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NOTE

ADOPTING THE CUMULATIVE HARM FRAMEWORK TO ADDRESS SECOND-GENERATION DISCRIMINATION

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Analytical frameworks of constitutional review vary. One framework is the "cumulative harm framework." This method examines the entirety of harm experienced by an individual to determine whether the harms rise to the level of a constitutional violation. For example, in the context of one's right to a fair trial, a reviewing court will aggregate the harm from each error committed at trial. Here, a reviewing court may find that the total harm resulting from the accumulation of all errors may have deprived the defendant's right to a fair trial—even if each error in isolation would not.

Another analytical framework is the "sequential approach." This framework reviews each harm experienced by the individual in isolation to determine whether each harm independently violated an individual's rights. For example, if the sequential approach was applied to the scenario above, a reviewing court would examine an error at trial and assess whether that specific error deprived the defendant's right to a fair trial. If this specific harm is insufficient for a

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constitutional violation, a reviewing court would then examine the subsequent error at trial and conduct the same analysis. Under the sequential approach, even if the trial was saturated with minor errors—each of which were insufficiently egregious to result in an unfair trial—a defendant would not be entitled to a new trial. A reviewing court's analytical framework, therefore, can alter the outcome of a case.

This Note analyzes different applications of the cumulative harm framework and the sequential approach. It then evaluates the advantages and disadvantages of the cumulative harm framework. This Note concludes by arguing for broader adoption of the cumulative harm framework, particularly as an effective tool in addressing second-generation discrimination faced by minorities and people of color.

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I. INTRODUCTION

Many constitutional claims are analyzed as discrete, isolated occurrences. Examining a woman's right to receive an abortion is an instructive vehicle to demonstrate the power of different analytical frameworks.[1] Imagine a pregnant person[2] has chosen to exercise their "fundamental right to abortion."[3] Imagine that the government has passed four laws that impede on this person's ability to exercise this right. One law requires, after the initial visit to the doctor, that this person wait an additional twenty-four hours to consider the "nature of the procedure," the health risks, and the probable age of the "unborn child."[4] This first law also requires this person to produce a written statement that they have taken these factors into consideration.[5] If this person is married, the second law is triggered. The second law requires the person to produce a signed statement from their spouse that they are about to undergo an abortion.[6] A third law requires physicians who perform abortions to have "admitting privileges" at a local hospital, and this hospital has the discretion whether to grant the physician this privilege.[7] A fourth law mandates that private insurance can only be used for an abortion when the person's life would be threatened if the pregnancy is carried to term.[8] Each law, in some

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[1] Roe v. Wade, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

[2] Of course, reproductive rights belong to women, non-binary and intersex individuals, transgender men, and anyone with a uterus. This Note alternates between the terms "woman" and "pregnant person" to respect many individuals who do not identify as woman and have potential to become pregnant. *See* Joella Jones, Note, *The Failure to Protect Pregnant Pretrial Detainees: The Possibility of Constitutional Relief in the Second Circuit Under a Fourteenth Amendment Analysis*, 10 COLUM. J. RACE & L. 139, 141 n.1 (2020); *see also* Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173, 177 (2019). Further, when referencing a "pregnant person," this Note employs the singular "they" to honor those who do not identify with the gender binary.

[3] Harris v. McRae, 448 U.S. 297, 313 (1980).

[4] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992).

[5] *Id.*

[6] *Id.* at 887.

[7] *See An Overview of Abortion Law*, GUTTMACHER INST., www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/R3HB-79WH] (Sept. 1, 2020). *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (describing active admitting privileges to mean that a doctor must be a member in good standing of the hospital's medical staff with the ability to admit a patient and to provide diagnostic and surgical services to such patient) (citations omitted).

[8] *Russo*, 410 S. Ct. at 2103.

way, imposes a different burden upon this person in obtaining an abortion.

This pregnant person now challenges these laws, arguing that they collectively present an "undue burden."[9] In this scenario, this person has not experienced a direct ban—a first-generation barrier—on their reproductive rights.[10] Rather, this person faces second-generation barriers in attempting to exercise their rights—barriers which are more concealed, complex, and, arguably, more dangerous than their explicit predecessors.[11]

A reviewing court, in considering the constitutionality of these regulations, will begin by analyzing whether the first law presents an undue burden, and then conduct the same analysis on the second, third, and fourth law.[12] Under this method of constitutional review, the *overall* harm experienced by this person is not considered.[13] Rather, the harm from each law is isolated and then analyzed.[14] Commentators have called this analytical method the "sequential approach."[15]

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[9] *Casey*, 505 U.S. at 874.

[10] *See, e.g.*, Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013) (Ginsburg, J., dissenting) (discussing first-generation discrimination as explicit denial of rights).

[11] *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 476 (2001) ("[N]ormative theories [of second-generation discrimination] are plural, subtle, and, not surprisingly, more complex. One such theory would apply to decisions or conditions that violate a norm of functional, as opposed to formal, equality of treatment. This theory defines discrimination to include differences in treatment based on group membership, whether consciously motivated or not, that produce unequal outcome.").

[12] *See Casey*, 505 U.S. at 879. ("We now consider the separate statutory sections at issue."). The first two laws are not a hypothetical, but are the laws challenged in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In this case, the Supreme Court upheld the statute requiring a 24-hour waiting period. *Id.* at 887. The Supreme Court invalidated the statute requiring a married woman to obtain informed consent from her spouse. *Id.* at 898.

[13] *See id.*

[14] *See* Kate L. Fetrow, *Taking Abortion Rights Seriously: Toward a Holistic Undue Burden Jurisprudence*, 70 STAN. L. REV. 319, 328 (2018) ("Indeed, both the parties and the Court [in *Casey*] considered the admitting privileges requirement and the surgical center requirement separately-not looking at whether the two challenged laws together might impose a greater burden on women than either of the two acting alone."). *See also*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016) (evaluating two different requirements of a statute, but only focusing on the "relevant statute here"); *see also*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879 (1992) ("We now consider the separate statutory sections at issue.").

[15] *See Casey*, 505 U.S. at 879 (1992) ("We now consider the separate statutory sections at issue."); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 314 (2012) (defining the "sequential

A different analytical method would not analyze each harm in isolation. Rather, what I call the "cumulative harm framework" reviews the *entirety* of this person's harm—the impact from the four laws above—to determine whether this pregnant person has experienced an "undue burden" in attempting to receive an abortion.[16] Stated differently, the four laws would be analyzed for their cumulative impact under this methodology.[17] Under the hypothetical above, perhaps the mandatory twenty-four-hour waiting period is insufficient to trigger a constitutional violation. But, maybe the twenty-four-hour waiting period *combined* with the spousal consent requirement, the admitting privileges requirement, and the limitations on private health insurance, presents an undue burden.

This Note explores these two analytical frameworks of judicial review. Part II discusses different substantive areas of law in which a reviewing court adopts the cumulative harm framework. Part III explores the different substantive areas of law in which a reviewing court adopts the sequential approach. Part IV evaluates the cumulative harm framework. This section begins by arguing that the framework more appropriately assesses constitutional harms from the perspective of the right-holder and that courts have the institutional capacity to adopt the framework more broadly. It asserts this framework is

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approach" of Fourth Amendment analysis as taking "snapshot of each discrete step and assess[ing] whether that discrete step at that discrete time constitutes a search").

[16] Commentators have described this analytical framework as "aggregate harm." Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1316 (2017). Others have called it the "cumulative harm model." Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 288. I use the term "cumulative harm framework" because it suggests that there are multiple frameworks of constitutional review and that this analytical framework is not limited to one substantive area of law. I also use this term because "aggregate harm" is sometimes used to describe the collective harm experienced by groups of people. *See*, *e.g.*, Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667 (2001) (discussing how vote dilution cases are understood as "aggregate rights" and a group's deprivation of the right to meaningfully participate in the voting process as an "aggregate harm"). In contrast, the cumulative harm framework focuses on the total harm experienced by an individual.

[17] *See* Abrams & Garrett, *supra* note 16, at 1318 ("Under *Strickland*, courts ask not whether each individual act or decision by a defendant's counsel was deficient, but instead whether all of the lawyer's errors, taken together, amounted to a constitutionally deficient performance."). *See also*, Strickland v. Washington, 466 U.S. 668, 695 (1984) ("In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.").

necessary to addressing second-generation discrimination experienced by Black people,[18] Latinxs,[19] and other minorities and communities of color. Part IV also critiques the framework. It argues that the cumulative harm framework is difficult to administer because there is no clear limit on which facts should be cumulated. It also argues that the framework permits unrestrained judicial review. Further, it argues that the cumulative harm framework may not be suited for evaluating prospective harm and facial challenges of law. This Note concludes by arguing for broader adoption of the cumulative harm framework because of its ability to prevent second-generation discrimination.

II. THE JUDICIARY'S CURRENT ADOPTION AND LIMITATION OF THE CUMULATIVE HARM FRAMEWORK

This section provides an overview of the judiciary's adoption of the cumulative harm framework. It examines six different substantive areas to explain different applications of the cumulative harm framework.

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[18] I use the terms "Black" and "African American" interchangeably by adhering to Professor Kimberlé Crenshaw's formulation of these terms:

> When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun. . . . 'Black' should not be regarded 'as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions.'

Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (quoting Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 515, 516 (1982)).

[19] I use the term "Latinx" to reject the gender binary that is inherent linguistically in "Latino/as." *See, e.g.*, Luz E. Herrera & Pilar Margarita Hernández Escontrías, *The Network for Justice: Pursuing A Latinx Civil Rights Agenda*, 21 HARV. LATINX L. REV. 165, 165 n.1 (2018) (using the term "Latinx" throughout the article as a gender-neutral replacement for Latino/as and Latin@s). I also use this term to reject "Hispanic" because it exclusively honors those of Spanish origin. Jyoti Nanda, *The Construction and Criminalization of Disability in School Incarceration*, 9 COLUM. J. RACE & L. 265, 265 n.2 (2019).

A. The Fourteenth Amendment's Guarantee of a Fair Trial

A defendant enjoys the right to a fair trial.[20] In *Taylor v. Kentucky*, the Supreme Court adopted the cumulative harm framework as the test to determine whether a defendant had been deprived of their right to a fair trial.[21] Commentators[22] and courts[23] have called this test the *cumulative error doctrine*. As the Eleventh Circuit described, the cumulative error doctrine "provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal."[24] Such errors are analyzed for their cumulative effect because, as the Tenth Circuit held, "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."[25]

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[20] Estelle v. Williams, 425 U.S. 501, 503 (2006) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."); U.S. CONST. amend. XIV, § 1.

[21] Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978). ("Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence, we do not reach petitioner's further claim that the refusal to instruct that an indictment is not evidence independently constituted reversible error.").

[22] Ruth A. Moyer, *To Err is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 DRAKE L. REV. 447, 450 (2013) ("[T]he cumulative-error doctrine instructs that 'an aggregation of non-reversible errors [such as harmless errors] can yield a denial of the constitutional right to a fair trial, which calls for reversal.'") (quoting United States v. Munoz, 150 F.3d 401, 418 (5th Cir. 1998)). *See also*, Abrams & Garrett, *supra* note 16, at 1317.

[23] United States. v. Azmat, 805 F.3d 1018, 1045 (11th Cir. 2015) ("Under the cumulative-error doctrine, we will reverse a conviction if the cumulative effect of the errors is prejudicial, even if the prejudice caused by each individual error was harmless."). *See also*, *Munoz*, 150 F.3d at 418 ("[T]he cumulative error doctrine . . . provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors)"); United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993) ("Of necessity, claims under the cumulative error doctrine are *sui generis*. A reviewing tribunal must consider each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy—or lack of efficacy—of any remedial efforts); and the strength of the government's case.").

[24] *Munoz*, 150 F.3d at 418.

[25] United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990). *See also*, Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973) ("Petitioner's contention . . . is that he was denied 'fundamental fairness guaranteed by the Fourteenth Amendment' as a result of several evidentiary rulings. His claim, the

In *Taylor*, the Supreme Court aggregated the harm resulting from four actions independently caused by two actors.[26] The first two harms were caused by the trial judge's rejection of the defense's following two requests: An instruction to the jury that law presumes a defendant to be innocent of a crime[27] and that the defendant's indictment should not be considered as evidence to determine the defendant's guilt.[28] The Supreme Court also aggregated the harms caused by the prosecution after the trial judge had rejected the defendant's request. During closing argument, the prosecution stated "*like every other defendant* who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt";[29] and that "[o]ne of the first things *defendants do after they rip someone off*, they get rid of the evidence as fast and as quickly as they can."[30]

The *Taylor* Court found that the four harms alone were "not necessarily improper, but the combination" resulted in an unfair trial.[31] Even though errors resulted from different actors, the Supreme Court permitted the aggregation of harm caused by the trial judge's refusal to grant specified jury instructions paired with the prosecution's statements.[32] Thus, the analytical method adopted by the Supreme Court for determining whether a defendant experienced a fair trial is the cumulative harm framework.

