prisons are facilities run by either the state or the federal government and typically hold inmates for longer sentences.[11] Texas is unique in that it also has a separate state jail system for housing certain types of low-level felony offenders for sentences that are less than two years.[12] For the purposes of this Note, jail refers only to locally operated jails and not the Texas state jail system. Regardless of which type of facility an inmate goes to—federal prison, state prison, or state jail—the first stop in their journey through the criminal justice system is usually a local jail.

In a typical jurisdiction, individuals arriving at a jail begin an intake process aimed at identifying their medical, mental, substance abuse, social, and behavioral risks and any other immediate needs.[13] A high-fidelity screening includes an initial, brief mental health screening that flags potentially high-risk, high-need individuals who need a more in-depth mental health assessment with a licensed clinician.[14] The information obtained during the mental health screening and intake

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[6] COUNCIL OF STATE GOV'TS, *Criminal Justice / Mental Health Consensus Project*, 107, 236 (2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf, <https://perma.cc/H39T-CV6D> [hereinafter *Consensus Project*].

[7] Hung-En Sung et al., *Jail Inmates with Co-Occurring Mental Health and Substance Use Problems: Correlates and Service Needs*, 49 J. OFFENDER REHAB. 126, 127-28 (2010).

[8] *Id.*

[9] Fred Osher et al., *Adults with Behavioral Health Needs Under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery*, COUNCIL OF STATE GOV'TS JUSTICE CTR. (2012), https://www.bja.gov/Publications/CSG_Behavioral_Framework.pdf, <https://perma.cc/M7WE-GTTQ>.

[10] BUREAU OF JUSTICE STATISTICS, *FAQ Detail: What is the Difference Between Jails and Prisons?*, http://www.bjs.gov/index.cfm?ty=qa&iid=322, <https://perma.cc/MAB7-8SBE> [hereinafter *FAQ Detail*].

[11] *Id.*

[12] TEX. CRIMINAL JUSTICE COAL., *Safe Alternatives to State Jail will Increase Cost Savings, Public Safety, and Personal Responsibility*, http://www.texascjc.org/sites/default/files/publications/State%20Jail%20Talking%20Points.pdf, <https://perma.cc/RQC3-B7MB> (last updated Dec. 2012).

[13] AM. CORR. ASS'N, *Performance-Based Standards for Adult Local Detention Facilities*, 4-ALDF-2A-21 (Ref. 3-ALDF-4A-01) (4th ed. 2004).

[14] *Id.*

process is also used to classify the type of housing, custody, supervision, and programming for every inmate.[15]

Getting this classification correct from the beginning is important because depending on an inmate's mental health diagnoses, history of treatment, and current symptomology,[16] they may need a special custody level or housing to keep them safe, or it may be appropriate for diversion away from incarceration to cheaper, more community-based services like supervised probation or mental health treatment.[17] The classification process sorts individuals into housing that will be the least restrictive possible while maintaining safety for both offenders and jail staff.[18] For example, violent inmates should be sorted into higher security facilities whereas suicidal inmates may be placed in anti-suicide uniforms or cells with line-of-sight safety checks every fifteen minutes.[19] Having an intake process that gathers thorough information while still being quick is no easy task; as one researcher put it, "Local jail systems are faced with the daunting task of appropriately classifying numerous inmates each day in a matter of minutes through the use of standard protocols and a series of questions."[20]

Although consistent governmental oversight and data reporting is hard to come by, research in recent years has shown that many jails are not completing a quality mental health screening during the intake of every new inmate.[21] Three of the most commonly used and widely researched mental health screening tools—the Jail Screening Assessment Tool (JSAT), the Brief Jail Mental Health Screen (BJMHS), and the Referral Decision Scale (RDS)—have been found to have significant problems in recent years.[22] These screening instruments have a range of different issues, including: doing a poor job of accurately identifying mental illness across genders and races, taking too long to administer, and having too many false positives (i.e., inappropriately referring too many people without mental illness for more expensive in-depth psychological services).[23]

Given that minorities make up the majority of jail populations[24] and

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[15] Roger H. Peters et al., *Screening and Assessment of Co-occurring Disorders in the Justice System*, CMHS NAT' L GAINS CENT., 1, 33 (2008), https://csgjusticecenter.org/wp-content/uploads/2014/12/ScreeningAndAssessment.pdf, <https://perma.cc/XY73-BJ7G>; *ABA Standards*, *supra* note 4.

[16] Peters et al., *supra* note 15, at 36.

[17] *ABA Standards*, *supra* note 4.

[18] AM. CORR. ASS' N, *supra* note 13.

[19] *Id.*

[20] Steven L. Proctor et al., *Response Bias in Screening County Jail Inmates for Addictions*, 1 J. DRUG ISSUES 117, 119 (2011).

[21] Sarah Krueger, *Responses of Minnesota Jails to Mental Illness: Survey of Minnesota Jails*, NAT' L ALLIANCE ON MENTAL ILLNESS 1 (Apr. 2006) http://www.namihelps.org/assets/PDFs/NAMIMN JailSurveyReport42006.pdf, <https://perma.cc/49TX-MJYA>.

[22] Michael S. Martin et al., *Mental Health Screening Tools in Correctional Institutions: A Systematic Review*, 13 BMC PSYCHIATRY 275, 2 (2013).

[23] *Id.* at 2, 7.

[24] Todd D. Minton & Daniela Golinell, *Jail Inmates at Midyear 2013-Statistical Tables*, BUREAU OF

females have been the fastest-growing group of inmates in jails for over the past decade,[25] it is more important than ever that mental health screening instruments are sensitive to gender and race differences. The Correctional Mental Health Screen-Men (CMHS-M) and the Correctional Mental Health Screen-Women (CMHS-W) are two gender-specific screenings that are more accurate than the BJMHS in detecting mental illness in inmates across races and genders, more cost effective than the JSAT, and more comprehensive than the RDS.[26] This Note will discuss in greater detail why the CMHS screening instruments should be considered for adoption in jails nationwide.

Jails also vary greatly in regards to how they administer whichever screening they choose to use. Some jails have the initial mental health screening as part of the normal booking process and the arresting officer is included in making the classification and custody decisions;[27] in other jails, inmates may wait hours before they receive a mental health screening[28] while in more well-funded jails, inmates might complete longer, more in-depth screenings with a qualified mental health professional.[29] This wide variability in intake processes between jails makes enforcement, oversight, and accountability difficult. Add to that the severe understaffing of independent oversight bodies like the Texas Commission on Jail Standards and the fact that few states even have such centralized oversight departments set up to regulate their jails, and it becomes clearer how and why problems in jails often only come to light following grave tragedies.[30] In response to Sandra Bland's death in a Texas county jail in the summer of 2015, criminal justice researcher and policy expert Michele Deitch argued in an opinion piece in The Texas Tribune that "[t]he public is asking tough questions and demanding answers about jail suicide, the jail intake process, staff supervision, appropriate housing placements, inmate access to mental health treatment[,] and safety precautions for inmates."[31]

Local jails can be more secure and efficient while reducing recidivism over the long term by improving the screening, treatment, and diversion processes for inmates with mental health issues. It is also important for legislators and local decision makers to help fund new mandates and voluntary efforts to improve mental health care in jails. As

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JUSTICE STATISTICS, at 6, Table 1 (Aug. 12, 2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf, <https://perma.cc/YHT8-6HMF>.

[25] *Id.* at 1.

[26] *Id.*

[27] *Consensus Project*, *supra* note 6, at 107.

[28] Observations at Downtown Austin Travis County Jail (Apr. 22, 2015 & Apr. 30, 2015).

[29] *ABA Standards*, *supra* note 4.

[30] Edgar Walters & Kiah Collier, *Sandra Bland Case Shows Deficiencies in Jail Oversight*, TEX. TRIB., July 24, 2015, http://www.texastribune.org/2015/07/24/sandra-bland-case-shows-deficiencies-jail-oversigh/, <https://perma.cc/572H-8736>.

[31] Michele Deitch, *Bring Texas Jails Out of the Shadows*, TEX. TRIB., July 29, 2015, http://www.tribtalk.org/2015/07/29/bring-texas-jails-out-of-the-shadows/, <https://perma.cc/77LC-3UT3>.

Fort Bend County Sheriff Troy Nehls puts it, legislators need to help finance the "unfunded mandates" they have passed down to local jails that have rendered them the "de facto mental health facilities" in many communities.[32] Given the high costs and risks associated with incarcerating such a large number of individuals with mental health diagnoses, this Note addresses several issues: the prevalence and problems of mental illness in the jail system, how the mental health screening and intake process affect mental health treatment behind bars, and what jails can do differently during the intake process to bring down overall costs and recidivism while improving security, successful diversion from jail, and the rehabilitative and humane treatment of individuals behind bars.

A. The Purpose of the Jail System

Local jails house individuals awaiting trial or sentenced to less than a two-year sentence, while prisons are reserved for more serious offenders with longer sentences.[33] The national jail population hit a record daily high of 785,500 inmates in 2008 and has decreased each year since, falling to approximately 731,200 jail inmates incarcerated at the end of 2013.[34] Individuals are incarcerated in local jails for four reasons: pre-trial detention, post-adjudication admission, short-term incarceration (including parole violations), or while waiting to transfer to another correctional facility.[35] Because inmates are sent to jails for such short periods of time, they cycle in and out very quickly, and the number of inmates in jails is constantly in flux.[36] While there were 731,200 inmates in local jails on a single day in 2013, those same jails saw 11.7 million inmates cycle through their doors during the span of one year.[37] This rapid cycling of inmates means that jails incarcerate most of America's inmates in a given year but have very limited time to assess an individual inmate's risks and needs or provide them with help accessing pre-trial diversion programs or rehabilitative programming while they are behind bars. Instead, their focus is on efficiency and security.

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[32] Emily Foxhall, *Fort Bend Sheriff Pushes Back Against Criticism Over Jail Suicides,* HOUS. CHRON., Nov. 28, 2015, http://www.houstonchronicle.com/neighborhood/fortbend/news/article/Fort-Bend-sheriff-pushes-back-against-criticism-6662591.php, <https://perma.cc/2CNG-77YH>.

[33] *FAQ Detail*, *supra* note 10.

[34] Lauren E. Glaze & Daniel Kaeble, *Correctional Populations in the United States, 2013*, BUREAU OF JUSTICE STATISTICS, at 13 (Dec. 2014), http://www.bjs.gov/content/pub/pdf/cpus13.pdf, <https://perma.cc/4F3T-PKHN>.

[35] *FAQ Detail*, *supra* note 10.

[36] Sung et al., *supra* note 7, at 16, 130.

[37] Minton & Golinell, *supra* note 24, at 4.

