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The Battle Over Voter Identification Laws in the United States

By Aleksandra Boots
CAS ’17

Voter identification laws have become controversial in American politics. As of today, a total of thirty-six states have passed laws requiring voters to show some sort of identification when voting. First time voters will face additional requirements at the polls. However, in some states, such as Arkansas, Louisiana, and Pennsylvania, voter identification laws have been struck down. The Supreme Court declined to hear Wisconsin’s case that its voter identification law is discriminatory. However, in Texas, the federal court blocked Texas’s voter identification law. While the Courts are upholding voter identification laws in many states, they are deeming the laws of other states unconstitutional.

On September 17, 2013, the Brennan Center, Lawyers’ Committee, and co-counsel filed a suit in federal court challenging SB 14, Texas’s strict photo voter identification law on behalf of the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives. In Texas NAACP v. Steen (consolidated with Veasey v. Perry), the 5th Circuit Court of Appeals ruled that Texas’s photo ID law violates Section 2 of the Voting Rights Act of 1965. The Courts argued that Texas’s photo ID requirement has been one of the strictest voter identification requirements in the United States. The appellate court also argued that Texas’s photo ID law violates Section 2 of the Voting Rights Act, claiming that the photo ID requirement “imposes an unconstitutional burden on the right to vote, was passed by the Texas legislature with the intent to discriminate, and constitutes an unconstitutional poll tax.” Texas’s photo voter ID law discriminates against minorities, preventing African Americans and Latinos from voting in the state of Texas.

Although the federal court has deemed Texas’s photo identification requirement discriminatory, other states continue to enforce strict voting requirements. Supporters of voter identification laws, especially Republican legislatures, believe that these laws will significantly reduce voter fraud. Despite such claims, a recent study performed by a group of political scientists from Stanford and University of Wisconsin indicates that “virtually all the major scholarship on voter impersonation fraud – based largely on specific allegations and criminal investigations – has concluded that it is vanishingly rare, and certainly nowhere near the numbers necessary to have an effect on any election.” Those who claim that voter fraud is rare also believe that the true purpose of the voter identification laws is to help Republicans win elections. On the other side of the debate, opponents of voter identification laws argue that the laws are, in fact, racially discriminatory. The American Civil Liberties Union strongly opposes the implementation of voter identification laws. According to the ACLU, the voter ID requirements make it more difficult for African Americans, the elderly, students, and people with disabilities to exercise their constitutional right to vote.

The voter identification laws that exist today have caused great controversy in American politics. Some politicians have already expressed their concerns about the fact that stricter laws may be enacted over the next few years. Due to the significant impact that voter identification laws have had on voter turnout in some states, disputes continue to arise between Democrats and Republicans.

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Anybody Want a Red-Sox Ticket?

By Amrita Sethi
CAS ‘16

The big game between the Boston Red Sox and the New York Yankees is tonight, your professor cancels your calculus midterm tomorrow, and the obstacle in your way no longer exists. However, there is another barrier to cross before you can witness the Red Sox destroy the Yankees. The tickets are all sold out. What do you do? Do you go online to StubHub, Seatgeek and other such sites? Do you buy them from one of the gentlemen in Kenmore Square selling tickets before every game? Or, do you sit at home and watch Game of Thrones instead? You meet a friend right outside Fenway and he says he has an extra ticket he is willing to sell you for a price less than the one printed on the ticket. As a law student, you question the legality of this transaction and wonder if it’s considered scalping. Is it still illegal if its not done for a profit? Does it still count as a business transaction? Can he be arrested?

You know that Section 185D states, "No licensee under section one hundred and eighty-five A shall resell any ticket or other evidence of right of entry to any theatrical exhibition, public show or public amusement or exhibition of any description at a price in excess of two dollars in advance of the price printed on the face of such ticket or other evidence of right of entry as the purchase price thereof." The state of Massachusetts not only requires you to possess a license for the resale of tickets, but also implements a price cap. These laws apply to everyone either selling them on or off of the premises.

The Lainer v. City memorandum at the United States District Court, D. Massachusetts tested these rules. In this case, the plaintiff, Gary Lainer, sought an injunction and compensation for damages that originated when he was arrested for selling a Boston Red Sox ticket outside Fenway Park. He asserted that the Boston Police Department’s arrest policy is “contrary to the controlling statute which prohibits an unlicensed person from engaging in the business of reselling tickets. Arrests under the flawed policy are unconstitutional, thus posing the risk of irreparable injury.” Lainer attached four affidavits from different individuals who were in similar situations. The defendant, City of Boston, claimed that the BPD is justified in arresting anyone that attempts to resell their tickets. Furthermore, they said that the damage done is not irreparable. The plaintiff then countered that the risk of injury caused by such an injunction outweighs its costs, stating that it seeks nothing more than the proper enforcement of the law. Lainer claimed that he asked, “Anybody need a ticket?” He then sold it to the buyer at the face value. He argued that this did not violate the anti-scalping law, and pointed out that the officers in question made no attempt to extract this information from him before taking action. Thus, he insisted, this should be deemed a wrongful arrest.

The defendants responded that the arrest was justified under Commonwealth v. Sovrenskey, in that it was made under the clear view of a “warning sign” in order to prevent Red Sox fans from being “accosted or impeded by scalpers.” The court allowed the plaintiff’s motion for a preliminary injunction and urged the officers, and all other personnel against arresting people who try to resell their Red Sox ticket near Fenway Park unless the officers have probable cause to do so. They specify that the sale must be made at face value or less, as only licensed merchants can resell the ticket at higher than face value.

Reselling of tickets has always been a gray area. The laws differ from state to state and are different for various organizations. While it might be legal to purchase tickets for a Red-Sox game from StubHub, because they are “the official fan to fan Ticket Marketplace of Redsox.com,” the same cannot be said for the Patriots. The debate continues on whether or not the secondary market should be legalized, and if consumers will benefit or suffer from its legalization.

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A “Less Cruel” Death Penalty

By Ana Paula Amatuzzi
CAS ’18

In 2014, Oklahoma used an untested mixture of drugs on the execution of Clayton Lockett, convicted in 2000 of murder, rape, and kidnapping.1 This untested drug caused Lockett to suffer for 40 minutes before dying, which obligated Oklahoma to suspend subsequent executions until an investigation was concluded. The state adopted a new protocol of drug combinations; however, the new combination still included midazolam, the initial drug used in Clayton Lockett’s execution. The incident not only led Lockett’s family to sue the responsible doctor, Dr. Johnny Zellmer, alleging that he violated the rule established at Nuremberg trials,2 but also sparked the questioning of whether or not Oklahoma violated the Eighth Amendment, which prohibits cruel and unusual punishment.3

The United States Court of Appeals for the Tenth Circuit became involved when Charles Warner, who raped and murdered an eleven-month-old baby, as well as other death row inmates, opened a petition for a writ of certiorari.4 They argued the violation of the Eighth Amendment by employees of the Oklahoma Department of Corrections, such as Richard Gross.5 Warner and the other plaintiffs expected the petition to prevent Oklahoma from moving forward with their executions.6 However, the Supreme Court declined to grant the petition and sided with the respondents who argued that midazolam has proved efficient in Florida, and that Oklahoma has had difficulty in obtaining the necessary chemicals to conduct executions.

Since Warner was executed, the case was renamed after one of the other plaintiffs, Richard Glossip, a man accused of beating his employer to death, petitioned to court. The opinion for the case Glossip vs. Gross was delivered on June 29, 2015, by Justice Alito, with a 5-4 majority. The Court decided that there was not sufficient evidence that using midazolam as an initial drug causes severe pain, and that the drug used in the protocol did not violate the Eighth Amendment. The Court argued the Eighth Amendment does not require the execution method to be free of risk and pain, and since the petitioners were unable to present a less cruel method, midazolam is still the only option known and available.

The Judgement was issued on August 28, 2015, after the denial of Glossip’s Rehearing Petition, closing the tentative of the plaintiffs to postpone their death. However, it did reopen the debate of whether or not the death penalty can be changed to avoid unnecessary suffering. In court, the concurring and dissenting opinions show how polemic the cruelty of death penalty still is in the United States.7 Justice Scalia, for example, pointed that “the arguments that it is cruel, deal with the concerns about conviction, not the punishment itself,” and Justice Breyer argued that “the death penalty is no longer constitutional”. It seems the disparate opinions about this issue will continue to diverge depending on whether the rules of ethics or the Constitution is used as a supporting argument.

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The European Union’s Law Surrounding the Refugee Crisis

By Andy Gorden
CAS ‘18

The European Union is in the midst of one of the largest influxes of refugees and migrants in its history. In grappling with this crisis, three important features of EU law have come into play: their legal definition of who is a refugee versus who is a migrant, their implementation of the Dublin Regulation which establishes a hierarchy in granting asylum for refugees, and their use of the Schengen Borders Code which regulates the crossing of external borders.

Serving as the legal framework for the EU’s asylum policy, the 1951 Geneva Convention on the Protection of Refugees established the standard definitions of who is a refugee and who is a migrant. Whereas migrants are those who “choose to move in order to improve the future prospects of themselves and their families,” refugees by contrast “have to move if they are to save their lives and protect their freedom.” Thus, the interpretations over what makes a person a migrant versus a refugee have important ramifications as the EU only grants asylum to “people fleeing persecution or serious harm in their own country,” thereby precluding migrants from getting the same protection as refugees.