Some circuit courts[33] have tailored their implementation of *Taylor*'s cumulative harm framework within a federal review

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substance of which we accept in this opinion, rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense. Although he objected to each ruling individually, petitioner's constitutional claim—based as it is on the cumulative impact of the rulings—could not have been raised and ruled upon prior to the conclusion of Chambers' evidentiary presentation.").

[26] *Taylor*, 436 U.S. at 480–81, 486–87.

[27] *Id.* at 480.

[28] *Id.* at 480–81.

[29] *Id.* at 486.

[30] *Id.* at 487.

[31] *Id.*

[32] *Id.* at 487–88 ("The prosecutor's description of those events was not necessarily improper, but the combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial.").

[33] *See, e.g.*, Derden v. McNeel, 978 F.2d 1453, 1458–59 (5th Cir. 1992) ("First, any cumulative error theory must refer only to *errors* committed in the state trial court. A habeas petitioner may not just complain of unfavorable

of state convictions.[34] The Fifth Circuit, for example, imposed four limitations on the cumulative error-doctrine: (1) the "court should only consider actual 'errors' committed at the trial court"; (2) the "error complained of must not be procedurally barred, and, regardless of procedural bar, the defendant must have objected to the error at trial"; (3) "state law errors are not cognizable, unless they individually amount to a due process violation"; and (4) "the court must review the trial record as a whole and ask 'whether the errors more likely than not caused a suspect verdict.'"[35] The Fifth Circuit also includes actions from the trial judge in the cumulative harm framework "only if the judge so favors the prosecution that he appears to predispose the jury toward a finding of guilt or to take over the prosecutorial role."[36] The Tenth Circuit also limits actions that are eligible to be aggregated to "error[s],"[37] rather than the aggregation of "non-errors."[38] However, the Tenth Circuit goes further and requires a defendant to "demonstrate that the ruling was an error" to subject the error to the cumulative harm calculus.[39]

The Fifth Circuit limits the scope of the cumulative harm framework because of the potential dangers of adopting a vague legal standard.[40] Adopting an unfettered cumulative harm

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rulings or events in the effort to cumulate errors. . . . Second, the error complained of must not have been procedurally barred from habeas corpus review. . . . Third, errors of state law, including evidentiary errors, are not cognizable in habeas corpus as such. . . . [Further] [t]he conduct of a trial judge can violate due process only if the judge so favors the prosecution that he appears to predispose the jury toward a finding of guilt or to take over the prosecutorial role."). *See also*, United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) ("Impact alone, not traceable to error, cannot form the basis for reversal. The same principles apply to a cumulative-error analysis, and we therefore hold that a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

[34] *See* Moyer, *supra* note 22, at 455–58.

[35] Pursell v. Horn, 187 F.Supp.2d 260, 375 (W.D.P.A. 2002) (quoting *Derden*, 978 F.2d at 1457).

[36] *Derden*, 978 F.2d at 1459.

[37] *Rivera*, 900 F.2d at 1470 n.7 (defining "errors" to "refer to any violation of an objective legal rule. . . . [such as] some violation of constitutional, statutory, or common law, or a violation of an administrative regulation or an established rule of court").

[38] *Id.* at 1471. *See also*, United States v. Hopkins, 608 F. App'x 637, 648 (10th Cir. 2015) ("Errors are only those violations 'of an established legal standard defining a particular error,' not just incidents a reviewing court considers troubling.") (quoting *Rivera*, 900 F.2d at 1471).

[39] *Rivera*, 900 F.2d at 1470

[40] *See Derden*, 978 F.2d at 1458. ("[A] free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system: one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less

framework, the Fifth Circuit reasoned, would lead to an "infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing the specific guarantees of the Bill of Rights and determining minimum standards of procedural due process."[41] The Fifth Circuit limits which actions may be aggregated under the cumulative error doctrine to encourage uniformity in its application.[42] An unrestricted cumulative harm framework, the Fifth Circuit held, results in a "free-floating fundamental fairness rule [which] subverts the uniformity of results that is the basic goal of an organized legal system."[43] The Fifth Circuit continued and explained that "one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record."[44] Although courts have adopted limitations, the cumulative harm framework is the analytical method to determine when a defendant was deprived of their right to a fair trial.[45]

B. Ineffective Assistance of Counsel

The Sixth Amendment grants a criminal defendant the right to reasonably effective assistance of counsel.[46] The Supreme Court, in *Strickland v. Washington*, held that a defendant is deprived of this right when (1) "counsel's representation fell below an objective standard of reasonableness,"[47] and (2) that

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imaginative, may be denied relief simply because he cited only four of the same errors out of the record.").

[41] *Id.* at 1457.

[42] *Id.* at 1458 ("To avert such a conflict . . . we can at least eliminate certain types of complaints that should generally not be considered in cumulative error review. By this process of elimination, minimum standards at least normally applicable to a cumulative error claim of constitutional dimension may be expressed.").

[43] *Id.* at 1458.

[44] *Id.*

[45] Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978) ("Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence, we do not reach petitioner's further claim that the refusal to instruct that an indictment is not evidence independently constituted reversible error.").

[46] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Strickland v. Washington, 466 U.S. 668, 687 (1984) ("As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance.").

[47] *Strickland*, 466 U.S. at 687–88.

such deficient performance "prejudiced the defense."[48] Using this test, the *Strickland* Court specified that a reviewing court "hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge or jury."[49] The errors of counsel, under a *Strickland* analysis, are not analyzed in isolation, but are analyzed for their aggregate effect.[50] Therefore, a court reviewing an ineffective assistance of counsel claim adopts the cumulative harm framework as its analytical methodology.[51]

The cumulative harm framework under *Strickland* is also temporally expansive.[52] Its review includes the various stages of a criminal case, including "the course of investigation[s], plea negotiations, trial, or appeal."[53] For example, the *Strickland* Court held that "[i]f counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective."[54] The *Strickland* Court also held that, "[f]or purposes of describing counsel's duties, therefore, [the] proceeding need not be distinguished from an ordinary trial."[55]

C. Prosecutorial Misconduct Claims

The cumulative harm framework is the analytical method adopted by courts reviewing a prosecutorial misconduct claim.[56]

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[48] *Id.* at 687.

[49] *Id.* at 695 (emphasis added).

[50] *Id.* ("[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.").

[51] *See* Porter v. McCollum, 558 U.S. 30, 41 (2009) ("To assess that probability [of whether the defendant's counsel was ineffective], we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'") (quoting Williams v. Taylor, 529 U.S. 362, 397–398 (2000)). *See also* Berghuis v. Thompkins, 560 U.S. 370, 389 (2010) ("In assessing prejudice, courts 'must consider the totality of the evidence before the judge or jury.'") (quoting *Strickland*, 466 U.S. at 695).

[52] *Strickland*, 466 U.S. at 698 ("The facts as described above . . . make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable.").

[53] Abrams & Garrett, *supra* note 16, at 1318. *See* Missouri v. Frye, 566 U.S. 134, 140 (2012) ("It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. . . . Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.").

[54] *Strickland*, 466 U.S. at 681.

[55] *Id.* at 687.

[56] Kyles v. Whitley, 514 U.S. 419, 421 (1995) ("[W]e follow the established rule that the state's obligation under *Brady v. Maryland* . . . to

In *Brady v. Maryland*,[57] the Supreme Court held that it is unconstitutional for the prosecution to suppress evidence favorable to a defendant upon request where the evidence is "material either to guilt or to punishment."[58] Material evidence has included, "for example, statements of witnesses or physical evidence that conflicts with the prosecution's witnesses, and evidence that could allow the defense to impeach a witness' credibility."[59] Under *Brady*, a reviewing court does not ask "whether each piece of evidence suppressed led to an unfair trial."[60] Rather, a *Brady* claim "turns on the cumulative effect of all such evidence suppressed by the government,"[61] because a reviewing court is required to assess the "net effect of the evidence withheld by the State."[62] Thus, a reviewing court adopts the cumulative harm framework when evaluating a *Brady* claim.[63]

D. "Cruel and Unusual" Prison Conditions

In *Rhodes v. Chapman*, the Supreme Court adopted the cumulative harm framework to determine whether the

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disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government.") (citations omitted). *See also*, Wearry v. Cain, 136 S.Ct. 1002, 1007 (2016) ("[T]he state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively.").

[57] Brady v. Maryland, 373 U.S. 83 (1963). In this case, the defendant admitted that he was involved in a murder, but denied that he conducted the killing by arguing that his co-defendant committed the killing. The defendant's counsel requested that the prosecution allow him to examine the co-defendant's extrajudicial statements. The prosecution gave the defense counsel some statements, but suppressed one statement of the co-defendant in which the co-defendant admitted the homicide. This particular statement was withheld by the prosecution and was not uncovered by defense counsel until after the defendant had been tried, convicted, and sentenced, and after the defendant's conviction had been affirmed. *See id.* at 84.

[58] *Id.* at 87.

[59] Cadene A. Russell, Comment, *When Justice Is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of* Brady v. Maryland, 58 HOW. L.J. 237, 242–43 (2014) (footnote omitted).

[60] Abrams & Garrett, *supra* note 16, at 1319.

[61] *Kyles*, 514 U.S. at 420.

[62] *Id.*

[63] *See, e.g.*, Turner v. United States, 137 S.Ct. 1885, 1895 (2017) ("We conclude only that in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to 'undermine confidence' in the jury's verdict . . . .") (quoting *Kyles*, 514 U.S. at 434). *See also*, Cone v. Bell, 556 U.S. 449, 476 (2009) ("Although we conclude that the suppressed evidence was not material to Cone's conviction for first-degree murder, the lower courts erred in failing to assess the cumulative effect of the suppressed evidence with respect to Cone's capital sentence.").

government's incarceration practices constituted cruel and unusual punishment.[64] The *Rhodes* Court held that prison "conditions . . . alone or *in combination*, may deprive inmates of the minimal civilized measure of life's necessities."[65] In effect, as noted by Justice Brennan's concurrence in *Rhodes*, the *Rhodes* majority adopted "totality-of-the-circumstances test" by evaluating the cumulative effect of individual conditions of confinement to determine whether such conditions were cruel or unusual.[66] Thus, the accumulation of individual harms could rise to a cognizable constitutional violation, even if the harms resulting from each condition of confinement, in isolation, would not rise to a constitutional violation.[67]

The Supreme Court, in *Wilson v. Seiter*, however, tailored the use of the cumulative harm framework.[68] Pearly L. Wilson and another inmate argued that their overall prison conditions were cruel and unusual.[69] Wilson advanced his claim by aggregating the harm from the following conditions: Wilson was forced sleep in a double bunk with another inmate; Wilson's clothing provided by the prison was inadequate in keeping inmates warm; Wilson's cell insulation was inadequate in keeping cell temperature warm during the winter; the summer temperatures were excessively high, resulting in heat-related rashes for some inmates and created respiratory problems for others; the food services were a threat to the inmate's health because of inadequate sanitation, ventilation, and sewage; and the restrooms were dirty, slippery, and malodorous.[70] Relying on *Rhodes*, Wilson argued that these conditions "in combination" resulted in overall cruel and unusual prison conditions.[71] Wilson further argued that these conditions were dependent upon each

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[64] Rhodes v. Chapman, 452 U.S. 337 (1981); U.S. CONST. amend. VIII, ("Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.").

[65] *Rhodes*, 452 U.S. at 347 (emphasis added).

[66] *Id.* at 363 (Brennan, J., concurring).

[67] *Id.* at 347. *See also*, Hutto v. Finney, 437 U.S. 678, 687 (1978) ("We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.").

[68] Wilson v. Seiter, 501 U.S. 294 (1991).

[69] Brief for Petitioner, Wilson v. Seiter, 501 U.S. 294 (1991) (No. 18-2937), 1990 WL 505735, at *37 n.32 [hereinafter Brief for *Wilson*] ("While the overcrowding might not be unconstitutional in itself, because the effect of overcrowding cannot be separated from the overall conditions of the unit, the trial court on remand should not arbitrarily exclude evidence of the impact of overcrowding on the overall conditions in the dormitory.").

