NEW ENGLAND LAW REVIEW

VOLUME 55
Spring 2021

NEW ENGLAND LAW | BOSTON

New England Law Review (ISSN 0028-4823) is published by the *New England Law Review*, New England Law | Boston, 154 Stuart Street, Boston, Massachusetts 02116-5616. *New England Law Review* maintains a Web site at http://www.NewEngLRev.com.

Individual issues of *New England Law Review* are available for $15.00. The annual subscription rate for domestic subscribers is $35.00 ($40.00 for foreign subscribers), payable in advance. Subscriptions are renewed automatically unless notice to the contrary is received. Address changes or other requests regarding subscriptions should be directed to the Business Managing Editor by email at lawreview@nesl.edu

Back issues may be obtained from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068. William S. Hein & Co., Inc. can be reached by telephone at (716) 882-2600, and by fax at (716) 883-8100. William S. Hein & Co., Inc. maintains a Web site at http://www.wshein.com. Recent issues may be obtained directly from *New England Law Review*. The *Law Review* is also available on LEXIS and WESTLAW, and individual articles from recent editions may be obtained from the *Law Review*'s website located at www.NewEngLRev.com.

The *Law Review* invites the submission of unsolicited manuscripts either through the mail or electronically. Directions for electronic submission are available on the *Law Review*'s website at http://www.nesl.edu/lawrev/submissions.cfm. Manuscripts should be sent to the attention of the Editor-in-Chief. Manuscripts submitted through the mail cannot be returned. The *Law Review* requests that submitting authors disclose any economic interests and affiliations that may influence the views expressed in submissions.

The citations in the *Law Review* conform to THE ALWD GUIDE TO LEGAL CITATION (Coleen M. Berger ed., 6th ed. 2017).

Postage is paid at Boston, Massachusetts, and additional mailing offices. POSTMASTER: send address changes and corrections to *New England Law Review*, New England Law | Boston, 154 Stuart Street, Boston, MA 02116-5616.

NEW ENGLAND LAW REVIEW

VOLUME 55 | 2020-2021 | NUMBERS 1-2

NEW ENGLAND LAW | BOSTON CORPORATION

HON. PETER L. BROWN, B.A., J.D.
President

CARY W. SUCOFF, B.A., J.D.
Treasurer

WILLIAM M. CASEY, B.S., J.D.
Secretary

DIANA L. WHEELER, B.A., J.D.
Vice President

ALBERT A. BALBONI, B.A., J.D.
HON. SUSAN J. CRAWFORD, B.A., J.D., Jur. D.
RICHARD J. LAWTON, B.A., J.D.
PETER G. FLAHERTY II, B.A., J.D.
JOHN F. O'BRIEN, B.A., J.D., LL.M., Jur. D.
C. BRENDAN NOONAN III, B.S., J.D.

BOARD OF TRUSTEES

ALBERT A. BALBONI, B.A., J.D.
Chairman

DIANA L. WHEELER, B.A., J.D.
Vice Chairman

WILLIAM M. CASEY, B.S., J.D.
Secretary

RICHARD C. BARDI, B.A., J.D.
HON. PETER L. BROWN, B.A., J.D.
HON. JACKIE A. COWIN, B.A., J.D.
HON. SUSAN J. CRAWFORD, B.S., J.D., Jur. D.
PETER G. FLAHERTY II, B.A., J.D.
STEPHANIE C. NARANJO, B.A., J.D.
C. BRENDAN NOONAN III, B.S., J.D.
KATHLEEN M. PFEIFER SPURLING, B.S., J.D
CARY W. SUCOFF, B.A., J.D.
JUDITH A. WAYNE, B.A., J.D.

FACULTY

SCOTT BROWN, *Dean and President (December 2020)*, B.A., J.D.
ALLISON M. DUSSIAS, *Interim and Associate Dean and Professor of Law*, A.B., J.D.
LISA R. FREUDENHEIM, *Associate Dean, Professor of Academic Excellence, and Director of the Academic Excellence Program*, B.A., J.D.

CHRISTINE ABELY, *Faculty Fellow*, B.A., J.D.
RUTH ADEYINKA, *Visiting Clinical Professor*, B.S., J.D.
GARY ALLEN, *Visiting Clinical Professor*, B.A., J.D., M.B.A.
BREANISHEA AMAYA, *Clinical Teaching Fellow*, B.A., J.D.
GARY M. BISHOP, *Professor of Law and Director of Legal Research and Writing*, B.A., J.D.
ROBERT A. COULTHARD, *Professor of Academic Excellence and Director of Bar Examination Preparation Services*, B.A., J.D., LL.M.
TIGRAN W. ELDRED, *Professor of Law*, A.B., J.D.
RUSSELL ENGLER, *Professor of Law and Director of Clinical Programs*, B.A., J.D.
LAWRENCE M. FRIEDMAN, *Professor of Law*, B.A., J.D., LL.M.
JUDITH G. GREENBERG, *Professor of Law*, B.A., J.D., LL.M.
VICTOR M. HANSEN, *Professor of Law*, B.A., J.D., LL.M.
DINA FRANCESCA HAYNES, *Professor of Law*, B.A., J.D., LL.M.
WILTON B. HYMAN, *Professor of Law*, B.A., J.D., LL.M.
PETER J. KAROL, *Professor of Law*, B.A., J.D.
ILENE S. KLEIN, *Clinical Law Professor*, B.A., J.D.

LISA J. LAPLANTE, *Professor of Law and Director of the Center for International Law and Policy*, B.A., M.Ed., J.D.
ERIC A. LUSTIG, *Professor of Law and Director of the Center for Business Law*, B.S., M.S., J.D., LL.M.
SEAN LYNESS, *Faculty Fellow*, A.B., J.D.
PETER M. MANUS, *Professor of Law*, B.A., J.D.
KRISTIN C. MCCARTHY, *Director of the Law Library and Assistant Professor of Law*, B.A., J.D., M.L.S.
CHANCE MEYER, *Academic Excellence Lecturer on Law*, B.S., J.D.
CARYN R. MITCHELL-MUNEVAR, *Clinical Law Professor*, B.A., J.D.
GARY L. MONSERUD, *Professor of Law*, B.A., J.D., LL.M.
NICOLE NOËL, *Assistant Professor of Law and Assistant Director of the Academic Excellence Program*, B.A., J.D.
KENT D. SCHENKEL, *Professor of Law*, B.A., J.D., LL.M.
DAVID M. SIEGEL, *Professor of Law and Director of the Center for Law and Social Responsibility*, B.A., J.D.
JORDAN M. SINGER, *Professor of Law*, A.B., J.D.
CHARLES W. SORENSON, JR., *Professor of Law*, B.A., M.A., J.D.
MONICA TEIXEIRA DE SOUSA, *Professor of Law*, B.A., J.D.
NATASHA N. VARYANI, *Associate Professor of Law*, B.A., M.B.A., J.D.
J. RUSSELL VERSTEEG, *Professor of Law*, A.B., J.D.

ADJUNCT PROFESSORS OF LAW

DAVID M. BAE, *Lecturer on Law*, B.A. & Sc., J.D.
HON. AMY LYN BLAKE, *Lecturer on Law*, B.A., J.D.
ERIC K. BRADFORD, *Lecturer on Law*, B.A., J.D.
DARREN L. BRAHAM, *Lecturer on Law*, LL.B., LL.M.
HON. RANDY S. CHAPMAN, *Lecturer on Law*, B.B.A., J.D.
ALAN L. CHOW, *Lecturer on Law*, B.A., J.D.
JACK CINQUEGRANA, *Lecturer on Law*, B.A., J.D.
ANDREW P. CORNELL, *Lecturer on Law*, B.A., J.D.
HON. PETER M. COYNE, *Lecturer on Law*, B.A., J.D., M.S.
BERNARDO G. CUADRA, *Lecturer on Law*, B.S., J.D.
THOMAS H. DAY, *Lecturer on Law*, A.B., J.D.
HON. NEALS-ERIK WILLIAM DELKER, *Lecturer on Law*, B.A., J.D.
DAWN D. EFFRON, *Adjunct Professor of Law*, B.A., J.D.
TYSON R. ENCE, *Lecturer on Law*, B.S., J.D.
JUSTIN M. FABELLA, *Lecturer on Law*, B.A., J.D.
BRIAN FLAHERTY, *Lecturer on Law*, B.A., M.L.S.
MICHELLE D. FORZLEY, *Lecturer on Law*, B.A., J.D., M.S.
DAVID J. FREDETTE, *Lecturer on Law*, B.A., J.D.
LAURA GREENBERG-CHAO, *Lecturer on Law*, B.A., J.D.
HON. SYDNEY HANLON, *Lecturer on Law*, A.B., J.D.
DIMITRY HERMAN, *Lecturer on Law*, B.A., J.D.
PAUL-JOHAN JEAN, *Lecturer on Law*, B.A., J.D.
TODD JOHNSON, *Lecturer on Law*, B.A., J.D., ARM, ARM-E, ARM-P, AIC
PATRICIA A. JONES, *Adjunct Professor of Law*, A.B., M.M.E., J.D
JOHN KIERNAN, *Adjunct Professor of Law*, A.B., J.D.
ROSA LICEA-MAILLOUX, *Lecturer on Law*, B.A., J.D.
HON. STEPHEN M. LIMON, *Adjunct Professor of Law*, A.B., J.D.
DAVID H. LONDON, *Lecturer on Law*, B.A., J.D.

HON. DAVID A. LOWY, *Adjunct Professor of Law*, B.A., J.D.
MAUREEN A. MACFARLANE, *Lecturer on Law*, B.A., M.A., M.S., J.D., M.E.L.
HALIM MORIS, *Lecturer on Law*, B.S., J.D.
FRANCIS C. MORRISSEY, *Lecturer on Law*, B.A., J.D.
MATTHEW C. MOSCHELLA, *Lecturer on Law*, B.A., M.S.W., J.D.
WENDY J. MURPHY, *Adjunct Professor of Law*, B.A., J.D.
RYAN H. NELSON, *Lecturer on Law*, B.S.B.A., J.D., LL.M.
ELENA NOUREDDINE, *Lecturer on Law*, B.A., J.D.
DANIEL P. PARADIS, *Lecturer on Law*, B.A., J.D., LL.M.
PETER J. PERRONI, *Lecturer on Law*, B.A., J.D.
LAWRENCE R. PLAVNICK, *Lecturer on Law*, B.S., J.D.
HOLLY CHAMBERLAIN RIGBY, *Lecturer on Law*, B.S., J.D.
HON. ROBERTO RONQUILLO, JR., *Adjunct Professor of Law*, B.A., J.D.
HON. JAMES P. ROONEY, *Lecturer on Law*, A.B., J.D.
DAVID P. RUSSMAN, *Lecturer on Law*, B.A., J.D.
BENNETT R. SAVITZ, *Lecturer on Law*, B.A., M.A., J.D.
THOMAS G. SHACK III, *Lecturer on Law*, B.A., M.B.A., J.D.
JUSTIN SILVERMAN, *Lecturer on Law*, B.A., J.D.
JOSEPH F. STANTON, *Lecturer on Law*, B.A., J.D.
JENNIFER A. SUNDERLAND, *Lecturer on Law*, B.A., J.D.
GARY OWEN TODD, *Lecturer on Law*, B.A., J.D.
HON. RICHARD WELCH II, *Adjunct Professor of Law*, B.A., J.D.
DONNA M. WHITE, *Lecturer on Law*, A.L.B., J.D., LL.M.
TANASIA WHITE, *Lecturer on Law*, B.S., J.D.
TIMOTHY L. WILLIAMSON, *Lecturer on Law*, B.A., J.D.

LEGAL RESEARCH AND WRITING FACULTY

STEFANIE GIULIANO ABHAR, *Instructor of Legal Writing*, B.A., J.D.
BRYAN M. ABRAMOSKE, *Instructor of Legal Writing*, B.A., J.D.
CHANISE ANDERSON, *Instructor of Legal Writing*, B.A., J.D.
TERESA ANDERSON, *Instructor of Legal Writing*, B.A., M.A., J.D.
EMANUEL N. BARDANIS, *Instructor of Legal Writing*, B.A., J.D.
ASHLEY BARKOUDAH, *Instructor of Legal Writing*, B.A., J.D.
BARRY BISSON, , *Instructor of Legal Writing*, B.S., J.D.
SANDRA WYSOCKI CAPPLIS, *Instructor of Legal Writing*, B.S., J.D.
MEDORA S.L. CHAMPAGNE, *Instructor of Legal Writing*, B.A., J.D.
SARA COLKET, *Instructor of Legal Writing*, B.A., J.D.
BETH PIRRO COOK, *Instructor of Legal Writing*, B.A., J.D.
STEVEN E. DICAIRANO, *Instructor of Legal Writing*, B.A., J.D.
JENNIFER L. DICARLO, *Instructor of Legal Writing*, B.S., J.D.
JOSEPH M. GALVIN, *Instructor of Legal Writing*, B.A., J.D.
MELISSA A. GAUTHIER, *Instructor of Legal Writing*, B.A., J.D.
HILLARY GELL, *Instructor of Legal Writing*, B.A., J.D.
LANE N. GOLDBERG, *Instructor of Legal Writing*, B.S., J.D.
JORDANA GOODMAN, *Instructor of Legal Writing*, B.S., J.D., M.S.
KAREN GUTHRIE, *Instructor of Legal Writing*, B.A., J.D.
LAURA HENNESSEY, *Instructor of Legal Writing*, B.A., J.D.
NINA S. HIRSCH, *Instructor of Legal Writing*, B.A., J.D.
DOUGLAS R. HYNE, *Instructor of Legal Writing*, B.A., J.D.

SALLYANN JANULEVICUS, *Instructor of Legal Writing*, B.A., J.D.
LISA JOHNSON, *Adjunct Professor of Legal Writing*, B.A., J.D.
JARED KELLY, *Instructor of Legal Writing*, B.S., J.D.
MICHELLE R. KING, *Adjunct Professor of Legal Writing*, B.A., M.P.H., J.D.
RITA KRANER, *Instructor of Legal Writing*, B.A., J.D.
CHRISTOPHER MARKHAM, *Instructor of Legal Writing*, B.A., J.D.
MARIAN MCGRATH, *Instructor of Legal Writing*, B.A., J.D.
NANCY L. MCPHEETERS, *Adjunct Professor of Legal Writing*, B.S., J.D.
REBECCA MOOR, *Instructor of Legal Writing*, B.A., J.D., LL.M.
BRANDON MOSS, *Instructor of Legal Writing*, B.S., J.D.
SHANE O'SULLIVAN, *Instructor of Legal Writing*, B.S., J.D.
NICOLE PAQUIN, *Instructor of Legal Writing*, B.A., J.D.
KRISTEN SCHULER SCAMMON, *Instructor of Legal Writing*, B.A., J.D.
JESSICA MAHON SCOLES, *Instructor of Legal Writing*, B.S., J.D.
CHRISTOPHER SHEA, *Instructor of Legal Writing*, B.S., J.D.
STACY J. SILVEIRA, *Instructor of Legal Writing*, B.A., M.A., J.D.
CHRISTINA SIMPSON, *Instructor of Legal Writing*, B.A., J.D.
HEATHER STEVENSON, *Instructor of Legal Writing*, B.A., M.S.E., J.D., LL.M.
MARK D. SZAL, *Instructor of Legal Writing*, B.A., J.D.
RENA VAN HAREN, *Instructor of Legal Writing*, B.A., M.A., J.D.
SIDRA VITALE, *Instructor of Legal Writing*, B.S., J.D.
KIERSTEN ZAZA, *Instructor of Legal Writing*, B.A., J.D.

VOL. 55 PUBLICATION TEAM

LAWRENCE M. FRIEDMAN, *Professor of Law and Faculty Advisor*, B.A., J.D., LL.M.
KYLE SUTTON, *Editor-in-Chief, New England Law Review*, Vol. 56
EMILY HORJUS, *Senior Executive Editor, New England Law Review*, Vol. 56

* * * *

* * * *

NEW ENGLAND LAW REVIEW

VOLUME 55 SPRING 2021 NUMBER 2

CONTENTS

ARTICLES

NOTES

* * * *

Denying Cultural Intellectual Property: An International Perspective on Anjali Vats's *The Color of Creatorship*

J. JANEWA OSEI-TUTU*

INTRODUCTION

In *The Color of Creatorship*, Anjali Vats offers a compelling analysis of intellectual property (IP) laws through the lens of critical race theory. Providing a persuasive account of the role of racialized perspectives and colonial histories in the making of IP laws, Vats calls on activists to "persuade lawmakers that knowledge production comes in a variety of forms." She makes a valuable contribution to the literature on race and IP, asking us to think about IP citizenship and how this has been framed in the United States. In this brief essay, I will connect Vats's analysis to some of the issues that arise in relation to international IP.

While she acknowledges the global issues and histories, Vats focuses primarily on the role of race in shaping IP law in the United States. However, the book engages in some discussion of the international aspects, primarily focusing on the Indian Traditional Knowledge Digital Library (TKDL).[1] Vats connects her theories to traditional knowledge discussions and dignity-based analyses of IP. At its core, this critical race framing calls for an acknowledgement of the personhood and dignity of creators of color. This aligns with the language one might find in an international human rights approach to IP, which requires recognition for the basic dignity of every person by virtue of their humanity. This essay will elaborate on these points, discussing the book in relation to traditional knowledge, human rights, and human flourishing approaches to IP.

* Professor of Law, Florida International University College of Law. LL.M. McGill University, J.D. Queen's University, B.A. (Hons.) University of Toronto.

1 *See generally About TKDL*, TKDL: TRADITIONAL KNOWLEDGE DIG. LIBRARY, https://perma.cc/R2EU-5ETJ (last visited Jan. 27, 2022).

I. Traditional Knowledge, Racist Branding, & Cultural Patents

As I have argued elsewhere, there is a cultural divide in global IP law.[2] The "whiteness as property" narrative that Vats applies to her analysis of IP is readily applicable to critiques of international IP and to the traditional knowledge debate in particular. Vats deftly incorporates this into her discussion of decoloniality, stating:

> The project of remaking intellectual property law, then, must address the centrality of the state and the centrality of whiteness in the formation of intellectual property policy and its underlying ideologies and cultural formations. This does not mean doing away with the nation-state or completely disempowering white people. Instead, it means confronting the role of the nation-state in its epistemic violence and its complicity in white supremacy.[3]

This racial structure of IP is well illustrated by the various forms of racially offensive branding and the failure to protect traditional knowledge. For example, in the fall of 2019, the luxury French fashion brand, Christian Dior, found itself embroiled in controversy relating to the use of Native American culture to promote the "Sauvage" perfume. The advertisement, a one-minute film titled, "We are the Land," featured American actor, Johnny Depp.[4] In the advertisement, a Native man dressed in full regalia appears to be doing a traditional Native American dance, while Depp plays the guitar and gazes at the landscape. A voiceover at the end asserts, "We are the land." The perfume name "Sauvage" translates from French to English as "savage." Amid backlash, Dior eventually pulled the ad. Although no particular Native group was identified, a generic Native American identity was portrayed.

This Dior advertisement could be considered an example of racially derogatory branding, particularly because of the association between the Native motif and the "savage" theme. It also involved traditional cultural expressions or expressions of folklore, which the World Intellectual Property Organization (WIPO) defines to include, among others, "music, dance, art, designs, names, symbols, performances, ceremonies, architectural forms, handicrafts and narratives."[5] WIPO continues to work on its *sui generis*

---

[2] *See* J. Janewa Osei-Tutu, *Value Divergence in Global Intellectual Property Law*, 87 IND. L.J. 1639, 1640 (2012).

[3] ANJALI VATS, THE COLOR OF CREATORSHIP 200–201 (2020).

[4] Maanvi Singh, *Dior Perfume Ad Featuring Johnny Depp Criticized over Native American Tropes*, THE GUARDIAN (Aug. 30, 2019, 10:23 PM EDT), https://perma.cc/436T-NHE9.

[5] *Traditional Cultural Expressions*, WIPO: World Intellectual Prop. Org., https://perma.cc/ED94-HC8Q (last visited Jan. 27, 2022).

legislation to protect traditional knowledge and traditional cultural expressions.[6] Yet, little progress has been made over the years, and there remains no international agreement to address claims of cultural appropriation.

In chapter 4, Vats discusses the value of India's TKDL in making Indian traditional knowledge prior art. She also identifies what she describes as a legal error in the Indian discussions of cultural property, explaining how some in the Indian community use "malapropisms" by discussing yoga piracy and cultural patents.[7] This is partly an act of resistance and reframing, as Vats points out. It is also an indication of the failure of the current international IP system to reflect a diversity of perspectives.

While, according to Western IP laws, it is legally inaccurate to speak of yoga patents or to insist on ownership of yoga as Indian cultural heritage, it is not an incorrect approach, but rather a different approach to IP rights. It is legally inaccurate, perhaps because those voices were not sufficiently incorporated in structuring the modern international IP system and these perspectives are not reflected in the World Trade Organization (WTO) 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). Cultural patents and yoga piracy are not legally cognizable because international IP law has been structured to exclude such claims. If we look more closely at the justifications for the IP rights that protect collective interests, including group rights, the concept of yoga piracy is not such a stretch.

As Vats points out, Indian assertions of infringement do not align with existing IP structures. Understanding the use of Indian traditional knowledge as a violation of IP rights is an example of a different cultural perspective regarding what is proprietary. Intangible cultural property may not be recognized by Western IP laws, but it may very much be recognized by national or traditional customary laws of a country in the "Global South." The existing international IP system has been criticized as having been developed from a Western perspective for the benefit of industrialized nations. Indeed, when the WTO TRIPS Agreement was implemented, there was concern from developing countries as well as critical scholars. The purpose of the TRIPS agreement is to create minimum standards for the protection of IP, thereby ensuring that multinational corporations from industrialized nations would have their economic interests protected when they did business overseas.

How does one confront the cultural assumptions that underlie global IP

---

[6] *See id.*

[7] VATS, *supra* note 3, at 172.

policy? One important step is to identify and acknowledge the clear but not easily justifiable differences when it comes to protecting, and even expanding, certain IP protections while denying others. The traditional knowledge discussions are a terrific example. There are several critiques of the failure to protect indigenous and cultural IP from international law perspectives, such as Third World Approaches to International Law (TWAIL).

TWAIL is a critical approach that offers a relevant critique of the traditional knowledge debates and, like critical race theory, comes from the perspective of historically disempowered persons. Both TWAIL and critical race theory identify some of the structural flaws in international IP structures. As James Gathii explains, there are differences between critical race approaches to law, which come from the perspective of race in the U.S., and TWAIL, which focuses more on the post-colonial critiques of international law.[8] However, these two approaches have some similarities.

As applied to international IP, both TWAIL and critical race theory might lead us to ask: What makes traditional knowledge public domain material and free for all to take while other forms of creation are not available as the common heritage of mankind? Vats writes about "the complex ways that whiteness and its attendant property interests structure intellectual property law, often in the guise of equality and race neutrality."[9] Vats argues that IP laws protect the interests of white people and devalue the IP interests of people of color.[10] Applying her analysis to the struggle to create international legal protection for traditional knowledge and traditional cultural expressions, it is apparent that the very structure of the laws and the justifications for these laws support her claim.

II. International IP—Defining IP to Exclude Cultural IP

There is a stark contrast between the willingness and ability of nations to come together to implement the TRIPS Agreement[11] and the significant challenges in obtaining an international agreement to protect traditional

---

[8] *See generally* James T. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 28–29 (2011), https://perma.cc/NHE2-J73W.

[9] VATS, *supra* note 3, at 2.

[10] VATS, *supra* note 3, at 3.

[11] Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 321 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1177 (1994) [hereinafter TRIPS Agreement].

knowledge.

WTO members agreed to extend copyright protection to databases, protect geographical indications, ensure medicine patents, and establish a global minimum term of patent protection of 20 years from the date of filing. These changes were not insignificant. For instance, prior to the TRIPS Agreement, some countries—including India, which is a major producer of generic medicines for the Global South—did not provide patents for medicines. In addition, patent terms may have been shorter, and most countries did not provide protection for geographical indications. But for intangible cultural heritage, there has been little to no progress over the past several years. Even though WIPO has taken the lead on negotiating an international instrument to protect traditional knowledge and traditional cultural expressions, the progress has been halting at best. The attempt to protect indigenous traditional knowledge has been ongoing at WIPO for several decades now. International law recognizes intangible cultural heritage but there is no legal protection for this type of knowledge that approximates the protection for classic IP rights.

There are international instruments, such as the *Convention for the Safeguarding of the Intangible Cultural Heritage* (ICH Convention),[12] that recognize intangible cultural property and the rights of indigenous peoples to their cultural heritage. Intangible cultural heritage is broadly defined by the ICH Convention such that it would encompass traditional knowledge and traditional cultural expressions, as defined by WIPO. Intangible cultural heritage includes "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."[13] Notably, the heritage recognized by the agreements is only that which is consistent with international human rights. It can be oral traditions and expressions, knowledge, performing arts and other manifestations of cultural identity.[14]

The ICH Convention, which dates to 2003, has 180 state parties as of 2020.[15] This is an overwhelming majority of the world's nations, nearly all of

---

[12] Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 Oct. 2003), 2368 U.N.T.S. 3, *entered into force* 20 Apr. 2006, https://perma.cc/6BNZ-QLQ7.

[13] *Id.* art. 2.

[14] *Id.*

[15] *The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003)*, UNESCO: UNITED NATIONS EDUC., SCI., & CULTURAL ORG., https://perma.cc/JX9X-G3H7 (last visited Jan. 27, 2022).

which are members of the United Nations,[16] and more state parties than the WTO, which has 164 member states.[17] Other international agreements also recognize the value of one's cultural heritage. For example, Article 31 of the *UN Declaration on the Rights of Indigenous Peoples* (UN DRIP), which was adopted by the UN General Assembly in 2007, recognizes that indigenous peoples have the right to control and protect their cultural heritage, including their traditional knowledge, traditional cultural expressions, and any related IP.[18] At the time of its adoption, the UN DRIP had broad support, with 144 states voting in favor of the declaration.[19] The 1992 *Convention on Biological Diversity* (CBD) addresses traditional knowledge in article 8(j), speaking about preserving traditional knowledge in accordance with local laws and encouraging the equitable sharing of the benefits arising from the use of such knowledge.[20] The CBD had 196 state parties as of 2021, which is also more than the TRIPS Agreement.[21]

Despite these various international instruments that recognize intangible cultural heritage, protections akin to IP remain elusive for traditional knowledge and traditional cultural expressions. However, the objections to protecting traditional knowledge are based on the very structure of IP law, which was devised to protect large corporate and commercial interests but not to protect human dignity or to recognize the human dignity of cultural minorities and post-colonial peoples.

For example, the concept of trade-related IP rights emphasizes the commercial aspect of these rights. This becomes problematic, particularly since the absence of commercialization is used to justify excluding intangible

---

[16] *See About Us*, UN: UNITED NATIONS, https://perma.cc/DC4L-YG9U (last visited Jan. 27, 2022).

[17] *Members and Observers*, WTO: WORLD TRADE ORG., https://perma.cc/2TQF-4T6L (last visited Jan. 27, 2022).

[18] G.A. Res. 295, U.N. GAOR, 61st Sess., Supp. No. 49, vol. III, at 22–23, U.N. Doc. A/61/49 (vol. III) (2007), https://perma.cc/7QHN-G79J.

[19] *UN Declaration on the Rights of Indigenous Peoples*, OHCHR: UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, https://perma.cc/3QFB-P9VV (last visited Jan. 27, 2022).

[20] Convention on Biological Diversity art. 8(j) (Rio de Janeiro, 5 June 1992), 1760 U.N.T.S. 79, *entered into force* 29 Dec. 1993, https://perma.cc/7UJ8-A7S5 ("Subject to its national legislation, [each party shall] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.").

[21] *List of Parties*, CBD: CONVENTION ON BIOLOGICAL DIVERSITY, https://perma.cc/ACV3-BZSG (last visited Jan. 27, 2022); *Members and Observers*, *supra* note 17.

cultural heritage from legal protection. IP rights, according to the mainstream approach, are not designed to protect human dignity or promote human development but are primarily designed to provide economic incentives for innovation and creativity. TRIPS emphasizes the commercial lens through which we see IP rights.

But IP rights are not purely about commercial transactions. Copyright law, which protects literary and artistic works, has both economic and dignitary aspects. For example, the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) recognizes moral rights, such as the right of the author to be named.[22] The TRIPS Agreement, which emphasizes the economic utilitarian approach to IP protection, expressly excludes the protection of moral rights as an obligation. In addition, the TRIPS Agreement clarifies that copyright protection extends to databases.[23] This is not because databases have creative value, but rather because they have financial value. If these databases clearly met the standard requirements for copyright protection, there would be no need to specifically state in TRIPS that databases should be protected by copyright. They may not be sufficiently original and creative, but the copyright protection offers an economic incentive to compile databases. Though there were not many substantive changes to copyright under the TRIPS Agreement, the inclusion of databases and the exclusion of moral rights are illustrations of a willingness to expand the economic aspects of copyright while excluding the dignitary aspects.

The inclusion of geographical indications in the TRIPS Agreement was a significant addition because before the TRIPS Agreement, geographic source indicators had not achieved international acceptance. Prior agreements that protected appellations of origin, such as the *Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration* (Lisbon Agreement), had relatively few parties.[24] Appellations of origin can be described as the predecessor to geographical indications, but the Lisbon Agreement has only thirty-one signatories as of 2021 and had

---

[22] *See* Berne Convention for the Protection of Literary and Artistic Works art. 6bis (Berne, 9 Sept. 1886), *amended effective* 28 Sept. 1979, https://perma.cc/99NS-BAPJ [hereinafter Berne Convention].

[23] TRIPS Agreement, *supra* note 11, at art. 10.2.

[24] Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration art. 2 (Lisbon, 31 Oct. 1958), *amended effective* 28 Sept. 1979, https://perma.cc/MM9U-KAKG (Article 2 defines an appellation of origin as "the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors").

even fewer when TRIPS came into effect in 1995.[25]

By comparison, the Berne Convention, which covers copyrighted works, and the *Paris Convention for the Protection of Industrial Property* (Paris Convention),[26] which addresses trademarks and patents, were widely accepted conventions.[27] While geographical indications, which are a variation of appellations of origin, had some recognition, the WTO significantly extended their reach. Importantly, the TRIPS Agreement was mandatory for all WTO members, which meant that member states could not opt out. Including minimum standards of protection for geographical indications was, therefore, a significant achievement. The inclusion of geographical indications in the TRIPS Agreement facilitates the protection of European cultural heritage, particularly with respect to the names and production methods for wines, spirits, and foods.

