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The Constitutional issues that arise when schools don't say gay: An ethical review of Florida's Parental Rights in Education Act

Author: Jamie Schulman
Editor: Madeleine Bodiford

I. Introduction

As more visibility has been brought to Gay, Lesbian, Bisexual, Transgender, and Queer (LGBTQ) youth, more national attention has surrounded the community. With this rise in national attention, parents, teachers, and school boards have banded together to try and protect the rights and freedoms of these individuals in the educational environment. Unfortunately, while many fight to protect these students' constitutional liberties, others have declared their disapproval of LGBTQ acknowledgment within school curriculums.

Past legislative sessions in states such as Tennessee and Missouri have tried to pass legislation to suppress types of LGBTQ discussion and topics in schools by prohibiting any classroom instruction, materials, or resources that conflict with natural reproduction.[1] Most recently, ratification of the "Don't Say Gay" bill was signed into Florida Legislation. Formally known as the "Parental Rights in Education" bill, it raises severe constitutional considerations and ethical concerns by censoring the instruction and discussion of LGBTQ topics in schools without considering its threats to students' safety and academic liberties.[2] Moreover, with more young children coming out as part of the

[1] Am. Civ. Libertes Union, *Just Say "No" to 'Don't Say Gay,"* https://www.aclu.org/blog/lgbtq- rights/lgbtq-youth/just-say-no-dont-say-gay (accessed April 15, 2022)

[2] Phillips, A. 2022, Apr 01-last update, *Florida's law limiting LGBTQ discussion in schools, explained* [Homepage of WP Company LLC d/b/a The Washington Post], [Online]. [***]

LBGTQ community, critics of the bill argue the dangerous implications it might teach school-aged children.[3]

This Note will begin by explaining an overview of the "Don't Say Gay" bill as it was signed into Florida Legislature. Following this overview, an analysis of the Constitutional issues and ethical concerns regarding student rights and parental oversight of education will be drawn. Finally, this Note will also look at the consequences the bill might cause through the stigmatization of homosexuality and other LGBTQ identities.

II. An Overview of the "Don't Say Gay" Bill

Effective on July 1, 2022, the Parental Rights in Education bill, otherwise coined as the "Don't Say Gay" bill, reinforces the right of parents to have a say regarding their children's upbringing while in the class environment.[4] The bill specifically targets the discussion of sexual orientation and gender identity, making it an illicit topic for Kindergarten through third grade and a cagey topic for older grade levels. The bill was drafted over concern over a possible lack of parental control over their children's learning.[5] These sentiments have led to at least eight other states promoting these types of "no promo homo" bills, all of which prohibit school employees from talking about LGBTQ topics within the school.[6]

III. The First Amendment Rights of Students and Teachers in School

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[3] *Id.*

[4] Fla. Legis., HB 1557 (2022) (available at https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=76545)

[5] Gay, Lesbian & Straight Education Network. States with safe schools laws. Available at: http://www.glsen.org/cgi-bin/iowa/all/library/record/2344.html.Accessed March 13, 2013. Google Scholar

[6] *Id.*

When considering the implications of Florida's "Don't Say Gay" bill, opponents argue that the law interferes with students' and teachers' First Amendment rights. Based on *Tinker v Des Moines Independent Community School District*, the supreme court recognized that students and teachers do not shed their First Amendment rights, including freedom of speech and expression, when entering school grounds.[7] Therefore, based on Tinker rules, it eludes that states cannot prohibit speech simply because they deem it unfavorable. However, there are three narrow exceptions where the Tinker ruling does not apply, and schools can prohibit topics. These exceptions include speech that encourages the use of illegal drug substances[8], speech that exercises editorial discretion surrounding school expression for legitimate pedagogical reasons[9], and speech that includes "lewd, vulgar, or offensive" language.[10] These exceptions do not apply to LGBTQ topics within an educational context, as opponents of the "Don't Say Gay" bill argue that homosexuality is no different from heterosexuality, a sanctioned school topic.[11]

In direct violation of Tinker Rules, the "Don't Say Gay" bill suppresses teacher and student expression and impedes their First Amendment rights.[12] The discussion of these LGBTQ topics yields little to no disruption at school, and therefore under Tinker rules, schools lack a viable constitutional argument to stifle LGBTQ speech.[13]

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7 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

8 Morse v Frederick, 551 U.S. 393, 403 (2007).

9 Bethel Sch. Dist. v Fraiser, 478 U.S. 675, 684-685 (1986).

10 Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260, 273 (1988).

11 Paige Hamby Barbeauld, *Don't Say Gay Bills and the Movement to Keep Discussion of LGBT Issues out of Schools*, 43 J.L. & EDUC. 137 (2014).

12 *Id.*

13 Tinker, 393 U.S. at 511.

Opponents also argue the bill's unconstitutionality through the social meaning it alludes to and the stigmatization it enforces against LGBTQ youth and their communities. LGBTQ advocates are challenging these policies in court through the argument of Equal Protection under the Fourteenth Amendment and the emerging constitutional right for LGBTQ individuals to come out.[14] This right stems from a mix of the First Amendment, which states the right for LGBTQ students to express their gender and sexuality openly, and the Fourteenth Amendment, which establishes the protection and fair treatment that students hold when exercising their freedoms.[15]

Proponents who proclaim the bill's constitutionality argue that the legislation does not aim to prevent all discussion of LGBTQ topics in school. However, opponents argue that the law is too vague and only used to further silence and oppress LGBTQ populations.[16] The bill's vagueness leaves much for interpretation, jeopardizing student and teachers' First Amendment rights.

IV. Parental Rights over Children's Education

While opponents argue the bill in favor of student and teacher First Amendment rights, proponents see it as a way for parents to gain more oversight into their children's learning curriculum. Proponents argue the bill's constitutionality under mainly two specific arguments: that parents have a fundamental right to exercise jurisdiction over their children's education and that the relationship between children and parents is constitutionally protected.

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[14] See STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PuBuc ScHooLs (Univ. Of Minn. Press, 2010) (discussing the legal foundations of students' right to be out in public schools).

[15] *Id*, at 3-4

[16] NPR. *What Florida's Parental Rights in Education Law Means for Teachers*. (2022). Accessed April 8, 2022.

Under *Meyer v. Nebraska*, the court recognizes that parents have a constitutional right to aid in the school curriculum and control their child's education.[17] With a fear that introducing LGBTQ topics into their children's school curriculum could threaten their religion and beliefs, parents and lawmakers say they are exercising this right when introducing the "Don't Say Gay" bill. In addition, through the court's recognition of the protection of parent and child relationships in Troxel v. Granville[18], proponents of the bill argue that they have a constitutional right to control their children's exposure to specific topics, including homosexuality and LGBTQ subjects.

