Mission Statement

The *Brandeis University Law Journal* aims to provide Brandeis University with the opportunity to contribute to discussions of law and law-related topics with the publication of undergraduate scholarship. We hope to aid in the furtherance of Brandeis University's motto of "truth even unto its innermost parts" through publishing rigorously researched articles and engaging in respectful, thoughtful, and insightful debates. This journal is both a publication and a constant work in progress as we are grounded in an undergraduate academic environment and constantly trying to learn, grow and improve. Our journal provides a platform for intellectual growth and debate where academic scholarship can flourish. We focus on academic excellence, encouraging expressions of scholarship, and encouragement of educational purposes.

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The *Brandeis University Law Journal* is an independent publication, managed entirely by undergraduate students, that functions as a neutral platform for the unrestricted circulation of community members' views on legal matters. The views expressed in the Journal do not necessarily reflect those of the Journal's Executive Board or its other authors and editors.

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Letter from the Editor-in-Chief

Dear Reader,

Your Executive Board is proud to present the 2023-24 issue of the *Brandeis University Law Journal*. This year has been one of many firsts for our Journal. Chief among these is the transition from a bi-annual to an annual publication. The following nine undergraduate-penned articles explore a range of legal issues: from the legal history of coverture and the precedent governing flag desecration to the legal protections needed to safeguard immigrant workers' civil rights.

This publication is indebted to our exceptional team of authors and editors. We are grateful to our gifted editorial team who consistently volunteer their finite time to edit submissions. The E-Board is equally grateful to our authors who have devoted their time and care to revisiting their work over many arduous editing cycles.

Longtime readers may notice a new referencing style in some of this year's articles. Indeed, in a trailblazing initiative at the undergraduate level, the Journal is adopting *The Bluebook: A Uniform System of Citation* to conform to the citation system used by the legal profession and other academic legal publications. To accommodate this transition and support our authors, we allowed citations to be completed in either *Chicago 17th ed*. or *Bluebook*. The articles written in *Bluebook* comprise the first half of the issue and those written in *Chicago* comprise the second. We are appreciative of our Government Information & Social Sciences Librarian, Aimee Slater, for lending so much of her time and expertise to enact this strenuous transition.

The E-Board extends its utmost gratitude to our faculty advisors, Professors Breen and Kabrhel, for their invaluable expertise. Their support has been instrumental in keeping the Journal faithful to its original mission established by Judah Marans. We thank the Student Union's Allocations Board for contributing the funds necessary to publish this issue.

The Journal's E-Board, which has grown to its largest size yet, is staffed by a team of gifted undergraduates who have dedicated many hours to the Journal's success. They are deserving of the utmost praise for their hard work and commitment.

Finally, I must thank my Co-Editor-in-Chief, Emanuel Glinsky. Manny, you're among the most hard-working people I have ever met. Your unwavering commitment to our shared project has pushed me to become a better and more accountable leader. You are the best teammate I have ever had; I wish you the best.

Sincerely yours,
Gonny D. Nir
Co-Editor-in-Chief

The following articles are written in:

The Bluebook: A Uniform System of Citations

The Israeli-Hamas War: The Legality of Israel's Invasion of Gaza Under International Law

Koby Gottlieb[1]

The ongoing Israeli-Hamas war continues to cause untold human suffering, dominate media coverage, and attract the attention of international organizations. This article seeks to clarify normative controversy related to the legality of Israel's invasion of the Gaza Strip by using international legal norms regarding self-defense, terrorism, and sovereignty. Using international legal theory and the expansion of customary law, as well as the politics between Palestinian factions, the article finds that Israel's invasion is legal under current international law.

I. Roadmap

About three months into the current Israeli-Hamas war, South Africa brought genocide charges against Israel in the International Court of Justice (ICJ).[2] This article addresses some of the Israeli arguments made during the court proceedings, especially those related to self-defense.[3] It is

[1] Brandeis University, Class of 2026.
[2] António Guterres, *Secretary-General's Remarks to the Security Council - on the Middle East*, (2024), https://www.un.org/sg/en/content/sg/speeches/2024-01-23/secretary-generals-remarks-the-security-council-the-middle-east; Mat Nashed, *Western Coverage of Israel's War on Gaza - Bias or Unprofessionalism?*, Al Jazeera, Oct. 29, 2023, https://www.aljazeera.com/news/2023/10/29/western-coverage-of-israels-war-on-gaza-bias-or-unprofessionalism; Republic of South Africa, *Application Instituting Proceedings*, (2023).
[3] State of Israel, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel): Verbatim Record*, (2023).

important to first establish the theoretical framework governing self-defense, terrorism, and territorial sovereignty. This framework will then be applied to the present case of Israel's invasion of the Gaza Strip. After concluding these assessments, it will become clear that Israel's invasion on October 27, 2023, is legal according to international law.

II. Introduction

On October 7, 2023, Hamas carried out a massacre in Israel, killing about 1,200 people and abducting approximately 240 people.[4] In the days following the massacre, Hamas indiscriminately launched barrages of rockets towards Israel. Israel consequently launched retaliatory airstrikes. On October 27, Israel began its ground invasion of the Gaza Strip.[5] An in-depth evaluation of the actions on October 7 is not within the scope of this article; instead, this article evaluates the legality of Israel's invasion. Acknowledging the difficulties of analyzing events during wartime, this article will only address one question—whether the invasion of the Gaza Strip was legal under international law—and not the legality surrounding the events that transpired during the invasion itself. This excludes any attempt to evaluate Israeli conduct under international legal

[4] Police say they've identified 859 civilian victims from October 7 massacre, up 16, The Times of Israel, Nov. 14, 2023, https://www.timesofisrael.com/liveblog_entry/police-say-theyve-identified-859-civilian-victims-from-october-7-massacre-up-16/.

[5] Israel pummels Gaza with strikes as it expands ground operations, France 24, Oct. 27, 2023, https://www.france24.com/en/live-news/20231027-israel-pummels-gaza-with-strikes-as-it-expands-ground-operations; Arthur van Coller, Israel-Hamas 2024 Symposium - Qassam Rockets, Weapon Reviews, and Collective Terror as a Targeting Strategy, (2024), https://lieber.westpoint.edu/qassam-rockets-weapon-reviews-collective-terror-targeting-strategy/.

principles, since any such inquiry would require an in-depth knowledge of classified information.[6]

III. The Right of Self-Defense

The United Nations Charter is the foundational text of the organization, and it is binding upon all member states.[7] Article 2(4) of the Charter enshrines the importance of refraining "from the threat or use of force against the territorial integrity or political independence of any state."[8] However, Article 51 of the Charter notes that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[9] Additional codification of self-defense can be found in United Nations General Assembly (UNGA) Resolution 3314, which criminalizes state aggression from the perspective of international law and helps clarify the definition of an "armed attack" under Article 51 of the Charter.[10] This resolution includes a few examples of acts of aggression, such as "invasion or attack by the armed forces of a State… or any military occupation, however temporary."[11] It is worth noting that the definition of "[s]tate" in this resolution "is used without prejudice to questions of recognition or to

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[6] Noam Lubell, Jelena Pejic & Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, (2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/Guidelines%20on%20Investigating%20Violations%20of%20IHL_%20FINAL.pdf.
[7] Alfred Verdross, General International Law and the United Nations Charter, 30 Royal Institute of International Affairs 342 (1954).
[8] *U.N. Charter art. 2, para.4.*
[9] *U.N. Charter art. 51.*
[10] *Thomas* Bruha, *The General Assembly's Definition of the Act of Aggression*, *in* The Crime of Aggression: A Commentary, 142 (2016); Report of the 1956 Special Committee on the Question of Defining Aggression, (1956).
[11] Definition of Aggression, U.N. GAOR (1974).

whether a state is a member of the United Nations," meaning that self-defense against a state can also be legal if the United Nations does not recognize that state, if that state is not a member of the United Nations, or even if both are applicable.[12]

In addition to the Charter and Resolution 3314, the ICJ's decision in *The Republic of Nicaragua v. United States of America* (1986) is also important in defining self-defense. In 1984, American military intervention in Nicaragua caused the latter to launch legal proceedings at the ICJ the same year.[13] *Nicaragua v. USA* adds an additional condition for an act of aggression to justify the right of self-defense: these acts must be "classified as an armed attack rather than as a mere frontier incident."[14] The difference between an armed attack and a frontier incident is based on the "scale and effects" of the operation.[15] The ICJ judgment furthers the importance of UNGA Resolution 3314 by considering the resolution a document of customary international law.[16] This decision changed UNGA Resolution 3314 from a non-binding General Assembly resolution to one that is binding upon all nations, as is the nature of customary international law.[17]

The right of self-defense against terror organizations is more complicated than the right of self-defense against a state; in fact, it may appear that UNGA Resolution 3314 limits the

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[12] *Id.*
[13] Carlos Arguello Gomez, *Request for the Indication of Provisional Measures of Protection Submitted by the Government of Nicaragua*, (1984), https://www.icj-cij.org/sites/default/files/case-related/70/9629.pdf; Carlos Arguello Gomez, *Application Instituting Proceedings*, (1984), https://www.icj-cij.org/sites/default/files/case-related/70/9615.pdf.
[14] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ 195 (1986).
[15] *Id.*
[16] *Id.*
[17] South West Africa Cases, ICJ 98 (1966); James Crawford, Brownlie's Principles of Public International Law 19–28 (9 ed. 2019).

right of self-defense to attacks from a state.[18] In the interest of this article, it is imperative to define terrorism under international law, so that we can evaluate it according to international legal principles. According to the Special Tribunal for Lebanon, terrorism has three elements: "perpetration of a criminal act… or threatening such an act; the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; when the act involves a transnational element."[19] As previously noted, UNGA Resolution 3314 claims that a state must be the body invading or attacking for it to be considered an act of aggression.

In 2003, the General Assembly requested that the ICJ investigate "the legal consequences arising from the construction of the wall being built by Israel" in the West Bank.[20] The opinion of the court became known as The Wall Advisory Opinion, and while it is only an advisory opinion, it carries normative weight.[21] The Wall Advisory Opinion (2004) recognized that "Article 51 of the [UN] Charter thus recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State."[22] Judge Higgins, former President of the ICJ, offers a dissenting opinion, concluding that "there is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defense is available only when an armed attack is made by a state."[23]

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[18] Definition of Aggression, U.N. GAOR (1974).
[19] The Prosecutor v. Ayyash et al., 85 (2011).
[20] General Assembly Resolution ES-10/14, (2003), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICJ%20ARESES1014.pdf.
[21] Niccolò Lanzoni, *The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case*, The Italian Review of International and Comparative Law (2022).
[22] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ 139 (2004).
[23] *Id.* at 33. (separate opinion of Judge Higgins)

Professor Vaughan Lowe, author of numerous books on international law and professor of international law at the University of Oxford, strengthens Judge Higgins' view by arguing that "the source of [an] attack, whether a state or non-state actor, is irrelevant to the existence of the right" to self-defense.[24] The opinions of both Judge Higgins and Professor Lowe carry a level of legal weight because the International Court of Justice's Statute recognizes that "judicial decisions and teachings of the most highly qualified publicists of the various nations" are means for determining law.[25] Based on their aforementioned qualifications, Judge Higgins and Professor Lowe demonstrate that they are, as stated by the ICJ, "highly qualified."[26] Therefore, their opinions are significant for future evaluation, even though they are not binding.

Raising a further possibility for a right of self-defense, *Nicaragua v. USA* states that if a state has "effective control of the military or paramilitary operations" of a terror organization while the terrorist organization is conducting acts of aggression, the state has a level of legal responsibility.[27] Moreover, UN Special Rapporteur Philip Alston remarked that "a targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if… the first, targeting, State has a right under international law to use force in self-defense under Article 51 of the UN Charter, because … the second State is unwilling or unable to stop armed attacks against the first State launched from its territory."[28] This interpretation allows room for states to fight

[24] Vaughan Lowe, *Principles of International Law on the Use of Force by States in Self-Defence*, 22 (2005).
[25] Statute of the ICJ, 38(1)d, https://www.icj-cij.org/statute.
[26] Judge Dame Rosalyn Higgins; Vaughan Lowe, QC.
[27] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 115.
[28] Philiip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 35 (2010).

terror organizations in foreign territory without the explicit permission of the sovereign.

Another advancement in the right of self-defense relating to terror is represented by UN Security Council Resolution (UNSCR) 2249. The Security Council passed Resolution 2249 in November 2015 as a means of combating the Islamic State throughout the Middle East and the wider world.[29] This resolution "calls upon Member States … to eradicate the safe haven [the Islamic State of Iraq and Syria (ISIS)] have established."[30] Importantly, the resolution uses the language "calls upon," and these words are "exhortatory rather than mandatory language and … therefore, they do not purport to impose any legal duty on any State." [31] Given the lack of a legal duty on a state to eradicate ISIS, Marc Weller, Professor of International Law at the University of Cambridge, argues that UNSCR 2249 "does not grant any fresh authority for states seeking to take action," but rather that this ability has already existed within international customary law.[32] Dapo Akande, Professor of Public International Law at the University of Oxford, and Marko Milanovic, Associate Professor in Law at the University of Nottingham, agree with the assessment that UNSCR 2249 "neither adds to, nor subtracts from, whatever authority" states already have in fighting terror.[33] The language

[29] Threats to international peace and security caused by terrorist acts, (2015), https://documents.un.org/doc/undoc/pro/n15/383/49/pdf/n1538349.pdf?token=S5UY6uLl3akxOfNVQa&fe=true.

[30] Resolution 2249, (2015).

[31] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, ICJ 114 (1971).

[32] Arabella Lang, *Legal Basis for UK Military Action in Syria*, 8 (2015), https://www.voltairenet.org/IMG/pdf/CBP-7404.pdf.

[33] Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, Blog of the European Journal of International Law (Nov. 21, 2015),

in UNSCR 2249 indicates that the right of states to attack terror regimes in foreign countries is not new, and that the resolution simply codified an established rule of customary international law that has been developing since the *Nicaragua vs. USA* ruling.[34] The majority of the academic discussion thus far relates to the right of self-defense against terror organizations and whether a terror organization is operating in another sovereign's territory. Therefore, discussions of what constitutes sovereign territory and the relevant principles for this conversation are essential.

IV. Sovereignty, Elements of a State, and Occupation

Article 2(1) of the UN Charter recognizes the idea of sovereignty of states through the principle of "sovereign equality" of nations.[35] In the *Case Concerning the Frontier Dispute between Burkina Faso and Mali*, the ICJ recognized the principle of *uti possidetis juris* (as possessing of law) as an aspect of customary international law. Through this, the court recognized that the borders of post-colonial states could result "from mere internal administrative divisions" of the previous colonial ruler. In this court case, the previous colonial ruler was France with the former French territories of French Upper Volta, later Burkina Faso, and French Sudan, later Mali. The ICJ applied the principle of *uti possidetis juris* to establish the

https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

[34] Arabella Lang, *Legal Basis for UK Military Action in Syria*, (2015), https://www.voltairenet.org/IMG/pdf/CBP-7404.pdf; Michael Scharf, *How the War Against ISIS Changed International Law*, (2016).

[35] United Nations Charter, 2(1) (1945), https://treaties.un.org/doc/publication/ctc/uncharter.pdf.

border between Burkina Faso and Mali based on the French colonial borders.[36]

Notably, the case *Land and Maritime Boundary Between Cameroon and Nigeria* notes that "the fundamental principle of respect for frontiers inherited from colonization [is] *uti possidetis juris*" and other relevant commitments.[37] Other decisions, such as the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, have also recognized the importance of *uti possidetis juris*.[38] Professor Malcolm Shaw, Professor of International Law at the University of Leicester, has written that the principle of *uti possidetis juris* means that "a new state has the boundaries of the previous entity." [39]

The Montevideo Convention on the Rights and Duties of States (1933) is a document of customary international law that lays out the requirements for a state to be granted statehood according to international law.[40] The Convention enumerates that for a state to be considered a state under international law, it must have "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[41]

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[36] Case Concerning the Frontier Dispute, ICJ 21–22 (1986), https://www.icj-cij.org/sites/default/files/case-related/69/069-19861222-JUD-01-00-EN.pdf.

[37] The Land and Maritime Boundary Between Cameroon and Nigeria, ICJ 18d (1998), https://www.icj-cij.org/sites/default/files/case-related/94/094-19980611-JUD-01-00-EN.pdf.

[38] Land, Island and Maritime Frontier Dispute, ICJ (1992), https://www.icj-cij.org/sites/default/files/case-related/75/075-19920911-JUD-01-00-EN.pdf.

[39] Malcolm Shaw, International Law 450 (9th ed. 2021).

[40] DJ Harris, Cases and Materials on International Law (6th ed. 2010).

[41] Montevideo Convention on the Rights and Duties of States, 1 (1933).

V. Palestine and the Montevideo Criteria

There are two paths set out in international law—as previously explained—that Israel could use to justify its invasion of Gaza. The first is a determination that it benefits from a right of self-defense, and the second involves establishing a connection between previous customary law on terrorism and Hamas, without relying on the doctrine of self-defense.

Although both Judge Higgins and Professor Lowe offer insight into the view that the right of self-defense may come from a non-state actor, in the interest of a strengthened argument, the remainder of the article will proceed on the basis of the majority's reasoning in the International Court of Justice's Wall Advisory Opinion.[42] Under that reasoning, the right of self-defense outlined in Article 51 of the UN Charter must be self-defense from a state. It is also worth mentioning that it does not matter whether the state is a member of the United Nations per UNGA Resolution 3314.[43] The determining factor, therefore, is whether Gaza is a state—which would include being part of a more comprehensive state—or not.

There is considerable debate among legal scholars on whether to consider Palestine a state under international law.[44] Within the pre-trial proceedings of an International Criminal Court case to determine whether Palestine is a state, Professor Malcolm Shaw claimed that "Palestine is not a state according to international law as it does not conform with the

[42] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, at 33 (separate opinion of Judge Higgins); Vaughan Lowe, *Principles of International Law on the Use of Force by States in Self-Defense*, 22 (2005); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 139.
[43] Definition of Aggression, U.N. GAOR (1974).
[44] Errol Mendes, *Statehood and Palestine for the Purposes of Article 12(3) of the ICC Statute*.

internationally recognized Montevideo criteria."[45] However, in the same case, the opposition argued for a more lenient application of the Montevideo criteria in determining whether Palestine is a state, which could allow it to fulfill the definition.[46] One way or another, however, in determining whether Palestine is a state that includes Gaza, one must deploy the Montevideo principles.[47]

The first point, a permanent population, is easy to prove—the population of Gaza in 2002 was about 1.1 million and about 2.1 million in 2023.[48] However, it is trickier for a Palestinian "state" in Gaza to prove it has a defined territory in accordance with the second criteria. In demonstrating a defined territory, it must be shown that the "territory is both the object of the State's right and the space within which its sovereignty and jurisdiction are exercised," as accepted by Professor Shaw.[49] Therefore, it is important to definitely determine the de facto (based on the reality) and de jure (based on laws) ruler of Gaza. The borders of the British Mandate on May 14, 1948, included the Gaza Strip as delineated in an agreement between the Ottomans and British-ruled Egypt in 1906. This was further confirmed in a speech in 1925 by the British Minister of State where he said that "the line dividing the territories under Egyptian and Turkish administration [was] defined in 1906 by

[45] Malcolm Shaw, Situation in the State of Palestine, https://legal-tools.org/doc/p5ixh2/pdf/.
[46] Office of the Prosecutor, Situation in the State of Palestine, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01746.PDF.
[47] Montevideo Convention on the Rights and Duties of States.
[48] The West Bank and Gaza: A Population Profile, (2002), https://www.prb.org/resources/the-west-bank-and-gaza-a-population-profile/; Gaza Strip, (2024), https://www.cia.gov/the-world-factbook/countries/gaza-strip/#people-and-society.
[49] Malcolm Shaw, Title to Territory in Africa: International Legal Issues (1986), 15.

a boundary commission and has not since been modified."[50] Using the aforementioned principle of *uti possidetis juris*, the Gaza Strip de jure belongs to Israel because the Palestinians only made a declaration of independence in 1988, whereas Israel did so on May 14, 1948, at the termination of the Mandate.[51]

Some may claim that Egypt continued the colonization of Gaza and therefore, the principle of *uti possidetis juris* cannot apply; however, this view is fundamentally wrong. Only in February 1949, nine months after Israel's declaration of independence, did Egypt officially gain control over Gaza through an armistice agreement.[52] But, this armistice agreement "is not to be construed in any sense as a political or territorial boundary," meaning that under the principle of *uti possidetis juris*, Egypt's control of Gaza has no effect on Israel's borders.[53] Furthermore, in 1979, Egypt and Israel signed a peace treaty whereby "the permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine … without prejudice to the issue of the status of the Gaza Strip."[54] While this peace treaty recognizes a special status for Gaza, this does not jeopardize the principle of *uti possidetis juris*. Using this principle, Israel could be the only inheritor of the

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[50] XX Reports of International Arbitral Awards: Case concerning the location of boundary markers in Taba between Egypt and Israel, 24–25, 114–116 (1988), https://legal.un.org/riaa/cases/vol_xx/1-118.pdf.

[51] Palestinian National Council Declaration of Independence, (1988), https://fmep.org/wp/wp-content/uploads/2015/01/PNC-declaration-of-independence.pdf; Declaration of Israel's Independence, (1948), https://avalon.law.yale.edu/20th_century/israel.asp.

[52] Armistice Agreement Between Egypt and Israel, (1949), https://documents.un.org/doc/undoc/gen/nl4/914/45/pdf/nl491445.pdf?token=Oo9YV9LqmAevgIPshD&fe=true.

[53] *Id.* at V(2).

[54] Peace Treaty Between the State of Israel and the Arab Republic of Egypt, II (1979).

territory based on the preceding information and the fact that Israel and Egypt signed the peace treaty nine years before a Palestinian declaration of independence.[55]

Others argue that the Israeli withdrawal from Gaza in 2005 indicates a loss of Israel's de jure status over the Gaza Strip. However, the Israeli Cabinet Resolution detailing the withdrawal never mentioned a loss of de jure status and maintained Israeli operational capabilities within Gaza.[56] Therefore, a Palestinian state in Gaza failed on this point—a defined territory—of the Montevideo Convention.

The third criterion in the Montevideo Convention, the existence of a government, is also tricky to establish, especially within Gaza. The challenges arise because the PLO "has been recognized as the sole legitimate representative of the Palestinian people" by the Arab League.[57] However, since 2006, Hamas has been controlling Gaza, and the PLO, primarily controlled by the Palestinian Authority, has not been able to exercise its rule over Gaza.[58] A more accurate presentation would be to label it as controversial whether a

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[55] Palestinian National Council Declaration of Independence, (1988), https://fmep.org/wp/wp-content/uploads/2015/01/PNC-declaration-of-independence.pdf

[56] The Cabinet Resolution Regarding the Disengagement Plan, (2004), http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/revised%20disengagement%20plan%206-june-2004.aspx; I acknowledge that Israel does not claim sovereignty over Gaza, however this does not make any substantive differences in Israel's de jure status over the territory.

[57] Salem Barahmeh, *The Palestinians, the PLO, and Political Representation: The Search for Palestinian Self-Determination*, (2014), https://icsr.info/wp-content/uploads/2014/07/ICSR_Atkin-Series_Salem-Barahmeh.pdf.

[58] Kali Robinson, *Who Governs the Palestinians*, (2024).; Ian Slesinger, *The Limits of Control: Technological Agency, Urban Terrain, Strategy and the State in the 2014 Gaza War*, Political Geography (2022); Yezid Sayigh, *Hamas Rule in Gaza: Three Years On*, Brandeis University Crown Center for Middle East Studies (2010).

Palestinian state in Gaza fulfills the third criterion due to the lack of a well-established government.

The last point in the Montevideo Criteria is much easier to prove, irrespective of the controversial status of whether the PLO or Hamas governs Gaza. The PLO has observer status in the United Nations and diplomatic representation in about ninety countries.[59] Hamas has definite relations with Qatar and Turkey and suspected relations with several other countries, thereby demonstrating its ability to enter into relations with foreign states.[60]

While not explicitly a document of customary law, the European Political Cooperation Declaration on the Recognition of New States in Eastern Europe and the Soviet Union states that unless a new state commits itself "to the rule of law … the Community and its Member States will not recognize" the state.[61] This statement has led individuals such as Tal Becker, legal advisor for the Israeli Ministry of Foreign Affairs, and Professor Robbie Sabel, professor of International Law at the Hebrew University of Jerusalem, to believe that, "even if the Palestinian entity were to meet those [Montevideo] criteria, the illegality associated with its current unilateral claim to statehood demands that recognition be withheld."[62] The

[59] General Assembly resolution 3237, (1974). List of Diplomatic Missions in Palestine & Palestinian Diplomatic Missions abroad, https://www.embassy-worldwide.com/country/palestine/.

[60] Mirren Gidda, *Hamas Still Has Some Friends Left*, (2014), https://time.com/3033681/hamas-gaza-palestine-israel-egypt/; Henri Barkey, *Turkey, the United States, and the Israel-Hamas War*, (2023), https://www.cfr.org/article/turkey-united-states-and-israel-hamas-war.

[61] Statement by an extraordinary EPC Ministerial Meeting concerning the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," (1991), http://aei.pitt.edu/36871/1/A2880.pdf.

[62] Tal Becker, *International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas*, https://www.jcpa.org/art/becker2.htm.; Robbie Sabel, International Law and the Arab-Israeli Conflict i, 397 (2022); Jeremy Sharon, *Israel Rejects*

illegality that Becker and Sabel refer to is the violations of the Oslo Accords if the Palestinians establish a Palestinian state unilaterally.

The Oslo Accords were a series of peace agreements between Israel and the Palestinian Liberation Organization (PLO) in the 1990s.[63] Professor Watson, former attorney-advisor in the U.S. Department of State and professor of international law, regards the Oslo Accords as "binding international agreements."[64] Unilaterally establishing a Palestinian state would violate the portion of the Oslo Accords stipulating that the Palestinian National "Council will not have powers and responsibilities in the sphere of foreign relations," which would be covered by Israel. Thus, unless Israel gives explicit permission for a Palestinian state, it would be illegal under the Oslo Accords.[65] The Oslo Accords also state that "neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip."[66] The unilateral establishment of a Palestinian state would clearly change the status of the territory that this state occupies. Although the merits of a Palestinian state fulfilling the Montevideo Criteria and whether a Palestinian state is legal are unconvincing due to the aforementioned disagreement on this topic, it is still important to discuss the legality of Israel's invasion, assuming that a Palestinian state exists in Gaza.

Genocide Claims at The Hague, Says South Africa's Allegations "Baseless," Jan. 12, 2024.

[63] Oslo Accords, (2024), https://www.britannica.com/topic/Oslo-Accords.

[64] Geoffrey Watson, The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements (200AD), 101.

[65] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Chapter 1 Article IX (5)(a), Chapter 3 Article XVII (4) (1995).

[66] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Chapter 5 Article XXXI (7) (1995).

VI. The Legality of Israel's Invasion

As previously explained, there are two possible Palestinian sovereigns of Gaza: Hamas and the PLO. First, assuming that Hamas is the state sovereign of Gaza, it does not matter that Hamas does not have representation at the United Nations nor official recognition as detailed in UNGA Resolution 3314. One must classify Hamas' attacks on October 7th as an armed attack. Hamas murdered about 1,200 Israelis during this invasion, and Hamas forces occupied specific locations within Israel for at least twenty-four hours.[67] Moreover, the attacking forces reached over thirty kilometers into Israeli territory, reaching Israeli towns as far from the Gaza border as Ofakim.[68] These attacks included about one thousand Hamas fighters and the combined forces of about five different Palestinian armed groups.[69] Moreover, in the first few hours of the Hamas invasion, Hamas fired about three thousand rockets at Israel.[70] As defined in the Nicaragua case, this attack

[67] Tamsin Westlake, *An Analysis of the 7th of October 2023 Casualties in Israel*, (2023), https://aoav.org.uk/2023/an-analysis-of-the-7th-of-october-2023-casualties-in-israel-as-a-result-of-the-hamas-attack/; Michael Bachner & Emanuel Fabian, *Israel Evacuates Civilians From Gaza-Area Towns as Forces Scour for Remaining Gunmen*, The Times of Israel, Oct. 9, 2023, https://www.timesofisrael.com/israel-evacuates-civilians-from-gaza-area-towns-as-forces-scour-for-remaining-gunmen/.

[68] Gil Lewinsky, *Bravery in Ofakim: The Civilians, Police Who Thwarted Hamas Massacre Plan*, Nov. 4, 2023, https://www.jpost.com/arab-israeli-conflict/gaza-news/article-771532.

[69] Daniel Byman et al., *Hamas's October 7 Attack: Visualizing the Data*, (2023), https://www.csis.org/analysis/hamass-october-7-attack-visualizing-data; Abdelali Ragad et al., *How Hamas Built a Force to Attack Israel on 7 October*, (2023), https://www.bbc.com/news/world-middle-east-67480680.

[70] Emanuel Fabian, *IDF: 9,500 Rockets Fired at Israel since Oct. 7, Including 3,000 in 1st Hours of Onslaught*, Nov. 9, 2023, https://www.timesofisrael.com/liveblog_entry/idf-9500-rockets-fired-at-israel-since-oct-7-including-3000-in-1st-hours-of-onslaught/.

is not "a mere frontier incident," but a full-scale invasion, with ground forces assaulting numerous towns, combined with an air and rocket attack.[71] Therefore, assuming that Gaza is a state governed by Hamas, Israel would have the right of self-defense.

The other grounds for an Israeli invocation of the right of self-defense does not depend on identifying a specific sovereign of Gaza. Rather, it depends on an analysis of laws governing state responses to terrorism. The first step is to apply the definition of terrorism to Hamas. Irrespective of the fact that over eight countries and the European Union, have designated Hamas as a terror organization, it is crucial to apply this definition according to international law as opposed to domestic law.[72] For international law to consider an organization a terrorist organization, three criteria must be met:

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[71] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 195.

[72] El gobierno argentino incluirá al grupo Hamás en la lista de organizaciones terroristas, Frente a Cano, Dec. 23, 2023, https://frenteacano.com.ar/el-gobierno-argentino-incluira-al-grupo-hamas-en-la-lista-de-organizaciones-terroristas/.; Hamas to be listed in entirety as a terrorist organisation by Australian government, ABC News, Feb. 17, 2022, https://www.abc.net.au/news/2022-02-17/hamas-palestinian-listed-as-terrorist-group-australia-government/100839262.; Trudeau affirms support for Israel in call with war cabinet member Benny Gantz, City News, Nov. 16, 2023, https://toronto.citynews.ca/2023/11/16/no-canadians-on-updated-exit-list-for-the-rafah-border-crossing-hundreds-still-stuck/.; Daniel Boffey, *EU Court Upholds Hamas Terror Listing*, The Guardian, Jul. 26, 2017, https://www.theguardian.com/world/2017/jul/26/eu-court-upholds-hamas-terror-listing.; Paraguay adds Hamas, Hezbollah to terrorism list, Middle East Monitor, Aug. 20, 2019, https://www.middleeastmonitor.com/20190820-paraguay-adds-hamas-hezbollah-to-terrorism-list/.; Ashlyn Messier, *Israel, Australia, Japan, UK, US, Others Have Officially Designated Hamas a Terrorist Organization*, Fox News, Oct. 13, 2023, https://www.foxnews.com/world/countries-designate-hamas-terrorist-organization.

a criminal act, intent to spread fear or coerce a national or international body to take or refrain from action, and transnationality.[73] International Criminal Court prosecutor Karim Khan remarked that the cruelties that occurred on October 7th led him to have "reason to believe" that Hamas' actions are criminal in nature according to international law.[74] Non-state actors are bound by doctrines of customary international law, including the Geneva Conventions.[75]

Hamas violated Article III of the 1949 Geneva Conventions through "murder … mutilation, cruel treatment and torture; taking of hostages" and more.[76] They murdered over eight hundred civilians on October 7th, raped women, and kidnapped about 240 civilians and soldiers into Gaza.[77] Experts at the Combating Terrorism Center at West Point have determined that Hamas' motivations before, on, and after October 7th are political, seeking to destroy the State of Israel.[78] Moreover, U.S. President Joe Biden believes that Hamas intended to disrupt Israeli-Saudi normalization with the

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[73] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 85.
[74] Yael Freidson, *ICC Prosecutor Calls Oct. 7 Hamas Attack on Israelis "Serious International Crimes,"* Haaretz, Dec. 3, 2023, https://www.haaretz.com/israel-news/2023-12-03/ty-article/icc-prosecutor-calls-oct-7-hamas-attack-on-israelis-serious-international-crimes/0000018c-3069-da74-afce-b5f926bb0000.
[75] Tatiana Londoño-Camargo, *The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts*, Vniversitas 207 (2015).; Legality of the Threat or Use of Nuclear Weapons, ICJ (1996).
[76] The Geneva Conventions of 12 August 1949, III.
[77] Westlake; Bethan McKernan, *Evidence Points to Systematic Use of Rape and Sexual Violence by Hamas in 7 October Attacks*, The Guardian, Jan. 18, 2024, https://www.theguardian.com/world/2024/jan/18/evidence-points-to-systematic-use-of-rape-by-hamas-in-7-october-attacks.; Police say they've identified 859 civilian victims from October 7 massacre, up 16.
[78] Devorah Margolin & Matthew Levitt, *The Road to October 7: Hamas' Long Game, Clarified*, 16 CTC Sentinel (2023).

said attack, indicating that Hamas had political goals.[79] These points answer the second and third criteria for terrorist organizations. Using violence for political purposes fulfills the second criterion; the de facto rulers of Israel and the Gaza Strip are different, thus making Hamas' attacks within the de facto sovereign territory of Israel, a transnational event.[80]

Given that Hamas is a terrorist organization under international law, one can use the customary international law of UNSC Resolution 2249 to prove the legality of Israel's invasion.[81] Since it is legal under international law for one state to attack terror organizations outside of their state, one can also focus on UN Special Rapporteur Philip Alston's aforementioned comments on targeted killings in the territory of another state if that state is "unwilling or unable to stop armed attacks against the first State launched from its territory." [82] While the Israeli invasion is not a targeted killing, this reasoning may help to establish grounds on which to build a legal case to prove the legality of Israel's invasion.[83] Benjamin Netanyahu, the Prime Minister of Israel, and other Israeli defense officials have clearly stated that Israel's ultimate goal in launching the invasion is the elimination of Hamas, which is in line with customary international law.[84]

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[79] Hamas Attack Aimed to Disrupt Saudi-Israel Normalization, Biden Says, Oct. 20, 2023, https://www.reuters.com/world/middle-east/hamas-attack-aimed-disrupt-saudi-israel-normalization-biden-2023-10-20/

[80] Yezid Sayigh, *Hamas Rule in Gaza: Three Years On*, Brandeis University Crown Center for Middle East Studies (2010).