While these two legal terms may seem rather black and white, the EU’s Dublin Regulation NO 604/2013 presents a problem. The law “establishes the Member State responsible for the examination of the asylum application” or in other words it forces refugees to apply for asylum in the state in which they initially landed. The complication comes in the disproportionate amount of people landing in the less developed EU states such as Italy and Greece. If a refugee, therefore, initially lands in Greece and decides that his family would have a better future in Germany, of a sudden his standing under EU law shifts to that of a migrant because he is not moving due to fear of persecution. This raises the question of whether or not the terms “migrant” and “refugee” are mutually exclusive.

With the amount of people reaching EU territory increasing from 280,000 in 2014 to 350,000 in January-August of 2015 alone, one has to wonder if there is an infrastructural problem in addition to the definitional one. Control of the EU’s border is based upon the Schengen Borders Code that establishes “a community code on the rules governing the movement of persons across borders.” It is worth noting that within this code, there is no rule calling for the construction of fences, which obviously makes the borders more permeable.

Additionally, even though Schengen requires a valid visa, travel documents, and justification for entrance into the country among other prerequisites, there is an important caveat. Indeed, after listing these rules for gaining entrance into an EU country, the code warns, “If these conditions are not met, entry into the territory is refused, unless special provisions (e.g. for humanitarian reasons) apply.” Clearly, people who might ordinarily be turned away due to insufficient documentation receive asylum for said humanitarian reasons. The possibility of easier entrance into EU territory, then, may be another contributing factor in the spike of migrants and refugees seeking asylum.

As the civil war in Syria rages on, a mitigation of the flow of migrants and refugees does not appear to be in sight. That said, the EU is currently relying on the tripartite approach of strict legal definitions of refugees and migrants, the Dublin Regulation, and the Schengen Borders Code, to simultaneously decrease the amount of people flowing in and keep the dispossessed safe.

Sources

By Asha Mehrotra
CAS ’17

Samantha Elauf, a then recent high school graduate, applied for employment at a Tulsa, Oklahoma Abercrombie and Fitch Kids store in 2008. As a Muslim teenager, Elauf wore a hijab, a type of headscarf, as a practice of her religion. According to the Abercrombie “Look Policy,” their version of a dress code, employees were prohibited to wear “caps” or “headwear.” The Assistant Manager, Heather Cooke, interviewed Samantha Elauf and consulted the district manager, Randall Johnson, who concluded that Elauf’s hijab violated company policy. Cooke, however, informed Johnson that she thought Elauf wore the headscarf as part of her religious beliefs. Elauf was not hired for the job, although the rest of her interview and application received a high rating that would have “qualified her to be hired.”

Elauf took her case to the U.S. Equal Employment Opportunity Commission (EEOC), which proceeded to file a lawsuit for her. The EEOC works to prevent any and all discrimination against applicants and employees. The main issue of the lawsuit was “whether an employer can be liable for discrimination when a would-be employee doesn’t give explicit notice of a need for religious accommodation.” This case hinged on the Title VII of the Civil Rights Act of 1964, which makes it illegal for employers to not hire someone because of his or her religion, including religious adherences.

The EEOC’s argument was based on the fact that Elauf should not have been completely responsible for requesting the employer take her religious beliefs into account. The assistant manager interviewing Elauf was fully aware that she was wearing a hijab in observance of her Islamic practices, even though Elauf didn’t explicitly state it. Employers must be aware of applicant needs, but are not supposed to explicitly ask about religious practices, as they may come off as being racially or religiously discriminating. If Elauf had requested reasonable religious accommodations, Abercrombie stated that they would have probably honored them, but “no such requests had been made in this case.” The store also argued that they weren’t discriminating specifically against her, due to the fact that the no “caps” or “headwear” policy is applicable to every employee, no matter what religion they may or may not practice. The Supreme Court ruled that Title VII “doesn’t require the employer to be neutral when it comes to religious practices.”

The case was first heard in the Oklahoma district court, which ruled in favor of Elauf and the EEOC. However, Abercrombie appealed and won at the U.S. Court of Appeals for the Tenth Circuit, which claimed that Abercrombie could not be held liable without receiving “explicit, verbal notice of the religious conflict.” The court, with a 3-0 decision, cited four other case precedents from circuit courts.

The U.S. Supreme Court heard the case of EEOC v. Abercrombie and Fitch Stores Inc. on February 25, 2015 and they ruled 8-1 in favor of EEOC on June 1, 2015. Justice Antonin Scalia stated, “An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.” According to the Court, the Tenth Circuit incorrectly interpreted Title VII in making its decision. The only justice who voted in favor of Abercrombie was Justice Clarence Thomas, who was also previously the chairman of the EEOC. He reasoned that Abercrombie and Fitch could only be “held liable for failing to hire Elauf only in it intentionally discriminated against her.”

The U.S. Supreme Court’s decision not only affects Samantha Elauf, but it also changes the way religion and religious practices are handled in the workplace. Employers will need to find the fine line between attempting to accommodate “unvoiced religious preferences” and religious discrimination.

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New Legislation Protects Native American Women from Sexual Assault

By Bidemi Palmer Questrom ’18

Under the Violence Against Women Reauthorization Act (VAWA) of 2013, non-Native Americans can now be tried by tribal courts for crimes taking place on the reservation and involving domestic violence, dating violence and criminal violations of protection orders. The provision under Title XI went into effect on March 7, 2015, two years after its proposal in 2013, making it the first major legislation designed to protect Native American women from violence and assault.1

For many years, Native Americans were subject to double standards pertaining to U.S. jurisdiction. Natives who were both tribal and United States citizens were culpable for crimes outside of the reservation. Moreover, these Natives were not subject to court or trial within their reservation, but instead in a U.S. court where they were many times unfamiliar with the system.2 Unsure of the VAWA’s potential outcomes, Congress rolled out a pilot study. The Confederated Tribes of the Umatilla Indian Reservation, the Pascua Yaqui Tribe, and the Tulalip Tribes all participated in the pilot project that launched in 2014.3 The program was authorized by VAWA and allowed for the new jurisdiction to be established specifically in those tribes after approval. As of May 2015, the three tribes collectively charged 26 defendants.3

Not only is violence against women extremely common, it is usually concealed, especially among Native American women. Where as one in five women across all races report having been raped in their lifetime in the United States, three in five Native women report having been raped.3 Thus, Native Americans are 2.5 times more likely to encounter sexual assaults than all other ethnic groups.4 However, often times, victims do not report rape, therefore, rates are suspected to be higher. Despite the statistics, tribal women were not sufficiently protected by the law, considering the limited power Natives had in their reservations.5 In 1978, the Supreme Court ruled that Native policeman could not arrest non-Native men on reservations in the case Oliphant vs. Suquamish.6

The provision only applies to crimes that take place within reservation boundaries and occur between non-native and native person(s). Also, the accused person(s) must have sufficient ties to the tribe, such as working on or living in the reservation.1 In regards to funding, Congress granted $25 million in tribal grants for the years between 2014 and 2018.1 Although Congress has not distributed the money as of May 2015, tribes are able to apply for funding.

There has been opposition and doubt concerning the effectiveness of the act. Mahnomen Native, Lisa Brunner’s daughter, was raped by 4 men outside of her reservation.7 However, the men were not tried because the event took place outside the reservation and the men involved had no ties to the reservation. Other loopholes remain, as the act does not cover all possible situations. Also, by relying on federal or state authorities, it can take a person many days to travel to the nearest prosecutor or examiner given the size of many reservations. The act also fails to expand tribal jurisdiction; currently tribes are limited to sentencing up to three years for even the most serious crimes.7 Many argue that the needs of Native women who are raped or experience domestic violence are not met by VAWA in its present form. The act’s current margin is very narrow, as it primarily focuses solely on dating violence and targeting domestic violence.

In the past, Republicans expressed strong disapproval for the bill, deeming it unconstitutional.3 Others see it as a beacon for positive change for marginalized Natives. Although the provision is in its infancy, it is a significant stride for the Native population and human rights in the United States. It is possible that, in the future, the act could be amended. For now, however, it is the first of its kind and can pave the way for more protection for Native Americans and other under representative minorities living in the United States.

Sources


Reasonable Suspicion

By Bill Cavena
CAS ’18

There is a phrase commonly used by authority figures, whether they be parents or police officers, which states that “ignorance of the law is no excuse for the violation of the law.” This expression is almost a direct translation of the Roman law “ignorantia juris non excusat.”¹

As simple as this may seem, a case involving the other side of the law, the enforcer, made its way to the Supreme Court in the winter of 2014. The question before the court was whether or not an officer’s ignorance of the law was reason enough to excuse an arrest and seizure of illicit drugs that violated the Fourth Amendment.