Many lawmakers and parents fighting for discretion over school topics do so in fear of a "homosexual agenda" they think might pervade their schools if the bill is not in effect.[19] They argue that this possible agenda might conflict with parental values and religious beliefs and, in turn, threaten their ability to control the types of topics their children are exposed to. While public schools reflect community composition, including LGBTQ members, and deserve representation in their learning materials, most parents feel these topics are most appropriate to be taught in the home and not in school.[20]

V. The Constitutional and Ethical Consequences of the "Don't Say Gay' Bill

With the "Don't Say Gay" bill in full effect beginning in July 2022, critics fear the potential constitutional and ethical consequences that might arise when schools prevent the instruction of LGBTQ topics. The bill serves as a form of curricular

[17] Meyer v. Neb., 262 U.S. 390, 397-398 (1923), *rev'd in part on other grounds*, Abbott v. Bragdon, 912 F. Supp. 580 (1st Cir. 1995).
[18] Troxel v. Granville, 530 U.S. 57, 65 (2007)(quoting U.S. Const. amend. XIV, § 1).
[19] Paige Hamby Barbeauld, *Don't Say Gay Bills and the Movement to Keep Discussion of LGBT Issues out of Schools*, 43 J.L. & EDUC. 137 (2014).
[20] *Id.*

ignorance, an attempt to ignore the realities of students identifying as part of the LGBTQ community.[21] Supporters of the legislation allude that the bill is about freedom of speech while censoring all discussion of LGBTQ topics in school.[22]

Under this bill, teachers are prohibited from addressing sexual differences-based bullying, further perpetuating the ignorance of LGBTQ issues within schools.[23] These effects activley undo the gains created to increase LGBTQ representation and allyship. Without representation and accurate information surrounding LGBTQ topics and persons, LGBTQ minorities face increased minority stress due to stigmas and prejudices made against them. The stress faced by these populations leads to adverse health outcomes such as decreased mental health, worsened state of well-being, and increased rate of suicide.[24] [25]

Without the education and support from teachers, LGBTQ students face further endangerment from a lack of acceptance and knowledge surrounding their community. Children learning in states with similar "Don't Say Gay" and "no promo homo" laws have had to navagate a much more hostile school climate with decreased acceptance of LGBTQ peers, increased homophobic slang, and an increased chance of LGBTQ based harassment and assault.[26] While trying to protect the rights of parental discretion over their child's learning subjects, LGBTQ students face dangerous implications and fear

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[21] Jennifer Logue, *Sanctioned Curricular Ignorance As a Challenge to Critical Educational Communities*, 44 Philosophical Studies in Education, 44–49 (2013)

[22] *Id.*

[23] *Id.*

[24] Meyer IH. Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: conceptual issues and research evidence. Psychol Bull. 2003;129(5):674–697. Crossref, Medline, Google Scholar

[25] Saewyc EM, Skay CL, Pettingell SL, et al. Hazards of stigma: the sexual and physical abuse of gay, lesbian, and bisexual adolescents in the United States and Canada. Child Welfare. 2006;85(2):195–213. Medline, Google Scholar

[26] GLSEN. (2018). Laws Prohibiting "Promotion of Homosexuality" in Schools: Impacts and Implications (Research Brief). New York: GLSEN.

over their safety. These fears infringe on the right to feel protected while learning and protected against discrimination and harassment as outlined by Title IX of the Education Amendments of 1972.[27]

Research also shows that when students learn in a hostile environment, they are more likely to skip class, reducing their grades and hurting their post-secondary education chances.[28] While being at a social disadvantage, LGBTQ youth seek role models and authority approval, a truth that is virtually nonexistent with the "Don't Say Gay" bill in effect. LGBTQ students will feel unsafe and unheard by their teachers and peers, retreating them into social isolation and creating decreased academic success, an ethical concern held by critics of the bill.

VI. Conclusion: A Case to Say Gay

Florida's "Don't Say Gay" bill presents two competing constitutional interests: a parent's right to exercise control over their children's learning topics and students' and teachers' right to freedom of expression and speech. While looking at the implications of this bill on students' and teachers' well-being and constitutional liberties, the bill explicitly infringes on their First Amendment Rights and protection against harassment.

In the late 1900s, "no promo homo" laws were enacted in response to the HIV/AIDS epidemic[29]. However, these laws are no longer necessary or sufficient when considering the constitutional implications and ethical concerns Florida's "Don't Say Gay" bill brings to students and teachers. While parents hold a constitutional right to

[27] Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 ET SEQ.

[28] Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools. New York: GLSEN

[29] "#DontEraseUs: FAQ About Anti-LGBT Curriculum Laws." Lambda Legal, www.lambdalegal.org/dont-erase-us/faq

control their children's education, an argument can be made that they exercise this right more securely outside the classroom environment. Through parental oversight of children's music, tv, films, internet access at home, and outside sources such as the church, parents have a considerable influence on their child's understanding of LGBTQ issues which does not need to seep into the school curriculum. Parents' influence in the home mitigates the diminished control held in school. The unjust burden placed upon LGBTQ students and teachers far outweighs parents' weakened control over their children's education.

The inclusion of LGBTQ topics in school would create a more diverse education that better prepares students to live in a diverse society. In addition, vetoing the "Don't Say Gay" bill will lead to a more tolerant school environment through LGBTQ diverse teachings and a reduced stigma and prejudice for the community, benefiting not only LGBTQ students but all students and society at large.

Betting on the Future of Sports Gambling in Florida

Author: Elke Schumacher

Editor: Vanessa Doueihi

The earliest accounts of sports betting date back to Ancient Rome with bets being placed on chariot races and gladiator fights. It was not until almost 2,000 years later that betting on horses began to rise in popularity, followed by the first laws in the industry being established throughout the late nineteenth century. Not much notable change occurred until the rise of the internet during the 1990s. Since then, digital technology has completely transformed the sports betting industry, raising legal debates related to the rules and regulations placed on betting platforms. Over the past few years, Florida in particular has faced an especially high number of complications related to the issue.

Back in 2018, the United States Supreme Court issued a landmark decision that overturned the federal ban on state authorization of sports betting. This ruling granted states the ability to allow betting on sporting events. [1] In this case, *Murphy v. National Collegiate Athletic Association*, the Court reviewed a challenge by the state of New Jersey to the federal Professional and Amateur Sports Protection Act (PASPA) which prohibited state authorization of sports gambling. This case concluded with the Supreme Court of the United States upholding New Jersey's argument that PASPA's bar on state allowance of sports gambling violated the anti-commandeering doctrine that prohibits the federal government from imposing targeted, coercive duties on state legislatures. [2] The American Gaming Association, a group in favor

of this ruling, stated that "through smart, efficient regulation, this new market will protect consumers, preserve the integrity of the games we love, empower law enforcement to fight illegal gambling and generate new revenue for state, sporting bodies, broadcasters and many others." [3]

A few years following this decision, Florida Governor Ron DeSantis signed a compact with the Seminole Indian Tribe in April 2021 that facilitated a way for legalized sports betting in the state to take place. [4] By November of that same year, the Seminole Tribe launched its Hard Rock online sportsbook app in the state, but just one month later the sportsbook app was pulled following a federal judge's decision to reject the tribe's argument that bets made on its site take place on servers on tribal land; the federal court cited this decision as a violation of the Indian Gaming Regulatory Act of 1988. [5]

Since then, powerhouse sports betting companies such as DraftKings, FanDuel, and Barstool Sports have been paving the way in the initiative to legalize widespread online sports betting. Both DraftKings and FanDuel supported the Florida Education Champions effort to add sports betting to the 2022 ballot, contributing nearly $37 million to the campaign combined; however, this initiative fell short of the 891,589 signatures needed to earn a ballot spot, garnering only 479,193 signatures. [6] This defeat transpired despite incentives offered by the companies to customers who helped get the initiative to the required number of signatures. In addition to this loss, DraftKings was recently fined $150,000 on March 4, 2022 for allowing a Florida VIP bettor to proxy bet live in New Jersey from a suite at the Super Bowl in Florida in 2020. [7] This report by the New Jersey Attorney General's office found that DraftKings had also violated proxy betting rules on multiple other occasions throughout 2019 and 2020.