[81] Resolution 2249.

[82] Alston, 35.

[83] Lang.

[84] Chris Brown, *After More than 3 Months of Fighting, Even Small Victories for Israel Are Elusive*, CBC, Jan. 20, 2024; https://www.cbc.ca/news/world/israel-war-goals-unachieved-1.7087509#:~:text=have%20been%20elusive.-,War%20aims,a%20news%20conference%20on%20Saturday; Matt Gutman, *Israeli Defense Minister Predicts 2 More Months of War, Then "Mop Up,"* ABC News, Dec. 6, 2023,

Some may argue that based on the International Court of Justice Wall Advisory Opinion, Israel does not benefit from a right of self-defense because Israel does not recognize a Palestinian state. Hence, the argument may go, the invasion is not legal.[85] However, this ruling is not fully relevant because the ruling was decided well before the development of the customary doctrine on dealing with terrorism in 2015, and the remarks by Special Rapporteur Philip Alston in 2010. This new evidence demands a fresh understanding of Israel's rights in dealing with terror.[86]

VII. Conclusion

Based on current standing international laws and rules governing conflict, it is apparent that Israel's invasion of Gaza on October 27, 2023 is legal under international law. Since Gaza is not part of a Palestinian state, Israel does not benefit from the traditional understanding of self-defense. However, recent expansions in customary international law, as well as the opinions of Special Rapporteur Philip Alston, legally substantiate Israel's invasion of Gaza, even if Gaza is not a state in the traditional sense. Although Israel's invasion may be legal under international law, this article makes no comment on the legality of Israel's conduct during the war. This war has harmed thousands of Israelis and Palestinians. Moreover, there is no clear end in sight.[87] Hopefully, this article can aid those seeking to understand the legality of Israel's invasion by

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https://abcnews.go.com/International/israeli-defense-minister-predicts-2-months-war-mop/story?id=105377308.

[85] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 139.

[86] Resolution 2249, 17.; Alston, 35.

[87] Police say they've identified 859 civilian victims from October 7 massacre, up 16; Mounting death tolls in Gaza, war could take months - WSJ, The Jerusalem Post, Dec. 25, 2023, https://www.jpost.com/israel-hamas-war/article-779421.

showing that it is legal under current understandings of international law regarding self-defense.

States of Emergency: The History and Legal Ramifications

Maia Katsnelson[88]

Emergencies happen globally on a daily basis, underscoring the pivotal role of governmental responses in managing these situations. The extent of a government's ability, specifically its Executive branch, to respond to an emergency can be a determining factor in disaster mitigation and future government stability. In the US, the power of the executive branch has been a longstanding issue, evident in the founders' aim to limit it and prevent a new monarchy in the Early Republic. Despite their intentions, this article highlights the significant increase of executive branch authority during times of emergencies. To explore the historical and legal foundations of State of Emergency jurisprudence, this article details how this concept developed across Europe, but more specifically in the United States. Lastly, further reforms to the doctrine as it is practiced in the United States are proposed.

I. Introduction

Pages upon pages of history books describe catastrophes: wars, disease, famine, and terror. Human suffering is thereby processed, recounted, cataloged, and taxonomized. This article addresses what often becomes occluded in retrospection, namely the immediate response to emergencies, rather than the eventual outcome. The expansion of governmental power in the aftermath of a disaster is the subject of this investigation.

The concept of a “State of Emergency” has existed for centuries without consensus on the limit of government power

[88] Brandeis University Undergraduate, Class of 2026.

during such times.[89] Cornell's Legal Dictionary defines the legal concept as "a government declaration stating that because of some crisis, the normal workings of political and social life are suspended in the given jurisdiction. A state of emergency may alter government operations, order specific action by individuals, and suspend regular civil rights."[90]

States of Emergency have recently come to the forefront of the news cycle due to events such as the COVID-19 Pandemic, the war in Ukraine, and, most recently, the October seventh terror attacks by Hamas militants on Israel. This article addresses how the U.S. and European countries have grappled with questions such as: what constitutes a State of Emergency, which constitutional procedures and personal liberties can a government suspend, and how long can a State of Emergency last? This article also proposes a mechanism by which Congress can place necessary limits on executive power during States of Emergency and proposes narrowing the definition of the concept.

II. Historical Perspective

A. Europe

Modern invocations of States of Emergency originate from the legal traditions of democracies in nineteenth-century Western Europe.[91] The concept traces back to the ancient Roman practice of designating an *auctoritas,* a dictator, in times of external attack or rebellion within the republic.[92] The *auctoritas* had the power to grant or suspend laws and operate

[89] Scott P Sheeran, *Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34.
[90] State of emergency | Wex |U.S.Law | LII / Legal Information Institute, https://www.law.cornell.edu/wex/state_of_emergency (last visited Nov 26, 2023).
[91] Scott P Sheeran, *supra* note 89.
[92] *Id.*

outside the *potesta* (the normal binding power of law).[93] In the eighteenth and nineteenth centuries, European states began to codify this Roman tradition into modern law.

The French Revolution constituted the most prominent European event that worked to establish the modern understanding of States of Emergency. The French revolutionaries proposed the idea of suspending the Constitution in response to a great danger.[94] Subsequently, in 1848, the Second French Republic created a new article for its Constitution, which formalized the definition of a "state of siege."[95] The post-Enlightenment definition was, therefore, born in a short-lived democratic historical moment.

Historically, States of Emergency have often been swiftly followed by dictatorships, human rights abuses, and the breakdown of constitutional government. The twentieth century saw a proliferation of States of Emergency, especially during the World Wars.[96] Governments worldwide took extraordinary measures, from rationing to censorship, to address wartime challenges.[97] However, this era also witnessed

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[93] Botha, Marc "Review: Untitled", Review of: State of Exception by Giorgio Agamben, Kevin Attell, *Oxford Literary Review*, vol. 31, No. 2, pp. 255-259.

[94] Giordanengo, Davide "The State of Exception", June 21, 2016, https://www.e-ir.info/pdf/63909.

[95] The Second French Republic is defined by Britannica as the republic established after the revolution which lasted from 1848-1852; Agamben, Giorgio, "The State of Exception" (Kevin Attell trans., Univ. of Chi. Press 2005) (2003). Article 14 of the Constitution granted the government the power to "make the regulations and ordinances necessary for the execution of the laws and the security of the State" and the Acte Additional to the Constitution first mentioned a "state of siege"; Sheeran, Scott P. "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics" *Michigan Journal of International Law*, vol. 34, Issue 3, pp. 491-557.

[96] Arend Lijphart, *Emergency Powers and Emergency Regimes: A Commentary*, 18 Asian Survey 401 (1978).

[97] *Id.*

State of Emergency misuse, with some regimes using the doctrine to justify the suppression of political opposition.[98] Notably, the breakdown of constitutional government in the Weimar Republic, Germany 1918, was partly due to the abuse of States of Emergency declarations.[99] Article 48 of the Weimar Constitution described the emergency powers of the president, stating that the president protects against great threats with "measures necessary to reestablish law and order, if necessary using armed force and including the suspension of a particular and limited set of rights."[100] The drafters of the Weimar Constitution attempted to prevent a situation in which a ruler could take advantage of the State of Emergency laws, but these attempts failed. Article 48 was invoked approximately 250 times throughout the relatively brief lifetime of the Weimar Republic.[101] Once Adolf Hitler and the Nazi Party rose to power, they suspended all articles of the Weimar Constitution pertaining to personal liberties.[102] Weimar politicians had made a major mistake–they had "normalized" emergencies. It was all the easier therefore for Nazi's to end Constitutional norms entirely.

B. The United States

The United States played a key role in establishing States of Emergency as a feature in the modern rule of law. Since President Abraham Lincoln's administration and his suspension of *habeas corpus* during the Civil War, U.S. history

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[98] *Id.*
[99] *Id.*
[100] The Reich Constitution of August 11th 1919 (Weimar Constitution) with Modifications, PSM DATA, http://www.zum.de/psm/weimar/weimar-vve.php.
[101] Sheeran, Scott P. "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics" *Michigan Journal of International Law*, vol. 34, Issue 3, pp. 491–557.
[102] *Id.*

is riddled with instances of Executive use of emergency powers.[103]

The Alien and Sedition Acts of 1798 were a defining moment in the codification of emergency powers. Although a formal State of Emergency was not declared at the time, the United States stood on the brink of the Quasi-War with France, a limited naval conflict centered on American trading rights.[104] The Federalist government of the time, afraid the Democratic-Republic criticism of Federalist policies would endanger the war effort and that 'aliens' who were subjects of foreign enemies would sympathize with the French during the conflict, passed four laws known as the Alien and Sedition Acts.[105] The president at the time, John Adams, criminalized criticism of his party through these acts, specifically through The Sedition Act.[106] Freedom of the press was the main freedom curtailed by the Sedition Act which stated that: "if any

[103] Habeas corpus ad subjiciendum | Wex |U.S.Law | LII / Legal Information Institute, https://www.law.cornell.edu/wex/habeas_corpus_ad_subjiciendum (last visited Nov 28, 2023)., defined as ""that you have the body to submit to" in Latin. It is also known as the "Great Writ" and is a writ that is directed to someone detaining another person to inquire as to the legality of the detention; Declared National Emergencies Under the National Emergencies Act | Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act (last visited Nov 28, 2023).

[104] The Quasi-War with France (1798 - 1801), USS Constitution Museum, https://ussconstitutionmuseum.org/major-events/the-quasi-war-with-france/ (last visited Dec 6, 2023).

[105] Alien and Sedition Acts (1798), National Archives (2021), https://www.archives.gov/milestone-documents/alien-and-sedition-acts (last visited Dec 6, 2023).

[106] The Alien and Sedition Acts (1798) | Constitution Center, https://constitutioncenter.org/the-constitution/historic-document-library/detail/the-alien-and-sedition-acts-1798 (last visited Dec 6, 2023); Avalon Project - An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States, https://avalon.law.yale.edu/18th_century/sedact.asp (last visited Dec 6, 2023).

person shall write, print, utter or publish [...] any false, scandalous and malicious writing or writings against the government of the United States, [...], or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, [...] shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."[107] This is a clear restriction of First Amendment free speech and an expansion of executive power during a time of national emergency, although it was not considered as such by President Adams in 1798. These Acts and the subsequent Sedition Act Trials led to a sharp increase in criticism of the Federalist Party and contributed to their defeat in 1800.[108] When Thomas Jefferson won the presidency in 1800, the Acts expired and he pardoned those convicted under them.[109]

There were other instances in the past 200 years which include the suspension of *habeas corpus* under President Lincoln, the Espionage Act of 1917 and the amendment to Title I of the Act - the Sedition Act of 1918 which curtailed free speech rights during war-time.[110] Additionally, President Franklin Delano Roosevelt declared an Unlimited National Emergency in May of 1941.[111]

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[107] *Id.*
[108] Alien and Sedition Acts (1798), *supra* note 105.
[109] The Alien and Sedition Acts (1798) | Constitution Center, *supra* note 106.
[110] Espionage Act of 1917 and Sedition Act of 1918 (1917-1918) | Constitution Center, National Constitution Center – constitutioncenter.org, https://constitutioncenter.org/the-constitution/historic-document-library/detail/espionage-act-of-1917-and-sedition-act-of-1918-1917-1918 (last visited Feb 11, 2024).
[111] Radio Address Announcing an Unlimited National Emergency. | The American Presidency Project, https://www.presidency.ucsb.edu/documents/radio-address-announcing-unlimited-national-emergency (last visited Feb 11, 2024).

In 1976, the U.S. Congress passed the National Emergencies Act (NEA), which created a time limit on existing declared States of Emergency.[112] It also included termination methods for a State of Emergency, such as the "automatic termination of national emergency upon its anniversary every year, if the President does not act to renew it."[113] The NEA aimed to formalize the process of declaring and renewing the State of Emergency.[114]

III. Legal Framework

A. Constitutional Provisions

Modern constitutions often contain provisions for States of Emergency.[115] For instance, the U.S. Constitution allows for the suspension of *habeas corpus* "when in Cases of Rebellion or Invasion the public safety may require it."[116] This principle was called into question in 2001 after the terror attacks on September eleventh, 2001. On November twelfth, 2001, President George W. Bush issued a military order to protect the United States from terrorist attacks, terrorists, or those in any

[112] 50 USC Ch. 34: NATIONAL EMERGENCIES, https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter34&edition=prelim (last visited Nov 26, 2023).
[113] Emergency powers | Wex | US Law | LII / Legal Information Institute, https://www.law.cornell.edu/wex/emergency_powers (last visited Nov 26, 2023).
[114] Michael Greene, *National Emergencies Act: Expedited Procedures in the House and Senate*, February 21, 2023.
[115] States of Emergencies: Part I, Harvard Law Review, https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/ (last visited Mar 5, 2024). "Over 90% of constitutions in force today include emergency clauses that allow the government to step outside of the ordinary constitutional framework and to take actions that would not otherwise be permitted."
[116] U.S.Const., Article 1, Section 9.

way affiliated or suspected to be affiliated with Al-Qaeda.[117] The government could detain and try those suspected of being affiliated with Al-Qaeda without applying "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[118] This order led to a landmark case, *Hamdan v. Rumsfeld,* in 2006, which raised questions about the limits on Executive power.[119]

In the case, Salim Ahmed Hamdan was captured by militia forces in Afghanistan and turned over to the U.S. military, after which he was transferred to the Guantanamo Bay military detention center.[120] In April of 2004, Hamdan petitioned for a writ of *habeas corpus* in federal district court. However, before the court could rule on his petition, a military tribunal designated him as an enemy combatant.[121] The district court granted Hamdan's petition and ruled that he must be allowed a hearing to determine his status as a prisoner of war under the Third Geneva Convention before he could be tried by a military tribunal.[122] This decision was reversed by the Circuit Court of Appeals for the District of Columbia with the rationale that the Geneva Convention could not be enforced by federal courts and that the military tribunals were authorized by Congress and were therefore not unconstitutional.[123]

The Supreme Court held, in a 5-3 decision, that the Bush Administration's attempt to try a prisoner of war (the plaintiff) by a military commission was outside the bounds of

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[117] President Issues Military Order, https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html (last visited Nov 26, 2023).
[118] *Id.*
[119] Hamdan v. Rumsfeld, Oyez, https://www.oyez.org/cases/2005/05-184 (last visited Nov 28, 2023).
[120] Peter J. Spiro, *Hamdan v. Rumsfeld. 126 S.Ct.2749*, 100 Am. J. Int. Law 888 (2006).
[121] Hamdan v. Rumsfeld, *supra* note 119.
[122] *Id.*
[123] *Id.*

executive powers and violated the constitutional rights of the plaintiff.[124] This decision imposed a clear limit on emergency executive authority. However, this constraint was soon disregarded when Congress passed the Military Commissions Act (MCA) in 2006, eliminating the right of *habeas corpus* to prisoners at Guantanamo Bay and other detainment facilities.[125]

B. Powers Granted to Government during Emergencies

The United States Constitution does not detail any extraordinary executive powers in times of emergency or war. However, many scholars believe that the Framers implied these powers by creating an Executive Branch that is more efficient than the Legislative Branch.[126] For this reason, Congress passed the NEA, granting the president 123 statutory powers during a declared emergency—ensuring that during a national emergency, decisions could be made quickly and efficiently to protect the nation.[127] Seven years later, the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha* emphasized a check to emergency executive power by restating the traditional position that Congress can not veto an administrative decision with a majority vote, a two-thirds

[124] Office of the Solicitor General | Hamdan v. Rumsfeld - Brief (Merits) | United States Department of Justice, (2014), https://www.justice.gov/osg/brief/hamdan-v-rumsfeld-brief-merits (last visited Nov 27, 2023); *Hamdan v. Rumsfeld*, United States Reports, June 29, 2006; NCC Staff, "Hamdan v. Rumsfeld: Applying the Constitution to Guantánamo prisoners", June 19, 2017.
[125] Legal Resources | Intelligence Committee, https://www.intelligence.senate.gov/laws/military-commissions-act-2009-title-xviii-national-defense-authorization-act-fiscal-year-2010 (last visited Nov 28, 2023).
[126] Emergency powers, *supra* note 113.
[127] Executive Powers Are a National Emergency - Harvard Political Review, https://harvardpolitics.com/executive-powers-emergency/ (last visited Nov 26, 2023).

majority is required in order to override executive power.[128] Although this ruling established a greater balance between Executive and Legislative powers, it still did not impose a significant enough limit of Executive power. This "legislative veto" that was reinforced for the NEA following the *Chadha* decision, has led to a situation where it is nearly impossible to collect enough votes to block declarations of emergencies.[129]

Individual states in general have their own separate laws relating to States of Emergency. In times of crisis, the governor has the power to declare a State of Emergency, at which point executive powers are increased. However, state legislatures generally have relatively strong checks on executive power, even in exigent circumstances.[130] For example, state laws on executive authority cannot be changed by an executive order, and legislatures can create firm limits on executive power.[131] These widespread checks demonstrate that bulwarks against growing executive power are a crucial

[128] Immigration and Naturalization Service v. Chadha, United States Reports, June 23, 1983. This case called into question a section of the Immigration and Nationality Act which allowed either House of Congress to suspend the deportation rulings of the U.S.Attorney General. The Constitutional question was whether the separation of powers doctrine was violated by authorizing a veto of executive power from only one House of Congress. The decision was 7-2, the Court held that the Immigration and Nationality Act did in fact violate the Constitution. The consequences of this were that Congress essentially needed a two-thirds majority to override executive power because a simple majority in both Houses would be vetoed by the President.

[129] Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution—And What to Do About It, N.Y.U. Review of Law & Social Change (2020), https://socialchangenyu.com/harbinger/trust-the-process-how-the-national-emergency-act-threatens-marginalized-populations-and-the-constitution-and-what-to-do-about-it/ (last visited Mar 5, 2024).

[130] Legislative Oversight of Emergency Executive Powers, https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers (last visited Nov 26, 2023).

[131] *Id.*

component of preserving the necessary balance of power between the arms of the government of a constitutional republic.

IV. Proposed Reforms

During times of crisis, a fine line must be walked by the Executive branch as to the extent of its powers. However, without proper limits and regulations on Executive emergency powers, there is no guarantee that the Executive branch *will* limit its powers.

> "As long as the two elements [law and life] remain correlated yet conceptually, temporally, and subjectively distinct ... their dialectic [...] can nevertheless function in some way. But when they tend to coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, the juridico-political system transforms itself into a killing machine."[132]

The dangers of an unlimited government cannot be understated. Our current system allows for a situation in which the president seizes considerable power under the guise of protecting the nation against an emergency.[133] To address this problem, Congress ought to create a set definition, and/or series of conditions, for declaring a State of Emergency. This would remedy the potential concern that the Executive branch can declare an emergency during a non-emergent situation. However, defining such a broad concept is a difficult feat and Congress would have to create and pass a law that defines and

[132] Agamben, Giorgio, "The State of Exception" (Kevin Attell trans., Univ. of Chi. Press 2005) (2003), 86.
[133] Executive Powers Are a National Emergency - Harvard Political Review, *supra* note 127.

narrows emergency powers. Some disasters are completely unexpected and cannot be anticipated in such a way. In such a case, there should be a condition that Congress must approve of the determination of a State of Emergency. This would prevent unnecessary renewals of States of Emergency and ensure that our rulers cannot take liberties with emergency powers.

V. Conclusion

A potentially dangerous situation is created when the Executive Branch is granted an exceeding amount of power during any national emergency. The argument that this discretion increase is necessary as it expedites a usually lengthy decision-making process during circumstances in which time is often finite, willfully ignores the threat of unrestrained presidential power. Regardless of conditions, unchecked executive power is a threat to democracy.

Delineating between necessary and superfluous power in times of calamity is a difficult job, but one the American legislature must take head-on, considering the history of rampant abuse of emergency executive power.[134] The 100-plus powers granted to the president during a declared State of Emergency include giving the president the power to deploy U.S. troops to any foreign country, take over domestic communications, and seize American bank accounts.[135] These powers are enormously broad and, without proper oversight,

[134] States of Emergencies: Part I, Harvard Law Review, https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/ (last visited Mar 5, 2024).

[135] Elizabeth Goitein, Joseph Nunn, "Emergency Powers", Brannan Center for Justice, https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers.

can easily be abused by over-ambitious politicians.[136] Although the NCA exists as a sort of safeguard, it is not strong enough to place adequate restrictions on emergency executive powers—mainly because it fails to define what qualifies as an emergency.[137] The NCA grants a president the power to declare a State of Emergency simply by signing an executive order. Although the law creates a semi-time limit for these powers, it allows the president to renew the State of Emergency status indefinitely.[138]

The checks and balances put in place by the founding fathers must be protected from erosion. Separation of powers is key to maintaining a limited executive branch, without which there is a danger of dictatorial power. The current legislative framework, while designed with the intention of swift and decisive action in times of crisis, also fails to ensure an equilibrium between executive agility and legislative oversight. Such a balance is crucial not only for safeguarding democratic principles, but also for maintaining public trust in governmental institutions. The development and implementation of stricter guidelines and definitions of States of Emergency would serve as a vital step toward mitigating the risk of abuse. The ultimate goal should be the creation of a framework that allows for the effective management of crises while simultaneously protecting the democratic freedoms and liberties of the United States.

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[136] Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution—And What to Do About It, *supra* note 129.
[137] *Id.*
[138] 50 USC Ch. 34: NATIONAL EMERGENCIES, https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter34&edition=prelim (last visited Nov 26, 2023).

Coverture: For the Benefit of All Man[kind]

Audrey Kiarsis[139]

Coverture was a central facet of 18th and 19th-century jurisprudence and legal thinking. Coverture stipulated that upon entering into a marriage contract, the legal identity of a wife would be entirely subsumed by that of her husband. At a time when the courts, both state and federal, often functioned as agents of marginalization, coverture was presented as a system intended to protect and provide for the very women it legally incapacitated. This paper examines the motivations behind coverture, how it perpetuated a patriarchal society devoid of female socio-political mobility, and its practical consequences in legal precedent and doctrine.

I. Introduction

William Blackstone writes in his 1769 *Commentaries on the Laws of England*:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and {...} is said to be {...} under the protection and influence of her husband {...}; and her condition during her marriage is called her coverture.[140]

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[139] Brandeis University Undergraduate, Class of 2025.

[140] Sir William Blackstone, renowned 18th Century English legal scholar and philosopher, upon whose writings the U.S. Constitution was heavily based; William Blackstone, Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765-1769 15 (1979), https://press.uchicago.edu/ucp/books/book/chicago/C/bo3636418.html (last visited Nov 30, 2023).

This "coverture" was a facet of the common law until the mid-late 19th century. At its core, coverture was the absorption of the complete legal identity of a wife into that of her husband. By modern legal standards, this may appear drastic; however, coverture prevailed throughout American law for decades, with roots in English common law.[141] Legislators, judges, and lawyers who were instrumental in perpetuating this practice often justified it based upon the assumed ineptitude of women.[142] Such assumptions regarding female ineptitude were enough to warrant that their care be placed solely in the hands of one better equipped to guide and manage them throughout their life.[143] However, the question regarding whether coverture was enacted and maintained with the best interests of women in mind, namely their reproductive and homemaking capacities, remains unclear.

As distressing as it may be, one must consider if coverture was merely wielded as a tool by which a disingenuous patriarchy could keep women in a state of permanent subjugation and legal incapacitation. While outright discrimination against women on the basis of sex alone would be blatantly unconstitutional by today's standards, the law could very well have provided an alternative avenue to perpetuate such subjugation. Under the guise of due process, and with foundations in both 18th century English legal doctrine and American jurisprudence, subjugation was lent a measure of constitutionality, allowing proponents to surmount objections of arbitrariness and discrimination.[144]

This paper begins by exploring 19th century legal documents and court opinions detailing how coverture was treated by the judges and legal professionals that put it into

[141] Blackstone, *supra* note 140.
[142] BARNES' LESSEE v. IRWIN, 2 U.S. 199 (1793), Justia Law, https://supreme.justia.com/cases/federal/us/2/199/ (last visited Dec 6, 2023).
[143] *Id.*
[144] Blackstone, *supra* note 140.

practice, followed by an examination of writings from some of the philosophical and feminist minds who argued against it. Court opinions and legal documents lay the groundwork for establishing the true intentions behind coverture and its supporters by providing a sample of the rationale shared in its defense. The writings to follow, those authored by the very women subject to coverture's limitations, will hold a mirror to the preceding justifications and reveal whether or not they conveyed the purported benefits. In seeking answers to these questions of intent and legality, special attention is paid to court cases, judicial opinions, and articles by legal scholars and professionals, as these are the few perspectives properly informed on the law with an adequate grasp of its history and nuances.

Upon the conclusion of these examinations, it ought to be apparent that the true impacts of coverture were *not* in the interest of women, nor were they ever intended to be. Rather, coverture was a re-packaging of patriarchal values and white, upper-middle class, male socio-political dominance, designed to pass as constitutional legislation under the guise of American legal doctrine.[145]

II. The Fragility of the Feminine

Coverture was first formally conceptualized by Blackstone, in *Book the First: Chapter the Fifteenth: Of Husband and Wife* of his *Commentaries on the Laws of England*, yet he offers little decisive explanation as to why such a system not only exists but is needed in the first place. Fortunately, surviving texts serve to illustrate the thoughts of philosophical and legal scholars on the subject of coverture and

[145] Review of The Law of Infancy and Coverture; Traités du Contrat de Mariage, de la Puissance du Mari, du Contrat de la Communauté, et du Douaire, Pothier, 26 North Am. Rev. 316 (1828), https://www.jstor.org/stable/25102704 (last visited Dec 6, 2023).

the female sex at various points throughout the 18th and 19th centuries. John Stuart Mill, widely considered to be the greatest English-language philosopher of the 19th century,[146] wrote on this very subject.[147] He, like many during the 18th and 19th centuries, wholeheartedly believed that women belonged in a place of total subjugation and dependence upon men.[148] This is especially evident in his 1870 pamphlet entitled *The Subjection of Women*, where he writes:

> It had been decided, on the testimony of experience, that the mode in which women are wholly under the rule of men, having no share at all in public concerns, and each in private being under the legal obligation of obedience to the man with whom she has associated her destiny, was the arrangement most conducive to the happiness and well being of both.[149]

Mill asserts that the state most conducive to the satisfaction of men and women alike is the latter's complete dependence upon, and allegiance to, the former. While coverture is not mentioned outright in this passage, this allusion to a "legal obligation of obedience" is clear. Specific words such as "mode" and "arrangement" are effective stand-ins for coverture. By using these allusions in place of the term itself, Mill's word choice serves to soften the impact of an otherwise clinical and harsh term, which conjures to mind all manner of oppression. His further inclusion of the phrase "on the testimony of experience" lends this excerpt a sense of authority

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[146] Christopher Macleod, *John Stuart Mill*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2020 ed. 2020), https://plato.stanford.edu/archives/sum2020/entries/mill/ (last visited Dec 6, 2023).
[147] *Id.*
[148] John Stuart Mill, *The Subjection of Women* (1870), https://jstor.org/stable/60244766 (last visited Nov 30, 2023).
[149] *Id.* at 3.

beyond the academic, by citing real-world experience rather than philosophy or legal doctrine. For all these reasons, Mill's writing champions coverture as an institution in service of the people, and one desired by them as conducive to their general quality of life.

This pamphlet is certainly later in time than the height of coverture-related legal discourse, as by the mid to late 19th century, coverture was slowly being phased out of the courtroom.[150] That being said, it serves as an excellent example of the pervasive mindset that the subjugation of women, specifically in a legal sense, would facilitate the happiness and well-being of men and women alike.[151]

Mill's explanation is one affirming that by subjugating women, and giving men complete dominion over them, society would be preserved in its most natural, pleasant state. Mill was a philosopher, not an attorney, judge, or legal scholar. His perspective on coverture is helpful when establishing a more general explanation of the issue, but it falls short of reliable legal doctrine or precedent. To that end, court cases dealing with coverture offer unique insight into the legal rationale behind decisions regarding the rights of women.

In the 1793 Pennsylvania Supreme Court case *Barnes's Lessee v. Irwin, et al.*, Chief Justice M'Kean wrote a majority opinion regarding the right of women to give away property acquired prior to entering their coverture.[152] In keeping with the trend thus far, Justice M'Kean stipulated "by the maxims and rules of the law she is disabled, as having no will of her own."[153] Here, M'Kean identifies the "maxims and rules of the law" as the source of women's disability, demonstrating the

[150] Married Women and the Law: Coverture in England and the Common Law World, (2013), https://www.jstor.org/stable/j.ctt32b7jq (last visited Dec 6, 2023).
[151] Mill, *supra* note 148.
[152] Barnes' Lessee v. Irwin, 2 U.S. 199 (1793), *supra* note 142.
[153] *Id.*

manner in which the legal system was blatantly used as a tool to deprive women of portions of the basic rights and autonomy enjoyed by the opposite sex. M'Kean goes on to offer an explanation for this facet of common law, stating, "[t]he reason or ground of a wife's being disabled {...}, is, from her being under the power of the husband, not from want of judgment, as in the case of an infant, or idiot."[154]

M'Kean here makes a crucial, and telling admission; it is not some mental or physical handicap that demands the legal subjugation of women, rather it is a product of the dominance allotted to a husband upon entering into the contract of marriage.[155] The implication of this is that coverture was not, in fact, a condition rendered for the protection of women from themselves, as would be warranted in the case of an inherently vulnerable individual like a child or disabled person. Rather, this condition is an artificial one, arising solely from the legally recognized dominance of men. "Artificial" in this context is descriptive of coverture as a fabrication. Coverture was fabricated for women in the sense that it would never have arisen naturally by virtue of any general defect in the constitution of women, it had to be forcibly created and assigned a purpose by a legal system desiring a measure of control over them.[156]

The 1864 case of *Drury v. Foster* further illustrates the true nature of coverture. The U.S. Supreme Court was tasked with determining if a deed signed by Mrs. Foster was enforceable without the added signature of her husband.[157] In the opinion delivered by Justice Nelson, he opened with the acute observation that coverture "exist[s] by statute and the common law for her protection, in consideration of her

[154] *Id.* at 202.
[155] *Id.*
[156] Barnes' Lessee v. Irwin, 2 U.S. 199 (1793), *supra* note 142.
[157] Drury v. Foster, 69 U.S. 24 (1864), JUSTIA LAW, https://supreme.justia.com/cases/federal/us/69/24/ (last visited Dec 6, 2023).

dependent condition, and to guard her against undue influence and restraint."[158] The inclusion of words relating to protection and guarding indicate that coverture was, at the very least, presented as existing for the sake of women. However, Nelson's opinion identifies the marriage contract, "her dependent condition," as the primary justification for a woman's condition under coverture. This is made evident by his inclusion of the phrase "in consideration of," which can be taken to mean as a result of, or because of.[159] To rephrase Nelson's writing in simpler terms, he acknowledges that coverture exists because of the condition of women as dependent upon men.

Nelson's sentiment was similar to that expressed by M'Kean. Both opinions establish that coverture was not solely intended to protect women and their interests, nor was it an institution necessarily arising from the nature of women themselves.[160] Rather, it was an effective tool employed to keep men in power and to keep women as the helpless subjects of their totalitarian control.[161] The arbitrary deprivation of the rights of women would have been deemed brazenly unconstitutional, so those wishing to maintain this authority needed a pretext in which to ground it, and a legitimate avenue through which they could exercise it. As the previous cases have demonstrated, this pretext was found in the ineptitude of women themselves, demanding a level of protection contingent upon their domination by men. The law provided the ideal avenue through which to carry out this "necessary" oppression, as it lent the legitimacy of any other hallowed legal doctrine of American jurisprudence.