B. The Evolution of Mental Health Services in the U.S.

Before the 1960s, the vast majority of mental health services were provided in state-run mental health hospitals on a long-term basis—lifetime commitments in "back wards" for patients with severe mental illnesses were not uncommon and hospital patients dealt with crowded wards and "appalling" living conditions.[38] A 1961 report from the Joint Commission on Mental Health helped to provide a shared framework and set of goals for advocates across the country who were pushing for more humane and therapeutic treatment of individuals with mental illness.[39] The deinstitutionalization of state-run mental hospitals was also pushed forward by the introduction of the first psychotropic medications and a corresponding shift in public attitude toward mental illness as a medical condition that could be treated in the community with medication.[40]

Throughout the next decade, there were consistent small steps forward in releasing individuals from state-run hospitals, but the deinstitutionalization movement really took hold in 1972 with the enactment of the Supplemental Security Income (SSI) disability benefits program that helped pay for community-based mental health services.[41] The system of institutionalization was then dealt a major blow in 1973 with a federal ruling that closed the doors of most state-run mental health institutions by extending rights under the Fair Labor Standards Act to mental health patients and forcing institutions to pay patient workers a living wage.[42] Without other sources of federal or state funding, more and more state-run hospitals shut down throughout the 1960s and 1970s, and prisons and jails across the United States increasingly became the de facto providers of mental health services in their communities.[43]

This shift from state-run hospitals to correctional facilities as the primary provider of mental health services was exacerbated during the 1980s and 1990s by the war on drugs and a corresponding move to increase the length of sentences for drug offenses. This change disproportionately affected individuals with mental health issues, who are more likely to use substances[44] and often self-medicate with drugs or alcohol to treat their symptoms when medication or other forms of

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[38] Chris Koyanagi, *Learning from History: Deinstitutionalization of People with Mental Illness as Precursor to Long-Term Care Reform*, HENRY J. KAISER FAMILY FOUND., 4 (Aug. 2007), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7684.pdf, <https://perma.cc/59J5-GUZT>.

[39] *Id.* at 5.

[40] Bernard Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 1, 65 (2011).

[41] *Id.*

[42] Souder v. Brennan, 367 F. Supp. 808, 815 (D.D.C. 1973).

[43] E. Fuller Torrey et al., *The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey*, TREATMENT ADVOCACY CENT. (Apr. 8, 2014), http://tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf, <https://perma.cc/9BXY-VVAM> [hereinafter *State Survey*].

[44] Sung et al., *supra* note 7.

treatment are not available.[45] After the economic recession in 2008, large cuts to publicly funded mental health services made it even harder for individuals to receive community-based treatment for their mental health problems.[46] By 2012, there were more than ten times as many individuals with mental illness in jail or prison than were receiving treatment in state psychiatric hospitals in the United States.[47]

This influx of individuals with mental health issues into the criminal justice system is a particularly difficult problem for jails because they house a higher percentage of individuals with mental health issues (64%) when compared to state prisons (56%) and federal prisons (45%).[48] Those higher percentages also come with higher operating costs for the local and state governments who are responsible for funding jails and state prisons. Individuals with mental illness generally are more expensive to incarcerate because they serve a larger portion of their full sentence, have more disciplinary infractions while imprisoned, and have higher rates of recidivism once released.[49]

The deinstitutionalization movement exacerbated a national shortage of both inpatient and outpatient mental health services: while there was one psychiatric bed available for every 300 people in the United States in 1955, that number dropped to only one available psychiatric bed for every 3,000 people in 2004.[50] While part of the reason for so many fewer psychiatric beds was a well-intentioned push for more community-based mental health services closer to the individual's home, that goal ended up backfiring because funding for those services did not materialize and community-based providers and traditional health care providers were not equipped to meet demand.[51]

Oakland County Sheriff Mike Bouchard describes watching this transition to jails as the primary providers of mental health services over the course of his career: "When I became the sheriff, which is about 16 years ago [1998], we had about 8% [of inmates] on psychotropic medications. Now, it fluctuates somewhere north of 30%."[52] Jails across the country are having to step up and fill the role of primary mental

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[45] J. R. Belcher, *Are Jails Replacing the Mental Health System for the Homeless Mentally Ill?*, 24 COMMUNITY MENTAL HEALTH JOURNAL 185 (1988).

[46] PEW CHARITABLE TRUST & MCARTHUR FOUND., *Mental Health and the Role of States* (June 2015), http://www.pewtrusts.org/~/media/assets/2015/06/mentalhealthandroleofstatesreport.pdf, <https://perma.cc/Y8R5-WJLW>.

[47] *State Survey*, *supra* note 43.

[48] *Id.*

[49] Doris James & Lauren Glaze, *Special Report: Mental Health Problems of Prison and Jail Inmates*, U.S. DEP'T OF JUSTICE'S OFFICE OF JUSTICE PROGRAMS (Dec. 14, 2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf, <https://perma.cc/3XBW-3R4R>.

[50] E. Torrey, *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States*, TREATMENT ADVOCACY CENT. (May 2010),http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf, <https://perma.cc/HM4Q-A53C> [hereinafter *More Mentally Ill*].

[51] Koyanagi, *supra* note 38.

[52] Kayla Brandon, *Mental Health in Oakland County Jail*, YOUTUBE (July 7, 2014), https://www.youtube.com/watch?v=xjgNDyKrysk, <https://perma.cc/RA3Y-5WQP>.

health providers; in Texas, for example, the Harris County Jail outside of Houston provides psychotropic medications to more people than all ten of Texas's public mental health hospitals combined.[53]

The total number of inmates in jail more than tripled between 1983[54] and 2006.[55] Yet during that same period, the number of inmates with a mental illness in jail jumped from approximately 14,307 in 1983[56] to 479,900 in 2005.[57] That means that while jails in America incarcerated about three times as many people during that time overall, they incarcerated 33 times as many people with a mental illness. When left untreated, symptoms of a serious mental illness can lead to criminal behavior and, as a result, more and more mental health cases got shuffled into the criminal justice system.[58] One study estimates that approximately 14% of the growth in incarceration during this period was due to the process of deinstitutionalization and releasing mentally ill individuals into the public without proper replacement services in the community.[59] Limited access to both inpatient treatment in psychiatric hospitals and outpatient community-based services has clearly been a driving force behind the increasing number of individuals with mental health needs in the criminal justice system. Black people in particular have been pushed to higher rates of arrest and incarceration due to limited access to mental health care services.[60]

There continues to be a large number of inmates with mental illnesses in more recent studies. The most recent report on mental illness in jails from the Bureau of Justice Statistics found that in 2006, 64% of jail inmates had a mental health problem.[61] In comparison, only about 18.5% of the U.S. population had a mental illness in 2013.[62] Figure 1 below shows the high percentage of jail inmates who have at least one symptom of mental illness.

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[53] Emily Deprang,, *Barred care: Want treatment for mental illness in Houston? Go to jail,* TEX. OBSERVER, Jan. 13, 2014, http://www.texasobserver.org/want-treatment-mental-illness-go-to-jail/, <https://perma.cc/7X6W-GHDP>.

[54] Craig Perkins, *Jails and Jail Inmates 1993-94*, U.S. DEP'T OF JUSTICE'S OFFICE OF JUSTICE PROGRAMS, http://bjs.gov/content/pub/pdf/jaji93.pdf, <https://perma.cc/4M8V-UGTQ>.

[55] James Stephan, *Census of Jail Facilities, 2006*, U.S. DEP'T OF JUSTICE'S OFFICE OF JUSTICE PROGRAMS, http://www.bjs.gov/content/pub/pdf/cjf06.pdf, <https://perma.cc/MRS8-NZJL>.

[56] Perkins, *supra* note 54; *More Mentally Ill*, *supra* note 50.

[57] James & Glaze, *supra* note 49.

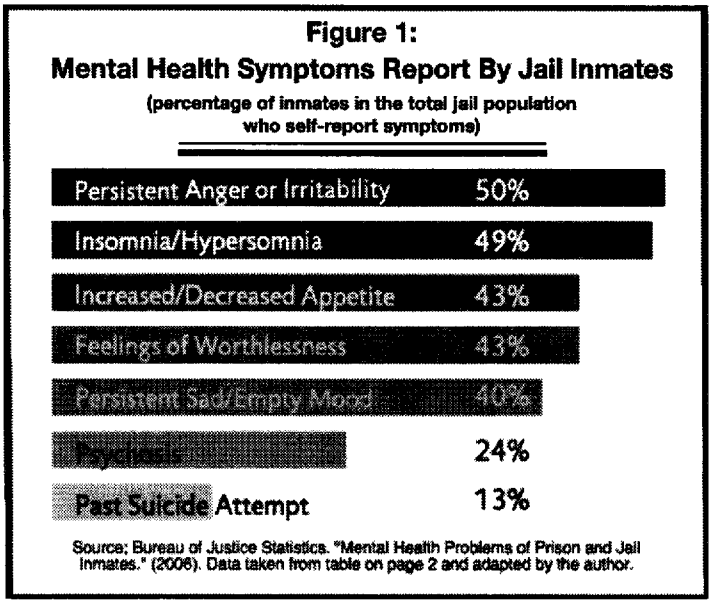
[58] Osher et al., *supra* note 9.

[59] Steven Raphael, *The Deinstitutionalization of the Mentally Ill and Growth in the U.S. Prison Population: 1971 to 1996,* GOLDMAN SCHOOL OF PUBLIC POLICY (2000), http://ist-socrates.berkeley.edu/~raphael/raphael2000.pdf, <https://perma.cc/H7JA-GG6N>.

[60] DIGNITY AND POWER NOW, *Impact of Disproportionate Incarceration of and Violence Against Black People with Mental Health Conditions In the World's Largest Jail System* 2 (2014), http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17740_E.pdf, <https://perma.cc/AZ8G-2AHR>.

[61] James & Glaze, *supra* note 49.

[62] NAT'L ALLIANCE ON MENTAL ILLNESS, *Mental Health by the Numbers*, https://www.nami.org/Learn-More/Mental-Health-By-the-Numbers, <https://perma.cc/4H6H-84K2>.



One reason for such high numbers of symptoms in jail inmates is a lack of sufficient spending on preventive, community-based mental health services, a problem that was only exacerbated by the economic recession in 2007–08.[63] Immediately during and after the recession, between 2007 and 2011, state budgets for mental health services were cut by approximately $2.2 billion.[64] Chicago had six of its 12 mental health clinics close in three years, and other metropolitan and rural areas continue to struggle with similarly difficult budget cuts and closings.[65] The National Association of State Mental Health Program Directors (NASMHPD) reports that state mental health authorities have continued to cut funding for community psychiatric and crisis services by at least $3.49 billion between 2009 and 2012, even while demand for those services continued to increase.[66]

This perpetual lack of funding for preventive, community-based psychiatric services continues to exacerbate the already high number of inmates with mental health needs behind bars. In Atlanta, Georgia, for example, the inmate population at the local county jail increased by 73.4% following the closure of the nearby Georgia Mental Health Institute.[67] Over the past several decades, these continued closures have had a cumulative effect on the number of people with mental illnesses

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[63] BAZELON CENT. FOR MENTAL HEALTH LAW, *Asking Why: Reasserting the Role of Community Mental Health* 8 (Sept. 2011), http://www.bazelon.org/LinkClick.aspx?fileticket=VFwb7PPm7K0=&tabid=104, <https://perma.cc/D64S-QAEY> [hereinafter *Asking Why*].

[64] *Id.*

[65] Laura Sullivan, *Mentally Ill Are Often Locked Up In Jails That Can't Help,* NAT' L PUB. RADIO, (Jan. 20, 2014) http://www.npr.org/2014/01/20/263461940/mentally-ill-inmates-often-locked-up-in-jails-that-cant-help, <https://perma.cc/87PZ-NWYV>.

[66] Osher et al., *supra* note 9.

