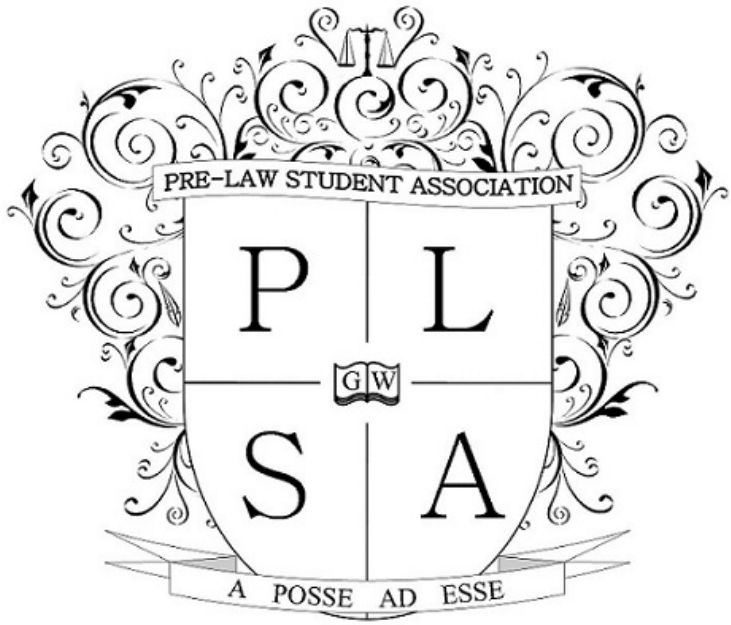
THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

PUBLISHED BY THE PRE-LAW STUDENT ASSOCIATION



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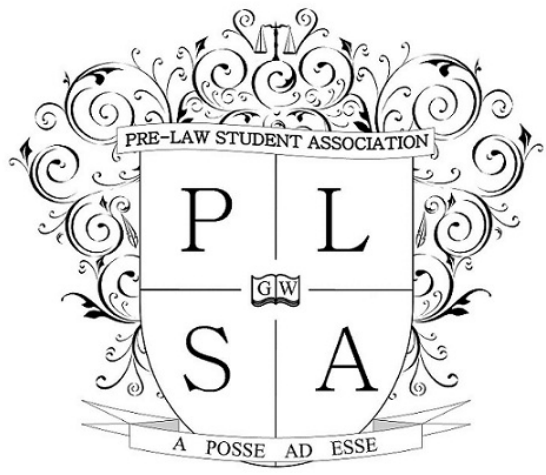

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Foreword

Dear Reader,

As the President of The George Washington University Pre-Law Student Association for 2018-2019 and a member of this year's writing staff for the Undergraduate Law Review team, it is with absolute pride that I introduce the 2019 *GW Undergraduate Law Review*.

Going through the Undergraduate Law Review process as a writer for the first time this year, I have been able to witness the incredible amount of effort, dedication and coordination necessary to produce a publication of superior legal rigor at the undergraduate level. The success of this extraordinary publication is owed to its leadership, editorial staff and writers, and should be recognized as no small feat. The *GW Undergraduate Law Review* is among a limited number of law review publications in the nation produced by an undergraduate student-run organization. Additionally, it is the only one that guides its own university's students through the year-long process and requires writers to utilize the Bluebook legal citation standard, a skill typically not acquired until law school. Selected writers are given the opportunity to research a legal topic of interest, write a scholarly work revised by teams of editors, and have their work reviewed by practicing legal professionals.

Since the introduction the Undergraduate Law Review in 2010, the organization has released nine consecutive publications with consistently compelling legal analysis across a widespread range of areas of legal study. The team's unwavering commitment not only foreshadows the bright future of the publication in years to come but more importantly, that of its writers and editors. With the backing of substantial experience in legal research and writing, I am excited to see the opportunities the writers, editors and leadership are able to take advantage of.

With great admiration and honor, I present the ninth edition of the *GW Undergraduate Law Review*.

Sincerely,

Dominica Dul
President, GW Pre-Law Student Association

Introduction

Dear Reader,

For the last three years, I have had the honor of being a part of the *George Washington University Undergraduate Law Review* (*ULR*) team. I've had the opportunity to work with dozens of talented writers, editors, and true friends. In my junior year at GW, I was given the chance to direct the publication that you are currently reading. I'm eager to share the spectacular pieces that our team has spent the last academic year refining.

After our most competitive application process to date, the 7 pieces in this publication represent the work of some of the best and brightest GW undergraduate students. These students chose, researched, and argued a legal issue of their own interest during the last year. They were assisted by our team of associate editors, also students, and our team of professional editors (legal professionals in the DC community and beyond) who graciously volunteered to offer their insight on the legal issues involved.

There are many words of gratitude I have for those involved in the publication process. First and foremost, I must thank the amazing ULR leadership team. The publication you are reading would not have been possible without the work of our three co-Editors-in-Chief Margaret Meiman, Ryan Niksa, and Monica Iskander. Additionally, I would like to thank our former Editor-in-Chief, Hope Mirski, for her work and guidance during the fall semester. Finally, I would like to sincerely thank former PLSA President Zach Sanders for all of his help and guidance as I navigated the Directorship this year. Without his support, this publication would certainly not have been possible.

Finally, I would like to thank out writers. The Articles that you are about to read are the result of a year of hard work, dedication, and genuine passion. The *GW Undergraduate Law Review* is only possible because of the undying interest and curiosity of the GW undergraduate community in exploring and analyzing legal issues. In times of political turbulence in the United States and abroad, a thorough analysis of society's underlying legal institutions and intuitions can provide a valuable insight into achieving stability. I know that the individuals involved in this volume of the GW *ULR* will go on to achieve great things. I am incredibly happy to have had the opportunity to have worked with them.

Sincerely,

Bri Mirabile
Director, *George Washington University Undergraduate Law Review*

ARTICLES

The Miranda Exclusion: A Tool Rather Than a Deterrent for the Government in Counterterrorism Investigations

Adarsh Patel

Introduction: Government Motivations in Investigation and Legal Limitations on Counterterrorism Investigations

In the aftermath of the deadliest attacks on United States soil, the U.S. government began an unprecedented counterterrorism effort resulting in the passage of revamped surveillance laws,[1] a massive restructuring of the federal bureaucracy,[2] the launch of the United States' longest war,[3] and special operations deployments to over 143 countries.[4] These changes after the September 11 attacks were guided by the fundamental shift in the government's motivation for counterterrorism investigations.

In traditional criminal investigations, which are cases that do not involve national security, the primary interest of the government has been trial and prosecution.[5] The 2011 United States Attorney General's Guidelines for the Federal Bureau of Investigation (FBI) specify that in criminal investigations, the immediate objectives include collecting evidence for prosecution, which requires close cooperation with prosecutors to "ensure that

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[1] *Patriot Act Primer*, WASH. POST (Mar. 15, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110301390.html?noredirect=on (explains the Patriot Act—one of the surveillance laws passed after the Sept. 11th attacks).

[2] Homeland Security Act of 2002, 6 U.S.C. §§ 164, 183, 203, 251, 291, 313, 381, 531, 541-57 (2012) (sections of the act restructured the federal bureaucracy).

[3] *The U.S. War in Afghanistan*, COUNCIL ON FOREIGN REL., https://www.cfr.org/timeline/us-war-afghanistan (last visited Dec. 31, 2018) (timeline of the longest war waged by the United States).

[4] W.J. Hennigan, *The New American Way of War*, TIME (Nov. 30, 2017), http://time.com/5042700/inside-new-american-way-of-war/ (explains special operations deployments after the Sept. 11th attacks).

[5] *See, e.g.,* Weeks v. United States, 232 U.S. 383, 393-94 (1917) ("desire to bring further proof to the aid of the government…").

investigations are conducted in a manner that will lead to successful prosecution."[6] This interest in criminal investigations is not limited to the FBI. For example, The Drug Enforcement Administration (DEA) emphasizes that the agency's top two responsibilities include "[i]nvestigation and preparation for prosecution."[7]

Before the September 11 attacks, counterterrorism investigations were treated as criminal investigations, and the government's primary interest in counterterror cases was the same as in criminal investigations: prosecution. In its congressionally authorized review of government actions leading to the September 11 attacks, the National Commission on Terrorist Attacks Upon the United States found that the FBI, "took a traditional law enforcement approach to counterterrorism," and incentivized agents to pursue arrests and prosecutions.[8] Most notably, FBI culture centered around gathering evidence to build cases and adhering strictly to legal standards to ensure admissibility in court.[9] Because of their focus on prosecution, agents focused on reacting to terrorism rather than preventing it.[10] According to the review, the prevailing error in counterterrorism efforts prior to the September 11 attacks was the mentality that the government interest in counterterrorism investigations was the same as it was in criminal investigations.[11]

Following the September 11 attacks, the United States government recognized the necessity to differentiate the government's interest for counterterrorism investigations from its interest for most traditional criminal investigations. The government deemed terrorism to be such a grave threat that if it waited to react to threats, it would severely undermine national security interests.[12] The U.S. Attorney General's Guidelines for the FBI emphasize the unique objectives of post-September 11 counterterrorism investigations as largely centered on preventing attacks rather than prosecution.[13] This shift did not affect the

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[6] U.S. Att'y Gen., Federal Bureau of Investigation's Domestic Investigations and Operations Guide, Appendix A, The Attorney General's Guidelines for Domestic FBI Operations (2011) (FBI Responsibilities-Federal Crimes).

[7] *Organization, Mission and Functions Manual: Drug Enforcement Administration*, U.S. DEP'T of JUST., https://www.justice.gov/jmd/organization-mission-and-functions-manual-drug-enforcement-administration.

[8] U.S. Nat'l Commission on Terrorist Attacks Upon the U.S., Staff Statement No. 9, Law Enforcement, Counterterrorism, and Intelligence Collection in the United States Prior to 9/11 (2004) ("Approach to Counterterrorism").

[9] *Id.*

[10] Amy Zegart, *9/11 and the FBI: The Organizational Roots of Failure*, 22 INTELLIGENCE AND NAT'L SECURITY 165, 168 (2007).

[11] *Id.* at 177.

[12] The White House, National Strategy for Combating Terrorism (2003) (Goal: Defeat Terrorists and Their Organizations).

[13] *See* U.S. Att'y Gen., *supra* note 6 ("But these investigations also often serve important purposes outside the ambit of normal criminal investigation and prosecution…").

government's approach to investigating traditional crimes, which remain focused on prosecution and trial.[14] The shift in counterterrorism priorities led to the federal bureaucracy being restructured, including the establishment of the Department of Homeland Security with the mission of ensuring structural security to prevent attacks.[15] The FBI, long considered to have a hybrid of law enforcement and intelligence authorities, emphasized its intelligence function and made terror prevention its highest priority.[16] Even the Department of Justice (DOJ), which handles prosecution of all federal cases, emphasized that, in terrorism investigations, its first priority was preventing attacks and that prosecution of terrorists was a secondary priority.[17] Thus, this shift in the government's primary interest in counterterrorism from prosecution to prevention of terrorism tested traditional legal institutions which had long functioned on the basis that the government's main interest in investigation was prosecution and trial.

The broad, post-September 11 expansion of executive authority[18] in pursuit of its new goal of preventing terrorism naturally led to legal challenges seeking to protect the rights of accused terrorists. Before the September 11 attacks, in *Ex Parte Milligan* (1866), the Supreme Court found that civilian U.S. citizens could not be tried by military commissions while civilian courts were still in operation on the basis that military commissions could lack trial by jury and other constitutional protections guaranteed to civilians.[19] After the attacks, the Court found it necessary to further constrain government treatment of suspected terrorists, especially those held indefinitely without trial as detainees at Guantanamo Bay Naval Base.[20] In *Rasul v. Bush* (2004), the Court ruled that aliens held as suspected terrorists have a statutory right to petition federal courts for review of their habeas corpus rights.[21] Furthermore, the ruling in *Hamdi v. Rumsfeld* (2004) affirmed that U.S. citizens detained as enemy combatants have due process rights and the right to challenge their status as enemy

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[14] U.S. Att'y Gen., *supra* note 6.

[15] 6 U.S.C. § 111b (1) (2012).

[16] *Oversight Hearing on Counterterrorism Before the S. Comm. on the Judiciary*, 107th Cong. 303-306 (2002). (statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation).

[17] Office of U.S. Att'y Gen., Dep't of Just., United States Department of Justice Fiscal Years 2014-2018 Strategic Plan (2014) (Strategic Goal 1; Objective 1.1 and Objective 1.2).

[18] *See, e.g.,* 6 U.S.C. §§ 164, 183, 203, 251, 291, 313, 381, 531, 541-57 (2012); *Patriot Actor Primer*, *supra* note 1; *The U.S. War in Afghanistan*, *supra* note 3; W.J. Hennigan, *supra* note 4.

[19] Ex Parte Milligan, 71 U.S. 2, 3-4 (1866).

[20] Kermit Roosevelt III, *Application of the Constitution to Guantanamo Bay*, 153 U. PA. L. Rev. 2017 (2005).

[21] Rasul v. Bush, 542 U.S. 466, 480-81 (2004).

combatants.[22] The terms "enemy combatant" and "unlawful combatant" refer to a status that affords fewer rights than prisoner-of-war status, which affords special military rights, and civilian defendant status, which affords the same rights as any typical civilian receives during a trial.[23]

Although the Bush administration was forced to allow detainees to receive petitions for habeas review in federal courts because of the *Rasul* and *Hamdi* rulings, it still claimed that it could use military tribunals known as Combatant Status Review Tribunals (CSRTs) to designate detainees as enemy combatants.[24] At the time, such a designation meant continued indefinite detainment without trial.[25] In 2005, Congress passed the Detainee Treatment Act (DTA) which constrained the appeals process and changed the law to allow only the D.C. Circuit Court of Appeals to hear habeas appeals from detainees challenging their designation by a CSRT.[26] Meanwhile, the Court ruled in *Hamdan v. Rumsfeld* (2006) that the specific forms of military commissions used by the Bush administration to try detainees at the time were statutory violations of Article 36 of the Uniform Code of Military Justice (UCMJ) and Article Three of the Geneva Conventions.[27] In response, under the Military Commissions Act of 2006 (MCA), Congress attempted to suppress detainees' habeas review rights by eliminating all federal courts' jurisdiction, including that of the Supreme Court, over all detainees—enemy combatant or otherwise—held at Guantanamo Bay.[28]

This series of conflicting litigation and legislation culminated in 2008, when the Court firmly ruled in *Boumediene v. Bush* that Congress could not limit the Court's jurisdiction over detainees' fundamental rights because federal courts hold jurisdiction over any territory where the United States maintains *de facto* sovereignty, including Guantanamo Bay.[29] Furthermore, the Court ruled that although Congress may suspend habeas corpus "in cases of rebellion or invasion" per its Article I powers,[30] it lacked the grounds to do so in this

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[22] Hamdi v, Rumsfeld, 542 U.S. 507, 509 (2004).

[23] Daniel Kanstroom, *"Unlawful Combatants" in the United States: Drawing the Fine Line Between Law and War*, HUMAN RIGHTS MAG., Jan. 2003, at 30.

[24] Doug Cassell, *Liberty, Judicial Review, and the Rule of Law at Guantanamo: A Battle Half Won*, 43 NEW ENG. L. REV. 37, 40 (2008-2009).

[25] *Id.* at 39.

[26] Detainee Treatment Act of 2005, 10 U.S.C. § 801(e) (2006); *Guantanamo Litigation – History*, LAWFARE, https://www.lawfareblog.com/guantanamo-litigation-history (last visited Jan. 1, 2019) ("Detainee Treatment Act").

[27] Hamdan v. Rumsfeld, 548 U.S. 557, 567, 586-87, 628 (2006).

[28] Military Commissions Act of 2006, 28 U.S.C. § 2241e (2006).

[29] Boumediene v. Bush, 553 U.S. 723, 755, 770-71 (2008).

[30] U.S. CONST. art. I, § 9, cl. 2; *Boumediene*, 553 U.S. at 783-87, 792.

instance because CSRTs required additional safeguards like habeas review since they did not afford protections to detainees that would adequately substitute habeas review.[31]

The Supreme Court's precedent for protecting detainees' habeas rights has indicated that indefinite detention without a trial is unlikely to be permitted in the future, as the Court has limited the government's ability to freely declare individuals enemy combatants. Options for entirely circumventing detention on U.S. territory are limited since extraordinary rendition—the process of sending terror detainees to countries that have fewer restrictions on detainee treatment—has been counterproductive, leading to strained alliances and sparking international criticism that it violated detainees' due process rights.[32] Allied prisons' harsh treatment of detainees also reduced the local credibility of the United States,[33] leading the Obama administration to finally curtail the practice.[34] Following limitations under *Hamdan*, only eight terror suspects have been convicted by military commissions, and at least seven of them were based on charges that a Circuit Court of Appeals later found to be outside the judicial authority of the military commissions.[35] The most effective option for long term detention of terrorists, therefore, has become prosecution in federal civilian courts.[36]

Yet, a dilemma emerged from this conclusion. Given that prosecution is the most viable option for protracted detention, there are concerns about how the government can still effectively achieve its primary goals of prevention and intelligence gathering in terror investigations while abiding by evidence-gathering standards necessary for prosecution. One potential solution is the two-step interrogation, a technique that tactically uses the

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[31] *Boumediene*, 553 U.S. at 783-87, 792.

[32] Max Fisher, *A Staggering Map of the 54 Countries that Reportedly Participated in the CIA's Rendition Program*, WASH. POST (Feb. 5, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/02/05/a-staggering-map-of-the-54-countries-that-reportedly-participated-in-the-cias-rendition-program/?utm_term=.58c0688cb55a.

[33] Elizabeth Grimm Arsenault, *US Detention Policy Towards ISIS: Between a Rock and a Hard Place*, 59 SURVIVAL: GLOBAL POL. AND STRATEGY 109, 123-24 (2017); *See* Fisher, *supra* note 32.

[34] Nancy Cordes, *Sean Spicer: Draft Order on Interrogation Methods "is not a White House document,"* CBS NEWS (Jan. 25, 2017), https://www.cbsnews.com/news/trump-executive-action-torture-black-site-prisons/ (references Obama administration's curtailment of rendition); *See* Fisher, *supra* note 32.

[35] Al Bahlul v. United States, 767 F.3d 1, 5, 9, 31 (D.C. Cir. 2014); Stephen Vladeck, *The Unraveling Guantánamo Military Commissions*, MSNBC (June 9, 2015), http://www.msnbc.com/msnbc/the-unraveling-guantanamo-military-commissions.

[36] Spencer S. Hsu, *Trump Administration Pursues Civilian Prosecutions After Benghazi Terror Verdict*, WASH. POST (Nov. 29, 2017), https://www.washingtonpost.com/local/public-safety/trump-administration-pursues-civilian-prosecutions-after-benghazi-terror-verdict/2017/11/29/fe90a5c8-d507-11e7-b62d-d9345ced896d_story.html?utm_term=.7e2acfa7913d (Evidence that the government sees civilian prosecution as the most effective option for long term detention).

exclusionary rule, the principle that prevents the government from using evidence at a trial if it was gained through a violation of the defendant's rights.[37]

Although the exclusionary rule was developed to prevent and remedy government misconduct, it has become a tool for counterterrorism investigators to create a legal distinction between coercive interrogations and lawful Mirandized interrogations. For the purposes of this article, the use of the terms "coercive" or "coercion" refers to questioning that can compel self-incrimination but is not torturous. The exclusionary rule only effectively protects Fourth and Fifth Amendment rights if the government's intent is to bring information it obtains to court, but in counterterrorism investigations, the primary intent is to obtain intelligence to prevent attacks. Qualified immunity, legal immunity for government officials while conducting investigations,[38] has effectively made the exclusionary rule the only remedy for violations of Fourth and Fifth Amendment rights by limiting the viability of civil suits. Thus, since the exclusionary rule is ineffective in counterterrorism investigations, there is essentially no existing remedy for violations of the Fifth Amendment right against self-incrimination in such cases. Therefore, alternative protections and remedies such as legislation limiting pre-Miranda interrogations or lowering qualified immunity barriers are necessary.

Given that terrorism largely falls under the jurisdiction of the federal government,[39] this article primarily focuses on legal precedent at the federal level. This article will first examine the establishment and evolution of the exclusionary rule, beginning with the Fourth Amendment exclusion to illustrate the nature of the rule, and leading to a discussion of Fifth Amendment exclusion, including Miranda warnings. It will then examine the role of the Fifth Amendment exclusionary rule in counterterrorism investigations and describe the two-step interrogation tactic. Finally, the article will consider possible alternative solutions to protect Fifth Amendment rights for suspected terrorists and explore the implications of the two-step interrogations on the evolving field of national security law.

I: The Evolution of the Exclusionary Rule and the Miranda Warning

A. Origins of the Exclusionary Rule

[37] Jeffrey F. Addicott, *The Legality of Dual Interrogations for High-Value Terrorists*, GEO. J. OF INT'L AFF. (Jan. 25, 2018), https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/1/25/the-legality-of-dual-interrogations-for-high-value-terrorists-1.

[38] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[39] 18 U.S.C. § 2332b (2012) (Definition of international terrorism and related United States jurisdiction).

The foundation of the exclusionary rule can be traced to the need to protect the Fourth Amendment right against unreasonable search and seizure without probable cause.[40] The Fourth Amendment gave neither the means for preventing government violations of the right nor a process for remedying violations if they occur.[41] Therefore, to prevent the Fourth Amendment from becoming futile, the judicial branch provided the exclusionary rule as a court-generated protection of the right against unreasonable search and seizure.

In *Weeks v. United States* (1917), the Supreme Court established the exclusionary rule and found that the Fourth Amendment applies at all times to all individuals under United States jurisdiction.[42] Though not explicitly stated in *Weeks*, the Fourth Amendment equally applies to both citizens and noncitizens because it uses the term "people" rather than "citizens."[43] It is important to note that the Fourth Amendment, though universal in application, is not universal in its substantive protection of the right against search and seizure because the amendment itself allows unreasonable search and seizure to occur if the government has probable cause.[44] Nonetheless, the Court found that the Fourth Amendment limitations apply to all federal officials.[45] Based on the assumption that federal officials' interest in investigations is prosecution, it was inadequate to allow officials to use illegally seized, but otherwise admissible, evidence in trial.[46] That would effectively undermine the Fourth Amendment by allowing them to still achieve their original interest for illegally obtaining evidence: strengthening the prosecution.[47] Assuming the officials' original interest for investigation is prosecution, barring them from using illegally obtained evidence in trial would be an effective deterrent against Fourth Amendment violations since such evidence would no longer serve their "desire to bring further proof to the aid of the government."[48]

In *Wolf v. Colorado* (1949), the Court ruled that the *Weeks* exclusionary rule did not apply to states because states, which are not automatically restricted by the Bill of Rights, had effective alternatives to the exclusionary rule for deterring Fourth Amendment

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[40] U.S. CONST. amend. IV.
[41] *Id.*
[42] *See Weeks*, 232 U.S. at 383.
[43] U.S. CONST. amend. IV; Plyler v. Doe, 457 U.S. 202, 202 (1982) ("whatever his status…").
[44] U.S. CONST. amend. IV.
[45] *Weeks*, 232 U.S. at 391-92.
[46] *Id.* at 393-94 ("desire to bring further proof to the aid of the government…").
[47] *Id.*
[48] *Id.* at 393-94.

violations.[49] However, the Court reversed the *Wolf* decision in *Mapp v. Ohio* (1961) based on its determination that states' alternatives to the exclusionary rule were ineffective in deterring and remedying misconduct.[50] The Court ruled that under the Due Process Clause of the Fourteenth Amendment, states had to protect Fourth Amendment rights through exclusion, deciding:

> [T]o close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct . . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case.[51]

The Court also declared that while exclusion is a courtroom procedure, it is also a protection that extends beyond the courtroom.[52] The reason that the exclusionary rule, albeit a remedy upheld only in trial, is expected to protect the broader right against search and seizure is because of the implicit assumption that prosecution is the ultimate purpose of all government investigations. The *Weeks* and *Mapp* rulings implied that since exclusion would prevent the use of such evidence at trial, the government has no use for illegally seized evidence, and thus has no incentive to commit unlawful search and seizure.[53] Assuming that this deterrent effect would apply in all cases, the Court affirmed that the exclusionary rule is fundamental to protecting the Fourth Amendment.

Other rulings reaffirmed the *Weeks* and *Mapp* logic for exclusion and further clarified the nature of the rule. In *Elkins v. United States* (1960), the Court affirmed that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[54] The incentive that the Court spoke about here is the incentive for the government to use illegally seized evidence to convict a defendant in a trial. Notably, the Court's reasoning for the exclusionary rule's effectiveness as a deterrent is problematic if the government has incentives for violating the Fourth Amendment other than using the illegally obtained

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[49] *See* Mapp v. Ohio, 367 U.S. 643, 645-46 (1961) (references government's argument invoking *Wolf* precedent).

[50] *See id.* at 652-53.

[51] *See id.* at 654-56.

[52] *See id.* at 648, 656 ("constitutionally required…" on 648 and "constitutional privilege" on 656).

[53] *See, e.g., Weeks*, 232 U.S. at 392-94.

[54] Elkins v. United States, 364 U.S. 206, 217 (1960) (citation omitted).

evidence to gain an advantage at trial. The unique nature of the exclusionary rule lies not in the rule itself, but rather in the rule's broad, barring effect in countering the government's interest to prosecute, an effect which was presumed to counter essentially all government misconduct. However, as the *Linkletter v. Walker* (1965) ruling reaffirmed, the rule is still at its core a court-generated remedy designed to prevent the basic injustice of the government having an unfair advantage in the adversarial system obtained at the cost of civil liberties.[55] As such, its application and effectiveness still require a court, and because the judiciary is passive, courts are limited to acting when cases are brought to it. Thus, the exclusionary rule, a court-generated remedy, cannot be formally applied beyond the courtroom.[56] Yet, the exclusionary rule is not applied to simply benefit guilty defendants solely because the government violated Fourth Amendment rights.[57] Rather, the rule is applied to deter misconduct and offer a remedy for legitimate harm caused by government violations of the right against search and seizure, creating an impact well beyond the courtroom.[58]

After the *Weeks* and *Mapp* rulings, the Supreme Court recognized that its initial establishment of the Fourth Amendment exclusionary rule may disadvantage the government to the point of letting guilty defendants walk free. This led the Court to carve out exceptions to the Fourth Amendment exclusionary rule. Establishing the Good Faith Exception in *United States v. Leon* (1984), the Court reasoned that, since the purpose of exclusion is to deter misconduct, the rule should not be used to punish officers for acting upon what they believed to be a lawful warrant that was later found to be invalid.[59] By establishing the Good Faith Exception, the Court demonstrated two principles: (1) the exclusionary rule's purpose is to deter misconduct; (2) the exclusionary rule is still fundamentally a procedural rule as opposed to being a constitutional right itself. The Court reasoned that using exclusion to punish officers for acting on good faith does not achieve the original purpose of Fourth Amendment exclusion,[60] and it reaffirmed that the purpose of exclusion is deterrence.[61] Furthermore, the Court believed that a guilty defendant should

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[55] Linkletter v. Walker, 381 U.S. 618, 637-38 (1965).

[56] *See, e.g., id.*

[57] *Id.*; *See Mapp*, 367 U.S. at 648, 656 ("nor can it be lightly assumed that . . . the exclusionary rule fetters law enforcement…").

[58] *Linkletter*, 381 U.S. at 637; *See Mapp*, 367 U.S. at 659-60.

[59] United States v. Leon, 468 U.S. 897, 918-21 (1984).

[60] *Id.*

[61] *Id.*; United States v. Janis, 428 U.S. 433, 445-446 (1976).

not be allowed to use the exclusionary rule to escape justice if the illegal search and seizure was conducted in good faith, as defined in *Leon*.[62]

It is important to note that there is a logical gap between the Fourth Amendment and the exclusionary rule. The exclusionary rule is the *protection* of the Fourth Amendment, rather than a component of the Fourth Amendment itself.[63] Thus, it would be presumably problematic that the exclusionary rule can only be enforced within the courtroom, even though it was intended to protect against Fourth Amendment violations, which have detrimental effects well beyond the courtroom. While the Fourth Amendment applies in all contexts of an investigation, as affirmed in *Weeks* and *Mapp*,[64] the exclusionary rule is an adversarial rule and cannot be enforced until and unless a trial takes place, as affirmed in *Linkletter* and *Leon*.[65] Those judgments have also clarified the court-generated exclusionary rule can effectively protect the universally applicable right against search and seizure by deterring government agents from violating it. Though the rule itself does not extend beyond the courtroom, its deterrent effect presumably does extend based on the assumption that the government's original interest in investigating was prosecution.[66]

B. Qualified Immunity

One of the essential components of the Supreme Court's reasoning for establishing the exclusionary rule was that alternatives to exclusion were ineffective in remedying, or deterring, Fourth Amendment violations.[67] Though it overturned *Wolf*, the *Mapp* ruling did not explicitly invalidate the theoretical notion of alternative protections nor reject *Wolf*'s interpretation of exclusion as a protection of a right rather than a right in itself.[68] In *Wolf*, the Court ruled that exclusion was not fundamentally part of the Fourth Amendment right against search and seizure,[69] meaning that exclusion is not a right in itself but rather a protection of a right. Theoretically, this would allow a wide range of remedies and protections for Fourth Amendment rights besides exclusion. The *Mapp* ruling found that exclusion was essential to protecting the Fourth Amendment because it was the only *effective*

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[62] *Leon*, 468 U.S. at 918-921.
[63] Wolf v. Colorado, 338 U.S. 25, 29-33 (1949).
[64] *Mapp*, 367 U.S. at 648, 659-60 ("judicially implied" on 648); *Weeks*, 232 U.S. at 383 ("reaches all alike…").
[65] *Leon*, 468 U.S. at 918-921; *Linkletter*, 381 U.S. at 637-38.
[66] *See Elkins*, 364 U.S. at 217-18.
[67] *See Mapp*, 367 U.S. at 652-53.
[68] *See id.*
[69] *See Wolf*, 338 U.S. at 29-33.

deterrent to Fourth Amendment violations.[70] Since *Mapp* essentially negated all possible criminal procedure alternatives to the exclusionary rule by deeming them ineffective when compared to the exclusionary rule,[71] the only remaining alternative for protecting the Fourth Amendment might be civil litigation. Theoretically, civil litigation can remedy misconduct by providing compensation to victims or even deter misconduct if officials fear a civil suit would result from their actions.[72] If the exclusionary rule was always effective, then suing law enforcement for Fourth Amendment violations would be unnecessary. However, as law professor Donald Dripps clarifies, "damage actions . . . offer the only practical remedy for police misconduct not motivated by the desire to initiate a formal prosecution. The exclusionary rule does not deter police who beat up citizens for sport."[73] Misconduct for amusement is not the only type of misconduct in which police might be motivated by something other than a desire for a formal prosecution and would thus be undeterred by the exclusionary rule. For example, police misconduct might be motivated by national security concerns. Nonetheless, the point is the same: exclusion is only effective insofar as the government interest in investigation is prosecution.[74]

Furthermore, qualified immunity protections undermine the capacity for civil action to serve as a remedy or deterrent for Fourth Amendment violations. The modern doctrine of qualified immunity was first established in *Harlow v. Fitzgerald* (1982), when the Court held that government officials such as police officers, acting in their official capacities, are immune to civil liability for misconduct if such misconduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[75] In *Anderson v. Creighton* (1987), the qualified immunity defense was expanded to be applicable so long as the defendant could demonstrate that a reasonable counterpart official would also have believed the conduct to have been legal at the time.[76] The qualified immunity defense is especially protective, in part, because it eliminates civil suits before they

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[70] *See Mapp*, 367 U.S. at 652-53.

[71] *See id.* at 652-53, 655-56.

[72] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *quoted in* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[73] Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 216 (2009) (footnote omitted).

[74] *See id.*

[75] *Harlow*, 457 U.S. at 818 (citation omitted).

[76] Anderson v. Creighton, 483 U.S. 635, 635 (1987).

are even brought to trial.[77] Since qualified immunity defenses are largely based on interpretations of the law rather than findings of fact, most are ruled on by judges instead of juries.[78] Consequently, there may be a failure to properly consider critical factual disputes about the circumstances of the case during the court's consideration of qualified immunity.[79]

In *Pearson, et al. v. Callahan* (2009), the qualified immunity defense was expanded even further to allow lower courts to permit the defense on either the constitutional basis or the clearly established basis,[80] which were the standards first established in *Harlow*.[81] Earlier cases invoking the defense had required courts to first determine whether there was a constitutional violation, and then whether the law violated had been clearly established.[82] Defendants seeking to invoke qualified immunity would likely face relatively high burdens of proof because constitutional rights are more fundamentally and clearly guarded than laws. After *Pearson*, courts could permit the defense simply on the basis that a law had not been clearly established without having to consider the complex issues related to a constitutional violation.[83] Hence, defendants invoking qualified immunity no longer have the high burden of establishing that they did not violate a clearly established *constitutional right*; they must only demonstrate that they did not violate a clearly established *law*. Since constitutional rights can be violated without necessarily violating any law, having to *only* prove that no clearly established law, rather than *also* having to prove that no clearly established constitutional right, was violated is a lower burden of proof for defendants. Therefore, qualified immunity makes civil suits far less effective than the exclusionary rule in protecting Fourth Amendment rights. Even Joanna Schwartz, whose study found that the qualified immunity defense is ineffective in shielding officials from the burdens of trial, acknowledges that "costs to government accountability accrue whether or not qualified immunity protects government officials from discovery and trial."[84] Even if the qualified immunity defense fails, there are still many hurdles in civil suits such as requiring the victim of constitutional violations to take proactive action and pay his own legal fees.[85]

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[77] David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 72-73 (1989).

[78] *Id.*

[79] *See id.* ("Only a case…").

[80] This refers to the standards that were mentioned in the earlier discussion of *Harlow v. Fitzgerald*. *See Harlow*, 457 U.S. at 818.

[81] Pearson v. Callahan, 555 U.S. 223, 223-26 (2009).

[82] *See id.* (references to *Saucier* standards).

[83] *Id.*

[84] Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. REV. 2, 70 (2017).

[85] Dripps, *supra* note 73, at 235-36.

The Supreme Court has ensured that qualified immunity protections are increasingly easy to invoke.[86] Consequently, without legislative reform, civil action cannot currently be considered a consistent and effective remedy or deterrent for misconduct because government officials have a reliable source of immunity to such action. This qualified immunity problem is not exclusive to Fourth Amendment misconduct as the same issue arises with Fifth Amendment misconduct. Since damage actions are essentially the only possible remedy for misconduct when the government's interest is not prosecution, and qualified immunity is a significant obstruction to such action, there is effectively no remedy or deterrent in cases where the government's Fourth Amendment misconduct—and, similarly, Fifth Amendment misconduct—is not in the interest of prosecution.

C. The Exclusionary Rule Applied to Miranda Warnings

The right against self-incrimination originates from the Fifth Amendment protection that ". . .nor shall [any person] be compelled in any criminal case to be a witness against himself."[87] Just as the Fourth Amendment protections against unreasonable search and seizure without a warrant apply in all instances—regardless of the items seized or evidence used—the Fifth Amendment right against self-incrimination applies to all cases.[88] The right applies to all individuals within United States jurisdiction, as indicated by the noun utilized by the Fifth Amendment of "person" rather than "citizen."[89] Critics claim, and the public often misconceives, that the Fifth Amendment right is not absolute.[90] However, as law professor Tracey Maclin explains, because "the Fifth Amendment is stated in absolute terms,"[91] the Court has consistently recognized that the right against self-incrimination is, in fact, absolute.[92] It is the right to remain silent which is not absolute.[93] When speech is not self-incriminating, one can be compelled to testify, via subpoena, for instance.[94] As a negative

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[86] *See id.*

[87] U.S. CONST. amend. V.

[88] *See* Tracey Maclin, *The Right to Silence v. the Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 264 (2016).

[89] U.S. CONST. amend. V; *Plyler*, 457 U.S. at 202 ("whatever his status…"); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 JEFFERSON L. REV. 367, 370 (2003).

[90] *See* Maclin, *supra* note 88, at 257-259.

[91] *See* Maclin, *supra* note 88.

[92] *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 479 (1966) ("A recurrent argument…The whole thrust of our foregoing discussion demonstrates that . . . That right cannot be abridged"); *See* Maclin, *supra* note 88.

[93] *See* Maclin, *supra* note 88, at 262, 264.

[94] *See* Maclin, *supra* note 88, at 259.

constitutional right,[95] the right against self-incrimination only restricts government actors, meaning that incriminating statements made to non-government entities are still usable.[96] This does not preclude the universality of the Fifth Amendment. Within its original intent—which was to restrain the government from compelling self-incrimination, the Fifth Amendment is universal.[97] The reason for the previous statements establishing the universality of the Fifth Amendment is to demonstrate that just as the Fourth Amendment is universal but the exclusionary rule is not, the Fifth Amendment is universal but the effectiveness of the Miranda warning, which is intended to protect the Fifth Amendment, is not.

The Miranda warning was established by the Supreme Court in *Miranda v. Arizona* (1966) in order to protect the Fifth Amendment right against self-incrimination.[98] The Court's reasoning for asserting this doctrine lays in its findings about police interrogations, specifically custodial interrogations, or questioning that occurs during detainment:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[99]

The Court's findings rested on the basis that custodial interrogation disadvantages the detainee to the extent that the voluntariness of an incriminating statement may be compromised even without threats or use of force by police—that compulsion may occur purely because of the environment of custodial interrogation.[100] Furthermore, the Court's ruling affirmed, by asserting that Fifth Amendment protections include nonjudicial testimony, such as a police interrogation,[101] that the right against self-incrimination can apply to situations beyond the physical courtroom.

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[95] U.S. CONST. amend. V.

[96] *Id.*; *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHICAGO L. REV. 864, 865-66, 886-87 (1986).

[97] *See* Maclin, *supra* note 88.

[98] *See Miranda*, 384 U.S. at 457-58, 498.

[99] *Id.* at 457-58 (footnote omitted).

[100] *Id.* at 457; *See* Ziang Sung Wan v. United States, 266 U.S. 1, 14-15 (1924).

[101] *Miranda*, 384 U.S. at 467.

It is important to note that, as opposed to Fourth Amendment exclusion, the Court has extensively debated whether the Miranda exclusion is court-generated or court-interpreted.[102] This question was critical to consider because it would determine whether Miranda warnings are constitutional principles under the Fifth Amendment or whether they are merely court-generated protections of the Fifth Amendment right against self-incrimination. If the former, a failure to administer the Miranda warning would constitute a constitutional violation in itself; if the latter, a failure to give the Miranda warning would not necessarily constitute a violation[103] of the Fifth Amendment unless the right against self-incrimination was violated. The Warren Court, which issued the *Miranda* ruling, believed that the Miranda warning was a constitutional right within the Fifth Amendment and its inherent exclusion principle.[104] Its basis for this was that warnings informing a suspect of their rights are so fundamental that any statements made before the warnings ought to be considered compelled or coerced regardless of whether the statements were voluntarily made.[105] The Fifth Amendment fundamentally bars such compelled statements,[106] and thus, the Warren Court recognized Miranda exclusion as part of the Fifth Amendment rather than a separate, court-generated principle.[107] However, as the Burger Court later suggested,[108] this is an inconsistent position for the Warren Court to have taken in its ruling on *Miranda*, given that in the same opinion it acknowledged that Miranda warnings are the only effective remedy the Court can provide in the absence of legislation.[109] The Court was contradicting itself by asserting that Miranda warnings are fundamental principles within the Fifth Amendment while simultaneously claiming that Congress could use legislation to create an alternative to Miranda warnings. If such warnings were fundamental, they would not be replaceable, and vice versa.

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[102] *See* James J. Tomkovicz, Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance Between Freedom and Order 108, 123 (Oxford Online Scholarship 2011), http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195369243.001.0001/acprof-9780195369243-chapter-003.

[103] That is not to say that a failure to administer the Miranda warning would not make constitutional rights *vulnerable* to violation, only that the failure to administer the warning would not be a violation on its face.

[104] *See id.*

[105] *See id.*

[106] U.S. CONST. amend. V.

[107] *See* Tomkovicz, *supra* note 102, at 123-26.

[108] *See* Oregon v. Elstad, 470 U.S. 298, 318 n.1 (1985).

[109] *Miranda*, 384 U.S. at 467 ("…potential alternatives...").

In *Harris v. New York* (1970) and *Michigan v. Tucker* (1974), the Court radically changed its interpretation of the nature of Miranda warnings to distinguish the warnings from Fifth Amendment rights.[110] It declared that such warnings were simply court-generated procedural safeguards, designed to make it easier for courts to review violations of the right against self-incrimination.[111] Thus, while the *Miranda* ruling asserted that Miranda warnings are absolute in their protection of the Fifth Amendment,[112] the *Harris* and *Tucker* rulings asserted that Miranda warnings are limited in their protection,[113] arguing that they were procedural rules that merely assisted courts in protecting the Fifth Amendment by providing a clear demarcation that a suspect understood his rights during questioning.

Finally, in *Oregon v. Elstad* (1984), the Court struck a balance, ruling that Miranda warnings were a court-generated adversarial remedy, but nonetheless were effective in substantively protecting Fifth Amendment constitutional rights through a deterrent effect.[114] The Court ruled that Miranda exclusion is not fundamentally included in the Fifth Amendment because it was generated by the *Miranda* ruling under the premise that exclusion was not the only possible remedy for self-incrimination violations, but rather the only *effective* remedy for such violations.[115] Thus, the *Elstad* ruling reasoned, Miranda exclusion is an adversarial rule that can only be enforced in a court, but protects rights well beyond the courtroom by deterring violations of the right against self-incrimination.[116] This brought the Court's view of the Miranda exclusion more in line with its view of the Fourth Amendment exclusion: as an inherently court-generated rule that was able to protect rights beyond the courtroom through its deterrent effect.[117]

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[110] *See* Michigan v. Tucker, 417 U.S. 433, 445-46 (1974); *See* Harris v. New York, 401 U.S. 222, 224 (1971); *See* Tomkovicz, *supra* note 102, at 113-14.

[111] *See* Tomkovicz, *supra* note 102, at 113-14.

[112] *See id.* at 123-26.

[113] *See id.* at 113-14.

[114] *See Elstad*, 470 U.S. at 298 ("A procedural *Miranda* violation differs in significant respects from violations of the Fifth Amendment . . . failure to administer *Miranda* warnings creates a presumption of compulsion…"); *See* Tomkovicz, *supra* note 102, at 116.

[115] *See Elstad*, 470 U.S. at 298 ("A procedural *Miranda* violation differs in significant respects from violations of the Fifth Amendment . . . failure to administer *Miranda* warnings creates a presumption of compulsion…"); *See* Tomkovicz, *supra* note 102, at 116.

[116] *Elstad*, 470 U.S. at 306-09; *See id.* at 348 (Brennan, W., dissenting); *See* Tomkovicz, *supra* note 102, at 116-17.

[117] *See Elstad*, 470 U.S. at 298 ("A procedural *Miranda* violation differs in significant respects from violations of the Fifth Amendment . . . failure to administer *Miranda* warnings creates a presumption of compulsion…"); *Elkins*, 364 U.S. at 217-18 (explains deterrent effect of Fourth Amendment exclusion); *See* Tomkovicz, *supra* note 102, at 116.

The Court continued to debate the *Elstad* logic over the next few decades.[118] In *Missouri v. Seibert* (2004), the Court's plurality opinion held that statements first obtained from pre-Miranda questioning and later obtained again from post-Miranda questioning are inadmissible unless it can be clearly demonstrated that the Miranda warning made in between the two periods of questioning "adequately and effectively apprised [the suspect] of his rights."[119] Thus, despite disagreeing with the specific application of the *Elstad* ruling on pre-Miranda questioning to *Seibert*, the Court still held the same view of the nature of Miranda warnings as it had in the *Elstad* ruling—that although Miranda warnings are court-generated and can only be enforced in court, they are fundamental in their protection of the Fifth Amendment because of their deterrent effect.[120] By asserting that Miranda warnings must be delivered in an effective manner, the Court acknowledged that the effect of such warnings is critical in the protection of the Fifth Amendment right against self-incrimination. Yet, the Court did not completely dismiss the possibility of pre-Miranda statements being admissible, effectively acknowledging that the Miranda exclusion itself is court-generated and is not constitutionally absolute.[121] This decision essentially created a similar situation for the Fifth Amendment and Miranda exclusion as the Fourth Amendment and Fourth Amendment exclusion. Just as the Fourth Amendment is absolute, so is the Fifth Amendment. Yet, the protection of these rights is limited at its core because exclusion requires a court in order to be enforced, and while the law is absolute, practice often is not. Thus, the only means by which exclusion can thoroughly protect those rights is through the deterrent effect. This effect, however, only occurs if the government is interested in prosecution.