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[158] *Id.* at 33.
[159] *Id.*
[160] Barnes' Lessee v. Irwin, 2 U.S. 199 (1793), *supra* note 142 at 202; Drury v. Foster, 69 U.S. 24 (1864), *supra* note 157 at 33.
[161] Barnes' Lessee v. Irwin, 2 U.S. 199 (1793), *supra* note 142 at 202; Drury v. Foster, 69 U.S. 24 (1864), *supra* note 157 at 33.

III. Challenges to Coverture Arise

The preceding cases certainly indicate that the condition of coverture was more a product of male dominance than a necessary means of protecting women. Such verdicts, however, are by their very nature, tailored to the individual case at hand. To answer questions regarding coverture as it pervaded both the legal sphere and society as a whole, sources containing broader reasoning are essential. To supplement the opinions of *Barnes's Lessee v. Irwin, et al.* and *Drury v. Foster*, one must draw from 18th and 19th century sources that discuss the issues posed by coverture in light of more general public discourse, beyond the scope of the courtroom.

An excellent touchstone that offers context within which one can better place and interpret Justice M'Keen and Nelson's opinions is the April 1828 issue of *The North American Review.* In a piece entitled "The Law of Infancy and Coverture," author *Peregrine Bingham* explores societal standards and perceptions for and of so-called civilized women. Within the first few paragraphs, Bingham notes coldly that "a spirit [men], {...} has too often presided over the formation of the laws, which fix the rights and obligations of woman in the social scheme."[162] Bingham's inclusion of the phrasing relating to the frequency of instances of oppression indicates his distaste for the role men have long played in regulating the place of women, both in society and under the law.

Bingham goes on to describe the place of women in various cultures, and upon reaching what he considers the most civilized world, Europe, he points to the equality European women have as something for Americans to strive towards. It is evident that Bingham himself believes women to be

[162] Review of The Law of Infancy and Coverture; Traités du Contrat de Mariage, de la Puissance du Mari, du Contrat de la Communauté, et du Douaire, Pothier, *supra* note 145 at 316.

inherently deserving and capable of enjoying the same rights and freedoms as men when he writes that "just equality with the other sex, which the sober and rational pursuit of their common felicity requires she should possess."[163] By including language such as "sober," "rational," and "common," Bingham acutely emphasizes how straightforward and indisputable this stance ought to be.[164] He thereby insists that the rights of women are nothing short of undeniable and should be treated as such by any individual with the capacity for rational thought and reasoning.

Bingham concedes that if the rights of women were to be left solely to a competition of physical strength, women would surely lose.[165] This is an interesting point, that because men have the power to bestow and deny the rights of women, largely as they see fit, it becomes something that reflects well on the men that do, and appreciated by the women that benefit.[166] Put simply, if women are at the mercy of men from a purely physical standpoint, every action taken by men to benefit women is one taken not out of necessity, but out of generosity.[167] A generous act is commonly understood to be a commendable one on the part of the giver, and something worthy of gratitude on the part of the recipient. By framing the capacity to bestow rights upon women as a gift, Bingham portrays the act of granting women such privilege as socially desirable and in good taste.[168] These sentiments, taken together, demonstrate Bingham's belief that women are perfectly capable of, and deserving of, exercising rights.

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[163] *Id.* at 317.
[164] *Id.*
[165] *Id.*
[166] Review of The Law of Infancy and Coverture; Traités du Contrat de Mariage, de la Puissance du Mari, du Contrat de la Communauté, et du Douaire, Pothier, *supra* note 145.
[167] *Id.* at 316, 317.
[168] *Id.*

Despite his evident belief in the capacity of women to occupy a position in society on par with that of men, Bingham asserts that the promises of men to improve the status of women are oftentimes performative and done in the interest of securing said "gift and its acceptance," which "are alike honorable to humanity."[169] Seeing as these promises are applauded as honorable, there is little incentive to fulfill them, as the desired effect of garnering praise has already been achieved. Given this stance, it is unsurprising that Bingham pointedly states, "the disabilities incident to a married woman are not designed for her benefit and protection; but for the security of her husband."[170] This directly answers the question posed at the outset of this paper—was coverture a system for preserving the best interests of women, or was it merely a tool employed to keep women in a state of permanent subjugation, and legal incapacitation, thus furthering the interests of men?

Bingham is convinced of the latter, as is evidenced by his stance that coverture was never enacted for the benefit or protection of women, but rather for that of her husband.[171] Unlike the opinions of Justice M'Keen and Nelson, Bingham's conclusion that coverture was for the benefit of men alone was reached not in the narrow legal context of a specific court case, but through careful consideration of what the author had experienced in everyday life. His reflections on the civilized world, as well as his recognition of the performative inclinations of men, are illustrative of a perspective shaped by the broader influences of society and dynamic socio-political affairs.[172] It is this broad perspective that fleshes out the narrow ones offered in *Barnes's Lessee v. Irwin, et al.* and *Drury v. Foster*, providing a framework in which to better contextualize them. Bingham's "The Law of Infancy and Coverture" serves

[169] *Id.*
[170] *Id.* at 332.
[171] *Id.*
[172] *Id.* at 318, 319.

as but one example of the growing defiance of coverture and the limitations it posed upon women.

While Bingham's writings are certainly invaluable for the purpose of framing and expanding upon relevant court opinions in light of broader social contexts, they are limited by the perspective of their author, a man, to whom the regulations of coverture did not apply. The voices of women, the true victims of this legal means of systematic oppression, are integral to understanding its real-life consequences. To that end, the following writings come from female authors, sharing their thoughts on an institution they themselves were subject to, with or without their consent.

Judith Sargent Murray was a preeminent female essayist and early proponent of women's equality during the late 18th century.[173] In 1790, Murray penned an article entitled "On the Equality of the Sexes," for an edition of *The Massachusetts Magazine*.[174] In this article, Murray challenges long-held assumptions regarding her sex, quipping, "suffer me to ask, in what the minds of females are so notoriously deficient, or unequal."[175] She continues,

> May not the intellectual powers be ranged under these four heads – imagination, reason, memory and judgment. The province of imagination hath long since been surrendered to us, and we have been crowned and undoubted sovereigns of the regions of fancy. Invention is perhaps the most arduous effort of the mind; this

[173] Kerri Alexander, *Biography: Sarah Moore Grimké*, National Women's History Museum, https://www.womenshistory.org/education-resources/biographies/sarah-moore-grimke (last visited Dec 6, 2023).
[174] Judith Murray, *On the Equality of the Sexes.*, Digital.library.upenn, https://digital.library.upenn.edu/women/murray/equality/equality.html (last visited Dec 6, 2023).
[175] *Id.* at 132.

> branch of imagination hath been particularly ceded to us, and we have been time out of mind invested with that creative faculty.[176]

Here, Murray is describing how the female mind is uniquely capable. By referencing categories of intellect often attributed to women, such as being "fanciful" and overly imaginative, Murray reclaims them as pillars of one form of "intellectual power"—imagination. This, in turn, is a reclamation of the very traits identified by cases such as *Barnes's Lessee v. Irwin, et al.* and *Drury v. Foster* as justifications for the existence of coverture. By doing so, Murray reframes these alleged deficiencies of women as strengths.[177] This resultantly negates the need for coverture arising from her position under the dominance of the husband as described by Justice M'Kean and her condition of dependence upon him as described by Justice Nelson.[178]

In place of these justifications, Murray's writings indicate that the obligation to provide protection and benevolent influence described by Blackstone was not so much born of necessity, as for the security of the position of the husband as concluded by Bingham.[179] In short, Murray's writings identify the aforementioned characteristics of women as strengths of the mind and character. Given the numerous justifications of coverture as contingent upon these characteristics as *weaknesses*, Murray's reframing of them necessitates a different justification.[180] It is here that the recurrent idea of coverture being used as a tool benefitting the dominance of men seems the only viable explanation in their stead.

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[176] *Id.* at 132, 133.
[177] *Id.*
[178] BARNES' LESSEE v. IRWIN, 2 U.S. 199 (1793), *supra* note 142.
[179] BLACKSTONE, *supra* note 140.
[180] Murray, *supra* note 174 at 132, 133.

Murray does concede certain shortcomings common to her sex, but here too she identifies men as the party at fault, rather than the women themselves.[181] When it comes to knowledge and education, for example, she points to the fact that women cannot reasonably be expected to possess any significant measure of the former without proper access to the latter.[182] In Murray's own words, "Are we deficient in reason? We can only reason from what we know, and if an opportunity of acquiring knowledge hath been denied us, the inferiority of our sex cannot fairly be deduced from thence."[183] Women have long been condemned as irrational, prone to fit and fancy, and as such, unfit for aspects of life demanding critical thought and reasoning.

Murray offers a logical explanation: women cannot exercise sound reason if they are denied the opportunity to learn when and how to do so.[184] That is, if men are able to keep women from educating themselves on reason and its proper uses, then women cannot be expected to be reasonable. It is not the fault of women that they have been denied the chance to learn and expand their knowledge, it is merely a consequence of the patriarchal and misogynistic society that prevailed during the 18th and 19th centuries.[185] Women were relegated from a young age to realms of domesticity, which excluded any manner of higher education.[186] Since women were handicapped in such a manner, their full intellectual potential could never truly be reached. The rest of society would have to pass judgment upon women who had been unfairly stunted by reduced opportunities for self-improvement and learning.[187]

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[181] *Id.* at 133.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at 132, 133.
[187] *Id.* at 133.

Continuing on the topic of education, Murray illustrates her point with a poignant observation:

> May we not trace [judgement's] source in the difference of education, and continued advantages? {...} how is the one exalted, and the other depressed, by the contrary modes of education which are adopted! The one is taught to aspire, and the other is early confined and limited. As their years increase, the sister must be wholly domesticated, while the brother is led by the hand through all the flowery paths of science. Grant that their minds are by nature equal.[188]

The above quote is evidence that, like Bingham, Murray contends that women have the capacity for rational thought and intelligence equal to that of men. However, from a young age that capacity is cultivated in males, and stunted in females, leaving women at an increasingly large disadvantage as both sexes age.[189] Murray's perspective on the issue is unique. She herself is a woman, and is thus better equipped to speak on the topic than most philosophical and legal writers of the time (as, needless to say, the vast majority were men). Murray went through life knowing firsthand what it was to be viewed and treated as a second-class citizen, deprived of opportunities equal to those of men. This firsthand experience is key, as her writing comes from experience, rather than speculation. This is evident from her repeated use of the words "we," us," and "our," whereby she includes herself in the women whose fate has been so constricted by men.[190]

The perspective of women on coverture and their own alleged disabilities is invaluable. To that end, the writings of Sarah M. Grimké, renowned 18th century abolitionist and

[188] *Id.*
[189] *Id.*
[190] Murray, *supra* note 174.

women's rights advocate, offer themselves up as an ideal companion to those of Judith Sargent Murray.[191] In an 1837 letter addressed to her sister entitled "Legal Disabilities of Women," Grimké laments and systematically proposes solutions to the numerous laws that existed solely to restrict the rights and legal identities of women.[192] The opening lines of this letter echo the sentiments expressed hitherto,

> There are few things which present greater obstacles to the improvement and elevation of woman to her appropriate sphere of usefulness and duty, than the laws which have been enacted to destroy her independence, and crush her individuality; laws which, although they are framed for her government, she has had no voice in establishing, and which rob her of some of her essential rights.[193]

Like Murray, Grimké asserts that the distinct lack of equality between women and men is a direct result of laws that have limited the independence and identity of the former.[194] That is to say women, given the proper chance through education, are perfectly capable of the self-improvement proposed by Grimké.[195] Murray and Grimké wholeheartedly believe women to possess capabilities equal to those of men, though both agree that their sex has been unjustly hindered in this pursuit by the laws and restrictions imposed by the latter.

Moreover, the "laws" to which Grimké attributes the oppression of women, she also condemns as merely contrived

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[191] Alexander, *supra* note 173.
[192] Sarah M. Grimké, *30_Letter_XII_legal_disabilities_grimke.Pdf*, CIVICS ONLINE, http://www.civics-online.org/library/formatted/texts/grimke.html (last visited Jan 21, 2024).
[193] *Id.* at 1.
[194] *Id.*
[195] Grimké, *supra* note 192.

for their benefit.[196] Grimké's comment that these laws "are framed for her government" speaks to the central question of coverture. These laws, of which coverture was essentially an performative amalgamation used the prevailing belief in the dependencies and vices of the "fairer sex" as an excuse to secure male power.[197] The inclusion of the word "framed" suggests the laws were presented as being in the best interest of women, but were, in reality, a way by which the law and courts could deny women many of their most fundamental rights.[198] Suffice to say, the courts did not have the best interests of women in mind and chose, on numerous occasions, to uphold their legal yoke by men.

Recalling one sentiment shared by Murray, it is men who have prevented women from expanding their knowledge. Thus, any judgments passed on the intelligence of the female sex are flawed, as they are based on the functioning of stunted minds rather than educated ones.[199] Grimké appears to share in her observation that women had been systematically made ignorant by men such that the former lacked the proper knowledge and confidence to challenge the decrees of the latter.[200] In combination with this, and in keeping with the prevailing mindset of the time, women were thought of as being "placed completely in the hands of a being subject like herself to the outbursts of passion, and therefore unworthy to be trusted with power."[201] In this manner, women were both denied knowledge and autonomy directly, and taught they lacked the basic capacity to make use of either. However, like Murray, Bingham, and M'Kean, Grimké, too, rejects this assumption, finding no fault with the intellectual powers of

[196] *Id.*
[197] *Id.* at 1.
[198] *Id.*
[199] Murray, *supra* note 174 at 132, 133.
[200] Grimké, *supra* note 192 at 1.
[201] *Id.* at 3.

women themselves.[202] Instead, she echoes the sentiments expressed hitherto, rejecting the notion that the laws and doctrines consolidated under coverture were, in truth, intended for the betterment and protection of womankind.[203] Grimké decidedly concludes that, "the laws which have generally been adopted in the United States, for the government of women, have been framed almost entirely for the exclusive benefit of men, and with a design to oppress women, by depriving them of all control over their property, is too manifest to be denied."[204] There can be no doubt that women of the time, those best equipped to speak on the true nature and implications of the coverture that afflicted them, did not view it as a state intended for their protection, nor one warranted by the nature of their sex. Rather, coverture was established and perpetuated as an instrument of their own oppression, rendered unto them, heedless of their objections, by the very men sworn to guard and shepherd them.

IV. Conclusion

After close examination of case law, legal commentaries, scholarly publications, and the writings of prominent female thinkers, an indisputable set of historical facts has emerged which recounts the repressive nature of coverture. The works of Blackstone and Mill serve to illustrate the mindset and rationalizations of those in support of the coverture of women, chiefly that it is a condition deemed necessary for the protection of women and one under which society will be the most stable. This is a sentiment echoed by Nelson in *Drury v. Foster* as well. The cases of *Drury v. Foster* and *Barne's Lessee v. Irwin,* however, demonstrate that in practice, at least in the realm of the courts, coverture was more

[202] *Id.* at 3, 4.
[203] *Id.*
[204] *Id.* at 4.

contingent on the husband and the state of marriage itself, rather than any disabilities or deficiencies found inherent within women.

To expand upon this idea, Bingham, Murray, and Grimké concur that coverture was a condition arising from the relationship of women to men, rather than the state of women themselves. Furthermore, they identify it as one knowingly tailored for the benefit of men and the protection of their assumed superiority, at the expense of women and their intellectual and legal opportunities. Hence, it may be concluded that coverture was never a product of the needs of women as inferior beings. Any such inferiority referenced at the time was demonstrably either entirely absent or merely manufactured by a system of imposed ignorance created by men.

In all, this article has described how coverture was a scheme intended to subjugate women and deprive them of their legal identity. In doing so, coverture's true purpose was to elevate men to a status far above women, thus protecting mens rights and ensuring their dominance. By perpetuating such a system, American jurisprudence not only allowed for the patriarchy to extend itself into the legal sphere, but also actively endorsed it.

Covid and the Court: Why the Supreme Court Should Not Diffuse European Speech Restrictions into American Law

Brandon King[205]

Speech constitutes an immense power which, at its best, can lead to open dialogue that creates the opportunity to achieve positive political and social change. At its worst, the freedom to speak can precipitate hate speech and violence. Across the world, the standards governing free speech are not necessarily the same. This article aims to analyze the constructs of free speech in both Europe and the United States. To this end, this article concerns two major questions: should the United States adopt legislation to combat hate speech in line with the Digital Services Act which the European Union previously enacted; and should this be enacted via the Supreme Court's opinion in Murthy v. Missouri, a case analyzing possible infringement of Free Speech by the federal government on social media sites. This article discusses the nature of how and which comparative law principles and jurisprudence should be diffused into judicial opinions written by U.S. judges. As well as why this issue is not one that should be handled by the courts, especially through the diffusion of European authored regulations on speech.

In February 2020, COVID-19 emerged as the worst pandemic in almost a century.[206] Hospitals were overwhelmed, store shelves were emptied, masks were mandated, and the

[205] Brandeis University Undergraduate, Class of 2026.

[206] Please note, *Murthy v. Missouri* is an ongoing case currently pending a decision in the United States Supreme Court. Any perspectives or interpretations provided in this article have been completed as of April 2024 and may be subject to alteration pending the court's decision.

global economy came to an abrupt halt.[207] Globally, to pursue prudent public health measures at the time, masks were worn, social distancing mandates were enacted, and individuals were forced to make hard decisions. Decisions such as attending funerals of loved ones over Zoom and kids attending classes online rather than in person, all in an effort to stop the spread. Across the world, many individuals followed protocols aimed at preventing the virus' spread, while others, contrary to the advice of the United States Center for Disease Control at the time, did not.[208] Subsequently as time went on, the unity of the nation exhibited at the start of the pandemic transitioned into polarized partisanship, with staunch opposition to policies such as mask and vaccination mandates.[209] Nowhere was this opposition to COVID-19 policies more evident than on social media.

Over time, governments across the world, particularly the United States government, came to understand the risks associated with social media during a pandemic.[210] In response to misinformation regarding COVID-19 which circulated across social media and the negative impacts of this misinformation on the nation; the Biden Administration initiated communications through both electronic and physical

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[207] Kate Li, Mona Al-Amin & Michael D. Rosko, *Early Financial Impact of the COVID-19 Pandemic on U.S. Hospitals*, 68 J. Healthc. Manag. 268 (2023).

[208] Judy Stone, *Public Pushes Back On CDC's Plan To Weaken Infection Control*, Forbes, https://www.forbes.com/sites/judystone/2023/08/25/public-pushes-back-on-cdcs-plan-to-weaken-infection-control/ (last visited Jan 9, 2024).

[209] Lu He et al., Why Do People Oppose Mask Wearing? A Comprehensive Analysis of U.S. Tweets during the COVID-19 Pandemic, 28 J. Am. Med. Inform. Assoc. JAMIA 1564 (2021).

[210] Hichang Cho et al., *The Bright and Dark Sides of Social Media Use during COVID-19 Lockdown: Contrasting Social Media Effects through Social Liability vs. Social Support*, 146 Comput. Hum. Behav. 107795 (2023).

means with social media companies such as Facebook, X (formerly known as Twitter), and Google via the White House, Office of the Surgeon General, and Department of Justice.[211] Through these communications, the Biden Administration urged social media companies, often by threat of future government scrutiny and antitrust prosecution, to take down and/or "shadow ban" certain posts and accounts.[212] The Biden Administration's goal as shown by the majority opinion issued in the United States' Fifth Court of Appeals in the case of *Missouri v. Biden,* the prior name for *Murthy v. Missouri* currently pending in front of the United States Supreme Court*,* was to limit the dissemination of COVID-19 misinformation via platforms' internal algorithms, as well as to limit the reach of the accounts of influential individuals who were deemed by the Administration to be spreading COVID-19 misinformation.[213]

As a result of these requests, many social media companies began a widespread crackdown on misinformation, often utilizing data provided to them by executive agencies.[214] In response to this crackdown, a group of plaintiffs, including the State of Missouri, sued the Biden Administration in federal court, alleging that the administration coerced social media platforms into censoring certain social media content. Plaintiffs alleged that these actions amounted to the state suppression of speech and at times "*prior restraint,*" violating the First Amendment's freedom of speech clause.[215] In response, the United States Court of Appeals for the Fifth Circuit issued a ruling in favor of the plaintiffs, stating that the Biden

[211] Biden v. Missouri, 595 U.S. (2022), https://supreme.justia.com/cases/federal/us/595/21a240/ (last visited Dec 5, 2023).
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*

Administration, both directly and through executive agencies, "coerced and significantly encouraged the platforms to moderate content … unlawfully violating the plaintiffs (First Amendment) rights."[216]

COVID-19 misinformation was not just a domestic issue, but a global one, affecting nearly every country in the world, including those within the European Union (EU). In response to the rise in misinformation through social media channels, the EU Parliament on July 5, 2022 enacted the Digital Services Act (DSA). The legislation set January 1, 2024 as the date on which affected companies had to begin complying with the legislation.[217] In this enactment, the EU set forth a comprehensive list of regulatory procedures to control the spread of misinformation, hate speech, terrorist propaganda, as well as specific provisions relating to the suppression of content during times of emergency. The legislation also established penalties for companies not in compliance, including a fine of up to six percent of a company's global revenues, and the barring of the company from operating in EU countries for a period determined by an independent commision.[218]

Through the case of *Murthy v. Missouri*, the Supreme Court has the opportunity to incorporate aspects of comparative law, by adopting ideals of other nations' laws into the laws of the United States, as the Court has done in the past

[216] *Id.*

[217] The Digital Services Act package | Shaping Europe's digital future, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (last visited Dec 21, 2023).

[218] Sweeping EU digital misinformation law takes effect, Legal Dive, https://www.legaldive.com/news/digital-services-act-dsa-eu-misinformation-law-propaganda-compliance-facebook-gdpr/691657/ (last visited Dec 21, 2023).

with cases such as *Roper v. Simmons.*[219] Though uncommon, the practice of adopting the ideals of other nations' laws into the laws of the United States is not unprecedented for the US Supreme Court; in fact, the landmark decision in *Roper v. Simmons* referred to international sources of law, including *The United Nations Convention on the Rights of the Child*, in order to articulate how the Eighth Amendment's cruel and unusual punishments clause bars the sentencing to death of a minor found guilty of a capital offense.[220]

In his opinion in *Roper v. Simmons*, Justice Kennedy not only utilized the laws of Western European nations that bar the execution of minors, but he also compared the United States to nations deemed "international pariahs" in the 1990s, including Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.[221] As shown by this example, it is not unprecedented for the United States Supreme Court's jurisprudence to reference the laws and doctrines of other nations. Utilizing this precedent, this paper will analyze three major questions regarding the implementation of other nations' laws in the legal system of the United States.[222]

1) Under what circumstances should the Supreme Court or lower courts utilize laws and or cases from other nations in their deliberation of cases?

2) In the case of *Murthy v. Missouri,* should the Supreme Court incorporate the ideals or principles of the EU's DSA in its jurisprudence of this case?

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[219] Roper v. Simmons, 543 U.S. 551 (2005), https://supreme.justia.com/cases/federal/us/543/551/ (last visited Dec 21, 2023).
[220] *Id.*
[221] *Id.*
[222] John Marshall, *Murray v. The Charming Betsey, 6 U.S. 64 (1804)*, Justia Law, https://supreme.justia.com/cases/federal/us/6/64/ (last visited Mar 30, 2024).

3) What is a potential counter argument to this type of Jurisprudence?

I. Circumstances in which United States' Courts should Utilize the Laws and Cases of Other Nations

"Courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[223] In the United States, courts impose checks on the elected bodies of government in accordance with their interpretation of the Constitution. While the Supreme Court was created by Article 3 Section 1 of the Constitution, its role in government was not fully realized until the landmark opinion of *Marbury v. Madison*.[224] In this opinion, Chief Justice Marshall lays out the judiciary's role to review the constitutionality of acts from other branches of government through judicial review.[225] While the courts may have the power to determine the constitutionality of legislative acts, they cannot act in a legislative capacity. This inability is the primary argument against the usage of foreign laws and cases in the deliberation of cases in American courts.[226]

In a democratic system, laws are passed by the people's representatives based on the interests and goals of

[223] The Avalon Project : Federalist No 78, https://avalon.law.yale.edu/18th_century/fed78.asp (last visited Dec 21, 2023).
[224] The Constitution of the United States: A Transcription, National Archives (2015), https://www.archives.gov/founding-docs/constitution-transcript (last visited Dec 5, 2023).
[225] John Marshall, Marbury v. Madison, 5 U.S. 137 (1803), https://supreme.justia.com/cases/federal/us/5/137/ (last visited Dec 21, 2023).
[226] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.

those affected by the enacted laws.[227] Therefore, it is argued that courts should not base their decisions on the laws and cases of other nations. Looking at the current case at hand, the decision in *Murthy v. Missouri* has no bearing upon the citizens of EU countries, the organization which enacted the DSA; furthermore, the representatives of the American people were not party to the passage of the DSA, and therefore legislative actions enacted by the EU should have no bearing on American courts.

In the case of *Roper v. Simmons*, Justice Kennedy presents a comprehensive argument for the barring of the death penalty for minors. The opinion applies previous case law, conducts an analysis of states that barred the practice, and examines the psychological and biological differences between minors and adults.[228] These arguments alone would have sufficiently demonstrated that the imposition of the death penalty on minors violated the Eighth and Fourteenth Amendments.[229] However, Justice Kennedy goes further in his opinion, bringing in the laws and practices of other nations to determine if a punishment is cruel or unusual. By mentioning the laws and practices of other nations to justify his opinion, Justice Kennedy grossly misstepped his authority and weakens the strength of his argument.[230]

In his opinion, Justice Kennedy references Article 37 of the United Nations Convention on the Rights of the Child, which prohibits capital punishment for crimes committed by individuals under the age of eighteen.[231] Justice Kennedy

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[227] Overview - Rule of Law | United States Courts, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited Dec 21, 2023).
[228] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.
[229] *Id.*
[230] *Id.*
[231] General Assembly resolution 44/25, *Convention on the Rights of the Child*, OHCHR (1989),

specifically mentions how every nation has ratified the treaty, with the exception of the United States and Somalia.[232] He uses this fact to further his point that most of the world has outlawed capital punishment for juveniles, and thus, the cruel and unusual punishment clause of the Eighth Amendment should apply in this case.[233] This rationale is a blatant overstep of separation of powers; and should not have been used in the opinion. The United States Constitution is clear about the procedure of ratifying treaties, as Article 2 Section 2 of the Constitution states that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[234] The judicial branch of government is not mentioned in this section of the Constitution and plays no role in negotiating and ratifying treaties, therefore should not incorporate laws or beliefs set forth by international treaties in which the United States is not a signatory nation.

Furthermore, Justice Kennedy reads into the rest of the world banning capital punishment for minors (with the exception of the United States and Somalia) as a clear example of times changing, and the world now viewing capital punishment for minors as a cruel and unusual punishment, thus he argued that the United States should follow suit.[235] On the contrary, the fact that the United States Senate did not ratify this treaty, speaks louder than the treaty's ratification by a large majority of the world. By referencing the actions of other legislatures in ratifying this treaty as a motive for baring the practice of imposing capital punishment against juveniles, Justice Kennedy places greater value on the

https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (last visited Jan 9, 2024).

[232] *Id.*

[233] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.

[234] The Constitution of the United States, *supra* note 224.

[235] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.

will of other nations' legislatures, values, and people over that of the American Congress, the American Constitution, and most importantly, the American People. Congress did not ratify Article 37 of the United Nations Convention on the Rights of the Child, and this failure to ratify is the best proof that the American people as a whole were not in favor of departing from the imposition of capital punishment for juveniles on the federal level. Given the evolving standards of the Eighth Amendment and his belief on the will and actions of other nations rather than his own, Justice Kennedy decided to override this implicit articulation by Congress.[236]

In general, courts should avoid applying the laws and cases of other nations in their jurisprudence of cases, with one exception. Since the act of creating law is vested in the legislature, lawmakers have immense freedom to craft laws given constituent needs, as long as such laws are in line with the Constitution. Given this freedom, legislatures are free to derive ideas from various sources, one such source can be other nations.[237] A congressperson is free to look at the laws and policies of other nations and decide if it could benefit the United States. That legislator must then go through the process of proposing a bill which diffuses the laws and policies of another nation. The bill must then be passed by the House of Representatives and the Senate, and subsequently signed by the President.[238]

If a legal case arises before a court regarding the meaning of this new law which was passed incorporating the

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[236] *Id.*

[237] Toni Johnson, *Congress and U.S. Foreign Policy*, Council on Foreign Relations, https://www.cfr.org/backgrounder/congress-and-us-foreign-policy (last visited Jan 9, 2024).

[238] The Legislative Branch, The White House, https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/ (last visited Apr 3, 2024).

laws and policies of another nation.A court who decides to utilize legislative intent as a means to decide what the true intention of the law is could examine the diffused law or policy from the country of origin which served as inspiration for the act of Congress. While the courts should be free to look at the laws and policies of other nations in order to establish legislative intent, the court should only take the lessons learned from the other countries' laws and policies in an advisory capacity. If there are better means of finding legislative intent, those means should take priority over the other countries' cases and enactments.

II. Should the Supreme Court Incorporate the Ideals or Principles of the DSA in their decision on *Murthy v. Missouri?*

Applying the principles articulated in the prior question, the Supreme Court should not incorporate the ideals or principles of the EU's DSA in their decision of *Murthy v. Missouri*. Courts in the United States, as referenced in question I, should not apply the laws and doctrines of other nations in their jurisprudence of cases in the US.[239] In fact, applying foreign law to this case necessitates condemnation in even stronger terms than did Justice Kennedy's use of international examples as applied in *Roper v. Simmons.*[240] In the case of *Roper v. Simmons,* one could argue for an international consensus, excluding the United States and Somalia, in regards to the imposition of capital punishment against minors.[241] It cannot be argued that the same international consensus exists in regards to deciding the appropriate regulations to curb misinformation in the age of social media, as this issue is very

[239] Cornell Law School, *Jurisprudence*, LII / Legal Information Institute, https://www.law.cornell.edu/wex/jurisprudence (last visited Jan 9, 2024).
[240] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.
[241] General Assembly resolution 44/25, *supra* note 231.

new and there has been far less time for consensus to emerge than there was in the case of capital punishment for juveniles. While as argued prior, such consensus should not impact the jurisprudence of American courts, this lack of consensus serves to differentiate between the cases of *Roper v. Simmons* and *Murthy v. Missouri.* Some, such as Justice Kennedy, have made the argument that comparative principles must be diffused into the United States jurisprudence in regards to *Roper v. Simmons.* This same argument cannot be made for *Murthy v. Missouri,* given the lack of an international consensus on the issue, as the international consensus which existed in regards to capital punishment for minors, which was a core aspect of Justice Kennedy's opinion, does not exist in regards to the American interpretation of governmental intrusion on free speech.

The First Amendment of the United States Constitution—and subsequent interpretations by the courts—have endowed the US with some of the strongest protections for the freedoms of speech and expression in the world.[242] With particular reference to Europe, almost every country within the EU can be described as a western democracy with certain protections for free speech.[243] However, many members of the EU have freedom of speech laws which are not nearly as strong or go as far as those in the United States. For example, in Germany, an EU member state, Section 130 of the German Criminal Code bans "incitement to hatred and insults that assault human dignity against people based on their racial, national, religious or ethnic

[242] Alex Gray, *Freedom of Speech: Which Country Has the Most?*, World Economic Forum (2016), https://www.weforum.org/agenda/2016/11/freedom-of-speech-country-comparison/ (last visited Jan 9, 2024).
[243] *Id.*

background."[244] This law has been used to prosecute individuals who publicly deny the Holocaust, as well as those who distribute Nazi propaganda both on and offline.[245]

Laws like this undoubtedly would be deemed unconstitutional in the United States, as freedom of speech is a fundamental concept strictly enforced by the Supreme Court.[246] Given that the restrictions imposed by the DSA would constitute a *content based restriction,* a restriction on speech imposed by the government that regulates speech on the basis of the content that the speech entails.*[247]* The doctrine of *strict scrutiny* applies in which the government is required to demonstrate a *compelling state interest,* as well as a narrowly tailored least restrictive approach*,* to any legal limitations imposed in the form of content based restrictions.[248]

One of the most famous cases in regards to content based restriction on speech is the case of *Cohen v. California.[249]* In this case, Paul Robert Cohen entered the corridor of a court room wearing a jacket which stated "Fuck the Draft", in reference to the Draft associated with the

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[244] Dan Glaun, *Germany's Laws on Antisemitic Hate Speech and Holocaust Denial*, https://www.pbs.org/wgbh/frontline/article/germanys-laws-antisemitic-hate-speech-nazi-propaganda-holocaust-denial/ (last visited Jan 9, 2024).
[245] Germany: Constitutional Court Upholds Free Speech Restriction in Banning Public Support of Former Nazi Regime, Library of Congress, Washington, D.C. 20540 USA, https://www.loc.gov/item/global-legal-monitor/2009-11-20/germany-constitutional-court-upholds-free-speech-restriction-in-banning-public-support-of-former-nazi-regime/ (last visited Apr 3, 2024).
[246] Strict scrutiny, LII / Legal Information Institute, https://www.law.cornell.edu/wex/strict_scrutiny (last visited Mar 30, 2024).
[247] Content Based Regulation, LII / Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-1/content-based-regulation (last visited Mar 30, 2024).
[248] Strict scrutiny, *supra* note 246.
[249] Cohen v. California, Oyez, https://www.oyez.org/cases/1970/299 (last visited Apr 1, 2024).