[70] *Id.* at *3.

[71] *Id.* at *36 (quoting *Rhodes*, 452 U.S. at 347).

other, as "the adequacy of the ventilation is directly related to the degree of crowding in the facility. The reasonableness of using two fans to supply ventilation for a dormitory turns on the number of bodies in the dormitory."[72]

The Supreme Court rejected Wilson's claim.[73] The Supreme Court explained that "*[s]ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise."[74] The *Wilson* Court thus clarified that the cumulative harm framework can only be used to combine the effects of facts relating to a single condition of confinement, such as aggregating the effects of "low cell temperature at night combined with a failure to issue blankets" to demonstrate insufficient warmth.[75]

Therefore, under *Wilson*, the Supreme Court does not permit a claim based on what this Note calls *cross-categorical cumulation*.[76] For example, cross-categorical cumulation would attempt to prove that overall conditions of confinement would amount to an Eighth Amendment violation by aggregating the harm from (1) cold nighttime cell conditions, (2) the deprivation of exercise because inmates were confined to their cells for twenty hours per day, and (3) inadequate sustenance because inmates were only provided with one meal a day. In this hypothetical, each fact points to three distinct categories: (1) insufficient heat, (2) lack of exercise, (3) and insufficient food. Each fact does not reinforce either of the three claims—a lack of exercise due to required confinement does not support the proposition that there was insufficient heat, and vice versa.

Wilson attempted to persuade the Supreme Court that cross-categorical cumulation was the appropriate analytical method for his claim by arguing that adequate ventilation depends on the amount of persons within a particular cell.[77] The

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[72] *Id.*

[73] *Wilson*, 501 U.S. at 305 ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when so specific deprivation of a single human need exists.")

[74] *Id.* at 304 (quoting *Rhodes*, 452 U.S. at 347).

[75] *Id.*

[76] This Note uses the term "cross-categorical cumulation" to refer to the cumulation of nonmutual enforcing facts or actions.

[77] *See* Brief for *Wilson*, *supra* note 69, at *36–37 ("Certainly the adequacy of the ventilation is directly related to the degree of crowding in the facility. The reasonableness of using two fans to supply ventilation for a dormitory turns on the number of bodies in the dormitory. Minimally adequate

Wilson Court rejected the cross-categorical cumulation claim.[78] The *Wilson* Court reasoned that even if "some prison conditions may interact in this [cumulative] fashion [it] is a far cry from saying that all prison conditions" aggregate together like a "seamless web" to find an Eighth Amendment violation.[79] The *Wilson* Court further explained that there cannot be a finding of "cruel and unusual punishment when no specific deprivation of a single human need exists."[80] Stated differently, in applying the cumulative harm framework, the Seventh Circuit's reasoned, that *Rhodes* does not "allow a number of otherwise unquestionably constitutional conditions to become unconstitutional by their aggregation."[81] Many courts, in determining whether conditions of confinement violate the Eighth Amendment, both employ and restrict the use of the cumulative harm framework.[82]

E. The Cumulative Harm Framework Within Asylum Law

The United States, under the 1951 United Nations Convention Relating to the Status of Refugees,[83] the 1967 United

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ventilation for 143 prisoners is different from the ventilation necessary for the smaller number of prisoners that could be accommodated were the dormitory not double-bunked.").

[78] *See Wilson*, 501 U.S. at 305 ("[O]ur statement in *Rhodes* was not meant to establish the broad proposition that petitioner asserts. *Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.") (quoting *Rhodes*, 452 U.S. at 347).

[79] *Id.*

[80] *Id.*

[81] Madyun v. Thompson, 657 F.2d 868, 874 n.10 (7th Cir.1981).

[82] *See, e.g.*, Mammana v. Federal Bureau of Prisons, 934 F.3d 368, 374 (3d Cir. 2019) (aggregating the harm "denied bedding, and exposed to low cell temperatures and constant bright lighting for four days" to find a "denial of 'the minimal civilized measure of life's necessities,' in particular, warmth and sufficient sleep") (quoting *Rhodes*, 452 U.S. at 347); Counts v. Newhart, 951 F.Supp. 579, 582, 586–87 (E.D.V.A. 1996), *aff'd*, 116 F.3d 1473 (4th Cir. 1997) (refusing to accept that overall prison condition were cruel and unusual by aggregating the harm resulting from (1) three inmates sharing and sleeping in a cell designed for two inmates, (2) the messiness resulting from overcrowding, (3) the presence of insects and vermin, arguably caused by the overcrowding, (4) inadequate staff for security, (5) inadequate allocation of recreation time, (6) an inadequate law library and, (7) the inability to properly practice one religion); Tokar v. Armontrout, 97 F.3d 1078, 1082 (8th Cir. 1996) (rejecting an Eighth Amendment claim based on the aggregation broken window and a leaky roof because the plaintiff did not have a window in his cubicle and because the plaintiff was provided blankets).

[83] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

Nations Protocol Relating to Status of Refugees,[84] and the United States Refugee Act of 1980,[85] is obligated to provide relief to persons fleeing from persecution in the form of refugee status or asylum.[86] Although the term "persecution"[87] is not clearly defined by statute, [88] "courts have interpreted the phrase to require a showing of something more than mere discrimination or harassment."[89] When determining whether an asylum applicant has faced persecution, many circuit courts adopt the cumulative

[84] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

[85] Refugee Act of 1980, Pub. L. No. 96-212 § 201, 94 Stat. 102 (1980).

[86] *See e.g.*, Marisa S. Cianciarulo, *Refugees in Our Midst: Applying International Human Rights Law to the Bullying of LGBTQ Youth in the United States*, 47 COLUM. HUM. RTS. L. REV. 55, 72–78 (2015); Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUM. RTS. L. REV. 1, 4–15 (2016); Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 63–65 (2009) (discussing the United States' obligations under international and domestic law to provide asylum for those who have experienced sufficient harm to rise to the level of persecution).

[87] 8 U.S.C. § 1101(a)(42) (defining a "refugee" as any person unable or unwilling to return to their home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

[88] *See* Shai v. Gonzales, 416 F.3d 587, 588 (stating that the court could not find "a case in which the BIA [the Board of Immigration Appeals] has defined 'persecution'"); *see generally*, Rempell, *supra* note 16, at 317–18 ("Persecution is the 'fundamental concept at the core of the refugee definition,' yet its meaning remains largely undefined.") (quoting In re T-Z-, 24 I. & N. Dec. 163, 167 (B.I.A. 2007)).

[89] Gupta, *supra* note 86, at 5–6.

harm framework, [90] including the Second,[91] Third,[92] Seventh,[93] Ninth,[94] and Tenth,[95] Circuit courts.

For example, in *Bejko v. Gonzales*, the Seventh Circuit held that an asylum applicant's harms are "not [viewed] in isolation from the other allegations; it is axiomatic that the evidence of persecution must be considered as a whole, rather than piecemeal."[96] Similarly, the Second Circuit, in *Edimo-Doualla v. Gonzales*, also adopted the cumulative harm framework to evaluate the applicant's claim.[97]

The Second Circuit's approach in this case was temporally expansive.[98] The *Edimo-Doualla* court analyzed the cumulative harm from multiple incidents over the span of ten years—occurring in 1991, 1996, 1997, and 2001.[99] The *Edimo-*

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[90] *See* Rempell, *supra* note 16, at 317 ("[T]he cumulative harm model recognizes as germane to a persecution assessment both the number of incidents an applicant experiences and the severity of each harm. The model's persecution inquiry is grounded in the foundational premise that instances of harm should not be viewed in isolation.").

[91] Poradisova v. Gonzales, 420 F.3d 70, 80 (2d Cir. 2005) ("Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account.") (citations omitted).

[92] Fei Mei Cheng v. Att'y Gen., 623 F.3d 175, 192 (3d Cir. 2010) ("Moreover, in determining whether actual or threatened mistreatment amounts to persecution, '[t]he cumulative effect of the applicant's experience must be taken into account' because '[t]aking isolated incidents out of context may be misleading.'") (quoting Manzur v. U.S. Dep't Homeland Sec.,494 F.3d 281, 290 (2d Cir. 2007)).

[93] Chen v. Holder, 604 F.3d 324, 333–35 (7th Cir. 2010) (reversing a ruling of the Board of Immigration Appeals for failing to analyze the cumulative impact of the multiple hardships faced by the asylum applicant).

[94] Krotova v. Gonzales, 416 F.3d 1080, 1084 (9th Cir. 2005) ("Even when a single incident does not rise to the level of persecution, 'the cumulative effect of several incidents may constitute persecution.'") (quoting Surita v. Immigr. & Naturalization Serv., 95 F.3d 814, 819 (9th Cir. 1996)).

[95] Ritonga v. Holder, 633 F.3d 971, 975 (10th Cir. 2011) (adopting the cumulative harm framework by stating, "[w]e do not look at each incident in isolation, but instead consider them collectively, because the cumulative effects of multiple incidents may constitute persecution").

[96] Bejko v. Gonzales, 468 F.3d 482, 486 (7th Cir. 2006) (quoting Cecai v. Gonzales, 440 F.3d 897, 899 (7th Cir. 2006)).

[97] Edimo-Doualla v. Gonzales, 464 F.3d 276, 283 (2d Cir. 2006) ("Incidents alleged to constitute persecution, however, must be considered cumulatively. . . . A series of incidents of mistreatment may together rise to the level of persecution even if each incident taken alone does not.").

[98] *Id.* ("There was an additional fundamental error in the IJ's analysis. In assessing the question of whether Edimo-Doualla's mistreatment amounted to persecution, the IJ considered the 1991 and 1996 incidents separately from the 1997 and 2000 incidents. Incidents alleged to constitute persecution, however, must be considered cumulatively.").

[99] *Id.* ("[F]our beatings during a 1991 arrest; a two-day arrest in 1996; multiple beatings and other forms of abuse during a three-to-five-day arrest in

Doualla court held that the "incidents alleged to constitute persecution . . . must be considered cumulatively."[100] Thus, the Second Circuit's application of the cumulative harm framework allows for a "series of incidents of mistreatment [to] rise to the level of persecution even if each incident taken alone does not."[101]

III. THE JUDICIARY'S APPLICATIONS OF THE "SEQUENTIAL APPROACH"

This section explores the "sequential approach."[102] This framework analyzes each occurrence of harm experienced by an individual in isolation.[103] Under this approach, unlike the cumulative harm framework, aggregation of harm is not permitted.[104] In certain cases, this framework analyzes statutes in isolation.

A. The "Sequential Approach" of the Fourth Amendment

The Fourth Amendment protects individuals against unreasonable government searches and seizures.[105] In determining whether a "search"[106] has occurred, a claimant must show (1) "that a person [has] exhibited an actual (subjective) expectation of privacy," and (2) "that the expectation [is] one that society is prepared to recognize as 'reasonable.'"[107] Courts[108] and

1997; a brief detention at the airport in 2000 during which he was forced to sign an arrest warrant without being allowed to read it; a break-in in which his property was seized; multiple beatings in 2000 during each of six days that Edimo-Doualla was held at a police station.").

[100] *Id.* at 283.

[101] *Id.*

[102] Kerr, *supra* note 15, at 314. (defining the "sequential approach" of Fourth Amendment analysis as taking "snapshot of each discrete step and assess[ing] whether that discrete step at that discrete time constitutes a search").

[103] *Id.*

[104] *See id.*

[105] U.S. CONST. amend. IV ("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.").

[106] *Id.*

[107] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[108] *See, e.g.*, *id.* at 360 (Harlan, J., concurring) ("[A] person has a constitutionally protected reasonable expectation of privacy . . . ."). *See also*, United States v. Knotts, 460 U.S. 276, 281 (1983) ("A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.").

commentators[109] have called this the reasonable expectation of privacy test.