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[118] *See* Tomkovicz, *supra* note 102, at 120-22.

[119] *See Miranda*, 384 U.S. at 467, *quoted in* Missouri v. Seibert, 542 U.S. 600, 608 (2004) (citation omitted).

[120] *See* Missouri v. Seibert, 542 U.S. 600, 600 (2004); *See Elstad*, 470 U.S. at 298 ("A procedural *Miranda* violation differs in significant respects from violations of the Fifth Amendment . . . failure to administer *Miranda* warnings creates a presumption of compulsion…").

[121] *See Seibert*, 542 U.S. at 615-16.

Since exclusion is an adversarial rule, not fundamentally included in the Constitution,[122] the Supreme Court has allowed exceptions to Miranda exclusion.[123] In *New York v. Quarles* (1984), the Court established the Public Safety Exception (PSE) in its decision not to exclude statements obtained by law enforcement through pre-Miranda questioning concerning possession of a weapon.[124] It declared that it did "not believe the doctrinal underpinnings of *Miranda* require . . . [it] to exclude the evidence, thus penalizing officers for asking the very questions which are the most crucial to their efforts to protect themselves and the public."[125] "[A]bsent actual coercion by the officer," pre-Miranda statements may be admitted to the court if the standards of the public safety exception are deemed to apply.[126] The Court held that these standards "in each case . . . [are] circumscribed by the exigency which justifies it."[127] Ultimately, the Court allowed the admission of pre-Miranda statements gathered under a public safety exception because it feared that forcing officers to gather the same information in a post-Miranda interrogation might lead officers to risk safety for the purpose of maintaining the integrity of the investigation.[128] After the September 11 attacks, law enforcement began widely applying the PSE to terrorism cases.[129]

II: The Exclusionary Rule's Role in Counterterrorism Investigations

A. The Uses, Refinement, and Growing Relevance of Two-Step Interrogations

As this article previously suggested, the government's interest in pre-September 11 counterterrorism investigations was—and in the case of criminal investigations, still is—prosecution. That interest empowers the deterrent effect of the exclusionary rule and closes the gap between the universal application of the Fifth Amendment right against self-incrimination and the adversarial nature of the exclusionary rule. In post-September 11

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[122] *See Elstad*, 470 U.S. at 298 ("A procedural *Miranda* violation differs in significant respects from violations of the Fifth Amendment . . . failure to administer *Miranda* warnings creates a presumption of compulsion…"); *See* Tomkovicz, *supra* note 102, at 116. http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195369243.001.0001/acprof-9780195369243-chapter-003.

[123] *See, e.g.,* New York v. Quarles, 467 U.S. 649, 651-54 (1984).

[124] *Id.*

[125] *Id.* at 658 n.7 (footnote omitted).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 657.

[129] *See* Elizabeth Nielsen, *The Quarles Public Safety Exception in Terrorism Cases: Reviving the Marshall Dissent*. 7 AM. U. CRIM. L. BRIEF. 19, 28-30 (2012); The number of terrorism cases drastically rose after the September 11 attacks. The use of PSE in terrorism cases became far more common after the attacks. *See* Joanna Wright, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*. 111 COLUM. L. REV. 1296, 1318-21 (2011).

counterterrorism investigations, however, the government's interest—though still involving detainment of suspects—is prevention, which often requires avoiding legal barriers such as Miranda.

Noting the extraordinary threat posed by terrorist actors, the FBI issued special instructions to its agents regarding interrogations of terror suspects. The FBI expects that the Public Safety Exception (PSE) can be used more frequently in terrorism cases given the nature of the threat as terror suspects often carry out complex, sometimes even coordinated, attacks,[130] and the interrogation of a captured suspect may be necessary to stop an ongoing attack.[131] However, the FBI notes "there may be exceptional situations in which continued unwarned interrogation is necessary to collect valuable and timely intelligence, and the government's interest in obtaining this intelligence—lawfully but without *Miranda* warnings—outweighs the disadvantages of proceeding in this fashion."[132] The nature and structure of terrorist organizations also means that terror suspects can have knowledge of future threats even if there is no immediate public safety threat.[133] In that case, not Mirandizing can be helpful for obtaining necessary intelligence to prevent future attacks. While courts can deter coercive questioning during PSE interrogations since statements from such interrogations are intended to be brought to court, the same cannot be done for coercive questioning during non-PSE pre-Miranda questioning. Since non-PSE pre-Miranda questioning is inherently excluded from use in court by the exclusionary rule, the courts cannot effectively deter coercive questioning that is not intended to produce evidence for trial, even though self-incriminating statements obtained from such questioning can still have severe consequences for suspects.

For terror suspects arrested on American soil, the FBI appears to have primarily limited interrogations to procedures allowed by the PSE only, rather than expanding beyond PSE to a non-PSE pre-Miranda interrogation.[134] All suspects arrested by US officials must

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[130] Aki Peritz & Eric Rosenbach, FIND, FIX, FINISH: INSIDE THE COUNTERTERRORISM CAMPAIGNS THAT KILLED BIN LADEN AND DEVASTATED AL-QAEDA (2012).

[131] Memorandum from United States Attorney General Eric Holder on Guidance for Conducting Interviews without Providing *Miranda* Warnings in Arrest of Terrorism Suspects to All United States Attorneys (Oct. 19, 2010) (on file with the United States Department of Justice).

[132] *Id.*

[133] *Id.* ("in light of the magnitude…").

[134] *See* Nielsen, *supra* note 129, at 28-29; Joanna Wright, *Applying Miranda's Public Safety Exception to Dzhokhar Tsarnaev: Restricting Criminal Procedure Rights by Expanding Judicial Exceptions*, 113 COLUM. L. REV. 136, 138-39 (2013).

appear for preliminary hearings before a magistrate,[135] and the standard time allotted by law before a suspect must be brought before a magistrate is forty-eight hours.[136] Since detainment procedures within the United States do not require extensive time for capture and transportation, and since suspects are brought into court for an initial hearing within forty-eight hours,[137] the FBI lacks the appropriate time to conduct an unwarned interrogation outside the confines of the PSE.[138] Once brought to court, judges must inform the defendant of his rights.[139] Thus, the FBI has a relatively short period to conduct pre-Miranda interrogations on US soil, and thus the PSE is adequate for pre-Miranda interrogations of domestic suspects since their interrogation time is limited anyway.[140] This is not to say that the FBI may not use non-PSE pre-Miranda interrogations on domestic suspects nor that the FBI may not be coercive in its questioning of domestic suspects. Rather, this is simply a possible explanation for why the FBI's use of non-PSE pre-Miranda interrogations seems to have focused overseas[141]: domestically, prompt presentment rules limit the period for possible pre-Miranda questioning,[142] and PSE interrogations are likely the most prolonged pre-Miranda interrogations possible with domestic suspects. Overseas, however, the situation can be different, and the FBI could have more time to carry out a

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[135] County of Riverside v. McLaughlin, 500 U.S. 44, 45 (1991); Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

[136] *McLaughlin*, 500 U.S. at 45.

[137] *Id.*; *Gerstein*, 420 U.S. at 126.

[138] United States Attorney General Eric Holder, *supra* note 131 ("…in all cases, presentment of an arrestee should not be delayed…").

[139] Fed. R. Crim. P. 5(d)(1).

[140] *McLaughlin*, 500 U.S. at 45; *Gerstein*, 420 U.S. at 126; United States Attorney General Eric Holder, *supra* note 131 ("…in all cases, presentment of an arrestee should not be delayed…").

[141] *See, e.g.,* Memorandum Opinion on Abu Khatallah's Mot. to Suppress at 1, United States v. Abu Khatallah, 275 F. Supp. 3d 32 (D.C. Cir. 2018) [hereinafter Khatallah Mot. to Suppress](No. 14-cr-00141 (CRC)); David Keenan, *Miranda Overseas: The Law of Coerced Confessions Abroad*, 67 HASTINGS L. J. 1695, 1729-30 (2016); Press Release, U.S. Att'y's Office for S.D.N.Y., Guilty Plea Unsealed in N.Y. Involving Ahmed Warsame, a Senior Terrorist Leader and Liaison Between al Shabaab and al Qaeda in the Arabian Peninsula, for Providing Material Support to Both Terrorist Org. (Mar. 25, 2013) [hereinafter Warsame Press Release] (on file with the Federal Bureau of Investigation); Adam Goldman & Eric Schmitt, *Benghazi Attacks Suspect Is Captured in Libya by U.S. Commandos*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/world/africa/benghazi-attacks-second-suspect-captured.html; Phil Hirschkorn, *The Three Legal Questions Left Unresolved by al-Libi's death*, JUST SECURITY (Jan. 3, 2015), https://www.justsecurity.org/18834/legal-questions-left-unresolved-al-libis-death/; Laura Jarrett, Dylan Stafford, and Kevin Bohn, *Trump administration transfers foreign terror suspect to US for trial in federal court*, CNN (Jul. 23, 2017), https://www.cnn.com/2017/07/23/politics/terrorism-suspect-brought-to-us-for-trial/index.html; Rebecca Ruiz, Adam Goldman, and Matt Apuzzo, *Terror Suspect Brought to U.S. for Trial, Breaking From Trump Rhetoric*, N.Y. TIMES (Jul. 21, 2017), https://www.nytimes.com/2017/07/21/world/europe/al-qaeda-suspect-court-trump-sessions-guantanamo.html.

[142] *McLaughlin*, 500 U.S. at 45; *Gerstein*, 420 U.S. at 126; United States Attorney General Eric Holder, *supra* note 131 ("…in all cases, presentment of an arrestee should not be delayed…").

non-PSE interrogation since it takes more time to capture and transport the suspect back to the United States.[143]

Boston Bombing suspect Dzhokhar Tsarnaev is a prime example of the FBI's use of the PSE.[144] Tsarnaev was detained longer than most domestic suspects because he was unconscious for forty-eight hours.[145] However, he was still only interrogated over the course of forty-eight hours after regaining consciousness before he was presented for his initial hearing.[146] In compliance with prompt presentment rules,[147] Dzhokhar Tsarnaev was read his rights for the first time by a magistrate at the hospital where he was being treated within forty-eight hours of regaining consciousness.[148] In Tsarnaev's case, the DOJ ultimately chose not to introduce statements from the PSE interrogation (his attorneys still filed a motion to suppress). [149] Nonetheless, this situation demonstrates how prompt presentment requirements lead the FBI to primarily rely on the PSE as the only form of un-Mirandized questioning for interrogating terror suspects captured on U.S. soil.

Unwarned interrogations beyond the PSE have largely come in the form of two-step interrogations. These interrogations are precisely where the government has used the exclusionary rule as a tool for counterterrorism investigations, although the tactic originated with domestic criminal investigations.[150] Two-step interrogations involve two phases: a pre-Miranda phase, followed by a reading of the Miranda warnings and a subsequent post-Miranda phase.[151] The purposes for using such an interrogation tactic can vary. Early uses of two-step interrogations focused on parallel construction: having the post-Miranda interrogation phase replicate the pre-Miranda phase.[152] Theoretically, confessions could be obtained using unlawful measures during the pre-Miranda phase, then legitimized by having them repeated during the post-Miranda phase. In such a case, the effects of coercion from

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[143] Khatallah Mot. to Suppress, *supra* note 141, at 30-31.

[144] Wright, *supra* note 134, at 136.

[145] *Id.* at 136-37.

[146] *Id.*

[147] *See* Fed. R. Crim. P. 5(d)(1); *See McLaughlin*, 500 U.S. at 45; *See Gerstein*, 420 U.S. at 126.

[148] Wright, *supra* note 134, at 154-55.

[149] Bruce Ching, *Mirandizing Terrorism Suspects? The Public Safety Exception, The Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome*, 64 CATH. U. L. REV. 613, 643 (2015).

[150] *See Seibert*, 542 U.S. at 600; *See Elstad*, 470 U.S. at 298.

[151] *See, e.g.,* Lee Ross Crain, *The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections*, 112 MICH. L. REV. 453, 454-55 (2013).

[152] *See Seibert*, 542 U.S. at 605-06; *See Elstad*, 470 U.S. at 301-02.

the pre-Miranda phase would essentially carry over to statements made during the post-Miranda phase, allowing prosecutors to use evidence initially obtained before the Miranda warning was given.[153] This use of the two-step interrogation tactic for parallel construction was found unconstitutional in *Missouri v. Seibert* (2004) because it undermined the goal of Miranda warnings and violated defendants' right against self-incrimination.[154]

More recently, two-step interrogations have been used in international counterterrorism cases, typically involving suspects captured overseas.[155] The pre-Miranda phase allows intelligence agents to obtain critical information for preventing further attacks while the post-Miranda phase allows law enforcement to gather information for prosecution.[156] When used in this manner, the two-step questioning tactic itself is not necessarily unconstitutional,[157] but it leaves many constitutional rights unprotected. Pre-Miranda statements from two-step interrogations are likely to be excluded,[158] and thus the government can use that phase to utilize coercive questioning because it is does not intend to use such statements in court. The government is not deterred by the exclusionary rule because it is aware that all courts can do to remedy or deter misconduct during the pre-Miranda phase[159] is to exclude this questioning, which is ineffective when the government never intended to use information from that phase of questioning for prosecution. It is still important to note that the primary priority remains prevention of future attacks, and although information from the pre-Miranda phase likely cannot be used in a court of law, there is no law or precedent binding the government to proceed to a post-Miranda phase if

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[153] *See Seibert*, 542 U.S. at 616-17.

[154] *See id.*

[155] *See, e.g.,* Crain, *supra* note 151; As previously mentioned, two-step interrogations have largely been used for suspects captured overseas, *See, e.g.,* Khatallah Mot. to Suppress, *supra* note 141; Keenan, *supra* note 141; Warsame Press Release, *supra* note 141; Goldman & Schmitt, *supra* note 141; Hirschkorn, *supra* note 141; Jarrett, Stafford, and Bohn, *supra* note 141; Ruiz, Goldman, and Apuzzo, *supra* note 141, likely because domestic suspects are usually given an initial presentment within 48 hours of arrest, *See* Nielsen, *supra* note 129, at 28-29; *See* Wright, *supra* note 134, as required by law, *McLaughlin*, 500 U.S. at 45; *Gerstein*, 420 U.S. at 126, and because the public safety exception seems to cover interrogations within that time frame.

[156] Khatallah Mot. to Suppress, *supra* note 141, at 44-48.

[157] *Id.* at 46.

[158] Furthermore, even when information obtained through torture, coercion, or other compulsion is incriminating, but not self-incriminating, precedent indicates that such information is unlikely to be admissible in legal processes (including not only prosecution, but also processes such as obtaining warrants) related to other investigations. Such evidence is considered tainted, and courts such as the D.C. Circuit have expressed concerns that the CSRTs were making decisions in the case of detainees based on incriminating evidence gathered through the involuntary statements of another detainee. *See* In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 472 (D.C. Cir. 2005).

[159] With the exception of coercion carrying over from the pre-Miranda phase to the post-Miranda phase, there should be no problem regarding self-incrimination during the post-Miranda phase as officials involved in that phase are effectively deterred—by the exclusionary rule—from misconduct since they plan to bring statements from the post-Miranda phase for prosecution.

it finds something during the pre-Miranda phase to warrant a change in the interrogation and detainment plan. For example, such a change might involve prolonging the pre-Miranda phase and detainment without access to counsel.

While the two-step interrogation tactic for foreign terrorism suspects evolved from over a decade of judicial checks against the executive branch's treatment of detainees following the September 11 attacks, the tactic itself did not face legal scrutiny until 2014.[160] In 2009, a Somali suspect who faced an interrogation method that was roughly similar to the two-step tactic pled guilty and did not go through with his challenge of the interrogation.[161] In 2013, the capture of Somali terrorist Ahmed Warsame led to the first publicly acknowledged use of the two-step tactic in the interrogation of a significant international terrorism suspect.[162] The pre-Miranda phase of Warsame's interrogation, which was for gathering intelligence, lasted two months and the post-Miranda phase, which was for gathering evidence for prosecution, lasted several days.[163] However, Warsame accepted a plea deal and did not challenge his interrogation, meaning that the two-step tactic for counterterrorism purposes did not face a legal test yet.[164] Libyan al Qaeda terrorist Anas al-Libi was captured in 2013, and subsequently interrogated by military and Central Intelligence Agency (CIA) officers during the pre-Miranda phase and by FBI and DOJ officials during the post-Miranda phase.[165] He challenged his interrogation during pre-trial proceedings but died due to pre-existing liver cancer before his challenge was considered by the court, resulting in another delay of the legal test of the two-step interrogation.[166]

The 2014 capture and subsequent two-step interrogation of a suspect in the Benghazi consulate attacks, Ahmed Salim Faraj Abu Khatallah,[167] was the first real

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[160] *See* Spencer S. Hsu & Ann E. Marimow, *Accused Benghazi Ringleader Convicted on Terrorism Charges in 2012 Attacks that Killed U.S. Ambassador*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/local/public-safety/accused-benghazi-ringleader-convicted-of-terrorism-charges-in-2012-attacks-that-killed-us-ambassador/2017/11/28/39fca3b8-ca37-11e7-aa96-54417592cf72_story.html?noredirect=on&utm_term=.87ef5a983da5.

[161] Keenan, *supra* note 141.

[162] Warsame Press Release, *supra* note 141.

[163] *Id.*

[164] *Id.*

[165] Hirschkorn, *supra* note 141.

[166] Hirschkorn, *supra* note 141; Maggie Michael, *Libyan Charged in 1998 US Embassy Bombings Dies*, ASS'D PRESS (Jan. 3, 2015), https://web.archive.org/web/20150104033251/http://hosted.ap.org/dynamic/stories/E/EMBASSY_BOMBINGS_AL_LIBI?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2015-01-03-08-49-57.

[167] Khatallah Mot. to Suppress, *supra* note 141.

opportunity for a legal test of two-step interrogations as a counterterrorism tactic.[168] Following his capture by U.S. military forces, Khatallah was transported aboard a naval warship to the mainland United States on a journey that took thirteen days.[169] Upon his capture, Khatallah was informed he was in U.S. custody and would be transported to the mainland.[170] From the perspective of the *Miranda* ruling, Khatallah's custodial interrogation began then since he was within U.S. custody despite not having been formally arrested yet.[171] As the Court found in *Miranda*, constitutional safeguards are needed at this point in an investigation because custodial interrogations—questioning that occurs during detainment—can threaten the voluntariness of a suspect's statements and, consequently infringe upon his right against self-incrimination.[172] This was relevant to Khatallah's case in regards to whether proper safeguards, possibly including Miranda warnings, had protected his rights from the moment he was placed in that custodial interrogation environment.

After the pre-Miranda interrogation of Khatallah, the government ensured a clear distinction between the two phases of interrogation. The intelligence team from the pre-Miranda interrogation made no contact with the law enforcement team from the post-Miranda interrogation before, during, or after the interrogation.[173] This appears to be an attempt to distinguish the use of the two-step interrogation technique as a preventative tactic in international counterterrorism investigations from its origins as an unconstitutional parallel construction tactic in criminal investigations.[174] Khatallah's physical environment was also altered between the two phases and made more accommodating for the post-Miranda phase: he was given a change of clothing, moved to a furnished detention pod, permitted to shower daily, and given more frequent meals.[175] His law enforcement interrogators were also dressed casually and his interrogation pod for the post-Miranda phase was decorated.[176] He was given a two-day break from questioning in between the phases.[177] These changes seem intended to convey to Khatallah a clear shift in the attitude of his

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[168] *See* Hsu & Marimow, *supra* note 160.
[169] Khatallah Mot. to Suppress, *supra* note 141.
[170] *Id.* at 10.
[171] *See Miranda*, 384 U.S. at 457-58.
[172] *See id.*
[173] Khatallah Mot. to Suppress, *supra* note 141, at 14-15.
[174] *See Seibert*, 542 U.S. at 616-17.
[175] *See* Khatallah Mot. to Suppress, *supra* note 141, at 15.
[176] *See id.*
[177] *Id.* at 14 n.4, 45.

interrogation and detainment so that coercive effects of the pre-Miranda phase would not carry over to the post-Miranda phase, which was a concern raised by the Court in *Seibert.*[178]

The FBI then informed Khatallah he was under arrest and aboard a ship.[179] Khatallah was given the Miranda warnings via a translator in both verbal and written forms, and he personally took notes seeming to indicate that he was aware of his rights.[180] The FBI agents informed Khatallah that they were officials different from those who had interrogated him previously and that his earlier statements from the pre-Miranda phase would "probably" not be used in court.[181] This explicit explanation of the two-step interrogation had not been provided during earlier uses of the tactic for counterterrorism investigations.[182] Khatallah was also informed that he would be brought for an initial court appearance as soon as possible, but when he asked if a lawyer was onboard, he was told that there was not one on the ship.[183] Throughout the post-Miranda interrogation, the FBI repeatedly expressed the Miranda warnings to Khatallah and reminded him of his rights.[184] The post-Miranda interrogation lasted several days, and Khatallah repeatedly waived his rights for that phase of the interrogation.[185] The interrogation ended when the ship reached New York and Khatallah was brought to court for an initial appearance.[186]

During pre-trial proceedings, Khatallah's attorneys filed a motion to suppress statements from the post-Miranda interrogation in part on the basis that the two-step tactic had undermined the voluntariness of his statements and that his knowledge of his rights prior to the Miranda warning was so deficient that such a warning was still not enough to ensure his statements were voluntary.[187] The defense also attempted to invoke the McNabb-Mallory exclusion, which requires exclusion of all incriminating statements—including voluntary ones—if prompt presentment rights are violated.[188] This exclusionary rule seeks

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[178] *See Seibert*, 542 U.S. at 616-17; Khatallah Mot. to Suppress, *supra* note 141, at 45, 49-51.

[179] Khatallah Mot. to Suppress, *supra* note 141, at 16; It appears Khatallah was not previously aware of his location. *See id.* at 12, 14.

[180] *Id.* at 16-18.

[181] *Id.* at 14, 14 n.4; In this case, no evidence from the pre-Miranda phase was introduced. *Id.* at 58.

[182] Keenan, *supra* note 141, at 1728-29.

[183] Khatallah Mot. to Suppress, *supra* note 141, at 17.

[184] *Id.* at 19-20.

[185] *Id.* at 17-20.

[186] *Id.* at 20-21.

[187] *Id.* at 2.

[188] *Id.*

to prevent the government from purposefully delaying presentment in order to prolong interrogation.[189]

The judge denied Khatallah's motion to suppress and refused to invoke the exclusionary rule on either the basis of a Fifth Amendment violation or a McNabb-Mallory violation.[190] The judge reasoned that the McNabb-Mallory exclusion could not be invoked because Khatallah's prompt presentment rights had not been violated since naval transportation was the most viable and reasonable option for transporting Khatallah for presentment without delay considering the logistical, security, and diplomatic concerns related to using other means of transportation at the time.[191]

On the two-step issue, the judge found that the Miranda warnings were effective in protecting the right against self-incrimination because the administration of warnings in this case passed the tests proposed by both the plurality and concurring opinions in *Seibert*.[192] The judge reasoned that the concurring test was passed because the pre-Miranda interrogation did not seek to undermine Miranda through parallel construction, but rather sought to obtain intelligence for national security purposes.[193] Furthermore, he found the pre-Miranda interrogation itself to be voluntary based on classified documents submitted by the government.[194] Additionally, the judge held that the *Seibert* plurality test was passed because the totality of circumstances during the transition between the pre-Miranda and post-Miranda phases would be interpreted by a reasonable person[195] as a distinction between the two phases of interrogation.[196] This would arguably alleviate any effects of coercion from the pre-Miranda phase on the post-Miranda phase. Finally, the judge reasoned that Khatallah's lack of familiarity with the U.S. legal system did not mean that he misunderstood the transition between the pre- and post- Miranda phases because his experience with the U.S. government's interrogation differed greatly from previous experience with oppressive regimes.[197]

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[189] John E. Betts, *Casenotes: Criminal Procedure—Exclusionary Rule—Evidence Obtained from Defendant during Period of Unnecessary Delay in Presenting Him before a Judicial Officer Subject to Exclusion under M.D.R. 723(a). Johnson v. State, 282 Md. 314, 384 A.2d 709 (1978)*, 8 U. BALT. L. REV. 562, 567-68 (1979).

[190] Khatallah Mot. to Suppress, *supra* note 141, at 41, 51, 55, 58.

[191] *Id.* at 33-41.

[192] *Id.* at 45.

[193] *Id.* at 46.

[194] *See id.* at 14 n.4, 58.

[195] Refers to the standard required by the *Seibert* plurality test. *Seibert*, 542 U.S. at 615, 617.

[196] Khatallah Mot. to Suppress, *supra* note 141, at 50-51.

[197] *Id.* at 53.

The ruling in Khatallah's case encouraged the government to continue using the two-step interrogation tactic on terrorist suspects captured overseas.[198] Another Benghazi suspect, Mustafa al-Imam, was captured and interrogated under the same tactic as Khatallah's case was unfolding.[199] As additional terror groups are dismantled by U.S. operations and their scattered operatives are individually captured, it seems likely that two-step interrogations will be used more frequently.[200]

B. How the Exclusionary Rule is a Tool for the Government in Counterterrorism Investigations and Problematic Consequences

As explained earlier in this article, legal decisions limiting government options for treatment of detained terror suspects have left two-step interrogations as the best option for balancing the legal obligations necessary for prosecution with the government's counterterrorism interests. The exclusionary rule is essential to the legal basis for two-step interrogations and is thus a tool for the government to extract intelligence from terror suspects while still being able to prosecute them afterwards.

Although the district court found that Khatallah's statements from the pre-Miranda phase were voluntary based on classified documents, it was only able to do so because of information that the government willingly offered to the court.[201] In other cases, the government can argue that evidence from the pre-Miranda phase would be excluded by the court anyways and simply refuse to submit information regarding the protection of the right against self-incrimination during the pre-Miranda phase. Thus, the courts' ability to review pre-Miranda interrogations for self-incrimination violations or other misconduct is shaky at best because the exclusionary rule loses much of its effectiveness in protecting constitutional rights when the government's interest is not prosecution and government officials are willing to compromise constitutional rights to achieve their objectives.

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[198] *See* Goldman & Schmitt, *supra* note 141.

[199] *Id.*

[200] *See* Owen Bowcott, *UK has no legal obligations towards Isis suspects, court told*, THE GUARDIAN (9 Oct. 2018), https://www.theguardian.com/law/2018/oct/09/uk-has-no-legal-obligations-over-isis-suspects-el-shafee-elsheikh-high-court-told (Anti-ISIS coalition partners more likely to let US take on their terror suspects because US has death penalty); *See* Goldman & Schmitt, *supra* note 141; *See* Jarrett, Stafford, and Bohn, *supra* note 141; *See* Ruiz, Goldman, and Apuzzo, *supra* note 141.

[201] *See* Khatallah Mot. to Suppress, *supra* note 14 n.4, 58.

In counterterrorism investigations, the Miranda exclusionary rule cannot be an effective deterrent against government misconduct when the government's primary focus is not prosecution, which—in two-step interrogations—is particularly true during the pre-Miranda phase. In fact, the exclusionary rule helps the government conduct pre-Miranda interrogations by allowing them to wield it as a tool that effectively excludes such interrogations from judicial review. At the very least, the government can restrict public access to information regarding the pre-Miranda phase by declaring it classified. Additionally, since it is expected that this phase will be excluded from court, the government can further reduce transparency and oversight of pre-Miranda interrogations. Given that the exclusionary rule is essentially the only effective remedy for self-incrimination violations in a custodial interrogation, its ineffectiveness as a deterrent in counterterrorism investigations leaves questions as to what options exist to deter misconduct.

These debates over the purpose and role of the Miranda exclusion raise the question as to whether there is any misconduct to deter during pre-Miranda interrogations if statements from such interrogations are never brought to court. This question is amplified by the claim that the Fifth Amendment is a trial protection. Some claim that since the Fifth Amendment right is about not being compelled to be a witness against oneself, it is a right that only applies during the trial.[202] According to this logic, any violations of the right against self-incrimination that are not introduced to the trial do not actually constitute misconduct that ought to be deterred.

However, the right against self-incrimination is more than just a trial right. It is only regarded as a trial right because the government's interest is assumed to be prosecution. The Fifth Amendment has been found to be absolute in its protection of the right against self-incrimination,[203] albeit not absolute in its protection of a right to silence.[204] The amendment says that a person may not be "compelled in any criminal case to be a witness against himself."[205] The amendment does not say that self-incrimination can only occur during trials or in courtrooms, instead using the vague term "criminal case."[206] For example, the Supreme

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[202] *See Quarles*, 467 U.S. at 686 (Marshall, T., dissenting).

[203] *See, e.g., Miranda*, 384 U.S. at 479 ("A recurrent argument . . . The whole thrust of our foregoing discussion demonstrates that . . . That right cannot be abridged"); *See* Maclin, *supra* note 88.

[204] *See, e.g.,* Salinas v. Texas, 570 U.S. 178, 189 (2013) ("But popular misconceptions not withstanding…"); *See* Maclin, *supra* note 88.

[205] U.S. CONST. amend. V.

[206] *Id.*; Note that the use of the word "criminal" in this context differs from this article's use of "criminal" during the earlier discussion of the difference between criminal investigations and counterterrorism investigations. Counterterrorism cases still involve charges from the criminal code and might be called

Court has found that civil cases involving the forfeiture of imported substances nonetheless fall within the Fifth Amendment's categorization of "criminal case[s]" because, despite being civil cases, they have equivalent consequences as any other penalty at the hands of the government.[207] Furthermore, testimony does not only occur within a courtroom or during an interrogation in preparation for trial as congressional hearings, for example, often involve testimony.[208] Individuals making statements under oath at such hearings can invoke their Fifth Amendment rights and refuse to answer a question.[209] Unlike custodial interrogation, which is entirely for the purpose of building a prosecutable case, congressional hearings are not intended to bring evidence to trial.[210] Unlike police officers or prosecutors who question to convict, congressional representatives question for oversight and legislative purposes. Yet, the right against self-incrimination is still protected during such hearings.

The right to not be compelled to bear witness against oneself is not only tied to simply avoiding self-incrimination leading to conviction by a court of law. Rather, it can be defined more broadly as a right against self-incrimination leading to government-imposed consequences. In other words, the Fifth Amendment is interpreted as a trial right because in the United States, self-incrimination typically leads to conviction by a court since the government's interest is typically prosecution. Yet, as seen with other countries, self-incrimination can lead to indefinite detention without a trial, execution, and other consequences.[211] Consequences imposed by the United States government as a result of self-incrimination are far from being as severe, but nonetheless do not have to involve a conviction. In the context of counterterrorism, such consequences could involve prolonged pre-Miranda interrogation and detention without access to counsel.

"criminal cases" even though the use of that term is not meant to conflate counterterrorism investigations with criminal investigations, which are street crime or white-collar cases.

[207] Boyd v. United States, 116 U.S. 616, 616 (1886) ("a proceeding to forfeit…").

[208] *See* Daniel Curbelo Zeidman, *To Call or Not to Call: Compelling Witnesses to Appear Before Congress*, 42 Fordham URB. L. J. 569, 570 (2016).

[209] *Id.*

[210] Watkins v. United States, 354 U.S. 178, 187 (1957).

[211] *See, e.g.,* Wei Wu & Tom Vander Beken, *Relativism and Universalism in Interrogation Fairness: A Comparative Analysis Between Europe and China*, 19 EUR. J. ON CRIM. POL'Y AND RES. 183, 183-85 (2013); *Coerced Confessions in the Islamic Republic of Iran*, HUM. RTS. & DEMOCRACY FOR IRAN (Aug. 15, 2007), https://www.iranrights.org/newsletter/issue/1/coerced-confessions-in-the-islamic-republic-of-iran; *North Korea-US talks: Who are North Korea's American detainees?*, BBC (May 9, 2018), https://www.bbc.com/news/world-asia-43983719.

In *Boumediene v. Bush* (2008), the Supreme Court made clear that the Constitution applies to all instances in which the United States has de facto control, meaning that as long as the United States has de facto control, the Fifth Amendment protections apply.[212] Even if the courts cannot exercise judicial review over certain situations, it does not mean that the Constitution does not apply. In other words, Fifth Amendment rights must be protected in any situation during which the United States government has de facto control, even if United States courts specifically are not involved in such cases.

Further evidence that the right against self-incrimination exists outside of trials and courtrooms is that violations of the right against self-incrimination can occur in contexts that are nonjudicial. The judiciary has recognized the principle that "there is nothing to suggest that the Framers were seeking to confine the right against self-incrimination to trial. The Founders apparently viewed the right more broadly, envisioning it to apply beyond the trial itself."[213] In *Garrity v. New Jersey* (1967), the Supreme Court held that the government cannot force employees to choose between self-incrimination and firing because it is a violation of their Fifth Amendment right against self-incrimination.[214] Arguably, the most apparent indication that the right against self-incrimination must be protected outside of trials and prosecution comes from post-September 11 counterterrorism. Incriminating statements made by Guantanamo detainees were undoubtedly part of the calculations made before officials decided whether to bring them to federal court or to continue indefinite detainment. The CSRTs and the Administrative Review Boards (ARBs) employed by the Bush administration were examples of this. These were administrative boards, not courts.[215] As such, they were not bound by traditional rules of evidence, and thus could accept involuntary self-incriminating statements.[216] In 2005, the DC Circuit Court expressed concerns regarding the possibility that CSRTs were making decisions based on evidence involving self-incriminating statements that were obtained through torture or coercion.[217] The CSRT and ARB decisions had serious consequences because they affected the legal status of a Guantanamo detainee, determining whether he was a prisoner of war, unlawful combatant, or civilian defendant.[218] This status in turn determined the fate of the detainee

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[212] *Boumediene*, 553 U.S. at 746-47.

[213] Vogt v. City of Hays, 844 F.3d 1235, 1246 (10th Cir. 2017).

[214] Garrity v. New Jersey, 385 U.S. 493, 493-95 (1967).

[215] *See* Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1641, 1649-56 (2005).

[216] *See id.*

[217] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472.

[218] Cassell, *supra* note 24; *See* Kanstroom, *supra* note 23.

as, at the time, detainees deemed unlawful combatants could expect indefinite detention.[219] Thus, self-incriminating statements can have severe consequences even if they are never brought to court. The Fifth Amendment, then, is not just a trial right, and any proper safeguard must be able to deter consequential misconduct outside the courtroom to adequately protect the amendment.

Although CSRTs and ARBs have largely been sidelined,[220] the Guantanamo example further reveals why two-step interrogations are dangerous in their current form.[221] At any point during the pre-Miranda phase, a self-incriminating statement could lead the government to entirely alter its plan. For instance, it might decide to delay proceeding to the post-Miranda phase because of incriminating statements that suggest that the detainee has an intelligence value that warrants continued un-Mirandized interrogation.[222] Since the government's intention throughout the pre-Miranda phase is prevention, not prosecution, and the exclusionary rule is ineffective in such an instance, the courts currently have no means of protecting a defendant who is coerced to make self-incriminating statements during the pre-Miranda phase from government-imposed consequences that might result from such compelled statements.

III: Introducing Alternative Protections and Remedies to the Exclusionary Rule in Counterterrorism Investigations

A. Considerations for Alternative Protections and Remedies

Without an alternative remedy for violations of the right against self-incrimination during two-step interrogations, there is no effective deterrent against government misconduct during the pre-Miranda interrogation phase. The findings in the Senate Select

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[219] *See* Cassell, *supra* note 24 at 39; Peal, *supra* note 1641, 1650-56.

[220] *See Boumediene*, 553 U.S. at 783-87, 792 (found CSRTs to be susceptible to habeas violations, though they have not been explicitly deemed unconstitutional). *See id.* at 785, 795, 792.

[221] *See* Hsu, *supra* note 36 (pursuit of prosecution for terror suspects implies less frequent employment of CSRTs and ARBs which are employed for Guantanamo detainees rather than defendants awaiting trial).

[222] The government could theoretically take such steps despite prompt presentment rules because such rules are enforced through the McNabb-Mallory exclusion rule. *See* Betts, *supra* note 189. As this article repeatedly argues, exclusionary rules are ineffective when the government interest is not prosecution. Thus, prompt presentment rules cannot be effectively enforced in such instances. Exclusionary rules are ineffective in deterring misconduct in two-step interrogations because the government expects and even desires the pre-Miranda phase to be excluded. Since the government would be violating prompt presentment during the pre-Miranda phase (by prolonging that phase), the courts would exclude that phase—but that was the hope of the government all along.

Committee on Intelligence's "Torture Report," which covered "enhanced interrogation" techniques used against terror detainees, demonstrate some of the potential consequences of not having proper legal deterrents during interrogations.[223] While current legislation restricts government officials from using torture or unlawful interrogation tactics, this cannot be enforced without proper remedies and deterrents in place.[224] In counterterrorism investigations, the primary government interest is prevention, and, as such, exclusionary rules do not necessarily deter the government from resorting to torture and inhumane interrogation tactics if it believes such tactics to be effective in extracting intelligence. Along with qualified immunity obstructing civil suits from being effective deterrents, this means there currently is no effective deterrent in place to enforce the current anti-torture legislation for un-Mirandized counterterrorism interrogations.

In the *Miranda* ruling, the Supreme Court recognized that unwarned interrogations—even when there is no outright coercion—cause a magnification of police power that has a psychological effect and could potentially lead a suspect to feel compelled to self-incriminate in a manner that is "destructive of human dignity."[225] In *Seibert*, the Court recognized that coercive effects from the pre-Miranda phase of a two-step interrogation can carry over to the post-Miranda phase if the phases are not properly and explicitly distinguished.[226] Based on these two cases, it is also possible that the magnification of government power from the pre-Miranda phase of a two-step interrogation can carry over to the post-Miranda phase even if there is no outright coercion during the pre-Miranda phase, and even if the two phases are clearly separated. In Khatallah's case, the post-Miranda FBI team made it clear that they were different government officials from the pre-Miranda team to alleviate psychological effects from the previous phase of interrogation by clearly distinguishing the two phases to the suspect.[227] Thus, in Khatallah's mind, the FBI team may have seemed less forceful or powerful than the intelligence team, thereby reducing the coercion he faced. Yet, the magnification of powers from the pre-Miranda phase might have remained because, even though the FBI team might seem less powerful, the overall United States government could still seem extremely powerful. Although the Court recognized that clearly distinguishing the phases of a two-step interrogation can alleviate the magnification

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[223] *See* S. Rep. No. 113-288, Findings and Conclusions, at 5-6, 16 (2014) (unclassified version).
[224] 42 U.S.C. § 2000dd-2 (2012).
[225] *Miranda*, 384 U.S. at 457 (footnote omitted).
[226] *See Seibert*, 542 U.S. at 616-17; Khatallah Mot. to Suppress, *supra* note 141, at 45, 49-51.
[227] Khatallah Mot. to Suppress, *supra* note 141, at 14 n.4, 17.

of powers,[228] when a suspect is unfamiliar with the United States government, it may hardly seem relevant to him whether his interrogators are in law enforcement or intelligence because ultimately, they all represent the United States government. This may result in a magnification of powers that continues from the pre-Miranda phase to the post-Miranda phase simply because a foreign suspect recognizes that his captivity throughout both phases is at the hands of the United States government.

Another issue arising from two-step interrogations is the length of time that a suspect is held without access to an attorney. Unlike criminal interrogations, counterterrorism two-step interrogations can have a pre-Miranda, unwarned phase that lasts several days or months.[229] While it is unreasonable to demand that attorneys be provided before Miranda warnings are issued or before a suspect invokes his right to counsel,[230] there are concerns which arise from the possibility that terror suspects can be interrogated and held for prolonged periods without an attorney present. Attorneys serve a purpose beyond protecting their client from coercive questioning by helping to protect against abuse of the suspect and ensuring his due process rights are respected for the entirety of his detainment, not just during his interrogation.[231] Two-step interrogations, however, can allow prolonged detainment of a suspect who is unaware of his rights and has no access to counsel. The longer he is detained without access to an attorney, the more vulnerable he is to abuse, not only during his interrogation but also throughout his overall detainment.[232]

To be sure, misconduct can arise in pre-Miranda interrogations during domestic criminal investigations, but the government has an incentive to Mirandize as early as possible in those cases because its goal is prosecution, and thus it will want to preserve the legal integrity of statements. The government lacks this incentive in terrorism investigations because prevention is prioritized, and thus has little incentive to immediately Mirandize, particularly when employing the two-step tactic. This intentional delay and deliberate use of the exclusionary rule gives an advantage to the government and increases opportunities for misconduct. Furthermore, all the foregoing misconduct is in addition to the potential

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[228] *See Seibert*, 542 U.S. at 616-17; Khatallah Mot. to Suppress, *supra* note 141, at 45, 49-51.
[229] *See, e.g.,* Warsame Press Release, *supra* note 141.
[230] It would be unreasonable because it would clearly place an undue burden on the government.
[231] *See Miranda*, 384 U.S. at 470; *See* Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
[232] *See Miranda*, 384 U.S. at 470.

violations of the right against self-incrimination during the pre-Miranda phase, which were discussed in Part II of this article.

Another issue arising from the government's use of the exclusionary rule as a tool during counterterrorism investigations is that it undermines the Miranda exclusion and the fundamental protection of the right against self-incrimination. The *Seibert* ruling recognized that this occurs when the two-step interrogation tactic is used for parallel construction purposes,[233] but, the *Khatallah* ruling held that when the two-step interrogation tactic is used for intelligence and national security purposes, it does not encounter the specific problem of undermining the protection afforded by the Miranda warning.[234] However, the *Khatallah* case failed to recognize that regardless of what the government's purpose is, the risk of undermining the protections of the right against self-incrimination remains. The protection of the right against self-incrimination is critical, and as Lee Ross Crain emphasizes, "like the Constitution itself, it cannot be jettisoned when convenience demands."[235] The deliberate use of the Miranda exclusion as a tool during two-step interrogations threatens to turn the protection of the right against self-incrimination—as well as related aspects of due process—into a light switch, allowing the government to turn its legal and constitutional responsibilities on and off based on its interests. From the origins of the Miranda exclusion, the Court has held that "the requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege, and not simply a preliminary ritual to existing methods of interrogation."[236] The risk with two-step interrogations and the government's use of Miranda exclusion as a tool is that if the government can avoid responsibility for misconduct by simply carrying out such conduct during the pre-Miranda phase, then Miranda loses its deterrent effect and becomes a simple phrase, uttered only when the government feels it is acceptable to afford a suspect protection of his constitutional rights.

Ultimately, by using the Miranda exclusion as a tool for counterterrorism investigations, the government is placing its interests above the constitutional rights of the suspect. This can certainly be justified if the government has enough of a compelling interest, and national security can be prioritized over traditional civil liberties. However, it must be recognized that the suspect is being deprived of one of his most fundamental rights, and

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[233] *See Seibert*, 542 U.S. at 616-17.
[234] Khatallah Mot. to Suppress, *supra* note 141, at 46.
[235] *See, e.g.,* Crain, *supra* note 151, at 488.
[236] *Miranda*, 384 U.S. at 476.

alternative safeguards that balance the government's interests with the suspect's rights must be considered.

It is important to recognize that two-step interrogations are a critical compromise between intelligence and legal interests in the "War on Terror" and are possibly the best available solution for balancing national security and constitutional liberties.[237] This article does not argue for disposing of the government's solution to nearly a decade of controversy concerning the treatment of terrorism suspects. In fact, when executed properly, as it largely appears to have been in the Khatallah case, (despite some of the flaws in the *Khatallah* ruling) two-step interrogations can be effective in balancing the rights of the suspect with the interests of the government. Currently, there is little publicly available data—especially regarding the pre-Miranda phase—about counterterrorism benefits gained from two-step interrogations, an issue which itself is an indicator of the problematic lack of oversight over the pre-Miranda phase. However, the government's growing use of the tactic[238] suggests that it has found intelligence gathered from two-step interrogations to be effective.[239] Two-step interrogations can be effective at balancing government interests and suspect rights because they allow the government to efficiently extract intelligence from detainees while still allowing officials to gather admissible evidence needed to bring detainees for prosecution, during which detainees are brought before a court that will safeguard their rights unlike indefinite detention processes. However, this article suggests that two-step interrogations present a new challenge for guaranteeing that rights are protected, and misconduct deterred *during* interrogations—before the detainees are brought to court. The reliance on the exclusionary rule to ensure this protection does not translate to the counterterrorism sphere, especially considering new tactics such as two-step interrogations. The development of new safeguards is necessary.

B. Possible Solutions That Provide Safeguards During Two-step Interrogations

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[237] Addicott, *supra* note 37.