This case, Heien v. North Carolina, arose in 2013 from a traffic stop in North Carolina. A police officer, seeing a broken taillight, pulled the car over to issue a warning ticket for the brake light. After the officer deemed the car’s occupants “suspicious,” he asked if he could search the vehicle. Heien consented and the officer discovered a bag of cocaine. After this incident, Heien went to court and attempted to have the results of the search suppressed because state law requires only one working brake light, which the car in question had.² After being denied by the trial court, he appealed to the North Carolina Court of Appeals and his decision was reversed. They concluded that the stop violated the Fourth Amendment because “an officer’s mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop.”³

The Court of Appeals then held that evidence from the search had to be suppressed under the exclusionary rule, meaning that any evidence collected while violating the defendant’s’ rights is unable to be used against him in court. Heien argued that, because he was not breaking any law, there was no reasonable or individual suspicion that warranted being pulled over. Thus, he argued, his rights were violated and the evidence had been seized illegally. The United States Supreme Court, however, disagreed.

Supreme Court Chief Justice John Roberts, affirming the 8-1 opinion, stated, “Because [the officer’s] mistake of law was reasonable, there was reasonable suspicion justifying the stop under the Fourth Amendment.”⁴ He continued, “The Fourth Amendment requires government officials to act reasonably, not perfectly,”⁵ and referenced a previous case in which the court held that the Fourth Amendment gave governmental officials “fair leeway for enforcing the law.”⁶ Chief Justice Roberts and seven other justices, with Justice Sotomayor dissenting, ruled that as long as an officer makes a reasonable mistake, he is within his rights to stop anyone for perceived slights of the law. As Orin Kerr at The Washington Post opines, “If the Fourth Amendment incorporates reasonable mistakes of law, then there must be a standard for how much law a reasonable officer knows.”⁷ This decision calls to question the standard to which legislative bodies hold officers regarding the knowledge they should reasonably be expected to possess.

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By Bradley Ferber
CAS ’17

In recent times, the National Collegiate Athletic Association (NCAA) has been subject of controversy. One overarching idea is whether athletes — specifically Football Bowl Subdivision (FBS) level athletes— should be paid or not. According to ESPN, all 125 FBS institutions earned combined revenue of $3.4 Billion in 2014 through universities’ broadcasting deals, ticket sales, and merchandise sales. However, the best return for revenue generated by these athletes are full tuition scholarships, meal plans and special benefits, which equate to at most $68,000 a year which may be deemed minimal in comparison to the institutions’ revenue. While university coaches control their daily lives to ensure maximum profit, these athletes are not paid for their commitment.

One question to ask is what has allowed an atmosphere in which big-time NCAA FBS programs generate millions of dollars annually in revenue, while their star athletes never receive any of the money generated. Furthermore, why would any future National Football League (NFL) player agree to play in the NCAA even though the average NFL salary was $1.9 million in 2013, which is $1,832,000 more than the value he receives at the FBS level?

Universities operate based on the idea that their athletes are students before they are athletes. In fact, Northwestern University believes athletic programs increase the overall college experience of their student athletes. In fact, Northwestern University’s mindset is universally agreed upon throughout the NCAA.

Aspiring NFL players agree to play in the NCAA for multiple reasons, one being they must wait at least three years after graduating from high school in order to be “eligible for the NFL.” Furthermore, if they do not play in the FBS — the second best football league in the United States after the NFL— they most likely will never get drafted into the NFL. The necessity of FBS football for aspiring professional football players presents the idea that the NCAA is set up as an unavoidable monopoly. All NCAA institutions have banded together to further benefit themselves, while student athletes have minimal say and virtually no compensation. The NCAA clearly violates the Sherman Anti-Trust Act of 1890. Being a “student-athlete” is a necessity for any aspiring NFL player, and therefore there is no reliable way around the FBS. Even though student athletes have tried to improve their conditions, their failure is most notable in the attempt at unionization by Northwestern University football players in 2015. Thus it becomes evident that the Sherman Anti-Trust Act of 1890 fails to protect FBS athletes.

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Killing for Sport

By Cleo Yahn
COM ’16

On July 1st of 2015, a thirteen-year-old male Southwest African lion named Cecil was lured out of Hwange National Park in Zimbabwe and shot by 55-year-old Minnesotan dentist and big game hunting enthusiast Walter Palmer. With $50,000 Palmer and his hired team were “permitted” to lure, track, shoot, put down, skin, and finally decapitate Cecil. In all, the private hunt lasted over 40 hours, but the public outcry persisted for weeks. The incident reopened an old wound: the wildly controversial practice of trophy hunting. The story of Cecil the Lion has called into question once again the regulations of big game hunting in Zimbabwe and has set into motion a complicated legal battle.

Cecil’s death sparked activist concern for a ban on trophy hunting of big game animals such as lions, elephants, and rhinos. There is an online petition with over a million supporters demanding the President of Zimbabwe, Robert Mugabe, seek “justice” for Cecil by discontinuing the issuing of hunting permits to kill endangered animals. Activists hope this will protect the population of wild African lions, which has declined from an estimated 200,000 to approximately 30,000 in the past century. In Zimbabwe, the lion population is roughly between 1,000 and 1,700. Unfortunately, South Africa’s big game hunting industry earns over $744 million, which makes banning hunting permits less alluring.

The central statute that protects wildlife like Cecil in Zimbabwe is the Parks and Wildlife Act of 1975. In part, the law establishes sanctuaries, national parks, and safari areas. Additionally, the act determines which animals are “specially protected” and does not include lions in this classification. Even though the act does not protect lions, geographically restrictive permits do to an extent. The Parks and Wildlife (General) Regulations (SI 362 of 1990) controls the rules and forms for wildlife permits. Under the Regulations, it is illegal to hunt wildlife in national parks. Moreover, in 1999, the Regulations restricted the use of bow and arrow to include “alienated land” and prohibited crossbows. In the case of Cecil, he was lured out of a park, shot with a crossbow, and then shot to death with a rifle 40 hours later. These details make justice for his demise a complicated legal battle.

Advocates of regulated hunting, such as US Fish and Wildlife Service—which issues import permits—and the World Wildlife Fund argue the revenue from trophy hunting provides funding for the conservation of endangered species. Moreover, proponents claim that hunting helps maintain the natural balance—it enables the Darwinian idea of “survival of the fittest.”

The story of Cecil the Lion is a recent, high-profile example of what has occurred for many years. Trophy hunting and poaching are not new policy issues. However, this event has brought these concerns back to the forefront of the U.S. policy agenda. Following Cecil’s death, on August 3rd, New Jersey senator Bob Menendez introduced an act to disincentivize trophy killings called The Conserving Ecosystems by Ceasing the Importation of Large (Cecil) Animal Trophies Act. Similarly, the US Fish and Wildlife Service proposed listing lions as threatened under the Endangered Species Act. Although these acts have not been signed into law yet, they still serve, as does Cecil, to illustrate the growing need for wildlife regulation and the rising interest in trophy hunting legislation reform.

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Congress: Overhauling the Criminal-Justice System

By Daniel Rollins
CAS ’16

As has been stated throughout the media time and time again, compared to the rest of the world, the United States has the largest prison population. It is clear that the United States’ criminal-justice system has been in dire straits, but when it comes to national conversations about budgets, incarceration is rarely considered. Thus, any possibility of ample changes is rarely proposed. As U.S. prison populations and recidivism rates continue to climb to an unprecedented high, the legitimacy of incarceration is being called into question.

Currently, the overcrowding of prisons is placing a heavy burden on the infrastructure of the federal prison system. Throughout the country, the normative conception of “paying time for committing crime” is slowly deteriorating into that of distrust and even resentment. However, as of October 1st, in a major step forward, a bipartisan congressional push to reform the criminal-justice system by way of Senate legislation will essentially reduce the long criticized mandatory minimums for nonviolent drug offenders.

The introduction of the Sentencing Reform and Corrections Act was pushed chiefly by two senatorial newcomers from opposite sides of the political spectrum: Senator Cory Booker, D-N.J. along with Senator Mike Lee, R-Utah. A work-in-progress since this spring, after months of intense negotiations, lawmakers were ultimately able to convince skeptical leaders in both parties to back their cause. The key to advancing the legislation was winning the endorsement of Senate Judiciary Chairman Charles E. Grassley. Senator Grassley has long held reservations again the endorsement of Senate Judiciary Chairman Charles E. Grassley. Senator Grassley has long held reservations again the endorsement of Senate Judiciary Chairman Charles E. Grassley. Senator Grassley has long held reservations again...grassley, the other Senators to agree to a package aimed at making the criminal-justice system impartial, particularly for minorities.

This bill’s provisions entail significant concessions for both Democrats and Republicans. More specifically, the bill would significantly reduce federal mandatory minimum sentences for nonviolent, repeat drug offenders, enhance prisoner rehabilitation programs and largely ban solitary confinement of juveniles. The bill would also give judges more discretion to override a mandatory minimum. That said, to some Democrats the sentencing reforms did not go as far as they had hoped as the bill would create more categories of crimes that come with a mandatory minimum. They did not include a provision for a mens rea -criminal intent. Honest citizens could get tripped up by laws they do not know they are breaking. Unfortunately, there is little the little the proposed federal law can do to reduce incarceration rates at the state level. According to statistics from the Department of Justice, in 2014 alone, just over 200,000 of the 1.5 million prisoners were in the federal system; the other 1.3 million are held by states.