The reasonable expectation of privacy test does not adopt the cumulative harm framework, but rather adopts what commentators have called the "sequential approach."[110] This analytical method isolates each government action and then independently reviews the constitutionality of each discrete act.[111] *Terry v. Ohio* provides an informative example.[112] In this case, a police officer stopped Terry and subsequently patted the outside of his clothing to determine whether Terry had a weapon.[113] In applying the sequential approach, the Supreme Court first analyzed whether the officer's seizing of Terry violated the Fourth Amendment, and then analyzed whether the officer's pat-down was unconstitutional.[114] Because the officer's initial seizing of Terry was lawful, the Supreme Court then reviewed the constitutionality of the officer's patting down the outside of Terry's clothing.[115] The Supreme Court did not evaluate whether Terry had suffered a Fourth Amendment violation by aggregating harm from both the stop and the

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[109] Kerr, *supra* note 15, at 316–17; *see* Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 912–25 (1997) (describing how a court may analyze a "reasonable expectation of privacy" to evaluate Fourth Amendment claims). *See, e.g.*, JOSEPH G. COOK, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED 3d § 4:2 (2019); Timothy T. Takahashi, *Drones and Privacy*, 14 COLUM. SCI. & TECH. L. REV. 72 (2013).

[110] Kerr, *supra* note 15, at 315 ("Fourth Amendment analysis traditionally has followed what I call the sequential approach: to analyze whether government action constitutes a Fourth Amendment search or seizure, courts take a snapshot of the act and assess it in isolation."). *See, e.g*, United States v. Moses, 540 F.3d 263, 272 (4th Cir. 2008) (examining whether the act of inserting a key into the door was unlawful before analyzing the opening of the door); United States v. Jones, 565 U.S. 400, 410–12 (2012) (holding that placing a Global-Positioning-System device (GPS) on an individual's car "encroached on a protected area," and thereby foregoing an analysis of whether the totality of the data produced by the GPS was unlawful).

[111] *See Moses*, 540 F.3d at 272; *Jones*, 565 U.S. at 410–12.

[112] Terry v. Ohio, 392 U.S. 1 (1968).

[113] *Id.* at 7.

[114] *Id.* at 19 ("In this case there can be no question, then, that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did.").

[115] *Id.* at 23 ("The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.").

subsequent frisk.[116] Thus, in applying the reasonable expectation of privacy test, a reviewing court takes a snapshot of each government action and evaluates each action isolation.[117] As the First Circuit noted, this "step-by-step analysis is inherent" in the Fourth Amendment and demonstrates the absence of aggregation within the sequential approach. [118]

B. Determining an "Undue Burden": Application of Both the Cumulative Harm Framework and the Sequential Approach

As discussed in the Part I, the government may not create an "undue burden" for a pregnant person seeking an abortion.[119] A single jurisdiction typically has multiple laws which prevent a woman from receiving an abortion, such as gestational limits, state-mandated counseling, mandatory waiting periods, limitations in funding, limitations of private insurance's coverage of abortion, which results in a general reduction of doctors and medical facilities due to increased regulations.[120] Yet, in analyzing the undue burden from these laws, courts use *both* the sequential approach and the cumulative harm framework. A recent abortion case, *Whole Woman's Health v. Hellerstedt*,[121] demonstrates the application of both frameworks.[122]

In *Whole Woman's Health*, the Supreme Court considered the constitutionality of two provisions of a Texas law known as HB 2.[123] In analyzing each statutory provision in isolation—first, the provision regarding admitting privileges, and second, the provision regarding the surgical requirements—the Court applied the sequential approach.[124] The Court, in its application of this approach, did not address the impact of previously passed abortion restrictions, even though they were mentioned.[125]

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[116] *See id.*

[117] *Kerr*, *supra* note 15, at 315.

[118] United States v. Beaudoin, 362 F.3d 60, 70–71 (1st Cir. 2004).

[119] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

[120] *See* GUTTMACHER INST., *supra* note 7.

[121] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[122] *See* Fetrow, *supra* note 14, at 328 ("Indeed, both the parties and the Court [in *Whole Woman's Health*] considered the admitting privileges requirement and the surgical center requirement separately—not looking at whether the two challenged laws *together* might impose a greater burden on women than either of the two acting alone.") (internal citations omitted).

[123] *Whole Woman's Health*, 136 S. Ct. at 2300.

[124] *See id.* at 2310. ("[W]e first consider the admitting-privileges requirement."); *id.* at 2314 ("The second challenged provision of Texas' new law sets forth the surgical-center requirement.").

[125] *Id.* ("Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. Under those

Yet, in limiting the parameters of their analysis, Supreme Court evaluated the *cumulative* harm caused "admitting privileges" by reviewing the *cumulative* harm resulting from this single provision.[126] For example, the Court found that admitting privileges caused the closing of about half of the abortion clinics in the state, from about forty to twenty clinics.[127] These closures resulted in "fewer doctors, longer waiting times, and increased crowding," and also meant that women now had to travel longer distances to find a provider.[128] The Supreme Court specified that while longer distances alone were sometimes insufficient to result in a constitutional violation, these impacts "when taken together" could result in an undue burden.[129] Here, the Supreme Court permitted *some* aggregation of harm, but limited its overall analytical framework to the cumulative effects of a single statutory provision.[130]

The Supreme Court continued its application of the sequential approach by then analyzing the second challenged law—specifically the requirement that abortion facilities meet the standard of "ambulatory surgical centers."[131] This provision required a specific number of staff at a clinic in case of an emergency and included requirements of the physical building, specifically within the surgical suite.[132] The Court found that the surgical requirements would reduce the "number of abortion facilities available to seven or eight facilities."[133] As a result, "the number of abortions that the clinics would have to provide would rise from 14,000 abortions annually to 60,000 to 70,000—an increase by a factor of about five."[134] Thus, although the Supreme Court cumulated the harm resulting from the total impacts resulting each statutory provision, the Supreme Court still

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pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements . . . .").

[126] *See id* at 2313 ("But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's 'undue burden' conclusion.") (internal citations omitted).

[127] *Id.* at 2312.

[128] *Id.* at 2313.

[129] *Id.*

[130] *See id.* at 2310–13.

[131] *Id.* at 2314.

[132] *Id.* 2314–15 (For example, HB 2 required "including specific corridor widths," specific "advanced heating, ventilation, and air conditioning system[s]," and a specified "piping system and plumbing requirement").

[133] *Id.* at 2316.

[134] *Id.*

declined to evaluate the *cumulative impact* of the abortion regulations.[135]

C. An Explicit Rejection of the Cumulative Harm Framework

As noted above, a criminal defendant enjoys the right to reasonable effective assistance of counsel.[136] The Supreme Court, in *Strickland v. Washington*, held that a defendant is deprived of this right when (1) "that counsel's representation fell below an objective standard of reasonableness,"[137] and (2) that such deficient performance "prejudiced the defense."[138] Circuit courts disagree on whether the cumulative harm framework can be applied to *Strickland*'s second prong—whether counsel's deficient performance prejudiced the defendant.[139] The First,[140] Second,[141] Third,[142] Fifth,[143] Seventh,[144] and Ninth[145] Circuits

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[135] *See* Fetrow, *supra* note 14, at 328 ("Indeed, both the parties and the Court considered the admitting privileges requirement and the surgical center requirement separately—not looking at whether the two challenged laws *together* might impose a greater burden on women than either of the two acting alone.").

[136] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."); Strickland v. Washington, 446 U.S. 668, 687 (1984) ("As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance.").

[137] *Strickland*, 446 U.S. at 687–88.

[138] *Id.* at 687.

[139] *See* Moyer, *supra* note 22, at 466–74.

[140] Dugas v. Copland, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effects of counsel's errors in determining whether a defendant was prejudiced.") (quoting Kubat v. Thieret, 867 F.2d 351, 370 (7th Cir. 1989)).

[141] Lindstadt v. Keane, 239 F.3d 191, 203–04 (2d Cir. 2001) ("Taken together, ineffectiveness permeated all the evidence. . . . We assess the impact of these errors in the *aggregate*.").

[142] *See* Breakiron v. Horn, 642 F.3d 126 (3d Cir. 2011) ("We conclude that [the defendant's] claim[] of ineffective assistance of counsel, whether considered alone or cumulatively, require relief from his robbery conviction.").

[143] Richards v. Quarterman, 566 F.3d 553, 571–72 (5th Cir. 2009) (basing its decision on "review of the record and consider[ation of] the cumulative effect of [counsel's] inadequate performance").

[144] Sussman v. Jenkins, 636 F.3d 329, 360–61 (7th Cir. 2011) ("Here, however, we are not faced with a single error by counsel and, therefore, must consider the cumulative impact of this error when combined with counsel's [other errors]."); Goodman v. Bertrand, 467 F.3d 1022, 1023 (7th Cir. 2006) ("[T]he cumulative effect of counsel's errors constituted ineffective assistance of counsel.").

[145] Ewing v. Williams, 596 F.2d 391, 395–96 (9th Cir. 1979) ("And even where, as here, several specific errors are found, it is the duty of the Court to make a finding as to prejudice, although this finding may either be "cumulative" or focus on one discrete blunder in itself prejudicial.").

adopt the cumulative harm framework in determining whether a defendant was prejudiced by counsel's deficient performance.

In contrast, the Eight Circuit rejects the cumulative harm framework in determining whether a defendant was prejudiced by counsel's ineffectiveness.[146] *Pryor v. Norris* is an instructive case.[147] Pryor alleged that her trial counsel was ineffective for (1) failing to timely object to questions regarding possession of cocaine; (2) failing to request a mistrial immediately following improper testimony from a prosecution witness; (3) opening the door to the prosecutor's prejudicial remarks during summation concerning her potential sentence; and (4) "not challenging the introduction of a transcript, rather than the original tapes," of audio-recorded drug transactions.[148] The *Pryor* court rejected this argument, reasoning that "'cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own.'"[149] *Pryor* did not further explain its rejection of the cumulative harm framework. However, as reasoned by the Eight Circuit in *Wainwright v. Lockhart*, "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation. Neither [the] cumulative effect of trial errors nor [the] cumulative effect of attorney errors are grounds for habeas relief."[150]

IV. EVALUATING THE CUMULATIVE HARM FRAMEWORK

This section analyzes the advantages and disadvantages of the cumulative harm framework. It argues that the cumulative harm framework more appropriately analyzes harms from the perspective of the right-holder. This perspective is necessary because "[t]he Constitution protects individuals," and rights should be viewed through the lens of the right-holder.[151] This section then argues that the judiciary has the capacity to more broadly adopt the framework because of its similarity between a "totality of the circumstances" analysis.[152] Finally, and most

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[146] Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002) ("[P]etitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test.").

[147] Pryor v. Norris, 103 F.3d 710 (8th Cir. 1997).

[148] *Id.* at 711–12.

[149] *Id.* at 714 n.6 (citations omitted) (quoting Girtman v. Lockhart, 942 F.2d 468, 475 (8th Cir. 1991)).

[150] Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996).

[151] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992).

[152] *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of

importantly, this section argues that the cumulative harm framework is a necessary tool to combat second-generation forms of discrimination.

This section also critiques the cumulative harm framework. It argues that the framework is difficult to administer because there is no clear limit on which facts should be cumulated. It also argues that the framework permits unrestrained judicial review. Further, the cumulative harm framework would present issues in facial challenges of law and in evaluating prospective harm. This section concludes by arguing for a greater adoption of the cumulative harm framework.

A. Advantages of the Cumulative Harm Framework

1. The Cumulative Harm Framework Evaluates the Harm from the Perspective of the Right-Holder

The cumulative harm framework more appropriately reflects one's lived experience as compared to the "sequential approach."[153] Take, for example, a pregnant person's right to abort a fetus.[154] A pregnant person does not experience each regulation limiting access to an abortion, such as gestational limits, state-mandated counseling, mandatory waiting periods, limitations in funding, and general reduction of doctors and medical facilities due to increased regulations, in isolation.[155] Rather, in attempt to receive this medical treatment, that person experiences *every* regulation before they can receive an abortion.[156] A law review article provides an instructive hypothetical of one's experience:

> Imagine you are a woman living in Lubbock, Texas (the eleventh most populous city in Texas with around a quarter-of-a-million people)[,] and you want to have an abortion. As a result of Texas'

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the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. . . . This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative* information available to them that 'might well elude an untrained person.'") (emphasis added) (citations omitted) (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)).

[153] *See* Fetrow, *supra* note 14, at 332–33.

[154] Roe v. Wade, 410 U.S. 113, 152–53 (1973).

[155] GUTTMACHER INST., *supra* note 7.

[156] *See* Fetrow, *supra* note 14, at 332–33. *See also*, Marlow Svatek, *Seeing the Forest for the Trees: Why Courts Should Consider Cumulative Effects in the Undue Burden Analysis*, 41 N.Y.U. REV. L. & SOC. CHANGE 121, 133–34 (2017).

