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TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF *Matthew Wellington Burns* vii

ARTICLES & ESSAYS

STRANGE FRUIT AT THE UNITED NATIONS *Ursula Tracy Doyle* 187

SPEED MATTERS *Kif Augustine-Adams,* 239
Candace Berrett
& James R. Rasband

THE OPEN HAND: MODERATE REALISM
AND THE RULE OF LAW *Michael F. Duggan* 271

CHARLES HAMILTON HOUSTON:
MOCKINGBIRD WITH TALONS *Albert M. Pearson* 319

BLOCKING THE MEANS TO EXPLOIT:
ENDING KAFALA UNDER THE PRINCIPLE
OF SADD AL-DHARA'I *Faraz Siddiqui* 341
& Aleea Stanton

NOTES & COMMENTS

NANA'S NEED: HOW TO PROTECT
THE BABY BOOMER GENERATION
NOW ELIGIBLE FOR MEDICARE *Heidi Thomas* 369

WHAT'S IN A NAME?: DEFINING
TERRORISTS AND TERRORIST ORGANIZATIONS *Shanice Dara Hinckson* 397

POLICE OFFICERS, I.Q., AND
THE DEPRIVATION OF RIGHTS *Ayana Williams* 425

ADJUDICATING THE YOUNG ADULT:
COULD SPECIALIZED COURTS PROVIDE
SUPERIOR TREATMENT TO THIS
EMERGING CLASSIFICATION? *Elijah D. Jenkins* 455

LETTER FROM THE EDITOR-IN-CHIEF

History is one of our greatest teachers. As Dr. Martin Luther King Jr. once said, “[w]e are not makers of history. We are made by history.” It clearly and unequivocally highlights our trials and defeats, while at the same time boasting our triumphs and accomplishments as a society. These experiences serve as important lessons that equip us with the tools necessary to reform our society. In Issue 2 of Volume 61, each submission takes a lesson from history, and through policy, reason, and law, makes arguments that serve to strengthen our communities both locally and globally. Our hope is that these articles will underscore the importance of our history while also serving as a catalyst for progression and change in the future.

In our first article, Ursula Doyle surveys and evaluates the opportunities taken – and not – by the relevant branches of the United Nations to address Jim Crow during the period 1945 to 1965. In particular, her article “The United Nations, the ‘Negro’ and the Dream Deferred,” explores the underlying reasons for the creation of the United Nations, the functions, powers and limitations of each of its principal organs, and considers the efforts taken by these UN entities to combat racial segregation and racial discrimination.

Kif Augustine-Adams, Candace Berrett, and James R. Rasband then discuss the relationship between speed and grades on first year law school examinations. In “Speed Matters,” they reveal the findings of their research which indicates a strong correlation between total words written on first year law school examinations and grades, suggesting that speed does indeed matter. Furthermore, the article considers whether speed is a reasonable indicator of future performance as a lawyer, surrounding the question with relevant psychometric literature regarding speed and intelligence. They suggest that professors should consider whether their exams over-reward length, and consequently, speed, or whether length and speed are a useful proxy for future professional performance and success as lawyers.

Next, in “The Open Hand: Realism and The Rule of Law” Michael Duggan questions and analyzes rule of law initiatives from a perspective of moderate realism. He explores the values that underlie rule of law initiatives and argues that these alleged purposes may be used as a pretext for cultural and economic imperialism. He concludes with an alternative enabling Western republics to exhibit ideas of liberalism and constitutional governance to nations with emerging legal systems without actively imposing such ideas on these countries.

In “Charles Hamilton Houston: Mockingbird with Talons,” Albert Pearson conducts an in-depth analysis of the literary character Atticus Finch

from the book “To Kill a Mockingbird.” He contrasts Finch’s portrayal of the role of the civil rights lawyer with that of Charles Hamilton Houston. Pearson wisely advises against the idolization of Finch, as his efforts may not have been as significant as other real-life civil rights lawyers.

Next, former Howard University School of Law graduates Faraz Siddiqui and Alea Stanton, use Islamic law to analyze labor practices in the Gulf States in “Blocking the Means to Exploit: *Kafala* Under *Sadd al-Dhara’i*.” They illustrate a brief history of the socioeconomic and political history of the Gulf States and the origin of the *kafala* system and then examine the Quran and Sunnah to expound upon relevant principles of Islamic law that are implicated in both labor law and the *kafala* system. They then argue that, according to the *Sadd al-Dhara’i* principle, the *kafala* system is prohibited under Islamic Law and the cause of severe abuse and exploitation of migrant workers in Gulf States.

The next four articles are authored by current members of the *Howard Law Journal*, who have provided insight and legal arguments based on historical implications. In Heidi Thomas’s article, “Nana’s Need: How to Protect the Baby Boomer Generation Now Eligible for Medicare,” she argues that attention must be focused on the problem of fraud perpetrated on senior citizens eligible for the Medicare program. She states that senior citizen’s access to *quality* health care is dependent upon consumer protections in the health insurance market. This will ensure beneficiaries receive medical coverage comparable to Medicare and are not exploited by unfair or deceptive marketing. Thomas concludes by arguing that this new focus will lessen the strain on the healthcare system and lower healthcare cost for all Americans.

Shanice Hinckson then discusses the United States government’s current standard used to qualify an individual or organization as a terrorist or terrorist organization in her article “What’s in a Name?: Defining Terrorists and Terrorist Organizations.” She uses the history of international terrorism in America during the twenty-first century and the current laws related to international terrorism in order to argue that – the current system – is too discretionary. As a result, Hinckson argues that there are predominately unrestricted policies regulating investigations into suspected terrorist links, which ultimately has a negative impact on American society. She proposes that the United States should modify the deference given to agencies and direct such agencies to one foundational standard. She also advocates that individuals must be protected from discriminatory national security tactics.

Thereafter, Ayana Williams, in her article “Police Officers, I.Q., and the Deprivation of Rights” challenges New London, Connecticut’s Police Department’s policy to automatically reject applicants who scored too high on an exam testing general intelligence. Williams recapitulates the lawsuit brought by Robert Jordan, a rejected forty-eight-year-old college graduate, who scored well above the average on his test, emphasizing his unsuccess-

ful Equal Protection claim. She then argues that these maximum scores, in fact, do violate the Fourteenth Amendment's protection of bodily integrity.

Lastly, in his article "Adjudicating the Young Adult: Could Specialized Courts Provide Superior Treatment to this Emerging Classification?" Elijah Jenkins advances the proposition that young adults should be recognized as one group, distinct from both juveniles and adults, and engages with whether specialized courts could provide meaningful redress to offenders within this classification. To support his argument, Jenkins examines the historical recognition of reduced culpability for young offenders, the disconnect between the current criminal justice system approach and the penological goals of punishment, and the psychological and sociological data supporting an extension of reduced culpability to young offenders.

On behalf of the members of Volume 61 of the *Howard Law Journal*, I would like to thank you for your support and readership. It is our hope that through these submissions, we might allow history to serve as our teacher once more and equip us with the knowledge to ensure that the injustices of our past do not become reality for future generations.

MATTHEW WELLINGTON BURNS
EDITOR-IN-CHIEF
VOLUME 61

Strange Fruit¹ at the United Nations

URSULA TRACY DOYLE*

INTRODUCTION	189
I. THE UNITED NATIONS	192
A. The Founding	192
B. The United Nations Charter	195
II. THE UNITED STATES	201
III. STRANGE FRUIT AT THE UNITED NATIONS	208
A. The General Assembly	209

1. Abel Meeropol (also known as Lewis Allan) appears to have coined the term “strange fruit” in a poem. *The Strange Story of the Man Behind “Strange Fruit”*, NAT’L PUB. RADIO, <https://www.npr.org/2012/09/05/158933012/the-strange-story-of-the-man-behind-strange-fruit> (last visited Jan. 19, 2018). That poem was set to music and became the song “Strange Fruit,” recorded, in 1939, by jazz and blues artist Billie Holiday. *Id.* The lyrics are as follows:

Southern trees bear strange fruit
Blood on the leaves and blood at the root
Black bodies swinging in the southern breeze
Strange fruit hanging from the poplar trees
Pastoral scene of the gallant south
The bulging eyes and the twisted mouth
Scent of magnolias, sweet and fresh
Then the sudden smell of burning flesh
Here is fruit for the crows to pluck
For the rain to gather, for the wind to suck
For the sun to rot, for the trees to drop
Here is a strange and bitter crop

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* Associate Professor of Law, Salmon P. Chase College of Law (Chase), Northern Kentucky University; A.B., Cornell University; M.A., Columbia University; J.D., Indiana University-Bloomington School of Law. For their generous and critical feedback on earlier drafts of this article, I thank Kenneth Anderson, Ben Davis, Mary Dudziak, Samuel Moyn and Mark Stavsky (I also thank Mark for suggesting that I use the term “strange fruit” in the title.). Additionally, I thank the participants of the following conferences and workshops for their helpful comments: 2017 Association for the Study of Law, Culture & the Humanities Annual Conference, Chase Faculty Workshop, LatCrit XXI Annual Conference, Ohio Legal Scholarship Workshop and St. Louis University School of Law/Chase College of Law Faculty Exchange Workshop. As well, I thank the phenomenal Jacqueline C. Young and the great editorial staff at the *Howard Law Journal* for their diligence and patience. I especially thank my research assistant Erik Crew for his invaluable assistance at every stage of this article’s development. His brilliant insights and research skill enabled me to write the article that I had envisioned. Any and all errors herein are, of course, my own.

1. General Condemnations of Racial Segregation and Racial Discrimination	211
2. Specific Condemnations of Racial Segregation and Racial Discrimination	212
a. Union of South Africa	212
b. Territory of South West Africa	214
c. Angola	215
3. General Promotion of Human Rights and Fundamental Freedoms as Consistent with the United Nations Charter and the Universal Declaration of Human Rights	216
4. Referral to the ICJ of Issues Regarding Human Rights and Fundamental Freedoms	217
5. Presentation of Instruments Concerning Human Rights and Fundamental Freedoms	217
B. The Security Council	220
C. The Economic and Social Council	221
D. The Secretariat	225
E. The International Court of Justice	226
1. Contentious Jurisdiction in the International Court of Justice	228
2. Advisory Jurisdiction in the International Court of Justice	229
a. Assessing Obligations of States	232
b. Answering Abstract Legal Questions	233
CONCLUSION	237

[T]he United Nations exists not merely to preserve the peace but also to make change – even radical change – possible without violent upheaval. The United Nations has no vested interest in the status quo. It seeks a more secure world, a better world, a world of progress for all peoples. In the dynamic world society which is the objective of the United Nations, all peoples must have equality and equal rights.

—Ralph Bunche, Under-Secretary General to the United Nations for Special Political Affairs (1968-1971); Nobel Peace Prize Recipient (1950)²

2. Ralph Bunche, *Nobel Lecture, Some Reflections on Peace in Our Time*, NOBEL PRIZE (Dec. 11, 1950), https://www.nobelprize.org/nobel_prizes/peace/laureates/1950/bunche-lecture

INTRODUCTION

After nearly 350 years of advocating for “equality and equal rights,”³ many African Americans thought that this new international body, the United Nations, as described by Ralph Bunche, would be, at long last, the vehicle through which they might achieve this elusive goal. The United Nations was founded, yes, to rid the world of the scourge of war⁴ but also to recognize and to vindicate the rights accorded every human being by virtue of their humanity.⁵ It arose, after all, in the wake of the Holocaust, a tragedy which spurred governments to vow that mass atrocities on this scale would never happen again.⁶ Its founding document, the UN Charter, commits each UN Member State to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁷

The Charter also established machinery to vindicate the UN’s mission, namely the organization’s principal organs — the General Assembly, Security Council, Economic and Social Council, International Court of Justice, Secretariat and Trusteeship Council.⁸ Each organ possesses both the charge and the capacity to advance human rights and fundamental freedoms.⁹ In one way or another, each works to ensure that both the United Nations as an organization and each individual Member State uphold their separate and collective responsibilities under the Charter.

This Article, in part, explores the ability of these organs to address the specific human rights issues posed by “Jim Crow”¹⁰ laws and practices in the United States during the approximately last twenty years of Jim Crow and the first twenty years of the United Nations.

.html. Bunche, an African American diplomat, received a Nobel Prize for Middle East Peace Negotiations. For a comprehensive biography of him, see BRIAN UROUHART, *RALPH BUNCHE: AN AMERICAN LIFE* (1993); PEGGY MANN, *RALPH BUNCHE: UN PEACEMAKER* (1975).

3. BUNCHE, *supra* note 2.

4. U.N. Charter pmbl.

5. *Id.*

6. *History of the Document*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/history-document/index.html> (last visited Nov. 3, 2017).

7. U.N. Charter art. 1, ¶ 3 and art. 2.

8. *Fact Sheet: This is the United Nations, The Six Main Organs*, UNITED NATIONS, https://visit.un.org/sites/visit.un.org/files/FS_This_is_the_UN_2013.pdf (last visited Nov. 3, 2017).

9. *Id.*

10. “Jim Crow” once referred to a popular minstrel show. EQUAL JUSTICE INITIATIVE (EJI), *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 3 (2d ed. 2015). Eventually, however, the term came to denote conduct – legal and not – designed to restrict African American life. *Id.*

The Jim Crow era was a period of *de jure* and *de facto* disfranchisement of African Americans roughly spanning the years 1877 to 1965,¹¹ and characterized by segregated public facilities, poll taxes, literacy tests, forced displacement, debt peonage, convict leasing, “vagrancy” prohibitions, rape, torture and lynching.¹² Frequently, perpetrators committed the lynching by hanging their subjects from a tree. Some called the hanged “strange fruit,” a nod to the popular song. Indeed, by 1950, a reported 4,075 African Americans had been lynched in the United States since 1877.¹³

The world was well-aware of these goings on. Indeed, newspapers around the globe vigilantly covered them.¹⁴ The lynchings of two African American couples, in Monroe, Georgia,¹⁵ and of fourteen-

11. *Id.*; see also C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 141 (2d ed. 1966).

12. Lynching is the extrajudicial killing of a human being. See generally EQUAL JUSTICE INITIATIVE, *supra* note 10 (describing the characteristics and function of lynching). Common forms of this killing included hanging, dragging, burning and shooting. *Id.* As scholar James H. Cone observes, however, African Americans were not the exclusive targets of lynching. See generally JAMES H. CONE, *THE CROSS AND THE LYNCHING TREE* (2011) (explaining that lynching was an extralegal act perpetrated against Mexicans, Indians, Chinese and Caucasians, as well).

13. *Id.* This article does not seek to make the case that certain acts — e.g., lynching — meet the criteria for a legal cause of action.

14. Some of those stories include: *Negro Rights*, THE TIMES OF INDIA, May 20, 1954, at 6 & Mar. 24, 1956, at 6; Neela D. Souza, *Towards Equality for the Negro*, THE TIMES OF INDIA, Sept. 22, 1957, at 5; Associated Press and the Times of India News Service, *Outlawing Negro Organisation*, June 2, 1956, at 9; Claude Sittou, *Negroes Fight For Rights*, THE TIMES OF INDIA, Mar. 23, 1960, at 6; *The Negro Struggle*, THE TIMES OF INDIA, Mar. 20, 1965, at 6; *Right to Vote*, THE TIMES OF INDIA, Feb. 6, 1965, at 6.

In June 1949, THE PALESTINE POST published an article entitled “Negroes Petition President Truman,” regarding the petition prepared by the civil rights organization the National Negro Council requesting presidential intercession in the Jim Crow regime that was, principally, throughout the American South. See *Negroes Petition President Truman*, THE PALESTINE POST, June 14, 1949, at 1. Other news outlets also published stories about racial segregation and race relations in the United States: *American Negroes*, THE SCOTSMAN, June 6, 1950, at 7; *American Racialism*, THE IRISH TIMES, Dec. 10, 1953, at 5; Bruce MacDonald, *Governor Wallace Not In*, THE GLOBE AND MAIL, Mar. 26, 1965, at 1; Colin Legum, *The U.S. Negro’s Summer of Discontent*, THE GLOBE AND MAIL, Aug. 27, 1963, at 7.

15. On July 25, 1946, a mob, consisting solely of Caucasian men, killed two African American couples near Moore’s Ford Bridge, in Monroe, Georgia. See CAROL ANDERSON, *EYES OFF THE PRIZE, THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS 1944–1955* 59 (2003). Later known as the “last mass lynching” and the “Moore’s Ford Bridge lynchings,” these killings were extrajudicial and gruesome. See Terrence McCoy, *The Ghosts and Terror of America’s “Last Mass Lynching”*, WASH. POST (Feb. 18, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/02/18/the-ghosts-and-terror-of-americas-last-mass-lynching/?utm_term=.f474e39fee7a. George and Mae Dorsey and Roger and Dorothy Malcolm were variously bound, shot, crushed and pistol-whipped. Reportedly, one victim was seven months pregnant at the time. ANDERSON, *supra*. Despite the facts of this event, the outcry from the black community, *id.* at 59–60, and even the concern and resource-commitment of President Harry S. Truman, *id.* at 61, no one was ever indicted. *Id.* at 160; see Jon Swaine, *FBI Investigates Claim Suspects in 1946 Georgia Mass Lynching May Be Alive*, THE GUARDIAN (Feb. 16, 2015), <https://www.theguardian.com/us-news/2015/feb/16/suspects-1946-moores-ford-bridge>.

year-old African American Emmett Till, in Money, Mississippi,¹⁶ are two of the most famous examples. Events perhaps once perceived local were no longer.

The article examines the UN's response to these Jim Crow laws and practices. In the process, it additionally considers the organization's actions in the face of some of the world's greatest human rights challenges, especially including apartheid in South Africa and present day Namibia, and European colonialism. Further, the article attempts to recognize the powers and constraints of each organ when confronted not just with potential human rights violations in a Member State but in *the* United States. As well, it also suggests options that the organs might reasonably have pursued given their capacities and speculates as to why they were not. It additionally endeavors to show the propriety of addressing the issues that confronted African Americans, during the Jim Crow era, in human rights terms.

Part I of the Article, "The United Nations," discusses the UN's founding. It identifies the competing goals of the organizers and describes the institutional entities created to give form and function to the organization. Part II, "The United States," discusses the meaning of Jim Crow, considers its historical antecedents – e.g., the transatlantic slave trade, slavery, and Reconstruction – and its everyday reality for African Americans. Part III, "Strange Fruit at the United Nations," discusses the efforts within the UN principal organs¹⁷ to ad-

georgia-mass-lynching-alive. Truman and his team were aware of the attention that events like Moore's Ford received internationally. See THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* 76 (2001). Scholar Thomas Borstelmann notes that "[Secretary of State Dean] Acheson in 1946 regretted with some annoyance being 'reminded over and over by some foreign newspapers and spokesmen that our treatment of various minorities leaves much to be desired.'" *Id.*

16. Twenty-one-year-old Carolyn Bryant, a Caucasian woman, accused Emmett Till of touching or squeezing her hand when he offered his hand to pay for candy at her store in Money, Mississippi. TIMOTHY B. TYSON, *THE BLOOD OF EMMETT TILL* 1–2 (2017). She also reported that during this episode, he asked her for a date and, at some point, whistled at her. *Id.* Later that evening, two Caucasian men, Bryant's husband and brother-in-law, abducted, shot and mutilated Till. *Id.* A fisherman later found his body in the Tallahatchie River. *Id.* at 2. The abductors were tried and acquitted. *Id.* at 179. Fifty years later, the accuser reportedly told writer Timothy B. Tyson that her story was not true. *Id.* at 6–7.

The death of Emmett Till garnered perhaps more national and international media attention than any other race-related incident to date (which is saying quite a lot given the coverage of the so-called Scottsboro Boys Case). See, e.g., *Whites Indicted for Murder*, *TIMES OF INDIA*, Sept. 8, 1955, at 11; *Crowd Hails Acquittal*, *UNITED PRESS AGENCY & TIMES OF INDIA NEWS SERV.*, Sept. 25, 1955, at 10; *Negro Murder Case Stirs Up Racial Controversy*, *N.Y. TIMES & TIMES OF INDIA NEWS SERV.*, Sept. 26, 1955, at 5.

17. This Article does not discuss the work of the Trusteeship Council as it appears not to have had any capacity to directly address Jim Crow issues in the United States. A sign of the times, but also perhaps the most salient evidence of the UN's ambivalence towards human rights

dress racial segregation and racial discrimination in general and Jim Crow in particular. It especially examines the unexplored opportunity by a UN body to seek an advisory opinion from the International Court of Justice (perhaps the least politicized body of the United Nations) regarding whether the United States was violating the UN Charter given the existence of Jim Crow laws within its borders.

I. THE UNITED NATIONS

A. The Founding

On September 1, 1939, Germany invaded Poland, launching what would become World War II.¹⁸ This action eventually enveloped the domestic and international agendas of virtually every State on the planet. Before the war expired, six million Jews would be killed upon the instruction of Germany's leader.¹⁹

Midway through this tragedy, the President of the United States, Franklin Delano Roosevelt, began planning for a post-war world. On January 6, 1941, he declared essential to that world four freedoms: "freedom of speech and expression," "freedom of every person to worship God in his own way," "freedom from want," and "freedom from fear."²⁰ Shortly thereafter, in October 1944, representatives of China, Great Britain, the Soviet Union and the United States met at Dumbarton Oaks mansion, in Washington, D.C., to determine the basic structure of an organization²¹ designed to prevent and, if necessary, halt the very kind of war then raging in Europe, and in which each of these nations had committed troops, materiel and more. They determined that the organization – denominated the "United Nations" – would operate principally through a General Assembly, Security Council, Economic and Social Council, Secretariat and

for all, the Trusteeship Council consists of both United Nations Member States which were managing "trust" territories (also known as colonies), and those Member States which were not managing such territories. This entity existed to manage the transition of colonies into independent self-governing States. See U.N. Charter art. 86(1).

18. MAX HASTINGS, *INFERNO: THE WORLD OF WAR, 1939-1955* 3–4 (2012); see also PAUL KENNEDY, *THE PARLIAMENT OF MAN* 23 (2006).

19. Ervin Staub, *The Psychology of Bystanders, Perpetrators and Heroic Helpers*, in *UNDERSTANDING GENOCIDE: THE SOCIAL PSYCHOLOGY OF THE HOLOCAUST* 11 (Leonard S. Cohen & Ralph Erber ed., 2002). *Introduction to the Holocaust*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005143> (last visited Nov. 4, 2017).

20. *Four Freedoms*, FDR LIBR., <https://fdrlibrary.org/ff-curriculum-hub> (last visited Nov. 4, 2017).

21. STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* 46–48 (2003).

International Court of Justice.²² They concluded that the League of Nations (League), the issue of the First World War,²³ would sunset at the end of the second²⁴ and the new international organization, with broader powers than the League,²⁵ would rise.²⁶

Four months after this meeting, Great Britain's Winston Churchill, the Soviet Union's Joseph Stalin and the United States' Roosevelt met in Yalta²⁷ to discuss voting procedures in the Security Council²⁸ — to wit, that each of their States would have veto power over every vote that mattered.²⁹ The leaders also resolved to commence a conference soon thereafter, in San Francisco, to further consider the purposes, principles, functions, powers and limitations of this new international body.³⁰ On April 25, 1945 that conference began — under the auspices, however, of the new President of the United States, Harry S. Truman,³¹ as two weeks prior, President Roosevelt had suddenly died.³²

Governments throughout the world wanted this new organization to prevent future wars by both promoting peace and creating a forum for the discussion — if not more — of the circumstances that could lead to war. They each, as well, wanted to influence the development of this new international organization to achieve their own very specific goals. France, the United Kingdom and others wanted to ensure that the new body would present no obstacle to their continued colonial rule throughout Africa, Asia and beyond.³³ Similarly, the United States sought an organization that would pose no threat to its author-

22. *Id.* at 48–49. At this meeting, the Trusteeship Council was not discussed. *Id.*

23. *Id.* at 19–20.

24. *Id.* at 41–50 (describing the discussions that occurred between leaders concerning the organization and powers of the new international organization).

25. SCHLESINGER, *supra* note 21, at 41–50.

26. *Id.*

27. *Id.* at 56–59.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 71–72.

32. *Id.*

33. See SYLVANNA M. FALCÓN, *POWER INTERRUPTED: ANTIRACIST AND FEMINIST ACTIVISM INSIDE THE UNITED NATIONS* 42 (2016) (“Other powerful governments . . . however, including France and the United Kingdom, had an interest in protecting their colonial territories. The status of colonial territories had to be addressed in some capacity because it was an international issue, so a new [conference] committee comprised of the colonial powers formed to discuss trusteeship.”); see also SCHLESINGER, *supra* note 21, at 60–61.

ity over its Pacific territories³⁴ — or its capital, global power³⁵ or social structure.³⁶

The Charter that resulted reflected these goals. The Trusteeship Council created a slow-moving vehicle for de-colonization, ensuring that colonies would remain subjects of other States for a long time to come.³⁷ The United States was particularly effective at getting a document that, despite its emphasis on peace and human rights, allowed neither the United Nations nor any one of its Member States the authority to intervene militarily — if in no other way — in the individual States' domestic affairs.³⁸ The United States' efforts resulted in one of the most powerful provisions in the Charter — the “domestic jurisdiction clause.”³⁹ Located after the provisions prescribing the purposes and principles on which the United Nations was founded, it states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.⁴⁰

A potent clause in that it has restrained the United Nations from intervening militarily in a State's internal conflicts, the domestic juris-

34. FALCON, *supra* note 33, at 42 (“The United States publicly supported self-determination for former colonies, and, at the same time, was not willing to have an international organization determine the fate of its strategic interests in the Pacific.”); SCHLESINGER *supra* note 21, at 61 (“The U.S. military wanted to occupy all the Japanese islands taken during the war for security purposes. . . .”).

35. See BERTRAND G. RAMCHARAN, NORMS AND MACHINERY, OXFORD HANDBOOK ON THE UNITED NATIONS 441 (Thomas G. Weiss et al. eds., 2007); FALCON, *supra* note 33, at 34.

36. ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 17 (2014) (“The United States did not commit itself to eliminating Jim Crow, and Great Britain and France did not commit themselves to liberating the subject populations in their colonies.”).

37. See U.N. Charter art. 86–88.

38. ANDERSON, *supra* note 15, at 48–49.

39. See KENNEDY, *supra* note 18, at xiv (observing that a “tension between sovereignty and internationalism . . . was built into the system from the beginning”); Borstelmann has also observed that:

The problem for the UN was the inherent tension between respecting national sovereignty and defending racial nondiscrimination; the second had to be pursued without overriding the first, or else the United States and the European colonial powers would not be supportive. The UN [C]harter thus compromised by including language supporting both principles. A divided U.S. delegation did agree to the principle of nondiscrimination—a significant symbolic step—but refused to take a strong stand against colonialism. Delegates like John Foster Dulles opposed the human rights clause in the [C]harter out of fears that it could lead to an international investigation of “the Negro question in this country.”

BORSTELMANN, *supra* note 15, at 41.

40. U.N. Charter art. 1, ¶ 7. Chapter VII allows the Security Council to act “to maintain or restore international peace and security.” *Id.* at art. 42.

diction clause has not operated to prevent the organization from studying internal conflicts,⁴¹ condemning a State for engaging in a conflict,⁴² recommending that a State change its behavior in light of a conflict,⁴³ or imposing sanctions on a State for participating in a conflict.⁴⁴

The body is authorized to act in many ways pursuant to its mission to promote human rights and fundamental freedoms. This mission reflects the influence of another constituency at the San Francisco conference – civil society.⁴⁵ Many of those participants fought for the inclusion of language in the Charter that would commit the organization and each of its Member States to vindicating the rights inherent to every human being.

B. The United Nations Charter

The UN Charter entered into force on October 24, 1945.⁴⁶ It is a source of international law⁴⁷ and establishes institutions, principally the General Assembly⁴⁸ and the International Court of Justice (ICJ),⁴⁹ that promote and develop that law. Its preamble announces the formation of the organization and broadly states that its goals are “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person [and] in the equal rights of men and women.”⁵⁰ It also avers that it exists “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress.”⁵¹

41. *See infra*, Part III.A.

42. *Id.*

43. *Id.*

44. *Id.*

45. KENNEDY, *supra* note 18, at 178; SCHLESINGER, *supra* note 21, at 122–124.

46. *Introductory Note*, UNITED NATIONS, <http://www.un.org/en/sections/un-charter/introductory-note/index.html> (last visited Nov. 4, 2017). The United States signed and ratified the Charter on June 26, 1945 and August 8, 1945, respectively. LOUIS HENKIN, ET AL., HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT 1 (2001).

47. *See generally* U.N. Charter.

48. *See* U.N. Charter art. 9–17 (explaining the composition, function, and power of the General Assembly).

49. *See* U.N. Charter art. 96; Statute of the International Court of Justice art. 38.

50. U.N. Charter pmbl.

51. *See* U.N. Charter pmbl.; KENNEDY, *supra* note 18, at 178 (“The international human rights regime that the United Nations . . . set up was qualitatively different from anything that had gone before . . . because those earlier proclamations about rights had little or no place in international law – that is, governments had not agreed among themselves to abide by them.”).

The Charter identifies the UN's "purposes" as: (1) "maintain[ing] international peace and security,"⁵² (2) "develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination,"⁵³ (3) "achieving international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion,"⁵⁴ and (4) "harmonizing the actions of nations in the attainment of these common ends."⁵⁵ In a separate section, the Charter also asserts that one purpose of the United Nations is to promote "universal respect for, and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion."⁵⁶ Here, it proclaims that, in becoming a member of the United Nations, States "pledge . . . to take joint and separate action in cooperation with the Organization"⁵⁷ to achieve these goals. These stated purposes collectively reveal that, at its founding, the organization's broad concerns were international peace and security and human rights — both signifying the drafters' awareness of events that gave rise to the United Nations as well as those happening around it.

The Charter further states that United Nations Member States must, in pursuing the organization's purposes, "fulfill in good faith the obligations assumed by them in accordance with the present Charter,"⁵⁸ "give the United Nations every assistance in any action it takes in accordance with the Charter,"⁵⁹ and "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."⁶⁰ While denominated "principles," this language mandates action on the part of each Member State, giving substance to the otherwise precatory language of the preamble and statement of purpose.

Despite this language requiring commitment and action to respect and to promote human rights and fundamental freedoms, the document, as noted above, does not authorize "interven[tion] [by the

52. U.N. Charter art. 1, ¶ 1.

53. *Id.* at art. 1, ¶ 2.

54. *Id.* at art. 1, ¶ 3.

55. *Id.* at art. 1, ¶ 4.

56. *Id.* at art. 55.

57. *Id.* at art. 56.

58. *Id.* at art. 2, ¶ 2.

59. *Id.* at art. 2, ¶ 5.

60. *Id.*

United Nations and other Member States] in matters which are essentially within the domestic jurisdiction of any state.”⁶¹ As intended, this language raises questions about the UN’s capacity to enforce the Charter’s human rights provisions. History has shown, however, that this domestic jurisdiction clause does not prevent the organization from involvement – at some level – in a State’s internal affairs, as the organization deems human rights an international matter, not an essentially domestic one. The clause does, though, deny the organization unlimited discretion to act – even in pursuit of its lofty goals.

These parts of the Charter – the preamble, purposes and principles, and provisions on cooperation and domestic jurisdiction — establish the mission of the organization and begin to identify the organization’s limitations in seeking to maintain international peace and security and to promote human rights and fundamental freedoms. This mission and these limitations are manifested in the work of its principal organs.

The most deliberative and democratic organ of the United Nations, the General Assembly, consists of at least one representative from each United Nations Member State.⁶² It is empowered to discuss any matter relevant to the Charter,⁶³ conduct studies, issue reports and make recommendations.⁶⁴ It may thus offer recommendations to the Security Council and to any Member State, regarding the Member State’s violation of a purpose or principle of the Charter, a significant tool in ensuring Member State compliance with human rights obligations.⁶⁵ The General Assembly’s observations, findings and recommendations generally appear in the form of a written resolution.⁶⁶

Indeed, a substantial part of the General Assembly’s work is “assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex language or religion.”⁶⁷ Accordingly, many of the body’s resolutions concern assertions of human rights violations by Member States. Historically, once the General

61. *Id.* at art. 2, ¶ 7.

62. *Id.* at art. 9, ¶¶ 1, 2.

63. *Id.* at art. 10. *But see* POSNER, *supra* note 36, at 17 (2014) (“The UN Charter did not give the General Assembly the power to make international law. Moreover, the rights were described in vague, aspirational terms.”).

64. *See id.* at art. 10.

65. *Id.*

66. *General Assembly Resolutions*, UNITED NATIONS, <http://www.un.org/en/sections/documents/general-assembly-resolutions/index.html> (last visited Nov. 3 2017).

67. *Id.* at art. 13, ¶ 1(b).

Assembly has taken cognizance of a matter, it has been vigilant in maintaining its focus and responding with recommendations and suggestions for penalties, increasing the severity of the penalties over time as necessary.⁶⁸ The General Assembly may also inform the Security Council of any matter that it deems a threat to international peace and security.⁶⁹

While the General Assembly clearly has the power to impact Member State behavior, the Security Council is unquestionably the most powerful body of the United Nations. It consists of fifteen members,⁷⁰ five of which are permanent and have veto power over all non-procedural votes of the Council.⁷¹ Those “Permanent Five” are China, France, the Soviet Union, the United Kingdom and the United States.⁷²

The Council has “primary responsibility for the maintenance of international peace and security.”⁷³ Pursuant to this authority, it may order military action.⁷⁴ Short of that, it may also investigate any matter that might threaten international peace⁷⁵ or impose sanctions against a State to pressure it to comply with a General Assembly or Security Council resolution, or a specific Charter provision.⁷⁶ Its sanctions power is broad. It may involve disruption of a State’s transportation and communications modalities, and termination of trade or diplomatic relations.⁷⁷ The sanctions order may also require other Member States to ensure the sanctions’ effectiveness.⁷⁸ In pursuing this charge of maintaining international peace and security, it is required “to act in accordance with the Purposes and Principles of the United Nations,”⁷⁹ meaning, among other things, to promote human rights and fundamental freedoms. Each Member State agrees to honor the Security Council’s decisions.⁸⁰ The significance of the Security Council’s powers is self-evident. These powers are delimited, however, by the veto power of the Permanent Five, a power which can

68. *See infra*, Part III.A.

69. *Id.* at art. 11, ¶ 3.

70. *Id.* at art. 23, ¶ 1.

71. *Id.* at art. 27.

72. *Id.* at art. 23, ¶ 1.

73. *Id.* at art. 24, ¶ 1.

74. *Id.* at art. 42.

75. *Id.* at art. 34.

76. *Id.* at art. 41.

77. *Id.*

78. *Id.*

79. *Id.* at art. 24, ¶ 2.

80. *Id.* at art. 25.

be exercised by the powerholder even when the voting matter involves them.⁸¹

By contrast, the powers of the Economic and Social Council (ECOSOC) do not expressly include the maintenance of international peace and security but certainly their portfolio concerns issues that could undermine these goals. Consisting of representatives from fifty-four Member States,⁸² ECOSOC's primary concerns are the "economic, social, cultural, educational and health"⁸³ status of the world's people. Either on its own, or through its subsidiary bodies – e.g., the Human Rights Council (formerly Commission on Human Rights⁸⁴) – it conducts studies,⁸⁵ issues reports,⁸⁶ establishes commissions,⁸⁷ calls conferences,⁸⁸ drafts international instruments⁸⁹ and makes recommendations to the General Assembly and other bodies.⁹⁰ It may specifically "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all."⁹¹ This is the body where the Universal Declaration of Human Rights (UDHR), the Declaration on the Elimination of All Forms of Racial Discrimination (DERD), the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the other core human rights instruments originated.⁹²

81. *Id.* at art. 27, ¶ 3 (stating this rule does not apply when the member of the Permanent Five is party to an international dispute that is subject to Security Council action at Chapter VI, or when the member is engaged in external dispute resolution pursuant to U.N. Charter art. 52, ¶ 3).

82. *Id.* at art. 61, ¶ 1.

83. U.N. Charter art. 62, ¶ 1.

84. *United Nations Human Rights Council*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Nov. 3, 2017).

85. U.N. Charter art. 62, ¶ 1.

86. *Id.*

87. *Id.* at art. 68.

88. *Id.* at art. 62, ¶ 4.

89. *Id.* at art. 62, ¶ 3.

90. *Id.* at art. 62, ¶ 1.

91. *Id.* at art. 62, ¶ 2.

92. Because this paper focuses on the United Nations' response to racial segregation and racial discrimination during the years 1945 to 1965, it will not discuss the "core human rights treaties" — e.g., the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Elimination of Discrimination Against Women, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, International Convention for the Protection of All Persons from Enforced Disappearance — as they entered into force after 1965. See generally POSNER, *supra* note 36 for a discussion about the efficacy of these instruments.

Responsible for overseeing the bureaucratic monolith discussed above is the Office of the Secretariat. It consists of the Secretary-General, the organization's top administrator, and supporting staff.⁹³ The Secretary-General is appointed by the General Assembly, pursuant to the Security Council's recommendation,⁹⁴ and may inform the Council of any issue that could threaten international peace.⁹⁵ The Secretary-General does not typically do the kind of hands-on work ascribed to the General Assembly, Security Council or ECOSOC, but in the past some Secretaries-General have exerted tremendous moral, strategic and tactical leadership on maintaining international peace and security and promoting human rights and fundamental freedoms.⁹⁶

Finally, the ICJ, the primary judicial arm of the United Nations⁹⁷ — consists of fifteen judges and has two types of jurisdiction — contentious⁹⁸ and advisory.⁹⁹ Its governing documents are the UN Charter and the Statute of the International Court of Justice (Statute), which is annexed to the Charter. It may preside over disputes concerning the proper interpretation and application of international law.¹⁰⁰ Only States can invoke the court's contentious jurisdiction¹⁰¹ and any party to any adversarial proceeding can make their case through written and oral means, including witness testimony.¹⁰² The court's decision in contentious cases is binding on the parties before it¹⁰³ and subject to enforcement by the Security Council.¹⁰⁴

By contrast, the court's advisory jurisdiction is not available to individual States. The General Assembly and the Security Council, however, may seek "an advisory opinion on any legal question."¹⁰⁵ Other United Nations organs and specialized agencies, which receive authorization from the General Assembly, may also seek an advisory

93. U.N. Charter art. 97.

94. *Id.*

95. *Id.* at art. 99.

96. *Timeline: UN Secretary-Generals*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/background/timeline-un-secretary-generals> (last visited Nov. 3, 2017) (discussing Dag Hammarskjöld (1953-1961), U Thant (1961-1971), and Kofi Annan (1997-2006), among the former Secretaries-General that fit this description.).

97. U.N. Charter art. 92.

98. Statute of the International Court of Justice art. 3, ¶ 1; *Id.* at art. 40, ¶ 1.

99. U.N. Charter art. 96; Statute of the International Court of Justice art. 65.

100. Statute of the International Court of Justice art. 36, ¶¶ 1, 2.

101. *Id.* at art. 34, ¶ 1.

102. *Id.* at art. 43, ¶¶ 1, 5.

103. *Id.* at art. 59.

104. U.N. Charter art. 41.

105. *Id.* at art. 96(a).

opinion but solely regarding “legal questions arising within the scope of their activities.”¹⁰⁶ According to the court, the object of the advisory opinion is “to guide the United Nations in respect to its own actions.”¹⁰⁷

Through its six principal organs, the United Nations aspired to great heights. Its creation, however, coincided with one of the lowest points in United States history.

II. THE UNITED STATES

In 1945, African Americans in the United States were in the midst of the Jim Crow era – that near 100-year period, after Reconstruction, characterized by a combustible set of laws and practices most deleteriously affecting those with dark skin.¹⁰⁸ Some states mandated racially segregated public facilities, poll taxes, literacy tests, convict leasing, debt peonage and vagrancy prohibitions. Many also allowed race-based forced displacement, land theft, rape, torture and lynching. These laws and practices were directed at African Americans throughout the United States¹⁰⁹ but the southern states had an especially complex legal and extralegal network designed to subjugate this group.

African Americans were locked in a system that began in the sixteenth century at the inception of the Transatlantic Slave Trade. The Africans that arrived in Jamestown, Virginia, in 1619,¹¹⁰ while not the first Africans to arrive in North America,¹¹¹ were some of the earliest. These Africans were enslaved persons from Angola and the bounty of English pirates.¹¹² From the sixteenth to nineteenth centuries the trade in humans carried at least ten million Africans,¹¹³ over nearly

106. *Id.* at art. 96(b).

107. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 27 (Oct. 26).

108. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 35, 37 (2012).

109. *Id.* at 35.

110. HENRY LOUIS GATES, JR., *THE HENRY LOUIS GATES, JR. READER* 13, (Abby Wolf ed., 2012).

111. The first documented African to arrive in North America, specifically Florida, was Juan Garrido, who arrived in approximately the year 1513. See Matthew Restall, *Black Conquistadors: Armed Africans in Early Spanish America*, *THE AMERICAS*, October 2000, at 171–05. Garrido was a free person who, allegedly, for a time, traveled with Ponce de Leon. *Id.* at 176.

112. Lisa Rein, *Mystery of VA's First Slaves is Unlocked 400 Years Later*, *WASH. POST* (Sept. 3, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090201097.html>.

113. *The Trans-Atlantic Slave Trade Database*, VOYAGES, <http://slavevoyages.org/> (last visited Nov. 3, 2017).

36,000 voyages,¹¹⁴ to the Americas.¹¹⁵ Four hundred fifty-five thousand of those Africans arrived in the United States.¹¹⁶

Men, women and children¹¹⁷ were transported in ships notable for their strictly compressed “seating” arrangements, germ incubation and corpse decay. During the trade, fifteen percent of the captured Africans died at sea, due mostly to disease, starvation and drowning.¹¹⁸ Those that arrived in the United States¹¹⁹ were delivered into the institution of slavery.

By the mid-1600s colonial governments began erecting a classification scheme that overtly relegated Africans in America to inferior status.¹²⁰ According to scholar Douglas Blackmon, “[t]he intentions were twofold: to create the legal structure necessary for building an economy with cheap slave labor as its foundation, and secondly, to reconcile bondage with America’s revolutionary ideals of intrinsic human rights.”¹²¹ Over time the peculiar institution of slavery developed alongside the promise, idealism and egalitarianism of the new nation, as manifested in its Declaration of Independence and Constitution.¹²²

This paradoxical reality was not lost on the enslaved or their sympathizers. In the years immediately following the American Revolution many enslaved Africans and their supporters began the long domestic and international effort to abolish slavery.¹²³ A network of

114. *Id.*

115. *Id.*

116. *Assessing the Slave Trade*, VOYAGES, <http://slavevoyages.org/assessment/estimates> (last visited Nov. 3, 2017).

117. David Etlis, *A Brief Overview of the Trans-Atlantic Slave Trade*, VOYAGES, <http://slavevoyages.org/assessment/essays> (last visited Nov. 3, 2017) (stating that roughly twenty-six percent of each ship containing enslaved Africans consisted of children).

118. *Id.*

119. GATES, *supra* note 110, at 143.

120. DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 40 (First Anchor Books ed., 2009).

121. *Id.*

122. *Id.*

123. As scholars Minisha Sinha and Jenny S. Martinez observe, the efforts to abolish slavery and the slave trade were simultaneously some of the earliest efforts to recognize human rights and to fashion human rights law. MINISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 3 (2016) (“Like the slave system they opposed, abolitionists were hybrids, old-fashioned moralizers as well as modern exponents of human rights.”); *Id.* at 3–4 (“The movement against slavery made a signal contribution to the discourse of both human rights and humanitarianism.”); JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 3 (2012) (“The nineteenth-century slavery abolition movement was the first successful international campaign, and international treaties and courts were its central features. Indeed, even the phrase “crimes against humanity” . . . was used in the nineteenth century to

people, places and transportation arose to usher the enslaved into freedom. Popularly known as the Underground Railroad, this phenomenon was birthed and implemented by a panoply of actors – free African Americans, the formerly enslaved and their national and international allies.

The case for abolition was also made through newspapers, speeches and “slave narratives.” Activist and journalist William Lloyd Garrison published *The Liberator*, a broadside devoted to pressuring powerholders to abolish slavery.¹²⁴ The formerly enslaved Frederick Douglass did the same in his newspaper *The North Star*.¹²⁵ Formerly enslaved persons and abolitionists toured Europe to give speeches decrying the brutality of slavery. Slave narratives were widely read throughout the United States and Europe.¹²⁶ This diffusion of information helped grow the abolition movement but also the reputation of the United States, among sister nations, as a State with a dangerous fault line. That fissure rent when numerous southern states declared that they would leave the Union if forced to abandon slavery. There followed a four-year war, from 1861 to 1865, over the continuation of the institution of slavery. In the middle of this war, in 1863, President Abraham Lincoln signed the Emancipation Proclamation, liberating some of the enslaved. However, eighty-seven percent of those enslaved in 1860 were not freed until 1865.¹²⁷

Shortly after the war ended, Congress passed legislation designed to repair a broken country and to set the stage for a future free of slavery. This period of legislative fecundity came to be known as Reconstruction.¹²⁸ In the wake of the assassination of President Lincoln,

describe the slave trade.”); *Id.* (“The abolition of the slave trade has received a great deal of attention from historians, but much less so from international lawyers. Yet the abolition of the transatlantic slave trade remains the most successful episode ever in the history of international human rights law.”).

124. *The Liberator*, ACCESSIBLE ARCHIVES, <http://www.accessible-archives.com/collections/the-liberator/> (last visited Nov. 3, 2017).

125. Benjamin Fagan, *The “North Star” and the Atlantic 1848*, 47 AFR. AM. REV. 1, 51–52 (2014).

126. See FREDERICK DOUGLASS, NARRATIVE OF THE LIFE (John R. McKivigan et al. eds., 2016) (stating the case for the inhumanity of slavery); HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (L. Maria Child ed., 1861) (telling the tale of her choice to “hide” in her grandmother’s attic for seven-years to escape the physical and sexual abuse of her “master”); HARRIET BEECHER STOWE, UNCLE TOM’S CABIN (2002) (informing the public about the harrowing truth of this institution in the hope of advancing its abolition).

127. GATES, *supra* note 110, at 144.

128. For a comprehensive look at Reconstruction, see W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA (1998); ERIC FONER, AMERICA’S UNFINISHED REVOLUTION, 1863-1877 (Henry S. Commager & Richard B Morris eds., 1988).

Congress passed the Thirteenth, Fourteenth and Fifteenth Amendments to the U.S. Constitution, thus abolishing slavery, recognizing African Americans' citizenship, and the right of African American males to vote. It also passed the Civil Rights Act of 1866, a prologue to the Fourteenth Amendment¹²⁹ which defined citizenship to include all persons born in the United States.¹³⁰ As well, Congress passed the Freedmen's Bureau Acts of 1865 and 1866, designed to aid the war-torn and the newly liberated with rebuilding and, in some cases, reinventing their lives. The Freedmen's Bureau,¹³¹ an agency which resulted from this legislation, was effective at assisting its target population with employment, education, property and other life-sustaining matters.¹³²

Additionally, "[w]ith the protection of federal troops," notes scholar Michelle Alexander, "[during Reconstruction] African Americans began to vote in large numbers and seize control, in some areas, of the local political apparatus. Literacy rates climbed, and educated blacks began to populate legislatures, open schools, and initiate successful businesses."¹³³ Alexander further observes that, "[i]n 1867, at the dawn of the Reconstruction Era, no black man held political office in the South, yet three years later, at least [fifteen] percent of all Southern elected officials were black."¹³⁴

These achievements, however, were quickly followed by efforts at reversal. Federal troops left the South,¹³⁵ funding for the Freedman's Bureau was radically reduced¹³⁶ and a previously moribund Ku Klux Klan rebounded, resulting in a steep uptick in violence against African Americans.¹³⁷ In response, Congress convened a remarkable set of hearings in 1871, ostensibly designed to understand the backlash to Reconstruction, occurring most profoundly throughout the American South.¹³⁸ During these hearings, witnesses testified to kidnappings,

129. *The Civil Rights Bill of 1866*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Historical-Highlights/1851-1900/The-Civil-Rights-Bill-of-1866/> (last visited Nov. 3, 2017).

130. *Id.*

131. See DuBois, *supra* note 128, at 273; John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, The Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70 (2006).

132. See DuBois, *supra* note 128, 273–74.

133. ALEXANDER, *supra* note 108, at 29.

134. *Id.*

135. *Id.* at 31.

136. *Id.*

137. *Id.* at 37.

138. See J. SELECT COMM. OF THE U.S. CONG., REPORT OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES (1872)

torture, lynchings, burnings, displacements and more;¹³⁹ they spoke of the atmosphere of terror that developed concurrent with the postwar efforts to remake the country and enfranchise African Americans.¹⁴⁰

Indeed, Reconstruction launched the Jim Crow era, known for the kind of brutality described by the congressional witnesses, but also for laws designed to disfranchise the newly franchised. Throughout the American South, for example, African Americans were no longer subject to slavery but were, in some states, subject to its kin – “convict leasing.”¹⁴¹ This legal practice allowed governments to rent the convicted to corporations and farmers to do the renter’s bidding.¹⁴² The rate of arrests corresponded to the industrial needs of those that bought convict labor.¹⁴³ As Blackmon states, “[b]y the end of 1877, every formerly Confederate state except Virginia had adopted the practice of leasing black prisoners into commercial hands.”¹⁴⁴ The convicted person typically did not receive remuneration for this work.¹⁴⁵ Many who suffered this fate did so as a result of other laws that typified the era – prohibitions against debt and “vagrancy.”¹⁴⁶ To wit, an unpaid debt could result in imprisonment, which, in turn, could result in servitude. Likewise, being found outside the home could yield a charge of vagrancy,¹⁴⁷ which could then lead to incarceration

[hereinafter *Report of the J. Select Comm.*] (investigating the Ku Klux Klan and other insurrectionary movements in the former Confederacy after the end of the Civil War); see also CONE, *supra* note 12, at 4 (“Lynching as primarily mob violence and torture directed against blacks began to increase after the Civil War and the end of slavery, when the 1867 Congress passed the Reconstruction Act granting black men the franchise and citizenship rights of participation in the affairs of government.”).

139. See generally *Report of the J. Select Comm.*, *supra* note 138 (investigating the Ku Klux Klan and other insurrectionary movements in the former Confederacy after the end of the Civil War).

140. *Id.*

141. See BLACKMON, *supra* note 120, at 5; see also *supra* note 138, at 6 (“The judges and sheriffs who sold convicts to giant corporate prison mines also leased even larger numbers of African Americans to local farmers, and allowed their neighbors and political supporters to acquire still more black laborers directly from their courtrooms.”).

142. *Id.* at 6.

143. *Id.* at 24.

144. *Id.* at 56.

145. *Id.* at 27.

146. According to Blackmon, convict leasing also “terrorized the larger black population into compliance with a social order in which they willingly submitted to complete domination by whites and it significantly funded the operations of government by converting black forced labor into funds for counties and states.” *Id.* at 68.

147. See *id.* at 53. Here, Blackmon expounds on the extent of convict leasing laws:

Every southern state except Arkansas and Tennessee had passed laws by the end of 1865 outlawing vagrancy and so vaguely defining it that virtually any freed slave not under the protection of a white man could be arrested for the crime. An 1865 Mississippi statute required African American workers to enter into labor contracts with white farmers by January 1 of every year or risk arrest.

and, again, forced labor.¹⁴⁸ These constructs spawned a form of neo-slavery.¹⁴⁹

Laws regulating African American life or impacting it disparately persisted for decades. In 1949, four years after the founding of the United Nations, numerous states still had such laws on their books.¹⁵⁰ The state constitutions of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Virginia required that all schools for children be separated by race.¹⁵¹ Some states also forbade intermarrying¹⁵² and cohabiting between the “Negro” and “white” races.¹⁵³ The State of Georgia even deemed it *prima facie* slanderous for anyone to accuse a Caucasian woman of having sexual intercourse with an African American man.¹⁵⁴

A number of states had additional laws to further ensure that life for blacks and whites was thoroughly segregated. North Carolina, for example, required that its cemeteries and libraries abide the color line.¹⁵⁵ It also prohibited the use of the same textbooks by blacks and whites.¹⁵⁶ South Carolina forbade the custody of a white child to a black person unless the black person was, in effect, the nanny of the child.¹⁵⁷ Mississippi deemed it a crime for anyone to publish anything that suggested the social equality of blacks and whites.¹⁵⁸

Such was the environment of Reconstruction and post-Reconstruction, in some states.

148. *Id.*

149. *Id.*

150. See generally PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR AND APPENDICES (1951) (examining race and color in the state constitutions of several Southern states). For background information about Pauli Murray’s efforts to compile these laws, see PATRICIA BELL-SCOTT, THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP, PAULI MURRAY, ELEANOR ROOSEVELT AND THE STRUGGLE FOR SOCIAL JUSTICE 193 (2016).

151. MURRAY, *supra* note 150 (detailing the state constitutions: ALA. CONST. of 1901 art. XIV, § 256; FLA. CONST. of 1885, art. 12, § 12; GA. CONST. art. VIII, § 1 (6576) (GA. CONST. of 1877, § 2-6601; GA. CONST. of 1945, § 2-6401); KY. CONST. of 1891, § 187; LA. CONST. art. 12, § 1 [1947 Supp.]); MISS. CONST. of 1890, art. 8, § 207; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. art. 11, § 7 (II, § 7, 1868; Art. 11, § 7, 1895); VA. CONST. § 140 (Const. 1902, as amended, Art. IX)).

152. *Id.* at 77 (FLA. CONST. of 1885, art. 16, § 24); *Id.* at 113 (Ga. Stat. § 53-106 (2941) (1927) (invalidated by *Loving v. Virginia*, 388 U.S. 1 (1967))); *Id.* at 173 (La. Stat. art. 740-79 (1942)); *Id.* at 407 (S.C. CONST. of 1895, art. 3, § 33).

153. *Id.* at 77 (Fla. Stat. §798.04 [Comp. Gen. Laws 1927, § 7566]), 173 (La. Stat. art. 740-79 (1942)), 30 (Ala. Stat. Title 14, § 360 (as amended 1927)).

154. *Id.* at 115 (Ga. Stat. §105-707. (4434) (1859)).

155. *Id.* at 329-30 (N.C. Stat. § 65-38 [1947 c. 821, § 2]).

156. MURRAY, *supra* note 150, at 331 (N.C. Stat. § 115-294 [1935, c. 422, § 2]).

157. *Id.* at 408 (S.C. Stat. § 1446 [1932 Code, § 1446]).

158. *Id.* at 247 (Miss. Stat. § 2339 [Codes, Hemingway’s 1921 Supp. § 1142e; 1930 § 1103; Laws, 1920, ch. 214]).

Strange Fruit at the United Nations

Some states also required the paying of a “poll tax” or passing of a “literacy test” to vote. While some of these laws were perhaps not explicitly racist – they often had racial effect. In Virginia, each county treasurer was required to file a list with the clerk of the circuit court in that county containing the names of each resident and whether they had paid taxes by a date certain.¹⁵⁹ Virginia law required that each of these residents be listed by race.¹⁶⁰ Presumably, the list was determinative of voting eligibility. Similarly, in Georgia, prospective voters had to pass a test containing civics questions to be eligible to vote.¹⁶¹

For African Americans these restrictive laws existed within a larger context of terror.¹⁶² According to Equal Justice Initiative (EJI), between 1877 and 1950, 4,075 “terror lynchings”¹⁶³ of African Americans occurred in the American South, principally the states Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia.¹⁶⁴ They typically targeted African American males and were triggered by events trivial¹⁶⁵ and substantial.¹⁶⁶ EJI reports that terror lynchings “peaked between 1880 and 1940”¹⁶⁷ and were often precipitated by “fear of

159. *Id.* at 479–80 (Va. Stat. § 24–120. [Michie Code 1942, § 109]).

160. *Id.*

161. *Id.* at 110–12 (Ga. Law H.B. No. 2 (1949)).

162. The threat of lynching was so clear to African Americans that it could result in whole communities fleeing their hometown to seek refuge elsewhere. In September 1912, in Forsyth County, Georgia, a few Caucasian residents expressly told the African American residents that they had the night to leave town or every one of them would be killed like the African American suspected of killing a Caucasian female. So, they left town. See PATRICK PHILLIPS, *BLOOD AT THE ROOT: A RACIAL CLEANSING IN AMERICA* 55 (New York, W.W. Norton & Company 2016). The threat of acts like this was partly responsible for the Great Migration, the vast movement of African Americans from the American South to cities farther north. Between 1910 and 1970, six million African Americans participated in this exodus. See TYSON, *supra* note 16, at 15–16. See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* (2010) (looking at the impact of the Great Migration on African Americans).

163. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 5. EJI defines “terror lynchings” as “violent and public acts of torture that traumatized black people throughout the country and were largely tolerated by state and federal officials.” *Id.* at 3. The lynchings reported by EJI were not prosecuted as criminal acts. *Id.* at 4.

164. *Id.* at 4.

165. *Id.* at 30 (noting that some lynchings occurred because of “arson, robbery, non-sexual assault and vagrancy” as well as “non-criminal violations of social customs or racial expectations.”).

166. *Id.* at 11 (“More than half of the lynching victims EJI documented were killed under accusation of committing murder or rape.”); see also *The Reign of Lawlessness*, THE RICHMOND PLANET, June 30, 1900 (showing a sketch of lynchings and a list of recent lynchings, including of an eight-year-old child).

167. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 3.

interracial sex,” “casual social transgressions” and “allegations of serious violent crime.”¹⁶⁸

The lynchings were a public spectacle – frequently garnering advertisements of coming attractions¹⁶⁹ — and often involved mutilation and killing in a public setting, participation in the mutilation and/or the killing by the masses, dismembering of body parts to retain as souvenirs,¹⁷⁰ hanging the victim from a tree (often on the courthouse lawn)¹⁷¹ and photographing it all for memorialization on a postcard.¹⁷² These events routinely received news coverage throughout the United States and the rest of the world.¹⁷³ The United Nations was created, in part, to address such widespread human rights abuses.

III. STRANGE FRUIT AT THE UNITED NATIONS

The founding of the United Nations launched the modern age of human rights. As discussed above, the UN’s founding document, the UN Charter, asserts that one of the purposes of the United Nations is to encourage and promote human rights and fundamental freedoms without regard to race. This document underscores the primacy of human rights throughout its pages¹⁷⁴ and requires UN Member States to pledge to act individually and collectively to promote them.¹⁷⁵ It also empowers its principal organs – the General Assembly, Security Council, Economic and Social Council, International Court of Justice and Secretariat¹⁷⁶ – to act to vindicate this set of rights endemic to every human because of their humanity.¹⁷⁷

168. *Id.* at 6.

169. CONE, *supra* note 12, at 9 (“Lynching became a white media spectacle, in which prominent newspapers, like the Atlanta Constitution, announced to the public the place, date, and time of the expected hanging and burning of black victims. Often as many as ten to twenty thousand men, women, and children attended the event.”).

170. *Id.* at 9; *see also* EQUAL JUSTICE INITIATIVE, *supra* note 10, at 12.

171. EQUAL JUSTICE INITIATIVE, *supra* note 10, at 4. *See generally* SHERRILYN IFILL, ON THE COURTHOUSE LAWN (2007) (observing that lynchings occurred on courthouse lawns across the country).

172. CONE, *supra* note 12, at 9.

173. *See supra*, Part II.

174. *See generally* U.N. Charter (articulating a commitment to uphold human rights).

175. *Id.* at art. 55, 56.

176. *See generally id.* at art 7, ¶ 1 (“There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat.”).

177. *See id.* at art. 55 (“[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”).

A. The General Assembly

The General Assembly, authorized to address any matter relevant to the Charter, speaks by resolution.¹⁷⁸ These resolutions are nonbinding and constitute a form of “soft law,” capable of influencing the conduct of a Member State.¹⁷⁹ Each resolution, while often fact-specific, seemingly pulls upon a finite body of terms, ranging from benign to not, in communicating with its audience. To wit, regarding a Member State’s violation or potential violation of the Charter, a resolution might state that the Assembly “deprecates”¹⁸⁰ that situation or “deplores”¹⁸¹ it. The resolution might go on to state that the Assembly “calls upon”¹⁸² or “appeals to”¹⁸³ the Member State to terminate its conduct.

The General Assembly, however, is not the Security Council so no artful verbiage can turn this soft law into hard. Nonetheless, a General Assembly resolution may be one of few ways that the United Nations can vindicate its mission if the Security Council is not disposed to act. Such may be the case if a matter concerns a member of the Security Council Permanent Five, as did the question of the United States’ complicity with the UN Charter and the Universal Declaration of Human Rights (UDHR) given laws in the United States mandating racial segregation and racial discrimination during the Jim Crow era. So, in the absence of a functioning Security Council on the matter of Jim Crow, the General Assembly’s functionality became more relevant. The General Assembly possessed the power,

178. Assembly votes fall into two categories: those regarding “important questions,” and those regarding “other questions.” *Id.* at art. 18, ¶¶ 2, 3. There must be a two-thirds majority of present and voting Members for a resolution regarding an “important question” to pass. *Id.* Such a question includes matters concerning international peace and security. *Id.* There must only be a simple majority of present and voting Members for a resolution concerning “other questions,” to pass. *Id.* at art. 18, ¶ 3. This category of question includes some procedural matters. *Id.* The Assembly’s tools of the trade, however, are broader than issuing resolutions and include creating special committees and appointing special rapporteurs.

179. Provocatively, Judge Wellington Koo, International Court of Justice, once opined that “although there is in the Charter no express undertaking to accept recommendations of the General Assembly similar to the agreement in Article 25 to accept and carry out decisions of the Security Council, ‘it cannot be said that the Charter specifically negates such an obligation and it may be possible to deduce certain obligations from the Charter as a whole which it would be impossible to establish from an express undertaking.’” *The South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment, 1966 I.C.J. Rep. 6, § 232 (July 18) (quoting F.B. Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT’L L. 1, 14 (1948)).

180. *E.g.*, G.A. Res. 1568 (XV), at 2 (Dec. 18, 1960).

181. *E.g.*, G.A. Res. 1312 (XIII), at 3 (Dec. 12, 1958).

182. *Id.* at 7.

183. *E.g.*, G.A. Res. 2074 (XX), at 12 (Dec. 17, 1965).

pursuant to the Charter, to influence State conduct and, from 1945 to 1965, undertook many actions to address racial segregation and racial discrimination in some UN Member States.¹⁸⁴ It did not, however, exercise its power to create soft law by issuing a resolution specifically regarding Jim Crow laws and practices in the United States. Likewise, it did not use its authority to request an advisory opinion from the International Court of Justice on the compatibility of these practices with the Charter and the UDHR.

During the subject time period, the Assembly did identify, in the abstract, some of these laws and practices – racial segregation, racial discrimination, torture and murder – as violations of human rights and fundamental freedoms, and thus violations of the Charter and the UDHR.¹⁸⁵ However, this article asserts that the Assembly fell short of its charge under the Charter to “assist[] in the realization of human rights and fundamental freedoms for all without distinction as to race,” by not issuing a resolution specifically concerning Jim Crow in the United States. At all times during the relevant period, it was confronted with several million African Americans who were living with some form of government-sanctioned racial segregation and racial discrimination. This circumstance had persisted for nearly 100 years (excluding the nearly 250 years of slavery). Given the worldwide coverage of events in the United States, the Assembly, through its Member State representatives, undoubtedly knew of the circumstances in the United States for African Americans. It certainly knew its charge under the Charter and had specifically recognized and even sanctioned other States for conduct similar to that occurring in the United States. The resolutions that the Assembly passed concerning racial segregation and racial discrimination, and human rights and fundamental freedoms generally fall into five categories: (1) general condemnations of racial segregation and racial discrimination as violations of the Charter and the UDHR; (2) State-specific condemnations of racial segregation and racial discrimination as violations of the Charter and the UDHR; (3) general promotion of human rights and fundamental freedoms as consistent with the Charter and the UDHR; (4) referrals of questions to the ICJ concerning human rights and fun-

184. *See infra*, Part II.A, 1-5; *see also* G.A. Res. 2106 (XX) (Dec. 21, 1965) (addressing the U.N.’s commitment to the elimination of all forms of racial discrimination).

185. *See generally* U.N. Charter (addressing the U.N.’s commitment to protecting human rights). *See also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (establishing fundamental rights to be universally protected).

damental freedoms; and (5) recommendations and presentations of instruments concerning human rights and fundamental freedoms.

1. General Condemnations of Racial Segregation and Racial Discrimination

Demonstrating its concern about human rights and fundamental freedoms, but particularly as they regard race,¹⁸⁶ during its first session, the Assembly unanimously passed the now-famous resolution 103 (I). It states:

*The General Assembly declares that it is in the higher interest of humanity to put an immediate end to . . . so-called racial persecution and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations and to take the most prompt and energetic steps to that end.*¹⁸⁷

The resolution was issued in 1946. At this time the Assembly was operating in a world still absorbing the tragedy that was and gave rise to World War II. It was also immersed in the debates over colonialism and — as UN headquarters are in the United States — situated on the same *terra firma* as Jim Crow. Presumably, it had little choice but opine, in some regard, as to the circumstances surrounding it.

At times the body spoke with great clarity about the need of the United Nations to address matters of discrimination, at one point stating, in Resolution 532B (VI), that “the full application and implementation of the principle of non-discrimination recommended in the United Nations Charter and the Universal Declaration of Human Rights are matters of supreme importance, and should constitute the primary objective in the work of all United Nations organs and institutions.”¹⁸⁸ In the same resolution, the Assembly further asserted that “the prevention of discrimination and the protection of minorities are two of the most important branches of the positive work undertaken

186. At one point, when addressing conduct in Non-Self-Governing Territories, the Assembly referred to “racial discrimination, in law and in practice,” as “utterly repugnant to humanity.” G.A. Res. 1850 (XVII) (Dec. 19, 1962).

187. G.A. Res. 103 (I) (Nov. 19, 1946) (emphasis in original). This was not the only human rights resolution that the assembly passed in the First Session. It also condemned genocide, recognized it as a crime under international law and requested that the Economic and Social Council begin the preparatory work to draft an international convention against genocide. See G.A. Res. 96 (I) (Dec. 11, 1946).

188. G.A. Res. 532B (VI) (Feb. 4, 1952).

by the United Nations.”¹⁸⁹ It also “[c]all[ed] upon . . . States to take all necessary steps to rescind discriminatory laws which have the effect of creating and perpetuating racial prejudice . . . wherever they still exist, to adopt legislation if necessary for prohibiting such discrimination, and to take such legislative or other appropriate measures to combat such . . . intolerance.”¹⁹⁰

These resolutions show that the Assembly viewed racial segregation and racial discrimination through the lens of UN Charter obligations. The resolutions are clear and orienting, indicating a sense of mission on the part of both the Assembly and each Member State. This sense on the part of the Assembly undoubtedly led it to focus as it did on the conduct of the Government of the Union of South Africa, in both territorial South Africa and South West Africa, and the Government of Portugal, in Angola.

2. Specific Condemnations of Racial Segregation and Racial Discrimination

a. Union of South Africa

In 1948, the Union of South Africa instituted a system of apartheid,¹⁹¹ premised on racial segregation and racial discrimination.¹⁹² Under it, race was destiny.¹⁹³ Every aspect of life was governed by whether one was “white,” “black,” or “coloured.”¹⁹⁴ The government goal was to keep every category of person separate from

189. *Id.* See also G.A. Res. 1510 (XV) (Dec. 12, 1960) (finding that “the United Nations is duty bound to combat [the manifestations of racial and national hatred], to establish the facts and the causes of their origin, and to recommend resolute and effective measures which can be taken against them” and “condemn[ing] all manifestations and practices of racial, religious and national hatred in the political, economic, social and educational and cultural spheres of the life of society as violations of the Charter of the United Nations and the Universal Declaration of Human Rights” and “call[ing] upon the Governments of all States to take all necessary measures to prevent all manifestations of racial, religious and national hatred”) (emphasis in original).

190. G.A. Res. 1779 (XVII), at 2 (Dec. 7, 1962) (emphasis in original).

191. Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs and Apartheid*, 19 *FORDHAM INT’L L. J.* 1464, 1467 (1996); Makau wa Mutua, *Hope and Despair in a New South Africa: the Limits of Rights Discourse*, 10 *HARV. HUM. RTS. J.* 63, 71–72 (1997).

192. Kevin Hopkins, *Assessing the World’s Response to Apartheid: A Historical Account of International Law and its Part in the South Africa Transformation*, 10 *U. MIAMI INT’L & COMP. L. REV.* 241, 244–45 (2002); Ronald C. Slye, *Apartheid as a Crime Against Humanity: A Submission to the South Africa Truth and Reconciliation Commission*, 20 *MICH. J. INT’L L.* 267, 268 (1999).

193. Hopkins, *supra* note 192, at 244.

194. *Id.* at 241.

the other¹⁹⁵ and to consolidate economic and government power in the “white” population.¹⁹⁶

For many years, the General Assembly, while focused on South Africa, stated the obvious about its policy of racial discrimination. However, its language grew stronger, perhaps a bit slowly, over time. In the early 1950s, in the context of discussing South Africa, the Assembly connected racial segregation with racial discrimination¹⁹⁷ and spoke about the “inconsisten[cy]”¹⁹⁸ of racial discrimination with the commitment of the Member States “to promote the observance of human rights and fundamental freedoms.”¹⁹⁹

By the mid-1950s, it appointed a commission to study the racial situation in South Africa.²⁰⁰ The Assembly later reported that, pursuant to the commission, South Africa’s policies conflicted with the Charter and the UDHR and threatened peace and international relations.²⁰¹ By the end of the 1950s, the Assembly’s anxiety over South Africa’s policies seemed to increase. It observed that it was “*deeply convinced* that the practice of racial discrimination and segregation is opposed to the observance of human rights and fundamental freedoms.”²⁰² That apparent increased concern about South Africa’s practice of apartheid launched a panoply of actions and recommendations by the body. It asked all Member States to assist South Africa in aligning its behavior with the Charter and the UDHR,²⁰³ requested Member States to “consider taking . . . separate and collective action . . . to bring about the abandonment of these policies;”²⁰⁴ and called apartheid not just “inconsistent with”²⁰⁵ or “contrary to”²⁰⁶ the Charter and the UDHR, as it had done earlier, but a “flagrant violation”²⁰⁷ of those documents.

195. *Id.*

196. *Id.* at 242; *see also* Mutua, *supra* note 191, at 72.

197. G.A. Res. 395 (V) (Dec. 2, 1950); G.A. Res. 511 (VI) (Jan. 12, 1952).

198. G.A. Res. 616B (VII), at 2 (Dec. 5, 1952).

199. *Id.*; *see* U.N. Charter art. 56 (articulating that all members must take action both jointly and separately).

200. G.A. Res. 616A (VII), at 1 (Dec. 5, 1952).

201. G.A. Res. 721 (VIII) (Dec. 8, 1953).

202. G.A. Res. 1375 (XIV) (Nov. 17, 1959) (emphasis in original).

203. G.A. Res. 1375 (XIV), at 4 (Nov. 17, 1959); G.A. Res. 1460 (XIV), at 5 (Dec. 10, 1959).

204. G.A. Res. 1598 (XV), at 3 (Apr. 13, 1961).

205. G.A. Res. 616B (VII), at 2 (Dec. 5, 1952).

206. G.A. Res. 721 (VIII) (Dec. 8, 1953).

207. G.A. Res. 1598 (XV), at 4 (Apr. 13, 1961).

During this period, it asserted that South African apartheid had caused “international friction”²⁰⁸ and threatened “international peace and security.”²⁰⁹ It also “[u]rged all States to take separate and collective action”²¹⁰ to bring South Africa into conformity with its Charter obligations. It specifically requested that they: cease all diplomatic relations, travel and trade with South Africa.²¹¹ It additionally requested that the Security Council take action against the State, possibly including its own sanctions, even expulsion from the United Nations, or the use of armed force.²¹²

These resolutions are remarkable for their progressive “penalties” against South Africa as it continued to flout the UN Charter and the UDHR by failing to respect the human rights and fundamental freedoms of its residents of color. They suggest that the General Assembly worked assiduously to remove the oxygen from a dangerous organism. It took decades, of course, for apartheid to be dismantled but the pressure brought to bear on South Africa by the General Assembly cannot be divorced from the ultimate achievements.

b. Territory of South West Africa

The General Assembly was also long concerned with how the Government of the Union of South Africa treated the inhabitants of South West Africa, which it began governing in 1920.²¹³ The complicated history between the three parties stems back to the League of Nations and its Mandate System, which allowed some States (“Mandatories”) to govern but not own territories (“Mandates”).²¹⁴

The Assembly specifically addressed the issue of South Africa’s imposition of apartheid in South West Africa in 1960, observing, in a resolution, that “the present situation in South West Africa constitutes a serious threat to international peace and security.”²¹⁵ It quickly moved from that pronouncement to “*call[ing] upon . . .* South Africa to revoke or rescind immediately all laws and regulations based on [the] policy [of apartheid].”²¹⁶ Three years later, it requested that the

208. *Id.* at 6.

209. *Id.*

210. G.A. Res. 1761 (XVII), at 9 (Nov. 6, 1962) (emphasis in original).

211. *Id.*

212. G.A. Res. 2054A (XX), at 16–17 (Dec. 15, 1965).

213. International Status of South West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128, 132 (July 11).

214. *See generally id.*

215. G.A. Res. 1568 (XV), at 33 (Dec. 18, 1960).

216. *Id.* (emphasis in original).

Security Council attend the matter²¹⁷ and that the Member States impose sanctions against South Africa, including refraining from trade in arms and petroleum and any other action that might thwart the goals of the General Assembly as regards South Africa.²¹⁸ By 1965, it took the extraordinary step and identified apartheid as a crime against humanity.²¹⁹

c. Angola

Portugal colonized present-day Angola hundreds of years ago.²²⁰ The latter decades of this colonization coincided with the creation and growth of the United Nations. Concluding that Portugal was committing human rights abuses against indigenous Angolans, the General Assembly passed a series of resolutions, progressively penalizing Portugal for its conduct.²²¹

In its early resolutions, it “[c]all[ed] upon the Government of Portugal to reform its conduct”²²² and appointed a committee to conduct inquiries, amongst other tasks, concerning Angola.²²³ It later referred to the situation in Angola as a “denial [of] human rights and fundamental freedoms”²²⁴ and “call[ed] upon the Portuguese authorities to desist forthwith.”²²⁵ The Assembly asked Member States to assist it in getting Portugal to comply with its request to cease its repressive conduct,²²⁶ and further asked them to “deny Portugal any support and assistance which may be used by it for the repression of the people of Angola.”²²⁷ It later observed that Portugal’s conduct was a “source of international conflict and tension as well as a serious threat to world peace and security”²²⁸ and requested that Member States impose sanctions against the State, including prohibiting arms trade.²²⁹

217. G.A. Res. 1899 (XVIII), at 47 (Nov. 13, 1963).

218. *Id.*

219. G.A. Res. 2074 (XX), at 60 (Dec. 17, 1965).

220. Lucinda Saunders, Note, *Rich and Rare are the Gems They War: Holding DeBeers Accountable for Trading Conflict Diamonds*, 24 *FORDHAM INT’L L.J.* 1402, 1416–17 (2001) (discussing the long-term role of Portugal in Angola).

221. G.A. Res. 1603 (XV), at 19 (Apr. 20, 1961) (emphasis in original).

222. *Id.*

223. *Id.*

224. G.A. Res. 1742 (XVI), at 67 (Jan. 30, 1962).

225. *Id.*

226. *Id.* (emphasis in original).

227. *Id.*

228. G.A. Res. 1819 (XVII), at 75 (Dec. 18, 1962).

229. *Id.*

These are the most striking examples of General Assembly engagement in specific human rights challenges concerning race, from 1945 to 1965. They demonstrate the body's willingness to exercise its powers – particularly public condemnation and sanctions requests — to impose pressure on the Member State acting in contravention of its obligations under the Charter.

3. General Promotion of Human Rights and Fundamental Freedoms as Consistent with the United Nations Charter and the Universal Declaration of Human Rights

There is a body of General Assembly resolutions solely devoted to reminding Member States of their obligations under the Charter and the UDHR to promote human rights and fundamental freedoms. Compared to the more pointed resolutions directed at a specific State, these more generic resolutions can appear somewhat tepid, even platitudinous and incapable of affecting State conduct, certainly that of a State that is well into its Charter violations. Nonetheless, they exist and form part of the larger corpus of General Assembly resolutions devoted to the promotion of human rights and fundamental freedoms.

To wit, at times the Assembly “*recogniz[ed]* the importance of social progress,”²³⁰ “[*c*]all[*ed*] upon all Member States to carry out all recommendations passed . . . on economic and social matters,”²³¹ “[*r*]ecommen[*ed*] that Members . . . intensify their efforts for the observance of human rights and freedoms in their own territories and in the Non-Self Governing and Trust Territories,”²³² “*condemn[ed]* all manifestations and practices of racial . . . hatred,”²³³ “[*c*]all[*ed*] upon . . . all States to take all necessary measures to prevent all manifestations of racial . . . hatred,”²³⁴ “[*c*]all[*ed*] upon . . . all States to take all necessary steps to rescind discriminatory laws which have the effect of creating and perpetuating racial prejudice . . . wherever [it] still exist[s],”²³⁵ “*desir[ed]* to . . . stimulate Members to press forward toward attaining the goals set forth in the [UDHR],” and reminded Members

230. G.A. Res.119 (II), at 24 (Oct. 31, 1947) (emphasis in original); G.A. Res. 540 (VI), at 35 (Feb. 4, 1952) (emphasis in original); G.A. Res. 1510 (XV), at 22 (Dec. 12, 1960) (emphasis in original); G.A. Res. 1779 (XVII), at 32 (Dec. 7, 1962) (emphasis in original).

231. G.A. Res. 119 (II), at 24 (Oct. 31, 1947) (emphasis in original).

232. G.A. Res. 540 (VI), at 35 (Feb. 4, 1952) (emphasis in original).

233. G.A. Res. 1510 (XV), at 22 (Dec. 12, 1960) (emphasis in original).

234. *Id.*

235. G.A. Res. 1779 (XVII), at 32 (Dec. 7, 1962) (emphasis in original).

of their human rights obligations under the Charter.²³⁶ Although these resolutions do not impose the same degree of pressure on a State as a State-specific resolution, they might be all that the Assembly felt empowered to say — and the only way that it felt empowered to say it — at a given time and to a given State.

4. Referral to the ICJ of Issues Regarding Human Rights and Fundamental Freedoms

Exercising its power to refer a legal question to the ICJ, the Assembly also issued resolutions containing questions to the court regarding accusations of human rights abuses in Hungary by the governments of Hungary and Bulgaria.²³⁷ It also asked the court of the obligations owed to the United Nations by the Union of South Africa concerning its governance of South West Africa and of the legal consequences for UN Member States who continued to do business with South Africa despite UN sanctions against the Government of South Africa.²³⁸

5. Presentation of Instruments Concerning Human Rights and Fundamental Freedoms

A number of General Assembly resolutions during the relevant time period concerned the preparation of human rights instruments. These instruments were generally drafted by the Economic and Social Council (ECOSOC) but the Assembly played a significant role in their development.²³⁹ The Assembly is perhaps best known for passing, in 1948, the nonbinding but highly influential UDHR. The UDHR is one of the milestone achievements of the United Nations. According to scholar Eric A. Posner, “Legally, the modern era of human rights began with the Universal Declaration and the recognition that individuals, rather than merely states, possess rights under international law, and thus are entitled to legal protection from abuses by their own governments.”²⁴⁰ This instrument originated in the

236. G.A. Res. 739 (VIII), at 19 (Nov. 28, 1953) (emphasis in original) (This resolution refers specifically to Member State obligations under Articles 55 and 56 to promote human rights and fundamental freedoms.).

237. G.A. Res. 294 (IV), at 16 (Oct. 22, 1949); G.A. Res. 385 (V), at 16 (Nov. 3, 1950).

238. *See infra*, Part III.E.

239. *See supra*, Part II.

240. POSNER, *supra* note 36, at 19.

Commission on Human Rights (CHR), an ECOSOC body, chaired by former United States First Lady Eleanor Roosevelt.²⁴¹

The Declaration's Preamble notes that "the inherent dignity . . . and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."²⁴² It also emphasizes the primacy of human rights,²⁴³ connects that priority with the commitments of Member States, and declares the contents of the Declaration to be "a common standard of achievement for all peoples and all nations . . ."²⁴⁴ Thereafter, the document gives definition — albeit limited — to the term "human rights."²⁴⁵ Among those are the right to "life, liberty and security of person,"²⁴⁶ equal protection before the law,²⁴⁷ freedom from slavery²⁴⁸ and torture,²⁴⁹ freedom of movement²⁵⁰ and freedom to participate in government.²⁵¹

The Assembly also adopted the Genocide Convention and passed the Declaration on the Elimination of All Forms of Racial Discrimination (DERD). In the resolution presenting this Declaration, the Assembly stated that it was "alarmed" by racial discrimination throughout the world, including through policies of "apartheid, segregation and separation, as well as by the promotion and dissemination of doctrines of racial superiority and expansionism in certain areas."²⁵² Because it was a nonbinding document, but on such an important topic, it served as a place holder while ECOSOC continued to finalize the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), all binding documents. The Assembly passed DERD while apartheid raged in South Africa, the caste system persisted in India and Jim Crow

241. The language in the document was, of course, the subject of widespread negotiation. Indeed, the United States Department of State had warned its representatives on the Commission "to avoid any language in the [Declaration] that would involve implementation or regulation . . ." KENNEDY, *supra* note 18, at 181.

242. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

243. *Id.*

244. *Id.*

245. *See id.*

246. G.A. Res. 217 (III) art. 3, Universal Declaration of Human Rights (Dec. 10, 1948).

247. *Id.* art. 7.

248. *Id.* art. 4.

249. *Id.* art. 5.

250. *Id.* art. 13.

251. G.A. Res. 217 (III) art. 21, ¶ 1, Universal Declaration of Human Rights (Dec. 10, 1948).

252. G.A. Res. 1904 (XVIII), at 35–36 (Nov. 20, 1963).

Strange Fruit at the United Nations

reigned in the United States. Throughout the first two decades of the United Nations, though, the General Assembly worked with ECOSOC to craft the ICCPR and the ICESCR, both of which opened for signature on December 16, 1966.²⁵³

Given the sustained pressure that the General Assembly applied to certain States, by way of resolution, it is likely that these resolutions were impactful. It is impossible to know, however, the extent of the impact. It is easy, though, to calculate the impact of a resolution when it does not exist, as in the case of Jim Crow in the United States. Doubtless the reason for a lack of U.S.-specific resolutions from the General Assembly was due to realpolitik. Perhaps the General Assembly was concerned that the United States would withdraw support for the United Nations or that it would withdraw support from individual Member States. Perhaps even the mere specter of U.S. wrath in the face of such a resolution was too much to fathom not to mention endure.

Had the Assembly acknowledged, in a resolution, that racial segregation and racial discrimination existed by law in the United States, and stated that these laws violate human rights and fundamental freedoms and thus the UN Charter and the UDHR, it would have vindicated its obligation under the Charter to promote human rights and fundamental freedoms,²⁵⁴ as it did regarding the situation in South Africa. Certainly, the United States and the Union of South Africa did not have identical governing systems and racial segregation and racial discrimination manifested differently in each State. These ills were, however, widespread in both States. The General Assembly's handling of the situation in South Africa showcased many, if not all, of its powers and limitations.

Over the subject twenty-year period, it used resolutions to: condemn the practice of apartheid; note that apartheid contravened the Charter and the UDHR; call upon Member States to impose sanctions; and request that the Security Council intervene, including by expelling South Africa from the United Nations, imposing more sanctions and using force. These actions in fact contributed to the Security Council imposing sanctions against the State. A resolution that spoke specifically to Jim Crow in the United States might have: (1) forced

253. The United States has not ratified the ICESCR. It ratified the ICCPR on June 7, 1992 and the CERD on October 21, 1994. See *Status of Ratification*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org/> (last visited Nov. 17, 2017).

254. See U.N. Charter art. 10; *Id.* at art. 11, ¶ 3; *Id.* at art. 13, ¶ 1(b).

the United States to confront its racial realities; (2) reminded it that the world was watching; (3) spawned the provision of expert assistance to aid in eradicating Jim Crow laws and practices; (4) revealed that the Member States viewed events in the United States as so serious that they would risk reputation, power and resources to address it; (5) elevated the notion of human rights (because at issue was the United States); and (6) relieved some of the pressure on African Americans due to the racially discriminatory laws and practices that they had suffered for nearly 350 years.

The General Assembly has an obligation, pursuant to the Charter to “make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race.”²⁵⁵ It is difficult to see how it vindicated this charge regarding the legalized racial segregation and racial discrimination in the United States.

B. The Security Council

The Security Council is empowered to maintain international peace and security.²⁵⁶ Pursuant to this authority it must “act in accordance with the Purposes and Principles of the United Nations.”²⁵⁷ However, during the period 1945 to 1965, the Security Council did not issue a resolution concerning Jim Crow laws and practices in the United States. Its reaction to apartheid in South Africa, though, reveals its awareness that some types of internal discord can threaten international peace and security.

In 1960, in response to a complaint from twenty-nine Member States, it called upon South Africa “to abandon its policies of apartheid and racial discrimination.”²⁵⁸ It also observed that this governmental scheme had in fact led to “international friction”²⁵⁹ and “endanger[ed] international peace and security.”²⁶⁰ Two years later, convinced that South Africa had crossed that threshold and was “seriously disturbing international peace and security,”²⁶¹ the Security

255. See U.N. Charter art. 10.

256. *Id.* at art. 24, ¶ 1. For a comprehensive discussion on the powers and limits of the Security Council, see Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191 (2013).

257. U.N. Charter art. 24, ¶ 2.

258. S.C. Res. 134, ¶ 4 (Apr. 1, 1960).

259. *Id.* at ¶ 1 (Apr. 1, 1960).

260. *Id.*

261. S.C. Res. 181 (Aug. 7, 1963).

Council called for sanctions, asking Member States “to cease forthwith the sale and shipment of arms, ammunition of all types and military vehicles to South Africa.”²⁶² It also issued a resolution stating that South Africa’s policies were “contrary to the principles and purposes of the Charter and . . . [South Africa] was in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights.”²⁶³

The Security Council used its tools of public shaming, community pressure,²⁶⁴ and sanctions to compel South Africa to end its policy of apartheid. This attention to South Africa more broadly demonstrates the Council’s awareness that governmental policies of racial segregation and racial discrimination violate the Charter and the UDHR. By responding to South Africa the way that it did, the Council was fulfilling its Charter obligation to promote human rights and fundamental freedoms.²⁶⁵

The Security Council’s powers under the Charter are considerable. It can issue resolutions that acknowledge illegal conduct, request a change in that conduct, call for the assistance of other Member States, order sanctions and the use of armed force and request an opinion from the ICJ.²⁶⁶ In the case of Jim Crow in the United States it did not use any of these tools. The likely reason, of course, is that the United States, through its veto power, would halt any effort at influencing its ostensible domestic conduct. The Security Council was thus not ever really disposed to address issues of racial segregation and racial discrimination in the United States. This incapacity evidences a serious shortcoming chargeable to the United Nations as an institution given the authority in the Charter for amendments to its terms.²⁶⁷

C. The Economic and Social Council

Like the General Assembly, the Economic and Social Council (ECOSOC) is charged with “promot[ing] respect for, and observance

262. *Id.* at ¶ 3.

263. S.C. Res. 182, ¶ 2 (Dec. 4, 1963).

264. It later sought an advisory opinion from the ICJ regarding the legal consequences for States that continued to do business with South Africa.