Vietnam War ongoing at the time.[250] He was subsequently arrested for violating section 415 of the California Penal Code which criminalizes "maliciously and willfully disturbing the peace or quiet of any neighborhood or person … by … offensive conduct."[251] When this case was ruled on by the Supreme Court of the United States, Justice John Harlan wrote one of the most famous majority opinions in the courts history stating, "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. … The Constitution leaves matters of taste and style so largely to the individual."[252] As demonstrated by the strong opinion written by Justice Harlan, California had no good reason to enforce this statute, given that the statement on Paul Cohen's jacket was speech, California did not have a *compelling state interest* that was threatened by his use of explicit terminology.[253] This case is demonstrative of the many differences in the legal interpretations of free speech in the United States versus Europe. Given this difference in the levels of speech protections, it is clear that fundamental cultural, constitutional, and legal differences exist between the US and EU countries. These divisions would make any attempted implementation of the DSA, within the opinion of *Murthy v. Missouri,* to go against the court's established precedent on this issue. This is due to the First Amendment concerns that would make any implementation of the DSA not only controversial, but also raise additional constitutional questions, given the

[250] Vietnam Lotteries, Selective Service System, https://www.sss.gov/history-and-records/vietnam-lotteries/ (last visited Apr 3, 2024).
[251] Cohen v. California, Global Freedom of Expression, https://globalfreedomofexpression.columbia.edu/cases/cohen-v-california/ (last visited Apr 3, 2024).
[252] Cohen v. California, *supra* note 249.
[253] Strict scrutiny, *supra* note 246.

high level of scrutiny the Supreme Court takes regarding regulations of speech, especially ones that are content based.

Third, the issue of misinformation being spread via social media, and particularly the power of large tech companies in the United States, is a topic that is discussed often in Congress.[254] Many hearings have taken place between members of Congress and the Chief Executive Officers' of major tech companies. Many Members of Congress have also advocated in favor of many ideas to curb the power of Big Tech, including the targeting of misinformation to vulnerable users.[255] If the Supreme Court were to rule in the case of *Murthy v. Missouri* based on the principles of the DSA, they would severely limit the ability for members of Congress to impose regulations on Big Tech. This would be due to the court implementing the principles of the European DSA in a manner that would likely interfere with the ability of American legislators to pass legislation which best serves the American public.

III. Counter Argument to this Method of Jurisprudence?

While freedom of speech is one of the most fundamental rights in the United States, many point to the rise of hate online hate speech and misinformation such as foreign adversaries attempts to influence the American electorate through digital means, as a rationale for why the United States government should implement a European-style approach to

[254] A. B. C. News, *Congress Grills Tech CEOs in Wide-Ranging Hearing on Monopoly, Political Bias, China and More*, ABC News, https://abcnews.go.com/Technology/ceos-amazon-apple-facebook-google-face-congressional-antitrust/story?id=72034939 (last visited Jan 9, 2024).
[255] House approves antitrust bill targeting Big Tech dominance | AP News, https://apnews.com/article/2022-midterm-elections-technology-business-lobbying-congress-6e49cfc65668b99c633647898d114a8b (last visited Jan 9, 2024).

combating misinformation online.[256] Furthermore, concerned citizens may conclude that if the legislative and executive branches of government cannot figure out how to combat these issues, the Supreme Court ought to do it unilaterally. The government has a duty to target misinformation online; the country does not benefit from external actors posting misinformation during elections and times of national emergencies.[257] This is a major issue that requires major government action in order to promote the public good. However, the public good must be weighed against individuals' civil liberties in regards to the First Amendment. This issue must be treated appropriately under our current system of government, in accordance with current precedent concerning government regulations regarding speech. The fact that Congress has not acted in a major way regarding the rise in misinformation online, is indicative of the fact that no general consensus has formed in regards to the best way to target the problems associated with misinformation.[258]

It is not the role of the judicial system to impose upon the American people a solution to a problem of which other branches of government have not solved yet. This would be vastly in contradiction with the democratic process. Instead,

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[256] Russian Interference In 2016 U.S. Elections, Federal Bureau of Investigation, https://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections (last visited Mar 30, 2024).

[257] OECD, *Transparency, Communication and Trust: The Role of Public Communication in Responding to the Wave of Disinformation about the New Coronavirus*, OECD, https://www.oecd.org/coronavirus/policy-responses/transparency-communication-and-trust-the-role-of-public-communication-in-responding-to-the-wave-of-disinformation-about-the-new-coronavirus-bef7ad6e/ (last visited Mar 30, 2024).

[258] Gabriel Sanchez & Keesha Middlemass, *Misinformation Is Eroding the Public's Confidence in Democracy*, Brookings, https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ (last visited Mar 30, 2024).

Congress must be the one that passes a bill into law which addresses the issues of misinformation online, which the President must then sign. If Congress chooses to implement a European-styled DSA approach to that legislation, that is entirely permissible, as Congress is free to derive ideas from a variety of sources, including other nations. Additionally, the issue regarding misinformation on social media, especially during elections and public health emergencies, is a complex political issue. In times of emergency, Congress and the Executive Branch, which unlike the federal courts is directly answerable to the American people, must take the lead over the judicial branch of government in solving this complex issue.

The role of Congress is to identify problems, research the best ways to solve the problems, and build a consensus strong enough to allow the passage of a bill to deal with the problems.[259] This process is purely political and must take into account the views of citizens throughout the nation through their representatives in order to build a consensus and step forward. In contrast, the Supreme Court's role is to review laws and balance them with constitutional principles in order to make sure that the law does not conflict with the civil liberties and rights afforded to the American people by the Constitution.[260] The Supreme Court's role is not to engage in the political process, and therefore, the court should not apply the laws and doctrines of other nations, in what would effectively be a legislative capacity, by implementing the DSA and the European principles of free speech through their ruling in *Murthy v. Missouri.* Even if one were to assert that the

[259] About Congress | U.S. Capitol - Visitor Center, https://www.visitthecapitol.gov/explore/about-congress# (last visited Mar 30, 2024).

[260] About the Supreme Court | United States Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Mar 30, 2024).

implementation of a DSA type law in the United States would bring more public good than harm, its enactment must go through proper channels of government via the people's representatives, not forced through by an unelected assortment of nine Justices. The act of balancing goods and harms is a classic legislative function and as the nine justices of the Court are not tasked with the political process of legislating bills into law, the issue of combating misinformation online is a political issue that requires a legislative solution, not a judicial one.[261]

Those who support the DSA may argue that countries within the EU such as Germany are strong democracies, often with less polarized electorates than the United States; therefore, given the polarized nature of the United States, a court should step in to implement a DSA-styled approach to regulate free speech protections in order to guard against misinformation and the dangers that can come from it. It is important to note that from speech comes power, and power has the possibility of leading to tyranny and abuse. Free speech, by nature, is a double-edged sword, which at times it can be used for good in order to defend the rights of the minority and offer necessary criticism to individuals in power without fear of prosecution.[262] On the other hand, the allowance of absolute free speech can lead to rhetoric designed to enthrall hate groups, leading towards violence.[263] While the dark side of free speech may be dangerous and one may not like what someone else says, the law must protect the other person's right to speak freely and if the roles were reversed, the

[261] The Court and Constitutional Interpretation - Supreme Court of the United States, https://www.supremecourt.gov/about/constitutional.aspx (last visited Feb 5, 2024).
[262] Genevieve Lakier, *The First Amendment's Real Lochner Problem*, Univ. Chic. Law Rev.
[263] Daniel Byman, *How Hateful Rhetoric Connects to Real-World Violence*, Brookings, https://www.brookings.edu/articles/how-hateful-rhetoric-connects-to-real-world-violence/ (last visited Mar 30, 2024).

same dynamics would apply.

In conclusion, the Supreme Court should not utilize the laws of other nations in their jurisprudence of cases in the United States, with the exception of the accepted use of such laws and cases in order to establish legislative intent when relevant. Additionally, in the case of *Murthy v. Missouri,* The Supreme Court should not diffuse the principles of the DSA within their jurisprudence of the case. By doing such, the Court would impede the separation of powers between the judicial and legislative branches of government, severely impacting the legislature's ability to create policy and law tackling misinformation online, as the court would be forcing laws upon the American people that they did not put in place on themselves, through their elected representatives. In summary, the Supreme Court should decide the case of *Murthy v. Missouri* based upon current precedent regarding the First Amendment, including relevant US case law, and the close nexus test.[264]

[264] State Action Doctrine and Free Speech, LII / Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-1/state-action-doctrine-and-free-speech (last visited Apr 3, 2024).

A Proposal to Reform the Practice of Solitary Confinement

Kaia Minkin[265]

Solitary confinement is a desolate prison within the penitentiary itself. Extreme isolation in a cell barely equipped to house human life manipulates the psyche of the prisoner and works to achieve a dehumanizing experience in the name of the penological interest of the state. It is common for individuals in solitary confinement to endure decades alone in windowless cement rooms the width of a king-sized bed, listening to the echoing cries of other inmates. While some policymakers and correction officers argue that the practice of solitary confinement for extended periods maintains the safety of staff and the other prisoners, the harmful mental toll taken on the inmate is an inappropriate bargain against the protections demanded by the Eighth Amendment for law enforcement to take.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[266] The cruel and unusual component of the Eighth Amendment is shrouded in ambiguity, as what it means for a punishment to be cruel is anything but obvious. In order to establish a "cruel and unusual punishment" violation of the Eighth Amendment, the appellate must demonstrate: an "objectively, sufficiently serious act or omission resulting in the denial of necessities; a culpable state of mind on the part of prison officials amounting to deliberate indifference to his health and safety; and that he has exhausted the prisoner-grievance system and that he has petitioned for relief

[265] Brandeis University Undergraduate, Class of 2025
[266] U.S Const. Amend. VII § 2.

under Article 138, UCMJ."[267]

Studies delineating a link between the experience of social pain and an adverse impact on the mental well-being of incarcerated individuals have been perpetually replicated. The results confirm the detrimental consequences of living in isolation. The harm incurred by an inmate, derived because of prolonged isolation, manifests in emotional, cognitive, and psychosis-related symptoms.[268] Solitary confinement was designed to encourage inmates to feel proper repentance, but a shift in paradigm has led to a devastating, exacerbated psychological impact on mentally ill.[269] Social isolation, idleness, and lack of control over aspects of daily life—all phenomena maximized by the practice of solitary confinement—incite rapid, dramatic psychological deterioration in inmates with mental illness. This mental deterioration, including maladaptive social tendencies and socially inept behaviors, can also manifest as extreme acts of self-harm or suicide.[270] In one Indiana supermax facility, Wabash Valley Correctional Facility Secured Housing Unit, a prisoner with mental illness committed suicide by self-immolation, and another man choked himself to death with a washcloth.[271] A mentally ill adolescent incarcerated in a New York supermax facility told Washington Post reporter Ian Kysel she attempted to hang herself within the first 24 hours of

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[267] First principles: Constitutional matters: Cruel and unusual punishment, https://www.armfor.uscourts.gov/digest/IB4.htm.
[268] Shalev, S. (2008). The health effects of solitary confinement. In Sourcebook on solitary confinement. Retrieved from http://solitaryconfinement.org
[269] ACLU (2014) *The Dangerous Overuse of Solitary Confinement in the United States*, *Briefing Paper - American Civil Liberties Union*. Available at: https://www.aclu.org/sites/default/files/assets/stop solitary_briefing_paper updated_august_2014.pdf?source=post_page at 6.
[270] *Id*, at 8.
[271] Karin Grunden, Man found hanging in cell at Wabash Valley Correctional Facility, TERRE HAUTE TRIBUNE-STAR, Oct. 1, 2003.

solitary confinement.[272]These few instances, among the thousands of stories that exist, encapsulate the severe psychological trauma affecting mentally ill individuals in solitary confinement.

Extensive social neuroscience research on the impact of environmental and social deprivation on the brain exists as another avenue of challenging the constitutionality of solitary confinement.[273] The results of this research attest to the vital importance of social interaction and stimulating environment on brain function, as studies have revealed brain deterioration imparted by isolation in restrictive housing units within only a couple of days.[274] Despite overwhelming evidence of the social pain induced through solitary confinement, the Supreme Court refuses to recognize that this mental harm caused is sufficiently "cruel" to be considered a violation of the Eighth Amendment.[275] With these standards in place, the Court has been generally unwilling to recognize that the psychological harm incurred from extreme isolation is sufficient to constitute a violation of the Eighth Amendment.[276]

The Court's neglect of the generalized demand for effective clinical support for mentally ill individuals suffering in isolation units stems from two fundamental discrepancies pertaining to basic human needs. The first is a tendency to dismiss social interaction as a basic human necessity, as

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[272] Ian Kysel, Solitary confinement makes teenagers depressed and suicidal. we ... The Washington Post (2015), https://www.washingtonpost.com/posteverything/wp/2015/06/17/solitary-confinement-makes-teenagers-suicidal-we-need-to-ban-the-practice/

[273] Federica Coppola, The brain in solitude: An (other) Eighth amendment challenge to solitary confinement Journal of law and the biosciences (2019)

[274] *Id.*

[275] Claire A. Nolasco et al., *Construing the Legality of Solitary Confinement: Analysis of United States Federal Court Jurisprudence*, AM. J. CRIM. J. (2018). DOI: https://doi.org/10.1007/s12103-018-9463-5

[276] Coppola, *supra* note 273.

deprivation of human needs is interpreted in terms of concrete physical demands such as nutrition and sanitation.[277] This myopic interpretation disregards psychological health as a human need and highlights the immense underestimation of the adverse mental effects of isolation. The ethical dimension of cruelty in punishment remains important within the parameters of basic human needs, and underpins the argument that current solitary confinement conditions meet the "substantial risk of physical harm" stipulation of the objective prong of the conditions standard. The mental, physical, and physiological harms imposed by the conditions of solitary confinement are on par with physical risk involved in starvation and sleep deprivation.[278] Therefore, although the harm of socio-environmental deprivation may translate into mental deterioration, the damage to the confined individual's psyche is ultimately due to physical harm to the brain similar to the damage done by starvation.[279]

As Aristotle notably wrote in *The Politics*, "a social instinct is implanted in all men by nature."[280] Over two thousand years later, the disciplines of neuroscience and behavioral psychology have produced immense empirical data establishing that the human psyche is biologically rooted in the need to be connected.[281] This social connection is as critical to a truly *human* life as food and water is to survival, and mentally ill or cognitively impaired individuals in solitary confinement should be afforded this fundamental need. Eliminating all social and environmental stimulation of

[277] *Id.*
[278] *Id.*
[279] Bennion, Elizabeth (2015) "Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment," Indiana Law Journal: Vol. 90: Iss. 2, Article 7. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6813937/#fn223,
[280] Aristotle, Politics 5 (Benjamin Jowett trans., 1999)
[281] Coppola, *supra* note 273.

incarcerated individuals is to deprive them of a basic human need and to impose a substantial risk of neurological, physiological, and psychological deterioration. Complete isolation involved in current solitary confinement practices risks inflicting unnecessary suffering, characterized by debilitating, and potentially permanent consequences. A punishment that entails unwarranted and possibly permanent damage through deprivation of basic human necessities fails to meet contemporary standards of societal decency, and should not be institutionalized in practice. The Court has stated that the interpretation of the "cruel and unusual punishment" aspect of the Eighth Amendment changes in tandem with the knowledge of an evolving society, and a civilized society should not tolerate the infliction of unnecessary pain on another human being.[282]

The second reason for this neglect is the dualistic perception of harm endorsed in principle by U.S. law.[283] This entails the separation of physical harm from mental suffering, creating a hierarchy of pain in which mental suffering is subjective and less important than physical ailments. As a result of this distinction, social interaction falls outside of the spectrum of constitutionally protected human needs. This has led courts to dismiss cases of mental harm without evidence of physical distress.[284] This judicial deference and unwillingness of the Court to intervene in the methods of inmate discipline and introduce uniform regulations to mitigate psychological harm incurred from solitary confinement was exemplified in the case of *Scarver v. Litscher*.[285]

In this case, the Seventh Circuit acknowledged that the plaintiff, who was repeatedly banging his head against the walls of his cell, had endured substantial psychological distress

[282] *Trop*, 856 U.S. 86, at 101.
[283] Coppola, *supra* note 273.
[284] *Id.*
[285] *Scarver*, 434 F.3d 972, at 976.

as a result of placement in solitary confinement. However, in 2006, the Supreme Court remained hesitant to interfere with correctional management in prisons and deferred to the prison administration to defend a legitimate penological interest in enforcing solitary confinement.[286] Often, judicial analysis of whether a punishment is cruel and unusual lacks scrutiny of the conditions of supermax facilities.[287] Supermax prisons do not have a single definition, but their essence is complete social isolation, deprivation of all environmental stimulation, and enforced idleness.[288] These qualities of an impoverished social environment are enforced only upon the individuals held in solitary confinement within one of these facilities. The Supreme Court defined the foundation of the penological evaluation of solitary confinement conditions as the "effect upon the imprisoned"[289] and that "deference to the findings of state prison officials in the context of the Eighth Amendment would reduce that provision to a nullity in precisely the context where it is most necessary."[290] This tendency of courts to show deference to state prison officials risks the penological interests of prison administrations superseding the well-being of incarcerated individuals. The Supreme Court has stated that constitutional protections relating to the conditions of confinement derive from the acknowledgment that inmates retain the dignity inherent in all humans.[291] Additionally, the Court has established that only "extreme deprivation" adequately supports a condition of confinement claim, and this requirement is met when the socio-environmental deprivation

[286] Coppola, *supra* note 273.
[287] *Id.*
[288] David C Fathi, The New Asylum: Supermax as Warehouse for the Mentally Ill Prison Legal News (2007), https://www.prisonlegalnews.org/news/2007/jul/15/the-new-asylum-supermax-as-warehouse-for-the-mentally-ill/
[289] *Rhodes*, 452 U.S. 337, at 364.
[290] Johnson v. California, 543 U.S. 499, 511
[291] Brown v. Plata, 563 U.S. 493, 510 (2011)

of solitary confinement denies "the minimal civilized measure of life's necessities."[292] Therefore, the punishment of extreme isolation deprives a human of basic human needs. It involves the infliction of unnecessary pain, and is therefore incompatible with the concept of human dignity as it exists in civilized society today.

Inmates who endure substantial mental harm within prison conditions are further burdened by the subjective prong of proving that prison officers were indifferent to their suffering.[293] This subjective prong of the conditions standard refers to the prison official's culpable state of mind and the requirement of proof that substantial risk to an inmate's health and safety was disregarded.[294] The decision of *Farmer* established the parameters of the prison official's culpability, as the Court held that deliberate indifference is equivalent to subjective recklessness.[295] While this test of deliberate indifference remains individualized to each solitary confinement case, the Court in *Farmer* also recognized that some risks of harm are objective such that "a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[296] The challenge of proving prison official's knowledge of the incurred mental harm became instrumental in cases regarding solitary confinement conditions, and establishing this deliberate indifference may rely on circumstantial evidence that the risk was known and ignored.

Proving the deliberate indifference of prison officials constitutes an obstacle to challenging objectively harmful conditions of supermax facilities, particularly in cases

[292] *Rhodes*, 452 U.S. 337, at 347
[293] Coppola, *supra* note 273.
[294] *Id.*
[295] *Farmer*, 511 U.S. 825, at 839
[296] *Id*, at 842

involving mentally ill incarcerated individuals.[297] Due to the lack of mental health training for prison officials, prison administrations may avoid liability by claiming to have no knowledge of the symptoms or risks of mental illness.[298] This creates the perverse incentive for prison staff; subpar knowledge of mental illness facilitates an avoidance of Constitutional responsibility as this condition stands. In light of the questionability of the subjective prong condition in solitary confinement litigation, the court should consider if the condition of extreme social isolation itself is sufficient to warrant a presumption of intentional disregard of prison administrations.

The personal testimonies of incarcerated individuals confined in restrictive cells paired with the research of the psychological harm imposed by prolonged social isolation demonstrates the need for reevaluation of what qualifies as an essential condition of human life. The Court should place more emphasis on social interactions among incarcerated individuals and the prison staff, and introduce regulations for solitary confinement which comport with constitutionally afforded protections for mentally ill inmates. Recent state reforms provide new insight into the impact of reforming solitary confinement and show a consensus that recognizes the need for change.[299]

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[297] Coppola, *supra* note 273.
[298] Lori Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, VALP. U. L. REV. 487 (2004)
[299] Jessica Sandoval, J. (2023, March). *How solitary confinement contributes to the mental health crisis*. National Alliance on Mental Illness. https://www.nami.org/Blogs/NAMI-Blog/March-2023/How-Solitary-Confinement-Contributes-to-the-Mental-Health-Crisis#:~:text=Among%20many%20other%20mental%20health,of%20an%20acute%20mental%20illness.

I. Arguments Against Unlimited Use of Solitary Confinement

Through testimonial accounts, hundreds of inmates in solitary confinement have attested to the devastating cognitive effects of isolation, such as perceptual distortions and hallucinations, increased anxiety and depression, fantasies of revenge on society, and other aspects of mental pain.[300] The effects of isolation also manifest in decreased cognitive function, as a decline in brain activity was found in inmates incarcerated in solitary confinement for only seven days.[301] When the only social stimulation available is sporadic conversations with guards and officers, sentiments of humiliation and meaninglessness compound to damage the mental well-being and neurological health of the prisoner.

Technological advancements such as video surveillance and virtual platforms of communication have eliminated even that fleeting human contact, facilitating a method of further isolation that was unforeseen in the earlier stages of prison development.[302] For example, in decades past, individuals in solitary confinement were able to regularly see and interact with human guards as they made their rounds. As technology developed and was integrated into the surveillance mechanisms of supermax prisons, even fleeting social contact is revoked for inmates in solitary confinement. In a 2007 study conducted by the Red Cross, the clinical impacts of isolation in solitary confinement were compared to those of physical torture, revealing similarities in negative psychological and

[300] Coppola, *supra* note 273.
[301] Paul Gendreau, N.L. Freedman, G.J.S. Wilde & G.D. Scott, Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement, 79 J. of Abnormal Psychol. 54, 57–58 (1972)
[302] David C Fathi, The New Asylum: Supermax as Warehouse for the Mentally Ill Prison Legal News (2007), https://www.prisonlegalnews.org/news/2007/jul/15/the-new-asylum-supermax-as-warehouse-for-the-mentally-ill/

physiological reactions.[303]

The socio-environmentally deprived conditions of isolation cells bear a devastating toll on the psychological well-being of those they confine. Hardened by psychological and physical abuse by prison administrations maximizing control of an individual, inmates have expressed suicidal ideation merely for the chance of an escape.[304] Correctional officers frequently misuse physical restraints and chemical agents as disciplinary measures, and the isolated nature of solitary confinement units render detection of staff abuse much more difficult.[305] The apathetic attitude of prison administrations to this mistreatment facilitates its practice, and the negative psychological effects of social deprivation are further intensified with this abuse. As stated by a California State prison psychologist in 2002, "It's a standard psychiatric concept, if you put people in isolation, they will go insane. . . . Most people in isolation will fall apart."[306]

The claim that solitary confinement cells harbor only the "worst of the worst," most threatening criminals who were convicted of heinous crimes or assaulted other inmates while incarcerated does not realistically reflect the practice of solitary confinement. Mentally ill individuals are disproportionately represented in restrictive housing facilities, and prison officials across the U.S. fill solitary confinement cells with inmates who pose any difficulty to management, whether that be a violation of minor prison rules or launching a lawsuit against the prison

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[303] Dr. Hernàn Reyes, The Worst Scars Are in the Mind: Psychological Torture, 89 Int'l Rev. Red Cross 591, 607 (2007)

[304] Calloway, K. (2023, February 27). *I spent 16 months in solitary confinement and now I'm fighting to end it: ACLU*. American Civil Liberties Union. https://www.aclu.org/news/prisoners-rights/i-spent-16-months-solitary-confinement-and-now-im

[305] Reyes, *supra* note 303.

[306] Human Rights Watch, Ill-Equipped: U.S. Prisons And Offenders With Mental Illness 149 n. 513 (2003).

administration.[307] If prison administration guidelines upheld this exclusivity and supermax facilities were restricted to only the most predatory, solitary confinement cells would stand virtually empty.[308] Nationwide data documenting the use of solitary confinement in prisons in the U.S. estimates that as of July 2021, 48,000 individuals are confined in their cells for at least twenty two hours a day for a minimum of fifteen days.[309] While this statistic has decreased from the 100,000 individuals housed in solitary confinement in 2014, the population of inmates confined in restricted housing among the two million individuals in state and federal prisons is massively unbalanced.[310]

A 2003 report based on data from state prisons throughout the U.S. by Human Rights Watch found one-third to one-half of inmates in solitary confinement cells to be mentally ill.[311] Cognitively impaired and mentally ill individuals who struggle to comprehend and abide by strict prison regulations without treatment garner reputations as troublesome inmates, and are cast aside in solitary confinement cells.[312] This facilitates a destructive cycle in which mentally ill inmates are misinterpreted as willfully defiant by under-trained prison staff and are subjected to prolonged periods of disciplinary

[307] ACLU *supra* note 269, at 9.
[308] Fathi, *supra* note 302.
[309] Correctional Leaders Association, Nationwide report finds reduction in reported use of solitary confinement Yale Law School (2022), https://law.yale.edu/yls-today/news/nationwide-report-finds-reduction-reported-use-solitary-confinement#:~:text=Time%2DIn%2DCell%3A%20A,for%2015%20days%20or%20more.
[310] Wendy Sawyer & Peter Wagner, Mass incarceration: The whole pie 2023 Prison Policy Initiative (2023), https://www.prisonpolicy.org/reports/pie2023.html (last visited Dec 9, 2023).
[311] Zoltan Lucas, Locking down the mentally ill The Crime Report (2010), https://thecrimereport.org/2010/02/18/locking-down-the-mentally-ill/
[312] Fathi, *supra* note 302.

segregation in solitary confinement cells.[313] This "willful defiance" perceived by the prison administration is unfounded, as the psychological damage inflicted by the conditions of solitary confinement alongside pre-existing mental illness compromises the cognitive and affective abilities of the inmates.[314] These cognitive and affective capacities are what contribute to logical reasoning and decision-making, and solitary confinement promotes the further atrophy of inmate ability to comprehend and respond to the emotions of others. The maladaptive psychological processes and anti-social behavior patterns identified as risks of confinement in isolation units will continue to comprise the individual's social functioning, and the rehabilitation process intended in solitary confinement is rendered ineffective.

Inmates with poor mental health are more susceptible to conflict within the prison community and demonstrate increased rates of misconduct and assault. This increases the existing threat to inmates and law enforcement within the prison walls, as complete social isolation of mentally ill inmates only exacerbates symptoms of psychiatric distress.[315] Along with compromised security, rampant mental illness among inmates demands more from already scarce resources, increasing the limited budgets of correctional facilities to offset the pressure put on correctional officers in deprived prisons.[316] The alternative solution to prison security maintenance relies on mitigation of the most oppressive features of supermax facilities. This step toward reform has been found to be effective. For example, a state prison in Washington

[313] Lucas, *supra* note 311.
[314] William Heirstein Et Al., Responsible Brains: Neuroscience, Law, and Human Culpability 222–24 (2018).
[315] Lucas, *supra* note 311.
[316] Kim KiDeuk, Becker-Cohen Miriam, Serakos Maria. 2015. *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System*. Washington, DC: Urban Institute.

experienced a dramatic decrease in violence and the use of punitive force following increased staff interaction with inmates and introduction of communal activities.[317]

The overproduction and overuse of supermax facilities, or prisons containing solitary confinement housing units, has also led to fiscal consequences for the entire federal prison institution.[318] Supermax facilities are three times more expensive to build and operate compared to maximum-security prisons. This fiscal strain was evident in a 2009 study revealing that criminal correction spending exceeded budget growth in all areas of federal and state spending except for Medicaid.[319] When mentally ill inmates are held in an overcrowded prison system that is simultaneously seeking to occupy expensive solitary confinement cells, these individuals are often transferred to isolation housing.[320]

The argument that placing certain inmates in solitary confinement protects other prisoners and officers from danger is cast into grave doubt by the fact that their complete seclusion from other inmates further impairs mental and social capabilities, increasing their risk of misconduct.[321] Isolation exacerbates inmates' existing mental illnesses and increases the threat posed to the rest of the prison community.[322] Only five percent of inmates housed in solitary confinement remain there permanently, and thus facilitating effective reentry into the

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[317] Rhodes, at 192–193.
[318] Fellner Jamie. 2006. "A Conundrum for Corrections, a Tragedy for Prisoners: Prisons as Facilities for the Mentally Ill." *Washington University Journal of Law & Policy* 22:135–44
[319] Solomon Moore, Study Shows High Cost of Criminal Corrections, N.Y. TIMES, Mar. 3, 2009, at A13.
[320] *Id.*
[321] ACLU *supra* note 269, at 9.
[322] Edgemon, T. G., & Clay-Warner, J. (2019). Inmate Mental Health and the Pains of Imprisonment. *Society and Mental Health*, *9*(1), 33–50. https://doi.org/10.1177/2156869318785424

greater prison population is essential.[323] The American Psychological Association reports that forty-five percent of federal prisoners experience mental health issues. Furthermore, with over two million people incarcerated in the United States, a tremendous number of mentally ill inmates suffer in an environment devoid of psychological treatment.[324]

The extreme security measures maintained in supermax units render adequate therapy sessions and mental health assessments unavailable. Intensified security measures entail being fed through a slot in a door, denial of physical or social contact, and a lack of access to medical services afforded to inmates within the greater prison population.[325] The only available therapy for individuals in solitary confinement cells consists of conversations through a steel door, surrounded by other prisoners and officers.[326] The inability to receive intimate and personal therapy in solitary confinement makes the available treatment largely ineffective. The withholding of effective therapy to inmates with mental illness in supermax facilities, coupled with the devastating impact of social isolation lays bare the substantial argument that solitary confinement of mentally ill inmates violates the Eighth Amendment.[327] Those that argue this suggest that ensured

[323] Timothy Hughes & Doris James Wilson, Reentry Trends in the United States, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statustics (2004), available at http://www.bjs.gov/content/pub/pdf/reentry.pdf (reporting that 95% of all state prisoners will eventually be released).
[324] Taylor, E. (n.d.). *Mental Health and Reentry: How Court Services Offender Agency Meets the Challenge of Mental Health Community Supervision*. https://cops.usdoj.gov/html/dispatch/05-2022/mental_health_reentry.html#:~:text=Approximately%20half%20the%20people%20in,path%20for%20prisoners%20returning%20home.
[325] Sandoval, *supra* note 299.
[326] ACLU *supra* note 269, at 9.
[327] *Id.*

psychological decline of mentally ill prisoners paired with a lack of treatment renders the practice of total social isolation cruel and unusual as understood in the context of the Eighth Amendment. As aforementioned, to establish a "cruel and unusual punishment" violation of the Eighth Amendment, the appellate must demonstrate: an "objectively, sufficiently serious act or omission resulting in the denial of necessities; a culpable state of mind on the part of prison officials amounting to deliberate indifference to his health and safety; and that he has exhausted the prisoner-grievance system and that he has petitioned for relief under Article 138, UCMJ."[328] The human neurobiological demand for social interaction is complemented by environmental stimulation, both contributing to proper brain function and behavior. Thus, the social and environmental stimulation deprived in solitary confinement is to deprive incarcerated individuals with the conditions necessary for physiological brain function, and thus the very nature of themselves. In acknowledging the vital importance of human interaction and environmental stimulation is an implication that forcing inmates into six by eight feet cells in complete isolation is sufficient *per se* to deprive them of basic human needs.[329] Courts have endorsed the view that solitary confinement conditions are legitimate as long as they guarantee the same basic necessities afforded to the general prison population.[330] However, this notion of equivalence disregards the fact that extreme socio-environmental isolation is the condition that renders the difference between solitary confinement and confinement in the general prison. Extreme isolation deprives inmates in solitary confinement of a biological based need that is provided to the general prison population, and social interaction should be regarded as a basic need rather than a

[328] First principles: Constitutional matters: Cruel and unusual punishment, https://www.armfor.uscourts.gov/digest/IB4.htm
[329] Coppola, *supra* note 263.
[330] *Hutto* 437 U.S. 678, at 686.

mere privilege.