States have long resisted changing their laws despite indications that they are disproportionately applied to minorities and the poor compared to white, wealthy offenders. While state mandatory minimums are likely to be less severe than those at the federal level, prosecutors more often than not, use them as leverage to negotiate a plea deal. In regards to the costs of incarceration the most expensive costs are the day-to-day expenses, which by most estimates are over $74 billion spent annually by the federal and state governments on prisons. In support of this, Senator Booker stated “mass incarceration has cost taxpayers billions of dollars, drained our economy, compromised public safety, hurt our children and disproportionately affected communities of color while devaluing the very idea of justice in America.” In the interim, current imprisonment practices are imposing substantial socioeconomic effects on individual inmates. To reiterate, mandatory minimums, particularly those surrounding drug violations, predominantly affect low-income African Americans and Latinos. Minimums came to prominence in the 1980s through 1990s during the nation’s tough-on-crime phase. And although supporters argue that crime dropped over that time period, prison populations have exponentially increased, and with them the price tag of running facilities.

With many high profile lawmakers getting involved, it is only a matter of the time until the bill gets a full Senate vote. Moreover, even the White House has gotten involved in the negotiations. As White House Spokesman Frank Benenati said, “The Administration hopes that Congress will move quickly so the President can sign such a bill into law this year.” While more can be done at the federal level to roll back mass incarceration in the United States, this is a strong effort with a realistic chance at becoming law.

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American food processing giants have recently been the subject of many inquiries on labor standards and workers’ rights, and Tyson Foods is no exception. Tyson Foods v. Bouaphakeo is a class action lawsuit filed by Peg Bouaphakeo and others regarding undercompensation for work performed and for time spent donning protective gear for their jobs. The principal questions that will be decided in this case are whether or not Tyson Foods is liable for payment to employees during the procedure for “donning and doffing” protective equipment, and if a class action suit may proceed when it contains members that may or may not have been injured. The first question is merely a simple issue of defining labor law. The principal argument that arises out of this is whether an employer, such as Tyson Foods, is financially liable for the time on an employee while donning and doffing protective clothing and equipment that is necessary for the carrying out of his or her duties. The second question will require the Supreme Court to decide on whether or not the mere act of being present for the action is enough to take part in a class action suit, or if injury must be proved in order to validate the suit.

The significant question of this case is if a class action can be certified when it contains parties who may not have been injured and thus have no right to pursue legal damages. In deciding this case, the Supreme Court will set the precedent of whether or not merely being party to damages is enough, and thus not having to prove actual injury. This case is significant as it is not a cut and dry case of uncompensated work for a set activity. The donning and doffing of protective clothing takes each employee a different amount of time. Thus it is hard to make a determination because those who take little time to don and doff protective clothing would legally not be able to claim uncompensated wages.

This case would overrule the precedent set in Wal-Mart Stores, Inc. v. Dukes, in which the Court stated that, in order for a class to be certified, all claims among class members must “depend on a common contention.” Tyson Foods v. Bouaphakeo is different from the Supreme Court’s previous decision in Wal-Mart Stores, Inc. v. Dukes since Tyson Foods kept no time cards or video footage of the process of donning and doffing protective clothing. Consequently, there is no way to verify that all members of a class are eligible for damages.

In conclusion, this case is significant as it represents a push by labor against a large industry such as Tyson Foods. The first question that arises from this case can be decided by a redefinition in labor law and determining whether donning a doffing protective equipment should be compensated. The second question, however, lies instead in the definition of a class and its eligibility for damages. In order to certify a class for a class action suit, one usually has to prove that each member of the suit was damaged in some way by the defendant. That would be nearly impossible in this case, as there are no tangible records and the class was certified for the original hearing by a lower court on the assumption that all members may or may not have been damaged by Tyson Foods Inc. The Supreme Court’s decision will determine if this assumption of damages is enough to warrant a class action, or if one must prove that all members of the class were injured in order to proceed.

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Miller v. Davis: Religious Freedom or Infringing the Law?

By Disha Patel
CAS ’17

The Constitution of the United States expresses clearly that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” What is not so clear anymore, however, is the interpretation and application of these words, and Miller v Davis heavily debates the meaning of this amendment.

Kim Davis is a clerk from Kentucky who issues marriage licenses for a living. Recently, she has refused to issue marriage licenses to same-sex couples, arguing that this goes against her religious beliefs of what a marriage should constitute. Her claim clearly violated the Supreme Court’s previous ruling in Obergefell v. Hodges, which made same-sex marriage legal; hence, two same-sex couples and two opposite-sex couples filed a lawsuit in the United States District Court for the Eastern District of Kentucky against Ms. Davis on July 1st of 2015. This issue escalated so much that Davis was found in contempt of court and was jailed for five days by U.S. District Judge, David Bunning.

Davis claimed that issuing such license would “violate her Christian convictions against same-sex marriage.” Supporters of Davis contend that sending her to jail for her choice thoroughly breaches her freedom of religion. One such supporter and former Arkansas Governor, Mike Huckabee, even stated, “I'm willing to spend the next eight years in jail, but I’m not willing to spend the next years in tyranny under people who think they can take our freedom and conscience away.” Her attorney Roger Gannam further argued that Davis should not resign because “accommodation of religious conscience is the law in Kentucky, including for elected officials.” He draws on this view from Kentucky’s Religious Freedom Restoration Act which, enacted in 2013, prohibits the state government from “substantially burdening a person’s freedom of religion unless the government proves it has a compelling interest in doing so and has used the least restrictive means to do it.”

On the other end of this debate are Davis’s critics, that believe her resistance to issue the licenses is a disobedience of the law. Judge Bunning affirmed, “The court cannot condone the willful disobedience of its lawfully issued order. If you give people the opportunity to choose which orders they follow, that’s what potentially causes problems.” In line with the judge, critics of Davis’s action assert that laws govern a nation, not subjective or discretionary decisions made by individuals. Though Davis has been released, she has been warned that she will find herself in jail again if she chooses to bar gay couples from obtaining marriage licenses.

Sources
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Criminal (in)Justice in Massachusetts

By India Mazzarelli
Questrom ’17

The Commonwealth of Massachusetts has constantly taken pride in its progressive stances on issues such as healthcare, education, and civil rights. In fact, Massachusetts is ranked as the most liberal state.¹ However, despite the unapologetically liberal lawyers, judges, and politicians that inhabit Massachusetts, the state remains comparatively passive on its Criminal Justice policies.

In 1975, William Horton was convicted of first degree murder in Lawrence, MA and sentenced to life in prison without the possibility of parole.² Eleven years later, in 1986, Horton was let out of prison as part of a Massachusetts weekend furlough program, and never reported back. A year later Horton raped and assaulted a couple in Maryland, a crime for which he was later convicted.

At the time of his escape from the Massachusetts furlough program, Michael Dukakis was the governor and a presidential candidate. As governor, Dukakis took a progressive stance on preventing crime, understanding that “public safety required more than building prisons.”³ Dukakis was also a staunch advocate for the controversial furlough programs, which granted convicted first-degree murderers sentenced to life without parole the ability to be temporarily released from prison for certain occasions.⁴ Dukakis’s stance on prison reform was used relentlessly against him in his presidential campaign; his opponents framed him as being lenient on crime by giving “weekend passes” to criminals. By the time of the election, the infamous name “Willie Horton” was synonymous with the Dukakis campaign.

The rebuke of Dukakis for his stand on prison reform was a strong deterrent to any policymakers from making the same mistake: “They learned a bad lesson: not to go out on a limb.”⁵ The country took an adverse approach, the media attacked lenient judges, and in return, judges mandated longer sentences and neglected prison alternatives.⁶ By 2010, the United States beat out Russia, China, and Iran for the country with the highest percentage of people in incarceration.⁷

The effects of the Horton case were especially prevalent in Massachusetts. In 2012, at a time when many states were working to remove this legislation, after a parole officer was shot, Massachusetts enacted a three strikes bill, removing the possibility of parole for repeat offenders.⁸ In early 2012 The Supreme Court ruled it unconstitutional for juveniles convicted of first degree murder to be sentenced to life in prison without the possibility of parole. Following this ruling in 2014, the Massachusetts District Attorneys Association supported legislation that would require juveniles who are tried and sentenced to life in prison for first-degree murder to serve a minimum of 35 years before the opportunity for parole.⁹ Essex District Attorney, Jonathan W. Blodgett, said about the decision, “while not ideal, 35 years of incarceration would provide victims’ families with some sense of justice.”¹⁰

The aftermath of the Willie Horton case is still influential over much of the criminal justice legislation passed in Massachusetts. For years, lawmakers remained paralyzed by the effects that the name “Horton” had on Dukakis’s failed presidential campaign. With the increasing burden of overcrowded and underfunded prisons, it is crucial for Massachusetts to escape the ominous “Willie Horton” shadow that has presided over its legislative decisions for years.