[67] *State Survey*, *supra* note 43, at 13.

who are behind bars. When taking into account both jail and prison populations together, there were approximately ten times as many individuals with psychiatric issues incarcerated in 2012 than there were in state mental health hospitals nationwide.[68]

C. The Criminalization of Drug Use

As mentioned earlier, jail populations have grown significantly in recent decades as a consequence of the so-called war on drugs and tough on crime policies of the 1980s and 1990s. Stated simply, drug law violations were the largest source of growth in local jail inmates during this time.[69] It is important to note that there is a high level of comorbidity, or dual diagnoses, of mental health disorders and substance use or abuse disorder. Major depression (54%) and bipolar disorder (46%) are the two most common co-occurring disorders with substance abuse.[70] Studies show that between 55%-69% of individuals with a substance use disorder also have a mental health disorder, and approximately 60% of individuals with a mental health diagnosis also have a substance use disorder.[71] That accounted for approximately seven to 10 million individuals in America as of 2002, about 3% of the total population.[72] However, this group of individuals with dual mental health and substance use disorders are disproportionately represented in jail populations. By 2006, 49% of jail inmates nationwide had a dual diagnosis of both substance use or abuse and another mental health disorder.[73] Having a mental health problem has been found to increase the risk of substance abuse or use by more than 23%.[74] Inmates with co-occurring mental health and substance disorders also have increased rates of depression, suicide, psychosis, homelessness, and violence when compared to individuals with only one such diagnosis.[75] Overall, inmates with a dual diagnosis are more likely to be arrested, incarcerated, and spend a longer time in jail than inmates diagnosed with only a mental health or substance use disorder.[76]

The American Psychiatric Association (APA) now classifies substance abuse and use as a mental health disorder in the Diagnostic and

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[68] *Id.*

[69] Perkins, *supra* note 54.

[70] Adi Jaffe et al., *Drug-abusing Offenders with Co-Morbid Mental Disorders: Problem Severity, Treatment Participation, and Recidivism*" 43 J. SUBSTANCE ABUSE TREATMENT 244, 246 (2012).

[71] *Id.* at 244.

[72] *Id.*

[73] James & Glaze, *supra* note 49, at 5.

[74] *Id.* at 1.

[75] Jacques Baillargeon et al., *Risk of Reincarceration Among Prisoners with Co-occurring Severe Mental Illness and Substance Use Disorders*, 37 ADMIN. & POL' Y IN MENTAL HEALTH 367, 368 (2009).

[76] Jaffe et al., *supra* note 70, at 244.

Statistical Manual of Mental Disorders (DSM-IV and DSM-V), but this was not always the case.[77] Efforts to toughen criminal sentences for substance abuse during the 1970s resulted in a dramatic increase in sentence lengths for drug-related charges and a subsequent increase in the total number of inmates in jail for drug-related offenses.[78] Although there were only 17,200 people in jail nationally for drug offenses in 1980, that number increased tenfold to approximately 180,600 by 2013.[79] Women experienced the greatest increase in incarceration for drug-related offenses, rising at a rate of 12% per year since 1980.[80] Substance use among women also appears to be linked to the actual act of committing a crime; in a 2003 study of twenty-five different jails, 86.4% of women who were screened had tested positive for alcohol at the time of their arrest, compared to only 9.5% of men.[81]

This increase in drug-related arrests has impacted local jails the most because they are responsible for all pre-trial detentions and because most of the crimes committed by individuals with substance abuse disorders are misdemeanor "quality-of-life" offenses (crimes like disorderly conduct, public intoxication, and possession of certain controlled substances, many of which are essentially public expressions of a personal battle with mental illness) that often carry shorter sentences served in jails.[82] For example, in Texas, more than 89% of statewide drug-related arrests in 2012 were for possession of a controlled substance, a non-violent and arguably victimless crime.[83]

As jail psychiatrist Dr. Charles Zaylor put it, "Jails and prisons are filling in the gap for services that people can't get other places."[84] Ideally, the public health system should be equipped to step in earlier and provide preventative services to try to avoid an arrest for possession in the first place. But without a safety net of services in place, many individuals with mental health needs will inevitably get swept up by law enforcement and put into jail.[85] Once that unfortunate process happens and someone is booked into jail, jails should be doing everything they can to identify, understand, and treat that underlying substance use

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[77] AM. PSYCHIATRIC ASS' N, *Substance-Related and Addictive Disorders Fact Sheet* 1 (2013), http://www.dsm5.org/documents/substance%20use%20disorder%20fact%20sheet.pdf, <https://perma.cc/DF7A-CWDH>.

[78] SENTENCING PROJECT, *Fact Sheet: Trends in U.S Corrections* 3 (2015), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf, <https://perma.cc/S37Y-VBL5>.

[79] *Id.*

[80] Roger H. Peters et al., *Treatment of Substance-abusing Jail Inmates: Examination of Gender Differences* 14 J. SUBSTANCE ABUSE TREATMENT 339, 339 (1997) [hereinafter *Examination of Gender Differences*].

[81] BONITA M. VEYSEY, A PUBLIC HEALTH PERSPECTIVE OF WOMEN' S MENTAL HEALTH 247 (Bruce L. Levin & Marion A. Becker eds. 2010).

[82] Sung et al., *supra* note 7, at 128.

[83] Pahl, *supra* note 5, at 4. The remainder of the drug-related offenses were for manufacturing or distributing the controlled substance. *Id.*

[84] Johnson County (Kansas) Sheriff, *How Mental Health Impacts Jail Population*, YOUTUBE (Oct. 10, 2014), https://www.youtube.com/watch?v=OJ3y2cEc8ew, <https://perma.cc/M2VD-4FEZ>.

[85] Sung et al., *supra* note 7, at 128.

disorder. As this Note will discuss in Section III: The Jail Intake Process, there is an unfortunate lack of recent nationwide data on screening procedures in jails, and smaller statewide surveys indicate that not all jails are completing quality mental health screenings during the intake process for every inmate.

II. MENTAL ILLNESS AND SECURITY IN JAILS

Inmates with mental illness, especially those with psychotic or depressive symptoms, are more likely to commit acts of violence and rule infractions while incarcerated.[86] These individuals can be especially prone to aggressive behavior during and after their initial intake because inmates are prohibited from bringing medications into jail.[87] This can often lead to inmates with mental illnesses or other health condition missing one or more doses of medication,[88] as was the case with Sandra Bland's epilepsy medication.[89] Ms. Bland had been taking at least one epilepsy medication before she got to the Waller County Jail but did not receive any doses of that medication—Keppra—during her three-day stay at the jail.[90] While withdrawals from Keppra may not be quite as dangerous as withdrawing from psychotropic medications like benzodiazepines, anti-depressants, or mood stabilizers,[91] Keppra is an anti-seizure medication that can have side effects of "suicidal tendencies, behavioral abnormalities and psychotic symptoms,"[92] in addition to increased risk of seizures if Keppra is discontinued suddenly.[93]

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[86] James & Glaze, *supra* note 49.

[87] *Consensus Project*, *supra* note 6, at 107.

[88] *Id.*

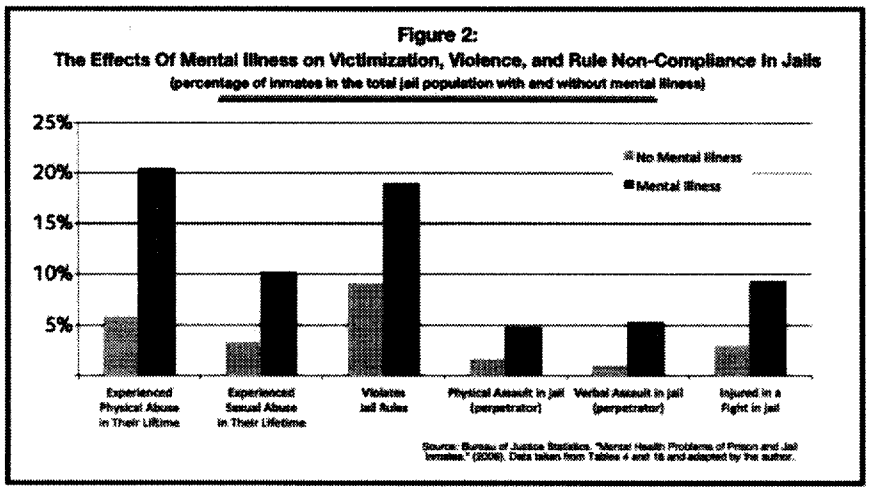
[89] Binkovitz, *supra* note 1

[90] *Id.*

[91] *See* H. Pétursson, *The Benzodiazepine Withdrawal Syndrome,* 89 ADDICTION 1455, 1455 (1994) (describing withdrawals from benzodiazepines).

[92] Binkovitz, *supra* note 1.

[93] UCB INC., *Keppra Prescribing Information* (Mar. 2015), http://www.ucb.com/_up/ucb_com_products/documents/Keppra_IR_Current_COL_%2003_2015.pdf, <https://perma.cc/A76H-PVM3>.



Violent, suicidal, and erratic behavior related to a mental illness directly impacts the classification decision for an inmate's custody level. This behavior can lead to a number of options; for example, a referral to psychiatric staff, more isolated confinement, or mechanical restraint in padded chair shackles. Jail inmates with mental health disorders are also more likely to have repeated infractions for misbehavior and for not following rules, leading to these inmates spending more time in jail.[94] For instance, the national average length of stay for jail inmates with a mental illness is 80 days while the average for inmates without a mental illness is only 20 days. But there are some areas of the country doing far worse than national averages; for example, inmates with a mental illness are incarcerated an average of 173 days longer than a general offender in New York's Rikers Island Jail.[95] Inmates with mental health needs also are at an increased risk for repeated victimization and abuse while they are in jail.[96] The Treatment Advocacy Center offers a succinct summary of the research on the safety and security risks that individuals with mental illness face behind bars: "Such individuals are often raped or otherwise victimized, disproportionately held in solitary confinement, and frequently attempt suicide. Because treatment of mental illness is often not available behind bars, symptoms often get worse."[97]

Suicide has been the leading cause of death in jails for well over a decade now,[98] and the presence of a mental illness drastically increases an inmate's risk of suicide[99]—while only 15% of inmates without a mental illness attempt suicide behind bars, inmates with mental health

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[94] *Id.*

[95] *State Survey*, *supra* note 43, at 14.

[96] *Id.* at 15.

[97] *Id.* at 102.

[98] BUREAU OF JUSTICE STATISTICS, *Mortality in Local Jails and State Prisons, 2000-2013 - Statistical Tables* 1 (2015), http://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf, <https://perma.cc/AZG7-4U3N> [hereinafter *Mortality Statistics*].

[99] Peters et al., *supra* note 15, at 24.

needs are more than five times as likely (77%) to attempt suicide in jail.[100] The presence of a mental illness generally increases an individual's baseline risk of suicide, but this risk factor is amplified behind bars because of the sudden stress individuals feel when they are initially booked into jail and completely isolated from their community and usual support networks.[101] The Marshall Project describes this "shock of incarceration" as something unique to the jail system since individuals entering local and county jails are "stripped of their job, housing, and basic sense of normalcy" for the first time.[102] Suicides in jails have increased in recent years and, as the most recent report from the Bureau of Justice Statistics shows, suicides continued to be the leading cause of inmate deaths in jails across the country in 2013.[103]

In considering the initial intake as a potential intervention point, it is important to note that an estimated 18% of jail suicides happen in the first 24 hours after initial admission.[104] But even with such a high percentage of jail suicides occurring during and directly following admission, jail staff should remain vigilant in preventing the other 82% of suicides—like that of Sandra Bland's—that occur after an inmate's first 24 hours in jail.[105] Suicidal thoughts and past attempts have also been linked to historically low disclosure rates compared to other mental health symptoms.[106] Since suicide is considered an act of opportunity that could happen suddenly and without notice or warning from the individual in crisis, staff should continually monitor all inmates to see if they need any additional mental health evaluations or interventions after the initial intake screening and classification.[107]

Suicide is a topic that is uncomfortable for many people to talk about. When the challenge of talking about suicide is coupled with the low disclosure rates for suicidal thoughts, it becomes perhaps easier to understand why accurately identifying suicide risks is so challenging and heavily reliant on intuition and rapport building.[108] Inmates with a substance use disorder are also at an increased risk of attempting suicide—particularly females—and could be as much as three times as

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[100] *More Mentally Ill*, *supra* note 50, at 10.