> TRAP [Targeted Regulation of Abortion Providers] laws, including the admitting-privileges requirement and ambulatory-surgical-center requirement . . . there were only ten abortion providers in Texas as of June 2015, a state that spans over 260,000 square miles. The only cities that had clinics were Austin, San Antonio, Dallas, Fort Worth, Houston, and McAllen, which were all on the other side of the state. Therefore, you would have had to drive four-and-a-half hours to get to the nearest clinic in Fort Worth. Once you got to Fort Worth, you would have had to undergo state-directed counseling and then waited another twenty-four hours before you could actually have the abortion procedure. This means that you would have to either spend at least one night in Fort Worth or make the 600-mile round trip twice.[157]

As demonstrated above, a woman cannot experience specific regulations on abortion in isolation—she experiences the *entirety* of the regulatory regime.[158]

The entirety of a pregnant person's experience, however, is not the perspective adopted by the Supreme Court in evaluating this right.[159] Rather, as noted above, the Supreme Court adopts the sequential approach by evaluating "regulation[s] in isolation and [by asking] whether the specific law imposed health risks on women, not whether women actually experienced an undue burden."[160] Thus, the regulations that have limited abortions clinics to eight cities in the state of Texas, the mandatory waiting period, and other regulations, cannot be

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[157] Svatek, *supra* note 156, at 133–34 (internal citations omitted). As of 2019, there are also abortion providers in El Paso and Waco. *Texas Abortion Clinic Map*, FUND TEX. CHOICE, https://fundtexaschoice.org/index.php/ftc-need-help/texas-abortion-clinic-map (Oct. 2019).

[158] *See id.* ("[F]rom a practical perspective, women who are seeking abortions do not experience individual restrictions in isolation. Rather, they experience the collective pressure of various limitations on their reproductive freedom and autonomy.").

[159] *See* Gonzales v. Carhart, 550 U.S. 124, 161 (2007). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879–80 (1992) (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (medical emergency provision); *id.* at 881–87 (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (informed consent); *id.* at 887–98 (O'Connor, Kennedy, & Souter, JJ.) (majority opinion) (spousal notice requirement); *id.* at 899–900 (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (parental consent); *id.* at 900–01 (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion) (recordkeeping and reporting requirements).

[160] Fetrow, *supra* note 14, at 326.

challenged together.[161] In contrast, the cumulative harm framework, by evaluating harms from the perspective of the right-holder, analyzes the *total* burden faced by a woman seeking an abortion.[162] Only through the aggregation of harm can a reviewing court realize the true lived experience of plaintiffs.

2. Courts Have the Institutional Capacity for a Broader Adoption of the Cumulative Harm Framework

Reviewing courts are well-equipped to more broadly apply the cumulative harm framework. The "totality of the circumstances" analytical framework, mirrors the logic of the cumulative harm framework.[163] This framework evaluates the "cumulative information available."[164] As noted by the Supreme Court, "[t]he 'totality of the circumstances' requires courts to consider 'the whole picture.' . . . [P]recedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."[165]

Courts apply the totality of the circumstances analytical framework in a variety of substantive areas, such as determining whether law enforcement has sufficient "reasonable-suspicion" to detain an individual,[166] whether a police officer has used excessive force,[167] whether the Voting Rights Act has been

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[161] FUND TEX. CHOICE, *supra* note 157.

[162] Fetrow, *supra* note 14, at 332–33; Svatek, *supra* note 156, at 133–34.

[163] *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. . . This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative* information available to them that "might well elude an untrained person.") (emphasis added) (citations omitted) (quoting United States v. Cortez, 449 U.S. 411, 417–18 (1981)).

[164] *Id.*

[165] District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018) (quoting *Cortez*, 449 U.S. at 417).

[166] *Id.*; *see* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 ("[I]n defining the contours of the right to be free from unreasonable searches and seizures, the specific content and incidents of this right must be shaped by the context in which it is asserted. Accordingly, the Court has often said that it must examine the totality of the circumstances of the case—which is no more precise than the total atmosphere of the case—to assess the reasonableness of a search or a seizure.") (citations omitted).

[167] *See, e.g.*, Cara McClellan, *Dismantling the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1 (2017) (describing the "totality of the circumstances" as the framework for determining

violated,[168] whether an employee has waived their right to bring a claim under the Civil Rights Act of 1964,[169] and whether a police officer has "probable cause" to perform an arrest.[170] In effect, by analyzing the "totality of the circumstances," a reviewing court adopts a flavor of the cumulative harm framework by assessing the entirety of an individual's harm and recognizing that the "whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."[171]

What differentiates the totality of the circumstances analysis from the cumulative harm framework is that some applications of the totality of the circumstances analysis have constrained judicial discretion by requiring guiding considerations.[172] For example, in determining whether a police officer had used excessive force, a reviewing court must analyze the totality of the circumstances from the perspective of an officer "at the moment force was used."[173] Further, this application of the totality of the circumstances analysis requires a reviewing court to give "allowance [to the] fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[174] Within this

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whether police officers have used excessive force); Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 267–70.

[168] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) (requiring a reviewing court to consider the "totality of the circumstances" whether plaints have experienced "unequal access to the electoral process through § 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110).

[169] Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 75 (2005) (describing how a majority of circuit courts apply the "totality of the circumstances" in determining whether an employee has waived their right to a Title VII of the Civil Rights Act of 1964 claim).

[170] *Wesby*, 138 S.Ct. at 586 ("To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. . . . depends on the totality of the circumstances.") (citations omitted).

[171] *See id.* at 588 ("The 'totality of the circumstances' requires courts to consider 'the whole picture.'") (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

[172] *See* McClellan, *supra* note 167, at 7–9 (describing the guiding considerations that must be used in a totality of the circumstances analysis of whether a police officer used excessive force).

[173] *Id.* at 8.

[174] Graham v. Connor, 490 U.S. 386, 397 (1989). *See also* McClellan, *supra* note 167, at 7–9.

analysis, circuit courts disagree on whether a police officer's preceding events may be included with this "totality of the circumstances" analysis, or whether this analysis is limited to the totality of the circumstances "at the moment" of an officer's use of lethal force.[175]

The cumulative harm framework and the totality of the circumstances analytical framework have many similarities. Both frameworks require courts to "hear evidence of multiple acts because many instances of constitutional harm occur in this manner—the harm comes in the form of 'death by a thousand cuts' rather than a single blow."[176] Both frameworks recognized that the "whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."[177] Although there are minor differences in the two analytical frameworks, courts are well-equipped to aggregate the harm an individual faces.[178] Courts are also well-prepared to aggregate harm and even apply conditional requirements, or give preference to specific considerations to guide judicial discretion.[179]

3. The Cumulative Harm Framework More Effectively Addresses Second-Generation Harms Than the Sequential Approach

First-generation discrimination, such as explicit denial of one's right to vote on account of gender or race,[180] the denial of

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[175] *See* Ryan Hartzell C. Balisacan, *Incorporating Police Provocation into the Fourth Amendment "Reasonableness" Calculus: A Proposed Post-*Mendez *Agenda,* 54 HARV. C.R.-C.L. L. REV. 327, 330–31 (2019) (finding that the First, Third, Seventh, Tenth, and Eleventh Circuit all analyze the entirety of law enforcement actions during an encounter—including antecedent, provocative acts of the police—within a "totality of the circumstances" evaluation, while the Second, Fourth, Fifth, Sixth, and Eighth Circuits only examine the "totality of the circumstances" at the moment of the officer's use of force).

[176] Abrams & Garrett, *supra* note 16, at 1314.

[177] District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018).

[178] *See id.*; McClellan, *supra* note 167, at 7–9.

[179] *Graham*, 490 U.S. at 396; *see* McClellan, *supra* note 167, at 7–9.

[180] *See* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."); Harper v. W. Va. State Bd. of Elections, 383 U.S. 663, 670 ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.") (citations omitted). S*ee generally*, Christopher Watts, Note, *Road To The Poll: How the Wisconsin Voter ID Law of 2011 Is Disenfranchising its Poor, Minority, and Elderly Citizens*, 3 COLUM. J. RACE & L. 119, 126–27 (2013) (describing the end of explicit racial discrimination in exercising the right to vote as a result of Twenty-Fourth Amendment, the Civil Rights Act of 1964, and the Voting Rights Act of 1965).

employment on the account of gender,[181] or explicit denial of rights on the account of gender identity,[182] although largely addressed, has not disappeared.[183] For example, members of the United States Women's National Soccer Team, who had recently won the 2019 FIFA World Cup,[184] recently filed a gender discrimination lawsuit alleging that a top-tier, twenty-game winning Women's National Team player "would earn only 38% of the compensation of a similarly situated" Men's National Team player.[185]

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[181] *See, e.g.*, Dothard v. Rawlison, 433 U.S. 321 (1971) (invalidating a law that placed height and weight requirements for correctional counselors disproportionately excluded women).

[182] *See* Sandhya Somashekhar et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/26MD-TDMM] (revoking "federal guidelines specifying that transgender students have the right to use public school restrooms that match their gender identity").

[183] *See, e.g.*, Civil Minutes, Morgan v. U.S. Soccer Fed'n (C.D. Cal. 2019) (No. 2:19-cv-01717-RGK-AGR), 2019 WL 5867441 (finding an injury-in-fact that the Women's National Soccer Team was compensated less on a per-game basis than the Men's National Soccer team, despite the fact that the Women's Team "performance has been superior to that of the" Men's Team); Floyd v. City of New York, 959 F.Supp.2d 540 (S.D.N.Y. 2013) (invalidating the New York City Police Department's stop and frisk policy because it unconstitutionally racially profiled African-Americans and Latinos). *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001) ("First generation discrimination has not disappeared, and indeed has played a significant role in recent litigation against companies such as Texaco and Mitsubishi.").

[184] Andrew Keh, U.*S. Wins World Cup and Becomes a Champion for its Time*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/07/sports/soccer/world-cup-final-uswnt.html.

[185] Complaint ¶ 58, Morgan v. United States Soccer Federation (C.D. Cal. 2019) (No. 2:19-CV-01717), 2019 WL 1199270. *See, e.g.*, Andrew Das, *U.S. Women's Soccer Team Sues U.S. Soccer for Gender Discrimination*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/sports/womens-soccer-team-lawsuit-gender-discrimination.html [https://perma.cc/9MDH-RUXP].

Second-generation discrimination,[186] however, is just as pervasive.[187] This type of discrimination is not explicit; it is much more subtle. It is frequently the product of facially neutral laws that disparately impacts disadvantaged groups.[188] For instance, second-generation harms, in the context of voting, are "[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot."[189] Second-generation harms are "often more sophisticated than the facially discriminatory mechanisms that preceded them."[190] Subtle forms of discrimination include requiring an identification (ID) card at the polls, which often impact minority voters more harshly than

[186] Although first-generation discrimination must be addressed, it is not the focus of this Note. Second-generation discrimination is subtler and is frequently the product of a facially neutral law that disparately impacts minorities. *See* Sturm, *supra* note 183, at 468–69 ("Second generation claims frequently involve patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. This exclusion is difficult to trace directly to intentional, discrete actions of particular actors. For example, a now-common type of harassment claim targets interactions among co-workers who have the power to exclude or marginalize their colleagues, but who may lack the formal power to hire, discipline, or reassign. This form of harassment may consist of undermining women's perceived competence, freezing them out of crucial social interactions, or sanctioning behavior that departs from stereotypes about gender or sexual orientation. It is particularly intractable, because the participants in the conduct may perceive the same conduct quite differently. Moreover, behavior that appears gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns.")

[187] *See* Sturm, *supra* note 183 (describing second-generation discrimination in employment). *See, e.g.*, Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 566 (2013) (Ginsburg, J., dissenting) (describing Congressional findings that "second generation barriers constructed to prevent minority voters from fully participating in the electoral process continued to exist") (citations omitted); Angelia Dickens, *Revisiting* Brown v. Board of Education*: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 470, 479–82 (1996) (arguing that a race neutral policy of tracking students into specific curriculums based on their academic achievement resulted in racial discrimination); Joseph O. Oluwole & Preston C. Green III, *Riding the* Plessy *Train: Reviving* Brown *for a New Civil Rights Era for Micro-Desegregation*, 36 CHICANA/O-LATINA/O L. REV. 1, 10–12 (2019) (providing empirical data on how Black people, Latinxs, and Native Americans were placed in low-track English and math courses at higher rates than their white peers).