As of March 2022, a few options remain for the state of Florida to bring sports betting to the market, which likely will not happen until 2024 at the earliest following the failure of the FanDuel and DraftKings-backed initiative to gather enough signatures to appear on the November 2022 ballot. Senator Jeffrey Brandes asserts that a citizen's initiative is the best option, as this approach would potentially sever the Seminole Tribe's monopoly over sports gambling within the state and also open up the market to third-party companies such as DraftKings and FanDuel. [8] A different, more plausible approach is the creation of a new gaming compact between the state of Florida and the Seminole Tribe. As previously mentioned, the state of Florida and the Seminole Tribe signed a compact in 2021 to allow sports gambling in the state, which passed by a vote of 38-1 within the Florida Senate and a vote of 97-17 by the House of Representatives, but was overturned just a few months later.

On February 9, 2022, the United States Department of the Interior and Interior Secretary Deb Haaland filed an appeal to the November 2021 court decision that invalidated internet sports betting and the 2022 Gaming Compact between the state of Florida and the Seminole Tribe. This action followed another appeal already issued by the Seminole Tribe to the US Court of Appeals District of Columbia Circuit. [9] The consequences of the court's decision in this case will produce significant effects related to the future of sports betting in Florida and beyond. The court siding with the DoI here will seemingly lead to an increase in the number of tribal gaming compacts being created by states throughout the nation; these compacts will likely include even more features and services than the one established by the state of Florida and the Seminole Tribe. The potential for millions of dollars in state revenue from sports betting in Florida will likely spur the creation of a new gaming compact if the recent appeals made by both the United

States Department of the Interior and the Seminole Tribe do not succeed first. On the other hand, if the court denies the appeals, future compacts will expectedly follow a trend of rejections.

As the sports betting industry continues to expand throughout the country, Florida is expected to be one of the hottest markets if and when it joins the already over thirty states that now allow some form of sports gambling. With industry expansion continuing throughout the nation, more Americans are spending more money than ever before. The American Gaming Association's Commercial Gaming Revenue Tracker reported an almost doubled amount of money spent on wagers from 2020 to 2021, totaling $42.19 billion in January of 2021. [10] Legalized sports betting within the state of Florida would bring a multitude of positive impacts including a safer market for sports bettors, millions of dollars generated annually in tax revenue, the creation of thousands of jobs, and increased integrity of bets on monitored platforms. [11] Although legislation of sports gambling in Florida will presumably not materialize until at least 2024, these benefits that have already been witnessed by other states throughout the country, such as Nevada, for example, which raised over thirty million dollars in state tax revenue in 2021, will aid in the argument in favor of legalization.

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The Inhumanity of Solitary Confinement: A Crucial Need for Reform

Author: Rosmarie Correa

Editor: Madison Tilton

The Solitary Confinement Reform Act introduced in the Senate in 2019 lays out a few guidelines for using solitary confinement as a form of disciplinary punishment. It limits the use of solitary confinement "to situations that meet certain criteria" and "for certain categories of inmates, including pregnant women and individuals with serious mental illness" S.719, 116th Cong. (2019). The act is a positive step toward reforming solitary confinement because most prisons operate without a criterion for who receives solitary confinement, for what reasons, and for how long. Considering how detrimental solitary confinement is to a person's mental and physical health, it is crucial that we continue introducing and advocating for more solutions that combat its effects. Increased access to recreational activities, human contact, and medical services should be included as additional criteria for keeping inmates in solitary confinement. Furthermore, it is essential that we understand how destructive this punishment can be, especially for inmates who are often forced to be in isolation for offenses that do not merit solitary confinement or who are isolated as the last resort for protection against offenders. If measures were taken to improve accessibility to those aforementioned services, these vulnerable people would not be so severely impacted in their well-being. They would have more trust in the prison system's original intention to protect them.

The correctional justice system is not infallible, but one often disregards its mistakes when the subjects of the matter are criminals. While it is easy to separate the injustices that occur

in prisons and jails from correctional officers and their rules, we should nevertheless remain vigilant and hold prison staff accountable for the laws they enforce. The effects of solitary confinement on inmates do not exist in a vacuum; the impact of solitary confinement on people becomes relevant to us when inmates are released and brought back into society or reunited again with families and loved ones. The majority of prisoners who fall victim to the effects of solitary confinement are not only inmates who committed misdemeanors and minor offenses but also those who are vulnerable and suffer from disabilities or have been sexually assaulted. Contrary to popular opinion, solitary confinement does not require any specific criteria or assessment and is often enforced "without regard to age, developmental disability, or mental illness despite growing recognition that solitary confinement is especially harmful for these categories of individuals" (Bennett, 2019). Instead of solitary confinement accomplishing its primary purpose of regulating violence, threats, and homicides, confinement in prisons and jails results in inmates remaining trapped for years, keeping victims of sexual assault silenced and inmates with disabilities forgotten and neglected. Its very nature produces the opposite effect of rehabilitation because it is ultimately damaging to the people it allegedly aims to protect; however, the implementation of recreational activities, human contact, and medical services could alleviate this issue.

Solitary confinement is the practice of placing individuals in a small cell alone for twenty-two to twenty-four hours per day, inherently considered abusive conditions due to their highly-restrictive nature. The punishment itself has a variety of terms, such as "special housing units," "administrative segregation," "disciplinary segregation," or "restrictive housing." However, all the same, people are confined for long periods in small spaces, often for vague reasons or minor offenses (Herring, 2020). In Florida, for example, there exists a form of solitary

confinement called "disciplinary confinement" that allows one incident to result in multiple charges. More specifically, "one incident could result in 20 days for disrespecting an officer, 30 days for disobeying an order and another 60 days for destroying property. Consequently, people may languish in disciplinary confinement for months or years" (Bennett, 2019). Thus, a repetitive and harmful cycle emerges from this process since the periods of confinement directly deteriorate inmates' emotional, mental, and physical well-being, increasing the likelihood that they will act out and remain in isolation even longer. Moreover, many of these infractions that cause inmates to accumulate time in confinement stem from their basic needs to exert exercise, have space, socially interact, and receive medical treatment. That is why improving conditions of solitary confinement by increasing accessibility to these services would help prevent the long cycle of an inmate accumulating disciplinary reports and extending their time in confinement.

As it currently stands, solitary confinement lacks the reform necessary to meet the needs of inmates with disabilities and prevent their physical and mental ailments from worsening. This reform would include taking actions towards improving the conditions of the cells and establishing clear standards that shorten the time inmates are locked in confinement cells, which are so restrictive that inmates cannot store their walkers and wheelchairs inside (Bennett, 2019). In addition, inmates who need assistance for mobility, taking showers, or getting dressed are denied access to consistent medical care. Inmates without physical disabilities are still affected physically in solitary confinement because they are denied access to recreational activities while there. They cannot exercise or move around as much as other inmates can because of confinement to a cell that is "about six feet by nine feet, slightly bigger than the size of an elevator," and further limited by the space taken up by their bed, desk, and toilet (Ward, 2021). The long-lasting harm of solitary confinement has been extensively researched, suggesting that