Sources

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FEMA: In Need of Some Disaster Relief

By Isaiah Tharan
CAS '18

The Federal Emergency Management Agency (FEMA) is a government agency that is usually not called to mind until a disaster strikes. Throughout its nearly forty-year lifespan, FEMA has faced more than its share of controversies. Complaints against FEMA culminated in the class action lawsuit McWaters v. FEMA. This case prompted FEMA to alter its system for temporary housing. Unlike before, evacuees did not need to fill out loan forms before getting access to shelter and would receive a two-week notice before being forced to leave their newfound homes. These past cases inspired the National Center for Law and Economic Justice (NCLEJ) to file a case against FEMA to ensure aid for all American citizens in the event of a disaster.

“FEMA’s insufficient aid for disabled Americans came to light after Hurricane Sandy, but this was not the first time FEMA was caught in a storm of controversy.”

Complaints against the agency include that FEMA often appears to have some bias against lower class areas and does not provide adequate support in critical times. Due to these issues, the National Center for Law and Economic Justice (NCLEJ) has recently filed a civil rights complaint against FEMA to ensure disaster relief, specifically housing, to people of all backgrounds including those with disabilities.1

FEMA’s insufficient aid for disabled Americans came to light after Hurricane Sandy, but this was not the first time FEMA was caught in a storm of controversy. One salient example is their handling of Hurricane Katrina. Many argued that FEMA did not respond in time, as well as that its preset housing units were not equipped for the conditions, and in some cases dangerous.2 FEMA apparently gave away over $85 million worth of goods intended for Louisiana to other states.3

The NCLEJ is no stranger to backing civil rights cases against FEMA, including the McWaters v. FEMA lawsuit. Prior to this case, many emergency trailer park housing areas were completely inaccessible to physically challenged citizens.4 The NCLEJ claimed this violated the Americans with Disabilities Act.5 The court ruled in their favor and declared that five percent of all emergency housing must be wheelchair user accessible and that other reasonable accommodations must be made for physically challenged citizens.6

The main obstacle to fulfilling these promises is obviously the financial burden. Although the NCLEJ lawsuit and a multitude of other class action lawsuits have been successfully leveled against FEMA, many of these serve to increase the cost of FEMA operations considerably. Converting just five percent of every emergency housing area to a wheelchair user accessible area costs an estimated $2.5 to $18.4 million.7 While there have been many successful attempts to rein in FEMA via lawsuits, prohibitive costs unfortunately impede substantive progress.

Sources
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Corporal punishment of children is generally frowned upon in various social settings yet it is practiced with startling frequency. A 2013 report from Child Trends revealed that about 94 percent of parents with children aged 3 to 4 have engaged in corporal punishment in the past year. Furthermore, 80 percent of men and 65 percent of women reported that children sometimes need some “good hard spanking.” For many years, laws regarding parental corporal punishment were vague and were adjudicated on a case-by-case basis. This flexibility can be attributed to the ongoing controversy in the issue of child protection and of parents’ privilege in disciplining their children. In June of 2015 the MA Supreme Court restructured the framework for parental privilege cases when it unanimously reversed a case where a father was convicted of spanking his three year old. This decision led to more controversy rather than clarification.

In the case of Commonwealth v. Jean G. Dorvil, the defendant was initially charged guilty for publicly spanking his child in Brockton, on May 13, 2011. According to the testimony of Detective Ernest Bell, the defendant verbally assaulted the child, kicked the child in the backside, smashed the child on the bottom, and expressed explicit anger. The defendant claimed that he and his child were “playing” and denied assaulting his daughter; but despite the defense, he was charged with assault and battery. The Supreme Judicial Court (SJC) later overturned the decision and, for the first time, recognized the parental privilege defense. The Supreme Judicial Court delineated that a parent or guardian may not be subjected to criminal liability for the use of force against a minor child under his or her care, given that 1) the force used is reasonable; 2) the force is for safeguarding or promoting welfare of the minor; 3) the force neither causes, nor creates a substantial risk of causing, physical harm, gross degradation, or mental distress. The SJC reasoned that corporal punishment has been established in our society as an integral part of parenting and parental autonomy that furthers children’s welfare. Hence, the SJC has attempted to arbitrate parental rights and protection of children from abuse by accentuating the reasonableness of the use of force.

In spite of this effort, the controversy still remains. The opponents contend that the SJC’s decision extenuates and normalizes parental aggression. Jetta Bernier of the Massachusetts Citizens for Children noted that the ruling “implies that physical punishment can, in fact, support the welfare of children.” In the case of Dorvil, the Commonwealth further argued that the age of the child and his or her comprehension ability must be considered in assessing the reasonableness of the use of force. To children who do not understand the consequences of behavior, corporal punishment does not communicate what they did wrong, why they are being punished, and what are the alternate positive behaviors. To them, it is just hostility from their primary attachment figure. Due to this, experts maintain that, though the observable physical harm may be minimal, the mental distress and its implication in child development are not negligible. The research conducted on representative sample from the United States found that physical punishment increases the risk of mood disorders, substance abuse, and personality disorder. Furthermore, in 2012, a research study conducted by Brendan L. Smith showed that corporal punishment is cyclical—children who received spanking are more likely to use force in solving problems in human interaction, possibly explaining why corporal punishment is so fixed in our society as a disciplinary action. However, such impacts in children’s behavior and psychology are protruded over a long developmental period. Thus, it is difficult to make an immediate judgment in the legal arena on the reasonableness of corporal punishment based on those factors.

The dilemma between parental rights in disciplining their own children and the assurance of children’s safety from physical and mental harm is not easily resolved. Corporal punishment can be a low-cost, time-efficient disciplinary method. However, the long-term detriments on child development should not be ignored. In order to assess the issue more completely, the law should focus not on the reasonableness of corporal punishment but on the reasonableness of parenting itself and its methods of discipline. Instead of encouraging reasonable physical punishment, the Supreme Judicial Court should take disparate measures to encourage reasonable alternate modes of discipline that do not inflict foreseeable harm on the youth.

Sources

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On January 21, 2010, the Supreme Court of the United States announced its decision in the case of Citizens United v. Federal Election Commission. The case began when the nonprofit corporation Citizens United released a politically biased documentary centered on then-presidential candidate Hillary Clinton. To distribute the film, they attempted to use general treasury funds, and were immediately met with accusations of unfair usage of funds and unwelcome influence on the political process.

The case quickly became a hallmark of free expression and the influence of money in politics. The FEC argued that such uninhibited use of funds from corporations would lead to corruption in elections, with no legal basis for such spending on behalf of corporations, while Citizens United argued that such spending was an expression protected by the First Amendment.

In a 5-4 decision that overruled two previous cases, the Supreme Court ruled in favor of Citizens United. Using the justification of First Amendment rights, the decision effectively defined the rights and protections of citizens to corporations, and recognized unchecked spending as an expression of free speech. The result of this decision was, not unexpectedly, uproarious around the nation. In twenty-four states, most notably Connecticut, the ruling challenged preexisting regulations on corporate political expenditures.

Subsequent court decisions to address these issues kept in line with the SCOTUS decision in Citizens United, as the court decision has come to be referred. Campaign donations in the U.S. were already a complicated affair prior to the decision, with Political Action Committees (PACs), SuperPACs, 501(c)(3-6) bodies, and more offering venues to undisclosed and tax-exempt donations. But it was undeniably clear that these donation capabilities had further basis to expand with Citizens.

Today, the issue of political donations affecting elections is more pertinent than ever, especially as the 2016 presidential race begins. Citizens United itself has been targeted specifically by candidates including Bernie Sanders, and defended by many other (largely Republican) candidates. Regardless of political opinion, it is undeniable that large donations from rich families, individuals, and corporations have an enormous hold on the existing candidate field. In a supported study by The New York Times, it was found that only 158 actors donated over half of all early funds to candidates. Of the candidates at the time of writing this article, only two receive primarily “grassroots,” small-dollar donations (Sanders, Carson). Many candidates are almost entirely dependent upon large SuperPAC and Committee donations (Clinton, Chafee, O’Malley). And even more rely on individual millionaire backing in large sums (Bush, Cruz, Huckabee, Rubio, Walker). Chafee and Trump are mostly self-dependent.

The major concern is the influence that major donors can have on candidate stances and motivations, to the extent that rich corporations could influence Congressional and Presidential decisions by dint of finance. Concrete data exists, for example, showing the very real influence lobbying has had on environmental congressional measures in the early 21st century.

There are doubtless questions to be answered on the legitimacy of Citizens and its approximations of corporations. It is only the beginning of the issue of campaign finance, but soon, Citizens may be forced to answer to American citizens.

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New Proposed Rule Addresses Discrimination in Healthcare Settings

By Katherine Harper
CAS ’17

On September 8, 2015, the Department of Health and Human Services issued a proposed rule prohibiting discrimination in healthcare settings. The rule, Nondiscrimination in Health Programs and Activities, expands upon Section 1557 of the Affordable Care Act and prohibits discrimination based on national origin, sex, and disability.1 It codifies a prohibition against discrimination toward transgender patients, a group that has been particularly vulnerable in years past.2 The rule contains specific requirements for retrofitting existing buildings and requirements for new buildings designed to accommodate individuals with physical disabilities. It addresses disparities in health services based on gender and expands mandatory language assistance tools. Health care professionals agree that the rule highlights a heretofore overlooked area of Section 1557.3 However, most agree that implementing the new rule will be challenging.