With the vast amount of evidence attesting to the harmful psychological effects of solitary confinement, the detriment to larger policy goals of prisons has become a pertinent topic of conversation. As a result, a reevaluation of the legitimacy of current solitary confinement practices is now in progress.[331] Federal courts have called into question whether the placement of mentally ill inmates in restrictive housing constitutes cruel and unusual punishment.[332] The U.S. Senate held its first congressional meeting to discuss the use of isolation measures in prisons in June 2012 and discussion is ongoing.[333] Several other influential organizations, such as the American Civil Liberties Union, American Bar Association, and National Alliance of Mental Illness, also vouch in opposition to the use of solitary confinement.[334] Since 2021, state-level efforts to regulate use of solitary confinement have increased with two hundred fifty-eight pieces of proposed legislation filed across forty-one states, the majority seeking to wholly eliminate some of the aforementioned components of the practice.[335]

Alongside state reform efforts and discussion of the depravity of solitary confinement conditions within federal courts, nationwide polling data demonstrates widespread bipartisan support for restrictions on the practice of complete isolation in prisons.[336] This evidence of limited political resistance minimizes deterrence for legislation, and functions as the foundation for constructive reform. Legislators and advocates for the regulation of solitary confinement practices are poised for genuine improvement, but some prison

[331] Sandoval, *supra* note 299.
[332] *Id.*
[333] Bennion, *supra* note 279.
[334] *Id.*
[335] Sandoval, *supra* note 299.
[336] *Id.*

administrations and a widespread judicial hesitancy to interfere with prison security deter change. Corrections officers and policy makers who consider solitary confinement an effective strategy to promote order in the prison system maintain that the potential benefits of solitary confinement to the individual inmate, other inmates, and prison staff counterbalances the adverse effects linked with stays in isolation.[337] This stance of penological interest is implicitly supported by the Court's exercise of judicial deference to solitary confinement management and condition regulations which prison officials deploy.[338] Despite the lack of established criteria to assess the penological interest of a prison in solitary confinement litigation, Courts often have "deferred to prison officials when they claim that a particular condition or treatment is necessary."[339] This notion posits that prison administrations and officials, who lack required mental health training, have a more accurate sense of which individuals are in need of additional psychological treatment.[340] Maintaining this skewed perspective on the expertise of prison officials creates a considerable barrier in solitary confinement litigation cases where conditions of isolation pose a risk of substantial harm which should trigger Eighth Amendment protections.

If an inmate without psychological illness is isolated in confinement, the harm to their psyche resulting from a solitary holding cell is enough to induce mental impairment.[341] Recent studies delineate the lasting detrimental effects of solitary confinement on the mental status of the individual, corroborating the notion that solitary confinement leads to the

[337] Coppola, *supra* note 263.
[338] *Id.*
[339] *Rhodes*, 452 U.S. 337, at 364.
[340] Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 626 (2014)
[341] Taylor, *supra* note 314.

development of acute mental disorders.[342] These mental disorders often manifest among incarcerated individuals as difficulties with impulse control, feelings of hostility and mania, and severe anxiety and depression.[343] Individuals without documentation of previous mental illness are found to become symptomatic with ranging severity after just brief stays in solitary confinement, and the negative psychological impact of isolation affects post-release outcomes of inmates.[344]
The persisting detriment inflicted by extended time in isolation can be fatal. Research identifies a correlation between time spent incarcerated in restrictive housing and an increased risk of death within the first year following release.[345] Individuals previously incarcerated within solitary confinement units are overall twenty-four percent more likely to die within the first year after release, including seventy-eight percent greater risk of suicide within that demographic.[346] The psychological and physical destitution induced through confinement in supermax sections of prisons not only fuels a disproportionately high rate of mental illness and self-harming tendencies compared to the general prison population, but also manifests in other symptoms, including social isolation, loss of identity, and sensory hypersensitivity.[347] Mental illness originating from an

[342] Sandoval, *supra* note 299.
[343]Mary Corcoran, Effects Of Solitary Confinement On The Well Being Of Prison Inmates Applied Psychology OPUS, https://wp.nyu.edu/steinhardt-appsych_opus/effects-of-solitary-confinement-on-the-well-being-of-prison-inmates/
[344] Dean, J., & June 16, 2020. (2020, June 16). *Short stays in solitary can increase recidivism, unemployment*. Cornell Chronicle. https://news.cornell.edu/stories/2020/06/short-stays-solitary-can-increase-recidivism-unemployment.
[345] Corcoran, *supra* note 343.
[346] *Id.*
[347] Reiter K, Ventura J, Lovell D, Augustine D, Barragan M, Blair T, Chesnut K, Dashtgard P, Gonzalez G, Pifer N, Strong J. Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017-2018. Am J Public Health. 2020

inmate's experience in solitary confinement further prevents them from a successful reentry into society, ultimately posing an even greater impact on the larger population.[348]

Amongst the chilling accounts of solitary confinement published, Kiana Calloway details his devastating experience of entering "Camp J."[349] Camp J is a Louisiana prison noted for its severe lockdown units, and Calloway was confronted with this stark image of what the rest of his life would be like when he entered the prison at only seventeen years of age in 2019.[350] Entering Louisiana State Penitentiary, Calloway was sentenced to solitary confinement for twenty-three hours a day for sixteen months. Struggling to retain his humanity under the torturous "23 and 1" regime, he languished in an environment constructed to maximize control over the individual and minimize the sense of self. Amidst the twenty-three hours a day spent within the perpetually lit cell, Calloway describes a single hour where a phone call or shower was permitted.[351] Deprived of educational or vocational programs, inmates are reduced to sitting in their cells listening to the anguished cries of neighboring prisoners who are also suffering the effects of long-term solitary confinement.[352] Testifying on the consequences of prolonged isolation, Calloway states, "It's been 22 years since my time in solitary and 8 years since my release from prison, but I still have flashbacks and nightmares. Even when I'm with someone else, I find myself secluded in

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Jan;110(S1):S56-S62. doi: 10.2105/AJPH.2019.305375. PMID: 31967876; PMCID: PMC6987940.

[348] Taylor, *supra* note 324.

[349] Calloway, K. (2023, February 27). *I spent 16 months in solitary confinement and now I'm fighting to end it: ACLU*. American Civil Liberties Union. https://www.aclu.org/news/prisoners-rights/i-spent-16-months-solitary-confinement-and-now-im

[350] *Id.*

[351] *Id.*

[352] *Id.*

my own mind. I call it being psychologically incarcerated."[353]

Calloway, who maintains his innocence, was initially convicted on two counts of first degree murder by a non-unanimous jury, receiving two life sentences without the possibility of parole and was immediately confined in a supermax facility. However, Calloway received an additional trial once it was revealed that the initial judge prohibited him from calling certain witnesses and neglected to require the prosecution to turn over two witness statements. His sentence was reduced to thirty four years in the general prison population.[354] Kiana Calloway is now an advocate for the Voice of the Experience (VOTE) organization, a foundation created in New Orleans by formerly incarcerated individuals, that strives for the reformation of the Louisiana Department of Corrections disciplinary procedures in prison.[355] The complete prohibition of access to education in the name of discipline is another manifestation of the ineffective policies surrounding solitary confinement in U.S. prisons.

Alongside the development of psychological and physical conditions from complete isolation, the increase in suicide rates and self-harm of inmates in solitary confinement has been repeatedly acknowledged and verified. Dr. Stuart Grassian, a practicing psychologist on the faculty of Harvard Medical School for over twenty five years, encapsulates the devastating psychiatric effects of solitary confinement by citing

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[353] *Id.*

[354] Hutchinson, P. (2023, November 28). *Louisiana considers education access for the incarcerated - including those on Death row*. News From The States. https://www.newsfromthestates.com/article/louisiana-considers-education-access-incarcerated-including-those-death-row#:~:text=One%20task%20force%20member%2C%20Kiana,count%20of%20feticide%20in%201997.

[355] Frances Madeson et al., LOUISIANA HUNGER STRIKERS - ALREADY IN SOLITARY - ARE BEING BRUTALLY PUNISHED TRUTHOUT (2021), https://truthout.org/articles/louisiana-hunger-strikers-already-in-solitary-are-being-brutally-punished/ (last visited Nov 28, 2023).

testimony from an individual confined in California's Pelican Bay state prison.[356] By 2011, Pelican Bay had showcased widespread, unregulated utilization of isolation in segregated units for over a decade, affecting approximately forty-five percent of inmates.[357] The incarcerated individual described in Dr. Grassian's testimony, lacking previously documented psychiatric disorders, emerged from restrictive housing afflicted with severe mental illness arising from the trauma he endured.

Dr. Grassian states that the individual became "overtly psychotic and suicidal."[358] At one point, the inmate resorted to writing a suicide note in his own blood and confessed to the doctor, "I'm tired of people talking in my head. I was mentally clear before . . . sometimes I get so confused, I don't even know what's going on."[359] Through research and personal contact with many formerly and currently incarcerated individuals, Dr. Grassian established a specific psychiatric disorder called Security Housing Unit (SHU) Syndrome, giving a name to the distress arising from periods in solitary confinement.[360] The practice of prolonged solitary confinement manifests as a psychological detriment to those it confines, having the power not only to aggravate pre-existing mental illnesses but to create them.

In 2017, The Department of Justice guidelines recognized that extreme isolation causes mentally ill inmates' already fragile psychiatric conditions to decline, which led to the launch of reform bills that advocated for limiting the use of

[356] ACLU, *supra* note 269.
[357] Tiana Herring, THE RESEARCH IS CLEAR: SOLITARY CONFINEMENT CAUSES LONG-LASTING HARM PRISON POLICY INITIATIVE (2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/ (last visited Nov 28, 2023).
[358] *Id.*
[359] *Id.*
[360] Sandoval, *supra* note 299.

solitary confinement in American prisons.[361] Fueled by the recognition of the substantial risk of psychological harm imposed by solitary confinement practices, a profusion of bills were introduced between 2018 and 2023.[362] These bills aimed to create reporting and oversight mechanisms to increase transparency of the inner workings of incarceration and regulate solitary confinement through legislation. However, only 29 states enacted these bills.[363] While ideas for reform circulate to regulate the practice, solitary confinement, as a form of security maintenance, in lieu of mental health treatment must be eliminated. Although maintaining order and safety within the prison and psychological treatment for mentally ill inmates are not mutually exclusive, the current practice of punitive isolation without access to psychological therapy does not achieve the goal of security. Moreover, restricting the use of solitary confinement is linked to a decline in prison misconduct.[364] Corroborating this phenomenon, a reduction in the number of inmates in solitary confinement has resulted in a decline in prison violence in Michigan.[365] When all isolation cells rates of violence in Mississippi prisons plummeted by seventy percent when all isolation cells were removed.[366]

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[361] *Report and recommendations concerning the use of restrictive housing*. The United States Department of Justice. (2017, March 13). https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing

[362] Sandoval, *supra* note 299.

[363] Banning Torture: Legislative Trends and Policy Solutions for Restricting and Ending Solitary Confinement Throughout the United States, Unlock the Box Campaign, January 2023.

[364] ACLU, *supra* note 269.

[365] Jeff Gerritt, Pilot Program in UP Tests Alternatives to Traditional Prison Segregation, DETROIT FREE PRESS, January 1, 2012, available at www.frep.com/fdcp/?unique=1326226266727.

[366] Terry A. Kupers et al., Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating

Theories supporting the use of solitary confinement emphasizes its capacity to deter future crime among inmates, however, empirical evidence in supermax prisons does not comport with this notion. When comparing the recidivism rates of inmates released from solitary confinement versus the normal prison population, there is an increased risk of recommitting a violent crime among those confined in isolation.[367] This increased risk of recidivism is largely rooted in the adverse psychological symptoms imposed by confinement in isolation cells, and present risk factors for socially dysfunctional behaviors.[368] Alongside its failure to decrease risk of recidivism, solitary confinement oppresses rehabilitation by removing the possibility of positive relationships with other perpetrators and the rest of society. This self-reform based on relational processes is stunted, and inmates in solitary confinement are unable to reintegrate into society as law-abiding and self-sufficient individuals.

With the devastating impacts of complete isolation units on psychological well-being being so well-documented, every federal court has been confronted with the question of whether or not placing individuals with mental illness in solitary confinement is cruel and unusual punishment in violation of the Eighth Amendment.[369] Despite the formal position statement released by the American Psychiatric Association stating that inmates afflicted with mental illness should never be confined in restrictive housing units without access to additional clinical support, the practice continues.[370] Courts endorse the notion that solitary confinement is not cruel and unusual punishment as long as its provisions of nutrition

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Alternative Mental Health Programs, 36 CRIM. JUST. & BEHAV. 1037, 1041 (2009).

[367] Coppola, *supra* note 273.

[368] *Id.*

[369] ACLU, *supra* note 269, at 12.

[370] *Id.*

and shelter do not differ from those provided to the general prison population.[371] Implicit in that precedent is the failure to recognize that extreme social isolation is the fundamental difference in condition between solitary confinement and the general prison population. Housing an inmate in supermax deprives inmates of a fundamental need that normal confinement facilitates, and social interaction should be acknowledged as a human necessity, not a mere privilege.[372]

The proposed policy restrictions on isolated confinement do not prevent the devastating consequences of the inmates' experience in restrictive housing cells on psychological health. Continued access to psychiatric treatment in conjunction with therapy and programs supporting rehabilitation should be demanded of federal and state institutions alike. Yet, repeated court mandates have not led to an established and protected right to psychological treatment for mentally ill inmates in solitary confinement.[373] Inmates are sentenced to live in insufferable confines with no treatment nor codified rights. The rights afforded to inmates in the general prison population include contact with other inmates, participation in programming and communal activities, and visitations.[374] Solitary confinement strips inmates of those opportunities and the benefits of social interaction.

Access to therapy and psychiatric treatment in prison is incredibly stunted, as three in five inmates do not receive

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[371] *Hutto* 437 U.S. 678, at 686.
[372] Coppola, *supra* note 273.
[373] NAMI. (2023). *Mental health treatment while incarcerated*. National Alliance on Mental Illness. https://www.nami.org/Advocacy/Policy-Priorities/Improving-Health/Mental-Health-Treatment-While-Incarcerated.
[374] Andreea Matei, Solitary confinement in US prisons Urban Institute (2022), https://www.urban.org/sites/default/files/2022-08/Solitary%20Confinement%20in%20the%20US.pdf.

appropriate mental health treatment while incarcerated.[375] Along with the deficit of effective mental health services, treatment regimens must grind to a halt for prisoners with previously diagnosed mental illness, as fifty percent of inmates who were medicated for mental illness upon admission did not continue to receive medication during their sentence in prison.[376] To circumvent the challenges faced by mentally ill incarcerated individuals and enhance the medical services provided to those in solitary confinement, consistent psychological screening and regular access to mental health professionals must be implemented in prisons. While isolation unit conditions vary depending on state legislature, systematic policies of confinement–including isolation behind a steel door for twenty-two to twenty-four hours a day, physical discipline including hog-tying and restraint chairs, severely limited contact with other humans, and inadequate rehabilitative and educational programming—are universal in the United States.[377]

As they serve their sentences, inmates experience immense anxiety surrounding social conduct after being deprived of interaction. If they are released from solitary confinement into larger society, many former inmates exhibit maladjustment disorders and difficulty acclimating to social contact after release from isolation units compared to inmates released from maximum security prisons.[378] In 2006, the Commission on Safety and Abuse in America's Prisons expressed concern for the practice of releasing inmates from isolation settings directly into the community due to the diminished social skills incurred from stays in solitary

[375] NAMI, *supra* note 373.
[376] *Id.*
[377] Madeodev. (2023). *Solitary confinement facts*. American Friends Service Committee. https://afsc.org/solitary-confinement-facts.
[378] Corcoran, *supra* note 343.

confinement.[379] Considering ninety five percent of inmates in solitary confinement will be released, the successful reintegration into society of previously incarcerated individuals should be the pinnacle of a correctional administration's mission.[380]

The practice of prolonged incarceration excluding the use of solitary confinement for "higher risk" inmates is already highly damaging due to the internalized prisonization effect. The unregulated, unlimited use of solitary confinement in federal prisons perpetuates and intensifies the cycle of "catch and release." This refers to the fundamental concept of recidivism among individuals released from prison, relating to a relapse into criminal behavior.[381] Drawn from linked prison records in the U.S. from 2006 to 2013, the recidivism rate for inmates released from solitary confinement increased by fifteen percent beyond the recidivism rate of fifty percent for general population inmates.[382] This correlation between release from isolation and increased risk of recidivism is documented in research conducted in state penitentiaries.

Preliminary research in California shows that recidivism rates are twenty percent higher for those released from solitary confinement as opposed to the general prison population.[383] In Colorado two-thirds of inmates released from restrictive housing units return to prison within three years of release.[384] Additional research comparing the behavioral trajectories of inmates who were not placed in solitary

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[379] Commission On Safety and Abuse In America's Prisons, Confronting Confinement 55 (2006), available at http://www.vera.org/download?file=2845/Confronting_Confinement.pdf
[380] Hughes, *supra* note 323.
[381] NIJ. (n.d.). *Recidivism*. National Institute of Justice. https://nij.ojp.gov/topics/corrections/recidivism#:~:text=Recidivism%20is%20one%20of%20the,intervention%20for%20a%20previous%20crime.
[382] Dean, *supra* note 344.
[383] ACLU, *supra* note 269, at 12.
[384] *Id.*

confinement with the inmates housed in isolation units confirms that the risk of conviction of another crime within three years of release is increased by fifteen percent.[385] One potential factor driving recidivism is the psychological trauma incurred from prolonged periods of solitary confinement, and when individuals are labeled as "problem inmates" by correctional officers due to mental health issues, the cycle of detriment continues.[386]

While research demonstrating the psychological damage from confinement in supermax units has become more widespread over the last two decades, the United States has a prolonged and dismal record of psychological harm resulting from use of isolation units.[387] In 1959, the American Correctional Association's *Manual of Correctional Standards* dictated that use of solitary confinement for mentally ill individuals should not exceed fifteen days and should only be utilized as a last resort, stressing that inmates must be provided with individual or group therapy to preserve mental well-being.[388] Despite previous efforts being made to regulate the practice of solitary confinement in the U.S., its widespread use was reignited in the 1980s, and the research demonstrating these effects is too often cast aside in U.S. prisons.[389]

It is important to note that the resurrection of isolation units in prisons was also spurred by the widespread dissolution of mental hospitals in the 1960s. This forged an era of "transinstitutionalization" where mentally ill individuals are transferred from psychiatric hospitals to prisons.[390] The

[385] Dean, *supra* note 344.
[386] *Id.*
[387] Bennion, *supra* note 279.
[388] Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinq. 126, 126 (2003).
[389] Herring, T. (2020, December). *The research is clear: Solitary confinement causes long-lasting harm*. Prison Policy Initiative. https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/
[390] Bennion, *supra* note 279.

intention was to house mentally ill persons in less-restrictive environments with treatment provided in group settings. However, once the mental hospitals closed, funding for support services and community housing failed to materialize.[391] As a result, America's largest inpatient facilities became not hospitals, but jails.[392] This concept manifests in the concentration of mentally ill individuals in prison that is observed in current society, as individuals diagnosed with psychological illness are three times more likely to be incarcerated than hospitalized for treatment.[393] The U.S. has been grappling with the facilitation of positive change among inmates for decades, and it remains critical that the psychological health of incarcerated individuals is preserved to create a rehabilitative environment.

II. Arguments For the Unlimited Use of Solitary Confinement

Advocates for unlimited use of solitary confinement claim that the isolating conditions imposed on a single prisoner preserve the safety of correctional officers and other inmates.[394] It is argued that segregation cells deter misconduct and properly punish inmates who are unwilling to abide by the prison's rules, promoting generalized orderly conduct.[395] The fundamental justifications for the use of solitary confinement rely on the deluded notion that only the "worst of the worst" are placed in social isolation cells, working to create a safer general prison environment.[396] The reality is wholly different,

[391] Fathi, *supra* note 302.
[392] Nation's Jails Struggle with Mentally Ill Prisoners, NPR (Sept. 4, 2011), http://www.npr.org/2011/09/04/140167676/nations-jails-struggle-with-mentally-ill-prisoners.
[393] Fathi, *supra* note 302.
[394] ACLU, *supra* note 269, at 10.
[395] *Id.*
[396] *Id.*

as incarcerated individuals cast into solitary confinement are generally placed there for one of three reasons beyond the presence of a genuine security threat. Isolation cells are utilized to control individuals perceived as a current or potential threat to the prison community, to shield certain inmates from threats and violence from other inmates, or to discipline dissent for prison rules.[397] Within the realm of the perceived threat, the majority of inmates housed in supermax facilities indefinitely are allegedly involved in gang activity.[398] Despite remaining free of disciplinary write-ups during their sentence and a lack of discrete evidence confirming affiliation with organized crime, inmates suspected of gang membership are confined in restrictive housing without a timeframe for release back into the greater prison population.[399]

Alongside inmates suspected of gang affiliation and those who commit minor infractions, mentally ill inmates are disproportionately represented in restrictive housing. Conforming to a heavily regimented prison environment is made even more difficult by the symptoms of severe mental illness, and thus minor infractions are more frequently committed by this group of inmates.[400] Correctional officers often treat this 'disordered behavior as disorderly behavior', and place mentally ill inmates in solitary confinement

[397] Hope Metcalf, Jamelia Morgan, Samuel Oliker-Friedland, Judith Resnik, Julia Spiegel, Haran Tae, Alyssa Work & Brian Holbrook, Administrative Segregation, Degrees Of Isolation, and Incarceration: A National Overview Of State And Federal Correlation Policies 2 (2013), https://www.aclu.org/files/assets/Administrative%20Segregation,%20Degrees%20of%20Isolation,%20and%20Incarceration.pdf.
[398] Bennion, *supra* note 279.
[399] Thomas L. Hafemeister & Jeff George, The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness, 90 DENV. U. L. REV. 1, 10 (2012).
[400] Bennion, *supra* note 279.

indefinitely, ultimately exacerbating the disordered behavior.[401] Due to the poorly defined policies regarding which inmates may be placed in solitary confinement, restrictive housing units become densely populated with inmates who committed small transgressions or petty annoyances.[402] Imposing complete isolation on an inmate is entirely left to the discretion of individual prison administrations, and without definitive guidelines restricting the length of confinement in restrictive housing units, inmates may be left to suffer in solitary confinement indefinitely. These low-risk inmates may pose minor management difficulties for the corrections officers, but do not demand complete sensory deprivation and social isolation.

Evaluating whether solitary confinement units deprive inmates of a basic human need entails weighing the gravity of the harm caused to an individual against the penological demands of the prison, such as security and inmate management.[403] Inherent in this comparison of the risk of harm and security needs, is the indifference of the prison guards to the psychological interests of the inmates.[404] This functions only to perpetuate the intransient trade-off between the mental well-being of the individuals incarcerated in solitary confinement and maintaining discipline within the prison. Neglecting the overwhelming research confirming the damages caused by solitary confinement leads to the use of supermax housing as the predominant solution for any conflict arising in the prison environment, including aforementioned alleged gang affiliation and minor infractions.[405] There is an

[401] *Id.*
[402] Atul Gawande, Hellhole, New Yorker, Mar. 30, 2009, pg. 36, 39.
[403] Coppola, *supra* note 273.
[404] *Id.*
[405] Ring, K. A., & Gill, M. (n.d.). *Mental Health Policies and practices surrounding mental health*. Prison Policy Initiative. https://www.prisonpolicy.org/research/mental_health/

imbalance between the traumatic and permanent implications of social isolation and the penological interests that solitary confinement is intended to serve. This emerging imbalance is derived from the fact that socio-environmental deprivation presents an excessive risk of severe brain deterioration and psychological consequences; this extremely unbalanced cost fails to be justified by any penological interest.[406] The evidence of excessive risk of psychological damage reinforces existing evidence that neither short nor prolonged sentences in solitary confinement reduces infractions or prison incidents as intended.[407] In fact, prisons that have restricted the use of solitary confinement have noted a decrease in inmate violence, and thus limited use of isolation cells does not undermine capacity of prison administrations to maintain prison safety.[408]

The reality remains that solitary confinement cells are consistently overused, causing a disproportionate isolation of mentally ill or cognitively-impaired prisoners struggling to navigate in prison settings.[409] Once placed in solitary confinement and excluded from the greater prison population, the prisoner must endure the detrimental effects of social isolation which increases the likelihood of psychological harm. The infliction of social deprivation on inmates through extended periods of solitary confinement is counterproductive to the release of a convict back into the greater prison community, and the release of a rehabilitated individual into

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[406] National Committee on Correctional Health Care, *Position Statement: Solitary Confinement (Isolation)*, 22(3) J. Correct. Health Care 257, 258 (2016).
[407] Joseph Lucas & Matthew Jones, *An Analysis of the Deterrent Effects of Disciplinary Segregation on Institutional Rule Violation Rates,* CRIM. J. POL. REV. 1 (2017).
[408] ASCA-Liman, *Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes* (Oct. 2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_workingtolimit.pdf.
[409] Ring, *supra* note 405.

greater society. Mental illness originating from an inmate's experience in solitary confinement further prevents them from a successful reentry into society, posing an even greater impact on the larger population.[410] The pervasive use of the practice of solitary confinement results in the release of thousands of mentally ill inmates from incarceration with diminished social capacities and life skills, and a greater likelihood to reoffend.[411]

Unlimited use of solitary confinement may also be preferred when alternative disciplinary options are ineffective in controlling high-risk inmates.[412] Supporters of the use of solitary confinement argue that other methods of discipline, including education programs and cognitive-behavioral therapy, are only applicable treatments to a minute portion of the prison population. However, with over fifty percent of the population in federal and state prisons suffering from mental illness, the need for more comprehensive psychological treatment is impertinent.[413] According to a prison report published by the Prison Policy Initiative organization, in 2017 and revised in 2023, sixty-six percent of mentally ill inmates do not receive, nor are they offered, psychological treatment while incarcerated.[414] In addition to the lack of psychological treatment, contact visits, rehabilitative therapy, work, and all other recreational activities that are afforded to the general prison population are prohibited for inmates in solitary confinement.[415]

The disproportionate incarceration of individuals with

[410] Taylor, *supra* note 324.
[411] ACLU, *supra* note 269.
[412] *Id.*
[413] *Id.*
[414] Ring, *supra* note 405.
[415] Madrid v. Gomez, 889 F. Supp. 1146, 1229 (N.D. Cal. 1995); Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary, 112th Cong. 20–21 (2012).

mental health issues paired with the lack of accessible treatment in prisons illuminates the U.S.'s deficit in attention to the psychological needs of inmates, and the glaring need for reform. The implementation of more opportunities for mental health treatment and the improvement of staff training would enhance communication regarding high-needs prisoners and replace solitary confinement to maintain prison security. The proliferation of supermax facilities as a more fiscally conservative alternative to high-quality therapy is a paradox. Supermax facilities are far more expensive to construct and maintain, and holding a prisoner in solitary confinement housing costs more than three times as much as incarceration in a maximum security prison per day.[416] The majority of the additional expenses of supermax prisons are rooted in higher staffing costs, as cleaning and food services are typically performed by inmates for no compensation in maximum security prisons.[417] Through reallocation of funds, community-based activities and increased group therapy programs within the prison can be arranged to maintain a safer prison environment without excessive additional cost.

III. Proposal To Eliminate the Unlimited Use of Solitary Confinement in Federal Prisons:

In this section, I will introduce five achievable reforms designed to mitigate the harm induced by solitary confinement without wholly eliminating the practice. As stated by Justice Sotomayor in *Apodaka*, "a punishment need not leave physical scars to be cruel and unusual."[418] While discontinuation of the use of supermax facilities to house mentally ill incarcerated individuals is necessary to uphold the Eighth Amendment,

[416] American Correctional Association, 2004 Directory (65th Ed. 2004), at 286, 288, 568, 570.
[417] Fathi, *supra* note 302.
[418] *Apodaka*, 586 U.S.

implementing the following reforms will alleviate some of the scars imposed by current practices of solitary confinement.

1. Prioritize mental health training for correctional officers to place greater emphasis on the psychological treatment of high-risk inmates; high-risk would entail those with pre-established mental illness or cognitive impairments. Contact visits, rehabilitative therapy, work, and all other recreational activities that are afforded to the general prison population are prohibited for inmates in solitary confinement. This would ensure that correctional officers have the skills and knowledge necessary to effectively and compassionately manage situations with non-compliant inmates without resorting to solitary confinement. In 2001, Appelbaum and colleagues published an article regarding the state of mental health training for correctional officers.[419] The article identified the discrepancy between professional cultures of security staff and mental health staff as a prominent issue within prison administrations. The article noted how many members of security and mental health staff actually collaborate effectively and share a common goal of humane treatment of inmates, and the capacity of mental health training sessions to hone these skills. Introducing collaborative training sessions focused on mental illness would function to create a multidisciplinary staff equipped with more skills to conduct a safe prison environment, and prevent inmate abuse. In the *Estelle* and *Wilson*[420] cases, the Supreme Court determined that claims of violation of the Eighth Amendment arising from solitary confinement conditions requires the subjective aspect of "deliberate indifference" of corrections officers to the risk to

[419] Kenneth L. Appelbaum, James M. Hickey & Ira Packer, *The role of correctional officers in multidisciplinary mental health care in prisons*, 52 Psychiatric Services 1343–1347 (2001).
[420] *Estelle,* 429 U.S. 97; *Wilson,* 501 U.S. 294, at 300

inmate health.[421] Through implementation of trauma-response training and established methods of accommodating mentally ill incarcerated individuals, the possibility of ignorant indifference to inmates' psychological suffering would be eliminated. This would facilitate litigation of solitary confinement conditions to appropriately deliver justice to those individuals who have suffered.

2. Establish solitary confinement for mentally ill individuals as a violation of the Eighth Amendment. This entails the need for the Court to uphold that the degree of mental injury endured as a result of prolonged isolation significantly exceeds the psychological pain compatible with Eighth Amendment standards.[422] The justification for this reform is predicated on the research indicating the increased vulnerability to detrimental effects of social isolation in people with pre-existing mental illness.[423] Once this discrepancy is acknowledged, comprehensive evaluation of the practice of solitary confinement can occur, and Congress may pass a statute that would effectively end solitary confinement in the future. Within the criteria to establish a punishment as "cruel and unusual" is a demonstration of an "objectively, sufficiently serious act or omission resulting in the denial of necessities…"[424] and the mental, physical, and physiological harms imposed by the conditions of solitary confinement are on par with physical risk involved in starvation and sleep deprivation. Given the biologically-based human need for social interaction and the irreversible neurological and psychological damage incurred from confinement in isolation units, the complete isolation imposed by solitary confinement

[421] Coppola, *supra* note 273.
[422] *Id.*
[423] *Id.*
[424] First principles: Constitutional matters: Cruel and unusual punishment, https://www.armfor.uscourts.gov/digest/IB4.htm

constitutes a deprivation of necessities.

3. Reconfigure the layout of isolation cells to align with defined environmental standards. The Constitution does not mandate comfortable cells.[425] However, empirical studies have confirmed that environmental surroundings influence psychological well-being and behavior, and severely under-furnished cells function to magnify the effects of social deprivation.[426] Research surrounding suicides in prisons have noted that prison characteristics constitute almost half of the variation of distress among inmates who had attempted suicide, highlighting the substantial impact of prison-level factors on compromised mental health.[427] Affording small personal amenities to incarcerated individuals, such as proper bedding and natural lighting, contributes to more generalized well-being of inmates and overall reduced prison misconduct.[428]

4. Develop alternative disciplinary measures that address the psychological root of an inmate's poor conduct. This could include providing more intensive therapy and vocational training outside of the cell in a consistent routine. Access to skills training and preparation for future employment would provide a constructive purpose for inmates to direct the intellectual and creative energies that are suppressed by confinement in Supermax housing. Access to social activities for inmates, and access to reading material, in-cell programming, and telephone calls can be maintained even if inmates remained segregated from the rest of the prison population. This routine should be maintained for as long as it

[425] Eg *Rhodes,* 452 U.S. 337, at 349.
[426] Coppola, *supra* note 273.
[427] Liebling Alison. 2006. "The Role of the Prison Environment in Prison Suicide and Prisoner Distress." Pp. 16–28 in *Preventing Suicide and Other Self-harm in Prison*, edited by Dear G. London: Palgrave Macmillan.
[428] *Id.*

is deemed necessary through evaluation by a psychologist. Research of brain plasticity has indicated that social engagement induces positive alterations in the neural circuits underlying socio-affective skills such as empathy, cognitive functions, and social behavior that persist throughout the individual's lifespan.[429] Facilitating positive social interaction through group therapy and interactive training courses allows for inmates to experience environmental stimulation and develop normal sociable tendencies.[430] Acknowledging the bidirectional link between cognitive function and social environment in the development of alternative disciplinary measures is key in protecting brain health among inmates and functional reentry into society.[431]

5. Increase the accessibility to enriching activities and group therapy sessions within the general prison population to generate a sense of community and trust between inmates and officers. Research indicates that the frequency of prison violence in America is more closely correlated to the manner in which inmates are treated by prison staff than the presence of a minute number of "high-risk" inmates.[432] By cultivating an environment of respect as opposed to a skewed hierarchy of power, a safer general prison population can be attained. The current vehicle for achieving respect in maximum security facilities is through repression, and this would be rectified by demonstrating that mentally ill inmates would form bonds of respect through constructive avenues. The availability of work

[429] Riitta Hari et al., *Centrality of Social Interaction in Human Brain Function,* 88 NEURON 181 (2015); Sophie Valk et al., *Structural Plasticity of the Social Brain: Differential Change After Socio-Affective and Cognitive Mental Training*, 3 SCI. ADVANCES e1700489 (2017).
[430] Coppola, *supra* note 273.
[431] *Id.*
[432] Leena Kurki & Norval Morris, The Purposes, Practices, and Problems of Supermax Prisons, 28 CRIME AND JUST. 385, 389 (2001).

and recreational activities have an immense impact on inmates' mental health, as activity deprivation is linked to depression and aggressive behavior.[433] Establishing these aspects of functional life within prison walls would decrease hostility between inmates and officers, as well as among inmates themselves. The implementation of this proposal eliminates the need for solitary confinement of mentally ill inmates while establishing a balance between maintaining order and safety within the prison and accommodating the psychological demands of the inmates.