the lack of space, human connection, and attention inmates receive devastates their mental and physical well-being. Inmates can become permanently affected even without preexisting mental health issues by developing "a progressive inability to tolerate ordinary things, such as the sound of plumbing; hallucinations and illusions; severe panic attacks; difficulties with thinking, concentration, and memory; obsessive, sometimes harmful, thoughts that won't go away; paranoia; problems with impulse control; and delirium" (Herring, 2020). Noting the severe impact solitary confinement has on inmates' mental health, the punishment would worsen the already low chances of an inmate's ability to be reintroduced back into society once they are released. However, this issue would be remedied by implementing recreational activities, human contact, and medical services to help against the blows confinement causes psychologically. Interestingly enough, solitary confinement is also used to protect prisoners from others. Such is the case for inmates placed in confinement because they are at risk of being a victim of sexual abuse. Due to the staggering amount of sexual abuse in prisons, the Prison Rape and Elimination Act (PREA) became law in 2003 to effectively prevent sexual abuse. PREA recognized the harmful conditions and effects of isolation in a standard implemented in 2015. The standard "emphasizes that individuals deemed at high risk for sexual abuse should not be placed in 'involuntary' segregated housing *unless* all available alternatives have been assessed and a determination made that there are no other means of separating them from likely abusers without temporary segregation" (Hastings, 2015). In other words, inmates can be placed in solitary confinement for protection from their abusers, as long as it is voluntary and all other alternatives have been considered. Despite this, correctional staff often use PREA as an excuse to "place more prisoners in solitary confinement" (Palacios, 2017). This is a reality facilitated by the fact that correctional officers are not bound to follow PREA guidelines or policy recommendations

since compliance is voluntary. Due to the manner in which PREA is enforced, primarily "through a financial incentive," the only consequence of not declaring full compliance to PREA is losing "5% of federal grant funding 'for prison purposes'" (Palacios, 2017). PREA policy recommendations are often ignored, and "sexual assault persists in prisons and jails, with only 8% of prisoners who experience sexual assault reporting their victimization" (Kubiak, 2018). This finding reveals that a large number of inmates find it more worthwhile to stay silent and not report their abuse.

One motive behind the avoidance of reporting sexual assault and getting involved with correctional staff following PREA guidelines is that it usually works against the interests of inmates. Many inmates do not find relief from their abusers for various reasons, such as finding there is no point in going through the steps of PREA when the results are often determined to be not sustained. For example, "if an investigation of a grievance results in an 'unfounded' outcome, the prisoner who filed the grievance may receive a charge of a new offense or a misconduct ticket for filing a 'false report'" (Kubiak, 2018). Thus, vulnerable inmates may find themselves in confinement, in addition to the threat of receiving new charges. It is common for prisoners to "adapt or cope…with a de facto 'code of silence' regarding abuse during incarceration to protect themselves from further stigmatization or longer confinement" (Kubiak, 2018). Having established that correctional officers can manage to keep inmates in solitary confinement after reporting sexual abuse, it would be a significant improvement to see the Solitary Confinement Reform Act cause a positive difference by establishing clear criteria and shorter terms to determine if the vulnerable inmates are unsuitable to be confined. In addition, there is also another way to improve the issue regarding the lack of compliance to PREA and confinement serving as a threat to vulnerable inmates. Solitary confinement would seem less of a punishment

and more of protection if inmates had the assurance that they would either not be kept locked away for more than the minimum term or that they would not be deprived of their basic needs to exercise, have space, socially interact, and be medically treated and listened to by staff. Confinement would be more bearable and more appropriate if it did not cause inmates to be isolated from their support system or community.

To conclude, solitary confinement needs to adopt changes to ultimately serve as a protective service and not a means of retaliation. The Solitary Confinement Reform Act is an improvement, but its proposed reform measures could be expanded on. For example, if lawmakers considered establishing a plan for inmates in confinement to receive the same access to recreational activities, human contact, and medical services as those not in solitary confinement, then inmates would come out of the prison system with less psychological and physical damage. Without these specific changes, the prison system will continue to leave released prisoners in a worsened state, ultimately causing even more harm to families and society as a whole.

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Opinions in Dobbs v. Jackson Women's Health: The Abortion Debate Exemplified

Author: Julia Tamborello

Editor: Jamie Schulman

In 1973, the Supreme Court protected a woman's right to an abortion by creating a three-trimester framework, where all abortions were permitted in the first trimester (zero to thirteen weeks, measured from the first day of the last menstrual period rather than conception)[30], some in the second (fourteen to twenty-six weeks), and none in the third (twenty-seven to forty weeks), *Roe v. Wade*, 410 U.S. 113 (1973). In 1992, a new Court discarded the three-trimester framework and created a new standard for laws regulating abortions: they could not create an "undue burden" on pregnant people seeking abortions, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). *Casey* included a prohibition on all regulation of abortions performed prior to viability, 505 U.S. 833 (1992); viabilty is generally around twenty-three weeks in pregnancy, when "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support," *Colautti v. Franklin,* 439 US 379, 388 (1979). Both of these rulings were based on a constitutional right to privacy established in *Griswold v. Connecticut*, 381 U.S. 479 (1965). On December 1st of 2021, the Roberts Court

[30] *Pregnancy The Three Trimesters*, UCSF Health, https://www.ucsfhealth.org/conditions/pregnancy/trimesters (last visited March 31, 2022); *Gestational Age: How Do You Count Pregnancy Weeks?*, Natalia Viarenich, https://flo.health/pregnancy/week-by-week/gestational-age (last visited March 31, 2022)

heard oral argument for *Dobbs v. Jackson Women's Health Organization*,[31] challenging a Mississippi law banning abortion after the fifteenth week of pregnancy "except in medical emergency and in cases of severe fetal abnormality."[32] Since the Court took this case up, multiple states–including Florida–have passed similar statutes.[33] In *Dobbs*, the Court is considering whether pre-viability bans on abortions should continue to be held as unconstitutional; in other words, whether or not to overturn *Roe* and *Casey*.

Roe and *Casey* rely on a balancing act between the state's interest in the life of a child (the fetus) and the right of the pregnant person to control their own body. *Roe* held that the balance shifts more and more to the state's interest as the pregnancy progresses, until the third trimester where the state's interest finally outweighs the rights of the pregnant person, 410 U.S. 113 (1973). *Casey* held that the balance tips to the state's interest at the point of viability, 505 U.S. 833 (1992). In the oral argument for *Dobbs*, multiple justices telegraphed frustration with the viability line prohibition; Justice Alito called it "arbitrary."[34] The decision in *Dobbs* could be released at any time from now until the start of the October 2022 sitting; the Court generally releases controversial decisions in June.

One possible ruling from the court would preserve the right to abortion based on the right to privacy but discard the viability line. This ruling would still functionally overturn *Roe* and

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[31] *Dobbs v. Jackson Women's Health Organization,* https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/ (last visited March 31, 2022).

[32] *Mississippi 15-week Abortion Law–Full Text*, Guidelinelaw, https://www.guidelinelaw.com/mississippi-15-week-abortion-law/ (last visited March 31, 2022).

[33] *Florida Gov. Ron DeSantis signs 15-week abortion ban into law*, NBC News, https://www.nbcnews.com/politics/politics-news/florida-gov-ron-desantis-signs-15-week-abortion-ban-law-rcna24416 (last visited April 18, 2022).

[34] *Dobbs v. Jackson Women's Health Organization,* https://www.oyez.org/cases/2021/19-1392 (last visited March 31, 2022).

Casey; viability as a standard is founded on the available science of when "life" begins, and without it some states would place the cutoff for abortion at 6 weeks–before a person knows they are pregnant. As with most controversial Supreme Court cases, advocacy organizations from both pro-birth and pro-choice backgrounds have filed *amicus curiae* briefs attempting to sway the Court one way or the other. There were 134 *amicus* briefs total filed in *Dobbs*, eighty-two for the petitioner and fifty-two for the respondent. The organizations filing *amicus* briefs fall into three categories: religious organizations, civil rights advocacy organizations, and scientific or expert opinions on the start of life begins . Both the petitioner and the respondent have support from briefs filed by each of these categories. This article focuses on the main arguments presented by each type of organization for each side.