While the TRIPS Agreement extended protection to geographical indications and created harmonized standards for the classic forms of IP, traditional knowledge remains unprotected at the international level. There are many objections to protecting traditional indigenous knowledge, but the main objection to offering protection analogous to IP is that traditional knowledge does not fit within the traditional models for IP. For instance, copyright protection applies to literary and artistic works, but the works must be original, meaning that they are independently created and enjoy a modicum of creativity. However, a traditional cultural expression, such as a totem pole, becomes "traditional" because it is an accurate copy and not an original work. Furthermore, intangible cultural heritage is, by definition, communal rather than individual, but classic IP does not recognize the communitarian model where there is no identifiable individual creator. In addition, copyright protection is time limited, whereas intangible cultural heritage may require protection over a period that covers multiple generations. Trademarks can last indefinitely, as long as they are being used. However, trademarks for collective identity are not protected unless that

---

[25] *Lisbon Agreement, Contracting Parties*, WIPO: WORLD INTELLECTUAL PROP. ORG., https://perma.cc/6REL-4JVH (last visited Jan. 27, 2022). Article 22 of the TRIPS Agreement, *supra* note 11, states, "Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin."

[26] Paris Convention for the Protection of Industrial Property (Paris, 20 Mar. 1883), *amended effective* 28 Sept. 1979, https://perma.cc/YQ3F-5C3B [hereinafter Paris Convention]; Berne Convention, *supra* note 22.

[27] Berne Convention, *supra* note 22; Paris Convention, *supra* note 26 (Both the Berne Convention and the Paris Convention have over 170 signatories).

identity is being used in commerce as a source indicator.

The traditional IP models were developed from a Western perspective, including Western concepts of ownership, which means that alternate approaches to intangible rights are unlikely to fit easily within the regime. For example, the focus under the current IP model is to protect and incentivize innovation. It is less inclined to focus on a communitarian model or a model that protects non-commercial identities. This can be a difficult barrier to overcome. If existing IP structures are based on a western model, it is not surprising that an alternate model that protects traditional knowledge would not meet the criteria established by the current model.

This failure of traditional knowledge to meet the existing criteria is then provided as a justification for not protecting traditional knowledge or other intangible indigenous cultural property. Yet, IP laws are not static, and the same IP model is expanded when there is a desire to expand it, even if the claimed justifications are not objectively supported. In addition, it is not clear how much IP protection actually incentivizes innovation. Some authors have argued that, at least in some industries, innovation flourishes where there are minimal IP rights.[28]

III. Collectives and Corporations

The objection to traditional knowledge as a collective right is an example of the way IP prioritizes the interests of major corporations. Prioritizing group interests raises some legitimate concerns about whether the group will oppress individual liberty. However, the law has demonstrated its capacity to address collective interests as well as individual rights. For example, if the collective is organized as a corporation, the questions relating to groups seem not to raise the same concerns. The leadership and structure of a corporation are made clear through corporate document. The leadership and structure of a cultural group that is claiming cultural IP rights can, and should, also be made clear. Importantly, the collective, structured as a legal corporation, does not become inherently more or less oppressive simply because it is commercial rather than cultural in its focus.

What we protect and how we protect it also has implications for *who* we protect. This is where the classic IP narrative enables the protection of major corporations and those who are well-informed and benefiting under the existing system. When looking at why we are willing to protect certain kinds of intangible goods but not others, it is impossible to simply dismiss the lens

[28] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006) ("[C]opying may actually promote innovation and benefit originators.").

that Vats applies in her explanation of IP laws in the United States as a story of racial capitalism[29] and the systematic exclusion of people of color.

The question we must ask is: what makes the economic, commercially driven model of IP justifiable, whereas a cultural or dignitary model is not acceptable? The analysis of this question is affected by original assumptions made by those who were most influential in creating the relevant legal structures. The current international IP system has not been structured with a view towards human rights, nor to the interests of collective groups or developing nations. Instead, it protects the national and international commercial interests of wealthy, industrialized countries.

International IP clearly protects commercial identities in the form of trademark and geographical indications. However, before IP law will protect cultural identity, those advocating for its protection are asked to identify the economic value that can be attached to these identities. We are also asked to explain how cultural identities, traditional knowledge, and traditional cultural expressions can be justified under labor or incentive theory. The argument is that these are not innovative, or creative works, and that there has been no labor invested in these creative creations; therefore, they should not be protected. Why, we might ask in reply, is labor theory the standard? Moreover, labor theory is not a consistent justification or rationale, because even when it comes to inventions and creative works, there is no requirement to demonstrate a significant investment of labor before IP protection becomes available. Nor do we give longer terms or broader rights to an invention that requires more investment in time and resources than we do to an accidental invention. Furthermore, it takes work to maintain one's identity, whether individual or collective.

The truth is that we could reject labor theory completely. Insisting on labor or incentive theory reinforces a structure that justifies property from a particular perspective. For instance, the Lockean notion that when you labor with something you take it out of the common state and can appropriate it to yourself is very much an individualistic approach, and not one that embraces a communitarian or collective vision. By default, this approach works against collective cultural identities as well as traditional knowledge and cultural expressions. Yet, this is not the only possible approach to IP rights. Indeed, IP rights are often justified based on labor theory, or utilitarian economic incentive theories. But other theories, such as human rights and human flourishing, could be integrated into the mainstream IP models. One way to shift the current model to one that is more inclusive of diverse cultures is to challenge the legal justifications and theoretical barriers

[29] *See generally* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153–54 (2013).

that exclude recognizable cultural identities from obtaining legal protection because of their poor fit into an IP model that has yet to embrace diverse perspectives.

CONCLUSION

This essay has assessed the ideas of *The Color of Creatorship* from an international perspective, focusing on traditional knowledge and intangible cultural heritage. The challenge in obtaining international protection for traditional knowledge, despite decades of negotiations, is an example of the race-based critique that Vats presents in her book. While the critical traditional knowledge literature tends to be based on TWAIL and anti-colonial narratives, critical race theory and TWAIL both offer a structural critique that demands that human beings are placed at the center, regardless of race, color, or creed. Vats invites us to re-think the structure of IP law. Ultimately, what Vats proposes fits within a TWAIL critique of IP. It is also an argument in favor of a human rights approach to IP, in which human dignity is valued within IP law, rather than being subjugated to the commercial interests of multinational corporations.[30]

[30] VATS, *supra* note 3, at 208.

* * * *

The Automation of Transportation: The Advent of Autonomous Driving Technology

Chris Costain[*]

INTRODUCTION

America is constantly moving forward. Since the mid-nineteenth century, America has cultivated homegrown technological innovations that have helped to make it a powerhouse in the global economy.[1] At the end of the eighteenth century, new manufacturing technologies found their home in New England, facilitating the development of transportation systems such as railroads and canals.[2] More than fourteen million immigrants came to America between 1860 and 1900, and the increase in human capital made the developments of the cotton mill, the steamboat, and the automobile attainable.[3] All of this innovation and creation did not occur in a vacuum, as the federal government intervened to ensure things stayed on the straight-and-narrow by creating "industrial policy."[4] Studies show that America is not slowing down either, as it continues to stay at the forefront of scientific and technological research and

[*] J.D., New England Law | Boston (2021). B.A., English Language & Literature, Providence College (2015).

[1] Sarah Tran, *Expediting Innovation*, 36 HARV. ENVTL. L. REV. 123, 124 (2012); *see The Industrial Revolution in the United States: Teacher's Guide*, LIBRARY OF CONG., https://perma.cc/6JA4-TKQA (last visited Nov. 28, 2021) [hereinafter *The Indus. Revolution in the United States*].

[2] *The Indus. Revolution in the United States*, *supra* note 1.

[3] *See The Indus. Revolution in the United States*, *supra* note 1.

[4] Steven C. Earl, Comment, *The Need for an American Industrial Policy*, 1993 BYU L. REV. 765, 766–68 (1993); *see* Robert B. Reich, *Why the U.S. Needs an Industrial Policy*, HARV. BUS. REV., Jan. 1982, https://perma.cc/JQE6-WPGW (describing industrial policy as a way to strengthen an economy by bolstering such industrial sectors, such as the automotive sector).

design.[5]

Perhaps the most important engineering and technological development during the late-nineteenth and early-twentieth centuries was the automobile.[6] Few inventions in history have had a greater impact than the automobile, which shrunk Americans' perceptions of their cities and towns and bolstered the country's economy.[7] Early iterations of the automobile were created by fledgling inventors in sheds behind their homes and were powered by steam or electricity, but there was limited infrastructure to support electric vehicles as electricity had not yet found its way into every corner of the country.[8] It was only a matter of time before someone developed and deployed a more convenient version of the automobile for mass consumption.[9]

A number of American engineers developed gasoline-powered automobiles leading up to, and after, the turn of the twentieth century, but none enjoyed more success than Henry Ford, who founded his own firm in 1903 to create a low-cost motor vehicle suitable for the masses.[10] Produced between 1908 and 1927, Ford's Model T was the company's most successful model, with more than fifteen million units sold during its production run.[11] The affordability of the Model T transformed American culture.[12] Suddenly, Americans could travel for leisure and experience their country like never before.[13] The need for steel and glass in the construction of Ford's popular vehicles meant that those industries began producing materials at an unprecedented rate.[14] The production of the Model T also benefited from the assembly line process, made popular during the Industrial Revolution, allowing Ford to lower the price of its vehicles.[15]

---

[5] Nat'l Sci. Found., *Report Shows United States Leads in Science and Technology as China Rapidly Advances*, SCI. DAILY (Jan. 24, 2018), https://perma.cc/NB9W-GJJ4.

[6] *See generally* David Blanke, *Rise of the Automobile*, TEACHING HIST., https://perma.cc/GD5Y-6ZG2 (last visited Nov. 28, 2021).

[7] Krista Doyle, *How the Invention of the Car Changed the World*, ACEABLE, https://perma.cc/YAD5-LVRZ (last visited Nov. 28, 2021).

[8] *See* Cromer et al., *Automobile*, ENCYCLOPEDIA BRITANNICA, https://perma.cc/UEU3-RN3Y (last updated Nov. 2, 2021).

[9] *See* Blanke, *supra* note 6.

[10] *See* Cromer et al., *supra* note 8.

[11] *1926 Ford Model T Roadster*, NAT'L MUSEUM OF AM. HISTORY, https://perma.cc/PKF7-64AE (last visited Nov. 28,2021).

[12] *See* Blanke, *supra* note 6.

[13] Blanke, *supra* note 6.

[14] *See* Blanke, *supra* note 6.

[15] Austin Weber, *Ten Ways the Model T Changed the World*, ASSEMBLY (Sept. 2, 2008),

In many ways, the conception and production of the Model T can be seen as a microcosm of other technological and engineering developments in America, especially those particular to the automotive industry.[16] America has been at the forefront of developing not only a mass-produced and affordable car, but also the technology that vehicles use to keep motorists safe, including airbags, seatbelts, and anti-lock braking systems.[17] With each new development came legislation.[18] Massachusetts must continue this trend and make diligent efforts to develop sensible legislation aimed at protecting its citizens while also promoting the development and widespread use of autonomous driving technology.[19]

Part I of this Note will discuss the history of the automobile generally in the United States and in Massachusetts, with a particular focus on the development of technology to mitigate accidents and the way in which legislation has applied to such technologies.[20] Part II of this Note will discuss why autonomous vehicle legislation is important to ensure public safety and how autonomous technology can be implemented in a way that allows Massachusetts to fully realize its benefits.[21] Part III of this Note will argue that Massachusetts' Executive Order 572 is an insufficient first attempt to legislate the manufacturers and operators of vehicles that use autonomous driving technology, and that without stricter legislation, the public welfare of the people of the Commonwealth is at risk.[22] Part IV of this Note will identify existing autonomous vehicle legislation in the United States and argue that it is incumbent upon the Commonwealth's legislature to enact effective legislation concerning the manufacture and operation of vehicles with autonomous driving technology.[23]

---

https://perma.cc/9B7B-RXTZ.

[16] *See generally* Blanke, *supra* note 6 ("The automobile proved to be a harbinger of modern, liberating technologies that provided individuals extensive new freedoms.").

[17] *See* Blanke, *supra* note 6.

[18] *See* Blanke, *supra* note 6.

[19] *See* Dorothy J. Glancy, *Autonomous and Automated and Connected Cars—Oh My! First Generation Autonomous Cars in the Legal Ecosystem*, 16 MINN. J.L. SCI. & TECH. 619, 653 (2015).

[20] *See infra* Part I.

[21] *See infra* Part II.

[22] *See infra* Part III.

[23] *See infra* Part IV.

I. Background

A. *The Origin and Development of the National Highway Traffic Safety Administration*

A review of the current regulations promulgated by the National Highway Traffic Safety Administration ("NHTSA") shows that the U.S. federal government plays a major role in regulating the operation of motor vehicles on American roadways.[24] NHTSA regulates everything from fuel economy standards to seat headrest dimensions and turn signals.[25] But NHTSA did not always legislate every minute detail of the auto industry, such as school bus passenger seating capacities and roof crush resistance rates.[26] The idea of regulating motorists on U.S. roadways only came about after Americans were confronted with shocking facts that they could not ignore.[27] In 1965, Ralph Nader opened his book *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* with the powerful line, "[f]or over a half century the automobile has brought death, injury, and the most inestimable sorrow and deprivation to millions of people."[28] It did not take long for Nader's words to draw the attention of the American public, who were consuming automobiles faster than ever before and were disturbed by glaring safety issues that automakers neglected to remedy.[29] Other publications that highlighted the number of motor-vehicle related fatalities made Americans rethink their widespread consumption of the automobile.[30]

In September 1966, ten months after Nader's book was published, President Lyndon B. Johnson signed the National Traffic and Motor Vehicle Safety Act ("the Act"), which required that automakers comply with strict

---

[24] *Laws and Regulations*, NHTSA: NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://perma.cc/NC3B-UNT6 (last visited Nov. 28, 2021).

[25] *Id.*

[26] *See id.*

[27] *See* Christopher Jensen, *50 Years Ago, 'Unsafe at Any Speed' Shook the Auto World*, N.Y. TIMES (Nov. 26, 2015), https://perma.cc/DY25-73F5.

[28] RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE 1 (1965).

[29] *See Automobile History*, HISTORY (APR. 26, 2010), https://perma.cc/WW63-9JNQ; *see also* Mathilde Carlier, *Number of Cars Sold in the U.S. 1951–2021*, STATISTA (Sept. 10, 2021), https://perma.cc/2LTX-GGDR.

[30] *See generally* ACCIDENTAL DEATH AND DISABILITY: THE NEGLECTED DISEASE OF MODERN SOCIETY, NAT'L ACAD. OF SCIENCES 8 (Nat'l Highway Traffic Safety Admin. 1997) (1966), https://perma.cc/89RX-QMBR (stating that in 1965, 49,000 deaths were due to motor vehicle accidents and that among accidental deaths, those caused by motor vehicles constitute the leading cause for all age groups under seventy-five).

safety standards.[31] The Act passed without a single negative vote.[32] NHTSA eventually grew out of the Act, which required that manufacturers of motor vehicles provide prompt notice to dealers, consumers, and the Secretary of Commerce of any safety-related product defect for the first time.[33] Instead of trying to regulate the behavior of drivers, the federal government aimed to ensure that manufacturers would adhere to safety guidelines in the design and construction of their vehicles so that accidents caused less trauma to passengers.[34] It was no surprise that manufacturers, who wanted to avoid costly engineering fixes, tried to convince the federal government that the onus to ensure safe driving rested with drivers.[35] Importantly, the Act focused not only on eliminating post-accident energy transfer, but also on promoting crash avoidance technologies to prevent harmful accidents altogether.[36] In light of the grim statistics showing motor vehicle-related deaths, automakers had the ability to put a halt to one of America's greatest public health crises of the twentieth century by engineering technology that would make accidents less deadly—but only if they were willing to invest time and money into safety technology instead of shiny chrome bumpers.[37]

B. *Understanding Post-NHTSA Regulation Litigation*

It did not take long for litigation to ensue over the Act's regulations.[38] In *Automotive Parts & Accessories Ass'n v. Boyd*, the plaintiff brought a lawsuit fearing that the Act's regulation requiring that all new passenger cars be equipped with headrests from the factory would preclude the Association

---

[31] Jensen, *supra* note 27; *see* National Traffic and Motor Vehicle Safety Act, Pub. L. No. 89–563, 80 Stat. 718 (1966) ("An Act to provide for a coordinated national safety program and establishment of safety standards for motor vehicles in interstate commerce to reduce accidents involving motor vehicles and to reduce the deaths and injuries occurring in such accidents.").

[32] 112 CONG. REC. 14,256 (1966) (Senate vote); 112 CONG. REC. 19,669 (1966) (House of Representatives vote); *National Traffic and Motor Vehicle Safety Act*, THE ASS'N OF CENTERS FOR THE STUDY OF CONGRESS, https://perma.cc/5APX-23ER (last visited Nov. 28, 2021).

[33] *National Traffic and Motor Vehicle Safety Act*, *supra* note 32.

[34] Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 258–59 (1987).

[35] *Id.* at 261.

[36] *Id.* at 259. *See generally* Michael Paine, *What Happens to the Energy of a Moving Car When It Hits a Wall?*, NEWSCIENTIST (June 5, 2019), https://perma.cc/K6LL-MPG6 (describing how a car acts like a compressed spring at the peak of energy displacement during a crash, bouncing off of a wall and dispersing energy to the occupants of the vehicle).

[37] Mashaw & Harfst, *supra* note 34, at 260–61.

[38] *See* Mashaw & Harfst, *supra* note 34, at 276.

from enjoying the profits from the sale of their aftermarket headrests.[39] The plaintiff further argued that the Act's headrest requirement would cause further injuries and deaths to passengers in the event that they struck their head on a corner of the restraint in an accident.[40] In a detailed opinion, Judge Carl McGowan of the District of Columbia Circuit Court of Appeals rejected all of the plaintiff's arguments and legitimized the Act's regulations with support from the judiciary.[41] Judge McGowan's opinion also set out the standard of review that would be applied to the Act's regulations for the following years.[42] First, the headrest regulation was analyzed to determine whether it was arbitrary or capricious, with a particular focus on the agency's reasoning process in promulgating the regulation.[43] Judge McGowan rejected the plaintiff's argument that the headrest regulation should be struck and that consumers should be able to select which aftermarket headrests they wanted in their vehicles, instead holding that the regulation was "reasonable and within the range of authority conveyed."[44] Judge McGowan further rejected the argument that factory-installed headrests would cause injury to passengers, deferring to the writers of the Act, who had to consider "many variables, and make 'trade-offs' between various desiderata in deciding upon a particular standard for auto safety."[45] Lastly, Judge McGowan held that the Act's regulation relating to headrests passed muster because it was incorporated by a concise and general statement outlining its purpose.[46] Judge McGowan's opinion outlined the analysis that would be applied to the Act's regulations and showed that the Act's regulations that involved less technology were supported by ample research and had already been in use for years, making them less likely to be annulled.[47]

However, some of the regulations under the Act were not so ubiquitous.[48] In April 1971, once NHTSA had officially been formed, the

---

[39] Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 332 (D.C. Cir. 1968).

[40] *Id.* at 339, 342.

[41] *Id.* at 342–43.

[42] *Id.* at 343; *see* Mashaw & Harfst, *supra* note 34, at 276.

[43] *See Automotive Parts & Accessories Ass'n*, 407 F.2d at 338 ("The paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future.").

[44] *Id.* at 339, 343.

[45] *Id.* at 342.

[46] *Id.* at 337–38.

[47] *See* Mashaw & Harfst, *supra* note 34, at 278–79.

[48] *See, e.g.*, 49 C.F.R. § 571.117 (1972).

agency promulgated Standard 117 on retreaded tires.[49] Standard 117 set out performance standards for retreaded tires, which were expected to perform just as well as normal tires.[50] Predictably, tire retreading companies soon complained that Standard 117 would prove to be too restrictive on their businesses and would thereby erode profit margins.[51] Standard 117 required retreaded tires to withstand extreme forces during endurance and high speed testing, which tire manufacturers found to be too burdensome, as retreaded tires failed 28% of the time on the endurance test and 17% of the time on the speed test.[52] In *H & H Tire Co. v. U.S. Dep't of Transp.*, the plaintiff argued that NHTSA failed to test the retreaded tires for wear resistance before promulgating its standards for endurance and speed durability.[53] The court agreed.[54] Judge Wilbur Pell of the Seventh Circuit Court of Appeals critiqued NHTSA for "fail[ing] to evaluate reasonably the relevant, available data."[55] The court further found that NHTSA had failed to actually test the retreaded tires and instead merely produced vague production specifications without analyzing their cost effectiveness or stating when the manufacturers should begin the production of the new tires.[56] Unlike the regulations at issue in *Automotive Parts & Accessories Ass'n v. Boyd*, which avoided fatality by arbitrariness and irrationality, NHTSA did not prevail in *H & H Tire Co. v. U.S. Dep't of Transp.* where it failed to rationally connect its regulation to its research.[57]

The development of NHTSA safety regulations and litigation stemming from the new regulations did not end in the 1960s.[58] In 1976, NHTSA sued Ford seeking enforcement of a NHTSA Administrator's order determining

---

[49] *Id.*; *see National Highway Traffic Safety Administration*, FED. REG., https://perma.cc/9YDE-ZG49(last visited Nov. 28, 2021); *see also* Kevin M. McDonald, *Judicial Review of NHTSA-Ordered Recalls*, 47 WAYNE L. REV. 1301, 1306 (2001). *See generally How Does Retread Work*, TIRE RECAPPERS, https://perma.cc/X29L-T5XZ (last visited Nov. 28, 2021) (describing retreaded tires as affordable tires that have old tread removed and new tread "recapped" on the surface).

[50] *See How Does Retread Work*, *supra* note 49.

[51] *See* H & H Tire Co. v. U.S. Dep't of Transp., 471 F.2d 350, 353–54 (7th Cir. 1972).

[52] *Id.* at 354.

[53] *See id.* at 352.

[54] *Id.* at 355–56.

[55] *Id.* at 355.

[56] *See id.* at 354–55 ("The deleterious economic effect on the industry of required compliance with Standard 117 might be permissible if retreads unquestionably were major safety hazards . . . [h]owever, it appears . . . that . . . tires in general, retreaded tires included, pose no significant safety problem.").

[57] *See* Mashaw & Harfst, *supra* note 34, at 279–80.

[58] *See* McDonald, *supra* note 49, at 1322.

that Ford had engineered and installed on its vehicles defective windshield wipers, increasing the likelihood of a deadly collision caused by impaired vision.[59] In 1996, NHTSA sued Chrysler to force a recall of nearly 100,000 vehicles for faulty seat belt assemblies.[60] And in 2000, the Ford and Firestone Tire scandal erupted, resulting in a Congressional investigation into forty-six deaths and more than 300 injuries caused by Firestone tires that shredded on the highway.[61]

C. *The Law Pertaining to Technology and the Automobile*

As demonstrated by NHTSA's involvement in the industry, the law pertaining to automobiles and their operation on roadways is not impervious to technological developments, both related to the car and extraneous to its operation.[62] The 1990s signaled the creation, implementation, and legislation of traction control systems that helped to keep vehicles on the road during inclement weather or sudden and aggressive maneuvering.[63] The 2000s saw the expansion of the cellular telephone, a technology extraneous to the automobile that required legislation to ensure the safety of motorists and pedestrians alike from distracted drivers.[64] Over the last five years, autonomous driving technology has flooded the industry and changed the way Americans travel.[65] The development of autonomous driving technology is a giant step forward for the automobile, even though it may not match up directly with mid-twentieth century America's predictions that we would be piloting hovercrafts by now.[66] With such sophisticated technology comes great

---

[59] United States v. Ford Motor Co., 453 F.Supp. 1240, 1241–42 (D.D.C. 1978).

[60] United States v. Chrysler Corp., 158 F.3d 1350, 1351 (D.D.C. 1998).

[61] *See* Robert L. Simison, Karen Lundegaard, Norihiko Shirouzu & Jenny Heller, *How a Tire Problem Became a Crisis for Firestone, Ford*, WALL ST. J. (Aug. 10, 2000 11:59 PM EST), https://perma.cc/7SPQ-SLW2.

[62] *See* Andrew Hard, *20 Car Technologies We're Thankful For (And a Little Spoiled by)*, DIGITAL TRENDS (Nov. 19, 2017), https://perma.cc/SM8L-5UDF; Chris Lisinski, *New Law Targets Cell Phone Use While Driving*, WICKED LOCAL (Nov. 27, 2019, 7:00 PM ET), https://perma.cc/3Q2A-LRK2.

[63] *See Traction Control*, BRAIN ON BOARD, https://perma.cc/GV6N-CVKT (last visited Nov. 28, 2021) (stating that primitive traction control systems were first used on high end luxury vehicles in the late 1980s).

[64] *See Texting and Driving Laws and Fines by State*, I DRIVE SAFELY, https://perma.cc/EJ8J-EKP8 (last visited Nov. 8, 2021).

[65] *See* Ronan Glon & Stephen Edelstein, *The History of Self-Driving Cars*, DIGITAL TRENDS (July 31, 2020), https://perma.cc/SG9D-79J9.

[66] *See* Thom Dunn, *11 Ridiculous Future Predictions from the 1900 World's Fair–And 3 that Came*

responsibility for automakers, consumers, and legislators.[67] Videos of Tesla drivers sleeping behind the wheel of their cars while they travel down the highway shocked the conscience of the American public, not unlike the disbelief Americans experienced when faced with Nader's statistics on automobile-related deaths.[68] Autonomous vehicles make us question what the future has in store for American roadways.[69] These vehicles also make it evident that legislation is needed to make autonomous driving safer.[70] One of the ostensible benefits of autonomous vehicles—fewer collisions—cannot be fully realized if the drivers fail to operate them in accordance with manufacturer instructions, thereby causing more collisions.[71]

As our world becomes increasingly technologically focused, so have NHTSA's and state legislators' focuses with respect to driving laws.[72] This change in focus is appropriate, as more than 3,000 Americans were killed in 2019 because of distracted driving.[73] Just as the law adapted to activities extraneous to the mechanics of the vehicle, such as talking on a cellular phone, new regulations have been enacted to regulate technologies that are directly related to the car itself.[74] Electronic stability control systems and

True, UPWORTHY (Aug. 10, 2016), https://www.upworthy.com/11-ridiculous-future-predictions-from-the-1900-worlds-fair-and-3-that-came-true.

[67] *See Distracted Driving: Cellphone Use*, NCSL: NAT'L CONFERENCE OF STATE LEGISLATURES (July 20, 2021), https://perma.cc/QW75-EVTG (describing the problematic reality that technology in vehicles distracts drivers from the task of driving).

[68] *See* Aaron Holmes, *Watch These Unsettling Videos of All the Times Tesla Autopilot Drivers Were Caught Asleep at the Wheel in 2019*, BUS. INSIDER (Dec. 2, 2019, 12:48 PM), https://perma.cc/3T54-K3DN; NADER, *supra* note 28, at 1.

[69] Lora Kolodny & Katie Schoolov, *Self-Driving Cars Were Supposed to Be Here Already–Here's Why They Aren't and When They Should Arrive*, CNBC (Nov. 30, 2019, 9:00 AM EST),https://perma.cc/Y3QC-VY49.

[70] Robert Hamparyan, *Five Ways Self-Driving Cars Will Change Our Laws*, BLOOMBERG LAW (Aug. 27, 2019, 4:00 AM), https://perma.cc/WE5D-VFR9.

[71] *See* University of Exeter, *Public Blame Accidents on Drivers More Than Their Automated Cars When Both Make Mistakes*, SCI. DAILY (Oct. 28, 2019), https://perma.cc/56GX-9ZXB.

[72] *See Distracted Driving*, MASS.GOV, https://perma.cc/M8ZY-L9HU (last visited Nov. 28, 2021).

[73] *See Distracted Driving*, NHTSA: NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://perma.cc/4QEE-T3P8 (last visited Nov. 28, 2021) (defining distracted driving as activities that divert attention away from the road, including talking on the phone, text messaging, eating or drinking, and changing the radio station).

[74] *See, e.g.*, 49 C.F.R. § 571.126 (2015); MASS. GEN. LAWS ANN. CH. 90, § 8M (West 2019) (outlining restrictions on the use of cell phones while driving by junior operators); Nathan Bomey, *Backup Cameras Now Required in New Cars in the U.S.*, USA TODAY (May 2, 2018, 8:14 AM ET), https://perma.cc/YFG9-6LHE.

backup cameras are technologies that are installed in vehicles by manufacturers that make driving safer for everybody.[75] Until NHTSA decides to enact a law regulating the use of technology while driving, states are at liberty to determine what the law ought to be.[76] There are myriad varieties of cell phone use laws in effect in various states.[77] The variety of traffic laws among states makes sense where population density and road type vary so greatly throughout our country.[78] Other legislation, such as NHTSA's backup camera mandate of 2018, was sensible legislation aimed at eliminating tragic accidents.[79] Legislative developments, such as the backup camera mandate, came to fruition relatively quickly.[80] Backup cameras became popular in luxury vehicles in the mid-2000s and slowly trickled their way down throughout the market over the following fifteen years.[81] Cell phones plotted a similar trajectory.[82] It follows that where some new technology is created that poses a risk of threatening the public welfare, in the case of the cell phone, or the possibility of saving lives, in the case of the backup camera, that NHTSA and state legislatures act quickly in regulating that technology and its users.[83]

---

[75] *See Safety Tech in Cars Can Cut Backup Crashes by 78 Percent, Study Finds*, CBS NEWS (Feb. 22, 2018, 1:15 PM EST), https://perma.cc/XKB4-XJCY; *see also Automated Vehicles for Safety*, NHTSA: NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://perma.cc/U6T8-F9VZ (last visited Nov. 28, 2021).

[76] *See generally Cellphone Use Laws by State*, IIHS: INST. FOR HIGHWAY SAFETY, https://perma.cc/YZ28-M8RF (last updated Nov. 2021).

[77] *See id.*

[78] *See* MASS. GEN. LAWS ANN. CH. 90, § 17*; Driving Laws Vary from State to State*, DEFENSIVEDRIVING.COM (Aug. 26, 2011), https://perma.cc/UQ9S-HLM8; *see also* Glancy, *supra* note 19, at 653–54.

[79] *See Federal Motor Vehicle Safety Standard No. 111, Rear Visibility*, FED. REG., https://perma.cc/873H-WT63 (last visited Nov. 28, 2021); *see also* Adam Bulger, *After His Son's Tragic Death, This Doctor Fought to Put Backup Cameras in Every Car*, KIDSANDCARS.ORG (May 14, 2018, 9:40 AM),https://perma.cc/M2FT-ZKJD.

[80] *See* Peter Gareffa, *What You Need to Know About Backup Cameras*, EDMUNDS (Nov. 8, 2018), https://perma.cc/699W-ACGF.

[81] *See* i*d.*

[82] *See generally* Rahul Chowdhury, *Evolution of Mobile Phones: 1995 – 2012*, HONGKIAT, https://perma.cc/JDG8-4K46 (last updated Dec. 31, 2014).

[83] *See Safety Tech in Cars Can Cut Backup Crashes by 78 Percent*, *supra* note 75; *see also Automated Vehicles for Safety*, *supra* note 75.