Current progress towards the limitation and uniform regulation of the use of solitary confinement has proven to be inconsistent, therefore, ongoing dialogue and collaboration with all advocates for and against the unlimited use of solitary confinement must be maintained.

[433] Tartaro Christina, Lester David. 2009. *Suicide and Self-harm in Prisons and Jails*. Lanham, MA: Lexington Books.

The Development of Privity of Contract as the Common Law Standard for Product Liability: An Analysis of Winterbottom v. Wright, Thomas v. Winchester, and Industrialization

Harrison Sugarman[434]

This article explores the development of standards of product liability during the Market Revolution, arguing that jurists adopted the standard of privity of contract to protect manufacturers from the legal consequences of industrialization. This article surveys the history of product liability prior to the Market Revolution, and then it describes how Winterbottom v. Wright and Thomas v. Winchester radically departed from this tradition. This article then analyzes how judges specifically feared the increased volume of liability cases under a strict liability framework that would have arisen from a depersonalized and mechanized economy. The article concludes with parallels between questions surrounding product liability in the Market Revolution and the present day.

I. Introduction

James McGreevey, former Governor of New Jersey, once said, "the arc of American history almost inevitably moves toward greater individual legal rights."[435] Since the 1930s, his statement applies to much of American history, but

[434] Brandeis University Undergraduate, Class of 2024.
[435] James McGreevey, *James McGreevey Quotes*, BrainyQuote.com, https://www.brainyquote.com/quotes/james_mcgreevey_468732.https://www.brainyquote.com/quotes/james_mcgreevey_468732.

there have also been long periods where legislatures and courts restricted individual rights. For example, American courts dismantled a series of 17th and 18th-century legal privileges during the Market Revolution (1815-1855). This was a period of unprecedented economic growth, industrialization, and corporatization in the rapidly maturing republic. During these years, the courts particularly targeted product liability, a "condition of being bound to respond because a wrong has occurred… with reference to property, proceeds[, or] yield."[436] Under the colonial standard of strict liability, average consumers could have successfully sued for injuries caused by a manufacturer "when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save [the] defendant."[437]

Winterbottom v. Wright (1842) and *Thomas v. Winchester* (1852), two court cases decided within a decade of each other, overturned strict liability and replaced it with a standard of privity of contract. Jurists define this concept as "that connection or relationship which exists between two or more contracting parties."[438] In other words, these two cases limited a manufacturer's duty of care strictly to consumers with whom a contract was agreed. This sudden shift in jurisprudence left scholars of American legal history perplexed as to what caused this departure from precedent. This article argues that judges established privity of contracts to protect manufacturers from the potential legal ramifications of industrialization. This article provides background on the strict liability era, and the two cases that overturned it. It will also connect the factual background of the cases with the two trends, the emergence of

[436] Henry Campbell Black, *Black's Law Dictionary*, 1060, 1374 (4th ed. 1968), https://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf.
[437] Black, *supra* note 436 at 1591.
[438] *Id.* at 1362.

a "faceless economy" and dangerous industrial technology, that led judges to legally insulate manufacturers. Lastly, the article will establish broader connections between late 19th century product liability standards and modern tort jurisprudence.

II. Background

Prior to *Winterbottom v. Wright,* product liability was an obscure field of the law that had hardly changed since its inception. Historians have determined that early Roman law includes the first mention of product liability as a legal concept.[439] Laws, such as the Twelve Tables of 450 BC, presumed that goods purchased by consumers at a fair price should be of a fair quality, and therefore, the manufacturer was liable for any injury the purchaser suffered as a result of the manufacturer's negligence.[440] When Rome conquered Britain in 43 AD, Roman law strongly influenced English common law and continued to prove fundamental long after the fall of the Western Roman Empire.

In his *Summa Theologica*, St. Thomas Aquinas — among the foremost Western philosophers — defended the virtue of strict liability on the basis that selling a product with a known liability was a sin according to scripture.[441] Scholars agree that his endorsement contributed to strict liability's survival throughout the Medieval Era.[442] English colonists imported English common law to the New World, including its understanding of product liability, and it remained foundational into the Antebellum Period.[443] Until 1842, American courts

[439] David G. Owen, *The Evolution of Products Liability Law*, 26 Rev. Litig. 955, 956 (2007).
[440] John C. Reitz, *A History of Cutoff Rules as a Form of Caveat Emptor: Part II-From Roman Law to the Modern Civil and Common Law*, 37 Am. J. Comp. Law 247, 249 (1989).
[441] Owen, *supra* note 439 at 958.
[442] *Id.* at 958–959.
[443] *Id.* at 959–960.

upheld this standard of product liability which remained virtually unchanged since antiquity.[444]

It was in *Winterbottom v. Wright* that courts took the first step to dismantle the ancient standard of strict liability. Winterbottom, a stagecoach driver, was severely injured when his stagecoach broke down on August 8, 1840.[445] An investigation revealed that the carriage broke down because Wright, a stagecoach repairman and builder, did not properly maintain it.[446] Consequently, Winterbottom sued Wright for damages, and the case went all the way to the Court of Exchequer, which ultimately ruled in favor of the respondent.[447] The court reasoned that Wright acted negligently but was not liable for Winterbottom's injuries because Wright owed Winterbottom no duty of care.[448]

The court ruled that a manufacturer could only owe a consumer a duty of care within privity of contract; that is, only a well-established contract between parties could, in case of breach, give rise to damages.[449] Winterbottom and Wright did not have a contractual relationship due to the absence of privity between them as consumer and servicer.[450] Winterbottom worked as a driver for the Postmaster-General, and the Postmaster-General was, in turn, employed by Nathaniel Atkinson, a wealthy aristocrat.[451] Atkinson also employed

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[444] *Id.* at 960.
[445] Winterbottom v. Wright, 110–116, https://sites.la.utexas.edu/judpro/files/2016/02/Winterbottom-v.pdf.
[446] *Id.*
[447] *Id*; the Court of Exchequer was one of the four major courts of England prior to the reorganization of the English court system during the late 19th century. The court heard common and natural law cases, especially those relating to financial matters and equity.
[448] Black, *supra* note 436 at 267.
[449] Winterbottom v. Wright, *supra* note 445 at 110–116.
[450] *Id.*
[451] *Id.* at 109.

Wright to maintain his fleet of carriages.[452] Hence, Wright had no contractual obligations to Winterbottom because they did not sign a contract to formally establish any duty of care.[453] Wright vanished from the historical record after this case, but Winterbottom remained handicapped for the rest of his life and did not receive compensation for his injuries.[454]

Ten years later, *Thomas v. Winchester* affirmed the legality of *Winterbottom v. Wright*'s precedent, with certain exceptions. The facts of the case are as follows: Mrs. Mary Ann Thomas became ill in 1849.[455] After visiting the doctor, Mrs. Thomas received a prescription for dandelion extract.[456] Her husband picked up a dose from Dr. Foord's drug store, but immediately after Mrs. Thomas took the medication, she fell almost fatally ill.[457] An investigation discovered that the jar was mislabeled and contained belladonna, a poison that resembles dandelion extract. Mr. Thomas sued the labeler, an employee of Winchester named A. Gilbert. Gilbert sold the mislabeled belladonna to a distributor named Aspinwall, who then sold it to Dr. Foord.[458]

The case eventually reached the New York Court of Appeals in 1852 and the court ruled in favor of Thomas.[459] The court upheld the legality of privity of contract, but it ruled that the danger and blatancy of Winchester's negligence made it almost tantamount to manslaughter.[460] Justice Ruggles made this argument by first defining manslaughter as "[when]

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[452] *Id.*
[453] *Id.* at 110–116.
[454] Daniel Breen, *The Role of the Judge in Formulating Legal Rules*, (2021).
[455] *Id.*
[456] Thomas v. Winchester, https://www.nycourts.gov/reporter/archives/thomas_winchester.htm (last visited Dec 3, 2023).
[457] *Id.*
[458] *Id.;* Daniel Breen, *supra* note 454.
[459] *Id.*
[460] Thomas v. Winchester, *supra* note 456.

culpable negligence, [an individual] causes the death of another, although without intent to kill."[461] He then included several examples of case law where a court found a pharmacist or chemist guilty of manslaughter due to mislabeling by an employee, improper mixing of chemicals, or any other such act of negligence.[462] Mrs. Thomas' survival of the poisoning shielded him from criminal prosecution, but the court found "no doubt of his liability in a civil action" according to their understanding of equity.[463] Thus, *Thomas v. Winchester* crystalised the precedent of *Winterbottom v. Wright* that a manufacturer could only be liable for damages within the privity rule, except in cases where products were "imminently dangerous to human life."[464]

III. Connections from the Case to the Argument

This article primarily relies upon two sources of information. The first is a set of legal opinions from the Market Revolution, *Winterbottom v. Wright* and *Thomas v. Winchester*. These legal decisions offer the fact patterns or the key facts of a particular legal case, and the court's reasoning behind each decision. Second, this article utilizes scholarly articles that trace the development of Anglo-American product liability law, and provide invaluable context and an overview of broad American legal and historical trends. Articles written by Donald G. Gifford, a Professor of tort law at the Francis King Carey School of Law, and David G. Owen, a professor emeritus at the Joseph F. Rice School of Law support my argument that courts established the privity of contract standard to protect nascent industry from legal repercussions. These articles provide invaluable contextualization and overviews of

[461] *Id.*
[462] *Id.*
[463] *Id.*
[464] *Id.;* Daniel Breen, *supra* note 454.

broad legal and historical trends that will help understand the development standards of product liability. Thus, these two types of sources create a robust explanation for the switch in standards of product liability.

The establishment of the privity rule had a profound impact on American society because it facilitated American industrialization during the second half of the 19th century. To this effect, Owen writes, "the privity requirement was an effective instrument of social policy for a nation bent on promoting the development of its infant industries."[465] In other words, American manufacturers were left uninhibited by the fear of product liability litigation.[466] This allowed manufacturers to expand in size, develop new technologies, and take risks that contributed to the US's unparalleled economic supremacy by the beginning of the 20th century.[467] Gifford best summarizes this development:

> "[t]he liability exposure of businesses [that] heavily invested in new technologies was almost assuredly substantially reduced. As a result, railroads, mines, and factories flourished. In effect, the change from a strict liability to a negligence-based regime created a 'subsidy' for railroads and other newly emerging industries."[468]

The decision to establish the privity of contract standard represented a massive departure from the tradition of formalism in American jurisprudence.[469] Formalist political and

[465] Owen, *supra* note 439 at 963.
[466] *Id.*
[467] Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 30 (2017), https://digitalcommons.law.umaryland.edu/fac_pubs/1590.
[468] *Id.* at 30–31.
[469] Michael Willrich, *The Making of the U.S. Constitution, Part II*, (2022).

legal theorists of the Early Republic, such as Alexander Hamilton and other Federalists (and later Whigs), maintained that judges "[had] no active resolution whatsoever."[470] Law, in the formalist tradition, evolves by applying a precedent to different fact patterns, which leads to the gradual "discovery of new law."[471] However, as American historian Morton Horowitz writes, the Market Revolution (the period of economic, technological, and political growth during the Antebellum Period) "reflected the overthrow of eighteenth-century pre-commercial and anti-developmental common law values."[472] This included the anachronistic judicial paradigm of formalism. In replacement of formalism, legal instrumentalism, which advanced that the law could be directed toward a collective social good, began to dominate American courts, including the NY Court of Appeals.[473]

According to accredited sources, any discussion about American product liability, privity of contract, and *Thomas v. Winchester* would be fundamentally incomplete without discussing *Winterbottom v. Wright* at length.[474] Although the case was adjudicated under English law, applying the principles of *Winterbottom v. Wright* to American jurisprudence is essential because the NY Court of Appeals adopted the Court of Exchequer's approach, exemplifying the concurrent socioeconomic and legal challenges Great Britain and the US faced as a consequence of industrialization and economic expansion.

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[470] Alexander Hamilton, *No. 78*, *in* The Federalist 401, 409 (by Alexander Hamilton ed. et al. eds., Gideon ed. 2001).
[471] *Id.*
[472] Morton J. Horwitz, *The Rise of Legal Formalism*, 19 Am. J. Leg. Hist. 251, 251 (1975).
[473] Michael Willrich, *supra* note 469.
[474] Daniel Breen, *supra* note 454; Gifford, *supra* note 467 at 50; Owen, *supra* note 439 at 960.

IV. Analysis

A. The Technology-Expansion Fear

Judges also feared that strict liability left manufacturers vulnerable to litigation resulting from the expansion of the market of manufactured goods.[475] The Market Revolution and industrialization increased the overall efficiency of production and distribution which dramatically lowered prices for consumers.[476] The lower cost of finished products allowed more consumers to engage in the market and created a middle class of high-paid workers and managers who could now afford these products.[477] Because they were part of the emerging consumer class themselves, judges keenly realized that the combination of these factors would produce more injuries inflicted by defective products.[478] Other businesses also constituted a large share of the manufactured goods market, and the amount of product liability lawsuits coming from the private sector dramatically rose in the decades prior to 1842.[479] Faulty machinery caused 63 percent of injuries in the textile industry—among the largest aspects of American industry—and many of these injured people successfully sued the manufacturers.[480] Judges understood that, in the words of Gifford, the "darker side to this unprecedented expansion of technology and industry," would engulf American industry if strict liability was not modified or replaced.[481]

Even more, judges feared the consequences of an expanding market with increasingly dangerous products and

[475] Gifford, *supra* note 467 at 17.
[476] Michael Willrich, *Legal Instrumentalism in the Age of the Market Revolution*, (2022).
[477] Michael Willrich, *supra* note 469.
[478] Gifford, *supra* note 467 at 31.
[479] *Id.* at 19.
[480] *Id.* at 18.
[481] *Id.*

machinery. Lewis Mumford, a foremost American historian and sociologist of the 20th century, described the Industrial Revolution as "a transition from the 'ecotechnic' era, characterized by wood, water, and handicrafts, to a new 'paleotechnic' world of steam, iron, and factories."[482] Essentially, the Industrial Revolution represented a shift in both the materials and methods of manufacturing, moving away from craftsmanship toward industrialization. The industrial machines that dominated this new paleotechnic era provided "much greater [power] than that supplied during the pre-industrial era by humans and animals and, as a result, the severity of the injury was likely to be much greater."[483] Market Revolution judges presumed that the increased severity of injuries caused by paleotechnic technology would increase the likelihood that a consumer would seek legal action against a negligent manufacturer.[484] A trend in tort law vindicated this belief because, before 1842, mechanized transportation (railroads and steamships) generated a disproportionate amount of litigation, and the severity of the injuries incentivized victims to sue tortfeasors.[485] Judges found the idea of mechanized transportation companies being litigated to bankruptcy especially likely, and disturbing, because of their risk, profitability, and economic importance.[486] Chief Justice Lemuel Shaw, in the Massachusetts Supreme Court's ruling on *Farwell v. Boston & Worcester Railroad Company* (1842), wrote that the protection of the nascent railroad industry "is an action of new impression in our courts, and involves a principle of great importance."[487] In that case, a railroad engineer sued

[482] *Id.*
[483] *Id.*
[484] *Id.* at 19.
[485] Gifford, "Technological Triggers," 10.
[486] Michael Willrich, *supra* note 469.
[487] Farwell v. Boston & W. R. R. Corp, 55, https://advance.lexis.com/api/document?collection=cases&id=urn:contentIt

his employer for damages he suffered from the negligence of a fellow employee.[488] Shaw understood that affirming the plaintiff's suit would set a precedent that transportation and heavy industry must assume the financial risk associated with the dangers of their business, so Shaw elected to err on the side of business and pen his infamous "assumption of risk" doctrine.[489] Judges, compelled by concerns about severity and frequency, decided to act decisively in favor of installing privity of contract.

The ruling in *Winterbottom v. Wright* illustrates the fear of judges at a time when technology, specifically mechanized transportation, was expanding and becoming more innovative. Justice Byles provided, in his dissent, the example of a recent railroad accident in France to support his argument:

> "For example, every one of the sufferers by such an accident as that which recently happened on the Versailles railway, might have his action against the manufacturer of the defective axle. So…every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps against every seller also of the iron."[490]

He embedded the key presumption of unreasonableness in this example to illuminate the absurdity of Winterbottom's case.[491] His usage of the phrase "every one" suggests that the railroad accident resulted in broad and severe damages.[492] Paying remedies for so many severe injuries would have bankrupted

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[488] Michael Willrich, *supra* note 469.
[489] *Id.*
[490] Winterbottom v. Wright, *supra* note 445 at 111.
[491] *Id.*
[492] *Id.*

the manufacturer of the defective axle. He warned that "alarming consequences" would have followed for the economy if the court ruled for Winterbottom and defended strict liability.[493]

The opinion in *Thomas v. Winchester* voices a concern for unfamiliar products, and this illustrates the issues of the technology expansion theory.[494] Ruggles wrote that belladonna and extract of dandelion " may on careful examination be distinguished the one from the other by those who are well acquainted with these articles."[495] In a pre-industrial world, someone consuming either belladonna or dandelion extract would likely not have possessed the expertise necessary to differentiate between the two substances themselves or immediate access to expert supervision. Here, Ruggles recognized that consumers buying and using unfamiliar products was an inevitable consequence of consumerism's upsurge.[496] Prior to industrialization, consumer expertise was a final safeguard against injuries, but the court reaffirmed the privity of contract to reduce manufacturer liability from consumer unfamiliarity.

However, Ruggles somewhat accounted for the severity of injuries caused by modern technology through the "imminent danger" exception. Pre-industrial pharmacists could not make enough of a drug, with sufficient concentrations of chemicals, to accidentally kill a consumer through their negligence.[497] However, new machinery allowed pharmacists to increase the quantity and quality of their products, so they faced increased legal risk through producing better drugs.[498] Even though the court decided to penalize Winchester, the

[493] *Id.*
[494] Thomas v. Winchester, *supra* note 456.
[495] *Id.*
[496] *Id.*
[497] Daniel Breen, *supra* note 454.
[498] *Id.*

exception of "imminent danger" leaves ample space for manufacturers of possibly hazardous products to defend themselves from product liability lawsuits.[499]

B. The Faceless Economy Theory

Through analysis of the relevant literature and sources, it became evident that judges worried that depersonalizing the relationship between the consumer and the manufacturer would create additional product liability lawsuits. For the purposes of clarity, I shall refer to the aforementioned process as the faceless economy theory. Before 1820, Gifford concluded that few product liability lawsuits were argued because most consumers personally knew the artisan who made their product; they were often relatives, friends, or personally connected.[500] This connection further disincentivized the consumer from filing a product liability lawsuit.[501] Litigation remains an inherently acrimonious and arduous process that destroys any personal relationship between the parties. Industrialization fundamentally depersonalized the relationship between the manufacturer and the consumer, who started to see manufacturers as "anonymous…large industrial enterprises that had access to significant resources to pay for the costs of the accidental injuries they had inflicted."[502] Judges sensed the change in public opinion toward manufacturers and the subsequent increased prosperity to sue them for negligence. The privity standard theoretically remedied this issue by rehumanizing litigation because an injured party could only sue a manufacturer with whom he shared a contract. This implies a certain familiarity between both parties, and therefore a desire to avoid any acrid litigation.

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[499] *Id.*
[500] Gifford, *supra* note 467 at 9, 11.
[501] *Id.* at 11.
[502] *Id.*

The opinion in *Winterbottom v. Wright* demonstrates the Court of Exchequer's conviction in the faceless economy theory. Lord James Scarlett Abinger, who wrote the main opinion for the court, maligns that "if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action."[503] He foresaw that ruling in favor of Winterbottom, based on the old standard of strict liability, would have "le[t] in …an infinity of actions."[504] Abinger's language implies that any individual with the slightest injury from the accident would try to sue Wright, a man they likely had no personal connection with. The subsequent "infinity of actions" would financially ruin Wright's business and swamp the courts with seemingly frivolous litigation.[505] Therefore, the court would prevent these opportunistic litigants by ruling for Winterbottom.

The NYSC's decision in *Thomas v. Winchester* demonstrates the faceless economy theory because it ruled in favor of the plaintiff and against privity of contract, based on the exception of "imminent danger."[506] Chief Justice Charles Ruggles, the author of the court's unanimous opinion, upheld the legality of the decision on *Wright v. Winterbottom*. However, he stated that the court ruled against the defendant because "the case …stand[s] on a different ground."[507] Unlike the negligence of a repairman failing to maintain a carriage or a "horse be[ing] defectively shod by a smith[,] … [t]he death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label."[508]

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[503] Winterbottom v. Wright, *supra* note 445 at 112.
[504] *Id.*
[505] *Id.*
[506] Daniel Breen, *supra* note 454.
[507] Thomas v. Winchester, *supra* note 456.
[508] *Id.*

The court ruled in favor of the plaintiff for "considerations of public policy or safety."[509] Otherwise, manufacturers would have faced no civil legal liability for virtual manslaughter. This decision held manufacturers more culpable for injuries arising from their negligence.[510] However, it established such a high threshold for the "imminent danger" exception that it shielded manufacturers from the opportunistic litigants that judges feared.[511]

IV. Conclusion

Judges stimulated industrial growth during the Market Revolution by reducing manufacturers' legal liability to consumers. The NYSC overturned its previous ruling on *Thomas v. Winchester* with its 1916 decision on *MacPherson v. Buick Motor Company*, and legal scholars view this as the beginning of modern product liability law; the case established the standard of reasonability, but a series of product liability cases further reestablished the ancient standard of strict liability.[512] Justice Benjamin Cardozo of the NY Court of Appeals astutely realized that the economy had become so industrialized and integrated by the early 20th century that consumers almost exclusively purchased products from manufacturers they did not know personally.[513] The distribution of burden that privity of contract placed on consumers by that point was so unacceptable that even conservative formalists, like Carodozo, knew that the faceless economy theory outlived its utility.[514] In a broader context, the analysis of the shift in product liability standards assesses the distribution of risk

[509] *Id.*
[510] Daniel Breen, *supra* note 454.
[511] *Id.*
[512] Daniel Breen, *Old Rules in Modern Settings: How the Rule of Law Provides for Change, Even as It Strives for Consistency*, (2021).
[513] *Id.*
[514] *Id.*

associated with technological progress. New forms of industries and products unavoidably generate accidents and injuries, so the legal system ought to establish order and assign blame accordingly.[515] Keeping pace with a rapidly globalizing and digitizing world will continue to bedevil contemporary jurists, as questions of industrialization frustrated them during the Industrial Revolution.[516]

[515] Michael Willrich, *supra* note 469.
[516] Gifford, *supra* note 467 at 5.

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Immigrant Labor and Civil Rights in the United States

Peyton Gillespie[517]

Immigration has been the subject of intense political debate in the United States for decades. It is consistently a high policy priority for presidential administrations, a subject of endless stalled action from the U.S. Congress, and an issue that ultimately fuels mass anti-immigrant rhetoric such as the idea that immigrants take away domestic jobs. This paper addresses the intersection of immigration and labor in the U.S. and refutes such rhetoric as inaccurate and grossly misinformed. In reality, immigrant laborers, regardless of legal status, are indispensable contributors to the U.S. economy and endure arbitrary U.S. immigration laws and policies that enable repeated violations to their fundamental human rights.

I. Context and Guiding Questions

Immigrant laborers constitute a substantial demographic in the U.S. labor market. According to a 2022 report by the U.S. Bureau of Labor Statistics, immigrants make up about 18.1 percent of the U.S. civilian labor force.[518] That same year, over 500,000 various types of work visas were issued by the U.S. government to immigrants seeking work in the country.[467] The same report indicates that, as of 2022, the U.S. labor force participation rate of foreign-born adults was higher than that of native-born adults: 65.9 percent of all workforce-eligible (16-years and older) foreign-born adults participate in the workforce, compared to just 61.5 percent of all workforce-eligible native-born adults.[519] Thus, analyzing the

[517] Brandeis University Undergraduate, Class of 2025.
[518] United States Department of Labor, *Foreign-Born Workers: Labor Force Characteristics 2022*, 1.
[519] United States Department of Labor, *Foreign-Born Workers: Labor Force Characteristics 2022*, 1.

nexus of immigration and labor is critical to providing a better understanding of the U.S. economy and its labor market. As will be discussed subsequently, the interplay of these fields is marked by inconsistent applications of legal protections for the fundamental human rights of immigrants.

Accordingly, this article seeks to answer the following questions:

1. How do immigrant laborers with and without legal status contribute to and interact differently with the U.S. economy?
2. What is the process for becoming an immigrant worker in the U.S.? How are immigrant laborers in the U.S. without legal status treated differently in the legal system and by employers as opposed to immigrant laborers who have legal status?
3. What implications do these differences have on the fundamental human rights entitled to every person within the jurisdiction of the U.S.?

To begin answering these questions, we first need a clearer understanding of the specific ways in which immigrants interact with the economy and labor market.

II. Interactions with the Economy

Immigrant workers in the U.S. are frequently the subject of harsh assertions about "stealing jobs" from native-born workers.[520] A quote from a report by the American Civil Liberties Union (ACLU) encapsulates and addresses this assertion directly: "Contrary to popular belief, immigrants do not take away jobs from American workers. Instead, they create new jobs by forming new businesses, spending their incomes on American goods and services, paying taxes, and

[520] American Civil Liberties Union, *Immigrants and the Economy*, 1-2.

raising the productivity of U.S. businesses."[521] In the same report, the ACLU contextualizes the contributions of immigrants in terms of tax payments: each year, immigrants (with and without status) pay over $90 billion in taxes and only receive $5 billion in welfare benefits. Per person and household, immigrants receive significantly less in welfare benefits than U.S. Citizens while simultaneously paying their fair share and contributing substantially to the U.S. economy.[522]

There is also significant evidence to indicate that one of the only reasons the Social Security and Medicare programs continue to obtain the necessary funding to stay afloat is because of immigrant laborers. A 2018 report from the Social Security Administration articulated this, noting that: "increasing average annual total net immigration by 100,000 persons improves the long-range actuarial balance by about 0.08 percent of taxable payroll."[523] This 0.08 percent represents a substantial sum, especially when multiplied by the hundreds of thousands of immigrants who are issued work permits every year, plus undocumented workers. It is important to understand in the context of these contributions, which will be explained later in this paper, as it helps to show that immigrants are not reaping benefits or experiencing treatment that is proportional to their contributions to the economy.

Finally, the specific jobs that immigrants fill in the labor market provide additional context for understanding their treatment in the workplace and the crucial role they play in the U.S. economy. A 2015 report by the Panel of Experts from the National Academy of Sciences observed that "...immigrants appear to be taking low-skilled jobs that natives are either not

[521] American Civil Liberties Union, *Immigrants and the Economy*, 1-2.
[522] Sherman, *Immigrants Contribute Greatly to U.S. Economy, Despite Administration's "Public Charge" Rule Rationale*, 2.
[523] The Social Security Administration, *The 2018 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds*, 181.

available or unwilling to take."[524] The vast majority of immigrant laborers (with and without status) in the U.S. are employed in low-skill positions and make up a substantial portion of the workforce in numerous industries. According to research conducted by the Center on Budget and Policy Priorities, industries with large percentages of immigrant workers include farming, fishing, and forestry (36 percent), grounds and maintenance (36 percent), textile and apparel manufacturing (29 percent), food manufacturing (27 percent), hotels (27 percent), and construction (24 percent).[525] These industries, critical to the function of the U.S. economy, would undoubtedly collapse without the support and contributions of immigrant laborers.

III. The Process

The legal process for becoming an immigrant laborer in the U.S. depends largely on the individual's immigration status, what their country of origin is, whether they have parents or a spouse with U.S. citizenship, whether they have obtained a job prior to arriving, and other factors. These specifics won't be covered in this article. However, for the purposes of this article, it is important to understand that each individual seeking to obtain status and work in the U.S. is additionally subject to "grounds of inadmissibility," or categorizations defined by the government that disqualify certain individuals from working in the U.S. entirely. These grounds of inadmissibility are often arbitrary and unfairly enforced, making the process to become immigrant laborers incredibly difficult in the first place for too many people..

[524] National Academies Press, *The Integration of Immigrants into American Society*, 6.
[525] United States Department of Labor, *Foreign-Born Workers: Labor Force Characteristics 2022*, 1.

One such ground of inadmissibility is the "public charge" rule, which was originally established in the late nineteenth century and has been continually modified to this day.[472] The rule gives the Department of Homeland Security (responsible for immigration enforcement) the ability to "determine that a noncitizen is likely at any time to become a public charge if the noncitizen is likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense."[526] Many immigrants who come to the U.S., especially those fleeing persecution, natural disaster, and economic downturn, arrive with few resources and require aid. The nature of the public charge rule thus allows the government unfair and arbitrary enforcement power to turn away a large number of immigrants at their discretion. It is hard to imagine that this practice is fair, given that so many millions of Americans access welfare benefits from the government (including food and economic assistance) as a result of economic downturn, environmental disasters, and more—in other words, millions of Americans are public charges themselves. In fact, it is widely believed that Congress continues to implement the rule in order to actively discourage migrant workers from coming to the U.S. seeking employment, a clear violation of fundamental human rights and dignity.

Another example of the arbitrary policies immigrants encounter in the U.S. pertains to asylum seekers. Individuals seeking to be granted asylum in the U.S. (which, per the Immigration and Nationality Act, is granted to individuals fleeing from persecution based on one or more grounds of race, religion, nationality, political opinion, or membership in a particular social group) have one year from their time of entry into the U.S. to file their asylum application. Asylum

[526] Federal Registrar, *Public Charge Ground of Inadmissibility*, 1.

applications are lengthy filings, often reaching hundreds or sometimes thousands of pages of detailed information, documents, and testimony about the individual's story. Such applications take time to file, and in the meantime, individuals applying for asylum are not legally permitted to work in the U.S.; in fact, they must wait until six months *after* their asylum application is filed to be eligible for an employment authorization document, according to the Immigration and Nationality Act. There seems to be no good reason for this rule. It is one of the many examples in which immigration laws make the legal process for becoming an immigrant laborer in the U.S. so needlessly difficult and arbitrary.

The above processes, of course, do not pertain to immigrants who are in the U.S. without lawful status, yet still seek to engage in employment opportunities to provide for themselves and their families. These individuals often work "under the table," meaning they work without benefits, proper pay, and often in dangerous working conditions.[527] Many of the aforementioned low-skill industries in which immigrant laborers are employed involve more hazardous working conditions than an average office job environment. The nature of these positions combined with the already vulnerable legal state of the undocumented immigrant workers breeds conditions for unfair treatment and abuse on the part of their employers.

IV. U.S. Labor Law and Civil Rights

The U.S. Constitution applies to all people within the jurisdiction of the United States, regardless of legal immigration status. Crucially, its language consistently

[527] Sherman, *Immigrants Contribute Greatly to U.S. Economy, Despite Administration's "Public Charge" Rule Rationale*, 2.

references "people" or "peoples" as opposed to "citizens."[528] While certain fundamental rights are established in the Constitution, the right to work is not one of them. However, despite the lack of a Constitutional "right to work," laborer rights are still applicable to all workers, whether they are citizens, undocumented people, or permanent residents. According to the ACLU, "Federal labor and employment laws generally apply to all employees regardless of an individual's immigration status."[529] A report from the University of Chicago clearly states that all immigrant laborers, regardless of legal status, share in the right to minimum wage and overtime pay, breaks and tips, and protections under health, safety, and anti-discrimination laws.[530] Not only are all immigrants protected under the Constitution as having certain fundamental rights, they are also entitled to protections as laborers as a matter of statute.

Given the context that has thus far been established, many undocumented workers routinely face exploitation, dangerous working conditions, wage theft, and physical and emotional abuse.[531] The same report from the University of Chicago notes that 37 percent of undocumented immigrant laborers receive less than minimum wage and 76 percent of immigrant laborers experience wage theft.[532] In addition, the report reveals: "Immigrant workers experience 300 more workplace fatalities and 61,000 more workplace injuries

[528] The National Archives, *The Constitution of the United States of America*.
[529] American Civil Liberties Union, *How Do Labor Laws Apply to Immigrants?*, 1.
[530] Garcia Quijano, *Workplace Discrimination and Undocumented First-Generation Latinx Immigrants*, 4.
[531] American Civil Liberties Union, *How Do Labor Laws Apply to Immigrants?*, 1.
[532] American Civil Liberties Union, *How Do Labor Laws Apply to Immigrants?*, 1.

annually than native-born workers…"[533] This research empirically supports these claims. The vast majority of immigrant laborers work in low-skilled industries with more dangerous working conditions and experience high levels of exploitation.

