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Address Trento Student Law Review Association
c/o University of Trento, Faculty of Law
Via Verdi 53
38122 Trento (Italy)
Email trentostudentlawreview@unitn.it
Website https://thetslr.unitn.it

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Prefazione

Nicola Lirussi
Direttore

In queste settimane difficili, in ogni angolo del nostro mondo, centinaia di milioni di persone sono state costrette a modificare le proprie abitudini, a limitare gli spostamenti, a ridurre relazioni e attività all'essenziale, per affrontare un'emergenza senza precedenti. Spontaneo è stato anche per ognuno di noi, *editor* della rivista, chiedersi cosa davvero fosse prioritario e cosa no, all'interno della propria vita quotidiana e delle abituali occupazioni così repentinamente stravolte. Fra le considerazioni personali ve ne è stata una, condivisa spontaneamente da tutti: il desiderio di portare avanti, seppur con modalità di *smart working*, gli intensi lavori per la pubblicazione del nostro Volume 2, Numero 1.

Certamente, questa attività non può essere ritenuta essenziale, ma ciascuno di noi l'ha comunque considerata importante e necessaria. Necessaria per noi come persone, per sentire e per condividere il desiderio di un po' di quella normalità che ci è stata tolta; necessaria per noi come studenti, per conservare e per far emergere ancor più vivo il nostro desiderio di conoscere; necessaria per noi come cittadini d'Italia, d'Europa e del mondo, per partecipare in modo attivo con un nostro pur piccolo contributo, culturale e sociale.

Ci ha spinto a pubblicare anche il desiderio di ringraziare i nostri professori e professoresse, i dottorandi e le dottorande e tutto il personale universitario. Lo sforzo di tutti, anche di noi studenti, nel continuare ad erogare e fruire dell'offerta didattica di Ateneo, fa sperare che la formazione universitaria non diventi mai solo un'impresa, in senso economico, ma rimanga sempre, prima di tutto, *l'impresa* di formare menti libere e critiche, pronte ad agire consapevolmente, ad unire più che a dividere, ad accogliere più che a respingere, a capire più che a temere.

La situazione attuale non ci vieta di avere paura, in quanto umani, ma ci impone di non cedere a comportamenti egoistici o scelte scarsamente lungimiranti. Siamo stati richiamati alla solidarietà e al rispetto da parole autorevoli, che ci hanno ricordato come «nessuno si salv[i] da solo»[1] e come «il senso di responsabilità dei cittadini [sia] la risorsa più importante su cui può contare uno stato democratico in momenti come questo»[2]. Sembra essere (ri)nata in tutti la consapevolezza dell'importanza della comunità – non come casuale agglomerato di persone, ma come unità di valori umani e di rispetto reciproco – mai come oggi chiamata a stringersi intorno ad ognuno e – soprattutto – ai più deboli, pur nella distanza a cui siamo costretti.

In conclusione, dopo aver rinnovato il ringraziamento a quanti già citati ed estesolo a coloro che in questi frangenti donano il loro impegno e perfino la loro vita per salvare altre vite, mi sia permesso stringere in un abbraccio e ringraziare calorosamente, nel mio piccolo, tutto il *board* della rivista per l'eccellente lavoro, ed, in particolare, la vicedirettrice Maria Grazia Torresi, senza la quale quanto fatto fino ad oggi non sarebbe stato possibile.

Spero che presto potremo tornare alla vita di prima, senza dimenticare chi abbiamo purtroppo perduto o ciò che abbiamo passato, ma sapendo guardare con occhi nuovi e commossi quanto c'è di straordinario in ciò che, fino a ieri, ci sembrava tanto – banalmente – ordinario.

1. Papa Francesco, benedizione *Urbi et Orbi*, 27 marzo 2020.

2. Sergio Mattarella, discorso del Presidente della Repubblica Italiana alla nazione, 27 marzo 2020.

Preface

Nicola Lirussi
Editor-in-Chief

In these difficult weeks of unprecedented emergency, hundreds of millions of people have been forced to change their habits, limit travel and reduce their social contact and activities to a bare minimum.

Naturally, we – the editors of the *Review* – were also confronted with questioning certain necessities and priorities of our daily lives and occupations, which were so suddenly disrupted. Among all the considerations each one of us took into account, we shared the common wish to continue the labour-intensive work and agreed to publish Volume 2, Number 1 of our law review, adapting to smart working methods.

Of course, editing a law journal cannot be considered essential, but all of us believed it necessary. Necessary as people, to regain a sense of normality that has been taken away from us; necessary for us as students to be able to express and spread our persistent desire for more knowledge; necessary for us as Italian citizens and citizens of Europe and of the world, to affirm the importance of our small cultural and social contribution.

Moreover, it was the desire to thank our professors, PhD students and all the staff of the University of Trento, that kept us going. The effort of everyone, including us students, in continuing to provide and benefit from the didactical services of the university, makes us hope that university education will never become just an enterprise, in a purely economic sense, but will always remain, first of all, the *enterprise of* forming free and critical minds, seeking to unite rather than to divide, to welcome rather than to reject, to understand rather than to fear.

The current situation does not forbid us to be afraid (we are human beings), but it does require us not to give in to selfish and irrational choices and behaviours. We have been called to solidarity and

respect by authoritative words, which have reminded us that "no one is saved alone"[1] and that "the sense of responsibility of its citizens is the most important resource on which a democratic state can count on in times like these"[2]. It seems as if an awareness of the importance of community has been (re)born in people, not as a casual agglomeration of individuals, but as a unity of human values and mutual respect. Never before we were called upon to be gathered around each other, especially around the weakest, despite the distance to which we are forced to at present.

In conclusion, after renewing my thanks to those already mentioned and extending them to those who in these circumstances give their commitment and even their lives to save other lives, I would like to thank all the members of the board for the great job they have done in contributing to create this volume. A special thanks goes to Maria Grazia Torresi, the vice editor-in-chief, without whose dedication this issue would have most certainly not been possible.

I dare to hope that soon it will be possible to return to our daily lives, without forgetting who we have lost or what we have been through, but able to see all the extraordinariness in the things around us that seemed so ordinary just yesterday.

1. Pope Francis, *Urbi et Orbi* blessing, March 27, 2020.

2. Sergio Mattarella, address to the nation by the President of the Italian Republic, March 27, 2020.

The Uptake of Green Public Procurement in the EU in Light of New Directives, Policies and Expectations: Towards a Modern Holistic Society, or Just an Integrated Economic Governance for the EU?

Fabio Cinti*

Abstract: Green Public Procurement (GPP) in the European Union is becoming more and more relevant, with the new directives on public concessions 2014/23/EU, on classic public procurement 2014/24/EU and on Utilities 2014/25/EU the aim is to reach the 50 percent GPP target. The environmental awareness demanding Public Procurement to turn into GPP/SPP opens to a modern holistic society, in which environmental issues come into major relevance. This study collects several data from other researches and Organizations works, with an innovative approach, regarding also Small and Medium Enterprises (SME) to identify problems and related legislative solutions, analyzing best sound procurement performance in the EU with a focus on Nordic good practice and Worldwide situation. The study inquires whether the article 11 TFEU and the new environmental consciousness are just strengthening the current integrated economical governance concept or if, instead, they are moving towards a new concept of modern Holistic Society.

Keywords: Green Public Procurement; holistic society; article 11 TFEU; GPP; integrated economic governance.

1. *Introduction: Public Procurement and Green Public Procurement*

Competitiveness and growth in a market are widely influenced by public procurement. The main purpose of a unified European public procurement market consists in better overall welfare in the services market through progressive removal of substantial non–tariff barriers to intra–community trade by introducing an element of competitiveness to prevent favoritism policies from single States[1]. Best sound administration management in goods delivery by public entities is represented by public procurement regulations[2]. Under this point of view, Green Public Procurement (GPP) is its necessary implementation, in light of the environmental principles expressed in the Treaty on the Functioning of the European Union (TFEU)[3]. Thus, aiming at "a process whereby public authorities seek to procure goods, services

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* Fabio Cinti holds a combined J.D. and LL.M. degree from University of Bologna School of Law. He is deeply interested in green and climate debate and in studies on legal Chinese and English terminology.

1. See Christopher H. Bovis, *EU Public Procurement Law* VII–IX and 6 (Edward Elgar 2nd ed. 2013).

2. So far, EU public procurement accounts for 1.8 trillion euros, accounting for 14 percent of the whole EU GDP, and 20 percent of the whole public expenditure on goods, workers in single-member States. It is regulated by EU directives 2014/23/EU, 2014/24/EU and 2014/25/EU. See DG GROW G4, *Public Procurement Indicators 2013* (European Commission, 2015) available at https://ec.europa.eu/docsroom/documents/11022/attachments/1/translations/en/renditions/native (last visited April 26, 2020).

3. See article 11 TFEU.

and works with a reduced environmental impact throughout their life cycle when compared to goods, services and works with the same primary function that would otherwise procure"[4].

One of the elements characterizing green public procurement is the life-cycle cost (LCC), which is described as an "economic assessment considering all agreed projected significant and relevant cost flows throughout analysis expressed in monetary value. The projected costs are those needed to achieve defined levels of performance, including reliability, safety, and availability"[5].

LCC aims at specifying the financial value of assets in connection with the environmental cost by enabling a strict connection between the green procurement field and the environmental research field. The forerunner of LCC is the life–cycle assessment (LCA), which is a concept developed by the Society of Environmental Toxicology and Chemistry (SETAC) in 1993[6]. It is now drawing attention in EU procurement whether, as a matter of theory, it can be compatible with LCC, now spread in every EU green procurement practice.

At the same time, another procurement concept, the Sustainable Public Procurement (SPP) has been introduced. SPP inscribes itself right inside the GPP, empowering its purposes of sustainability[7]. Having said this, it is important to outline the main and actual legal framework of EU GPP, as well as the new tendencies towards a progressive and effective implementation of GPP throughout whole Europe, and only then, SME contributions and needs to effectively participate within this environment.

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4. Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Public Procurement for a Better Environment*, COM/2008/0400 § 3.1.

5. International Organization for Standardization, *Buildings and Constructed Assets — Service Life Planning — Part 5: Life-Cycle Costing* (ISO 15686-5:2017) as cited in Oshani Perera, Barbara Morton, and Tina Perfrement, *Life Cycle Costing in Sustainable Public Procurement: A Question of Value* 1 (International Institute for Sustainable Development, 2009) available at https://www.iisd.org/pdf/2009/life_cycle_costing.pdf (last visited April 26, 2020).

6. See Walter Klöpffer, *The Role of SETAC in the Development of LCA*, 11 International Journal of Life Cycle Assessment 116, 116–22 (2006).

7. See Fernando Pacheco-Torgal, et al. *Eco-Efficient Construction and Building Materials Life Cycle Assessment (LCA), Eco-Labelling and Case Studies* 4 (Woodhead 2014).

2. *Legal Framework, Award Criteria and Soft Law Instruments for GPP*

If Public Procurement can be a major driving factor for development in a market, it can be reasonably stated that, green public procurement shall be a major driving factor for the sustainability in that market development[8]. Therefore, under the aegis of the EU directive 2014/24/EU recital 91: "Article 11 TFEU requires that environmental protection requirements be integrated into the definition and implementation of the Union policies and activities, in particular, to promote sustainable development. This directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts".

An element has been introduced into procurement to turn it "green"[9]. Due to explicit remit of article 11 TFEU: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular, to promote sustainable development"[10].

The future EU bodies' policies must be adopted considering the environmental sustainability and protection *in species* promoting sustainable development[11]. For this purpose, it has been noted that "integrating environmental protection in all areas to the extent necessary to secure sustainable development is a prerequisite to securing the very basis of our existence"[12].

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8. See Organization for Economic Co-operation and Development, *Mapping Out Good Practices for Promoting Green Public Procurement* 3–4 (2013), available at https://www.oecd.org/gov/ethics/Mapping%20out%20good%20practices%20for%20promoting%20green%20public%20procurement%20GOV_PGC_ETH_2013_3.pdf (last visited April 26, 2020).

9. See Commission of the European Communities, *Communication* (cited in note 4).

10. article 11 TFEU.

11. See Beate Sjåfjell and Anja Wiesbrock, *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* 114–116 (Cambridge University Press 2015); Ida Auken, *Green Procurement Is the Key to Green Growth* (Ministry for the Environment and Food of Denmark, 2012) available at http://eng.mim.dk/newsarchive/2012/okt/20121009–green–procurement (last visited April 26, 2020).

12. Anja Wiesbrock and Beate Sjåfjell, *The Importance of Article 11 TFEU for Regulating Business in the EU: Securing the Very Basis of Our Existence*, in Beate Sjåfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* 1 (Routledge 2015).

Indeed a clarification is needed: what has been done so far, not only within the EU but also in other parts of the globe as in China, Mercosur, Russian Federation, and the United States, was to achieve a welfare State[13] assuring services to the most, but this now appears not to be sufficient enough. In the long run, that aim is indeed interwoven with the needs of a new kind of society, from now on say, "holistic society", which sees the general and universal need of preserving and somehow encouraging the stability of the ecosystem[14]. And there exactly is where article 11 TFEU plays a role: it stands as a general interpretation clause, policy guidance for all of the future aims and works of every EU institution[15].

GPP policies in Europe began in the 1990s, with the Communication *on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement*[16]; the Communication introduces for the first time in Eurocommunitarian context the concept of an Integrated Product Policy (IPP), along with the first action plans (NAP), the aim of which was to enhance the nationwide uptake of these politics, and promote a green procurement policy mainly by setting goals in terms of percentage of green public procurement contracts out of total ones. Despite these measures, only a few nations were regarding the push towards a GPP as a comprehensive phenomenon, with Denmark being one of the first

13. See Giovanni Guzzetta and Francesco Marini, *Lineamenti di diritto pubblico italiano ed europeo* 139 (Giappichelli 2014) where by "form of state" is meant how the constitutive elements (people, territory, sovereignty) interact together in the various experiences.

14. Reasonably in this sense Wiesbrock and Sjåfjell, *The Importance of Article 11 TFEU* (cited in note 12), naming it as the holistic approach of article 11 TFEU. See also Rita Roos, *Sustainable Public Procurement Mainstreaming Sustainability Criteria in Public Procurement in Developing Countries* 2 (Leuphana University of Lueneburg, Centre for Sustainability Management, 2012), which notes this concept is borrowed from the United Kingdom Sustainable Procurement Task Force.

15. It is *de facto* connected to article 3 of the Treaty on European Union (TEU), which states that the EU shall work for the sustainable development of Europe, therefore including protection and improvement of the quality of the environment.

16. Commission of the European Communities, *Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations into Public Procurement*, COM/2001/0566.

in implementing a NAP on GPP in 1994[17]. The revolutionary aspect in IPP consists of a toolbox of policy instruments aimed at greening' the market on both supply and demand sides by cutting environmental impact[18]. After the COM (2008) 400, as of now, every EU State adopted an action plan on GPP[19]. As shown in EU factsheets[20], the need for a common framework applicable to public procurement shall not possibly come only from legal provisions, but from common standards too[21]. In this sense, the european *Eco-label*[22] comes in aid, as the selecting of technical environmental criteria suited for each product is a task which requires specific expertise, Procurement Officers can be made available this new instrument whose criteria allow them to greatly simplify the tender documents[23]. These eco-labels preferential

17. See Martin Charter, et al,, *Integrated Product Policy (IPP) and Eco–Product Development (EPD)* (Centre for Sustainable Design 2001). This Paper was prepared for the 5th International "Towards Sustainable Product Design" Conference (October 23–24, 2000) and published in Martin Charter and Ursela Chitner, *Sustainable Solutions: Developing Products and Services for the Future* (Routledge 2001), available at http://www.cfsd.org.uk/ipp–epd/ipp–epd_discuspaper2.html (last visited April 26, 2020).

18. *Id.* at 98.

19. Particular forerunners were the Nordic–Baltic Countries, as stated in Isa-Maria Bergman, et. al, *Mainstreaming GPP in the Nordic Countries – A Scoping Study* 7 (Nordic Council of Ministers, 2012).

20. See Chambers Ireland, *Factsheet: Green Public Procurement (GPP)* 1–2 (Chambers Ireland 2015); Mariusz Maciejewski and Christina Ratcliff, *Public Procurement Contracts, Fact Sheets on the European Union* (European Parliament Think Tank, 2017).

21. See article 10 subsection 4 of directive 2009/125/EC *establishing a framework for the setting of ecodesign requirements for energy–related products*, L285/10 OJ (2009); and, as for single states, see article 11 of regulation (EC) 66/2010 *on the EU Ecolabel*, L27/1 OJ (2009); recital 4 subsection 2 of directive 2014/23/EU *on the award of concession contracts*, L94/1 OJ (2014). In light of article 191 TFUE (formerly article 174 of the EC Treaty), and for ICT procurement standards, see European Commission, *Commission Implementing Decision (EU) 2016/120 on the Identification of the Extensible Business Reporting Language 2.1 for Referencing in Public Procurement*, L23/77-78 OJ (2016).

22. See regulation (EC) 66/2010 (cited in note 21).

23. Directive 2004/18/EC, L94/65 OJ (2004) repealed by directive 2014/24/EU *on public procurement and repealing directive 2004/18/EC* article 43, L94/65 OJ (2014); directive 2014/25/EU *on procurement by entities operating in the water, energy, transport and postal services sectors and repealing art. 61, directive 2004/17/EC,* L94/243 OJ (2014); article 18 subsection 6 of directive 2009/81/EC *on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting*

criteria appear to be somehow mitigated by the provisions which do not allow contracting authorities to impose in the tender procedure arbitrarily, choosing to admit, reject or award proposals based on either a pretext environmental criteria, or of a lack of a particular ecolabel[24]. The GPP administration can choose to insert in the tender call the same environmental criteria underpinning a particular label. The former ones must necessarily comply with specific needs and link to the subject-matter of the contract for which the tender call was issued, and not refer to any other managerial or financial aspect[25]. Once the public entity has set the criteria and the public tender notice, the bidders make their offer into a sealed envelope, and the administration has to choose which one is to be awarded the tender according to several principles and criteria[26]. Whilst the minimum requirements which all bidders must abide are set by the "technical specifications", the "award criteria" reward those bidders who offer enhanced performance under all those headings which have a strict connection with the subject–matter of the contract itself[27].

The new directives on GPP also innovate under this point of view, as stated in their recital, the old best price award criteria (BPA) is being changed with the new criteria of the most economically advantageous tender (MEAT)[28]. This has to be interpreted by taking into account the LCC sustainability of goods or services related to many factors such as environmental impact, production process, and utilization. Indeed public administrations are still free to choose a BPA or BPA-LCC

authorities or entities in the fields of defense and security, and amending directives 2004/17/EC and 2004/18/EC, OJ L216/76 (2009).

24. Article 43 of directive 2014/24/EU (cited in note 23); recital 1–2, article 61 subsection 1 of directive 2014/25/EU *on procurement by entities operating in the water, energy, transport and postal services sectors and repealing directive 2004/17/EC*, OJ L134/114 (2004).

25. Article 43 subsection 2 of directive 2014/24/EU (cited in note 23); article 61 subsection 2 of directive 2014/25/EU (cited in note 23).

26. See Sofia Lundberg, Per-Olov Marklund, Elon Strömbäck and David Sundström, *Using public procurement to implement environmental policy: an empirical analysis*, 17(4) Environmental Economics and Policy Studies 491, 491 (2015).

27. See Environmental Protection Agency, *Green Procurement Guidance for the Public Sector,* available at https://www.epa.ie/pubs/reports/green%20business/greenprocurementguidanceforthepublicsector.html (last visited April 26, 2020).

28. Recital 90 last subsection directive 2014/24/EU (cited in note 23); Recital 97 last subsection directive 2014/25/EU (cited in note 23).

criteria, as most relevant on MEAT, evolved from LCC (and LCA)[29]. Within the MEAT are to be considered several categories of components which the administration needs to take into consideration, they are total price, qualitative features, delivery issues, environmental aspects and civil, ethical aspects: hence best price still plays a major role[30]. It was noted by doctrine, that article 68 of the new directive states that the LCC criteria do not comprise the so–called "sustainable" GPP; whilst if using best quality-price ratio criteria (BPQR) and MEAT, such values can be comprised within the award of contract. This is probably an intent of the European Legislator to balance the needs of an internal market with the environmental policy goals, in a much more effective way than the previous 1990s policy which would have led to important – yet stochastic – effects[31].

Provided those criteria are linked to the subject-matter of the contract, and that they do not confer an "unrestricted freedom of choice" upon the contracting authority or entity[32], it is also possible for such authority to conduct market consultations, eventually with external experts, to inform economic operators of their procurement plans[33]. directive 2014/24/EU *on Innovation Partnerships* introduces a peculiar green policy tool incentive and an important opening up for research and development (R&D) in the green market: according to article 31, it is possible for contracting authorities, stated the need of an innovative product which cannot be found on the market, to state in a procurement that they are willing to start a partnership with the awarded bidder, to get that product[34]. Such argument can reasonably be stated in light of article 67, since the contract must be awarded under the

29. *Id.* respectively, article 67 subsection 2 and article 82 subsection 2.

30. See Katriina Parikka-Alhola, Ari Nissinen and Ari Ekroos, *Green Award Criteria in the Most Economically Advantageous Tender in Public Purchasing* 257, 264 in Khi V. Thai, and G. Piga, eds, *Advancing Public Procurement: Practices, Innovation and Knowledge Sharing* (PrAcad Press 2007).

31. See Gustavo Piga and Tunde Tatrai, *Public Procurement Policy* 231–233 (Routledge 2015).

32. Article 41 of directive 2014/23/EU (cited in note 21); article 82 of directive 2014/25/EU (cited in note 23). C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, ECR 2002 I-07213.

33. Article 40 of directive 2014/24/EU (cited in note 23).

34. *Id.* article 31.

best quality-price ratio criteria. It was notably assessed[35], that it's uncertain in what measure GPP principles will be made enforceable by single States courts[36], So far it has been ignored in a wide majority of cases at National level notwithstanding the ECJ continuous – but still too bland – pressures, for reaching a common environmental concern level in all of the EU institutions and the Member States, the *acquis* communautaire is still lacking in this area[37].

Except from recital 91 of directive 2014/24/EU, article 11 TFEU and article 3.3 Consolidated version of Treaty *on the European Union*, GPP EU rules are mainly outlined by TFEU and EU directives, according to the relevant case–based interpretations of the European Court of Justice. It has to be noted that every State and organization adhering to WTO have also to comply particular agreements which are either soft law or bi–lateral, multi–lateral treaties[38]. The international law instruments are well acknowledged as a source of law for GPP whereas the EU accepts to introduce green standards in international instruments when establishing trade agreements which concern new and specific rules that apply to third countries the same rights that EU envisages for its economic operators[39]. As outlined by the 2015 EU

35. See Wiesbrock and Sjåfjell, *The importance of Article 11 TFEU* (cited in note 12); David Grimeaud, *The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?* 9(7) Eur Envtl L Rev 207, 207 (2000).

36. See Sue Arrowsmith, et al,, *EU Public Procurement Law: An Introduction* §3 at 61 (EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation 2010).

37. Only four sentences are relevant under green public procurement: they were decided before new directives came into play and state environmental principles must be read in light of the EU Treaties and directives. C–368/10 *European Commission v Kingdom of the Netherlands*, ECR 2012 1–284; T–331/06 *Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Environment Agency (AEE)*, ECR 2010 II–00136. C–448/01 *EVN AG and Wienstrom GmbH v Republik Österreich*, ECR 2003 I–14527. C–513/99, *Concordia Bus Finland* (cited in note 32).

38. United Nations Division for Sustainable Development, *International Expert Meeting on a 10-Year Framework of Programmes for Sustainable Consumption and Production (Chapter III of the Johannesburg Plan of Implementation)* (2003), Plan of Implementation of the World Summit on Sustainable Development, available at http://enb.iisd.org/crs/sdscp/curtain.html (last visited April 26, 2020).

39. Important agreements are the ones concerning third–party green procurement goods coming from Singapore, after the new FTA, offering each other best treatment and commitment even more than the WTO's respective ones. And new agreements are to be signed with Russia, Singapore, and other Asian governments.

Commission action plan on Circular Economy[40] special emphasis will be given on GPP aspects connected to a circular economy, its criteria will be encouraged in public institutions throughout Europe, initially voluntarily, thus ensuring a greater uptake of the promoted criteria, the Commission itself prompts through EU funds and its institutions the widest use possible of GPP principles[41].

2.1. *European Commission Action Plan on Circular Economy and Europe 2020 Strategy*

With the aim of "modernize and transform the European economy, shifting it towards a more sustainable direction"[42] and "mainstream the circular economy into the full lifecycle of products" through the implement of GPP criteria and best practices in public procurement, it has introduced an element of "circularity" within public authorities in several products, for now, GPP criteria are only used voluntarily, but it will be encouraged as GPP "will play a key role" towards the CEAP implement, and Commission is working to ensure such criteria can become the standard practice, considering public procurement sector accounts for a large part of EU expenditures[43].

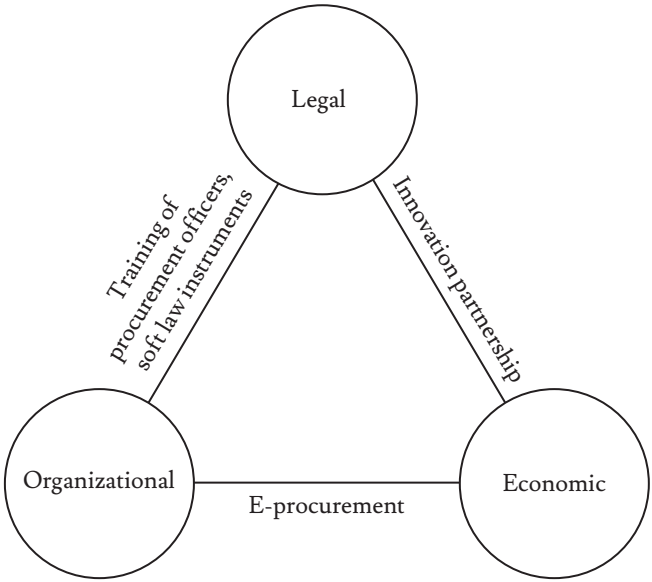
40. European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Closing the loop – An EU action plan for the Circular Economy* (2015) COM/2015/0614.