D. *Autonomous Driving Technology Aids*

Automaker Tesla was founded in 2003.[84] Its first vehicle, the Roadster, a two-seat sports car, was released in 2008, as a fully-electric vehicle propelled by an army of lithium-ion batteries.[85] The Roadster exemplified Tesla's mission to prove that electric vehicles that are friendly to the environment do not have to be boring to drive.[86] After the Roadster, Tesla moved on to family-hauling vehicles—first with the Model S, which hit showrooms in 2012, and later released the Model X, in 2015.[87] Tesla led the pack not only with engineering long-range lithium-ion batteries, but also with autonomous driving technology, which first debuted on the Model S in 2014.[88] Since then, autonomous driving technology gradually migrated from engineering schools around the country and made its way into our vehicles.[89] But like the advent of the cellular phone and its unseemly marriage with motor vehicles, which produced tragic results, the implementation and use of autonomous driving technology has not been without its growing pains.[90] Operator misuse and technological failure have caused tragic accidents that demand the immediate attention of NHTSA and state legislators.[91] The first fatality involving self-driving technology came in May 2016 when Joshua Brown struck and passed beneath a tractor trailer in Williston, Florida.[92] Tesla took Mr. Brown's tragic death as an opportunity to remind consumers that its Autopilot system is merely an "assist feature" that requires drivers to keep their hands on the steering wheel at all times.[93] Despite Tesla's half-hearted and untimely disclaimer, its operators have

---

[84] *About Tesla*, TESLA, https://perma.cc/6PBT-YM3S (last visited Nov. 28, 2021).

[85] *Id.*

[86] *Id.*; *see* Jayant Ganesan, *Why Is the Toyota Prius Hated on So Much?*, DRIVETRIBE, https://perma.cc/95P5-L6WK (last visited Nov. 28, 2021) (explaining that the Prius, while efficient and affordable, is a slow and uninspiring car to drive).

[87] *See About Tesla*, *supra* note 84.

[88] *See* Brittany Chang, *Every Major Change Tesla Has Made to the Model S Throughout the Years*, BUS. INSIDER (Aug. 24, 2019, 8:47 AM), https://perma.cc/LK5M-PHDV.

[89] BARUCH FEIGENBAUM, AUTONOMOUS VEHICLES: A GUIDE FOR POLICYMAKERS 1 (2018), https://perma.cc/PZ3C-WJB6.

[90] *See generally Distracted Driving*, CDC, https://perma.cc/7F3R-LJXC (last visited Nov. 28, 2021); *see also* Holmes, *supra* note 68.

[91] *See* Noah Manskar, *Tesla on 'Autopilot' Slams into Connecticut Police Cruiser*, N.Y. POST (Dec. 9, 2019, 12:25 PM), https://perma.cc/76UA-PFF2.

[92] Neal E. Boudette, *Tesla's Self-Driving System Cleared in Deadly Crash*, N.Y. TIMES (Jan. 19, 2017), https://perma.cc/AF5Y-YD6M.

[93] *See* Electric Jen, *Ignoring Tesla Autopilot Warnings—What Happens?*, TESLARATI (Nov. 5, 2015), https://perma.cc/NHL9-6EVG.

devised ways to circumvent the requirement that they keep their hands on the steering wheel at all times.[94]

Tesla's Autopilot system is just one type of autonomous driving technology.[95] In 2013, NHTSA developed levels of automation pertaining to the degree of autonomy offered by the different manufacturers' technologies.[96] Levels one and two are only partial automation systems that, under certain conditions, can provide assistance with steering, braking, and accelerating.[97] Levels three and four represent the highest forms of automation available on the market today and are capable of controlling the vehicle with minimal operator involvement or intervention.[98] This Note is concerned only with levels three and four as these forms of autonomous driving technology provide the greatest degree of automation currently in the market.[99] Furthermore, operators of vehicles with levels three and four autonomous driving technology are the most likely to intentionally misuse the technology by making their cars think that they have their hands on the wheel when they are actually distracted by their cell phone or simply taking a nap.[100]

E. *Massachusetts Executive Order 572*

In October 2016, Massachusetts Governor Charlie Baker signed Executive Order 572 ("Order 572").[101] Governor Baker's timely effort to enact legislation in the Commonwealth, like in other states, recognized the prevalence of autonomous vehicle technology on the roads.[102] Like other

---

[94] *See, e.g.*, Fred Lambert, *Tesla Autopilot 'Buddy' Hack to Avoid 'Nag' Relaunches as 'Phone Mount' to Get Around NHTSA Ban*, ELECTREK (Sept. 9, 2018, 2:31 PM PT), https://perma.cc/3BCP-3GG5 (discussing how company 'Autopilot Buddy' continues to manufacturer a weight that is designed to grasp a Tesla steering wheel, mimicking the touch of a human hand).

[95] *See Path to Autonomy: Self-Driving Car Levels 0 to 5 Explained*, CAR AND DRIVER (Oct. 3, 2017), https://perma.cc/RM4G-T34H [hereinafter *Path to Autonomy*] (describing and comparing various autonomous driving technologies from different automotive manufacturers).

[96] *Automated Vehicles for Safety*, *supra* note 75.

[97] *Path to Autonomy*, *supra* note 95.

[98] *Automated Vehicles for Safety*, *supra* note 75.

[99] *See Automated Vehicles for Safety*, *supra* note 75.

[100] Andrew Krok & Sean Szymkowski, *Amazon Still Sells Versions of the Dangerous Autopilot Buddy Tesla Accessory*, CNET (Aug. 30, 2021, 1:40 PM PT), https://perma.cc/DNY6-AEKJ.

[101] To Promote the Testing and Deployment of Highly Automated Driving Technologies, Mass. Exec. Order No. 572 (Oct. 20, 2016), https://perma.cc/BC84-655U (last visited Nov. 30, 2021).

[102] *See Autonomous Vehicle Laws*, IIHS: INST. FOR HIGHWAY SAFETY, https://perma.cc/3KZE-8S8W (last updated Nov. 2021).

states' executive orders, Order 572 promotes the testing and deployment of highly automated driving technologies.[103] The states enacted autonomous vehicle technology legislation, despite an absence in Congressional action, after repeated stalemates between a Republican-controlled House of Representatives and a Democrat-controlled Senate precluded forthcoming legislation by NHTSA.[104] Order 572 assumes an overly-optimistic forecast of autonomous vehicle technology, describing its ostensible benefits in detail without acknowledging its obvious and inherent dangers.[105] Order 572 further fails to assess liability in the event of a collision where an operator misuses autonomous driving technology or where a manufacturer's defect is to blame.[106] Instead of acknowledging the dangers of autonomous vehicle technology and recommending urgent legislation to limit the likelihood of deadly crashes caused by autonomous vehicle technology, Order 572 merely creates a "special working group on autonomous vehicles" for testing autonomous vehicle technology to ensure the "social benefits that may accrue" from it.[107]

II. The Issue Being Addressed

While Order 572 carefully toes the line between incentivizing autonomous vehicle technology in Massachusetts and protecting the public welfare, it does too little to ensure that harsh penalties will be levied against operators of vehicles who abuse autonomous technology.[108] If the Massachusetts legislature hastily legislates autonomous driving, then there is a great risk of operator abuse and misuse of the feature, especially on Massachusetts' narrow and confusing roads.[109] Like Order 572, NHTSA's

---

[103] Mass. Exec. Order No. 572.

[104] *See* Andrew J. Hawkins, *Congress Takes Another Stab at Passing Self-Driving Car Legislation*, THE VERGE (July 28, 2019, 10:00 AM EDT), https://perma.cc/4MLB-UNGD; *see also* Justin T. Westbrook, *NTSB Calls Out Tesla, Apple and NHTSA Over Fatal Autopilot Crashes and Sloppy Regulating*, JALOPNIK (Feb. 25, 2020, 4:52 PM), https://perma.cc/G857-SRFG.

[105] *See* Mass. Exec. Order No. 572. *See generally* Tracy Hresko Pearl, *Fast & Furious: The Misregulation of Driverless Cars*, 73 N.Y.U. ANN. SURV. AM. L. 19, 20–21 (2017).

[106] *See* Mass. Exec. Order No. 572.

[107] *Id.*; *see* Michelle L.D. Hanlon, *Self-Driving Cars: Autonomous Technology That Needs a Designated Duty Passenger*, 22 BARRY L. REV. 1, 25 (2016) (calling for a "designated duty passenger law" to reduce accident-related deaths caused by faulty technology or misuse of technology).

[108] *Compare* Mass. Exec. Order No. 572, *with* CAL. VEH. CODE § 38750(d)(3) (West 2017) (stating that operators of autonomous vehicles who do not safely operate their vehicles may have their licenses revoked, suspended, or denied).

[109] *See generally* Martin Finucane, *Boston's Streets Do Go in All Sorts of Directions. These Charts*

outlook on the prospect of an America that fills its roads with autonomous vehicles is optimistic.[110] NHTSA's webpage dedicated to self-driving technology describes autonomous vehicles as "helping to save lives and prevent injuries."[111] NHTSA would certainly be justified in closely regulating manufacturers of autonomous driving technology and operators of vehicles who use such technology because such regulation is within its range of authority and ample, credible research supports such regulation.[112] Tesla is not alone in feverishly engineering autonomous driving technology with the vision that the future is at its fingertips.[113] Volvo purports that its IntelliSafe Assist autopilot system will change the world by reducing "driver strain in tedious driving situations" and by increasing safety margins.[114] It takes only one simple Google search to locate countless collisions involving autonomous vehicles.[115] It follows that Massachusetts' vested interest in avoiding tragedies ensures that as the prevalence of autonomous cars increases, drivers obey not only existing traffic laws, speed limits, and stop signs, but also laws specific to autonomous vehicles and operators.[116] Furthermore, Massachusetts must not wait for federal legislation that may never come as the need for protection of its citizens is urgent.[117]

Prove It, BOS. GLOBE (July 12, 2018, 11:32 AM), https://perma.cc/4L5V-C4R2 (describing Boston's confusing streets that owe their planning to the eighteenth century).

110 *See Automated Vehicles for Safety*, *supra* note 75.

111 *Automated Vehicles for Safety*, *supra* note 75.

112 *See* Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 342–43 (D.C. Cir. 1968).

113 *See, e.g.*, *Innovating the Future of Driving. Again.*, CADILLAC, https://perma.cc/TF2Q-2BXL (last visited Nov. 30, 2021); *IntelliSafe Assist*, VOLVO, https://perma.cc/74Z6-J5CY (last visited Nov. 30, 2021).

114 *IntelliSafe Assist*, *supra* note 113.

115 *See, e.g.*, Clifford Atiyeh, *NHTSA Looking into Fatal Tesla Model S Crash in California*, CAR AND DRIVER (Jan. 3, 2020), https://perma.cc/BB7C-3FMD; Bill Howard, *Another Tesla Crash, Another Investigation Into Autopilot*, EXTREMETECH (Dec. 17, 2019, 1:03 PM), https://perma.cc/C8SA-626F; Tom Krisher, *3 Crashes, 3 Deaths Raise Questions about Tesla's Autopilot*, ASSOCIATED PRESS (Jan. 3, 2020), https://perma.cc/G3ML-TR74.

116 *See* Glancy, *supra* note 19, at 654.

117 *See* Hawkins, *supra* note 104; *see also* David Butler, *Consumer Reports: Uber Crash Should Be 'A Wake-Up Call' for Companies Developing Self-Driving Cars, DOT, and State Governments*, CONSUMER REP. (Nov. 19, 2019), https://perma.cc/G4EX-FX9G.

ANALYSIS

III. Order 572 Is Too Broad in Scope and Does Not Obligate Operators to Use Extra Caution

There is no disputing that driving is a difficult task that demands the undivided attention of motorists who operate their vehicles on our roads.[118] Even the most competent drivers may encounter situations while driving that no one could predict or safely avoid.[119] It is reasonable to ask how we can then be comfortable with allowing autonomous driving technology to make critical decisions, such as protecting the vehicle's occupants or protecting pedestrians.[120] Framed in this way, the optimistic language of Order 572 fails to ensure that the autonomous driving technology that is to be tested on Massachusetts' roads is congruous with the safety of the general public.[121] Governor Baker's Order 572 does not affirmatively obligate manufacturers of autonomous driving technology to maintain records of their testing procedures, including the details of accidents involving self-driving vehicles.[122] Order 572 is facially concerned primarily with the deployment of autonomous driving technology as a means of "support[ing] innovation" in the sector.[123]

The focus on reasonable and calculated legislation of autonomous driving technology takes a back seat to enticing manufacturers to enter the market where the special working group created by Order 572 is tasked only with "consider[ing] . . . changes to statutes or regulations" particular to the operation of autonomous vehicles.[124] The special working group created by Order 572, comprised of various officials, including the Secretary of Transportation and the Registrar of Motor Vehicles, is responsible for flooding the Commonwealth's roadways with vehicles equipped with

---

[118] *See Ensuring Your Competence in Split Second Road Decisions*, DRIVEN AUTOS MAG. (Apr. 17, 2018), https://perma.cc/FNM2-PBB8 (stating that split-second situational difficulties are common occurrences on roadways that drivers encounter).

[119] *See, e.g.*, NBC Washington Staff, *Beltway Driver Injured After Road Debris Goes Through Windshield, Official Says*, NBC WASH. (Nov. 26, 2019), https://perma.cc/TWP5-Y96K.

[120] *See* Steven M. Sweat, *The Moral Dilemma for Self-Driving Cars*, CAL. ACCIDENT ATT'YS BLOG (June 28, 2016), https://perma.cc/DM6A-K2HW; *see also* Hanlon, *supra* note 107, at 2.

[121] *See* To Promote the Testing and Deployment of Highly Automated Driving Technologies, Mass. Exec. Order No. 572 (Oct. 20, 2016), https://perma.cc/BC84-655U (last visited Nov. 30, 2021).

[122] *See id.*; *see also* CAL. VEH. CODE § 38750(G) (West 2017).

[123] *See* Mass. Exec. Order No. 572.

[124] *See id.*

autonomous driving technology and ensuring their "safe development."[125] "Safe development" is a misnomer, as there is no requirement to collect data regarding technology malfunctions or accidents involving autonomous driving aids.[126] Furthermore, public safety is an afterthought of Order 572 where manufacturers of autonomous driving aids must only provide to the Commonwealth "information regarding the operators of any such vehicles, including a description of the training that the operators have been provided."[127] Requiring manufacturers to provide other critical information, including driving record data that may indicate whether the operator is likely to be involved in a collision or drive recklessly based on past citations, is also notably missing from Order 572.[128]

If Governor Baker enhances the language of Order 572 to affirmatively require that the special working group recommend substantive changes to the law particular to the operation of autonomous vehicles, he must look no further than other governors' executive orders and other states' statutes currently in effect.[129] In March 2018, Arizona Governor Douglas Doucey amended his executive order on the development of autonomous driving technology with the public welfare in mind, requiring that autonomous driving systems comply with existing state traffic and safety laws as well as other licensing and regulatory requirements.[130] Governor Doucey's executive order also contains a definitions section that references existing definitions under Arizona state law for certain terms including "person," "drive," and "dynamic driving task."[131] By contrast, Governor Baker's Order 572 fails to require the special working group to suggest new legislation or changes to existing Massachusetts' traffic laws, stating that it will be interpreted "consistent with federal law and policy."[132] Governor Doucey's executive order also takes into account the efficacy of autonomous driving technology with respect to the split-second decision making that is often required of drivers, thereby placing the burden on manufacturers to ensure the technology is capable of functioning at a high level in all situations.[133]

---

[125] *See id.*

[126] *See id.*

[127] *Id.*

[128] *See id.*

[129] *See* Advancing Autonomous Vehicle Testing and Operating: Prioritizing Public Safety, Ariz. Exec. Order No. 2018-04 (Mar. 1, 2018), https://perma.cc/M9DB-CV4B (last visited Nov. 30, 2021).

[130] *Id.*

[131] *Id.*

[132] Mass. Exec. Order No. 572; *but see, e.g.*, NEV. REV. STAT. ANN. § 482A.100 (West 2017).

[133] Ariz. Exec. Order No. 2018-04 (describing one type of "dynamic driving task" as "object

The tasks of Governor Baker's special working group are only loosely tied to ensuring the safety of Massachusetts' motorists, as Order 572, on its face, primarily encourages manufacturers of autonomous vehicle technology to enter the Massachusetts market as a means to strengthen the economy.[134] An approach to autonomous vehicle technology appropriate for Massachusetts must be guided by caution that limits its use until its manufacturers can ensure that the technology can manage to make the correct decision in an emergency situation.[135] Otherwise, tragedy will be around every corner.[136]

IV. Massachusetts Must Look to Existing State Laws to Create Its Own Statutory Provisions

Revisions to Order 572 must ensure not only that manufacturers of autonomous vehicle technology are held to the highest engineering standards, but also that operators of autonomous vehicles are held to higher standards of care while operating their vehicles.[137] In December 2016, NHTSA completed its investigation into a fatal car accident involving Tesla's Autopilot System, finding "no specific flaw in the technology and taking no action against the carmaker."[138] If the autonomous driving technology is found not to be at fault, then we must scrutinize operators who misuse the technology and cause deadly accidents.[139] Massachusetts' laws must recognize that when a vehicle is being operated using autonomous vehicle technology, instead of absolving its driver of liability for accidents, a heightened duty must be imposed on its driver for the safe operation of the vehicle.[140] Massachusetts law must require that autonomous vehicles clearly and conspicuously alert their operator when autonomous driving software

---

and event response execution"); *see* Kylie Stevens, *'My Head Hurts, but Most of All – My Heart Hurts:' Family of a Promising Teen Cyclist Recall the Heartwrenching Moment a Driver's Split-Second Decision Changed Their Lives Forever*, DAILY MAIL (Oct. 24, 2019, 2:18 AM EST), https://perma.cc/HB77-FECQ.

[134] *See* Mass. Exec. Order No. 572.

[135] *See generally* UNIV. OF WASH. TECH. POLICY LAB., DRIVERLESS SEATTLE (2017), https://perma.cc/T3SA-5AYL.

[136] *See, e.g.*, Steve Dent, *Uber Self-Driving Car Involved in Fatal Crash Couldn't Detect Jaywalkers*, ENGADGET (Nov. 6, 2019), https://perma.cc/L6SN-4CNM; *see also* Hanlon, *supra* note 107, at 9–15.

[137] *See generally* Hanlon, *supra* note 107, at 17.

[138] Alan Ohnsman, *US Investigation of Deadly Tesla Autopilot Crash Finds No Defect*, FORBES (Jan. 19, 2017, 1:26 PM EST), https://perma.cc/2YZD-44MJ.

[139] *See* Sophia H. Duffy & Jamie Patrick Hopkins, *Sit, Stay, Drive: The Future of Autonomous Car Liability*, 16 SMU SCI. & TECH. L. REV. 453, 471 (2013).

[140] *See* Hanlon, *supra* note 107, at 17.

is engaged and available and, more importantly, when such software fails or is unavailable, so that operators cannot dispute whether they were using autonomous driving aids.[141] Governor Baker must look no further than other states' statutes that comment on the liability of occupants in a motor vehicle while leading Massachusetts in enacting effective legislation.[142]

A. *Florida's Passenger Duty Doctrine*

Like other states, Florida imposes a legal duty whenever a "human endeavor creates a generalized and foreseeable risk of harming others."[143] In *Roos v. Morrison*, the Florida District Court of Appeals recognized that where a person's conduct creates a foreseeable zone of risk, the person has a duty to either "lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses."[144] The Florida Supreme Court has posited that a person whose conduct creates a reasonably foreseeable risk is required to "exercise prudent foresight" where it is possible that other people may be injured.[145] This reasoning extends to purchasers of automobiles who drive their two ton rolling masses of metal on public roads, subjecting themselves, other motorists, and pedestrians to risk of injury or death, or a foreseeable zone of risk.[146] Florida did not hesitate to extend the doctrine of the foreseeability of risk to passengers in vehicles, noting "that certain circumstances can give rise to a duty on the part of a mere passenger to make reasonable attempts 'through suggestion, warning, protest or other means suitable to the occasion, to control the conduct of the driver.'"[147] The court clarified its passenger duty rule by holding that it applies only where the passenger knows or should know that the driver of the vehicle that the passenger is riding in is not operating the vehicle "compatible with the safety of his passenger."[148] While the *Roos* holding relating to a passenger's duty was not crafted under the framework of autonomous vehicle technology, it is nonetheless instructive when considering how a legislature

---

141 *See* UNIV. WASH. TECH. LAW AND PUB. POLICY CLINIC, AUTONOMOUS VEHICLE LAW REPORT AND RECOMMENDATIONS TO THE ULC BASED ON EXISTING STATE AV LAWS, THE ULC'S FINAL REPORT, AND OUR OWN CONCLUSIONS ABOUT WHAT CONSTITUTES A COMPLETE LAW 17–18 (2014), https://perma.cc/CHV7-MQQT [hereinafter AUTONOMOUS VEHICLE LAW REPORT].

142 *See* Hanlon, *supra* note 107, at 18.

143 McCain v. Florida Power Corp., 593 So. 2d 500, 503 (Fla. 1992).

144 913 So. 2d 59, 63 (Fla. Dist. Ct. App. 2005); *see* Kaisner v. Kolb, 543 So. 2d 732, 735 (Fla. 1989).

145 *McCain*, 593 So. 2d at 503.

146 *See* Hanlon, *supra* note 107, at 18.

147 *Roos*, 913 So. 2d at 64 (quoting Knudsen v. Hanlan, 36 So. 2d 192, 194 (Fla. 1948)).

148 *Id.* at 64.

might codify a system of laws particular to autonomous vehicle technology.[149]

Once an operator of an autonomous vehicle utilizes the vehicle's autonomous technology, thereby relinquishing control over the speed and direction of the vehicle, the operator becomes a passenger free to read a book or enjoy a snack so long as the operator stays minimally involved in the task of driving by keeping one hand on the steering wheel.[150] It follows, then, that Florida's passenger duty doctrine would apply to operators of autonomous vehicles who become passengers by relinquishing control of their vehicles, subjecting them to a heightened duty to ensure that the driver of the vehicle, the technology, is operating the vehicle in a manner "compatible with the safety of his passenger."[151] Application of this rule would cure issues flowing from the improper use of autonomous technology, including operators who sleep while their vehicles drive them down the highway, by placing an affirmative duty on them to ensure that their autonomous vehicles are being operated safely.[152] Such a duty is an appropriate remedy that must be implemented until consumers are confident in the ability of autonomous vehicle technology to make split-second decisions on their behalf that may have dire consequences.[153] Although fully autonomous vehicles are not yet widespread on American roads, as evidenced by Order 572 and other states' executive orders authorizing only the testing of autonomous vehicle technology on roadways, it makes logical sense to implement such a duty now so that consumers are aware of the requirements of ownership of an autonomous vehicle.[154]

B. *Pennsylvania's Sensible Legislation Related to Autonomous Driving Technology*

In June 2016, Pennsylvania Department of Transportation Secretary Leslie Richards launched the Pennsylvania Automated Vehicle Task Force

---

[149] *See* Hanlon, *supra* note 107, at 18–19.

[150] Joey Cheng, *A New Passenger Experience with Autonomous Vehicles*, VIA TECH., INC. (Aug. 12, 2019), https://perma.cc/9WPZ-L3DN.

[151] *See* Hanlon, *supra* note 107, at 20–21 (quoting *Roos*, 913 So. 2d at 64).

[152] *See, e.g.*, Holmes, *supra* note 68; *see also* Hanlon, *supra* note 107, at 22.

[153] *See* Jennings Brown, *Tesla Autopilot Malfunction Caused Crash That Killed Apple Engineer, Lawsuit Alleges*, GIZMODO (May 1, 2019, 5:00 PM), https://perma.cc/H5TB-JBSY.

[154] *See, e.g.*, To Promote the Testing and Deployment of Highly Automated Driving Technologies, Mass. Exec. Order No. 572 (Oct. 20, 2016), https://perma.cc/BC84-655U (last visited Nov. 30, 2021); *see also* Hanlon, *supra* note 107, at 21.

("Task Force").[155] Pennsylvania's foray into autonomous vehicles was substantially more far-reaching than Order 572.[156] Pennsylvania constructed a "state-of-the-art training and testing facility" specifically for autonomous vehicle technology aimed at assessing the efficacy of self-driving cars in "traffic incident management" and work zones.[157] Pennsylvania also commissioned a one-year project to analyze the effect autonomous vehicle technology would have on state infrastructure over the next twenty years.[158] Involving its citizens in the burgeoning world of autonomous driving technology on its roadways, Pennsylvania created an interactive frequently-asked-questions section on its website that answers questions about autonomous vehicles.[159] Lastly, Pennsylvania posted on its Department of Transportation website a "Notice of Testing" application that autonomous driving testers must complete and submit prior to getting state approval.[160] The Notice of Testing requires that testers provide test driver biographical information, including whether they have completed enhanced driver training courses, and that test vehicles are equipped with data recorders in the event of a collision.[161] Pennsylvania has clearly and seriously considered what it means to have vehicles equipped with autonomous driving technology operating on its roads, and these measures demonstrate that it has placed its citizens' safety at the forefront of the discussion.[162] Notably, none of these precautions are included in Order 572, but they must be if Massachusetts seeks to ensure the safety of the general public.[163]

C. *Defining Key Statutory Terms and Revising Licensing Standards*

Implementation of a passenger duty for operators of autonomous vehicles must coincide with redefining key statutory terms currently in

---

155 *AV Policy Task Force*, PA. DEP'T OF TRANSP., https://perma.cc/WB8B-CYCY (last visited Nov. 30, 2021).

156 *See CAV Initiatives: PennSTART*, PA. DEP'T OF TRANSP., https://perma.cc/FMY3-YTVA (last visited Nov. 30, 2021).

157 *See id.*

158 *See id.*

159 *Frequently Asked Questions*, PA. DEP'T OF TRANSP., https://perma.cc/LW6Z-JS5E (last visited Nov. 30, 2021).

160 *AV Testing*, PA. DEP'T OF TRANSP., https://perma.cc/9BLZ-VRU2 (last visited Nov. 30, 2021).

161 *Id.*

162 *See, e.g.*, *id.*

163 To Promote the Testing and Deployment of Highly Automated Driving Technologies, Mass. Exec. Order No. 572 (Oct. 20, 2016), https://perma.cc/BC84-655U (last visited Nov. 30, 2021).

effect with respect to the operation of motor vehicles.[164] Massachusetts must look to other jurisdictions in devising a set of statutory definitions particular to the operation of vehicles using autonomous technology.[165] Conspicuously, Massachusetts has no statutory definitions pertaining to autonomous vehicles or their operators.[166] Based on the definitions used by Nevada, California, and Florida, an appropriate definition of "autonomous vehicle" for Massachusetts would be "any vehicle equipped with autonomous driving technology that can drive the vehicle on which it is installed for any duration of time without the constant assistance of a human operator."[167] Language such as "any duration of time" will sufficiently cover all levels of autonomous driving technology, from temporary autonomous aids to fully autonomous technologies.[168]

California has also enacted a statutory provision requiring that test drivers of autonomous vehicles have clean driving records.[169] If test drivers of autonomous vehicles are required to have driving records with no at-fault accidents involving injury or death and with no convictions for driving under the influence of alcohol or drugs, then it reasonably follows that such restrictions must be placed on the consuming public until autonomous vehicle technology can function at a high enough level so that accidents are not possible.[170] California further left open the question of whether to require additional licensing on operators of autonomous vehicles.[171] Where the task of driving has transformed so substantially that the standard Massachusetts permit and licensing tests are no longer useful tools in preparing drivers of autonomous vehicles for operation on Massachusetts roads, the state must revise licensing assessments.[172] Massachusetts must revise its permit and

---

164 *See generally* MASS. GEN. LAWS ANN. CH. 90, § 1 (West 2020) (providing definitions for terms including "operator," "manufacturer," and "motor vehicle").

165 *See, e.g.*, NEV. REV. STAT. ANN. § 482A.030 (West 2017); CAL. VEH. CODE § 38750 (West 2017); FLA. STAT. ANN. § 316.003 (West 2019).

166 *See* MASS. GEN. LAWS ANN. CH. 90, § 1.

167 *See* NEV. REV. STAT. ANN. § 482A.030; CAL. VEH. CODE § 38750; FLA. STAT. ANN. § 316.003; *see also* AUTONOMOUS VEHICLE LAW REPORT , *supra* note 141.

168 *The 6 Levels of Vehicle Autonomy Explained*, SYNOPSYS, https://perma.cc/2JG9-YCFD (last visited Nov. 30, 2021). *See generally Path to Autonomy*, *supra* note 95 (describing the various levels of autonomous driving technology).

169 *See* CAL. CODE REGS. TIT. 13, § 227.34 (2020).

170 *See id.*; *see also* AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141, at 9.

171 CAL. VEH. CODE § 38750(d)(3) ("The department may establish additional requirements . . . regarding . . . new license requirements for operators of autonomous vehicles . . . .").

172 *See Automated Vehicles for Safety*, *supra* note 75; *see also, e.g.*, *Free MA RMV Diagnostic Test*

licensing tests by making assessments particular to the task of driving an autonomous vehicle, including the types of roads best suited to self-driving systems and whether driver involvement is required or not.[173] Drivers must also be required to certify that they have read the manufacturer's instructions regarding the operation of the autonomous driving system, as variety in the marketplace means no single test can encapsulate all systems.[174]

Other statutory definitions must be added or changed to ensure that the public is protected from the dangers of autonomous vehicle technology.[175] Crash data recorders must become compulsory components of autonomous driving technology.[176] In California, autonomous vehicle manufacturers must install recorders that capture and store "autonomous technology sensor data" for at least thirty seconds before a collision between an autonomous vehicle and another vehicle, an object, or a person.[177] Such a technology will not only resolve legal disputes arising out of crashes involving autonomous vehicle technology, but will also provide answers as to the genesis of a crash and whether the technology used was faulty, or whether the driver is liable for the intentional or negligent misuse of the technology.[178] Such information would be invaluable to both Massachusetts and the manufacturers and would allow for further research and design to limit the likelihood of future accidents.[179]

Massachusetts must also require that autonomous vehicles be in compliance with state laws regarding the operation of vehicles on state roadways.[180] These requirements include, generally, the ability to obey the posted speed limit at all times; to decipher traffic lights, road signs, and

2021, DRIVING TESTS, https://perma.cc/KL79-38W5 (last visited Nov. 30, 2021).

[173] *See* Zvi Greenstein, *Creating A Driver's License Test for Self-Driving Cars*, NVIDIA (Oct. 10, 2018), https://perma.cc/WUE7-KQBJ.

[174] AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141, at 19. *See generally* Doug Demuro, *7 Best Semi-Autonomous Systems Available Right Now*, AUTOTRADER (Jan. 432018, 7:00PM), https://perma.cc/TT5L-XMED (describing the differences between the various autonomous driving systems produced by each manufacturer).

[175] *See* AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141, at 16–18.

[176] *See generally Event Data Recorder (EDR) for Automated Driving*, EUR.OPEAN ASS'N FOR ACCIDENT RESEARCH AND ANALYSIS (Sept. 19, 2017), https://perma.cc/MZD3-W632 (describing an event data recorder as a technology that records material information relating to the operation of a vehicle that is useful when determining the cause of an accident).