[101] Anasseril E. Daniel, *Care of the Mentally Ill in Prisons: Challenges and Solutions*, 35 J. AM. ACAD. PSYCHIATRY & L. 406, 409 (2007).

[102] Maurice Chammah & Tom Meagher, *Why Jails Have More Suicides Than Prisons,* MARSHALL PROJECT, Aug. 2, 2015, https://www.themarshallproject.org/2015/08/04/why-jails-have-more-suicides-than-prisons#.wFLFyNmJm, <https://perma.cc/FX7X-673X>.

[103] *Mortality Statistics*, *supra* note 98, at 1.

[104] Daniel Dillon, *A Portrait of Suicides in Texas Jails: Who is at Risk and How Do We Stop it?* 21 LBJ J. PUB. AFF. 51, 55 (2013).

[105] Edgar Walters Edgar & Kiah Collier, *Sandra Bland Case Shows Deficiencies in Jail Oversight*, TEX. TRIB., July 24, 2015, http://www.texastribune.org/2015/07/24/sandra-bland-case-shows-deficiencies-jail-oversigh/, <https://perma.cc/QSZ7-8HTK>.

[106] Bruce B. Way et al., *Suicidal Ideation among Inmate-Patients in State Prison: Prevalence, Reluctance to Report, and Treatment Preferences*, 31 BEHAV. SCI. & L. 230, 230 (2013).

[107] James & Glaze, *supra* note 49.

[108] *Examination of Gender Differences*, *supra* note 80, at 22.

likely to attempt suicide as male inmates with similar addiction issues.[109] Inmates with mental illnesses are much more likely to have a history of sexual or physical abuse and are also at an increased risk of physical assault and sustaining an injury during a fight while in jail, making their time behind bars especially traumatic.[110] Figure 2 shows the multitude of risks that inmates with mental health diagnoses face while incarcerated in jail.

A. Mental Health and Rearrest: The Revolving Door

Recidivism is the likelihood that an individual will either reoffend or be reincarcerated within a specified amount of time. Once an individual with an undiagnosed mental health or substance disorder enters the criminal justice system for the first time, a revolving door process begins: the likelihood that they will be arrested or incarcerated is much greater than that of a first-time offender without a diagnosis.[111] Inmates who have a history of mental health treatment seem to be at particular risk of being arrested and jailed—one study in New York found that involvement in public mental health services was linked to a drastically increased risk of incarceration during a five-year period for both males (400%) and females (600%).[112] After their initial entry into the criminal justice system, offenders with mental health needs are likely to cycle back into jail throughout their lifetime; a study of inmates in the Los Angeles County Jail found that 95% of offenders with mental health issues have had at least one previous arrest.[113] While the exact reason for this increased recidivism cannot be determined conclusively from the data, inmates with mental illness have particular difficulty gaining employment, getting access to psychiatric appointments and medications,[114] and meeting the terms of their probation once they are released from jail and prison.[115] Pre-trial diversion programs like mental health courts aim to bring down the high number of individuals with mental illness and substance abuse disorders who are rearrested for minor offenses, like property theft, possession of illegal substances, public intoxication, or parole and probation violations.[116]

It should also be noted that this constant cycling in and out of jails by individuals with mental health needs increases the stress and job

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[109] *Id.*

[110] James & Glaze, *supra* note 49.

[111] *Id.* at 18.

[112] *Consensus Project*, *supra* note 6, at 4.

[113] Richard H. Lamb et al., *Treatment Prospects for Persons With Severe Mental Illness in an Urban County Jail*, 6 J. PSYCHIATRIC SERVICES 72, 86 (2007).

[114] Christy K. Scott et al., *Predictors of Recidivism Over 3 Years Among Substance-Using Women Released From* Jail, 41 CRIM. J. & BEHAV. 1257, 1261 (2014); Peters et al., *supra* note 15, at 2, 33.

[115] Osher et al., *supra* note 9.

[116] *Consensus Project*, *supra* note 6, at xiii, 122.

dissatisfaction felt by jail staff. During a set of recent observations of the Travis County Jail in Texas by the author, several jail guards and other staff expressed their frustration and a feeling of defeat coming to work every day with a desire to help their community but, instead, they spend a large part of their shifts providing subpar mental health services to individuals with mental illness, only to have them return the next day for the same offense.[117] Dealing too frequently with these high-need populations often leads to job dissatisfaction and "burn-out" (general job fatigue and disaffection) among not only jail staff, but officers in other parts of the criminal justice system.[118] One staff member at the Cook County Jail in Chicago expressed this frustration and feeling of helplessness that many jail employees feel when they work with such a large number of individuals with mental health needs on a daily basis: "To walk in and feel like every other person I'm interviewing [is] mentally ill on any given day, I can't wrap my brain around it. It's staggering what we're really dealing with."[119]

B. The Costs of Managing Mental Illness Behind Bars

It costs $7,017 per year to incarcerate an individual with mental illness in Harris County, Texas, compared to just $2,599 per year for an inmate without mental health needs.[120] In Broward County, Florida, it costs an additional $50 per day to house an inmate who is mentally ill than one who is not, and in one summer month in 2012, Ohio's Clark County Jail spent more on prescription medications than it did on food for inmates.[121] Other jails report spending almost half of their medication budget[122] on already-expensive psychotropic medications that continue to increase in price by anywhere from 18% (for anti-depressants) to 71% (for antipsychotics) annually.[123]

Offenders with mental health issues cost more to incarcerate because their average length of stay is longer[124] and because they need increased supervision, medication, regular assessments, and more frequent interventions.[125] Inmates with mental illness also cost jails more over time because of their increased likelihood to be rearrested and

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[117] Observations at Downtown Austin Travis County Jail (Apr. 22, 2015 & Apr. 30, 2015).
[118] Osher et al., *supra* note 9, at 38.
[119] Sullivan, *supra* note 65.
[120] Mark A. Levin, *Mental Illness and the Texas Criminal Justice System*, TEX. PUB. POLICY FOUND., 2 (2009), http://www.texaspolicy.com/library/doclib/2009-05-PP15-mentalillness-ml.pdf, <https://perma.cc/Z996-H9JJ>.
[121] *State Survey*, *supra* note 43, at 10.
[122] Osher et al., *supra* note 9, at 8.
[123] Sheila Fifer et al., *Rising Mental Health Drug Costs: How Should Managed Care Respond?*, MEDSCAPE (2005).
[124] James & Glaze, *supra* note 49.
[125] Osher et al., *supra* note 9, at 8.

reincarcerated during the span of their lifetime.[126] Their increased risk of institutional violence and misbehavior also raises overall operating costs due to injuries to guards and inmates, lawsuits, missed workdays, and increased employee turnover.[127] When an inmate commits suicide or is provided significantly negligent medical or mental health care that results in death or injury, jails can be sued for millions of dollars—a bill that taxpayers end up paying.[128] The increased direct supervision, safety equipment, and secure housing that are needed to care for suicidal inmates and inmates with substance abuse issues is particularly costly. It is easier to picture how expensive it is to incarcerate offenders with mental health issues when we look at the cost savings associated with alternatives to incarceration; for example, the Pew Charitable and MacArthur Foundation found that California taxpayers saw $7 in savings in overall incarceration costs for every $1 spent on their state's mental health court system, which aims to divert certain offenders from prison and jail into more rehabilitative (and less expensive) case management models of restitution.[129]

While most everyone agrees that inmates with mental illness are very expensive to incarcerate and treat in the judicial system, there is little research on the system-wide financial and societal costs associated with jailing so many individuals with mental health issues.[130] As these cost estimates improve and different states try new methods to bring down the costs of their criminal justice systems, it will be more important than ever to continue using and evaluating treatment and diversion programs like the mental health courts used in California that utilize a "therapeutic jurisprudence" model of judicial intervention.[131]

C. The Constitutional Requirements for Providing Mental Health Care in Jails

Although there are significant costs associated with providing care to inmates, local communities must also be aware of potentially costly lawsuits if they do not offer adequate care. Typically, inmates can bring lawsuits concerning inadequate medical care through tort cases grounded

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[126] *State Survey*, *supra* note 43, at 18.

[127] *Consensus Project*, *supra* note 6, at 150.

[128] *State Survey*, *supra* note 43, at 13.

[129] STANFORD LAW SCH. THREE STRIKES PROJECT, *When Did Prisons Become Acceptable Mental Healthcare Facilities?* 10 (2014), http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf, <https://perma.cc/S49L-5UE6>.

[130] KiDeuk Kim, Miriam Becker-Cohen, & Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System,* URBAN INST. 13 (Mar. 2015), http://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system, <https://perma.cc/49RZ-Y7HL>.

[131] *Id.* at 27.

in state law or through federal civil rights actions through 42 U.S.C. § 1983.[132] Under tort cases, inmates can sue prison and jail medical providers for malpractice by proving negligence, but most actual suits are brought under Section 1983 actions to protect constitutional rights.[133] The U.S. Supreme Court has developed the "deliberate indifference" test to determine whether medical providers in correctional institutions have violated inmates' Eighth Amendment rights to be free from cruel and unusual punishment.[134]

The Court announced the existing test for evaluating whether adequate medical care was provided in 1976 in its first inmate medical case, *Estelle v. Gamble*.[135] In *Estelle*, the Court determined that the Eighth Amendment's reference to the "unnecessary and wanton infliction of pain" meant that prison medical providers had to be "deliberate[ly] indifferen[t] to serious medical needs of prisoners" in order to constitute a violation. [136] In doing so, the Court held that "inadvertent failure[s]" to provide proper treatment could not meet that standard, but only indifference that violates "evolving standards of decency."[137] This eschewed the possibility that negligence could ever qualify. In *Farmer v. Brennan,*[138] the Supreme Court further refined its deliberate indifference standard by requiring that officials have actual knowledge of a medical problem.[139] To find that prison officials disregarded an "excessive risk to inmate health or safety," the Court said the officials must be aware of a substantial risk of serious harm to the inmate and "fail[] to take reasonable measures to abate it."[140] These Eighth Amendment rights are at the foundation of every individual's right to be, at a minimum, properly screened and provided with necessary emergency medical interventions.