41. See *id.* § 2 at 6.

42. European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Circular Economy Action Plan* 2 (2017) COM/2019/190.

43. See *id.* at 8.

3. *Development of GPP: Analysis of Obstacles and Solutions*



Legal issues	Environment knowledge and environmental criteria development
	Research and development
	Incentive needs
Economic issues	Perception that environmentally friendlier products would be more expensive
Organizational issues	Management support, strategic focus, and organizational policy
	Practical tools and information (such as handbooks and Internet tools)
	Training of public procurement officers
	Bureaucratic load

The chart and the table above show GPP main issues organized into taxonomic categories they attain to. Due to the interdependence of some no single category related issues, the arrows, and related captions show the possible solution to each problem according to the

actual instruments, introduced with the new Procurement Directive and Europe 2020 Initiative. Hence, the main problems are revealed by recent Surveys on GPP, as well as EU Action Plans presented in this Chapter.

3.1. *Core GPP and Comprehensive GPP*

The empirical studies on GPP offer an innovative point of view on the phenomenon. In fact, according to recent data, it is duly distinguished between core GPP and comprehensive GPP: the former is the environmental criterion usually implied in the eco–label, and thus it is suitable of use throughout the whole EU and its contracting authorities, with low or without verification cost, as it refers to the key environmental issues. The latter is a functional criterion for which the administration evaluates the market, choosing the most sustainable product among the ones available at the state–of–art. Since it goes further on the best green environmental practice commitment, and it implies a market research, an administration does not need to implement yet[44].

3.2. *GPP and SME Participation*

If on the one hand there are the Public institutions, on the other hand there are their suppliers: GPP is getting more and more mandatory for Public EU institutions, but it is not sure whether GPP rules can be made suppliers friendly. Despite as stated by UK National SME Engagement Programme, new EU public procurement directives are "aimed at achieving greater flexibility, facilitating access to contracts for small and medium–sized companies (SMEs)", the latter are skeptic about an immediate implementation *rebus sic stantibus* of the new EU criteria and Action Plan. Claiming that out of the 26 percent SMEs participating, 40 percent claim that bureaucratic load is a major hindrance to their participation into GPP calls[45]. Indeed steps

44. See Lundberg, et al,, *Using public procurement to implement environmental policy* (cited in note 26).

45. See European Association of Craft, Small and Medium-Sized Enterprises, *Position Paper on the EU action plan for the Circular Economy* (Brussels, March 2016), referring to Commission, *Communication* (cited in note 40).

need to be made towards SMEs to let them achieve a mayor GPP acknowledgment and, above all, market–friendly entry conditions. And thus "supporting the strategic use of public procurement for environmental and social policy goals, providing more clarity on the application of the rules, and shifting to full electronic procurement".

Considering "an adequate, balanced and flexible legal framework for the award of concessions" would prevent distortions in the functioning of the internal market and ensure SMEs' effective and non–discriminatory access to the market to all Union. This is what is meant when recital 1 of directive 2014/23/EU states that "Particular importance should be given to improving the access opportunities of SMEs throughout the Union concession markets"[46]. Directive 2014/23/EU further insists on the importance of creating a "basis for and means of further opening up international public procurement markets and boosting world trade", through the proactive involvement of SMEs within the process[47].

3.3. *OECD Discussion Paper on Public Procurement: Six Points of Importance for the EU*

Far from being considered just as a local phenomenon, GPP is increasingly striving to become a global one and international meetings acquire relevance as a source of law development and, before that, a model for GPP[48]. Indeed, one of the most important organizations involved in the process is OECD: during its meetings, policy and scientific debates are held, and various GPP experts and researchers can show their results and eventually elaborate new policies in the note of guidance for future policies. The *Discussion Paper on Public Procurement of 11–12 February 2013 Paris*, OECD Conference Centre, states out six main dimensions, in which it is possible to collect data for GPP good practices[49]. As the first step, setting a clear and detailed GPP legal

46. Recital 1 of directive 2014/23/EU (cited in note 21).

47. See *id.*

48. See, for example, Organization for Economic Cooperation and Development, *Recommendation of the Council on Improving the Environmental Performance of Public Procurement*, C (2002) 3.

49. See OECD, *Mapping out good practices* at 3–4 (cited in note 8).

framework to assist buyers: that for EU specific case means a new standard applicable to every country in Europe[50].

Secondly, there is the need to adapt this legal framework to every specific local market's green technical cost-solutions up-taking capacity. In this latter case, a relevant EU example is shown by the Swedish market. When Stockholm County Council first tried introducing a biogas ambulance, it had to face, among other technical-related issues, also the lack of manufacturers on the market: it was only after five years of dialogue with builders that it managed to realize the world's first biogas powered green ambulance in 2009[51].

A third point, there is a need for the introduction of new environmental standards directly into technical specifications, selection and award criteria, as well as in contractual performance clauses. This has been partially implemented with eco-labels and environmental standard criteria. However, at a deeper level, it should be noticed that recent streams and researches suggest a major need for a uniform and harmonized common framework of environmental standards for EU, as well as the creation of an environmental standard regulation authority[52].

The fourth point is the need of additional professionalism in the procurement function: too often a particular training is requested for nowadays procurement officers, not needed before[53]. In particular, ac-

50. See International Council for Local Environmental Initiatives (ICLEI), *Green Public Procurement (GPP) Training Toolkit – Module 1: Managing GPP Implementation* (European Commission, DG Environment-G2 2008) available at http://ec.europa.eu/environment/gpp/toolkit_en.htm (last visited April 26, 2020).

51. See Center for International Climate Research (CICERO), *Second Opinion on SLL's Green Bond framework* 9 (2014).

52. See Parikka–Alhola, Nissinen and Ekroos, *Green Award Criteria* at 257 (cited in note 30); Regulation (EC) 761/2001, L114 OJ (2001), repealed by Regulation (EC) 1221/2009 *on the voluntary participation by organizations in a Community eco–management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001*, L342/1 OJ (2009); European Commission, *Decision 2001/681/EC*, L247/24 OJ (2001) and European Commission, *Decision 2006/193/EC*, L342/1 OJ (2009), both repealed by Regulation (EC) 1221/2009, *on the voluntary participation by organizations in a Community eco–management and audit scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC*, L342 OJ (2009). As a rule, the British standard BS 8903:2010, still considered as of international relevance.

53. See Maarten Bouwer, et al,, *Green Public Procurement in Europe 2005 – Status overview* (Virage Milieu & Management 2005) available at http://europa.eu.int/

cording to a 2005 survey on some tender calls by the EU 27 plus the United Kingdom, lack of training of public procurement officers is seen as an obstacle to EU–GPP criteria adoption into tendering procedures. And it is stated as a major problem in Denmark, Finland, Ireland and Malta. The modern holistic society paradigm requires not only the executive branch, but also administrative one to be aware of the needs of environment protection[54]. And exactly here comes the fifth point, which requires raising the awareness of GPP solutions. Last points would be to monitor the results of the green public procurement, as essential for the benefits deriving from, and as a demonstration of, the reaching of the 50 percent Green Procurement policy goal in the EU[55].

Even if very tantalizing, this setting has to be further improved: it is necessary to mention the environmental effectiveness cost–efficiency parameters in concrete; under the financial perspective, it is required to further improve and analyze market factors, such as GGP attitude of being a real cost–efficient environmental policy instrument, able to affect EU–global competition over tenders made, and if so, in which way[56]. Indeed, this kind of approach has important antecedents in doctrine[57] and reminds much of the classical public procurement system[58]: it is useful to save this setting as it shows GPP as a system in a stable equilibrium, due to the proficient interaction of a force or a set of forces whose result is the overall proficiency in the public procurement efforts[59]. This view of GPP/SPP – in terms of the result of forces – is stressed also in the economical doctrine and is a constant to whoever wants to deepen the relationship between

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comm/environment/gpp/media.htm (last visited April 26, 2020).

54. See Harro van Asselt, *Green government procurement and the WTO*, W–03/06 IVM Report 20, 35 (Department of Environmental Policy Analysis 2003).

55. See European Resources Efficiency Platform, *Manifesto and Policy Recommendations* 7 (EREP 2014).

56. See Sofia Lundberg, Per–Olov Marklund and Runar Brännlund, *Assessment of Green Public Procurement as a Policy Tool: Cost–Efficiency and Competition Considerations* 25 (Center for Regional Science at Umeå University 2009).

57. See Khi V. Thai, *Public Procurement Reexamined*, 1 Journal of Public Procurement 9, 50 (2001).

58. Which is composed of management, regulations, authorizations, operational functioning, feedback. See *id*. at 18.

59. See *id*. at 33.

legal frameworks and its effects in GPP[60]. The United Nations Environment Programme of 2013 can drastically adjust this point of view, adding new researches on the theme of GPP and SPP: in particular where the European Union is concerned[61].

3.4. *The United Nations Environment Programme (UNEP) and Its Importance for the EU*

At a global level, only 36 percent of public authorities implemented LCC into procurement, and price-only based award accounts for 43 percent of tenders, BPA for 34 percent, and SPP/GPP for 7 percent, whilst the implement of eco-labels use for verification of claims that products meet criteria and, just for a reference to create new criteria, are accounting for 26 percent and, 34 percent respectively, with a GPP monitoring practice of only 49 percent of the Countries members of UNEP[62].

According to the survey conducted by UNEP on GPP global wide, the GPP further implementation for the next years is expected to cover 84 percent of countries (including EU countries): this suggests that in the next years there will be more sustainable policies implemented[63].

60. See Christopher McCrudden, *Using public procurement to achieve social outcomes*, 28 United Nations Natural Resources Forum 257 (Blackwell 2004); Gustavo Piga and Tunde Tatrai, *Public Procurement Policy* at 175 (Routledge 2015); Lundberg, Marklund and Brännlund, *Assessment of Green Public Procurement* at 8–11 (cited in note 56); Roger Perman, Yue Ma, Michael Common, David Maddison and James McGilvray, *Natural Resource and Environmental Economics* 206 (Pearson Education 3rd ed. 2003); and, as for EU Courts, see C–513/99 *Concordia Bus Finland* (cited in note 32), promoting interaction between economic and legal policies; and with relevance for Nordic Countries: Bjørn Bauer, Jens Christensen, Karen Christensen, Tue Dyekjær–Hansen and Ida Bode, *Benefits of Green Public Procurement* at 23–24, 34–35, 37–39 (Nordic Council of Ministers, Copenhagen, TemaNord 2009).

61. See Anastasia O'Rourke, Charlotte Leire, Trevor Bowden, Farid Yaker and Carlos Andrés Enmanuel, *Sustainable Public Procurement: a Global Review Final Report* (UNEP 2013), survey conducted between September 5 and October 5, 2012, on 273 respondents.

62. See *id.* at 34–46.

63. See *id.* at 39.

3.5. *New Surveys on GPP: Obstacles and Effective Policies*

Several brief surveys approach GPP with a problem–solution focus [64]. Data collected from different agencies and tendering contracts during different periods suggest possible obstacles to GPP, which can be grouped into three main areas: economical, juridical and organizational. Indeed, a wide perception concerns the higher cost of environmentally friendly procurements, which are seen as a major issue for almost the half of the public contracting agencies in the EU, steadily followed by those who claim environmental knowledge and its development criteria are not spread well enough.

Organizational problems that have to be faced are a greater strategic focus, organizational policies and the need for an increased effort in GPP management. SMEs tend to respond better to relational «peer–to–peer» approaches rather than to bureaucratic ones. The need of an advocacy on GPP, for which it is thought a closer work with intermediaries (such as trade associations) "can help communicate concerns in an aggregate and impactful way"[65].

The last issue being constantly addressed is the lack of relevant tools of information[66], through the publishing of the so-called "Best GPP practice" and "New GPP Criteria", specific for each kind of product the contracting authority is willing to acquire. Moreover, to streamline procedures for procurement and invoicing of goods, it is being developed throughout EU countries an e-procurement system, which has been made mandatory according to article 11 of directive 2014/55/EU *on electronic invoicing in public procurement*, which states that "Member States shall adopt, publish and apply the laws,

64. See van Asselt, *Green government procurement and the WTO* at 35–36 (cited in note 54); Andrea Renda, Jacques Pelkmans, Christian Egenhofer, Lorna Schrefler, Giacomo Luchetta, Can Selçuki, Jesus Ballesteros and Anne–Claire Zirnhelt, *The Uptake of Green Public Procurement in the EU27* 4344 (Centre for European Policy Studies and Council of Europe 2012).

65. Westminster Sustainable Business Forum, *Round Table: "Sustainable Procurement and SMEs" – Discussion Summary* (July 7th, 2015).

66. See Bouwer, et al, *Green Public Procurement in Europe* (cited in note 53); also, even the UNEP 2013 research (cited in note 61) states that World major barrier for GPP/SPP is the perception of higher prices of sustainable products.

regulations and administrative provisions necessary to comply with this Directive at the latest by 27 November 2018"[67].

To the above–mentioned issues it should be added the need for a specific training course on GPP for the procurement contracting authorities and the bureaucratic cost of the participation for the bidders, as well as the need for an incentive for eco–technology R&D, claimed by SMEs, to ensure better products.

3.6. *GPP in Nordic Countries: A Good Praxis Example*

Other than OECD works, there is a complementary research on GPP conduct by PricewaterhouseCoopers among Nordic EU countries over 1105 tenders for the EU[68]. The study states the reasons why administrations choose going green, the availability of green alternatives, leading with 43 percent, and the environmental impact of the purchase accounting for 40 percent.

A useful cutting costs solution is seen in the implementation of the "Joint Procurement", a practice widespread in Nordic countries and the UK, consisting in the combined action of two or more authorities, generally for the publishing of one tender on behalf of all of the

67. European Commission, *Rollout of e–procurement in the EU*, available at http://ec.europa.eu/DocsRoom/documents/16332/attachments/1/translations (last visited April 26, 2020), and European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Single Market Act II Together for new growth* (2012) COM/2012/0573; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Strategy for e–procurement* (2012) COM/2012/0179; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – End–to–end e–procurement to modernize public administration*, (2013) COM/2013/0453; Multi–Stakeholder Expert Group on e–procurement, Regulatory Aspects and Interpretation, *Reports*, available at http://ec.europa.eu/DocsRoom/documents/20842 (last visited April 26, 2020).

68. PricewaterhouseCoopers, Significant and Ecofys, *Collection of statistical information on Green Public Procurement in the EU Report on data collection results* (European commission 2009) based on Austria, Denmark, Finland, Germany, The Netherlands, Sweden, United Kingdom.

participating authorities[69]. GPP is an administrative solution available within the administration's *command and control* power. Thus, it can convert the market share where it has that discretion into a greener and sustainable one, albeit it cannot influence directly the other competitors and enact an environmental–safe production or pollution control: this kind of actions require the intervention of the legislative branch[70]. However, what the public contractor can do is acting as a pro–active market agent and, as such, it can, therefore, influence all the bidders who wish to conclude, in a better green praxis, contracts with the public administration[71].

In this order of things, the provisions of an LCC–BPA over the lowest price award allow GPP to establish a real green market practice, where at least LCC (if not a full MEAT–BPQR) is used, while the calculation method and the data to be provided by suppliers are set out in the tender documents. Specific rules regarding methods for assigning costs to environmental externalities also apply and aim to ensure that these methods are fair and transparent. Data[72] show that before the commencement of directives 2014/24/EU and 2014/25/EU environmental life cycle cost and aspects were taken into consideration in just one–third of total tenders[73], whilst price was a constant component in the totality of contracts, along with the quality of products, accounting for the quasi–totality; and delivery aspects, which came in relevance in more than a half of tenders.

In other surveys, if taking into consideration also Austria, Germany, Netherlands and UK, LCC based evaluations were minimal before the entry into force of the new directives, LCC–BPA and BPA were

69. See ICLEI, *Green Public Procurement (GPP) Training Toolkit* (cited in note 50) as an example the Eco-Procurement Service of the federal state of Vorarlberg in Austria could save about 60 percent of costs.

70. Indeed, Ecolabel is a way to allow GPP influencing that, but not directly. O'Rourke, Leire, Bowden, Yaker, Enmanuel, *Sustainable Public Procurement* (cited in note 61) sees the National Legislation as a major driver for 91 percent of UNEP countries' GPP policy development (cited in note 61).

71. See Perman, et al, *Natural Resource and Environmental Economics* at 206 (cited in note 60);

72. Experimental material on 180 tender calls in Denmark, Finland and Sweden, in 2005.

73. Corrected to 36.6 percent if considering only tenders in which at least one environmental aspect was used.

close to 40–50 percent[74]. Nonetheless, Nordic countries appeared ever since to be a step further in GPP/SPP policies[75]: the previous directives 2004/17/EC and 2004/18/EC (along with several other elements) caused an increment of around 15 percent for tenders taking into consideration the environmental criteria and awarded using at least one of the environment criteria[76]. Furthermore, a 2012 report on GPP for the EU27 claims that above 55 percent of public authorities' tenders take into consideration at least one of the environmental criteria, whilst one out of four takes into account all of the environmental criteria[77]. This leads to believe that the new directives are going to have an even bigger impact on the implementation of GPP criteria in tenders.

3.7. *Regional GPP v. National GPP*

It has to be noted that the major uptake of GPP/SPP is within Regional and local government, with almost two–thirds of the tenders considering at least one of the GPP criteria. This trend is even more acute in another survey on the Nordic States plus Austria and the UK (except for Germany and the Netherlands), with an average for the aforementioned of more than two–thirds (72 percent local authorities outperforming a 67 percent of central ones)[78]. Data show that the 50 percent GPP target set by COM 2008 was not reached before the introduction of the new 2014 EU directives, with Portugal, Ireland, Poland, the Czech Republic, Finland, Slovenia, Hungary, Romania, Bulgaria, Greece, Latvia and Estonia having a GPP uptake of less than

74. PricewaterhouseCoopers, Significant and Ecofys, *Collection of statistical information* (cited in note 68).

75. See Bouwer, de Jong, Jonk, Szuppinger, Lusser, Berman, Bersani, Nissinen, Parikka, *Green Public Procurement in Europe* (cited in note 53); Henna Hauta–Heikkilä, Päivi Kippo–Edlund, Heikki Miettinen and Ari Nissinen, *Measuring the environmental soundness of public procurement in Nordic countries* (Nordic Council of Ministers 2005); Katriina Parikka–Alhola, Ari Nissinen and Hannu Rita, *Environmental criteria in the public purchases above the EU threshold values by three Nordic countries: 2003 and 2005*, 68 Ecological Economics 6.

76. See *id.*

77. See Renda, et al, *The Uptake of Green Public Procurement* (cited in note 64).

78. See PricewaterhouseCoopers, Significant and Ecofys, *Collection of statistical information* (cited in note 68).

20 percent. The need of another major innovation in GPP was represented in the *Europe 2020 Flagship Initiative Innovation Union*[79]: the target of this initiative is innovation into procurement especially triggered in the area of green public procurement, as well as the creation of a single public procurement market within the EU.

Current surveys and researches state that three-quarters of SMEs do not bid for government work[80]. SMEs participate directly or as joint bidders or subcontractors in 45 percent of the aggregate contract value above EU thresholds, nonetheless, they are underrepresented as their effective weight in public procurement – which should be 58 percent when considering the one they have within the general economy – is below that threshold. This means that SMEs' participation in implementing the new directives is not spread enough[81].

A particular directive, 2009/81/EC, was enacted to grant defense procurement, services and goods to supply its demand: unlike civil procurement, the former has regulated subcontracting ever since it was enacted. Article 20 states: "Contracting authorities/entities may lay down special conditions [] concern subcontracting [] following Articles 21, 22 and 23, or take environmental or social considerations into account"[82].

There is a margin for GPP in defense procurement as well: the directive has been enacted close to the Europe Eco–design Framework directive 2009/125/EC concerning energy, which is usually a

79. European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Europe 2020 Flagship Initiative Innovation Union* §3.2 at 15 *Creating a single innovation market,* (2010) COM/2010/583 and European Commission, *Communication from the Commission – Europe 2020: A strategy for smart, sustainable and inclusive growth*, (2010) COM/2010/2020.

80. See Research and Library Services, *Research Paper 119/08 Public Procurement and SMEs* (Northern Ireland Assembly 2008) updated by Research and Library Services, *Briefing Note 84/09 Public procurement and SMEs – an update* (Northern Ireland Assembly 2008).

81. See Scorecard Working Party, *Evaluating SME experiences of government procurement*, (FreshMinds 2008) available at http://www.fsb.org.uk/LegacySitePath/policy/images/12615%20fsb%20procurement.pdf (last visited April 26, 2020). SMEs' access to public procurement markets and aggregation of demand in the EU.

82. Article 20 of directive 2009/81/EC (cited in note 23).

major need for the EU defense procurement[83]. In this regard, article 6 subsection 1 of directive 2012/27/EU *on Energy Efficiency* states that "Member States shall ensure that central governments purchase only products, services and buildings with high energy–efficiency performance, insofar as that is consistent with cost–effectiveness, economic feasibility, wider sustainability, technical suitability, as well as sufficient competition, as referred to in Annex III"[84].

Nonetheless, it is important to remember that, even if in the last years, it gained major importance concerning its role on reducing footprint and environmental impact, defense procurement is granted a major freedom of choice in awarding contracts especially as described under article 6 subsection 2 of the same directive: "The obligation referred to in paragraph 1 shall apply to the contracts of the armed forces only to the extent that its application does not cause any conflict with the nature and primary aim of the activities of the armed forces".

From another standpoint, the regulation of subcontracting aims at creating opportunities for SMEs. article 21 and articles 50-54 of directive 2009/81/EC provide a quite detailed regulation on subcontracting compared with the new directives which regulate subcontracting more than before[85]. Moreover, the new directives regulate the conflict of application between the defense directive and the civil procurement one, at article 5 *Mixed procurement covering the same activity*, and article 6, other than articles 25–27[86]. Summarizing, the defense procurement is a "sensitive" matter, subject to special regulations: article 346 TFEU or directive 2009/81/EC, which are explicitly deemed to prevail (for their extent into the contract's subject–matter) over the general civil procurement one's[87].

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83. See Dinesh H. C. Rempling, *Climate, Environmental and Energy Security – From Strategy to Action, Report from Workshop Series,* 6, 7 and 13 June 2013 (European Defence Agency 2013), available at https://www.eda.europa.eu/docs/default–source/documents/military–green–2013–report.pdf (last visited April 26, 2020).

84. Directive 2012/27/EU *on energy efficiency, amending directives 2009/125/EC and 2010/30/EU and repealing directives 2004/8/EC and 2006/32/EC*, L315 OJ (2012).

85. Article 88 of directive 2014/25/EU (cited in note 23); article 71 of directive 2014/24/EU (cited in note 23); article 42 of directive 2014/23/EU (cited in note 21).

86. Directive 2014/25/EU (cited in note 23).

87. European Commission, *Commission Staff Working Document Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security – Accompanying the document: Report from the Commission to the European Parliament*

Directive 2014/25/EU sub recital 13 states that "the applicable rules should be determined concerning the main subject of the contract where the different parts which constitute the contract are objectively not separable". Whilst sub recital 15[88]: "contracting entities should not be prevented from choosing to apply this Directive to certain mixed contracts instead of applying Directive 2009/81/EC". This is of particular importance because, in case of mixed contracts under new GPP Directives, the new MEAT criteria could eventually be applied, whilst, if the contract falls under the defense Directive[89], lowest price (b) or old MEAT (BPQR) (a) shall be the award criterion.

3.8. *The Holistic Approach of Article 11 TFEU: Integrated Economic Governance*

According to the economic theory point of view, *Integrated Economical Governance* consists of the efficiency/effectiveness of how to achieve greater environmental effectiveness through cost–effective policy integration. The debate is currently open on how it is possible to embed ecological concerns right into traditionally non–environmental sector operational context, and re-organizing governance processes and structures[90].

Institutional structures focus their attention on the issues of sustainability and show it up through instruments within the decision–making process that promote continuous attention to ecological concerns. To double–check the uptake and the effectiveness of these ecological principles within this new kind of economical governance an ongoing monitoring ecological performance is needed[91].

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and the Council on the implementation of directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that directive (2016) SWD/2016/0407, referring to article 15 of directive 2014/24/EU (cited in note 23), and article 24 of directive 2014/25/EU (cited in note 23); see also European Commission Press Release, *New Directive on defense and security procurement enter into force* (2009).

88. Recital 13 of directive 2014/24/EU (cited in note 23).

89. Article 47 of directive 2009/81/EC (cited in note 23).

90. See Lennart Lundqvist, *Sweden and ecological governance: Straddling the fence* at 120–124 (Manchester University Press 2013).

91. See William Maher Lafferty and Eivind Hovden, *Environmental policy integration: towards an analytical framework*, 12 Environmental Politics 1, 15 (2003).

Swedish experience has shown a sectoral responsibility, such as splitting tasks into secondary and minor objectives, to ensure that the authorities will perform the tasks demanded by the ecological concerns thus embedded. However, this sectoral responsibility appears very premature for an application to EU GPP contracting authorities concerning environmental criteria or Ecolabels principles. At the same time, it is not to be excluded that, with the reaching of the 50 percent tender's green policy[92] auspicated by the *EU 2020 Initiative Innovation and Single Market Action Initiatives*, it could be implemented as well.

4. *Conclusion*

According to the researches and data examined, the EU is a world top performer in GPP/SPP policies, with a 53 percent average GPP criteria awarding against a rough less 36 percent average in UNEP Countries. The monitoring and data transparency in the EU are widespread and acknowledged.

What is to be expected is a major effort in implementing the 50 percent GPP goal, though; the challenge is whether the new directives of 2014 and the ones on ICT (e-procurement) can help to achieve that goal in the next years. It is also of notable importance to check the actual relevance of the kind of instruments implemented: perhaps further surveys and researches on the effectiveness of the proposed instruments are needed.

To reach the policy target, forces involved in GPP/SPP must work together proficiently, and it is important to have a constructive dialogue between EU, governments, administrations, and suppliers: in particular, data show that streamlining SME bureaucratic procedures could potentially implement their positive participation into tender procedures, thus concretely implementing article 31 of the 2014/24/EU. Likewise, on the opposite side, unified e-procurement market

92. See Robert Kaukewitsch, *Webinar GPP in the Health Care Sector* (European Commission, Environment Directorate-General 2014) available at http://ec.europa.eu/environment/gpp/webinars_en.htm (last visited April 26, 2020).

and joint procurement for reducing costs and subcontracting appear as an administration-friendly reasonable solution.

Due to the multi–faceted peculiarity of GPP issues, solutions are not expected to come only by a single legislative, economical or contracting authority initiative, but they will have to take in consideration more comprehensive solutions, such as better training of procurement officers, innovation partnership between contracting authority and bidders, and several soft law instruments to ensure the abiding of the standards and good practices in all of the institutions and SMEs participating. Not neglecting the regional and local dimension over the national GPP one, where SMEs hardly can participate, and boosting the R&D for SMEs and their participation through subcontracting may be an efficient solution for SMEs inclusion.