Neither U.S. labor nor immigration laws prevent immigrants from serving as independent contractors, exposing them to even more possibilities of exploitation; this is especially true in cases of the many immigrant laborers who work in private residences.[534] For example, the report from the University of Chicago goes on to confirm that many of the 22 percent of undocumented immigrants working in private homes, the majority of whom are women, experience exploitative and inhumane working conditions: "In addition to unregulated pay, they are often victims of physical and mental abuse, ranging from rape and verbal abuse to 12-hour work days with little to no breaks and no overtime pay."[535] Despite the fact that each person in the U.S. is entitled to fundamental rights and labor rights, current laws fail to protect immigrant workers equally, irrespective of their legal status, and, in fact, enable their ill-treatment.

This ill-treatment raises the question: if immigrant workers enjoy the same fundamental laborer rights as native-born people in the U.S., aren't they entitled to legal remedies for that mistreatment? Technically, the answer is "yes"—but there's a catch. Any undocumented immigrant who takes a case to court, especially pertaining to work-related

[533] American Civil Liberties Union, *How Do Labor Laws Apply to Immigrants?*, 1.
[534] American Civil Liberties Union, *How Do Labor Laws Apply to Immigrants?*, 1.
[535] American Civil Liberties Union, *How Do Labor Laws Apply to Immigrants?*, 1.

rights, becomes vulnerable to deportation. According to the University of Chicago report:

> "An undocumented worker bringing a dispute to court risks punishment if found to have used false documentation in obtaining work. For example, an undocumented worker unfairly terminated from a job is not actually entitled to back pay or reinstatement because such remedies would directly violate the IRCA. Anti-retaliation provisions make it unlawful for employers to use undocumented status to terminate employment in retaliation of a worker complaint. However, if employer retaliation does occur, Immigration and Customs Enforcement (ICE) can still follow up on a report and attempt to deport the undocumented worker."[536]

Here exists an absurd and apparent legal paradox: immigrant workers can seek legal redress for workplace discrimination, yet they're exposed to serious legal repercussions if they dare to take action to obtain said redress. This treatment of immigrant workers, enshrined in law, unequivocally makes a mockery of American legal principles of fairness, consistency, and rationality.

V. Conclusions and Recommendations:

In what follows, this article proposes some policy solutions which address the issues pertaining to violations of fundamental human rights and dignity throughout this article. To start, there must be a substantive effort by government leaders to curb rhetoric and ideology that mischaracterizes immigrants and their contributions to the economy. Especially

[536] American Civil Liberties Union, *How Do Labor Laws Apply to Immigrants?*, 1.

in the U.S., where major decisions are made by representative bodies composed of elected officials, shaping public opinion is a critical component of influencing policy outcomes. The executive branch plays an immensely important role in the shaping of public opinion and must be strategic about employing methods for both 1) acting to influence public opinion on particular issues and 2) exercising executive power to achieve policy outcomes. This, in turn, may lay the groundwork for eliminating arbitrary policies like unreasonable limits on work permit applications and rules like the "public charge" rule in the name of fundamental human rights and dignity.

An excellent example of this proposal in action is the Obama Administration's implementation of Deferred Action for Childhood Arrivals (DACA). According to the Migration Policy Institute, roughly one-third of the over 11 million noncitizens currently in the U.S. were brought here as children (commonly known as "Dreamers").[537] The issuance of DACA by the executive branch provided work permits and temporary protection from deportation for these young immigrants. In a 2012 speech to the American public following DACA's implementation, President Obama seized the opportunity to provide a compassionate perspective on the immigration debate:

> "These are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents -- sometimes even as infants -- and often have no idea that they're undocumented until

[537] Migration Policy Institute, *Profile of the Unauthorized Population - US*, 1-2.

> they apply for a job or a driver's license, or a college scholarship."[538]

Although much of DACA was ultimately struck down by a federal court in Texas, its implementation provides a key example of how the executive branch may take action to address policy issues. Such actions are crucial in the face of an increasingly polarized Congress and effective in working to reshape public opinion. Presidential administrations have the ability to create fairer conditions for immigrants and vouch for their rights. This is crucial for implementing effective immigration policy in the face of a deadlocked legislature and increases in anti-immigrant rhetoric.[539]

Additionally, the federal government must ensure that labor laws are being equally enforced across the U.S. with the intent to protect all workers, regardless of status, in the name of safety, fairness, and equality. Special attention must be paid to workers in low-skill industries because, as mentioned previously, these laborers are the most susceptible to exploitation and abuse. Moreover, this is especially true for independent contractors who, for example, work in private homes and are at even greater risk of experiencing mistreatment.[540] Ensuring that labor law protections are enforced and apply equally to all people is not just humanly decent, but it is enshrined in the law and entitled to each and every person within the jurisdiction of the U.S. Constitution.

Lastly, immigrants must have equal access to fair legal processes and legal remedies. Arbitrary policies like unreasonable limits on work permit applications and rules like

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[538] White House Office of the Press Secretary, *Remarks by the President on Immigration*, all.
[539] United States Department of Labor, *Foreign-Born Workers: Labor Force Characteristics 2022*, 1.
[540] White House Office of the Press Secretary, *Remarks by the President on Immigration*, all.

the "public charge" rule must cease. They are violations of fundamental human rights and dignity. Immigrants should not feel the need to refrain from seeking legal relief because they are worried about the threat of deportation. Hence, another proposal, stemming from the interest of fundamental rights and dignity, is that all courts in the U.S. should adopt an amnesty rule that legally protects personal information from agencies like ICE when individuals bring suits, as is their legal right. Upholding policies that place a burden on an individual's right to seek legal remedies is entirely against American values. Finally, the same rights of citizens should unquestionably apply to immigrants in terms of receiving back pay when unfairly terminated from a job.

The assertion that immigrant workers are "taking our jobs" is an ignorant mischaracterization that not only invalidates the vital contributions of immigrants to the U.S. economy, but also their lived experiences as human beings seeking a better life. Immigrants are an essential cornerstone of the livelihoods of all people in the U.S., especially in a country built by, for, and of immigrants. Upon examination, it is apparent that U.S. immigration laws and policies not only make the legal process of obtaining work unnecessarily difficult, but also don't adequately protect immigrants. Rather, these laws actively discourage immigrants from seeking legal relief, essentially depriving them of their fundamental rights. The federal government must ensure laws and policies are consistent with upholding the equal treatment of all people in the U.S., regardless of status.

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"Decisions We Do Not Like": Flag Desecration Case Law and the Culture War

Jack Granahan[541]

The years following the Reagan Administration were defined by a newfound American cultural conservatism. The First Amendment's protection of flag desecration as a form of symbolic speech was one of the most divisive issues in American politics, and it comprised a major facet of the cultural conflict between liberals and conservatives.[542] *Although the Supreme Court issued several conservative rulings on cultural issues at this time, the decisions of Texas v. Johnson (1989) and United States v. Eichman (1990) did not follow this trend. This paper analyzes the extent to which the Supreme Court in general, and the Court's conservative wing in particular, repudiated culture war pressures to uphold constitutional civil liberty.*

I. Introduction

During the 1992 Republican National Convention (RNC), presidential candidate and traditionalist conservative stalwart Pat Buchanan gave a speech in which he described the political division of the United States as "a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself," and called upon Republican voters to "take back [their] culture, and take back [their] country."[543] According to Buchanan, this marked an increased political relevance of cultural issues, which positioned traditionalist, nationalist, and

[541] Brandeis University Undergraduate, Class of 2026.
[542] Henderson, "Today's Symbolic Speech Dilemma," 534.
[543] Collins, *Transforming America*, 171.

religious conservatives against countercultural, secular, and multicultural liberals.[544]

Over three decades later, America still appears to be in the midst of a culture war. In the 2022 U.S. midterm elections, three prominent cultural issues—abortion, gun policy, and parental oversight of education—held special significance in the eyes of voters, with over half of registered voters considering these issues to be "very important."[545]

The shift of American politics toward a focus on the cultural issues Buchanan described can be traced back ten to twenty years prior to his RNC speech. Following the conservative backlash against the counterculture movement during the Nixon era, American politics experienced a liberalization under Gerald Ford and Jimmy Carter's presidencies. Shortly thereafter, the presidency of Ronald Reagan ushered in a period of increased conservatism, religious faith, and American patriotism. Increased reverence for the American flag was indicative of the Reagan era resurgence of patriotism—one of the most prominent facets of the culture war.[546] Conversely, desecration (usually by burning) of the American flag became a symbol for some of Reagan's political opponents.[547]

With few exceptions, the holdings of cases heard by the late Burger Court and early Rehnquist Court overwhelmingly took traditionalist stances on cultural issues. In the 1986 case of *Bowers v. Hardwick*, which upheld Georgia's criminal statute prohibiting sodomy, Chief Justice Warren Burger appealed to traditional perceptions of sexuality. More specifically, he pointed to the Blackstonian view of homosexuality as an "infamous crime against nature," stating

[544] *Ibid*, 171.
[545] Schaeffer and Green, "Key Facts about U.S. Voter Priorities Ahead of the 2022 Midterm Elections."
[546] Hunter, *Culture Wars*, 147.
[547] Goldstein, *Flag Burning and Free Speech*, 44.

that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[548] Although it upheld *Roe v. Wade*'s federal protection of reproductive rights, the Supreme Court's 1992 holding in *Planned Parenthood v. Casey* also rolled back many of *Roe*'s provisions and created additional obstacles for those seeking abortions.[549] In his concurrence, Chief Justice William Rehnquist compared abortion to the other traditional vice of bigamy, "with which entire societies of reasonable people disagree."[550] The Supreme Court's traditionalist streak during and after the peak of the Reagan era was indicative of a "spiteful *kulturkampf*" (or cultural clash), motivated by religious and national conservative values.[551] The Supreme Court's decisions in *Texas v. Johnson* and *United States v. Eichman* are unique in that, unlike in cases regarding other cultural issues, they rejected the application of cultural conservatism to their jurisprudence in favor of protecting the constitutional rights of Americans.

II. History of Flag Customs

Although reverence for the American flag is usually seen as ubiquitous in the United States, this was not the case for much of the country's history. In the decades following the American Revolution, even the United States military did not fight under the flag, and the "demand for flags was so low that no private company manufactured them until after 1845."[552] In fact, it was not until the Civil War that the American flag received its current reputation, as it was Union veterans of the

[548] Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986).
[549] Planned Parenthood v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992).
[550] *Ibid.*
[551] Schulman, "Kulturkampf and Spite," 62.
[552] Goldstein, *Flag Burning and Free Speech*, 1.

Civil War who founded the Flag Protection Movement (FPM) in the 1890s.[553] This movement was a conglomeration of organizations that sought to prevent the flag from being desecrated, commercialized for profit, or otherwise disrespected.

The first state law banning flag desecration was enacted in South Dakota, in 1897.[554] By 1932, every state had a ban on flag desecration.[555] In the first half of the 20th century, approximately two dozen individuals were prosecuted for flag desecration, most of whom committed such acts in protest of American entry into World War I.[556] However, only one of these prosecutions, that of New York clergyman Bouck White in 1916, involved the burning of the flag, which is generally considered the gravest offense against the flag.[557]

Flag desecration, particularly flag burning, made a resurgence in the late 1960s, following the deployment of American troops in the Vietnam War. This protest was accompanied by a spike in popularity for the anti-establishment counterculture movement.[558] In response, Congress passed the Flag Protection Act of 1968, a federal statute that banned "publicly mutilating, defacing, defiling, burning, or trampling upon" the American flag.[559] Shortly after the passage of this law, the American flag became, as described by a 1970 *Time* story, "the emblem of disunity."[560] Many cultural liberals saw the desecration of the flag as a symbol of protest, whereas their conservative counterparts saw the flag itself as a powerful symbol of traditional American culture.[561] The conservative

[553] *Ibid*, 7.
[554] Codified Law 22-9-1.
[555] Guenter, *The American Flag, 1777-1924*, 144.
[556] Guenter, *The American Flag, 1777-1924*, 167–169.
[557] Goldstein, *Flag Burning and Free Speech*, 27.
[558] Goldstein, *Flag Burning and Free Speech*, 23.
[559] H.R.10480 - 90th Congress (1967-1968).
[560] Goldstein, *Flag Burning and Free Speech*, 24.
[561] *Ibid*, 23.

Reagan Revolution of the 1980s coincided with the increased flying of the American flag.[562] As Reagan-era American patriotism eclipsed the counterculture movement's skepticism of the idealist American vision, so too did reverence for the flag eclipse disdain for the flag. This is perhaps why so many Americans had such visceral reactions to flag burnings, including the one by Gregory Lee Johnson on August 22, 1984.

III. Background of *Texas v. Johnson*

The 1984 RNC in Dallas, Texas, was met with left-wing political demonstrations against President Reagan. One particular protest was carried out by the Revolutionary Communist Party (RCP), an anti-capitalist organization that "advocated violent revolution in the United States," particularly in light of the rise of Reagan-era nationalist conservatism.[563] At the end of the protest, RCP member Gregory Lee Johnson set an American flag, in his possession, on fire.[564] Johnson's disdain towards the American flag was certainly a product of his reaction to cultural conservatism. In his own words, Johnson saw "a need to condemn and repudiate" Reagan's "belligerent American patriotism" by "burning the flag of the empire."[565] Johnson also compared Dallas, which had "flags draped all over the place," to "a modern Nuremberg Rally."[566]

Johnson was convicted under Texas's flag desecration law and sentenced to one year in prison and a $2,000 fine.[567] He subsequently appealed his case to the Texas Supreme Court,

[562] Hunter, *Culture Wars*, 147.
[563] Goldstein, *Flag Burning and Free Speech*, 44.
[564] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[565] Johnson, Gregory Lee Johnson Interview.
[566] *Ibid*.
[567] Taylor, "The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision," 1477.

which struck down the state's law and vacated Johnson's conviction.[568] When Texas appealed to the U.S. Supreme Court, famed civil liberties attorney William Kunstler defended Johnson. Kunstler's defense hinged upon the First Amendment to the Constitution, which states that "Congress shall make no law [...] abridging the freedom of speech."[569] In previous cases, however, the Supreme Court had ruled that speech can be restrained when it is "likely to produce a clear and present danger of a serious substantive evil that rises far and above public inconvenience, annoyance, or unrest."[570]

Kunstler's argument explained that flag desecration, while controversial and inflammatory, did not produce a clear and present danger.[571] Kunstler cited *West Virginia State Board of Education v. Barnette*, a 1943 Supreme Court ruling that held students could not be legally compelled to recite the Pledge of Allegiance to the American flag in their classrooms.[572] The *Barnette* decision specifically held that mandating respect for the flag "cannot be justified as a means of meeting a 'clear and present danger' to national unity," with Justice Robert Jackson famously opining that "compulsory unification of opinion achieves only the unanimity of the graveyard."[573]

According to Kunstler, *Barnette* and *Johnson* shared the same premise, and if the government "can't order you to salute the flag," it also "can't order you to do all these obeisances with relation to the flag," such as not burning it.[574] In addressing Chief Justice William Rehnquist, who was "easily

[568] *Ibid*.
[569] Constitution Annotated.
[570] Terminiello v. Chicago, 337 U.S. 1, 93 L. Ed. 2d 1131, 69 S. Ct. 894 (1949).
[571] Texas v. Johnson.
[572] *Ibid*.
[573] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943).
[574] Texas v. Johnson.

the most conservative member" on the bench at the time, Kunstler stated that the predicament created by Johnson's burning of the flag was exactly what the First Amendment was written to protect.[575] Kunstler reasoned that "to hear things or to see things that we hate test[s] the First Amendment more than seeing or hearing things that we like [...] it wasn't designed for things we like."[576]

District Attorney Kathi Drew, who argued on behalf of the state of Texas, pushed back against Kunstler's reasoning. While being questioned by Justice Antonin Scalia, Drew stated that the "preservation of the flag as a symbol of nationhood and national unity is a compelling and valid state interest," and the flag desecration law was crucial to preventing a "breach of the peace."[577] Drew also attempted to frame the American flag's status as one transcending private property ownership in favor of being "this nation's cherished property," to which Justice Scalia responded, "I never thought that the flag I owned is your flag."[578] This was the first indication of Scalia's hesitancy to rule on behalf of traditional patriotic values in *Johnson*, despite his conservative approach to jurisprudence. He was not convinced that the collective interest of the state outweighed the personal agency of the individual burning the flag.

IV. Politics of the Rehnquist Court

For William Kunstler, arguing before the Supreme Court in *Texas v. Johnson* was an uphill battle. At the time of this case, the judicial branch of the federal government was not immune to the culture wars. In his two terms, President Reagan appointed more federal judges than any other American president, and the Supreme Court was no exception. Three

[575] "Biography: Chief Justice William Rehnquist."
[576] Texas v. Johnson.
[577] *Ibid.*
[578] *Ibid*.

conservative Supreme Court justices—Anthony Kennedy, Sandra Day O'Connor, and Antonin Scalia—were appointed by Reagan, while the Nixon-appointed William Rehnquist had been elevated to the position of Chief Justice in 1986.[579]

Additionally, the Ford-appointed John Paul Stevens, while known for his more liberal tendencies, fell squarely within the conservative wing of the Supreme Court on questions of American patriotism.[580] Stevens, an outspoken World War II veteran, gave an emotionally charged response to Kunstler's argument that flag desecration constituted free expression. During these exchanges with Kunstler, Stevens reportedly "turned red and was clearly quite angry."[581] The reliably centrist Byron White similarly had a history of ruling conservatively on flag use cases, having previously joined Rehnquist's dissent in the 1974 case of *Spence v. Washington*. In *Spence*, the Supreme Court held that adorning an American flag with peace symbols was a constitutionally protected form of free speech.[582] This left three liberal justices—Harry Blackmun, William Brennan, and Thurgood Marshall—for Kunstler to rely on, compared to the six justices who would ostensibly be eager, as evidenced by their past decisions regarding cultural issues, to reinstate the conviction of a man who had committed, what many had deemed to be, the most egregious offense against the American flag.[583]

V. The *Johnson* Decision

On June 21, 1989, the Supreme Court handed down its decision in *Texas v. Johnson*. In an unexpected rebuke of culture war conservatism, the ruling was 5-4 in favor of

[579] Hunter, *Culture Wars*, 251–252.
[580] Goldstein, *Flag Burning and Free Speech*, 106–107.
[581] *Ibid*, 95.
[582] *Ibid*, 99.
[583] *Ibid*, 98.

Gregory Lee Johnson. As expected, Rehnquist, O'Connor, Stevens, and White sided with the state of Texas and voted to reinstate Johnson's conviction for flag desecration. Anthony Kennedy and Antonin Scalia, however, defected from their conservative colleagues to side with the liberal wing of the Court in opposition to the legal prohibition of flag desecration.[584] Justice William Brennan wrote the opinion for the majority, in which he applied several legal standards to Texas's flag desecration law.[585]

First, Brennan clarified that Johnson's burning of the American flag, especially outside of a political convention in protest of a political action or entity, constitutes "expressive conduct" of an "overtly political nature."[586] Though Johnson himself had uttered no words in the process of setting the flag alight, he had, in Brennan's view, made a powerful enough non-verbal statement for the First Amendment to be applicable.[587] Brennan also discredited Kathi Drew's testimony on behalf of the state of Texas under the *O'Brien* test. The *O'Brien* test stipulates that, for the government to prohibit an act of symbolic speech, there must be a "legitimate governmental interest" in doing so that "is unrelated to restricting expression."[588]

This test originated from *O'Brien v. United States*, a 1968 case that held that the First Amendment did not protect draft card burning because such an act, while expressive, interfered with the state interest of raising a military force via conscription.[589] Therefore, to uphold the Texas statute would

[584] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[585] *Ibid*.
[586] Goldstein, *Flag Burning and Free Speech*, 103.
[587] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[588] Henderson, "Today's Symbolic Speech Dilemma," 550–551.
[589] Taylor, "The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision," 1479–1480.

require the state to prove that flag desecration impedes the government's ability to further its interests. Upon analyzing the purported interest of the state of Texas in preventing a breach of the peace, the Supreme Court found that Johnson's burning of the flag did not increase the risk of such an event, nor did Texas's legal counsel even attempt to prove such a risk.[590]

Brennan's opinion also challenged the supposed importance of the Texas law in maintaining "nationhood and national unity," which the Supreme Court found to be an insufficient interest, due to the inherently expressive nature of opposing such a form of patriotism.[591] Brennan wrote that the motive behind the Texas law was instead to prohibit an action that an audience could take "serious offense" to, a concern that Brennan countered by pointing out that the "bedrock principle underlying the First Amendment" is that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[592]

VI. Justice Kennedy's Concurrence

Justice Anthony Kennedy's concurrence in *Texas v. Johnson* was perhaps the most powerful indicator of the case's rejection of the culture war. Agreeing with Brennan's definition of flag burning as a form of constitutionally protected political expression, Kennedy emphasized that "the hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."[593] Justice Kennedy, a Reagan-appointed conservative, made no secret of his opposition to flag desecration. However, he also firmly

[590] Birkett, "Flag Desecration Statutes after Texas v. Johnson," 640.
[591] *Ibid*, 642.
[592] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[593] Henderson, "Today's Symbolic Speech Dilemma," 573.

argued that "the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit," and that "it is poignant but fundamental that the flag protects those who hold it in contempt."[594] Despite his own disgust with the practice of flag burning, he acknowledged that the law is not to be solely based on his own personal views, and that the First Amendment's protection of free expression had been settled long before Gregory Lee Johnson burned the flag.

VII. Dissenting Opinions

Chief Justice William Rehnquist, joined by Justice Sandra Day O'Connor and Justice Byron White, wrote the primary dissenting opinion. The Chief Justice's dissent rejected the overtly legal angle to flag desecration law taken by the majority, in favor of an emotionally charged exaltation of the American flag as a unique symbol deserving special legal protection.[595] Most importantly, Chief Justice Rehnquist disagreed with the premise that the flag represented "simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[596] Instead, he claimed that "millions and millions of Americans regard it with an almost mystical reverence" and a "uniquely deep awe and respect" that would create a legitimate interest under the O'Brien test.[597] Sentiment like that of the Chief Justice was well at home in the 1980s; as a result of the culture war, the American flag was "monopolized" as a "symbol of legitimacy" for the conservative movement.[598] Among an American populace that

[594] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[595] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[596] *Ibid*.
[597] Goldstein, *Flag Burning and Free Speech*, 106.
[598] Hunter, *Culture Wars*, 147.

had elected Ronald Reagan president twice in a row in landslide victories, it is likely that very few individuals would not take offense to the destruction of the American flag.[599]

Following this surge of American patriotism, Justice John Paul Stevens wrote a separate dissenting opinion that decried the majority's belief that the flag was but an expendable symbol of a political ideology. A testament to Justice Stevens' military service and immense patriotism, this dissent drew heavily on military iconography, stating that the flag, which had motivated "the Philippine Scouts who fought at Bataan and the soldiers who scaled the bluff at Omaha Beach," was "itself worthy of protection from unnecessary desecration."[600] In contrast with the conservatives of the majority, Stevens, a justice with moderate conservative-to-liberal tendencies, heavily incorporated cultural conservatism in his decision.[601]

VIII. Reactions to *Johnson*

The Supreme Court's ruling in *Texas v. Johnson*, which invalidated all state laws prohibiting flag desecration, received nearly instantaneous backlash. According to a Washington, D.C. dispatch from the day following the decision, "citizens across America were outraged by the Supreme Court decision yesterday ruling that flag burning is not a crime."[602] Some

[599] Goldstein, *Flag Burning and Free Speech*, 108.
[600] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
[601] There is academic skepticism that cultural conservative assumptions are able to fully explain Stevens' dissent. I am grateful to Professor Daniel Breen of the Brandeis University Legal Studies Department for pointing out that Justice Stevens' use of cultural conservatism is not the most important or heaviest part of this descent. To read more on why this skepticism is warranted, see the words of one of his former clerks: "The Least Popular Dissent," *SCOTUSblog* (blog), May 4, 2010, https://www.scotusblog.com/2010/05/the-least-popular-dissent/.
[602] Hunter, *Culture Wars*, 28.

opponents of the decision went as far as "gather[ing] on the steps of the high court… to burn a mock Supreme Court justice's robe."[603]

On the night of the decision, Peter Jennings told ABC evening news viewers that "there are very few Supreme Court decisions which we can imagine evoking such a gut reaction as this one," while a *USA Today* poll taken two days after the *Johnson* decision found that "69 percent [of Americans] supported a constitutional amendment" prohibiting flag desecration.[604] President George H.W. Bush stated that the Supreme Court's decision to effectively legalize the desecration of a "banner of freedom" was "wrong, dead wrong."[605] Meanwhile, the House of Representatives voted 411-15 to condemn the ruling and the Senate voted 97-3 to express "profound disappointment" with the Supreme Court.[606]

Although the *Johnson* decision struck down all state-level flag desecration statutes, it did not preclude the federal government from acting on the issue. Both houses of Congress quickly moved to legally circumvent *Johnson*, with Jack B. Brooks (D-TX) leading the charge in the House of Representatives and Joseph R. Biden (D-DE) in the Senate.[607] After initial arguments over whether to introduce a constitutional amendment or a more feasible federal statute, Representative Brooks and Senator Biden each proposed a bill to amend the Flag Protection Act of 1968 in their respective chambers. To avoid a challenge similar to *Johnson*, the Flag Protection Act of 1989 amended the 1968 Act to criminalize flag desecration in the name of any ideology. The Flag

[603] *Ibid*, 28.
[604] Goldstein, *Flag Burning and Free Speech*, 108–112.
[605] Henderson, "Today's Symbolic Speech Dilemma," 564.
[606] Goldstein, *Flag Burning and Free Speech*, 114.
[607] *Ibid*, 115.

Protection Act of 1989 passed in both houses, before President Bush allowed it to pass without signing it.[608]

IX. *United States v. Eichman* Tests the *Johnson* Decision

The immense public backlash to the *Johnson* ruling may suggest that the decision was a regrettable mistake by the Supreme Court. This possibility was soon eliminated when the Flag Protection Act of 1989 received its first test. On the day of the law's codification into federal law, Gregory Lee Johnson and seven others burned American flags in protest of the law in Washington, D.C. and Seattle, Washington.[609] All eight were charged with violating the 1989 law, though charges against Johnson were dropped after witness testimony confirmed that his flag had not ignited.[610] Just as supporters and opponents of the Flag Protection Act had planned, the case was appealed to the Supreme Court, with the case being submitted as *United States v. Eichman* (Johnson's fellow activist, Shawn Eichman, was listed as the primary appellee).[611]

After almost a year of the public relations firestorm that had resulted from the *Johnson* decision, it certainly would not have been surprising for any of the five justices who had voted with the majority—especially a conservative justice who had only tentatively sided with Johnson—to change their mind on the flag desecration issue. Nevertheless, on June 11, 1990, the Supreme Court once again ruled 5-4 that the flag desecration ban was unconstitutional, and every justice voted the same as in *Texas v. Johnson*.[612] William Brennan's majority opinion in *Eichman* was nearly identical to his *Johnson* opinion, slamming the Flag Protection Act as "suppression of free

[608] Text - H.R.2978 - 101st Congress (1989-1990).
[609] Goldstein, *Flag Burning and Free Speech*, 174.
[610] *Ibid*, 175.
[611] United States v. Eichman, 496 U.S. 310, 110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990)."
[612] Goldstein, *Flag Burning and Free Speech*, 206.

expression."[613] John Paul Stevens's *Eichman* dissent also mirrored his *Johnson* dissent, claiming that the federal government, like Texas's state government, "has a legitimate interest in protecting the symbolic value of the American flag."[614]

Since the Supreme Court's decision in *Eichman*, the focus of supporters of a flag desecration ban has shifted towards passing a constitutional amendment to circumvent *Johnson* and *Eichman*. Such an amendment would supersede the First Amendment to prohibit flag desecration, exempting the ban from the O'Brien test. The most recent of these attempts was in 2006 when Orrin Hatch (R-UT) introduced a Senate resolution proposing an amendment to ban flag desecration, which would ultimately fall one vote short of the two-thirds majority needed to pass in the Senate.[615]

X. Conclusion

Shortly before his 1990 retirement from the Supreme Court, William Brennan expressed his disappointment with the Supreme Court's shift towards cultural conservatism but also stated firmly that he was "not discouraged to the point of giving up [...] after all, Kennedy and Scalia joined me on the flag-burning case, for God's sake."[616] In the words of Gregory Lee Johnson, "being able to criticize the government is at the heart of the First Amendment—without that, the First Amendment really means nothing."[617] This was the view of flag desecration taken by five members of the Supreme Court in *Texas v. Johnson* and *United States v. Eichman*, not the least surprising of whom were Anthony Kennedy and Antonin

[613] United States v. Eichman, 496 U.S. 310, 110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990).
[614] *Ibid*.
[615] S.J.Res.12 - 109th Congress (2005-2006).
[616] Goldstein, *Flag Burning and Free Speech*, 101.
[617] Johnson, Gregory Lee Johnson Interview.

Scalia. For these two conservative, Reagan-appointed justices to join the liberal wing of the Supreme Court in affirming a constitutional civil liberty, not once, but twice, was no accident.

By choosing to rule in favor of Gregory Lee Johnson and later Shawn Eichman, et. al., Kennedy and Scalia were able to set their own conservative leanings aside to rule in a way that they believe most appropriately interpreted the First Amendment. To paraphrase Kennedy, the two made a decision they did not like, but in doing so made the right decision, compelled by the law and the Constitution.[618] Thus, as the Supreme Court becomes more motivated by partisan politics, perhaps the sitting justices should heed the words of Anthony Kennedy and make more decisions they do not like.

[618] Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).

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Texas v. Johnson, 491 US 397 (1989).
Texas v. Johnson, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).
United States v. Eichman, 496 U.S. 310, 110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990).
West Virginia State Board of Education v. Barnette, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943).

The Psychedelic Surge and its Threats to Native American Communities

Leora Karoll[619]

The psychedelic substances market is preparing to outpace the legal cannabis market in the United States by 2027. The country's federal policies are not prepared to protect Native Americans in the potential acquisition of their traditional resources such as peyote (Lophophora williamsii), a small and spineless cactus that contains psychoactive alkaloids. Through case studies of biopiracy instances in the United States and around the world, this paper demonstrates the vulnerability of Indigenous Knowledge and resources and advocates for its protection as the popularity of psychedelics surges. These cases prove how easily and recklessly Indigenous Knowledge and resources are exploited, barring Indigenous people from accessing them due to new patent rights, laws, or scarcity. President Biden pledged to incorporate Indigenous Knowledge in federal research and policymaking in 2022, but due to the lack of a Tribal consultation model and international agreements signed to protect Native Americans, the administration risks enabling further exploitation of these invaluable resources in the United States.

I. Introduction

America is surging into psychedelic research. An unprecedented amount of funding is being allocated to psychedelic research to bring promising discoveries to the field of mental health.[620] However, to many Native Americans, the

[619] Brandeis University Undergraduate, Class of 2024.
[620] "Johns Hopkins Center for Psychedelic and Consciousness Research," Johns Hopkins Medicine, accessed November 9, 2023,

powerful healing properties of the psychoactive plant peyote have been known and used in religious ceremonies for thousands of years.[621] As more research is done, policymakers and more than half of American voters begin to wake up to the wealth of benefits that many currently illegal substances may bring to American society.[622] Although exciting to many, this phenomenon causes concern for many traditional peyote users. Many believe peyote should remain a closed practice, and staunchly oppose genetic manipulation of the plant and commercialization of what many Native Americans consider an "ancestor and a living relative."[623] Even more pressing is the threat of biopiracy, the act of taking knowledge and genetic resources from Indigenous communities without consent or compensation.[624] Companies and individuals have historically used United States patent law to gain the sole right to produce and distribute medical plants that have long been part of the Traditional Knowledge of Indigenous people. The legalization of psychedelics has the potential to improve countless American lives; however, numerous protections need to be established to protect Native American sovereignty over their traditional resource. The United States has signed the United Nations Declaration on the Rights of Indigenous Peoples

https://www.hopkinsmedicine.org/psychiatry/research/psychedelics-research.

[621] James D. Muneta, "Peyote Crisis Confronting Modern Indigenous Peoples: The Declining Peyote Population and a Demand for Conservation," *American Indian Law Journal* 9, no. 1 (December 23, 2020), 139.

[622] Catherine Ho, "Majority of U.S. Voters Support Therapeutic Use of Psychedelic Drugs," San Francisco Chronicle, July 13, 2023, https://www.sfchronicle.com/bayarea/article/majority-u-s-voters-support-therapeutic-use-18197873.php.

[623] Louis Sahagun, "Legalization Efforts Spur 'Peyote Crisis'; As Cities Move to Allow Psychedelic Plants, Some Native Americans Cry Foul.," Los Angeles Times, May 17, 2020.

[624] John Reid, "Biopiracy: The Struggle for Traditional Knowledge Rights," *American Indian Law Review* 34 (2009).

(UNDRIP), but has yet to meaningfully ratify it. In doing so, the United States would be obligated to prioritize Native American voices by improving its Tribal consultation model by establishing free, prior, and informed consent (FPIC) standards. In addition to UNDRIP, the United States must sign and uphold international agreements such as the Nagoya Protocol to protect the rights of Native Americans.