[238] *See, e.g.,* Khatallah Mot. to Suppress, *supra* note 141; Crain, *supra* note 151; Keenan, *supra* note 141; Warsame Press Release, *supra* note 141; Goldman & Schmitt, *supra* note 141; Hirschkorn, *supra* note 141; Jarrett, Stafford, and Bohn, *supra* note 141; Ruiz, Goldman, and Apuzzo, *supra* note 141.

[239] *See* Goldman & Schmitt, *supra* note 141; *See* Jarrett, Stafford, and Bohn, *supra* note 141; *See* Ruiz, Goldman, and Apuzzo, *supra* note 141.

One clear and necessary solution is to provide effective legal protections for the pre-Miranda phase of two-step interrogations. Legislation could be introduced to safeguard against violations of rights resulting from the exclusionary rule being used as a tool by the government in two-step interrogations. Setting strict time frames and restricting the length of the pre-Miranda phase would be a simple way to safeguard rights. For example, a two month long pre-Miranda phase like that of Ahmed Warsame's interrogation might be considered excessive and would violate such legislation.[240] While this example is somewhat arbitrary, a more reasonable period might be a week, roughly the length of Khatallah's pre-Miranda interrogation.[241] Regardless of the exact time limits imposed, setting a strict time frame would help bring the pre-Miranda phase more in line with the post-Miranda phase, which is already restricted on time by the McNabb-Mallory exclusion.[242] Furthermore, limiting the length of the pre-Miranda phase would limit the amount of time the suspect is detained without access to counsel and, consequently, the amount of time during which the suspect's constitutional rights are vulnerable to government misconduct. To ensure compliance with the time frame, Congress can legislate which modes of transport are permissible for a detainee undergoing a two-step interrogation to prevent intelligence agencies from prolonging transport for prolonging pre-Miranda interrogation. Other legislation could impose requirements regarding government reporting of two-step interrogations and the effectiveness of intelligence extracted from such interrogations in preventing attacks to help increase transparency and allow for greater oversight.

By writing two-step interrogations into legislation, it can also be ensured that once a suspect is captured and a two-step interrogation process begins, the government cannot decide during the pre-Miranda phase to delay the post-Miranda phase and prolong the period of vulnerability of constitutional rights. This could resolve the issue of self-incriminating statements made during the pre-Miranda phase possibly allowing or causing the government to impose consequences like prolonged pre-Miranda interrogation rather than a timely transition to post-Miranda interrogation. To ensure compliance with the *Elstad* and *Seibert* rulings regarding separation of the two phases of interrogation, legislation requiring an automatic pre-trial review of the transition between the two interrogation phases can be introduced.[243] Legislation can also mandate that all pre-Miranda interrogations be run by the

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[240] Warsame Press Release, *supra* note 141.
[241] Khatallah Mot. to Suppress, *supra* note 141, at 1, 17-20.
[242] *See McLaughlin*, 500 U.S. at 45; *See Gerstein*, 420 U.S. at 126; *See* Betts, *supra* note 189.
[243] *See Seibert*, 542 U.S. at 616-17; *See Elstad*, 470 U.S. at 314-15.

High-Value Detainee Interrogation Group (HIG) and not the military or CIA alone. Since HIG, while composed of several agencies, is headed by the FBI, its policies are more in line with the FBI's standard operating procedures, which are more attentive to suspects' rights since the bureau retains a law enforcement function unlike other agencies in the intelligence community.[244] Granted, HIG policy may allow use of questioning tactics that differ from those used by typical FBI interrogators because HIG's purpose is to extract national security intelligence.[245] However, because of FBI doctrines, HIG is more amenable to restraint than some of the early Guantanamo-era interrogation groups—which were headed by the military and CIA—have historically been.[246] HIG was used during the Khatallah case but has not been granted statutory authority over all two-step interrogations.[247] Additionally, though all agencies prioritize prevention of terrorism, the FBI's secondary objective is still prosecution, and as such, it is better equipped to manage the delicate transition necessary between the two phases of interrogation.[248]

Finally, an alternative protection for pre-Miranda interrogations can be formulated by adjusting qualified immunity standards. Civil suits, if made viable by adjusting the qualified immunity standards, present the best opportunity for deterrence of misconduct and protecting the Fifth Amendment in the absence of the exclusionary rule's deterrence effect. The Army Field Manual is standard doctrine for U.S. military interrogators,[249] and the FBI interrogation doctrine is even more restrained in its approach.[250] In light of the Guantanamo controversies, Congress established the policies for interrogations contained in the Field Manual as standard practice under the McCain-Feinstein Amendment.[251] Thus, violations of the Field Manual should logically be considered violations of "clearly established law" by courts and should not be protected by the qualified immunity defense.[252] However, while

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[244] *See* Addicott, *supra* note 37; *See High-Value Detainee Interrogation Group*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about/leadership-and-structure/national-security-branch/high-value-detainee-interrogation-group [hereinafter *HIG*] (last visited Jan. 4, 2019).

[245] *See* Addicott, *supra* note 37; *See HIG*, *supra* note 244.

[246] *See* Addicott, *supra* note 37; *See HIG*, *supra* note 244.

[247] *See* Laurel E. Fletcher et al., *Guantanamo and Its Aftermath: U.S. Detention and Interrogation Practices and Their Impact on Former Detainees* 1 INT'L. HUM. RTS. CLINIC 7, 8, 11 (2008).

[248] *See* Addicott, *supra* note 37.

[249] 42 U.S.C. § 2000dd-2 (2012).

[250] *Id.*; *See* High Value Detainee Interrogation Group., Interrogation Best Practices, at 1, Introduction (2016).

[251] 42 U.S.C. § 2000dd-2 (2012).

[252] *Id.*; *Harlow*, 457 U.S. at 818.

torture violates the "clearly established law" of the Field Manual, other forms of interrogation might not, and courts have often had expansive latitude in determining what exactly violates "clearly established law."[253] Furthermore, since the McCain-Feinstein Amendment only mandates adherence to the Field Manual itself,[254] but the policies within the manual may be altered at any time,[255] courts may hesitate to consider the policies of the Field Manual to be "clearly established". Hence, even if tactics used by interrogators violate the McCain-Feinstein Amendment, courts might allow qualified immunity defenses. Congress should pass legislation explicitly designating any form of coercive interrogation, torturous or not, that is not approved by the Field Manual to be considered a violation of "clearly established law" and unprotected by qualified immunity.

Conclusion

This article has sought to highlight the many inconsistencies that exist in modern national security law, including how traditional legal remedies and protections--including Miranda exclusion--are far less effective in deterring misconduct during counterterrorism investigations. Miranda exclusion itself has had a paradoxical nature from its origin as a court-generated procedural rule that only succeeds in protecting constitutional rights through a deterrent effect. The exclusionary rule, which began as a protection for defendants against violations of the right against self-incrimination, is being used as a tool by the government to conduct counterterrorism investigations while avoiding judicial oversight that could hamper national security efforts. Courts must allow the government enough flexibility to effectively extract intelligence while also guaranteeing suspects the basic right to refuse to self-incriminate themselves.

Yet, these contradictions are manageable. They exist because of competing interests of the government, but such interests can and must be balanced. The contradictions within Miranda exclusion exist because legal safeguards relying on the competitive nature of the adversarial system can overestimate the government's desire to prosecute while failing to consider other national interests that the government may prioritize. The courts can adapt such safeguards for unforseen circumstances if they are properly empowered by well-crafted legislation. Congress can write newly developed government tactics into legislation in order

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[253] Rudovsky, *supra* note 77.

[254] 42 U.S.C. § 2000dd-2 (2012).

[255] Adam Jacobson, *Could the United States Reinstitute an Official Torture Policy?*, 10 J. OF STRATEGIC SECURITY 97, 107 (2017).

to specifically detail and limit the circumstances in which they may be employed. Increasing transparency--at least in reporting to Congress--regarding the use of such tactics can allow for better oversight. For their part, intelligence agencies can preemptively moderate their own policies. Most critically, alternative safeguards and deterrents can be improved. The current dilemma between counterterrorism efforts and constitutional rights is not from a lack of solutions that account for both. There are many solutions available, but they must be implemented.

National security is a critical interest, but when that interest leaves constitutional rights unprotected, such rights are undermined if solutions that balance both are not developed. It is perilous to allow the government to use national interests to justify abridging rights when both government interests and constitutional rights can be balanced because it diminishes the respect for rights that the Constitution demands. As counterterrorism powers and executive authority continue to expand, constitutional safeguards established largely for criminal law must be adapted and adjusted effectively to national security law. If such changes are not implemented, the consequences will stretch far beyond the national security field as the lack of protections for constitutional rights in any instance threatens to undermine the rule of law.

A Re-examination of Title IX: Implications of the #MeToo Movement and Proposed Reforms

Courtney Lange

Introduction

Several allegations of sexual misconduct against director Harvey Weinstein surfaced in October of 2017, prompting a national movement over sexual harassment and assault in the workplace.[1] In the weeks and months following, accusations erupted on social media and across various industries as part of the #MeToo and #TimesUp movements. While the country was stunned by the downfall of various on-stage personalities, politicians, and businessmen, the energy brought by the #MeToo movement has simultaneously echoed across college campuses, shedding light on the magnitude of the problem at hand.[2] *The Harvard Crimson* recently reported that Harvard University has seen a twenty percent increase in sexual-harassment complaints since the allegations against Weinstein were brought to light.[3] Bill McCants, the Director of the Office for Sexual and Gender-Based Dispute Resolution (ODR) at Harvard, has attributed this increase at least in part to the #MeToo movement, citing conversations that he had with students.[4] As McCants stated, the ODR

[1] Samantha Schmidt, *#MeToo: Harvey Weinstein case moves thousands to tell their own stories of abuse, break silence.* The Washington Post (2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?utm_term=.4e9da99df12c (last visited Jan 5, 2019).

[2] Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.* The New York Times (2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html (last visited Jan 5, 2019).

[3] Claire E. Parker, *Reports of Sexual Harassment at Harvard Increase Amid National Movement*. The Harvard Crimson (2017), https://www.thecrimson.com/article/2017/12/13/title-ix-harvey-weinstein/ (last visited Jan 5, 2019).

[4] *Id.*

has "… reason to believe that it is in part because of the #MeToo movement based on statements people make—it's very much on people's minds."[5]

While more visible due to recent media attention, sexual violence has been a longstanding issue on college campuses; one in five women and one in sixteen men are sexually assaulted while in college.[6] However, these numbers most likely under-represent the rate of sexual assault. In 2017, the National Sexual Violence Resource Center found that more than 90 percent of sexual assault victims on college campuses do not report the assault.[7] In fact, a variety of studies have found that the main reason survivors do not report instances of sexual assault is because they fear hostility from legal and medical authorities or worry that their accusation will not be believed.[8] Other factors preventing survivors from reporting sexual violence include: "not thinking a crime had been committed, not thinking what had happened was serious enough to involve law enforcement, not wanting family or others to know, lack of proof, embarrassment from publicity, lack of faith in or fear of court proceedings or police ability to apprehend the perpetrator, fear of retribution from the perpetrator, and belief that no one will believe them and nothing will happen to the perpetrator."[9] Clearly, the stark difference between the number of alleged instances of sexual misconduct and the number of reports on college campuses illustrates the need for legal reform, as many students find the current system unapproachable for various reasons.

In 1972, the Department of Education (DoED) passed Title IX of the Education Amendments to the Civil Rights Act, which states that: "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[10] The law was enacted following *United States v. Virginia*, in which the Supreme Court recognized that "our Nation has had a long and unfortunate history of sex

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[5] *Id.*

[6] National Sexual Violence Resource Center, *Statistics About Sexual Violence,* NSVRC (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (last visited Jan 5, 2019).

[7] *Id.*

[8] Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, 3 NASPA Journal About Women in Higher Education 49–50 (2010).

[9] *Id.*

[10] 20 U.S.C. § 1681-1688 (2012).

discrimination." [11] Consequently, the act was intended to protect individuals from discrimination on the basis of sex in education programs at federally funded institutions.[12] Though Title IX makes no specific mention of sexual assault or harassment, it has been established through case law that sexual harassment and sexual violence are forms of gender discrimination that are prohibited by Title IX and thus any university that receives federal funding is expected to comply with the guidance issued by the DoED regarding Title IX.[13] Through documents such as the 2001 Revisions to the Office of Civil Rights' (OCR) Title IX Guidebook, the 2011 Dear Colleague Letter (DCL), and the 2017 Interim Guidance on Campus Sexual Misconduct, the DoED has attempted to clarify the degree to which a university is responsible for handling sexual misconduct allegations, as prompted by Supreme Court decisions. Despite this, Title IX's effectiveness in addressing cases of sexual assault on campus remains inconsistent. Success stories exist simultaneously with ones of remiss and indifference.[14] One such failure occurred in June of 2018, when the OCR found that the University of North Carolina at Chapel Hill was in violation of Title IX when the University's administration failed to provide "a prompt and equitable" response to accusations of sexual misconduct.[15] Yet, because the DoED has failed to specify what exactly a "prompt and equitable" investigation looks like, investigations into allegations of sexual misconduct on campus take many forms and can last for varying degrees of time — often leaving both the accused and the accuser in limbo. Despite efforts to clarify the role that Title IX plays in the adjudication of sexual assault on campus, Title IX continues to provide inconsistent protection both to the victim and the accused. Because it does not provide clear guidelines for universities to follow in regard to accusations, this could be interpreted as an infringement upon the Equal Protection Clause of the Fourteenth Amendment.[16]

Following calls to clarify a university's obligations under Title IX, the Obama Administration issued a Dear Colleague Letter (DCL) in 2011. Overall, the guidance took

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[11] *U.S. v. Virginia*, 518 U.S. 515, 531 (1996), *quoting Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).
[12] *Id.*
[13] End Rape on Campus, *Title IX,* EROC, http://endrapeoncampus.org/title-ix/ (last visited Jan 5, 2019).
[14] American Association of University Professors, *The History, Uses, and Abuses of Title IX,* AAUP 69 (2016), https://www.aaup.org/file/TitleIXreport.pdf.
[15] Office of Civil Rights, U.S.Dep't of Educ., *Re: OCR Complaint No. 11-13-2051 Letter of Findings,* OCR (2018), https://www.unc.edu/wp-content/uploads/2018/06/FINAL-R-LOF-UNC-Chapel-Hill-11132051-PDF-1.pdf.
[16] U.S. Const. amend. XIV, § 2.

an approach that focused on the protection of the rights of the accuser, by outlining procedural requirements for a university to take following an allegation of sexual harassment such as publishing a notice of nondiscrimination, designating a Title IX coordinator, and publishing a grievance procedure.[17] However, in March of 2017, the DoED rescinded the 2011 DCL issued by the Obama administration, which emphasized a more victim centered approach,[18] stating that it "lacked basic elements of fairness."[19] Though the 2011 DCL was intended to lay out procedural requirements for a university to take following an allegation of sexual misconduct, the DoED, currently led by Secretary DeVos, believes that the DCL has created a system which deprives some accused students of their due process rights.[20] In September of 2017, the DoED issued interim guidance as a placeholder until the DoED could engage in a formal rulemaking process.[21] In November of 2018, Secretary DeVos proposed a new set of standards for how sexual assault should be handled on campus.[22] Devos' proposed reforms would allow schools to select a higher standard of proof (a choice between either the "preponderance of the evidence" standard or the higher "clear and convincing evidence" standard) for sexual misconduct cases. While the "preponderance of evidence" standard states that colleges must conclude that sexual misconduct has occurred if evidence shows that it is more likely than not for the incident to have happened, the "clear and convincing" standard calls for a higher proof stating that the evidence must demonstrate that it is highly probable that misconduct took place.[23] This choice is in contrast to Obama-era policy, which directed universities to use the lower "preponderance of the evidence" standard when determining culpability.[24] Additionally, the proposal limits university liability,

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[17] Sara O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. Pitt. L. Rev. 511, 542 (2018).

[18] Office of Civil Rights, U.S.Dep't of Educ., Dear Colleague Letter (2011) [hereinafter Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html

[19] Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations* The New York Times (2017), https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html (last visited Jan 5, 2019).

[20] *Id.*

[21] Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence 1–2 (2014) [hereinafter Q&A], http://www2.ed.gov/ about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[22] Office of Civil Rights, U.S.Dep't of Educ., *Notice of Proposed Rulemaking* (2017) [hereinafter *Notice of Proposed Rulemaking*], https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf.

[23] Saul and Taylor, *supra* note 19.

[24] *Id.*

confines responsibility to incidents occurring only on campus, and restricts the definition of sexual harassment to exclude behavior such as unwanted jokes and flirting, though they were previously classified as harassment under the 2011 DCL.[25] Furthermore, the proposal guarantees the right of the accused to cross-examine the accuser.[26]

Title IX was formulated to ensure that both sexes have equal opportunity in academic institutions and evolved into what once appeared to be a seemingly viable means to address campus sexual misconduct. However, the newly proposed rules fail to provide a clearly outlined protocol for universities to follow in the event of a sexual misconduct allegation. While the proposed regulations supply relevant suggestions, they lack strict procedures, which in turn gives universities too much discretion. This abundant discretion ultimately harms victims by making it more difficult to prove they were harassed or assaulted.

This article will focus on reexamining Title IX, suggesting legal reforms to increase its efficacy in light of the recent conversations about sexual misconduct in popular culture. Part One of this article will explain the history of the application of Title IX in campus sexual misconduct and the legal obligation that a university has to respond to such incidents. Then, in Part Two, the article will analyze what appears to the shortcomings of both past and present guidelines issued by the OCR regarding sexual misconduct on campus. Finally, Part Three of this article will consider and propose that a more stringent and less adaptive system — one that includes more comprehensive information detailing the protocol for universities to follow in the event of a sexual misconduct allegation — needs to be developed to protect the due process rights of both the accuser and accused.

Part I: Legal Cases that Revolve Around the Implementation and Application of Title IX in Universities Dealing with Sexual Misconduct Allegations

A. Changes in What is Considered Sexual Misconduct under Title IX

In 2001, through the revisions to the OCR Title IX Guidebook, the Office of Civil Rights defined sexual harassment as "unwelcome conduct of a sexual nature."[27] According

[25] *Id.*
[26] *Id.*
[27] U.S. Dept. of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance* (2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

to these guidelines, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.[28] The OCR stated that what determines whether sexual harassment has occurred, in the context of Title IX, is "whether the harassment rises to a level that it denies or limits a student's ability to participate in or benefit from the school's program based on sex..."[29] The 2001 revisions to the OCR Guidebook leaves it up to the university to determine this threshold.

With the 2011 release of the DCL, the Obama administration reexamined sexual harassment in the context of Title IX. The letter stated that:

> Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX…. Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion.[30]

The 2011 DCL was the first time that clarification was provided by the OCR as to what falls under the scope of sexual harassment in the context of Title IX.[31] Unlike the 2001 Guidebook, this guidance specifically noted sexual violence and rape are included in the Title IX definition of sexual harassment.[32]

Yet, under the DeVos proposal, the Trump administration aims to redefine sexual harassment to mean:

> ...either an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault.[33]

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[28] *Id.*
[29] *Id.*
[30] *Dear Colleague Letter*, *supra* note 18, at 1.
[31] Keri Smith, *Title IX and Sexual Violence on College Campuses: The Need for Uniform on-Campus Reporting, Investigation, and Disciplinary Procedures*, 35 St. Louis U. Pub. L. Rev. 165 (2015).
[32] *Id.*
[33] Notice of Proposed Rulemaking, *supra* note 22, at 16.

This definition narrows what constitutes sexual harassment. Though the measures in the proposal have not yet been approved, it is important to note the potential implications that the definition might have. The Rape Crisis Center (RCC) and other survivors advocates fear that this definition may deter victims from reporting instances of sexual misconduct — as the instances of sexual harassment under this standard are far more difficult to prove.[34] Additionally, in accordance with this definition, schools are not obligated to respond to an accusation of sexual misconduct, with the exception of rape, until after a student's access to educational opportunities have already been hindered —- a stark contrast to the precedent set by the 2011 DCL.

B. Differences in How the Law vs. How Schools Respond to Instances of Sexual Misconduct

In 2013, the Department of Justice changed the definition of rape, redefining it as "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[35] In comparison to a typical felony tried in a court of law, prosecutors face "unique procedural hurdles" when dealing with rape in accordance with Section 213 of the Model Penal Code.[36] Although it is not a requirement for victims of other felonies to "promptly" file a complaint, a prompt complaint rule in rape law meant that if the victim did not "immediately report to authorities," he or she could not try the alleged offender in a court of law. [37] The Model Penal Code defines "prompt action" as "no prosecution may be instituted or maintained under this Article [for sexual offenses] unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence…[38] In other words, the Model Penal Code establishes a time frame for victims to report an alleged incident — outside this period, the accuser is unable to bring charges. Secondly, in accordance with the Model Penal Code,

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[34] Gracie Groshens, *Education Secretary DeVos proposes changes to Title IX, sexual harassment definition,* https://badgerherald.com/news/2018/12/04/education-secretary-devos-proposes-changes-to-title-ix-sexual-harassment-definition/ (last visited Jan 6, 2019).
[35] Federal Bureau of Investigation - Uniform Crime Reporting, Frequently Asked Questions about the Change in the UCR Definition of Rape (2014), https://ucr.fbi.gov/recent-program-updates/new-rape-definition-frequently-asked-questions.
[36] *Model Penal Code § 213.6(4).*
[37] Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 Yale L. J. 1946, 2005 (2016).
[38] *Model Penal Code, supra* note 36.

"no person shall be convicted of any felony under this [sexual offenses] Article upon the uncorroborated testimony of the alleged victim."[39] The corroboration requirement calls for "corroborative evidence" in a rape case, such as evidence obtained from the use of a rape kit or witness testimony, despite the fact that perpetrators of almost all other crimes can be found guilty solely from a reliable testimony from a victim.[40] Lastly, although juries sitting in judgment in cases involving other felonies were not warned against believing the complainant, the Model Penal Code urges the jury in the rape case to treat the complainant's testimony with skepticism. To be sure, critics view Article 213 of the Model Penal Code to be outdated, and consequently several revisions have been made in recent years and a new draft of the Article is currently under review.[41]

The difference between how Title IX deals with allegations of sexual misconduct and how the law deals with allegations results in differences in how allegations are resolved. First, while universities tend to base their verdicts on evidence provided by the accuser and the accused, criminal investigations have the power to utilize search warrants and forensic testing.[42]A second key difference between schools and the criminal justice system is the standard of proof that needs to be met for a claim to be considered credible. Under the 2011 DCL, as explained previously, the "preponderance of the evidence" standard is used when handling cases of sexual misconduct on campus: where "the proof need only show that the facts are more likely to be than not so." [43] In other words, it's more likely than not that the misconduct had occurred than had not occurred. In contrast, in criminal court cases dealing with sexual misconduct, the standard of "beyond a reasonable doubt" (similar to the "clear and convincing evidence" standard that is favored by the DoED under Secretary DeVos) needs to be met. This means that the "facts proven must, by virtue of their probative force,

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[39] *Model Penal Code§ 213.6(5).*

[40] Anderson, *supra* note 37, at 1947.

[41] Larry Cata Backer, *The Battle Over the Legal Construction of Sexual Assault -- A Report From the Battle Lines at the American Law Institute's Model Penal Code Revision Project, Law at the End of the Day*, October 11, 2018, available at http://lcbackerblog.blogspot.com/2018/10/the-battle-over-legal-construction-of.html

[42] Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 Mich. L. Rev. 170 (2017).

[43] Chris Loschiavo & Jennifer L. Waller, *The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes*, Association of Student Conduct Administration, https://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf.

establish guilt."[44] The third crucial difference between university and criminal proceedings is that if the accused is found guilty, a criminal court proceeding may lead to a prison sentence, but the worst punishment a university can issue is expulsion.[45]

C. Application of Title IX to University Response to Instance of Sexual Misconduct

Title IX regulations were first applied to the issue of sexual harassment in *Alexander v. Yale University* in 1977.[46] In *Alexander,* five female students joined by a male teacher claimed that sexual harassment by faculty members violated Title IX with respect to its guarantee to equal access to opportunities provided by academic institutions.[47] The Second Circuit ruled in favor of Yale because the plaintiffs were unable to demonstrate that any sexual harassment had taken place. However, the court established that sexual harassment is a form of sex discrimination under Title IX due to the fact that it hinders a student's ability to learn and as a byproduct, can create educational disparities.[48] In 1990, the Supreme Court established that monetary damages could be awarded in Title IX cases. In *Franklin v. Gwinnett County Public Schools,* the school district failed to take effective action to address sexual harassment of a student by her coach and teacher, but the Court did not clarify what an "effective action" entails.[49] Many [or Experts] credit this case with motivating academic institutions to respond to and to prevent instances of sexual misconduct in an effort to avoid paying monetary damages.[50]

However, in 1998, the Supreme Court established in *Gebser v. Lago Vista Independent School District* two criteria for sexual harassment claims under Title IX: actual notice and deliberate indifference. Second, the plaintiff must prove that despite the school's knowledge, the school district was "deliberately indifferent" and failed to address the situation at hand.[5152] Ultimately the Court in *Gebser* found in favor of the Lago Vista Independent School District, stating that the school could not be held accountable for sexual harassment

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[44] *Id.*
[45] Ellman-Golan, *supra* note 42, at 170.
[46] Alexander v. Yale Univ., 631 F.2d 178, (2d Cir. 1980).
[47] *Id.*
[48] *Id.* at 184-185.
[49] Franklin v. Gwinnett Cnty. Sch., 503 U.S. 60, 60-63 (1992).
[50] Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 Yale L. J. 2038, 2105 (2016).
[51] *Id.* at 290.
[52] *Id.*

damages, as the respondent had not shown deliberate indifference to the incident.[53] This case is significant in that it provided clear criteria to determine whether a school would be held liable for providing corrective measures to deal with sexual harassment on the basis of Title IX, establishing a precedent for future cases.

A year after *Gebser,* the Court further expanded the precedent of institutional liability under the scope of Title IX to cover cases of student-on-student sexual harassment in *Davis v. Monroe County Board of Education.*[54] Rather than holding a school liable for the acts of the accused, *Davis* makes clear that a university is only liable for damages when its own actions are so irresponsible as to result in discrimination.[55] Under *Davis,* an aggrieved party must show that the academic institution "(1) had actual knowledge of (2) and was deliberately indifferent to gender-based harassment that is (3) so severe, pervasive, and objectively offensive as to (4) deprive the plaintiff of access to educational opportunities, and that (5) occurred in a context, and at the hands of a harasser, over which the defendant exercised substantial control." [56] Though *Davis* sets principles as to what criteria needs to be met to make a claim under Title IX, it fails to clarify what exactly is an appropriate response by an institution following student-on-student sexual harassment and raises the standard of proof that needs to be met when a plaintiff chooses to file a case against the school.

D. Standards Outlined by Title IX for How Schools Should Respond to Sexual Misconduct

Throughout the forty-six years since Congress passed Title IX, the DoED has periodically issued administrative guidelines to help explain a college's obligations to comply with the administrative aspects of the Act. In 2001, the DoED published the Revised Sexual Harassment Guidance, in which it solidified the responsibility of the Office for Civil Rights to enforce the liability standards set in *Gebser* and *Davis*. With this, the Department asserted that it recognizes that sexual assault/harassment to be discrimination that falls under the

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[53] *Id.*
[54] Davis v. Monroe Bd. of Ed. 526 U.S. 629, 644-45 (1999).
[55] Peter Baumann, *Deliberate Indifference: How to Fix Title IX Campus Sex-Assault Jurisprudence*, 106 Geo, L.J. 1139, 1160 (2018).
[56]Davis v. Monroe Bd. of Ed. 526 U.S. 629, 644-45 (1999).

scope of Title IX, on the basis that it can impact a student's access to educational opportunity,[57]upholding the precedent set in *Alexander v. Yale*.[58]

In an attempt to further clarify a school's responsibility to address sexual violence, in the 2011 DCL, the OCR provided further explanation as to what was outlined in the 2001 guidance, stating that:

> Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must: (A) Disseminate a notice of nondiscrimination; B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and (C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.[59]

This letter reaffirmed the idea that federally funded institutions, including those whose students receive federal financial aid, have a responsibility to comply with legislative guidance dealing with Title IX. After stating a school's obligation to respond to sexual harassment, the DCL discussed procedural requirements for a university following an allegation of sexual harassment such as the publication of a notice of nondiscrimination, the designation of a Title IX coordinator, and the publication of a grievance procedure. Additionally, the DCL also established several other requirements for a prompt and equitable investigation, including a notice to students and others of the grievance procedures, an appropriate and impartial investigation of complaints, a reasonable time frame, and a notice of the end result of the investigation. However, it is important to note that though the DCL highlighted key aspects of proper Title IX investigations, it still does not set a uniform system/timeline for an institution to follow after an allegation of sexual misconduct. [60]

More recently, the DoED under the Trump administration issued the *2017 Interim Guidance on Campus Sexual Misconduct* (this document is also referred to as the 2017 Q&A on

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[57]Jessica Davidson, *Current Developments in Immigration Law: Changing Title IX Enforcement Under Secretary DeVos and the Impact on Immigrant and Undocumented Students*, 32 Georgetown L.J. 153 (2018) https://www.law.georgetown.edu/immigration-law-journal/wp-content/uploads/sites/19/2018/05/32-1-Changing-Title-IX-Enforcement-Under-Secretary-Devos-and-the-Impact-on-Immigrant-and-Undocumented-Students.pdf.

[58] Alexander v. Yale, *supra* note 46.

[59]*Dear Colleague Letter*, *supra* note 18, at 6.

[60] Sara O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. Pitt. L. Rev. 511, 542 (2018).

Campus Sexual Misconduct). In this document, the OCR established that a Title IX investigation does not have a set timeline for how/when it should be completed. The OCR states that it will "evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution" — though it does not clarify what is entailed for an investigation to constitute the aforementioned qualities.[61] Additionally, the interim guidance notes that an investigation into an allegation of sexual assault should place the burden on the school, not the accuser, to gather evidence to determine whether sexual assault has or has not occurred. Lastly, the interim guidance establishes that a university has a choice between using the "preponderance of the evidence" standard or the "clear and convincing evidence standard" in the adjunction of Title IX in the context of sexual misconduct.[62] All in all, instead of providing more stringent standards for a university's role in on campus sexual misconduct, by including a choice between two different standards of evidence, the 2017 Interim Guidance has simply further added confusion to the already flawed and unclear process.

Part II: The Problems with the Application of Title IX Across College Campuses

A. Lack of Legislative Guidance

Despite efforts made over the years by the DoED to clarify the role that universities should play in instances of peer-on-peer sexual misconduct, an overall lack of legislative guidance surrounding Title IX remains. The DoED does not set out specific guidelines for how a Title IX investigation should proceed or who should conduct the investigation, stating that it will depend on the case at hand. As a result, colleges and universities have been left to to formulate a system at their discretion that complies with the bare guidelines set by the DoED.[63] As noted by Nicole Smith in 2016 in an article titled *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct,* colleges' approaches to handling sexual misconduct on campus are sometimes categorized by some scholars [or at

[61] Q&A, *supra* note 21 at 3
[62] Q&A, *supra* note 21.
[63] Nicole E. Smith, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 Columbia L.R. 961 (2016) https://columbialawreview.org/content/the-old-college-trial-evaluating-the-investigative-model-for-adjudicating-claims-of-sexual-misconduct/.

least one scholar] as either an "investigative model," "a disciplinary-hearing model," or a "combined investigative and disciplinary-hearing model." [64] These three different approaches to the adjudication of Title IX cases create variances in who the investigative burden is delegated to (whether it be one person or a panel) and in how investigative information is used. [65] Consequently, the lack of guidance from the DoED has left schools with significant flexibility in applying the loose standards for dealing with sexual misconduct resulting in a lack of resolution in many cases for either the accused or the accuser. [66]

This lack of guidance also includes a lack of clear punitive standards for what should be done if the accused is found guilty. Though the OCR does state that if the accused is found guilty of sexual violence, sanctions can be issued, there are no guidelines as to what types of sanctions are considered appropriate.[67] Typical punishments range from the very soft hand slap of writing an apology letter, making a presentation to a campus advocacy group, or writing a research paper on sexual violence to the more serious expulsion.[68] Consequently, there is a lack of uniformity across the country as to what punishment is appropriate for a certain wrongdoing which could be interpreted as a violation of equal justice under the law, guaranteed by the Constitution.[69]

B. Lack of Clarification as to what a "Prompt and Equitable" Investigation Entails

Another element that has resulted in issues adjudicating Title IX is the lack of clarification as to what is considered a "prompt and equitable" investigation under Title IX. As the OCR states in the *2017 Interim Guidance on Campus Sexual Misconduct*, "There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution."[70] This lack of guidance surrounding the timeframe has given schools too much latitude in deciding when a claim should be handled. Consequently, cases can be left unresolved for excessive amounts of time, as found in

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[64] *Id.* at 954.
[65] *Id.*
[66] *Id.*
[67] Q&A, *supra* note 21, at 34.
[68] Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, Ctr. for Pub. Integrity (2010), http://www.publicintegrity.org/2010/02/24/4360/lack-conse quences-sexual-assault.
[69] U.S. Const. amend. XIV, § 2.
[70] Q&A, *supra* note 21, at 3.

Williams v. Board of Regents, where a school district took eight months to respond to a report of gang rape. [71] Yet, despite the fact that the DoED has not issued guidelines on the timeline for an investigation, schools can still be held liable for not conducting an investigation that is considered to be prompt in the eyes of the OCR. This occurred during OCR's 2013 investigation into the Palo Alto Unified School District. [72] The court found that district failed to respond "promptly and equitably" to claims made by students under the scope of Title IX, though there was no mention as to what exactly was considered to be a reasonable timeframe for an investigation.[73] This discrepancy in time frame ultimately is at the detriment to both the accused and the accuser.

C. High Standard of "Deliberate Indifference"

In *Gebser,* the standard of deliberate indifference was established by which a university could only be held liable for an instance of sexual misconduct if "an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance."[74] Many critics suggest that this high standard "minimizes universities' incentive to comply with the regulations for prevention of and response to sexual harassment unless the Office for Civil Rights of the Department of Education initiates an enforcement action."[75] This is due to the fact that this high bar of proof makes it more difficult to prove an academic institution was negligent, thereby lowering the chance that a student would be successful in bringing claims against a university for mishandling an instance of sexual misconduct.[76] Furthermore, under the high standard of deliberate indifference, an academic institution is not mandated to resolve every report of sexual misconduct, as noted by the Smith in *Title IX and Sexual Violence on College Campuses: The Need for Uniform on-Campus*

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[71] Williams v. Bd. of Regents, 477 F.3d 1282, 1297 (11th Cir. 2007**).**

[72] Laura Faer - OCR, *Letter to Dr. Glenn McGee from the OCR*, Department of Education, March 8, 2017), available at https://www.pausd.org/sites/default/files/pdn-news/attachments/PAUSD-OCRFindings-3-8-17.pdf

[73]Jacqueline Lee, *Feds: Palo Alto schools failed to promptly act on sex harassment complaints*, The Mercury News (California), March 17, 2017, available at https://www.mercurynews.com/2017/03/16/feds-palo-alto-schools-failed-to-promptly-act-on-sex-harassment-complaints/

[74] *Gebser, at 90.*

[75] A. J. Bolan, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86 Geo. Wash. L. Rev. 804, 838 (2018).

[76] *Id.*

Reporting, Investigation, and Disciplinary Procedures,[77] as it only requires the school to "respond to known peer harassment in a manner that is not clearly unreasonable."[78] Under this precedent, as long as the incident had been "addressed in some way, the school is likely to be protected from Title IX liability."[79]However, the DoED fails to provide clarification as to what delineates a reasonable response to an accusation of sexual misconduct.

D. *Issue with the "Substantial Control" and "Actual Knowledge" Principles*

In accordance with DeVos' proposed guidance for Title IX, a university does not have jurisdiction over spaces that fall outside of campus such as off-campus housing and off-campus fraternity houses.[80] This concept is based on the principle of "substantial control," which was established in *Gebser* and reaffirmed in *Davis*. In a suit filed by two women against the Kansas State University regarding an off campus assault at a party at a wildlife area near campus (Pillsbury Crossing) and an off-campus fraternity house, the court found that "Kansas State did not have substantial control over both the assault at Pillsbury Crossing and the assault in the off-campus fraternity house," therefore the school could not be held liable for not responding to the assault.[81] Nonetheless, the substantial control principle arguably prevents investigations of off-campus incidents which in turn creates a hostile learning environment, thereby resulting in unequal access of the educational opportunities that are guaranteed by Title IX.[82]

As established by *Gebser* and reaffirmed in *Davis*, an academic institution with "actual knowledge" of an incident and who has chosen not to act is "deliberately indifferent."[83] Furthermore, under the DeVos proposal, an accuser has to report the instance of sexual misconduct to "an official who has the authority to institute corrective measures" for an academic institution to have "actual knowledge."[84] Consequently, under this guidance, if a student reports an incident to someone at the school who does not hold this power, the school cannot be held liable. However, it is unclear what type of employees are considered

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[77] Smith, *supra* note 31, at 164.
[78] *Davis*, 526 U.S at 644-45.
[79] Smith, *supra* note 31, at 164.
[80] Notice of Proposed Rulemaking, *supra* note 22.
[81] Baumann, *supra* note 55, at 1154..
[82] Baumann, *supra* note 55, at 1158.
[83] *Id.* at 1154.
[84] Notice of Proposed Rulemaking, *supra* note 22, at 16.

to have "the authority to institute corrective measures." As a result, like much of the other aspects of the guidance issued, it is left up to the institution to decide who is considered to be an individual with these powers.

Part III: Developing Comprehensive Guideline to Interpreting Title IX

It is imperative that the DoED formulates a more comprehensive system that details the protocol for universities to follow in the event of a sexual misconduct allegation. This framework could ultimately be issued in the form of guidance, similar to the 2011 DCL, and should work in conjunction with the grounds laid out by Title IX. This model should consist of specific guidelines clearly delineating procedures for, but not limited to, notice of sexual misconduct, investigation, and sanctions, and should ultimately clarify an academic institution's obligation to act.

The first element of this framework is the development of a uniform system for filing notices of sexual misconduct. In accordance with the DeVos proposal, in order for a university to have "actual knowledge," an incident of sexual misconduct must be reported to a member of the university that has "the authority to institute corrective measures."[85] However, the proposal fails identify which employees essentially have this power. Thus, it is imperative that the DoED clarifies what officials are considered to have this authority, and for academic institutions to clearly communicate the officials to its students. Furthermore, once an official who has this power has been notified, academic institutions must then file a formalized written notice of sexual misconduct through the Title IX office at the institution. In the past, the main question in Title IX suits is whether the university had actual knowledge of the issue at hand.[86] Hence, a uniform procedure that documents when a university has been notified of an incident, will eliminate this grey area of "deliberate indifference" that was set forth in *Davis*. [87] Furthermore, the OCR should also lay out procedural guidelines

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[85] *Id.*
[86] Smith, *supra* note 31, at 170.
[87] *Davis*, 526 U.S at 644-45.

for how students should be notified of an allegation made against them, specifically stating what to do in the event that an alleged victim chooses to remain anonymous.[88]

The Office of Civil Rights also should use the private sector as a model, and require universities to outsource the fact finding portion of their investigation to independent institutions such as Rape Crisis Centers. Though some may argue that the criminal justice system is better equipped to deal with on-campus sexual misconduct rather than universities, as pointed out by Ellman-Golan in *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, it is important to note that "the criminal justice system struggles to prosecute rape, and that much of the conduct covered by Title IX—such as sexual harassment—does not rise to the level of a crime."[89] In instances where the actions that occur do not rise to the level of a crime, academic institutions have the important ability to prevent future harm to a student from occurring, whether it be by providing academic or housing accommodations.[90] Nevertheless, the handling of reports of sexual misconduct requires the use of trained officials with extensive knowledge of the law and methods to derive evidence — resources that most academic institutions don't possess.[91] Thus, in the interest of conducting an in-depth and unbiased investigation, the OCR should require universities to outsource the fact-finding portion of their investigation.[92] Under this model proposed by Ellman-Golan, academic institutions would contract independent centers such as rape crisis centers to uncover evidence.[93] Though the fact-finding portion of this process would be left up to an outside entity, the school's Title IX coordinator would determine what to do with the information found.[94] This approach is similar to what has occurred in the private sector at companies such as CBS, where the board of directors chose to hire outside legal counsel to investigate reported instances of misconduct in an effort to alleviate the investigative burden on the company and to eliminate bias in the investigative process.[95] This system would guarantee students the right to a fair and unbiased investigative process

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[88] Smith, *supra* note 31, at 170.
[89] Ellman-Golan, *supra* note 42, at 171.
[90] *Id.*
[91] Smith, *supra* note 31, at 173.
[92] Ellman-Golan, *supra* note 42, at 181.
[93] *Id.* at 182.
[94] *Id.*
[95] Claire Atkinson, CBS board of directors to hire outside counsel for misconduct investigation. NBC News (2018), https://www.nbcnews.com/news/us-news/cbs-board-discuss-allegations-against-ceo-les-moonves-n895736 (last visited Jan 26, 2019).

while simultaneously taking away the investigative burden from the university. Furthermore, within this protocol, the OCR needs to issue a list of approved sanctions and guidelines as to what measures are appropriate for certain wrongdoings.[96]

Moreover, it is vital that the OCR provide a timeline for the entire process, from the moment a student submits a claim to the resolution of the incident, possibly formulated after previous "model" Title IX cases to clarify what exactly a prompt investigation looks like. The Department of Education ought to model this timeline off of universities that currently have stringent procedural timelines for handling such incidents. By providing a timeframe, the DoED would be reaffirming a university's obligation to promptly address sexual misconduct instead of the current system which allows academic institutions to proceed with a timeframe that is most convenient to them at the expense of both the accuser and the accused.

Within this comprehensive guideline, it is imperative that the DoED provides clarification as to what an academic institutions' obligation is to act in instances of sexual misconduct both on-campus and off-campus. In accordance with *Davis,* schools are not mandated to resolve every instance of harassment,[97] but are only obligated to "respond to known peer harassment in a manner that is not clearly unreasonable." [98] Yet the OCR fails to provide a clear example of what a reasonable response entails. Thus it is vital that the OCR issues a list of standard offenses under Title IX and what it would consider to be an appropriate response for a university to take in each incident.

With respect to off-campus sexual misconduct, it is unreasonable to expect universities to monitor what occurs outside their jurisdiction. Despite this, schools must play a role in addressing incidents of off-campus sexual misconduct, if the victim wishes, to ensure that what has transpired does not "create a substantially hostile environment on campus that 'deprive[s] the victim of access to educational opportunities'" which are guaranteed by Title IX.[99] Actions in this situation could be, but are not limited to, counseling and changes in academic schedules or living conditions.[100] Though the university did not

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[96] Smith, *supra* note 31, at 172.
[97] Baumann, *supra* note 55, at 1150.
[98] Davis at 648–49.
[99] Baumann, *supra* note 55, at 1158.
[100] *Id.*

have "substantial control" over the incident, and cannot thus be held liable for it, peer-on-peer sexual misconduct can hinder one's access to the educational opportunities that are afforded by Title IX regardless of where the incident occurred.[101] Thus a university should be held accountable for deliberate indifference for incidents that that occurred outside its jurisdiction, if an incident impairs a students' access to what is guaranteed by Title IX.[102]

Conclusion

As it exists today, Title IX in the context of sexual misconduct fails to provide a comprehensive protocol for an academic institution to follow in the event of an incident. Though the OCR has made genuine attempts to provide clarification as to what falls under the jurisdiction of Title IX, it has ultimately failed to clarify what exactly an academic institution should do in the event of peer-on-peer sexual misconduct. Thus, it is imperative that the DoED formulates a more complete and less adaptive system that is comprised of more extensive procedures for universities to follow to ensure the protection of the rights of both the accuser and the accused.

[101] *Id.*
[102] *Id.*

Health Care Cybersecurity: Data Security in Medical Devices

Maiya Kondratieff

Introduction

Technology is, and will continue to, advance at a rapid pace. This progression is especially evident in the health care industry, where medical technology continues to evolve. While beneficial to patient health, this evolution poses new threats to the cybersecurity of the health care industry and the security of patient data. In 2013, a senior Federal Drug Administration (FDA) official warned, "We are aware of hundreds of medical devices that have been infected by malware…it's not difficult to imagine how these types of events could lead to patient harm."[1] A 2017 government document titled *Report on Improving Cybersecurity in the Health Care Industry* found that "health care cybersecurity is a key public health concern that needs immediate and aggressive attention."[2]

According to the Federal Food, Drug, and Cosmetic Act, a medical device is defined as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article"[3] to diagnose, cure, or treat a disease.[4] Although the advancement of medical devices is beneficial to the health of patients, increased connectivity renders these devices more susceptible to cybersecurity threats. When these threats are realized, they prove costly to both consumers and companies. In 2013 alone, consumers

[1] Christopher Weaver, *Patients Put at Risk By Computer Viruses*, WALL ST. J. (June 13, 2013), https://www.wsj.com/articles/SB10001424127887324188604578543162744943762?ns=prod/accounts-wsj.