In conclusion, environmental principles are currently becoming a constant in EU policies and GPP, along with the need of inclusion for social aspects. Perhaps, it is too early for speaking about a holistic society, even though the approach made by article 11 TFEU is a big step forward in this sense. At this time, environmental concerns are changing the way of perceiving and pursuing the EU market economy towards a more sustainable one: green policy is permeating Institutions and governance functioning processes.

The Judicial Dialogue in the CJEU and the Fake Contradiction of the *Taricco* Saga

Francesco Carelli*

Abstract: Although initially the CJEU left no space for the inclusion of national issues in order to establish the founding qualities of EU legal order, such as supremacy and direct effect, more recently the Court has developed a trend towards taking into account the protection of national fundamental rights and constitutional provisions by using EU primary legislation. The new approach adopted by the Luxembourg Court is fostering the judicial dialogue with the national constitutional courts. The aim of the paper is to demonstrate that the "*Taricco* Saga" represents the last step of this pathway by fitting the qualities of EU legal order in the peculiarity of national legal systems not as national exception but as an issue of European law through concepts like "common constitutional principles". Commenting the features of *Taricco II*, in particular, it will be demonstrated that this ruling does not contradict *Taricco I* but, rather, it represents a specification of the interpretation of article 325 TFEU that encompasses also the acknowledgment of an issue linked to the principle of legality, as intended by the constitutional traditions of EU.

Keywords: EU law; constitutional law; judicial dialogue; supremacy; effectiveness.

1. *Introduction*

Since the birth of the European Community, the Court of Justice of the European Union (CJEU) has had a central role in establishing the founding features of EU legal order: direct effect, supremacy and effectiveness. Initially, the Court's approach left little space for the inclusion of national issues stating that the "recourse to the legal rules or concepts of national law to judge the validity of measures adopted by EU institutions would have an adverse effect on the uniformity and efficacy of Community law". However, more recently, it is developing a trend toward giving consideration to the protection of national fundamental rights and constitutional provisions by using EU primary legislation which fosters the judicial dialogue between the European Court and the national constitutional courts. The aim of this paper is to demonstrate that the "*Taricco* Saga" represents the last step of this pathway by fitting the qualities of EU legal order in the peculiarity of national legal systems, not as a national exception but as an issue of European law, through concepts like "common constitutional principles".

The paper firstly investigates the nature of supremacy and effectiveness of EU law as developed by the CJEU. Subsequently, the essay analyzes how national courts, namely the German *Bundesverfassungsgericht* (*BVerfG*) and the Italian *Corte costituzionale*, reacted to these principles and the limits introduced by them. Afterward, the focus lies on the rulings, rendered by the CJEU and the *Corte costituzionale*, which constitute the "*Taricco* Saga". Finally, commenting the features of *Taricco II* in particular, the paper postulates that this ruling does not contradict *Taricco I,* but rather it represents a specification of the interpretation of article 325 of the Treaty on the Functioning of the European Union (TFEU), in a way that also encompasses the

acknowledgment of an issue linked to the principle of legality, as intended by the constitutional traditions of EU. In conclusion, the essay assesses the willingness of the Court to strengthen the judicial dialogue between itself and the national constitutional courts in general by using the preliminary reference as an instrument.

2. *Supremacy and Effectiveness of EU Law*

The EEC Treaty included no provision dealing with the supremacy of Community law over national law. Notwithstanding the absence of any explicit provision, the CJEU enunciated its vision of supremacy in the early years of the Community. In *Van Gend en Loos*[1], it stated that the Community represented a new legal order of international law, on behalf of which the States had limited their sovereign rights. In *Costa v. Enel*[2], the Court deployed several arguments to support the conclusion that EU law should be accorded primacy over national law. Firstly, the Court argued that primacy of EU law is a result of the agreement made by the Member States to create "a new legal order which became an integral part of their legal systems and which their courts are bound to apply"[3] and to confer to the EU "real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, albeit within limited fields"[4]. Then, the Court stated that the aims of the Treaty were integration and cooperation, and their achievement would be undermined by a Member State refusing to implement a law that should uniformly bind all. Finally, discrepancy in the application of EU law among Member States would occur, if States could unilaterally override Treaty provisions.

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* Francesco Carelli is a law student at Bocconi University in Milan and the Supervising Editor of *Bocconi Legal Papers*. He is currently interning at law firm BonelliErede in Milan.

1. C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECR 1963 3.

2. C-6/64, *Flaminio Costa v. E.N.E.L*, ECR 1964 585.

3. *Id.* at 593.

4. *Id.*

In *Internationale Handelsgesellschaft*[5], the Court ruled that the legal status of a conflicting national measure was irrelevant as for the question of whether EU law should prevail neither a fundamental national constitutional provision could be invoked to challenge the supremacy of a directly applicable norm. As an independent source of law, EU law cannot be overridden by national law without being deprived of its character. In fact, "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the Constitution of that State or the principles of a national constitutional structure" although "The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"[6]. Thus, the CJEU has gradually transformed primacy from a general principle of constitutional law to a specific obligation on national courts to provide full and effective remedies for the protection of EU rights.

Conversely, the principle of effectiveness, although of judicial origin, may find its legal basis in article 4(3) of the Treaty on European Union (TEU), namely the duty of loyalty or solidarity. Accordingly, Member States shall not only take any appropriate measure to implement the obligations arising from the Treaties or from the acts of the EU institutions, but they shall also facilitate the achievement of the Union's tasks and objectives without jeopardizing it. Hence, effectiveness requires the effective enforcement of EU law in national courts and, notably, the effective protection of the Community rights. Moreover, effectiveness "is a more articulated proxy than primacy and direct effect, and, as such, corresponds to a more advanced stage of the federalization process"[7]. It is through it, in fact, that, the supremacy of EU law penetrated throughout the national legal system and was to be applied by all national courts in cases that fell within their jurisdiction,

5. C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR 1970 1125.

6. *Id.* para. 4.

7. Takis Tridimas, *The ECJ and the National Courts: Dialogue, Cooperation and Instability*, in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* 415 (Oxford University Press 2015).

refusing to apply provisions of national law that conflicted with EU law.

The supremacy of EU law has not only been construed as an obligation on national courts, but on Member States as well. In *Francovich,*[8] the Court declared that rights provided by the Treaty could be implemented also through States' obligation to compel with community rules in order to provide the full effectiveness of these rights. It recognized the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible.

> The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law[9].

In the same case, the Court also stated the conditions detecting State liability:

> The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties[10].

In *Simmenthal*[11], the CJEU further extended its supremacy doctrine, stating that it applied regardless of the fact that national law predated or post-dated EU law: an EU measure invalidates any conflicting

8. C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, ECR 1991 I-5357.

9. *Id.* para. 34.

10. *Id.* para. 40.

11. C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA,* ECR 1978 629.

provision of national law and prevents the adoption of new national law that would conflict with it.

> Accordingly, any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law, by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect, are incompatible with those requirements which are the very essence of Community law[12].

In civil law countries this was an issue of special concern, as only the Constitutional Court may declare a national provision unconstitutional and, therefore, deliberate its disapplication. However, the *Simmenthal* principle does not require that national courts invalidate or annul the provision of national law which conflicts with EU law; it rather prescribes not to apply it, in order to give immediate effect to Union Law, without awaiting the prior ruling of the Constitutional Court.

The CJEU case law has developed the value of the principle of full effectiveness, providing it with a wider range of applications. Thus, in *Factortame*[13], CJEU affirmed that a "national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule"[14]. Furthermore, in *West Tankers*[15], an anti-suit injunction made by a national court for commencing proceedings before the court of another Member State has been deemed contrary to EU law as conflicting with an arbitration agreement: this would, consequently, affect the full effectiveness of the community regulation on jurisdiction, the aim of which is to unify rules across the Union.

12. *Id.* para. 22.

13. C-213/89, *The Queen v. Secretary of State for Transport, ex parte Factortame,* ECR 1990 I-2433.

14. *Id.* para. 23.

15. C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc,* 2009 I-663.

Arguably, "direct effect is a powerful tool, with its own area of application and its own conditions for use, to invoke EU law, allowing individuals to enforce rights which are only available in the national legal order because of EU law"[16]. However, it represents only one of the instruments provided by the court to invoke EU law at a national level: state liability, primacy and consistent interpretation are relevant as well when individuals' rights provided by community norms are at stake. Therefore, in order to solve the conflicts that direct effect may cause, the boundaries and conditions under which effectiveness occurs must be clear.

Nonetheless, in the late 1990s, with the development of European citizenship and fundamental rights protection provisions, such as the general principle of non-discrimination[17], controversies have increased, outlining a relevant judicial dialogue around the need of harmonization between the different constitutional traditions and the full effectiveness of EU law. In cases like *Omega*[18] and *Mangold,*[19] a clash arose between the national protection of general rights granted to individuals and the full application of EU law. Although the Court repeatedly supported that "fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States", it is substantially challenging to reconcile the *effet-utile* of Community law with constitutional pluralism. Hence, in *Omega*, Germany could guarantee the level of protection of human dignity as enshrined in the German constitution also overriding freedom of services on grounds of proportionality of measures. Instead, in *Mangold*, the principle of non-discrimination was given effectiveness, through the assertion of the prohibition for Germany to adopt labour law measures that

16. Koen Lenaerts and Tim Corthaut, *Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law*, 31 European Law Review 287, 306 (2006).

17. See Nicolas Leron, *The Constitutional Governance of Judges in the EU, the Invention of a Communicative Mode of Regulation of Constitutional Conflict Risks*, speech at the European Consortium for Political Research 2014 General Conference (Glasgow, September 5, 2014), available at https://ecpr.eu/Events/PaperDetails.aspx?PaperID=17541&EventID=14 (last visited April 26, 2020).

18. C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004 I-9609.

19. C-144/04, *Werner Mangold v. Rüdiger Helm*, ECR 2005 I-9981.

created discrimination only based on age. In *Mangold*, the judicial dialogue is partially developed by two acknowledgements: first the Court imposed primacy of EU law and obliged judges to set aside the national rule; further, it asserted the possibility for national courts to limit Community law, still abiding by principles of proportionality and necessity.

Melki[20] is a remarkable case about the impact of the principle of effectiveness, since it emphasized the interaction between EU obligations and national constitutional norms. "French law did not intend to question the primacy of EU law but give priority to constitutional review over review of compatibility with international treaties, thus reiterating that the constitution was at the apex of the national legal system"[21]. The CJEU ruled that EU law precluded this national legislation insofar as the priority nature of the procedure prevented all other national courts from referring to the CJEU under article 267 TFEU, both before submission of a question of constitutionality to the national Constitutional Court and after its decision. However, the Court outlined certain conditions under which such procedure could comply with EU law:

> article 267 TFEU does not preclude such national legislation, insofar as the other national courts or tribunals remain free: to refer to the CJEU for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary; to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order; and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law[22].

Moreover, "*Melki* also opened the way for a direct dialogue between the ECJ and the *Conseil constitutionnel*. The effect of *Melki* is that the

20. C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*, ECR 2010 I-5667.
21. Takis Tridimas, *The ECJ and the National Courts* at 415 (cited in note 7).
22. *Aziz Melki* para. 57 (cited in note 20).

Court reversed the priorities: instead of EU primacy accommodating the national system of constitutionality review, the latter had to fit in with EU primacy"[23].

As the paper asserts below, the rulings in *Taricco* do not contradict with this set of jurisprudence. In both cases the effectiveness of EU law is indeed confirmed even though the limits outlined by the principle of legality, as enshrined in the "common constitutional principles", must also be taken into account by national judges when applying the "Taricco rule".

3. *The Reaction of National Courts*

Member States' courts have embraced the primacy of EU law, but on the basis that primacy results from the provisions of national law recognizing incorporation of EU law into domestic legal systems, and not from EU law itself. Conflicts continuously surround the acceptance of the principle of supremacy, due to the different views given by national courts and the CJEU about the origins of supremacy. Some scholars discuss the interaction between constitutional courts and the CJEU by assessing the "inequality theory": "certain national courts are in a privileged position vis-à-vis other national courts. Their potential to participate and affect the European-level political process is greater than that of other national courts"[24]. This power derives, among others, from several elements like the relevance of the country and the activism of the national constitutional court. Only constitutional courts of the most important countries, such as the German *BVerfG* or the French *Conseil constitutionnel*, can establish a judicial dialogue in a condition of equality with the Luxembourg Court, due to the utmost importance of the Member States they represent. Notably, Germany and Italy are countries with extensive case-law in this area highlighting this conflict, precisely on ground of protection of constitutional fundamental rights.

23. Takis Tridimas, *The ECJ and the National Courts* at 416 (cited in note 7).

24. Tomi Tuominen, *Aspects of Constitutional Pluralism in Light of the Gauweiler Saga*, 43 European Law Review 186 (2018).

3.1. *Germany*

The supremacy of EU law is based primarily on article 23 of German Constitution, which is specifically concerned with the EU and allows for delegation of sovereign powers. Reliance on constitutional provisions has been the dominant rationale for the acceptance of EU supremacy within Germany. Nonetheless, the German courts provided limits for the acceptance of EU supremacy: in *Solange I*[25], the German Constitutional Court held that article 24 could not cover a transfer of power to amend an "inalienable essential feature" of the German legal order, such as the protection of fundamental rights. Hence, national protection would prevail over EU law in the event of a conflict. Afterward, in *Solange II*[26], the German Constitutional Court reduced the likelihood of a clash between EU and national law. Although the court did not surrender jurisdiction over its fundamental rights, it held that "so long as" the EU law and CJEU case law ensure effective protection of fundamental rights which is deemed substantially equal to the one required unconditionally by the German Constitution, the *BVerfG* will no longer exercise its jurisdiction. However, in the more recent *Lisbon Treaty*[27] and *Gauweiler*[28] cases, the *BVerfG* has recentralized its role, by allowing citizens and constitutional organs to refer issues of constitutionality towards two types of acts emanated by EU institutions: *ultra vires* acts, which are acts beyond conferred competences, and acts that may violate the constitutional identity of the nation. According to the Court, this competence is not in contradiction with the EU principle of cooperation.

3.2. *Italy*

The Italian courts have accepted the supremacy of EU law, albeit subject to qualification, at a relatively early stage. The conceptual basis for compliance with the principle of supremacy is article 11 of the

25. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 2 CLMR 540 (Bundesverfassungsgericht 1974).

26. Bundesverfassungsgericht, *Re Wünsche Handelsgesellschaft*, 3 CLMR 225 (1987).

27. Bundesverfassungsgericht, 2 BvE 2/08, June 30, 2009.

28. Bundesverfassungsgericht, 2 BvR 2728/13, June 21, 2016.

Italian Constitution, which allows limitations of national sovereignty, subject to reciprocity, to ensure peace and justice among nations. Acceptance of EU law has not been unconditional: in *Frontini*[29], the Italian Constitutional Court, while accepting the direct effect of EU law, confirmed that it would continue to review the exercise of power of EU institutions to ensure that there was no infringement of fundamental rights or basic principles of the Italian constitutional order. This has subsequently been defined as the "controlimiti" doctrine. However, in *Granital*[30] the Constitutional Court accepted the principle of effectiveness of EU law asserting that, in order to enforce the supremacy of EU law, Italian courts must be prepared, where necessary, to disregard conflicting national law and to apply EU law directly. The national law would not be abrogated, but rather ignored, insofar as the field in which it operated had been preempted by EU law. The national provisions would survive and still regulate the relevant subject matter in areas which transcend the scope of the EU provision.

4. *The* Taricco *Saga*

The *Taricco* saga is representative of the most recent stage of this evolution, as it encompasses two fundamental issues of European law: primarily, the relation between supremacy of EU law and the national courts' reaction to the duty of enforce Union provisions; secondly, it represents a path of development of judicial dialogue among the courts in order to dismiss the conflict and avoid the trigger of the "counter-limits" doctrine by the Italian Constitutional Court.

4.1. *The Ruling in* Taricco I

During a criminal proceeding for VAT fraud, an Italian tribunal submitted a preliminary reference to the CJEU questioning the compatibility with EU law of the Italian provisions regulating the limitation periods applicable to tax and financial offenses. In the case in question, the prosecution would have likely become time-barred

29. Corte costituzionale, December 18, 1973, no. 183.
30. Corte costituzionale, June 5, 1984, no. 170.

before a final judgement could be delivered and, according to the referring Court, this was because of a structural problem of the Italian criminal justice system rather than the specific circumstances of the case. The referring Court asked the CJEU to determine whether limitation rules infringed Treaty provisions on competition, state aid and sound public finance principle, as well as directive 2006/112 on VAT.

The CJEU reformulated and decided to focus on the possible incompatibility of the Italian limitation provisions with article 325 TFEU which provides for the duty for the Union and the Member States to combat any "fraud or illegal activities affecting the financial interests of the Union through measures which shall act as a deterrent and be such as to afford effective protection in the Member States"[31]. As criminal penalties may "be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner"[32], the Member States has the duty to put in place criminal penalties that are effective and dissuasive in order to punish these offences.

Leaving the evaluation to the Italian courts the CJEU held that if "in a considerable number of cases the commission of serious fraud will escape criminal punishment"[33], then national law is incompatible with article 325 TFEU because it can not be considered "effective and dissuasive". If national courts had accepted this, they would have been called to disapply the domestic provision and to give full effect to EU law. To support this, the Court recalled its established case-law on EU law effectiveness and primacy. However, the Court made a reservation in paragraph 53 of the Judgement asserting that, even though national courts conclude for the disapplication of national law, they are still called to ensure the respect for the fundamental rights of the individuals affected by criminal proceedings. However, in this Judgement the Court did not seem to be concerned with possible fundamental rights infringements because the disapplication of national law on limitation periods, in its view, did not affect the principle of legality and proportionality as enshrined in article 49 Charter of fundamental rights of the European Union (the Nice Charter). On the contrary, paragraph 53 was crucial in the analysis of the *Taricco II* Judgment.

31. Art. 325(1) TFEU.
32. C-105/14, *Criminal proceedings against Ivo Taricco and Others* para. 39 (2015).
33. *Id.* para. 47.

4.2. *The Reaction of the Italian Courts and the Preliminary Reference of the Constitutional Court*

The decision of the CJEU caused turmoil in the Italian legal system because Italian criminal law considers limitation periods as part of substantive criminal law. Accordingly, the Constitutional Court applies also to the limitation period rules the principle of non-retroactivity, explicitly denying the possibility of applying retroactively amendments *in peius*. The application of the so-called "*Taricco* rule" would have led therefore to a conflict between EU law and the Italian Constitution, particularly with regard to article 25.

Two Italian courts, among which the Court of Cassation, referred a question of constitutionality doubting whether the "*Taricco* rule" would comply with the "supreme principles of the Italian constitutional order", including fundamental rights. The Constitutional Court recognized the severe consequences that would have derived from the application of the "*Taricco* rule" in the Italian legal order. Thus, it decided to avoid an immediate conflict with the CJEU and preferred to send another preliminary reference to the latter asking for further clarifications on the interpretation of article 325 TFEU.

The Italian Constitutional Court[34] reaffirmed its long-standing case law concerning the primacy of EU law moderated by the existence of the "controlimiti" theory, namely the respect for the supreme principles of the national constitutional order and of fundamental rights as a condition for the applicability of EU law in Italy. Indeed, in the view of the Italian Constitutional Court, the principle of legality is one of these supreme principles. Hence, a contrasting EU provision could not be incorporated in the Italian legal order.

As the Italian legal system considers the limitation rules as part of substantive criminal law, *Taricco I* was in apparent contrast with the Italian Constitution. The Constitutional Court brought two sets of arguments before the CJEU to solve the conflict between the legal orders and avoid enforcing the "controlimiti". The first set was based on the notion of the respect for national constitutional identities constructed on the basis of article 4(2) TEU. The Italian Constitutional Court was *de facto* asking for the formal recognition of the

34. Corte costituzionale, November 23, 2016, no. 24.

counter-limits doctrine. In its view, EU law, including the *Taricco* rule, would only be applicable "if it is compatible with the constitutional identity of the Member State". Although this argument was raised in the preliminary reference, the CJEU in the *Taricco II* ruling did not address this issue. This seems reasonable since it aims to enhance the debate on common European grounds rather than strengthening national identity arguments.

In the second set of arguments, the Italian Constitutional Court asked the CJEU to reconsider its interpretation of article 325 TFEU on the basis of its incompatibility with article 49 of the Nice Charter and the principle of legality. The Court held that the CJEU in its first decision took into account only the aspect of the prohibition of retroactivity without considering that in Italy limitation periods are part of substantive criminal law. Therefore, also the requirement of precision of punishment must be analyzed. he "*Taricco* rule" was reformulated by the CJEU precisely on this ground in order to encompass the Italian particularity.

4.3. *The Decision in* Taricco II

The ruling under the accelerated procedure delivered in the *M.A.S. Case*[35] introduced an important clarification on the interpretation of article 325 given in *Taricco I*. Indeed, according to the CJEU, national courts should not disapply the provisions on limitation periods when

> [the disapplication would]entail a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions on criminal liability stricter than those in force at the time the infringement was committed[36].

The CJEU positively addressed the concerns of the Italian Constitutional Court so that the latter did not have to operate the the controlimiti doctrine.

35. C-42/17, *Criminal proceedings against M.A.S. and M.B.* (2017).
36. *Id.* para. 62.

Firstly, the CJEU held that it is especially for the national legislature to lay down rules ensuring compliance with EU law obligations and so also with article 325 as interpreted in *Taricco I* considering that EU financial interests protection is a concurring competence of EU and Member States under article 4(2) TFEU. Furthermore, it is for the legislature to remedy a national situation incompatible with EU law when national courts are prevented to do so due to their fundamental rights obligations. This holding is not in contradiction with the *Simmenthal* rule because disapplying national legislation would have led to a breach of EU fundamental rights.

Secondly, the Court brought together the peculiarity of the Italian system, namely the inclusion of the limitation period rules in substantive criminal law, and the need to respect the principle of legality of criminal offenses and penalties that is part of the common constitutional traditions of the Member States. Italy was indeed allowed to consider the limitation provisions as substantial criminal rules because the EU law had not yet harmonized the matter. Furthermore, Member States may apply national fundamental rights standards higher than those provided by the Nice Charter without compromising primacy, unity and effectiveness of EU law. These choices are "the expression of legitimate diversity within the Union's legal order"[37].

Moreover, since the Italian requirements of foreseeability, precision and non-retroactivity apply also to the limitation rules for criminal offenses related to VAT, domestic courts must not disapply national limitation provisions. It will be a duty of the legislature to remedy to this situation of incompatibility with the EU. The Court based its reasoning on the finding that the principle of legality is one of the "common constitutional principles" of Union law. The CJEU offered to the Italian Constitutional Court the way to ensure the respect of the principle of legality within the national legal order without imposing the same solution to the rest of the Member States of the European Union.

37. Matteo Bonelli, *The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union*, 25 Maastricht Journal of European and Comparative Law 357, 365 (2018).

4.4. *The Constitutional Court Application of the "*Taricco *Rule"*

In the Judgment 115/2018[38] the Italian Constitutional Court held that the *Taricco* rule is not applicable to facts that occurred before the publication of *Taricco I* ruling. Afterwards, the Court stated that, in any case, whether the crimes are committed before or after the *Taricco I* decision, the degree of precision required under article 25(2) of the Italian Constitution precludes the application of the *Taricco* rule, even as clarified in *M.A.S.* The Court held indeed that individuals must be able to foresee the consequences of their conducts through legislative texts and that it is "intuitive" that the *Taricco* rule cannot be read into article 325 TFEU. However, the way in which the Italian Constitutional Court enforced the CJEU ruling is questionable: it reaffirmed the concept of "constitutional identity" and it reiterated its pivotal role in overseeing the relationship between the Italian legal order and the EU one claiming its central role in the constitutional review of fundamental rights.

5. *A Superficial Contradiction to Strengthen the Judicial Dialogue*

Looking at the two judgments by the CJEU, at first glance, it may seem that there is a strong contradiction and in particular a "retreat" by the Court from imposing supremacy of EU law under the threat of the *Corte costituzionale* of triggering the "controlimiti" doctrine and so of the creation of a serious conflict between the two legal orders. However, the saga should be viewed as a step forward in the CJEU attempt to adapt the concepts of primacy and effectiveness to the peculiarities of national legal systems.

In the *Melki* case the Court avoided the conflict with the French *Conseil constitutionnel* providing for certain conditions under which there is no need for disapplying national rules on constitutional reference. In *Taricco II*, the Luxembourg Court understood the peculiarity of the national legal system under scrutiny and provided for an interpretation of article 325 TFEU capable to accommodate also this feature.At the same time, the Court guaranteed a general rule for the EU

38. Corte costituzionale, April 10, 2018, no. 115.

rather than granting an exception for the specific country. It is noteworthy how the Court, although recognizing the peculiarities of the Italian legal system, never referred to the concept of "constitutional identity" but rather it prefered to discuss of the "common constitutional principles of the Member States".

Indeed, the issue of the Taricco II/MAS Judgment is based on paragraph 53 of the previous judgment, that is, "the respect of the fundamental rights of persons", and on the interpretation of article 49 Nice Charter, namely the principles of legality and proportionality of criminal offenses and penalties. "The court established a link between the Italian decision to consider limitation rules as part of substantive criminal law and the common concern for the principle of legality and for the requirements of foreseeability, precision and non-retroactivity deriving from it"[39]. Ensuring the respect for these principles became an obligation for the national courts, not only a possibility. The key argument of the Court's reasoning was the avoidance not only of a breach of article 25 of the Italian Constitution but, first and foremost, of a breach of the EU principle of legality by disapplying rules on limitation periods.

The *Taricco II* Judgment represents a step forward by the CJEU toward considering with a more positive attitude the constitutional law claims compared to the past. Nevertheless, the refusal of the "national constitutional identity" argument may be read as "an invitation to national constitutional courts to frame their fundamental rights concerns in terms of common principles rather than on a national basis"[40]. Therefore, these constitutional claims should be better framed as claims based on legally binding primary Union law such as the Charter of Fundamental Rights.

An analysis of the nature of the Judgment further corroborates the thesis that the contradiction in the *Taricco* saga is misleading. It does not exist under EU law a right of "appeal" before the CJEU. Therefore, new arguments must be brought to the attention of the latter court in order to obtain a further judgment. Besides, the Court, when answering questions referred for a preliminary ruling, must take account of

39. Bonelli, *The Taricco Saga* at 371 (cited in note 37).
40. *Id.*

the factual and legislative context of the questions as described in the reference order.