[177] CAL. VEH. CODE § 38750(c)(1)(G) (West 2017).

[178] *See* AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141, at 13.

[179] *See* AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141, at 12–13.

[180] *See generally* AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141.

warning signals; to recognize and respond to turn signals indicated by other vehicles; to yield to pedestrians; and to activate the turn signals when appropriate.[181] Where an autonomous vehicle fails to perform one of these functions and causes a collision of any type, the crash data recorder will be able to discern whether the crash was the result of a technological defect or operator misuse.[182] Other roadway encounters that autonomous driving technology must be able to competently respond to include emergency service vehicles responding to calls, such as police cars and firetrucks, and impromptu construction work in which vehicles may need to suddenly stop or change lanes.[183]

D. *Changes to the Auto Insurance Industry*

In many states in the United States, drivers are required to obtain an auto insurance policy before they may be licensed to operate their vehicle on that states' roadways.[184] Like all other types of insurance, higher risk insured policies are assessed higher premiums and higher deductibles to limit the likelihood and amount of money that the insurance company will have to contribute towards the resolution of a claim.[185] Typical high-risk auto insurance policies are written to insure teenage drivers, elderly drivers, drivers with poor credit or no credit, and drivers with storied driving records that include citations for speeding and road-rage and convictions for driving under the influence.[186] These drivers are seen as high-risk drivers who are likely to be involved in crashes or other costly insurance-related claims.[187] Some insurers even use technology to track their insured's driving

---

181 AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141, at 14.

182 AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141, at 12-13; *see* Eric Loveday, *Watch Tesla Model S on Autopilot Hit Cement Divider: Video*, MOTOR 1 (Mar. 26, 2019, 9:40 AM ET), https://perma.cc/U6UQ-872P.

183 *See* AUTONOMOUS VEHICLE LAW REPORT, *supra* note 141 at 14; *see also* Ira Boudway, *First Responders Work with Developers to 'Teach' Self-Driving Cars to Pull Over*, TRANSPORT TOPICS (Mar. 8, 2019, 11:30 AM EST), https://perma.cc/S6YT-MF5K (stating that Tesla's Autopilot autonomous driving technology is not equipped to detect and stop for emergency sirens but that the artificial intelligence industry is "motivated to find answers").

184 *See generally* Mila Araujo, *Minimum Car Insurance Requirements by State*, THE BALANCE, https://perma.cc/2Z3Y-8NJW (last updated Oct. 7, 2021) (listing the states that make auto insurance policies compulsory and describing the different levels of coverage that are required).

185 *See generally What Is High-Risk Insurance*, RAMSEY SOLUTIONS (Apr. 2, 2020) https://perma.cc/WDT7-L3G2 (describing what a high-risk auto insurance policy may look like and how auto insurance companies assess high-risk policies).

186 *Id.*

187 *Id.*

habits, gathering information that can be used to adjust rates or even cancel coverage altogether if the results are troubling.[188] The history of serious crashes caused by vehicles using autonomous driving technology is problematic.[189] Based on the available data regarding the history of crashes and equipment malfunction involving autonomous driving technology, some insurers have increased rates for autonomous vehicles.[190]

Massachusetts requires minimum auto insurance policies as a way of protecting its citizens from high-risk operators.[191] Failure to maintain the minimum coverage permits Massachusetts state law enforcement officials to seize registration plates.[192] Although Massachusetts' statutorily-required minimum auto insurance rates have remained the same since the 1980s, autonomous vehicle technology presents a substantial risk that is deserving of its own higher minimum requirements.[193] The auto insurance industry's response to the increase in autonomous driving-related crashes by raising premiums and deductibles is a clear signal to Massachusetts that it, too, must raise minimum insurance requirements for auto insurance policies on vehicles with levels three and four autonomous driving technology until accidents involving such technology are few and far between.[194]

CONCLUSION

Autonomous driving technology is becoming more widespread in our neighborhoods. It is the way of the future. However, as it weaves its way into the fabric of our country, we must carefully monitor its development. Keeping American motorists and pedestrians safe must be the preeminent

---

[188] *See generally* Kristen Hall-Geisler, *How Do Those Car Insurance Tracking Devices Work?*, U.S. NEWS (Aug. 27, 2021), https://perma.cc/H3YD-BULC (stating that in 2013, Progressive began using data collected from in-car tracking devices to penalize insureds for dangerous driving habits, such as aggressive acceleration or braking).

[189] *See, e.g.*, Howard, *supra* note 115; *see also* Westbrook, *supra* note 104 (describing the findings of a National Transportation Safety Board investigation into a Tesla crash in which the vehicle's autopilot system steered the car directly into a crash barrier on a highway off-ramp in California, killing the operator).

[190] *See* Katie Burke, *Tesla Owners Should Pay More for Insurance, AAA Says*, AUTOMOTIVE NEWS (June 4, 2017, 1:00 AM) https://perma.cc/TLW6-PPXR ("'Teslas get into a lot of crashes and are costly to repair afterward.'").

[191] See Araujo, *supra* note 184. *See generally* MASS. GEN. LAWS ANN. CH. 90, § 34A–R (West 2020).

[192] MASS. GEN. LAWS ANN. CH. 90, § 34P (West 2020).

[193] *See* Krisher, *supra* note 115.

[194] *See* Burke, *supra* note 190; *see also Automated Vehicles for Safety*, *supra* note 75.

concern as the technology grows and becomes ubiquitous over the next century. Until autonomous driving technology manufacturers can prove that their artificial intelligence can competently perform dynamic driving tasks, such as evading a deer leaping from the roadside at 60 miles-per-hour, Americans must be vigilant against hastily-crafted legislation that sacrifices their safety in exchange for the economic benefit of encouraging manufacturers to bolster their states' economies. Autonomous driving systems must be checked at the door. Operators must be assessed for their understanding of how their vehicles' self-driving systems work. Operators who intentionally or negligently misuse their vehicles' self-driving aids and cause accidents must be penalized under the law. Statutory amendments must be enacted specifically for autonomous vehicles consistent with other states, and minimum insurance rates must be adjusted under the law to reflect the increased risk of operating vehicles with autonomous driving technology. This important technology must move forward, but only as we responsibly allow.

* * * *

Are All Felons Liars? Reexamining Federal Rule of Evidence 609 Under the Lens of Equal Protection

Emily Horjus[*]

INTRODUCTION

By the end of 2016, the Bureau of Justice Statistics estimated that state and federal corrections departments had jurisdiction over at least 1,506,800 prisoners with sentences of more than one year, with imprisonment rates at 582 per 100,000 residents aged eighteen or older.[1] Of those prisoners, 487,300 of them were estimated to be Black, accounting for 32% of the overall prison population.[2] To put these numbers in context, the Census Bureau estimated the population of the United States in July of 2019 to be 328,239,523 people, with 13.4% of the population identifying as Black.[3] This disparity between the percentage of Black people in the general population and the percentage of Black people in prison is not an unknown issue in the world of criminal law.[4] The very existence of this discrepancy demonstrates that the procedures of the criminal system will and do disproportionately impact the Black population of this country.[5]

---

[*] J.D., New England Law | Boston (2022). B.S., English Education, Boston University (2009).

[1] Prisoners in 2016, NJC No. 251149, at 1 (DOJ Bureau of Just. Stat. Jan. 2018), https://perma.cc/L5HE-2UCD; Prisoners in 2018, NCJ No. 253516, at 1 (DOJ Bureau of Just. Stat. Apr. 2020), https://perma.cc/CZZ3-HDJ5 (noting that the number of prisoners under state and federal jurisdiction at the end of 2018 was 1,465,200).

[2] Prisoners in 2016, *supra* note 1, at 5; see Prisoners in 2018, *supra* note 1, at 6 (noting that the number of Black prisoners under state and federal jurisdiction was 465,200).

[3] *Quick Facts*, U.S. CENSUS BUREAU, https://perma.cc/734C-4KBQ (last visited Dec. 6, 2021).

[4] *See* Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599, 604–05 (2007).

[5] *See* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE xiv (2003) ("Police decisions to stop, search and arrest, and prosecutorial decisions to charge, clearly have a massively disproportionate

Individuals convicted of serious criminal offenses punishable by more than a year are often referred to simply as "felons."[6] While the number of felons currently in the correctional system is carefully tracked and estimated, the number of released felons in the general population of the United States remains unknown.[7] Studies suggest that because more than six hundred thousand convicts are released from prison every year, there may be as many as twenty million formerly incarcerated felons attempting to live out their lives "as fathers and mothers, as breadwinners, as citizens—as people who make the most of a second chance."[8] Yet, what kind of a second chance are they given, when statistics demonstrate that an overwhelming number of them reenter the mechanisms of the criminal system within three years of being released?[9] What kind of a second chance are the formerly incarcerated given when their past records are used against them to paint them all as liars, as witnesses that a jury should give no credence to?[10] Furthermore, if the prior convictions used to challenge the truthfulness of felons are themselves questionable, how can the use of past convictions to impeach a witness's credibility rationally be allowed?[11] All of these questions lead to the conclusion that there must be a re-examination of how the Federal Rules of Evidence, and Rule 609 in particular, deal with the formerly incarcerated.[12]

---

impact on black Americans."); *Mass Incarceration*, ACLU, https://perma.cc/R6G9-FBDM (last visited Dec. 6, 2021) ("One out of every three Black boys born today can expect to go to prison in his lifetime, as can one of every six Latino boys—compared to one of every 17 white boys.").

[6] *See, e.g.*, Nicholas Eberstadt, *Why is the American Government Ignoring 23 Million of its Citizens?*, WASH. POST (Mar. 31, 2016), https://perma.cc/TAE5-L68H; Gary Fineout, *Florida Loses Appeals Court Ruling on Felon Voting Law*, POLITICO (Feb. 19, 2020, 11:17 AM EST), https://perma.cc/CU8Q-KQPW.

[7] Eberstadt, *supra* note 6.

[8] Eberstadt, *supra* note 6.

[9] *See* 2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014), NJC No. 250975, at 1 (DOJ Bureau of Just. Stat. May 2018), https://perma.cc/VPK5-6KTN [hereinafter 2018 Update] (noting that four out of nine state prisoners released in 2005 were arrested again at least once during the first year after release, and one out of three were arrested during the third year after release).

[10] *See* FED. R. EVID. 609; *see also* Timothy R. Rice, *Restoring Justice: Purging Evil from Federal Rule of Evidence 609*, 89 TEMP. L. REV. 683, 685–86 (2017).

[11] *See* DRIPPS, *supra* note 5, at xiv ("[O]ur criminal process is not punishing enough of the guilty, exonerating enough of the innocent, or doing equal justice under the law."); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 567 (2014).

[12] *See* DRIPPS, *supra* note 5, at xvii–xviii ("Invidious discrimination in policing, charging, or jury selection is unconstitutional, but the defendant has to prove invidious discrimination and can rarely do so simply by proving disparate impact . . . . The long history of discrimination in the criminal law, and the profoundly disturbing disparate impact of the criminal justice system, suggest . . . a turn away from the Bill of Rights to the Fourteenth Amendment [that] would promote legitimacy, reliability, and equality."). *See generally* Jeffrey Bellin, *The Evidence Rules*

This Note will argue that Federal Rule of Evidence 609(a)(1), which allows parties to introduce past convictions to impeach the truthfulness of character witnesses,[13] must be re-evaluated under the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution. This Note will illustrate how Rule 609(a)(1) relates to and separates felons as a distinct class, how it impacts minority felons in particular, and how it works against the purpose of the Equal Protection Clause. Part I of this Note will introduce the language, purpose, history, and application of Rule 609 leading up to its current iteration. Part I will also address the history and language of the Equal Protection Clause of the Fourteenth Amendment and how the U.S. Supreme Court has applied this clause toward various classes of individuals. Part II will argue that Rule 609(a)(1) undermines the rights of criminal witnesses, criminal defendants, and people of color, therefore failing to uphold the constitutional values laid out in the Thirteenth and Fourteenth Amendments to the U. S. Constitution. Part III will examine Rule 609(a)(1) under an Equal Protection Clause analysis, viewing felons as a suspect or quasi-suspect class. Finally, Part IV will demonstrate that Rule 609(a)(1) may be challenged in the alternative based on the jurisprudence of *Oregon v. Mitchell* or an enhanced rational basis test as demonstrated in *City of Cleburne v. Cleburne Living Ctr*. This Note will conclude that Rule 609(a)(1) must therefore be rejected as unconstitutional.

I. Background

A. *Federal Rule of Evidence 609—The Language of the Rule*

When a witness takes the stand in a federal courtroom, in general, that witness's character is initially immune from attack except for one aspect: either party may challenge that witness's character for truthfulness.[14] Because the purpose of a trial is to determine the truth, it is highly relevant to a jury or judge whether the witness has a tendency to lie.[15] However, even when challenging the truthful character of a witness, outside or extrinsic evidence generally may not be introduced to prove or disprove the answers

that Convict the Innocent, 106 CORNELL L. REV. 305 (2021) (discussing how the Innocence Movement and data on wrongful conviction necessitates a reevaluation of the Federal Rules of Evidence).

[13] FED. R. EVID. 609(a)(1). For a discussion of the problematic nature of Fed. R. Evid. 609(a)(2), see Jesse Schupack, Note, *The Liar's Mark: Character and Forfeiture in Federal Rule of Evidence 609(A)(2)*, 119 MICH. L. REV. 1031 (2021).

[14] FED. R. EVID. 607.

[15] *See* Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of* Crimen Falsi, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1108 (2000) ("[T]he pursuit of truth is more important than most every other value in adjudication.").

a witness gives when questioned about specific instances of truthfulness.[16] There is an exception to this general rule—Federal Rule of Evidence 609 allows parties to introduce past convictions to impeach a witness's character for truthfulness.[17]

Federal Rule of Evidence 609 categorizes how evidence of past convictions may be introduced against a witness based on four factors: (1) what type of conviction it was, (2) whether the witness is a defendant or not, (3) how much time has passed, and (4) whether the conviction occurred when the witness was a juvenile.[18] Evidence of a witness' juvenile conviction is only admissible under limited conditions.[19] For non-juvenile convictions, however, if the elements of the underlying offense intrinsically relate to dishonesty (such as with the offenses of perjury or embezzlement), then the prior conviction must be admitted without applying a judicial balancing test.[20] Yet, Rule 609 not only allows for the introduction of convictions related to *crimen falsi* (crimes of dishonesty) but also for the introduction of *any* conviction where the underlying offense was punishable by more than a year in prison or by death.[21] Section (a)(1)(A) of Rule 609, which applies to non-defendant witnesses in civil or criminal trials, states that a judge determining whether to admit the evidence of a past conviction must analyze it under the standard set forth by Federal Rule of Evidence 403: whether the prejudicial effect of the evidence substantially outweighs its value in proving a relevant fact of the case.[22] As any criminal lawyer will tell you, though, Rule 403 favors admissibility.[23]

Section (a)(1)(B) of Rule 609 applies to defendant witnesses only.[24] Under this section, evidence of a defendant's past conviction must be

---

[16] FED. R. EVID. 608(b).

[17] *Id.* ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness.").

[18] FED. R. EVID. 609; *see* Roberts, *supra* note 11, at 569.

[19] FED. R. EVID. 609(d) (stating that juvenile convictions are admissible only if "offered in a criminal case," for a witness "other than the defendant," where "an adult's conviction for that offense would be admissible," and "admitting the evidence is necessary to fairly determine guilt or innocence"); Roberts, *supra* note 11, at 568.

[20] FED. R. EVID. 609(a)(2); James McMahon, Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 FORDHAM L. REV. 1063, 1075 (1986) ("For all witnesses, *crimen falsi* are automatically admissible for impeachment purposes.").

[21] FED. R. EVID. 609(a)(1); Roberts, *supra* note 11, at 567.

[22] FED. R. EVID. 403; FED. R. EVID. 609(a)(1)(A).

[23] *See* McMahon, *supra* note 20, at 1078.

[24] FED. R. EVID. 609(a)(1)(B).

admitted *only if* the evidence passes almost a reverse Rule 403 analysis—proponents must demonstrate that "the probative value of the evidence outweighs its prejudicial effect."[25] In determining the admissibility of prior convictions, judges often look to factors such as the type and nature of a conviction and its similarity to the current charge (as outlined by Justice Burger in *Gordon v. United States*), but it still remains within each trial judge's personal discretion as to whether to admit the evidence.[26] As a consequence, judges have applied these factors in inconsistent and contradictory ways, and even though the Rule 609(a)(1)(B) test should not favor admissibility, judges generally admit prior convictions for impeachment purposes.[27] As a final matter, Rule 609 states that prior convictions are admissible as long as it has been less than ten years since a witness's release from prison, which means Rule 609 affects a vast number of cases involving defendants that were formerly incarcerated.[28]

B. *The Purpose and History Behind the Rule on Impeachment by Prior Convictions*

Rule 609 does not clarify why crimes unrelated to dishonesty are useful in determining a witness's character for truthfulness, but there is a simple rationale behind it: because these witnesses were convicted of a serious crime, they will not abide by an oath to tell the truth.[29] In other words, the law favors the use of felony convictions to prove the assumption that "all felons are liars."[30] Previously under the common law, felons were not even

---

[25] *Id.*; Roberts, *supra* note 11, at 567; McMahon, *supra* note 20, at 1075–76 ("The balancing test of Rule 609(a) is much more exclusionary than that of Rule 403.").

[26] *See* 383 F.2d 936, 940 (D.C. Cir. 1967); Tarleton David Williams, Jr., Comment, *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 900 (1992) (noting the *Gordon* factors as "the type and nature of the criminal conviction . . . ; the amount of time that had passed since the conviction; the similarity between the proffered conviction and the crime with which the defendant was charged; and, the importance of the defendant's testimony."); *see also, e.g.*, United States v. Paige, 464 F. Supp. 99, 100 (E.D. Pa. 1978) (explicating further on judicial discretion in allowing past convictions); United States v. Brewer, 451 F. Supp. 50, 53–54 (E.D. Tenn. 1978) (demonstrating how to use the *Gordon* factors).

[27] FED. R. EVID. 609(a)(1)(B); *see* Jonathan Hurt, Note, *A Textual Structure of Confusion: Problems with the Federal Rules Governing Impeachment by Evidence of Criminal Conviction*, 67 ALA. L. REV. 1237, 1238–40 (2016) (describing federal cases with similar facts but contrary decisions as to admitting conviction for impeachment); Roberts, *supra* note 11, at 569–70.

[28] FED. R. EVID. 609(b); *see* 2018 Update, *supra* note 9, at 1 (noting that five out of six prisoners released in 2005 were arrested at least once within nine years after their release).

[29] McMahon, *supra* note 20, at 1066.

[30] *See* McMahon, *supra* note 20, at 1066.

allowed to testify,[31] but this changed as courts and legislatures began to give greater importance to the ability of criminal defendants to tell their side of the story.[32] However, as jurisdictions began to grant the formerly incarcerated the right to testify in their own defense, states and courts maintained a wide variety of statutory and common law regarding whether past convictions could be introduced to impeach these defendants and other witnesses.[33]

One of the seminal cases in this area of the law was *Luck v. United States*, which opined that trial judges should be allowed to exercise judicial discretion in determining whether to admit prior convictions as impeachment evidence.[34] In *Luck*, the Appellate Court of the District of Columbia determined that a statute allowing for the impeachment of witnesses by prior conviction did not *require* these convictions to be automatically admitted into evidence.[35] Rather, the Court stated that convictions could be excluded or admitted depending on the trial judge's determination of whether "the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction."[36] However, even with this guideline, judges demonstrated wildly different understandings and applications of the *Luck* doctrine.[37] This led to enormous inconsistency in the trial courts and across the federal circuits in the admission of prior convictions for impeachment purposes.[38]

---

[31] Alan D. Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 20 (1997) ("At early common law, persons who had been convicted of committing a crime were disqualified from testifying. The disqualification, however, had a limited effect as most felons were hanged.").

[32] *See* Rock v. Arkansas, 483 U.S. 2704, 2714 (1987) (holding that Arkansas's blanket ban on hypnotically refreshed testimony was impermissible given defendant's constitutional right to testify in her own defense); *see also* 1 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELREID, DAVID H. KAYE, & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 42 (Robert P. Mosteller ed., 8th ed. 2020) [hereinafter MCCORMICK ON EVIDENCE]; Carl McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOC. ORD. 1, 14 (1970) (noting that a defendant "may not be guilty of the particular crime for which he has been picked up" and "[h]is only defense may be his own story, and sometimes at least that story may be a plausible one.").

[33] *E.g.*, Commonwealth v. Bonner, 97 Mass. 587 (1867) (allowing for impeachment of defendant witnesses); *see* MCCORMICK ON EVIDENCE, *supra* note 32, § 42; McGowan, *supra* note 32, at 4–5.

[34] 348 F.2d 763, 768 (D.C. Cir. 1965); Hornstein, *supra* note 31, at 22–23.

[35] 348 F.2d at 767–68.

[36] *Id.* at 768; McGowan, *supra* note 32, at 3.

[37] McGowan, *supra* note 32, at 3–4 nn.12–13.

[38] McGowan, *supra* note 32, at 3–4 nn.12–13.

By the end of the 1960s, federal judges hoped clarification would come from the Federal Rules of Evidence then being crafted by the U.S. Supreme Court and the Advisory Committee on the Federal Rules of Evidence.[39]

As noted by the Advisory Committee, Rule 609 was specifically modeled after § 133(a) of Public Law 91-358, D.C. Code § 14-305(b)(1).[40] Before it was enacted in 1975, Rule 609, first drafted by the Supreme Court, went through the U.S. House of Representatives, the Senate, and the Conference Committee.[41] Within these illustrious bodies, there was enormous disagreement as to whether Rule 609 should be included because of the high likelihood that admission of past convictions would create impermissible prejudice against witnesses, especially criminal defendants.[42] The result was a compromise designed to include a balancing test that the Conference Committee hoped would prevent unfair prejudice to criminal defendants in particular, but which still allowed for the use of past convictions as an impeachment device based on the discretion of trial judges.[43]

Due to the heavy focus on Rule 609's impact on criminal defendants, much confusion remained as to how it should apply to other types of witnesses, especially in the context of civil trials.[44] The Supreme Court's 1989 ruling in *Green v. Bock Laundry Machine Co.* did not clarify the matter, as the Court indicated that "all prior convictions except those that adversely affect a criminal defendant are mandatorily admissible."[45] The year following this decision, the Supreme Court sought to amend Rule 609 to better illuminate how it was to be applied and to reimplement the use of a Rule 403 balancing test for non-defendant witnesses in criminal and civil trials.[46] Rule 609 has

---

[39] *See* McGowan, *supra* note 32, at 5.

[40] *See* H.R. COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-650, at 7085 (1973).

[41] McMahon, *supra* note 20, at 1070–73.

[42] *See Federal Rules of Evidence: Hearings on H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong. 25, 124–25, 150–51 (1974).

[43] *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1982–83 (2016) [hereinafter *Conviction by Prior Impeachment*] ("The FRE 609 rules on impeachment of criminal defendants represented a political compromise: the House of Representatives wanted only convictions involving dishonesty or false statements to be admissible, while the Senate wanted felony convictions to be admissible."); McMahon, *supra* note 20, at 1073; Hornstein, *supra* note 31, at 8.

[44] *See generally* McMahon, *supra* note 20, at 1076–77.

[45] Mark Voigtmann, Note, *The Short History of a Rule of Evidence that Failed (Federal Rule of Evidence 609,* Green v. Bock Laundry Machine Co. *and the New Amendment)*, 23 IND. L. REV. 927, 937 (1990); *see* Steven J. Hippler, Green v. Bock Laundry—*Rule 609(a)(1) in Civil Cases: The Supreme Court Takes an Imbalanced Approach*, 1990 UTAH L. REV. 613, 614. *See generally* Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

[46] Voigtmann, *supra* note 45, at 944, 944 n.110.

continued to undergo changes in language (it was last restyled in 2011), but even with updated language and organization, the underlying assumption of Rule 609(a) that "all felons are liars" remains unchanged.[47]

C. *The Language and History of the Equal Protection Clause*

Section One of the Fourteenth Amendment to the U.S. Constitution declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[48] The Equal Protection Clause was drafted as part of the Fourteenth Amendment at the conclusion of the Civil War by members of the Thirty-Ninth Congress.[49] In order for the states that had seceded to be readmitted to the Union, they were required under the Reconstruction Act of March 1867 not only to submit new state constitutions to Congress for approval, but also to adopt the Fourteenth Amendment.[50] Such requirements were designed to ensure that "the rebel states should adopt universal suffrage, regardless of color or race, excluding none, white or black"; in exchange, military rule would be lifted, and the seceded states would once more have representation in Congress.[51]

The Supreme Court's determination of what "equal protection of the laws" might mean has undergone a drastic evolution since the initial adoption of the Fourteenth Amendment, fortunately moving away from the horrific doctrine of "separate but equal" established by the majority in *Plessy v. Ferguson*,[52] and moving toward the proposition set forth by Justice Harlan's dissent in that case:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as

---

[47] *See* FED. R. EVID. 609; *Conviction by Prior Impeachment*, *supra* note 43, at 1999 ("Courts, rule drafters, and commentators . . . reason that impeachment by prior conviction is a necessary tool for the prosecution because if a defendant with a criminal record testifies in the absence of this form of impeachment, the jury will be misled into thinking that the defendant is blameless, blemish-free, or as trustworthy as 'Mother Superior.'").

[48] U.S. CONST. amend. XIV, § 1.

[49] Richardson v. Ramirez, 418 U.S. 24, 49–50 (1974).

[50] *Id.*

[51] *Id.* at 50–51.

[52] *See generally* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–27 (1997) (explaining the historical, social, and legal contexts of the *Plessy v. Ferguson* decision).

guaranteed by the supreme law of the land are involved.[53]

This ideology of a color-blind and class-free Constitution was nowhere so strongly embraced as in the case overruling *Plessy v. Ferguson*: *Brown v. Board of Educ. of Topeka*.[54] In *Brown*, even though Black students in the school district had physical facilities of equal quality to white students, the separation of Black students into a different class was in and of itself determined to violate the Equal Protection Clause.[55] The Supreme Court held that intangible considerations, such as students of color experiencing "a feeling of inferiority as to their status in the community that may affect their hearts and minds," were a sufficient demonstration that segregation in public schools should be rejected as unconstitutional.[56] In coming to this conclusion, the Court noted that, "in approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[57]

The Supreme Court's analysis in *Brown* demonstrates two important points regarding the Equal Protection Clause: (1) an analysis under the Equal Protection Clause may be triggered by differential treatment of a particular class of people by the state or federal government *regardless* of whether the effects of this treatment are tangible or intangible, and (2) the Court's determination of what types of classes the Equal Protection Clause may apply to will continue to evolve as American society changes.[58] Separately, the Supreme Court has made clear that the Equal Protection Clause applies to all people within the territories of the United States.[59]

---

[53] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954); *see Brown*, 347 U.S. at 488 (noting that *Plessy v. Ferguson* had established that "equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate").

[54] *See* 347 U.S. at 494–95.

[55] *Id.* at 495.

[56] *Id.* at 493–94.

[57] *Id.* at 492–93.

[58] *See id.*; Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1230–31 (2006) ("*Carolene Products* and subsequent cases have been the basis for judicial intervention in the name of minority protections ranging from desegregation of public schools to giving resident aliens welfare benefits on the same terms as U.S. citizens, protections clearly beyond the specific visions of the framers of the Fourteenth Amendment.").

[59] Plyler v. Doe, 457 U.S. 202, 214–15 (1982) (quoting Senator Howard on the objectives of the 14th Amendment: "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal

D. *The Application of an Equal Protection Clause Analysis*

An Equal Protection Clause analysis is triggered only when the states or the federal government act in a discriminatory fashion against a particular class of people.[60] The judicial test that will be applied depends on two factors: whether a law is facially discriminatory or facially neutral, and whether the class of people is suspect.[61] If state or federal action is discriminatory on its face against a "discrete and insular minority," then the government's actions require a "more searching judicial inquiry."[62] Given the history of the Fourteenth Amendment as an effort to protect the rights of newly freed Black Americans, the Supreme Court has traditionally held that race is always a "discrete and insular minority" so that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and the courts "must subject them to the most rigid scrutiny."[63] Other than race, a suspect class may be established as one that has an immutable characteristic, a tradition of little to no political power or influence, and a history of experiencing oppression and prejudice.[64] If the government acts against a suspect class in a facially discriminatory way, the test of strict scrutiny demands that the state "demonstrate that its

protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another . . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction"); Yick Wo v. Hopkins, 118 U.S. 356, 368–69 (1886) (holding the Equal Protection Clause applied to Chinese nationals being excluded from laundry licenses in San Francisco, because the provisions of the 14th Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws").

[60] *See* Mass. Board of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (noting that an Equal Protection Clause analysis may also be triggered when there is interference with a fundamental right, but this branch of case law will not be examined in this Note's argument).

[61] *See* Washington v. Davis, 426 U.S. 229, 240–41 (1976).

[62] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[63] *Id.*; Johnson v. California, 543 U.S. 499, 505–06 (2005); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214–16 (1995); Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[64] *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986); *see also Plyler*, 457 U.S. at 216 n.14, 220 (noting that suspect classes usually have been set aside due to some immutable characteristic such as race, "some classifications are more likely than others to reflect deep-seated prejudice," and that these suspect groups "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'"); Geiger, *supra* note 58, at 1206 (noting that "national origin" and "alienage" also receive strict scrutiny).

classification has been precisely tailored to serve a compelling governmental interest."[65]

Other than when a suspect class has been facially discriminated against, the Supreme Court held that strict scrutiny will not apply, with some limited exceptions.[66] Strict scrutiny may still be appropriate when a law that seems neutral on its face either: (1) only applies to a singular suspect class (such as a specific race or national origin), or (2) can be demonstrated to have both a disparate impact against a suspect class *and* a discriminatory intent as evidenced by its legislative and procedural history.[67] As established in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, however, even if the legislative and procedural history of a government action suggests invidious discrimination, the government still may offer a race-neutral, non-discriminatory explanation for its action to avoid a test of strict scrutiny.[68]

If a class of individuals possesses some, but not all, of the characteristics of a suspect class, it is deemed a quasi-suspect class.[69] Quasi-suspect classes identified by the U.S. Supreme Court include gender and undocumented children seeking public education, but some state supreme courts have also recognized that sexual orientation may constitute a quasi-suspect class.[70] When a law facially discriminates against a quasi-suspect class, the courts must apply intermediate scrutiny, which requires the government to show that the discrimination serves "important governmental objectives" and that the discriminatory action is "substantially related to the achievement of those objectives."[71] An important governmental interest is more likely to be found legitimate if there is significant evidence behind it, meaning that discrimination against a quasi-suspect class cannot just be based on general, archaic stereotypes.[72]

---

[65] *Plyler*, 457 U.S. at 217.

[66] *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 259, 265–66 (1977); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

[67] *See Arlington Heights*, 429 U.S. at 265–66; *Yick Wo*, 118 U.S. at 373–74 ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

[68] *See* 429 U.S. at 265–66.