Parts of this rule are new and groundbreaking, other parts merely reiterate past rules and regulations. The prohibition against discriminating against patients on the basis of national origin expands on existing rules and regulations enacted to comply with Title VI of the Civil Rights Act of 1964.4 Prior regulations addressed the need for health care facilities to provide interpreters for Limited English Proficient (LEP) patients free of charge. The new proposed rule expands the requirements to include taglines for the top 15 languages spoken nationally. The taglines advise the patient, in his/her preferred language, that language services are available without cost.5 The intent of the proposed regulation is to increase meaningful communication between the LEP patient and his/her health care providers, to improve patient outcomes and to ultimately cut healthcare costs by reducing re-admissions due to misunderstandings of post discharge care.

The proposed rule also addresses issues that are pertinent to our current diverse population. Issues of discriminatory practices between male, female and intersexed patients are addressed. The rule specifically discusses equal treatment options without regard to the gender of the patient.6 If the rule is finalized, treatment could not be refused based on the sex or intersex of the patient. After publishing a Request for Information (RFI) on August 1, 2013, the Office for Civil Rights (OCR) received over 300 comments from members of the LGBT community, particularly transgendered individuals who detailed their own personal experiences with discrimination and disparagement in a healthcare setting.7 This RFI prompted the promulgation of the new rule mandating that section 1557 of ACA applies to all individuals, not just hetero/cisgender individuals.

The proposed rule contains a number of specific requirements for retrofitting existing and new construction buildings.8 The intent is to allow patients with physical challenges to move about health care facilities without impediments.

As our population becomes increasingly diverse, the importance of effective communication and equal access in healthcare become more crucial. The new proposed rule addresses many of the issues that limit access to our healthcare system. Proponents of the rule believe that increasing access to and communication within our hospitals and health service organizations will ultimately be universally beneficial.

Sources
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The Different Sides to Gun Control

By Kelsie Merrick
CAS ’18

I

It is not unknown to Americans that gun control is a divisive topic. Currently there has been a multitude of school shootings, and for this reason, the regulations on guns have been brought into political debate more heavily. Neither Republicans nor Democrats believe Americans should not be able to possess guns because the Second Amendment states, “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” But on one hand, the Democrats believe that there needs to be a “reasonable regulation” when it comes to owning firearms. On the other hand, Republicans believe that one should be able to possess firearms and ammunition without regulations.

Accounting for the gravity of the matter, there are laws and regulations already placed on the possession of firearms. For example, the Brady Handgun Violence Prevention Act of 1994, better known as the Brady Act, is the one law that is constant in every state. Under federal law, the Brady Act requires criminal background checks in anyone who wishes to own a gun. Through the background check, it seeks to prevent gun ownership in criminals, the underaged, those with mental illness, and others that are not fit to possess weapons. Even with this law enacted, however, there are still ways around the background check. One major issue, that the Democrats especially have a problem with, is gun-show loopholes. The term “gun-show loophole” mainly refers to the selling of guns at gun shows, but it generally means any private transaction. The problem with these private transactions is that no background check happens; therefore, anyone that should not own a firearm is capable of owning one.

Another problem with the background checks is the issue of mental illness. When the Brady Act was established, the National Instant Criminal Background Check System (“NICS”) was also established. This is the database through which all background checks are run when someone wishes to buy a firearm. Just like the Brady Act, there are loopholes in the NICS. Federal law does not require states to submit mental health information to the NICS, and thus participation is strictly voluntary. Furthermore, in order to be recognized as mentally ill under the Brady Act, one must be acknowledged by a court official; however, there are numerous people with mental problems who have not been acknowledged by the courts. For this reason, these people would not be registered as being mentally incapable of owning a gun.

The Republican side has been known to be fighting heavily against gun control but what they are fighting for is much deeper. They do not believe that every individual should possess firearms if they are not suited to; they instead believe that, in lieu of the federal government, each state should be the one to enact certain ownership rights. One possible reason could be that many of the traditional Republican states are in the Midwest or South, where a great deal of their population is hunters.

One area where the two sides harmonize is that of mental health. The Republicans and Democrats agree that new laws need to be enacted so people like the Sandy Hook shooter are not capable of owning a firearm. As most people know, the Republicans especially have a problem with, is gun-show loopholes. The term “gun-show loophole” mainly refers to the selling of guns at gun shows, but it generally means any private transaction. The problem with these private transactions is that no background check happens; therefore, anyone that should not own a firearm is capable of owning one.

When it comes to gun control, there seems to be a clear divide between the Republicans and the Democrats. One wants regulations for all and the other wants minimal or no regulations at all. They can both agree that unnecessary shootings, especially in schools, need to be stopped, but as to how they should be stopped is something on which they cannot agree. They both know that there needs to be some regulation in terms of prohibiting the mentally handicapped from possessing firearms. Unfortunately, neither side can deny the statistics. According to the Brady Campaign, on average 32,514 people die annually from gun violence, and no matter what side you support, the number needs to change.

Sources
Separation of Powers and Foreign Recognition

By Natalie Goldberg
CAS ’17

George W. Bush enacted the Foreign Relations Authorization Act, Fiscal Year 2003 with the knowledge that various provisions expanded executive authority over diplomatic relations. The bill authorized appropriations and diplomatic measures to better relations with US international counterparts.¹ In the past, presidents have had the power to recognize other countries, though this is not explicitly listed in the Constitution. Article II, section three relays the presidential authority to appoint ambassadors and public ministers. Appointments of this nature would be impossible without first recognizing the country to which these ambassadors are going.² However, there is no dispute mechanism to resolve when Congress disagrees with the president’s choice to recognize a country.³ The impacts of the Foreign Relations Authorization Act of 2003 still remain relevant, especially within the case Zivotofsky v. Kerry case, 576 U.S. __ (2015), where the Court ruled on the matter of balancing presidential recognition power and Congress’ role in foreign affairs.

Menachem Zivotofsky had been born in Jerusalem, and when his parents applied for him to get a U.S. passport, they requested that it list his place of birth as “Israel,” in accordance with of the Foreign Relations Authorization Act of 2003. Section 214(d) of this bill states that the Secretary of State should label “Israel” as the birthplace of anyone born in Jerusalem applying for a U.S. passport.³ However, the State Department informed them that because the president recognizes Jerusalem as a neutral city, and not a part of Israel, the passport must say “Jerusalem,” directly countering the 2003 act. The parents challenged this decision, leading up to thirteen years of deliberations. The Supreme Court ultimately determined that the Foreign Relations Authorization Act Section 214(d) in fact is unconstitutional because it contradicts presidential recognition of Jerusalem as neutral.⁵

The Supreme Court ruled that this case was a separation of powers issue involving presidential power of recognition and congressional statements that go against the former. The majority decision of the Court argued that because recognition power had been used by the president throughout history and is exclusive, Congress should not have the ability to interfere. The Foreign Relations Authorization Act formally contradicts this notion and would force the president to change views on not recognizing Jerusalem as the capital of Israel. Therefore, the majority of the Court reasoned that the statute is unconstitutional and also recognized it as a deliberate act by Congress to show disapproval in a presidential policy. To appeal to Congress, the Court did enumerate congressional roles in plenty of matters of foreign affairs including making treaties, declaring war, and confirming an ambassador appointment.⁶ To address the topic of a separation of powers, the dissenters explained that no branch should have exclusive powers of any component of foreign affairs. Each branch should be able to contradict the statutes of another, as had been done.⁷

Ultimately, the Court discussed limitations that branches impose on one another when one opposes the policies of another. Emerging questions as a result of this case may consist of whether the president should have the sole power to recognize foreign entities, if Congress should play a role in this process, and how to balance competing interests of opposing branches when dealing with international diplomacy. Another important implication of this particular case is the idea of which branch has power in recognizing territories engaged in conflict. For example, Jerusalem had been a long disputed territory for religious groups, which is why the executive branch does not label it an official part of Israel. The Court addressed concerns such as reactions to the law from the Palestine Liberation Organization.⁸ The ruling that the Foreign Relations Authorization Act Section 214(d) is unconstitutional leaves room for further discussion about the role of Congress in foreign affairs, mainly balancing foreign power between legislative and executive branches.

Sources
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By Neha Narula  
Questrom ’16

America is one of the only Western countries that allows for the death penalty: over two-thirds of the countries in the world have abolished the death penalty either in law or in practice. In 2010, the overwhelming majority of all known executions took place in China, Iran, North Korea, Yemen, and the United States. The fact that the U.S. is still enacting the death penalty when most of the world has stopped is a fact that demands our attention and requires us to ask whether or not the U.S. should reform its current system of capital punishment.

In the U.S. at the end of 2013, 35 states and the Federal Bureau of Prisons held nearly 3,000 inmates on death row. Since the U.S. Supreme Court reinstated the death penalty in 1976, 82% of all executions have taken place in the South, with 37% of them occurring in Texas. It is clear that there are regional differences among the states and that while the incidents of capital punishment may be concentrated in a few key areas it is a matter of national importance.

The U.S. has the highest incarceration rate in the world. About 2.4 million people in America are in prison or jail. Politicians often describe their approach as being "tough on crime," in an attempt to garner support across a variety of socio-economic levels. Tactics like this also claim that putting people on death row will deter others from committing crimes. However, putting more people in jail is an increased strain on taxpayers.