265. See U.N. Charter pmb. art. 1, art. 2, art 24, ¶¶ 1–2.

266. See U.N. Charter art. 96, ¶ 1.

267. See *id.* at art. 108–09; see also Richard Butler, *Reform of the United Nations Security Council*, 1 PENN. ST. J. L. & INT’L AFF. 23, 28 (2012).

of, human rights and fundamental freedoms for all.”²⁶⁸ Pursuant to that mandate, the Charter empowers it to “initiate studies and reports,”²⁶⁹ “make recommendations”²⁷⁰ and draft conventions.²⁷¹ It also entitles it to seek authorization from the General Assembly to request an advisory opinion from the International Court of Justice on any legal question necessary for the conduct of its affairs.²⁷²

A great deal of the work of this principal organ occurs in committee. From 1945 to 1965, the Commission on Human Rights (CHR) and the Subcommittee on the Prevention of Discrimination and the Protection of Minorities were especially focused on issues of racial segregation and racial discrimination and performed work that led to some of the most lasting human rights achievements of the time, including the UDHR, the Genocide Convention, the Declaration on the Elimination of All Forms of Racial Discrimination and the preparatory work on the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²⁷³ ECOSOC, through the CHR, also conducted studies on racial segregation and racial discrimination, worked with the Secretary-General regarding State submission of triennial reports on human rights issues, and provided advisory services on human rights as requested.

Because of the unfettered human rights focus of ECOSOC, during the subject period, many citizens looked to this body to redress human rights abuses in their communities. Addressing the incoming complaints fell to the CHR, which did not have a protocol for handling them. This systemic flaw was made plain when, in 1947, the National Association for the Advancement of Colored People (NAACP) submitted a petition to the CHR, curated by scholar W.E.B. DuBois, requesting that the United Nations redress Jim Crow in the United States. The NAACP wanted this petition, entitled *An Appeal to the World: A Statement on the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America*

268. U.N. Charter art. 62, ¶ 2.

269. *Id.* at ¶ 1.

270. *Id.* at ¶ 2.

271. *Id.*

272. *Id.*

273. *See supra*, Part III.A; *see generally* ANDERSON, *supra* note 15.

Strange Fruit at the United Nations

and an Appeal to the United Nations for Redress, considered by the CHR,²⁷⁴ for later action by the General Assembly.²⁷⁵

Very aware of the mission of the United Nations (and involved in the San Francisco Conference), the NAACP submitted this document not only to seek tangible relief on behalf of its constituency²⁷⁶ but also to cast the challenges of African Americans in the light of human rights, and to see if the principal organization charged with promoting these rights would do so in the case of African Americans.²⁷⁷ As chronicled by scholar Carol Anderson, the pushback to this appeal was palpable.²⁷⁸ It came directly from the United States Government

274. ANDERSON, *supra* note 15, at 101–12. See generally NAACP, AN APPEAL TO THE WORLD: A STATEMENT ON THE DENIAL OF HUMAN RIGHTS TO MINORITIES IN THE CASE OF CITIZENS OF NEGRO DESCENT IN THE UNITED STATES OF AMERICA AND AN APPEAL TO THE UNITED NATIONS FOR REDRESS, NAACP 1947. DuBois acknowledged that this issue was “internal and national.” *Id.* at 13. He contended that it was also, however, international and threatened to become more so as nations increased their interactions with each other. He stated: “[It is . . . fitting and proper that the thirteen million American citizens of Negro descent should appeal to the United Nations and to ask that organization in the proper way to take cognizance of a situation which deprives this group of their rights as men and citizens. . . .” *Id.*

275. *Id.* See generally NAACP, *supra* note 274, at 1–14. The group’s petition endeavored to present a case to the United Nations that at once spoke to African American history, the existence of an economic model in the United States that depended on the subjugation of African Americans for success, the development of a legal system to support this subjugation, the systemic efforts to disfranchise African Americans in voting, education, health, employment and housing, the current lived conditions of African Americans, the efforts of African Americans to seek redress in U.S. domestic courts, *id.* at 12, and the ultimate necessity of resort to the United Nations to do what theretofore U.S. domestic courts had not done. The Appeal includes an introduction by DuBois and five works of legal scholarship: EARL B. DICKERSON, THE DENIAL OF LEGAL RIGHTS OF AMERICAN NEGROES: 1787-1914; MILTON R. KONVITZ, THE LEGAL STATUS OF AMERICANS OF NEGRO DESCENT SINCE WORLD WAR I; WILLIAM R. MING, JR., THE PRESENT LEGAL AND SOCIAL STATUS OF THE AMERICAN NEGRO; LESLIE S. PERRY, PATTERNS OF DISCRIMINATION IN FUNDAMENTAL HUMAN RIGHTS; AND RAYFORD W. LOGAN, THE CHARTER OF THE UNITED NATIONS AND ITS PROVISIONS FOR HUMAN RIGHTS OF MINORITIES AND DECISIONS ALREADY TAKEN UNDER THIS CHARTER. The Appeal essentially noted that the United States had a duty to vindicate human rights because it was a member of the family of nations, respect for human rights assists in international relations, and the United States was a member of an organization devoted to the respect for human rights.

276. At the time, the NAACP was the largest organization in the country, with over 500,000 members, and had as its purpose addressing the very kinds of complaints that concerned the United Nations. NAACP, *supra* note 274, at 13–14; ANDERSON, *supra* note 15, at 2 (“Although there were other African American organizations contributing to this effort . . . none of them had the credibility, the money and the influence to make human rights the agenda in the struggle for black equality. Only the NAACP could do that.”).

277. ANDERSON, *supra* note 15, at 30. One of the more persuasive parts of this essay was DuBois’s juxtaposition of the size of the African American population to that of some nations, noting that, at thirteen million, there were more African Americans in the United States than there were people in Canada, Saudi Arabia, Ethiopia, Hungary, the Netherlands, Australia, Switzerland, Portugal, Peru, Greece, Belgium or the Union of South Africa. NAACP, *supra* note 274, at 14. He also observed that there were at least as many African Americans in the United States as people in Argentina, Czechoslovakia, or all of Scandinavia. *Id.*

278. See generally ANDERSON, *supra* note 15.

and Eleanor Roosevelt, Chairperson of the Commission.²⁷⁹ The government was concerned that such a hearing would cast great doubt on its public commitment to the UN's mission²⁸⁰ and to human rights more generally — all to the delight of its Cold War rival, the Soviet Union.²⁸¹ This latter concern Roosevelt shared.²⁸² So, despite Du-Bois's considerable efforts to have the petition formally considered and addressed, it never was.²⁸³ The CHR refused to act upon it.²⁸⁴ Rejecting the petition was perhaps made easier than it otherwise would have been because of the CHR's lack of a meaningful process for managing communications, e.g., complaints and petitions, from the public.²⁸⁵

But given the hue and the cry over the document and the case that it made, the United States, as represented by Eleanor Roosevelt, knew that it had to do something to advance human rights. The pressure that it felt furthered the efforts of the CHR to finish the UDHR.²⁸⁶ In the meantime, the days were dark in the United States — with ongoing racial segregation, racial discrimination and lynchings²⁸⁷ — and the CHR had refused to accept the petition of its largest civil rights organization.

Doubtless the discussion about racial segregation and racial discrimination in the United States contributed to some of the fervor behind the drafting of several landmark human rights instruments. However, some of those instruments took decades to prepare and decades more to get the United States' signature and ratification.²⁸⁸

279. *Id.* at 102, 105.

280. *Id.* at 109–12.

281. *See id.* (discussing at length the efforts of Soviet representative Alexander P. Borisov to get the UN's Commission on Human Rights to act on the NAACP's petition); BORSTELMANN, *supra* note 15, at 75 (“The Soviet government and its allies, unsurprisingly, delighted in publicizing news of American racial discrimination and persecution.”); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 75 (1988).

282. ANDERSON, *supra* note 15, at 112.

283. *Id.* at 101, 103, 105, 107–08.

284. *Id.* at 111, 149. Despite the NAACP's experience, in 1951, the Civil Rights Congress (“CRC”), prepared its petition to the august body. *See generally* WE CHARGE GENOCIDE: THE CRIME OF GOVERNMENT AGAINST THE NEGRO PEOPLE (William L. Patterson et. al. eds., 4th ed. 1952) (arguing strenuously and exhaustively for a United Nations role in combatting the Jim Crow realities confronted by African Americans every day). As well, the CRC wanted its petition heard by the General Assembly. *See* ANDERSON, *supra* note 15, at 179–09 (discussing at length the petition and the politics around getting it to the United Nations).

285. NAACP, *supra* note 274, at 92.

286. ANDERSON, *supra* note 15, at 148, 150.

287. *See supra* Part II.

288. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995).

Given its authority and clear ability to address challenging social issues, ECOSOC might have more effectively addressed Jim Crow issues had it accepted and acted upon the NAACP petition (or the petition of the Civil Rights Congress, which came along four years later). It could have also worked with the General Assembly to prepare a resolution to address Jim Crow in the United States. As well, it could have asked the General Assembly to forward a legal question to the ICJ for an advisory opinion.

D. The Secretariat

The Secretariat is the administrative office of the United Nations.²⁸⁹ It consists of a Secretary-General, the top administrator of the organization, and supporting staff. The Secretary-General may apprise the Security Council of any issue they deem a threat to international peace and security.²⁹⁰ They may also seek authorization from the General Assembly to request an advisory opinion from the ICJ concerning any legal question. Historically, Secretaries-General have also appointed special rapporteurs, initiated studies and solicited information from Member States regarding their complicity with the Charter.

During the subject period, the Secretary-General required Member States to submit triennial reports identifying internal human rights issues and discussing ways to address them. Pursuant to the reports, the Secretary General made resources, e.g., experts, available to assist States in addressing any human rights challenges.

In 1946, the Secretariat, like the CHR, also had an opportunity to shepherd a petition concerning Jim Crow through the UN system. The National Negro Congress (NNC), a relatively young civil rights organization, drafted a document entitled *A Petition to the United Nations on Behalf of 13 Million Oppressed Negro Citizens of the United States of America*, in which it endeavored to make the case that African Americans' human rights were consistently violated in the United States pursuant to Jim Crow practices.²⁹¹ They argued that those practices were conducted both pursuant to law and not and were a part of a concerted effort by government officials and private individ-

289. See generally Theo Van Boven, *The Role of the United Nations Secretariat in the Area of Human Rights*, 24 N.Y.U. J. INT'L L. & POL. 69 (1991) ("The U.N. Charter lists the Secretariat among the principal organs of the United Nations . . .").

290. U.N. Charter art. 99.

291. ANDERSON, *supra* note 15, at 81.

uals to control the conduct of African Americans and to punish them for being African American.²⁹² Specifically, they argued that African Americans were regularly segregated, terrorized, lynched and more²⁹³ — a reality, which, they thought, should trigger the interest of the world’s largest and most preeminent human rights organization.²⁹⁴ The NNC submitted its petition to the Secretary-General’s office but wanted it formally considered by ECOSOC or any other appropriate body.²⁹⁵ The Secretary-General’s office informed them of the need to provide more specific data about Jim Crow life before it could act on the petition.²⁹⁶ Unable to provide this information, the NNC abandoned its efforts to get a hearing.²⁹⁷

Given the time of the UN’s founding and the widespread knowledge of Jim Crow, the Secretariat might have made it clear early, publicly and repeatedly that the United States was violating its obligations under the Charter by having laws within its borders that mandate racial segregation and racial discrimination. It might have also urged the General Assembly and the Security Council to issue resolutions, specifically identifying Jim Crow laws, as violative of the Charter. Finally, it, too, might have sought authorization from the General Assembly to request an advisory opinion from the ICJ regarding the compatibility of Jim Crow laws with the United States’ obligations under the Charter and the UDHR.

E. The International Court of Justice

The International Court of Justice is the “principal judicial organ of the United Nations,”²⁹⁸ with both contentious²⁹⁹ and advisory³⁰⁰ jurisdiction.³⁰¹ Only States can institute a contentious proceeding.³⁰²

292. See generally NATIONAL NEGRO CONGRESS, A PETITION TO THE UNITED NATIONS ON BEHALF OF 13 MILLION OPPRESSED NEGRO CITIZENS OF THE UNITED STATES OF AMERICA (June 6, 1946) (requesting that the Director-General place the petition for consideration before the Economic and Social Council).

293. *Id.*

294. *Id.*

295. *Id.* at 3; ANDERSON, *supra* note 15, at 79–92.

296. ANDERSON, *supra* note 15, at 82.

297. *Id.* at 92.

298. U.N. Charter art. 92; Statute of the International Court of Justice art. 1; see also Marian Nash Leich, *The International Court of Justice*, 80 AM. J. INT’L. L. 163, 165 (1986).

299. Statute of the International Court of Justice art. 40.

300. U.N. Charter art. 96; Statute of the International Court of Justice art. 65.

301. See generally Ralph G. Steinhardt, *The International Court of Justice at Several Crossroads*, 103 AM. SOC’Y INT’L L. PROC. 397 (2010) (stating that the ICJ increasingly addresses legal questions arising in substantive legal areas that would have been inconceivable to the framers of the ICJ Statute and its predecessor court).

To date, the disputes adjudicated have included the application of the International Convention for the Elimination of Racial Discrimination to the Government of Russia regarding the treatment of Ukrainians in Crimea and eastern Ukraine;³⁰³ the application of the Genocide Convention to the conduct of the Former Republic of Yugoslavia during the war in Bosnia;³⁰⁴ and the application of the UN Charter and other international law to the Union of South Africa regarding its treatment of the people of Namibia (South West Africa).³⁰⁵

Quite differently, States may not seek the court's advisory jurisdiction. As noted above, however, the General Assembly and the Security Council may do so regarding "any legal question."³⁰⁶ The Assembly may also authorize other UN organs and specialized agencies to seek this jurisdiction concerning "legal questions arising within the scope of their activities."³⁰⁷

The purpose of the advisory opinion is "to guide the United Nations in respect to its own actions."³⁰⁸ To date, those questions have included the legality of the threat or use of nuclear weapons,³⁰⁹ the legality of Kosovo's declaration of independence,³¹⁰ and the legal consequences for States concerning the Security Council's sanctions against South Africa for its occupation of South West Africa.³¹¹

The ICJ contemplates a range of legal questions in executing its advisory powers. Some of those questions concern a UN Member State's obligations under the Charter. Charter obligations, though, are not always clear. The Charter, for example, lacks language that

302. Statute of the International Court of Justice art. 34.

303. Application of the International Convention for the Suppressing of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Discrimination (Ukraine v. Russian Federation), Pending, 2017 I.C.J. (2017).

304. Application of the Convention on the Prevention of and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

305. South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Judgment, 1966 I.C.J. 6 (July 18).

306. U.N. Charter art. 96, ¶ 1; see Mark Angehr, *The International Court of Justice's Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions*, 103 Nw. U. L. Rev. 1007, 1008 (2009).

307. U.N. Charter art. 96, ¶ 2.

308. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, 27 (Oct. 16).

309. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 254 (July 8) [hereinafter *Legality of Nuclear Weapons*].

310. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, 405 (July 22).

311. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 16 (June 21) [hereinafter *Legal Consequences—South Africa*].

unambiguously imposes a duty on individual Member States to prevent human rights abuses against its citizens and to protect these citizens from human rights abuses. The legal import, then, of the Member States' human rights obligations pursuant to the Charter was ripe for determination by the ICJ during the early decades of the United Nations and the latter of Jim Crow. Given its role as the principal judicial organ of the United Nations and its statutory authority to answer any legal question in an advisory capacity, the court was well-disposed to opine as to the relevance of the UN Charter (and for that matter, customary international law) to Jim Crow laws and practices in the United States.³¹² However, no entity that had the power to seek the court's opinion on this question — the General Assembly, the Security Council, the Economic and Social Council, the Secretariat and perhaps specialized agencies — exercised that franchise.³¹³

1. Contentious Jurisdiction in the International Court of Justice

Two States did invoke the court's contentious jurisdiction to sue another State on human rights grounds. However, as is the case in many other jurisdictions, in the ICJ, the complaining State must have standing before the court will address the complaint on the merits. In the consolidated cases of *Ethiopia v. South Africa* and *Liberia v. South Africa*, Ethiopia and Liberia contended, among other things, that South Africa was failing in its duties, pursuant to the Covenant of the League of Nations, to promote the welfare of the residents of its Mandate South West Africa and to provide annual reports concerning its administration of that territory. After a close vote, the court concluded that neither Ethiopia nor Liberia was directly implicated by South Africa's duties and obligations under the Covenant and, consequently, lacked standing to bring the cases. Accordingly, the court did not address the merits of the two States' claims against South Africa. In dissent, Judge Koretsky stated, "This decision . . . would have been of vital importance for the peoples of South West Africa and to peoples of other countries where an official policy of racial discrimination

312. See SHIV R. S. BEDI, *THE DEVELOPMENT OF HUMAN RIGHTS LAW BY THE JUDGES OF THE INTERNATIONAL COURT OF JUSTICE* 6–7 (2007) (observing that it is a "well-known fact" that the ICJ has "contribut[ed] to the orderly development of international law" but that it is "less known . . . that the [court] . . . has also made, and sometimes also failed to make, an important contribution to the development of human rights law").

313. Perhaps the General Assembly's charge of "encouraging the progressive development of international law and its codification," UN Charter art. 13, ¶ 1, contemplates referral of a legal question to the ICJ by the General Assembly.

still exists.”³¹⁴ The impact of the court’s actual decision, then, beyond denying the petitioners a merits-based ruling (which was obviously quite significant), is that it prevented States from bringing actions against sister States for other alleged human rights abuses therein. It precluded, thus, an action against the United States for maintaining a system of racial segregation and racial discrimination in violation of the UN Charter, the UDHR and/or customary international law.

2. Advisory Jurisdiction in the International Court of Justice

There is no per se “standing” requirement to invoke the court’s advisory jurisdiction but, as noted, the only entities that are authorized by the Charter to seek this jurisdiction are the General Assembly, Security Council and any other organ or specialized agency authorized by the Assembly. Pursuant to its charge, the court can “give an advisory opinion on any legal question.”³¹⁵ It does not require the consent of any other interested party before recognizing its advisory jurisdiction. Moreover, it typically grants a request for an advisory opinion, once stating that “[a] reply to a request for an Opinion should not, in principle, be refused.”³¹⁶ Indeed, the court will only deny this request if there are “compelling reasons” to do so.³¹⁷ It has opined that “by replying to the request it would not only remain faithful to the requirements of its judicial character, but also discharge its functions as the principal judicial organ of the United Nations.”³¹⁸

The advisory opinion is not binding but it can answer legal questions with the same rigor and integrity as a legally binding opinion.³¹⁹ Indeed, the court has stated that “advisory opinions have the purpose

314. South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Dissenting Opinion of Judge Koretsky, 1966 I.C.J. Rep. 239, 240 (July 18).

315. U.N. Charter art. 96, ¶ 1.

316. *Legal Consequences—South Africa*, Advisory Opinion, 1971 I.C.J. Rep. 16, 27 (June 21).

317. *Id.* at 226; *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, 27 (Oct. 26) (citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, 1950 I.C.J. Rep. 72; *Legal Consequences—South Africa*, Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21)).

318. *Legal Consequences—South Africa*, Advisory Opinion, 1971 I.C.J. Rep. 16, 27 (June 21).

319. The advisory proceeding itself can be of great value. It can, in fact, resemble its adversarial counterpart. It usually has two component parts: the written proceeding and the oral proceeding. The written proceeding consists of written statements by the requesting party and, pursuant to court permission, any other interested party. In their formality, precision and documentation, these statements resemble typical court briefs in the contentious proceedings. The oral proceeding consists of oral presentations by the requesting party and, pursuant to court permission, any other interested party. Judges are entitled to write separate opinions if they see fit and they often do. *See generally* Statute of the International Court of Justice; Rules of Court (1978), International Court of Justice.

of furnishing to the requesting organs the elements of law necessary for them in their action.”³²⁰ For example, in *Western Sahara*, the court observed that an advisory opinion could “furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara.”³²¹

The authority to issue an advisory opinion is, of course, not one enjoyed by all courts. United States federal courts, of course, do not have this power. The value of such a license, though, is plainly apparent. Not only might it allow the requester, or some other implicated party, to receive clarity on a legal issue and tailor their conduct accordingly, but it might also, in the words of former ICJ judge Kenneth Keith, “move things along.”³²² Moreover, such an opinion, by clarifying law, duties and obligations, might prevent future conflict.

Because the ICJ can opine on *any legal question* regarding international law it can consider the proper interpretation and/or application of statutory³²³ or customary law. One might think that given the opportunity for advance notice from the ICJ, the court’s advisory function would be frequently sought. Reality, however, wildly contravenes the thought.

Since its inception in 1945, the court has received only twenty-seven requests for an advisory opinion (Between 1945 and 1965, the years relevant to this paper, it received twelve requests.).³²⁴ It has only refused such a request once.³²⁵ The extreme odds are, then, that

320. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 162 (July 9).

321. *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12, 37 (Oct. 26).

322. Judge Kenneth Keith, *The Role of International Law in National Law*, AUDIOVISUAL LIBR. OF INT’L L., http://legal.un.org/avl/lis/Keith_IL.html# (last visited Jan. 20, 2018).

323. In *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, 1948 I.C.J. Rep. 57, 61 (May 28), the court made clear its capacity to interpret provisions in the UN Charter. It stated:

[I]t has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, ‘the principal judicial organ of the United Nations,’ to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.

324. See *Advisory Proceedings*, I.C.J., <http://www.icj-cij.org/en/advisory-proceedings> (last visited Nov. 5, 2017).

325. See *Legality of Nuclear Weapons*, 1996 I.C.J. Rep. 226, 260 (July 8). That request was made by the World Health Organization (WHO) concerning the use of nuclear weapons. The court did not think that the answer to the question was necessary for the WHO’s performance of its work.

The court recently received a request regarding the “Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965,” Press Release, 2017 I.C.J. 1, 1–2 (June 29). This request was forwarded to the ICJ by the General Assembly on June 22, 2017. G.A. Res. 71/292. It is pending.

if a proper entity requests such an opinion, it will receive it. Between 1945 and 1965, the General Assembly requested 10 advisory opinions; they were each granted.³²⁶

Despite the court's view that the exercise of its advisory jurisdiction is necessary to its function as the principal judicial organ of the United Nations, this exercise is regularly challenged. Some of the most adversarial of advisory cases have concerned South Africa's presence in Namibia. After South Africa flouted Security Council Resolution 276, which declared (yet again) South Africa's presence in Namibia to be illegal and demanded its immediate withdrawal, the Security Council asked the ICJ for an advisory opinion. It posed the following legal question: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"³²⁷ It further stated that "an advisory opinion from the International Court of Justice would be useful for the Security Council in its future consideration of the question of Namibia[.]"³²⁸

All states "entitled to appear before the court" may provide a written response to a request for an advisory opinion.³²⁹ In this case, twelve States submitted statements.³³⁰ Pursuant to protocol, the United Nations Secretary General transmitted to the court the request, the written statements and other documents likely "to throw light upon the [legal] question."³³¹

South Africa argued strenuously that the court decline the request for an advisory proceeding, in part on the ground that the court would be forced to engage in impermissible factfinding. In response, the court noted the institutional deference to the requester of the advisory opinion, stating that it "must bear in mind that . . . '[a] reply to a request for an Opinion should not, in principle, be refused.'"³³² It concluded that it saw no "compelling reason[]"³³³ to decline jurisdiction and further stated that "it feels that by replying to the request it would not only 'remain faithful to the requirements of its judicial

326. See *Advisory Proceedings*, I.C.J., <http://www.icj-cij.org/en/advisory-proceedings>. But see *Legality of Nuclear Weapons*, *supra* note 325.

327. S.C. Res. 284, ¶ 1 (July 29, 1970).

328. *Id.*

329. Statute of the International Court of Justice art. 66, ¶ 2.

330. See *Legal Consequences—South Africa*, 1971 I.C.J. Rep. 16, 18 (June 21).

331. Statute of the International Court of Justice art. 65, ¶ 2.

332. *Legal Consequences—South Africa*, 1971 I.C.J. Rep. 16, 27 (June 21).

333. *Id.*

character³³⁴ but also discharge its functions as ‘the principal judicial organ of the United Nations.’³³⁵ The court is keen to exercise the jurisdiction that it possesses. In the exercise of that jurisdiction it is permitted to answer a panoply of legal questions, including those that seek to ascertain the duties and obligations of States pursuant to a discrete set of facts and those that seek to more broadly determine the reach of the law.

a. Assessing Obligations of States

In the process of this assessment, the court is entitled to apply a wide swathe of law, including treaties, customary international law and other international law. Pursuant to that license, the court has interpreted and applied provisions of the UN Charter. The court’s response to the question of the legal consequences of States, in light of South Africa’s treatment of the inhabitants of Namibia, evidences its willingness to assess a State’s obligations under the Charter. In its response, the court directly addressed the legality of South Africa’s conduct:

Under the Charter of the United Nations, the former Mandatory [South Africa] has pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.³³⁶

The court concluded that:

South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. *It is therefore under obligation to withdraw its administration from the Territory of Namibia.* By maintaining the present illegal situation, and occupying the Territory without title, South Africa *incurs international responsibilities arising from a continuing violation of an international obligation.*³³⁷

334. *Id.* (quoting ICJ Reports 1960, at 153).

335. *Id.*

336. *Id.* at 57 (emphasis added).

337. *Legal Consequences—South Africa*, 1971 I.C.J. Rep. 16, 54 (June 21) (emphasis added).

The foregoing is an example of the legal clarity that an advisory opinion can bring. If there was a question regarding whether race-based policies violate fundamental rights and whether such a violation also abridges the Charter, this opinion answers. It additionally observes the duty owed by the implicated State given the court's determination that it is in breach.

In determining State obligations, the court also routinely invoked customary international law, law borne of State practice and obligation. In *Western Sahara*, it explored whether Western Sahara was *terra nullius* at the time that it was colonized by Spain.³³⁸ To answer the question, the court considered the ways that others determined title during the relevant time period.³³⁹ It ultimately concluded that, based upon State practice and *opinio juris*, Western Sahara was not *terra nullius* at the time that it was occupied by Spain.³⁴⁰ The court has also applied other law to answer the questions posed in requests for advisory opinions, including international humanitarian law,³⁴¹ but it is the Charter and customary international law that would have applied to the United States during the Jim Crow era.

b. Answering Abstract Legal Questions

The court is additionally disposed to answer abstract legal questions and, in the doing, determine the reach of the law.³⁴² In *Western Sahara*, Spain contended that the court lacked this authority.³⁴³ The court responded, however, “[t]hat according to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.”³⁴⁴ Further, the court has stated that the term “legal question,” in both the Charter and the Statute, is not to be read “restrictively.”³⁴⁵ Indeed, the court has opined:

[T]o assert that an advisory opinion deals with a legal question within the meaning of the Statute only when it pronounces directly upon the rights and obligations of the States or parties concerned, or upon the conditions which, if fulfilled, would result in the coming

338. *Western Sahara*, 1975 I.C.J. Rep. 12 (Oct. 26).

339. *Id.*

340. *Id.*

341. *Legality of Nuclear Weapons*, 1996 I.C.J. Rep. 226, 227 (July 8).

342. Thomas Buergenthal, *Lawmaking by the ICJ and Other International Courts*, 103 AM. SOC'Y INT'L L. PROC. 403, 403 (2010).

343. *See Western Sahara*, 1975 I.C.J. Rep. 12, 19 (Oct. 26).

344. *Id.*

345. *Id.* at 19–20.

into existence, modification or termination of such a right or obligation, would be to take too restrictive a view of the scope of the Court's advisory jurisdiction.³⁴⁶

The court deems its authority fully inclusive of answering questions that do not specifically concern the rights and duties of specific States.³⁴⁷

The court exercised this broad power to opine in *Legality of the Threat or Use of Nuclear Weapons*. There, it answered the question "In view of the health and environmental effects, would the use of nuclear weapons by a State in a war or other armed conflict be a breach of its obligations under international law including the [World Health Organization] constitution?"³⁴⁸ The breadth of this question is perhaps breathtaking and yet the court attempted to answer it. To do so, it considered both international human rights law and international humanitarian law, ultimately concluding that it could not answer the question because of widespread divergence among States on the propriety of using nuclear weapons and because of the rights of States, under Article 51 of the Charter, to self-defend.³⁴⁹ It did not refrain from answering because of institutional incapacity.

The ICJ is clearly ready, willing and able to grant a request for an advisory opinion if proffered by the proper party. It has certainly done so in contested circumstances and regarding questions with significant political import. But the ICJ cannot assign itself. For an advisory opinion to issue concerning Jim Crow laws and practices, an appropriate entity had to request it. The General Assembly was likely the most appropriate one.³⁵⁰ (1) it had the power to act relative to any matter concerning the Charter; (2) it had a history of seeking such opinions in other matters (and so would be acting in accordance with past precedent); (3) it had the capacity to issue follow-up resolutions with the power to influence the subject State; and (4) no State could veto the

346. *Id.* at 20.

347. Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. Rep. 166, 172 (July 12).

348. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. Rep. 66, 68 (July 8).

349. *See generally id.*

350. In considering how such a question might travel to the ICJ, it is doubtless a nonstarter to begin with the Security Council given the United States' veto power. This is not the case when one considers the General Assembly. Notably, it sought such opinions three times concerning South Africa's occupation of South West Africa. Procedurally, the General Assembly needed only to craft a legal question (or receive one from a duly authorized agency), pass a resolution to pose the question to the ICJ and then transmit the resolution to the Secretary General for forwarding to the court.

passing of a resolution asking the legal question. Yet the General Assembly did not seek this opinion.

This lack of an advisory opinion concerning Jim Crow laws and practices perhaps shows that at issue was not the court's readiness to answer a difficult question but rather the broader UN's readiness to ask it. The General Assembly might have asked the court any number of questions to address the issue of Jim Crow laws and practices in the United States. It could have framed its question generally so as to contemplate the racial realities in numerous Member States.³⁵¹ It might have asked: (1) whether the Preamble of the Charter, acknowledging the commitment of Member States to "reaffirm faith in fundamental human rights," imposes a legal obligation on the Member States;³⁵² (2) whether Article 1(3) of the Charter, stating that it is the purpose of the United Nations "[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race,"³⁵³ imposes a legal obligation on the Member States; (3) whether Article 2(2) of the Charter, stating that the Member States "shall fulfill in good faith the obligations assumed by them in accordance with the present Charter," imposes a legal obligation of the Member States; (4) whether Article 56 of the Charter, stating that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55 [e.g., promotion of human rights and fundamental freedoms]," imposes a legal obligation on the Member States; (5) whether the Preamble, Purposes and/or Principles of the Charter obligate Member States to protect their citizens against human rights violations; (6) whether human rights violations by a Member State against its territorial population threaten international peace and security; (7) whether the "domestic jurisdiction" clause of the Charter applies only to military intervention; and (8) whether *jus cogens* violations override the "domestic jurisdiction" prohibition in the Charter.

The General Assembly might also have posed questions that were specific to the United States. For example, it might have asked:

351. The difference in impact between a General Assembly resolution that generally condemns racial segregation and racial discrimination and an ICJ advisory opinion that generally states that racial segregation and racial discrimination are violative of the UN Charter and customary international law would seem substantial given the imprimatur of a court (to determine law) compared to that of a legislative body (to create it – "it," in this case, being soft law).

352. U.N. Charter pmb. l.

353. U.N. Charter art. 1, ¶ 3.

(1) whether Jim Crow laws in the United States – e.g., regarding convict leasing, “vagrancy,” poll taxes and segregated housing, education and public utilities – violate the Preamble, Purposes, Principles, Article 2(2) and Article 56 of the Charter; (2) whether Jim Crow practices in the United States – e.g., regarding lynching, torture, forced displacement and terrorism – violate the same provisions of the Charter; (3) whether Jim Crow laws and/or practices threaten international peace and security; and (4) whether Jim Crow practices – e.g., regarding lynching and torture – are *jus cogens* violations.³⁵⁴

This article certainly does not contend that an advisory opinion finding Jim Crow laws and/or practices violative of international law would have immediately resulted in their rollback. Indeed, despite the court’s opinion concluding that South Africa’s occupation of Namibia was illegal, South Africa continued this practice for an additional twenty years.³⁵⁵ Similarly, the court’s conclusion that Western Sahara was not *terra nullius* when Spain laid claim to it did not result in Spain’s immediate withdrawal. These realities certainly reveal that the advisory opinion is not a king’s edict.

The advisory process, however, can bring sunlight to an issue and to the persons – namely other UN Member States – who are in a position to vindicate the court’s finding. While the opinion is not binding, the court’s language can be stark, declarative and indicting, as in the South Africa matter, thus applying pressure to the State in question to conform its conduct to the requirements of international law.

That the United Nations missed a critical opportunity to present the issue of the legality of Jim Crow to the UN’s primary judicial organ seems clear. As with other General Assembly inaction regarding Jim Crow, the body perhaps did not seek an advisory opinion regarding this phenomenon out of concern that the United States would withdraw its support, in some way, from the United Nations or from individual Member States. Indeed, a declaration from the court regarding Jim Crow laws and practices that was akin to that by the court regarding South Africa’s occupation of Namibia might well have, for a moment, upturned the world. It perhaps would have also imposed a degree of pressure against the United States to precipitate efforts to

354. That torture is a *jus cogens* violation is quite clear today. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS § 217; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 712 (9th Cir. 1992).

355. See *Namibia Profile – Timeline*, BBC NEWS (Nov. 2, 2017), <http://www.bbc.com/news/world-africa-13891138>.

Strange Fruit at the United Nations

dismantle a regime that fully disfranchised African Americans – solely because they were African American.

CONCLUSION

The United Nations was founded, in part, to promote human rights and fundamental freedoms. Through its treaty drafting and pressure campaigns against Charter non-conforming Member States it has helped to create international human rights law and an atmosphere of accountability. It did not, however, use the tools available to it to promote the human rights and fundamental freedoms of African Americans during the Jim Crow era, thus calling into serious question its commitment to its mission in the face of millions suffering legalized racial segregation and racial discrimination in the territory of the world's most powerful State.

Speed Matters

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INTRODUCTION	240
I. SHOULD SPEED MATTER?	244
A. Valuing Speed in Law	244
B. Speed for Psychometricians	246
C. Professor Henderson's Consideration of Speed on Law School Exams	249
II. METHODS AND FINDINGS	253
A. Data Set	253
B. Statistical Methodology	254
C. Detailed Findings	257
1. Grades vs. Exam Words Written Per Minute ...	257
a. Correlations	257
b. Mixed Effects Linear Regression Models ...	259
i. On Average, Students Who Write More Get Higher Grades	259

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ii. Professors Value Speed Differently	261
iii. Just Saying More Is Not Enough	263
2. Grade vs. Typing Speed	265
a. Correlations	266
b. Mixed Effects Linear Regression	267
D. Additional Findings	268
1. First Year Grades	268
2. Typing Speed	269
CONCLUSION	269

INTRODUCTION

The first year of law school is surely among the most stressful educational experiences in higher education. It is not just, or even primarily, the Socratic Method made famous by Professor Kingsfield in *The Paper Chase*.¹ In fact, belittling Socratic dialogue Kingsfield-style is not the norm in legal education. A greater source of stress is that students receive almost no feedback until one, high stakes examination at the end of the semester, which typically determines their entire grade in the course.² To compound the stress, a student's first year grades are often a critical factor in their employment prospects both post-graduation and for more immediate summer jobs that can set a future career trajectory. Most law schools assign students a percentile rank and employers often choose whom to interview based on class ranking. Grades can also determine whether students retain a conditional scholarship.³ With so much riding on one examination, it is important to consider exam pedagogy, including whether the exams

1. *THE PAPER CHASE* (Thompson-Paul Productions 1973).

2. Much has been written about the value of feedback to student learning. From the voluminous literature, see, e.g., John Hattie & Helen Timperley, *The Power of Feedback*, 77 *REV. OF EDUC. RES.* 81 (2007) (citing feedback as "one of the most powerful influences on learning and achievement"); Richard Higgins, Peter Hartley & Alan Skelton, *The Conscientious Consumer: Reconsidering the Role of Assessment Feedback in Student Learning*, 27 *STUD. HIGHER EDUC.* 53, 53 (2002) (reporting study findings that "formative assessment feedback is essential" to learning in higher education); Paul Black & Dylan William, *Assessment and Classroom Learning*, 5 *ASSESSMENT EDUC.* 7, 7, 9 (1998) (engaging in meta-analysis of 250 studies that showed improved learning through frequent feedback). This Article does not take up that issue. The traditional explanation for the lack of feedback is that law school is graduate education on the cheap. Traditionally law schools had few expensive labs or clinics. And whereas a standard PhD program has a student-faculty ratio in the single digits, law school, and particularly the first year of law school, has traditionally seen much larger class sizes and thus much higher student-faculty ratios.

3. See generally Barbara Glesner Fines, *Competition and the Curve*, 65 *UMKC L. REV.* 879, 886-87 (1997) (observing that "a great deal of wealth is distributed based on our grade currency" and listing some of the ways in which this is true).

administered reliably test the legal knowledge and skills faculty members strive to teach their students.

Most first year exams are intended to evaluate a student's ability to critically consider and analyze problems with reference to the legal rules and principles that are the subject of the course – e.g., torts, property, contracts, criminal law. There are clearly variations among faculty members – with some emphasizing the “black letter” legal rules and others focusing more on the theory or policy underlying the rules. But most faculty members share the broad goal of testing legal knowledge and analytical acumen as it is exhibited by a student's application of the law to a hypothetical fact pattern the student has not previously encountered.

Most law schools also measure performance along a curve.⁴ To produce a curve, there must be a distribution of performance and the most reliable way to produce a distribution is to make the examination sufficiently challenging that even the very best students will not be able to achieve a perfect score.⁵ In our experience, the most common way to achieve this distribution on first year exams is for the faculty member to construct a complex fact pattern that raises more legal issues than can be spotted during the time allotted or even by one individual.⁶

This approach to exams places a premium not only on the quantum of knowledge a student has accumulated during the course but also, perhaps, on speed. Students who quickly perceive the legal issues generated by a fact pattern would presumably be better off. Those who are slower to translate the facts into the legal questions those facts raise would presumably do less well. Our empirical re-

4. See generally Nancy H. Kaufman, *A Survey of Law School Grading Practices*, 44 J. LEGAL EDUC. 415, 417–18 (1994); *List of Law School GPA Curves*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_law_school_GPA_curves (last updated Sept. 29, 2017) (citing the variety of grading curves employed by law schools).

5. Philip Kissam has suggested that the emphasis on speed in law school exams: [I]s the perceived need of many schools and professors to impose grading curves with many distinctions on examination performances in individual courses. Multiple grade categories can be generated and explained to students most easily by establishing the final exam as a race and then observing the order in which contestants cross the finish line. The race is created by establishing relatively complex problems for the time allowed – “overfacting” as some students say — and by using objective grading methods for essay questions.

Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 453 (1989). See also Fines, *supra* note 3, at 899–08 (critiquing the arguments in support of curving law school exams).

6. It is not uncommon for a student to see an issue or argument in an exam fact pattern that was not perceived by the faculty member when writing the exam. Thus, even the faculty member would not score 100% on her own exam, assuming that the denominator for determining a student's score includes all of the potential issues presented by the fact pattern.

search suggests that speed may indeed matter because students who write more on their examinations do better on average. Our sense is that most law school faculty members will be comfortable with the idea that both the amount of knowledge learned by the student and the speed with which she applies that knowledge – which might be termed “cognition speed” – matters, although, as we discuss below, psychometric literature raises many questions about whether we ought to be comfortable with speed mattering.⁷

Even if one is comfortable that cognition speed matters on first year exams, what if it were not the only speed variable for which law school exams tested? In an exam-taking environment which now depends almost exclusively on typing exam answers,⁸ what if a student’s grade depended upon typing speed?⁹ Whatever benefits fast typing enjoys at the margins of law practice, most would probably agree that the purpose of a law school exam is not to sort students by typing speed. Thus, we also considered the question whether students’ grades correlate with typing speed.

This study is not our first effort to understand whether grading of law school exams is affected by factors that most would regard as irrelevant. We previously studied whether typing exams provided some grade advantage over handwriting exams.¹⁰ The data we collected indicated that, on the 4.0 grading scale used at Brigham Young University’s J. Reuben Clark Law School (“BYU Law” or “BYU Law School”) where we teach,¹¹ typing an examination, on average, provided a student with a 0.1 grade benefit.¹² Our prior work did not attempt to explain why typing produced an advantage. Anyone who has ever graded a scrawled bluebook examination can attest to the challenge. Nevertheless, we were not able to conclude that the legibil-

7. See Kissam, *supra* note 5, at 438.

8. In contrast to our own experience of hours of cramped handwriting in bluebooks, out of nearly 900 first-year examinations taken by BYU Law students in the 2015–2016 school year, all but four were taken on a laptop, and two of those four began on a laptop but concluded in a bluebook because of a computer malfunction. In other words, a vanishingly small percentage of examinations were started (0.2%) or completed by hand (0.4%).

9. As discussed further below, although reading speed is undoubtedly relevant to understanding student examination success, we did not test its effect.

10. Kif Augustine-Adams, Suzanne Hendrix, & James R. Rasband, *Pen or Printer: Can Students Afford to Handwrite Their Exams?*, 51 J. LEGAL EDUC. 118, 119 (2001).

11. BYU Law’s grades are on a 4.0 scale using intervals of 0.1. 4.0 is the maximum grade and 1.6 is the minimum grade and represents complete non-performance. The average grade required for graduation is 2.7. For all first year courses the median grade must be 3.3 and the mean grade may be no higher than 3.4. See BYU Law Policies and Procedures, BYU L., http://www.law.byu.edu/policiesandprocedures/table_of_contents.php (last visited Oct. 27, 2017).

12. Augustine-Adams, *supra* note 10, at 126.

ity of a typed exam was what produced the grade benefit. Our previous research hinted at another effect: the importance of exam answer length. Our earlier study showed a positive correlation between the number of words a student typed on the final essay examination and the grade the student received in the course.¹³ On average, the higher the word count, the higher the grade.¹⁴

Without the potentially confounding presence of handwritten examinations and with a more robust database of typed examinations, we returned to explore the correlation between word count and grade. To do so, we collected data on just over 6,000 first year law school examinations taken by nearly 1,000 students at BYU Law School over the course of six years from April 2011 through April 2017. Consistent with our previous research, statistical analysis of the new data set reveals a strong and statistically significant positive correlation between the amount a student writes on a first year essay exam and the grade on the exam. On average, the more a student says, the better she does.

If that is true, the question is why? Our greatest concern, and thus the one we sought to address, was whether saying more on an examination was simply a function of typing speed. If the top students are merely the fastest typists, or if a strong correlation exists, it would say something very troubling about the entire first year law school examination enterprise. To explore this question, we administered a timed typing speed test to 201 students for whom we had examinations. We found, quite fortunately in our view, that there was not a statistically significant relationship between typing speed and grades. The strong and statistically significant positive correlation between exam length and exam grade existed independent of a student's typing speed.

This article follows the empirical format of social science research by presenting a hypothesis test on the relationship of word count, typing speed, and grades on first year law school examinations. Part I presents the importance of speed in law school examinations as a theoretical question and indicator of future performance as a lawyer, contextualizing the question in relation to the debate in the relevant psychometric literature regarding speed and ability or intelligence. Part I also distinguishes our study from the only other empirical schol-

13. *Id.* at 126–27.

14. *Id.* at 127–28.

arship to date that theorizes the role of speed in law school examinations: William Henderson's 2004 article "The LSAT, Law School Exams and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed."¹⁵ Part II presents the study's data set, methodology, and detailed findings. Part II describes additional findings beyond the relationship between word count, speed, and grades.

In conclusion, we discuss the implications of the study's results and urge law professors to consider more explicitly the role speed may play in their first-year law school examinations. Because the effect of exam length is so strong, law professors will want to consider whether their exams over-reward length, and potentially speed, and whether those attributes are actually a useful proxy for future professional performance and success as lawyers.

I. SHOULD SPEED MATTER?

A. Valuing Speed in Law

As described below,¹⁶ we found a strong correlation between word count and final grade. On average, a student who generates an additional 5.26 words per minute, which would be 947 additional words on a three-hour essay exam, would increase his grade by 0.1 on a 4.0 scale. What explains the grade advantage of generating higher word counts on first-year law school examinations? Certainly, 5,000 words strung together in random sentences or 5,000 words transcribing an irrelevant text would not merit the same grade as 5,000 words specifically addressing the questions presented in the final examination. And yet word count matters. Why?

As described above, a typical law school essay examination contains a detailed factual scenario from which students are to identify and analyze the issues presented by those facts with reference to the legal rules and policies learned in the course.¹⁷ Fact patterns usually contain many issues and each issue can require multiple layers of analysis as students explore argument, counter-argument, reply to the counter-argument, etc. Ideally, the universe of potentially creditable analysis is not closed but open to the analytical creativity and acumen of the student. In practice, the layers of analysis are not infinite but

15. William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 975 (2004).

16. See *infra* Part II.C.1.a.

17. See *supra* Introduction.

they are often sufficiently numerous that it should not be particularly surprising that saying more on an examination would produce a grade benefit.

In addition to the multi-layered nature of legal analysis, the imperative to curve examination scores further encourages faculty members to insure that the number of issues to be discovered and analyzed on an exam exceeds the allotted time. This helps explain why speed matters on essay examinations.¹⁸

If the format of law school essay exams helps explain why saying more improves a student's grade, it begs the question of what skill or attribute allows a student to say more. A student's ability to generate words on an essay examination is potentially a function of a variety of factors, including how much they learned in the course and how quickly and thoughtfully they can apply their knowledge to the fact pattern before them. Separating underlying knowledge from cognition speed is, as we discuss further below, challenging. It is more challenging when we add other potential speed components such as reading speed and typing speed.¹⁹ One can imagine faculty members reasonably disagreeing about exam-question length because of concerns about over-weighting reading speed, but, in our judgment, it would, and should, be troubling if typing speed were a significant factor in explaining a student's grade. A law student's keyboarding skill does not seem relevant to a student's understanding of course material, analytical ability, or to her future performance as a lawyer. We assume that most law professors do not intentionally test typing speed and thus we wanted to know whether they do so inadvertently.²⁰ The answer appears to be no. As set forth in detail in Part II, after controlling for word count on first year essay examinations, LSAT score, and UGPA, we found that, on average, a student's typing speed had no statistically significant correlation with the student's grade.

18. Note that the addition of extra issues to a fact pattern for curving purposes is more akin to how speed can matter in a multiple choice exam. A standard multiple choice examination is designed to have a single correct answer and thus speed tends to be a function of the number and complexity of the questions.

19. Bruce Parady suggests that exams test how well students "can think, learn, analyze, communicate, plan, prepare, focus, and perform under pressure." Bruce Parady, *Head Starts and Extra Time: Academic Accommodation on Post-Secondary Exams and Assignments for Students with Cognitive and Mental Disabilities*, 25 *EDUC. & L.J.* 192, 203 (2016).

20. We view the relationship between reading speed and professional success as less tangential, although again most law faculty would likely resist the notion that testing reading speed is a primary goal of their examinations. We did not study reading speed.

When we embarked on this research, our assumption was that, if producing more words on an examination was a function of overall course knowledge and the cognition speed with which students engaged in the analytical process described above, the grade benefit of saying more would be legitimate. In rough terms, better students – and ultimately better practicing lawyers – understood more about the law and applied their knowledge more quickly by discerning issues and their layered sub-issues faster. As discussed in the next section, the psychometric literature – psychometrics being the academic field of testing theory and design – raises questions about this assumption. We don't attempt to resolve the question whether testing for analytical or cognitive speed is appropriate but in revealing how important word count is to law school performance, we hope to stimulate faculty consideration of whether analytical speed should matter.²¹

B. Speed for Psychometricians

Although the subject is not without controversy, psychometrics scholars generally distinguish between speed and reasoning ability, or power, in aptitude assessments.²² In other words, they treat as distinct

21. Whether speed matters, or should matter, also has potential implications for disability accommodations. In a recent article, Bruce Pardy suggests that additional time on examinations is not a legitimate accommodation for a disability because speed is the characteristic being tested on a curved examination. *See Pardy, supra* note 19, at 192. Pardy's assumption that speed matters is supported by our empirical work. Whether speed should matter is, as we have discussed elsewhere in the text, a different question. Pardy's paper does not address the psychometric literature which separates speed and power but instead assumes that testing for speed is appropriate and an inevitable component of any assessment along a curve. *See id.* at 198–99 (“Students' course grades depend in large measure upon how their performance compares to that of others in the class. Professors differ in their methods and purposes of assessment, and there are no ironclad rules about how an exam is to be graded. However, inevitably exams and assignments are compared to each other to determine appropriate grades and students' relative standing in the class The competitive nature of assessment is especially acute where professors are subject to a mandatory grade curve.”). For an opposing view on whether law school examinations should test for speed and employ accommodations, *see Ruth Colker, Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413, 414 (2008).

When we accounted for students with time length accommodations in our data set, we found a small, statistically significant increase in word count (1.26 additional exam words per minute, p-value = 0.035), but a lower grade on average even after holding all other variables constant (coefficient: -0.055, p-value = 0.016). In other words, on average, the time accommodation put the student beyond parity in terms of word count, but the additional words did not produce a corresponding increase in grade.

22. *See, e.g.,* PAUL KLINE, A PSYCHOMETRIC PRIMER 150–51 (2000) (concluding that reaction times and inspection times are a measure of mental speed which “all recent research shows to be only modestly correlated with intelligence” and that “speed and intelligence are separate”); Lazar Stankov et al., *Models of Paradigms in Personality and Intelligence Research*, in INT'L HANDBOOK OF PERSONALITY & INTELLIGENCE 15, 27 (Donald H. Saklofske & Moshe Zeidner eds., 1995) (arguing that “[i]n general, speed in doing easy tasks shows higher correlation . . . with intelligence, whereas speed in doing difficult (power) tests shows zero correlation”);

and independent an individual's ability to find a solution to a problem or choose a correct answer from how quickly he does so. While recognizing it is "not possible to give any simple answer to the question of how speed is related to intelligence," psychometric scholars generally argue that assessments of power should be designed to measure the relevant aptitude or ability rather than the speed with which the subject completes the assessment.²³

Psychometrics has developed the concept of a test's "speededness" to refer to the interaction among three factors: the test taker's cognitive speed, the labor required to answer questions, and test time limits.²⁴ An overly speeded test, one that a significant portion of the subjects are unable to complete within the allotted time – which is the basic format for first year law examinations graded on the curve – would measure speed more than power, and thus be a less useful, less accurate assessment of the underlying attribute. The construct validity of an overly speeded assessment is arguably suspect as it measures and rewards something other than the quality it was designed to test.

JOHN B. CARROLL, HUMAN COGNITIVE ABILITIES: A SURVEY OF FACTOR-ANALYTIC STUDIES 444 (1993) (arguing that "speed is an influential and undesirable confound in many factor-analytic studies"). Other psychometric scholars dispute the clear delineation between speed and power. See Nicholas J. Cepeda, Katharine A. Blackwell & Yuko Munakata, *Speed Isn't Everything: Complex Processing Speed Measures Mask Individual Differences and Developmental Changes in Executive Control*, 16 DEVELOPMENTAL SCI. 269, 269 (2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3582037/> (identifying the complex interaction between processing speed, executive control, and cognitive performance); Arthur R. Jensen, *Mental Chronometry and the Unification of Differential Psychology*, in COGNITION & INTELLIGENCE: IDENTIFYING THE MECHANISMS OF THE MIND 26, 32 (Robert J. Sternberg & Jean E. Pretz, eds., 2005) (finding the distinction between "mental speed" and intelligence to be a "strongly entrenched misconception in psychometrics" and "a mistake to attribute these purely descriptive terms to categorically different cognitive processes"); Astrid F. Fry & Sandra Hale, *Relationships Among Processing Speed, Working Memory, and Fluid Intelligence in Children*, 54 BIOLOGICAL PSYCHOL. 1, 1 (2000), http://www.psych.wustl.edu/cdl/publications/Fry_Hale_2000.pdf (noting that "[w]ith respect to individual differences among young adults, it is well established that processing speed and intelligence test scores are correlated."); Hsiu-Zu Ho, Laura A. Baker, & Sadie N. Decker, *Covariation Between Intelligence and Speed of Cognitive Processing: Genetic and Environmental Influences*, 18 BEHAV. GENETICS 247 (Mar. 1988), <http://link.springer.com/article/10.1007%2FBF01067845> (summarizing research that shows "faster processing rates are associated with higher intelligence score[s]").

23. CARROLL, *supra* note 22, at 492. For recent research, see, e.g., Frank Goldhammer, *Measuring Ability, Speed, or Both? Challenges, Psychometric Solutions, and What Can Be Gained from Experimental Control*, 13 MEASUREMENT: INTERDISC. RES. & PERSP. 133 (2015), <http://dx.doi.org/10.1080/15366367.2015.1100020>.

24. Wim J. van der Linden, *Test Design and Speededness*, 48 J. EDUC. MEASUREMENT 44, 44 (2011) (describing the industry standard for determining speediness of an assessment). As a basic rule of thumb, a test's speededness is considered to be neutral if "at least 80% of the test takers complete all items and all test takers complete at least 75% of the items" within the allotted time. *Id.* at 44.

A limitation of the psychometric concept of test speededness, however, is its development and application almost exclusively in the context of quantitative aptitude assessments like multiple choice tests rather than qualitative modes of testing like timed essay questions, also known as constructed-response questions,²⁵ the form most often used in the first year of law school. Psychometricians have specifically acknowledged the paucity of research on the speededness of constructed-response examinations, but noted a potential clue in the length of the answer.²⁶

In addition to the lack of research focused on disentangling speed and power in essay/constructed response assessments, another gap in psychometric literature is that test-taking speed has most often been defined in terms of cognitive speed rather than physical movement or psychomotor speed. Although a number of studies explore handwriting versus typing in examination settings, literature to which our 2001 study contributed, little has been done on typing speed itself or on the potential interaction between psychomotor speed and assessments of reasoning ability.²⁷ In fact, we were unable to identify *any* studies that explore the motor skill of typing speed as a variable potentially relevant to a subject's score on an examination or other assessment. The acknowledged lack of research on the speededness of constructed re-

25. See, e.g., David D. Qian & Mingwei Pan, *Response Formats*, in *THE COMPANION TO LANGUAGE ASSESSMENT* (Antony John Kunan, ed.) 6–7 (2013); Neil J. Dorans & Alicia P. Schmitt, *Constructed Response and Differential Item Functioning: A Pragmatic Approach*, in *CONSTRUCTION VERSUS CHOICE IN COGNITIVE MEASUREMENT: ISSUES IN CONSTRUCTED RESPONSE, PERFORMANCE TESTING, AND PORTFOLIO ASSESSMENT* 135, 142–43 (Randy Elliot Bennett & William C. Ward eds., 2012) (discussing test speededness in the context of multiple choice questions but not constructed-response questions); Wim J. van der Linden, *Test Design and Speededness*, *LSAC RES. REP. SERIES* (2007) 1–12 (discussing how to create LSAT forms with a set degree of speededness); John Mazzeo, Alicia P. Schmitt & Carole A. Bleistein, *Sex-Related Performance Differences on Constructed-Response and Multiple-Choice Sections of Advanced Placement Examinations*, *C. BOARD REP. NO. 92-97, ETS RR NO. 93-95*, 17–20 (1993) (identifying potential speededness issues with multiple choice questions on AP examinations but not the constructed-response sections). See also, CARROLL, *supra* note 22, at 531–43 (reviewing studies through 1993).

26. Ying Lu & Stephen G. Sireci, *Validity Issues in Test Speededness*, 26 *EDUC. MEASUREMENT: ISSUES & PRAC.* 29, 31 (2007).

27. See, e.g., Gautam Puhan, Keith Boughton & Sooyeon Kim, *Examining Differences in Examinee Performance in Paper and Pencil and Computerized Testing*, 6 *J. TECH., LEARNING, & ASSESSMENT* (2007); Michael Russell & Walt Haney, *Testing Writing on Computers: Results of a Pilot Study To Compare Student Writing Test Performance via Computer or via Paper-and-Pencil*, *MID-ATLANTIC ALLIANCE FOR COMPUTERS & WRITING CONFERENCE* (1996). For a review of the extant research on psychomotor skill generally and specific discussion of the difficulties of assessing writing speed, see CARROLL, *supra* note 22, at 541 (urging additional research “to obtain good measures of [speed of speech and speed of writing] so that they can be used to make appropriate adjustments in measures of cognitive abilities that require open-ended speech or writing.”).

sponse examinations as well as psychometrics' focus on cognitive speed rather than psychomotor skills underlies this significant gap in the research.²⁸ By exploring the potential relationship between the psychomotor skill and of typing speed and grades on first-year law school essay examinations, our research makes a contribution not only to law school pedagogy but also to psychometrics literature more generally.

C. Professor Henderson's Consideration of Speed on Law School Exams

The only other study to consider the issue of speed in law school examinations is Professor William Henderson's 2004 article, "The LSAT, Law School Exams and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed."²⁹ Professor Henderson's research inquired whether "part of the predictive validity of the LSAT is likely attributable to test-taking speed rather than reasoning ability."³⁰ Relying on the work of Schnipke and Scrams, which investigated the logical and analytical reasoning sections of the GRE, Henderson concluded that the LSAT has a significant speededness component.³¹ If, in fact, the LSAT is speeded, Henderson hypothesized, one would expect the LSAT to be a better predictor of law school grades where the law school assessment methodology also has a significant speededness component.³²

Henderson noted that the role of time pressure, and therefore speed, for in-class law school exams "has not been a topic of systematic investigation," but observed "there appears to be a general consensus among law professors that time pressure is a standard component of most law school exams."³³ Our work on the correlation between the number of words on an exam and the grade received provides empirical support for this assumption. In the absence of that data, Henderson compared LSAT performance, where some research had suggested speed mattered, to three types of law school examinations: (1) timed, in-class examinations with a limit of about three hours; (2) take-home examinations with time limits between 8 and 24

28. See Lu & Sireci, *supra* note 26.

29. Henderson, *supra* note 15.

30. *Id.* at 981.

31. *Id.* at 992-93.

32. *Id.* at 993.

33. *Id.* at 994.

hours; and (3) assigned papers with no specific time limitation.³⁴ His hypothesis was that the value of speed would decline for these respective examination methods and thus the positive correlation with an assumedly speeded LSAT would likewise decline.³⁵ Consistent with this hypothesis, Henderson found that “the LSAT was a relatively robust predictor of in-class exams and a relatively weak predictor of take-home exams and papers.”³⁶

Henderson derived two implications from this finding. First, he suggested that “time-pressured law school exams” – the assessment measure that particularly dominates the first year of law school – “increase[] the relative importance of the LSAT as an admission criterion” because both depend upon speed.³⁷ Second, relying upon the insight of psychometric literature that “test-taking speed and reasoning ability are . . . distinct, separate abilities with little or no correlation,”³⁸ he concluded that “time-pressured law school exams. . . may skew measures of merit in ways that have little theoretical connection to the actual practice of law.”³⁹

34. *Id.* at 1008–10.

35. *Id.* at 986, 1024.

36. *Id.* at 975.

37. *Id.*

38. *Id.* at 979. To illustrate why he accepts the insight of psychometric literature that separates speed and power, Professor Henderson develops a hypothetical to show how two students with differences in both their reasoning ability and their test-taking speed can end up with the same score on the LSAT. *Id.* at 987–88. He posits one student who moves quickly through the LSAT, answering all of the multiple choice questions through “solution behavior” (i.e., solving the problem rather than guessing). *Id.* A second student, by contrast, has a much higher level of accuracy, (i.e., chooses the correct answer much more often) when employing solution behavior but moves more slowly through the questions, such that as time expires, the second student engages in “rapid guessing” to answer the final questions on the multiple choice test. *Id.* Rapid guessing may improve a student’s score through the random probability of marking a correct answer rather than through the student’s cognitive ability. The students’ identical LSAT scores represent them as highly similar in their cognitive abilities, when in fact both their test-taking speed and reasoning ability when engaged in solution behavior are quite different. *Id.* at 988.

Professor Henderson’s hypothetical offers an explanation of how the same multiple choice score can be the product of both speed and power. Indeed, the inclusion of random guessing, which is not available on law school essay exams, is not really necessary to make the point; two students could produce an identical score — one by quickly answering correctly a lower percentage and the other by slowly answering correctly a higher percentage. What the hypothetical does not do is answer the harder question of whether valuing speed is legitimate. Imagine, for example, two students who answer the same percentage of questions correctly but one responds to twice as many questions. Is it appropriate to prefer the faster student? As suggested in the text below, we believe the answer will differ depending on what the faculty member may value and on the priority one places on different conceptions of law practice.

39. *Id.* at 976. *See also id.* at 983, 996–97, 1030, 1034–39. For a similar view, *see* Kissam, *supra* note 5, at 484 (“[L]aw professors seem to reify law school grades, which represent only the relative speed and ability of students at basic legal analysis, as symbols of more general intellectual, imaginative, and prudential qualities. This reification, of course, serves as a powerful self-affirmation of our personal worth and talents because we bestow accolades up an elite group of

The results of our study, which show that higher word counts correlate with higher grades, give empirical weight to Henderson's first claim that one reason why the LSAT predicts first year law school grades is that both depend on speed.⁴⁰

As mentioned above, we are not as comfortable with Henderson's second conclusion that questions whether speed on law school exams has a connection to the practice of law.⁴¹ Although we agree this would be true to the extent the number of words on an exam is primarily about typing speed – which is why we studied that issue – we see room for reasonable disagreement about whether the speed with which a student perceives and analyzes issues and sub-issues is relevant to the practice of law. Our view is that this is a value judgment that partly depends on the diversity of law practice and definitions of success. If custom is any guide, employers and others – including judges offering prestigious clerkships, law reviews selecting editors, and law professors seeking research assistants – rely primarily on first year law school grades as predictive tools.

Ultimately, Henderson's conclusion regarding the limitations of time-pressured law school examinations for predicting future performance as a lawyer is also a value judgment. He does not offer empirical support on the relationship between speed and lawyering but argues by analogy.⁴² For example, he analogizes his three law school exam

students who reflect ourselves by earning the highest grades on Blue Books. If we judge students in this fashion, however, are we not also likely to confuse quick and productive conventional analysis with many of the broader qualities that the entire legal community should be looking for in future lawyers?").

40. Henderson's comparison of LSAT score with performance on the three types of exams is itself a form of empirical work, and a valuable approach to the speed question. Instead of investigating whether the amount of exam time allowed correlated to an assumption about LSAT speededness, however, our empirical work looks directly at student test-taking speed, at least insofar as word count is a useful proxy for not just content knowledge but cognitive processing speed. Henderson also made a rough cut of student test-taking speed by considering the relationship between LSAT and page length of student examination answers. Henderson, *supra* note 15, at 1025–26. He divided the examinations in his sample roughly in half into exams of four pages or less and exams of five pages or more. *Id.* He found that the longer examinations correlated better with the LSAT (0.270) than did the shorter examinations (0.190), both with $p = 0.01$. *Id.* at 1026. Again, however, in contrast to his binary division of exams, our study of word counts provides a firmer foundation for the conclusion that speed matters, particularly because our study focuses on the correlation between word count and law school grade rather than word count and LSAT score.

41. *Id.* at 976, 996, 1030. *See also* Pardy, *supra* note 19, at 203 (discussing Pardy's conclusions about why law school exams legitimately test speed).

42. We do not suggest this is a failing of Henderson's study. Indeed, it would be difficult to construct an empirical test that could comprehend the value of speed in the multitude of lawyering tasks.

categories to a day in the life of a junior associate at a law firm.⁴³ Henderson likens the roughly written memorandum the associate produces at 11:30 am in response to a partner's 8:00 am request to the product of a three-hour, time-pressured, in-class law school examinations, the form dominant in the first year of law school.⁴⁴ After consulting with the partner and doing further research and refining, the associate returns at 5:00 pm with a more polished, better reasoned memorandum, akin to the written product of a take-home final examination. Finally, at the end of a week of work, the associate produces a tightly reasoned and well-written legal brief sufficient for litigation, similar to a high-quality paper submitted in law school.

This analogy has some intuitive appeal and lends support to Henderson's caution that an over-reliance on time-pressured, in-class examinations may not fully predict future performance as an attorney, given the multiplicity and variety of time constraints and written products.⁴⁵ On the other hand, one can likewise hypothesize that the partner would evaluate the associate's written work at each stage of its production or that, because lawyers so often work under tremendous time pressures, the ability to produce a stronger first draft leaves more time to engage in extra research, refined analysis, or to move onto another task.⁴⁶ Our point is not that Henderson is wrong. It is simply

43. Henderson, *supra* note 15, at 1035–36.

44. *Id.*

45. *Id.* at 1036. Professor Kissam has made a similar point:

The Blue Book system sends law graduates into the many worlds of legal practice with several specific if implicit messages that can distort their views of what constitutes good or high-quality legal practice. These messages also clearly influence the views of law professors about what constitutes good teaching as well as good legal practice. These messages include a basic notion that “rules” rather than “practical judgments” solve problems and, more subtly, a notion that “legal analysis” requires strict adherence to a careful, precise, and comprehensive analysis of legal forms and objective authorities that avoids general, more abstract, more imaginative, and “non-legal” considerations. These messages also promote the idea that quickness, precision, and correctness are the proper ideals for all lawyerly pursuits; this idea diminishes other ideals such as reflection, deliberative action, imaginative analogy, general principles, and tentative or risk-taking behavior.

Kissam, *supra* note 5, at 491–92.

46. Henderson suggests that additional time doesn't just allow the less speedy to catch up but that it can result in a different evaluation of performance altogether. He asserts that “[t]he empirical evidence from this study strongly suggest that ordering of test takers can change dramatically” when different time limitations are imposed on examinations. Henderson, *supra* note 15, at 1036. But his evidence for this assertion appears to be one example from his national law school data. He points out that the student with the highest GPA for time-constrained, in-class examinations also had the highest LSAT in the sample; whereas the student with the highest GPA for paper classes had an LSAT at the bottom of the sample, a below average GPA for in-class examinations, and an average GPA for take-home examinations. *Id.* at 1036–37. Using this limited sample size to conclude that “time-pressured law school exams appear to be an unrealistic metric for efficient writing ability,” *id.* at 1037, seems bold, particularly because qualifying

that judgments about speed and the predictive signal of law school grades are not empirically grounded but instead reflect value judgments and reasoned extrapolation from different aspects of law practice.

What is empirically grounded, as the findings in the next section demonstrate, is that word count, and thus likely speed, on law school exams does matter to students' grades. That finding merits greater attention and consideration in law school pedagogy and in law student hiring practices.⁴⁷ Both professors and employers should consider how much they value speed.⁴⁸

II. METHODS AND FINDINGS

A. Data Set

Our data set consisted of 6039 first-year law school examinations taken by 981 Juris Doctorate students at BYU Law School between April 2011 and April 2017. The examinations came from all first year courses: Torts, Contracts, Property, Civil Procedure, Criminal Law, Legislation & Regulation, and Structures of the Constitution. We excluded Legal Research and Writing grades from our analysis because grades in that course are based on multiple untimed written assignments during the semester rather than primarily through a timed final examination at the end. Thirty-one different professors administered the exams. Fifty-nine percent (3565/6039) of the examinations were essay or essay and short answer examinations. Forty-one percent of examinations (2474/6039) included a multiple choice component.

For each of the 981 JD students who took a first-year examination between April 2011 and April 2017, we gathered demographic data regarding LSAT score, UGPA, undergraduate major, race, and sex.

To determine typing speed, over the course of several weeks in spring 2016, a subset of 201 current students took a five-minute timed typing test using Office Proficiency Assessment and Certification

writing ability as efficient introduces an element of speed and the LSAT, as a multiple choice test, does not directly measure writing.

47. It may also merit consideration in the form of disability accommodation for law school examinations. *See supra* note 21 (discussing this question).

48. As discussed below in Part II.C.1.b.ii, our study revealed that word count mattered more on some exams than others, suggesting that professors value speed differently.

(OPAC) software,⁴⁹ the software program that Brigham Young University has used for a decade to assess students' office skills for on-campus employment.⁵⁰

Students' gross typing speeds ranged from twenty-six wpm to 119 wpm. The net typing speed on which we conducted the regression analysis combined students' speed and accuracy. Net typing speeds ranged from twenty-one wpm to a super speedy and accurate student at 108 wpm.⁵¹ The median net typing speed was sixty-three wpm. The average net typing speed was sixty-one wpm.

B. Statistical Methodology

To measure relationships among the items on which we gathered data, we started with a simple linear regression and then employed mixed effects linear regression models.⁵² A simple linear regression measures the relationship between two variables (e.g., exam grade and total words written on the exam) to determine whether the relationship is strong enough to be statistically significant, in other words, unlikely to arise from chance alone.⁵³ The simple linear regression shows whether variables are correlated but, of course, the correlation between two variables does not mean there is a causal relationship. Statisticians sometimes illustrate this simple point by noting that ice cream sales and homicide rates are positively correlated.⁵⁴ This correlation begs the question whether eating more ice cream will bring about more homicides, whether an increase in homicides causes an increase in ice cream consumption, or whether, even though correlated, the two are not causally related. In the case of the ice cream

49. Prior to administering the typing speed test, we did a power study to determine the requisite sample size for statistical significance if a small relationship held. For a hypothesized correlation between typing speed and grade with a value of 0.275 that resulted in a power greater than 0.8, we needed a typing speed sample size of 200.

50. As with almost all components of any research design, the method we employed to determine typing speeds is probably itself capturing additional variables beyond pure typing speed. Work has been done, for example, showing that typing speed will be different if measured on a well-learned text passage than if measured, as in our case, by transcription typing, which involves a more complex set of cognitive processes. See L. Henry Shaffer, *Intention and Performance*, 83 PSYCHOL. REV. 375, 376–78 (1976). Our assumption is that the relative typing speeds we discern are still useful for the purposes for which we employ the data.

51. This student had a gross typing speed of 112 and an accuracy rate of 98.2%.

52. See, e.g., ALVIN C. RENCHER & G. BRUCE SCHAALJE, *LINEAR MODELS IN STATISTICS 1* (2d ed. 2008).

53. *Id.* at 1.

54. See, e.g., ROXY PECK, CHRIS OLSEN & JAY DEVORE, *INTRODUCTION TO STATISTICS & DATA ANALYSIS 232* (4th ed. 2012); NEIL J. SALKIND, *STATISTICS FOR PEOPLE WHO THINK THEY HATE STATISTICS 99–00* (2000).

and homicide relationship, there is a confounding variable – or a variable that is related to both homicide rates and ice cream sales – that helps make sense of this coincidental relationship: warm weather. Ice cream sales and homicide rates both increase with warmer weather. Thus, a more accurate understanding of the relationship between ice cream sales and homicide needs to account for the confounding variable of weather. Accounting for multiple potentially confounding variables is the purpose of a mixed effects linear regression model.

To illustrate, in the ice cream example, once we add weather to our analysis, we can answer the question, “If we know the weather, does knowing ice cream sales give us any more information about the homicide rate?” If the answer is “no” – and that is the answer – then we can say that the variable of ice cream sales does not have a causal relationship with the response variable of homicides. Notice that this is different than saying that warm weather causes homicides. The weather variable can also be subjected to the mixed effects model to see whether it maintains any potential explanatory power after being compared to other variables related to homicide, for example, more socializing involving alcohol or drugs.

In our specific mixed effects linear regression models, we examine the relationship between exam grade and two variables (exam words written per minute and typing speed) as well as other potential confounding variables with both fixed effects (LSAT, GPA, other speed variables, etc.) and random effects (student and class variations).⁵⁵ This approach does not allow us to infer causality, but it does help us account for as many confounding variables as possible and thereby narrow down remaining significant relationships. As described below, after examining potentially confounding variables, we found that the number of words written on an exam continued to show a statistically significant relationship to the exam grade but typing speed did not. Although typing speed was correlated, it turned out to be ice cream.

55. Accounting for both fixed effects and random effects is what makes the model a “mixed” effects model. With respect to the random effects, we accounted for differences in the average grade across individuals and differences in average grade relationship with words on an exam for each class. We call these random effects because of how they are mathematically estimated. The mathematical reason for estimating the random effects differently from fixed effects is that we have a large number of random effects (192 a' and 47 b' and c' in the model fit to essay-only exams and including typing speed).

The following formula describes the mixed effects linear regression models we fit to our data.⁵⁶ Let Y_{ij} be the course grade for student i and class j . The base model is then,

$$Y_{ij} = \beta_0 + \beta_1 EWPM_{ij} + \beta_2 TWPM_i + \beta_3 LSAT_i + \beta_4 UGPA_i + \beta_5 MC_j + \beta_{6m} I(SEX_i = m) + \beta_{7k} I(RACE_i = k) + \beta_{8l} I(MAJ_i = l) + a_i + b_j + c_j EWPM_{ij} + \epsilon_{ij},$$

where β_0 is the intercept, β_1 is the average coefficient for number of exam words per minute (EWPM), β_2 is the coefficient for typing words per minute (TWPM), β_3 is the coefficient for LSAT score, β_4 is the coefficient for UGPA, and β_5 is the coefficient for the percent of the exam that is multiple choice. For these coefficients, we interpret the relationship as the average change in grade when the corresponding covariate is changed by one, but all other covariate values remain constant. For example, consider a hypothetical scenario where students identical in LSAT score, UGPA, sex, etc. are divided into two groups. Students in one group write one more word per minute on an exam than students in the other group. In this scenario, our model assumes that the average grade of the first group of students is β_1 higher than the average grade of the second group.

The next three coefficients are slightly different. β_{6m} represents the coefficient that shifts the average grade depending on sex, m . Where two groups of students are identical in every way other than sex, the group of women will have an average grade shifted by β_{61} , and the group of men will have an average grade shifted by β_{62} . Similarly, β_{7k} is the coefficient corresponding to race k , and β_{8l} is the coefficient corresponding to undergraduate major l .

The coefficients a_i , b_j , and c_j , are the random effects that account for individual average grades (a_i), class-specific grade intercepts (b_j), and class-specific coefficients for exam words per minute (c_j). For example, c_j will account for the fact that the exact relationship between number of words written on an exam and grade will be different for each individual class. Finally, ϵ_{ij} is a random noise term that captures the difference between the observed grade and the average grade the model estimates.

56. To fit the mixed effects linear regression models, we used the *lmer* function from the *lme4* package (version 1.1.13) in the statistical software R (version 3.4.1). See R CORE TEAM. R: A LANGUAGE AND ENVIRONMENT FOR STATISTICAL COMPUTING. R FOUNDATION FOR STATISTICAL COMPUTING, AUSTRIA, (2017), <https://cran.r-project.org>; Douglas Bates, Martin Mächler, Benjamin M. Bolker & Steve Walker, *Fitting Linear Mixed Effects Models Using lme4*, 67 J. STAT. SOFTWARE 1, 1–3 (2015).

We fit four versions of the base model. First, we fit the model to all of the available exam data. Second, we fit the model to only the essay/short-answer exam data. Because none of these exams had any multiple choice questions, we excluded this piece (β_5 MCj) from this second model. As a check on our findings given that our typing speed data subset (201 students) reduced the number of observations available for analysis, we fit third and fourth models that were the same as the previous two models but excluded typing speed (β_2 TWPMi).

The section below provides detailed findings for our two variables, exam words written per minute in Part II.C.1 and typing speed in Part II.C.2.

C. Detailed Findings

1. Grades vs. Exam Words Written Per Minute

a. Correlations

We expect that examinations with only constructed-response questions (pure essay or a combination of essay and short answer) most accurately capture the true number of words written on an exam in the available time. If a portion of the exam is multiple choice, students may vary in the amount of time they spend on each portion of the exam, even if a professor allocates recommended times to each portion. Because a student may allocate time as she chooses rather than as the professor recommends on mixed essay and multiple choice examinations, the number of words written on the exam will vary more than if the entire exam were essay only. That students in fact allocate time as they choose between multiple choice and essays is seen in the reported correlations in our study because correlations between grade and exam length are strongest when we consider the essay-only exams.

Table 1 shows the correlations between number of words written on an exam and four separate variables. Notice that the strongest correlation is between exam answer length and course grade for essay-only exams (0.415). The amount a student writes on an essay exam is also positively correlated with her typing speed (0.196), LSAT score (0.131), and UGPA (0.137); however, these correlations are weak (between 0.1 and 0.2). Table 1 does not account for the relationship among the separate variables. That is done in the mixed effects linear regression section below.

<i>Correlation between Exam Answer Length/Exam Words Written per Minute and:</i>	Essay-Only Exams	Partial Multiple Choice Exams	All Exams
Course Grades	0.415 (<0.001)	0.388 (<0.001)	0.333 (<0.001)
Typing Speed	0.196 (<0.001)	0.097 (0.003)	0.140 (<0.001)
LSAT	0.131 (<0.001)	0.153 (<0.001)	0.094 (0.003)
UGPA	0.137 (<0.001)	0.098 (0.002)	0.114 (<0.001)

Table 1. Marginal correlations (and corresponding p-values) between exam words written per minute and LSAT, UGPA, course grades, and typing speed for various subsets of the data.⁵⁷

As a graphical representation of the shaded cell in Table 1, Figure 1 shows students' course grades versus the number of words written per minute on the exam.

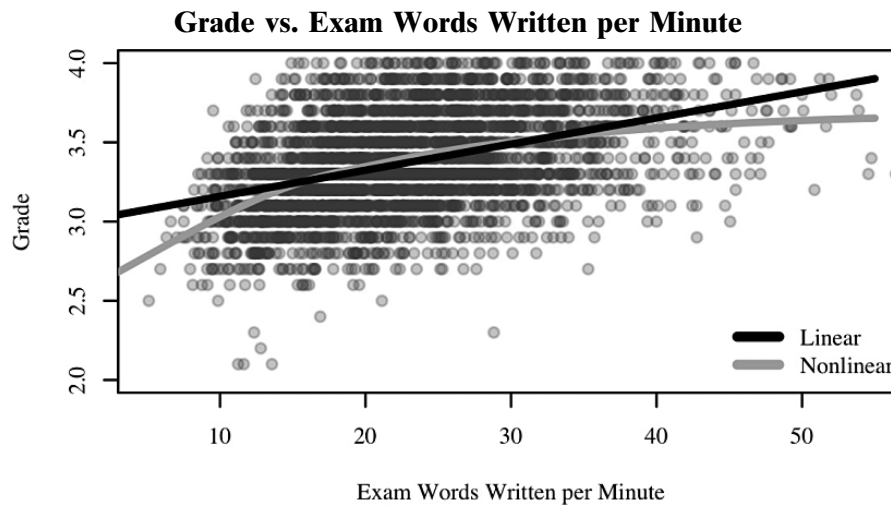


Figure 1. Course grade vs. the number of words written on the exam per minute with lines showing the smoothed linear (black) and nonlinear (gray) relationships.

57. These correlations are provided for different subsets of the collected data: “Essay-Only Exams” includes only those courses for which the exam was all short answer or essay; and “All Exams” includes all of the exams from all courses, whatever the examination format.

The gray line shows the average relationship between exam words per minute and grade, while the black line shows the straight linear relationship across the entire data set (correlation: 0.415; p-value: <0.001). The slope of the black line is 0.0165, meaning that this simple model estimates that for every one more word per minute written on an exam, the grade is 0.0165 higher on average. For six more words per minute, the grade is approximately 0.1 higher, on average. Note that the slope of the gray line is less steep for larger numbers of words given the maximum 4.0 grade. Both lines show the positive correlation between the number of words a student writes on an examination and the course grade. The positive correlation holds even after accounting for other variables in the mixed effects linear regression analysis detailed below.

b. Mixed Effects Linear Regression Models

i. On Average, Students Who Write More Get Higher Grades

For the reasons described above in Part II.B, the value of a single correlation between exam words per minute and grade is limited, particularly when other variables are also positively correlated with exam words per minute, as was the case with typing speed, LSAT and UGPA as described in Table 1. Therefore, we fit the mixed effects linear regression models to our data sets, the details of which are set forth in the methodology section above, also Part II.B.

Covariate	Essay-Only Exams		All Exams	
	With typing speed	Without typing speed	With typing speed	Without typing speed
Intercept, β_0	-1.4310 (0.003)	-0.3995 (0.045)	-1.6384 (<0.001)	-0.3189 (0.0730)
Exam WPM, β_1	0.0190 (<0.001)	0.0209 (<0.001)	0.0160 (<0.001)	0.0190 (<0.001)
Typing Speed, β_2	0.0013 (0.162)	NA	0.0016 (0.067)	NA
LSAT, β_3	0.0220 (<0.001)	0.0178 (<0.001)	0.0228 (<0.001)	0.0173 (<0.001)
UGPA, β_4	0.2213 (<0.001)	0.1237 (<0.001)	0.2549 (<0.001)	0.1315 (<0.001)

Covariate	Essay-Only Exams		All Exams	
	With typing speed	Without typing speed	With typing speed	Without typing speed
Multiple Choice % of Exam, β_5	NA	NA	0.0034 (<0.001)	0.0040 (<0.001)
Sex M/F, β_{6m}	0.0096/-0.0096 (0.515)	0.0074/-0.0074 (0.244)	0.0158/-0.0158 (0.264)	0.0092/-0.0092 (0.110)
Race CW/Other, β_{7k}	-0.0042/0.0042 (0.806)	0.0036/-0.0036 (0.640)	0.0001/-0.0001 (0.995)	0.0110/-0.0110 (0.113)
Number of students	192 ⁵⁸	881 ⁵⁹	192 ⁶⁰	959 ⁶¹
Number of exams	847	3463	1335	5891

Table 2. Estimated coefficients (and corresponding p-values) for the mixed effects linear regression models fit to two data sets. For brevity, we do not include the estimated coefficients for the different majors (β_{8i}), but the p-values are (in order of the columns), 0.870, 0.842, 0.827, and 0.242. Major is not statistically significant in any model. The bottom two lines include the number of unique students and total number of exams used for fitting each model.

Table 2 shows the estimated coefficients and p-values for the fixed effects part of the mixed effects linear regression models. Recall from Part II.B that we can interpret the coefficients as the average change in grade for a one unit increase in the covariate value, holding all else constant. Using the estimates from the model that includes typing speed fit to the essay-only exams (first column in Table 2), writing one more word per minute on an all-essay exam, on average, provided a grade benefit of 0.0190 on a 4.0 scale, even when the model accounted for the influence of other covariates. This is a small but statistically significant effect (p-value: < 0.001).

Applying the coefficient, the model estimates that if a student with the median grade of 3.3 writes an additional 180 words during a

58. This number is less than the 201 students in the typing test subset because some students did not have an LSAT, UGPA or both as described in note 61.

59. 903 students in the data set took at least one all-essay exam. Twenty-two of the 903 are not in this data set because they did not have an LSAT, UGPA or both as described in note 61.

60. See *supra* note 58.

61. This number is less than the 981 total reported previously in the text because a total of twenty-one students (with high GPAs and high SAT or ACT scores) were admitted without an LSAT, or had attended a foreign undergraduate and program were admitted without UGPAs. An additional LLM transfer student was admitted to the JD program on the strength of the student's LLM performance.

three-hour exam (one more word per minute x 180 minutes), the student's grade would, on average, be 3.3190 instead. Likewise, because BYU Law professors assign grades in 0.1 increments, our model estimates that a student would need to generate an additional 5.26 words per minute for a total of 947 additional words for an average grade change of 0.1, or from the median 3.3 to 3.4. 947 words are roughly three and two-thirds additional pages in twelve point font, double spaced. The empirical data bears out our intuitive sense prior to engaging in this study – very short exams are less likely to be strong exams and longer exam answers are unlikely to be the weakest. A lot can be said in three and two-thirds additional pages.

ii. Professors Value Speed Differently

As suggested above,⁶² whether speed is a legitimate basis on which to differentiate student performance on essay exams depends primarily on value judgments about the need for speed in law practice, recognizing that the work of lawyers varies widely across the profession. While most first year essay exams share common characteristics, we might expect to find some variation in their speededness partly because different faculty members might value speed differently.

To discern whether professors value speed differently, we took a student with entering credentials right around BYU Law's medians (162 LSAT and a 3.79 UGPA) and "predicted" an average grade for the student depending on the number of words the student typed and using the estimated coefficient values from our mixed effects model in Table 2. Of course, the range of uncertainty for the "prediction" is very large, as it would be for any student knowing only their entering credentials. Nevertheless, the regression lines in Figure 2 – which would shift up or down on the y-axis depending on the student's entering credentials – are useful because they allow us to compare the predicted performance based on words per minute in three first year classes: Civil Procedure, Legislation and Regulation, and Torts.

62. See *supra* Part I.A.

**Grade vs. Exam Words Written per Minute:
Comparison Across Classes**

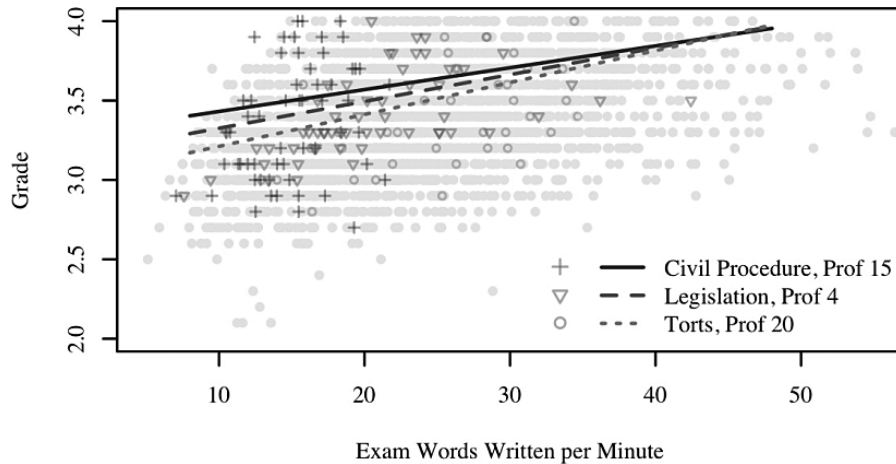


Figure 2. Predicted course grades for the case study student by exam words per minute for three different classes. The marked points (plus sign, triangle, and open circle) show the points that correspond to students' actual grades in each class.

Figure 2 shows that for these three classes, writing more words was of greatest benefit in Torts, which has the steepest slope, and of least benefit in Civil Procedure.⁶³ This result is consistent with our hypothesis that professors value speed differently, although it may also have something to do with the nature of the materials being tested and whether they lend themselves to embedding a greater number of issues and sub-issues within a particular exam fact pattern.

Further evidence of how professors value speed differently is found in Figure 3. Figure 3 shows, by professor and specific class, the difference from the average grade change (0.0190, Table 2) for each additional word written per minute on the exam. In other words, Professor 7 values additional words per minute more than the average because all four of the data points are above the average slope indicated by the gray line. In contrast, Professor 10 values additional

63. At the risk of suggesting far more precision than we intend given the range of uncertainty in the initial "prediction," to simplify, if this student had written ten words per minute on each exam, the "predicted" grade (drawing a vertical line from 10 on the x-axis running perpendicular to the y-axis and through the three slopes) would be 3.21 for Torts, 3.33 for Legislation, and 3.43 for Civil Procedure. In contrast, had the student written forty-five words per minute on each exam, the predicted grades for all of these classes would be approximately 3.91. In other words, typing more words per minute had a larger effect on the Torts grade than the other two classes.

words per minute less than the average as five of the six data points are below the gray line. Most of the twenty professors who administered all-essay exams have data points both above and below the gray line, suggesting the multiplicity of factors that may affect the importance of word count, and perhaps speed, from year to year or course to course or section to section.