[69] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 574 (1996); *Plyler*, 457 U.S. at 217–18.

[70] *See, e.g.*, *Virginia*, 518 U.S. at 532–33; *Plyler*, 457 U.S. at 223–24; Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431-32 (Conn. 2008) (recognizing sexual orientation as a suspect class); Varnum v. Brien, 763 N.W.2d 862, 895–96 (Iowa 2009) (holding discrimination based on sexual orientation requires heightened scrutiny).

[71] *Virginia*, 518 U.S. at 516.

[72] *See* Craig v. Boren, 429 U.S. 190, 198 (1976).

If a court determines that a class is neither suspect nor quasi-suspect, then the rational basis test will apply.[73] A class that all U.S. residents will one day be a part of, such as the elderly, is, by its very nature, not a suspect class.[74] Economic or social classes are also not generally suspect or quasi-suspect classes (although the indigent may be a class if a benefit is absolutely deprived in a way that interferes with an essential right).[75] Under the rational basis test for non-suspect classes, if the government can provide a reason for the classification, whether that reason has merit or not, then the law survives judicial scrutiny.[76] In very rare instances, a type of enhanced or heightened rational basis requiring evidentiary support for the government's classification may apply if all the reasons given by the state subjectively revolve around the characteristic that is the basis for the discrimination.[77]

II. The Issue Being Addressed

The U.S. Constitution and tradition of law regard nothing so highly as the rights of the criminal defendant, as evidenced by the rights enshrined in the original articles of the Constitution and in its first ten amendments.[78] These rights include: the right to issue a writ of habeas corpus; the right to a

---

[73] *See, e.g.*, N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 591–92 (1979); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955).

[74] *See* Mass. Board of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) (rejecting age as a suspect classification because old age "marks a stage that each of us will reach if we live out or normal span").

[75] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 27–28 (1973) (holding wealth was not a suspect classification in terms of per-pupil spending related to property taxes); *Williamson*, 348 U.S. at 491; Jones v. Governor of Fla., 950 F.3d 795, 800 (11th Cir. 2020) (holding that a law requiring released felons to pay fines prior to the restoration of their voting rights essentially punished the indigent as a class and was subject to a heightened scrutiny); *see also* Geiger, *supra* note 58, at 1206–07. *But see* Raysor v. DeSantis, 140 S. Ct. 2600, 2600–03 (2020) (mem.) (Sotomayor, J., dissenting) (outlining the subsequent history of *Jones v. Governor of Fla.* And related cases).

[76] *See Williamson*, 348 U.S. at 491.

[77] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–50 (1985), *superseded by statute*, Fair Housing Act, 42 U.S.C. § 3604, *as recognized by* Human Res. Research and Mgmt. Grp., Inc. v. County of Suffolk, 687 F. Supp. 2d 237, 255–56. In *City of Cleburne*, all of the city's reasons for denying a permit for a home for the mentally impaired revolved around stereotypes and other spurious claims regarding the mental impairment of the residents. Subsequently, the Fair Housing Act prohibited this type of discrimination against disabled individuals, and federal circuit courts have applied heightened scrutiny as a result. This does not negate the import of the Court's reasoning in *City of Cleburne* regarding the improper use of stereotypes as the basis for governmental discrimination.

[78] *See generally* U.S. CONST. amend. I–X.

trial by jury; the requirement of a grand jury indictment for capital or serious crimes; the prohibition against trying a defendant twice for the same crime (double jeopardy); the right to due process of law; the right to a speedy and public trial; the right to know the charges brought; the right to confront witnesses; the right to present witnesses in defense; the right to assistance by counsel; and the prohibitions against excessive bail, excessive fines, and cruel and unusual punishment.[79] Understanding that these rights already existed in the text of the U.S. Constitution and the Bill of Rights, the Fourteenth Amendment guaranteed the "equal protection of the laws" for "any person" within the jurisdiction of the United States.[80] Along with the Fifteenth Amendment, the Fourteenth Amendment sought to grant the rights and privileges already enjoyed by persons within the United States to the formerly enslaved.[81] But the Thirteenth Amendment, which purportedly codified the eradication of slavery first declared in the Emancipation Proclamation, still allowed for slavery or involuntary servitude "as a punishment for crime whereof the party shall have been duly convicted."[82]

The effect of this phrase in the Thirteenth Amendment was devastating,

---

[79] *Id.* art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); U.S. CONST. art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by Law have directed."); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."); U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common law."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[80] *Id.* amend. XIV, § 1.

[81] *Id.* amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); Richardson v. Ramirez, 418 U.S. 24, 50–51 (1974).

[82] U.S. CONST. amend. XIII; *see* The Emancipation Proclamation, Proclamation No. 95 (Sep. 22, 1862), *reprinted in* 1863 Presidential Proclamation No. 17, Proclamation No. 17, 12 STAT. 1268 (Jan. 1, 1863).

as it allowed the states that formerly relied on slavery to recreate a free source of labor by arresting and convicting a large number of newly freed slaves on charges as innocuous as loitering and vagrancy.[83] The subsequent history of higher rates of conviction and more severe punishments for Black Americans, along with the propagation of the myth of the "dangerous black man," call into question whether this country has ever truly provided the "equal protection of the laws" to Black individuals.[84] Nowhere is this more apparent than in the area of drug convictions, where data suggests that while usage rates of cocaine and marijuana are comparable, Black people are still multiple times more likely than white people to be convicted on charges relating to drugs.[85] Given the disproportionate number of Black people enmeshed in the criminal system, the procedural fairness of that system and the constitutionality of its rules of evidence could not be more vital.[86]

Recent cases involving the Confrontation Clause of the Sixth

[83] *See* Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System.*, N.Y. TIMES (Aug. 14, 2019), https://perma.cc/26J3-MAX7 ("[W]hite policymakers invented offenses used to target black people: vagrancy, loitering, being a group of black people out after dark, seeking employment without a note from a former enslaver. The imprisoned were then 'leased' to businesses and farms, where they labored under brutal conditions. An 1887 report in Mississippi found that six months after 204 prisoners were leased to a white man named McDonald, dozens were dead or dying, the prison hospital filled with men whose bodies bore 'marks of the most inhuman and brutal treatment . . . so poor and emaciated that their bones almost come through the skin.'"). *See generally* 13TH (Netflix, Forward Movement, & Kandoo Films 2016); Weatherspoon, *supra* note 4, at 599–604 (outlining the effects of the "Black Codes" on newly freed black Americans).

[84] Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2275–76 (2017) ("Not long ago, police enforced discriminatory slave codes and Jim Crow laws and turned a blind eye to mob violence and lynchings against blacks, all of which contribute to racial minorities' history of distrusting the police. Today, African Americans are 3.6 times more likely to be subject to use-of-force by police and 2.5 times more likely to be shot and killed by police than are whites."); *see* John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 599–600 (1991) (part of *Symposium on Legalization of Drugs*); Stevenson, *supra* note 83 ("Hundreds of years after the arrival of enslaved Africans, a presumption of danger and criminality still follows black people everywhere . . . . Children as young as 13, almost all black, are sentenced to life imprisonment for nonhomicide offenses. Black defendants are 22 times more likely to receive the death penalty for crimes whose victims are white, rather than black—a type of bias the Supreme Court has declared 'inevitable.'"). *See generally* Weatherspoon, *supra* note 4, at 608–11; 13TH, *supra* note 83.

[85] DRIPPS, *supra* note 5, at xiv; *see* Weatherspoon, *supra* note 4, at 604–06, 608–11 (arguing that the "War on Drugs" is a continuation of the "Black Codes" of the post-Civil War); Powell & Hershenov, *supra* note 84, at 568 ("An astounding eighty to ninety percent of those who are eventually prosecuted for drug-related offenses are African-American males."). *See generally* 13TH, *supra* note 83.

[86] *See* Gonzales Rose, *supra* note 84, at 2272–73.

Amendment demonstrate the Supreme Court's openness to re-evaluating whether the Federal Rules of Evidence uphold constitutional principles.[87] The Confrontation Clause guarantees the right of criminal defendants to confront the witnesses presented against them, and the Supreme Court held that this right supersedes hearsay evidence regardless of other indicia of the evidence's reliability.[88] In other words, under a Confrontation Clause analysis, as Justice Scalia noted, the issue is not primarily whether an out-of-court hearsay statement can be trusted, but whether a criminal defendant's constitutional rights have been violated by its introduction.[89] The Confrontation Clause cases confirm that constitutional rights must and do supersede the Federal Rules of Evidence, and that the Supreme Court may upend any Federal Rules of Evidence that conflict with the values embodied in the U.S. Constitution.[90]

It is in this context that Federal Rule of Evidence 609 and in particular section (a)(1) must be examined.[91] The history of the law in this country has developed such that courts must convict based on whether a defendant has committed "this crime in this particular instance," but the prejudicial effect of Rule 609(a)(1) undermines this core value.[92] Further, by allowing for the impeachment of a witness's character for truthfulness based on past convictions, Rule 609(a)(1) holds onto an outdated and stereotypical view of felons, and its application negatively impacts the right to a fair trial for

---

[87] *See, e.g.*, Williams v. Illinois, 567 U.S. 50 (2012); Bullcoming v. New Mexico, 564 U.S. 647 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Crawford v. Washington, 541 U.S. 36 (2004). *See generally* U.S. CONST. amend. VI.

[88] *See Crawford*, 541 U.S. at 61; *see generally* FED. R. EVID. 801(c) (defining hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.").

[89] *See Crawford*, 541 U.S. at 61.

[90] *See* Robert D. Dodson, *What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 23 N.C. CENT. L.J. 14, 51 (1997–1998) ("Our criminal justice system sacrifices accuracy in order to afford protection to criminal defendants . . . . Our system excludes all kinds of evidence which may help a jury to discover the truth, such as: privileged communications, hearsay exclusions, and exclusions because evidence was obtained in violation of the Fourth or Fifth Amendments of the Constitution."). *See generally Williams*, 567 U.S. at 50; *Bullcoming*, 564 U.S. at 647; *Melendez-Diaz*, 557 U.S. at 305; *Crawford*, 541 U.S. at 36.

[91] *See generally* DRIPPS, *supra* note 5, at xvii ("It turns out that the right place to look for criminal procedure doctrine is right there in the text of the Fourteenth Amendment. Due process means no punishment without a fair trial, and equal protection means no racial discrimination in criminal justice. The current reliance on the Bill of Rights has meant that due process and equal protection have been marginalized, even if they have not yet fallen into complete desuetude.").

[92] *See* McGowan, *supra* note 32, at 14; Dodson, *supra* note 90, at 51.

defendant witnesses.[93] Additionally, because Black people are disproportionately convicted and punished, it follows that Rule 609(a)(1) has a disproportionate effect on them.[94] If the goal of the Fourteenth Amendment really was, as Justice Harlan wrote, to ensure that the laws of this country do not create different classes and castes of people, then a Federal Rule of Evidence that brands members of a class as liars based on previous encounters with a prejudicial criminal system must undergo an Equal Protection Clause analysis.[95]

ANALYSIS

III. Federal Rule of Evidence 609(a)(1) Must Be Rejected Because Felons Are a Suspect or Alternately a Quasi-Suspect Class

A. *The Facially Discriminatory Nature of Rule 609(a)(1) Against the Class of Felons*

When the state or federal government acts in a way that discriminates against a particular class of people, the courts must apply an Equal Protection Clause analysis to determine the constitutionality of the governmental action.[96] As previously discussed, the test applied under such an analysis depends on whether or not the action is facially discriminatory and if the class being discriminated against is a suspect class.[97] Federal Rule of Evidence 609(a)(1), as a rule of procedure determining the admission of evidence in a federal courtroom, clearly separates felons from other types of witnesses.[98] The Rule states that those who have been convicted of crimes punishable by more than a year (or by death) may have their past convictions introduced as a means of impeaching their truthful character as witnesses.[99] This exception stands in stark contrast to the general proposition of the Rules of Evidence that extrinsic evidence should not be admitted for the purposes of demonstrating the propensity of a witness to act in a certain

---

[93] *See* McGowan, *supra* note 32, at 4; Dodson, *supra* note 90, at 56.

[94] *See* DRIPPS, *supra* note 5, at xiv; *Conviction by Prior Impeachment*, *supra* note 43, at 2004–05 ("[B]y compounding the racial disparity embodied within patterns of criminalization, prior conviction impeachment contributes to the racial disparity found throughout the criminal justice system.").

[95] *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting), *overruled by* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[96] *See supra* Part I(D).

[97] *See supra* Part I(D).

[98] *See* FED. R. EVID. 609(a)(1).

[99] *Id*.

matter.[100] In this way, Federal Rule of Evidence 609(a)(1) facially discriminates against felons.[101]

However, to resolve whether this facial discrimination survives a constitutional challenge, the appropriate judicial test must still be determined.[102] If felons are a suspect class, then Federal Rule 609(a)(1) must undergo a test of strict scrutiny.[103] The case for felons as a suspect class relies on three factors: whether felons as a class have an immutable characteristic, a lack of political power and influence, and a history or tradition of being oppressed and discriminated against.[104] If some, but not all, of these factors apply, felons may still be a quasi-suspect class, and the proper test for Rule 609(a)(1) would be one of intermediate scrutiny.[105]

The type of immutable characteristic that the courts recognize in suspect and quasi-suspect classes often has to do with some trait, like race, that a class is born with or that a class acquires through no fault of that class's members.[106] Because the class is not at fault for this immutable characteristic, it is legally objectionable to discriminate against class members for it.[107] This accounts for why children cannot be discriminated against for the wrongdoings of their parents—children have no choice in who their birth parents are or how their parents act—and also why a lack of citizenship cannot be a basis for the denial of certain state benefits.[108] Immutable characteristics like race or gender have little to no connection with individual responsibility or culpability, and the Supreme Court has thus held discrimination based on stereotypes about race and gender to be unconstitutional.[109]

---

[100] *See* FED. R. EVID. 608.

[101] *See* FED. R. EVID. 609(a)(1); *see also* Hornstein, *supra* note 31, at 6 ("As impeachment by evidence of the defendant/witness's poor character for veracity, it is the most general form of impeachment, tending to show that the defendant is unworthy of belief regardless of context. Beyond that, however, it requires that the factfinder draw an inference from prior conduct to the defendant's character, an inference our jurisprudence generally forbids.").

[102] *See supra* Part I(D).

[103] *See supra* Part I(D).

[104] *See supra* Part I(D).

[105] *See supra* Part I(D).

[106] Geiger, *supra* note 58, at 1211.

[107] Geiger, *supra* note 58, at 1211.

[108] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 226 (1982); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972); Graham v. Richardson, 403 U.S. 365, 376 (1971). The prohibition of discrimination against noncitizens generally only applies *outside* of the context of immigration law. Immigration officials have large discretion and noncitizens have very few legal rights during the process of admission into and deportation out of the United States. *See generally* IMMIGRATION NATION (Netflix television series 2020).

[109] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 209–10 (1976); Reed v. Reed, 404 U.S. 71, 76–77 (1971).

Unlike members in a suspect class of race or quasi-suspect class of gender, felons were not born as criminal offenders.[110] However, once they become felons, criminal offenders cannot choose to leave that class.[111] Even in states where a felon can expunge or seal criminal records, this process can take years, meaning that "a formerly incarcerated person wears a digital scarlet letter."[112] Yet, once felons have been released from prison, under any theory of punishment they have unquestionably served their debt to society, and therefore governmental discrimination that punishes felons beyond their prison sentences is not justified.[113]

The argument against considering those convicted of crimes punishable by more than a year (or by death) as a suspect class has been that "ex-offenders are both responsible for their membership in their classification and morally culpable for it."[114] If felons are the cause of the immutable characteristic that sets them apart, the contention is that this characteristic should not be taken into account when determining whether felons are a suspect class.[115] However, this argument falls short in two important ways.[116] First, it contradicts Supreme Court jurisprudence that establishes the importance of "the relevance between *individuals'* responsibility for their membership in a group and the legal burden imposed upon the group."[117] Arguing that felons cannot be considered a suspect class because they are the architects of their own convictions creates a fundamental unfairness—this argument essentially claims that *all* felons, regardless of the type of

---

110 *See* Geiger, *supra* note 58, at 1222.

111 *See* Geiger, *supra* note 58, at 1218–19.

112 Geiger, *supra* note 58, at 1200; *see, e.g.*, *Find Out If You Can Seal Your Criminal Record*, MASS.GOV, https://perma.cc/7MZ7-4KJ8 (last visited Dec. 6, 2021) (noting that in Massachusetts you must wait until "7 years after you were found guilty or after any jail or prison time, whichever is later" before you can request to seal your criminal record); *Find Out If You Can Expunge Your Criminal Record*, MASS.GOV, https://perma.cc/HU3S-FS48 (last visited Dec. 6, 2021) (noting that you must wait seven years after you were found guilty of a felony to request an expungement, and certain crimes cannot be expunged).

113 *See* Fineout, *supra* note 6 (describing a recent appeals court decision in *Jones v. Governor of Florida* where the court held released felons must be allowed to vote without having to pay additional fees); Geiger, *supra* note 58, at 1219–20.

114 Geiger, *supra* note 58, at 1192.

115 Geiger, *supra* note 58, at 1192.

116 Geiger, *supra* note 58, at 1192.

117 Geiger, *supra* note 58, at 1192; *see* Enmund v. Florida, 458 U.S. 782, 800 (1982) ("As for retribution as a justification . . . , we think this very much depends on the degree of . . . culpability."); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality) (noting in the plurality that "an immutable characteristic determined solely by the accident of birth" would contradict "the basic concept of our system that legal burdens should bear some relationship to individual responsibility").

crime committed or the rehabilitation efforts of each individual, should be equally burdened by laws such as Federal Rule 609 without relief from the Equal Protection Clause.[118] Such an argument promotes inequity and must be rejected.[119]

Second, the claim that felons are responsible for their own class membership fails to recognize that felons are perhaps *not* entirely to blame for the immutable characteristic of their convictions.[120] The effects that socioeconomic factors play in the lives of those who were convicted cannot be underestimated,[121] nor can we ignore the disproportionate targeting and conviction of Black individuals.[122] In fact, there is every indication that convictions cannot be fairly relied upon as indicative of individual culpability given the "growing body of data on wrongful convictions, for example, and on disparities in law enforcement, and on the nature and dominance of plea-bargaining."[123] Consider as well that whether an offense is punishable by more than a year is governed statutory provisions and federal sentencing guidelines coupled with judicial discretion.[124] Thus, the

---

[118] Geiger, *supra* note 58, at 1192, 1219–20.

[119] *See* Jones v. Governor of Fla., 950 F.3d 795, 812 (11th Cir. 2020) ("Whatever interest the State may have in punishment, this interest is surely limited to a punishment that is applied in proportion to culpability.").

[120] *See* Geiger, *supra* note 58, at 1222 ("The notion that criminals deviate from social norms due to an evil nature is in tension with the belief that criminals are the product of their socioeconomic circumstances and political shortcomings.").

[121] *See* Geiger, *supra* note 58, at 1222; *See generally* The Lucas Bros, *Our Brother Kaizen*, VULTURE (June 4, 2020), https://perma.cc/7VQR-JFKM ("[W]e all suffered from acute post-traumatic stress disorder as a result of growing up in a war-torn inner city. We were both exposed to violence, which had an insidious impact on our psychological health. . . . Our issues with depression, suicide, and substance abuse materialized during our time in law school, at Duke and NYU; Kaizen's did on the streets of Newark.").

[122] *See* Powell & Hershenov, *supra* note 84, at 599–600 ("[H]aving helped to create the [drug] problem, law enforcement efforts then target minority populations for surveillance, arrest, prosecution, and incarceration."); *see also* SIR THOMAS MOORE, UTOPIA (Henry Morley ed. 2000) (1516), https://perma.cc/2EYJ-UJZV ("[I]t is a vain thing to boast of your severity in punishing theft, which, though it may have the appearance of justice, yet in itself is neither just nor convenient . . . what else is to be concluded from this, but that you first make thieves and then punish them?").

[123] Roberts, supra note 11, at 563; *see* INNOCENTS WHO PLEAD GUILTY, NAT'L REGISTRY OF EXONERATIONS 1 (2015), https://perma.cc/4ECS-A5EA ("About 95% of felony convictions in the United States . . . are obtained by guilty pleas, . . . [a]nd innocent defendants who plead guilty almost always get lighter sentences than those who are convicted at trial—that's *why* they plead guilty—so there is less incentive to pursue exoneration."). *See generally* Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2531–39 (2020) (highlighting how legal scholars conflate legal and factual guilt).

[124] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the U.S. Sentencing

immutable characteristic of being a felon cannot be negated by arguing that it is entirely the fault of the offenders.[125]

The lack of political power that felons suffer cannot be more clearly seen than in the fact that the U.S. Constitution itself enshrines the right of the government to strip convicted persons of their ability to vote in the same amendment that guarantees equal protection of the law.[126] The states have embraced this constitutional provision wholeheartedly.[127] Felons in all but two states have been legally disenfranchised during or after incarceration, with eleven states permitting indefinite disenfranchisement.[128] To be clear, constitutional *permission* for felon disenfranchisement should not be confused with constitutional *approval* of prejudice against the felons so disenfranchised.[129] Although Section Two of the Fourteenth Amendment allows for disenfranchisement "for participation in rebellion, or other crime," there is no such language in Section One allowing for the denial of equal protection of the law for felons.[130] While the structure of the U.S. Constitution revolves around the establishment of the powers of the federal and state governments, the Amendments establish distinct and numerous protections for individuals against the political and legal power of these governments.[131] In this way, the U.S. Constitution and its Amendments predict the existence of political majorities and minorities, but while "[p]olitical inequality is clearly accepted in American constitutionalism;

Commission Guidelines are advisory; the federal sentencing statute "requires a sentencing court to consider the Guidelines ranges, . . . but it permits the court to tailor the sentence in light of other statutory concerns as well").

125 *Conviction by Prior Impeachment*, *supra* note 43, at 1993–94 ("[I]n an age of wrongful convictions, and mass production of convictions, it cannot be taken as a given that a conviction correlates to commission of the crime . . . . [S]ixteen percent of the [exonerated] convictions included in the National Registry of Exonerations were the result of a guilty plea."); Geiger, *supra* note 58, at 1192.

126 U.S. CONST. amend. XIV, § 2; *see* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

127 U.S. CONST. amend. XIV, § 2; *see Felon Voting Rights*, NCSL: NAT'L CONF. OF ST. LEGISLATURES (June 28, 2021), https://perma.cc/Z35K-A657.

128 *Felon Voting Rights*, *supra* note 127; *see* Geiger, *supra* note 58, at 1191. *See generally* CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 (2016), https://perma.cc/SG7K-MA3G (defining "felony disenfranchisement" as "laws restricting voting rights for those convicted of felony-level crimes" and detailing the staggering number of disenfranchised felons).

129 Geiger, *supra* note 58, at 1192, 1232; *see* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (noting that the decision in *Richardson v. Ramirez* allows disenfranchisement laws but does not permit disenfranchisement enacted for the purpose of racial discrimination).

130 U.S. CONST. amend. XIV, §§ 1, 2.

131 *See* Geiger, *supra* note 58, at 1232–34.

inequality of oppressive legal burdens . . . is not."[132]

Besides experiencing disenfranchisement, felons have also been restricted from serving on juries, holding office, and testifying in court.[133] State legislatures often create statutes and regulations that prohibit the ability of felons to fully reenter into society, and the passing of such laws speaks to the inability of convicts to protect themselves in the political arena.[134] State regulations affect whether felons can find employment and housing, receive welfare benefits, access higher education, get drivers' licenses, and, as mentioned, vote.[135] Additionally, private employers may have access to the court and criminal records of prospective employees, either through free government access online to such records or by paying fees to private companies like LexisNexis and Westlaw.[136] The federal government regulates felons, as well, by barring anyone convicted of a drug-related felony from receiving federally-funded cash assistance and food stamps.[137] The federal government has also, through its spending power, incentivized states to suspend the licenses of individuals convicted of drug offenses.[138] The formerly incarcerated have little political wherewithal to change or even challenge the laws discriminating against them, because "the forces of social stigma incentivize political silence" for felons.[139]

Beyond political powerlessness, there is a long history in American culture of social prejudice against those with criminal histories.[140] More

---

[132] Geiger, *supra* note 58, at 1234.

[133] Geiger, *supra* note 58, at 1225.

[134] *See* Geiger, *supra* note 58, at 1195, 1198 ("Upon release, it is not unusual for a formerly incarcerated person to possess nothing more than a bus ticket and $125.").

[135] Geiger, *supra* note 58, at 1198; *see* Weatherspoon, *supra* note 4, at 616.

[136] *See* Geiger, *supra* note 58, at 1199; *see also, e.g.*, *LexisNexis Public Records*, LEXIS NEXIS, https://perma.cc/F6JA-T26E (last visited Dec. 6, 2021); *PeopleMap on Westlaw*, THOMSON REUTERS, https://perma.cc/YN4T-VMC6 (last visited Dec. 6, 2021); *Public Case Search*, COMMONWEALTH OF MASS. APP. CTS., https://perma.cc/E9Y4-CNE4 (last visited Dec. 6, 2021). *See generally Privacy/Public Access to Court Records State Links*, NCSC: NAT'L CENTER FOR ST. CTS., https://perma.cc/HL7L-YVES (last visited Dec. 6, 2021).

[137] Geiger, *supra* note 58, at 1205. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2168 (1996); Making Essentials Available and Lawful (MEAL) Act of 2020, H.R. 5915, 116th Cong. (2020) (seeking to remove the portion of Pub. L. No. 104-193 that makes incarcerated individuals ineligible for assistance and introduced in the Senate during the 117th Congress).

[138] *See* Geiger, *supra* note 58, at 1205. *See generally* Department of Transportation and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-388, 106 Stat. 1520 (1992).

[139] Geiger, *supra* note 58, at 1227. *See generally* M. Eve Hanan, *Invisible Prisons*, 54 U.C. Davis L. Rev. 1185, 1213-16 (2020) (discussing the epistemic injustice that discredits the testimony of the incarcerated).

[140] *See* Geiger, *supra* note 58, at 1191.

importantly, this prejudice against felons and other ex-offenders has worsened since the early 1970s.[141] Incarceration rates since the beginning of the so-called "War on Drugs" have increased dramatically.[142] Political incentives lead prosecutors to be "tough on crime," and financial incentives ensure private prisons continue to fill their jails.[143] The "War on Drugs" and the "tough on crime" movement of the 1990s have led political representatives at the state and national levels to demean and denigrate criminal offenders.[144] Felons have fared no better at the hands of the media, which has thrived by covering crime and criminals on late night news channels.[145] Besides this, the number of fictional and true crime programs that focus on sensationalizing aspects of crime and the criminal mind serve to further prejudice the general public against the convicted[146] In the end, "[i]n the public eye, the generic criminal is likely to be the worst kind, and deserving legislative sanction."[147]

B. *The Injury Caused by Rule 609(a)(1)*

While felons may be a suspect class under the jurisprudence of the Supreme Court, the damage caused by Rule 609(a)(1) must be made clear in order to establish an Equal Protection Clause claim in a court of law.[148] Rule 609(a)(1) creates an inordinate number of injuries: it generally prejudices judges and juries against felons that are witnesses (indeed, that is the point of the rule); it denies felons the right given to other witnesses to not have propensity evidence used against them; and, most significantly, it impacts the testimonial ability and trial outcomes of criminal defendants.[149] Given

---

[141] *See* Geiger, *supra* note 58, at 1191, 1194.

[142] *See* Geiger, *supra* note 58, at 1194; *see also* Powell & Hershenov, *supra* note 84, at 569. *See generally* Weatherspoon, *supra* note 4, at 606–07.

[143] *See* Roberts, *supra* note 11, at 600–01 ("[O]ne commentator has asserted that '[t]here is little doubt that admission of prior conviction evidence makes a prosecutor's job easier.' That would unquestionably be true if the prosecutor's job were to score a conviction by any means necessary."); s*ee also* Weatherspoon, *supra* note 4, at 611–12; 13TH, *supra* note 83.

[144] Geiger, *supra* note 58, at 1197; *see, e.g.*, Andrew Kaczynski, *Biden in 1993 Speech Pushing Crime Bill Warned of 'Predators on Our Streets' Who Were 'Beyond the Pale'*, CNN (Mar. 7, 2019), https://perma.cc/BBR4-PXT8. *See generally* 13TH, *supra* note 83.

[145] *See* Geiger, *supra* note 58, at 1197.

[146] *See e.g.*, *Criminal Minds* (CBS television series 2005–2020), *CSI: Crime Scene Investigation* (CBS television series 2000–2015), *NCIS* (CBS television series 2003-present), *Law & Order* (NBC television series 1990–2010), *Making a Murderer* (Netflix television series 2015–2018), *Conversations with a Killer: The Ted Bundy Tapes* (Netflix television series 2019).

[147] Geiger, *supra* note 58, at 1223; *see* Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015, 7:00 AM EDT), https://perma.cc/8V7R-HQU2.

[148] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[149] *See* FED. R. EVID. 607; FED. R. EVID. 609(a)(1); Hornstein, *supra* note 31, at 33–34. *See*

the heavy constitutional weight given to the rights of criminal defendants, the strongest argument against Federal Rule 609(a)(1) is the harm that it does to this group of felons.[150]

The ability of prosecutors to impeach a witness's character for truthfulness with prior convictions dramatically impacts the trials of criminal defendants that are felons.[151] First and foremost, regardless of any other outcome, Federal Rule 609(a)(1) directly affects whether criminal defendants will choose to testify.[152] The prejudicial effect of impeachment evidence can be significant, but if a defendant chooses not to testify, a jury may improperly assume that the defendant's silence is an indication of guilt.[153] Thus, the felon defendant loses what has been the primary argument for allowing felons to testify in the first place—the ability to tell their side of the story.[154] If the defendant chooses not to testify after past convictions are admitted, or if a defendant chooses to testify about past convictions during direct examination to lessen their prejudicial effect, the defendant loses the right to appeal the admission of this conviction evidence, creating a "damned if you do, damned if you don't" dilemma.[155] Given this

generally Roberts, *supra* note 11.

[150] *See* Hornstein, *supra* note 31, at 38–40 (outlining the development of the defendant's right to testify on his or her own behalf). *See generally* U.S. CONST. amend. I–X.

[151] *See* Roberts, *supra* note 11, at 600–01 ("Prosecutors are frequently obtaining permission to impeach—defendants are impeached in over seventy percent of cases . . . . [P]rosecutors are thought to proffer this evidence *with the intention* that it be used for unauthorized purposes."); Hornstein, *supra* note 31, at 4–5.

[152] *See* Roberts, *supra* note 11, at 564 ("[I]n one recent study of exonerated defendants, the most common reason given for their decision not to testify was their fear of prior conviction impeachment."); *Conviction by Prior Impeachment*, *supra* note 43, at 1978–79 ("Like Odysseus, defendants must attempt to sail between Scylla and Charybdis, choosing whether to waive their right to testify, and thus either plead guilty or remain mute at trial, or to take the witness stand and risk the demolition of their testimony through the use of their criminal records. . . . [A]ll too often, the result of impeachment—actual or threatened—is virtually automatic conviction.").