In the *Taricco* Judgment, although the *Tribunale di Cuneo* raised a preliminary reference on grounds of a violation of competition law and public finance provisions, the CJEU "found it necessary, to provide it with an interpretation of article 325(1) and (2) TFEU"[41].

Instead, in the *M.A.S. case*, the Italian Constitutional Court raised the preliminary reference. It described the matter of dispute as follows:

> *Corte costituzionale* raises the question of a possible breach of the principle that offenses and penalties must be defined by law which might follow from the obligation stated in the Taricco judgment to disapply the provisions of the Criminal Code at issue, having regard, first, to the substantive nature of the limitation rules in the Italian legal system, which means that those rules must be reasonably foreseeable by individuals at the time when the alleged offenses are committed and cannot be retroactively altered *in peius*, and, second, to the requirement that any national rules on criminal liability must be founded on a legal basis that is precise enough to delimit and guide the national court's assessment[42].

The differences between the two cases about the core issue under scrutiny are particularly relevant in order to comprehend the reasoning of the CJEU. In the first case, the aim of the Court was to enforce the effectiveness of EU law and particularly of article 325 TFEU utilizing the *Simmenthal* principle, that is, disapplying the contrasting relevant national rules. Very few attention was given to the ground of the respect of fundamental rights especially because, following previous CJEU and ECtHR case-law, the disapplication of the limitation period rules would have not constituted a breach of the fundamental principle of legality of criminal offenses and penalties.

In the second judgment, instead, the focus evolved into the design of a "decentralized constitutional model" capable to accommodate a legitimate national peculiarity *such as* the inclusion of the limitation

41. *Criminal proceedings against M.A.S. and M.B.* para. 26 (cited in note 35).
42. *Id.* para. 27.

rules in substantive criminal law, without modifying the EU general rule providing for the efficacy and the dissuasive power of the sanctions for fraud against EU financial interests. Hence, the solution was found in light of the supranational principle of legality. National judges have the duty to verify the respect of the EU principle of legality considering the specific circumstances of each case and to prevent the application of the "*Taricco* rule" if this principle is not found to be abided by.

To conclude, the Italian Constitutional Court has sharply asserted that the "*Taricco* rule" is incompatible with the Italian constitutional legal system because it violates the national principle of legality and also because this rule would give to the judges the task of pursuing criminal policy objectives violating article 101 of the Constitution. Furthermore, the Italian Constitutional Court ruled that it has the exclusive competence to verify the compatibility of the *Taricco* rule with the principle of legality, since a supreme principle of the Italian constitutional order is at stake.

6. *Conclusion*

The *M.A.S* Judgment may be superficially seen in contradiction with the *Taricco I* ruling. The CJEU, instead, reiterated the lack of effectiveness and dissuasive power of the Italian criminal system and still ruled for the applicability of the *Simmenthal* principle to ensure the full effectiveness of EU law, in particular article 325 TFEU. However, the Court demonstrated its willing to consider the issues arising at a national level as a matter of EU law. Therefore, the CJEU placed on the national judges the duty to verify if a principle of legality common to all Member States' constitutional traditions was at stake in the specific case. The CJEU held that if the disapplication of the national rule had undermined the protection of this common principle, the national judges would have been obliged to not put aside the national provision in question. The approach taken in the *Taricco II* Judgment can be seen as positive for the development of the "decentralized constitutional model" of the EU. The Court demonstrated an interest in having a judicial dialogue with national constitutional courts on grounds of common constitutional issues; however, the Court

considered the peculiarity of the national legal systems as an integral part of the European judicial debate itself. Indeed, the Court did not provide an exemption for the Italian legal order due to its peculiar feature, but rather found a solution in having a general European norm suitable for the different legal systems of the Union. The choice of the Court of strengthening the cooperation between the two legal systems is fundamental for the development of the EU law as cooperation is the most promising tool to reach its uniform and effective application thanks to the implementation of EU provisions by national judges.

How an Abortion Ban Would Impact Wrongful Birth Claims in the United States

Matthew Russ*

Abstract: Recently, several USA states have enacted abortion laws that restrict women's reproductive freedom. These laws are generally being challenged and the United States Supreme Court is expected to hear cases about them in order to affirm whether they are constitutional or not. If the Supreme Court decided that these laws are constitutional and allowed states to establish strict regulations on abortion, then it would create issues concerning wrongful birth claims across the United States. In this context, also assuming hypothetical enaction of state-by-state or nationwide abortion bans, which would be the possible effects and the proposals to alleviate potential issues that these restrictions would arise?

Keywords: Abortion ban; wrongful birth claim; abortion right; conscience exemptions; medical liability.

1. *Introduction*

Abortion is and always will be a topic that is a subject of extreme controversy. However, this article is not to argue why abortion should or should not be constitutionally protected. Nor is it to talk about the morals concerning bringing a wrongful birth claim. The aim is to present USA actual legal framework about wrongful birth claims and to discuss the hypothetical scenario of what would happen if there were abortion bans either in individual states or nationwide. In order to determine the possible outcomes, this article goes through the history of wrongful birth claims and the impact that *Roe v. Wade* had on this cause of action. Additionally, it will quickly consider abortion and wrongful birth laws around the world and look at how the two coexist with one another. Further, it will broadly underline arguments in support of wrongful birth as a cause of action and arguments opposing to it. Then, the analysis will look at various issues concerning wrongful birth claims in order to figure out the impact that a state-by-state or a nationwide abortion ban would have on wrongful birth claims. Following this assumption, some innovative solutions are proposed to continue granting a minimum of legal protection through wrongful birth claims.

2. *Background*

2.1. *Wrongful Birth Claims*

Wrongful birth claims are medical negligence claims where parents allege that a doctor deprived them of the opportunity to make an

informed decision on whether to terminate the pregnancy[1]. This deprivation occurs when the doctor fails to inform the parents of a prenatal genetic test that might reveal the likelihood of their child having a genetic defect; to provide adequate genetic counseling; to interpret correctly the prenatal genetic test. The common consequence of these omissions or negligence is that the doctor does not properly inform the parents[2] on the real health status of the fetus, preventing them from taking an informed and free decision.

The most prominent method of prenatal genetic testing is amniocentesis and it is performed by extracting fluid from the amniotic sac within the first 14–20 weeks of pregnancy[3]. Then, the fetus's cells are tested to detect genetic defects, chromosomes abnormalities, or neural tube defects[4]. If properly performed and read, this test should inform the doctor of a child's likelihood of being born with genetic diseases. The failure, either to discover a defect or to inform the parents of the likelihood that their child could have a genetic disease, may result in the mother giving birth to a child born with pathologies that could severely affects the livelihood of the parents and the child. Following the birth, the parents could sue the doctor claiming that they did not have the possibility to take an informed and conscious decision due to the negligence of the doctor.

In wrongful birth cases, typically, the court awards the mother with medical expenses and emotional distress damages, however, most courts reject to expand damages to include the costs of raising a child[5]. Historically, this claim goes back even before the Supreme Court's decision in *Roe v. Wade.* In fact, the first wrongful birth claim was in Minnesota in 1934. However, the state of Minnesota rejected parents'

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* Matthew Russ is a Juris Doctor student at University of Mississippi School of Law and he had already cooperated with litigation firms as Maynard Cooper & Gale in Huntsville and Starnes Davis Florie LLP in Birmingham. He holds his Bachelor of Arts in Political Sciences from Mississippi State University.

1. See 62A Am. Jur. 2d, Prenatal Injuries § 73.

2. See *id.*

3. For a general description of the test, see American Pregnancy Association, *Amniocentesis*, available at https://americanpregnancy.org/prenatal-testing/amniocentesis (last visited April 26, 2020).

4. See *id.*

5. See Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 Harvard Civil Rights – Civil Liberties Law Review 141 (2005).

action in order to obtain damages after the birth of their child, reasoning that "the birth of a new child was a blessed event"[6].

The first appellate court to rule on wrongful birth was the New Jersey Supreme Court in *Gleitman v. Cosgrove*[7] in 1967. The New Jersey Supreme Court held that in order to prevail in wrongful birth claims, the plaintiff must establish that the healthcare provider *caused* the birth of a child with a preexisting condition[8].

In 1974, Wisconsin was the first state to handle the first wrongful birth case post *Roe v. Wade*[9], but he Wisconsin Supreme Court refused to recognize wrongful birth claims stating that this decision should be made by the residents of the state or their elected representatives[10].

However, since *Roe v. Wade*, courts began to face more wrongful birth claims and a majority of states began to recognize wrongful birth causes. Texas became the first state to recognize a woman's right to collect damages for wrongful birth actions[11]. For example, in *Jacobs v. Theimer*, Dortha Jacobs contracted rubella during her pregnancy and gave birth to a child whose major organs were defective[12]. Jacobs brought a wrongful birth claim against her doctor[13], who reassured her

6. Paola Frati, et al,, *Preimplantation and Prenatal Diagnosis, Wrongful Birth and Wrongful Life: A Global View of Bioethical and Legal Controversies*, 23 Human Reproduction Update 338 (2017). See *Christensen v. Thornby*, 225 N.W. 620 (Minn. 1934).

7. See *Gleitman v. Cosgrove*, 227 A.2d 689 (New Jersey 1967) (The plaintiff has rubella and the doctor informed her that her child would not be affected. However, the doctor was wrong and the child was born with defects caused by the plaintiff's infection. The court held that the plaintiff did not establish the essential elements of her case, therefore, the plaintiff's wrongful birth claim failed).

8. See *id.* at 192.

9. See *Slawek v. Stroh*, 215 N.W.2d 9 (Wisconsin 1974).

10. See *id*. at 22. See also *Howard v. Lecher*, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (New York 1977) (Parents sued a physician for failure to inform them of their child's risk of having Tay-Sachs disease). See also *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (New York 1977) (The Court allowed parents of a child born with polycystic kidney disease to bring a wrongful birth claim).

11. Recently, Texas became the 12th U.S. state to outlaw abortion. See Madlin Mekelburg, *Bill to Prohibit 'Wrongful Birth' Lawsuits Unanimously Passes Texas Senate Panel*, The Dallas Morning News, available at https://www.dallasnews.com/news/politics/2017/02/27/bill-to-prohibit-wrongful-birth-lawsuits-unanimously-passes-texas-senate-panel (last visited April 26, 2020).

12. See *Jacobs v. Theimer*, 519 S.W.2d 846, 847 (Texas 1975).

13. See *id.*

that rubella would not have affected the child[14]. Jacobs claimed she would have terminated the pregnancy had she been aware of the risk of her child being born with a severe defect to his organs[15]. The Texas court decided that wrongful birth claims were not matter of public policy or expression of abortion[16]. Rather, the question was to be resolved concerning the misinformation that did not allow her thinking what she would have done, if she had known about her child's defect[17]. As a result, the plaintiff received damages for the cost of care for a child with disabilities, however, she did not receive damages for emotional distress[18].

2.1.1. *State's Views*

In 2017, only 12 states have enacted laws preventing woman from recovering damages using a wrongful birth claim[19], while 28 states recognize these claims either by statute or common law and 10 states have not ruled on the issue one way or the other. Iowa was the most recent state to recognize wrongful birth claims in the case *Plowman v. Fort Madison Community Hospital*[20]. The court agreed with the plain-

14. See *id.*
15. See *id.*
16. See *id*. at 848.
17. See *id.*
18. See *id.*
19. These States are Texas, Arizona, Idaho, Indiana, Michigan, Minnesota, Missouri, North Carolina, North Dakota, Pennsylvania, South Dakota, and Utah. However, some states have never ruled on the issue of wrongful birth. See, for example, Jimmie E. Gates, *Bill Would Stop Wrongful Birth Suits,* The Clarion Ledger, available at https://www.clarionledger.com/story/news/politics/2017/01/09/mississippi-wrongful-birth-lawsuits/96353220 (last visited April 26, 2020).
20. See *Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393 (Iowa 2017) (In this case, the suit arose when a doctor negligently interpreted, diagnosed, and communicated fetal abnormalities that were shown by a prenatal ultrasound. As a result, a mother gave birth to a child with severe brain defects. The mother sued the defendants claiming that had she known of the defects she would have terminated the pregnancy. The court held that wrongful birth claims fall in line with a traditional medical malpractice claim; therefore, the mother can recover damages. The court uses a comparison to highlight the similarities: "Imagine the case of a woman carrying a healthy fetus injured during the delivery because of a failure to diagnose a birthing issue, such as an umbilical cord wrapped around the neck. In that circumstance, we would have no problem assessing damages. More importantly we would not even consider

tiff that wrongful birth claims fit in line with traditional medical negligence claims[21]. Further, the court was persuaded by the fact that a majority of jurisdictions recognizes this claim[22]. On the other hand, Texas and Mississippi recently tried to introduce legislation to outlaw wrongful birth claims[23]. However, neither of the bills were enacted into law, although, it is clear that these claims are still contested. The wrongful birth bills were generally commented with criticism. For example, an important representative of the Texas League of Women Voters said that abolishing wrongful birth claims would create an unreasonable restriction of a woman's constitutional right[24]. On the other hand, some people underlined that the rarity of these types of cases makes this legislation meaningless. For example, one prominent Dallas attorney stated: "The thing is, I [ha]ve worked on medical malpractice for 30 years and I have never brought one of these[.] I know all the other experienced medical malpractice lawyers in Dallas, and I don't know any of them who have brought these lawsuits"[25]. Another attorney claimed that even if someone approached them about this case, he believes that lawyers would be deterred from taking a wrongful birth claims because of various obstacles[26]. On the other hand, a Texas state representative explained that even though these claims are rare, this law was enacted to protect doctors[27]and the same affirmed some Mississippi's senators[28]. Although these bills were not enacted,

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the theory that the joy of parenthood should offset the damages. Would anyone in their right mind suggest that where a healthy fetus is injured during delivery the joy of parenthood should offset the damages? There is no more joy in an abnormal fetus come to full term than a normal fetus permanently injured at delivery. Both are heartbreaking conditions that demand far more psychological and financial resources than those blessed with normal children can imagine").

21. See *id*. at 398.

22. See *id.*

23. See Madlin Mekelburg, *Bill to Prohibit 'Wrongful Birth' Lawsuits Unanimously Passes Texas Senate Panel* (cited in note 14).

24. See *id*.

25. See *id*.

26. See *id*.

27. See Madlin Mekelburg, *Bill to Prohibit 'Wrongful Birth' Lawsuits Unanimously Passes Texas Senate Panel* (cited in note 14).

28. See, for example, Mississippi Senate Bill 2034, Mississippi Legislature, 2017 Regular Session, available at http://billstatus.ls.state.ms.us/documents/2017/html/SB/2001–2099/SB2034IN.htm (last visited April 26, 2020).

they suggest that there are more states trying to get out on the forefront of this issue.

2.1.2. *Wrongful Birth Claims Around the World*

Wrongful birth claims exist all across the globe. Which should come as no surprise since a majority of countries recognize abortion as a right[29]. Of these countries, most have laws regarding wrongful birth claims comparable to those in the United States. For example, the Supreme Court in Canada recognized wrongful birth in 1997 when a woman sued a doctor who failed to inform her of the risk of contracting chicken pox during her pregnancy[30]. After the birth of a malformed baby was born, she claimed that, if she had known of the risks, it would have led her to decide to terminate the pregnancy[31]. In the United Kingdom, the court ruled in favor of the plaintiff after the doctor did not inform the mother of test results that showed her baby would likely be born with Down Syndrome[32]. The Netherlands, Australia, Spain, Italy, Belgium, Germany, and France are other examples ofwestern countries that recognize wrongful birth as a cause of action[33].

On the other hand, for example, Chile does not recognize wrongful birth as a cause of action, due to the fact that the right of abortion is not recognized[34]. The current view of the Chilean judicial system in regards to wrongful birth is articulated by a Chilean Professor who states that Chile believes that a child with a severe medical condition

29. Only 26 countries prohibit abortion altogether. See, for example, Center for Reproductive Rights, *The Worlds Abortion Laws*, available at https://reproductiverights.org/worldabortionlaws (last visited 26 April, 2020).

30. See *Arndt v. Smith*, 2 S.C.R. 539 (Canada 1997). See also Frati, et al,, *Preimplantation and prenatal diagnosis, wrongful birth and wrongful life: A Global View of Bioethical and Legal Controversies* (cited in note 6).

31. See *id*.

32. See *Rand v. East Dorset Health Authority,* 56 BMLR 39, Lloyd's Reports Medical 181 (Queen's Bench Division 2000). See also Frati, et al,, *Preimplantation and prenatal diagnosis, wrongful birth and wrongful life: A Global View of Bioethical and Legal Controversies* (cited in note 6).

33. See *id*.

34. See *id*.

should never be viewed as economically harmful[35]. He even compares the valuing of a human life to the alternative of non-existence, stating that rewarding damages based on this comparison is deplorable[36]. In addition, the professor states that wrongful birth claims are not possible in Chile because abortion is illegal[37].

Recently Ireland began to recognize wrongful birth, however, it only began doing so after amending the constitution to remove a sentence from the Eighth Amendment that granted the unborn the "right to life"[38]. The 66.4 percent of voters said yes to the referendum that lifted the ban[39]. Shortly after the referendum passed, Ireland's first wrongful birth claim was brought[40]. In this case, a mother claimed that she was deprived of her right to reach the United Kingdom to get an abortion, after she was misinformed about test results concerning her unborn child[41]. The defendants conceded and settled the case, awarding the mother €1.8 million[42]. In a letter, the defense conceded the argument due to the referendum that passed, further, they waived their public policy argument[43].

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35. See Alexis Mondaca Miranda, *Compared Panorama of the Wrongful Life, Wrongful Birth and Wrongful Conception. Its Possible Application in Chilean Law*, Ius et Praxis, available at https://scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-00122015000100002&lng=en&nrm=iso&tlng=es. (last visited April 26, 2020).

36. See *id.*

37. See *id.*

38. See *The Guardian View on the Abortion Referendum: Ireland's Choice will have a Global Impact,* The Guardian,available at https://www.theguardian.com/commentisfree/2018/may/23/the-guardian-view-on-the-abortion-referendum-irelands-choice-will-have-a-global-impact (last visited April 26, 2020). See the official results of the referendum, *Abortion Referendum*, The Irish Time, available at https://www.irishtimes.com/news/politics/abortion-referendum (last visited April 26, 2020).

39. See *id.*

40. See Mary Carolan, *Mother Gets €1.8m in First Ever 'Wrongful Birth' Case,* The Irish Time, available at https://www.irishtimes.com/news/crime-and-law/courts/high-court/mother-gets-1-8m-in-first-ever-wrongful-birth-case-1.3537490 (last visited April 26, 2020).

41. See *id.*

42. See *id.*

43. See *id.*

2.2. *Background on Abortion Rights in the United States*

Prior to 1867, abortion was legal in the United States[44]. During this period, the most common form of abortion was by taking drugs that would terminate the pregnancy[45], known as "abortifacients"[46]. Women would take abortifacients before quickening[47]to terminate their pregnancy[48]. In the 1840s, the abortion industry was booming[49]: women were purchasing abortifacients from physicians, pharmacists, and even through the mail[50] and, if the abortifacients did not work, they could find a doctor who performed instrumental abortions via advertisements in the paper[51]. However, the abortion industry took a hit in 1857 when the American Medical Association[52]started to protest to make abortion illegal at every stage of pregnancy[53]. The movement continued to grow until 1867 when Illinois became the first state to completely ban abortion[54]. This led to a state-by-state ban on abortion, that was accomplished nationwide, which lasted over 100 years[55].

Although illegal, abortion was still widely available during this time period[56]and was performed by physicians, midwives in the homes all across the country[57]. This was prominent until 1940s, when stricter restrictions on abortion were initiated, despite the increasing request of abortion practices by women in the United States[58]. Such restric-

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44. See Leslie Regan, *The Introduction to When Abortion was a Crime: Women, Medicine, and the Law in the United States 1867–1973* (University of California Press 1st ed. 1996).
45. See *id.*
46. See *id.*
47. See Regan, *The Introduction to When Abortion was a Crime* (cited in note 47).
48. See *id.*
49. See *id.*
50. See *id.*
51. See Regan, *The Introduction to When Abortion was a Crime* (cited in note 47).
52. See Robert D. Rondinelli, et al,, *Guides to the Evaluation of Permanent Impairment* (American Medical Association 6th ed. 2007).
53. See *id.*
54. See *id.*
55. See *id.*
56. See Rondinelli, et al,, *Guides to the Evaluation of Permanent Impairment* (cited 56).
57. See *id.*
58. See *id.*

tive measures remained in place until 1973, when the Supreme Court handed down its decision in the landmark case, *Roe v. Wade*.

The Supreme Court held that a woman has the constitutionally protected right to decide whether she wants to terminate her pregnancy or not[59]. This means that women across the United States have the freedom to get an abortion, regardless of the state they live in; however, there is still controversy about how much power individual states have in regulating abortion. For example, the Supreme Court has ruled that a state can refuse to fund abortion so long as it does not place additional obstacles in the path of the woman's exercise of her right[60]; but which this threshold should be is not easy to be clarified.

Further, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, abortion clinics and physicians challenged the constitutionality of two amendments that were made to Pennsylvania's abortion statute[61]. The amendments established various conditions that the woman's situation must meet in order to get an abortion[62]. In *Casey,* the court reaffirmed its decision in *Roe v. Wade*[63], but also established a new standard for determining whether the state's abortion statutes are unconstitutional[64]. The Supreme Court shifted from the strict scrutiny standard in *Roe* to the undue burden standard[65]. So, with this innovation, abortion statutes are only deemed unconstitutional if they impose an undue burden, not any burden, on the woman's right to terminate her pregnancy[66].

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59. See *Roe v. Wade*, 410 U.S. 113 (1973).

60. See *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980) (there is an argument that refusal by the state to fund abortion is itself an additional obstacle placed in the woman's path to exercise her right to get an abortion).

61. See *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992).

62. *Id.* (for example, she would have to give her informed consent for the procedure and then must wait 24 hours before the procedure was performed. Also, she would be required to get consent from either her parents or, if she was married, she would have to get consent from her husband).

63. See *id.*

64. See Legal Backgrounder, *A History of Key Abortion Rulings of the United States Supreme Court*, available at https://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court (last visited April 26, 2020).

65. See *id.*

66. See *id*. See also, for example, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Despite the Supreme Court reaffirming its decision that abortion is a constitutional right, several states are attempting to get the Supreme Court to reconsider the issue. Recently, some states enacted laws banning abortion, probably with the purpose of getting the Supreme Court to hear its case[67]. For example, recent Alabama abortion law has been defined by some journals as the "most aggressive anti-abortion law in recent American history[68]".Generally, these laws have been deeply undermined or shot down by federal courts. In any case this new trend shows that the controversy surrounding abortion rights still rages on.

3. *The Stigma Surrounding Wrongful Birth Claims*

When first introduced, wrongful birth claims were met with backlash. For example, the court in *Gleitman* used strong language when deciding not to recognize these claims stating that they were not "talking about the breeding of prize cattle"[69]. One scholar stated that "[j]udicial revulsion toward 'wrongful birth' claims harkens back to past generations that almost universally regarded as immoral 'the very notion that birth, even of a seriously deformed child, could provide a basis for claiming damages'"[70]. Due to *Roe v. Wade* and the passage of time, wrongful birth claims became more accepted.Although, parents are still sometimes subject to widespread criticism if they bring these claims.

Several media outlets reported stories about mothers who sued their doctors under this claim. The headlines of these articles featured disparaging remarks that would shock the conscience of person; but probably, if the average person knew the full story, they might be more understanding.

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67. See Tara Law, *Here are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana and Elsewhere*, available at https://time.com/5591166/state-abortion-laws-explained (last visited April 26, 2020).

68. *Id.*

69. See *Gleitman*, 227 A.2d at 693.

70. Sofia Yakren, *Wrongful Birth Claims and the Paradox of Parenting a Child with a Disability*, 87 Fordham Law Review 583 (2018).

For example, in 2016 LifeNews.com reported a story about a mother, Kerrie Evans, that brought a wrongful birth claim against her doctor[71]. The headline of the story read "Mother Loses $15 Million in Wrongful Birth Lawsuit, She Wishes Her Daughter Was Never Born?"[72]. The mother argued that she loved her child; however, this argument was attacked by the defense attorney. The attack was based solely on the fact that she was bringing the wrongful birth claim[73]. The attorney's rebuttal to the mother saying she loved her child was that the mother should not be allowed to say she is glad her child was born and in the same breath argue that she would have terminated the pregnancy if she had known about her child's defects[74].

This high level of conflict between the parties and in public opinion is quite common in relation to wrongful birth claims.

3.1. *Arguments in Support of Wrongful Birth Claims*

Without considering here other relevant elements, the most important argument in support of wrongful birth claims seems to be that it is a way to provide financial support to parents who do not have the means to take care of a child with severe birth defects and who did not have the possibility to choose to terminate the pregnancy.

Quite often parents argue that they do not have enough finances to take care of a child with severe genetic defects and that they had been deprived of the necessary information in order to make a conscious and free decision whether to stop the pregnancy or not. As one scholar put it: "A healthy child is a so lovely creature that I can well understand the reaction of one who asks: how could his or her birth possibly give rise to an action for damages? But every baby has a belly to be filled and a body to be clothed. The law relating to damages is concerned with reparation in money terms and this is what is needed for the maintenance of a baby"[75].

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71. See *id*. at 598.

72. *Id.*

73. *Id.*

74. See Yakren, *Wrongful Birth Claims and the Paradox of Parenting a Child with a Disability* (cited in note 74).

75. C.M. Thomas, *Claims for Wrongful Pregnancy and Child Rearing Expenses*, archived at https://www.massey.ac.nz/massey/fms/Colleges/College%20of%20

3.2. *Arguments Opposing Wrongful Birth Claims*

One argument against the eligibility of wrongful birth claims could be that it violates rights of people considered in the Americans with Disabilities Act (ADA), signed into law by President Bush in 1990[76]. The ADA protects individuals with mental or physical disabilities from being victims of discrimination, by providing them protection and equal opportunity[77]. The ADA defines disability as a physical or mental impairment that impacts an individual's ability to perform at least one of life's major activities[78]. A major life activity includes, but is not limited to, activities such as: being able to care for oneself, performing manual tasks, speak, hear, see, and even being able to walk[79]. The ADA's main purpose is to prohibit discrimination in employment, public service, and accommodations[80].

In addition, title II of the ADA expanded the scope of the Act to include protections that Congress created for individuals with disabilities in the Rehabilitation Act of 1973, specifically, section 504[81]. Section 504 of the Rehabilitation Act was the United States first attempt to provide civil liberties to individuals with disabilities[82]. It prohibits programs that receive federal financial assistance from discriminating against individuals with disabilities[83]. Section 504 uses the term

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Business/School%20of%20Accountancy/Documents/Discussion%20Papers/213.pdf (last visited April 26, 2020).