[2] EMERY CSULAK ET AL., REPORT ON IMPROVING CYBERSECURITY IN THE HEALTH CARE INDUSTRY 2 (2017).

[3] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321 (2012).

[4] *Id.*

spent almost twelve billion dollars on expenses associated with compromised medical insurance records.[5]

The central vulnerability lies in the modern network and wireless capability of medical devices.[6] Threats may include data breaches, data corruption and manipulation, or data loss, with web and database servers, as well as software applications, being points of vulnerability for medical devices.[7] The motivation of these cyberattacks can range from financial aspirations to cyberterrorist aims.[8] In 2016, Hollywood Presbyterian Medical Center was a victim of a financially motivated attack, in which the hospital's computers were infected with ransomware, malware that holds data "hostage" until a ransom is paid.[9] Hollywood Presbyterian paid the hackers and retrieved its data, but a similar attack at Erie County Medical Center in New York left six thousand computers without data and cost the hospital over ten million dollars in hardware, software, overtime compensation, and lost revenue.[10] These security issues can have an impact on personal medical devices as well. In 2013, former Vice President Dick Cheney's pacemaker was stripped of its wireless functions amid concerns the device could be hacked in an assassination attempt.[11] Similarly, in 2017, Abbott's implantable cardiac pacemakers were recalled by the FDA after officials found that the devices had the potential to be exploited and modified by unauthorized users.[12]

Today, cybersecurity efforts in the health care industry are largely viewed as an afterthought and an IT concern instead of "a solution that can help the patient."[13] Accordingly, in 2015, the health care and public health sector encountered the most data

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[5] BARBARA FILKINS, HEALTH CARE CYBERTHREAT REPORT: WIDESPREAD COMPROMISES DETECTED, COMPLIANCE NIGHTMARE ON HORIZON 5 (2014).

[6] Patricia A.H. Williams & Andrew J. Woodward, *Cybersecurity Vulnerabilities in Medical Devices: a Complex Environment and Multifaceted Problem*, 8 MEDICAL DEVICES: EVIDENCE AND RESEARCH 305, 307 (2015).

[7] *Id.* at 309.

[8] *Id.*

[9] Vanessa Romo, *As Atlanta Seeks To Restore Services, Ransomware Attacks Are On The Rise*, NPR (March 30, 2018), https://www.npr.org/sections/thetwo-way/2018/03/30/597987182/as-atlanta-seeks-to-restore-services-ransomware-attacks-are-on-the-rise.

[10] *Id.*

[11] Andrea Peterson, *Yes, Terrorists Could Have Hacked Dick Cheney's Heart*, WASH. POST (October 21, 2013), https://www.washingtonpost.com/news/the-switch/wp/2013/10/21/yes-terrorists-could-have-hacked-dick-cheneys-heart/?noredirect=on&utm_term=.488c9e4ee7ba.

[12] *Firmware Update to Address Cybersecurity Vulnerabilities Identified in Abbott's (formerly St. Jude Medical's) Implantable Cardiac Pacemakers: FDA Safety Communication*, U.S. FOOD & DRUG ADMIN. (August 29, 2017), https://www.fda.gov/MedicalDevices/Safety/AlertsandNotices/ucm573669.htm?mod=article_inline.

[13] CSULAK, *supra* note 2, at 9.

breaches out of the sixteen critical infrastructure sectors.[14] Moving forward, cybersecurity of medical devices and software must be viewed critically, as "[i]n addition to data security and privacy impacts, patients may be physically affected (i.e., illness, injury, death) by cybersecurity threats and vulnerabilities of medical devices."[15]

While extensive legislation currently regulates the healthcare industry and the public's electronic data, advancements in technology have pushed, and will continue to push, the scope of these regulations. As the healthcare industry and personal medical devices have continued to evolve, related legislation has been amended and new legislation has been passed. However, this legislation has progressed at a slower pace than both medical technology and the sophistication of threats attempting to exploit health care data. The content and scope of current legislation is inadequate given the importance and privacy of medical data, as well as the variety of entities in the industry. Thus, regulation of the public's health care data must be comprehensive and free from ambiguity regarding what entities are regulated. To ensure this, additional legislation is needed to increase and streamline medical data protection.

This article will examine the tension between the health care industry and cybersecurity regulations concerning medical devices and software. In Part II, current legislation regulating the security of health care data will be examined. Part III will discuss concerns regarding when entities that possess healthcare data fall within, and outside of, current legal definitions. The scope of these legal definitions results in ambiguities concerning the relevance of different legislative and regulatory bodies. Part IV will examine proposed legislative efforts to increase device security and provide policy recommendations.

I: Legislative Background

A. Federal Food, Drug, and Cosmetics Act

The Federal Food, Drug, and Cosmetics Act (FD&C Act) defines a medical device as "an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or

[14] CSULAK, *supra* note 2, at 18.
[15] CSULAK, *supra* note 2, at 16.

other similar or related article, including any component, part, or accessory"[16] that is either recognized by the National Formulary or United States Pharmacopeia, or is

> intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or… intended to affect the structure or any function of the body of man or other animals, and which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes.[17]

The applicability of software to this definition was clarified by the 21st Century Cures Act, which excludes software that provides "administrative support of a health care facility," is used "for maintaining or encouraging a healthy lifestyle and is unrelated to the diagnosis, cure, mitigation, prevention, or treatment of a disease or condition," serves "as electronic patient records," or is designated "for transferring, storing, converting formats, or displaying clinical laboratory test or other device data and results" from this definition.[18]

B. The Health Insurance and Accountability Act

The Health Insurance and Accountability Act of 1996 (HIPAA) provides the legislative groundwork for the medical industry.[19] Under Title II Subtitle F, HIPAA aims to support the digitalization of health care information through the establishment of "standards and requirements for the electronic transmission of certain health information."[20] These standards must be suitable for financial or administrative transactions, in order to decrease administrative costs and increase the operational ability of the health care delivered.[21] Under Subtitle F, a health plan, health care clearing house, or a health care provider ("covered entities") that completes an electronic transaction of health information[22] must "maintain reasonable and appropriate administrative, technical, and physical safeguards."[23] These safeguards extend to the protection "against any reasonably anticipated…threats or hazards

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[16] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321 (2012).
[17] 21 U.S.C. § 321 (2012).
[18] 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1130-31 (2016).
[19] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.
[20] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2021.
[21] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2025.
[22] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2023.
[23] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2026.

to the security or integrity of the information…or unauthorized uses or disclosures of the information." [24] In addition to these safeguard protections, HIPAA mandates recommendations for individually identified health information privacy standards to be made by the Secretary of Health and Human Services.[25] Individually identifiable health information is defined as any information that is "created or received by a health care provider, health plan, employer, or health care clearinghouse," or "relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual" that could identify, or reasonably be believed to be used to identify, the individual.[26] HIPAA also mandated that legislation be created concerning the standards of transactions pertaining to individually identifiable health information within thirty-six months.[27] Since Congress failed to do so, the Secretary of Health and Human Services drafted and submitted standards, which became the Standards for Privacy of Individually Identifiable Health Information and went into effect in 2001.[28]

C. Code of Federal Regulations

Title 45 Part 160 of the Code of Federal Regulations (CFR) provides the basis for both the Standards for Privacy of Individually Identifiable Health Information (HIPAA Privacy Rule) and the Security Standards for the Protection of Electronic Protected Health Information (HIPAA Security Rule).[29] This section of the CFR utilizes the same definition of individually identifiable health information[30] as the original HIPAA legislation,[31] and defines protected health information as individually identifiable health information transmitted or maintained in electronic media or in a different form.[32] A business associate is defined as an entity that executes, or helps in the execution of, activities with individually identifiable health information, which include "claims processing or administration, data

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[24] *Id.*
[25] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2033.
[26] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2023.
[27] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2033.
[28] Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82,462 (Dec. 28, 2000).
[29] 45 C.F.R. § 160.101 (2017).
[30] 45 C.F.R. § 160.103 (2004).
[31] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2023.
[32] 45 C.F.R. § 160.103 (2004).

analysis, processing or administration, utilization review, quality assurance, billing, benefit management, practice management, and repricing," or "legal, actuarial, accounting, consulting, data aggregation…management, administrative, accreditation, or financial services."[33]

D. Standards for Privacy of Individually Identifiable Health Information

The Standards for Privacy of Individually Identifiable Health Information (HIPAA Privacy Rule) was established under the Code of Federal Regulations Title 45 Part 160 and Subparts A and E of Part 164.[34] The HIPAA Privacy Rule provides regulation for covered entities which complete an electronic transaction of health information.[35] A covered entity may "use or disclose protected health information…to the individual," or "for treatment, payment, or health care operations."[36] In addition to covered entities, the HIPAA Privacy Rule allows business associates to receive protected health information from a covered entity, or for "a business associate to create or receive protected health information on its behalf, if the covered entity obtains satisfactory assurance that the business associate will appropriately safeguard the information."[37] In order for this relationship to occur, the covered entity must receive a written contract from the business associate regarding its satisfactory assurances.[38] This contract must include when the business associate may disclose or use the individual's information, including for the business associate's administrative needs or data aggregation services.[39]

E. Security Standards for the Protection of Electronic Protected Health Information

The Security Standards for the Protection of Electronic Protected Health Information (HIPAA Security Rule) are promulgated within the Code of Federal Regulations in Title 45 Part 160 and Subparts A and C of Part 164.[40] The Rule aims to create regulations

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[33] *Id.*

[34] Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 250, 82,462 (Dec. 28, 2000).

[35] 45 C.F.R. § 160.103 (2004).

[36] 45 C.F.R. § 164.502 (2011).

[37] *Id.*

[38] *Id.*

[39] See *id.* § 164.504.

[40] Health Insurance Reform: Security Standards, 68 Fed. Reg. 34, 8,334 (Feb. 20, 2003).

for a covered entity to follow regarding electronic health information.[41] The covered entity is required to:

> (1) Ensure the confidentiality, integrity, and availability of all electronic protected health information the covered entity creates, receives, maintains, or transmits. (2) Protect against any reasonably anticipated threats or hazards to the security or integrity of such information. (3) Protect against any reasonably anticipated uses or disclosures of such information. (4) Ensure compliance with this subpart by its workforce.[42]

Notably, however, the methods used to share information are left to the covered entity's discretion as long as standards are "reasonably and appropriately" implemented, and factors including the entity's size, technical ability, costs, and susceptibility to potential risks are taken into account.[43] The HIPAA Security Rule also outlines three categories of safeguards: administrative, physical, and technical. [44] Administrative safeguards are defined as "administrative actions, and policies and procedures, to manage the selection, development, implementation, and maintenance of security measures to protect electronic protected health information and to manage the conduct of the covered entity's workforce in relation to the protection of that information."[45] These safeguards include implementing "policies and procedures to prevent, detect, contain, and correct security violations."[46] Specifically, this requires an analysis of "the potential risks and vulnerabilities to the confidentiality, integrity, and availability of electronic protected health information,"[47] and the implementation of necessary efforts to "reduce risks and vulnerabilities to a reasonable and appropriate level."[48] Physical safeguards are defined as "physical measures, policies, and procedures to protect a covered entity's electronic information systems and related buildings and equipment, from natural and environmental hazards, and unauthorized intrusion."[49] Technical safeguards are defined as "technology and the policy and procedures for its use that protect electronic protected health information and control access to it."[50] These technical safeguards range

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[41] 45 C.F.R. § 164.302 (2011).
[42] See *id.* § 164.306.
[43] *Id.*
[44] *Id.*
[45] See *id.* § 164.304.
[46] See *id.* § 164.308.
[47] *Id.*
[48] *Id.*
[49] See *id.* § 164.304.
[50] *Id.*

from required elements such as unique use identification to discretionary elements like encryption and decryption.[51] In addition to the covered entity, all business associates must also carry out all three safeguard categories, in order to "reasonably and appropriately protect the confidentiality, integrity, and availability of the electronic protected health information that it creates, receives, maintains, or transmits."[52]

F. Health Information Technology for Economic and Clinical Health Act

The passing of the Health Information Technology for Economic and Clinical Health Act (HITECH Act) in 2009 significantly increased the regulations established under HIPAA.[53] Under HITECH, a business associate has the same responsibilities with respect to the administrative, physical, and technical safeguards imposed in the HIPAA Security Act as a covered entity.[54] Furthermore, HITECH requires a covered entity to notify individuals of any discovered breaches of unsecured protected health information, and requires a business associate to notify covered entities of any such breaches.[55] In addition, vendors of personal health records who are not covered by HIPAA must report any breaches, notify the individual whose information was breached, and notify the Federal Trade Commission (FTC).[56] If a third party service provider of a vendor becomes aware of a breach, the provider must also notify the vendor.[57]

G. Federal Trade Commission Act

Under Section 5 of the FTC Act, the Commission is "empowered and directed to prevent persons, partnerships, or corporations…from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[58] The Commission has used this directive to litigate against companies with

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[51] See *id.* § 164.312.

[52] See *id.* § 164.314.

[53] News Release, U.S. Dept. of Health and Human Serv., HHS Strengthens HIPAA Enforcement, https://wayback.archive-it.org/3926/20131018161347/http://www.hhs.gov/news/press/2009pres/10/20091030a.html.

[54] Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-115, 123 Stat. 260.

[55] *Id.*

[56] Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-115, 123 Stat. 269.

[57] *Id.*

[58] 15 U.S.C. § 45 (2011).

inadequate cybersecurity measures. In *FTC v. Wyndham Worldwide Corporation* (2015), the United States Court of Appeals for the Third Circuit ruled that the unfairness prong of Section 5 gives the FTC the ability to regulate cybersecurity.[59] The FTC has enacted this power as an enforcement mechanism within the medical industry. In *GMR Transcription Services, Inc., In the Matter of*, the FTC settled a complaint against GMR Transcription Services, Inc., an audio transcription service working with medical information. The FTC accused GMR of not sufficiently confirming that its service partner was implementing "reasonable and appropriate security measures to protect personal information."[60] Since the company advertised itself as implementing reasonable security measures, the FTC issued a complaint that GMR Transcription Services had violated multiple counts of the FTC Act.[61] However, in *LabMD, Inc. v. FTC (*2018), the United States Court of Appeals for the Eleventh Circuit found neglecting "to implement and maintain a reasonable data-security program" did not qualify as "a specific act or practice" necessitated by Section 5.[62]

H. The Cybersecurity Act of 2015

Title IV Section 405 of the Cybersecurity Act of 2015 aims to improve cybersecurity within health care. Such aims include the establishment of a "Health Care Industry Cybersecurity Task Force" to analyze challenges the health care industry faces and ways in which other industries mitigate cybersecurity threats.[63] The Cybersecurity Act also calls for the establishment of

> a common set of voluntary, consensus-based, and industry-led guidelines, best practices, methodologies, procedures, and processes that A. serve as a resource for cost-effectively reducing cybersecurity risks…B. support voluntary adoption and implementation efforts to improve safeguards to address cybersecurity threats.[64]

These efforts must adhere to the National Institute of Standards and Technology Act's guidelines, HIPAA, and the HITECH Act.[65]

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[59] F.T.C. v. Wyndham Worldwide Corp, 799 F.3d 236 (3d Cir. 2015).
[60] Complaint at 4, F.T.C. v. GMR Transcription Serv. (No. C-4482).
[61] Complaint at 5, F.T.C. v. GMR Transcription Serv. (No. C-4482).
[62] LabMD v. F.T.C., No. 16-16270 (11h Cir. June 6, 2018).
[63] Cybersecurity Act of 2015, Pub. L. No. 114-113, 129 Stat. 2982-83 (2015).
[64] Cybersecurity Act of 2015, Pub. L. No. 114-113, 129 Stat. 2983 (2015).
[65] *Id.*

I. 21st Century Cures Act

The 21st Century Cures Act amends the Federal Food, Drug, and Cosmetic Act's regulations regarding medical devices. Specifically, it uncouples certain medical software from being defined as a medical device by the FD&C Act.[66] Medical software for "administrative support of a health care facility," to "maintain or encourag[e] a healthy lifestyle and is unrelated to the diagnosis, cure, mitigation, prevention, or treatment of a disease or condition," that acts as "electronic patient records," or for use regarding clinical test data are no longer bound to the FD&C Act's definition of a medical device.[67]

II: Scope of Legal Definitions

A. Ambiguities in Definition: Entities

Although the Health Insurance and Accountability Act and its subsequent amendments constitute substantial bodies of legislation, the definitions they employ establish a narrow scope for regulation. The regulated body within HIPAA is the "covered entity," comprising health plans, health care clearinghouses, and providers that electronically send health information indicative with a transaction.[68] A transaction is broadly defined as the transfer of information associated with health care for administrative or financial functions.[69]

Alongside covered entities, "business associates" comprise a second body that is defined and regulated by HIPAA and related legislation. A business associate may be a "Health Information Organization, E-prescribing Gateway," or another entity that executes the transmission of routinely accessed "protected health information to a covered entity."[70] A business associate can also be an entity that provides personal health records or a "subcontractor" responsible for the management of protected health information for a covered entity.[71] The number of entities classified as business associates is substantial, with between four and ten thousand under each covered entity.[72] While the addition of the definition for business associates increased the number of entities regulated under HIPAA,

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[66] 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1130 (2016).
[67] 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1130-31 (2016).
[68] 45 C.F.R. § 160.103 (2013).
[69] See *id.* § 160.104.
[70] See *id.* § 160.103.
[71] *Id.*
[72] CSULAK, *supra* note 2, at 26.

one of the defining characteristics of a business associate is its connection to a covered entity. This relation defines a business associate as an entity that provides services on behalf of a covered entity or services directly to a covered entity.[73] Thus, if this qualification is not met, the definition, and thus regulations of, HIPAA may not apply.

This definition leads to ambiguity regarding whether an entity is considered a business associate. This is imperative, as entities that hold health information but do not qualify as a business associate are not responsible for complying with HIPAA regulations. Products such as the Apple Watch fall into this ambiguous area. The primary determinant of whether HIPAA regulations pertain to an entity lies in the direction to which health data is transferred.[74] Whether or not the information accumulated by, and stored on, the Apple Watch falls under HIPAA is contingent on whom, and to whom, the data are being transmitted and utilized.[75] Under the HIPAA Privacy Rule, covered entities and business associates are allowed to produce and receive protected health information as long as safeguards are put in place.[76] However, if a business does not have a relationship with a covered entity, the definition of a business entity will not be satisfied, thus removing requirements for any safeguards under HIPAA, and potentially making the consumer's health information increasingly vulnerable. Furthermore, when health information is collected on an individual's personal or wearable device, or when that information is inputted into an application outside of HIPAA's scope, privacy regulations become uncertain.[77] In fact, a 2016 report by the U.S. Department of Health and Human Services (HHS) found that organizations not classified as covered entities

> may not be ensuring health information is 'protected with reasonable administrative, technical, and physical safeguards to ensure its confidentiality, integrity, and availability and to prevent unauthorized or inappropriate access, use, or disclosure, as is required of covered entities and business associates by the HIPAA Rules.'[78]

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[73] 45 C.F.R. § 160.103 (2013).

[74] Paul A. Drey and Sarah Wendler, *Peeling Back the Apple Watch: Do HIPAA and the Apple Watch Go Together*?, AMERICAN BAR ASSOCIATION (Sept. 27, 2018), https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2015-2016/september/applewatch/.

[75] *Id.*

[76] 45 C.F.R. § 164.502 (2011).

[77] Drey and Wendler, *supra* note 74.

[78] U.S. DEP'T OF HEALTH AND HUMAN SERV., EXAMINING OVERSIGHT OF THE PRIVACY & SECURITY OF HEALTH DATA COLLECTED BY ENTITIES NOT REGULATED BY HIPAA 23 (2016).

Non-covered entities that may not utilize encryption or have inadequate encryption methods, fail to employ regular risk evaluations, or fail to use advanced authentication methods.[79] These entities are not accountable for a minimum level of security regulation, increasing the likelihood of these entities' operations failing to satisfy the standards set by HIPAA and not complying with the reasonable security prescribed by Section 5 of the FTC Act.[80] Moreover, differences exist among entities regulated under HIPAA and non-covered entities in terms of the use of health information for marketing purposes. Covered entities are required to receive authorization to use protected health information for marketing purposes.[81] However, non-HIPAA entities are only required to do so if the authorization is consistently part of their own terms of use agreement. Otherwise, an individual's health information may be used for unwelcome marketing tactics by third parties.[82] Additionally, depending on what type of entity information is being disclosed to, the health information may change from being covered by HIPAA to not being covered. Under the HIPAA Privacy Rule, a covered entity may disclose protected health information to the individual.[83] In this case, the protected health information is covered by HIPAA, and subject to the necessary safeguards under the HIPAA Security Rule as it is held by a covered entity. However, if the individual then chooses to disclose this information to a third party that is not a covered entity, then these safeguards and assurances under HIPAA are no longer required.[84] This indicates a significant gap in legislation that could prove harmful to the security of an individual's health care information.

B. Ambiguities in Definition: Information

As differing definitions regarding entities result in differing legislative scope, the same is true regarding varying definitions of health information. Under HIPAA, "health information" is defined as information, whether sent orally or in a written format, that "a health care provider, health plan, public health authority, employer, life insurer, school or

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[79] *Id.* at 23-24.
[80] *Id.* at 24.
[81] 45 C.F.R. § 164.508 (2007).
[82] U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 78, at 22.
[83] 45 C.F.R. § 164.502 (2015).
[84] U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 78, at 22.

university, or health care clearinghouse" generates or receives, and that involves the past, present, or future health (physical or mental), health care administered to an individual, or payment for care.[85] Building off of this definition, "individually identifiable health information" is a component of "health information" that is specifically received by a covered entity and can identify an individual, or can reasonably be used to do so.[86] "Protected health information" is individually identifiable health information transmitted or maintained by electronic media or another medium, with exclusions applying to employment records of a covered entity or specific educational records.[87] While these definitions are applicable to a significant amount of health information, the definitions, and thus the protections assured by them, are only applicable if the information is within the scope of HIPAA. If a covered entity, or a business associate under contract with a covered entity, produces or holds information that satisfies these definitions, then the information is secured under HIPAA regulations. However, if a covered entity or a business associate is not involved, the information is not protected.

Outside of HIPAA terminology, the term "Personal Health Records" (PHRs) is often applied. However, unlike the detailed HIPAA terminology, the term PHR does not have one generally accepted definition.[88] Nevertheless, the HITECH Act defines "PHR identifiable health information" as individually identifiable health information that identifies, or could be used to, identify an individual.[89] More generally, PHR is defined in HITECH as "an electronic record of PHR identifiable health information…drawn from multiple sources and that is managed, shared, and controlled by or primarily for the individual."[90] Instances in which health information may be not covered under HIPAA regulation include information disclosed by an individual to an entity not under HIPAA, such as research organizations conducting genome-sequencing, boutique clinics, or health-related social media platforms.[91] Additional circumstances include when an individual is directly given or

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[85] 21 C.F.R. § 160.103 (2004).

[86] *Id.*

[87] *Id.*

[88] MAXIMUS FEDERAL SERV., NON-HIPAA COVERED ENTITIES: PRIVACY AND SECURITY POLICIES AND PRACTICES OF PHR VENDORS AND RELATED ENTITIES REPORT 1 (2012).

[89] Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-15, 123 Stat. 270.

[90] Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-15, 123 Stat. 259.

[91] U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 78, at 21.

sold "mobile software tools" for compiling health data, also known as "mobile health" or "mHealth,"[92] or PHR.[93] Mobile health technology is displayed in fitness trackers and smartwatches that gather health data, such as the Apple Watch. This sector is especially relevant, as by 2022, 190 million wearable devices are forecasted to be shipped globally, with 63.3 percent being smartwatches and 24.7 percent being fitness trackers.[94] However, if such devices are sold directly to an individual and applications used are not from a covered entity or related business associate, the resulting health information is not constituted under HIPAA regulations, and not subject to HIPAA definitions.[95] Nonetheless, PHR does garner some protections, although they are limited in comparison to the protections covered by HIPAA. For example, vendors of PHR not covered under HIPAA are required to notify affected individuals and the FTC in the case of a security breach.[96] However, these vendors lack a standard avenue for privacy protection, so approaches often vary.[97] Some vendors utilize and promote their compliance with private companies' designated security and privacy criteria; however, these criteria vary, and fewer than half of all vendors may possess any certification at all.[98] Furthermore, unlike entities covered by HIPAA, non-HIPAA entities are not required to give individuals access to their own data.[99] In sum, the definitions distinguishing the type of data and entities handling this information greatly affect the regulations imposed on an individual's health information.

III: Scope of Regulatory Bodies

A. Regulatory Complexity: Food and Drug Administration

The span of regulatory agencies present in the medical field adds another level of complexity to the cybersecurity of medical devices. The FDA is one such administration, working to protect patient safety by ensuring medical devices are effective and safe.[100]

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[92] *Id.* at 1.
[93] *Id.* at 21.
[94] Paul Lamkin, *Smartwatches To Dominate Wearable Tech - Double Digit Growth Forecast For Industry*, FORBES (Dec. 19, 2018), https://www.forbes.com/sites/paullamkin/2018/12/19/smartwatches-to-dominate-wearable-tech-double-digit-growth-forecast-for-industry/#7a0ee35b1a4b.
[95] U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 78, at 9.
[96] 16 C.F.R. § 318.3 (2010).
[97] U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 78, at 3.
[98] U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 78, at 8.
[99] U.S. DEP'T OF HEALTH AND HUMAN SERV., *supra* note 78, at 21.
[100] CSULAK, *supra* note 2, at 12.

Owners of establishments involved in the "manufacture, preparation, propagation, compounding, assembly, or processing of a [medical] device intended for human use" are required to register and give a list of their devices to the FDA.[101] In order to regulate devices, the FDA utilizes three different device classification levels. Class I devices are subject to "general controls"[102] under the FD&C Act, which include provisions for adulterated,[103] misbranded,[104] and banned devices,[105] as well as registration,[106] notification,[107] and record and report standards.[108] Class II devices are to be regulated by "special controls" as the general controls do not provide sufficient safety and effectiveness.[109] Such controls include "performance standards, postmarket surveillance, patient registries, development and dissemination of guidelines."[110] Class III devices require "premarket approval" that affirms that the device's performance standards are reasonably found to be safe and effective.[111] In addition, makers and user facilities of medical devices must report to the FDA any situations in which their device caused, or may have contributed to, a death or instance of serious harm.[112] Under the FD&C Act, the FDA is also given authority to recall devices it finds to have the probability to "cause serious, adverse health consequences or death."[113]

Despite the regulatory capacity that the FDA holds, the agency has taken a limited approach to the regulation of "digital health technology."[114] The FDA operates a Digital Health Program, with the recognition that "[f]rom mobile medical apps and fitness trackers, to software that supports the clinical decisions doctors make every day, digital technology has been driving a revolution in health care."[115] As this revolution has progressed, the FDA has taken a targeted approach to regulation, focusing mobile medical application oversight "to only those that present higher risk to patients, while choosing not to enforce compliance

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[101] 21 C.F.R. § 807.21 (2018).
[102] 21 U.S.C. § 360c (2018).
[103] 21 U.S.C. § 351 (2018).
[104] See *id.* § 352.
[105] See *id.* § 360f.
[106] See *id* § 360.
[107] See *id.* § 360h.
[108] See *id.* § 360i.
[109] See *id.* § 360c.
[110] *Id.*
[111] *Id.*
[112] 21 C.F.R. § 803.1 (2018).
[113] 21 U.S.C. § 360h (2018).
[114] U.S. FOOD & DRUG ADMIN., DIGITAL HEALTH INNOVATION ACTION PLAN 1 (2017).
[115] *Id.*

for lower risk mobile apps."[116] Furthermore, the FDA has decided not to apply oversight to technology that "promote general wellness" or that "receive, transmit, store or display data from medical devices."[117]

B. Regulatory Complexity: Office for Civil Rights

While the FDA pursues safety and not privacy concerns, the Office for Civil Rights (OCR) oversees HIPAA's regulations regarding security and privacy.[118] As of August 31, 2018, the OCR received more than 188,562 complaints regarding HIPAA and resolved 181,350 cases, with 26,218 requiring corrective measures.[119] The most frequent reason for investigation was "impermissible uses and disclosures of protected health information," followed by inadequacy of safeguards for protected health information.[120]

To respond to complaints of possible noncompliance with HIPAA regulations, the OCR investigates, conducts compliance reviews, and provides educational outreach.[121] To resolve issues of noncompliance, the OCR pursues corrective actions, voluntary compliance, and/or resolution agreements for the covered entity in question.[122] If the case is not resolved, the OCR has the ability to "impose civil money penalties."[123] The largest such case occurred on January 29, 2015, when the business associate Anthem, Inc. discovered it had been a victim of a cyberattack aimed at "extracting data," resulting in the breach of electronic personal health information of approximately 79 million customers.[124] The OCR found that Anthem had potentially violated multiple provisions of the administrative safeguard requirements as mandated by the HIPAA Security Rule, such as failing to implement necessary measures including risk analyses, preventing the access of electronic protected

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[116] *Id.* at 2.

[117] *Id.*

[118] CSULAK, *supra* note 2, at 12.

[119] *Enforcement Highlights*, U.S. DEP'T OF HEALTH & HUMAN SERV., https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-highlights/index.html (last updated Dec. 19, 2018).

[120] *Id.*

[121] *How OCR Enforces the HIPAA Privacy & Security Rules*, U.S. DEP'T OF HEALTH & HUMAN SERV., https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/examples/how-ocr-enforces-the-hipaa-privacy-and-security-rules/index.html (last updated June 7, 2017).

[122] *Id.*

[123] *Id.*

[124] Press Release, U.S. Dep't of Health & Human Serv., Anthem Pays OCR $16 Million in Record HIPAA Settlement Following Largest U.S. Health Data Breach in History (Oct. 15, 2018), https://www.hhs.gov/about/news/2018/10/15/anthem-pays-ocr-16-million-record-hipaa-settlement-following-largest-health-data-breach-history.html?language=en.

health information by unauthorized individuals, the review of information system records, and the identification and responsive action once the breach was detected.[125] As a result of the OCR's investigation, a resolution agreement was established, leading to a "corrective action plan" for Anthem to execute, as well as a $16,000,000 "Resolution Amount" to be paid by Anthem to HHS.[126]

However, the enforcement range of the OCR is limited. Of the 188,562 complaints, 113,867 cases did not qualify for OCR enforcement mechanisms, either because the activity did not conflict with HIPAA's rules or because the entity in question was not within HIPAA's scope.[127] This is significant, as the OCR's enforcement authority ends when HIPAA's scope ends: when the entity is not a covered entity or business associate regulated under HIPAA.

C. Regulatory Complexity: Federal Trade Commission

When entities fall outside of HIPAA jurisdiction, the FTC may extend authority. Utilizing its authority under Section 5 of the Federal Trade Commission Act, the FTC is able to prevent "unfair or deceptive acts" in commerce.[128] Regarding health information, the Commission may implement this authority by pursuing businesses that are not issuing proper information about how a consumer's data are used, or by pursuing companies that violate their advertised privacy policies.[129] Such a situation occurred in *In the Matter of PaymentsMD, LLC.,* in which PaymentsMD, in conjunction with Metis Health LLC, created a service where customers had the ability to maintain an accumulation of their health records.[130] Such a service became subject to an FTC complaint, as PaymentsMD created these records by requesting health information from laboratories, pharmacies, and health plans about each customer that registered for the application, without the customer being able to clearly realize that they were authorizing such requests to third parties.[131] However, the FTC works to implement its enforcement authority on an individual, case-to-case basis, focusing on

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[125] O.C.R. v. Anthem, Case. No. 01-15-204066 (Resolution Agreement Oct. 15, 2018), https://www.hhs.gov/sites/default/files/anthem-ra-cap.pdf?language=en.

[126] *Id.*

[127] U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 119.

[128] 15 U.S.C. § 45 (2011).

[129] MAXIMUS FEDERAL SERV., *supra* note 88, at 13-14.

[130] Complaint at 2, F.T.C. v. PaymentsMD (2014) (No. C-4505).

[131] *Id.* at 7.

situations in which there are widespread violations as opposed to minute cases.[132] Despite such a system being more adaptable in comparison to the set of legislation enacted by HIPAA, the FTC's approach to enforcement does not translate into explicit regulations governing the industry of non-HIPAA entities that handle health data.[133]

IV: Policy Recommendations

A. Recommendations from the Health Care Industry Cybersecurity Task Force

As mandated by the Cybersecurity Act of 2015, the Health Care Industry Cybersecurity Task Force created a "Report on Improving Cybersecurity in the Health Care Industry" to address cybersecurity within health care.[134] The current problem facing the industry, and thus patients, is well-summarized and articulated within the report:

> The health care industry in the United States is a mosaic, including very large health systems, single physician practices, public and private payers, research institutions, medical device developers and software companies, and a diverse and widespread patient population. Layered on top of this is a matrix of well-intentioned federal and state laws and regulations that can impede addressing issues across jurisdictions. This creates the potential to develop barriers to innovation and ease of use. Within this complex network, patients must be protected from harms that may stem from cybersecurity vulnerabilities and exploits.[135]

In order to work towards a resolution, the Task Force found it crucial to "[d]efine and streamline leadership, governance, and expectations for health care industry cybersecurity."[136] The report noted the need to enhance the security of medical devices by ensuring continued support for aging devices, increasing transparency from manufacturers, and considering security risks throughout the entire lifecycle of devices.[137] Furthermore, the Task Force recommended a cybersecurity leadership position be created within the HHS, for the purpose of synchronizing action within the HHS and among other actors within the industry.[138] Additionally, the creation of a framework for minimum cybersecurity standards

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[132] MAXIMUS FEDERAL SERV., *supra* note 88, at 4.
[133] *Id.* at 6.
[134] Cybersecurity Act of 2015, Pub. L. No. 114-113, 129 Stat. 2982-83 (2015).
[135] CSULAK, *supra* note 2, at 1.
[136] *Id.* at 22.
[137] *Id.* at 28-30.
[138] *Id.* at 23.

drawn from the Security Rule and the National Institute of Standards and Technology's cybersecurity guidelines was recommended.[139] Given the complexity and ambiguity noted in Part III, this is one of the most significant routes to increase the cybersecurity of medical devices. However, while increasing security among HIPAA entities is necessary and impactful, HIPAA entities are not the only entities creating and maintaining health information of consumers. Thus, increased security measures cannot end when HIPAA's scope ends. Greater cybersecurity measures must be prevalent across both covered and non-covered entities.

B. Currently Proposed Legislation

Internet of Medical Things Resilience Partnership Act of 2017

The Internet of Medical Things Resilience Partnership Act of 2017 was introduced to the House of Representatives on October 5, 2017 and guided to the Subcommittee on Health the following day.[140] No additional action has taken place concerning the bill.[141] However, if enacted into law, the bill would require the establishment of a working group to create "voluntary frameworks and guidelines to increase the security and resilience of networked medical devices sold in the United States" for devices that could cause harm to a patient if it were to forward data to an unauthorized outside recipient.[142] The working group would publish a summary of current and proposed domestic and international "standards, guidelines, frameworks, and best practices" for these devices, as well as gaps that require new standards.[143] Overall, this act would help advise, but not require, medical device manufacturers to adopt better practices to increase the cybersecurity of their devices. While this act would potentially generate security benefits for Americans, compliance would remain voluntary, and thus passage of this legislation would not ensure increased measures would be taken to strengthen cybersecurity.

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[139] *Id.* at 24.

[140] H.R. 3985, 115th Cong. (2017).

[141] *H.R. 3985 - Internet of Medical Things Resilience Partnership Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/3985/all-actions?overview=closed#tabs (last visited Jan. 27, 2019).

[142] H.R. 3985, 115th Cong. (2017).

[143] See *id.* § 2.

Medical Device Cybersecurity Act of 2017

The Medical Device Cybersecurity Act of 2017 was introduced into the Senate on July 27, 2017, and referred to the Committee on Health, Education, Labor, and Pensions the same day.[144] No additional action has taken place following its introduction.[145] The bill, if enacted, would amend the FD&C Act.[146] A central component of the bill is the development of a cybersecurity report for medical devices that can be accessed by the FDA Secretary and entities within the health care sector.[147] The report card would convey a device's compatibility with the National Electrical Manufacturers Association and Healthcare Information and Management Systems Society's *Manufacturer Disclosure Statement for Medical Device Security*.[148] The report card would also include a "traceability matrix," redacting confidential components and noting design elements and their associated "design compensating controls."[149] Controls that mitigate common security weaknesses and give administrators industry standards to enhance cybersecurity must also be noted in the report.[150] Additionally, the occurrence and results of cybersecurity assessments on a device are required to be reported. Finally, a "cybersecurity risk assessment" and indication of security efforts in the case of a device becoming remotely accessed must be disclosed.[151] In addition to the report card, the Act requires consent for the remote access of a device by a manufacturer, as well as free updates for the cybersecurity functions of a device for a set duration of time.[152] Furthermore, the Act shifts authority to the Industrial Control Systems Cyber Emergency Response Team to examine cybersecurity vulnerabilities that possess the potential to harm or allow for data exploitation.[153]

The Medical Device Cybersecurity Act of 2017 would improve transparency concerning the security of medical devices. Through the report card, the FDA and industry entities would gain greater understanding of a device's security potential and risks. The

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144 S. 1656, 115th Cong. (2017).

145 *S.1656 - Medical Device Cybersecurity Act of 2017*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/1656/actions (last visited Jan. 27, 2019).

146 S. 1656, 115th Cong. (2017).

147 See *id.* § 2.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

cybersecurity risk assessment requirement would also bolster the safety of devices. However, the Act is not applicable to devices in which premarket approval or notification were registered prior to the enactment.[154] Thus, this legislation would still leave a vast number of medical devices without further regulation. Moreover, while a report card would be submitted pertaining to the current and future cybersecurity of the device, additional, more specific security measures are not included in this bill. As a result, the enactment of this bill would promote further awareness among industry professionals but fall short of security measure reform. Despite this, the bill is significant as it amends the FD&C Act, and thus narrows the disparity between entities covered and not covered by HIPAA.

C. International Regulation

European Union General Data Protection Regulation

The European Union General Data Protection Regulation is a comprehensive set of legislation governing "the processing of personal data" by establishments within the European Union (EU) or by establishments outside of the EU if the subjects or their behavior are within the Union.[155] Under EU Regulation, processing "data concerning health," "genetic data," or "biometric data for the purpose of uniquely identifying a natural person" is not allowed.[156] However, this process is permitted in certain cases, including when an individual provides "explicit consent" for "specialized purposes."[157] Additionally, this regulation requires the processing of an individual's data to be restricted to what is necessary and for only as long as necessary, gathered for a specific, legitimate purpose, "processed lawfully, fairly and in a transparent manner," as well as in a secure manner.[158] This security includes "appropriate technical or organizational measures" to prevent against unauthorized access or damage to an individual's data.[159] Furthermore, individuals are able to access the data that an entity has processed about them,[160] as well as have their own data erased.[161]

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[154] *Id.*
[155] Council Directive 2016/679, art. 3, 2016 O.J. (L 119) 1, 32-33 (EC).
[156] Council Directive 2016/679, art. 9, 2016 O.J. (L 119) 1, 38-39 (EC).
[157] Council Directive 2016/679, art. 9, 2016 O.J. (L 119) 1, 38-39 (EC).
[158] Council Directive 2016/679, art. 5, 2016 O.J. (L 119) 1, 35-36 (EC).
[159] Council Directive 2016/679, art. 5, 2016 O.J. (L 119) 1, 35-36 (EC).
[160] Council Directive 2016/679, art. 15, 2016 O.J. (L 119) 1, 43 (EC).
[161] Council Directive 2016/679, art. 17, 2016 O.J. (L 119) 1, 43 (EC).

The EU General Data Protection Regulation encompasses a significantly broader scope of information in comparison to the United States' industry-specific legislation regulating cybersecurity. Such an approach could help to fill the current gaps and ambiguity in the United States' system. Instead of differing regulatory systems for covered and uncovered entities, a general regulation for data security would ensure individual's valuable health information is protected regardless of who or what is handling the data. However, while such legislation is impactful for the security of user's data, it may also have negative impacts on the economic sector. In the United States, companies reportedly spent almost $7.8 billion in measures to comply with the new EU legislation.[162] Moving forward, such costs must be weighed against enacting new, more comprehensive legislation to protect Americans' health care data.

D. Expansion of the Scope of HIPAA or FTC

A possible avenue for increasing protection of health data on electronic devices would be to expand the scope of HIPAA's protections. This would require expanding the definition of a covered entity, business associate, or including a new classification for entities that fit under neither description but still require increased legislation. However, such a development would dramatically change a well-established body of legislation. The regulation created by HIPAA was created and amended to explicitly "inform and regulate the practices of institutional health care actors," and such a shift to a "patient-centric" framework would require careful consideration.[163]

A different avenue would be adding greater definition to the FTC's authority. Further defining what "unfair and deceptive acts" constitute could strengthen the security of data not protected by HIPAA. However, for this strengthening to take place, the FTC's current approach of pursuing violations that pose the most risk, as opposed to all violations, would require revision.[164] The FTC's case-by-case enforcement approach provides an incentive for businesses to comply with its Section 5 authority, but the Federal Trade

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[162] Chris A. Denhart, *New European Union Data Law GDPR Impacts Are Felt By Largest Companies: Google, Facebook*, FORBES (May 25, 2018), https://www.forbes.com/sites/chrisdenhart/2018/05/25/new-european-union-data-law-gdpr-impacts-are-felt-by-largest-companies-google-facebook/#7320bbe4d367.

[163] MAXIMUS FEDERAL SERV., *supra* note 88, at 36.

[164] MAXIMUS FEDERAL SERV., *supra* note 88, at 37.

Commission Act does not provide cybersecurity specifications for medical device manufacturers.

Conclusion

The existing legislation governing the health care industry is a component of the United States' assortment of data protection regulation. Within this patchwork system, some entities, namely those covered by HIPAA, are extensively regulated. However, outside of the scope of HIPAA, cybersecurity regulations become limited. Legislation, such as the FTC Act, has attempted to bridge this gap; however, the current authority and approach of the FTC is insufficient. As summarized in a report submitted to the Office of the National Coordinator for Health Information Technology, "[N]either the FTC enforcement actions nor HIPAA regulations currently provides adequate or complete privacy and security protections for consumer information contained in non-HIPAA PHRs."[165] The nuance and ambiguity of differing definitions regarding entities and information translate into complex and uncertain requirements and regulatory bodies. Even more worrisome, discrepancies in definition can result in little regulation at all.

New legislation is required to ensure the protection of Americans' health information. To bridge the gaps in legislation, several avenues are possible. Expansion of HIPAA or the FTC Act could bring a resolution but is unlikely and would prove cumbersome. Currently proposed legislation would increase security, but not to a necessary extent. Other international data security regulations, such as the European Union's General Data Protection Regulation, would create overarching principles, assisting in increased non-covered entity regulation. However, such measures would require a reexamination of policies and changes for all industries. Thus, the most plausible solution is enacting additional legislation regulating the cybersecurity safeguards needed for all health care devices, regardless of the entity handling the data. Such a measure is necessary given the rapid advance in technology, and thus the growing number and types of devices which store important medical data.

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[165] MAXIMUS FEDERAL SERV., *supra* note 88, at 4.

Employment Without Fear: The Constitutional and Lawful Protections for LGBTQ+ Individuals in the Workplace

Mark McKibbin

Introduction

In twenty-eight out of fifty states in the United States, an employer can fire an employee solely on the basis of their sexual orientation.[1] For individuals who identify as Lesbian, Gay, Bisexual, Transgender, Queer, or as another member of a sexual minority group (defined as LGBTQ+), living in one of these states can mean going to work plagued by the constant fear that they will be found out and terminated from their position. Statistics show that the fears of these individuals are well founded. This article will explore if workplace discrimination on the basis of sexual orientation violates Title VII of the Civil Rights Act, which protects against discrimination on the basis of sex. Additional analysis will discuss workplace discrimination on the basis of sexual orientation violates the 5th and 14th amendments of the Constitution.