[153] *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 407–09 (2018); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 861–63 (2016); Roberts, *supra* note 11, at 574.

[154] *See* Roberts, *supra* note 11, at 575 ("Finally, it keeps the defendant from experiencing one core aspect of procedural justice: the experience of having a voice in the proceedings."); Hornstein, *supra* note 31, at 19–20; McGowan, *supra* note 32, at 14 (noting that a defendant "may not be guilty of the particular crime for which he has been picked up" and "[h]is only defense may be his own story, and sometimes at least that story may be a plausible one").

[155] *See* Ohler v. United States, 529 U.S. 753, 755 (2000) (holding that if a defendant discusses his criminal record on direct examination, the defendant cannot appeal the evidentiary ruling); Luce v. United States, 469 U.S. 38, 42–43 (1984) (holding that if an evidentiary ruling permits impeachment and a defendant refrains from testifying, the defendant cannot appeal the evidentiary ruling); Roberts, *supra* note 11, at 573; *Conviction by Prior Impeachment*, *supra* note 43,

predicament, criminal defendants frequently choose to forego trial altogether and enter into plea bargaining with the prosecution instead.[156]

Some studies suggest that the introduction of past convictions in order to impeach increases the chance of further conviction.[157] It is certainly unrealistic to assume that jurors will always fully comprehend or fully abide by limiting instructions advising them to only consider past convictions for their ability to impeach a witness.[158] And while Rule 609(a)(1) rests on the assumption that past convictions reliably demonstrate a felon's character of truthfulness, in reality, past convictions may be anything but reliable evidence of a defendant's character given the high levels of wrongful conviction and racial discrimination within the criminal system.[159] The assumption that past convictions are a reliable indicator of moral culpability because they were the product of a "fair fight" is further undermined by the consistent lack of funding for public defenders and the pressures faced by those charged with a crime to plea out.[160] There are also significant indicators that the "War on Drugs" has created incentives for the judiciary itself to admit evidence that fails to adhere to the protections of the Bill of Rights, as courts have allowed "vague and over-inclusive search warrants" and "searches conducted in the absence of warrants and without either probable cause or individualized suspicion" in an effort to combat the drug crisis.[161]

---

at 1986–87.

[156] Roberts, *supra* note 11, at 565.

[157] *See* Roberts, *supra* note 11, at 565.

[158] *See* Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 732; Ric Simmons, *An Empirical Study of Rule 609 and Suggestions for Practical Reform*, 59 B.C. L. REV. 993, 1013–18 (2018); Roberts, *supra* note 11, at 578; *Conviction by Prior Impeachment*, *supra* note 43, at 1997 ("[T]he word 'felony,' through its prejudicial effect, may prevent the jury from hearing anything else. In addition, the jury already has every reason to suspect that a defendant faced with the loss of liberty and perhaps life might shape his or her testimony in order to maximize the possibility of acquittal."); Bellin, *supra* note 153, at 403 ("If jurors used prior convictions as the law intends, past crimes that undermined the defendant's truthful character, such as perjury, would be the most damaging to defendants' chances of acquittal. Yet empirical research has shown that even when properly instructed, mock jurors convict most readily when presented with prior crimes that are similar to the charged crime . . . .").

[159] Roberts, *supra* note 11, at 566 ("Courts often assume that convictions are the product of a fair fight—despite the nature of plea-bargaining, the collapse of public defense, and the data on wrongful convictions. Moreover, courts often assume that convictions demonstrate relative culpability—despite the racial and other disparities that pervade law enforcement. And lastly, courts often assume that convictions connote moral culpability—despite the growth of prosecutions that require no culpable mental state."); *see Conviction by Prior Impeachment*, *supra* note 43, at 1995.

[160] *See* Roberts, *supra* note 11, at 580–85; Hornstein, *supra* note 31, at 10–12.

[161] Powell & Hershenov, *supra* note 84, at 578–79 ("Perhaps the judiciary's single most

The government may argue that Federal Rule 609(b) and Federal Rule 609(c) mitigate the injuries caused by Rule 609(a)(1) by encouraging a stronger balancing test for convictions older than 10 years and by disallowing the admission of convictions that have been the subjects of pardons by findings of innocence or certificates of rehabilitation.[162] However, the majority of offenders are arrested at least once *within* ten years of being released, seriously lessening the alleviating power of Rule 609(b).[163] Rule 609(c)'s ability to prevent the admission of convictions where the defendant has been found innocent or rehabilitated provides little recompense to Rule 609(a)(1) given the difficult and lengthy processes of overturning wrongful convictions and obtaining certificates of rehabilitation.[164] Even Rule 609(a)(1)'s balancing tests, specifically designed to moderate the prejudicial effect of past convictions, still allow judges to admit these prior convictions in a way that permits the continuation of injustice.[165]

C. *Federal Rule 609(a)(1) Fails a Test of Strict Scrutiny*

Because Federal Rule 609(a)(1) acts against the suspect class of felons in a facially discriminatory manner, the test of strict scrutiny must be applied to determine if the federal government's action has been narrowly tailored to serve a compelling governmental interest.[166] Unlike other suspect classes, the class of felons is one that the government has many reasons to regulate.[167]

---

destructive contribution to the drug war has been its creation of the 'drug exception to the Constitution.'").

[162] *See* FED. R. EVID. 609(b); FED. R. EVID. 609(c).

[163] 2018 Update, *supra* note 9, at 1 (noting that five out of six prisoners released in 2005 were arrested at least once within nine years after their release).

[164] *See generally* MARGARET LOVE & APRIL FRAZIER, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS (2006), https://perma.cc/N8A7-NPHR (surveying various states to understand the process of obtaining rehabilitation certificates); *All Cases*, INNOCENCE PROJECT, https://perma.cc/76MF-HMWD (last visited Dec. 6, 2021) (listing clients who have had wrongful convictions overturned after years in prison); *Wrongful Conviction*, EQUAL JUSTICE INITIATIVE, https://perma.cc/2V8K-SYE5 (last visited Dec. 6, 2021) (noting that those exonerated of wrongful convictions spent an average of almost nine years in prison).

[165] Roberts, *supra* note 11, at 565 ("[A] vicious cycle continues to be perpetuated: convictions that may have been the product of something less than a fair fight may help to make the next fight less fair, and convictions that may not have been based on culpability may help bring about more convictions of the same kind."); *see Conviction by Prior Impeachment*, *supra* note 43, at 2006–07 (outlining how prior conviction impeachment is a "collateral consequence" that heightens the risk of additional convictions).

[166] *See* Johnson v. California, 543 U.S. 499, 505 (2005); Plyler v. Doe, 457 U.S. 202, 217 (1982).

[167] Geiger, *supra* note 58, at 1229.

However, this does not give the government unlimited license to determine all felons to be "members of an unreformable class" that cannot be trusted as witnesses.[168] Because Rule 609(a)(1) has not been narrowly tailored to serve a compelling governmental interest, Rule 609(a)(1) fails the test of strict scrutiny and therefore must be held as unconstitutional.[169]

The government interest at stake here, while not directly stated in Rule 609(a)(1), is the interest at stake in every trial, whether civil or criminal: the quest for truth and justice.[170] Rule 609(a)(1) allows prior convictions to be admitted only to impeach the character of a witness for truthfulness.[171] The ability of juries and judges to determine a witness's credibility ensures the overall goal of the Federal Rules of Evidence—clearly a compelling interest.[172]

However, Federal Rule 609(a)(1) is by no means narrowly tailored to achieve this objective.[173] The Rule permits for the impeachment of *all* felons for crimes specifically *not* related to truthfulness (as those are admitted under Federal Rule 609(a)(2)).[174] Federal Rule 609(a)(1) paints all felons with a broad brush, treating them the same regardless of type of crime or evidence of efforts to rehabilitate.[175] Rule 609(a)(1) does not consider whether a conviction is punishable by incarceration for a year and a day, ten years, or by death—under the Rule, all felony convictions are considered equally reliable indicia of a witness's character for truthfulness.[176]

The drafters and federal government may argue that the admission of prior conviction impeachment under Rule 609(a)(1) is narrowly tailored to each individual witness through the use of the judicial balancing tests included in the Rule.[177] Yet, the language of each of the balancing tests lacks any real specificity.[178] Each judge must decide for herself what it means for a piece of evidence to have probative value or prejudicial effect.[179] In fact, the

---

[168] Geiger, *supra* note 58, at 1229.

[169] *See Johnson*, 543 U.S. at 499.

[170] FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); *see* Green, *supra* note 15, at 1108.

[171] FED. R. EVID. 609(a)(1).

[172] *See* FED. R. EVID. 102.

[173] *See* FED. R. EVID. 609(a)(1).

[174] *Id.*; FED. R. EVID. 609(a)(2).

[175] *See* FED. R. EVID. 609(a)(1).

[176] *See id.*

[177] *See id.*

[178] *See id.*

[179] *See id.*

language of Rule 609(a)(1) is *purposefully* vague to allow for the kind of judicial discretion encouraged by *Luck v. United States* and *Gordon v. United States*.[180] This general vagueness, however, has resulted in judges exercising discretion in vastly different ways.[181] For example, judges have used the *Gordon* factors of interpretation to weigh the similarity of past convictions to current charges both for *and* against admissibility.[182]

Federal Rule 609(a)(1) is imprecise in its text and application, and so it clearly does not meet the "narrowly tailored" standard set by the jurisprudence of the Supreme Court.[183] Narrowly tailored means the government must not use the immutable characteristic of a suspect class in a way that is outcome determinative.[184] In cases regarding affirmative action, for example, the Court has found that race, as a suspect classification, cannot be the dispositive factor in college admissions.[185] Universities that gave too much weight to race in an effort to achieve greater diversity in higher education—a compelling interest—were found to have unconstitutional admission policies.[186] Comparing these affirmative action cases to the application of Rule 609(a)(1), most federal judges, in trying to interpret and apply the balancing tests of the Rule, rely on the *Gordon* factors to weigh the probative value versus prejudicial effects of past conviction evidence.[187] Each of these *Gordon* factors relates to details of the very convictions that define defendants or witnesses as felons.[188] In other words, under Rule 609(a)(1), there are no factors a judge could consider and no outcomes on admissibility that are distinct from a felon's immutable characteristic.[189]

Finally, Rule 609(a)(1) cannot be considered to be narrowly tailored because there are plenty of other means to achieve the government's

---

[180] *See id.*; 348 F.2d 763, 768 (D.C. Cir. 1965); Williams, *supra* note 26, at 900.

[181] Roberts, *supra* note 11, at 569–70.

[182] *See* Roberts, *supra* note 11, at 569; Williams, *supra* note 26, at 900; *Conviction by Prior Impeachment*, *supra* note 43, at 2001.

[183] *See* FED. R. EVID. 609(a)(1); Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

[184] *See, e.g.*, Fisher v. Univ. of Tex., 570 U.S. 297, 311–12 (2013); Grutter v. Bollinger, 539 U.S. 306, 338–39 (2003); *Gratz*, 539 U.S. at 270; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

[185] *See, e.g.*, *Fisher*, 570 U.S. at 311–12; *Grutter*, 539 U.S. at 338–39; *Gratz*, 539 U.S. at 270; *Bakke*, 438 U.S. at 315.

[186] *See, e.g.*, *Fisher*, 570 U.S. at 311–12; *Grutter*, 539 U.S. at 338–39; *Gratz*, 539 U.S. at 270; *Bakke*, 438 U.S. at 315.

[187] FED. R. EVID. 609(a)(1); Roberts, *supra* note 11, at 569; *see* Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

[188] *See Gordon*, 383 F.2d at 940; Roberts, *supra* note 11, at 569.

[189] *See* FED. R. EVID. 609(a)(1); Roberts, *supra* note 11, at 569.

compelling interest of attaining truth and ensuring justice is done.[190] There are other Rules of Evidence by which parties may impeach the credibility of a witness, including ample other reasons under Rule 404(b) for which prosecutors may introduce past convictions, such as proving bias or motive.[191] Because Federal 609(a)(1) is not narrowly tailored to meet the compelling interest of ascertaining truth and securing justice, it must fail a strict scrutiny test and therefore be deemed unconstitutional.[192]

D. *Alternately, Federal Rule 609(a)(1) Fails a Test of Intermediate Scrutiny*

As argued, felons should fit within the Supreme Court's jurisprudence regarding the identification of suspect classes.[193] However, the point raised that felons are the creators of their own immutable characteristic may be used by a court to determine that they should be considered a quasi-suspect rather than suspect class.[194] Indeed, the Supreme Court has been reluctant to create new suspect classes beyond race, national origin, and alienage, but in instances where a class almost meets the criteria for being a "discrete and insular minority," the Supreme Court has recognized it as quasi-suspect.[195] When government action facially discriminates against a quasi-suspect class, courts must apply the test of intermediate scrutiny, which requires that discriminatory action be substantially related to the furtherance of important governmental objectives.[196] Federal Rule 609(a)(1) fails this test.[197]

The important governmental objective is the same under intermediate scrutiny and strict scrutiny–the ultimate goals of litigation are truth and justice.[198] This Note has already challenged the government's employment of Federal Rule 609(a)(1) as overly broad rather than narrowly tailored, but

---

[190] *See* FED. R. EVID. 102; FED. R. EVID. 609(a)(1).

[191] FED. R. EVID. 404(b); FED. R. EVID. 608(a) (allowing for impeachment by reputation or opinion); FED. R. EVID. 608(b) (allowing inquiry into specific incidents related to truthfulness on cross-examination); FED. R. EVID. 613 (allowing for extrinsic evidence of a prior inconsistent statement); FED. R. EVID. 801(d)(1)(A) (allowing the introduction of prior inconsistent statements into evidence); *see* Roberts, *supra* note 11, at 576–77.

[192] *See* FED. R. EVID. 609(a)(1); Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

[193] *See supra* Part III(A).

[194] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 219–20 (1982) (illustrating that if a class does not meet all the characteristics of a suspect class, they may be treated as a quasi-suspect class).

[195] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (affirming gender as a quasi-suspect class requiring intermediate scrutiny); *Plyler*, 457 U.S. at 230 (establishing that undocumented children, whose immutable characteristic of illegality could be changed only upon their maturation, were a quasi-suspect class in terms of access to public education).

[196] *Virginia*, 518 U.S. at 516.

[197] *See infra* Part III(D).

[198] FED. R. EVID. 102.

the question remains as to whether the rule is "substantially related" to achieving the government's objective.[199] The answer must assuredly be no, for the Supreme Court has made it clear that facial discrimination of a quasi-suspect class cannot be based on general stereotypes, but must have a foundation in actually significant data.[200] In *Craig v. Boren*, for example, the Court's majority found the rationale that young men drink and drive more than young women to be insufficient justification for a law prohibiting the sale of light beer to eighteen to twenty-year-old men (but not to women of the same age).[201] The Court struck down the Oklahoma statute, holding that the goal of traffic safety, while an important objective, was not furthered given the insignificant differential between men and women's tendency to drive under the influence of alcohol.[202] The Court found the statistics offered by Oklahoma to be unconvincing, concluding that "the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving."[203]

Felons under Federal Rule 609(a)(1) are analogous to eighteen to twenty-year-old men in *Craig v. Boren* in that the assumption that a past conviction indicates a willingness to lie under oath is an archaic stereotype.[204] The courts and drafters of Rule 609(a)(1) concluded that because felons broke the law once, they will be more likely to break the law of perjury—in other words, felons are "ready and willing to do evil."[205] Social science specifically rejects the stereotypical rationale behind Rule 609(a)(1) that "all felons are liars."[206] Furthermore, not all felony convictions require the demonstration

---

[199] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[200] *See id.* at 198–99.

[201] *Id.* at 199.

[202] *Id.* at 199–201 (noting that .18% of females versus 2% of males aged 18 to 20 were arrested for driving under the influence, an inadequate "basis for employment of a gender line as a classifying device").

[203] *Id.* at 202–04.

[204] *See* FED. R. EVID. 609(a)(1); *Craig*, 429 U.S. at 200–01. *See generally* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 155–58 (2017) (arguing impeachment rules estimate the credibility of witnesses based on reputation and compliance with "norms of worthiness" to society more than on actual truthfulness).

[205] Walden v. Georgia-Pacific Corp., 126 F.3d 506, 523 (3d Cir. 1997) (noting that Rule 609 is "premised on the common sense proposition that one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath."); Roberts, *supra* note 11, at 587; *see* Hornstein, *supra* note 31, at 13–14 (outlining the inferential chain required by Rule 609(a)(1)'s assumption).

[206] Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 5 (1988); Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 545–46 (1992) ("[O]ur common sense tells us that a convicted murderer would be more likely to lie on the witness stand than Mother

of a culpable mental state, with the result that not all felons have been legally demonstrated to have criminal intent at all.[207] In addition, if convictions are the result of plea bargaining, there is no proof beyond a reasonable doubt that a defendant broke the law in the first place, meaning that many convictions are much more indicative of a felon's estimation of the outcome of a trial than a felon's moral bankruptcy and willingness to lie.[208] In the end, Rule 609(a)(1) acts in opposition to the government's own goals of "ascertaining the truth and securing a just determination" by encouraging juries to discount the testimony of felon witnesses.[209] Thus, Federal Rule 609(a)(1) cannot be said to be substantially related to the furtherance of an important governmental objective, and as it fails a test of intermediate scrutiny, it is therefore unconstitutional.[210]

IV. In the Alternative, Federal Rule 609(a)(1) Must Be Rejected Based on *Oregon v. Mitchell* or Under an Enhanced Rational Basis Test

A. *Federal Rule 609(a) Appears Facially Neutral Under the* Arlington Heights *Factors but Should Be Rejected Based on* Oregon v. Mitchell

The Supreme Court established in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* that even if government action seems neutral on its face, strict scrutiny may still apply if the government action can be shown to have been the product of invidious discrimination.[211] Discriminatory impact alone will not warrant a determination of invidiousness.[212] In addition to disproportionate impact, the discriminatory

---

Theresa. . . . Nonetheless, a large body of scientific research has been developed over the last thirty years that calls into question this common sense notion . . . ."); Roberts, *supra* note 11, at 576.

[207] Roberts, *supra* note 11, at 588.

[208] Roberts, *supra* note 11, at 590–91; *see* Thea Johnson, *Fictional Pleas*, 94 Ind. L. J. 855, 885 n.156 (2019); Hornstein, *supra* note 31, at 10 ("[T]here is a real question about whether the reasonable doubt standard serves to assure the integrity of the underlying convictions that may be used to impeach when a very substantial majority of all criminal convictions are not the result of trial determinations, but of plea bargains.").

[209] FED. R. EVID. 102; *see* FED. R. EVID. 609(a)(1); *Conviction by Prior Impeachment*, *supra* note 43, at 2003 ("[T]he silencing of the criminal defendant has troubling consequences for both the fact finder and the pursuit of truth. . . . While prior conviction impeachment offers some information about the defendant's past, when it chills defendant testimony it deprives jurors of information that may be important in order for them to fulfill their roles as fact finders.").

[210] *See* United States v. Virginia, 518 U.S. 515, 555–57 (1996).

[211] 429 U.S. 252, 265–66 (1977).

[212] Washington v. Davis, 426 U.S. 229, 242 (1976). *But cf.* Charles R. Lawrence III, *The ID, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–24 (1987) (arguing that the *Washington v. Davis* decision requiring intentional, invidious discrimination

intent of government action may be inferred from its historical background, the sequence of events leading up to it, any departures from normal procedure, substantive departures from procedure, and the legislative or administrative history behind a government action.[213] However, the government still has an opportunity to demonstrate that a nondiscriminatory rationale would have produced the same action and result:

> To establish a violation of the [F]ourteenth [A]mendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor. . . . They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered.[214]

Under the *Arlington Heights* test, the Supreme Court determined in *Hunter v. Underwood* that a provision of the Alabama Constitution disenfranchising those convicted of crimes of "moral turpitude" violated the Equal Protection Clause.[215] While the language of the provision was neutral, the legislative history indicated that the motivating factor behind the provision was a desire to disenfranchise Black citizens of Alabama—white delegates to the constitutional convention in 1901 sought to include in the definition of crimes of "moral turpitude" specifically crimes believed to be "more frequently committed by blacks."[216]

The disparate impact of Federal Rule 609(a)(1) lies in the fact that Black individuals are disproportionately arrested, convicted, and incarcerated in the United States; therefore any rule that relies upon past convictions will disproportionately target Black people.[217] However, the procedure by which the Federal Rules of Evidence were created and the Advisory Committee notes on Rule 609(a)(1) do not demonstrate evidence of discriminatory intent

---

does not fully address the "common historical and cultural heritage in which racism has played and still plays a dominant role").

[213] *Arlington Heights*, 429 U.S. at 268.

[214] Hunter v. Underwood, 471 U.S. 222, 225 (1985); *Arlington Heights*, 429 U.S. at 270.

[215] 471 U.S. at 222–23.

[216] *Id.* at 227.

[217] *See* Weatherspoon, *supra* note 4, at 606–12 (relating the number of Black men in federal prisons, state prisons, and local jails); Gonzales Rose, *supra* note 84, at 2272–73 ("[U]sing Rule 609 against a defendant of color encourages fact-finders to rely implicitly on racial character evidence . . . 'as most Americans associate Blacks with crime, revealing a Black defendant's prior convictions under Rule 609 reinforces widely held stereotypes about Blacks and encourages jurors to engage in *reasonable* racism.'"). *See generally* 13TH, *supra* note 83.

against one race.[218] Without demonstrating some evidence of the *Arlington Heights* factors beyond disparate impact, the argument might be that invidious discrimination cannot be proven in the drafting of Rule 609(a)(1), and therefore strict scrutiny does not apply.[219]

However, even if strict scrutiny does not apply under *Arlington Heights*, an earlier line of Equal Protection Clause jurisprudence regarding literacy tests and voting rights illustrates that proof of invidious discrimination can be demonstrated outside of a singular government action.[220] In *Gaston County v. United States*, for example, the Supreme Court held that because Gaston County had "systemically deprived its Black citizens of the educational opportunities it granted to its white citizens," even a neutral "administration of the literacy test today would serve only to perpetuate these inequities in a different from."[221] The Supreme Court went even further in *Oregon v. Mitchell*, upholding Congressional legislation being challenged by the state of Arizona that prohibited the use of literacy tests altogether.[222] Even without evidence that the literacy test was drafted or administered with invidious intent, and despite the fact that Arizona's education system was found to be nondiscriminatory, the Supreme Court held that because of the widespread discrimination against Black citizens throughout the United States "the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education."[223]

Under the type of analysis utilized in *Oregon v. Mitchell* and *Gaston County*, Federal Rule 609(a)(1) need not, by itself, be drafted with invidious intent or be administered in a discriminatory manner to be rejected.[224] Instead, invidious discrimination against Black individuals can be found in the history of the mass incarceration of Black people in this country.[225] The

---

[218] *See* H.R. COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-650, at 11 (1973); *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong. 25, 124–25, 150–51 (1974).

[219] *See* Washington v. Davis, 426 U.S. 229, 242 (1976); 429 U.S. at 265–66.

[220] Gaston County v. United States, 395 U.S. 285, 297 (1969).

[221] *Id.*

[222] 400 U.S. 112, 118 (1970), *superseded by Constitutional amendment*, U.S. CONST. amend. XXVI, *as recognized by* Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (affirming a ban on literacy tests but rejecting the lowering of the voting age in state elections from 21 to 18; Amendment XXVI superseded the case only in establishing 18 as the voting age and not in the decision's rejection of literacy tests).

[223] *Id.* at 235.

[224] *See id.* at 209; *see also Gaston*, 395 U.S. at 287.

[225] Powell & Hershenov, *supra* note 84, at 569–70 ("[Y]oung black men compromise fully half

criminal system disproportionately targets and convicts Black individuals and gives them harsher sentences than white criminal defendants,[226] and the laws created by states following the Thirteenth Amendment were specifically designed to incarcerate Black people.[227] State legislatures further crafted disenfranchisement laws with the specific intent of discriminating against Black people in order to render them politically powerless, as noted in *Hunter v. Underwood*.[228] Federal Rule 609(a)(1) thus further perpetuates the inherent discrimination and injustices of the criminal system.[229] Therefore, based on *Oregon v. Mitchell*, Rule 609(a)(1) may be challenged as unconstitutional despite the *Arlington Heights* factors not being met, and Congress has not only the power, but the obligation, to reject it.[230]

B. *Alternately, Federal Rule 609(a) Fails an Enhanced Rational Basis Test*

When a class is found to be neither suspect nor quasi-suspect, the discrimination against that class usually undergoes the judicial test of rational basis—if the government can provide any reason at all for its discriminatory intent, then the law withstands judicial scrutiny.[231] In very limited circumstances, however, an enhanced rational basis test requiring evidence supporting the government's rationale may apply.[232] The Court

---

of the total inmate population in the United States—despite the fact that they constitute only about five percent of the country's population. . . . Black men are now four times more likely to be incarcerated in the United States than they are in South Africa. . . . Currently there are more African-American men in prison than in college."). *See generally* Weatherspoon, *supra* note 4; 13TH, *supra* note 83.

226 Stevenson, *supra* note 83; Powell & Hershenov, *supra* note 84, at 609–12.

227 *See generally* Weatherspoon, *supra* note 4; 13TH, *supra* note 83.

228 471 U.S. 222, 228–29 (1985); *see, e.g.*, Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998) (noting the Mississippi offender provision in effect from 1890 to 1968 "was motivated by a desire to discriminate against blacks") (quoting *Hunter*, 471 U.S. at 233); Ratliff v. Beale, 74 Miss. 247, 247 (1896) (explaining that the Mississippi constitutional convention "swept the circle of expedients to obstruct the exercise of the franchise" by Black individuals).

229 *See* Hornstein, *supra* note 31, at 10–12.

230 *See* 400 U.S. 112, 235–236 (1970), *superseded by Constitutional amendment*, U.S. CONST. amend. XXVI, *as recognized by* Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005); *see also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp. (Arlington Heights), 429 U.S. 252, 266–68 (1977) (setting out factors to determine invidious discrimination but not rejecting the conclusion of *Oregon v. Mitchell* that Congress has the power under Section 5 of the 14th Amendment to enforce the Equal Protection Clause of Section 1).

231 *See supra* Part I(D).

232 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–50 (1985), *superseded by statute*, Fair Housing Act, 42 U.S.C. § 3604, *as recognized by* Human Res. Research and Mgmt. Grp., Inc. v. County of Suffolk, 687 F. Supp. 2d 237, 255–56. As discussed in *note 77*, while the Fair Housing Act now statutorily prohibits discrimination against disabled individuals, *City of*

utilized this type of heightened analysis in *City of Cleburne v. Cleburne Living Ctr.*, where all of the reasons given by the City of Cleburne to deny a permit for a home for the mentally impaired revolved around subjective and irrational beliefs about the mentally impaired.[233] The Supreme Court determined that because the City of Cleburne could not provide a rationale untainted by prejudice that its actions failed an enhanced rational basis test.[234] The Court held that the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational," and a "desire to harm a politically unpopular group" is not a legitimate state interest.[235] As the Supreme Court noted, "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[236]

Rule 609(a)(1) purportedly serves the legitimate governmental interest of ascertaining truth and seeking justice.[237] However, the assumption beneath the rule that "all felons are liars" is clearly prejudicial and arbitrary.[238] Social science rejects a connection between past conviction and veracity, and, as this Note has argued, past convictions may have little to do with criminal intent and the character for truthfulness of an individual.[239] The fact that Rule 609(a)(1) distinguishes felons as a class based on their past convictions is remarkably analogous to the situation in *City of Cleburne*.[240] The Rule, rather than providing any truly rational reason why prior convictions should be allowed to impeach felons, codifies the bias against ex-offenders ever present in American culture.[241] Because the rationale behind Rule 609(a)(1) irrationally discriminates against felons in this manner, it fails an enhanced rational basis test.[242]

Cleburne may still be used as an example of an enhanced rational basis test.

[233] *See id.* at 447–51 (listing the city's reasons for denying the permit, such as a conjecture that the junior high school students across the street from the home might harass the residents, all of which rested on an "irrational prejudice" against the mentally impaired).

[234] *Id.* at 450.

[235] *Id.* at 446–47; *see also* Jones v. Governor of Fla., 950 F.3d 795, 814 (11th Cir. 2020).

[236] *City of Cleburne*, 473 U.S. at 448 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[237] *See* FED. R. EVID. 102; FED. R. EVID. 609(a)(1).

[238] *See City of Cleburne*, 473 U.S. at 446–47; *Conviction by Prior Impeachment*, *supra* note 43, at 2015–16 (noting that Rule 609 encourages propensity evidence specifically rejected by other rules of evidence, but perhaps it remains because the idea of a convicted individual being "by nature a 'criminal'" permeates the entire criminal legal system).

[239] *See supra* Part III(B) (discussing how plea bargaining, strict liability felonies, wrongful incarceration, and socioeconomic factors, including systemic racism, all contribute to felony convictions).

[240] *See* FED. R. EVID. 609(a)(1); *City of Cleburne*, 473 U.S. at 450.

[241] *See generally* Roberts, *supra* note 11.

[242] *Cf. City of Cleburne*, 473 U.S. at 450.

CONCLUSION

Given the arbitrary rationale, inconsistent application, and damaging consequences of Federal Rule 609(a)(1), it must be rejected under an Equal Protection Clause analysis and consequently stricken from Federal Rule of Evidence 609. Rule 609(a)(1) separates and punishes felons as a class without consideration for the individual culpability and rehabilitative efforts of the formerly incarcerated. Felons, as a suspect (or quasi-suspect) class, have been historically discriminated against, and, as a result of widespread disenfranchisement, they lack the political power to combat the restrictive laws they encounter on a daily basis. An analysis of Rule 609(a)(1) under a test of strict scrutiny, or even intermediate scrutiny, demonstrates that Rule 609(a)(1) violates the Equal Protection Clause because it is not narrowly tailored or substantially related to the governmental objective of seeking truth and justice. Rule 609(a)(1) even fails under *Oregon v. Mitchell* and an enhanced rational basis test for one simple reason: *not* all felons are liars. To treat them as such, especially given the disproportionate targeting and conviction of Black individuals by the criminal system, counteracts the very point of the Fourteenth Amendment—that all individuals should be treated equally under the law.

* * * *

Herd Immunity Requires a Herd Mentality: Eliminating Religious and Philosophical Vaccine Exemptions Nationwide

Gabrielle Muniz[*]

INTRODUCTION

The 2020 COVID-19 outbreak threw into sharp relief the United States' vulnerability to deadly epidemics.[1] Along with an increasing death toll that has surpassed U.S. service member deaths in the Vietnam War, COVID-19 also fundamentally changed the way every American has lived since 2020.[2] Shelter-at-home orders, closed businesses, millions unemployed, social distancing, and mask mandates are just a few of the life-altering changes caused by the ongoing pandemic.[3] COVID-19 is a deadly and debilitating disease, and it will continue to affect our lives until a successful vaccine can be given to the majority of the population.[4] While COVID-19 is not the only deadly disease to kill thousands of Americans, it is the most recent.[5] Despite the clear destructive power of viruses like

[*] J.D., New England Law | Boston (2021), Salutatorian. B.A., Biology, College of the Holy Cross (2018).