76. See Randy Chapman, *The Americans with Disabilities Act: Civil Rights for Persons with Disabilities*, 19 Colorado Lawyer 2233 (1990).

77. See Americans with Disabilities Act (ADA), Pub L No 101–336, 104 Stat 327, as amended at 42 U.S.C. § 12101 et seq. (1990), https://www.ada.gov/pubs/adastatute08.pdf (last visited April 26, 2020).

78. See *id*.

79. See *id*.

80. See Disability Rights Education & Defense Fund, *A Comparison of the ADA, IDEA, and Section 504*, available at https://dredf.org/legal-advocacy/laws/a-comparison-of-ada-idea-and-section-504 (last visited April 26, 2020).

81. See *id*.

82. Disability Rights Education & Defense Fund, *Section 504 of the Rehabilitation Act of 1973,* available at https://dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973 (last visited April 26, 2020).

83. See *id*.

"handicapped individual"[84] rather than "disability"; however, the two terms can be used interchangeably[85]. As soon as a child with a genetic defect is born, they are immediately covered by the ADA[86]. Furthermore, the Supreme Court stated "[] the central purpose of section 504, which is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals"[87]. The ADA provides equal opportunity for individuals with disabilities, but – in any case – it does not prohibit abortion, neither if the baby presents genetical defects or disease. The question that arises, however, is:

84. U.S. Dept. of Education, *The Civil Rights of Students With Disabilities Under Section 504 of the Rehabilitation Act of 1973*, available at https://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html (last visited April 26, 2020) (handicapped individuals are defined as: "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. The regulation further defines a physical or mental impairment as (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities").

85. See Darpana M. Sheth, *Better off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 Tennessee Law Review 641, 655 (2006).

86. See *United States v. University Hospital, State University of New York at Stony Brook*, 729 F.2d 144, 155 (2nd Cir. 1984) (the issue, in this case, is whether a baby is protected under Section 504 the Rehabilitation Act of 1973. The court held that since the baby presently had the severe defects, and will be severely impaired for the rest of her life, she is considered a "handicapped individual" and is protected under Section 504. Notwithstanding this ambiguity in the phrase "major life activities", we hold that Baby Jane Doe falls within the definition of a "handicapped individual". The record indicates that Baby Jane Doe's rectal, bladder, leg, and sensory functions are all presently impaired. Further, the record suggests that, with or without corrective surgery, Baby Jane Doe will experience severe mental retardation for however long she lives. Absent any explicit indication in the statute or regulations that "major life activities" should be defined only with reference to adults, under these circumstances it would defy common sense to rule that she is not presently *regarded* as handicapped). See also *Flight v. Goeckler*, 878 F. Supp. 424, 426 (N.D. N.Y. 1995).

87. *Traynor v. Turnage*, 485 U.S. 535 (1988). See also *Alexander v. Choate*, 469 U.S. 287 (1985) ("Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance").

"Does a wrongful birth claim discriminate against an individual who may be born with a genetic disability?". Whether anyone may agree with abortion or not, the idea of wrongful birth claims seems to violate the ADA, which, as stated above, aims to provide individuals with disabilities equal protection under the law[88]. Of course, also a healthy baby can be aborted, but the effective existence of undetected or not-considered disabilities of the child seems to be the central condition allowing parents to sue the doctor with a wrongful birth claim and so leading to an unjustifiable disparate treatment on babies born with defects[89].

Disparate impact occurs when there is a policy that is neutral on its face but has a discriminatory impact. In regards to wrongful birth claims, it is argued that wrongful birth claims have a different impact on children born with severe disabilities[90]. It has been said this tort claim damages the dignity of the disabled community[91]. Further, it has been argued that wrongful birth claims discriminate individuals with disabilities because it encourages parents to abort their disable-child[92], pushing them to consider the child himself a damage. Essentially, the argument is that wrongful birth claims belittle the individuals with handicaps, which is in direct opposition to the purpose that the ADA was established to provide.

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88. See Disability Rights Education & Defense Fund, *Section 504 of the Rehabilitation Act of 1973,* available at https://dredf.org/legal-advocacy/laws/section-504-of-the-rehabilitation-act-of-1973 (last visited April 26, 2020).

89. See Darpana M. Sheth, *Better off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act* (cited in note 89) at 660–661 (a state Senator from Pennsylvania highlighted the issues that wrongful birth claims have on their goal to eliminate discrimination of individuals with disabilities. He stated that the intent of legislation barring wrongful birth and wrongful life claims is to stop a court-engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call "a normal child" and to prevent the practice of medicine . . . from becoming coerced into accepting eugenic abortion as a condition for avoiding [such] lawsuits).

90. See *id*. at 659.

91. See *id.*

92. See *id*. at 658.

4. *Conscientious Exemption in Healthcare*

Another debated and relevant issue, related to wrongful birth claims, is conscientious exemption in healthcare. Once a healthcare provider accepts a person as a patient, they enter into a fiduciary relationship[93]. This relationship means that the healthcare provider is obligated to maintain that an "undivided loyalty to a patient should guide a physician's decisions, and [] any influence on a physician's decisions - other than the patient's welfare - must be disclosed to the patient"[94]. This loyalty includes providing the patients with as much information as possible to allow them to take an informed decision[95]. However, this relationship could operate in tension with the conscience exemptions that are recognized in healthcare law.

Conscience exemption rules arose following the Supreme Court's decision in *Roe v. Wade*. Congress passed the Health Programs Extension Act of 1973, known as the Church Amendment[96],which allowed individuals and entities to refuse to provide facilities or perform abortions or sterilization procedures, if those procedures were in

93. See Sarah M. Stephens, *Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare*, 29 Yale J.L. Feminism 93, 97 (2017).

94. *Id.*

95. See *id.*

96. See Church Amendment, 42 U.S.C. § 300a-7 (1973): "Sterilization or abortion. (a) [] (b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act [], the Community Mental Health Centers Act [] or the Developmental Disabilities Services and Facilities Construction Act [] by any individual or entity does not authorize any court or any public official or other public authority to require (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or (2) such entity to (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel []".

opposition to their religious beliefs[97]. This Act proved to be the first domino to fall creating a ripple effect for states to pass their own conscience exemptions laws. Now almost all 50 states have their own conscience exemption laws that protect healthcare providers, healthcare facilities, and healthcare institutions that refuse to perform certain reproductive medical procedures[98]. In addition, recently, conscience exemption rights have been expanded[99]. Some healthcare providers are not even required to give their patients full information about their situation if they have a conscience exemption, and they are not required to refer them to another doctor[100]. Further, pharmacists have the "right to refusal", meaning that they can refuse to fill abortifacient prescriptions for patients, including birth control, if filling the prescription would conflict with their religious beliefs[101].

For example, South Dakota is one of the most restrictive states in regard to "reproductive freedom"[102]. In fact, it is stated by law a conscience clause that provides individuals and healthcare institutions with a wide exemption from informing about prenatal diagnoses and practice abortion intervention[103]. Even social workers and counselors are protected under this conscience clause. Further, South Dakota does not recognize wrongful birth as a cause of action.

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97. See *id.*

98. See *id.* (conscience exemptions apply to more than just reproductive medical procedures. Alaska, Minnesota, and New Jersey have conscience laws that have been enjoined as unconstitutional when they apply to public, quasi-public, non-sectarian or non-profit institutions. Some states have written very narrow conscience legislation, only exempting individual doctors and religiously-affiliated medical entities if they object in writing. More restrictive states, however, have promulgated broad refusal legislation, which allows almost any individual or entity to exclude abortion from its services, health care plans, or counseling programs on the basis of moral beliefs). See also Julia Lichtman, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 Georgetown Journal on Poverty Law. & Policy 345, 350 (2003).

99. See *id*. at 101.

100. See *id.*

101. See Claire Marshall, *The Spread of Conscience Clause Legislation*, available athttps://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/the_spread_of_conscience_clause_legislation (last visited April 26, 2020).

102. Lichtman, *Restrictive State Abortion Laws* (cited in note 103).

103. See *id*.

In contrast, Connecticut allows individuals to refuse to participate in any phase of the abortion process, but does not allow healthcare institutions the right to refuse to inform patient about, to practice prenatal screening and abortion interventions[104]. However, even though Connecticut is more liberal regarding reproductive freedom, the law does not require each doctor to informed the patient about all available abortion practices, nor to refer the patient to another doctor[105]. Even though this is the case, the fact that institutions as a whole cannot refuse to participate in the abortion process can mitigate some of the problems that could arise by an individual healthcare provider refusing to properly assist a patient about abortion interventions.

In 2017, Alabama introduced legislation to adopt a conscience clause. The goal of the bill was to protect healthcare providers from being obligated to perform procedures that they had a moral or religious objection to[106]. The bill would protect all individuals, but not institutions[107], who decline to perform any of the following health services: sterilization procedures, abortion, human cloning and embryonic stem-cell research[108]. An important issue in Alabama's bill is the necessity for medical staff to object in writing and in advance in order to be exempted from performing the procedures[109]. Although this is not maybe the perfect solution, but it does inform patients that the healthcare provider is not going to perform the procedure and gives them the opportunity to find another doctor that will help them. However, what if the patient does not have the financial capabilities to find a new healthcare provider? This could put the patient in an unfair situation that can be fixed with careful planning by state legislatures via reform of medical liability laws.

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104. See Legislative Tracker, *Connecticut Refusal Clause*, available at: https://rewire.news/legislative-tracker/law/connecticut-abortion-refusal-clause (last visited April 26, 2020).

105. See *id.*

106. See Alabama Policy Institute, *Guide to the Issues*, available at: https://www.alabamapolicy.org/wp-content/uploads/2017/03/Guide-to-the-Issues-The-Right-of-Conscience-of-Health-Care-Providers.pdf (last visited April 26, 2020).

107. This is different from most conscience clauses. Most states protect institutions.

108. See Alabama Policy Institute, *Guide to the Issues* (cited in note 111).

109. See *id.*

An issue with Conscience Clauses in healthcare is deception by healthcare providers in order to impose their beliefs on a patient.Although courts have deemed the methods unethical and illegal[110], several state legislatures passed legislation that is titled "Woman's Right to Know Act (WRKA)"[111]. North Carolina's WRKA requires that healthcare providers inform all women that seek to get an abortion of every detail about it, including physical, psychological, and additional medical risks that are associated with abortions[112]. Further, the healthcare provider must give the potential mother information about free ultrasounds, and various agencies that can assist the mother during childbirth and with the costs of raising the child[113]. The WRKA also asks that the woman waits 24 hours after receiving this information before making her decision whether or not to have an abortion[114]. On its face, the WRKA could be seen as a potential burden on healthcare providers to ensure that women have all the information available to them in order to make an informed decision, but, on the other hand, the information provided to the mother seem tryng to convince her to not terminate the pregnancy.

5. *How Would an Abortion Ban Affect a Wrongful Birth Claim?*

As before said, recently several states have enacted laws restricting abortion as an attempt to get the Supreme Court to reconsider the

110. See *Wood v. University of Utah Medical Center*, 67 P.3d 436 (2002).

111. Minnesota Department of Health, *Woman's Right to Know Act*, available at https://www.health.state.mn.us/people/wrtk (last visited April 26, 2020) (this is an example of Minnesota's Right to Know Act. Several states have enacted similar legislation. Woman's Right to Know Act will hereinafter be "WRKA").

112. See North Carolina Department of Health and Human Services, *Woman's Right to Know Act*, archived at https://wrtk.ncdhhs.gov (last visited April 26, 2020).

113. See *id.*

114. See Ryan Bakelaar, *The North Carolina Woman's Right to Know Act: An Unconstitutional Infringement on a Physician's First Amendment Right to Free Speech*, 20 Michigan Journal of Gender & Law 187 (2013) (in addition to the WRKA affecting the woman's rights, there is also a scholarship about the effect it has on the healthcare providers rights. The argument is that by requiring the healthcare provider to tell their patients about specific tests, it infringes upon their right to free speech).

issue[115]. Governor of Alabama, Kay Ivey, affirmed that in the present legal framework these laws are likely unenforceable[116]. Considering this, Ivey admits that the reason for enacting this law is to get the Supreme Court to reconsider abortion laws in the United States[117]. Ivey stated that "[t]he sponsors of this bill believe that it is time, once again, for the U.S. Supreme Court to revisit this important matter, and they believe this act may bring about the best opportunity for this to occur"[118].

One of the ripple effects of restricting or banning abortion in the United States is the impact it would have on wrongful birth claims. Let's imagine two scenarios, one where the Supreme Court allows each state to choose its abortion law, and the other where the Supreme Court rules that abortion is unconstitutional and bans abortion nationwide.

5.1. *State's Choice*

If the Supreme Court allowed states to make their own abortion laws, there could be several states passing laws against abortion altogether. This would create an issue with wrongful birth claims. In order to explain this issue let's suppose that Alabama passes a legislation that makes abortion illegal in the state and that wrongful birth claims are not recognized. In addition, let's suppose that Tennessee does not enact a ban on abortion and recognizes wrongful birth claims. Given this hypothetical situation, a mother in Huntsville, Alabama, gives birth to a child with Down Syndrome and wants to sue the doctor alleging that, if she hadknown of the likelihood of the child being born with Down Syndrome, she would have terminated the pregnancy. Considering the existing legal context in this example, the mother would not have been able to terminate the pregnancy in Alabama, therefore, the doctor would argue that there is no damage, because she could not have legally terminated the pregnancy. On the other hand,

115. See Tara Law, *Here are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana, and Elsewhere* (cited in note 71) (this includes the States of Alabama, Missouri, Louisiana, Georgia, and Mississippi).

116. See *id.*

117. See *id.*

118. *Id.*

the mother would rebut and argue that she could have crossed state lines into Tennessee and obtained a legal abortion; therefore, she was damaged due to the doctor's failure to give her adequate information. It is likely the mother would lose this lawsuit and that she would not have any kind of economical restoration.

In addition to that, another scenario could arise where, given a context such as the one depicted above, the mother travels to Tennessee to see a healthcare provider. Considering the cause of action will accrue in Tennessee, and the defendant is domiciled in Tennessee, the mother will be able to bring a wrongful birth claim in Tennessee.

The outcome in those two scenarios are rather simple procedurally; however, it could establish a situation where healthcare providers simply choose not to inform mothers of prenatal testing available to them, or where healthcare providers are not meticulous in their interpretation of the results of prenatal tests because there is no legal action against their negligence. Further, in situations where healthcare providers have a conscientious objection to abortion, they may intentionally withhold information from a patient that they know may go across state lines to receive an abortion.

Looking at a more complicated scenario, imagine an instance where the lawsuit involves more than just two parties. For example, assume that the woman is poor and lives in rural Tennessee. The healthcare provider performs a prenatal test on the mother and sends the lab results to a facility in Alabama that gets her test mixed up with another woman's test and sends it back to the healthcare provider. Let's suppose the results show that the baby is perfectly healthy. The mother then gives birth to a baby which has severe birth defects. She finds out that her test results got mixed up and wants to sue for wrongful birth. This creates a complicated scenario because the healthcare provider was not negligent, the lab in Alabama was negligent; however, if she were to sue the lab in Alabama, she could not recover wrongful birth damages. She would need to sue the lab in Tennessee but that may not be feasible. Therefore, the woman may not be able to recover any damages[119].

119. See Demetrios C. Batsides and Melissa S. Geller, *The Cross-Border Dilemma: Wrongful-Birth and -Life Litigation in NJ,* 115 New Jersey Law Journal (1996) (There is a real-world issue that poses a conflict of laws problem highlighted by the differences

In addition to these hypotheticals, there are numerous other complicated cases that could arise if there was a state-by-state wrongful birth ban. Looking at just the hypotheticals above, it is clear to see the issues that could arise regarding wrongful birth claims. However, giving a similar scenario, there would be fair solutions to this issue that benefit the child's mother while also continuing to protect healthcare providers and prevent a rise in the cost of healthcare by ensuring that there is not an increase in healthcare providers fear of litigation.

5.1.1. *Reform Medical Liability*

Assuming this scenario, one solution to protect women from not being able to recover damages, if their healthcare provider is negligent, is reforming medical liability. This reform would simply require all healthcare providers to openly communicate all the objective and available information about possible prenatal screenings and abortion practices, giving less protection to conscientious exemption.

Every medical liability reform is focused on a balance between protecting healthcare institutions from uncountable litigations and allowing people to obtain satisfaction in case of negligence of the

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in state laws between New York, New Jersey, and Pennsylvania. New Jersey has a very liberal approach and rewards the most money out of the three states. New York is more restrictive than New Jersey, but not as restrictive as Pennsylvania. Considering this, residents tend to go to New Jersey for their healthcare needs. Consequently, a case arose where the court had to undergo a complicated conflicts of laws analysis): "[P]laintiffs in these cross-border cases will seek to file in New Jersey whenever possible. However, counsel on both sides should be aware that New Jersey courts generally have been reluctant to apply New Jersey law to out-of-state defendants in wrongful-birth cases, given the claims' sensitive and controversial nature []. [T]his presented a dilemma for the [New Jersey] Superior Court, which had to apply conflicts-of-law principles to determine whether New York or New Jersey law should apply in a case involving New Jersey residents who, at the time of injury, were New York residents; a New York hospital; several New Jersey health-care providers; and a medical testing company headquartered in New Jersey, but which performed all relevant actions in New York. The Superior Court ruled that New Jersey law should apply to all defendants. Last year the Appellate Division reversed, for the first time approving the practice of applying the law of different states in the same case, and held that New York law should apply against defendants whose only contact with the plaintiffs occurred in New York, and the law of New Jersey against the medical professionals practicing in New Jersey").

providers. It is true that with the increased risk of litigation for healthcare providers comes an increase in healthcare costs. However, healthcare providers' job should ensure their patients get the best treatment available. A balanced increase in the risk or fear of litigation would push healthcare providers to do their best to avoid being sued by their patients. Also keeping healthcare costs low, one way to slightly increase this sensitive balance in favor of patients, is to require higher standards of communication for physicians. So, subsequently capping the damages that a patient could receive in a lawsuit where the physician's negligence was minor or patient's damage was insignificant or even nonexistent, would mean that a physician can be held strictly liable for failing to properly communicate with their patient.

It would be important that healthcare providers are held to a higher standard than the current one, because very often wrongful birth claims arise from a lack of communication. Holding healthcare provider's strictly liable for failing to communicate with their patients is beneficial for patients and will probably cause little harm to healthcare providers that simply do already their job at best. Potentially, holding healthcare providers to a higher standard of communication, could be beneficial to them as well because they know from the first meeting with the patient that they are required to be completely open and transparent about the tests and procedures available to them.

For example, a healthcare provider that is visiting a pregnant woman should be required to inform the woman of all the prenatal tests that are available to her already at their first meeting. If the doctor fails to do so at the initial examination, the woman may recover nominal damages from the doctor, even without the presence of any subsequent damage that resulted from their negligence. This medical liability reform would create a new tort by creating a form of strict liability. The patient would only need to prove that the tort occurred and that the healthcare provider was responsible. This would create a duty on the healthcare provider to be thorough in their communication with the mother, in order to avoid also creating risks of litigation. In a "strict abortion ban scenario", the strict liability could be an answer to ensure women a minimum legal and economical protection in case of unlucky pregnancies, also in a context where they do not have possibility to legally choose abortion. In fact, the mother would sue the doctor not for preventing her take an informed decision whether or not

to terminate the pregnancy, assuming that a similar decision would be not legally available; but for having simply not making her aware of the possible complications or risks of the pregnancy, regardeless whether a decision could had been taken or not.

At the surface, it seems that choosing strict liability would increase the fear of litigation, therefore, increasing medical costs. However, by taking a closer look at the potential effects of this type of reform, it would likely to bring beneficial to both parties, healthcare institutions and patients. For instance, all that would be required of healthcare providers would be to meet statutory guidelines of communication.Next, if a healthcare provider fails to follow the guidelines, even though they would still be liable absent any concrete damage occurring to the patient, the patient would be able to recover nominal damages. Considering this, the lawsuit would serve as a "wake-up call" to the healthcare provider that they need to follow the statutory guidelines. Further, a similar reform would protect healthcare providers from committing negligent acts that could be costly to them, also if any damage occurred to the patient. By establishing clear statutory requirements of communication, healthcare providers would not be sued if they simply meet those requirements. Because of the guidelines, healthcare providers would be more likely to meet the communication requirements, therefore they would be less likely to be sued because of negligently failing to properly communicate with their patient.

At the beginning, the effect of reforming medical liability and establishing strict liability against healthcare providers could create ambiguities on standards of communication. Although the standards would be higher than it currently is, forcing healthcare providers to be proficient in their communication and get in a routine of meeting these higher standards. Meeting these standards could be accomplished via recorded verbal communication and by a standardized written document that the doctor explains to the patient. The healthcare provider will be required to get the patient to sign this document that indicates she is aware of all the testing methods available to her, as well as, of her rights to either get an abortion or the doctor's conscientious objection to abortion.

Except for the first period, reforming medical liability to create a strict liability tort for a health provider's failure to properly communicate with the patient would maybe paradoxically decrease the amount

of litigation for healthcare providers, rather than raise the amount because of a higher standard. This is because of the clear and unambiguous communication requirement that would be established. Rather than healthcare providers exercising their own discretion about what information they should share with a patient, they would have precise and binding statutory guidelines that lay out a roadmap explaining what information they are required to supply with the patient. The healthcare providers could avoid litigation simply by meeting the guidelines required by law. Therefore, medical liability reform could both create a higher standard for healthcare providers and, at the end, decrease the risk of litigation in the case of meticulous application of the rules.

5.1.2. *Narrow the Scope of Conscience Exemptions*

Always in a "strict abortion ban scenario", another viable solution would be to focus on the doctors' and health providers' duty to inform clearly and in advance of their own attitude to prenatal screening and abortion. It could be required the doctor to apply for "conscience exemption status". This would mean that if the doctor has a moral or religious belief that abortion should not be practiced, they should be required to apply for a special status that gives them the right not to disclose information that may contribute to the patient's decision to get an abortion. As well, the healthcare providers should be required to disclaim this status on their website and inform the patient at the first meeting. This is beneficial in two ways. First, it prevents the doctor from committing negligence, and then out of convenience, raising a conscientious exemption defense in order to escape liability. Second, it allows the patient to understand from the outset that the doctor has a conscious objection to abortion. This would ensure that the patient has the opportunity to either continue seeing the doctor or find a new doctor. Further, the process to get conscience exemption status is similar to the process to obtain conscientious objector status in the army. The army allows individuals who oppose war based on moral or religious beliefs to opt-out if they are called to arms[120]. To

120. See Selective Service System, *Conscientious Objection and Alternative Service*, available at https://www.sss.gov/consobj (last visited April 26, 2020) (the

achieve this status, the individual must appear before a local board and explain his beliefs to the board[121]. Healthcare providers could achieve this status following a similar process.

In this proposed solution, each state will have its own board that governs conscientious exemption status within its state. If healthcare providers want to achieve this status, they must appear in front of the state board and give their case. They will explain their beliefs, religious or moral, and the board will decide whether to give them the status or not. The individual may use their own oral testimony, written statements from family and friends, evidence of membership in a church or religious group, along with statements from pastors or priests that they are associated with. The boards granting of this status should be liberal in the sense that the individuals would not be held to high standard when proving involvement in a religious group or showing evidence of their beliefs against abortion or other medical procedures.

Next, the conscientious exemption status would have various levels of exemption. For example, some individuals may be exempt from all aspects of the abortion process. This means that they do not have to provide any information regarding abortion, nor they have to refer patients to other doctors. However, others could only ask and receive exemption from the performance of the abortion or similar medical procedures. So, they could be required to provide the patient with information about abortion including, risks, long-term effects, and referral to a healthcare provider that may help them. This would include referral to an out-of-state doctor.

Although this proposal may be controversial, but it simply gives the patient all the information. Doctors, similar to attorneys, are required to put their patient's interests above their own. This is already stated by the various medical organizations that recognize a healthcare providers duty to their patient. For example, "the Code of Ethics of the International Federation of Gynecology and Obstetrics" requires that a physician's right to preserve his or her own moral or religious values cannot result in the imposition of those values on the patient, nor can

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most famous example of an individual who had a conscientious objection to war is Muhammad Ali. Ali was drafted to serve in the Vietnam War and refused to serve because he opposed the war).

121. See *id.*

the physician's right absolve the physician from the duty to "tak[e] immediate steps in an emergency to ensure that the necessary treatment is given without delay"[122]. Additionally, the same statement is shared by the American Medical Association[123].

Therefore, if there were an abortion ban in individual states, legislatures should act to narrow the scope of conscientious exemptions to prevent patients from being left in the dark. Given that, it is obvious that at least some states should allow abortion, otherwise it could be not possible to access legal termination of pregnancy, even if perfectly informed.

5.2. *Nationwide Ban*

Wrongful birth was not considered a tort until after *Roe v. Wade*. Therefore, a nationwide ban may render wrongful birth claims, as we know them, obsolete. Since the parents would no longer have the option to terminate the pregnancy, they would not be able to prove they suffered any damages because of the doctor's failure to properly inform them. In fact, also if the doctor had properly informed them, they could have not taken any kind of decision to terminate the pregnancy. Further, looking at Ireland as the most recent example, it appears that wrongful birth exists because abortion is legal. Proof of this is offered by the fact that as soon as abortion was made legal in Ireland, the first wrongful birth claim was successfully brought against a healthcare provider[124].

On the other hand, it is possible to suppose how wrongful birth claims could exist without abortion. Wrongful birth claims could survive if they were approached from the already discussed "strict liability perspective" Rather than looking at damages from the loss of chance, they could be considered stemming from the diagnostic error or the misinformation that the doctor committed. The compensation that the mother would receive would accrue from the malpractice of the

122. Sarah M. Stephens, *Freedom from Religion: A Vulnerability Theory Approach to Restricting Conscience Exemptions in Reproductive Healthcare*, 29 Yale Journal of Law and Feminism 93, 97 (2017).

123. See *id.*

124. See Carolan, *Mother Gets €1.8m in First Ever 'Wrongful Birth' Case* (cited in note 42).

doctor misdiagnosing the child; rather than the compensation coming from the mother claiming she would have considered to terminate the pregnancy if she had known that the child would be born with a severe genetic disease. This is a possible outcome that could occur if there is a nationwide ban on abortion.