Specific Class Relationships to Word Count: Comparison by Professor

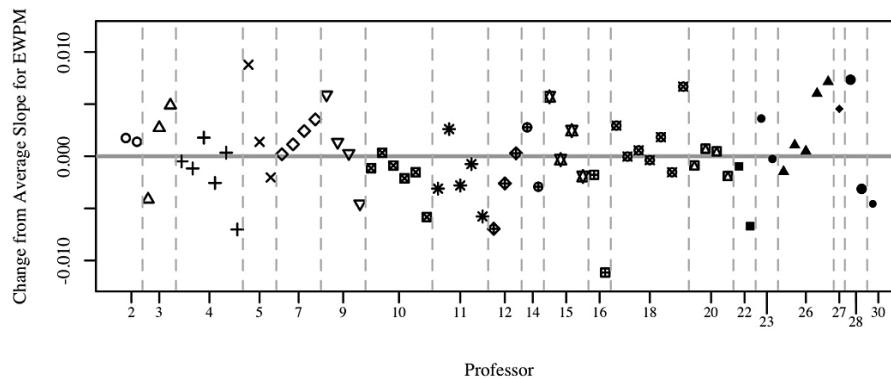


Figure 3. This figure shows, for a specific professor, course, and semester, the difference between the relationship (i.e., slope) between words written per minute and grade compared to the average relationship (slope). Points above the gray line indicate a steeper slope than average for that specific class, or that number of words written mattered more for that specific class than average. In contrast, points below the gray line indicate a less-steep slope, or that the number of words written mattered less than average.

iii. Just Saying More Is Not Enough

Although the data points strongly to the grade benefit of saying more on any essay exam, what a student says plainly matters. Additional strong analysis is more valuable than additional weak analysis. Figure 4 below illustrates this point by comparing the average relationship between number of words written on the exam and the exam grade for students divided into two cohorts by their entering credentials. The points marked by a plus sign in this figure correspond to Cohort 1, incoming students with an LSAT score ≥ 165 and UGPA ≥ 3.8 . The points marked by a triangle correspond to Cohort 2, students with LSAT scores ≤ 156 and UGPA ≤ 3.6 . Given the known cor-

relation between LSAT, UGPA and first year law school grades,⁶⁴ and the correlation our empirical work identifies between grades and exam word count, we expect that students in Cohort 1, with the stronger numerical entering credentials, would tend to write more words than students in Cohort 2, with the lower numerical entering credentials. In fact, students in Cohort 1, on average, write 6.00 more words per minute on their exams. Moreover, although most students in both cohorts wrote between fifteen and thirty exam words per minute, the cohort with stronger entering credentials receives higher grades, on average. The black and gray lines represent the relationship between number of exam words per minute and grade for the average student in Cohort 1 and Cohort 2, respectively.⁶⁵ For both cohorts, the more words a student writes, the better the grade. On average though, students in the first cohort earn a higher grade than do students in the second cohort for the same number of words written.

64. A series of studies by the Law School Admissions Council have found that both LSAT and UGPA correlate with first year grades. The most recent report concluded:

[F]or both of the study years evaluated in this report, the combined use of LSAT score and UGPA was a stronger predictor of FYA [correlation: 0.47 for 2013] than either LSAT alone [correlation: 0.37 for 2013] or UGPA alone [0.25 for 2013]. Additionally, LSAT score had a stronger positive relationship with first-year performance in law school than did UGPA. These results are consistent with findings from earlier LSAT validity summary reports.

Lisa C. Anthony et al., *Predictive Validity of the LSAT: A National Summary of the 2013 and 2014 LSAT Correlation Studies*, L. SCH. ADMISSION COUNCIL, LSAT TECHNICAL REP. 16-01, at 6 (2016). As described in Part II.D.1, our study also found a positive correlation between first year grades and LSAT (correlation: 0.384; p-value <0.001), and between first year grades and UGPA (correlation: 0.169; p-value <0.001).

65. We used the median LSAT score and the median UGPA within each cohort to determine the black and gray lines using a simplified version (only the statistically significant variables) of the mixed effects model in Table 2.

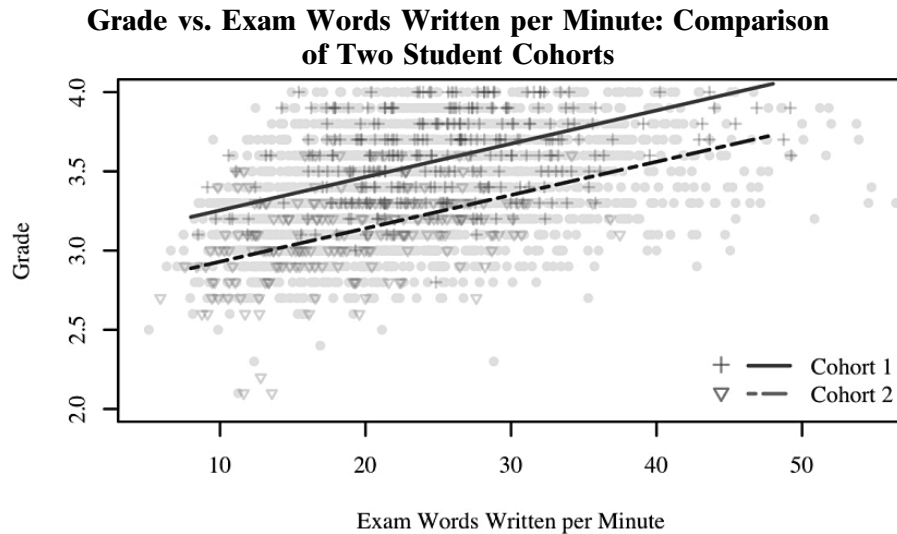


Figure 4. Comparison of predicted grades for different numbers of words written for the average student of Cohort 1 (black) and the average student of Cohort 2 (gray dashed). Points corresponding to Cohort 1 ($LSAT \geq 165$ and $UGPA \geq 3.8$) are marked with a plus sign; points corresponding to Cohort 2 ($LSAT \leq 156$ and $UGPA \leq 3.6$) are marked with a triangle.

As suggested by Figure 4, the effect of saying more is beneficial for all students, but other factors also likely matter, such as the strength of the analysis and the ability to focus directly on the facts and law upon which a legal resolution is most likely to turn. This may also explain why one course in our data set that imposed a word count limit on students' exam responses still showed a positive, statistically significant correlation between grades and word count.⁶⁶

2. Grade vs. Typing Speed

Given the statistically significant correlation between exam words written per minute and course grade, within both the standard linear regression and mixed effects linear regression models, a challenging question inexorably follows: is saying more just a question of how fast a student types? Figure 4 suggests more is at play than typing speed, but we also tested this question directly by applying standard linear

66. The particular class established separate word limits for each essay on a three-hour essay exam, resulting in collective word limits of 3850, 3925 and 4200 words on the exam administered in three different semesters. Even with the word limit, each of these three exams revealed a statistically significant correlation between exam words written per minute and grade – respectively 0.362 ($p < 0.0126$), 0.596 ($p < 0.001$), and 0.599 ($p < 0.001$).

regression and the mixed effects linear regression models to the typing test data set as well.

a. Correlations

Table 3 below shows that, under a simple linear regression, typing speed is positively correlated at a statistically significant level with course grade across essay-only exams (0.224), partial multiple choice exams (0.223), and all examination formats combined (0.224).

Covariate	Essay-Only Exams		All Exams	
	With typing speed	Without typing speed	With typing speed	Without typing speed
Intercept, β_0	-1.4310 (0.003)	-0.3995 (0.045)	-1.6384 (<0.001)	-0.3189 (0.0730)
Exam WPM, β_1	0.0190 (<0.001)	0.0209 (<0.001)	0.0160 (<0.001)	0.0190 (<0.001)
Typing Speed, β_2	0.0013 (0.162)	NA	0.0016 (0.067)	NA
LSAT, β_3	0.0220 (<0.001)	0.0178 (<0.001)	0.0228 (<0.001)	0.0173 (<0.001)
UGPA, β_4	0.2213 (<0.001)	0.1237 (<0.001)	0.2549 (<0.001)	0.1315 (<0.001)
Multiple Choice % of Exam, β_5	NA	NA	0.0034 (<0.001)	0.0040 (<0.001)
Sex M/F, β_{6m}	0.0096/-0.0096 (0.515)	0.0074/-0.0074 (0.244)	0.0158/-0.0158 (0.264)	0.0092/-0.0092 (0.110)
Race CW/Other, β_{7k}	-0.0042/0.0042 (0.806)	0.0036/-0.0036 (0.640)	0.0001/-0.0001 (0.995)	0.0110/-0.0110 (0.113)
Number of students	192 ⁵⁸	881 ⁵⁹	192 ⁶⁰	959 ⁶¹
Number of exams	847	3463	1335	5891

Table 3. Correlations (and corresponding p-values) between typing speed and course grades for different exam formats

Figure 5 represents graphically the correlation between typing speed and course grade for essay-only exams, the highlighted cell from Table 3.

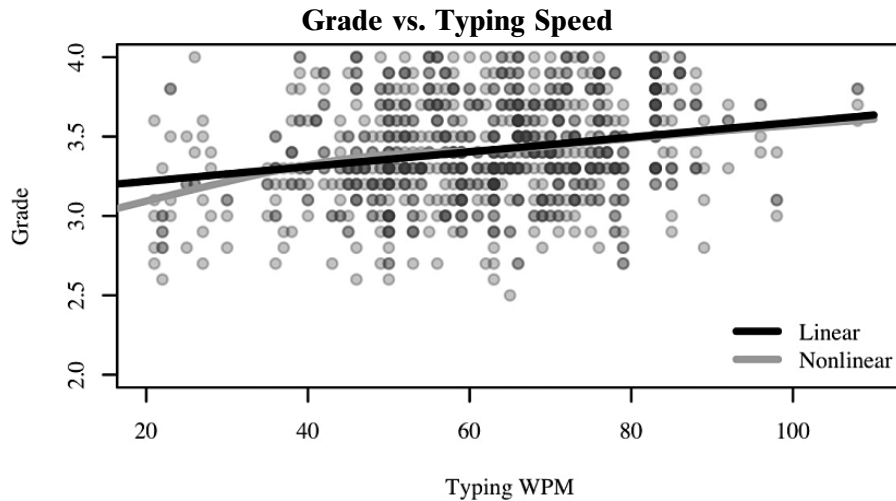


Figure 5. Grade vs. Typing words per minute with lines showing the smoothed linear (black) and nonlinear (gray) relationships.

All the typing speed correlations with course grades, described in Table 3 above, are much weaker than the 0.415 correlation between exam words written per minute and course grade identified in Table 1. Indeed, once we account for both of these correlations as well as other covariates in the mixed effects linear regression models below, the positive correlations between typing speed and course grades lose statistical significance.

b. Mixed Effects Linear Regression

Even though typing speed correlates with a student's course grade in a simple linear regression analysis, the mixed effects linear regression in Table 2 above shows that typing speed doesn't provide any additional information on grade when we account for the other variables. The coefficient corresponding to typing speed and course grade, 0.0013, is not statistically significant given its p-value of 0.162. Other covariates explain the apparent grade advantage a faster typing speed suggested in the simple linear regression. In sum, our results suggest, on average, faster typing speeds do not result in better grades.⁶⁷

67. Indeed, an additional statistical analysis of the mixed effects linear regression model demonstrated that only two variables, exam words per minute and LSAT, are necessary to render the relationship between typing speed and grade statistically insignificant. We determined this by fitting a mixed effects linear regression model to grades with only LSAT, exam

D. Additional Findings

Although the primary focus of our study was on the relationship between grades and the two variables of exam words per minute and typing speed, our data yielded additional insights that themselves merit comment and further research. Below we briefly discuss a few of those additional findings.

1. First Year Grades

In keeping with prior research on this subject,⁶⁸ our study found a strong positive, statistically significant relationship between students' grades on first-year essay examinations and the students' LSAT scores (correlation: 0.384; p-value: <0.001) and UGPA (correlation: 0.169; p-value: <0.001). Those relationships are shown graphically in Figure 6 below.

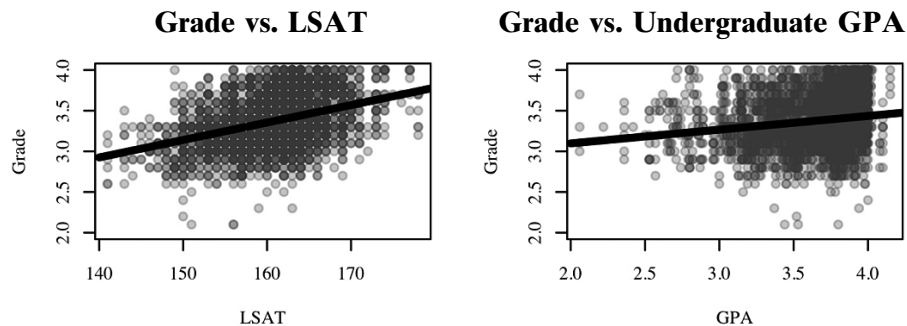


Figure 6. Grade vs. LSAT score (left) and grade vs. UGPA (right). The linear relationship between the variables is shown by the black line.

Both LSAT and UGPA maintained their statistically significant relationship with first year grades in the mixed effects model as presented in Table 2 in Part II.C.1.b.i above.

Any differences in average course grade by race, sex, and major were not statistically significant in the mixed effects models.⁶⁹

words per minute, and typing speed as covariates, wherein the coefficient for typing speed was not statistically significant.

68. See Anthony et al., *supra* note 64, at 6 (citing to research by the Law School Admissions Council on the predictive value of LSAT and UGPA).

69. See *supra* Table 2, Part II.C.1.b.i.

2. Typing Speed

The simple linear regression found that typing speed correlated with LSAT at a statistically significant level (correlation: 0.298; p-value: <0.001). The correlation between LSAT and typing speed is part of the reason that the relationship between typing speed and law school grades lost significance (i.e., didn't add to our understanding) once we had information about the number of words written on an exam and about a student's LSAT score in the mixed effects linear regression models. Note that the relationship between typing speed and LSAT is based on a simple linear regression. Because our focus was on word count and typing speed, we did not fit a mixed effects linear regression model with typing speed as the response variable. It may be useful in future research to measure these relationships while accounting for other variables.

Typing speed was different for sex at a statistically significant level, where the average net typing speed was 64.05 for females and 59.49 for males (p-value: 0.044).

Typing speed did not correlate at a statistically significant level with UGPA (p-value: 0.761), different undergraduate majors (p-value: 0.722), or race (p-value: 0.054).

CONCLUSION

Does speed matter on law school exams? Our finding of a statistically significant positive correlation between the number of words a student writes on a first year essay exam and the student's grade on the exam suggests that it does. Nonetheless, as the psychometric literature alludes, the number of words a student generates on an essay examination is likely a complex function of knowledge, power or ability, and speed in its varied iterations including cognitive speed. To the extent speed matters, we were pleased to find that typing speed was not the explanation. Although this finding is not perhaps as satisfying as would be a causal explanation for precisely what allows a student to generate more words on an exam, we believe law faculty and students can take some comfort from our finding that law school exams do not appear to test typing speed.

If saying more on an exam matters, law professors need to give further consideration to whether it should. If additional words are a function of underlying knowledge about the law being tested, presumably additional words should produce a better grade. The same might

be said for a student's facility in applying that knowledge to a complicated fact pattern. Application speed too seems like a lawyering skill, although this proposition is contested in the psychometric literature that emphasizes the difference between speed and power. Given the high stakes nature of first year law school exams, further consideration of testing pedagogy and particularly the importance of word count and exam speededness is necessary.

The Open Hand: Moderate Realism and the Rule of Law

MICHAEL F. DUGGAN*

INTRODUCTION	272
I. ON THE UNIVERSALITY OF VALUES	275
II. THE IRONIES OF ACTIVE HUMANITARIANISM .	285
III. THE BROADER PICTURE: MODERATE REALISM VERSUS ESCHATOLOGY.....	302
CONCLUSION: THE OPEN HAND	312

When we talk about the application of moral standards to foreign policy, therefore, we are not talking about compliance with a clear and generally accepted international code of behavior. If the policies and actions of the U.S. government are made to conform to moral standards, those standards are going to have to be America's own, founded on traditional American principles of justice, and propriety. When others fail to conform to those principles, and when their failure to conform has an adverse effect on American *interests*, as distinct from political tastes, we have every right to complain and, if necessary, to take retaliatory action. What we cannot do is to assume that our moral standards are theirs as well, and to appeal to those standards as the source of our grievances.¹

—George F. Kennan

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1. GEORGE KENNAN, AT A CENTURY'S ENDING: REFLECTIONS 1982-1995 272 (1996).

Interventions on moral principle can be formally defensible only if the practices against which they are directed are seriously injurious to our interests rather than just our sensibilities.²

—George F. Kennan

To be good is noble; but to show others how to be good is nobler and no trouble.³

—Mark Twain

INTRODUCTION

A number of years ago, I was invited to observe a conference in New York City on issues related to “the rule of law.” At the introductory reception, our group was greeted by a foreign ambassador who defined for us what this term means.⁴

2. *Id.* at 273.

3. Mark Twain, *Following the Equator*, in *THE WIT AND WISDOM OF MARK TWAIN* 89 (Alex Ayers ed., 1987).

4. One of the most difficult tasks in approaching the rule of law is simply to define it. As with pornography, people think they know what this term means when they hear it, but specific definitions vary. Rachel Kleinfeld attempts to define, or rather explain the evolving definitions of the rule of law in her book, *ADVANCING THE RULE OF LAW ABROAD* 7–17 (2012). Among these are the definitions given by the Government Accounting Office (GAO) and the multi-point “first generation” definition of Stephen Golub. The former of these states:

[W]e use the phrase “rule of law” to refer to U.S. assistance to support legal, judicial, and law enforcement reform efforts undertaken by foreign governments. This term encompasses assistance to help reform legal systems (criminal, civil, administrative, and commercial laws and regulations) as well as judicial and law enforcement institutions (ministries of justice, courts, and police, including their organizations, procedures, and personnel).

Although Golub’s outline is too long to go into here, both of these definitions characterize the rule of law in terms of institutions and their jurisdictional scope, that is in terms of what rule of law efforts *do* rather than what they *are* substantially. In other words, they give positive generalities of institutions that few people can oppose as elements of a domestic policy. According to Kleinfeld, “first generation” rule of law reform programs tend to be preoccupied with “writing new commercial codes, adding human rights laws, altering or writing new constitutions” as well as with “providing [police] equipment and more modern facilities,” capital projects generally, “new technologies, training, structural reform,” organizing bar associations, providing access to lawyers, legal aid programs and the structural “access to justice.” The idea of the rule of law seems predicated on the establishment and enforcement of universal values, and yet “institutional” first generation definitions of the rule of law are strangely shorn of values.

Kleinfeld concedes the problematic nature of institution-based views of the rule of law. She then references the “greatly improved” “second generation” rule of law reform based on pragmatic “ends-based” definitions. This too she admits is “no silver bullet” noting that “[t]he rule of law has never had a fixed set of end goals; new reasons are added and removed depending on the era and purposes of the proponent.” This said, she gives

[A] set of ends, although phrased differently, often separated in slightly different ways, and often adding or removing an element or two, are generally agreed upon as creating the idea of a rule-of-law based state: Governments are subject to law and must follow pre-established and legally accepted procedures to create new laws. Citizens are equal before the law. Judicial and governmental decisions are regularized: They are not sub-

My impression from what he said was that the rule of law characterized the promulgation or proselytizing of certain Western humanist values via the law in parts of the world where they do not already flourish.

After his brief remarks, the floor was thrown open for initial questions; given that his definition of the rule of law seemed to exclude any system at odds with Western liberalism and humanism, my question to him was whether it would include the rule of Sharia law in majority Muslim regions of the world. The answer, in a word, was “no.” My follow-up question — unasked by me for the sake of civility or by anyone else present — should have been: “Why not? Doesn’t Sharia law have more organic legitimacy in Islamic countries than concepts arising from the social and political philosophy of John Locke, Montesquieu, the *Federalist Papers*, or similar fonts of the Western Enlightenment?”

On its face, supporting the rule of law would seem both liberal-minded and sensible. After all, who can be against efforts to reduce governmental corruption, brutality, and mass atrocities? Who cannot

ject to the whims of individuals, or the influence of corruption. All citizens have access to the effective and efficient dispute-solving mechanisms regardless of their financial means. Human rights are protected by law and its implementation. Law and order are prevalent.

From this list of precepts, we can infer that some of the values and ideas being embraced are of the dominance of law over government, a presumption of equality of citizens before the law, opposition to arbitrary and corrupt rule and adjudication, access to due process (and the idea of a fair and speedy process), the protection of unspecified human rights, and a general condition of law and order.

In a similar vein, Supreme Court Associate Justice Anthony Kennedy has suggested a provisional definition of The Rule of Law with three elements:

1. The law is superior to, and thus binds, the governed and all its officials.
2. The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends
3. The Law must establish and safeguard the constitutional structures necessary to be a free society in which all citizens have a meaningful voice in shaping and enacting rules that govern them. The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfill just expectations and seek redress of grievances without fear of penalty or retaliation.

See Rich Cassidy, *The Rule of Law: Supreme Court Justice Anthony Kennedy Tells us What it Means and Why it Counts*, ONLAWYERING.COM (May 4, 2010), <http://onlawyering.com/2010/05/the-rule-of-law-supreme-court-justice-anthony-kennedy-tells-us-what-it-means-and-why-it-counts/>.

An even more general definition of the rule of law can be found in the U.S. Citizens Immigration Services (USCIS) Citizenship Exam. Question 12 asks, “What is the rule of law?” and then answers in four parts: “Everyone must follow the law; leaders must obey the law; government must obey the law; no one is above the law.” This is all well and good, but it tells us little about the specific *nature* of the law in question. Moreover, as a basis for a nation’s organic beliefs this may all be well and good (depending on the nature of the laws in question). The question remains about whether an outside nation or civilization has a right to try to impose its own view of the rule of law on other nations.

be in favor of modern liberal constitutionalism, democracy, governmental transparency and accountability, women's rights, and human rights in general? Who would not support the fair access to justice and property and the equitable transference of the latter?

Likewise, the term "the rule of law" itself seems innocuously general, benignly benevolent, and vaguely high-minded (very unlike the more severe-sounding "law and order"). A problem with this term is that its elements are imprecise to the point of meaning virtually anything the casual observer would care to project on to it while in fact advocating a specific outlook that its supporters hold up as universal. When I first heard of "the rule of law" in this context I wondered, exactly *whose* "law" was it that we were speaking of and whether "rule" was in fact an aspirational goal for a latter-day *Pax Romana* upon which to build new global status quo with huge economic and environmental ramifications.⁵ The term seemed more like a cloak than a concise and meaningful description.

In the first Part of this Article I discuss the rule of law and the allegedly universal bases for the values that underlie perspectives advocating it and suggest that it may be a pretext for a sort of cultural and economic imperialism. In the second Part I discuss the often illiberal policies of nations advocating rule of law initiatives and how bad policies are themselves often the result of initiatives justified in moral or ideological terms. In the third Part I frame the concept of the rule of law in broader historical terms and within the context of the realist/idealist debate. I conclude with a modest and practical alternative that would allow Western republics to make available ideas of liberalism and constitutional governance to nations with emerging constitutions and legal systems without actively imposing them on other countries, regardless of whether or not they want our help.

My analysis is mostly historical rather than moral or theoretical, but I also argue that policy based on a moderate reading of history tends to produce better moral results than policy specifically couched in ethical or ideological terms. It is not my purpose to assert or defend historical norms in the place of what may very well be changing normative desires and aspirations in distant lands; rather, my point is sim-

5. An argument that supporters of rule of law efforts sometimes make is that good governance is key to the stability of a region. But to what end? One cannot help thinking that the primary driving force is economic, that the larger purpose is to make the world safe for a neoliberal economic scheme.

ply that the domestic activities of other nations are largely none of our business until they affect our interests.

I. ON THE UNIVERSALITY OF VALUES

I think that the sacredness of human life is a municipal ideal of no validity outside of the jurisdiction.⁶

—Oliver Wendell Holmes, Jr.

During the first full day of the conference, two high-ranking officials from the United Nations addressed us and elaborated on the rule of law and issues related to it. My questions to one of them were: “What about local customs, practices, normative values and laws that strike Westerners as illiberal? To what degree can the rule of law be seen as the imposition of Western values? Is ‘the rule of law’ nothing more than a euphemism for a sort of cultural imperialism based on principles attractive to Western sensibilities? How can this not be an attempt to impinge on the sovereignty of other nations?”

Her reply was impassioned and couched in the brave and occasionally soaring universalistic eloquence of liberal eschatology. Idealistic oratory and boilerplate aside, she made what seemed to be a good point: that the cultural imperialist/violation of national sovereignty argument was often used cynically as was the local customs argument, the latter having apparently been used in a particular sub-Saharan nation to justify cheating women out of property ownership and inheritance. Fair enough. But what about the earnest use of these arguments, and why is it even the business of the United States and the nations of the West to tell people how to manage their internal affairs given that our own domestic and foreign dealings are often so far from perfect? A lot of very bad things happen in the world, and as George Kennan writes, “[d]espite arguments to the contrary, not everybody in this world is responsible, after all, for the actions of everyone else, everywhere.”⁷ The United States and rich West cannot be all

6. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Feb. 1, 1920), in 2 HOLMES-POLLOCKS LETTERS, at 36 (Mark de Wolfe Howe ed.) (1946).

7. KENNAN, *supra* note 1, at 276. The rule of law presents a set of highly politicized issues. There can be no doubt that some arguments against the rule of law are made cynically by corrupt leaders trying to maintain their power. But why is it up to the United States to hold leaders of other countries responsible to their people in the first place? And what should we think of the disturbing possibility that recent wars and violent efforts at “regime change” and “humanitarian intervention” by the West were in fact driven by powerful private economic interests trying to extend their power by taking out systems that have historically resisted them, and doing so in the

things to all peoples, and it hurts American interest and its reputation abroad when we assert American first principles as superior universals especially and then not live up to them ourselves. From a liberal rights perspective, the world is in far worse shape than many Americans realize, and most are ignorant or apathetic of how their own country acts in distant lands. Our current hegemonic status is not only unsustainable over the long run, but in terms of moral consistency – i.e. in terms of stated ideals relative to implemented policy – it is at odds with itself to the point of appearing hypercritical and even cynical.⁸ It is far better to lead by moral example than by dictating internal policies for others that contradict our own actions, and if a country cannot lead by example, it has no moral claim to lead by fiat.

I would hope that nobody reading this would approve of the swindling of women in poor, distant parts of the world out of what may rightfully be theirs, with claims righteously appealing to local custom and the sanctity of national sovereignty. Of course there are things that happen to women in parts of Eastern Africa and Southwest Asia that are worse than the denial of property rights, and some of these practices actually enjoy local popular support. I also hope that nobody will mistake what I am saying as signaling approval of such unjust and even brutal policies. I *am* saying that questionable motives lay on both sides of this issue and that a perception of earnestness and high-mindedness may just as easily cloak cultural arrogance, and entitlement, especially if massive economic gain is at stake.

Claims of illiberality can be made against the governments of most countries of the developing world, and the United States would not have the resources to address the vast majority of these if it had the inclination to do so and had something like an international mandate. Regarding the widely believed moral fiction sometimes called the “community of nations,” British philosopher John Gray writes:

At present there are almost two hundred sovereign states in the world. Most are unstable, oscillating between weak democracy and

name of human rights, freedom, and progress? One need only consider the list of nations which the U.S. or NATO has invaded, occupied, bombed, or merely vilified in recent years. Except for China, it is largely identical with the list of nations that have not accepted American military hegemony: Afghanistan, Iran, Iraq, Libya, Russia, and Syria.

8. Regarding the unsustainability of the current American hegemonic status, *see* JOHN GRAY, *BLACK MASS* 166 (2006) [hereinafter *BLACK MASS*]. The fact that we are now a debtor nation that borrows money to underwrite our “liberal imperialism” not only underscores this unsustainability, but also its hypocrisy. It would be difficult for instance, to justify the U.S. support of the right wing coup against a democratically-elected government in Ukraine in terms of American first principles.

weak tyranny; many are rusted through with corruption, or controlled by organized crime; whole regions of the world – much of Africa, southern Asia, Russia, the Balkans and the Caucasus, and parts of South America – are strewn with corrupt or collapsed states.⁹

Countries with good records on human rights would seem to be the exception rather than the rule. The United States can be a far greater force for good in the world if it acts in a measured and realistic way rather than by going broke through quixotic efforts trying to save the world or by attempting to shore up its misguided foreign involvements.

Even if the U.S. had the material resources to save the world from itself, it would hardly seem like justice for outsiders to vigorously advocate through official channels for the adoption of external standards with little or no meaningful connection to local traditions and values. One of the favorite words of the new internationalism is “freedom,” but we might consider that some of the various manifestations of this concept include the freedom from outside interference, the freedom to practice traditional customs, and the freedom to be left alone. Besides, if the officials of a country are willing to use local customs and sovereignty arguments cynically, if pressed, they would certainly not be above adopting the appearance of democratic form as cover in order to assuage Western interlopers while securing foreign aid. After all:

“Democracy” is a loose term. Many varieties of folly and injustice contrive to masquerade under designation. The mere fact that a country acquires the trappings of self-government does not automatically mean that the interests of the United States are thereby furthered. There are forms of plebiscitary “democracy” that may well prove less favorable to American interests than a wise and benevolent authoritarianism. There can be tyrannies of a majority as well as tyrannies of a minority, with the one hardly less odious than the other.¹⁰

Of course issues related to democratic form and the franchise are only one aspect of the rule of law, and it is one that its supporters

9. JOHN GRAY, *STRAW DOGS* 12 (Farrar, Straus, and Giroux eds., 2002). What exists in the world is at best a collection of modestly cooperative, self-interested sovereign states. More typically, cooperation is based on alliances based on perceived national interests. Regarding the unsustainability of the current policies and hegemonic status of the United States, see BLACK MASS, *supra* note 8, at 166.

10. KENNAN, *supra* note 1, at 273–74.

concede is among the more contentious (presumably true democratic form could actually work against rule of law initiatives, if the majority of people in a country oppose such efforts).¹¹ But “the rule of law” is an even looser concept than “democracy” and it takes little imagination to realize that other liberal prescriptions can be faked even more easily than democratic procedure and institutions. Just as democratic form is not the same thing as liberal sensibilities, nor is transparency synonymous with accountability, and a pleasing form can easily mask a lack of substance and conceal corruption and a multitude of other sins. It is therefore very difficult to accurately measure the success of any reform. The difficulty of measuring compliance, much less the success of rule of law initiatives only exacerbates these problems. Law that cannot be enforced effectively does not exist.¹² As rule of law advocate Rachel Kleinfeld notes, the historical record of such reform initiated by the United States is not an impressive one, which suggests that either the U.S. is not very good at it or that it is a bad idea, or both.¹³

11. Thomas Carothers’ foreword to KLEINFELD, *supra* note 4, at x. Regarding the unintended consequences of democracy and our reaction to them, see ZBIGNEW BRZEZINSKI, DAVID IGNATIUS, & BRENT SCOWCROFT, *AMERICA & THE WORLD* 93–94 (2008).

12. As a practical matter, in order for law to exist there must be a codified rule, general compliance, and enforcement. If any of these elements are missing, the law ceases to exist as a functioning enterprise. The potential problem with the rule of law abroad is the difficulty of its application, measurement of success and its enforcement. How can a policy be enforced if it is so difficult to even monitor compliance and measure its impact? As a believer in the Hobbesian idea of the law as the command of a sovereign, I have always been skeptical idea of international law given that the definition of a sovereign entity – a state – is one that has no consistent strata of law above it. Such law is enforced in a haphazardly and in some cases not at all. This suggests that in the broadest sense, international law may be little more than a widely believed fiction. This would certainly include the rule of law. See THOMAS HOBBS, *THE LEVIATHAN* 145 (1651). Of course issues of human rights have themselves been used as justification to violate the territorial sovereignty of other nations. See BLACK MASS, *supra* note 8, at 162.

13. See KLEINFELD, *supra* note 4, at 5. Nation building and proselytizing liberal or utopian narratives is not only extremely difficult, but the historical record shows that it can be very dangerous. The graves of imperialists and idealists around the world may serve as cautionary reminder of the high price of the active spreading of ideals and markets, especially if the locals are not buying what is being peddled. As Kipling famously writes:

“And the end of the fight is a tombstone white with the name of the late deceased, and the epitaph drear: ‘a fool lies here who tried to hustle the East.’” RUDYARD KIPLING, *THE NAULAHKA: A STORY OF THE WEST AND EAST* 66 (1899). The fatal results of a democratic revolutionary like Lord Byron (who died of a fever during the Greek War of Independence), later utopian revolutionaries like Che Guevara, or imperial soldiers like Arthur Conolly and Charles Stoddart who were unceremoniously executed in Afghanistan in 1842, illustrate the often high-risk nature of such enterprises. To be fair, none of these men had any illusions of the risks involved in their activities, and it could be argued that all great efforts potentially require the deaths of courageous individuals. Adept at self-mockery, Byron writes:

When a man hath no freedom to fight for at home, Let him combat for that of his neighbors; Let him think of the glories of Greece and Rome, And get knock’d on the head for his labors. To do good to mankind is the chivalrous plan, And is always as

What was perhaps most revealing about the reply of the official to my questions was the bold, cosmopolitan language in which she couched her arguments. The values we intend to foist on others were, in the similar words of Thomas Carothers, “international universals” and are “universally agreed-upon.”¹⁴ It made me wonder that with such universal acceptance why their active advocacy and dissemination is necessary to begin with. On this point so widely believed and so thinly supported, George Kennan writes:

[T]here are no internationally accepted standards of morality to which the U.S. government could appeal if it wished to act in the name of moral principles. It is true that there are certain words and phrases sufficiently high-sounding the world over that most governments, when asked to declare themselves for or against, will cheerfully subscribe to them, considering that such is their vagueness that the mere act of subscribing carries with it no danger of having one's freedom of action significantly impaired.¹⁵

In spite of the illusions and delusions of globalization, the words are as fresh today as it was when Ambassador Kennan wrote them in 1985.

“Universality” and “universal international standards” then are the shibboleths, the weasel words of globalist eschatology suggestive of a kind of ethical rationalism, natural law formalism or moral Newtonianism perhaps akin to the impressive but ultimately failed neo-Kantian project of John Rawls.¹⁶ They are the solemn, secular

nobly required; Then battle for freedom wherever you can, And, if not shot or hang'd you'll get knighted.

Of course the deaths of Byron, Guevara, Conolly, and Stoddart, might be balanced out with the accomplishments of expatriate revolutionaries and aristocratic rebels like Lafayette and Kosciuszko. Byron was baffled by the apathy of the Greeks toward the prospect of their own independence and his sardonic poem shows that even as an idealist he could make fun of himself. The Greeks did eventually win their independence from the Turks. GEORGE GORDON BYRON, *THE POEMS OF LORD BYRON* 72 (New York: A.L. Burt Publishers) (n.d.); George Gordon Byron, *Stanzas: When A Man Hath No Freedom*, POEMHUNTER, <https://www.poemhunter.com/poem/stanzas-when-a-man-hath-no-freedom/> (last visited Jan. 25, 2018). Regarding Conolly & Stoddart, see PETER HOPKIRK, *THE GREAT GAME* 1–2 (John Murray Publishers 2006) (1990). Regarding the category of the aristocratic rebel, see BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 747 (1945).

14. In the forward to Rachel Kleinfeld's *ADVANCING THE RULE OF LAW ABROAD*, Thomas Carothers uses the similar “commands near-universal respect” in characterizing the world-wide regard for the values embodied in rule of law initiatives. See KLEINFELD, *supra* note 4, at ix.

15. KENNAN, *supra* note 1, at 271.

16. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971). As with Kant before him, Rawls attempted to construct a rational basis for morality and the law. The reason why moral rationalism fails is because morals and the values embodied the law are not primarily rational, but rather emotional. This is also why the difference between the law and morality is one of kind, although there is some overlap (issues of clemency, for instance; see generally Samuel Morison,

holy words asserted as absolutes – as facts – in order to put certain claims beyond discussion and immunize them from criticism. After all, to draw a parallel, physicists long debated the fundamental nature of gravity, but they never doubted its existence. The enforced result of such absolutes – the *rule* of “rule of law” – would be worldwide moral homogenization under a model of neoliberal utopianism.

But what of the “universal” nature of Western humanist values? John Gray writes that many of the timeless moral laws which we praise and hold up so confidently are actually quite recent in origin and are primarily Western. In fact the eternal truths of modern liberalism to which we appeal are mostly about 300-350 years old with their implementation being about a century younger in our country. As Gray writes, “Today everyone knows that inequality is wrong. A century ago everyone knew that gay sex was wrong. The intuitions people have on moral questions are intensely felt. They are also shallow and transient to the last degree . . . [i]deas of justice are as timeless as fashions in hats.”¹⁷

The Politics of Grace: On the Moral Justification of Executive Clemency, 9 BUFF. CRIM. L. R. 1 (2005)) as well as a much larger area of distinction. The law is an external system of rules that tends to reflect a normative morality. See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). By contrast morality comes from inner motivations – feelings that rise up in us – that govern our behavior. As Hemingway observes “So far, about morals, I only know that what is moral is what you feel good after and what is immoral is what you feel bad after . . .” See ERNEST HEMINGWAY, *DEATH IN THE AFTERNOON* 4 (1932).

The fact that values do not exist objectively does not mean they are not important; it merely underscores their relative vulnerability. In this sense it makes them even more precious. The law is fundamentally a power enterprise and the fact that it has an analytical element and reflects morality and empathy is all that prevents it from devolving into a monstrosity.

17. GRAY, *supra* note 9, at 102–03. Even though moral relativism may be a true position, its adoption puts one on a particularly precarious footing. The temporality and relativity of values underscores a number of problems with ethics. Generally, among the most fundamental of these is the fact that ethics is of primary importance for individuals and at every social level, and yet it is impossible or nearly impossible to know and define it rationally. We could not escape ethics even if we wanted to – the flat denial of the existence of ethics is still an ethical statement reflecting an ethical position – and yet I think it is nearly impossible to get our minds around it. That may be the most fundamental problem of ethics we can’t get a handle on ethics yet they can’t be dismissed or ignored. Morals may be the fictions of a social creature, but they are necessary fictions. One of the more interesting theories of morality proffers that ethics is actually a kind of language, which embodies a phenomenon parallel to the deep grammar syntactical language. We are by nature ethical as well as linguistic creatures, and there seem to be as many distinct ethical systems as languages – suggesting the possibility of a kind of overriding meta-ethical foundation that needs only the regular stimulus of social interaction to develop within the individual. All cultures and communities have their own variants of language (salesmen and women, people in the military, pilots, jazz musicians, sailors, the mafia, the law, medicine, every human culture and subculture). Each of these has its own internal lingo or insider’s language, and it is difficult to learn the jargon of a social subclass mechanically. In order to be fluent in a language one must be immersed in it and have time to absorb and digest it. Is there a parallel cognitive framework for ethics?

The idea here is that these groups and subgroups also have their own social and moral codes that can be learned and mastered over time, and that just as there is an innate human meta-language, there is also a meta-ethics (a “deep grammar” or meta-language for values). This would suggest that there may be an underlying ethical commonality across our species, but that (unlike the models postulated by Kant and Rawls, it would be visceral and intuitive and not rational. In language, people who lack the ability to understand are called aphasic; in ethics they are psychopaths (sometimes “sociopaths”). The question then becomes how can we know or access this meta-ethic and what if any insights might be gleaned from it? Regarding human syntax, *see generally* NOAM CHOMSKY, LANGUAGE AND MIND 5–6 (2d ed. 2002); NOAM CHOMSKY, SYNTACTIC STRUCTURES (1957). On psychopaths generally, *see* HERVEY CLECKLEY, M.D., THE MASK OF SANITY (5th ed. 1988) (1941); ROBERT D. HARE, PH.D., WITHOUT CONSCIENCE: THE DISTURBING WORLD OF PSYCHOPATHS AMONG US xi-xiii (1999).

One approach to try to corroborate this theory might be to find panhuman commonalities in ethics; in language, if one separates at birth the two most distantly related human beings with a normal human language capacity, both will learn their adopted language a normal amount of time. This suggests that the bigger part of language is not learned but rather “hardwired” into us (it also suggests that we are a very closely related – perhaps inbred – species). We develop language more than we learn it.

But what about ethics? Most of the Amish in this country are of German stock as were most Nazis during WWII, so the lion’s share of both groups are probably genetically identical or very similar even though their ethical behavior is about as different as any two groups on the planet. Is there a meta-ethic that would include and account for both Amish and Nazis behavior, and what possible commonality could they possess? More importantly, if both *can* be accommodated, what does it say about the theory? A friend of mine suggested that when fear and insecurity dominate a community and there develops a sense of distrust of the world outside (as with the Amish in the seventeenth century or Germany during and after the First World War), people tend to adopt tribalism. I think it is fair to say that both the Amish and Nazis embody tribalist outlooks (which makes the Amish a fairly distinctive category, being an inward-looking tribalist sect embracing a universalist religion – i.e., Christianity). Each turned its acculturated ethics (Anabaptist Christianity and German Militarism respectively) into extremes of separatist pacifism and racist fascism.

Chomsky writes that language is not a learned technology but a fundamental part of what we are as conscious beings, and this theory says that so is ethics. *See generally* CHOMSKY, *supra*. The question is whether the two are related – is there an actual link between meta-grammar and meta-ethics (language is often loaded with ethical implications and even words are not neutral – i.e., “cunning” or “shrewd” may have good or bad connotations depending on cultural values and the context of their usage) – or are they just parallel cognitive frameworks? This cognitive frame for ethics is likely the product of natural processes any may be explained by sociobiology. *See generally* EDWARD O. WILSON, ON HUMAN NATURE (1978); EDWARD O. WILSON, THE SOCIAL CONQUEST OF EARTH (2012).

Ethics is like aesthetics: we make strong judgments about what art or music is good or appropriate and what is not, and although there may be some agreement within cultures, universal judgments about such things outside of one’s culture is a dicey business. But perhaps here and beneath the trappings of the world’s various ethical systems, there is a commonality with certain underlying principles. I do not believe along with Kant or Rawls that underlying our values is a deontology of reason that we can access and know. Of course one alternative to all of this is to say that ethics is all relative to culture. Once we accept the fact that ethics are relative – although very possible true – we have made a stark and significant choice and are on the slippery slope. For if ethics is a human construct and the world is therefore absurd, then the question, as Camus writes, is whether life is worth living at all (admittedly this may be more of a question of temperament given that men like Hume and Holmes were rational pessimists with sunny personalities). *See generally* ALBERT CAMUS, THE MYTH OF SISYPHUS (Alfred A. Knopf & Justin Obrien trans., 1955)

The central paradox of ethics is that relativism may be a true position, and yet we cannot live without values, we cannot escape ethics; we can neither truly know them nor deny them. Existentialism therefore leads us to a choice between nihilism (which nobody can realistically

I would not go as far as Gray and would offer that there may be nothing wrong with Western values—for the West. I will even concede that although subjective, some values are *more* universal, *more* moderate and liberal-minded, *more* self-consistent, *more* rational, and *less* tribalistic than others. But this is not the same thing as saying that they are universal, much less objective, like fundamental laws in physics; they are all still just human assertions reflected in and backed up by law, which is a nice way of saying “by force.” Where the law is not actively enforced by people, nature makes no correction as it does with physical laws like those of gravity or electromagnetism. Unlike the true universals of physics, there is no general moral tenet that applies in all situations, in all places, at all times. Even if there were moral absolutes, it would make little difference given that we are not talking about the comparative *truth* or the universal application of values, but rather their political and cultural *legitimacy*, and if the values of other peoples pose no threat to U.S. interests, we should leave them alone. This is apparently one of the hardest things for a Western neo-liberal or neo-conservative to accept: that the “right” thing to do is not always the right thing to do. There may be nothing wrong with Western liberalism for the West, and parts of the world voluntarily open to it.¹⁸ The problem therefore lies less in American or Western

live by) and an asserted humanism (which Camus embraced in his last book, *THE REBEL*). For a discussion of the problems with humanist ethics, see GRAY, *supra* note 9 at xiii–xiv. So many of us feel a strong commitment to ethical behavior but cannot give a reason for such beliefs and feelings, and the fact that many atheists are decent, principled people and that some religious people are not, suggests that the connection between belief and ethical behavior is tenuous at best (as the minor German philosopher and friend to Friedrich Nietzsche, Paul Rée, observes, “[b]elief and disbelief are not moral qualities, but only opinions.”) See PAUL REE, *Psychological Observations*, in *BASIC WRITINGS* (2003). It also tends to support Freud’s claim that being a good or bad person is largely a matter of luck. In a rational sense this also gets us back to the question of the Grand Inquisitor from *The Brothers Karamazov*, that if ethics are human fabrications then does anything go? See generally FYDOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* (1880). So how does all of this affect the discussion of moral relativity and what Karl Popper calls the “myth of the framework” in regard to the rule of law? As regarding foreign affairs, I adopt the view that it affects the discussion very little, that we are not talking about the *truth* of the ethics of various traditions, but rather their political and cultural *legitimacy*. If a Nazi-like regime rises in a liberal culture as a rogue faction part of that framework, it should be crushed. However, if another culture embraces traditional customs and practices that strike Westerners as illiberal and does not interfere with our interests, then we should adopt a position of mutual non-aggression and they should be left alone. It is obviously a more difficult question when a former colony falls under illiberal rule such as a modern dictatorship. Even in these instances, the political divisions are usually based on indigenous factors.

18. John Gray sees humanism as secularized version of Christianity with a fair measure of seventeenth and eighteenth-century moral rationalism thrown in and which artificially and perhaps dangerously separates mankind from the rest of the natural world. We have thus substituted a worldly delusion for a theistic one in his estimation. See GRAY, *supra* note 9, at xiii–xiv. On the various sources of humanism, see generally ALAN BULLOCK, *THE HUMANIST TRADITION*

values than in an ideology of mission adventurism and humanitarian interventionism that advocates the active spreading of those values.¹⁹

Even if we can forcefully argue for the validity of the Western ethical canon as being more rational and a more accurate generalized statement of a universal human nature, it does not follow that either this nor the overstated appeals to the “universal” acceptance of some of these values gives us a right or license to interfere with local or regional views that offend our sensibilities unless and until they directly impinge on our vital interests and institutions. An assertion of universality is not a reasonable basis for imposing a belief or practice on others not inclined toward such beliefs.

What the “rule of law” is then, is a euphemism for the imposition of Western values in places where they have not historically occurred or exist in locally modified form. It is the supplanting of indigenous practices that offend Western sensibilities with ones that proponents find more congenial both morally and practically. At its best, rule of law initiatives are a high-minded attempt at liberal legal cosmopolitanism and universalism—the judicial arm of globalization. At its worst, it is utter hypocrisy, an imperialism of neoliberal values in or-

IN THE WEST (1985). Most traditional systems, by contrast, tend to embrace religious beliefs and mix them in with local customs

In these cultures and religions, the sort of reason that makes humanism so appealing to many of us in the West tends to play a second fiddle to moral prejudices. As such, to Westerners, ideas like equality, freedom, a system of rights seem more rational universal and less prejudiced than systems of laws growing more directly out of a local ethos. If morality is the embracing of prejudices and predilections that we hold up as good, then it seems likely that rationalist cosmopolitan outsiders will only see the prejudicial aspect of such beliefs rather and the purported goodness of the values therein will seem foreign, outlandish, perplexing, and illiberal.

In addition to diverse naturalistic sources like the common law, the Anglo-American liberal tradition is generally regarded as beginning with the English Whigs of the late seventeenth-century and especially with John Locke. As John Miller points out, Locke is fairly radical even within the context of the political Whigs of the Glorious Revolution, framing his arguments in classical, scriptural, and above all theoretical terms and assertions rather than in the more traditional terms of the “ancient constitution.” Some of Locke’s views echo the sentiments of the radical Levellers of the English Civil War, and “went well beyond the norms of Whig thought.” Even with Locke’s formalistic systemizing of these ideas with his own, the general outlook – as with the common law itself — is an organic expression of English moral and legal culture and ethos rather than a sort of moral equivalent to the laws of physics that were being revealed by Newton around the same time. Although liberal humanism may be more rational and universal than tribalism, they are not expressions of objective natural laws or morality. It should also be noted, that Miller believes that the ideas found in Locke’s *Treatise* represent a justification of the revolution rather than description of actual causes, which seem to have had more to do with England’s distrust of Catholicism and which it saw as authoritarian and which it successfully sought to exclude from power. See JOHN MILLER, *THE GLORIOUS REVOLUTION* 22–31 (1983); see generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 33–54 (1967).

19. On mission ideology and eschatology, see generally BLACK MASS, *supra* note 8.

der to gain access to valuable economic resources and to further geopolitical influence via U.S. military hegemony. If it is in earnest, it is the misled but well-intended extension of Western values, as latter-day white man's burden of moral and legal enlightenment. It is a sort of paternalism intended to help what its supporters must consciously or unconsciously regard to be the morally backward peoples of the world see the secular light.²⁰

I want to be clear that what I am criticizing is not simply the dissemination of information to nations with well-established or even emerging systems of justice and who are eager to learn from our experience in a wide range of relevant areas of administration and procedure. We must be careful to distinguish, on the one hand, the useful imparting of knowledge to individuals or systems asking for our help in practical areas like docket management or how to set up a working clerk's office and a wide range of other functional and perhaps even substantive activities, and on the other hand, the proactive proselytizing of our values to places that may not want them. This allowing of others to voluntarily learn from our experience is very different from aggressive missionary zeal. We must learn to distinguish bestowing helpful knowledge and information from potentially meddlesome interference.

I would also add that it is perfectly acceptable from a perspective of moderate realism for the United States to register comment and opinion on human rights issues without resorting to pressure, coercion, or intervention. Likewise the United States is fully justified in seeking broadly-based international cooperation regarding issues that directly impact American interests, such as the unfolding world environmental crisis, global resources, international law enforcement *vis a vis* organized crime, as well as the enforcement of territorial sovereignty and peace between nations. Certainly American private citizens are free to voice their views in hope of influencing world opinion. What we must avoid is interference with the internal policy matters and cultural issues of other nations. The United States along with its Western allies must not become the world's international morality police.

20. For a discussion of humanism as a secular version of Christianity, see GRAY, *supra* note 9, at xiii–xiv. Regarding the term “white man's burden,” see Rudyard Kipling, *The White Man's Burden*, in *THE FIVE NATIONS* 79 (1903).

II. THE IRONIES OF ACTIVE HUMANITARIANISM

“These cultural beliefs mean that efforts to work for equality under the law, or even anticorruption, can run smack into norms pointing in other directions. Either reformers admit that the rule of law requires altering these cultural norms, or they will fail.”

—Rachel Kleinfeld²¹

Liberal imperialism has also resulted in a retreat from liberal values in the US. The Bush administration continues to insist that the president must be free to determine what counts as torture.²²

—John Gray

It’s always the good men who do the most harm in the world.²³

—Henry Adams

Although I was only an observer at the rule of law conference, I have some familiarity with the historical record of foreign policy based on ideology relative to that of moderate realism. I am a historian who believes that a reading of history both broad and deep is a better and more effective basis for policy than ideology or morality, no matter how laudable and high-minded its tenets and stated goals. It is probably fairly obvious from my citations that the view I have outlined here owes a great deal to the moderate-realist tradition in U.S. foreign affairs and specifically to the farsighted vision of George F. Kennan.²⁴ The debate between realism and idealism (or rather between policy based on historical understanding and the pursuit of vital interests and those based on moral and ideological considerations), has long inter-

21. KLEINFELD, *supra* note 4, at 65. This “altering” of “traditional norms” is vaguely reminiscent of the ironic explanation by an American army officer in a battle to retake the town of Bén Tre during the Vietnam War, that “it became necessary to destroy the town to save it.” Peter Arnett, Associated Press, February 2, 1968.

22. BLACK MASS, *supra* note 8, at 167.

23. See GEOFFREY WARD, *CIVIL WAR: AN ILLUSTRATED HISTORY* 284 (1990).

24. George Kennan was the charge d’affaires at the U.S. Embassy in Moscow who wrote and sent the famous 5,350 word “Long Telegram” (No. 511) on February 22, 1946. This document was widely circulated and became the basis for the U.S. grand strategy known as containment which in part eventually led to the end of the Cold War on terms favorable to the West. It was also the basis for his famous “x” article. See George F. Kennan, *The Sources of Soviet Conduct*, 25 *FOREIGN AFF.* 566–82 (1947), https://www.cvce.eu/content/publication/1999/1/1/a0f03730-dde8-4f06-a6ed-d740770dc423/publishable_en.pdf. Kennan was a prolific policy writer, memoirist, and historian and wrote more than twenty books and was the recipient of two Pulitzer Prizes, two National Book Awards, and the Bancroft Prize. See JOHN LEWIS GADDIS & GEORGE F. KENNAN, *AN AMERICAN LIFE* 696 (2011).

ested me and the rule of law position is just one more incarnation of the idealist position; the tone overarching themes of the two days of meetings made me restless. Throughout all of this discussion, I perceived two elephants standing in the room that nobody else brought up on their own. These were the fact that some of our allies are among the worst violators of human rights²⁵ and that in recent years the United States itself has pursued illiberal policies including the embracing of legally-sanctioned torture, the suspension of *habeas corpus*, and a presidential “kill list.”²⁶

25. A short list of U.S. allies who were exceptionally notable for human rights violations and illiberal rule would include Stalin during WWII, South Korea under Syngman Rhee, South Vietnam under Diem, Iran under the Shah, Cuba under Batista, Chile under Pinochet, Spain under Franco (after WWII), the Philippines under Marcos, Nicaragua under Somoza, Egypt from 1981 until the fall of Hosni Bubarak in 2011, South Africa under apartheid, Columbia, Panama for much of its history (numerous tin hat dictators of the Caribbean Basin), the Saudi Royal family (much of the Arab world generally). Regarding human rights abuses by U.S. allies in the Americas, see Dan Kovalik, *Seven Truths Inconvenient to U.S. Foreign Policy*, THE COUNTERPUNCH (Jan. 20, 2012), <https://www.counterpunch.org/2012/01/20/seven-truths-inconvenient-to-u-u-foreign-policy/>.

On the issue of illiberal and authoritarian American allies, it might actually be easier to list our friends with *good* human rights records. Among post-World War II nations, these include Australia, Canada, Japan, Lebanon (prior to the civil war), Uruguay, most Western European countries.

26. Regarding the Presidential kill list, see Andrew Bacevich, *Uncle Sam, Global Gangster*, TOMDISPATCH (Oct. 16, 2016), www.tomdispatch.com/dialogs/print/?id=175505. See also Jo Becker & Scott Shane, *Secret ‘Kill List’ proves a Test of Obama’s Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>; Doug Noble, *Assassination Nation*, THE COUNTERPUNCH (July 19, 2012), <https://www.counterpunch.org/2012/07/19/assassination-nation/>; Katrina Vanden Havel, *Obama’s “Kill List” is Unchecked Presidential Power*, WASH. POST (June 12, 2012), https://www.washingtonpost.com/opinions/obamas-kill-list-is-unchecked-presidential-power/2012/06/11/gJQAHw05WV_story.html?utm_term=.f298a720a22f; see also Vicki Divoll, *Who Says You Can Kill Americans, Mr. President?* N.Y. TIMES (Jan. 16, 2013), <http://www.nytimes.com/2013/01/17/opinion/who-says-you-can-kill-americans-mr-president.html>. On torture, see David Cole, *No Accountability for Torture*, N.Y. REVIEW ON BOOKS, (May 7, 2012, 3:05 PM), <http://www.nybooks.com/daily/2012/05/07/john-yoo-jose-padilla-torture-lawsuit/>. On indefinite detention, see the National Defense Authorization Act for fiscal year 2012, Pub. L. No. 112-81, 125 Stat. 1551, §§1021–22.

The monographs and article dealing with the illiberal turn in United States policy since 2001 are numerous. See generally CHARLIE SAVAGE, TAKEOVER: THE RETURN OF IMPERIAL PRESIDENCY (2007); JOHN DEAN, CONSERVATIVES WITHOUT CONSCIENCE (2007).

There is something both jarring and unreal about the fact that a discussion on the morality of largely unaccountable torture is even necessary in a nation that has historically prided itself on being founded on liberal values, rights, and liberties. What is even more disturbing and demoralizing is the relative lack of outrage among the American people over such things. As Benjamin Franklin notes in his *An Historical Account of the Constitution and Government of Pennsylvania*: “Those that would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.” FRANKLIN PEARCE ADAMS, FPA BOOK OF QUOTATIONS 494 (1952). In addition to Franklin’s “liberty” I would add a full list of other values near and dear to the American heart. On this point, Karl Popper writes:

The claim that if you want security you must give up liberty has become a mainstay of the revolt against freedom. But nothing is less true. There is, of course, no absolute security in life. But what security can be obtained depends on our own watchfulness, enforced by institutions to help us watch – i.e. by *democratic institutions* which are

Let us to dispense with moral pretensions for a moment. After all, in spite of high-sounding distinctions made by United States and United Nations officials, there is a tendency in practice to look at human rights violations around the world in ways that is inconsistent. The U.S. may claim to support initiatives related to liberalism, rights, and democracy oftentimes in haughty and moralistic terms when profitable and convenient to American goals, and then put them aside when they are not.²⁷ The fact remains that illiberal rule and the viola-

devised (using Plato's language) to enable the heard to watch, and to judge, their watchdogs.

See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 730 n.62 (5th ed. 1966).

Torture has been practiced throughout history during time of war, including by individuals fighting for and with the United States. It was however, never legally sanctioned. If waterboarding is not torture, then why did the U.S. execute Japanese officers for submitting American prisoners of war to similar treatment? Islamist terrorism is not an existential threat to the United States, unlike the Soviet Union during the Cold War. And yet at no point during the Cold War — when at times thousands of Soviet nuclear warheads were targeted at the United States — or the Second World War, was secret torture ever legally sanctioned by the United States Government. For the number of Soviet missiles and warheads, see Pavel Podvig, *The Window of Vulnerability that Wasn't: Soviet Military Buildup in the 1970s*, PAVEL PODVIG (Apr. 24, 2007), http://russianforces.org/podvig/2008/06/the_window_of_vulnerability_that_wasnt.shtml.

Ironically, the United States — the proud, self-conscious, and conspicuous arsenal and constabulary of democracy and liberal values abroad — is increasingly underwritten by an authoritarian regime that, among other things, denies its people full access to the Internet and has executed pro-democracy protesters. Of course I refer to China. As John Gray writes, “America’s military adventures are paid for with borrowed money — mostly lent by China, whose purchases of American government debt are crucial in underpinning the U.S. Economy. This dependency on China cannot be squared with the idea that America has the capacity to act as the global enforcer of liberal values.” BLACK MASS, *supra* note 8, at 166.

Another disturbing and dangerous trend in recent years in conjunction with American interventionist policies abroad is our increasing “outsourcing” of security in combat zones to “private contractors” a terms which is essentially a euphemism for hired guns — incorporated mercenaries. Do such policies really embody the sort of behavior that a great liberal republic should embrace? Can they be justified in terms of our values? If so then why have Americans historically had such a poor opinion of the Hessians who fought with the British in our War of Independence?

27. An example of such exasperated moralism is found in the oft-repeated line that such-and-such a leader of an authoritarian regime is guilty of “killing his own people.” *Every* government that believes itself to be legitimate will “kill its own people” in order to preserve itself. During the American Civil War, the United States government killed several hundred thousand of what it officially recognized as “its own people.” Union soldiers even killed civilians in the North such as those who rose up during the New York City Draft Riots in July, 1863. Needless to say, Confederates not only killed surrendering Union Army troops at the Battle of the Crater and at Fort Pillow, but irregular units such as Quantrill’s Raiders actually murdered unarmed civilians. See TIMOTHY J. REESE, *SYKES REGULAR INFANTRY DIVISION* 274–84 (1990); JAMES MCPHERSON, *THE BATTLE CRY OF FREEDOM* 610 (1988) (regarding units from the Army of the Potomac killing American civilians). See generally DAVID H. DONALD & J.G. RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* (1969) (discussing the American Civil War). It is ironic that comparatively few Americans seem as troubled by chilling developments in illiberal U.S. policies — including an asserted authority to target and kill American citizens — at home and abroad as they were by the acts of Saddam Hussein, Bashar al-Assad, or Moammar Gadhafi.

There is a major incongruity — a disconnect — in regard to how the United States treats nations who kill their own people. When the Syrian government kills people rising up in rebel-

tion of rights exists in every autocratic state including many traditional allies of the United States. We may bristle at the denial of rights to women in sub-Saharan Africa, yet supported the brutal rule of Hosni Mubarak for three decades, and then when he is ousted in a “democratic” revolution, declare a new policy outlook and act essentially as if we had never done business with him. We decry the violence of the Assad regime in Syria (whose civil war probably had more to do with Sunni/Shiite sectarian issues and old ethnic divisions and U.S.-Russian geopolitics than a Western ideological split along the lines of democracy/autocracy), yet ignore a bad human rights situation in Bahrain, where the Naval Support Activity for the U.S. Naval Forces Central Command (the Fifth Fleet) is based. Could this be an ongoing coincidental oversight? We use Saddam Hussein’s massacre of the Kurds as one of a litany of justifications for invading Iraq and toppling its regime, but are mostly silent about those killed by our NATO ally, Turkey (and to this day some Americans feel it necessary to tiptoe around the inconvenient issue of the Armenian genocide of a century ago).²⁸ Likewise we still do business with Pakistan, Kyrgyzstan (in spite of ethnic cleansing campaigns), and Ethiopia out of assertions of policy necessity. Interestingly, Americans are often quick to bring up issues of war crimes in regard to other nations, and yet both the United States and Israel have signed but curiously have not ratified the Rome Statute creating the International Criminal Court.²⁹

All too often issues of human rights have been used as a pretext for intervening in the affairs of other nations – including military interventions – while the real reasons remain murky and obscure: the U.S. may help overthrow the government in Libya allegedly to prevent a looming “genocide” but did not lift a finger to prevent actual massacres in Rwanda and Sudan.³⁰ Ironically, the intervention of NATO in Libya made the conflict far more severe than it had been up

lion – including some Sunni Islamists, we sided with the people. But when the government in Mali killed Islamic Toaregs rising up among its own people, we supported the government. France actually sent military forces to back up the Malian government. It may be no coincidence that Mali has extractive resources that France needs, including oil, natural gas, and uranium.

28. See, e.g., Elizabeth Kolbert, *Dead Reckoning, the Armenian Genocide and the Politics of Silence*, THE NEW YORKER (Nov. 6, 2006), <https://www.newyorker.com/magazine/2006/11/06/dead-reckoning-5>.

29. See RICHARD N. HAASS, THE OPPORTUNITY 145 (2005). See generally JAMES MANN, THE RISE OF THE VULCANS 187–88 (2004).

30. To get an idea of the scale of the NATO air campaign against Gadhafi’s forces, see Franklin Lamb, *Anatomy of a NATO War Crime*, THE COUNTERPUNCH (Dec. 16, 2011), <https://www.counterpunch.org/2011/12/16/anatomy-of-a-nato-war-crime/>.

to then and its former leader – while admittedly unsavory – had bucked the will of the West since 1970; another coincidence perhaps. American moralists applaud when former Serbian officers are hauled up on charges of war crimes, of ethnic cleansing, but are conspicuously silent when Israelis bulldoze Palestinian settlements on the West Bank in violation of the Fourth Geneva Convention or when they used white phosphorous in residential areas of the Gaza Strip.³¹ We do not speak of it often, but the temporary military success of the U.S. surge in Iraq in 2007 was itself largely the result of the bloody homogenization of its three primary ethnic regions by local militias. Ethnic cleansing is a policy we are officially and presumably morally against and which in Iraq possibly resulted in the deaths of hundreds of thousands of people.³² Examples of American fickleness in regard to the pursuit and enforcement of first principles abroad are legion. This also underscores the often illusory nature of the official reasons and public explanations for given policies.

When confronted with such stark contradictions, idealists often become stopgap pragmatists, and reply with arguments stating that the perfect is the enemy of the good, that it is better to do *something* however imperfect when we are able, than to do nothing at all. They may even note that historically the forces of good have had to make occasional pacts with the devil to good ends (such as our necessary alliance with the Soviet Union during the Second World War), echoing Franklin Roosevelt’s famous “they may be sons of bitches, but they are *our* sons of bitches.”³³ To this I would say that what some

31. Regarding the treatment of the Palestinians by Israelis, see John J. Meachemer & Stephen M. Walt, *The Israel Lobby and U.S. Foreign Policy*, 13 MIDDLE EAST POL’Y 45, 29–38 (2006), <http://mearsheimer.uchicago.edu/pdfs/IsraelLobby.pdf>.

My overarching position in this paper is one that endorses national sovereignty over globalization (“sovereignty” here simply meaning a political entity with no strata of law and governance above it and which has a military, conducts its own foreign policy, and mints its own currency). This said, and although nations may and do withdraw from treaties, a country signs on to an international agreement it is liable if it violates the conditions of that agreement. Regarding the 1990s Balkans Wars, see DIANA JOHNSTONE, *FOOLS CRUSADE* (2003).

32. See Maggie Fox, *Satellite Images show Ethnic Cleanout in Iraq*, REUTERS (Sept. 19, 2008), <https://www.reuters.com/article/us-iraq-lights/satellite-images-show-ethnic-cleanout-in-iraq-idUSN1953066020080919>.

33. This is a quote attributed to Franklin Roosevelt from 1939. It allegedly is in references to the regime of Nicaraguan strongman Anastasio Somoza. It should be noted that the United States entered World War II because we were attacked and not out of any altruistic motive and then sided with arguably the second most notorious murderer in history in order to defeat the first. Although in distant retrospect the Second World War may not have been an existential conflict for the United States, it was widely seen so at the time and in any case the defeat of the Axis powers was very much in our vital interest. Either way, siding with the Soviet Union was an instance when cooperation with a “bandit” state was necessary in moral and realistic terms as

Americans see as the strategic allotment of limited resources to particular situations but not others, others around the world see as inconsistency. In fact, the selective application of moral standards to judge human rights violations is self-serving to the point of hypocrisy and reflects its own cynicism. Again, Ambassador Kennan:

Practices or policies that arouse our official displeasure in one country are cheerfully condoned or ignored in another. What is bad in the behavior of our opponents is good, or at least acceptable, in the case of our friends. What is unobjectionable to us at one period of our history is offensive in another. This is unfortunate, for a lack of consistency implies a lack of principle in the eyes of much of the world; whereas morality, if not principled is not really morality.³⁴

I have some understanding of how power works in the world and readily concede the practical necessity of having allies that have done very bad things. Sometimes the United States may have had to do bad things in order to pursue a greater good in terms of the interests of its people, and as a powerful republic embodying liberal values, when we helped ourselves it has often helped the world. My point is simply that morality by itself is almost never a viable basis for policy (and when it is, it is then because of realist considerations)³⁵ whereas some sem-

the lesser of bad options. Regarding the necessity of the United States siding with the Soviet Union during the Second World War. See GEORGE KENNAN, AMERICAN DIPLOMACY, 75–77 (1984); GEORGE KENNAN, RUSSIA AND THE WEST UNDER LENIN AND STALIN 349–69 (1961). Alfred W. McCoy places the “our s.o.b.s” quote with President Dwight D. Eisenhower. See ALFRED W. MCCOY, IN THE SHADOWS OF THE AMERICAN CENTURY 62–63 (2017).

34. KENNAN, *supra* note 1, at 275.

35. There are certainly times in foreign affairs when the realistic thing to do is also the right thing to do from a humanitarian perspective. What distinguishes the moderate and circumspect realism of policy thinkers like George Marshall, George Kennan, and Brent Scowcroft from the more draconian forms of *realpolitik* is the fact that moderation tends to produce better results both in moral and practical terms than does realism of a more severe and nakedly self-serving type. The great ostensibly moral projects of the European Recovery Program (the Marshall Plan) and the postwar rebuilding of Japan were also realistic initiatives. A more recent instance where a military intervention on moral grounds might have also been a realistic measure would have been an effort to save the Tutsis and their allies from the Hutu majority in Rwanda between April and July, 1994. If the United States had intervened and had saved the lives of 800,000 people at virtually no cost, the spectacular success and humanity of the act would have been self-justifying as a realistic measure. I should note that there are unproductive and even harmful forms of foreign policy realism. Describing the “principled realism” of former Senator Chuck Hagel in an article titled *Don’t Believe What Today’s GOP Says About the Foreign Policy Mainstream*, John Judts notes that “Hagel and the ex-officials understand realism to mean a ‘realistic’ – as opposed to ‘reckless’ – foreign policy. They don’t reject the idea that the world would be better if dictators became democracies, but they are very cautious about how the United States could bring that about.” See John B. Judis, *Don’t Believe What Today’s GOP Says About the Foreign Policy Mainstream*, NEW REPUBLIC (Jan. 10, 2013), <https://newrepublic.com/article/111777/dont-believe-what-todays-gop-says-about-foreign-policy-mainstream>.

On the topic of realism and morality, Alexander Hamilton writes “the interests of the nation, when understood, will be found to coincide with their moral duties.” See Alexander Hamil-

blance of consistency is necessary if the United States is to be respected and trusted in the world. The fact that moralists concede the necessity of immoral allies also means that they concede the universality of their larger position, after all the lesser of evils is still evil in an absolute world. To declare one's own superior morality to be a basis for policy and then honor the assertion in the breach by setting it aside when convenient is therefore hypocrisy in both in perception and in fact. Of course, even before accepting such a view as a basis for policy, we would have to be consistent and above reproach to a degree that would be impossible to attain much less maintain.

Regarding the two enumerated points above, the U.S. would do well to adopt the simple maxim: any nation that cannot lead by moral example both in domestic and foreign policy, has no business telling other nations how to run their own affairs, let alone actually dictate policy. Even then it should refrain from enforcing rigid moral precepts in the vast majority of instances. I have no qualms with the idea of leading by moral example as a beacon to the world, and if leading by example is impossible then it merely underscores how unrealistic a basis morality for foreign policy really is. As a practical matter, when a nation puts moral or ideological considerations above considerations of vital national interest, it puts its long-term prospects at risk, to include its very survival. Even over the short run, it is a risky and ineffective basis for policy.

It may be that rule of law initiatives are an attempt of the West, and more specifically the United States, to clean up its own house by cleaning those of new allies with checkered pasts.³⁶ This would be ad-

ton, *THE WORKS OF ALEXANDER HAMILTON* 106, 266–67 (1971); CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 8-9 (1964). On Hamilton's foreign policy realism, see also *Pacificus No. IV letter of July 10, 1793*, in *SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON* 404–07 (Morton J. Frisch ed. 1985).

36. It is especially interesting that some of the countries in which the United States and private American organizations like the ABA are actively supporting law and order initiatives include former member states of the Eastern Bloc and the Soviet Union itself such as Albania, Armenia, Azerbaijan, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Moldova, Romania, Serbia, Tajikistan, Turkmenistan, and the Ukraine.

On a parallel note, Ambassador Kennan is strongly – even dramatically – on the record as opposing the expansion of NATO during the Clinton Administration into the Czech Republic and Poland as destabilizing and likely to be interpreted by the Russian Government as sign of bad faith.

The story, which has been related by both Richard Holbrooke and Strobe Talbot (via John Lewis Gaddis) goes as follows: in October, 1996, Talbot, President Clinton's Deputy Secretary of State, gave a presentation in favor of the expansion of NATO at the Harriman Institute at Columbia University. Then, as Gaddis writes, "Kennan spoke first at the dinner that followed, denouncing the idea as a 'strategic blunder of potentially epic proportions.' Holbrooke recalls Kennan characterizing the planned expansion "an enormous and historic strategic blunder."

mirable, but in light of our recent foreign policy history seems highly unlikely and we should not say, “do as we say,” until we have done so ourselves. In light of our own practices over the past decade, the idea of the United States citing morality as the guiding principle of its foreign policy is little short of laughable.

Please do not mistake my position for one of multiculturalism; I heartily believe in the civilization of the West – *for* the West. But I do not believe that its liberal ethos is fungible and exportable or that we should try to export it even if it were.³⁷ I agree with Peter Viereck’s

On the continued expansion of NATO, Kennan is certainly right. Still, a better case can be made for expanding Western influence into the Czech Republic and Poland – countries that have at times looked Westward – than to nations further to the east with little connection to the West, and well within the Russian sphere of influence. This is to say nothing about the U.S. support of a rightwing coup against a corrupt but democratically-elected government in Ukraine. It would seem that the baffling renewal of tensions with Russia is in part a direct result of these ill-advised policies. See Richard Holbrooke, *The Paradox of George Kennan*, WASH. POST (Mar. 21, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A52533-2005Mar20.html>; see also GADDIS & KENNAN, *supra* note 24, at 680–81; GEORGE F. KENNAN, *THE KENNAN DIARIES* 656 (Frank Costigliola ed. 2014); STROBE TALBOTT, *THE GREAT EXPERIMENT* 287 (2008); see also STEPHEN F. COHEN, *SOVIET FATES AND LOST ALTERNATIVES, FROM STALIN TO THE NEW COLD WAR* 189 (New York: Columbia University Press) (2008 [2011]).

It is arguable that earnest advocates of rule of law initiatives realize the illiberal effects of economic Globalization and see their own efforts as proactive attempts to counteract it. As the late Tony Judt writes notes his final book *Ill Fares the Land*,

[W]e have no good reason to assume that economic globalization translates into political freedom. The opening up of China and other Asian economies has merely shifted industrial production from high wage to low wage regions. Furthermore, China (like many other developing countries) is not just a low wage country – it is also above all a ‘low rights’ country. And it is the absence of rights which keeps wages down and will continue to do so for some time – meanwhile depressing the rights of workers with which China competes. Chinese capitalism, far from liberalizing the condition of the masses, further contributes to their repression.

While it is possible that China will liberalize – either gradually or abruptly – it is also possible that this 5,000-year old civilization regards the United States and its values to be temporary trends. See TONY JUDT, *ILL FARES THE LAND* 194–95 (2010).

37. On the exportation of democracy, Ambassador Kennan writes:

First of all, I know of no evidence that “democracy,” or what we picture to ourselves under that word, is the natural state of most of mankind. It seems rather to be a form of government (and a difficult one, with many drawback, at that) which evolved in the eighteenth and nineteenth centuries in northwestern Europe, primarily among those countries that border on the English Channel and the North Sea (but with a certain extension into Central Europe), and which was then carried into other parts of the world, including North America, where peoples from that northwestern European area appeared as original settlers, or as colonialists, and had laid down the prevailing patterns of civil government. Democracy has, in other words, a relatively narrow base both in time and in space.

See GEORGE KENNAN, *THE CLOUD OF DANGER, CURRENT REALITIES OF AMERICAN FOREIGN POLICY* 41–42 (1977) [hereinafter *THE CLOUD OF DANGER*].

He also notes that “[d]emocracy, as Americans understand it, is not necessarily the future of mankind, not is it the responsibility of the U.S. Government to assure that it becomes that.” See Kennan, *supra* note 1, at 276. As a general rule, Kennan believes that foreign affairs should be run by apolitical professionals – career experts and area specialists – and not by political operatives. The disjointed nature of American foreign affairs over the past half-century might be explained by its proximity to the political process. Regarding how politics got in the way of more

view that people should know their own cultural history, philosophical traditions, and values before faddishly taking up exotic ones.³⁸ Nor do I believe that this view runs afoul of what Karl Popper calls “the myth of the framework.”³⁹ I do not believe in totalitarianism, extremism,

effective policy leading up to the world wars, see GEORGE KENNAN, *AMERICAN DIPLOMACY 1900-1950*, 65–66, 73, 83–84 (1951) [hereinafter *AMERICAN DIPLOMACY*]. On Kennan’s run-ins with politicians regarding policy, see GEORGE KENNAN, *MEMOIRS 1950-1963* 293, 303 (1972); EVAN THOMAS AND WALTER ISAACSON, *THE WISE MEN* 666–67 (1986); GADDIS & KENNAN, *supra* note 24, at 563–65, 569. See GEORGE KENNAN, *AROUND THE CRAGGED HILL* (1994) [hereinafter *AROUND THE CRAGGED HILL*] for Kennan’s comments on democracy.

It should also be pointed out that the United States is not a pure democracy and never was; the word is not mentioned in any of our founding documents. At the start of the American Revolution, “democracy” was a “technical term” referring to lower, directly-elected legislative house. Even here it was originally a minority of white, male, property-owning citizens who voted. See GORDON WOOD, *THE AMERICAN REVOLUTION* 68–69 (2002). As a matter of fact, some of the Founders and Framers did not hold such political populism in high regard. See GORDON WOOD, *RADICALISM OF THE AMERICAN REVOLUTION* 366–67 (1992). See also Alexander Hamilton’s letter to Theodore Sedgwick dated July 10, 1804 in which he famously decries “Our real disease which is democracy.” On the question of whether the United States is actually a democracy, it should be noted that the “winners” of the 2000 and 2016 presidential elections received fewer votes than the defeated candidates. ALEXANDER HAMILTON, *WRITINGS* 1022 (Joanne B. Freeman ed. 2001). Strictly speaking the United States is a federal republic, a representative system. See *AROUND THE CRAGGED HILL, supra*, at 133–34.

As Karl Popper notes, democracy is not a panacea and that its primary advantage is not moral at all but rather the very practical fact that it is an effective way to get rid of bad leaders in lieu of violence. He writes, “since only democracy provides an institutional framework that permits reform without violence, and so the use of reason in political matters.” The other practical benefit of democracy is to offer the electorate a better or preferable choice. KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 4 (1961).

A number of notable commentators have had a skeptical view on the sanctity of democratic form. In his speech to the House of Commons on November 11, 1947, Winston Churchill famously quipped that “[d]emocracy is the worst form of government, except for all those other forms that have been tried from time to time.” Likewise, H. L. Mencken writes that “[d]emocracy is the theory that the common people know what they want for them and deserve to get it good and hard.” See H.L. MENCKEN, *A LITTLE BOOK IN C MAJOR* (1916).

38. Peter Viereck believes that citizens should be educated in the humanities in order to instill a function degree of cultural literacy that comes variously from religion, the arts, literature, and the classics. His idea is to temper the unchecked ego of what he calls the “Mass Man” into the more educated and circumspect “Individual Man.” See PETER VIERECK, *CONSERVATISM REVISITED* 33, 48–51 (1962). Oliver Wendell Holmes also discusses how people fashionably take on the trappings of other cultures while abandoning their own. See Holmes’ letter to Harold Laski dated June 1, 1919 in 1 *HOLMES-LASKI LETTERS* 159-60 (Mark DeWolfe, ed., 1963).

39. Popper talks about the Myth of the Framework as a sort of Trojan horse of relativism. As far as the encroachment of ideologies into the formal truth of science and pure reason are concerned, I think he is right. But here we must make a distinction between what Popper calls the *descriptive* or objective truth of epistemology and the *prescriptive* alleged truth of ethics. As I mention in the text of this article, even within ethics, some systems are more universal, more rational, moderate, liberal-minded, and less tribalistic than others (e.g. Western humanism as opposed to ethnocentrism). That said, there is no demonstrable rational basis for assuming that any set of values is transcendent in an objective or deontological sense or corresponds to a such objective external setoff truths. Relativism therefore is a much stronger position in ethics than in science.

My view is that traditional values systems – although they may in part grow out of practical situational reasoning (whose reasons may over time become obsolete, obscure, or forgotten and therefore may seem arbitrary to non-believers) – are in fact mostly grounded not in moral ra-

utopianism, eschatology, or the “end of history” historicism of global-

tionalism, but from religious beliefs and cultural quirks, habits and superstitions. Given that there is no rational or empirical reason to prefer one religion over another as descriptive programs, it would seem that each appeals to its followers for cultural rather than objective reasons. In this sense I am a moral, and to some degree, a cultural relativist, even though an outlook like humanism seems to embody a more accurate characterization of the human nature than tribalism and is therefore preferable.

Although he applauds open-mindedness, Popper speaks out against cultural relativism. See KARL POPPER, *THE MYTH OF THE FRAMEWORK: IN DEFENSE OF SCIENCE AND RATIONALITY* 44–46 (1994) [hereinafter *THE MYTH OF THE FRAMEWORK*]. He concedes that there are some non-value-laden cultural practices that are the result of customs stemming from historical accidents rather than values or objectively better answers (the example he gives is driving on the left as opposed to the right side of the road). But where values are at stake, he believes that there is always a substantive preference. Referencing the cultural tolerance and cosmopolitanism of Herodotus Popper writes “[t]his is a healthy attitude. But it may lead to relativism, that is to the view that there is no absolute or objective truth, but rather one truth for the Greeks, another for the Egyptians, still another for the Syrians, and so on.”

On this point, it is difficult to see how he could be right. If he was correct, there would be one set of rationally demonstrable values that would be universally accepted for what they are like logic, math and science, and yet this is clearly not the case. Here Popper seems to believe that in respect to every moral question there is always a “best” answer that can usually be demonstrated via a confrontation of the values in question. *Id.* at 36–37. If this were true, long standing areas of conflict would be easily resolved simply by appealing to the truth; there is no serious disagreement in applied mathematics.

Even if Popper is right that some values beliefs are preferable to others, this assumption of a clashing or “confrontation” of values in order to show other peoples the light is not a sound basis for international policy if the values of others do not interfere with American interests. A confrontation of ideas may be necessary in critical discussions designed to get to the truth of the matter, but it is not a realistic means of promulgating the Western rule of law in far flung regions that do not want it. We may oppose the values of another culture when it imposes them on our interests, but not before.

Regarding ethics, Popper writes in *The Open Society and its Enemies*, that ethical rules are “prescriptive” rather than “descriptive” (as, say, the laws of science or logic would have it, or as a natural law or moral rationalist scholar might argue). But a “prescription” is a tool, a remedy, a means to an end, and just because such a prescription is an invention doesn’t mean that the goal to be achieved, or the problem to be solved, is not of itself “descriptive,” i.e., objectively real. Popper seems to have concluded that the role of ethics could, indeed, be objectified, so long as it was understood that people could differ on what constitutes the “good,” but would find virtually total agreement on what constitutes the “bad.” Thus Popper’s ethics can be summarized as “do no harm.” The problem with this view of course is that one person’s meat is another person’s poison, and vice-versa. My own view is that ethics can possibly be universalized to the extent that human nature is the same for everyone, and that humanism may have the most accurate take on human nature of the major values systems. Still, I suspect the truth is much less clear than those who would attempt to construct universal systems of morality might suspect. Although in practical terms, moral relativism may put us on a slippery slope that includes positions are difficult to defend, it is quite likely a true position. See generally POPPER *supra*. Popper famously writes that “ideas are dangerous things” and believes that epistemological relativism is especially dangerous. He adds,

The situation is really very simple. The belief of a liberal – the belief in the possibility of the rule of law, of equal justice, of fundamental rights, and a free society – can easily survive the recognition that judges are not omniscient and may make mistakes about facts and that, in practice absolute justice is hardly ever realized in any particular legal case. But the belief this belief in the possibility of a rule of law, of justice, and of freedom, cannot well survive the acceptance of an epistemology which teaches that there are no objective facts; not merely in this particular case, but in any other case; and that the judge have make a factual mistake because he can no more be wrong about the facts than he can be right.

ization, or that we should interfere with non-liberal foreign systems and practices if they do not pose a threat to us or our vital interests. Until they emerge as a potential threat, other peoples are as entitled to their moral delusions as we are to ours.

Even more fundamentally, I do not believe that human values and practices are universal much less objective.⁴⁰ Values exist and evolve (“progress” is both too strong and too presumptuous of a word⁴¹) within a historical context and have historical pedigrees. Democracy and liberalism – values systems and sensibilities generally – have historical lineages and cannot be measured, cut, and laid down where and when it is needed, like carpet. Although not identical, what Kennan writes about democracy applies even more so to the Western civil ethos generally, that it “is a matter of tradition and custom, of what people are used to and expect. It is something that cannot be suddenly grafted onto an unprepared people – particularly not from

On the point of epistemological skepticism and relativism, progressives who decry the “fake news” of our own time, can in part thank left-leaning postmodernists and irrationalists of the past few decades for supplying the double-edge sword of subjectivism to their ideological opponents. See KARL POPPER, *CONJECTURES AND REFUTATIONS 5* (1963) [hereinafter *CONJECTURES AND REFUTATIONS*].

Oliver Wendell Holmes Jr. regards belief in a universalist natural law to be reflective of a “naïve state of mind.” On the generalized necessities of human life writes “some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized – some form of permanent association between the sexes – some residue of property individually owned – some mode of binding oneself to specified future conduct – at the bottom of all, some production for the person.”

40. Sociobiologists like Edward O. Wilson believe that ethics emerge from a form of human social intelligence. The idea is that all non-diseased people are born with a psychological matrix allowing for the development of values which are then penciled-in by our time and place – our culture and our personal experiences. See generally EDWARD O. WILSON, *ON HUMAN NATURE* (1978); see also *supra* note 17.

41. Regarding the death of the idea of Progress among liberals, see Judt, *supra* note 36, at 139–44. See also Gray, *supra* note 9, at xiv. Regarding historically deterministic views of progress, see generally BLACK MASS, *supra* note 8, and for a refutation of historical laws of progress, see generally KARL POPPER, *THE POVERTY OF HISTORICISM* (1991) [HEREINAFTER *THE POVERTY OF HISTORICISM*].

Economic orthodoxy adhering to the idea of unending progress (now a neoliberal concept) is on a collision course with the finite nature of our planet. Although too sensible to be a neoliberal, Jane Jacobs (among other writers on economics) notes that a growing economy requires a growing population. And yet we live on a fairly small planet and the idea unending growth is a factual impossibility given current technologies and energy needs. The problem of economic growth based on population growth in a situation of limited resources might be called the Jacobs-Malthus Conundrum. The question then is whether a situation would be possible in which a nation (or the world) could maintain both a more or less stable population and a more or less stable economy (either one of these would be difficult to pull off much less both, and such a situation would seem to be the dream of rationalist utopianism cloaked as practical realism). On population growth, see generally T. R. MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION* (1993). On population growth being necessary to sustain a growing economy, see JANE JACOBS, *THE ECONOMY OF CITIES* 117 (1969).

the outside, and not by precept and preaching and pressure rather than example.”⁴² Law is a naturalistic phenomenon that works best when it emerges from within a nation, and when the law is divorced from its cultural and historical context it becomes more arbitrary than need be.⁴³

Not only is there confusion over the portability of democracy and liberalism, but there is a tendency to conflate the two. To be clear, democracy is a form of government where liberalism is a sensibility, an outlook based on certain values. Governmental form does not guarantee results of cultural temperament and if an Islamic state with a large fundamentalist segment institutes the popular franchise, it is unlikely that they will elect leaders with the values of Hamilton, Jefferson, and Madison. They will probably vote for people who see things their way and who will represent their interests. They will vote for people like themselves. Given this, a rational dictator may at times

42. George F. Kennan, *The State of U.S.-Soviet Relations*, in *AT A CENTURY'S ENDING* 91 (1996). He also writes “It must also be understood that in the world of public affairs as in personal life, example exerts a greater power than precept. KENNAN, *supra* note 1, at 280.

43. John Gray writes that “[j]ustice is an artifact of custom.” See GRAY, *supra* note 9, at 103. Similarly, Friedrich Nietzsche writes that “[w]here the customs are unsettled its dictates soon become dated.” In *Human, all too Human*, he writes:

Arbitrary law necessary. Lawyers argue whether that law which is most thoroughly thought out, or that which is easiest to understand should prevail in a people. The first type, whose greatest model is Roman law, seems incomprehensible to the layman and therefore no expression of his sense of justice. Popular laws, like the Germanic, for example were crude, superstitious, illogical, in part silly, but they reflected quite specific inherited native customs and feeling.