Subsequent cases have extended *Estelle*'s deliberate indifference standard to psychiatric and psychological care.[141] In *Bowring v. Godwin*, the Court held that an inmate with a mental illness is entitled to treatment if: (1) the prisoner's symptoms show evidence of a serious disease or injury; (2) the disease or injury is curable or can be alleviated with treatment; and (3) delay or denial of care has the potential for substantial harm to the prisoner.[142] Mental health needs are considered serious if

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[132] William C. Collins, *Jails and the Constitution*, NAT' L INST. OF CORR. 43 (2007), http://static.nicic.gov/Library/022570.pdf, <https://perma.cc/C4JC-3PZ7>.
[133] *Id.* at 43-44.
[134] *Id.*; U.S. CONST. amend. VIII.
[135] Collins, *supra* note 132, at 44; Estelle v. Gamble, 429 U.S. 97 (1976).
[136] *Estelle*, 429 U.S. at 103 (1976).
[137] *Id.* at 105-06.
[138] 511 U.S. 825 (1994).
[139] *Id.* at 837.
[140] *Id.* at 847.
[141] Michele Deitch, *Correctional Health Care and Special Populations–Legal Considerations and Context, in* MANAGING SPECIAL POPULATIONS IN JAILS AND PRISONS 21-9 (Stan Stojkovic ed., 2005).
[142] *Id.* (citing Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977)).

they cause "significant disruption" in an inmate's life and prevent the inmate from functioning "without disturbing or endangering others or himself."[143]

Because the deliberate indifference standard has been applied in the mental health context, correctional institutes must have intake screening systems in place to identify mental illness among the inmate populations, and they must provide adequate treatment to inmates with mental health needs.[144] To avoid liability under Section 1983 claims, mental health providers in prisons and jails will also have to address issues with suicide by identifying inmates who are at risk, protecting and monitoring them once identified, and responding to suicide attempts.[145] As the doctrine established by *Estelle* shows, every individual who comes through the doors of a jail is legally and constitutionally entitled to a quality mental health screening, suicide interventions, and access to emergency medical and mental health care. This is particularly notable considering that as recently as 2014, the No. 1 source of complaints for jail inmates in Texas was issues related to medical services.[146]

III. THE JAIL INTAKE PROCESS

A. The Purpose of the Jail Intake Process

When an individual is being booked into a local jail, the first step is the completion of an intake (or "booking") process that identifies, among other things, an inmate's immediate medical needs and security risks.[147] The American Correctional Association's (ACA) Standards for Adult Local Detention Facilities state that a high-fidelity jail admissions process should include: a criminal-history check, a photograph of the inmate, fingerprints, an inventory of personal property, collection of personal information for mailing and visitation lists, assignment of the inmate's registered number, an assessment of general appearance and behavior, verification of identity, and screenings for any risks and needs associated with medical, dental, mental health, drug or alcohol use, or suicidal tendencies.[148] This whole intake and classification process should be completed "as soon as possible" and is supposed to be completed within 48 hours of the inmate's arrival at the jail, but that can vary depending on the time of day, number of inmates, or available staff

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[143] *Id.*
[144] *Id.*
[145] Collins, *supra* note 132, at 46.
[146] TEX. COMM'N ON JAIL STANDARDS, *2014 Annual Report* 12 (2015) http://www.tcjs.state.tx.us/docs/2014AnnualJailReport.pdf, <https://perma.cc/9LXK-J3ZE>.
[147] AM. CORR. ASS'N, *supra* note 13.
[148] AM. CORR. ASS'N, *supra* note 13.

resources.[149]

During the initial intake process, jail intake staff are also supposed to check available state records for inmates' past involvement with public mental health systems. For example, in Texas, state standards set forth in the Texas Administrative Code require jail staff to research every inmate's past involvement with public mental health systems using the Department of State Health Service's (DSHS) Continuity of Care Query (CCQ) system.[150] The CCQ system uses state records to determine whether an inmate has ever received mental health services at state psychiatric hospitals or through community health centers run by state-funded local mental health authorities.[151] Record-keeping systems like the CCQ system are also important in combating low disclosure rates during the intake process; one study found that 34% of inmates were not flagged by jail staff as having a mental illness during the intake process but had a documented history of mental health treatment.[152] Unfortunately, this type of verification of past treatment does not always happen. In the case of Sandra Bland, her mental health records and treatment history in the CCQ system were not checked during the three days she spent in the Waller County Jail before her suicide.[153]

The American Bar Association's Criminal Justice Standards for the Treatment of Prisoners emphasizes that the primary purpose of gathering such a wide breadth of information during intake is to inform the classification process that separates prisoners into housing, custody levels, and programming that is safe and secure, given each prisoner's risks and needs.[154] The initial brief mental health screening is especially important in determining whether an individual is suicidal, a harm to others, or in need of psychotropic medications.[155] Because there are not always enough mental health staff available in jails to meet every inmate's needs, individuals that present a risk to themselves or others during intake are often put into isolation units[156] or seats with restraint straps for their legs and arms until staff is available.[157] This is especially common during nighttime shifts, weekends, and other busy times.[158]

Jail standards in Texas require visual checks of every inmate each hour and visual checks every 30 minutes for inmates who are potentially

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[149] *ABA Standards*, *supra* note 4.

[150] 37 TEX. ADMIN. CODE § 273.5(c)(1) (2013).

[151] *Id.*

[152] TEX. COMM'N ON JAIL STANDARDS, *Mental Health Study* (2004), http://www.tcjs.state.tx.us/docs/MH%20Study.pdf, <https://perma.cc/UHE4-EDDU> [hereinafter *Mental Health Study*].

[153] *See* Terri Langford, *Mental Health Jail Check Failed in Bland Case*, TEX. TRIB., July 30, 2015, http://www.texastribune.org/2015/07/30/texas-two-part-mental-health-jail-check-failed-san/, <https://perma.cc/9STM-FA3Y> (reporting that were technical difficulties that did not allow the jail to check the CCQ).

[154] *ABA Standards*, *supra* note 4.

[155] *Consensus Project*, *supra* note 6, at 128.

[156] *State Survey*, *supra* note 43.

[157] Observations at Downtown Austin Travis County Jail (Apr. 22, 2015 & Apr. 30, 2015).

[158] *Id.*

suicidal, mentally ill, assaultive, or demonstrating bizarre behavior.[159] Using the case of Sandra Bland as an example of how suicide prevention policies can break down in practice, Waller County Jail was cited by the Texas Commission on Jail Standards on July 26, 2015, for failing to provide its corrections officers with the required mental health and suicide prevention training required under the Texas Administrative Code.[160] Waller County Jail was also cited for failing to administer the basic hourly visual safety checks that are required for every inmate (not to mention the 30-minute checks that "potentially suicidal" inmates are required) under the Texas Administrative Code.[161] Ms. Bland was left alone and out of sight for almost two hours after she had expressed a history of mental health treatment, suicidal ideation, suicidal attempts, and the recent death of her child.[162]

With limited psychiatric inpatient resources available in the community, jails are also responsible for housing inmates with serious mental illnesses while they wait for state-funded psychiatric beds to become available at mental health hospitals.[163] For example, in Bexar County, Texas, jails have been able to bring down their population of inmates with mental health needs by expanding the number and type of community psychiatric facilities where inmates can be transferred to during the intake process.[164] Communities can see significant savings by diverting individuals with serious mental illness to psychological services outside the correctional setting and freeing up those scant psychological services behind bars for more dangerous, serious offenders who need them.[165] In Michigan, for instance, researchers estimate that diverting individuals with serious mental illnesses from incarceration into programs like supportive case management and Assertive Community Treatment could save the state $5–$8 million annually.[166] In Texas, specialized probation caseloads and intensive case management provided through the Texas Correctional Office on Offenders with Medical and Mental Impairments have been shown to significantly reduce recidivism rates for offenders with certain mental health needs who are enrolled in the program, which saves the state incarceration costs both now and in the future.[167]

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[159] 37 TEX. ADMIN. CODE § 275.1 (2013).

[160] TEX. COMM' N ON JAIL STANDARDS, *Special Inspection Report: Waller County* (July 16, 2015), http://www.tcjs.state.tx.us/docs/Waller_NC.pdf, <https://perma.cc/J75U-XQWP>.

[161] *Id.*

[162] Greg Botelho & Dana Ford, *Sandra Bland' s Death Ruled Suicide by Hanging*, CNN, July 23, 2015, http://www.cnn.com/2015/07/23/us/sandra-bland-arrest-death-main/, <https://perma.cc/Q5PY-9K2H>.

[163] *State Survey*, *supra* note 43, at 28, 56, 65.

[164] Alexander J. Cowel et al., *The Impact on Taxpayer Costs of a Jail Diversion Program for People with Serious Mental Illness*, 41 EVALUATION & PROGRAM PLAN. 31, 35 (2013).

[165] *Id.*

[166] *Asking Why*, *supra* note 63, at 8.

[167] TEX. DEP' T OF CRIMINAL JUSTICE, *Biennial Report of the Texas Correctional Office on Offenders with Medical or Mental Impairments Fiscal Year 2013-2014* (Feb. 2015), https://www.tdcj.state.tx.us/documents/rid/TCOOMMI_

B. The Brief Mental Health Screening

The jail intake process is every offender's first interaction with the corrections system and provides officials with a unique opportunity to help shape future treatments, custody decisions, and interactions with the justice system.[168] The intake process is essential to maintaining security in jails. However, facilities that conform to ABA and ACA standards still have a lot of variation in the structure, depth, and timeliness of their intake procedures because each jail is managed and operated by its own local government officials or sheriff.[169] Jails are particularly inconsistent in which brief mental health screening instrument they use during intake and how they administer that screening.[170] While a 1989 study found that only 70% of jails nationwide were providing mental health screenings at intake,[171] a random sample survey of 600 jails in 1997 found that 88% of jails provided "some level of initial screening" during booking and only 76% of jails reported screening "all booked detainees."[172] Unfortunately, there has not been another systematic study of the prevalence and types of mental health screenings used in jails nationwide since the 1997 study. At the state level, one study in 2000 found that approximately 93% of Florida's 67 county jails were offering some sort of mental health screening during intake, but those results are not necessarily representative of national mental health screening practices in jails in 2015.[173]

Troubling still is a more recent 2006 study of Minnesota jails that found only 61% of jails "always" conducted a mental health screening at intake and only 15% of jails offered mental health screenings with questions that went beyond basic booking questions about medications, past suicide attempts, and treatment history.[174] This Minnesota study shows that even within the borders of one state, there is not always one singular, validated mental health screening instrument used by all jails. Additionally, when screenings do take place, the level of training of the staff conducting the screening and the varying location of the screening create even more inconsistencies between jails.[175] As one of the few

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Biennial_Report_2015.pdf, <https://perma.cc/QSG7-A3EC>.

[168] *ABA Standards*, *supra* note 4, at 28.

[169] Osher et al., *supra* note 9, at 35.

[170] NAT' L INST. OF JUSTICE, *Mental Health Screens for Corrections*, U.S. DEP' T OF JUSTICE (2007), https://www.ncjrs.gov/pdffiles1/nij/216152.pdf, <https://perma.cc/7AC3-6RBY> [hereinafter *Mental Health Screens*].

[171] Nathalie C. Gagnon, *Mental Health Screenings in Jails* 18 (2009) (Ph.D dissertation, Simon Fraser University).

[172] Henry J. Steadman & Bonita M. Veysey, *Providing Services for Jail Inmates With Mental Disorders*, NAT' L INST. OF JUSTICE (1997), https://www.ncjrs.gov/pdffiles/162207.pdf, <https://perma.cc/5Z3Q-YNHH>.

[173] Randy Borum & Michelle Rand, *Mental Health Diagnostic and Treatment Services in Florida' s Jails*, 7 J. CORRECTIONAL HEALTH CARE 189, 202 (2000).

[174] Krueger, *supra* note 21, at 1.

[175] *Id.*

states that has an independent governing body overseeing jail operations, the Texas Commission on Jail Standards currently provides county jails across the state with the Screening Form for Suicide and Medical/Mental/Developmental Impairments to use during the initial intake process.[176] This form was updated in October 2015 to include more specific instructions to jailers regarding how to ask inmates about suicidal risk.[177] The new form has a series of questions for jail staff to ask inmates, while the previous screening form relied on inmates to self-report any medical or mental health needs.[178] While the Texas Commission on Jail Standards worked with outside experts to develop the instrument and even got feedback on the form from jailers in four different counties, the screening instrument used in Texas's jails still has not been validated for accuracy across jail populations of different races and genders.