Discrimination and employment termination on the basis of sexual orientation discrimination is a rampant problem. Studies by the Williams Institute at UCLA highlight that forty-two percent of Lesbian, Gay and Bisexual (LGB) individuals have endured employment discrimination, thirty-five percent have reported harassment, and sixteen percent have reported job loss. An estimated eight to seventeen percent of LGB individuals have been terminated or denied a job because of their sexual orientation. Additionally, being open about one's sexual orientation leads on average to higher levels of workplace discrimination and job loss than not being open about one's sexual orientation. Among

[1] Emily Ciccio, Teacher suspended for being gay: How this is legal in 28 states, Fox News (June 26, 2018), https://www.foxnews.com/us/teacher-suspended-for-being-gay-how-this-is-legal-in-28-states

transgender individuals, employment discrimination ranged from fifty-eight percent to seventy-two percent.[2]

There is also evidence that discrimination against sexual minorities remains underreported. LGBTQ+ individuals may not report because they do not believe that any action will or can be done about the discrimination they have experienced. They may also fear that they will out themselves to their co-workers or be fired if they report sexual orientation discrimination. Discrimination and fear of discrimination among LGBTQ+ individuals has led to higher rates of stress, unhappiness, isolation, trust issues, distress, depression, and lower confidence levels. Additionally, gay males receive less pay than straight males in the workplace, although lesbian women make about the same amount of money as straight women.[3]

The statistics show that employment discrimination against sexual minorities is neither uncommon nor mild in the workplace. Discrimination has visible impacts on the mental and emotional well-being of LGBTQ+ individuals and results in more difficulties for them to experience workplace success. Furthermore, being terminated from one's job may lead to familial instability and higher rates of poverty. In the twenty-eight states that do not have laws prohibiting discrimination on the basis of sexual orientation, many LGBTQ+ individuals will probably experience one of these negative experiences in their place of work, which will likely decrease the joy they derive from their occupation and the quality of their life.

In 2015, for the first time, the Equal Employment Opportunity Commission (EEOC), which enforces workplace discrimination laws laid out in the Civil Rights Act, recognized that "discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in

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[2] Brad Sears and Christie Mallory, Employment Discrimination Against LGBT People: Existence and Impact, en: Gender Identity and Sexual Orientation Discrimination in the Workplace, Parsippany, New Jersey: BNA Books, 2014, p. 3-6. https://williamsinstitute.law.ucla.edu/wp-content/uploads/CH40-Discrimination-Against-LGBT-People-Sears-Mallory.pdf

[3] Brad Sears and Christie Mallory, Employment Discrimination Against LGBT People: Existence and Impact, en: Gender Identity and Sexual Orientation Discrimination in the Workplace, Parsippany, New Jersey: BNA Books, 2014, p. 13-15. https://williamsinstitute.law.ucla.edu/wp-content/uploads/CH40-Discrimination-Against-LGBT-People-Sears-Mallory.pdf

violation of Title VII."[4] Title VII of the Civil Rights Act states, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[5] The EEOC provides examples that demonstrate how sexual orientation discrimination is a form of sex discrimination according to Title VII. If a lesbian employee is suspended for putting up a photo of a female partner and a man is not suspended for putting up a photo of his female partner, it "is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex" and "association discrimination" because it means that the person is being discriminated against for a particular association they have with a person of the same sex. The commission also identified "discrimination based on gender stereotypes" that defy "heterosexually defined gender norms" as a violation of Title VII.[6]

This article takes a similar stance as the EEOC on the link between sex discrimination and sexual orientation discrimination under Title VII. If someone is fired because of their sexual orientation, it means that they have a characteristic that runs contrary to the employer's beliefs of the proper characteristic of someone of a certain sex… namely, that they are exclusively romantically interested in or romantically affiliated with a person of the opposite biological sex. In the same way that Title VII prohibits the termination of a woman who makes certain lifestyle choices that the employer doesn't endorse, it should be equally unlawful for an employer to fire an LGBTQ+ person for that same reason.

The Supreme Court has not yet issued a decision on the explicit question of workplace discrimination on the basis of sexual orientation. To outline an argument about the legality and constitutionality of discrimination on the basis of sexual orientation based on Supreme Court precedent, this article will look to previous cases that have addressed similar issues, such as discrimination on the basis of sex as it relates to the experiences of

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[4] Sex Based Discrimination, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/types/sex.cfm

[5] Title VII of the Civil Rights Act (CRA) of 1964, 42 U.S.C. § 2000d, et seq.

[6] What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

women in the workplace and cases that have dealt with discrimination on the basis of sexual orientation outside of the workplace. The legal reasoning and legal statements of previous Supreme Court decisions outlawing various forms of sexual orientation discrimination support the argument that workplace discrimination on the basis of sexual orientation is unconstitutional on the basis of the Equal Protection Clauses of the 5th and 14th amendments.

Several federal courts of appeal have issued decisions on the legality and constitutionality of sexual orientation discrimination in the workplace. Appellate court rulings have conflicted on this issue, and therefore it is necessary to conduct a careful reading of the differing opinions of those courts and their rationale. Key distinctions arise based on their interpretation of Title VII and the Equal Protection Clause, or whether they ruled a certain way on a case because of the merits and evidence of an individual case. This article argues that a reading of appellate court rulings that have declared sexual orientation discrimination in the workplace a violation of Title VII leads to the conclusion that these rulings were predominantly based on the former type of reasoning, while appellate courts that made the opposite decision were predominantly based on the latter type of reasoning. Therefore, in establishing a precedent, courts of appeal that base their findings on the former type of reasoning should have more bearing on future legal questions about sexual orientation discrimination in the workplace than courts of appeal that base their ruling on the latter type of reasoning.

Firing or discriminating against an employee because of their sexual orientation violates the Title VII of the Civil Rights Act and the 5th and 14th amendments of the United States Constitution.

Part I: Background on Previous Supreme Court Rulings on Gender and Sexual Orientation Discrimination

Although the Supreme Court has yet to hear a case related to sexual orientation discrimination in the workplace, they have decided cases on issues of sex discrimination in the workplace, sexual orientation discrimination outside of the workplace, and cases the constitutionality of outlawing interracial marriage. Supreme Court rulings in all of these cases

provide insights into understanding ways sexual orientation discrimination constitutes a form of sexual discrimination and is a violation of Title VII and the Equal Protection Clause of the 5th and 14th amendments, and each of these cases has been cited in various appellate court rulings on the issue of workplace sexual orientation discrimination.

A. Loving v. Virginia: The Supreme Court Prohibits Laws Banning Interracial Marriage

In a decisive 9-0 ruling, the Supreme Court struck down all state laws banning interracial marriage as a violation of the Due Process and Equal Protection Clauses of the 14th amendment. They issued this ruling in response to the marriage between Mildred Jeter, a black woman, and Richard Loving, a white man. This couple married in the District of Columbia and then moved to Virginia. After moving, a Virginia Judge found them guilty of violating Virginia's law outlawing interracial marriage and sentenced them to a year in jail. The Supreme Court ruling vacated their conviction.[7]

B. Supreme Court Rulings Relating to Discrimination on the Basis of Sex

The Supreme Court has ruled in multiple instances that if an employer denies a person a professional opportunity or discriminates against someone in the workplace based on stereotypes that employer may have about that employee's sex, it is a violation of Title VII. In 1973, the Supreme Court agreed to hear the case of Jo LaFleur, a high school teacher in Cleveland, Ohio, after she became one of the female teachers forced by the school board to stop teaching and go on maternity leave five months before her child's birth, during which time she did not receive a salary. Additionally, the school board's policy stated that LaFleur could only come back three months after her child's birth and only if she had received written permission from her doctor.[8] The Supreme Court held that mandating that a female school teacher go on maternity leave without pay violates the Equal Protection Clause of the 14th amendment because it was unreasonable to assume that a female teacher could not perform her duties just because of her pregnancy.[9]

In a second case, *Price Waterhouse v. Hopkins*, the Supreme Court ruled in favor of plaintiff Ann Hopkins, who claimed that while working at the accounting firm Price Waterhouse, her Title VII rights had been violated through the company's refusal to approve

[7] Loving v. Virginia, 388 U.S. 1, 12 (1967).
[8] Cleveland Board of Education v. LaFleur, 414 U.S. 632, 632 (1974).
[9] Cleveland Board of Education v. LaFleur, 414 U.S. 632, 650-51 (1974).

a professional project she had already received funding for and refusing to promote Hopkins to a partnership. The Supreme Court ruled that Hopkins had been discriminated against under Title VII because her employers assumed that Hopkins's gender hindered her from completing her professional project successfully or disqualified her from receiving a promotion. However, the court also ruled that Hopkins should not receive full damages because her weak interpersonal skills, not just her sex, had contributed to some of her professional setbacks.[10] In both *Price Waterhouse* and *Cleveland Board of Education,* the Supreme Court used an employer's assumptions and stereotypes about an employee's gender to determine the legality and constitutionality of their treatment in the workplace.

Gender discrimination also violates Title VII if it creates a hostile work environment for certain employees based on sex. In *Mentor Sav. Bank v. Vinson*, Mechelle Vinson sued the Vice President of Meritor Savings Bank Sidney Taylor for subjecting her to constant sexual harassment and creating a "hostile work environment"[11] while she was employed at the bank. The Supreme Court sided with Vinson, ruling that discrimination and harassment in the workplace based on sex that creates a hostile work environment violates Title VII. The court wrote that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[12]

The Supreme Court has also found that Title VII's prohibition against sex discrimination covers same-sex discrimination in addition to cross-sex discrimination, resulting in protection afforded to men by the statute even when other men discriminate against them. Plaintiff Joseph Oncale went before the Supreme Court and successfully argued that he had been a victim of sexual harassment by his male co-workers in violation of Title VII.[13] This could also be used to demonstrate how a hostile work environment can constitute sex discrimination.

C. Supreme Court Rulings Relating to Discrimination on the Basis of Sexual Orientation

Two recent Supreme Court rulings on matters of sexual orientation provide guidance about whether people of a sexual minority are constitutionally protected from

[10] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[11] Mentor Sav. Bank v. Vinson, 477 U.S. 57, 78 (1985).
[12] Mentor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1985).
[13] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998).

workplace discrimination under the Equal Protection Clause, and are therefore included in this background section. In the past decade, the Supreme Court has soundly ruled in favor of marriage equality under the Due Process and Equal Protection Clauses of the 5th and 14th Amendment in the cases of *United States v. Windsor* and *Obergefell v. Hodges*. The first case, decided in 2012, was decided based on the situation of a woman named Edith Windsor. Windsor married Thea Clara Spyer in Canada in 2007, and upon moving to New York State their marriage was recognized. When Spyer died, she had left her estate to Windsor in her will. However, because of the Defense of Marriage Act (DOMA), the federal government tried to place $363,000 in taxes on the home that would not have been imposed if the couple had received the same marital exemption that straight couples did under federal law. The Supreme Court struck down the fine and the Defense of Marriage Act, claiming that the law imposed a "disadvantage, a separate status, and so a stigma"[14] on same-couples is a violation of the Equal Protection Clause.

In *Obergefell v. Hodges*, plaintiffs from four states that had bans on same-sex marriage claimed that the bans in their states violated the Civil Rights Act, and the Equal Protection and Due Process clauses of the 14th amendment. The Court agreed with the plaintiff's arguments and sided with these petitioners in a landmark 5-4 ruling.[15]

Part II: Background on Federal Appellate Case Law on Sexual Orientation Discrimination in the Workplace

The lack of Supreme Court precedent on the specific issue of sexual orientation discrimination in the workplace results in the need to examine the next highest federal court. The court of appeals provides these next areas to draw conclusions about whether sexual orientation discrimination in the workplace is legally or constitutionally permissible. There have been conflicting appellate court rulings on this case, with some ruling that Title VII's sex discrimination protections include sexual orientation, while some say that it does not. This section highlights seven major appellate court rulings on the issue of sexual orientation discrimination in the workplace, with three ruling in favor of prohibiting sexual orientation

[14] United States v. Windsor, 570 U. S. 1, 3 (2013).
[15] Obergefell v. Hodges, 576 U. S. 1, 28 (2015).

discrimination in the workplace and three ruling against. This section provides background on these decisions.

A. Appellate Court Decisions Ruling in Favor of Prohibiting Workplace Sexual Orientation Discrimination

The three appellate court cases that have ruled against sexual orientation discrimination in the workplace have based their decisions on the permissibility of employers firing a worker based on knowledge of and assessments about their gender identity and sexual orientation. The 11th Circuit Court of Appeals ruled in *Glenn v. Brumby* that it is inappropriate for an employer to make an assessment of the impact that gender identity of an employee will have on the workplace environment and take discriminatory actions based on that assessment. Vandiver Elizabeth Glenn claimed that her boss, Sewell S. Brumby, fired her from her job because of a medical condition she had called "Gender Identity Disorder." Glenn was undergoing a medical procedure that would allow her to become a woman.[16] When Glenn informed her supervisor Beth Yinger that she would subsequently be dressing as a woman to work and changing her name, Yinger alerted Brumby. Brumby subsequently terminated Glenn stating that Glenn's transition was "inappropriate," "disruptive," a "moral issue," and could make other workers "uncomfortable."[17] The 11th Circuit Court of Appeals ruled that Glenn's firing was prohibited by Title VII and the Equal Protection Clause of the 14th amendment.[18]

In two other cases, the appellate courts found that an individual's disclosure of their sexual orientation had been the dominant reason for their employment termination and used that reason as the basis for their ruling of whether the employment termination constituted a violation of Title VII. The first case, *Hively v. Ivy Tech Community College*, involved a woman named Kimberly Hively, who sued the Ivy Tech Community College of Indiana for repeatedly declining to renew her contract because she was a lesbian.[19] Although the college did not necessarily deny that discrimination on the basis of sexual orientation occurred, they claimed that this was not a form of discrimination protected under Title VII.[20] The Illinois

[16] Glenn v. Brumby, No. 10-14833, at *2 (11th Cir. Dec. 6, 2011).
[17] Glenn v. Brumby, No. 10-14833, at *4 (11th Cir. Dec. 6, 2011).
[18] Glenn v. Brumby, No. 10-14833, at * 7-10 (11th Cir. Dec. 6, 2011).
[19] Hively v. Ivy Tech Community College of Indiana, No. 15-1720, at *2 (7th Cir. Apr. 4, 2017).
[20] Hively v. Ivy Tech Community College of Indiana, No. 15-1720, at *8 (7th Cir. Apr. 4, 2017).

Seventh Circuit Court of Appeals disagreed, ruling that discriminating against someone for who they associate with in a particular manner is taking sex into account and is a violation of Title VII. Furthermore, discrimination based on sexual orientation was made based on an employer's determination of what proper behavior for a person of a certain sex should be. The court ruled that firing someone for being in a same-sex relationship is the same as firing someone for being a woman in that they may speak or dress in a way that the employer does not like, which constitutes discrimination.[21]

In the second case, the 2nd Circuit Court of Appeals considered the situation of Donald Zarda in *Zarda v. Altitude Express*. Zarda was a gay man who regularly participated in skydives for his work as a sort of "team bonding exercise." Before going on one of the skydives, he attempted to alleviate any discomfort by telling the woman he was skydiving with that he was a gay man. After the skydive, she then claimed that Zarda had inappropriately touched her and accused Zarda of disclosing his sexual orientation as a way of preventing her from claiming sexual harassment after the fact. After being fired for this, Zarda sued the company, stating that he denied any sort of touching and said that without the disclosure of his sexual orientation he would not have been fired.[22] The 2nd Circuit sided with Zarda, agreeing that Zarda had been discriminated against because he disclosed his sexual orientation and ruled that his employment termination was prohibited under Title VII.[23]

B. Appellate Court Decisions Ruling Against Prohibiting Workplace Sexual Orientation Discrimination

Four appellate cases have ruled against plaintiffs claiming employment discrimination on the basis of sexual orientation. Most of these cases had to do with harassment charges. In *Evans v. Georgia Regional Hospital*, Jemeka Evans, a security guard from the Georgia Regional Hospital in Savannah, claimed that she was harassed, physically assaulted, and paid less because of her status as a lesbian women. Evans claimed that she, along with some co-workers who were also not straight, were subject to unfair practices from their supervisor Charles Moss, who tried to goad Evans into leaving her job at the hospital by creating scheduling issues and unpredictable shift changes in her job. Additionally, Evans

[21] Hively v. Ivy Tech Community College of Indiana, No. 15-1720, at *14 (7th Cir. Apr. 4, 2017).
[22] Zarda v. Altitude Express, No. 15-3775, at *11-12 (2d Cir. Feb. 26, 2018).
[23] Zarda v. Altitude Express, No. 15-3775, at *69 (2d Cir. Feb. 26, 2018).

stated that Senior Human Resources Manager Jameika Powers had asked Evans about her sexuality.[24] The 11th Circuit Court of Appeals denied Evans's claim that her case was actionable under Title VII.[25] The Supreme Court declined to hear this case.

Another harassment case that the 1st Circuit Court of Appeals heard was that of Robert Higgins in *Higgins v. New Balance Athletic Shoe*. Higgins claimed that in the ten years he worked at the company New Balance Athletic Shoe, he had been called derogatory names and had been mocked for his sexual orientation as a gay man. His supervisors refused to stop the abuses, and actively participated in some cases.[26] Eventually, Higgins's complaints about the harassment led to his termination from the company. The 1st Circuit rejected Higgins's argument that his situation constituted a violation of Title VII protection against sex discrimination.[27]

In the third case, *Blum v. Gulf Oil Corporation,* a supervisor fired plaintiff Jerry Blum for what the supervisor claimed was the repeated use of the company telephone to make personal calls.[28] However, Blum refuted the claim that the underlying reason for his termination was because of his telephone calls, but because he was a Jewish white male who was also homosexual, and that he was fired for all four of these characteristics.[29] The Fifth Circuit Court of Appeals disagreed that any of these personal characteristics contributed to Blum's termination.[30]

Part III: A Legal Argument as to Why Employment Discrimination on the Basis of Sexual Orientation is a Violation of Title VII and the 5th and 14th Amendments of the U.S. Constitution

A. If Someone Falls Outside of Assumed Gender Stereotypes, They are Protected by Title VII and the Equal Protection Clause

Without a legislative change to the Civil Rights Act, the case that sexual orientation discrimination violates Title VII can only be made if a court agrees with the presumption

[24] Evans v. Georgia Regional Hospital, No. 15-15234 at *3 (11th Cir. Mar. 10, 2017).
[25] Evans v. Georgia Regional Hospital, No. 15-15234 at *16 (11th Cir. Mar. 10, 2017).
[26] Higgins v. New Balance Athletic Shoe, No. 99-1043 (1st Cir. Oct. 22, 1999).
[27] Higgins v. New Balance Athletic Shoe, No. 99-1043 (1st Oct. 22, Cir. 1999).
[28] Blum v. Gulf Oil Corporation, 597 F.2d 936 (5th Cir. Jun. 28, 1979).
[29] Blum v. Gulf Oil Corporation, 597 F.2d 936 (5th Cir. Jun. 28, 1979).
[30] Blum v. Gulf Oil Corporation, 597 F.2d 936 (5th Cir. Jun. 28, 1979).

that discrimination on the basis of sexual orientation is a form of discrimination on the basis of this sex. For this reason, the first legal argument of this article centers around why sexual orientation discrimination in the workplace is a form of sex discrimination because it relies on the gender stereotypes of the employer, which was prohibited by the Supreme Court in *Price Waterhouse v. Hopkins*. When an employer discriminates against an employee on the basis of sexual orientation, they are basing it off of their own stereotype of a person of a particular sex should be attracted to. Additionally, changing the nature of someone's employment based on a gender stereotype associated with sexual orientation has also been found to be a violation of the Equal Protection Clause.

In the *Price Waterhouse* decision, Justice William Brennan wrote for the majority that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group."[31] This statement affirms the Court's ruling that that gender stereotypes constituted sex discrimination. If an employer thinks that it is only natural for a person to love the opposite gender as their own and punishes someone for deviating from that behavior, that is a punishment based on a gender stereotype. Gender stereotypes, once again, are a violation of Title VII under this Supreme Court ruling.

In his decision, Brennan also explained how the comments of Hopkins's employers led them to their decision:

> Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations.[32]

This standard provides help in assessing cases the Supreme Court might agree to hear when considering whether cases on Title VII discrimination on the basis of sexual orientation. This case presented a clear propagation of sex-based stereotypes, which made it a good case for proponents of sex based equality in the workplace to bring before the Supreme Court.

The standard set by the Supreme Court in *Price Waterhouse* was used by the Court of Appeals in *Zarda v. Altitude Express*. They quote the test the Supreme Court laid out in *Price Waterhouse*, with the Court of Appeals writing that "if we asked the employer at the moment

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[31] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).
[32] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

of the decision what its reasons were and if we received a truthful response, one of those reasons would be [sex]."[33] In this case, the company tried to argue that there was a meaningful difference between the truthful admission "I fired him because he is gay"[34] and the admission "I fired him because he is a man."[35] The Supreme Court disagreed:

> This semantic sleight of hand is not a defense; it is a distraction….. were this Court to credit amici's argument, employers would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology. Title VII instructs courts to examine employers' motives, not merely their choice of words.[36]

A slight change in words fails to change the intent of the employment termination or the basis by which an employer chooses to enact this termination. The Court of Appeals decision makes clear that deciding to fire someone on the basis of sexual orientation operates from a paradigm of their beliefs about sex. Changing a word does not changing the employer's underlying paradigm.

In this case, the Court of Appeals affirmed the reasoning of the ACLU in their amicus brief filed for this case, where the ACLU wrote:

> Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one's sex in relation to the sex of the individuals to whom one is attracted. And bias against lesbian, gay, and bisexual people turns on the sex-role expectation that women should be attracted to only men (and not women) and vice versa.[37]

The ACLU's sound logical argument explains why sexual orientation discrimination constitutes an unlawful and unconstitutional form of sex discrimination. Additionally, the 2nd Circuit used *Zarda* to overturn an earlier 2nd Circuit decision which ruled against sexual orientation protections under Title VII, *Simonton v. Runyon*, showing an emerging legal expansion of Title VII protections that favors its inclusion of sexual orientation discrimination as an aspect of sex discrimination.[38]

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[33] Zarda v. Altitude Express, No. 15-3775, at *23 (2d Cir. Feb. 26, 2018).
[34] Zarda v. Altitude Express, No. 15-3775, at *23 (2d Cir. Feb. 26, 2018).
[35] Zarda v. Altitude Express, No. 15-3775, at *23 (2d Cir. Feb. 26, 2018).
[36] Zarda v. Altitude Express, No. 15-3775, at *23 (2d Cir. 2017).
[37] Brief of American Civil Liberties Union as Amici Curiae supporting Zarda, Zarda v. Altitude Express Inc., No. 15-3775 (2017).
https://consumerist.com/consumermediallc.files.wordpress.com/2017/07/zardaaclu.pdf.
[38] Zarda v. Altitude Express, No. 15-3775, at *3 (2d Cir. Feb. 26, 2018).

Another gender stereotype an employer might use to justify changes to or termination of someone's employment is someone's choice of dress at their workplace. In *Glenn v. Brumby,* the 11th Circuit Court of Appeals wrote that a man being fired for cross dressing is an unlawful gender stereotype:

> The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.[39]

If a person wants to dress in clothing associated with an individual of the opposite gender, both the Equal Protection Clause and Title VII allows them the ability to do so even if it falls outside what their supervisor assumes proper behavior for someone of their gender is.

In their decision in *Brumby*, the 11th Circuit cited another Court of Appeals decision, *Smith v. Salem*, as a basis for their rationale, writing that "the Sixth Circuit likewise recognized [in Smith v. Salem] that discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by Title VII and the Equal Protection Clause."[40] In *Smith v. Salem*, the 6th Circuit ruled that suspension of the transgender firefighter was prohibited because it was "based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance."[41] The 6th Circuit went on to say that "we hold that Smith has satisfied the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8 with respect to his claim of sex discrimination, grounded in an alleged equal protection violation, and we therefore reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim."[42] Both *Salem* and *Brumby* set clear precedent for ruling in favor of plaintiffs who claim sexual orientation based discrimination on the basis of the Equal Protection Clause and who say that sexual orientation discrimination is a form of sex discrimination under Title VII.

B. If Someone Offers an Irrebuttable Presumption Argument About Sex as a Justification for Changes to Someone's Employment, it is a Violation of the 5th and 14th Amendments

Sexual orientation discrimination violates the Due Process and Equal Protection clauses of the 5th and 14th amendments because it makes assumptions about someone's

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[39] Glenn v. Brumby, No. 10-14833, at *13 (11th Cir. 2011).
[40] Glenn v. Brumby, No. 10-14833, at *9 (11th Cir. Dec. 6, 2011).
[41] Smith v. Salem, No. 03-3399 (6th Cir. Aug. 5, 2004).
[42] Smith v. Salem, No. 03-3399 (6th Cir. Aug. 5, 2004).

ability to perform their job based on their gender identity. This kind of assumption has been called an "irrebuttable presumption" by the Supreme Court and was ruled to be an unconstitutional reason for changing the nature of someone's employment. In the majority opinion in *Cleveland Board of Education v. LaFleur*, the court held that assuming that a female teacher's pregnancy, which was a function of her gender, would inhibit her from performing her duties met the irrebuttable presumption standard. Justice Potter Stewart wrote that "the rules [of the company] contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary."[43]

The court ruled that an employer citing an attribute of a woman as a justification for changing someone's employment status is an "irrebuttable presumption." In the same way, citing an attribute that the employer negatively associates with someone's sexual orientation, such as who their partner is or how they dress, to make a change in someone's employment status also constitutes an "irrebuttable presumption" and would violate the due process clause of the 5th and 14th amendments. Future courts examining cases of sexual orientation discrimination should strongly consider whether an "irrebuttable presumption" was involved in an employer's decision to terminate someone's employment status because of their sexual orientation, and if such an assumption was made, should rule in favor of the plaintiff claiming unlawful sexual orientation discrimination in their place of employment.

C. The Fear of Being Fired Because of Sexual Orientation Constitutes a Disadvantageous, Severely Hostile, and Abusive Workplace Environment, in Violation of Title VII

If one accepts the argument that discrimination on the basis of sexual orientation is a form of sex discrimination, that means that the protections that Supreme Court has said that Title VII affords women against a hostile work environment also apply to sexual minorities. In *Oncale v. Sundowner Offshore Services, Inc.,* the Supreme Court wrote that "the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[44] Constant fear of being terminated or harassed specifically because of one's

[43] Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644 (1974).
[44] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998).

sexual orientation, which is a characteristic that may violate a supervisor's presuppositions about a person's sex, is a disadvantageous condition for that employee and therefore a violation of Title VII.

The court also wrote in this case that "common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[45] The fear of being able to be fired from one's job someone on the basis of sexual orientation and the power that gives a supervisor to manipulate an employee can certainly be defined as "severely hostile and abusive."[46] If someone is being subjected to a hostile work environment because of the negative opinions that others have about someone's sexual orientation, and especially if that harassment prompts an individual to leave their place of employment, that person's Title VII rights are being violated.

D. Individuals Are Not Only Guaranteed the Right to Marry, but the Ability to Exercise That Right of Marriage

The right of same-sex individuals to marry was guaranteed in *Obergefell v. Hodges*. *United States v. Windsor* struck down a law that limited many of the benefits married same-sex couples could receive. Together, these two cases signal strong support for marriage equality, which means the right of individuals to enjoy the benefits of being married. This includes the ability to be open about one's same-sex marriage or relationship in the workplace without fear of repercussions such as having one's employment terminated. Justice Kennedy wrote in *United States v. Windsor* that DOMA "forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect,"[47] as is thus a violation of the Equal Protection Guarantee. In the same way, individuals who live in states that do not protect them from being fired on the basis of sexual orientation cause them to live as married for the purpose of state law but not for the purpose of federal law.

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[45] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998).
[46] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998).
[47] United States v. Windsor, 570 U. S. 1, 4 (2013).

In *Obergefell,* Justice Kennedy wrote:

> The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry.[48]

In ruling that the right of same-sex couples to marry is protected under the 14th amendment, the Court also recognized that the 14th amendment protects the ability to exercise the right of marriage through being open about their relationship in the workplace without fear of retaliation by their employer.

This argument is especially important because it would mean that even if a future court rejected the claim that sexual orientation discrimination constitutes a form of sex discrimination under Title VII, they would still have a reason to prohibit sexual orientation discrimination in the workplace as unconstitutional based on two previous Supreme Court cases. The Equal Protection Clause protects people from being discriminated against at their place of work because of their sexual orientation, regardless of invoking an argument about gender stereotypes and Title VII.

E. If All Other Things Stay the Same and Sexual Orientation is the Deciding Factor That Causes Someone to be Treated Differently, it is a Violation of Title VII and the Equal Protection Clause.

In *Hively v. Ivy Tech Community College of Indiana*, the Court of Appeals establishes a test that helps determine if sex was the deciding factor in someone's ill treatment at their place of work. The court writes in regard to Hively, who was a woman in a relationship with a woman, that "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her."[49] The court used the Supreme Court's decision in *Loving v. Virginia* to address this issue of all other factors remained the same:

> The [Supreme] Court in *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on 'distinctions drawn according to race,' which were unjustifiable and racially discriminatory. 4 Loving, 388 U.S. at 11. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome

[48] Obergefell v. Hodges, 576 U. S.1, 28 (2015).
[49] Hively v. Ivy Tech Community College of Indiana, No. 15-1720, at *11 (7th Cir. Apr. 4, 2017).

> would be different. This reveals that the discrimination rests on distinctions drawn according to sex.[50]

The Court of Appeals considered Hively's case to be a distinction drawn according to sexual orientation. The court viewed Hively's claim as a legitimate interpretation of Title VII because if her gender had been different, she would not have experienced the same form of discrimination. In the same way that she was treated differently because of her gender, the possibility that she would not have been treated differently had she been treated as a man means that Title VII applies to her situation, and therefore Title VII applies to sexual orientation discrimination. Furthermore, if all other factors stayed the same and changing a particular characteristic that is under a protected class such as sex or race would have led to a different outcome, the discrimination is a violation of the Equal Protection Clause of the 14th amendment.

F. The Importance of Comparable Evils and Related Supreme Court Precedent

When a case relating to sexual orientation discrimination in the workplace goes the Supreme Court, the plaintiff attorney should address and counter two potential weaknesses that the opposing attorney more than likely will use. First, an acknowledgement that sexual orientation was unlikely to have been considered when the Civil Rights Act was written. Secondly, that the Supreme Court has never dealt with the issue of employment discrimination based on sexual orientation before, giving the plaintiff no Supreme Court precedent from which to rely. Typically, Justices remain hesitant to rule on these issues and instead defer these questions to being rectified by acts of Congress.

In the *Hively* decision, the Court of Appeals makes two statements that will help plaintiff lawyers rebut these arguments. The 7th Circuit writes that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[51] Though sexual orientation may not have been considered when Title VII was originally adopted to prevent sex discrimination, it certainly constitutes a comparable evil related to sex that must now be addressed in the social context of present day society.

The 7th Circuit also makes an important point about Supreme Court precedent:

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[50] Hively v. Ivy Tech Community College of Indiana, No. 15-1720, at *18 (7th Cir. 2017).

[51] Hively v. Ivy Tech Community College of Indiana, No. 15-1720, at *9 (7th Cir. Apr. 4, 2017)

> the logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.[52]

This statement in the Hively decision justifies the use of Supreme Court precedent to argue for discrimination on the basis of sexual orientation, even if they have not considered a specific case dealing with sexual orientation discrimination in the workplace. The Supreme Court can and should use previous cases that sex discrimination and marriage equality as precedent in this case because of the clear similarities between these three issues pointed out in this article.

Part IV: Examining Appellate Court Cases That Ruled Against People Who Claimed That Their Termination on the Basis of Their Sexual Orientation Violated Title VII, and Why These Cases Have Narrow Reach

Though there have been three court of appeals rulings that have ruled in favor those claiming sexual orientation discrimination under Title VII, there have also been three decisions that have ruled against those claiming sexual orientation discrimination under Title VII. However, as the following analysis will show, the latter three cases should not be given as heavy consideration as the first three cases in future cases, because the opinions of the latter three cases seem to suggest that the judges based their rulings more on the merits of the individual case than because of broader interpretations about the scope of Title VII.

A. Blum v. Gulf Oil Corporation

It appears that the court ruled against Jerry Blum's claim primarily because his case was too complicated and without a clear argument, not because of his Title VII claim. The 5th Circuit writes that Blum "contends this was a pretext and that he was fired because he was Jewish, male, white, and homosexual and was discriminated against on all four bases."[53] However, if this is examined in the context of the fifth argument of the previous section, all other things equal, it is extremely hard to contest employment termination on the basis of four different characteristics. Therefore, it seems as if the 5th Circuit's ruling is more in

[52] Hively v. Ivy Tech Community College of Indiana, No. 15-1720, at *21-22 (7th Cir. 2017).

[53] Blum v. Gulf Oil Corporation, 597 F.2d 936 (5th Cir. 1979).

regard to the merits of Blum's individual case and not a solid indication of whether Title VII prohibits discrimination on the basis of sex.

B. Evans v. Georgia Regional Hospital

In 2017, the Supreme Court declined to hear *Evans v. Georgia Regional Hospital*, the case of a woman named Jameka Evans, a security guard at a Georgia Hospital who claimed that she was fired for being a lesbian. The 11th Circuit Court of Appeals rejected Evans's claim and sided with the hospital. In their decision, the 11th Circuit explained problems it had with the evidence Evans presented:

> Even though we hold, infra, that discrimination based on gender nonconformity is actionable, Evans's pro se complaint nevertheless failed to plead facts sufficient to create a plausible inference that she suffered discrimination. See Surtain, 789 F.3d at 1246. In other words, Evans did not provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions. Id. Therefore, while a dismissal of Evan's gender non-conformity claim would have been appropriate on this basis, these circumstances entitle Evans an opportunity to amend her complaint one time unless doing so would be futile.[54]

This decision by the court seems to suggest that the court based its ruling more on the proof in the individual case than the overall Title VII standard itself. In fact, the court's inclusion of a statement about discrimination on the basis of gender non-conformity suggests that there is a basis for the illegality of discrimination under Title VII. For this reason, it could be argued that the reasoning of the court in this case is less based on whether Title VII covers discrimination on the basis of sexual orientation than the credibility of Evan's individual case.

Attorney David Long-Daniels explained the ruling this way: "The Court in Evans explicitly stated that despite the fact that claims for gender non-conformity and same sex discrimination may be brought under Title VII, it does not allow the Court to abandon the longstanding holding in Blum. Id. at *15."[55] In their decision, the appellate court also cited *Blum v. Gulf Oil Corp.* as the basis for their decision:

> Whether those Supreme Court cases impact other circuit's decisions, many of which were decided after *Price Waterhouse* and *Oncale*, does not change our analysis that *Blum* is binding precedent that has not been overruled by a clearly contrary opinion of the

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[54] Evans v. Georgia Regional Hospital, No. 15-15234 at *10 (11th Cir. 2017).

[55] Long-Daniels, David, 11th Circuit Upholds Longstanding Precedent: Sexual Orientation Claims Are Not Cognizable Under Title VII (March 16, 2017), https://www.gtlaw.com/en/insights/2017/3/11th-circuit-upholds-longstanding-precedent-sexual-orientation-claims-are-n

> Supreme Court or of this Court sitting en banc. Accordingly, we affirm the portion of the district court's order dismissing Evan's sexual orientation claim.[56]

Much of the argument of the court in *Evans* lies on the *Blum* ruling. However, because of Jerry Blum's weak and confusing case, that precedent may be easily overturned, and so the Court of Appeals should not have used it as "binding" in this case. Furthermore, this statement suggests that there is possible legal ground to prohibit sexual orientation discrimination on the basis of Title VII, but the Supreme Court is needed to weigh in on whether sexual orientation constitutes Title VII discrimination.

Even if one accepts the use of *Blum* as binding precedent for the decision in *Evans*, they must then consider the cases that came after *Evans* that dealt with the same issue. The *Evans* decision was issued before the *Zarda* or *Hively* decision and with the existence of those two cases the court's logic could be applied to say that the most recent precedent established in *Zarda* and *Hively* mandates that until the Supreme Court reaches a resolution in this case, *Zarda* and *Hively* are the binding precedent in regards to Title VII and therefore future appellate court should look to those cases as precedent to side with the plaintiffs claiming sexual orientation discrimination under Title VII.

Additionally, as in *Blum*, the 11th Circuit based their ruling in *Evans* on technical errors that Evans and her legal team made, including an improper objection by Evans and Lambda Legal's inability to help with Evans's objection.[57] These technical errors should not be used as the basis for interpreting Title VII as a whole. For this reason, this case ruling against Evans should be viewed narrowly, and is not strongly legal grounds for a larger argument of why Title VII does not prohibit discrimination on the basis of sexual orientation.

C. Higgins v. New Balance Athletic Shoe

In ruling against Robert Higgins in this case, the court wrote that "because the district court did not err in concluding, on the arguments actually presented to it, that there was no sufficient showing of a causal connection between the appellant's discharge and his complaints about conditions in the workplace, we uphold its judgment in this respect."[58]

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[56] Evans v. Georgia Regional Hospital, No. 15-15234 at *16 (11th Cir. 2017).
[57] Evans v. Georgia Regional Hospital, No. 15-15234 at *18 (11th Cir. Mar. 10, 2017).
[58] Higgins v. New Balance Athletic Shoe, No. 99-1043 (1st Cir. Oct. 22, 1999).

Like *Evans*, this case seems to be based on the court's problem with the credibility of the individual case rather than the belief of the court that Title VII does protect discrimination based on sexual orientation. Perhaps if the court had thought there was a causal connection, they would have ruled differently. Additionally, the 1st Circuit decision cites the evidence of the specific case as a strong factor in their decision:

> The record makes manifest that the appellant toiled in a wretchedly hostile environment. That is not enough, however, to make his employer liable under Title VII: no claim lies unless the employee presents a plausible legal theory, backed by significantly probative evidence, to show, inter alia, that the hostile environment subsisted 'because of such individual's race, color, religion, sex, or national origin.[59]

The discussion of Title VII in this case seems to show that with strong enough evidence, Title VII could be shown to have been violated based on sexual orientation. Nowhere in the decision does the court explicitly say that sexual orientation is not covered under Title VII.

Conclusion

The Supreme and Appellate Court cases invoked in this article about sex discrimination and sexual orientation discrimination as it relates to Title VII and the 5th and 14th amendments of the U.S. Constitution present a strong argument for why employment discrimination on the basis of sexual orientation is prohibited by the Civil Rights Act and the Constitution. If an employer or supervisor holds the belief that being part of a sexual minority makes someone less capable of doing their job, it is an "irrebuttable presumption" and a violation of the Due Process and Equal Protection Clauses of the 5th and 14th amendments. If someone is legitimately afraid of being discriminated against or fired because of their sexual orientation, it is a violation of Title VII. If sexual orientation is the deciding factor that causes someone to be discriminated against in or terminated from their job, it is a violation of Title VII and the Equal Protection Clause. If employers discriminate against an employee based on their sexual orientation because it does not fit a certain gender stereotype they hold, it is a violation of someone's Title VII protections. Additionally, one appellate court noted the importance of looking at Title VII through the lens of comparable

[59] Higgins v. New Balance Athletic Shoe, No. 99-1043 (1st Cir. 1999).

evils. Even though those who wrote Title VII may not have been explicitly thinking of sexual orientation, the intent of Title VII was to protect employees from comparable evils such as discrimination based on sexual orientation.

Furthermore, even if a court rejected the argument that sexual orientation discrimination is a form of sex discrimination, they would still have reason to outlaw sexual orientation discrimination because of the previous Supreme Court decisions in *United States v. Windsor* and *Obergefell v. Hodges*. These decisions guaranteed marriage equality, and Justice Kennedy's opinions demonstrate that marriage equality not only means the right to marry someone, but the right to be open about that marriage in the workplace in the same way that opposite sex couples can be. If someone is unable to exercise their constitutionally guaranteed right to marry in the workplace, it is a violation of the Equal Protection Clause.

This article also addresses why the three appellate court cases ruling in favor of plaintiffs claiming Title VII restrictions against sexual orientation discrimination in the workplace have more of a broad scope on future legal precedent than the three appellate court cases that ruled against plaintiffs claiming sexual orientation discrimination under Title VII. While the cases that ruled against the plaintiff's Title VII constituted a violation of sexual orientation discrimination seemed to come to their decisions because of issues the specific appellate court had with the individual case. Cases that ruled in favor of plaintiff's arguing for sexual orientation discrimination were much broader in scope, and therefore should be given greater weight if the issue reaches the Supreme Court.

For the reasons listed in this review, terminating someone on the basis of their sexual orientation violations their 5th and 14th amendment rights, as well as Section VII of the Civil Rights Act of 1964.

The Sovereignty of Indian Tribes and The Basis for United States Legal Decisions Concerning Native Americans

Ryan Nassar

Introduction: US-Tribal Relations Before Cherokee Nation v. Georgia

Since the first European contact with Native Americans over 500 years ago, Native American tribes have suffered many challenges to their existence, from massive losses of land to sizable drops in population. Soon after the United States' founding, Native Americans began to have a complicated relationship with the nascent country.[1] In July of 1787, the US Congress passed the Northwest Ordinance, laying out a method for admitting new states into the Union, specifically concerning the area that now contains Ohio, Michigan, Illinois, Indiana, and Wisconsin. Within this congressional ordinance, Congress referenced the Native Americans and their lands, stating that, "the utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed… Laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them."[2]

While the Natives were originally allowed to keep their land in the northwest for a time, circumstances differed in the southern states. At the beginning of the 19th century, the

[1] Lewis Lord, *How Many People Were Hear Before Columbus*, U.S. News and World Report, Aug. 18-25, 1997.

[2] The Northwest Ordinance, 1 Stat. 50 (1787)

Spanish still controlled Florida, yet many Americans were migrating into the territory where they were being attacked by British-backed Seminoles. Since this territory was also a safe haven for escaped slaves, the US used both these reasons to invade Florida in 1817. After four years, Spain ceded Florida to the US, which in turn meant the US was now responsible for relations with the Seminole Tribe. While the Tribe was initially given the right to hold onto its territory, President Andrew Jackson pushed for relocation of Native Americans in the southeast to Indian Territory. This led certain Seminole leaders — but not all — to sign the Treaty of Payne's Landing in 1832.[3] The treaty stated that "Seminole Indians would relinquish to the United States all claim to the lands they at present occupied in the Territory of Florida, and agreed to emigrate to the country assigned to the Creeks, west of the Mississippi River."[4] The enforcement of the ordinance still put into question the democratic nature of the treaty, since not all Seminole leaders signed it, and many from the tribe stayed to fight in the Second Seminole War that began shortly after.[5]

Since the US government gave itself the ability to order and relocate tribes at will, there was a lack of consensus on whether tribes were sovereign political entities or merely another group under the influence of the United States. This uncertainty continued for the first few decades after the revolution. However, in 1831, in *Cherokee Nation v Georgia*, Chief Justice Marshall declared Native American tribes as "domestic dependent nations."[6] This classification has since allowed for legal US government intervention in Native American politics and everyday life. However, the definition also recognized that tribes possess inherent sovereign powers therefore creating a complex legal relationship between the US and the several native tribes under its jurisdiction. For a century and a half, this complicated classification has severely impacted the economic and political stability of several hundred tribes within the US. Since many were relocated by the federal government to isolated areas with little access to economic resources, tribal governments have had difficulty carrying out social services.

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[3] Treaty of Payne's Landing, Seminole-U.S., art. 1, May 9, 1832, 7 Stat., 368.

[4] Treaty of Payne's Landing, Seminole-U.S., art. 1, May 9, 1832, 7 Stat., 368.

[5] *The Seminole Wars*, Florida Department of State, https://dos.myflorida.com/florida-facts/florida-history/seminole-history/the-seminole-wars/ (last visited Jan. 6, 2019).

[6] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831)

To rectify these severe restrictions that have been detrimental to tribal economic growth, the Supreme Court of the United States should rule on cases involving Native American tribes in a way that pushes the US government to bestow more sovereignty over tribes. This would allow tribes to gain a greater sense of political self-determination, which would help to enhance tribal governments. This stance is concurrent with the US Department of the Interior's statement affirming that the US "[acknowledges] the history of past mistreatment and destructive policies that have hurt tribal communities [and] continues efforts to restore and heal relations with Native Americans."[7] Therefore, if US legislative policy was in accord with this statement, the Supreme Court should rule on these Native American cases in a way that obliges the federal and state governments to give sufficient aid to tribes, a policy which is currently not being undertaken, while not compromising the sovereignty of tribes. Further, the US Congress, with the support of the Supreme Court, should look into a possible Constitutional amendment concerning tribes and their reclassification under US law to ensure that the rights granted to them through Supreme Court decisions cannot be taken away.

This article will begin by presenting the history of US-Native relations, as it relates to legislative actions, and how it shaped the current reservation system. It will then discuss the various definitions of sovereignty used by the US government to classify these native tribes and allow for federal and state intervention. This article will also describe specific issues faced by current tribes and how these are a result of past federal actions. Finally, it will present solutions to some issues discussed concerning various tribes' poor economic and governance performance.