Led by emerging medical studies funded by the United States National Institutes of Health[625] and the United States Department of Veterans Affairs, a 21st century term, "psychedelic renaissance," has been coined to describe this new period of acceptance of psychedelics.[626] Psychedelics are psychoactive substances that are either lab-made or naturally occurring in plants. Peyote, methylenedioxy-methamphetamine (MDMA), ayahuasca, psilocybin, and lysergic acid diethylamide (LSD) are common psychedelic drugs.[627] Consumption of these drugs generally does not lead to dependence or addiction.[628] From 2007 to 2020, 105 registered clinical trials took place around the world examining the use of psychedelic drugs.[629] Notably, Johns Hopkins Medicine

[625] Brian S. Barnett, Sloane E. Parker, and Jeremy Weleff, "United States National Institutes of Health Grant Funding for Psychedelic-Assisted Therapy Clinical Trials from 2006–2020," International Journal of Drug Policy 99 (January 2022): 103473, https://pubmed.ncbi.nlm.nih.gov/34624734/.

[626] "Correa, Bergman Applaud House-Passage of Their Amendment Pushing VA to Study Impact of Psychedelics on Veterans: United States Congressman Lou Correa of California," Congressman Correa, July 27, 2023, https://correa.house.gov/news/press-releases/correa-bergman-applaud-house-passage-of-their-amendment-pushing-va-to-study-impact-of-psychedelics-on-veterans.

[627] David E. Nichols, "Psychedelics," Pharmacological Reviews 68, no. 2 (February 3, 2016): 264–355, https://doi.org/10.1124/pr.115.011478.

[628] Nichols, "Psychedelics," 264–355.

[629] Joshua S Kurtz et al., "The Use of Psychedelics in the Treatment of Medical Conditions: An Analysis of Currently Registered Psychedelics

received a federal grant of nearly $4 million to research the impacts of psilocybin[630] on tobacco addiction in 2021.[631] A breakthrough study by Johns Hopkins (2022) found that psilocybin relieved symptoms of major depressive disorder for up to a month in adults, and a follow-up study proved that benefits lasted up to a year for some participants.[632]

In 2010, the *Journal of Psychopharmacology* found that 83 percent of formerly treatment-resistant patients who underwent two MDMA treatments were cured of PTSD.[633] A long-term follow-up study found the positive results to be stable for 3.5 years.[634] In response to the promising results of these studies, the United States Congress unanimously passed an amendment to the Military Construction, Veterans Affairs, and Related Agencies Appropriations Bill in 2023 to encourage the United States Department of Veterans Affairs to utilize federal funding for research of psychedelic therapies to help treat veterans suffering from PTSD.[635] A growing proportion of Americans report using psychedelic drugs, and 53 percent of users say they used it therapeutically.[636] Fifty-six percent of United States voters also express support for federal regulators to approve the use of psychedelics for prescription use,

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Studies in the American Drug Trial Registry," *Cureus*, September 14, 2022, https://doi.org/10.7759/cureus.29167.

[630] Psilocybin is a psychedelic chemical compound naturally occurring in some species of fungi.

[631] Johns Hopkins Medicine "Psychedelic Research."

[632] Natalie Gukasyan et al., "Efficacy and Safety of Psilocybin-Assisted Treatment for Major Depressive Disorder: Prospective 12-Month Follow-Up," Journal of Psychopharmacology 36, no. 2 (2022): 151–58, https://doi.org/10.1177/02698811211073759.

[633] MDMA is also known as Ecstasy, a synthetic stimulant and psychedelic drug; Erwin Krediet et al., "Reviewing the Potential of Psychedelics for the Treatment of PTSD," *International Journal of Neuropsychopharmacology* 23, no. 6 (2020): 385–400, https://doi.org/10.1093/ijnp/pyaa018.

[634] Krediet et al., "Psychedelics Treatment of PTSD," 385–400.

[635] Congressman Correa "Applaud House-Passing Amendment."

[636] Ho, "Voters Support Therapeutic Use."

according to a survey by the UC Berkeley Center for the Science of Psychedelics.[637] As more studies provide fruitful findings, the psychedelic substances market is projected to rapidly expand, from $2 billion in 2020 and expected to reach $10.75 billion by 2027.[638] These studies display the increased readiness of the American medical community, government, and general public to accept the legality of psychedelics.

II. Peyote in Native American Communities

Although the medical community in the United States may only begin to accept the benefits of psychedelic remedies, they have long been understood by Native Americans. Herbal medicines and psychedelics such as peyote have been used for thousands of years by Native Americans as part of their medicinal and spiritual practices and rituals; carbon dating proves that peyote was used 6,000 years ago at an archaeological site in Texas.[639] However, many Tribes further claim that peyote has been used by them since time immemorial.[640] Peyote is often ingested during a night-long ceremony shared by a community involving singing, praying, drumming, and communication with a creator or some other metaphysical entity.[641] Members sit in a tipi or other ceremonial structure facing a crescent-shaped altar with a fire. There are four elements to the ceremonies, including praying, singing,

[637] Ho, "Voters Support Therapeutic Use."
[638] Phelps, "Investment in Psychedelics."
[639] Muneta, "Peyote Crisis," 139.
[640] Fannie Kahan, "The Struggle for Peyote," in *A Culture's Catalyst* (University of Manitoba Press, 2016), https://doi.org/10.1515/9780887555084-007.
[641] Peter N. Jones, "The Native American Church, Peyote, and Health: Expanding Consciousness for Healing Purposes," Contemporary Justice Review 10, no. 4 (2007): 411–25, https://doi.org/10.1080/10282580701677477, 415.

ingestion of peyote, and quiet contemplation.[642] Ceremonies are usually called by a Tribe to pray for the healing of a sick person or to give thanks for being cured.[643] Additionally, ceremonies take place to heal other problems or to pray for a loved one who is away at school or in the military.[644] According to personal anecdotes, the revelations experienced through these ceremonies can lead to forgiveness, the alleviation of physical and emotional illness, and bonding with others in the community.[645]

As peyote offers both religious, emotional, and physical healing, it has helped countless Native Americans recover from life challenges such as substance abuse, mental illness, homelessness, poverty, and food insecurity.[646] The tradition of the peyote ceremony strengthens communities through a shared intergenerational ritual, not only by connecting individual community members but also by linking generations through a common experience. Losing this ritual endangers the wellness of individuals, the strength and continuity of their communities, and their religious freedom. However, with the arrival of settlers from the West, this tradition became vulnerable.

European conquerors and their descendants have long been critical of peyote and its religious uses by Indigenous people. When the Spanish Conquistadors arrived on the land in 1492, they tried to eradicate the plant entirely.[647] As the Natives reported visiting God when using peyote, the Spanish identified it as a threat to the priesthood of their Catholic

[642] Jones, "Native American Church," 415.
[643] Jones, "Native American Church," 415.
[644] Jones, "Native American Church," 415.
[645] Jones, "Native American Church," 415.
[646] Muneta, "Peyote Crisis," 172–173.
[647] Michael Pollan, "Chapter 4: Mescaline," *How to Change Your Mind,* directed by Alison Ellwood and Lucy Walker, 2022, Netflix.

faith.[648] In 1620, the Roman Catholic Church deemed peyote "an evil to be rooted out in the New World."[649] During the Mexican Inquisition, the plant was labeled the "diabolical root" and was a "heretical perversity opposed to the purity and integrity of our Holy Catholic faith."[650] From the start of Western colonization of the land, Indigenous rights to peyote have been imperiled.

After thousands of years of Native American use of peyote, Congress passed the Indian Religious Crime Code of 1883, enforcing the imprisonment and withholding of government rations from anyone in possession of peyote.[651] The legislation stated that "dances and so-called religious ceremonies, shall be considered 'Indian offenses'... cognizable by the court of Indian offenses."[652] Upon losing the ability to legally practice these traditional and spiritual rituals, the alienation of Native Americans and their cultures became codified in law. This law forced these practices to move underground out of threat of persecution. It fragmented the passing down of Indigenous Knowledge from one generation to the next, severing a connection between past and present. This infringement of Indigenous rights to peyote fractured identity, sovereignty, community connection, spirituality, healing, and freedom.[653]

As of the 1994 Amendment of the American Indian Religious Freedom Act (AIRFA), Native American Church of North America (NACNA) members alone are legally allowed to use peyote for solely religious purposes.[654] The potential mainstream legalization of the plant raises concerns for many

[648] Pollan, "Mescaline."
[649] Muneta, "Peyote Crisis," 139.
[650] Pollan, "Mescaline."
[651] Muneta, "Peyote Crisis," 140.
[652] Muneta, "Peyote Crisis," 140.
[653] Muneta, "Peyote Crisis," 140.
[654] Muneta, "Peyote Crisis," 139.

Indigenous people, especially in the wave of decriminalization of other psychedelics such as psilocybin. Colorado became the first state to legalize psilocybin for therapeutic uses in 2019, and Oregon followed in 2020.[655] Based on data from the trajectory of cannabis legalization, it is projected that most states will have passed legislation legalizing psychedelics by 2033–2037.[656]

Nonprofit organizations such as Decriminalize Nature have emerged in recent years, aiming to grant the healing properties of natural hallucinogens including peyote accessible to all.[657] Some Native Americans, including Navajo spiritual leader Steven Benally, beg outsiders to "leave peyote alone" and ask, "is that too much to ask?"[658] Benally claims that "the spiritual healing power peyote offers is only attainable through Native American protocol," and that the illegality of the plant for non-Natives "is one of the few federal laws on our side…We want to hold on to it."[659] Benally is one voice of many who believe that peyote should remain inaccessible to the general public. From his perspective, peyote usage is a closed practice and should only be ingested ceremonially with the proper protocol traditionally performed by Tribes. The concept of a closed practice asks only members of a certain culture to perform traditional practices as a way of preserving the culture and practices and often the sanctity centered around them. Close practices for some cultures are a way of self-protection against colonial infiltration, especially if the group suffers from a history of settler colonialism.

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[655] Joshua S. Siegel et al., "Psychedelic Drug Legislative Reform and Legalization in the US," *JAMA Psychiatry* 80, no. 1 (January 1, 2023): 77, https://doi.org/10.1001/jamapsychiatry.2022.4101.
[656] Siegel et al., "Psychedelic Drug Legislative Reform," 80.
[657] Sahagun, "Legalization Efforts."
[658] Sahagun, "Legalization Efforts."
[659] Sahagun, "Legalization Efforts."

In a commercialist society, many traditional peyote users fear what could happen if the sacred plant becomes accessible to the general public. Dawn Davis, a member of the Shoshone-Bannock Tribes, worries about any "cultivation of peyote outside of the ancient terrain it shares with Indigenous people" and that "it is a step toward hybridization and commercialization."[660] She is concerned that this reborn national interest in psychedelic experiences reminds her of the 1960s when peyote was illegally bought and sold to non-Natives. This illegal activity decreased access to Native Americans and led many non-Natives to profit from the illegal exploitation of the sacred plant. Although to most Americans peyote is just a psychoactive plant, Davis explains that "to us, peyote is an ancestor and a living relative," holding immense spiritual significance.[661] For this reason, the hybridization and commercialization of it poses serious concerns.

However, some Native Americans believe that the use of the plant should not be restricted to Native Americans alone. Indigenous leaders such as Comanche William Voelker claim that the decriminalization of peyote may be best for all.[662] Voelker is also the director of the nonprofit group Sia, which is dedicated to the preservation of eagle feathers. He argues that "it wouldn't be very humble of us to claim exclusive ownership to peyote and prevent others from using it. It wasn't just given to us."[663] However, in opening up the practice to outsiders, there should be intentional respect for the plant and consideration for its conservation needs. Miriam Volat, a soil scientist and co-director of the RiverStyx Foundation, which funds psychedelic research while simultaneously collaborating with Tribes to contribute to the conservation of peyote argues that "instead of saying, '[y]ou owe us this plant, the

[660] Sahagun, "Legalization Efforts."
[661] Sahagun, "Legalization Efforts."
[662] Sahagun, "Legalization Efforts."
[663] Sahagun, "Legalization Efforts."

decriminalization movement should be saying, '[w]e'd like to help you take care of your sacred medicine.'"[664] Researchers should work with Tribal leaders to ensure respectful use of the sacred plant.

However, Native Americans have previously witnessed an exploitative pattern of their traditional resources. Jon Brady, the former president of the Native American Church of North America (NACNA), worries that

> [a] lot of people want to tap into [peyote] because they see the potential, the almighty dollar … They've done that to a lot of our medicines already … This is kind of the last of our medicines of our Native American people, so we're trying every avenue to have its protection.[665]

According to Brady, with the influence of capital, peyote will inevitably become exploited if it becomes legal for all. He believes that NACNA "should not have to fight endless efforts to decriminalize Peyote," and that "it requires that the federal government to anticipate and act to cease states' usurpation of American Indian religious rights."[666] Brady argues that legalization and decriminalization of peyote violates the religious right of peyote as outlined in the 1994 Amendment of the American Indian Religious Freedom Act (AIRFA). He therefore instigates the federal government to initiate actions to prevent states' legalization or decriminalization efforts.

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[664] Sahagun, "Legalization Efforts."
[665] Hallie Golden, "Inside the Battle to Save the Sacred Peyote Ceremony: 'We're in Dire Straits,'" The Guardian, December 9, 2022, www.theguardian.com/us-news/2022/dec/09/peyote-native-american-medicine-nacna-federal-protection.
[666] Jon Brady, "Strengthening the Indigenous Communities Through Cultural and Environmental Preservation" (Testimony before the House Natural Resources Committee, United States Congress, November 8, 2021), 2.

However, as the federal government falls short on meeting many necessary protections for Native Americans, many Tribal governments are empowered to implement their own legislation for protecting their cultural property. Indigenous rights scholar Angela Riley is concerned that "in an age of globalization…property and quasi-property can spread across the world…in a matter of moments."[667] Once Indigenous cultural ideas and practices gain exposure, they are subject to appropriation and exploitation, and therefore need protection. Although Tribal law has limited jurisdiction, its development or revitalization is uniquely capable of accommodating the specific needs and circumstances of each Tribe.[668] Therefore, Tribes can determine how to protect themselves within each cultural context and normative framework. As Tribal law gains prevalence, it will gain legitimacy and standing in American courts.[669] Riley advocates for a tiered system approach of incorporating international, national, and Tribal law to protect cultural property.[670] However, Tribal law must be the foundation.[671]

III. The Threat of Biopiracy

Many Indigenous communities in the United States and abroad have historically been exploited by biopiracy, executed by individuals and companies. This process often involves using patent law to grant the patent holder the sole right to manufacture and distribute a plant. Consequently, Indigenous people are criminalized for using the plant in their traditional way if they lose their rights to it.

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[667] Angela R. Riley, "'Straight Stealing': Towards an Indigenous System of Cultural Property Protection," *Washington Law Review*, 2005, 69–164, 79.
[668] Riley, "Straight Stealing."
[669] Riley, "Straight Stealing."
[670] Riley, "Straight Stealing."
[671] Riley, "Straight Stealing."

This process often involves pharmaceutical companies using Indigenous Knowledge to identify medicinal plants. Indigenous Knowledge is a body of knowledge, observations, practices, philosophies, and beliefs developed by Indigenous people, passed down from generation to generation, based on lived experiences, and interactions with the environment.[672] As pharmaceutical companies seek treatments in plants such as psychedelics, the research process is lengthy and expensive. Using Indigenous Knowledge of medicinal plants instead of discovering them individually increases efficiency by over 400 percent.[673] Therefore, the world market for medicinal plants discovered by Indigenous communities is valued at up to $43 billion.[674]

The United States has a history of lenient patent laws, allowing the biopiracy of many plants and their medicinal applications. In 1995, a United States patent was granted to two researchers at the University of Mississippi Medical Center filed for the oral and topical use of turmeric powder from India as a surgical wound and ulcer healing agent.[675] This was allowed despite the fact that evidence of ancient Ayurvedic texts on traditional Indian medicine, books about home remedies. Simultaneously, previous scientific publications proved that turmeric has been known and used as a wound healer long before the University of Mississippi Medical Center even existed.[676] Similarly, in 1993, American company AgriDyne received a United States patent for the use of neem oil extract as an insecticide and fungicide in the United States

[672] "Indigenous Knowledge and Traditional Ecological Knowledge," National Parks Service, accessed February 29, 2024, https://www.nps.gov/subjects/tek/description.htm.
[673] Reid, "Biopiracy."
[674] Reid, "Biopiracy."
[675] K. S. Jayaraman, "US Patent Office Withdraws Patent on Indian Herb," Nature 389, no. 6646 (1997), https://doi.org/10.1038/37838.
[676] Jayaraman, "Patent on Indian Herb."

and the European Union.[677] Neem is a tree that has been used in India for over two thousand years as a medicine, cosmetic, and insect repellent. Once the patent was approved and came into effect, the European Union struck it down for lack of novelty because it had proof of traditional usage, although the patent was upheld in the United States. The Indian government spent nearly six million dollars fighting these cases.[678]

Lack of novelty can help protect these resources when backed by Indigenous Knowledge of these resources. However, especially seen with historically marginalized people, novelty can often be difficult to prove. For an invention to be patented in the United States, it needs to be qualified as a novel invention. To be novel, "it either could not have been known or used by others in the United States or have previously been patented or described in a printed publication in the United States or a foreign country."[679] Therefore, if a medicinal plant is known to Indigenous people or published, it *should* be protected from patenting. However, with lack of publishing, it can be challenging to prove if it is known by Indigenous people. Additionally, by tweaking a minor part of the plant or the procedure in which the plant is used for medicinal purposes, novelty can be justified, especially against historically marginalized people.[680] Most Indigenous Knowledge on medicinal resources is not written or published and is instead passed down orally, which increases the vulnerability of patenting by non-Natives. If the traditional Indian documents on turmeric were officially published and reviewed by the United States patent office, India would not have needed to spend millions of dollars fighting the case.[681]

[677] Reid, "Biopiracy," 89.
[678] Reid, "Biopiracy," 90.
[679] Reid, "Biopiracy," 82.
[680] Reid, "Biopiracy," 92.
[681] Reid, "Biopiracy," 90.

Following the turmeric and neem cases, India's National Institute of Science Communication and Information Resources (NISCIR) started collecting information on 130,000 traditional Indian medicinal products to publish in a database. The European Patent Office (EPO) entered an agreement with India to gain access before granting any patents involving botanical knowledge to the database to help prevent future cases like these.[682] This was a progressive step towards preventing biopiracy, as if the knowledge of a plant's medicine uses has been previously published, it cannot be patented.

Implementing this system with Native American medicine would prove to be almost impossible. Tracking down all Traditional Knowledge on medicinal plants spanning thousands of years and all over the country would be a nearly impossible and costly feat, if possible at all. The database project in India had a budget of $2 million. Much Indigenous Knowledge is passed down orally and uses different names for plants than what scientists use. Additionally, due to the closed nature of many Native American practices, community members may feel uncomfortable sharing their sacred knowledge that has traditionally only been passed down orally from generation to generation.[683]

A database may pose additional concerns and may inadvertently subject this knowledge to further biopiracy. An estimated 4,000 plants with medicinal properties have been patented on plants that are already known.[684] Therefore, Traditional Knowledge could more easily be obtained and copied. It is also subject to being misconstrued or distorted and then patented. For example, a United States Patent was granted for a solution of leaves from the aloe vera plant and water that was documented in Indian literature.[685] The patent was granted

[682] Reid, "Biopiracy," 91.
[683] Reid, "Biopiracy," 82.
[684] Reid, "Biopiracy," 92.
[685] Reid, "Biopiracy," 92.

on the grounds that the solution used only chlorinated water.[686] By changing one element such as the kind of water or the temperature of the water, the practice is then eligible to be patented. The United States often exercises leniency when defining novelty; therefore, companies that pirate and profit from Indigenous resources often rely on United States patent law.

In 1974, the founder of the International Plant Medicine Corporation based in California, Loren Miller, traveled to Ecuador, where he obtained samples of ayahuasca from a local Indigenous tribe. Ayahuasca is a psychoactive plant that has been used by Indigenous South Americans and is often administered by a shaman in a long healing ceremony for its therapeutic and medicinal benefits.[687] The plant is sacred to many Indigenous South Americans; the name translates from Quechua as the vine of "souls."[688] Miller took samples back to California to reproduce and study for its potential uses in cancer treatment and psychotherapy. In 1986, Miller obtained United States Plant Patent No. 5,571 for the specific strain, awarding him the exclusive right to grow and sell it.[689] In a statement, Miller claimed: "If this patent was causing any harm to the Indigenous people, I would have it canceled myself."[690]

However, in 1994, the Amazon Alliance, Center for International Environmental Law, and Coordinating Body of Indigenous Organizations of the Amazon Basin challenged the patent. They were successful on the basis that the strain was no

[686] Reid, "Biopiracy," 92.
[687] Jonathan Hamill et al., "Ayahuasca: Psychological and Physiologic Effects, Pharmacology and Potential Uses in Addiction and Mental Illness," Current Neuropharmacology 17, no. 2 (January 7, 2019): 108–28, https://doi.org/10.2174/1570159x16666180125095902.
[688] Sara V. Press, "Ayahuasca on Trial," *History of Pharmacy and Pharmaceuticals* 63, no. 2 (2022): 328–53, https://doi.org/10.3368/hopp.63.2.328, 329.
[689] Press, "Ayahuasca on Trial," 329.
[690] Press, "Ayahuasca on Trial," 352.

different from the original form of the plant that Miller collected and therefore lacked novelty. In 1999, the United States Patent and Trademark Office revoked the patent. However, Miller succeeded in his patent reinstatement in 2001 based on evidence that the shapes of the leaves and stems of his breed were novel.[691] Miller left many Indigenous people concerned with his actions, despite his supposed good intentions to study the beneficial uses of a plant. Miller's patent reinstatement by the United States after protests and legal action from Indigenous-led groups demonstrates the unwillingness to listen to and consider Indigenous voices in these matters. This case demonstrates again how lenient patent law in the United States can be, and how easily novelty can be proven.

In 2022, San Francisco-based company Journey Colab, which uses psychedelics to study addiction treatment, obtained a patent for lab-made mescaline (the active ingredient in peyote). However, it became the first company of its kind to publish a patent non-assertion pledge. This means that the company vowed to not sue Indigenous people for patent infringement for using peyote in their traditional way.[692] Additionally, Journey Colab established The Journey Reciprocity Trust, devoting a small portion of the company's founding equity to Indigenous communities; however, the company does not specify which Indigenous communities and whether they are solely ones that use peyote.[693] Although this initiative is a progressive addition to studying psychedelics for medical research and innovation in mental health care, it is unclear to what extent Indigenous communities were

[691] Press, "Ayahuasca on Trial," 331.
[692] "The Journey Colab Reciprocity Trust," Journey Colab, accessed November 9, 2023, https://www.journeycolab.com/the-journey-colab-reciprocity-trust.
[693] Journey Colab, "Reciprocity Trust."

thoroughly consulted, and whether they provided consent and are receiving benefits from this process.

Hopefully, companies continue to follow this precedent. However, there are no regulations or incentives to follow suit. A non-assertion pledge is not required, enforceable by law, or even encouraged. As psychedelic lab research accelerates companies continue to receive patents, the federal government must have a role in protecting the rights of Indigenous people to not be sued for patent infringement for using their crucial traditional resource of peyote.

IV. The Federal Government's Role

Protected by the patent laws of the United States, private companies can become the new gatekeepers of Indigenous Knowledge and resources. As this surge in psychedelic research accelerates, policies need to be implemented quickly to protect against exploitation and biopiracy of Indigenous resources such as peyote on United States soil. Patent law leniency jeopardizes the autonomy of Indigenous people's right to use peyote if companies gain the right to peyote or mescaline.

New medical research of psychedelics spearheads potential progress in the mental health medical field. Discoveries in psychedelics have the potential to improve countless lives. Many supporters of these initiatives argue that no more roadblocks or limitations should be placed on these endeavors.[694] However, "progress" in the United States often comes at the expense of Native American livelihoods.[695]

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[694] Alicia Victoria Lozano, "Candidates Who Support Psychedelics as Medicine Get a Political Action Committee," NBCNews.com, March 20, 2023, https://www.nbcnews.com/news/us-news/candidates-support-psychedelics-medicine-get-political-action-committe-rcna75295.

[695] John Gast, "American Progress," An allegorical female figure of America leads pioneers westward, as they travel on foot, in a stagecoach,

While the pursuit of these new medical advances for Americans accelerates, Native Americans still experience unequal access to health care. The life expectancy of Native Americans is five years shorter than the general United States population.[696] Native Americans are 20 percent more likely than white Americans to experience colon and lung cancer.[697] Native Americans are more likely to commit suicide than white Americans, with those under the age of 25 being three times more likely.[698] The Indian Health Service (IHS) expenditures per patient are three times lower compared to Medicare.[699] The IHS struggles with the retention and recruitment of professional staff, causing grave limitations and a lack of continuity of care. IHS primary care physicians often feel overworked and are forced to take on a higher degree of patient complexity than they can manage without specialty consultation.[700] Lack of attention and funding for the IHS from Congress leads to poor health and the premature deaths of Native American individuals. Funding towards research in psychedelics has the potential to deliver transformative health care, however, simultaneously, the Indigenous people of this land still lack the funding and support to meet their basic healthcare needs.

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conestoga wagon, and by railroads, where they encounter Native Americans and herds of bison., The Library of Congress, 1872, Autry Museum of the American West, Los Angeles, California, https://www.loc.gov/item/97507547/.

[696] Gina Kruse et al., "The Indian Health Service and American Indian/Alaska Native Health Outcomes," Annual Review of Public Health 43, no. 1 (2022): 559–76, https://doi.org/10.1146/annurev-publhealth-052620-103633.

[697] Kruse et al., "The Indian Health Service."

[698] Kruse et al., "The Indian Health Service."

[699] Desiree L Fox, Ciara D Hansen, and Ann M Miller, "Over-Incarceration of Native Americans: Roots, Inequities, and Solutions," Safety and Justice Challenge, n.d., https://doi.org/https://safetyandjusticechallenge.org/, 35.

[700] Kruse et al., "The Indian Health Service."

V. Legislation and Agreements

One hundred and forty-four other countries have vowed to take steps against the exploitation of Indigenous resources by signing the Nagoya Protocol on Access and Benefit Sharing.[701] The Nagoya Protocol was established by the United Nations in 2014 to protect Indigenous resources such as peyote, turmeric, and neem against biopiracy. This international treaty stresses working with Indigenous communities to agree upon terms in an informed, consensual manner with an emphasis on benefit sharing. When countries abide by the Nagoya Protocol, Indigenous communities need to consent to the utilization of their traditional knowledge and genetic resources by any government, individual, or company.[702] Further, they also need to negotiate mutually agreed upon written terms for the equitable and fair sharing of profits and subsequent third-party use.[703] Each party may take legislative, administrative, or policy measures to ensure that the terms of their agreement are upheld.

The Nagoya Protocol also promises that Indigenous Knowledge associated with genetic resources is accessed with the prior and informed consent of the Indigenous communities. In addition, under the Protocol, there must be consideration for the Indigenous and local communities' customary laws, community protocols, and procedures. Parties who benefit from the utilization of genetic resources are encouraged to contribute to the conservation efforts and sustainable uses of the resource. Although the Protocol was opened for signatures

[701] "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity," United Nations Treaty Collection, n.d., https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8-b&chapter=27&clang=_en.
[702] United Nations Treaty Collection, "Nagoya Protocol."
[703] United Nations Treaty Collection, "Nagoya Protocol."

in the United Nations headquarters in New York for a full year, the United States has never signed it.[704]

In 2021, the Biden-Harris administration announced new pledges to support Native American communities and elevate Indigenous Knowledge to inform federal policymaking.[705] The administration outlined its goals of growing mutually beneficial relationships with Tribal Nations and Indigenous people, as well as "considering, including, and applying Indigenous Knowledge in Federal research, policies, management, and decision making."[706] This is a tremendous and properly celebrated achievement in legitimizing Indigenous Knowledge and elevating Indigenous voices in initiatives such as climate resilience and environmental restoration. Along with this statement, the administration vowed to strengthen the Tribal consultation model.[707] Tribal consultation is the government-to-government dialogue between official representatives of Tribes and Federal agencies to discuss Federal proposals before the Federal agency makes decisions on those proposals.[708] New consultation training and guidebooks will be created to ensure that Tribal self-government, sovereignty, and rights are respected and upheld. These statements sound promising. However, the

[704] United Nations Treaty Collection, "Nagoya Protocol."
[705] "Fact Sheet: Biden-Harris Administration Announces New Actions to Support Indian Country and Native Communities Ahead of the Administration's Second Tribal Nations Summit," The White House, November 30, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/#:~:text=Initiated%20at%20the%202021%20Tribal,promote%20environmental%20sustainability%20and%20the.
[706] The White House "Indigenous Knowledge Guidance."
[707] The White House "Indigenous Knowledge Guidance."
[708] Government-to-government dialogue between official representatives of Tribes and Federal agencies to discuss Federal proposals before the Federal agency makes decisions on those proposals.

guidebook, which was published in 2023, is seriously flawed. It includes tips for consulting with Tribal Nations such as "[a]void using patronizing language when working with Tribes" and "do not mistake kindness, silence, or politeness for consent or agreement," but does not require obtaining consent from Tribes. In fact, in the 121-page document, requiring consent is only mentioned when it involves removing Native American human remains, cultural items, and archeological resources from Tribal lands.[709] Therefore, although the federal government may use Traditional Knowledge to guide federal agencies, Native Americans are still powerless to consent to how Indigenous Knowledge is used.[710] Additionally, the federal government is still not required to receive consent from Native Americans about federal proposals involving Tribes.

Free, prior, and informed consent (FPIC) must be implemented in the United States. FPIC is the right of self-determination of Indigenous people, established by the United Nations. Under FPIC, when decisions are made by

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[709] DoD Legacy Resource Management Program, Department of Defense Tribal Engagement Guidebook, 2023.

[710] *Editorial Note:* Here, the author intended to justify the use of capitalizing Indigenous and Traditional Knowledge. These terms are capitalized by the DOI and White House. See the following sources for inspiration of this capitalization: "Departmental Policy on Indigenous Knowledge | Indian Affairs," accessed March 23, 2024, https://www.bia.gov/service/tribal-consultations/departmental-policy-indigenous-knowledge; "Indigenous Knowledge | OSTP," The White House, accessed March 23, 2024, https://www.whitehouse.gov/ostp/ostps-teams/climate-and-environment/indigenous-knowledge/; However, I have also seen literature fail to capitalize Indigenous Knowledge and Traditional Knowledge. See the Harvard Public Health Magazine for recent works without capitalization:Harvard Public Health Magazine and Makepeace Sitlhou Tu Lucy, "How Indigenous Knowledge May Shape the Future of U.S. Policy," *Harvard Public Health Magazine* (blog), June 5, 2023, https://harvardpublichealth.org/equity/indigenous-knowledge-to-shape-u-s-approach-to-health-climate/.

governments that impact Indigenous people, resources, or land, Indigenous people must consent without coercion, intimidation, or manipulation prior to authorization of activities. They must also receive sufficient knowledge about the proposed activities. In the federal government's aim to strengthen ties with Tribal Nations, no effort has been made to implement FPIC. FPIC in Tribal consultation is outlined in Article 19 of the United Nations Declaration On The Rights Of Indigenous Peoples (UNDRIP), declaring that states must consult with and obtain FPIC from Indigenous people "before adopting and implementing legislative or administrative measures that may affect them."[711]

The United States did not support UNDRIP when it was adopted by the General Assembly in 2007 but later endorsed it in 2010 due to administration change. However, alongside the endorsement came a preface; a document expressing that the Declaration will have limited legal power.[712] The United States announced that instead, the "[d]eclaration expresses aspirations that the United States seeks to achieve."[713] Although the Biden-Harris administration's steps to improve Tribal consultation display progress, the United States, if it wants to keep its word about aspiring to uphold UNDRIP, must begin to implement FPIC in Tribal consultation.

VI. Conclusion

Before proceeding with the expansion of psychedelic research and legalization, the United States must instate protections for Native American. First, the United States must sign and abide by the Nagoya Protocol. This will codify Native

[711] United Nations, United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[712] Jordyn Arndt, "Explanation of Position on 'Rights of Indigenous Peoples'" (New York, New York, November 7, 2019).
[713] Arndt, "'Rights of Indigenous Peoples.'"

Americans' ability to use peyote without risk of criminalization for patent infringement. It will ensure that Native American people, communities, Indigenous Knowledge, and resources are protected and used under mutually agreed-upon terms. Second, the Biden-Harris administration must fully ratify and abide by UNDRIP. This will require Native Americans to provide free, prior, and informed consent for the use of their resources and Indigenous Knowledge. Tribes and companies must reach mutual agreements on the sharing of benefits, extraction, and use of peyote. Third, Tribal law must be legitimated and considered in matters involving Tribes. Fourth, funding for the IHS including addiction, trauma, and mental health treatment must be increased to mitigate unacceptable disparate health outcomes that leave Native Americans behind. These actions are not just empty promises, statements, or aspirational documents. Native American rights and sovereignty over their traditional resources must not be protected "aspirationally," but protected by no less than United States law.

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