Brief mental health screenings in jails typically last five minutes or less and consist of two to eight yes or no questions.[179] However, some jails still report asking only one or two simple mental health related questions as part of the regular interview during booking.[180] Individuals who are flagged during the screening process as being at risk of having suicidal thoughts or other serious mental health needs should then be referred for a more in-depth clinical assessment with the first available social worker or trained medical staff.[181] Unfortunately, a referral for further psychiatric evaluation does not always happen quickly or uniformly for every jail detainee[182]—individuals also may need to wait several hours for a screening if, for example, they are booked in the middle of the night and no staff is available until morning.[183] In a survey of Texas inmates in 2004, 22% of them reported not being screened for mental illness within 72 hours of their arrival at jail.[184] Because of the limited time and resources in local jails, the brief mental health screening is a balancing act that requires casting a wide net to catch as many risks as possible while not referring an excessive number of individuals to a full psychiatric assessment if they do not need those more expensive and resource-intensive services.[185] In the case of Sandra Bland, she was never

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[176] Katharine Ligon, *Suicide in Texas Jails: Time for Reform*, CTR. FOR PUB. POLICY PRIORITIES (July 29, 2015), http://bettertexasblog.org/2015/07/suicide-in-texas-jails-time-for-reform/, <https://perma.cc/P76X-D3VA>.

[177] TEX. COMM'N ON JAIL STANDARDS, *Memo on Revised Intake Screening Form* (Oct. 22, 2015), http://www.tcjs.state.tx.us/docs/TAMemo-RevisedIntakeScreeningForm.pdf, <https://perma.cc/R356-SMG7> [hereinafter *Revised Intake Screening Form*].

[178] Johnathan Silver, *New Statewide Jail Form Aimed at Suicide Risks*, TEX. TRIB., Nov. 13, 2015, https://www.texastribune.org/2015/11/13/county-jails-adopt-revised-intake-form-next-month/, <https://perma.cc/8G6F-583A>.

[179] *Mental Health Screens*, *supra* note 170; *Consensus Project*, *supra* note 6, at 42.

[180] Krueger, *supra* note 21, at 2.

[181] AM. CORR. ASS'N, *supra* note 13; *Consensus Project*, *supra* note 6, at 134.

[182] 37 TEX. ADMIN. CODE § 273.5 (West 2015).

[183] Observations at Downtown Austin Travis County Jail (Apr. 22, 2015 & Apr. 30, 2015).

[184] *Mental Health Study*, *supra* note 152.

[185] Martin et al., *supra* note 22, at 2.

referred to a mental health professional for a psychiatric evaluation after disclosing to jail staff a previous suicide attempt, thirty cut marks on her arms,[186] and the recent death of a child.[187]

The initial mental health screening is not a full diagnostic tool but rather is meant to send a warning signal to jail staff that a particular inmate needs further mental health assessment or immediate safety precautions.[188] In the case of affirmative or evasive answers to questions related to suicidality or homocidality, jail staff can take a wide range of immediate actions (e.g. isolation in a solitary cell with visual checks every half hour) to keep an inmate safe until they can become stable, meet with psychiatric staff, or are transferred offsite to a psychiatric facility.[189] Inmates at risk of suicide should also be kept away from potentially lethal objects, making it surprising that the Texas Commission on Jail Standards did not cite the Waller County Jail on July 16, 2015, for Sandra Bland having had access to the trash bag in her jail cell that she used to hang herself.[190]

Combined with the sociological and biographical information obtained during the rest of the intake process, the brief mental health screening is instrumental in referring detainees to diversionary inpatient psychiatric services, setting up appropriate pre-trial diversion services,[191] negotiating lower bail amounts or deferred adjudication,[192] and arranging necessary psychiatric and medical accommodations for individuals who are still going to be incarcerated.[193] Unfortunately, judges and other important decision makers experience significant delays in receiving information about an inmate's mental health status. One survey in Texas found that most of the 244 judges surveyed reported not finding out about inmates' mental health status until arraignment or during trial, a delay that leads to inmates being held for longer periods of time than is necessary.[194]

C. Commonly Used Brief Mental Health Screenings in Jail Settings

Standards for the treatment of prisoners set forth by groups like the ACA, ABA, and Texas Commission on Jail Standards require jails to

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[186] Botelho & Ford, *supra* note 162.
[187] Langford, *supra* note 153.
[188] *ABA Standards*, *supra* note 4, at 23-2.1.
[189] AM. CORR. ASS' N, *supra* note 13.
[190] Jareen Imam & Henry Hanks, *5 Questions asked in the Sandra Bland case*, CNN, July 27, 2015, http://www.cnn.com/2015/07/23/us/sandra-bland-questions-remain-social-irpt/, <https://perma.cc/P3GM-T69M>.
[191] *ABA Standards*, *supra* note 4, at 23-6.2.
[192] *Consensus Project*, *supra* note 6, at 102.
[193] *ABA Standards*, *supra* note 4, at 23, 24.
[194] Levin, *supra* note 120, at 2.

administer a high-fidelity mental health screening during the intake process, but jail administrators and other local authorities are generally left to decide which specific screening instrument to use. While many states use screenings they develop in legislative work committees and advisory councils, there are only five mental health screening instruments used in jails that have published replication studies using independent samples in the United States, making them the most researched and statistically validated screening instruments available: the Jail Screening Assessment Tool (JSAT), the Brief Jail Mental Health Screen (BJMHS), the Referral Decision Scale (RDS), and the Correctional Mental Health Screening-Men and -Women (CMHS-M and CMHS-W).[195] The JSAT, BJMHS, and RDS are significant improvements over previous screening tools, but all three still present significant limitations in adopting them for nationwide use with all jail populations.[196] The BJMHS in particular has gained support in recent years from groups such as the Substance Abuse and Mental Health Services Administration and the National Gains Center for Behavioral Health and Justice Reform.[197] However, for reasons this Note will discuss below, preliminary studies indicate the BJHMS may not be as accurate as the CMHS-M and CMHS-W scales in detecting mental illness in females and other minority jail populations.

1. The Referral Decision Scale (RDS)

The RDS is the oldest of the three screening instruments discussed here and was lauded as a great advance in corrections screenings in the early 1990s.[198] The RDS was created specifically for use in correctional settings, and researchers were particularly optimistic about the RDS's diagnostic accuracy because its questions were derived from a more comprehensive, full-scale screening called the Diagnostic Interview Schedule, Version 3 (DIS-III).[199] The RDS focused specifically on identifying risk factors for three major mental health diagnoses: major depression, bipolar disorder, and schizophrenia.[200] An example of one question from the RDS bipolar scale is: "Have you ever felt for a period of a week or longer that you had a special talent or powers and could do things others could not or that in some way you were an especially important person?" This compartmentalization of screening questions into separate categories that correspond to distinct diagnoses is one

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[195] Martin et al., *supra* note 22, at 4.
[196] *Id.* at 7-8.
[197] Ligon, *supra* note 176.
[198] *See, e.g.*, Linda A. Teplin & James Swartz, *Screening for Severe Mental Disorder in Jails: The Development of the Referral Decision Scale*, 13 L. & HUM. BEHAV. 1, 14 (1989).
[199] *Id.* at 5.
[200] *Id.* at 3.

reason the RDS does not predict the presence of mental illness as accurately as other screenings.[201]

The RDS has also been faulted for its myopic focus on a history of mental illness treatment instead of focusing more holistically on mental health and including questions related to acute crises or recent functioning.[202] The RDS has fallen out of use in recent years for a number of reasons: its inability to distinguish between depressive and psychotic symptoms,[203] its generally poor ability to predict mental illness,[204] its lack of specificity which puts it at an increased risk for misinterpretation by correctional staff or inmates,[205] a general inability to identify specific diagnoses or concerns,[206] the exclusion of any questions related to suicidality,[207] and too many referrals for mental health services when the individual did not actually have a mental health diagnosis.[208] This last issue is crucial because it makes the RDS prohibitively expensive to implement on a large scale due to its excessive number of unneeded referrals to longer, more in-depth psychological evaluations, also known as false positives.[209]

2. Jail Screening Assessment Tool (JSAT)

The JSAT is distinct from the RDS or BJMHS because instead of using yes or no questions and a structured rubric to score individuals' responses, the JSAT is a semi-structured assessment that has no objective scoring scale.[210] Instead, the JSAT relies on the interviewer's professional judgment and prior mental health training to talk generally about symptoms with each individual, subjectively respond to their responses to sets of questions in eight subject areas, and flag individuals who are likely at risk and need further psychiatric follow-up.[211] Some of the subject areas of questions include "legal situation, violence issues, social background, substance use, [and] mental health treatment."[212]

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[201] Bonita M. Veysey et al., *Using the Referral Decision Scale to Screen Mentally Ill Jail Detainees: Validity and Implementation Issues*, 22 L. & HUM. BEHAV. 205, 210 (1998).
[202] *Id.* at 212.
[203] *Id.* at 210.
[204] Richard Rogers et al., *The Referral Decision Scale with Mentally Disordered Inmates: A Preliminary Study of Convergent and Discriminant Validity*, 19 L. & HUM. BEHAV. 481, 490 (1995).
[205] *Id.* at 488.
[206] *Id.* at 488.
[207] *Id.* at 490.
[208] Stephen D. Hart et al., *The Referral Decision Scale: A Validation Study*, 17 L. & HUM. BEHAV. 618, 620 (1993).
[209] Veysey et al., *supra* note 201, at 213.
[210] Thomas Grisso, *Jail Screening Assessment Tool (JSAT): Guidelines for Mental Health Screenings in Jails*, 57 J. AM. PSYCHIATRIC ASS' N 1049, 1049 (2006) (reviewing Tony Nichols et al. BRITISH COLUMBIA, MENTAL HEALTH, LAW AND POLICY INSTITUTE (2005).
[211] *Id.* at 1050.
[212] *Id.*

Because the JSAT has no objective rating system for scoring responses, there is considerable discretion on the part of the interviewer in terms of how to respond and follow-up to responses.[213]

The creators of the JSAT state that a social worker, nurse, or someone with "graduate training in psychopathology and assessment" should administer the JSAT—a wholly unrealistic requirement for budget-strapped jails that often need to rely on arresting officers or jail guards to handle intake paperwork.[214] Unlike older screening instruments like the Minnesota Multiphasic Personality Inventory (MMPI) and the Millon Personality Inventory, which took one to two hours to complete,[215] the JSAT is designed to be administered over a fifteen- to thirty-minute period—a considerable length of time that still makes it impractical for use in most jail intake settings when compared to the BJMHS, RDS, and CMHS tools.[216] The JSAT has been shown to correctly identify mental illness in about 71% of women and 84% of men, but in terms of nationwide implementation across all jails, that level of accuracy is not enough to outweigh the JSAT's high cost, excessive length, and unrealistic requirements for extensive mental health training for the staff who administer it.[217] It also costs money to buy the JSAT from Proactive Resolutions and use it with inmates, which increases the price tag of the JSAT even more.[218]

3. Brief Jail Mental Health Screening (BJMHS)

The BJMHS was developed as an improved and updated version of the RDS, meant to be shorter and more accurate at detecting mental illness while having fewer false positives (i.e. screenings that indicate the presence of mental health issues in individuals who do not actually have mental health issues).[219] The BJMHS's overall accuracy in detecting mental illness is about the same as the JSAT (65%-75%) but unlike the JSAT, correctional staff can administer it in under three minutes and with much less training required.[220] Unfortunately, some studies have found that the BJMHS has a false-negative rate for females (approximately

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[213] *Id.*

[214] *Id.*

[215] Linda A. Teplin et al., *Screening for Severe Mental Disorder in Jails: The Development of the Referral Decision Scale*, 13 L. & HUM. BEHAV. 1, 2, 14 (1989).

[216] *Mental Health Screens*, *supra* note 170; Martin et al., *supra* note 22, at 7.

[217] Tonia L. Nicholls et al., *Women Inmates' Mental Health Needs: Evidence of the Validity of the Jail Screening Assessment Tool (JSAT)*, 3 INT' L J. FORENSIC MENTAL HEALTH 167, 179-80 (2004).