Religious organizations for the petitioner offer arguments based on various sources, including scripture,[35] the Constitution,[36] and the writings of Margaret Sanger.[37] This variety is cited in support of multiple holdings that would overturn *Roe,* such as discarding the viability line from *Casey* or returning the choice to regulate abortion at any stage of pregnancy to the states.[38] One argument that recurs often in the pro-petitioner briefs from religious organizations is that the compelling interest the state has in protecting an unborn fetus has greater weight than the parent's rights even prior to viability, so the state should be able to protect that interest through regulation at any stage of pregnancy.[39] This state interest argument aligns with the view

[35] Jewish Pro-life Foundation, The Coalition for Jewish Valyes, Rabbi Yacov David Choen, Rabbi Chananya Weissman, and Bonnie Chernin, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).
[36] United States Conference Of Catholic Bishops And Other Religious Organizations, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).
[37] African American, Hispanic, Roman Catholic And Protestant Religious And Civil Rights Organizations And Leaders, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).
[38] Id.
[39] Center for Religious Expression, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

in some religions that life begins at conception, but most of the organizations do not argue from religious authority, only precedent and interpretations of the law.

Meanwhile, organizations that deal with religion who submitted for the respondent are fewer and more oriented around atheism or separation from religion; there are three total that are oriented purely to religious debate.[40] Two have arguments stemming from the assumption that any compelling interest a state has in preventing abortions is based in religious precepts; banning abortions for religious reasons would violate the Establishment Clause of the First Amendment.[41] The third comes from a coalition of pro-choice religious organizations from various traditions, arguing that there is no consensus in religion on the point where life begins; to prohibit abortion, the brief alleges, would violate the mandate in many religions to help the marginalized and oppressed.[42] All three of these submitters argue based on case law and articles dealing with religious identities and views in America.

Civil rights advocacy organizations (including politicians and legislators) for the petitioner attack the decisions in *Roe* and in *Casey* as unworkable,[43] advocate for the viability

[40] *Dobbs v. Jackson Women's Health Organization,* https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/ (last visited March 31, 2022).
[41] The Freedom From Religion Foundation, Center for Inquiry, and American Atheists,Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022); Americans United for Separation of Church and State, American Humanist Association, Bend the Arc: A Jewish Partnership for Justice, and Interfaith Alliance Foundation, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).
[42] Catholics for Choice, et al., Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).
[43] Alabama Center For Law And Liberty, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Melinda Thybault, Founder of the Moral Outcry Petition, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Senators Josh Hawley, Mike Lee, and Ted Cruz, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Ethics and Public Policy Center, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

line to be rescinded,[44] advocate for the right of the state to legislate as it sees fit,[45] and argue that the compelling interest that states have in protecting unborn fetuses has a greater weight earlier in pregnancy than previously accepted.[46] They argue from case law, from Constitutional interpretation, and from both federal and state statutes. Many of the briefs for the petitioner focus on how *Roe* and especially *Casey* are difficult to enforce–particularly the "undue burden" standard introduced in *Casey*, 505 U.S. 833 (1992), which meant states are prohibited from introducing any law creating an "undue burden" on pre-viability abortions. Civil rights organizations who support the petitioner argue that the undue burden standard is too vague, and *Casey* should be overturned.[47]

Civil rights advocacy organizations (including politicians and legislators) for the respondent appeal to the right to liberty,[48] the right to equal personhood under the law,[49] the original logic in *Roe* and *Casey*,[50] and highlight the harms that overturning *Roe* would deal disproportionately to marginalized people.[51] *Roe* is a nearly fifty year precedent now, and it has

[44] Alabama Center For Law And Liberty, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Trinity Legal Center, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[45] 396 State Legislators from 41 States, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; National Right to Life Committee and Louisiana Right to Life Federation, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[46] Claremont Institute's Center for Constitutional Jurisprudence, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[47]Senators Josh Hawley, Mike Lee, and Ted Cruz, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Ethics and Public Policy Center, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[48] American Bar Association, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; American Civil Liberties Union, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[49] National Advocates for Pregnant Women, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[50] American Bar Association, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; American Civil Liberties Union, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[51] The Autistic Self Advocacy Network and The Disability Rights Education and Defense Fund, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022); Organizations Dedicated to the Fight for Reproductive Justice Mississippi in Action, et al, Brief for the Respondent as Amicus Curiae, *Dobbs v.*

had impacts across the country. Civil rights advocacy organizations in support of leaving *Roe* in place emphasize the way that *Roe* made positive change in the lives of people who are, unlike pre-viability fetuses, indisputably alive: people who find themselves pregnant when they do not want to be, and those who want to be pregnant but cannot safely carry a pregnancy to term. Supporting *Roe* carries the assumption that the state has an interest in these positive changes, an interest that means prioritizing the right of the parent to choose whether or not to abort.

Scientific and expert opinions offered for the petitioners argue that the viability line has been rendered irrelevant because we know more about developmental milestones pre-viability through improvements in science.[52] Some also argue that banning abortion protects the parent: as with any intensive medical procedure, there are risks that come with getting an abortion.[53] Those arguing for the respondent point out the benefits and protections that access to abortion have given to women,[54] including how without legal access women turn to dangerous procedures to induce miscarriage or seek out illegal abortions–which can be fatal.[55]

Roe v. Wade has been the law of the land for almost fifty years. Multiple briefs for the respondent in *Dobbs* argued that banning abortions won't prevent them—it will only make dangerous back-room abortions more common, endangering the lives of people with unwanted

Jackson Women's Health Org. (2022).; Legal Voice, Asian Pacific Institute on Gender-based Violence, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[52] American College of Pediatricians and Association of American Physicians and Surgeons, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[53] American Association of Pro-Life Obstetricians and Gynecologists, Brief for the Petitioner as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[54] International Federation Of Gynecology And Obstetrics, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Social Science Experts, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Economists, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Experts, Researchers and Advocates Opposing the Criminalization of People Who Have Abortions, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

[55] International Federation Of Gynecology And Obstetrics, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Experts, Researchers and Advocates Opposing the Criminalization of People Who Have Abortions, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).

pregnancies.[56] When Texas passed a six-week abortion ban in 2021, Planned Parenthoods in surrounding states received an almost 800% increase in the number of patients seeking abortions.[57] The response to the Texas law reflects that idea. While a greater proportion of the *amicus* briefs in *Dobbs* favor overturning *Roe*, a majority of Americans still support *Roe* remaining in place.[58] *Roe* has been one of the central factors in partisan politics since it was decided in 1973—if it is reversed, the American political world will become a different place entirely. Overturning *Roe* would be a travesty paid for in blood; unfortunately, this Court may choose to do so anyway.

[56] International Federation Of Gynecology And Obstetrics, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).; Experts, Researchers and Advocates Opposing the Criminalization of People Who Have Abortions, Brief for the Respondent as Amicus Curiae, *Dobbs v. Jackson Women's Health Org.* (2022).
[57] *NEW PLANNED PARENTHOOD DATA HIGHLIGHT THE FAR-REACHING IMPACT OF TEXAS ABORTION BAN*, Planned Parenthood, https://www.plannedparenthood.org/about-us/newsroom/press-releases/new-planned-parenthood-data-highlight-the-far-reaching-impact-of-texas-abortion-ban (last visited March 31, 2022).
[58] *Americans Still Oppose Overturning Roe v. Wade*, Lydia Saad, https://news.gallup.com/poll/350804/americans-opposed-overturning-roe-wade.aspx (last visited March 31, 2022).