However, wrongful birth might still be a viable cause of action, just with different elements. For example, in some cases, wrongful birth was brought against a healthcare provider who failed to perform adequate sterilization procedures. With that in mind, it stands to reason that wrongful birth could survive. Parents who consult a doctor about sterilization procedures may still be able to bring a wrongful birth claim against a doctor that: fails to adequately inform the parents of all their options; negligently performs the sterilization procedure which results in an unwanted pregnancy; or fails to inform the parents of the risks following a sterilization procedure that results in an unwanted pregnancy. For example, the Pennsylvania Supreme Court dealt with a case where a mother became pregnant and gave birth to a child with genetic defects after her husband underwent a vasectomy procedure[125]. The doctor told the couple that no supplemental birth control was necessary to prevent the woman from becoming pregnant[126]. As a result, the parents brought a cause of action seeking damages for the doctor's negligence in informing them properly about and in performance of the vasectomy procedure[127]. Whilst the court refused to recognize this cause of action as wrongful birth, it still recognized the plaintiff's right to recover damages because of the negligence of the healthcare provider[128].

There is also evidence, before the *Gleitman*[129]case, that wrongful birth claims were intended to be actions brought by couples when an unintended pregnancy occurred[130]. These claims were directed

125. See *Speck v Finegold*, 497 Pennsylvania 77, 82 (Pa. 1981) (in addition to that vasectomy procedure, the doctor failed to terminate the mother's pregnancy after he agreed he would).

126. See *id.*

127. See *id.*

128. See *id.* at 100.

129. See *Gleitman*, 227 A.2d at 689.

130. See Frati, et al,, *Preimplantation and Prenatal Diagnosis, Wrongful Birth and Wrongful Life* (cited in note 6).

towards contraceptive manufacturers and doctors who administered ineffective drugs or failed to perform proper sterilization procedures[131]. There is a 1967 case that further highlights an example of this type of wrongful birth claim. This case started in 1963, when a woman, Custodio, became pregnant after a doctor performed an operation to remove a portion of the woman's fallopian tubes in order to prevent her from becoming pregnant[132]. However, approximately one year after the operation, Custodio discovered that she was an expectant mother[133]. Custodio brought a suit against the doctor's alleging negligent treatment in the performance of the operation[134]. The cause of action focuses more on the negligent performance of the sterilization procedure, rather than the healthcare providers' duty to inform their patients of potential genetic defects[135]. The court held in favor of the plaintiff, awarding her the damages for medical expenses and supporting the child[136]. So, in case of a nationwide abortion ban there would be the possibility that wrongful birth claims would survive but the plaintiff would have to prove different elements.

On the other hand, if there is nationwide abortion restriction, but not a definitive abortion altogether, wrongful birth claims would be likely not be necessary affected in any case. Suppose that a so called partial-birth abortion ban, that means abortions after the 20th week of pregnancy[137], were enacted nationwide. In this case, considering that the prenatal testing that often gives rise to a wrongful birth claim are generally conduct before the 20th week of pregnancy, the woman would have ample time between the cause of action accrues and when abortion would be not allowed. So, if the healthcare provider acted

131. See *id.*

132. See *Custodio v. Bauer,* 251 Cal.App.2d 303 (1967).

133. See *id.*

134. See *id.*

135. See *id.* (in addition to a medical malpractice claim, the plaintiff alleges misrepresentation and breach of contract).

136. See *Custodio*, 251 Cal.App.2d at 303.

137. See Julie Rovner, *Partial-Birth Abortion: Separating Fact from Spin*, National Public Radio, available at https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin (last visited April 26, 2020) (partial-birth abortion is an abortion that occurs farther along in the pregnancy. It is an extremely controversial procedure that involves dilating the woman's cervix and pulling the fetus out of the womb through the birth canal).

with negligence not allowing the woman to take her informed decision before the 20th week, when she would have been still able to legally terminate her pregnancy, it should be considered as responsible for wrongful birth claim. In fact, she could have benefit of her abortion right if she were immediately correctly informed about the result of the test.

In light of the foregoing, wrongful birth claims, potentially, would survive if the Supreme Court decided to restrict abortion nationwide. Despite this, it is likely that, even without a decision from the Court, wrongful birth claims will not survive. In fact, because states tend to be willing to protect physicians from medical malpractice claims, rather than subject them to more of them, states would probably enact legislation outlawing wrongful birth claims altogether.

6. *Conclusion*

Wrongful birth claims are nowadays still a central matter of discussion in the USA and some new trends, that could renew the actual legal framework, are assuming even more importance. On this way, it was thought to assume some possible scenarios of abortion restrictions in a state-by-state and in a national wide perspective.

In the former case, some possible solution to grant at least a minimum persisting right of being compensated in case of wrongful birth cases could be: oblige healthcare provider to inform women about abortion practices, offered in other states if not available in their country, too; impose a "strict liability" on informational duties of healthcare institutions in order to arose their diligence standards;discipline a more transparent "conscience exemption status" that would impose more clear disclosure about their position on abortion. In this scenario, wrongful birth claims could be limited, but they would probably survive, despite new jurisdictional and procedural issues.

Finally, wrongful birth claims are unlikely to exist if abortion is illegal nationwide. So, assuming that a definitive abortion ban was adopted in the USA, it would be probably the end of the wrongful birth claims, as we know them nowadays. On the other hand, they could assume new forms. For example, they could be restricted to cases where healthcare providers failed informing about or performing

sterilization or other contraceptional practices.Although, there are some evidences that could ensure that these relatively recent claims would continue to exist upon an occurrence as a partial abortion restriction. In fact, an incomplete information set or negligent behaviors could still be relevant, in the case these would in any way prevent the mother to take the free and legal decision to abort.

Third-Party Doctrine: The Threat of the Digital Age

Amarildo Haxhiu*

Abstract: The evolution of the Third-Party Doctrine, its impact on the Fourth Amendment, and its current iteration in the modern digital age is evaluated through a number of precedent cases. The Paper will start with the principal of reasonable expectation of privacy, established in *Katz v. United States*, and carry onward into the foundation of the Third-Party Doctrine in *United States v. Miller* and *Smith v. Maryland*, the Court questioning the viability of the doctrine in *United States v. Jones*, and perhaps shifting its outlook in *Carpenter v. United States*. The paper will analyze the Third-Party Doctrine concerns through the *Carpenter* balancing test and conclude with the possible benefits and detriments in applying such a test.

Keywords: Fourth Amendment; criminal procedure; Third-Party Doctrine; balancing test; Supreme Court.

1. *Introduction*

George Orwell boldly wrote, "[a]lways eyes watching you and the voice enveloping you. Asleep or awake, indoors or out of doors, in the bath or bed – no escape. Nothing was your own except the few cubic centimeters in your skull"[1]. Written more than half a century ago, these words ring potentially true and meaningful today and in different contests, too. Nowadays citizens must face multiple privacy risks, as they seem not totally aware of Government programs regularly recording citizens data while endangering Constitutional freedoms[2]. The Government can access information without a warrant and, considering the abundance of information that is constantly shared through several devices, such as cell phones most people should re-evaluate their attitude towards sharing personal data[3].

Concerns are further intensified when large corporations, such as Google and Amazon, collect massive amounts of customers data in their servers[4]. Cloud computing, of which both companies are promi-

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* Amarildo Haxhiu is a Juris Doctor student at Western Michigan University Cooley Law School and an intern at the Public Defender Office in Ann Arbor, Michigan. He holds his Bachelor of Arts in Political Sciences and Government from Wayne State University.

1. George Orwell, *1984* (Secker & Warburg 1949).

2. See *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor concurring: "Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse").

3. See *id.* at 418 (Sotomayor concurring: "I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year").

4. See *Carpenter v. United States*, 138 S. Ct. 2206, 2262 (2018) (Gorsuch dissenting: "Countless Internet companies maintain records about us and, increasingly, for us.

nent players, users can store documents and access them from multiple devices without the necessity to expand their computer data storage[5]. Such documents might range from an innocuous list of grocery items, to detailed banking records, medical records, to culminate to an individual's private diary[6]. In *Riley*, Chief Justice John G. Roberts Jr. appropriately mentioned that:, "[cellphones] could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or, newspapers"[7]. Our homes have welcomed objects embedded with computing systems connected to the internet that monitor our health, and our safety depends on them[8]. The Government cooperates with private companies to combine data and to build profiles of individuals: their habits, their likes and dislikes, their daily movements and routines, and much more[9].

The Third-Party Doctrine – a legal justification used to obtain such information – states that a person has no reasonable expectation to privacy on information shared voluntarily with others, whether it concerns bank details, colleagues, or even telecommunications providers[10]. Most individuals would claim that they never wished to make such information available to the Government, but the latter would reply that the information is admittedly and voluntarily shared with third parties[11]. This argument is misleading. Individuals could theoretically hide their money under their mattresses or send letters instead of emailing, but such measures would prove excessively burdensome, if not incompatible with today's society. As the modern world progresses, the legal community should look to *Carpenter*. Expanding the *Carpenter* decision to cover the Third-Party Doctrine could be an adequate remedy.

Even our most private documents – those that, in other eras, we would have locked safely in a desk drawer or destroyed – now reside on third party servers").

5. See *id.*
6. See *id.*
7. *Riley v. California*, 573 U.S. 373, 393 (2014).
8. See *id.*
9. See *id.*
10. See *United States v. Miller*, 425 U.S. 435 (1976).
11. See *Carpenter*, 138 S. Ct. 2206, 2220 (2018).

2. *Background*

The evolution of the Third-Party Doctrine, its impact on the Fourth Amendment and its current iteration in the modern digital age will be evaluated through a number of precedents. The following section will examine the principle of reasonable expectation of privacy, established in *Katz v. United States*, and carry on into the foundation of the Third-Party Doctrine in *United States v. Miller* and *Smith v. Maryland*, the Court's questioning of the viability of the doctrine in *United States v. Jones*, and its shifting outlook in *Carpenter v. United States*. The concerns arising from the Third-Party Doctrine will be analyzed through the Carpenter balancing test and, in the final part, the benefits and detriments of such test will be examined.

2.1. *Birth of the Third-Party Doctrine*

2.1.1. *Dawn of a New Age:* Katz v. United States

The current precedent on privacy was established in *Katz v. United States*. The main facts of the case revolved around the Government placing a listening device on a payphone to listen to the defendant's conversation. By doing so, the Government was found in violation of the defendant's Fourth Amendment rights. In what later became the bright-line rule, Justice Harlan wrote that, to have violation of Fourth Amendment rights, there is a requirement "first that a person have exhibited an actual expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as reasonable"[12]. By listening to the conversation without a warrant, the Government had violated the Fourth Amendment Search and Seizure Clause. The Court distanced itself from previous rulings of constitutionally protected areas and solidified the Fourth Amendment as guardian of people, rather than places[13]. Nevertheless, the Court clarified that whatever the individual shares publicly is not protected by the Fourth Amendment[14]. The era of the Third-Party Doctrine started.

12. *Katz v. United States*, 389 U.S. 347, 360 (1967).
13. See *id.* at 351 (declining to adopt government's suggested standard).
14. See *id.*

2.1.2. *Third-Party Doctrine Takes Shape:* United States v. Miller *and* Smith v. Maryland

Following *Katz*, in *United States v. Miller*, Mitch Miller was convicted of running an unregistered distillery and failing to pay taxes. The Government had obtained bank records and checks with an allegedly defective *subpoena*[15]. Miller moved to suppress the evidence as a violation of his Fourth Amendment right against "unreasonable searches and seizures"[16]. Relying on *Katz*, the Court held that Miller had no expectation of privacy[17]. They reasoned that, since Miller had given the information to the bank –a third party–voluntarily, the documents no longer belonged to him and were now property of the bank. The Court established a concrete rule concerning expectation of privacy on documents voluntarily surrendered to third parties: individuals have no legitimate expectation of privacy, and there is no violation of Fourth Amendment unreasonable searches and seizures when the individual voluntarily surrenders information to third parties.

In *Smith v. Maryland*, the Court affirmed the rule established in *Miller*. In *Smith*, after a robbery, the victim was continually receiving threatening phone calls from the defendant who identified himself as the robber. On one particular occasion, the defendant asked the victim to step outside, and slowly drove past her home. The victim described the defendant and the car to the police, who later identified him by tracing the license plate number. The Government, without a warrant, requested the telephone company to install a pen register on the victim's telephone. The pen register identified that the calls originated from the defendant's home. Based on the calls, and additional evidence, police obtained a search warrant. The search revealed a phone book, which indicated the victim's name and phone number[18]. The defendant was arrested on the basis of such evidence[19]. Defendant sought to suppress the evidence based on a "legitimate expectation of

15. See *United States v. Miller*, 425 U.S. 435 (1976).
16. *Id*. at 439.
17. See *id*. at 442.
18. See *Smith v. Maryland*, 442 U.S. 735 (1979).
19. See *id.*

privacy"[20], arguing that the installation of the pen register and the identification of dialed numbers constituted a violation of one's legitimate expectation of privacy[21].

Using the rule established in *Katz*, the Court held that the defendant, under the Third-Party Doctrine, had no legitimate expectation of privacy[22] in the numbers that he dialed, since all users must display such numbers to the telephone company, and the subjective expectation that these would remain private was not something society would be prepared to recognize as reasonable[23]. Based on *Miller*, the Court concluded that the defendant assumed a risk by voluntarily conveying information to the third party[24].

In a separate opinion, and what can only be called an ominous allusion to future intrusions by the Government through the tools of third parties, Justice Brennan stated:

> The numbers dialed from a private telephone – although certainly more prosaic than the conversation itself – are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long-distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life[25].

Similarly, Justice Marshall addressed the argument of assumption of risks. He stated, "unless a person is prepared to forgo use of what for

20. *Id*. at 741 ("Petitioner's claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in *Katz*, infringed a *legitimate expectation of privacy* that petitioner held").

21. See *id*. at 742.

22. See *Smith*, 442 U.S. at 744.

23. See *id.*

24. See *id.* ("When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and exposed that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed").

25. *Id*. at 748 (Brennan dissenting).

many has become a personal or professional necessity, he cannot help but accept the risk of surveillance"[26]. Justice Brennan added, "[i]t is idle to speak of assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative"[27]. Both allude to the risks related to the Third-Party Doctrine in the modern age. Technology has entrenched itself so deeply into people's lives that it has become a necessity. It is not simple to expect an individual to assume the risk of sharing information with a third party, when they have no other choice, and, at times, no awareness of the shared information.

2.2. *Third-Party Doctrine Stalls*

2.2.1. *Skepticism Over Third Party:* United States v. Jones

After decades of consistency, the Third-Party Doctrine came under scrutiny in the case *United States v. Jones*[28]. In *Jones*, Antoine Jones came under suspicion of drug trafficking[29]. The Government obtained a warrant to install a tracking device underneath his car which was parked in a public parking lot[30]. Over the next 28 days, the Government tracked the vehicle, collecting more than two thousand pages of data[31]. With the support of this data, Jones was charged with conspiracy to possess and distribute drugs[32]. Relying on the Third-Party Doctrine, the District Court suppressed the information obtained while the vehicle was parked in Jones's residence, but allowed everything else, reasoning that, since the roads on which Jones was traveling were public, he had no reasonable expectation of privacy[33]. The Court of Appeals disagreed and reversed the decision, finding that the Government's warrantless tracking of Jones's car was an intrusion of Fourth Amendment rights[34].

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26. *Smith*, 442 U.S. at 750 (Marshall dissenting).
27. *Id.* (Brennan dissenting).
28. See *Jones*, 565 U.S. 400 (2012).
29. See *id.* at 402.
30. See *id.*
31. See *id.* at 403.
32. See *id.*
33. See *id.*
34. See *id.*

The Government appealed to the Supreme Court and argued that, although the information was not directly shared with a third party, it had been received through the use of the public road system, therefore, Jones had no reasonable expectation of privacy[35]. The Court disagreed, stating that, by attaching a device on Jones's vehicle, the Government invaded a constitutionally protected area[36].

Although Justice Sotomayor ultimately agreed with the majority, she wrote in her prophetic concurring opinion that the Court should address the Third-Party Doctrine head-on.[37] She specifically referred to the impact of the doctrine on individuals in the modern age:

> People reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers... I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year[38].

She suggested that a better solution to the problem would be to address the problem through the lens of *Katz*, according to which an individual has a reasonable expectation of privacy under the Fourth Amendment[39].

35. See *id.* at 410.

36. See *id.*

37. See *id.* at 417 (Sotomayor concurring "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties").

38. *Id.*

39. See *id.* ("I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection").

2.2.2. *Winds of Change:* Carpenter v. United States

The wreck of the traditional notion of privacy, possibly caused by the appearance of digitalization in the modern world and influenced by the echoes of Jones, has driven the Supreme Court to a change in its attitude. In *Carpenter*, the landscape of police investigation had changed from the one in Jones, five years before. In April 2011, four men were arrested for a long string of armed robberies of cell phones in Ohio and Michigan[40]. The FBI managed to seize some of the members, turning them to their cause of capturing the rest[41]. The seized criminals quickly turned on Timothy Carpenter and his brother, providing the government with their phone numbers[42]. The Government used the numbers to apply for court orders under the Stored Communications Act, in order to access cell phone records from Sprint and MetroPCS.[43] The first court order provided the Government with 152 days of cell-site location information records (CLSI), while the second supplied two more days of data[44]. Altogether, the Government had obtained 12,000 CSLI data pinpointing the location of an individual[45] and it was able to produce a detailed map that placed Carpenter near the robberies' sites[46]. Furthermore, they could theoretically go back five years and construct a detailed map of Carpenter's location throughout his life[47]. Carpenter was charged with six counts of robbery and carrying a firearm during a federal crime, and was convicted to more than 100 years of prison[48].

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40. See *Carpenter*, 138 S. Ct. 2206, 2212 (2018).

41. See *id.*

42. See *id.*

43. See *id.* ("That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it *offers specific and articulable facts showing that there are reasonable grounds to believe* that the records sought *are relevant and material to an ongoing criminal investigation*").

44. See *id.*

45. See *id.* ("Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI)").

46. See *id.* at 2213.

47. See *id.* at 2218.

48. See *id.* at 2213.

However, the Court determined that the Government had violated Carpenter's Fourth Amendment rights when they accessed CSLI data from the carriers, and in an unprecedented move[49], withdrew from the precedent of the Third-Party Doctrine and laid out a new balancing test, that could be used in similar circumstances[50]. *Carpenter* had a narrow view. The decision did not eliminate the possibility of obtaining location based on tower dumps, nor did it retreat from the established *Smith* and *Miller* decisions of obtaining information through banking records and cell phone records[51]. However, it established a balancing test for future cases to scrutinize warrantless police activity of an individual's private digital footprint[52].

The following sections will cover in detail the balancing test established in *Carpenter* and apply it to digital areas where it could serve as a gatekeeper to warrantless third-party information gathered by the Government. Perhaps, in the future, it may become a clear legal standard applicable to modern privacy conflicts.

3. *Analysis*

3.1. Carpenter *Balancing Test*

In what amounted to a severe misrepresentation by the Government, the assertion was that the Third-Party Doctrine applied to *Carpenter,* because cell phone location tracking data was similar to business records[53]. Justice Roberts, however, deduced an argument perpetuated by the Government, from *Miller* and *Smith* and established a balancing test. The application of this test could additionally be accounted for other pervasive technologies, which are currently being used by the Government to obtain individual data without any legal or official authorization[54].

49. See *id.* at 2220.
50. See *id.*
51. See *id.*
52. See *id.*
53. See *id.* at 2210.
54. See *id.*

Justice Roberts broke down the Third-Party Doctrine and applied it to Carpenter. Firstly, he assessed whether the individual had a reasonable or reduced expectation of privacy[55]. In determining so, the Court took two steps. The Court contrasted that in *Smith* and *Miller,* the shared information presented certain limitations, incomparable to those of *Carpenter*, "[t]here is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers today"[56]. Unlike banking records or a pen register, the wealth of CSLI allows the government a pervasive ability to trace a person's current and past location in a five-year time span with nearly perfect precision[57]. Furthermore, the information is time stamped, therefore, the level of pervasiveness increases as the Government is able to easily pinpoint their daily activity, be it a visit to religious institutions, their professional life, sexual associations, or other pursuits[58].

Secondly, Justice Roberts looked at whether voluntary exposure under the Third-Party Doctrine applies to CSLI. He reasoned that for the information to be truly voluntary, an individual had to have some choice in sharing the information. Cell phones have become so indispensable in everyday life, that they are almost required in the modern world, further diminishing one's options[59]. Even AT&T, who handsomely profits from the extensive use of their services, echoes a similar concern over the lack of genuine choice:

> *Smith* and *Miller* rested on the implications of a customer's knowing, affirmative provision of information to a third party and involved less extensive intrusions on personal privacy. Their rationales apply poorly to how individuals interact with one another and with information using modern digital devices...a legal regime that forces individuals to choose between maintaining their privacy and participating in the

55. See *id.*
56. *Id.*
57. See *id*. at 2210.
58. See *id.*
59. See *id*. at 2220.

> emerging social, political, and economic world facilitated by the use of today's mobile devices or other location-based services[60].

Additionally, voluntariness connotes an affirmative act on the part of the user, however, in the case of CLSIs, the user makes no affirmative act aside from turning on the cell phone[61]. Once the user turns a phone on, any subsequent action (checking e-mail, phone calls or texts messages) generates a CLSI[62]. Thus, the user assumes no voluntary risk of sharing the data with a third party.

Putting it all together, the Court balanced the voluntary exposure of data with the reasonable expectation of privacy and found that the government had stepped on Carpenter's Fourth Amendment rights[63].

3.2. *Applying the Balancing Test*

3.2.1. *Tower Dumps*

Unfortunately for third-party denouncers, the narrow decision by the Court allowed the Third-Party Doctrine to advance mostly unabated[64]. In a convoluted move, the Court allowed tower dumps to continue[65]. Tower dumps are the big brother of CSLI. A CSLI is sought out when the government has a suspect in mind and is searching for their number in the midst of a haystack of numbers from a cell tower, at a particular time and location[66]. As in the case of Timothy

60. En Banc Brief of *Amicus Curiae* by Counsel for *Amicus Curiae* AT&T Mobility, LLC, not supporting either party, *United States of America v. Quartavious Davis,* 12–12928, *5–6 (11th Cir. filed November 17, 2014).

61. See *id.*

62. See *id.*

63. See *id.*

64. See *Carpenter*, 138 S. Ct. at 2220 ("Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or *tower dumps*... We do not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras").

65. See *id.*

66. See *Carpenter,* 138 S. Ct. at 2206 ("Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI)").

Carpenter, the collection of information in CSLIs might range from a few seconds to more than five years[67]. In contrast, in a tower dump, the government investigates criminal activities which take place at a certain location, at a particular time, and the suspect of which is unknown[68]. The timing aspect could vary between a few seconds and a few days, far shorter than CSLI, and yet no less intrusive[69].

Although tower dumps reveal less information about a particular individual, they are nonetheless highly intrusive. The provided information could be of little use to an investigation, taking into consideration the absence of identity of a suspect, but unlike CSLI, which can reveal somewhat about certain individuals, in the case of tower dumps, the government is able to request the phone numbers and locations of every individual in an area, at a certain time – exponentially increasing the level of intrusiveness upon a multitude of individuals. For instance, in 2010, the FBI received more than 150,000 numbers in a single dump to determine the location of a suspect in a bank robbery, and there are more than 14,000 tower dump requests annually[70].

Further concerns follow the conclusion of the investigation, since there is little oversight on what happens to that information and its disposal, as certain governmental agencies have retained the information for many years[71]. The government has revealed neither what measures are taken to notify those involved in the collection of information, nor whether any measures are in place to ensure that collection of data from unsuspected individuals is minimized[72].

Considering that CLSIs and tower dumps share a DNA, an application of the *Carpenter* balancing test should be straightforward. As

67. See *id.*

68. See Katie Hass, *Cell Tower Dumps: Another Surveillance Technique, Another Set of Unanswered Questions*, (ACLU, March 27, 2014), available at https://www.aclu.org/blog/national-security/privacy-and-surveillance/cell-tower-dumps-another-surveillance-technique (last visited April 26, 2020).

69. See Mason Kortz and Christopher Bavitz, *Cell Tower Dumps*, 63 Boston Bar Journal 27, 28 (2019).

70. See *id.*

71. See Ellen Nakashima, *Agencies collected data on Americans' cellphone use in thousands of 'tower dumps'*, (Washington Post, December 9, 2013), available at https://www.washingtonpost.com/world/national-security/agencies-collected-data-on-americans-cellphone-use-in-thousands-of-tower-dumps (last visited April 26, 2020).

72. *Id.*

to the aspect of pervasiveness, tower dumps provide the government with vast amounts of data on numerous individuals. Furthermore, this data, like CSLI, can be used to map out the daily activity of every single individual in the data set, which the government warrantlessly requested from various providers[73]. For the Court, such an intrusion on a known suspect was found to be too pervasive[74]. In the case of tower dumps, the data is of numerous unaware individuals whose privacy is intruded by the government to have an unknown needle in a haystack found.

It is argued that the data set considers a large number of unknown subscribers within a relatively small-time window[75]. However, taking into account that most, if not all, of these subscribers are innocent in whatever crime the government may be investigating, and these subscribers have not volunteered any information to third parties, it should be obvious that the *Carpenter* balancing test shall likewise apply to tower dumps[76]. These individuals did not assume the risk when they decided to use their phones, and for many they had no awareness of such level of intrusion[77]. As in the case of CSLI, these individuals simply want to engage in an inoffensive activity such as calling a beloved one, or connecting on social media (perhaps chuckling at a funny cat video). The information collected by subscribers is meant to serve the purpose of providing better cell service, and the participants are strung along with little choice in today's digital age. These individuals have no realistic alternative in the matter because all subscribers collect information through the use of their towers.

Lastly, to balance the voluntariness of tower dump data with the legitimate expectation of privacy others expect from that data, we would find that most of these individuals, as well as society, would have a legitimate expectation of privacy of the data.

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73. See Kortz and Bavitz, 63 Boston Bar Journal 27, 28 (cited in note 70).

74. See *Carpenter*, 138 S. Ct. at 2220.

75. See Amanda Regan, *Dumping the Probable Cause Requirement: Why the Supreme Court Should Decide Probable Cause is Not Necessary for Cell Tower Dumps*, 43 Hofstra L. Rev. 1189, 1217–1219 (2015).