But when law is no longer a tradition, as in our case, it can only be *commanded*, or forced; none of us has a traditional sense of justice any longer; therefore, we must content ourselves with *arbitrary laws*, which express the necessity of *having to have* a law. Then, the most logical law is the most acceptable, because it is the *most impartial*, even admitting that, in the relationship of crime and punishment, the smallest unit of measure is always set arbitrarily.

See FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN* 219 (1984).

Admittedly a civil law model that allows for local values to be incorporated into the law might be a means of bringing westward-leaning states into a frame of modern constitutionalism while not abandoning the cultural uniqueness of such nations.

Some neoliberals and neoconservatives see the spread of liberal government and democratic institutions as a part of an inexorable march of progress and freedom in much the same way Marxists saw a world revolution and the universal adaptation of their program as historically necessary. In fact, an inorganic legal system – i.e. one not grounded on a normative indigenous morality – will almost certainly be uprooted if political tides change. It is possible that if an imperialist nation is involved in the affairs of another long enough, some of the institutions that are able to adapt may survive. An example of this might be the liberal institutions in India that reflect Britain’s long involvement in that country. Of course, cultural interaction often causes crosspollination as witnessed by the fact the British still drink tea.

Kennan observes that even dictatorial regimes, if they are to survive, tend to reflect some aspects of the popular ethos (and conversely, democratic governments may embody some aspects of authoritarianism). See *THE CLOUD OF DANGER*, *supra* note 37, at 42.

be preferable to a radical or corrupt democracy.⁴⁴ Nor does democratic form guarantee peace – wars are more the result of human irrationality and the pursuits of perceived interest than they are the byproducts of governmental form.⁴⁵

The question of “who can be against the blessings of Western liberalism?” is in fact the wrong one to ask in an international context including in regard to issues of the rule of law. The proper question is not about the ideas themselves so much as it is as the ideological basis for actively disseminating them. The problem is that many policy thinkers in the United States have been seduced by an activist, historicist ideology, seduced because they have asserted their own beloved values into the template of globalist eschatology. To see the flaws with this kind of missionary adventurism, we need only fill in the blanks

44. On this point Kennan writes “There are forms of plebiscitary ‘democracy’ that may well prove less favorable to American interests than a wise and benevolent authoritarianism. There can be tyrannies of a majority as well as tyrannies of a minority, with the one hardly less odious than the other. Hitler came into power (albeit it under highly unusual circumstances) with an electoral mandate, and there is hardly a dictatorship of this age that would not claim the legitimacy of mass support.” Kennan, *supra* note 1, at 274. Regarding “tyrannies of a majority” in the United States, on the abuses of political minorities during the period of the Articles of Confederation by local majorities. WOOD, *supra* note 37, at 139–141, 152. On tyrannies of the majority generally, see VIERECK, *supra* note 38, at 40–41. It seems likely that some of the revolutions of the “Arab Spring” may yield illiberal fruit over the long run.

45. Regarding innate aggression in human beings, see Wilson *supra* note 40, at 99–20 and JOHN KEEGAN, *A HISTORY OF WARFARE* 81–84 (1993). War it seems is a part of the human condition and cannot be wished away via moral rationalism, pacifism, or utopian projects. It stems in part from the pursuit of interest, but despite the apparent rational and quasi-rational reasons for war, the real underlying cause is the fact that human beings are aggressive creatures that will kill within their own species. Edward O. Wilson regards ethnic identification to be perhaps the leading font of human aggressive irrationality.

There is a widespread neoliberal myth that democracies do not fight wars against each other and yet Hamas, Hezbollah, Iran, Iraq, Israel, Lebanon, and the United States all have democratic elements to their systems and do not shy away from war. Both the Union and the Confederacy of our Civil War were republics representative democracies – and yet they fought the bloodiest war in U.S. history. We should also note that the prehistories of “special relationship” allies like Britain were not as felicitous as our current relationship would suggest; we violently threw Britain out of their North American colonies after they had supported our interests during the French and Indian War and a few decades later they burned the White House, the Capitol Building and other Federal buildings in Washington, D.C. There is a similar cliché that famines do not occur in democracies. See, e.g., JEDEDIAH PURDY, *AFTER NATURE* 48–49 (2016).

In his Pulitzer Prize-winning *On Human Nature*, Wilson spends a whole chapter discussing innate human aggressiveness. Even peoples thought of as entirely peaceful are a single step away from acting on murderous blood lust. An example Wilson gives involves the Semai, a Malayan tribe that did not even have a word for “kill.” And yet during the Malayan war in the 1950s, it was widely noticed that members of this tribe had been unusually susceptible to “blood drunkenness” in combat. See Wilson, *supra* note 17, at 100–01. Likewise, we tend to think of modern Scandinavians and the Swiss as being peace-loving peoples. Even here, however, these perceptions are recent ones: many Scandinavians are the descendants of the Vikings, and the great Swedish king, Gustavus Adolphus has a good claim to being one of the fathers of modern warfare. Likewise, for centuries, Switzerland was famous for producing mercenaries.

with another set of values, or in other words, to reverse the scenario in regard to the export of values while keeping the eschatological zeal and the desire to spread them.⁴⁶

Imagine for instance if one day the forces of a powerful foreign nation came to the shores of a greatly diminished United States and said: “Your civic values are recent in pedigree and wastefully favor the individual over the group, the community, the nation, and the one true faith. The values of Islam are tested and have existed hundreds of years longer than your problematic modern take on humanism and liberalism. Moreover our values are taken directly from the word of God and are therefore universally true in a way that the laws of man can never be. Therefore, for your own sake – for your eternal salvation and temporal happiness – we advocate and will try to enforce Sharia law over you. Since no good person can possibly be against the universal will and benevolence of God, you should therefore relinquish your foolish and self-indulgent provincialism in favor of Islam. In our efforts to bring enlightenment to your country we have had to kill many of thousands of your men, women and children. We sincerely apologize for this, but try to ignore such ‘collateral damage,’ because a better world is waiting that will easily justify such losses.”

Would we accept this line of argument? If not then what is our counterargument for the current situation in which we are the ones attempting to impose our values on others? Is it “our values are better for you than your own values”? The only argument we could make to justify a rule of law position is to say that our values are superior to those of everybody else. Since everybody believes their own values to be superior, then our argument stripped of its false modesty must be: “yes, but our values really *are* better than yours. They are universal and at a certain level of historical development and cultural sophistication you too may come to appreciate this fact. You just need a little help to see the truth.” The attitude implicit in this position is spot-on with the arrogance and sense of entitlement that has characterized American foreign policy in recent years and is not as far off from the hypothetical of the Islamic imperialist as we might like to think.⁴⁷ The

46. See generally BLACK MASS, *supra* note 8 (on eschatology).

47. One problem with eschatological programs is that they tend to end up resembling that which they despise. The punishing God of the Puritans is very much like an inverted version of Satan. As Bertrand Russell writes: “it is pleasant to think ourselves as virtuous, our enemies wicked.” The fact of the matter is probably less clear than most of us would like to admit. See BERTRAND RUSSELL, *WHY I AM NOT A CHRISTIAN* 50 (New York: Simon & Schuster) (1957);

hypothetical also underscores the issue of the violation of national sovereignty from the perspective of the weaker country.

Nobody except for sociopaths and malicious neurotics act publicly believing they are doing evil, and policies and actions both good and bad are usually cast in terms of progress, enlightenment, necessity, historical inevitability, morality, and the word of God. John Brown, Timothy McVeigh, Ted Kaczynski, and Adolph Hitler were all moral extremists who took their beliefs to the point of murderous irrationality. They acted upon these beliefs to an extent and degree far beyond that which most ordinary people would go. In each instance none professed to have acted out of a motivation of self-consciously furthering an evil purpose. All couched their position in terms of doing a greater good, and today we are more inclined to forgive John Brown to an extent because we agree with the substance of his values if not with his methods. But this problematic secular saint precipitated an event which helped trigger a war in which perhaps of 700,000 or more people were killed with millions of others maimed.⁴⁸ From the examples of these moral extremists, we can see that being a “person of principle” is only as good as the principles, methods, and rapidity and degree of change being embraced. Many of the worse acts are done by fairly ordinary people under the influence of zealots, under banners of a greater good; the only thing more dangerous than a person willing to act violently on strongly-held beliefs is the same person with magnetism, eloquence and charisma who can inspire others to follow.⁴⁹

FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 24–24 (1996) (noting that one’s enemies are a reflection of oneself when describing the noble ethos).

48. We can see from the case of John Brown and the American Civil War that the unleashing of passions forcing quick change generally results in instability and eventually violence. The French and Russian revolutions may serve as other examples. This suggests that a more modest gradualist approach toward progressive change and reform is often preferable to quick radical change. On conservatism as moderate gradualism, see VIERECK, *supra* note 38, at 38. On John Brown’s raid, see generally EDWARD J. RENEHAN, JR., *THE SECRET SIX: THE TRUE TALE OF THE MEN WHO CONSPIRED WITH JOHN BROWN* PAPERBACK (University of South Carolina Press) (1997). Regarding the Civil War, see generally DONALD, *supra* note 27; MCPHERSON, *supra* note 27. Recent scholarship suggests that the number of killed and mortally wounded in the American Civil War may be considerably higher than the approximately 620,000 traditionally given (the rounded-up number is now given at 700,00 or more). See Rachel Cooker, *Historian Revises Estimate Of Civil War Dead*, DISCOVER-E (Sept. 21, 2011), <https://discover.binghamton.edu/news/civilwar-3826.html>; David Hacker, *Recounting the Dead*, N.Y. TIMES (Sept. 20, 2011), <https://opinionator.blogs.nytimes.com/2011/09/20/recounting-the-dead/#more-105317>. As regards moral extremists, it would seem to be difficult to tell whether a psychopath or malicious paranoid is merely justifying delusional acts in moral terms, or whether they really believe that they are acting toward such ends in earnest as a part of their delusion.

49. Justice Holmes believes that certitude of belief and zeal are themselves primary causes of war. Henry Cohen, *Oliver Wendell Holmes Jr.: Life and Philosophy*, 51 FED. LAW. 22, 23

Given all of this as well as the Postwar record of the ideas of George Marshall and George Kennan, I would argue that moderate realism actually produces better moral results and is less problematic than righteous, ideologically-inspired policy more specifically calculated toward moral ends. The worst acts of mankind are generally justified at the time in terms of righteous ideology or moral necessity, and in hindsight, if successful, as forwarding the cause of the good. American ventures in Vietnam, and Iraq were all justified in ideological or moral terms. By contrast the U.S. intervention in the Second World War, the Marshall Plan, the Berlin Airlift, and the rebuilding of Japan were first and foremost realistic policy measures.⁵⁰ It is therefore preferable to implement moderate, interest-based policies by thoughtful people than moralism via ideologies.

(2004) (“Certitude, Holmes believed, leads to war and invariably results in the destruction of the fragile social order.”).

50. Neoconservatives have sometimes pointed to the rebuilding of Germany and Japan as paragon examples of nation building, the establishment of the rule of law, and democracy. Although a superficially impressive argument, the analogy breaks down immediately under historical analysis and it would be a grave mistake to see either instance as a model for nation building in Iraq or Afghanistan. Germany was an industrial nation that had long been at the heart of the Western tradition. Likewise, from the 1860s onward, Japan had been a Westward-looking nation based on a communitarian tradition. Both countries had been utterly devastated by the largest war in human history and merely needed to be rebuilt under new management. By contrast, neither Iraq nor Afghanistan has ever been a part of the modern Western tradition, and both are deeply divided on bases of tribe and sectarian splits based on ethnicity and unreformed religion. The Afghans are a clannish people who have never been permanently subdued by outsiders.

It is true that after World War Two, Douglas MacArthur brought in American legal scholars to write the Japanese postwar constitution (including Beate Gordon) that gave women the franchise and freed a wide range of political prisoners. But these idealistic measures along with the Marshall Plan were also the embodiment of realism, thus illustrating the liberal results of sensible interest-oriented policy.

We must also never underestimate the influence of personal elements in policy and the strutting, theatrical, and egocentric MacArthur as a warrior aristocrat seemed to resonate with the Japanese as a sort of latter-day Shogun. As things turned out, they learned the lesson of liberal capitalism all-too well; by the 1970s their durable goods and technological products were generally better than those produced by the United States. There is a now old joke stating that if the Germans and Japanese had won the Second World War, we would all be driving German and Japanese cars. On MacArthur and the Post-World War II Japanese Constitution, see WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR, 1880-1964* 498–02, 528, 695 (1978); see also Margalit Fox, *Beate Gordon, Long Un-sung Heroine of Japanese Women’s Rights, Dies at 89*, N.Y. TIMES (Jan. 1, 2013), <http://www.nytimes.com/2013/01/02/world/asia/beate-gordon-feminist-heroine-in-japan-dies-at-89.html>.

For a brief example of the problematic nature of foreign policy based on moral considerations, see the account of the *idées napoléonnes* – the grandiose plan of Louis-Napoleon to spread liberal enlightenment across what at least one historian characterized as a “United States of Europe.” See GEOFFREY WARD, *THE FRANCO-PRUSSIAN WAR 9–12* (Cambridge University Press) (2003). The failure of this policy (to say nothing of French adventures in Mexico during his reign) might be contrasted to the stark realpolitik of his opponent, Otto von Bismarck in unifying the German states, defeating France, and taking the Alsace-Lorraine regions.

Moral justificationism is also a problem with the globalist rule of law ideology. As a rule of thumb, we should always be wary of invaders and others marching under standards of progress and the claim that the invasion is for the good of the invaded. Hand-in-hand with this is the danger implicit in the overuse of our own ideological holy words like “freedom,” “liberty,” “democracy,” “women’s rights,” and “human rights.” This is because they can easily become weasel words to justify less high-minded motives or obscure the real bases for policy. When the Soviets invaded Hungary in 1956 and Czechoslovakia in 1968, they came with brave slogans of “brotherhood and socialism,” and for the most part were not believed. Though our system is far better than the former USSR, we cannot be shocked when Iraqis or Afghans look at us with contempt when we justify the deaths of tens or even hundreds of thousands of their countrymen and women in newspeak terms and technical expression such as “collateral damage” or under rationalizations of democracy, women’s rights, and the rule of law; the dead and maimed of war don’t care a damn for the high-sounding words of occupiers and outsiders. Traditional imperialists like the Romans and Zulus had the forthrightness and honesty to say “we are here; surrender or die.” In such cases, the victims did not suffer the additional indignity of having their deaths and losses justified by high-sounding principles and national myths of temporal or eternal salvation.⁵¹

51. On the point of moral justificationism by democracies, John Gray writes:

It would be comforting to think that the perversion of politics by repressed religion only occurs in totalitarian regimes. Yet democracies have displayed very similar tendencies. Even more than despotic regimes, liberal states have tended to see the violence they have inflicted as morally admirable. Tzvetan Todorov, the French historian who grew up in Stalinist Bulgaria and has written illuminatingly on the Nazi and Soviet concentration camps, has noted this tendency in the context of the bombing of Hiroshima and Nagasaki: Atomic bombs killed fewer people than the famine in the Ukraine, fewer than the Nazis slaughtered in the Ukraine and Poland. But what the bombs and slaughters have in common is that their perpetrators all thought they were but a means to achieve a good. However, the bombs have another purpose: they are a source of pride to those who made and dropped them . . . whereas totalitarian crimes, even if they were considered by their perpetrators to be useful and even praiseworthy political acts, were kept secret . . . Both the Soviet and the Nazi leadership knew that the world would damn them because they knew exactly what they had done. They were not wrong, because as soon as their crimes were revealed they were treated as the emblems of absolute evil. Things are quite different in the case of the atomic bombs, and for that reason even if the crime is less grave, the moral mistake of the people who killed in the name of democracy is greater.

BLACK MASS, *supra* note 8, at 190–91. Gray goes on to write: “Liberal democracies are not only willing to commit acts that when perpetrated by totalitarian regimes are condemned as signs of barbarism – they are ready to praise them as heroic.” *Id.*

Gray’s and Todorov’s points are powerful and there is more than a grain of truth to them, but here a distinction must be made: the exterminations conducted by the Nazis and Soviets during the Second World War were committed in the name of ideology whereas the allied bomb-

III. THE BROADER PICTURE: MODERATE REALISM VERSUS ESCHATOLOGY

My country is the world and my religion is to do good.⁵²

—Thomas Paine

ing of Hamburg, Dresden, Tokyo, Hiroshima and Nagasaki were utilitarian policy measures designed to win the war, or, in the case of the latter two, arguably to end it more quickly and without an invasion of Japan. Here too a distinction must be made in regard to U.S. policy during and since World War Two: the bombings by the United States in the Second World War, no matter how horrible, were intended as measures to stop regimes that had attacked or declared war on it and were an ongoing threat. Although allied bombing was sometimes justified afterwards as a tool that brought democracy to postwar Germany and Japan, its initial purpose was to win what was regarded by many at the time to be an existential conflict. Likewise such attacks may have been justified propagandistically at the time in terms of revenge, but it is doubtful that policy makers and war managers at the highest levels saw them in such terms. By contrast, the bombing of North Vietnam, Iraq, Afghanistan (after the initial punitive attacks by the U.S.), Libya, and Syria were in fact justified in moral and ideological terms of the sort that Grays speaks. *Id.* at 190–91.

In Errol Morris's 2003 documentary film *THE FOG OF WAR* (Sony Pictures Classics 2003), former Secretary of Defense, Robert McNamara notes "in that single night we burned to death 100,000 Japanese civilians in Tokyo – men, women, and children." "[General Curtis] LeMay said 'if we lost the war, we'd all have been prosecuted as war criminals.' And I think he's right. He and I'd say I we're behaving as war criminals. LeMay recognized that what he was doing would be thought immoral if his side had lost. But what makes it immoral if you lose and not immoral if you win?" This is a difficult question with perhaps no adequate answer; one answer, unfortunately, is that the ends of a war are generally used by the victors to justify the means achieving them. Justification in terms of necessity would seem to be a better and more honest (or at least less delusional) argument than either morality or ideology.

Americans like to think of themselves as not having an ideology, that a belief in unregulated markets, deregulated business, and democracy somehow suggests an absence of ideology. This would not seem to be the case. To be a patriotic American means less a of a tie to blood lines and ethnicity or even nationalism strictly speaking, but rather a commitment to certain ideas. Among these ideas are a belief in the enlightenment values embracing equality and freedom (which are often at odds with each other as are security and freedom), and an appreciation for the rights of the individual generally. In this sense, being "patriotic" in the United States has historically been very different from the "blood and soil" nationalism of Bismarck's Germany, or the commitment Russians may feel toward the Motherland or the ethnic identity and cultural Japanese and Israelis feel toward their national communities. It is at its best a patriotic commitment to moderate values and reason. Where our outlook has bifurcated historically is in regard to the Lockean ideals of the Declaration and the Bill of Rights, and the realist structure of the Constitution that separates power and provides checks and balances. Although there has always been a tension between these outlooks – and both have dominated at one time or another – they have often served us well through a sense of balance of realism and idealism.

On a side note on earlier empires, the Romans believed that they were in fact bringing a better system to benighted parts of the world – and in many cases they were probably right – but they were fairly non-ideological about it. When they went into regions in which impressive civilizations were already established, they tended to get into trouble (such as in what is now Iraq).

52. The idea of mission goes back far in American history and is the font from which the idealistic side of U.S. international relations issues springs. The *universal* rights of man expounded on by Thomas Jefferson, Thomas Paine, the *Declaration of Independence*, and *Common Sense* are enlightenment manifestations of this ideology. In modern times, it was President Wilson who advocated proselytizing for democracy abroad and more recently by the neoconservative perspective with its unlikely pedigree of Trotskyite adventurism, the American anti-Stalinist Left, and the University of Chicago's Leo Strauss. See *BLACK MASS*, *supra* note 8, at 31–34, 82, 100, 117–28, 131, 133–40, 143–45, 160–62, 196, 205. Among conservatives and liberals,

America does not go abroad in search of monsters to destroy. She is the well-wisher to freedom and independence of all. She is the champion and vindicator only of her own.⁵³

—John Quincy Adams

To understand political power aright, and derive it from its origin, we must first consider what estate all men are naturally in and that state is, a perfect state of freedom.⁵⁴

—John Locke

Freedom is not, as John Locke imagined, a primordial human condition: where it exists it is the result of generations of institution building. Yet in America an idea of natural freedom became the basis of a civil religion that claimed universal authority.⁵⁵

—John Gray

Historically the real split in American politics and especially in foreign policy has not been between liberal and conservative but between the related designations of realism and idealism.⁵⁶ The Lock-

humanitarian interventionism has been supported by such strange bedfellows as Bill Clinton, Tony Blair, George W. Bush, Barack Obama, Samantha Power, and Susan Rice.

53. John Quincy Adams, Speech to the United States House Of Representatives On Foreign Policy (July 4, 1821).

54. JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* 9 (1986). Of course Locke bases his theory of a natural state of mankind on a biblical theological model, and not on an anthropological/sociobiological understanding of human beings as a species. Science tells us that human beings are hunter-gatherers and that there was no singular “state of nature,” that we evolved from similar creatures presumably with similar behaviors.

55. See BLACK MASS, *supra* note 8, at 110–11. Here Gray also notes that:

Locke’s political theory served Americans well in the war of independence. It has been less useful when applied to foreign policy where it promotes the belief that freedom is a condition that comes about simply through the removal of tyranny. Despite its universal claims, Locke’s thought is a distillation of beliefs and values that only make sense in particular historical conditions.

Id.

56. On the idea that American policy breaks down along lines of elite versus populist, see WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* 29 (1986). My own view is that the most successful periods of domestic history have been characterized by aristocratic/plebian cooperation (and that the greatest American presidents, other than Lincoln, have been high-minded patricians). To illustrate the point of a realist/idealist split in policy (as opposed to a conservative/liberal or Republican/Democratic divide) consider that George F. Kennan worked for Democratic administrations and Brent Scowcroft for Republican administrations, and yet one cannot help think that they would have agreed on most approaches to policy. Likewise, George W. Bush was a very conservative Republican where President Obama is thought by some to be a liberal Democrat, and yet one would be hard pressed to find any major substantive differences between their approaches to foreign affairs or between their actual policies.

ean/Jeffersonian “friends of liberty” component to our national outlook marked the beginning of the idealist – even utopian – strain while the Hamiltonian/Federalist “friends of order” position was the font of the realistic. The genius of our Constitution is in the amalgam of the realistic balancing of powers with a bill of Lockean rights largely drawn from real events.⁵⁷ It is a document that accommodates human imperfection while appealing to high ideals.

As we have seen, the discussion on the rule of law then is actually a single front or beachhead in a much broader debate between realism and mission idealism, between a critical, historical approach to policy and an ideology of liberal eschatology that may be a cloak for an aggressive form of unregulated globalist capitalism (“eschatology” is an overarching term for a range of religions and ideologies that believe human history is drawing to an end, to a post-historical endgame, each

57. The Antifederalist/Republican outlook of the Early Republic incorporated – what became the Jeffersonian Republican/Antifederalist outlook incorporated the idealism of Locke and the seventeenth-century English Whigs. Their perspective is reflected in the preamble of the Declaration of Independence and is enshrined in the Bill of Rights of the United States Constitution. The Federalist outlook is the realist perspective in the tradition of Hume and Montesquieu and is apparent in the separation of powers prescribed in the Constitution. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 33–54 (1992). Regarding the Federalist outlook as being anti-utopian, see BLACK MASS, *supra* note 8, at 111. Traditional constitutional conservatives like Edmund Burke and Peter Viereck see conservatism as moderate, gradualistic, realism.

Foreign policy realism took the form of relative nonalignment in the 1790s. Today moderate realism would avoid the extremes of both imperialism and autarchy and would advocate for a more limited form of internationalism in which policy would be based on sphere of influence internationalism. President Washington admonished the New Republic to take a course that was cautious and inward-looking and to steer clear of “foreign entanglements.” Such a course might have been sensible for the fledgling nation but would be impossible for a modern world power that wishes to remain vital. During the course of the seventeenth-century, the previously outward-looking Spain turned inward from an over-extended empire and fell into decrepitude. Of course one of the best illustrations of the perils of U.S. isolationism in the 1930s was the rise of fascism and Nazism in Europe, and Japanese military imperialism. This is not to say that the opposite extreme of our own imperialism or the *de facto* imperialism of globalization is desirable either. On the problems caused by the isolationism and related attitudes in the 1930s, see GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900-1950* 77–84 (1985).

Although Franklin certainly proved to be a realist as a diplomat in Paris during the Revolution, it is Alexander Hamilton who (as with so many other areas to include industry, the fiscal-military state, and the centralization of government), proved to be the prophet of foreign policy realism. Regarding the truths and myths of Hamilton as the grandfather of American foreign policy realism, see CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 6–9 (1964). Rossiter gives a number of quotes by Hamilton that sound a great deal like a modern moderate realist. See also ALEXANDER HAMILTON, *SELECTED WRITINGS*, *supra* note 35, at 404–07. John Quincy Adams – a failed president, but one of our greatest Secretaries of State – is another early American proponent of realism, and perhaps more than anybody help define our sphere of influence as the primary author of the Monroe Doctrine. See ROBERT V. REMINI, *JOHN QUINCY ADAMS* 50 (2002); MARY W. M. HARGREAVES, *THE PRESIDENCY OF JOHN QUINCY ADAMS* 128–29 (1985); J. REUBEN CLARK, *MEMORANDA ON THE MONROE DOCTRINE* 79–103 (1930).

believing that their specific model is the correct one.⁵⁸ Throughout history there have been numerous eschatological programs from medieval millennialism to seventeenth-century Puritanism to Marxism to National Socialism to flat-earth globalization to radical Islamism).

As John Gray observes, despite their conspicuous but ultimately superficial differences, all eschatology has several things in common: they all believe in a historicist (historical deterministic) model of the world, and to date all have been wrong.⁵⁹ We may destroy ourselves, but it will be because of our own human limitations and irrationality rather than deterministic “laws” of history.⁶⁰ Although the neoliberal and neoconservative ideologies behind many of our current and recent policies have roots that are longer and more interesting than one might first suspect (ironically in Lockean liberalism and Trotskyism respectively), as a basis for policy they only became influential toward the end of the Cold War.⁶¹

The victory of the West in the Cold war was the result of a foreign policy based on a sensible reading of history, moderate realism and a vision toward goals of long-term national interests. It was in large measure the result of George Kennan’s ideas of containment, a deep and intimate (as opposed to a formal and remote) understanding of Russian history and its national psychology and its ideological overlay. It was in part due to the avoidance of rigid historical narratives or ideology such as that embraced by the Soviet Union – and now by Radical Islam – and to think otherwise is to dangerously misread the lessons of 1945-1991 and those of our own time.

This is exactly what has happened. Far from discrediting deterministic historical narratives, the end of the Cold War actually seems to have inspired the West with heady pernicious myths of its own; if Soviet-style Marxism was not the correct historical model, then it must be one embracing the opposite: unrestricted free markets, deregulated domestic economies, the active spreading of democracy, liberal sensibilities, and the rule of law. Consequently from the 1980s onward, United States policy has been captivated by such eschatological pro-

58. See generally BLACK MASS, *supra* note 8.

59. See *id.*

60. See generally THE POVERTY OF HISTORICISM, *supra* note 41.

61. For a history of neoconservatism, see generally JAMES MANN, *THE RISE OF THE VULCANS* (New York: Penguin) (2004). See also BLACK MASS, *supra* note 8, at 31, 82, 100, 117–28, 131, 133–40, 143–45, 160–62, 195, 205. For a chart following the history and pedigree of neoconservatism, see Peter Hoey & Marie Hoey, *The Neocons: An Illustrated Progression*, WASH. POST, Feb. 3, 2008. See generally IRWIN M. STELZER, *A NEOCON READER* (2004).

grams as neoliberalism, neoconservatism, notions of American exceptionalism and the free market and deregulatory ideas behind the theories subsumed under the catchall term of globalization. We should make no mistake about it: these ideas and programs are every bit as much of an ideologically-based historical narrative as Marxism, Puritanism, or Radical Islamism. Rule of law initiative can be understood as the legal and judicial manifestation of this ideology, it is globalization in a judicial robe.

As far as the United States is concerned, in recent years an overly interventionist ideology and related economic outlook combined with our vast military capabilities has resulted in a hegemonic role that is as undesirable as it is unsustainable and serves to enrich a new global elite at the expense of U.S. economic interests and ultimately our national security. In this sense the rule of law may be used as a conveniently high-minded cover for cynical purposes.⁶²

62. A primary factor behind the economic success of the magnificent American mid-twentieth-century (roughly 1945-1970) was the fact that the U.S. working class was a part of the middle class. With a huge tax base created in part by blue collar workers whose disposable income allowed them to afford the durable goods they produced, a progressive tax schedule, our economy flourished under an ethos embracing the production of high-quality manufactured goods. This of course was aided by the fact that the U.S. had few international competitors immediately following the Second World War. After the war, tariffs were lifted, and over the decades that followed an ideology of free trade arose in the country.

In recent years, with both political parties largely controlled by special interest and subsequently embracing an increasingly extreme ideology of unrestricted free trade, multilateral trade agreements, and deregulation, the working middle class has been largely decimated. According to Donald L. Barlett and James B. Steele, in 1950 about 30% of all jobs in the United States were in manufacturing. This had dropped to 27% by 1960, 23% by 1970, 18% by 1980, 15% by 1990, and 11% by 2000. The past 30 years or so has also seen the rise of a plutocracy of investment banks that have come to largely control our economy are experiencing year after year of record profits while the rest of the country continues to do poorly. See BARLETT & STEEL, *THE BETRAYAL OF THE AMERICAN DREAM* 268 (New York: Public Affairs) (2012).

A man with a high school degree in 1950 or 1960 could support a family with a recognizably middle class lifestyle with a well-paying job in construction or the steel or automobile industries. Rather than sustaining a healthy multi-tiered economy based on the diversified production of durable goods (as Germany has done), our current economic preoccupation is now on producing manufactured goods as cheaply as possible by outsourcing manufacturing to nations with low labor costs and often a convenient lack of labor and environmental laws. The result has been huge trade imbalances, and a continued decline in American manufacturing and well-paying blue collar jobs. If an American today does not get a college degree, or more likely an advanced degree (and one in a lucrative field, like investment finance), he or she will likely get a low-paying service sector job. If the job is in retail, he or she will likely be selling cheap products made in places like India, China, Vietnam, and Indonesia. If labor costs continue to flatten worldwide, eventually American workers will eventually command salaries roughly on par with their counterparts in developing counties.

With sensible re-regulation, an economic policy embracing small and medium-sized companies and the protection of certain markets, some of our Postwar economic success — or more — can be maintained. If not, then the present economic malaise will likely persist and will be the first step in a steady decline to a second rate national status. Corporate bigness is a necessary evil in some sectors such as the automobile, aerospace, and certain defense industries. Likewise, a

History as a basis for policy must involve an understanding of regions that is intimate rather than formalistic. There are many American doctors of Islamic History who know the timelines and events of the Near East and Southwest Asia, but have little idea of its true character, needs, and desires. The relevant question is: how many of these scholars have actually lived with a typical family in that region for an extended period? Our polls tell us what people in various parts of the world believe what we want to hear, but what do they say to each other when our pollsters, officials, and soldiers leave the room? The fact that we are attempting to impose our values on these regions casts doubt on the depth of our intimate understanding of them. At the very least it suggests that we do not respect or take them or their beliefs seriously, although we may naively or patronizingly say that we are here to save them from themselves and their backward views. Rule of law initiatives have also adapted their view toward a greater understanding of local culture and beliefs.

The more subtle and perhaps insidious manifestation of the rule of law is the “second generation” approach whose attempts to subvert local views is reminiscent of Khrushchev’s attempts to export communism during the 1960s by adapting it to local flavor. Christianity has also proved versatile under this *modus operandi*.⁶³ What Ms. Kleinfeld

global approach is desirable in regard to world climate issues, international crime, and certain fungible agricultural commodities like flour and corn, and multilateral responses to violations of territorial sovereignty. Beyond this, limiting businesses to less-than “too big to fail” level, regulating Wall Street and businesses generally to act in the public interest, national economic sustainability, and a reconstitution of the American middle class should be our goals. Without a vital middle to sustain its economy, the idea of a prosperous United States becomes an impractical proposition.

Instead, what is emerging is an international power elite, a concentrated supranational class made up of financiers, multinational corporations, big energy, and military industries. Our world is increasingly one in which these big moneyed interests with increasingly minimal ties to specific countries will continue to reap the benefits of flattening labor markets, lowering trade restrictions and tariffs. The problem is that since this money will not trickle down much beyond high-end services, there will not be a viable middle class to buy products on the scale to sustain large industries. The pathway we are on is inherently unsustainable. On the new international power elite, see generally BARLETT & STEELE, *supra*; CHRYSTIA FREELAND, *PLUTOCRATS: THE RISE OF THE NEW GLOBAL SUPER-RICH AND THE FALL OF EVERYONE ELSE* (New York: Penguin) (2012); JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* (New York, New Press) (1998); see also Chrystia Freeland, *The Rise of the New Global Elite*, *THE ATLANTIC* (Jan./Feb. 2011), <https://www.theatlantic.com/magazine/archive/2011/01/the-rise-of-the-new-global-elite/308343/>; Robert Hunziker, *The New Transnational Elite*, *THE COUNTERPUNCH* (Aug. 7, 2012), <https://www.counterpunch.org/2012/08/07/the-new-transnational-elite/>; Joseph Stiglitz, *Inequality is Holding Back the Recovery*, *N.Y. TIMES* (Jan. 19, 2013), <https://opinionator.blogs.nytimes.com/2013/01/19/inequality-is-holding-back-the-recovery/>.

63. Regarding a discussion of the “second generation” rule of law, see KLEINFELD, *supra* note 4.

apparently fails to realize is what so many American policy makers over the past few decades have also missed: that there are some regions of the world whose people see us as alien by nature and who do not want what we have to offer. To such people, we will always be outsiders, intruders, and even infidels whose interests are fundamentally at odds with theirs and whose outlook and lifestyle is anathema to their beliefs, and a superficial understanding of their beliefs in order to subvert them is not an approach that is likely to win us many friends over the long term.⁶⁴ It is supremely ironic that in a time when the American people are more politically divided than at any time since our Civil War – a time when we cannot agree on the most fundamental of issues or even pass a national budget – some of us think that we can make people in distant regions with vastly different beliefs see things our way and agree to our principles.

Although trying to infiltrate a system by cleverly adapting programs to its cultural milieu is obviously a questionable practice, there may be a real question of whether or not something approximating modern liberal constitutionalism within a context of traditional law in nations that are also looking westward – Sharia law, for instance – may be possible in the near future. Noah Feldman addresses this question in his 2008 book *The Fall and Rise of Islamic States*.⁶⁵ When I first read about this idea it struck me as perhaps being an instance of

64. There is a widespread view that many of our current problems with Islamist terrorism grew out of the fact that we “abandoned” Afghanistan after the Soviet defeat there. This view – expressed prominently at the end of the film *CHARLIE WILSON’S WAR* (Universal Pictures, 2007) – is both misled and dangerous; the Mujahidin and their supporters were never friends of the United States; the U.S. was merely a convenient supplier of military hardware and coincidentally their enemy’s enemy. To think that, vastly diverging interests and outlooks aside, they would have warmed up to us if we had replaced the Soviets as uninvited would-be landlords or reformers, is delusional. To the Afghans Americans will always be outsiders, occupiers, and infidels and there is nothing we can do to change that fact or their perception of it.

The lesson here is a simple one: just because people take American money, technology, and weapons is no reason to assume that they are U.S. allies much less friends. The fact is that there is deep chasm of differences in outlook between the clannish, unreformed fundamentalist religion of the Afghans and the modern, universalist, Western sensibilities of the United States and its allies. They see us as fundamentally alien, as the primary enemy of everything they hold dear, and we will never be able to even realistically appraise the situation there if we do not realize this.

American issues related to the Islamic Near East are complex and longstanding and find their origins in part in the U.S.-supported overthrow of the democratically-elected Mosaddegh government in Iran on August 19, 1953, our support of Israel, and our historical support of authoritarian leaders in the region for geopolitical and economic gain and the securing of vital resources like oil. Skeptics of U.S. policy have frequently suggested that if it were not for oil and Israel, we would not even be in this region.

65. See generally NOAH FELDMAN, *THE RISE AND FALL OF THE ISLAMIC STATE* (Princeton University Press) (2008).

cherry-picking ideas found in the *Koran* and in Sharia law and matching them with similar concepts in modern liberalism as an unconscious exercise to shore up wishful thinking. I now think that this is an open question and that in some Westward-looking Muslim nations that are fairly consolidated and where there are fewer ethnic or sectarian minorities than in other Islamic states. Here such an adaptation or synthesis may be a possibility, but again, it would have to be a voluntary synthesis initiated from within perhaps as a part or result of an Islamic reformation, and Western policymakers should tread lightly. The idea of amalgamating modern constitutionalism and non-reformed religion seem far less likely in places like Afghanistan and Tunisia, especially in the near future. In any case, the choice to adopt or amalgamate or incorporate elements of a foreign system should be up to the people who practice it and not outsiders.

The larger point here is that the intellectual backdrop of modern American idealism, globalization, is a cliché – a bubble – made believable by its general acceptance and the widespread belief that it is somehow the product of inevitable historical laws rather than the reality that human decisions can be rescinded and modified in light of experience and perceptions of national interest.⁶⁶ It is to the current generation of intellectuals and policy thinkers what Marxism was to the radicals of a century ago: an uncritical belief, an intellectual opiate. The difference is that where most Americans of 1915 or 1920 were too realistic to accept such un-self-critical utopian dogma, most Americans today either believe what is fed to them or else are so dazzled by the technological trappings of a shrinking world to doubt what

66. As Tolstoy writes in *Anna Karenina* that “[t]here are no conditions of life to which a man cannot get accustomed, especially if he sees them accepted by everyone around them.” JUDT, *supra* note 36, at 12. Judt, in agreement with Popper notes that history is driven by human decisions and folly rather than by deterministic laws of progress or a vitalistic evolution of a rational Zeitgeist. He writes:

We have been swept up into a new master narrative of “integrated global capitalism,” economic growth and indefinite productivity gains. Like earlier narratives of endless improvement, the story of globalization combines an evaluative mantra (“growth is good”) with the presumption of inevitability globalization is with us to stay, a natural process rather than a human choice. The ineluctable dynamic of globalization has become the illusion of the age.

JUDT, *supra* note 36, at 193.

In other words, the uncritical, followers of globalization are worse than mere conformist followers of the herd, they are historicists who believe that the trends they believe in are beyond any human capacity to oppose. There are admittedly a few areas that require a global approach out of practical necessity. But even this comes out of a realization that a united world approach is the only realistic means of address individual problems and areas of problems of a global nature, and not the result of historical necessity.

seems to be parallel social and economic developments.⁶⁷ There are no silver bullets in policy, no simple programs of moral rationalism that will solve the world's problems or improve human nature. Ironically globalization appeals to both idealists and pragmatic, albeit short-sighted, businessmen and women. Also ironic is the degree to which the ideas of liberal idealists and cynical business types have cross pollinated in justification of globalist policies.

A third elephant in the room regarding discussions of the rule of law is the *huge* economic interests that would benefit from it, especially in respect to concerns of patents and trademarks (for instance) and whose design seems to be to lay the legal groundwork for multinational corporations. I will not discuss these issues here at length, but one can only wonder whether the economic or moral aspect is dominant in driving the push for law and order around the world. Although there are many good people whose love of humanity earnestly points them into activities related to the rule of law abroad – and from what I infer from her book, I believe Rachel Kleinfeld and Thomas Carothers are this sort of person – I cannot help but think that the larger financial and business-oriented currents of this trend are cynical, powerful, and increasingly stateless business entities. As a historian I realize that nothing happens for a single reason and that the stated reasons for policy are often not the real ones. The simple fact is that businesses cannot thrive where there is no order, and they can make more money where the laws are geared or leveraged in their favor. More and more the rule of law looks like an effort of efforts to establish toeholds for the globalist exploitation of poor countries by an emerging international power elite.⁶⁸ The rule of law has more to do with neoliberal economics than it does with progressive values.

67. Even so staunch and respected a realist as Brent Scowcroft appears to have conceded the tendency toward globalization. See BRZEZINSKY, IGNATIUS & SCOWCROFT, *supra* note 11, at 14, 26–27, 32–33, 220, 227–29. General Scowcroft believes – quite correctly – that certain environmental and world peace issues will require a global approach. More surprising is his belief that the role of the state is diminishing and that the United States will need to adapt to this reality. My own view is that although there are trends toward the disbursal of power, the death of the nation state has been greatly exaggerated and that it is still the best way to govern consolidated regions of the world. General Scowcroft does not seem to accept the idea of globalization whole-cloth, but sees the world as transforming from one of hierarchal “hard” power structures to one that is made up of a combination of hard and “soft” power (p.p. 32-33). It is conceivable that while Scowcroft believes in realistic means to achieve policy goals, his larger vision is more amenable to a broader internationalist outlook than older realists like Kennan.

68. See *supra* note 62; See generally BARLETT & STEELE, *supra* note 62; CHRYSIA FREELAND, PLUTOCRATS (2012); Chrystia Freeland, *The Rise of the New Global Elite*, THE ATLANTIC (2011), <https://www.theatlantic.com/magazine/archive/2011/01/the-rise-of-the-new-global-elite/>

When idealistic advocates of globalization embrace the rule of law citing economic development, it is reminiscent of liberals a decade ago who were coopted by the administration of George W. Bush into supporting the invasion of Iraq by citing human rights concerns, or how advisors in the Obama Administration justified the 2011 NATO air campaign in Libya in terms of humanitarian intervention in order to prevent an impending “genocide.” The primary push behind spreading the rule of law abroad is probably economic, but there are also both cynical and earnest egotistical humanitarian elements as well. As Kennan writes:

The first of these relates to what I call the histrionics of moralism at the expense of its substance. By that I mean the projection of attitudes, poses and rhetoric that cause us to appear noble and altruistic in the mirror of our own vanity but lack substance when related to the realities of international life. It is a sad feature of the human predicament, in personal and in public life, that whenever one has the agreeable sensation of being impressively moral, one probably is not. What one does without self-consciousness or self-admiration, as a matter of duty or common decency, is apt to be closer to the real thing.⁶⁹

The policy moralism behind the rule of law is no doubt in part a cover for aggressive economic interests, and sometimes an egotistical attachment to genuine moral earnestness can be easily manipulated or at least utilized by individuals and organizations with less noble motives. One has to wonder if the idealists in these initiatives have become the unsuspecting dupes and puppets for a growing supranational plutocratic class. Here the liberal proponents of rule of law initiatives must ask: to what degree does the rule of law represent an effort to keep the world safe for plutocracy and non-state capitalism? Other than to say that in this instance the “histrionics of moralism” may in fact lead to notable substance – albeit negative – I will let Ambassador Kennan’s point stand on its own.

The bigger story here is the ascension of a neoliberal worldview as the basis for U.S. foreign affairs. We live in a time of bubbles and clichés, of careerist and conventionalists and groupthink. We live in a time that disdains mavericks like Kennan, and the few realists that persist in the academy are far from the halls of power. Those who

308343/; Robert Hunziker, *The New Transnational Elite*, COUNTERPUNCH (Aug. 7, 2012), <https://www.counterpunch.org/2012/08/07/the-new-transnational-elite/>.

69. KENNAN, *supra* note 1, at 277.

question the status quo of the “Washington Consensus” don’t get the job, and if they are already working in foreign relations, they won’t get the promotion to positions that influence policy.⁷⁰

CONCLUSION: THE OPEN HAND

The humanitarian, like the missionary, is often an irreducible enemy of the people he seeks to befriend, because he has not imagination enough to sympathize with their proper needs nor humility enough to respect them as if they were his own. Arrogance, fanaticism, meddlesomeness, and imperialism may then masquerade as philanthropy.

—George Santayana⁷¹

I should make it clear that I am wholly and emphatically rejecting any and all messianic concepts of America’s role in the world: rejecting, that is, the image of ourselves as teachers and redeemers to the rest of humanity, rejecting the illusions of unique and superior virtue on our part, the prattle about Manifest Destiny or the “American Century” – all those visions that have so richly commended themselves to Americans of all generations since, and even before, the foundation of our country. We are, for the love of God, only human beings, the descendants of human beings, the bearers, like our ancestors, of all the usual human frailties.

—George F. Kennan⁷²

We do not have the God-given right to shape every nation in our own image or as we choose.

—Robert S. McNamara⁷³

70. ANDREW J. BACEVICH, *AMERICA’S WAR FOR THE GREATER MIDDLE EAST* 363 (2016). For the policy consensus in the U.S. Government, see ANDREW BACEVICH, *WASHINGTON RULES* (2011).

71. Georges Santayana quoted by GRAY *supra* note 8, at 161. On a similar note, Frank Costigliola quotes Kennan saying “it is very, very difficult for outsiders to come into a situation and to do good.” Frank Costigliola, *Is this George Kennan?*, N.Y. REV. OF BOOKS, (2011), <http://www.nybooks.com/articles/2011/12/08/is-this-george-kennan/>.

72. *AROUND THE CRAGGED HILL*, *supra* note 37, at 182–83. Kennan observes “[t]he tendency to see ourselves as the center of political enlightenment and as teaches to the rest of the world strikes me as un-thought-through, vainglorious and undesirable.” See Costigliola, *supra* note 71.

73. ROBERT S. MCNAMARA, *IN RETROSPECT* 323 (1995).

What then is to be done? Any assertion that the larger question here is indicative of an either/or game in which the United States must choose between globalization and isolationism, hegemony and marginalization, and quasi-imperialist internationalism or autarchy in fact presents a false set of choices. As regards the rule of law, along with so many other areas of our policy abroad, I would say that the truth lies somewhere in between these extremes, in a more limited, sensible, and sustainable form of internationalism. This would allow us to avoid both isolationism and the hegemonic overreach that characterizes the current state of affairs of American foreign policy. Such a policy reorientation would also have the practical effect of waiting out of Radical Islam and allowing its revolutionary, eschatological elements to burn out on their own, as they did with American puritanism, Soviet Marxist-Leninism, and now among the young people in the Iranian birthplace of the Islamic Revolution.⁷⁴ We should never forget that it was heavy-handed interference over the years that has resulted in or contributed to so many of our problems in the Near East. This sort of policy outlook would have the added benefit of allowing the United States to refocus its attention on great state geopolitics.

74. In *Black Mass*, John Gray makes a powerful argument that ideologies based on eschatology — the belief that human civilization is heading toward a post-historical endgame — have made a powerful resurgence in recent years and include neoliberalism, neoconservatism, and radical Islamism. This said, such revolutionary zeal tends to burn itself out over a period of a few generations if not given fuel from external sources. This was the case with American puritanism, Marxist-Leninist socialism, and any number of millennialist religious sects. Interestingly, all such programs to date have also been wrong in their predictions.

Islamic extremism, with its terrorist networks and regional appeal, present a formidable threat to our influence and values in many parts of the world. Our engagement with this dangerous phenomenon has, in my opinion, been excessively confrontational and destabilizing. A deliberate but watchful disengagement from most of these dangerous Islamic hot spots would, I believe, serve us better than our recent policies of humanitarian intervention, counterinsurgency, and nation building. Just as our previous Cold War strategies of containment and détente hastened the collapse of Marxist-Leninism under its own weight and inefficiencies, contradictions, and unsustainable historicist ideology, so a policy of regional disengagement isolating Jihadi Islamists would result in their eventual implosion and self-destruction (admittedly, Islam is a diverse phenomenon with many faces). We have a recent example of such a development in the growing dissatisfaction shown among the young people of Iran, the birthplace of the Islamic revolution. In addition, a program of gradual but deliberate disengagement from the “Great Game” in south and central Asia would reduce considerably unnecessary public waste and sacrifice in a venture that has done little more than exacerbate conflict with regional powers (e.g. China and Russia). The down side of such a realist prescription would involve the disposition of long-term friends and alliances (e.g. Israel, Ethiopia, the Kurds). Obviously such additional problems would demand considerable attention.

In the spirit of the second-century Roman emperor who sought to consolidate the empire from its overextended limits, we might call this moderate and realistic outlook Neo-Hadrianism.⁷⁵

Although the topic of this article is one that concerns the law and values, a workable solution must necessarily be found in policy. The position of the United States on issues of the rule of law abroad should be one component of a more generalized policy outlook embracing a more modest and less ideologically-based form of internationalism, non-interference, sphere of influence regionalism, trade bilateralism, and a moderate, long-range outlook of realism in pursuit of well-defined national interests. This coherent middle way between “Fortress America” isolationism and the *de facto* imperialism of globalization, would also include a gradual disengagement from parts of the world not of demonstrable national interest and whose people do not want or need us, and where our mere presence is a destabilizing factor. The United States would be better off embracing a more sustainable role of a regional world power, rather than its current status as an overextended military hegemon, the bulldog of globalization. As China rises, perhaps to the position of the dominant power of Eurasia, it will become increasingly apparent that the days of U.S. military and economic dominance are numbered. The only choice is between an orderly relinquishing of power, and an outright collapse.⁷⁶

75. My concept of Neo-Hadrianism prescribes a moderate realist policy approach named for the second-century Roman emperor who pulled back from certain far-flung reaches of the empire for the sake of preserving Roman strength and stability. The idea is to strike an optimal balance between serving our practical interests as a global maritime power, and recognizing the limits imposed on our ambitions and influences as we encounter alien nations and cultures with their own regional claims, interests, and spheres of influence. It prescribes a sensible path intermediate to the hegemonic overreach of recent decades, and a return to the equally dangerous isolationism and autarchy. This perspective advocates withdrawing from parts of the world where our vital interests are not directly at stake and where we are not wanted or needed. We would of course reserve the right to strike back violently at any attacks on American interests anywhere in the world, and to participate in repelling violations of nation sovereignty, as with our actions in Kuwait in 1990-1991, and in Korea during 1950-1953. Such a view also advocates trade bilateralism and military multilateralism. See Michael F. Duggan, *On Containment and Islamism: Moderate Realism for a Fractious*, GEO. J. FOR INT'L AFF. (2017), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/on-containment-and-islamism-moderate-realism-for-a-fractious-age-by-michael-f-duggan>.

76. On the ascendancy of China and its new infrastructure projects, see ALFRED W. MCCOY, *IN THE SHADOWS OF THE AMERICAN CENTURY* (2017); Gal Luft, *China's Infrastructure Play: Why Washington Should Accept the New Silk Road*, FOREIGN AFF. (2016), <https://www.foreignaffairs.com/articles/asia/china-s-infrastructure-play>; Pepe Escobar, *The New Silk Road will go Through Syria*, ASIA TIMES (July 13, 2017), <http://www.atimes.com/article/new-silk-road-will-go-syria/>.

As regards the promulgation of American or Western values via the law, we should also adopt a less pious or moralistic tone and a less ideologically-charged approach to policy. The law and normative morality are not synonyms, but they do have a proximity to each other: they must reflect a similar outlook of values and thus bear a close resemblance. As such we would do well to, as much as possible, take our own values out of discussions of the law in countries with different traditions. If we must couch our actions in moral terms, let it proceed from the realization that respect for other cultures, for other people to rule themselves by their own standards, and non-interference are also liberal values. After all, first among American cardinal principles are freedom and independence. The most conspicuous manifestations of these principles are freedom and independence from the coercion of outsiders, even those promising the blessings of political liberalism.

As believers in the Western liberal tradition where does this leave us specifically in regard to the rule of law? Let me conclude with an analogy and a confession of what the West can offer to the world. I think that all we can tell others is this: these are our values and the institutions and traditions that have sprung from them; they have frequently served us well, and we endorse them. Under them we have prospered – our people have flourished under the blessings of liberty and with equal access to justice and the guarantee and protection of rights, and in a spirit of benevolence we commend these things to others. Come here, study our system, and see for yourselves what it has produced for our civilization and the individuals in it. Be our guests; come to our universities and law schools and observe firsthand the civic blessings liberal constitutionalism had bestowed. Weigh their benefits and judge for yourselves whether or not they will translate into your culture with the realistic possibility of general acceptance and compliance. We will cooperate with you openly and will aid you in your study. Feel free to emulate, copy, and adapt our principles into the idiom of your cultural milieu, *but only if you want to*. The rule of law should be allowed as a naturalistic adoption initiated by the host nation and adapted to be reflective of its own cultural values. Such countries should not be scouted and recruited or targeted; they should not be garnered as an element of the bulwark of what we regard to be our own superior system, jewels in our imperial crown.

Westward-looking individuals in non-Western regions and those who have been victimized, fear for their safety, or for whatever reasons do not agree with local practices, should be considered as candi-

dates for asylum in the West. We might consider allowing them to come here and in fact the United States and other Western nations have sheltered people under such circumstances. But we should not try to actively alter or overthrow the systems they flee; the individual is the ultimate minority but the normative morality of a nation is based on a sort of *de facto* democratic consensus and must therefore be considered legitimate even in our own terms of majority rule. Of course individuals displaced by ill-advised American military campaigns and “humanitarian interventions” in places like Libya and Syria should be given priority as asylum seekers.

Given all of this, I would suggest that we must always question who our new friends and advocates are in unfamiliar lands as well as the basis of their interest in our system and our support. Westward-looking dissidents and expatriates who oppose or are far removed from local customs of their native lands by definition do not reflect the popular views of their country. Likewise, when justifying the promulgation of U.S. interests and values abroad, we must always question the motives of our supporters and also whether we ourselves are cherry-picking their support based on their views. Rich cosmopolitans, expatriate elites, and pro-West cronies with only an ethnic link to a nation are hardly an objective basis for assuming or divining broadly-based support for our policies in that nation. Even groups of high-minded Western-educated professionals may not be representative of a nation’s majority outlook. The question is whether a sizable portion of the population is genuinely interested in our system. Of course the arguments I have made above do not even get into the myriad of problems and details about how to administer such programs, including potentially prickly issues of departmental and even branch jurisdiction.⁷⁷ As for global economics, the West should curb its aggressive policies and allow regional economies to grow in a naturalistic way that is in proportion to the human and economic resources of their respective regions of production.⁷⁸

77. Not only have Western policies in the Near East since Versailles, and especially since the end of the Second World War have been catastrophic in terms of regional stability, the ongoing instability and conflict in regard to Ukraine and Russia finds its proximate causes in the actions of the United States, NATO, and the European Union. In the years following the Cold War, the United States wasted little time in humiliating the Russian Federation with aggressive trade policies. Perhaps the most insulting and ill-considered policy of all, has been the continued expansion of NATO into the Russian sphere of influence. George F. Kennan called this provocative policy “the most fateful error of American policy in the entire post-cold war era.” GADDIS & KENNAN, *supra* note 24, at 680–81; THE KENNAN DIARIES, *supra* note 36, at 656–57.

78. See generally JANE JACOBS, CITIES AND THE WEALTH OF NATIONS (1984).

When promulgating our system abroad, we must always be aware to ask ourselves if potential host countries are genuinely interested or whether there may be other motivations such as security issues, political leverage, massive payoffs in aid, or geopolitical rationales lurking beneath the surface (to say nothing of ethnic, tribal, or religious considerations). We must ask whether there are factions involved and what the internal politics are and whether one is playing us off against the other. Here as with all policy an intimate historical knowledge of a region and a critical and flexible reading of its history is of far more use than shoring-up our beliefs with moral justificationist ideology and an assumption that every conflict is a fight of freedom and democracy against oppression and authoritarianism. In policy, career area specialists are preferable to politically-connected true believers, just as history and critical analysis are a sounder basis for policy than morality and un-self-critical ideology.

The analogy I would suggest then for such an outlook is a simple one: for the purpose of establishing trust and good faith in recommending our system, we should embrace a policy of an open hand — like a person trying to win over the trust of a wild bird. We may attract it somewhat with seed, but the method to win it over is with an open hand rather than to try to grab it outright or otherwise try to capture it against its will. The choice whether or not to partake of the seed must be up to the bird. So it is with values and nations.

ESSAY

Charles Hamilton Houston: Mockingbird with Talons

ALBERT M. PEARSON*

INTRODUCTION	319
I. THE INVENTION OF ATTICUS FINCH	321
II. ENTER CHARLES HAMILTON HOUSTON.....	333

INTRODUCTION

In his January 10, 2017 farewell address,¹ President Obama invoked the words of Atticus Finch to underscore the importance of the nation’s laws against discrimination: “You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.”² The President rightly assumed that many Americans are well acquainted with the central character in *To Kill a Mockingbird*, Harper Lee’s widely read novel.³

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1. The full transcript of this address can be located on the White House website. *See President Obama’s Farewell Address*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 10, 2017), <https://obamawhitehouse.archives.gov/node/360231>.

2. HARPER LEE, *TO KILL A MOCKINGBIRD* 33 (1st Perennial Classics ed. 2006).

3. The Atticus Finch veneration began with the *To Kill a Mockingbird* trifecta: first, the Pulitzer Prize in 1960; next, an Academy Award winning movie in 1962 starring Gregory Peck who won the Oscar for his portrayal of Atticus Finch; and finally, a captive audience over decades of student readers (and book purchasers) in classrooms throughout the U.S. Christopher Sergel’s adaptation of *To Kill a Mockingbird* has been performed regularly in high schools and community theaters throughout the country since 1988. In 2003, the American Film Institute voted Atticus Finch the greatest film hero of the twentieth century. When President Bush awarded Harper Lee the Presidential Medal of Freedom in 2007, he observed that Finch exemplified the “old sense of honor” in his defense of “a man falsely accused.” The House and the Senate passed resolutions in honor of Harper Lee in 2010 on the fiftieth anniversary of the publication of *To Kill a Mockingbird*. The resolutions declared that *To Kill a Mockingbird* “ad-

In the novel, Finch is the court-appointed lawyer for Tom Robinson, a black man accused of raping a white woman in Depression Era Maycomb, Alabama.⁴ His defense of Robinson has come to be seen as a model of lawyerly professionalism and an example of moral courage in the face of racial injustice.⁵

This Essay suggests that President Obama's allusion to Atticus Finch is deeply ironic. The Maycomb⁶ depicted in *To Kill a Mockingbird* sugarcoats the racial and economic hierarchy of small town life in the South in the 1930s. Atticus Finch, his hollow platitudes notwithstanding, is both a product of and defender of the status quo – racially, socially and economically. As a lawyer, he is shallow and unremarkable at best. He is compromised and incompetent at worst. Yet, his saintly image in the public mind reinforces the longstanding segregation of Southern history – a past which blacks and whites experienced and yet remember so differently.⁷ Finch's long shadow has unfortunately obscured the legally innovative and genuinely heroic work of the real-life lawyers who opposed the systemic injustices of Jim Crow well before *Brown v. Board of Education*⁸ was decided. The great irony is that these lawyers, unlike Atticus Finch, were almost invariably black and remain invisible to the larger society.⁹

dressed the issue of racial inequality in the United States by revealing the humanity of a community grappling with moral conflict," and specifically mentioned the "Oscar winning film . . . starring Gregory Peck." H.R. Res. 1525, 111th Cong. (2010); S. Res. 614, 111th Cong. (2010).

4. LEE, *supra* note 2, at 86, 100–01.

5. See generally Claudia D. Johnson, *Without Tradition and Within Reason: Judge Horton and Atticus Finch in Court*, 45 ALA. L. REV. 483 (1994); Timothy Hall, *Moral Character, the Practice of Law, and Legal Education*, 60 MISS. L.J. 511 (1990) (upholding Finch as a model lawyer). But see Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994).

6. LEE, *supra* note 2, at 3–16.

7. See generally W. FITZHUGH BRUNDAGE, *THE SOUTHERN PAST: A CLASH OF MEMORY AND RACE* (2005) (showing a classic study of this important phenomenon). Perhaps the most vivid current example is the current controversy about monuments in public places honoring military and political leaders of the Confederacy. See Anna Dubenko, *Right and Left on Removal of Confederate Statues*, N.Y. TIMES (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/us/politics/right-and-left-on-removal-of-confederate-statues.html> (referencing views from both sides of this debate).

8. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

9. White lawyers who represented black clients, in cases like Tom Robinson's, and who also challenged the racist underpinnings of the Southern criminal justice system were typically not from the South and, if white, they were frequently Jewish. For example, Samuel Leibowitz, who defended the Scottsboro Boys, was from New York as were Bella Abzug and Emmanuel Bloch, who represented Willie McGee in a notorious Mississippi death penalty case. See PHILLIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 312–13, 397–98 (2002).

Their leader was Charles Hamilton Houston, a man of formidable intellect, legal creativity and single-minded determination.¹⁰ He offered this prescient assessment of lawyers like Atticus Finch in a 1935 article:

[E]xperience has proved that the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He . . . usually himself profits as an individual by that very exploitation of the Negro which, as a lawyer, he would be called upon to attack and destroy.¹¹

He understood the mores of the Jim Crow South in a way that was beyond Finch's comprehension. The problem of racial injustice was systemic and pervasive. The "average white lawyer," in his view, was part of the problem, not part of the solution.¹² Had he lived long enough to read *To Kill a Mockingbird*, Houston would have bridled at Harper Lee's mockingbird imagery denoting passivity and helplessness on the part of Tom Robinson and blacks more generally. He also would have been contemptuous of Finch's pretensions and puzzled at his status as a cultural icon.

I. THE INVENTION OF ATTICUS FINCH

Harper Lee grew up in small town Monroeville, Alabama during the Depression.¹³ She enjoyed a comfortable, privileged existence in Monroeville's rigidly segregated world,¹⁴ much like the Finch family she depicts in *To Kill a Mockingbird*.¹⁵ Her father, A.C. Lee, was one

10. The earliest biography of Houston is GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983). In the foreword, Judge Leon Higginbotham recounts the highlights of Houston's career and ventures this opinion: "[b]ecause of his tenacity and genius, he deserves a stature in our nation as significant as that specially reserved for Thomas Jefferson, George Washington, Patrick Henry or Chief Justice John Marshall." *Id.* at xvii. At Houston's funeral in 1950, Thurgood Marshall, Houston's most famous student and most able lieutenant, stated, "[w]e wouldn't have been any place if Charlie hadn't laid the groundwork for it." *Id.* at 3; see also JACK GREENBERG, *CRUSADERS IN THE COURTS* 3-13 (1994) (showing a short sketch of Houston's career and enduring influence).

11. Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49, 49 (1935).

12. *Id.* at 50-51. Houston devoted the bulk of his discussion to the dearth of Negro lawyers in the United States but particularly in the South where their career prospects were difficult to say the least. For example, according to the 1930 Census, Alabama had four Negro lawyers for a Negro population statewide of 944,834. To overcome race discrimination, more Negro lawyers were needed. "The great work of the Negro lawyer in the next generation must be in the South and the law schools must send their graduates there and stand squarely behind them as they wage their fight for true equality before the law." *Id.* at 52.

13. CHARLES J. SHIELDS, *MOCKINGBIRD: A PORTRAIT OF HARPER LEE FROM SCOUT TO GO SET A WATCHMAN* 21 (Rev. Ed. 2016).

14. *Id.* at 5-10, 12-17, 27-40; see also *infra* note 19.

15. LEE, *supra* note 2, at 3-16 (describing Maycomb in the opening chapter of *To Kill a Mockingbird*).

of the town's leading citizens: a lawyer, businessman, newspaper owner and from 1926 to 1938, a member of the Alabama legislature.¹⁶ He was, according to author Charles Shields, "typical of his generation, especially about issues surrounding blacks, the law, and segregation."¹⁷ Though Harper Lee displayed some rebellious tendencies in college, those outbursts were more personal than political.¹⁸ She never seriously challenged the racial status quo.¹⁹ She fled Alabama in 1949 to become an ex-patriate Southerner in New York City where she joined her childhood friend and fellow writer, Truman Capote.²⁰ At most, she was a gradualist willing to support the goals of the civil rights movement while disavowing its unseemly tactics.²¹ Nothing was worse to her, it seems, than a Negro with bad manners. In response to a question about the Freedom Riders, she once opined, "I don't think this business of getting on buses and flouting state laws does much of anything. Except getting a lot of publicity and violence."²² She said nothing about the impolite mob that beat the Freedom Riders senseless or the police that vanished while the assaults occurred.²³ Tellingly, Lee went silent on civil rights issues for the balance of her life.

Alabama was a racist cauldron following the Supreme Court's 1954 decision in *Brown*. The logos of the Democratic Party, which included the words, "White Supremacy," reflected the mentality of

16. SHIELDS, *supra* note 13, at 18–22, 35–42.

17. *Id.* at 39. It is generally accepted that A.C. Lee was the model upon which the character Atticus Finch was based. But there is scant support for the belief that Harper Lee watched her father perform in the courtroom. He was not a trial lawyer; he was a title lawyer. Timothy Hoff, *Influences on Harper Lee: An Introduction to the Symposium*, 45 ALA. L. REV. 389, 394 (1994).

18. Lee was a plain, indifferent dresser, masculine in appearance, a heavy smoker and surprisingly profane in conversation. See SHIELDS, *supra* note 13, at 47–50, 54–55, 64. Oddly, while a student at the University of Alabama, she joined a sorority that "specialized in blondes," even though she clearly did not fit the mold and made no attempt to conform. *Id.* at 53–55. Eventually she gravitated toward the school newspaper where she wrote articles and a one-act play displaying disdain for the pompousness of politicians and contempt for the Klan. *Id.* at 56–58.

19. When actor Gregory Peck visited Monroeville in 1962 to prepare for his movie role as Atticus Finch, it was a Jim Crow town. Peck stayed at a segregated hotel and ate at a segregated restaurant. There is no evidence that Peck or those accompanying him ever met any of Monroeville's black citizens. If Harper Lee felt any awkwardness towards the disconnect between *To Kill a Mockingbird's* theme of racial justice and the reality of segregation in Monroeville, she kept it to herself. The locals were star struck and mainly interested in getting a glimpse of Peck. *Id.* at 172–78; see also LYNN HANEY, GREGORY PECK: A CHARMED LIFE 306–11 (2005).

20. SHIELDS, *supra* note 13, at xvi–xvii. Capote was the inspiration for the character Dill in *Mockingbird*.

21. *Id.* at 204.

22. *Id.*

23. RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 140–76 (2006).

Alabama politics.²⁴ The overwhelmingly white Alabama Bar, which included Lee's father, the model for Atticus Finch, was resolute in its hostility to *Brown* and the steady erosion of the separate but equal doctrine.²⁵ One of the bar's prominent leaders and most prolific writers was Judge Walter B. Jones, an unabashed racist. He was a trial judge in Montgomery, Alabama from 1920 until his death in 1963, the author of several books on Alabama law, the founder and dean of Jones Law School, the president of the Alabama State Bar from 1954 to 1955, and founder and editor of *The Alabama Lawyer*, which is still the state bar's official publication.²⁶ As editor of *The Alabama Lawyer*, Jones published a stream of articles extolling the virtue of state's rights, glorifying secession and the Confederacy, bemoaning the "tragedy" of reconstruction and advocating massive resistance to *Brown*.²⁷ In 1957, without fear of offending his readership, he wrote an article entitled, "I Speak for the White Race."²⁸ The white race, he claims, "is being unjustly assailed all over the world" through a "massive campaign of super-brainwashing propaganda . . . by those who envy its glory and greatness."²⁹ Jones concludes on an ominous note, "[w]e have all kindly feelings for the world's other races, but we will main-

24. The most famous articulation of Southern values in this regard was the "Declaration of Constitutional Principles," which came to be known as the Southern Manifesto. 102 CONG. REC. 4459-60 (1956). Both Senators and all congressmen from Alabama were signers. The document denounced the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). While it appealed to "our people not to be provoked by the agitators and troublemakers invading our states and to scrupulously refrain from disorder and lawless acts," that admonition was more honored in the breach than in the observance as subsequent events were to bear out. For historical studies of the emergence of the Southern strategy of resistance to *Brown*, see generally NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* 67-07 (1969); DAVID R. GOLDFIELD, *BLACK, WHITE AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE 1940 TO THE PRESENT* 63-17 (1990). As of 1960, Alabama was one of five states in the old Confederacy in which no public school had been desegregated. See GREENBERG, *supra* note 10, at 255.

25. See, e.g., R. Carter Pittman, *All Men Are Not Equal*, 17 ALA. LAW. 252 (1956); see also Marvin Frankel, *The Alabama Lawyer, 1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243 (1964) (showing a fascinating survey of all articles published in the Alabama Lawyer from 1954 to 1964). Among Frankel's conclusions is that the official publication of the Alabama State Bar spoke with only one voice. "Year in and year out, every issue . . . supplies heady reminders that it is written by white men for white men. More than this, numerous articles exalt the Great White Race as the race of achievement and progress, while establishing beyond question that Negroes comprise an inferior race of 'slothful' and unclean people." *Id.* at 1253.

26. *Walter Burgwyn Jones, 1888-1963*, ALABAMA AUTHORS, http://www.lib.ua.edu/Alabama_Authors/?p=1623 (last visited Jan. 21, 2017).

27. See *supra* note 24 (discussing the Southern Manifesto).

28. Judge Walter B. Jones, *I Speak for the White Race*, 18 ALA. LAW. 201 (1957).

29. *Id.*

tain at any and all sacrifices the purity of our blood strain and race The white race shall forever remain white.”³⁰

Harper Lee, it turns out, was keenly aware of the South’s and Alabama’s toxic racial environment. The publication of *Watchman* in 2015 is very revealing in this regard. Lee knew about the Emmett Till murder, the *Brown* decision, and the White Citizens Council.³¹ And perhaps much more, such as the Montgomery bus boycott, Autherine Lucy’s thwarted attempt to attend the University of Alabama in 1957, and Alabama’s protracted legal war against the NAACP. These were subjects she chose never to talk about. The original version of Atticus Finch,³² as developed in *Watchman*,³³ bears a much stronger resemblance to Judge Jones – and arguably to Lee’s father – than the softer, more benign version in *To Kill a Mockingbird*, which is a very different book. In the years since *To Kill a Mockingbird*’s publication in 1960, no documents have been found shedding light on this transformation. But one can readily understand why it took Lee two years to rewrite *Watchman* and reinvent the Atticus Finch character.³⁴ *To Kill a Mockingbird* otherwise probably would not have achieved much literary or commercial success.

To Kill a Mockingbird is a comforting tale to its admirers. The Finches of Maycomb are descendants of a prosperous slaveholding family and entrenched members of the white establishment.³⁵ Memo-

30. *Id.* at 203.

31. HARPER LEE, GO SET A WATCHMAN 8, 101–03, 236–53 (2015) [hereinafter WATCHMAN]. The *Watchman* manuscript is generally regarded as the manuscript from which *Mockingbird* evolved. It was submitted to the publisher in 1957. The transformation of *Watchman* into *Mockingbird*, is something of a literary mystery. See SHIELDS, *supra* note 13, at 82–01.

32. Harper Lee knew all along – as did her editor at Lippincott – that there was a darker Atticus Finch hidden away like the Boo Radley character. The adult narrator in *To Kill a Mockingbird* knows this as well. But this was kept secret from the public until 2015 – a decision that proved to be very beneficial financially both to Harper Lee and to the publisher.

33. The darker Atticus Finch in *Watchman* doesn’t have many redeeming qualities. Jean Louise (the adult Scout) finds a pamphlet entitled *The Black Plague* in his office. Documenting the biological inferiority of Negroes, the pamphlet would make “Dr. Goebbels look like a naïve little country boy.” LEE, WATCHMAN, *supra* note 31, at 101–02. Her father is also a member of the board of directors of the Maycomb County Citizen’s Council, an organization she equates with “trash.” *Id.* at 104. She secretly observes a meeting of the Council from the colored balcony in the courthouse at which the invited speaker delivers a racist harangue. Her father appears to agree with everything said. *Id.* at 105–11. Finally, in a climactic argument, Finch makes his views about Negroes, the NAACP and the Constitution painfully clear to Jean Louise. *Id.* at 236–53. He thinks that “Negroes down here are still in their childhood as a people.” *Id.* at 246.

34. See *supra* note 31. To paraphrase Winston Churchill, *Watchman* is a modest novel with much to be modest about.

35. Life in Maycomb is described in Chapter 1 of *Mockingbird* at 1–16. “Atticus derived a reasonable income from the law. He liked Maycomb, he was Maycomb County born and bred; he knew his people, they knew him, and because of Simon Finch’s industry, Atticus was related

ries of the Civil War are still evocative.³⁶ By the Depression era standards of rural Alabama, they live comfortably but not luxuriously.³⁷ Jim Crow permeates Maycomb's daily life yet the Finches are oblivious to the unearned advantages it affords them or the daily humiliations it inflicts. In matters of race, they distinguish themselves from lower class whites by discouraging use of the word "nigger"³⁸ and by their paternalism, embodied most vividly in their treatment of Calpurnia, their maid.³⁹ She is referred to as "family" with a condescension that would be recognizable to many Southerners even today.⁴⁰ Atticus is a respected lawyer who has served in the Alabama legislature for years without opposition.⁴¹ His wife died when Scout was two.⁴² He lives not far from the town square with Scout and her older brother Jem.⁴³ Calpurnia serves them from morning to night.

by blood or marriage to nearly every family in town." LEE, *supra* note 2, at 4–5. Simon Finch was a slave owner who in the early 1800's established the family homestead on the Alabama River known as Finch's Landing. *Id.* at 4.

36. The author alludes to the Civil War in several places. *Id.* at 4 ("the disturbance between the North and the South"); *id.* at 74 ("Hasn't snowed in Maycomb since Appomattox"); *id.* at 87 ("Cousin Ike Finch was Maycomb County's sole surviving Confederate veteran" who "wore a General Hood beard of which he was inordinately vain."); *id.* at 178 (Braxton Bragg Underwood, the owner of the Maycomb Tribune, is named after a Confederate general).

37. LEE, *supra* note 2, at 22–24, 132. Of the thirty million persons who lived in the former Confederate states in 1932, "a substantial majority . . . were so lacking in resources and creature comforts – by our modern-day standards, at least – that it seems elementally fair and honest to call them dirt poor." JOHN EGERTON, *SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* 19 (1994). The South was "a feudal land . . . rural, agricultural, isolated. It had its ruling nobles, its lords of the plantation manor – and its peasants, its vassals. Its values were rooted in the land, in stability and permanence, in hierarchy and status, in caste and class and race." *Id.* Egerton's discussion of the desperate plight of Depression Era Southerners, black and white, is absorbing. *Id.* at 18–33.

38. With a touch of smugness, Finch tells Scout that use of the word is "common." LEE, *supra* note 2, at 85.

39. In the first four chapters of *To Kill a Mockingbird*, Calpurnia's service to the Finch household is developed at length.

40. Calpurnia explains to Scout and Jem that she followed Atticus from Finch's Landing to Maycomb after Atticus got married to their mother. LEE, *supra* note 2, at 142. Atticus describes Calpurnia as "a faithful member" of the family. *Id.* at 155. She was not, however, a full member. *To Kill a Mockingbird* is replete with references to the kitchen and Calpurnia, indicative of her subordinate status. Occasionally, Calpurnia would stay overnight at the Finch house and when she did, "she slept on a folding cot in the kitchen." *Id.* at 133–34. This brings to mind the oft stated truism about race in the South: "[Whites] don't care how close you get as long as you don't get too high." Terry Gross, *W. Kamau Bell's "Awkward Thoughts" on Racism and Black Comedy*, NPR (May 1, 2017, 2:28 PM), <http://www.npr.org/2017/05/01/526387278/w-kamau-bells-awkward-thoughts-on-racism-and-black-comedy>.

41. LEE, *supra* note 2, at 3, 36, 86. One of *Mockingbird's* many implausibilities is Scout's worry that her father is considered a "nigger-lover" by some in Maycomb, including members of the Finch family. *Id.* at 94, 124. Her father acknowledges that he indeed is a "nigger-lover," *id.* at 124, and yet insists that if he did not represent Tom Robinson, "I couldn't hold up my head in town, I couldn't represent this county in the legislature." *Id.* at 86.

42. *Id.* at 6.

43. *Id.*

Her role as cook, housekeeper and surrogate mother illuminates the awkward relationship in the South between racial intimacy and racial subordination.⁴⁴ The Finch benevolence toward blacks, typical of Maycomb's better class of whites, is genuine but subject to an inviolable limit: the preservation of the color line. The idea that blacks might resent, even loathe, them is almost unimaginable.⁴⁵

If it were important to climb into another person's skin, Atticus Finch does not come close to doing so in *To Kill a Mockingbird*. Calpurnia and the emotionally afflicted Boo Radley are cardboard characters, props for the adventures and antics of Scout, Jem, and Dill. The reader learns nothing of their inner lives. The villainous Bob Ewell⁴⁶ is another prop. He is the "white trash" stereotype – a smelly, unkempt, tobacco chewing, welfare freeloader who is racist to the core.⁴⁷ His family lives in squalor – much deserved the author repeatedly reminds the reader – near the garbage dump on the outskirts of Maycomb.⁴⁸ The Bob Ewells of Maycomb do the dirty work necessary to sustain Jim Crow – the nighttime visit, the occasional beating or lynching.⁴⁹ This cultural hierarchy permits the Finches and their upper-class ilk to distance themselves from Maycomb's racial terror-

44. See *supra* notes 38–40.

45. When Finch is away in Montgomery on legislative business, Calpurnia takes Scout and Jem to Sunday service at the First Purchase African M.E. Church. She makes a big fuss to get them washed up and dressed properly for the occasion. Most of the parishioners are appropriately deferential to the presence of Scout and Jem because of their whiteness. But one woman asks Calpurnia in an unfriendly manner, "why you bringin' white chillun to nigger church." Calpurnia responds, "[t]hey's my comp'ny." The woman replies acidly, "[y]eah, an' I reckon you's comp'ny at the Finch house durin' the week." LEE, *supra* note 2, at 135. Scout later reflects that it had "never dawned" on her that Calpurnia "led a modest double life." *Id.* at 142.

In *Watchman* there is a similar moment of realization when Jean Louise (the adult Scout) visits her beloved Calpurnia. Calpurnia is old and frail but mentally still sharp. Jean Louise senses a distance between them. The conversation is strained. In distress, Jean Louise begs Calpurnia to talk to her but sees that it is "hopeless." She asks, "[t]ell me one thing, Cal . . . before I go — please, I've got to know. Did you hate us?" After a long pause, Calpurnia just "shook her head." LEE, *WATCHMAN*, *supra* note 31, at 160.

46. The reader is first introduced to the Ewell family through Burris Ewell, one of Scout's first grade classmates. He is the "filthiest human" Scout had ever seen – a defiant, cootie infested, miniaturized version of his father. LEE, *supra* note 2, at 29–30. Atticus subsequently tells Scout the "Ewells had been the disgrace of Maycomb for three generations . . . They were people, but lived like animals." *Id.* at 33.

47. *Id.* at 33–35, 193–95, 208, 248, 257–58.

48. *Id.* at 192–93.

49. The literature on racial terrorism in the South prior to the civil rights movement is vast. See, e.g., AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940* (2009); RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 11–55 (2006); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 18–52 (2003); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29–75 (1997).

ism while benefiting enormously from its oppressive effects. Atticus Finch is blind to his complicity. He can't even get inside his own skin.

Tom Robinson is accused of raping Bob Ewell's eldest daughter, Mayella.⁵⁰ Finch reveals a lot to the implausibly precocious Scout about the upcoming trial but is oddly uninterested in Robinson's inner life. Robinson's predicament makes him the central prop in *To Kill a Mockingbird*.⁵¹ This invites the reader to ponder Finch's turmoil, not Robinson's. "Scout, simply by the nature of the work, every lawyer gets one case in his lifetime that affects him personally. This one's mine, I guess."⁵² Atticus hopes "to get through life without a case of this kind." He fears that he cannot "get Jem and Scout through [the trial] without bitterness and, most of all, without catching Maycomb's usual disease."⁵³ Without a hint of irony, Finch professes not to understand "[w]hy reasonable people go stark raving mad when anything involving a Negro comes up."⁵⁴ While some whites in Maycomb consider Atticus to be a "nigger lover" and mock his children,⁵⁵ the crisis is contrived as the reader eventually learns. Several stalwarts of the Maycomb community – Judge John Taylor, District Attorney Horace Gilmer, Sheriff Heck Tate, and Link Deas – are portrayed as reluctant about Robinson's prosecution, even seeing it as a miscarriage of justice.⁵⁶ As part of *To Kill a Mockingbird's* happy ending, such belated epiphanies serve to absolve them all from the wickedness of a racist jury and the evil of Bob Ewell. But these epiphanies also pose an intriguing question about their utter lack of courage. Atticus Finch, the reader learns, is willing to bend the law in "special cases" but not for Tom Robinson.⁵⁷ Why?

50. LEE, *supra* note 2, at 196.

51. *Id.* at 140.

52. *Id.* at 86, 190.

53. *Id.* at 100.

54. *Id.* at 100–01.

55. *Id.* at 86, 94–96, 124.

56. Atticus believes that Judge Taylor made Bob Ewell look like a fool and suggests that he was actively trying to prejudice the jury in Tom Robinson's favor. *Id.* at 287. In a similar vein, District Attorney Gilmer "seemed to be prosecuting almost reluctantly," *id.* at 214, "like he wasn't half trying." *Id.* at 226. Link Deas rose spontaneously from the audience in the middle of the trial and spoke up for Tom Robinson who had worked for him for eight years, *id.* at 222, and gave Robinson's wife, Helen, a job because "he felt right bad about how things turned out." *Id.* at 285. Sheriff Heck Tate at the end of *Mockingbird* proclaims that, "[t]here's a black boy dead for no reason and the man (Bob Ewell) responsible for it's dead." *Id.* at 316–17. Even Braxton Underwood, the owner of The Maycomb Tribune who despises Negroes, *id.* at 178, wrote an editorial deploring the senseless killing of Tom Robinson. *Id.* at 275.

57. Atticus tells Scout how it is sometimes acceptable "to bend the law in special cases." *Id.* at 33. In closing argument at Tom Robinson's trial, he tells the jury that the "case should never have come to trial." *Id.* at 230–31. What happened? Why did it come to trial? Interestingly, the

A lot must have been going on in Robinson's mind. He is languishing in jail facing the death penalty.⁵⁸ The specter of lynching is ever present. Southern sheriffs were known to stand aside while enraged mobs stormed into their jails to seize their quarry.⁵⁹ A lynching after all was a popular spectacle in the South – often attended by festive crowds including women and children, some around young Scout's age.⁶⁰ The scene at the Maycomb jail featuring plucky Scout shaming the lynch mob is a preposterous fantasy.⁶¹

Robinson's defense is his word against the Ewells, the worst-case scenario in Finch's mind. The coming trial is an apocalyptic event. In light of this grimness, the reader senses only Robinson's meekness and despair.⁶² He is nothing without Atticus Finch and yet he is invisible to his lawyer. For Finch, Tom Robinson is an inconvenience to be over and done with.⁶³ For black defendants like Robinson, however, there was no alternative. The South had no black law schools and very few black lawyers.⁶⁴ Black clients often thought they would be better off in court with a white lawyer before a white judge and an all-white jury.⁶⁵ In the final analysis, however, there were two ironclad caveats for the white lawyer representing a black client: steer clear of

law is bent to accommodate even the scofflaw Ewells, *id.* at 33, and is bent again to invent the story that Bob Ewell died not because Boo Radley stabbed him in defense of Jem but because Ewell fell on his own knife. This bizarre fabrication was rationalized to protect Jem and Boo Radley (both white) from unwanted attention and publicity. *Id.* at 313–17.

58. *Id.* at 168–76, 250.

59. Perhaps the most notorious example is the lynching of Leo Frank. A mob from Marietta, Georgia broke into the state prison in Milledgeville, Georgia where Frank was incarcerated. The governor of Georgia had recently commuted his death sentence to life imprisonment to the outrage of many whites. STEVE ONEY, AND THE DEAD SHALL RISE: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK, 499–06 (2003). The mob took Frank into custody and drove back to Marietta, Georgia where he was hung. *Id.* at 561–72. Among the members of the lynch mob were “Georgians of the first rank.” *Id.* at 583.

60. See EQUAL JUSTICE INITIATIVE, *Lynching in America: Confronting the Legacy of Racial Terror* 3 (2d. 2015), for a recent report documenting lynching as a public spectacle in America. See also AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA 1890-1944* (2009).

61. LEE, *supra* note 2, at 168–76.

62. Except for his trial testimony, Tom Robinson has no voice in *To Kill a Mockingbird*. *Id.* at 216–26. Finch says nothing about talking with Robinson before trial. The only reference to any discussion with Robinson after trial is Finch's assurance of a “good chance” to win on appeal. *Id.* at 267–69. According to Calpurnia and Atticus, Robinson lost all hope for winning an appeal and basically committed suicide by attempting to escape from prison. *Id.*

63. *Id.* at 86, 100–01, 190.

64. Houston, *supra* note 11, at 49.

65. Paul Finkelman, *Not Only the Judge's Robes Were Black: African American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 179–88 (1994) (providing a review of J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944* (1983)).

any challenge to Jim Crow and exercise the utmost caution in questioning the credibility of a white witness.⁶⁶

Working within those constraints, Finch actually had a viable strategy for Robinson – the “Good Negro” defense. White jurors were not unalterably hostile to black defendants who knew their place. Finch refers paternalistically to Robinson as a “clean living” Negro.⁶⁷ The implication – no doubt unintended by Harper Lee – is that, in this respect, Robinson is an exception to the norm. He is also married with children and a churchgoer.⁶⁸ Reverend Sykes, a respected black preacher and a spectator at the trial,⁶⁹ could have attested to Robinson’s character. An even more helpful witness might have been Link Deas who, in a twist reminiscent of Perry Mason, rose spontaneously from the audience during the trial to vouch for Robinson: “[t]he boy’s worked for me for eight years an’ I ain’t had a speck o’ trouble outa him. Not a speck.”⁷⁰

In the Jim Crow era, white lawyers occasionally handled cases like Robinson’s.⁷¹ The key was exploiting the psychology of white jurors and using their racial preconceptions to the advantage of black clients.⁷² If Finch had called Deas to testify, the dynamics of the trial might have changed. The credibility battle would have matched the

66. *Id.* at 185; *see also* GREENBERG, *supra* note 10, at 10, 55, 101, 273, 504. White lawyers in the South represented black clients in routine cases but would rarely raise legal or constitutional challenges to the legitimacy of Jim Crow. GREENBERG, *supra* note 10, at 55, 273; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 272–73 (2004).

67. LEE, *supra* note 2, at 86, 135.

68. *Id.*

69. Reverend Sykes is a prominent character in Chapter 12 when Calpurnia takes Scout and Jem to her black church for Sunday services. *Id.* at 131–43. He appears again in Chapters 21 and 22, during the trial when he allows Scout and Jem to observe Tom Robinson’s trial from the courtroom balcony reserved for “colored” persons. *Id.* at 235–47.

70. *Id.* at 222. Robinson picked cotton for Deas in the summer and worked in the yard in the wintertime. *Id.* at 217.

71. A noteworthy “white champion” from Alabama in the 1920s was Roderick Beddow, a well-regarded attorney from Birmingham. He successfully defended Jake Crenshaw in the notorious murder of a white socialite in her rural Alabama home. Without challenging the exclusion of blacks from the grand and petit juries or asking for a change of venue, Beddow prevailed in two separate appeals claiming straight forward evidentiary errors. *Crenshaw v. State*, 207 Ala. 438 (1922); *Crenshaw v. State*, 205 Ala. 256 (1922). In 1931, the NAACP retained Beddow to represent the Scottsboro Boys and he briefly worked on the case along with Clarence Darrow. But due to a toxic dispute between the NAACP and the International Labor Defense – a communist organization – Beddow eventually withdrew from the case. *See* DAN CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 70–03 (Rev. Ed. 2007). One side note to Beddow’s involvement was his unwillingness to challenge the exclusion of blacks from the jury rolls. *Id.* at 75.