[188] *See* Sturm, *supra* note 183, at 468–69 (describing second-generation discrimination as subtle and part of patterns of interactions that exclude nondominant groups).

[189] *Shelby Cnty.*, 570 U.S. at 563.

[190] Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 80 (2010).

white voters.[191] Specifically, six states have "strict"[192] requirements for voters to present a photo ID, twelve states have "non-strict"[193] photo ID requirements, three states have "strict" non-photo ID requirements, and fourteen states have "non-strict," non-photo ID requirements.[194] The remaining fifteen states, and the District of Columbia, do not require a form of identification to vote.[195]

Other second-generation discrimination includes the total loss of 1,200 polling places in the southern United States since 2013,[196] which has resulted in thousands of voters waiting for six hours to vote;[197] the purging of 16,000,000 voters from voting rosters between 2014 and 2016;[198] the insufficient training of poll workers, resulting in the turning away of eligible voters;[199] the loss of the ability to take time off work to go vote without loss

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[191] *See Voter Identification Requirement: Voter ID Laws*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/voter-id [https://perma.cc/WX2S-HVZX] (Aug. 25, 2020).

[192] *Id.* (defining "strict" laws as "[v]oters without acceptable identification must vote on a provisional ballot and also take additional steps after Election Day for it to be counted")

[193] *Id.* (defining "non-strict" laws as "[a]t least some voters without acceptable identification have an option to cast a ballot that will be counted without further action on the part of the voter. For instance, a voter may sign an affidavit of identity, or poll workers may be permitted to vouch for the voter. In some of the 'non-strict' states . . . voters who do not show required identification may vote on a provisional ballot").

[194] *Id.*

[195] *Id*; *see also*, Shayanne Gal & Ellen Cranley, *Most States, Including Texas and Florida, Now Require Showing ID to Vote. Here's the Full State-By-State Breakdown*, BUS. INSIDER (Nov. 6, 2018), https://www.businessinsider.com/voter-id-requirements-in-every-state-midterm-elections-2018-11 [https://perma.cc/UN7Q-ZJC7].

[196] Andy Sullivan, *Southern U.S. States Have Closed 1,200 Polling Places in Recent Years: Rights Group*, REUTERS (Sept. 10, 2019), https://www.reuters.com/article/us-usa-election-locations/southern-us-states-have-closed-1200-polling-places-in-recent-years-rights-group-idUSKCN1VV09J [perma.cc/F57K-VW83].

[197] Todd J. Gillman et al., *'No One Should Wait Six Hours to Vote,' But in Texas, Thousands Did on Super Tuesday*, DALL. MORNING NEWS (Mar. 4, 2020), https://www.dallasnews.com/news/politics/2020/03/05/no-one-should-wait-six-hours-to-vote-but-in-texas-thousands-did-on-super-tuesday [https://perma.cc/X5RY-GWKL].

[198] Li Zhou, *Voter Purges Are on the Rise in States with a History of Racial Discrimination*, VOX (Jul. 20, 2018), https://www.vox.com/2018/7/20/17595024/voter-purge-report-supreme-court-voting-rights-act [perma.cc/8X4K-T7L3].

[199] *See* Vann R. Newkirk II, *Voter Suppression is Warping Democracy*, ATLANTIC (July 17, 2018), https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355 [https://perma.cc/JZ65-MQ9A].

of pay;[200] and requiring voters to vote on different days for state and federal primaries.[201] These requirements result in more difficulties in registering to vote, or staying registered, as well as other barriers to early voting or absentee voting.[202]

None of these laws explicitly prohibit an individual from exercising their right to vote. The laws, in theory, present an equal barrier to everybody. However, that is far from the truth—these "second generation, indirect structural barrier[s]" to vote have factually resulted in disparate impact for Black and Latinx individuals as well as other people of color.[203] One study found that "[r]elative to entirely-white neighborhoods, residents of entirely-[B]lack neighborhoods waited 29% longer to vote and were 74% more likely to spend more than 30 minutes at their polling place."[204] Another study found that individuals in neighborhoods that consisted of a 75% Latinx population waited, on average, 46% *longer* than individuals voting in neighbors that consisted of a 75% white population.[205] Minorities communities in the 2020 Democratic primary also experienced longer waiting times than their white peers.[206]

Other commentators have discussed how the closing of polling places has occurred in jurisdictions with the largest Black

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[200] Rachel Gillett & Grace Panetta, *In New York, California, Texas, and 27 Other States You Can Take Time Off from Work to Vote—Here's the Full List*, BUS. INSIDER (Nov. 6, 2018), https://www.businessinsider.com/can-i-leave-work-early-to-vote-2016-11 [https://perma.cc/3CMM-GFVC].

[201] Vivian Wang, *Why Deep Blue New York Is 'Voter Suppression Land'*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/nyregion/early-voting-reform-laws-ny.html [https://perma.cc/76VW-K64Q].

[202] *See New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Nov. 18, 2019), https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf [https://perma.cc/3FZ9-J9PK].

[203] Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991).

[204] M. Keith Chen et al., *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* 2 (Nat'l Bureau Econ. Rsch., Working Paper No. 2648, 2019) https://www.nber.org/papers/w26487.pdf [https://perma.cc/MZE4-EN8R].

[205] CHRISTOPHER FAMIGHETTI, BRENNAN CTR. FOR JUST., LONG VOTING LINES: EXPLAINED, 5 (Nov. 4, 2016), https://www.brennancenter.org/sites/default/files/analysis/Long_Voting_Lines_Explained.pdf [https://perma.cc/MJ2N-H46Y].

[206] *See* Nicole Narea, *Black and Latino Voters Were Hit Hardest by Long Lines in the Texas Democratic Primary*, VOX (Mar. 3, 2020), https://www.vox.com/2020/3/3/21164014/long-lines-wait-texas-primary-democratic-harris [https://perma.cc/8WCM-FLMB].

and Latinx population growth.[207] Even the frequency of changing polling locations,[208] the inability to get paid leave for going to vote,[209] and conforming to new voter ID laws[210] all disparately impact racial minorities.[211] Finally, the Government Accountability Office has found that requiring voters to demonstrate an ID disproportionately impacts racial minorities.[212]

Taken in isolation, each restriction to vote may seem reasonable and may serve a legitimate government interest in its application, such as "detecting voter fraud," or "safeguarding voter confidence" in elections.[213] However, as found by Congress[214] and as discussed in judicial opinions,[215] these

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[207] Richard Salame, *Texas Closes Hundreds of Polling Sites, Making It Harder for Minorities to Vote*, GUARDIAN (Mar. 2, 2020), https://www.theguardian.com/us-news/2020/mar/02/texas-polling-sites-closures-voting [https://perma.cc/78RN-BZBL]("The analysis finds that the 50 counties that gained the most Black and Latinx residents between 2012 and 2018 closed 542 polling sites, compared to just 34 closures in the 50 counties that have gained the fewest black and Latinx residents.").

[208] Zachary Roth, *Study: North Carolina Polling Site Changes Hurt Blacks*, NBC NEWS (Nov. 23, 2015), https://www.nbcnews.com/news/nbcblk/study-north-carolina-polling-site-changes-hurt-blacks-n468251 [https://perma.cc/8572-XRSE]("In total, black voters will now have to travel almost 350,000 extra miles to get to their nearest early voting site, compared to 21,000 extra miles for white voters.").

[209] Newkirk, *supra* note 199.

[210] Sari Horwitz, *Getting a Photo ID so You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23 [https://perma.cc/FU92-F4ZY].

[211] *See* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush . . . voter photo ID law[s] [are] a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."), *aff'd*, 553 U.S. 181 (2008).

[212] REBECCA GAMBLER & NANCY R. KINGSBURY, U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-634, ELECTIONS: ISSUES RELATED TO STATE VOTER IDENTIFICATIONS LAWS (2014) ("In both Kansas and Tennessee[,] we found that turnout was reduced by larger amounts among African-American registrants, as compared with Asian-American, Hispanic, and White registrants.").

[213] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008) (upholding a law requiring voters to present an ID card prior to voting).

[214] Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 592 (2013) (Ginsburg, J., dissenting) ("As the record for the 2006 reauthorization [of The Voting Rights Act] makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions.").

[215] *See* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) (2008) ("Let's not beat around the bush. . . voter

restrictions are a continuation of first-generation discrimination—explicit deprivations of a right.

At an abstract level, these second-generation barriers and forms of discrimination result in continually incremental encroachment upon rights. In the context of reproductive rights, barriers to obtain an abortion work together to ultimately deprive a person's of their right to choose.[216] An article by Kate Fetrow provides an illuminating hypothetical explaining the dangers of incremental regulation:

> In Year 0, a state has a regulatory regime under which abortion is regulated no differently than other medical procedures. Under that regime, women in the state face no undue burden. Then in Year 1, the state imposes a new, relatively minor restriction on abortion. Women in the state now face a slight barrier—say a 10% increase in the barriers they face. In Year 2, the state passes another, equally minor restriction—but now women face a barrier 20% greater than they did in Year 0. In Years 3, 4, and 5, the state continues to pass small, incremental regulations. Finally, when the burden increases to 50% relative to Year 0, a clinic or woman objects to the Year 5 regulation, claiming that it imposes an undue burden. Under the undue burden standard as it is currently articulated, the court would ask whether the Year 5 law imposes a burden compared to the previous status quo, comparing the regulation of Year 5 to the status quo of Year 4—not to the neutral state of affairs in Year 0. Because the regulation is incremental, that there

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photo ID law[s] [are] a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."), *aff'd*, 553 U.S. 181; *Crawford*, 553 U.S. at 221 n.25 (Souter, J., dissenting) ("Studies in other States suggest that the burdens of an ID requirement may also fall disproportionately upon racial minorities."); *Shelby Cnty.*, 570 U.S. at 592 (Ginsburg, J., dissenting) ("As the record for the 2006 reauthorization [of The Voting Rights Act] makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions.").

[216] *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart*,* 117 YALE L.J. 1694, 1706 (2008) (describing how the sequential approach in evaluating reproductive rights "uphold[s] incrementalist regulation enacted for fetal-protective purposes and subsequently defended on woman-protective grounds.").

> is some additional burden imposed by the Year 5 regulation is not sufficient to declare the regulation unconstitutional. And even were the plaintiff to challenge the Year 4 regulation, too, it would be analyzed independently of the other restrictions. The court never compares any provision to the neutral Year 0; nor does it consider whether the combination of small restrictions in Years 1 through 5 might, in total, impose enough of a burden that the burden becomes undue even though each restriction, individually, does not. As a result, the state can continue to pass piecemeal restrictions on abortions, creating downward incremental pressure on abortion access, because none of the restrictions, standing alone, imposes an undue burden.[217]

Of course, it is difficult to quantify the exact harm a person may face when seeking an abortion. Regardless of this lack of precision, this hypothetical demonstrates the inability of the sequential approach to address second-generation discrimination.[218]

There are, of course, many policy proposals[219] and legal theories[220] that may increase access to voting using tools outside of the courts that are beyond the scope of this Note. At the judicial level, courts should adopt the cumulative harm framework in

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[217] Fetrow, *supra* note 14, at 330.

[218] *See also* Siegel, *supra* note 216, at 1706.

[219] *See* BRENNAN CTR. FOR JUST., AN ELECTION AGENDA FOR CANDIDATES, ACTIVISTS, AND LEGISLATORS, 6–13 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Democracy%20Agenda%202018.pdf [https://perma.cc/9Q4J-VSV8]; German Lopez, *9 Ways to Make Voting Better*, VOX (Nov. 7, 2016, 8:30 AM), https://www.vox.com/policy-and-politics/2016/11/7/13533990/voting-improvements-election-2016. *See, e.g.*, Danielle Root & Liz Kennedy, *Increasing Vote Participation in America: Policies to Drive Participation and Make Voting More Convenient*, CTR. FOR AM. PROGRESS (July 11, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america [https://perma.cc/P4BG-6AJZ].