[218] PROACTIVE RESOLUTIONS, *Jail Screening Assessment Tool (JSAT) Manual* (2015), http://proactive-resolutions.com/shop/jail-screening-assessment-tool-jsat/, < https://perma.cc/KHE4-CJWY>.

[219] Henry J. Steadman et al., *Validation of the Brief Jail Mental Health Screen*, 56 J. AM. PSYCHIATRIC ASS' N 816, 816 (2005).

[220] Martin et al., *supra* note 22, at 5.

35%) that is alarmingly high when considering it for nationwide use with all inmate populations.[221] This false negative rate means that a large number of females would be screened as having no mental health needs when in fact they did have mental health issues, an undoubtedly dangerous situation.

A second version of the BJMHS was developed, the BJMHS-R, which included additional questions measuring symptoms related to post-traumatic stress disorder (PTSD) and depression, two issues which are more common in female inmates.[222] While the newer BJMHS-R did not improve on the accuracy or validity of the BJMHS, researchers in the new BJMHS-R study also re-administered the BJMHS and found a less alarming range of false negative rates in women (14% to 37%) than was found in the initial research studies validating the BJMHS.[223] Although the BJMHS's rate of false negatives was improved in this second validation study, this wide range of false negative rates still represents a significant percentage of women being misidentified as not having a mental illness, which is concerning when considering the BJMHS for nationwide adoption. The BJMHS is also ineffective at identifying mental illness in African-Americans, Latinos, and low-income populations.[224] This is due to the BJMHS relying too heavily on the inmate having a history of involvement in mental health treatment in order to trigger further mental health assessment. A history of treatment is often absent in minority and low-income populations because of financial and geographical barriers to obtaining healthcare. [225]

4. The Correctional Mental Health Screenings: Women (CMHS-W) & Men (CMHS-M)

There has been increased interest recently in brief mental health screenings that are more sensitive to race, gender, and class. The Correctional Mental Health Screening-Women (CMHS-W) and the Correctional Mental Health Screening-Men (CMHS-M) are the most consistently validated scales across all jail populations and the most adaptable for jails of all different sizes, staffing numbers, and resource levels.

The CMHS-M and CMHS-W are gender-specific mental health screenings that improve upon many of the faults of the JSAT, BJMHS,

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[221] Steadman et al., *supra* note 219, at 821.

[222] Henry J. Steadman et al., *Revalidating the Brief Jail Mental Health Screen to Increase Accuracy for Women*, 58 J. PSYCHIATRIC SERVS. 1398, 1398-99 (2007) [hereinafter *Revalidating the Brief Jail Mental Health Screen*].

[223] *Id.*

[224] Alexander I. Simpson et al., *Does Ethnicity Affect Need for Mental Health Service Among New Zealand Prisoners?*, 37 AUSTL. & N.Z. J. PSYCHIATRY 728, 728 (2003).

[225] Seth J. Prins et al., *Exploring Racial Disparities in the Brief Jail Mental Health Screen*, 39 CRIM. JUST. & BEHAV. 635, 636 (2012).

and RDS. Unlike the JSAT, the CMHS-W and CMHS-M can be administered in under five minutes[226] and have simple scoring systems that do not require the interviewer to have extensive training or experience in mental health treatment.[227] The CMHS scales are more effective than the RDS scales because they contain questions that relate to suicidality and have much lower rates of false positives than the RDS.[228] Finally, the CMHS-M and CMHS-W tools are an improvement over the BJMHS because the CMHS tools identify mental illness equally well across races and genders with fewer false positives than the BJMHS or BJMHS-R.[229]

The CMHS scales are also the most accurate in identifying symptoms related to depression and anxiety in males, which could be especially helpful for correctional workers who have consistent difficulty detecting symptoms of depression and anxiety in both genders.[230] This difficulty detecting depression and anxiety is especially important given that six of the top seven mental health symptoms reported in jail are symptoms related to a diagnosis of major depression.[231] The CMHS-W's increased focus on symptoms of anxiety and depression may at least partially explain why the CMHS-W is more accurate overall in identifying mental illness in females. The ability for the CMHS-W to accurately identify mental illness in women is particularly important given that the female jail population has increased more than any other group in recent years, jumping 10.9% between 2010 and 2013 (while the male population in jails declined 4.2% during that same time).[232] Symptoms of depression are also prone to response bias and closely linked to thinking about and attempting suicide, so identifying these symptoms early is a crucial component of an effective jail suicide prevention strategy.

In testing the accuracy of the CMHS scales, researchers have looked at raising and lowering the cut-off point for how many positive responses trigger a referral for more in-depth psychiatric services. In the largest meta-analysis of CMHS-M data available, researchers suggest that lowering the cut-off point from six positive responses to five raises the overall accuracy of the CMHS-M from 77% to 79%.[233] That same meta-analysis found that for the CMHS-W, lowering the cut-off point from five positive responses to four provides a better balance of false positives and false negatives while still maintaining the CMHS-W's overall accuracy in correctly detecting mental illness in inmates 73% of

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[226] Martin et al., *supra* note 22, at 7.

[227] *Mental Health Screens*, *supra* note 170, at 10.

[228] *Id.*

[229] *Id.*

[230] Denis Lafortune, *Prevalence and Screening of Mental Disorders in Short-Term Correctional Facilities*, 33 INT' L J.L. & PSYCHIATRY 94 (2010).

[231] *Id.*

[232] Minton & Golinell, *supra* note 24, at 1.

[233] Martin et al., *supra* note 22, at 5.

the time.[234] While that still leaves 27% of inmates with mental illness undetected by the screening, that number should decrease if jail staff use the screening in combination with an electronic records systems—like Texas's CCQ system—that checks each individual's history of mental health treatment at publicly-funded clinics and health centers.[235]

IV. WHY LEADERS SHOULD FOCUS ON IMPROVING MENTAL HEALTH SCREENINGS DURING JAIL INTAKES

The jail intake process is every offender's first interaction with the corrections system, and as the first step in a sometimes life-long cycle of incarceration and release, jail intakes can have a ripple effect on every treatment and custody decision made thereafter. The brief mental health screening and admissions process is at the foundation of every security and treatment decision that is made for an inmate after the admissions process; as the American Bar Association puts it, many of their standards for the treatment of prisoners "can be safely and effectively implemented only if they are preceded by sound classification of the affected prisoners."[236] In Texas, for example, more than 90% of judges report that having access to a mental health assessment before an inmate goes to court would help them make more effective judgments and treatment decisions.[237] The first step in making that happen is ensuring the initial mental health screening is as accurate as possible, and that intake processes and suicide prevention plans are consistently implemented in all jails. While recent changes to the mental health screening used in Texas jails are certainly a step in the right direction,[238] the Texas Commission on Jail Standards will likely need increased staff and resources to make sure the new screening and suicide prevention procedures are implemented properly statewide and updated where necessary.[239]

The case of Sandra Bland is a tragic example of how minimum jail standards for the treatment of inmates with mental illnesses can break down and suicide prevention procedures can be forgotten or ignored without adequate oversight and training. While no one can say for sure that Ms. Bland's death in the Waller County Jail could have been prevented, jail staff could have better responded to her mental health needs had they given her the 30-minute visual checks required by law[240]

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[234] *Id.*

[235] *Mental Health Study*, *supra* note 152. Note: The precursor to the CCQ electronic records system was the Case Assignment and Registration (CARE) system discussed in this report.

[236] *ABA Standards*, *supra* note 4, at 24.

[237] Levin, *supra* note 120, at 2-3.

[238] *Revised Intake Screening Form*, *supra* note 177.

[239] Deitch, *supra* note 31.

[240] 37 TEX. ADMIN. CODE § 275.1 (2013).

or had their employees been given the proper mental health and suicide prevention training that the Texas Administrative Code requires for all corrections officers.[241]

This section of the Note provides a set of five recommendations for jail administrators and officials who are interested in making changes to improve mental health services in jails while reducing both the costs of incarceration and rates of recidivism.

A. Local Jail Officials Should Begin Using More Accurate Mental Health Screening Tools.

The limitations and inaccuracies of three of the most commonly used brief mental health screenings—the BJMHS, JSAT, and RDS—suggest that jails should begin using screening instruments that have been validated and are more accurate in identifying mental illness in inmates of all genders, races, and economic classes.[242] Potentially more worrisome is the apparent lack of validation studies of screening tools used in different states, like the Screening Form for Suicide and Medical/Mental/Developmental Impairments that the Texas Commission on Jail Standards currently uses in Texas jails.[243] Organizations including the American Psychiatric Association recommend using a standard, uniform screening instrument at every jail within each state to help improve reporting and training in addition to making data and records sharing between correctional facilities more efficient.[244] However, it is important that any screening a state decides to use is also validated to accurately identify mental illness in all types of jail populations.

Independent jail oversight bodies and local officials should begin using brief screening instruments like the CMHS-M and CMHS-W[245] that are accurate in detecting mental illness in all races and genders while still remaining cost effective by not referring too many inmates without a mental illness for further evaluation.[246] By tightening up and improving the quality of the mental health screening during intake, correctional systems should see a cascade of benefits and payoffs at each step of the criminal justice process following the initial pre-trial booking into a local

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[241] TEX. COMM'N ON JAIL STANDARDS, *supra* note 146.

[242] *See generally* Steadman et al., *supra* note 219.

[243] *See generally* TEX. COMM'N ON JAIL STANDARDS, *Instructions for Suicide and Medical/Mental/Developmental Impairments Form*, http://www.tcjs.state.tx.us/docs/Instructions-Suicide_Medical_and_Mental_Impairments_Form.pdf, <https://perma.cc/57Q3-B8P4>.

[244] *Consensus Project*, *supra* note 6, at 131.

[245] The CMHS screenings are available online and free to copy and use in both research and institutional settings: ASS'N OF STATE CORR. ADM'RS, *Correctional Mental Health Screening for Women*, http://www.asca.net/system/assets/attachments/2640/MHScreen-Women082806.pdf?1300974694, <https://perma.cc/PB87-7MG4>; ASS'N OF STATE CORR. ADM'RS, *Correctional Mental Health Screening for Men*, http://www.asca.net/system/assets/attachments/2639/MHScreen-Men082806.pdf?1300974667, <https://perma.cc/J42J-8FGL>.

[246] Martin et al., *supra* note 22, at 6-8.

jail. And with an increasing number of women entering U.S. jails in recent years, it is more important than ever that corrections officers are identifying the mental health needs of *every* inmate during their initial intake.

B. Officials Should Ensure that Screeners are Appropriately Dressed and Trained.

Jail administrators and policymakers should evaluate the dress, demeanor, training, and gender of the staff that administers brief mental health screenings in an effort to improve disclosure rates and overall accuracy in detecting mental health needs. Research suggests that there are overall higher rates of symptom disclosure, especially of depressive and suicidal or homicidal thoughts, when mental health screenings are administered by female staff members[247] or staff members who are dressed in uniforms that are less intimidating than traditional jailer uniforms.[248] Inmates also tend to disclose more symptoms when corrections officers have received training in how to calmly and naturally communicate with someone about their symptoms of mental health problems and thoughts of suicide.[249] When mental health and suicide prevention training is insufficient or not completed by all staff, it opens up the door for increased risk of injury and tragedy. It bears repeating that following Sandra Bland's death, the Waller County Jail was cited by the Texas Commission on Jail Standards for not being in compliance with providing the minimum two hours of mental health training that is legally required for all corrections officers.[250] Before looking to improve mental health training for jail staff, officials must first ensure that existing minimum standards are being implemented and enforced.