72. In this regard, Charles Houston was a master. *See infra* notes 102–120 and accompanying text.

respectable and seemingly influential Deas against the “white trash” Ewells. Under that scenario, class affinity might have overridden racial bias and given Robinson at least a fighting chance for acquittal.⁷³ Why the supposedly wily Atticus overlooked this strategy is rarely pondered by his admirers.

Finch’s actual defense of Tom Robinson is incomprehensible. Before trial, he acknowledges to Scout that he is not going to win Robinson’s case.⁷⁴ All-white juries, he explains, habitually take the word of a white man over a black man.⁷⁵ One wonders whether he told Robinson what he told Scout.⁷⁶ Nevertheless, at trial, Finch inexplicably asks the jury to do what he knows they will not do – take the word of his client over the word of the Ewells.⁷⁷ The narrative glosses over the fact that trial begins less than one day after the lynch mob appeared at the jail intending to lynch Robinson.⁷⁸ No amount of lawyerly eloquence can overcome the fact that the jurors – “all farmers,” no “townsfolk” – have much more in common with the Ewells and the lynch mob – race and class – than either the patrician Finch or certainly Tom Robinson.⁷⁹

Remarkably, Finch manages to make Robinson’s plight even worse. Instead of calming an already tense atmosphere, Finch elicits testimony certain to arouse the wrath of every white person in the courtroom.⁸⁰ Robinson testifies that the trapped, pathetic Mayella

73. For a discussion of the advantage of having a white witness to vouch for a black defendant in a criminal case, see Gabriel J. Chin, *The Disappointing Right to Counsel*, 122 YALE L. J. 2236, 2244 (2013).

74. LEE, *supra* note 2, at 87.

75. *Id.* at 100, 251–52.

76. *Id.* at 250, 269.

77. *Id.* at 232–33.

78. For any criminal defense lawyer in the Depression era, including Atticus Finch, this would have been a paramount concern. The leading case on point was *Moore v. Dempsey*, 261 U.S. 86 (1923). It involved the murder convictions of several black men who were attacked by a group of white men while at a meeting in a church. In the shootout, a white man was killed and the charges against the black defendants arose from his death. After being convicted in state court and sentenced to death, the defendants sought habeas corpus relief in federal court. *Id.* at 265–66. They alleged that the trial was conducted in a mob dominated atmosphere. The Supreme Court ruled that facts alleged in support of the petition were sufficient, if true, to make the criminal trial “absolutely void.” *Id.* at 267. In this vein, Finch also would have known that after the first round of convictions had been reversed in the Scottsboro Boys case, the trial was moved from Scottsboro to Decatur, Alabama to avoid the lynch mob atmosphere. CARTER, *supra* note 71, at 181–85.

79. Scout’s brother, Jem, observes that none of the jurors seem to come from the town of Maycomb: “[t]hey all come from out in the woods.” LEE, *supra* note 2, at 252. “The jury sat to the left, under long windows. Sunburned, lanky, they seemed to be all farmers, but this was natural: townsfolk rarely sat on juries.” *Id.* at 187.

80. *Id.* at 220–21.

may have been sexually attracted to him and that he, a black man, felt pity for her.⁸¹ He also implies that Mayella was sexually victimized by her repulsive father whose wife, having died some years before,⁸² left Mayella as his only sexual outlet.⁸³ In yet another Perry Mason like surprise twist, Robinson exposes Bob Ewell as the real rapist. Even if this scenario were literally true as Harper Lee wants the reader to believe, Finch has introduced two explosive taboos into the case through the testimony of a black man: incest and consensual interracial physical attraction.⁸⁴ Whatever glimmer of hope Robinson had surely vanished with this suicidal and provocative testimony.

Atticus Finch's closing argument is the dramatic heart of *To Kill a Mockingbird*. Finch voices lofty sentiments about racial justice to the all-white jury,⁸⁵ which is unmoved by his pieties just as Finch had foreseen. Convicted and sentenced to die, Robinson – Harper Lee's mockingbird – abruptly fades from the narrative, shunted off to prison and the electric chair awaiting him.⁸⁶ In contrast, Finch exits the courtroom in a glorious recession, black spectators in the balcony standing to honor their white hero.⁸⁷

Later, apparently forgetting that Robinson is now on death row, Finch chortles over the humiliation supposedly inflicted on Bob Ewell. It was as though he won a culture war against the white trash of Maycomb:

I proved [Ewell] a liar but John [Judge Taylor] made him look like a fool. All the time Ewell was on the stand I couldn't dare look at John and keep a straight face. John looked at him as if he were a three-legged chicken or a square egg. Don't tell me judges don't try to prejudice juries.⁸⁸

81. *Id.*

82. *Id.* at 30, 195.

83. *Id.* at 220–21.

84. In Alabama, the jury would have been told that Mayella Ewell could not have consented to any sexual activity with Tom Robinson. There was virtually a conclusive presumption that a white woman, even a prostitute, would not “yield – has not yielded – even in her confirmed depravity to a negro charged” with raping her. *Story v. State*, 178 Ala. 98, 104 (1912). As pathetic as Mayella was, she did not labor under the taint of being a prostitute. A jury charge to this effect was given in the Scottsboro Boys case where both of the accusers were prostitutes and the juries in multiple trials returned verdicts of guilty again and again. *CARTER*, *supra* note 71, at 375.

85. *LEE*, *supra* note 2, at 232–33.

86. *Id.* at 241, 250.

87. *Id.* at 241.

88. *Id.* at 287.

The jury chose to believe the Ewells so, contrary to Finch's boast, the guilty verdict would seem to have vindicated them in the eyes of the farmers and country folk who typically sat on Maycomb juries.

Finch also expresses confidence about Robinson's chances on appeal,⁸⁹ despite knowing that Judge Taylor was "seldom reversed."⁹⁰ But on what ground one might plausibly ask? It has long been the law that jury determinations of witness credibility are rarely reversed on appeal.⁹¹ To mitigate the lynch mob atmosphere surrounding the trial, Finch had grounds for a change of venue or a continuance but he apparently chose not to seek either remedy.⁹² He also could have challenged the exclusion of blacks from the grand and petit jury.⁹³ Raising any of those issues would have taken "real courage" to use one of Finch's pet phrases.⁹⁴ The notion that an appeal might have spared Robinson is another fantasy. Even by the professional norms of the Depression Era, Finch doesn't just fail Tom Robinson; he dooms him.⁹⁵

89. *Id.* at 250, 269. Elsewhere, according to Calpurnia, Tom just gave up hope despite Finch's assurances, which raises the question whether Tom Robinson had a more realistic view of his plight than his sermonizing lawyer. *Id.* at 267, 269.

90. LEE, *supra* note 2, at 215.

91. Evidence is sufficient to support a conviction if a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. An appellate court faced with a record supporting conflicting inferences must presume that the trier of fact resolved those conflicts in favor of the prosecution, and must defer to that resolution. *Cavazos v. Smith*, 565 U.S. 1, 2 (2011); *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979).

92. Judge Taylor had already postponed the trial once as a matter of convenience to Finch. LEE, *supra* note 2, at 86. As accommodating as he had been to Finch, it should have been an easy decision to delay the trial again to allow the lynch mob atmosphere to dissipate. *Id.* at 232–33.

93. White lawyers in the South rarely raised this issue even though the Supreme Court condemned the practice as an equal protection violation in the early 1880s. *See Neal v. Delaware*, 103 U.S. 370 (1881) (discriminatory enforcement of facially neutral statute); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (racial exclusion by statute). In the *Scottsboro Boys* case, which occurred before the Robinson trial in 1935, a challenge to the exclusion of blacks from jury service was raised. The Supreme Court upheld the challenge in *Norris v. Alabama*, 294 U.S. 587 (1935). The attorney representing the *Scottsboro boys* was not a Southerner. He was a Jewish criminal defense lawyer from New York City. *See supra* note 9.

94. LEE, *supra* note 2, at 128.

95. Today, Robinson would have one basis for an appeal: ineffective assistance of counsel. The Supreme Court in *Strickland v. Washington*, made clear that the physical presence of an attorney in the courtroom in a criminal case is not enough to satisfy the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). Under *Strickland*, Finch's representation of Tom Robinson is indefensible. But under the "farce and mockery of justice" standard prevalent at the state level in the Depression era, that would not have been the case. *See, e.g., Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir. 1945) ("farce and mockery of justice"); *State v. Keller*, 223 N.W. 698, 700 (1929) ("farce and travesty on justice"); Niles Chubb, *Appointment of Counsel for Indigent Accused*, 28 TEX. L. REV. 236, 243–49 (1949). In the *Scottsboro Boys* case, for example, the Alabama Supreme Court found the representation in the initial trials to be adequate under state law even though the defense lawyers were appointed on the morning of trial and had no opportunity to investigate the case or to prepare for trial. *See Weems v. State*, 141 So. 215 (1932);

To Kill a Mockingbird is an early example of what has come to be known as the white savior genre.⁹⁶ Atticus Finch provides soothing confirmation that not all whites in the South are afflicted with “Maycomb’s usual disease.” For that he has been placed on a pedestal by *To Kill a Mockingbird* admirers who regard his platitudes with almost scriptural reverence.⁹⁷ His exalted status rests in no small measure on a cultural myopia that undermines productive discussion of racial issues. It perpetuates the demeaning and false notion that blacks were submissive and passive in the face of the relentless cruelties of the Jim Crow South. They were not.

II. ENTER CHARLES HAMILTON HOUSTON

In a world without sanctuary, blacks resisted slavery, lynching, the convict labor system, the sexual ravishing of their women, an extortionate sharecropping system, an education system that ignored their needs and racial subordination in all its manifestations.⁹⁸ Despite all, they displayed a remarkable faith in this nation’s constitutional ideals. If there were any civil rights heroes in the South, the great irony is that they did not act or look like Atticus Finch.

If Atticus Finch existed, he would have been Houston’s contemporary. Unlike Finch, however, Houston understood that the quest for racial justice was a cause not a temporary distraction from a life of privileged serenity.⁹⁹ He saw the world as it was and made the commitment – case-by-case, year-by-year – to attack a legal and social

Patterson v. State, 141 So. 195 (1932); Powell v. Alabama, 141 So. 201 (1932). This holding was reversed as violation of Due Process by the Supreme Court in *Powell*.

96. MATTHEW W. HUGHEY, *THE WHITE SAVIOR* FILM 13 (2014). Two recent examples are books that were made into popular movies: *The Blind Side* by Michael Lewis and *The Help* by Kathryn Stockett. The noblesse oblige of white heroines is the focal point in both.

97. See Melissa Fay Greene, *Foreword* to *THE ENDURING POWER OF TO KILL A MOCKINGBIRD* 9–15 (2015); Cathy Newman, *Zip USA: 36460, To Catch a Mockingbird*, NAT’L GEOGRAPHIC, Jan. 2006, at 114 (“People around here actually quote lines from the book like scripture.”). See generally MONROE COUNTY HERITAGE MUSEUMS, MONROEVILLE: THE SEARCH FOR HARPER LEE’S MAYCOMB (1999); KATHY MCCOY, MONROEVILLE: LITERARY CAPITAL OF ALABAMA (1998).

98. See generally JOHN EGERTON, *SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* (1994); LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1998); C. VAN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

99. Atticus Finch sees his appointment to represent Tom Robinson as a burden. He “hoped to get through life without a case of this kind” LEE, *supra* note 2, at 100. In contrast, Charles Hamilton Houston from the very beginning of his legal career, sought out opportunities to challenge every manifestation of race discrimination that came to his attention. At times this was to his financial detriment and to the consternation of his father with whom he practiced law. He literally worked himself to an early death. MCNEIL, *supra* note 10, at 194–12.

system that so unjustly benefitted whites. When Houston became Dean of Howard University School of Law in 1929, his foremost goal was to transform it into a first-class, fully accredited institution and to develop a pool of top notch civil rights lawyers.¹⁰⁰ He went about this task with focus and intensity. Only black lawyers could be counted on to challenge institutional racism in this country. Litigation – not legislation – was the only means to achieve that goal.¹⁰¹

Under Houston's leadership, Howard University School of Law became a boot camp to train black lawyers to fill the ranks of civil rights litigators in the years ahead.¹⁰² Houston was the kind of lawyer Atticus Finch could not imagine being. He tried many noteworthy criminal and civil cases, several of which lead to important Supreme Court decisions.¹⁰³ He could make a silk purse out of sow's ear. Two criminal cases illustrate the point.

In 1934, when the trial of the Scottsboro Boys was attracting national and international attention, he led a team of lawyers in the defense of a black man accused of murdering a wealthy white woman and her housekeeper in a rural Virginia county.¹⁰⁴ No white lawyer would touch the case.¹⁰⁵ No black had ever served on a jury in the county and no black lawyers practiced there. Still worse, unlike the Scottsboro Boys who were surely innocent, Houston's client was very

100. MCNEIL, *supra* note 10, at 63–85; GREENBERG, *supra* note 10, at 2–5, 30–31, 38; Percy R. Luney & Walter J. Leonard, *Charles Hamilton Houston and the Search for a Just Society*, 22 N.C. CENT. L.J. 1, 7–13 (1996).

101. Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49 (1935); GREENBERG, *supra* note 10, at 5. For example, the NAACP worked doggedly but futilely to convince Congress to outlaw lynching. This effort initially focused on the Dyer Bill, which passed the House of Representatives but died in the Senate in 1922 due to a filibuster by Southern senators. DRAY, *supra* note 9, at 259–72. In the aftermath of several well documented atrocities in the 1930s, the political climate for passing an anti-lynching bill appeared to be favorable. *Id.* at 335–62. The obstacle again was the Senate, dominated by hostile white southerners such as Senator Russell of Georgia who referred to proposed legislation as “skunk meat” and saw the anti-lynching campaign as a scheme to establish “a soviet Negro republic.” *The Congress: Black's White*, TIME, Jan. 24, 1938, at 8, 10. The opposition of the Southern senators prevailed. KENNETH R. JANKEN, WHITE: THE BIOGRAPHY OF WALTER WHITE, MR. NAACP 199–31 (2003); DRAY, *supra* note 9, at 344–62.

102. GREENBERG, *supra* note 10, at 5 (describing Howard Law School under Houston's leadership as the “West Point of civil rights”).

103. For an overview of Houston's career as a trial and appellate lawyer, see Jose F. Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. BALT. L. REV. 313 (2006).

104. RICHARD KLUGER, SIMPLE JUSTICE 147 (1976).

105. *Id.* at 149. For a detailed discussion of this trial, see also RAWN JAMES, JR., ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL AND THE STRUGGLE TO END SEGREGATION 1–16 (2010).

likely guilty.¹⁰⁶ Houston put up a fierce, well-conceived defense, which included a challenge to the county's longstanding practice of excluding blacks from the grand and petit juries.¹⁰⁷ It was almost a foregone conclusion that his client would be sentenced to death.¹⁰⁸ The all-white jury did convict but astonishingly recommended a life sentence.¹⁰⁹ Several jurors told reporters that Houston's closing argument was decisive.¹¹⁰ Houston understood that even in Jim Crow Virginia whites wanted to be seen as fair to blacks. The challenge was finding the right jury psychology. Eschewing Atticus Finch's tedious sermonizing, he offered the jurors a rationale for sparing his client's life without attacking their beliefs about race and racial hierarchy. He described his client as "a poor homeless dog" and shrewdly asked the jury to spare his life so that if an accomplice to the crime were ever caught, he would be available to testify against him.¹¹¹ Houston got the best possible outcome any lawyer could have gotten.

In *Legions v. Commonwealth*,¹¹² Houston did an equally masterful job. His client, a black man accused of raping a white woman, was convicted and sentenced to death.¹¹³ The challenge was to get an appellate court to overturn a jury's fact finding. The case against *Legions*, like the case against Tom Robinson, rested on the testimony of two white witnesses – the alleged victim and her husband. Houston's defense was simply that a rape did not occur.¹¹⁴ Houston established that the incident took place in a small house in "a thickly settled," predominantly black neighborhood.¹¹⁵ The house was easily accessible to a nearby, well-lit street.¹¹⁶ People were up and about on the street and, in particular, were gathering at a Negro restaurant well within earshot to customers.¹¹⁷ Any call for help would have been heard.¹¹⁸ The accused, who was concededly unarmed, was known

106. The state had a confession. Defendant's alibi witnesses never materialized. Several local witnesses – all black – placed the defendant in Loudon County the day before the murder, not Boston as he had claimed. KLUGER, *supra* note 104, at 152.

107. *Id.* at 150–52. McNEIL, *supra* note 10, at 91, 93.

108. KLUGER, *supra* note 104, at 152–53; McNEIL, *supra* note 10, at 93–94.

109. KLUGER, *supra* note 104, at 153.

110. *Id.*

111. *Id.*

112. *Legions v. Commonwealth*, 23 S.E.2d 764 (1943).

113. *Id.* at 765.

114. *Id.* at 764–65.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

both to the victim and her husband who was present when the rape allegedly happened.¹¹⁹ The key was the husband's failure to put up any resistance or to call for help.¹²⁰

Houston astutely recognized that the husband's feeble performance in defense of his wife, a white woman, against a Negro attacker would be perceived as cowardly and an embarrassment to whites generally. It went against notions of white manliness and suggested overwhelmingly that a crime could not have been committed. The court reversed Legions' conviction, noting "[t]he whole thing does such shocking violence to any righteous conception of human conduct as to be unbelievable even to the most credulous and naïve."¹²¹ "[W]e are not required to believe that which we know from human experience is inherently incredible."¹²²

Houston's most consequential work, however, came in school desegregation litigation. He devised a truly ingenious strategy to subvert the "separate but equal" rationale of *Plessy v. Ferguson*.¹²³ Southerners focused on the "separate" part of *Plessy* but ignored the "equal" part. If they wanted to preserve Jim Crow, Houston intended to hold their feet to the fire and demand strict equalization of treatment. The cost of equalization, he reasoned, would eventually prove to be so onerous that Jim Crow would eventually collapse.¹²⁴ Among the black lawyers working for Houston in this crusade was Thurgood Marshall, a commanding personality and highly effective trial lawyer even in the most hostile Southern courtrooms.¹²⁵

Over nearly two decades, Houston and Marshall patiently executed the game plan. The initial targets were all-white law schools and graduate level academic programs.¹²⁶ In that era those programs were male bastions,¹²⁷ minimizing the taboo of a black man sitting in a

119. *Id.*

120. *Id.* at 765.

121. *Id.*

122. *Id.*

123. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

124. Brent E. Simmons, *Charles Hamilton Houston*, 69 NAT'L LAW. GUILD REV. 178, 182 (2012); Luney, *supra* note 100, at 12.

125. See GREENBERG, *supra* note 10, at 93–02, 133–35, 140–49; see also GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS AND THE DAWN OF A NEW AMERICA* (2012) (describing Thurgood Marshall's defense in 1951 of two black clients accused of raping a white woman in the notorious Groveland case in Florida).

126. GREENBERG, *supra* note 10, at 62–78; KLUGER, *supra* note 104, at 256–84.

127. GREENBERG, *supra* note 10, at 5–6.

classroom next to a white woman.¹²⁸ They were uniformly successful in these cases. Equalization of racially separate facilities and programs, as Houston had foreseen, proved too costly and too impractical. As a result, by 1950 at the higher education level, blacks and whites physically occupied the same classroom at the same time pursuing the same degree.¹²⁹ A critical threshold had been crossed.

Houston's incrementalist strategy neared the ultimate goal: desegregation of public schools where young black and white children would be in classrooms together. Due to Houston's death in 1950, the question whether "to go for the gold"¹³⁰ and directly attack *Plessy* was left largely to Thurgood Marshall.¹³¹ One of *Plessy's* key passages referred approvingly to state laws "permitting, and even requiring" separation of the races in public schools.¹³² In the mind of the white Southerner, this was constitutional bedrock. If *Plessy* were to be overruled, Jim Crow would be swept away. On the other hand, if *Plessy* survived, the setback for blacks would be catastrophic. Segregation would remain indefinitely as long as facilities for blacks were "equalized."

At this juncture, another colleague of Houston's came to the fore: James Nabrit, a relentless advocate for an all-out assault on *Plessy*. As a ten-year old in Americus, Georgia, he experienced first-hand the viciousness of a lynch mob.¹³³ A black man had been too openly gleeful about boxer Jack Johnson's 1910 defeat of Jim Jeffries, then known as "The Great White Hope."¹³⁴ The mob brutally beat him, hog tied him and dragged him to the colored section of town where he died.¹³⁵ The body was burned and during the night whites picked off pieces of the corpse as souvenirs.¹³⁶ Nabrit's home stood 200 yards away.¹³⁷

Like Houston, Nabrit was a brilliant student and a tenacious lawyer. He enrolled in Northwestern Law School where he was editor of

128. *Id.*; see also *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (noting the plaintiff in the case was a black woman).

129. See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

130. GREENBERG, *supra* note 10, at 31.

131. *Id.* at 31, 112–14, 285–86; KLUGER, *supra* note 104, at 290–94, 520.

132. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

133. KLUGER, *supra* note 104, at 518.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

the law review and ranked first in his class.¹³⁸ Showing the steely resolve that exemplified his career, Nabrit began law practice in Texas, a state with very few black lawyers.¹³⁹ He soon gained a reputation as a formidable litigator achieving some notable successes in Texas voting rights cases. His work came to the attention of Dean Houston who persuaded him to join the Howard University School of Law faculty where he later served as Dean of the Law School and then as President of Howard University.¹⁴⁰

In 1950, Nabrit was approached about challenging segregation in the District of Columbia public schools.¹⁴¹ He did not equivocate. Impatient with quibbling about equalization of black and white schools, Nabrit insisted on a direct challenge to *Plessy*.¹⁴² If this strategy succeeded, *Plessy* would join *Dred Scott* as one of the most discredited decisions ever handed down by the Supreme Court. Meanwhile, Thurgood Marshall was uncertain and he was not alone.¹⁴³ There were many, including some prominent legal scholars, who doubted the wisdom of the “go for the gold” strategy.¹⁴⁴ Nabrit’s forceful argument for a showdown over *Plessy* eventually prevailed.¹⁴⁵

In 1954, after nearly two decades of painstaking litigation, Houston’s strategy bore fruit. *Brown v. Board of Education* overruled the hated “separate but equal” doctrine.¹⁴⁶ It is still the most far reaching case ever handed down by the Supreme Court. Without *Brown*, the emergence of the civil rights movement would have been delayed indefinitely. The protest activities that spread throughout the South in *Brown’s* aftermath would have gone for naught. The civil rights and voting rights legislation of the 1960s might never have been passed. Public accommodations would have remained segregated in many regions of the nation and barriers to voting would have continued. The campaign against the death penalty might never have been undertaken. Worthy of special note here is the Supreme Court’s 1977 deci-

138. *Id.* at 519

139. *Id.*

140. *Id.* (noting that Nabrit participated in two voting rights cases out of Texas which brought him to the attention of Charles Houston.); see generally *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

141. KLUGER, *supra* note 104, at 520–23.

142. *Id.* at 291–92, 522–23.

143. *Id.* at 290–93.

144. *Id.*; GREENBERG, *supra* note 10, at 112–14.

145. GREENBERG, *supra* note 10, at 114–15; KLUGER, *supra* note 104, at 536–37. Nabrit’s case was one of the companion school desegregation cases decided by the Supreme Court along with *Brown*. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

146. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

sion in *Coker v. Georgia*¹⁴⁷ holding that the death penalty cannot be imposed in rape cases. *Coker* brought an end to the long, sordid history in the South of putting black men to death as a form of human sacrifice to protect white womanhood and to preserve white racial integrity.

Charles Hamilton Houston was the Moses of the American civil rights movement.¹⁴⁸ He never saw the Promised Land. Unlike Atticus Finch, he was the fierce, resolute crusader for racial justice that Harper Lee could not imagine. To ennoble her ill-conceived metaphor, he was a mockingbird with talons. Tragically, few people today know Charles Hamilton Houston's name.

147. See generally *Coker v. Georgia*, 433 U.S. 584 (1977).

148. GREENBERG, *supra* note 10, at 3. The title of "Moses" was given at Houston's funeral in 1950, well before anyone had seen the Promised Land.

Blocking the Means to Exploit: Ending *Kafala* Under the Principle of *Sadd al-Dhara'i*

FARAZ SIDDIQUI* & ALEEA STANTON**

I. A BRIEF POLITICAL AND SOCIOECONOMIC HISTORY OF THE GULF STATES.....	344
A. The Rise of the Gulf States.....	344
B. Recent Trends in the Gulf.....	346
C. The History of <i>Kafala</i> in the Gulf States.....	347
D. Case Study: The <i>Kafala</i> System of Saudi Arabia....	349
II. ISLAMIC PRECEPTS ON LABOR AND LABOR LAW.....	350
A. Work and Labor.....	352
B. Worker-Employer Relationship.....	353
C. Worker Rights and Responsibilities.....	354
D. Workers Compensation.....	355
E. State's Obligations.....	355
F. Contractual Obligations.....	356
G. Human and Civil Rights.....	357
H. Labor Practices Under the Caliphate.....	358
III. SADD AL-DHARA'I.....	359
IV. RECOMMENDATIONS — AND CHALLENGES — FOR REFORMS.....	364

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At [Qatar's] Ministry of Labor . . . we find Jayraj, who . . . [along with] around thirty of his colleagues [hasn't] been paid in more than three months. "We cannot even return to our countries because we don't have money. Our companies say, '[w]ait for two months' Back home, I have my mother, a wife, and two children to feed"¹

The Arabian Peninsula experienced an immense economic boom within a few decades of the discovery of oil in the region.² This was especially true for the countries that form the Gulf Cooperation Council (GCC) – Saudi Arabia, Kuwait, Bahrain, Qatar, Oman and the United Arab Emirates.³ A rapid pace of development ensued, made possible by an army of migrant workers like Jayraj, who were brought in from Asia and Africa.⁴ Migrant workers entered the GCC or "Gulf" states under a temporary work-permit system, a sponsor-based scheme called *kafala*.

This paper argues that the *kafala* system "facilitates and fosters" violations of Islamic principles of justice and fairness in the areas of labor and contracting, and enables the abuse and exploitation of migrant workers.⁵ Accordingly, this Article urges Gulf states that claim to derive their rules from the Shariah to abolish the *kafala* system. This Article builds a case that the *kafala* system is forbidden in Islam under the principle of Islamic law called *Sadd al-Dhara'i*.⁶ *Sadd al-Dhara'i* states that an action is forbidden if it leads to an outcome that is forbidden.⁷

There are three reasons why this Article uses Islamic law to analyze labor practices in the Gulf states. First, this analysis eschews an

1. Al Jazeera English, *Migrant Workers Mistreated in Qatar*, YOUTUBE (Jun. 11, 2012), <https://youtu.be/6NmxUDXP4LI>.

2. For example, Kuwait first started exporting crude oil in 1946. In 1965, Kuwait's GDP was \$2.1 billion. In 1980, it was \$28.6 billion. *Kuwait*, WORLD BANK OPEN DATA, <http://data.worldbank.org/country/kuwait> (last visited Apr. 12, 2017).

3. *See id.*

4. In 2013, only eleven percent of UAE's total population of nine million were nationals of UAE. *United Arab Emirates*, WORLD BANK OPEN DATA, <http://data.worldbank.org/country/ united-arab-emirates> (last visited Apr. 12, 2017); *Gulf Labour Markets & Migration*, GULF RES. CTR., <http://gulfmigration.eu> (last visited Apr. 12, 2017) [hereinafter GLMM].

5. *Accord*. HumanRightsWatch, *Domestic Workers Trapped, Exploited and Abused in the UAE*, YOUTUBE (Oct. 22, 2014), <https://youtu.be/NXqHLFngobw?t=2m24s> ("[t]he UAE facilitates and fosters abuse and exploitation of domestic workers" because of restrictions placed on them under the country's *kafala* system).

6. Literally, *Sadd al-Dhara'i* means "closing off the means that can lead to evil." Izzi Dien, Mawil Y., *Sadd al-Dhara'i*, in ENCYCLOPAEDIA OF ISLAM (P. Bearman et al. eds., 2d ed. 2005), <http://bit.ly/2oZAJES>.

7. Izzi Dien, Mawil Y., *Sadd al-Dhara'i*, in ENCYCLOPAEDIA OF ISLAM (P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs ed.) (2d ed. 2012), http://dx.doi.org/10.1163/1573-3912_islam_SIM_6414.

analysis under an “orientalist” lens which would end up “disregarding, essentializing, denuding the humanity” of the Gulf states.⁸ Second, “Islam remains a source of legislation for the majority of Arab countries, so it is worth examining new Islamic paradigms to address challenges in migrant workers’ employment and working conditions.”⁹ Indeed, Saudi Arabia and Qatar claim that their legislation is organized on the Shariah, while Bahrain and Kuwait use Shariah law and Shariah courts in at least part of their legal framework.¹⁰

Finally, Islamic discourse might prove a useful tool for advocacy for migrant workers’ rights. It is hoped that finding the *kafala* system untenable with Islam would push citizens and the governments in the Gulf states to rethink their labor laws. For example, Professor Hossein Askari of George Washington University recently used a similar line of advocacy. Rather than evaluating Muslim-majority countries on how “democratic” or “liberal” they are, he evaluated them on how Islamic they are.¹¹ These “Islamicity” indices helped “provide a benchmark for Islamic teachings to assess a country’s performance.”¹² Soon after, the Islamic Development Bank and the Malaysian government adopted similar indices to measure the country’s compliance with Islamic teachings – and used them to identify areas that needed reforms and progress.¹³

Part I presents a brief history of the socioeconomic and political history of the Gulf states and the origins of the *kafala* system. Part II examines the Quran and Sunnah to elucidate the relevant precepts of Islamic law that underlie labor law in general and the *kafala* system in particular. Part III describes the *Sadd al-Dhara’i* principle and argues

8. See EDWARD SAID, *ORIENTALISM* 308 (1978).

9. Ahmed Al Mukaini, *Islam’s Evolving Role in the Protection of Foreign Workers*, THE NAT’L. (Dec. 6, 2011), <http://bit.ly/2o12I9b>.

10. Karen Pfeifer, *Islam and Labor Law: Some Precepts and Examples*, in ISLAM AND EVERY DAY LIFE: PUBLIC POLICY DILEMMAS 113, 117 (Sohrab Behdad & Farhad Nomani eds., 2006). See also QATAR CONST. art. 1 (“Qatar is an independent Arab country . . . Shariah law shall be the main source of its legislations”); HERBERT J. LIEBESNY, THE LAW OF THE NEAR AND MIDDLE EAST: READINGS, CASES, AND MATERIALS 109–10 (1972) (explaining the origins of the Kuwaiti and Bahraini laws). Kuwait, UAE and Bahrain adopted clauses in their constitution that made Shariah a rather than the chief source of legislation. Clark B. Lombardi, *Constitutional Provisions Making Sharia “A” Or “The” Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?*, 28 AM. U. INT’L L. REV. 733, 746–49, 758, 763.

11. Hossein Askari, Hossein Mohammadkhan, Liza Mydin & Mostafa Omid, *Background on Islam and Islamicity Indices*, ISLAMICITY INDICES, <http://islamicity-index.org/wp/islamicity-indices/> (last visited Dec. 31, 2017) (“‘Islamicity’ Indices are designed to answer [the] question . . . Do these countries reflect the human, social, economic and governance teachings of Islam?”).

12. Hossein Askari, *Islamicity Indices — The Best Instrument for Changing the Muslim World*, HUFFINGTON POST (Jan. 10, 2016), <http://huff.to/1P0wbFt>.

13. *Id.*

that, according to this principle, the *kafala* system is prohibited under Islamic Law. This Part also presents evidence that the *kafala* system is the cause of severe abuse and exploitation of migrant workers in Gulf states. Finally, Part IV proposes several recommendations to encourage labor reform in the Gulf states so that the values of Islam are adequately reflected in their laws.

I. A BRIEF POLITICAL AND SOCIOECONOMIC HISTORY OF THE GULF STATES

A. The Rise of the Gulf States

By the end of the First World War, the British Empire had rewritten the map of the Arabian Peninsula. The British army had used alliances with chiefs of local tribes to completely untether the region from the Ottoman Empire's diminishing control.¹⁴ By the mid-1920s, the British had formed protectorates, mandates and dependencies with dozens of small independent states.¹⁵

During the interwar period, several countries in the region discovered oil. Bahrain, Saudi Arabia, and Kuwait discovered oil fields in the 1930s, Qatar in 1940, and UAE and Oman in the 1950s.¹⁶ Soon after, the states began to declare independence from the British.¹⁷ Kuwait was the first to declare its independence in 1961 and the UAE was the last, in 1971.¹⁸ Today, the peninsula consists of seven countries: the six Gulf states and Yemen.

Over the next few years, most Gulf states established themselves on their oil revenues. Then, in the 1970s, the Arab oil embargo, the Iranian revolution and the Iran-Iraq War caused the price of oil to triple in 1973, and triple again in 1979.¹⁹ Each of these events caused a global oil crisis but created a windfall for the oil producing Gulf states. They undertook massive public infrastructure and construction projects to jumpstart the private sector.²⁰ The labor-intensive nature

14. NEIL FAULKNER, *LAWRENCE OF ARABIA'S WAR* xiii (2016).

15. ROSEMARIE SAID ZAHLAN, *THE MAKING OF THE MODERN GULF STATES* 9–11 (1989).

16. See SIMON C. SMITH, *BRITAIN'S REVIVAL AND FALL IN THE GULF* vi (2004).

17. See generally, ZAHLAN, *supra* note 15.

18. *Id.*

19. *The Price of Fear*, *THE ECONOMIST* (Mar. 3, 2011), <http://www.economist.com/node/18285768>; See also James Hamilton, *Historical Oil Shocks* in *ROUTLEDGE HANDBOOK OF MAJOR EVENTS IN ECONOMIC HISTORY* 239–65 (Randall E. Parker & Robert Whaple eds., 2013).

20. See Mohammed Dito, *Kafala: Foundations of Migrant Exclusion in GCC Labour Markets*, in *TRANSIT STATES* 79, 80 (Abdulahadi Khalaf, Omar AlShehabi & Adam Hanieh eds., 2015).

of many of these projects meant that huge numbers of foreign workers were required.²¹ In 1975, for example, UAE's population rose by 16.2%, while the population growth in the other Gulf states was between 4.7% (Oman) and 6.8% (Qatar).²² The bulk of this population growth came through immigration. For example, in 2013, 6.1 million out of nine million people in UAE were migrant workers.²³ Close to five million migrant workers were from India, Pakistan or Bangladesh, while another 1.2 million from Egypt or the Philippines.²⁴

So far, the pattern of development mimicked that of other countries going through a development phase. But Gulf states differ from other destination countries in one important respect. In other immigrant-heavy countries such as the United States or Australia, migrants form a primary source of new citizens. In the Gulf states, immigrants are denied from integrating in the citizenry by consciously excluding the settlement of foreigners or non-citizens.²⁵ The workforce lives in the periphery of the mainstream society with no access to citizenship and minimal rights.²⁶ We have two societies in each country; one for the citizens, and one for the migrants.²⁷

Scholars note that the exclusion immigration policies served at least three goals. First, exclusion could allow the state to redistribute its oil wealth to a tiny population of citizens without diluting it among millions of migrants.²⁸ Second, the policies reflected "a strong wish to

21. *Id.* at 80–81.

22. *Population Growth (Annual %)*, WORLD BANK OPEN DATA, <http://bit.ly/2o88Kou> (last visited Apr. 12, 2017).

23. GLMM, *supra* note 4. Similarly, Kuwaiti (thirty-one percent) and Bahraini (forty-eight percent) nationals make up a minority in their respective countries. Only Oman (fifty-five percent) and Saudi Arabia (sixty-six percent) have more nationals than foreigners. *Id.*

24. Froilan T. Malit Jr. & Ali Al Youha, *Labor Migration in the United Arab Emirates: Challenges and Responses*, MIGRATION POLICY INSTITUTE (Sept. 18, 2013), <http://bit.ly/1zdfNvj>. Asian workers vastly outnumber Arab workers although Arab migrant workers. Scholars have suggested three reasons for this. Due to the common language and culture Arab migrants would share with the nationals, they would be inclined to settle permanently. Also, they would be more likely to voice and defend their workers' interest. Finally, a common language between the workers would have helped them create a working class as opposed to Asians from different linguistic backgrounds. Philippe Fargues, *Immigration Without Inclusion: Non-Nationals in Nation-Building in the Gulf States*, 20 *ASIAN & PAC. MIGRATION J.* 273, 277–78 (2011). Interestingly, most South Asians in the Middle East have managed to coalesce around a common *lingua franca*, called Hindustani. (Author's personal experience).

25. Fargues, *supra* note 24, at 275.

26. Nasra M. Shah & Philippe Fargues, *Introduction*, 20 *ASIAN & PAC. MIGRATION J.* 267, 268 (2011). Fargues also notes a de facto separation in the severely limited or absent interaction between nationals and non-nationals due to the separation of national and foreign quarters. Fargues, *supra* note 24, at 278.

27. *Dito*, *supra* note 20, at 98.

28. *Dito*, *supra* note 20, at 81.

preserve identity [in the face of] a weak demography.”²⁹ Finally, they were designed to eventually allow the countries to nationalize its labor market and shift the jobs to the nationals.³⁰ Permanent workers who could naturalize would be antithetical to all three of these rationales.

B. Recent Trends in the Gulf

Predictably, the goal of keeping the wealth within a tiny population succeeded, but that did not translate into stronger institutions that preserved the identity of the national, nor did the nationals ever enter the job market. Despite the temporary nature of the *kafala* contracts, the job market has yet to shift to the nationals. Nationals, comfortable with their share of the oil revenue under wealth redistribution schemes, are effectively excluded from the labor market. This has resulted in a spatial socio-political and cultural segregation that ironically has created a mutual economic dependency, founded on the dominance of the nationals and sustained by the labor of the migrant.³¹

Over the years, the Gulf states have continued to bring young migrant workers for short-term, unskilled jobs such as construction.³² In 2016, males between twenty and forty-five years of age constituted a whopping forty-seven to forty-eight percent of Qatar and UAE’s total population.³³ According to one expert, this “exceptional demography of the Gulf States is not explained by an exceptional level of immigration as much as by an exceptional closure of local societies.”³⁴ Much like the Transatlantic slave trade, where slaves could always be replenished by “a steady stream of new arrivals from West Africa,” migrant workers in the Gulf states are expelled before they become

29. Fargues, *supra* note 24, at 276–77.

30. *Id.*

31. Dito, *supra* note 20, at 98.

32. The construction sector created the largest numbers of short-term jobs for foreign-nationals. See generally CHOUCRI NAZLI ET AL., *MIGRATION AND EMPLOYMENT IN THE CONSTRUCTION SECTOR: CRITICAL FACTORS IN EGYPTIAN DEVELOPMENT* (1978). Eventually, the GCC countries transformed their oil wealth into comfort and material wellbeing for citizens through the recruitment of foreign workers for everything from maintaining their new infrastructure (public works jobs) to maintaining a luxurious lifestyle (service industry jobs) to raising children (domestic worker jobs). See Fargues, *supra* note 24, at 276.

33. POPULATIONPYRAMID.NET, <https://www.populationpyramid.net> (last visited Apr. 12, 2017) (select country from the drop-down menu). In Oman, the number was forty-two percent, in Kuwait, thirty-one percent, Bahrain, thirty-five percent, and Saudi Arabia, twenty-five percent. *Id.* For a crude comparison, Iraq is 17.5%, Western Europe is 15.4%, Yemen is 18.7%, and the World is 18.9%.

34. Fargues, *supra* note 24, at 274.

old enough to require pensions or healthcare, and are duly replaced by new workers.³⁵

On the other hand, skilled and highly skilled workers are not as easy to replace and managed to persist long enough to raise and educate their children in the Gulf. Often, these “second generation migrants” stay and find employment in the Gulf too. For example, in Kuwait in 2012, eighteen percent of all non-Kuwaitis were born in Kuwait, the majority of them from other Arab countries.³⁶ But even these migrants and their children continue to be politically excluded due to the lack of naturalization and intermarriages.³⁷ For these migrants, their “temporary” status exists in a “persistence of temporariness” where they “are neither temporary in reality nor permanent in status,” but are simply “long-term migrants.”³⁸

Recently, the GCC has been experiencing rising inflation and some of the lowest oil prices in years.³⁹ This has caused unemployment to rise among young nationals and created a hostility against migrant workers, who are seen as competitors in the labor market.⁴⁰ Yet, the *kafala* system in the Gulf states continues to thrive because it continues to serve the interests it was built upon. Moving away from the *kafala* is not simply a managerial or institutional task: it has foundations within the culture, and needs to be tackled at a deeper level and in a more familiar way. Islam is one such level.

C. The History of *Kafala* in the Gulf States

In its early inception, there was little doubt that the *kafala* system was a “tradition of Arab hospitality” which set forth obligations for the protection and treatment of foreign guests.⁴¹ While there are varying theories as to its origin, most agree that the system was created

35. TERESA A. MEADE, *A HISTORY OF MODERN LATIN AMERICA: 1800 TO THE PRESENT* 51 (2010).

36. Dito, *supra* note 20, at 98; *see also* Malit, *supra* note 24.

37. Dito, *supra* note 20, at 98.

38. *Id.* at 98–99. In Bahrain, the 2010 census indicated that approximately forty percent of non-Bahrainis have lived in the country for six years or more. *Id.* at 98.

39. *See, e.g.*, Tim Bowler, *Falling Oil Prices: Who Are the Winners and Losers?*, BBC NEWS (Jan. 19, 2015), <http://www.bbc.com/news/business-29643612> (analysis of dipping oil prices and its effects on countries like Saudi Arabia). *See also* THE ECONOMIST, *supra* note 19.

40. Shah, *supra* note 26, at 268.

41. Jennifer Heeg, *Gender, International Human Trafficking Norms and Gulf Migration*, TEX. A&M U. AT QATAR (Mar. 6, 2010), <http://bit.ly/2p8vs3E>.

to regulate the relationship between employers and foreign workers.⁴² Anh Nga Longva, in her book *Walls Built on Sand: Migration, Exclusion and Society in Kuwait*, explains that the *kafala* system stemmed from pearl fishing expenditures in the Gulf Coast.⁴³ At the beginning of each season, boat owners would hire pearl divers while “sponsoring” them a room and board, as well as expenses for their families.⁴⁴ When the season ended, the boat owners would subtract these expenses from the diver’s salary and pay them the remainder.⁴⁵ Often, the salary paid to the divers was not enough to cover their room and board expenses and as a result, the divers remained in a continuous cycle of debt.⁴⁶

After the discovery of oil in the nineteenth century, Gulf states extended the use of the *kafala* to meet the growing demands of labor. Under the established law of the *kafala*, those living in other countries were required to obtain a sponsorship by someone inside the country.⁴⁷ The aim of the sponsorship requirement was to monitor the influx of migrants and to ensure that once employment had ended, the migrants would either find new employment or return home.⁴⁸

Today, the *kafala* system is no longer viewed as a principle of hospitality. Instead, it is internationally denounced as a system of structural dependency between an employer and a migrant worker that leads to extreme exploitation and oppression. International organizations and non-profit groups, such as the Human Rights Watch (“HRW”) and Amnesty International, consider the *kafala* system a form of contemporary slavery.⁴⁹ This is because, under the *kafala* system, the employer assumes full legal and economic responsibility for the migrant worker and thereby possesses an immense degree of control and power.⁵⁰ As a result, workers depend on their sponsors for

42. Khan, Azfar & Rola Abimourched, *Migrant Workers Rights in Arab States*, Paper Presented at the Fourth Arab-European Human Rights Dialogue of the National Human Rights Institutions on Migrant Workers’ Human Rights (Mar. 11–13, 2009).

43. Azfar Khan, *Why It’s Time to End Kafala*, THE GUARDIAN (Feb. 26, 2014), <https://www.theguardian.com/global-development/2014/feb/26/time-to-end-kafala>.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Slow Movement: Protection of Migrants’ Rights*, HUM. RTS. WATCH (Dec. 16, 2009), <https://www.hrw.org/news/2009/12/16/slow-movement>.

48. Heeg, *supra* note 41.

49. Al-Sharq-Qatari, *Modern Slavery: The Plight of Foreign Workers in Qatar*, DIGITAL JOURNAL (Jan. 27, 2011), <http://digitaljournal.com/article/303006>.

50. *As If I Am Not Human: Abuses Against Asian Domestic Workers in Saudi Arabia*, HUM. RTS. WATCH (July 7, 2008), <https://www.hrw.org/report/2008/07/07/if-i-am-not-human/abuses-against-asian-domestic-workers-saudi-arabia>.

their livelihood and accommodation.⁵¹ When migrant workers arrive to the host country, employers typically confiscates their passports.⁵² Passport confiscation allows employers to exploit migrant workers in various ways, such as preventing them from filing complaints and leaving the country.⁵³ As a result, hundreds of thousands of workers are living in conditions of forced labor throughout the Middle East.⁵⁴

D. Case Study: The *Kafala* System of Saudi Arabia

Saudi Arabia claims to be the “guardian” of true Islam.⁵⁵ It claims to have molded the framework of its country according to Islamic law.⁵⁶ However, the *kafala* system of Saudi Arabia challenges these claims. Under its *kafala* system, in order to transfer or terminate employment, a migrant worker must first obtain consent from his or her employer.⁵⁷ This so called consent requirement has two effects. First, migrant workers are prohibited from leaving the Kingdom without obtaining an exit visa granted by their employers. Second, their dismissal, whether legitimate or capricious, can always results in deportation.⁵⁸ The government claims that the consent requirement assures that foreign nationals limit their stay to the period of actual employment.⁵⁹ Essentially, private citizens have the role of migration surveillance and the authority to exile.⁶⁰ The employer’s authority under the Kingdom’s *kafala* system has created a situation in which foreign migrants are completely dependent on their employers and subject to gross exploitation and abuse.⁶¹ This dependence occurs because once the employment relationship is terminated, there is no le-

51. Migrant Forum Asia, *Reform of the Kafala (Sponsorship) System*, INT’L LAB. ORG., <http://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf> (last visited Feb. 2, 2017).

52. Khan, *supra* note 43.

53. Migrant Forum Asia, *supra* note 51.

54. Migrant Rights, *End the Kafala System*, MIGRANT-RIGHTS, <https://www.migrant-rights.org/campaign/end-the-kafala-system/> (last visited Feb. 11, 2018 4:13 PM).

55. The Kingdom purports its constitution to be “[t]he Holy Qur’an and the Prophet’s Sunnah (traditions).” See Basic Law of Governance, art. I, https://www.constituteproject.org/constitution/Saudi_Arabia_2005.pdf (last visited Dec. 31, 2017).

56. *Id.*

57. *Id.*; Migrant Rights, *supra* note 54.

58. Migrant Rights, *supra* note 54.

59. *Id.*

60. *Id.*

61. Human Rights Watch, *Exported and Exposed: Abuses Against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates*, HUM. RTS. WATCH (Nov. 14, 2007), <https://www.hrw.org/report/2007/11/13/exported-and-exposed/abuses-against-sri-lankan-domestic-workers-saudi-arabia>.

gal premise for the worker to remain in the host country.⁶² As a result, migrants that cannot afford to travel home to their origin country live and work on the caprices of their employer.⁶³

The Saudi government claims that in return for this authority, employers are liable for any damage, debt, or even criminal activity committed by them. But the Kingdom does not investigate nor imprison employers for the acts committed by their workers. Yet, this notion of “imagined responsibility” permeates Saudi society and prevents any real attempts of reform.⁶⁴

Unsurprisingly, migrant workers in Saudi Arabia suffer a wide range of abuses. The most common grievances arise from confiscation of passports by employers, late or non-payment of salaries, an inability to leave an abusive employer, and the long waits and opaque proceedings of labor tribunals.⁶⁵ The most severe grievances include beatings, food deprivation, sexual assault, and even rape by the employers.⁶⁶ Despite that, the ministry responsible for managing these grievances has focused more on maintaining the economic benefits of the system rather than protecting migrant workers from abuse.⁶⁷ Its bureaucratic and flawed structure denies the workers any meaningful protection.

II. ISLAMIC PRECEPTS ON LABOR AND LABOR LAW

As noted above, Islam remains a chief source of law for several Gulf states.⁶⁸ Outside of the Arabian Peninsula, the Islamic Republics of Iran and Pakistan also claim to be organized on Islamic legal principles.⁶⁹ But Islamic sources do not provide a detailed labor code, and scholars have had to extract legal rulings from general guidance on trade, justice, human dignity, fair contracting and workers’ rights.

The lack of clarity in this area resulted in “a wide range of diverse and sometimes contradictory interpretations of how the basic texts of

62. Richard Morin, *Indentured Servitude in the Persian Gulf*, N.Y. TIMES (Apr. 12, 2013), <http://www.nytimes.com/2013/04/14/sunday-review/indentured-servitude-in-the-persian-gulf.html>.

63. *Id.*

64. *Id.*

65. Human Rights Watch, *Looser Rein, Uncertain Grip*, HUM. RTS. WATCH (Sept. 27, 2010), <https://www.hrw.org/report/2010/09/27/looser-rein-uncertain-gain/human-rights-assessment-five-years-king-abdullahs>.

66. *Id.*

67. Migrant Rights, *supra* note 54.

68. *See supra*, note 10.

69. Pfeifer, *supra* note 10, at 117.

Islamic jurisprudence apply to contemporary society.”⁷⁰ “Islamic” countries exercise a great latitude in what kind of economic system they use to structure their societies and, as a result, what labor laws they adopt.⁷¹ Both hyper-capitalist UAE and communist Syria have claimed at some point in history to have laws based on the Shariah.⁷² Islamic sources suggest that they both may be right. On the one hand, some of the Prophet’s closest companions such as Abdulrahman ibn Awf were aggressive entrepreneurs and participated in commerce.⁷³ On the other, companions such as Abu Dharr al-Ghifari, sometimes credited as the founder of “Islamic socialism,” encouraged aggressive wealth redistribution schemes and lived in austerity.⁷⁴

By the 1980s, adherents of an emerging field of “Islamic economics” rejected the capitalist-communist dichotomy.⁷⁵ They were uncomfortable with the accumulation of wealth in capitalist societies that created vast income disparities and exploited workers.⁷⁶ They also rejected communism’s denial of individual talent, creativity, and property ownership.⁷⁷ Instead, these scholars argued that Islam represents

70. *Id.*

71. A country’s labor laws are a function of the economic system within which they exist. This is because labor policies are “at the core of the productive processes that sustain society.” *Id.*

72. Lombardi, *supra* note 10, at 737, 758. A capitalist economy, the relationships between employers and employees are based on voluntary wage labor: workers sell their labor to employers, who own capital, for wages. Countries differ as to what powers they give employers to hire and fire workers and what freedoms workers have with respect to collective actions. On the other extreme, a communist society involves enterprises owned by the states, where the state plans production and employment centrally. Workers do not work to generate private wealth or assets but towards a common goal of using the productive capacities of the land and labor.

73. Abdulrahman ibn Awf related that, after he emigrated to Medina, he did not take charity but asked for the marketplace. Within a few days, he had made enough money to marry, pay a dowry of a gold piece the weight of a date stone. The Prophet approved of this. See *Merits of the Helpers in Madinah (Ansaar), Hadith 3780*, SUNNAH, <https://sunnah.com/bukhari/63> (last visited Feb. 2, 2017). Accord. Néjib Hachicha & Amine Ben Amar, *Islamic Finance and Economic Growth: The Malaysian Case*, in 2 ISLAMIC ECON.: THEORY, POL. & SOC. JUST. 173, 176 n.16 (El-Karanshawy et al. eds., 2015) (“labor force is the main factor that explains and justifies the wealth creation and capital accumulation by the individuals in Islam” (citations omitted)), http://www.irti.org/English/Research/Documents/Conferences/ICIEF/ICIEF_9/Islamic%20Finance%20Book_Volume_2.pdf.

74. Abu Dharr al-Ghifari related that Mohammad said, “[w]hat I desire is that Uhud be gold with me and three nights should pass and there is left with me any dinar but one coin which I would keep to pay debt” Sahih Muslim, *The Book of Zakat*, SUNNAH, <https://sunnah.com/muslim/12/41> (last visited Feb. 11, 2018 4:30 PM).

75. See, e.g., MUHAMMAD ABDUL MANNAN, ISLAMIC ECONOMICS: THEORY AND PRACTICE 80–88 (1986). The phrase “Islamic economics” first appeared in the encyclopedia of Islam in the 1940s. See *Riba*, ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 596–97 (Richard C. Martin ed., 2004). But see Karen Pfeifer, *Is There an “Islamic Economics”?*, in POLITICAL ISLAM 154, 154 (J. Stork & J. Beinin eds., 1997).

76. Mannan, *supra* note 75, at 80–88.

77. *Id.*

a “third path” based on Islamic precepts of fairness and justice and that Islam both encourages hard work and individual economic freedoms as well as requires Muslims to serve the common good and help the needy.⁷⁸

It is within this dynamic and unsettled area of law that the Gulf states adopted the *kafala* system as the exclusive labor law that applies to migrant workers.

A. Work and Labor

Labor law officially defines and regulates the relationships between employers and employees. Labor law may consist of formally codified statutes or regulations, or it may be informal practices that operate in society. The informal practices may cover areas that the formal law does not regulate, or areas that the state does not enforce.⁷⁹ The informal laws nevertheless are subject to principles of justice and equity. Here, we look at Islamic laws that are relevant for our analysis of the *kafala* system.

Work and labor have a special place in Islam. Islam associates labor with godliness. God persuades mankind to “disperse through the land and seek of the bounty of God.”⁸⁰ Some scholars go as far as to say that work is a duty of all able-bodied Muslims.⁸¹ But work is not *ibadaat* (ritual acts of worship), rather it is *muamalaat* (mundane commercial or civil act), so Islam encourages it be done in moderation and not for over-satisfying needs.⁸²

At the same time, Islam does not look down upon labor in general, or manual labor in particular. Much to the contrary, medieval Islamic society moved away from the contempt that ancient Greece and Medieval Europe had for manual labor. Scholars such as Ibn Khaldun extolled the benefits of labor for the progress of society, and

78. Pfeifer, *supra* note 10, at 113.

79. For example, according to the World Bank, twenty to forty percent of workers in the Middle East are informal. See NANCY BENJAMIN, *INFORMAL ECONOMY AND THE WORLD BANK* 22–25 (2014), <http://documents.worldbank.org/curated/en/416741468332060156/pdf/WPS6888.pdf>.

80. *Quran* 62:10; see also *Quran* 53:39 (“humans attain only what they strive for.”).

81. Abd al-Salam, J. *Haqq al-Amal fi al-Islam*, in 1 MAJALLAT AL-MU’AMALAT AL-ISLAMIYYA, 13, 25–26 (1993); Al-Faruqi, I.R. *Islam and Labour*, in *ISLAM AND A NEW INT’L ECON. ORDER: THE SOCIAL DIMENSION* 79, 79–80 (I.R. Al-Faruqi ed., 1980).

82. BAYAT, A., *WORK, POLITICS, AND POWER: AN INTERNATIONAL PERSPECTIVE ON WORKERS’ CONTROL AND SELF-MANAGEMENT* 18–22 (1991). See *Quran* 53:9–10 (“O you who believe! When the call is made for prayer on Friday, hasten to the remembrance of God, and drop all business . . . Then, when the prayer is concluded, disperse through the land, and seek God’s bounty.”).

intellectuals like the Brethren of Purity infused new, positive dimensions for labor by likening the individual laborer to a participant in creation.⁸³

In the Gulf countries, however, the political exclusion of migrants has created a corresponding exclusion of citizens from the labor market.⁸⁴ Nationals keep away from manual labor jobs even in the face of unemployment because of the perceived reputation of the profession, low wages, and employer beliefs that migrant workers are more obedient, reliable and loyal as their work permit in the country is at stake.⁸⁵ Unskilled migrant workers work in the “3D” professions – the “dirty, dangerous and difficult” jobs.⁸⁶ Instead of breaking the exclusion, some GCC governments have instituted policies that have deepened a schism between nationals and non-nationals. For example, nationals and non-nationals operate taxis in Kuwait and Saudi Arabia. However, non-nationals are prohibited from picking up fare at the airports – those are reserved for the nationals.

B. Worker-Employer Relationship

Islam requires workers and employers to treat each other with respect. Islam categorically forbids the mistreatment of employees. The Prophet is recorded to have said, “[t]he owners who mete out evil treatment toward their servants shall find the gateway to Paradise shut in their faces.”⁸⁷ Islam also respects the position of an employer as creative entrepreneurs with organizational skills and not just the owners of capital.⁸⁸ Even in disputes, parties are expected to strive to

83. MAYA SHATZMILLER, *LABOUR IN THE MEDIEVAL ISLAMIC WORLD* 402 (1994). See generally ABDUL RAHMAN KHAN, *LABOR RIGHTS IN ISLAM* (2014), <http://icnacsj.org/2014/05/labor-rights-in-islam-sh-abdool-rahman-khan/> (describing the virtues of work from Islamic sources).

84. Dito, *supra* note 20, at 98.

85. Mojca Zerovec & Marika Bontenbal, *Labor Nationalization Policies in Oman: Implications for Omani and Migrant Women Workers*, 20 *ASIAN & PAC. MIGRATION J.* 365, 378 (2011) (presenting research results from Oman). Similarly, in 2009, unemployment among Kuwaiti nationals was 4.2% and as high as fourteen percent in Kuwaitis aged twenty to twenty-four years old, whereas it was merely 1.1% among non-Kuwaitis. Nasra M. Shah, *Kuwait's Revised Labor Laws: Implications for National and Foreign Workers*, 20 *ASIAN & PAC. MIGRATION J.* 339, 351 (2011).

86. PETER STALKER, *THE NO-NONSENSE GUIDE TO INTERNATIONAL MIGRATION* 68 (2008).

87. MOORE, R. M., & DELENER, N., *Islam and Work*, in *WORKFORCE MANAGEMENT IN THE ARABIAN PENINSULA: FORCES AFFECTING DEVELOPMENT* 75 (G. S. Roukis & P. J. Montana eds. 1986).

88. *Id.* at 75.

uphold this mutual respect and quickly and fairly resolve the situation before it becomes injurious to the fabric of society.⁸⁹

C. Worker Rights and Responsibilities

Workers are to perform their jobs diligently and honestly, with the benefit of society in mind.⁹⁰ They are not to damage or steal from their employers' property as both shirking and theft are moral transgressions.⁹¹ In return, the employers have several obligations to their employees. For example, an employer may not force his employees against their will. The Prophet was reported to have said, “[your servants] are your brothers and sisters [placed] in your hands. Whoever has his brother under him should . . . not burden him beyond his ability. If you [do,] help him.”⁹² In addition, an employer should not punish a worker for equipment damage that is not the fault of the servant, or was a mistake. A story from Ali bin Husain, the grandson of Caliph Ali bin Abu Talib, is instructive here.⁹³ A slave girl was helping Ali perform his ablution by pouring some water out of a water can when the can slipped from her hand and injured him. She recited some verses from the Quran where God praised “those who restrain their anger, and those who forgive people: God loves the doers of good.”⁹⁴ After each phrase of the verse, Ali responded to her, “I have restrained my anger;” “I forgive you;” and finally, “I free you for the sake of God.”⁹⁵

Workers are entitled to breaks during the day and on the weekly Sabbath, to vacation, and to safe and healthy working conditions.⁹⁶ The Prophet was reported as having said, “[w]hen your slave or servant prepares food [and] has suffered the inconvenience of heat and smoke when cooking – [i]f the food is in a small quantity . . . at least give him a morsel or two therefrom”⁹⁷

89. Pfeifer, *supra* note 10, at 117.

90. Mannan, *supra* note 75, at 88–91.

91. Pfeifer, *supra* note 10, at 115.

92. Sahih Muslim, *The Book of Oaths*, SUNNAH, <https://sunnah.com/muslim/27/61> (last visited Feb. 11, 2018 5:05 PM).

93. *Ali Bin Husain bin Ali bin Abi Talib*, ISLAMWEB, http://library.islamweb.net/hadith/display_hbook.php?bk_no=798&pid=386951&hid=43303 (last visited Dec. 31, 2017).

94. *Quran* 3:134.

95. Hakeem Barakâtuhum, *How Do I Deal with Anger*, SEEKERS HUB (Aug. 11, 2014), <http://seekershut.org/ans-blog/2014/08/11/how-do-i-deal-with-anger/>.

96. Pfeifer, *supra* note 10, at 115.

97. *Id.*; Sunan Ibn Majah, *Chapters on Food*, SUNNAH, <https://sunnah.com/urn/1273990> (last visited Feb. 11, 2018 5:09 PM).

D. Workers Compensation

The Islamic sources prohibit the economic exploitation of workers and require a “just” or “fair” wage – one that is set by mutual agreement through written or oral contract before the work is undertaken. The Prophet was recorded as having said, “[t]he employer who fails to pay workers their due shall meet the displeasure of God.”⁹⁸ Also, he said, “[p]ay the worker his wages before his sweat has dried.”⁹⁹ According to Pfeifer, scholars have differing opinions on what a “just” wage is: that it should be calculated based on the production value of labor, or it should be based on supply and demand, or based on a minimum subsistence wage standard.¹⁰⁰

One expert goes so far as to believe that Islam obliges employers to provide housing, healthcare, transportation, education and meals to employees.¹⁰¹ Another believes that providing vocational training to employees is an obligation because it increases the productive capacity of the individual and of society overall.¹⁰²

Finally, Islam promotes profit sharing, and scholars have considered this concept in the modern context.¹⁰³ Scholars believe that profits could (and should) be shared with employees by subsidizing for employees the products of their labor, or benefits that cover the workers’ necessities of housing, daycare and medical expenses.¹⁰⁴ More aggressive profit sharing options could include bonuses, employee stock options, worker representation in management decision making, or even equal and joint partnership interest in the business.¹⁰⁵

E. State’s Obligations

At a minimum, an Islamic state should enforce the rights and responsibilities of the employees and the employers, however defined

98. Pfeifer, *supra* note 10, at 115; See Abd al-Salam, *supra* note 81, at 33.

99. Sunan Ibn Majah, *The Chapters on Pawning*, SUNNAH, <https://sunnah.com/urn/1267610> (last visited Feb. 11, 2018 5:15 PM).

100. A minimum wage is supported by the Islamic notion that all natural resources (timber, pasture, minerals) belong to God, so are public property. Thus, if access to these resources was limited to commercialize them, workers should at the very least be paid as much as they would get from the public lands using their own labor on those free resources for their own subsistence. S. M. YUSUF, *ECONOMIC JUSTICE IN ISLAM* 74–79 (1988).

101. H. M. SAID, *THE EMPLOYER AND THE EMPLOYEE: ISLAMIC CONCEPT* 85 (1972).

102. M. UMER CHAPRA, *ISLAM AND THE ECONOMIC CHALLENGE* 253 (1992).

103. For a discussion on profit sharing, a central theme of Islamic economics, see Pfeifer, *supra* note 10, at 115.

104. *Id.*

105. *Id.*

and protect the mechanisms of society by regulatory oversight, social security, and its judicial and police functions.¹⁰⁶ Some scholars suggest that Islam requires a state to regulate collective action by empowering workers to negotiate a “fair” wage and by raising the minimum wage when the cost of living increases.¹⁰⁷

The first four Caliphs believed that the state should provide a minimum standard of living.¹⁰⁸ By the same principle, a contemporary government must provide healthcare and education – similar to the modern welfare state.¹⁰⁹ Others add unemployment benefits, vocational training, and the power to coerce citizens to undertake some jobs that are necessary for the state’s welfare.¹¹⁰

Despite all this, the living conditions of migrant workers in the Gulf states is dismal.¹¹¹ Rather than subsidize costs or share profits, sponsors often shift the financial burden for medical insurance and residence permits to the workers.¹¹²

F. Contractual Obligations

Islam encourages to have agreements such as worker-employer agreements, written up in clear terms. The Prophet is known to have said, “[e]mployer must declare the wages to worker before the worker embark on the required work.”¹¹³ Once the contract is drawn up, a contract law is often considered as constituting not merely secular law between the parties, but also “a Shariah, that is, literally a sacred law between the parties.”¹¹⁴ Therefore, Islamic sources are very clear that contractual obligations need to be upheld. The Quran declares, “O you who believe! Fulfill your commitments.”¹¹⁵ In the worker-em-

106. *Id.* at 117–18.

107. *Id.* at 116. Traditionally, several Muslim-majority countries such as Pakistan and Egypt have had labor unions. However, the Gulf states strictly prohibit them. *Id.* at 118.

108. See MUHAMMAD SHARIF CHAUDHRY, FUNDAMENTALS OF ISLAMIC ECONOMIC SYSTEM, ch. 17, Pt. IV (2003) (describing the social welfare policies of the first four Caliphs), http://www.muslimtents.com/shaufi/b16/b16_17.htm.

109. MUHAMMAD AKRAM KHAN, ISSUES IN ISLAMIC ECONOMICS 108 (1983).

110. Pfeifer, *supra* note 10, at 116.

111. Americans for Democracy and Human Rights in Bahrain, *Slaving Away: Migrant Labor Exploitation and Human Trafficking in the Gulf*, 15–17, 38–39, 56–57 (June 17, 2014) <http://www.adhrb.org/2014/06/slaving-away-migrant-labor-exploitation-and-human-trafficking-in-the-gulf/>.

112. Khan, *supra* note 43.

113. ABDUL-RAHMAN AL-SHEHA, HUMAN RIGHTS IN ISLAM AND COMMON MISCONCEPTIONS 82 (2001).

114. S. Habachy, *Property, Right, and Contract in Muslim Law*, 62 COLUM. L. REV. 450, 450–73 (1962).

115. *Quran* 5:1.

ployer context, willful non-payment of wages or worker defaulting on other obligations is strictly forbidden: *pacta sunt servanda*.¹¹⁶

The logical extension of the principle of agreeing to a wage in advance today is contracting with a collective bargaining unit of a labor union.¹¹⁷ A Gulf state that wants to abide by the Shariah may want to large construction companies to implement this. A bargaining unit could help give the migrant workers agency and equal bargaining power. But monitoring contract compliance is more difficult in the domestic worker context, where the state has delegated to private citizens the surveillance of the migrant workers' immigration status by allowing the sponsors to retain the workers' passports.¹¹⁸ Workers cannot terminate their contracts and seek better employment without risking being deported by their sponsors (*kafeels*).¹¹⁹ In this context, it is important to remember that, under Islamic law, a contract that is imposed on the basis of exploitation, duress or undue influence is not enforceable.¹²⁰

G. Human and Civil Rights

Islam recognizes basic civil rights such as the freedom of speech and the freedom of movement.¹²¹ In Islam, it is a natural right of a human being to be able to depart and return to his country, and to move within that country. In fact, mobility “is a requirement of life . . . because it is often necessary to earn a livelihood, find employment, seek knowledge, and achieve many other things.”¹²² Freedom of movement is established by the Quran and other Islamic sources. The

116. Hazik Mohamed, *Compensation for Breach of Contract: Conventional & Islamic Perspectives*, ACADEMIA, https://www.academia.edu/5612810/Compensation_for_Breach_of_Contract_-_Conventional_and_Islamic_Perspectives (last visited Feb. 9, 2017). Islam does make concessions for breach of contract that was not willful. For example, the inability to pay due to sudden or unforeseen financial circumstances are justified reasons for non-performance.

117. Pfeifer, *supra* note 10, at 118. GCC states do not migrant workers to form labor unions.

118. Shah, *supra* note 26, at 268.

119. Khan, *supra* note 43. The alternative – absconding without their travel documents give rise to the problems of “runaway maids.” See, e.g., Mohammed Rasooldeen, *Guidelines for Sponsors with Runaway Maids*, ARAB NEWS (May 28, 2016), <http://www.arabnews.com/node/930901/saudi-arabia>.

120. Mohamed, *supra* note 116.

121. See, e.g., The Prophet has said, “[a] word of truth in front of a tyrannical ruler” is the best jihad. Abu Amina Elias, *Hadith on Jihad: The Best Jihad is to Speak Truth in Front of an Oppressor*, DAILY HADITH ONLINE (Jan. 29, 2013), <https://abuaminaelias.com/dailyhadithonline/2013/01/29/hadith-on-jihad-the-most-virtuous-jihad-is-to-speak-truth-in-front-of-an-oppressive-ruler/> (suggesting the freedom of speech).

122. *Understanding Islam: Concept of Freedom in Islam*, MASJIDMA (Feb. 3, 2011), <http://www.masjidma.com/2011/02/03/concept-of-freedom-in-islam/>.

Quran says: “It is He Who made the Earth submit to you, so traverse its surface and eat of its sustenance and to Him is your return.”¹²³ This establishes the basic principle of freedom of movement. To facilitate the people’s freedom of movement, Islam prohibits any transgression being committed against travelers and has prescribed an extremely stern punishment for highway robbery.¹²⁴

The main issue is that *kafala* restricts labor mobility. Being able to travel for work is a closely protected right in Islam. For example, Islamic scholars that require women to stay at home nevertheless make the exception for women who have to go out to work to acquire money for their necessities.¹²⁵ Under the *kafala* system, any mobility on part of the worker is strictly prohibited unless approved by the *kafeel*.¹²⁶ If the *kafeels* are unwilling to let them go, workers cannot leave them for better employment.¹²⁷ The retention of passports has, in many instances, led to situations of forced labor or human trafficking where migrant workers face arduous conditions, long hours, no overtime pay, and no breaks or vacations.¹²⁸

Experts believe that migrant workers will not see any real change in their situation until there are basic civil liberties in the Gulf States.¹²⁹ This is because the freedoms of speech and assembly are vital to hold the government accountable. The freedom to assemble can also force the private sector to respond to the demands of the migrant workers. Yet, Gulf states do not allow migrant workers to strike — previous collective action was followed by mass deportation.¹³⁰

H. Labor Practices Under the Caliphate

The situation in this part of the world has not always been so bad. The companions of the Prophet valued labor and respected their ser-

123. *Quran* 67:15.

124. See generally SAMI MOHAMMED HASHIM, *THE FELONY OF HIGHWAY ROBBERY BETWEEN THE ISLAMIC AND CRIMINAL LAW* (1993).

125. Stephanie Jason, *The Muslim War on Women’s Rights*, THE HILL (July 1, 2016), <http://thehill.com/blogs/pundits-blog/foreign-policy/286138-the-muslim-war-on-womens-rights>.

126. Khan, *supra* note 43.

127. *Id.*

128. Azfar Khan & Hélène Harroff-Tavel, *Reforming the Kafala: Challenges and Opportunities in Moving Forward*, 20 ASIAN & PAC. MIGRATION J. 293, 298 (2011).

129. Shah, *supra* note 26, at 268.

130. Chris Arsenault, *Striking Dubai Workers Face Mass Deportation*, AL JAZEERA (May 23, 2013), <http://www.aljazeera.com/indepth/features/2013/05/201352375248751541.html>.

vants and slaves.¹³¹ The Rightly Guided Caliphs themselves worked for wages even when they ruled the nascent Islamic empire.¹³² Minimum standards of living, including food, clothing and shelter were provided.¹³³ A positive attitude towards labor and laborers continued through the Abbasid caliphate.¹³⁴ During the Ottoman rule, Suleiman the Magnificent was known to have freed farm laborers from serfdom.¹³⁵ It appears that the *kafala* has regressed the Islamic community. The current state is more akin to the way slaves such as Bilal were treated during the *Jahiliyyah* period, the period of Ignorance before the advent of Islam in the region.¹³⁶

Looking at the number of egregious violations of Islamic law that employers in Gulf countries have committed, it is no surprise that scholars such as Sheikh Youssef El Qaradawi, an eminent Islamic scholar, issued a fatwa in March 2008 that the sponsorship rule which prevails in some countries is inconsistent with the teachings of Islam and should be abolished: “[t]he sponsorship system nowadays produced visas market, leaving tens of workers living in sub-human conditions, as a large number of laborers are accommodated in small areas It is really a shame and also it is against the Islamic principles which call for respecting human rights.”¹³⁷ This paper hopes to add to the body of literature of Islamic law in this area.

III. SADD AL-DHARA’I

The principle of *Sadd al-Dhara’i* implies blocking the means to evil.¹³⁸ Therefore, the purpose of *Sadd al-Dhara’i* is founded on the

131. Islam holds the companions of the Prophet in high esteem. *See, e.g.*, Quran 9:100. Their conduct is persuasive authority for legal rulings in Islam, especially in the Maliki school of jurisprudence.

132. Abu Bakr sustained himself on his own labor. When he first started as a Caliph, he did not accept any payment for his duties as Caliph. Although he finally conceded to the advice of others and withdrew an official stipend for those duties, his will returned all these payments to the treasury. WILL DURANT, *THE AGE OF FAITH* 187 (1980).

133. KHAN, *supra* note 109.

134. *See supra*, note 47 and accompanying text.

135. Robert Wilde, *The Sultans of the Ottoman Empire: c.1300 to 1924*, THOUGHTCO (Apr. 1, 2017), <https://www.thoughtco.com/ultans-of-the-ottoman-empire-1221866>.

136. For a discussion of pre-Islamic slavery *see* Jonathan E. Brockopp, *Slaves and Slavery in ENCYCLOPAEDIA OF THE QUR’AN* (Jane Dammen McAuliffe, ed.), http://referenceworks.brillonline.com/entries/encyclopaedia-of-the-quran/*-EQSIM_00393 (last visited Dec. 31, 2018).

137. Nour Abuzant, *Call for Review of Sponsorship System*, GULF TIMES, Mar. 14, 2008.

138. Although in its juridical application *Sadd al-Dhara’i* also extends to “opening the means to a beneficence,” this latter meaning is not particularly highlighted because opening the means to beneficence is the purpose of Shariah as a whole. M. H. Kamali, *Principles of Islamic Jurisprudence*, ISLAM HOUSE, https://d1.islamhouse.com/data/en/ih_books/single2/en_Principles_of_Islamic_Jurisprudence.pdf (last visited Feb. 9, 2017).

idea of preventing evil before it happens. The means are viewed in light of the ends they are expected to obtain. A means likely to lead to an evil result or a violation of the Shariah renders the means unlawful, even before the realization of the expected result. If the means serve the most significant purposes of Islamic law, such as the five essential values (life, religion, property, progeny and the mind) they have the highest legal value and similarly, if they lead to the most harmful results, they hold the most serious legal value.¹³⁹

When both the means and the ends are directed towards evil, the issue is likely governed by the general rules of Shariah.¹⁴⁰ However, permissible means at times can lead to both good and evil. In this event, if the evil is either equal to or greater than the benefit, the former will prevail over the latter.¹⁴¹ This is based on the principle that blocking evil takes priority over securing a benefit.¹⁴²

To determine the probability of whether a mean will lead to harm, the likely consequences of the action must first be examined.¹⁴³ This is a question of probability. The Shariah uses four degrees of probability:

- (1) Means which definitely lead to evil are strictly forbidden e.g., digging a pit in front of a dimly lit entrance for people to fall in;
- (2) Means which are most likely to lead to evil and rarely expected to lead to a benefit are forbidden e.g., selling weapons during a time of warfare;
- (3) Means which frequently lead to evil but there is no certainty that evil will occur are held to be lawful by some, and prohibited by others e.g., a lawful sale that is later used to as a means to procure usury and;
- (4) Means which are rarely expected to lead to evil and are most likely to lead to a benefit are permitted e.g., to dig a water well in a place that is not likely to cause injury to anyone.¹⁴⁴

Inquiry into these consequences is not accomplished by looking at the intent of the doer but rather, it focuses on the results and fruits

139. See generally RECEP DOGAN, *USUL AL FIOH, METHODOLOGY OF ISLAMIC JURISPRUDENCE* (2015).

140. IBRAHIM IBN MUSA ABU ISHAQ AL-SHATIBI, *THE RECONCILIATION OF THE FUNDAMENTALS OF ISLAMIC LAW: AL-MUWAFQAAT FI USUL AL-SHARIA* 195 (2012); BADRAN ABDUL-'AINAIN, *USUL AL-FIOH AL-ISLAMI* 242 (1975).

141. *Id.*

142. *Id.*

143. *The Tenth Source: The Principle of Means (adh-Dhara'i')*, INT'L ISLAMIC U. MALAY., http://www.iiu.edu.my/deed/lawbase/maliki_fiqh/usul11.html (last visited Feb. 9, 2017) [hereinafter *The Tenth Source*].

144. *Id.*

of the action.¹⁴⁵ Therefore, even if the intention is pure, if the action results in evil then it must be condemned.

To fit under the first category, *means that definitely lead to harm*, the mean must satisfy two criteria: (1) the action itself must be forbidden; and (2) the results of the action must also be forbidden.¹⁴⁶ Because this category involves two prohibitions, the forbidding is strengthened.¹⁴⁷ As explained above, the *kafala* system in and of itself is not prohibited by law or Islamic precepts. Instead, the violation occurs by the results of its implementation and therefore, although the second criterion is met, it fails the first prong. *Kafala* must be analyzed under the remaining categories.

Knowledge of the harm's likelihood of occurrence is important for the other categories.¹⁴⁸ If the harm is not definite, but it is also not rare, the mean could fall under the second or third category depending on the frequency of its occurrence. However, this is an issue of contention. Imams Malik and Ahmad b. Hanbal hold that the mere possibility or expectation that a mean could lead to evil must result in the obstruction of the mean.¹⁴⁹ On the other hand, Imams Abu Hanifah and al-Shafi'i have held that these acts are permissible unless the possibility of harm is dominant.¹⁵⁰ A means will fall under the fourth category if the harm only occurs on rare occasions.¹⁵¹

While accurate statistics are not readily accessible, a recent survey in Saudi Arabia shows that the harm caused by the *kafala* system is apparent and common. At the end of 2013, fifty-five percent of all suicides committed in Saudi Arabia involved domestic workers while fifty-eight percent of all suicides were committed by male migrant workers.¹⁵² In light of the fact that foreign nationals only make up for roughly thirty percent of Saudi Arabia's population, the high number of suicides amongst migrant workers indicates that their conditions are most likely the cause for blame.

145. *Id.*

146. *The Tenth Source*, *supra* note 143.

147. *Id.*

148. *Id.*

149. See generally RECEP DOGAN, *USUL AL FIQH, METHODOLOGY OF ISLAMIC JURISPRUDENCE* (2015).

150. *Id.*

151. *The Tenth Source*, *supra* note 143.

152. *Migrant Rights Statistics*, MIGRANT RTS., <https://www.migrant-rights.org/statistic/suicide/> (last visited Feb. 11, 2018 6:19 PM).

Domestic workers in the Kingdom work an average of 63.7 hours a week, the second highest rate in the world.¹⁵³ Although domestic labor law in Saudi Arabia prohibits an employee from working more than forty-eight hours per week,¹⁵⁴ this legislation is rarely enforced because most domestic workers live with their employer and therefore, the workers' mobility and access to redress mechanisms are circumscribed.¹⁵⁵ Statistics from 2014 show that 3,740 migrant workers filed complaints against their employers that year, the majority of them relating to issues of withholding salary.¹⁵⁶ However, it is likely that the number of complaints is much higher because registered complaints only represent a small portion of abuses.¹⁵⁷ Also, in a span of twenty-two months, more than 635 Nepali domestic workers were in need of rescue from Saudi Arabia.¹⁵⁸

The harm caused by the *kafala* system is also apparent in other GCC states. In 2013, eighty-one percent of all suicide cases in Kuwait involved South Asian migrant workers.¹⁵⁹ The Nepali embassy in Kuwait reports an average of over thirty cases a week of exploitation and abuse committed by employers.¹⁶⁰ It was also reported that an average of thirty women a month escape to the Nepali embassy seeking rescue.¹⁶¹ In 2014, Kuwait's Labor Dispute office received over 8,000 complaints concerning delayed wages and passport confiscation.¹⁶² In Qatar in 2014, reports say that nearly ninety percent of low-income migrant workers did not have their passports, while in 2013, migrant workers filed more than 3,558 complaints of abuse.¹⁶³

In light of these statistics, the likelihood for abuse to occur as a result of the *kafala* system is substantial and therefore, category four, *means that are rarely expected to lead to an evil*, does not apply. Instead, categories two and three are most applicable. Under category two, *means which are most likely to lead to evil and rarely expected to lead to a benefit* are forbidden. For either category, our *Sadd al-*

153. *Id.*

154. Saudi Arabia Royal Decree No. M/46 of 05/05/1436H.

155. *Migrant Rights Statistics*, *supra* note 152.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Low Wage Workers—Migrant Rights Statistics*, MIGRANT RTS., <https://www.migrant-rights.org/statistic/low-wage-workers/> (last visited Feb. 11, 2018 6:22 PM).

163. *Id.*

Dhara'i inquiry must next analyze any potential benefits of the *kafala* system. There are several well-known benefits to the system. First, the *kafala* system allows nationals of low-resourced countries to find work.¹⁶⁴ Without the use of these GCC recruiting agencies, most of these workers would not be afforded the opportunity to make a living and provide for their families. It is clear that many migrant workers view the sacrifice of leaving their home country as a risk worth taking in order to work.¹⁶⁵ Second, migrant workers typically receive higher wages than in their countries of origin, which benefits their family and community at home through remittance and employment.¹⁶⁶ Lastly, the host country benefits by having the labor necessary to expand its infrastructures.¹⁶⁷ These benefits typically do occur and are not considered rare.

It logically follows then that the *kafala* system best fits under category three, *means that frequently lead to evil but there is no certainty that evil will occur*. As explained above, there is no certainty that the *kafala* system, as prescribed by law, would lead to evil. However, as the HRW and other organizations have explained, the unbalanced authority granted by the *kafala* system inevitably leads to exploitation and abuse.¹⁶⁸ But whether *kafala* should be prohibited depends on the relative weight of the benefit and the harm. Under Imams Maliki and Ahmad b. Hanbal, which only requires the mere possibility of harm, *kafala* is clearly prohibited. The criteria for prohibition under Imams Abu Hanifah and al-Shafi'i requires the harm to be dominant. This stricter threshold may also be met, given the extreme nature and frequency of the abuse suffered by migrant workers, the overwhelming international outcry, and promises by the host countries' labor ministries, including Saudi Arabia, that it would end the *kafala* system, and the suicides, the ultimate cry of migrant workers who understood that the wages were not worth the abuse.

Our analysis only leads to one conclusion: that the *kafala* system is prohibited in Islam under the principle of *Sadd al-Dhara'i*. To comply with *Sadd al-Dhara'i* and the fundamental principles of Islam,

164. For demographics of workers in the Gulf countries, see Malit, *supra* note 24 and accompanying text.

165. Khan, *supra* note 43.

166. Middle East Institute, *Impacts Global Economic Crisis Migration Arab World*, MIDDLE EAST INST. (Apr. 18, 2010), <http://www.mei.edu/content/impacts-global-economic-crisis-migration-arab-world>.

167. *Id.*

168. *As If I Am Not Human*, *supra* note 50.

GCC states need to engage in a sweeping reform of the *kafala* system and end the abuse of migrant workers.

IV. RECOMMENDATIONS – AND CHALLENGES – FOR REFORMS

Despite promises made in 2012 by the foreign minister of Saudi Arabia, exploitation and abuse of migrant workers is currently at an all-time high.¹⁶⁹ In 2016, low oil prices and an economic downturn impacted the ability of Saudi Arabia's major construction companies to continue their projects and pay the salaries of migrant workers.¹⁷⁰ Thousands of migrant workers were stranded without salary and unable to return back home due to the exit visa requirements.¹⁷¹ The majority of these migrants were reported to be living in makeshift camps, relying on humanitarian assistance from their embassies and charitable organizations.¹⁷²

Qatar also made promises to end its *kafala* system.¹⁷³ As a result of international pressure relating to Qatar's hosting of the 2022 World Cup, in 2016, Qatar passed legislation purporting an end to its *kafala* system.¹⁷⁴ However, the new legislation left in place the most exploitative aspects of the *kafala* system, such as the exit visa requirement and the prohibition of workers changing employment without their employer's consent.¹⁷⁵

Other GCC countries have taken smaller steps to reform or abolish the *kafala* system. The Bahraini government began the process of dismantling its *kafala* system in 2006, when it established the Labour

169. *Saudi Arabia Events of 2016*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2017/country-chapters/saudi-arabia#b94615> (last visited Feb. 11, 2018 6:24 PM). Saudi Arabia has succeeded to several relevant international instruments such as ILO Convention 105 on the abolishment of forced labor, Elimination of All Forms of Discrimination Against Women and its Protocols ("CEDAW"), ILO Convention No. 100 on Equal Remuneration; ILO Convention 105 on the Abolition of Forced Labour; and ILO Convention No. 29 Concerning Forced or Compulsory Labour. See *Bahrain: Exploitation of Migrant Workers, Including for Political Reasons, Puts Their Lives at Risk*, INT'L TRADE UNION CONFEDERATION (Apr. 1, 2011), <http://www.ituc-csi.org/bahrain-migrants-exploited-their?lang=EN>.

170. *Id.*

171. In essence, the law does not require employers to enter into a contract with the migrant worker, detailing the salary and other terms of employment. *Id.*

172. The "vast majority" of domestic workers interviewed by HRW reported some form of physically, verbal, or psychological abuse. See *Bahrain: Exploitation of Migrant Workers*, *supra* note 169.

173. *Qatar: Migrant Workers Still at Risk of Abuse Despite Reforms*, AMNESTY INTERNATIONAL (Dec. 12, 2016), <https://www.amnesty.org/en/latest/news/2016/12/qatar-migrant-workers-still-at-risk-of-abuse-despite-reforms/>.

174. *Id.*

175. *Id.*

Market Regulation Authority (LMRA) to replace the employer as a migrant worker's sponsor.¹⁷⁶ The LMRA is empowered to issue work visas, regulate private employment agencies, educate workers and employers about their rights and legal obligations, and simplify the work permit system.¹⁷⁷ In addition, reforms in Bahrain's labor law, which were implemented in August 2009, allow workers to change employers without the employer's consent.¹⁷⁸ The goal of this change was to provide workers with the ability to leave abusive employers, and increase the pressure on employers to compensate their workers better.¹⁷⁹ However, there are still problems with abuse in this system.¹⁸⁰ For example, the 2009 amendment require a worker to provide his or her employer a three-month notice prior to leaving employment.¹⁸¹ This requirement has no safe harbor for workers who are facing abuse.¹⁸²

Kuwait has also taken measures to make it easier for migrant workers to change employers.¹⁸³ In 2010, the Minister of Social Affairs and Labor announced that it would abolish the *kafala* system in February 2011.¹⁸⁴ Subsequent to that announcement, a secretary from the same ministry stated that Kuwait would not abolish the system, but it would amend the system to make it easier for employers to change employment.¹⁸⁵

Yet, little has changed for the migrant worker in the Middle East and year after year, stories of exploitation persist. The authors of this paper believe that these changes cannot truly be effective in a political climate that denies non-citizens most civil liberties. For example, in both Bahrain and Kuwait, employers continue to punish their workers

176. *Bahrain: Exploitation of Migrant Workers*, *supra* note 169.

177. *Bahrain Moves to Reform Kafala, Exclusions Remain*, AM. FOR DEMOCRACY (Oct. 28, 2016), <http://www.adhrb.org/2016/10/bahrainkafala/>.