[220] *See* Shane Grannum, *A Path Forward for Our Representative Democracy: State Independent Preclearance Commissions and the Future of the Voting Rights Act After* Shelby County v. Holder, 10 GEO. J.L. & MOD. CRITICAL RACE PERSP. 95, 128–39 (2018); *see, e.g.*, Andres A. Gonzalez, *Creating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act*, 27 BERKELEY LA RAZA L.J. 65, 86–91 (2017); Edward K. Olds, *More Than "Rarely Used": A Post-*Shelby *Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185 (2017).

addressing these harms. Due to its ability to examine the totality of the circumstances and aggregate harm from multiple sources, the cumulative harm framework is a more useful analytical tool to address second-generation harms than the sequential approach.[221] The sequential approach, of course, has been an effective analytical framework to promulgate bright-line rules that combat explicit racism.[222] But, newer, subtler forms of second-generation discriminations "constitute barriers to racial justice that are in many ways more difficult to overcome."[223] The sequential approach would analyze the constitutionality of each law that results in the closing polling places, longer waiting times, new voter ID requirements, and the insufficient training of polling workers that turns eligible voters away from voting, in isolation.

The cumulative harm framework, in contrast, asks whether "multiple election [laws] work together to fence out minority voters and effectively eliminate opportunities to cast a ballot."[224] This analytical framework realizes that life is complex and the "panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting" the right to vote.[225] By aggregating harm, this analytical framework assesses the totality of harm, as opposed to allowing continuous incremental burdens placed upon the right to vote.[226]

B. Disadvantages of the Cumulative Harm Framework

This section evaluates the disadvantages of the cumulative harm framework. The section discusses how this

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[221] *See* Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63, 72 (2004) (describing how "rigid legal prescriptions" of "anti-discriminatory laws" have been effective in fighting first-generation harms, "they have not been as effective in combating more subtle and contemporary forms of discrimination—what is often referred to as 'second-generation discrimination'—including discrimination arising from intersectional oppression); Sturm, *supra* note 183, at 469.

[222] *See* Reynoso, *supra* note 221, at 72.

[223] Pedro A. Noguera, *Educational Rights and Latinos: Tracking as a Form of Second Generation Discrimination*, 8 LA RAZA L.J. 25, 25 (1995).

[224] Hayden Johnson, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 GEO. L.J. 449, 472 (2019).

[225] Clingman v. Beaver, 544 U.S. 581, 607–08 (2005) (O'Connor, J., concurring).

[226] *See* Siegel, *supra* note 216, at 1706 (arguing the sequential approach permits increased "incrementalist regulation" in the context of abortion rights). The same logic, however, can be applied to the voting context. If minor impediments to the right to vote are continually upheld, incrementally harmful impediments to vote will continue.

analytical framework is difficult to administer because the framework does not have clear boundaries in its application. It also discusses how the framework grants judges substantial discretion and the implications of increased judicial discretion. Further, it describes the difficulty in adopting the framework in facial challenges of law and in cases of prospective harm.

1. Difficulty in Administration: Where to Draw the Cumulative Line?

The cumulative harm framework would be difficult to administer.[227] One immediate question is temporal: how far back in time may a reviewing court be permitted in considering an individual's cumulative harm? In some cases, this question is answered by the inherent scope of the constitutional violation. In determining whether one's right to a fair trial was violated, for example, the analysis is limited to the scope of the trial. Similarly, in determining prosecutorial misconduct claims under *Brady*, the inquiry naturally is limited to the scope of the government investigation.

Other constitutional challenges do not have this natural time-frame. Asylum law is particularly instructive. As noted above, a reviewing court is required to assess the cumulative harm of the asylum seeker.[228] But, how expansive is a review court's analysis? In one asylum case, the Second Circuit reviewed harms over the span of twelve years.[229] Another case, also from the Second Circuit, evaluated four discrete harms during a nine-year period.[230] There is no clear answer to whether a reviewing court should, or should not, have an expansive review. However, if courts do create a bright-line rule regarding the temporal scope of this analysis, such rigidity could negatively impact claimants.

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[227] *See* Kerr, *supra* note 15, at 333.

[228] *See, e.g.*, Fei Mei Cheng v. Att'y Gen., 623 F.3d 175, 192 (3d Cir. 2010) ("Moreover, in determining whether actual or threatened mistreatment amounts to persecution, '[t]he cumulative effect of the applicant's experience must be taken into account' because '[t]aking isolated incidents out of context may be misleading.'") (quoting Manzur v. U.S. Dep't Homeland Sec., 494 F.3d 281, 290 (2d Cir.2007)).

[229] *Manzur*, 494 F.3d a 290–91 (2d Cir. 2007) ("The petitioners' claim of past persecution in this case is primarily predicated on the alleged pattern of harms to which the petitioners were subjected over approximately a twelve-year period in Bangladesh.").

[230] Edimo-Doualla v. Gonzales, 464 F.3d 276, 283 (2d Cir. 2006) ("There was an additional fundamental error in the IJ's analysis. In assessing the question of whether Edimo-Doualla's mistreatment amounted to persecution, the IJ considered the 1991 and 1996 incidents separately from the 1997 and 2000 incidents. Incidents alleged to constitute persecution, however, must be considered cumulatively.").

For example, if such a strict timeframe exists, such as five years, it would be unjust to ignore relevant harm a claimant has experienced two days before this five-year cut off. The only solution to this hypothetical is to allow judges to decide these questions on a case-by-case basis.[231]

Another pressing question is how much cumulative harm is sufficient to justify a constitutional violation? *Jones v. United States*[232] illustrates the difficulties of this question. In this case, the government placed a battery-powered GPS device on Jones's car for twenty-eight days[233]. The device tracked the location of Jones's car every seven seconds, resulting in over 2,000 pages of data throughout the four weeks of surveillance.[234] The government obtained a warrant to install the GPS within ten days of the warrant's issuance, but the government installed the GPS on the eleventh day.[235] Regardless, the D.C. Circuit adopted the cumulative harm framework, reasoning that the data resulting from the GPS constituted a search under the Fourth Amendment because the totality of the search revealed "an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse."[236] Because the Supreme Court's majority held that "attaching the device to [Jones's] Jeep" unlawfully encroached on a protected area, the majority did not reach the question of whether the cumulative harm from the entire data collection constitutes an unlawful search. [237] The concurring opinions, however, followed the approach of the D.C. Circuit by alluding to the cumulative harm framework.[238]

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[231] *See* Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1296 (1972) (explaining how judicial discretion "allows for the operation of expertise and human sensitivity where standards or stringent review might stifle such expression.").

[232] United States v. Jones, 565 U.S. 400 (2012).

[233] *Id.* at 403.

[234] *Id.*; Kerr, *supra* note 15, at 323.

[235] *Jones*, 565 U.S. at 403.

[236] United States v. Maynard, 615 F.3d 544, 563 (D.C. Cir. 2010), *aff'd in part sub nom.* United States v. Jones, 565 U.S. 400 (2012).

[237] *Jones*, 565 U.S. at 410–12 (2012).

[238] *See Jones*, 565 U.S. at 430 (Alito, J., concurring) ("[The] relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. . . . But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *See id.* at 416 (Sotomayor, J., concurring) ("I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the *sum* of one's public movements.") (emphasis added).

Justice Alito's concurrence adopted a version of the cumulative harm framework.[239] In contrast to the majority, Justice Alito frames the question by "asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."[240] Justice Alito reasoned that for most offenses "society's expectation has been that law enforcement . . . would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period."[241] On the one hand, the aggregate surveillance presents the constitutional violation and outweighs the government interest in investigating typical crimes.[242] On the other hand, prolonged investigation resulting in an accumulation of information may be justified "in the context of investigations involving extraordinary offenses."[243]

Embedded in this analysis is the question of how much surveillance is sufficient to violate the Fourth Amendment. Justice Alito declined to answer this question: "[w]e need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark. Other cases may present more difficult questions."[244] In context, however, should courts be drawing the constitutional line at three days, three weeks, or some other threshold?[245] Even if, *arguendo*, the Supreme Court creates a bright-line rule that a week of GPS surveillance violates the Fourth Amendment, what if law enforcement conducted five days of GPS monitoring, and then re-opens the investigation a year later and conducts five more days of surveillance? The cumulative harm framework does not provide an answer to this difficulty.[246]

The third question relates to *cross-categorical cumulation*.[247] For instance, to continue with the facts presented by *Jones*, suppose a week of GPS surveillance is sufficient for a

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[239] *See id.* at 430 (Alito, J., concurring) (describing the cumulative impact of surveilling the vehicle for a long period and not needing to "identify with precision the point at which the tracking of this vehicle became a search").

[240] *Id.* at 419.

[241] *Id.* at 430.

[242] *Id.*

[243] *Id.* at 431.

[244] *Id.* at 430.

[245] *See* Kerr, *supra* note 15, at 333 (discussing the difficulty of determining the duration of time necessary to create the relevant mosaic).

[246] *See id.* (discussing the various problems posed by delays and differences in the type of information gathered about different suspects).

[247] *See supra* Part II.D (introducing the idea of cross-categorical cumulation).

Fourth Amendment violation. Should a reviewing court be permitted to aggregate the surveillance of a suspect that results from five days of GPS monitoring, three days of public camera surveillance, and ten minutes of audio monitoring from a microphone the size of a ballpoint pen?[248] If so, even though five days of GPS monitoring may be insufficient for a constitutional violation, does the five days of GPS monitoring *combined* with other surveillance become unlawful? What about the cumulation of surveillance of the suspect's movements in the real world through undercover law enforcement combined with publicly available information online—like information held on social media—[249] and a suspects' information owned by third parties—such as internet search history, call information, cell phone location data, text messages, and emails?[250] Even if the Supreme Court creates a bright-line rule to determine how much surveillance is sufficient to constitute a Fourth Amendment violation, a reviewing court would face serious challenges attempting to appropriately cumulate the surveillance from drastically different types of surveillance.

Each of these considerations suggest that the cumulative harm framework is not perfect. Because the variety of questions presented through the framework's application cannot be easily answered, or uniformly applied, the framework would be difficult to administer.[251] The framework presents "so many novel and difficult questions that courts would struggle to provide reasonably coherent answers," that some commentators argue against its adoption.[252]

2. Potential for Unrestrained Judicial Discretion

As discussed above, the cumulative harm framework presents many challenging questions.[253] If adopted, the

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[248] *See* Kerr, *supra* note 15, at 334–35.

[249] Kashmire Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [ ].

[250] *See* Josephine Wolff, *Losing Our Fourth Amendment Data Protection*, N.Y. TIMES (Apr. 28, 2019), https://www.nytimes.com/2019/04/28/opinion/fourth-amendment-privacy.html [ ]. *See also*, Jennifer Valentino-DeVries, et al., *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret*, N.Y. TIMES (Dec. 10, 2018) https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html [ ] (describing the numerous sources of information available to law enforcement in the digital age).

[251] *See* Kerr, *supra* note 15, at 346–47.

[252] *Id.* at 353.

[253] *See id.* at 328–29.

cumulative harm framework would require judges to answer these questions, thereby granting judges wide judicial discretion.[254] If unchecked, "discretion is a dangerous form of power" that could theoretically lead to partiality in administering the law.[255] Scholarship regarding excessive judicial discretion and advocating for its limitation is extensive.[256] In fact, restraining judicial direction is the primary thrust of textualism.[257] This Note attempts to summarize the predominant arguments.

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[254] *See id.* at 346 (describing administrability of a cumulative harm framework as the "legal equivalent of Pandora's Box").

[255] William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 648 (1982).

[256] *See, e.g.*, *id.* at 647–48 (discussing how discretion "is a far from perfect tool"); Anastasoff v. United States, 223 F.3d 898, 901 (8th Cir. 2000) (Judicial discretion "is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion.") (quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 44–45 (Univ. Chi. Press 1971)); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 63 (1984) ("propos[ing] limits on judicial discretion to exclude prejudicial evidence under [Federal] Rule [of Evidence] 403 by suggesting standards for interpretation and application."); Daniel A. Chatham, *Playing with Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 620 (2007) (arguing for the limiting of judicial discretion in sentencing of non-extraordinary white collar crimes); Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1055 (2002) (arguing for the limitation of judicial discretion in using nonpublished opinions); Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 847 (2009) (discussing how legislatures have attempted to limit judicial discretion by creating "statutory directives . . . that tell the judiciary how to interpret a statute or statutes"). *But see*, Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069, 1080 (2006) (discussing how "[j]udges always have discretion" and that "judges make law constantly").