[1] *See* Editorial Bd., *America May Be Done with Coronavirus, but COVID-19 Is Not Done with America*, USA TODAY (June 18, 2020, 9:03 PM ET), https://perma.cc/G6PS-PTVN (explaining that the coronavirus has killed more Americans than the Vietnam War, and the number of deaths keeps increasing).

[2] *Id.*

[3] *See, e.g.*, *Reopening Massachusetts*, MASS.GOV, https://perma.cc/CN5Y-5K8U (last visited Jan. 2, 2022).

[4] *See* Caroline Chen, *How—And When—Can the Coronavirus Vaccine Become Reality?*, PROPUBLICA (June 17, 2020, 5:00 AM EDT), https://perma.cc/H7FS-RD3N (noting the phased appropriate to creating, testing, and releasing the vaccine).

[5] *See* Jacob Gershman, *A Guide to State Coronavirus Reopenings and Lockdowns*, WALL ST. J., https://perma.cc/4Q6M-4PG3 (last updated May 20, 2020, 1:47 PM ET).

COVID-19, vaccination rates in the United States have been decreasing, thus placing more people at risk of dying from entirely preventable diseases.[6] Not only are decreasing vaccination rates concerning for resurging diseases like measles, they also raise questions about the efficacy of the coronavirus vaccine: if enough Americans choose not to get the vaccine, then COVID-19 will continue to infect Americans.[7] COVID-19 exposed the inherent national challenges of viruses that charge over state lines and global borders, challenges implicit in the nature of viruses that were exposed by the rampant spread of COVID-19.[8] This Note argues that, in order to increase vaccination rates across the United States, the federal government is best suited to implement a national vaccination policy for public schools.[9]

All states require public school students to be vaccinated.[10] However, vaccination rates of children have been decreasing, a decline exacerbated by COVID-19 pandemic.[11] However, most states allow parents to opt out of vaccination by claiming either a medical, religious, or philosophical exemption.[12] In 2019, New York, joining just four other states, banned all non-medical exemptions and tightly regulated medical exemptions in an effort to increase vaccination rates and prevent outbreaks.[13] While extreme, this Note will argue that the federal government has the authority to mandate vaccination in public schools, including the COVID-19 vaccine, with only medical exceptions, thereby expanding New York's public school

---

[6] *See* Catharine Paules, Hilary Marston & Anthony Fauci, *Measles in 2019—Going Backward*, 380 NEW ENG. J. MED. 2185, 2186 (2019).

[7] Lauren S. Grossman, *To Put Covid-19 Behind Us, All Americans Should Be Vaccinated Against It*, STAT (May 12, 2020), https://perma.cc/6RMU-FX4U; *see* Morgan Krakow, *A Tourist Infected with Measles Visited Disneyland and Other Southern California Hot Spots in Mid-August*, WASH. POST (Aug. 24, 2019), https://perma.cc/4QHF-9WPL (demonstrating how a contagious virus can quickly spread through crowds of people when one person spread the measles virus to 147 people at Disney in 2015, and other subsequent measles outbreaks have been traced back to Disney); Warren Cornwall, *Just 50% of Americans Plan to Get a COVID-19 Vaccine. Here's How to Win Over the Rest*, SCIENCE (June 30, 2020), https://perma.cc/SJH8-PNH9 (explaining that some surveys predict only 50% of Americans will get the COVID-19 vaccine).

[8] *See* Center for Systems Science and Engineering (CSSE), *COVID-19 Dashboard*, JHU: JOHNS HOPKINS UNIVERSITY, https://perma.cc/ZU8G-EA2E (last updated Jan. 27, 2021).

[9] *See* Paules, Marston & Fauci, *supra* note 6.

[10] Leila Barraza, Cason Schmit & Aila Hoss, *The Latest in Vaccine Policies: Selected Issues in School Vaccinations, Healthcare Worker Vaccinations, and Pharmacist Vaccination Authority Laws*, 45 J.L. MED. & ETHICS 16, 16 (2017).

[11] *See Decline in Child Vaccination Coverage During the COVID-19 Pandemic — Michigan Care Improvement Registry, May 2016–May 2020*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION (May 18, 2020), https://perma.cc/ZU5Q-9K3F.

[12] Barraza et al., *supra* note 10.

[13] *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019).

vaccination requirements nationally.[14] With the advent of COVID-19, and the resurgence of viruses like measles, this Note will argue that it is necessary to federally mandate vaccination in order to protect both lives and the economy.[15] Vaccines can give back the freedom, safety, and normalcy COVID-19 took away, but they can only do so if people vaccinate.[16]

First, this Note will provide a background on vaccinations: their history, how they work, global vaccination rates, and that vaccines, including the COVID-19 vaccine, are safe.[17] Second, this Note will discuss the different vaccine exemptions and state vaccination policies, focusing on New York's 2019 policy.[18] This Note will then briefly discuss the necessity of vaccination in an increasingly connected world using COVID-19 as an example.[19] To argue that the federal government should adopt New York's 2019 policy nationally, and include COVID-19 as a vaccine, this Note will first explain that mandating a national vaccination policy is constitutional and does not unconstitutionally infringe on religious freedom, freedom of choice, or state powers.[20] Finally, this Note will explore the federal government's power to implement a vaccination policy first through a national recommendation, and second, through the spending and taxing powers.[21]

I. Background

A. *Measles Resurgence*

Welcome to Disneyland, the Happiest Place on Earth.[22] Forty-five thousand people visit the California theme park every day.[23] But one day in 2015, one of those forty-five thousand people was infected with measles.[24] If the United States maintained vaccination rates necessary for herd immunity

---

[14] *Id.*; *see infra* Part III.

[15] *See infra* Part III.

[16] *See* Oxford Vaccine Grp., *Herd Immunity: How Does it Work?*, UNIV. OF OXFORD, MED. SCI. DIV. (Apr. 26, 2016), https://perma.cc/F8MN-JPWF; *see also* Barraza et al., *supra* note 10, at 16–19.

[17] *See infra* Part I.

[18] *Infra* Part I(F).

[19] *Infra* Part II.

[20] *Infra* Part III.

[21] *See infra* Part IV.

[22] *See* Katie M. Palmer, *Why Did Vaccinated People Get Measles at Disneyland? Blame the Unvaccinated*, WIRED (Jan. 26, 2015, 6:00 AM), https://perma.cc/6UUR-7U2H (describing Disneyland as "The Happiest Place on Earth").

[23] Krakow, *supra* note 7.

[24] Krakow, *supra* note 7.

(90–95%), then the disease would not have spread.[25] Instead, because one person in Disneyland had measles, and vaccination rates were not high enough, 125 people contracted measles in eight different states.[26] Of those infected, "45% were unvaccinated for measles, and 43% had unknown vaccination status . . . . Among the unvaccinated patients . . . a majority (67%) of vaccine-eligible patients intentionally were unvaccinated because of personal beliefs."[27]

Instead of decreasing, measles cases are increasing in the United States.[28] Between January 1, 2019, and April 26, 2019, there were 704 measles cases in twenty-two states—the most measles cases reported in a single year since 1994.[29] In that four-month time period, there were thirteen outbreaks of measles, and the median age of a person infected with measles was five years old.[30] One of the greatest medical innovations—vaccination—prevents thousands of illnesses and deaths.[31] But, many children are still not getting vaccinated.[32]

B. *History of Vaccination*

Janet Parker began to feel unwell on August 11, 1978.[33] Her body was covered in red bumps, and she soon became too weak to stand.[34] The red, pus-filled bumps were so numerous on her face that Ms. Parker essentially went blind, unable to see because the sores obscured her vision.[35] She had

[25] *See* Oxford Vaccine Grp., *supra* note 16.

[26] Barraza et al., *supra* note 10, at 16–17.

[27] Barraza et al., *supra* note 10, at 17.

[28] Manisha Patel et al., *Increase in Measles Cases—United States, January 1–April 26, 2019*, 68 MORBIDITY & MORTALITY WKLY. REP. 402, 402 (2019).

[29] *Id.*

[30] *Id.*

[31] *See generally* Susan Pryor, *Smallpox in the 18th Century*, COLONIAL WILLIAMSBURG DIGITAL LIBR., (1984), https://perma.cc/GN8J-4GJ9 (describing the relief provided by a smallpox vaccine).

[32] *See States with Religious and Philosophical Exemptions from School Immunization Requirements*, NCSL: NAT'L CONFERENCE OF STATE LEGISLATURES, (Nov. 22, 2021) https://perma.cc/HR8T-6QAN; s*ee also Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, NY.GOV (June 18, 2019), https://perma.cc/6M43-37ER; Paul A. Offit, *Are Kids Getting Too Many Vaccines?*, DAILY BEAST (Jan. 29, 2017, 12:01 AM ET), https://perma.cc/87YM-JTWU.

[33] Monica Rimmer, *How Smallpox Claimed Its Final Victim*, BBC NEWS (Aug. 10, 2018), https://perma.cc/CF9H-456K.

[34] *Id.*

[35] *Id.*

renal failure and pneumonia, and then stopped talking.[36] Finally, on September 11, 1978, Ms. Parker died.[37] She was the last victim of smallpox.[38]

Smallpox had been one of the most feared viruses in the world for thousands of years.[39] Smallpox "disfigured, crippled, or killed every tenth person"[40] and killed over three hundred million people in the twentieth century alone.[41] But now, in a triumph of vaccination, smallpox has been eradicated worldwide.[42] Edward Jenner is largely credited with developing the first rudimentary smallpox vaccine in 1796.[43]

After Louis Pasteur created the first rabies vaccine in 1885, many scientists quickly invented vaccines.[44] Developments in science fueled the creation of vaccines against diphtheria, tetanus, cholera, typhoid, tuberculosis, polio, measles, mumps, rubella, pertussis, hepatitis B, and many others.[45] Today, there are vaccines for twenty-six diseases, including the seasonal flu.[46] Vaccines are essential to prevent humans, and especially children, from suffering from many deadly, debilitating diseases.[47]

However, the increase in vaccination rates has always been accompanied by a fear of vaccines.[48] During an outbreak of smallpox in Boston in 1721, Reverend Mather began giving people an inoculation using a technique similar to the Chinese method (smearing pus from an infected person over a cut on a healthy person) and had a bomb thrown in his

---

[36] *Id.*

[37] *Id.*

[38] *Id.* (explaining that, soon after Ms. Parker's death, the WHO declared smallpox eradicated).

[39] *See* Pryor, *supra* note 31.

[40] Pryor, *supra* note 31.

[41] Rimmer, *supra* note 33.

[42] Rimmer, *supra* note 33.

[43] Rimmer, *supra* note 33. *Contra* Coll. Of Physicians of Phila., *Chinese Smallpox Inoculation*, HISTORY OF VACCINES, https://perma.cc/S7NG-BL9T (last visited Jan. 2, 2022) (explaining that smallpox vaccinations were practiced in China for thousands of years). *See generally* Coll. of Physicians of Phila., *All Timelines Overview*, HISTORY OF VACCINES, https://perma.cc/65GS-KP6K (last visited Jan. 2, 2022) [hereinafter *The History of Vaccines*].

[44] *The History of Vaccines*, *supra* note 43.

[45] WHO, UNICEF & WORLD BANK, STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS at 6, 8 (World Health Org., 3d ed. 2009), https://perma.cc/U8ZY-EXFE [hereinafter STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS]; *The History of Vaccines*, *supra* note 43.

[46] *List of Vaccines Used in the United States*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/QLM9-D8TP (last updated Apr. 13, 2018).

[47] *See* Rimmer, *supra* note 33.

[48] *See* Matthew Niederhuber, *The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, HARV. UNIV. (Dec. 31, 2014), https://perma.cc/VZ27-7HF5.

window by someone who opposed vaccination.[49] Thankfully, the bomb did not detonate, and the Reverend's inoculations were largely successful—of those who got smallpox, people who had been inoculated had a mortality rate of 2%, while people who had not been inoculated had a mortality rate of 14.8%.[50]

C. *Modern Vaccination*

1. The Body's Immune Response

Vaccines teach the body to recognize harmful germs (either viruses or bacteria) and speed up the body's natural immune system.[51] Normally, when a body is infected by a germ, the body takes some time to recognize and respond to that germ.[52] In the meantime, that germ has been replicating and spreading throughout the body, making the infected person sick.[53] The body has two types of cells that recognize germs: B-lymphocytes and T-lymphocytes.[54] When a B-lymphocyte encounters a germ, it binds to the germ and then clones itself, so there are more B-lymphocytes to bind with more germs.[55] The B-lymphocytes make memory B-cells (cells that have receptors that bind to that particular germ) and plasma cells that produce antibodies (molecules made to bind to germs to incapacitate them and identify them for destruction).[56] Then, the body summons macrophages to destroy any marked germs.[57] T-lymphocytes function similarly to B-lymphocytes, except they mark and destroy cells that have been infected with germs.[58] In summary, the natural immune response can take time because B- and T-lymphocytes need time to clone themselves and find the virus that is already in the body.[59]

Vaccination aims to speed up the body's natural immune response by

---

[49] *See id.* (describing how the pus transferred smallpox to the inoculated person, who developed a minor form of smallpox, recovered, and then had smallpox immunity).

[50] *Id.*

[51] *Understanding How Vaccines Work*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/2LHJ-ZKPS (last updated Aug. 17, 2018).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Ali Roghanian & Rebecca Newman, *B Cells*, IMMUNOLOGY, https://perma.cc/UA9Z-X5EL (last updated Mar. 2021).

[56] *Id.*

[57] *Understanding How Vaccines Work*, *supra* note 51.

[58] Maurie Markman, *B-cells Vs. T-cells: What's the Difference?*, CANCER CENTER, https://perma.cc/6R65-JLZR (last updated Jan. 10, 2022).

[59] *See id.*

introducing weakened, dead, or only part of a germ to the body so the body responds by producing antibodies and T-lymphocytes, but the germ itself does not cause the person to get sick.[60] Because the body has an immune response to the vaccine, it also builds and stores memory cells.[61] So, if that person is infected with a disease the person was vaccinated for, the memory cells will recognize the germs faster, and the person's body will be able to fight the disease more quickly and effectively.[62]

Vaccines do have some side effects.[63] The body takes time to build immunity (by making B- and T-lymphocytes) to diseases after receiving a vaccine.[64] So, it is possible to get a vaccine and still get the disease a few weeks later before the body has built up an immune response.[65] However, the vaccine did not cause that disease.[66] Rather, the vaccine did not have enough time to build immunity before that person was exposed to the disease.[67] Sometimes people can get a mild fever after a vaccine as a result of the body's immune response.[68] Again, that does not mean the person is sick with the germ, it means that the body is working hard to produce antibodies and B-lymphocytes.[69] In summary, while vaccinations have rare side effects, they are beneficial to human health because they teach the body to recognize harmful germs and speed up the body's natural immune system.[70]

2. Global Vaccination Goals

The World Health Organization ("WHO") launched the Expanded Programme on Immunization (EPI) in 1974 with the goal of increasing vaccination rates among children.[71] By 1990, 80% of children globally were vaccinated for at least the six main EPI diseases.[72] "WHO has estimated that

---

[60] *Understanding How Vaccines Work*, *supra* note 51.

[61] *Understanding How Vaccines Work*, *supra* note 51.

[62] *See Understanding How Vaccines Work*, *supra* note 51.

[63] *Understanding How Vaccines Work*, *supra* note 51.

[64] *Understanding How Vaccines Work*, *supra* note 51.

[65] *Understanding How Vaccines Work*, *supra* note 51.

[66] *See Understanding How Vaccines Work*, *supra* note 51.

[67] *Understanding How Vaccines Work*, *supra* note 51.

[68] *Understanding How Vaccines Work*, *supra* note 51.

[69] *See Understanding How Vaccines Work*, *supra* note 51.

[70] *See Understanding How Vaccines Work*, *supra* note 51.

[71] *History of Vaccine Development*, WHO: WORLD HEALTH ORG., https://perma.cc/CW2X-3DHF (last visited Jan. 23, 2022). *See generally* STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45.

[72] *History of Vaccine Development*, *supra* note 71 (explaining that the six main EPI diseases are tuberculosis polio, diphtheria, pertussis, tetanus, and measles).

if all the vaccines now available against childhood diseases were widely adopted, and if countries could raise vaccine coverage to a global average of 90% . . . an additional two million deaths a year could be prevented among children under five years old."[73] Vaccination is not just an individual protection; when most people in an area are vaccinated, then germs cannot find hosts to replicate and spread, and diseases are effectively eliminated from vaccinated communities.[74] This concept is called herd immunity.[75] If vaccination rates decrease, then the disease can spread again.[76] Immunization can also have effects beyond just preventing sickness and death.[77] "A recent study by a Harvard School of Public Health team found that by keeping children healthy and in school, immunization helps extend life expectancy and the time spent on productive activity–thereby contributing to poverty reduction."[78] The goal of vaccination is to have the world vaccinated at a level that would eliminate preventable diseases on a global scale, save lives, reduce poverty, and use herd immunity to protect those for whom it is medically unsafe to get vaccines.[79]

D. *Vaccines Are Safe*

Vaccines undergo years of testing, safety regulations, and certifications before being made available to the public.[80] The National Regulatory Authority ("NRA") monitors vaccines and ensures their safety and the Food and Drug Administration ("FDA") licenses vaccines.[81] Vaccines undergo at least three rounds of clinical trials before they are licensed, and then are subject to constant post-licensure surveillance and monitoring.[82] The Centers

---

[73] STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45, at xix.

[74] *See* Oxford Vaccine Grp., *supra* note 16.

[75] *See* Oxford Vaccine Grp., *supra* note 16.

[76] Offit, *supra* note 32; *see, e.g.*, *Measles (Rubeola): Cases and Outbreaks*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/RBB5-XX9A (last updated Nov. 19, 2021) (explaining how measles has infected over 1,200 people in 31 states in 2019 due to low vaccination rates).

[77] *See generally* STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45.

[78] STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45, at xxix.

[79] *See Expectations Towards Safety of Vaccines*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/2UCG-HPR8 (last visited Jan. 2, 2022); STATE OF THE WORLD'S VACCINES AND IMMUNIZATIONS, *supra* note 45.

[80] *Expectations Towards Safety of Vaccines*, *supra* note 79.

[81] *Vaccine Safety Partners*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/M2JD-GJGR (last visited Jan. 2, 2022); *Expectations Towards Safety of Vaccines*, *supra* note 79.

[82] *Pre-Licensure Vaccine Safety*, WHO: WORLD HEALTH ORG., https://perma.cc/HFU6-37Y7 (last visited Jan. 2, 2022); *Post-Licensure Vaccine Safety*, WHO: WORLD HEALTH ORG.,

for Disease Control and Prevention ("CDC") also has an immunization safety office which tracks any reported side effects of vaccines to ensure that vaccines are safe and effective.[83] Every vaccine available to the public has been rigorously tested, monitored, and licensed.[84]

E. *The COVID-19 Vaccine*

Similarly, the COVID-19 vaccine underwent rounds of rigorous testing before it was released.[85] The FDA, the federal agency responsible for licensing vaccine producers, released guidance explaining the benchmarks and testing requirements the COVID-19 vaccine needed to pass to be released to the public.[86] The FDA's guidelines ensure that, even though the COVID-19 vaccine was being made quickly (hence the name Operation Warp Speed), the vaccine was still rigorously tested to ensure it is safe.[87] The FDA guidance covered chemical testing, manufacturing requirements, animal studies, clinical tests, and post-licensure vaccine safety, as well as providing detailed requirements for the ingredients, facilities, and testing of the vaccine both pre- and post-licensure.[88] Additionally, the "COVID-19 vaccines licensed in the United States must meet the statutory and regulatory requirements for vaccine development and approval, including for quality, development, manufacture, and control . . . ."[89] Luckily, researchers were not starting from scratch with the COVID-19 vaccine.[90] Because COVID-19 is part of a family of viruses that includes SARS and MERS, scientists have already been researching and developing vaccines for those types of viruses.[91] The scientists know that coronaviruses have an S protein spike projecting from the virus that binds with human cells.[92]

---

https://perma.cc/NF3B-3CCY (last visited Jan. 2, 2022).

[83] *Vaccine Safety*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/H96D-RRTG (last visited Jan. 2, 2022).

[84] *See generally id.*

[85] *Coronavirus (COVID-19) Update: FDA Takes Action to Help Facilitate Timely Development of Safe, Effective COVID-19 Vaccines*, FDA: FOOD & DRUG ADMIN. (June 30, 2020), https://perma.cc/9WNZ-NAZF.

[86] *Id.*

[87] *Id.*

[88] Development and Licensure of Vaccines to Prevent COVID-19: Guidance for Industry, Guidance No. FDA-2020-D-1137, CTR. FOR BIOLOGICS EVAL. & RESEARCH 2 (FDA June 2020), https://perma.cc/WN36-EJ47.

[89] *Id.* at 3.

[90] *COVID-19 Vaccines: Get the Facts*, MAYO CLINIC, https://perma.cc/B2N3-TPPJ (last updated Dec. 18, 2021).

[91] *Id.*

[92] *Id.*

Because the vaccine prevents the S protein from binding with human cells, the vaccine can be effective.[93] However, experts estimate that about 70% of people will need to develop immunity, either through the vaccine or through infection, to break the COVID-19 pandemic, and an even higher immunity rate is necessary to eliminate the virus.[94]

F. *States Currently Decide Vaccination Requirements*

Vaccination requirements are governed by the states because states protect the health, safety, welfare, and morals of their citizens.[95] All states require students attending public schools to be vaccinated unless the child has a valid exemption—and some states also have the same requirements for private schools.[96] In 2016, all 50 states allowed medical exemptions, 47 states allowed religious exemptions, and 18 states allowed philosophical exemptions.[97] By 2019, states that allowed religious and philosophical exemptions decreased: 45 states currently allow religious exemptions and 15 states currently allow philosophical exemptions.[98] California, Mississippi, Maine, West Virginia, and New York are the only states that have eliminated both religious and philosophical exemptions.[99]

Out of those five states, New York has arguably the strictest vaccine laws.[100] First, unlike other states, New York's vaccine laws were immediately implemented.[101] Second, unlike California or Maine, New York has no exemption for students with special needs.[102] Also, New York made it harder to get a medical exemption:

> A signed, completed medical exemption form approved by the NYSDOH or NYC Department of Education from a physician licensed to practice medicine in New York State certifying that

---

[93] *Id.*

[94] Cornwall, *supra* note 7.

[95] See U.S. CONST. amend. XIV.

[96] Barraza et al., *supra* note 10, at 16 ("[O]ften these requirements extend to children attending daycare or private schools.").

[97] Barraza et al., *supra* note 10, at 16.

[98] *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 32.

[99] *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 32.

[100] *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019); Sharon Otterman, *Get Vaccinated or Leave School: 26,000 N.Y. Children Face a Choice*, N.Y. TIMES (Sept. 3, 2019), https://perma.cc/T6AH-HJDW.

[101] *See* Otterman, *supra* note 100 (noting that Maine's new law did not go into effect immediately).

[102] Otterman, *supra* note 100.

> immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated. The medical exemption must be reissued annually. The principal or person in charge of the school may require additional information supporting the exemption.[103]

In New York, parents must apply every year to get a medical exemption, which must be approved by a state physician.[104] New York also reserves the right to deny any unvaccinated child with a medical exemption the right to go to school during an outbreak of a vaccine-preventable disease.[105] Unvaccinated children without medical exemptions are not allowed to attend public school in New York.[106] New York's strict vaccination laws also apply to private schools.[107] Thus, parents can choose to homeschool, move to another state, or vaccinate.[108]

New York's strict vaccine laws are in response to a large measles outbreak in 2018, where 654 people in New York City and 414 people in other parts of New York contracted measles—a high number considering that measles was declared eliminated from the United States in 2000.[109] Measles still exists in pockets around the world and can spread when infected travelers encounter a group of unvaccinated people.[110] Because New York had 26,000 unvaccinated children claiming religious exemptions, and those children were clustered mostly in Orthodox Jewish communities, exposure to measles quickly led to a severe outbreak.[111]

G. *Explaining the Exemptions: Medical, Religious, and Philosophical*

Parents can obtain medical exemptions if certain vaccines would not be

---

[103] N.Y. Comp. Codes R. & Regs. 10, § 66-1.3(c).

[104] N.Y. Comp. Codes R. & Regs. 10, § 66-1.3(c).

[105] N.Y. Comp. Codes R. & Regs. 10, § 66-1.10.

[106] Otterman, *supra* note 100.

[107] Otterman, *supra* note 100.

[108] Otterman, *supra* note 100.

[109] Otterman, *supra* note 100; *see Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32 ("The United States is currently experiencing the worst outbreak of measles in more than 25 years . . . . As a result of non-medical vaccination exemptions, many communities across New York have unacceptably low rates of vaccination, and those unvaccinated children can often attend school where they may spread the disease to other unvaccinated students, some of whom cannot receive vaccines due to medical conditions.").

[110] *See Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32.

[111] Otterman, *supra* note 100.

safe for their child.[112] For example, individuals cannot safely get a vaccine if they are allergic to one of its ingredients.[113] The medical exemptions vary with each disease, but, in general, age, impaired immune function, current illness, and allergies can provide grounds for medical exemptions.[114] The requirements to receive a medical exemption also vary by state; some states require medical exemptions to be renewed each year, and all require some sort of physician authorization.[115] In states that allow it, parents can get philosophical exemptions if they do not want their child to be vaccinated.[116] Some parents choose not to get their child vaccinated because they want their child to develop immunity naturally.[117] Many parents believe vaccines are not safe.[118] One study claims that about 25% of parents are concerned about vaccine safety, and 30% of parents think vaccines cause autism.[119] Parents can receive a religious exemption if they certify that their religion objects to vaccines.[120] But only a few religions, like Christian Scientists and some faith healing groups, actually object to vaccines.[121] Unlike medical exemptions, which require doctor approval, "in most states, . . . you can simply sign a form stating that you have religious reasons to opt out."[122] Because so few religions actually object to vaccines, some religious exemptions are more matters of personal interpretation.[123] One mother stated that "[t]he Bible . . . barred her as a Christian from 'desecrating the body,' which is what she says vaccines do."[124] But many Christians do get vaccines, and the Christian faith does not object to vaccines.[125] Similarly, not all Orthodox Jews object to vaccinations.[126]

---

[112] *See generally Who Should NOT Get Vaccinated with These Vaccines*?, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/M572-CCML (last updated Apr. 2, 2020).

[113] *See id.*

[114] *See id.*

[115] *What Are the Rules on Vaccine Exemptions?*, WEBMD, https://perma.cc/W2N7-JQPY (last updated Apr. 21, 2021).

[116] *Id.*

[117] *See generally id.*

[118] *See id.*

[119] Otterman, *supra* note 100.

[120] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[121] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[122] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[123] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[124] Otterman, *supra* note 100.

[125] *See* Vincent Iannelli, *Are There Religious Exemptions to Vaccines?*, VERYWELL FAMILY, https://perma.cc/AW8H-LFHK (last updated Dec. 9, 2020).

[126] Kimiko de Freytas-Tamura, *Despite Measles Warnings, Anti-Vaccine Rally Draws Hundreds of Ultra-Orthodox Jews*, N.Y. TIMES (May 14, 2019), https://perma.cc/NS6M-7BQ8 (showing that

II. A National Need for Increased Vaccination

Measles resurgences are becoming more common across the country.[127] The majority of people infected by measles outbreaks in 2019 were unvaccinated, and "underimmunized close-knit communities . . . accounted for 88% of all cases."[128] If the United States does not increase its vaccination rates, especially among children, then more people will get sick from completely preventable diseases.[129] And measles is not the only disease making a comeback:

> Poliovirus hasn't spread in our country because immunization rates are high. If immunization rates drop, however, polio will be back. Which is exactly what happened in an undervaccinated Amish community in Minnesota in 2005 when five children came down with polio. Or in an Amish community in Pennsylvania in 2001 when six children suffered meningitis caused by Hib. Or in states newly independent of the Soviet Union between 1990 and 1994 when 50,000 people, mostly children, were infected with diphtheria. Let your guard down, and these diseases will come back.[130]

States are not as equipped as the Federal Government to handle national outbreaks.[131] In 2019, twenty-two states had reported measles cases.[132] In 2015, one infected person in Disneyland spread the infection to eight different states.[133] COVID-19 spread to every continent in the world and every state in the United States in three months.[134] It has killed hundreds of thousands of people, left millions unemployed, and subjected Americans to the harshest quarantine measures in living memory.[135] The United States is facing an immediate and increasing health crisis and needs to quickly and

---

Orthodox Rabbi objected to the anti-vaccination movement).

[127] *See* Patel et al., *supra* note 28, at 402.

[128] Patel et al., *supra* note 28, at 402.

[129] *See* Patel et al., *supra* note 28, at 403.

[130] Offit, *supra* note 32; *see* Charles Payne, *Untraceable Coronavirus Clusters Emerge Outside Asia, Worrying Health Officials*, FOX BUSINESS (Feb. 22, 2020), https://perma.cc/Z6GN-XLA9 (illustrating how a contagious virus can spread globally, despite the extreme measures China took to contain it).

[131] *See generally* Patel et al., *supra* note 28, at 403.

[132] Patel et al., *supra* note 28, at 402.

[133] Adeel Hassan, *Disneyland Visitor with Measles May Have Exposed Hundreds to Infection*, NY TIMES (Oct. 23, 2019), https://perma.cc/6LED-S9ZR; Krakow, *supra* note 7.

[134] Associated Press, *How Did Coronavirus Infect People on Every Continent but Antarctica in Just Three Months?*, THE OREGONIAN (July 26, 2020, 6:23 AM), https://perma.cc/LY7Z-NTMC.

[135] *See* Editorial Bd., *supra* note 1.

dramatically raise its vaccination rates nationally to prevent outbreaks.[136] New York's public school vaccine policy (immediately implemented, with no religious or philosophical exemptions, and with state-monitored, annual medical exemptions) is the most effective way to increase vaccination rates because it compels parents to comply.[137] The government has a duty to protect the most vulnerable population—people who cannot get vaccines for medical reasons—and the choices of a few parents should not endanger the health of the community.[138] The Federal Government needs to adopt New York's strict vaccination law to prevent more outbreaks.[139]

III. It Is Constitutional for the Federal Government to Adopt a National Vaccination Policy

A. *The New York Policy Would Be the Best to Implement Nationally*

The 2019 New York vaccination policy would be the most effective policy to achieve herd immunity for diseases with a current vaccine, like measles and COVID-19.[140] The federal government should require all students without a strictly regulated medical exemption to be vaccinated before going to public school.[141] The New York policy is better than other state policies for three reasons.[142] First, New York's vaccine laws were immediately implemented, requiring all students attending New York schools to be vaccinated before the 2019 school year.[143] An immediately implemented national vaccine policy would similarly achieve high vaccination rates quickly.[144] Second, New York has no exemption for special needs students, ensuring a greater vaccination rate.[145] Third, New York also made it harder to get a medical exemption, avoiding a situation like California where medical exemptions doubled when the state eliminated

---

[136] *See generally* Patel et al., *supra* note 28; *Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32.