178. *Three Months After the Sponsorship System in Bahrain was "Scrapped," What Really Changed?*, MIGRANT RTS. (Nov. 11, 2009), <https://www.migrant-rights.org/2009/11/three-months-after-the-sponsorship-system-in-bahrain-was-scrapped-what-really-changed/>.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Jamie Etheridge, *Kuwait Sparks Confusion with Labour U-turn*, FIN. TIMES (Oct. 18, 2010), <https://www.ft.com/content/063fe278-dad5-11df-a5bb-00144feabdc0>.

184. *Id.*

185. *Labour Minister: No Intention of Dismantling the Kafael System*, SHOROUK NEWS, <http://www.shorouknews.com/404.aspx> (last visited Feb. 9, 2017).

by engaging in vengeful action such as filing fictitious complaints to the police that often result in the cancelation of the worker's visa.¹⁸⁶

Despite these continued problems, these legislative efforts show that GCC states have the means necessary to dismantle the *kafala* system and end the abuse of migrant workers. The *kafala* system of GCC states should be abolished, as the current abuses undermine fundamental precepts of Islam and negatively affect their relations with the global community. The GCC states have several alternatives that are much more harmonious with Islamic principles and reflect the minimum labor standards held by the international community. At the minimum, host countries must grant migrant workers the right to freedom of movement by allowing labor mobility. They must also increase the safeguards of abuse and exploitation by protecting basic contract principles such as the right to information and equal bargaining power. Lastly, host countries must strengthen the implementation of labor laws by adequately monitoring the handling of complaints, and enforcing sanctions against employers who are found guilty. On the other side, countries of origin must respond to the needs of their nationals abroad by ensuring that their citizens are adequately informed of the realities and their rights abroad.

The basic principles of international labor law, as provided for by the International Labour Organization (ILO), can guide the implementation of these reforms, and provide the groundwork for future improvement. GCC states must protect migrant workers' freedom of movement by ensuring mobility so that migrant workers can remain in the host country without being subject to arbitrary expulsion by the employer. Migrant workers should be in possession of their passports at all times and a severe penalty must be imposed (and actually carried out) when employers break this regulation. Additionally, workers must have the ability to terminate or end employment without the employer's consent, and without losing his or her legal immigration status.

While no ILO convention grants a migrant worker the right to freely change employers, ILO Conventions 143 and ninety-seven, and the UN Migrant Workers Convention, provide migrant workers with the equal rights as nationals, including the right to freely choose em-

186. *Bahrain Moves to Reform Kafala*, *supra* note 177. This shows a lack of due process of law. Other events such as the deportation of striking workers also show the lack of free speech. See *Bangladeshi Workers Strike Again in Kuwait*, BANGLADESH NEWS (Aug. 19, 2008), <http://bit.ly/2EaYjvT>.

ployment.¹⁸⁷ Adopting this policy will afford migrant workers greater possibilities to seek protection and file complaints by eliminating the fear of being deported. Further, states should allow migrant workers to stay for a grace period after the end of employment in order to seek new employment.

Under the *kafala* system, not only are migrant domestic workers at risk due to the restrictive sponsor-based visas, but also due to their exclusion from protection under labor laws.¹⁸⁸ To better protect their workers, GCC states should ratify and enforce the ILO Domestic Workers Convention No. 189 (“Convention 189”).¹⁸⁹ Convention 189 is the internationally recognized minimum standard for domestic workers.¹⁹⁰ It provides domestic workers the fundamental rights to decent living and working conditions.¹⁹¹ Convention 189 affirms the elimination of all forms of forced or compulsory labor.¹⁹²

Further, Member States are required to ensure that domestic workers are informed of the terms and conditions of the employment. In particular, domestic workers must be informed of the type of work to be performed, the method and calculation of their salaries, the normal hours of work, and the length of duration of their contract.¹⁹³ Convention 189 further stipulates that each Member must take steps to ensure that domestic workers in their country enjoy *effective* protection against all forms of abuse, violence, and harassment.¹⁹⁴ Members are required to take measures to ensure that domestic workers have access to courts and other impartial dispute resolution mechanisms.¹⁹⁵ It also provides for fair terms of employment and living conditions.¹⁹⁶

The Minister of Labor, instead of the Ministry of Interior, should be made responsible authority for enforcing labor law provisions. While current and pending legislation may afford migrant workers with new protections, these efforts are undermined by weak enforce-

187. *Id.*

188. *Id.*

189. ILO Convention 189, Domestic Workers Convention, 2011, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189.

190. *Id.*

191. *Id.*

192. *Id.* art. 3.

193. *Id.* art. 7(a)–(k).

194. *Id.* art. 5.

195. *Id.* art. 16.

196. *Id.* art. 9.

ment.¹⁹⁷ A stronger complaint and dispute resolution system is needed in all GCC states. The Ministry of Labor should handle complaints by workers and employers, investigate the allegations of abuse and mistreatment, and ensure that appropriate remedial measures are being taken. In addition, the Ministry of Labor should create strict and comprehensive enforcement measures of the labor laws and labor inspection. When an employer is found guilty of abuse or mistreatment, the Ministry of Labor must ensure that the appropriate sanctions are imposed against the employer.

The essence of an Islamic state is based on its application of Islamic law.¹⁹⁸ Islamic states must be called upon to fulfill their obligations of dispensing justice and maintaining law and order in accordance the Islamic precepts of labor. There is no doubt that Islamic law obliges its states to protect the rights of migrants living within its territory.¹⁹⁹ Indeed, the four noble Caliphs required Islamic governments to provide for the welfare of their states.²⁰⁰ The present *kafala* system is a form of indentured servitude and without any meaningful reform or abolishment, it will continue to tarnish the virtues of Islam. For GCC states claiming to be guided by Islamic law, implementing the changes outlined in this paper would help harmonize the labor practices of these countries with the virtues of true Islam.

197. Strict enforcement measures should be introduced for employers that violate migrant workers' rights. *See generally Reform of the Kafala System, supra* note 51.

198. ASHGAR ALI ENGINEER, *THE STATE IN ISLAM: NATURE AND SCOPE* 91 (2006).

199. Pfeifer, *supra* note 10, at 5–6.

200. *See* CHAUDHRY, *supra* note 108.

COMMENT

Nana's Need: How to Protect the Baby Boomer Generation Now Eligible for Medicare

HEIDI THOMAS*

INTRODUCTION	370
I. THE PRIVATIZATION OF THE MEDICARE PROGRAM AND THE ACA'S MANDATE FOR HEALTH INSURANCE	374
A. The Privatization of the Medicare Program: Introduction of Medigap, Medicare Advantage, and Medicare Prescription Drug Plans	374
B. Federal and State Regulation of Private Health Insurance Companies that Provide Medicare Coverage	376

* My God has shown me a path of discipleship that lights up my life; and also provided me with family, friends, and mentors that feed into my path and bless me through their own works and discipleship. I am thankful. I would like to give a special thank you to my mentor, advisor, and inspiration, Professor Christian Okianer Dark. Professor Dark pushed me to research deeper and to be creative with my resolution. Her wealth of knowledge in Healthcare and Antitrust law served me well in writing this article. I also want to give a special thank you to my Momma, Mrs. Tracy Brown Teague. No matter how big the dream or how crazy the idea might seem, my Momma is always there. God blessed me when He chose her to nurture me into the woman I am. My biggest thank you goes to my sweet angel, my Nana, Ms. Lottie Brown. On January 15, 2018, my Nana passed away. I am so sad to have lost a true love, but through me, her life and light continue. Because of her I was equipped with all the tools necessary to conquer my Juris Doctorate. She instilled in me the importance of reading, writing, and thinking. She also taught me to be courageous and honest. I will forever love and miss my Nana. To her I owe everything. Lastly, I dedicate this article to any young, black girl that has a dream. Chase your dreams, stay grounded in your faith, surround yourself with people who truly love you, and never allow the ways of the world to suffocate your voice. Say it loud!

C. The ACA Further Expands the Medicare Program and Creates Unlimited Access to Private Health Care Plans for Baby Boomers 378

D. States Lack of Consistent UDAP Statutes and Consumer Protections for “Business of Insurance” 381

II. BABY BOOMERS CREATE AN INCREASED STRAIN ON AMERICA’S HEALTHCARE SYSTEM, RESULTING IN INCREASED HEALTHCARE COSTS FOR AMERICANS 388

A. Baby Boomers: They Age!..... 388

B. No More Risk Pools for Health Insurance Candidates 389

III. NANA’S NEED: A LITTLE TIME AND NOTICE ... 391

CONCLUSION 395

INTRODUCTION

Since the enactment of the Medicare Act of 1965, the Medicare program has been an intricate part of the fabric of America.¹ In 2012, there were approximately fifty-five million U.S. citizens enrolled in the program, as compared to about nineteen million in 1966.² Undoubtedly, Medicare has provided millions of elderly Americans with access to quality health care at affordable costs. Ms. Lottie Brown (my Nana)³ and her sisters, Annie Sue and Ora Dean, are three of the millions of elderly Americans who receive the many benefits of the Medicare program. It has provided them and others with access to affordable prescription drugs, rehabilitative services, and even medical equipment. Since its inception, Medicare has proven to be beneficial in providing the elderly with adequate coverage for various health

1. The Medicare program played a significant role in the desegregation of hospitals and other medical facilities. David Barton Smith, *Stealth Capture: The Civil Rights Movement and the Implementation of Medicare*, 25 *POVERTY & RACE* 1, 1–2, 12–13 (2016). Individuals within the government and hospitals worked inconspicuously to ensure hospitals were in fact implementing desegregation plans. *Id.* The operation was one of the largest activism moments within the Civil Rights Movement. *Id.* at 1. Many thanks to the people who fought for equal health care facilities and health care services. Due to their servitude, black Americans were no longer rejected from hospitals or provided lesser health care services based on the color of their skin or a presupposed notion blacks were unable to pay for services. *Id.*

2. *On Its 50th Anniversary, More Than 55 Million Americans Covered by Medicare*, *CTRS. FOR MEDICARE & MEDICAID SERVS.* (July 28, 2015), <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2015-Press-releases-items/2015-07-28.html>.

3. My Nana is my grandmother.

care services, or where need be, providing them with access to supplemental health insurance plans.

Indeed, not all health care issues are covered by Medicare. Medicare beneficiaries are permitted to shop the private health insurance market for health insurance coverage that suits their health care needs. Unfortunately, time has demonstrated that when Medicare beneficiaries enter into the market for private health insurance plans, they can fall victim to the negative reality of consumer fraud that plagues the elderly community. This is what happened to my Nana and her sisters – they fell victim to health insurance fraud. The misrepresentations made to them by an insurance agent provided them with the impression that they would receive better coverage from the marketed private health insurance plan.

While Medicare may not provide coverage for all health care issues, private health insurance plans often provide lesser coverage than Medicare. During the summer of 2015, an insurance agent individually contacted my Nana and each of her sisters over the phone. Initially, the agent appealed to my Nana's need for supplemental coverage. Then, he began to introduce other plans that were "better" than her then existing Medicare coverage. The agent advised that the private health insurance plan would cost less and also provide greater benefits than Medicare. The monthly \$200 premium for the plan could be deducted directly from her social security benefits. What a deal, right? And how convenient! No – what a hoax!

My Nana changed her health insurance from Medicare to the private health insurance plan, which, subsequently, had a significant impact on the caliber of healthcare services she received. For example, under my Nana's initial Medicare coverage, her prescription drugs were free. Under the new insurance, however, she paid anywhere from two dollars to fifteen dollars per prescription, witnessing a price increase of almost forty dollars per month for her insulin alone. The new coverage had a negative impact on her prescription drug costs and other services, such as rehabilitation.

Approximately six months after my Nana made the change to a private health insurance plan, she suffered congestive heart failure and needed rehabilitative services. While in rehabilitative care, our family learned that Nana's new coverage only allowed for thirty days of treatment. One can imagine the utter shock our family experienced when we received the news, especially since my Nana's previous Medicare coverage allowed for 100 days of rehabilitative services. But

even after a host of phone calls and written complaints, my mother was unable to cancel the new insurance and re-enroll Nana back onto the Medicare program. The open enrollment period for the Medicare program had passed; and if she cancelled the new policy, she would likely be without coverage for approximately nine months.

In October of 2017, my Nana was able to re-enroll and restore her original Medicare plan. She spent almost a year and a half with the private health insurance once the process was finalized. The private plan not only failed to provide her with coverage comparable to Medicare, but more importantly, it did not provide her with health insurance coverage that actually suited her health care needs. As the elderly demographic of the American population increases, there is a need for efficient and effective health insurance programs that support and help to perpetuate a healthy, elderly American population. From 2012–2015, there was an increase of nearly three million people in the Medicare program.⁴ The Centers for Medicare & Medicaid Services attribute this increase to the retirement of the baby boomer generation.⁵

Part I of this Comment examines the implementation of the Medicare program, its evolution, and how it has impacted the lives of elderly Americans. The Medicare Act of 1965 was created with the intent to provide persons sixty-five and older with access to quality and affordable health care. Eventually, the Medicare program expanded and began to offer access to private health insurance plans, with the intent to create a healthier elderly population by providing the elderly subset with access to a higher *quality* of health care.⁶ Nonetheless, what legislators realized was that in order to ensure the elderly population receives *quality* health insurance, there must be adequate consumer protections that prevent fraud and misrepresentation in the health insurance market.

Part I further discusses the current consumer protections enforced by Centers for Medicare and Medicaid Services (CMS) and the National Association of Insurance Companies (NAIC). The federal government reserves the power to regulate the marketing and adver-

4. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 2.

5. *Id.* “Baby boomers” are a result of an increase in childbirth after the Great Depression and World War II. From 1946 to 1964, approximately seventy million children were born to American families. *See Baby Boomers*, HIST., <http://www.history.com/topics/baby-boomers> (last visited Oct. 28, 2016).

6. 89 CONG. REC. H1, 30 (daily ed. Jan. 4, 1965) (statement of Rep. King).

tising practices of private health insurance companies that participate in the Medicare program. Generally, CMS and NAIC regulate private health insurance plans that participate in the Medicare program, but private insurance companies that do not participate in Medicare are regulated by state governments.

Through enactment of the McCarran-Ferguson Act of 1945, the federal government provided states with the power to regulate the marketing and advertising practices of the “business of insurance.”⁷ In most instances, private health insurance companies are exempt from a state’s Unfair or Deceptive Acts and Practices (UDAP) statute; and where consumers are able to seek legal remedy, damages are limited. A reality of the Medicare program is that there is no requirement a person enroll, and it does not always provide the most comprehensive coverage. So, in instances like my Nana’s, where there is no requirement that you acquire and maintain Medicare, but there is a federal mandate⁸ that you acquire and maintain health insurance, the elderly easily become susceptible to health insurance fraud. This crossroad presents a growing concern for increased consumer protection in the health insurance industry as it pertains to individuals who qualify for the Medicare program.

Part II of this Comment will discuss the baby boomer generation and researchers’ anticipation as to how this generation will have an increasing impact on America’s healthcare system as they reach retirement and Medicare eligibility. In 2014, there were approximately seventy-five million baby boomers in America, a majority of whom have now become eligible for Medicare.⁹ The number of Medicare participants and high-risk persons in the health care system will continue to increase as the baby boomer generation ages. As baby boomers transition into retirement and become eligible for Medicare, market researchers are concerned they will fall victim to various health insurance scams.¹⁰ It is my position that these effects will not only

7. 15 U.S.C.A. § 1011 (West 2017).

8. *See infra* Part I.

9. Paul Barr, *Baby Boomers Will Transform Health Care as They Age*, HOSPS. & HEALTH NETWORKS (Jan. 14, 2014), <https://www.hhnmag.com/articles/5298-Boomers-Will-Transform-Health-Care-as-They-Age>.

10. Michelle “Missy” Apodaca, et al., *Senior Scams: How Universal Healthcare May Bring an Increase in Cons Targeting the Elderly*, TX. BAR J. 1023, 1024 (2013), https://www.texasbar.com/AM/Template.cfm?Section=Table_of_Contents&Template=/CM/ContentDisplay.cfm&ContentID=24383. *See Scams and Safety: Fraud Against Seniors*, FBI, www.fbi.gov/scams-and-safety/common-fraud-schemes/seniors (last visited Oct. 29, 2016) (providing that seniors are attractive to con artists for a number of reasons – senior citizens are trusting nature, they tend to

harm the beneficiaries' health and finances, but will also have a negative impact on the entire health care system.

Part III of this Comment provides a proposal that states enact notice statutes to protect Medicare beneficiaries in the market place for private health insurance. The notice statutes will allow Medicare beneficiaries to shop freely for private health insurance, but also provide them with immediate safeguards. In particular, beneficiaries will have the opportunity to cancel a private health insurance policy and re-enroll onto Medicare if ever presented with a misrepresentation or fraudulent information. In conclusion, the future viability of the American health care system and Medicare program depend on the health of the baby boomer generation and their access to *quality* health care. Thus, it is important the aging baby boomer population maintains quality health insurance coverage through Medicare and does not fall victim to unfair or deceptive marketing and advertising practices in the health insurance marketplace.

I. THE PRIVATIZATION OF THE MEDICARE PROGRAM AND THE ACA'S MANDATE FOR HEALTH INSURANCE

A. The Privatization of the Medicare Program: Introduction of Medigap, Medicare Advantage, and Medicare Prescription Drug Plans

In 1965, President Lyndon B. Johnson signed the Medicare Act into law.¹¹ The law was the result of growing concern for uninsured elderly Americans.¹² Since enactment of the Medicare Act, the Medicare program has expanded to provide the elderly with greater access to affordable health insurance.¹³ Initially, Medicare offered only two

own their home or have good credit, and they are more interested in products that are "guaranteed" to promote vitality). For a discussion of the top ten financial scams targeted at senior citizens, where Medicare/health insurance scams is listed as number one, see *Top Ten Financial Scams Targeting Seniors*, NAT'L COUNS. ON AGING, <https://www.ncoa.org/economic-security/money-management/scams-security/top-10-scams-targeting-seniors/> (last visited Oct. 29, 2016).

11. *History: CMS's Program History*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/about-cms/agency-information/history/index.html> (last visited Feb. 20, 2017); Steve Anderson, *A Brief History of Medicare in America*, MEDICARE RESOURCES, www.medicareresources.org/basic-medicare-information/brief-history-of-medicare/ (last visited Feb. 20, 2017). A number of United States' presidents attempted to push Congress for legislation that would provide health care for elderly Americans. *Id.* President Johnson's success in bringing the Act to fruition can be attributed to the works of Harry S. Truman and John F. Kennedy. *Id.*

12. Anderson, *supra* note 11.

13. *Id.* In 1972, President Richard M. Nixon authorized the first expansion of the Medicare program to include disabled persons sixty-five and older. *Id.*

types of health insurance, Part A (hospital insurance) and Part B (medical insurance) – now collectively known as the “original Medicare.”¹⁴ Although Part A and Part B of the Medicare program cover substantial amounts of health care costs, beneficiaries sometimes bear out-of-pocket expenses and deductibles.¹⁵ In order to reduce out-of-pocket expenses and deductibles for beneficiaries, the Medicare program initially expanded to include Medigap plans.¹⁶ Medigap plans are supplemental, private health insurance plans that cover beneficiaries’ out-of-pocket expenses and deductibles when their existing Medicare coverage is insufficient.¹⁷

The federal government continued with the expansion and privatization of the Medicare program by enacting the Balanced Budget Act of 1997 (BBA).¹⁸ The BBA established Medicare+Choice and allowed beneficiaries to receive benefits comparable to Medicare through private health insurance plans.¹⁹ Eventually, Congress passed the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA), which renamed Medicare+Choice to Medicare Advantage (Part C) and introduced the Medicare Prescription Drug Plan (Part D).²⁰ The implementation of Part C and Part D continued the privatization of the Medicare program and consistently provided Medicare beneficiaries with more access to private health insurance plans. However, these changes came with inconveniences for beneficiaries as the systems were complicated and confusing, often leaving beneficiaries susceptible to fraud and misrepresentations.

14. See 42 U.S.C. §§ 1395(c),(k) (2016); see also *History: CMS's Program History*, *supra* note 11; Anderson, *supra* note 11. In 1966, approximately nineteen million persons sixty-five and older were enrolled in the Medicare program. *Id.*

15. Gretchen Jacobson, et al., *Medigap Reform: Setting the Context for Understanding Recent Proposals*, THE HENRY J. KAISER FAM. FOUND. (Jan. 13, 2014), <http://kff.org/medicare/issue-brief/medigap-reform-setting-the-context/>; Anderson, *supra* note 11. The expansion also included persons with end stage renal disease. *Id.*

16. Jacobson, et al., *supra* note 15.

17. See *id.*; *Medigap – Medicare's Supplemental Insurance*, MEDICARE RESOURCES (Sept. 16, 2017), <https://www.medicareresources.org/medicare-benefits/medigap/>. The Medicare program does not always cover all health care costs for beneficiaries; therefore, in some instances, beneficiaries are required to purchase private health insurance plans to supplement those costs. *Id.*

18. See Balanced Budget Act of 1997 § 4001, Pub. L. No. 105-33, 111 Stat. 251 (codified in 42 U.S.C. § 1395w-1 (2017)).

19. See *id.*; see also The Henry J. Kaiser Family Foundation, *Medicare Advantage*, KAISER FAM. FOUND. (May 11, 2016), <http://kff.org/medicare/fact-sheet/medicare-advantage/>.

20. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066; 42 U.S.C. § 1395w-22 (2016); see also The Henry J. Kaiser Family Foundation, *supra* note 19; *How do Medicare Advantage Plans Work?*, MEDICARE, <https://www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/how-medicare-advantage-plans-work.html> (last visited Mar. 26, 2017).

B. Federal and State Regulation of Private Health Insurance Companies that Provide Medicare Coverage

Due to Medicare's various expansions, beneficiaries began to have access to privately managed health care plans and prescription drug plans that were loosely regulated by the Medicare program. For example, after the implementation of Medigap plans, Medicare witnessed an increased number of complaints from beneficiaries regarding misinformation and abusive marketing and advertising practices utilized by private insurance companies and insurance agents.²¹ In order to reduce consumer confusion and lessen instances of fraud, Congress enacted voluntary marketing and advertising standards for Medigap plans.²² Eventually, under the Omnibus Reconciliation Act of 1990 (ORA), the voluntary standards became permanent regulations that private supplemental health insurance plans were required to follow.²³ Among other things, the regulations require private health insurance companies that offer Medigap plans to submit advertising information to state insurance commissions for approval.²⁴ If states do not have approved regulatory patterns, the Secretary of Health and Human Services must approve of the Medigap policies.²⁵

21. See *Abuses in the Sale of Health Insurance to the Elderly in Supplementation of Medicare: Hearing on Comm. Pub. no. 95-165 Before H. Select Comm. on Aging*, 95th Cong. 93-113 (1978) (statement of Bill Gunter, Commissioner, Florida Department of Insurance, statement of Ms. Linda Lamel, Deputy Superintendent, New York Insurance Department, statement of Val J. Halamandaris, Special Counsel, Select Committee on Aging, U.S. House of Representatives; statement of Margaret Dickson, Special Senior Citizen Investigator, Select Committee on Aging, U.S. House of Representatives; statement of Yosef Riemer, Professional Staff Member, Select Committee on Aging, U.S. House of Representatives); see also *Medigap Insurance: Strengthening Federal Standards Hearing on S. 2050, S. 2189, S. 2640, S. 2641, and S. 3020 Before the Subcommittee on Medicare and Long Term Care S. Comm. on Finance*, 101st Con. 3 (1990) (opening statement of Hon. Max Baucus, a U.S. Senator from Montana).

22. See Social Security and Disability Amendments, Pub. L. No. 96-265 § 507 (1980) (providing voluntary guidelines for Medigap health insurance plans to follow). The guidelines proposed in the Social Security and Disability Amendments are commonly known as the Baucus Amendments. Carol Rapaport, *Medigap: A Primer*, CONG. RES. SERV. 6 (Sept. 19, 2012), <https://fas.org/sgp/crs/misc/R42745.pdf>.

23. See The Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508 (1990); Rapaport, *supra* note 22.

24. See The Omnibus Reconciliation Act of 1990 No. 100-508; June Gibbs Brown, *The Impact of OBRA 1990 on State Regulation of Medigap*, DEP'T OF HEALTH & HUM. SERVS. OFF. INSPECTOR GEN. 2 (Mar. 1995), <https://oig.hhs.gov/oei/reports/oei-09-93-00230.pdf>; Rapaport, *supra* note 22; see also Medicare Supplemental Insurance Minimum Standards Model Act § 11 (Nat'l Ass'n. Ins. Co. 1994). Prior to introduction of regulations for Medigap plans, there were approximately one hundred different plans offered to Medicare beneficiaries. Rapaport, *supra* note 22. The regulations promulgated under the Omnibus Budget Reconciliation Act of 1990 limited the number of Medigap plans available to beneficiaries to ten. *Id.* This too reduced the amount of confusion witnessed amongst Medicare beneficiaries. *Id.*

25. See The Omnibus Reconciliation Act of 1990 No. 100-508; Brown, *supra* note 24.

Also, the Department of Health and Human Services (DHS) is required to provide Medicare beneficiaries with information on marketing abuses and actual costs of Medigap policies.²⁶

Unfortunately, when the Medicare program expanded to include Part C and Part D it sustained many of the same consumer complaints regarding fraud and confusion that were witnessed after the introduction of supplemental Medigap plans.²⁷ As such, CMS, the insurance industry, state governments, and consumer advocates worked to achieve other means of consumer protections in the market place.²⁸ Under the Medicare Prescription Drug Improvement and Modernization Act of 2008 (MMA), CMS was given the authority to regulate the marketing and advertising practices of private health insurance companies that offer Part C and Part D plans to Medicare beneficiaries.²⁹ Although not as stringent as prior Medigap regulations, CMS proposed regulations for the marketing and advertising practices of private health care plans under contract with Medicare, that were later codified.³⁰ States are permitted to regulate the licensure and insolvency of Part C and Part D plans; however, the MMA preempts state governments from regulating the marketing and advertising practices

26. Rapaport, *supra* note 22.

27. The National Association of Insurance Commissioners, *Second State Survey on Medicare Marketing Issues*, NAIC (Feb. 5, 2008), http://www.naic.org/documents/committees_b_seni_or_issues_medpp_survey_2nd_summary.pdf. The National Association of Insurance Commissioners (NAIC), conducted two reports, one in 2007 and another in 2008, in response to consumer complaints from Medicare beneficiaries in the marketplace. See NAT'L ASS'N OF INS. COMM'RS, WHITE PAPER OF REGULATION OF MEDICARE PRIVATE PLANS 7 (2008), <http://www.naic.org/store/free/MPP-OP.pdf>. (discussing the first report conducted in 2007. This report is no longer available on the NAIC website). Thirty-four states reported consumer complaints about misrepresentations "in the marketing and sales of Medicare private plans" and "thirtytwo states reported complaints about inappropriate or confusing marketing practices leading beneficiaries to enroll into a [Medicare Advantage] plan without fully understanding consequences of leaving traditional Medicare." *Second State Survey, supra*.

28. See generally NAT'L ASS'N OF INS. COMM'RS, *supra* note 27 (detailing the different avenues the federal government and government agencies have taken to increase consumer protections amongst those who are eligible for Medicare and interested in the private health plan options. State governments too have suggested and implemented systems and regulations to increase consumer protections for those who are in the market for MA and PDP plans.).

29. See Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-73, 42 U.S.C. §1395w-26 (2008); *Medicare Marketing Guidelines for Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, Prescription Drug Plans, Employer/Union-Sponsored Group Health Plans, Medicare-Medicaid Plans, and Section 1876 Cost Plans*, THE CTRS. FOR MEDICARE AND MEDICAID SERVS., (June 6, 2016), <https://www.cms.gov/medicare/health-plans/managedcaremarketing/downloads/2017medicaremarketingguidelines2.pdf>.

30. See 42 C.F.R. §§ 422, 423; NAT'L ASS'N OF INS. COMM'RS, *supra* note 27, at 17-18.

of private health insurance plans that participate in the Medicare program.³¹

Undoubtedly, federal and state governments, the insurance industry, and consumers all recognized the need for increased consumer protections in the market place as the Medicare program expanded to provide beneficiaries with access to private health insurance plans. But the Patient Protection and Affordable Care Act (ACA) has since further expanded the Medicare program; and American citizens (including Medicare beneficiaries) have been given greater access to private health insurance plans. Not only does the ACA work to increase the quality of care provided by Medicare, but it provides access to unlimited health insurance plans for “high risk” persons, which includes the baby boomer generation now eligible for Medicare. Arguably, the most recent expansion mimics past experiences and creates an increased risk for consumer fraud and abuse of marketing and advertising practices amongst the elderly population. The past marketing guidelines and standards implemented by CMS (and, in some instances, NAIC) do not adequately protect the baby boomer generation as the guidelines only apply to health insurance plans that contract with Medicare to provide services.

C. The ACA Further Expands the Medicare Program and Creates Unlimited Access to Private Health Care Plans for Baby Boomers

In 2010, Congress passed the ACA, which includes a number of consumer, industry, and regulatory provisions in different areas of healthcare that work to increase access to quality, affordable health care in America.³² Specifically, the ACA “aims to increase the number of Americans covered by health insurance and decrease the costs associated with health care.”³³ Furthermore, the reformed health care program also expands the Medicare program.³⁴ The ACA’s expansion of Medicare attempts to provide quality health insurance for individu-

31. *White Paper on Regulation of Medicare Private Plans*, NAIC, 18 (2008), <http://www.naic.org/store/free/MPP-OP.pdf>.

32. *See generally* The Patient Protection and Affordable Care Act 2010, Pub. L. No. 111-148, 124 Stat. 119, 42 U.S.C § 18001 (2010); *See generally* Scott Solkoff, *Report of the Patient Protection and Affordable Care Act: Its Impact on the Special Needs and Elder Law*, 11 NAT’L ACAD. OF ELDER L. ATT’YS J. 1, 4-9 (2016).

33. § 18001; Nat’l Fed’n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

34. *See* § 18001; Eleanor D. Kinney, *The Affordable Care Act and the Medicare Program: The Engines of True Health Reform*, 13 YALE J. HEALTH POL’Y L. & ETHICS 253, 256, 283 (2013).

als who qualify for the program by implementing health care incentives and programs that are driven by value and not volume.³⁵ In fact, when Congress discussed the ACA's expansion of the Medicare program, it specifically addressed the importance of providing Medicare beneficiaries with access to quality coverage.³⁶ In particular, Congresswoman Nancy Pelosi stated “[the ACA will] . . . improve care and benefits under Medicare . . . extending Medicare solvency for almost a decade, creating a healthier America through prevention.”³⁷

Furthermore, the individual mandate³⁸ requires most Americans maintain “minimum essential” health insurance coverage and provides “high risk” Americans with access to private health insurance plans from which they previously would have been excluded.³⁹ With

35. See § 18001; Kinney, *supra* note 34.

36. Throughout the Congressional Record, Congressmen and women denote how the ACA will improve care and benefits for Medicare and created a healthier America. See *Congressional Record for The Patient Protection and Affordable Care Act*, 111th Cong. 111-148 H1891 (2010).

37. See *id.* at H1896 (2010) (statement from House Representative Ms. Nancy Pelosi). The ACA also expanded Medicaid and was challenged before the Supreme Court on its constitutional merits. See *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012). Initially, the Medicaid program was enacted to provide medical coverage for very “discrete” groups of people; pregnant women, children, needy families, the blind, the elderly, and the disabled. *Id.* at 2601. However, there was no mandatory coverage for adults without children, and the states were provided with power to execute the Medicaid program as they saw fit. *Id.* The expansion required states to cover all individuals by 2014. *Id.* The Act provided that “essential health benefits,” sufficient to satisfy the individual mandate, must be provided to new Medicaid enrollees. *Id.* The federal government would begin paying one hundred percent of the costs to cover the new enrollees, but the coverage would eventually decrease to ninety percent. *Id.* Nonetheless, the scope of this Comment does not discuss the Medicaid expansion under the ACA.

38. As a part of the 2017 tax reconciliation act, Congress voted to repeal the ACA's individual mandate tax penalty. Elizabeth O'Brien, *The Senate's Tax Bill Eliminates the Individual Mandate for Health Insurance. Here's What You Need to Know.*, TIME (Dec. 2, 2017), <http://time.com/money/5043622/gop-tax-reform-bill-individual-mandate/>. Although the tax bill relieves Americans of the tax penalty that would be assessed for not maintaining health insurance (effective 2019), the individual mandate itself is still in place. *Id.* There is little to no research that demonstrates that the tax bill will eliminate uninsurable Americans' guaranteed access to quality and affordable health insurance or that health insurance companies will again be able to exclude certain persons from coverage or create separate “risk pools” for certain uninsurable persons. Additionally, the tax bill did not have an effect on the Medicare expansions created by the ACA. Thus, it is unlikely the repeal of the tax penalty will have bearing on the analysis provided in this Comment.

39. See § 18001. In *National Federation of Independent Business v. Sebelius (Sebelius I)*, twenty-six states brought actions alleging that the individual mandate was outside the scope of Congress's constitutional power. *Nat'l Fed'n Indep. Bus.*, 132 S. Ct. at 2566. The federal government asserted it had the power to regulate health insurance under the Commerce Clause of the United States Constitution as cost shifting could have a significant impact on interstate commerce. *Id.* at 2587. The federal government further contended that it had the power to legislate the ACA under the Necessary and Proper Clause; however, the Court held that Congress has the power to create necessary laws only insofar as the laws are “incidental to the [enumerated] power.” *Id.* at 2591. The Court made clear Congress cannot attempt to regulate Americans' failure to obtain health insurance on the basis that it creates a burden on interstate commerce as Congress cannot be given the power to regulate inactivity. *Id.* The Supreme Court provided

that being said, Medicare beneficiaries (soon approximately 74.9 million baby boomers)⁴⁰ now have access to Medigap plans or Medicare Advantage and Medicare Prescription Drug plans through Part C and Part D of Medicare. And they also have access to a host of other private insurance plans⁴¹ that might not provide adequate coverage. As Congresswoman Nancy Pelosi has acknowledged, providing Medicare beneficiaries with quality health care and preventative services is essential to prevent the insolvency of our nation's Medicare health care system.⁴² Again, it is my contention that the lack of adequate health insurance coverage for 74.9 million "high risk" baby boomers will certainly create an increased strain on the American health care system.⁴³ Therefore, to promote access to private health insurance plans, while simultaneously attempting to promote the longevity of the Medicare program and the American health care system, there must be increased consumer protections in the market place.

Once the federal government enacted the ACA, most states and other agencies began to raise awareness as to the likelihood of increased fraud within the private health insurance sector. For example, the state of Tennessee released press statements in 2009 and 2010 warning consumers, in particular the elderly, about fake health insurance and health care fraud in the wake of the federal health care re-

that Art. I, § 8, cl. 3 grants Congress the power to regulate commerce, however, it presupposes that there exists commerce to be regulated. *Id.* The significance of this ruling was the Court's acknowledgement of: (1) Congress's power to regulate "activity" that interferes with interstate commerce, and more importantly, (2) Congress's power to regulate the "business of [health] insurance."

40. Richard Fry, *Millenials Take Over Baby Boomer's as America's Largest Generation*, PEW RESEARCH (Apr. 25, 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>.

41. The Patient Protection and Affordable Care Act No. 111-148, §§ 1101, 1312, 1501(a)(2)(G) (2010); Karen Pollitz, *High Risk Pools for Uninsurable Individuals*, THE HENRY J. KAISER FAM. FOUND. (last updated Feb. 22, 2017), <http://kff.org/health-reform/issue-brief/high-risk-pools-for-uninsurable-individuals/>.

42. *See Congressional Record for The Patient Protection and Affordable Care Act*, 111th Cong. 111-148 H1896 (statement from House Representative Ms. Nancy Pelosi).

43. It is likely that some baby boomers will die before they become eligible for Medicare, thus reducing the number of baby boomers that actually contribute to the number of "high risk" persons in the single risk pool. However, studies suggest that people around the world now have longer life expectancies. *See generally* National Institute on Aging, *Living Longer*, U.S. DEPT. OF HEALTH & HUM. SERVS. (last updated Jan. 22, 2015), <https://www.nia.nih.gov/research/publication/global-health-and-aging/living-longer> (detailing the statistics of life expectancies in various countries in the twentieth century). "[D]ata on life expectancies between 1840 and 2007 show a steady increase averaging about three months of life per year." *Id.* So, there is an increased chance that a majority of the 74.9 million baby boomers will reach Medicare eligibility before death.

form.⁴⁴ The AARP, too, has provided elderly consumers with information on how to protect themselves against health insurance fraud noting that, “[a]s the Affordable Care Act ramps up, the country is likely to see more frequent insurance scams, and they’re likely to get more sophisticated.”⁴⁵ Even the Director of the Coalition Against Insurance Fraud in Washington, D.C. has cautioned consumers of abusive and fraudulent tactics used by health insurance companies since the enactment of the ACA.⁴⁶ In particular, he stated that “[c]rooks are offering fake health coverage, stripped down policies masquerading as real coverage. They’re also selling . . . fake Obamacare coverage.”⁴⁷ So, one must pose the question: if market experts have acknowledged increased consumer health insurance fraud since the ACA’s enactment, why has no one attempted to regulate the marketing and advertising practices of these health insurance companies?

As it pertains to private health insurance plans that contract with the Medicare program, there are currently different regulations and guidelines each company must follow in order to market and advertise to Medicare beneficiaries. However, these particular guidelines do not pertain to insurance companies that do not participate in Medicare but still market health insurance products to Medicare beneficiaries. In fact, the “business of insurance” is generally regulated by state governments and not the federal government. Moreover, state regulation is inconsistent and often ineffective in protecting consumers in the market for health insurance.

D. States Lack of Consistent UDAP Statutes and Consumer Protections for “Business of Insurance”

Regulation of the “business of insurance” by the federal government has been almost nonexistent for approximately seventy years.⁴⁸ Outside of programs like Medicare, Medicaid, and now the ACA, the “business of insurance” has escaped a number of federal and state

44. See *Protect Yourself Against Fake Health Insurance*, ST. OF TENN. DEP’T OF COM. & INS. (May 28, 2009), <https://www.tn.gov/assets/entities/commerce/attachments/052809GuardAgainstFakeInsurancerelease.pdf>; *Beware of Health Care Scams Related to Insurance Reform*, ST. OF TENN. DEP’T OF COM. & INS. (Apr. 13, 2010), <https://www.tn.gov/assets/entities/commerce/attachments/HealthCareReformScamsPressRelease.pdf>.

45. Kaiser Health News, *Seniors Get Hung Up in Health Care Scams*, AARP (Apr. 22, 2013), <http://blog.aarp.org/2013/04/22/seniors-health-care-scams-financial-fraud-targets-elderly/>.

46. *Id.*

47. *Id.*

48. See 15 U.S.C. §§ 1011-1015 (2016); Alan Anderson, *Insurance and Antitrust Law: The McCarran Ferguson Act and Beyond*, 25 WM. & MARY L. REV. 81, 81 (1983).

regulations.⁴⁹ The first Supreme Court case that involved federal regulation of the “business of insurance” provided that the business was not interstate commerce.⁵⁰ However, this decision was overturned in *U.S. v. Southeastern Underwriters Ass’n* when the Supreme Court decided the “business of insurance” fell within the scope of the Sherman Act.⁵¹ But dissatisfied with the Court’s outcome, approximately one year later, the seventy-ninth Congress enacted the McCarran Ferguson Act of 1945, which confers upon the states the power to regulate the “business of insurance.”⁵²

The McCarran-Ferguson Act removes the power to regulate unfair or deceptive practices and acts within the “business of insurance” from the Federal Trade Commission (FTC)⁵³ and vests it with the states.⁵⁴ Specifically, the Act provides that:

No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: provided, [t]hat . . . the Sherman Act . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.⁵⁵

49. See 15 U.S.C. §§ 1011-1015 (1970); Anderson, *supra* note 48, at 81–82.

50. See generally *Paul v. Virginia*, 75 U.S. 168 (1868) (holding that a corporation is not a citizen within the meaning of the Privileges and Immunities Clause). The first case to involve regulation of the “business of insurance” appeared before the Supreme Court in 1868. *Id.* In *Paul v. Virginia*, an insurance agent sold insurance in the state of Virginia for a company that was only incorporated to conduct insurance business in the state of New York. *Id.* at 176. The agent was charged under Virginia law for failure to operate with the appropriate state license. *Id.* The Court recognized the Constitution’s Commerce Clause conferred upon Congress the power to regulate interstate commerce. *Id.* at 182–84. However, the Virginia statute did not interfere with the Commerce Clause because an insurance transaction was not interstate commerce; and the corporation did not have the same privileges or immunities in the state as it was not a citizen of Virginia. *Id.*

51. *U.S. v. Southeast Underwriters Ass’n*, 322 U.S. 533, 561–62 (1944).

52. 15 U.S.C. §§ 1011–1015 (2016).

53. Not only does the Constitution confer upon Congress the power to regulate interstate commerce, but it also provides Congress with the power to create regulatory entities to help enforce those laws. U.S. Const., art. I, § 1. The Federal Trade Commission Act of 1914 created the Federal Trade Commission (FTC), and specifically provides that “unfair and deceptive acts or practices in or affecting commerce are . . . declared unlawful” and the FTC is “empowered and directed to [. . . prevent the use of] unfair methods of competition in or affecting commerce and unfair or deceptive acts in or affecting commerce.” See 15 U.S.C. § 45(a)(1)-(2) (2016); Federal Trade Commission, *Fed. Trade Commission: Protecting Am.’s Consumers*, FTC, <https://www.ftc.gov/about-ftc/our-history> (last visited Sept. 18, 2016). From its inception, the FTC has worked to ensure consumer protection in an array of areas ranging from data security to Do Not Call violations, but regulation of the “business of insurance” was limited. *Id.*

54. 15 U.S.C. §§ 1011-1015 (1970).

55. *Id.*

If a state has enacted legislation to regulate the “business of insurance,” the Supreme Court has interpreted the McCarran-Ferguson Act to mean that the FTC cannot impose federal regulation where states have adequate resources to protect consumers.⁵⁶ In response to the McCarran-Ferguson Act, all states adopted a variation of the Federal Trade Commission Act (FTCA) or a UDAP statute.⁵⁷ The UDAP statutes prohibit deceptive practices, and in some states, unfair or unconscionable business practices.⁵⁸ However, the execution and effectiveness of those statutes vary from state to state as it pertains to the “business of insurance.”⁵⁹ For example, in some states, the “business of insurance” is entirely exempt from the UDAP statute.⁶⁰ In instances where the industry is not exempt, and the Attorney General, a state agency, or consumers can file suit – remedies are limited.⁶¹

56. See *FTC v. Nat'l Cas. Co.*, 357 U.S. 560, 562–64 (1958) (finding that the question before the Court was not whether Congress intended federal regulation where state regulation was inadequate; here, the insurance companies authorized local agents to disburse advertising materials within a particular state where the state had, in fact, enacted legislation to regulate the business within its boundaries. The Federal Trade Commission Act is applicable to the “business of insurance” insofar as it is not regulated by state law.). *Contra* *FTC v. Travelers Health Ins.*, 362 U.S. 293, 297–00 (1960) (distinguishing from *Nat'l Cas. Co.*, the Court provided that in *Nat'l Cas. Co.*, the question was whether the FTC Act displaced the McCarran Ferguson Act where the state had implemented an unfair or deceptive acts and practices statute; here, however, the issue was whether one state’s enactment of an unfair or deceptive acts and practices statute was sufficient to displace the FTC Act in other states that might not have enacted such legislation. The Court held that the state regulation relied upon to displace federal law did not provide sufficient protection to citizens of other states as it only regulates unfair or deceptive acts and practices within that state. Traveler’s health insurance was based in Nebraska and sent advertising materials to individuals in every state. Nebraska’s unfair acts and deceptive practices act provides that: “[n]o person shall engage in this state in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance. No person domiciled in or resident of [Nebraska] shall engage in unfair methods of competition or in unfair or deceptive acts and practices in the conduct of the business of insurance in any other state, territory, possession, province, country, or district.”).

57. Richard L. Ismond, *The Law of Honest Insurance Advertising*, 4 *FORUM* 175, 178–80 (1969) <http://www.jstor.org/stable/25760653>.

58. Carolyn Carter, *Consumer Protection in the States: A 50 State Report on Unfair Deceptive Acts or Practices Statutes*, *NAT'L CONS. L. CTR* 1, 3 (Feb. 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

59. *Id.*

60. *Id.*

61. *Id.* at 1, 5, 15. There are twenty-five states that immunize the “business of insurance” from regulation under UDAP statutes to some degree. The states which immunize the “business of insurance” include: Alabama, Alaska, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, Vermont, Virginia, Wisconsin, and Wyoming. *Id.* at 15. For states that allow consumers, or the Attorney General, to bring suit against insurance companies, there are different kinds of terms for bringing a suit, and different remedies that are offered to the state’s citizens. *Id.* at 16. Some of the terms and remedies that are offered include, equitable relief, restitution for consumers, and a civil penalty. *Id.* An equitable relief is an injunction or other order requiring a business to stop engaging in unfair or deceptive practice; restitution for consumers is an order requiring the business to return money that was wrongfully

Consumer protection measures are in place in all fifty states; however, majority of the states' UDAP statutes are ineffective as they lack adequate protection for consumers, permit limited avenues for remedy, or provide little to no penalty for the violator.⁶²

In 2011, the state of Tennessee, a state that once allowed private civil action against insurance companies for unfair or deceptive acts and practices,⁶³ underwent tort reform and amended the Tennessee Consumer Protection Act (TCPA) to exempt the "business of insurance" from the state's consumer protection laws.⁶⁴ Nonetheless, exemptions do not always shield the entire "business of insurance" from penalty under a state statute. For example, the "business of insurance" is exempt from Florida's Deceptive and Unfair Trade Practices Act (FDUTPA); however, the state has enacted an insurance code to regulate the industry.⁶⁵ The Florida Insurance Code (Code) governs the insurance industry, and section 626.9451 of the Code defines what type of acts, practices, and trades are considered unfair or deceptive.⁶⁶ Specifically, the Code classifies "[m]isrepresentations and false advertising of insurance policies" as unfair or deceptive acts and practices punishable by the Department of Financial Services or the Department of Insurance (Departments).⁶⁷ Yet, consumers are permitted to file private causes of action against insurance companies and agents in very limited contexts.⁶⁸

taken from consumers; and a civil penalty is a monetary penalty imposed for having engaged in in the unfair or deceptive practice. *Id.*

62. *Id.* at 17.

63. See 47 TENN. CODE ANN. § 18 (2010); *Mynt v. Allstate Ins. Co.*, 970 S.W.2d 920, 924–25 (Tenn. 1998) (finding that insurance companies were not excluded from the Tennessee Consumer Protection Act – although not enumerated – which protects the state's citizens from unfair or deceptive acts, and the state's Insurance Trade Practices Act did not limit other remedies); see also *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 822 (Tenn. 2013).

64. TENN. CODE ANN. § 47-18-104 (2016). Tennessee is an important state in this analysis as this is the state where Nana was deceived into thinking the new insurance was better or at least comparable to her previous Medicare coverage. Also, the state of Tennessee has separate insurance code which speaks to unfair or deceptive acts and practices. However, the Tennessee Court of Appeals has provided that the insurance code does not allow a private right to action. See TENN. CODE ANN. § 56-8-101 (2016); *Leverette v. Tenn. Farmers Mut. Ins. Co.*, 2013 Tenn. App. LEXIS 161, 44–46 (Tenn. Ct. App. Mar. 4, 2013).

65. See generally FL. STAT. ANN. § 626.9541; David J. Federbush, *The Unexplored Unfairness in Florida's Deceptive and Unfair Trade and Practices Act*, LXXIII FL. BAR J. 5, 26 (1999). I chose to provide an analysis of Florida's Deceptive and Unfair Trade Practices Act because I think it provides a clear example of how a state might regulate the "business of insurance" but in such a manner that the regulations serve little to no benefit to consumers.

66. See generally FL. STAT. ANN. § 626.9541 (LexisNexis 2017).

67. *Id.* §§ 626.9541(1)(a)–(b), 624.310 (2)–(8).

68. *Id.* § 624.155.

Florida provides a perfect example of inadequate consumer protections in “business of insurance” when the industry is not exempt and consumers are able to file private causes of action. In Florida, a consumer may file a private civil action against an insurance company or agent if, and only if, the damages arise from “unfair settlement claim prices,” “illegal dealings with premiums,” “refusal to insure,” “favored agent or insurer; coercion of debtor,” illegal dealings with life or disability insurance, life or disability insurance discrimination on the basis of the sickle cell anemia trait, or failure to return unearned premium after the cancellation of “motor vehicle insurance.”⁶⁹ Conversely, claims that involve “[m]isrepresentations and false advertising of insurance policies” are afforded administrative proceedings, which can only be petitioned by the Departments.⁷⁰ In either scenario, penalties for an insurer in violation of the Code can include a fine up to \$20,000, revocation or suspension of an agent’s license, or a cease and desist order.⁷¹ The civil penalties imposed under the Code could be considered strong even though consumers might not receive direct remedy for the insurer’s violations. Regrettably, however, the petitioner’s burden of proof is difficult to meet as the Departments must prove, by clear and convincing evidence, the insurance company or agent “knowingly” violated the Code.⁷²

69. *Id.* Private civil action can be brought under § 624.155 of the Florida Statute if (1) the insurance company did not perform its due diligence in attempting to settle the insured’s insurance claim; (2) the insurance company charges an excess premium for motor vehicle coverage, cancellation or renewal of insurance coverage; (3) the insurance company refuses to insure or cancels a person’s insurance based on race, marital status, etc.; (4) a financial service requires the consumer to negotiate insurance through a particular dealer or broker; (5) the life insurance or disability insurance provider refuses to issue or renew a life or disability insurance policy; (6) the insurance company discriminates against persons with the sickle cell anemia trait; or (7) the insurance company fails to reimburse the insured after cancellation of motor vehicle coverage. *Id.* §§ 624.155, 626.9541(1)(i), 626.9541(1)(o), 626.9541(1)(x), 626.9551, 626.9705, 626.9706, 626.9707, 627.7283.

70. *Id.* at § 626.9541(a).

71. *Id.* at §§ 624.310, 624.4211.

72. *Id.* at § 626.651(2); *see also* Dep’t of Fin. Servs. v. Cherry, No. 11-2744PL, 2012 Fla. Div. Adm. Hear. LEXIS 572, at *34–35 (Fla. Div. Adm. Hear. Sept. 27, 2012), for the court’s explanation of what qualifies as “clear and convincing evidence.” In particular, “[f]or Petitioner to penalize Respondent’s license, it must prove the charges specifically alleged in the administrative complaint by clear and convincing evidence. [citations omitted]. Florida courts have described clear and convincing evidence as follows: clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. *Id.* The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.” *Id.* The “clear and convincing evidence” burden can be even more difficult to meet when the consumer who has fallen victim to the misrepresentation and false advertising is elderly and unable to “distinctly remember” the facts with the precision

The “clear and convincing” standard exercised by Florida’s administrative courts requires the witness who testifies to distinctly remember and not confuse the facts at issue.⁷³ I believe this is an incredible burden to place on an elderly victim. When I interviewed my Nana in preparation for this Comment, it was very hard for her to articulate *distinctly* what occurred when the insurance agent contacted her. Furthermore, she confused many of the facts that were at issue in her case – e.g. dates, what exactly the agent said over the phone, and whether she had previously received marketing brochures from the insurance company. Her inability to distinctly remember the facts or state them without confusion does not discredit her claims. It simply means she is seventy-six years old and cannot remember things with the same precision as she once could. Often such a high standard can leave the “business of insurance” without penalty for deceptive or unfair marketing and advertising practices, and again, provide inadequate marketplace protections for consumers.

Unlike the state of Florida, there are states that do not restrict consumers’ ability to file a private civil action under the states’ respective UDAP statutes. In particular, the state of New York provides broad coverage for unfair or deceptive business acts and practices and false advertising, with no exemptions for the “business of insurance.”⁷⁴ Nonetheless, adjudication for consumers may pose difficulty as New York state courts have held that a consumer’s complaint must allege “conduct that is consumer oriented” resulting in a “broad impact on consumers at large.”⁷⁵ Therefore, an individual who experiences unfair or deceptive acts and practices or false advertising under an individualized insurance contract is not afforded adequate protections under New York’s UDAP statute as it is unlikely the consumer

and explicitness required by the standard. Also, it is not uncommon for older persons to be easily confused about “the facts in issue.” Approximately twenty percent of the American population, sixty-five or older, resides in the state of Florida. Laura Kent, *Where Do the Oldest Americans Live?*, PEW RESEARCH CTR. (July 9, 2015), <http://www.pewresearch.org/fact-tank/2015/07/09/where-do-the-oldest-americans-live/>. With such a large elderly population (anticipated to grow), one can see why the “clear and convincing evidence” burden of proof is troublesome in the state of Florida and potentially leaves these consumers without adequate consumer protections. *Cherry*, 2012 Fla. Div. Adm. Hear. LEXIS 572, at *34–35.

73. *Cherry*, 2012 Fla. Div. Adm. Hear. LEXIS 572, at *34.

74. See N.Y. GEN. BUS. LAW §§ 349, 350 (Consol. 2017).

75. N.Y. Univ. v. Cont’l Ins. Co., 662 N.E.2d 763, 770 (N.Y. 1995). There are actually three elements that must be met in order for a plaintiff to successfully plead a prima facie case for unfair or deceptive acts and practices or false advertising. The plaintiff must plead facts that demonstrate the defendant’s conduct was (1) consumer oriented, (2) materially misleading, and (3) led to plaintiff’s injury. *Id.* at 769–70; *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000).

can demonstrate “consumers at large” were impacted by her individualized insurance contract.⁷⁶

Furthermore, where insurance contracts are not “unique to the parties,” a consumer might still be afforded less protection if he or she cannot establish a prima facie case that demonstrates the defendant’s “conduct [was] consumer oriented” and resulted in a “broad impact on consumers at large.”⁷⁷ Take for example my Nana’s case. My Nana can only attest to her sisters’ experience with the insurance company’s unfair or deceptive advertising and marketing practices. In New York, the court might find these facts do not meet the preliminary threshold of a “broad impact on consumers *at large*” because they are only a microscopic portion of the consumer base. Moreover, the insurance agent convinced my Nana to change her health insurance over the phone – there were no circulars or commercials promoting the change. With that being said, it would be particularly difficult for a consumer, similar to Nana, to plead facts that demonstrate this was a standard or routine practice of the insurance company.

Tennessee, Florida, and New York all provide interesting perspectives on how UDAP statutes vary from state to state and provide little consistency for consumers. I was born and raised in Tennessee, and my Nana has lived in Tennessee her entire life. So, Tennessee’s consumer protection laws are particularly important to me. Whether the “business of insurance” is exempt from a state’s UDAP statute or a consumer’s right of private action is limited to specific instances, the aging “high risk” baby boomer generation, that now has access to an array of private health insurance plans, is vulnerable without effective and consistent consumer protection laws to govern the “business of insurance.” As previously stated, the ACA has created more instances for the Medicare beneficiary to fall susceptible to unfair or

76. Cont’l Ins. Co., 662 N.E.2d at 770; *see also* *Zawahir v. Berkshire Life Ins. Co.*, 22 A.D.3d 841, 842 (N.Y. App. Div. 2005).

77. Cont’l Ins. Co., 662 N.E.2d at 770. In order to bring a claim under § 349 of New York’s General Business Law, the claimant must establish a prima facie case that demonstrates the business’s (1) conduct was consumer oriented, (2) materially misleading, and (3) resulted in plaintiff’s injury. *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 11 (N.Y. App. Div. 2012). In *N. State Autobahn v. Progressive Ins. Grp. Co.*, the court provided an explanation of what constitutes consumer oriented conduct. *Id.* at 12. “Simply put, the defendant’s conduct must have an effect on consumers at large.” *Id.* In this case, plaintiffs plead facts which demonstrated the insurance company misled a host of customers in the area, making the customers believe they were required to have their vehicles repaired at particular repair shops. *Id.* at 13. Furthermore, the plaintiffs also plead facts which demonstrated this was a standard practice for the defendant that was applied to all persons who sought to have their care repaired by the plaintiffs or other repair shops. *Id.*

deceptive acts and practices utilized by the “business of insurance.”⁷⁸ In particular, it is likely consumers could purchase health insurance that is of a lesser quality than what Medicare provides, or even worse, does not actually meet their health care needs. The baby boomer generation’s purchase of a lesser quality health insurance will undoubtedly have a direct impact on their medical bills and preventative care, but there will also be an increased strain on the health care system, negatively impacting all Americans.

II. BABY BOOMERS CREATE AN INCREASED STRAIN ON AMERICA’S HEALTHCARE SYSTEM, RESULTING IN INCREASED HEALTHCARE COSTS FOR AMERICANS

A. Baby Boomers: They Age!

Americans pay more for health care than most people throughout the world.⁷⁹ It is expected that the costs for health care will continue to increase over the next twenty years as the baby boomer generation continues to age.⁸⁰ The baby boomer generation will soon cause the number of United States citizens sixty-five and older to double by the year 2030, with citizens over the age of eighty-five going from 4.7 million in 2003 to 20.9 million in 2030.⁸¹ As the baby boomer generation becomes elders, it is expected that their health care issues will have a significant impact on the health care system.⁸²

Quite naturally, as time continues, everyone will age. Studies suggest that aging can be accompanied by amplified health care issues such as: longer recovery periods, the need for rehabilitative services or

78. The Patient Protection and Affordable Care Act 2010 No. 111–148, 124.

79. Jason Kane, *Health Costs: How the U.S. Compares with Other Countries*, PBS (Oct. 12, 2012), <http://www.pbs.org/newshour/rundown/health-costs-how-the-us-compares-with-other-countries/>. According to a report conducted by the Organization for Economic Co-Operation and Development, the United States spends approximately \$8,233.00 per year, per person on health care costs. *Id.* The amount America spends per person is approximately two and a half times greater than other countries with high health care costs such as Sweden or France. *Id.*

80. Mary Kaczorek, Comment, “No Country for Old Men:” *AARP v. EEOC and Age Discrimination in Employer-Sponsored Retiree Health Benefits*, 26 L. & INEQ. 435, 437 (2008).

81. *Id.* at 439. A research study conducted by the Pew Research Center provided that in 2015 the millennial generation (ages 18–34) outnumbered the baby boomer generation (ages 51–69). Fry, *supra* note 40. In 2015, there were 75.4 million millennials in America as compared to 74.9 million baby boomers. *Id.*

82. See CHRISTINE K. CASSEL, *MEDICARE MATTERS: WHAT GERIATRIC MEDICINE CAN TEACH AMERICAN HEALTH CARE* 30–41 (2005); NANCY R. HOOYMAN & H. ASUMAN KIYAK, *SOCIAL GERONTOLOGY: A MULTIDISCIPLINARY PERSPECTIVE* 101–45 (6th ed. 2002); Kaczorek, *supra* note 80, at 437.

transitional care, increased preventative care for the common cold or flu, and significant increases in the cost of prescription drugs.⁸³ However, it is not definitive that aging has to include increased health concerns.⁸⁴ Researchers conclude that a number of health care issues that plague the elderly community can be minimized or even avoided if they are provided with adequate health care.⁸⁵ In particular, doctors are not thoroughly trained on geriatrics or when they are presented with an elderly patient, services just are not as aggressive as with other, younger patients.⁸⁶ Studies demonstrate that a number of preventative health care services, mental health treatments, exercise regimens, and the patient's smoking routine are often overlooked or flatly ignored when it comes to the elderly patient.⁸⁷ If these patterns persist, the baby boomer generation's age could have a negative impact on the American health care system.

B. No More Risk Pools for Health Insurance Candidates

The baby boomers' effect on the health care system should be considered in conjunction with the dissolution of most "risk pools" across the country.⁸⁸ Prior to the ACA, Medicare beneficiaries (and other "high risk" persons) who sought to supplement their coverage with private health insurance were usually required to purchase coverage from a "risk pool" consisting of other high risk persons.⁸⁹ State's typically had their own risk pool, and each state's "risk pool" provided

83. See CASSEL, *supra* note 82; HOOYMAN & KIYAK, *supra* note 82; Kaczorek, *supra* note 80, at 438. A study conducted by AARP provided that eighty-seven percent of the individuals surveyed who were sixty-five or older were more likely to take prescription drugs than sixty-seven percent of the population ages fifty to sixty-four. Linda L. Barrett, *Prescription Drug Use Among Midlife and Older Americans*, AARP (2005) http://assets.aarp.org/rgcenter/health/rx_midlife_plus.pdf.

84. *Ageism: How Health Care Fails the Elderly*, ALLIANCE FOR AGING RESEARCH, http://www.agingresearch.org/backend/app/webroot/files/Pressroom/51/Ageism_How%20Healthcare%20Fails%20the%20Elderly.pdf (last visited Nov. 14, 2017).

85. *Id.*

86. *Id.* Medical programs across the country have noticed a reduction in geriatrics professors over the course of the last ten to fifteen years. *Id.*

87. *Id.*

88. Pub. L. No. 111-148, §§ 1, 1101, 1302(c), 1501(a)(2)(G); Pauline Bartolone, *The Problem with Replacing Obamacare with High-Risk Health Pools*, TIME (Nov. 22, 2016), <http://time.com/money/4579210/high-risk-health-pools-replace-obamacare/>. Prior to the ACA, thirty-five states utilized "risk pool" insurance programs to provide access to health insurance for "uninsurable" Americans who were denied coverage due to pre-existing conditions or paid higher premiums based on pre-existing conditions. *What is a Risk Pool?*, NAT'L ASS'N OF STATE COMPREHENSIVE INS. PLANS, http://www.naschip.org/what_is_a_risk_pool.htm (last visited Mar. 26, 2017).

89. Pollitz, *supra* note 41.

access to health insurance for its citizens with pre-existing medical conditions, sometimes considered “uninsurable.”⁹⁰ “Risk pool” candidates were distinct and separate from other insureds as their health issues come with increased costs for insurance companies.⁹¹

The ACA now mandates that all Americans have access to “quality and affordable” health care, and it prevents health insurance companies from denying someone coverage based on certain pre-existing conditions, essentially dissolving the state “risk pool.”⁹² This arrangement requires that healthier Americans pay higher premiums in order to offset the health care costs of sicker Americans.⁹³ Indisputably, it would benefit the American health care system to perpetuate a healthier “risk pool.” But as the baby boomer generation, and second largest subset of the American population,⁹⁴ continues to age and live longer,⁹⁵ America is faced with many challenges. The most important challenge is to ensure that the aging baby boomer generation continues to receive *quality* health care by providing health care services that older patients are usually discounted to receive. If baby boomers are provided with quality health care services and insurance that work to keep them healthy, their anticipated impact on the health care system could lessen.

The guaranteed preventative measures, mental health examinations, and wellness checkups provided through the Medicare expansion could help offset the impact.⁹⁶ Furthermore, the baby boomers’ participation in the Medicare program will likely decrease their presence in the private health insurance market, which too could have a positive impact on the single risk pool and health insurance costs for healthier individuals.

The Medicare program has definitely evolved since its inception. The various expansions have created greater access to private health insurance plans for beneficiaries, but the expansions and access to private insurance companies have also been accompanied by increased consumer fraud issues. Often times, the misrepresentations in the

90. *Id.* “Risk pools” are maintained by states. *Id.* Most risk pools have become obsolete as the ACA now prohibits health insurance companies from denying coverage. *Id.*

91. *Id.*

92. Pub. L. No. 111-148, §§ 1101, 1302(c), 1501(a)(2)(G); Pollitz, *supra* note 41.

93. Drew Altman, *High Risk Pools as a Fallback for High Risk Patients*, THE HENRY J. KAISER FAM. FOUND. (Jan. 23, 2017), <http://kff.org/health-reform/perspective/high-risk-pools-as-fallback-for-high-cost-patients-require-new-rules/>.

94. Fry, *supra* note 40.

95. *See supra*, Part II.D.

96. *See* Pub. L. No. 111-148, tit. III.

marketing and advertising practices of insurance companies and insurance agents have led Medicare beneficiaries to select private health insurance plans that do not suit their health care needs. As previously mentioned, the American people now share a single “risk pool” for health insurance. Thus, it is of benefit to the entire population for baby boomers to participate in the Medicare program or other health insurance plans that provide them with *quality* health insurance coverage. Ideally, the *quality* health insurance will address their specific health care needs and lessen their strain on the health care system.

III. NANA'S NEED: A LITTLE TIME AND NOTICE

In looking at the health insurance problems of the aging, that it is not only the health insurance problems of the aging; it is the health services problem of us all. It is the retirement problems of all of us, and the fact that we look to social security as a retirement system and it isn't, and we look to [M]edicare as a full, paid-in-full health benefit, and it isn't, and if that is what we want as a nation, then we have to do it a different way . . . I am afraid there are much larger issues that need to be addressed that would help senior citizen a whole lot more.⁹⁷

As the baby boomer generation ages, there is a likelihood there will be an increased strain on the American health care system – the elderly population, who sometimes have more health care needs, will grow. However, the inevitable is now compounded by the ACA's elimination of separate risk pools. Now, the single risk pool for health insurance will see an increase in “high risk” persons, resulting in an increase in premium costs and potentially co-pays for healthier individuals. So, how do we handle the “health insurance problems of the aging?”⁹⁸ Or better yet, how do we manage the “health services problems of us all?”⁹⁹

As previously mentioned, consumers, state and federal governments, and the insurance industry have all recognized that market abuses are employed against Medicare beneficiaries looking to

97. See Abuses in the Sale of Health Insurance to the Elderly in Supplementation of Medicare H. Select Comm. on Aging, Hearing on Comm. Pub. no. 95-165, 95th Cong. 102 (1978) (statement of Linda Lamel, Deputy Superintendent, New York Insurance Department).

98. Anyssa Garza, *The Aging Population: The Increasing Effects on Health Care*, PHARMACY TIMES (Jan. 19, 2016), <http://www.pharmacytimes.com/publications/issue/2016/january-2016/the-aging-population-the-increasing-effects-on-health-care?p=2>.

99. Sanjay Gupta, *America's 9 Biggest Health Issues*, CNN, <http://www.cnn.com/2015/01/02/opinion/gupta-health-challenges-2015/index.html> (last updated Jan. 5, 2015).

purchase private plans. And each entity has worked to ensure there are regulations and laws in place to monitor the marketing and advertising practices of Medigap, Medicare Advantage, and Medicare Prescription Drug plans. Since implementation of corrective measures, the number of abuses reported has decreased. Nonetheless, loopholes still exist in the regulatory frameworks that leave the aging baby boomer generation vulnerable to abusive and fraudulent marketing and advertising practices. Moreover, with the ACA's elimination of risk pools and mandatory access to private health insurance for *all* Americans, one can only anticipate consumer complaints will continue.

Some might contend that the ACA made private health insurance plans more accessible for “high risk” persons, and also provided states with a means of regulating the private health insurance plans by creating marketplace exchanges.¹⁰⁰ The “Exchange” or marketplace mandate requires health insurance providers that *participate* in the program to disclose competitive prices in the online marketplace created by the state or federal government.¹⁰¹ The mandate allows the consumer to compare products and make an informed decision about quality, affordable health care suitable for his or her condition and income.¹⁰² However, in order for private health insurance companies to be susceptible to the rules of a marketplace exchange, the insurance plan must volunteer to participate in the program.¹⁰³ Without the insurance company's consent, there are little to no regulations that govern the marketing and advertising practices of its business.

Furthermore, Medicare beneficiaries are already vulnerable on a state level as state governments are preempted from regulating the marketing and advertising practices of Medicare Advantage and Medicare Prescription Drug plans under the MMA.¹⁰⁴ In addition, states create more harm for consumers by excluding the “business of insurance” from UDAP statutes or limiting when and how much relief can be sought after someone who has fallen victim to market abuses.

100. Specifically, the language of the ACA provides that “[e]ach state shall . . . establish an American Health Benefit Exchange . . . for the state;” and if the state chooses not to establish its own Exchange, the Secretary “shall . . . establish and operate such Exchange within the state.” *King v. Burwell*, 135 S. Ct. 2480, 2487 (2015).

101. Solkoff, *supra* note 32, at 2–3.

102. J. Angelo Desantis & Gabriel Ravel, *The Consequences of Repealing Healthcare Reform in Early 2013*, 60 CLEV. ST. L. REV. 365, 376–77 (2012).

103. Solkoff, *supra* note 32, at 2–3.

104. NAT'L ASS'N OF INS. COMM'RS, *supra* note 27, at 40.

Therefore, I recommend that Congress promulgate a model “notice” statute for persons sixty-five and older who enter into insurance contracts with state agents and *require* states that participate in the Medicare program to adopt the statute. The “notice” statute will permit a fifteen business day notice and rescission period, which will allow the beneficiary to cancel any changes she might have made to her prior health insurance plan. The “notice” statute is applicable to *any* health insurance company that markets or sells to persons sixty-five or older, not simply individuals in the market for Medicare Advantage, Medigap, or Medicare Prescription Drug plans.

Furthermore, I suggest the states implement and enforce notice statutes instead of the federal government and CMS because the notice statutes are applicable to more than just the private health care plans that participate in Medigap or Medicare Part C and Part D. The notice statute is applicable to any plan in the state’s private health insurance market that is sold to any person sixty-five or older. Additionally, it is practical to enforce the “notice” statutes on a state level because states and insurance agents currently engage in a Producer Database (PD).¹⁰⁵ The PD allows each state, the NAIC, and insurance companies to monitor agent and broker licensing and the sponsors for which agents and brokers sell insurance plans.¹⁰⁶ The PD is accessible to all fifty states and is updated on a consistent basis.¹⁰⁷ It is my position that states should utilize the PD to keep record of health insurance companies that have enrolled persons sixty-five or older. This is a program that is familiar to the states, insurance companies, and the NAIC. Thus, acclamation to the program and its operational functions will not be a factor and costs for implementation will be minimal.

The notice statutes should further require the insurance agent to notify the PD once he or she has enrolled any person sixty-five or older in a private health insurance plan. The notification provided to the PD will then begin an evaluation period that allows the insured a specific number of days to compare the plan and confirm his or her enrollment. States should allow fifteen business days for evaluation, but not less than ten. I particularly believe the evaluation period is crucial to ensure the aging generation of “high risk” persons receive quality and affordable health insurance that suits their specific needs.

105. *Id.*

106. *Id.*

107. *Id.*

Most elderly beneficiaries do not have enough time to compare health insurance plans during the decision-making process. The proposed notice and rescission period allows beneficiaries to seek advice, whether it be from CMS or a family member, on the decision to enroll. Had my Nana been able to review the health insurance plan with my Momma, prior to officially cancelling her Medicare enrollment, she likely would have had a better understanding as to what coverages she needed and what would come from a change in coverage.

The notice statute will also provide state governments with a means of addressing consumer fraud within the state without specifically regulating the marketing and advertising practices of the “business of insurance” or private health insurance plans offered under Medicare. As previously stated, the regulation of marketing and advertising practices for the insurance industry have been complicated, limited, and inequitable for many years. Instead of attempting to find the best blanket regulations for market abuses in health insurance, states should consider the contract aspect of a health insurance plan. No contract is enforceable if the terms of the agreement permit for notice and rescission and the party who intends to rescind the agreement acts within the contract’s terms.

When my Nana entered into a contractual agreement for health insurance, she honestly had no idea what she got herself into. She was distracted by anecdotes and empty promises that left her with shoddy health insurance. Unfortunately, the shoddy health insurance was in place when our worst nightmare happened and she was rushed to the hospital with congestive heart failure. One week after her diagnosed congestive heart failure, she was sent to rehabilitation for thirty days. The new health insurance was a perfect example of coverage that did not suit the health care needs of the patient. Nana needed more than thirty days in the rehabilitation facility; and we were able to confirm her health care needs when, within six months of her release from rehab, she relapsed and was sent back to the hospital.

On the day my Nana was rushed to the hospital my family knew nothing about the many benefits of the Medicare program. Because of what happened to my Nana, we were angry. We were sad. We all wanted a chance to go back in time and undo what Nana had done. But we did not have time. There was no law or statute that protected my Nana; and I have never felt so helpless. So, I asked myself, a budding lawyer who has pledged to seek justice for the American people: what can I do so this does not happen to anyone else’s Nana?

What I have done is proposed a solution to the brokenness demonstrated in our health insurance industry that inevitably will have negative impacts on our entire healthcare system. The issue of quality and affordable health care supersedes my Nana and her generation, however, our country has approximately 74.9 million baby boomers who are reaching the age of retirement and becoming nanas and papas.¹⁰⁸ These aging baby boomers will likely live longer and increase the elderly population in the United States unlike ever before. In order to sustain a viable healthcare system and Medicare program after the baby boomer generation has passed, there must be adequate consumer protections in place to ensure their aging does not necessarily mean a crippling of the American healthcare system.

CONCLUSION

In conclusion, the future viability of the American healthcare system and the Medicare program are dependent upon the health of the aging baby boomer generation and their access to *quality* healthcare. There is no doubt that the elderly population can create a strain on the American healthcare system. As the baby boomer generation continues to age, it is likely the strain imposed by the elderly generation will increase. As a result, there will be an increase in health care costs for all Americans, especially given the creation of a single “risk pool” under the ACA. Nonetheless, this does not have to be the fate of the American health care system. Adequate consumer protections, in the form of state enforced notice statutes, will ensure Medicare beneficiaries maintain coverage comparable to Medicare and do not fall victim to unfair or deceptive marketing and advertising practices. This will lessen the strain on the healthcare system and lower healthcare costs for all Americans.

As Ms. Linda Lamel, Deputy Superintendent of the New York State Insurance Commission provided, “[i]n looking at the health insurance problems of the aging . . . it is not only the health insurance problems of the aging; it is the health services problem of us all.”¹⁰⁹ Thus, let us work together to eliminate our health services problems and create a robust health care system for all.

108. Fry, *supra* note 40.

109. See Abuses in the Sale of Health Insurance to the Elderly in Supplementation of Medicare H. Select Comm. on Aging, Hearing on Comm. Pub. no. 95-165, 95th Cong. 102 (1978) (statement of Linda Lamel, Deputy Superintendent, New York Insurance Department).

COMMENT

What's in a Name?: Defining Terrorists and Terrorist Organizations

SHANICE DARA HINCKSON*

INTRODUCTION	398
I. THE EVOLVING CONCEPT OF TERRORISM	400
A. Origins of Terrorism	401
B. Modern Terrorism in the United States	402
II. DIVIDED WE FALL: IMPACT OF CURRENT STANDARD FOR CLASSIFYING AN INDIVIDUAL AS A "TERRORIST" AND AN ORGANIZATION AS A "TERROR ORGANIZATION"	409
III. ONE NATION, ONE STANDARD: IMPLEMENTING ONE UNIFIED STANDARD FOR CLASSIFYING AN INDIVIDUAL AS A "TERRORIST" AND AN ORGANIZATION AS A "TERROR ORGANIZATION"	415
CONCLUSION	424

* J.D. Candidate, Howard University School of Law, Class of 2018, Managing Editor, *Howard Law Journal*, Vol. 61. "For unto whomsoever much is given, of him shall be much required." Luke 12:48. I give honor and glory to God who has not only provided me with countless opportunities beyond my wildest dreams, but who has placed obstacles in my path to make all of my successes all the more rewarding. I would like to thank my mother, Denise Hinckson, for raising me to be a leader and always believing in my greatness even before I see it for myself. I thank my sister, Sade Hinckson, for never allowing me to give up even when the road gets too tough. I thank my cousin, Natasha Budd, for always encouraging me to reach for the stars. I thank my niece and nephews for motivating me to be a better role model. I deeply thank Professor Darin Johnson and Professor Sha-Shana Crichton for guiding me throughout my writing and research process. I thank the *Howard Law Journal* editors for all of their hard work and dedication. This Comment stems from my work as an intern with the Women Without Borders Organization-Sisters Against Violent Extremism Campaign. Without the fresh perspective that I received regarding extremism, this Comment would never have come into fruition. I dedicate this to all of the Black and Brown women and men who have experienced discrimination or constantly face discrimination in their daily lives - our struggle will not be in vain.

INTRODUCTION

In 2012, California airport officials placed the letters “SSSS” on the boarding pass of a seven-month-old baby boy, known commonly as Baby Doe.¹ After the Transportation Security Administration (“TSA”) officials reviewed the boarding pass, they removed Baby Doe from the security line, patted him down, and proceeded to conduct a “chemical test.”² Additionally, the officials searched his baby bag and examined his diapers.³ The four letters, “SSSS,” on Baby Doe’s boarding pass signaled that he was among, what American society considers, an especially dangerous class of individuals: “known or suspected terrorists.”⁴

With only seven months of experience on Earth, Baby Doe could not walk, form a sentence, nor write. He had no control over boarding the airplane or booking the trip. At only seven months old, he had no authority to make any legitimate decisions for himself. However, according to the American government, Baby Doe qualified as an individual who potentially poses a national threat to the United States of America.

Unfortunately, this incident is not an isolated event unique to Baby Doe.⁵ Many American citizens, especially Muslims or those of Middle Eastern descent, have been subjected to the same type of treatment, finding themselves placed on the terror watch list presumably without a just reason. Not only do many individuals face the embarrassment and barriers that are created because of their placement

1. Ryan Devereaux, *Class-Action Suit Targets System That Added a Baby to Terrorist Watchlist*, THE INTERCEPT (Apr. 6, 2016, 12:25 PM), <https://theintercept.com/2016/04/06/class-action-suit-targets-system-that-added-a-baby-to-terrorist-watchlist/>.

2. A chemical test is also referred to as the TSA swab test. This test swabs passengers’ hands to test for contaminations by explosive material. These chemical tests are administered by TSA officials using portable explosive trace detection machines, which are supposed to test only for explosives not for drug contraband. However, fertilizers and heart medicines may read as a false positive. Jeanne Meserve & Mike M. Ahlers, *TSA to Swab Airline Passengers’ Hands in Search for Explosives*, CNN (Feb. 19, 2010, 9:33 PM), <http://www.cnn.com/2010/TRAVEL/02/17/tsa.hands.swabbing/index.html>.

3. Devereaux, *supra* note 1, at 2. Before chemical tests were administered on passengers’ hands the officials swabbed passengers’ luggage and bags to test for contaminated substances. Meserve & Ahlers, *supra* note 1, at 1.

4. Devereaux, *supra* note 1, at 2.

5. *Id.*

on these lists,⁶ but they also face far worse dilemmas by being subjected to investigations that strip them of their dignity and integrity.⁷

International terrorism is an epidemic that is not new to American society, or American soil. For example, when European settlers first came to America, they killed Native American peoples and took their land to gain power and political status.⁸ Settlers raided villages and raped women. Yet, terrorism of white settlers is not the terrorism that we focus on in Twenty-first century society.⁹ Instead, the face of terrorism in America is a Muslim man of Middle Eastern descent.¹⁰

There have been numerous international terror attacks in the past twenty years and a great deal of media coverage on these attacks.¹¹ The United States government reacted to this spike and as a result, there has been a larger number of terror suspects and detainees recorded.¹² The standard the U.S. follows to determine who qualifies as a terrorist and what qualifies as a terrorist organization are discretionary. Thus, it has given rise to a significant amount of innocent people being incorrectly accused of being involved with terrorism.

To combat these issues, the United States must establish a more comprehensive and stringent standard to determine who qualifies as a terrorist or what qualifies as a terrorist organization. If the United States implements a more stringent standard, the number of individuals who are unjustly investigated or accused of being terrorists or illegally affiliated with terrorist organizations will be reduced greatly. Vowing to protect the nation by persecuting those who fit a stereotypical and inaccurate profile of a terrorist threatens the very pro-

6. See generally Matthew Bender, *Background Explanation of Terrorist Lists*, 2008 EMERGING ISSUES 1545 (2013) (identifying and explaining the differences between lists associated with identifying terrorists or terror organizations). These lists include "State Sponsors of Terrorism," "Specially Designated Terrorist," "Specially Designated Global Terrorist," and the "No-Fly" list.

7. Devereaux, *supra* note 1, at 2.

8. See Asafa Jalata, *The Impacts of English Colonial Terrorism and Genocide on Indigenous/Black Australians*, SAGE OPEN, July-Sept. 2013, at 3. It is important to note that Jalata defines terrorism as "a systematic governmental or organizational policy or strategy through which lethal violence is practiced openly or covertly to instill fear on a given population group beyond the direct victims of terror to change their behavior of political resistance to domination or the behavior of dominant group for political and economic gains or other reasons." *Id.*

9. See *id.*

10. Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, PEW RESEARCH (Aug. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/27/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/>.

11. Jamie Doward, *Media Coverage of Terrorism "Leads to Further Violence"*, THE GUARDIAN (Aug. 1, 2015, 3:30 PM), <https://www.theguardian.com/media/2015/aug/01/media-coverage-terrorism-further-violence>.

12. *Id.*

gression of American society,¹³ a society that has attempted to outlaw slavery, defeat legalized segregation, and eliminate discrimination based on gender, sexual orientation, or race. Unfortunately, this same society has been taking steps in the wrong direction with regard to the determination of whether someone is a terrorist.

This Comment describes the current standard the government employs to determine whether an individual or an organization qualifies as a terrorist or a terrorist organization, the problems with the standard, and potential solutions to these problems.¹⁴ This Comment also advocates for the protection of individuals from discriminatory national security tactics and a change in the current federal law, which will have a positive impact on American society. Part I discusses the background of international terrorism in America during the twenty-first century and the current federal laws related to international terrorism. Part II argues that the current standard is too discretionary, resulting in predominantly unrestricted policies regulating investigations into suspected terrorist links. Additionally, Part II examines concrete examples of individuals who were negatively impacted by the current standard. Lastly, Part III proposes that the United States should modify the deference it gives to agencies; the Comment also presents opposing arguments, and suggests that there should be one foundational standard that all agencies should follow.

I. THE EVOLVING CONCEPT OF TERRORISM

The words “terrorist” and “terrorism” are widely used political terms that can be interpreted in a broad manner.¹⁵ For the purposes of this comment, “terrorist” will be defined as a person who attempts to further his or her views by employing a system of coercive intimidation tactics.¹⁶ “Terrorism” will be defined as the intricately planned and organized violence or the threat of violence, used to pursue a political aim or invoke political change.¹⁷ This section will be divided into two parts. Part A discusses the origins of terrorism, briefly surveying where the term first arose and its history. Part B discusses

13. Brief of Former National Security Officials as Amici Curiae Supporting Plaintiffs, pp. 1, 5, *Int'l Refugee Assistance Project, et. al. v. Trump*, 8:17-CV-00361-TDC (2017).

14. This Comment will focus on international terrorism as opposed to domestic terrorism.

15. BRUCE HOFFMAN, *INSIDE TERRORISM* 1 (2006).

16. *Id.* at 3.

17. *Id.* at 2—3.

modern international terrorism, particularly focused in the United States.

A. Origins of Terrorism

The concepts of “terrorist” and “terrorism” can be traced back to the French Revolution in 1794.¹⁸ At this point in history, these labels had a positive connotation.¹⁹ During the French Revolution, people referred to the French government as “terrorists” because agents of Public Safety and the National Convention had almost limitless power to arrest individuals and enforced policies that the majority considered the “terror.”²⁰ During a time where there were multiple uprisings, the government attempted to enforce peace, which included suppression of people or views that the French government did not agree with. Terror was considered good because it kept people in order and upheld justice.²¹

In the Nineteenth Century, with the rise of the nation-state, there was also an evolution of a nuanced political rebel.²² These political rebels were known as anarchists and, although actions and attacks against nation-states had terror traits, the ideology behind modern terrorism still had not fully developed.²³ As nationalism grew in the Twentieth Century, threats from other nations rose and the impact of two world wars damaged the legitimacy of international order.²⁴ Technological advances have also contributed greatly to the multi-faceted dimensions and progressions of terrorism over the years.²⁵ Technological innovations, such as the creation of the guillotine²⁶ during the French Revolution and dynamite in the Nineteenth Century, ena-

18. *Id.* at 3. The word was popularized during the French Revolution because it was a time that was tormented by chaos. The uprisings from the French revolutionaries were suppressed by the government and government officials used terror tactics to restore order. *See id.*

19. *Id.* Many believed that these tactics were ridding the country of the anti-government anarchists.

20. *Id.* The French government was referred to as the *régime de la terreur*, which is where the English adopted the word terror.

21. *Id.*

22. *Id.* at 8–9. There was a drastic shift with regard to what was considered terrorism. Attacks on the government by marginalized individuals spread greatly. *Id.*

23. *Id.*

24. *Id.* at 16.

25. GLENN E. SCHWEITZER, *A FACELESS ENEMY: THE ORIGINS OF MODERN TERRORISM*, 29 (2002).

26. A guillotine is a killing machine of the French Revolution used to behead thousands. *The Guillotine*, HISTORY, www.history.com/topics/french-revolution/videos/coroners-report-guillotine (last visited Feb. 23, 2018).

bled terrorism's progression.²⁷ More apparent in American society were the technological advances in international travel, which some argue "ushered terrorist activity into" the backyard of the United States.²⁸

B. Modern Terrorism in the United States

Air travel, even before the September 11th ("9/11") attacks on the World Trade Center, served as an area of great turmoil for America's relation to international terrorist attacks.²⁹ The 1960's skyjackings of American airplanes and other airplanes pushed American society to recognize the reality of terrorism.³⁰ After other international terror attacks during that time, such as the bombings in Jordan and the murders during the Munich Olympics, the Nixon Administration formed the Cabinet Committee to Combat Terrorism.³¹ However, terrorist attacks against American diplomats, citizens, and ultimately cities continued to grow.³² As a result, the United States counterterrorism tactics grew more aggressive, both in the formulation of new committees, charters, and government agencies and also in the establishment of legislation.³³ Furthermore, in America, these counter terrorism tactics have collectively been understood as the tools used for the "war on terror."

The "war on terror" is a phrase that was coined during the George W. Bush administration.³⁴ Its aim was to eliminate terrorism on all fronts, including capturing all those who were responsible for attacks, preventing those who conspired to attack, and punishing any person or group who may have aided others to attack.³⁵ The "war on terror" has served as both a metaphor similar to the "war on drugs"

27. See SCHWEITZER, *supra* note 25, at 26–29.

28. *Id.*

29. *Id.*

30. *Id.*

31. Nixon was the first president to create a global anti-terror initiative. The Committee consisted of the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Secretary of Transportation, the U.S. Ambassador to the United Nations, the Assistant to the President for National Security Affairs, the Assistant to the President for Domestic Affairs, and the Directors of the CIA and the FBI. Chris Barber, *The Dawn of American Counterterrorism Policy*, NIXON FOUND. (Sept. 6, 2016), <https://www.nixonfoundation.org/2016/09/the-dawn-of-american-counterterrorism-policy/>.

32. SCHWEITZER, *supra* note 25, at 30.

33. See 18 U.S.C. § 2331 (2001).

34. Kathryn L. Einspanier, *Burlamaqui, The Constitution, and the Imperfect War on Terror*, 96 GEO. L.J. 985, 986 (2008).

35. *Id.* at 1015.

and as an actual war with countries such as Iraq and Afghanistan on the opposing side.³⁶ This phrase came about after the 9/11 attacks and has been an ongoing United States battle cry for the years following it.³⁷

Under 18 U.S.C. § 2331, the term “international terrorism” is defined as:

[a]ctivities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.³⁸

Whereas the term “domestic terrorism” means activities that include all of the other elements of international terrorism, but it occurs primarily within the territorial jurisdiction of the United States.³⁹

Although the concepts of international terrorism and domestic terrorism are defined in statutory United States law, specifically who would be classified as a terrorist or suspect before the commission of a terror act is not defined.⁴⁰ After the 9/11 attacks on the United States,⁴¹ President George W. Bush signed Executive Order 13224 (“E.O. 13244”) on September 23, 2001.⁴² The Executive Order gave the United States government the authority to designate and block the assets of foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism.⁴³ It is through Execu-

36. *Id.* at 987.

37. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2048 (2005).

38. 18 U.S.C. § 2331 (2001).

39. *Id.*

40. *See generally* Exec. Order No. 13224, 3 C.F.R. § 13224 (2001).

41. The 9/11 attacks were a series of coordinated terrorist attacks on September 11, 2001. An organization known commonly as Al Qaeda took responsibility for hijacking airplanes and crashing these planes into the Twin Towers and the Pentagon. This resulted in the death and injury of over 3,000 people. *9/11 Attacks*, HISTORY, <http://www.history.com/topics/9-11-attacks> (last visited Feb. 23, 2018).

42. Exec. Order No. 13224, 3 C.F.R. § 13224 (2001).

43. *Id.*

tive Order 13224 that the Secretary of State, in consultation with the Secretary of Treasury and the United States Attorney General, has the power to designate an individual or an entity as a terrorist or terror organization.⁴⁴

The Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, are granted with the authority to label foreign individuals or entities that, he or she determines have committed, or pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the U.S.⁴⁵ The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, have the authority to label individuals or entities that these institutions individually or collectively determined to be owned or controlled by, or act for or on behalf of an individual or entity listed as a terrorist or terror organization.⁴⁶ The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, may designate individuals or entities that are determined to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, acts of terrorism or individuals or entities listed as a terrorist or terror organization.⁴⁷

In Executive Order 13224, there is a list of legal consequences associated with the designation or “terrorist” or “terror organization.”⁴⁸ Once the appropriate governing body designates an individual or entity as a terrorist or terror organization, the Office of Foreign Assets Control (“OFAC”) of the Department of the Treasury takes action to block the assets.⁴⁹ This action must be appropriate accord-

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See generally* Exec. Order No. 13224, 3 C.F.R. § 13224 (2001). The list of consequences include (1) With limited exceptions set forth in the Order, or as authorized by OFAC, all property and interests in property of designated individuals or entities that are in the United States or that come within the United States, or that come within the possession or control of U.S. persons are blocked; (2) With limited exceptions set forth in the Order, or as authorized by OFAC, any transaction or dealing by U.S. persons or within the United States in property or interests in property blocked pursuant to the Order is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of individuals or entities designated under the Order; (3) Any transaction by any U.S. person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions in the Order is prohibited. Any conspiracy formed to violate any of the prohibitions is also prohibited; (4) Civil and criminal penalties may be assessed for violations. *Id.*

49. *Id.*

ing to their standards but the Executive Order does not articulate what constitutes as appropriate action.⁵⁰

It also provides that the Secretary of the Treasury may re-delegate any of these functions to other officers and agencies of the United States government.⁵¹ All agencies of the United States government, pursuant to Executive Order 13224, are directed to take all appropriate measures within their authority to carry out the provisions of the Order.⁵²

However, Executive Order 13224 is silent as to the criteria and standard that the Secretary of State must employ when determining whether an individual or entity poses a significant risk of committing acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or the economy of the U.S.⁵³ While the Executive Order does articulate what actions would fall under the category of a “significant risk,”⁵⁴ it fails to define what would be considered a “threat” to U.S. nationals, national security, foreign policy or the economy. Thus, by establishing such a broad guideline, the Executive Order is the first example of the far-reaching implications of the terrorist designation under United States law.

Absent any direction from Executive Order 13224, 8 U.S.C. § 1189 was adopted to govern the designation of foreign terrorist organizations, which gave the Secretary a vast amount of authority to designate an organization as a foreign terrorist organization.⁵⁵ Even though this statute explicitly lists what he or she has the authority to do, it essentially grants the Secretary of State almost limitless discretion. Although under 8 U.S.C. §§ 1182(a)(3)(B), and 22 U.S.C. §§ 2656f(d)(2), 140(d)(2), there is a clear definition of what past activity would serve as terrorist activity, none of the sections explicitly state what would qualify as having the intent to commit these activi-

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.*

54. *Id.*

55. “The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that –

(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in [Title 8] section 1182(a)(3)(B) . . . or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.” *Id.* (internal citations omitted).

ties.⁵⁶ The Secretary of State has discretion to determine what qualifies as having the capability or intent to engage in terrorist activity or terrorism because there are no clear definitions within the statute of capability or intent. Thus, the Secretary of State's authority represents another example of the nearly limitless far-reaching nature of the government in terrorist-related issues.

On November 19, 2001, Congress passed the Aviation and Transportation Securities Act ("ATSA"), which established the Transportation Security Administration ("TSA").⁵⁷ Under § 102 of the ATSA, the "Under Secretary" is the head of the administration and is appointed by the President of the United States.⁵⁸ Among other responsibilities, the ATSA gives the Under Secretary the power to "establish procedures for notifying the Administrator of the Federal Aviation Administration, appropriate State and local law enforcement officials, and airport or airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of . . . terrorism."⁵⁹ The legislation does not expressly state what circumstances would lead the Under Secretary to determine who would be considered an individual suspected of posing a risk to terrorism.⁶⁰ Accordingly, the Under Secretary may use its discretion when implementing procedures to identify individuals who pose a risk to terrorism.⁶¹

56. Under 8 U.S.C. § 1182(a)(3)(B)(iii), terrorist activity is defined as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any
 - (a) biological agent, chemical agent, or nuclear weapon or device, or
 - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing."

8 U.S.C. § 1182(a)(3)(B)(iii) (2013).

57. Aviation and Transportation Security Act, Pub. L. No. 107-71 § 101, 115 Stat. 597 (2001).

58. *Id.* § 102.

59. *Id.* § 101.

60. See *id.*

61. *Id.*

Furthermore, in 2003 Homeland Security Presidential Directive-6 (“HSPD-6”) gave the Attorney General the authority to establish an organization that consolidates terrorist screening, like the Terrorist Screening Center.⁶² This directive gave birth to the Terrorist Screening Database (“TSD”), known commonly as “the watchlist.”⁶³ In determining what qualifications a person must have to be placed on the Terror Watchlist, there must be reasonable suspicion to determine that the person is a terrorist or a terror suspect.⁶⁴ However, there is no indication that there is a comprehensive understanding of what would give rise to reasonable suspicion that a person placed on the list is a terrorist or a terror suspect. Thus, the lack of watchlist criteria represents another example of the far-reaching implications of the terrorist designation under United States law. Exemplified through the watchlist, multiple federal agencies may use, and have the ability to potentially abuse,⁶⁵ the government’s almost limitless discretion to establish who and what actually qualifies as a terrorist or a terror organization by discriminating against certain groups marginalized in American society.

Further, the United States’ relaxed and discretionary standard regarding who qualifies as a terrorist and what organizations qualify as terror organizations is problematic because there is no clear interpretation of the standard. Under E.O. 13224, the Attorney General has the power to designate an individual or an entity as a terrorist or terror organization and promulgate any agencies to fight terrorism.⁶⁶ As a result, the Attorney General directed all United States Attorneys to create Anti-Terrorism Advisory Councils in their respective jurisdictions.⁶⁷ These councils do not clearly establish what action would give them the authority to declare an incident related to terrorist attacks,

62. *Homeland Security Presidential Directive/HSPD-6—Directive on Integration and Use of Screening Information To Protect Against Terrorism*, THE WHITE HOUSE (Sept. 16, 2003), <https://www.gpo.gov/fdsys/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1174.pdf>. The Terrorist Screening Center is a multi-agency organization that serves as a bridge between local law enforcement, federal law enforcement, Federal Bureau of Investigation, Homeland Security, Intelligence Agencies and International partners. *Id.*

63. *See id.*; *Terrorist Screening Center*, F.B.I., <https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc> (last visited Feb. 23, 2017).

64. *Id.*

65. Since multiple federal agencies have access to the list, agents can use the information on this list to falsely accuse innocent individuals of conspiracy, violate privacy rights, or harass individuals.

66. Exec. Order No. 13224, 3 C.F.R. § 13224 (2001).

67. *Anti-Terrorism*, DEP’T OF JUST., <https://www.justice.gov/usao-sdoh/anti-terrorism> (last visited Jan. 16, 2018).

but emphasize the fluidity of such an endeavor.⁶⁸ The Anti-Terror Advisory Council in Maryland describes their collaborative efforts in analyzing activity as one that is also “concerned with general criminal activity since it is often difficult to determine if, and at what point, information related to general crimes may become relevant to terrorism matters.”⁶⁹

The discretionary standard serves as the foundation for United States’ definition for “terrorist.” Yet, it is no secret that “politically motivated” actions are tactics a group may employ to influence a government against its current policies. But some forms of politically motivated action can help a government continue to do its current policies. This, of course, occurs when the government is itself tyrannical and may be terrorizing its people. Similar to the French government during the French Revolution, the government of the Indian state of Gujarat almost encouraged Hindus to burn Muslims alive, and were almost encouraged by the extremist state government.⁷⁰ Even today, the themes of Donald Trump’s election campaign⁷¹ fueled the fire for domestic terrorism and groups like the Klu Klux Klan to feel more empowered to execute their plans of terror on certain Americans.⁷² If these organizations act upon their missions to support governmental policies oppressing certain groups of people, then these organizations have the ability to escape the classification of terrorists or terror organizations.

68. See generally *id.* (considering the approach to take in the fight against terrorism).

69. *Anti-Terrorism Advisory Council of Maryland*, DEP’T OF JUST., <https://www.justice.gov/sites/default/files/usao-md/legacy/2013/08/05/ATACOverview213.pdf> (last visited Dec. 11, 2017).

70. Paul Marshall, *Hinduism and Terror*, HUDSON INST., <https://www.hudson.org/research/4575-hinduism-and-terror> (last visited Feb. 23, 2018).

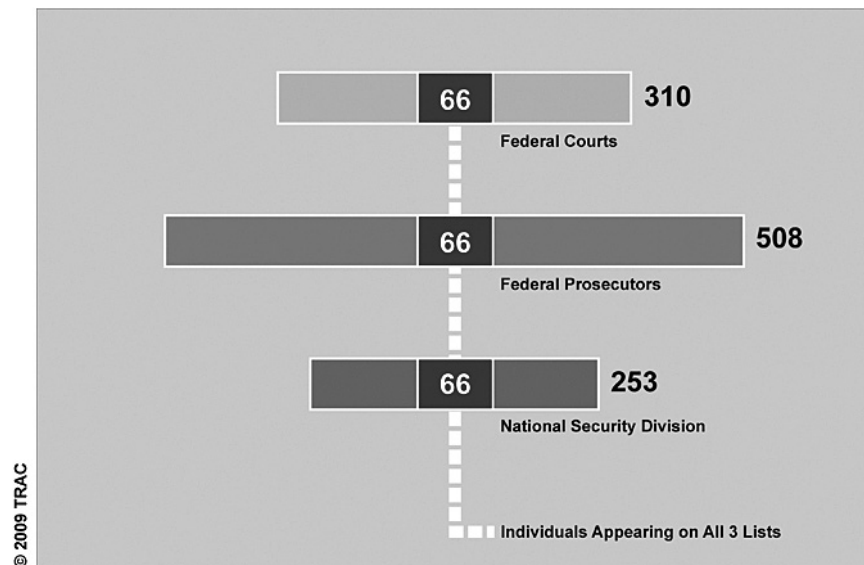
71. The misogynist, racist and prejudicial remarks served as Donald Trump’s 2016 Presidential campaign theme. David Smith, *How Trump Won the Election: Volatility and a Common Touch*, THE GUARDIAN (Nov. 6 2016), <https://www.theguardian.com/us-news/2016/nov/09/how-did-donald-trump-win-analysis>. See also DOUGLAS KELLNER, *AMERICAN HORROR SHOW: ELECTION 2016 AND THE ASCENT OF DONALD J. TRUMP* 12 (2017); Lydia O’Connor and Daniel Marans, *Trump Condemned Racism As ‘Evil.’ Here Are 20 Times He Embraced It*, HUFFINGTON POST (last updated Jan. 12, 2018), https://www.huffingtonpost.com/entry/trump-racism-examples_us_5991dcabe4b09071f69b9261.

72. See generally Chris Sommerfeldt & Cameron Joseph, *North Carolina KKK Group to Hold “Victory Parade” for President-elect Donald Trump*, N.Y. DAILY NEWS (Nov. 11, 2016 7:47 PM), <http://www.nydailynews.com/news/politics/n-kkk-group-hold-victory-parade-donald-trump-article-1.2868491> (discussing the parade held by The Loyal White Knights of Pelham, N.C. in honor of Donald Trump’s successful presidential campaign).

II. DIVIDED WE FALL: IMPACT OF CURRENT STANDARD FOR CLASSIFYING AN INDIVIDUAL AS A “TERRORIST” AND AN ORGANIZATION AS A “TERROR ORGANIZATION”

Agencies have been implementing and enforcing policies differently because there are multiple interpretations of the definition of terrorist or terror organization.⁷³ For example, a 2009 study found that courts, prosecutors, and the National Security Division, have each identified current cases across the nation that related to terrorism.⁷⁴ A comparison of the three lists revealed that in a vast majority of the cases each entity independently classified as “terror related” did not overlap. Out of all of the defendants documented in the three separate lists, only four percent of the defendants overlap between the three entities.⁷⁵

Persons Labeled as Terrorists,
Criminal Prosecutions for Fiscal Years 2004-2009 (April)



73. *Who is a Terrorist? Government Failure to Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk*, TRAC REPORTS, <http://trac.syr.edu/tracreports/terrorism/215/> (last visited Jan. 15, 2018).

74. *Id.*

75. *Id.*; see also ERIK LUNA, MARIANNE WADE, *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 282 (2012).

Due to this discretion, there has been a trickle down effect where certain individuals and groups are targeted as terror suspects or unjustly investigated as a result. In 2002, Council on American Islamic Relations (“CAIR”) reported that there were 224 incidents of FBI/police/Immigration and Naturalization Service intimidation and discrimination related tactics.⁷⁶ An FBI report found that complaints of discrimination targeting Muslim people, institutions, and businesses increased from a mere 28 in 2000 to 481 in 2001, presumably after the 9/11 attacks.⁷⁷ In 2008, 2,728 Muslim American civil rights complaints were filed with CAIR.⁷⁸

Rahinah Ibrahim is an example of an individual who was impacted by the unjust investigation procedures implemented as a direct result of conflicting government agencies’ discretion in terror-related cases. Ibrahim is a Malaysian architect who received a doctorate from Stanford and is a mother of four children.⁷⁹ She has been a devout Muslim throughout her lifetime, proudly identifies as a Muslim, and routinely wears her hijab.⁸⁰ On January 2, 2005, she was scheduled to fly from San Francisco to Hawaii.⁸¹ But, when she got to the airport and reached the counter, instead of checking her bags, the airport agents summoned the police.⁸² Ibrahim was then arrested and detained in an airport cell.⁸³ It was then revealed that her name had been placed on to the no-fly list prior to her travel⁸⁴ and she was detained for two hours.⁸⁵ A Homeland Security agent informed her that they made a mistake and she had been removed from the no-fly list.⁸⁶

76. Riad Abdelkarim, *Surge in Hate Crimes Followed by Official U.S. Targeting of Muslim Arab Men*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS (Apr. 2003), <http://www.wrmea.org/2003-april/surge-in-hate-crimes-followed-by-official-u.s.-targeting-of-muslim-arab-men.html>.

77. *Id.*

78. ADVANCING EQUITY AND DIVERSITY IN STUDENT AFFAIRS: A Festschrift in Honor of Melvin C. Terrell 122 (Jerlando F. L. Jackson et al. eds., 2017).

79. *The FBI Checked the Wrong Box and a Woman Ended Up on the Terrorism Watch List For Years*, PROPUBLICA (Dec. 15, 2015, 6:00 AM), <https://www.propublica.org/article/fbi-checked-wrong-box-rahinah-ibrahim-terrorism-watch-list>.

80. *Id.*; Ibrahim v. Dep’t of Homeland Sec., 669 F.3d 983, 987 (9th Cir. 2012).

81. ProPublica, *supra* note 79; Ibrahim, 669 F.3d at 987.

82. *Id.*

83. *Id.*

84. ProPublica, *supra* note 79. The no-fly list is a small subset of the U.S. government Terrorist Screening Database, maintained by the FBI’s Terrorist Screening Center that contains the identity information of known or suspected terrorists. *DHS Traveler Redress Inquiry Program*, TRANSP. SEC’Y ADMIN., <https://www.tsa.gov/travel/passenger-support/travel-redress-program> (last visited Jan. 8, 2018).

85. ProPublica, *supra* note 79; Ibrahim, 669 F.3d at 987.

86. *Id.*

Although the stress-filled ordeal seemingly ended on a relatively positive note, this unfortunately was not the end of her story.⁸⁷

Ten weeks after this encounter, Ibrahim was set to fly from Malaysia back to California, but instead she learned her visa was revoked by the U.S. State Department, which “cited her possible ineligibility under INA.”⁸⁸ In 2006 after filling out the Travel Reform Inquiry Progress Report,⁸⁹ Ibrahim filed a lawsuit in federal court to clear her name because she was not given a reason for this classification.⁹⁰ Ten years after first filing a suit, the proceedings revealed that FBI agent Kevin Kelley was investigating a militant Islamic Malaysian group called Jemaah Islamiyah.⁹¹ Agent Kelley had previously interviewed Ibrahim who said she had no affiliation with the organization.⁹² Agent Kelley checked the wrong box on a terrorism form, erroneously placing Rahinah Ibrahim on the no-fly list.⁹³

Yet, the proceedings also revealed that the government refused to articulate why Ibrahim was on the list and reconcile how one agency can consider an individual a terrorist suspect while another does not.⁹⁴ Ibrahim prevailed in court on all her claims, clearing her name and receiving a renewed visa.⁹⁵ Ibrahim’s experience highlights a huge problem of the competing classifications of terrorist in different government agencies.

Brandon Mayfield was also a victim of the overbroad reach of American statutes. Mayfield is an attorney and previously served as a

87. ProPublica, *supra* note 79; see also Ken Broder, *FBI Fessed Up: Agent's Error Kept Woman from Flying for 9 Years*, ALL GOV (Feb. 7, 2014), <http://www.allgov.com/usa/ca/news/california-and-the-nation/fbi-fessed-up-agents-error-kept-woman-from-flying-for-9-years-140207?news=852374>.

88. *Ibrahim*, 669 F.3d at 987. “That section of the INA provides, among other things, that ‘[a]ny alien (1) who has engaged in terrorist activity; (2) who ‘a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity; or (3) who ‘has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity, is inadmissible to the United States.’” *Id.* (citing 8 U.S.C. § 1182(a)(3)(B)).

89. DHS Traveler Redress Inquiry Program, *supra* note 85. Traveler Redress Inquiry Program, known commonly as TRIP, is the single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel screening at airport hubs.

90. Ibrahim’s case lasted for approximately nine years because of the underlying issue of whether she possessed standing to sue in federal court. See generally *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983 (9th Cir. 2012).

91. *Id.* at 987.

92. *Id.*

93. *Id.*

94. ProPublica, *supra* note 79.

95. *Id.*

lieutenant in the Army.⁹⁶ He is a Caucasian-American who converted to Islam after his marriage.⁹⁷ He also represented a terrorism defendant in a child-custody case, which potentially served as reason for him being a suspect in his case.⁹⁸

Mayfield was wrongly accused of being connected with terrorist attacks that took place in Madrid, Spain on March 11, 2004.⁹⁹ The Patriot Act enhanced the federal government's routine surveillance powers, these powers authorized officials to wiretap terror suspects phones, which now included Mayfield. The government secretly conducted a search of his home and law office, and placed Mayfield in jail for two weeks.¹⁰⁰ Although Spanish officials had doubts that Mayfield was in fact involved, the United States government went forward with an aggressive investigation,¹⁰¹ illustrative of the government's unrestrained discretion and reach.

Like many other individuals who were victims of wrongful investigations, Mayfield recalls being "subject to lockdown, strip searches, sleep deprivation, unsanitary living conditions, shackles and chains, threats, physical pain and humiliation."¹⁰² Believing that he was targeted based on his religion, Mayfield filed a lawsuit against the United States, and the case settled for two million dollars.¹⁰³ Mayfield's ordeal identifies the problematic nature of the overbroad reach the government can employ in terror-related cases.

Some may argue that although there are instances where the federal government made mistakes, these mistakes are outweighed by the greater good. Furthermore, there are avenues for people to seek relief if there has been an unjust investigation. For example, if an organization or individual has been designated as a foreign terrorist group, the watchlist offers individuals or groups the opportunity to petition the United States to revoke the designation and the label.¹⁰⁴ How-

96. Eric Lichtblau, *U.S. Will Pay \$2 Million to Lawyer Wrongly Jailed*, N.Y. TIMES (Nov. 30, 2006), http://www.nytimes.com/2006/11/30/us/30settle.html?_r=1&oref=Login.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Lichtblau, *supra* note 96.

103. *Id.*

104. 8 U.S.C. § 1189(a)(4)(B)(ii) (2004); *see generally* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 613 F.3d 220, 222–23 (D.C. Cir. 2010) (explaining the process of designating an entity a Foreign Terrorist Organization ("FTO")).

ever, this opportunity is accompanied by high costs,¹⁰⁵ such as the expensive consequences of litigating the matter, the years required to revoke the designation, and the limitedness of any revocation.¹⁰⁶ These obstacles deter people from attempting to challenge the classification.

In the 2010 decision of *People's Mojahedin Organization of Iran*, an Iranian organization, known commonly as PMOI, which was labeled a foreign terrorist organization, petitioned to have the classification revoked multiple times.¹⁰⁷ After relinquishing any military weapons and publicly denouncing any affiliation with anti-government ideals or violence, it challenged its continued designation as a foreign terrorist organization.¹⁰⁸ The Secretary of State denied this challenge and the PMOI appealed.¹⁰⁹ The court held that the Secretary of State violated due process by not notifying the group that it was designated as a foreign terrorist organization.¹¹⁰

Additionally, because the Secretary of State's decision was based on "unclassified material" and did not allow PMOI the opportunity to present, at least in written form, "such evidence as it would need to rebut the unclassified portion of the record that the Secretary of State compiled."¹¹¹ Although the case was not decided on its merits and it was remanded, the court held that the Secretary of State abused her discretion.¹¹² This case provides insight not only into the difficulty associated with challenging the designation of terrorist organization, but it also highlights the discretion the Security of State has throughout the entire process, from designation to revocation of the designa-

105. Joe Silver, *After Seven Years, Exactly One Person Gets Off The Gov't No-Fly List*, ARS TECHNICA (Mar. 7, 2014 6:10 PM), <https://arstechnica.com/tech-policy/2014/03/after-seven-years-exactly-one-person-gets-off-the-govt-no-fly-list/> (identifying that the attorney for Ibrahim sought 3.5 million dollars in attorneys fees).

106. The Intelligence Reform and Terrorist Prevention Act of 2004 § 7119 removed the two-year limitation on the designation of Foreign Terrorist Organization. Thus, a designation that an organization is a foreign terrorist organization no longer lapses. Instead, a designated organization may seek revocation two years after the designation is made or, if the designated organization has previously filed a petition for revocation, two years after that petition is resolved. *Id.*

107. *People's Mojahedin Org. of Iran*, 613 F.3d at 222 (remanding the case to the lower court with instructions to allow petitioner the opportunity to rebut the unclassified portions of the record).

108. *Id.*

109. *Id.* at 225.

110. *Id.* at 228.

111. *Id.* at 227.

112. *See generally id.* at 228–31 (explaining the court's rationale in remanding the case to evaluate the Secretary's decision and determine whether it was based on a justifiable grounds or speculation).

tion.¹¹³ This case illustrates the final problem of the “terrorist” label: the challenge of successfully getting the terrorist classification revoked.

Moreover, the impact of this discretionary standard used to establish which groups would be classified as terrorist organizations can have a debilitating future impact on groups whose aim is to incite political change. If the Secretary of State determines that an organization potentially fits into that category, the Secretary of State has the power to declare it as such. For example, over 100,000 individuals voted on a Petition for the White House to have the Black Lives Matter Movement labeled an international terrorist organization.¹¹⁴ Some people argue that the Black Lives Matter Movement fits this designation because it encourages the killing of United States police officers as an approach to igniting political change in the United States.¹¹⁵ Additionally, some have relied on the protests throughout Europe, which are in solidarity with the Black Lives Matter Movement as an indication that the Black Lives Matter Movement can qualify as a foreign entity.¹¹⁶ Although these claims, arguments, and proposals do not possess any legal veracity because they are vested in public opinion, they serve as an indication that governmental tactics often support the public opinion of groups who directly attack the Black Lives Matter movement.¹¹⁷

Based on admissions and confessions, it is evident that a sect of Muslims exists that has been radicalized into using political violence as the only tool to have its voice heard or seek power.¹¹⁸ Terror attacks on American landmarks and citizens have been viewed as victo-

113. See generally *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 222–31 (2010) (detailing the process of challenging an FTO designation and the role the Secretary of State plays in the process).

114. Daniel Chaitin, *White House Petition Asks Trump to Formally Recognize Antifa as Terrorist Organization*, WASH. EXAM’R (Aug. 18, 2017, 8:47 PM), <http://www.washingtonexaminer.com/white-house-petition-asks-trump-to-formally-recognize-antifa-as-terrorist-organization/article/2632024>.

115. Vedat Xhymshiti, *Are Black Lives Terrorist Lives?*, FOREIGN POLICY JOURNAL (July 29, 2016), <http://www.foreignpolicyjournal.com/2016/07/29/are-black-lives-terrorist-lives/>.

116. *Id.*

117. See Julia Craven, *32 Blue Lives Matter Bills Have Been Introduced Across 14 States This Year*, HUFFINGTON POST (Mar. 1, 2017), https://www.huffingtonpost.com/entry/blue-black-lives-matter-police-bills-states_us_58b61488e4b0780bac2e31b8. Even local police departments use threat assessment software to spy on twitter feeds related to the movement. Karina Brown, *Spying on Black Lives Matter — Recalls Days of FBI Snooping*, COURTHOUSE NEWS (Nov. 19, 2015), <https://www.courthousenews.com/spying-on-black-lives-matterrecalls-days-of-fbi-snooping/>.

118. Jonathan Schanzer, *At War with Whom?*, MIDDLE EAST FORUM (Spring 2002), <http://www.meforum.org/168/at-war-with-whom>.

ries in some extremists' eyes.¹¹⁹ Additionally, the current standard is not without its triumphs, multiple terror attacks have been prevented in the United States under this standard.¹²⁰ Yet, the lives that have been impacted by false accusations are alarming. Neither religion, race, nor creed, in itself, serves as any indication of terrorism. Even an individual whose parent is a convicted terrorist (that took responsibility for terror acts) may not be predisposed to becoming a terrorist.¹²¹ One report found that in the years since September 11, 2001, Muslim communities have, in some instances, helped U.S. security officials prevent nearly one out of every three Al-Qaeda plots threatening the United States.¹²² Thus, by maintaining multiple discretionary standards that have a negative disparate impact on many innocent individuals in this community reinforces a false narrative that these individuals are the enemy.

III. ONE NATION, ONE STANDARD: IMPLEMENTING ONE UNIFIED STANDARD FOR CLASSIFYING AN INDIVIDUAL AS A "TERRORIST" AND AN ORGANIZATION AS A "TERROR ORGANIZATION"

Our national security will be strengthened and individuals' civil liberties will be protected if there is one clear stringent standard that serves as the definition of terrorist or terrorist group that all United States agencies are required to follow. Additionally, there is a correlation between the United States' policies targeting Muslim-Americans and hate crimes against Muslim-Americans following the 9/11 attacks. Thus, a more stringent standard regarding the classification of terrorist or terror organization will likely lead to more stringent investigation policies and a decrease in the amount of hate crimes against Muslim-Americans.

119. *Id.*

120. Ellen Nakishima, *Officials: Surveillance Programs Foiled More Than 50 Terrorist Plots*, WASH. POST (June 18, 2013), https://www.washingtonpost.com/world/national-security/officials-surveillance-programs-foiled-more-than-50-terrorist-plots/2013/06/18/d657cb56-d83e-11e2-9df4-895344c13c30_story.html?utm_term=.2ea11f2106a4.

121. See Zak Ebrahim, *I Am the Son of a Terrorist, Here's How I Chose Peace*, TED TALKS, https://www.ted.com/playlists/188/insights_on_terrorism; Rex A. Hudson, *The Sociology and Psychology of Terrorism: Who Becomes a Terrorist and Why*, LIBR. OF CONGRESS 29 (1999), https://www.loc.gov/rr/frd/pdf-files/Soc_Psych_of_Terrorism.pdf.

122. *Data on Post-9/11 Terrorism in the United States*, MUSLIM PUB. AFFAIRS COUNS. 12–13 (June 2012), <http://www.mpac.org/assets/docs/publications/MPAC-Post-911-Terrorism-Data.pdf>.

A more stringent standard will be imposed if the government changes current legislation. Amending current statutes related to the classification of terrorists or terror organizations is ideal but if that is impossible, the Department of Homeland Security should institute universal guidelines for all federal agencies to classify individuals or organizations as terrorists or terror organizations. As a last resort, the United States government should create a less stringent remedial standard where individuals and organizations may seek an expedited process to bring a claim against the government because the current process to redress these issues is extremely burdensome.

Although it is important for the government to have some discretion when classifying a person as a terrorist or a group as a terrorist organization, agencies should still have the capacity to develop multiple tactics to combat terrorism, which can be employed fairly, efficiently, and effectively.¹²³ The broad language in the definitions of terrorist and terror organization leave room for government agencies to interpret and enforce the law in methods that are far-reaching. Thus, if they all have the same interpretation of one standard, it is likely that there would be greater efficiency in preventing terror attacks and protecting civil liberties. Although nations with wealth and influence comparable to America's also have broad definitions and standards regarding the classification of individuals as terrorists or terror organizations, the United States should not look to those foreign standards. The United States' view on terror suggests that it uniquely placed itself as the leader of the war on terror movement and this self-proclamation gives the American government a greater responsibility to ensure it has the most efficient definition.¹²⁴

To solve this issue, the legislature should define the ambiguous terms in the statutes related to terrorism, such as "intent" to commit terror attacks and "capability" to commit terror attacks. Intent in the statute should be defined similarly to the four categories of culpability established in the Model Penal Code.¹²⁵ Therefore, the amended addition to the law should read "an individual acted with intent if the

123. Community policing attempts to bridge the gap between the local or federal enforcement agents and certain marginalized groups. Amna Akbar, *National Security's Broken Windows*, 62 *UCLA L. REV.* 834, 890 (2015).

124. See generally Einspanier, *supra* note 34 (discussing American perception of terrorism, the Bush administration coining the term "war on terror" and extensive counterterrorism tactics observed by the United States).

125. See John C. Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 *CRIM. JUST. J.* 87, 99 (1986) (describing the four degrees of culpability).

individual acted purposely, knowingly, recklessly, or negligently, as the law may require to commit an act of terrorism.”

An individual acts purposely if it is his conscious object to engage in conduct that would result in violence or threat to violence in order to pursue a political aim. A person acts knowingly when he is aware that his conduct is of that nature or that such circumstances exist that would result in violence or threat to violence in order to pursue a political aim. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that would result in violence or threat to violence in order to pursue a political aim.¹²⁶ A person acts negligently when he should be aware of a substantial and unjustifiable risk that would result in violence or threat to violence in order to pursue a political aim that exists or will result from his conduct.¹²⁷

If a suspect's action fits within any of these four definitions, then intent should be attributed to their actions. However, “no definition of intent encompasses the motivation of the actor in committing the act charged.”¹²⁸ The ambiguity of the intent clause can be used as a gateway to making sure that any suspect or organization fits the criteria of a terrorist or terror organization.

Further, the courts should define “reasonable suspicion.” Reasonable suspicion is “articulable facts” of an individual's conduct which leads an officer to reasonably conclude, in light of his experience, “criminal activity may be afoot”.¹²⁹ Reasonable suspicion must be more than an inchoate hunch and the court must consider the totality of the circumstances in light of the officer's experience.¹³⁰ In analyzing the factors that give rise to reasonable suspicion, the relevant question is not whether certain behavior is innocent or guilty, but rather what degree of suspicion attaches to particular types of non-criminal acts.¹³¹ However, it is important for the courts to refrain

126. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. MODEL PENAL CODE § 2.02 (AM. LAW INST., Proposed Official Draft 1962).

127. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. MODEL PENAL CODE § 2.02 (AM. LAW INST., Proposed Official Draft 1962).

128. Lyman, *supra* note 125.

129. Terry v. Ohio, 392 U.S. 1, 21, 30 (1968).

130. *Id.* at 27.

131. *See id.*

from attributing suspicion to certain noncriminal acts in a discriminatory manner.

These definitions will force agencies to subscribe to one interpretation of the statutes related to terrorist classifications. As a result, this will prevent differing interpretations on what qualifies a person as a terrorist, and increase the likelihood that civil liberties will be protected and the country will be protected from attacks. Creating a narrow legislation focused on terrorism is an attainable solution because the United States already has other terror-related legislation that offers a clearer more unified standard. For example, less than six months after the tragic 9/11 attacks, the Container Securities Initiative (“The Initiative”) was signed into law.¹³²

The Initiative was established as a preventative measure to combat potential threats of terrorist attacks involving weapons of mass destruction transported by cargo containers.¹³³ About “90% of shipment across the world happens in form of containerized cargo,” which makes importing containers a premium avenue for potential terror threats to the United States.¹³⁴ With the host government’s permission, customs agents are posted in the foreign port where they inspect “high risk” containers bound for the United States before the containers ever leave the foreign port.¹³⁵

High risk containers are containers that pose a terror threat to the nation.¹³⁶ Shipment containers associated with a shipper on a terrorist watch list could initially be identified as high risk but, “through further research, CBP officials can determine that the shipper is not a true match to the terrorist watch list and, therefore, the shipment should not be considered high risk.”¹³⁷ The administrations use non-intrusive inspection (“NII”) and radiation detection technology to

132. The Initiative was signed in January 2002. *Container Security Initiative in Summary*, U.S. CUSTOMS AND BORDER PROT. (Mar. 2011), https://www.cbp.gov/sites/default/files/documents/csi_brochure_2011_3.pdf.

133. *Id.*

134. See Smita Singla, *What is Container Security Initiative (CSI) and How Does It Work?*, MARINE INSIGHT (July 21, 2016), <http://www.marineinsight.com/marine-safety/what-is-container-security-initiative-csi-and-how-does-it-work/>.

135. *Id.*

136. See *CSI: Container Security Initiative*, U.S. CUSTOMS AND BORDER PROT. (June 26, 2014), <https://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief>.

137. Amanda Vicinanza, *Ineffective Oversight Of High-Risk Cargo Shipments Create Supply Chain Vulnerabilities*, HOMELAND SEC’Y TODAY (Feb. 5, 2015, 11:57 AM), <http://www.hstoday.us/single-article/ineffective-oversight-of-high-risk-cargo-shipments-create-supply-chain-vulnerabilities/56ff097706e2df375dd54860dfae0245.html>.

screen high risk containers before they are shipped to U.S. ports.¹³⁸ NII technology detects contraband and materials that pose potential nuclear and radiological threats.¹³⁹ This technology consists of large X-ray and Gamma ray imaging systems as well as portable systems.¹⁴⁰ CSI is viewed as “a bilateral system of information exchange,” which means that a host country performs security checks on cargo containers leaving for a United States port and, in return, “the host country can send its officers to any U.S. port to target ocean-going containerized cargo being exported to their own country.”¹⁴¹ The U.S. Customs and Border Protection has identified three core elements of CSI:

- (1) Identify high-risk containers [by using] automated targeting tools to identify containers that pose a potential risk for terrorism, based on advance information and strategic intelligence.
- (2) Prescreen and evaluate containers before they are shipped . . . as early in the supply chain as possible, generally at the port of departure.
- (3) Use technology to prescreen high-risk containers to ensure that screening can be done rapidly without slowing down the movement of trade.

In totality, to participate in CSI, a candidate nation must commit to the following minimum standards:

- (1) The Customs Administration must be able to inspect cargo originating, transiting, exiting, or being transhipped through a country.
- (2) Non-intrusive inspectional (NII) equipment (including Gamma or X-ray imaging capabilities) and traditional detection equipment must be available and utilized for conducting such inspections. The equipment is necessary in order to meet the objective of quickly screening containers without disrupting the flow of legitimate trade.
- (3) The seaport must have regular, direct, and substantial container traffic to ports in the United States.
- (4) Commit to establishing a risk management system to identify potentially high-risk containers, and automating that system. This system should include a mechanism for validating threat assessments and targeting decisions and identifying best practices.

138. Singla, *supra* note 134.

139. *Non-Intrusive Inspection Technology*, U.S. CUSTOMS AND BORDER PROT. (May 2013), https://www.cbp.gov/sites/default/files/documents/nii_factsheet_2.pdf.

140. *Id.*

141. Singla, *supra* note 134.

- (5) Commit to sharing critical data, intelligence, and risk management information with the United States Customs service in order to do collaborative targeting, and developing an automated mechanism for these exchanges.
- (6) Conduct a thorough port assessment to ascertain vulnerable links in a port's infrastructure and commit to resolving those vulnerabilities.
- (7) Commit to maintaining integrity programs to prevent lapses in employee integrity and to identify and combat breaches in integrity.¹⁴²

This thoroughly defined standard for the CSI is not perfect, but it has evolved over time. Additionally, more countries are willingly deciding to become members of the Initiative, which shows that there are successful alternative methods to combat terrorism.¹⁴³ Yet, the legislative body will not make these changes without a push. The United States government has become less transparent and less accountable for its actions.¹⁴⁴ "The best way for individuals to protect their rights is through civic engagement and participation in their local government."¹⁴⁵

If this method proves to take much longer than anticipated, imposing universal guidelines for all federal agencies to follow when classifying individuals or organizations as terrorists or terror organizations is a safe step the Department of Homeland Security should be willing to take. The Department of Homeland Security publishes guidelines and other documents that represent the Department's views on critical topics. Such topics have consisted of U.S. Citizenship and Immigration Services, U.S. Coast Guard, and U.S. Customs and Border Protection.¹⁴⁶ However, not one of these guidelines speaks to the standard in classifying terrorist or terror organizations. Thus, the Department of Homeland Security should disseminate guidelines to instruct agencies on a unified interpretation of the terrorist standard.

If government agencies continue to have unfettered discretion, they will continue to shrink individuals' civil liberties. Donald Trump's Executive Order, entitled *Protecting the Nation from Foreign*

142. EDWARD HINKELMAN, *DICTIONARY OF INTERNATIONAL TRADE: HANDBOOK OF THE GLOBAL TRADE COMMUNITY* 585 (6th ed. 2002).

143. *Id.* at 584.

144. Harold McDougall, *Social Change Requires Civic Infrastructure*, 56 *How. L.J.* 801, 842 (2012).

145. *Id.*

146. *Significant Guidance at the Department of Homeland Security*, DEP'T OF HOMELAND SEC. (Apr. 19, 2017), <https://www.dhs.gov/significant-guidance>.

Terrorist Entry Into the United States, is an example of the detrimental effect of governmental action relying on broad definitions of what qualifies a person as a terrorist. President Trump's Executive Order suspended the issuance of visas and other immigration benefits to nationals of countries of "particular concern."¹⁴⁷ Under Section 1 of the Executive Order entitled Purpose it states:

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.¹⁴⁸

The individuals banned from entering the United States are from Iraq, Libya, Syria, Iran, Sudan, Somalia and Yemen, which are majority-Muslim nations.¹⁴⁹ Even though nationals of the seven countries that the travel ban directly impacts have not killed anyone in the United States from 1975 to 2015, the ban is premised as a response to the 9/11 attacks and others in the last fifteen years.¹⁵⁰

147. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

148. *Id.*

149. Matt Zaptosky et al., *Revised Executive Order Bans Travelers From Six Muslim-Majority Countries from Getting New Visas*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.8b1f615b05a3.

150. Uri Friedman, *Where America's Terrorists Actually Come From*, THE ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/international/archive/2017/01/trump-immigration-ban-terrorism/514361/>.

Although the travel ban was later amended, the new order perpetuates the same flaws that existed in the original. The March 6, 2017 travel ban imposes a 90-day prohibition on the issuance of new visas from citizens from Libya, Syria, Iran, Sudan, Somalia and Yemen, excluding Iraq.¹⁵¹ The new order provides other exceptions explicitly for travelers from those countries who are legal permanent residents of the United States, those who have been granted asylum or refugee status, and dual nationals who use a passport from another country.¹⁵² The new revised version removes an exception to the refugee ban for members of religious minority groups and the indefinite prohibition on travelers from Syria is no longer applicable.¹⁵³ Yet, the revised March 6th travel ban still holds the presumption that terrorists exist from the six predominantly Muslim countries that have remained on the ban.

The March 6th revision is also still premised on the notion that this serves a national security interest, but there is no legitimate national security purpose served.¹⁵⁴ Furthermore, it is clear that the sources relied upon in the March 6th revisions actually contradict the assertions.¹⁵⁵ For example, the 2015 Country Reports used to justify the ban as a preventative measure on future threats point out “more than 55 percent of all terrorist attacks in 2015 took place in only five countries (Iraq, Afghanistan, Pakistan, India and Nigeria), *none of which are subject to the travel ban.*”¹⁵⁶

Furthermore, an amici brief written by former individuals who had the highest national security clearance argues that the ban will ultimately harm national security efforts and foreign relations.¹⁵⁷ They envision the Order disrupting crucial counterterrorism tactics, foreign policy agreements, and national security partnerships that are critical to our country’s efforts to address the threat posed by terrorist groups and individuals.¹⁵⁸ The intense international criticism the Order has already sparked has the potential to alienate U.S. allies and partners. Additionally, domestic law enforcement will also be detri-

151. Zapotosky, *supra* note 149.

152. *Id.*

153. *Id.*

154. *See generally* Brief of Former National Security Officials as Amici Curiae Supporting Plaintiff-Appellees at 5, *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017) (No. 17–15589).

155. *Id.* at 6–7.

156. *Id.* at 7–8.

157. *Id.* at 16.

158. *Id.* at 18.

mentally impacted.¹⁵⁹ Local law enforcement agencies rely heavily on partnerships with American Muslim communities to fight home-grown terrorism.¹⁶⁰ Thus, by alienating these individuals and attacking some of their natural origins the relationship will likely deteriorate.

Although, the travel ban in totality has been condemned by many people, including those who have had former national security clearance, it does in fact proceed on the heels of previous legislation. The White House reportedly never asked the Department of Homeland Security for review of the initial Order.¹⁶¹ Furthermore, the initial Order had multiple ambiguities, leading to confusion among agencies that were supposed to implement the policies.¹⁶² Yet, the revisions that followed the initial ban reflected “mostly minor technical differences” and was intended to achieve “the same basic policy outcome,” according to senior White House officials.¹⁶³ Even the most recent March 6th revision, which included some guidance from other agencies, still presents a series of fundamental issues that even the former high-ranking national security individuals did not acknowledge.

The ban mimics much of the problematic discretionary freedom implemented in other terror-related legislation. The March 6th revision allows the Secretaries of State and Homeland Security to admit travelers from those six countries targeted, but only on a case-by-case basis.¹⁶⁴ It fails to give any guidance as to what those cases would in fact look like. The amici brief from individuals formerly in positions of high national security clearance states, “it would be unrealistic for these overburdened agencies to apply such procedures to every one of the thousands of affected individuals with urgent and compelling needs to travel.”¹⁶⁵ However, they still fail to acknowledge that there would likely need to be an appropriate unified procedure implemented to ensure that the Secretary of State and Homeland Security will use this discretion wisely. If the government continues to take action that is not based on actual facts or bolstered by real evidence, it

159. *Id.* at 19–20.

160. Brief of Former National Security Officials as Amici Curiae in Support of Plaintiff-Appellees at 19, *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017) (No. 17–15589).

161. *Id.* at 26.

162. *Id.*

163. *Id.* at 27.

164. *Id.* at 20–21.

165. *Id.*

will not only alienate the Muslim community, but it will continue to strain international relationships.

CONCLUSION

This Comment points out the trend and correlation between the federal standard establishing what constitutes a terrorist or terror organization and Islamaphobia. International Terrorism is scary; however, having multiple interpretations reflecting who should bear the burden of being classified within the most dangerous class of people threatens civil liberties. The wide net that the United States casts to catch all terrorists may be more harmful than helpful for the future of American society.

Current United States anti-terror legislation has an underlying and important objective to protect American people. However, this legislation must be checked and agencies should not have unlimited discretion to rely on their own interpretation. Allowing this policy has led to a series of problems including competing classifications, discriminatory investigation practices, and the near-impossibility of revoking the label. Amending the federal statutes and creating a stringent and more unified standard classifying terrorists and terrorist organization will begin to prevent the legal pitfalls and infringement upon civil liberties. Baby Doe is four years old now and he still finds himself on the TSA's terrorist watch list. With the current social climate and travel bans sweeping the nation, he may remain on the watch list indefinitely.

COMMENT

Police Officers, I.Q., and the Deprivation of Rights

AYANA WILLIAMS*

INTRODUCTION	425
I. ROBERT JORDAN'S REJECTION FROM THE NEW LONDON POLICE ACADEMY	427
II. EMOTIONAL INTELLIGENCE AND GENERAL INTELLIGENCE ARE CRUCIAL FOR POLICE OFFICERS	428
A. The Wonderlic Exam and I.Q.	429
B. The Courts' Tradition of Deference to Police Officers	433
C. Police as Protectors of Rights	437
III. WHAT IS CONSTITUTIONALLY "ARBITRARY?"	438
A. The Black Letter Law	438
B. New London Case Study	447
IV. WHAT CAN NEW LONDON COURTS DO?	451
CONCLUSION	453

INTRODUCTION

By failing to understand the importance of a police officer's I.Q. to the performance of his/her duties, federal courts have failed to pro-

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protect the rights of civilians dealing with police officers. President Obama's Task Force on twenty-first Century Policing recognized the importance of I.Q. related attributes for police officers and suggested that departments consider them in recruitment, and develop them in training.¹ The federal courts, in their role as protector of constitutional rights, should prohibit police departments from instituting I.Q. caps on incoming officers because I.Q. caps result in the kind of arbitrariness prohibited by the Due Process Clause of the Fourteenth Amendment.

This Comment will first discuss the story of Robert Jordan, an applicant to the New London Police Department who was rejected for scoring too highly on a cognitive ability test.² The Comment will then explain the nature of the test given to Mr. Jordan, as well as why and how I.Q. is important for police officers. More specifically, the Comment will discuss what instituting an I.Q. cap does to a police department purportedly committed to protecting rights.³ Among these rights is the right to bodily integrity, which is particularly at risk under the enforcement of a department with an I.Q. cap in place because the cap both excludes potential officers less likely to be violent, and implicitly prefers those who tend to be more violent. This Comment will then explain how the Supreme Court has suggested that the state may have an affirmative duty to protect citizens from foreseeable harm at the hands of state actors. Given the duty to protect that the Court has implicitly acknowledged, the science surrounding I.Q., and the discretion that the Court has given police officers over the last fifty years, this Comment contends that imposition of an I.Q. cap is arbitrary under the Due Process Clause. This is especially true because the courts often refuse to discipline officers who violate clearly established rules. If the courts will not discipline rogue officers, they should be prepared to regulate how officers are selected. Afterward, the Comment discusses the police department in the city of New London, Connecticut – where Mr. Jordan was rejected from the police force – and its record of Constitutional violations and lawsuits. Lastly, this Comment poses a potential solution specifically for the District Court of Connecticut – which very well might be hesitant to attempt

1. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 51 (May 2015).

2. *See generally* Jordan v. City of New London, No. 3:97CV1012(PCD), 1999 U.S. Dist. LEXIS 14289, at *1 (D. Conn. Aug. 29, 1999).

3. *New London Police Department*, CITY OF NEW LONDON, <http://www.ci.new-london.ct.us/0> (last visited Jan. 20, 2018).

to regulate the New London Police Department for any number of reasons.⁴

I. ROBERT JORDAN'S REJECTION FROM THE NEW LONDON POLICE ACADEMY

The story of Robert Jordan inspired this Comment. Mr. Jordan applied to the police force in New London, Connecticut.⁵ As part of the application process, he took a standardized test called the Wonderlic Personnel Test and Scholastic Level Exam.⁶ According to Wonderlic, the exam measures “how well a candidate will be able to understand instructions, learn, adapt, solve problems and handle the mental demands of the position.”⁷ The Wonderlic User Manual suggested that the minimum score for a patrol officer should be twenty-two.⁸ Mr. Jordan scored a thirty-three.⁹ When he requested an interview with the official in charge of personnel, he was told that his high score had disqualified him because the department was only considering applicants who scored between twenty and twenty-seven on the examination.¹⁰

Mr. Jordan sued the city of New London, Connecticut, claiming that his rejection violated his Fourteenth Amendment right to Equal Protection under the law.¹¹ Mr. Jordan claimed that the state had discriminated on the basis of cognitive ability and that he was denied Equal Protection of the laws as a result.¹² Applying the Supreme Court's Equal Protection jurisprudence, the District Court of Connecticut wrote: “[the state] need show only that there was reason to believe that employing the classification could be beneficial in achieving their stated goal.”¹³ The state provided studies that had shown that people with high cognitive ability would experience job dissatis-

4. Federal judges may see themselves as encroaching on states' rights by declaring a police department practice unconstitutional without explicit guidance from the Supreme Court.

5. *Jordan*, 1999 U.S. Dist. LEXIS 14289, at *1–*2.

6. *Id.*

7. *Cognitive Ability Test - Wonderlic Personnel Test*, WONDERLIC, <http://www.wonderlic.com/assessments/ability/cognitive-ability-tests/cognitive-ability-pretest> (last visited Jan. 20, 2018).

8. *Jordan*, 1999 U.S. Dist. LEXIS 14289, at *2.

9. *Id.*

10. *Id.* at *2–*3.

11. *Id.* at *1.

12. *Id.*

13. *Id.* at *6.

faction, and thus, the state would have to pay high turnover costs.¹⁴ Although the plaintiff claimed that the validity of these studies was questionable, the District Court held that it was sufficient that the state believed them to be valid.¹⁵ The District Court granted the state's request for summary judgment.¹⁶ The Second Circuit affirmed.¹⁷

Robert Jordan's story received relatively little press nationwide. ABC News covered the piece in only one short article.¹⁸ In general, mostly only counter-culture news sources covered the story in any detail. It is surprising that the country was not more outraged at the idea that there are any police departments in the country that are not seeking the best and the brightest to protect and serve because police officers have both great power and responsibility in American society. Robert Jordan's story does, in fact, bring to light a constitutional issue that could bring the policy of intelligence quotient cutoffs to an end. However, that issue is not Equal Protection of the rejected applicant.¹⁹ This issue must be understood in Due Process terms, as it implicates both the Due Process rights of Mr. Jordan as well as the civilians in New London who will be policed by an arbitrarily selected police force.

II. EMOTIONAL INTELLIGENCE AND GENERAL INTELLIGENCE ARE CRUCIAL FOR POLICE OFFICERS

The findings of President Obama's Task Force on twenty-first century policing support the conclusion that it is irresponsible to impose caps on general intelligence (or emotional intelligence, as they are correlated). The Task Force explained in its report that "it is imperative that agencies place value on both educational achievements and socialization skills when making hiring decisions."²⁰ These educational achievements and socialization skills could be understood as

14. *Jordan v. City of New London*, No. 3:97CV1012(PCD), 1999 U.S. Dist. LEXIS 14289, at *6-*7 (D. Conn. Aug. 29, 1999).

15. *Id.* at *6.

16. *Id.*

17. *Jordan v. City of New London*, No. 99-9188, 2000 U.S. App. LEXIS 22195, at *1 (2d Cir. Aug. 23, 2000).

18. *See Court OKs Barring High I.Q.s for Cops*, ABC NEWS (Sept. 8, 2000), <http://abcnews.go.com/US/court-oks-barring-high-I.Q.s-cops/story?id=95836>.

19. The Equal Protection standards of review are far too deferential to state actors when they are not classifying on the basis of a "suspect" class (such as race).

20. PRESIDENT'S TASK FORCE, *supra* note 1.

markers of general and emotional intelligence. The Task Force also stressed that the goal of this recommendation is not just increased community trust, but actual “procedural justice and fairness.”²¹ This Comment contends that the risk is much greater than just procedural violations and unfairness. Nonetheless, the Task Force understood interpersonal skills to be just as important as tactical training and prowess.²² Indeed, one of the Task Force’s recommendations is that basic officer training includes “critical thinking [and] social intelligence.”²³ In sum, the President’s Task Force recommended the opposite of what New London has chosen to do.

A. The Wonderlic Exam and I.Q.

The test that the city of New London administered to Mr. Jordan is known as the Wonderlic Personnel Test and Scholastic Exam.²⁴ According to Wonderlic, the exam measures cognitive ability, which consists of the ability to “understand instructions, learn, adapt, [and] solve problems” among other things.²⁵ The *Jordan* court, however, was not the first court to consider the Wonderlic Test.²⁶ In *Griggs v. Duke Power Co.*, Duke Power Company chose to administer the Wonderlic Test to applicants in all but one of its departments and require a minimum score.²⁷ An expert testified that the Wonderlic Test assesses the test taker’s “ability to understand, to think, [and] to use good judgment.”²⁸ In other words, the expert explained, the test “was professionally developed to measure general intelligence.”²⁹ More recently, in *In re Magistrate Eligibility Examination*, another court explained that the topics and skills tested on the Wonderlic Test include reading level, basic mathematics, days of the week/months of the year, and weights and measures.³⁰ That court also categorized the test as a “test of general intelligence.”³¹

21. *Id.* at 52.

22. *Id.* at 51.

23. *Id.* at 56.

24. *Jordan v. City of New London*, No. 3:97CV1012(PCD), 1999 U.S. Dist. LEXIS 14289, at *1 (D. Conn. Aug. 29, 1999).

25. *Wonderlic Personnel Test*, *supra* note 7.

26. *See generally* *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 245–46 (M.D.N.C. 1968).

27. *Id.*

28. *Id.* at 250.

29. *Id.*

30. *In re Magistrate Eligibility Examination*, 2015 S.C. LEXIS 439, at *4 (S.C. 2015).

31. *Id.*

This general intelligence that the Wonderlic Test assesses can loosely be understood as I.Q. (Intelligence Quotient).³² Psychology scholars have stated that intelligence includes the ability to “make abstract associations and characterizations.”³³ General intelligence also includes verbal comprehension, processing speed, and working memory.³⁴ One can imagine many reasons for administering such a test and for requiring a minimum score. Police officers will be required to use critical thinking skills to solve crime and to make quick decisions in the field. Quick decisions require the brain to be able to operate with fast processing speed. Officers will also need to be able to make abstract associations to understand and apply legal concepts (e.g. probable cause).³⁵ This is exactly the kind of problem-solving that the Wonderlic exam is intended to test. In most Fourth Amendment inquiries, an officer’s conduct must be “reasonable” to be constitutional.³⁶ This requirement necessarily assumes that an officer is capable of deciding what is reasonable under the circumstances. Making that decision requires careful analysis, considering the totality of the circumstances. Moreover, the officer will often be required to explain clearly, orally or in writing, how he or she arrived at that legal conclusion in testimony or in an affidavit in support of a warrant.³⁷ There will be few categorical, bright-line rules for a young officer to simply commit to memory. More often, an officer will need to use his or her own judgment to determine what is the constitutionally appropriate course of action in a particular situation. Again, this requires the ability to make logical decisions quickly and reliably. It is easy to understand why police departments would require a minimum score for officers who will need to aggressively enforce the laws while also being mindful of the limits proscribed by the Constitution. It is not as clear why departments would decline to hire candidates with higher scores.

32. *Wonderlic Personnel Test*, *supra* note 7.

33. Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 127–28 (2004).

34. Dylan Lane, *Working Memory and Processing Speed*, SPELD NSW E-NEWS, 3 (2014).

35. The majority of arrests are made without warrants after an officer has determined that probable cause to arrest exists. In other words, there is no judicial determination of probable cause before the arrest is made.

36. *See* U.S. CONST. amend. IV.

37. *Id.*

Notably, general intelligence scores strongly correlate to emotional intelligence scores.³⁸ Researchers have found that “general intelligence depends [on] and also reflects, to a large extent, emotional intelligence.”³⁹ Psychology professors John Mayer, Peter Salovey, and David Caruso defined emotional intelligence as “the ability to monitor one’s own and other’s feelings and emotions, to discriminate among them and to use this information to guide one’s thinking and actions.”⁴⁰ Although this may seem unimportant, the skills it includes are:

[1] Managing emotions so as to attain specific goals; [2] Understanding emotions, emotional language, and the signals conveyed by emotions; [3] Using emotions to facilitate thinking; and [4] Perceiving emotions accurately in oneself and others.⁴¹

In other words, someone who is less intelligent is less likely to be able to perceive another person’s attitude and use it to solve problems — or decide how to communicate with that person. Both are crucial for a police officer that may, for example, encounter a nervous driver during a traffic stop. Research is beginning to show that the frontal and parietal cortices are integral to both general and emotional intelligence.⁴² This is evidenced by the fact that verbal comprehension, perceptual organization, processing speed, and working memory — aspects of general intelligence — are predictors of emotional intelligence.⁴³ Scientists speculate that this is because emotional intelligence and general intelligence “share mechanisms” in the brain.⁴⁴

Emotional intelligence has a profound effect on other aspects of behavior as well.⁴⁵ Those with a lower emotional intelligence score have been found to exhibit more aggressive behaviors than those with

38. Arthur Rizer, *The Militarized Mentality of the Police (Part 2 of 3)*, HUFFINGTON POST (May 28, 2015, 2:47 PM), http://www.huffingtonpost.com/arthur-rizer/the-militarized-mentality_b_7462878.html; *Correlation Between Emotional Intelligence and I.Q.*, ABOUT MEMORY (Feb. 2013), <http://www.memory-key.com/research/news/correlation-between-emotional-intelligence-and-i.q.>; Beckman Institute, *Vietnam Veterans Help Neuroscientists Map Emotional Intelligence in the Brain*, YOUTUBE (Jan. 17, 2013), <https://www.youtube.com/watch?v=t2AXbFAtX2Y&feature=youtu.be>.

39. Beckman Institute, *supra* note 38.

40. John Mayer et al., *Emotional Intelligence: New Ability or Eclectic Traits?* 63 AM. PSYCHOL. 503, 504 (2008).

41. *Id.* at 507.

42. *See* Beckman Institute, *supra* note 38.

43. *Id.*

44. *Id.*

45. Rizer, *supra* note 38.

higher emotional intelligence scores.⁴⁶ Emotional intelligence, in part, dictates who is likely to be a bully.⁴⁷ Both of these findings are significant for police officers. Their importance cannot be overstated. In effect, police departments that impose caps on I.Q. are weeding out applicants that are less likely to display aggressive behavior and/or more likely to intervene if they see aggressive behavior while selecting for the opposite traits.

Remarkably, there is also a negative correlation between intelligence and racial animus. More specifically, those with higher verbal ability have more positive views of African-Americans and other racial minority groups.⁴⁸ A 2016 study surveyed the responses of nearly 45,000 white participants.⁴⁹ The participants were asked a number of questions that assessed their opinions about people of color.⁵⁰ Of the highest scoring participants, only 28.8% reported that they agreed with the statement that “blacks are lazy.”⁵¹ However, of the lowest scoring participants, 45.7% agreed.⁵² The study showed similar results when the participants were asked about their stances on interracial marriage and having black neighbors.⁵³ Those on the higher end of the verbal ability spectrum were more supportive of both concepts.⁵⁴ Only 28% of those in the highest third of test takers were disapproving, while almost half (46.7%) of those in the lowest third were disapproving.⁵⁵ Obviously, opposition to the entire concept of interracial marriage reflects a certain amount of racial animosity because the underlying rationale is that the black person is undeserving of a white spouse. Similarly, a broad categorization of the entire race as “lazy” reflects hostility towards African-Americans and belief in negative stereotypes. Although the study only addressed and analyzed outwardly expressed views towards African-Americans,⁵⁶ it supports the proposition that those with lower intelligence generally have lower

46. *Id.*

47. *Id.*

48. Denise-Marie Ordway, *Are Smart People Less Racist? New Research*, JOURNALIST’S RESOURCE, (Jan. 14, 2016) <http://journalistsresource.org/studies/society/race-society/smart-people-racism-equality-prejudice>.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. It is certainly possible that those who do not express racial animus nonetheless have implicit bias.

opinions of African-Americans. This suggests that weeding out higher scoring applicants results in a police force more likely to subscribe to racial stereotypes.

In effect, New London is selecting officers that are more likely to have racist attitudes, and be violent. The risk presented by having selected officers with these attributes is compounded by the courts' hesitation to hold officers accountable for their behavior because a rogue officer is often not punished for stepping outside the constitutional lines. In other words, even an officer that understands a bright-line rule but violates it anyway will often be vindicated by a reviewing court. Even though President Obama's Task Force recommended the exact opposite, New London's policy persists.

B. The Courts' Tradition of Deference to Police Officers

In a long line of cases, particularly beginning with *Terry v. Ohio*, the Supreme Court has shown incredible deference to police officers.⁵⁷ In the infamous *Terry* case, Officer McFadden saw three men who did not “look right” to him, although he could not articulate why, and he decided to watch them.⁵⁸ Officer McFadden watched them walk up and down the street, taking turns looking through a store window.⁵⁹ Some would call this window shopping, but Officer McFadden, who was assigned to patrol for pickpockets and shoplifters, decided to investigate further.⁶⁰ He approached them, concerned that they may be armed and preparing to rob the store they had been peering into.⁶¹ When Officer McFadden was apparently unsatisfied with the way that the men said their names, he grabbed Terry, turned him around and began to pat him down.⁶² At the time of the incident, Officer McFadden certainly had no probable cause. In fact, he could not even describe what made him want to want to approach Terry and his companions.⁶³ This undoubtedly violated their Fourth Amendment rights according to the law of that time.

The Fourth Amendment reads, “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable

57. *Terry v. Ohio*, 392 U.S. 1, 1, 30 (1968).

58. *Id.* at 5–6.

59. *Id.* at 6.

60. *Id.* at 5–6.

61. *Id.* at 6–7.

62. *Id.* at 7.

63. *Id.* at 1, 5.

cause.”⁶⁴ The Court was pained by the idea of categorizing a frisk as anything other than a search: “it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”⁶⁵ Having confronted that reality, the Court acknowledged that McFadden both seized and searched Terry, but then departed from the Fourth Amendment standard that should have governed.⁶⁶ Instead, the Court asked: “would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”⁶⁷ In asking that question, the Court shifted away from the test plainly described in the Fourth Amendment by shifting the inquiry away from probable cause and reasonableness to appropriateness. In answering the question, the Court gave license to police officers to act first and think about constitutional rights later.

The Court emphasized Officer McFadden’s thirty years of experience throughout the opinion.⁶⁸ According to the Court, Officer McFadden’s thirty years of experience made him more qualified than the justices on the Supreme Court to determine what was reasonable when interacting with Terry and his companions on the street.⁶⁹ Even though McFadden’s duties and experience did not involve investigations of armed robberies and the like, the Court deferred to his judgment about what he saw. The Court did not consider the possibility that Officer McFadden happened to simply be lucky.⁷⁰ Nor did the Court fully consider that not excluding the revolver found on his person would undermine the purported purpose of the exclusionary rule: to deter unconstitutional police conduct. Rather, the Court strained itself to grant police extra power to solve crime at the expense of the Constitution.

Justice Douglas appropriately categorized the Court’s decision as the first step in “a new regime.”⁷¹ In this new regime, officers essentially have greater power than magistrate judges because had Officer

64. U.S. CONST. amend. IV.

65. *Terry*, 392 U.S. at 1, 16.

66. *Id.* at 19–20.

67. *Id.* at 21–22.

68. *See generally id.* at 5, 23.

69. *See generally id.* at 15.

70. It should be acknowledged that cases only arrive at a court for consideration of a suppression motion when the officer has found something. In this way, the Court likely has a skewed sense of how often officers are correct in their guesses about suspects.

71. *Terry*, 392 U.S. at 1, 39 (Douglas, J., dissenting).

McFadden stopped to seek a warrant, a magistrate judge would not have granted one. Nonetheless, Officer McFadden proceeded in a way that he was only allowed to do with a warrant. The simple and inescapable fact is that there was no probable cause for arrest or search *before* the pat down, much less before Officer McFadden approached Terry and his companions. Although the words “reasonable suspicion” did not appear in the majority opinion, this case essentially gave police officers a new standard when dealing with citizens. After *Terry*, an officer may conduct a brief pat down of a suspect to check for weapons if the officer has reason to believe that the person is armed and dangerous.⁷² In so doing, the Court was extremely deferential and accommodating to police officers – even those officers who violated the law.

The Court has been accommodating to police in other scenarios as well. In *Kentucky v. King*, the Court allowed police officers to create exigent circumstances that would justify a warrantless search.⁷³ In *King*, the police knocked on the door of an apartment and announced their presence because they could smell marijuana coming from inside the apartment.⁷⁴ They chose not to obtain a warrant, but rather decided to enter at that time.⁷⁵ According to the police, after they knocked, they heard noises that led them to believe that the drug evidence was about to be destroyed.⁷⁶ They then considered this to be an exigent circumstance where their warrantless entry was permitted, and forced their way into the home.⁷⁷ Instead of excluding the evidence to discourage this questionable police conduct, the Court rejected the idea of creating a ban on police-created exigency.⁷⁸ The Court reasoned that that rule would be too nebulous for police officers or judges to adhere to.⁷⁹ Nothing in the record suggested that the police would not have had time to seek a warrant once they smelled the marijuana and return after they had obtained it. Indeed, what prompted

72. See *Maryland v. Buie*, 494 U.S. 325, 332 (1990) (“We therefore authorized a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or hunch, that he is dealing with an armed and dangerous individual.”) (internal quotations and citations omitted).

73. See generally *Kentucky v. King*, 563 U.S. 452, 455 (2011).

74. *Id.* at 456.

75. *Id.*

76. *Id.*

77. *Id.* at 456–57.

78. *Id.* at 468–69.

79. *Id.*

the defendants to begin to destroy the evidence (if that is in fact what was happening) was the police presence at the door. Had they not knocked, the evidence in all likelihood would have still been there when they returned. Justice Ginsburg agreed in her dissenting opinion.⁸⁰ Once again, instead of erring on the side of protecting rights of citizens, the Court chose to give more authority to police officers.

Most recently, the Supreme Court bent over backwards to excuse even more obviously unacceptable police conduct in *Utah v. Strieff*.⁸¹ In *Strieff*, Salt Lake City Police Detective Douglas Fackrell decided to investigate an anonymous tip regarding drug activity in a particular house.⁸² Fackrell watched Strieff exit that home and then detained him without any legally recognizable level of suspicion.⁸³ Fackrell interrogated Strieff and asked him to produce identification.⁸⁴ When Fackrell, having already detained and questioned Strieff, relayed Strieff's identification to dispatch, the dispatcher told him that Strieff had an outstanding warrant.⁸⁵ Fackrell then arrested Strieff pursuant to that warrant and performed a search incident to arrest.⁸⁶ During that search, Fackrell found drugs and drug paraphernalia.⁸⁷

Predictably, Strieff moved to suppress the evidence recovered in the search and ultimately prevailed in the Utah Supreme Court.⁸⁸ In a strange turn of events, the United States Supreme Court reversed the judgment of Utah's highest court and held that the arrest warrant was an intervening event that attenuated the taint of the illegal seizure.⁸⁹ In reasoning that can only be described as illogical, the Court wrote: "Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant."⁹⁰ In other words, the warrant that already existed but Fackrell did not know of when he approached Strieff was somehow an intervening event that justified the illegal stop. This conclusion defies logic because it suggests that a preexisting condition (not known to the officer) could somehow be intervening, which generally means happening between two events.

80. *Id.* at 474–76 (Ginsburg, J., dissenting).

81. *Utah v. Strieff*, 136 S. Ct. 2056, 2063–64 (2016).

82. *Id.* at 2059.

83. *Id.* at 2060.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 2060.

88. *Id.*

89. *Id.* at 2064.

90. *Id.* at 2063.

The Court further stated that exclusion of evidence is only favored when doing so would deter unlawful behavior on the part of police officers.⁹¹ That is, evidence should be excluded when the police conduct was “purposeful or flagrant.”⁹² According to the Court, Fackrell was “at most negligent.”⁹³ Somehow, approaching Strieff without so much as reasonable suspicion as he exited a residence and walked to a convenience store was not purposeful. This opinion is further evidence of the Court’s growing deference to police officers.

By being so accommodating to police, the Court continues to increase police officers’ power over civilians. Even accosting a man walking down the street without having any articulable suspicion of him (which could be called harassment) is not conduct that the Court sees fit to deter. The police can sidestep the Fourth Amendment by creating exigent circumstances that would allow them to enter a residence without a warrant. As Justice Douglas aptly predicted in *Terry*, we are in a new regime where the police have immense power that remains mostly unchecked by the courts.⁹⁴ In a city like New London, that power belongs to a group chosen from those more likely to be bullies and more likely to harbor racial animus than the general population. If the Supreme Court (and lower courts following its precedent) will not require officers to operate within the bounds of the Constitution, perhaps the lower courts will be amenable to challenges to hiring policies.

The increasing deference that the Supreme Court has shown officers over the last half century makes implementation of the 21st Century Policing Task Force’s recommendations even more essential. With the Supreme Court being unwilling to hold officers accountable for unconstitutional behavior, constitutional rights will only be protected if the department polices itself. A department that screens out applicants with high I.Q., like New London, is unlikely to do so.

C. Police as Protectors of Rights

Most Americans expect the police to “protect and serve;” President Obama’s Task Force on 21st Century Policing recognized that this should be the mission of every police department.⁹⁵ The execu-

91. *Id.*

92. *Id.*

93. *Id.* at 2063.

94. *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

95. PRESIDENT’S TASK FORCE, *supra* note 1, at 5.

tive summary of the Task Force's report explained that the Task Force was commissioned to make recommendations to build trust "between law enforcement agencies and the people they *protect and serve*."⁹⁶ The report also includes a quote from a Task Force member who explained that a "police officer's mission is . . . to protect."⁹⁷ That is, police officers are tasked with protecting "the rights of all involved in police encounters."⁹⁸ Of course, police are expected to reduce crime, but they must "do so fairly while protecting the rights of citizens."⁹⁹ The Task Force has articulated what every police department should strive to do, and New London purports to have the same mission.

The New London Police Department website commits it to "preserving peace, reducing fear and providing for an overall safe environment."¹⁰⁰ It also says that the department "*protects the rights and dignity of all citizens*."¹⁰¹ This Comment aims to show that the very department claiming to protect rights of all citizens has a policy in place that actually violates at least one right: the Fourteenth Amendment right to bodily integrity. The department's preference for lower I.Q. candidates violates the Fourteenth Amendment bodily integrity rights of the patrolled citizens because it is arbitrary in light of the Department's stated mission, and the science showing the connection between I.Q. and behavior. The department's policy arbitrarily contradicts not only its own stated goals, but also the recommendations of experts in the field.

III. WHAT IS CONSTITUTIONALLY "ARBITRARY?"

A. The Black Letter Law

The Fourteenth Amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law."¹⁰² The concept of due process has both procedural and substantive components. The substantive component is of interest to the present inquiry. Although the term substantive due process is far from self-defining, the Supreme Court has treated substantive due process as the people's protection

96. *Id.* at 1.

97. *Id.* at 11.

98. *Id.* at 19.

99. *Id.* at 42.

100. *New London Police Department, supra* note 3.

101. *Id.*

102. U.S. CONST. amend. XIV.

from “arbitrary action of [the] government.”¹⁰³ The Court uses substantive due process to protect constitutional rights that are not explicitly enumerated in the constitution, but must exist by implication if the rest of the document is to have meaning. Essentially, “[s]ubstantive due process is . . . a matter of personal liberty.”¹⁰⁴ Liberty includes “[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect.”¹⁰⁵ Because the concept is somewhat amorphous, the Supreme Court has decided a wide range of issues on substantive due process grounds.¹⁰⁶ However, the government is given wide latitude; “only the most egregious conduct can be said to be ‘arbitrary in the constitutional sense.’”¹⁰⁷

When approaching a case, a reviewing court must first consider the facts to ascertain if there is a constitutional right at stake. In determining what is a constitutional right, the Court considers the role of the purported right in society. Only those rights that are either “fundamental” or encompassed by the term “liberty” survive the first step of the analysis. A right is “fundamental” if it is integral to the structural function of society and “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty or justice would exist’” without that right.¹⁰⁸ The Court heavily weighs historical evidence in determining whether the right can be considered “fundamental.”¹⁰⁹ The Court only accepts the fundamental nature of a newly asserted right in the most rare of instances: “we have always been reluctant to expand the concept of substantive due process.”¹¹⁰ Because of the Court’s hesitation in recognizing new fundamental rights, many new substantive due process rights are recognized because of their connection to the meaning of liberty.

103. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

104. *McDonald v. Chicago*, 561 U.S. 742, 864 (2010) (Stevens, J., dissenting).

105. *Id.* at 880.

106. *See generally*, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (expanding the right to marry to include same-sex marriage on substantive due process and equal protection grounds); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that a Texas law that banned homosexual sodomy violated the substantive due process rights of those charged under the statute); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (upholding a qualified right to abortion under substantive due process); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a statute criminalizing use of contraception violated substantive due process rights of the user).

107. *Lewis*, 523 U.S. at 846.

108. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

109. *See id.* (“Our Nation’s history, legal traditions, and practices thus provide the crucial ‘guideposts for responsible decisionmaking,’ that direct and restrain our exposition of the Due Process Clause.”) (citations omitted).

110. *Id.* at 720.

Liberty is the right to live without excessive state intrusion; generally, “the right to be left alone.”¹¹¹ While a fundamental right must have a long history to be recognized, liberty rights do not. Whether a particular right is essential to liberty has little to do with the history of that right. In other words, society need not have recognized the existence of such a right for centuries or even generations before the Court can decide that it is integral to liberty. In fact, the Court has recognized that new and even unpopular rights must sometimes be defined because they are integral to liberty: “[t]he nature of injustice is that we may not always see it in our own times.”¹¹² This language explicitly leaves open the possibility for courts to recognize new substantive due process rights. Justice Kennedy wrote recently that “[w]hen new insight reveals discord between the Constitution’s central protections and a received legal structure, a claim to liberty *must* be addressed.”¹¹³ The Court’s due process jurisprudence indicates that a “progressive society” will have new needs.¹¹⁴ The Court has addressed such new claims relating to bodily integrity, intimate relationships, and privacy.¹¹⁵ When a court addresses a new purported liberty interest, it must first assess the infringing government action.

If there is a constitutional right at stake, a court then must analyze the facts to determine if a government action has substantially affected the exercise of that right. The inquiry is highly fact-specific and conducted on a case-by-case basis: “In each case ‘due process of law’ requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims.”¹¹⁶ At the very least, a state action that infringes on a constitutional right can “be justified only by a compelling state interest.”¹¹⁷ Where there is a fundamental right at stake, the standard is less predictable.¹¹⁸ In practice,

111. Carlos Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1216–17 (2004).

112. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

113. *Id.* (emphasis added).

114. *Rochin v. California*, 342 U.S. 165, 172 (1952).

115. *McDonald*, 523 U.S. at 880.

116. *Rochin*, 342 U.S. at 172.

117. *Roe*, 410 U.S. at 155 (quotations omitted).

118. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that states cannot place an “undue burden” on the right to abortion); *Washington v. Glucksberg* 521 U.S. 702 (1997) (applying what might be categorized as a balancing test between the state interest in preventing suicide and the right to control one’s own life).

this means that substantive due process is a growing and somewhat unpredictable area of constitutional law.

In 1952, the Supreme Court explicitly recognized that liberty is incomplete without bodily integrity.¹¹⁹ In *Rochin v. California*, the Court held that the government violated the substantive due process rights of a suspect by forcing him to have his stomach pumped in order to uncover evidence.¹²⁰ In *Rochin*, the police had information that Rochin was selling narcotics and entered his home, without a warrant, when they noticed that the front door was open.¹²¹ Police officers found Rochin sitting on a bed with his wife and noticed some capsules on the night stand.¹²² When an officer asked Rochin who the capsules belonged to, Rochin immediately put the capsules in his mouth and swallowed them.¹²³ The officers handcuffed him and took him to a hospital, where they asked a doctor to force a tube down his stomach to induce vomiting.¹²⁴ The doctor did so, and the officers recovered morphine.¹²⁵ The California appellate court, bound by the Supreme Court's earlier decisions, affirmed Rochin's conviction but denounced the officers' conduct.¹²⁶ Justice Frankfurter responded that the Court did not intend to authorize such an affront to bodily integrity: "It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record."¹²⁷

Although the words bodily integrity cannot be found in the opinion itself, this case is clearly one where the Court is recognizing such a right. The Court expresses outrage at "[i]llegally breaking into the privacy of [Rochin]" through a "struggle to open his mouth and remove what was there" by "forcible extraction of his stomach's contents."¹²⁸ Although the Court does not explicitly say so, it seems to base its holding on what the officers did to Rochin's physical person.¹²⁹ In other words, the Court is not outraged by the fact that the officers proceeded past an open front door, and then walked into his

119. *Rochin*, 342 U.S. at 172.

120. *Id.* at 174.

121. *Id.* at 166.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 166.

126. *Id.* at 167.

127. *Id.* at 174.

128. *Id.* at 172.

129. *Id.*

closed bedroom. Rather, the Court is appalled by the physical intrusion into Rochin's person.¹³⁰ By recognizing that such conduct was unconstitutional, the Court was recognizing a right to bodily integrity. The officers violated Rochin's Constitutional rights by prying his mouth open and forcibly inducing him to vomit. Many cases after *Rochin* also recognized this right to bodily integrity and autonomy.¹³¹

Rochin also introduced language that the Court still uses in substantive due process cases: government conduct that violates the due process clause must be so outrageous that it "shocks the conscience."¹³² The Court elaborated on this statement forty years later in *City of Sacramento v. Lewis* when it held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"¹³³ In this way, *Rochin* has shaped the Court's substantive due process jurisprudence for over sixty years. The standard set in *Rochin* and applied in *Lewis* is extremely high and gives wide latitude to the government in its action. However, the Court may be willing to consider more passive governmental action to be arbitrary in the constitutional sense.

In *Deshaney v. Winnebago County Department of Social Services*, the Supreme Court considered a substantive due process claim grounded in the state's failure to protect a person from a foreseeable injury.¹³⁴ Joshua Deshaney's parents had been divorced and a Wyoming court granted custody to Joshua's father, Randy Deshaney.¹³⁵

Reports that Randy was abusing Joshua began to surface when Joshua was between two and three-years-old.¹³⁶ Joshua was even hospitalized at one point because of "multiple bruises and abrasions."¹³⁷ Still, the Department of Social Services (DSS) released Joshua back into the care of his father.¹³⁸ Over the next year, DSS received at least one report that Joshua was being treated at the hospital again, and the social worker assigned to his case documented her ongoing

130. *Id.*

131. *See, e.g., Roe*, 410 U.S. at 113, 164 (holding that a state cannot completely ban abortion at all stages of pregnancy); *Griswold*, 381 U.S. at 479, 485 (holding that a state cannot prevent a person from voluntarily taking contraceptive drugs).

132. *Rochin*, 342 U.S. at 172.

133. *City of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998).

134. *Deshaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 191 (1989).

135. *Id.*

136. *See id.* at 192 (accusations of child abuse first surfaced in 1982 and the child was born in 1979).

137. *Id.*

138. *Id.*

suspicion that someone in the home was abusing Joshua.¹³⁹ At one point when she visited the home, she was told that Joshua was “too ill to see her.”¹⁴⁰ Even after receiving all of this information over a two-year period, DSS took no action to remove Joshua from his father.¹⁴¹

When Joshua was four-years-old, he was admitted into the hospital after his father beat him “so severely that he fell into a life-threatening coma.”¹⁴² Surgery revealed that he had “a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time.”¹⁴³ Although four-year-old Joshua survived, he suffered severe brain damage¹⁴⁴ and was expected to require full-time care in an “institution for the profoundly retarded,” for the rest of his life.¹⁴⁵ His mother sued the state, claiming that the state failed to protect Joshua from a harm that it knew or should have known of, and that this was in violation of his substantive due process rights.¹⁴⁶ The Court granted certiorari to resolve the dispute in lower courts about whether the government could be liable for failing to provide adequate protection to an individual.¹⁴⁷

The Court ultimately rejected the family’s claim because the injury was inflicted by a private actor, and not the state or its agents.¹⁴⁸ The Court writes: “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”¹⁴⁹ The Court devotes a lengthy discussion to the notion that the state cannot be obligated to protect individuals from private actors. According to the Court, the Due Process Clause does not extend such an “affirmative obligation” onto the state.¹⁵⁰ In emphasizing the fact that the issue with *Deshaney’s* claim is that the Due Process Clause does not protect citizens against *private* actors, the Court leaves open the possibility that

139. *Id.* at 192–93.

140. *Id.* at 193.

141. *Id.* at 192–93.

142. *Id.* at 193.

143. *Id.*

144. Joshua *Deshaney* died in 2015, at the age of thirty-six. Bob Collins, *The Sad End of ‘Poor Joshua,’* MPR NEWS (Nov. 12, 2015), <http://blogs.mprnews.org/newscut/2015/11/the-sad-end-of-poor-joshua/>.

145. *Deshaney*, 489 U.S. at 193.

146. *Id.* Although substantive due process law ultimately comes from the Fifth and Fourteenth Amendments, *Deshaney* filed a claim under 42 U.S.C. § 1983 seeking civil liability because the Fourteenth Amendment does not create a right to sue for damages.

147. *Id.* at 194.

148. *Id.* at 195.

149. *Id.*

150. *Id.*

there could be a cause of action for failing to protect an individual from foreseeable harm at the hands of a government agent. In other words, had Deshaney's father been a state actor, the state's failure to protect Josh from him may have been arbitrary as defined by the Due Process Clause.

The Court takes great care to contrast the government's actual duty not to inflict harm with a duty to protect from harm at the hands of private actors that the plaintiff asks it to recognize.¹⁵¹ The government only has the former duty. The Court states this repeatedly throughout the opinion.¹⁵² The Due Process Clause guarantees "protection against unwarranted *governmental* interference" with an individual's liberty interests.¹⁵³ In emphasizing this, the Court is essentially saying that the deficiency in the plaintiff's claim is not that the government cannot be obligated to protect citizens from foreseeable harm. Rather, the Court is suggesting that the claim fails because that harm came at the hands of a private actor. In other words, because no affirmative act by the government created the harm, it is not arbitrary *governmental* action.

The dissenters, however, thought that the government had in fact committed affirmative acts that made the government responsible.¹⁵⁴ Three dissenting justices wrote that the majority framed their analysis from an improper perspective.¹⁵⁵ Instead of focusing on what the government did *not* do, the dissent said that the majority should have analyzed the situation in light of what the state of Wisconsin actually did.¹⁵⁶ The state, according to the dissenters, had an affirmative duty created by the Fourteenth Amendment to take action to protect children like Joshua because it established a child welfare system designed to do so. In this way, the decision to not act was an act in and of itself. Moreover, in the dissent's view, the state is not simply a third party watching from afar. Rather, the state held itself out to be a protector of children by establishing a child-welfare system and intervening in response to reports of abuse.

The dissenters believed that the Seventh Circuit Court of Appeals improperly granted summary judgment to the state.¹⁵⁷ The so-

151. *Id.* at 196.

152. *Id.* at 196–97.

153. *Id.* at 196 (emphasis in original).

154. *See Deshaney*, 489 U.S. at 205–09 (1989) (Brennan, J., dissenting).

155. *Id.* at 204 (Brennan, J., dissenting).

156. *Id.* at 205 (Brennan, J., dissenting).

157. *See id.* at 211 (Brennan, J., dissenting).

cial worker in the case said, “I just knew the phone would ring some day and Joshua would be dead.”¹⁵⁸ In the dissenters’ view, the decision not to remove Joshua from his father was not one of professional judgment that should be afforded deference.¹⁵⁹ To the contrary, it was rooted in “the kind of arbitrariness that [the Court] ha[s] in the past condemned.”¹⁶⁰ Although the state never explained why it did not remove Joshua, the dissent reasons that, in light of all of the information that the state had, its action was undoubtedly arbitrary and the government cannot avoid accountability by claiming that it had no duty to intervene.¹⁶¹ Although the dissenters did not suggest that the Deshaney would (or should) win in a trial, they believed that the case was inappropriately disposed of on summary judgment.¹⁶²

Deshaney supports two important propositions that are relevant to the issue at hand: first, there is certainly a substantive due process right to bodily integrity; secondly, the state has an obligation to protect people under its care from violation of that right at the hands of state action.¹⁶³ Failure to do so may be arbitrary. The fact that Due Process liberty includes bodily integrity is neither new nor controversial. In the sixty years since *Rochin*, its holding in that regard has remained undisturbed. The police and other government actors cannot arbitrarily invade a person’s bodily space without consequences. The second piece of *Deshaney* is that because the deficiency of the plaintiff’s claim was the fact that the harm came from a private actor, the Court left open the possibility that the holding would have been different had the state had information that a police officer (for instance) was abusing citizens and did not intervene. This holding is powerful in that it makes room for more governmental accountability. Currently, then, the state of the law is that the government may be liable for the acts of a particular officer (notwithstanding the qualified immunity that officers have) after the fact.¹⁶⁴ If the government is liable for failing to intervene, citizens could bring claims where the government has created a situation that is bound to lead to violations of citizens’ bodily integrity and does nothing to mitigate that risk.

158. *Id.* at 209 (Brennan, J., dissenting).

159. *Id.* at 211 (Brennan, J., dissenting).

160. *Id.*

161. *Id.* at 202, 211 (Brennan, J., dissenting).

162. *Id.* at 211 (Brennan, J., dissenting).

163. *Id.* at 200.

164. *See id.* at 201–03.

In a case decided after *Deshaney*, the Court rejected respondent's claim that a police department was liable under for its failure to enforce a restraining order because respondent had no Fourteenth Amendment interest in its enforcement.¹⁶⁵ In *Castle Rock*, Jessica Gonzales had a restraining order against her estranged husband that prohibited him from being within 100 yards of the family home and from "molest[ing] or disturb[ing] the peace of [Jessica Gonzales] or of any child."¹⁶⁶ When the order was finalized, it detailed that Gonzales's husband was entitled to pick up his three daughters from the family home for visits every other weekend and for midweek visits, if the parties could arrange them.¹⁶⁷ One day, respondent's husband took the children while they were playing outside, even though no arrangements had been made for a visit.¹⁶⁸ Respondent called the police department four times over the course of about five hours, asking officers to enforce the restraining order and arrest her husband for violating its terms.¹⁶⁹ She even provided a location where officers would likely be able to find him and the children.¹⁷⁰ Officers made no efforts to locate him, much less arrest him or "use every reasonable means to enforce" the order as the order said officers were obliged to do.¹⁷¹ Tragically, about six hours after the children disappeared with their father, the father came to the police station and "opened fire with a semiautomatic handgun" that he had purchased that day.¹⁷² Police killed respondent's husband in the shootout and then discovered the bodies of respondent's three children – whom he had already shot – when they approached his car.¹⁷³

Gonzales sued the town, using § 1983, and claiming that the police department deprived her of her Fourteenth Amendment "property" interest by refusing to enforce the restraining order.¹⁷⁴ The Court, however, rejected the idea that she had a "property" interest in enforcement of the order such that she could claim to have been deprived of a Constitutional entitlement that § 1983 exists to protect.¹⁷⁵

165. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

166. *Id.* at 751.