The New Dangers of Medical Error

Author: Ethan Sarakun

Editor: Madeleine Bodiford

Radonda Vaught, a nurse working at Vanderbilt Medical Center, pled not guilty to charges of impaired adult abuse and reckless homicide on December twenty-sixth, 2017. Vaught administered an incorrect form of medicine to Charlene Murphey, a seventy-five-year-old woman treated for a subdural hematoma, a build-up of blood on the brain's surface. Nurses throughout the United States have come to Vaught's aid and showed Vaught visible support.[59] Vaught was found guilty of two charges: reckless homicide and impaired adult abuse. Vaught could find herself in the most important medical malpractice case of the fact that Vaught was not charged with a lesser charge to reckless homicide commonly associated with medical error such as comparative or professional negligence. Prosecutors of medical error cases specifically can now invoke the doctrine of *stare decisis*, raising charges significantly.

Murphey's death was caused by miscommunication and medical error, as a full-body scan was ordered for Murphey and a drug to help with the patient's claustrophobia. The prescribed drug is known as "Versed" or "Midazolam," but when Vaught went to the automated medication dispensing system, she incorrectly chose the drug known as "Vecuronium." Vecuronium is a neuromuscular blocker that would have potentially worsened Murphey's

[59] Medication error death - former Vanderbilt Nurse pleads not guilty, McLaughlin & Lauricella PC (2021),

subdural hematoma. This is because the drug contains a paralyzing agent. After being given Vecuronium, Murphey fell unconscious and could not be resuscitated. Vaught told the staff at Vanderbilt University that despite this tragedy occurring, she continued to work at VUMC until the next month because Vanderbilt's report lacked any evidence of medical error and was devoid of the drug vecuronium. Due to this, there is no investigation regarding Murphey's death. Radonda Vaught continued to work at VUMC until the next month, January of 2018. When Vaught was fired, Vanderbilt took action to keep any word of the medical error from spreading by hiding the medical error from state and federal officials. Vanderbilt arranged an out-of-court deal with Murphey's family to fully guarantee that no news of the medical error would leak out to the media.

Despite Vanderbilt's efforts, a tip led to CMS confirming Murphey died of medical error, and the story went public. As the story went public, the Vanderbilt University released a statement reasoning why Murphey was given the incorrect medication because Vaught had bypassed critical safety mechanisms instituted to prevent this exact circumstance. Vaught was arrested on a criminal indictment in February of 2019 for her alleged role in Murphey's death and lost her nursing license on July twenty-third, 2021.[60]

A study from John Hopkins University concluded that only cancer and heart disease kill more people than medical errors, accounting for 251,454 deaths in 2013.[61] The American Nurses Association released a statement defending Vaught, reasoning that, "The nursing profession is already extremely short-staffed, strained and facing immense pressure – an unfortunate multi-

[60] Brett Kelman, The RADONDA Vaught trial has ended. This timeline will help with the confusing case. The Tennessean (2022)

[61] Study suggests medical errors now third leading cause of death in the U.S. - 05/03/2016, Johns Hopkins Medicine, based in Baltimore, Maryland (2016)

year trend that was further exacerbated by the effects of the pandemic."[62] However, according to the Tennessee Bureau of Investigation Investigative Report, Vaught claimed that despite working from 7:00 A.M. to 7:00 P.M. both on December twenty-fifth and December twenty-sixth, the date of the accident, she was not tired. Vaught additionally stated how the Neuro Intensive Care Unit (NICU) was not understaffed the day of the incident, going as far as saying it "never is shorthanded." Vaught was responsible for a new orientation employee that was working alongside herself that day, but she (Vaught) was comfortable having him with her. When Vaught couldn't find a computer to scan medication (and perhaps specify the medication if it's the one related to the case), Unit Manager Mitsby Ashley told her that the medication administration record would do it.

When Vaught retrieved Murphey's patient profile, she could not find the patient's profile prescribed by the doctor of medicine and approved by the pharmacy. Instead of initiating the override, Vaught did not attempt to contact the pharmacy to question this. An initial warning appeared before Vaught, stating, "Override medications should only be accompanied by STAT orders of when the clinical status of a patient would be significantly compromised by the delay that would result from pharmacist review." From there, Vaught searches for Versed, typing "VE'. Vecuronium is the first drug to appear due to the Acudose search by a generic name instead of the brand name. The following warning appears, asking for a justification of the override, clearly stating "PARALYZING AGENT," a trait that Vecuronium holds. Vaught can not remember what reasoning she selected. The third warning appears as the screen returns to Vecuronium, reading "PARALYZING AGENT." Two more warnings appear after the screen is

[62] Zachary Levine & Shannon McClendon, Statement in Response to the Conviction of Nurse RaDonda Vaught Cedars

bypassed. Vaught negates both of them even though the screen alerts her that Vecuronium causes "Respiratory Arrest" and that the patient "must be ventilated" and an additional warning that the chosen drug was a paralyzing agent.

After completing the override, Vaught failed to respond to several "red flags" that presented themselves when she grabbed the paralyzing agent and administered the drug. The first red flag is that Vecuronium comes in a powdered form while Versed is administered in a liquid. The second red flag is that the cap for Vecuronium is red and once again states "Paralyzing Agent." Vaught then refrained from reading the instructions to reconstitute that were printed on the Vecuronium bottle, though continued onward although the bottle was labeled Vecuronium and not Versed or Midazolam. The bottle must be shaken to reconstitute Vecuronium, which is not the case for Versed or Midazolam. Lastly, Vaught would need to have seen the cap of Vecuronium, which once again was labeled a paralyzing agent.

Additionally, Vaught was informed that she could not administer medicine personally because they ran the prescribed full-body scan. After all, it would be impossible to monitor the patient after the Vecuronium had been administered. Despite this, Vaught decided to administer the medication and left Murphey alone on a mobile bed, which led to Vaught not witnessing signs of acute Vecuronium intoxication, which would have prompted her to prevent Murphey's respiratory failure.[63]

On March twenty-fifth, 2022, a jury convicted Vaught of two charges, reckless homicide, and impaired adult abuse. The American Nurses Association and the Tennessee Nurses Association are "deeply distressed by this verdict and the harmful ramifications of criminalizing the honest reporting of mistakes." Recalling the priorly-mentioned John Hopkins University

[63] State of Tennessee VS. Radonda L. Vaught, Criminal Court for Davidson County, Tennessee IV, 2022

study stated that the third-highest cause of death in the United States is a medical error, which aligns with the ANA and the TNA's statement that "mistakes happen and systems will fail." They continue to claim that the criminalization of medical errors sets a dangerous precedent putting nurses across the country at risk. They believe that this ruling will have a "long-lasting negative impact on the profession" .[4]

Ann Latner, J.D., analyzed a court case in Nevada where a fatal amount of morphine was given to a patient that ultimately led to their death. If the court decided that the tragedy could be defined as medical malpractice, an affidavit would be required from a medical professional but not required if the court deemed the tragedy an act of ordinary negligence. While the names of the individuals involved in the case are private, the facts were deemed uncontested. The patient was given 120 milligrams of morphine prescribed to another patient. Three days later, the patient receiving the morphine passed away. The deceased patient's daughter filed a lawsuit with the nursing home, claiming that mismanagement and understaffing led to the fatal administration of morphine. The nursing home motioned to dismiss the case, claiming that the incident can be labeled as professional negligence, which in Nevada is defined as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of healthcare." Latner discusses how a court decides whether the incident is professional or ordinary negligence, where courts look specifically at the case, including "medical judgment, diagnoses, or treatment." If a jury can understand whatever occurred without a medical professional explaining to the jury standards of care, it is an ordinary negligence claim. However, if the jury cannot understand the claim without the help of the medical official, then it is a professional negligence claim. The court in question looked backward onto other cases to help find a possible precedent

in identifying what type of negligence a claim is and found that a nurse administering the wrong prescription fell into ordinary negligence.[64]