Part I: History of US-Native Relations and Legal Decisions Following *Cherokee Nation v Georgia*

A. Court Cases Regarding Federal Policy Towards Tribes Following 1831

After *Cherokee Nation v. Georgia*, members of the Cherokee Nation felt defeated, seeing as they knew this ruling gave the state of Georgia and federal government a way to pass laws exclusively designated solely towards the Cherokee tribe and no other member of

7 Tribes, U.S. Department of the Interior: International Affairs, https://www.doi.gov/international/what-we-do/tribes (last visited Jan. 6, 2019).

the state. The ruling could allow Georgia to put in place laws that would curtail the ability for self-determination of the Cherokee people and harming their community.[8] Soon after this case was decided on, the Supreme Court began hearing another case, *Worcester v. Georgia*, concerning the Cherokee Nation and the State of Georgia. When Worcester, a missionary in the Cherokee Nation encouraged the Cherokee people not to emigrate, he was arrested by the State of Georgia because he would not take an oath to uphold its laws, an oath all white citizens had to take if they were in Native Territory.[9] Chief Justice Marshall delivered the Court's opinion, which sided with Worcester. Marshall stated that the Cherokee tribe is "a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia have no force and which the citizens of Georgia have no right to enter."[10]

While this originally appeared to be a victory for the Cherokee people, as this ruling gave the nation its own jurisdiction separate from that of the state, granting the Cherokee nation special legal status, this decision was met with severe resistance by the State of Georgia. After the Court's decision, officials in Georgia refused to release Worcester on the grounds that the Supreme Court decision violated the jurisdiction of the State in criminal cases. Nevertheless, he was eventually set free and it seemed, for a time, the Cherokee had won.[11] However, this victory was short-lived when, three years later, the Cherokee were removed from Georgia after some members of the Tribe signed the Treaty of New Echota, agreeing to relocate the Tribe west. However, most of the members of the tribe contested this treaty, stating that only a small minority of the tribe's population actually went to New Echota and agreed to the treaty without consulting the rest of the tribe or its leadership. Nonetheless, the tribe was removed with the full support of President Andrew Jackson.[12]

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[8] Stephen Breyer, *The Cherokee Indians and the Supreme Court,* The Georgia Historical Quarterly, 2003, at 408, 416.

[9] Stephen Breyer, *The Cherokee Indians and the Supreme Court,* The Georgia Historical Quarterly, 2003, at 408, 417.

[10] Stephen Breyer, *The Cherokee Indians and the Supreme Court,* The Georgia Historical Quarterly, 2003, at 408, 419.

[11] Stephen Breyer, *The Cherokee Indians and the Supreme Court,* The Georgia Historical Quarterly, 2003, at 408, 422.

[12] Stephen Breyer, *The Cherokee Indians and the Supreme Court,* The Georgia Historical Quarterly, 2003, at 408, 424.

While *Worcester v. Georgia* could be seen as a partial victory by the Cherokee tribe, other Supreme Court decisions show a distinct favor towards the federal and state governments. One such case is *United States v. Kagama*. After Congress passed the Major Crimes Act, a section of the Indian Appropriations Act of 1885, which granted federal jurisdiction over certain major crimes committed by natives against one another within Indian country, *Kagama* was tried by the US court system for murder against another Native American.[13] He challenged the jurisdiction on the grounds that the Major Crimes Act was unconstitutional. Here, Justice Samuel Miller delivered the opinion of the Court, which favored the United States. His opinion went on to solidify the legal right of Congress to alter the sovereignty of native tribes. Justice Miller stated that, "[Native American tribes] owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress."[14] This demonstrated a clear shift in Supreme Court policy towards Native American sovereignty and a complete retraction of any complete independence the tribes previously held.

Almost a decade after *United States v. Kagama* was decided, a similar case appeared on the Supreme Court's docket — *Talton v. Mayes*. After *Bob Talton* was charged of murder in the Cherokee Nation and sentenced to death, he filed a petition of habeas corpus on the grounds that he was deprived of liberty without due process of law because the grand jury that heard his case only consisted of five grand jurors, enough to satisfy the laws of the Cherokee Nation but not those of the United States.[15] The Court eventually decided that *Talton* was given due process because he was tried in the Cherokee Nation in a grand jury that followed the laws of Cherokee Nation.[16] The opinion went on to list several treaties that affirmed the sovereignty of the Cherokee Tribe such as the Treaty of 1835 and the Treaty of 1866. Finally, the opinion states, "As the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the Fifth Amendment."[17] This decision clearly favors tribes more than did the decision in *Talton v.*

[13] United States v. Kagama, 118 U.S. 375, 379 (1889).
[14] United States v. Kagama, 118 U.S. 375, 375 (1889).
[15] Talton v. Mayes, 163 U.S. 376, 376 (1896).
[16] Talton v. Mayes, 163 U.S. 376, 376 (1896).
[17] Talton v. Mayes, 163 U.S. 376, 384 (1896).

Mayes and declared that the rights tribes had existed before the constitution and were therefore not limited by it.

Nevertheless, this victory was somewhat short-lived, with the decision in *Lone Wolf v. Hitchcock* again diminishing Native American sovereignty some fifteen years later.[18] At the end of the 19th century, Congress attempted to change the terms of a treaty with the Kiowa, Apache, and Comanche tribes by allowing non-Indians to settle in two million acres of reservation lands, land which was previously earmarked for tribes per the agreements of the treaty. Lone Wolf filed a complaint saying that this violated the treaty that had already been agreed upon.[19] The Court eventually decided that Congress had the right to change the provisions of the treaty. Justice White stated that "when… treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress."[20] The opinion goes on to cite *United States v. Kagama,* affirming that "no Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty,"[21] and continued the Congressional right to modify these treaties. This yet again limited the sovereignty originally bestowed upon tribes and continues to allow intervention by Congress into Native American affairs.

While it appeared that federal government policy became clearer after the decision made in *Cherokee Nation v. Georgia* in 1831, federal attitude towards native tribes continued to be very unclear throughout most of the 19th and into the 20th century. While *Cherokee Nation v. Georgia* left the question of tribal legislative authority open, by declaring that tribes are not on the same footing as foreign nations with Chief Justice Marshall stating that they are "domestic dependent nation," *Worcester v. Georgia*, decided on less than a year later in 1832, prevented the state government from interfering in the affairs of the Cherokee Tribe. However, three years later, the tribe was then removed from the state when the federal government approved the signing of a treaty by a minority of the tribe. Several decades later, in 1886, the Supreme Court yet again allowed for United States' intervention in tribal affairs,

[18] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[19] Lone Wolf v. Hitchcock, 187 U.S. 553, 560 (1903).
[20] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).
[21] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

stating, in *United States v. Kagama*, that the US could prosecute Native Americans for crimes committed on tribal lands. However, this decision was altered in *Talton v. Mayes* in 1896, when Justice White stated that the Cherokee Nation does not operate under the Fifth Amendment, allowing for more legal sovereignty within the tribe. Unfortunately, less than a decade later in 1903, the Supreme Court granted more power to the US government as it relates to Native Americans in *Lone Wolf v. Hitchock*, by allowing the Senate to modify past treaties with native tribes at will. These cases, and several more, all demonstrate the fluid nature of federal attitude towards native tribes, which, as will be discussed later, has caused several issues concerning US-Native cooperation over the last few decades.

B. Specific Policies Concerning Native Americans Carried Out by the United States

The previous section of this article demonstrated how, since *Cherokee Nation v. Georgia*, the US Supreme Court has often shifted its stance on tribal sovereignty by recognizing Native American tribes' independence through one decision, and then completely reversing course a decade later in another case. Likewise, the federal government was inconsistent with the types of policies it has carried out regarding native population. Over the course of 250 years, US policy shifted from granting tribes the sovereignty and support they needed to create functioning political units, to stripping them of certain rights and attempting to absorb these groups into mainstream America.

While the courts were deciding how much sovereignty certain tribes retain, the federal government was already carrying out policies that diminished tribal sovereignty. One way the government did that was through the Bureau of Indian Affairs (BIA). Through this bureaucratic department, agents carried out the government's authority on tribal land by promising schools and instructions on farming as a way of assimilating Native Americans into the United States.[22] The BIA also carried out a process of allotment of tribal lands to individual Indians, where the federal government had the right to assign who received what piece of land on a native reservation. As stated before, this issue came up in *Lone Wolf v. Hitchcock*, and the Court affirmed that Congress had the right to not only assign, but modify the land given to members of tribes. The federal government further attempted to assimilate

[22] Richard B. Collins, *A Brief History of the U.S.-American Indian Nations Relationship*, Human Rights, 2006, at 3, 4.

natives through a process of granting them citizenship in 1924, further putting into question the sovereignty of tribes if all their tribal members were also citizens of the United States.[23]

In 1934, Congress then shifted federal policy from integration and assimilation, to a policy of Native American self-determination through the Indian Reorganization Act (IRA).[24] The act called for "home rule" by the tribes and ended the process of allotment. The act further encouraged tribal organization and activities, as well as provided revolving loan funds for tribal members. While this policy did seem beneficial at first, it had several shortcomings that did not end up benefiting the tribes.[25] Unfortunately, tribal economies did not improve through this program, with the IRA being plagued by charges of communism and antireligion as the United States developed an "America First" philosophy during WWII.[26] Furthermore, while the IRA appeared to put the tribes first and push for tribal identities, the act was built on assimilationist notions that attempted to further integrate tribes into American society by increasing their economic autonomy to later include them in state jurisdictional systems.[27]

Finally, in the 1950's and 1960's came the termination era. This was a time when the federal government was implementing a forceful effort to terminate the federal-tribe relationship. This era officially began with House Concurrent Resolution (HCR) 108.[28] This resolution stated that it was "the policy of Congress… to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States."[29] This policy took on the form of many different actions carried out by the federal government. As Charles F. Wilkinson, from the University of Colorado Law School, states:

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[23] Richard B. Collins, *A Brief History of the U.S.-American Indian Nations Relationship*, Human Rights, 2006, at 3, 4.

[24] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 144-145 (1977) (discussing shifting Congressional attitude towards Native Americans).

[25] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 144-145 (1977) (discussing effects of IRA).

[26] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 144-145 (1977) (discussing effects of IRA).

[27] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 144-145 (1977) (discussing assimilationist notions of IRA).

[28] H.C.R. 108, 83rd Cong. (1953)

[29] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 144-150 (1977) (discussing HCR 108).

> The total termination program included the following federal action: the transfer of civil and criminal jurisdiction over Indians from the tribes and the federal government to the states under Public Law 280;… the authorization for sale and lease of restricted Indian lands to non-Indians; legislative and administrative inaction regarding reservation economic development; and continued relocation programs to encourage Indian migration from the reservation to urban areas.[30]

According to Wilkinson's report, the federal government carried out several policy decisions in an effort to ultimately dismantle tribal identity and the reservation system. This further shows a US policy of decreasing the sovereignty of these tribal entities.

This policy was very effective. While termination policy never explicitly stated it would extinguish tribal sovereignty, several of the acts following this congressional policy had this notion in mind, such as imposing state judicial authority and ending state tax exemption for tribes.[31] Wilkinson later states, "The loss of the land base meant that in most cases the tribe had no geographic area over which to exert jurisdiction… no terminated tribe has continued to make laws or to maintain tribal courts to enforce any laws after termination."[32] This demonstrates a true push by those in the US Congress to effectively end tribal sovereignty, something that was in-keeping with US policy at the time, but went against certain Supreme Court policies decided on decades earlier, such as *Worcester v. Georgia* and *Talton v. Mayes*.

While there has been a string of US policy against tribal sovereignty and progress, other decisions made by the US government have demonstrated support for increasing tribal self-determination. One recent way that US government has done this has been through the enactment and implementation of the Indian Gaming Regulatory Act of 1994.[33] This act states that "an Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction."[34] This shows government support for tribal self-

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[30] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 149-150 (1977) (discussing federal termination policy).

[31] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 153 (1977) (discussing federal termination policy).

[32] Charles F. Wilkinson & Eric R. Briggs, *The Evolution of the Termination* Policy, 5 Am. Indian L. Rev. 139, 153-154 (1977) (discussing effects of the termination policy).

[33] Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (1994).

[34] Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (1994).

determination and sovereignty because it is bestowing upon tribes a privilege that most other places in this country are barred from. The act also exemplifies one way the US government is currently attempting to encourage economic development, which is clear in the wording of the act, where it states that its purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[35] This act has been very beneficial to many of the tribes who have implemented gaming facilities on their land because it has provided their governments with increased revenue, which has allowed tribes to fund programs to invest in public goods and poverty reduction.[36] Furthermore, this does demonstrate a promising change in US-Tribal cooperation.

Part II: Current State of Indian Sovereignty and Challenges Faced by Native Tribe

A. Current US Definition of Tribal Sovereignty

While the previous sections of this article have discussed how tribal sovereignty has been bestowed and revoked by the US government over the course of many centuries, there is no indisputable definition for the term 'sovereignty.' Therefore, it is important to note the various definitions of sovereignty that are generally agreed upon by the international community and how that relates to the type of sovereignty that the US government claims to recognize that tribal governments possess within its borders. According to Black's Law Dictionary, sovereignty is described as, "The supreme, absolute, and uncontrollable power by which any independent state is governed."[37] Black's definition would imply that, if native tribes are truly sovereign, they would have the final authority over all laws and regulations that govern their peoples, a characteristic that, as discussed later in the article, is not completely apparent in tribes.

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[35] Indian Gaming Regulatory Act, 25 U.S.C. § 2702 (1994).

[36] Randall K. Q. Akee, Katherine A. Spilde & Jonathan b. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 Am. Econ. Ass'n. 185, 196 (2015) (discussing effects of Indian Gaming Regulatory Act).

[37] James A. Casey, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty,* 79 Cornell L. Rev. 404, 406 (1994) (discussing the definition of sovereignty).

Furthermore, in 1996, the United Nations passed Resolution 50/172, titled "Respect for the principles of national sovereignty and non-interference in the internal affairs of States in the electoral process."[38] Within this resolution, the United Nations gives a more concrete and modern definition of sovereignty, especially as it relates to those within the state, asserting that it is the "concern solely of peoples to determine methods and to establish institutions regarding electoral process, as well as to determine the ways for its implementation according to their connotational and national legislation."[39] The UN is affirming that, for a state to be sovereign, its people must have the ability to freely develop their system of government without external interference. This resolution further helps solidify this particular idea of sovereignty because it provides a strong international norm agreed upon by several other states.

Even though US policy concerning Native Americans continued to shift well into the 20th century, official American law dealing with Native Americans was codified in 1934 with the IRA in U.S. Code § 5123, and is still in effect today.[40] According to this code, Indian tribes are allowed to adopt their own constitution and bylaws as long as they are "approved by the Secretary [of the Interior]."[41] This indicates that the federal government retains strong control over tribes as it relates to the laws by which tribes are governed. Furthermore, this law states that the Secretary of the Interior must also "review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws."[42] This demonstrates that the federal government also has the power of interpreting the legality of the laws that these various tribes want to create, further giving the federal government power over tribes. This would be contrary to the definitions put forth by the UN, which state that for a state to be sovereign, they, and their people, must solely have the highest authority on all legal issues. Given the amount of power the federal government has bestowed on itself to regulate the legal affairs of native tribes, it would indicate that the tribes are, in fact, not sovereign.

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[38] G.A. Res. 50/172, title (Feb. 27, 1996)

[39] G.A. Res. 50/172, ¶ 12 (Feb. 27, 1996)

[40] The Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. § 5123 (1994).

[41] The Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. § 5123 (1994).

[42] The Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. § 5123 (1994).

While this code gives many powers to the federal government, it also bestows certain rights to the tribes. In § 5123(e) of the IRA, the government gives the tribal councils the right "to employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the federal, state, and local government."[43] This demonstrates that the federal government is willing to recognize some aspects of tribal sovereignty, such as the ability to negotiate with various governments within the United States and to prevent any shift in ownership of their land. This is further supported in § 5123 (h) of the IRA, added in 2004,[44] which states that "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section."[45] While this part of the code does use the word "sovereign", it does not state that the tribes are entirely sovereign but merely retain sovereign power to adopt other documents, further demonstrating that tribes aren't seen as holding complete sovereign authority according to the federal government.

In Peter d'Errico's article in *The Encyclopedia of Minorities in American Politics*, he further discusses how these Indian tribes are not sovereign within the United States and how the court system worked to preserve US hegemony over tribes. He states that:

> The debate about legal authority versus political and economic power also informs the definition of sovereignty in federal Indian law. In the earliest treaties, statutes, and cases, indigenous nations were regarded as having a 'subordinate' sovereignty related to their 'right of occupancy.' Denied full sovereignty as independent nations, they were nevertheless regarded as having authority over their own relations amongst themselves — an 'internal' or 'tribal' sovereignty.[46]

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[43] The Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. § 5123 (1994).

[44] The Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. § 5123 (1994).

[45] The Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. § 5123 (1994).

[46] Peter d'Errico, *Sovereignty-A Brief History in the Context of U.S. "Indian Law," in* The Encyclopedia of Minorities in American Politics 691(Oryx Press, 2000).

D'Errico's reference to "right of occupancy," a term established in the decision made in *Johnson v. McIntosh*,[47] indicates that the federal government views tribes as only having a right to occupy the territory but not own it, which contines to set a precedent of US dominance over the tribes.[48] This would therefore allow the government to move the territory of tribes at will, something they have done. Furthermore, d'Errico states that the tribal government have the ability to control their land and people, but only with the consent of the US, something that is exemplified in 25 U.S.C. Code § 5123[49], which continues to point to the fact that the US federal government does not consider tribes as completely sovereign entities.

However, even though U.S. code has never stated that tribes are in fact completely sovereign nations, that has not stopped many bureaucratic agencies within the government from stating that they consider tribes as distinct from the federal government. On the other hand, however, these agencies' specific policies towards tribes would indicate that the agencies in fact don't consider tribes as sovereign entities. According to the Environmental Protection Agency (EPA), the "EPA recognizes and works directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land and membership, and not as political subdivisions of states or other governmental units."[50] This would indicate that this agency considers these groups as sovereign and are completely distinct from other U.S. political entities. Therefore, if tribes were fully sovereign in the ideas of this agency, the EPA would not have the same jurisdiction as they would in one of the states or cities in the US. However, the EPA states that they only give "special consideration to their interests whenever EPA's actions may affect Indian country or other tribal interests."[51] While this further demonstrates that the EPA does see a difference between state governments and tribal governments, they do not state that they would, in effect, cancel a project if it was counter to the interests of a tribe. This would put into question the actual

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[47] Johnson v. McIntosh, 21 U.S. 543, 574 (1823)

[48] Peter d'Errico, *Sovereignty-A Brief History in the Context of U.S. "Indian Law," in* The Encyclopedia of Minorities in American Politics 691(Oryx Press, 2000).

[49] The Organization of Indian tribes; constitution and bylaws and amendment thereof; special election, 25 U.S.C. § 5123 (1994).

[50] Environmental Protection Agency, *Tribal Consultation Policy Implementation Guidance Document* 2 (2013).

[51] Environmental Protection Agency, *Tribal Consultation Policy Implementation Guidance Document* 5 (2013).

sovereignty of tribes that the EPA is claiming they have, since a branch of the federal government would be able to intervene in their affairs.

Bureaucratic recognition of sovereignty is further stated in the mission of the Department of Energy (DOE). The DOE states that "Tribes are sovereign governments… The United States did not grant tribal rights, rather, tribes reserved such rights as part of their pre-existing status as sovereign nations."[52] This demonstrates that the DOE, at least in their mission statement, sees tribes as having complete sovereignty, similar to any other nation. However, they also only state that they would "Consult… with governments prior to taking actions that affect federally recognized tribal governments."[53] This is similar to the EPA's claims that they would merely consult with the tribe if their actions affect them, yet there is potential for them to carry out actions contrary to the wishes of the tribe, putting into question the agency's true definition of sovereign. Furthermore, the Department of the Interior's (DOI) policy on consultation with Indian Tribes never states that tribes are sovereign. It merely states that the DOI would ensure that communication would be transparent in the "government-to-government consultation process."[54] While the DOI's policy does acknowledge that there is a government-to-government relationship and the tribes do have certain rights, the Department never concedes that they are sovereign. This can cause confusion between these different agencies when dealing with the tribes since there could be miscommunication over what these agencies believe tribes have the power to carry out.

B. *Current Challenges Faced by Native Tribes*

This lack of sovereignty that tribes hold, demonstrated in the last section, creates several problems. This section will examine how US law concerning tribes and past legal action has brought about some of the challenges they are facing today. This section will use the Navajo tribe as an example for some of these challenges. While not representative of the whole native population within the United States, it is one of the most populous tribes and

[52] Department of Energy, *Working with Indian Tribal Nations* 1 (2000).
[53] Department of Energy, *Working with Indian Tribal Nations* 6 (2000).
[54] Department of the Interior, *Policy on Consultation with Indian Tribes* 2 (2009).

can therefore serve as a sizable sample.[55] The Navajo Nation, itself is in a very difficult situation. According to 2010 census data, "Poverty rates on the Navajo Nation Reservation [which spans across Arizona, Utah, and New Mexico], (38%) are more than twice as high as poverty rates in the State of Arizona (15%)."[56] Furthermore, "Poverty rates are consistent for Navajo Nation tribal members residing in all three states."[57] This demonstrates that many Navajo Nation tribal members are living under very difficult circumstances not consistent with the rest of the population in the state they reside in. This discrepancy can be attributed to several factors, which will be discussed in the following paragraphs.

Location of tribal reservations is causing several issues with tribal developments. While not all Navajo live within the reservation, over half live within the borders of the Navajo Nation — almost 174,000 people.[58] Each community inside the border is dispersed among the reservation and is very distant from markets and commercial opportunities, making it very difficult for those within the nation to seek opportunity to improve their economic status. Additionally, because these communities are distant from other large urban centers, it makes it difficult for certain resources to reach this tribes, therefore, "Of the roughly 48,000 homes on the reservation, an estimated 18,000 — 37.5% —are without electricity." [59] Since the federal government declared that tribes only had a "right to occupancy" but didn't actually own the land, it gave the federal government the power to move tribes wherever they see fit. This leaves the Navajo, as well as many other tribes, stuck in parts of the country that are distant from any significant urban area, putting strain on the ability for resources, such as electricity, to reach the tribe, leaving many in a state of poverty.

Another issue faced by Native Americans is their lack of ownership over the land they reside upon.[60] While the federal government did grant tribes large tracts of land through

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[55] U.S. Department of Commerce, Census Bureau, Census 2000 Brief: The American Indian and Alaska Native Population, 2000, 2002. (Not sure exactly how to cite census information)

[56] American Rural Policy Institute, *Demographic Analysis of the Navajo Nation Using 2010 Census and 2010 American Community Survey Estimates* 32 (2010)

[57] American Rural Policy Institute, *Demographic Analysis of the Navajo Nation Using 2010 Census and 2010 American Community Survey Estimates* 32 (2010)

[58] Donald R. Baum, *Defining Well-Being from Inside The Navajo Nation: Education As Poverty Derivation and Poverty Reduction*, All Theses and Dissertations, 2010, at 1, 4.

[59] Donald R. Baum, *Defining Well-Being from Inside The Navajo Nation: Education As Poverty Derivation and Poverty Reduction*, All Theses and Dissertations, 2010, at 1, 4.

[60] *Native American ownership and governance of natural resources*, U.S. Department of the Interior, https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/ (last visited Jan 6, 2019).

the reservation system, most of the land is legally held by the federal government.[61] The territory held by the federal government was a mixture of trust land and fee land. Trust land is described as land that "the federal government holds legal title, but the beneficial interest remains with individual or tribe," comprising most of Indian land with 56 million acres.[62] The less common form of Native land is fee land, which is land "purchased by tribes, in which the tribe acquires legal title under specific statutory authority."[63] Another type of ownership began with the Dawes Act in 1887, with precedent being set by Marshall's definition of tribes as "domestic dependent nations," and giving the federal government the right to work on behalf of tribes and their members, which includes their lands.[64] Section 5 states that "Patents [for land] shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years."[65] However, the section goes onto say that "The President of the United States may in any case in his discretion extend the period."[66] Therefore, even though much of this land was allotted to individual Indians several decades ago, most is still owned by the federal government in trust. This causes large problems for tribes as it relates to increasing economic opportunity. While many Americans who own land can pay the startup costs for a new business by mortgaging their assets for a loan, many Indians cannot do this because many do not legally own their land and, therefore, tribal members cannot mortgage these types of assets.[67] This puts strain on the ability for a tribe to spur economic development because owning trust land makes it very difficult for an individual to start their own business within the tribe.

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[61] *Native American ownership and governance of natural resources*, U.S. Department of the Interior, https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/ (last visited Jan 6, 2019).

[62] *Native American ownership and governance of natural resources*, U.S. Department of the Interior, https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/ (last visited Jan 6, 2019).

[63] *Native American ownership and governance of natural resources*, U.S. Department of the Interior, https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/ (last visited Jan 6, 2019).

[64] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 10 (2011).

[65] Dawes Act, Pub. L. No. 49-119, 24 Stat. 388, at 387, 389 (1887) (codified as amended at 25 U.S.C. § 331).

[66] Dawes Act, Pub. L. No. 49-119, 24 Stat. 388, at 387, 389 (1887) (codified as amended at 25 U.S.C. § 331).

[67] Shawn Regan, *5 Ways The Government Keeps Native Americans in Poverty,* Forbes (2014), https://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#489165cb2c27

Even though the lands that the federal government allotted to Indians may seem tucked away in the corners of states, they hold in fact large amounts of untapped wealth. According to recent surveys, the reservations lay on top of nearly 30% of coal reserves west of the Mississippi, 50% of uranium deposits, and 20% of oil and natural gas reserves,[68] encompassing over $1.5 trillion dollars' worth of natural resources.[69] However, because of certain laws governing mineral extraction within the reservations, it is extremely difficult to extract these resources. Since the land is owned by the federal government, any extraction of these resources must be approved by them.[70] Yet, even after this approval, federal oversight is constantly required, leading to an excruciatingly long process since, usually, any individual or company extracting these resources would have to go through at least four government agencies, all of which are understaffed and underfunded, making the process of extracting resources increasingly difficult.[71]

Furthermore, inheritance laws make leasing the land out to contractors a difficult process as well. Since the IRA states that the tribe can "prevent the sale, disposition, lease… [of] tribal assets without the consent of the tribe,"[72] consent of all those who own the land is required to be able to lease it out. However, since the inheritance laws concerning allotted land are complicated, many of the parcels that contain mineral deposits are owned by hundreds of individuals, and therefore make the extraction of these resources even more difficult.[73] Moreover, recent Supreme Court cases have made it less appealing for outside contractors to mine these resources. The Supreme Court, in *Montana v. Blackfeet Tribe of Indians* held that "Montana may not tax respondent's royalty interests from leases issued pursuant to [The Indian Mineral Leasing Act of 1938."[74] This effectively prevented states

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[68] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 3 (2011).

[69] Shawn Regan, *5 Ways The Government Keeps Native Americans in Poverty,* Forbes (2014), https://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#489165cb2c27

[70] https://revenuedata.doi.gov/how-it-works/native-american-ownership-governance/

[71] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 3 (2011).

[72] https://www.law.cornell.edu/uscode/text/25/5123

[73] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 11 (2011).

[74] Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)

from taxing Indian mineral owners.[75] Conversely, the Supreme Court in *Cotton Petroleum Corporation v. New Mexico* held that "The State may validly impose severance taxes on the same on-reservation production of oil and gas by non-Indian lessees as is subject to the Tribe's own severance tax."[76] These cases have led to issues in some states where non-Indian contractors extracting minerals from Indian land are getting taxed twice, once by the state in which the tribe resides and once by the tribe. In some cases, these taxes are making the cost of extracting these resources prohibitively expensive for the contractors to do.[77] These past policies have put strain on both Indian corporations and non-Indian corporations to extract the immense amount of resources present in Indian owned lands, preventing the tribes from reaping the financial benefits.

Part III: Possibilities to Increase Tribal Empowerment

A. Current Changes in Tribal Self-Determination Through Economic Development

As discussed in the previous section, while some may claim that native tribes are sovereign entities, the federal government has failed to provide legitimate sovereignty. Because of this, the lands of tribes are strictly controlled by the federal government, causing several problems concerning economic development within these regions. Since there are comparatively more Native Americans living in poverty than non-natives, encouraging economic development within tribes will certainly be a key factor in supporting the longevity of tribes.

Luckily, some steps have already been taken to encourage tribal economic growth. In 2005, the Energy Policy Act was passed.[78] Title V of the law is known as the Indian Tribal Energy Development and Self-Determination Act (TERA), which established the Office of Indian Energy Policy and Programs.[79] According to the act, the office should "promote

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[75] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 22 (2011).

[76] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)

[77] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 22 (2011).

[78] Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 594, 594 (2005) (codified as amended at 42 U.S.C. §15801).

[79] Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 594, 793 (2005) (codified as amended at 42 U.S.C. §15801).

Indian tribal energy development, efficiency, and use,"[80] as well as "enhance and strengthen Indian tribal energy and economic infrastructure relating to natural resource development and electrification"[81] This would be done through agreements entered into between the tribe and the Department of the Interior. Effectively, this act makes it much easier for tribes to extract resources because, once the Secretary of the Interior approves the use of the TERA for the project, the tribes do not have to continue to get approval for every agreement that is made throughout the process, significantly decreasing the amount of time it takes to mine the resources.[82] While this could potentially help increase economic development for tribes who have large amounts of resources, the process to get the Secretary's approval for a TERA is very complex.[83] This could be one of the leading reasons why many tribes have entered into discussions with the DOI about TERA, but none have yet to enter into the agreement with the department.[84]

While several policies across centuries have both helped and hurt native economic development, the attitude of specific administrations also play a key role in how much support tribes receive from different institutions. Under the Obama Administration, DOE announced $3 million in 2016 to initiate development of renewable energy and energy efficiency on tribal lands.[85] From 2002 to 2015, the DOE had invested over $50 million in 200 tribal energy projects, further supporting the need for tribes to take advantage of their natural resources.[86] Moreover, in 2016, the Small Business Administration (SBA) trained over 12,500 Native American small business owners, participants of which said that they estimated they would create 499 full-time jobs and 205 part-time jobs.[87] The encouragement of these small businesses within tribes by the federal government is a good step in attempting

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[80] Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 594, 793 (2005) (codified as amended at 42 U.S.C. §15801).

[81] Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 594, 793 (2005) (codified as amended at 42 U.S.C. §15801).

[82] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 15 (2011).

[83] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 16 (2011).

[84] Maura Grogan, Rebecca Morse & April Youpee-Roll, *Native American Lands and Natural Resource Development*, Revenue Watch Institute 16 (2011).

[85] Executive Office of the President, *A Renewed Era of Federal-Tribal Relations* 21 (2017).

[86] Executive Office of the President, *A Renewed Era of Federal-Tribal Relations* 21 (2017).

[87] Executive Office of the President, *A Renewed Era of Federal-Tribal Relations* 22 (2017).

to keep more money in the reservation and improve the economic situation of many within its borders.

While many of these policies were carried out by bureaucracies with minimal direct oversight by the president, surely President Obama's encouragement of Native American self-determination, especially through the creation of the White House Council of Native American Affairs, helped to spur some for the actions carried out by these agencies.[88] Nevertheless, Former President Obama did directly support legislation that encouraged tribal self-determination, with one such bill being the Native American Tourism and Improving Visitor Experience Act (NATIVE).[89] The purpose of this act is to encourage tribal self-determination by showcasing its history and culture to visitors, while simultaneously attempting to "enhance and improve self-determination and self-governance capabilities… [by providing] grants, loans, and technical assistance to Indian tribes… that will spur important infrastructure development."[90] Through this program, the federal government would fund and support an enterprise within the reservation system that brings in jobs and a flow of money through foreign tourists. According to the American Indian Alaska Native Tourism Association, "Tourism is America's number one service export."[91] Furthermore, "in 2016, approximately 1.96 million overseas travelers visited Indian Country,"[92] which helped to create 41,000 new US jobs. It is also important to note that many of these tourists who visit Indian Country are Cultural Heritage Travelers, tourists who tend to visit many places and tour small towns.[93] Therefore, encouraging the development of the tourist industry within tribal reservation would not only create more jobs for Native Americans, but also allow more money to travel to many of the small towns located on these reservations that these tourists might like to visit.

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[88] Executive Office of the President, *A Renewed Era of Federal-Tribal Relations* 3 (2017).

[89] Native American Tourism and Improving Visitor Experience Act, 25 U.S.C. §4351 (2016).

[90] Native American Tourism and Improving Visitor Experience Act, 25 U.S.C. §4351 (2016).

[91] *Understanding the NATIVE Act*, AIANTA, https://www.aianta.org/understanding-the-native-act/ (last visited Jan. 6, 2019).

[92] *Understanding the NATIVE Act*, AIANTA, https://www.aianta.org/understanding-the-native-act/ (last visited Jan. 6, 2019).

[93] *Understanding the NATIVE Act*, AIANTA, https://www.aianta.org/understanding-the-native-act/ (last visited Jan. 6, 2019).

Furthermore, the Supreme Court recently ruled in favor of tribal self-determination. One such decision was made in the resolution of *Washington State Department of Licensing v. Cougar Den*. In 1855, the Yakama Nation in Washington signed a treaty where they gave up a large tract of land so they would be able to travel freely on public highways and conduct commerce.[94] In 2013, the state of Washington demanded millions of dollars in unpaid taxes from Cougar Den Inc., a company owned by a member of the Yakama Nation, for the transportation of gas from Oregon to the reservation.[95] When brought to the court, the question in *Washington State Department of Licensing v. Cougar Den* was "whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways."[96] In March, 2019, the Court ruled in favor of Cougar Den Inc. by stating that "the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855."[97] This indicates the Court's favor towards the tribe and is setting the precedent for allowing tribes to determine the true definition of treaties made between them and the United States, granting them, as well as other tribes, a stronger sense of self-determination. Furthermore, this decision allows for Cougar Den Inc. to continue to transport fuel without being taxed by Oregon, further allowing encouraging the economic development of the Yakama Nation. Hopefully this will signal a lasting trend in the Court's rulings on Native American tribes and their rights as they relate to the interpretation of treaties.

B. Future Legal and Political Action to Improve Tribal Economic Development

While the state of tribal sovereignty and economic development has been improving in recent years, there is still more that needs to be done. Currently, there are several pending decisions, both in the Capitol and in the Court that could continue to affect Native self-determination and economic growth. Earlier in 2018, the National Congress of American Indians (NCAI) called for the enactment of the Native American Business Incubator

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[94] Emily Schwing, *U.S. Supreme Court Hears Yakama Nation Tax Case, As Justices Interpret 1855 Treaty*, NW News Network, Oct. 30, 2018.

[95] Washington State Dept. of Licensing v. Cougar Den Inc., 586 U.S. 1, 3 (2019)

[96] *2018-2019 Term Supreme Court Cases Related to Indian Law,* National Indian Law Library, https://narf.org/nill/bulletins/sct/2018-2019update.html (last visited Jan. 6, 2019).

[97] Washington State Dept. of Licensing v. Cougar Den Inc., 586 U.S. 1, 10 (2019)

Program Act.[98] The NCAI states that there "has been a tremendous need for access to business development and entrepreneurial assistance programs designed and tailored to Indian Country's unique… characteristics."[99] They also state that the original U.S. Small Business Administration (SBA) incubator programs were never designed to address the unique issues faced by Native tribes, another reason for a tribal-specific incubator.[100] Furthermore, the establishment of a bill such as this would require the DOI to establish a grant program within the Office of Indian Energy and Economic Development with grants that serve Native communities.[101] Since this bill has been introduced, it has only passed the Senate.[102] A bill such as this would allow for more federal support of small businesses within tribal lands with more targeted financial and logistical support.

Currently, there are also several petitions to the Supreme Court which could further determine how much power tribes have governing their own affairs. In *Bearcomesout v. United States*, Tawnya Bearcomesout is being tried in both tribal court and federal court for killing her common-law husband.[103] The question that is being asked in this case is:

> Whether the 'separate sovereign' concept actually exists when Congress's plenary power over Indian tribes and the general erosion of any real tribal sovereignty is amplified by the Northern Cheyenne Tribe's constitution in such a way that the petitioner's prosecutions in both tribal and federal court violate the double jeopardy clause of the Fifth Amendment to the U. S. Constitution.[104]

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[98] *Calling for Enactment of the Native American Business Incubators Program Act*, National Congress of American Indians, http://www.ncai.org/resources/resolutions/calling-for-enactment-of-the-native-american-business-incubators-program-act (last visited Jan. 6, 2019).

[99] *Calling for Enactment of the Native American Business Incubators Program Act*, National Congress of American Indians, http://www.ncai.org/resources/resolutions/calling-for-enactment-of-the-native-american-business-incubators-program-act (last visited Jan. 6, 2019).

[100] *Calling for Enactment of the Native American Business Incubators Program Act*, National Congress of American Indians, http://www.ncai.org/resources/resolutions/calling-for-enactment-of-the-native-american-business-incubators-program-act (last visited Jan. 6, 2019).

[101] *Calling for Enactment of the Native American Business Incubators Program Act*, National Congress of American Indians, http://www.ncai.org/resources/resolutions/calling-for-enactment-of-the-native-american-business-incubators-program-act (last visited Jan. 6, 2019).

[102] Native American Business Incubators Program Act, S. 607, 115th Cong. (2018).

[103] *Supreme Court delays action for ninth time in Indian Country violence case,* Indianz.com, June 5, 2018.

[104] *2018-2019 Term Supreme Court Cases Related to Indian Law,* National Indian Law Library, https://narf.org/nill/bulletins/sct/2018-2019update.html (last visited Jan. 6, 2019)

This case is very similar to *Talton v. Mayes*, which also calls into question if the federal government had jurisdiction over crimes committed in tribal territory. Currently though, it seems as if the Supreme Court has no interest in hearing the case, as they have not responded to Bearcomesout's petition.[105] On the other hand, the Court has delayed action responding to the petition for the ninth time, suggesting that it might be possible for the case to be heard.[106] Should it be heard, though, and ruled on in favor of Bearcomesout, it is possible that this could set a new precedent of less federal intervention in tribal internal affairs, allowing natives to gain a stronger hold of their land and government.

The Bearocomestout trial isn't the only pending case, however, that deals with federal jurisdiction over crimes committed in Indian Country. Patrick Murphy, who is a member of the Creek Nation, was convicted in Oklahoma state court of the murder of another member of the nation.[107] Murphy sought relief for his conviction by arguing that, according to the Major Crimes Act, the federal government had exclusive jurisdiction over the case since the act gives the federal government jurisdiction over murders committed by Indians in reservations, allotments, and dependent Indian community.[108] Since this filing for a relief, the main issue surrounding this case has been the question over whether or not the Creek Nation, and the exact land the crime was committed on, was a reservation, allotment, or a dependent Indian community.[109] While this isn't necessarily a question of whether or not the tribe itself has jurisdictions over these crimes or not, the decision in this case could still have lasting consequences for how tribes are classified under US law, and potentially how they interact with the federal and state governments. If the Court were to rule in favor of Murphy, this would mean that the Creek Nation was not a reservation, allotment, or a dependent Indian community, potentially forcing the Court to better define what the modern Creek Nation is and what its relation is to the government of the United States. This might also create repercussions for how other Indian nations are classified.

Conclusion

[105] *Supreme Court delays action for ninth time in Indian Country violence case,* Indianz.com, June 5, 2018.
[106] *Supreme Court delays action for ninth time in Indian Country violence case,* Indianz.com, June 5, 2018.
[107] *Carpenter v. Murphy*, Oyez, https://www.oyez.org/cases/2018/17-1107 (last visited Apr. 1, 2019)
[108] *Carpenter v. Murphy*, Oyez, https://www.oyez.org/cases/2018/17-1107 (last visited Apr. 1, 2019)
[109] *Carpenter v. Murphy*, Oyez, https://www.oyez.org/cases/2018/17-1107 (last visited Apr. 1, 2019)

With the growth of the United States to the West, Native tribes found themselves subject to the expansionist urge of the United States. However, in 1831, Chief Justice Marshall helped preserve a semblance of tribes' sovereignty in *Cherokee Nation v Georgia.* While this did help to slow the tide of American expansionism into these tribal lands through war and conquer, it did put these lands under federal control, along with its people. Over the next century and a half, tribes would be subject to periods of increasing sovereignty, such as during the case of *Worchester v. Georgia* and *Talton v, Mayes*, and periods of intense subjugation by the United States, such as the forced removals by Andrew Jackson and the termination period of the 50's and 60's. Nevertheless, Native Americans are currently in a state of relative cooperation with the federal government, even if they might not be completely sovereign.

While there are several government agencies that would claim that tribes are completely sovereign entities, the Department of the Interior, which has the most direct relationship with tribes, would claim otherwise. In 1934, the US passed U.S. Code § 5123, which gave the Secretary of the Interior enormous power over tribes by dictating what constitutions and bylaws were consistent with US law. Furthermore, the code never states that tribes are actually sovereign, but only possess certain sovereign qualities. Therefore, this has allowed the United States to become very involved in how tribes function, especially as it relates to their land. Since most of the land tribes hold is legally owned by the federal government, it makes it very difficult for tribes to improve their economic situation. This strong federal control over the land is keeping many reservations in dire economic straits and leaving large portions of their population below the poverty line. Moreover, the complex laws concerning tribal ownership of the lands have also made it very difficult for tribal companies to export the resources that many of these reservations are located on top of, further hindering the tribe's ability to gain more capital and provide more economic opportunity.

In the last few years however, there have been some changes that could be very promising. With the passage of TERA, it is more likely that minerals might be able to be exported off these reservations and bring in more opportunity. The actions of the last administration have also been a significant help to several tribes, especially through all the

work the federal institutions did during his presidency. Obama's bill to increase tourism within tribes is also certainly going to create more jobs, investments, and disposable income for several tribal members. With all the work that has already been done, there are still several bills and court cases that require attention if tribes hope to gain more self-determination and economic development. The passage of the Native American Business Incubator Program Act could further help to support small business development within tribes, something that is surely needed. Decisions such as *Bearcomesout v. United States* and *Carpenter v. Murphy* will also have an effect on what precedents are set concerning federal and state government control over tribal activities. While many tribes still have a high proportion of members living in poverty, it is important to note that there are several steps that can be taken at the local, state, and federal levels to attempt to bring positive change to tribes and encourage economic development and tribal self-determination.

Two Decades After the Optional Protocol: The Effectiveness of the Convention on the Elimination of All Forms of Discrimination Against Women

Dominica Dul

"In recent decades, we have seen remarkable progress on women's rights and leadership in some areas. But these gains are far from complete or consistent…"
—United Nations Secretary General, António Guterres[1]

Introduction

The adoption of the Charter for the United Nations in 1945 precipitated the establishment of the first comprehensive international platform for women's rights law. The UN Charter pledged "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[2] This signaled the formation of commissions, international conferences, treaties, and legal mechanisms to deliver on its commitment to eliminate discrimination and violence against women and to improving the social, economic, and political status of women throughout the world. One of the most active and successful commissions to expand the breadth of the UN's commitment to women's rights law was the Commission on the Status of Women (CSW). Formed in June 1946 by the UN Economic and Social Council (ECOSOC) in Resolution 2/11, the CSW created the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[3] As the first international women's human rights commission, the CSW was tasked with creating

[1] Secretary-General's Message for 2019, International Women's Day 8 March, https://www.un.org/en/events/womensday/sgmessage.shtml (last visited April 30, 2019).
[2] U.N. Charter art. 1.
[3] Economic and Social Council Res. 2/11 (July 13, 1946).

country-by-country case studies and researching the global political and legal status of women. The Commission's work became the foundation for the construction of the standards for anti-discrimination legislation and promotion of women's issues that would be embodied by later treaties and declarations.[4] The CSW even drafted some of the first conventions to protect women's rights: the Convention on the Political Rights of Women in 1953, the Convention of the Nationality of Married Women in 1957, and the Convention of Consent to Marriage, Minimum Age for Marriage and Registration of Marriages in 1962.[5] More recently in 1995, the Commission played an instrumental role in the ratification of the Beijing Declaration and Platform for Action, which resulted in the addition of the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI).[6]

While the Commission's work provided the infrastructure for the advancement of women's rights law through these initial conventions, over time it became clear that the existing agreements were narrowly defined and fragmented. Likewise, none of them contained any comprehensive language to achieve equality. The CSW saw the need for a stronger, more unified instrument in international women's human rights law. Consequently, in 1963 the CSW was tasked by the General Assembly in Resolution XVIII (1921) with articulating international standards in a single instrument, which became known as the Declaration on the Elimination of Discrimination against Women.[7] [8] The Declaration included arduous discussions about whether the resolution should include language to end the perpetuation of the effects of discriminatory customs and laws specifically surrounding Article 6, which regarded family law and marriage, and Article 10, which examined employment.[9] These contentious discussions foreshadowed the difficulty of designing later treaties that would respect states' sovereignty while simultaneously seeking to condemn discriminatory customs and laws. Nonetheless, while the Declaration was successful in covering a substantial number of women's issues, it ultimately "amounted

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[4] A brief history of the Commission on the Status of Women, http://www.unwomen.org/en/csw/brief-history (last visited Jan. 5, 2018).