76. See Katie Hass, *Cell Tower Dumps* (cited in note 69).

77. *Id.*

3.2.2. *Smart Homes*

Cicero wrote, "What is more sacred, what is more strongly guarded by every holy feeling, than a man's own home?"[78]. Words spoken centuries ago have permeated modern days in Western culture . We treat our home as a sacred place, which the Constitution under the Fourth Amendment has explicitly addressed as a place that should be "free from unreasonable governmental intrusion"[79]. Yet, as everything else, the digital revolution has penetrated our homes. We upgrade our "unintelligent" homes with Google Assistant, or the Amazon Echo, devices that now are able to control everything from turning on a TV to regulating our showers[80]. The devices are constantly in the working mode and listen to our instructions, with every syllable being recorded and preserved in servers, subsequently overseen by Google, Amazon, and other third parties[81]. They may even indivertibly catch us in the process of what the government may later construe as criminal conduct.

One evening, James A. Bates and his co-workers decided to watch a football game and have a drink at Bates's home[82]. The co-workers stayed for the night, and in the morning, one of them was found drowned in the bathtub[83]. Law enforcement officers found blood and broken bottles around the bathtub, and the medical examiner concluded the case as homicide[84]. Law enforcement immediately seized Bates's electronics and obtained a search warrant directing Amazon to provide vast amounts of information in the hopes of finding among the records any hint to struggle or argument that led to the co-worker's

78. Marcus Tullius Cicero, *Ad Pontifices,* XLI, 109.

79. U.S. Const. Amend. IV.

80. See Jay Stanley, *The Privacy Threat From Always-On Microphones Like Amazon Echo* (ACLU, January 13, 2017), available at https://www.aclu.org/blog/privacy-technology/privacy-threat-always-microphones-amazon-echo (last visited April 26, 2020).

81. *Id.*

82. See Amy B. Wang, *Police land Amazon Echo data in quest to solve murder* (Chicago Tribune, March 9, 2017), available at https://www.chicagotribune.com/business/blue-sky/ct-amazon-echo-murder-wp-bsi-20170309-story.html (last visited April 26, 2020).

83. *Id.*

84. *Id.*

death[85]. Law enforcement has also obtained data from Bates's smart water meter, by showing a simple probable cause, in attempts to uncover extensive use of water to wash away blood[86]. Amazon contested the search in their motion stating that the request "would chill users' exercise of their free speech rights to seek, receive, and review information in the privacy of their own homes"[87]. They further indicated that the amount of requested information goes beyond what a mere document could provide[88].

From Bates's point of view, at no point could he have contested his privacy concern over the data held by Amazon and seized by law enforcement. His privacy concerns – in his own home – were disregarded and the fight ultimately raged between law enforcement and third parties over the data[89]. Although Bates eventually consented to the search, and law enforcement later dropped the charges, the invasion into Bates's privacy painted a bleak picture of the modern-day deterioration of privacy – an invasion of one's castle[90]. Bates's attorney stated as follows: "[y]ou have an expectation of privacy in your home, and I have a big problem that law enforcement can use the technology that advances our quality of life against us"[91].

Taking the previous event into account, one can easily see that the Court needs to take a serious look at Third-Party Doctrine, apply the *Carpenter* balancing test as a legal standard to smart home devices, and extend a reasonable expectation of privacy to such data. Under the *Carpenter* balancing test, we would first look at whether someone would have a legitimate or reduced expectation of privacy in the

85. *Id.*

86. See Amy B. Wang, *Police land Amazon Echo data in quest to solve murder* (cited in note 83).

87. Morgan M. Wiener, *Digital Evidence and Privacy: Can you ask Alexa if mom's incapacitated?* (Holland & Heart LLP, March 1, 2017), archived at http://www.lexology.com/library/detail (last visited April 26, 2020).

88. *Id.*

89. *Id.*

90. See Amy B. Wang, *Police land Amazon Echo data in quest to solve murder* (cited in note 83).

91. Eric Boughman, et al, *"Alexa, Do You Have Rights?": Legal Issues Posed by Voice-Controlled Devices and the Data They Create* (American Bar Associations, July 20, 2017), available at https://www.americanbar.org/groups/business_law/publications/blt/2017/07/05_boughman (last visited April 26, 2020).

information shared in their own homes. When addressing one's legitimate expectation of privacy, an observation could indicate the limitations one expects when sharing information in their own homes, and the pervasiveness one can experience when the Government obtains such information – with only probable cause if necessary.

The Fourth Amendment has always presented a strict limitation when one's property is invaded; and a firm line is drawn at the door of the home[92]. Even if a person is to share that data with some third party, that information should undergo the strictest scrutiny and a person should have a legitimate expectation of privacy in that data. In Bates's case, an absent search warrant left no ground for law enforcement to obtain the data from third parties; the Government obtaining the data without a warrant is absolutely pervasive. What purpose would the Fourth Amendment serve if the Government's intrusion in the homes and obtained data on the ground of being shared with third parties were to be confronted with the idle reaction? When at home, people are in the most vulnerable, relaxed and intimate state; a great level of privacy is expected in the abode from intruders. The information shared with third parties carries the same insecurities when intruded upon, and at times the same level of intimacy. A person has a legitimate expectation of privacy in that data, and should be the one deciding whether the data is necessary to be handed to authorities.

The second element to consider from the *Carpenter* balancing test is whether there is some voluntary exposure in sharing data from devices in one's own home. What transpired in Bates's home that evening is something that may never be known. However, there was no indication that Bates took a voluntary risk by bringing an Amazon Echo into his own home[93]. When individuals purchase the devices, they have no intention of sharing their voice recordings with an outside party. Instead, they are simply looking for simplification of their daily routines – playing music, turning on the TV, obtaining an innocuous factoid from the internet. Bates behaved similarly. He took

92. See *Payton v. New York*, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house").

93. See Morgan M. Wiener, *Digital Evidence and Privacy: Can you ask Alexa if mom's incapacitated?* (Holland & Heart LLP, March 1, 2017), available at http://www.lexology.com/library/detail (last visited April 26, 2020).

no affirmative act when using his Amazon Echo, aside from deciding to listen to some music[94].

Finally, if the balance is struck in Bates's voluntary exposure of the data with the legitimate expectation of privacy, it would be found that Bates had a legitimate expectation of privacy in the data shared in his home.

4. *Conclusion*

Privacy has always been a cornerstone of American identity. For centuries, the Fourth Amendment has stood as guardian at the gate armed with the following words:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized[95].

Yet, the rise of the Third-Party Doctrine certainly proved a strong adversary to this guardian. It carved exceptions into the body of the Fourth Amendment and supplied the Government with the necessary tools to defeat it. It exposed people to insecurity in their own houses through devices such as the Amazon Echo. The documents and belongings that now reside in digital format on the cloud, can be accessed by the Government without warrants upon the showing of probable cause. Fortunately, the Amendment withstands today, and yet, it requires reinvigoration. Just as *Katz* complemented the Fourth Amendment with the precious armor of reasonable expectation of privacy, the same must be done with the shield of *Carpenter*[96].

Firstly, it must be inquired whether the individual has a reasonable or reduced expectation of privacy by assessing the level of

94. *Id.*
95. U.S. Const. Amend. IV.
96. See *Katz v. United States*, 389 U.S. 347, 360 (1967).

pervasiveness of the Government in the individual's digital data[97]. Secondly, it shall be considered whether voluntary exposure under the Third-Party Doctrine applies to the digital shared data by assessing whether the individual has some choice in sharing the information, by assuming some risk when doing so[98]. Lastly, the legitimate expectation of privacy is weighed against the voluntariness of the shared information, and a decision is made as to whether the information could be outside the purview of an individual's legitimate expectation of privacy[99]. It can therefore be assumed that the Fourth Amendment has been fortified and reinvigorated in the digital age and beyond.

97. See *Carpenter v. United States*, 138 S. Ct. 2206, 2210 (2018).
98. *Id.* at 2220.
99. *Id.*

Home Confinement in the United States: The Evolution of Progressive Criminal Justice Reform

Markus Aloyan*

Abstract: Home confinement, also known as house arrest or home detention, first appeared in the United States in the 1970s as a form of pretrial release issued after a defendant's indictment. Today, this alternative sentencing scheme possesses several additional purposes. Home confinement is imposable as a form of supervised release from incarceration and as a term of parole. More importantly, it has evolved into a condition of probation and an autonomous criminal sanction that serves in a capacity independent of probation. This article aims to show that although historically spurred in large part by the practical deficiencies of the American prison system (namely its overcrowding and excessive costs), the study of home confinement actuation promulgates a broader understanding of its effectiveness in the promotion of rehabilitation and the prevention of recidivism. Psychological and fiscal aspects will be analyzed with domestic and international (New Zealand) considerations. Concurrently, this paper draws attention to the margin of judicial discretion afforded in shaping individual home confinement implementations, and discusses its advantages and related concerns.

Keywords: Home confinement; house arrest; criminal law; recidivism; prison.

1. *Introduction*

Home confinement, also known as house arrest or home detention, is a criminal sanction that consists of confining a person to their place of residence. Travel is forbidden or restricted to departures of specific and pre-authorized purposes, such as employment. If the confined individual violates the terms of their home confinement, they may incur the imposition of further detention and the possibility of incarceration. The threat of further sanctions ensures that persons under home confinement impositions are incentivized to abide by the protocols set forth upon them[1].

While home confinement as a government-imposed sanction has existed throughout history[2], it first appeared in the United States as a form of supervised pretrial release. An offender was placed under temporary terms and conditions of confinement, whose violation would result in an additional punishment[3]. Today, home confinement serves several purposes: it is imposable upon sentencing as a condition of probation, whereby the sentence of confinement is suspended so

* Markus Aloyan possesses a Juris Doctor from the University of Massachusetts School of Law as of May 2020. He holds his Bachelor of Science in Business Administration and Management with an Emphasis in Finance from California State University, Los Angeles.

1. See *United States v. Murphy*, 108 F.R.D. 437, 439 (E.D.N.Y. 1985).

2. See Randy R. Gainey, *House Arrest*, in David Levinson (ed), 2 *Encyclopedia of Crime and Punishment* 859 (SAGE 2002).

3. See *id.*

long as the offender does not violate their terms of probation; as an autonomous criminal sanction that serves an alternative to incarceration and independent of probation; and, lastly, as a term of parole[4].

This evolution connects with the growing popularity of home confinement. One cause for the trend is the growing concern surrounding the overcrowding and the growing cost of the American prison system. The increasing popularity of its imposition also reflects a widely-held view that home confinement is favorable in the prevention of recidivism and promotion of rehabilitation. This goal is facilitated not only by preventing the detrimental psychological impacts that stem from incarceration, but also because the judiciary is required to tailor the terms of home confinement to the underlying facts of every case through a process known as judicial discretion.

This article considers these key aspects of the history and the role of home confinement in the United States. It aims to show how this measure, while historically spurred in large part by practical deficiencies of the prison system, responds today to a broader understanding of the dimensions of rehabilitation and non-recidivism. Moreover, this paper draws attention to the margin of judicial discretion afforded in shaping home confinement in particular cases by discussing its advantages and related concerns.

The structure of this paper is as follows. Section 2 recounts the historical development of home confinement in the United States. It describes the first experimental implementations of pretrial home confinement, the rise of home confinement as a probationary measure, its evolution into a separate criminal sanction that served as an alternative to incarceration, and statistics on its prevalence today. Section 3 analyzes what and how key goals are served by home confinement schemes. Section 4 discusses judicial discretion and the risks associated with sentencing disparity, illustrated by two exemplifying cases introduced in Section 2 and by California's home confinement statute.

4. See Jody Klein-Saffran, *Electronically Monitored Home Confinement – Not a Panacea for Corrections, but a Useful Tool*, 4 IARCA Journal 30 (1991), available at https://www.bop.gov/resources/research_projects/published_reports/gen_program_eval/oreprelectronicmon.pdf (last visited April 26, 2020).

2. *Historical Development of Home Confinement in the United States*

2.1. *Early Experiences at the State Level*

Home confinement was originally introduced in the United States as a form of supervised pretrial release. One the first known instances of home confinement dates back to 1976; the San Diego County Probation Department directed supervision of juvenile delinquents awaiting trial as an alternative to incarceration[5]. The program was implemented as a means of ensuring that the children were able to attend school while facing punishment for their crimes[6]. Home confinement, as opposed to traditional incarceration, was found a healthier alternative for the children's psyche and rehabilitation[7]. Today, this finding is also supported by studies that show that juveniles placed into prisons are five times more likely to commit suicide[8]. Accordingly, these studies illustrate that home- and community-based interventions are more effective in preventing recidivism than incarceration for young persons charged with various kinds of offenses; the causation is linked to their not fully developed psyche[9].

Although its early implementation began with children, home confinement was soon adopted by state legislatures as a form of probation. Probation has a long history in the United States. It first appeared in 1841[10] because of the pioneering efforts of boot maker John Augustus, later known as the "father of probation"[11]. Augustus persuaded a Boston judge to entrust him the custody of a common

5. See United States Bureau of Justice Statistics, *Prisoners in 1983* (1984), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=3500 (last visited April 26, 2020).

6. See *id.*

7. See *id.*

8. See Wendy Sawyer, *Youth Confinement: The Whole Pie 2019* (Prison Policy Initiative, December 19, 2019), available at https://www.prisonpolicy.org/reports/youth2019.html (last visited April 26, 2020).

9. See *id.*

10. See County of San Mateo Probation Department, *The History of Probation*, available at https://probation.smcgov.org/history-probation (last visited April 26, 2020).

11. See New York City Department of Probation, *History of Probation*, available at https://www1.nyc.gov/site/probation/about/history-of-probation.page (last visited April 26, 2020).

drunkard for a brief period[12]. The drunkard appeared in court sober three weeks later, and to the surprise of all in attendance, composed himself well[13]. Thus, the very first form that probation took in the United States was an unconventional decision by a progressive judge. Despite the absence of statutory provisions, this probationary scheme was soon widely implemented by judges as a form of alternative sentencing. In response, the United States Supreme Court found in 1916 that the lower-level judiciary did not possess the authority to impose such decisions and sanctions[14]. This holding led to President Calvin Coolidge's signing of the National Probation Act in 1925. The Act provided the judiciary the power to suspend the execution of traditional sentences, and to use their discretion in determining the terms and conditions of probation that they deemed most suitable to the case in question[15]. With the passage of this congressional act, impositions of probation gained legal recognition. It later developed into a multifaceted tool; home confinement serves as one of the facets.

In 1979 an Illinois statute codified home confinement as an acceptable condition of probation; requiring the defendant in question to remain inside a location of the court's choosing[16]. This codification reflected the success of existing juvenile programs, made apparent the growing concerns with the effectiveness of traditional incarceration for light offenders, and was influenced by the changes of societal attitudes[17]. Empowering the judiciary to impose home confinement by means of state legislation preempted the Supreme Court from questioning the legitimacy of this power, impeding what previously transpired at the federal level[18]. Therefore, a judge was finally statutorily authorized to decide that a defendant could serve a sentence under home confinement rather than traditional incarceration. The

12. See *id.*

13. See *id.*

14. See *Ex parte United States*, 242 U.S. 27 (1916); Administrative Office of the United States Courts, *Probation and Pretrial Services History*, available at https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history (last visited April 26, 2020).

15. *Id.*

16. See Ill. Ann. Stat. ch. 38 § 1005-6-3b(10)(i).

17. See J. Robert Lilly and Richard A. Ball, *A Brief History of House Arrest and Electronic Monitoring*, 13 Northern Kentucky Law Review 343, 356–366 (1987).

18. See *id.*

Illinois statute provided that the defendant's home was to serve as the location of confinement[19]. Under this statute, a judge is able to impose curfews under certain circumstances: a defendant is able to ask for authorization to leave their confinement premises for certain events[20]. Therefore, these initial implementations were consistent with contemporary impositions in regard to constant supervision with the right to travel for limited purposes. It essentially strayed from modern implementations because of technological limitations, in that electronic monitoring was not yet available.

2.2. *The Influence of Prison Population Growth in the 1970s and 1980s*

United States prisons have become increasingly overpopulated. In 2018, America registered the highest rate of incarcerated citizens in the world: 655 per 100,000 Americans were incarcerated[21]. Although the United States represents only 4.5 percent of the world's population, it houses about 25 percent of the world's prisoners[22]. The United States Bureau of Justice Statistics estimated that the prison industry in the United States was worth about $74 billion in 2007; this estimated value has since increased[23].

Since the 1980s, the increased use of home confinement has been part of a wider effort to combat overcrowding in prisons and the high cost of its upkeep[24]. In the United States, increases in violent crime rates during the 1960s promulgated the prevalence of conservative political movements dedicated to decreasing crime rates and

19. See Ill. Ann. Stat. ch. 38 § 1005-6-3b(10)(i).

20. See *id.*

21. See Roy Walmsley, *World Prison Population List* (Institute for Crime & Justice Policy Research 2018), available at https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (last visited April 26, 2020).

22. See *id.*

23. See Tracey Kycklhahn, *Justice Expenditures and Employment, FY 1982–2007 – Statistical Tables* (United States Bureau of Justice Statistics, 2011), available at https://www.prisonlegalnews.org/media/publications/bjs_justice_fy_1982–1007_expenditures_and_employment_statistics_2011.pdf (last visited April 26, 2020); Shelley S. Hyland, *Justice Expenditure And Employment Extracts, 2016 – Preliminary* (United States Bureau of Justice Statistics, November 7, 2019), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=6728 (last visited April 26, 2020).

24. See *id.*

drove the criminal justice system to harshen the severity of criminal sanctions as an attempt to prevent recidivism[25]. In this context, the prison population increased while fewer convicts were released on parole for reasons such as good behavior[26], resulting in a 40 percent increase in the population of incarcerated Americans during the 1970s[27]. Soon enough, overcrowding in prisons developed into a major issue and thus societal pressures to reform increased[28]. In 1984, when – as discussed below – states began to implement home confinement as a form of alternative sentencing, the state and federal prison systems were populated at 110 percent of their capacity; this level has since stayed relatively stagnant[29], despite violent crime rates plateauing in 1993[30].

There emerged two general philosophies on how to best address the problem of growing prison populations. The first approach, usually upheld by conservative policy-makers, suggested allocating more funds for the construction of prisons; the second, commonly pursued by liberal politicians, proposed reform through alternative sentencing[31]. Conservative President Ronald Reagan increased the federal budget during his second term by 40 percent, with the goal – among others – of repairing the American prison system[32]. However, while additional budgeting was allocated by President Reagan's administration, sociologists noted that constructing a new prison would cost $80,000 per prison cell, and the cost of holding each inmate would amount to $20,000 per year[33]. The high cost of incarceration forced

25. See Patrick A. Langan, *The Prevalence of Imprisonment* (United States Bureau of Justice Statistics, 1985), available at https://www.bjs.gov/content/pub/pdf/pi.pdf (last visited April 26, 2020).

26. See *id.*

27. See *id.*

28. See *id.*

29. See United States Bureau of Justice Statistics, *Prisoners in 1983* (cited in note 5).

30. See Lauren-Brooke Eisen and Oliver Roeder, *America's Faulty Perception of Crime Rates* (Brennan Center for Justice, March 16, 2015), available at https://www.brennancenter.org/our-work/analysis-opinion/americas-faulty-perception-crime-rates (last visited April 26, 2020).

31. See *id.*

32. See *id.*

33. See Joseph W. Lipchitz, *Back to the Future: An Historical View of Intensive Probation Supervision*, 49 Federal Probation 78, 78 (1985); Wendell Rawls Jr, *Crises and Cutbacks Stir Fresh Concerns on Nation's Prisons* (The New York Times, January 5,

politicians to consider cost-effective alternatives. This drew increased attention to new forms of alternative sentencing schemes such as home confinement, which started gaining traction with an increasing awareness of its benefits[34].

2.3. *Federal Reform:* United States v. Murphy *and* United States v. Wayte

Against this historical and social background, two federal cases in the 1980s set the stage for alternative sentencing in the form of house arrest. They served as a guide for years to come and are often studied because of their practicality in understanding the mechanisms and objectives of home confinement. In *United States v. Murphy*, the defendant was found guilty of mail fraud charges and obstruction of justice. Defendant Murphy aided her employer in committing fraud and convinced several witnesses to withhold the truth in their testimony. She faced a prison sentence of 50 years and $56,000 in fines[35]. She accepted an offer to plead guilty and thus settled for a more lenient punishment[36]. Murphy was in fact provided with an alternative to incarceration: a groundbreaking form of punishment called house arrest[37]. The sentencing judge, observing that "[i]t [was] unclear at [that] time whether a penalty of house arrest may be imposed without probation as a substitute for incarceration"[38], imposed home detention nonetheless for a period of two years. Murphy was also forced to comply with community service requirements[39]. Her progress was monitored with daily phone calls and constant, unannounced in-person check-ins at her home[40]. She was to remain on-call and to expect these check-ins at any hour of the day[41]. As addressed in the previous paragraphs, home detention schemes contemplate and incorporate exceptions. In

1982), available at https://www.nytimes.com/1982/01/05/us/crises-and-cutbacks-stir-fresh-concerns-on-nation-s-prisons.html (last visited April 26, 2020).

34. See *Back to the Future* at 79 (cited in note 33).
35. See *Murphy*, 108 F.R.D. at 439 (cited in note 1).
36. See *id.*
37. See *id.*
38. *Id.*
39. See *id.*
40. See *id.*
41. See *id.*

Murphy's case, the defendant was given four basic excuses for vacating her residence: commuting to work (community service included), medical appointments, religious events, and grocery shopping[42]. The four exceptions required pre-authorization from Murphy's probation officer[43]. Murphy was further allowed typical unusual-need exceptions: deathbed visits and funerals. This particular kind of exception was only reserved for her immediate family[44]. There was no other exception for Murphy to exit her residence while serving the two-year period of home detention[45]. If she was to find employment or change her place of residence, she was required to request authorization to do so from her probation officer[46]. Lastly, authorization was not required for visitors to frequent her home[47].

The conditions in *Murphy* were less restrictive than in *United States v. Wayte*[48]. The defendant in *Wayte* had not properly registered for the Selective Service System[49]. He was found guilty, but his sentence was suspended and he was placed on probation for six months[50]. The terms of probation stated that Mr. Wayte was to be placed under home confinement in his grandmother's residence, only to vacate the premises for emergency purposes "with the [explicit authorization] of his probationary officer"[51]. Wayte was precluded from leaving his home under any non-exigent circumstance[52]. This particular condition completely prevented Wayte from obtaining employment.

The difference in severity between the two impositions is made evident by the fact that if Wayte had left his home for employment purposes, he would have violated his conditions. This imposition was not only significantly stricter than those in *Murphy*, but is also

42. See *id.* at 442.
43. See *id.*
44. See *id.* at 444.
45. See *id.*
46. See *id.* at 439.
47. See *id.*
48. See *United States v. Wayte*. 549 F. Supp. 1376 (C.D. Cal. 1982).
49. See *id.* The Selective Service System is a United States government agency in the realm of military conscription.
50. See *Judgment and Probation/Commitment Order No. CR-82-630-TJH* (C.D. Cal. 1985).
51. *Id.*
52. *Id.*

considered strict by modern standards. The imposition of forbidding a defendant to leave their residence for employment will often be negotiated away if defendants are not wealthy enough to financially sustain themselves[53]. Wayte's conditions only allowed him to leave his residence without pre-screened authorization from his probation officer if facing a life-threatening, exigent circumstance[54]. Any of the other general exceptions discussed above, such as grocery shopping and religious events, required explicit approval by his probation officer. Wayte's situation was in theory not significantly different from actual imprisonment. If considered for its constitutionality, Wayte's situation may even stimulate debate about possible violations of his right to the freedom of religious expression[55].

The two parties successfully rehabilitated during their confinement and so illustrate the intended results of home confinement sentencing schemes. Moreover, the two cases outline different possible results of judicial discretion. Different judges decided the terms of the parties' confinements, and exercised their discretion by carefully evaluating the two situations and their surrounding facts as statutorily indicated and dictated. They determined in their discretion that the parties deserved different terms of confinement. Just as there exists no blanket holding in American jurisprudence, neither exists a blanket, binding rule of home confinement impositions because every situation will present the presiding judge different factual circumstances that require different terms of confinement. As discussed in the following paragraph, the need for governing the exercise of judicial discretion was promptly addressed by State legislation.

2.4. *Developments in State Legislation: The Case of Florida*

Florida is an example of an early pioneer of house arrest. The State created landmark distinctions through legislation in 1985[56]. Florida's home confinement statute specifies in explicit detail the conditions of

53. See Jeffrey N. Hurwitz, *House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction*, 135 University of Pennsylvania Law Review 771, 794 (1987).

54. See *Judgment and Probation/Commitment Order* (cited in note 50).

55. See U.S. Const. art. I § 1; see Hurwitz, *House Arrest* at 794–795 (cited in note 53).

56. See Fla. Stat. Ann. § 948.01.

confinement[57]. The statute states that the court provides for "intensive supervision and surveillance for an offender placed into [home confinement]" and confines the defendant to "an agreed-upon residence during hours away from employment and public service activities"[58]. Thus, the statute orders that the defendant is to remain in their home except for pre-authorized activities. Florida's *Implementation Manual for Community Control*[59] defines three categories of pre-authorized activities, which comprise employment and public service activities: essential travel, acceptable travel, and a hybrid form of travel. Essential travel pertains to religious events, one's education, public service, and regular appointments with a probation officer[60]. Essential travel includes the types of travel necessary for the offender to function in society. Movements necessary for the basic needs of the defendant's existence in society, such as visiting a bank, medical needs, shopping, and family emergencies, are instead defined as acceptable travel[61]. These movements are not strictly necessary for survival, but are related to the offender's participation in society. The third form is a hybrid between the first and the second category[62]. All forms of travel require a formal request and are authorized in advance; however, travel for family emergencies is permissible as long as the defendant alerts their probation officer later in the same day[63]. Conditions under the Florida program mimic a prison sentence. There exist no exemptions for holidays and weekends. The detainee is subject to visits for monitoring purposes at any time during the day or night, and the probation officer is not compelled to announce his inspections[64]. If the detainee is allowed employment, the conditions are not attenuated[65].

Thus, the first instance of statutory provision of home confinement as an autonomous form of sentencing, alternative to imprisonment, came to fruition. Florida courts affirmed that for sentencing

57. See Fla. Stat. Ann. § 948.03(2)(b).

58. See Fla. Stat. Ann. § 948.101(1).

59. See Florida Department of Corrections, Probation and Parole Services, *Implementation Manual for Community Control*, part B, 11 (1987).

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.*

purposes "probation and [home confinement] are two separate [and] distinct concepts"[66].

2.5. *The Prevalence of Home Confinement Today*

Since its inception, home confinement has become more common for yet another, more practical reason: technological advances that have made electronic monitoring more affordable. Correctional authorities are now able to monitor it more effectively. The monitoring of offenders by means of electronic devices was approved by the pioneering Florida legislature in 1987[67]. The first device used to electronically monitor those confined to their homes is known as an RF (radio frequency) system[68]. This device alerts a probation officer when an offender moves beyond a predetermined distance from the base unit during specific times[69].