Under this line of reasoning and precedence, it would make sense that Vaught was charged with ordinary negligence. However, the fact that she was charged with reckless homicide has set a new precedent for medical error. Tennessee Code 39-13-215 allows for a high level of discretion, stating that reckless homicide is a "reckless killing of another." However, the state does not explicitly define recklessness in this context, which leaves it up to the courts. Additionally, reckless homicide is a Class D Felony.[65]

A part of the reason Vaught was not charged with ordinary negligence is that it is not recognized under Tennessee law. The closest thing to ordinary negligence in Tennessee is comparative negligence. Tennessee Code 29-11-103 defines comparative negligence, where the blame is shared in the proportion of degree of fault between two parties.[66] It is a possibility that Vaught was not charged with comparative negligence due to Vanderbilt University's lack of comment and participation in Murphey's death and Vaught's statements claiming that she was the only person responsible for the medical error. Comparative negligence is not stated as a felony in the statute.[67]

Vaught's case creates a dangerous precedent for medical error. Vaught's charges were more severe, rising from comparative negligence to reckless homicide when she took responsibility for her actions. She could no longer be charged with comparative negligence due

[64] Ann W. Latner, Fatal medication error: Ordinary negligence or professional malpractice? MPR (2020)

[65] How are different types of murder charges classified in Tennessee?: Knox County Criminal Defense attorney, How Are Different Types of Murder Charges Classified in Tennessee? | Knox County Criminal Defense Attorney

[66] 2016 Tenn. Code Title 29 - Remedies and Special Proceedings, Chapter 11 - contribution among tort-feasors § 29-11-103.

[67] Tenn. Code Ann. § 39-13-215, Lexis®

to her statements and Vanderbilt University's statements condemning her actions. Since Vanderbilt only had to make amends with the deceased patient's family and submit a plan of correction and did not have any legal prosecution, hospitals in the future could look to follow in VUMC's footsteps and allow their employees to take the fall for medical error. In states that recognize professional negligence, the victims of medical error can levy reckless homicide, a felony, over the medical professional for whatever incentives the victims may have.

Painting the Future for Delinquency Prevention in Youth

Author: Gabriel Moreno

Editor: Vanessa Doueihi

It is estimated that almost four children per second are arrested in the US. This rate equates to just over 2,000 for every 100,000 youth, despite juvenile arrests declining over 75% since 1996. [1] Instead of being exposed to education or healthy socialization in the community, they will spend time detained and in residential care. While many of these children are in their positions due to their own choices, society has not done enough to ensure they are supported or adequately diverted from the criminal justice system. As a result, nationwide, rearrest rates are over 55% for these youth.[2]

The juvenile justice system mirrors the criminal justice system regarding the over-representation of minority populations and children of color. Over 58% of the children charged as adults and 38% of youth in residential commitment are black despite only being about 14% of the population under the age of 18 in the United States.[3] In Florida's Residential systems, black youth make up over 52% of the residents across all risk levels.[4] Deficits in educational and social opportunities and limited protective factors cause these youth to turn to delinquency as a form of stimulation. The data suggest that youth in juvenile justice centers have significantly lower reading levels when compared to their peers and require special education at rates between three to seven times as much.[5] These delinquent acts following these educational deficits can involve academic truancy, running away from home, or association with those prone to criminal

activity. Each of which, in turn, are incredible predictors for criminogenic behavior both now and in adulthood.[6]

The Department of Juvenile Justice (DJJ) was created in the state of Florida, intending to refocus the juvenile justice system to a more punitive system than its origin. In recent years the state leadership has progressed in moving away from this. The most significant and most recent steps the state has taken regarding delinquency prevention come in the form of civil citations. These are best described as warnings issued from law enforcement instead of an arrest or other citation, and with over 12,000 issues per year, this is a large part of the "services" the state offers [7]. The state claims the program yields a 95% non-recidivism rate; however, the lack of data sharing and subsequent support programs fail to relay a comprehensive story [8]. DJJ's arrest numbers have been between 69,864 (FY2015-16) to 45,366 (FY 2019-20) in recent years [9]. The Comprehensible Accountability Reports from 2019 indicate that youth committed against-person offenses 39.7% of the time; the other 60.3% of the time, youth are committing nonviolent offenses, illegal substance abuse, and engaging in public disorder as their most serious offense, not including civil citations [10]. Florida lacks an established and empirically supported prevention program system with curriculums proven to decrease juvenile delinquency statewide.

A solution to this issue may require an expansion of community-based cultural arts programs for Duval, Orange, and Miami-Dade/ Broward counties to reduce recidivism rates. This proposal suggests that such programs should be modeled after the Prodigy Cultural arts program that currently serves The Tampa Bay area with 11 programs in 11 counties [11]. These programs allow children to develop effective emotional regulation, academic performance, and life skills through art-based classes taught by members of their local community. Historically, the curriculum has shown an 89% non-recidivism rate for previous offenders, and around 95% of

youth remain nonoffenders when voluntarily participating [12]. Utilizing programs like this can offer more than 8:1 savings compared to youth adjudicated to residential facilities [13]. Each site currently serves an average of 137 youth with rates under $30 a day per child, bringing the combined operating cost of these three initial sites to just under $750,000 a year, maintaining the average class size of existing programs and considering additional maintenance costs[14] [15]. Startup costs may range up to $300,000 for the three sites to account for supplies and initial contracts. Utilizing existing community centers and school facilities will ensure the upkeep and initial costs remain low. This program has proved effective in areas with similar population and density statistics as the targeted counties above. Thus, the evidence suggests that this is a cost-effective, community-based ideology that prevents Florida youth from involvement in the justice system.

When considering the initial price tag and issues with funding, it is essential to consider the tangible and intangible costs the state will incur should such a project not be funded. A study conducted in Pittsburg ran an analysis on the greater economic impacts of youth crime for a cohort of 503 boys over their adolescence. Despite their involvement with law enforcement and time before the law, this cohort, with a range of different offenses, is estimated to have caused between $89 million and $101 million in damages across all of their offenses [16]. Without the cost of prevention or diversion programs, it is estimated that juvenile crime alone costs the US around $158 million a year[17]. This data suggests that the issues a recommendation like this makes have not only moral implications for the youth of the state but also vast economic impacts.

Florida must refocus its attitudes on juvenile justice treatment before these problems can be assessed. In the early 2000s, Florida has historically taken a punitive approach toward

juvenile justice with the Tough love campaign.[18] This approach often causes a lack of priority front-end spending on the issue.[19] Initially, the Agency that was to become the Department of Juvenile Justice stemmed from the Department of Health and Rehabilitative Services due to a series of mistreatments of youth in the state's care, namely the death of Martin Lee Anderson after being served in a Pensacola boot camp. This initiated a movement that resulted in the Juvenile Justice Reform act of 1994 and an eventual shift to evidence-based practice from the state agency[20].

The state often advocates for increased support of the civil citation program; however, the data, data sharing process, and utilization policy prevent this tool from explaining the full scope of its impacts. While the Agency has limited access to these statistics, communication between community law enforcement is even more limited and, as a result, leads to unequal treatment of our youth. Additionally, a mere punishment (often in the form of community service) and a fee have been proven not to deter youth from recidivating [20]. The lack of support and redirection away will often lead them right back to the activities that lead them to their contact with law enforcement in the first place.