Looking past current standards toward best practices that jails should be aiming to implement, one evidence-based training on communicating with individuals experiencing a mental health crisis that is already being used by different state health agencies across the country is the Applied Suicide Intervention Skills Training (ASIST) program.[251] The ASIST training is just one example of the type of therapeutic communication trainings that every staff member in jails should be receiving. Mental health counselors in Texas jails have further suggested that inmates would more readily disclose feelings of suicide and other

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[247] *Revalidating the Brief Jail Mental Health Screen, supra* note 222, at 1398.

[248] Hart et al., *supra* note 208, at 622; *Consensus Project*, *supra* note 6, at 69.

[249] Peters et al., *supra* note 15, at 24.

[250] Botelho & Ford, *supra* note 162.

[251] *ASIST*, LIVINGWORKS, (2015), https://www.livingworks.net/programs/asist/, <https://perma.cc/9S8A-9MK8>; TEX. HEALTH & HUMAN SERV. COMM'N, *Presentation to the Senate Health and Human Services Committee on Mental Health Coordination* (Aug. 15, 2014), https://www.hhsc.state.tx.us/news/presentations/2014/Senate-Presentation-Mental-Health.pdf, <https://perma.cc/9NSD-BGVY>.

symptoms if the counselors in jails could offer them the same client-patient privacy protections that mental health counselors and their patients have in other institutionalized settings.[252] Legislators should seriously consider looking at this issue since changing the level of patient-client privacy that a correctional counselor can offer inmates may increase disclosure rates of mental health symptoms, suicidal and otherwise.[253]

Jail administrators should also ensure that their staff are properly trained in the electronic medical records systems and referral processes that are used when an inmate needs their prior mental health records checked or forwarded for a referral for further psychological assessment. Sandra Bland's death is just one example of what can potentially go wrong when important information about suicide risk is left off of intake forms[254] or when public mental health records systems (like the CCQ system used in Texas) are not properly used or backed up.[255]

C. Jails Should Minimize the Use of Restraints to Respond to Mental Health Crises.

When corrections officers or other jail staff determine that an inmate has serious mental health issues, they should be immediately evaluated by a mental health specialist, and the use of mechanical restraints and solitary confinement should be minimized whenever possible. As discussed earlier, when nursing or psychiatric staff are not available, jail guards are often forced to resort to isolation and seat restraints as a means for controlling violent or suicidal inmates, making the already unpleasant experience of being incarcerated (potentially while withdrawing from medication)[256] even more traumatic.[257] Jail corrections staff should be regularly trained in crisis intervention and de-escalation techniques that have been proven to help calm inmates down before staff are forced to resort to solitary confinement or physical restraints.[258]

Inmates' potential refusal of medication presents another set of security risks for jails. In those cases when an inmate refuses medication and the effects of withdrawal present health or safety risks, there should

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[252] Observations at Downtown Austin Travis County Jail (Apr. 22, 2015 & Apr. 30, 2015).

[253] *Id.*

[254] *See* David Warren, *Sandra Bland Mentioned Previous Suicide Attempt to Jailer: Report*, NBCDFW, July 22, 2015, http://www.nbcdfw.com/news/local/Sandra-Bland-Mentioned-Previous-Suicide-Attempt-to-Jailer-Report-318199011.html, <https://perma.cc/LA2Y-ZY6N> (noting discrepancies in jail forms).

[255] *See* Langford, *supra* note 153 (noting incomplete results due to technical problems when Waller County jail officials ran Sandra Bland' s CCQ query).

[256] *Consensus Project*, *supra* note 6, at 104, 107.

[257] *Id.* at 102.

[258] *Id.* at 62.

be an expedited process for court orders to mandate medication compliance. Inmates may also have difficulty obtaining medications that are not on a particular jail's formulary of medication that are deemed acceptable and available to dispense.[259] Making sure there are no missed doses of psychotropic medications during the initial intake is crucial to overall jail security and positive outcomes for individual inmates—a step toward avoiding costlier interventions down the road. Over time, more accurate detection of mental health problems that are underlying psychotic, antisocial or violent behavior during the intake process should naturally expand the use of acute psychiatric units inside jails and increase the number of inmate diversions to community inpatient treatment where appropriate. This should also decrease jail staff's reliance on solitary confinement as a "catch-all" to keep at-risk inmates safe.

D. Jails Should Institute 15-Minute Visual Checks for Suicidal and Homicidal Inmates.

Suicide prevention plans and standards in jails need to be followed and, where necessary, updated. Using Texas as just one example, current jail standards only require visual observation of inmates "no less than once every 60 minutes," and that increases to every 30 minutes for potentially suicidal, assaultive, mentally ill inmates, or individuals who have "demonstrated bizarre behavior."[260] Hourly safety checks for suicidal inmates are insufficient to keep them safe, but it appears that even the minimal hourly checks are not happening in all jails, as was the case of Sandra Bland.[261] Safety checks for inmates at risk of suicide should be increased to every 15 minutes, the same standard used for patients on suicide precaution in inpatient psychiatric facilities[262] and set forth by the Texas Commission on Jail Standards for inmates being monitored in seat restraints.[263] Visual checks every 15 minutes for potentially suicidal inmates are also supported by the American Bar Association's Criminal Justice Standards on the Treatment of Prisoners.[264]

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[259] *Id.* at 107.

[260] 37 TEX. ADMIN. CODE § 275.1 (2014).

[261] Botelho & Ford, *supra* note 162.

[262] *See* Jon E. Grant, *Failing the 15-Minute Suicide Watch: Guidelines to Monitor Inpatients*, 6 CURRENT PSYCHIATRY 6 (2007), http://www.currentpsychiatry.com/home/article/failing-the-15-minute-suicide-watch-guidelines-to-monitor-inpatients/fd39a8da44342594aa91346d7447c616.html, <https://perma.cc/FP6S-DX6J> (showing that 15-minute checks must be used to protect patients from harming themselves or others; in psychiatric settings, even 15-minute checks are insufficient because about one-third of the 1,500 inpatient suicides in the United States still occur in those settings).

[263] 37 TEX. ADMIN. CODE § 273.6 (2013).

[264] *ABA Standards*, *supra* note 4.

Given that decentralized control is inherent to the local and county jail system, it's important for there to be independent oversight bodies to audit and monitor jails on a regular basis. While many states still lack a central independent oversight body to regulate and oversee compliance with jail standards, regulatory bodies that do exist—like the Texas Commission on Jail Standards—need to be properly funded and staffed.[265] If we want to avoid tragedies like that of Sandra Bland's, these oversight bodies need to be able to proactively monitor the conditions and intake procedures in jails rather than be forced to direct limited resources to responding to tragedies that have already occurred.

E. Diversion and Treatment Programs Must be Expanded to Take on More Enrollees.

With improved mental health screenings at intake, diversion and treatment programs will likely see increased referrals for the specific types of offenders they were designed to help. As discussed earlier in this Note, judges also need to receive information regarding inmates' mental health status quickly in order to make clinically and fiscally effective decisions regarding their placement, custody level, and possible diversion. While these treatment and diversion programs will likely need expanded resources and funding to meet an increased demand brought on by improved screening processes, many different diversion and treatment programs have been shown to reduce overall financial and societal costs associated with jailing individuals with mental illness.

For example, both Harris and Bexar counties in Texas have established diversion programs that transfer certain offenders with mental health needs out of the traditional court system into drug and mental health courts that approach the legal process in a more rehabilitative and therapeutic manner.[266] Both counties have lowered taxpayers' costs to operate local jails by reducing the average lengths of stay and reincarceration rates. Those reductions in recidivism continued on after enrollment and exit from these programs, making for safer communities and a less costly correctional system.[267] Individuals enrolled in a similar mental health court diversion program in Indianapolis experienced 45% fewer arrests annually.[268] These drastic reductions in rearrests can result in big savings for taxpayers; in Maryland and New York, diversion programs saved taxpayers an

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[265] *See* Deitch, *supra* note 31 (explaining that the Texas Jail Commission has only four inspectors, giving it insufficient resources to do "frequent surprise inspections" and follow up with any issues).

[266] SARAH R. GUIDRY ET AL., TEX. CRIMINAL JUSTICE COAL., A BLUEPRINT FOR CRIMINAL JUSTICE POLICY SOLUTIONS IN HARRIS COUNTY (2015).

[267] *Id.*

[268] Henry J. Steadman et al., *Effect of Mental Health Courts on Arrests and Jail Days: A Multisite Study*, 68 ARCHIVES OF GEN. PSYCHIATRY 167, 168 (2011).

estimated $2,800 per inmate for the two years after a mental health court intervened, with most of the cost savings coming from reductions in rearrests, court appearances, and multiple incarcerations.[269] Similarly, California has seen a 700% return on investment for every $1 dollar they invested in their mental health court diversion program, with these savings mostly coming from reductions in recidivism.[270] In other parts of California, the Connections program has been successful in reducing rearrests and days spent in jail by providing jail probationers with acute case management services when they are released into the community.[271]

Whether it is parole, probation, mental health courts, supportive case management services, or any of the other innovative alternatives to incarceration that are being researched and developed around the country, community supervision has proven to be a much cheaper and more effective alternative to incarceration in jail for many offenders with mental health needs.

V. CONCLUSION

The recommendations in this Note aim to present some solutions to the lack of quality mental health screenings and procedures in America's local and county jails. As state and local governments closed state-run mental health institutions over the last several decades, jails and prisons have become the de facto providers of mental health treatment in America. In Texas, for example, the Harris County Jail in Houston provides psychotropic medications to more people than all ten of the state's public mental health hospitals combined.[272] There is also recent evidence to suggest that jails like Harris County are so overburdened dealing with psychiatric care that they are not able to provide proper medical care for conditions like diabetes and tuberculosis.[273]

While improved mental health procedures during intake will improve conditions and outcomes for individuals that are (and *should* be) incarcerated, it also opens up the opportunity for local jails to make more use of evidence-based diversion programs that provide treatment-based alternatives to incarceration. Recent studies and pilot programs have shown that such diversion programs can reduce costs and recidivism at the same time. In the words of Johnson County, Kansas Sheriff Frank Denning, "We have a social obligation here as law enforcement to

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[269] Cowel et al., *supra* note 164.

[270] STANFORD LAW SCH. THREE STRIKES PROJECT, *supra* note 129, at 10.

[271] *Id.*

[272] Deprang, *supra* note 53.

[273] James Pinkerton, Anita Hassan, & Lauren Caruba, *Harris County Jail Considered 'Unsafe and Unhealthy' for Inmates, Public*, HOUS. CHRON., Nov. 21, 2015, http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php, <https://perma.cc/F6D6-V8N7>.

partner with the medical health field to attempt some innovative ways to avoid that incarceration."[274]

While some inmates can be counted on to communicate their need for suicide intervention or mental health treatment, a lack of quality jail intake screening instruments and processes that are properly and consistently implemented ensures that many inmates with mental health needs will fall through the cracks of the criminal justice system. Jails should be using a multi-tiered system assessment system that includes a validated brief mental health screening instrument, secondary referral to timely psychiatric services when needed, and an electronic records check of past involvement with publicly-funded mental health treatment. In the case of Sandra Bland, poor mental health intake procedures and a complete lack of follow-through with suicide prevention plans and electronic record checks of Ms. Bland's past treatment undoubtedly contributed to her preventable death on July 13, 2015. Having a multi-tiered system of interventions for offenders with mental health needs not only saves lives, it also saves significant taxpayer dollars and ultimately makes our communities safer and more stable. While quality mental health screenings and intake procedures are far from a cure-all for the wide range of problems facing America's jails, they will go a long way in laying the much-needed groundwork to prevent deaths like Sandra Bland's and ultimately provide individuals with the judicial and clinical interventions they need to be rehabilitated.

[274] Johnson County (Kansas) Sheriff, *supra* note 84.