167. *Id.* at 752–53.

168. *Id.* at 753.

169. *Id.* at 753–54.

170. *Id.* at 753.

171. *Id.* at 752–54.

172. *Id.* at 754.

173. *Id.*

174. *Id.* at 755.

175. *Id.* at 768.

In other words, the Constitutional claim that she chose to rest her § 1983 suit on was inadequate because the state had not given her a right to have the police arrest her husband for violating the restraining order – the order simply warned that its violation “may” result in arrest.¹⁷⁶ It did not guarantee that the police would locate, much less arrest, him if he violated the order. According to the Court, this was the deficiency in Gonzales’s claim – not necessarily that § 1983 could not be used to impose liability on officers for failing to act to protect Constitutional rights.¹⁷⁷ Rather, the issue was that there was no Constitutional right to protect in this case.¹⁷⁸

In sum, *Deshaney* stands for the proposition that the state may be held liable for failing to prevent a foreseeable harm at the hands of a state actor.¹⁷⁹ *Castle Rock* does not disturb that because the Court’s holding centers on what is a valid property interest, and not what is arbitrary in Due Process terms.¹⁸⁰ The constitutional right to bodily integrity and the notion that the state may be affirmatively required to protect that right still remain. The discrimination against officers with higher I.Q.s (and presumably less propensity for violence and racial animus) in favor of those with opposite qualities is arbitrary in light of New London’s stated mission of protecting rights and the nascent notion that states can be held liable for failing to protect from harm at the hands of private actors. New London’s policy is dangerous, arbitrary and unconstitutional. This is evidenced by the sheer number of complaints against officers (including some repeat offenders) and the community’s response.

B. New London Case Study

The New London branch of the National Association for the Advancement of Colored People called on the Department of Justice to investigate the New London Police Department because of unconstitutional encounters.¹⁸¹ Some of these encounters have resulted in lawsuits.¹⁸² Officer Roger Newton even retired so that the Police De-

176. *Id.* at 752, 760.

177. *Id.* at 748, 768.

178. *Id.*

179. *Deshaney v. Winnebago Cty. Dep’t of Soc. Services*, 489 U.S. 189, 201–03 (1989).

180. *Gonzales*, 545 U.S. at 756– 66, 768; *Deshaney*, 489 U.S. at 189, 196.

181. Greg Smith, *NAACP Plans Investigation of New London Taser Death*, THE DAY, <http://www.theday.com/article/20141007/NWS01/141009735>.

182. *See, e.g., Fletcher v. New London*, No. 3:16CV241(MPS), 2017 U.S. Dist. LEXIS 23519, at *2 (D. Conn., Feb. 21, 2017); *Gilbert v. Newton*, No. 3:13CV1715(JCH), 2015 U.S. Dist. LEXIS 77375, at *1 (D. Conn., June 15, 2015).

partment would terminate its investigation into his behavior.¹⁸³ These claims show a pattern of unconstitutional conduct resulting in the violation of Constitutional rights, particularly the right to bodily integrity.

The city of New London was forced to pay \$50,000 to Lance Goode after multiple incidents where the police violated his rights.¹⁸⁴ First, on April 29, 2010, a police officer made a false report to the New London Housing Authority, causing Goode to be (unknowingly) banned from the premises where his mother lived.¹⁸⁵ Four police officers responded later that day to a tip that Goode was in the building.¹⁸⁶ These four officers followed Goode into his friend's apartment, entered without a warrant, and proceeded to taser Goode twice.¹⁸⁷ During this incident, they also broke his elbow, slammed his head into the wall, and handcuffed him.¹⁸⁸ He was unarmed, and did not resist at any point.¹⁸⁹ He was taken into custody and charged with various offenses, which were eventually dropped because they were baseless.¹⁹⁰ Six months later, Officer Newton approached Goode as Goode exited his car in a private driveway, and asked Goode for identification.¹⁹¹ When Goode went into the home to retrieve his car insurance information, Newton dropped a bag of oxycodone and kicked it over to the passenger side door of Goode's car.¹⁹² This is pictured on a police dashcam.¹⁹³ Officer Newton would later claim that the drugs fell out of the glove compartment, arrest Goode, and charge him with three felonies that carried a minimum sentence of five years' imprisonment.¹⁹⁴ Mr. Goode alone experienced two incidents of severe misconduct perpetrated by the New London Police Department.

In another incident, Donald Gilbert sued the city of New London alleging both misconduct stemming from his own encounters with police as well as the following departmental practices: arbitrary motor vehicle stops in violation of the Fourth Amendment, arbitrary deten-

183. *Goode v. Newton*, No. 3:12CV754(JBA), 2013 U.S. Dist. LEXIS 35171, at *6 (D. Conn., Mar. 14, 2013).

184. See Associated Press, *US Judge Dismisses Lawsuit Against New London*, NEWS 8 (Nov. 19, 2014, 6:57AM), <http://wtnh.com/2014/11/19/us-judge-dismisses-lawsuit-against-new-london/>.

185. *Goode*, 2013 U.S. Dist. LEXIS 35171, at *3.

186. *Id.*

187. *Id.*

188. *Id.* at *3-4.

189. *Id.* at *3.

190. *Id.* at *4.

191. *Id.* at *4-5.

192. *Id.* at *5.

193. *Id.*

194. *Id.*

tions of persons in violation of the Fourth Amendment, arbitrary arrests, and failure to properly train officers.¹⁹⁵ Mr. Gilbert’s own incident involved Officer Newton conducting a violent pat down of him and arresting him for interfering with an officer when Gilbert yelled out in pain.¹⁹⁶ According to the federal complaint filed by Mr. Gilbert, Officer Newton followed Mr. Gilbert as he drove in his vehicle and pulled Gilbert over without even reasonable suspicion (much less probable cause) – a violation of Mr. Gilbert’s Fourth Amendment rights.¹⁹⁷ Officer Newton ordered Gilbert to exit his vehicle and then performed a frisk.¹⁹⁸ Even though Mr. Gilbert did not resist, Officer Newton “inappropriately touched [Gilbert’s] genitals in a manner which was unauthorized and . . . inflicted pain . . . upon [Gilbert].”¹⁹⁹ Gilbert was held in custody overnight following his arrest even though the baseless charge was eventually nolle²⁰⁰ and Newton resigned.²⁰¹ According to the docket, this matter was settled by the parties although the terms of the settlement appear to be confidential.²⁰²

This is not to suggest that Officer Newton is the only police officer who has been accused of such practices; to the contrary, Donald Gilbert’s complaint lists three other individuals who sued the city and alleged violent confrontations with police that resulted in violations of their constitutional rights.²⁰³ Donald Gilbert’s complaint makes reference to Reuben Miller’s complaint, where a witness claims to have seen a police officer run out of his vehicle, up to Mr. Miller, grab him from behind, and throw him to the ground.²⁰⁴ The officer did not identify himself at all.²⁰⁵ Shortly after he wrestled Miller to the ground, a second officer arrived and began punching Miller and slam-

195. *Gilbert v. Newton*, No. 3:13CV1715(JCH), 2015 U.S. Dist. LEXIS 77375, at *12–13 (D. Conn. June 15, 2015).

196. *Id.* at *3.

197. *Id.* at *2–3.

198. *Id.*

199. Complaint at 2, *Gilbert v. Newton*, No. 3:13CV1715(JCH) 2015 U.S. Dist. LEXIS 77375 (D. Conn., Nov. 18, 2013).

200. The term “nolle” comes from the term “nolle prosequi”—which means that the prosecuting attorney has agreed not to prosecute the matter further. *THE LAW DICTIONARY, What is Nolle Prosequi*, <http://thelawdictionary.org/nolle-prosequi/> (last visited Jan. 20, 2017).

201. *Goode v. Newton*, No. 3:12CV754(JBA), 2013 U.S. Dist. LEXIS 35171, at *6 (D. Conn. Mar. 14, 2013).

202. *See generally Gilbert*, 2015 U.S. Dist. LEXIS 77375.

203. *Id.* at *15–16.

204. Greg Smith, *New London Poised to Settle Another Suit Against Police*, *THE DAY*, (Oct. 6, 2015, 5:11 PM), <http://www.theday.com/article/20151006/NWS01/151009501>.

205. *Id.*

ming his head into the ground.²⁰⁶ This entire confrontation took place despite the fact that the officers had no probable cause to arrest, and Miller was not being violent.²⁰⁷ The complaint also makes reference to a suit filed by Francisco Francovilla, alleging a violent “pat down search” that required Francovilla to seek medical treatment.²⁰⁸ Officer Newton was not involved in either of these incidents.²⁰⁹

This pattern of violent behavior is also evidenced by the death of Lashano Gilbert in police custody.²¹⁰ Lashano Gilbert was having a manic episode of some sort when he was taken to the hospital, and then into police custody.²¹¹ Even though he continued to act strangely (trying to keep his aunt who wasn’t present from touching his hair, and chanting in an unknown language), officers entered the cell and began to talk to him.²¹² At some point, a physical struggle ensued and officers “handcuffed and shackled” Gilbert after subduing him.²¹³ While Gilbert was handcuffed and shackled, officers continued to apply pressure to his body, tasered him, and pepper sprayed him.²¹⁴ Gilbert, not threatening to anyone because he was handcuffed, told the officers that he could not breathe.²¹⁵ They ignored his pleas and continued to attack the defenseless and shackled man even when he became unresponsive and stopped breathing.²¹⁶ When he was pronounced dead, his death was ruled a homicide caused by “restraint, electric shock, [and] pepper spray.”²¹⁷ In sum, the New London Police killed Lashano Gilbert using only their bare hands, a taser, and pepper spray; all while he was in their custody and having a manic episode.

The incidents recounted above are certainly not the only occasions on which New London Police officers have behaved recklessly and engaged in flagrant violations of constitutional rights – even phys-

206. *Id.*

207. *Id.*

208. *Gilbert*, 2015 U.S. Dist. LEXIS 77375, at *16.

209. Complaint at Ex. 3, 4, *Gilbert v. Newton*, No. 3:13CV1715(JCH), 2015 U.S. Dist. LEXIS 77375 (D. Conn., June 15, 2015).

210. Complaint ¶ 68, *Fletcher v. New London*, No. 3:16CV241(MPS), 2017 U.S. Dist. LEXIS 23519 (D. Conn., Feb. 21, 2017).

211. *Id.* ¶¶ 9, 14, 22, 31, 49.

212. *Id.* ¶¶ 54, 55, 58.

213. *Id.* ¶¶ 59–61.

214. *Id.* ¶¶ 62–63.

215. *Id.* ¶ 64.

216. Complaint at ¶¶ 65–66, *Fletcher v. New London*, No. 3:16CV241(MPS), 2017 U.S. Dist. LEXIS 23519 (D. Conn., Feb. 21, 2017).

217. *Id.* ¶¶ 71–72.

ically brutalizing people in the process.²¹⁸ Undoubtedly, many similar encounters did not result in lawsuits, or even formal complaints. The cases above simply demonstrate exactly what is at stake in allowing police departments to continue to arbitrarily impose caps on qualities that are quite important in a police officer. The science has shown that those with lower emotional intelligence scores are more likely to behave in this violent way and less likely to intervene when witnessing such behavior.²¹⁹ As mentioned above, President Obama's Task Force implicitly recognized this.²²⁰ In the New London cases cited, the officers did not even draw their guns, but still caused serious harm to the people that they encountered. The risk of irreparable harm, such as Lashano Gilbert's death, is only increased as police departments acquire military grade weaponry.²²¹

IV. WHAT CAN NEW LONDON COURTS DO?

The courts in New London are undoubtedly loathed to encroach on the police department, but they can still support the people of New London. The Connecticut District Court and the Second Circuit rejected Robert Jordan's Equal Protection claim, and would likely shy away from declaring the entire policy unconstitutional.²²² However, the courts are still free to more subtly challenge the department and its continued implementation of this policy based on Due Process concerns.

New London Courts should shift the evidentiary burden away from complaining civilians and onto the police department. The incidents recounted above demonstrate the violent and arbitrary practices of the New London Police Department. In fact, one officer resigned

218. *Gilbert v. Newton*, No. 3:13CV1715(JCH), 2015 U.S. Dist. LEXIS 77375, at *15–16 (D. Conn., June 15, 2015).

219. Melvin L. Otey, *Toward Improving Policing in African American Communities*, 29 J. CIV. RTS. & ECON. DEV. 68, 98–99 (2016).

220. *Id.* at 98.

221. EXEC. OFFICE OF THE PRESIDENT, *Review: Federal Support for Local Law Enforcement Equipment Acquisition*, 2–3, 8, 11 (Dec. 2014). As part of the War on Drugs, Congress created several schemes through which federal agencies give local and state police agencies access to military-grade equipment for “counterdrug and counterterrorism activities.” Between 2009 and 2014, the Federal Government provided \$18 billion worth of equipment to local law enforcement agencies. This equipment has included M-16 rifles, Mine-Resistant, Ambush Protected Vehicles and Humvees, etc. Local and state police agencies are searching homes and performing other routine tasks using SWAT team resources that were intended for hostage situations, active shooters, and the like.

222. *Jordan v. City of New London*, No. 3:97CV1012(PCD), 1999 U.S. Dist. LEXIS 14289, at *8 (D. Conn. Aug. 29, 1999).

rather than be investigated because of what an investigation would reveal.²²³ This officer may have been hired after the department's policy was put in place, and may in fact have scored in the mediocre to below average range on the Wonderlic exam. However, a complaining civilian would not have access to police academy applications. The very group committing constitutional violations can block access to the information required to make a cognizable constitutional claim, and hide behind the authority courts have given it. Given the newly discovered scientific connections between I.Q., emotional volatility, and violent tendencies, and the Court's decisions about what obligations police officers have, New London courts should require departments to prove that a rogue officer with a practice of violating constitutional rights was not hired as a result of an I.Q. cap. In other words, instead of presuming that the officer has acted reasonably and in good faith, courts should create a rebuttable presumption that an officer has acted unreasonably in departments that have an I.Q. cap in place.

The courts are already familiar with burden shifting frameworks and rebuttable presumptions – most notably in employment discrimination claims under Title VII. In 1973, the Supreme Court decided *McDonnell Douglas Corp. v. Green*, which articulated a burden shifting framework.²²⁴ The plaintiff is tasked with establishing a plausible claim of employment discrimination, and then the burden shifts to the defendant to articulate a nondiscriminatory reason for its actions.²²⁵ In this way, the court presumes that there was some discrimination, and then requires the defendants to show that the discrimination was not race based. Courts in New London could fashion a similar scheme for claims against the police department.

Instead of deciding that the policy itself is unconstitutional, courts can require police departments to show that an officer accused of constitutional violations would have been hired with or without the policy.²²⁶ The plaintiff (or plaintiffs) initially would be required to prove

223. *Goode v. Newton*, No. 3:12CV754(JBA), 2013 U.S. Dist. LEXIS 35171, at *6 (D. Conn. Mar. 14, 2013).

224. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

225. *Id.*

226. This would undoubtedly require courts to confront the “good faith” defense available to officers under § 1983 (recognized by the Supreme Court in *Pearson v. Ray*, 386 U.S. 547, 550–52 (1967)). The courts must be willing to acknowledge that a “good faith” standard loses meaning when a police department prefers applicants less capable of thinking critically, reading body language, and making fast decisions.

that his or her constitutional rights were deprived by a particular officer. Then, the police department would be required to prove that this officer would have been hired before implementation of the policy. In other words, the department would have to prove that it did not screen out more qualified candidates with higher I.Q.s (and less propensity for violence) in favor of the accused officer. If the department fails to make such a showing, the courts should hold the department liable for the actions of the rogue officer, ordering money damages and/or equitable relief. This burden shift could bring an end to the policy, or it could give the New London Police Department an opportunity to show that I.Q. caps do not affect policing the way that the science suggests. Whatever the outcome, the citizens of New London would be better off.

CONCLUSION

In conclusion, imposing I.Q. caps for police officers likely results in a higher likelihood of deprivation of Constitutional rights. As explained above, lower I.Q. scores correspond with lower emotional I.Q. scores. Those with lower emotional I.Q. are more likely to exhibit aggressive behavior, and are less able to regulate their own emotions. Moreover, people with lower I.Q. tend to harbor more racial animus than those with higher I.Q. For example, a police officer with lower I.Q. is statistically more likely to misread an African-American's body language and perceive perfectly normal behavior as evidence of a crime in progress. What does "reasonable suspicion" mean to that officer? Is it what the Supreme Court intended? Civilians who have negative encounters with police will not have access to any specific officer's test scores, and thus, will likely not be able to make the argument that there is a correlation between lower I.Q. scores and unfair treatment of civilians. However, the science suggests that such a correlation exists. Now that scientists have discovered links between general intelligence, emotional intelligence, and behavior, the courts should force police departments to take appropriate action – either by declaring that the practice itself is unconstitutional, or by requiring the department to prove that the policy has not resulted in the hiring of officers that pose a risk to the people of New London. The courts are abrogating their responsibility to the people of New London by failing to take action.

COMMENT

Adjudicating the Young Adult: Could Specialized Courts Provide Superior Treatment to This Emerging Classification?

ELIJAH D. JENKINS*

INTRODUCTION	456
I. THE DISCONNECT BETWEEN YOUNG ADULTS AND OUR CURRENT SYSTEM.....	460
A. The History Recognizing Youth in Sentencing	460
B. The Sentencing Model for Young Adults Does Not Advance the Penological Goals of Punishment	463
C. Current Psychological and Sociological Data Supports Treating Young Adults Differently from Adults and from Juveniles	468
II. ARE SPECIALIZED COURTS THE ANSWER TO THE ARBITRARY AND ANTIQUATED TREATMENT OF YOUNG ADULTS?	473
A. Process and Principles of Specialized Courts.....	474
B. Currently Operative Specialized Courts.....	476

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III. OPPOSITION AND ARGUMENTS AGAINST THE
CONCEPT OF YOUNG ADULTS, SPECIALIZED
COURTS, AND A YOUNG ADULT COURT 479

A. Young Adults 479

B. Specialized Courts 482

C. Young Adult Court 483

D. Additional Concerns 486

CONCLUSION 489

INTRODUCTION

On one end of the age spectrum lies childhood, while adulthood lies at the opposite end. The clear distinctions our society makes between the two groups affects the way we view individuals who don't quite fit into either category. There are individuals who lie somewhere in between these two groups of offenders. Many have referred to individuals within this intermediate group as young adults.¹ Although young adults are currently still considered adults, this comment advances the proposition that this group should be recognized as one distinct from both juveniles and adults. Because young adults fall between juveniles and adults, the relationship between those two groups is worth exploration. The legal distinction between the criminal justice system's treatment of juveniles and adults can be traced back to the late 1800s.² Since then, there have been several shifts in our perception and understanding regarding juvenile sentencing.³ In the early 1970s, all but two states lowered their age of majority from twenty-one to eighteen when the voting age was lowered.⁴ This particular shift was unaccompanied by an assessment of potential ramifications of such a decision, nor a justification as to its utility.⁵ Other shifts over the years have been based on the collective understanding of scientific and psychological data at the time.⁶ As new information

1. For the purposes of this comment, the term "young adult" refers to individuals ranging in age from eighteen to twenty-five.

2. Morgan Molinoff, *The Age of (Guilt or) Innocence: Using ADR to Reform New York's Juvenile Justice System in the Wake of Miller v. Alabama*, 15 CARDOZO J. CONFLICT RESOL. 297, 306 (2013).

3. *Id.*

4. Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 770-71 (2016).

5. *Id.*

6. See generally G. STANLEY HALL, *ADOLESCENCE: IT'S PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION* (1904) (introducing and examining from a scientific perspective, the stage of life defined as "adolescence").

comes to light, our approach to adjudication should be swiftly updated in order to reflect any recently acquired information. Accordingly, we should re-examine our approach to young adult adjudication in light of legal precedents, scientific data, and changing societal norms.

Within the last thirteen years, the United States Supreme Court has decided three seminal cases involving juvenile justice.⁷ Starting with the 2005 decision of *Roper v. Simmons*, a seventeen-year-old defendant⁸ was tried as an adult on charges of burglary, kidnaping, stealing, and first degree murder.⁹ Despite the trial judge's instruction that the jury could consider the defendant's age as a mitigating factor, the death penalty was imposed.¹⁰ On appeal, the Supreme Court went on to conclude that the Eighth Amendment requires rejection of the imposition of the death penalty on juvenile offenders under the age of eighteen.¹¹

Five years later in *Graham v. Florida*, a sixteen-year-old defendant was arrested on charges of armed burglary with assault or battery, and attempted armed robbery.¹² He was able to enter into a plea agreement, receiving only three years of probation,¹³ however, six months later, he was arrested for violating his probation in connection with a home invasion robbery.¹⁴ Because of Florida's abolition of the parole system, Graham received the maximum sentence for his crimes – a life sentence without the possibility of parole.¹⁵ The Supreme Court held that “[t]he Constitution prohibits the imposition of life without parole sentences on a juvenile offender who did not commit a homicide.”¹⁶

This line of decisions culminated in 2012 with *Miller v. Alabama*. There, a fourteen-year-old defendant was convicted of murder and sentenced to life in prison without the possibility of parole.¹⁷ The Supreme Court applied the arguments related to penological justifica-

7. Molinoff, *supra* note 2, at 298.

8. When Roper was sentenced to death nine months later, he was eighteen. *Roper v. Simmons*, 543 U.S. 551, 556–57 (2005).

9. *Id.* at 556–57.

10. *Id.* at 558.

11. *Id.* at 568.

12. *Graham v. Florida*, 560 U.S. 48, 53 (2010).

13. *Id.* at 54.

14. *Id.* at 55.

15. *Id.* at 57. The trial court took note of the severity of Graham's crimes and did not view them as the actions of a pre-teen, but rather a “seventeen-year-old who was ultimately sentenced at the age of nineteen.” *Id.* at 58.

16. *Graham*, 560 U.S. at 82.

17. *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

tions for punishment articulated in *Roper* and *Graham*.¹⁸ The Court went on to find that a juvenile facing life in prison without the possibility of parole for homicide would essentially suffer the same fate as a juvenile who was facing the death penalty for homicide.¹⁹ The Supreme Court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.”²⁰

These decisions clearly demonstrate that the Supreme Court recognizes several fundamental differences between adults and juveniles with regard to their culpability.²¹ The Court has recognized that juveniles’ diminished culpability and increased capacity for change is relevant “not only to how youths are sentenced, but also to how they are adjudicated.”²² Recently, some have suggested the adoption of a more rehabilitative approach to the adjudication of young adult offenders.²³ The Court’s decisions, along with developing psychological and sociological data, could possibly mark the beginning of a new shift in our understanding and approach to the sentencing of young adults; just as was once done for juveniles.

Starting with *Roper* and concluding with *Miller*, the Supreme Court altered the way juveniles were treated in our criminal justice system when it comes to crimes punishable by the most extreme sentences available. This line of decisions used scientific data and legal reasoning to justify their mandate that the distinction between juveniles and adults be recognized in our juvenile jurisprudence. While the Court took a large step toward preventing juveniles from receiving unconstitutional sentences, they failed to articulate a ruling that was not premised on an arbitrary age of majority. The Court in *Roper v. Simmons* did not provide any discernable justification for drawing the line at eighteen for the imposition of the death penalty.²⁴ As of today, those under the age of eighteen will be spared as a result of the precedent set by the Court. However, young adult offenders

18. *Id.* at 472–73.

19. *Id.* at 474.

20. *Id.* at 479.

21. Cohen, *supra* note 4, at 774–75.

22. Molinoff, *supra* note 2, at 298.

23. Cohen, *supra* note 4, at 770 (“[r]ecognizing that there is no developmentally informed magical demarcation at eighteen, contemporary proponents of criminal justice reform are also making the case for a rehabilitative approach to young adult offenders.”).

24. *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (“[t]he age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.”).

will continue to receive punishments that the Court has deemed unconstitutional for their counterparts only a few years younger, despite the overwhelming lack of substantial differences between these two groups. Young adult offenders with similar case profiles to juveniles will continue to be tried as adults, when they would likely benefit under a system more analogous to that of juveniles. This dilemma presents an opportunity to apply existing legal precedents for juveniles to this new group in order to conform to the constitutional limits on punishment.

Creating a specialized court for young adults may be able to resolve the young adult problem. Specialized courts allow for a more narrowed examination of issues, even though they can veer from the traditional model of incarceration. There are several unique considerations specific to young adults that our current system does not account for.²⁵ A specialized court system would offer something more than a change in the age of majority would, and more than uniform leniency for all sentences would. Specialized courts could potentially offer an alternative for the adjudication of young adults that will eventually change the way we view this group. My hope would be that this change in the perception of young adults would have ramifications in our criminal justice system to the effect of allowing us to more effectively adjudicate other groups of offenders in the future.

Part I of this comment discusses the Supreme Court's reasoning in *Roper*, *Graham*, and *Miller*, and why it is appropriate to adopt the same constitutional approach with regard to the sentencing of young adults. Specifically, I look at the historical recognition of reduced culpability for young offenders; the lack of alignment that our current approach has with the penological goals of punishment; and the psychological and sociological data which supports an extension of reduced culpability to young adult offenders. Part II explores the concept of specialized courts, including their foundational principles, successes in implementing effective change in their fields, and the shortcomings in their utility within the criminal justice system. It also highlights some advantages from existing specialized courts that would be particularly useful for a young adult specialized court. Part III addresses concerns regarding the concept of young adults as an intermediate category of offenders, specialized courts as an option to

25. See *infra* Part III.

address this issue, and potentially disproportionate sentencing based on race and socio-economic status.

I. THE DISCONNECT BETWEEN YOUNG ADULTS AND OUR CURRENT SYSTEM

A. The History of Recognizing Youth in Sentencing

When societal norms change, they have the potential to affect our approach to adjudication. Our own history of adopting new approaches in response and according to these norms suggests that we might be due for a shift in how we view young adults. In response to a potentially new group of offenders,²⁶ it would follow that we respond with an approach that, in turn, explores the possibility of a new approach to the adjudication of this group. Youth, or juveniles, are a group that has experienced varied treatment from the criminal justice system. So many different approaches have been used for juveniles that their adjudication system has been described as schizophrenic²⁷ and compared to a pendulum.²⁸ This Comment does not make the argument that young adults should be viewed as juveniles, but rather as their own category between juveniles and adults. Juveniles are discussed for the purpose of illustrating the point that we can change our sentencing structure to reflect our views on a given group. Juveniles are also discussed due to the similarities that the group shares with young adults based on youthfulness. The remainder of this section will discuss and explain the reasons for the shifts in the juvenile adjudication system.

The United States juvenile justice policy has had three significant and distinct shifts within the past 150 years. For the majority of the nineteenth century, juvenile offenders were tried as adults.²⁹ However, in the late 1800s, industrialization and immigration led to the urbanization of major cities, thereby causing a rise in crime.³⁰ Beginning in the early twentieth century, and in response to the progressive

26. *See infra* Part III.A.

27. Molinoff, *supra* note 2, at 306.

28. HOWARD N. SNYDER & MELISSA SICKMUND, NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 88 (1999).

29. Maggie Gertz, *The Road Less Traveled: Using ADR to Help Reform – Time Juvenile Offenders*, 8 CARDOZO J. CONFLICT RESOL. 339, 343 (2006).

30. Molinoff, *supra* note 2, at 306.

reform movement,³¹ juveniles were treated separately from their adult counterparts, particularly with an emphasis on care and rehabilitation.³² A multitude of factors were responsible for this approach. The rise of truancy and delinquency led to a “desire to rescue children and restore them to a healthful, useful life.”³³ Additionally, interests in the social sciences expanded concurrently.³⁴ Despite the sound logic and reasoning behind a more compassionate and benevolent approach, we would soon opt for a more punitive approach.

The second shift could be characterized as a focus from politicians to secure votes from individuals who responded favorably to a “tough on crime” approach. Toward the end of the twentieth century, politics, academia, and the media played a role in redefining “adolescent offenders as a new, younger breed of criminal whose predatory conduct necessitated nothing less than adultlike interventions and punishment.”³⁵ Under the Reagan administration, the federal government – thinking that our system was too protective of juveniles at the expense of public safety – began targeting serious and repeat juvenile offenders in an effort to shift the system “in the direction of control.”³⁶

The concept of “superpredators”³⁷ became a tool for politicians to “[collapse] the distinctions between young offenders and adults.”³⁸ The media fueled the existing public fear which, in turn, advanced the notion that young people “no longer deserved the protective environs of a juvenile system that focused on care and rehabilitation.”³⁹ This term was often expressly used to refer to black and brown children.⁴⁰

31. The Progressive Era was a period of social activism and political reform across the United States from the 1880s to the 1920s. See generally JOHN D. BUENKER ET. AL., *PROGRESSIVISM* (1986).

32. Cohen, *supra* note 4, at 772.

33. Molinoff, *supra* note 2, at 306.

34. *Id.* (noting that “reformers began to call attention to the ‘brutality’ of incarcerating young children alongside adult criminals in prisons with sub-standard living conditions.”).

35. Cohen, *supra* note 4, at 772–73 (noting that an increase in juvenile crime between 1980 and 1999 “shook the public’s confidence that youthful offenders were indeed less culpable than their adult counterparts.”).

36. Molinoff, *supra* note 2, at 309–10.

37. Allison Graves, *Did Hillary Clinton Call Black Youth Super Predators?*, POLITIFACT (Aug. 25, 2016, 4:46 PM), <http://www.politifact.com/truth-o-meter/statements/2016/aug/28/reince-prieus/did-hillary-clinton-call-african-american-youth-su/>.

38. Cohen, *supra* note 4, at 773; see also David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 504 (2006) (“Changes in juvenile law were unprecedented in the 1990s as state legislators cracked down on juvenile crime.”).

39. Cohen, *supra* note 4, at 773.

40. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 159 (2014).

Criminologists “suggested that America would soon be overcome by ‘elementary school youngsters who pack guns instead of lunches’ and who ‘have absolutely no respect for human life.’”⁴¹ A couple years prior, the passage of the Juvenile Offender Act in 1978 removed family court jurisdiction over thirteen through fifteen-year-olds charged with certain violent crimes, and labeled them as juvenile offenders, subjecting them to same prosecution and sentencing laws as adults.⁴² It is fascinating that increased crime rates, one of the same justifications used in the early twentieth century to support a more rehabilitative approach, was used to support a more punitive approach at the close of the same century. It is likely no coincidence that the youth referred to as “superpredators” were primarily African American.⁴³

Just as before, the existing rationale remained for a while, but was renounced when it became misaligned with our societal norms and notions of punishment for those under the age of eighteen.⁴⁴ In the last decade, a third shift has found policymakers moving away from more punitive approaches and “gravitat[ing] toward a more nuanced understanding of the developmental traits that distinguish adolescents from adults.”⁴⁵ One reason for this backpedal might be that the predicted crime waves caused by out-of-control adolescents never materialized.⁴⁶ It would, thus make sense to revert back to an approach that took juveniles’ wellbeing and rehabilitative capacity into consideration. Additionally, fiscal limitations caused by the global recession have compelled policymakers to pay closer attention to the cost of the punitive reforms that they were so easily able to implement in the 1980s and 90s.⁴⁷

It appears that we are yet again on the precipice of a new shift in our approach to juvenile adjudication. This shift, however, will not change the way we treat juveniles by contrasting their treatment to that of adults. Instead, we can give credence to the individuals who

41. *Id.*

42. Ashley A. Hughes, *The Evolution of Youth as an Excuse: Striking a Balance Between the Interest of Public Safety and the Principle that Kids Are Kids*, 29 *TOURO L. REV.* 967, 996 (2013).

43. See Graves, *supra* note 37.

44. STEVENSON, *supra* note 40, at 160.

In 2001, the surgeon general of the United States released a report labeling the “super-predator” theory a myth and stated that “there is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years.” *Id.*

45. Cohen, *supra* note 4, at 772.

46. *Id.* at 773; STEVENSON, *supra* note 40.

47. Cohen, *supra* note 4, at 772.

are a part of the group of offenders that lie between adults and juveniles.⁴⁸ With the aid of modern psychological data, a drastically changing social atmosphere, and an imperative need to remediate the lasting effects of the discriminatory treatment of certain groups, it is worth considering the adoption of a new approach to the adjudication of young adults.

B. The Sentencing Model for Young Adults Does Not Advance the Penological Goals of Punishment

If the history of shifting approaches is not on its own convincing, the current adjudication of young adults is also unsupported by goals recognized by the Supreme Court for the imposition of punishments.⁴⁹ The Supreme Court has recognized four goals of criminal punishment: retribution, incapacitation, rehabilitation, and deterrence.⁵⁰ The goals are relevant to any sentencing analysis, and it is within a legislature's discretion to choose among them when crafting the corresponding punishment for a crime.⁵¹ In fact, "[any] sentence lacking [a] legitimate penological justification is by its nature disproportionate to the offense."⁵² It makes a lot of sense that we would have some sort of articulated principles in place to ensure that punishments are fair and serve some purpose. Thus, a sentencing scheme for young adults should incorporate these justifications into a system that furthers their key objectives. In *Graham*, the Supreme Court recognized that the imposition of sentences, which required juveniles to serve life in prison without the possibility of parole for non-homicide offenses, were not "adequate[ly] justif[ied]" by any of the penological goals of punishment.⁵³ The current sentencing scheme for young adults does not sufficiently satisfy any of the four penological goals of punishment; therefore, it warrants an examination of whether we should adopt a new process that satisfies these goals.

48. See JEFFREY JENSEN ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES 3 (2015) ("Later ages of marriage and parenthood have created a space between the late teens and the late twenties for the new life stage of emerging adulthood.").

49. See *infra* Part I.B.

50. *Graham v. Florida*, 560 U.S. 48, 71 (2010) ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."); see also Kelsey B. Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J. CRIM. L. & CRIMINOLOGY 667, 692 (2014) (noting that the Eighth Amendment does not require one penological goal in particular, but must be supported by some justification).

51. *Graham*, 560 U.S. at 71.

52. *Id.*

53. *Id.*

The first of the four goals is retribution. Retribution has roots in the Old Testament of the Bible and has been defined as “administering criminals their ‘just deserts’ for their crimes.”⁵⁴ Since the 1970s, retribution has enjoyed resurgence as the adult criminal justice system’s dominant penological goal.⁵⁵ Interestingly, at its inception, retribution served as the primary objective of the juvenile justice system.⁵⁶ However, the focus shifted away from retribution in the late twentieth century.⁵⁷ It is settled that society is entitled to impose severe sanctions on juvenile non-homicide offenders to express our disapproval of the crime, and to seek restoration of the resulting moral imbalance.⁵⁸ However, retribution rests on the principle that “a criminal sentence must be directly related to the personal culpability of the criminal offender.”⁵⁹ The Supreme Court has already taken the stance that “the case for retribution is not as strong with a minor as with an adult.”⁶⁰

The *Roper* Court stated that “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”⁶¹ Although this quote speaks to the death penalty, its logic can similarly be applied to crimes of a lesser severity.⁶² The logic behind sparing young souls the harshest punishments does not, rather it should not, disappear when an individual turns eighteen. Not every young adult is deserving of this protection, but it can certainly be said that there are some deserving individuals. This approach is not wholly inconsistent with how we currently deal with the sentencing of certain juvenile offenders. We have effectively drawn the line of adulthood at eighteen years of age, despite the fact

54. Christopher D. Lee, *They All Laughed at Christopher Columbus When He Said the World Was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 526 (2011); see also Molinoff, *supra* note 2, at 314 (stating that retribution can be thought of as pay-back to the offender for the damage caused by his offense).

55. Molinoff, *supra* note 2, at 314.

56. Gertz, *supra* note 29, at 344.

57. Molinoff, *supra* note 2, at 315.

58. *Graham v. Florida*, 560 U.S. 48, 71 (2010).

59. *Id.*

60. *Id.*

61. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

62. When *Roper* was decided, the Court focused only on issues pertaining to the death penalty, however, the subsequent line of cases building on *Roper*'s precedent led the way for the same rationale to be applied to non-death penalty cases.

that juveniles are sometimes treated as adults for the purposes of sentencing even though they clearly are not mature enough.

Although the *Graham* Court made the mitigation argument for juveniles who commit non-homicide offenses,⁶³ the same rationale used by the Court applies to young adults. The *Roper* Court accepts the analysis of psychological data done in *Graham* and merely expands upon it.⁶⁴ If it is determined that society's retribution interest in an offender who commits his crime at seventeen-years and 364 days is almost non-existent for certain crimes, then it would only make sense that the same should be said for an offender that commits his crime twenty-four hours later.⁶⁵ To say otherwise would place much more of an emphasis than necessary on a distinction of only a matter of hours. To say otherwise would also undermine the Court's rationale for preventing juveniles from receiving capital punishment. Although this decision was fairly recent in the grand scheme of our legal precedent, we have grown to accept this idea, and would likely grow to accept the idea that a punishment given to a nineteen-year-old could be just as unconstitutional as that same punishment would be if given to a seventeen-year-old.

Incapacitation, the second of the four goals, aims to physically prevent an offender from committing another offense, or to literally remove the physical capability of offending.⁶⁶ Simply put, if there is not some rational concern that an offender will be a danger to the civilian population, a sentence may not adequately serve this goal. In *Graham*, the Court made the observation that life in prison without parole is a particularly harsh sentence for juveniles because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."⁶⁷ The Court goes on to discuss how life in prison without parole for juveniles implicitly makes the determination that the juvenile is beyond repair; and that a

63. *Graham*, 560 U.S. at 71.

64. *See id.* at 69; *Roper*, 543 U.S. at 572–74.

65. These ages are used to highlight the arbitrary nature of a bright-line distinction. This example places offenders immediately on either end of the bright-line rule so we are not dealing with extremes on either end of the spectrum. A comparison between a twelve-year-old and a nineteen-year-old, would not be as appropriate to demonstrate that young adults are in some ways similar to juveniles.

66. Gabriel Hallevy, *Therapeutic Victim-Offender Mediation Within the Criminal Justice Process – Sharpening the Evaluation of Personal Potential for Rehabilitation While Righting Wrongs Under the ADR Philosophy*, 16 HARV. NEGOT. L. REV. 65, 69–70 (2011).

67. *Graham*, 560 U.S. at 70.

judgment of that kind is “questionable.”⁶⁸ The Court makes both of these observations without going on to explain why the rationale applies to a seventeen-year-old, but not a nineteen-year-old. Understandably, a line needs to be drawn somewhere for adulthood, but an age range spanning from eighteen to twenty-five is more effective for the adjudication of young adults. This is partially because “‘expert psychologists’ have trouble differentiating between young offenders who succumb to ‘unfortunate yet transient immaturity’ and those ‘whose crime reflects irreparable corruption.’”⁶⁹ Experts can still have the same difficulty making this distinction between those aged eighteen to twenty-five.⁷⁰

The third penological goal that the Court has recognized is rehabilitation. In 1899, the nation’s first juvenile court had rehabilitation at the forefront of the newly established model for reform.⁷¹ Rehabilitation is focused on addressing the root of the problem and formulating a proper treatment regime using social and personalized measures.⁷² The underlying theory of rehabilitation is that the offender committed the specific offense for specific motives, which are social, economic, mental, behavioral or physical, and with appropriate treatment, these motives will not entice the offender to commit further offenses.⁷³ Rehabilitation is forward-looking and does not address the crime already committed, but rather aims to prevent recidivism.⁷⁴ Rehabilitation remained the central goal asserted by the American criminal justice system until the final quarter of the twentieth century.⁷⁵

It is essential for our laws to recognize the importance of acknowledging this same capacity for change, especially in young adults. If not, then we are subjecting a substantial group of offenders to harsh sentences while presumptively concluding that they are beyond repair and should rot in prison for their crimes. This injustice should not be

68. *Id.* at 72–73.

69. Shust, *supra* note 50, at 695.

70. A factor that partially contributes to this difficulty is that personality disorders frequently can be diagnosed in individuals over the age of eighteen. *See id.*

71. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1 (2003).

72. Hallevy, *supra* note 66, at 70.

73. *Id.* at 66–67.

74. *Id.* at 67.

75. Alschuler, *supra* note 71, at 6. It may be of particular note to keep in mind that these shifts in penological goals coincided and likely were influenced by the social shifts discussed in *infra* Part I.A.

allowed to stand because it has built its foundation on an arbitrary age of adulthood. The same sentiments protecting juveniles from harsh punishments should not disappear solely based on the number of years spent on the planet. This comment does not suggest that all young adults deserve to be absolved of guilt based on age alone, but rather they deserve to be afforded the opportunity to be rehabilitated due to their relative youthfulness.

The fourth and final penological goal is deterrence. The overarching objective behind the goal of deterrence is to intimidate offenders with the intention of preventing them from committing additional crimes in the future.⁷⁶ Within the context of crimes punishable by the death penalty, the interest of preventing future crimes is almost non-existent. Practically speaking, when an offender receives the death penalty or is sentenced to life in prison without parole, the concern of recidivism is nearly eliminated because the opportunity for the offender to return to society is eliminated. The opportunity does, however, exist for an incarcerated individual to commit further crimes while in prison. This concern is somewhat separate, although not lesser, from the concern of an offender harming individuals in civilian life.

Alternatively, for crimes mandating less severe sentences than the death penalty or life in prison without parole, deterrence can serve the purpose of preventing a particular offender from reoffending.⁷⁷ On the subject, Oliver Wendell Holmes said:

If I were having a philosophical talk with a man I was going to have hanged . . . I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.⁷⁸

The nature of deterrence requires lawmakers to preemptively assess the decision-making process of an offender and their cost-benefit analysis.⁷⁹ Like all of the other goals of punishment, the Supreme Court has recognized important differences when they are applied to juveniles. They have expressly recognized that the “same characteris-

76. Hallevy, *supra* note 66, at 69.

77. ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 79 (5th ed. 2010).

78. Alschuler, *supra* note 71, at 3.

79. See ASHWORTH, *supra* note 77, at 79 (“deterrence must operate (if at all) through the potential offenders’ minds, so it is essential that they know about the severity of the probable sentence [and] take this into account when deciding whether to offend.”).

tics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”⁸⁰ Deterrence as a justification for sentences which are rarely imposed carries even less weight than they do normally.⁸¹

The Court in *Graham* concluded that juveniles were less likely to consider potential punishments when making decisions due to their “lack of maturity and undeveloped sense of responsibility”⁸² It does not rationally follow that legal adulthood automatically and unequivocally eliminates either of these psychological constructs. This type of determination would benefit from an inquiry into the circumstances of the individual offender unrestricted by age (to some extent). The characteristics that make deterrence less applicable to juveniles also reach young adults. In both groups, there is the potential for the offender to not appreciate the severity of the punishment that they are facing, to be immature, and to have an “undeveloped sense of responsibility.”⁸³ In the cases where this occurs, a sentence under the current sentencing scheme has very little deterrent value.

Since the Supreme Court has articulated some fairly new principles for juvenile sentencing, it is necessary to explain why these principles are applicable to young adults. Based on the seemingly objective criteria used by the Court, there appears to be no reason why its application to young adults should not be explored further. It was determined by the Supreme Court that certain sentences were invalidated due to their noncompliance with the penological goals of punishment.⁸⁴ As such, the current sentencing scheme allows sentences to be given to young adults when they would clearly implicate constitutional issues if given to juveniles.

C. Current Psychological and Sociological Data Supports Treating Young Adults Differently from Adults and from Juveniles

Aside from the adjudication of young adults being misaligned with the four penological goals of punishment, their adjudication is misaligned with current psychological and sociological data. The physical and psychological differences between juveniles and adults have long been a basis for a legal distinction between the two

80. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

81. *Graham v. Florida*, 560 U.S. 48, 72 (2010).

82. *Id.*

83. *Id.*

84. *See id.* at 71.

groups.⁸⁵ The distinction has been so ingrained in our notions of adjudication, that the distinction itself has become a justification for the imposition of a distinction.⁸⁶ There is a critical need to highlight these differences and to search for other rational bases about and for a distinction. Accordingly, a change in our idea of young adulthood has been recently observed in the past few decades.⁸⁷ We have, for so long, accepted that eighteen is the age where a person is ready for adult responsibility, however, recent evidence suggests that our neuropsychological development is far from being complete at this age.⁸⁸ The age of eighteen spanning to twenty-five has been identified as a unique period in young adults' lives where it is no longer appropriate to consider them children, but it may be equally as inappropriate to consider them adults.⁸⁹ This is more than likely due to significant advances in the neurological field that point to the conclusion that our previous ideas of when brain development stops were inaccurate.⁹⁰

While it has been presumed that juveniles accused of criminal misconduct are competent to stand trial, current literature indicates that a significant portion of juveniles suffer from mental health issues,

85. See generally Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1009 (2003) (using a developmental perspective to examine questions about the criminal culpability of juveniles and juvenile death penalty).

86. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (highlighting the fact that society distinguishes between adolescence and adulthood at the age of 18).

87. It is clear that the "definition of adulthood is changing," when we consider young adults taking longer to: get married, buy homes, have children and find long-term employment. Hope Reese, *Yes, 20-Somethings are Taking Longer to Grow Up—But Why?*, THE ATLANTIC (Nov. 30, 2012), <http://www.theatlantic.com/national/archive/2012/11/yes-20-somethings-are-taking-longer-to-grow-up-but-why/265750/>.

88. Lev Grossman, *Grow Up? Not so Fast*, TIME (Jan. 16, 2005), <http://content.time.com/time/magazine/article/0,9171,1018089,00.html>; see also Matthew Mientka, *Adulthood Extended to Age 25 by Child Psychologists in UK*, HEALTHY LIVING (Sept. 24, 2013, 5:31 PM), <http://www.medicaldaily.com/adulthood-extended-age-25-child-psychologists-uk-257835> (Stating that neurological research has shown that human cognitive development continues well into early adulthood, with emotional maturity and judgment still evolving during this time).

89. See Reese, *supra* note 87 ("The years from 18 to 25 have become a distinct and separate life stage . . . between adolescence and adulthood . . ."); see also Mientka, *supra* note 88 (Stating that child psychologists in the United Kingdom have redefined maturity to twenty-five years of age, as opposed to how it is generally viewed as eighteen); He Len Chung et al., ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS 68 (D. Wayne Osgood et al. eds., 2005) ("Indeed, it is well-established that young offenders demonstrate a poor ability to adjust between the ages of eighteen and twenty-five . . .").

90. Laverne Antrobus, a child psychologist in the UK, suggested that "neuroscience has made these massive advances where we now don't think that things just stop at a certain age, that actually there's evidence of brain development well into early twenties and that actually the time at which things stop is much later than we first thought." Mientka, *supra* note 88.

which would undermine such a presumption of competency.⁹¹ No matter the underlying reason for this newly developing understanding, it is clear that some of our numbers and conclusions were incorrect – or at least only partially correct due to limitations on the progression of our scientific processes. The Supreme Court used updated understandings of the psychological and physical conditions of juveniles in order to make a decision regarding the constitutionality of sentencing schemes in *Roper*, *Graham*, and *Miller*.⁹² Here, it would only make sense to do the same for young adults.

Psychological data was at the forefront of the Court’s decisions in *Roper*, *Graham*, and *Miller*.⁹³ Although the Supreme Court does not support the proposition that juveniles – or those belonging to a classification just below adulthood – should be absolved from all culpability for their criminal actions, there is a definitive recognition that youthfulness justifies some level of reduced culpability.⁹⁴ The Court in *Roper* articulated three reasons why the culpability of juveniles does not rise to the level of adults.⁹⁵ First, juveniles lack maturity, which can lead to reckless behavior and ill-considered actions.⁹⁶ Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,”⁹⁷ and therefore, have a diminished capacity to “extricate themselves from . . . criminogenic setting[s].”⁹⁸ Third, juveniles have not yet fully developed a fixed character, as opposed to adults.⁹⁹

Subsequently, the Court in *Graham* refused to disturb the psychological observations made in *Roper*, stating that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”¹⁰⁰ These differences were relevant to the Court, not based on an arbitrary age of adulthood, but on concrete scientific facts that acknowledge a stark psychological difference in non-adults.¹⁰¹ The Supreme Court did not come to their

91. Katner, *supra* note 38, at 503–04.

92. *Miller v. Alabama*, 567 U.S. 460, 471–72, 479 (2012).

93. *Id.* at 471–72.

94. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’”).

95. *Roper v. Simmons*, 543 U.S. 551, 553 (2005).

96. *Id.* at 569.

97. *Id.*

98. *Id.*

99. *Id.* at 570.

100. *Graham v. Florida*, 560 U.S. 48, 68 (2010).

101. *Id.*

conclusion arbitrarily, so it only follows that we assess young adults under the same principles that the Court highlighted for juveniles. Offenders within the young adult category share similarities with the Court's treatment of juvenile offenders. There are three primary arguments that support this proposition.

First, while all of us at times possess the potential to behave immaturity, juveniles fall prey to this condition disproportionately due to their youthfulness. If immaturity is an acceptable basis to mitigate an offender's sentence, or limit the type of sentence they may receive, then we must ask if the same can be said for young adults. Having such a subjective reason for mitigation, and such an objective qualification for receiving mitigation creates the opportunity for extremely arbitrary determinations of immature behavior. We do not mitigate the sentence of a juvenile solely based on immature behavior; it is more of a matter of circumstance that makes such behavior unavoidable. That being said, the psychology contributing to immature behavior does not disappear once an individual turns eighteen; it has the potential to continue into young adulthood. This does not call for a delay of the age of adulthood, but rather a more subjective decision making process for the adjudication of young adults.

Second, young adults are more susceptible to negative influences and outside pressures including peer pressure than adults. Because youthfulness is the catalyst of this analysis, it would stand to reason that the older an offender gets in age, the less applicable this mitigating factor becomes. For example: this argument is more applicable to a seven-year-old than it is to a seventeen-year-old, but both groups are currently viewed similarly and protected under the law. However, to establish a hard cut-off point would suggest that we can sufficiently pinpoint the age where juveniles cease being susceptible to negative influences and peer pressure. Individuals in the category of young adults similarly are put in situations where they are susceptible to peer pressure in environments unique to them.¹⁰² At the collegiate level, young adults fail to accept responsibility for their actions and attempt to place the blame on others.¹⁰³ The problem of an arbitrary age of

102. See Donald L. McCabe, *The Influence of Situational Ethics on Cheating Among College Students*, 62 *SOC. INQUIRY* 365, 371 (1992) ("a difficult conflict for some students is balancing the desire to help a friend against the institution's rules on cheating. The student may not challenge the rules, but rather views the need to help a friend, fellow fraternity/sorority member, or roommate to be a greater obligation which justifies the cheating behavior.").

103. See *id.* at 369–72 (observing that college students often deny responsibility, deny injury, deny any victims, condemn those who attempt to condemn them, and appeal to higher loyalties

adulthood creates a problem for this factor as well. Young adults are susceptible to negative influences and peer pressure to a degree that far exceeds that of adults, however, they do not receive the advantage of having their culpability reduced.

Third, young adults are also more likely to have developed a fixed character than juveniles, but far less likely than adults. Similar to being susceptible to negative influences, young adults occupy a space in between juveniles and adults. Young adults today exhibit unique behaviors that previous generations have not.¹⁰⁴ Regardless of whether this behavior is positive, or just a fad of today's time, our criminal justice system should be open to adjusting to accommodate the current state of young adults. This should especially be the case since we are currently in an era that takes into consideration a juvenile's capacity for rehabilitation and their general well-being.¹⁰⁵ Additionally, due to the prominence of mental illness in young adults,¹⁰⁶ we should be hesitant to make broad generalizations about mental health solely based on age.

Despite the legal age of adulthood, the functional age of adulthood can, at times, be lower than eighteen in the context of criminal punishment.¹⁰⁷ The rationale behind this would appear to be that there are situations where, despite an offender's legal age, the severity or nature of the crime warrants a court to treat the offender a certain way. Thus, in order to maintain symmetry in the application of this principle, discretion and judgment should be applied to young adults. Our system currently allows discretion and judgment to circumvent the age of adulthood in favor of giving juveniles harsher sentences, but does not allow for any alteration in favor of legal adults receiving more leniency.¹⁰⁸ Within the context of young adults, the application of this principle would allow a judge to apply all three of the principles articulated by the court freely and when appropriate. As of now, a

in an attempt to justify cheating at the college level). The culture of binge drinking serves as a prime example of this issue.

104. Reese, *supra* note 87 (implying that millennials differ from their counterparts in other generations).

105. See *infra* Part I.A.

106. See Shust, *supra* note 50, at 695.

107. Cohen, *supra* note 4, at 770. Every state permits at least some adolescents to be tried and punished as adults before they reach the legal age of adulthood. *Id.*

108. *Id.* Even today, young people are subject to prosecution and punishment as adults at the age of fourteen in most states (and even younger in some). *Id.* at 775. In fact, in 2006, twenty-three states did not have a minimum age for trying children as adults. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 114 (2006), <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/chapter4.pdf>.

judge may certainly determine that a young adult offender lacks maturity, is more susceptible to negative influences and peer pressure, and has not developed a fixed character. Even having made these determinations, under the current sentencing scheme the judge would not be able to apply mitigation principles to the same extent that she could apply to juveniles.

Somewhat tellingly, different age thresholds are prescribed to an assortment of activities and benefits in a non-uniform fashion. For instance: teenagers are allowed to receive contraceptives without parental consent, while the consumption of alcohol is restricted to the age of twenty-one and parental health insurance coverage is mandated until the age of twenty-six.¹⁰⁹ It appears, implicitly in these examples, that there is some recognition of the principle that one uniform age of majority is not the most practical, nor the most equitable approach when making distinctions between juveniles and adults. Drawing the line in a realm of fluidity somewhere between eighteen and twenty-five, as opposed to strictly drawing the line at eighteen, would encompass the recent shift in our physical and psychological understanding of juveniles, while still abiding by the principles articulated by the Court in *Roper*, *Graham*, and *Miller*.

II. ARE SPECIALIZED COURTS THE ANSWER TO THE ARBITRARY AND ANTIQUATED TREATMENT OF YOUNG ADULTS?

This section addresses whether specialized courts are a possible solution to the problem of arbitrary sentencing of young adults, and the misalignment of the current system with psychological and sociological norms. This section also examines already established specialized courts across the country and their efficiency at providing a remedy for the unique problems in which they set out to solve.

During the Progressive Era, our criminal justice system saw a shift from adjudication to administration as a means for courts to provide speedier and more efficient justice.¹¹⁰ Efforts to adopt these principles led to an emergence of specialized courts in the 1990s.¹¹¹ In

109. Cohen, *supra* note 4, at 770.

110. Rekha Mirchandani, *What's So Special About Specialized Courts? The State and Social Change in Salt Lake City's Domestic Violence Court*, 39 L. & Soc'y 379, 379 (2005); see also Part I.A.

111. These included drug, community, mental health, and domestic violence courts. Mirchandani, *supra* note 110, at 379–80.

addition to specialized courts, our criminal justice system uses mini-trials, negotiations, mediation, and arbitration to provide alternatives to incarceration.¹¹² Specialized courts that are currently utilized include: family courts,¹¹³ bankruptcy courts,¹¹⁴ tax courts,¹¹⁵ drug courts,¹¹⁶ mental health courts,¹¹⁷ landlord-tenant courts,¹¹⁸ and even patent courts in some instances.¹¹⁹ Juvenile courts and drug courts specifically “emerged concurrently with new scientific theories and shifts in jurisprudential thought.”¹²⁰ The emergence of a number of these courts signals a movement towards specialized justice that is likely to “expand into areas never thought of before.”¹²¹

A. Process and Principles of Specialized Courts

Two very different approaches used by specialized courts have been recognized by scholars: exclusivity and limitation.¹²² Courts invoking principles of exclusivity hear every case of a certain kind, while courts focused on limitation only hear a particular type of case.¹²³ This is an important distinction to make, because one route – exclusiv-

112. *Id.* at 383.

113. Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. POVERTY L. & POL’Y 473, 485–86 (2015).

114. See generally Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COM. L.J. 383 (2005) (discussing the use of bankruptcy courts at the federal and state level).

115. See generally Cole Barnett & Christopher Weeg, *Intervention in the Tax Court and the Appellate Review of Tax Court Procedural Decisions*, 67 FLA. L. REV. 1483 (2016) (highlighting the importance of the specialized Tax Court that resolves majority of tax-related litigation).

116. See Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 30 (2006).

117. See generally Gregory L. Acquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971 (2006) (explaining how specialized mental health courts focus on mental health treatment as opposed to incarceration).

118. See generally Fred D. Gray, Jr., Project, *Special Project on Landlord-Tenant Law in the District of Columbia Court of Appeals: The Jurisdiction of the Landlord and Tenant Branch of the Superior Court*, 29 HOW. L.J. 137 (1986) (tracing the early development of D.C.’s exercise of the Landlord and Tenant Branch of the Superior Court).

119. See generally Kong-Woong Choe, *The Role of the Korean Patent Court*, 9 FED. CIR. B.J. 473 (2000) (discussing the establishment of specialized patent courts in Korea).

120. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1464 (2004).

121. Meekins, *supra* note 116, at 14.

122. Jay P. Kesan & Gwendolyn G. Ball, *Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialized Patent Trial Court*, 24 HARV. J. L. & TECH. 393, 399 (2011). Two other variables often considered are the staffing of the court – whether generalists or specialists are serving as judges – and “whether a court is subject to review by a generalist regional appellate court.” *Id.*

123. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1129–33 (1990). For example: all bankruptcy disputes are raised in bankruptcy court, while only a select few drug cases are brought in drug courts.

ity – provides offenders more opportunities to “game the system.”¹²⁴ The approach a specialized court takes will dictate the resources needed for the court to function. This distinction would be particularly significant in the context of a young adult court because a proposal suggesting that a court hear all cases involving young adults would require massive amounts of resources in order to operate in a marginally effective manner. Thus, it would be impractical for a young adult court to follow principles of exclusivity. However, under the limitation approach, the young adult court would still retain the discretion to hear or not hear certain cases depending on the alignment of the applicant’s case to the principles of the court.

Under the limitation approach, a young adult court could give its judges an opportunity to apply a narrow lens to issues with the expertise that they will acquire over time. The enhanced and increased role of a judge plays an integral part within a specialized court.¹²⁵ This is an essential benefit of specialized courts because this process will produce judges who are considerably more knowledgeable about what has and has not been useful for offenders in the past. Admittedly, judges from any court can enjoy these benefits to some extent if they happen to hear a large number of a particular type of case. However, due to the nature of a specialized court focused on limitation, these judges will be guaranteed to hear a large number of the same type of case.

Depending on the subject matter of the specialized court, a judge’s enhanced understanding of the field can result in widely varying trends. This is likely due to the role of a judge in a specialized court being substantially different from traditional courts, where the lawyers take center stage.¹²⁶ Whether it be leniency or a more pertinent emphasis on rehabilitation, judges in the young adult court will be able to implement effective change through their well-reasoned and informed sentences.

Young adults, as the subject of a specialized court, will benefit from particularly tailored supervision and support. Specialized courts can offer alternatives to incarceration that focus on the rehabilitation of the offenders and their reintegration into our society.¹²⁷ A greater

124. See *Infra* Part III.B.

125. Meekins, *supra* note 116, at 21.

126. *Id.*

127. See generally Mirchandani, *supra* note 110 (listing other types of courts and includes how these courts help offenders after sentencing).

emphasis on rehabilitation will be one of many unique benefits young adults would receive by participating in the young adult court. Receipt of these benefits, however, is not a new concept. Some states have begun designing and reviving special sentencing arrangements for young adult offenders.¹²⁸ Others have even suggested that youth alone should be permissible grounds for a judge to impose a more lenient sentence than what a presumptive guideline suggests.¹²⁹ With a young adult court, there would be a specific interest in protecting offenders from receiving sentences that run contrary to our history of sentencing, trends in psychological data, and our current notions of justice informed by the social climate. If these suggestions are put to practice, a young adult court could lower the number of harsh or inappropriate sentences given to offenders ages eighteen to twenty-five.

B. Currently Operative Specialized Courts

Although listing out several specialized courts demonstrates their effectiveness in some realms, the functions of specific specialized courts are worth examining in order to deconstruct their effectiveness to each specific problem faced. This section demonstrates how specialized courts can serve as an alternative to incarceration and assist communities with the “big picture” of a particular problem.

Domestic violence in particular is an issue that has been well known to criminal courts for a number of years.¹³⁰ In fact, there are currently more than 300 courts across the country that implement specific “processing mechanisms” for domestic violence cases.¹³¹ In 1997, Salt Lake City, Utah established a domestic violence court that was the subject of a nine-month observation.¹³² A general interest in preventing domestic violence as well as the Battered Women’s Movement in Utah had a role in bringing about this particular specialized court.¹³³ At any given time, Salt Lake’s domestic violence court was staffed with individuals with particular knowledge and training related to domestic violence.¹³⁴

128. Cohen, *supra* note 4, at 776.

129. Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1827 (2016).

130. Meekins, *supra* note 116, at 23.

131. Anat Maytal, Note, *Specialized Domestic Violence Courts: Are They Worth the Trouble In Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 208 (2008).

132. Mirchandani, *supra* note 110, at 390.

133. *Id.* at 395–96. With this court, judges have the opportunity to “mobilize the battered women’s movement’s rhetoric and use the courtroom to challenge the patriarchal attitudes and cultural values that support violence against women.” *Id.* at 409.

134. *Id.* at 397–98.

This domestic violence court also identified an issue specific to domestic violence that occurs rampantly in our current judicial system. They highlighted the fact that “[a] domestic violence incident can trigger a series of civil and criminal cases Victims can find themselves in multiple courtrooms, in more than one courthouse, facing multiple judges and even conflicting judicial orders.”¹³⁵ An officer of Salt Lake’s police force also pointed out an all too familiar concern with the abuse of our current system: “[m]any of these guys just learned how to beat the system. They would be assigned counseling with one judge, then have another hearing before another judge. We were getting people who were charged over and over again with domestic violence. And they weren’t facing any consequences.”¹³⁶

Salt Lake specifically points out the benefit of speed attributed to their specialized court when compared to other courts.¹³⁷ From the perspective of an offender, this is beneficial because they will save time, money, and may potentially receive the services they are in dire need of.¹³⁸ From the courts’ perspective, the domestic violence court can rehabilitate more individuals and do so without sacrificing the efficiency of the traditional courts. Although success in one domestic violence court in one jurisdiction does not mean that specialized courts are the answer to every legal problem, this example shows that they can be an effective solution to a problem that runs deep within our country’s history.

Discussion of an experimental District of Columbia drug court also lends itself to the exploration of a young adult court. After receiving a \$5 million grant from the Department of Justice in the 1990s,¹³⁹ the District of Columbia enacted and experimented with several different specialized courts – including a drug court.¹⁴⁰ The program only accepted offenders who demonstrated a history of drug abuse and were charged with misdemeanors.¹⁴¹ During regularly

135. *Id.* at 394.

136. *Id.* at 395.

137. *Id.*

138. Meekins, *supra* note 116, at 24–25 (The first established mental health court focused on providing mental health services and resources for defendants “whose mental illness was the primary reason for their recidivism.”).

139. *Id.* at 30. In addition to normal adjudication procedures, the drug court, in some instances liberally gave sanctions for continuing drug use and offered long-term inpatient treatment, group therapy, and even acupuncture. *Id.*

140. *Id.* at 28, 30. The District of Columbia drug court should be of particular note because its system of adjudication was described as: “unique even among other cities with similar population demographics.” *Id.*

141. *Id.* at 31.

scheduled status hearings, the judge addresses the offender directly, and has broad discretion over the imposition of sanctions for an offender's violations of the conditions of the treatment court.¹⁴²

From these examples, we can see that specialized courts can serve as a response to injustice or to a complex problem. The use of specific knowledge of the law and training that was used in Salt Lake's domestic violence court would also be effective in a young adult court. As the science pertaining to this group continues to develop, their interests will likely be best protected by those who are up to date on areas of law affecting this group and by those who have been trained to uphold those interests. Salt Lake's court is also inspiring to the case of young adults as the community recognized the issue of domestic violence and responded by creating a specialized court to combat that specific issue. Once the problems affecting young adult offenders are properly recognized, I would hope that a jurisdiction would potentially have the same forward-looking mindset to come up with an equally innovative solution.

Aspects of the District of Columbia drug court also give insight into the potential functionality of a young adult court. Just as this court only accepted those charged with misdemeanors and who demonstrated a history of drug abuse,¹⁴³ the young adult court could adopt an analogous set of criteria to insure the court's utility to the intended offenders. With these factors in place, there will be a level of control that will preliminarily be exercised before a judge even hears a case. In the field of patent law, specialized courts have been proposed as a solution to more easily decipher their particularly complex language, customs, and laws.¹⁴⁴ While a young adult court would not deal with any new laws or overly-complex language, young adults could certainly still benefit from a more nuanced approach to their adjudication.

On their face, specialized courts are a promising medium for judges to apply the principles from *Roper*, *Graham*, and *Miller* to young adults. It would align our adjudication of young adults with current psychological and sociological data, and move away from a system that is based on an arbitrary age of adulthood. When more

142. *Id.*

143. *Id.*

144. *See generally* Kesan & Ball, *supra* note 122, at 394 (highlighting the efficiency of patent litigation courts in dealing with patent litigation proceedings that have complex customs and laws).

research is conducted, and enough supporters are gathered, jurisdictions could potentially establish experimental young adult courts – as the District of Columbia did for their drug court.¹⁴⁵

III. OPPOSITION AND ARGUMENTS AGAINST THE CONCEPT OF YOUNG ADULTS, SPECIALIZED COURTS, AND A YOUNG ADULT COURT

The implementation of specialized courts is not a perfect solution nor is it a suitable model for every problem. There are several reasons to hesitate to turn to specialized courts to solve our problems. A specialized court for young adults would represent a significant change in adjudication from what we are used to seeing. In this section, I address some concerns with the concept of young adults generally. Next, I address some of the criticisms of specialized courts and explore whether a young adult specialized court could conceivably be effective. Finally, I offer some context to the current social climate and why a young adult court could be ideal to confront these particular issues.

A. Young Adults

A cornerstone of my argument for a change in the adjudication of young adults is that the current age of adulthood – the threshold deciding who receives the benefits of *Roper*, *Miller*, and *Graham* – is arbitrary. A concern that could potentially present strong opposition to this point is that the young adult age range would simply be moving the “arbitrary line” back. Another concern is that since we have used eighteen for so long, it is not worth disturbing. A few logical questions follow such propositions, such as: why not simply increase the age of adulthood; and why the specific age range of eighteen to twenty-five for young adults? I will attempt to answer both of these questions in a manner that gives credence to the emerging classification of young adult.

With regard to the first question, my concern is not the placement of the age of adulthood at eighteen, rather that it is arbitrary for the purposes of punishment. Justice Stevens, in his concurring opinion in *Roper*, criticized the majority for failing to adequately explain the difference in maturity between a seventeen-year-old and a young adult to the extent that it would “justify a bright-line prophylactic rule

145. Meekins, *supra* note 116, at 30.

against capital punishment” of juveniles.¹⁴⁶ I argue that one single age of adulthood for the purposes of sentencing is not the most practical solution. In the realm of health care, the Joint Strategic Needs Assessment has stated that

Across service types, practitioners and evidence suggest that having a cut-off point at age [eighteen] is arbitrary and unhelpful The needs and “emotional ages” of [eighteen] year olds differ widely, and some young adults may receive more appropriate care in a young people service than an adult service.¹⁴⁷

The concern of arbitrariness will presumably be present regardless of a single age chosen. If the age of adulthood were raised from eighteen to nineteen, that would not solve the problem of a lack of an inherent distinction between the individuals immediately on either sides of the line. An amorphous age range lessens the degree to which it is necessary to draw distinctions between substantially similar groups. The differences between a seventeen-year-old and a twenty-six-year-old will likely always be more readily apparent than the differences between an eighteen-year-old and someone who previously held that designation just mere days prior.

In the alternative, even if a single age of adulthood was the only possible option, our criminal justice system would benefit more if it were increased from the age of eighteen. At a minimum, the scientific data supports a conclusion that eighteen is not a sufficient age to draw the line.¹⁴⁸ No matter the age at which we draw the line, there will always be distinctions between the groups on either side. While this concern becomes less important the further we push the line back, we are operating in an area where the best decision may not be to draw one line and call it a day.

As to the second question concerning the selection of a specific age range, the Supreme Court in *Graham* expressed disapproval of a case-by-case analysis for juvenile sentencing, in favor of a categorical rule.¹⁴⁹ This, however, is also not practical, as more discretion would allow for more meaningful and just sentences. An offender’s psychological characteristics are not concrete enough at any age to be able to confidently establish a hard cut-off point. While scientific data does

146. *Roper v. Simmons*, 543 U.S. 551, 601 (2005) (Stevens, J., concurring).

147. JOINT STRATEGIC NEEDS ASSESSMENT, *Health and Wellbeing Needs of Young Adults age 18-25* (Jan. 2017), <https://www.jsna.info/sites/default/files/Young%20Adults%20JSNA%20RKBC%20WCC.pdf>.

148. See Part I.C.

149. *Graham v. Florida*, 560 U.S. 48, 75 (2010).

not point to one specific age that denotes universal psychological development and maturity, the data does suggest that if such an age existed, it would be beyond eighteen.¹⁵⁰ This is why a spanning range of ages constituting the classification of young adults lessens the problems associated with a hard cut-off point. We will be able to account for the hypothetical “ideal age” that science places somewhere in this range for most offenders. I use “lessen” rather than “solve” because my classification of young adult still precludes those over the age of twenty-five from participation in the young adult court. Nevertheless, one could anticipate this counter-argument in response to any categorical sentencing distinctions that utilize age as the determining factor.

While I believe the idea of an age range is clear, I can understand how one would question why eighteen and twenty-five were chosen specifically. The age range of eighteen to twenty-five represents an emerging new category of individuals between juveniles and adults.¹⁵¹ This group faces several unique challenges¹⁵² and circumstances that potentially justify different treatment of this group from both juveniles and adults. The age range of eighteen to twenty-five is largely rooted in science rather than in a tradition perpetuated throughout time without any real explanation.

The older an offender becomes, the less persuasive the argument against making an offender spend a “greater percentage of his life in prison than an adult offender,”¹⁵³ becomes. This age range effectively serves as the new “eighteen.” We will have years to discover whether this is the most apt range to classify young adults. It may be the case

150. See Part I.C.

151. See JOINT STRATEGIC NEEDS ASSESSMENT, *Health and Wellbeing Needs of Young Adults age 18-25* (Jan. 2017), <https://www.jsna.info/sites/default/files/Young%20Adults%20JSNA%20RKBC%20WCC.pdf> (“there is an emerging consensus that the needs of young adults are not fully understood or being met.”); see also Amudha S. Poobalan et al., *Diet Behaviour Among Young People in Transition to Adulthood (18-25 year olds): A Mixed Method Study*, 2 HEALTH PSYCHOL. & BEHAV. MED. 909, 909 (2014) (“Young adults [eighteen to twenty-five] in transition from adolescence to adulthood, addressed as ‘emerging adults,’ begin independent living, embark on higher education/employment, start living with partners or get married and/or become parents themselves”); see generally JEFFREY JENSEN ARNETT, *EMERGING ADULTHOOD: THE WINDING ROAD FROM THE LATE TEENS THROUGH THE TWENTIES* (2015) (advocating for the age range of eighteen to twenty-nine to be viewed distinctly as a new category separate from adults and juveniles called “emerging adulthood”).

152. *Recreational Alcohol Use Among 18–25 Year-Olds*, ALCOHOL REHAB ADVICE, <http://alcoholrehabadvice.com/recreational-alcohol-use-among-18-25-year-olds/> (last visited Oct. 24, 2017 11:29 PM) (“young people ages 18 to 25 have the highest rates of alcohol use among all the age groups.”).

153. *Graham*, 560 U.S. at 50.

that thirty years down the road, after our psychological data improves significantly, that we learn that the young adult court should be limited to those under the age of twenty-one as opposed to twenty-five. The young adult court offers us an opportunity to utilize a seemingly effective system that can account for the particular needs of a group of individuals while being mindful of the interests of the justice system.

B. Specialized Courts

Even if one were to accept the concept of young adults, there may also be concerns that relate to specialized courts as a method to effectuate any type of change. In order to address this, it is important to draw a distinction between the two approaches to specialized courts and their implementation in practice. The concern of a young adult specialized court being abused by offenders would likely only present itself in a specialized court operating under principles of exclusivity, rather than in a court adopting a limitation approach. If the young adult court were to adopt an exclusive approach, every young adult would be required to be adjudicated by the young adult court regardless of the circumstances and the severity of their crime. Unlike the bankruptcy courts – which hear all bankruptcy cases – it would be impractical for a young adult specialized court to hear every case that involves individuals within this category. Under a limiting approach, the mechanisms to choose its offenders would need to develop some sort of system that “weeds out” those individuals looking to abuse the court’s discretion. Through a more practical analysis of how a young adult court would actually operate, these problems would certainly be addressed and accounted for. Several studies, beyond the scope of this Comment, would be necessary to compile the amount of data and information to put the young adult court in motion.

Another general concern about specialized courts is their potential effect on the traditional functions and processes of our criminal justice system. One criticism is that specialized courts stand to substantially interfere with the role of the conventional criminal defendant and the advocacy on their behalf.¹⁵⁴ The opposition seems to stem from a shift of power from attorneys to judges in specialized courts. More specifically, the concern appears to be that defense attorneys who represent offenders in these specialized courts will be less willing to advocate on behalf of their clients due to the collaborative

154. Meekins, *supra* note 116, at 3.

nature of such courts.¹⁵⁵ This phenomenon has been attributed to principles derived from other social sciences and multiple academic approaches to criminal law theory.¹⁵⁶ Specifically, rehabilitation, therapeutic jurisprudence, and restorative justice have been singled out for their lack of congruence with traditional notions of our criminal justice system.¹⁵⁷ Ordinarily, these approaches would warrant concern where they represent such a dramatic shift in an approach to adjudication. However, these same problems do not plague other specialized courts to the extent that they are rendered ineffective. The solution to any concerns in this area is extensive research and sufficient resources put into the young adult court.

C. Young Adult Court

The first concern regarding a young adult court, which represents a somewhat skewed view of the possibilities, is that a young adult specialized court would result only in shorter, less harsh sentences for otherwise matured adults who are actually deserving of much greater sentences. While this is a possibility, it would not be the primary goal of a young adult court to simply provide more lenient sentences to young adults. For example: a young adult may receive a sentence of the same duration as one of his adult counterparts, however, the young adult could serve the time in a special facility or participate in programs that heavily emphasize rehabilitation of the offender. Additionally, the decision to admit an offender into the specialized court could be separate from the sentencing process. The determination can be made that an offender is prime for the benefits of the program, but they could still receive a relatively lengthy sentence once admitted. These types of sentences reflect the interest to punish deserving offenders while also ensuring that the well-being of young adults is made central to the sentencing process.

Not to say that courts today do not possess the authority or the capacity to give such a sentence, but a young adult court would theoretically be able to provide more appropriate services. In the interest of reducing recidivism, the young adult specialized court could potentially offer job placement assistance to young adults. This goal is more likely to materialize if courts can partner with employers who are will-

155. *Id.* at 4–6.

156. *Id.* at 7.

157. *Id.*

ing to hire offenders who have gone through the young adult court.¹⁵⁸ Additionally, the time that a judge will spend dealing with young adult offenders will give them insight and allow them to observe trends in sentences. This, hopefully, will translate to sentences with more appreciation for the individual rather than strict adherence to statutory minimums.

Another potential concern with a young adult court is that, with the knowledge that they would automatically receive a more lenient sentence, young adults may be more likely to commit crimes. Under a cost-benefit analysis, if the risk of severe punishment is suddenly decreased, a particular crime may appear more attractive to a prospective offender. This is, however, likely not a serious concern because we were faced with a similar one after the *Miller* decision. At the point in time after *Miller*, juveniles were viewed completely separate from adults with regard to the punishments that they could receive in general and for more serious crimes. Regardless of the heinousness of a juvenile's actions, they will not receive the death penalty or life in prison without the possibility of parole. Are juveniles more likely to commit a heinous offense because they know they will no longer receive the death penalty? The psychological data would suggest that this is not the case because juveniles are more impulsive and are not as adept at decision-making as their adult counterparts.¹⁵⁹ The opportunity for offenders to commit crimes once they become exempt from a type of punishment is present here, however, the cost-benefit analysis conducted by young adults is not likely to be altered significantly.

The United States court system already operates very similarly to the way a young adult specialized court might. Offenders under the age of eighteen are treated as juveniles by default, however, when a court makes the determination that the offender deserves to be treated as an adult, the individual is no longer viewed or sentenced as a juvenile. In that same vein, eighteen to twenty-five-year-old offenders will be viewed as young adults by the young adult court, however,

158. See Caitlin Curley, *Denying Employment to Ex-Offenders Increases Recidivism Rates*, GENFKD (Mar. 17, 2017, 8:15 PM), <http://www.genfkd.org/denying-employment-ex-offenders-increases-recidivism-rates>. A program trying to achieve this would need to be heavily monitored by courts. Otherwise, these employers might attempt to hire young adult offenders at a lower rate or attempt to subject them to conditions clearly unfit for the ordinary workforce. The jobs available to offenders will likely be limited, however, the interest is to make sure that they can receive a job once they complete their sentence. See *id.* ("Many applications will automatically disqualify those who have felony convictions.").

159. See *infra* Part I.C.

when the specialized court makes the determination not to hear their case, they will be sentenced as adults. If we continue to recognize that there are some juveniles deserving of the harsh punishments imposed on adults, we cannot be sure that courts will be able to accurately distinguish “the few incorrigible juvenile offenders from the many that have the capacity to change.”¹⁶⁰ The young adult specialized court will not take anything away from the criminal justice system, it simply offers opportunities for deserving individuals so that they may be sentenced in a manner more receptive to their specific needs and circumstances.

Due to the constantly changing nature of our approach to juvenile sentencing, it is worth keeping an open mind about the fact that this solution may be limited to the young adults of today’s time. This, however, does not take away from the utility that a young adult court could have on offenders until we adopt a new sentencing model. Depending on the social and political climate of our society, certain schemes will be more effective than others. This is important to remember because for example: The Progressive Reform Movement was a largely significant factor that changed our ideals about juvenile sentencing.¹⁶¹ If in twenty years this system is not congruent with society’s view of young adults, then we should retain the freedom to adjust the parameters of the young adult court. Accepting solutions that only purport to offer indefinite solutions to today’s problems is short-sighted.

Specialized courts are not the end all be all and will present substantial roadblocks in its implementation. Thus, it is worth examining other, potentially more viable, options. One possible alternative to the current adjudication of young adults would be having a young adult advocate speak on behalf of the offender. This would achieve the goal of making sure that the group was recognized, in that by having someone (a young adult expert possibly) advocate on your behalf would give some credence to the classification that academic arguments simply may not be able to achieve. An advocate system could also potentially serve as a filter for offenders who wish to take advantage of the young adult court. These advocates could possibly recommend offenders for the program based on criteria that the court deems satisfactory. Finally, an advocate system would provide more of a

160. *Graham v. Florida*, 560 U.S. 48, 77 (2010).

161. *Cohen*, *supra* note 4, at 772.

personalized adjudicatory process for selected young adults so that their sentences would be less arbitrary. An advocate system or program certainly has some roadblocks – such as the criteria of choosing said advocates – but, in theory a court could establish a process that furthers the goals advanced in this Comment.

D. Additional Concerns

Aside from the type of cases that they hear, specialized courts offer unique advantages that relate to our notions of social utility. One benefit offered by specialized court advocates is that they “allow legal officials to respond not only to individual troubles but also to broader social issues as communities identify them.”¹⁶² This section addresses how specialized courts can combat certain social issues, and additionally how other social issues serve as a roadblock to a young adult specialized court.

It is important to note that the social climate for young adults leading up to this point may not be completely illustrative of the perpetual adjudication of young adults. Such adjudicatory measures should ideally find themselves aligned with the general conventions of their time. For example: the fact that juveniles are exempt from the death penalty today certainly does not mean they will continue to enjoy that privilege indefinitely. Although juveniles have the support of the Supreme Court today, that precedent has the potential to quickly become outdated. A little over a century ago, overt racial inequality was not only prevalent in our society, but was supported by the Supreme Court.¹⁶³ Now, however, such ideas and policies would likely not be entertained by the better part of America. Although, in light of the 2016 presidential election, that much is still left to be seen.

The fact that at a point, *Plessy v. Ferguson*¹⁶⁴ represented the Supreme Court’s opinion serves to demonstrate that our laws reflect the circumstances of our time. A sentencing structure that does not consider young adults is an approach fit for the criminal justice system of yesterday. Just as sentiments about racial minorities have changed since *Plessy* – where the United States was only thirty-two years re-

162. Mirchandani, *supra* note 110, at 380.

163. *See generally* *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state racial segregation for public facilities under the “Separate but Equal” doctrine).

164. *Id.*

moved from slavery¹⁶⁵ – sentiments about young adults have changed since the “tough on crime” initiative in the 1960s.¹⁶⁶ Now, with the support of judicial precedent, scientific data, and changing attitudes on sentencing, it is an opportune time to establish a system designed to account for these changes.

Another particular issue that the young adult court can address is that of the prison system in the United States, which is certainly unique.¹⁶⁷ In addition to the startling numbers of incarcerated individuals, the demographics of those who are incarcerated paints a picture of our country that is not representative of our actual composition. The 1920s through the 1970s saw a stable rate of incarceration in the United States, until rates more than quadrupled in subsequent decades.¹⁶⁸ At a point in 2012, roughly twenty-five percent of the world’s prison population was held in American prisons, despite the fact that the United State’s population accounted for about five percent of the world population.¹⁶⁹ The background of the American prison system is important because it shows that something is not working.

Despite our supposed leniency towards juveniles, they still feel the effects of our distinctive prison system. Every year, over 200,000 juveniles face prosecution as adults in criminal court.¹⁷⁰ This is a discretionary practice that allows the legal age of adulthood to be circumvented in order to punish particularly deserving juveniles. Because of this, most of the decisions to send juveniles into the adult criminal justice system are made by prosecutors and legislatures rather than judges.¹⁷¹ These transfer laws have been criticized for too easily trying and convicting children in adult criminal court.¹⁷² In fact, recent research on adolescent development has been used to support

165. Slavery ended in the United States on December 6, 1865 when the Thirteenth Amendment was ratified, then thirty-two years later, *Plessy* was decided. See U.S. Const. amend. XIII, § 1; see also *Plessy*, 163 U.S. at 537.

166. Molinoff, *supra* note 2, at 309–10.

167. NAT’L RESEARCH COUNCIL OF NAT’L ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2* (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter *GROWTH OF INCARCERATION*] (“The growth in incarceration rates in the United States over the past [forty] years is historically unprecedented and internationally unique.”).

168. *Id.* at 1.

169. *Id.* at 2.

170. Cohen, *supra* note 4, at 775; see also STEVENSON, *supra* note 40, at 156–57 (“Children who commit serious crimes long have been vulnerable to adult prosecution and punishment in many states . . .”).

171. Cohen, *supra* note 4, at 775.

172. Drinan, *supra* note 129, at 1825.

proposals to mitigate the severity of punishment for adolescents tried as adults.¹⁷³ This clearly demonstrates that the practice of sentencing juveniles as adults is conceptually inconsistent with the Supreme Court's precedent regarding juveniles. Thus, we should be skeptical of presumptive and advisory sentencing guidelines that do not account for youth as a mitigating factor.¹⁷⁴

The laws governing juvenile adjudication not only have a history of ushering young children in to the adult criminal justice system, but also of doing so disproportionately for youth of color.¹⁷⁵ At one point, juveniles as young as thirteen could find themselves being tried as an adult when their crime was "unusually high-profile" or when a black child committed a crime against a white person in the South.¹⁷⁶ In the 1930s, two thirteen-year-old black boys in Alabama were wrongfully convicted of rape and sentenced to death.¹⁷⁷ In 1944, fourteen-year-old George Stinney was executed following the disappearance of two young white girls in Alcolu, South Carolina.¹⁷⁸ Also, in response to the predicted wave of super-predators, "[m]any states lowered or eliminated the minimum age for trying children as adults, leaving children as young as eight vulnerable to adult prosecution and imprisonment.¹⁷⁹ The majority of incarcerated individuals in U.S. prisons come from the most disadvantaged parts of the population.¹⁸⁰ These individuals are primarily made up of minority men under the age of forty who lack education, are battling drug and alcohol addiction, have mental and physical illness, and "lack work preparation experience."¹⁸¹ Possibly due to higher rates of poverty and urbanization and a younger age distribution, minorities show higher rates of offending and victimization for some categories of offenses.¹⁸² Research and statistics also confirm that defendants who are poor and who are from ethnic and racial minority groups are over-represented in current specialized courts.¹⁸³

173. Cohen, *supra* note 4, at 770.

174. Drinan, *supra* note 129, at 1826.

175. Cohen, *supra* note 4, at 775. The rise in incarceration beginning in the 1970s has had a disproportionate effect on African Americans and Latinos. GROWTH OF INCARCERATION, *supra* note 167, at 56.

176. STEVENSON, *supra* note 40, at 157.

177. *Id.*

178. *Id.*

179. *Id.* at 59.

180. GROWTH OF INCARCERATION, *supra* note 167, at 2.

181. *Id.*

182. *Id.* at 56.

183. Meekins, *supra* note 116, at 3.

The disparity between offenders from different socio-economic backgrounds presents a problem that could potentially plague a young adult court to a greater extent than our current system. Any young adult court would need to take extra precaution to ensure that offenders with more resources did not disproportionately receive the benefits the court has to offer. With these statistics and concerns in mind, the young adult court will need a heightened degree of discretion to consider an offender's race and socio-economic status when sentencing. Judges will be expected to develop a level of understanding of these offenders' problems and be able to give sentences that are fair. Judges can directly alleviate some disproportionate sentencing through the criteria they use to allow offenders to go through the young adult court. It is not apparent that the young adult court will be used to give minority offenders lower sentences on the basis of race alone, however, the young adult court can disregard some of the known tropes of our criminal justice system that lead to disproportionate sentencing. For example: the court could begin placing possession of crack-cocaine and powder-cocaine on equal grounds with regard to sentencing for the offense. If the same disproportionality of sentencing encroaches upon the territory of a young adult court, hopefully we would be able gather more useful data on the phenomenon. This data would then be used with the hope to move us closer to understanding the root of this proportionality problem. Specialized courts' unique ability to "allow legal officials to respond not only to individual troubles but also to broader social issues as communities identify them,"¹⁸⁴ can potentially do a lot of good for a group of offenders that have been unfairly treated by our criminal justice system for over a hundred years.

CONCLUSION

In this Comment, it has been argued that young adults should be recognized as its own group, distinct from both juveniles and adults, for the purposes of adjudication. This Comment has also argued that the leniency in sentencing and greater emphasis on rehabilitation used for juveniles should be extended to young adults. It has been demonstrated that the current sentencing scheme for young adults does not satisfy the penological goals of punishment and resists conclusions gathered from modern psychological and sociological data collected

184. Mirchandani, *supra* note 110, at 380.

from young adults. This Comment has acknowledged that there are practical and conceptual concerns for the use of specialized courts; however, a young adult specialized court might be able to provide effective and meaningful change to young adult adjudication without seriously jeopardizing foundational adjudicatory principles. Additionally, a young adult court might be able to avoid many of the traditional sentencing practices that have significantly disproportionate effects on racial minorities. A young adult specialized court is not the apex of solutions regarding the sentencing of young adults. It is, however, a viable option for courts to address the concerns and needs of this newly emerging group known as young adults.