The Department of Juvenile Justice does not retain the right to operate the day-to-day functions of a program. Instead, to complete the suggestions in this article, must guarantee certain goals through contracts and grants approved by the state as provided by FLA. Stat. §985.17. The state would then be required to create a grant or draft a contract for a specific provider to fulfill the goals of this proposal. Like most social programs, the state budget will serve as a barrier to a lasting impact of legislation like this. Historically, the State legislature has shown hesitancy towards juvenile justice funding, with its most recent cut totaling over a 12%

cut to the agency budget, which is an additional hurdle to consider when proposing a remedy of this nature[22].

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The Climate Change Loophole in the Clean Air Act of 1970

Author: Anya Finley

Editor: Elke Schumacher

It has been over fifty years since President Richard Nixon first sat down with Senator Henry M. Jackson and special counsel William Van Ness to discuss, and eventually sign, the National Environmental Policy Act (NEPA), into law[68]. From NEPA, such laws as the Clean Air Act of 1970 and Clean Water Act of 1972 were enacted, and regulatory bodies like the Environmental Protection Agency (EPA) were formed. In the 1970s, NEPA was revolutionary. It demonstrated at least a minimal acceptance that a "quality environment" is a national goal and takes precedence over other objectives.

But in what way do we define a quality environment? Is it simply a livable environment, where hazardous air pollutants are regulated, like the Clean Air Act states? Perhaps a quality environment ought to be one where these baseline measurements are met, but major issues, like climate change, receive more attention. While the National Environmental Policy Act and the subsequent Clean Air Act have been highly influential in legal decisions, our environment has changed, and thus these laws should too.

While science demands change, our legal system does too. As we have learned more about issues like climate change and their causes, it seems time to alter these laws to reflect the

[68] Jim Kershner, NEPA, the National Environmental Policy Act (2011), https://www.historylink.org/File/9903 (last visited Mar 25, 2022).

current status of these issues. Because these laws were created over fifty years ago when our nation's climate issue was just beginning to gain mainstream attention, they lack some of the nuance and specificity that they now ought to include. This lack of nuance has led to an inability to address certain aspects of the environment, while also creating what is in essence a loophole, making it difficult for climate change to be truly accounted for.

This loophole is most clearly shown in the case of Massachusetts v. Environmental Protection Agency (2007).[69] The case began when Massachussetts, among other states, sued under the notion that the Environmental Protection Agency, or EPA, has a responsibility to regulate greenhouse gas emissions, which they were not currently meeting. Massachusetts claimed that failure to regulate these emissions would result in climate change that could permanently harm or destroy coastal lands, of which Massachusetts has many. The EPA denied this responsibility, claiming they did not have the statutory authority. Additionally, they argued that if climate change were to cause damage, it would be widespread amongst the country, and therefore Massachusetts lacked the standing to bring this lawsuit. Massachusetts had to prove that a concrete injury could occur, in particular to their lands and coastline.

In this case, the United States Supreme Court held that the EPA could be sued "over potential damage caused to its territory over global warming," essentially concluding that the petitioners, the State of Massachusetts, did have the standing to bring this case.[70] Justice Stevens, in his majority opinion, claimed that the EPA is obligated to protect one state from harm caused by another state. This means that if Massachusetts coastlines were to be destroyed, as caused by the carbon emissions of another state, the EPA must regulate this. Conversely, Chief Justice

[69] Massachusetts v. EPA, 549 U.S. 497 (2007)
[70] *Id.*

Roberts delivered a dissenting opinion that claimed Massachusetts had not demonstrated that they would suffer an injury or damage that was distinct from injuries suffered by other states.

In sum, Massachusetts was able to show sufficient causation that the EPA's failure to regulate would negatively affect Boston, Cape Cod, Plymouth, and other cities. Additionally, it was determined that the EPA must base its carbon emission decisions on whether these emissions lead to climate change. This case was monumental because it was one of the first times climate change was considered in the decision. Additionally, it set a precedent that the burden for states to demonstrate standing is less than that of individuals.

This case demonstrated the loophole the EPA had essentially created that was allowing for unregulated climate change. Because of their failure to include the words "climate change," in the Clean Air Act, they were failing to regulate to prevent this. The words "climate change" do not appear once in the Clean Air Act, although 97% of scientists who focus on climate agree that climate change is real and that it is likely caused by human activity.[71] Because the Clean Air Act fails to identify what climate change is, its causes, and ways to regulate to protect it, Massachusetts was determined to have standing in this case. If the Clean Air Act had some policy outlined to regulate against things that cause climate change, they simply could have ran certain tests to see if these climate change-causing air pollutants were present. If they were present, the EPA could have informed Massachusetts of this and found a way to decrease these pollutants. If air pollutants were not found at a level that would lead to climate change, the EPA likely would have won this lawsuit because Massachusetts would have lost its standing.

[71] Scientific consensus: Earth's climate is warming, NASA (2022), https://climate.nasa.gov/scientific-consensus/. (last visited Mar 25, 2022).

This knowledge begs the question: How can we acknowledge that climate change is real, have an Act that is said to protect the environment, and then fail to mention climate change in that very act? While it may be understandable for this language to be missing from the original 1970 NEPA and Clean Air Act, it seems like there has been a failure to amend it to include this language.

Had the Clean Air Act included a portion regarding climate change, this case likely would not have made it to the United States Supreme Court. However, there is a possible solution that could include added language to the Clean Air Act. Doing so would help prevent climate change and make it easier for the courts to determine standing going forward. It would be as simple as having the EPA find if pollutants were leading to or causing climate change. If they are, the state would have the standing to protect the state well-being of their nature, resources, and climate.

This potential addition could include a definition like this one from the National Aeronautics and Space Administration, which states that climate change is the "long-term change in the average weather patterns that have come to define Earth's local, regional and global climates."[72] This definition seems like it would fit appropriately into section 101 of the Clean Air Act, which essentially lays out the overall goals and objectives NEPA hopes to achieve.[73] A definition of climate change with a goal to avoid causing climate degradation could become a seventh prong in this section. It could perhaps say: "protect against climate change, the long-term change in weather patterns, which can have negative effects on air quality,

[72] Overview: Weather, Global Warming and climate change, NASA (2021), https://climate.nasa.gov/resources/global-warming-vs-climate-change/. (last visited Mar 31, 2022).

[73] The National Environmental Policy Act, 1969, Pub. L. 91-190, 1970.

temperature, and human and animal life." The inclusion of both this definition and goal would make it substantially easier for courts to rule in cases related to climate change, as these factors would be more clearly defined.

Discussion of climate could also easily be added to section 201, which identifies which aspects of the environment will be monitored for status and condition.[74] It identifies environmental features like air, water, and land, but fails to explicitly name climate. While air and water quality can undoubtedly be signals for climate change, directly monitoring the status and condition of our climate is slightly different. To simply add the word "climate" into this list adds a layer to the Clean Air Act that is necessary. It would ensure that the status of our climate, and its perpetual changes, are being accounted for and considered.

Environmental protection has gained a lot from NEPA and its following laws and regulations, but there is still work to be done. As our environment continues to change, our laws need to also change to protect the environment for this generation and following ones. The case of Massachusetts v. The Environmental Protection Agency highlighted a flaw in the Clean Air Act, but one that could be fixed. The Clean Air Act has helped protect the environment for the past 50 years; however, it is time to revisit and make amendments to ensure protection against climate change for generations to come.

[74] *Id.*

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