[137] *See* Otterman, *supra* note 100.

[138] *See generally* Patel et al., *supra* note 28 (noting the unvaccinated are the primary source of outbreaks).

[139] *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019).

[140] *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019); *see also* Oxford Vaccine Grp., *supra* note 16.

[141] *Contra* N.Y. Comp. Codes R. & Regs. 10, § 66-1.1(a) (applying the New York policy to private schools as well as public schools).

[142] *See generally* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10.

[143] Otterman, *supra* note 100.

[144] *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10.

[145] Otterman, *supra* note 100.

religious and philosophical exemptions.[146] To further ensure that only people with true medical conditions get the exemption, in New York, parents must annually complete a detailed application that is submitted to a state physician for approval.[147] New York also reserves the right to deny any unvaccinated child with a medical exemption the right to go to school during an outbreak of a vaccine preventable disease.[148] Unvaccinated children without medical exemptions are not allowed to attend school in New York.[149] Although New York's strict vaccination laws apply to private schools, this Note questions the legitimacy of the federal government's control over private schools that, unlike public schools, do not receive federal funding.[150] Thus, under the federally-mandated vaccination plan this Note advocates for, parents can choose: to homeschool, to send their children to private school, or to vaccinate.[151] People who truly cannot get vaccinated for medical reasons will be protected by herd immunity; and, most importantly, the public will be protected from the spread of diseases.[152]

B. *Medical Exemptions Should Be the Only Exemption*

Medical exemptions are only for people who cannot safely be vaccinated, and are not a choice, unlike religious and philosophical exemptions.[153] Very few children actually require medical exemptions.[154] But some parents use medical exemptions as a way to circumvent stricter vaccine laws.[155] When California banned non-medical exemptions, medical exemptions increased by 250% because "some doctors began writing medical exemptions for parents who had personal objections to vaccines."[156]

---

[146] Otterman, *supra* note 100 (explaining that when California banned all non-medical exemptions, their medical exemptions went from .2% to 1% of the population, dulling the law's effect).

[147] N.Y. Comp. Codes R. & Regs. 10, § 66-1.3(c).

[148] N.Y. COMP. CODES R. & REGS. 10, § 66-1.10.

[149] Otterman, *supra* note 100.

[150] Grace Chen, *An Overview of the Funding of Public Schools*, PUB. SCH. REV., https://perma.cc/3325-4P84 (last updated Mar. 31, 2021) (explaining that about 8% of a public school's budget is federal funds); Otterman, *supra* note 100.

[151] *See generally* Otterman, *supra* note 100.

[152] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[153] *But see* Otterman, *supra* note 100 (explaining that when California banned all non-medical exemptions, their medical exemptions went from .2% to 1% of the population, dulling the law's effect).

[154] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115.

[155] *See What Are the Rules on Vaccine Exemptions?*, *supra* note 115; *see also* Otterman, *supra* note 100.

[156] *What Are the Rules on Vaccine Exemptions?*, *supra* note 115; *see* Otterman, *supra* note 100.

Thus, medical exemptions should be narrow and regulated like the New York policy, allowing only the few children who cannot receive vaccines to get the exemption.[157] In order to protect people who have valid medical exemptions, the exemptions need to be narrow and vaccination rates need to be high.[158] If too many unvaccinated people are in one area, then herd immunity is not effective, and the disease can spread to those who cannot safely get the vaccine.[159] Furthermore, vaccines are never 100% effective, meaning that sometimes a few people who get vaccinated can still get a mild version of the disease.[160] Therefore, a higher vaccination rate means that there is less virus spreading, and infection is less likely, whether a person is vaccinated or not.[161]

Parents who claim philosophical exemptions raise several objections to vaccines.[162] They claim vaccines are not safe, they want their children to develop natural immunity, and they worry vaccines cause autism.[163] All of these concerns are unfounded.[164] First, while vaccines have rare side effects like every other medicine, vaccines are rigorously tested, licensed, and monitored to ensure their safety.[165] Second, while vaccines are effective in helping a body build immunity, developing natural immunity exposes the unvaccinated child and the community to dangerous disease.[166] Third, vaccines *do not* cause autism.[167] Although the 1998 Wakefield studies claimed that vaccines caused autism, such studies were retracted and disproved by

---

157 *See* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.3(c) (2019) at 11 (mandating that parents must apply for a medical exemption every year, and that the exemption must be approved by a specific doctor trained by the state thereby eliminating the choice of parents who find the one doctor to sign off on their medical exemption).

158 *See* Oxford Vaccine Grp., *supra* note 16 (underlining that immunizing 90-95% of the population is necessary to prevent the spread of measles).

159 *See* Oxford Vaccine Grp., *supra* note 16.

160 *Vaccines and Immunization: Myths and Misconceptions*, WHO: WORLD HEALTH ORG. (Oct. 19, 2020), https://perma.cc/285B-ZAGG.

161 *See* Shelly McNeil, *Overview of Vaccine Efficacy and Vaccine Effectiveness* (Canadian Center for Vaccinology PowerPoint 2006), https://perma.cc/W64X-QM7X.

162 *See Understanding How Vaccines Work*, *supra* note 51; *see also Vaccines and Autism*, CHILDREN'S HOSPITAL OF PHILA., https://perma.cc/TQU5-DXAM (last visited Jan. 3, 2022).

163 *Understanding How Vaccines Work*, *supra* note 51; *Vaccines and Autism*, *supra* note 162; *see Overview, History, and How the Safety Process Works*, CDC: CTRS. FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/C6W3-EQ3B (last visited Jan. 3, 2022).

164 *See Vaccine Safety*, *supra* note 83; *see also Understanding How Vaccines Work*, *supra* note 51; *Vaccines and Autism*, *supra* note 162.

165 *Vaccine Safety*, *supra* note 83.

166 *Understanding How Vaccines Work, supra* note 51.

167 *Vaccines and Autism*, *supra* note 162.

dozens of other studies.[168] In short, philosophical exemptions are mainly based on misinformation about the safety and effectiveness of vaccines and should not be a valid basis for exemption nationwide.[169]

Finally, many parents argue that mandatory vaccination infringes on their religious freedom and fundamental right to parent their child how they choose.[170] But, to a certain extent, the federal government has always limited personal rights in order to protect the public.[171] The government may limit First Amendment rights to prevent the public from panicking.[172] The FDA regulates the safety of the food we eat.[173] The Clean Air Act regulates how much emission cars can emit.[174] The draft requires people to sign up for military service to protect the country.[175] Vaccine-preventable diseases are a grave and increasing health threat to the public.[176] The federal government, like it already does in many ways, should limit personal choices that harm other people.[177]

C. *How to Counter Anti-Vax Beliefs*

People have always protested against vaccines.[178] Before the first true vaccines were ever invented, people protested against a Boston experiment that was largely successful.[179] In this experiment, those inoculated against smallpox had a mortality rate of 2% while people who had not been inoculated had a mortality rate of 14.8%—but many people still protested

---

[168] *Vaccines and Autism*, *supra* note 162.

[169] *See What Are the Rules on Vaccine Exemptions?*, *supra* note 115. *See generally Vaccines and Autism*, *supra* note 162.

[170] *See generally* Troxel v. Granville, 530 U.S. 57, 63 (2000) ("[P]arents should be the ones to choose whether to expose their children to certain people or ideas.").

[171] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[172] *Id.* (explaining that one cannot yell "fire" in a crowded theatre).

[173] *What We Do*, FDA: FOOD & DRUG ADMIN., https://perma.cc/WP3B-787E (last updated Mar. 28, 2018).

[174] *See* 42 U.S.C. § 7412 (1967) (explaining the criteria for a major source polluter and how that polluter is regulated).

[175] *See generally* Selective Draft Law Cases, 245 U.S. 366 (1918) (showing how the U.S. Supreme Court upheld the draft as constitutional).

[176] *See* Offit, *supra* note 32; *see also* Payne, *supra* note 130.

[177] *See* 42 U.S.C. § 7412 (explaining how there are limits on how much air pollution someone can put into the atmosphere); *Selective Draft Law Cases*, 245 U.S. at 366 (showing that the government can compel its citizens to do something); *What We Do*, *supra* note 173 (illustrating how there are safety limitations on what food and drugs can be sold).

[178] *See generally The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

[179] *See The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

the inoculations.[180] People fear science that they do not understand.[181] Psychologists have conducted research to discover the best way to change parent's minds about vaccination.[182] One study concluded that parents should be educated about the benefits, low safety risks, and the community necessity of vaccination.[183] By "convincing parents that the probability of disease contraction is high if they do not vaccinate their children and that the consequences of getting these illnesses are severe," the study concluded parents would be more likely to vaccinate.[184]

However, if dozens of peer-reviewed scientific studies cannot convince parents that vaccines do not cause autism, it may be difficult to eliminate parents' persistent fear.[185] If that is the case, and the federal government adopted the New York Law, parents would not be entirely bereft of options—parents could choose not to vaccinate and to homeschool their children instead.[186]

D. *Mandating Vaccination Is Not a Freedom of Religion Violation*

Religious exemptions are a greater danger to the public than philosophical exemptions because unvaccinated people with strongly held religious beliefs tend to live in tightly knit communities, making it easy for a disease to spread.[187] Religious groups are also a target for the anti-vaccination movement.[188] "[T]he anti-vaccination movement can exploit fear and anxiety within relatively insular communities, especially religious ones, to undercut scientifically sound warnings from health experts."[189] While it is important to educate parents about the safety of vaccines, it is equally important to quickly increase vaccination rates to prevent outbreaks and protect the vulnerable population that cannot get vaccinated for medical reasons.[190] Therefore, the federal government should adopt New York's

---

[180] *The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

[181] *See The Fight Over Inoculation During the 1721 Boston Smallpox Epidemic*, *supra* note 48.

[182] Zachery Horne et al., *Countering Antivaccination Attitudes*, 112 PROCEEDINGS NAT'L ACAD. SCI. 10321, 10321 (2015), https://perma.cc/UP9Z-3UT2.

[183] *See id.*

[184] *Id.*

[185] *Vaccines and Autism*, *supra* note 162; *see* Otterman, *supra* note 100 (demonstrating that parents will believe that vaccines cause autism if they have a child who received vaccines and developed autism).

[186] Otterman, *supra* note 100.

[187] *See generally* Patel et al., *supra* note 28 (noting close-knit communities are often underimmunized).

[188] Freytas-Tamura, *supra* note 126.

[189] Freytas-Tamura, *supra* note 126.

[190] *See Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from*

vaccine policies and require all students attending public school to be vaccinated unless they have a verified medical exemption.[191]

Religious freedom is an essential right protected by the First Amendment.[192] But, that right is not absolute.[193] In *Reynolds v. United States*, the Supreme Court held that freedom of belief was absolute, but not freedom of practice.[194] Thus, the defendant could believe in polygamy, but could not practice polygamy in violation of U.S. law.[195] The right of parents to practice their religion should be weighed against the state's interest in protecting children.[196] Regarding vaccination, the government's interest in protecting the community against national outbreaks of deadly diseases outweighs parents' religious views.[197] Personal religious views must not be allowed to endanger the community.[198]

Furthermore, a religiously neutral and generally applicable law does not need to be justified by a compelling government interest to be constitutional, even if that law has the incidental effect of burdening a particular religious practice.[199] Courts in the Second, Third, and Fourth Circuits, in addition to courts in New York, California, and Arkansas, have upheld the constitutionality of vaccine mandates that do not have religious exceptions.[200] They have held that vaccine mandates are neutral, and only incidentally affect religion, *even if states had religious exemptions, then repealed them*.[201] Deciding that removing a religious exemption was neutral and did not target religious beliefs, a New York trial court looked at the purpose of

---

School Vaccination Requirements, *supra* note 32.

[191] *See generally* N.Y. Comp Codes R. & Regs. 10, § 66-1.3 (2019).

[192] U.S. CONST. amend. I.

[193] *See* Reynolds v. United States, 98 U.S. 145, 145 (1878).

[194] *Id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[195] *Id.*

[196] *See* Wisconsin v. Jonas Yoder, 406 U.S. 205, 214–15 (1972).

[197] *See id.*

[198] *See id.* at 233-34.

[199] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877–80 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . . [Religious objections have not] 'relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.'") (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940).

[200] *See* F.F. v. State, 108 N.Y.S.3d 761, 770–72 (N.Y. Sup. Ct. 2019).

[201] *See id.* at 772–74 ("A neutral law, the Supreme Court has explained, is one that does not 'target[ ] religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation.'") (quoting Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459, 464 (2006)).

the entire vaccination statute, not just the repeal of the exemption—because the purpose of the mandatory vaccination requirement was to "protect[] the public health from vaccine-preventable diseases" after "a serious outbreak of measles . . . concentrated in areas of low vaccination rates," the trial court decided that the repeal was neutral and did not violate the First Amendment.[202] Decisions like this demonstrate that it is constitutional, and does not violate the free exercise of religion, not only to have vaccine mandates without religious exemptions, but also to repeal existing religious exemptions.[203]

E. *The Federal Government, Not the States, Needs to Mandate Vaccination*

It is undisputed that states have the power to mandate vaccination; the Constitution grants states police powers over the health, safety, welfare, and morals of their citizens.[204] Thus, the U.S. Supreme Court has upheld a state's power to mandate vaccination under its police powers.[205] In *Jacobson v. Massachusetts*, a Massachusetts citizen challenged the state's mandatory smallpox vaccine.[206] Smallpox was one of the most feared illnesses in the world in the early 18th century.[207] It was so contagious and deadly that it killed over 300 million people in the 20th century alone.[208] But, one Massachusetts resident claimed vaccines made him ill, and he did not want to vaccinate his son.[209] He said the state's mandatory vaccination policy invaded his liberty.[210] The Court upheld Massachusetts's mandatory vaccination policy saying, "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[211] The Court ultimately decided that because the state vaccination statute had a substantial relation to protecting people's health, it was constitutional.[212] Most importantly, the Court recognized that people's liberty is not absolute:

> [T]he liberty secured by the Constitution of the United States to

---

[202] *Id*. at 774.

[203] *See generally id.*

[204] *See* U.S. CONST. amend. X; Berman v. Parker, 348 U.S. 26, 28 (1954).

[205] *See* Jacobson v. Massachusetts, 197 U.S. 11, 35 (1905).

[206] *Id.* at 12.

[207] Pryor, *supra* note 31.

[208] *Smallpox*, NAT'L GEOGRAPHIC, https://perma.cc/54RT-9KJV (last visited Jan. 3, 2022).

[209] *Jacobson*, 197 U.S. at 36.

[210] *Id.* at 26.

[211] *Id.* at 25.

[212] *Id.* at 31.

> every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned. . . . The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law."[213]

Historian Michael Willrich discussed *Jacobson* in his book, *Pox*.[214] He said that

> constitutional restraints on police power [are] few. Laws must apply equally to all under like circumstances . . . government interferences with individual rights must be 'reasonable'—they must have a clear relation to some legitimate legislative purpose. Beyond those outer limits . . . most courts stayed out of the way of [state] police power.[215]

In extraordinary times, the state government can act to regulate individual liberty in order to protect collective health.[216]

Jacobson creates, and Willrich explains, a reasonableness test for the constitutionality of mandatory vaccine policies.[217] In other words, a mandatory vaccine policy is constitutional as long as the health concerns

---

[213] *Id.* at 26–27 (citations omitted).

[214] MICHAEL WILLRICH, POX: AN AMERICAN HISTORY 302 (2012).

[215] *Id.*

[216] *See, e.g.*, *Jacobson*, 197 U.S. at 29–30; Brown v. Smith, 235 Cal. Rptr. 3d 218, 224–27 (Cal. Ct. App. 2018) (upholding *Jacobson* and holding: (1) immunization is rationally related to police powers; (2) mandating vaccination did not violate freedom of religion, equal protection, or the right to attend school); WILLRICH, *supra* note 214, at 302.

[217] *See Jacobson*, 197 U.S. at 25; WILLRICH, *supra* note 214, at 302.

requiring vaccination have a clear relation to a legitimate government power.[218] We live in a global society where it is easy to travel from one state to another, or from one country to another.[219] At the time of this writing, COVID-19 is a global pandemic infecting millions.[220] COVID-19 is just the latest example of the danger associated with disease outbreaks in our globally-connected society, and it will not be the last.[221] The first part of the *Jacobson* test, the strong health concerns, is clearly met.[222] State governments meet the second part of the test, a clear relation to legitimate government power, because courts have affirmed they have the legitimate police powers to mandate vaccination.[223] This Note takes the analysis one step further, arguing that the increasingly global nature of society necessitates that the federal government implement a national vaccination policy in public schools.[224]

Jacobson was decided before the Court established its substantive due process analysis, and the Supreme Court has not decided a mandatory vaccination case since.[225] Now, there are three levels of scrutiny to determine the constitutionality of statutes that infringe on fundamental rights.[226] First, if the right infringed on is a fundamental liberty interest, then a court applies strict scrutiny, meaning that the government has to show a compelling state interest and that their action is narrowly tailored to meet state goals.[227] Second, if the right is a non-fundamental liberty interest, then a court applies

---

[218] *Jacobson*, 197 U.S. at 39; *see* WILLRICH, *supra* note 214, at 302.

[219] *See generally* Barraza et al., *supra* note 10 (noting that, once one person traveling from overseas brought measles back to the United States and visited Disneyland, 125 people in eight states got measles).

[220] Emily Landon, *COVID-19: What We Know So Far About the 2019 Novel Coronavirus*, UCHI. MED., (May 8, 2020), https://perma.cc/DU6E-FRQS.

[221] *See* Barraza et al., *supra* note 10, at 16–19.

[222] *See Jacobson*, 197 U.S. at 25, 27. S*ee generally* WILLRICH, *supra* note 214.

[223] *Jacobson*, 197 U.S. at 24–25, 35; s*ee* U.S. CONST. amend. X.

[224] *See generally* Jacobson, 197 U.S. at 14, 24–25 (outlining that people give up some liberties to live in an organized society, and that a liberty intrusion reasonably related to a legitimate government interest is constitutional); Helen Branswell, *Understanding Pandemics: What They Mean, Don't Mean, and What Comes Next with the Coronavirus*, STAT (Feb. 12, 2020), https://perma.cc/Z2DP-4DW8 (explaining how pandemics start and how quickly an outbreak can turn into a pandemic).

[225] Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. HEALTH POL'Y L. & ETHICS 39, 48 (2012); *see* Biden v. Missouri, 142 S. Ct. 647, 655 (2022) (staying an injunction on a federal vaccine mandate for facilities receiving Medicare and Medicaid funding, thereby allowing the mandate until the case is decided on the merits).

[226] *See* Holland, *supra* note 225, at 48–49.

[227] *See* Holland, *supra* note 225, at 48–49.

the rational basis test, meaning that the government restriction cannot be arbitrary.[228] Third, under intermediate scrutiny, the law/policy must further an important government interest by means that are substantially related to the interest.[229] At least one law review article has argued that the Supreme Court would view mandatory vaccination under intermediate scrutiny.[230] While the Supreme Court has not decided a mandatory vaccination case since *Jacobson*, a 2015 decision in the Second Circuit affirmed that a mandatory vaccination policy does not violate substantive due process rights.[231]

IV. The Federal Government Should Mandate National Vaccination

A. *Option One: A National Recommendation from the Executive*

To mandate national vaccination, the federal government must have the legitimate power to do so.[232] Because the states already have the police power to mandate vaccination, the first option for increasing that policy across all states would be through a non-binding national recommendation.[233] A presidential guideline requesting all states to follow New York's strict vaccine policies in public schools could motivate state governments to use their police powers to put that recommendation into law.[234] While this option is most in accord with the current division of police powers between the states and the federal government, there is a significant downside to this choice.[235] Namely, the recommendation would be non-binding on states.[236] As we saw with the reopening guidelines, many states disregarded presidential guidelines and opened up early, triggering a

---

[228] *See* Holland, *supra* note 225, at 48–49.

[229] *See* Holland, *supra* note 225, at 48–49; City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

[230] *See, e.g.*, Holland, *supra* note 225, at 48–49 (explaining that the Supreme Court suggested it would apply intermediate scrutiny in a case about a patient's liberty interest in the right to refuse care).

[231] Phillips v. City of New York, 775 F.3d 538, 542 (2015).

[232] *See Jacobson*, 197 U.S. at 25; WILLRICH, *supra* note 214.

[233] *See Jacobson*, 197 U.S. at 28.

[234] *See, e.g.*, *Coronavirus: Trump Unveils Plan to Reopen States in Phases*, BBC (Apr. 17, 2020), https://perma.cc/MU7U-VFEC (demonstrating the type of Presidential guideline that could be implemented).

[235] *See* Derek Hawkins, Marisa Iati & Jacqueline Dupree, *Coronavirus Updates: Seven-Day Average Case Total in the U.S. Sets Record for 27th Straight Day*, WASH. POST (July 5, 2020), https://perma.cc/N9U2-68DA; Jasmine C. Lee et al., *See Reopening Plans and Mask Mandates for All 50 States*, N.Y. TIMES, https://perma.cc/5V8J-R536 (last updated July 1, 2021) (demonstrating state's varied mask mandates and reopening plans despite the presidential guidelines).

[236] *See Coronavirus: Trump Unveils Plan to Reopen States in Phases*, *supra* note 234.

second wave of COVID-19 cases.[237] Additionally, in today's polarizing political climate, it would likely be challenging for the President and state legislatures to all agree on something.[238] The goal of increasing vaccination rates across all states would likely be thwarted by a non-binding recommendation.[239] This Note recognizes the recent Supreme Court order staying an injunction on the President's vaccine mandate for facilities receiving Medicare and Medicaid funding.[240] While not a decision on the merits of the mandate, and while, unlike with public schools, the Secretary of Health and Human Services is statutorily authorized to promulgate health and safety regulations, the order indicates that the Supreme Court is not foreclosed to Executive Branch vaccine mandates.[241]

B. *Option Two: Spending Clause*

This Note argues that the federal government has the power, under the Spending Clause, to withhold a small percentage of federal funds for education unless states eliminate religious and philosophical exemptions.[242] Congress has the power to spend for the general welfare and to condition the receipt of federal funds.[243] This power "is not limited to the direct grants of legislative power found in the Constitution," meaning that the federal government could use the Spending Power to control legislative fields the Constitution does not explicitly grant them.[244] In *South Dakota v. Dole*, South Dakota challenged a congressional act, the National Minimum Wage Drinking Age Act, which withheld a percentage of highway funds from states until they changed their drinking age to 21.[245] South Dakota argued that the Twenty-first Amendment gave states the right to set a minimum drinking age.[246] The Court upheld the constitutionality of the Act deciding that the "relatively mild encouragement to the States" of withholding 5% of state highway funds was a valid use of the Spending Clause.[247] Furthermore,

---

[237] *See* Hawkins, *supra* note 235; Lee et al., *supra* note 235.

[238] *See, e.g.*, Hawkins, *supra* note 235; Lee et al., *supra* note 235.

[239] *See, e.g.*, Hawkins, *supra* note 235; Lee et al., *supra* note 235.

[240] Biden v. Missouri, 142 S. Ct. 647 (2022).

[241] *See id.*

[242] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that an Act withholding federal highway funding on the condition that states make their drinking age 21 is constitutional).

[243] U.S. CONST. art. I, § 8, cl. 1; *Dole*, 483 U.S. at 206.

[244] United States v. Butler, 297 U.S. 1, 66 (1936).

[245] *See* 483 U.S. at 205–06.

[246] *Id*. at 205–06 ("South Dakota asserts that the setting of a minimum drinking age is clearly within the 'core powers' reserved to the states under § 2 of the Amendment.").

[247] *Id*. at 211–12.

the Court decided that, although the Twenty-first Amendment barred Congress from enacting a national drinking age directly, Congress could do so through withholding federal funds without infringing on state rights.[248]

Dole established a five-part test for judging the constitutionality of Spending Clause actions.[249] First, the spending must promote the general welfare.[250] Courts generally defer to the judgment of Congress in deciding if there is a public purpose for the spending.[251] Second, Congress must unambiguously condition the receipt of federal funds so States can knowingly decide whether to acquiesce to the condition.[252] Third, the condition must be related to the "federal interest in the particular national projects or programs."[253] Fourth, the conditional grant of federal funds must not be barred by another constitutional provision.[254] Finally, the condition cannot be coercive.[255]

While it may appear to be a broad provision, the Spending Power is not unlimited.[256] In *NFIB v. Sebelius*, the Court held as unconstitutional a Medicaid expansion plan requiring states to provide healthcare coverage to new categories of people or lose their Medicaid funding entirely.[257] As one law professor argues, the Court's interpretation of the *Dole* factors in that case also potentially limits the Spending Clause.[258] The second factor, for example—whether the terms of the condition are clear for states—Justice Roberts in *NFIB v. Sebelius* interpreted as "whether the States could have known at the time they agreed to participate in the *original* Medicaid plan that those funds might later be at risk unless additional conditions—to be disclosed at some unknown point in the future—were met."[259] Also, the Justice Roberts read the third factor—the program's relatedness to a federal interest—as allowing only a modification of Medicaid, and not an expansion.[260]

This Note argues that withholding federal education funding unless

---

[248] *Id*. at 209–10.

[249] *Id*. at 207–08; *see* Lynn A. Baker, *The Spending Power After* NFIB v. Sebelius, 37 HARV. J.L. & PUB. POL'Y 71, 74–75 (2014).

[250] *Dole*, 483 U.S. at 207.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.* at 208.

[255] *Id.* at 211.

[256] *See generally* Baker, *supra* note 249, at 71–72.

[257] 567 U.S. 519, 579–80 (2012).

[258] Baker, *supra* note 249, at 75–76.

[259] Baker, *supra* note 249, at 76.

[260] Baker, *supra* note 249, at 77.

states eliminate their religious and philosophical vaccine exemptions meets all five *Dole* factors and is Constitutional.[261] First, education spending promotes the general welfare and school vaccination increases classroom learning and decreases poverty.[262] Second, so long as Congress made the conditions unambiguous, then such a law would pass the *Dole* standard.[263] However, this argument is weakened by Justice Roberts' interpretation in *NFIB v. Sebelius* of the second factor; if the Court interpreted the second provision as whether States could have known at the time they agreed to receive federal education funding that additional conditions might later attach to those conditions, then it would be challenging in this context to meet that factor.[264] Third, such conditional funding is related to a federal interest because vaccinations allow children to stay healthy and stay in school.[265] Arguably, unlike *NFIB*, eliminating religious and philosophical exemption is only a modification of vaccination laws, not an expansion, because some states have already eliminated the exemptions.[266] Fourth, vaccine mandates are constitutional when promulgated by the states.[267]

Finally, if Congress withheld a small percent, say 5% like *Dole*, of federal education funds, then the condition to remove vaccine exemptions would likely be constitutional because, unlike eliminating all of a state's Medicaid budget, a 5% reduction would not be coercive.[268] Also, conditioning the receipt of federal funds on adopting a vaccine policy would not infringe on state powers under the 10th Amendment because, like *Dole* and the Twenty-first Amendment, Congress could not directly legislate a national vaccine policy but could condition spending without infringing on state rights.[269] With this all being said, the constitutionality of Congressional action to encourage national vaccination in public schools would find support under the Spending Clause.[270]

---

[261] *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

[262] *See State of the World's Vaccines and Immunizations*, *supra* note 45. ("A recent study by a Harvard School of Public Health team found that by keeping children healthy and in school, immunization helps extend life expectancy and the time spent on productive activity–thereby contributing to poverty reduction.").

[263] *See Dole*, 483 U.S. at 207.

[264] *See* Baker, *supra* note 249, at 76.

[265] *See* Dole, 483 U.S. at 207; *State of the World's Vaccines and Immunizations*, *supra* note 45.

[266] *See* Baker, *supra* note 249, at 77; *see also States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 32.

[267] *See generally* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[268] *See Dole*, 483 U.S. at 211; NFIB v. Sebelius, 567 U.S. 519, 579-580 (2012); Chen, *supra* note 150 (explaining that federal funding is about 8% of a public school's budget).

[269] *See Dole*, 483 U.S. at 209–10.

[270] *See* United States v. Butler, 297 U.S. 1, 66 (1936).

C. *Option Three: Congressional Tax Powers*

Even if vaccines were not considered a unique form of commerce that the federal government could regulate under the Commerce Clause, the federal government could enact a tax for the general welfare on people who choose not to get vaccinated.[271] Like *NFIB*'s individual mandate on people who do not get health insurance, a tax on people who choose not to get vaccines would both raise revenue for the government (necessary for a federal act to be constitutional under the taxing power) and would encourage national vaccination.[272] The downside to using the taxing power rather than the Commerce Clause is that people could choose to pay the tax rather than get vaccinated.[273] The purpose of strict laws like those in New York is to prevent choice and thereby prevent outbreaks.[274] To ensure herd immunity, vaccination rates need to be high to eliminate diseases, and for vaccination rates to be high, the government must require people to vaccinate.[275]

CONCLUSION

This Note was written acknowledging that the federal government has never before instituted a national vaccination policy in public schools. However, the purpose of this Note is to explore solutions, start debates, and begin thinking about potential solutions to increase vaccination rates. COVID-19 has thrown into sharp relief the inherent national spread of viruses. Where before COVID-19 virus outbreaks were mostly clustered in under-immunized communities, COVID-19 exposed what would happen in the United States when unimmunized people confront a highly contagious virus, thereby showing us what could happen if vaccine rates continue to decline. But the purpose of this Note is also to inspire hope. Widespread vaccine use has allowed the United States to triumph over viruses in the

---

[271] *See* U.S. CONST. art. I, § 8 (stating that the Constitution gives Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States").

[272] *See* NFIB v. Sebelius, 567 U.S. 519 (2012).

[273] *See id*. at 546–547 (explaining the individual mandate).

[274] *See Frequently Asked Questions About Legislation Removing Non-Medical Exemptions from School Vaccination Requirements*, *supra* note 32 ("The United States is currently experiencing the worst outbreak of measles in more than 25 years. . . . As a result of non-medical vaccination exemptions, many communities across New York have unacceptably low rates of vaccination, and those unvaccinated children can often attend school where they may spread the disease to other unvaccinated students, some of whom cannot receive vaccines due to medical conditions."). *See generally* N.Y. Comp. Codes R. & Regs. 10, §§ 66-1.1–66-1.10 (2019).

[275] *See* Otterman, *supra* note 100.

past, and it can do so again. Vaccines promote freedom because they allow Americans to return to a life of normalcy. We live in an increasingly global society, so the federal government must ensure that the rights, health, and safety of all its citizens are protected. In an era of mobility and fake news, more people are traveling across state lines and spreading diseases and misinformation, while less people are vaccinating. Because of this, only the federal government can protect the United States from deadly diseases by mandating vaccination in public schools unless a child has a valid medical exemption.