Starting in 1997, the Global Positioning System (GPS) was also used to monitor an offender's movements in real time[70]. With these technological advances, the monitoring of defendants and offenders has been simplified. Probation officers are no longer required to physically enter the confined premises to ensure that the offender has not violated the terms of his or her probation. Furthermore, a single probation officer may supervise multiple offenders at the same time.

These technological advances in monitoring offenders contributed significantly to the use of house arrest in the United States[71]. In 1999, 3 percent of federal prisoners were placed in home confinement programs[72]. Fifteen years later, that percentage had risen to 20 per-

66. See *Mitchell v. State*, 463 So. 2d 416, 419 (Fla. Dist. Ct. App. 1985).

67. See William Bales, Karen Mann, Karla Dhungana, *A Quantitative and Qualitative Assessment of Electronic Monitoring* (National Institute of Justice, 2010), available at https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf (last visited April 26, 2020).

68. See *id.*

69. See *id.*

70. See *id.*

71. See James E. Fowler, *House Arrest* (Wiley Online Library, 2014), available at https://onlinelibrary.wiley.com/doi/full/10.1002/9781118517383.wbeccj437 (last visited April 26, 2020).

72. See Ann E. Carson, *Prisoners in 2014* (U.S. Department of Justice, Bureau of Justice Statistics, September 2015) available at https://www.bjs.gov/content/pub/

cent[73]. In 1999, the percentage of state prisoners in home confinement was 5 percent, but only increased to about 8 percent during the same time frame[74]. The disparity between federal- and state-level impositions is partly due to the fact that every American state has adopted its own unique set of criminal codes, while the federal system is uniform throughout the nation. The disparity also lends itself to differences in political stances on criminal justice reform[75].

As discussed below, the convenience and cost savings associated with these technological advances are only part of the perceived benefits of home confinement vis-à-vis traditional incarceration. Increased awareness of its effectiveness in preventing recidivism and promoting the rehabilitation of offenders also plays a role in encouraging the use of home confinement.

3. *Goals and Benefits: A Theorization of Home Confinement with an Eye to Recent Experiences*

Important touchstones of the benefits of house arrest, as opposed to traditional incarceration, are the prevention of prison overcrowding, cost savings, and an effectiveness in promoting rehabilitation and preventing recidivism. The goals of reducing prison overpopulation and its costliness concern the objective aspects of prison systems. Home confinement's aptitude to rehabilitate offenders and prevent recidivism concerns the subjective aspects of the offender. The two sets of goals are interconnected because the prevention of recidivism and successful rehabilitation of offenders helps to limit prison overpopulation and, consequently, generates cost savings.

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pdf/p14.pdf (last visited April 26, 2020).

73. See *id.*

74. See *id.*

75. See *Overcrowding* (Penal Reform International, 2020), available at https://www.penalreform.org/ issues/prison-conditions/key-facts/overcrowding (last visited April 26, 2020).

3.1. *Prison Overcrowding*

In 2018, there were a total of 2.3 million inmates incarcerated in the United States[76]. The American prison system is currently overcrowded at about 110 percent of its capacity[77].

The Florida home confinement statute specifically mentions that its goal is to reduce the rate of re-offense and incarceration to 10 percent[78]. Due to the state home confinement program, from its inception until 1987, 72.5 percent of Florida's probationers were pulled from the prison population, which resulted in a 16 percent reduction in the number of individuals traditionally incarcerated[79]. This illustrates how a greater number of enrolees in home confinement schemes would result in a deduction in the rate of overcrowding in American prisons at a significantly smaller cost than through the construction of new prisons[80].

3.2. *Cost Savings*

Home confinement implementations further the goal of cost savings. To place an individual in home confinement would generally result in the savings of governmental finances because of the high costs of conventional prison systems[81]. Multiple jurisdictions have reported an increase in resources in terms of dollars saved by implementing home confinement programs – for example, Rock Island County, a large metropolitan area of Illinois and Iowa[82]. Rock Island County's savings of $72,000 during the 1980s[83] are noteworthy be-

76. See Wendy Sawyer and Peter Wagner, *Incarceration: The Whole Pie* (Prison Policy Initiative, 2020), available at https://www.prisonpolicy.org/reports/pie2020.html (last visited April 26, 2020).

77. See *id.*

78. See Hurwitz, *House Arrest* at 783 (cited in note 53).

79. See *id.* at 786.

80. See Linda Harrison, *Adult and Juvenile Correctional Populations Forecasts* (Colorado Division of Criminal Justice, February 2019), available at https://cdpsdocs.state.co.us/ors/data/PPP/2019_PPP.pdf (last visited April 26, 2020).

81. See Hurwitz, *House Arrest* at 784 (cited in note 53).

82. See *Home Detention Gaining Support* (Criminal Justice Newsletter, November 21, 1983).

83. See Hurwitz, *House Arrest* at 784 (cited in note 53).

cause the County found home confinement to be cost effective while implemented during an era of sub-par and inefficient technology and equipment. As mentioned above, the costliness may be more apparent today with new technologies that have enhanced the ability to monitor an offender.

Cost savings may accrue through the prevention of recidivism, contributed to by the use of home confinement[84]. An analysis of costs through home confinement requires that arrests prevented by the program translate into fungible dollars to compare finances with the program's cost. The benefits of preventing recidivism include savings to criminal justice agencies and savings from the prevention of victimization of innocent Americans[85]. An analysis from 2000 found that arrests prevented by the the decrease in the rate of recidivism obtained through home confinement programs may generate $5,300 in benefits per participant[86].

3.3. *Rehabilitation and Recidivism*

Another purpose of home confinement is to rehabilitate the offender by encouraging them to live the life of a positively contributing member of society. The nation's earliest home detention statutes specifically mention the rehabilitation of the criminal[87]. This, in turn, should contribute to the prevention of recidivism.

3.3.1. *Psychological Benefits*

Home confinement can help to counter some of the detrimental psychological effects connected with traditional incarceration, in turn promoting healthier behavior and decreasing the likelihood of

84. See John K. Roman, et al,, *The Costs and Benefits of Electronic Monitoring for Washington, D.C.* 6–8 (District of Columbia Crime Policy Institute, September 2012), available at https://www.urban.org/research/publication/costs-and-benefits-electronic-monitoring-washington-dc (last visited April 26, 2020).

85. See James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, *A Quasi-Experimental Evaluation of an Intensive Rehabilitation Supervision Program*, 27 Criminal Justice and Behavior 312, 312–319 (2000).

86. See Roman, et al,, *The Costs and Benefits* at 6–8 (cited in note 84).

87. See, for example, Fla. Stat. Ann. § 948.01(4)(b).

recidivism. Psychiatric research has demonstrated that incarceration can exacerbate or even give rise to an array of disorders such as anxiety, claustrophobia, clinical depression, delusions, obsessive-compulsive disorders, panic attacks, personality disorders, phobias, and psychoses[88]. A survey of studies among jail inmates, state prisoners and federal prisoners found that, respectively, 64 percent, 54 percent and 45 percent of them reported mental health concerns; consistent reports of substance abuse are often co-occurring[89]. While only 5 percent of Americans experience serious mental illness such as schizophrenia, about 25 percent of the prison population exhibits symptoms of mental illness, often without experiencing symptoms prior to their confinement[90].

As a result of the overcrowding of the prison system, mental health problems are difficult to deal with and many ill prisoners are left untreated. These problems are compounded by the fact that many prisoners spend their days in isolation, sometimes confined to their cell for twenty-four hours per day[91]. Psychologists and sociologists have further found that prison inmates are prone to interpersonal distrust, emotional alienation, diminished sense of self-worth, and distrust of authoritarian environments[92]. Parent inmates, particularly mothers, suffer from the additional emotional stress caused by being isolated from their children[93]. In short, a general consensus exists that impris-

88. See Suzanne Yang, et al,, *Doing Time: A Qualitative Study of Long-Term Incarceration and the Impact of Mental Illness*, 32 International Journal of Law and Psychiatry 294 (2009); Doris Layton MacKenzie and Fawn Ngo Mitchell, *Inmates' Experiences in Prisons*, 21 Journal of Contemporary Criminal Justice 309 (2005).

89. See Lorna Collier, *Incarceration Nation*, 45 Monitor on Psychology 56 (2014), available at https://www.apa.org/monitor/2014/10/incarceration (last visited April 26, 2020).

90. See *id.*

91. See *id.*

92. See, for example, Stanley Cohen and Laurie Taylor, *Psychological Survival: The Experience of Long-Term Imprisonment* (Penguin Books 1973); James Tosh, *The Pains of Imprisonment* (SAGE 1982); Craig Haney, *The Psychological Impact of Incarceration* (Urban Institute, 2002), available at http://webarchive.urban.org/publications/410624.html (last visited April 26, 2020); Craig Haney, Curtis Banks and Phil Zimbardo, *A Study of Prisoners and Guards in a Simulated Prison*, in Michael Balfour (ed), *Theatre in Prison: Theory and Practice* (Intellect Books 2004).

93. See Carol Anne Hooper, *Abuse, Interventions and Women in Prison: A Literature Review* (HM Prison Service 2003).

onment can produce negative and long-lasting damage in the inmates' psyche[94].

On the contrary, a driving consideration behind home detention is that, by confining a person to their usual living environment and possibly their circle of loved ones, the above-described psychological effects are mitigable without compromising the deprivation of freedom. Therefore, home confinement can increase the likelihood that the person is positively influenced away from further offense.

3.3.2. *Economic Benefits*

A focus of liberal criminal justice reform is to improve the system in which recidivism and disenfranchisement generate lifestyles of crime motivated by a lack of economic opportunities. The *Murphy* case stresses that crime is often committed as a result of a necessity of finances and a lack of economic opportunity[95]. In instances where a lack of economic opportunity lies, individuals may resort to crime because they have no possible avenue of income to sustain their livelihood. While in traditional incarceration, offenders are unable to financially provide an income for themselves and their families; in the case of home confinement, they are usually encouraged to obtain or retain employment as a condition of probation.

3.3.3. *Statistics*

Statistics support the claim that offenders under home confinement programs reoffend at lower rates than incarcerated offenders. During the first year of the Florida home confinement program, rates of reoffending were almost identical between those placed under home confinement and ordinary probation[96]. Of the total percentage of enrolees in the home confinement program, 14 percent of the participants violated a condition imposed unto their confinement, while 10 percent of those under ordinary probation violated their

94. See Susan Greene, Craig Haney and Aida Hurtado, *Cycles of Pain: Risk Factors in the Lives of Incarcerated Women and Their Children*, 80 Prison Journal 3 (2000).

95. See *Murphy*, 108 F.R.D. at 440 (cited in note 1).

96. See Hurwitz, *House Arrest* at 787 (cited in note 53).

respective conditions[97]. Of the 14 percent whose programs terminated prematurely, 2 percent were re-arrested[98]. Although it was the first large scale implementation of the program, the statistics were favorable. The early Floridian program illustrated that offenders are able to follow their conditions successfully. Aside from the low rate of violating the conditions of probation, the program's home confinement implementation also had a significantly low rate of re-offense amongst the probationers. Of the seventy-six probationers surveyed eleven months after the completion of their program, sixty-nine had not committed a new offense[99]. In other words, 91 percent of the probationers had not reoffended.

In New Jersey, where a similar home confinement scheme was implemented shortly after Florida, the state's board of probation reported that, after one year of operation, 29 (13 percent) of the 226 participants had been re-incarcerated[100]. Of these twenty-nine individuals, only one was incarcerated for the violation of a criminal statute[101]. The most frequently occurring cause of recidivism was curfew violations[102].

Home confinement was also suggested to have a mitigating effect on recidivism rates in California[103]. While the Public Policy Institute of California (PPIC), a non-profit and non-partisan think tank, found that the state's various boards of supervisors are reluctant in providing information regarding the matter[104], the information they provide indicates that recidivism rates in California decrease when court systems are more willing to afford alternative sentencing[105].

In 1999, after criminologists from New Zealand observed American implementations achieve success in the electronic monitoring

97. See *id.*

98. *Id.*

99. *Id.*

100. See Frank S. Pearson, *New Jersey's Intensive Supervision Program: A Progress Report*, 31 Crime & Delinquency 393, 398–399 (1985).

101. See *id.* at 401.

102. See *id.*

103. *Id.*

104. See *California's Changing Corrections Landscape: Electronic Monitoring* (Public Policy Institute of California), available at https://www.ppic.org/blog/tag/electronic-monitoring/#fn-19 (last visited April 26, 2020).

105. See *id.*

of criminal defendants, home detention as a form of sentencing was enacted in New Zealand[106]. Between 2000 and 2005, the total number of implementations in New Zealand quadrupled[107]. In 2003, 87 percent of all home detention orders were successfully completed by the defendants that were subject to the implementation[108]. However, far from all of the remaining 13 percent of defendants did in fact breach their conditions of probation. About 9 percent of them did not complete their condition of probation because they were recalled to prison, while about 4 percent voluntarily returned to prison or successfully appealed their original sentence[109]. Only 0.3 percent of defendants actually violated their home confinement sentences[110]. More importantly, when analyzing for reoffending statistics, the New Zealand Parole Board found that while 29.10 percent of criminals in a traditional incarceration sentence reoffended only 11.90 percent of criminals subjected to home confinement reoffended[111].

Therefore, whether one observes statistics on the earliest conception of home confinement, or contemporary statistics in American as well as international jurisdictions, home confinement suggests itself to be a more effective tool in the prevention of recidivism in comparison to traditional incarceration.

106. See A. Church and S. Dunstan, *Home Detention, The Evaluation of the Home Detention Pilot Programme, 1995–1997* (New Zealand Ministry of Justice 1997).

107. See New Zealand Parole Board, *Annual Report 2004–2005 (*2005), available at https://www.paroleboard.govt.nz/about_us/publications (last visited April 26, 2020).

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

4. *Home Confinement and Judicial Discretion*

4.1. *Sentencing Disparity in* Murphy *and* Wayte

Terms of home confinement are ordered through the judiciary's and a probation officer's discretion, in terms of the strictness of the imposition and the degrees of exceptions allotted[112]. With respect to the *Wayte* and *Murphy* cases, an observer of law can notate the succinct differences in implementation firsthand. The sentencing in Murphy's confinement acted as more of a probationary system to monitor the defendant after her conviction to remind her that she was being surveilled. Wayte's confinement, however, was a direct substitute for a prison sentence. As noted, Wayte was only allowed to leave his residence in the event of an emergency.

These differences are explained by the different underlying facts of the cases in question and by differing judicial philosophies in regard to avoiding recidivism. In particular, a defendant's criminal history is a driving force in determining the severity of criminal sanctions. If a uniform punishment was ordered for similar offenses, the judiciary would lose its ability to factor in circumstances such as criminal history and various other details that factor in a judge's calculus in imposing a criminal sanction. As discussed in the following paragraph – which considers the example of California – the described judicial discretion is a key concern for both legislation and case law.

4.2. *Room for Judicial Discretion in California's Home Confinement Statute*

In 1988, California adopted its home confinement statute[113]. Because Californian prisons were overcrowded, legislators were eager to implement alternative sentencing provisions to alleviate the situation created by California's attempt to decrease crime rates. Different methods of alternative sentencing were implemented. This section

112. See Mark Jones and John J. Kerbs, *Probation and Parole Officers Discretionary Decision-Making: Response to Technical and Criminal Violations*, 71 Federal Probation: A Journal of Correctional Philosophy and Practice 1 (2007).

113. See California Penal Code § 1203.

will focus on "supervised electronic confinement", as named in California's statute.

4.2.1. *Statutory Language*

California's statute on home confinement was enacted through the State's home detention program. The statute states that a county's board of supervisors may allow a correctional administrator to "offer a program under which inmates committed to a county jail or other correctional facility or granted probation" may voluntarily participate or be placed under house arrest during their sentence in lieu of traditional confinement. The program also allows inmates participating in a work furlough program to opt in[114]. This introductory passage of the statute gives judges the authority to sentence a criminal defendant to home confinement under the supervision of a probation officer. The probation officer ensures that the defendant is complying with the terms of the sentence.

The statute states that the board of supervisors, "in consultation with the correctional administrator", may prescribe "reasonable rules and regulations" for the defendant to oblige and follow as terms of their sentence. The second clause of the statute provides that the administrators of the home confinement are the deciders of the terms of the defendant's conditions, but that they must decide so reasonably. The statute describes a crucial requirement for participation in the home confinement program: the defendant must agree in writing to comply with the terms; or, in the case of mandated implementation, must be provided with the explicit terms[115]. The parties thus indirectly agree to the terms prescribed through contractual obligations, the breach of which will result in traditional incarceration. Therefore, the explicit nature of the agreement is crucial to the enforcement of the implementation. The above-mentioned writing outlines the rules and regulations of the program's mandatory-enforced rules, and are to be reviewed annually[116].

114. See *id.*
115. See *id.*
116. See *id.*

The minimum requirements of a home confinement program are stated as follows:

> [T]he participant shall remain within the interior premises of his or her residence during the hours designated by the correctional administrator, [..] the participant shall admit any person or agent designated by the correctional administrator into his or her residence at any time for purposes of verifying the participant's compliance with the conditions [of detention;] the participant shall agree to the use of electronic monitoring [..] for the purposes of helping to verify compliance with the rules [..] of the home detention program. The devices shall not be used to eavesdrop [..] except a conversation between the participant and the [supervisor] to be used [..] for [..] voice identification; [..] the participant shall agree that the correctional administrator in charge of the county correctional facility from which [they] were released may, without further order of the court, immediately retake the person into custody to serve the balance of [their] sentence if the [devices] are unable to [..] perform their function, the person fails to pay fees to the provider [..] or if the person for any other reason no longer meets the established criteria under this section[117].

The defendant must remain inside of their home during the incarceration and is subject to random screenings of cooperation from their supervisor throughout the sentence. Also, the defendant agrees to the electronical monitoring of their movement. The supervisor reserves the right to imprison the defendant if they tamper with the device, do not pay the fees associated with administering the device, or fail to meet any of the other explicit requirements. The statute requires a reasonable cause for the supervising officer to doubt whether the participant has been complying with the terms of confinement. If this doubt exists, the supervisor provides authorization to a peace officer to arrest the offender or retake them into custody for completion of their sentence through traditional incarceration. An arrest warrant

117. *Id.*

is not required, but notification of removal from the program must be given in writing[118].

The statute defines the eligibility requirements of the sentence. Also, there is no requirement for a correctional administrator to allow an individual to participate into the program, but it calls for a review of the defendant's record before such a determination is to be made[119]. The legislators were of the opinion that if a criminal defendant possesses a history of avoiding court dates, they show themselves to be a flight risk and therefore not eligible for a home confinement sentence. A flight risk cannot be trusted with the liberty provided by home detention – there will exist no barrier from this defendant finding a route of overstepping their requirements and evading their court-ordered compliance.

The judge in a sentencing determination provides recommendations of home confinement if they deem it fit for the defendant. If the court recommends home confinement for a defendant, it is to be given great weight – usually implying that the condition of release or a form of alternative sentencing sanction is the most effective course of action. However, the court possesses the authority to reject the imposition of house arrest[120]. A judge is given wide discretion for the implementation of house arrest sanctions because the factors that determine whether the defendant is a eligible candidate vary on a case-by-case basis.

The judge is given discretion also in regard to the supplementary conditions of probation, and thus decides how strict of a confinement is to be sanctioned onto the offender[121]. For instance, a judge may encourage applicants to "seek and retain" employment in the community, or in some instances disallow it (as noted in the contrasts between the two, above-mentioned landmark home confinement cases)[122]. Another possible required condition is the possibility of the defendant to attend psychological counseling sessions[123]. This condition is also deemed part of the rehabilitation process to prevent further offenses.

118. See *id.*
119. See *id.*
120. See *id.*
121. See *id.*
122. See *id.*
123. See *id.*

In order to promote the rehabilitation of the defendant, the court may also allow the defendant to attend educational or vocational training classes[124]. Lastly, an offender is always allowed to obtain medical and dental health assistance[125]. It would be impractical to require a defendant to obtain these treatments in their home, therefore routine doctor's visits are almost always granted to a defendant. Violations of these conditions are punishable by potential reinstatement of traditional incarceration as described above[126].

A court is further allowed to enforce fees to be paid by the defendant in return for entering the program[127]. The fee is used to soothe the costs of implementation. The statute does not allow the court to charge defendants under the age of twenty-one these fees[128]. Also, the assessment of the fees (in terms of amounts to be charged and frequency of payments) are determined by the court through collaboration with the defendant's probation officer[129].

4.2.2. *Judicial Interpretation in* People v. Superior (Hubbard)

An appeal held in 1991 was the landmark case and first instance of home confinement in California as a criminal sanction: *People v. Superior (Hubbard)*[130]. This case set the precedent for the state of California's home confinement program in that the court found that the California home confinement statute provided for the establishment of a home detention program in lieu of county jail detention[131]. In this case, the prosecution sought to vacate the sentencing order of the Superior Court of Los Angeles County[132]. The Los Angeles Court sentenced the defendant to six months of probation served in her residence under the electronic home detention program discussed above[133]. The

124. See *id.*
125. See *id.*
126. See *id.*
127. See *id.*
128. See *id.*
129. See *id.*
130. *People v. Superior (Hubbard)*, 230 Cal. App. 3d. 287 (1991).
131. See *id.*
132. See *id.*
133. See *id.*

defendant was subject to a mandatory jail sentence in response to her third conviction for driving under the influence[134].

The appeals court decided that the imposition of home confinement as a work furlough program exceeded the discretionary authority of the judiciary because the judiciary on the trial level stepped into the bounds of authority that was statutorily handed to the Chief Probation Officer (CPO)[135]. The appropriate CPO is the decider of whether a defendant is allowed to enter a work furlough program (defined as a program in which a defendant is allowed to seek full-time employment during a probationary period or incarceration)[136]. The defendant in this case was unemployed at the time of question, therefore the question of whether the defendant was an eligible candidate for the program was completely out of the boundaries of the judiciary's authority[137].

However, although the actual home confinement sentence was overturned, this case set the standard of future cases. The idea of a "minimum security inmate" as stated in the statute was defined in this case as an inmate eligible for "type IV local detention facility as described in Title 15 of the California Code of Regulations" or for placement into the community for work or school activities, or those considered a minimum-security risk "under a classification plan developed pursuant to section 1050 of title 15 of the California Code of Regulations"[138]. The judges in the appeal explicitly defined a "low-risk offender" as an individual who, "based on an objective scoring analysis relating to the offender's risk of reoffending", is deemed worthy of the home confinement program[139]. Moreover, other factors admitted into this calculus include academic/vocational skills, employment, financial management, alcohol and drug usage, emotional stability, prior convictions, and prior probation records and revocations[140]. In regard to the work furlough program, the appeals court decided that a judge may only place the defendant into a worker's furlough program

134. See *id.*
135. See *id.*
136. See *id.*
137. See *id.*
138. *Id.*
139. *Id.*
140. See *id.*

once they've been previously admitted into it by the appropriate body[141]. However, the judiciary is allowed to retain the right to reject an applicant previously accepted into the program[142].

The prosecution argued that non-traditional incarceration would have been an inappropriate sentence to impose onto the defendant[143]. Although jail time was explicitly prescribed for the crime committed by the defendant, the court decided to weigh more value onto the fact that the home confinement statute did not exclude alternative sentencing in such cases[144]. The court justified this determination by observing that the defendant qualified as a "minimum risk offender", as defined above, and that the crime of driving under the influence was explicitly defined in the statute as an example of a possible crime deserving of alternative sentencing rather than incarceration[145].

According to the appeals court, once the above-mentioned requirements are met, the appropriate body (a county's board of supervisors) decides the matter via recommendation of probation for a defendant[146]. The driving force behind this idea is to curb the power of judicial authority for the sanctity of the separation of powers[147]. In terms of efficiency, the judiciary and probation office should work together with regard to these decisions for the implementation of a uniform standard of home confinement for first-time, non-violent offenders in order to ensure that discrepancies such as the one that initiated this appeal do not transpire. If the judiciary and board of supervisors were operating more succinctly and in a unified manner, there would be a more cohesive determination and standard of application that is necessary for such a widespread implementation to be effective.

4.3. *Comment*

Judicial discretion in home detention sentencing is necessary for the assurance of more tailored and humane sentencing. However,

141. See *id.*
142. See *id.*
143. See *id.*
144. See *id.*
145. See California Penal Code § 1203.016.
146. See *People*, 230 Cal. App. 3d. (cited in note 130).
147. See *id.*

the judiciary must work hand in hand with the board of probation to find the most practical and just confinement terms[148]. In terms of its relation to the court, a probation officer serves as a counselor, advisor, director and authority figure[149]. Most courts divide their probation officers into groups that work towards either pre-sentencing or post-sentencing goals[150]. After noting the presiding prosecutor's sentencing recommendation, the judiciary will consider the presiding probation officer's sentencing recommendation as well[151]. The judiciary values the opinion and recommendation of a probation officer because, unlike a prosecutor or defense attorney, the probation officer will provide an impartial perspective[152]. The fact that a felon is statistically more likely to undergo probation rather than a prison sentence suggests that these branches of the criminal justice system seem to frequently collaborate efficiently[153].

5. *Conclusion*

In the United States, home confinement has developed into a versatile form of alternative sentencing. The evolution of home confinement sentencing schemes is owed in part to shortcomings of the American criminal justice system, namely the overcrowding and growing cost of prisons. This trending favorability is also strongly encouraged by the significant potential benefits that home confinement schemes possess in promoting rehabilitation and preventing recidivism. The objective and subjective dimensions of its goals are strongly interconnected. The prevention of recidivism brings forth cost savings because it counters the overcrowding of prisons and the associated costs. With a decrease in the prison population, more resources

148. See Scott MacDonald and Cynthia Baroody-Hart, *Communication Between Probation Officers and Judges: An Innovative Model* (U.S. Courts 1999), available at https://www.uscourts.gov/sites/default/files/ 63_1_7_0.pdf (last visited April 26, 2020).

149. See *id.*

150. See *id.*

151. See *id.*

152. See *id.*

153. See *id.*

can be untapped for the successful rehabilitation of imprisoned offenders. Concurrently, the attainment of said benefits is dependent on the correct use of judicial discretion, particularly in regard to the collaboration between the judiciary and relevant boards of probation. Legislation, however comprehensive, cannot be the only guiding light in determining an individual's terms of confinement and incarceration. Ultimately, an understanding of the subjective dimensions of every individual case is necessary for the success of this alternative to incarceration.

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