[5] *Id.*

[6] *Id.*

[7] Short History of CEDAW Convention, http://www.un.org/womenwatch/daw/cedaw/history.htm (last visited Jan. 5, 2018).

[8] G.A. Res. 1921 (XVIII), (Dec. 5, 1963).

[9] Short History of CEDAW Convention, *supra* note 6.

to only a statement of moral and political intent without the contractual force of a treaty" at its adoption in 1967.[10] [11] It urged state parties to repeal discriminatory penal codes, create equal access to resources, and, *inter alia,* develop legislation that would embody the political, social, and economic rights of women. However, the lack of enforcement mechanisms and reliance on states' self-awareness and willingness to act motivated the CSW to use the Declaration as a precursory document for an international, legally-binding treaty.

The CSW developed the concept for the CEDAW in 1974. However, it took more than a decade after the adoption of the Declaration on the Elimination of Discrimination against Women for the General Assembly to adopt the CEDAW in Resolution 34/180.[12] This revolutionary treaty in women's rights law highlighted the distinction between "equity" and "equality", indicated specific responsibilities and actions of state parties to guarantee women's rights, and established a committee to monitor state parties' progress on the Convention.

Nonetheless, while the CEDAW was a major advancement in women's international law, it contained "one of the weakest enforcement mechanisms of all human rights instruments adopted since 1965."[13] [14] For example, while other human rights treaties provided the opportunity for the submission of individual complaints of violations of women's rights against a state party, the CEDAW's only enforcement mechanisms at inception were a reporting procedure and an inter-state complaints mechanism. The reporting procedure mandated that member states submit progress reports for review and comment by the Committee. The inter-state complaints mechanism allowed states to resolve disputes regarding the Convention through arbitration in front of the Committee. In addition to these basic mechanisms, other human rights treaties such as International Covenant on Civil and Political Rights also included optional protocols. Optional protocols

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[10] G.A. Res. 2263 (XXII), (Nov. 7, 1967).

[11] Short History of CEDAW Convention, *supra* note 6.

[12] G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

[13] Renee Holt, *Women's Rights and International Law: The Struggle for Recognition and Enforcement*, 1 Colombia Journal of Gender and Law 117, 134 (1991).

[14] Theodor Meron, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 The American Journal of International Law, 213, 213 (1990).

are adopted and ratified as separate treaties to provide extra reinforcement through provisions for a communications and inquiry procedure. Under a communications procedure, individuals and groups are allowed to submit reports of violations, and under an inquiry procedure, the Committee is given permission to complete further investigative work in the State party on serious or systemic violations in order to give thorough recommendations.[15]

Unfortunately, the CEDAW operated for two decades with weaker enforcement mechanisms before the adoption of its Optional Protocol. However, even after the addition of the Optional Protocol in 1999, the CEDAW has not been successful in accomplishing its established goals and in fulfilling its potential to forge new legal precedents in international women's human rights law.[16] In this article, I will consider the structural flaws in the CEDAW, analyze how reservation trends have proven to be a setback to the Convention's enforceability, examine the reality of the Optional Protocol in practice, and thematically review the CEDAW's case law since the adoption of the Optional Protocol to determine the Convention's inconsistency in its application of inadmissibility rules and its lack of assertiveness in enforcing conformity with the Convention. My analysis will demonstrate the necessity for the international community to revisit the effectiveness and efficiency of the Optional Protocol and to bolster the CEDAW with new legal mechanisms to achieve its paramount purpose.

Part I: History of the CEDAW

A. History of International Human Rights Law

Although this article will examine the weakness of the CEDAW in an effort to demonstrate the need for stronger legal mechanisms to protect women's human rights, it is also important to display this treaty in the larger context of international human rights law with the purpose of acknowledging that such progress would not be feasible without the contributions of scholars throughout history. Although the term "international humanitarian law" was only formally accepted in the 20th century, its foundations stem

[15] Lauren Bock Mullens, *CEDAW: The Challenges of Enshrining Women's Equality in International Law,* 20 Public Integrity, 257, 259-60 (2017).

[16] Optional Protocol to the Convention of the Elimination of All Forms of Discrimination Against Women, http://www.un.org/womenwatch/daw/cedaw/protocol/ (last visited on Jan. 5, 2018).

from the dynamics of warfare. Early civilizations in Europe, Asia and the Middle East all wrote about the importance of the limitation of destruction and preservation of life in war.[17] As early as the fourth century B.C., Chinese military theorist, Sun Tzu, wrote about the boundaries of warfare and the obligation to "treat captives well, and care for them."[18] Later governmental documents such as the Magna Carta in 1215, the French Declaration of the Rights of Man and Citizen in 1789, and the U.S. Bill of Rights in 1791 also asserted the rights of the individual. While in practice, these early documents operated on the exclusion and oppression of minority groups, they served as models for progressively more inclusive international humanitarian law. Scholars agree that the turning point in modern international humanitarian law took place when Henry Dunant, a Swiss social activist, witnessed the death and suffering that took place at the Battle of Solferino in 1859. He led the organization of the Geneva International Conference in 1863, which brought together 30 delegates from 14 countries and resulted in the establishment of the International Committee of the Red Cross (ICRC).[19] Dunant's activism also influenced the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in 1864.[20] In the 20th century, the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights (UNDHR) in 1948 precipitated the emergence of legally binding international humanitarian law. The UNDHR was crucial in the subsequent creation of more than 80 international human rights treaties and declarations, spanning disadvantaged populations including women, racial minorities, children, migrants, disabled persons, indigenous peoples, and victims of torture.[21] Perhaps the greatest accomplishment in international human rights law has been the development of the International Bill of Human Rights, comprised of the UNDHR, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Both the International Covenant on Civil and

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[17] Amanda Alexander, *A Short History of International Humanitarian Law, 26* The European Journal of International Law 109, 112 (2015).

[18] Aryeh Neier, The International Human Rights Movement 117 (2012).

[19] Dinah L. Sheldon, *An Introduction to the History of International Human Rights Law,* GW Law Faculty Publications & Other Works, Paper 1052, 1, 7-8 (2017).

[20] Amanda Alexander, *supra* note 16 at 112.

[21] The Foundation of International Human Rights Law, http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html (last visited Jan. 5, 2018).

Political Rights and the International Covenant on Economic, Social and Cultural Rights have high rates of ratification of 172 and 169 State parties, respectively; however, their optional protocols have gained underwhelming support with 116 and 24 State parties, respectively.[22] These ratification trends demonstrate a larger obstacle in international law: balancing the importance of respecting States' sovereignty while implementing protective and progressive treaties and declarations. Despite these challenges, international human rights law continues to slowly elevate the standards in human rights legislation in individual countries and correct historical wrongs.

B. Core Provisions of the CEDAW

Although the "Women's Rights are Human Rights" movement emerged years after the adoption of the CEDAW, this treaty embodied the sentiment—it was the first international body of law to recognize the need to specify the rights of women and to include mechanisms to protect those rights. The Convention is composed of a preamble and thirty articles. The first sixteen articles list specific rights of women as well as the actions that state parties should take to ensure the adoption of these rights in their jurisdictions. The next twelve articles specify reporting requirements for State parties so that the Committee, which is established in Article 17(1), can monitor state parties' progress and compliance with the Convention.[23] The last two articles stipulate the procedures for the resolution of disputes between State parties as well as the languages of the Convention.[24] The CEDAW defines the term "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[25]

Among its provisions, the Convention addresses women's right to political participation in Articles 7 and 8, women's rights to nationality and their right to transfer

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[22] Ratification of 18 International Human Rights Treaties, http://indicators.ohchr.org/ (last visited Jan. 5, 2018).

[23] G.A. Res. 34/180, *supra* note 11.

[24] Renee Holt, *supra* note 12 at 119

[25] G.A. Res. 34/180, *supra* note 11.

their nationality onto their children in Article 9, and women's right to equal employment opportunities and paid maternity leave in Article 11. The Convention also details women's rights to equal access to healthcare including "those [services] related to family planning" in Article 12, and women's right to equal legal capacity in Article 15.[26] The CEDAW is also unique in that it specifies state parties' responsibilities "to take all appropriate measures to eliminate discrimination against women" in public, private, and cultural life. In the public sphere, the Convention mandates equality in "national constitutions or other appropriate legislation" and "through law and other appropriate means" in Article 2(a). Likewise, Article 2 (c) mandates "legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions."[27] The Convention also recognizes the negative consequences of the actions of private actors on women's rights. Article 2(e) identifies the State's responsibility to monitor private actors within in boundaries and to prevent discrimination by "any person, organization or enterprise." Lastly, the CEDAW acknowledges the perpetuation of discrimination by cultural traditions and practices. Thus, Article 5(a) reaffirms state parties' responsibility "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[28] In addition to speaking to women's rights in the public, private, and cultural spheres, the CEDAW perpetuates the idea of "de facto equality" to signify that identical *treatment* of women and men does not result in equal *outcomes*. Rather, by referring to de facto equality, otherwise known as substantive equality, the Convention compels the international community to understand the "underlying causes of women's inequality" in order to take additional measures to atone for historical wrongs, such as disenfranchisement.[29]

C. Legal Enforcement Mechanisms Before the Enactment of the Optional Protocol

[26] G.A. Res. 34/180, *supra* note 11.
[27] G.A. Res. 34/180, *supra* note 11.
[28] G.A. Res. 34/180, *supra* note 11.
[29] U.N. Office of the High Commissioner, *Women's Rights are Human Rights* 2014, at 31-34.

While the CEDAW's core provisions, attention to domains of women's rights, and distinction of de facto equality created a progressive treaty for its time, the Convention's enforcement mechanisms were discouraging. The only enforcement mechanism provided for in the Convention was a state self-reporting procedure established in Article 18. Through this article, State parties must submit "a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect." As per Article 18(b), reports are to be submitted "at least every four years and further whenever the Committee so requests." While state parties are asked to report their progress under the Convention, they are also encouraged to report on areas of difficulty in fulfilling obligations. The Convention also establishes the Committee on the Elimination of Discrimination against Women in Article 17(1) to review the mandated reports and provide recommendations to State parties. The Committee is comprised of "twenty-three experts of high moral standing and competence in the field covered by the Convention" that are nominated and elected by the State parties. The officers of the Committee include a Chairperson, three Vice Chairpersons, and a Rapporteur. As per Article 17(5), Committee members serve terms of four years after which elections are held again. While the establishment of a Committee and a self-reporting mechanism had been standard across several human rights treaties, the procedure was not effective in thoroughly analyzing the status of women in member states. Just as with other human rights treaties, self-reporting became problematic because such reports tend to be self-serving and minimize the extent to which states are complying while simultaneously inflating the progress that had been made on the Convention.[30] Jurist Dinah Sheldon rightfully pointed out:

> Unlike other human rights treaties, such as the U.N. Covenant on Civil Political Rights, the Convention has no provision for communications or complaints to be filed by those who feel their rights have been violated. Nor is there a mechanism for one state to complain about violations by another state party. The self-reporting procedure is the only measure of implementation in the Convention and there are reasons to be concerned about its effectiveness.[31]

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[30] Dinah Sheldon, *Address Given at Fourth Annual International Law Symposium,* 9 Whittier Law Review 413, 416 (1987).

[31] *Id.* at 416.

Sheldon's point reflects a previously mentioned concern: while other human rights treaties made provisions for individual communications to be made to their committees, the CEDAW did not provide such an option. For example, when the UN Covenant on Civil Political Rights was adopted in 1966, an optional protocol that provided the opportunity to submit an individual communication was simultaneously adopted.[32] In the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 14(1) also recognized "the competence of the Committee to receive and consider communications from individuals or groups of individuals."[33] This provision was even included in the original ICERD treaty instead of through an adjoining optional protocol. In 1984, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also included language for individual communications in the original treaty.[34]

Moreover, the CEDAW was not explicitly clear on whether non-state actors like non-governmental organizations (NGOs) would be allowed to submit reports on their country of origin if the state was party to the Convention. The Convention ultimately did allow NGOs to submit their own reports called "shadow reports," which helped the Committee to obtain independent information to compare against state parties' reports. However, the failure to define this allowance clearly in the Convention led to low rates of NGO participation and frequent misunderstandings of the procedures involved in submitting a "shadow report."[35]

D. Adoption of the Optional Protocol

The adoption of the Optional Protocol in 1999 was a crucial step in putting the CEDAW on par with other treaties in the body of international human rights law and substantiating the United Nation's commitment to women's rights issues.[36] The Optional

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[32] U.N. Office of the High Commissioner, *Core International Human Rights Treaties* 2014, at 83-84.
[33] *Id.* at 22.
[34] *Id.* at 193-194.
[35] Statement by the Committee on the Elimination of Discrimination against Women on its relationship with non-governmental organizations 45th session 2010, at 1-2. https://www2.ohchr.org/english/bodies/cedaw/docs/statements/NGO.pdf
[36] Dinah Sheldon, supra note 29 at 417.

Protocol gave the Committee the right to receive and review communications under Article 2 from individuals or groups of individuals who claimed "to be victims of a violation of any of the rights set forth in the Convention by that State Party."[37] This provision does not allow NGOs to independently submit their own communications unless they are submitting on behalf of an individual or group of individuals with their consent. However, Article 2 does specify that consent is necessary "unless the author can justify acting on their [the individual's] behalf without such consent." This provision has been used in cases where the individual has died or been murdered such as in *Goeke v. Austria (No. 5/2005)* and *Yildrim v. Austria (No. 6/2005)*, in which the women in both cases had been murdered by their husbands.[38] [39] These circumstances allowed the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice to submit a communication on their behalf.

The Optional Protocol to the CEDAW also allowed for an inquiry procedure under Article 8(2), which permits the Committee to "designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the state party, the inquiry may include a visit to its territory."[40] The inquiry procedure serves to investigate serious and systemic discrimination in state parties and to date has been used fourteen times by the Committee.[41]

Although not part of the Optional Protocol, the Convention did clarify the extent of NGO participation in the CEDAW's self-reporting mechanism at its 45th Session in January 2010. Although the CEDAW was adopted in 1979, the first "shadow report" by an NGO was not submitted until 1988 due to the aforementioned ambiguous language and failure to outline a process for NGO reporting.[42] Nonetheless, in 2010, the Committee reaffirmed the value of NGO participation and even allowed NGOs to attend proceedings

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[37] G.A. Res. A/54/4, Optional Protocol to the Convention of the Elimination of All Forms of Discrimination Against Women (Oct. 6, 1999).

[38] Communication No. 5/2005, U.N. Doc. CEDAW /C/39/D/5/2005 (Aug. 6, 2007).

[39] *Id.*

[40] G.A. Res. A/54/4, *supra* note 36.

[41] U.N. Human Rights Office of the High Commissioner, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeCategoryID=7 (last visited Jan. 5, 2018).

[42] Statement by the Committee on the Elimination of Discrimination against Women on its relationship with non-governmental organizations 45th session, *supra* note 34 at 1.

and give oral presentations to the Committee.[43] Further, NGOs were also given the opportunity to "provide reliable information on grave or systematic violations of women's human rights in relation to the mandate of the Committee to conduct an inquiry under the Optional Protocol."[44]

Part II: Inefficiencies and Inconsistencies in the CEDAW and its Optional Protocol

1. Structural Weakness of the CEDAW

Before delving into the shortcomings of the Committee's application of the CEDAW's Optional Protocol, it is important to acknowledge the major structural flaws with the procedures of the CEDAW itself. One major inhibitor of timely and frequent assessments of State parties' reports is the limited amount of time that the CEDAW permits the Committee to convene on an annual basis. According to Article 20(1) of the CEDAW, "The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention." [45] This limited meeting time has caused excessive delays in recommendations and a considerable backlog of reports. The Committee tried to combat this problem in 1995 and again in 1996 by extending its sessions to three weeks instead of two.[46] However, even with this additional time, the Committee was not able to significantly reduce the backlog since they spent this time on creating more thorough recommendations and discussing how to create a more efficient system in the future.[47] This strongly suggests that with the current two-week annual time limit the Committee is not only unable to review a significant number of reports but that the recommendations they submit are not of the highest possible quality. On average, the Committee has been able to review approximately 15 reports at each meeting—a startlingly low number when considered

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[43] International Women's Rights Action Watch Asia Pacific (IWRAW), Shadow Report Guidelines on CEDAW & Rights of Sex Workers, https://law.yale.edu/system/files/area/center/ghjp/documents/shadow_report_guidelines_on_rights_of_sex_workers_under_cedaw.pdf (last visited Jan. 5, 2018).

[44] Statement by the Committee on the Elimination of Discrimination against Women on its relationship with non-governmental organizations 45th session, *supra* note 34 at 3.

[45] G.A. Res. A/54/4, *supra* note 36.

[46] Marsha A. Freeman, The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance, 91 American Society of International Law 378, 381 (1997).

[47] *Id.* at 381.

against the number of reports submitted by each of the 189 state parties.[48] This also delays the due date of a state party's next report since deadlines are individually established by the Committee once a report has been scheduled and considered.[49] As opposed to other treaty bodies, the issue is exacerbated with the CEDAW since the treaty gives preferential treatment for report consideration based on geographic consideration.[50] Therefore, some state parties do not have a strict timetable for when they are expected to submit their next report. This has undermined the incentive for state parties to submit timely reports at all. However, this structural flaw does not pertain just to the CEDAW—an "average of 70% of states parties to every treaty have overdue reports," and for the HRC, CESCR, CEDAW and CAT the backlog for considering state parties' reports is approximately two years.[51] If every state party submitted their report on time, the CEDAW Committee would have 242 overdue reports.[52] Considering only 15 reports annually, it would take the Committee about 16 years to consider all reports.[53]

Ratification trends and their correlation to substantive change in state party countries is another important point to consider when discussing the efficacy of the CEDAW and its Optional Protocol. Greater ratification of international human rights treaties has been proven to have positive impact on domestic policies and laws.[54] In a major study conducted by Harvard political scientist Beth A. Simmons, it was concluded that "CEDAW ratification has had an influence on domestic politics by stimulating the formation of women's organizations, at least in some cases" with the greatest effects being seen in transitional countries instead of stable democracies or autocracies.[55] In the study, transitional countries were defined as countries that "had passed a moderately high democratic threshold at some point in the postwar years."[56] With 189 ratifications, the

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[48] Anne F. Bayefsy, The UN Human Rights Treaty System: Universality at the Crossroads, Apr. 2001, at 8.

[49] *Id.* at 9.

[50] *Id.* at 24.

[51] *Id.* at 17.

[52] *Id.* at 8.

[53] *Id.*

[54] Andrew Byrnes and Marsha Freeman, The Impact of the CEDAW Convention: Paths to Equality, World Development Report, 2012, at 54.

[55] Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics, 2009, at 209.

[56] *Id.* at 183.

CEDAW enjoys a higher rate of ratification than some of its other human rights treaty counterparts.[57] However, it is still significantly lower when compared to treaties like the Convention on the Prevention and Punishment of the Crime of Genocide or the International Convention on the Elimination of All Forms of Racial Discrimination.[58] [59] In the 20th century, ratification trends were naturally high since the treaty had just been adopted. There were noticeable spikes in ratification during years when large international conferences on women's rights took place.[60] However, in the 21st century, the trend has significantly dropped off and ratifications have not been as responsive to external events.[61] The same has been true of the ratification of the treaty's Optional Protocol. With 109 ratifications—significantly lower than the number of state parties to the Convention—the trend for ratification was high when the Optional Protocol was first adopted but experienced a dip in 2005 and has been on a downward slope ever since.[62]

In addition to ratification, a barrier to the treaty's effectiveness exists in the number and content of state party reservations to the CEDAW. In international human rights treaties, a reservation is a statement that "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" and can be made by state parties at the time of ratification.[63] At the time of ratification, seventy-seven countries entered reservations and while the Convention on the Rights of the Child has more substantive reservations, reservations made to the CEDAW should not be taken lightly.[64] Many reservations have been made to fundamental parts of the Convention, which completely defeats the purpose of the treaty and nullifies the responsibilities of the state party under the Convention. The most significant reservations have been made to Article 2, which requires state parties to comply with the treaty in their constitutions,

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[57] United Nations Treaty Collection: Convention on the Elimination of All Forms of Discrimination Against Women, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Jan. 5, 2018).

[58] *Id.*

[59] *Id.*

[60] Andrew Byrnes and Marsha Freeman, supra note 54 at 8.

[61] *Id.* at 9.

[62] *Id.* at 11.

[63] Linda M. Keller, The Impact of State Parties' Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, 2014 Michigan State Law Review 309, 310-11 (2014).

[64] *Id.* at 311.

statues and policies, and to Article 16, which declares women's equality in family and marriage.[65] [66] It should be mentioned that, since ratification, the Committee has successfully urged state parties to withdraw numerous substantive reservations. Likewise, in 1997 and 1998, the Committee indicated that Articles 2, 9, 15 and 16 were fundamental to the purpose of the treaty and that reservations to Article 16 were impermissible.[67] In 2008, the Committee reaffirmed and stated that reservations to Articles 2, 7, 9 and 16 were required to be explained and that updates needed to be provided on how those reservations affected the status of women in the country.[68] Regardless of these statements, many countries still have substantive reservations to the CEDAW with the most unwithdrawn reservations being Sharia-based.[69] Throughout the treaty's existence, these reservations have worked to undermine its purpose, creating a structural weakness in its application.

2. Weaknesses of the Optional Protocol to the CEDAW

Although the adoption of the Optional Protocol was meant to strengthen the legal enforcement mechanisms of the CEDAW, the full potential of this mechanism has not yet been fully explored. The first communication was reviewed by the Committee in 2004; however, since then the communications procedure has been used only 61 times.[70] Of these 61 cases, 33 cases, or 54%, have been ruled inadmissible, which has left few cases for the Committee to build jurisprudence or strong legal precedents.[71] Additionally, since the Committee is allowed to review cases based on a geographic consideration, most cases considered have been from Europe with some consideration given to Latin America and Asia, but with little to no attention paid to Africa or the Middle East.[72] Thus, even with the relative paucity of communications that have been submitted, victims have found it hard to

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[65] Marsha A. Freeman, Reservations to CEDAW: An Analysis for UNICEF, Dec. 2009, at 7.
[66] *Id.* at 10.
[67] *Id.* at 3.
[68] *Id.* at 4.
[69] *Id.* at 11.
[70] CEDAW Jurisprudence Database: U.N. Office of the High Commissioner, http://juris.ohchr.org/en/search/results/1?sortOrder=Date&typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0, (last visited Jan. 5, 2018).
[71] *Id.*
[72] *Id.*

gain successful outcomes in choosing to proceed through international legal mechanisms, further alienating victims from choosing this option for justice.

While a criteria for inadmissibility is critical to any legal proceeding, the frequency of inadmissibility for CEDAW cases is a reason for concern. This frequency in inadmissibility rulings is due to the vagueness of the criteria itself, which causes inconsistency in the Committee's application of the rules across cases. Before dissecting these reasons and the CEDAW's jurisprudence, it is first important to explain the criteria.

In the Optional Protocol to the CEDAW, the criteria for inadmissibility are laid out in Article 4.[73] Under Article 4(1), the Committee will not consider a communication admissible unless "it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief."[74] This rule's vagueness brings to light questions about the legal extent to which domestic remedies need to be used, what constitutes a domestic remedy, and what amount of time is considered "unreasonably prolonged."[75] Under 4(2)(a), the Committee will not review communications where "the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement."[76] Additionally, a communication will not be heard if it is "incompatible with the provisions of the Convention," is "manifestly ill-founded or not sufficiently substantiated," and is "an abuse of the right to submit a communication."[77] Finally, the Committee will not consider a communication when the "facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date."[78]

The language of these rules omits numerous specificities; however, it is important to clarify that the CEDAW is not the only human rights treaty that suffers from the

[73] G.A. Res. A/54/4, *supra* note 36.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

vagueness of these rules.[79] In fact, the language for inadmissibility is standard across most human rights treaties with minor variations. As with most international law treaties, language is generally kept vague in order to protect state sovereignty and increase participation in treaties. However, this simultaneously hinders the goals of said treaty, especially in the case of the CEDAW where so many communications have been rejected. Additionally, when the Committee's application of these rules is inconsistent across multiple cases, it causes room for state parties to discredit the resolutions that the Committee does pass. Likewise, the vagueness of these rules hinders the authority of the Committee. In looking at case law, the Committee has several times hesitated to be assertive with its rulings in order to forge its own legal precedents. In order to further demonstrate the dangers of this vagueness and inconsistency as a weakness of the enforcement of the Optional Protocol, the next section will present a thematic breakdown the CEDAW's jurisprudence.

a. Economic and Employment Rights

A primary example of the harms of a vague criteria can be seen in one of the Committee's first communications, *B.J. v. Germany*, Communication No. 1/2003.[80] The author of this communication alleged that Germany's marital and divorce laws distributed assets unequally among male and female divorcees, which put her in a precarious financial situation at 57-years old, an age close to retirement. Over the course of three years and ongoing at the time of submission, the author unsuccessfully appealed to Germany's Federal Constitutional Court, the Court of Göttingen, the Federal Ministry of Justice, and the Ministry of Justice of Women's Issues of the Land Niedersachsen to remedy the issue domestically.[81] During this time, the cost of the court proceedings continued to accrue. She further argued that the "risks and stresses" of court proceedings for divorce are "carried unilaterally by women" and that women in similar situations are "victims of systemic discrimination, disadvantage and humiliation."[82] The author claimed that Germany's laws violated Articles 1, 2, 3, 5, 15 and 16 of the CEDAW, which outline women's economic,

[79] United Nations Office of the High Commissioner, Individual Complaint Procedures under the United Nations Human Rights Treaties, 2013, at 7-9.

[80] Communication No. 1/2003, U.N. Doc. CEDAW/C/36/D/1/2003 (July 14, 2004).

[81] *Id.* at 2.

[82] *Id.* at 2.

legal and martial rights. In the final decision, the Committee ruled that the communication was inadmissible based on Articles 4(1) and 4(2)(e), stating that the author had not exhausted domestic remedies and that the facts of the case occurred prior to the entry of the Optional Protocol for the state party and did not continue afterwards.

This ruling was problematic with regards to both criteria of inadmissibility. In response to Article 4(1), a dissenting opinion rightfully pointed out that domestic proceedings regarding spousal maintenance and accrued gains had been ongoing for five years compared to the year it took domestic courts to finalize the divorce.[83] Additionally, for a 57 year-old woman, who devoted her life to homemaking so that her husband could advance his career and had been dependent on his income for her whole life, five years is an "unreasonably prolonged" amount of time.[84] During these five years, the Court of Göttingen granted the author € 280 per month; however, over the course of their marriage, the author's husband has "successfully capitalized the 30 years of unremunerated work" and earned €5000 per month, which by German standards was considered a very good salary.[85] With regards to Article 4(2)(e), the communication was ruled inadmissible *ratione temporis*. However, the Committee failed to acknowledge that, although divorce proceedings concluded before the state party's adoption of the Optional Protocol, the issue of spousal maintenance and accrued gains was ongoing after the adoption of the Optional Protocol, which helps show that the facts of the case continued after the date of adoption.[86] Additionally, the court proceedings for spousal maintenance continued for two years after the state's ratification of the Optional Protocol in 2002 and even the Court of Göttingen's ruling allotting the author €280 per month was made in 2004.[87] The ruling of inadmissibility in this case was based on ambiguous and subjective meanings of "domestic remedies" and the *ratione temporis* rule. This not only harmed the victim trying to gain justice but also jeopardized the validity of the Committee's future rulings.

As mentioned previously, the Committee has also struggled being assertive in its rulings and has demonstrated hesitance in employing the inquiry procedure of the Optional

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[83] *Id.* at 13-14.
[84] *Id.* at 1.
[85] *Id.* at 13-14.
[86] G.A. Res. A/54/4, *supra* note 36.
[87] Communication No. 1/2003, *supra* note 79 at 13.

Protocol to investigate systemic discrimination. This was clearly seen in *Nguyen v. Netherlands*, Communication No. 3/2004, when the author complained under Article 11(2)(b) that women in the Netherlands "whose income stems from both salaried and other forms of employment only receive partial compensation for their loss of income during their maternity leave," which results in negative effects on income due to pregnancy.[88] The Committee admitted the case but ruled that no violations occurred under the CEDAW since Article 11(2)(b) never stated that "full pay" or "full compensation for loss of income" was promised.[89] The Committee further relinquished its authority by deferring to the state party stating, "the Convention leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits to fulfil [sic] Convention requirements."[90]

This ruling is an example of how vague language in the Convention and the Optional Protocol allows state parties to escape accountability for discrimination. In a dissenting opinion, Committee members stated that while the 59WAZ, the law against which the author was arguing, may not have been *directly* discriminatory, the state party admitted in several communications that "part-time work is particularly common among women" and that "under a new Invalidity Insurance Act (WAO) for self-employed persons, 55 per cent of the applicants were women."[91] This data suggests that the 59WAZ may have constituted *indirect* discrimination—an issue that was never explored by the Committee.[92] Had the Optional Protocol's language regarding criteria of inadmissibility been more clearly outlined, the Committee could have avoided ruling with the state party and instead, used the language of the Convention to further investigate maternity leave laws in the Netherlands. The dissenting opinion itself admitted that not enough data was presented to clarify the cause of the discrimination.[93]

Last in this category is *Kayhan v. Turkey*, Communication No. 8/2005, in which the author, a teacher of religion and ethics at a Turkish middle school, received warnings, a deduction in salary, and was eventually terminated from her job because her wearing of a

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[88] Communication No. 3/2004, U.N. Doc. CEDAW A/61/38 (Aug. 29, 2006), at 2.
[89] *Id.* at 13.
[90] *Id.* at 13.
[91] *Id.* at 14.
[92] *Id.* at 14.
[93] *Id.* at 14.

headscarf was "spoiling the peace, quiet and work harmony" of the school.[94] Additionally, because the author received the "gravest of disciplinary penalties," she would not be able to further teach at any private schools and would lose her means of subsistence.[95] Unfortunately, the Committee decided that the case was inadmissible based on Article 4(1) of the Optional Protocol, deciding that, because the author failed to bring up a sex-based discrimination argument in domestic courts, the numerous times that the author proceeded through domestic channels did not count as domestic remedies.[96] Although it is well-known that a headscarf is an article of clothing that is unique to women, the case was rejected based on subjective criteria of inadmissibility rather than being analyzed based on its merits.[97] As pointed out by Jurist Alda Facio, "it is quite disconcerting that the Committee declared this matter inadmissible based on arguments that the State party itself did not bring up."[98] There is also established legal precedent in international law for the state party to have "the obligation to demonstrate that the exhaustion of domestic remedies has not been completed" not the Committee itself.[99] Instead, due to vague language, the Committee ruling not only reversed the Optional Protocol's own effort to maintain consistency among all international bodies as specified in Article (2)(a) but also limited the Committee in its ability to judge the case based on its merits.

b. Asylum Rights

Zheng v. the Netherlands, Communication No. 15/2007, further demonstrates the Committee's inconsistency in application of the criteria for inadmissibility and failure to assert its authority as an international treaty body protecting women's rights in the sphere of asylum and refugee rights. The author of this communication was a Chinese woman who had been trafficked into the Netherlands for prostitution purposes. After escaping a brothel, she was taken in by a Chinese woman to do heavy housework. However, after

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[94] Communication No. 8/2005, U.N. Doc. CEDAW/C/34/D/8/2005 (Jan. 27, 2006), at 2-3.
[95] *Id.* at 3.
[96] *Id.* at 10.
[97] *Id.* at 10.
[98] Alda Facio, The OP-CEDAW as a Mechanism for Implementing Women's Human Rights: An Analysis of the First Five Cases Under the Communications Procedure of the OP-CEDAW, International Women's Rights Action Watch Asia Pacific, No. 12, 2008, at 40.
[99] *Id.*

finding out that the author was pregnant, the woman released her from work, at which time the author filed for asylum.[100] The Immigration and Naturalization Service (IND) rejected the author's application because she could not explain how she came to the Netherlands due to language barriers, did not have identity documents, and waited eight months before applying.[101] The author unsuccessfully tried several more times on appeal to gain asylum before submitting her communication to the Committee under Article 6 of the Convention, which outlines state parties' responsibilities to suppress trafficking and exploitation of prostitution.[102]

In its review of the communication, the Committee found the case inadmissible based on Article 4(1) of the Optional Protocol, stating that domestic remedies had not been exhausted since the author failed to appeal an asylum decision from a district court and since other legal proceedings in Dutch courts were still pending despite having been rejected numerous times before.[103] This explanation for inadmissibility; however, pertained to the author's asylum proceedings and did not pertain at all to the core issue of the Netherlands' responsibility to take appropriate measures "to suppress all forms of traffic in women and exploitation of prostitution of women" as stated in the Convention.[104] The dissenting opinion addressed this issue and stated that it is the state party's responsibility to have trained law enforcement able to identify victims of trafficking and to give them guidance on all the available domestic remedies in the country for their protection.[105] The opinion also rightfully pointed out that while the author never explicitly stated that she was a victim of trafficking due to her illiteracy, the author's medical records and statements explaining her rape during interviews, should have alerted authorities.[106] To further prove the state party's lack of accountability, the Committee issued recommendations to the Netherlands that same year "to provide all necessary benefits to victims of trafficking regardless of whether they are able to cooperate."[107] The Committee's limitations to act

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[100] Communication No. 15/2007, U.N. Doc. CEDAW/C/42/D/15/2007 (Oct. 26, 2009), at 2.
[101] *Id.* at 2.
[102] G.A. Res. A/54/4, *supra* note 36.
[103] Communication No. 15/2007, *supra* note 99 at 6-7.
[104] *Id.* at 3.
[105] *Id.* at 8.
[106] *Id.* at 8.
[107] *Id.* at 8.

due to vague rules of inadmissibility represented a severe loss of justice for the Convention's own goals of protecting trafficked women.

c. Identity Rights

In Communication No. 7/2005, *Cristina Muñoz-Vargas y Sainz de Vicuña v. Spain,* the author argued that Spain's laws for the succession of titles of nobility discriminated against women since they established male primacy.[108] The author claimed that after the death of her father in 1978, her younger brother succeeded their father's royal title despite her being the first-born simply because she was a woman. Spain's law had stood unquestioned since 1948 and although royal titles have no legal authority in the country anymore, Article 14 of Spain's 1981 Constitution emphasizes equality and non-discrimination on the basis of sex.[109] The author litigated her case through several domestic channels including appeals to the Supreme Court of Spain; however, each time, courts ruled that there was no violation "in view of the historical and symbolic nature of those titles."[110] The author argued that Spain's laws violated Articles 2(c) and (f) of the Convention.

Despite a Supreme Court ruling in the author's case in 2002 and a rejected appeal to the Constitutional Court in 2004, the Committee ruled the communication inadmissible *ratione temporis* since the original change of titles occurred in 1980 prior to Spain's adoption of the Optional Protocol.[111] This ruling is yet another example of how the vagueness of Article 2(e) of the Optional Protocol with regards to what facts are considered ongoing harms authors and the Committee's credibility. Interestingly, in this communication a significant number of Committee members created a second opinion, ruling the communication inadmissible *ratione materiae.* Based on Article 4(2)(b), they stated that the author's claims were completely incompatible with the provisions of the Convention since the symbolic and honorific nature of titles of nobility does not impair women from enjoying or exercising their rights on a basis of equality and human rights.[112] This ruling

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[108] Loveday Hodson, Women's Rights and the Periphery: CEDAW'S Optional Protocol, 25 The European Journal of International Law, 561, 573 (2014).
[109] Communication No. 7/2005, U.N. Doc. CEDAW/C/39/D/7/2005, (Aug. 9, 2007), at 2.
[110] *Id.* at 3.
[111] *Id.* at 8.
[112] *Id.* at 9-10.

further failed to assert the authority of the Committee because although titles of nobility do not carry legal advantages in Spain, they stem from a historically patriarchal system that dictates the author's name, which is still part of her identity. A dissenting opinion responded to both the Committee's *ratione temporis* and *ratione materiae* ruling. The opinion stated that "when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment, it is a violation, in principle, of women's right to equality."[113] Further, the opinion stated that the 2002 and 2003 Supreme Court rulings, which occurred after Spain ratified the Optional Protocol and dismissed the author's claims, "need to be seen as affirming the previous violation of the State party."[114]

A last example of the Committee's failure to be assertive and forge its own legal precedent can be found in Communication No. 12/2007, *G.D. and S.F. v. France.* In this communication, two authors, G.D. and S.F., argued that France's laws were discriminatory under Article 16(1)(g) of the Convention since they did not allow the women to change their last names from their father's to their mother's. In the particular case of *G.D. and S.F. v. France*, the authors' fathers had been absent from their lives since childhood and they had been raised by their mothers.[115] The authors argued that a "family name constitutes an individual's identity as well as a linkage with a family" and since they had been raised by their mothers and their mothers' families, they had a "psychological, familial, social and administrative identity" with their mothers' last name.[116] After years in domestic courts, the authors received rulings that their rights had not been violated because their desire to change their last names were of an "emotional nature."[117]

In its decision, the Committee admitted that France's law, even after it was amended in 2003, was discriminatory because, although it addressed women's difficulty in changing their last names, it still gave the father veto rights by allowing him to oppose the transmission of the family name.[118] Likewise, the Committee expressed concern over the "effectiveness of the relief" that proceedings in domestic courts would bring and stated

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[113] *Id.* at 12.
[114] *Id.* at 14.
[115] Loveday Hodson, *supra* note 107 at 573-74.
[116] Communication No. 12/2007, U.N. Doc. CEDAW/C/44/D/12/2007 (Aug. 4, 2009), at 2.
[117] *Id.* at 4.
[118] *Id.* at 13.

that domestic remedies had been unreasonably prolonged.[119] Nonetheless, the Committee still ruled the communication inadmissible because the authors did not qualify as victims under Article 2 of the Convention and no rights were violated under Article 16(1)(g).[120] The Committee justified this ruling by stating that the only beneficiaries of Article 16(1)(g) were married women, women living in de facto union, and mothers. Since the authors did not hold any of these statuses, they were not considered victims by the Committee.[121] Although the Committee made a second argument, which claimed that regardless of sex all children receive their father's name, the ruling failed to acknowledge that the issue did not lie in receiving a last name but changing it. Once again, the Convention's broad language left the Committee unable to protect the authors' identities and address a state party's discriminatory laws. In a dissenting opinion, members argued that the "apparently gender-neutral norm" of transmitting last names produced gender-based discrimination because the request to change a family name acquired through a discriminatory law is not viewed as a "lawful interest."[122] Likewise, the opinion argued that the authors did qualify under victim status since Article 1 of the Convention defines discrimination "irrespective of their [women's] marital status."[123] Members also argued that "the fact that a man could also be a victim of such gender-based discrimination does not affect the victim status of the authors."[124] The vagueness of the language in both the Convention and the Optional Protocol limited the Committee's ability to be assertive in its application of the criteria of inadmissibility even though the Committee acknowledged that the state party's laws were discriminatory.

3. Other Shortcomings of the Optional Protocol

Similar to the structural weaknesses of the Convention itself, the Committee has also struggled to apply the Optional Protocol in a timely manner. While the CEDAW has significant problems with overdue reports from state parties, the Committee itself is

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[119] *Id.* at 13.
[120] *Id.* at 15.
[121] *Id.* at 14.
[122] *Id.* at 16.
[123] *Id.* at 16.
[124] *Id.* at 17.

delayed in reviewing and deciding submitted communications under the Optional Protocol. The Committee currently has 42 pending cases, with some dating back to 2013.[125] Even on decisions of eventual inadmissibility, there have been delays of up to four years between the initial submission of a communication and the Committee's decision. In Communication No. 76/2014, *H.D. v. Denmark,* the Committee first received communications in October 2014 and took until July 2018 to deliver a decision of inadmissibility.[126] The communication was especially time sensitive since the author was seeking asylum and facing deportation.[127] These delays, although caused by the time limitations of the Committee's meeting times, harm authors and prevent the Committee from enacting the Convention's purpose.

4. Counterargument

Although this analysis of the Convention and its Optional Protocol has been largely critical of the weak legal enforcement mechanisms in place, it is equally important to acknowledge the positive effects of the CEDAW. The Convention and especially its Optional Protocol have statistically advanced the status of women since their ratification, which is why strengthening their enforcement mechanisms is worth significant consideration. According to a quantitative study performed by Neil Englehart and Melissa Miller in the Journal of Human Rights, even controlling for domestic variables including state capacity, civil and international war, democracy, economic development, and population size, the CEDAW has had positive, but sometimes uneven, statistical impact on women's rights.[128] Englehart and Miller's work reflected that of Professor Daniel Hill Jr.'s, who pointed out that controlling for state-level characteristics like democracy, which favorably disposes a state towards human rights, is necessary to eliminate statistical bias.[129] While state-level indicators are known to affect repressive practices, they also affect the "likelihood of a

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[125] Office of the High Commissioner: Complaints Procedure: Table of Pending Cases, https://www.ohchr.org/EN/HRBodies/CEDAW/pages/cedawindex.aspx (last visited Jan. 5, 2018).

[126] Communication No. 76/2014, U.N. Doc. CEDAW/C/70/D/76/2014 (Aug. 15, 2018), at 1.

[127] *Id.*

[128] Neil A. Englehart and Melissa K. Miller, The CEDAW Effect: International Law's Impact on Women's Rights, 13 Journal of Human Rights 22, 26-7 (2014).

[129] Daniel W. Hill Jr., *Estimating the Effects of Human Rights Treaties on State Behavior,* 72 The Journal of Politics 1161, 1161 (2010).

state making a formal commitment to the human rights regime."[130] Since there are extreme variances across ratifying and non-ratifying countries of human rights treaties, Hill used the Coarsened Exact Matching (CEM) algorithm to eliminate bias inferences and to compare the "difference between a ratifying state's level of repression and the level of repression that would be observed had that state not ratified the treaty."[131] The study concluded that the CEDAW ratification significantly improves the probability that women's political and social rights will improve in a state party.[132] On the contrary, the CEDAW has had virtually no effect on women's economic rights.[133] Nonetheless, the substantiated direct effect between the CEDAW and the status of women in state parties is not one that is seen in most other international human rights treaties.[134] Therefore, despite aforementioned shortcomings, it is imperative to focus more attention on strengthening the treaty's enforcement mechanisms. Englehart and Miller summed up their study by writing that there has been a tendency to "relegate CEDAW to the margins, a poor cousin of what are sometimes considered "core" treaties;" however, the "CEDAW ought to have a higher profile in human rights scholarship because of its demonstrable positive effects."[135]

Part III: Solutions

The issues of the Convention and its Optional Protocol are not unique to the body of international human rights law and many other treaties struggle with the same limitations. However, there are several solutions that should be considered to alleviate shortcomings of the CEDAW and promote its purpose.

A. Recommendations of the UN High Commissioner for Human Rights

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[130] *Id.* at 1161.
[131] *Id.* at 1168.
[132] Neil A. Englehart and Melissa K. Miller, *supra* note 127 at 27.
[133] *Id.*
[134] Daniel W. Hill Jr., *supra* note 128 at 1171.
[135] Neil A. Englehart and Melissa K. Miller, *supra* note 127 at 41.

In 2014, the UN High Commissioner for Human Rights recognized the issues of enforceability associated with human rights treaties and addressed them with several comprehensive recommendations. One recommendation to increase the efficiency with which state parties submit their reports to the Committee is a provision for the option to submit reports using the "Simplified Reporting Procedure" or SRP. Under the SRP, the Committee sends the state party a list of questions regarding issues that the state party should have been addressing within the last cycle instead of requiring the state party to first submit a full report. After the state party submits their responses, the dialogue and final recommendations of the Committee can proceed. Using this method will eliminate one step of the reporting procedure, thus saving both the state party and the Committee time in reviewing reports and allowing the Committee to address specific topics instead of reading broad and self-serving analyses prepared by the state party.[136] The High Commissioner also addressed the impartiality and independence of treaty bodies by improving the election processes for committee members. During the election of committee members, state parties tend to nominate members from their own country, which discredits the rulings of the whole body. Thus, the Commissioner's proposition of an "open public space" for state parties to present their nominations will increase the Committee's authority and may address its past inability to be aggressive in rulings.[137]

B. Inclusion of domestic NGOs in reporting process

Although NGOs have been free to submit shadow reports to supplement the Committee's consideration of state parties' reports, the awareness of this option as well as specific submission guidelines were limited. Realizing this issue, the Committee released a statement at the 45th CEDAW Committee Session in 2010 reaffirming its close cooperation with NGOs.[138] Presently, NGOs are permitted to attend open committee meetings including those with the attendance of the state party, submit shadow reports, attend informal consultation meetings with the Committee, and provide information to the

[136] U.N. Office of the High Commissioner, Reporting to the United Nations Human Rights Treaty Bodies Training Guide, 2017, at 30.