Regardless of the cost to citizens, one could argue that putting people on death row serves as a reminder to all that crime has serious consequences. This idea, however, is challenged by insights found in a study conducted by the National Academy of Sciences. The study states that 4% of death row inmates are innocent. While this may seem like a small percentage, in reality it is an exceptionally large oversight. These innocent people are forced to live in captivity and are then executed. This is merely one of the many facts advocates against capital punishment cite to defend eliminating the practice altogether.

This debate was brought to national attention when there was a case of a botched execution in Ohio. On September 17, 2009 Romell Broom was to be sentenced to death via lethal injection. During the execution, the executioners administering the lethal injection struggled to find a suitable vein in his arms or legs. After 2 hours of writhing and grimacing with pain, one of Broom’s lawyers wrote to Ohio Supreme Court Chief Justice Thomas J. Moyer imploring him to end the procedure. The lawyer explained that this would “violate Ohio’s statutory requirement that a lethal injection execution be quick and painless.” He was granted a temporary reprieve from Governor Ted Strickland and is currently still on death row.

Similar instances have been reported numerous times, with varying degrees of severity. Perhaps the most notable instance occurred on April 29th, 2014 in Oklahoma. Clayton D. Lockett was supposed to be executed via lethal injection. The state refused to divulge any information on the experimental drugs, making it difficult to predict any complications that could have arisen. For the first hour, the executioner was struggling to find a useable vein. Then a sedative was administered because the following two lethal drugs were known to cause “excruciating pain.” However, Lockett was conscious and began clenching his teeth and thrashing around in pain three minutes after the second and third drugs were administered. Fifteen minutes later, witnesses were told to leave the room. Lockett died 43 minutes later from a heart attack.

There is a long history of complications in executions, which beg the question of whether or not the practice is morally sound. Regardless of its legality, what happened to Broom and Lockett depicts the flawed nature of the capital punishment system. The Eighth Amendment to the United States Constitution protects against cruel and unusual punishment by the federal government. The Supreme Court ruled that this clause also applies to the states. Although it would appear as though lethal injection and experimental drugs should be classified in this category, executions of this nature are still perpetrated.

Such examples are unsettling to hear and force us to question the nature of capital punishment: is there a place for these types of actions in a country that is supposed to represent one of the most advanced places in the world? If America is going to continue the practice of capital punishment, it is clear that finding a more humane and reliable alternative is vital.

Sources
1 King v. Burwell, 759 F.3d 359 (4th Cir. 2015).
3 Ibid.
In Support of SUPPORT?:
Legal and Ethical Implications of Looney v. Moore

By Ryan Knox
SAR ’16

The SUPPORT Study was conducted by 23 academic institutions, which assessed the standard of care procedures for extremely premature infants.¹ The current standard of care for preterm infants is maintaining oxygen saturation levels between 85% and 95%, and researchers in the study were trying to determine the optimum target saturation ranges within the standard.² In the study, premature infants were randomly divided into the low range group (85-89%) or the high range group (91-95%) for oxygen; however, the informed consent signed by the parents did not include the risks associated with each of these groups, including retinopathy of prematurity (ROP), neurological issues, and unknown differences in mortality rates.³ In 2013, some of these infants developed neurological issues and ROP, and their parents sued University of Alabama-Birmingham Hospital in which they were enrolled in the study, on their children’s behalf.

Looney v. Moore, the lawsuit in the United States District Court of Alabama, was decided on August 13, 2015, when Judge Bowdre granted the defendants summary judgment.⁴ The main arguments of the plaintiffs were the physician’s negligence in their research practices and the lack of informed consent, resulting in injury and increased risk of injury to the premature infants.⁵ To prove a negligence case, the plaintiff must demonstrate that the defendant had a duty to the plaintiff, the defendant breached that duty, the plaintiff suffered damages after this breach, and these damages were probably and foreseeably caused by this breach of duty.⁶ In this case, summary judgement was given because the plaintiff could not adequately prove causation; although some premature babies may have suffered adverse effects after the treatment, the plaintiff could not prove that their conditions were a result of the SUPPORT Study as opposed to being born extremely premature. Furthermore, the plaintiffs argued that the damages included increased risk of future injury, which is not defined as damage under Alabama Law.⁷ ⁸ ⁹

The implications of the Looney v. Moore decision have been highly debated. In The New England Journal of Medicine, Dr. John Lantos, a bioethicist and professor at University of Missouri-Kansas City School of Medicine and Children’s Mercy Hospital, described the decision as “a vindication of both the investigators and the U.S. system of research oversight.”⁶ He indicated that Judge Bowdre’s decision represents support of the researchers’ study and methods; however his view is not representative of the whole bioethics community. A New York Times article quoted Professor George Annas, the Chair of the Department of Health Law, Bioethics and Human Rights at Boston University, who stated that the informed consent of the study was still viewed as inadequate and the decision “simply meant that the families could not prove the study had caused the injuries.”⁸

The opinion itself does not validate the informed consent forms and procedures used by the physicians and scientists involved in the SUPPORT Study. The lawsuit decided only on whether the injuries, health effects, and future risks were more likely than not caused by the actions of the SUPPORT Study. As the physicians’ operations were within the standard of care and the effects were not uncommon for extremely preterm infants, the plaintiffs could not prove causation. Despite the decision, the lawyer for the plaintiff has filed a notice of appeal.⁹ Although the future of the case is unclear, further decisions on the nature of the study’s informed consent and research practices could be nationally significant, affecting the manner in which physicians and scientists conduct medical research.

Sources
Boston’s Legacy of Racial Segregation

By Shanti Khanna
CAS ’18

According to 2010 US Census data, Boston is one of the most segregated cities in the US. Despite the 1968 Fair Housing Act, which made it illegal to create restrictive covenants discriminating against black homeowners buying in predominantly white areas, Boston has neighborhoods such as Mattapan, Chinatown and Dorchester that remain almost entirely populated by a singular race.

Political scientists measure segregation using dissimilarity indices, which measure the percentage of the minority population that would need to move out of their neighborhoods to have minorities evenly spread across the metropolitan area. Boston’s dissimilarity index is 0.64, meaning 64% of minorities would need to move to completely desegregate the city. Boston is in a state of de facto hyper-segregation.

What are the legal causes and ramifications of segregation in Boston? The answer is complex. Segregation in Boston became highly institutionalized in the 1930s when the Homeowners Loan Corporation (HOLC) created the concept of “redlining.” HOLC gave out affordable loans to prospective homebuyers, but only those who already lived in neighborhoods that were not “redlined” or thought to be less likely to repay their loans. The redlined areas were predominantly inhabited by African Americans, which meant that African American prospective homeowners could not obtain loans through HOLC. This redlining also occurred in Jewish, Slavic and Eastern European neighborhoods of Boston but not to the same extent as it did for African American neighborhoods.

In 1968 the Fair Housing Act made HOLC’s policies illegal. However, it was still difficult for African American families to move into predominantly white areas. In 1988, the NAACP filed a class-action lawsuit against the Boston Housing Authority (BHA) for “maintaining racially segregated public housing through site-specific waiting lists.” African American homeowners were being systematically discouraged from applying to public housing in predominantly white areas of the city during the 1980s such as South Boston, Charlestown and East Boston. As a result of the lawsuit, Boston was forced to integrate all public housing projects.

African Americans in predominantly white areas continue to face challenges. As recently as 2008, Nadine Cohen, an attorney and founding board member of the Fair Housing Center of Greater Boston, said that African American and Latino families were targets for racial violence. “Many of these incidents were harrowing: young African American children having firecrackers put in their jackets while their hands were held behind their backs; bricks and bottles being thrown through the windows of African American and Latino families; doors of families of color locked from the outside so people couldn’t escape; feces thrown on doors; racial graffiti and vandalism endemic and constant verbal and physical harassment of minority tenants.”

Cohen argues that the BHA did not take appropriate action to protect minorities living in these hostile environments. The Lawyer’s committee brought 13 Jane Doe cases to the HUD, or the Department of Housing and Urban Development. This resulted in the BHA creating a Civil Rights Protection Plan, which outlined response procedures for the BHA to follow in cases of racially motivated harassment of tenants.

The Supreme Court case Texas Department of Housing and Urban Development v. The Inclusive Communities Project, Inc., which reached a decision in June 2015, ruled that disparate-impact claims are cognizable under the Fair Housing Act. The lawsuit claims that certain public housing could be considered illegal discrimination if it has a measurable “adverse impact” on the people there. The Inclusive Communities Project argued that the Texas Department of Housing was only creating affordable public housing in predominately African American neighborhoods, keeping an area more impoverished portion of the population from leaving these areas.

This landmark Supreme Court case applies to the city of Boston, where almost 58,000 residents live in subsidized housing provided by the Boston Housing Authority. Many of these public housing projects are located in predominately black neighborhoods such as Mattapan, which is 81% African American.

As Boston grows both economically and in population, desegregating the city remains an important issue. Historic and recent Supreme Court cases pave the way for a less segregated and more racially diverse city, but there is still much work to be done in Boston, the Cradle of Liberty.