[257] Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1899 (2008) ("Textualism . . . is an approach to statutory interpretation that accords dispositive weight to the meaning of the statutory text. It maintains that in interpreting statutes, courts must seek and abide by the public meaning of the enacted text, understood in context. The approach is thus closely identified with Oliver Wendell Holmes's famous claim that '[w]e do not inquire what the legislature meant; we ask only what the statute means.'") (quoting John F. Manning, Textualism and Legislative Intent, 91 VA. L. REV. 419, 420 (2005)) (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)). *See also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, at 93 (Mar. 8–9, 1995) [hereinafter Scalia, *Common-Law*] https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf [perma.cc/XNK2-3TQF] (discussing how discretion allows judges to "pursue

The primary argument is that, armed with unfettered discretion, judges will overstep their institutional role by creating new laws or invalidating democratically promulgated laws, thereby violating the separation of powers doctrine.[258] The Constitution vests powers in the Congress to legislate, the President to execute the laws, and the judiciary to adjudicate.[259] The separation of powers principle provides that, first, these major branches of governments should be kept in some fundamental senses separate;[260] and second, this separateness should allow each branch to guard its own institutional prerogatives and serve as a check to other branches' self-interested behavior.[261] An overstepping of one branch's role upon another's—e.g., if Congress sought to make a final determination of whether its own law was constitutional—would violate this principle. Some, even as early as James Madison, take this argument a step further by positing that a state cannot have the rule of law without separation of powers.[262] Therefore, empowering judges with wide discretion in assessing the aggregate harm faced by individuals through an entire regulatory framework would permit judges to "pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."[263] Taking this argument to the extreme, some commentators argue that

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their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field").

[258] *See* Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1880) ("[A]ll the powers intrusted [sic] to government . . . are divided into the three grand departments . . . . [T]he functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. . . . [T]he successful working of this system that the persons intrusted [sic] with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others.").

[259] U.S CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."); U.S CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States of America."); U.S CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court . . . .").

[260] Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 435 (1987).

[261] *Id.* at 450.

[262] *See* THE FEDERALIST NO. 47 (James Madison) (discussing Montesquieu's conception of separation of powers in terms of protection of liberty under law, and in particular of preventing "*the same* monarch or senate" that enacts laws from being able "to *execute* them in a tyrannical manner").

[263] Scalia, *Common-Law*, *supra* note 257, at 93.

excessive judicial discretion threatens the legitimacy of the judiciary.[264]

Another argument is that with increased discretion, the most important factor in determining an outcome of a trial, could be the presiding judge.[265] For instance, in the most abstract sense and without clear guidelines, a judge can consider that the cumulative harm resulting from five laws that prevent a woman from receiving an abortion are not sufficient for a constitutional violation. Another judge, evaluating the same circumstances, can reach the opposite outcome.

The cumulative harm framework also does not provide clear remedies. To continue from the example above, even if two judges agree that the cumulative effect of five laws results in a constitutional deprivation of a right, how would a judge determine which of the five laws to strike down? All of these questions must ultimately be decided, and may be decided differently by the presiding judge of each case.

3. Prospective vs. Retroactive Litigation

Many of the previous examples focused on litigating harm that has already occurred. However, not all cases are retroactive. Facial challenges of statutes focus on prospective harm.[266] These challenges allege that a statute is invalid in *all* of its applications.[267] In these instances, the judicial discretion granted under the cumulative harm framework is exacerbated because the litigation is based on prospective harm.

Cases of prospective harm often result from quick legal response to new laws. And often, these lawsuits are facial challenges. A recent reproductive rights case[268] and a voter ID

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[264] *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 641–49 (1982) (arguing that excessive judicial discretion at remedial stage threatens judicial legitimacy).

[265] *See* Derden v. McNeel, 978 F.2d 1453, 1458 (5th Cir. 1992). ("[A] free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system: one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record.").

[266] A successful facial challenge means that a statute is unlawful in all of its potential applications. Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 880–81 (2005).

[267] Nihal S. Patel, *Weighty Considerations: Facial Challenges and the Right to Vote*, 104 NW. U. L. REV. 741, 742 (2010).

[268] Complaint, South Wind Women's Center v. Stitt, 808 F. App'x 677 (10th Cir. 2020) [hereinafter Oklahoma Complaint] (No. CIV-20-277-G), 2020

case[269] demonstrate the speed of which litigation arises and variation in evaluating prospective harm.

On March 24, 2020, in response to the COVID-19 global pandemic, the Governor Stitt of Oklahoma issued an executive order postponing all elective surgeries and minor medical procedures.[270] Three days later, on March 27, the governor declared that the order prohibited all abortions which were not a "medical emergency" or "otherwise necessary to prevent serious health risks" to the woman carrying the fetus.[271] Another three days later, on March 30, the South Wind Women's Center and Planned Parenthood filed a lawsuit challenging the government's order.[272]

Although the plaintiffs were abortion providers, much of the litigation focused on the harm caused to patients who wished to seek an abortion.[273] Further, even though the prospective harm in this litigation was prospective, it was predictable.[274] The prospective harm was at its fullest: a total ban on abortion, with the exception of medical emergency. However, in other cases, aggregating prospective harm is more difficult.

Take, for example, *Crawford v. Marion County State Board of Elections*.[275] On April 27, 2005, the Governor of Indiana signed Senate Enrolled Act 483 (SEA 483).[276] The bill required a person to present a photo ID when casting an in-person ballot at both primary and general elections.[277] A voter who is unable to present photo identification may file a provisional ballot that will

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WL 1521890 (showing how a complaint was filed three days after a governor clarified that an executive order banned all non-emergency abortions).

[269] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[270] OFF. GOVERNOR, J. KEVIN STITT, FOURTH AMENDED EXECUTIVE ORDER 2020-07, (Mar. 24, 2020), https://www.sos.ok.gov/documents/executive/1919.pdf [https://perma.cc/SYQ5-XKRW].

[271] OKLAHOMA GOVERNOR STITT, PRESS RELEASE: GOVERNOR STITT CLARIFIES ELECTIVE SURGERIES AND PROCEDURES SUSPENDED UNDER EXECUTIVE ORDER (Mar. 27, 2020), https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries [https://perma.cc/29LS-RVSK].

[272] Oklahoma Complaint, *supra* note 268, ¶ 1.

[273] *Id.* ¶¶ 4–5.

[274] *Id.* ¶ 5 ("Plaintiffs *will* be forced to continue turning away patients, resulting in immediate and irreparable harm for which no adequate remedy at law exists.") (emphasis added).

[275] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[276] Complaint at ¶ 4, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (1:05-cv-0634-SEB-VSS), 2005 WL 3708052 [hereinafter, *Crawford* Complaint].

[277] *Id.*

be counted if they bring their photo ID to the circuit court clerk's office within ten days.[278] The Democratic Party filed their complaint five days later, arguing that "requiring registered and otherwise qualified voters who do not presently possess" photo identification at the time of voting was unlawful.[279] The *Crawford* plaintiffs argued that SEA 438 was especially burdensome to impoverished people, elderly people, people experiencing homelessness, and people of color.[280]

The Supreme Court discussed the difficulty in evaluating prospective harm in the context of a facial challenge. Justice Stevens, writing for the Court's majority, agreed that through the Indiana law, "a somewhat heavier burden may be placed on a limited number of persons."[281] Yet, the Court found that "on the basis of the evidence in the record it [was] not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them."[282] The record did not show "any concrete evidence of the burden imposed on voters who currently lack photo identification," nor were some of the witnesses able to indicate "how difficult it would be for them to obtain" the necessary documentation for a state-issued photo ID card.[283] Some witnesses even testified that they were able to pay for the necessary documents to receive a photo identification card.[284] Overall, the *Crawford* Court concluded that they "do not know the magnitude of the impact SEA 483 will have on indigent voters."[285] The Court was especially reluctant to accept the plaintiff's facial challenge to SEA 483 because plaintiffs bear a heavy burden of persuasion in these types of challenges.[286]

Justice Steven advances a reasonable concern. It is often difficult to quantify the magnitude of harm or estimate the scope of individuals that will be harmed by a potential law.[287] When harm is retroactive, at least judges can point to separate

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[278] Ind. Code Ann. § 3-11.7-5-2.5(b) (West 2006); *Crawford*, 553 U.S. at 186.

[279] *Crawford* Complaint, *supra* note 276, at ¶ 17.

[280] Brief for Petitioners at 39–45, Crawford v. Marion County Election Bd., 553 U.S. 181 (2008) (No. 07-21), 2007 WL 3276506.

[281] *Crawford*, 553 U.S. at 199.

[282] *Id.* at 200.

[283] *Id.* at 201.

[284] *Id.*

[285] *Id.*

[286] *See id.* at 202–03 (deciding that the plaintiff did not show that the "statute imposes 'excessively burdensome requirements' on any class of voters").

[287] *See id.* at 200 (describing the high burden of persuasion imposed by a broad attack on the constitutionality of SEA 483 and questioning the accuracy of the evidence in the record to determine the magnitude of the burden).

occurrences to justify the use of the cumulative harm framework. When harm is prospective, judges cannot. A prediction of prospective harm may be reasonable, yet the calculus of evaluating the cumulative impact of prospective harm grants judges with more discretion. At one extreme, such as a total ban, prospective harm is clear. At the other, judges may not be able to adequately evaluate the type, severity, or expansiveness of potential harm.

C. The Judiciary Should Adopt the Cumulative Harm Framework

The cumulative harm framework has advantages and disadvantages. The judiciary, despite such drawbacks, should adopt the cumulative harm framework more broadly. Courts are well-equipped to implement this framework because the framework is used throughout constitutional law.[288] The cumulative harm framework evaluates potential constitutional violations from the perspective of right-holders.[289] This perspective is reasonable because the "Constitution protects individuals."[290] Without this perspective, and without this framework, the judiciary cannot adequately address continued incremental burdens.[291] The cumulative harm framework also is better equipped to evaluate and address second-generation discrimination than other analytical methods.[292] Because second-generation discrimination and harms are no longer explicit deprivations of rights, courts should expand analysis to cumulative harm experienced by individuals—including harm experienced from a collection of statutes.

Although the framework provides judges with more discretion, discretion is a natural element of the judicial process.[293] Judicial discretion "allows for the operation of expertise and human sensitivity where standards or stringent review might stifle such expression."[294] Limiting a judge's discretion through an adoption of the sequential approach will be under-inclusive because a rigid rule does not have the flexibility

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[288] *See* discussion *supra* Part III and Part IV.A.2.

[289] *See* discussion *supra* Part IV.A.1.

[290] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992).

[291] *See* Siegel, *supra* note 216, at 1706 (describing one strategy of the antiabortion movement as emphasizing incremental opposition to Roe and abortion legislation to change public opinion).

[292] *See* discussion *supra* Part IV.A.3.

[293] *See* Erwin Chemerinsky, *supra* note 256, at 1069, 1080 (discussing how "[j]udges always have discretion" and that "judges make law constantly").

[294] Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1296 (1972).

to account for the complexity of life.[295] The more complex cases become, the more "individualized justice [is needed], that is, justice which to the appropriate extent is tailored to the needs of the individual case. Only through discretion can the goal of individualized justice be attained."[296] This flexibility allows the judiciary to respond to novel questions that arise in contemporary society in innovative ways.[297] Thus, "there can be no justice without discretion."[298]

V. CONCLUSION

This Note has shown the power of different analytical methods of constitutional review. The Supreme Court employs the cumulative harm framework in multiple areas of law.[299] In contrast, the Supreme Court also adopts the sequential approach in other areas of law.[300] This Note evaluates the advantages and disadvantages of the cumulative harm framework.[301] By doing so, this Note demonstrates that constitutional questions can turn on the analytical framework adopted by a reviewing court. Because the "Constitution protects individuals . . . from unjustified state interference," the judiciary should more broadly apply the cumulative harm framework.[302] This framework is the best analytical method to combat new forms of discrimination and help the judiciary truly bring equal justice under law.

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[295] *See* David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 999–1000 (1990).

[296] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 19 (1969).

[297] *See* Leonard, *supra* note 295, at 1002. ("[Judicial] [d]iscretion . . . permits innovation and creativity in law. One of the strengths of the common law is that it was composed in large part of broad principles rather than detailed rules, thus facilitating creativity and innovation that help the law to mature in more enlightened ways."). *See also*, Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2217 (1991) ("In a modern society, the law regulates the complex behavior of millions of people. To do this efficiently [the judiciary] must use broadly applicable rules. Yet such rules are bound . . . to fail in some cases . . . . Some of these failures can be ameliorated by according discretion to . . . judges.").

[298] Harold E. Pepinsky, *Better Living Through Police Discretion*, 47 LAW & CONTEMP. PROBLEMS 249, 253 (1984).

[299] *See* discussion *supra* Part II.

[300] *See* discussion *supra* Part III.

[301] *See* discussion *supra* Part IV.

[302] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992).