[137] U.N. ESCOR, 66th Sess., Agenda Item 124, at 74, U.N. Doc. A/66/860 (June 26, 2012).

[138] Statement by the Committee on the Elimination of Discrimination against Women on its relationship with non-governmental organizations 45th session, supra note 34 at 1-2.

pre-working group by request.[139] Additionally, NGOs may participate in the Optional Protocol by helping authors submit their communications. Nonetheless, while NGOs focused on women's rights are more aware of the opportunities under the Convention and its Optional Protocol, awareness still remains low. Thus, greater awareness of the use of the Optional Protocol must be spread by the Convention to NGOs in order to address the previously mentioned issue of state self-interested reporting and to increase the number of cases that individuals submit through the Optional Protocol. One way to do this would be for the Committee to partner with a highly-recognized NGO in each region to disseminate information throughout the state parties in that region. These regional partnerships would even allow more diversity in the geographical distribution of submitted communications since there is currently disproportionate attention paid to European countries.

C. Advisory Committee to the CEDAW Committee

Although the Committee already relies on a pre-working group that meets for five days directly after a plenary session to decide issues and questions of discussion for upcoming sessions, the group is only comprised of 5 committee members. In order to truly address the issue of the Committee's inability to review reports and communications in a timely manner due to time constraints, the Convention should be strengthened by the establishment of an advisory committee. This advisory committee would be under the direction of the Committee and could provide research and expertise as well as advice on how best to effect the successful implementation of the treaty's goals.[140] There is precedent for such an advisory committee under the Human Rights Council resolution 5/1 paragraphs 65-85, which establishes an advisory committee comprised of 18 experts who "function as a think-tank for the Council."[141]

D. Guideline on Criteria of Inadmissibility

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[139] NGO Participation at CEDAW sessions, http://www.un.org/womenwatch/daw/ngo/cedawngo (last visited Jan. 5, 2018).

[140] Background Information on the Advisory Committee, https://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/AboutAC.aspx (last visited Jan. 5, 2018).

[141] Human Rights Council Res. 5/1, U.N. Doc. A/HRC/RES/5/1, at 8 (June 18, 2007).

The best way to allow for uniformity and consistency in the application of the criteria of inadmissibility is to make clearer guidelines that all human rights treaty bodies can use. Since the criteria of inadmissibility is generally standard among human rights treaties, a wide-ranging examination of all communications to all human rights committees should be completed to identify the precedents that have already been established. This will help committees to review how the criteria has been applied in the past and what corrections need to be made in its application in the future. A comprehensive guideline should then be compiled to not only help the Committee in its rulings but also to provide authors and their representatives with clear expectations as to the success of their communication. A model for this type of guideline was created in 2009 by the European Court of Human Rights.[142] Although the guide itself admits to not being exhaustive, it explains the criteria of inadmissibility, their origin, purpose, and, most importantly, uses the Court's case law to make specifications and clarifies the language of each rule. The guide states that it is designed to both reduce the number of communications that have no prospects of being admissible and ensure that those communications "warrant examination on the merits pass the admissibility test."[143]

Since there was inconsistency among the Committee's *ratione temporis* rulings and what facts are regarded as ongoing, specifically in *B.J. v. Germany, Muñoz-Vargas y Sainz de Vicuña v. Spain*, and *Kayhan v. Turkey,* the European Court's clarifications on continuing violations might prove useful for the Committee to consider.[144] In regards to the requirement of domestic remedies, the Court clarified that "if more than one potentially effective remedy is available, the applicant is only required to have used one of them."[145] This would have helped alleviate much of the confusion in several of the cases presented in this analysis.

Since 2009, the European Court of Human Rights has continuously revised and improved its language and expectations for its rules of inadmissibility as well as other standards like timeliness, legal certainty and transparency.[146] This has led to a significant

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[142] European Court of Human Rights, Practical Guide on Admissibility Criteria, Apr. 2018, at 1.
[143] *Id.* at 6.
[144] *Id.* at 31.
[145] *Id.* at 22.
[146] Janneke H. Gerards and Lize R. Glas, *Access to Justice in the European Convention on Human Rights System,* 35 Netherlands Quarterly of Human Rights 11, 29 (2017).

improvement in providing a consistent application of rules across cases and has also allowed the Court to provide more substantive justice to victims due to not having an overwhelming number of cases to review. For example, at the end of March 2012, the Court had over 150,000 pending cases in its docket and it was determined that approximately 90% of applications to the Court are considered inadmissible.[147] This is contrasted with only 56,350 pending applications in December 2018, a drastic improvement in efficiency due to consistency in application of rules.[148] Thus, the strengthening and clarification of standards clearly leads to a reduction in inconsistency and an increase in delivering stronger legal precedents. Although the Court's stricter criterion of inadmissibility have attracted some criticism due to a new clause that would allow the Court to rule an application inadmissible if "the applicant has not suffered a significant disadvantage," the effort to define language and rules has clearly served the Court well.[149] The Committee could strive towards its own objectives and guide its own jurisprudence by following the example of the European Court and creating clearer terms and expectations for the criteria of inadmissibility.

Conclusion

Since its ratification, the CEDAW has been an incredible step in the promotion and protection of women's human rights. However, while the Optional Protocol has evolved to provide more opportunities for justice for women facing discrimination, the Convention continues to struggle to live up to the ambitions of its original purpose. The CEDAW's inability to provide timely feedback and rulings, inconsistency in the application of inadmissibility rules, overall inefficiency in reviewing state party reports, and weak legal enforcement mechanisms even after the ratification of its Optional Protocol merit serious

[147] Updated Publication: Bringing a case to the ECtHR – A practical guide on admissible criteria, https://www.asylumlawdatabase.eu/en/content/updated-publication-bringing-case-ecthr-practical-guide-admissibility-criteria (last visited Mar. 29, 2019).

[148] Pending Applications Allocated to a Judicial Formation (31/12/2018), https://www.echr.coe.int/Documents/Stats_pending_2019_BIL.pdf (last visited Mar. 29, 2019).

[149] Helen Keller, Andreas Fischer and Daniela Kühne, *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, 21 The European Journal of International Law 1025, 1037 (2011).

consideration of the effectiveness of the Convention. While the Committee has delivered justice to numerous individuals, the relatively low number of considered cases proves that although the Optional Protocol strengthened the CEDAW, it is not a strong enough legal mechanism to enforce repercussions for violations of women's rights. Likewise, the Optional Protocol's positive effects are severely hindered by other shortcomings in the CEDAW's efficiency that can be combated through the addition of more legal mechanisms. Progress for women's rights has occurred painfully and slowly throughout history; however, without attention being brought to the issues that women face, progress would not be possible at all.

Sanctuary Cities: A Legal Quagmire

Enrique Covarrubias

Introduction

While sanctuary policies have been a characteristic of many local jurisdictions across the United State since the late 1980s[1], this practice has recently gained widespread attention due to recent legal efforts by the Trump administration to discourage jurisdictions from adopting sanctuary policies.[2] Specifically, the Trump administration has attempted to withhold federal funding from sanctuary cities in addition to suing the state of California for adopting an expansive sanctuary policy.[3] The administration has claimed that these efforts are a response to a series of crimes committed by undocumented immigrants residing in sanctuary jurisdictions.[4] While the precise legality of these actions is currently being argued in federal court, the intent of the Trump administration to limit sanctuary policies whenever possible is clear.[5] The controversial nature of sanctuary city policies has raised several interesting legal issues, including whether federal authorities are legally allowed to withhold federal funding from jurisdictions that refuse to cooperate with federal immigration authorities

[1] Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era,* MIGRATION POLICY INSTITUTE (April 1, 2016), https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era.

[2] *Justice Department Demands Documents and Threatens to Subpoena 23 Jurisdictions As Part of 8 U.S.C. 1373 Compliance Review*, DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (Jan. 24, 2018), https://www.justice.gov/opa/pr/justice-department-demands-documents-and-threatens-subpoena-23-jurisdictions-part-8-usc-1373.

[3] Rebecca Morin, 9th Circuit rules White House can't withhold money from 'sanctuary cities', POLITICO (August 1, 2018), https://www.politico.com/story/2018/08/01/trump-sanctuary-cities-appeal-ruling-756925.

[4] DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS, *supra* note 2.

[5] Fred Barbash, *Renewed Trump 'sanctuary cities' crackdown ruled illegal*, WASHINGTON POST (March 5, 2019), https://www.washingtonpost.com/world/national-security/renewed-trump-sanctuary-cities-crackdown-ruled-illegal/2019/03/05/19274ee4-3f58-11e9-a0d3-1210e58a94cf_story.html.

Proponents of sanctuary policies argue that they help protect the relationship between marginalized immigrant populations and local law enforcement. In contrast, critics of sanctuary policy argue that such policies can lead to criminals being released back into local communities instead of being taken into federal custody and deported.[6] Although research has shown that jurisdictions with sanctuary policies do not generally experience higher crime rates and often have more robust economies,[7] there have been several instances in which deportable aliens in sanctuary jurisdictions have been released by local law enforcement and gone on to commit serious crimes.[8] These contradictory outcomes from sanctuary policies underscore the need for change in how sanctuary jurisdictions enforce policy and how the federal government enforces immigration laws within the United States.

Proponents of sanctuary jurisdictions have long argued that their establishment is necessary to preserve relationships between immigrant populations and local law enforcement by encouraging immigrants to report crimes without fear of being deported by federal immigration authorities.[9] This view is typically advanced by local law enforcement officials, who often believe that assisting in federal immigration matters can be more harmful than helpful to their communities. Empirical data supports this assertion – a 2017 study by the Center for American Progress found that counties with sanctuary policies in place experience 35.5 fewer crimes per 10,000 than counties without such policies in place.[10] Similar correlations were also found with regards to poverty and employment levels in sanctuary jurisdictions versus non-sanctuary jurisdictions.[11]

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[6] Deroy Murdock, *Fugitive Cities Have Harbored 10,000 Criminal-Alien Recidivists*, NATIONAL REVIEW (March 9, 2018), https://www.nationalreview.com/2018/03/fugitive-cities-have-harbored-10000-criminal-alien-recidivists/.

[7] Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy,* NATIONAL IMMIGRATION LAW CENTER (Jan. 26, 2017), https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf.

[8] Jessica Vaughan, *Massachusetts Sanctuary Policies Freed Hundreds of Criminal Aliens in 10-Week Period*, CENTER FOR IMMIGRATION STUDIES (July 13, 2018), https://cis.org/Vaughan/Massachusetts-Sanctuary-Policies-Freed-Hundreds-Criminal-Aliens-10Week-Period.

[9] Loren Collingwood, Benjamin Gonzalez-O'Brien & Stephen El-Khatib, *Sanctuary Cities Do Not Experience an Increase in Crime,* THE WASHINGTON POST (Oct. 3, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/sanctuary-cities-do-not-experience-an-increase-in-crime/?utm_term=.5490b830a117.

[10] Wong, *supra* note 7, at 6.

[11] *Id.*

The first section of this article will examine how the haphazard development of sanctuary policy in local jurisdictions has resulted in a patchwork of laws across the country that has sometimes led to unwanted outcomes that have been exploited by certain political actors. This will be followed by an analysis of the constitutional arguments in favor of sanctuary policies. In the second section, I will discuss the impact and legality of California State Bill 54, which established California as the first "sanctuary state" in 2017, as well as the impact and legality of the Trump administration's response. The third section will argue that the localized nature of sanctuary policy has resulted in an ineffective and inconsistent system across localities that should be replaced by state-level systems that set forth clear and consistent guidelines for sanctuary policy within particular states.

A. Historical Background

The American sanctuary movement originated in the 1980s when churches and other religious organizations declared their properties "sanctuaries" for Central American refugees fleeing civil conflicts that were facing deportation by the Immigration and Naturalization Services.[12] Although the Department of Justice initiated criminal proceedings against sixteen Arizona activists behind the movement, none served jail time, and the Department of Justice eventually ceased prosecuting individuals associated with the sanctuary movement because of an inability to secure sentences with jail times.[13] The establishment of sanctuary cities was first codified into law in 1989, when the city of San Francisco passed the "City and County of Refuge" Ordinance, which stated in part that "No department, agency, commission, officer, or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law…"[14]

In the following twenty-five years, over two hundred jurisdictions all over the United States have adopted variations of this policy into their municipal ordinances. However, because sanctuary legislation is drafted at the local or state level, there is no official definition or list of what constitutes a "sanctuary jurisdiction", despite their prevalence,

12 Gzesh, *supra* note 1.
13 *Id.*
14 San Francisco, Cal., Municipal Code § 12H (1989).

unofficial lists compiled by organizations such as the Center for Immigration Studies (CIS) have put the number of sanctuary jurisdictions in the United States at over two hundred.[15] In recent years, sanctuary policies have gone from being enforced by local cities and counties to entire states such as California.[16]

Because of the decentralized nature of sanctuary policies across the United States, there is no singular official definition as to what constitutes a "sanctuary jurisdiction." Cities and counties often enact significantly different policies in order to comply with state as well as federal law. For example, as of November 2017, the Center for Immigration Studies listed over 340 localities as "sanctuary jurisdictions" but simply defined a sanctuary jurisdiction as "one that obstructs ICE."[17] Under this definition, jurisdictions that refused a detainer request from the Immigration and Customs Enforcement Agency (ICE) appeared on the list. However, many jurisdictions who decline to honor ICE detainers may do so purely to respect the Fourth Amendment rights of detainees in light of recent legal decisions, and not necessarily out of a desire to "obstruct ICE".[18]

Efforts by the Trump administration to withhold federal funds from sanctuary jurisdictions through executive order have been unsuccessful on two fronts, with several Supreme Court rulings, such as *Pennhurst State Sch. and Hosp. v. Halderman* establishing that the "power of the purse" belongs exclusively to Congress.[19] Furthermore, even if Congress were to pass a law withholding federal funds from sanctuary jurisdictions, precedent from *Pennhurst State Sch.* indicates that it would likely be found unconstitutional because case law states that Congress cannot retroactively impose conditions for federal aid,[20] nor can the conditions for aid be so coercive that they force the state to comply (*NFIB v. Sebelius).*[21] However, there have also been limitations placed on the degree to which a jurisdiction can

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[15] Bryan Griffith & Jessica Vaughan, *Maps: Sanctuary Cities, Counties, and States,* CENTER FOR IMMIGRATION STUDIES (Mar. 18, 2019), https://cis.org/Map-Sanctuary-Cities-Counties-and-States.

[16] Peter Galuszka, *What Are Sanctuary Cities, Anyway?,* THE WASHINGTON POST (Nov. 6, 2017), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/11/06/what-are-sanctuary-cities-anyway/?utm_term=.03b2039c1b1f.

[17] *Id.*

[18] Kelly Rule, *Chesapeake City Council Votes Against Specifying Sanctuary City Policies,* NEWS 3 TV (May 9,2017), https://wtkr.com/2017/05/09/council-to-vote-on-resolution-prohibiting-chesapeake-from-becoming-a-sanctuary-city/.

[19] Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984).

[20] *Id.*

[21] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

enforce a sanctuary policy. In *City of New York v. U.S. (1999),*[22] the Second Circuit Court of Appeals ruled against the implementation of a local policy that would forbid city officials to transmit any information about an immigrant's immigration status to federal authorities.

Many jurisdictions, such as California, have responded to the Trump administration's immigration policies by enacting even more wide-ranging and expansive sanctuary policies. The constitutionality of sanctuary jurisdictions has recently been challenged in court by the Trump administration.[23] This is best exemplified by the passage of SB54 by the California Legislature in 2017 that made California a "Sanctuary State" and was immediately met with a court challenge by the Trump administration, which will be discussed in detail later in this article.

B. Legal Basis for Sanctuary Policy

The legality of sanctuary policies is derived from the Tenth Amendment of the United States Constitution, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[24] Dating back to the 1850's, the Supreme Court has interpreted the Tenth Amendment to the Constitution to mean that although states cannot prevent the federal government from enforcing federal law, the federal government cannot compel states to enforce federal statutes, a doctrine known as the anti-commandeering doctrine. The anti-commandeering doctrine was first established in *Prigg v. Pennsylvania* (1842),[25] where the Supreme Court held that it would be an "unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the Constitution."[26]

The anti-commandeering doctrine was further strengthened during the Rehnquist Court, particularly during two specific cases. In *New York v. United States* (1992), the

[22] City of New York v. United States, 179 F.3d 29 (New York., 1999).
[23] Morin, *supra* note 3.
[24] U.S. Const. amend. X.
[25] Prigg v. Pennsylvania, 41 U.S. 539, 616 (1842).
[26] *Id.* at 616.

Rehnquist Court found that a provision in a federal law relating to the handling of nuclear waste, known as the take-title provision, violated the sovereignty of New York State.[27] The Court held that the take-title provision was coercive in nature because it forced the State to either act in accordance to federal law or accept the liability of nuclear waste.[28] Although *New York* was primarily concerned with the power of the federal government to regulate interstate commerce, Justice O'Connor, writing for the majority, stated that Congress could not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[29] Justice O'Connor also clarified that the Constitution has never given Congress the power to "require the States to govern according to Congress' instructions,"[30] as such a law was in violation of the Tenth Amendment.

Five years later, the Supreme Court ruled in *Printz v. United States* that a provision in the Brady Gun Bill requiring local law enforcement officials to enforce a background check on prospective gun owners was unconstitutional.[31] Writing for the majority, Justice Scalia reprimanded the federal government for attempting to circumvent the precedent set forth in *New York* by attempting to conscript state officials into a federal program.[32] Setting forth the clearest defense for the anti-commandeering doctrine to date, Scalia held that the federal government could "neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[33] Applied to sanctuary policy, this precedent means that the federal government cannot require states or local jurisdictions to assist or participate in the enforcement of federal immigration law.

C. Legality of ICE Detainers

As applied to sanctuary jurisdictions, these decisions by the Rehnquist Court have allowed for certain sanctuary practices to be generally seen as permissible under the law. A

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[27] New York v. United States, 505 U.S. 144 (1992).
[28] *Id.* at 187.
[29] *Id.* at 203.
[30] *Id.* at 162.
[31] Printz v. United States, 521 U.S. 898 (1997).
[32] *Id.* at 935.
[33] *Id.*

common practice of sanctuary jurisdictions is to refuse to comply with detainers issued by the Immigrations and Customs Enforcement Agency (ICE), also known as ICE Form I-247D.[34] When ICE is made aware that an undocumented immigrant has been taken into local custody, it may issue a Form I-247D to the jurisdiction requesting that the undocumented immigrant be detained for an additional 48 hours past the initial release date to allow ICE agents more time to decide whether to detain the individual and initiate removal proceedings.[35] ICE detainers became widespread following the implementation of a federal program known as Secure Communities, which aimed to allow ICE to more effectively identify and deport criminal aliens held in local jails, in part through the use of detainers.[36] Secure Communities was an "information-sharing partnership" between the Department of Homeland Security and the Federal Bureau of Investigation that allowed federal immigration authorities to identify criminal immigrants in local custody and take action.[37] Secure Communities was first implemented in 2008 and continued to grow in size and scope throughout President Obama's first term, going from around 186,000 detainers being issued by ICE in 2008 to around 310,000 in 2011.[38]

As the use of detainers by ICE became more widespread, so did the number of legal cases challenging their constitutionality on various fronts. In *Galarza v. Szalczyk*,[39] the Third Circuit Court of Appeals held that "immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal."[40] can request the cooperation of local jurisdictions in carrying out ICE detainers, but it may not compel jurisdictions to cooperate with their request. Justice Fuentes, writing for the majority, clarified that the Court's decision was based on both a "plain reading" of 8 C.F.R. § 287.7 – the federal statute relating to immigration detainers – but also by arguing that interpreting

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[34] Trent Powell, *Overview of ICE Form I-247,* TINGEN AND WILLIAMS ATTORNEYS AT LAW (Oct. 22, 2015), https://tingenwilliams.com/2015/overview-ice-form-247/3694.

[35] *Immigration Detainers*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers (last visited Jan. 5, 2019).

[36] *Secure Communities*, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT, https://www.ice.gov/secure-communities (last visited Jan. 6, 2019).

[37] *Id.*

[38] *Latest Data: Immigration and Customs Enforcement Detainers,* TRAC IMMIGRATION (April 2018). http://trac.syr.edu/phptools/immigration/detain/.

[39] Galarza v. Szalczyk, 745 F.3d 634 (2014).

[40] *Id.* at 636.

detainers as mandatory would be "inconsistent with the anti-commandeering principle of the Tenth Amendment," citing *New York* and *Printz* as evidence.[41] Additionally, other court decisions, discussed in the following paragraphs, have indicated that even *voluntary* compliance with detainers may be unconstitutional, as localities may violate an individual's Fourth Amendment right by detaining individuals past their original release date without charging them with a new crime. This is in violation of the Fourth Amendment's provision that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[42]

In *Lunn v. Commonwealth*,[43] the Massachusetts Supreme Judicial Court held that state law enforcement officers lacked the authority to comply with ICE detainers because nothing in Massachusetts state law authorized state officers to be able to make arrests solely for civil immigration violations.[44] Although the legal reasoning behind *Lunn* was based heavily on Massachusetts law and thus not immediately applicable to other states, the reasoning behind the ruling echoed rulings made by other courts in previous years.

In *Morales v. Chadbourne,* the Rhode Island District Court held that detaining an individual past their scheduled release date constituted a new arrest under the Fourth Amendment requiring a new warrant needing to be supported by probable cause.[45] Although the Supreme Court has not yet ruled on the constitutionality of ICE detainers, the established legal precedent from the aforementioned decisions appears to be that not only can jurisdictions decline to comply with an ICE detainer, but they may be compelled to decline to comply with ICE detainers because of Fourth Amendment concerns.

Part I: Existing Sanctuary Policy

A. Legal Limitations of Sanctuary Policy

Despite the spate of legal decisions that have granted local jurisdictions autonomy in deciding their level of cooperation with federal immigration authorities, there have been

[41] *Id.* at 643.
[42] U.S. Const. Amend. IV.
[43] Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass., 2017).
[44] *Id.* at 1146.
[45] Morales v. Chadbourne, 996 F. Supp. 2d 19. (1st Cir. 2015).

several legal decisions that have placed limits on the type of sanctuary policies that local jurisdictions can enact.[46] In *City of New York v. United States,*[47] the City of New York unsuccessfully challenged the constitutionality of 8 U.S.C.S. § 1373, a recently enacted federal law that stated in part that local government entities could not "...prohibit, or…restrict, any government entity or official from sending to…the Immigration and Naturalization Service information regarding the citizenship or immigration status…of any individual."[48] This law was in direct conflict with New York City Executive Order No. 124, which prohibited city employees from transmitting information regarding the immigration status of any individual to federal immigration authorities unless authorized to do so by an immigrant.[49] New York City sued the federal government, arguing that the newly-enacted statute violated the Tenth Amendment by preventing local governments from "controlling the use of information regarding the immigration status of individuals obtained in the course of their official business."[50]

The Second Circuit Court disagreed with the City's claims, stating in the majority opinion that "that states do not retain under the Tenth Amendment an untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs."[51] The Court was particularly skeptical that 8 U.S.C.S. § 1373 violated the anti-commandeering doctrine in large part because it did not compel the City of New York to administer any federal program, conscript city employees into the service of the federal government, or even compel the City to require or prohibit anything, and only prohibited the City from directly restricting the voluntary exchange of immigration with the Immigration and Naturalization Service (INS).[52] Although the Court's decision to uphold 8 U.S.C.S. § 1373 forbade localities from prohibiting employees from voluntarily *sharing* immigration information with immigration authorities, it did not prohibit localities from prohibiting employees from *asking* about immigration status, or from prohibiting employees

[46] Many of the legal cases regarding the limitations of sanctuary policy are currently being argued or appealed. As such, I will primarily focus on legal decisions that have concluded, with the exception of CA SB54 because of the scope and importance of the bill in making California the first 'sanctuary state'.

[47] City of New York v. United States, 179 F.3d 29 (New York., 1999).

[48] 8 U.S.C § 1373 § A (1996).

[49] City of New York Exec. Order No. 124 § 2.1 (August 7, 1989).

[50] City of New York, *supra* note 47, at 6.

[51] *Id.* at 35.

[52] *Id.*

from sharing other information with federal immigration authorities, such as release dates or criminal case information.

Another important case whose implications may limit the scope of sanctuary policy –albeit to a lesser degree than *City of New York* – is *Arizona v. United States (2012).* [53] In *Arizona*, the United States government sought to overturn Arizona State Bill 1070, a wide-ranging law that, among other things, sought to impose criminal penalties on undocumented immigrants who sought employment.[54] The Supreme Court stated that § 5(C) of SB1070 was in conflict with the Immigration Reform and Control Act (IRCA) of 1986, a federal law enacted by Congress that did not impose criminal penalties on undocumented immigrants who "seek in or engage in unauthorized employment."[55] The Court further noted that the "ordinary principles of preemption" preempted state laws when they presented an obstacle to "the accomplishment and execution of the full purpose and objectives of Congress."[56] The Court determined that § 5(C) "would interfere with the careful balance struck by Congress" when it enacted IRCA into law because "proposals to make unauthorized work a criminal offense were discussed during the long process of drafting IRCA…But Congress rejected them."[57] Essentially, because Congress had previously declined to criminalize unauthorized work during the debate surrounding the passage of IRCA, SB1070 prevented IRCA from working as Congress had intended by adding these provisions.

Under the preemption doctrine, the Supreme Court held that Section 5(C) of SB1070 violated Article VI of the United States Constitution,[58] which established the supremacy of federal laws over state laws, and SB1070 was thus preempted by federal law.[59] Another important section of SB1070 that was struck down in *Arizona* for similar reasons was §3, which authorized state law enforcement officers to arrest unauthorized immigrants for certain violations of federal immigration law.[60] The Court ruled that if this particular provision of SB1070 were allowed to stand, "every State could give itself independent

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[53] Arizona v. United States, 567 U.S. 387 (2012).
[54] ARIZ. REV. STAT. § 13-2928 § 5(C) (LexisNexis 2018).
[55] Arizona*, supra* note 53, at 406.
[56] *Id.*
[57] *Id.* at 405.
[58] U.S. Const. Art. VI S. 2.
[59] Arizona*, supra* note 53, at 406.
[60] ARIZ. REV. STAT. § 13-1509 (LexisNexis 2018).

authority to prosecute federal registration violations," which would interfere with the federal government's ability to independently enforce federal immigration law.[61] Although not directly relating to sanctuary policy, the arguments relating to the preemption doctrine laid forth in the majority opinion have been used by the federal government in attempts to strike down certain sanctuary policies, as I will discuss in a later section of this paper.

B. CA S.B. 54 & U.S. v. California

By far the most ambitious and wide-ranging sanctuary policy to date, California Senate Bill 54 was enacted into law by the California state government in 2017.[62] SB54 established California as a "sanctuary state" and included a series of provisions intended to severely limit the ability of state agencies and private employers – albeit to a lesser extent than the state – to cooperate with federal immigration authorities.[63] SB54 includes provisions that broadly prohibit all state law enforcement agencies from making inquiries into an individual's immigration status or cooperating with federal immigration authorities in most circumstances, except those where an individual has been previously convicted of a particularly serious crime, such as child or sexual abuse.[64]

Around the same time that California Governor Jerry Brown signed SB54 into law, he also signed two other related measures into law – Assembly Bill 103 and Assembly Bill 450. A.B. 103 prohibited local jurisdictions from "entering into a contract with the federal government to house or detain an adult noncitizen… for the purposes of civil immigration custody", in addition to prohibiting localities from expanding the capacity of their immigration detention facilities.[65] Additionally, the bill required the State Attorney General to conduct inspections of detention facilities holding noncitizens "for purposes of civil immigration proceedings" and make the report available to the general public.[66] A.B. 450 prohibited both public and private employers from providing "voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor" except

[61] Arizona, *supra* note 53, at 402.
[62] Senate Bill 54. (California 2017)
[63] Senate Bill 54 S. 2. (California 2017).
[64] Senate Bill 54 S.3. (California 2017).
[65] Assembly Bill 103 S. 3. (California 2017).
[66] Assembly Bill 103 S. 4. (California 2017).

when required to by federal law.[67] Additionally, the bill required employers to notify employees of potential workplace inspections by immigration authorities if they themselves were notified.[68] All three of these bills broadened protections for undocumented immigrants in California, and could potentially serve as a model for other states in the future.

Almost immediately after Governor Brown signed SB54 into law in October 2017, the Department of Justice sued California over these three recently enacted sanctuary policies. In its initial suit filed in the Eastern District of California,[69] the federal government argued that these provisions "have the purpose and effect of making it more difficult for federal immigration officers to carry out their responsibilities in California" and were thus unconstitutional under the Supremacy Clause of the United States Constitution.[70] The government attempted to argue that *Arizona* had established that the federal government had "broad authority to establish immigration laws" and that individual states could not obstruct or discriminate against."[71] Throughout the initial filing, the government claimed that AB's 103 and 450 and SB54 constituted obstruction towards the activities of the federal government and were therefore in violation of 8. U.S.C. § 1373 and should be declared invalid under the preemption doctrine of the Supremacy Clause.[72]

In its decision denying the federal government's request for a preliminary injunction against all three bills,[73] the United States District Court for the Eastern District of California found that the government was likely to fail in arguing that A.B. 103, which would prohibit localities from expanding detention facilities housing noncitizens, and SB54, establishing California as a sanctuary state and broadly prohibiting local law enforcement from cooperating with federal immigration authorities, were in violation of the Supremacy Clause.[74] With regards to A.B. 103, the Court noted that the legislation did not "enact a new regulatory scheme or impose substantive requirements" that might have otherwise conflicted

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[67] Assembly Bill 450, S.1. (California 2017).
[68] Assembly Bill 450, S. 4. (California 2017).
[69] Complaint, United States v. California, (E.D. Cal. 2018) (No 18-264).
[70] U.S. Const. Art. V. S. 2.
[71] California, *supra* note 69, at 4.
[72] California, *supra* note 69, at 16.
[73] This decision is currently being appealed in federal court at the time of this writing.
[74] United States v. California, No. 2:18-cv-490-JAM-KJN, 2018 U.S. Dist. LEXIS 113759 at 4 (E.D. Cal. July 9, 2019).

with the activities of federal officials in California, and the government's challenge was likely to fail.[75] With regards to SB54, the Court found that the constitutionality of 8. U.S.C § 1373 itself was "highly suspect"[76] due to the recent Supreme Court case *Murphy v. NCAA. Murphy,* which held that Congress cannot dictate what a "state legislature may and may not do," and extended the anti-commandeering doctrine to prohibitions on state legislative actions.[77] However, the Eastern District Court declined to "reach a definitive answer" regarding the constitutionality of Section 1373 of 8. U.SC., punting on the issue by it noting that SB54 expressly permitted sharing information in accordance with Section 1373.[78]

To reach the decision, the Court relied on a narrow reading of Section 1373, one that construes it narrowly to "include only one's immigration status or citizenship" and not broadly to "encompass information such as release dates and addresses."[79] The Court reasoned that if Congress "intended the statute to sweep so broadly, it would have used broader language."[80] The Court also disagreed with the federal government's claim that California's decision not to assist federal immigration enforcement was an "obstacle" to immigration enforcement because "refusing to help is not the same as impeding."[81]

C. Legality of Retaliatory Measures by the Federal Government Against Sanctuary Jurisdictions

Although the Obama Administration opposed sanctuary cities as a matter of public policy, it did not generally litigate against or seek to excessively punish sanctuary jurisdictions.[82] However, under the direction of President Trump, the DOJ has attempted to take a more aggressive stance against sanctuary jurisdictions, primarily through withholding federal funds from sanctuary jurisdictions. In January 2017, The Trump administration issued Executive Order 13768, entitled *Enhancing Public Safety in the Interior of the United States.*[83] This order stated that jurisdictions that "willfully refuse to comply with 8. U.S.C. § 1373 are

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[75] *Id.* at 14.
[76] *Id.* at 35.
[77] *Id.* at 33.
[78] *Id.* at 37.
[79] *Id.*
[80] *Id.* at 39.
[81] *Id.* at 43.
[82] Mike DeBonis, *Senate Democrats block 'sanctuary cities' bill*, THE WASHINGTON POST (Oct. 20, 2015), https://www.washingtonpost.com/news/powerpost/wp/2015/10/20/senate-democrats-block-sanctuary-cities-bill/?utm_term=.870dd32578b1.
[83] Exec. Order No. 13,768, 82 Fed. Reg 8799 (January 30, 2017).

not eligible to receive federal grants, except as deemed necessary for law enforcement purposes."[84] The order has resulted in several court battles between sanctuary jurisdictions and the federal government, many of which are still ongoing.

Nearly all of the Trump's administration's policies regarding sanctuary jurisdictions have faced setbacks in federal courts. Notably, on August 1, 2018, the United States Court of Appeals for the Ninth Circuit ruled in *San Francisco v. Trump* (2018) that Executive Order 13768 was unconstitutional because it violated the Spending Clause of the United States Constitution.[85] Specifically, the Court held that:

> "under the principle of Separation of Powers and in consideration of the Spending Clause, which vests *exclusive* power to Congress to impose conditions on federal grants, the Executive Branch may not refuse to disperse the federal grants in question without congressional authorization."[86]

The Court further noted that because legislation that would accomplish the goals of the Executive Order had previously been considered and rejected by Congress, "the sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play… Not only has the Administration claimed for itself Congress's exclusive spending power, it has also attempted to coopt Congress's power to legislate."[87] The decision by the Ninth Circuit Court only applied to San Francisco, however other court rulings have struck down the applicability of the Executive Order for similar reasons.

In *San Francisco v. Sessions* (2018), the U.S. District Court for the California Northern District ruled on a similar case.[88] At issue in *San Francisco* was a separate attempt by Attorney General Jeff Sessions to coerce jurisdictions into complying with §1373 by requiring that applicants for the Edward Byrne Memorial Justice Assistance Grant, a public safety federal grant program, comply with three new conditions. Specifically, localities would need to provide ICE with access to their correctional facilities, notify ICE when a detainee was to be released, and certify compliance with §1373.[89] In its decision, the Northern District of

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[84] *Id.* at 8801.
[85] City & Cty. of San Francisco v. Trump, 897 F. 3d 1225 (9th Cir. 2018)
[86] Id. at 4.
[87] Id. at 13.
[88] City & Cty. of San Francisco v. Sessions III, No. 3:18-cv-05146-JCS (N.D. Cal. Filed Aug. 22, 2018).
[89] *Id.* at 1-2.

California noted the previous cases where other jurisdictions had successfully sued the Trump administration for similar policies, and ruled that the conditions that the Trump administrations were attempting to impose on the Byrne Justice Assistance Grant (JAG) program were unconstitutional because they violated the Spending Clause of the United States Constitution.[90] Notably, the Court ruled that even if Congress had authorized the restrictions, they would still be unconstitutional because the conditions imposed were "ambiguous and insufficiently related to the grant or the local criminal justice program purposes of the federal spending", since the Byrne JAG is meant to generally improve public safety as a jurisdiction sees fit.[91]

Because the Justice Department had mandated compliance with U.S.C 8. § 1373 as a condition for receiving the Byrne JAG, San Francisco was able to make the legal argument that §1373 was unconstitutional on its face because it violated the anti-commandeering principle of the Constitution.[92] The Court agreed with assertion primarily because in order to comply with the information sharing requirements of §1373, states and local jurisdictions would "need to submit control of their own officials' communications to the federal government… They would also need to allocate their limited law enforcement resources to exchange information with the federal government instead of to the essential purposes… they believe would most benefit their respective communities."[93] Because of the precedent set forth in *Murphy*, the Court reasoned that there was "no distinction for anti-commandeering purposes… between a federal law that affirmatively commands States to enact new laws and one that prohibits states from doing the same."[94] Thus, the Court ruled that §1373 was unconstitutional, and issued a nationwide injunction against the Trump administration pending an appeal before the Ninth Circuit Court of Appeals.[95]

Part II: Limitations of a State to Regulate Local Jurisdictions

Another problem with individual sanctuary policies stem from the fact that what a "sanctuary policy" entails is not well defined. Often, this means that two jurisdictions can

[90] *Id.* at 41.
[91] *Id.*
[92] *Id.* at 23.
[93] *Id.* at 26.
[94] *Id.* at 29.
[95] *Id.* at 59.

have the same policy of not complying with ICE detainer requests but have different motivations for doing so. One jurisdiction may do so out of a desire to adopt a wider sanctuary policy. In contrast, another jurisdiction may do so only because it has been advised to by legal counsel in light of recent decisions questioning the legality of ICE detainers, but may still seek to aid federal immigration authorities in other areas – as is the case in Chesapeake County, VA.[96] Such policies can lead to the worst of both worlds in certain jurisdictions, where immigrant communities may not trust local law enforcement, and violent criminals may still slip through the cracks. Because of the shortcomings of individual sanctuary policies, the best way forward for sanctuary policy is the enactment of statewide sanctuary policies that standardize the behaviors of local law enforcement agencies across an entire state in regard to cooperation with immigration authorities, and ideally allow compliance with ICE detainers when deal with individuals with a previous history of serious crimes.

Sanctuary policies on the state level are relatively new, with California's State Bill 54 being the first instance of a state adopting a uniform sanctuary policy. However, the legality of SB54 with regards to the Constitution of California was quickly, and successfully, challenged by Huntington Beach and other cities within California in *City of Huntington Beach v. State of California* (2018).[97] Huntington Beach argued that SB54 contradicted Article XI, Section 5(a) of the California Constitution that gave Huntington Beach (and all charter cities in California) exclusive authority to "make and enforce all ordinances and regulations in respect to municipal affairs, and that "City authority shall supersede all State laws inconsistent therewith."[98] The Court agreed with this assertion, stating that SB54 was an "unconstitutional invasion into the rights of the city" and could not be applied to charter cities in California, although California stated it would appeal.[99] Although *Huntington* is currently being appealed, it highlights the reality that when states pass sanctuary policies, they will be bound by their own constitutions, and may or may not be able to dictate the extent to which local cities cooperate with federal immigration authorities.

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[96] Rule, *supra* note 18.

[97] City of Huntington Beach v. State of California, No. 30-2018-00984280 (Cal. Super. Ct. Filed April 4, 2018).

[98] Cal. Const., Art XI, § 5(a).

[99] City of Huntington Beach, *supra* note 97, at 11.

A. Potential Solutions

As previously discussed, it is well-established that the federal government cannot compel local jurisdictions to enforce a particular immigration policy under the anti-commandeering doctrine. Thus, the onus falls on individual states to regulate their local jurisdictions uniformly. Although an amnesty policy enacted as part of a comprehensive immigration reform bill would greatly reduce the need for sanctuary cities, it is not realistic in the current political climate. As such, state legislation that standardizes sanctuary policy across a state to the greatest extent possible and requires local jurisdictions to cooperate with ICE in cases involving violent and deportable immigrants may be the best way to mitigate the negative effects of sanctuary policies while preserving the original goal of maintaining positive relationships between local law enforcement officers and the immigrant community.

There are several advantages to adopting state-level sanctuary policies over the current disorganized patchwork of city and county policies that often release violent immigrants that should have been taken into federal immigration custody. For example, in November 2018, Luis Perez was charged with eleven felonies after murdering two men and a woman in a two-day span.[100] Although ICE had placed a detainer on Perez when he was previously arrested on separate charges because of his prior criminal history, local officials in Middlesex County, New Jersey, declined to honor the request in order to comply with county policy that generally declined ICE detainer requests unless there was an active order of deportation or the individual had been previously convicted of a first or second-degree crime.[101]

In addition to potentially reducing public safety, these patchwork sanctuary policies adopted by individual localities are often not strongly enshrined in the law and can be modified or withdrawn without sufficient oversight or accountability from legislators – causing stress to the immigrant populations of a local community. Such situations can occur when local jurisdictions face pressure from the federal government – as Miami-Dade County

[100] *Suspect in three Missouri slayings faced ICE issue in New Jersey,* ASSOCIATED PRESS (Nov. 9, 2018), https://www.abc15.com/news/national/suspect-in-three-missouri-slayings-faced-ice-issue-in-new-jersey.

[101] *Id.*

did when it reversed its sanctuary policy of not complying with ICE detainer requests in order to comply with federal law and be eligible for federal police grants.[102]

B. State Sanctuary Policy using California SB54 As a Model

As a legislative text, SB54 offers a good roadmap for future legislation. As Judge Mendez of the Eastern District of California noted in his ruling granting in part California's motion to dismiss the DOJ's lawsuit against SB54, "the challenged provisions of SB54 do not violate the Supremacy Clause", nor do they violate §1373.[103] Coupled with the spate of court rulings such as *Murphy* and *San Francisco* that have indicated that §1373 may be itself unconstitutional, other states should feel emboldened to draft their own sanctuary policies without fear of retaliation by the federal government. Upon doing this, states should be cognizant of how individual state constitutions would affect such legislation.

For example, *Lunn* restricted the ability of Massachusetts law enforcement to make immigration arrests because they weren't authorized to do so by the Massachusetts Constitution, while *Huntington* indicates that SB54 may be limited in dictating how charter cities comply with federal immigration law, although *Huntington* is likely to be appealed.[104] However, even if *Huntington* is upheld, SB54 has consistently withstood all federal challenges against it, and will likely prevail in the Ninth Circuit Court of Appeals, one of the most liberal in the country. Thus, other states who choose to follow SB54 as a model for Sanctuary policies would have to comply simply with the limitations of their own state constitutions.

One state that might find SB54 useful as a model for a potential statewide sanctuary policy is Massachusetts. The precedent set forth in *Lunn* has already restricted the ability of Massachusetts state officials to enforce ICE detainers – a key plank of many sanctuary policies. Furthermore, the Massachusetts Constitution does not empower charter cities to the same extent that the California Constitution does, meaning that a legal challenge in the

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[102]Douglas Hanks, *Miami-Dade Complied With Trump to Change its 'Sanctuary' Status. It Worked.* Miami HERALD (Aug. 7, 2017), https://www.miamiherald.com/news/local/community/miami-dade/article165837497.html.

[103] United States v. California (Motion to Dismiss), No. 2:18-cv-490-JAM-KJN (E.D. Cal. Filed July 9, 2018) at 5.

[104] Leslie Berestein Rojas, *What You Need To Know About The Ruling That Lets Huntington Beach Opt Out Of California's Sanctuary Law*, LAIST (Sept. 28, 2018), https://laist.com/2018/09/28/huntington_beach_sanctuary_law_ruling.php.

vein of *Huntington* would be unlikely if a similar statewide sanctuary policy was to be to be enacted in Massachusetts.[105]

Conclusion

Although the current conflict between cities, states and the federal government in regard to sanctuary policies has been exacerbated by the immigration policies of the Trump administration, it is not a new conflict, nor one that will resolve itself at the end of President Trump's term in office. The widespread use of detainers by ICE and initial court cases regarding sanctuary policy were also an issue during the Obama administration. The multitude of legal challenges that have been mounted by both the federal government and local jurisdictions during this time period bring attention to the fact that as long as sanctuary policies remain fragmented and decentralized across the country, unwanted outcomes, like raids in immigrant neighborhoods or illegal aliens with criminal records continuing to commit crimes will continue to occur.

On one hand, illegal aliens with criminal records will continue to be inadvertently released by sanctuary jurisdictions against ICE's wishes and possibly go on to commit violent crimes. On the other hand, ICE has indicated that in the absence of cooperation by sanctuary jurisdictions, ICE has "no choice but to conduct at-large arrests in local neighborhoods and at work sites" which often results in the arrests of undocumented immigrants with no criminal histories.[106] Both of these outcomes have the potential to harm families and communities by potentially allowing violent criminals to reoffend as well as leaving immigrant families in a constant state of fear and anxiety over a potential raid by federal immigration authorities. To avoid situations like this and resolve many legal uncertainties, states should take advantage of the recent court rulings that have weakened the ability of the federal government to interfere with local sanctuary policies and enact statewide sanctuary policies that are consistent with their state constitutions.

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[105] Mass. Const., Art LXXXIV § 2.

[106] Christina Goldbaum, *State Courts Become Battleground Over Trump's Sanctuary Cities Policy,* NEW YORK TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/nyregion/sanctuary-cities-state-courts.html.