Sources


7. Ibid

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By Sofia Zocca
CAS ’18

Debates regarding government funding of Planned Parenthood have recently emerged in Congress. The conservative push to defund Planned Parenthood, a top global healthcare provider,1 resurfaced when the Center for Medical Progress, an anti-abortion group that monitors medical advancements,2 produced heavily edited videos which presented Planned Parenthood officials selling fetal tissue for scientific research. Later discoveries of the full, unedited videos showed the executives emphasizing that their clinics charged only enough to cover the costs of processing, preserving, storing, and transporting the fetal tissue, and were not earning a profit.3 This raises the question of whether or not Planned Parenthood’s current practice of providing aborted fetuses to medical researchers is legal. The two issues surrounding this debate are the use of aborted fetuses for scientific experimentation and the monetary compensation associated with the transfer of fetal tissue to the medical researchers.

The 1973 Supreme Court decision in Roe v. Wade ruled a Texas state statute criminalizing abortion unconstitutional.4 This decision allowed women the right to an abortion under the Due Process Clause of the Fourteenth Amendment, and created a precedent that allowed healthcare clinics, such as those operated by Planned Parenthood, to provide abortions to women.5

The video, however, discusses the use of fetal tissue for scientific and medical experimentation, an issue that was addressed in the 1990 U.S. District Court case Lifchez v. Hartigan.6 In this lawsuit, Dr. Aaron Lifchez challenged a provision of the Illinois Abortion Law that prohibited fetal experimentation. This provision stated that “no person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced.”7

The U.S. District Court upheld Dr. Lifchez’s objection to the law, ruling the provision unconstitutional. The Court asserted that the law violated the Due Process Clause because of its vagueness, failing to define “experimentation” and “therapeutic,” as well as its invasion of the right to privacy.8 This decision struck down the provision of the Illinois Abortion Law criminalizing fetal experimentation, and set a determinate precedent allowing human fetal tissue to be legally utilized for scientific research.

The legality of fetal experimentation was sustained when Congress passed the National Institutes of Health Revitalization Act of 1993.9 This law permitted experimentation upon fetal tissue procured from abortion with stipulations requiring the woman’s consent. The issue of consent was addressed in the video with Planned Parenthood official, Dr. Deborah Nucatola, in which the executive emphasizes the importance of consent and ensuring that the women are not coerced.10

Another issue that the pro-life community, as well as conservative members of Congress, has discussed is the illegality of selling fetal tissue. United States Code Title 42 - The Public Health and Welfare, Section 289g-2 includes “prohibitions regarding human fetal tissue.”11 42 U.S.C. 289g-2 criminalizes the sale, purchase, or transfer of human fetal tissue for “valuable consideration,” which it defines as “not includ[ing] reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.”12 Thus, while it is illegal to earn a profit on the sale of fetal tissue, receiving monetary compensation to cover the costs listed under this statute is legal.

While Planned Parenthood participates in the transfer of fetal tissue to medical researchers, it complies with United States law. As Dr. Nucatola specifies, the healthcare facility charges $30 to $100 per patient in order to cover the costs of processing, preserving, storing, and transporting the tissue.13 The healthcare provider only requests payments for services that can legally be covered, according to 42 U.S.C. 289g-2, and that do not constitute “valuable consideration,” or earn a profit for the organization. Based on the testimonies of the Planned Parenthood officials in the videos and a careful inspection of the laws regarding abortion, the use of aborted fetal tissue for medical experimentation, and financial remuneration, we can conclude that the actions of Planned Parenthood are within the law.

Sources

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8 Ibid.
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Meet ‘Em and Plead ‘Em: Underpaid Public Defenders Battle Excessive Workloads

By Victoria LeCates
CAS ‘17

The sixth amendment establishes the right to an attorney stating, “The accused shall enjoy the right...to have the assistance of counsel for his defense.” Despite its constitutional origins, this fundamental right is seemingly undermined by the broken public defense system in the United States. Public defenders are facing excessive caseloads, while some accused persons are never even provided with a lawyer at all. Overworked and underpaid, it is a challenge for public defenders to properly serve their clients.

The right to counsel has been tested in many different courtrooms over the course of our nation’s history. Perhaps the most famous ruling on the matter was handed down in 1963, when the Supreme Court decided on Gideon v. Wainwright. Gideon, a Florida citizen, was accused of breaking into a poolroom. He requested a lawyer, but at the time indigent defendants (defendants who cannot afford to hire a private attorney) were only guaranteed counsel in capital cases. Forced to represent himself, Gideon was sentenced to five years in prison. After filing a writ of habeas corpus that was denied by the Florida State Supreme Court, Gideon wrote to the Supreme Court of the United States from his jail cell. The ensuing case ended in the landmark decision that extended the sixth amendment right to counsel to defendants in state courts.

This is exactly what happened to Georgia resident Richard Anthony Heath in 2000. Heath was in a truck that collided head on with a car full of teenagers, all of whom were injured. He was charged with fifteen counts of serious injury by vehicle, two counts of driving under the influence of alcohol, and one count of reckless driving. Unable to afford an attorney, he was assigned to public defender Jason Shwiller. Heath, who had no memory of the accident, confided in Shwiller that he believed his coworker was driving the truck at the time of the collision. Shwiller neglected to hire a private investigator to verify these claims. In fact, Shwiller never requested court funds to hire a private investigator in any of his cases as a public defender, and never once took a case to trial before a jury. Shwiller advised his client to plead guilty to three counts of serious injury by vehicle and two counts of driving under the influence of alcohol. He told Heath that he would likely receive a sentence on the lower end of a four to fifteen year range. Heath was sentenced to serve the full fifteen years. The resulting court case Health v. State ended in a ruling that allowed Heath to withdraw his plea. The decision was reversed by the Supreme Court of Georgia in 2003. The root of the issue seems to be that Shwiller was one of just four public defenders in his county.

The United States needs more public defenders, or at least an increase in assigned counsel (attorneys that also run a private practice). However, underfunding discourages many lawyers from representing indigent persons. The compensation for assigned counsel is often a low hourly wage that does not cover all of the overhead costs. Consequently, the unwillingness of private attorneys to become assigned counsel in turn causes higher caseloads for public defenders. While this situation is strenuous for public defenders, it is their clients, who otherwise cannot afford to hire attorneys, who ultimately pay the price.

Sources
1. U.S. Const. amend.VI.
I n the 1990s, Stephen Kimble made Halloween significantly more fun with his patented invention of a Spider-man inspired contraption that would allow the wearer to shoot a foamy string up to 3 feet away. Toy Biz, now part of Marvel Enterprises, declined to buy the license to use the patent, but made a verbal agreement that they would pay Kimble if they produced a similar toy. Some years after, Marvel launched the Web Blaster®, which had many similarities to Kimble’s invention, without Kimble’s knowledge or consent. Marvel’s spidey-senses should have warned the company of what was to come.

Kimble sued Marvel and won for patent infringement and breach of contract in 1997. Both parties then appealed the decision, and then settled in 2001. Kimble and Marvel had a brief period of peace, but there was a ticking time bomb underneath the settlement agreement. Kimble’s patent expired in 2010, however, the 2001 settlement with Marvel allowed Kimble to receive royalty payments even after the patent expiration as there was no written clause on when Kimble’s benefits would be terminated. Marvel’s lawyers chose to use the precedent of Brulotte v. Thys Co. to immobilize Kimble and his lawyers in a sticky web of stare decisis rather than Spider-man’s faux silk.

Brulotte v. Thys Co. (1964) decided that a patent owner cannot collect royalties for his or her invention once the patent has expired per se. Under the current patent laws, an inventor has exclusive rights to a patented invention (typically 20 years). After the patent expiration, the invention is free for the public to use. Because only one person or thing has the rights to a single invention for a certain amount of time, the invention is thought to be under time-limited patent monopoly and thus anti-trust laws apply.

Many groups of people that were rooting for Kimble’s point that the current law hurts innovation. For the same reason, Brulotte v. Thys Co. is not well liked amongst those in the fields of academics, medicine, and economics. Many economists point out that the per se laws made in Brulotte v. Thys Co. do not make economic sense and therefore prefer a “case-by-case” system. Justice Breyer, however, noted that no economist seems to have considered the costs of judicial administration in analysis that the case-by-case “rule of reason” would bring. According to the Supreme Court, only Congress, not the friendly neighborhood Spider-man, can decide the fate of the Brulotte v. Thys Co. precedent.

On its own, Kimble v. Marvel did not justify that change was needed enough to convince the Supreme Court. This might have been because Kimble v. Marvel never should have happened. Justice Kagan even mentioned that many lawyers know how to get around the narrow scope of Brulotte v. Thys Co. Marvel’s attorneys should have put in a clause about when Kimble would stop receiving royalties and made him aware before the agreement. Kimble could have received more money upfront as part of his pre-expiration payment, had such a clause been drafted in. Although the law does not allow an inventor to receive royalties for patented aspects of the invention after the expiration, it is permissible to receive royalties for non-patented parts of the invention. Other precedent allows an inventor to receive royalty payments for sales, whenever a part of the invented object is used in a product. The moral of this less-than-action-packed tale is that with the “great power” of a law degree, “comes great responsibility” to the client.
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